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Essays

Self-Determination as an Expression of Collective Human Dignity: The Case of Catalonia

Antoni Abat i Ninet*

'*Je me révolte, donc nous sommes*'[1]

Abstract

This paper has two distinct sections; the first one is devoted to an epistemological reconceptualization of the principle of self-determination. This principle needs to be updated to take account of the realities of the Twenty-First Century (globalization, new political structures, IT era, post-modern concept of sovereignty) and linked to the principle of Human Dignity as a collective right. The starting point is focused on the relationship between democracy and self-determination. The analysis takes both a theoretical and empirical approach to encompass a comprehensive democratic theory of self-determination. The main idea is to demonstrate in detail the link between constitutional democracies and self-determination. The second section of this paper is devoted to the individual and collective rights debate, paying special attention to the conceptualization, meanings and understanding of the fundamental principle of human dignity. This second section presents arguments to provide a justification for the transplantation of rights from the realm of the individual to that of the group. The anthropocentric conception of the theory of rights is reviewed in order to extend some of its theoretical foundations to groups, collectives and peoples. The conclusion of this paper considers whether the Spanish violent, disproportionate and repressive reaction to the peaceful and democratic Catalan process to independence legitimises the exercise of self-determination as a remedy.

I. Epistemological Reconceptualization of the Principle of Self-Determination

International relations, norms, and practices must be updated for the new era, a factual reality that Manuel Castells defined as the:

> 'new dominant social structure, the network society; a new economy, the informational/global economy; and a new culture, the culture of real

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[1] A. Camus, *L'homme révolté*, *Collection Folio essais no 15* (Paris: Gallimard, 1985), 5.

virtuality'.[2]

This new social materiality confronts directly national borders, homogenous communities and other elements that support the Peace of Westphalia ideology. We are in a new Eon and states are no longer the most significant actors in the international legal and political arena. Thus, their rights (territorial integrity and border's inalterability) and privileges are not sufficient to achieve the goals and objectives of a new society.

The principle of self-determination, in both the individual and collective sense, does not escape this new trend and requires a reconceptualization and an update to become a valid source of adapting the international legal corpus to this new reality. On this basis, this paper presents a proposal to appraise self-determination and to link it as an expression of democracy and human dignity in a collective sense. The theory faces different theoretical and normative challenges, such as the validity of the individual-collective transplantation in both cases, the justification of the epistemological link between both principles and the appropriateness of self-determination as a tool to heighten human dignity. All these questions are addressed in this work to promote the revision of the principle on self-determination for the twenty-first century.

The starting point of any epistemological reconfiguration or updating of the principle of self-determination must be an analysis of the evolution of the principle, followed by a justification of its evolutionary or dynamic character. Regardless of whether it was Lenin (based on a socialist political philosophy) or Woodrow Wilson (liberal political philosophy) who championed self-determination, the original principle was affected by internal and external variables. These are dimensions which Antonio Cassese highlighted in his famous book on the topic.[3] External self-determination, in relation to the non-self-governing territories, meant that they had the opportunity to choose freely their international status and about the manner in which self-determination would be implemented,[4] whereas the internal dimension means the right to authentic self-government; the right for a people to freely choose its own political and economic regime.[5]

In terms of the extensive acceptability of the principle of self-determination by the states and the international community, the internal dimension had less opposition. This weaker resistance of states to the internal perspective is because it respects the principle of non-intervention in domestic affairs and safeguards the territorial integrity of nation-states. Therefore, the internal dimension of self-determination is more respectful with the status quo and the predominant

[2] M. Castells, *End of Millennium: With a New Preface* (Hoboken: Wiley-Blackwell, 2nd ed, 2010), III, 372.

[3] A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995).

[4] ibid 71.

[5] ibid 101.

role of states in the international arena. Internal self-determination does not threaten the monopolistic use of violence of states and their territorial borders. The state's empire is assured; their *autorictas* and *potestas* to impose 'legitimate' violence is not under threat with an internal claim. Constitutional design of liberal constitutional democracies rests ultimately in this internal and monopolistic dimension of violence and in the hierarchical structure to enforce concrete political decisions. The state's institutions, through their institutional apparel and official discourse, have the last word when a conflict with sub-national entities, groups or any other subject arises. The principle of non-intervention is so strong that hampers the possibility of interference. In this sense, everything remains very Westphalian. Internal self-determination is only possible in the so-called constitutional democracies. In non-liberal regimes an internal claim is only a purposive principle, a dead letter, in the same way as the rest of democratic values and fundamental rights that authoritarian regimes constitutionally accommodate. Based on this, we find a link between democracy and self-determination in its internal perspective.

The external dimension of self-determination challenges states and *status quo* in a critical way, and contradicts the principle of national unity and territorial integrity. The resistance of the beneficiaries of this *status quo* is comprehensible but not desirable, especially if this static interpretation is imposed against democratic, remedial, dignity or just cause claims. If, as according to some doctrine (James Crawford), there is not really a right to secession, this will lead to the conclusion that the exercise of such a principle will rest on force, violence and enforcement.

The debate on the nature of self-determination as an individual or a collective right seems to prevail through the textual expression in international law of the right. Art 1, para 2, of the Charter of the United Nations remarks that one of the purposes of United Nations is

> 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.

The Charter also attributes the right of self-determination to peoples, in the plural and collective sense in Art 55.

Cassese is right when remarking upon the relevance of this codification in a multilateral treaty, an important turning-point which signals the maturing of the political postulate of self-determination into a legal standard of behaviour.[6] This accommodation in international law is complemented by other legal instruments that convert the principle of self-determination into a customary law with elements of *jus cogens*.[7] The General Assembly Resolution 68/175 and

[6] ibid 43.

[7] See United Nations General Assembly Resolutions, 1514 (XV) of 14 December 1960; 1541 (XV) of 15 December 1960; 2625 (XXV) of 24 October 1970; Vienna Declaration and Program

the Note of the Secretary General A/69/272, containing the interim report of the Independent Expert on the promotion of a democratic and equitable international order, are relevant in that sense due to the explicit recognition of the epistemological link between democracy and self-determination. These legal instruments recognize that universal realization of self-determination is a fundamental condition for the effective guarantee and observance of human rights.[8]

Since its legal accommodation in the international legal corpus, the principle had great reservations by the states because the dynamic nature of the principle. States were the only entities in the world community that possessed legal rights and were deemed to have absolute control over its peoples and its own territorial jurisdiction.[9] After juridification of the principle, and the recognition of its mandatory character for the parties, states have developed different arguments and guidelines to dismiss its application and, therefore, to *de facto* remove the legal character of the principle.

It seems generally accepted that the principle of self-determination and the principle of territorial integrity are in a contradictory disjunction. The principle of territorial integrity, which is a *jus cogens* element of public international law, refers to the principle of non-interference in the internal affairs of states. Traditionally, the non-interference in domestic affairs has been considered as an important tool for in the relations among states. However, empirical evidence demonstrates that an overly rigid application of this principle may cause the opposite effect. An impermeable border can distort peace and serve as cover for breaches of human rights. The secular-sacred discourse on the principle of territorial integrity has been unable to avoid the expansion of international and transnational law within the borders of the states, the prominent role of human beings and NGOs in public international law, and the fact that in the twentieth century, a vast number of new states emerged.

In constitutional terms, two constitutional principles cannot be contradictory *per se,* and constitutional courts around the world have addressed this incongruity through harmonization. Only norms of equal standing can be harmonized, otherwise, the superior norm will prevail. The orthodox doctrine has simply stated that the principle of territoriality outweighs all other norms and there is

Action of 25 June 1993; The International Covenant on Economic, Social and Political Rights, General Assembly Resolution, 2200A (XXI) of 16 December 1966; The International Covenant on Civil and Political Rights, General Assembly Resolution 2200A(XXI) of 16 December 1966 and the International Court of Justice. The International Court of Justice advisory opinions on Namibia (South West Africa), Western Sahara, the legal consequences of the construction of a wall in the Occupied Palestinian Territory and Kosovo, including commenting on the *erga omnes* character of self-determination. (See A/69/272: Promotion of a democratic and equitable international order Note by the Secretary-General of 7 August 2014).

[8] A. Abat i Ninet, 'Do You Want Catalonia to Be an Independent State in the Form of Republic?' paper delivered at the conference *The Limits and Legitimacy of Referenda*, University of Toronto, Canada, 21-22 September 2017, 14-15.

[9] A. Cassese, n 3 above, 165.

no contradiction at all. The first sector (James Crawford, Anders Henriksen), following this orthodoxy, even denies any conflict and considers that there is no contradiction between equals. Thus, it follows that territorial integrity is hierarchically superior and so prevails.[10]

Another conventional approach admits the contradiction and, similar to the constitutional terms, they claim harmonization takes place. This approach involves undermining the applicability of the principle of self-determination. The reduction of the scope of applicability aims to discourage secessionist movements. Even so, there is no express limitation to the right to self-determination, and no norm limits its applicability to colonial territories. Currently, and because the relation between territorial integrity and self-determination has been emphasised, other arguments have been used to justify self-determination (remedial, *justa causa* and the claim for democracy).

The report A/69/272: *Promotion of a democratic and equitable international order*, Note by the Secretary-General, 7 August 2014 is a good example of this new aspect of democratic legitimacy.[11] However, the relation between both concepts is more profound. Both concepts work symbiotically and the relation affects both perspectives (collective and individual) of self-determination. Democracy, as a political regime, requires individually and collectively self-determined persons. However, the converse is also true: democratic collective self-determination requires a population which desires democracy. This symbiotic relation/dependence and epistemological linkage only work out when collective self-determination is effective democratically, both procedurally and materially.[12]

II. A Democratic Theory of Self-Determination

Liah Greenfeld states that we can only talk about collective individuals and collective identities in a metaphorical sense. She remarks that:

> 'It is never the people (all or a majority of individuals) who would exercise the right of self-determination so conceived, but those who find themselves in a position to impose their particular interests on the people. These can be a group or a particular individual'.[13]

This statement is very interesting for the purpose of this paper for two reasons, firstly because it deals with the nature of the right of self-determination

[10] See J. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2007); A. Henriksen, *International Law* (Oxford: Oxford University Press, 2017), 71.

[11] A/69/272: Promotion of a democratic and equitable international order Note by the Secretary-General, 7 August 2014, §32.

[12] A. Abat i Ninet, n 8 above, 14.

[13] L. Greenfeld, 'Self-Determination vis-à-vis Nationalism and Democracy: Defining the the Concept empirically', available at https://tinyurl.com/yxdlct9t (last visited 28 May 2019).

(individual, collective or both). This will determine the origin, essence, and scope of a democratic theory of self-determination. Secondly, Greenfeld's statement opens a theoretical parallelism between a theory of self-determination and the ancient Platonic classifications of political systems and constitutions (*Politeia*).

1. Individual and Collective Self-Determination

Self-determination is individual in nature; Paul Ricoeur, Pierre Bourdieu, Émile Benveniste, Jacques Derrida and Ronald Dworkin among others, have extensively analyzed this aspect of it. The theoretical elements of these theories are thus an apposite starting point to a discussion of collective transplantation of the concept to collectivities. I propose an appeal to the individual right of self-determination and to the values that arise from it, in order to make the case for a collective right to self-determination. This, however, does not imply that the collective right would be no more than the sum of individual rights.[14]

Ricoeur, Bourdieu and Benveniste's dialectics of selfhood (*Ipséité:l'identité comme fait d'être soi-même à travers le temps*) and Sameness (*Mêmeté: le fait de rester le même*) define and limit the constitution of oneself.[15] Selfhood and sameness are also relevant in a collective dimension. A people, to be self-determined in the sense of selfhood, requires consciousness. The 'condition' or 'character' of a people, group or Nation is self-ascribed; it first depends on the members of that concrete collective entity. The individuals determine the identity of the group over time, through being a collectivity of selves. In Canada are the Canadians; in France, the French, etc. According to Charles Taylor, Axel Honneth and Jürgen Habermas identity is not monologic but dialogic by necessity. Thus, the French are not the 'only' individuals who determine what the French identity is.

This collective consciousness of selfhood is variable. Identities, and more emphatically group identities, are intangible, multiple, immaterial, illusive and subjective despite the efforts of objectivise nations. A process of objectivisation that sometimes emphasizes romantic ideas (*Volkgeist*) is used and abused by current xenophobic populists. According to this idea, individual democratic self-determination provides the means to achieve collective democratic self-determination.

The second element is 'sameness', which predicates staying or being the same. From a collective perspective, sameness means that a people democratically want to be as they are; the group acknowledges that they are Canadians or French. In an international arena where sub-state entities cannot stay or be the same, self-

[14] P. Jones, 'Group Rights' 22 September 2008, available at https://tinyurl.com/y7npgmcq (last visited 28 May 2019).

[15] P. Ricoeur, *Soi-meme comme un autre* (Paris: Editions du Seuil, 1990); Id, 'Interprétation et Reconnaissance' *Cites*, XXXIII, 1-192 (2008). See also, É. Benveniste, *Problèmes de Linguistique Générale* (Paris: Gallimard and Pierre Bourdieu, 1966); Id, 'L'identité et la représentation. Éléments pour une réflexion critique sur l'idée de région' *Actes de la recherche en sciences sociales,* XXXV, 63-72 (1980).

determination is justified and legitimate.[16]

Derrida's notion of individual self-determination is enlightening for the individual/group transplantation of self-determination. He notes the need for (individual) self-determination of the self when defining democracy. According to him, democracy would be, precisely, a force (*kratos*) in form of sovereign authority (sovereign, that is, *kurios* or *kuros*, having the power to decide, to be decisive, to prevail, to have reason over or win out over and to give the force of law, *kuroō*), and thus the power and ipseity of the people (*dēmos*).[17] Self-determination in its collective sense means also the power to decide as a community. Did Quebec and Scotland not self-determine when the people voted 'no' in their referendums? They had the power to decide, to prevail, and they did so democratically.

The work of Dworkin is also thought-provoking for a democratic collective transplantation of self-determination. According to him, individual self-determination entails special responsibility for how his or her own life goes.[18] Responsibilities can be translated into obligations by the self-determining people.

Responsibilities also entail post-self-determination acts, such as how to restructure the relations between the state and the sub-state entity in case of non-secession and in case of secession. There may also be an obligation to limit on time the claim of holding of a new referendum on secession. The impact of the referendum issue on the constitutional democratic state is so relevant that it must be an exceptional mechanism. It is simply unfair and against the minimum requirement of the principle of mutual institutional loyalty to request the holding of a new referendum on secession after a brief period.

The demand for a new referendum is neither respectful of the democratic decision that follows from the outcome of the initial referendum or with the principle of self-determination. According to Thomas Jefferson, and also Georg Wilhelm Friedrich Hegel, the debate on a referendum on secession should be postponed at least for one generation, the same period required to update a constitutional system.

2. Constituent Moment and Self-Determination

Liah Greenfeld's statement, that some processes of external self-determination were primarily and essentially personalist, are also of interest. She mentions Muhammed Ali Jinnah in Pakistan, Amin Al-Husseini in the case of Palestinians, but there are other similar examples of a Founding Father or a leader of a self-determination movement. In this sense, we can include among others, Mohammad Ali in Egypt, Mustafa Kemal Ataturk in Turkey or Mohandas Gandhi (Bapu) in

[16] In this sense I want to remark the work of G. Delledonne and G. Martinico, *The Canadian Contribution to a Comparative Secession Law* (London: Palgrave Macmillan, 2019).

[17] J. Derrida, *Rogues: Two Essays on Reason* (Stanford: Stanford University Press, 2005), 13.

[18] R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2008).

India or Artigas in Uruguay. In Africa, when in some states the decolonization meant that a 'King' was substituted by another 'King', as Mugabe did in Zimbabwe (President thereof since 1987 and currently running for a new term at the age of ninety-three), Hastings Kamuzu Banda in Malawi or Mohamed V of Morocco.

Other processes of self-determination were led by aristocratic or oligarch elites, such as the Founding Fathers of the United States of America, a group of white, rich men (a point belied by the use of the fiction 'We The People' in their constitution). An aristocratic or oligarchic (the few) self-determination also happened in other countries of the Americas.[19] Lastly, we find many democratic processes of self-determination, as happened in the Baltics, Slovenia and could happen in Catalonia, where the referendum as an instrument has become essential. In democratic self-determination, the foundation or political constituent act is lead from bottom to the top by the many.

By referring to the constituent or foundational moment (understood as the act that materializes self-determination) and who leads that act, be it the one, the few or the many, we can categorize the self-determination according to the classifications of political systems (Plato, Aristotle, Polybius, Cicero, Thomas Aquinas or Jean Bodin). The classification of the polities started with Plato, who distinguished six types, organized in pairs: kingship, tyranny, aristocracy, oligarchy and bad and good democracy.[20] Plato considered that there are, so to speak, two 'mother' constitutional models from which we can rightly say that the others have been derived. One of these we may properly call monarchy and the other democracy.

In Platonic terms, as applied to the self-determination movement, the one leading self-determination would be a King-Philosopher. He is the one that guides the blind masses to see the light of knowledge and exit from the cavern of ignorance, in this case towards a new State. If the 'King' promotes group self-determination for the benefit of all, it would be justifiable, whereas were he a philosopher, if he does so for his own benefit, it would be a tyrannical measure and self-determination would be a vitiated political act. Tyrannical or philosophical foundations of self-determination may have political and legal consequences in the form of the state and its political form. The same can be said about the other forms of government (aristocracy, oligarchy and democracy) by the few, described by Cicero[21] as *civitas optimatium*, or by the many (*civitas popularis*) lead self-determination.

Aristotle, in the third book of the Politics, also classifies systems of governments and their cyclical nature.[22] In this sense, the political power of the

[19] See R. Gargarella, *The Legal Foundations of Inequality: Constitutionalism in the Americas, 1776-1860* (Cambridge: Cambridge University Press, 2010) and the book review of J. Colón-Ríos, *International Journal of Constitutional Law*, II, 563–566 (2017).

[20] A. Abat i Ninet, 'Playing at being gods' *Philosophia Quarterly of Israel*, I, 41-55 (2009).

[21] Cicero, *De Re Publica, De Legibus* (Cambridge: Harvard University Press, 1961).

[22] Aristotle, *Politics: A Treatise on Government* (Scotts Valley: Create Space, 2010).

aristocracy is transformed into an oligarchy, then into tyranny and then transitioned towards democracy. In the case of self-determination, Aristotle shows that an aristocratic/*civitas optimatium* led self-determination does not mean necessarily that the state will remain an aristocracy, as it could later become an oligarchy or a democracy.

3. Juridification of Self-Determination

The debate on the nature of self-determination as an individual or a collective right it is overcome with the international law juridification of the right. Art 1, para 2, of the Charter of United Nations notes that one of the purposes of United Nations is 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. The Charter also attributes the right of self-determination to peoples, collectively, in Art 55. The different ways in which States interpret this norm and its implied principles are more related to the limitations and shortcomings to the right. This legal acquis has been interpreted as not recognizing the right to secede from a sovereign country, and instead to limit the scope to colonial peoples or aiming towards a progressive implementation towards self-government or independence.[23] However, the resistance to accepting of self-determination as a collective right has been more academic and theoretical than practical.

Cassese is right when remarking that the codification of this right in a multilateral treaty is significant, in that it marks an important turning-point at which the political postulate of self-determination has matured into a legal standard.[24] This legal international accommodation is complemented by other legal instruments that convert the principle of self-determination into a customary law with elements of *jus cogens*.[25] The General Assembly Resolution 68/175 and the Note of the Secretary General A/69/272, containing the interim report of the Independent Expert on the promotion of a democratic and equitable international order, are relevant to this paper due to the explicit recognition of the epistemological link between democracy and self-determination. These instruments recognize that universal realization of self-determination is a fundamental condition for the effective guarantee and observance of human rights.

Neither in constitutional law is the denial of a democratic principle of self-determination coherent. If a constitution stipulates an eternal clause of unity, the denial of self-determination is a constitutional inconsistency. The goal of constitutionalism is to facilitate self-determination fully and in the most inclusive sense.[26] Self-determination is essential to the development of constitutionalism

[23] A. Cassese, n 3 above, 42.
[24] ibid 43.
[25] See n 7 above.
[26] N. Feldman, 'Imposed constitutionalism' 37 *Connecticut Law Review*, 857, 881 (2005).

including fundamental rights, principles, institutions, and authority to govern.[27]

Self-determination is a mother-right, or in David Feldman's words a 'right of rights': it enables the recognition, accommodation and later enforcement of constitutional rights.

A Constitution is the supreme legal and political expression of self-determination. The approval of a Constitution is an act of self-determination *per se*, as it juridifies a collective decision of a people, giving it the greatest force of law. Self-determination is the *raison d'être* of constitutions. Thus denying this right (internal and externally) to another people is an incongruity. Self-determination is not an egocentric or ego-ist act, as it cannot end with our own self-determination. It must also be acknowledged from a constitutional perspective. A condition *sine qua non* for an individual to self-determine is to recognize the same right to other individuals; the same is applied to peoples.

Maurice de Sayas is right when he states:

> 'Self-determination is an expression of the individual and collective right to democracy, as democracy is an expression of the individual and collective right of self-determination'.[28]

However, the relation between both concepts and their epistemological link is more profound. Both concepts work symbiotically and the relation affects both perspectives (collective and individual) of self-determination. Democracy, as a political regime, requires individually and collectively self-determined persons, but this also works the other way around. Democratic collective self-determination requires previously democratic Men. This symbiotic relation/dependence and epistemological linkage only work out when collective self-determination is effective democratically, both procedurally and materially.

Paradoxically, the best juncture to prove that democratic self-determination is materialized and effective is when a self-determination claim is exercised by a people or group within your own State. The best time to exhibit the democratic condition is accepting and defending the results of a referendum or elections that are the contrary to those we want. Catalonia will have the opportunity to show its respect for self-determination by recognizing this right to another nation, Aran.

III. Individual and Collective Rights Debate

Before analysing the link between self-determination and human dignity the paper deals with different theoretical and normative challenges, such as the validity of the individual-collective transplantation in both cases, the justification of

[27] ibid.

[28] A/69/272: Promotion of a democratic and equitable international order Note by the Secretary-General of 7 August 2014, para 32.

the epistemological link between both principles and the appropriateness of self-determination as a tool to heighten human dignity. Self-determination has an individual sphere and nature; Ricoeur, Bourdieu, Benveniste, Derrida or Dworkin among others, have extensively analysed this aspect. In fact, the conceptual elements of these theories are the starting point to the collective transplantation. I propose then an appeal to the individual right of self-determination and to the values that arise from it, in making the case for a collective right to self-determination. This does not imply that the collective right would be no more than the sum of individual rights to which we appeal.[29] An analogous transplantation, similar to the one that is accepted for the principle of self-determination, is proposed for the principle of Human Dignity. As we appeal to individual rights of self-determination, and to values that underlie them, in making the case for a collective right of self-determination,[30] I propose making an appeal on the basis of human dignity.

Its transplantation from the realm of individuality to the collective nature is contested. The arguments are varied and they range from a negation of the existence of collective rights as such (Michael Ignatieff)[31] to a reduction of a collective sense of human dignity (Michael Rosen).[32] Human dignity has myriad meanings, although over the course of its long history it has been used primarily as a social value.[33]

It does not seem feasible to provide a universally accepted and all-inclusive definition of human dignity. There is no explicit definition of the expression 'dignity of the human person' in international instruments or in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors.[34] Where it has been invoked in concrete situations, it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined.[35]

The concept of human dignity as a constitutional value, and as a constitutional right, is relatively new. It remains as old as modern constitutions. The principle has been extensively defined and legally accommodated in the preamble to the Charter of the United Nations, the Universal Declaration of Human Rights of 1948 and in Art 1 of the German Basic Law (*Grundgesetz*) in 1949.[36] Aharon Barak affirms: 'The question whether human dignity applies to the protection of

[29] P. Jones, n 14 above.

[30] ibid.

[31] M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001).

[32] M. Rosen, *Dignity, Its History and Meaning* (Cambridge: Harvard University Press, 2012).

[33] A. Barak, *Human Dignity, The constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 3.

[34] O. Schachter, 'Human Dignity as a Normative Concept' *American Journal of International Law*, 848, 849 (1983).

[35] ibid.

[36] A. Barak, n 33 above, 3.

the human race has not been yet decided'.[37] The concept is omnipresent in everyday speech and deeply embedded in political and legal discourse.[38] At this juncture, it would be appropriate to analyse whether human dignity can be applied in a collective dimension.

According to Joseph Raz, a group has a collective right if their shared interest is sufficient to ground a duty in others, and if the interest of any single member of the group is insufficient by itself to ground the duty.[39] In the case of Human Dignity of groups, the sufficient interest will lie in the fact that some of the actions that breach the dignity have a collective dimension and reflect prejudice in relation to groups of individuals. Racism, xenophobia, Anti-Judaism, Islamophobia, homophobia or Gender discrimination are not just responses to individual characteristics. As Jeremy Waldron remarks, racist talk in America refers to African-Americans as 'these people' or when the audience is African-American 'you people'.[40]

These actions and behaviours transgress human dignity individually and as a group. The key question to be answered is whether we consider that groups have value by themselves and are not necessarily dependent on the aggregation of individuals. Group dignity is not reducible to the notion of respect for collective will/autonomy since it also involves basic goods of the group that are different from autonomy, and not wholly derivative from it.[41] Konstantin Tretyakov correctly defines crowds as systems and, just like another system, they cannot be correctly explained in terms of their parts alone: any adequate understanding of how a system works should embrace the principles of interaction between its individual components and the resulting element, which are different in kind from their isolated counterparts.[42]

It is not by chance that the triumph of the normative accommodation of Human Dignity came after the Holocaust and the horrors and atrocities of the Second World War. It is the same concept that has ancient and multiple meanings, the same concept which Barak notes has endured through two thousand five hudred years of history and the same concept which has been influenced by different religions that held it as an important component of their theological approach.[43]

1. Human Dignity in a Collective Sense

[37] ibid 34.

[38] ibid.

[39] J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 208. As quoted by P. Jones, n 3 above, 6.

[40] J. Waldron, 'The Dignity of Groups' *Acta Juridica*, 66, 81 (2008).

[41] K. Tretyakov, 'Corporate Identity and Group Dignity' *Washington University Jurisprudence Review*, 171, 211 (2016).

[42] ibid 214.

[43] A. Barak, n 33 above, 20 preface.

Massive breaches of human rights justify, in terms of human dignity, the application of the right to self-determination as a remedy. However, what should happen with other cases in which the essential constitutional-democratic principles are violated? Human dignity is a first-order constitutional principle, comparable to the rule of law and separation of powers, and it sets out the structuring features of this principle in three stages, drawing on (as far as possible) the full range of European constitutional orders.[44] As a constitutional foundation, the principle of dignity, first and foremost, indicates a strong commitment to the respect and protection of humanity. This must be substantiated by a fundamental rights chapter, often located in prime position and underpinned by a broad commitment to human dignity.[45]

The German Constitutional Court establishes a high standard of protection against violations of the concept of human dignity, as an absolute, supreme and eternal human right. These three traits grant unique normative status to human dignity within the German constitutional system. However, the jurisprudence of the German Constitutional Court has also limited the area that the principle covers.[46] The absolute character of the right to human dignity is unique to German law, which is naturally a factor in the narrow interpretation of the constitutional right to human dignity. Such an interpretation is not necessary for the other legal systems.[47] In other constitutions, (Israel, South Africa, Canada) human dignity has a different and broader interpretation that might be easier to connect with a collective dimension.

The next section moves from the realm of theory to that of praxis and it analyses a current case-scenario that can test the acceptance of a concept of human dignity in a collective sense, as explained in this paper. Despite the concrete casuistry of the Spanish-Catalan conflict, the Spanish non-dialogical and repressive answer to the Catalan territorial challenge places the crisis in a different level. The acts of the Spanish government endanger individual and collective human rights. Since Spanish a constitutional democracy, it was supposed to respond to these kinds of challenges (political secession, less economic power of the State, less influence and political weigh of Spain in the EU) as Canada, the United Kingdom or Denmark did, instead of balkanising the crisis.

2. The Case of Catalonia

The question is whether the repressive actions of the Spanish institutions constitute sufficient grounds to justify self-determination as a remedy in Catalonia. The actions of the Spanish government and other state institutions against the

[44] C. Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle' *European Public Law*, 319-340, 319 (2013).

[45] ibid 323.

[46] A. Barak, n 33 above, 233.

[47] ibid 241.

'seditious' and 'rebellious' Catalan institutions and representatives had begun before the October 1st referendum moved into the political epicentre. Catalan political representatives were brought to trial months before the consultation. For example, former President of Catalonia, Artur Mas, faces a criminal trial in Barcelona for organizing a symbolic popular consultation on independence on 9 November 2014. The non-binding consultation was opposed by the Spanish government which challenged the Catalan Government's decree and called for a consultation vote on independence in Spain's Constitutional Court.

The highest tribunal decided two articles of the decree were unconstitutional. The first one related to the regulation which called the referendum, which the Court held was unconstitutional. The second one was unconstitutional because, according to the Court, the popular participatory consultation was indeed a referendum and therefore the Catalan Government could not go beyond its competencies. The decision was made unanimously by the twelve members of the Court, which is controlled by a conservative majority of members appointed by the currently-ruling People's Party. This is the same Court which has been particularly hostile on distinctive identity claims.[48]

When the Constitutional Court overruled the law and the decree, the President, and the Government, against the advice of both parties that supported him, decided to accept the decision and transform the query into something radically different: a participatory process left to the public with minimal support from the Government. Later, the Spanish Constitutional Court banned the popular consultation and did not answer a request of the Catalan Government on what the Catalan institutions were allowed to do. With no answer, according to the Public Prosecutor, the Catalan government organized the symbolic voting anyway. The defence for the Catalan president and the other members of the Parliament argued that the popular initiative was manned by thousands of volunteers in order to subvert the restrictions. More than eighty point eight per cent of those who cast their vote in the 2014 vote did so in favour of independence, although the participation was approximately thirty-seven per cent of the people with the right to vote.[49]

Former President Mas, former vice-president Joana Ortega and former-Minister of Education Irene Rigau stand accused of disobedience against the state and wrongdoing (breach of trust) as a public official. They could face a ten-year ban from public office if found guilty. None of them will go to prison because the felony of misappropriation of funds was excluded from the trial. This last charge was based on the presumption that public funds had been spent to organize the voting.

The criminal prosecution of the former President has had huge political

[48] A. Abat i Ninet, 'Catalan Political Representatives Stand Criminal Trials' *International Journal of Constitutional Law Blog*, 25 February 2017.

[49] ibid.

and media repercussions in Catalonia and Spain. Around forty thousand people came out to protest at eight am on a Monday morning as Mr Mas was criminally prosecuted in what they consider a political trial. They argue that it is a judicialisation of a political conflict and a way to weaken self-government, the right to self-determination, and democracy itself. Former President Mas' et al defense further showed that the Spanish Government has disobeyed the Constitutional Court on more than twenty-six occasions and no member of the central government has faced a criminal procedure because of it. Furthermore, the criminal procedure and penal law are always an *ultima ratio* (last resort) in a democratic system; no justification was given to instruct these political facts in this latest instance.[50]

With the referendum at the centre of the political debate in Catalonia and Spain, the Spanish measures to avoid the 'illegal' consultation can be viewed as before, on and after according to when the measures were taken. The repressive actions *before the referendum,* started by the central government treasury department include taking control of the payroll of the Catalan government in order to bring additional pressure and to prevent payment for the referendum with public funds, the confiscation of everything used to 'promote or disseminate' the consultation, police identification and sanctioning of individuals hanging posters, painting or murals. The Spanish police also registered private printing presses (more than forty police registers), journals and digital newspapers. The general prosecutor threatened public and private media with incurring criminal responsibility had they broadcast or advertised any content relating to the referendum.

Other coercive measures to avoid the referendum included the interception of private correspondence and post of private citizens, the blocking of websites, arresting of fourteen Catalan government officials, the imposition of disproportionate economic fines to private persons that collaborated with the organisation of the referendum (*Junta Electoral*), the penal prosecution of hundreds of city majors, Catalan Police officers, the President of the Catalan Parliament and other parliamentarians. The Spanish government also sent thousands of militarised police officers to avoid the referendum by force and to undermine the peaceful exercise of voting. Catalonia is under siege, living under an undeclared state of emergency. Basic fundamental freedoms and rights are being regularly violated and curtailed.

On the day of the referendum. Unlike in other countries that call themselves liberal democracies, the Catalan referendum on self-determination was held in very critical, almost unimaginable conditions. Unlike in other countries that claim to cherish the ideals of democratic self-government, the Spanish government made it necessary for the ordinary citizens to protect the safety of their polling stations themselves, risking, in the process, their own physical safety. Together with the

[50] ibid.

officials of the Catalan government, political representatives and private enterprises – many Catalan citizens were made the target of unlawful violence, unleashed by the repressive apparatus of the Spanish state.[51] The Spanish militarised police used disproportionate and senseless aggression against ordinary citizens. Hundreds were hurt by the brutality of the Spanish police. A repression that wrought against ordinary people – the people who only wanted to exercise their democratic right to vote, to be heard, and make their voices count.[52] Police actions did not perform randomly, they targeted concrete electoral polls based on the symbolism (the one where President Puigdemont should vote) and where a major participation of pro-independence electors were predicted. What is particularly disturbing is that the police brutality we just experienced might not be the end of this illegal and abusive tendency, but rather only the first attempt to suppress the 'seditious' will of the Catalans. Spanish police brutality was not limited to 'ordinarily' brutal violence, but also inflicted symbolic violence aiming to threaten and condition the Catalan Republican agenda with fear.

After the referendum, the repressive measures of the Spanish Government and judicial institutions continued. The judicial repression followed with the *purge* of dozens of pro-independence workers on the Catalan administration and institution, including the imprisonment of political activists (Jordi Sánchez and Jordi Cuixart). The incarceration of these political activist breaches some of the basic principles of the Spanish criminal procedure (such as the exceptionality of the preventive detention under the Spanish penal system) and denaturalizes the criminal definition of the delicts that they are accused (sedition). The distortion of these penal crimes and principles of criminal procedure are justified *ad absurdum*. The same judge later also agreed to imprison half of the Catalan legitimate Republican Government on similar grounds and to a European arrest warrant against the rest of the Government and the President-in-exile in Belgium. The Spanish Prosecutor of the *Audiencia Nacional* (High Court) has been acting beyond his powers on the felonies under investigation and as an emergency court.

The Spanish Government followed the repressive campaign by applying and abusing of Art 155 of the Spanish Constitution. Art 155 reads as follows:

> '1. If a Self-governing Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government, after having lodged a complaint with the President of the Self-governing Community and failed to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take all measures necessary to compel the Community to meet those obligations, or to protect the abovementioned

[51] A. Abat i Ninet, 'I-CONnect Symposium: The Independence Vote in Catalonia–! Aidez la Catalogne et l'Espagne!' *International Journal of Constitutional Law Blog*, 3 October 2017.

[52] ibid.

> general interest. 2. With a view to implementing the measures provided for in the foregoing paragraph, the Government may issue instructions to all the authorities of the Self-governing Communities'.[53]

The article is inspired by Art 37 of the German Basic Law (Federal execution). A major difference between the two systems is that the *Bundesrat* (Federal Council) is a chamber of representatives of the federal states (*Länder*) and the Spanish *Senado* or upper house is not a chamber of representatives of the autonomous communities, but rather of provinces. The highly exceptional nature of the mechanisms envisaged in Art 155 is not evidenced in any previous application. Nor are there any precedents for any application of Art 37 of the German Basic Law. It is also important to remark that the draft of Art 155 had several amendments along the constitutional process in 1978.[54] The Spanish government followed this vague definition and, in doing so, converted Art 155 in an unconstitutional piece of constitutional law which breached other constitutional principles. Art 155 has been interpreted as a *carte blanche* to 'legitimise' a total re-centralization of the state, distorting horizontal and vertical separation of powers and institutionalizing a *coup d'état* in Catalonia. The authoritarian abuse of Art 155 can be also understood as a stern warning to other autonomous communities in Spain. It provides a pertinent example which offers few answers to the question of whether self-determination can be understood as a remedial measure and as an expression of human dignity in the individual and collective senses.

[53] Translation of the Spanish Constitution provided by the web of the Spanish Parliament, available at https://tinyurl.com/3knbq8r (last visited 28 May 2019).

[54] See M. Bacigalupo Sagesse, 'Synopsis artículo 155' available at https://tinyurl.com/ksszzqg (last visited 28 May 2019).

Essays

Compensation for Torts of Necessity: The Law and Economics View

Enrico Baffi*

Abstract

This paper seeks to propose a new interpretation of the rules that envisage compensation, be it damages or an indemnity, when a person takes an action in a case of necessity. The person acting out of necessity will also take into account the sum of money that he will be required to pay if the necessary action is taken and this will consequently affect his choices. Moreover, the amount of the damages or indemnity will also have an effect on the choices that the victim will make. More specifically, it will be shown that in certain situations compensation should ideally be equal to the loss actually suffered by the victim while in others optimal compensation could even be a figure equal to zero and in any case not such as to cover the entire loss suffered by the victim. This incentive-based interpretation suggests that certain compensation rules that until now have been considered efficient by scholars of law and economics are actually inefficient.

I. Introduction

Special rules governing the civil law consequences[1] of actions taken in a case of necessity are contained in various Western legal systems,[2] including the Italian system.[3] Firstly the legal systems classify the potential victim's reaction as lawful or unlawful, in the wake of which they then establish the consequences of taking the necessary action, providing for full damages, a fair indemnity or even nothing at all.

US scholars have pointed out[4] that provisions under which the taking of an action gives rise to an obligation to pay a sum of money can serve two different

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1 In this paper it is assumed that the rules governing actions taken in a case of necessity only concern the civil law consequences. It should however be noted that in the Italian system the concept is also regulated by provisions of criminal law. Therefore, if the necessary action is classified as a tort, the victim may have recourse to self-defense but, from a criminal-law point of view, only within the limits set forth by Art 52 of the Italian Criminal Code. Art 54 of the Italian Criminal Code contains provisions on the state of necessity as justification.

2 As we will see, rules governing the private consequences of an action taken in a case of necessity are found not only in Italian law but also in German, English and US law, with French law providing a notable exception.

3 Reference is made to Art 2045 of the Italian Civil Code, as below.

4 See K.W. Simmons, 'The Restatement (Third) of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines' 44 *Wake Forest Law Review,* 1355, 1359 (2009).

functions. The first is the fairness-based function that seeks to achieve a balance of interests considered equitable and morally fair. The second is the incentive-based function that seeks to influence the conduct of the persons who, aware of the negative consequences of their conduct, will decide to act in one way rather than another, taking the cost required under the provision into account in their cost-benefit analysis. The negative consequences arising from certain conduct are therefore tantamount to a price that must be paid to implement that conduct. As that price varies, the decisions made by persons will also change.

Following the law and economics approach, optimal prices can exist and these are ones that cannot be amended by others allowing additional aggregate benefits that are higher than the additional aggregate costs. Therefore, there are no fairness-based grounds at the basis of ideal provisions but only reasons of efficiency. It should also be noted that an efficient provision can often also appear equitable. So, for example, if by imposing an obligation on A that entails a cost of two euro for it but a gain of one hundred euro for B, the efficient provision that imposes the obligation on A could also appear equitable.[5]

Without seeking in any way to deny that the provision of compensation in the event of a necessary action has a primarily fairness-based function, this article seeks to propose an incentive-based interpretation and to imagine that the damages or indemnity must be calculated taking into account how the actor and the victim behave when the sum of money to be paid is set at a certain level, so that it represents the price for taking the necessary action. The incentives created on the basis of differing amounts of compensation will then be assessed, according to precepts of law and economics, on the basis of their capacity to produce efficient results.[6] In the same way the potential victim's conduct will also be studied, taking into account how he will react on the basis of the amount payable if the necessary action is taken.

II. Problems to Be Addressed

The rules governing actions taken in a case of necessity essentially raise two problems for interpreters of law.

The first problem concerns whether or not the action taken out of necessity can be classified as lawful or not. This classification serves to determine the nature of the potential victim's reaction to protect himself. If the action of the person

[5] Reference is firstly made to R. Posner's work, which is well represented in the volume *The Economics of Justice* (Cambridge: Harvard University Press, 1981). See also F.H. Buckley, 'Three Theories of Substantive Fairness' 19 *Hofstra Law Review*, 33 (1990). On the relationship between efficiency and fairness see U. Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997), 1-27.

[6] With all the caveats that accompany the economic analysis of law, referencing, if I may, E. Baffi, 'Su alcuni limiti dell'analisi economica del diritto (a proposito di un recente volume di Guido Calabresi)' *Rivista critica del diritto privato*, 457 (2016).

acting out of necessity (the actor) must be classified as lawful, then the victim's reaction will be unlawful and will therefore give rise in the ordinary way to an obligation to pay damages for the harm that the victim causes. If instead the action taken out of necessity constitutes unlawful conduct, then the victim's reaction will be lawful and indeed may be classified as self-defense, with the main consequence that the victim will not be under any obligation to pay damages for the harm that he has caused through his reaction.

The second question concerns the consequences in terms of the indemnity or damages payable by the person who acted out of necessity. In Western legal systems[7] the solutions are many and varied, as according to some systems nothing is payable to the victim of the necessary action, while other legal systems call for full compensation of the loss caused.[8]

III. Elements of Comparative Law

With regard to the first point, that is to say, the nature of the victim's reaction, commencing with US common law, it has to be said that the rules essentially arise from the leading case of *Ploof* v *Putnam*.[9] In this case Ploof moored his ship at a dock owned by Putnam, without the latter's consent. Ploof was forced to moor, as due to a storm and rough sea, the ship would very probably have been lost if he had ventured into open sea. Due to its movements Ploof's ship was damaging Putnam's dock and to avoid further damage Putnam had his employees set the ship free. The vessel ended up in the storm-torn sea, ran aground and suffered damage. The ship's cargo was lost and the people on board fell into the sea and also suffered injury. The Court established that Putnam's reaction to protect his own interests was unlawful and ordered him to compensate Ploof for the harm caused. The necessary action taken by Ploof was therefore lawful.

After that The Restatement of Torts and The Restatement (Second) of Torts[10] classified reactive measures taken by victims of a necessary action as unlawful, defining the necessary act as lawful.

To understand whether or not a necessary act is lawful under the German legal system, reference must be made to § 904 BGB (German Civil Code), which in stating that the owner cannot prohibit the harmful act taken to avoid more serious damage, appears to classify an action taken in a case of necessity as

[7] An analysis of the rules governing actions taken in a case of necessity from a comparative law perspective is contained in J. Gordley and A.T. von Menren, *An Introduction to the Comparative Study of Private Law* (Cambridge: Cambridge University Press, 2009), 213-233.

[8] With regard to the possibility of using the economic analysis of law as a tool for a comparative study of legal institutions, reference to U. Mattei, n 6 above, is imperative.

[9] *Ploof* v *Putnam* 71 A. 188 (Vt. 1908).

[10] §§ 197 and 263 of both Restatements.

lawful.[11] The commentary to the second draft of the BGB[12] states that the conduct of someone who destroys another person's fence to enable the fire brigade to enter his own property or a neighbor's house so that they can fight a fire, is lawful. But for certain respects the code rules appear inadequate. In fact while § 904 of the BGB states that a person acting out of necessity may damage another person's property and in this case will be obliged to pay an amount to the victim, it does not lay down any rule for cases where a personal right is infringed.

The French legal system lacks a provision defining the nature, or civil law consequences, of actions committed out of necessity. The French Code Civil does not contain an article corresponding to Art 2045 of the Italian Civil Code or to § 904 of the BGB. This has led academic commentators to draw up theories based on criminal law, but attention has mainly focused on the compensation to be paid to the victim rather than on whether or not the necessary action is lawful.[13]

The same applies to the English legal system, where no leading cases deal with the consequences of victims' reactions and therefore indirectly with the legal classification of necessary actions. It has to be said that the leading cases concerning compensation due to victims have once again led scholars to address the issue of the existence and size of the claim for compensation.[14] However, in the first case dealt with by an English Court, ie *Mouse's Case*,[15] the Court expressly ruled that it was lawful to take a necessary action that causes damage to third parties.[16]

In Italy[17] academic commentators are sharply divided on the legal nature of

[11] On the matter M. Bianca, *Diritto Civile. La responsabilità civile* (Milano: Giuffrè, 2012), V, 655, fn 23. An in-depth analysis of German law and legal literature is provided in A. Diurni, *Gli stati di giustificazione nella responsabilità civile* (Torino: Giappichelli, 2003), specifically 169.

[12] *Protokolle Der Kommission für die zweite Lesung des Bürgerlichen die zweite Gesetzbuches* (Berlin, 1898), VI, § 419, 214.

[13] In France there is a plan to reform the law of torts available at https://tinyurl.com/y2fp4twu (last visited 28 May 2019).

[14] W.V.H. Rogers, *Winfileld and Jolowitz on Tort* (London: Sweet & Maxwell, 15th revised ed, 1998), 880.

[15] 77 Eng. Rep. 1341 (K. B. 1609).

[16] For a comparison between English and American law see N. Tamblyn, 'Private Necessity in English and American Tort Law' *Global Journal of Comparative Law*, 38 (2012).

[17] The most important monographic studies on cases of necessity in civil law are those of M. Briguglio, *Lo stato di necessità nel diritto civile* (Padova: CEDAM, 1963); B. Troisi, *Lo stato di necessità nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1988); G. Chironi, *Lo stato di necessità nel diritto privato* (Torino: Fratelli Bocca, 1906). Other works on the matter include: S. Piras, 'Saggio sul comportamento necessitato nel diritto privato' *Studi sassaresi* (1948); T. Brasiello, *I limiti della responsabilità per danni* (Milano: Giuffrè, 1959); A. De Cupis, *Il danno* (Milano: Giuffrè, 3rd ed, 1979), I; B. Inzitari, 'Necessità (diritto privato)' *Enciclopedia del diritto* (Milano: Giuffrè, 1977), XXVII, 852; R. Scognamiglio, 'Responsabilità civile' *Novissimo Digesto Italiano*, XV, 655 (1968); D. Rubino, 'Osservazioni in tema di stato di necessità e concorso di persone nel fatto colposo' *Rivista giuridica della circolazione e dei trasporti*, 202 (1953); A. Brunetti, 'Contributo allo studio del risarcimento del danno prodotto nello stato di necessità' *Filangieri*, XVIII, 481, 670, 734 (1903); L. Coviello, 'Lo stato di necessità nel diritto civile' *Filangieri*, XXIII (1898); A. Diurni, n 11 above; M Comporti, 'Fatti illeciti: le responsabilità presunte (Artt

necessary actions, as one side believes they should be included under lawful acts[18] or that there is such a thing as a 'right of necessity',[19] while the other side and case-law[20] considers them to be unlawful.[21] Additional particular theories have also been developed by individual authors.[22] Unlike other legal systems, such as

2044-2048)', in P. Schlesinger and F.D. Busnelli eds, *Codice Civile. Commentario* (Milano: Giuffrè, 2012); G. Monateri, 'Illecito e responsabilità civile', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 2005), I, 104; M. Franzoni, 'Fatti illeciti (Artt 2043-2059)', in F. Galgano ed, *Commentario del codice civile Scaloja-Branca* (Bologna: Soc. ed. del Foro italiano, 1993), 294. The subject was recently addressed by L. Nonne, 'Profili critici dello stato di necessità nel diritto privato' *Rivista di diritto civile*, 582 (2017).

[18] See S. Piras, n 17 above, 182, who states that 'as the conduct is lawful (…) the lawfulness of self-defense (...) by someone who (…) is the victim of the necessary damage, is excluded'; A. Candian, *Nozioni istituzionali di diritto privato* (Milano: Giuffrè, 1949), 139; N. Di Taso, 'Stato di necessità e fatto del terzo', note on Corte d'Appello di Napoli 24 December 1951, *Foro Padano,* 1094, especially 1098 (1952), according to whom, conduct committed out of necessity constitutes a ground for excluding unlawfulness, because 'as it does not infringe any legal rule and indeed as the possibility of such an action is expressly recognized and regarded positively, this conduct is not to be considered unlawful, but rather lawful, that is, legally authorized or permitted'; G. Tucci, *Il danno* (Napoli: Jovene, 1970), 9, and also Id, 'La risarcibilità del danno da atto lecito nel diritto civile' *Rivista di diritto civile,* 229 (1967), especially 265, according to whom, while the case referred to in Art 2045 constitutes a 'lower level of wrongdoing', it envisages a lawful action and the power to take said action is expressly recognized by the legal system according to 'a just principle of social solidarity', given that the damaged interests weigh less than the protected interests. See also A. De Cupis, n 17 above, 29 and 153, according to whom action taken out of necessity 'remains not unlawful'; Id, 'Stato di necessità e responsabilità indiretta' *Rivista di diritto civile,* 445 (1957). Finally, see P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2017), 104, who classifies the case of necessity as one of the grounds of justification, stating that the infringing party who acts out of necessity cannot be considered at fault.

[19] L. Coviello, n 17 above, 2: 'in our country a state of necessity should be considered (…) as a right of necessity'.

[20] Corte di Cassazione 13 December 1966 no 2913, *Giustizia civile*, I, 1951 (1967): the conduct of anyone who, forced by the need to save himself or others from serious personal injury, not deliberately caused by him and not otherwise avoidable, causes damage to a third party, is always attributable to the perpetrator, because it is the result of a free determination of intention to commit a breach of legal rules or rules of conduct to avoid personal injury to himself or others. This explains why in civil law, even in the case of necessary action, there is still a form of liability, even if it is mitigated. To the same effect, Corte di Cassazione 27 November 1972 no 3464, *Giustizia civile,* I, 170 (1974).

[21] The unlawfulness of necessary actions is claimed by E. Bonasi-Benucci, 'Colpa e stato di necessità' *Rivista giuridica della circolazione e dei trasporti,* 1129, especially 1131 (1954); A. Giuliani, *Dovere di soccorso e stato di necessità nel diritto penale* (Milano: Giuffrè, 1970), 33; A. Venchiarutti, 'Lo stato di necessità', in P. Cendon ed, *La responsabilità civile* (Torino: UTET, 1998), 487; M. Franzoni, n 17 above, under the entry on Art 2045, 294. Further details on the various theories drawn up with regard to the Italian legal system can be found in the study contained in C. Caricato, *Danno e indennità* (Torino: Giappichelli, 2012), 29-63 and the bibliography cited therein.

[22] According to M. Bianca, n 11 above, 667: 'A distinction has to be drawn between a case of necessity entailing the sacrifice of another person's personal right and a case of necessity entailing the sacrifice of another person's economic right. The first case is classified as a personal exemption from liability (…) The second case is classified as a ground for excluding unlawfulness.

the US and German ones, the Italian system provides that necessity only exists when the infringing party acts to save himself or others from the danger of serious personal injury, which means that an action taken to save a property right will not be classified as an action taken out of necessity under Art 2045 of the Italian Civil Code.[23]

The second question concerning a necessary action regards the existence and size of the indemnity or damages that the person acting out of necessity must pay to the victim.

In the US legal system[24] the leading case arose two years after the one that defined victims' reactions as unlawful and is the *Vincent* v *Lake Erie Transportation* case.[25] Once again the case concerned the owner of a vessel that had moored at a dock without the dock owner's consent. More specifically, Lake Erie Transportation owned a ship that was unloading goods at Vincent's dock when a storm hit that stretch of sea. Instead of facing the open sea with the almost certain risk of losing the ship, Lake Erie Transportation moored its vessel firmly to Vincent's dock, causing damage to the dock. Because of the ship's movements, Lake Erie Transportation replaced the ropes that were breaking with stronger ropes. In this case the Court stated that although Lake Erie Transportation had not acted negligently, it still had to fully compensate Vincent for the damage.[26]

The Court also specified that if, in the *Ploof* case, where human lives were

For example, the action of anyone who breaks into another person's property to save himself from a fire is not unlawful'.

[23] If the action taken to save a property right is therefore unlawful, the victim's reaction cannot also be classified as unlawful and will constitute the justification for self-defense. However the victim's reaction will only be lawful as a form of self-defense within the limits set forth in Art 52 of the Italian Criminal Code, under which the defense must be proportionate to the injury. For example, if a person moors his ship to a dock without the owner's consent, and does so to avoid the actual and real danger that the ship will be destroyed in a storm, the action of the dock owner who unties the ship to avoid damage to the dock cannot be classified as self-defense, given the disproportion between the defense and the injury. To this effect, Corte di Cassazione 5 August 1964 no 2227, *Foro italiano*, I, 1931 (1964): 'while it is true that Art 2044 Italian Civil Code does not expressly reproduce the condition concerning proportionality between defense and injury, there can however be no real doubt that the civil law has adopted the same notion of the criminal-law exemption in all its constituent elements and, therefore also that resolute condition'. To the same effect, Corte di Cassazione 25 May 2000 no 6875, *Massimario del Foro italiano* (2000): 'when the defense reaction is excessive, it ceases to be lawful, giving rise to a tort constituting a source of obligation to provide civil compensation'. See, among the many, M. Bianca, n 11 above, 680.

[24] On the various rules proposed in the US to govern cases of necessity, see S.D. Sugarman, 'The "Necessity" Defense and The Failure of Tort Theory, The Case against Strict Liability for Damages Caused while Exercising Self–Help in an Emergency' 5(2) *Issues in Legal Scholarship*, 1-153 (2005).

[25] *Vincent* v *Lake Erie Transportation* 124 N.W. 221 (Minn. 1910).

[26] With regard to the *Vincent* case, R. Posner, 'Can Lawyers Solve the Problems of the Tort System?' 73 *Californian Law Review,* 743, 754 (1985) states that 'The owner of the pier rendered the shipowner a valuable service, for which ordinarily he would as a businessman expect to be paid. It seems as a minimum he should be compensated for out-of-pocket costs in rendering the service'.

also at stake as well as serious risks to individuals' safety, Ploof had stayed moored to Putnam's dock, he would have had to pay compensation for the damage caused. So according to the Court, in the case of a necessary action, compensation had to fully cover the loss. The Restatement of Torts and The Restatement (Second) of Torts stated in Sections 197 and 263 that in the case of damage arising from a necessary action, full compensation must be paid.

In § 904 of the BGB the German legal system also provides for full compensation when a property right has been infringed. As already stated, the German Civil Code lacks a provision to govern cases where the right sacrificed by the victim is a personal right. It is however recognized that when there is a conflict between personal rights, fair compensation must be awarded.[27]

For their part French scholars believe that compensation must correspond to full reparation of the damage,[28] while in England the prevalent view is that damage must be partially compensated.[29]

However, in the English legal system two of the leading cases on the civil law consequences of actions taken in cases of necessity did not envisage any compensation at all for the victims. More specifically, the first case in chronological order, ie *Mouse's Case*,[30] dating back to 1609, concerned a barge crossing the Thames, carrying people and their baggage. The barge was in danger and in order to avoid sinking some passengers threw other peoples' baggage into the river.

The plaintiff, who was the owner of some of the baggage thrown into the water, claimed compensation on the basis of the trespass rule. The Court did not recognize any entitlement to damages or an indemnity, ruling that

> 'for (the) safety of the lives of passengers (…) it is lawful for any passenger to cast the things out of the barge'.[31]

The second case in chronological order, *Esso Petroleum Co.* v *Southport Corp.*,[32] concerned the matter of a vessel owned by Esso Petroleum Co. when in danger of being wrecked and consequently losing its cargo and also human lives, the ship discharged four hundred tons of oil into the sea, which polluted the coastline and required a cleanup operation. The Southport Corporation claimed compensation for the expenses incurred to clean the beach. The House of Lords

[27] See C.W. Canaris, 'Notstand und Selbstaufopferung im Straßenverkehr' *Juristen Zeitung*, 655 (1963), who considers the case of a motorist who, in order to avoid a danger on the road, knocks down a pedestrian, in this case recognizing the pedestrian's right to fair compensation.

[28] B. Starck et al, *Obligations. 1, Responsabilité délictuelle* (Paris: Litec, 4th ed, 1991), §§ 300-301. With regard to fair reparation on the basis of an unjust enrichment, see also F. Terre et al, *Droit private Les obligations* (Paris: Dalloz, 7th ed, 1999), § 704.

[29] W.V.H. Rogers, n 15 above, 880.

[30] 77 Eng. Rep. 1341 (K.B. 1609).

[31] ibid 1342.

[32] *Esso Petroleum Co.* v *Southport Corp.* 1956 App. Cas, 218.

upheld the decision of the trial judge who had not awarded any compensation.[33]

In the Italian legal system, Art 2045 of the Italian Civil Code establishes that a 'fair indemnity' is due to the victim of a necessary action. The provision has been interpreted as meaning that the victim is not entitled to full reparation of the damage, but at the same time the court cannot award nothing. The prevalent view is that determination of the amount of compensation in question is entirely unrelated to the actual damage and therefore entails an entirely independent assessment.[34] However, some also claim that the damage suffered by the victim must provide a point of reference for determining the amount of the indemnity payable.[35]

IV. The Function of Compensation

Again with regard to the Italian legal system, the unanimous opinion is that the provision of compensation in the shape of a fair indemnity has a fairness-based function as it seeks to make good the loss which, according to a principle of distributive justice, the victim of the necessary action suffered.[36]

In order to carry out an incentive-based analysis, it is necessary to divide the situations where the actor takes an action that infringes another person's right into four categories.

V. The Various Cases of Necessity

It is indeed possible to identify four categories of situations where an action is taken out of necessity, which in turn can be divided into two groups.

The first category of situations occurs when the presence of the victim in person[37] or the victim's *chattel* in a certain place and at a certain time is a

[33] According to the trial judge '(t)he safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary on another's property (*Southport Corp*. v *Esso Petroleum Co*, 2 All E.R. 1204, 1209-1210 (Q.B. 1953)'.

[34] Among the many, A. De Cupis, n 17 above, 583.

[35] To this effect, R. Scognamiglio, 'Indennità' *Novissimo Digesto Italiano* (Torino: UTET, 1962), VIII, 594, according to whom the extent of the damage 'will considerably affect the court's equitable assessment, at least by persuading it to set an upper limit on compensation'.

[36] See, eg, M. Franzoni, 'L'illecito', in M. Franzoni ed, *Trattato della responsabilità civile* (Milano: Giuffrè, 2nd ed, 2010), I, 1167, according to whom the equitable assessment must seek to assign a sum which, in terms of a sense of justice, proves satisfactory. To the same effect, M. Briguglio, n 17 above, 164; B. Troisi, 'L'autonomia della fattispecie di cui all'art. 2045 cod. civ.' *Rassegna di diritto civile*, 975, 1001 (1984); Id, 'Stato di necessità' *Enciclopedia giuridica Treccani* (Milano: Treccani, 30th ed, 1993), I Diritto Civile, 1, 3.

[37] When the comparison is between the actor's life and the victim's life, an economic analysis cannot provide any indication. The same may also conceivably apply to serious damage to the victim's physical integrity.

necessary condition for implementing the necessary action, meaning that without the victim or his *chattel* the necessary action could not have been taken and consequently the asset in danger could not have been saved (category a)).

A second category can be added, characterized by the fact that a certain investment made in the victim's *real estate* is a necessary condition for implementing the necessary action (category b)).

Both these categories of situations are also distinguished by the fact that the presence of the victim or his property does not contribute to creating the danger.

An example of a situation that falls under the first category (category a)) is provided by the presence of a boat in an area frequented by bathers and when one of them gets into difficulty, he climbs onto the boat to save himself from drowning, causing damage. If the boat had not been there, the necessary action could not have been taken.

The *Vincent* case can be considered an example of the second category (category b)), where the action taken to protect the ship was only possible thanks to the presence of the dock built by Vincent. Without that dock the necessary action could not have been taken.

The requirement that the victim or his property (that is damaged) must not have contributed to causing the situation of necessity seeks is based on a distinction which it is felt is essential be drawn. It is intended to distinguish it from the case where the property not only provides the tools for taking the necessary action but also contributed to the creation of the situation of necessity. An example is *Mouse's Case*, where the baggage thrown into the Thames was the means by which the necessary action was taken but its presence had contributed to causing the danger. These cases require special efficiency-based rules that differ from the optimal rules for the first two categories considered.

A third category is represented by situations where the investments made in the victim's *real estate* that is damaged by the person acting out of necessity are not a necessary condition for implementing the necessary action (category c)).

Another category can be added where the presence of the victim or his *chattel* in a certain place and at a certain time is not a necessary condition for implementing the necessary action (category d)).

An example of a category c) situation is provided by the case where a motorist plunges his car onto farmed land, destroying the crops. In this case the presence of crops is not a necessary condition for implementing the necessary action (the necessary action could still have been implemented if the land had not been farmed).

An example of the fourth category (category d)) is provided by the case where a motorist is forced to knock down a pedestrian to avoid serious damage to himself caused by a car driving the wrong way. In this situation the presence of the pedestrian was not a necessary condition for implementing the necessary action.

Hence we have seen four categories of situations that can be divided into

two groups and that are seldom differentiated by legal commentators. However, incentive-based reasoning suggests that different rules are required for these categories.

VI. Categories a) and b) of Situations of Danger and of Necessary Action

With regard to categories a) and b) of situations of danger, *optimal compensation is equal to the damage actually suffered by the victim*. From the actor's perspective, optimal compensation is indeed equal to the damage caused to the victim. If the damage suffered by the victim is indicated by L and the benefit to the actor by G, and if compensation I is equal to L, then the actor will only take the action if G > L,[38] determining a change where the gain is higher than the loss. The necessary action would therefore be efficient.

Instead from the victim's perspective, it is conceivable that optimal compensation need not be commensurate with the actual damage. For example, it could be said that if a number of efficient precautions could be taken by the potential victim, the compensation receivable should only be equal to the damage if the victim took those precautions, otherwise it should be lower. Assume that a boat finds itself surrounded by numerous bathers, giving rise to a certain likelihood that some of them may find themselves in a situation of necessity. Imagine that an efficient precaution could be to place boarding ladders on the boat to help the bather climb on board, hence limiting the damage. Therefore, the compensation could be established as equal to the damage that would have been suffered if the boat owner had positioned the boarding ladder, thus encouraging the owner to put the efficient precaution in place. If he failed to do this, the compensation receivable by him would be lower than the damage suffered. However, in such cases compensation calculated on the basis of just the damage that would have been suffered if the boat owner had taken the precautions, determines a cost for the boat owner, represented by the efficient precautions. If he failed to take them he would incur a loss represented by the difference between the compensation receivable and the damage actually suffered. The fact that he has to bear a cost could induce the boat owner to give up that particular activity. In the case under review, he could be induced to move further away from the area frequented by the bathers. This action would entail a sacrifice for him as he would have preferred to stay where the bathers were, but above all a sacrifice for the bathers who would no longer have access to the property that would enable them to take the necessary action to save their life.

Another example, falling under category b) of situations of danger, is

[38] This follows the reasoning of K. Hylton, 'The Economics of Necessity' 41 *The Journal of Legal Studies,* 269 (2012) and assumes that the actor makes a rational balanced choice rather than an instinctive action.

represented by the *Vincent* v *Lake Erie Transportation Co* case.[39] In that case the real danger that the ship would sink was avoided thanks to the presence of Vincent's dock. Compensation lower than the actual damage suffered by Vincent would have dissuaded others in the same condition from building docks at all.

Therefore there would have been fewer docks to which boats in difficulty could have moored.[40]

If the compensation receivable were *always* lower than the damage suffered, this effect of substituting (ie of forgoing) the activity required to implement the necessary action would be even more pronounced.

So in category a) and b) cases, the need to ensure that the potential victim does not forgo his activity thereby causing consequent harm for potential actors suggests that, also from the point of view of incentives for the potential victim, the optimal compensation should totally cover the damage suffered.

At this point it may be worth establishing whether, according to economic logic, in these situations a reactive measure should be considered as self-defense or as an unlawful act entailing an obligation for the victim to pay damages to the actor for the harm occasioned to the latter.

As, in the cases under review, optimal compensation is equal to the damage suffered, ie I = L, the actor will take the action only when G > L.

Now if we assume that the costs of legal proceedings are equal to zero while the cost of objecting to the necessary action is positive, which can be indicated with a, then it could be said that the victim will never object to the necessary action. In fact, if he objected, that would save the asset worth L but would mean incurring the cost a, while if he did not object he would obtain compensation equal to L.

He will therefore object when

[39] On the matter W. Landes and R. Posner, 'Salvors, Finders, Good Samaritans, and other Rescuers: An Economic Study of Law and Altruism' 7 *The Journal Legal Studies,* 83, 128 (1978) state that if the owner of the dock were not fully compensated 'there will be insufficient dock building'.

[40] A particular case that has been studied by US moral philosophers is the one where a hiker is caught in a snowstorm and in order to save his life enters someone else's cabin, eats their food to satisfy his hunger and burns their wood to keep himself warm. This specific case falls under those where the investment made in the victim's property must be considered the means by which the necessary action leads to the desired result (category b). In this situation the presence of the cabin guarantees that the hiker can save his life. Some US moral philosophers believe that the hiker has a moral obligation to pay for the goods consumed, while other believe the opposite. Examining the issue from the point of view of incentives, if the legal provision states that no compensation or only a partial compensation must be paid to the owner of the cabin, this may well result in the owner abandoning the cabin or, coming from an *ex ante* prospective, not building it at all, causing specific damage for hikers who will no longer have a place to take shelter to save their lives. See in particular J. Feinberg, 'Voluntary Euthanasia and The Inalienable Right to Life' 7 *Philosophy & Public Affairs*, 93, 102 (1978). On the matter also G. Christie, 'The Defense of Necessity Considered From the Legal and Moral Points of View' 48 *Duke Law Journal,* 975, 1005 (1999).

$$L\text{-}a > L$$

Given that, as has been said, the costs for objecting to the necessary action are positive, he will never object.

It should therefore be stated that the question of the legal nature of the victim's reaction is immaterial from a practical point of view, as measures of this type would never be implemented.

However the situation changes if there are costs of legal proceedings to consider. One can imagine that the victim of a necessary action must incur costs to identify the person who acted out of necessity, bring legal action and see his claim satisfied. When such costs, which can be high, exist and assuming that the victim will not be under an obligation to pay compensation for the harm caused by his reaction, he will object to the necessary action whenever

$$a < c$$

ie when the cost of the reactive measure is lower than the costs of legal proceedings.

If the victim objects, he obtains a benefit equal to L-*a*. If he does not object, he obtains a benefit equal to L-c, as the compensation receivable for the damage he has suffered is equal to L, so if $a < c$ he will object.

However, when the victim decides to react against the necessary action because $a<c$ and he does not have to pay compensation for the harm caused by his reaction, he will not take into account the loss of wealth that the person acting out of necessity will suffer. The actor takes his action when G>L,[41] so that if the victim objects to the necessary action he incurs harm equal to G. The advantage arising from the reactive measure lies in the fact that the potential victim saves the asset worth L. From a social point of view, reactive measures should only be taken when

$$a < c - (G\text{-}L).$$[42]

[41] However, it can be argued that when the actor takes the action he is not in a position to compare the value of the asset to be saved and the value of the asset that will be sacrificed. In other words, when faced with real and tangible danger of damage to a personal asset/right, he does not make a rational balanced choice based on a cost-benefit analysis, but acts instinctively. In such cases, the equitable function of indemnity or damages comes into play. It must however be pointed out that, in order not to discourage the victims of necessary actions from behaving in a certain way, in these category a) and b) cases, compensation equal to the full damage sustained by the victim guarantees desirable results. It is also worth mentioning that Italian case-law underlines the fact that the actor is free to choose how to act. For example, Corte di Cassazione 13 December 1966 no 2913, *Giustizia civile*, I, 951 (1967), states that necessary action is always attributable to the person causing the damage, because it is the result of a free determination of intention to commit a breach of legal rules or rules of conduct.

[42] For the sake of simplicity, the actor's costs of proceedings are not considered. Instead these costs are taken into account by K. Hylton, n 38 above, passim.

In other words the cost of the victim's reaction must be lower than the costs of legal proceedings, from which G must be deducted, ie the harm sustained by the actor, and the value of the asset saved by the actor, ie L, must be deducted from the damage suffered by the victim.

Therefore, as G-L > 0[43]

$$c > c - (G-L)$$

There will then be an excessive level of reactive measures as the potential victim will object even when the cost of his reaction is lower than the cost of legal proceedings but higher than the difference between the costs of legal proceedings and the loss in wealth. If now we assume that when the potential victim reacts he must pay compensation for the harm thereby caused, he will take the reactive measure when

$$a < c - (G-L)$$

In fact, if he takes the reactive measure he will have to compensate the harm G, but will save the asset L from loss.

Given the coincidence between one and two, providing that the harm inflicted must be compensated and therefore that the reactive measure is unlawful produces optimal incentives for the potential victim.

Assume, for example, that the asset to be saved is worth one thousand euro, the costs of legal proceedings are equal to three hundred euros, the costs of the reactive measure are equal to one hundred euro and the benefit for the actor is equal to ten thousand euros.[44] If the reactive measures were lawful, the potential victim would compare his costs of reaction with the costs of proceedings. In this example he would take the reactive measure and the solution would be inefficient, because for a saving of three hundred euros made by not incurring the costs of legal proceedings and of one thousand euro for saving the asset that would have been sacrificed, there would be a loss of ten thousand euros by the actor, in addition to one hundred euro represented by the costs of reaction. So for a social benefit of one thousand three hundred euros there would be social harm equal

[43] In actual fact it is not always the case that G-L > 0. In fact, if a<c the actor will take the action in a case of necessity if G> L-a. In cases where L-a<G<L, the actor will take his action even if it is inefficient to do so, and the victim will not implement reactive measures and will not bring court proceedings.

If a>c, the actor will take the action whenever G>L-c. For L-c<G<L, the necessary action will be taken even though it is inefficient to do so and the victim will not implement reactive measures and will not bring court proceedings. In this paper, in order to keep in line with Hylton's reasoning, it will be considered that G>L.

[44] This example does not take into account the fact that for many legal systems self-defense must be proportionate to the injury. However some Italian legal commentators state that, when there is a real risk of damage to a personal right and when the asset to be sacrificed is a property right, this proportionality is not required (see S. Piras, n 17 above, 143).

to ten thousand and one hundred euros. The potential victim's decision would have been optimal if he had been required to pay compensation for the harm he has inflicted.[45]

It must therefore be said that, according to an economic logic, the victim's reaction is to be considered unlawful, with the consequence that the harm suffered by the actor should be compensated. However this does not mean that reactive measures are always inefficient and therefore undesirable. Consider this second example: the benefit for the actor is equal to one thousand two hundred euros; the costs of legal proceedings are equal to seven hundred euros; the cost of the reactive measure is equal to one hundred euro and lastly the cost of the sacrifice of the victim's right is equal to one thousand euro. In this case the reactive measure would be implemented and its implementation would be efficient. It is important to bear in mind that the costs of legal proceedings are still social costs. More specifically, if the reactive measure was taken the change in social welfare would be €1000 - €1200 - €100 = - €300. If the victim did not react and later brought legal action the change in social welfare would be equal to €1200 - €1000 - €700 = - €500.[46]

At this point it is necessary to understand why there needs to be a distinction between a trespass, ie an action by which another person's property right is infringed and which is classified as an unlawful act, and an action taken in a case of necessity, which is instead a lawful act. Even in the case of trespass the damage caused must be compensated in full and even in the case of trespass the problem of excessive victim reactions can arise.

The distinction between a trespass, which is an unlawful act, and a necessary action, which is a lawful act, lies in the different presence of transaction costs. In the case of necessity the transaction costs are so high compared to the time in which negotiations should be concluded that the legal system uses a liability rule,[47] that is, it authorizes the infringement of another person's right against

[45] In fact, for a benefit of one thousand three hundred euros, he would have incurred a cost of ten thousand one hundred euros and would not therefore have reacted.

[46] It could however be argued that if reactive measures are considered unlawful, after they are taken proceedings will have to be initiated to investigate and order payment of damages and the parties will have to bear the costs of proceedings. As part of these costs will be borne by the actor, the potential victim will not take that part into account and therefore reactive measures will still be excessive.

[47] With regard to the nature of liability rules, reference must be made to G. Calabresi and A. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85 *Harvard Law Review*, 1089 (1972). Two aspects are worthy of mention: when the victim has to sacrifice his physical integrity or a personal right, the use of a liability rule may not be justified as it may not be possible for the court to measure the subjective appraisal of these assets, which could differ considerably from one person to another. Besides, the existence of high transaction costs does not always justify use of a liability rule. For example, a person cannot break the window of a house when the owner is absent to take a bar of chocolate, even if his desire is strong and he would be willing to pay the damage caused. In order for a case of necessity to exist, legal systems demand that there is a risk of serious damage for the actor, or

payment of compensation. Instead in cases of trespass, the transaction costs compared to the time in which the negotiations should be concluded are low, which means that the right may be transferred through a voluntary agreement, ie a contract. The transferor's right is then protected by a property rule.[48] Where there is a contract, the transferor may obtain a share of the contractual surplus, which in the case of necessity instead goes entirely to the actor but, above all, a contract provides the certainty that a right passes into the hands of the person who values it most while no such certainty is provided when the legal system relies on a liability rule. If, say, the courts systematically underestimate the damage suffered by the victim of the necessary action, inefficient transfers of rights may well occur and this is why it is preferable to use a voluntary agreement to transfer rights when transaction costs are low. Therefore in a trespass the victim may lawfully take action to protect his own interest, because in this way the right will be transferred – where there is an advantage for both parties – through a contract.[49]

VII. Categories c) and d) of Situations of Danger and of Necessary Action

1. Category c)

Category c) of situations where action is taken out of necessity is represented by cases where investments have been made in a property that are not a necessary condition for implementing the necessary action. In other words if the investments had not been made, it would still have been possible to successfully implement the necessary action. In these situations efficient compensation rules should ensure that the actor takes action when the benefit obtained is higher than the damage inflicted.[50] However, at the same time, if the victim of the necessary action were entitled to compensation equal to the damage actually suffered, he would make investments that were not efficient and too many investments compared to those that would ideally be made if account were taken of the certain likelihood

serious harm. On the point, see K. Hylton, 'Property Rules and Liability Rules, Once Again' *Review of Law & Economics*, 137- 191, 178, 182 (2006).

[48] With regard to the insubordination of property rules also in situations where transaction costs are low see I. Ayres and E. Talley, 'Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade' 104 *Yale Law Journal*, 1027 (1995), and L. Kaplow and S. Shavell, 'Property Rules versus Liability Rules: An Economic Analysis' 109 *Harvard Law Review*, 713 (1996).

[49] This point is underlined by K. Hylton, n 38 above, 272 et seq.

[50] In US law, when someone acts on instinct rather than on the basis of a rational balanced choice, no compensation for damage is due. So, eg, if a person intrudes on land to escape a vicious dog, no compensation is due. See K. Hylton, n 38 above, 273. Instead, under the Italian legal system, the person would be entitled to a 'fair indemnity' pursuant to Art 2045 of the Italian Civil Code.

that they would be destroyed as a result of the necessary action. Hence a moral hazard[51] would arise, as the victim, knowing that he will be fully compensated, will not consider the fact that those investments could be destroyed. In these cases the efficient solution would be to provide for fixed compensation equal to the damage that would be suffered by a victim who has made efficient investments. If the potential victim acts rationally and does not miscalculate, where such compensation is payable, he will only make efficient investments and compensation will be equal to the damage suffered.

Consideration will be given to cases where the potential victim cannot take reactive measures because it is too costly to do so.[52]

In practical terms, consider the following case. Tom is the owner of a piece of land beside a road where there is a dangerous bend and therefore a certain likelihood that motorists may find themselves in a case of necessity and have to run off the road, ruining the crops growing on the land. Suppose that in the period when the field is farmed there is a one third probability that the crops will be destroyed by a motorist forced to intrude on the land to avoid harm to himself or his property.

Tom can choose whether to grow beets or roses. Bear in mind that in one third of cases the crop will be destroyed as a result of a necessary action.

Beets have a cost of thirty euros and provide a revenue of sixty euros. Roses have a cost of two hundred euros and provide a revenue of two hundred forty euros.

The expected value of the two investments is the following:

with regard to beet growing:

$$EVb = 2/3\ €60 + 1/3\ €0 - €30 = €\ 10;$$

with regard to rose growing:

$$EVr = 2/3\ €240 + 1/3\ €\ 0 - €200 = -\ €40$$

The investment with the highest expected value is represented by the beet growing. The investment in roses actually has a negative expected value.

Now suppose that the owner of the land is entitled to compensation equal

[51] Although the term 'moral hazard' is traditionally used to indicate the conduct of an insured who implements an inefficient 'hidden action' in the knowledge that the costs will be passed on to the insurance company, the term is also used to indicate the inefficient non-hidden conduct of someone who knows that the damage sustained will be compensated by a third party. With regard to the first meaning, see K. Arrow, 'Uncertainty and the Welfare Economics of Medical Care' 53(5) *American Economic Review*, 941 (1953); with regard to the second meaning, see L. Blume et al, 'The Taking of Land: When Should Compensation Be Paid?' 99 *The Quarterly Journal of Economics*, 71 (1984).

[52] Assume, eg, that to prevent motorists from driving onto land, it is necessary to build a very expensive wall. In this case it could prove advantageous to be the victim of a necessary action rather to invest resources to prevent that action from being taken.

to the damage actually suffered.

In this case his expected revenue would be:

for beets

ERb = 2/3 €60 + 1/3 €60 - €30 = €30;

for roses

ERr = €2/3 240 + 1/3 €240 - €200 = €40

He would therefore consider it more advantageous to grow roses even if it would be more socially desirable to invest in beets.

However, if entitled to full compensation, not only will the person make less efficient investments but he will also make excessive investments, ie too many investments. Assume that the entitlement has altered the potential victim's incentives so that he chooses the more efficient investment, ie in beets, and imagine that the first unit of investments in beets has a value of nine hundred euros and costs two hundred euros. The second unit of investments in beets still costs two hundred euros, but the value of the investment is equal to seven hundred and fifty euros. The third unit of investments in beets costs two hundred euros and has a total value of two hundred forty euros.

The first unit of investments in beets has a positive expected value and is therefore desirable.

EV1 = 2/3 900 + 1/3 0 - €200 = €400

For the second unit of investments in beets the expected value is equal to:

EV2 = 2/3 €750 + 1/3 0 - €200 = €300

And it is therefore socially desirable.

The third unit of investments in beets has an expected value equal to

EV3 = 2/3 €240 + 1/3 0 - €200 = - €20.

The third unit of investments in beets should not therefore be made.

However, if the owner is entitled to receive compensation equal to the actual damage suffered, he will make the investment in question because his excepted revenue will be

ER = 2/3 €240 + 1/3 €240 - € 200 = €40

Hence, when compensation is equal to the damage actually suffered, the victim of the necessary action will not make the most efficient investments and will make too many investments.

The situation where there is a likelihood that an actor destroys the investments

made by the victim is similar to the case where government expropriates private property for a different purpose to what was intended by the private individual and destroys the investments made by the expropriated person.[53] It was scholars researching the optimal rules governing takings[54] who pointed out that compensation equal to the investments made leads to inefficient choices as, when choosing which and how many investments to make in a property, the person who could potentially be expropriated will not take into account the probability that those investments may be totally destroyed as the expropriating government will have to use the property for a different purpose.[55]

Instead zero compensation firstly proves efficient. In this case for the victim of the expropriation the expected revenues from his investments will be equal to their expected value and therefore he will only make those with a positive expected value. In the case with which we are concerned of actions taken out of necessity and with regard to category c) cases, the optimal compensation could therefore be said to be equal to zero, as in this way the victim of the necessary action will take into account all the investments that will be lost if the actor takes the action. It should be borne in mind that in the English case of *Esso Petroleum*, which falls under this category c) of necessary actions, the court did not award any compensation.

Scholars of the notion of expropriation have also shown that the result of making efficient investments is achieved by providing for fixed compensation,[56] which is not contingent on the amount of the investments made by the person who could potentially be expropriated (or the potential victim of the necessary action). With regard to choosing the most efficient investments, it is sufficient to point out that with fixed compensation equal to T, the expected revenues of two possible investments increase by the amount of T, which means that the zero-compensation investment which proves preferable and is also efficient, will still be preferable when compensation is fixed. With regard to excessive levels of investments, fixed compensation once again guarantees the optimal choice.[57]

[53] In Italian legal theory, S. Piras, n 17 above, 194, hypothesizes that cases of necessity can constitute a taking due to private necessity. The commentary to the second BGB project, *Protokolle Der Kommission für die zweite Lesung des Bürgerlichen die zweite Gesetzbuche* n 12 above, 214, also develops a parallel between necessary action and taking.

[54] Reference is made to L. Blume, D. Rubinfeld and P. Shapiro, n 51 above.

[55] If the government acquires the property to achieve an aim that coincides with the private individual's aim, then optimal compensation will be equal to the value of the investments, in order not to dissuade the private individual from producing those properties. On the point see S. Rose-Ackerman, 'Regulatory Takings: Policy Analysis and Democratic Principles', in N. Mercuro ed, *Taking Property and Just Compensation, Law and Economics Perspectives on the Takings Issue* (Boston: Kluwer, 1992), 30. On the economic analysis of takings see T. Miceli, *The Economic Theory of Eminent Domain. Private Property, Public Use* (Cambridge, Mass.: Cambridge University Press, 2011).

[56] L. Blume et al, n 51 above, 78.

[57] Going back to the example of the investment in beets, the third unit of investments proved inefficient. If fixed compensation, for example of €1,000, is provided, the person will

Fixed compensation, ie not contingent on the investments made by the person who could potentially be expropriated or the potential victim of the necessary action, ensures that the most efficient investments are chosen and that the investment level is optimal. Instead, compensation linked to the actual damage suffered by the expropriated person or the potential victim of the necessary action will in any case lead to inefficient choices, as part of the social cost of the investment will be passed on to the government or to the actor and the potential victim will not take this into account.[58]

So, for example, if a person sets up a very expensive system for growing tropical plants on a beach near a commercial port, given that there is a certain likelihood that one of the many ships using the port may find itself in a situation of necessity and have to pour the oil from its tankers into sea – which will destroy the tropical plant growing system – it has to be said that the investment is inefficient and therefore that compensation should not be linked to said investment. Reference should only be made to the damage that would have been sustained if efficient investments had been made. An even more extreme example is provided by the case where a person places his collection of crystal-ware near a bend on a dangerous road where motorists may have to run off the road, intruding on another person's property and crashing into the crystal-ware. In this case compensation should not be equal to the damage actually suffered by the victim, because such compensation would not encourage the victim to choose a different place to keep his crystal-ware.

It has been pointed out that, from the actor's point of view, efficient compensation is equal to the damage caused to the victim. The potential actor will decide whether to take the action to save his property on the basis of the compensation established by law. So, if compensation is equal to zero the actor will take too many necessary actions,[59] as even when the benefit is only marginal, he will still take the necessary action. Fixed compensation could therefore be calibrated in such a way as to control the actor's choice. To sum up, it has been pointed out that with regard to the potential actor compensation should be equal to the damage suffered by the victim. Instead with regard to the victim, the optimal compensation should be fixed and not contingent on the investments made so as to ensure that costs arising from the destruction of investments are

not make that third investment in beets. In fact, if he only makes the first two investments his expected revenue will be equal to €1,000 + €1,450 = €2,450. If he makes the third investment his expected revenue will be equal to €1,000 + €1,410 = €2,410.

[58] L. Blume and D. Rubinfeld, 'Compensation for Takings: An Economic Analysis' 72(4) *Californian Law Review*, 569, 644 (1984): 'Whatever the exact determination of compensation, it is important that the measure be one that cannot directly affect the behavior of the individual investors, since any compensation measure which can be affected by private behavior will create the possibility of inefficiency due to moral hazard'.

[59] The Italian legal system controls the actor's choices by providing, in Art 2045 of the Italian Civil Code, that a case of necessity is present only when action is taken to avoid 'serious personal injury'.

not passed on to the actor and overlooked by the victim.

The solution to the *conundrum* is to set fixed compensation that is equal to the damage that would be suffered by a victim if he only made efficient investments.[60] Given that, when compensation is fixed, a rational person will only make efficient investments, that is to say, with a positive expected value, the compensation will be equal to the damage actually suffered. But this concurrence between compensation and damage must not give the impression that the compensation is contingent on the damage actually suffered by the victim. If the victim were to act irrationally or misjudge the situation and make further or inefficient investments, the compensation would be lower than the damage actually suffered. To go back to the farming example, compensation must be established as the value of the crop when beets are grown and only the first two units of investment are made. A rational person will grow beets and only make two units of investment. In this way the damage suffered by a rational person will be precisely equal to the compensation set by the law. However, if the potential victim irrationally or mistakenly grows roses or makes the third unit of investment in beets, compensation would be lower than the damage actually suffered.

It is however important to note how difficult it can be for the court to determine which investments are efficient and how efficient they are. Generally speaking it can be said that if the likelihood of a situation of necessity occurring is very low, efficient investments in terms of type and number will tend to be those that would be made if the likelihood were equal to zero, whereby the compensation should seek to cover the damage actually suffered by the victim. If the likelihood of the harmful event is high, then the type and level of investments may well be inefficient and the court will be required to carefully assess whether the potential victim chose, and only made, investments of the efficient kind.

The result that appears to have been obtained so far lies in the fact that in category c) cases compensation should not be linked to the investments made by the victim but should be fixed. This is why legal systems such as the German and US system, which provide for full compensation of the damage caused, prove inefficient.[61]

[60] This solution is identified by T. Miceli, 'Compensation for the Taking of Land under Eminent Domain' 147 *Journal of Institutional and Theoretical Economics*, 354 (1991).

[61] Until now we have assumed that the potential victim was unable to take reactive measures. Now we need to see what happens when these measures can be taken. Assume that the potential victim has made efficient investments worth five hundred euros and that compensation is set at five hundred euros. Now imagine that the potential victim makes a further investment of four hundred euros which increases the value of the investments by four hundred fifty euros. The compensation level stays the same at five hundred euros. In this case, if the reactive measure is considered unlawful, the person will take the reactive measure even though it would be efficient to leave the actor the possibility of infringing the right. Imagine that the actor obtains a benefit of one thousand and one hundred euros from the necessary action. If the potential victim does not take any reactive measures he will suffer a loss of €500- €950 = - €450, ie equal to the difference between the compensation that was not obtained and the value of the sacrificed asset. Assume then that a reactive measure costs fifty euros. If the potential victim takes a reactive measure he will

2. Category d)

Lastly consideration must be given to category d) situations where the presence of the victim or his chattels is not a necessary condition for implementing the necessary action, but rather a mere possibility.

These are situations where the potential victim is not constantly exposed to the risk of the necessary action, but may occasionally find himself in a situation where this risk is present. Imagine the case of a pedestrian who may find himself at a junction where there is a certain likelihood of being knocked down by a motorist acting out of necessity. The pedestrian may be in that place for a certain period of time, but at other times he will be in different places where there is no risk of being knocked down by a motorist. *In these cases the aim is to ensure that the actor only takes the action when the benefit is higher than the cost.*[62] But at the same time it is necessary to discourage the potential victim from making excessive investments or implementing excessive levels of activity. Given the lack of information provided by the courts, a second best solution could be represented by compensation linked to the damage suffered by the victim.

In terms of efficiency, both the level of investments that the potential victim makes and that may be destroyed, and the length of time or number of times that he is exposed to the risk of suffering damage as the result of a necessary action should be controlled by means of optimal compensation. In the case in

suffer damage equal to €950 - €50 - €1100= - €200. He will save the asset worth nine hundred and fifty euros but will have to spend fifty euros to take the reactive measure and will have to compensate the damage equal to one thousand and one hundred euros. It will therefore be advantageous for the potential victim to take the reactive measure even if the forced transfer of the right would have been efficient. In any case it will therefore always be preferable to consider reactive measures as unlawful and as giving rise to an obligation to compensate the actor for the harm inflicted on him. If said measures were considered lawful, the potential victim would always object, as in the example considered he would obtain a benefit of four hundred and fifty euros, equal to the difference between the value of the investment saved and the compensation that was not obtained for not having permitted the necessary action to be taken. In this case the potential victim would also object to all the efficient necessary actions that would lead to a benefit for the actor that was greater than the victim's investment loss. Instead by envisaging the need to pay compensation equal to the harm caused to the actor, ie G, the potential victim will object to all the inefficient necessary actions, while less reactive measures will be taken against efficient necessary actions.

This paper does not however deal with the social desirability of the additional investment that has been envisaged.

[62] As already said, we are imagining that a person can make a rational choice, rather than acting on instinct. In US law, no indemnity or damages are payable in cases of instinctive action. This was the ruling in the *Cordas* v *Peerless Transportation Co.* case (27 N.Y.2d 198 [N.Y. City Ct. 1941]), where a cab driver jumped from his car to escape an armed man who had got into the cab. The car continued to roll and knocked down a woman and her two children. The Court ruled that in this case no compensation was due as the cab driver's behavior was reasonable in view of the nature of the threat and the emergency conditions. This rule is approved by K. Hylton, n 38 above, 273. Under the Italian legal system the victims would have been entitled to compensation in the shape of a fair indemnity. The provision of an indemnity or damages could be justified with a view to allocating the risk to the best risk bearer, as referred *infra*. It could be assumed that the taxi company is the party that best bears the risk of the consequences of necessary actions.

question it is however extremely difficult to identify rules to limit the investments made by the potential victim in order to contain losses in the event of a necessary action. As I have said, the potential victim is exposed to a risk of damage from a necessary action at certain times while at others he is not and the investments he makes serve to increase his welfare even when he is not running any risk.[63]

The requirement to be met by the legal system consists in governing the activity of the potential victim with regard to the number of times and length of time he finds himself in a situation where there is a risk of suffering damage as the result of a necessary action. Imagine the case of a pedestrian who intends to spend time at a junction where there is a probability *p* that he will be knocked down by a motorist in a situation of necessity. With regard to the person potentially causing the damage, optimal compensation should totally cover the damage. In this way he would only take the necessary actions that are valued higher than the damage they produce. With regard to the potential victim there is the problem that, when compensation is equal to the damage actually suffered, he externalizes the social costs of the accident, in that he does not take them into account as they are fully compensated by the actor. Imagine that a pedestrian has a benefit equal to ten euros in stopping at a junction. The probability *p* that he will be knocked down is equal to zero point two. If the investment is made, the damage is equal to one hundred euros. The decision to stop at the junction therefore has an expected value equal

$$EV = 0.8 \times € 10 + 0.2 \times - € 100 = - €12.$$

This decision is therefore socially undesirable.

If, however, in the event of an accident the damage were fully compensated, then the expected revenue would be equal to eight euros (ER = €8 + €0 = € 8), which means that the pedestrian would stop at the junction.

Efficient compensation would be equal to zero. In that way, by internalizing all the costs the potential victim would be spurred to choose the efficient activity level. Therefore, the pedestrian would only stop at the junction if the expected benefit obtained was higher than the expected social cost that could arise. Zero compensation however runs counter to the need to encourage the potential actor to consider the damage he causes through the necessary action. It has indeed been pointed out that, with regard to the actor's decisions, optimal compensation would be equal to the damage actually produced.[64]

[63] However there are still cases where the potential victim's conduct may be subject to sanctions and namely when, *in view of the investments made*, he behaves in a way that puts those investments at risk by virtue of a necessary action. So someone who brings particularly precious and easily damaged items to an area where necessary actions are frequently taken could be discouraged from doing so by providing for compensation that may even be equal to zero. In other words, these are cases where the conduct in itself must be controlled, regardless of the level of activity.

[64] Suppose that a person gains a benefit of ten euros from the first hour he stops near the

It can be expected that, when it is possible to assess the benefit gained by the potential victim from the activity and identify his exact activity level, then it should be possible to calculate the compensation on the basis of the efficient activity level. The compensation payable should be equal to the damage when the activity level is efficient and equal to zero when the activity level is excessive. In fact when the activity level is excessive, any compensation would lead to inefficient choices, as when deciding whether to undertake a further level of activity, the person would also consider the compensation he would be paid.[65] With zero compensation when the activity level is excessive, rational people, knowing that no damages or indemnity would be received if they chose an excessive activity level, would choose the efficient level of said activity.[66]

In those cases where it is impossible to assess the benefits gained by the potential victim from his activity or to assess his activity level,[67] when the legal system is faced with a situation where (a) with regard to the actor, the optimal compensation to be set should be equal to the actual damage and (b) with regard to the victim, it should be equal to zero, a 'second best' solution could be represented by compensation that is a percentage of the damage caused. In this way, the actor's choices would be at least partially controlled and the potential victim's choices would also be at least partially controlled. The provision of compensation that is a portion of the damage actually caused also spurs the actor to take the action that entails a lower cost for him and that corresponds to a lower social cost.[68]

junction, a benefit of six euros from the second hour and a benefit of three euros in the third hour. The efficient level could be to stop for two hours and therefore the person would obtain compensation equal to the damage suffered if he stopped for only two hours. If the person stopped for three hours and the necessary action was taken in that third hour, he would not be entitled to any compensation. In fact in that case any compensation would lead to inefficient choices, as when deciding whether to undertake a further level of activity, the person would also consider the compensation he would be paid.

[65] So, for example, if a person stops for hours at a junction where it is dangerous to stop on account of necessary actions taken by motorists, without gaining a significant benefit from stopping there, then the compensation should be equal to zero.

[66] Again in this case we can raise the issue of whether or not victim's reactions are to be classified as unlawful. The same reasoning made with regard to category a) situations when a necessary action is implemented applies: the reactive measure must be considered unlawful, so that the potential victim will only implement it if $a < c - (G-L)$, which is the condition for achieving optimal incentives.

[67] For example we cannot know how many hours the victim stopped at a certain junction.

[68] Suppose that a motorist in difficulty has to choose whether to head towards farmed land or towards an area where there are people. Compensation linked to damage will push him towards the farmed land. However the same result could be achieved in Italian law by interpreting the expression 'not otherwise avoidable' contained in Art 2045 of the Italian Civil Code as meaning that, to ensure that the case of necessity is justified, the necessary action taken must be the one that causes the least social damage.

VIII. Optimal Allocation of Risk and Compensation

So far we have assumed that compensation has to be calculated without assigning it the function of allocating the risk to the best risk bearer. In other words we have assumed that the persons were risk neutral. However, it may prove necessary to allocate the risk to the person who is more capable of bearing it. There may in fact be cases where one person certainly appears to be the best risk bearer. So, if a person encounters various situations of necessity, it may be preferable to allocate the risk of harmful events to him, as he could eliminate the negative consequences borne with one single insurance cover. One such example is the case of a transport company, whose employees may find themselves having to deal with situations of necessity when driving its vehicles. By allocating the risk to the transport company, with consequent compensation equal to the damage suffered by the victim, it can insure itself against said risk, while if the potential victims of the necessary action had to insure themselves, the costs would be higher.

In the case of two equally risk averse persons who find themselves with the same probability of having to take a necessary action to the detriment of the other, a mutual form of insurance could entail sharing the damage caused by the necessary action between them. Consider the case of two motorists who may both find themselves causing ten thousand euros of damage to the other. In this case the provision of compensation equal to five thousand euros would represent a form of mutual insurance.[69]

IX. Conclusions

The situations where a person is forced to act out of necessity are so many and varied that it is impossible to find a single optimal measure of the compensation to be paid.

More specifically, in cases where the victim himself or his property represents the means by which the necessary action is taken, compensation equal to the damage actually suffered by the victim prevents him from deciding not to do certain things so as not to suffer the damage arising from the necessary action, with the undesirable consequence that the actors potentially causing the damage will not be able to take the necessary action and therefore save their property.

Instead in situations where the victim himself or his property is not the means by which the necessary action is taken, in order to ensure that potential victims do not fail to take into account the risk that their property may be destroyed when the necessary action is taken, compensation that does not cover

[69] Assuming that the damage can be shared between two motorists when neither of them caused the accident through negligence, in order to obtain a form of mutual insurance, E. Carbonara et al, 'Sharing Residual Liability: The Cheapest Cost Avoider Revisited' 45 *The Journal of Legal Studies*, 173, 200 (2016).

all the damage and which, where possible, is fixed, is desirable.

This article has shown that rules, especially the US and German rules, which envisage full compensation for the damage suffered by the victim of the necessary action are inefficient[70] for actions belonging to categories c) and d), ie situations where the injured party or his property are not the means through which the necessary action is successfully taken.

Likewise rules, such as the English ones, that do not award any compensation to the victim of the necessary action are equally inefficient. This is because they do not take into account category a) and b) cases where the victim's property or the victim himself represents the means by which the necessary action is taken and therefore only partial compensation would lead potential victims not to implement the activities that actually allow the necessary action to be taken.

The rule laid down in Italian law, according to which the victim is awarded a 'fair indemnity', allows compensation to be calculated according to the different situations in which he finds himself.[71]

The rules of the Italian legal system, set forth in Art 2045 of the Italian Civil Code, therefore appear more economically efficient than the different rules established in Western legal systems. They allow compensation to be calibrated by distinguishing between cases defined as categories a) and b) and those falling under categories c) and d).

Leaving aside the efficiency factor, the fairness-based reasons that commend a certain amount of compensation rather than another are still valid, as has been shown from the start.

[70] The efficiency of the US rules is instead claimed by K. Hylton, n 38 above, passim.

[71] This article has not dealt with the case of necessary rescue, and namely when someone acts causing damage to save others from a certain danger. See, on the matter, the analysis of A. Porat and E. Posner, 'Offsetting Benefits' 100 *Virginia Law Review*, 1165 (2014). However the arguments put forward hereunder to claim that a distinction must be made between the various situations and that the victim should not always be awarded full compensation still appear valid.

Essays

Turning Gumbo into *Coq Au Vin*: Translating the Louisiana Civil Code

Matthew Boles*

Abstract

In July of 2016, a project to translate the current Louisiana Civil Code that was enacted in 1870 from English to French was completed, marking the first time that the Code was completely translated. The monolingual version of the 1870 Code differed from the 1825 Code and the 1808 Digest in that both of those were written into French and translated into English, having the official source of law in two languages. Although the French version of the current Code is not an authoritative source of law, the project received an award for its contributions to preserving the French language in Louisiana.

This article provides an overview of the French impact in Louisiana from a language and legal perspective, and then provides an explanation of the two main legal translation theories: the formal equivalency and functional equivalency. The article also examines the role of culture in legal translation and ends by examining how the translators of the Code decided to translate it and provides specific examples. By examining how this translation project was done, future translators can determine which method is best for them in their projects.

I. Introduction

Robert Cavelier, Sieur de la Salle named Louisiana in the late 17th century in honor of French King Louis XIV.[1] The French influence in the state in the United States extends beyond its name. The *fleur-de-lis* is strongly associated to the state and to this day

> 'remains a powerful symbol of Louisiana and its French heritage. It was planted three hundred years ago in the garden of our (Louisiana) laws, where it is still cultivated though more as a hybrid than in its original form'.[2]

The *fleur-de-lis* also demonstrates a contrast between France and Louisiana because, though wearing the *fleur-de-lis* in France today would be *shameful*,[3]

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[1] See O. Moréteau, 'Louisiana 1812–2012: 200 Years of Statehood and 300 Years of French Law Influence' 59 *Louisiana Bar Journal*, 325 (2012) (the official name in French was *La Louisiane*).

[2] ibid 326.

[3] F. Servando Teresa de Mier, *The Memoirs of Fray Servando Teresa De Mier* (Oxford: Oxford University Press, 1998).

what used to be a Gallic symbol is still an integral part of New Orleans and of Louisiana.[4] The different perceptions of the image show that people can perceive the same thing in different ways, which makes the work of legal translators that much harder.

The French language and culture[5] have influenced Louisiana since its inception. Notwithstanding the French influence for centuries, at least one scholar has declared that French in Louisiana '*is dying*'.[6]

In July 2016, the Center of Civil Law Studies at the Paul M. Hebert Law Center, Louisiana State University, published the current Louisiana Civil Code in French, marking the first completed translation of the Code.[7] Dr. Olivier P. Moréteau, the Director of the Center of Civil Law Studies, coordinated the seven-year project.[8] Although the French version is not an authoritative source of law,[9] the project won the John Ashby Hernandez III Memorial Award for Francophone Leadership in 2014 for its contributions to preserving the French language in Louisiana.[10] The translated version of the Code was published in 2017 in Paris, which was the first time that the state's Code was published outside of the United States.[11]

There are a number of theories a translator may draw upon when translating a legal text. The decision to translate the Code resulted in numerous questions concerning the best way to achieve that end. The translation of any legal text is difficult[12] because each country has its own unique cultural norms.[13] Legal translation requires the translators to be fluent in both languages and cognizant of the legal theory and legal systems involved in the project.[14] Two different

[4] R. Jeanfreau, *The Story Behind the Stone* (La Gretna: Pelican Publishing, 2012), 13.

[5] C. Trépanier, 'The Cajunization of French Louisiana: Forging A Regional Identity' 157 *The Geographical Journal*, 161 (1991).

[6] J. Degrave, 'The Economics and Politics of Louisiana's Latest French Renaissance' 1 *Transatlantica*, 2 (2013).

[7] LSU Center for Civil Legal Studies, *Louisiana Civil Code*, available at https://tinyurl.com/y62pocgk (last visited 28 May 2019). See the Code in exclusively in French: LSU Center for Civil Legal Studies, *Louisiana Civil Code* (French), available at https://tinyurl.com/y5st99n2 (last visited 28 May 2019).

[8] The translation project began in 2009 with the beginning of the translation work and creating a structure and a plan for the project. The translation began in 2011 after two years of planning.

[9] Interview with O. Moréteau, Director of Translation Project, in Baton Rouge, Louisiana (30 September 2016) (notes on file with author); some of Moréteau's works include, A. Masferrer, K. Modeer and O. Moréteau eds, *Comparative Legal History* (Cheltenham: Edward Elgar Publishing, 2019); O. Moréteau, J. Romañach and A. Zuppi eds, *Essays in Honor of Saúl Litvinoff* (Baton Rouge: Claitor's, 2008); O. Moréteau, 'The Louisiana Civil Code in French: Translation and Retranslation' 9 *Journal of Civil Law Studies*, 223-258 (2016).

[10] ibid.

[11] ibid.

[12] D. Cao, *Translating Law* (Clevedon: Multilingual Matters LTD, 2007), 13.

[13] ibid 24.

[14] D.T. Griffin, 'Lingua Fracas: Legal Translation in the United States and the European Union' 34 *Boston University International Law Journal*, 355 (2016).

legal translation theories have dominated the legal translation field for the last forty years: the formal equivalency approach and the functional equivalency approach.[15] The translators of the Civil Code wanted to adhere to the Louisiana style of the French language as much as possible and stay faithful to Louisiana's laws, as opposed to translating the laws to sound as if they were from another French-speaking jurisdiction.[16]

Part I highlights the rise of the civil law and the French language in Louisiana, specifically from its colonial days to the Cajun Renaissance. Part II describes the legal translation theory and the advantages and disadvantages of its two main methodologies, the formal equivalency approach and the functional equivalency approach. Part III discusses the role of culture in legal translation, both in the abstract and in Louisiana. As Louisiana culture is unique, it provides for unusual discussion regarding the translation of certain code articles. Part IV then provides eight examples in which the translators used the functional equivalency approach and discusses which factors they considered in deciding to use this method. Furthermore, this comment argues that the translators were correct in their decision to use the formal equivalency approach as the default rule but were flexible and utilized the functional equivalency approach when a word, phrase, or entire article justified the switch in approaches.[17]

II. Louisiana Civilian History

Louisiana's legal history has been well documented.[18] Although a comprehensive history is outside the scope of this comment, a succinct synopsis will illustrate the importance of accurately translating the Code. Understanding the history of Louisiana demystifies not only the French language in Louisiana but also Louisiana's legal development.[19]

[15] S. Šarcevic, 'Coping With Challenges of Legal Translation in Harmonization', in C.J. W. Baaji ed, *The Role of Legal Translation in Legal Harmonization (*Alphen aan den Rijn: Wolters Kluwer, 2012), 102-103.

[16] O. Moréteau, n 9 above.

[17] The focus is on instances in which the translators used the functional equivalency approach to better understand the purpose for not literally translating the text. Therefore, all of the examples are from the use of the functional equivalency approach.

[18] A. Parise, 'A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience' 35(1) *Seton Hall Legislative Journal,* 3 (2010) ('The history of the civil code of Louisiana has been explored with different degrees of intensity, with the analysis written by Athanassios B. Yiannopulos being perhaps the most circulated, clear, and didactic'.).

[19] M. Franklin, 'Equity in Louisiana: The Role of Article 21' 9 *Tulane Law Review*, 485-515 (1935); see also J. Gémar, 'Catching the Spirit of the Law: From Translation to Co-Drafting', in S. Glanert ed, *Comparing Law – Engaging Translation* (Abingdon: Routledge, 2015), 68, stating that Montesquieu 'believed that the law of a country clarify its history'.

1. From Its Establishment to State, how French Became the Lingua Franca

The land named by La Salle in 1682 was much larger than the geographical boundaries of present-day Louisiana.[20] France enticed its citizens and other Europeans to travel to the French colony with land grants.[21] A royal edict promulgated on 14 September 1712, mandated that the applicable law in Louisiana would be the Custom of Paris.[22]

The groups of people who settled in Louisiana in the eighteenth century arrived either speaking French or learning the language soon after arriving,[23] creating a 'linguistic mosaic'.[24] This French speaking population also increased during and immediately after the Seven Years' War.[25] During the war, Louisiana 'suddenly became the nucleus about which France would rebuild her colonial empire in America after the peace'.[26]

a) Spanish Rule of Louisiana

On 3 November 1762, France and Spain signed the Treaty of Fontainebleau, in which France ceded Louisiana to Spain.[27] Interestingly, the Spanish never uprooted the French language while Louisiana was under Spanish rule, so '(the) French language continued to flourish in Louisiana'.[28] Even though Louisiana, for a period of time, was

> 'de jure Spanish, Louisiana and its population remained de facto French (…). Even when abandoned by their mother country, French-Louisianans never saw themselves as anything but Frenchmen'.[29]

Louisiana's resistance to this 'cultural pressure' from Spain for nearly half

[20] A.A. Levasseur, 'The Major Periods of Louisiana Legal History' 41 *Loyola Law Review,* 585 (1996). Robert Cavelier, Sieur de la Salle, of France, traveled to New France (Quebec) in 1667, and he discovered what is now Louisiana after navigating and trying to discover the mouth of the Mississippi River.

[21] R.K. Ward, 'The French Language in Louisiana Law and Legal Education: A G*émar* Requiem' 57 *Louisiana Law Review*, 1283-1288 (1997).

[22] A.A. Levasseur, n 20 above, 586.

[23] J. Johnson, 'The Louisiana French', in A. Valdman ed, *Contemporary French Civilization* (Boston: Springer, 1st ed, 1976), 19.

[24] C.A. Brasseaux, *French, Cajun, Creole, Houma: A Primer on Francophone Louisiana* (Louisiana: LSU Press, 2005), 2.

[25] V.J. Parenton, 'Socio-Psychological Integration in a Rural French-Speaking Section of Louisiana' 30 *Southwestern Social Science Quarterly*, 188 (1949) (the Seven Years' War, also known as the French and Indian War, was primarily between England and France).

[26] A.S. Aiton, 'The Diplomacy of the Louisiana Cession' 36 *American Historical Review*, 701-711 (1931).

[27] A.A. Levasseur, n 20 above, 587.

[28] R.K. Ward, n 21 above, 1289.

[29] ibid 1288.

of a century highlights the fact that French was firmly planted in Louisiana and could withstand cultural and governmental changes.[30]

b) Changing of the Guard Back to France

Napoleon Bonaparte believed that France needed to re-gain possession of Louisiana because its strategic location and proximity to resources could help France's economy.[31] Spain and France signed the Treaty of San Ildefonso on 1 October 1800.[32] The treaty was subsequently confirmed on 21 March 1801, with the Convention of Aranjuez.[33] The deal was not made public until 1803 because France feared that England would try to seize the port of New Orleans if it found out.[34] France controlled Louisiana for only twenty days until the Louisiana Purchase went into effect and the United States gained control.[35]

2. Entering the United States: A Shift to Common Law Characteristics of Louisiana's Sister States

The shift in control from the French to the Americans was complicated. President Thomas Jefferson ordered governor of the Mississippi Territory, William C.C. Claiborne, to New Orleans to take possession of Louisiana on 20 December 1803.[36] Governor Claiborne appointed 'as many of the foreigners (people from Louisiana) to public office as possible', which enraged settlers from other parts of the United States.[37] If Governor Claiborne opined that these appointments would alleviate the concerns of the citizens of the territory he was wrong because

> '(t)he touchy, proud Creoles denounced the American regime for its so-called savage manners, poor selection of officials, intemperate speeches, and for the use of English as the official language'.[38]

Therefore, the transition from French to American rule was not seamless.

The Louisiana Legislature in 1806 determined that the Territory would use a Civil Code based on the pre-existing law 'in the effort to make the law clearer and more accessible to the French, Spanish, and American inhabitants'.[39] Once the drafters of the Digest of 1808 finished, Governor Claiborne ordered the

[30] V.J. Parenton, n 25, 191.
[31] A.A. Levasseur, n 20 above, 593.
[32] ibid.
[33] J.P. Rodriguez, *The Louisiana Purchase: A Historical and Geographical Encyclopedia* (Santa Barbara: Abc-Clio, 2002), 9-10.
[34] A.A. Levasseur, n 20 above, 593.
[35] ibid.
[36] J.D. Winters, 'William C.C. Claiborne: Profile of a Democrat' 10 *Louisiana History: The Journal of the Louisiana Historical Association*, 189-195 (1969).
[37] ibid 196.
[38] ibid.
[39] O. Moréteau, n 1 above, 325.

Digest to be the applicable laws of the Territory, and as a result 'much of the legal chaos began to dissipate' from both proponents and critics of the Civil Law.[40]

a) The Code and the Languages in Which It Was Published

The Code was initially written in French, the dominant language of the Territory, and was subsequently translated into English.[41] Despite the bilingual nature of the Code, the French version was the only usable version because

> 'the French-language code (was) succinct, lucid, and internally consistent. The English version, on the other hand, (was) riddled with ambiguity, muddled, and inconsistent with its French counterpart'.[42]

In an 1808 letter, Governor Claiborne opined that the English version should not be used.[43]

It soon became apparent that the 1808 Digest was no longer effective and needed to be replaced. As with the 1808 Digest, the drafters wrote the 1825 Civil Code in French, which was then translated into English.[44] This Code, however, differed from the 1808 Digest in one important way. Whereas the French version of the 1808 Digest was the only authoritative source of law, both languages of the 1825 Code were deemed the official law.[45] Although both versions of the Code were theoretically equal in status, 'a number of errors'[46] made the English version 'spectacularly bad'.[47] The poor quality of the English translation did not go unnoticed by the Louisiana Supreme Court, which stated that the English version was the 'greatest defect in the body of (Louisiana) laws' and questioned the use of the Code in English.[48]

b) The Current Code

The current Code was promulgated in 1870 and was 'essentially the same' as the 1825 Code substantively, with the notable exception of slavery.[49] One

[40] J.D. Winters, n 36 above, 197.

[41] J.B. Garvey and M.L. Widmer, *Louisiana: the First 300 years* (La Gretna: Pelican Publishing, 2001), 77.

[42] R.K. Ward, n 21 above, 1303.

[43] Letter from Governor Claiborne to the Secretary of State (7 October 1808), in A.A. Levasseur, n 20 above, 628.

[44] O. Moréteau, 'The Louisiana Civil Code Translation Project: An Introduction' 5 *Journal of Civil Law Studies*, 97 (2012).

[45] A.N. Yiannopoulos, 'First Worldwide Conference on Mixed Jurisdiction: Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities: Requiem for a Civil Code: A Commemorative Essay' 78 *Tulane Law Review*, 379, 388-389 (2003).

[46] ibid 389.

[47] R.K. Ward, n 21 above, 1284.

[48] Supreme Court of Louisiana, *Egerton* v *New Orleans*, 1 *Louisiana Annual*, 435-437 (1846).

[49] R.K. Ward, n 21 above, 1306.

important change in style, however, was that the Code was written and published exclusively in English.[50] As a result, the Louisiana Supreme Court grappled with issues related to parties' understanding of English and French in various contexts.[51] Judges continued to consult the French text when determining legislative intent.[52] The Louisiana Supreme Court would often look to the comparable article in the 1825 Code when a case hinged upon the meaning of a word in the 1870 Code.[53] Additionally, the United States Supreme Court heard a case and reached its conclusion by analyzing the Louisiana statute in French since the article was written in French and subsequently translated.[54] Hence, even if the laws were no longer being published in French, judges and lawyers continued to look to previous articles and legislation in French to better understand the law in English.[55]

3. The Decline of French and French's Impact on the Code

Scholars have described Louisiana as a unique combination of Spanish laws in a French structure with a Caribbean flare.[56] Louisiana's Code 'is indigenous to (it) soil, that (it) is part of the culture of the people', which requires an understanding of French to truly analyze the Code.[57] This natural progression of studying the French language ended due to the negative attitudes associated with French-Louisiana speakers.[58]

Pinpointing the exact moment when the use of French began to decline in Louisiana has proven to be a difficult task, evidenced by the different theories surrounding the time at which the French language reached its pinnacle.[59] People

[50] ibid.

[51] Supreme Court of Louisiana, *Succession of Cauvien*, 46 *Louisiana Annual*, 309 (1894) (the Court examined the ability of the testator to speak French and English, as well as the notary and witnesses in determining the will's validity); *Landry* v *Tomatis,* 32 *Louisiana Annual*, 113-116 (1880) (the Court heard arguments whether the testator was truly bilingual, as the notary only spoke English, and there was some doubt that she spoke English); *Succession of Rouquette*, 161 *Louisiana Annual*, 155-159 (1926) (the testator was an elderly woman who only spoke French, and upon the advice of an attorney since no notaries fluent in French could be found, had five French-speaking witnesses. The Court had to determine whether the will was valid).

[52] S.L. Herold, 'The French Language and the Louisiana Lawyer' 5 *Tulane Law Review,* 169-176 (1931).

[53] Supreme Court of Louisiana, *Phelps* v *Reinach*, 38 *Louisiana Annual*, 547-551 (1886).

[54] Supreme Court of Louisiana*, Carondelet Canal & Navigation Co.* v *Louisiana,* 233 US, 362-387 (1914) ('(t)he use of '*elle*' in the French version is of strong significance. There is no neuter gender in the French language, every noun is masculine or feminine, and the pronoun which stands for it must agree (…) (because) there is more certain indication of the antecedent (in French).').

[55] R.K. Ward, n 21 above, 1284.

[56] O. Moréteau, n 44 above, 326.

[57] S.L. Herold, n 52 above, 171.

[58] J.J. Natsis, 'Legislation and Language: The Politics of Speaking French in Louisiana' 73 *French Review*, 325-326 (1999).

[59] W. Boelhower, *New Orleans in the Atlantic World: Between Land and Sea* (Abingdon: Routledge, 2013) (describing the decline in Louisiana as an 'erosion' over two centuries, as opposed

of French origin were proud of their heritage and 'the name creole (was) dear to them'.[60] Although the French-speaking population was able to 'resist' the use of English for two centuries, 'even this close-knit community (had) not been able to withstand the onslaught of American English'.[61]

The constant erosion of French in Louisiana resulted in few bilingual lawyers, lawyers who only consulted English resources, and lawyers who adopted common law interpretive techniques foreign to the civil law.[62] The position of the civil law in Louisiana declined to the point where professor Gordon Ireland argued in the 1930s that Louisiana was no longer a civilian jurisdiction.[63] The fact that scholars were able to provide a formidable argument that the civil law was dead evidences the withering state of the Code and the prominence of the common law.[64] If Louisiana were to retain its civil law system, it would need French-speaking lawyers and judges 'who (would be) able to read the language in which alone may be found the roots and sources of the system which they pretend to practice'.[65] Needless to say, the French language in Louisiana was declining, first as a cultural shift and later by law that severely restricted its use.[66]

4. A Renewed Interest in French: Discovering the French Flavor from Old Cookbooks

The preservation of the French language in Louisiana began when Cajun soldiers in France during World War II experienced the positive connotations associated with their language.[67] Upon the soldiers' return to Louisiana,

to a single point in time of determining the decline).

[60] R. Van Allen Caulfield, *French Literature of Louisiana* (La Gretna: Pelican Publishing, 1999).

[61] S.J. Caldas and S. Caron-Caldas, 'Rearing Bilingual Children in a Monolingual Culture: The Louisiana Experience' 67 *American Journal of Speech*, 290 (1992)

[62] D. Gruning, 'Bayou State Bijuralism: Common Law and Civil Law in Louisiana' 81 *University of Detroit Mercy Law Review*, 437-446 (2004).

[63] G. Ireland, 'Louisiana's Legal System Reappraised' 11 *Tulane Law Review*, 585-591 (1937) (Ireland received his S.J.D. from Yale Law School and served as a law professor at different schools, such as at Harvard and at Louisiana State University).

[64] L. Greenburg, 'Must Louisiana Resign to the Common Law?' 11 *Tulane Law Review*, 598 (1937) (opining that the civil law was gone in Louisiana and that 'from the time Louisiana began to have a judiciary, the bench and bar with very few exceptions had no interest other than an ostentatious one in the civil law'); but see also H.S. Daggett, J. Dainow, P.M. Hebert and H.G. McMahon, 'A Reappraisal Appraised: A Brief for the Civil Law of Louisiana' 12 *Tulane Law Review,* 12-13 (1937) (disagreeing with Ireland because, *inter alia*, he treated civil law as if it applied to the entire Louisiana legal system when in fact it is a branch of private law, assumed that any difference between Louisiana law in the 1930s that was different than the Napoleonic Code was only because of common law influence, and said that Louisiana judges look to judicial precedent but not in the same binding way as common law with *stare decisis*).

[65] S.L. Herold, n 52 above, 176.

[66] D. Gruning, n 62 above, 445.

[67] B.J. Ancelet, 'A Perspective on Teaching the "Problem Language" in Louisiana' 61 *French Review*, 345 (1988).

> '(d)ance halls throughout South Louisiana once again blared the familiar sounds of homemade Cajun music',[68]

and a 'rallying point' for the ethnicity occurred in honor of the bicentennial of the *Grand Dérangement*.[69] Since then, there has been a renewed interest in Louisiana culture.[70]

The increased interest in learning about Louisiana culture did not, however, result in an interest in learning Louisiana French because,

> '(although) anti-French-speaking sentiment has all but disappeared in Louisiana, so has the French language among this generation of Cajuns'.[71]

Today, the word 'Cajun' or 'Creole' no longer conjures up the backward-moving, poor, and uneducated people in the Louisiana swamps, but the harm of those previous connotations persists.[72] With the rise of importance in French across the globe, however, the Louisiana Code's translation from English to French, the first time it has ever been done, incorporated the history into the translation.

III. Translating Legal Texts

Some scholars suggest that it may be impossible to accurately translate legal texts because of differences in languages that force translators to manipulate the text.[73] This critical view is manifested in the Italian proverb '*traduttore, traditore*', meaning translator, traitor.[74] Pragmatically speaking, however, legal texts must be translated to better help lawyers and judges when they have to interpret and apply laws from other countries.[75]

1. The Effectiveness of Legal Translation: Can It Be Done?

The effectiveness of legal translation is based not on the size or prestige of the project but rather on the degree to which the translated and original work carry the same meaning.[76]

[68] ibid.

[69] ibid (The *Grand Dérangement* began in 1755 when England began to force French Canadians outside of the conquered territory).

[70] S. Dubois and B. M. Horvath, 'Sounding Cajun: The Rhetorical Use of Dialect in Speech and Writing' *77 American Journal of Speech,* 264, 269-270 (2002).

[71] S.J. Caldas and S. Caron-Caldas, n 61 above, 291.

[72] S. Dubois and B. M. Horvath, n 70 above, 270.

[73] T.O. Main, 'The Word Commons and Foreign Laws 46 *Cornell International Law Journal*, 219-260 (2013).

[74] J. HC Leung, 'Translation Equivalence as a Legal Fiction', in L. Cheng et al eds, *The Ashgate Handbook of Legal Translation* (Abingdon: Routledge, 2014), 57.

[75] O. Cachard, 'Translating the French Civil Code: Politics, Linguistics and Legislation' 21 *Connecticut Journal of International Law*, 41-55 (2005).

[76] J. HC Leung, n 74 above, 57.

a) The Chef's Secret Ingredients in Legal Translation: A Customized Approach

Translation theory is an area that has been largely neglected by scholars because historically there was only one approach taken – the formal equivalence method.[77] The increase in the number of translation projects, however, has spurred the advancement of different legal translation theories.[78] Consequently, classifying translation projects as strictly adhering to a single method does not accurately describe the decisions and combined approaches legal translators use.[79]

2. Competing Views on Legal Translation

There are two main methods which translators may utilize when carrying out legal translation: formal equivalency method and the functional equivalency. The formal equivalence method calls for a literal translation of the text and adherence to the specific words used by legislatures.[80] The functional equivalency approach occurs when translators look to decipher the underlying rationale and spirit of the text, and not necessarily the text *verbatim*.[81] Thus, the functional equivalency approach requires translators to be more active in the translation process.[82] Although some may argue that legal translators should not engage in functional equivalency, this approach takes into consideration linguistic and societal changes over time.[83]

a) The Formal Equivalency Approach

The formal equivalency approach involves taking legal text in its current language and form and creating an equivalent version of the same text in a different language. The goal is that the legal text appears exactly the same.[84] Under this approach, translators do not interject their own views and interpretations of the text.[85]

Historically, legal translators exclusively engaged in the formal equivalency

[77] ibid.

[78] S. Šarcevic, n 15 above, 102-103.

[79] J. Engberg, 'Legal Meaning Assumption – What Are The Consequences For Legal Interpretation And Legal Translation?' 15 *International Journal for the Semiotics of Law*, 375-385 (2002).

[80] S. Šarcevic, n 15 above, 102-103.

[81] ibid 95.

[82] N. Kasirer, 'Francois Geny's libre recherce scientifique as a Guide for Legal Translation' 61 *Louisiana Law Review*, 331-333 (2001).

[83] O. Moréteau, 'Le Code civil de Louisiane en français: traduction et retraduction' 28 *International Journal for the Semiotics of Law*, 155-168 (2015).

[84] J. Ainsworth, 'Lost in Translation? Linguistic Diversity and the Elusive Quest for Plain Meaning in the Law', in L. Cheng et al eds, *The Ashgate Handbook of Legal Translation* (Abingdon: Routledge, 2014), 43.

[85] S. Šarcevic, n 15 above, 95.

approach.[86] The idea of literal translation comes from the overarching notion that translators should remain 'faithful' to the text, which is 'a constraint upon the interpreter's freedom to fix meaning with other considerations in mind (…)'.[87] Another scholar noted that translators 'remain in the shadows' and do not impose what they believe is correct because a translator's job is not that of the legislature.[88]

Critics of the formal equivalence approach argue that literal translation often misleads the readers of the translated works because the literal translated may be difficult to understand.[89] Another critical disadvantage of the formal equivalency approach is the lack of precision of the words used when literally translating text. To illustrate this point, translation under this method has created problems such as 'passing off a usufruit (usufruct) as a life estate in English', when in fact there are differences between a usufruct and a life estate.[90] The use of the formal equivalency approach raises a contradiction: by strictly translating the text of the law, readers have difficulties understanding what the text means, thereby rendering the translation ineffective.

b) Functional Equivalency Approach

Under the functional equivalency approach, translators recognize the maxim *'traduire, c'est choisir*', which means 'to translate is to choose'.[91] This view recognizes that no two languages are the same, which forces translators to decide on how to accurately convey the substance of the text.[92] Translators who use functional equivalency approach argue that they are more faithful to the text than are translators who follow the formal equivalency view because the functional approach better captures the law.[93] Translators who adopt the functional equivalency approach also believe that this method betters helps their translation accurately conveys the meaning of the text for lawyers in a different country.[94]

No one approach has emerged as the best method, and legal translators

[86] N. Kasirer, n 82 above, 332-333.

[87] ibid.

[88] R. Correia, 'Translation of EU Texts', in A. Tosi ed, *Crossing Barriers and Bridging Cultures: The Challenges of Multilingual Translation for the European Union* (Bristol: Multilingual Matters, 2003), 40.

[89] G. Peruginelli, 'Accessing Legal Information Across Boundaries: A New Challenge' 37 *International Journal of Legal Information*, 276-292 (2009).

[90] N. Kasirer, n 82 above, 331-332 (author wrote the word 'usufruit').

[91] R. Correia, n 88 above, 40 (*traduire, c'est choisir* is the title of a well-known 1967 article by *Pierre-François Caillé* in the journal *Babel*).

[92] A.N. Adler, 'Translating & Interpreting Foreign Statutes' 19 *Michigan Journal of International Law,* 37-46 (1997).

[93] P.P. Frickey, 'Faithful Interpretation' 73 *Washington University Law Quarterly,* 1085 (1995).

[94] M.H. Hoeflich, 'Translation & the Reception of Foreign Law in the Antebellum United States' 50 *American Journal of Comparative Law*, 753-766 (2002) (italics and repetition of 'different' used for emphasis).

recognize that the best approach depends on the specific project and objectives.[95] An example of translating text from English to French under both the formal equivalency and the functional equivalency approaches are provided in the table below. Under the formal equivalency approach, the translation theoretically makes sense in French, but the translation is awkward and does not effectively convey the true meaning of the text.[96]

Table 1: Formal Equivalency example

Adjudication implies for a judge to decide in a dispute that has been brought, through one means or another, by the parties in the bar of justice.	*Juger implique qu'un juge décide un litige que les parties ont porté devant la barre de justice d'une façon ou d'une autre.*

Table 2: Functional Equivalency example

The example below is the French translation to the same text in English about adjudication. A French speaker, however, is more likely to understand the translation below with the functional equivalency of the law in English.[97]

Adjudication implies for a judge to decide in a dispute that has been brought, through one means or another, by the parties in the bar of justice.	*Rendre un jugement consiste, pour un juge, à dire le droit dans le litige que les parties ont soumis à la justice.*

The two methods of legal translation highlight that translators must decide which approach to use before translating a document. In the translation of the Louisiana Code from English to French, numerous translators worked on the project at different times, each with a different level of experience and background training.[98] If each translator interjected his or her own thoughts into the translated article, it would create an incoherent work riddled with inconsistencies – one that would have limited the value and usefulness of the translated Code. While not adopting a strict rule of utilizing the formal equivalency approach, the translators' decision to start with the formal equivalency approach and adjust accordingly was the correct decision for this translation project. Some Louisiana state legislators have expressed interest in making the translated version of the Code an official source of law.[99] Hence, the text in French cannot deviate to the point where the

[95] L. Lessig, 'Fidelity in Translation' 71 *Texas Law Review*, 1165 (1993).
[96] J. Gémar, n 19 above, *70*.
[97] ibid.
[98] O. Moréteau, n 9 above.
[99] ibid.

articles may provide or deprive people of rights that are not in the English version. At the same time, however, modifications ensured that French speakers would understand what the laws actually meant when a literal translation would not suffice.

IV. Factoring in Culture with Legal Translation: Incorporating Local Flavors

At first blush, considering cultural differences in translating the law may seem unnecessary because several legal systems use words and concepts that have derived from Latin, French, and English.[100] A legal translation without factoring in the country's culture, however, would not capture the nuances and understandings of each country.[101]

1. Culture and Its Impact on Legal Translation

The law lies within culture because legislators are shaped by what surrounds them.[102] This means that translators have to look beyond just the text of the law.[103] Additionally, translators who do little more than translate misrepresent the law because words alone do not reflect the 'unique priorities, preferences, and goals of a judicial, political, or social system'.[104] Furthermore, the use of legal English, specifically in Louisiana, creates additional obstacles for legal translators who follow the formal equivalence approach because Louisiana language contains English words specific to the state.[105] Louisiana had to create its own terms in English to describe civilian concepts.[106]

Some translation scholars suggest that culture plays a limited role in translation because law is written, formal, and omits colloquial phrases.[107] Although this is true to a certain extent, the claim fails to consider that culture

[100] T.O. Main, 'The Word Commons and Foreign Laws' 46 *Cornell International Law Journal*, 219-221 (2013).

[101] E.J. Eberle, 'The Method and Role of Comparative Law' 8 *Washington University Global Studies Law Review*, 452 (2009).

[102] ibid.

[103] ibid.

[104] T.O. Main, n 100 above, 221-222.

[105] ibid 226 (stating that *contrat* in French applies to donations and gifts that would not be classified as a contract in English, so the legal Louisiana terminology is not the same as in other English-speaking jurisdictions); Louisiana Civil Code Annual § Art 1468 (2016) ('A donation *inter vivos* is a contract by which a person, called the donor, gratuitously divests himself, at present and irrevocably, of the thing given in favor of another, called the donee, who accepts it').

[106] S. Gualtier, 'The Louisiana Civil Code Translation Project: Enhancing Visibility and Promoting the Civil Law in English' *DipLawMatic Dialogues* (2014), available at https://tinyurl.com/y205xefd (last visited 28 May 2019).

[107] D. Stevenson, 'Book Review: Forensic Linguistics: an Introduction to Language in the Justice System' 77 *University of Colorado Law Review*, 257-259 (2006).

engulfs the legislators when drafting and approving legislation.[108] Culture still matters, even in situations where translators focus on two jurisdictions that speak the same language because the vocabularies may be not be identical.[109] Hence, in order to accurately translate legal text, the translators must be both scientists and anthropologists.[110] Translators must be scientists since translation requires a well-defined plan and precision. Further, they must also be anthropologists because law is local, meaning that a translator will fail without understanding the values of society in that location.[111]

2. Louisiana Culture and Its Impact on Legal Translation

The results and lessons learned from previous translations outside of Louisiana offered insights before the team translated the Louisiana Code into French. In previous translations, French translators generally focused the spirit of the legislation while the English translators generally focused on the letter of the law.[112] For example, English has many words associated with law, such as state, legislation, enactment, act, etc.[113] French also has many words associated with the word 'law', such as *le droit* to refer to the entire legal field, *la justice* for the legal system, and *le loi* for legislation passed by Parliament.[114] Specifically, *loi* may have either a broad or narrow interpretation, making it difficult to accurately translate because of the culture and connotations associated with the terms.[115] If a translator uses phrases and terms other than the ones that apply, there is a loss of context and nuance of a translated text.[116]

By capturing cultural norms and values into the laws, translators are more accurate, helping to create a bridge connecting different cultures.[117] Without understanding the culture of the two jurisdictions involved in a translation, legal translators are unable to successfully translate because they must

> 'recognize the meaning of the idea or word in its own culture, explain its underlying cultural context, and then translate that meaning as best we can to another legal culture (…)'.[118]

[108] D. Cao, n 12 above, 33.
[109] ibid.
[110] E.J. Eberle, n 101 above, 453.
[111] R. Pound, 'The Influence of the Civil Law in America' 1 *Louisiana Law Review*, 1-2 (1938).
[112] N.J. Jamieson, 'Legal Transplants: World-Building and Word-Borrowing in Salvic and South Pacific Legal Discourse' 42 *Victoria University of Wellington Law Review*, 417-423 (2011).
[113] D. Cao, n 12 above, 70.
[114] ibid 71-72.
[115] ibid.
[116] H.J. Berman, *Law and Language: Effective Symbols of Community* (Cambridge: Cambridge University Press, 2013), 29.
[117] E.J. Eberle, n 101 above, 453.
[118] ibid.

Knowing that at least some background of a country's culture is required in order to translate its laws, the following section examines whether the Louisiana Civil Code that was recently published in French retains the state's unique history and heritage.

V. Translating the Louisiana Civil Code

The translators of the Louisiana Civil Code recognized that, though a literal translation from English to French would be easier, it would cause the project's objective to fail because an accurate translation would not be achieved.[119] Although today English is considered a 'universal second language',[120] it is not a 'civilian language' like French or Latin.[121]

1. How the Translated Code Came out as *Crème de la Crème*

The translators of the Louisiana Civil Code used a customized legal translation approach *by* utilizing the formal equivalency method by looking at the 1808 Digest and 1825 Code as a starting point.[122] Despite the default rule, however, the translators found themselves, at times, using the functional equivalency approach to better follow the spirit of the law.[123]

2. Accuracy of Legal Terms

Interestingly, the first word to be translated using the functional equivalency approach was 'law'. The first Art of the current Louisiana Civil Code declares that '(t)he sources of law are legislation and custom'.[124] The French translation states, '*Les sources du droit sont la loi et la coutume*'.[125] A cursory glance of this article demonstrates that the word for 'law' is *droit* and the word for 'legislation' is *loi*. However, the distinction between 'law' was not as easy as it may appear to translate.

When comparing the French version of Art 1 of the current Civil Code to the 1808 Digest, there is an apparent discrepancy between the words used for 'law'. The 1808 Digest declares that '(l)aw is a solemn expression of Legislative will, upon a subject of general interest and interior regulation'.[126] The same article

[119] O. Moréteau, n 9 above.

[120] C.B. Picker, 'International Law's Mixed Heritage: A Common/Civil Law Jurisdiction' 41 *Vanderbilt Journal of Transnational Law*, 1083-1124 (2008).

[121] W. Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' 60 *Louisiana Law Review*, 677-731 (2000).

[122] O. Moréteau, n 9 above.

[123] ibid.

[124] Louisiana Civil Code Ann. § Art 1.

[125] Louisiana Civil Code Ann. § Art 1 (French).

[126] Louisiana Civil Code Ann. § Art 1.

in French reads *'(l)a Loi est une déclaration solennelle de la volonté législative, sur un objet général et de régime intérieur'*.[127] Herein lies the first determination that the translators had to make: determining whether the proper word for 'law' was *droit* or *loi*. The answer for the translators came after recognizing the dual meaning of the word and that 'laws are not the law'.[128] The phrase, 'an unjust law is not law', demonstrates the numerous definitions of the law because the second use of the term 'law' is referring to what the law should be, as opposed to the reality as described in the first use.[129] In French, *droit* is a more comprehensive term that encompasses *loi* as the legislation, but also goes further to include the rationale of the law: a structure in society that governs fairness and justice.[130] If the translators were to have used the word *loi* for the Code, then one of the official sources of law, custom, would have been excluded. Additionally, one of the sources of the law would have been the law, and the Code does not have such circular reasoning in its first Article. Therefore, the translators' use of the functional equivalency approach and deviating from the 1808 Digest with regards to *loi* was the correct decision.

Under the formal equivalency method, the translators would have looked generally to previous Code articles, and the formal equivalency approach would have directed them to follow the 1808 Digest and use *loi*.[131] In doing so, the translators would have translated the article in such a way that would not have made since. Therefore, this specific use of the functional equivalency approach was appropriate for the translation of the Louisiana Code.

3. Non-Legal Words

Another example that highlights the accuracy of the translated Code and provides insight as to why using the functional equivalency approach was correct is the translation of the word 'pregnancy'.[132]

[127] 1808 Digest of the Civil Laws of the Territory of Orleans Art 1.

[128] C.B. Gray, *The Methodology of Maurice Hauriou: Legal, Sociological, Philosophical* (Amsterdam: Rodopi, 2010).

[129] C.A. Thomas, 'The Uses and Abuses of Legitimacy in International Law' 34 *Oxford Journal of Legal Studies*, 729 (2014).

[130] C.B. Gray, n 128 above, 105.

[131] O. Moréteau, n 9 above.

[132] P. Wuteh Vakunta, *Critical Perspectives on the Theory and Practice of Translating Camfranglais Literature* (Cameron: Langaa RPCIG, 2016) (stating that the Pidgin English and French in some African nations have resulted in two words for pregnancy for two different contexts: *bele* for unwanted pregnancies and *tcha,* or 'catch' as a planned/wanted pregnancy); G.N. Herman and J.M. Cary, *Legal Counseling, Negotiations and Mediating: A Practical Approach* (New York: LexisNexis, 2009), 382 (recounting a story of an American who told people in France at a dinner *Je suis plein* to say that he was full and could not eat more food, but he erroneously said that he was pregnant); V.R. Sasson and J.M. Law, *Imagining the Fetus the Unborn in Myth Religion, and Culture* (Oxford: Oxford University Press, 2008), 139 (noting in Hebrew that some people, instead of using the verb for the state of being pregnant, people use the word 'belly').

The word 'pregnant' is used in only one current Louisiana Civil Code article. Art 252 states, '(i)f a wife happens to be pregnant at the time of the death (…)'.[133] The translation reads: '*(l)orsqu'une femme se trouve enceinte au moment du décès de son mari*'.[134] In the French version, the word for pregnancy is *enceinte*, used in this article concerning a husband passing away while his wife is pregnant.[135]

The 1825 Louisiana Civil Code has an article about a pregnant woman, and it states that '*(s)i une veuve se trouve grosse au tems de la mort de son mari* (…)'.[136] The word in this article about a woman being a pregnant when becoming a widow is *grosse*.[137] If the translators of the current Louisiana Civil Code adhered to the formal equivalence approach of legal translation, they would have used *grosse*. The translators, however, made the decision to deviate from literally translating the document from nearly two centuries ago and substitute the word pregnancy. The decision to change 'pregnancy' for clarity and modernity purposes stems from the origin of the original term and its change in meaning over time.[138]

The two derivations to refer to an expectant mother include the old French word *preignant*, meaning 'pressing', and the Latin word *praegnantem*, meaning 'fruitful, with child'.[139] The word origin matters because an explanation for the change of wording by the translation team justifies the decision of the translators to use the functional equivalency approach. At the beginning of the 19th century, the French word used to describe a pregnant woman had its roots in the Latin word *grossus*, which is an adjective that means 'large, bulky'.[140] Moreover, French language textbooks from that same epoch caution that the placement of the adjective *grosse* can change the meaning of the term.[141]

The French Civil Code does not use either *grosse* or *enceinte* in references to pregnancy,[142] but the terms are used in its Criminal Code. In the Criminal Code, the word that is used in numerous articles is *grosse*.[143] The word *enceinte*, however, is used in three articles, and in each case the word refers to a building.[144]

[133] Louisiana Civil Code § Art 252 (2016).
[134] Louisiana Civil Code Ann. § Art 252 (2016) (French).
[135] ibid.
[136] ibid.
[137] ibid.
[138] O. Moréteau, n 83 above, 168.
[139] R. Cohen, *Shakespeare on Theatre: A Critical Look at His Theories and Practices* (Abingdon: Routledge, 2015), 37.
[140] A. Brachet and J. Jacques, *An Etymological Dictionary of the French Language* (Oxford: Clarendon Press, 1873), 176.
[141] J.V. Douville, *Speaking French Grammar, Forming a Series of Sixty Explanatory Lessons, With Colloquial Essays* (London: William Clowes and Sons, 5th ed, 1835), 264 (placing the adjective after the noun results in the meaning being pregnant, *une femme grosse*, but the adjective after the noun, or *une grosse femme*, describes a stout woman).
[142] French Civil Code (2015) (The code uses the term *grosse*, but for a different meaning, in Arts 605, 606, 1283, 1284, 1335, and 1396, and the word *enceinte* is used in a different context in Art 1019).
[143] Illustrative list: 212-1(7)(*la grossesse forcee*); 221–4(3)(*a un etat de grossesse*).
[144] Illustrative list: 431-22, 434-35-1, and R645–12.

Additionally, the Haitian Civil Code from 1825 uses *grosse* to describe pregnancy.[145] The fact that two French-speaking civilian jurisdictions still use the same word that Louisiana did in 1825 suggests that the translators *should not* have taken the functional equivalence approach and instead kept the word without changes.

The Quebec Civil Code provides insight into what may be becoming a trend in revised Codes to better reflect the phrasing and vocabulary used today. Whereas the French and Haitian Civil Codes have not been completely changed since the nineteenth century, the current Quebec Civil Code went into effect on 1 January 1994.[146] An interesting word selection from the most recent Code illustrates the decision of the translators of the Louisiana Civil Code to use the word *enceinte* for pregnancy. Under the *previous* Quebec Code, Art 218 used the word *grossesse* when defining the minimum and maximum amount a time that a woman is pregnant.[147] Additionally, Canadian jurisprudence and politicians referred to pregnant women as *grossesse* at that time, and legal dictionaries used the same term.[148] In the current Civil Code and Criminal Code, however, the word *enceinte* is used.[149] Therefore, the evolution of French indicates a shift to *enceinte* for pregnancy. Hence, the decision to deviate from the formal equivalency approach was justified in order to be more consistent with modern French.

4. Impact of Culture: *France French* v *Louisiana French*

A word that shows a difference in culture is *parishes*, or the governmental subdivisions of the state. Louisiana is the only state that divides its government into 'parishes'.[150] A parish, according to one non-Louisianan source, is '(t)he smallest and most basic realization of the "basic church" '.[151] The French word for parish, *paroisse*, comes from the Latin word *paroecia*.[152] Because 'parish' has two different meanings, particularly when factoring in that Louisiana's French did not change over time, the functional equivalency approach was needed in order for foreigners to understand the meaning of the term.

The translators had three options available: (1) change the term 'parish' to make it understandable to the audience outside of the United States; (2) literally translate the word and leave the reader to speculate why a term describing the territorial boundaries of a church in the Code; or (3) create a note to explain the

[145] L. Borno, *Code Civil D'Haïti, Annoté*, Art 205 (Paris: A. Giard & E. Brière, 1892).

[146] W. Tetley, n 121 above, 591 (the new Quebec Civil Code replaced the Civil Code of Lower Canada).

[147] Art 218 Civil Code of Québec (1980).

[148] R. Joyal, '*Adolescentes, avortment et dignité*' 3 *Canadian Journal of Women and the Law*, 234-235 (1989); G. Cornu, *Vocabulaire Juridique* (Paris: Puff, 9th ed, 2011), 496; H. Reid, *Dictionnaire de Droit Québécois et Canadien* (Montréal: Wilson & Lafleur, 2nd ed, 1999), 268.

[149] Civil Code of Québec (1980), SQ 1980, c 218.

[150] US Bureau of Commerce, *History of the 1982 Economic Censuses* (1987), 200 (other states use the word 'county').

[151] R. McBrien, *101 Questions and Answers on the Church* (Mahwah: Paulist Press, 2003), 7.

[152] A. Brachet and J. Jacques, n 140 above, 253.

differences in meanings.[153] The notes in the translated Code, were used to defend the decision of a translation of a certain word or article or to provide context to the readers.[154] The decision to use a footnote furthered the goal of maintaining the purity of the Louisiana Code. If the translators were to have substituted counties for parishes, this would have been inaccurate. Consequently, by trying to help the audience understand, in reality the translators would have misled the scholars who would be relying on the translated Code. If translators were silent regarding the issue, readers would have been equally confused and may have believed that there was a translation error. Therefore, the translation team kept the term 'parishes' and helped the reader understand the meaning. Hence, the team was able to avoid a mutually conflicting situation and accurately promote the civilian tradition in Louisiana by including a footnote and explaining the context of the word 'parish'.

5. When Louisiana Has a Larger Scope of Law than Other French Jurisdictions

The translators of the Louisiana Civil Code used the functional equivalency approach to translate Art 396, regarding interdiction.[155] In Louisiana, interdiction refers to a legal framework that is the 'most powerful involuntary legal regimes that may be applied to a person' in civil matters.[156] Louisiana's laws of interdiction, which strips a person of powers to dispose his patrimony, 'is overwhelmingly French'.[157] Louisiana enlarged the concept of interdiction from the French Civil Code by both expanding the rights taken away from interdicted people and the scope of who may be interdicted.[158]

Under Roman law, interdicere, also known as interdiction, referred to people who, by decree, were prohibited from enjoying the same rights as a non-interdicted person due to a lack of competency.[159] Over time, the definition was further defined to refer to people who, through mental conditions, were judicially or voluntarily constrained from disposing of property and entering into obligations.[160] This definition was codified in Art 394 of the 1825 Louisiana Civil Code as,

[153] O. Moréteau, n 9 above.

[154] ibid.

[155] ibid.

[156] W. Reed Huguet, 'The New Law of Interdiction - Clear and Convincing Revision' 47 *Loyola Law Review,* 1059-1061 (2001).

[157] J.L. Carriere, 'Reconstructing the Grounds for Interdiction' 54 *Louisiana Law Review*, 1199 (1994); G. Cornu, *Dictionary of the Civil Code* (New York: LexisNexis, 2014), 423 (A. A. Levasseur et al translation) (patrimony refers to the aggregate of a person's assets, claims, and obligations that can be valued in money).

[158] J.L. Carriere, n 157 above, 1200-1202.

[159] A. Berger, *Encyclopedic Dictionary Of Roman Law* (Philadelphia: American Philosophical Society, 1953), 507.

[160] H. Chisholm, *Encyclopedia Britannica: A Dictionary of Arts, Sciences, Literature and General Information* (Cambridge: Cambridge University Press, 14th ed, 1910), 684.

> '*Tous les actes passés par l'interdit dans l'intervalle de la provocation de l'interdiction au jugement définitif qui l'a prononcée, sont nuls*'.[161]

In the English version of the Code, the same article reads

> '(a)ll acts done by the person interdicted from the date of the filing of the petition for interdiction, until the day when the same is pronounced, are null'.[162]

Currently, the first article about interdiction in the Code is Art 396, which states, 'A judgment of interdiction has effect retroactive to the date of the filing of the petition for interdiction'.[163]

When translating the Louisiana Code, the translators deviated from the formal equivalency approach and embraced the functional equivalency approach because the article 'was losing meaning' with a literal translation.[164] This Art demonstrates one of the few instances in which the 1825 Code in English was clearer than its French counterpart.[165] Therefore, the translated Art states that '*(l)e jugement d'interdiction a un effet rétroactif à compter de la date du dépôt de la demande d'interdiction*'.[166] If the translators followed the formal equivalency approach, unnecessary words would have made the article more complicated. The article would have included words like 'all acts', referring to obligations that interdicted people entered into, when this is implied in the translated version. Therefore, not only was the translated version of the article clearer, it was the correct decision to break from the previous translations that attempted to convey the same message.

6. When Previous Translations Had Errors: Follow the Error for Consistency or Deviate?

Although the translation of *interdictto* English was clearer than its French counterpart, several issues arise when translators use the functional equivalency approach to correct the mistakes of previous translators. In cases of apparent translation error, the translation team had to determine whether to correct the mistake or to compound the mistake by including it in the French translation.[167]

For example, Art 883 states that

> '(r)epresentation does not take place in favor of the ascendants, the nearest relation in any degree always excluding those of a more remote

[161] Louisiana Civil Code Art 394 (1825).
[162] ibid.
[163] Louisiana Civil Code Art 396 (1870).
[164] O. Moréteau, n 9 above.
[165] ibid.
[166] Louisiana Civil Code Ann. § Art 396 (2016) (French).
[167] O. Moréteau, n 9 above.

degree'.[168]

The source of this article originates in Art 892 of the 1825 Code, which declared that

> '(r)epresentation does not take place in favor of the ascendants, the nearest relation in degree always excluding those a degree superior or more remote'.[169]

The problem becomes apparent when looking to the same Art in French. The French versions states that

> *'(l)a représentation n'a pas lieu en faveur des ascendants, le plus proche en degree dans les lignes paternelles ou maternelles excluant toujours ceux d'un degré supérieur ou plus éloigné*'.[170]

The use of the word *ou*, meaning 'or', demonstrates that the lineage is disjunctive when examining the degrees of relationship when determining who should inherit from intestacy.

Even to a novice in French, the degree of lines is clearly referring to the paternal, *paternelles*, and maternal, *maternelles*. However, the distinction of lines is absent in the English version because of a poor translation.[171] The translators favored looking to past translations to adhere to the Louisiana history and French, but the formal equivalency approach would have correctly stated the law, but in so doing would also further the translation mistake.[172] The translators again used the functional equivalency approach and justified their decision by correcting the errors of the 1825 translators.

The translators decided to translate the article as

> *'(l)a représentation n'a pas lieu en faveur des ascendants; le plus proche en degré dans les lignes paternelle ou maternelle excluant toujours ceux d'un degré plus éloigné'*.[173]

A cursory glance of the words proves that the translation team reverted back to the language from 1825 with respect to the two lines of ascendants, but by doing so decided not to use the word 'any' like the Code Art does in English. There are important distinctions between these interpretations and understandings of these two words. Linguistically, 'or' is an example of a word that adheres to the principle of cooperation, which means that the source of a message will use

[168] Louisiana Civil Code Art 883 (1870).
[169] Louisiana Civil Code Art 892 (1825).
[170] Louisiana Civil Code Art 892 (1825) (French).
[171] O. Moréteau, n 9 above.
[172] ibid.
[173] Louisiana Civil Code Art 883 (1870).

the most informative word as possible to describe a concept.[174]

The accuracy of the translation of the article is from the recognition that, according to Art 883, there are only two options when dealing with ascendants and intestacy.[175] The use of the word 'any', which courts have examined when interpreting statutes, suggests that there are more than two options.[176] Therefore, the layperson reading the current Louisiana Civil Code may erroneously believe that there will be more than two options. The same person, however, who reads the Art in French would, as a result of the more precise language used, realize that there were only two options. Therefore, because the wording is more precise and clear, the translation team correctly engaged in the functional equivalency approach for this code article.

7. When a Word Exists in French but not in English

The last code Art demonstrates the translators shifting from the formal equivalency approach to the functional equivalency approach when trying to define 'seashore'.[177] In the 1825 Civil Code, Art 442 stated that a '(s)eashore is that space of land over which the waters of the sea are spread in the highest water, during the winter season'.[178] The same Art in French reads,

> *'(o)n entend par ravage de la mer, l'espace de terre sur lequel s'éndent les flots de la mer, dans la plus grande elevation que les eaux ont en temps d'hiver'*.[179]

In the current Civil Code, seashore is defined in Art 451 as

> 'the space of land over which the waters of the sea spread in the highest tide during the winter season'.[180]

The translators of the Louisiana Code translated the article as, '*Le ravage de la mer est l'estran d'hiver'*.[181] In the English version of the Civil Code, the current article is sixteen words, and the French translation is ten words. The explanation for the difference in the amount of words comes from the functional equivalency approach and using a word in French that does not exist in English.[182]

[174] S. Crain, *The Emergence of Meaning* (Cambridge: Cambridge University Press, 2012), 8.
[175] Louisiana Civil Code Art 883 (1870) (note that if the decedent does not have ascendants on other side, this issue is moot since the real and/or personal property would go to the ascendants that are in fact living and can inherit them).
[176] J. Martin and T. Storey, *Unlocking Criminal Law* (Abingdon: Routledge, 2013), 512.
[177] O. Moréteau, n 9 above.
[178] Louisiana Civil Code Art 442 (1825).
[179] Louisiana Civil Code Art 442 (1825) (French).
[180] Louisiana Civil Code Art 451 (2016).
[181] Louisiana Civil Code Art 451 (French).
[182] O. Moréteau, n 9 above.

The word *l'estran*, although technically translates to 'foreshore' in English,[183] is not always translated as such in scholarly articles.[184] The word, however, does not require a definition in French since French speakers know what the word signifies.[185] Notwithstanding these different translations, the translators for the Civil Code adamantly believed that estran was the appropriate choice, despite the fact that some scholars questioned the decision.[186] Part of the criticism, Professor Moréteau explains, is that

> '(w)e've been radical. We abandoned the original French and adopted a different word, which goes against our system, where instances where the language barely changed and we're using different wording'.[187]

Although the translators *abandoned* the way the drafters phrased this same content in the 1825 Code, here the translation using *estran* was more appropriate.

Civil Codes are about using precise language and not inundating the average person with unnecessary words and phrases.[188] Therefore, the use of the more precise term that does not exist in the same way in English was the correct decision; the translators should not be limited when writing in French if a comparable word in English does not exists. The French translation of the French Civil Code is for French speakers, so if this segment of the population understands the content of the article without a definition, the translators effectively translated the code.

8. When the Functional Equivalency Approach Better Fits the Needs of a Code

The functional equivalency approach permits the translator to express the same substance in a way that is easier to understand for the reader.[189] Unlike the abovementioned example in which the English translation was incorrect in its entirety from 1870, there are other occasions where the translation is not per se wrong, but it may be misleading and was not the best translation.[190]

Art 2690 of the current Louisiana Civil Code states that, '(d)uring the lease,

[183] ibid.

[184] B.Waeles et al, 'Modélisation Morphodynamique Cross-Shore d'un Estran Vaseaux' 336 *Comptes Rendus Geoscience*, 1025 (2004) (translates the word to 'mudflat'); see also V. Albinet, 'Coastal Bluffs Retreat as Beach Nourishment: A Volumetric Evaluation Along the Coast of la Bernerie and Les Moutiers-en-Retz (Loire-Atlantique, France)' 7 *Géomorphologie: Relief, Processus, Environment*, 41 (2016) (in which the article translates the word to 'seashore').

[185] O. Moréteau, n 9 above.

[186] ibid.

[187] ibid.

[188] R. Batiza, 'Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code' 60 *Tulane Law Review,* 799-815 (1986).

[189] M.H. Hoeflich, n 94 above, 766.

[190] O. Moréteau, n 9 above.

the lessor may not make any alterations in the thing'.[191] According to the Louisiana State Law Institute, the content of this Art is the same as the 1870 version, which stated in Art 2698 that '(t)he lessor has not the right to make any alteration in the thing during the continuance of the lease'.[192] Although the 1870 Art was only available in English, the provision was the same as the 1825 Civil Code.[193] The 1825 Art in English was a mere translation from its French counterpart, and the translation was not technically incorrect in terms of the message that was conveyed, but it was not a good translation into English.[194] The sub-par translation created the issue of using the formal equivalency approach and the translators' decision regarding the functional equivalency approach.

The translators decided to use the 1825 French Art for the current Code article: *'(l)e bailleur ne peut, pendant la durée du bail, changer la forme de la chose louée*'.[195] At first glance, this deviation from the adherence of the current Code Art shows the translators not respecting the current Civil Code, which may be the only one that matters since it is the governing source of law. If the translators were to have literally translated the Code article back into English, the actual meaning would have been lost, so the use of the functional equivalency approach and '(f)idelity to the sources led us to revive this language, identical in substance to English but linguistically further away'.[196] The justification for the functional equivalency approach stems from the fact that there are subtle differences between 'may not', 'cannot', and 'must not', and the single approach used by the translators in 1825 did not capture these subtle differences that could have an effect on the outcome.[197]

VI. Conclusion

Some authors have commented that the 'persistence of French in Louisiana three centuries after the initial colonization is remarkable'.[198] From a pragmatic standpoint, this is also a tribute to the benefits of the civil law, as Louisiana is the only state in the United States to use a Civil Code. The range of perceptions of the Louisiana Civil Code is a broad: whereas some scholars view the Louisiana

[191] Louisana Civil Code Ann § Art 2690 (2015).

[192] O. Moréteau, 'La Traduction du Code Civil Louisianais, Exercice Historico Linguistique', in E. Bracchi and D. Garreau eds, *Codes, Termes et Traduction* (Milano: Giuffrè, 2017), 7-8.

[193] ibid 8.

[194] ibid.

[195] ibid.

[196] ibid.

[197] See Writing Explained, 'Can v. May: What's the Difference?' available at https://tinyurl.com/yy3r4upf (last visited 28 May 2019); see also Modals 1, British Council, https://tinyurl.com/yxn9kvh5 (last visited 28 May 2019).

[198] M.D. Picone, 'Cajun French and Louisiana Creole', in M. Di Paolo and A.K. Spears eds, *Languages and Dialect in the U.S.: Focus on Diversity and Linguistics* (Abingdon: Routledge, 2001), 196.

civil law as a 'white elephant',[199] others perceive Louisiana's civilian approach as 'the most perfect child of the civil law'.[200]

The current Louisiana Civil Code, first promulgated in 1870, is now completely translated into French and available online. Of the two types of legal translation theories, the formal equivalency approach and the functional equivalency approach, the translators used the formal equivalency approach and deviated when there was the need to do so. The use of the functional equivalency approach, when not necessary but instead useful in ascertaining the meaning of the articles, was essential to the accurate translation of the Civil Code. The translation team accurately transformed the Code from English to French by using the functional equivalency approach when it was needed to avoid the loss of meaning with the nuances of the French language in Louisiana.

[199] A.S. Aiton, n 26 above, 701; see also A. Parise, 'Report on the State of Louisiana to the Second Thematic Congress of the International Academy of Comparative Law' 31 *Mississippi College Law Review*, 397-398 (2013) (describing Louisiana as a 'Civil Law island' surrounded by a 'sea of Common Law').

[200] J.T. Hood Jr, 'The History and Development of the Louisiana Civil Code' 19 *Louisiana Law Review*, 18 (1958).

Essays

The Veil at School in Italy and in France

Ennio Codini*

Abstract

This article focuses on the freedom for female students from the Islamic tradition to attend public schools wearing a veil in Italy and in France. Moreover, it addresses the various aspects in which the presence of religious signs and symbols can be manifested at school, including in particular the possibility for teachers to wear a veil and the lawfulness of displaying a crucifix in classrooms. Italy and France have come up with contrasting solutions in this regard. This article highlights that underlying these solutions are two different legal-official intepretations of the meaning of the veil and in general of religious signs and symbols in the school environment in connection with the adoption or otherwise of an intercultural pedagogy.

I. Introduction

In Italy as in France the issue of the presence in public schools of religious signs and symbols has arisen and the similarities between the two contexts are evident. Italy and France are two countries of a Catholic tradition, where however for centuries there have also been many people of other faiths and where both atheism and anticlericalism have a certain following. Moreover, in recent decades, initially in France – in connection with the colonial and postcolonial experience – and later in Italy, Islam has rapidly increased due to immigration,[1] causing some tension. Furthermore, if the legal context is also taken into account, the similarities between Italy and France are so evident and well known that they do not require particular underlining. Not only in general are constitutional law and administrative law similar, but in Italy as in France human rights are recognised at constitutional level and in particular religious freedom is guaranteed in both

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[1] According to estimates made by the *Pew Research Center* Muslims in France numbered about three million six hundred thousand in 2010 and five million seven hundred thousand in 2016 whereas in Italy the corresponding figures were one million five hundred thousand in 2010 and almost three million in 2016. However, it would be a mistake to suppose that all those people fit the mainstream image of being devout. Moreover, not all women somehow linked to Islam actually wear a veil. For example, in France before the enactment of the 2004 law about which more will be said later, 'the Ministry of the Interior had reported only 1,254 girls wearing headscarves in French schools in 2003 – a fraction of 1 percent of all Muslim girls': J. Laurence and J. Vaisse, *Integrating Islam: Political and Religious Challenges in Contemporary France* (Washington: Brookings Institution Press, 2006), 165.

countries, endorsed also by Art 9, para 1, of the European Convention on Human Rights (ECHR). Moreover, they are two secular states[2] and the role played by public schools in both countries is essentially the same.

It is therefore striking that Italy and France have come up with contrasting solutions regarding the presence of religious signs and symbols in public schools.

This article proposes a reflection on that issue.

Indeed, a topic like this could be addressed through an analysis of how the secular state is a value common to Italy and France but has developed historically in a significantly different way in the two countries. But here we will pursue an approach more in tune with a reflection that is short and to the point, simply highlighting the different solutions employed in relation to the presence of religious signs and symbols in public schools while at the same time also seeking to explain the rationale for the solutions that have been adopted.

This article will focus on the issue of the freedom or not for female students from the Islamic tradition to attend schools wearing a veil, also because, at least in France, in recent years this has emerged as the most hotly debated topic and even beyond France has become an important component of the conflict that is going on in Europe about the place to be given to religions in public space in connection with immigration.

Moreover, this article will seek to engage in a systematic reflection that methodically considers the various aspects in which the presence of religious signs and symbols can be manifested at school, including in particular the possibility for teachers to wear religious signs and the lawfulness of displaying a crucifix in classrooms, an issue that has been debated at length in Italy. In fact, scholars have mostly considered the issue of female students' freedom to wear the veil separately from other issues but by contrast this article will seek to join up the dots, so to speak, between the various solutions adopted in the field of religious signs and symbols in the search for a common thread.[3] Moreover, also the European Court of Human Rights (ECtHR), in the famous *Lautsi* v *Italy* case of 2011[4] (more about which below), when assessing the lawfulness of displaying a crucifix in the classroom, took account among other things of the

[2] Art 2 of the French Constitution defines France as an *indivisible, secular, democratic and social Republic*. In Italy, after the 1984-1985 revision of the Lateran Pact between the State and the Catholic Church, all reference to Catholicism as the official religion were removed and the Constitutional Court would later rule that '*secularism is one of the supreme principles of the Constitutional order*' (Corte Costituzionale 12 April 1989 no 203, *Foro italiano*, I, 1333 (1989)).

[3] There are studies that in one way or another have sought to establish a link between the different topics. See amongst others S. Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law', in J. Temperman ed, *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden-Boston: Martinus Nijhoff, 2012), 13-34; C. Joppke, 'Double Standards? Veils and Crucifixes in the European Legal Order' 54(1) *European Journal of Sociology*, 97-123 (2013).

[4] Eur. Court H. R., Lautsi v *Italy* App no 20814/06, Judgment of 18 March 2011, available at www.hudoc.echr.coe.it.

possibility for female students to attend lessons wearing a veil.

Without prejudice to the differences, above all that consisting of the fact that 'the veil is always an attribute of the person wearing it, while the crucifix (is) part of an institutional environment',[5] the use of the veil concerns individual freedom and may possibly conflict with collective interests while displaying a crucifix concerns collective interests, and may possibly conflict with individual liberty. Furthermore, it is arguable that

> 'a religious symbol worn by a student does not have the same political and legal importance that a religious symbol displayed by law in all the schools of a State'.[6]

Reference to female students wearing a veil is to the use of *hijab*, a type of veil that covers the hair and the neck leaving the face uncovered, which is the most common, or the use of the *chador*, similar to the *hijab* for the purposes of this article. This will allow us to leave aside all the issues that can be specifically raised about the *niqab* and even more so the *burqa* in terms of recognizability, safety, and compatibility between the physical limitations that such garments entail and normal school interaction and activities.[7]

II. A Divergent Evolution

Generally in both Italy and France nowadays public schools do not require uniforms to be worn (so the issue typical of many Anglo-Saxon contexts of the relationship between the obligation to wear a uniform and religious freedom does not arise).[8] Students and teachers are free to wear whatever they like although in both countries many schools have regulations that set limits in the interests of maintaining a certain *decorum* as it were.

It is in that context, where there is general freedom but prohibitions are allowed on the basis of specific needs, that the issue of female students wearing a veil must be addressed.

[5] C. Joppke, n 3 above.

[6] S. Ferrari, n 3 above.

[7] In this regard in general in Europe the issue (at least at the level of formal justification for restrictive policies) becomes above all one of security and the limitations introduced, if any, tend not to target the school specifically but public spaces in general (see A. Piatti-Crocker and L. Tasch, 'Veil Bans in Western Europe: Interpreting Policy Diffusion' 16(2) *Journal of International Women's Studies*, 15-29 (2015)). And the issue of their lawfulness, considering as a whole the values at stake, is viewed in very different terms because specifically linked to the fact that one's face is covered (see R. McCrea, 'The Ban on The Veil and European Law' 13(1) *Human Rights Law Review*, 57-97 (2013)). Just as the issue of their impact on the lives of women is viewed in different terms (see E. Brems ed, *The Experience of Face Veil Wearers in Europe and the Law* (Cambridge: Cambridge University Press, 2014)).

[8] See the House of Lords Judgment of 22 March 2006 holding that it was lawful to require students to wear a uniform if such accommodated various religious dictates.

Indeed, as the ECtHR has also recognised, what is involved is not only in general the freedom to dress as one wishes but also religious freedom since the latter also includes the right to manifest one's faith through a sign like the veil. This, it should be noted, allows one in principle not to address the many questions related to the obligation to wear the veil and the different specific meanings of the veil in the Islamic tradition[9] when discussing the connection between the veil and religious freedom.

But this certainly does not imply, either in Italy or in France, that limits cannot be placed to protect other interests: limitations 'necessary in a democratic society' according to the provisions of Art 9.2 of the ECHR. For example, in the Dogru v *France* case decided in 2008[10] the ECtHR observed that it may be lawful 'to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.

In France in 1989, following the case of three female students expelled from school because they wore a veil (*les foulards de Creil*), at the request of the Minister of Education the *Conseil d'État*[11] gave an opinion (*avis*), not merely with reference to the veil in particular but with reference to religious signs in general, partly because in France as in Italy the principle of equality induced the authorities to avoid *ad hoc* provisions for this or that faith (even though the dispute that the opinion originated from concerned a veil). The opinion states that students must generally be free even in public schools to wear signs expressing their religious identity. Not so teachers: for them there is instead a ban for the sake of the secularity-neutrality of the school, an interest in whose name freedom can be limited.

More specifically, as regards students the *Conseil d'État* opinion stated that they should be allowed to wear 'signs by which they manifest their affiliation to a particular religion', as an exercise of the 'freedom of expression and manifestation of religious beliefs', except where that proves to be provocative in the eyes of classmates who do not share the same faith, or in any case such as to interfere with the normal functioning of the public service. So in relation to students, there is a conflicting interest that can lead to restrictions on freedom but it is assumed that such interest is a mere eventuality and hence any limitation must be viewed as being an exception to the rule.

Consistent with the above, in subsequent years the *Conseil d'État* struck

[9] Topics that have been the subject matter of many studies including G. Vercellin, *Tra veli e turbanti: rituali sociali e vita privata nei mondi dell'Islam* (Padova: Marsilio, 2002) and R. Pepicelli, *Il velo nell'Islam: storia, politica, estetica* (Roma: Carocci, 2012). As regards in particular the issue of obligatoriness, for an overview see D. McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart Publishing, 2006), 8-12.

[10] Eur. Court H.R., *Dogru* v *France* App no 27058/05, Judgment of 4 December 2008, available at www.hudoc.echr.coe.it.

[11] Conseil d'État, *Section de l'interieur*, 27 November 1989, no 346893, available at www.conseil-etat.fr.

down regulations of individual schools that by contrast introduced a general ban.[12]

The opinion of the *Conseil d'État* represented a break with the more intransigent interpretations of the French tradition of *laïcité-séparation* according to which religion must be confined to the private sphere and therefore necessarily outside school, a public sphere *par excellence* given its educational goals for the citizenry and thus also students are obliged to leave their religious convictions *à la porte de l'école* (at the school door). Rather what was established was a *laïcité-neutralité* that afforded priority to religious freedom over the logic of separation-exclusion.[13] Consistent with this break is the approach that can be found in the Debray Report of 2002 on the teaching of *fait religieux* (religious facts) in secular schools,[14] where it is hoped there would be a move from a *laïcité d'incompétence*, whereby the latter by definition must be foreign to the institution, to a *laïcité d'intelligence* whereby the institution must instead consider and understand it.[15]

The approach mandated by the *Conseil d'État*[16] would be short-lived as a change was triggered by the Stasi Commission.[17] In its final report of 2003[18] it took the view that the presence *per se* of female students wearing a veil was a serious obstacle to the mission of the school, because the presence at school of one or more students wearing some conspicuous sign of religious affiliation, which could be a *kippah* or indeed a veil, 'is sufficient in itself to disturb the quiet of school life'.[19] Hence the Commission's proposal to prohibit such forms of attire in general. Shortly before that, another report on secularism commissioned by the government, the Baroin Report,[20] had expressly criticised the approach of the *Conseil d'État* by talking about an error committed in 1989:

> 'that of believing that the Islamic veil was a (mere) sign of religious affiliation when in fact it is a characteristic trait of fundamentalists that adhere to a model of society founded on the logic of the ghetto and hostile to democracy'.[21]

[12] See the decision in the *Kherouaa* case (Conseil d'État, 2 November 1992, no 130394, available at www.legifrance.gouv.fr) and in the *Yilmaz* case (Conseil d'État, 14 March 1994, no 145656, available at www.conseil-etat.fr).

[13] That is how the development was seen by B. Massignon, 'Laïcité et Gestion de la Diversité Religeuse à l'École Publique en France' 47(3) *Social Compass*, 353-366 (2000); for his juxtaposition referring back to M. Barbier, *Laïcité* (Paris: L'Harmattan, 1995).

[14] Rapport à Monsieur le Ministre de l'Éducation Nationale: *L'Enseignement du Fait Religieux Dans l'École Laïque*, February 2002.

[15] Debray Report (Ministère de l'Éducation Nationale, 2002), 22.

[16] See N. Deffains, 'Le Principe de Laicité de l'Enseignement Public à l'Épreuve du Foulard Islamique' 34 *Revue Trimestrielle des Droit de l'Homme*, 203-250 (1998).

[17] *Commission de Reflexion sur l'Application du Principe de Laïcité Dans la Republique.*

[18] *Rapport au President de la Republique* submitted on 11 December 2003.

[19] Debray Report (Ministère de l'Éducation Nationale, 2002), 42.

[20] F. Baroin, *Pour Une Nouvelle Laïcité*, Report for the Prime Minister of France submitted in Spring 2003.

[21] That viewpoint has since become characteristic of French society and underpins support

There then followed loi 15 March 2004 no 228, which – taking its cue from what had been recommended by the Stasi Commission, whose report is expressly cited in the report accompanying the legislation[22] – amended the Education Code by introducing a provision (still in force today) that prohibits students in public schools from using signs through which they '*overtly* (*ostensiblement*) *manifest religious affiliation*'.

In 1998 Italy also tackled not specifically the issue of religious signs at school but more in general the issue of cultural differences, which naturally encompass religion in this context. However, the approach differs not only from that espoused in the *Conseil d'État* opinion but the philosophy that would soon inform French legislation. Art 38 of decreto legislativo 25 July 1998 no 286 (Immigration Code), still in force, provides that 'the school community embraces cultural (…) differences as a value'. And right from the beginning it was assumed that religion was a cultural difference to be accepted as a value in general and without exception, including where expressed through one's attire and hence also through wearing a veil.

Significantly in the guidelines periodically published in these years by the Ministry of Public Education in order to better manage the acceptance of foreign students, the issue of veils is not even mentioned because it is taken for granted that female students are free to attend school wearing a veil.[23] Indeed, in the *Charter of Values, Citizenship and Integration* – approved by decreto ministeriale 23 April 2007 and which since 2009 has been legally binding in as much as incorporated into the integration agreement which, like the French *contrat d'intégration*, binds the State and new immigrants – the section on secularism and religious freedom peremptorily states that as long as one's face is not covered, 'in Italy there are no restrictions on people's attire'. And in note 39 to the official text of the Charter it is expressly stated that 'Italy does not ban the wearing of a veil' if it does not hinder the identification of the person, and specifically makes the point that in this regard Italy 'does not follow the path adopted by other European countries, in particular by France'.

The story of a school principal[24] who tried in Italy to follow the model

for the ban under the 2004 law (see J.R. Bowen, *Why the French Don't Like Headscarves. Islam, the State, and Public Space* (Princeton: Princeton University Press, 2007)), a ban that would receive quite a lot of criticism also in academic circles (see C. Laborde, *Critical Republicanism* (Oxford/New York: Oxford University Press, 2008)).

[22] The close connection between the 2004 law and the Stasi Commission's report is widely known: '*The law implements one of the recommendations of a special commission on religion in France, appointed by the government and headed by Bernard Stasi*' (J. Laurence and J. Vaisse, n 1 above).

[23] See the most recent *Guidelines for the Acceptance and Integration of Foreign Students* of February 2014 (Ministero della Pubblica Istruzione, 2014). Likewise in a ministerial document from October 2007 called *The Italian Way for Intercultural Schooling and the Integration of Foreign Students* (Ministero della Pubblica Istruzione, 2007) that specifically refers to cultural differences, the issue of the veil is not mentioned in the slightest.

[24] 'Preside vieta il velo in classe, tolleranza zero verso comportamenti razzisti', available at

enshrined in the 2004 French law made the headlines a few years ago. A directive dated 11 February 2015 issued by the principal of a high school in Friuli stated that the school would

> 'not accept (…) a display (...) of the outward signs of one's own religious beliefs (...) for example, the scarf or veil' because 'it can be perceived as a provocation and cause a reaction'.

Regarding veils, female students are 'free to wear them outside of school but not in the classroom'. A few days later a circular issued by the regional education authority criticised that directive maintaining that in general in Italian schools 'there are no reasons (…) to oppose (…) the use of signs of expression of one's cultural and religious affiliation', in the wake of which the school principal promptly withdrew the directive. The episode confirms that in Italy female students are in general and without exception free to wear a veil.

The same can also be said for teachers. In general, it can be concluded that as long as one's face is not concealed, in Italy 'the use of the Islamic veil (…) in schools (…) is not banned by the legal system'.[25]

The picture of the divergence between Italy and France as regards the possible presence of religious signs and symbols in public schools is completed, so to speak, by a diametrically opposite solution adopted as regards the presence of the crucifix in classrooms.

Banned for well over a century now in France (further to a provision contained in a law dating back to 9 December 1905 on the separation of church and state),[26] it is traditional for crucifixes to be displayed in Italian schools, in connection with a different history of the secular state and presence of Catholicism in the public space. There is no actual law as such on the matter, it is simply the case that crucifixes are envisioned by regulations on school furnishings.

From the above it transpires that there is a sharp difference between the two countries in relation to the presence of religious signs and symbols in public schools: in France female students are not allowed to wear a veil let alone teachers but in Italy both may do so. Furthermore, in Italy a crucifix can be displayed in the classroom but not so in France. One can speak of a general openness in Italian schools to the presence of religious signs and symbols compared to a general reluctance in French schools.

https://tinyurl.com/yyxqd8ts (last visited 28 May 2019).

[25] S. Carmignani Caridi, 'Libertà di abbigliamento e velo islamico', in S. Ferrari ed, *Musulmani in Italia* (Bologna: il Mulino, 2000), 223-234. Although dating back to 2000 that conclusion is still valid today. News reports mention just one case to the contrary, in 2004 (in Samone, a town near Ivrea), concerning a trainee teacher who was denied the opportunity for an internship at a nursery school due to her veil; however the relevant authorities immediately intervened and the woman was able to complete her internship (although at another location for reasons of expediency).

[26] Loi 9 December 1905, Art 28: 'It is prohibited to affix religious signs or symbols in public places except for places of worship, cemeteries, funeral monuments and museums'.

III. Rationale for the Divergence

The ECtHR considers the French model to be legal. That the law can prohibit teachers from wearing a veil in schools has been affirmed by the Court ever since the *Dahlab* v *Switzerland* case decided in 2001.[27] More recently, in its decision in the *Ebrahimian* v *France*[28] case, the Court held that laws can prohibit any public official from displaying religious signs. The Court also ruled that loi 15 March 2004 no 228 was valid. At the start of the 2004-05 school year some Muslim girls went to school wearing headscarves to cover their hair and refused to remove them, following which the schools' disciplinary bodies finally expelled the pupils. This gave rise to several appeals before the French courts and then, when they were rejected, to applications filed with the ECtHR. However, the latter declared all of the applications to be inadmissible[29] stating that, without a doubt, the ban is part of the margin of appreciation left to the national authorities in this area because it pursued the legitimate aim or protecting the rights of others and the functioning of the school.

The liberal approach towards the wearing of the veil exhibited by the Italian legal system has never been assessed by the ECtHR, as could well happen if some members of the school were considered injured in their rights by an '*ostentation*' of religious affiliation. However, in light of the decision in the aforementioned *Lautsi* v *Italy* case where the presence of a crucifix in the classroom was held to be lawful, there are no reasons why the wearing of a veil by female students and even teachers at school would be considered unlawful.

Even apart from the very fact of the divergence between the two models, it is striking that the French solution to the issue of the veil and the various judgments in the matter place an emphasis on balancing religious freedom with other values that can legitimately lead to a sacrifice of the religious interest if the opposing one is of high rank, which is how the ECtHR considers those related to the operation of public services.[30]

That is not the case for the Italian model, due to the different meaning

[27] Eur. Court H.R., *Dahlab* v *Switzerland* App no 42393/98, Judgment of 15 February 2001, available at www.hudoc.echr.coe.it.

[28] Eur. Court H.R., Ebrahimian v France App no 64846/11, Judgment of 26 November 2015, available at www.hudoc.echr.coe.it.

[29] See Eur. Court H.R., *Aktas* v *France* App no 43563/08, Judgment of 30 June 2009, available at www.hudoc.echr.coe.it, the first of a number of similar judgments.

[30] A different view was expressed by the ECtHR regarding private business enterprises that wish to protect their image. In this regard see the opposing conclusions of two cases as always concerning the possibility for a female employee to wear a veil, one working in the public sector and the other in the private sector (see *Ebrahimian* v *France*, n 28 above and Eur. Court H.R., *Eweida and Others* v *United Kingdom* App no 48420/10, Judgment of 15 January 2013, available at www.hudoc.echr.coe.it). As regards striking a balance in these cases see C. Ruet's comment on the decision in the *Ebrahimian* case: C. Ruet, 'Actualités Droits-Libertés: Interdiction du Port de Signes Religieux par les Agents du Service Public: La Combinatoire Subtile de l'Arrêt Ebrahimian' *Revue des Droits de l'Homme*, 1-14 (2016).

attributed to '*religious*'. And the very lawfulness of both models according to the caselaw of the ECtHR depends precisely on the position taken by the Court in relation to the meaning of religious signs and symbols which, among other things, has led it to recognise a wide margin of appreciation and therefore the possibility that national models can be markedly different and at the same time valid.[31]

Therefore, the meaning given to the signs and symbols strongly conditions the rational structure and lawfulness of the different models. For example: if the meaning of the female student's veil is provocation then it is forbidden in the interests of the good functioning of school and the restriction is legitimate. If, on the other hand, the veil is considered as a manifestation of a value then it is permissible without any need to strike a balance.

In the caselaw of the ECtHR and in general in that of the highest national courts, the States are free within the limits of what is reasonable to decide on the meaning to be given to signs and symbols. A striking example can be found in the judgments issued on the subject of displaying crucifixes in Italian schools.

In recent decades there has been strong pressure in Italy to remove crucifixes from classrooms, and in particular on a number of occasions it has been the parents of foreign students who have sued before the courts to demand removal. However, apart from occasional favourable rulings by lower court,[32] such demands have not been held to be well founded by higher courts, in particular by the Council of State (*Consiglio di Stato*) in 2006.[33] Neither, as mentioned before, was such a claim upheld by the ECtHR in the *Lautsi* v *Italy* case.[34]

The Council of State held that displaying a crucifix in a public school can be justified and is not discriminatory

[31] As pointed out, amongst others, by C. Ruet in the above mentioned comment on the *Ebrahimian* case.

[32] One of the most well known is that of the Tribunale di L'Aquila 23 October 2003, *Foro italiano*, I, 1262 (2004).

[33] Consiglio di Stato 13 February 2006 no 556, *Foro italiano*, II, 181 (2006).

[34] The litigation, which dragged on for many years, gave rise to much debate among scholars. Without any pretence as to completeness, the following contributions are worthy of mention: those contained in the volume R. Bin et al eds, *La laicità crocifissa? Il nodo costituzionale dei simboli religiosi nei luoghi pubblici* (Torino: Giappichelli, 2004); N. Fiorita, 'Se il crocefisso afferma la laicità dello Stato' *Rivista OLIR – Osservatorio delle libertà ed istituzioni religiose*, 1-7 (2005); A. Morelli, 'Simboli, religioni e valori nelle democrazie costituzionali contemporanee' *Forum di Quaderni Costituzionali*, 1-22 (2005); Id, 'Un ossimoro costituzionale: il crocifisso come simbolo di laicità' *Forum di Quaderni Costituzionali*, 1-3 (2006); those contained in the volume E. Dieni ed, *I simboli religiosi tra diritto e culture* (Milano: Giuffrè, 2006); P. Cavana, 'Laicità e simboli religiosi' *Stato, Chiese e pluralismo confessionale*, 1-12 (2007); L.P. Vanoni, 'I Simboli religiosi e la libertà di educare in Europa: uniti nella diversità o uniti dalla neutralità?' *Rivista AIC*, 4 (2010); M. Bignami, 'Il crocifisso nelle aule scolastiche dopo Strasburgo: una questione ancora aperta' *Rivista AIC*, 2 (2011); S. Luzzatto, *Il crocifisso di Stato* (Torino: Einaudi, 2011); G. Brunelli, 'La laicità italiana tra affermazioni di principio e contraddizioni della prassi' *Rivista AIC*, 1 (2013); N. Colaianni, 'Simboli religiosi e processo di mediazione' *Stato, Chiese e pluralismo confessionale*, 1-16 (2014); and F. Ferrari, 'Another brick in the wall? Il difficile dialogo costituzionale con l'immagine del Cristo crocifisso' *Rivista AIC*, 1 (2018).

> 'if it is able to represent (...) civically relevant values'. In fact, in that case 'even from a secular standpoint it can serve, other than its innate religious function, a highly educational symbolic purpose regardless of the religion professed by the students'.

Morever, the Council of State observed that

> 'in Italy the crucifix is capable of expressing (...) values of tolerance, mutual respect, personal improvement, affirmation of one's rights, regard for one's freedom, independence of moral conscience towards authority, human solidarity and rejection of discrimination, which denote Italian civilisation'.

The ECtHR for its part maintained that

> 'the presence of the crucifix is not associated with compulsory teaching about Christianity' and 'Italy opens up the school environment in parallel to other religions'.

It noted that, for example,

> 'it was not forbidden for pupils to wear Islamic headscarves'. So 'in deciding to keep crucifixes in the classrooms (...) the authorities acted within the limits of the margin of appreciation left to the (...) State'.

According to those judgments the legally relevant meaning of the crucifix is not necessarily something that is embedded in the artifact, definable by looking to those who created or first used the symbol, meaning that the crucifix would be plainly religious in nature.[35] Nor is it necessarily what has prevailed in history or what this or that member of the school community today recognises or could recognise like, for example, the Spanish administrative court of Valladolid held in a famous judgment of 2008[36] in which the removal of a crucifix was ordered because its display 'could create (in the students) the impression that the State is closer to (the associated) religious confession (...) than to others'. Nor is the legally relevant meaning in the school where the crucifix hangs necessarily that which emerges at the level of interpretive community based on the idea that is presented in Pierce's theory of signs and has been robustly articulated and defended by Stanley Fish.[37]

[35] To quote the words of the US Supreme Court in connection with the display in a public school of the Ten Commandments in the 1980 case of *Stone* v *Graham*: 'The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text (...) and no legislative recitation of a supposed secular purpose can blind us to that fact'.

[36] Juzgado de lo Contencioso Administrativo no 2, Valladolid, 14 November 2008, 28, available at www.poderjudicial.es.

[37] S. Fish, *Is There a Text in This Class? The Autority of Interpretive Communities*

Instead, so the Courts say, the legally relevant meaning is the one chosen by the authority that governs the school, provided that this choice is in itself reasonable and fits into an overall ethos of the school coherent with it. In concrete, it can be reasonable to view the crucifix as an indicator of a specific religious orientation of the institution but also for example as a symbol of values that are religious but secularised. And it is in connection with the reasonable meaning chosen by and placed in a coherent context by the authority that one must judge the lawfulness of displaying the crucifix in classrooms.

This not only explains why two contrasting solutions can be legitimate but also explains why Italy and France have arrived at opposite solutions, not only as regards the crucifix but also with regard to the possibility for female students and teachers to wear a veil.

If we look back at the opinion of the *Conseil d'État* in 1989, it is clear that the underlying assumption is that the wearing of a veil by female students does not usually constitute a provocation and, therefore, does not interfere with the normal functioning of the school, thereby meaning that such behaviour is normally acceptable. If, however, in particular circumstances there is provocation, the *Conseil d'État* permits school authorities to forbid wearing the veil even if that entails a partial sacrifice of freedom. By contrast and as mentioned before, in its report the Stasi Commission maintained that the presence at school of one or more male or female students wearing some manifest (*ostensible*) sign of religious affiliation, which could be a *kippah* or indeed a veil, constituted *per se* provocation or, to use the already quoted words of the Baroin Report, an expression of a logic of the *ghetto* hostile to democracy. Accordingly, wearing that attire was considered in itself apt to 'disturb the quiet of school life', leading to a proposal to introduce a general ban that would then materialise with the above mentioned law of 2004, because on the basis of such an interpretation it is reasonable in general to partially sacrifice religious freedom by forbidding the veil.

In Italy, on the other hand, as we have seen, banning the veil in public schools is not permitted. Without doubt, while in France there is

> 'a militant secular culture of numerous teachers who, on the basis of a particular interpretation of the legal and ideological work of the Third Republic, advocate the exclusion of religion from school',[38]

in Italy teachers appear on the whole more 'open' to the presence of religious signs and symbols. That is not to say however that the presence in Italian schools of such signs and symbols is not a ground for conflict. In particular, the veil appears in the eyes of many to be a sign to be tackled with bans because linked to an integralism judged to be dangerous from a security standpoint or because

(Cambridge MA: Harvard University Press, 1980).

[38] B. Massignon, n 13 above.

emblematic of a rejection of secularity and equality between men and women[39] while many see the display of the crucifix as an imposition. Otherwise, how does one explain a directive like the one mentioned above issued by the principal of a high school in Friuli and the lawsuits demanding the removal of crucifixes from the classroom? The difference stems from the different meaning attributed by law to signs and symbols.

The previously mentioned Charter of Values reads: 'No one can feel offended by the signs and symbols of religions other than their own' (§ 25). It is added that at school the young should be educated not to see religious convictions and manifestations of others as *divisive factors*. Rather, they are *values* according to the intercultural approach expressly adopted as its own by the Ministry[40] – and by no coincidence difficult to introduce in France.[41] It should be noted, precisely in relation to Italian schools,[42] that

> 'the main aim of an intercultural model is to promote real interaction between different cultures', everybody must 'open up to equal dialogue with the other, recognizing and accepting their diversity as an element to be appreciated since it enriches their own identity'.

If at this point we also consider the previously mentioned Art 38 of decreto legislativo 25 July 1998 no 286 mandating in categorical terms that the school community embrace cultural differences as a value, what becomes clear is a regulatory stance that – amongst other things as far as we are concerned here – requires everyone to interpret religious signs and symbols consistent with that approach. A veil, borrowing the words of the *Conseil d'État*, can certainly constitute a 'provocation' but nobody in an Italian school must act on the basis of such an interpretation whether it be a female student or even a teacher who is wearing a veil.

Once adopted, an intercultural approach has its implications for the meaning of religious signs and symbols. Those implications could well be similar to those of the multicultural approach which, for example, led to Canada permitting a pupil to wear the *kirpan* in a public school, as established in 2006 by the Supreme Court in the *Multani* v *Commission Scolaire Marguerite-Bourgeoys* case, observing that

> 'the argument that the wearing of kirpans should be prohibited because

[39] As pointed out by S. Regasto, 'Il velo (islamico) fra pregiudizi e realtà' *Forum Quaderni costituzionali*, 11 (2017).

[40] See *The Italian Way for Intercultural Schooling* n 23 above.

[41] See H. Zilliacus and G. Holm, 'Multicultural Education and Intercultural Education: Is There a Difference?', in G. Holm et al eds, *Dialogues on Diversity and Global Education* (Bern: Peter Lang, 2009), 11-28.

[42] G. Pasquale, 'Toward a New Model of Intercultural Education into Italian School' 191 *Procedia – Social and Behavioral Sciences*, 2674-2677 (2015).

the kirpan is a symbol of violence' must give way to 'Canadian values based on multiculturalism'.[43]

Without, however, neglecting that what in a multicultural approach is above all protection (if not actually promotion) of the right to diversity, in an intercultural approach takes on a different and more dynamic meaning, enriching the relationship.[44]

It is here that we can understand the underlying difference between the two divergent approaches adopted in relation to the presence of female students and even teachers wearing a veil. In France, even from the viewpoint of the most open stance embodied in the opinion of the *Conseil d'État* of 1989, there is the notion that signs even by their nature or in any case due to their ostentatious (*ostensible*) or demanding character constitute 'an act of pressure, provocation, proselytism or propaganda' that would be such as to 'undermine the dignity' of the other members of the school community and to disrupt its regular functioning. In the Italian legal system, in reverse, this does not happen because in the context of an intercultural approach any negative reactions are never justified, because the wearing of a veil is by law to be considered by others not as provocation but as enrichment, even apart from any difficulties;[45] on that basis, experience in interpretation and dialogue must also constantly develop, including as regards the meaning of the veil, in line with an intercultural approach.[46] Thus, in Italy,

[43] On which see D. Koussens, 'Neutrality of the State and Regulation of Religious Symbols in Schools in Quebec and France' 56(2) *Social Compass*, 202-213 (2009).

[44] See H. Zilliacus and G. Holm, n 41 above.

[45] Difficulties that must not be underestimated not only because they actually exist in many contexts but also because the ECtHR has held that they can be a ground for restricting liberty. As in the above mentioned case of *Dahlab* v *Switzerland*, where the Court ruled that a ban on teachers wearing a veil was lawful because the Islamic headscarf 'appears difficult to reconcile (…) with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'.

[46] The issue of the various meanings of the veil – originally, then over the course of time in different locations and now in concrete today in the eyes of the wearer or those of external observers as the case may be – thus assumes relevance or not depending on the level concerned. As highlighted above, according to the ECtHR the issue is not relevant in linking the freedom to wear the veil to religious freedom and neither is it relevant in Italy in permitting the wearing of the veil at school because in this regard all that suffices is the link with religious diversity accepted by law as a value. On the other hand, the issue of the various meanings of the veil becomes relevant when it comes to developing in schools the relationships typical of an intercultural approach. At this level one, to use the French expression *laïcité d'intelligence* (regarding whose possible meaning at school at teaching level see P. Gaudin, *Vers une Laïcité d'Intelligence?* (Aix-en-Provence: P.U.A.M., 2014)) it is required, which implies first of all the ability to interpret the sign starting from what studies say about it (see G. Vercellin, *Tra veli e turbanti*, and R. Pepicelli, n 9 above), with particular attention to the fact that in the current context the veil does not have *a single* meaning, for example, since it could be associated with subordination but also viewed as a means of identity affirmation (see I. Acocella, 'Il velo islamico e la pluralità dei suoi significati' *Studi di sociologia*, 51-66 (2011)), or it could well be linked to marginalisation but also by contrast to a path towards integration-emancipation (see O. Aksoy and D. Gambetta, 'Behind the Veil: The Strategic Use of Religious Garb' 32(6) *European Sociological Review*, 792-

without the need for any balancing, a sort of inclusive neutrality is achieved, where freedom of religion is ensured through the public presence of symbols and manifestations of different religions.

The Italian approach reaches a point that is, so to speak, extreme but coherent as regards the crucifix. The religious significance of this object cannot be denied, but members of the school community are duty bound to act by considering the crucifix as a symbol of values linked to Christianity certainly but also secular in nature (ie, appreciable also separately from religion). Therefore, displaying a crucifix cannot conflict with individual rights and likewise in this case there are no grounds for striking a balance, and the greater importance of the crucifix in context compared to an individual sign like the veil of a female student does not change the conclusion in favour of lawfulness. Without prejudice to the fact that with regard to this symbol and all other religious signs and symbols present in a school context, the legally relevant meaning deriving from the intercultural approach does not negate in any way freedom of interpretation: society should be allowed to develop multiple conceptions of what symbols mean because alternative interpretations and conceptions can co-exist, overlap, and even compete.[47] However, in their deeds people in Italy must adhere to the meaning consistent with the intercultural approach adopted in that country: a person can certainly see, for example, in the crucifix and in the veil two different forms of obscurantism that threaten freedom but in concrete must behave at school in line with the prescribed interpretation.

This legislative interpretation of signs and symbols may appear to be a bit stretched – and this has appeared so to many Italian scholars in particular with regard to the crucifix[48] – but it cannot be denied that it is reasonably incorporated into a project – schools premised on intercultural pedagogy – that as aforesaid exhibits a strong link with the wider plan of citizenship education – one of the

806 (2016)). The interpretation of the sign in the various contexts will obviously have to take into account what in concrete can have value according to the intercultural approach. In principle alien to this approach is the view – although relevant in other respects – that it is *better* for Muslim women to wear a veil (see, in critical terms, M. Lazreg, *Questioning the Veil. Open Letters to Muslim Women* (Princeton: Princeton University Press, 2011)).

47 Consequently, there are no grounds for concern by those (B.G. Scharffs, 'The Role of Judges in Determining the Meaning of Religious Symbols', in J. Temperman ed, n 3 above, 35-57) who fear that the authorities may 'impose' on society *a* meaning to be attributed to this or that sign.

48 This is the belief of almost all of the authors cited in footnote 33, where as regards the meaning of the crucifix opinions range from, on the one hand, the view that the meaning is – to employ an expression used before –embedded in the artifact, definable looking to those who created or first used the symbol such that the symbol is plainly religious in nature to, on the other hand, the view that the meaning is tied to history and there is an element of religious imposition. At times it is argued that the individual viewpoint should take precedence, such that the interpretation of the crucifix '*as an expression of repudiation of all exclusion cannot be imposed when on the contrary the symbol is perceived by some as the representation of a particular concept*' (E. Dieni, 'Simboli, religioni, regole e paradossi' *Rivista OLIR – Osservatorio delle libertà ed istituzioni religiose*, 1-10 (2005)).

missions of schooling in Italy like in France – in a context marked by current and potential conflicts linked to cultural and religious differences.

IV. Conclusions

This article has shown the extent to which in recent years Italy and France have adopted contrasting solutions regarding the presence of religious symbols and signs in schools and has reflected on this.

In doing so the article has touched upon issues that are problematic today not only in Italy and France but also in many other countries with similar situations and legal principles. In May 2018, for example, much debate surrounded the ruling of a labour court in Berlin, which rejected the appeal of a teacher dismissed from a public primary school for wearing the *hijab* by applying the law of that *Land* that prohibits all public employees from wearing signs that refer to their religious beliefs. It is the latest episode in a series of similar disputes in that country where the laws of some *Länder* impose a general ban while others do not. In 2015 the *Bundesverfassungsgericht* adopted a stance in some ways similar to that taken by the *Conseil d'État* in the aforementioned opinion of 1989, ie, in favour of a general freedom save for the possibility to impose bans in situations marked by specific tension, but at the same time extending the freedom to teachers.[49]

In Spain, like in Italy, crucifixes are displayed in classrooms and again in that country positions to the contrary have been expressed, for example, in the previously mentioned judgment of the Court of Valladolid.

In Austria, the crucifix is by law displayed in classrooms and in April 2018 the government took the first steps towards introducing legislation seeking to deny access to schools to female students who wear a veil. On the other hand, in Switzerland in 1990 the Federal Court banned the display of crucifixes in schools and in September 2018 declared a referendum aimed at banning the veil at school to be inadmissible because it contrasted with a constitutionally guaranteed right. Even in the comparison between Austria and Switzerland, therefore, we see two countries with a similar culture that have adopted an opposite position in relation to religious signs and symbols at school. If we consider also the prohibition for teachers to wear the veil (often disputed but upheld by the Federal Court in 1988 and again in 1997), Switzerland has adopted an approach similar to the pre-2004 French position whereas Austria seems to favour a peculiar combination of allowing crucifixes but not veils.

Reflecting on the Italian and French cases enables one to highlight the fact

[49] The judgment concerned a 2006 law in Nordrhein-Westfalen forbidding teachers from conveying 'any outward signs of a political or religious nature or in any event pertaining to a particular conception of the world' that would call into question the neutrality of the State (§ 57.4 *SchulG NW*).

that underlying these solutions are two different legal-official interpretations of the meaning of the veil at school and in general religious signs and symbols. In Italy they are considered elements of value: viewed through an intercultural lens they are considered as an element of relationships in the case of the veil or as a basis for relationships in the case of the crucifix. Whereas in France they are considered partisan and, therefore, a provocation in the case of the veil or an imposition in the case of the crucifix, within an overall conception of the school rooted in the idea that the religion should, as much as possible, play no part in relationships.

Both models are, as we have seen, considered lawful by national courts and the ECtHR. The fact that the State is afforded such wide power to establish meanings in a given context may not sit well with those who perceive different meanings. Indeed, it was mentioned before that some Italian legal scholars are puzzled by the secular meaning of the crucifix and similarly misgivings could also been voiced about legislation that can define the veil as either provocation or a value that promotes dialogue. However, as this article has sought to highlight, the attributed meaning cannot be arbitrary because it must be intrinsically reasonable and above all consistent with the context as well as the way in which schools are conceived and actually structured.

It is at this level in essence that lawfulness must be assessed. It is the school as it is structured overall that must, as regards all of its traits taken together, be respectful of freedom and operate in a manner consistent with its mission in civil society.

Although the French model appears to be valid from that standpoint, the Italian one is certainly more attractive, especially from the perspective of civic education due to its ambition to include everything without fear of tensions.

Essays

Thirty Years of CISG: International Sales, 'Italian Style'

Edoardo Ferrante*

Abstract

The ordering of international contracts has a natural inclination to break free from national systems and create a sort of lingua franca for trade law. This has not prevented international sales, ie the typical model of cross-borders transactions, from finding their main source in the 'United Nations Convention on Contracts for the International Sale of Goods' (CISG): a lex indeed, but incomplete and open to derogations, which does not hinder but supports the establishment of a global lex mercatoria. And with the contemporary crisis of European Private Law, the CISG gains ground, both as to the number of ratifying countries and to its ability to generate transnational case-law.

In Italy, the CISG celebrates its thirtieth birthday and time has come for a moment to 'pause and reflect'. Just to use a motto: 'little case-law but good'. Whatever reason lies behind such scarcity of case-law, its quality is surely high. After a few initial uncertainties, our court decisions appear mindful, compliant with autonomous interpretation and observant about foreign precedents. For instance, in dealing with international good faith, the formation of contract, the reasonable time for the notice of defects, our courts have substantially achieved the founding fathers' ideals: uniformity, flexibility, filtration, practicability.

But it is a commonplace belief that the importance of the CISG depends upon much more than its mere being the law in force. It plays the role of a model-legislation. It has been the source of inspiration for new regulations, in Europe and elsewhere – among all, the Directive 1999/44/EC and the new Directive 2019/771/EU on the sale of consumer goods and associated guarantees –it provided guidance for the so-called soft law, it served as a first draft of the Common European Sales Law (CESL) and, even before, of the Draft Common Frame of Reference (DCFR). In a nutshell, it has become a cultural paradigm in the scholarly debate and has found there its paramount ground for legitimacy. Here comes the understanding that studying Italian precedents on the CISG – which are after all national case-law – also means studying how our domestic system is capable of opening the door to universally recognised principles and values.

I. CISG as a Ratio Scripta for International Contracts and a Model Law for New Legislation

1. The 'Air-Bubble' of International Trade: Order Without Law?

It is well-known that international contracts tend to escape from any territorial normative 'habitat': usually companies design such detailed clauses that they marginalise the law applicable according to private international law rules; this

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latter thus remains at the background, called up to fill in the few gaps left by party autonomy. Most of the time, international contracts also regulate jurisdiction, sometimes selecting the forum of a third country, more often deferring disputes to an arbitrator based in a country where none of the parties has its place of business, which entails the choice either of such national law or of the law more frequently applied by the arbitrator. At that stage, both the legislation and the natural judge are casted out.

What becomes evident in such a supra-national dimension is the levelling between legislation and contracting, their being two halves of the same whole.[1] This creates a sort of air-bubble, hanging above and outside the domain of national systems and the rules imposed by public powers.[2] One can recognise there a new legal order, the order of contracts and international trade.[3]

In this *private Rechtsordnung* contract is the very paramount source. But it would be too simplistic to conceive such rules as the unique and creative outcome of a free meeting of minds, unanchored from previous practices.[4] To a considerable extent, contract is just a serial product of contracting, ie a drafting practice that mainly boasts technical legitimacy. Jurists access contracts' databases – is this a new *lex mercatoria*? –,[5] draw from them a useful sample, reshape it according to the client's needs and provide it to the enterprise, which might be strong enough to impose it on the counterpart, most likely with minor amendments following the negotiation.[6]

[1] P. Femia, 'Desire for Text: Bridling the Divisional Strategy of Contract' *Law and Contemporary Problems*, 151, 157 (2013).

[2] Is everything ready for an irreversible opting out of the legal system? Among others, L. Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' *The Journal of Legal Studies*, 115 (1992); in a very different perspective, R.C. Ellickson, *Order Without Law* (Cambridge, Mass: Harvard University Press, 1991), passim.

[3] The 'plurality of legal orders' has got a new lease on life: Santi Romano, *L'ordinamento giuridico* (Firenze: Sansoni, 1945), 55 (whose studies have been recently rediscovered by P. Grossi, *Ritorno al diritto* (Bari: Laterza, 2015), 8, 21, 34, 63, 77); see also, A. Musumeci, *Santi Romano un giurista tra due secoli*, in I. Birocchi and L. Loschiavo eds, *I giuristi e il fascino del regime (1918-1925)* (Roma: RomaTre-Press, 2015); W. Cesarini Sforza, *Il diritto dei privati* (Milano: Giuffrè, 1963), 21.

[4] C.M. Bianca, 'Condizioni generali di contratto, usi negoziali e principio di effettività' *Condizioni generali di contratto e tutela del contraente debole. Atti della Tavola rotonda tenuta presso l'Istituto di diritto privato dell'Università di Catania (17-18 maggio 1969)* (Milano: Giuffrè, 1970), 31, who denounces the artificiality of recalling the idea of contract clause where practice witnesses the formation of constant and uniform rules for typical contractual relationships.

[5] The forming of a *lex mercatoria* is a cyclic phenomenon: L. Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law', in I. Fletcher et al eds, *Foundations and Perspectives of International Trade Law* (London: Sweet & Maxwell, 2001), 3; in a critical perspective, P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 314; G. Alpa, 'Paolo Grossi, alla ricerca di un ordine giuridico' *Contratto e impresa*, 399 (2016); and S. Delle Monache, 'Giudice, *forum shopping*, *lex mercatoria*', in S. Mazzamuto and L. Nivarra eds, *Giurisprudenza per princìpi e autonomia privata* (Torino: Giappichelli, 2016), 267-268.

[6] For a recollection of some of the most recurring model clauses, above all Anglo-American,

There is also a sort of 'practice positivism': pre-drafted forms and boilerplate clauses become stratified in their use until they create a quasi-custom, which does not amount to a source of law only because it is not perceived as binding.[7] In this light, the meeting of minds is not much aimed at setting the terms, most of which have already been drafted by the stronger party, but rather at making the agreement binding.[8]

Yet, the framework partially changes for international sales, because, in that field, the tendency of international contracts towards self-sufficiency and their disconnection from their home country, has taken a peculiar turn. In fact, the subject is regulated by the 'United Nations Convention on Contracts for the International Sale of Goods', adopted in Vienna on 11 April 1980, hereafter referred to as the 'CISG' (the English acronym for the Convention).[9] As a source of uniform private international law, the Convention does not provide any useful criteria for identifying the applicable law. Instead, it sets forth material provisions aimed at regulating legal grounds and effects, at times through rules, at times through principles, all this in the spirit of flexibility and compromise. It looks far more like the modern soft law than like a code, but within its scope it governs sales contracts directly, except if the parties decided to avoid its application through an express or implied opting-out. In other words, CISG's text is somehow optional – the parties can avoid its application – but cannot be downgraded to usages or *quasi*/soft-law.[10]

When CISG applies, the sales contract remains national-laws-resistant but falls under a uniform regulation. Therefore, one could make the gross mistake of drawing the following equivalence: general sales law-Civil Code, consumer sales law-consumer code, international sales law-CISG. After all, international sales are governed by their own *lex*. Yet, as soon as one goes into further details, things prove different. Unlike European codes, the Convention is not only an optional text but is also limited in scope and full of open-formulas. Most of all, it is a 'fossilised' regulation, the expression of an exhausted source that has no chance to renew or produce new rules.

Therefore, given the genetic characteristics of the CISG, its spreading in the

see E. Ferrante, *Der Einfluss des US-amerikanischen Rechts auf das "kontinental"-europäische Vertragsrecht: US-amerikanische Vertragspraxis im DCFR?*, in F. Ebke et al eds, *Das deutsche Wirtschaftsrecht unter dem Einfluss des US-amerikanischen Rechts* (Frankfurt a. M.: Verlag Recht und Wirtschaft GmbH, 2011), 131.

[7] G. Alpa, 'La prassi, Le fonti del diritto italiano 2: Le fonti non scritte e l'interpretazione', in G. Alpa et al eds, *Trattato di diritto civile Sacco* (Torino: UTET, 1999), 97, 106.

[8] P. Femia, 'Autonomia e autolegislazione', in S. Mazzamuto and L. Nivarra eds, *Giurisprudenza per princìpi* n 5 above, 37.

[9] A. Flessner and T. Kader, 'CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf vom 11 April 1980' *Zeitschrift für Europäisches Privatrecht*, 347 (1995).

[10] M.J. Bonell, 'Introduction to the Convention', in C.M. Bianca and M.J. Bonell eds, *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milano: Giuffrè, 1987), 7.

trade practice does neither entail a return to territoriality, nor a new season of legalist positivism, if it is true that parties can easily do without it, that it requires an intense gap-filling process and that it does not seek to establish a set of new and alternative values. Certainly it ends up being the guideline for international trade, but this is just a 'factual' consequence of a spontaneous acceptance by its users.[11] Such spread of the CISG confirms – rather than denying it – the establishment of an autonomous order of international trade, where contracts now find a regulatory framework, not only in themselves, but also in the Vienna Convention, which further contributes to separate the contract from the *lex fori*.

What has just been outlined helps us guess how and why the Convention has been increasingly capable of stimulating intense and lively litigation. Traditional codes – and to a certain extent also sectoral ones, widespread in several countries – used to (and do) have the ambition of completeness, instrumental to a coherent organisation of private relationships; they skilfully balance rules and principles, but for this very reason tend to cover all circumstances, even through mandatory provisions. Their being anti-case-law is almost consequential. The myth of the judge as *bouche de la loi*, he who purely subsumes facts into legal patterns, originates from that pan-legalistic conception which has found its major expression in the codes.[12]

The Vienna Convention has nothing to do with that cultural universe and nothing that could approximate it to the model-code. It follows from a 'disordered' and fast growing case-law. This depends on several reasons: literal interpretation, here more than elsewhere, can be misleading or insufficient, even just for the shortness of the text, but above all for the absence of a unique underlying policy; moreover, matters dealt with by the Convention are few, and for the rest the judge serves as the glue between contracts and national laws, or he is supposed to extract from CISG principles, from time to time, useful gap-filling rules.[13] Well, for these and other reasons the Convention encourages, rather than discouraging, the interpretative activism of judges.

[11] Again, M.J. Bonell, 'Introduction to the Convention' n 10 above, 14-16.

[12] Even if, free from that conception, the 1700s idea of the judge as *bouche de la loi* – synecdoche for '*bouche du droit*' – well perceives the essence of *jus dicere*: see, among others, L. Lombardi Vallauri, *Saggio sul diritto giurisprudenziale* (Milano: Giuffrè, 1967), 205; and G. Perlingieri, *Portalis e i 'miti' della certezza del diritto e della c.d. 'crisi' della fattispecie* (Napoli: Edizioni Scientifiche Italiane, 2018), 27, 41.

[13] It applies here, *a fortiori*, what has been observed by a prominent expert of international sales law: '(…) la dottrina privatistica assume ad oggetto della sua analisi le proposizioni della legge scritta mentre gli operatori del diritto conoscono le norme filtrate nell'esperienza dell'ordinamento in azione: conoscono cioè le norme nel significato e nel contenuto che esse concretamente acquistano nella vita di relazione'; C.M. Bianca, 'Il principio di effettività come fondamento della norma di diritto positivo' *Estudios de derecho civil en honor del prof. Castan Tobeñas* (Pamplona: Ediciones Universidad de Navarra, 1969), II, 63-64.

2. Autonomous Interpretation, 'Cross-Border' Precedents and Living Constitution of the CISG

However, what strikes the observer's eye is not much the volume of CISG case-law, remarkable as it may be, but rather its quality: in applying the Convention the judge is called upon to promote its uniformity, in compliance with its supra-national nature, as required by Art 7, para 1, the CISG and the principle of autonomous interpretation. He shall therefore break free from domestic bias and create norms capable of surviving in the world of international trade, rather than in their own territorial dimension. In other words, he shall avoid what Honnold called 'homeward trend',[14] ie the bias to which he is exposed as a part of a local system governed by its own rules and values.[15]

Here is an example of how the Convention contributes to the 'independence' of international sales law: courts, which are after all national, should aim to internationally-oriented interpretations, and the main way for reaching this goal is to implement and reproduce precedents that have already engaged their battle against homeward trend. Contracts are cross-border and circulate across legal systems, and so does case-law; in other words, also precedents are meant for circulation and interaction, regardless of their home jurisdiction. Thus, for an Italian judge it is normal to quote the German BGH, and he does not neglect to mention foreign decisions, whether by Supreme Courts or lower courts. Even US or Chinese case-law is now opening to dialogue, and 'Western' judgments have not failed to reach Arabic countries. Certainly it is not an *èden*, but some kind of judicial egalitarianism is emerging, capable of overcoming hierarchies and barriers linked to the national systems, in the name of interpretative autonomy.

Actually, unlike European law and the Strasbourg Convention, whose disputes are respectively deferred to the EU Court of Justice and to the ECHR, the CISG is not provided with a supreme judge having (at least partially) exclusive jurisdiction.[16] The creation of conventional provisions is left to the single judges of the contracting states (and also to the judges of non-contracting ones, just

[14] J. Honnold, *Documentary History of the Uniform Law for International Sales* (Deventer and Boston: Kluwer Law & Taxation Publishers, 1989), passim; before: F.A. Mann, 'The Interpretation of Uniform Statutes' *Law Quarterly Review,* 278 (1946); W.F. Bayer, 'Auslegung und Ergänzung vereinheitlichter Normen durch staatliche Gerichte' *Rabels Zeitschrift,* 603 (1955); many papers collected in *Rapport sur les divergences d'interprétation du droit uniform* (Roma: Unidroit, 1959); J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen: Mohr Siebeck, 1964), 345; J.W.F. Sundberg, 'A Uniform Interpretation of Uniform Law' *Scandinavian Studies in Law*, 219 (1966); H.Vv. Hülsen, 'Sinn und Methode der Rechtsvergleichung, insbesondere bei der Ermittlung übernationalen Zivilrechts' *Juristen Zeitung*, 629 (1967); R.H. Graveson, 'The International Unification of Law' *American Journal of Comparative Law*, 4, 12 (1968); J. Kropholler, *Internationales Einheitsrecht* (Tübingen: Mohr Siebeck, 1975), 258.

[15] M. Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft* (Berlin: De Gruyter, 1999), 483.

[16] And this was not disliked by the first commentators: M.J. Bonell, 'Introduction to the Convention' n 10 above, 19-20.

because the Convention applies also when the addressed court belongs to a third country). Such liquid and spread nomophylaky represents somehow a unique feature, but it seems effective, to the extent that it makes the law sufficiently knowable. It looks as if the absence of a supreme judge encourages the recourse to 'active' comparison – in the meaning of a comparative method applied to cases[17] – and the interpretative self-sufficiency, far from erasing the past, becomes a synthesis and accomplishment of national experiences.

On the contrary, there is no evidence of competitiveness or antagonism among supreme judges, maybe because the dialogue among courts is not restricted to the highest jurisdictions or more simply because the CISG has no supreme court;[18] but, if one pushes the reasoning to its extreme consequences, in this context there is no rigid (or semi-rigid) institutional framework comparable to the European one, not only provided with a supreme court, but also with a complete set of political and judicial institutions.[19]

Therefore, as a counterbalance to such fossilised rules, where the exhaustion of the source seems to mortify the *lex*, stands a judicial polycentrism that vitalises and brightens it, up to the establishment of an authentic living constitution. In the light of a petrified and scarcely forward-looking source, case-law becomes more than ever *viva vox legis*.[20] But a significant contribution to the birth of such a living constitution comes from an equally transnational scholarship, almost an interpreting community that predicts and inspires case-law.[21]

3. Can CISG Overcome the Crisis of European Private Law?

Yet, before dealing with our 'thirty years of CISG' and our 'house style' in the interpretation of the Treaty, a quick remark is worth on the position CISG has achieved among the other sources of private international law and private law *tout court*.[22]

Now, CISG does have its drawbacks, it may not reach the goal of a uniform

[17] G. Alpa, 'Comparazione e diritto straniero nella giurisprudenza della Corte di Giustizia dell'Unione europea' *Contratto e impresa*, 879 (2016).

[18] P.G. Monateri, 'Internazionalizzazione delle Corti e salvaguardia dell'ordine costituzionale', in G. Iudica and G. Alpa eds, *Costituzione europea e interpretazione della Costituzione italiana* (Napoli: Edizioni Scientifiche Italiane, 2006), 213.

[19] J. Smits, 'The Future of Contract Law in Europe', in C. Twigg-Flesner ed, *Research Handbook on EU Consumer and Contract Law* (Cheltenham: Elgar, 2016), 549, 554.

[20] In the words of T. Ascarelli, 'Antigone e Porzia', in Id ed, *Problemi giuridici* (Milano: Giuffrè, 1959), I, 14, the relationship between legislation and interpretation is not what stands between reality and a mirror, but what stands between a seed and a tree; so that interpretation is law creation, but it has the peculiarity of being a continuum with its object.

[21] Among others, A. Procida Mirabelli di Lauro, 'Quando la dottrina si fa giurisprudenza', in S. Bagni et al eds, *Giureconsulti e giudici. L'influsso dei professori sulle sentenze, Le prassi delle Corti e le teorie degli studiosi* (Torino: Giappichelli, 2016), I, 113; and G. Amoroso, *La formazione del precedente nella giurisprudenza e l'apporto della dottrina*, ibid 178.

[22] E. Ferrante, *La vendita nell'unità del sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2018), 13.

international sales law, so dear to Rabel,[23] but it is an ascending parabola: member states are increasing in number and so are court decisions; scholars' interest in them is growing. In other words, both theory and practice cannot ignore CISG as a crucial regulating factor of international trade. And the most decisive evidence comes from the fact that it gradually acquired the role of a model-legislation. All the harmonisation attempts undertaken after 1980 have looked at the CISG as a natural and almost inevitable landmark – and that is the utmost form of legitimacy legislation could ever achieve, because it is independent from its practical success, from its effectiveness as the law in action.[24] Here it is: up to now, the paradigmatic meaning of CISG overcomes or precedes its applicative meaning. Perhaps, it is exaggerated to claim that every form of legislation is an experiment, but it is not so excessive to claim that every legislation, including the CISG, has a strong experimental component;[25] and here the experiment has been successful.

In Europe and Italy the CISG is likely to gain more and more space and supporters, along with the flaring up of the European private law crisis.[26] It is from the very CISG that the EU legislator has drawn Directive 1999/44/UE on warranties in consumer sales law[27] and later the draft *on a Common European*

[23] E. Rabel, *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung* (Tübingen-Berlin: De Gruyter, 1936), passim.

[24] Corte di Cassazione 5 October 2009 no 21191, *Giustizia civile*, I, 60 (2010), *Responsabilità civile e previdenza*, 453 (2010). The Vienna Convention is intended as a set of provisions used by the communitarian legislator himself as a model regulation, given its broad sharing at an international level and its capability to offer autonomous and uniform interpretative solutions.

[25] R. David, 'The Methods of Unification' *American Journal of Comparative Law* (1968), 13, 27; more recently P. Perlingieri, 'Quella di Hugh Collins sul "codice civile europeo" non è la via da seguire' *Rassegna di diritto civile*, 1208, 1215, 1220 (2014).

[26] P. Dupichot, 'Vom Brexit zum Europäischen Wirtschaftsgesetzbuch' *Zeitschrift für Europäisches Privatrecht*, 245 (2017); R. Schulze, 'Towards a European Business Code?' *Contratto e impresa/Europa*, 413 (2016).

[27] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, in OJ L 171, 7 July 1999. Regarding the relationship between this directive and the current status of European private law, see T. Zerres, *Die Bedeutung der Verbrauchsgüterkaufrichtlinie für die Europäisierung des Vertragsrechts* (München: Sellier, 2007), passim. The debate has been intense especially in Germany: U. Huber, *Das geplante Recht der Leistungsstörungen*, in W. Ernst and R. Zimmermann eds, *Zivilrechtswissenschaft und Schuldrechtsreform* (Tübingen: Mohr Siebeck, 2001), 31; B. Gsell, 'Kaufrechtsrichtlinie und Schuldrechtsmodernisierung' *Juristen Zeitung*, 65 (2001); H. Honsell, 'Die EU-Richtlinie über den Verbrauchsgüterkauf und ihre Umsetzung ins BGB' ibid 278 (2001); S. Grundmann, 'Verbraucherrecht, Unternehmensrecht, Privatrecht – warum sind sich UN-Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?' *Archiv für die civilistische Praxis*, 40 (2002); P. Westermann, 'Das neue Kaufrecht' *Neue Juristische Wochenschrift*, 241 (2002); I. Saenger, 'I fondamenti della nuova vendita tedesca' *Contratto e impresa/Europa*, 834 (2004); but also elsewhere, S.A. Kruisinga, 'What do consumer and commercial sales law have in common? A comparison of EC Directive on consumer sales law and the UN Convention on contracts of international sale of goods' *European Review of Private Law*, 177 (2001); D. Corapi, 'La direttiva 99/44/CE e la convenzione di Vienna sulla vendita internazionale: verso un nuovo diritto comune della vendita?' *Europa e diritto privato*, 655 (2002).

Sales Law (CESL).[28] Yet, the first, still inspired by the idea of minimum harmonisation, has given rise to divergent and fairly ineffective implementations by national laws, thus leading to poor litigation, above all in Italy. The other one – after endless debates,[29] and despite its being a serious attempt of founding a common European sales law[30] – at first has fallen into the Council's swamp of anti-Europeism, then has been withdrawn and replaced by temporary drafts of minor significance.[31] Recently CISG has also inspired the new Directive

[28] COM (2011) 635 def., 11 October 2011, also in *Contratto impresa/Europa*, 847 (2011); the CESL undertook the ordinary legislative procedure and the EU Parlament, called up under Art 294, para 3, Treaty FUE, adopted the ‚Legislative Resolution (…) of 26 February 2014 on the EU Parlament and Council's draft on a common European sales law (COM [2011] 0635 – C7-0329/2011 – 2011/0284 [COD])', classified as 'P7_TA-PROV(2014)0159', with the 264 amendments to the draft sent by the EU Commission (See on this point, P. Svoboda, 'The Common European Sales Law – Will the Phoenix rise from the Ashes again?' *Zeitschrift für Europäisches Privatrecht*, 689 (2015); H.P. Mayer and J. Lindemann, 'Zu den aktuellen Entwicklungen um das Gemeinsame Europäische Kaufrecht auf EU-Ebene', ibid 1 (2014); and S. Groß, 'Kaufrecht: Zustimmung des Parlaments zum Kommissionsvorschlag für ein Europäisches Kaufrecht' *Europäische Zeitschrift für Wirtschaftsrecht*, 204 (2014). About the CESL, more generally: the hole no 1/2012 ('*Numero speciale*') of *Contratto e impresa/Europa*; ibid, the two 'dibattiti' in no 2/2013; the *Special Issue 2013* of *The Common Market Law Review*; and then, P. Sirena, 'Il contratto alieno del diritto comune europeo della vendita' *La Nuova giurisprudenza civile commentata*, II, 608 (2013); R. Schulze, *Common European Sales Law (CESL). Commentary* (Baden-Baden: Nomos, 2012); M. Schmidt-Kessel, *Ein einheitliches europäisches Kaufrecht?* (München: Sellier, 2012); B. Gsell, *Der Verordnungsentwurf für ein Gemeinsames Europäisches Kaufrecht und die Problematik seiner Lücken*, in O. Remien et al eds, *Gemeinsames Europäisches Kaufrecht für die EU* (München: Beck, 2012), 145; G. Alpa, G. Conte, U. Perfetti and M. Graf v. Westphalen, *The Proposed Common European Sales Law – The Lawyers' View* (München: Sellier, 2013); G. D'Amico, 'Direttiva sui diritti dei consumatori e Regolamento sul Diritto comune europeo della vendita: quale strategia dell'Unione europea in materia di armonizzazione?' *Contratti*, 611 (2012); P. Stanzione, 'Il regolamento di diritto comune europeo della vendita', ibid 624; G. Pongelli, 'La proposta di regolamento sulla vendita nel processo di creazione del diritto privato europeo' *La nuova giurisprudenza civile commentata*, II, 665 (2012); G. Donadio, 'Diritto contrattuale comunitario e "*optional instrument*": una valutazione preventiva' *Contratto e impresa/Europa*, 649 (2011); A. Rocco, 'L'istituzione di uno strumento opzionale di diritto contrattuale europeo' *Contratto e impresa/Europa*, 798 (2011); F.P. Patti, 'Le clausole abusive e l'"*optional instrument*" nel percorso dell'armonizzazione in Europa' *Contratto e impresa/Europa*, 662 (2011).

[29] Among others, G. Alpa, 'Towards a European Contract Law' *Contratto e impresa/Europa*, 124 (2012); and R. Zimmermann, 'Diritto privato europeo: "Smarrimenti, disordini" ' ibid 33 (2012).

[30] F. Galgano, 'Dai Princìpi Unidroit al Regolamento europeo sulla vendita' *Contratto e impresa/Europa*, 5-6 (2012); see also, O. Lando, 'CESL or CISG? Should the proposed EU Regulation on a Common European Sales Law (CESL) replace the United Nations Convention on International Sales (CISG)?', in O. Remien et al eds, *Gemeinsames Europäisches* n 28 above, 15 et seq; U. Magnus, 'CESL vs CISG', in U. Magnus ed, *CISG* vs *Regional Sales Law Unification* (München: Sellier, 2012), 97.

[31] See the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2015. A New Start', COM (2014) 910 final, 16 December 2014, Annex II, no 60. A failure for the very proposing institution: R. Canavan, *Contracts of sale*, in C. Twigg-Flesner ed, *Research Handbook* n 19 above, 281.

2019/771/EU.[32]

In this *impasse*, CISG is 'little' but it is still 'something'. Far from loosing ground, it earns it everywhere, a stronghold of a harmonising idea that, with no imperialism or authoritarianism, believes in a uniform regulation for international contract law.[33] And, should a re-codification of *lex mercatoria* become appealing again, it remains the model-legislation.[34]

It is in light of such a temporary assessment and uncertain predictions that the following *résumé*, which will look at the 'Italian difference' in handling the CISG, must be read.

II. The Beginnings: Inter-Temporal Issues, Methodology and National Bias

1. Prehistoric CISG

The CISG was signed by the Italian Republic on 30 September 1981, ratified with legge no 11 December 1988 no 765 and, in accordance with Art 99, para 1, CISG, entered into force on 1 January 1988 (the same day as in the other eight countries that had first adopted it).[35] Given that the ratification took place

[32] Directive 2019/771/EU of the European Parliament and of the Council of 20 May 2019 on certain aspects of the sale of consumer goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, in OJ L 136, 22 May 2019 (see E. Ferrante, 'Primi appunti sulla nuova dir. 19/771/UE in materia di vendita al consumo', in A. D'Angelo et V. Roppo eds, *Annuario del contratto 2018* (Torino: Giappichelli, 2019), forthcoming). On this general topic see R. Schulze, 'Europäisches Privatrecht im Gegenwind' *Zeitschrift für Europäisches Privatrecht*, 691 (2014). The times of eirenic and apologetic are far away: V. Roppo, *Il contratto del duemila* (Torino: Giappichelli, 2011), 35; before, R.C. Van Caenegem, *European Law in the Past and in the Future* (Cambridge, UK: Cambridge University Press, 2002), 36-37; T.M.J. Möllers, *Die Rolle des Rechts im Rahmen der europäischen Integration* (Tübingen: Mohr Siebeck, 1999), 47.

[33] Among others, U. Magnus, 'UN-Kaufrecht – Konsolidierung und Ausbau nach innen und gleichzeitig Erodierung von außen? Aktuelles zum CISG' *Zeitschrift für Europäisches Privatrecht*, 178 (2015); S. Patti, 'Relazione di sintesi' *Contratto e impresa/Europa*, 672 (2013); R. Schulze, 'The CESL's Innovative Features – a Brief Overview', ibid 485 (2013); I. Caggiano, 'L'uniformazione del diritto contrattuale europeo. *American and European Perspectives*', ibid 13 (2013); M. Loos and H. Schelhaas, 'Commercial Sales: The Common European Sales Law Compared to the Vienna Sales Convention' *European Review of Private Law*, 105 (2013); R. Peleggi, 'Il futuro diritto comune europeo della vendita ('CESL'): reale competitore o (mero) doppione della Convenzione di Vienna?' *Diritto del commercio internazionale*, 983 (2013); already before, R. Zimmermann, 'Lo *jus commune* e i Princìpi di diritto europeo dei contratti: rivisitazione moderna di un'antica idea' *Contratto e impresa/Europa*, 127-128 (2009).

[34] L. DiMatteo, 'How Innovative is the Common European Sales Law? Using the CISG as a Benchmark' *Contratto e impresa/Europa*, 513 (2013); and U. Magnus, 'UN-Kaufrecht – Aktuelles zum CISG' *Zeitschrift für Europäisches Privatrecht*, 140 (2017).

[35] That is to say Argentina, China, Egypt, France, Hungary, Lesotho, Syria and the U.S.A.; up until 15 July 2018 the CISG has been adopted by eightynine countries; the complete list of the contracting States is available at https://tinyurl.com/585fw5 (last visited 28 May 2019). See F. Ferrari, *The CISG and its Impact on National Legal Systems* (München: Sellier, 2008);

without reservations, the Convention is entirely applicable in Italian law.[36]

As Italy was already a party to the two Hague Conventions dating back to 1 July 1964 – one concerning a 'Uniform Law on the Formation of Contracts for the International Sales of Goods' (LUFC), the other relating to a 'Uniform Law on the International Sales of Goods' (LUVI or ULIS)[37] – the CISG could not come into effect until the denunciations of both these Conventions had themselves become effective (as happened on 31 December 1987), in accordance with Art 99, paras 3 and 6, CISG.

Therefore, unsurprisingly, the first court decisions are about inter-temporal issues, linked with the transition from the Hague Conventions to the CISG (the first two applicable until 31 December 1987, the latter since 1 January 1988) or, broadly speaking, with the chronological requirements under Art 1, para 1, CISG.[38] Such issues are only relevant retrospectively, as they are unlikely to be raised after almost thirty years from the first enactment of the Convention.

Nevertheless, there is one case which is worth a brief comment: *Nuova Fucinati* v *Fondmetall International*, decided by the Tribunal of Monza.[39] As far as the applicability of the Convention, in accordance with Art 1 CISG, is concerned, the Tribunal highlighted two main aspects.

First of all, the buyer's place of business was in Sweden, a contracting State

Id, *Quo vadis CISG?* (München: Sellier, 2005); O. Lando, 'CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law' *American Journal of Comparative Law*, 379 (2005); M.J. Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law', ibid 1 (2008); and two important collective books, ie L. DiMatteo et al eds, *International Sales Law* (Baden-Baden: Nomos, 2016); L. DiMatteo, *International Sales Law* (New York: Cambridge University Press, 2014).

[36] See, among others, M. Torsello, 'Reservations to international uniform commercial law conventions' *Uniform Law Review*, 35 (2000).

[37] Both Conventions were ratified by Italy with legge 21 June 1971 no 816, and entered into force on 1 January 1972; only nine countries decided to ratify them and put them into effect in their legal system (besides Italy, Belgium, Zambia, Israel, Luxemburg, the Netherlands, Germany and San Marino), so that diplomatic negotiations were re-opened soon after their adoption: see N. Boschiero, 'Le convenzioni internazionali in tema di vendita', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1987), XXI, 262; previously, E.V. Caemmerer, 'Die Haager Konferenz über die internationale Vereinheitlichung des Kaufrechts vom 2 bis 25 April 1964' *Rabels Zeitschrift*, 101 (1965); G. Longo, 'La Convenzione dell'Aja sulla formazione dei contratti di vendita internazionale, banco di prova di un incontro fra ordinamenti "romanzi" e "common law". Un nuovo progetto di studi' *Rivista di diritto commerciale*, I, 96 (1966); G. Bernini, 'Le Convenzioni dell'Aja del 1964 sulla formazione e disciplina del contratto di vendita internazionale di beni mobili' *Rivista di diritto civile*, II, 626 (1969).

[38] Corte di Cassazione 24 October 1988 no 5739, *Foro italiano*, I, 2878 (1989), *Giustizia civile*, I, 1888 (1989), *Uniform Law Review*, 857 (1989).

[39] Tribunale di Monza 14 January 1993, *Giurisprudenza italiana*, 149 (1994), *Foro italiano*, I, 916 (1994), *I Contratti*, 580 (1993), *Rivista di diritto internazionale privato e processuale*, 367 (1994); see on this judgement, F. Ferrari, 'Diritto uniforme della vendita internazionale: questioni di applicabilità e diritto internazionale privato' *Rivista di diritto civile*, II, 669 (1995); and V. Maglio, 'I criteri di applicazione della convenzione di Vienna sulla vendita internazionale: una sentenza italiana non persuasiva e l'insegnamento della giurisprudenza tedesca' *Contratto e impresa/ Europa*, 29 (1996).

in which the CISG would enter into force on 1 January 1989, that is to say, after the contract proposal was made as per Art 100 CISG[40] (instead, the place of business of the seller was in Italy, where the CISG had been in force since 1 January 1988). Given that a State, in order to be qualified as 'contracting', must not only ratify but also put the Convention into force, at that time Sweden did not meet the required conditions.

Secondly, the parties expressly agreed upon the choice of Italian law, which would prevent the applicability of the CISG, also in accordance with Art 1, para 1, letter *b*), because the conflict of laws provisions do not apply when the applicable law is the result of an agreement. That said, the Tribunal decided on the non-applicability of the CISG.

However, the Tribunal failed to consider that, if the parties make a valid choice as to the law of a contracting State where the CISG has already entered into force at the time of the proposal, (as required by Art 100 CISG), there is no reason why the applicability of the Convention should be excluded under Art 1, para 1, letter *b*). In fact, the *professio juris*, if admissible, is not alternative to the rules on the conflict of laws but is, rather, the criterion which determines the applicable law.[41] Not only does it not prevent the application of Art 1, para 1, letter *b*), CISG,[42] but it also clarifies the meaning of that provision, unless we believe – but this was not the Tribunal's view –[43] that the CISG should not be qualified as 'Italian law' and that when the parties choose 'Italian law' they mean to exclude the CISG as per Art 6.

This conclusion must be rejected in principle – the CISG is indeed 'Italian

[40] S. Carbone, 'Art 100' *Nuove leggi civili commentate*, 349 (1989).

[41] In that sense both Arts 2-3 of the Hague Convention of 15 June 1955 ('on the applicable law to the international sale of goods'), which is actually in force, and Art 3 European Parliament and Council Regulation (EC) 2008/593 of 17 June 2008 on the law applicable to contractual obligations (Rome I) (2008) OJ L177/6, which reproduces Art 3 Rome Convention of 19 June 1980 ('on the applicable law to contractual obligations') are applicable; about these texts also, below, para 2; on *professio juris* as the main linking criterion in the recent international and EU legislation see, among others, S. Sendmeyer, 'The Freedom of Choice in European Private International Law. An Analysis of Party Autonomy in the Rome I and Rome II Regulation' *Contratto e impresa/Europa*, 792 (2009); and more recently M.P. Weller, N. Benz and C. Thomale, 'Rechtsgeschäftsähnliche Parteiautonomie' *Zeitschrift für Europäisches Privatrecht*, 250 (2017).

[42] In the same direction OLG Düsseldorf 8 January 1993, *Recht der internationalen Wirtschaft*, 325 (1993); OLG Koblenz 17 September 1993, *Recht der internationalen Wirtschaft*, 934 (1993); more recently BGH 28 May 2014, *Internationales Handelsrecht*, 184 (2014). On this topic see G. Sacerdoti, 'I criteri di applicazione della Convenzione di Vienna sulla vendita internazionale: diritto uniforme, diritto internazionale privato e autonomia dei contraenti' *Rivista trimestrale di diritto e procedura civile*, 733 (1990).

[43] The judgment states: 'Now it is true that the law applicable to the contract is Italian law, by virtue of the explicit provision inserted in the order confirmation ('law: Italian law to apply'); and it is also true that, because the Vienna Convention at this time was in force in the national system, it must be considered a law like any other law of this State'. In the same direction, Chamber of National and International Arbitration of Milan 28 September 2001, available at cisgw3.law.pace.edu/cases/010928i3.html (last visited 28 May 2019).

law' and choosing Italian law is equivalent to choosing the CISG –[44] but in some cases a *professio juris*, although in favour of the law of a certain contracting State, could nevertheless be interpreted as an opt-out clause (also in accordance with Art 8 CISG): what should the conclusion be, for instance, when the parties declare that they choose the 'Italian Civil Code'[45] or 'Italian law exclusively',[46] rather than simply 'Italian law'? Could it still be considered as a confirmation of their intention to apply the CISG? Would it not rather represent an exclusion clause?[47]

Aprioristic answers in one or the other direction would sound ideological. The equivalence between national law and the Convention, though formally correct, might not meet the parties' will, which has been, after all, expressed in a *professio juris*; and even when such clause is embodied in a standard form, its

[44] Among others, LG Landshut 5 April 1995, available at https://tinyurl.com/yygr5qvv (English translation at https://tinyurl.com/y6lve9xo) (last visited 28 May 2019); OLG München 9 July 1997, available at https://tinyurl.com/y3xfbmbb (last visited 28 May 2019) overrulling the previous LG München 29 May 1995, available at https://tinyurl.com/y3tfyf64 (English translation at https://tinyurl.com/y5gomrud) (last visited 28 May 2019); OLG Hamburg 5 October 1998, available at https://tinyurl.com/y5nbl8pc (English translation at https://tinyurl.com/y4hnlb7m) (last visited 28 May 2019); BGH 25 November 1998, available at https://tinyurl.com/y2uxtorp (English translation, abstracts and comments available at https://tinyurl.com/y6duxbzr) (last visited 28 May 2019); OLG Frankfurt 30 August 2000, *Recht der internationalen Wirtschaft*, 383-384 (2001), also available at https://tinyurl.com/y4caldgt (last visited 28 May 2019); BGH 16 September 2015, *Internationales Handelsrecht*, 25 (2016). *Contra* F. Ferrari, 'La vendita internazionale', in F. Galgano ed, *Trattato di diritto commerciale e di diritto pubblico dell'economia* (Padova: CEDAM, 2nd ed, 2006), 214.

[45] OLG Frankfurt 30 August 2000, n 44 above.

[46] This latter expression used by the contracting parties in the case decided by the Florence Court of Arbitration 19 April 1994, *Diritto del commercio internazionale*, 861 (1994), where the applicability of the CISG has been excluded by the dissenting opinion of an arbitrator: certainly the expression is not so appropriate from the point of view of editing and can raise more than one doubt, but is not choosing 'Italian law exclusively' equivalent to choosing simply 'Italian law'? Yet, we could not admit without a doubt that two parties, who declare to choose Italian law 'exclusively', are willing to apply the CISG. Under Tribunale di Forlì 6 March 2012, available (only in English translation) at https://tinyurl.com/yxe5dvph (last visited 28 May 2019), '(…) to show that the parties wanted to exclude the Convention in favor of Italian domestic law, an express choice in favor of the "Italian Civil Code", the "Italian domestic law" or the "purely domestic law" would have been necessary'. Still, the question remains unsolved.

[47] In this latter sense, though *obiter*, Tribunale di Padova 11 January 2005, *Rivista di diritto internazionale privato e processuale*, 791 (2005), according to which the choice of applying the regulations of the International Chamber of Commerce in Paris would not mean an implied exclusion of the Convention, given that 'the reference to the laws and regulations of the International Chamber of Commerce of Paris cannot be considered a 'choice of law' according to the rules of international private law that – at least under the Italian perspective – do not admit the selection of a non-national set of rules (…). Which is to say that Art 7 of the contract is not a choice of law under the rules of international private law, and so it is not capable of having the selected rules prevail over the mandatory rules otherwise applicable (the same would have happened if the parties opted for the *lex mercatoria*, the Unidroit Principles or for the same UN Convention in the event it would have not been applicable). For the same reasons, the parties' choice does not amount to an implied exclusion of the Convention'; see F. Ferrari, 'La vendita internazionale' n 11 above, 214.

incorporation and interpretation shall be carefully assessed.

It is equally worth reminding that, in the case at issue, the solution to the problem must be found in the law applicable according to uniform private international law, and not in Art 8 CISG.[48] In fact, the Convention does allow an opting-out (Art 6 CISG), but provides no express or implied rules on its formal or substantive requirements. If the opting-out aims at excluding the CISG, it would be illogical to defer its regulation to this latter source. The choice expressed through it cannot fall within the formation of contract or the recognition of essential requirements or the other matters covered by the Convention.

Now, if the parties select Italian law, like in *Nuova Fucinati* v *Fondmetall*, the possible exclusionary meaning of that choice will be assessed in light of Art 1362 et seq Italian Civil Code. But, if the exclusionary clause, under the form of a *professio iuris* in favour of Italian law, is embodied in a set of fixed terms, the judge must pre-emptively reconstruct its meaning and only then investigate its enforceability (according to the law applicable law or, as seems preferable, to the Convention, given that the matter falls within the formation of contract).[49] In that context a paramount role will be played by the *contra proferentem* rule under Art 1370 Italian Civil Code , a provision capable of drawing a renewed attention both on scholarly debate and on case-law applications.[50]

2. Italian Language and Mentality

In this first phase of application of the CISG another defect can be found out, later gradually overcome: the judges, despite being aware that these rules are alternative and prevailing over domestic ones, nevertheless tend to base their decisions on the civil code or national law in general.[51] It seems like earlier

[48] *Contra* M.J. Bonell, 'Art 6', in C.M. Bianca and M.J. Bonell eds, *Commentary* n 10 above, 55-56; U. Magnus, 'UN-Kaufrecht – Aktuelles zum CISG' n 34 above, 147 (2017).

[49] Among others, OLG Hamm 19 May 2015, *Internationales Handelsrecht*, 30 (2016); *contra* U. Magnus, 'UN-Kaufrecht – Aktuelles zum CISG' n 34 above, 154.

[50] E. Ferrante, 'Transparency of Standard Terms as a Fundamental Right of European Law', in B. Heiderhoff et al eds, *EU-Grundrechte und Privatrecht* (Baden-Baden: Nomos, 2016), 115.

[51] Pretura Tribunale di Parma-Fidenza 24 November 1989, *Diritto del commercio internazionale*, 441 (1995), even if the translation tends to hide the problem: 'We focus our attention on the seller's partial performance (see Art 1455 Italian Civil Code). The seller's non-performance is a fundamental breach of contract according to Art 49, para 1, letter *a*) of legge 27 December 1995 no 765 (legge no 765/1995 is the law approving the CISG as the domestic law of Italy); exactly the same happened in Tribunale di Padova 11 January 2005 n 47 above; and in Corte di Cassazione 9 June 1995 no 6499, *Giustizia civile*, I, 2065 (1996): 'The issues converge in this sense under either the criteria followed in the application of the rules of the Civil code or the criteria expounded in Art 3 of the Convention on Contracts for the International Sale of Goods'; Pretura Tribunale di Torino 30 January 1997, *Giurisprudenza italiana*, 982 (1998), in which the Court, after claiming the applicability of the CISG, in dealing with the burden of proof, bases its arguments *tout court* on Art 2697 Italian Civil Code, without even asking itself if that issue is included in the substantive scope of the Convention; subsequent case-law affirmed this: see for example BGH 9 January 2002, *Neue Juristische Wochenschrift*, 1651 (2002), *Recht der internationalen Wirtschaft*, 396 (2002), *Wertpapier Mitteilungen*, 1022

decisions were perceived as incomplete or weaker without a few references to 'traditional' Italian law, even if the applicability of the CISG was unquestioned. It is, however, normal that this trend towards eclecticism has lost its appeal: most of all the pressure of EU law, being the main driving factor in European private law,[52] has forced also Italian judges to be receptive to transnational norms, principles and values, and to be more confident in making reference to case-law. An increasingly conscious and firm application of uniform international law has followed: recent judgments have no longer felt the need to write *obiters* based on the Italian Civil Code or other domestic provisions when CISG applies.[53]

Methodology is worth a further comment: since the first decisions, courts have tended to use, instead of the original text itself, Italian translations, which are undoubtedly not equally authentic, as specified under Art 101, para 2, CISG.[54] Given that Italian is not one of the official languages of the CISG – unlike Arabic, Chinese, English, French, Russian and Spanish – to refer to an informal translation as a ground for the applicability of the Convention, not only implies a violation of Art 101, para 2, CISG, but also makes the aims under Art 7, para 1, CISG more difficult to achieve. And that means undermining autonomous interpretation.[55] In fact, if multilingualism is already in itself a critical factor for a coherent application – and European jurists know the difficulties of 'trans-' or 'meta'-linguistics in EU law very well[56] – to interpret a text in its non-authentic version is misleading. Strictly speaking, it would mean the application of a text which has no legal value. Even after separating the official languages from mere translations, we would anyway have to take into account that in practice the English version has prevailed, being considered as 'the' text *par excellence* of the CISG. There is no reason to

(2002), *Zeitschrift für Insolvenzpraxis*, 672 (2002); see P. Perales Viscasillas, 'Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002' *Vindobona Journal for International Commercial Law and Arbitration*, 217 (2002).

[52] M. Bin, 'Per un dialogo con il futuro legislatore dell'attuazione: ripensare l'intera disciplina della non conformità dei beni nella vendita alla luce della direttiva comunitaria' *Contratto e impresa/Europa*, 403 (2000).

[53] A different approach can be noted since Corte di Appello di Milano 11 December 1998, *Rivista di diritto internazionale privato e processuale*, 112 (1999); though a certain eclecticism emerges then in Corte di Cassazione 14 December 1999 no 895, *Giustizia civile*, I, 2333 (2000), case-note by F. Ferrari; as well as in the recent Tribunale di Modena 19 February 2014, available at https://tinyurl.com/y28rz9gp (last visited 28 May 2019), in particular para 7; yet crystal-clear, for the prevailing approach, Chamber of National and International Arbitration of Milan 30 July 2007, available with *abstract* at https://tinyurl.com/yxjdbfjs (last visited 28 May 2019).

[54] This is even true for recent judgements, such as Trib. Reggio Emilia 12 aprile 2011, available in English translation at https://tinyurl.com/y5xd9b3w (last visited 28 May 2019). About this problem, C.M. Germain, 'Language and Translation Issues', in L. DiMatteo et al eds, *International Sales Law* n 35 above, 21- 30; Id, 'Reducing Legal Babelism', in L. DiMatteo ed, *International Sales Law*, n 35 above, 52-53.

[55] See also below, para 5; and Tribunale di Padova 11 January 2005, n 47 above.

[56] Academics have not always paid attention to such crucial issues: S.M. Carbone, 'Interpretazione e integrazione degli strumenti di *hard* e *soft law* relativi al commercio internazionale' *Contratto e impresa/Europa*, 870 (2012).

use versions other than the English one, even though they are official and better suit non-English speaking parties. Conversely, the use of non-authentic versions amounts to a violation of the Convention.

III. Sources of International Sales Law: Conflict and Uniform Substantive Rules

1. Uniform Law First

While the denunciation of the two Hague Conventions of 1964 (LUFC and LUVI) was necessary for the CISG to become effective, such denunciation was neither required by the CISG, nor made by Italy with regard to the Hague Convention of 15 June 1955 'on the law applicable to the international sales of goods'.[57] This latter, despite its practical failure,[58] is undoubtedly in force[59] and prevails over Regulation EC 593/2008 ('on the law applicable to contractual obligations'), under Art 25,[60] as well as over the Rome Convention of 19 June 1980 ('on the law applicable to contractual obligations'),[61] under Art 21.[62] It is quite strange that four judgments by the Italian Supreme Court (Joint Divisions) have made no comment on it, and have ruled on jurisdiction without even

[57] The Hague Convention of 1955 was ratified with legge 4 February 1958 no 50, and entered into force in Italy on 1 September 1964; see G. Cassoni, 'La compravendita nelle convenzioni e nel diritto internazionale privato italiano' *Rivista di diritto internazionale privato e processuale*, 429 (1982).

[58] The contracting States are Belgium, Denmark, Finland, France, Italy, Niger, Norway, Sweden and Switzerland; see F. Padovini, 'La vendita internazionale dalle Convenzioni dell'Aja alle Convenzioni di Vienna' *Rivista di diritto internazionale privato e processuale*, 47 (1987).

[59] The second Hague Convention 'on the applicable law to the contracts of international sale of goods' was adopted on 31 October 1985, but it never entered into force due to the fact that the minimum number of ratifications (five, as per Art 21) was not reached; the version of the Convention which is in force is therefore the one of 1955; see N. Boschiero, 'Le convenzioni internazionali' n 37 above, 214, 251; A. Luminoso, *La compravendita* (Torino: Giappichelli, 7th ed, 2011), 498-500.

[60] In particular, there is no inconsistency with Art 25, para 2, Regulation EC 593/2008: in fact, also countries which are not members of the EU have signed the Hague Convention of 1955, so there is no reason to refuse the prevalence over EU law to the mentioned-above provision. See doubtfully, A. Frignani and M. Torsello, *Il contratto internazionale* (Padova: CEDAM, 2010), 438.

[61] The Rome Convention of 19 June 1980, ratified with legge 18 December 1984 no 975, entered into force on 1 April 1991, and was transposed into EU law with Regulation EC 593/2008, where Art 24, para 1, restricts, without excluding, its effectiveness; both the Rome Convention of 1980, though within the limits of Art 24, para 1, Regulation EC 593/2008, and this latter Regulation are still applicable outside the subjective and objective sphere of the Hague Convention of 1955, as per Art 4, para 1, letters *a*) and *c*), Regulation EC 593/2008, but obviously under the condition that they are not excluded by the CISG. Clearly, as a consequence, the research and coordination of the sources are quite complex tasks.

[62] *A fortiori* the Hague Convention of 1955 – which, for now, has not yet been replaced by the one of 1985 – prevails over legge 31 May 1995 no 218 ('Reform of the Italian system of international private law'), where Art 57 refers to the Rome Convention of 1980, that is to say now to Regulation EC 593/2008, in accordance with Art 24, para 2, of the latter.

mentioning the Hague Convention of 1955.[63]

In any case, the above-summarised normative framework raises a fundamental problem of international private law: in Italy there are two Conventions on sales which are simultaneously in force,[64] the first, the Hague Convention of 1955, which provides the rules on the conflict of laws aimed at selecting the applicable law, the other, the CISG, establishing uniform provisions aimed at regulating the issue directly; the question is therefore, which of these two conventions should be primarily applicable, even though the result might not change.[65]

According to an earlier opinion, sales which present one or more foreign elements should be qualified first of all by means of the rules on the conflict of laws. These may provide the criterion to establish the applicable law: so, if such law pertains to a contracting State of the CISG, it prevails over the remaining domestic law.

A notable example is offered by the judgment of the Italian Supreme Court (Joint Divisions) in *Premier Steel Service* v *Oscam*:[66]

> 'For the international sales of goods (…), the rules of international private law are established by the Hague Convention of 15 June 1955 (…), which has an international nature (Art 7) and prevails over the Rome Convention of 19 June 1980 (…), to which Art 57 of Statute no 218/1995 refers (this prevalence can be deduced both from the final part of Art 57, and from Art 21 of the Rome Convention). The Hague Convention of 1955, in contrast with what was argued by the *resistente* (the party against whom a second-level appeal has been filed), cannot be considered as abrogated by the Vienna Convention of 11 April 1980 (…), because this latter Convention

[63] Corte di Cassazione 1 February 1999 no 6, available at https://tinyurl.com/y3shquo9 (last visited 28 May 2019); Corte di Cassazione 14 December 1999 no 895 n 53 above; Corte di Cassazione 6 June 2002 no 8224, available at https://tinyurl.com/y548gbef (last visited 28 May 2019); Corte di Cassazione 20 June 2007 no 14300, *Rivista di diritto internazionale privato e processuale*, 511 (2008); but already before, Corte di Cassazione 8 February 1990 no 859, ibid 138 (1994), where the CISG is quoted through an *obiter*; contrastingly, among others, Corte di Cassazione 9 June 1992 no 7073, ibid 408 (1994), where the CISG is quoted again *obiter*; Tribunale di Pavia 29 December 1999, *Corriere giuridico*, 932 (2000).

[64] The framework of international conventions signed by Italy on the subject of sale is even more complicated, and includes, moreover, the two Hague Conventions of 15 April 1958, the New York Convention of 14 June 1974 and the Geneva Convention of 1983: but none of these conventions is actually into force, due to the fact that the minimum number of ratifications to be achieved has not been reached; for further information see N. Boschiero, 'Le convenzioni internazionali' n 37 above, 233, 263.

[65] The problem would not be solved if the Hague Convention of 1955 could not be applicable due to the lack of the subjective and objective requirements, and had to be replaced by the Regulation EC 593/2008 or – but it is now very rare – by the Rome Convention of 1980. See in particular N. Boschiero, *Il coordinamento delle norme in materia di vendita internazionale* (Padova: CEDAM, 1990), passim.

[66] Corte di Cassazione 19 June 2000 no 448, *Giurisprudenza italiana*, 233 (2001), *Foro italiano*, I, 527 (2001), *Corriere giuridico*, 369 (2002).

> contains substantive uniform rules, rather than international private law rules, given that the former provide substantive law whose purpose is to substitute domestic law, rather than to determine the law applicable to the contract of sale, which must be identified on the basis of the Hague Convention. According to Art 3 of this latter Convention, in default of a law declared applicable by the parties, a sale shall be governed by Italian law, as it is the country in which the purchaser has his habitual residence (…). The *locus destinatae solutionis* (…) must therefore be determined on the basis of Italian law. Nonetheless, given that Italy has signed the above-mentioned Vienna Convention (…), Italian law has been replaced by the provisions of that Convention (Art 1, para 1, letter *b*))'.[67]

Actually, such a complex interpretation would lead to the non-application *a priori* of Art 1, para 1, letter *a*), CISG, as if the article consisted only of letter *b*): the result may not change, but there is no need to waste time with further discussions if the applicability of the Convention originates from the provision of letter *a*) itself. It is a matter of method, regardless of any normative implications: if a convention, which has become part of domestic law, regulates the issue directly, through substantive rules, it is *lex specialis* by nature, compared to the provisions of the conflict of laws. These latter, in fact, only govern the choice of law and qualify the issue indirectly. If the issue concerns international sales, the closer and more 'specialised' source is the CISG, which contains uniform substantive provisions, rather than the Hague Convention of 1955, which establishes mere linking criteria for the identification of the applicable law.

After overcoming some initial uncertainties,[68] judges adopted this second solution on 29 December 1999, when the Tribunal of Pavia in *Tessile 21* v *Ixela*, balancing the relationship between the CISG and the Hague Convention of 1955, held:

> '(…) the reference to provisions of uniform substantive law (established by international conventions), which prevail over the conflict of laws provisions due to their specific nature, must be preferred over the reference

[67] In the same direction Corte di Appello di Milano 20 March 1998, *Rivista di diritto internazionale privato e processuale*, 170 (1998), *Diritto del commercio internazionale*, 455 (1999); and the already mentioned Corte di Cassazione 1 February 1999 no 6 n 63 above; Corte di Cassazione 14 December 1999 no 895 n 53 above; Corte di Cassazione 6 June 2002 no 8224 n 63 above, which ignore the Hague Convention of 1955, but permit the application of CISG through the filter of the conflict of laws provisions, rather than by virtue of its nature of *lex specialis* which directly regulates international sale (a peculiar opinion can be found especially in Corte di Cassazione 6 June 2002 no 8224, where, despite the fact that the contract *sub judice* has been qualified as a sale, the Court does not apply either the Hague Convention of 1955, or the CISG; the motivation is too short to draw from it the exact rule applied).

[68] On this point see, among others, T. Treves, 'Il labirinto della vendita internazionale' *Politica del diritto*, 97 (1973); M. Lopez De Gonzalo, 'Vendita internazionale' *Contratto e impresa*, 267 (1988).

to international private law'.[69]

This opinion was confirmed by the Supreme Court.[70]

Therefore, in reconstructing the rules governing international sales, Italian legal operators will have to verify the applicability of the CISG first; then, if necessary, the applicability of the Hague Convention of 1955; and finally, if the latter is entirely or partially non-applicable, the applicability of Regulation EC 593/2008 (or of the Rome Convention of 1980, if still pertaining to the sale in question).[71]

Nevertheless, this hierarchy of sources must not be evaluated in a mechanical way: in fact, if there is a trend towards the pre-eminence of uniform law conventions over conflict of law ones – ie a prevalence of the CISG over the Hague Convention of 1955 –, it is impossible not to remark the fact that the provisions on the conflict of laws normally entail the applicability of uniform law. Thus, if the requirement under Art 1, para 1, letter *a*), CISG, is not met – one of the two parties is not a contracting State –, letter *b* requires an assessment of the applicable law in accordance with the conflict of laws provisions,

[69] Tribunale di Pavia 29 December 1999, n 63 above; Tribunale di Vigevano 12 luglio 2000, *Giurisprudenza italiana*, 280 (2001), *Rivista di diritto internazionale privato e processuale*, 143 (2001) (on this judgement see F. Ferrari, 'Applying the CISG in a truly uniform manner: Tribunale di Vigevano (Italy), 12 July 2000' *Uniform Law Review*, 206 (2001); Id, 'Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With' *Journal of Law & Commerce*, 225 (2001)); Corte di Appello di Milano 23 January 2001, *Rivista di diritto internazionale privato e processuale*, 1008 (2001); Tribunale di Rimini 26 November 2002, *Giurisprudenza italiana*, 896 (2003) (on this decision see F. Ferrari, 'International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini' *Vindobona Journal of International Commercial Law and Arbitration*, 1 (2004)); Tribunale di Padova 25 February 2004, *Giurisprudenza italiana*, 1402 (2004) (also L. Graffi, 'L'interpretazione autonoma della Convenzione di Vienna: rilevanza del precedente straniero e disciplina delle lacune' *Giurisprudenza di merito*, 867 (2004)); Tribunale di Padova 31 March 2004, *Giurisprudenza di merito*, 1065 (2004); Tribunale di Padova 11 January 2005 n 47 above; Tribunale di Rovereto 21 November 2007, available in English translation at https://tinyurl.com/yy3xst39 (last visited 28 May 2019); Tribunale di Forlì 9 December 2008, available at https://tinyurl.com/yxl2gf7c (last visited 28 May 2019); Tribunale di Forlì 16 February 2009, (English translation at https://tinyurl.com/y2vrmuj6) (last visited 28 May 2019); Tribunale di Forlì 26 March 2009, available at https://tinyurl.com/y2kjww8o (last visited 28 May 2019); and Tribunale di Forlì 6 March 2012 n 46 above.

[70] Corte di Cassazione 5 October 2009 no 21191 n 24 above; Corte di Cassazione 20 June 2007 no 14299, n 63 above, which fails to consider the Hague Convention of 1955, but affirms, however, the prevalence of the CISG over the provisions on conflict of laws, wrongly identified in those of the Rome Convention of 1980; Corte di Cassazione 20 April 2004 no 7503, *Rivista di diritto internazionale privato e processuale*, 111 (2005), which fails to verify the applicability of the Hague Convention of 1955; and subsequently Corte di Cassazione 20 September 2004 no 18902, available in English translation at https://tinyurl.com/yydnemck (last visited 28 May 2019).

[71] The legge 31 May 1995 no 218, in accordance with Art 2, para 1, and more specifically Art 57, is in the background of the normative framework of international and EU law (Tribunale di Reggio Emilia 3 July 2000, available in English translation https://tinyurl.com/y3rpdyv5 (last visited 28 May 2019); see also Tribunale di Modena 19 February 2014, n 53 above, in particular para 6).

which means in accordance with the Hague Convention of 1955. The application of this latter, even if uncommon, can lead to an exclusion of the CISG, through an 'interlocking puzzle' which first confirms (under letter *a*), but then smoothens (under letter *b*) the hierarchy of sources.[72]

2. Incomplete CISG

Despite being number one in the hierarchy of sources, the CISG does not provide an exhaustive regulation of international sales: just think of the wide variety of (unexpressed) external gaps and the provisions of Art 4 CISG. On the contrary, due to its limited substantive sphere of application, the Vienna Convention necessarily competes with other 'non-specialised' sources, such as private international law and international conventions on the conflict of laws pertaining to the case at issue. This not to mention the even more radical competition, of a different kind, between the CISG rules and those provided by the parties' free will[73] or by *lex mercatoria*,[74] to which Arts 6 and 9 CISG refer. Therefore, in Italy, as well as in many other countries, the CISG appears to be insufficient for a full harmonisation and coordination, even supposing that these are realistic aims.[75]

Yet, jurists have become familiar with non-self-sufficient statutes. European jurists, for instance, have been dealing for decades with an inevitably sectoral communitarian legislation that, combined to domestic one, results in a *Stufenbau* which is hard to unify.[76] They are required to make a further effort: it may be untrue that in the first half of the 1900 the national systems were nearly as complete and coherent as the 'code ideology' pretended them to be, but undoubtedly the current level of complexity is unprecedented in the history of contemporary law.[77] Supporting evidence seems to come right from international

[72] The 'interlocking puzzle' is clear in the judgment of Tribunale di Reggio Emilia 3 July 2000 n 71 above.

[73] Nevertheless, freedom – in its private international meaning – is not unlimited, mainly as far as the mandatory national provisions are concerned: M. Lopez De Gonzalo, 'Vendita internazionale' n 68 above, 268-270.

[74] Fundamental, M.J. Bonell, *Le regole oggettive del commercio internazionale* (Milano: Giuffrè, 1976); F. Galgano, *La globalizzazione nello specchio del diritto* (Bologna: il Mulino, 2005); Id and F. Marrella, 'Commercio internazionale', in F. Galgano ed, *Trattato di diritto commerciale e di diritto pubblico dell'economia* (Padova: CEDAM, 2010), 432; A. Frignani and M. Torsello, 'Gli usi nella Convenzione di Vienna sulla vendita internazionale di beni mobili' *Contratto e impresa/Europa*, 407 (2013).

[75] Italian academics are doubtful in this respect, L. Mengoni, 'L'Europa dei codici o un codice per l'Europa?' *Rivista critica del diritto privato*, 515 (1992); *contra* M.J. Bonell, 'La Convenzione di Vienna sulla vendita internazionale: origini, scelte e principi fondamentali' *Rivista di diritto internazionale privato e processuale*, 715 (1990).

[76] Lately, M.W. Hesselink, 'Contract theory and EU contract law', in C. Twigg-Flesner ed, *Research Handbook* n 19 above, 508.

[77] A. Ruggeri, 'Sistema integrato di fonti, tecniche interpretative, tutela dei diritti fondamentali' *Politica del diritto*, 3 (2010). And in the light of such complexity, one perceives the inadequacy of the traditional criteria for antinomies' resolution, when considered in their cold formal logic: *lex superior*, *lex posterior* and *lex specialis* still «exist», but nobody would think of using them

sales and 'their own' law.

The Vienna Convention itself is repeatedly concerned with highlighting its incompleteness; it does that by omitting some aspects which might be, after all, inferred *ratione materiae* (take Art 17 CISG, where nothing is said about the withdrawal of the offer); it does that by openly declaring its material incompetence (eg, Arts 4-5 CISG). Yet, even at a first glance, it is evident that between the matters expressly included and the matters expressly excluded lies a wide 'grey zone'. Likewise, a first glance reveals that the borders of the covered and uncovered areas are blurred, with the usual non-conceptual and fairly colloquial approach. Expressions like formation of contract – a container rather than a portion of contract law – or rights and obligations listed in a quite *naïf* manner, or validity and effect (…) on the property, facilitate a dialogue, unite instead of dividing. The right expression is hard to find, but it looks like there is something nontechnical in the wording.

Though, one point must be considered uncontroversial. Given that a pure literal interpretation is impossible, the border between what is in and what is out of the Convention must be drawn according to the equivalence or the functional divergence of grounds and remedies, rather than their *nomen iuris* or their various local shapes.[78]

Here as somewhere else, it feels like, in front of such a fossilised regulation as the CISG, the interpreter's duty is to pursue an interpretative policy. A daring one could include in the scope of the Convention matters that are just mentioned or even implied; a cautious one may exclude all that is not regulated in detail, thus making it necessary to refer a large amount of unsolved questions to national law. When dealing with a light normative framework, to widen or narrow, strengthen or weaken, the role of the Convention in the current status of international trade is a matter of approach.[79]

mathematically, as it was instead common at the times of statalist legalism: P. Perlingieri, *Diritto comunitario e legalità costituzionale. Per un sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 1992), 133; Id, 'Una rivoluzione nel sistema delle fonti', in N. Lipari ed, *Diritto privato europeo e categorie civilistiche* (Napoli: Edizioni Scientifiche Italiane, 1998), 49; Id, *Il diritto civile nella legalità costituzionale* n 5 above, 284, 592; recently Id, 'I princìpi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali SISDiC*, 1 (2017); G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 96-97; P. Schlesinger, 'La grande dicotomia', in Id et al, *Studi in onore di G. Cian* (Padova: CEDAM, 2010), II, 2307.

[78] In the same sense, F. Ferrari, 'The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)' *Rabels Zeitschrift*, 52, 65 (2007); M. Tescaro, 'Il concorso tra i rimedi contrattuali di cui alla Convenzione di Vienna sulla vendita internazionale di beni mobili (CISG) e i rimedi domestici' *Contratto e impresa/Europa*, 319, 337 (2007).

[79] The system as a knowledge process, a product of applied hermeneutics: P. Perlingieri, 'Interpretazione e applicazione: profili dell'individuazione normativa' *Diritto e giurisprudenza*, 826 (1975).

IV. The Lack of Italian Case-Law

As the CISG has been part of the Italian legal system since 1 January 1988 and prevails over any other treaty on the subject of sales, one would expect a relevant number of cases, proportional to its age and preponderance in the framework of international sales. Actually such expectations are disappointed. From a quantitative point of view, there are fewer than fifty Italian judgments, and the analysis of the scarce material available increases a feeling of inadequacy, given that many of the judgments only deal with jurisdiction or the choice of the applicable law, without interpreting directly the provisions of the Convention.[80]

This lack of cases may well appear to be inconsistent with the volume of Italian foreign trade, which perhaps is not comparable to that of other developed countries, but is still relevant both to exports and imports.[81] On this point one can only make some assumptions, none of which is sufficient to explain the phenomenon. Nevertheless, altogether, such assumptions are capable of revealing the main reasons behind the lack of litigation.

First of all, it is well known that the normal practice in business-to-business contracts, with a particular focus on general terms and conditions for transnational business, mainly tends to exclude the application of the Convention, as per Art 6 CISG, and to choose the drafter's domestic law.[82]

The influence of this practice seems to be even greater if we consider that, according to the *obiter dicta* of some Italian judgments – which have been confirmed in other countries – the exclusion of the CISG can be established not only expressly by an oral or written clause, but also by conduct, that is to say, through a certain behaviour, either simultaneous or subsequent to the contract formation, showing tacit consent.[83] It is superfluous to remark what a negative

[80] L. DiMatteo, 'The CISG across National Legal Systems', in Id, *International Sales* n 35 above, 594-595.

[81] As an example, we can compare the amount of Italian cases to that of German cases: very close business partners give rise to a disproportioned number of cases, which cannot be merely explained by the greater dynamism or export trends of the German economy (see the report of S. Kröll and S. Kiene, 'Germany', in L. DiMatteo ed, *International Sales Law* n 35 above, 361, 377).

[82] M.J. Bonell, 'Art 6' *Nuove leggi civili commentate*, 16 (1989); more recently, P. Mankowski, 'Artikel 6 CISG und Abbedingung der CISG' *Festschrift für Magnus* (München: Sellier, 2014), 255; U. Schroeter, 'Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)', in L. DiMatteo ed, *International Sales Law* n 35 above, 649; C. Giesecke, *Interessengerechte Rechtswahl im Kaufrecht* (Frankfurt a. M.: Nomos, 2014), passim. In the case law, BGH 4 December 1996, available at https://tinyurl.com/y6o3pjcg (English translation available at https://tinyurl.com/yy24u9qy) (last visited 28 May 2019).

[83] Tribunale di Vigevano 12 July 2000 n 69 above; Tribunale di Rimini 26 November 2002 n 69 above; Tribunale di Padova 25 February 2004 n 69 above; Tribunale di Padova 31 March 2004 n 69 above; Tribunale di Padova 11 January 2005, n 47 above; Tribunale di Forlì 9 December 2008 n 69 above; Tribunale di Forlì 16 February 2009 n 69 above; and S. Patti, 'Silenzio, inerzia e comportamento concludente nella Convenzione di Vienna sui contratti di vendita internazionale di beni mobili' *Rivista di diritto commerciale*, I, 135 (1991); similar questions are raised by the applicability of Art 11 CISG to the arbitration clause, which is not

impact would future case-law have on the identification of the applicable law if it ever took such an *obiter* as the *ratio decidendi*. In fact, such identification would depend upon conducts that cannot be unequivocally reconstructed and interpreted, especially when they are subsequent to the conclusion of the contract or to the rise of a dispute.

Nevertheless, according to this view, the exclusion does not depend upon the mere circumstance that the parties, in drafting procedural acts or during court hearings, have neglected to base their arguments on the CISG.[84] This is logical because no opt-out, even by conduct, can ever disregard the real intention of the parties to exclude the CISG[85] but those *obiter dicta*, favourable to the idea of an informal opt-out, appear not to be persuasive as a matter of method, and anyway irrelevant to the establishment of a general rule. It is true that Art 11 CISG makes freedom of form a basic principle of the Convention, in accordance with Art 7, para 2, CISG;[86] but it is also true that the opt-out, expressed or implied, does not belong to the subjects dealt with by the Convention (as the provisions of Art 6 CISG alone are irrelevant to that effect). Given that the Convention allows but does not regulate the opt-out – in other words, an external rather than internal gap – this latter does not fall under the general principles set by Art 7, para 2, CISG, but is left to the applicable law; and such law does not necessarily permit freedom of form.

Those *obiters* too, even though unconvincing, may have contributed to the lack of disputes. Undoubtedly, as a concurrent factor one can mention the general trend towards the exclusion of the CISG from business-to-business relationships, which drastically decreases the number of cases that can be decided on the

itself a subject dealt with by the Convention; further details in A. Janssen and M. Spilker, 'The relationship between the CISG and international arbitration: a love with obstacles?' *Contratto e impresa/Europa*, 44 (2015).

[84] Among others, very clearly, Tribunale di Padova 25 February 2004, n 69 above.

[85] See Tribunale di Vigevano 12 July 2000, n 69 above; in Germany, KG Berlin 24 January 1994, available at https://tinyurl.com/y5yeocb6 (English translation at https://tinyurl.com/yywa82pb) (last visited 28 May 2019); OLG München, 9 July 1997 n 11 above; OLG Dresden 27 December 1999, available at https://tinyurl.com/y5skokqe (English translation at https://tinyurl.com/y6dwdmd6) (last visited 28 May 2019). *Contra*, OLG Saarbrücken 13 January 1993, available at https://tinyurl.com/yxkq65tj (last visited 28 May 2019); LG Landshut 5 April 1995, n 44 above; OLG Koblenz 20 January 2016, available at https://tinyurl.com/y2r2ntbb (last visited 28 May 2019). In any case, could all this happen through conduct, also? Could what is expressed through mere conduct rather than with words be really unambiguous? Caution is due, above all because once the application of the CISG has been excluded, it is not a forgone conclusion that the rules on conflict of laws allow the free choice by the parties of the applicable law; and anyway, this choice could not be implied through conduct: it is true that, according to the criticised thesis, the exclusion of the CISG could be implicit, but the eventual *professio juris* could not (provided that it is consistent with the rules on conflict of laws and the parties reach an agreement on that point).

[86] Corte di Cassazione 16 May 2007 no 1126, available at https://tinyurl.com/y4n5cnkz (last visited 28 May 2019); Corte di Cassazione 13 October 2006 no 22023, available at https://tinyurl.com/y6x5v8wn (last visited 28 May 2019). See also S. Patti, 'Art 11' *Nuove leggi civili commentate*, 44 (1989).

basis of the Convention.

Another question – which would go far beyond the scope of this essay – is why such mistrust still persists towards the CISG, as witnessed by the wide use of exclusions by conduct: certainly the reasons lie neither in the substance of the Convention nor in any negative remark on its quality, but rather in the fact that companies, not recruiting specialised personnel with specific legal and language skills, are not familiar with such rules. Further difficulties arise for small or medium-sized companies, which hold in Italy significant shares of the import and export markets.[87]

It remains therefore more convenient and cheaper to choose domestic law, provided that the company, at the end of negotiations or in the act of setting general terms and conditions, is able to impose its choice on the other party; otherwise, mistrust towards the CISG could even lead to a missed agreement if one party, who might be in favour of the Convention, does not wish to be bound by the other party's domestic law.

It is also well-known that in business-to-business contracts, especially when the contracting companies are large and based in different countries, a wide use of arbitration clauses is made, by means of which any disputes or interpretative issues connected with the performance of the contract are transferred from domestic jurisdiction to (domestic or international) arbitration;[88] actually the most advanced case-law databases, and certainly those on the CISG, may register a considerable number of decisions, including domestic and international arbitration awards. Yet, for the same privacy concerns that make arbitration appealing in international disputes, an arbitration award is likely to remain secret indefinitely. Another portion of case-law could thus remain unknown to any official source, above all to the legal databases that control the market of juridical information.[89]

Finally – still hypothetically speaking – a relevant role may be played by forum selection clauses, ie agreements on the derogation (or prorogation) of jurisdiction, as per Art 4, para 2, *legge* no 218/1995. Regardless of the law applied, whether it is the CISG or not, a case can be qualified as 'Italian' only if it was an Italian judge who decided it; if the parties excluded Italian jurisdiction in favour of the German or the Swiss one, the case would no longer be 'Italian'. This might explain, at least partially, the large number of cases decided in neighbouring countries, where Italian companies have more frequent trade relationships, for example Germany. The total number of cases under the CISG obviously does not change; what changes is the percentage of 'Italian' ones.

[87] O. Meyer, 'The CISG: Divergences between Success-Scarcity and Theory-Practice', in L. DiMatteo ed, *International Sales Law* n 35 above, 23.

[88] A. Janssen and M. Spilker, 'The relationship' n 83 above, 44; U. Draetta, 'La Convenzione delle Nazioni Unite del 1980 sui contratti di vendita internazionale di beni mobili e l'arbitrato' *Contratto e impresa/Europa*, 393 (2015).

[89] M.S. Newman, 'CISG Sources and Researching the CISG', in L. DiMatteo ed, *International Sales Law* n 35 above, 43.

Conversely, the lack of disputes is unlikely to depend on the little expertise of lawyers and judges:[90] exceptions are always possible, but, apart from them, it is hardly believable that the CISG is neglected in Italy because those who should apply it ignore its existence and decide on disputes that are regulated by the Convention in accordance with domestic law.[91] But if this were true, scholars should undoubtedly feel responsible for having failed to make such provisions, which are in force and have a paramount importance for the Italian economy, better known and more widely applied.

V. Towards Supranational *Stare Decisis?*

1. '… Although not Binding …'

If on one hand, the amount of cases is on the whole small, on the other hand the quality of the decisions interpreting and applying substantive provisions of the Convention can be considered high.[92] First of all one can remark a proper use of autonomous interpretation, in accordance with the principles established by Art 7 CISG.[93]

As far as method is concerned, the few Italian judgments highlight the importance of foreign case-law and its international reception, as an irreplaceable

[90] *Contra* M. Torsello, 'Italy', in F. Ferrari ed, *The CISG and its Impact on National Legal Systems* (München: Sellier, 2008), 215; and F. Ferrari, *The CISG and its Impact on National Legal Systems – General Report*, ibid, 421.

[91] Among others, U. Schroeter, *Empirical Evidence* n 82 above, 663.

[92] It has been confirmed by foreign observers: C. Baasch Andersen, 'The CISG in National Courts', in L. DiMatteo ed, *International Sales Law* n 35 above, 72-73.

[93] As an example Tribunale di Padova 25 February 2004 n 69 above could be mentioned: 'On the substantive side, it is necessary that the contract is a contract of sale, whose definition is not provided by (the CISG). However, the lack of an express definition should not lead to turning to a national definition, eg, as provided in Art 1470 Italian Civil Code. On the other hand, as with most of the concepts used in the (CISG) (among which that of 'place of business', 'domicile', and 'goods' but not the concept of 'private international law', which instead corresponds to the private international law of the forum), the concept of 'sale' has to be identified autonomously, without referring to any domestic definition'; in the same direction, among others, Tribunale di Padova 11 January 2005 n 47 above; Tribunale di Modena 9 December 2005, available at https://tinyurl.com/yymwznct (last visited 28 May 2019); Tribunale di Forlì 9 December 2008 n 69 above; Tribunale di Forlì 16 February 2009 n 69 above; about these latter judgements, F. Ferrari, 'Do Courts Interpret the CISG Uniformly?', in F.Ferrari ed, *Quo Vadis CISG?* (München: Sellier, 2005), 3; and Tribunale di Forlì 6 March 2012 n 46 above. About Art 7 CISG, beyond the 'historic' M.J. Bonell, 'Art. 7', in C.M. Bianca and M.J. Bonell eds, *Commentary* n 10 above, 65; Id, 'Art. 7' *Nuove leggi civili commentate*, 20 (1989); L. DiMatteo, 'An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability' *Syracuse Journal of International Law and Commerce*, 79 (1997); Id, 'Case Law Precedent and Legal Writing', in A. Janssen and O. Meyer eds, *CISG Methodology* (München: Sellier, 2009), 113; F. Ferrari, *Homeward Trend: What, Why and Why Not*, ibid, 171; Id, 'Interpretation of the Convention and Gap-filling: Article 7', in F.Ferrari, H.M. Flechtner and Brand eds, *The Draft Uncitral Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (München: Beck, 2004), 138.

tool for ensuring uniformity and restricting 'forum shopping';[94] this is a point worth emphasising, as foreign precedents are not only mentioned but also applied in deciding cases.[95] This implies the undertaking of a real active or case-based comparative evaluation,[96] which is not a mere comparative argumentation,[97]

[94] However, Tribunale di Rimini 26 November 2002 n 69 above, does not hide the difficulties of the battle against *forum shopping* in the application of uniform international law; and, as far as international sale is concerned, we cannot ignore that the CISG offers a wide-reaching but not exhaustive statute, so that there is a strong interest connected with several substantive and procedural aspects to choose the more 'convenient' jurisdiction.

[95] A leading example is Tribunale di Cuneo 31 January 1996, *Diritto del commercio internazionale*, 653 (1996). This decision is also interesting for the absence of *obiter dicta*, which are, on the contrary, very frequent in the other Italian CISG-related judgments. More recently, Tribunale di Forlì 26 March 2009 n 69 above and Tribunale di Reggio Emilia 12 April 2011 n 54 above.

[96] G. Alpa, 'Comparazione e diritto straniero nella giurisprudenza della Corte di Giustizia dell'Unione europea' *Contratto e impresa*, 879 (2016).

[97] Recently, U. Kischel, *Rechtsvergleichung* (München: Beck, 2015), 77. About the so-called 'fifth' method, ie the comparative one, among others: P. Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechstvergleichung als 'fünfter' Auslegungsmethode' *Juristen Zeitung*, 913-916 (1989); I. Zaitay, 'Die Rezeption fremder Rechte und die Rechtsvergleichung' *Archiv für die civilistische Praxis*, 361 (1957); B. Aubin, 'Die rechtsvergleichende Interpretation autonom-internen Rechts in der deutschen Rechtsprechung' *Rabels Zeitschrift*, 463-478, 458 (1970); B. Großfeld, 'Vom Beitrag der Rechtsvergleichung zum deutschen Recht' *Archiv für die civilistische Praxis*, 289, 303 (1984); U. Drobnig, 'Rechtsvergleichung in der deutschen Rechtsprechung' *Rabels Zeitschrift*, 621-624, 610 (1986); P. Volken, 'The Vienna Convention: Scope, Interpretation and Gap-Filling', in Id and P. Sarcevic eds, *International Sale of Goods. Dubrovnik Lectures* (New York: Oceana, 1986), 38; U. Everling, 'Rechtsvereinheitlichung durch Richterrecht in der Europäischen Gemeinschaft' *Rabels Zeitschrift*, 193 (1986); H. Kötz, 'Alternativen zur legislatorischen Rechtsvereinheitlichung', ibid, 218 (1992); M. Storme, 'Rechtsvereinheitlichung in Europa', ibid, 296 (1992); B. Markesinis, 'Il ruolo della giurisprudenza nella comparazione giuridica' *Contratto e impresa*, 1356 (1992); Id, 'Judge, Jurist and the study and use of foreign law' *Law Quarterly Review*, 622 (1993); W. Odersky, 'Harmonisierende Auslegung und europäische Rechtskultur' *Zeitschrift für Europäisches Privatrecht*, 1 (1994); R. Legeais, 'L'utilisation du droit comparé par les tribunaux' *Revue international de droit comparé*, 347 (1994); C. v. Bar, 'Vereinheitlichung und Angleichung von Deliktsrecht in der Europäischen Union' *Zeitschrift für Rechtsvergleichung*, 230-231 (1994); U. Drobnig, 'The Use of Foreing Law by German Courts', in Id and S. van Erp eds, *The Use of Comparative Law by Courts* (The Hague: Kluwer Law International, 1999), 127; A. Somma, *L'uso giurisprudenziale della comparazione nel diritto interno e comunitario* (Milano: Giuffrè, 2001), 258; R. Calvo, 'Il valore del precedente extrastatuale nell'interpretazione della disciplina interna sulle vendite al consumo' *Contratto e impresa/Europa*, 289-292 (2007); Id, 'Il precedente extrastatuale tra fonti comunitarie e unitarietà del sistema giuridico: spunti per un dibattito' *Contratto e impresa/Europa*, 3 (2008); Id, 'La giurisprudenza come fonte del diritto comune moderno?' *Contratto e impresa/ Europa*, 1 (2009); C. Baldus, 'Il valore del precedente extrastatuale nell'applicazione del diritto interno: un punto di vista tedesco di diritto privato comunitario' *Contratto e impresa/Europa*, 4 (2008); M. Gebauer, 'Il valore del precedente extrastatuale nell'applicazione del diritto interno: un (altro e diverso) punto di vista tedesco di diritto privato comunitario' *Contratto e impresa/ Europa*, 14 (2008); G. Hirsch, 'Das Netzwerk der Präsidenten der obersten Gerichte der Europäischen Union' *Zeitschrift für Europäisches Privatrecht*, 1 (2009); M.R. Ferrarese, 'Il diritto comparato e le sfide della globalizzazione. Oltre la forbice differenze/ somiglianze' *Rivista critica del diritto privato*, 369, 388 (2013); M. Andenas and D. Fairgrieve eds, *Courts and Comparative*

but a carefully reasoned use of foreign precedents.

In spite of this, the judgments clarify that foreign case-law, even though worthy of consideration, 'is not binding'. It seems rather like a stock phrase by which they do weaken – or pretend to – the value of the foreign binding precedent; an almost fixed formula follows:

> '(...) foreign case-law (...), which, *although not binding*, is however to be taken into consideration as required by Art 7, para 1, of the UN Convention' (emphasis added).[98]

But the expression 'although not binding' sounds so little genuine that it raises doubts on its substance. Italian judges have rejected the idea of an internationally binding precedent, but actually they uphold it every time they apply the CISG and comply with the principles established by foreign courts.[99]

If it is so, we should not overrate the expression 'although not binding': the internal or foreign precedent will not be considered when the factual requirements are not met – common law courts have elaborated highly refined techniques in the article of distinguishing –[100] or when an error *in judicando* or *in procedendo* occurs; but these derogations to the binding force of the precedent are quite obvious, even to the common law judicial tradition. No one, anywhere in the world, would think of following a precedent which does not apply to the current facts or is vitiated by procedural or substantive errors.

Beyond such cases, on the other hand, there is no reason to reject the authority of internal or foreign precedents applying the CISG;[101] and it is right

Law (Oxford: Oxford University Press, 2015); M.P. Mantovani, 'Uso dell'argomento comparativo a fini ermeneutici' *Contratto e impresa/Europa*, 550 (2016).

[98] Tribunale di Pavia 29 December 1999 n 63 above; the formula occurs, nearly unchanged, in Tribunale di Vigevano 12 July 2000 n 69 above; Tribunale di Rimini 26 November 2002 n 69 above; Tribunale di Padova 25 February 2004 n 69 above; Id 10 January 2006, *Giurisprudenza italiana*, 1016 (2006), *Giurisprudenza di merito*, 1408 (2006), *Rivista di diritto internazionale privato e processuale*, 147 (2007); in Tribunale di Forlì 6 March 2012 n 46 above; but not in Tribunale di Padova 11 January 2005 n 47 above.

[99] C. Baasch Andersen, 'Uniformity in the CISG in the First Decade of its Application', in I. Fletcher, L. Mistelis and M. Cremona eds, *Foundations and Perspectives* n 5 above, 295-297.

[100] M. Bin, *Il precedente giudiziario* (Padova: CEDAM, 1995), 41; the topic is extremely wide: G. Gorla, 'Precedente giudiziale' *Enciclopedia Giuridica* (Roma: Treccani, 1990), XXIII, 4-5; D. Freda, *Una dispotica creazione* (Torino: Giappichelli, 2012); M. Serio, 'Il valore del precedente tra tradizione continentale e *common law*: due sistemi ancora distanti?' *Rivista di diritto civile* (*Supplemento annuale di studi e ricerche*), 109 (2008); M. Croce, 'Precedente giudiziale e giurisprudenza costituzionale' *Contratto e impresa*, 1117 (2006); B. Markesinis, 'Studying Judicial Decisions in the Common Law and the Civil Law: A Good Way of Discovering Some of the Most Interesting Similarities and Differences that exist Between these Legal Families', in M. Van Hoecke and F. Ost eds, *The Harmonisation of European Private Law* (Oxford: Hart Publishing, 2000), 117; the 'Italian' F. Wieacker, 'Legge e arte giudiziale', in Id et al, *Studi in memoria di Lorenzo Mossa* (Padova: CEDAM, 1961), III, 628.

[101] Again, L. DiMatteo, 'An International Contract Law Formula' n 93 above, 79; Id, *Case Law Precedent* n 93 above, 113. *Contra*, among others, H. Kronke, 'Ziele–Methoden, Kosten–

in Art 7, para 1, CISG that the legal and rational basis of this supranational *stare decisis* are to be found. In the context of conventional interpretation the binding force of precedent is instrumental to an international harmonisation of *res judicata*, which mirrors the uniformity of the applicable contract law.[102]

2. Detractors

The majority view, according to which foreign precedents have no binding force, regardless of Art 7, para 1, CISG, is based essentially on two arguments, one practical, the other technical: as to the former, requiring a national judge to possess perfect knowledge of the case-law of the whole world would mean exceeding his knowledge and skills, as he should collect and study a huge amount of cases in foreign languages; as to the second, a supranational *stare decisis* would require an equally supranational judicial system supervised by a supreme judge with the power of ensuring uniform application of the Convention.[103]

These two arguments can be easily refuted. The amount of material to be collected and studied may be large, but whether it is averagely larger than the one needed to decide a domestic case, where the influence of foreign precedents remains marginal, one can hardly tell; on the other hand, CISG databases are very functional, they improve accessibility to the sources by making them easily available in English, also remotely. The practical problem does not seem to frustrate any ambitions towards an international uniformity of case-law.[104]

As to the lack of a supreme judge with a so-called 'nomophylactic' function, the creation of another international judicial body does not appear fundamental: would the supreme judges of the single states not be sufficient? If a domestic decision infringes Art 7, para 1, CISG for having disregarded a foreign precedent without motivating, would it not be enough to address the Court of Appeals or the national Supreme Court? The crucial point is the need to enhance the mandatory nature of Art 7, para 1, CISG (the same nature which pertains to Art 2, para 2, legge no 218/1995): the uniform supranational application of the Convention is not a general trend of legislative policy, a *minus quam perfecta* recommendation, but a legal rule with a binding nature; if this is so, the decision unduly neglecting a foreign precedent also infringes Art 7, para 1, CISG. Should

Nutzen: Perspektiven der Privatrechts-harmonisierung nach 75 Jahren UNIDROIT' *Juristen Zeitung*, 1152 (2001); U. Magnus, 'Wiener UN-Kaufrecht (CISG)' *Staudingers Kommentar zum BGB* (Berlin: Sellier, De Gruyter, 2013), 194-195; M. Torsello, 'Il valore del precedente extrastatuale nell'applicazione del diritto interno: circolazione del formante giurisprudenziale e uso della giurisprudenza straniera nelle corti italiane' *Contratto e impresa/Europa*, 26, 31 (2009).

[102] W. Odersky, 'Harmonisierende Auslegung' n 97 above, 1; H. Kötz, 'Alternativen' n 97 above, 218; C. v. Bar, 'Vereinheitlichung' n 97 above, 230-231; and M. Storme, 'Rechtsvereinheitlichung' n 97 above, 296.

[103] In this direction, among Italian scholars, M. Torsello, 'Il valore del precedente extrastatuale' n 101 above, 19.

[104] Tribunale di Rimini 26 November 2002 n 69 above.

this violation not be considered equivalent to any other violation of a mandatory provision, with all the related consequences under domestic procedural and substantive law?

But if the problem lies in the word 'binding' or the expression '*stare decisis*', it would probably be enough to use other expressions without, however, changing the substance. The substance is that, despite the words used, the courts follow foreign precedents and consider Art 7 CISG as a mandatory provision. The expression 'although not binding' is therefore superfluous and misleading.

VI. Topics Based on Real Cases: Good Faith and *Venire Contra Factum*

1. CISG *ex Fide Bona*

It is above all in interpreting and applying general clauses that lie the risk of a 'homeward trend'. Actually, while general clauses grant that flexibility being essential for the survival of the system, the loose way in which they have been used, for instance in the DCFR and in the CESL draft, is far from convincing. It feels like such a loose attitude has been imposed by the need to overlook matters where a better compromise could not be reached, rather than by the intent to smoothen and complete analytic rules, which are rigid and characterising by nature. Such was the essence of general clauses in the Italian Civil Code of '42.[105] That is exactly what happened during the drafting of the Vienna Convention, when divergences begun to blaze among the various delegations. There is really no need of so many 'empty boxes',[106] 'a danger to the law and the state'.[107]

Furthermore, in the context of CISG an extra difficulty arises: concretisation (or *Konkretisierung*) must be undertaken on the basis of a text that has proven lacking and artificial from the beginning, which is in need of a gap-filling rather than ready to fill, itself, other gaps.[108] On one hand, general clauses were born to refer to the judge matters that remained intentionally or inevitably unsolved at a legislative stage, but on the other hand, at least, traditional codes provided a

[105] S. Rodotà, 'Il tempo delle clausole generali' *Rivista critica del diritto privato*, 728 (1987); P. Rescigno, 'Appunti sulle «clausole generali»' *Rivista di diritto commerciale*, I, 1 (1998); G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' *Modern Law Review*, 11 (1998); L. Lombardi Vallauri, 'Norme vaghe e teoria generale del diritto' *Jus*, 25 (1999); L. Mengoni, 'Autonomia privata e costituzione', in C. Castronovo, A. Albanese and A. Nicolussi eds, *Scritti*, I, *Metodo e teoria giuridica* (Milano: Giuffrè, 2011), 110.

[106] P. Perlingieri, 'Obbligazioni e contratti' *Annuario del contratto 2016* (Torino: Giappichelli, 2017), 213.

[107] J.W. Hedemann, *Die Flucht in die Generalklauseln* (Tübingen: Mohr, 1933); G. Teubner, *Standards und Direktiven in Generalklauseln* (Frankfurt a. M.: Athenaeum, 1971), 115.

[108] Among others, M. Franzen, *Privatrechtsangleichung* n 15 above, 504, 536; and M. Pennasilico, *Metodo e valori nell'interpretazione dei contratti. Per un'ermeneutica contrattuale rinnovata* (Napoli: Edizioni Scientifiche Italiane, 2011), 61, 110.

well-grounded framework for giving meaning to legislative formulas; whereas a recollection of partial and scarcely cohesive rules is not the best guideline for the judge.[109] In such a context he is likely to resort to domestic law, which he perceives as more familiar and structured for problem solving, rather than to uniform international law.[110] Therefore, the risk arises that general clauses even more than norms, above all when numerous and located in crucial points, lead to a revival of a wide interpretative regionalism.[111]

The judgment by the Tribunal of Padova in *So.m.agri* v *Erzeugerorganisation Marchfeldgemüse* seems influenced by domestic law.[112] The Austrian seller of agricultural products, after waiting around six months for the payment of the agreed price, filed a lawsuit against the Italian buyer, without previously sending him a warning or giving him a deadline for performance. The Tribunal (after pointing out that if the buyer is not bound by agreement or usage to pay at any other specific time, he must pay within the time established by Art 58 CISG),[113] notes that the expiry of the time limit automatically implies that the buyer falls into arrears without requiring any formal notification, as per Art 59 CISG.[114] It is true that Art 63, para 1, CISG allows the seller to give the buyer a *Nachfrist* of performance (and this must be of a reasonable length of time to allow late payment); but it is not compulsory for the seller to set a final deadline by which the contract must be performed to avoid its termination. We cannot apply the rule according to which the seller is entitled to a remedy on condition that he previously established a deadline for performance. Nevertheless, the time set by Art 58 CISG cannot be identified with the same accuracy by both parties: the buyer may not know the exact moment from which the goods are at his disposal. Therefore, whenever the seller had not even ascertained the expiry of the payment deadline, a claim for termination would be against the principle of good faith. And

[109] S. Rodotà, 'Le clausole generali nel tempo del diritto flessibile', in A. Orestano ed, *Lezioni sul contratto* (Torino: Giappichelli, 2009), passim; Id, 'Il tempo delle clausole generali' n 105 above, 721; Id, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 1969), 150; P. Perlingieri, 'Interpretazione assiologica e diritto civile' *Le Corti salernitane*, 478 (2013); R. Zimmermann and S. Whittaker eds, *Good Faith in European Contract Law* (Cambridge, UK: Cambridge University Press, 2000), passim; F.D. Busnelli, 'Note in tema di buona fede ed equità' *Rivista di diritto civile*, I, 537 (2001); M. Pennasilico, 'Legalità costituzionale e diritto civile' *Rassegna di diritto civile*, 840 (2011); E. Navarretta, 'Good Faith and Reasonableness in European Contract Law', in J. Rutgers and P. Sirena eds, *Rules and Principles in European Contract Law* (Cambridge, UK: Intersentia, 2015), 135.

[110] S. Grundmann and D. Mazeaud eds, *General Clauses and Standards in European Contract Law* (The Hague: Kluwer Law International, 2006), passim.

[111] R. Zimmermann, 'The Present State of European Private Law' *American Journal of Comparative Law*, 479 (2009).

[112] Tribunale di Padova 25 February 2004 n 69 above.

[113] In the same direction Tribunale di Padova 31 March 2004 n 69 above.

[114] Yet again Tribunale di Padova 31 March 2004 n 69 above confirmed this opinion; see also G. Cottino, 'Artt 57-59' *Le nuove leggi civili commentate*, 261 (1989).

> 'the conduct of the contracting parties must be pursuant to the principle of good faith which – since it is one of the general principles on which (the CISG) is based (…) – must not only influence the entire regulation of the international sale (…), but also supplies an essential standard for the interpretation of the rules set forth in the CISG'.[115]

First, the Tribunal pointed out in *obiter* the following: as the lawsuit of the Austrian seller was filed approximately six months after the expiry of the payment deadline and the Italian buyer had had every opportunity to make amends, the alleged violation of good faith for recklessness of remedy is inconsistent with the facts and was mentioned only as an example.[116] Secondly, the consideration seems to be the result of a heteronomous interpretation of Art 7, para 1, CISG, which does mention good faith, but as a rule for the interpretation of the Convention, rather than for the performance of the contract; the modification of good faith from a rule for the interpretation to a rule for contract performance appears to be due to the variety of meanings that it carries in continental Europe – above all in Germany and in Italy –[117] but finds only a weak basis in the Convention itself.[118]

This argument is therefore the result of a 'homeward trend', unless we clarify which of the Convention's principles is implied and its source.[119] In any case, we should go beyond Art 7, para 1, CISG, which does not appear adequate

[115] On this specific point see G. Eörsi, 'General Provisions', in N.M. Galston and H. Smit eds, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Chicago: Bender, 1984), para 2.03; F. Diesse, 'La bonne foi, la coopération et la raisonnable dans la Convention des Nations Unies relative á la vente internationale de merchandise (CVIM)' *Journal de droit international*, I, 82 (2002).

[116] A reference to good faith appears in Tribunale di Busto Arsizio 13 December 2001 *Rivista di diritto internazionale privato e processuale*, 150 (2003); but not only is it *obiter*, it is also useless as to the corroboration of the opinion.

[117] F. Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB* (Tübingen: Mohr, 1956), passim; J.P. Dawson, 'The general clauses, viewed from a distance' *Rabels Zeitschrift*, 441 (1977); K. Larenz, *Lehrbuch des Schuldrechts*, I, *Allgemeiner Teil* (München: Beck, 1987), 125; A. Guarneri, 'Le clausole generali', in G. Alpa et al eds, *Le fonti del diritto italiano*, 2, *Le fonti non scritte e l'interpretazione*, in *Trattato di diritto civile-Sacco* (Torino: UTET, 1999), 137; V. Roppo, 'Il contratto' *Trattato di diritto privato-Iudica and Zatti* (Milano, 1st ed: Giuffrè, 2001), 493; M.W. Hesselink, 'The Concept of Good Faith', in A.S. Hartkamp et al eds, *Towards a European Civil Code* (Alphen aan den Rijn: Kluwer Law International, 2011), 619; F.D. Busnelli, 'Idee-forza costituzionali e nuovi principi: sussidiarietà, autodeterminazione, ragionevolezza' *Studi in onore di G. Iudica* (Milano: Giuffrè, 2014), 241; F. Piraino, *La buona fede in senso oggettivo* (Torino: Giappichelli, 2015), 147; C. Schubert, '§ 242' *Münchener Kommentar zum BGB* (München: Beck, 2016), 72.

[118] F.G. Mazzotta, 'Good Faith Principle: Vexata Quaestio', in L. DiMatteo ed, *International Sales* n 35 above, 120, 129; P.J. Powers, 'Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods' *Journal of Law & Commerce*, 333 (1999).

[119] Similarly Tribunale di Rovereto 21 November 2007 n 69 above; but here too the claim is not grounded on any provisions on good faith in its continental meaning, as a fundamental principle of the Convention.

for the purpose, and ask ourselves what are the potentials of Art 9, para 2, CISG, where the Convention qualifies international trade usage as a source of law; however, would not this simple operation also represent a symptom of 'homeward trend'? In any case, Art 9, para 2, CISG should be more rooted in Italian case-law.[120]

2. No *Contra Factum* when CISG Applies

In *Scatolificio La Perla* v *M. Frischdienst*, similar to the case mentioned above, the Tribunal of Padova invoked the prohibition of *venire contra factum proprium* as a fundamental principle of the Convention.[121] The German seller, in placing the goods at the Italian buyer's disposal, gave him extended payment terms – around fifty days from the delivery date. Despite the fact that the parties had not agreed otherwise and Art 58 CISG provides that the payment has to be made at the very moment of placing the goods at the buyer's disposal, in the case at issue the buyer could have fallen into arrears only at the expiry of the fixed time, and not at the expiry of the time which would otherwise follow from Art 58 CISG. In fact, the seller did not offer to the buyer a *Nachfrist* – up to that moment there had been no breach of contract –, but merely a delay. The Tribunal refers to the prohibition of *venire contra factum proprium*, which is evidently close to the 'continental' good faith. There is nevertheless some 'homeward trend' in referring this prohibition to the 'principles of the Convention' without specifying what the principle at issue is and where we should identify its basis in the Convention; it is as if the experience gained in dealing with domestic law had made that research superfluous. In this case too, as already underlined, Art 9 CISG may help.[122]

Provisions like Art 9 CISG cast light, even in the field of the Vienna Convention, on a phenomenon which is among the most remarkable in the trade practice and consequently in the very general theory: what could be defined as the prevalence of contracting over contract, of the activity over the result. Contracting means something more than one single outcome of the contractual activity,[123] and in business-to-business contracts a deal-by-deal regulation tends to be replaced

[120] F. Galgano and F. Marrella, *Commercio* n 74 above, 432.

[121] Tribunale di Padova 31 March 2004 n 69 above; see F. Astone, *Venire contra factum proprium* (Napoli: Edizioni Scientifiche Italiane, 2006); and F. Festi, *Il divieto di 'venire contro il fatto proprio'* (Milano: Giuffrè, 2007).

[122] B. Zeller, 'The Observance of Good Faith in International Trade', in A. Janssen and O. Meyer eds, *CISG Methodology* n 93 above, 133; U. Magnus, *Wiener UN-Kaufrecht* n 101 above, 190-191, 196, 217; about Art 9 CISG, in the Italian case-law, Corte di Appello di Genova 24 March 1995 *Diritto del commercio internazionale*, 734 (1997), and (in English translation) at https://tinyurl.com/y3zlfes6 (last visited 28 May 2019); among Italian scholars, M.J. Bonell, 'Art 9', in C.M. Bianca and M.J. Bonell eds, *Commentary* n 10 above, 103; Id, 'Art 9' *Le nuove leggi civili commentate*, 37 (1989).

[123] P. Femia, 'Nomenclatura del contratto o istituzione del contrarre? Per una teoria giuridica della contrattazione', in G. Gitti and G. Villa eds, *Il terzo contratto* (Bologna: il Mulino, 2008), 271.

by some kind of 'umbrella agreement'.[124] Its formation begins with the first meeting of minds but, once the connection is created, rights and obligations converge in a *continuum* that transcends all subsequent moments.

This deals neither with duration relationships nor with linked contracts. The point is rather the creation of an unplanned *continuum* resulting from a sequence of contracts which, taken individually, are instantaneous-performance (performance can be deferred but is neither continuous nor periodical). Here is another sign of the impossibility to reduce the relationship within the meshes of the contract; and the '*prius*' influences the '*posterius*', the past marks the future. Agreed usages and established practices are like the case-law of the relationship, which – just to push the metaphor further – is not made up by the isolated precedent but by the gradual consolidation of precedents, by the progressive repetition of conducts (regardless if material or legal), and therefore by the mutual reliance that all of this entails and guards.

In this light, the meagre wording of Art 9, para 1, CISG acquires a deep-seated meaning, not because it is embodied in a regulation, but because it mirrors what traders normally think and how they normally act.[125]

Therefore, the fact that continental good faith has a weak basis in the Convention does not mean that this latter neglects some aspects, event relevant ones, which German or Italian jurists are accustomed to include under that general clause.[126] That might sound a forgone assumption, yet it reveals helpful in smoothening the debate (and the frequent reluctance of operators and commentators with an American background). Very often the conventional *humus* is useful to the purpose, as it encourages looking beyond exteriority, following the method taught by the very best comparative theory.

VII. Formation of the Contract and Battle of Forms

In *Takap* v *Europlay*, ruled by the Tribunal of Rovereto,[127] a dispute arose between the parties on a forum selection clause in favour of the Dutch jurisdiction. Although the Italian seller, to obtain a payment injunction, addressed the Italian judge, the Dutch buyer counterclaimed that the jurisdiction belonged to Dutch courts pursuant to a forum selection clause which was incorporated into the contract as per Art 23 letter *b* of the Regulation EC 44/2001 (then replaced by

[124] C. Mak, 'The Role of Trade Usages in the CESL' *European Contract Law Review*, 64 (2014).

[125] What has been neglected by BGH 24 September 2014, *BGHZ*, 202, 258; also available at https://tinyurl.com/y6cd2mvj (last visited 28 May 2019) (see U. Magnus, 'UN-Kaufrecht – Aktuelles' n 34 above, 148-149).

[126] The same should be said about Art 77 CISG: U. Magnus, 'Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation', in L. DiMatteo ed, *International Sales* n 35 above, 279-281.

[127] Tribunale di Rovereto 21 November 2007 n 69 above.

Regulation (UE) no 1215/2012);[128] the question was whether the clause was a term of the contract agreed upon by the parties or not.

The Tribunal, after having decided for the applicability of the EC Regulation, had to verify the fulfilment of the requirements established by Art 23, para 1, letters *a*, *b* and *c*, as to the validity and effectiveness of the forum selection clause, but first of all, it had to ascertain if the clause had been properly agreed upon, given that it had not been negotiated, but simply included in the form drafted by the purchaser.

The question is a key point in the CISG and in the history of every national legal system: how are standard terms and conditions incorporated into the contract without having been individually negotiated or accepted (technically speaking) by the other party?[129] In this case too, there is a high risk of 'homeward trend', as the issue, due to the relevant interpretative matters, gives rise to a heated debate in all legal systems. This leads to extremely different solutions, all aimed at balancing opposing interests.

If the CISG were to be applied – as the case deals with the formation of the agreement, a matter covered by the Convention –[130] the internal gap would have to be filled with a rule which cannot be inferred from a literal interpretation, but only from general principles under Art 7 CISG.[131]

In the case at issue, the buyer claimed that he had always sent the other party written offers, expressly mentioned in the body of the document embodying general terms and conditions: this way of bringing the conditions to the other party's notice would have allowed their incorporation into the contract, as they were immediately accessible to the offeree, who could accept them or not. The same cannot be said for the other standard clauses. These latter should have

[128] See below, para III.

[129] L. Raiser, *Das Recht der allgemeinen Geschäftsbedingungen* (Bad Homburg: 1935, reprint 1961), 59-64, 109, 237, 281-283, 324, 502; F. Kessler, 'Contracts of adhesion – Some Thoughts About Freedom of Contract' *Columbia Law Review*, 629, 640 (1943); T.D. Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' *Harvard Law Review*, 1173 (1982-1983). But also, T. Wilhelmsson, 'Standard Form Conditions', in A.S. Hartkamp et al eds, *Towards a European Civil Code* n 118 above, 571; A.M. Garro, 'Rule-Setting by Private Organisations, Standardisation of Contracts and the Harmonisation of International Sales Law', in I. Fletcher, L. Mistelis and M. Cremona eds, *Foundations and Perspectives* n 5 above, 310.

[130] The assumption is unchallenged, even if, strictly speaking, the incorporation of standard terms is not even mentioned in the CISG: W.A. Achilles, 'Art 14', in J. Ensthaler ed, *Gemeinschaftskommentar zum Handelsgesetzbuch mit UN-Kaufrecht* (München: Beck, 2015), § 6; U. Schroeter, 'Art 14', in P. Schlechtriem and I. Schwenzer eds, *Kommentar zum einheitlichen UN-Kaufrecht – CISG* (München: Beck, 2013), § 33; and F. Ferrari, 'Art 14', in S. Kröll, L. Mistelis and P. Perales Viscasillas eds, *UN Convention on Contracts for the International Sale of Goods (CISG)* (München: Beck, 2011), § 38; U. Magnus, 'Incorporation of Standard Terms', in L. DiMatteo et al eds, *International Sales* n 35 above, 246.

[131] All this needs to be updated and maybe rethought in light of the more recent techniques for distance contracting: M. Zachariasiewicz, 'Inclusion of Standard Terms in Electronic Form under the CISG', in I. Schwenzer and L. Spagnolo eds, *The Electronic CISG* (The Hague: Kluwer Law International, 2017), 95.

been brought to the other party's notice in addition to the clauses contained in the offer, and the law cannot require the other party to make efforts to become aware of them.[132]

No evidence of such incorporation was produced in court and, moreover, evidence was given that the buyer had replied to the offers with letters of acceptance in which his own standard terms and conditions were written and countersigned.

At this point, two overlapping lines of argument remain: if the form drafted by the buyer was neither knowable nor known to the seller – as emerged from the enquiries – also the forum selection clause in favour of the Dutch courts could not be considered valid, as there had been no agreement. The fact that the seller had shown an intention to incorporate his own form in the contract, which had no forum selection clauses, is irrelevant: such form would have been the only one to be incorporated in the contract without affecting jurisdiction.

Conversely, if the forms of both parties had fulfilled the minimum 'noticeability' requirement for incorporation, a battle of forms would have arisen. The Tribunal mentioned it, but it was clearly *obiter*, because evidence was produced that the buyer's form had not been incorporated into the contract. In any case, the seller's form, embodied in the letter of confirmation subsequently countersigned by the buyer, would have prevailed over the one drafted by the buyer. In fact, the buyer's form materially modifying the offer in line with Art 19, para 3, CISG, would have qualified the letter of confirmation as a new offer, then accepted by the original offeror upon signing the confirmation. In the end, if there had been a battle of forms, the prevalence of the seller's form would have prevented the application of the forum selection clause.

The *obiter* can be criticised as it includes the battle of forms in the scope of Art 19 CISG – which instead refers to individual negotiations –[133] but cannot be considered the product of regional 'bad' influences, representing on the contrary an open application of CISG rules and principles. The fact that Art 19 CISG bears a similarity to Art 1326, mainly in its para 5, Civil Code, is coincidental.

It is not appropriate to talk about 'homeward trend' when dealing with the judgment of the Tribunal of Rovereto in *Euroflash* v *Arconvert*:[134] as in *Takap* v *Europlay* (a more recent case), the problem was the effectiveness of a forum selection clause embodied in the (Italian) seller's form, which the (French) buyer alleged not to have agreed upon; the whole form had been written at the bottom of the order confirmation by which the seller had declared his acceptance of the

[132] For an even more formalist approach, see Cour d'Appel de Paris 13 December 1995, available at https://tinyurl.com/y2scz6rc (last visited 28 May 2019).

[133] For this opinion, see E. Ferrante, 'Battle of Forms and the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG). A note on the BGH (German Supreme Court) decision of 9 January 2002' *Uniform Law Review*, 977-978 (2003).

[134] Tribunale di Rovereto 24 August 2006, available at https://tinyurl.com/yyzyr3bc (last visited 28 May 2019).

seller's offer: in this way the form was brought to the buyer's notice, but there was no evidence that he had specifically accepted it and, moreover, no commercial or normative usage could allow an interpretation of the buyer's conduct as an acceptance.

In the Tribunal's view the acceptance was not compliant with the offer and therefore amounted to a counter-offer which needed a new acceptance by the original offeror. Given that the original offeror had not declared anything and there was no usage between the parties which permitted acceptance by conduct, the forum selection clause could not be considered as accepted and could not establish jurisdiction in favour of Italian courts, which was in itself excluded by Regulation EC 44/2001.

The decision is peculiar in three respects: first of all, the opinion according to which general terms and conditions require actual acceptance, similar to the one required for the other terms of the offer, as if the distinction between unilateral clauses and negotiated clauses would fade (and such a rule could neither apply to Art 14 et seq. CISG, nor to Art 1326 et seq. Italian Civil Code); secondly, if the opinion is reliable, the Tribunal should have drawn the conclusion that not only the forum selection clause, but the whole agreement was void (which can be deduced both from Art 19, paras 1 and 3, CISG, and from the 'mirror image rule' of Art 1326, para 5, Italian Civil Code); finally, it is clear that the solution adopted – according to which the forum selection clause is void for lack of consent, while the contract itself remains valid – is inconsistent both with the CISG (especially with Art 19, para 3) and with the Italian Civil Code, which has no similar provision. In any case, regardless of the positive or negative remarks, the decision is not the result of a 'homeward trend'.

VIII. Reasonable Time for the Notice of Lack of Conformity

It is well known that another crucial issue concerns Art 39 CISG, and in particular the meaning of reasonable time for giving notice of the lack of conformity.[135] Regarding this issue, in order to evaluate the free interpretation of the Italian judge deciding international cases, a preliminary remark needs to be made: while the CISG relies on the general clause of reasonable time,[136] Art 1495, para 1, Italian Civil Code fixes a time limit of merely eight days. The reasonableness of time, therefore, is ascertained by a judge who is accustomed to applying a very short time limit. Actually, it is not just an opposition between

[135] On this point, see A. Janssen, 'La durata dei termini d'ispezione e di denuncia di non conformità dei beni nella Convenzione di Vienna: la giurisprudenza dei giudici nazionali a confronto' *Contratto e impresa/Europa*, 1321 (2003); already before, F. Frattini, 'Art 39' *Le nuove leggi civili commentate*, 176 (1989); and K. Sono, 'Art 39', in C.M. Bianca and M.J. Bonell eds, *Commentary* n 10 above, 303.

[136] The formula of reasonable time has been expressly qualified as a 'general clause' by Pretura di Torino 30 January 1997 n 51 above.

a long and a short period of time, but a final cut between a normative technique aimed at flexibility and another aimed at rigidity, between a widely and a narrowly discretional solution.

In *Sport D'Hiver* v *Ets Louys et Fils* the Tribunal of Cuneo,[137] given that the flexibility of the general clause 'will have to be measured on the basis of a case-by-case approach', established that a delay of twenty-three days in giving notice of lack of conformity of the goods sold (clothes) was not reasonable, and that the buyer had lost the right to rely on this provision.

Besides the strict observance of foreign case-law, two implied criteria of evaluation emerge from this decision: first of all, the measure of reasonableness should depend on the facts, rather than on systematic needs or analogy;[138] secondly, it could consist of an extension of the time limits fixed by the Italian Civil Code – a period longer than eight days can indeed be reasonable – but we should not lose sight of balance: eight days as well as twenty-three can be a reasonable time but, evidently, somewhere in-between would be more desirable.

Less relevant than it appears is the case *C. & M.* v *Bakintzopoulos*, where the Pretura of Turin,[139] in deciding on a notice which had been given seven months after the delivery of the goods (cotton fabrics), held that the reasonable time had expired and the buyer had lost his right to rely on it. Similarly, in *Rheinland Versicherungen* v *Atlarex*, the Tribunal of Vigevano,[140] after emphasising the need to consider the nature of the goods sold, excluded the reasonableness of a notice given four months after the delivery of the goods (rubber plates). The smaller degree of relevance of these latter cases depends on the fact that, in both, the notice was given quite a long time after delivery, so that it was clear from the beginning and *prima facie* that the buyer had lost his right to rely on the lack of conformity.

The same remarks apply to *Officine Maraldi* v *Intesa BCI*, decided by the Tribunal of Forlì,[141] where the notice was given more than thirteen months after delivery, despite the non-perishable nature of the goods (petrol tanks), clearly leading to the loss of the right to rely on the lack of conformity; and similarly for *Zintix* v *Olitalia*, decided by the same Tribunal, where the notice was given after about fifteen months.[142]

[137] Tribunale di Cuneo 31 January 1996 n 95 above.

[138] G. Alpa, 'L'analogia', in G. Alpa et al eds, 'Le fonti del diritto italiano, 2, Le fonti non scritte e l'interpretazione' *Trattato di diritto civile Sacco* (Torino: UTET, 1999), 297, 330.

[139] Pretura di Torino 30 January 1997 n 51 above.

[140] Tribunale di Vigevano 12 July 2000 n 69 above. Restricting our analysis to the reasonable time of notice, in the judgment at issue all the observations on the relevance of contractual freedom, on the *dies a quo* in case of hidden defects and on the burden of proof are out of the *ratio decidendi*, given that the buyer had lost his right to rely on the lack of conformity. Anyway, here there was no agreement between the parties on fixing the time limits (see instead, Tribunale di Foggia 21 June (*rectius*, 3 July) 2013, available at https://tinyurl.com/y5xae264 (last visited 28 May 2019) and the judge believed that the nature of the defect had not been proved.

[141] Tribunale di Forlì 16 February 2009 n 69 above.

[142] Tribunale di Forlì 26 March 2009 n 69 above, which, actually, refuses the idea, drawn from foreign case-law, that, for the purposes of Art 39 CISG, reasonable time means one

Yet, against such trend stands the Tribunale di Bolzano in *Ecogen Holding* v *Isolcell Italia*:[143]

> 'With regard to the reasonable time (sometimes defined as a 'general clause'), the (Italian) courts have held that it shall be determined on a case by case basis, thus by taking into consideration the circumstances of the case, and the nature of the contracted goods. For instance, the reasonable time for a notification referring to perishable goods is shorter than the one related to non-perishable goods. In the case at hand the parties contracted for the sale of industrial machines, and therefore the reasonable time period shall not be interpreted narrowly. This court is of the opinion that in this case, the four months period preceding the notification is a reasonable period of time'.

The opposition between the abovementioned decision and *Rheinland Versicherungen* v *Atlarex* is evident, as in that case (rubber plates) a notice given after four months was considered untimely. The distinction between perishable and non-perishable goods may be illustrative – the delay appears more excusable in the first case – but does not prevent the judge from more tailor-made assessments within one or the other category. Regardless of such *tranchant* classifications, goods can be more or less perishable and justify longer or shorter periods for the notice. Actually, according to our case-law industrial machineries are less perishable than rubber plates, so four months must be considered reasonable in the first case but not in the second one; or rather, instead of the major or minor perishability, one must distinguish between goods for which it is easier to ascertain the defect, where a short time-limit sounds convincing, and goods for which it is more difficult and thus a longer time-limit is more suitable.

The judgment by Tribunale di Bolzano is relevant also under another aspect. The seller attempted to invoke the applicability of Art 1495, para 3 Italian Civil Code, which fixes a time limitation of one year from the delivery. It is clear that such argument implied the exclusion of time limitation from the matters covered by the Convention and the consequential need to identify the applicable law (in that case, Italian law).

The Tribunal, though, denies such exclusion from the scope of the CISG – it will thus be only an apparent or literal gap – but, in spite of that, recognises that a possible annual time limitation is inconsistent with Art 39, para 2, CISG. This latter, in fact, qualifies as untimely 'in any event' the notice given after more

month: in fact, such a 'generalisation' would end up in a sort of presumption, which, once stratified in the precedents, would determine a permanent inversion of the burden of proof (as a result of such reasoning it would be up to the seller to prove that the notice exceeded the time limits). In the same direction, Id 6 March 2012 n 46 above.

[143] Tribunale di Bolzano 27 January 2009, *Giurisprudenza italiana*, 2436 (2009), case-note by Reinstadler, also available in English translation at https://tinyurl.com/yy95ylzz (last visited 28 May 2019) (where the following sentences appear).

than two years from the delivery and such time limit, the expire of which makes the buyer loose 'the right to rely on a lack of conformity of the goods', cannot but prevail over any other. A system which permits to give notice of the defects after two years from the delivery but prevents legal action after one year would be unconceivable. Well, the inclusion of time limitation in the scope of the Convention remains questionable – to tell the truth, the opposite view is prevailing[144] –, but in any case the possible hetero-supplementation by the applicable law must lead to harmonising outcomes.

The most recent Italian case-law on reasonable time shows a stronger compliance with foreign precedents: in *Kiessling* v *Serenissima CIR* the Tribunale di Reggio Emilia held that

> '(…) with regard to the reasonable time period indicated in Art 39 of the CISG the prevailing case-law indicates that a period of one month (or a maximum of two months under specific conditions, that are not met in the present case) from the time when the buyer could (or should) have examined the goods can be considered adequate'.[145]

In *Expoplast* v *Reg Mac* the Tribunal of Busto Arsizio needed to concentrate on the *dies a quo* (regarding the discovery of the defect) and the requirement of specificity – 'specifying the nature of the lack of conformity' – established as per Art 39, para 1, CISG, rather than on the reasonableness of time.[146] As far as the first point is concerned, after confirming the need for a case-by-case approach that takes into account the nature and type of the lack of conformity,[147] the exact fixing of the *dies a quo* was said to depend on the exteriority of the defect. If an examination is necessary to discover it, as in the case at issue, the time for the notice cannot run from the delivery, but only from the results of the examination, bearing in mind the limit of two years established by Art 39, para 2, CISG. This is a common argument in Italian case-law, where the very short time limits fixed for domestic sale by Art 1495, para 1, Italian Civil Code – the already-mentioned eight days – have led to a heated debate on the *dies a quo*, which is not expressed in such narrow terms. Nevertheless, the decision of the Tribunal seems to be free from national prejudice, given that also Art 38, para 1, CISG permits a minimum delay for a further examination of the goods, which is not feasible on delivery.[148]

As far as the profile of specificity is concerned, the judgment tends to mediate between two opposing needs: on one hand, the need not to worsen excessively

[144] U. Magnus, *Wiener UN-Kaufrecht* n 101 above, 141-142, 203; and F. Ferrari, 'Art 4', in P. Schlechtriem and I. Schwenzer eds, *Kommentar* n 131 above, 118-119.

[145] Again, Tribunale di Reggio Emilia 12 aprile 2011 n 54 above; that translation is to be found at https://tinyurl.com/y5xd9b3w (last visited 28 May 2019).

[146] Tribunale di Busto Arsizio 13 December 2001 n 116 above.

[147] In the same direction, as already said, Tribunale di Cuneo 31 January 1996 n 95 above.

[148] F. Frattini, 'Art 38' *Le nuove leggi civili commentate*, 171 (1989).

the buyer's position, by requiring notice with detailed and motivated content similar to expert evidence; on the other, the need to prevent the seller from being at the mercy of the buyer's complaints and give him the opportunity to amend the lack of conformity depending on specifically identified defects. Also here the nature of the goods sold plays a relevant role, because examining clothes[149] or fabrics[150] is different from examining rubber plates[151] or, as in the case in question, complicated machinery for industrial production. A trade-off formula follows:

> '(…) the burden of proof on the timely notice of the lack of conformity as it appears is on the buyer, but he is not required to prove also the specific cause of it'.

Notice is itself an extrinsic act, so it does not require an explanation of the reasons on which the alleged lack of conformity is based; we should bear in mind that notice neither amounts to a lawsuit, nor requires the buyer to identify a breach on the other party's side.

In *Al Palazzo* v *Bernardaud* the Tribunal of Rimini,[152] having referred to the principles already established by previous decisions, nonetheless specified that the buyer only needs to give notice within a reasonable time in order not to lose his right to rely on the lack of conformity, while the requirement to examine the goods within as short a period as is practicable is merely secondary and accessory. It must be said that, if the reasonable time is respected – and the buyer is entitled to all the remedies provided for by the Convention – what might the consequence of a late examination be? Logic prevails over practical needs: if the short time-limit for the examination aims to ensure the reasonableness of the time-limit for notice, but this latter is in practice respected, it follows that the examination must be considered timely as well. However, this latter could be absolutely superfluous and therefore omitted by the buyer if the lack of conformity is immediately noticeable without any examination.

In the case in question, the Tribunal unsurprisingly excluded the timeliness of notice, once it was proven that it had been given six months after delivery of the goods, a period of time which can hardly raise doubts as to the non-reasonableness of the delay (despite the buyer's attempt to allege the circumstances provided by Arts 40 and 44 CISG, without succeeding in proving the factual elements).

Among the several *obiters* found throughout the judgment, one of them is worth noticing, even though irrelevant to the decision itself: in recalling the criterion of reasonableness in fixing the time as per Art 39 CISG, the Tribunal –

[149] Tribunale di Cuneo 31 January 1996 n 95 above.
[150] Pretura di Torino 30 January 1997 n 51 above.
[151] Tribunale di Vigevano 12 July 2000 n 69 above.
[152] Tribunale di Rimini 26 November 2002 n 69 above.

in addition to the parties' agreement,[153] the circumstances of the case[154] and the nature of the goods[155] – refers to any usage agreed upon and any practices established as per Art 9 CISG. Further elaborating on the Tribunal's decision, we could ask ourselves whether any previous conduct of mutual tolerance – which proves not so rare in the case-law available – necessarily entails an extension of the reasonable time whenever one party relied on the other party's conduct and collaborative attitude. Such reliance on the other party's good disposition towards out-of-court arrangements might lead to delays in giving notice, or to notice whose reasonableness would not be held if not by virtue of the previous fiduciary relationship between the parties.

Finally, in *Mitias* v *Solidea* the Tribunal of Forlì,[156] confirming the solutions found in the previous case-law, specified that if the seller, as a consequence of the buyer's complaints, offers a remedy to amend the lack of conformity, the complaints amount to a timely notice: the seller's admissions would be equivalent to attesting the reasonableness of the time period of notice. It would have been much easier to apply Art 40 CISG directly, which fully resolves the question.[157]

This leads us back to the premises: a judge who, in the conventional system, is supposed to spell out the reasonable time requirement under Art 39 CISG, in the domestic one is required to 'coldly' apply the eight days' time limit provided by Art 1495, para 1, Italian Civil Code; and it appears now evident, in the light of the abovementioned case law on international sales, that a time limit of eight days for the notice of defects is all but reasonable, and the status of sales contracts regulated by the code is not acceptable anymore.[158]

Then, the remedy is neither trying to postpone the *dies a quo,*[159] nor excessively

[153] Again Tribunale di Vigevano 12 July 2000 n 69 above.

[154] Tribunale di Cuneo 31 January 1996 n 95 above; Tribunale di Busto Arsizio 13 December 2001 n 116 above.

[155] Pretura di Torino 30 January 1997 n 51 above; but also, Tribunale di Vigevano 12 July 2000 n 69 above.

[156] Tribunale di Forlì 9 December 2008 n 69 above.

[157] See also Cour de Cassation 4 November 2014, available at https://tinyurl.com/y497ejkw (last visited 28 May 2019). Among Italian scholars, F. Frattini, 'Art 40' *Le nuove leggi civili commentate*, 183 (1989). The decision by Tribunale di Forlì 9 December 2008 n 69 above is also remarkable as it confirms that within the system of values of the CISG, the remedy of avoidance is *extrema ratio*, as it is always subdued to the fundamental breach and it implies the breaking-off of the relationship, and the entitlement to restitutionary remedies; despite the fact that Art 1455 Italian Civil Code uses the expression 'of non-scarce importance', which appears to be something less severe than the fundamental breach, Tribunale di Padova 11 January 2005 n 47 above claimed the there is a 'correspondence of meanings' between the two formulas, which promotes a harmonic interpretation of the CISG together with domestic law.

[158] Uniform private international law therefore amounts to a normative expression of reasonableness, emergence point of values and principles whose application is cross-context (G. Perlingieri, *Profili applicativi della ragionevolezza* n 77 above, 22 n 49). This can and must lead, if that is the case, to a rethinking of the system as a whole (G. Alpa, *Diritto privato europeo* (Milano: Giuffrè, 2016), 69).

[159] D. Rubino, 'La compravendita' *Trattato di diritto civile e commerciale Cicu-Messineo-Mengoni-Schlesinger* (Milano: Giuffrè, 1971), 831; C.M. Bianca, 'La vendita e la permuta' *Trattatto*

widening the concepts of 'recognition' or 'concealment of the defect' under Art 1495, para 2, Civil Code.[160] Instead, the solution lies in acknowledging that, in light of the hints coming from uniform international law – and of the related need for a certain unity of the system despite the stratification of sources[161] – Art 1495, para 1, Italian Civil Code is – or 'has become' – unconstitutional. In fact, this latter provision is against Art 3 Cost on the grounds of an unreasonable use of legislative discretion,[162] and contradicts what Art 24, paras 1 and 2 Cost and Art

di diritto civile Vassalli (Torino: UTET, 1993), 1027. See also Corte di Cassazione 30 August 2000 no 11452, *Giurisprudenza italiana*, 1133 (2001); Corte di Cassazione 14 May 1990 no 4116, available at www.dejure.it; Corte di Cassazione 14 February 1994 no 1458, *Repertorio del Foro italiano*, 1994 entry *Vendita* no 61, but also available at www.dejure.it; in the same direction, before, Corte di Cassazione 8 July 1995 no 7541, *Guida al diritto*, 39 (1995).

[160] Again D. Rubino, *La compravendita* n 160 above, 838, 840; C.M. Bianca, *La vendita* n 160 above, 1034, 1040. About the Italian case-law, Corte di Cassazione 15 March 2004 no 5251, available at www.dejure.it (*contra*, the 'ancient' Tribunale di Napoli, 20 August 1946, *Monitore dei Tribunali*, 585 (1946)); Corte di Cassazione 12 June 1991 no 6365, available at www.dejure.it; before, Corte di Cassazione 24 July 1968 no 2678, *Massimario del Foro italiano* (1968); Corte di Appello di Napoli 17 January 1974, *Diritto e giurisprudenza*, 129 (1975); see also, Corte di Cassazione 20 April 2012 no 6263, *Notariato*, 366 (2012); and Corte di Cassazione 13 January 1995 no 381, *Corriere giuridico*, 607 (1995) (*contra* Corte di Cassazione 21 April 2005 no 13294, *Giustizia civile*, I, 2955 (2005); more case-law in A. Cerulo, 'Riconoscimento dei vizi della cosa venduta e novazione dell'obbligazione' *La Nuova giurisprudenza civile commentata*, II, 425 (2006)).

[161] P. Perlingieri, 'Nuovi profili del contratto', in Id, *Il diritto dei contratti tra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 421; Id, *L'ordinamento vigente e i suoi valori. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006), 327; Id, *Il diritto civile nella legalità costituzionale* n 5 above, 198; in the same direction, G. Perlingieri, 'Invalidità delle disposizioni «mortis causa» e unitarietà della disciplina degli atti di autonomia' *Diritto delle successioni e della famiglia*, 145-146 (2016).

[162] About reasonableness as a constitutional standard, G. Perlingieri, *Profili applicativi della ragionevolezza* n 77 above, 29, 44, 56; G. D'Amico, *Clausole generali e ragionevolezza*, in Id et al, *I rapporti civilistici nell'interpretazione della Corte costituzionale. La Corte costituzionale nella costruzione dell'ordinamento attuale. Princìpi fondamentali* (Napoli: Edizioni Scientifiche Italiane, 2007), I, 429; A. Ruggeri, 'Interpretazione costituzionale e ragionevolezza', in Id et al, *I rapporti civilistici nell'interpretazione della Corte Costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2007), II, 215; O. Clarizia, '*Tertium comparationis*, norma eccezionale e incostituzionalità con effetto estensivo', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 171; more generally, L. Paladin, 'Corte costituzionale e principio generale d'eguaglianza' *Giurisprudenza costituzionale*, I, 222 (1984); A. Pizzorusso, 'Clausole generali e controllo di costituzionalità delle leggi' *Politica del diritto*, 655 (1988); A. Cerri, 'Ragionevolezza delle leggi' *Enciclopedia del diritto* (Roma: Treccani, 1994), XXV, 2; A. Morrone, *Il custode della ragionevolezza* (Milano: Giuffrè, 2001), passim; L. D'Andrea, *Ragionevolezza e legittimazione del sistema* (Milano: Giuffrè, 2005), passim; F. Modugno, *La ragionevolezza nella giustizia costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2007), 12; in the North-American world, among others, G.P. Fletcher, 'The Right and the Reasonable' *Harvard Law Review*, 949 (1985). And while the reach of reasonableness goes beyond the constitutional parameter of Art 3 Constitution (F. Sorrentino, *Le fonti del diritto italiano* (Padova: CEDAM, 2009), 131), it nevertheless finds in such parameter its highest expression (G. Scaccia, *Gli «strumenti» della ragionevolezza nel giudizio costituzionale* (Milano: Giuffrè, 2000), 14; and H. Hanau, *Der Grundsatz der Verhältnismäßigkeit als Schranke privater Gestaltungsmacht* (Tübingen: Mohr Siebeck, 2004), 93).

47 EU Charter provide as to the right to an effective remedy.[163]

Consequently, given both the unconstitutional formula of Art 1495, para 1, Civil Code and the impossibility of a constitutionally-oriented interpretation,[164] a ruling by the Italian Constitutional Court would be indispensable.

IX. The CISG as a 'Tool Box' (Towards a CISG-Based Judicial Review?)

Also in Italy the Convention plays a role which goes far beyond its sphere of application and normative value. As stated from the beginning, it has gradually increased its cultural and paradigmatic function, which represents after all its highest form of legitimacy.[165] First of all, there is evidence that the CISG is a tool for interpreting other international Conventions and EU acts in force. In particular, Italian case-law has made a wide use of the Convention to clarify the meaning, first, of Art 5, no 1, of the Brussels Convention of 1968 ('on the jurisdiction and enforcement of judgments in civil and commercial matters', ratified by legge no 804 of 21 April 1971), and then of Art 5, no 1, Reg EC 44/2001 ('on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'), which has transposed the provisions of the Convention and replaced it 'among the member-States' (as follows from Art 68, para 1, Regulation EC 44/2001). Something similar is certainly to happen with the more recent Regulation EC 1215/2012, of which Art 7, no 1, reproduces Art 5, no 1, Regulation EC 44/2001.

Just to consider the most recent judgments issued on the basis of this Regulation EC 44/2001, rather than of the 'old' Brussels 1968, a controversial matter concerns the operational requirements of the special jurisdiction provided by Art 5, especially no 1, letter *b*, Regulation EC 44/2001: as we are dealing with sales, the exception to the general jurisdiction established by Art 2, para 1, Regulation EC 44/2001 is possible when the judge has jurisdiction in 'the place (…), situated in a member-State, where the goods have been or should have

[163] At a European level see, Joined Cases C-402/05 and C-415/05 *Kadi/Al Barakaat Intern. Found.* v *Council/Commission*, [2008] ECR I-6351; Case C-47/07, *Masdar* v *Commission*, [2008] ECR I-9761; and Case C-432/05, *Unibet* v *Justitiekanslern*, [2007] ECR I-2271.

[164] Per tutti, P. Perlingieri, 'Giustizia secondo Costituzione ed ermeneutica. L'interpretazione c.d. adeguatrice', in P. Femia ed, *Interpretazione a fini applicativi* n 163 above, 3, 60; Id, *L'ordinamento vigente* n 161 above, 371.

[165] For the sake of brevity we omit any reference to other para-normative values of the CISG: in European law – and, consequently, in Italian law – the Convention has repeatedly operated as a 'tool box' even *de jure condendo*; it is well known that a large part of the *acquis communautaire*, at least in contract law, has been built on the model of the CISG, which has provided not only a huge background of ideas, but also provisions which have been literally copied and transposed into the EU legislative acts; we are especially thinking about the important EU Directive 1999/44/EC and – just to quote a modern example – the recent proposal for a 'Common European Sales Law', that is to say COM(2011) 635 final.

been delivered', that is to say, the place where the obligation has or should have been performed (*forum destinatae solutionis*). If the contract does not say anything on this point – which is rather common – we must adopt some criteria to clearly identify the legal place of delivery (also when delivery has not taken place and represents the controversial issue). In doing this, the judges, despite some dissenting opinions,[166] rely on Art 31 CISG, which incorporates detailed and comprehensive provisions.[167]

In this case, the CISG is used as a real argument for interpretation: provisions are interpreted according to the meaning suggested by one or more CISG rules, which are respected as a 'cultural paradigm' rather than for their being applicable to the case at stake.

The paradigmatic meaning and value of the CISG is so strong that Italian case-law has used some of its provisions to interpret even domestic law: the Italian Constitutional Court, called upon to rule on the constitutionality of Art 1510, para 2, Italian civil code, which in relation to sales including transport provides that 'the seller is discharged from the obligation to deliver when he hands the goods to the carrier', confirmed that it is consistent with the Constitution because it is consistent with Arts 31 and 67 CISG.[168]

In *F.A.S. Italiana* v *Ti.Emme* the subject-matter of the referral was the alleged inequality of treatment between the seller's liability in case of 'sales & shipping' and the ordinary seller's vicarious liability. In fact, in the first case,

[166] See Tribunale di Rovereto 28 August 2004, available at https://tinyurl.com/y6pp76v5 (last visited 28 May 2019); Tribunale di Rovereto 24 August 2006 n 134 above, but also Corte di Cassazione 5 October 2009 no 21191 n 24 above; and, more recently, Corte di Cassazione 10 February 2017 no 3558, available at https://tinyurl.com/yxpkuvzd (last visited 28 May 2019).

[167] Corte di Cassazione 24 June 2007 no 13891, available at www.dejure.it, also available (but only per abstract) at https://tinyurl.com/y6sf9u2f; Corte di Cassazione 3 January 2007 no 20436, *Rivista di diritto internazionale privato e processuale*, 1105 (2007) (English translation available at https://tinyurl.com/y4a3txp2) (last visited 28 May 2019); Corte di Cassazione 27 September 2006 no 20887, *Giustizia civile*, I, 1393 (2007); Tribunale di Padova 10 January 2006 n 98 above; Tribunale di Verona 21 December 2006, available at https://tinyurl.com/y3zvba8o (last visited 28 May 2019); but also Corte di Cassazione 18 October 2002 no 14837, available at www.dejure.it, available (per abstract) at https://tinyurl.com/yxvserpc (last visited 28 May 2019); Corte di Cassazione 10 March 2000 no 14837, *Foro Italiano*, I, 2226 (2000), *Rivista di diritto internazionale privato e processuale*, 773 (2000); Corte di Cassazione 5 November 1998 no 11088, available at www.dejure.it, available (in English translation) at https://tinyurl.com/yxvg2bev (last visited 28 May 2019); Corte di Cassazione 7 August 1998 no 7759, available at www.dejure.it, available at http://www.unilex.info/cisg/case/348 (last visited 28 May 2019) and (in English, per abstract) at https://tinyurl.com/y6jq8pg5 (last visited 28 May 2019); Corte di Cassazione 8 May 1998 no 4668, *Rivista di diritto internazionale privato e processuale*, 290-294 (1999), also available at https://tinyurl.com/y4ecxp6c (last visited 28 May 2019); in a different sense, as already reported, Corte di Cassazione 5 October 2009 no 21191 n 24 above; and Corte di Cassazione 10 February 2017 no 3558 n 166 above.

[168] Corte Costituzionale 19 November 1992 no 465, *Giurisprudenza costituzionale*, 4191 (1992); *Foro italiano*, I, 3201 (1992); *Giustizia civile*, I, 313 (1993); *Diritto del commercio internazionale*, 446 (1995). See on that decision, L. DiMatteo, 'The CISG across National Legal Systems', in Id, *International Sales* n 35 above, 602.

thanks to the referred provision, the seller is relieved from liability as soon as he delivers the goods to the shipper or the carrier, while in the second case, by virtue of Art 1228 Italian Civil Code, the seller is always liable for the intentional or negligent conduct of its auxiliaries. In the referring judge's opinion, it would be irrational and unreasonable to treat the two situations differently, as shippers and carriers are, after all, auxiliaries; and the parameter adduced by the judge is Art 3 Cost. The Court adopted an opposite view and, on the grounds of the symmetry existing between the controversial provision and the uniform international sales law, rejected the referral.[169]

Such an intrusion of CISG into domestic case-law, where the quotation of foreign precedents or legislation is on the whole rare and the very comparative argument not so common, appears to be considerably significant. Yet, maybe the resort to the Vienna Convention has wider margins of success compared to the import of foreign law: in fact, the CISG enshrines rules and principles that, filtered by the lively experience of trade and merged to various extent in the communitarian legislation as well as in the soft law, provide a map of universally acknowledged mental schemes; therefore a prominent map, but also a map ready to be used, as moulded by practice. This contributes to ensure the compliance of the Italian Civil Code with the Constitution, by expressing shared and internationally-recognised values and principles.[170]

The battle against 'homeward trend' in the interpretation of the Convention could now be replaced by the battle for 'CISG-trend' in the interpretation of domestic law: would it be too premature to envisage a CISG-based judicial review? Maybe yes, but that could be the fullest and ultimate sense of the thirtieth birthday of CISG in Italy.

[169] '(…) it was not properly pleaded for, as element of comparison of the rule that the remitting judge [a quo] hypothesises unreasonably different, the principle of the debtor's (buyer's) liability, who in carrying out his duties avails of third parties performances (Art 1228 Cc), if one considers that the returning of the goods to the carrier already fulfils the seller's obligation of delivery. This latter principle is in force in the legal systems of other countries with legal traditions close to ours. Also, it finds a clear legislative expression in any systems where sales contracts have, instead, only obligatory effects (§ 447 of the German Civil Code), and not real effects as is the case in the Italian legal framework provided by the Civil Code. The transfer of risk from the seller to the buyer upon the delivery of the goods to the carrier responds also to a principle, previously affirmed in Art 19 of the Convention on the Uniform Laws on the International Sale of Moveable Goods (ULIS) (adopted in The Hague 1 July 1964 and ratified with the L. 21 June 1971, n. 816), which has been confirmed by Arts 31 and 67 of the United Nations Convention on Contracts for the International Sale of Goods (adopted in Vienna 11 April 1980, ratified with the L. 11 December 1985, n. 765, which entered into force on 1 January 1988)' (translation available at https://tinyurl.com/y3hasyyd) (last visited 28 May 2019).

[170] The exact correspondence between the rules of the Convention and the code's provisions excludes from the beginning the suspect of 'homeward trend': see Corte di Cassazione 3 January 2007 no 20436 n 167 above.

Algorithms and Law

Erika Giorgini*

Abstract

The paper moves from the idea that thanks to a technology, which was able to transmit data in a rapid and secure way, and the spread of (personal) computers, a globalised network of data users was created. They started to produce content which was then organized and interconnected.

This essay outlines the role of the law in this process. It notes that the law of states was not interested at first in the regulation of this network, which was at first used only used by its inventors-designers. They created and established the technical norms through which it existed, ie 'the original code'. Little by little, the participants with ownership rights to this technology, and the market, added to these non-legal norms.

In this regard, theory has been elaborated which claims that the network is regulated by the existence of autonomous legal systems which are made 'by communities of choice clustering around shared interests'.

The work criticizes this approach because, in the era of digitalism, not even the most articulated and precise legal system allows to calculate the law, so that, *a fortiori*, also the respect of fundamental human right could be threatened.

The essay also highlights that the obscure nature of legal systems in which norms are formulated by algorithms is amplified by the current function of the data that is being considered somewhat akin to natural resources, as 'data in the wild'. This phenomenon appears in the so-called 'deep learning' phenomenon, in which is not possible to know *ex ante* the data that are the inputs of the algorithmic procedure. Thus, the data are not provided by humans, but they are learned from the algorithm itself.

In conclusion, algorithmic mathematical design needs to be considered in more detail in order to understand its real function. Indeed, it is only through the investigation of this function that the possible regulation of decisions based on algorithms and the role of the law within the machine-internet-web system can be analyzed.

I. From Digital to Digitalism: The Transformation of Human Experience into a Compatible Format (Numbers) Through the Use of Machines

It is not an easy task to define the current era by identifying, all its characterizing elements. Indeed, the constant and rapid evolution of our society makes it impossible to distinguish between what should be included in such definition, and what should not. In the attempt to identify its fundamental

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traits, the extreme rapidity of data circulation clearly emerges.[1]

It is necessary to highlight what makes the contemporary age significantly different from the previous ones: it is neither the use, nor the existence of its information itself, but its digital nature, and, accordingly, the possibility to have it used and transmitted differently.

Moreover, the scenario presented to the observer is that the whole human presence has been fragmented and transformed in a format compatible with computerised machines to the point that the digitalisation of the heritage has acquired a normative value.[2]

Accordingly, the human experience itself has become 'data' and, therefore, an object of calculation. The massive digitalisation that started at the beginning of the 1990s has allowed music, photographs, videos, etc to be dematerialized, giving rise to a real digital world-wide market which, within the European Market perspective, must be unique as well.

The phenomenon of digitalisation has thus revealed its real, greater dimension and it has formatted the whole world in an extension compatible with every computer.[3] Consequently, a large amount of data has been produced since then, which has been transformed elaborated and circulated as part of substantially different other data.[4]

The association and complementarity between the aforementioned elements has led to the rise of a technology which is able to reach the greatest part of humans and to interconnect them more significantly. A decisive step forward in this direction can be found in the nomenclature adopted for computers. Stewart Brand in 1974 invented the expression personal computer.[5] The idea was great: that is to provide everybody with a computer given that, until then, they had been exclusively domain of public entities and big industries.[6] This aim of Ubiquitous

[1] According to ISO/IEC 2382-1, data are a reinterpretable representation of information in a formalized manner suitable for communication, interpretation, or processing. Data can be created by persons o be generated by machines/sensors, often in the form of a 'by-product'. Some examples can be found in geospatial, statistical, meteorological, research and other kinds of data.

[2] UNESCO on 17 October 2003 has adopted the Charter on the preservation of digital heritage. The latter 'consists of unique resources of human knowledge and expression. It embraces cultural, educational, scientific and administrative resources, as well as technical, legal, medical and other kinds of information created digitally, or converted into digital form from existing analogue resources. Where resources are "born digital", there is no other format but the digital object'.

[3] E. Esposito, 'Artificial Communication? The Production of Contingency by Algorithms' 46(4) *Zeitschrift für Soziologie*, 252 (2017) who highlights that 'the premise is the process of "datification", which allows us to express more and more phenomena in a quantified format that can be analyzed and processed'.

[4] G. Finocchiaro, 'Introduzione al Regolamento Europeo sulla protezione dei dati' *Nuove leggi civili commentate*, 1-18 (2017).

[5] S. Brands, *Cybernetic Frontiers* (United States: Random House, 1974). In 1974 TCP/IP standard of transmission (Transmission Control Protocol/Internet Protocol) has been introduced and, from that point on, communication on the web has been named 'the Internet'.

[6] E. Alpaydin, *Machine Learning. The New Al* (Cambridge, Mass: The MIT Press Essential Knowledge Series, 2016), 8, who says that 'computer-per-person ratio increased very quickly

computing has been undoubtedly reached and, at the same time, overcome with the development of smartphones and of the so-called App(lications).

> 'What makes a smartphone special is that it is also a mobile sensing device and, because it is always on our person, it continuously records information about its user, most notably their position, and can make this data available. The smartphone is a mobile sensor that makes us detectable, traceable, recordable'.[7]

II. The Effects of the Machine-Internet-Web System. The Antinomy: Simplicity of Use/(Hidden) Complexity of Procedures as a Mirror of New Sociality

The switch from the digital era to 'digitalism' can then be confirmed. From the 1960s on, a new way of thinking started as a natural consequence of that relatively brief process culminated in the spread of smartphones.[8]

The famous quote by Steve Jobs at Stanford University on 12 June 2005 'Stay hungry, stay foolish' is highly representative of this process. Indeed, it was literally taken from a work that was meant to be the Whole Earth Catalogue,[9] whose author changed the name to the computer making it 'personal': ie Stewart Brand.[10]

On the other hand, the same idea of cataloguing the entire web is the basis of Google, the most used search engine. Similarly, the Web itself was created with the aim of interconnecting content by means of links. There are many other such examples, from Amazon to Spotify.

The basic idea remains the same: that is, to make everything reachable and available.

To sum up, thanks to a military technology (ie ARPAnet), developed by some American Universities, which was able to transmit data in a rapid and secure way, together with the spread of computers, a globalised network of users was created. They started to produce content to be organised and interconnected as well as transmitted.

The Berlin wall had fallen. The infinite, assuming it still existed, could be

and the personal computer aimed to have one computer for every person'.

[7] E. Alpaydin, n 6 above, 8.

[8] 'You can't change human nature, but you can change tools, you can change techniques' and in that way 'you can change civilisation'. Citation is by S. Brand (C. Cadwalladr, *Stewart Brand's Whole Earth Catalog, the Book That Changed the World*, available at https://tinyurl.com/y27han4q (last visited 28 May 2019).

[9] 'It was sort of like Google in paperback form, 35 years before Google came along: it was idealistic, and overflowing with neat tools and great notions': C. Cadwalladr, n 9 above.

[10] A map of the history of digital insurrection is brilliantly plotted by: A. Baricco, *The Game* (Torino: Einaudi, 2018).

finally enclosed in a beginning and an end. Therefore, it was going to lose any kind of charm.

In this portrait, not only economical relationships,[11] but the whole system of human relationships started to change significantly.[12]

Unlike what is usually assumed,[13] it was not technological innovation that determined a change of pace in the way of conceiving the world but, in fact, it was the other way round.

> 'Personal computers (in fact) that were designed for and belonged to single individuals would emerge initially in concert with a counterculture that rejected authority and believed the human spirit would triumph over corporate technology, not be subject to it'.[14]

Nevertheless, it cannot be denied that, from the 1960s up to the present, many things have changed and not so much is left of the spirit which animated that cultural (anti)revolution which had started from the Western Coast of America.

Undoubtedly, the current era can be placed in between of a tension, a sort of double binary. On the one hand, the world is becoming extremely complex from a technological point of view. On the other hand, it is incredibly easy to access and it is available to the greatest majority of (western) people.

This ease of the use has contributed to the minimization of the complexity of the underlying structures of the network, up to the point that they appear not to exist. It is possible to interrogate a search engine by a click and immediately receive pages of results; book a holiday; open a bank account etc. Each gesture, accomplished through the machine web-Internet is immediate, able to eliminate

[11] From this point of view, the same European Commission expressly qualifies data as the core element for business and economics. Communication from the Commission, *Towards a thriving data-driven economy* (COM (2014) 0442), 4; which in its introduction observes that: 'We witness a new industrial revolution driven by digital data, computation and automation. Human activities, industrial processes and research all lead to data collection and processing on an unprecedented scale, spurring new products and services as well as new business processes and scientific methodologies'.

[12] C. Perlingieri, *Profili civilistici dei* social networks (Napoli: Edizioni Scientifiche Italiane, 2014), 23, who underlines the 'radicale mutamento di paradigma delle relazioni sociali', to an extent that 'non è più sufficiente tenere esclusivamente conto delle peculiarità dei mezzi informatici'; Ead, 'Gli accordi tra i siti di *social networks* e gli utenti', in Ead and L. Ruggeri eds, *Internet e diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 204. Social studies on this regard are also decisive. See V. Karavas, 'The Force of Code: Law's Transformation under Information Technological Conditions' *German Law Journal*, 471 (2009), who writes that 'we can hardly still argue for the autonomy of the social sphere *vis-à-vis* media; media that under current conditions not only disclose spaces of communicative possibilities, as Luhmann wants it, but in a more radical way pre-determine the content of communications, thus transforming the whole social sphere into a hybrid entity of techno-social character'.

[13] On the contrary, cf F. Di Ciommo, 'Il diritto di accesso all'informazione in Internet', in C. Perlingieri and L. Ruggeri eds, n 12 above, 78.

[14] J. Markoff, *What the Dormouse Said: How the Sixties Counterculture Shaped the Personal Computer Industry* (New York: Penguin, 2005), 15.

space and time of execution. As a consequence, users believe that they need no help anymore from experts such as professors, travel agencies, financial institutions, or other knowledgeable parties.

It was indeed defined as

> 'the big promise to dis-intermediate society, to directly connect politicians with voters, producers with customers, to bypass the traditional gatekeepers'.[15]

However, the ambiguity of the mechanisms governing the Web-Internet itself – just making everything easy and giving people the illusion of full freedom, which was the core of the anti-revolution – shows the obscure nature of its inner structure.

The already mentioned double binary, in terms of complexity-easiness is mirrored in many other dichotomies such as: freedom of press – right to be forgotten; equality of access – inequality in the exercise of rights and respect of duties.[16]

III. The Position of the So-Called Traditional Law in Front of the Machine-Internet-Web System

In spite of these changes, the law, at least national and supranational statutory law remained detached, and in some way alienated from the network, due to its erroneous belief that these changes simply reflected a technological shift involving new, but familiar issues.[17]

It does not seem far from truth to claim that this initial indifference shown by the law was not dictated by weakness in regulating technologically complex and transnational phenomena. In the best of the hypotheses, this inaction was the result of an awareness that it was a technological issue to be left to technology itself,[18] as if what was allowed or not in the Web depended upon technological

[15] N. Cristianini, 'Media and Artificial Intelligence' *Keynote lecture at Stoa*, European Parliament, 21 November 2017. J. Markoff, n 14 above, 15: 'The personal computer had the ability to encompass all of the media that had come before it and had the additional benefit of appearing at a time and place where all the old rules were being questioned'.

[16] It is out of the scope of this essay to show the huge implications, also on the legal level, of such a theory. On this regard, reference can be made, among other things, to the question of the ownership and, consequently, to the accessibility to data and its connections with copyright law. Furthermore, another huge question, to some extent opposed to the former one, is that of protection and security of personal data and, more in general, the real respect of fundamental human rights.

[17] L. Lessing, *Code. Version 2.0* (New York: Basic Books, 2006).

[18] In respect of the idea that technic has never been apart from the society that produces it, see below. However, it is important to highlight that starting, from 1987 European Parliament felt in need to create a consulting board (STOA, *Science and Technology Options Assessment*), composed of experts, in order to make it available to members of the Parliament itself neutral evaluations, not depending on scientific options and the related political options. The last report

norms, whereas what was external to it was conditioned by traditional legal norms.[19]

In other words, judges and legislators wanted to rely, exclusively, on the already existing abstract rules, even though they were not able to account for the cultural change in progress.[20]

For too much time, there was a predominance of law over rights, which is in its own nature and culture, not static but dynamic, together with the human being.[21]

Consequently, if national law was not interested at first in the regulation of the network, then the task of creating its norms was left to its inventor-designers. They created and established the technical norms through which it existed, ie 'the original code'. Little by little, the participants with ownership rights to this technology, and the market, added to these norms.[22]

Indeed, referring to this system as a 'network' gives this system a planetary dimension, which was ruled by its own supranational and spontaneously formed norms, which became, in essence its own law.[23] Since the so-called traditional law did not take part to the phenomenon of digitalisation, the internal architecture of software and hardware ended up covering a great part of the jurisdiction (ie *lex informatica*),[24] too much taken for granted as *lex mercatoria*.[25]

What is more, the lex ruling the cyberspace, ie *lex digitalis*,[26] would be even

published by STOA in June 2018 (available at https://tinyurl.com/y6kmlztl (last visited 28 May 2019)) highlights that the main event held during 2017 concerned how media and other communication tools are governed and distributed in the era of artificial intelligence.

[19] T. Schultz, 'Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface' *The European Journal of International Law*, 802 (2008).

[20] E. Opocher, 'Il diritto senza verità', in Id et al eds, *Scritti giuridici in onore di F. Carnelutti*, (Padova: CEDAM, 1950), I, 188.

[21] 'The debate is never *for its own sake*, its own glory, but it wants in its different usages to lead to language an experience, a way of living in and being part of the world which precedes it and which needs to be said': P. Ricoeur, 'Du texte à l'action. Essais d'herméneutique', in G. Grampa ed, *Dal testo all'azione. Saggi di ermeneutica* (Milano: Jaca Book, 2004), II, 28.

[22] P. Femia, 'Una finestra sul cortile. Internet e il diritto dell'esperienza metastrutturale', in C. Perlingieri and L. Ruggeri eds, n 12 above, 36.

[23] L. Lessing, n 17 above, 48, who highlights the change in functioning: 'the Web as originally built would not be of much use to commerce. But as I've said again and again, the way the Web was is not the way the Web had to be. And so those who were building the infrastructure of the Web quickly began to think through how the web could be "improved" to make it easy for commerce to happen. "Cookies" were the solution'; and 'If commerce is going to define the emerging architectures of cyberspace, isn't the role of government to ensure that those public values that are not in commerce's interest are also built into the architecture?' (77).

[24] J.R. Reidenberg, '*Lex Informatica*: The Formulation of Information Policy Rules through Technology' *Texas Law Review*, 553 (1998), who defines it as 'the set of rules for informations flows imposed by technology and communications networks'. The Code, according to Lessing.

[25] In general, see F. Galgano, 'Lex mercatoria' *Enciclopedia del diritto* (Milano: Giuffrè, 2001), V, 721. *Si vis* E. Giorgini, *Ragionevolezza e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2010), 185, also for other bibliographical materials.

[26] *Lex informatica* would consist in the Code, while *lex digitalis* in norms: H. Lindahl, *Authority and Globalisation of inclusion and exclusion* (Cambridge: Cambridge University Press,

more influential than the *lex mercatoria*, for it applies itself in at least two contexts. In the first context,[27] it is not possible to disobey to the lex digitalis unless you have no access to the Web. In the second context, this lex digitalis is provided with an autonomous system of internal sanctions applied through autonomous decisions.[28] Indeed, the concept of the self-application of these norms is based the existence of autonomous legal systems which are made 'by communities of choice clustering around shared interests'.[29]

IV. *Drittwirkung* of Fundamental Human Principles in the Transnational Field

This shift from a territorial based jurisdiction to a specific-issue jurisdiction is, on the one hand, animated by social demands and, in this specific case, comes from scientific and technological evolution, which the law must adapt to.[30] On the other hand, it is also true that the normative issues emerging from the current fragmentary social needs are, in most of the cases, prompted by commercial and economic issues that need predictable and fast decisions. More precisely, it is necessary to point out that the ability of economic issues and norms to contaminate other social domains, including technology, is of course more pervasive than the contamination that the economic system suffers from other systems. Accordingly, placing every legal system considered as autonomous, in particular the one created by economics and the market, on the same place without a hierarchical order, requires careful consideration. However, this does not mean that the aforementioned economical norms could delay the transitional regulative processes of the fundamental rights of human beings. It is crucial to highlight that this consideration opens the doors to the immense issue of direct applicability human rights at a transnational level, as well as to the role that the so-called

2018), 145.

[27] E. Maestri, *Lex informatica. Diritto, persona e potere nell'età del cyberspazio* (Napoli: Edizioni Scientifiche Italiane, 2015), 93.

[28] V. Karavas and G. Teubner, '*CompanyNameSucks.com:* The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law', translated by G. Grappi, *Scienza & Politica*, 117 (2006), exemplifying auto-application in the context of ICANN arbitration proceedings; P. Femia, 'Una finestra sul cortile' n 22 above, 61 construes the relationship between *lex digitalis* and the traditional normative organization in terms of 'exchange of information streams and normative fractions, having different architectures which, nonetheless, belong to one single system'.

[29] T. Schultz, n 19 above, 829; V. Karavas and G. Teubner, n 28 above, 1356 'the law is also divided into autonomous transnational legal regimes, which define their jurisdiction along 'issue-specific' rather than territorial lines, and which lay claim to global validity'; A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' *Michigan Journal of International Law*, 1009 (2004).

[30] Literature regarding relations between autonomous social systems and the judicial social system, in its strict meaning, is infinite.

traditional law currently plays.[31]

The necessity of the law's intervention in digitalised relationships seems to be recognised,[32] at least in Europe, and is based on the assumption that autonomous laws in the Web totally exclude the regulative power based upon the international sovereignty. All in all, this would mean excluding the continuous link between politics (and therefore social needs) and law leaving, in this way, the power to create norms to exclusively economic processes.

We now need to clarify the methods by which the law may intervene in digitalized relationships. Interventional methods. For this perspective, the statement according to which 'different code makes differently regulable networks. Regulability is thus a function of design'[33] has already hit the mark. In this way, this intervention is being imagined happening *ex ante*, through the imposition of a specific set of technical specifications. However, as soon as the attention goes to transnationality, such a model, based uniquely on a programming code, is inevitably going to fail.[34]

The same criticism also applies with regard to the adoption of a connecting factor between law and digitalized relationships based on the place where the activities carried out on the internet produce their effect.[35] So, even though it is true that regulating *ex ante* the Code is of fundamental importance, it is not sufficient in itself. Thus, many feel the need to create procedural infrastructures that with an *ex ante* prospective, would allow autoregulated norms (private ordering) to exercise a 'virtual domestic law'.[36]

With a rough approximation, such procedural structures should help to normalise the inevitable and also indispensable clashes among the many different parts of the society,[37] including the transnational ones. Ruling on these clashes would, draw the boundaries between autonomous norm creating groups of society and would create incompatibility rules which would foster cooperation between systems.[38]

[31] Literature on this regard is very wide. The contribution by P. Femia ed, Drittwirkung*: principi costituzionali e rapporti tra privati* (Napoli: Edizioni Scientifiche Italiane, 2018) is really a valuable one. See also M. Zarro, 'L'evoluzione del dibattito sulla Drittwirkung tra Italia e Germania' *Rassegna diritto civile*, 997 (2017), from whom further bibliographic references can be drawn.

[32] P. Femia, 'Una finestra sul cortile' n 23 above, 59.

[33] L. Lessing, n 17 above, 34.

[34] A useful test is given by the very much debated issue on the so-called right to oblivion. Even if it was admitted as a right, it would be absolutely ineffective. It is, in fact, sufficient to change the domain of the research (from .it to .com) to completely bypass it.

[35] As compared to a connection based on the place where servers sending data streams are located.

[36] K.H. Ladeur, 'La *Drittwirkung* dei diritti fondamentali nel diritto privato "Diritto privato costituzionale" come diritto delle collisioni', in P. Femia ed, Drittwirkung n 31 above, 245.

[37] ibid 247. Precisely, he writes that: 'il diritto privato costituzionale consiste invece nel nuovo "diritto delle collisioni" che considera i diritti fondamentali quale garanzia della differenziazione dei sottosistemi sociali e della permeabilità reciproca dei regimi che in tale processo prende forma'.

[38] G. Teubner, 'Un caso di corruzione strutturale? La fideiussione dei familiari nella collisione

Moreover, a solution based on procedure should not be surprising. Whenever the law is not able to set a specific final rule, in whichever field, it tends to create a number of different norms which should serve to set forth limits that society should not cross.[39]

This perspective seems to predicate a sort of freedom from something (in a negative, rather than in a positive sense) and clarifies, with some extent of intellectual honesty, the limits of 'justiciability' according to the so-called traditional law, based on the sovereignty now of politics, then of the law,[40] and, what is more, also the limits of a procedural approach in terms of autonomous social spheres. In other words, the best a judicial system could get is no more than a second best.[41]

However – even admitting that justiciability of individuals' claims (rights) does not remain confined within an autonomous social system as self-executing – it needs to be highlighted that, in the era of digitalism, not even an articulated system of rules on clashes can assure a model for calculating norm making nor, much less the respect of fundamental rights.[42]

As explained in further detail below, innovation in technology in the digital era and its economic functionalization make a rule-making process only operating *ex ante*, or trying at most to monitor compatibility among the different instances of the society, inadequate.

Given that the method for collecting data, as well as for processing and, subsequently, reusing it, may not be under the domain and, thus, the control of any human being, the code is no longer able to predict its result. If this is so, many implications follow. First of all, traditional law cannot abstain from controlling and conforming the hermeneutic result.[43]

di logiche d'azione incompatibili (BVerfGE 89, 214 ss.)', in P. Femia ed, Drittwirkung n 31 above, 219.

[39] It is very useful, for this purpose, at every level, the whole set of laws by the financial market. The best result that the law can obtain is the building of an adequate strategy and not the best negotiation in concrete, admitted that it places at the centre of the law the regulation the best interest of the client.

[40] G. Teubner, *Nuovi conflitti costituzionali: norme fondamentali dei regimi trasnazionali* (Milano: Mondadori, 2012); C. Camardi, *Certezza e incertezza nel diritto privato contemporaneo* (Torino: Giappichelli, 2017), 211.

[41] 'In the place of an illusory integration of a differentiated global society, law can only, at the very best, offer a kind of damage limitation': A. Fischer-Lescano and G. Teubner, 'Regime-Collisions' n 29 above, 1045.

[42] It is worth it to cite: G. Teubner, 'I precari rapporti tra diritto e teoria sociale', in P. Femia ed, Drittwirkung n 31 above, 285, which claims that the effectiveness of fundamental rights in relations between individuals is not guaranteed by the position of individual fundamental rights but only through the protection of the organization and the procedure. These last constitute the premises and structures of the individual positions.

[43] P. Perlingieri, '«Controllo» e «conformazione» degli atti di autonomia negoziale' *Rassegna diritto civile*, 216 (2017); P. Femia, 'Autonomia e autolegislazione', in S. Mazzamuto and L. Nivarra eds, *Giurisprudenza per principi e autonomia privata* (Torino: Giappichelli, 2016), 5 of the manuscript, where it is read that: '*non basta la formale riconducibilità dell'agire all'applicazione di una regola che ci si è dati da sé, occorre che questa autonomia sia giusta, nel senso di conforme, adeguata all'oggetto che la produce*'(it is not enough the formal traceability of the action to the

V. Evolution of the Concept of Data: From the Object of what Computers Process to Natural Resources

In such a scenario, trying to fit the network, defined internet-web-machine within the realm of the Rule of Law, we must emphasize that 'the original code' had the objective of classifying the whole world and making it available with no substantial limits except for the costs of creating the necessary technology and the costs dealing the agreement with the Internet Service Provider (ISP).[44] In this phase, data was (simply) objects processed by software. They were, in other words, passive. The real turning point occurred when the question as to what to do with all this data was raised.

> 'With this question, data starts to drive the operation; it is not the programmers anymore but the data itself that defines what to do next'.[45]

It follows that the meaning of data to which also EU rules refer, is ontologically different from the one it had before digitalization reached its mature phase.

The true turning point is in fact the idea of data being considered on the same level of natural resources, as 'data in the wild'. Once again, economic issues have significantly influenced all the other social contexts, including law.

What is radically different in the current consideration of data is the volume, variability and speed of data, as well as the ability to link them one with the other. Indeed, alluvial amounts of data (Big Data),[46] coming from different sources such as web pages, files from weblogs, forums, social-media, audios, videos, clickstreams, emails, documents and sensor systems automatically implement new data, constituting new assets (*Big Data Economy*).[47] Such new assets, from a legal point of view, represent 'new situations, assets mostly in the users' availability'.[48]

It is now common knowledge, also shared by institutions, that

> 'the development of an enormous and increasing amount of data (…) through the analysis and advanced methods of processing gives an

application of a rule that has been given by itself, this autonomy must be right, in the sense of conforming, adequate to the object that produces it).

[44] At the beginning, however, the service was substantially made by the public institutions where, in fact, the Internet had been implemented.

[45] E. Alpaydin, n 6 above, 11 that underlines that: 'With this question the whole direction of computing is reversed'.

[46] 'With the expression "big data" it is refereed to large amounts of data of different types, produced at high speed, by different types of sources. The management of these dataset at high variability and at real time imposes to resort to new instruments and methodologies, such as for example, powerful processors, software, and algorithms': declaration Communication by the Commission, *Towards a thriving data-driven economy* (COM(2014)0442).

[47] It has been pointed out by: P. Perlingieri, '*Privacy* digitale e protezione dei dati personali tra persona e mercato' *Il Foro napoletano*, 481 (2018); R. Moro Visconti, 'La valutazione economica dei database (banche dati)' *Il diritto industriale*, 358 (2017).

[48] P. Perlingieri, 'Relazione conclusiva', in C. Perlingieri and L. Ruggeri eds, n 12 above, 419.

unprecedented picture of human behavior, of private life, as well as of our society'.[49]

This creation of new situations starting from data which have converted human experience to numbers is thus the starting point for analysis. It also becomes essential to consider by a lawyer trying to understand, even though not in details, the origins of a similar shattering phenomenon.

In order to do this, we must go back to the time when the potential *whole* has become, at least theoretically, available to entire collectivities: get back, that is to say, to the time when the first digital calculators were invented and automatic calculation on a big scale commenced. The latter, having numbers as a subject, without any doubt involves mathematical calculations. Indeed, mathematicians believe that the extraordinary force of numbers is a fundamental feature of their field.[50] The force of numbers is also of a generative nature, ie able to create new things and, for this reason they are inextricably linked to technology.

Sticking to the main argument of this essay, the century which has just passed – in the context of a renewed attention for the foundations of mathematics – has gathered mathematical abstraction and practical reality thanks to the development of automatic calculation on a big scale.[51] The invention of electronic computational machines presupposed, in fact, the use of abstract structures which only pure mathematics would be able to elaborate and, at the same time, could solve any problem of the physical world suitable to a mathematical solution.[52]

It is not a mere coincidence that, after World War II, a group of scientists was studying how to define at its best of abstract structures able to solve practical problems: the algorithm. There is no need to highlight the position expressed in

[49] Report on the proposal of resolution of the European Parliament on 20 February 2017, on the implications of Big Data for the fundamental rights: privacy, data protection, non discrimination, security, and activity of (2016/2225(INI)), point C.

[50] It is highlighted in: P. Zellini, *La matematica degli dei e gli algoritmi degli uomini*, (Milano: Adelphi, 2016), 72. Starting from the analysis of the Greek mathematics, he writes: '*un ente matematico ne produce un altro (dynamis), come se si trattasse di una forza di progressivo ampliamento insita negli stessi enti matematici*' (original quote) (a mathematical entity produces another mathematical entity (dynamis), as if it were a force of progressive expansion inherent in the mathematical entities themselves).

[51] The tribute to A. Turing on the theme of digital computationability cannot be calculated. It must be remembered that A. Turing, during the Second world war, discovered a weakness in the Enigma's application thus contributing decisively to the victory of the war itself. In addition, he publishes for the Journal Mind, in 1950, an article entitled 'Computing Machinery and Intelligence', where he identified a test that was meant to verify when a machine can be considered as intelligent. According to the test by Turing is, in fact, sufficiently intelligent when it is able to provide answers which are not distinguishable from those provided by human beings.

[52] It is particularly worth it to observe that the development of automatic calculation starts from the theorical considerations on the critics to the fundaments of mathematics and, in particular, from the ones by David Hilbert. According to this latter, it was necessary to answer to the question whether mathematical problems do not admit, neither in theory, to be resolved through an algorithm (ie a logical-mathematical procedure).

this essay is not that algorithms have appeared only in the middle of the twentieth century, but that algorithms have always existed.[53] According to mathematicians, this change resulted in the need to build and methods of calculation and to make them manifest so that these were certain and effective in a specific place and time.[54] That was the moment when the science of algorithms, not algorithms per se, turned mathematical operations into a process or procedure.

It has been claimed that the same idea of a process-procedure evokes that of *lógos*,[55] which can, in light of the semantic studies by Heidegger, be defined as a selection (lay) of what is present in non-concealment or an unveiling. Such manifestations, in simple terms, happen through language (in this specific case, a mathematical one). On the other hand, we should remember that the crisis of the foundation of mathematics, which required the elaboration of methods of calculation that are traceable, certain and effective in a specific time and space, was substantially simultaneous to that philosophy, which saw the being-there in the unveiling. Man became a project. The central argument is therefore the theme of technology.[56]

Within this scenario, the law also not excepted from this 'antimetaphysic realism'. In fact, a shift from the exegetic to the systematic and dogmatic method occurred during these years.[57]

The role of the jurist is to synthesize, regroup the applicable rules together in an institution, and group of institutions into a unified system.[58] The Pandectistic

[53] P. Zellini, *La dittatura del calcolo* (Milano: Adelphi, 2018), 51, that maintains that the concept of algorithm is pre-euclidean and that was meant to compare, since then, two different measuremements.

[54] Literally, P. Zellini, *La matematica degli dei e gli algoritmi degli uomini* n 50 above, 52.

[55] Elsewhere (E. Giorgini, *Consulenza finanziaria e sua adeguatezza* (Napoli: Edizioni scientifiche italiane, 2017)), it was referred the logarithms not in a strictly mathematical sense, but in order to shed light to the argumentative profile.

[56] N. Irti and E. Severino, *Dialogo su diritto e tecnica* (Roma-Bari: Laterza, 2001).

[57] 1881 is a turning point that starts the shift from the esegetic method to the systematic one thanks to the publication of E. Gianturco, 'Gli studi di diritto civile e le questioni del metodo in Italia (1881)', in Id, *Opere giuridiche*, I, (Roma: Libreria dello Stato, 1947), 3 where the necessity of a reform of methodology to be applied at University can be found**.** On the role of the work by Gianturco for the overcoming of the esegetic school, please, see: P. Perlingieri, 'Relazione conclusiva', in Id and A. Tartaglia Polcini eds, *Novecento giuridico: i civilisti* (Napoli: Edizioni scientifiche italiane, 2013), 351. 1881 was also the year of publication of the *Lectio Magistralis* in occasion of the inauguration of the course of Civil Law at the Regale Università di Roma on 26 January by E. Cimbali, 'Lo studio del diritto civile negli stati moderni', in Id, *Studi di dottrina e giurisprudenza civile* (Lanciano: Tip R. Carabba Edit, 1889), 5. It has been highlighted that the first generation of Civil Law scholars did not agree with the esegetic methods: ie A. Masi, 'Il metodo esegetico, le prolusioni e l'inizio del metodo dogmatico', in P. Perlingieri and A. Tartaglia Polcini eds, n 57 above, 8.

[58] To address these passages is out of the purpose of the present work. For a summary, see: N. Irti, 'Diritto civile' *Digesto delle discipline privatistiche. Sezione civile* (Torino: UTET, 1990), VI, 147; Id, *La cultura del diritto civile* (Torino: UTET, 1990); C. Ghisalberti, *La codificazione del diritto in Italia 1865-1942*, (Roma-Bari: Laterza, 1994), 142; G. Cazzetta, *Scienza giuridica e*

method created 'a castle perfectly walled by principles and rules'.[59] The perfection and completeness of this system was due to its ability to address every case, at least from a formal point of view, thanks to the elaboration of categories. The judicial system arising from this process is thus closed, logically closed.[60]

The qualifying product of Pandectistic is the scientific construction of the system which leads to the recognition and statement of the intrinsic connections among every right, in a way as to the concepts hereby expressed assume an organizing function.[61] The enclosure of the system is intimately connected to the possibility of abstracting from the idea of law. Such abstraction is able to materialize principles which can be applied in non-contemplated hypothesis.

Very briefly, mathematics, philosophy and also law, through the construction of procedure (logos), truly had the objective to expel infinity from human reasonings and try to reach stability (in calculations and in decisions) and power to predict.

VI. The Science of Algorithms, Computational Complexity, and Necessary Approximation

If in the mathematical system built by human beings there is no room for the idea of infinite, it needs to be replaced by procedures made of finiteness. In other words, by the science of algorithms, which is developed with the aim of 'conducting to the finite arithmetical calculation every type of process entailing the concept of infinite'.[62]

At this point, it is necessary to investigate the purpose and the functioning of the algorithm, since the legal implications of this way of thinking are impressive. It is worth it to highlight from now on, indeed, that the architecture of the functioning system of the digital worlds is based upon the science of algorithms. That is, coding itself is made of algorithms.

Algorithms, through detailed and numerically finite series of instructions,

trasformazioni sociali. Diritto e lavoro in Italia tra Otto e Novecento (Milano: Giuffrè, 2007), 41.

[59] Are the words of P. Grossi, *Il diritto nella storia dell'Italia unita*, in *www.lincei.it*, 9.

[60] For a summary see A. Mezzacane, 'Pandettistica' *Enciclopedia del diritto* (Milano: Giuffrè, 1981), XXXI, 592.

[61] '*Lo scopo della Pandettistica era di creare un sistema positivo, dogmaticamente privo di contraddizione, di un diritto privato generale (c.d. «*Harmonistik *delle Pandette» dei manuali pandettistici), attraverso il ricorso all'interpretazione (esegesi) delle Pandette giustinianee quale presupposto sovrapositivo di legittimazione*' ("The purpose of the Pandettistica was to create a positive system, dogmatically devoid of contradiction, of a general private right (the so-called "Harmonistik delle Pandette" of the pandettistic manuals), thanks to the use of the interpretation (exegesis) of the Justinian Pandects as a superpositive assumption of legitimation'): H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte. Rechtsentwicklungen im europäischen Kontext*, (translated by M. Zarro, *Tratti fondamentali della nuova storia del diritto privato. Evoluzioni giuridiche nel contesto europeo* (Napoli: Edizioni Scientifiche Italiane, 2016), 153).

[62] P. Zellini, *La dittatura del calcolo* n 53 above, 139.

which can be processed in a particular space and time, allows the achievement of a result that represents the solution of the initial problem.

Each set of instructions is an abstract structure derived from pure mathematics such as linear equations, polynomial calculations, matrix calculations etc. The so-called algorithm strategy produces intermediate results, hidden most of the time, that are the result of mathematical calculations entailed by each instruction. That work is the base for the subsequent step. Needless to say, each piece of instruction may also be another algorithm with what follows in terms of extension of the number of calculations to make. The achievement of the solution depends upon the correct execution of the instructions.

It is intuitive that the execution of an algorithm might have an extreme computational complexity which does not affect, at least in theory, its own effectiveness. If it was not executable, the algorithm itself would not exist but it cannot affect its efficiency.

This efficiency, under the mathematical perspective, must be valued in terms of arithmetical cost, that is, in terms of space and time of execution. When the latter are excessive, the ability of the algorithm itself to sort the problems of applied science is questioned, which is same problems for which the algorithm was created. The inefficiency would question the actual effectiveness of the algorithm.

Algorithmic efficiency on a large scale, in the era of digital calculation must face inevitable phenomena such as the production of such great numbers which exceed the space available in memory of a computer. Moreover, the execution of each piece of instruction requires the solution of equations of linear systems and, consequently, of matrix calculations with a different number of variables. The matrix calculations, in turn, require the execution of different arithmetical operations which may require a large amount of time.

In order to deal with problems, mathematics has developed, through the time, models of simplification of calculation that could avoid the growth of the size of the numbers not compatible with the space and time of computers. Accordingly, technological progress permitted the development of more and more powerful engines, provided with more processors and a better memory ability. This evolution, in relation to the models of simplification and reduction as well as to the technical features of computerized engines, however, are not able to prevent the errors during the whole, complex computational process. The increase of the latter, together with the increase of the numbers' size, creates a risk of doubt regarding the correctness of calculation the ability of the algorithm to achieve the purpose for which it was created. Consequently, assuming the resolution of a problem by means of an algorithmic formula, (even one involving substantial computational difficulty) does not necessarily guarantees the actual practicability of the solution. The number produced by the calculation, indeed, may not correspond to the model required by the algorithm.

The only expedient that seems possible is, therefore,

> 'to weaken the demand for exactitude (…) resorting either to the approximated algorithms or to procedures the result of which corresponds to the solution found with a significantly high probability'.[63]

Moreover, the digital calculation on large scale also posits additional critical profiles. First of all, numbers are represented through binary series of figures (ie 0/1).[64] These series must be finite in order to be inserted in a calculator and, therefore, the digital data, from their first input into the computational system are already approximations. Considering the millions of calculations made by the computer, this approximation increases the serious risk of generating instability of the calculation itself.

At the beginning of the paragraph we already noted that the science of algorithms aims at finiteness, that is, to the mathematical concept of discreteness. The digital calculation, indeed, can only operate in the area of discreteness and not in the continuous (infinite) as happens with the analogical calculations.

VII. Non-Neutrality of the Algorithms: The Necessary Role of Law

The previous discussion notes that the progressive digitalization of human experience, together with the design of computerized engines, allowed the expansion of science in the algorithms, which was rooted in the idea of providing an answer to practical, mathematically resolvable issues throughout finite procedures. In name of this finiteness, the system based on the algorithms renounce the exacteness of calculation.

Consequently, as a first conclusion to the current investigation, the code is for its own nature destined to produce approximated results in two ways. On the one hand, the digital binary numerical system requires the constant approximation of the data at each operation. On the other hand, the simplification and reduction aimed at making the algorithm efficient produces errors which are directly proportional to the increasing of the size of the number. All that is aggravated by the fact that the multiple operations of calculation are hidden and, therefore, out of control of the human user.[65] Thus, assuming that the algorithm ruling the

[63] ibid 136.

[64] E. Alpaydin, n 6 above, 2, 'a computer represents every number as a particular sequence of binary digits (bits) of 0 or 1, and such bit sequences can also represent other types of information. For example, "101100" can be used to represent the decimal 44 and is also the code for the comma; likewise, "1000001" is both 65 and the uppercase letter 'A'. Depending on the context, the computer program manipulates the sequence according to one of the interpretations'.

[65] C. O'Neil, *Weapons of Math Destruction: How Big Data IncreasesIinequality and Threatens Democracy* (New York: Crown Books, 2016), 19; L. Avitabile, 'Il diritto davanti all'algoritmo' *Rivista italiana per le scienze giuridiche*, 321 (2017), which highlights that '*La produzione di dati, dietro le apparenze semplificate, nasconde un traffico controllato da algoritmi operativi sulla base di stringhe opache o inaccessibili alla totalità*' (The production of data, behind simplified appearances, hides a traffic controlled by algorithms that operate on the basis of opaque

code is the solution to the practical problem to solve, this solution, as a matter of clarity, is totally approximated, with evident consequences as regards the efficiency of the solution itself. Substituting the infinite of the possible solutions with the digitally calculable (following a finite procedure) first of all, represents the death penalty for the peculiarity of the concrete fact, engendering an evident paradox.

The force of the rules designed in the Code would be based on a choice (economic, most of the time) which, however, appears as if it were truth and as such hard to control, especially as regards the results it produces.

From this point of view, in fact, a large part of the effort of the so-called traditional (supra)national law, despite having made decisive and important steps forward in the matter of personal data processing,[66] has instead kept in the background the question of controlling the effects of the application of the algorithms.

The regulation, even the most specifically directed to the issue of profiling and the automatic decisions that could be based on it,[67] remains firmly anchored to the requirement of consent. Indeed, it is so much so that explicit consent is one of the exceptions from the prohibition on automated decision-making and profiling defined in Art 22(1) GDPR and to the Right to be informed by the controller about and, in certain circumstances, a right to object to 'profiling', regardless of whether solely automated individual decision-making based on profiling takes place.[68]

The rules of the GDPR that require controllers, in a nutshell, to provide meaningful information about the logic involved and to implement suitable measures to safeguard data subjects' rights freedoms and legitimate interests cannot seriously guarantee in individual situations that the algorithmic strategy does not violate fundamental rights.[69] As it has been observed, in fact, '*non si può controllare ciò che non si capisce*' ('what cannot be understood cannot be

or inaccessible strings to the totality). In the same meaning, see: *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, 'Profiling processes can be opaque. Individuals might not know that they are being profiled or understand what is involved'.

[66] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR). For some bibliographical reference see: B. Goodman and S. Flaxman, 'European Union Regulations on Algorithmic Decision Making and a 'Right to Explanation'' *AI Magazine*, 38, 3 (2017).

[67] According to Art 4(4) GDPR, profiling is 'any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements'.

[68] Literally, *Guidelines* n 65 above, 17.

[69] It is useful to underline that the normative model based on the correct execution of proceedings is the same that the Community legislator has used in the field of financial market regulation (MiFID I and II). It is sufficient to compare the provisions on conflict of interests or, more recently, those on algorithmic bargaining.

controlled').[70]

VIII. Evolution of Algorithmic Models (Deep Learning). Insufficiency of the Perspective of the Right of Access and/or of that the Comprehensibility of the Logics Underlying the Algorithm

We have already noted that, for long time, mathematics has identified simplification models with the aim of making computation viable. Through these models (kernel function, support vector machines, etc) algorithmic science has undergone a new revolution, a change of paradigm, which could be summarized, in a non-technical and trivializing way, in the ability to make linear (simpler) systems that they aren't.[71] Therefore, the complexity of a function is not an absolute concept but depends on the possibility of it being simplified. Naturally the resulting function is not mathematically exact: for this reason, we have to incorporate ideas from statistical learning theory to rule out meaningless explanations of the data and so it can be possible as generalization performance.

On this generalizing power, in the last decade, a theory of learning machines has emerged and with it the possibility of analyzing existing algorithms and designing new ones that they don't require intelligence but data.[72] Accordingly, we can say that in any kind of learning algorithm, they adjust the parameters of the model by optimizing a performance criterion defined on the data. This phenomenon is exponential in the so-called 'deep learning' concept, in which is not possible to know *ex ante* the data that are the inputs of the algorithmic procedure. Accordingly, the data is not provided by humans, but it is learned from the algorithm itself.

In short,

> 'a deep neural network can be trained one layer at a time. The aim of each layer is to extract the salient features in its input, and a method such as the autoencoder can be used for this purpose. There is the extra advantage that we can use unlabeled data – the autoencoder is unsupervised and hence

[70] P. Domingos, *L'Algoritmo Definitivo. La macchina che impara da sola e il futuro del nostro mondo* (Torino: Bollati Boringhieri, 2016), 16. Moreover, according to the GDPR, the duty of the controller, does not necessarily consist in a complex explanation of the algorithms used or disclosure of the full algorithm.

[71] 'In a way, researchers now have the power of nonlinear function learning together with the conceptual and computational convenience that was, to this point, a characteristic of linear systems': N. Cristianini and B. Schölkopf, 'Support Vector Machines and Kernel Methods The New Generation of Learning Machines' *Al Magazine*, 32 (2002).

[72] 'This ability of generalization is the basic power of machine learning; it allows going beyond the training instances. Of course, there is no guarantee that a machine learning model generalizes correctly – it depends on how suitable the model is for the task, how much training data there is, and how well the model parameters are optimized – but if it does generalize well, we have a model that is much more than the data': E. Alpaydin, n 6 above, 42.

> does not need labeled data. Accordingly, starting from the raw input, we train an autoencoder, and the encoded representation learned in its hidden layer is then used as input to train the next autoencoder, and so on, until we get to the final layer trained in a supervised manner with the labeled data. Once all the layers are trained in this way one by one, they are all assembled one after the other and the whole network of stacked autoencoders can be fine-tuned with the labeled data'.[73]

We are now back where we started: the whole human experience has become data, deep learning is now able to read all this data and to use them as if they were natural resourced (data in the wild) to train algorithms. The science of algorithms was born to enclose the infinite in the finite and nowadays, thanks to the deep learning, the inability to foresee the levels of transformation (abstraction) of the data entered in the algorithmic procedure reopens the doors to infinity.

Needless to say that this model can grow exponentially, making it clear that the real issue is no longer the accessibility of the Code or the comprehensibility of the logic underlying the algorithm as legislation, at least European, requires. That legislation takes into consideration the opacity of the algorithm or in the meaning of a form of proprietary protection, 'corporate secrecy', or as a problem of readability of the code, but the legislative provisions do not adequately evaluate the opacity as mismatch between mathematical procedures of machine learning algorithms and human interpretation.[74] It was indeed well highlighted that

> 'an algorithm can only be explained if the trained model can be articulated and understood by a human. It is reasonable to suppose that any adequate explanation would, at a minimum, provide an account of how input features relate to predictions'.[75]

IX. Initial Conclusions: The Act Based on the Algorithmic Decision Must Always Be Interpreted

At this point, it becomes clear that the functioning of algorithms involving legal effects must be controlled to ensure that they produce outcomes compatible with our legal system. This control must take place through the interpretation of

[73] ibid 107.

[74] J. Burrell, 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' *Big Data & Society*, 3 (2016). She, convincingly, proposes the three meanings of opacity and she argues the 'the opacity of machine learning algorithms is challenging at a more fundamental level. When a computer learns and consequently builds its own representation of a classification decision, it does so without regard for human comprehension. Machine optimizations based on training data do not naturally accord with human semantic explanations'.

[75] B. Goodman and S. Flaxman, 'European Union regulations on algorithmic decision making' n 66 above, 6.

the act generated by the application of the algorithm. It cannot be sufficient, even if indispensable, to rely on the right to access to the code, or to implement measures to safeguard. It does not even convince the vision, finally pursued by the legislator of the financial markets,[76] of monitoring the results of the algorithmic application that would subsequently allow to intervene on the construction of the algorithm itself. This approach, in fact, is once again, not only of mere compliance, but explicitly legitimizes the validity of an act incompatible with the principles of the legal system. But there is more. In that process of communicative osmosis, considered by many among the autonomous spheres of the social world, the digital one would irreparably prevail. Or in other words, this would have colonized, even through the provision of legal norms in the strict sense, the law.

[76] See arts 4(1), no 39 and 17 MiFID II.

Essays

The Loss of a Right Within the System of Private Punitive Remedies

Francesco Longobucco*

Abstract

Moving from the intent to govern general clauses more rigorously than in the past, the following research assumes that the loss of a right may result, *stricto iure*, from the application of a civil penalty, provided for by the legislator or conventionally determined. Thus, it does not seem that the use of the objective good faith, as in the German theory of *Verwirkung*, may lead the interpreter to rule the loss of the right irreparably, without adequate review of the *voluntas legis* or where no explicit dismissive intention of disposable situation can be found. On the contrary, the loss of a right seems to be, more properly, a heteronomous penalty only for the cases characterized by conducts of misuse of powers.

I. The Loss of a Right as a Case of *Renonciation Tacite*

In the Italian system the loss of a legal situation or of a whole legal relationship mostly depends on the parties' intentions (the most relevant examples being the withdrawal, the termination of contract by mutual consent, the unilateral termination, the renunciation). In other cases, it depends on a specific legal provision. Consider the failure to perform a contract and the remedies against it; the ways, other than performance, to settle an obligation, in which either the parties' intentions or the objective fact (Art 1256 Civil Code) determine the termination of the relationship. Finally, limitation and prescription periods – which revolve around the passage of time – may also cause the loss of a right.

This articulated scenario begs the question: is there a grey area in which the termination of legal subjective situations may occur for reasons other than explicit renunciation or expiration of the limitation period? This question generates anxiety and concern in modern lawyers, particularly as the predictability and certainty of the legal system would be potentially impaired should the loss of a right be permitted without limitations. Pushing the limits of termination would result in permitting the loss of a right in unforeseeable circumstances, even in cases in which the parties did not mean to lose the right or a given limitation period has not expired.[1]

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[1] See F. Festi, *Il divieto di 'venire contro il fatto proprio'* (Milano: Giuffrè, 2007), 140-142, especially 243, which argues that connecting the loss of the right to the failure to exercise it in

These understandable concerns are symptomatic of the conclusions reached by Italian courts on the issue. An emblematic Court of Cassation decision reads that

> 'a delay in the exercise of the right, even where it is attributable to the holder and it is such as to create the debtor's reasonable expectation that the right will no longer be exercised, cannot determine the rejection of the application for the exercise of the right itself, unless there has been an unequivocal renunciation and, obviously, unless the limitation period has expired'.[2]

Thus, a delay in the exercise of the legal situation is relevant only in the event of renunciation or expiration of a given limitation period.

The issue outlined before immediately requires an analysis of the orthodox view which notoriously focuses on the varieties of objective good faith and, in particular, on the loss of a right due to the unfair delay in its exercise.[3] This is the so-called *Verwirkung* theory, which German courts widely use in their decisions. Where a party delays the exercise of a right (even before the limitation period has expired) and thus triggers a reasonable expectation in the other party that the right will no longer be exercised, the former may lose its right due to the judicial application of the good faith clause.[4] This theory has gained currency in

an undetermined period of time would entail conferring on courts the power to establish deadlines arbitrarily and without review.

[2] In such way, Corte di Cassazione 15 March 2004 no 5240, *Foro italiano*, 1397 (2004), with commentary by G. Colangelo; F. Astone, 'Ritardo nell'esercizio del credito, Verwirkung e buona fede' *Rivista di diritto civile*, 603 (2004). Opinion later worked on by Id, Venire contra factum proprium. *Divieto di contraddizione e dovere di coerenza nei rapporti tra privati* (Napoli: Jovene editore, 2006); L. Racheli, 'Ritardo sleale nell'esercizio del diritto (*Verwirkung*): tra buona fede, abuso del diritto e prescrizione' *Giustizia civile*, 2179 (2005).

[3] Monographs on the issue, although with different approaches, were authored by F. Ranieri, *Rinuncia tacita e* Verwirkung. *Tutela dell'affidamento e decadenza da un diritto* (Padova: CEDAM, 1971). Later in Id, 'Verwirkung et renonciation tacite. Quelques remarques de droit comparé', in D. Bastian, *Mélanges en l'honnerur de Daniel Bastian. Droit de sociétés* (Parigi: Librairies techniques, 1974), I, 427; Id, 'Eccezione di dolo generale' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1991), VII, 311, and, more recently, in Id, 'Bonne foi et exercice du droit dans la tradition du civil law' *Revue de droit international et de droit comparé*, 1055 (1998). As well as, by S. Patti, *Profili della tolleranza nel diritto privato* (Napoli: Jovene editore, 1978), 5 (later in Id, 'Abuso del diritto' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1987), I, 1; Id, 'Verwirkung' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1999), XIX, 722.

[4] German scholarship on the issue is wide. See W. Siebert, *Verwirkung und Unzulässigkeit der Rechtsausübung: ein rechtsvergleichender Beitrag zur Lehre von den Schranken der privaten Rechte und zur* exceptio doli *(§§ 226, 242, 826 BGB), unter besonderer Berücksichtigung des gewerblichen Rechtsschutzes (§ 1 UWG)* (Marburg: Elwert, 1934). On which, recently for the Italian translation of the pages 83-106 see L. Di Nella and A. Addante, 'Lineamenti della dottrina dell'inammissibilità dell'esercizio del diritto nell'ordinamento tedesco sulla base del diritto comparato' *Rassegna di diritto civile*, 274 (2006). *Verwirkung* has also penetrated Swiss scholarship and case-law (see, *inter alia*, E. Merz, 'Die Generalklausel von Treu und Glauben als Quelle der

Spain too, where the *retraso desleal* theory has been developed,[5] as well as in common law jurisdictions through the so-called *estoppel* (*by representation* or *by acquiescence*).[6] These developments shed light on the peculiar aptitude of good faith and fair dealing to determine the loss of a right in private relationships.

Italian scholars' approach to the study of *Verwirkung* – in order to explore its possible transplant in the legal system through the application of objective good faith – is indicative of a tendency to stick to undisputed system categories (namely, renunciation). Thus, they have brought the *Verwirkung* within the *fictio* of the so-called tacit renunciation,[7] thereby emphasizing the intentions behind the loss of a right.[8]

Filippo Ranieri's analysis – which draws on the first German decisions concerning the loss of a right due to unfair delay in its exercise (in the context of the law of obligations, and then labor law, trademark and copyright law) –[9] highlights that continental legal systems contain functional equivalents to the German doctrine of *Verwirkung*.[10] His analysis focuses on French and Italian case-law to show that, while continental courts nominally pay deference to the principle of renunciation as an always voluntary act that cannot be presumed, they are sometimes ready to apply the doctrine of tacit renunciation (or acquiescence) to a right because they need to protect a party where the other party's action or omission has generated an expectation or reliance on the loss of its right. Regardless of the definitions used, this doctrine represents an application of the same *ratio decidendi* underlying German decisions on *Verwirkung*.[11] Accordingly, tacit renunciation amounts to a mere *fictio* to protect – through the paradigm of objective good faith – the party's reliance on the loss of a right

Rechtsschöpfung' *Zeit für schweizerisches Recht*, 360 (1961). In Italy see, in addition to the authors cited in the footnote above, and *inter alia*, V. Tedeschi, 'Decadenza' *Enciclopedia del diritto* (Milano: Giuffrè: 1962), XI, 778, and also fn 47, who places *Verwirkung* based on the prohibition of *venire contra factum proprium* in an intermediate position between limitation period (based on the combination of non-activity with time) and the so-called acquiescence (whose effect depends on the party's conduct, on which, *amplius*, see Id, 'L'acquiescenza del creditore alla prestazione inesatta', in E. Allorio et al, *Studi in memoria di F. Vassalli* (Torino: UTET, 1960), II, 1580.

[5] Recently, see M.N. Tur Faúndez, *Prohibición de ir contra los actos proprios y el retraso desleal* (Cizuz Menor, Navarra: Aranzandi, 2011); in case-law, *inter alia*, see Tribunal Supremo 12 December 2011 no 872.

[6] Outlined in the statement of an English court of 1862: 'a man shall not be allowed to blow hot and cold to affirm at one time and deny at another making a claim on those to whom he has deluded to their disadvantage and founding that claim on the very matters of the delusion' (available at https://tinyurl.com/y6pbub6x (last visited 28 May 2019)).

[7] This is the idea behind the analysis by F. Ranieri, *Rinuncia tacita* n 3 above, 78. In Spain some believe that it may amount to a conventional *novación extintiva*: see Tribunal Supremo 13 September 2016 no 530.

[8] F. Ranieri, *Rinuncia tacita* n 3 above, 126.

[9] ibid 14, 31 (the *leading cases RG* 5 July 1923 and *RG* 27 January 1925 are here reported at page 17) and, for an analysis of Swiss law, see page 36.

[10] F. Ranieri, *Rinuncia tacita* n 3 above, 72.

[11] ibid 106; F. Ranieri, 'Eccezione di dolo' n 3 above, 327-329, especially fn 100.

which the other party's conduct generated.[12]

At the same time, when German courts interpret *Verwirkung* as a legal effect depending on unfair conduct[13] and associate it with objective good faith and abuse of rights, they seem to have the party's renunciation in mind.[14] Indeed, they have never accepted a case of loss of a right which did not meet the requirements for a tacit renunciation (eg rights which are not subject to renunciation or belong to incapacitated parties), or for a legal act of the right holder.[15] Filippo Ranieri's analysis ends with a realistic conclusion on the law applied in France, and in Italy to a certain extent, that is continental jurists are familiar with the prohibition of *venire contra factum proprium*, at least as an implicit *ratio decidendi* behind many judgments.[16]

II. The Italian Courts' Restrictive Position About Receiving the *Verwirkung* Theory

As far as Italian courts are concerned, they are reluctant to accept the German *Verwirkung*. While courts have adopted less formalistic views in support of a generous application of objective good faith in the context of work dismissal[17] and termination of guarantees,[18] they tend to have reasonable concerns for the plain transplant of an institution which is substantially alien to the Italian civil code,[19] along with the unsupervised use of objective good faith and the escape to general clauses (*Flucht in die Generalklauseln*), as well as the absolute unpredictability

[12] Here the paradigm of objective good faith becomes relevant. See, in particular, F. Ranieri, 'Eccezione di dolo' n 3 above, 327; Id, *Rinuncia tacita* n 3 above, 122.

[13] See, in particular, with a view to downplaying the role of party autonomy W. Flume, 'Rechtsgeschäft und Privatautonomie', in E. v. Caemmerer et al, *Hunder Jahre deutsches Rechtsleben. Festschrift für den deutschen Juristentag* (Karlsruhe: Müller, 1960), I, 135; Id, 'Das Rechtsgeschäft und das rechtlich relevante Verhalten' *Archiv für die civilistische Praxis*, 71 (1962), cited by F. Ranieri, *Rinuncia tacita* n 3 above, 29, fn 23).

[14] F. Ranieri, *Rinuncia tacita* n 3 above, 122.

[15] ibid 46.

[16] F. Ranieri, 'Eccezione di dolo' n 3 above, 327.

[17] See Corte di Cassazione 28 November 1992 no 12475, cited by M. Del Conte, *Le dimissioni e la risoluzione consensuale del contratto di lavoro* (Milano: Egea, 2012), 46; conforming also Corte di Cassazione 28 April 2009 no 9924, *Centro Elettronico di Documentazione (CED) Cassazione* (2009).

[18] See Tribunale di Milano 3 January 2000, 'Fideiussione e mandato di credito' *Repertorio del Foro italiano*, 22 (2001).

[19] A limited application has been found in Art 48 of regio decreto 21 June 1942 no 929, concerning trademarks, insofar as a challenge against the patent is prohibited where the trademark has been publicly used in good faith for five years without objections. According to F. Ranieri, *Rinuncia tacita* n 3 above, 118, this rule balances the protection of third parties' reliance with legal certainty and makes the burden of proof easier for the application of *Verwirkung* doctrine in case law. In a similar vein see E. Bonasi Benucci, *Tutela della forma nel diritto industriale* (Milano: Giuffrè, 1963), 57; M. Rotondi, 'La mancata difesa del marchio e l'art. 48 R.D. 21 giugno 1942 n. 929' *Rivista trimestrale di diritto e procedura civile*, 74 (1968).

in the loss of a right. Indeed, such fears are not even foreign to part of the German scholarship contrary to the *Verwirkung* theory which, has been strengthened both by the interpretation of the good faith clause and the abuse of rights theory.[20]

In a decision concerning the failure to perform a loan for the purchase of cars, the Court of Cassation considered that a two-year delay to bring an action for the restitution of undue money (within the limitation period) did not amount to an abuse of right which the court could review of its own motion. Consequently, it held that a delay to exercise the right does not violate the principle of good faith in contract performance, albeit attributable to the right-holder and such as to generate the debtor's reasonable expectation that the right would no longer be exercised, and it constitutes no ground for denying the judicial protection of the right, unless that delay would result from an unequivocal renunciation. This decision was grounded on the idea that a party's mere delay in the exercise of a right (in that case, the right to bring legal proceedings against the other party's failure to perform the contract) may amount to a violation of the principle of objective good faith in contract performance only if it does not satisfy a party's interest, considering the limitations and aims of the contract, and only if it damages the other party.[21] Moreover, where a working mother appealed the order which excluded her from the lists of farm workers, lower courts have ruled that she was not under an obligation to inform the Italian National Social Security Institute (INPS) about that appeal, given that Italian law does not recognize the *Verwirkung* principle (or the unfair delay in the exercise of a right).[22]

Other decisions regarding different cases rule out that delay entails tacit renunciation to a right because a failure to act or a delay in the exercise of a right are not *per se* sufficient expressions of an intention to dismiss the right.[23] It is equally suggested that, in order for any rights to expire due to the holder's

[20] It is worth reminding, with a view to warning against the equitable use of objective good faith in case law, J.W. Hedemann, *Die Flucht in die Generalklauseln* (Tübingen: Mohr, 1933); W. Flume, *Richter und Recht* (München-Berlin: C.H. Beck, 1967). Despite being a minority opinion, see also E. Wolf, *Allgemeiner Teil des BGB* (Köln-Berlin: Vahlen, 2nd ed, 1976), 89, who rejects, in particular, *Verwirkung* on the ground that it runs contrary to the legal rules on prescription periods.

[21] This way, Corte di Cassazione 15 March 2004 no 5240, n 2 above. See also Corte di Cassazione 9 August 1997 no 7450, 'Opere pubbliche' *Repertorio del Foro italiano*, 504 (1997).

[22] Arguing this way Tribunale di Vallo della Lucania 2 March 1990, *Nuovo diritto (Il)*, 769 (1990).

[23] See Corte di Cassazione 20 January 1994 no 466, 'Contratto in genere' *Repertorio del Foro italiano*, 481 (1994); Corte di Cassazione 27 June 1991 no 7215, 'Obbligazioni in genere' *Repertorio del Foro italiano*, 37 (1991); Corte di Cassazione 15 December 1981 no 6635, 'Contratto in genere' *Repertorio del Foro italiano*, 281 (1981). It has been said that, when it comes to explicit termination clauses, the tolerance on the creditor's part, which may substantiate in a negative or positive conduct, does not determine the termination of the clause due to a change in its contractual regime, nor a tacit renunciation occurs where the creditor, at the same time or after the tolerance, shows the intention to avail himself of the clause in the event of further delay in the performance (this way, Corte di Cassazione 31 October 2013 no 24564, 'Contratto in genere' *Repertorio del Foro italiano*, 481-482 (2013)).

non-exercise, Art 2934 Civil Code requires the lapse of a period of time, regardless of the holder's good faith.[24]

III. The Loss of a Right as a Case of 'Qualified Tolerance'

There have been endeavors to build a *Verwirkung* doctrine without considering intention, but rather assessing the objective good faith arising from the right-holder's conduct. Indeed, a German scholar pointed to the party's 'qualified tolerance' (*Duldung*) generating expectations in the other party.[25] This theory does not consider *Verwirkung* an exception to the principle that the right's holder inertia can determine the loss of a right only where a limitation or prescription period expires. To that end, it is required that the right-holder undertakes a specific conduct under the circumstances, while mere inertia would not be sufficient.[26]

It is submitted that the party's failure to exercise a right either where the other party interferes with the enjoyment of a real or absolute right or where the other party fails to correctly perform an obligation, may amount to the party's tolerance, where the party did know about that interference or failure to perform.[27]

Salvatore Patti remarked that, although Italian courts have felt compelled to consider the conflict of interests determined by tolerance (which appears to be a misguided view, because it tends to apply fictional intentions rather than the principle of good faith),[28] it is necessary to deny any relationship between the German *Verwirkung* and tacit renunciation (thus any subsequent association of tolerance with *iuris et de iure* presumptions of renunciation).[29]

This theory dismisses the idea of tacit renunciation and praises an attribution of legal effects, based on the principle of good faith, to conducts that have triggered an expectation in the other party. Accordingly, the German *Verwirkung* is closely connected with the applications of tolerance because the focus would not be on renunciation, but only on the right holder's conduct under the circumstances. The aim of judicial scrutiny consists of finding the other party's reliance, justified by

[24] Corte di Cassazione 26 May 1999 no 5099, *Diritto e giurisprudenza agraria e dell'ambiente*, 399 (2000), with critical commentary by F. Sesti.

[25] See, in particular, E. Riezler, Venire contra factum proprium: *studien im römischen, englischen und deutschen Civilrecht* (Leipzig: Duncker & Humblot, 1912), 146.

[26] S. Patti, '*Verwirkung*' n 3 above, 724.

[27] This is said by S. Patti, 'Esercizio del diritto' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1991), VII, 660.

[28] ibid 660.

[29] It is known that a tacit renunciation in German law meets two hurdles: one consists in the fact that a unilateral renunciation does not determine the loss of a right, which requires a contract under § 397 BGB; the other can be found in § 119 BGB which makes it possible to challenge an agreement due to a mistake irrespective of third parties being aware of it, which, when claimed by the right-holder to challenge the legal relevance of his inertia, may paralyze the application of *Verwirkung*.

the right holder's previous conduct, such scrutiny having an objective nature irrespective of the (explicit or tacit) intentions of the right holder.[30] This would ultimately show that *Verwirkung* is not a legal act (*negozio giuridico*) because it has *ex lege* effects. Even where German courts consider the unfair delay (*illoyale Verspätung*) relevant, they only do that where that delay has generated an expectation in the other party, and not on the ground that the party did want to delay the exercise of the right in order to get a better benefit.[31]

The consequence of the expectation generated by the other party's tolerance is that *Verwirkung* can determine either the extinction of a right (its effects being equated to the expiration of a limitation period, but its nature and function being different),[32] or the mere limitation of a right (on the ground of *Unzumtbarkeit*, that is something which cannot be demanded).[33]

IV. The Limits of the Previous Theories: For a New Reconceptualization of the Issue

This debate has shed light on the complexity of the issues around the loss of a right.

The two perspectives – the former belonging to Latin systems such as the Italian and French systems, which focuses on the intentionality of tacit renunciation (*renonciation tacite*) justifying the other party's expectation,[34] the latter belonging to the German system, which is based on the objective scrutiny *ex fide bona* of tolerance, justifying the other party's expectation too –[35] have at least two points in common, albeit grounded on different premises.

The first point in common is their non-heteronomous nature. While the intentional and autonomous dismissal of a right is inherent to tacit renunciation, the act of tolerance justifies the other party's expectation only if the tolerating party is cognizant.[36] Hence, it is suggested in the latter case that the right-holder consciously and intentionally dismisses his right through his tolerance, while knowing about the consequences of his conduct; so, the effect the *Verwirkung*

[30] S. Patti, *Profili della tolleranza* n 3 above, 120.

[31] See, on the matter, ibid 115.

[32] S. Patti, *Profili della tolleranza* n 3 above, 109, and there fn 17, with regard to the German scholarship objection to associate *Verwirkung* with a sort of reduced prescription period. Also, F. Ranieri, *Rinuncia tacita* n 3 above, 126, warns against a prescription *de facto*.

[33] ibid 119.

[34] F. Ranieri, *Rinuncia tacita* n 3 above, 125, argues, in a way which is quite similar to S. Patti's perspective, that the idea that the loss of a right may occur only through an act of will has hindered the recognition of the principle that a loss of the right may occur, irrespective of the right-holder's intention, where he has determined in the other party a justified reliance that the right would no longer be exercised.

[35] *infra*, *retro*, § 3.

[36] Cases decided by German courts show that parties knew about the actual development of the relation: in this sense, see S. Patti, *Profili della tolleranza* n 3 above, 107.

takes does not seem to be heteronomous, ie imposed by the legislator.[37]

The second point in common is that a finding of *Verwirkung*, which may be on request or *ex officio*, has a relational nature.[38] Such finding is based on the violation of objective good faith within the relationship between the parties; thus, it is not an absolute finding because it concerns both parties' conduct and, ultimately, the performance of their relation (Art 1375 Civil Code). It follows that *Verwirkung* is often found where a party's action or omission[39] also amounts to a real failure to perform an obligation.[40]

It is quite clear that the so-called evaluative good faith may be used to correct conducts in the contractual relation. In both the aforementioned perspectives, the function of *Verwirkung* is associated to justice in the specific case, which is so typical of the *ex fide bona* review. Therefore, the reason behind the institution can be found in the equitable function of the loss of a right.[41]

It is thus necessary to ponder these inputs, considering the hurdles to transplant foreign models in the Italian system and the risks associated with easy generalizations and with the acceptance, *sic et simpliciter*, of solutions developed by German scholars based on the general clause of good faith.[42]

Along these lines, this paper seeks to determine whether the Italian legal system contains that grey zone (which we discussed above) stretching between the intentional dismissal of a right and limitation/prescription periods (subject to a term). However, it will first have to examine the codified elements that may warrant the loss of a right.[43] After that, it will give these elements a legal qualification, and determine their *ratio essendi* and function (consisting in punishing misuses of power, as it will be discussed below). Finally, it will explore the issue of whether the loss of a right may be subject not only to law, but also to

[37] This is supported by P. Cisiano, 'Atto non negoziale di autonomia' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET: 2003), Agg I, 168.

[38] Unlike prescription periods which, as is well known, cannot be established by the court on its own motion. On the matter, with references to German scholarship, see S. Patti, *Profili della tolleranza* n 3 above, 119, and there fn 39.

[39] F. Festi, *Il divieto* n 1 above, 27, accepts that positive conducts may be relevant too.

[40] See L. Pascucci, *Ritrattazione della volontà risolutoria e reviviscenza del contratto* (Torino: Giappichelli, 2013), 174.

[41] See P. Gallo, 'Estinzione dei diritti', in G. Gabrielli ed, *Commentario al Codice Civile* (Torino: UTET, 2016), 513, according to whom, thanks to *Verwirkung*, German courts have applied much of the discretion that the law gave them in the field of prescription periods. This is a relevant element, although complicated questions arise; to what extent is it appropriate that courts apply equity, ie justice to the specific case, to the detriment of law in the strict sense? What has to be accepted is that, after legal positivism and the exegesis school, most recent scholars have increasingly appealed to equity.

[42] These risks are highlighted by F. Carusi, 'Correttezza (Obblighi di)' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), X, 713; C.M. Bianca, 'Dell'inadempimento delle obbligazioni', in A. Scialoja e G. Branca eds, *Commentario al Codice Civile* (Roma-Bologna: Zanichelli, 1967), 75; V. Pietrobon, *L'errore nella dottrina del negozio giuridico* (Padova: CEDAM, 1963) 90.

[43] *infra*, *amplius*, §§ 5 fol.

private transactions *poenae nomine*,[44] which would make it a legal remedy within the diverse context of private civil penalties.

V. The Loss of a Right in the Italian Civil Code: The General Case of Art 1015 Civil Code (the Misuse of the Usufructuary)

The first step towards an exact systematization of the issue at hand within the Italian legal system consists of examining some cases provided for by the civil code, in which a forced loss of a legal situation occurs. This analysis seeks to determine whether those provisions share the same *ratio*, which may be used to establish a common framework.

Starting with real rights, Art 1015 of 1942 Civil Code (already Art 516 of 1865 Civil Code) connects the loss of the right of usufruct to the abuse the usufructuary made through specific conducts, such as the transfer of the assets, their deterioration or destruction due to the failure to repair them.

The list of the 'abusive' conducts is indicative and not exhaustive. Any conducts by the usufructuary presenting a relevant degree of severity and capable to impair the right of ownership may be found to be abusive. This occurs where the property is irreparably and permanently damaged and its value severely declined. Think of the case of the alteration made by the usufructuary of the economic destination, which the literature has drawn from Art 981 Civil Code. On the contrary, where the court deems the situation less serious, the other remedies laid down in the second paragraph of that article may be used. They tend to not have a punishing nature, but to modify the legal relation through the provision of adequate security and compensation for damages.

According to the traditional view, the *ratio* behind the provision lies in the general prohibition of the abuse of rights. In other terms, the abuse of the right of usufruct consists of breaking the limits to its enjoyment and results in possible usufructuary's conducts related to the ways it enjoys. the right.[45] The view at hand believes that an inherent limitation to the right represents the violation of the principle of fairness and of the good faith clause,[46] which in most serious circumstances would lead to the loss of the real right. The loss results from a judgment that may even hold the usufructuary liable for damages under Art 1218 Civil Code. In order to prevent the usufructuary from keeping abusing the right, thereby increasing the damage in the period between the application and the damage, the owner may claim a seizure of the assets. The loss of the right effected by the judgment would result from the application of objective good

[44] *infra*, § 9.

[45] See A. Lamanuzzi, *L' abuso del diritto nei rapporti di godimento di cosa altrui* (Bari: Cacucci, 2005), 110, contending that the abuse of right by the usufructuary requires that a specific relation between usufructuary and owner exists.

[46] ibid 117.

faith to the contract.

However, a different interpretation of the provision appears feasible. The wording 'abuse of usufruct' is correct where it relates to the deterioration of the property in usufruct (indeed, the usufructuary must respect its economic destination: Art 981 Civil Code); the wording 'abuse' is not correct where it relates to the transfer of the property in usufruct (the French Civil Code does not provide for this situation). The latter conduct, strictly speaking, amounts to a misuse (as an excessive use), ie the exercise of a power which actually does not exist, because the usufructuary transfers a right (the ownership) which he does not hold.[47]

This distinction primarily draws on the *discrimen* between abuse of rights and misuse of powers, which will be thoroughly discussed in the conclusion, and provides the courts with a fixed and reliable criterion to determine the severity of the conduct which may justify an adequate civil remedy.

In this context, the loss of the right of usufruct can be considered a private penalty which results in the loss of the power in the event of its misuse (eg in the above-mentioned event of transfer of the property by the usufructuary).[48] In the different scenario of abuse of rights in the strict sense (think about the alteration of the economic destination of the property in usufruct, such as the impairment or destruction, which affects the content of the right), the remedies available to the courts should be different and less invasive, namely precautionary measures.

The two classes of active conducts – on one hand, the transfer of property, on the other the impairment/destruction thereof – can be conceptualized in

[47] This correct intuition is owed to P. Rescigno, 'L'abuso del diritto' *Rivista di diritto civile*, 259 (1965) (later in Id, *L'abuso del diritto* (Bologna: il Mulino, 1998), 95), who believes that conducts under Art 1015 Civil Code actually amount to misuses of powers, ie conducts falling outside the right's content, so that these cases are not subject to tort rules under Art 2043 Civil Code, as the misuse of power would require, but to the termination of right, as explicitly provided for by law. Limiting the misuse of power to the sale of property, P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2004), 142, and, G. Palermo, 'L'usufrutto', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 2002), II, 8, 139. Remarking that the transfer must concern the ownership, on which the usufructuary has no power T. Carnacini, 'Sull' abuso dell' usufruttuario' *Rivista trimestrale di diritto e procedura civile*, 468 (1978). Arguing that the usufructuary transfers the assets and not the mere usufruct on them, A. De Cupis, 'Usufrutto (Diritto vigente)' *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLV, 1124.

[48] See, *inter alia*, D. Barbero, *L'usufrutto e i diritti affini* (Milano: Giuffrè, 1952), 523; F. De Martino, 'Usufrutto, uso e abitazione', in A. Scialoja e G. Branca eds, *Commentario al Codice Civile* (Roma-Bologna: Zanichelli, 1978), 75, 338; R. Nicolò, 'Dell'usufrutto, dell'uso e dell'abitazione', in M. D'Amelio and E. Finzi eds, *Commentario al Codice Civile* (Firenze: Barbero, 1942), 637; L. Bigliazzi Geri, 'Usufrutto, uso e abitazione' *Enciclopedia giuridica* (Roma: Treccani, 1994), XXXII, 275; L. Luchini, 'Abuso dell'usufruttuario e responsabilità extracontrattuale' *Responsabilità civile e previdenza*, 214 (1998); G. Venezian, 'Dell'usufrutto, dell'uso e dell'abitazione', in P. Fiore and B. Brugi eds, *Trattato di diritto civile* (Torino: Eugenio Margheri - Unione tip. Editrice torinese, 1936), V, 2, 865. In case law, the punitive nature of the remedy is supported by Tribunale di Trani 3 March 1953, *Giurisprudenza italiana*, I, 293 (1953); Tribunale di Brescia 29 March 1954, *Giurisprudenza italiana*, I, 799 (1954); Corte di Cassazione 2 March 1976 no 699, *Giustizia civile - massimario*, 308 (1976).

different ways. The first case is independent from the relationship between owner and usufructuary as it relates to conducts falling outside the usufructuary's powers. The loss of a right ensues from the objective fact – regardless of any subjective elements of the conduct – of a conduct falling outside the usufructuary's power. Such effect is a heteronomous penalty imposed by the legislator, which does not result from the parties' failure to perform their obligations; it is indeed a case of misuse of powers. By contrast, where the right of usufruct is abused (think of the alteration of the economic destination, or the destruction of the property), as it has been observed above, the court should be given some leeway to find the most adequate remedies under the circumstances, which may be less severe than the loss of the right (eg compensation for damages).

Once the punitive nature of the provision in question has been clarified, it is possible to argue for the non-exceptional character of Art 1105 Civil Code, and thus its extension to the complex system of real and personal rights of enjoyment. To be fair, courts and scholars have advocated for such extension based on objective good faith through a systematic and analogical interpretation of Arts 833, 1015, para 1, and 1375 Civil Code. For example, courts have accepted that the principle laid down in Art 1015 Civil Code may apply not only to usufruct, but also to the other two real partial rights of enjoyment, namely use and housing, based on the explicit reference within Art 1026 Civil Code (limit of compatibility), by phrasing arguments based on objective good faith.[49] While enjoying properties belonging to third parties, even the holder of a right of easement may abuse and violate the limits of his right where the ways it is exercised run contrary to the act originating the right or, in any case, to good faith (basing this argument on Art 1063 Civil Code). Another example is personal rights of enjoyment (eg lease) in the event of a change in the property's destination, non-use, or delay in its return. In these scenarios, the loss of the right does not really ensue from a judgment on the loss of the right, but from a judgment on the termination of contract due to the failure to perform it.

However, an indiscriminate extension needs clarification. Only a conduct amounting to misuse of power and not a generic appeal to objective good faith (which could apply only to abusive conducts) could justify the extension of the legal removal of the entitlement – considering the same requirements and needs for protection – to cases other than the misuse of usufruct, ie all the real and personal rights of enjoyment.

[49] See Corte di Cassazione 27 March 1970 no 854, 'Usufrutto' *Repertorio della giurisprudenza italiana*, 3736 (1971). In scholarship see G. Pugliese, 'Usufrutto, uso e abitazione', in F. Vassalli ed, *Trattato di diritto privato* (Torino: UTET, 2nd ed, 1972), 854; L. Bigliazzi Geri, n 48 above, 312. Recognizing the abuse of the right of use, M. Trimarchi, 'Uso (diritto di)' *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLV, 930; with regards to the right of housing, S. Orlando Cascio, 'Abitazione (diritto civile)' *Enciclopedia del diritto* (Milano: Giuffrè, 1958), I, 102. Lately, see A. Lamanuzzi, n 45 above, 121.

VI. The Loss of a Right in Contract Law: The Case of Art 1956 Civil Code (the Misuse of the Guarantor)

Turning to contracts, it is interesting to point to the extinction of the guarantee and, particularly, the scope of Art 1956 Civil Code.

This article is also generally construed in a relational perspective, through a constant association with the violation of fairness and objective good faith,[50] so that the duty to monitor imposed on creditors in Art 1956 Civil Code results in a rule to run credit activities fairly and prevents conducts amounting to abusive granting of credit.[51]

Yet, the term used in the article in question, ie the 'release' of the guarantor, appears quite atechnical. It does not relate to a sort of *exceptio doli*, as it has been recently remarked,[52] or to a 'releasing contractual violation',[53] as supported by a body of case-law, which is evocative of a direct failure to perform on the creditor's part. Rather, it concerns a real extinction of the guarantee.

Accordingly, also in this situation a construction of the article in a relational perspective is not convincing at all. As observed on the misuse of usufruct above, it seems that a conduct consisting in failing to inform the guarantor falls outside the theory of abuse of rights and the application of objective good faith. On closer inspection, failing to inform the guarantor, in the event of a guarantee *in fieri*, seems to constitute an omission which falls outside the creditor's powers; otherwise, the nature of the guarantee will be jeopardized. In other words, the duty to inform and obtain the guarantor's consent does not amount to a mere duty *ex fide bona* thus it does not influence the failure to perform the contract; instead, it is a limit to the guaranteed credit from the outside, whose violation determines the loss of the guarantee in his favor. It is not a case of abuse of rights (*rectius*: abusive granting of credit) as it is in traditional literature, but of misuse of powers, resulting in the legal loss of the entitlement to the guarantee.

[50] There is plenty of case law on the matter: Corte di Cassazione 22 October 2010 no 21730, *Corriere giuridico*, 510 (2011), with commentary by F. Rolfi, 'Fideiussione *omnibus* ed obblighi di buona fede del creditore'; Corte di Cassazione 11 January 2006 no 394, *Contratti*, 922 (2006); Corte di Cassazione 29 October 2005 no 21101, *Contratti*, 775 (2006), with commentary by A. Angiuli, 'La fideiussione "*omnibus*" tra silenzio del fideiussore e scorrettezza del creditore'; Corte di Cassazione 9 March 2005 no 5166, *Giurisprudenza italiana - massimario*, (2005); Corte di Cassazione 14 June 1999 no 5872, *Contratti*, 922 (1999); Corte di Cassazione 1 July 1998 no 6414, *Giurisprudenza italiana - massimario*, (1998).

[51] Lately, Corte di Cassazione 2 March 2016 no 412, and Corte di Cassazione 9 August 2016 no 16827, *Contratti*, 1077 (2016), with commentary by A.A. Dolmetta, 'Sulla "speciale autorizzazione" del fideiussore *ex* art. 1956 c.c.'.

[52] See the significant considerations by F. Rolfi, 'Fideiussione *omnibus*' n 50 above, 514, who clarifies the scope of the provision and argues that the *exceptio doli* under art 1956 Civil Code plays a wider role, because it applies to the events in the obligation covered by the guarantee. Arguing for the *exceptio doli* see also A.A. Dolmetta, 'Sulla "speciale autorizzazione" del fideiussore' n 51 above, 1084.

[53] Corte di Cassazione 9 August 2016 no 16827 n 51 above; Corte di Cassazione 21 February 2006 no 3761, *La giurisprudenza del bollettino di legislazione tecnica*, 476 (2006).

This opinion is supported by a couple of reasons, which it is worth discussing below.

Firstly, para 2 of the article in question provides for the nullity of any preventive waiving to the guarantor's release. Not even the guarantor could avoid the change of circumstances following a conduct amounting to misuse of powers (thus, determining the extinction of the guarantee); on the contrary, it would be possible if the duty to inform concerns objective good faith or the performance of contractual obligations through the creditor's waiving to challenge the failure to perform the contract. As a consequence, the loss of the right is a heteronomous penalty imposed by law, thus unavailable in the event of conducts which fall outside the individual's powers. This also suggests that the forced loss of the entitlement can occur in cases other than an explicit or tacit renunciation because the article explicitly provides for the nullity of any voluntary renunciation.

Secondly, courts have remarked that, even in trial, the guarantor cannot avail himself of the penalty consisting in the loss of the right. Extinction under Art 1956 is not an exception in the strict sense and courts can establish the loss of the guarantee (actually, the Court of Cassation held the 'nullity' of the guarantee) on their own motion at every stage and level of the proceedings.[54]

In conclusion, in light of the arguments phrased above, upon abandoning the perspective revolving around the mere failure to perform the obligation and good faith leading to the abuse of rights, Art 1956 Civil Code seems to open up to a new interpretation within the system, ie the loss of a right resulting from misuse of powers, which it is here discussed.

VII. The Loss of a Right in Succession Law: The Case of Arts 527, 493, 494, 505 Civil Code (the Loss of the Power to Waive the Inheritance and the Loss of the Benefit of Inventory)

Even in the context of succession law, the loss of a right seems to adopt a punitive function, which is independent from the paradigm of objective good faith and the abuse of rights.

Firstly, consider Art 527 Civil Code, under which the prospective heirs who removed or hid assets belonging to the hereditary mass lose their power to waive the inheritance and are considered purely and simply heirs (while a waiver of the inheritance would have no effect).

It has been correctly observed, probably with less discussion compared to the situations examined above, that the article concerns a loss with a punitive

[54] On this matter, see Corte di Cassazione 3 July 2015 no 13759, unpublished, which construes Art 1956 Civil Code as a particular case of (supervening) nullity of the guarantee due to the difficult satisfaction of credit. The nullity of the guarantee can be established in any at every stage and level of proceedings.

function,[55] irrespective of any imposed deadlines. The fraudulent possession of hereditary assets is a conduct amounting to misuse of powers, which the prospective heir does not have power to take without previously accepting the inheritance (explicitly or tacitly), even more so in the event he waived the inheritance. This conduct justifies the loss of the right to waive the inheritance while he becomes a pure and simple heir.

As in the case of an *omnibus* guarantee discussed above, the waiver of the inheritance is irrelevant because the prospective heir becomes a real heir *ipso iure* for the operation of the article in question. This gives further support to the thesis concerning the heteronomous and imposed nature of the loss of the right (to waive the succession) subject to conducts that the prospective heir has no power to take.

The heir may also lose the benefit of inventory under Arts 493, 494 and 505 Civil Code.[56] Such loss does not relate to the loss of a right due to the inertia lasting for a given time (which is a limitation in its own right), yet again to a specific penalty that the law imposes on heirs with a view to protecting hereditary creditors and legatees, when the heir who had previously accepted the inheritance with the benefit of inventory acts in a certain way.

In particular, the benefit may be lost before or after acquiring it. For the purposes of this essay, it is more interesting to explore the losses of the benefit after its acquisition. For instance, it is worth considering the loss resulting from dispositions of the hereditary assets (Art 493 Civil Code) without a judicial authorization, omissions or lies in the inventory (Art 494 Civil Code), failure to comply with the procedural steps during liquidation (Art 505 Civil Code). These conducts, which are prohibited for the benefited heir, do not amount to a mere failure to perform the obligations with creditors and legatees, but constitute a misuse of powers since they fall outside the powers conferred by the law upon the heir with benefit. In these cases, the heir's good faith is presumed until proven otherwise. However, it is not a case of objective good faith, because once more the unfair conduct is not relevant for the purposes of the loss, but only for the duty imposed on creditors and legatees to provide evidence of the party's bad faith.

According to some scholars, also the failure to provide a guarantee (Art 492 Civil Code) would justify the loss of the benefit, whereas the law remains silent

[55] Highlighting the punitive nature of the provision, see F. Messineo, *Manuale di diritto civile e commerciale* (Milano: Giuffré, 1962), VI, 456; G. Azzariti and G. Martinez, *Successioni per causa di morte e donazioni* (Padova: CEDAM, 1979), 82; C. Giannattasio, 'Delle successioni', *Commentario al Codice Civile* (Torino: UTET, 1971), II, 245. *Contra*, L. Ferri, 'Successioni in generale', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1980), 137.

[56] On the punitive nature of such provisions, see B. Thellung De Courtelary, 'Volontaria giurisdizione e sucessione *mortis causa*' *Enciclopedia diritto* Cendon, (Padova: CEDAM, 2000), 295, and, before, N. Stolfi, *Diritto civile*, VI, *Il diritto delle successioni* (Torino: UTET 1934), XII, 151.

on the matter;[57] according to others, it would only warrant an attachment order or other precautionary measures under Art 700 Code of Civil Procedure.[58] Since the failure to provide guarantee does not amount to a real case of misuse of powers, it would be better to avoid the *extrema ratio* of the loss of the right and opt for a less severe remedy.

That the loss of the benefit of inventory may be relied on only by the deceased's creditors and by legatees, under Arts 505 - last para - and 509 Civil Code, in order to let the heir keep on the liquidation although he may have incurred the loss, depends on the peculiar nature of the liquidation procedure, and on the desirability to avoid the confusion of patrimonies may harm creditors and legatees. In these circumstances, the loss is clearly balanced by the interests of those who rely on it, highlighting another shade of the issue, ie the remedial soul of the loss of a right, which rests with an assessment made by the protected party.

VIII. The Loss of a Right in Family Law: The Case of Art 330 Civil Code (the Loss of Parental Responsibility)

The loss of a right occurs also in the context of family law. Consider the classic case of the loss of parental responsibility under Art 330 Civil Code, which determines the extinction or loss of the entitlement to the legal situation. The court can establish the loss as an irremediable option, considering the child's right not to suffer a material injury.[59] In a similar vein, consider Art 384 Civil Code concerning the removal of the guardian, especially in the event of conducts running counter to scope of guardianship: it is self-standing that, in this clear case of misuse of powers, the loss of the guardian's powers amounts to a penalty for conducts which fell outside its powers.

Turning back to Art 330 Civil Code, although the punitive construction of the provision has lost momentum, it is suggested that, with a view to protecting only the minor's interest, the loss of parental responsibility results from objective acts and conducts, irrespective of the author's intention or negligence. Those acts or conducts are not only merely abusive, but they are also not even included within the parent's powers. Accordingly, where Art 330 Civil Code mentions the abuse

[57] L. Ferri, n 55 above, 384, refers to preservation orders.

[58] A. Cicu, 'Successioni per causa di morte. Parte generale. Delazione e acquisto dell'eredità', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale*, (Milano: Giuffré, 2nd ed, 1961), 290; G. Grosso and A. Burdese, 'Le successioni. Parte generale', in L. Vassalli ed, *Trattato di diritto civile* (Torino: UTET, 1977), XII, 473.

[59] See, within this perspective, M. Sesta, 'Il controllo giudiziario sulla potestà', in M. Bessone ed, *Trattato di diritto privato* IV, *Il diritto di famiglia* (Torino: UTET, 1999), III, 247; A. Bucciante, 'La potestà dei genitori, la tutela e l'emancipazione', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1997), 4, 661; G. Villa, 'Potestà dei genitori e rapporti coi figli' *Il diritto di famiglia*, in G. Bonilini e G. Cattaneo eds, *Trattato* (Torino: UTET, 1997), III, 307; in case law see Corte d'Appello di Bologna 11 May 1988, *Diritto delle persone e della famiglia*, I, 602 (1989).

of (parents') powers,[60] it is necessary to consider the most serious cases (eg abandonment or sexual assault), as well as the parents' abuse of their legal usufruct (cf Arts 324 and 326 Civil Code on the transfer of the usufruct itself)[61] as a lack of power on the parent's part, which determines its extinction. By contrast, in the least serious cases different measures will suffice, such as an order to remove the parent from the family home (Art 333 civil code). All these measures will have to be taken by giving due consideration to the circumstances of each individual case.

The loss of a right is characterized by its reversible nature, since parental responsibility, as it is known, can be reinstated (Art 352 Civil Code). This is justified by the need to protect the minor and secure him their parent.

On the other hand, it has been observed that, in case of control of private powers, the functions behind the power are not related to the concept of abuse, if not in a diverted or conventional sense. The original function of the power is preserved *a priori* by the relevant provision, through specific duties of conduct imposed on the person having that power.[62] This opinion adds that the form of control, the specific exercise of power, is inherent to its structure, and has the sense and form of an obligation.[63] This contributes to downplaying, in keeping with the analysis so far developed, the role of good faith and abuse of control of family powers, dragging it onto a more objective assessment of the conducts' compliance with the legislative framework, thereby warranting the scrutiny that the exercise of power remains within what the law permits the acting party.

IX. The Loss of a Right as an Exercise of Party Autonomy: For a Theory of a 'Punitive Extinguishing Agreement'

The source of the loss of a right can be found not only in the law, but also in the parties' intention. It is possible, as in the legal situations examined before,

[60] Art 330 Civil Code has been construed as encompassing two cases of termination, the violation of the imposed obligations and the abuse of powers; see M. Cerato, *La potestà dei genitori. I modelli di esercizio, la decadenza e l'affievolimento* (Milano: Giuffré, 2000), 150; P. Vercellone, 'Il controllo giudiziario sull'esercizio della potestà', in P. Zatti ed, *Trattato di diritto di famiglia*, II, *La filiazione*, edited by G. Collura, L. Lenti and M. Mantovani (Milano: Giuffré, 2002), 1043.

[61] Arguing for the application of Art 1015 Civil Code to the termination of parental responsibility M. Dogliotti and F. Gallo, 'Genitori e figli: l'usufrutto legale' *Famiglia e diritto*, 309 (2007); *contra*, M. Gennaro, 'Usufrutto legale dei genitori' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1999), XIX, 579.

[62] This way, D. Messinetti, 'Abuso del diritto' *Enciclopedia del diritto* (Milano: Giuffré, 1998), II, 20, who cites, at fn 35, P. Rescigno, 'L'abuso del diritto' n 47 above, 248, who summarizes the complexity of function in the violation of specific obligations, which protect the interests that the law seeks to achieve. On the contrary, A. di Majo, 'Delle obbligazioni in generale', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1988), 347; Id, *La tutela civile dei diritti* (Milano: Giuffrè, 4th ed, 2003), 410, seems to advocate for the use of objective good faith to control so-called private powers (criticizing public law techniques, such as legitimate interests and procedures).

[63] D. Messinetti, n 62 above.

that parties exercise their autonomy in such a way as to agree on terms encompassing the loss of a right with a punitive function, ie the punitive extinction of their rights and duties. This would be a peculiar intentional regime of extinction for the purposes of Art 1321 Civil Code which must be constrained by some limits, as it will be detailed below.

Within the context of agreements with punitive function – which traditional literature has investigated[64] – one might consider the parties' agreement on a loss of a right *poenae nomine*, which would be lost in the event of conducts, possibly determined by the parties in advance, which do not amount to a mere failure to perform the obligations undertaken, but to a more serious case of misuse of the powers afforded by the contract.

One thing should be made clear: while in the legal situations examined before the outer limit to the situation is clearly set by law (consider the known scope of Art 1105 Civil Code) and then applied by courts, in this case it should be upon the parties to set the limit determining the conducts that fall outside their powers. These are neither conducts that overstep the agreement function (the so-called internal limit to the situation), as they would otherwise represent a case of abuse of rights; nor conducts in breach of the parties' duties, thereby determining the failure to perform them and resulting in compensation for damages. Instead, they are conducts that cannot be identified with the obligations undertaken by the parties and reflect the unlawful exercise of a power. In other terms, the parties may well list a series of conducts which fall outside their powers, on pain of the loss of the situation they are entitled to. The term would amount to a prohibition to act which may limit legal situations from the outside. It would not really target conducts contrary to the agreement (thus the failure to perform), but rather conducts which the agreement does not provide for. The loss would depend on a private punishing agreement, though in relation to the *modus operandi* of the legal situation analyzed before.

An example could help better understanding. The parties to a contract can list a series of particularly serious conducts that do not constitute failure to perform it. Consider the case of 'abuse' of the property on lease, which could be governed by an extensive application of the rule concerning the misuse of usufruct, as mentioned above. However, the loss of the right could also ensue from party autonomy, where the parties agree on the prohibition to act on the property in certain, serious ways, which would irremediably result in the loss of the right to enjoy that property. This situation, which the courts tend to square within the failure to comply with a general duty of care[65] and may be even inserted in a termination clause,[66] could be targeted by the parties through the loss of the

[64] It is debated whether other conventional private penalties may be added to the penalty clause, which is the most famous of private penalties, probably because of its name: E. Moscati, 'Pena (dir. priv.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1982), XXXII, 774.

[65] See a recent decision delivered by Tribunale di Frosinone 27 January 2017 (unpublished).

[66] Arguing this way Corte di Cassazione 11 October 2000 no 13525, *Giurisprudenza italiana* -

right, where the parties themselves frame it as a case of lack of power *ex negotio*. This would let the parties obtain a deterrent and punitive effect for undesirable conducts without using the – functionally neutral – scheme of the failure to perform the contract, rather managing the loss with an intentional and punitive mechanism. This conclusion seems to be supported by the lower courts which do not accept the exhaustive nature of the conducts listed in Art 1015 Civil Code, thereby opening the door to a potential agreement on the punishment of conducts through a free exercise of party autonomy.[67]

This theory could also apply to the so-called testamentary losses. Consider the well-known case of the prohibition to challenge the testament before a court. This agreement is traditionally brought within the resolutive condition, ie a loss from failure to perform, but on closer inspection it could be construed as an atypical testamentary clause on the *ex voluntate* dismissal of situations transferred *mortis causa*, with a punitive function.

In conclusion, the conventional loss of a right would enrich the area of so-called civil penalties, including the well-established mechanisms consisting of penalty clauses and compensation for damages. It would tackle unlawful conducts which do not constitute a mere failure to perform the contract, resulting in compensation for damages (given also that private law penalties do not always advantage the other party), but rather a real lack of power, ie the exercise of powers which the parties do not envisage in their agreement.

In contrast with the legal heteronomous and hetero-imposed situations discussed above, this would be self-imposed by the parties without a view to determining the conducts in breach of the undertaken obligations according to the most common scheme of the failure to perform the contract and, as it will be seen, the termination clause; it rather aims to establish the real limit to the power afforded by a given rule in the agreement. In this case, the parties articulate the physiognomy and content of the subjective situations which the agreement affords them, even replacing the legislator in order to better adapt the regime to their interests. This pursues a clear deterrence effect; put differently, the parties could regulate their mutual interests by listing conducts that do not really affect their own interest to terminate the agreement and seek a compensation for damages (such interest would underlie a termination); by substantiating a misuse of power resulting in the loss of the right, they seek to prevent those conducts through the conventional threat of an extreme penalty, ie the loss. Besides, even in the different context of the failure to perform, there is consensus that the penalty clause may also underpin the obligation, thereby playing a deterrent function as a private penalty.

However, where misuses of power have to be punished, the parties' self-imposition of a limit cannot be arbitrary altogether and must be scrutinized by

massimario, (2000).

[67] See Tribunale di Nocera Inferiore 6 April 2012 (unpublished).

lawyers. It follows that a clause, intended as an atypical civil penalty, which encompasses the loss with punitive function in a contract or a will, must pass the lawfulness and worthiness tests.[68] While in the legal situations discussed above it is the legislator who determines the outer limit to the situation in the event of certain conducts, where the conducts are defined by the parties and not by the law, the lawyer plays a decisive role in the review of the clause.

First of all, the clause in question must not run counter to the mandatory principles and rules of the legal system, and must only concern available situations. The issue of lawfulness appears quite delicate, because it relates to the potential conflict between the exercise of party autonomy and the regime of limitation and prescription periods (subject to time limits).

It is known that rules on limitation periods are imperative, thus the improper limitation *poenae nomine* intended by the parties (without a period) may avoid the application of the prohibition to change the legal regime of limitation periods. This fear is reasonable, but there might be a solution. On one hand, the improper, conventional limitation does not violate the law, namely Art 2936 Civil Code, because the clause does not establish (limitation or prescription) periods within which the right must be exercised. It just lists conducts amounting to misuse of powers which may lead to the punitive loss of the right. By contrast, that fear seems to be well-founded when it comes to *Verwirkung*, because the inertia for a considerable period of time (upon which *Verwirkung* is based) resembles the scheme of prescription periods more than the mechanism here discussed, which on the contrary is based on serious conducts that do not depend on time limits. On the other hand, permitting a punitive loss on a conventional basis according to a mechanism which already exists in our civil code (the paradigm is Art 1015), does not mean neglecting the prescription period, which still has to apply. Regardless of the possible loss due to misuse of powers, the legal situation keeps being subject to prescription due to non-use within the time limit provided for by law.

Doubt remains as to the possible *fraus legis* (Art 1344 Civil Code), that is the improper limitation clause may indirectly violate the principle of non-derogation from prescription rules. To be honest, where the loss of a right is made contingent on the specific requirement of misuse of powers and is given a punitive function, there seems to be no danger of defrauding the law. It is a fact that the punitive function – and thus the specific function of the punitive agreement determining the loss – can be placed within the wide system of civil penalties and appears to be as lawful and worthy of protection as the need for legal certainty underlying prescription periods, which are structurally and

[68] From a methodological point of view, see E. Moscati, 'Pena (dir. priv.)' n 64 above, 785, contending that private penalties are in accordance with the limits themselves to party autonomy. Thus, the first problem is to establish whether the punitive function is lawful per se. If the answer is affirmative, one has to ask whether it is also worthy of legal protection under Art 1322, para 2, Civil Code. If the answer is affirmative too, then a discussion on private penalties may be carried on.

functionally different from a civil penalty. In conclusion, save for each specific agreement, it is suggested that, in theory, the conventional regime of the loss under Art 1321, contingent on serious conducts amounting to misuse of powers and pursuing a punitive function worthy of legal protection, does not run contrary to the legal regime of prescription periods and their *ratio*. This is even more true if one considers that, according to some scholars, the prescription determines a deadlock in the claim, but not a real loss of the legal situation (as it would happen in the event of payment of debt when the prescription period has lapsed).[69]

Furthermore, it is no coincidence that, leaving aside the less problematic issue of real and personal rights of enjoyment, and credits, even the right to ownership, albeit theoretically not subject to a prescription period, may be subject to the so-called punitive expropriation, where it does not perform the social function prescribed by the Constitution at Art 42. This confirms that prescription periods and private loss penalties are not mutually exclusive, but can co-exist and combine with each other. Thus, absolute and real situations too, taking *erga omnes* effects, may well be subject to a punitive loss, where the use of a specific property – considering its function – amounts to a possible case of misuse of power by the owner, with a view to protecting superior and collective interests.[70]

Improper (conventional) limitation clauses are not alien – in other areas – to case-law and scholarship. Think about the clauses requiring a policy-holder to inform in writing the insurance company about policies against the same risk that they later took out with other companies, and, in the event of accident, to inform all the insurers and disclose all the policies. These clauses determine an improper loss of the right to compensation due to the mere non-compliance with an obligation and do not depend on time, but the insured party still has to pay the insurance premium.[71] They are accepted and subject to a review on their burden and possible unfairness (Arts 1341 para 2 Civil Code, and 33 Consumer Code), because, as it has been correctly observed, the legal regime of costly and unfair terms does not concern only the limitations depending on time, but also improper limitations where these generate a legal imbalance.[72]

Leaving aside the issue of lawfulness, the agreement on the loss, with a punitive function, must also be worthy of legal protection, thus not arbitrary to the detriment of one of the parties. The review of the penalty clause, which may

[69] See, *inter alia*, P. Vitucci, 'Prescrizione (dir. civ.)' *Enciclopedia giuridica* (Roma: Treccani, 1991), XXIV, 20.

[70] This has been advocated for cultural assets by F. Longobucco, 'Beni culturali e conformazione dei rapporti tra privati. Quando la proprietà «obbliga»' *Politica e diritto*, 549 (2016).

[71] They derogate from Art 1910 Civil Code. See, on the matter, A.D. Candian, 'In tema di clausole di decadenza "improprie" nel contratto di assicurazione' *Responsabilità civile e previdenza*, 294 (1986); G. Scalfi, *I contratti di assicurazione. L'assicurazione danni* (Torino: UTET, 1991), 184. See, in case law, Corte di Cassazione 4 August 1995 no 8597, *Giustizia civile - massimario*, 1486 (1995).

[72] This way, P.M. Putti, 'Le clausole vessatorie', in G. Alpa ed, *Le assicurazioni private* (Torino: UTET, 2006), I, 1216.

have a unilateral or bilateral structure,[73] must be carried out under the circumstances and must focus on elements such as the seriousness of the punished conduct amounting to a misuse of powers, as well as on the balance between the extreme remedy consisting in the loss of the right and the punitive outcome pursued by party autonomy.

This review, as said before with regard to legal situations, has no relational nature because it does not relate to the mutual obligations undertaken by parties, but it qualifies and scrutinizes conducts which have been conventionally determined, without any reference to objective good faith and to the performance of the obligations undertaken in the agreement. Where the review has a positive outcome, the court will deliver a decision determining the loss of the right, as in the case of the legal situations discussed above. This decision requires the application of one of the parties as the court cannot rule the loss the right of its own motion, and it does not impact on the rights which third parties have acquired before the *ex negotio* loss occurs, pursuant to the traditional principles of '*possesso vale titolo*' and the registration of the application to the court for the loss.

X. Conclusions: The Loss of a Right as a Punitive Remedy for the Cases of Misuse of Powers

An attempt can be made to answer the question asked at the beginning of the present essay. There exists the possibility of terminating the legal situation in cases other than the voluntary renunciation (explicit or tacit) and the prescription/limitation of the right (connected to time). But the only way to conceptualize the loss of rights rigorously, based on the current legislative framework and on an attentive examination of the case-law, seems to consist in relating the loss to a punitive situation which removes the entitlement to the right, which is sourced either in law or in party autonomy.

This conceptual operation entails the need to govern general clauses more rigorously than in the past, especially the good faith clause, with a view to bringing them within their exact role, rather than downplaying their meaning. Thus, it does not seem that the use of objective good faith may lead the interpreter to rule the loss of the right irreparably, without adequate review of the *voluntas legis* or where no explicit dismissive intention of disposable situation can be found. On the contrary, the loss may result certainly more from the application of a civil penalty provided for by the legislator or conventionally determined, thereby pointing to the valuable function behind the situation so far outlined.

The requirements of the loss are clear too: neither the abuse of rights, as it has so far been said for the transplant of *Verwirkung* in the Italian legal system,

[73] The issue of the variability of the punitive agreement structure has been raised by several authors. See, in particular, E. Moscati, 'Pena (dir. priv.)' n 64 above, 786.

nor the compensation for damages or the failure to perform the contract. This is why the opinion cannot be shared that the penalty for the failure to exercise the right within a reasonable time, albeit not being determined by an express provision in the Italian system, may well be drawn from the system, through the combined provisions of Art 1175 Civil Code and Art 2043 Civil Code. The ethical rules of good faith work as criteria to select interests worthy of legal protection which, where unjustly compromised, lead to compensation for damages under Art 2043 Civil Code.[74] Indeed, compensation is a remedy against abuse of rights, whereas the loss of a right amounts to a real civil penalty seeking to tackle conducts which fall outside parties' powers because the provision or party autonomy itself do not encompass them in the rule established by law or by agreement.

Such a conclusion, as it has been remarked so far, makes it possible to dispel the doubts about the transplant, *sic et simpliciter*, of German *Verwirkung* in the Italian legal system. On one side, the loss of the right should not result from mere inertia, on the other hand it would determine a considerable decrease in the tolerating conducts which according to some scholars are extremely positive phenomena from a social point of view and the economy of proceedings.[75] Similarly, the phenomenon at hand, even where it is imposed by parties with a punitive function, makes it possible to shy away from *fictiones iuris*, like tacit renunciation, to which the Italian courts appeal.[76] As a consequence, bringing the loss of the right in the area of penalties naturally makes the exercise of private powers more certain as compared to an indirect examination of parties' intentions concerning a tacit dismissal of the right.

In this way, the *ex lege* or *ex voluntate* occurrence of a punitive loss, which results in the removal of the entitlement to the legal situation, punishes the misuse of power, ie the lack of power or the excess of its limits. Consequently, the interpreter is tasked with scrutinizing both the specific circumstances possibly leading to the punitive legal loss of the right and the lawfulness and worthiness of possible punitive agreements on the loss.[77]

[74] In these terms, see D. Galli, 'Le nuove frontiere della prescrizione: *Verwirkung*, abuso del diritto e buona fede' *Corriere giuridico*, 934 (1998) (commentary to Corte di Cassazione-Sezioni unite 29 September 1997 no 9554).

[75] As it was remarked by F. Festi, *Il divieto* n 1 above, 140.

[76] *Retro*, § 1.

[77] Private law scholarship looks for the fair remedy, based on the circumstances of each specific case as being instrumental to the interests which the parties seek to achieve: P. Perlingieri, 'Il "giusto rimedio" nel diritto civile' *Giusto processo civile*, 1 (2011) (for an application, you may want to see F. Longobucco, 'Profili evolutivi del principio *fraus omnia corrumpit*' *Rassegna di diritto civile*, 712 (2012); Id, 'Circolazione di immobili abusivi e giusto rimedio civile' *Rivista giuridica dell'edilizia*, 243 (2015)). For further details, see F. Longobucco, *Eccesso di potere e perdita del diritto nel sistema delle pene civili* (Napoli: Edizioni Scientifiche Italiane, 2017), passim.

Essays

Invalidity of Contracts and the Protection of Third Parties' Acquisitions of Land

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Abstract

Purchasers of land have a strong interest in becoming the fully vested owners of the land they intend to acquire. One of the risks a buyer potentially is exposed to stems from the legal relationship between the seller and the person from whom the seller previously bought the land. In this article, we examine the protection of purchasers in such scenarios in three jurisdictions: Italian law, Turkish law, and German law. The solutions adopted each represent the legal family to which they belong, and the findings of this comparative study therefore are not necessarily confined to said three jurisdictions. This article will however reveal that, under a surface of strong differences, it is possible to outline common trends and common objectives, and therefore that it is not at all inconceivable to hypothesize a harmonization's perspective in this field.

I. Introduction

Even in our times of a globally financialized and dematerialized economy, in an average citizen's life, the purchase of land is considered to be one of the most important transactions to enter into. The capital invested in the acquisition of land usually accounts for a substantial part of the entire funds earned in a person's lifetime. Similarly, the economic success of businesses often depends on immovable property deals. Even the last global great recession has originated in the USA in result of a crisis of immovable mortgages and a lack of certainty with regard to immovable transfers, a situation that, *inter alia*, has boosted the development of a title insurances market.

It goes without saying that purchasers therefore have a particularly vital interest in becoming the fully vested owners of the land they intend to acquire.

Indeed, one of the most important risks a buyer potentially is exposed to stems from the legal relationship between his seller and the person from whom the seller previously bought the land. Suppose A sells land to B who resells the land to C. In this scenario, we consider C the third party. Assuming there was

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some kind of legally relevant disruption in the relationship between A and B, the acquisition of ownership through B may be compromised. C's later acquisition, in turn, depends in principle on his seller's (B's) position as owner. Thus, C has reason to be concerned with the legal relationship between A and B. Of course, this is a simplified model. In practice, there could be a long sequence of transactions of the same property before C aspires to gain ownership from B. C's position would then be up to the validity of all links in the chain of transfers.

In consequence, C will be prompted to enquire the validity of all transferors' prior acquisitions if he wants to ensure the persistence of his acquisition. Such an undertaking will most likely turn out to be impossible or trigger prohibitively high transaction costs. It could therefore be argued that society as a whole has an interest in lowering the risk C is exposed to. The purchase of land is a desirable activity and all legal orders try to protect it.

In this article, we examine the protection of third-party transferees, such as C, under three legal orders that have been selected as relevant examples of the main options to be taken into account: Italian, Turkish, and German law. As the reports will show, the German system is the paradigm of a model centered on the land register and based on the strict separation between obligations and transfers of rights as well as on the principle of abstraction; the Turkish system represents a large scale application of a model, originally developed in Switzerland, that instead merges the principle of underlying causa with the principle of separation; the Italian system presents an interesting, and almost unique, combination of the proclaimed rule of transfer by mere consent, originally derived from the French experience, with other rules that instead give much more importance to the land registration, and, furthermore, a different system, derived from the Austrian one, still in force in some provinces. Thus, our three legal orders turn out to be highly representative of the diversity of the possible solutions adopted, outside and inside the EU, within the continental civil law tradition.[1]

These three jurisdictions have established fundamentally different requirements for the transfer of land with significant implications for third party purchasers. Such different assumptions in three European states *per se* provide an incentive

[1] After all, the civil law tradition was historically shaped precisely in the territories now belonging to these three jurisdictions. We could remember C. Beccaria, *Dei delitti e delle pene* (Livorno: Coltellini, 1764), 1, where the author ironically summarizes the history of the civil law tradition as follows: '*Alcuni avanzi di leggi di un antico popolo conquistatore fatte compilare da un principe che dodici secoli fa regnava in Costantinopoli, frammischiate poscia co' riti longobardi, ed involte in farraginosi volumi di privati ed oscuri interpreti, formano quella tradizione di opinioni che da una gran parte dell'Europa ha tuttavia il nome di leggi... Queste leggi, che sono uno scolo de' secoli i piú barbari...*' (translation: 'Some leftovers of the laws of an ancient people of conquerors (ie the Romans), collected by a prince who twelve centuries ago reigned in Constantinople (ie İstanbul), then mixed with the Longobards' (ie a Germanic people's) customs, and inserted in complicated volumes by private and unknown scholars, form that tradition of opinions that nevertheless in the greater part of Europe has the name of laws... Those laws that are a relic of the most barbarous centuries...').

for a closer comparative study. Moreover, the solutions adopted in Italian, Turkish, and German law each represent the legal family to which they belong, and the findings of this comparative study therefore are not necessarily confined to said three jurisdictions. This article will however reveal that, under a surface of strong differences, it is possible to outline common trends and common objectives, and therefore that it is not at all inconceivable to hypothesize a harmonization's perspective in this field.

II. Italian Law

1. Introduction and Historical Developments

The Italian law on property transfer is twofold: One rule is proclaimed as the general principle in the Civil Code, and a different rule concretely operates through many other provisions of the Code itself, and of other statutes. It is mainly due to historical reasons: That's why the present country report will need a longer introduction than the other two.

Until the 18th century, the Roman law tradition, and the Germanic customs mixed with it, had always followed the ancient idea that a sale contract does not transfer property, but just creates the obligation of the seller to perform another act, which will operate the planned transfer.[2] Depending on the value and on the social importance of the concerned goods, this second act could be a complex and public ritual, meant to inform the whole community about the transfer, or simply the delivery of the good itself to the buyer, an operation that anyway made evident to everyone its passage under the control of a different owner.[3] After all, this was a logical consequence of the doctrine of contract's privity: If the contractual agreement can create rights and duties only among the contracting parties, something else was needed in order to transfer property, a right which is defined as absolute (*erga omnes*), and so always involves also the position of third parties.

With the Enlightenment and the French Revolution, also contract law underwent strong transformations. The main objectives were to radically simplify the too complex rules inherited from the past and to center the new ones on the free expression of will by the contracting parties. Therefore, a new principle was imposed to our subject: Property is transferred by the simple meeting of the parties' consents,[4] ie by the mere stipulation of the sale contract (in Latin:

[2] About the Roman sale contracts see, also for further references, C. Argiroffi, *Causa e contratto nella prospettiva storico comparatistica* (Torino: Giappichelli, 2017).

[3] In Roman law the most important goods were land, slaves, cows and horses: They could be transferred only though the solemn ritual of *mancipatio*, whilst the other movable good could be transferred through the mere *traditio*, ie delivery.

[4] According to Art 1583 of Napoleon's *Code Civil* of 1804, the contract of sale '*est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé*' ('produces legal effects among the contracting parties, and so transfers ownership from

consensus parit proprietatem). The new rule had the beauty of pure ideas and the strength of revolutionary movements, so it suddenly became an untouchable dogma. Indeed, the French Civil Code retained some traditional rules hardly compatible with this principle, having regard to the less important property transfers,[5] but the new system turned out to be very problematic with regard to the most important ones, at that time and maybe also at our time: immovable properties' transfers.

In fact, under the pure rule of the mere consent, a buyer could never know if the seller had already sold the immovable to someone else with a previous contract and had always to fear that this previous buyer will appear and claim to be the true owner. In order to solve these problems, and so to increase mutual trust in real estate market, in the 19th century the French legislator introduced a mechanism of transcription, ie public registration, of contracts: the buyer was entitled to prevail against other buyers of the same immovable only if and when he registered his sale at the public registrar office, making it accessible to anyone, and so a prospective buyer could free himself of any fear by checking if someone else had previously registered the purchase of the concerned good.[6] The Civil Code principle of mere consent formally was not touched by this reform,[7] but in

the seller to the buyer, since the moment when the parties have agreed on the goods and on the price, even if the goods have not been delivered and the price has not been paid yet').

[5] Art 1141 of Napoleon's Code had maintained the old Germanic (Frankish) rule *en fait de meubles la possession vaut titre* and stated that: '*Si la chose qu'on s'est obligé de donner ou de livrer à deux personnes successivement, est purement mobilière, celle des deux qui en a été mise en possession réelle est préférée et en demeure propriétaire, encore que son titre soit postérieur en date, pourvu toutefois que la possession soit de bonne foi*' ('If someone consented to deliver the same mobile goods to two persons, the one who receives the delivery first prevails on the other, even if his contract has been agreed later, provided that he acquired the possession in good faith'). Therefore, with regard to movables the decisive moment is not consent but delivery.

[6] A first draft of the transcription's system had been introduced by the Law of 11th Brumaire VII (1 November 1798), but suddenly abrogated by the *Code Civil* of 1804. Then the transcription was definitely reintroduced by Napoleon III with the law of 23 March 1855, in order to help the safe development of mortgage credit in times of growing urbanization.

[7] The principle is still seemingly proclaimed by Art 1196 of the *Code Civil*, as reformed in 2016: '*Dans les contrats ayant pour objet l'aliénation de la propriété ou la cession d'un autre droit, le transfert s'opère lors de la conclusion du contrat*" ('With regard to contracts transferring ownership or other rights, the transfer takes place when the contract is concluded'), but Art 1198 suddenly specifies that: "*Lorsque deux acquéreurs successifs d'un même meuble corporel tiennent leur droit d'une même personne, celui qui a pris possession de ce meuble en premier est préféré, même si son droit est postérieur, à condition qu'il soit de bonne foi. Lorsque deux acquéreurs successifs de droits portant sur un même immeuble tiennent leur droit d'une même personne, celui qui a, le premier, publié son titre d'acquisition passé en la forme authentique au fichier immobilier est préféré, même si son droit est postérieur, à condition qu'il soit de bonne foi*' ('If the same mobile goods are acquired by two buyers from the same seller, the one who has received the delivery of the goods first prevails, even if his contract has been agreed later, provided that he acquired the possession in good faith. If the same immovable property is acquired by two buyers from the same seller, the one who has registered his acquisition first prevails, even if his contract has been agreed later, provided that he was in good faith'). See S.

substance the latter implied that the most important passage was public registration, and not private consent. In fact, as a consequence of the transcription's mechanism, the second buyer who registers as first prevails against the first buyer who registers as second.

The Italian Civil Codes inherited from the French one both the proclaimed principle of transfer by mere consent[8] and the concrete rule of transcription as the sole criterion to solve conflicts among different buyers from the same seller.[9] After the First World War, this quite contradictory system had to be compared with the different one that was in force in the new eastern provinces, taken from the dissolved Austrian-Hungarian Empire.[10] In the Austrian legal order, according to the Roman tradition, the sale contract creates only an obligation to transfer property with a second act. Therefore, the immovable is actually transferred only when a judge, to whom the interested party has to submit the sale contract, verifies that everything is fine and so modifies its ownership in the public cadaster.[11] It is evident that this system is in deep contrast with the transfer-by-mere-consent principle, but it looked like more efficient, and so the winners did not abolish it, rather they preserved such a mechanism in the new provinces,[12] with the aim to

Meucci, 'Doppia vendita immobiliare, opponibilità e buona fede nel riformato Code Civil' *Persona e Mercato*, I, 120 (2018).

[8] We refer to Art 1125 of the Civil Code of 1865, the first Civil Code of the newly unified Italy, which was in substance a translation of the French one.

[9] The ancient Italian States had developed some mechanisms comparable to the modern public registration of contracts, such as the Venetian '*notatorio*' entrusted to a magistrate called '*procuratore di San Marco*'. However, an actual transcription system has been introduced only in the 19th century by many Italian States, and then by Civil Code of 1865. See, also for further references, N. Coviello, *Della trascrizione* (Napoli-Torino: Marghieri UTET, 1924), I, 36 and V. Colorni, *Per la storia della pubblicità immobiliare e mobiliare* (Milano: Giuffrè, 1954), 233.

[10] In force of the Treaties of Saint-Germain-en-Laye (10 September 1919) and Rome (27 January 1924), Italy annexed the new Provinces of Bolzano, Trento, Gorizia, Trieste, Pola, Fiume and Zara, as well as other minor towns that were incorporated in the, already Italian, Provinces of Belluno, Brescia, Vicenza and Udine. However, after the Second World War, with the Treaty of Paris (10 February 1947), Italy had to cede to Yugoslavia the Provinces of Zara, Fiume and Pola, as well as parts of those of Trieste and Gorizia.

[11] The Austrian cadaster dates back to the reforms of Empress Maria Teresa in the 18th century, ironically realized with the crucial contribution of prominent Italian lawyers, such as Carl'Antonio Martini and Pompeo Neri.

[12] We refer to the Royal Decree of 28 March 1929 no 499. About this peculiar system of public registration, still in force in the former Austrian Provinces, see: G. Gabrielli and F. Tommaseo, *Commentario della legge tavolare = Kommentar zum Grundbuchsgesetz* (Milano: Giuffrè, 1999); M. Bassi, *Manuale di diritto tavolare* (Milano: Giuffrè, 2013); M. Cosulich and G. Rolla, *Il riconoscimento dei diritti storici negli ordinamenti costituzionali* (Napoli: Editoriale Scientifica, 2014); A. Nicolussi and G. Santucci, *Fiat intabulatio* (Napoli: Editoriale Scientifica, 2016); A. de Bertolini, 'Speciale Sistema Tavolare' *Il Foro Trentino*, II, 12 (2017); A. Nicolussi et al, *Luigi Mengoni. Scritti di diritto tavolare. Schriften zum Grundbuchsrecht* (Napoli: Jovene, 2018). Something similar happened, in the same Post-War period, in France after the annexation of Alsace and Lorraine, where the Law of 1 June 1924 has maintained, even if with important modifications, the German system of registration: see A. Ciatti Càimi, 'Premesse storiche a un'indagine sulla pubblicità immobiliare', in G. Conte and S. Landini eds, *Principi, regole,*

extend it to the rest of Italy, if and when a reliable cadaster would be available,[13] but this result is still far from being achieved.[14]

2. Acquisitions from the Owners, from the Non-Owners, and Related Remedies

In the rest of Italy, also the new Civil Code of 1942 confirmed the French twofold system, with the mere consent principle proclaimed as a general rule by the 4th Book of the Code,[15] but contradicted by the concrete rules governing immovable property transfer, centered on transcription, which is regulated in the 6th Book of the same Code (and indeed also by the other, old and new, rules governing any other kind of property transfer).[16] In fact, in accordance to the 6th

interpretazione. Contratti e obbligazioni, famiglie e successioni. Scritti in onore di Giovanni Furgiuele (Mantova: Universitas Studiorum, 2017), II, 468.

[13] Indeed, the possible introduction of an Austrian-like system of public registration was debated even before the War (see G. Venezian, 'Il disegno di legge Scialoja sulla trascrizione' *Rivista di diritto civile*, 509 (1910) and F. Ferrara, 'Il progetto Scialoja sulla trascrizione' *Rivista di diritto commerciale*, I, 46 (1910)), and it was actually introduced in Italian colonial law with regard to African territories where public registers had never existed before, or to former Turkish provinces where the last Ottoman officials had deliberately destroyed the registers rather than consign them to the colonialists. Therefore, in these contexts a reliable cadaster and the connected Austrian-like registration system were realized from scratch, without the problems posed by historical Italian cadasters in the metropolitan territory: See Royal Decree of 31 January 1909 no 378, for Eritrea (then reversed by Royal Decree of 7 February 1926 no 269, which instead introduced the transcription system); Royal Decree of 3 July 1921 no 1207, for Libya; Governmental Decree of 22 August 1925 no 46, for the Dodecanese. In the latter, the Austrian-like system has been maintained also after the Second World War, when the Islands passed to Greece in force of the Treaty of Paris (10 February 1947), while in the newly independent Eritrea it has been reintroduced, in a different socialist shape, with the Land Proclamation no 95 of 1997.

[14] Italian cadasters are important for tax purposes (see L. Einaudi, *La terra e l'imposta* (Torino: Einaudi, 1974)), but, in most cases, they provide data that are not reliable nor updated: Therefore, according to Art 950 of the Civil Code of 1942, cadaster has no probative value as for property rights in private litigations, and the civil judge has to take it into consideration only if he lacks of any other element to be evaluated. Nowadays, in force of the decreto legge 31 May 2010 no 78, public notaries have to ensure the conformity between the cadaster and the public register of transcription (see G. Petrelli, *Conformità catastale e pubblicità immobiliare* (Milano: Giuffrè, 2010)): If this new statute will be correctly implemented, maybe in the next decades it will be possible to reconsider a reform of the whole public registration system.

[15] According to Art 1376 of the Civil Code, property is transferred by consent (see G. Vettori, *Consenso traslativo e circolazione dei beni: analisi di un principio* (Milano: Giuffrè, 1995)) and, according to Art 1465, the risks pass on the buyer as soon as the contract is stipulated, even if the good has not been delivered to him (see F. Azzarri, *Res perit domino e diritto europeo: la frantumazione del dogma* (Torino: Giappichelli, 2014)).

[16] With regard to registered movables, ie cars, ships and planes, Art 2683 et seq of the Civil Code provide a transcription system that is very similar to the immovable properties' one. With regard to all other movables, according to Art 1155 of the Civil Code, the second buyer who receives in good faith the delivery of the goods prevails against the first buyer who has not received the delivery (see L. Mengoni, *Gli acquisti a non domino* (Milano: Giuffrè, 1975)), and in consumers' contracts the risks pass on the buyer only with the delivery of the goods (see M. Rizzuti, 'Comment to article 63', in V. Cuffaro ed, *Commentario al Codice del Consumo* (Milano: Giuffrè, 2015), 482-484). With regard to credit assignments, according to Art 1265 of the Civil Code, the

Book, the second buyer who registers his purchase as first, even if he is not in good faith, prevails against the first buyer who registers as second, provided that also the previous acquisition of the same immovable by the seller had been registered.[17]

According to the transfer-by-mere-consent principle, we had to consider the first buyer as owner and the dishonest seller as a non-owner, but the mentioned rules on transcription make possible the acquisition by the second buyer, who becomes the real owner. In fact, the first buyer has no remedies *in rem* nor he can erase the acquisition of the second one, but he can just claim damages under contractual liability against the seller. This set of rules explain also other aspects of the legal and practical structure of Italian real estate market.

First of all, that is why in Italy immovable property transfers are in the hands of public notaries. According to the 4th Book of the Code, a private signature is enough to constitute the consent that transfers immovable property, but, according to the 6th Book, only a notarial deed can be registered.[18] Moreover, according to case-law, it is a notary's duty, before the sale, to check at the public registrar office whether the prospective seller is still entitled to sell the concerned immovable or there are previous transcriptions of transfers to other buyers, as well as, after the sale, to rapidly register the new purchase, in order to avoid that other acquisitions can be registered in the meanwhile.[19] According to a recent

second assignor who has notified as first the assignment to the debtor prevails against the first assignor who notifies later (see P. Perlingieri, *Cessione dei crediti* (Bologna-Roma: Zanichelli, 1982)). With regard to rental contracts, according to Art 1380 of the Civil Code, the second tenant who receives as first the possession of the good prevails against the first tenant who has not received it (see U. Natoli, *Il conflitto dei diritti e l'art. 1380 del codice civile* (Milano: Giuffrè, 1950)). Quite similar rules are provided with regard to the transfers of stocks and company shares (see L. Furgiuele, *Trasferimento della partecipazione e legittimazione* (Milano: Giuffrè, 2013). For a general overview of these issues see F. Carnelutti, *Teoria generale della circolazione* (Padova: CEDAM, 1933) and G. Furgiuele, *La circolazione dei beni* (Milano: Giuffrè, 2009).

[17] We refer to Arts 2644 and 2650 of the Civil Code, which are the pillars of the immovable property transfers' regulation system provided by Art 2643 et seq. of the said Code: see S. Pugliatti, *La trascrizione* (Milano: Giuffrè, 1957); R. Nicolò, *La trascrizione* (Milano: Giuffrè, 1973); M. D'Orazi-Flavoni and L. Ferri, *Trascrizione immobiliare. Trascrizione mobiliare* (Bologna-Roma: Zanichelli, 1977); G. Sicchiero, *La trascrizione e l'intavolazione* (Torino: UTET, 1993); R. Messinetti, *La tutela della proprietà sacrificata: contributo allo studio delle circolazioni attributive legali* (Padova: CEDAM, 1999); E. Ferrante, *Consensualismo e trascrizione* (Padova: CEDAM, 2008); G. Petrelli, *L'evoluzione del principio di tassatività nella trascrizione immobiliare* (Napoli: Edizioni Scientifiche Italiane, 2009); G. Baralis, *La pubblicità immobiliare fra eccezionalità e specialità* (Padova: CEDAM, 2010); E. Gabrielli and F. Gazzoni, *Trattato della trascrizione* (Torino: UTET, 2012), I.

[18] According to Art 1350, in the 4th Book, an immovable property transfer contract is void if not concluded in writing, but any kind of writing is adequate for the purposes of this norm. On the other hand, according to Art 2657, in the 6th Book, an immovable property transfer contract can be registered only if a public notary, or a judge, has authenticated or drafted it.

[19] About the consequent notary's liabilities see, also for further references to the case-law, M. D'Auria and M. Rizzuti, 'La responsabilità civile dell'avvocato e del notaio' *Giurisprudenza Italiana*, 184-193 (2014). It's important to notice that the parties, and above all the buyer, have the interest to register the sale contract, but for the public notary its transcription is also a specific duty, according to Art 2671 of the Civil Code. However, even the most scrupulous notary

statute, the notary has also to receive in trust the price from the buyer, when the sale contract is signed, and then to give it to the seller, only if the transcription is completed without any problem.[20] So, notaries are the guarantors of the well-functioning of the whole mechanism of immovable property transfer.

The contracting parties are often used to define and fix privately their agreement first, and subsequently go to the notary. Therefore, the practice has developed and the Civil Code has recognized the so-called preliminary contract,[21] which does not transfer property but binds the parties to sign the notarial final contract, which will operate the transfer (but maybe it would be better to say, whose subsequent transcription will operate the transfer). However, further reforms have recently introduced the possibility to register also the preliminary contracts,[22] and so a new practice is developing: the parties agree a private pre-

cannot avoid that, after his last check of the registers and before the transcription of the act he drafted (this time interval can be reduced even to a few hours, but cannot be eliminated), another purchase is registered. Therefore, a legal scholar, Professor E. Lucchini Guastalla, has proposed to modify the law, giving to notaries the power to book in advance the successive transcription when checking the registers (see A. Busani, 'Vendita di immobili con rischi' *Il Sole 24 Ore*, 24 May 2009), but this proposal has never been accepted by the legislators.

[20] We refer to Art 1, para 142, of the legge 4 August 2017 no 124, that has modified Art 1, paras 63 et seq, of the legge 27 December 2013, no 147 (see G. Sicchiero and M.D. Stivanello-Gussoni, *Legge concorrenza e mercato: novità per i notai* (Montecatini Terme: Altalex, 2017)).

[21] In the French model, the preliminary contract did not exist, or rather it was already an ordinary sale contract transferring the property, because of the mere consent rule, endorsed by Art 1589 of the Code Civil: '*La promesse de vente vaut vente*'. Instead, the idea of *Vorvertrag*, ie pre-contract, as something different from the final sale was developed in the German legal order, where the mere consent rule has never been in force, then imported in the Italian legal practice and finally recognized by Arts 1351 and 2932 of the Civil Code of 1942. Sometimes the contracting parties anticipate, partially or totally, at the moment of preliminary contract also the payment of the price and/or the delivery of the goods. See L. Montesano, *Contratto preliminare e sentenza costitutiva* (Napoli: Jovene, 1953); M. Giorgianni, *Contratto preliminare, esecuzione in forma specifica, e forma del mandato* (Milano: Giuffrè, 1961); G. Gabrielli, *Il contratto preliminare* (Milano: Giuffrè, 1970); A. Chianale, *Obbligazioni di dare e trasferimento della proprietà* (Milano: Giuffrè, 1990); G. Palermo, *Contratto preliminare* (Padova: CEDAM, 1991); F. Gazzoni, *Il contratto preliminare* (Torino: Giappichelli, 1999); M. Mustari, *Il lungo viaggio verso la realità: dalla promessa di vendita al preliminare trascrivibile* (Milano: Giuffrè, 2007); R. Calvo, *Contratto preliminare* (Milano: Giuffrè, 2016); M. Farina, *Contrattazione preliminare e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2017).

[22] We make reference to Art 3 of the decreto legge 31 December 1996 no 669, that introduced in the Civil Code Art 2645-*bis* on preliminary contracts' transcription, that renders the registered preliminary contracts opposable to the subsequent buyers (see A.A. Carrabba, *La trascrizione del contratto preliminare* (Napoli: Edizioni Scientifiche Italiane, 1998); A. Luminoso and G. Palermo, *La trascrizione del contratto preliminare: regole e dogmi* (Padova: CEDAM, 1998)), and to Art 23 of the decreto legge 12 September 2014 no 132, regulating the transcription of 'rent to buy contract', a peculiar contract that mixes elements of preliminary sale contract, rental contract and option contract (see D. Poletti, 'L'accesso alla proprietà abitativa al tempo della crisi: i c.d. contratti rent to buy', in G. Alpa and E. Navarretta eds, *Crisi finanziaria e categorie civilistiche* (Milano: Giuffrè, 2015), 251; A.C. Nazzaro, 'Il rent to buy tra finanziamento e investimento' *Rivista di diritto bancario*, 5 (2015); C. Cicero and V. Caredda, *Rent to buy* (Napoli: Edizioni Scientifiche Italiane, 2016); R. Clarizia et al, *I nuovi contratti immobiliari: rent to buy e leasing abitativo* (Padova: CEDAM, 2017)). In general terms, to avail or not of the rules on preliminary contracts'

preliminary contract, then the notarial preliminary to be registered, and after that the final contract to be registered too.[23]

For the legal scholarship it is not so easy to deal with this complex situation. According to the traditional mainstream opinion still followed in the textbooks,[24] property is transferred by mere consent and transcription renders the transfer opposable to third parties. On the other hand, some scholars have critically remarked that this idea is self-contradictory because a non-opposable property is not real property, and, taking into consideration the legal order as a whole, they think that, notwithstanding the literal wording of the Code, property transfer is indeed the result of a long and complex process, in which consent is just a link in the chain and transcription is the decisive moment.[25]

3. The Protection of Third Parties in Chains of Acquisition

Having regard to the above-mentioned peculiar context, we can try to explain how Italian law has dealt with the protection of third parties in the specific hypothesis to which this paper is dedicated: A sells land to B who resells the land to C, but there is some kind of legally relevant disruption in the relationship between A and B.

Given the general characteristics of the Italian model, a reader will easily understand that, also from this point of view, the decisive moment will be transcription. But we have to specify that, in the Italian legal system, not only the immovable sale contracts but also the judicial requests having regard to these contracts have to be registered, otherwise they are not opposable to third parties. Therefore, what really matters is whether C's acquisition has been registered after or before the registration of the judicial demand contesting the

transcription is a free parties' choice, and often they prefer to continue to conclude preliminary contracts by private signature, in order to avoid the costs of notarial intervention and public registration, even if this choice is risky from the prospective buyer's point of view. But, pursuant to the new Code of Insolvency, approved on 10 January 2019 in accordance with Art 12 of the legge delega 19 October 2017 no 155, to draft preliminary contracts in notarial form, and so to register them, is mandatory when a property under construction is concerned.

[23] Corte di Cassazione 6 March 2015 no 4628, *Corriere giuridico*, 609 (2015) reversing the previous case-law, has stated that pre-preliminary contracts are fully valid.

[24] See, for instance, one of the most important Italian law handbooks: F. Gazzoni, *Manuale di diritto privato* (Napoli: Edizioni Scientifiche Italiane, 2011), 287.

[25] The seminal works on the general concept of legal process as a dynamic chain of acts are A.M. Sandulli, *Il procedimento amministrativo* (Milano: Giuffrè, 1940) and S. Romano, *Introduzione allo studio del procedimento giuridico nel diritto privato* (Milano: Giuffrè, 1961). About its applications to property transfer see: G. Furgiuele, 'Il contratto con effetti reali fra procedimento e fattispecie complessa: prime osservazioni' *Diritto privato*, 83 (1995); A. Vitucci, *La trascrizione nel procedimento traslativo* (Napoli: Edizioni Scientifiche Italiane, 2014); C. Mazzù, 'La compravendita immobiliare dall'atto al procedimento', available at www.consiglionazionaleforense.it (2014); R. Lenzi, 'La vendita come procedimento' *Rassegna di diritto civile*, 1359 (2015); S. Landini, 'Pubblicità immobiliare e procedimento', in G. Conte and S. Landini eds, *Principi, regole, interpretazione. Contratti e obbligazioni, famiglie e successioni. Scritti in onore di Giovanni Furgiuele* (Mantova: Universitas Studiorum, 2017), III, 83.

A-B contract's validity or effectiveness, submitted eg by A or by a further party. If C registers his purchase before the judicial claim is registered, he will retain the land; otherwise, if he registers it after the judicial claim's registration, he has bought the land at his own risk, knowing or having to know that the position of B was already contested, and is possible that he will lose it, provided that the judicial demand is upheld.

However, the Civil Code contains more specific provisions governing these issues, and different kinds of judicial demands are subject to different rules. In some cases, C will prevail if he registers his purchase before the judicial demand against A-B contract and he is in good faith, having no material knowledge about the disruption of A-B contract,[26] whilst in other cases only transcription matters and C will prevail, provided that he had registered before, even if he was not in good faith when he bought the land.[27]

The most complicated rules are those regarding the judicial demands for contractual nullity or annulment. Generally speaking, if the A-B sale contract is void, the property has never passed to B, whilst, if it is annulled by a judge at the request of A, the property, which was actually passed to B, will be returned back to A.[28] Thence, from a merely logical point of view, in case of nullity C could never acquire property from the non-owner B, while in case of annulment C would have to lose it when the ground of its acquisition is cancelled.[29]

But the transcription rules are different. With regard to the most part of annulment cases, if C has acquired in good faith the land from B for reward and has registered the purchase before the registration of A's judicial demand of annulment, he will retain the acquired immovable. Instead, with regard to nullity and to the peculiar case of annulment because of legal incapacity, C will prevail if he was in good faith, has registered his purchase before the registration of the judicial demand and, anyway, this demand has been registered at least five years after the registration of the A-B invalid contract.[30]

[26] Eg when A-B contract is contested, by A or by further parties, as sham or fraudulent against creditors, according to Art 2652 no 4 and no 5, of the Civil Code.

[27] Eg when A demands the termination of A-B contract, according to Art 2652 no 1, of the Civil Code.

[28] It is important to notice that, in the Italian legal system, in case of nullity the judge declares that a contract is void, and that it has always been void even before his intervention, whilst in case of annulment the judge is indispensable, because the parties have not the power to privately annul the contract (see I. Pagni, *Le azioni di impugnativa negoziale: contributo allo studio della tutela costitutiva* (Milano: Giuffrè, 1998)).

[29] These logical principles are respectively expressed by the Latin formulas '*Nemo plus iuris ad alium transferre potest quam ipse habet*' (*Digestum 50.17.54*, ie Ulpianus, *46 ad edictum*) and '*Resoluto iure dantis, resolvitur et ius accipientis*'. Of course, if and when A remains owner, he can claim his rights against C through *rei vindicatio* without time-limits, pursuant to Art 948 of the Civil Code.

[30] These rules are provided by Art 2652 no 6, of the Civil Code (see C. Pilia, *Circolazione giuridica e nullità* (Milano: Giuffrè, 2002)). Annulation for legal incapacity is, from any point of view, a case of annulment, but this norm treats it as it was a case of nullity because C could

Therefore, in case of nullity, after these five years C will acquire the property even if B is not, and has never been, the owner. Clearly this acquisition does not depend on the A-B contract, whose disruption could never be healed,[31] but only on the transcription mechanism: That is why Italian lawyers are used to call this hypothesis 'healing registration'.[32] Anyway, it is sure that in this case A loses his property but it is questionable whether he has at least a claim for professional negligence against the notary who drafted the B-C contract.[33]

III. Turkish Law

1. Introduction

In Turkish law, in cases where there is a legal disruption in chain of transfers, the principle of the protection of third parties aiming at acquisition of a property right is adopted under certain conditions. In consideration of the doctrinal framework of the Turkish Civil Code, one can well notice that this principle has a broader range in immovables than movables. Undoubtedly, when and under which requirements justified reliance of a third party is safeguarded is a matter of policy of law. In turn, it is the question of how the conflict of interests between the title holder and the third party shall be reconciled by the legal system. Under Turkish law, this conflict of interests has been resolved by the rule that the third party could acquire property right only if he acts in good faith. To put it differently, a purchaser, for example, is secured by virtue of his good faith reliance. This solution, at the same time, serves to maintain the security of transactions.

Under Turkish law, in order for property rights in both movables and

know about the legal incapacity of B at the time of the A-B contract just by checking the civil status public registers, and therefore in this case the law considers him as worthy of less protection than in all other annulment cases.

[31] The idea that nullity cannot be healed has been endorsed by Art 1423 of the Civil Code, but, as the said article recognizes and as modern legal scholarship has better highlighted, this principle is not without exceptions: see S. Polidori, 'Nullità relativa e potere di convalida' *Rassegna di diritto civile*, 931 (2003); S. Pagliantini, *Autonomia privata e divieto di convalida del contratto nullo* (Torino: Giappichelli, 2007); S. Monticelli, 'La recuperabilità del contratto nullo' *Notariato*, 174 (2009); G. Perlingieri, *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici* (Napoli: Edizioni Scientifiche Italiane, 2010); M. Rizzuti, *La sanabilità delle nullità contrattuali* (Napoli: Edizioni Scientifiche Italiane, 2015).

[32] Anyway, the so-called healing registration (in Italian: '*pubblicità sanante*') does not heal the A-B contract, which remains void and not binding towards A and B, but only the successive acquisition of C: see, also for further references, R. Calvo, 'Nullità, inefficacia e circolazione immobiliare' *Rivista Trimestrale di Diritto e Procedura Civile*, 995 (2013).

[33] See G. Baralis and G. Metitieri, 'Pubblicità sanante, leggi speciali e responsabilità notarile. Note tratte da un'esperienza professionale' *Rivista del Notariato*, 425 (1992); G. Casu, 'La c.d. pubblicità sanante. Riflessioni sulla sua operatività nell'attività del notaio' *Studi e materiali del Consiglio Nazionale del Notariato*, *Studio no 4227*, 446 (2003); L. Ballerini, 'Sistema tavolare e responsabilità del notaio per pubblicità di un atto già annullato o risolto' *La nuova giurisprudenza civile commentata*, 92-98 (2013); M. Bianca, 'La responsabilità del notaio e la pubblicità sanante' *Fondazione notariato* (2016), available at https://tinyurl.com/y52nrdmd (last visited 28 May 2019).

immovables to be acquired through legal transaction, two stages need to be fulfilled. In the literature, this rule is called as 'the principle of separation'. According to this, transferor and transferee, in the first place, conclude an obligatory transaction (eg contract of sale), and subsequently they proceed to a second stage, that is the disposal transaction,[34] whereby the property right is transferred or established as agreed.[35] Having said that, as to immovables, these two transactions must be realized before the Land Registry Office (*Tapu Dairesi*).[36] The land registry, consisting primarily of the main register, the journal, the plans and the documents, serves the purpose of publicity regarding the legal status of property rights in immovables (Art 997(2) TCC). The rules regulating the land registry and land registry offices are mainly found in the TCC, Land Registry Act (LRA) and Land Registry Regulation (LRR). Land registry is kept under the supervision and responsibility of public administration (Ministry of Public Works and Settlement) by the Land Registry Directorates (Art 1007 TCC, Arts 5 and 6 LRR).

According to Art 1024(2) TCC, the transfer of property rights in immovables is governed by the causal principle, namely the principle of underlying *causa*, meaning that the validity of any transfer is dependent on the validity of an underlying transaction (*causa*).[37] Hence, if there exists any ground rendering the obligatory contract invalid, then the disposal transaction becomes automatically invalid even if this transaction, in itself, does not suffer from any invalidity. At this point, considering our simplified example above (A-B-C), it should be stressed that where there is a legal disruption in the contract of sale between A and B, or conversely only the disposal transaction incurs invalidity, the decisive factor in C's acquisition of the property right in immovable is that whether C

[34] Disposal transaction in immovables is composed of two separate elements, which must be materialized consecutively, namely request for registration and registration. There is a lively debate among scholars regarding the legal nature of the request for registration. Whilst some suggest that this is characterized as real contract (*ayni sözleşme*), others argue that this is nothing more than a procedural transaction. Third view on this subject, which seems currently to be prevailing in the literature, is of the opinion that request for registration should not be looked upon as a contract, what is in question here is mere unilateral disposal transaction (for detailed information, see H. Rey, *Die Grundlagen des Sachenrechts und das Eigentum* (Bern: Stämpfli, 3rd ed, 2007), para 1486; K. Oğuzman et al, *Eşya Hukuku* (İstanbul: Filiz Kitabevi, 20th ed, 2017), para 849).

[35] M. Dural and S. Sarı, *Türk Özel Hukuku Cilt 1, Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri* (İstanbul: Filiz Kitabevi, 11th ed, 2016), para 1132.

[36] K. Oğuzman et al, n 34 above, para 1391; A.L. Sirmen, *Eşya Hukuku* (Ankara: Yetkin Yayınları, 5th ed, 2017), 312; W. Wiegand, *Basler Kommentar Zivilgesetzbuch II* (Basel: Helbing Lichtenhahn Verlag, 5th ed, 2015), Art 656, para 1; P. Hänseler and D. Hochstrasser, 'Real Estate in Switzerland', in N.P. Vogt ed, *Swiss Commercial Law Series* (Basel: Helbing & Lichtenhahn, 1996), V, 19. In the literature, this legal necessity is termed as 'principle of registration' (see H. Rey, n 34 above, para 308; W. Wiegand, ibid, Art 656, para 2; J. Schmid and B. Hürlimann-Kaup, *Sachenrecht* (Zürich: Schulthess, 4th ed, 2012), para 572).

[37] A.L. Sirmen, n 36 above, 117; H. Rey, n 34 above, para 353; W. Wiegand, n 36 above, preliminary remarks on Arts 641 et seq, para 67; R. Serozan, *Eşya Hukuku I* (İstanbul: Filiz Kitabevi, 3rd ed, 2014), para 1115; J. Schmid and B. Hürlimann-Kaup, n 36 above), para 75.

has acted in justified reliance on the respective record in the land registry.[38]

a) Acquisition from the Owner (The Healthy Case)

Despite the fact that Turkish property law adopts the principle of separation, both obligatory transaction (eg contract of sale) and disposal transaction are concluded at the land registry office. These transactions, however, serve different purposes. Whilst the obligatory contract produces only obligations under which the obligor promises to do, not to do or to give something, the disposal transaction itself serves as a performance, namely it is effected in order to fulfill the performance, and consequently the property right is transferred, altered or terminated.[39] As such, taking the contract of sale as an example again, for the contract to be valid, it must be drawn up in the form of official deed and signed by the parties before the land registry office (Art 21(1) LRR). That is, under Turkish law, the contract of sale of immovable property is subject to official form which is to be carried out only at the land registry office (Art 706(1) TCC). On the other hand, as the contract of sale *per se* does not give rise to a transfer, ownership over land is still vested on the seller (B). Subsequent to this phase, the land registry office registers the transfer of ownership in the name of the buyer (C) at the seller's written request for registration (Art 1013(1) TCC, Art 237(1) TCO).[40] In this sense, the act of registration (*tescil*) is of constitutive nature, meaning that so long as the registration is not yet completed, ownership cannot in principle be conveyed to the buyer.[41]

To be more precise, having regard to the registration process and formalities thereof, several requirements must be satisfied as follows: (i) that request for registration must be made by authorized person viz. the owner or his representative (Art 1013 TCC, Art 16 LRR), and (ii) that the person (the

[38] Since there is no explicit provision regarding which system (the principle of underlying *causa* or the principle of abstraction) movables are subject to, this matter is markedly debated in the literature. For relevant discussions and explanations, see K. Oğuzman et al, n 34 above, para 2592; R. Serozan, n 37 above, para 1115 et seq.

[39] I. Schwenzer, *Schweizerisches Obligationenrecht Allgemeiner Teil* (Bern: Stämpfli, 7th ed, 2016), para 3.31-3.33; M. Dural and S. Sarı, n 35 above, para 1131 et seq; H. Rey, n 34 above, para 348 et seq; W. Wiegand n 36 above, Art 656 para 4; K. Oğuzman and N. Barlas, *Medeni Hukuk - Giriş, Kaynaklar, Temel Kavramla* (İstanbul: Vedat Kitapçılık, 23rd ed, 2017), para 630, 631.

[40] K. Oğuzman et al, n 34 above, para 865; A.L. Sirmen, n 36 above,173 et seq; H. Rey, n 34 above, para 1326; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 499 et seq.

[41] Nonetheless, by virtue of certain circumstances set forth in Art 705(2) TCC, such as inheritance, court decision, enforcement, occupation, expropriation and so on, it is possible that the property right could be acquired without the need of registration. In that case, it is still useful and advisable for the acquirer to get his property right registered in land registry, because the present land registry does not reflect the actual legal status of the said immovable property, and thereby it may pose some risks, especially the risk to lose property right to the *bona fide* third party. The registration in this sense is, unlike above, of declaratory nature (see K. Oğuzman et al, n 34 above, para 1495; W. Wiegand, n 36 above, Art 656 para 11; A.L. Sirmen, n 36 above, 341; H. Rey, n 34 above, paras 1543, 1544; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 577; P. Hänseler and D. Hochstrasser, n 36 above, 19.

transferor) requesting for the registration must provide documents demonstrating that he has an authority to dispose of said immovable property and there is a concluded contract of sale (Art 1015 TCC, Arts 17 and 18 LRR).

In the light of what has been stated thus far, in order for the immovable property to be acquired, the contract between the owner B and the purchaser C must first meet the validity requirements. Moreover, the disposal transaction must also be completed in conformity with the validity requirements. What matters most at this point is that in order to transfer the ownership to C, as a rule, B (or his representative) must have the authority to dispose of the land, ie he must be the owner.

b) Acquisition from a Non-Owner

As we already pointed out, acquisition of ownership or any other property right over land is contingent on what the transferor, during the disposal transaction and registration, is authorized to dispose. In the ordinary sequence of events, a person appearing as an owner in the land registry has also this authority, yet this need not be the case for all. In some abnormal cases, the land registry does not mirror the actual legal status, and when such is the case, it is described as 'wrongful entry (record)' (Art 1024(2) TCC). This means that there is a discrepancy between the true owner (A) and the registered owner (B).[42] There may be a number of reasons for this. To illustrate, the contract of sale does not bear the validity requirements, or in the course of disposal transaction and registration, A lacks legal capacity, due to eg his mental illness, or has no authority to dispose. Likewise, despite the absence of any invalidity grounds, in cases where the property right is acquired without registration due to certain situations expressed in Art 705(2) TCC, such as inheritance, court decision, enforcement and others, the given land registry entry (record) becomes wrongful, that is to say, it does not mirror the actual legal status.[43]

With regard to invalidity of the underlying contract, which we primarily address as a central question in our article, there are two types of invalidity, depending on which requirement envisaged in the law is missing at the time of contract formation: voidness and voidability. According to Art 27(1) TCO, the former emerges when the contract is contrary to the mandatory provisions of law, morality, public order, personal rights, or its subject matter, at the time of conclusion, is impossible to fulfill. When such is the case, the contract is deemed void. The latter type of invalidity comes into existence within the scope of Arts 28, 30 et seq. TCO, and thus encapsulates the situations considered as unfair exploitation and defects of consent (mistake, fraud, duress, respectively). In

[42] K. Oğuzman et al, n 34 above, para 1077; A.L. Sirmen, n 36 above, 225; H. Rey, n 34 above, para 1527; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 584 et seq.

[43] A.L. Sirmen, n 36 above, 225, 341; J. Schmid and B. Hürlimann-Kaup, n 36 above, paras 577, 584.

such cases, the party suffering from defect of consent or unfair exploitation has the right to rescind the contract, and once the rescission is realized, the contract becomes retrospectively (*ex tunc*) void from the beginning.[44] It may be clear from these considerations that where the contract of sale is invalid because of either voidness or voidability, pursuant to the causal principle in immovables, the disposal transaction is automatically invalid, and no ownership over land passes to B. Since B is not owner, as a matter of course, he is not entitled to dispose of the land, and thus he cannot in principle transfer any property right to anyone. Notwithstanding this general rule, under certain circumstances indicated in Art 1023 TCC, the *bona fide* third party's (C's) justified reliance on the land registry is protected, and consequently C acquires the ownership over land. This outcome rests legally on the idea that the contents of the land registry are presumed to be accurate unless proven otherwise.[45] The fact that C has acted in good faith during the process of disposal transaction and registration repairs the absence of B's authority to dispose. Thus, the ownership of the land is conveyed to C.

c) The Owner's Claims Against an Unsuccessful Purchaser

It is established above that even if there is a legal disruption, and correspondingly the land registry is legally groundless (ie wrongful entry exists), the *bona fide* purchaser's reliance on the land registry prevails against the absence of the seller's authority to dispose. Under this heading, we will focus on what kind of remedies and rights the true owner (A) could exercise in case that the third party (C) fails to attain his aim to be true owner of the land, namely that he cannot acquire the ownership, but at the same time, he is recorded in the land registry as new owner. There are two possible reasons why C does not acquire the ownership: either C is not the *bona fide* purchaser or, even though he acts in good faith, his obligatory contract with B (the seller) and/or the disposal transaction is invalid. Both possibilities have something in common: that the true owner of the land and the registered owner of the land are different persons.

Under Turkish law, the owner (A) has two basic rights of action serving to protect ownership right from violations, which are provided in Art 683(2) TCC, namely: action for recovery of property (*rei vindicatio*) and negatory action (*actio*

[44] I. Schwenzer, n 39 above, para 39.23; B. Schmidlin, *Berner Kommentar zum schweizerischen Privatrecht, Obligationenrecht, Allgemeine Bestimmungen: Mängel des Vertragsabschlusses, Schweizerisches Zivilgesetzbuch, Art. 23-31 OR* (Bern: Stämpfli, 2013), Arts 23-24, para 379; N. Kocayusufpaşaoğlu et al*, Borçlar Hukuku Genel Bölüm, Birinci Cilt, Borçlar Hukukuna Giriş, Hukuki İşlem – Sözleşme* (İstanbul: Filiz Kitabevi, 6th ed, 2014), para 71; F. Eren, *Borçlar Hukuku Genel Hükümler* (Ankara: Yetkin, 22nd ed, 2017), 426; E. Kanışlı, *İsviçre-Türk Borçlar Hukukuna Göre Sözleşmenin Kurulmasında Yanılma* (İstanbul: On Iki Levha Yayıncılık, 2018), 562.

[45] A.L. Sirmen, n 36 above, 196; H. Rey, n 34 above, paras 1517, 1518; W. Wiegand, n 36 above, Art 973 para 31; J. Schmid and B. Hürlimann-Kaup, n 36, para 599 et seq; P. Hänseler and D. Hochstrasser, n 36 above, 18.

negatoria). With the former, the owner brings a claim for recovering property from any unlawful possessor in order to obtain direct possession. The latter action is brought before the court by the owner, who still holds the possession of the property, in an attempt to prevent or eliminate violations and unwarranted interventions towards ownership right.[46] In case the ownership right (or any other property rights) in immovable property is violated, pursuant to Art 1025 TCC the owner files a claim for correction of the wrongful entry, and thus the land registry not reflecting the real legal situation is rectified. This action, albeit debated, serves as a particular kind of *rei vindicatio*.[47] Since both actions are designed to protect rights in rem, they are not subject to any prescription.[48]

Turning to our example again, A, as a true owner, has a remedy to bring an action against C for correction of the wrongful entry.[49] In addition to this, A has a right to claim damages under the rules governing the legal relationship between the owner and the unlawful possessor according to Arts 993-995 TCC. As per these rules, the extent of liability incurred by C may vary as to whether he is the possessor in good faith or bad faith. Assume that the reason why C has not reached his aim to acquire the ownership of land is his possession in bad faith, C must compensate for any damage to the immovable property resulting from such unlawful possession and pay damages for any fruits which he obtained or neglected to obtain and any use of the immovable property. Conversely, C may demand only reimbursement for necessary expenditures he made.

2. The Protection of Third Parties in Chains of Acquisition

Where the land registry does not correspond to the real legal situation, that is to say, the entry regarding the immovable property in the land registry turns

[46] K. Oğuzman et al, n 34 above, para 1130 et seq; W. Wiegand, n 36 above, Art 641 para 42 et seq; A.L. Sirmen, n 36 above, 250 et seq; R. Serozan, n 37 above, para 823 et seq; H. Rey, n 34, para 2032 et seq; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 659.

[47] K. Oğuzman et al, n 34 above, para 1092; A.L. Sirmen, n 36 above, 251. At this juncture, it is worth noting that some authors argue that claim for correction of the wrongful entry and *rei vindicatio* have different functions, and thus the former should not be regarded as a special kind of the latter, rather it is qualified as a declaratory action (see H. Rey, n 34 above, para 2215a; W. Wiegand, n 36 above, Art 975 para 6; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 621).

[48] K. Oğuzman et al, n 34 above, paras 1135, 1147; W. Wiegand, n 36 above, Art 641, paras 54, 67; A.L. Sirmen, n 36 above, 253, 257; R. Serozan, n 37 above, paras 840, 857; H. Rey, n 34 above, para 2047; J. Schmid and B. Hürlimann-Kaup, n 36 above, paras 665, 681.

[49] Next to this basic remedy, during the legal proceedings, A, who asserts that he is a true owner, and thus has a property right in immovable property, may at the same time have recourse to the court for obtaining the 'provisional annotation' (*geçici tescil şerhi*) on the land registry in order to eliminate the possibility of *bona fide* third parties' acquisitions resulting from the wrongful entry at the land registry (Art 1011 TCC). After the court adjudicates that the annotation shall be recorded in the land registry, it is no longer possible for any third to plead good faith, in turn, to acquire property right. It is also worth mentioning here that the court decision on the provisional annotation serves also as an interim injunction (see A.L. Sirmen, n 36 above, 218-220; K. Oğuzman et al, n 34 above, para 925 et seq; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 487 et seq).

out to have been wrongfully made as a result of any legal disruption affecting either the obligatory contract or the disposal transaction, the protection for the *bona fide* third parties placing reliance on the legal appearance (*Rechtsschein*) is possible solely by virtue of Art 1023 TCC. In this respect, it should be mentioned that the acceptance of the principle of underlying *causa* (causal system) in immovables under Turkish law primarily favors the original owner's (A's) interests. Nevertheless, the protection of the stability of transactions, and more particularly the third parties relying on the legal appearance in good faith is ensured, provided that the purchase at the land registry is concluded in good faith. Pursuant to said provision, two requirements must cumulatively be satisfied for the protection of the *bona fide* third parties: (i) there must be a discrepancy between the land registry and the real legal situation, namely the wrongful entry with respect to the immovable property in question, and (ii) the third party seeking to acquire property right over land must be in good faith.[50]

At this juncture, special attention should be paid to the certain drawbacks of the wrongful entry which the true owner may suffer. First, the true owner, who is A in terms of our example, cannot make any contract or disposition regarding the property right over the land at the land registry because he is not recorded as owner there. Second, as per Art 712 TCC, if the person who is falsely recorded as owner in the land registry, who is B in our case, has possession in good faith of the land uninterruptedly and without any lawsuit for the correction of the wrongful entry for ten years, he may enjoy the possibility of the ten-year acquisitive prescription, and thus he can become the true owner. Third and most importantly, as we pointed out in this article, *bona fide* third parties (like C) who make legal transactions in relation to the land by relying on the land registry, which deviates the actual legal situation, are protected, in turn, they acquire the property right over the land (Art 1023 TCC).[51] This possibility is termed as the positive effect of registration in the literature.[52] On the other hand, it should be kept in mind that C's acquisition of the land is also dependent on the validity of both the obligatory contract and the disposal transaction between C and B.

Good faith encompasses the situations where the third party (C) seeking to acquire the property right over the land did not know and ought not to have known the actual legal situation, ie, that the transferor (B) was not the owner. Pursuant to the general provision regarding good faith, Art 3 TCC, in cases where the law attaches a legal effect to the requirement of good faith, there is a presumption that such good faith exists. Consequently, it is not for C to prove that he acted in good faith, on the contrary, the burden of proof rests on the one claiming that C

[50] K. Oğuzman et al, n 34 above, para 996 et seq; A.L. Sirmen n 36 above, 196 et seq; H. Rey, n 34 above, para 1527 et seq; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 584 et seq.

[51] K. Oğuzman et al, n 34 above, paras 1079-1082; A.L. Sirmen, n 36 above, 225.

[52] W. Wiegand, n 36 above, Art 973 para 13; A.L. Sirmen, n 36 above, 196; H. Rey, n 34 above, para 284; R. Serozan, n 37 above, para 241; J. Schmid and B. Hürlimann-Kaup, n 36 above, para 579.

was not the *bona fide* purchaser.[53] For good faith to produce its acquisitive legal effects, it suffices that C acts in good faith only at the time when the land is recorded in his name in the land registry. So, the maxim '*mala fides superveniens non nocet*' (subsequent bad faith does not harm) comes into play here.[54] What is more, once C becomes the new owner through the good faith purchase, even if the persons aiming to acquire the ownership from C are in bad faith, meaning that they were aware of or should have been aware of the actual legal situation, this does not pose any obstacle for them to be successive owners in the chain of transfers.

IV. German Law

1. Introduction

The protection of legitimate expectations in the acquisition of rights is a fundamental principle deeply engrained in German private law. It can be traced down in various areas of private law, such as property, unjustified enrichment, assignment, and agency.[55] In German doctrine, the term *Verkehrsschutz* is employed to embrace the general argument in favour of the persistence of transactions. In particular, the acquisition of rights generally should not be compromised as a result of the legal relations between the transferor and the person from whom the transferor previously received the right.[56]

In the context of the acquisition of property rights in both movables and immovables, two legal devices are primarily employed to safeguard the transferee's interests in multi-party situations: The doctrine of separation and abstraction, which legally isolates the conveyance of ownership from the underlying contract of sale, and a broad concept of *bona fide* purchase. Both devices are usually justified as a basic necessity of commerce.[57] Without them, every transferee would

[53] A.L. Sirmen, n. 36 above, 200; P. Hänseler and D. Hochstrasser, n 36 above, 18; H. Rey, n 34 above, para 1529.

[54] K. Oğuzman et al, n 34 above, para 1006; A.L. Sirmen, n 36 above, 204; H. Rey, n 34 above, para 1530.

[55] See, from the perspective of a comparison of German law with English law, L. Rademacher, *Verkehrsschutz im englischen Privatrecht* (Tübingen: Mohr Siebeck, 2016), 1 et seq.

[56] C.W. Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (München: Beck, 1971), 3, 9 et seq, 28 et seq, 491 et seq; K. Larenz and C.W. Canaris, *Lehrbuch des Schuldrechts II: Besonderer Teil* (München: Beck, 13th ed, 1994), II, § 70 IV 5, 235 et seq, § 70 VI 1, 246 et seq; H. Westermann, 'Die Grundlagen des Gutglaubensschutzes' *Juristische Schulung*, 1, 7 et seq (1963); J. Hager, 'Der sachenrechtliche Verkehrsschutz als Muster der Lösung von Dreipersonenkonflikten', in C.W. Canaris et al eds, *50 Jahre Bundesgerichtshof. Festgabe aus der Wissenschaft* (München: Beck, 2000), I, 777 et seq.

[57] D. Leenen, 'Die Funktionsbedingungen von Verkehrssystemen in der Dogmatik des Privatrechts', in O. Behrends et al eds, *Rechtsdogmatik und praktische Vernunft: Symposium zum 80. Geburtstag von Franz Wieacker* (Göttingen: Vandenhoeck & Ruprecht, 1990), 108, 110 et seq, 115 et seq; L. Leuschner, 'Die Bedeutung von Allgemeinwohlinteressen bei der verfassungsrechtlichen Rechtfertigung privatrechtlicher Regelungen am Beispiel der §§ 932 ff. BGB' *Archiv für die civilistische Praxis*, 205, 228 (2005).

have to enquire the validity of his transferor's prior acquisition, which most likely will turn out to be impossible or trigger prohibitively high transaction costs.

Although the acquisition of property rights in both movables and immovable share concurrent structures, the transfer of immovable property additionally features the involvement of the land register (*Grundbuch*).[58] The rules governing the land register can be found outside the BGB (*Bürgerliches Gesetzbuch*, 1900) in the GBO (*Grundbuchordnung*, 1900) which deals with the register's organization and procedure.[59] The land register belongs to the court system in non-contentious matters (*Freiwillige Gerichtsbarkeit*) and is administered by local courts of first instance (*Amtsgerichte*), where the day-to-day business is operated by registrars (*Rechtspfleger*) under the supervision of judges.[60] Any change of title in respect of rights in land requires a public act of disclosure in the land register.

a) Acquisition from the Owner (the Healthy Case)

A characteristic feature of German law is the strict separation (*Trennungsprinzip*) between obligations and the transfer of rights (*Verfügungen*).[61] While an obligation is the obligee's right against the obligor to do or to refrain from doing something, only a contract *in rem* can actually transfer a right. When, eg, a contract of sale establishes the seller's duty to transfer ownership to the buyer, an additional contract *in rem* is required to perform the obligation. As long as the parties have only created obligations, ownership is still vested in the seller.

The contract *in rem* to transfer immovables is governed by §§ 873, 925 BGB. Parties have to reach an agreement that property is immediately conveyed from the transferor to the transferee (*Auflassung*). The conveyance must be declared in the presence of both parties before a competent agency, which in practice is a notary in the vast majority of cases. Furthermore, the new owner has to be recorded in the land register.

In principle, a conveyance pursuant to §§ 873, 925 BGB can occur only between the land's owner and the transferee. A non-owner does not have the legal capability to dispose of someone else's rights.

b) Acquisition from a Non-Owner

However, what was just said admittedly is only half the truth. German law

[58] S.J.H.M. van Erp and B. Akkermans eds, *Cases, Materials and Text on National, Supranational and International Property Law* (Oxford: Hart Publishing, 2012), 845.

[59] An English translation of the provisions of German law cited in this section can be found in the volume edited by S.J.H.M. van Erp, B. Akkermans, n 58 above, and, in the case of the BGB, online at https://tinyurl.com/yag2yf52 (last visited 28 May 2019).

[60] See §§ 1 et seq GBO.

[61] See generally from a comparative perspective S.J.H.M. van Erp, B. Akkermans, n 58 above, 823; B. Häcker, *Consequences of Impaired Consent Transfers* (Tübingen: Mohr Siebeck, 2009), 49.

allows for the *bona fide* purchase of land under § 892 BGB: In favour of a person seeking to acquire a right in land by a legal transaction, the contents of the land register are presumed to be correct, unless an objection to the accuracy is registered or the inaccuracy is known to the acquirer. The transferee is then treated as if he had entered into the transaction with the true owner. As the land register is endowed with the authority of a public body, its contents carry with themselves the appearance of accuracy.

The provision's first requirement, therefore, is that the land register misstates the proprietary rights in a specific piece of land. Such inaccuracies can have different reasons, eg the textbook example of human error on the part of a registrar or, more relevant within the present context of chains of acquisition, that a conveyance undetectably suffered from a defect rendering the transfer void. Suppose A was mentally ill and his condition was unrecognizable when he concluded a contract *in rem* with B, who is recorded in the land register as the new owner of a specific immovable. For A's lack of legal capacity, the property did not pass to B. A still is the owner. Nevertheless, the land register displays B as the land's owner. In such cases, the formal information given by the land register deviates from the actual legal situation. The land register is inaccurate.

If C seeks to become the new owner by way of a transaction with B, C cannot rely on §§ 873, 925 BGB alone, for these provisions put into effect the conveyance by an actual owner only. Yet, § 892 BGB may save the day for C if he acted *bona fide* in the transaction with B. Here, *bona fide* (or good faith) means that B did not possess actual knowledge of the land register's inaccuracy. In contrast to the *bona fide* purchase of movables (cf § 932(2) BGB), grossly negligent lack of knowledge of the transferor's absent ownership does not prevent the transferee's acquisition. The transferee is under no duty to enquire the information contained in the register.[62] Indeed, § 892 BGB does not require the transferee actually to inspect the land register at all and verify the transferor's registration.[63] However, C can only acquire ownership from the non-owner B if no objection to the accuracy of the register has been recorded.[64]

c) The Owner's Claims Against an Unsuccessful Purchaser

What kind of liability is someone exposed to when he unsuccessfully tried to obtain ownership? First of all, the owner has the right to demand vacation pursuant to § 985 BGB, the *rei vindicatio*, from any person who without sufficient entitlement occupies an immovable. Concurrent claims may arise for unlawful dispossession (§ 861 BGB), in unjustified enrichment (§ 812(1) BGB), and, in

[62] K.H. Gursky et al, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Berlin: De Gruyter, 2013), § 892 BGB, 140.

[63] K.H. Gursky, n 62 above, § 892 BGB, 7.

[64] Under §§ 899, 894 BGB the true owner can register an objection challenging the accuracy of the land register, typically on the basis of an interim injunction.

the case of fault, delict (§ 823 BGB). Additionally, the occupier may incur liability for damages and received emoluments under the complex rules of the owner-possessor relationship (§§ 987-993 BGB). Moreover, the person falsely registered as owner may be forced to approve of the correction of the land register under § 894 BGB.

Against claims for vacation, the person occupying an immovable can only defend himself by counter-claiming the reimbursement of certain expenditures incurred for the benefit of the immovable (§§ 994-1001 BGB). However, the occupant cannot invoke as a defence the price paid to the seller of the land *vis-à-vis* the owner.[65]

2. The Protection of Third Parties in Chains of Acquisition

The protection of third parties in chains of acquisition is twofold.

On the one hand, C in the exemplified chain of A-B-C has a vital interest that B was the owner of the land before C entered into the transaction with B. In this regard, C does not have to be concerned with the obligations between A and B. As pointed out before, only the contract *in rem* is relevant for the property to pass. Compared to a contract of sale, the contract *in rem* – merely having the content of the transfer of a specific piece of land from the transferor to the transferee – is much less complex and thus muss less prone to suffer from legally relevant defects.[66]

Moreover, the contract *in rem* is valid irrespective of the existence or validity of the underlying obligation – and *vice versa*. Therefore, an invalid contract of sale does not prevent the transfer of property through a valid contract *in rem*.[67] In turn, an invalid contract *in rem* leaves the contract of sale unharmed. This is referred to as the principle of abstraction (*Abstraktionsprinzip*) which – in typical BGB fashion – is not directly expressed in the code but was silently implied by the BGB's composers. The upshot is that all defects of the contract of sale between A and B cannot put C's acquisition of ownership in jeopardy. For C it is only important that no relevant defects affected the contract *in rem* between A and B.

On the other hand, C may acquire ownership even if B was a non-owner. This is a result of the application of the rules on *bona fide* acquisition of land according to § 892 BGB, requiring that B was (falsely) recorded in the land register as the owner and that C acted in good faith, meaning that he did not know of B's absent ownership.

[65] Bundesgerichtshof 3 November 1989, 109 *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, 179, 182 (1989).

[66] A. Stadler, *Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion* (Tübingen: J.C.B. Mohr, 1996), 132.

[67] Yet, this picture would be incomplete without mentioning the legal consequence of the acquisition of ownership absent a valid underlying legal ground: The buyer will incur liability under the law of unjustified enrichment to return the acquired property right to the transferor (§ 812(1) sent. 1 BGB).

V. Comparative Remarks and Conclusions

Our country reports show how the three legal orders taken into consideration start from very different theoretical assumptions with regard to the concerned subject. Italian law, as the most part of Latin legal systems, seemingly endorses the Napoleonic principle that property is transferred by mere consent. On the contrary, Turkish and German law, in accordance with the Roman law tradition, both separate a first contract that creates an obligation to transfer and a second act that actually transfers property. But, as for the relations among these two acts, they are strongly different from each other: Turkish law, as Swiss and Austrian law, follows the principle of underlying *causa*, whilst the opposite abstraction's principle is one of the main cornerstones of German law which it shares with only very few other legal systems.

From this point of view, any attempt of harmonization may appear daunting. Perhaps a hypothetical discussion within a working group in order to choose between mere consent and separation, as well as between underlying *causa* and abstraction would sound ideological and unsolvable. However, if we look at the specific operational rules in each jurisdiction through the lens of the concept of 'functional equivalent', the picture changes and distances are reduced. In all the considered countries, a distinctly pursued objective of the rules on the transfer of ownership of land is to create legal certainty, to protect third parties, C in our example, and to free the immovable property transfers from the burden of prohibitively high transaction costs. To achieve this objective, in all the three legal orders the differently proclaimed principles are left apart and eventually a registration system becomes the decisive element: if C justifiably has relied on public registers, even a – theoretically impossible – acquisition from a non-owner becomes possible.

In Italian, Turkish, and German law the interests of third parties, such as C, are protected as long as the register does not display any contradiction against B's acquisition from A (see above, I.3, II.2, III.3). In fact, in all three jurisdictions, land registers are run by the respective State, ideally with an extraordinary degree of diligence and precision. In the vast majority of cases, the registered entries reflect the actual legal situation, and so the public may rely on the information provided. Therefore, in some cases, buyers of land are treated as if the seller was the owner even when in fact he is not, because of a disruption in the transfer between the seller and his seller. Yet, when doubts about the legal validity of the transaction between the seller and his seller were registered, too, the final buyer's acquisition of the land may be challenged.

This is also why the professionals who manage the access to the registration system, ie notaries and registrars, are so important in all the considered models. The Latin-type notariats of all EU Member States familiar with this institution cooperate within the Council of the Notariats of the European Union (CNUE), today represented by a French President and including both Germany and Italy

as members, as well as Turkey as observer. Moreover, the associations of public registrars do the same within the European Land Registry Association (ELRA), including Italy as member and Turkey as observer. These cooperations flourish, notwithstanding the different legal principles adopted in the respective countries.

Of course, there are many differences in the details of regulation, but they do not depend so much on the proclaimed general principles. And, of course, the aim of any harmonization process cannot be to eliminate all and every difference within the concerned legal systems. But it is possible to outline that, under the surface of different assumptions, reliance in the public registries as the decisive element for immovable property transfer is a common principle. Therefore, it could be quite useful to hypothesize a project of harmonization of the registries' regulation, in order to facilitate transnational acquisitions of land. The result could form a uniform basis for the protection of third parties.

On the other hand, a possible counter-argument could be that immovables' public registries are deeply connected with the control of a territory and so with a historically essential function of the State's sovereignty. Indeed, in the last decades, the EU has progressively harmonized private international and sometimes substantive law, in the fields of contractual and non-contractual obligations, as well as in family and successions matters, while immovable (as well as movable) property and public registration systems seemingly have remained outside this process. But nowadays many other matters, much more sensitive and rooted in history, such as eg monetary policy, external frontiers' control and the recognition of diverse family models have been Europeanized (at an EU and/or an ECHR level): Therefore, such a counter-argument does not seem like a very founded one.

Probably, even if a deliberate policy in this direction will not be implemented in the foreseeable future, the matter of immovable property transfer will anyway undergo a sort of harmonization as a collateral effect of other processes:[68] For instance, the very first ECJ decision concerning the Succession Regulation (Case C-218/16, *Kubicka*, Judgment of 12 October 2017) deals precisely with the transfer of immovables, rights *in rem* and their public registration. Yet a further analysis of such a development would be quite beyond the scope of the present contribution.

[68] With regard to the growing perspectives of harmonization in the field of property law, see S.J.H.M. van Erp and B. Akkermans, n 58 above, 1011; and E. Raemakers, *European Union Property Law. From Fragments to a System* (Cambridge: Intersentia, 2013). With more specific reference to a harmonization in the field of land registration systems, see L.M. Martínez Velencoso et al, *Transfer of Immovables in European Private Law* (Cambridge: Cambridge University Press, 2017), 12, where also the role that new technologies can play in this process is stressed.

Essays

Low-Income Workers' Financial Participation in Italy: A Proposal *de iure condendo*

Silvio Sonnati*

Abstract

Following the acknowledgment of empirical evidence supporting the implementation of financial participation among all classes of workers, the Author assesses the Italian context and concludes that such systems have been poorly implemented, especially among low-income workers. By looking at the experience of other EU countries and taking into account the recommendations provided by the European Commission, the Author then argues for the implementation of a regulated dialogue between workers, employers and trade unions. The aim of such dialogue would be to boost the development of financial participation systems among low-income workers without endangering their income.

I. The Reasons Behind the Essay: A Premise

The primary objective of this work is to encourage a dialogue on financial participation with special reference to those groups of low-income workers who are usually affected by a lack of bargaining power and not sufficiently involved in the company's results.

While there are several ways in which employees may link a portion of their salary to the company performance and share part of the corporate risk, this paper follows the approach adopted at the EU level and takes into account a wide concept of 'workers' financial participation', which includes a broad variety of schemes very different from each other.[1]

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[1] One of the first example where the term 'workers' financial participation' was used in a wide sense (including profit sharing schemes, gain sharing and employee ownership) can be identified with the Council Recommendation 27 July 1992 no 443, concerning the promotion of participation of employed persons in profits and enterprise results (including equity participation) available at https://tinyurl.com/y2fr6wdq (last visited 28 May 2019). The same concept has been used in other European documents: eg M. Uvalic, *The Report Pepper IN,*

Notwithstanding some differences amongst the Member States, generally the diffusion of financial participation among these types of employees is underdeveloped. Due to their weak position and the lack of local collective bargaining (for example in Italy it covers only thirty-five percent of firms), companies do not offer an opportunity to trade unions to bargain for employee participation in firms' profits.

In this introduction, it is important to clarify the utility of participative capitalism among the vast majority of employees. The aim is not to defend the effectiveness of this type of workers' participation. The article proceeds on the premise that the empirical evidence indicating the effectiveness of workers' financial participation is correct insofar as that it not yet been refuted even by those who are critical towards participative capitalism.

In order to frame respond to those criticisms, it seems to be appropriate to mention a recent paper by the National Bureau of Economic Research entitled 'Who has a better idea? Innovation, shared capitalism, and HR policies'.[2] The authors of the research, despite highlighting the difficulties of obtaining clear and consistent results, found significant positive empirical evidence in support of financial participation practices, when properly implemented or supported by appropriate human resources management practices.[3]

As a matter of fact, since these employees lack bargaining power, there is a greater need for specific regulations allowing variable pay in the form of participation plans to be an essential part of the wage. This applies even more to the Italian framework, where low-income workers are given fewer participation opportunities.[4]

Promotion of Employee Participation in Profits and Enterprise Results (Social Europe) (Luxembourg, Commission of the European Communities, 1991); Pepper II Promotion of participation by employed person and enterprise results, Report from the Commission of European Communities 8 January 1997 COM(96)697; Commission Staff Working Paper, Financial participation of employees in the European Union, 26 July 2001, SEC (2001)1308; Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a framework for the promotion of employee financial participation' (COM(2002) 364 final) available at http://eur-lex.europa.eu/homepage.html; Report Pepper III, Promotion of Employee Participation in Profits and Enterprise Results in the New Member and Candidate Countries of the European Union see https://tinyurl.com/y3433rlc (last visited 28 May 2019); Report Pepper IV, Benchmarking of Employee Participation in Profits and Enterprise Results in the Member and Candidate Countries of European Union, 2008/2009 see www.adapt.it, indice A-Z, Partecipazione dei lavoratori; European Parliament Report on financial participation of employees in companies' proceeds (2013/2127(INI).

[2] E. Harden and D.L. Kurse, 'Who Has a Better Idea? Innovation, Shared Capitalism, and HR Policies' *National Bureau of Economic Research Working Paper no 14234*, 2008 available at https://tinyurl.com/y5wb4dlj (last visited 28 May 2019).

[3] D.L. Kurse, 'Research evidence on prevalence and effects of employee ownership, testimony before the subcommittee and employer-employee relations', Committee on Education and the Workforce, US, House of Representatives, 13 February 2002, available at https://tinyurl.com/yxfwgvbw (last visited 28 May 2019).

[4] In Italy, variable pay in the form of workers' financial participation, if any, is under five-

In fact, in the Italian context there are several reasons that explain the underdevelopment of participative capitalism, especially among low-skilled workers. Firstly, trade unions are sceptical towards linking a part of the wages to the firm's performance. Secondly, the unions' representatives are ineffective at negotiating financial participation schemes, especially at the local level. Thirdly, at the government level, there are no policies aiming at efficiently addressing the public incentive (tax break) to support participation schemes.

So far, in the Italian framework, the main actors in charge of implementing financial participation schemes (mainly in the form of variable pay) have been trade unions through collective bargaining agreements at national and local level. In Italy, collective bargaining is structured in a 'dual channel' system: i) national collective bargaining that sets the minimum wage and is organized into sectors, each with designated general regulations and ii) local collective bargaining, which takes place at the company (if unionized), or local level, and is provided with specific regulations with particular attention to financial participation schemes.[5] As will be considered later in this paper, the second level collective agreements generally do not work as the legislator expects, which, along with other factors, has caused the under-development of workers' financial participation.

II. The Importance of Cultural Aspects: Public Policies and Trade Unions' Approach

As already observed, the role played by unions is fundamental for the implementation of financial participation, especially among low-income workers. In general, it is not only in Italy where unions have demonstrated hostility on the topic. However, the views of trade unions towards financial participation, and the ways in which they conceptualise it may differ between confederations.

Depending on the case, the presence of trade unions has been associated with both increasing and decreasing the chance of firms having financial participation. This may be related to the fact that the unions' positions have varied significantly across countries and throughout time. In some European countries, unions have been increasingly involved with financial participation schemes.[6]

six percent, lower if compared with a European average of seven-twelve percent. The situation is different in the US where variable wage covers the twenty five-forty percent of total wages, source C. Lucifora and L. Murphy, *Executive and Employees Compensations: Productivity, Profits, and Pay* (Oxford: Oxford University Press, 2013).

[5] Furthermore, national level agreements between employers and unions have been used to implement initiatives at the EU level. There are also national level discussions between unions, employers and the government, which sometimes lead to agreements. In recent years, the most important of these was the agreement between employers, unions and the government at national level that was signed on July 1993 and that radically reformed the system of collective bargaining in Italy. It restructured the links between industry and company level bargaining, and drew up new bargaining timetables.

[6] V. Pérotin and A. Robinson, 'Employee Participation in Profit and Ownership: A Review

It is possible to observe different approaches also between unions in the same confederation, such as in Germany.[7] Overall, at least in France and Italy, socialist and communist confederations tend to be more hostile to financial participation than do liberal, social democrat, or Catholic confederations, and those that represent mainly manual workers tend to be less enthusiastic about financial participation than those representing non-manual and professional employees.[8]

Focusing on the Italian framework, it is possible to find three main trade unions (so-called Cgil, Cisl, Uil) with different views on employees' financial participation. Generally, socialist and communist confederations tend to be more hostile to workers' financial participation than liberal, social democrat or catholic confederations. Union Confederations have opposed financial participation in the past in cases where employers explicitly coupled it with greater salary flexibility. In particular, the 'Cgil' (*Confederazione Generale Italiana del Lavoro*) (which is the biggest) adopts a more critical attitude towards financial participation schemes than the 'Uil' (*Unione Italiana del Lavoro*) and 'Cisl' (*Confederazione Italiana Sindacati Lavoratori*) (which is more supportive of worker involvement in company profits).

In Italy trade unions seem to have missed an opportunity, since the Italian employers are keen to engage proactively in the debate of financial participation.[9]

Taking into account the unions' hostility[10] towards participative capitalism, which exists at various intensities in each Member State,[11] it is necessary to improve the alternatives through which employees may link their wage to the company's performance.

We could enhance low-income workers' bargaining power and financial participation by creating legal and cultural instruments to promote such results. In doing so, it would be important to recognize part of the State incentives in favour of low-income workers and to increase communication between them and local unions. Local (company or territorial) unions' representatives should be the ones in charge of reducing the lack of information that affect participative schemes in addition to supervising the whole bargaining process between firms and employees.

From this perspective, there is a greater need to train local unions' representatives who currently do not have the knowledge to understand the risks

of the Issues and Evidence', 3 (2002), available at https://tinyurl.com/y6ywwrdq (last visited 28 May 2019).

[7] C. Weltz and E.F. Macìas, 'Financial Participation of Employees in the European Union: Much to Do About Nothing' 14 *European Journal of Industrial Relations*, 479-496 (2008).

[8] For an overview on the unions approach in Italy and in Europe see ibid 479-496.

[9] C. Weltz and E.F. Macìas, n 7 above.

[10] For the recent hesitant change of approach of the union see § 7.

[11] For an overview of trade unions position among European countries see 'worker-participation.eu' available at https://tinyurl.com/yydkfchr (last visited 28 May 2019).

and benefits of different participation schemes. It is interesting to note what occurred in the United States, the country where financial participation was first introduced and where it has slowly become an institutionalized phenomenon, a point partially proven by the presence of many training courses that aim to provide a recognized qualification for expertise in employees' financial participation.[12]

Switching the attention to Public policies, it is possible to observe, as stated in 1996, the Pepper II report,[13] that in many Member States there was very little activity in terms of financial participation. Currently, that situation is partially changed; in nearly every European Member States, financial participation is actively pursued. This can be partly attributed to the copious incentive activities of EU institutions.[14] Nevertheless, despite these incentives, currently about sixty-eight percent of the companies within the EU do not provide for any type of employees' financial participation.[15]

Analysing the different incentive policies implemented among various Member States, it is possible to explain, at least partially, the gaps in the development and quality of participation amongst various European States.[16]

Recognizing the crucial role that governmental incentives play, a better allocation of public resources is required. To promote this end, it is important to encourage the dialogue between law scholars' jurists and economists to ensure that legal schemes to promote employee financial participation achieve the desired results.

In other words, economic and legal theory must work together: i) to help

[12] For an example of this kind of course see the program in *Compensation, Benefits, and Job Analysis Specialists*, implemented by Certified Equity Professional Institute (CEPI) available https://tinyurl.com/y45kgzgq (last visited 28 May 2019).

[13] Pepper II, n 1 above.

[14] C. Weltz and E.F. Macìas, n 7 above; since 1983 the European Parliament made a resolution with the aim of stimulating the European Commission to intervene on the topic. In the 1992 the EU Council published the European Council Recommendation 92/443/CEE, which contains the promotion of financial participation showing the potential positive effects available at https://tinyurl.com/yxobnagl (last visited 28 May 2019). Beside such recommendation the most important documents are the report Pepper I which contains some proposal in order to implement workers' financial participation, see Pepper I and Pepper II, n 1 above. To move the issue forward, in 2002, the European Commission published a communication titled 'Framework for promoting employee financial participation' available at https://tinyurl.com/y6svulrq (last visited 28 May 2019). There is also an important opinion made by the European Economic Social Committee (in 2010) as well as reports and studies made by the European Parliament, and a 2014 resolution focused, in particular, on employee financial participation with respect to small firms. See J. Lowitzsch et al, 'The Promotion of Employee Ownership and Participation' *Inter-University Centre for European Commission's DG MARKT* (2014) available at https://preview.tinyurl.com/y5nyzsxe (last visited 28 May 2019).

[15] J. Lowitzsch et al, ibid: in the report, the authors also observed that three hundred thousand enterprises around the EU-28 could be eligible candidates for the implementation of employee financial participation schemes.

[16] For an overview of similarities, differences and trends see the report prepared by K. Wilke, P. Maack and Partner 'Financial Participation in Europe: Overview of Similarities, Differences and Trends' (2014) available at https://tinyurl.com/y3nh8lq7 (last visited 28 May 2019).

legislature to direct incentives more profitably; ii) to provide laws that are effective at improving financial participation among low-income middle-class workers and iii) to enable the social parties to converge in their interests and to reach more cooperative relations by working on the social and cultural issues.

III. How Communication Between Economists and Jurists Can Improve Public Funds Allocation and Understanding of the Benefits of Workers' Financial Participation

The pay system transformation in the last thirty years has coincided with the transition from a strong union control structure (rigidly egalitarian and very oriented to the defence against wage inflation), to a control structure in which flexibility has gained importance, together with individual and collective bargaining. Attention has shifted from the defence against inflation to the enhancement of employees' professionalism and the firm's productivity.[17]

Despite the growing attention to increasing employee financial participation, the European trend, especially in Italy, is still fluctuating.[18] In recent years, the percentage of middle-class workers and the quantity of wages involved in participation schemes (already characterized by low development) have actually decreased further.[19] Low-income middle-class workers are sporadically, and only marginally, involved in financial participation schemes.[20]

To break the stalemate afflicting Italian companies, it can prove useful to involve workers in the firm's profitability, renewing the common 'alliance' between employer and employees.[21] The connection of salary to participation plans (gain sharing, profit sharing, employee ownership) should be implemented in a transparent way and focused on local collective agreements,[22] which, if properly

[17] A significant rise in EFP in the EU-27 in last decade. See I. Hashi and A. Hashani, 'Determination of Financial Participation in the EU Employers' and Employees' Prospective', in D. Kurse ed, *Sharing Ownership, Profits, and Decision Making in the 21st Century* (United Kingdom: Emerald Group Publishing Limited, 2013), 192.

[18] As noted it is not easy to pinpoint the spread of financial participation in countries like Italy where these types of schemes do not have a real tradition, see A. Pendleton, 'Politica e pratiche di partecipazione finanziaria in Europa' *Diritto Relazioni Industriali*, XII, 361 (2002).

[19] This happens for all categories, but the trend is higher at the clerical level. The loss, however, is a special characteristic of the Italian labor market, as the European trend, at least from 2009-2013, has been to increase variable remuneration arrangements, see J. Lowitzsch et al, n 14 above.

[20] This is the general trend, but in Italy it is even more pronounced. See I. Hashi and A. Hashani, n 17 above, 208.

[21] L. Lusinyan and M. Dirk, 'Assessing the Macroeconomic Impact of Structural Reforms The Case of Italy' *International Monetary Fund Working Paper no 13/22* (2013) available at https://tinyurl.com/y4m4jtrw (last visited 28 May 2019). The authors highlight the greater necessity to more involve the workers in the firms' capital.

[22] V. Maio, 'Struttura ed articolazione della contrattazione collettiva', in G. Proia ed, *Organizzazione sindacale e contrattazione collettiva* (Padova: CEDAM, 2014), 112: the author observed how it would be opportune to limit the possibility by the employer to supply the

used, are always 'fertile ground' for experiments related to productivity.[23]

Financial participation in this context becomes a useful tool to enhance organizational efficiency, competitiveness, and equality, as well as the development of individual firms and the economy as a whole.[24]

Thus, it is only by focusing on empirical evidence, obtained through economic theory, that there is the means to find the legal tools to enhance the diffusion of such schemes among the vast majority of low-income workers.

It is necessary to improve the workers' performance by involving them more in the fortunes of the company.[25] For this to occur, there is a need to stimulate a closer dialogue between economists and lawyers, even if it is particularly complicated in the field of law,[26] where traditional approaches seem to separate law and economics more than other the other branches of the social sciences.[27]

Economic approach can help the legal doctrine to better address its researches. This is even truer on the topic of workers' financial participation where law and economics are strictly linked. The combination between juridical[28] and economic[29] approach would play a fundamental role: i) in ensuring correct juridical schemes, suitable for optimizing all the benefits emerging from participation practices, without leaving the lower-income employees at the mercy of employers; ii) in

variable wage linked to the company performance unilaterally.

[23] G.P. Cella and T. Treu, *Relazioni Industriali e contrattazione collettiva* (Bologna: il Mulino, 2009), 135.

[24] M. Tiraboschi, 'Partecipazione finanziaria: caso italiano e prospettiva comparata', in I. Senatori ed, *Teoria e prassi delle relazioni industriali* (Milano: Giuffrè, 2008), 370; for the benefits that financial participation can apport to the firms see J. Lowitzsch and I. Hashi, n 14 above, 9.

[25] L. Zoppoli, 'Modelli partecipativi e tecniche di regolazione' *Diritto delle relazioni industriali*, I, 19 (2010); G. Proia, 'La partecipazione dei lavoratori tra realtà e prospettive. Analisi della normativa interna' *Diritto delle relazioni industriali*, I, 60 (2010): who observed that, until now, companies have preferred awards of profitability which did not lead to the spread of participation rights. This can still be justified only in light of the reduced size of the variable pay that has not eliminated the different role played by the employee and employer.

[26] Looking at the Italian framework there are not many researches which take into account empirical evidence concerning the implementation of workers' financial participation. On this subject see M. Biagioli and S. Curatolo, 'Microeconomic Determinants and Effects of Financial Participation Agreements: An Empirical Analysis of the Large Italian Firms of the Engineering Sector in the Eighties and Early Nineties' 2 *Economic Analysis*, 99-130 (1999): they found that profit-sharing firms are more productive than non-profit sharing firms.

[27] P. Ichino, 'Il dialogo tra economia e diritto del lavoro' *Rivista Italiana Diritto del Lavoro*, 165-201 (2001) and B. Luchino, *Manuale di economia del lavoro* (Bologna: il Mulino, 2003), chapter XXII.

[28] In most cases, jurists only study the *law* in a strict juridical sense, thus assessing the provision in an abstract framework and irrespective of the effects that it may cause. G. Alpa et al, *Analisi economica del diritto privato* (Milano: Giuffrè, 1998); R. Del Punta, 'L'economia e le ragioni del diritto del lavoro' *Giornale di Diritto Lavoro Relazioni Industriali*, 3-45 (2001).

[29] The economist studies not only the economic relationships that are the subject of 'positive analysis' but also the effects of possible policy measures which are the subject of so-called, 'normative analysis'. The idea behind this analysis is that, since the implementation of any law will produce specific effects, we should look at past experiences and draft law provisions on the basis of pursued outcomes.

more efficient allocations of public funds through the implementation of economic analysis of law (given that any such analysis is implemented in Italy).[30]

In general, for the purposes of economic modelling, laws were generally assumed to be self-executing, and issues concerning the incompleteness and imperfect operation of legal rules were left unexplored.

Over the course of the past decade the situation has changed. The role of legal systems in shaping the nature of regulation and, as a result, economic outcomes, has been placed centre stage by the highly influential legal origins hypothesis[31] which has applications to labour law. Established practices and systematic evaluation of labour policies' effects can now be found in Anglo-Saxon and north European countries, as well as in many other European countries, most notably Germany.[32]

In particular, looking at Italian labour laws, it is hard not to agree on the fact that there is a greater need for 'experimental' laws (ie, laws implemented on a temporary basis in order to assess the actual costs and benefits of the provisions). This is particularly true in times of 'ideological uncertainty', where different legislative paths have been tried but none led to satisfactory outcomes.[33] In fact, if we focus the attention on the public incentives that Italian Governments have provided (over the last twenty years) to promote participative capitalism, it is clear to certify the absence of any results. There are several studies which show the consequences of employees' involvement in a company's profit.[34]

On the contrary, there is still a greater need to provide more funds and to incentivise research, at institutional level, focusing on laws that provide tools to improve participative capitalism. In this regard, it is necessary to agree with scholars that show that there is a need to provide for a different allocation of public funds and, in particular, that there is the need to invest more in cultural instruments as they represent a fundamental tool to implement workers' financial

[30] In Italy, governments have often provided incentives by provisions called 'experimental' but in the end none checked the result in term of costs/benefits.

[31] R. La Porta et al, 'The Economic Consequences of Legal Origins' 46 *Journal of Economic Literature*, 285-332 (2008).

[32] On 22 February 2002, the Federal Government of Germany created the Committee for Modern Services in the Labour Market, (better known as the Hartz Committee, named after the head of commission Peter Hartz). Proposals to improve the efficiency of the Labour Market policy and suggestions to reform the Federal Labour Office were required due to the persistently high unemployment in Germany. The committee formulated thirteen 'innovation modules'; a set of recommendations that have been eventually put into practice by 1 January 2005. For further comments see M. Akiol and M. Neugart, 'Were the Hartz Reforms Responsible for the Improved Performance of the German Labour Market?' 33(1) *Economic Affairs*, 34-47 (2013); L. Jacobi and J.Kluve, 'Before and After the Hartz Reforms: The Performance of Active Labour Market Policy' *Journal for Labour Market Research/Zeitschrift für Arbeitsmarktforschung*, 40, 45-64 (2007).

[33] U. Trivellato, 'La valutazione degli effetti di politiche pubbliche: paradigma e politiche' *Istituto per la Ricerca Valutativa sulle Politiche Pubbliche Working Paper no 2009-01*, 1-53 (2009).

[34] For empirical evidences see n 2, 3 and 4 above.

participation among the vast majority of employees.[35]

Despite the Italian Legislator often qualifying a certain labour law provision as 'experimental' (even when it would not be appropriate to do so), usually that provision enters into force and no resources are allocated to further verify the effects. The testing of the effects of legislative measures often remains only an intention of the legislature that never occurs in practice.[36]

So far, the incentive policies made by governments have not produced the expected results. The sources provided by law to implement workers' financial participation plans are instead used to reduce the cost of labour for employers.[37]

This is what has been observed by OECD (Organisation for Economic Co-operation and Development) in 2013 in relation to the *linee programmatiche per la crescita e la competitività in Italia* (signed by the social parties in 2012 to obtain the refinancing of the incentives). The OECD underlined the fact that the measures taken were only of little use in increasing productivity and that they intervened on labor costs rather than on rewarding results.

IV. Why Use Financial Participation Among Lower-Income Middle Class Workers

As consistent empirical evidence shows, the workers who benefit of incentive paid in the form of financial participation are more likely to be males, highly educated, and to have longer tenure; the financial involvement is more common for high-skilled professional employees and less common in service jobs.[38] The employees who are not involved in a participation scheme have lower wage levels than those employees that are covered by (any) incentive pay.[39]

One of the main reasons for the current economic crisis could be found in the excessive concentration of incentives and financial participation at the top of firms, in finance and elsewhere, 'that generated huge risk-taking and spread toxic assets around the world'. Increasing normal employees' performance-related

[35] S. Mainardi, 'Le relazioni collettive nel "nuovo" diritto del lavoro', speech given at the *Aidlass days on Legge e contrattazione collettiva nel diritto del lavoro post-statutario*, Naples 16-17 June 2016, 52 available at www.aidlass.it.

[36] It is necessary to focus on the monitoring and evaluation of the effects arising from the introduction of new laws concerning labor relations because they could be essential for i) the comparison of the various parties involved in promulgating the laws; ii) attributing responsibilities to parties involved; iii) *learning* from the operation of the interventions made and to recognize the directions to take; iv) finding the incentive to start implementing structural reforms in the field of labour law.

[37] P. Campanella, 'Decentramento contrattuale e incentivi retributivi nel quadro delle politiche di sostegno alla produttività del lavoro' *PRISMA Economia - Società - Lavoro*, 53-78 (2014).

[38] A. Bryson et al, 'Paying for performance, incentive pay schemes and employees financial participation', in T. Boeri et al eds, *Executive Remuneration and Employee Performance-Related Pay* (Oxford: Oxford University Press, 2013), 5.

[39] ibid 7.

pay and ownership share, rather than allocating corporate profits only into the hands of top managers, might help prevent the reoccurrence of the distorted incentives focused on short-term gains, which led to the financial disaster. The implementation of policies that give workers in start-up organizations incentives in the form of financial participation could be essential in increasing the rate of growth of small firms, thus helping with the recovery from future crises.[40]

Some critics of *participative capitalism* sustain that what is beneficial for the company necessarily has to be negative for the employees. Furthermore, they affirm that the incentives based on such practices are measures of disguised *speed up*. They also try to undervalue financial participation schemes, arguing that these would cause: i) the free riding phenomenon; ii) confusion among the roles fulfilled in the enterprise and iii) excessive risk for the employees' income, especially among lower-income workers. Nevertheless, all of the above arguments have only been theorized and seem to lack support from the available empirical evidence.[41]

On the contrary, numerous results obtained at a global level through multivariable analysis show positive outcomes from having workers' wage involved in financial participation schemes.[42] Even though there is a possibility that the analysis did not take into consideration some variables, the overall framework still shows positive effects,[43] especially when financial participation practices are properly implemented, or supported by practices of human resources management.[44]

Certainly, it is undeniable that, sometimes, financial participation can have different aims, rather than producing shared goals and thus improving company's performance. Both profit-sharing and employees' ownership plans can aim at a more *neo-liberal* perspective[45] financial involvement, occasionally, in extreme scenarios; they can represent a tool to reduce the workers' rights protections provided by the law and collective agreements. For example, this is what happens

[40] ibid 5.

[41] E. Kaarsemaker, 'Employee Ownership and Human Resources Management. A Theoretical and Empirical Treatise with a Digression on the Dutch Context. Doctoral Dissertation', Radboud University Nijmegan, 2006, available at https://tinyurl.com/y5bpof6j (last visited 28 May 2019).

[42] The bulk of the empirical evidence on workers' financial participation in a variety of countries and variety of settings has concluded that financial participation has a positive influence on the performance of companies. For a review, R. Freeman et al, *Shared Capitalism at Work*: *Employee Ownership, Profit and Gain Sharing, and Broad-Based Stock Options* (Chicago and London: Chicago University Press, 2010). For more empirical evidences in the European framework that show positive results on workers' wages, M.M. Andrews et al, 'The Impact of Financial Participation on Workers' Compensation' available at https://tinyurl.com/yxq8n8mz (last visited 28 May 2019).

[43] R. Freeman, 'Il ruolo dei lavoratori nella partecipazione agli utili aziendali: iniziative e misure contro lo shirking' *Rivista di Politica Economica*, 22 (2007).

[44] D.L. Kurse, 'Research Evidence on Prevalence and Effects of Employee Ownership' *Committee on Education and the Workforce, US House of Representatives* (2013), available at https://tinyurl.com/yxfwgvbw (last visited 28 May 2019).

[45] A. Alaimo, 'L'eterno ritorno della partecipazione: il coinvolgimento dei lavoratori al tempo delle nuove regole sindacali' *Working Paper "Massimo D'Antona" CSDLE It, no 219/2014*, 27 (2014).

today in the UK,[46] (which has a long history in the field of financial participation) following the introduction of the '*Employee Shareholder Status*' (*Growth and Infrastructure Act* 2013).[47] Section 31 of the *Growth and Infrastructure Act* 2013 allows employers to buy out workers' rights in exchange for tax-free shares in their company. In particular, under this law, employers are entitled to provide workers with tax-free shares, in exchange for giving up their important rights to: i) make claims against unfair dismissals (apart from the discriminatory ones); ii) request flexible working and training; iii) receive statutory redundancy pay.[48]

For all of the above reasons, when we attempt to implement juridical solutions in order to improve financial participation among *vulnerable* employees we have to consider many factors and the way in which those kinds of schemes can be misappropriated.

V. Some Issues Underlying the Involvement of Low-Income Workers: The Exchange Between Organizational Flexibility and Financial Participation to Implement *Upward* Financial Participation

Whenever more low-income middle class workers are involved in companies' financial results, it is necessary to take into account the extent of their income. From this perspective, it is preferable, and more realistic, to focus on the upward side of financial workers' participation (or in terms of 'flexibility upwards'), rather than on the *defensive declination* ('flexibility downwards').[49]

In this vision, which is also sponsored by the European Commission,[50] the variable part of the salary linked to the company's performance is added to the fixed pay amount, which must be guaranteed in any case. Interpreted in this way, financial participation schemes can represent an important stimulus to the entire production system and not only an instrument to limit the cost of labour.

[46] See para 8.

[47] The *status* of 'employee shareholder' has been provided by Section 31, 'Growth and Infrastructure Act 2013. J. Prassl, 'Employee Shareholder 'Status': Dismantling the Contract of Employment' 4 *International Labour Journal*, 307 (2013).

[48] M. Biasi, 'On the Uses and Misuses of Worker Participation: Different Forms for Different Aims of Employee Involvement' 4 *International Journal of Comparative Labor Law and Industrial Relations*, 459-481 (2014).

[49] B. Bercusson and B. Ryan, 'The British Case: Before and After the Decline of Collective Wage Formation', in R. Blanpain ed, *Collective Bargaining and Wages in Comparative Perspective* (The Hague: Kluwer Law, 2005), 83.

[50] The European Commission adopted the opinion on Financial Participation of Workers in Europe, resuming the debate on the issue in order to give it new impetus. The basic principle states that participation must be voluntary and must necessarily be added to the fixed wage and not replace it. See European Economic Social Committee, *Opinion* n 1 above. More recently (resolution 2014), the European Parliament recommended the dissemination of tools for implementing variable pay systems. For a reconstruction of all the interventions in the field of financial participation in Europe, see J. Lowitzsch et al, n 14 above, fn 12.

In fact, considering the Italian framework, workers' financial participation schemes are often implemented in times of crisis to further reduce the workers' income. On the contrary, efficient schemes have to be implemented as a structural tool, and must be present especially at times when the company performance is improving.

To make this happen, a great effort from all the social forces is necessary. The State must provide incentives properly. Additionally, the full cooperation of the unions in this context is required. They must play the role of supervisors and guarantors in financial participation schemes for low-income workers. Finally, also the employers, mainly Italian, have to be able to understand the medium-to-long-run benefits of participation practices.

As previously mentioned, government intervention can play a fundamental role in the implementation of participation schemes among lower-income workers. However, public intervention in this area is complicated. While, in general, firms which link the wage to the result perform better than others in terms of productivity and profits,

> 'the large heterogeneity observed, across firms and institutional contexts, suggests that not all firms in all circumstances are going to benefit from incentive pay'.[51]

Some legislative incentives are used to reach different goals, such as reducing the cost of labour.[52]

According to the European Commission, the only realistic path to take involves this category of employees, so as to create schemes in terms of flexibility upwards. The question arises as to what can stimulate the employer to connect the workers' wages to financial upside, if low-income workers are not willing to risk their wages in the event of loss. In other words, what can employers gain by sharing part of their profits with the employees if they do not share the risk in term of salary reduction in case of negative performance? To answer this question we have to take into account that the majority of European Member States have highly regulated labour markets[53] (such as the Italian one) and, in those contexts, employers always strive for more organisational flexibility. In this scenario, it could be hypothesised to allow workers, through a specific juridical mechanism, to veer from mandatory regulations provided by law and collective agreements and provide the flexibility desired by the company in exchange for an effective portion of financial participation.[54] In this way the employees would share the company's fortune without risking their salary (that is already

[51] A. Bryson et al, n 38 above, 163.

[52] P. Campanella, n 37 above, 1.

[53] In those contexts, the employee is protected from a rigid law discipline mainly composed from mandatory rules.

[54] Not only symbolic as happened so far, see para 6.

minimal).[55] In other words, they would spend their *human-capital*, providing organizational flexibility to the company[56] in the same way in which the employer risks his money.

However, any such system needs to carefully consider appropriate safeguards to protect workers from employer's opportunistic behaviour. This should be taken into account to prevent events such as the ones that happened in the United Kingdom.[57]

Furthermore, given the importance of the rights protected by labour law mandatory rules, it is appropriate to emphasizes once again the need for serious experimentation following the introduction of such legal mechanisms.

VI. The Presence of Financial Participation Schemes Among Low-Income Middle-Class Workers in the Italian Context

Starting in the late 1990s, with the decentralization of collective bargaining, a continuous debate ensued over the topic of employees' financial participation. The argument also started to include the two different practices of financial participation[58] that were traditionally used by Italian enterprises as tools for incentivizing individual performance and not collective share management.[59]

Accordingly, workers' financial participation was one of the main goals of the legislature since 1993 when the so-called '*Protocollo Ciampi*' agreement that was signed by the social parties.[60] Furthermore, the increased sharing of companies' profits (especially among low-income workers) was also one of the main objectives of the 2012 Italian labour market reforms,[61] in the field of industrial relations. With the goal of 'promoting workers' participation and thus improving the competitiveness of Italian firms',[62] the afore-mentioned act

[55] With reference to the 2007-2013 period, the average wage has decreased by six percent and the average the productivity per employee by 5 percent, see 'Ilo global report 14/1' available at www.ilo.org.

[56] S. Sonnati, 'Lo stallo del salario variabile: le reti di impresa ed il recupero dell'autonomia individuale in forma assistita come tecniche di implementazione della retribuzione di risultato' *Rivista Italiana Diritto del Lavoro*, 617 (2015)

[57] Section 31 of the *Growth and Infrastructure Act 2013* allows employers to buy out workers' rights in exchange for tax-free shares in their company.

[58] Employees share ownership and the multiple profit/productivity-related wage arrangements.

[59] Also considering the *private nature* of Italian firms, G.G. Balandi, 'Governance e diritto del lavoro' *Quaderno Rivista Trimestrale di Diritto e Procedura Civile*, 124 (2011), in comparison with American public companies, where the '*ESOPs*' developed: H. Hansmann, 'When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination and Economic Democracy' 99 *The Yale Law Journal*, 1749 (1990).

[60] A. Cristini and R. Leoni, 'The '93 July Agreement in Italy: Bargaining Power, Efficiency Wages or Both?', in N. Acocella and R. Leoni eds, *Social Pacts, Employment and Growth* (Heidelberg: Physica-Verlag, 2007), 97-119.

[61] Legge 28 June 2012 no 92, known as *Fornero Act*.

[62] M. Biasi, n 48 above, 459.

required the Government to 'enact one or more legislative decrees aimed at favouring forms of employees' involvement' to be, eventually, introduced through *totally facultative* plant-level collective agreements.[63]

Nevertheless, efforts towards the development of financial participation schemes were unsatisfactory, especially in comparison to the average European Member States.[64]

Many factors contributed to the unsatisfactory development of workers' financial participation in Italy, both at quantitative and qualitative levels. One factor, as just mentioned, is the inappropriate payment of incentives by the State. Moreover, the Unions' hostility towards the involvement of low-income workers in firms' capital is of even greater importance (they ignored the positive results of empirical evidence). The second level collective bargaining (when present) has been characterized by an insufficient level of performance pay.[65] The bargaining practices, except for the experiences of some interesting companies, continue to represent a *barren land* in the search for innovative and efficient solutions for workers' financial participation, especially among lower-income workers.[66] Unions tend to resist profit sharing due to concerns that management can manipulate profit figures, and that such pay can create inequality among workers.[67]

The trend has been the conclusion of agreements at the local collective bargaining level based on productivity or profitability that seek the redistribution of economic resources aimed at pursuing an egalitarian policy.[68] Companies do not reward employees taking into account the different levels of workers' professionalism; the consequence is the hindrance of the realization of the planned productivity objectives.[69] In fact, the Italian unions utilized the government

[63] Art 4, para 62 legge 28 June 2012 no 92.

[64] For an overview on the European framework see J. Lowitzsch et al, n 14 above.

[65] The offensive function of financial participation; 'Osservatorio sulla contrattazione di 2° livello - Dipartimento Industria CISL' available at https://tinyurl.com/y369wbp3 (last visited 28 May 2019).

[66] Most of the local agreements do not use sophisticated indicators to provide the additional part of the salary linked to financial data, fixing only an equal goal for all workers, which does not allow the valuation of the contribution made by the individual or group of workers to achieve it. E. Gargnoli, 'La retribuzione ad incentivo e principi costituzionali' *Argomenti di Diritto del Lavoro*, 221 (1995).

[67] In the US union members are less likely than non-union employees to be part of profit sharing and gain-sharing plans. J. Zalusky, 'Labor-Management Relations: Unions View Profit Sharing', in A. Blinder ed, *Paying for Productivity: A look at the Evidence* (Washington DC: Brookings Istitution, 2011).

[68] So far, the local collective bargaining (when present) has worked to ensure that the part of the wage connected to the company performance was supplied to every employee without distinction. Furthermore, the local collective agreements have tried also reduce the frequency in which financial participation schemes are implemented in occasion of companies' crisis, frustrating the main function of such plan (that is to stimulate productivity and above all in times of economic crisis). E. Villa, 'La retribuzione di risultato nel lavoro pubblico e privato' *Rivista Italiana Diritto del Lavoro*, 451 (2013).

[69] Some contracts differ in the quantum of the award based solely on the employment level, see G. Bianchi, 'I premi di produttività in Lombardia: Limiti e nuove opportunità' *Istituto di*

incentives to concede a small share of wages in a fixed form to all workers, deceiving the government's real incentive goals.[70] So far, unions have proven unsuitable for negotiations that are less egalitarian and more differentiated among workers, such as variable pay arising from financial participation. In this context, it is difficult to avoid the risk of compromising the collective variable wage bargaining (the unions could be excluded from the financial participation schemes bargaining), with all the consequences of possible opportunistic behaviour by employers.[71]

The unions should change their attitude and try to be more willing to plan and sign second level collective agreements, with the aim of *real* financial participation. In doing so, the companies' collective bargaining would be able to coordinate its bargaining power with the autonomy of the individual workers. Given the employees' vulnerability and their absence of competence on the topic it is important to not leave the workers without expert assistance and advice in making decisions about whether and how to join participation schemes.

In this framework, it is useful to highlight the experiences of other European Member States.[72] In this perspective it should be noted, mainly as a warning,[73] a criticized legislative action implemented by the UK Parliament, which, in the name of enterprises' productivity, has legitimized the exchange between forms of financial participation and the waiver of some important rights in the regulation and termination of employment.[74]

In such situations, the shift in the balance of bargaining (derived from the

studi sulle relazioni industriali e di lavoro, 5, 1 (2013) available at https://tinyurl.com/y43czc9f (last visited 28 May 2019).

[70] The fifty percent of collective agreements provide as *variable salary* an equal bonus for all workers, data OCSEL consulted on 'Observatory bargaining 2nd level - Industry Department Cisl, table no 17 Distribution of the 'performance bonus' ', available at https://tinyurl.com/y2yds9oc (last visited 28 May 2019).

[71] The alternative is not between individual bargaining and collective bargaining, but between a union variable wage bargaining and a salary unilaterally established by the employer. See M. D'Antona, 'Intervento', in Associazione Italiana di Diritto del Lavoro e della Sicurezza Sociale ed, *Autonomia individuale e rapporto di lavoro: Atti del X Congresso nazionale di diritto del lavoro, Udine, 10-11 maggio 1991* (Milano: Giuffrè, 1994), 192.

[72] As an example, we can highlight the experience of the UK, where the discipline of *variable pay* is the result of a gradual loss of power caused by the *anti-union* politics of conservative governments. For the historical evolution of labor relations and the role of collective agreement in Britain, see H. Clegg, *The Changing System of Industrial Relations in Great Britain* (Oxford: Basil Blackwell, 1979); B. Bercusson and B. Ryan, n 49 above, 49.

[73] M. Biasi, 'Retribuzione di produttività. Flessibilità e nuove prospettive partecipative' *Rivista Italiana Diritto Lavoro*, 362 (2014).

[74] 'Employee Shareholder Status', introduced by clause 31 Growth and Infrastructure Bill of 1 September 2013. This provision drew heavy criticism from the British doctrine, which censored the iniquity of the exchange between a limited number of actions and some fundamental rights of workers, with possible repercussions on the structure of the employment contract. J. Prassi, 'Employee Shareholder 'Status': Dismantling the Contract of Employment' 4 *International Labour Journal*, 313-314 (2013); R. Jeary, 'Employee Owner Status - Business Democracy or Beecroft by the Back Door?', available at www.ier.org.uk; N. Countouris et al, 'Turning Employees into 'Owners'? The Falsest Promise yet', available at www.ier.org.uk; for the whole discipline see M. Biasi, n 48 above, 459.

unions' exclusion) has not achieved an enhancement of negotiating power for individual workers. Rather, given the lack of *bargaining power* among lower-income middle class workers, it has resulted in unilateral determination of financial participation schemes by employers.[75]

VII. The Measures Taken by the Italian Legislator in the Latest Years and the *Hesitant* Change of Approach of the Unions. Are We Going Towards a More Effective and Conscious Workers' Financial Participation System?

As described above, the public contribution to support workers' financial participation has been limited to the granting of a favourable tax treatment to firms willing to sign second-level collective agreements with local unions (no matter if signed at a company level or at territorial level). Italian legislator has never intervened on the structure and elements of workers' remuneration, since the regulation of those aspects has always been left to collective bargaining.

The approach of the social parties, as previously observed, wiped out all the effort carried out by various governments in order to find resources to incentivise the development of structured workers' financial participation systems.

Unions aimed to reduce the competition between employees instead of rewarding their effective performance. Indeed, in this matter, second-level collective bargaining has so far pursued an egalitarian and not very rewarding policy characterized by great stillness. Companies preferred to spread the provided public resources in order to reduce the labour cost, rather than to pursue the declared objective of increased productivity.

The above mentioned approaches are the main elements that can explain the reason why public incentives have not so far led to the expected results.[76]

Nonetheless, the necessity to incentivize workers' financial participation is still considered an essential element by public players. To this extent the Italian legislator seems to be more conscious of the need to rationalize and make more effective public funds intended to enhance workers' financial participation. In fact, the most recent legislative measures appear to constitute a serious brake in the fight against distorted use of economic incentive.

In particular, a gear shift was initiated starting from 2015. Through the enactment of the Law 28 December 2015 no 208 (the so-called the Economic Stability Law 2016), and through the successive finance acts enacted in 2017 (Law 11 December 2016 no 232) and in 2018 (Law 27 December 2017 no 205), the

[75] M. D'Antona, n 70 above, 445; in a comparative view see B. Bercusson and B. Ryan, n 49 above, 78: they observe that in UK it is not realistic to talk of negotiating the salary at the individual level because only for a very residual categories of workers can you actually speak of bargaining at the individual level.

[76] P. Campanella, n 37 above, 20.

Italian legislator finally seemed to invest in an effective system supporting workers' financial participation which is not (only) aimed at the reduction of labour costs.

The regulation appears radically changed. Firstly, under certain circumstances, it relieves from taxes also the sums perceived by workers with a medium salary (up to eighty thousand euro gross) expanding the number of workers benefited by the incentive.

According to the new regulation, the variable wage that an employer intends to provide to his employees (benefiting of public incentives) must now alternately (i) be linked to measurable and verifiable increases in productivity, profitability, quality, efficiency and innovation, or (ii) be provided in the context of profit-sharing plans with the explicit exclusion of all sums negotiated as consideration for the working activity (for example the sums paid for overtime work in the past were deemed to be relieved from taxes under certain conditions, therefore hindering the achievement of the objectives behind the incentive).

Nevertheless, the act expressly still requires the involvement of local labour unions (by the signing of a collective agreement at company or provincial/regional level). This will probably continue to be one of the main obstacles to the diffusion of workers' financial participation in Italy.[77]

However, also the unions' attitude regarding workers' financial participation is now gradually changing. Unions are now relinquishing their scepticism to embrace a more cooperative approach aimed at the enhancement of the latest economic incentives provided by Italian law.

In this regard, it must also be highlighted the symbolic importance of the July 2016 agreement signed by and between Confindustria (the most important employer union in Italy) and the most important Italian trade unions

This agreement can also be seen as an indicator of the resumption of the industrial relations with Confindustria on a fundamental matter which could have a significant impact on the qualitative and quantitative expansion of a new type of second-level collective bargaining.

In particular, the parties are starting to discuss again in order to reach second-level agreements able to implement effective workers' financial participation mechanism and, consequently, to enhance productivity and competitiveness between firms.

To this end, in order to provide small companies with the possibility to benefit

[77] Indeed, it should be noted that empirical evidence is not able to prove the existence of a positive link between incentives and the spread of second level collective bargaining. Moreover, the diffusion of the latter, during the last years has decrees notwithstanding the measures implemented to enhance it. P. Pini, *Salario di produttività o di redditività nell'agenda Monti, non ancora di partecipazione*, 13, available at https://tinyurl.com/y34nn6ge (2012) (last visited 28 May 2019); T. Treu, 'Le forme retributive incentivanti' 1 *Rivista Italiana di Diritto del Lavoro*, 661 (2010); G. Ferraro, 'Sgravi per incentivare la produttività', in M. Cinelli and G. Ferraro eds, *Lavoro, competitività, welfare, Commentario alla legge 24 dicembre 2007, n. 247 e riforme correlate* (Torino: UTET, 2008), 245- 251.

from public incentives, an active role has been given to local social parties with the aim of encouraging, also in such small firms, the application of mechanisms of variable pay linked to the firm's performances. The objective is to give the chance to benefit from the more favourable tax treatment (eg the tax relief from productivity bonuses provided by the latest legislation on the matter) also to small firms that do not want to directly bind themselves through agreements with unions.

The same reasoning has been resumed and promoted by the same unions also in the document signed on 9 March 2018 and titled *Patto per la Fabbrica* (Agreement for plants) in which unions shows to be aware of the need to identify alternative paths to benefit from tax incentives related to variable salary.

In this perspective, in order to find a solution to the low take-up of second level collective bargaining among small companies and optimize the effectiveness of recent legislative measures, the Italian Revenue Agency issued a circular concerning tax breaks in favour of companies implementing workers' financial participation schemes.[78] According to this last document it is now possible for companies not implementing any second-level collective agreement to benefit from public incentives though the application of all the provisions of a collective bargaining agreement (either regional or provincial) notwithstanding which category it refers to.

The aim is to allow also small employers (which do not intend tend to be directly bound by collective agreements), to benefit from the tax exemption provided for by the last regulation. In fact, in order to get the incentives, the collective agreement, even if referred to other category, has to be fully applied.

The above perspective, although very interesting, is hindered by the deep-rooted belief (still present among little employers) which, in most cases, identifies local collective bargaining as a mere cost for firms, not balanced by any advantage.

This is the reason why, in the opinion of the Author, there is a greater need to provide the parties with the cultural means which are necessary to understand the benefits potentially deriving from an effective implementation of financial participation schemes also among the small-medium size companies. From this point of view, a cultural approach can be considered even more important than the granting of tax incentive in favour of workers' financial involvement. This could even justify a different use of public funds reserved to workers' financial participation not limited to the grant of tax incentives in favour of firms applying second level collective bargaining agreements.

VIII. Learning from Some European Experiences. The Importance of a Dialogue with the Unions in the Structure of Financial Participation Schemes

[78] This possibility was expressly provided by Circolare of 29 March 2018 no 5/E of the Italian Revenue Agencies related to bonuses and welfare.

To better understand the risks connected to the unions' lack of support for financial participation, it is important to highlight what happened in UK and in Germany,[79] as a result of the unions' marginalized role in determining the lower-income workers' wages in light of the firms' financial performance. This critical observation is justified since the German and British frameworks respectively may represent a warning for Italian social parties, urging them to show more willingness to bargain effective forms of financial participation and to understand that pay systems managed unilaterally by companies can result in such undesirable outcomes also in Italy. In fact, financial participation schemes, both in UK and Germany, are mainly implemented unilaterally by employers, especially in the case of lower-income middle class workers.[80]

The German framework highlights the problems for workers and the countless benefits for firms of a financial participation system heavily focused on financing unilaterally granted by employers. While companies are able to adapt quickly workers' wages to market trends, the employees do not have a solid expectation of income because their salaries are under intense economic fluctuations based on the companies' performance. They do not have the unions' protection and supervision for the part of the salary linked to profit sharing and employee ownership schemes.[81]

In Germany, the workers' wage structure is provided mainly by the contract of the district.[82] The variable pay (in the form of profit sharing or gain sharing) is unilaterally added by the employer to the base salary (set in the contract of the district) and covers approximately twenty percent of the total wages. Employers have no legal obligation to give that variable pay and they are also free to decide its reduction, or even its elimination. The lack of unions' supervision in this process lead to sharp fluctuations in wages during periods of market uncertainty, because employers tend to cut or suppress the variable part of the wage as soon as the firm's performance diminishes.

Focusing on the British framework, it is possible to observe that minimum wages are set by law, while the rest of the salary is paid partially by enterprises as a fixed sum and partially based on variable pay systems (linked to financial data).[83] This discipline is the result of a progressive loss of unions' power and

[79] Both of them are countries with an important development in the field.

[80] C. Weltz and E.F. Macìas, n 7 above.

[81] E. Villa, 'Retribuzione flessibile e contrattazione collettiva', available at https://tinyurl.com/y2y8p9ln, 73 (last visited 28 May 2019).

[82] M. Borzaga, 'I più recenti sviluppi della contrattazione collettiva in Germania: clausole di apertura, orario di lavoro e retribuzione', in M. Rusciano et al eds, *Istituzioni e regole del lavoro flessibile* (Napoli: Editoriale scientifica, 2006), 579.

[83] In the past, even in UK, collective agreements had a central role in setting the employees' wages. When collective agreements lost that role, firms, at least initially, have found themselves in difficulties in setting the wage level. See A. Bryson and D. Wilkinson, *Collective bargaining and workplace performance an investigation using the workplace employee relations,* available at https://tinyurl.com/y390csaj, 3 (1998) (last visited 28 May 2019).

collective bargaining caused by *anti-union* politics promoted by *conservative* governments.[84]

In the past (something that still occurs in Italy), the unions determined the employees' financial participation schemes pursuing an egalitarian policy. They favoured equal wage increases for all workers, rather than experimenting with true forms of participation. Consequently, the sums linked to participative schemes covered a marginal part of the overall wage, causing a lack of positive results.

Nowadays, the *variable pay* is mostly managed unilaterally by the management of the companies and takes different forms depending on the interest that each company intends to pursue.[85] In the UK there has been a growth in the pay disparity between workers, because individual bargaining plays a positive role in determining the salary only with high-level employees, who are in strong demand in the market.

Individual bargaining on the topic of financial participation resulted in the British case in employers' unilaterally establishing the salary available to low-skilled workers.[86] This is evidenced from the British experience where the *variable pay* increased inequality among employees, since high-skilled employees are able to assert their individuality and the weakest workers are *crushed* by the individual contract.

Most of the financial participation schemes, unlike those regulated with the intervention of the unions, have shown a lack of transparency, a lack of monitoring mechanisms in the course of exercise, and a lack of verification systems of the correspondence between the results achieved and the incentives granted.[87]

IX. A Proposal for an Increase in the Financial Participation Among Low-Income Workers in Italy: Redraw the Boundaries Between Collective and Individual Bargaining in Order to Achieve Agreements Essentially Respondent to Each Employee's Needs

[84] For historical evolution of labour relations and the role of the collective agreement in Britain see H. Clegg, n 73 above; see also A.C. Neal and P. Lorber, 'Financial Participation Worker and the Role of Social Partners: United Kingdom Experience', in M. Biagi, *Quality of Work and Employee Involvement in Europe*, 195-218 (The Hague: Kluwer Law International 2002); B. Bercusson and B. Ryan, n 49 above, 49.

[85] For a general view of different forms of *variable pay* implemented see A. Bryson et al, 'CEP Discussion Paper No 1112', available at https://tinyurl.com/7ff6p2c, 1 (last visited 28 May 2019); P. Marginson et al, 'Undermining or Reframing Collective Bargaining? Variable Pay in Two Sectors Compared' 18 *Human Resource Management Journal*, 327 (2008); J. Arrosmith and E.P. Marginson, 'The Decline of Incentive Pay in British Manufacturing' 41(4) *Industrial Relations Journal*, 291 (2010).

[86] B. Bercusson and B. Ryan, n 49 above, 78.

[87] W. Brown et al, 'The Management of Pay as the Influence of Collective Bargaining Diminishes', in P.K. Edwards ed, *Industrial Relations: Theory and Practice in Britain* (Oxford: Blackwell, 2003), 197; J. Arrosmith and E.P. Marginson, n 85 above, 303.

The aim of this paper is not to argue for any specific financial participation scheme, but rather to suggest an appropriate juridical mechanism to support the diffusion of financial participation schemes among low-income middle-class workers, without impact on their already vulnerable position.

In this perspective, it is worthy considering the following elements: i) firms always claim the need for more flexibility at work (especially in highly regulated labour markets, such as the Italian case); ii) collective agreements that provide more flexibility are not easily accepted by workers because they cannot see any advantages, since in general unions tend to concede flexibility (by the derogating to law and collective bargaining), justifying the decision to do so in the name of safeguarding jobs; iii) recent surveys show that workers are, in general, more inclined to be involved in companies' results.

In light of the above, a question arises as to whether it would be possible to go one step forward and allow the second level collective bargaining the use of all instruments at its disposal,[88] in order to entertain a productive dialogue with each individual worker. Thus, financial participation may act as an incentive to enable workers to regulate the discipline of the contract of employment in a different manner than what it is provided under the national collective bargaining agreements and, in some cases, in the labour legislations.[89] In this way, employers would gain greater flexibility with its workforce.

The primary goal is to establish a mechanism that would allow the single employee to decide, for a different modulation of his own rights provided in the employment contract.[90] This does not mean disregarding the importance of collective bargaining (on the contrary, the supervisory role of the unions will be crucial in the prospective enhancement of individual autonomies), but it requires a redrafting of the role of trade unions, which is already underway.[91]

One solution could be the enhancement of the role played by the unions (especially in second level collective bargaining) as a mediator and supervisor, of the employees that, in the name of effective financial participation, voluntarily choose to join a different rights' settlement instead of the one provided by law and collective bargaining.[92] In this case, a law that guarantee this possibility would be required.[93]

Labour Law Scholars have been long pursuing this alternative, by interrogating as to whether the pursuance of mandatory regulation might end up denying,

[88] To which Art 8 Law no 148/2011 has been also recently added.

[89] Art 8 Law no 148/2011 provides the possibility to derogate from the mandatory labor law discipline.

[90] Under Italian law, the main provisions of the employment contract are provided by law and national collective agreements and cannot be modified by the parties.

[91] R. Del Punta, 'Ragioni economiche, tutela dei lavoratori, e libertà del soggetto' *Rivista Italiana Diritto Lavoro*, IV, 420 (2002).

[92] S. Sonnati, n 56 above.

[93] In Italy there is a much-criticized rule that can be used as a tool for implementing this type of dialogue see Art 8 legge 2011 no 148.

instead of favouring worker's protection.[94] The current legal framework is composed mainly of mandatory rules that can sometimes create inefficiencies due to their unavailability for the single employees that,[95] in some cases, can have different needs from the rest of the employees' pool.[96] This *inefficiency* can be represented in terms of *sacrificing* some workers' preferences for supporting the preferences of others (in theory the majority of them).[97]

Under civil law, so-called mandatory rules (*norme imperative*) pursue interests considered by the legislator as generally superior and prevailing. These interests cannot thus be derogated by personal ones. As a matter of fact, whenever discrepancies between such mandatory rules and the recipients' preferences arise, a *cost* is also produced.

In order to provide suitable alternatives and, thus, improve the techniques for regulating workers' financial participation, a theoretical solution could be the introduction of a technique known as 'multiple choice connection'.[98] This

[94] On the role played by mandatory discipline in the Italian labour law see R. De Luca Tamajo, *La norma inderogabile nel diritto del lavoro* (Napoli: Jovene, 1976); recently see A. Zoppoli, 'Il declino dell'inderogabilità' *Diritto Lavoro Mercato*, 1, 53 (2013); M. Novella, *L'inderogabilità nel diritto del lavoro. Norme imperative e autonomia individuale* (Milano: Giuffrè, 2009). See the papers discussed during the 'Giornate di studio dell'Associazione Italiana di Diritto del Lavoro e della Sicurezza Sociale' held in 2008 in Modena (C. Cester, 'La norma inderogabile: fondamento e problema del diritto del lavoro' *Giornale di diritto del lavoro e di relazioni industriali,* 341 (2008) and P. Tullini, 'Indisponibilità dei diritti dei lavoratori: dalla tecnica al principio e ritorno' *Giornale di diritto del lavoro e di relazioni industriali*, 423 (2008)); in-depth analysis, M. Napoli, 'Introduzione. Interrogativi sull'inderogabilità' *Rivista Giuridica Lavoro*, 157 (2008); A. Albanese, 'La norma inderogabile nel Diritto civile e nel Diritto del lavoro tra efficienza del mercato e tutela della persona' *Rivista Giuridica Lavoro*, 165 (2008); A. Occhino, 'La norma inderogabile nel diritto del lavoro' *Rivista Giuridica Lavoro*, 183 (2008).

[95] The application of mandatory rules lead to a restriction of the competition among employees with employer since it limits the possibility for an employee to negotiate their rights. It is important to specify that, despite such restriction of competition is an instrument (often irreplaceable) to implement the constitutional principles of protection of *individual* and *work*, it may also increase the risk of unjustified privileges and parasitical incomes, A. Okun, *Eguaglianza ed efficienza* (Napoli: Liguori, 1990), 22.

[96] In Italy, Labour law experts generally agree on the fact that the distinctive feature of labour law, as opposed to civil law, is the restriction of individual independent negotiations through mandatory regulations which take into consideration the imbalance of bargaining power between the contractual parties. For an overview on the role played by the individual workers' bargaining in Italy see M. Novella, n 94 above.

[97] The same *cost* is also attributable to *half–mandatory* techniques implemented by local collective agreements, so that flexibility in the mandatory rule has been implemented via a collective bargaining. The issue is that the collective agreement remains mandatory for the individual employee bargaining. On one side, this technique prevents strong parties from taking advantage of weaker ones; on the other, it also generates a cost, translated in terms of efficiency. M. Novella, n 94 above, 431.

[98] The theoretical debate around the issue stems from the release, by the Ministry of Labour and Social Policies, of a White Paper on the Labor Market in Italy in 2001, which favored its introduction in the Italian jurisdiction, after considering its experimentation in the Netherlands. Cases of pre-defined individual derogation by *multiple choice* have been already acknowledged by the labor legislation, for instance, in the legislator's flexible clauses provided in the old discipline on part-time work. For a critical review of this technique see R. Del Punta, n 91 above, 415; G.

would entail interdependence between local collective agreements and individual employment contracts. It is supposed to redraw the boundaries between collective and individual bargaining in order to achieve agreements essentially respondent to each employee's needs.[99] The employee would be given choices, upon agreement with the employer, out of several aspects previously bargained by local collective negotiations.[100]

These different bargained packages stem from mixed levels of protection and economic conditions of work performance. All options (left to the workers' choice) would be linked to a different level of financial participation. In such a way, it would be avoid the possibility that the restoration of employees' bargaining power could, in fact, turn into an overall loss of their rights, since *equivalence* between the proposed alternative packages would already result from local collective bargaining.[101]

In this sense, a first step should be towards a desirable re-definition of the lines between collective and individual bargaining, which would allow for the establishment of regulatory frameworks effectively complying with both the interests of individual workers and the specific expectations placed upon them by employers.

As we can see, the Italian labour legislation already acknowledges limited and predefined cases of individual derogations by the 'multiple choice technique'.[102] However, these cases are regulated by the legislator and not by the collective bargaining. It would be sufficient to consider the legislation on *part-time (work)*[103] that allows for an exchange between alternative protection packages, or the flexibility with regard to maternity leave.[104]

Proia, 'Flessibilità e tutela nel contratto di lavoro subordinato' *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 411-461 (2002); M. Novella, 'Considerazioni sul regime giuridico della norma inderogabile' *Argomenti di Diritto del Lavoro*, 545 (2003); U. Carabelli and V. Leccese, 'Una riflessione sul sofferto rapporto tra legge e autonomia collettiva: spunti dalla nuova disciplina dell'orario di lavoro' *Working Paper no 44/2004 Centro Studi di Diritto del Lavoro Europeo 'Massimo D'Antona*, 39 (2004), available at https://tinyurl.com/y3aks4tb (last visited 28 May 2019).

[99] Since 2001, the Netherlands has been testing this link between collective agreement and individual autonomy which our country was an early proponent of and considered an interesting instrument to introduce, M. Biagi, 'Competitività e risorse umane: modernizzare la regolazione dei rapporti di lavoro' *Rivista Italiana Diritto Lavoro*, 257 (2001).

[100] For example, a lower wage level in exchange for higher employment security, a better compensation in exchange for longer working hours, the renunciation of Christmas allowance in exchange of shares of the company, see ibid, n 99 above, 257.

[101] M. Novella, n 98 above, 432.

[102] ibid 433, according to whom also the discipline contained in the outdated Art 18, by which the employee may opt for an indemnity of fifteen months of his global salary and give up reinstatement, was inspired by a logic similar to the model under survey.

[103] Art 3 of the decreto legislativo 25 February 2000 no 61, as amended by Law 24 December 2007 no 247, contemplates an exchange in the part where it prescribes that the right of modification of the working time by the part-timer entitles of specific additional remunerations provided by collective bargaining.

[104] In the decreto legislativo 26 March 2001 no 151, notwithstanding the overall duration

In the above cases, the worker, once being informed by the local unions, is free to waive the general regulation provided by law or collective bargaining, opting for a special regulation. However, as already mentioned, any such possibility of derogation from the general regulation has to be explicitly foreseen by the law. In order to be valid, the agreements have to be first analysed and then signed in a recognized institutional context. In other words, the worker who decides to opt for a different regulation of his employment contract must physically go (with a union representative) in front of an impartial commission (usually created at the regional level or in some universities or other authorized institutions) and sign the agreement that, in order to be valid, must be reviewed and approved by the commission.[105] Essentially, the same process could be utilized also in the mechanism theorised above.

Once admitting the possibility that the preferences of some employees might influence the regulation of the employment contracts (through individual autonomy), the focus will be laid upon the search for instruments to encourage workers to voluntarily adhere to different regulations, while giving up some of their rights.

A valid exchange instrument for increasing individual workers' adhesion to a package of lower protections (if compared to a *standard* regulation) can be envisioned precisely in the financial participation schemes.[106] From this perspective, especially employees' ownership plans can be offered to ensure a benefit for the individual workers who decide to adhere to adjustments different from the standard regulations.

Unlike the UK,[107] where the bargaining with individual employees may implicate less ethical purposes, such as the reduction of legal protection, in this case, a trade union will be responsible for bargaining the different protection packages and monitoring the whole process. The same trade union will be responsible for instructing the worker so as to allow him to choose according to his own needs and will also monitor the supply of wages in the form of financial participation.

By the aforementioned mechanism, trade unions might bargain contractual options with fewer rights (compared to the standard regulation of employment contract) without risking critical reactions by the employees, since their adhesion would occur by individual choice.

A company would surely benefit from this: first, managers would have the possibility to increase organizational flexibility in the occurrence, for instance, of productive peaks, secondly, the company would positively benefit from a

of the maternity leave (five months) the expectant mother can decide when to take her leave.

[105] This system has already provided for some kinds of agreements that, in order to be valid, have to be signed by the worker in front of the so-called *Direzione Territoriale del Lavoro* which is a government office that take place at provincial level.

[106] S. Sonnati, n 56 above, 646.

[107] See para 8.

proper implementation of the participative schemes.

In this context, the government would be responsible for creating the conditions for a dialogue. This includes the proper channelling of resources expendable, for instance, for the training of trade unionists or for tax-free packets agreed by trade unions and offered to workers. It would also entail the creation of rules that might allow trade unions to derogate from mandatory disciplines provided not only by national collective agreements, but also by the law, and to contemplate an effective financial participation of the workers, as a compensation for these derogations.

A recent and highly criticized law exists in Italy,[108] which, if properly implemented, could be a useful tool for increasing financial participation. Trade unions use the above regulation to surreptitiously derogate from the law and the collective agreement almost (ie they sign agreements in derogation, without reference to the *criticised* law), since those agreements are unpopular among the involved employees and occur for the maintenance of employment levels.

With the implementation of the aforementioned mechanism, trade unions could also reach the same agreements, yet in the open, since workers would voluntarily participate in them.

The above raises a question as to how and where the dialogue between the involved parties could take place. As already mentioned, the collective bargaining practices already knows some positive experiences in which company level agreements created appropriate conditions (by the creation of appropriate boards) to facilitate the dialogue between unions and management with the objective of implementing and supervising financial participation schemes.[109] The Birra Peroni company's agreement serves as an interesting example,[110] where contrary to what usually happens, the percentage of financial participation is not determined in advance, but rather set after a mutual evaluation and verification of the company's results and objectives achieved.

X. The Diffusion of Workers' Financial Participation Through the Dialogue Between Collective and Individual Bargaining as a Useful Instrument in the Field of Human Resources

The implementation of financial participation among lower-income middle-class workers, especially on a voluntary basis, in addition to creating the possibility

[108] Art 8 of law 14 September 2011 no 148, provides to the local unions the possibility to derogate from the mandatory labor law discipline.

[109] Interesting practices are implemented by some collective company agreements (Protocol Competitiveness signed by Finmeccanica company agreement entered into by KME) that provided specific monitoring mechanism though the introduction of a joint composition organs (commissions) with informative and consultative duties.

[110] Art 11 company collective agreement 8 April 2015, available at https://tinyurl.com/y4abul94 (last visited 28 May 2019).

of increasing the average workers' wage might: i) improve firms' performance ii) represent a useful mechanism for proper and careful management of human resources.

It is often ignored that performance-related salary may also help companies gain a competitive advantage by attracting and retaining the most productive employees whilst avoiding ones who are less productive and do minimal work. In contrast, fixed compensation schemes, not only have less incentive power, but they are also less able to help employers in selecting employees since they are usually implemented when it is difficult and costly to measure individual performance.[111]

Recent studies have examined the dynamics of various companies involved in participation schemes based on participation rates. The results showed that the most skilled workers, if involved in the company's financial results, are more motivated to work hard in order to have incremental wages. With the mechanism suggested above, it will be easier to select workers who are more productive and skilled because the participation is made on a voluntary basis.

Economic doctrines of variable-pay schemes demonstrate that the change from a fixed to a variable compensation mechanism might increase the average output per employee because of incentive effects.[112] Furthermore, if there are differences with respect to ability among the workers, high skilled employees should be more attracted than low skill employees by the variable-pay (linked to the company's performance) because it would allow them (once the firms' goal is achieved) to receive a higher wage by exerting more effort in their job. Experimental evidence confirms the coexistence of the selective and incentive effects of payment schemes; low skill employees are not attracted by the variable pay scheme when firms do not offer minimum fixed wages.[113]

Another important effect of financial participation, until recently rather ignored, is the reduction of the shirking phenomenon (ie the shirking of duties by some workers within the same company). This is even truer if the participation is implemented in the above-proposed way since employees, through training and discussion with the unions' experts, voluntarily and collectively; decide to

[111] U. Trivellato, 'La valutazione degli effetti di politiche pubbliche: paradigma e politiche' *Istituto per la Ricerca Valutativa sulle Politiche Pubbliche Working Paper No. 2009-01,* 1-52 (2009).

[112] T. Eriksson and M.C. Villeval, 'Performance – Pay, Sorting and Social Motivation' 68(2) *Journal of Economic Behavior & Organization*, 21 (2007); E.P. Laser, 'Output-based pay: incentive or sorting?', in S.W. Polachek ed, *Accounting for Worker Well-Being (Research in Labor Economics, volume 23)* (Bingley: Emerald Group Publishing Limited, 2004), 1 – 25: the author observes also that 'if this self-sorting effect is not accounted for, the higher efficiency observed when comparing a piece-rate compensation scheme relative to an hourly wage scheme may be unduly attributed to the incentive effect of the variable wage'.

[113] E.P. Lazer, 'Performance Pay and Productivity' 90 *American Economic Review*, 1346 (2000); recently on the issue see T. Eriksson and M.C. Villeval, ibid, 1: they found a natural self-selection made by the workers.

join into different participation schemes with different modulation of participatory rights.

The incentive effects of financial participation are generally expected to be stronger when more information about performance is provided to employees and when more influence employees perceive they have over the performance indicator that determines their income.[114] The most productive workers who have opted for financial participation plans by giving up some of their rights will certainly be more predisposed, directly and indirectly, to monitor the work performance of their colleagues.

Moreover, the choice made voluntarily by the employee, after consultation with unions' experts, can alleviate the problem of reduction of incentive effects arising from poor comprehension of the companies' goals by the workers.[115]

Employees, through training and discussion with the unions' experts, on purpose and collectively, decide to join into different plans with different modulation of participatory rights. This, in turn, facilitates an employer's classification of human resources: the firm's management would be able to immediately identify the more motivated workers willing to take part of company risks and to use them in a more profitable manner.[116]

[114] V. Pérotin and A. Robinson, n 6 above, 18.

[115] R. Freeman et al, n 42 above, which states that the difficulty of understanding the parameters of participative plans causes a reduction in incentive effects; to reduce the employees aversion to variable pay it is important to implement a correct communication system, see also K.K. Merriman and J.R. Deckop, 'Loss Aversion and Variable Pay: A Motivational Perspective' 18(6) *International Journal Human Resource Management*, 1026 (2007).

[116] V. Pérotin and A. Robinson, n 6 above, 18: 'extensive, independent and regular information about firm performance and its determinants (as well as the relevant training) may help employees understand all the implications of the scheme and trust it'.

Essays

The Rental Contract. Bike Sharing and Car Sharing as Sustainable Forms of Mobility

Maria Francesca Tommasini*

Abstract

Starting with the concept of rental, this work aims to analyse alternative and more sustainable forms of mobility such as bike sharing and car sharing, and to discuss their legal regulation. Car sharing and bicycle sharing are services aimed at reducing the number of circulating cars in order to minimise the impact on the environment and human life. We should not underestimate the fact that nowadays more and more often in various commercial sectors, businesses prefer to lease rather than purchase equipment, thus conserving cash and avoiding the consequences of their deterioration. Furthermore, the need to adapt production to market demands justifies the need to innovate goods with increasing speed. Even for private individuals, rental (short- or long-term) is a tool that is increasingly used and incentivised mainly by vehicle manufacturers. It is necessary to identify the applicable regulations in this field: whether those concerning leases, or those commonly adopted to regulate mixed contracts (theory of absorption, combination and analogical application).

I. Introduction. Rental

A lease agreement, provided for in the 1882 code,[1] is not a contract envisaged under the Italian Civil Code. First citations on rental, however, can be found in the navigation code and in other special laws.[2] In practice, just as for legal relationships, the terms and concepts regarding rental have often been designated heterogeneously. Legal scholarship considered a lease agreement any contract having as its object mobile property restricted to a single use, for example, for musical instruments, binoculars or church benches. With the progression to a hire economy, this expanded to include also radios and television sets, calculating machines, computers, measuring instruments, and receptacles for liquids and gases, generally with an additional contract for supplying gadgets.[3]

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[1] Book I, Title IV, Chapter IV of the Trade Code of 1882 was entitled 'Passengers' but did not in any way regulate a system similar to the rental contract, as understood today, but a contract for the transport of persons (G. Romanelli, 'Autonomia privata e norme inderogabili in materia di trasporto' *Diritto dei trasporti*, 3 (1998); G. Righetti, *Trattato di diritto marittimo* (Milano: Giuffrè, 1990), II, 435).

[2] A. Fiorentino, *I contratti navali* (Napoli: Jovene, 1951), 8.

[3] A. Tabet, 'Nolo o noleggio (Diritto civile)' *Novissimo Digesto italiano* (Torino: UTET, 1957), XI, 298.

Furthermore, contracts govern licences to use cinematographic works, and in particular we consider to be rental agreements those between film producers and intermediary-distributors, and between the latter and the cinema management company.[4]

Additionally, rental contracts are exemplified in the use of industrial vehicles and mechanical devices.[5] It is worth also distinguishing so-called 'cold freight', ie a rental in which the renter supplies solely machinery without the driver, from so-called 'hot freight', ie a rental where machinery and an employee may be hired together.

The different content of these two types of contracts respectively led to various disputes regarding their codification. In fact, while 'cold freight' was included in a lease,[6] 'hot freight' was covered by a contract for works.[7]

II. Types of Rental. The Rental of Vehicles for the Transport of Things

Rental of land vehicles is probably the only type of contract for which we have some regulations. Once again, it is a non-homogeneous category that, although it may be collocated among result contracts, poses many issues in terms of definite and unambiguous classification. In fact, vehicles can be hired, with or without a driver, depending on whether they are for the transport of goods or people.

With regard to the transport of goods, there seems to be no doubt about the application of the transport regulations in the case of the hirer also being the driver of the vehicle (Arts 1678 et seq of the Italian Civil Code). A contract for

[4] This terminology was used for the first time in contracts between ANICA and AGIS (V. Mangini, 'Il contratto di distribuzione cinematografica' *Giurisprudenza italiana*, 862 (1959); L. Sordelli, 'Cinematografia (Diritto privato)' *Enciclopedia del diritto* (Milano: Giuffrè, 1977), VI, 999; E. Moscati, 'Noleggio (Diritto privato)' *Enciclopedia del diritto* (Milano: Giuffrè, 1978), XXVIII, 239; C. Garilli, 'Le intese di distribuzione esclusiva nel mercato cinematografico' *Giornale di diritto amministrativo*, III, 279 (2003)).

[5] Consider the hypothetical of a contract for the loading and unloading of goods transported by the carrier (Corte di Cassazione 16 February 1956 no 447, *Foro padano*, I, 833 (1956); Corte di Cassazione 24 October 1956 no 3878, *Foro italiano*, I, 807 (1957); Corte di Cassazione 11 May 1967 no 968, *Giustizia civile*, I, 1257 (1967) for the research and collection of war residuals or for the distribution of advertising leaflets (Pretura di Bologna 5 May 1970, *Giurisprudenza italiana*, I, 2-30 (1971)).

[6] Tribunale amministrativo regionale Sicilia-Catania 29 November 2011 no 2080, *Foro italiano*, XI, 3737 (2011).

[7] L. Ricciardelli, 'Sulla natura giuridica del contratto di cessione di uso di automezzi con conducente per un determinato viaggio' *Foro italiano*, I, 1609 (1954), which says that 'the assumption of the technical risk of the journey by the renter and the power of the charterer to give orders and necessary instructions relating to the commercial operation according to which the vehicle was rented, correspond perfectly to the risk on the contractor and the supervisory and control powers of the client, who as is known cannot interfere in the company's physical organisation or in the technical management of the work' (Art 1662, para 1 of the Civil Code) (translation author's own).

transport of goods may include ancillary activities, such as when the renter has to collect or deliver the goods entrusted to him by the charterer to a particular destination. In this situation, the principal commitment (ie the transfer of things from one place to another) of the carrier, ends up taking priority over the mentioned services.[8] On one hand, the assumption is that, for example, the hirer must also purchase goods on behalf of a second hirer, in which case there occurs a link of negotiation between the sale contract and the transport contract of the purchased goods, with the consequence that invalidity or ineffectiveness of the first contract affects the second one.

On the other hand, in the event of hire requested without a driver, the lessee, after having secured the vehicle, can transport his own goods or, acting as an independent contractor, can carry things for third parties.[9] This type of lease implies responsibility towards third parties, or *vis-à-vis* those for whom the transport is carried out, and lies with the lessee.[10]

III. Rental for the Realization of a Trip. Rental Without a Driver

Different from the types of rental referred to above are those concerning the lease of motor vehicles intended for the transport of people. The contract is applied differently depending on whether the vehicle lease for the trip is with or without a driver.[11] This element determines the legal nature of the contract and the applicable rules.[12] On the one hand, for a rental without a driver, enjoyment of the vehicle is attributed directly to the charterer who takes delivery of it without any interference with regard to performance of the journey by the lessee, but on the other hand, through his driver, the management of the journey, and the direct availability of the asset to the charterer, is ruled out.[13]

[8] M. Stolfi, 'Appalto-Trasporto', in G. Grosso and F. Santoro Passarelli eds, *Trattato di diritto civile* (Milano: Vallardi, 1966), 98; M. Iannuzzi, 'Del trasporto', in A. Scialoja and G. Branca eds, *Commentario al codice civile* (Bologna-Roma: Zanichelli, 1971), IV, 147.

[9] In the context of the organisation of industrial production, the practice created the so-called logistics contract to regulate all the activities of handling and transport of products that businesses often entrust to third parties (M.L. De Gonzalo, 'Il contratto di logistica nella giurisprudenza e nella prassi contrattuale' *Diritto del commercio internazionale*, 409 (2015); F. Marongiu, 'La disciplina giuridica dei contratti di fornitura di servizi di logistica integrata' *Diritto del commercio internazionale*, 305 (2002)).

[10] Corte d'Appello di Bari 28 November 1957, *Giustizia civile - Massimari Corti di Appello*, 47 (1957). This is the case even if the rental is accompanied by the secondment of the renter's staff who are temporarily included in the charterer's business organisation (Corte d'Appello di Milano 9 November 2011, *Giurisprudenza Milanese*, 357 (2002); Tribunale di Torino 22 November 2003, *Giurisprudenza di merito*, 708 (2004)).

[11] N. Canzian, 'Il legislatore tentennante sul servizio di noleggio con conducente: l'incertezza ricostruttiva tra reviviscenza e assenza di una disciplina positiva' *Rivista di diritto dei media*, I, 161-175 (2018).

[12] E. Papa, 'Locazione di autoveicolo, trasporto, noleggio' *Diritto e giurisprudenza*, 546 (1963).

[13] A. Tabet, 'La locazione-conduzione', in A. Cicu and F. Messineo eds, *Trattato di diritto*

Hence, distinct rules are applicable to the two cases. In the first circumstance, since the renter is obliged solely to deliver the vehicle efficiently, and the journey takes place under the direction of the charterer who bears the related risks, legislation concerning leases applies.[14] The prevailing jurisprudence is also oriented in this direction.[15]

In the second circumstance, the renter has to assure operation of the vehicle and must directly take care in performance of the journey, and we are in the presence of the different concept of rental in the strict sense. Since it is the technical staff provided by the hirer who are responsible for the journey, the hirer does not incur any liability for damage or damage to the vehicle, nor for harm caused to third parties, for which the renter is liable.[16] It follows, moreover, that if the vehicle is not used due to a breakdown or acts performed by the renter's staff, the charterer is not required to pay rental for the period of inactivity, but can claim compensation for any damages deriving from breach of contract.

Interestingly, the lessee conveys the risks of the commercial transaction, ie the property owner is entitled to the payment of the agreed rent regardless of the economic outcome of the trip and, unless he is also a carrier, assumes no risk for the storage of things transported by the hirer on behalf of third parties.[17]

IV. Rental with a Driver

The lack of any arrangement for this specific situation led to the stipulation of rental agreements with a driver as unregulated contracts. This has been assimilated to the letting of goods in which the driver's performance assumes an instrumental and accessory nature with respect to the purpose of enjoyment of the vehicle.[18] Critically, however, it has been observed that such a lease lacks typical requirements, namely transfer of ownership of the vehicle, the taking possession of the vehicle by the user and the qualification of the service as giving rather than doing.[19]

civile e commerciale (Milano: Giuffrè, 1972), 258.

[14] G. Romanelli and G. Silingardi, 'Contratti di viaggi organizzati' *Enciclopedia giuridica* (Roma: Treccani, 1978), IX, 1.

[15] Corte di Cassazione 4 October 2017 no 23145, available at www.unionegiudicitributari.it. In terms of amortization coefficients, since the rental of passenger cars without a driver is not a transport contract but a leasing contract does not apply to the thirty per cent coefficient (decreto ministeriale 31 December 1988 'for transport people with cars from the square and garage'), but the lower one by twenty-five per cent.

[16] G. Valeri, 'Osservazioni critiche sul concetto di «trasporto» nel diritto privato' *Rivista del diritto commerciale*, I, 486 (1920).

[17] Corte d'Appello di Napoli 18 October 1962, *Diritto e giurisprudenza*, 542 (1963).

[18] Corte di Cassazione 28 May 1986 no 3581, *Responsabilità civile e previdenza*, 81 (1987).

[19] R. Miccio, 'La locazione di cose', in W. Bigiavi ed, *Giurisprudenza Sistematica di Diritto Civile e Commerciale* (Torino: UTET, 1967), 54; A. Tabet, 'La locazione-conduzione' n 13 above, 257; G. Provera, 'Locazione', in A. Scialoja and G. Branca eds, *Commentario al codice civile* (Bologna-Roma: Zanichelli, 1980), 69.

The type of agreement to which, however, as a rule, this case has been compared is that of the procurement contract (Arts 1655 et seq of the Civil Code), the broad regulations of which may regulate a type of agreement whereby the debtor is bound to provide a service through the use of a good that he made available and managed through his own business organisation.[20]

Isolated and more recent is the opinion that the contract under which a party makes a vehicle with driver available to another for payment of a monthly fee and a fee based on mileage, supplementing the temporary licence for enjoyment of a thing for payment, can be classified as a subtype of the transport contract governed by Art 1678 Commercial Code.[21] The technical-economic operation of travelling is in fact equivalent to the operation of transferring people from one place to another. Further, the renter's performance

> 'is in its essence equivalent to the typical act performed by a carrier, given that if a vehicle is used, it is because there is someone to be transferred from one place to another'.[22]

This approach has been criticised by those who say that

> 'even if the lessee intends to pursue a purpose similar to that typical of the transport contract, this, at most, can be considered as a reason that remains unrelated to the contractual cause'.[23]

It has also been specified that the lessee's purpose is not always that of transport, since he could use the renter's services for different purposes without any transport being carried out, only using the vehicle for moving around.[24]

V. Bicycle Sharing and Car Sharing Services

In Europe the issue of the transport of goods and people and urban mobility has for years been at the centre of a debate that revolves around the negative effects that these activities can have on the environment and on quality of life.[25]

[20] Corte di Cassazione 23 July 1955 no 2364, *Rivista giuridica della circolazione e dei trasporti*, 1203 (1955). In literature, compare: G. Mirabelli, 'La locazione', in F. Vassalli ed, *Trattato di diritto civile italiano* (Torino: UTET, 1972), 160; A. Asquini, 'Trasporto (in generale)' *Novissimo digesto italiano* (Torino: UTET, 1973), XIX, 567.

[21] Corte di Cassazione 28 January 1985 no 493, *Rivista giuridica della circolazione e dei trasporti*, 379 (1985).

[22] G. Romanelli, *Profilo del noleggio* (Milano: Giuffrè, 1979), 70.

[23] A. Flamini, 'Noleggio' *Digesto italiano sezione civile* (Torino: UTET, 1995), XII, 132.

[24] F.M. Dominedò, 'Sviluppi della teoria del noleggio' *Rivista del diritto commerciale*, I, 266 (1939).

[25] The EU Smart Cities Information System (SCIS for the years 2014-2017) brings together project developers, cities, institutions, industry and experts from across Europe to exchange data, experience and know-how and to collaborate on the creation of smart cities and an energy-

In this context, in Italy, the Decree of the Ministry of the Environment of 27 March 1998 introduced regulations on sustainable mobility in urban areas, where the protection of atmospheric and environmental conditions is promoted through the rationalisation of vehicular traffic, planning and incentives to use public transport and the promotion of mobility solutions with a lower environmental impact. This decree, together with the obligation to rehabilitate and protect the air quality imposed on regional councils, has promoted alternative and more sustainable forms of mobility such as bicycle sharing and car sharing.

Bicycle sharing is a service whereby a certain number of bicycles are made available to users, which can be picked up and used for travel in historic city centres.[26] Bicycles can only be used by those users who, upon registration, can unlock them by means of a contactless key or card. The service is not, therefore, usable by everyone. Under the provisions of the contract, after use the bicycles can be returned to other stations or to the departure station. In some cities, however, the service is 'free flowing': bicycles can be left anywhere as they are identified with the use of GPS.[27]

Indicated in practice as a rental, this type of use of bicycles (or motorcycles), according to some scholarship, is different from that of other vehicles. In fact, for bicycles and motorcycles, only the full and direct use by the charterer is technically possible. The term 'rental' therefore seems to be used here improperly.[28]

In effect, however, decreto legislativo 30 April 1992 no 285 and subsequent amendments (New Highway Code) to Art 85 concerning rental with driver for transportation of persons, states in the second paragraph that also motorcycles with or without sidecars, tricycles, velocipedes and quadricycles 'may be intended

efficient urban environment. With a focus on smart cities, energy efficiency, transport and mobility and ICT, SCIS showcases solutions in the fields of sustainable building and district development, renewable energy sources for cities, energy efficiency and low-carbon technology applications. Launched with support from the European Commission, SCIS encompasses ongoing and future projects under the CONCERTO initiative, Smart Cities and Communities European Innovation Partnership (SCC EIP), Energy-efficient Buildings Public Private Partnership (EeB PPP) and Smart Cities calls in Horizon 2020.The Smart Cities Information System: collects valuable data and expertise from smart cities demonstration projects and sites and channels them into a comprehensive database to promote replication of projects; presents a thematic overview of projects with a focus on technologies and expertise in fields such as energy-efficient buildings, districts and cities, sustainable energy, geothermal communities, sustainable urban planning, low-carbon cities and zero-energy neighbourhoods; offers an outline of renewable energy sources and low-carbon technologies and examples of their use; establishes best practice by analysing and visualising project results, enabling project developers and cities to learn and replicate; identifies barriers and points out lessons learnt, with the aim of finding better solutions for technology implementation and replication, and policy development; provides recommendations to policy makers on support and policy actions needed to address market gaps.

[26] The use of bicycles was promoted for the first time under legge 19 October 1998 no 366 'Rules for the financing of cycling mobility'. The local authorities, then, over the years have been called to draw up their own network plans for cycling mobility.

[27] Messina case in the announcement of 25 September 2018, available at www.messinaora.it.

[28] E. Spasiano, 'In tema di noleggio di veicoli' *Foro italiano*, I, 948 (1955).

to perform a rental service with driver for the transportation of persons'.[29] The standard should be read in conjunction with Art 47 of the Highway Code, in which these categories are deemed to be vehicles since they are equipped with engines. In this regard, the office of the Undersecretary for Infrastructures and Transport on 11 September 2013 clarified that 'only vehicles equipped with engines may be used to provide rental services with drivers for the transport of persons'.[30] Consequently, more and more frequently, motorcycles are hired with drivers by the hour, day or kilometre, by specialised companies and used for the transport of people or things.[31] Although these vehicles do not provide a supplementary service for public transport, they require an appropriate licence issued by the relevant municipality.[32] The municipality is required to regulate the carrying out of these activities on its territory, in order to reconcile the interest of individual businesses with the public interest.[33] Anyone who, even if authorised, does not comply with the provisions laid down by municipal regulations, incurs the penalties provided for under Art 4-*bis* legge 30 April 1992 no 285.

In addition to bike sharing, we have car sharing and car-pooling services, which also reduce the number of cars circulating in terms of environmental impact.[34] In the first case, a car is hired from a rental company by the hour or day by a person with a driver's licence and must be returned at the end of the stipulated period of use; in the latter case, the car is owned by a private person

[29] The category of velocipedes was inserted in Art 85, para 2, with decreto legge 23 December 2013 no 145, *Gazzetta Ufficiale* 23 December 2013 no 300, coordinated with the legge di conversione 21 February 2014 no 9, regarding 'Urgent measures for the launch of the *Destinazione Italia* plan, for the containment of electricity and gas tariffs, for the internationalisation, development and digitalisation of companies, as well as measures for the construction of public works and EXPO 2015'.

[30] Specifically, Minister Rocco Girlanda stated: 'Pedal tricycles cannot be used to perform rental services with drivers in historic centres, as they cannot be included in the category of motor vehicles referred to in Art 47, para 2, CdS' (Bollettino delle Giunte e delle Commissioni, 11 September 2013).

[31] L. Marfoli, 'Trasporti, ambiente e mobilità sostenibile in Italia' *Rivista giuridica dell'ambiente*, III-IV, 305 (2013).

[32] According to a ruling by Tribunale amministrativo regionale Lazio 27 May 2016 no 6208, *Archivio giuridico circolazioni e sinistri stradali*, VII-VIII, 623 (2016), the municipal regulations on the exercise of public services are required to define the 'requirements and conditions for the issuance of licences for the exercise of taxi services and the authorization for the exercise of rental services with drivers'.

[33] Consiglio di Stato 5 November 2014 no 5476, available at http://www.dirittoegiustizia.it; Consiglio di Stato 6 September 2012 no 4735, available at http://www.dirittodeiservizipubblici.it.

[34] The first manifestation of interest in these forms of sustainable mobility is contained in the Ronchi Decree of 27 March 1998. In the same year, the Ministry of the Environment, in the framework of the Environmental Protection Program, introduced the National Car Sharing Program. At the beginning of the year 2000 a memorandum of understanding was signed between the Ministry and the Municipalities of many Italian cities, establishing the desire to set up a national car sharing circuit and the establishment of a body able to coordinate the project. In December 2000 'the integration and completion of the project for the creation of a coordinated and integrated system of car sharing services was promoted'.

who makes it available for short journeys in the company of other people. In these situations, as well as with bicycle sharing, vehicle circulation appears to be instrumental to the transport of people, which means that the vehicle becomes a natural and non-essential element of the transport contract. Hence the further consequence that, while people who rent the vehicle cannot remain indeterminate (and are identifiable on the basis of the registration made or the agreements signed with the renter), the vehicle on or in which they will travel may, however, not be identified. This is contrary to what happens when renting a vehicle made available for the accomplishment of a journey, in which the vehicle must be at least determinable, while any indication regarding the persons or things for whose transfer the vehicle is rented may be absent.

VI. Rental as a Business Activity

For a long time, scholarship has assimilated rental with a lease contract, also believing that it could be similarly interpreted (Art 1571 Civil Code) in regulatory terms.[35] Considering, however, that leases can concern both real estate and movable property, and rental is only for movable property, some authors have stated that rental 'remains a species of lease'.[36] On this point it was stated that in the letting of movable things it appears essential to acquire the de facto power of the tenant over the thing, and that this power involves possession of the asset, whose licence for use constitutes the subject matter of the obligation assumed by the lessor.

From this point of view, leasing regulations and, in particular, those that deal with the duration of the permanent contract (Art 1574, no 4) apply to those who lease motor vehicles 'without a driver': costs of conservation and ordinary maintenance (Art 1576, para 2, Civil Code); fire of the insured thing (Art 1589, para 2, Civil Code); place to return the thing (Art 1590 Civil Code);[37] prohibition to sublease (Art 1594 Civil Code); effects of the sale of movables not registered in public registers.

On the other hand, the presence of auxiliary drivers provided by the grantor prevents the classification of the rental event as a rental. In this case the renter, in fact, retains availability of the vehicle. Circumstances such as the assumption by the driver of expenses related to fuel, maintenance and storage of the vehicle, or certain peculiarities related to consideration do not assume essential importance for the distinction between the case of the rental and that of the rental of

[35] L.M. Bentivoglio, 'Disciplina giuridica del volo charter nel quadro di una politica nazionale del trasporto aereo', in L.M. Bentivoglio et al, *Trasporto aereo charter e movimento turistico. Atti del congresso internazionale di Taormina 19-21 novembre 1976* (Milano: Giuffrè, 1977), 31.

[36] G. Romanelli and G. Silingardi, 'Noleggio (diritto civile)' *Enciclopedia giuridica* (Roma: Treccani, 1990), XX, 3.

[37] Tribunale amministrativo regionale Lazio-Roma 4 September 2012 no 7516, *Foro amministrativo*, IX, 2742 (2012).

movables.[38] These elements, in fact, only indicative of the configurability of the relationship as a case of rental.[39]

On the basis of what has been said, it is simplistic to state that the rental contract is governed by the rules on rental, and even more so if one thinks of the fact that the renter generally organises the work as a business activity, ie as a stable and organised production activity, carried out with economic criteria (Art 2082 of the Civil Code). In the various sectors of commerce, businesses prefer to lease machinery rather than purchasing it, retaining liquidity and not suffering the consequences of the deterioration of assets. Furthermore, the need to adapt production to market demands justifies the need to innovate contracted goods with increasing speed.

The freedom of persons to regulate economic phenomena (associative or exchange) at their own discretion has certainly been encouraged by globalisation, the Internet and, moreover, by the advent of a process of delegation.[40] From the first point of view, the Uber application ('app') was created as a platform to connect motorists and passengers, thus offering a car transport service that is distinct from traditional public bus services.[41] Uber's breakthrough into the market generated various disputes involving social parties often resulting in jurisdictional litigation.[42] In Italy, for example, consider the 'Milan case'[43] where unfair competition was ascertained pursuant to Art 2598, no 3, Civil Code, and as a result, Uber International BV and others were consequently prohibited from using the app in Italy or in any case from providing a service

> 'that organises, disseminates and promotes, by persons without administrative authorisation and/or a license, the transportation of a third party at the request of the person transported, so not continuous or periodic,

[38] Corte d'Appello di Messina 28 March 1957, *Foro italiano - Repertorio generale annuale*, 59 (1957); Corte d'Appello di Brescia 27 February 1958, *Foro italiano - Repertorio generale annuale*, 8 (1958).

[39] Corte d'Appello di Firenze 28 July 1956, *Giurisprudenza Toscana*, 39 (1957); Corte d'Appello di Bari 28 November 1957, *Repertorio generale annuale della giurisprudenza italiana*, 4 (1958).

[40] G. Palmieri, 'Le grandi riforme del diritto dell'impresa nell'Italia contemporanea' *Banca, borsa e titoli di credito*, 251 (2012).

[41] Uber Technology Inc was created in 2008, with the original name of UberCab and with a modest initial investment (two hundred thousand dollars). It operates in North and South America, Europe, the Middle East, Africa, Asia Pacific. It entered the circle of tech giants (E. Morozov, *I silicon lords* (Torino: Codici Editore, 2016); S. Galloway, *The Four: the Hidden DNA of Amazon, Apple, Facebook and Google* (London: Bantam Press, 2017)).

[42] On the action spaces of city administrators to regulate the activity of the platforms, D.E. Rauch and D. Schleicher, 'Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy' 76 *Ohio State Law Journal*, 901 (2015); S.R. Miller, 'Decentralized, Disruptive and On Demand' 77 *Ohio State Law Journal*, 47 (2016); C. Holloway, 'Uber Unsettled: How Existing Taxicab Regulations Failed Address Uber, Lyft, and Comparable Innovators' 16 *Wake Forest*, 2 (2015).

[43] Tribunale di Milano 25 May 2015, *Diritto dell'informazione e dell'informatica*, 1053 (2015).

on itineraries and according to schedules established from time to time'.

Judges in other Italian cities have made similar pronouncements that of the Milan case.[44] To date the problem has not been solved. In particular, the regulation of rental services with drivers seems to have been deferred.[45]

The autonomy of the parties and the flexibility of the institutions is accompanied by a process of market deregulation in general and, in this case, of rental activity. The lessee has an interest in granting the means of payment (freight) from the perspective of a short or long-term investment. We are faced with a situation that entails the establishment of a series of relationships given the use of labour and capital investment organised by the lessor and the non-occasional development of a productive activity of services destined for the market. We could qualify these as 'internal' relationships: with the charterer, as a user of the rented vehicle (with or without driver) to be used for transportation (on his own account or for third parties) of goods or people; and the 'external' relationships, with the workers (auxiliaries, commander, drivers), with the market. These are all interests that deserve recognition and protection and that combine to give rise to mixed contracts.[46] We cannot however ignore the fact that scholars who have analysed the legal concepts applicable to the different types of rental contracts have based their studies, depending on the specific case and without reaching uniform conclusions, on the theories commonly used to regulate mixed contracts (absorption theory, combination and analogue application).[47]

Considering, in fact, the theory of centralisation, according to which the joint contract must be governed on the basis of the norms of the prevailing contractual

[44] Tribunale di Genova 16 February 2015, *Il Foro italiano*, V, 1845 (2015); Tribunale di Torino 22 March 2017, *Diritto dell'informazione e dell'informatica*, 284 (2017); Tribunale di Roma 7 April 2017, *Il Foro italiano*, VI, 2082 (2017).

[45] M. Midiri, 'Nuove tecnologie e regolazione: il caso Uber' *Rivista trimestrale di diritto e procedura civile*, 1017 (2018); R. Lobianco, 'Servizi di mobilità a contenuto tecnologico nel settore del trasporto di persone con conducente: brevi riflessioni sulla natura giuridica del fenomeno Uber' *Responsabilità civile e previdenza*, 1046 (2018); E. Ferrero, 'Le *smart cities* nell'ordinamento giuridico' *Il Foro amministrativo*, IV, 1267 (2015).

[46] There is a mixed contract when 'the merger of the case causes the distinctive elements of each instrument to be taken as elements of a single instrument subject to the rule of the prevailing cause' (Corte di Cassazione 28 March 2006 no 7074, *Guida al diritto*, 22, 39 (2006). With specific reference to the rental contract as a joint contract: Corte di Cassazione 27 March 2012 no 4921, *Massimario di Giustizia civile*, III, 408 (2012)).

[47] E. Contino, 'Contratti misti, contratti collegati e meritevolezza degli interessi' *Giustizia civile*, 1897 (2001); F. Sangermano, 'La dicotomia contratti misti-contratti collegati: tra elasticità del tipo ed atipicità del contratto' *Rivista del diritto commerciale*, 557 (1996); N. Corbo, 'Tipicità, contratto misto e giurisprudenza: qualche breve riflessione, nota a Trib. Monza 12 novembre 1985' *Giurisprudenza di merito*, 77 (1987); C. Di Nanni, 'Collegamento negoziale e funzione complessa' *Rivista del diritto commerciale*, 279 (1977); A. Cataudella, *La donazione mista*, (Milano: Giuffrè, 1970); G.B. Ferri, *Causa e tipo nella teoria del negozio giuridico* (Milano: Giuffrè, 1969), 402; F. Di Sabato, 'Unità e pluralità di negozi (Contributo alla dottrina del collegamento negoziale)' *Rivista di diritto civile*, I, 412, (1959); T. Ascarelli, 'Contratto misto, negozio indiretto, *negotium mixtum cum donatione*' *Rivista del diritto commerciale*, I, 464 (1930).

scheme, scholarship has considered that while typical lease rules should apply to rental contracts for the transport of things requested without a driver, transport regulations must instead be applied to the rental of vehicles for the transport of things in which the renter is also the carrier of the vehicle.[48]

Applying the theory that a mixed contract should be governed by the combination of the rules dictated for the individual typical models of which it is comprised, we arrive at the conclusion that a rental contract with a driver for the transport of persons would be both a lease and the performance of work.[49]

On the other hand, invoking the theory of analogical application, according to Art 12 of the preliminary provisions of the Civil Code, if rental for the transportation of people is carried out without a driver, legislation concerning leases will apply.[50]

Due to adaptations and interpretations that tend to protect different interests, the types of rental contracts emphasise and entrust the interpreter with adapting to the applicable discipline. In order to guarantee unique solutions, it seems essential to introduce legislation on leasing land vehicles, like that which already exists for the chartering of a ship or aircraft. Increasingly, socially typed contracts are now being transfused into law by the legislator. In the global system characterised by 'liquidity' and 'variability', certainly the arrangement of a standardised formal discipline may be of practical use in providing secure relationships.[51]

[48] N. Distaso, *I contratti in generale* (Torino: UTET, 1981), 1116; R. Scognamiglio, 'Contratto in generale', in A. Scialoja and G. Branca eds, *Commentario al codice civile* (Bologna-Roma: Zanichelli, 1970), 47.

[49] R. Sacco, 'Autonomia contrattuale e tipi' *Rivista trimestrale di diritto e procedura civile*, 790 (1966); L. Cariota Ferrara, *Il negozio giuridico nel diritto privato italiano* (1950) (Napoli: Edizioni Scientifiche Italiane, 2011), 219; G. De Gennaro, *I contratti misti. Delimitazioni, classificazioni e disciplina*. Negotia mixta cum donatione (Padova: CEDAM, 1934).

[50] S. Cascio and C. Argiroffi, 'Contratti misti e contratti collegati' *Enciclopedia giuridica* (Roma: Treccani, 1988), IX, 4.

[51] See my article 'Le tipologie del noleggio. Ipotesi di un quadro sistematico' *Nuova giurisprudenza civile commentata*, 92 (2018).

Essays

Presidentialism and Parliamentary System in Latin America. Considerations on a Balance to Be Defined

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Abstract

The balance among the different types of presidential systems in Latin American countries is an issue of current interest. These Latin American experiences do not respond to the same logic that influences the different forms of government in other systems. The political, economic and social conditions of these countries are still decisive in the search for the separation of constitutional powers, so maintaining the centrality of the president. Therefore, the last constitutional amendments failed to successfully consolidate the democratic transitions, remodelling hyper-presidentialism in parliamentary or semi-presidential systems.

I. Introduction

An intense debate has been going on about the evolutionary tendencies of the Latin American systems, rooted in the contrast between presidentialism and parliamentarism,[1] which has been recently addressed by the Inter-American Court of Human Rights.[2]

Venezuela has been condemned for violating the right to political

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[1] There is a wide range literature on this subject matter. Among others G.L. Negretto, 'La reforma del presidencialismo en América Latina hacia un modelo híbrido' *Revista Uruguaya de Ciencia Política*, 131-151 (2018); C.M. Villabella Armengol, 'Dilema presidencialismo vs. parlamentarismo en América. Apuntes sobre la realidada en el siglo XXI' *Estudios constitucionales*, 15-37 (2018); D. Nohlen, 'Presidencialismo *versus* parlamentarismo. Dos enfoques contrapuestos' *Revista Latinoamericana de Política Comparada*, 61-76 (2013); J. Lanzaro ed, *Presidencialismo y parlamentarismo. América Latina y Europa meridional: Argentina, Brasil, Chile, España, Italia, México, Portugal, Uruguay* (Madrid: Centro de Estudios Políticos y Constitucionales, 2012); J.J. Orozco Henríquez, 'Tendencias recientes en los sistemas presidenciales latino americanos' *Boletín Mexicano de Derecho Comparado*, 793-85 (2008); M.D. Serrafero, 'Presidencialismo y parlamentarismo en América Latina: un debate abierto' *Revista Mexicana de Sociología,* 165-186 (1998); D. Nohlen, 'Presidencialismo vs. parlamentarismo en América Latina. Notas sobre el debate actual desde una perspectiva comparada' *Revista de Estudios Políticos*, 43-54 (1991); D. Nohlen and M. Fernández eds, *Presidencialismo* versus *Parlamentarismo: América Latina* (Caracas: Nueva Sociedad, 1991).

[2] Corte Interamericana de Derechos Humanos 8 February 2018, *San Miguel Sosa y otras* v *Venezuela*, available at www.corteidh.or (last visited 12 March 2019).

participation,[3] so highlighting the persistent difference among the prerogatives of the various constitutional institutions.

The referendum proposal, aimed at revoking the President-in-office, is considered by senior state officials as a clear manifestation of political dissent against the executive branch and is based on an illegitimate dismissal.[4]

This recent event invites us to reflect upon the current balance among political government institutions in Venezuela and, generally, in presidential systems in Latin America. This issue has become even more relevant today after the recent Brazilian events. After all, for a long time the constitutional problems of Latin American legal systems have been debated even by the Italian doctrine, as shown by the so many meetings organized for almost a decade by the Italian Section of the Instituto Iberoamericano de Derecho Constitucional.[5]

The centrality of the presidency is determined by political, economic and social conditions, which not only accompanied the birth of the legal systems, object of this study, but which are still significant in the search for the separation of constitutional powers. The Latin American experiences do not respond to the same logic that influences other types of government, defines their real nature, and often contributes to the democratic consolidation of their legal systems.

This phenomenon has clear historical roots. These systems obtained their independence between 1811 and 1836; all the new-born States made reference

[3] Art 23 (Right to Participate in Government) of the American Convention On Human Rights: 'Every citizen shall enjoy the following rights and opportunities: a) to take part in the conduct of public affairs, directly or through freely chosen representatives; b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c) to have access, under general conditions of equality, to the public service of his country', available at www.oas.org (last visited 12 March 2019).

[4] In this judicial case, the appellants, according to the Court, were civil servants illegitimately fired, since they had signed a petition calling for a referendum to remove then-President Hugo Chavez from office. The reasons given by the members of the government to early terminate the contract of employment, due to the need to reduce costs, were judged unfounded. The Court concluded that the government had acted in abuse of power, also considering that there was a document prepared by the National Electoral Council listing the names of those who had signed a petition. According to the Court, the government did not give any detailed and precise explanation of the reasons for its decision. In these types of cases, the simple evocation of convenience or reorganization is not enough, without giving further explanations; thus the weakness of its reasons reinforces the verisimilitude of the contradictory evidences. For this reason, the Court concluded that the termination of the contract was a form of deviation from power, using this clause as a veil of legality to hide its real motive or real purpose, that is retaliation, to justify a legitimate political power to sign a petition for a referendum to revoke the mandate of the President. Cf. N. Carrillo-Santarelli, 'La responsabilidad de Venezuela por discriminar y perseguir ejercicios legítimos de participación política en el caso Sosa y otras contra Venezuela' *Diritto Pubblico Comparato ed Europeo* (*DPCE on line)*, 792-793 (2018).

[5] Instituto Iberoamericano de Derecho Constitucional is available at https://tinyurl.com/y5u9ktk8 (last visited 28 May 2019). During the 14th Congreso Iberoamericano de Derecho Constitucional, scheduled on 21, 22 and 23 May 2019 in Buenos Aires, the Italian Section debated the theme of the Constitutional Justice, strongly connected to the protection of fundamental rights and the forms of government.

to the American model since then, adopting the presidential system of government. However, while the US system is the 'pure' presidential system, the system adopted by Latin American States has shown some peculiarities right from the start that have changed the reference model of the presidential system and of the executive power, with the inevitable weakening of the role of the legislative branch.[6]

The imbalance of constitutional power in favour of the President of the Republic has favoured, for about a century and a half, authoritarian forms of government, leading to dictatorships.[7] In 1975 Colombia and Venezuela alone were governed by elected leaders, while all the other Latin American Countries were ruled by dictators. The Argentine general election of 1983 kick-started new constitutional reform processes which led Brazil (1988), Colombia (1991), Paraguay (1992), Peru (1993), Ecuador (1998), and Venezuela (1999)[8] to promulgate new constitutions. This process of constitutional reforms has continued in the new drafted Constitutions of Ecuador (2008), Bolivia (2009) and Dominican Republic (2010), while Venezuela is currently rewriting the Constitution.

There is no doubt that since the end of the last century the Latin American countries have been the protagonists of a transitional phase focused on the strengthening of human rights and on the affirmation of the essential elements of contemporary constitutionalism.[9]

Since then the growing, although not complete, reduction of the difference between the formal nature and the effectiveness of the Constitutions has accompanied the process of democratic consolidation, that still exists. This process

[6] M. Duverger, *Institutions politiques et droit constitutionnel* (Paris: Presses Universitaires de France, 1988), 13.

[7] L. Incisa Di Camerana, *I Caudillos* (Milano: Corbaccio, 1994).

[8] There is a wide range literature on this subject matter. Among others: G. Bland, 'Considering Local Democratic Transition in Latin America' *Journal of Politics in Latin America*, 65-98 (2011); J. Vargas Cullell, 'Lacalidad de la democracia y el studio comparado de la democratización' *Revista Latinoamericana de Política Comparada*, 67-94 (2011); J.C. Calleros-Alarcón, *The Unfinished Transition to Democracy in Latin America* (New York: Routlegde, 2008); L. Mezzetti, *Teoria e prassi delle transizioni costituzionali e del consolidamento democratico* (Padova: CEDAM, 2003), 585-756; Id, *Transiciones constitucionales y consolidaciòn de la democracia a albores del siglo XXI* (Bogotà: Universidad Externado de Colombia, 2003); L. Garzón and E. Valdés, 'Constitución y Democracia en América Latina' *Anuário de Derecho Constitucional Latino americano*, 55-80 (2000); L. Anderson, *Transitions to Democracy* (New York: Columbia University Press, 1999); L. Diamond, *Developing Democracy: Towards Consolidation* (London: The Jhons Hopkins University Press, Baltimore, 1999); J. Vargas Cullell, 'Lacalidad de la democracia y el studio comparado de la democratización' *Revista Latinoamericana de Política Comparada*, 67-94 (2011).

[9] C. Villabella Armengol, 'El Derecho Constitucional en Latinoamérica. Un cambio de paradigma', in R. Viciano Pastor ed, *Estudios sobre un nuevo constitucionalismo latino americano* (Madrid: Tirant lo Blanch, 2014), 51-77; C. Villabella Armengol, 'El constitucionalismo contemporáneo de América Latina. Breve estudio comparado' *Boletín Mexicano de Derecho Comparado*, 943-979 (2017); R. Viciano Pastor and R. Martínez Dalmau, 'El nuevo constitucionalismo latinoamericano: fundamentos para una construcción doctrinal' 9 *Revista General de Derecho Público Comparado*, 1-24 (2011); Id, 'Los procesos constituyentes latinoamericanos y el nuevo paradigma constitucional' *IUS*, 7-29 (2010).

finds its central point in the anomalous balance in the relationships among the constitutional bodies, and consequently in a form of government that bears little or no resemblance to the American presidential system. Indeed, the American model, which has over time shown a certain balance of powers among the branches of government, thus preventing the excessive power of the President, has only had a very slight or superficial impact on Latin American systems, where the presidential form of government has been indeed implemented with various changes.

II. 'Pure' Presidentialism and Its Transposition in Latin America

It is well-known that a presidential system of government, in its original conception, is characterized by the concentration of power in the hands of the President, who reflects a direct expression of the will of the people, and by the separation of powers, guaranteed by the non-existence of a trust relationship and of the presidential power to dissolve Parliament.

So all legislative powers shall be vested in the Congress, while the power of the executive branch is vested in the President, who is the Head of State, in a system with a strict separation of powers and which has to pursue the principle of the balance of power. Therefore, the system of 'checks and balances' guarantees that each branch has the power to check and influence each others powers. Therefore, the mutual interference between Congress and the President is different, and it should seek a compromise.[10] This element cannot *generally* be understood from the systems under study.

The parliament approves funds to allocate to the implementation of the President's policy, through the approval of the budget and of the most important spending bills (the so-called stock exchange). Moreover, parliament exercises its 'power of control' through the Permanent Commission and the Commission of Inquiry.[11] Specific powers of control are assigned exclusively to the Senate, which must give its consent to the presidential appointment of federal officials, and it requires that the President shall have power to make treaties with the consent of the Senate, provided two thirds of the Senators present concur.

Finally, the Chamber of Deputies (or House of Representatives) has the power to impeach the President or all executive officers,[12] although this rarely occurs in

[10] Cf M. Comba, 'Gli Stati Uniti d'America', in P. Carozza et al, *Diritto costituzionale comparato* (Roma-Bari: Editori Laterza, 2009), 138-144; M. Volpi, *Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo* (Torino: Giappichelli, 2004), 142-149.

[11] Therefore, *Permanent Commissions frequently hold hearings, also to take account of all interests involved in public policy; on the contrary, both public employees and ordinary citizens might be compelled to give evidence before the Commission of Inquiry*

[12] Impeachment for 'Treason, Bribery, or other high Crimes and Misdemeanors' (US Constitution - Art 2 section 4). In this case, the Senate has the sole power to try all impeachments, and in the event there is a two-thirds vote of the Senate to convict, they shall be removed from

South America, except for the recent events in Brazil. On the other hand, the President has only the power to support congressional activities, but does not enjoy legislative power, which by contrast have Latin American presidents.[13]

The veto power of the President instead assumes a special significance. An act does not enter into force without having been previously approved by the President, since overriding a presidential veto[14] of a bill requires a two thirds supermajority vote of the members of the Congress. On the contrary the Head of State has the power, not envisaged by the constitutional law, to issue executive orders, which have the force and effect of law, but only if delegated by the Congress or in times of crisis (especially during wartime), which differs from the Latin American systems where the President exercises legislative power.

1. Institutional Dynamics

The dual nature of the government, together with the essential nature of the Constitution, especially concerning the roles and powers of the President, ensured that Constitutions have evolved over time, adapting to new circumstances.

At the beginning of the last century the central role of the Congress was so well established that it was defined as 'Congressional Government'. Then a contrasting phase of 'Presidential Government'[15] started, as result of the development of the 'interventionist state' in social and economic sector in the 1930s, following the New Deal policy.[16]

However, another important dynamic has been prevailing since the end of the twentieth century, which strongly affects the functions of the form of government. It is the so-called divided government, when the Presidents have to cope with the opposition party which controls one or both Houses of Congress,

Office.

[13] However, under the *Budget and Accounting Act* of *1921,* he is required to submit a national budget each year. More generally, he shall submit to Congress with his annual budget message of the State of the Union and he shall submit his consolidated federal budget. The President's budget shall also contain budgetary proposals for the legislative and judicial branches. These estimates and proposals are developed by the legislative and judicial branches by independent agencies and government-sponsored enterprises.

[14] If the President does not sign the bill after ten days, it shall become law automatically, unless the President does not return the bill to Congress (for reasons of legitimacy or merit), within a ten-day period, because Congress is not in session. In this case the bill shall not become law (pocket veto). If the President vetoes a bill, the Congress may override his veto by passing the bill again in each chamber with at least two-thirds of each body voting in favour. Once the President's veto is overridden by both Houses, it becomes a law.

[15] President Roosevelt strongly supported it, and then it led to the 'imperial presidency' of Richard Nixon.

[16] It has caused the progressive strengthening of the federal government with respect to the Member States, the loss of the monopoly of the legislative power of Congress and the great growth of the federal public administration, as well as the growing role of the foreign policy, which has gradually become the prerogative of the President and of the executive branch (and this has been determined by the growing role of the United States in world politics).

and this weakens the executive branch.[17]

This flexibility, which is typical of the presidential system of government is not found, however, in the Latin American systems, which are mainly related to the dominance of presidentialism or hyper-presidentialism.

These are systems that clearly mitigate the function of control and counterbalance of the so-called 'pure' model, so neither the Parliament nor the judiciary have the power to control the presidential prerogatives.[18]

Indeed, in some systems, the President has the power to dissolve the Parliament before a general election (as in Uruguay, Peru, Venezuela and Chile) and has also important legislative powers. These are the legislative initiative power and the decree power, as well as the veto power, which can be overridden by an absolute majority of the legislature (Brazil and Colombia) or, in some cases, by the two-thirds majority (Argentina and Chile). Using his veto power, which is a reactive instrument, the President can stop any attempt to change any existing law. On the contrary, using his decree power, which is the best example of a proactive law-making power, he can promote significant legal changes. In this case some Constitutions delegate legislative power to the President.[19]

Moreover, even when the parliamentary majority has the power to repeal a decree, the President still plays a key role. First of all, the presidential decrees, in contrast to the bills passed by the Congress, immediately have the force of law. Secondly, the President can actually circumvent the parliamentary agenda by presenting numerous decrees and determining the priority of the decrees to be examined by the parliament. This has also made the legislative process increasingly difficult and, consequently, it has strengthened the presidential power over the normative function.

Therefore, what occurs between executive and legislature is not a system of 'checks and balances', as, in the in the event of tension between the two constitutional branches, the balance of power moves towards the President.

Thus each branch usually survives in office independently of one another, although the parliament is clearly subordinated to the hyper-presidential system, also because the executive branch continuously resorts to its decree power.

However the authoritarian component has diminished over time, at least on a formal level, because of the greater, although not yet decisive, power conferred on parliaments, which actually have been paying much more attention

[17] It is the so-called divided government, a term used to refer to the situation in which the President is forced to support his policies with individual parliamentary members and to make policy concessions, such as favours and patronage. Cf C.O. Jones, 'It Separated Presidency: Making It Work In Contemporary Politics', in A. King ed, *The New American Political System* (Washington: American Enterprise Institute, 1990), 3.

[18] M.D. Serrafero, 'Precidencialismo y Reforma Politica en América Latina' *Revista del Centro de Estudios Constitucionales*, 207 (1991).

[19] In Argentina, Brazil and Colombia, Presidents can issue decrees that immediately have the force of law. L. Mezzetti, 'L'America Latina', in P. Carozza et al, n 10 above, 479.

to widespread economic interests and to the pressure from new politicians.[20]

III. Constitutional Reforms and Trends in the Parliamentary Systems of Andean Countries

According to the doctrine, some systems seems to be 'hybrid' systems, which combine some features of the parliamentary system,[21] or even more of semi-presidentialism, thus favouring a potential change of the form of government. This is the case of the Andean countries,[22] particularly of Peru, Venezuela and Argentina.

The Constitutions of these legal systems have been recently amended, mainly with regard to the relations between the legislative and executive branches, but also through the creation of new bodies and institutions aimed at controlling public power and at a constitutional protection of human rights. The remedies or 'corrective' measures, introduced to reorganize the form of government, relates first of all to the motion of no confidence, in most cases even against individual members, and to the fiduciary relationship,[23] to which further fundamental duties are added, depending on the case.

The Constitution of Peru amended in 1993, although confirming the main features of the 1979 Constitution, establishes cooperation among the branches, as foreseen in Title IV Chapter VI, with typical features of parliamentarianism. In this sense, not only the motion of no confidence, even individual, and the fiduciary relationship are emblematic, but also the counter-signature (*refrendaciòn ministerial*).

The President has a wide range of powers, and, to exercise them, Art 12024 requires the ministerial counter-signature (*refrendaciòn ministerial*), and in its absence leads to acts being declared null and void. This power basically serves two purposes: to promote consultation between the President and Ministers and to maintain powerful checks on the President himself. This control can either concern the mere formal regularity of the act or be the expression of a complementary measure in the formation process.

[20] A. Perez Liñán, *Presidential Impeachment and New Political Instability in Latin American* (New York: Cambridge University Press, 2007), 202.

[21] This is the form of government of the Italian system, which, however shows 'a weak rationalization', with only limited interventions of the constitutional law being envisaged to provide a stable trust relationship and the capacity of political leadership of the government.

[22] E. Rozo Acuña, *Il costituzionalismo in vigore nei Paesi dell'America Latina* (Torino: Giappichelli, 2012), 399; M. Cameron, 'El Estado de la Democracia en los Andes' *Revista de Ciencia Política*, 5-20 (2010).

[23] This institution, for example, is not expressly provided by the Italian Constitution. Indeed, in the Italian system the constitutional ratio of the issue of trust derives from the regulation of the trust relationship, provided by the Art 94 of the Constitution.

[24] It is one of the oldest institutions of Peruvian Constitutional Law borrowed from parliamentarianism.

Moreover, in order to avoid responsibility for presidential acts, ministers must try, at the very least, to limit any arbitrary presidential decisions, thus appearing as 'presidential excess moderators'.[25] And this is the only function attributed to them since, if they refuse to countersign an act, they might provoke a ministerial crisis with their consequent resignation from office or, even worse, they could be removed by the President.[26]

With regard to the vote of no confidence and the matter involving trust, the disapproval of a ministerial initiative does not carry resignation with it, unless the matter involving trust has been placed on its approval. On the contrary vote of no confidence by Congress forces the prime minister, with whom there is a fiduciary relationship, to resign with a subsequent government crisis.[27] In this case it is interesting to note the fact that within thirty days of the formation of a new government, the new prime minister takes the floor before the Congress to demand a vote of confidence after making a policy statement.[28] This leads us to believe that the fiduciary relationship (between the prime minister and Congress) is presumed, in line with almost all parliamentary and semi-presidential systems.

On the contrary, the President of the Republic has the power to dissolve Congress, according to the 'checks and balances' system (Art 134 of the Constitution), which is a typical presidential prerogative of pure presidentialism, if Congress has passed a no-confidence motion twice or has moved a no confidence motion against an individual minister.[29]

Even the 1999 Constitution of the Bolivarian Republic of Venezuela regulates the no confidence motion against an individual minister; although in this system it is particularly interesting the figure of the Executive Vice-President, which brings this *experience* closer to semi-presidentialism.[30]

This is a figure, which differs from the President, who performs a number of functions, pursuant to Art 239 of the Constitution,[31] such as, among others,

[25] M. Rubio Correa, *Estudio de la Constitución Politica de 1993* (Lima: Fondo Editorial, 1999), 239.

[26] He is responsible for the appointment and dismissal of the Prime Minister and the Ministers.

[27] E. Rozo Acuña, n 22 above, 400-401.

[28] Arts 130 and 133 of the Constitution.

[29] Never used. E. Carpio Marcos, 'Articulo 134', in W. Gutiérrez Camacho ed, *La Constitución Comentada. Análisis artícolo por artícolo* (Lima: Gaceta Juridica, 2005), 451.

[30] Indeed, even before the current Constitution, many reforms were presented, which were based on the semi-presidential system and which consisted of a Vice-President too. See, S. Leal Wilhelm, 'Los ministros en el régimen presidencial venezolano' *Fronesis*, 52 (2012); P.E. Tejera, 'La figura del Primer Ministro' *Revista de la Facultad de Derecho*, 188-189 (1993); R.A. Garrido, 'Ventajas y dificultades del sistema presidencialista en Venezuela' *Revista del Centro de Estudios Constitucionales*, 510 (2011).

[31] He presides over the Council of Ministers and coordinates the relations between the executive branch and the National Assembly, he also proposes the appointment and dismissal of ministers to the President of the Republic and he exercises such powers as may be delegated to him by the President.

presiding over the Council of Ministers with the authorization of the President of the Republic. This prerogative grants, on a formal level, the Executive Vice-President the same powers as the Prime Minister, considering that he is politically answerable to the National Assembly, since a vote of no confidence against the Executive Vice President, passed by a two thirds majority in the National Assembly, leads to his dismissal.[32] Even in this case, just as in Peru, the presumed mutual trust between Congress and Executive Vice President is noteworthy. Another element borrowed by the semi-presidentialist system is the right to early dissolve the National Assembly.[33]

The Venezuelan experience is similar to that of Argentine,[34] where the no confidence motion against an individual minister is not mentioned, but an office similar to that of the Executive Vice President is in place.

This is the *Jefe de Gabinete*[35] (Prime Minister) who supports the presidential office, coordinates the work of the executive branch and *presides over the Cabinet*, with consent of the President.

Even in this context, a figure has been chosen which acts as an intermediary between Congress and whoever is politically responsible to it. Actually, during the *Consejo para la Consolidación para la Democracia* the propensity towards a semi-presidential system was already clear.[36] The *Jefe de Cabinete* is indeed one of the most relevant institutional office,[37] since he has the power to sign presidential orders and a fiduciary duty to the Congress, albeit presumed, just like in Venezuela and Peru.

Colombia, Bolivia and Ecuador are less articulated systems, nevertheless with some interest. The purpose of the Congress to legitimize checks over the Executive branch was in fact mainly promulgated by the Colombian Constitution of 1991.

In this context neither the question of fiduciary duty nor any counterbalancing

[32] Art 240 of the Constitution.

[33] After three no-confidence motions against the Vice President. M. Criado De Diego, 'La forma de gobierno en el nuevo constitucionalismo andino: innovaciones y problemáticas', in H. Cairo Carou et al eds, *América Latina: La autonomía de una región* (Madrid: Trama, 2012), 631.

[34] Some features of this doctrine also show a hypothesis of semi-presidentialism even in this experience. R. Dromi and E. Menem, *La Constitución Reformada* (Buenos Aires: Ciudad Argentina, 1994), 352; N.P. Sagüés, *La Constitución bajo tension* (Mexico: Instituto de Estudios Constitucionales del Estado de Querétaro, 2016), 149; M.A. López Alfonsín and A. Schnitmann, 'Semipresidencialismo e Hiperpresidencialismo en la Reforma Constitutional Argentina de 1994' *Florianópolis*, 53 (2016).

[35] R. Haro, 'El rol institucional del Jefe de Gabinete de Ministros en el Presidencialismo argentino', in J.F. Palomino Manchego and J.C. Remotti Carbonell eds, *Derechos Humanos y Constitución en Iberoamérica* (Lima: Grijley, 2002), 103.

[36] See, Consejo para la Consolidación de la Democracia, *Reforma constitucional dictamen preliminar del Consejo para la Consolidación de la Democracia* (Buenos Aires: Eudeba, 1987), 103; A. García Lema, *La reforma por dentro. La difícil construcción del consenso constitucional* (Buenos Aires: Planeta, 1994), 170; R.R. Alfonsín, *Memoria politica: Transición a la democracia y derechos humanos* (Argentina: Fondo de Cultura Económica, 2013), 234.

[37] C. Gutiérrez Casas, 'Relación entre los poderes legislativo y ejecutivo en los distintos sistemas políticos' *Heurística jurídica*, 94 (2016).

power by the Chairman, who has the power to early dissolve the Congress,[38] as in Peru and Venezuela, was provided. On the contrary, the no confidence motion is significant, as in Bolivia, but only against an individual minister; it is subjected to a particularly strict discipline, since it can be proposed even though, once the session is summoned, the ministers are not present without justifiable cause.

This differs from Ecuador where checks on the Executive are carried out through the impeachment proceedings of both the President and the Vice-President; this impeachment process is quite complex and it is counterbalanced, in terms of balance of power, by the president's power to early dissolve the National Assembly.[39]

Moreover, the concurrence of these two prerogatives, as established by the Constitution, in this experience may even more clearly determine the typical tendency of the relationship between the Executive and the Parliament to hinder each other in the systems being examined, thus clearly restricting the efficiency of the form of government. In fact the Constitution provides that in both cases, that is, after the dismissal of the President or the dissolution of the National Assembly, the people may vote for the election of both. Therefore, logically speaking, the National Assembly tends not to remove the President who tends not to dissolve the Assembly; in this perspective both tend to safeguard their own mandate.

IV. The Deep Difference Between the Formal Data and the Evolutionary Context

Starting from the factual experiences, the detailed analysis of the experiences taken into account shows the limits of the aforementioned evolutionary trends. These limits are still linked to the so-called caudillism,[40] to the congenital weakness of political parties and to the irrelevance of the electoral system of the legislative *branch,* which, although proportional in most cases, does not determine the role of Parliament.[41]

In Peru, for example, the system, as has been reformed, must be assessed especially in light of the election results. If the president retains a parliamentary majority, the parliamentary prerogatives will be further more restricted. Therefore, there is a genuine possibility that the instruments of control over the executive

[38] E. Rozo Acuña, n 22 above, 404.

[39] ibid 408.

[40] A term coined during the independence struggle in northern Latin America, which was used to describe the head of irregular forces who ruled a politically distinct territory (caudillo). During the following two centuries, this term was referred to many Latin American realities, where a strong relationship emerged between military and political forces.

[41] See F. Tuesta Soldevilla, 'Sistemas electorales en América', available at https://tinyurl.com/y3gabymq (last visited 28 May 2019).

branch are weaker,[42] just as the mechanisms of parliamentary government, aimed at limiting presidential power, might be bent in order to support the government majority. But the situation does not change much in the opposite case, that is when the President does not retain a stable majority in parliament, as in the case of the political events of the past fifteen years, since the Parliament has never held such a strength of power as to lead to a paralysis of the system.[43]

Therefore, even in this second case, the Parliament exercises great self-restraint. It is sufficient to underline that, although there is a greater use of the presidential power of observation[44] (Art 108 of the Constitution), the Parliament tends to pass a new bill rather than to provoke a direct confrontation with the President himself; just as the impeachment power (pursuant to the provisions of Arts 99 and 100 of the Constitution) has never been invoked against Presidents in power.

Moreover, the power of impeachment has effectively been applied as a tool to oversee the work of the executive branch, still regarding it as a political instrument against the governmental system.

A similar perception has been observed in Brazil as well, where in 2016 the impeachment of President Dilma Rousseff has had many effects on the young Brazilian democracy. This event was in fact interpreted by some as a real *coup d'état* and the first event of the many others that have paved the way for the election of Jair Bolsonaro. The widespread accusation made up for the absence of crimes of personal responsibility with judgements of a political nature, and of having therefore distanced this institution from its original function of ensuring a balance of powers,[45] has therefore fuelled a broad international interest. This debate has highlighted the differences between the predictions regarding the aims of the 'personal responsibility crimes' and the current parliamentarian trends in the relationship between executive and legislative power, where the only solutions,

[42] J.E. Cavero Cárdenas, 'Notas sobre la disfuncionalidad del Régimen Presidencial en el Perú. Reflexiones en torno a la posibilidad de instaurar un Régimen Parlamentario' *Revista del Foro Constitucional Iberoamericano*, 142 (2005).

[43] M. Rubio Correa, '25 años de Estado peruano: perspectiva social y constitucional', in J. Abugáttas et al eds, *Estado y Sociedad: Relaciones peligrosas* (Lima: DESCO, 1990), 43-80; M.Á. González, *El Perúbajo Fujimori: alumbramiento, auge y o caso de una dictadura peruana* (Madrid: Universidad Complutense de Madrid, 2004), 61.

[44] The bill, voted and passed by the Congress, is then signed by the Chairman of the Congress and finally referred to the President of the Republic for enactment within a fifteen days period. The President of the Republic shall promulgate the law and order its publication or reject it. If the President of the Republic has observations (*observaciónes*) to share regarding the whole or any part of the law passed by the Congress, he shall submit them to the Legislature within fifteen days. Once the law has been reconsidered by Congress, which enacts the law according to the President's observations (*reconsideración*).

[45] I. Jinkings, 'O golpe que tem vergonha de ser chama do golpe' , in Id et al eds, *Porque gritamo sao golpe? Para entender o impeachment e a crise politica no Brasil* (São Paulo: Boitempo Editorial, 2016), 12.

envisaged so far, seem to support broader procedural protections[46] for the President.

The obvious assumption is that the tendency towards a parliamentary system concerning the relationship between the executive branch and the Congress is further strengthened by the use of impeachment as a political tool. Moreover, the performance of presidentialism, which saw its start in Latin America as a result of the democratic transitions of the last century, confirms the fears linked to a 'distorted use' of this tool.

V. The Problems of Semi-Presidentialism and the Crisis of the Systems

Very important anomalies may be also detected in the semi-presidential evolutionary tendencies of Venezuela and Argentina, although there are conditions for a minimum definition of semi-presidentialism. That is the dual structure of the executive branch and the *fiduciary relationship* between the National Assembly and the Executive Vice President in Venezuela and between the National Assembly and the *Jefe de Gabinete* in Argentina.

In any case, neither can the Executive Vice President nor the *Jefe de Gabinete* be considered the 'second head of the eagle', that is of the executive branch, according to *Duverger's* juridical thinking.[47]

They are indeed particularly weak figures, being more comparable to the figure of the Vice President, according to the presidential model, and so entirely depending on the President, who appoints and revokes these two institutional figures in both systems. The executive branch is unipersonal.[48] Moreover, in such circumstances, the typical French constitutional praxis, which appoints the leader of the political party holding a parliamentary majority as prime minister, cannot be regarded as necessarily consolidated.

After all, there has only been one case of cohabitation[49] in Argentina, that has

[46] J. Paraffini, 'Il presidenzialismo brasiliano alla prova delle inchieste e della crisi del bilancio statale: osservazioni sull'impeachment e contro Dilma Rousseff' *DPCE on line*, 557 (2017).

[47] M. Duverger, 'Le concept de régime semipresidentiel', in Id, *Les régimes semi-présidentiels* (Paris: PUF, 1986).

[48] D. Valadés, 'El gobierno de gabinete y el neopresidencialismo latinoamericano' *Anales de la Academia Nacional de Derecho y Ciencias Sociales de Córdoba*, 18 (2003); M.D. Serrafero, 'Presidencialismo argentino: ¿atenuado o reforzado?' *Araucaria*, 138 (1999); M. Llanos and D. Nolte, 'The Many Faces of Latin American Presidentialism' *GIGA Focus-Latin America*, 1 (2016); R. A. Garrido, n 30 above, 526.

[49] This is the case of the *Jefe de Gabinete* Rodolfo Terragno (1999-2000), appointed by President Fernando de la Rúa, who, although from the same party of the President (UCR), supported a different trend, so that it was removed by the President himself. See, S. Cruz Barbosa, *Evaluando las instituciones políticas de gobierno de coordinación nacional en Argentina: el rol del Jefe de Gabinete de Ministros en la Argentina pos reforma. Un análisis desde la Ciencia Política, instituciones políticas, El Fortalecimiento del Alto Gobierno para el Diseño, Conducción y Evaluación de Políticas Públicas* (Caracas: CLAD, 2010), 5; A.R. Dalla Vía, 'Ensayo sobre la

been 'weak'. The Argentine system also lacks of one of the main features of semi-presidentialism,[50] that is the President's power to early dissolve the National Assembly. So far no no-confidence motion *against* a *Jefe de Gabinete*[51] has ever been presented in this system. A *Jefe de Gabinete* emerges from among the leaders of the President's political *party*, without representing the coalition governments supported by the Presidents,[52] as it is evident in Venezuela

In fact, the Venezuela's system is more affected by politics of non-recognition given to opposition parties, while it is actually necessary for the democratic development of the system, which is still trapped in the contrast amigo-enemigo (friend-enemy),[53] encouraged by Chávez and followed on by Maduro. Indeed, Vice-Presidents have always been members of the same party of the President, primarily to provide a successor to the President.[54]

Another element to be considered is that the dynamics of semi-presidential systems should be read also in light of the Constitutional Reform 2008 of the French political system, taken as a reference model by the Argentine and Venezuelan systems. This Reform, aimed at rebalancing the separation of powers, strengthening the role of parliament, with the aim of including the French experience into the trend that has seen the so-called semi-presidential systems or prevalent parliamentary systems[55] dominate for some time.

This element, however, is not found in the cases studied, since the constitutional amendments have not affected the role of the legislative branch nor limited the President's legislative powers. On the contrary it should be remembered that the French Presidents do not hold regulatory power, unless they exercise it indirectly by means of the parliamentary majority of their political party. The parliamentary or semi-presidential systems of the presidential system archetypes of Latin America seem theoretically possible, but similar hypotheses cannot be applied. The constitutional amendments have been unable to determine

situación actual del hiperpresidencialismo' *Revista de la Facultad de Ciencias Jurídicas y Sociales*, 162-187 (2014).

[50] See, A.M. Orihuela, *Constitución de la Nación Argentina Comentada* (Buenos Aires: Corte Suprema de Justicia de la Nación, 2008), 179; L. Sciannella, 'Recenti tendenze evolutive nella forma di governo argentina: dal semipresidenzialismo apparente alla presidenzializzazione dell'Esecutivo', in A. Di Giovine and A. Mastromarino, *La presidenzializzazione degli esecutivi nelle democrazie contemporanee* (Torino: Giappichelli, 2007), 211-238.

[51] J.R. Vanossi, '¿Régimen Mixto o Sistema Híbrido? El Nuevo Presidencialismo Argentino' *Estudios de teoria constitucional*, 53 (2002); M.D. Serrafero, 'Presidencialismo argentino' n 48 above, 138.

[52] M.M. Ollier and P. Palumbo, '¿Casotestigo o caso único? Patrones de la formación de gabinete en el presidencialismo argentino (1983-2015)' *Colombia Internacional*, 53-66 (2016).

[53] M. Fraschini, 'Los liderazgos presidenciales de Hugo Chávez y Álvaro Uribe. Doscaras de una misma forma de gobernar' *Revista de Reflexión y Análisis Político*, 529 (2014); T. E. Frosini, 'Venezuela: Chavez, Il presidente nel suo labirinto' *Quaderni costituzionali*, 872-874 (2007).

[54] See, M. Llanos and D. Nolte, n 48 above, 23; C. Bassu, 'La forma di governo venezuelana: tra presidenzialismo e caudillismo', in A. Di Giovine and A. Mastromarino eds, n 50 above, 239-263.

[55] M. Volpi, n 10 above, 157.

the consolidation of democratic transition, since they have clashed with a completely different practice. Therefore, the assumption that the Latin American systems have copied the US presidential system does not take into account the impact of specific factors. These elements have to be recognized in the different legal traditions, in political practices as well as in the existence of complex and conflicting social and cultural contexts,[56] such as the deep economic and humanitarian crisis in Venezuela.

Thus, the historical and political context plays a key role in these experiences to the extent that it has prevented the enhancement of constitutional instruments which had a different matrix, thus ensuring continuity with the previous regimes.

[56] A. Valenzuela, 'The Crisis of Presidentialism in Latin America', in S. Mainwaring and A. Valenzuela eds, *Politics, Society and Democracy Latin America* (Boulder, Colorado: Westview Press, 1999), 120-139

Corporate and Financial Markets Law

Gender Diversity Management and Corporate Governance: International Hard and Soft Laws Within the Italian Perspective

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Abstract

The protection of women's rights and the promotion of the principles of non-discrimination, equality and equal opportunities is one of the most sensitive issues in the public global debate. Long-standing discussions regarding women's empowerment in the public and private domains have stimulated both institutional and business actors to carry out empirical studies on the key concepts underlying the assessment and evaluation of legislative measures, public policies and business strategies aimed at fostering greater gender equality in corporate business activities.

I. Introduction

This article is firstly intended to outline a comprehensive appraisal of the theoretical linkage between gender diversity management and gender corporate governance, in order to assess if, when, where and under what conditions incorporating a gender perspective really impacts on the enrichment of financial outcomes of businesses working in relevant economic sectors at the national and international level. Secondly, the article seeks to measure and evaluate the conditions under which women work, and explores the potential to develop their individual and collective capabilities to close the gender gap in the public sphere, making specific reference to the elaboration and adoption of complex but significant indices in different intergovernmental and non-institutional systems. The article introduces a preliminary overview of the international hard and soft law standards in force (the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the United Nations Guiding Principles on Business and Human Rights (UNGPs)) and the explicit references contained therein to the principles of equality and equal opportunity as well as to the level of active participation of women in high level public administration and top-ranking positions in corporate settings. Next, the article examines the case of Italy with regard to the factual reception and implementation of the above mentioned standards within the constitutional, legislative and operational

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country-framework and particularly in relation to listed public-owned and private companies. The article concludes with a quantitative assessment of gender corporate governance in Italy, reference to some relevant considerations impacting on the role and participation of women in business and in high level ranking positions of management boards, the illustration of relevant initiatives, programmes, projects and awareness raising activities to stimulate the debate and to provide interesting data and information about the improvement of gender corporate governance to the attention of the public opinion as well as for institutional legislative innovations and strategic development policies by governmental and business stakeholders.

II. Gender Diversity Management and Gender Corporate Governance: An Introductory Theoretical Appraisal

A comprehensive appraisal of the theoretical linkage between gender diversity management and gender corporate governance requires a multidisciplinary approach, in order to assess if, when, where and under what conditions incorporating a gender perspective really impacts financial outcomes of businesses working in relevant economic sectors at the national and international level. The academic literature has advanced from plentifully defining the concepts underlining the potential gender advantage for business activities.[1]

It is first necessary to understand the concept of diversity outside of the very narrow legal context.[2] The principle of diversity has been defined as a right of the individual, to be enjoyed in close relation with the values of liberty, equality and justice. Its instrumental nature has been applied also to corporate settings, where diversity has been recognised as a tool to improve the functionality of the internal management, the quantitative and qualitative level of productivity, and therefore to provide greater revenue to stockholders.

Recent years have witnessed a complex and articulated debate from social

[1] M. Nussbaum et al, *Essays on Gender and Governance* (New Delhi: Human Development Resource Centre, United Nations Development Programme, 2003).

[2] K. Campbell and A. Minguez-Vera, 'Gender Diversity in the Boardroom and Firm Financial Performance' 83 *Journal of Business Ethics*, 435-451 (2007); D.A. Carter et al, 'Corporate Governance, Board Diversity, and Firm Value' 38 *Financial Review*, 33-53 (2003); F. Dobbin and J. Jung, 'Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?' 89 *North Carolina Law Review*, 809-838 (2011); S. Dwyera et al, 'Gender Diversity in Management and Firm Performance: The Influence of Growth Orientation and Organizational Culture' 56 *Journal of Business Research*, 1009-1019 (2003); D. Ferreira, 'Board diversity', in H.K. Baker and R. Anderson eds, *Corporate governance: A Synthesis of Theory, Research and Practice* (Hoboken, NJ: Wiley, 2010), 225-242; R. Labelle et al, 'To Regulate Or Not To Regulate? Early Evidence on the Means Used Around the World to Promote Gender Diversity in the Boardroom' 2 *Gender, Work & Organization*, 339-363 (2015); R. Valsan, *Gender Diversity in the Boards of Directors: A Corporate Governance Perspective, European Union Centre of Excellence University of Alberta*, *Working Paper n. 2* (Edmonton: Alberta, 2015).

and economic critical perspectives regarding the intrinsic value of gender diversity.

The social perspective emphasizes the importance of a gender power balance in corporate bodies: the equal representation of qualified men and women is understood as beneficial for the entire community of citizens. In general terms, diversity is understood as the moral and correct approach to overcoming historical discrimination and marginalization from the middle and higher levels of corporate leadership. In legal terms, this prerequisite is enshrined in legislation at the international, regional and national level to protect the principles of equality and equal opportunities as well as to promote social justice and democratic legitimacy: this has driven the important but unresolved discussion of the establishment of quota regimes at the regional and national level.[3] A gender-balanced corporate board could further prove to be truly effective for the three main functions of a board: monitoring, determining the strategic direction of the company, and decision-making procedures.[4]

From an economic perspective the effectiveness of gender diversity is evaluated based on the typicality of the female leadership role and on how it is perceived by the corporate stockholders to reinforce the solidity of the company and its capacity to prevent and manage expected and unexpected financial risks of the global monetary and trade markets. A number of economic benefits depend upon higher corporate efficiency with regard to governance and ethics; such benefits can be achieved by employing a gender perspective for the selection of talented workers, targeted investments in innovations and technologies, and potential expansion to new markets, and also by introducing self-regulatory policies aimed at responding to the challenges of corporate social responsibility principles and soft laws that are important for public perception. The economic viewpoint also encompasses better financial results to be pursued by gender-balanced boards: while no objective impact of gender balanced boards on corporate performance could be found, when evaluating subjective factors no impact or a negative impact were regularly observed.[5]

A second noteworthy concept is governance, which has been prominently

[3] R.B. Adams and P. Funk, 'Beyond the Glass Ceiling: Does Gender Matter?' 5 *Management Science*, 219-235 (2012); A.M. Konrad and V.W. Kramer, 'How Many Women Do Boards Need?' 84 *Harvard Business Review*, 22-24 (2006); P. Meier, 'Quotas for advisory committees, business and politics: Just more of the same?' 35 *International Political Science Review*, 106-118 (2014); C. Seierstad et al, 'Increasing the Number of Women on Boards: The Role of Actors and Processes' 141 *Journal of Business* Ethics, 289-315 (2017).

[4] B. Choudhury, 'New Rationales for Women on Boards' 34 *Oxford Journal of Legal Studies*, 511-542 (2014); R.B. Adams, 'Women on Boards: The Superheroes of Tomorrow?' 27 *The Leadership Quarterly*, 371-386 (2016); A. Chizema et al, 'Women on corporate boards around the world: Triggers and barriers' 26 *The Leadership Quarterly*, 1051-1065 (2015); D. Kim and L.T. Starks, 'Gender Diversity on Corporate Boards: Do Women Contribute Unique Skills?' 106 *American Economic Review*, 267-271 (2016).

[5] S.A. Haslam et al, 'Investing with Prejudice: The Relationship Between Women's Presence on Company Boards and Objective and Subjective Measures of Company Performance' 21 *British Journal of Management*, 484-497 (2010).

examined in its twofold economic and social connotation as the public management approach to the efficient and effective use of economic and social resources in a particular community. As originally explained, it is strictly linked to the role and activities of public administration authorities to facilitate access to basic opportunities and the exercise of capabilities by citizens at the individual and collective level. Moving from this narrow definition, corporate governance setting is assumed as incorporating three key elements: the governing philosophy of the company, the development and functioning of internal governance bodies and mechanisms to take decisions in a cost-effective manner and to efficiently use basic capital, and the regulatory framework in which companies are placed and are accountable for their work in front of stockholders and investors. The primary body within the corporate governance system is the board, which directs and controls company activities to respond to shareholders' interests in order to ensure a factual separation of their principal interests from those of agents.[6]

Through competent institutions, proper mechanisms and related processes, formal and informal participation in planning and decision-making is encouraged and could be stimulated particularly using a gender lens.[7] Indeed, the practical realization of the theoretical contribution of women to public governance has been hindered for a long time, due to the prevalent private side of their role which has had only an indirect impact on the participatory involvement of citizens in public management. Thus far their position vis-à-vis corporate governance has further suffered from this limitation, leading to negative attitudes regarding organizational architecture, distribution of powers, purposes and priorities and women's support in this regard.[8] As reported above, the literature has long debated the relationship between gender balance and corporate performance, opening the way to empirical studies measuring quantitative and qualitative positive or negative effects in such contexts.[9] When the composition of corporate boards has been studied, covering aspects such as the tenure of the body, its size and its gender makeup, the board's gender diversity management has been understood from the corporate perspective.[10] This vision has supported not

[6] C. Marquardt and C. Wiedman, 'Can Shareholder Activism Improve Gender Diversity on Corporate Boards?' 24 *Corporate Governance: An International Review*, 443-461 (2016).

[7] C. Francoeur et al, 'Gender Diversity in Corporate Governance and Top Management' 81 *Journal of Business Ethics*, 83-95 (2008); S. Janis, 'The Gender Implications of Corporate Governance Change' 1 *Seattle Journal for Social Justice*, 457 (2002).

[8] A. Sheridan and G. Milgate, 'Accessing Board Positions: A Comparison of Female and Male Board Members' Views' 13 *Corporate Governance: An International Review*, 847-855 (2005).

[9] R.B. Adams and D. Ferreira, 'Women in the Boardroom and their Impact on Governance and Performance' 94 *Journal of Financial Economics*, 291-309 (2009); H. Isidro and M. Sobral, 'The Effects of Women on Corporate Boards on Firm Value, Financial Performance, and Ethical and Social Compliance' 132 *Journal of Business Ethics*, 1-19 (2015); D.M. Wagana and J.D. Nzulwa, 'Corporate Governance, Board Gender Diversity And Corporate Performance: A Critical Review Of Literature' 12 *European Scientific Journal*, 221-233 (2016).

[10] A. Cook and C. Glass, 'Diversity Begets Diversity? The Effects of Board Composition on the Appointment and Success of Women CEOs' 53 *Social Science Research*, 137-147 (2015); A.

only the idea of quantifying and evaluating the presence of women in corporate boards, but also consideration of gender with relation to rankings and its relevance as a key driver in the organizational and operational strategy of the concerned company.[11] When the pool of qualified female director candidates is limited, firms – especially the smallest ones or the firms with poor corporate governance – may incur costs from the appointment of inexperienced or less qualified directors that can outweigh the benefits of increased gender diversity. Furthermore, if board gender diversity is mandated through legislation, it could be perceived as highly costly for shareholders.[12] It is uncontroversial that gender diversity is well connected with gender corporate governance and companies' performance due to the benefits of matching the diversity of companies' employees as well as potential and reliable customers, supporting creative and innovative solutions, and developing complex business alternatives by adapting and applying positive problem-solving tools.[13] On the other hand, literature applying the agency theory has demonstrated that gender diversity may affect the role and action of boards as monitoring & control bodies over the companies' performance both in positive and negative terms. For example, the creative component is relevant for sharing and communicating ideas internally and towards stockholders, but it may reduce performance if it promotes more opinions and questions and makes the decision-making process more time-consuming and less effective.[14]

III. How to Measure the Gender Gap at the Global Level

Kirsch, 'The Gender Composition of Corporate Boards: A Review and Research Agenda' 29 *The Leadership Quarterly*, 346-365 (2017); A. Sheridan and G. Milgate, ' "She says, he says": Women's and Men's Views of the Composition of Boards' 18 *Women in Management Review*, 147-154 (2003).

[11] K. Ahern and A. Dittmar, 'The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation' 127 *Quarterly Journal of Economics*, 137-197 (2012); S.W. Geiger and D. Marlin, 'The Relationship Between Organizational/Board Characteristics and the Extent of Female Representation on Corporate Boards' 24 *Journal of Managerial Issues*, 157-172 (2012); J. Grosvold et al, 'Women on Corporate Boards: A Comparative Institutional Analysis' 55 *Business and Society*, 1157-1196 (2016).

[12] References to broad literature on the structure of corporate boards and to the growing recognition of the role of supply-side factors in gender-based quota system are provided for by S. Hwang et al, 'Mandating Women on Boards: Evidence from the United States', 1-46, available at https://tinyurl.com/y6a5x4ks (last visited 28 May 2019).

[13] I. Boulouta, 'Hidden Connections: The Link Between Board Gender Diversity and Corporate Social Performance' 113 *Journal of Business Ethics*, 185-197 (2013); K. Byron and C. Post, 'Women on Boards of Directors and Corporate Social Performance: A Meta-Analysis' 24 *Corporate Governance: An International Review*, 428-442 (2016).

[14] R.B. Adams and D. Ferreira, n 9 above, 291-309; J. Joecks et al, 'Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a "Critical Mass?"' 118 *Journal of Business Ethics*, 61-72 (2013); M. Schwartz-Ziv, 'Gender and Board Activeness: The Role of a Critical Mass' 52 *Journal of Financial and Quantitative Analysis*, 751-780 (2017); V. Sila et al, 'Women on board: Does boardroom gender diversity affect firm risk?' 36 *Journal of Corporate Finance*, 26-53 (2016).

The involvement and active participation of women in public and private activities promoted and carried out by institutional and corporate actors might be measured and assessed based on the development and use of personal capabilities.

The capability parameter is intrinsically complex and, for this reason, its appraisal is based on both objective and subjective indicators as well as on internal and familiar or external and social dynamics. On one hand the preparedness of a woman encompasses her educational path, her health conditions and a high degree of self-confidence, which is at the core of the search for good and mutually-supportive relationships. On the other hand, one must also take into account the social framework, the legislation in force, the institutional setting, all aimed at promoting equality and equal opportunities in the economic, political and social fields, which could positively promote gender capability in governance scenarios. These two areas are strongly interrelated: qualitative patterns are a primary prerequisite and should be improved through wider legislative, institutional and corporate opportunities for women to be part of governance planning and stock-taking, while the reinforcement of political, social, economic and corporate conditions could surely influence women's personal capabilities in order to be ready for and react to opportunities to hold political office or a corporate management position at the national and international level. The exercise of women's abilities within the external context is instrumental for the enhancement of their personal capabilities in relation to governance issues at large.

In several different systems the challenge of measuring and evaluating the condition of women and the potential to build their individual and collective capabilities to close the gender gap in the public sphere has led to the elaboration and adoption of complex but significant indexes.

The gender inequality index has been adopted within the UN system to measure the lack of gender equity as a primary obstacle to human development. This index assesses the discrimination faced by women and girls with regard to education, health, political representation, participation in the labour market, and other areas.[15] Its main indicators are focused on three areas that are most crucial for programming and taking stock of public policies to overcome gender inequality: reproductive health, measured by maternal mortality ratio and adolescent birth rates; empowerment, measured by proportion of seats occupied by women in parliaments and proportion of adult females and males aged twenty-five years and older with at least some secondary education; and economic status, measured in terms of labour market participation and labour force participation rate of female and male populations aged 15 years and older. In 2014 Italy held twenty-sixth position with regard to the number of female legislators, senior officials and managers (twenty-five per cent).

The global gender gap index is focused on the analysis of gender parity and

[15] United Nations Development Program, 'Gender Inequality Index (GII)', available at https://tinyurl.com/p9kc9pz (last visited 28 May 2019).

its impact on the development of social and economic benchmarks.[16] It was introduced by the World Economic Forum in 2006 to have a first comprehensive outlook on gender-based disparities around the world in relation to the following thematic areas: economic participation and opportunity, educational attainment, health and survival, and political empowerment. The national rankings provide for a global awareness raising process about gender disparities, for regional comparison and tracking of progress, and for designing useful measures to impact economic growth, trade competitiveness and promptness in facing risks and managing problems by national economies and business actors. The global gender gap index methodology is aimed at assessing available resources and opportunities for women independently from the general level of development of concerned countries; at the same time the assessment is performed according to outcome indicators concerning basic rights of men and women such as economic participation, education, health and political empowerment. Moreover the index is not focused on gender empowerment and, so far, on the consequences of countries' outperforming results, but on the national proximity to gender parity as understood as equal outcomes achieved by men and women. As for the economic participation and opportunity sub-index, it is based on three parameters: participation, remuneration and advancement gaps. By connecting the first and the third parameters, the evaluation of the gender gap is measured in terms of utilization of female talent as a matter of fairness and equality *vis-à-vis* the gender labour force rate but also as a positive return due to gender leadership positions among legislators, senior public officials and public and private managers. Although this rate is not recorded, countries are requested to reflect attentively on the root causes of systemic gender gaps in their communities. According to this index Italy has the eighty-second and one hundred and eighteenth position for the global index and the above mentioned sub-index respectively (score: 0.692, 0.571).

Economic leadership	**female**	**male**	**value**
Law mandates equal pay			yes
Advancement of women to leadership roles			0.47
Boards of publicity traded companies	30.0	70.0	0.43
Firms with female (co-)owners			-
Firms with female top managers			-
Employers	4.0	1.1	3.77
R&D personnel	34.6	65.4	0.53

The gender-equality index is the methodological tool created at the European level to collect and compare disaggregated data by sex in EU Member States in order to assess the level of gender equality with regard to legislation, policies

[16] World Economic Forum, 'Global Gender Gap Report 2017', available at https://tinyurl.com/ybufmzbs (last visited 28 May 2019).

and actions carried out at the national level across eight main thematic areas: work, money, knowledge, time, power, health, violence and intersecting inequalities.[17] Thirty-one indicators are used to monitor progress in gender equality and to measure the outcomes in these fields on a scale from one (full inequality) to one hundred (full equality). The results of the gender cross-cutting analysis are useful to improve the implementation of legislative measures and policies and to increase awareness among public opinion and decision-makers. In the release of the last annual report for 2017, as it concerns gender equality in the participation of women to political, economic and social life, a general increase was recorded particularly for the high-ranking decision-making positions – in Italy included. This increase was mainly driven by the promulgation of new legislation and interactive public debate on the topic. As it concerned gender equality in corporate boards, a doubling of the presence of women in major EU listed companies was recorded, however women account for only seven per cent of board chairs/presidents and six per cent of CEOs in the largest EU companies.

The Equileap gender equality global ranking is another relevant tool used to monitor more than three thousand listed companies of twenty-three developed countries and to release yearly updated information about the level of corporate gender equality.[18] Nineteen criteria are at the core of each country scorecard to measure gender work opportunities and career in relation to corporate leadership, management and workforce of concerned listed companies. Each company is awarded points relevant to each criteria on a scale from one to three. Twelve primary criteria are assessed at the basic level: gender balance at the non-executive, executive and senior management levels and in the workforce as well as promotion and career development opportunities, along with seven kinds of workplace policies which are designed to pursue equal treatment and opportunities for men and women. Additional information is collected for assessment of seven secondary criteria: primary and secondary care-giver leave policies, flexible work schedules and equal pay; endorsement of the women's empowerment principles and independent gender audits. Finally a further assessment is carried out on companies performing at high rates regarding the criterion of the gender balance in the workforce. Out of the number of companies under monitoring, two hundred corporations have been included in the Equileap gender equality ranking.

IV. The Italian Case and the Potential for the Promotion of Gender Corporate Governance

1. The Reception and Implementation of Hard and Soft International Legal Standards

[17] United Nations Development Program, n 15 above.

[18] Equileap, 'Gender Equality Global Report and Ranking 2017', available at https://tinyurl.com/lhff452 (last visited 28 May 2019).

Understanding the Italian case concerning gender corporate governance requires a preliminary overview of the international hard and soft law standards in force and the explicit reference contained therein to the principles of equality and equal opportunity as well as to the level of active participation of women in high level public administration and top-ranking corporate positions.[19] This overview will be useful to assess the factual reception and implementation of the above-mentioned standards within the legislative and operational Italian framework, particularly in relation to listed public-owned and private companies (see V).

a) The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Preamble of the CEDAW emphasizes the principle of equality as a fundamental legal precondition for the participation of women in the public life:

> '*Recalling* that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity'.

Furthermore, women's participation in decision-making processes is prominently evoked:

> '*Convinced* that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields'.[20]

In line with previous UN legal standards the principle of equality is translated into the broader definition of the principle of non-discrimination under the gender lens in the first provision of the CEDAW. In Art 1 the principle is defined as

> 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

[19] M. Szydło, 'Gender Equality on the Boards of EU Companies: Between Economic Efficiency, Fundamental Rights and Democratic Legitimisation of Economic Governance' 21 *European Law Journal*, 97-115 (2015).

[20] United Nations, *Convention on the Elimination of All Forms of Discrimination against Women* (New York: Treaty Series, 1979), volume 1249, 13.

To positively implement this legal commitment CEDAW States parties are obliged to take all appropriate measures to eliminate discrimination against women in political and public life and to ensure that they enjoy equality with men in political and public life (Art 7):

> 'States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referendums and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country'.

The meaning of 'political and public life' has been broadly conceived to include the exercise of legislative, judicial, executive and administrative powers at the international, regional, national, and local level and, additionally, the participation and active involvement in public and private companies' central bodies with full equality and equal opportunities with men.

In 1997, to give a more precise and updated definition of the right contained in Art 7 of the Convention, the competent treaty body has released its general recommendation no 23.[21]

It is a matter of fact that public and private settings have been experienced by women differently than men. This originated from the historical and cultural prominent perception of the central role of women in family and in the domestic sphere, limiting their contribution and potential experiences in public life and isolating them from being engaged in active participation in political and decision-making processes. Even if this perception has been increasingly combatted by constitutional and legislative provisions introducing the principle of equality in a large number of countries worldwide, at the practical level the democratic system has not fully provided for a concrete equal participation of women, allowing them full involvement in public and political life to overcome economic, social and cultural obstacles to enjoy their participatory rights. To assess the accomplishment of this purpose and to confirm the democratic intrinsic value of a community, decision-making should be concretely shared by women and men taking into proper account both their interests on an equal footing. This process could be encouraged, as provided for by Art 4 of the CEDAW, by adopting temporary special measures to complement the legal ones and to truly implement Art 7: this has led, for example, to the introduction of fixed quotas

[21] General Recommendations adopted by the Committee on the Elimination of Discrimination Against Women, Sixteenth Session (1997), 'General Recommendation no 23: Political and Public Life', available at https://tinyurl.com/yxbcsj4v (last visited 28 May 2019).

for women to be appointed to public or private positions within the institutional and business sectors, with the aim of improving their political and economic power but also to reinforce the enjoyment of human rights regardless of gender and/or beyond the gender lens.[22]

Following the examination of country reports of CEDAW States parties, in the compilation of its general recommendation the CEDAW Committee reported on the general global record regarding women's participation in central and local policy activities, showing the contradictory nature of this process: the collective and public intention to pursue equality and to give equal opportunities to men and women has not been fulfilled by a concrete improvement of their participation. At the quantitative level a low number of women have been appointed in senior decision-making roles or consulted to provide for their opinions and to protect their interests; this has led to a limited qualitative gender contribution in the mainstreaming of gender issues to overcome traditional cultural barriers and to boost all kind of opportunities and initiatives to change social discriminatory attitudes towards women active role in political and public life.

For these reasons the CEDAW Committee has adopted some recommendations addressed to States parties in order to ensure the involvement of women in political settings and in high-ranking positions. These recommendations include: the inclusion of core provisions of the CEDAW in national constitutional and legislative frameworks and full compliance with its key principles against all forms of discrimination against women; gender balance of public and private positions; women's involvement in consultative processes and the enjoyment of the right to express their views, their right to vote and to be elected and appointed to hold public positions. They also include the adoption of ad hoc measures to facilitate women's representation and participation in political and public life. For example the Committee has explicitly mentioned

> 'the adoption of a rule whereby, when potential appointees are equally qualified, preference will be given to a woman nominee; the adoption of a rule that neither sex should constitute less than 40 per cent of the members of a public body; a quota for women members of cabinet and for appointment to public office'.

All these targeted suggestions could also be referred to private bodies as for gender membership, role and contribution to business activities.

To assess broad compliance with its recommendations the CEDAW Committee has required States parties to regularly provide data and information about legislative innovations, to explain the reasons underlying possible restrictions of women's rights, to identify and analyse the factors bearing on the

[22] M. De Vos and P. Culliford eds, *Gender quotas for company boards* (Cambridge: Intersentia, 2014); F. Engelstad and M. Teigen eds, *Firms, boards and gender quotas: Comparative perspectives* (Bingley: Emerald, 2012).

underrepresentation of women in political and public life, to illustrate the contents and the potential impact of gender policies, to report the real level of involvement and participation of women in public and private bodies and the factual results of their contributions.[23]

As for the Italian case, which will be further examined in detail, participation in the CEDAW has been implemented through act no 132 of 14 March 1985, and the related ratification of the optional protocol entered into force in Italy on 22 December 2000.

b) The UN BHR Guiding Principles: Soft Law Determinants for Gender Improvement in the Business Sector

It cannot be doubted that the role of business, its structural and operational features at the national and international level, and business strategies in compliance with ethical values and fundamental principles – as enshrined in basic laws and international binding or soft instruments – is at the core of global contemporary priorities.

This process stands on the UN Guiding Principles (UNGPs) on business and human rights, adopted by the UN Human Rights Council in 2011.[24] It was led by the UN Office of the High Commissioner for Human Rights and was carried out through extensive consultations from 2005 to 2009, with the main aim of operationalising the so-called '*Protect, Respect and Remedy*' *Framework* through the establishment of a new special procedure, covering the former mandate of the Special Representative of the Secretary-General (SRSG) on transnational corporations and other business enterprises with regard to human rights.

The SRSG created by CHR Resolution 2005/69 of 20 April 2005,[25] whose mandate was confirmed and expanded by HRC Resolution 8/7 of 18 June 2008,[26] had the following tasks: draft factual recommendations to states for the protection of human rights from violations entailing direct or indirect accountability of transnational corporations; contribute to the definition of the corporate social responsibility principle and support companies in implementing and respecting it; encourage the exchange of good practices and regular consultations; draft recommendations at the national, regional and international level to facilitate the access to remedy for victims, especially for vulnerable categories (ie women and

[23] J.C. Suk, 'Gender Parity and State Legitimacy: From Public Office to Corporate Boards' 10 *International Journal of Constitutional Law*, 449 (2012).

[24] United Nations, 'Guiding Principles on Business and Human Rights', available at https://tinyurl.com/y3hgw4mb (last visited 28 May 2019).

[25] United Nations, Office of the High Commissioner for Human Rights, Human rights and transnational corporations and other business enterprises, Human Rights Resolution 2005/69 of 20 April 2005 (E/CN.4/RES/2005/69).

[26] United Nations, Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Resolution 8/7 of 18 June 2008, (A/HRC/RES/8/7).

children); work closely with UN and other multi-stakeholders systems, such as the Global Compact, launched in 2000 by the UN Secretary General to promote and implement 10 voluntary principles on human rights, business, labour rights, environmental protection, countering criminality and corruption.

Following the end of the SRSG's mandate, the mandate of the UN Working Group on business and human rights was defined by HRC Resolution 17/4 of 16 July 2011.[27] The Working Group is composed of five geographically-representative independent experts appointed for a three year-cycle, with the purpose of disseminating and promoting the implementation of the UNGPs at the national, regional and international level, drafting recommendations, carrying out visits to Members States, providing appropriate technical advice, involving all competent UN offices and bodies. The Working Group has also been charged with the establishment and the organization of an annual meeting on business and human rights to debate criticalities and challenges of the implementation of the UNGPs with relation to specific sectors, geographical areas, and potential victims' protection. This task has led to the definition of common criteria for the so-called annual forum on business and human rights, yearly open to all relevant stakeholders and put under the leadership of a President appointed by HRC members and observers, supported by the Working Group for the identification of key issues and the drafting of concluding observations to strengthen the '*Protect, Respect and Remedy' Framework*.

The UNGPs have a soft law legal nature:

> 'Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights'.

Notwithstanding their soft legal relevance, they encompass significant operational measures aimed at preventing and managing any kind of potential violation of human rights by states and businesses.

The UNGPs rest on three key pillars: the state duty to protect human rights violations; the business responsibility to respect human rights; and the right of access to judicial, legislative and administrative remedies for victims of human rights violations.

The first pillar introduces the duty of the state to prevent and address the non-compliance of corporate actors with international and national legal commitments concerning the promotion and protection of human rights. The most critical challenge to accomplish the obligations descending from the UNGPs' first pillar is represented by the divergent approach of central and local

[27] United Nations, Human Rights Council, Human rights and transnational corporations and other business enterprises, Resolution 17/4 of 16 July 2011, (A/HRC/RES/17/4).

bodies in charge of the promotion of economic growth and business development and those tasked with the protection of human rights. This divergence needs to be properly managed in the elaboration of political orientations as well as in the implementation of public and private partnerships impacting on human rights. The second pillar is focused on business due diligence to prevent human rights violations in accordance with soft law standards: the correctness of conduct is represented by the formulation of public commitments by business actors to protect human rights, to implement due diligence regarding the impact of their activities on human rights, as well as to define the contents of business strategies in respect of human rights and to being accountable in cases of violations of human rights. The third pillar encompasses a joint action of public and business actors to create a proper legislative, administrative, judicial or quasi-judicial, voluntary and advisory framework to ensure the protection of victims of human rights violations caused by business activities.

A specific focus on the role and action of state-led public companies and their negative impact on the full respect for human rights has led to the compilation and presentation of a dedicated report from the above mentioned UN Working Group on 17 June 2016, containing ad hoc technical assistance to UN Member States for the implementation of UNGP 4:

> 'States should take *additional steps* to protect against human rights abuses by business enterprises that are owned or controlled by the State, ... including, where appropriate, by requiring human rights due diligence'.[28]

Even if the UNGPs are soft law measures, mention of their relevance in several hard law instruments of the UN system have pushed for the launch of significant processes of 'active ownership' by states and state-led public companies, further applicable to private corporations. This has meant that all the aforementioned actors should be committed to fully adhering to obligations descending from international human rights law: in the public domain an appropriate monitoring and control system over state-led public companies is necessary to inform possible reforms and amendments; in the private setting a positive and interactive dialogue and cooperation might be pursued for reputational and virtuous operational performances.

The critical implementation of the UNGPs third pillar has recently induced the UN system to launch a targeted working programme aimed at improving the fairness and efficiency of national mechanisms for monitoring and sanctioning public and private companies and holding them accountable for the violation of human rights. After the adoption of a first report of an independent expert in 2014, the programme titled 'Initiative on enhancing accountability and access

[28] United Nations, Working Group on the issue of human rights and transnational corporations and other business enterprises, Report of 4 May 2016 (A/HRC/32/45), available at https://tinyurl.com/y4vuwgow (last visited 28 May 2019)

to remedy in cases of business involvement in human rights abuses' started according to HRC Resolution 26/22 of 27 June 2014 and was completed by two preliminary and complementary reports – of June 2015 and May 2016 respectively – to introduce guiding proposals to strengthen the national judiciary frameworks to improve access to justice for victims of human rights violations perpetrated by public and private companies.[29]

In contrast to the reporting, monitoring and evaluating mechanisms provided for by the UN Treaty Bodies, the soft law nature of the UNGPs has entailed the establishment of a different procedure based on a voluntary periodic scheme to be carried out by UN Member States, known as national action plans (NAPs). At present 21 NAPs have been submitted to the attention of the UN Working Group.

The Italian case is informed by the adoption and the voluntary submission to the UN of the first NAP on business and human rights for the years 2016-2021 in December 2016.[30] The Italian NAP is essentially in compliance with structural and substantive criteria of the UN system. In particular the narrative of national commitments to implement the UNGPs and of expectations for businesses according to the UNGP's second and third pillars has a specific relevance. Further, the domestic setting, where the UNGPs and other legal or programmatic instruments have been already applied with positive results, is significant. The core of the NAP is represented by the general and, if appropriate, detailed description of programming and operational measures to face present and future challenges of the relationship between business and human rights at the national and international level. This approach requires the elaboration of short, medium and long term key actions for orienting, preventing, mitigating and correcting business activities that could negatively impact on human rights standards and on their effective protection. Finally the NAP properly defines a roadmap and basic criteria for evaluation as well as the establishment of mechanisms and monitoring procedures to follow up on NAP commitments and to review it.

A targeted approach has guided the elaboration of the Italian NAP, apart from the feasibility of identifying complementary key actions in the field of corporate social responsibility, which aims at equally protecting human rights standard. This approach has been determined to address global actors – states and businesses – fuelling economic, social and environmental development. The NAP commitments recall the role and the Italian contribution in the

[29] United Nations, Human Rights Council, Human rights and transnational corporations and other business enterprises, Resolution 26/22 of 27 June 2014, (A/HRC/RES/26/22), available at https://tinyurl.com/y5246nej (last visited 28 May 2019). See also United Nations, Office of High Commissioner for Human Rights, Improving accountability and access to remedy for victims of business-related human rights abuse (A/HRC/32/19), available at https://tinyurl.com/y2csmqmp (last visited 28 May 2019).

[30] Italian National Action Plan on Business and Human Rights, available at https://tinyurl.com/y4aelagu (last visited 28 May 2019).

drafting process of the UN 2030 Agenda for Sustainable Development and the achievement of its seventeen social development goals (SDGs).

It is a matter of fact that Italy is fully engaged to contribute at the national, regional and international level, to prevent and remedy potential and concrete negative impacts following human rights violations from states and business, with particular attention to the most vulnerable groups (women, children, persons with disabilities, LGBTI individuals, migrants and asylum seekers, ethnic and religious minorities).

First, the NAP statement of commitment states:

> 'To protect human rights, Italy undertakes to: - Continue to protect, promote universal respect for, and observance of, all human rights, fundamental freedoms and non-discrimination principles, with special attention to the rights of most vulnerable groups, such as women, children, disabled, LGBTI people, migrants and asylum seekers, and persons belonging to ethnic and religious minorities; (…)'.

Moreover, to mention a factual planned measure provided for in the NAP with regard to the gender dimension, the Italian Government has committed to

> 'Encourage companies in the dissemination of anti-discrimination culture by: i) promoting corporate policies and best practices on inclusivity and Diversity Management also via the institutional support to the adhesion, implementation and assessment of the *Carta per le Pari Opportunità e l'Uguaglianza sul Lavoro* (corporate voluntary initiative launched by Assolombarda in 2009, which participates in the European Diversity Charter Platform promoted by the EU Commission GD Justice, with the aim of disseminating in Member States a movement to tackle prejudices and enhance talents in diversity); ii) promoting bodies (such as the *Osservatorio Aziendale* and the Disability Manager) that will have the aim of promoting the inclusion of workers with disabilities within the workplace, as foreseen in the draft of the II Program of Action on Disability; iii) increasing the awareness within the workplace on the serious issue of sexual abuse and domestic violence; iv) providing incentives for corporate training on inclusion, diversity management, gender balance and gender mainstreaming with specific focus on women empowerment and LGBTI rights'.

2. The National Legal Framework

Full compliance with international legal standards is one of the key requirements of states as parties to the core human rights treaties as elaborated, adopted, signed, ratified and entered into force within domestic legislation systems.

Regarding women's rights, the principles of equality and equal opportunities

have been enshrined – as mentioned above – through the adoption of the CEDAW, codified in the Italian legal framework by act no 132 of 14 March 1985.[31]

Italy adopted the common approach of including the gender component not only in line with the constitutional provisions in force since 1948 but also with a positive vision for dealing with gender-related issues, ie to strategically provide for the establishment of a domestic environment where institutions, measures and procedures are not rigid but flexible enough to be reshaped and restructured for the advancement of women's rights and to tackle gender inequality in a constant reforming manner.[32]

a) Basic Law and Codes

The Italian Constitution refers to the principle of equality and equal opportunities in its Art 3, which reproduces substantially and formally the non-discrimination provision included in the Universal Declaration of Human Rights:

> 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country'.

As reported above, it was not until decreto legislativo no 198 of 11 April 2006 that a broad reform of the Italian legislation regarding the principle of equality and equal opportunities was adopted. This legislation introduced the so called Code of Equal Opportunities between men and women.[33] Its Art 1 sets forth:

> 'The provisions of this Decree focus on those measures designed to eliminate any distinction, exclusion or restriction based on sex, which has the effect of impairing or preventing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

The anti-discrimination approach, as formulated in Art 1, suggests a broad interpretation of the principles with the goal of achieving a concrete equality

[31] Legge 14 March 1985 no 132, *Gazzetta Ufficiale* no 89 of 15 April 1985.

[32] Consideration of reports submitted by States parties under Art 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Sixth periodic report of States parties, Italy, CEDAW/C/ITA/6, 19 May 2010; Consideration of reports submitted by States parties under Art 18 of the Convention, Seventh periodic report of States parties due in 2015, Italy, CEDAW/C/ITA/7, 11 January 2016; List of issues and questions in relation to the seventh periodic report of Italy, Addendum, Replies of Italy, CEDAW/C/ITA/Q/7/Add.1, 12 May 2017.

[33] Decreto legislativo 11 April 2006 no 198, *Gazzetta Ufficiale* no 125 of 31 May 2006.

between men and women and promoting equal opportunities in all spheres of life, in particular: for ethical and social relationships (decreto legislativo, book two), purely economic relations, namely in the workplace, business and access to goods and services (decreto legislativo, book three) and in civil and political relations (decreto legislativo, book four).

Through the incorporation of former pieces of legislation into decreto legislativo no 198/2006 a comprehensive and clear legislative setting has been defined to prevent and remove all forms of gender-based discrimination.[34] At the same time, relevant EU directives concerning the issue at hand have been properly translated into the decree as for specific fields of work and action where the principle of equality and equal opportunities between men and women should have been pursued in a constructive manner. These areas include: the concept of direct and indirect discrimination on gender grounds, the principle of equal treatment between men and women as it concerns access to goods and services and related supply, the implementation of the gender equality principle in the labour market, and the establishment of equality bodies and their re-ordering with the aim to give them new and differentiated competencies within the inter-ministerial national setting as well as at the decentralized level, to provide for proper evaluation mechanisms to measure their effectiveness and efficiency, and to focus their work on contributing to legislative and policy measures to proactively support gender equality and equal opportunities.[35]

In July 2018 a relevant amendment to the Italian Corporate Governance Code, approved by the competent Corporate Governance Committee in March 2006 and reviewed in the past years, was adopted in order to apply gender diversity criteria in the first renewal of the boards of directors and of statutory

[34] Some relevant legislation was included in the Code of Equal Opportunities: for example, legge 9 February 1963 no 66 on 'the admission of women to public offices and professions'; legge 9 December 1977 no 903 on 'Equal treatment between men and women in the employment area'; legge 10 April 1991 no 125 on 'Positive actions to achieve equality between men and women in the labour market'; legge 25 February 1992 no 215 of 1992 on 'Positive action for female entrepreneurship' (as amended by decreto legislativo no 198/06, which transfers to the Department for Equal Opportunities the relevant responsibilities on female entrepreneurship. See decreto legge 18 May 2006 no 181); legge 23 May 2000 no 196 on 'Regulation of the activities of the Equality Councillors'; decreto legislativo 31 July 2003 no 226 'the Establishment of the National Commission for Equality between men and women'; and legge 8 April 2004 no 90 on 'Rules on the election to the European Parliament'.

[35] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37; European Parliament and Council Directive 2006/54/EC 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 L 204/23; Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181},* COM/2008/0426 final.

auditors after the expiration of act no 120 of 12 July 2011.[36] This amendment covers specifically Arts 1, 2 and 8 of the aforementioned Code as well as related principles and criteria.

As far as the role of the board of directors (Art 1) boards are annually required to carry out a self-assessment regarding their composition and functioning. Regarding their membership, professional and managerial competencies, the gender diversity component has a significant relevance in line with following Arts 2 and 8. In relation to the composition of the board a new principle has been introduced as for the gender component apart from the common competence and professionalism of all the members:

> 'The issuer applies diversity *criteria*, including those related to gender, for the composition of the Board of Directors, taking into due consideration the primary goal of ensuring adequate competence and professional skills of its members' (Principle 2.P.4).

The informing criteria to accomplish the principle is represented by the ratio of one third of directors of the less-represented gender both on appointment and during the whole mandate (Criteria 2.C.3). This means that an adequate composition of the board demands not only competence and professional skills but also gender managerial and professional skills in compliance with act no 120/2011 and through by-laws provisions and/or diversity policies and/or a guidance to shareholders and/or a slate of candidates submitted by the board itself, further promoting equal treatment and opportunities regardless of gender within the company's structure. Similarly, concerning the board of statutory auditors (Art 8), the application of diversity criteria – including in relation to gender – is required (Principle 8.P.2), in accordance with the Criteria 8.C.3 that provides for a composition of at least one third of members of the less-represented gender, both on appointment and during the whole mandate.

As for the establishment of equality bodies, beside the reform of the institutional framework through the establishment of the Department for Equal Opportunities at the Italian Prime Minister's Office, two other bodies have been created to direct the promotion of equality and equal opportunities at the workplace. The Councillor for Equality has a mandate to monitor gender-based discrimination and to undertake initiatives to ensure the respect of the principles of non-discrimination and equal opportunities at the workplace at the national, regional and local level. According to Art 46 of the above mentioned Code for Equal Opportunities all public and private companies with more than one-hundred employees have the obligation to submit every two years to the regional councillors and to company referees a report that describes the gender staff component,

[36] Corporate Governance Committee, 'Corporate Governance Code', July 2018, available at https://tinyurl.com/y323bd45 (last visited 28 May 2019).

providing data on recruitment, training, career promotion, level of employment, change of category or qualification, and the adoption of ad hoc measures such as mobility, redundancy fund, layoffs, early retirements and retirements and wages paid. Whenever the report is not submitted, an invitation from the Regional Labour Directorate is sent to the employer to accomplish within a sixty-day time limit, otherwise administrative sanctions and at least the suspension of contributory benefits will be applied for one year. Moreover, in line with Art 50-b of the same Code, ad hoc preventive measures are applicable to prevent gender-based discrimination, asking companies to adopt collective labour agreements including guidelines, codes of conducts and similar documents covering sensitive issues such as harassment and sexual harassment at the workplace, or informing common principles to define equal working conditions for female employees as well as training and professional development addressed to them.

In 2011 proper guidelines were also issued by the Ministers for Public Administration and for Equal Opportunities concerning the Committee for the Protection of Gender Equality (CUGs): this new body took over the functions previously entrusted to the Equal Opportunities Committee and the Joint Committees on mobbing. The Committee's mandate consists of advising and monitoring all grounds of gender-based discrimination as well as labour access, security and safety conditions, economic treatment and reliable career advancement of women.

b) Additional Legislation

In compliance with the Constitution and the Code for Equal Opportunities two relevant legislative measures have been promulgated concerning the principle of equality and equal opportunities in the field of state-led listed companies, providing for new and comprehensive legislation linking the basic principles at the core of the international and national legal standards for human rights protection to the business sector and its core target of economic growth and development.

First, act no 120 of 7 December 2011 , the 'Equal access to Boards of Directors and Boards of Statutory Auditors of publicly-listed companies' has been enacted.[37] Act no 120/2011 is articulated in three main provisions: Art 1 concerns the 'Balance between genders in listed companies', Art 2 is focused on the 'Duration' of the act's implementation, and Art 3 accords special attention to 'state-controlled companies'.

According to the CEDAW framework and CEDAW Committee general recommendation no 23, act no 120/2011 could be considered as a temporary special measure providing for ad hoc actions aimed at preventing and repressing any form of gender-based discrimination. It requires publicly listed companies to amend their statutes by explicitly including the reservation of a quota of at

[37] Legge 7 December 2011 no 120, *Gazzetta Ufficiale* no 174 of 28 July 2011.

least one fifth in favour of gender representatives since the first implementation, to be progressively reinforced on the occasion of the following membership renewal up to one third of women in companies' governing bodies.

Further detailed provisions have been introduced by the Italian Stock Exchange Regulation Authority (CONSOB) in relation to the communication procedure and subsequent sanctions if the requirements are not met. State-owned companies shall provide information about the composition of their main bodies within fifteen days after the appointment of the membership or possible modifications; if this does not occur the Authority issues a warning to the attention of the company, which has four months to meet the obligation; in case of non-compliance the Authority could impose an administrative fine up to one million euros for the administrative board and up to two hundred thousand euros for control bodies; in such passage both the Authority and the Prime Minister's Office or the Minister for Equal Opportunities issue a warning procedure asking the concerned company to be compliant with the duty within three months and sixty days respectively otherwise the elected body will be removed.

Regarding state-owned companies, this process has been further regulated by Decreto del Presidente della Repubblica 30 November 2012 no 251 and put under monitoring of the Prime Minister or delegated to the Minister for Equal Opportunities.[38] Following its entry into force, the presidential decree was fully implemented as recorded by the Department for Equal Opportunities, which has received six hundred and forty communications from 2012 to 2016 concerning total or partial renewal of boards' membership from four hundred and thirty companies. Following the reception of the communication, thirty-seven and twenty-two warnings were issued at the first and second stage respectively: fifteen and eighteen companies have amended their statutory governing bodies and five non-compliant companies have seen their bodies removed.[39]

V. The Italian Case: Gender Corporate Governance in Listed Public-Owned and Private Companies

1. A Comprehensive Quantitative Assessment of Gender Corporate Governance in Italy

Recent data and related analysis show how gender corporate governance is relevant in Italian companies' business strategies and, for this reason, several measures have been promoted to improve the female employment rate as well as women's careers in the business sector.[40]

[38] Decreto del Presidente della Repubblica 30 November 2012 no 251, *Gazzetta Ufficiale* no 23 of 28 January 2013.

[39] S. Cuomo and A. Mapelli, 'Gender diversity e corporate governance dopo la legge Golfo-Mosca' 6 *Economia & Management*, 41-48 (2011).

[40] M. Bianco et al, 'Women on boards in Italy' *Consob Quaderni di finanza no 70* (2011).

According to recent quantitative research results from Unioncamere the following data provide a comprehensive outlook to assess the active role and contribution of women in stories of successful businesses. Between 2014 and 2016 over one million three hundred and thirty-one thousand businesses were run by women, an increase of thirty thousand and ten thousand if compared with the previous years (more than twenty-one point eighty-six per cent). This improvement concerns particularly structured businesses and limited companies: about two hundred and eighty-four thousand corporations were managed by women in 2017 (twenty-one per cent). Most of these companies are located in four Italian Regions: Sicily, Lazio, Campania and Lombardy. The most represented sector is tourism and related activities and services, but since 2016 there has also been an increase in the number of women running professional, scientific and technical businesses (more than three point eight per cent). Women in the business sector are aged under thirty-five, suggesting that a high level of education and professional training is the key to improving women-led business opportunities.

Another significant survey has been carried out under the coordination of the Department for Equal Opportunities, through EU financial resources and in collaboration with Dondena Research Centre for Social Dynamics and Public Policies and Bocconi University, titled 'Women Mean Business and Economic Growth — Promoting Gender Balance in Company Boards'. The project was aimed to promote gender-balanced representation in economic decision-making by providing quantitative data and best practices to promote female leadership and introducing an impact-assessment analysis of the new legislation and aggregated measures concerning women in economic decision-making settings. It has covered two hundred and forty companies listed on the Italian stock exchange as of 30 June 2013 and has been focused on the membership of the boards of directors and the boards of statutory auditors. The aforementioned companies were collected into three main categories: those ones whose last board renewal occurred after August 2012 (following the entry into force of act no 120/2011 and the Decreto del Presidente della Repubblica no 251/2012), those whose last board renewal occurred between July 2011 and July 2012 (before the new legislation entered into force), and those ones whose last board renewal occurred before July 2011 (without any ad hoc legislation in force). In the examination of the sequential reforms, as of 30 June 2013, thirty-four point six per cent of companies listed on the Italian stock exchange had renewed their boards, moving from a percentage of twelve point six (third category) to twenty-four point nine (first category). As recorded by the former analysis, women in companies' boards are younger and more educated (for detailed information, see 3).

2. Factors Affecting the Role and Participation of Women in Business Companies and in High Level Positions of Management Boards

In general terms all research activities on gender membership and active roles in companies' boards at the highest level have been developed starting from the concept of gender diversity management as a key factor which should be properly enhanced in decision-making processes in favour of female components of core corporate bodies. The agency theory is indeed important to board composition and mandate in addressing and solving corporate problems and in composing in a balanced way the interests of stockholders and company managers. If board diversity is preserved, different but complementary knowledge, skills, experiences, ideas and conduct could positively impact the overall viewpoint and factual interventions of the entire board, resulting in improving capability and performance of the company.[41]

To pursue the enrichment of the boards' membership by adding more women, a second – but not less relevant – factor has been represented by the national domestic commitment to increasing the percentage of women in governing bodies through the adoption of ad hoc pieces of legislation, in compliance with international and regional legal standards. Despite the provision for a regulatory framework for positioning women in corporate boards, after the entry into force of hard laws and soft legal tools – such as codes of conducts and targeted guidelines – for both state-led and private companies, not all settings have recorded virtuous results in terms of mandates, competencies and remuneration for female members when compared to their male colleagues.

Thus far the introduction of compulsory or voluntary quotas by domestic legislative measures is a secondary factor that has led to a long-lasting debate in the international literature on the potential of gender corporate governance.[42] From one side such quotas have been considered as a last resort for companies that have ignored gender diversity management and the opportunity to include

[41] But if the board diversity is imposed in terms of gender-based quota system, it could be detrimental. This is the case of the recent bill SB 826, at present awaiting the California Governor's signature, that imposes financial penalties on publicly held corporations headquartered and chartered in California if they should not include at least one self-identified woman director by the end of 2019 as well as, by December 31, 2021, within corporations with five (six directors at least two/three women directors respectively. If the goal is appreciable, conversely there are different counterpoints to be stressed: the Federal State's localisation and implementation of the bill, practical difficulties in requiring any change in favour of the quota system for public and private corporations at the same time, the fact that board's gender diversity is mainly a matter of internal corporate governance for which shareholders are methodically responsible for, the legislative process itself could be put at risk due to negative jurisprudence and could also be perceived as politically divisive (J. Grundfest, 'Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826' available at https://tinyurl.com/y3hfsm2z (last visited 28 May 2019)).

[42] M.M. Hughes et al, 'Gender Quotas for Legislatures and Corporate Boards' 43 *Annual Review of Sociology*, 331-352 (2017); M. Teigen, 'Gender Quotas on Corporate Boards: On the Diffusion of a Distinct National Policy Reform', in F. Engelstad and M. Teigen eds, *Firms, Boards and Gender Quotas: Comparative perspectives* (Bingley: Emerald, 2012), 115-146; S. Terjesen et al, 'Legislating a Woman's Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors' 128 *Journal of Business Ethics*, 233-251 (2015).

and increase gender representation in governing bodies; on the other side efforts to adopt such a regulatory framework as a one-step solution have been observed to be counterproductive: a step-by-step approach has been favoured to avoid imposing any constraint on board membership that could negatively affect corporate performance due to the non-appointment of the best – male or female – candidate. If the economic advantage and financial revenues stemming from the adoption of a quota regime have not all been proven, the reorganization of a board's composition is still perceived as an optimal means to increase the company's value and reputation if the governing body's quality is guaranteed.[43]

A last factor that could strongly influence women's participation in key corporate governing bodies is the promotion of relationships with outside stakeholders and institutional actors: dialogue and related advise and counsel from companies' boards including female representatives might have positive effects in terms of governance and financial performance outcomes.[44] Gender diversity management indeed could be reinforced in order to strengthen monitoring activities and consequent advise and orientation for the adoption of governmental economic development policies at the national and international level. The complementary impact of this factor is represented by the assessment of corporate performance: according to some diverging surveys it may be positively assumed in large and complex companies but it could have negative results in small and medium size enterprises. In the former there is weaker control by shareholders while in the latter governance is put under strict shareholders' monitoring and board members act namely for their predominant interests.

In the Italian case special attention has been devoted by research studies on the role, composition and performance of governing bodies of listed state-led companies under the gender lens.[45]

The results could be summarized in the formulation of two different models. In small companies the female component in boards has a direct or affiliated family connection with the controlling shareholder, the company has a concentrated ownership and the main domain is the consumer sector.[46] In widely held companies or in corporations that are owned by a foreign shareholder, whose primary field of work is the IT/telecommunications sector, a higher percentage of female independent representatives on boards and in executive and non-executive

[43] S. Terjesen and R. Sealy, 'Board Gender Quotas: Exploring Ethical Tensions From A Multi-Theoretical Perspective' 26 *Business Ethics Quarterly*, 23-65 (2016).

[44] L. Chapple and J.E. Humphrey, 'Does Board Gender Diversity Have a Financial Impact? Evidence Using Stock Portfolio Performance' 122 *Journal of Business Ethics*, 709-723 (2014); B. Elstad and G. Ladegard, 'Women on Corporate Boards: Key Influencers or Tokens?' 16 *Journal of Management and Governance*, 595-615 (2012).

[45] S. Solimene et al, 'Gender diversity on corporate boards: an empirical investigation of Italian listed companies' 3 *Palgrave Communications*, 1-7 (2017).

[46] M.D. Amore et al, 'Gender Interactions Within the Family Firm' 60 *Management Science*, 1083-1097 (2014); M. Bianco et al, 'Women on Corporate Boards in Italy: The Role of Family Connections' 23 *Corporate Governance: An International Review*, 129-144 (2015).

positions is recorded, according to their strong educational and professional background.

Regarding the quota regime, introduced through the abovementioned legislative measures, in Italy there has been a robust recomposition of boards' membership through the inclusion of women, who are also taking roles as directors. This has occurred in particular in larger companies, following an accurate elaboration of selection criteria to shortlist the best – male and female – candidates,[47] to ensure an equal and balanced gender diversity, to create interesting incentives for female participation, and to assess the efficiency and effectiveness of companies' performance at large.

In relation to companies' performance assessment, ad hoc surveys have considered the direct linkage between women's presence on boards and good corporate governance, measured by the number of board meetings and the average director attendance at board meetings. The companies whose boards have at least one woman have recorded a lower number of board meetings and a lower board attendance of the director. The first number is higher, however, for companies whose boards are composed only by non-family female directors.[48]

3. Awareness Raising, Initiatives and Projects to Improve Gender Corporate Governance

Several initiatives, programmes, projects and awareness raising activities have been promoted within the Italian system to stimulate the debate and to provide for interesting data and information about the improvement of gender corporate governance, in order to bring this issue to the attention of the public as well as to encourage institutional legislative innovations and strategic development policies by governmental and business stakeholders.[49]

In 2013 the Ministry of Labour and Social Policies launched a programme to

> 'increase women's employment and qualification, through the integration and reintegration into the labour market, development and consolidation

[47] M. Hutchinson et al, 'Who Selects the 'Right' Directors? An Examination of the Association between Board Selection, Gender Diversity and Outcomes' 55 *Accounting and Finance*, 1071-1103 (2015).

[48] C. Bart and G. McQueen, 'Why Women Make Better Directors' 8 *International Journal of Business Governance and Ethics*, 93-99 (2013); R.J. Burke and M.C. Mattis, 'Women on Corporate Boards of Directors: Where Do We Go from Here?', in Id, *Women on Corporate Boards: International Challenges and Opportunities* (Dordrecht: Kluwer, 2000), 3-10; S. Terjesen et al, 'Women Directors on Corporate Boards: A Review and Research Agenda' 17 *Corporate Governance: An International Review*, 320-337 (2009); S. Vinnicombe et al eds, *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham: Edward Elgar, 2008).

[49] F. Galia and E. Zenou, 'Board Composition and Forms of Innovation: Does Diversity Make a Difference?' 6 *European Journal of International Management*, 630-650 (2012).

of women-owned businesses'.[50]

The ultimate goal has been to provide financial incentives addressed to women working in the business sector to enhance individual capabilities and to create collective opportunities to support women's business networks.[51] Similar goals were served by the renewal of a memorandum of understanding previously signed by the Ministry of Economic Development, the Department for Equal Opportunities at the Prime Ministers' Office and the Italian Union of Chambers of Commerce in 2013, which has redefined the role and mandate of the one hundred and five Female Entrepreneurship Committees (CIF) established at every chamber at the local level, with the intent to support the internationalisation of women-owned and led companies.

The aforementioned project titled 'Women Mean Business and Economic Growth — Promoting Gender Balance in Company Boards' has been implemented since 2015 to collect data and best practices concerning female business leadership, to promote female leadership in Italy and to carry out an impact-assessment analysis of the new legislation and aggregated measures in force within the Italian legislative framework.[52] The two-hundred forty-one Italian companies listed on the Italian stock exchange put under monitoring have been examined in relation to the composition of the boards of directors and of statutory auditors. As a general note the results of the project have shown empirically that the quota regime, as introduced by the new legislative measures in force, has had an impact in terms of decrease of companies' debt on average, and thus of increase of companies' performance. By assessing the project outcomes in detail the following issues emerged: the number of women in both types of board increased from twelve point six per cent to twenty-four point nine per cent by comparing the pre and post-legislative reform periods; the female board representatives are younger, more educated, family-owned or affiliated members and hold primarily presidential positions and fewer CEOs roles.

Different awareness-raising campaigns have been launched in recent years by the Department for Equal Opportunities and the Ministry of Labour and Social Policies, devoted to the promotion of gender balance in decision-making processes and business initiatives at the micro-credit level; these include the 'Gender Quotas: A More Balanced Country has a Better Future' campaign and the 'Restart from you! Beautiful business to be a woman'.[53]

On the part of private business initiatives, as incentivized through the credit

[50] Ministero del Lavoro e delle Politiche Sociali, 'Donne e Lavoro: le misure a favore dell'occupazione femminile' available at https://tinyurl.com/y64dtlo8 (last visited 28 May 2019).

[51] C. Drago et al, 'The Role of Women in the Italian Network of Boards of Directors, 2003–2010', available at https://tinyurl.com/y4pcj4va (last visited 28 May 2019).

[52] Dondena Centre for Research on Social Dynamics and Public Policy, 'Women Mean Business' available at https://tinyurl.com/y4nr9quz (last visited 28 May 2019).

[53] Ministero del Lavoro e delle Politiche Sociali, n 50 above.

system, the support of gender equality and equal opportunities has been put at the core of interventions of the Intesa Sanpaolo Group for its own female employees, but also for business women.[54] Following the positive global assessment of the Group according to the gender equality index score and the gender equality global ranking, several best practices and tools may be here reported to enhance gender diversity management and corporate governance within Italy. For example women who work in or manage a company may ask the bank for access to tailored loans, the so-called business gemma, that is financially covered by the guarantee fund for SMEs and which provides for up to a one-year suspension on principal payments, might be used to support specific business management training programmes as well as digitalisation and internationalisation. Furthermore the Group has established a digital platform named *Tech-Marketplace* to facilitate the connection between demand and supply for technology in the form of the *WorkHer* platform to offer a range of mentorship, networking and training projects.

[54] Gruppo Intesa SanPaolo, 'Diversity' available at https://tinyurl.com/y2fesv4b (last visited 28 May 2019).

Corporate and Financial Markets Law

Information in the Context of Financial Markets and of Private Placements in Particular

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Abstract

There is no doubt about the decisive role that information plays in the market system. Markets need a constant flow of information, and that's why jurists have wondered whether the State should intervene or not in order to satisfy this need.

The debate on mandatory disclosure has actually been one most controversial in the field of financial markets, but it may have come to an end, because now it seems necessary to accept the opinion of those who consider indispensable a binding law.

Also, there is the need for an accurate evaluation of information, since the disclosure mechanism seems to be effective only if the operators are able to fully understand the information, but behavioral finance research shows that investors' decisions are often marked by moments of irrationality, wich lead them to inefficient choices.

There is currently no way to completely prevent such irrational tendencies, and that's why research on this issue would seem today to be sufficiently justified if it's aimed at ascertaining how this background disorder can be takled.

Meanwhile the European Union has been working on Capital Market Union, which is an ambitious project to unite the European capital markets and part of this project is dedicated to information.

EU also wants to innovate the market of private placement, ie the technique of selling financial products without going public and favoring individual negotiations with a limited number of investors. Usually small and low trust companies use private placements, whilst banks show little interest in them, so that the need to limit bank financing constitutes a sufficient reason to attempt to strengthen the private placements.

This way of financing has been increasing over time and its development is really important, also due to the undisputed centrality in the European economic system of small and medium-sized enterprises, but, if we want to achieve this goal, we need a greater harmonization of the markets active in the EU countries.

I. Information and Financial Markets

There is no doubt about the decisive role that information plays in market systems and it is also not disputed that a particularly intense debate has taken place on this issue, especially in the US; actually, as is well known, the United States have always had the most advanced financial markets, and this has allowed, in the US, the most relevant development of the doctrinal studies in

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that field. The concepts referred to below are therefore, for the most part, well known to any legal expert, so that we can certainly proceed briefly regarding these concepts. In doing so, we must first stress that the most important public need is obviously that of having an efficient market, wich is able to best allocate the resources of high trust companies, ie to the benefit of the productive structures that best enhance them. On the other hand, the market is more efficient the more it allows – and at the highest possible speed – to arrive at a correct price for the securities that are sold in it, and this result is achievable when investors have all the necessary information regarding the offered products – given that only with the right information we can make more or less accurate estimates on the value of these products – so that we can conclude that the price generated by the market expresses, ultimately, all the information available in it or, rather, the sum of opinions and choices made on the basis of this information. More specifically, those choices derive from the discrepancy between the market price and the estimated value of the specific financial instrument, and they are therefore pursued as long as the aforementioned discrepancy is not eliminated. At this point, however, two problems arise: that of ensuring the availability of all the information on the single instrument and that of being sure that such information is correctly assessed. The first objective, however, is clearly an utopia and just makes the aim of achieving the *correct price* unrealistic, with the consequent need to step back towards the achievement of a sufficiently correct price. In other words, the information given to investors will never be complete and, moreover, if this does not happen, it would be even more dangerous for two reasons. Firstly, we actually need to consider the phenomenon known as 'overload', which can also be explained by highlighting that 'more information is not better than less'.[1] In other words, it is common knowledge that a person can process only a finite amount of information at a given time; moreover, the knowledge of an excessive amount of information easily generates – and this even in the most experienced investors – overconfidence, that is to say an excessive confidence in the data available, with the result that a constant increase in the gained information is linked, before or after, with a progressive decrease in the quality of decisions made. The second problem deriving from a hypothetical situation of complete information consists, instead, in the fact that this would surely involve an absence of risk, and it is useless to underline how risk constitutes, at the end of the day, a positive element for investors, because in its absence investors should certainly renounce the advantages related to the investment,[2] that is to the profit that they hope will come from the instruments purchased. It's well known that the investor tries to 'beat the market' by focusing on its inefficiencies,[3] but if all the prices

[1] T.A. Paredes, 'Blinded by the Light: Information Overload and Its Consequences for Securities Regulation' 81 *Washington University Law Review*, 417-486, 451-452 (2003).

[2] C. Gulinello, 'Regulating Private Placements in China: A Principled Approach', 125, avalible at https://tinyurl.com/y5gmkg3n (last visited 28 May 2019).

[3] C. Angelici, 'La società per azioni - I - Principi e problemi', in A. Cicu et al eds, *Trattato*

were perfectly correct, then every speculative activity would be impracticable: as was said, 'when everyone knows the truth, no one can speculate on it',[4] even though it would also seem essential to avoid any extremes: the system, in order to work, still needs a constant and significant flow of information, and it is therefore normal that sometimes jurists have questioned whether the State should intervene or not, at the legislative level, in order to satisfy this need of information in the context of financial markets and of private placements in particular.

II. The Mandatory Disclosure

Briefly, the evoked theme is that of mandatory disclosure, that is to say one of the most controversial topics in the field of financial markets, even if more than one reason leads us to wonder if this traditional quarrel still has, today, reason to exist, or if the debate can be considered now exhausted or, at least, no more interesting. It's well known that this long-standing debate is linked to the fact that legislating in the financial sector means imposing costs relating to the production and dissemination of information. Therefore, many scholars have denied for long time the usefulness of a law that obliges companies to release information on their own structure and activity, arguing that this law would be pleonastic, since companies produce the necessary information even if not forced to do so. More precisely, in the hypothetical absence of any rules, releasing information about themselves would still be functional to the activity of high trust companies and vice versa negative for badly managed companies, so that markets would be in any case informed about the first ones but also, at the same time, warned about the dysfunctions of the others because of the lack of data on them; therefore, even if it is an expensive commodity, information would not be underproduced and this should also be proven by the fact that companies already release more information than that asked by the legislator.[5] However, this approach is questioned by those who think that mandatory disclosure is necessary. In spite of the costs borne to produce it, information is actually, by its nature, a public good, whose usefulness decreases very quickly: companies wich sustain the costs of information do not manage to fully capitalize its value, and this is paradoxically more true when the market is more efficient.[6] Recently, therefore, some scholars have argued that if there were no mandatory rules, because of the mentioned interests of broadcasters to disclose only positive information, companies would release news only as long as benefits related to the cost of the loan would not

di diritto civile e commerciale (Milano: Giuffrè, 2012), 537, fn 58.

[4] F.H. Easterbrook and D. Fischel, 'Mandatory Disclosure and the Protection of Investors' 70 *Virginia Law Review*, 682 (1984).

[5] R. Romano, 'Empowering Investors: A Market Approach to Securities Regulation' 107 *Yale Law Journal*, 237 (1997-1998).

[6] E. Macrì, *Informazioni privilegiate e disclosure* (Torino: Giappichelli, 2010), 9, fn 33.

become less significant than the costs related to the damage in terms market ranking, and that implies that in a voluntary scenario the release of information would be in suboptimal amount.[7] If we add to this that even some theoreticians of voluntarism recognize the potential benefits linked with mandatory disclosure, it seems necessary to accept the opinion of those who consider indispensable a binding law, and that is even more true in the case of the Italian system, where the market is notoriously inefficient. On the other hand, if the purpose of financial market regulation is to make markets as functional as possible, we can see that this aim is also achieved by mandatory disclosure, because through disclosure we aim to release the greatest amount of information, being aware that this increases both the liquidity of the securities and the attitude of prices to become a point of reference.[8] Furthermore, the imposition of disclosure requirements seems to satisfy the Kaldor-Hicks criterion, by reducing the overall cost of information, when the burden of production is borne by the companies, that is to say by the subjects for whom this cost is minor, since the retrieval of the data to be disclosed is obviously easier for the *intranei* than for the *extranei*. Finally, even if nothing prevents the release of information on a voluntary basis to a greater extent than asked by law, in any case this has not happened during the recent, international crisis, that is during an event related, in its genesis, to an information deficit towards institutional investors. Of course, through the legal rules it's very difficult to arrive at the aimed amount of information, since it is more probable that there will be an overproduction or an underproduction of information; but as we have said, this would also be the effect of an information regime left to the will of the issuers. After explaining this, we can also add that the proposed thoughts are channeled into a doctrinal polemic whose usefulness is now very little, because the different points of view are – and not from today – absolutely clear, and it seems that jurists should now take more care of the function – proper to legal sciences – of expressing *de iure condendo* models. Actually, this function is correctly performed only if the aforementioned models have at least a remote chance to be put into legal system in a not too wide period of time, otherwise we would create a mere intellectual theory. If this is correct, then we can not understand the *raison d'être* of pushing on the opportunity of a radical deregulation in the field of information to the markets, essentially for two reasons. The first one is that it's very difficult not to consider paradoxical a situation in which a listed company could give rise to an information blackout against investors and supervisors. The second – perhaps more significant – consists instead in the fact that the current context sees in all important legal systems the presence of a mandatory rule,[9] and above all nothing let us believe

[7] L. Enriques and S. Gilotta, 'Disclosure and Financial Market Regulation' *ECGI Working Paper Series in Law*, 18, avalaible at https://tinyurl.com/y60897wj (last visited 28 May 2019).

[8] B. Jorgensen, J. Li and N. Melumad, 'The Economic Consequences of Selective Disclosure', 20, available at https://tinyurl.com/y6n3n5jq (last visited 28 May 2019).

[9] F. Denozza, 'La trasparenza garantita nei mercati finanziari: "prolegomeni" ad un'analisi

that this situation is going to change in the short or in the medium-long term; in other words, everything shows that the vision of those who consider indspensable the imposition of informative duties is definitively rooted at least on political level. It is then necessary to wonder whether going on feeding a debate on the need of an imperative disclosure does not represent, ultimately, an unnecessary waste of intellectual energies that would be more profitably employed if only we would agree that we can not get rid of the imposition of disclosure obligation on issuersand that we should focus our research on regulatory models that move from this assumption. One of the tasks that seems to weigh on the current generation of jurists seems to be to determine not whether, but to what extent, disclosure should be provided – as was written, '(t)he appropriate comparison is not regulation against market but one kind of regulation against another'[10] – by considering the need to protect the interest of broadcasters and therefore to create a regulatory apparatus endowed with the necessary flexibility. Furthermore, the pervasive diffusion of mandatory disclosure also shows a further meaning, which seems necessary to have in mind. As someone has pointed out, it is important to understand both the functions the financial markets can concretely carry out and what are the ideal methods of operating that should be transferred to those markets.[11] If it's therefore true that three different kinds of market are theoretically thinkable – weak, semi-strong and strong – it seems however also indisputable that the legislator prefigures, in most cases, a semi-strong environment.[12] It then becomes necessary to wonder if it's useful to propose legal theories aimed at an hypothetical market when the rules are thought to apply to a different context: elementary needs of economy and rational use of resources seem, actually, to suggest to limit ourselves to the identification of legal solutions that are characterized, basically, by the hypothesis of a semi-strong market.

III. Considerations About Behavioral Finance

Then there is the second issue – wich is the need for a correct evaluation of the released information – which is undoubtedly important, given that the disclosure mechanism would seem to be effective only if the operators are able to correctly understand the information received. Inevitably, even the debate concerning this problem has had the chance to fully develop and can now be ended without any worry: in other words, we have all the premises to take a step forward. The data from which to move, in particular, is in this case represented by the fact that the discoveries of behavioral finance can finally be considered a

costi/benefici' *Banca Impresa e Società*, 191 (2007).

[10] F.H. Easterbrook and D. Fischel, n 4 above, 673.

[11] F. Denozza, n 9 above, 182.

[12] C. Angelici, 'Su mercato finanziario, amministratori e responsabilità' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 15-16 (2010).

common heritage, so that what we are waiting for are proposals that start from such discoveries and that integrate them into the traditional model, since in any case nobody denies the inestimable value of traditional models. The point is, in short, that even if it is excessive to argue that investors are almost always irrational, it is certain that they are marked by moments of irrationality;[13] on the other hand, it is sufficient to think of the *calendar anomalies*,[14] ie, how prices tend to grow on sunny days[15] and how people notoriously underestimate some information and overestimate other.[16] It seems to be clear that market actors are often irrational, and this irrationality is theoretically able to void the usefulness of the available data – given that disclosure may not be helpful to those suffering from bias[17] – to lead therefore to inefficient choices and, ultimately, to give rise to the failure of the market, given that the efficient market theory is based on rationality, ie on the premise that rational choices are made on the basis of a correct evaluation of the information released. The appropriate step would therefore consist simply in accepting that there is no way to completely fight such irrational drives. Several studies show that the market has antibodies to be activated against illogical behaviour;[18] but these reactions are most often insufficient in the short to medium term and above all so are, in most cases, the actions of information traders and, more specifically, the activities carried on by the arbitrageurs, whose work is notoriously often marked by the phenomenon of hearding. Actually, the arbitrageurs are also used to following the trend that they think is erroneous instead of facing the risk that the price does not readily coincide with what they consider as the correct value of the stock, thus putting in place a behavior that is not irrational,[19] since it's evident that it is often more convenient to follow the gregarious instinct and ride a speculative bubble rather than trying to counter it. If the foregoing conclusion is correct, then research on these issues would seem today to be sufficiently justified only if it aims to understand exactly to what extent each kind of investor gives rise to irrational behavior and also to ascertain how this *background disorder* can be fought, while the difficulty in fighting irrational elements through legal ways does not necessarily have to be seen as an insurmountable obstacle. There is no doubt about the fact that irrational investors are essentially retailers, and yet these people, especially if

[13] L.E. Ribstein, 'Fraud on a Noisy Market' *University of Illinois Law & Economics Research Paper no LE05-022*, 138, available at https://tinyurl.com/y4g2dfh6 (last visited 28 May 2019).

[14] E. Marchisio and U. Morera, 'Finanza, mercati, clienti e regole... ma soprattutto persone' *Analisi Giuridica dell'Economia*, 21, fn 8 (2012).

[15] S. Choi and A.C. Pritchard, 'Behavioral Economics and the SEC' 56 *Stanford Law Review*, 77 (2003).

[16] T. Odean, 'Volume, Volatility, Price, and Profit When All Traders Are Above Average' 53 *Journal of Finance*, 1883, 1888 (1998).

[17] S. Choi and A.C. Pritchard, n 15 above, 83.

[18] S.M. Bainbridge, 'Mandatory Disclosure: a Behavioral Analysis' 68 *University of Cincinnati Law Review*, 1023 (2000).

[19] E. Macrì, n 6 above, 3, fn 12.

they suffer from overconfidence, are prone to hyper-activity,[20] which has a positive effect on the liquidity (and therefore on the efficiency) of systems, making the realigment of prices easier. Therefore, also for this reason, one of the problems to be solved is that of understanding what percentage of the negative effects of irrational action are offset by positive ones, in order to figure out, when the gap between the two values looks unsustainable, if we need to accept proposals such as temporarily inhibiting retail activities[21] and therefore the action of many informed investors.

IV. Retail Investment, Institutional Investment and Their Actual and Hypothetical Protection

The proposed questions must be addressed not only on the basis of the consideration that the inefficient choices of irrational operators show their influence only in the short term –[22] because in the long run, as predicted by classical theory, prices always tend to reach the correct value – but also privileging, once more, realistic research. With regard to these issues it is therefore important to refer to experience accrued in trying to eliminate frauds. This result is today regarded as unattainable, and that's why the fact that frauds occur should not be considered an unequivocal index of the ineffectiveness of law,[23] as it's unnecessary 'to pursue the mirage of impossible, absolute guarantees'.[24] Likewise, it would seem desirable to consider that the studies concerning the irrationality of operators take into great consideration that retail investors are opposed to institutional operators, in order to give the right weight also to the work of institutional operators. Also on this point, on the other hand, we have now come to some explanations that can be considered definitive. Actually, it is no longer in doubt that even institutional subjects suffer from bias[25] – including overconfidence[26] – even though these biases are less significant than those of which retailer suffer from,[27] because organizations can in any case make themselves able to reduce the impact of these disfunctions.[28] On the other hand, this is not – and here we

[20] L. Guiso and T. Jappelli, 'Information Acquisition and Portfolio Performance' *CSEF Working Papers no 167, Centre for Studies in Economics and Finance (CSEF), University of Naples, Italy, 7-8*, available at https://tinyurl.com/y48lg3rq (last visited 28 May 2019).

[21] A. Dalmartello, *Private placement e circolazione di strumenti finanziari* (Milano: Giuffrè, 2013), 44.

[22] L.E. Ribstein, n 13 above, 142.

[23] F.H. Easterbrook and D. Fischel, n 4 above, 679.

[24] F. Denozza, n 9 above, 194.

[25] A. Dalmartello, n 21 above, 45.

[26] G. Strampelli, 'L'informazione societaria: profili evolutivi e problemi', in F. Annunziata ed, *Il Testo Unico della Finanza. Un Bilancio dopo 15 anni* (Milano: EGEA, 2015), 328.

[27] H.K. Baker, G. Filbeck and V. Ricciardi, 'How Behavioural Biases Affect Finance Professionals' *The European Financial Review*, 27 (2014).

[28] S. Choi and A.C. Pritchard, n 15 above, 39.

refer to well-known concepts – the only positive element related to the presence, in the system, of institutional investors. Indeed, we have to consider that the collection of information carries, from time to time, some costs and that the value of data obtained is linked to the amount of the related investment, so that people able to invest more are also the ones who are more dedicated to finding information;[29] and that's why while retail investors usually buy few securities and therefore are not interested in obtaining a huge amount of information,[30] institutional investors do the opposite, as they typically obtain a significant amount of data in the awareness of a greater ability to process them. The latter category is, in other words, composed by information traders, that is to say by subjects that historically are the most skilled to avoid both frauds and incompetent entrepreneurs, who are characterised by a stronger diversification attitude,[31] and generally are more able to sustain market efficiency[32] – because the more investors in the market are able to process and verify the available information in an efficient way, the more information tends to be reflected in the prices of financial instruments – so that it is quite natural that they become a reference for activity of other investors. If it is true that short-term investors are usually more careful in predicting the behaviour of other market players than conducting fundamental analysis,[33] it is also true that this *flock effect* tends to identify, in institutional investors, the *alpha subject* to be taken as a model; and similarly, it can not be ignored that a constantly growing number of small investors go to professional operators, when deciding to inject their savings into the financial market. It is then also from these elements that the legislator should draw its conclusions as to the course of action that has to be carefully followed, even at the cost of making unpopular decisions. The point is, first of all, the need to avoid protecting the retail investors just because they are such. On the one hand, actually, the logical corollary of the freedom of this type of investors to dispose of their goods consists in the tolerance of any consequences – hence also the negative ones – deriving from decisions taken; on the other hand, it is easy to see that any rule in favor of these investors would inevitably be associated with serious systemic effects, such as, for example, those consisting in hazards and in the greater chance that those investors make choices even less rational than those usually performed. Rather, the goal of protecting informed investors should be pursued with even greater effort, in order to increase liquidity and efficiency of the market, with the consequential, beneficial effects on other

[29] J. Peress, 'Wealth, Information Acquisition, and Portfolio Choice' 17 *Review of Financial Studies*, 879, 880 (2004).

[30] V. Maksimovic and P. Pichler, 'Private versus Public Offerings: Optimal Selling Mechanisms with Adverse Selection', 32, available at https://tinyurl.com/y64edwem (last visited 28 May 2019).

[31] C. Gulinello, n 2 above, 162-163.

[32] Z. Goshen and G. Parchomovsky, 'The Essential Role of Securities Regulation' 55 *Duke Law Journal*, 770 (2006).

[33] F. Denozza, n 9 above, 193.

investors. That does not mean, however, that rules that would objectively harm the retail category would be acceptable, because we have to remember the significant percentage of informed investors included in this category.

V. The Capital Market Union

It is now appropriate to draw attention to the European continent, so as to remember that the European Union has for some time been working on the Capital Market Union, wich is an ambitious project to unite the European capital markets – initially proposed to the European Parliament, in July 2014, by the President of the European Commission Junker – which essentially focuses on the Action Plan published on 30th September 2015. The European institutions called it a 'fundamental' project; however, it's not perfectly clear what a Capital Market Union really is,[34] as this expression has been defined misleading and 'more symbolic than real'.[35] Therefore, we must prudentially identify a set of reforms functional to the creation of a real union of the capital markets between all the twenty-eight EU Member States. The premise for such a great reform seems clear: if we want to sum up, the European economy is substantially similar to that of the US, but the capital markets of our continent correspond to less than half of the North American ones, while the debt markets are even less than a third. The project of the Capital Market Union is therefore characterised by a purpose that can actually be appreciated, even if it's not easy to identify the real aims that are pursued. The EU bureaucracy argues that this reform has, ultimately, three aims: that of widening the sources of financing the companies, that of strengthening the Single Market, and finally that of promoting financial growth and stability. A reconstruction in these terms appears, however, excessively generic and of limited value. More interesting is the one proposed by Confindustria in the Action Plan for the Union of Capital Markets, which highlighted how the Action Plan will bring into force twenty legal and non-legal measures, intended to be progressively implemented by 2019. Several of these measures are dedicated to information and one has already been implemented: EU Regulation no 1129/2017, has indeed realized a reform of the law concerning prospectus.

VI. Proposals for Reform and New Regulation of Prospectus

The desire to revise the law concerning prospectus was first of all based on

[34] P. Schammo, 'Capital Markets Union and Small and Medium-sized Enterprises (SMEs): a Preliminary Assesment', in F. Allen, E. Carletti and J. Gray eds, *The New Financial Architecture of the Eurozone (European University Institute, RSCAS, Florence School of Banking and Finance* (2015), 13-14, available at https://tinyurl.com/y3swyzxn (last visited 28 May 2019).

[35] W. Ringe, 'Capital Markets Union for Europe – A Political Message to the UK' 9 *Law and Financial Markets Review*, 5 (2015).

the feeling that this source of information was the real gateway to the EU capital markets, and that therefore this document should be easy to draft, clear for investors and quickly approved. Actually, jurists used to complain about how it was written in a very technical language – and that's why it was asked to make it 'simpler',[36] making it easier to process the information received –[37] and about how it usually highlighted so many risk factors that it was impossible to understand which of these were really relevant.[38] More generally, everybody asked for a less lenghty prospectus,[39] which was therefore less expensive to create. Finally, many jurists have denied the utility of the prospectus emphasising, on the one hand, that unsophisticated investors are not able to understand its content and, on the other hand, that sophisticated investors are still used to requesting additional information from the issuer. This usually leads to the conclusion that investment decisions are not made in the light of the prospectus, especially in the event of secondary issues, that is when the value of the prospectus decreases. These last set of considerations are not, however, fully persuasive. It is actually true that in general the retail investor is not inclined to dwell on the prospectus,[40] and that's why Italian SEC requests the delivery of a prospectus only upon request (see Art 9 of the Issuers Regulation); however, the retail category includes a significant number of informed investors, who use the prospectus – and are to be considered informed also because of this – and are unable to demand further data from the issuer. Precisely for this reason, it's very difficult to appreciate the great discretion which from now on the issuers will have when determining the content of the prospectus summary; and at the same time it is surprising that the legislator has underestimated that strengthening the flow of information is crucial for the financing of SMEs, as highlighted by the introduction of the *EU growth prospectus,*[41] which is extremely simplified (see Art 15). Beyond this, however, the decision to introduce new types of prospectus looks convincing. Moreover, the power of varying the content according to specific needs seems to be functional to a more orderly data exposure and therefore also able to mitigate the risk of information overload[42] on which we have previously focused. Similarly, we have to appreciate that from now on no more than fifteen risk factors can be underscored in the prospectus summary (see Art 7, para 10) and that a simplified prospectus will be provided for any secondary issues (see Art 14).

[36] G. Strampelli, n 26 above, 331.

[37] T.A. Paredes, n 1 above, 485.

[38] D. Busch, 'A Capital Markets Union for a Divided Europe', 13, available at https://tinyurl.com/y3vjnx7m (last visited 28 May 2019).

[39] L. Burn, 'KISS, but Tell All: Short-form Disclosure for Retail Investors' 5 *Capital Markets Law Journal*, 141 (2010).

[40] A. Dalmartello, n 21 above, 338.

[41] P. Maume, 'Initial Coin Offerings and EU Prospectus Disclosure' *MIT Sloan Research Paper No. 5347-18*, 26-27, available at https://tinyurl.com/yxekymwg (last visited 28 May 2019).

[42] T.A. Paredes, n 1 above, 474-475.

VII. The Private Placements

The data wich have emerged so far, however, must now be placed into the context of a specific market such as that of private placements – or *reserved placements* – ie the technique of selling financial products without going public (thus the solicitation of an undetermined public) but favouring individual negotiations with a limited number of usually sophisticated investors.[43] In general, companies that privilege private placements usually have two features. The first one is that they do not have a significant size.[44] Of course, even the reserved placement can be too expensive for many small enterprises,[45] and therefore the fact that European companies are almost always micro-enterprises[46] is an obstacle to it becoming widespread; however, in most cases, the cost of reserved placement does not appear excessive when compared to that of the bank loans, which are caratherised by the fact of allowing access to smaller loans when compared to the reserved placements. The second one is that we are talking about relatively non-transparent companies.[47] This characteristic – which is probably the most distinguishing feature of private placement transactions[48] – is an element strictly connected to the size of the business organization involved: the cost of disclosure, being mostly fixed, is a burden on structures with lower capitalisation,[49] so it is not surprising that lack of transparency usually marks companies that are not particularly developed. On the other hand, it is also true that a situation of information asymmetry is not always related to poor capitalization or poor management, while it has long been known that too much transparency can sometimes decrease the private incentive to innovate, because some new products are profitable only if made secretly;[50] there are situations in which disclosure of information affects the interests of companies,[51] given that through disclosure a substantial advantage is very often given to competitors, workers or customers.[52] Beyond this, however, private placements show the attitude to reducing information asymmetry, because the investors who participate in it know what information they need and are able to obtain it; moreover, they

[43] Y. Wu, 'The Choice of Equity-selling Mechanisms' 74 *Journal of Financial Economics*, 93-119, 93-94 (2004).

[44] D.W. Blackwell and D.S. Kidwell, 'An Investigation on Cost Differences Between Public Sales and Private Placements of Debt' 22 *Journal of Financial Economics*, 259 (1988).

[45] N. Branzoli and G. Guazzarotti, 'Il mercato dei private placement per il finanziamento delle imprese', 19, available at https://tinyurl.com/patrg74 (last visited 28 May 2019).

[46] C.E. Pupo, 'Lo «Small Business Act» e il work in progress della sua attuazione' *Analisi Giuridica dell'Economia*, 135 (2014).

[47] E. Maynes and J.A. Pandes, 'The Wealth Effects of Reducing Private Placement Resale Restrictions' 17 *European Financial Management*, 500-531, 501 (2011).

[48] Y. Wu, n 43 above, 93-94.

[49] L. Enriques and S. Gilotta, n 7 above, 23.

[50] F.H. Easterbrook and D. Fischel, n 4 above, 708.

[51] J.R. Macey and G.P. Miller, 'Good Finance, Bad Economics: An Analysis of the Fraud on the Market Theory' 42 *Stanford Law Review*, 1059-1092, 1091 (1990).

[52] L. Enriques and S. Gilotta, n 7 above, 14-15.

often formally guarantee the issuer that they will not make public the data transmitted to them, so that companies that prefer not to fully disclose their operational plans can also resort to this way of financing. Furthermore, in this type of financing the companies can better model the issue of shares,[53] which is often smaller[54] and also faster than the ones realized in organized markets[55] (but not faster than bank financing). Finally, this kind of placement is usually governed by the principle according to wich every cost borne by investors while fixing the value of a company ultimately ends up falling on the company itself.[56] Indeed, informationis what private placements that take place in Europe are lacking.[57] Furthermore, the need to carry out both due diligence and monitoring activities produces a further consequence. The point is the fact that the demand for private placement usually comes only from institutional investors and in particular from the bigger and/or qualified ones; this is a phenomenon which is perfectly understandable if we only think that often the small size of the issue cannot justify the cost of information. In this context there is actually profit for investors only starting from issues for a value of at least twenty million euros. If this is added to the aforementioned illiquidity of the securities and to the problem consisting in often dealing with a company in the start-up phase, it is clear why one of the frequent characteristics of people investing in this specific market is the power to engage in the long term.[58] The logical consequence of these premises has therefore been the modest interest of banks towards the reserved placement,[59] so that it would seem evident that the difficulties of growth of private placements are above all due – and this is absolutely true for Italy – to the small size of non-bank intermediaries. In addition, the long-term perspective has historically made a selection that has allowed insurance companies and pension funds to excel in the reserved placement system,[60] so that it is correct to say that the future development of private placement is linked to the solution – which is notoriously very difficult – of the problem of expanding the category of long-term investors. On the other hand, after the last global recession, it seemed obvious to many

[53] N. Tilli and A. Novarese, 'Il collocamento privato negli Stati Uniti d'America nell'ambito delle privatizzazioni' *Diritto ed economia dell'assicurazione*, 876 (1995).

[54] R. Varma and S.H. Szewczyk, 'The Private Placement of Bank Equity' 17 *Journal of Banking Finance*, 1111-1131, 1112 (1993).

[55] C.A. Morss, 'Tapping the Private Placement Market' 79 *Management Review*, 39, 41 (1990).

[56] T.J. Chemmanur and P. Fulghieri, 'A Theory of the Going-Public Decision' 12 *The Review of Financial Studies*, 249-279, 251 (1999).

[57] D. Valiante, *Europe's Untapped Capital Market – Rethinking financial integration after the crisis*, 24, available at https://tinyurl.com/y3brk3er (last visited 28 May 2019).

[58] N. Branzoli and G. Guazzarotti, n 45 above, 8.

[59] M. Carey et al, 'The Economics of the Private Placement Market', 32, available at https://tinyurl.com/yxqsznes (last visited 28 May 2019).

[60] D. He, D.C. Yang and L. Guan, 'Earnings Management and Long-run Stock Underperformance of Private Placements' 15 *Academy of Accounting and Financial Studies Journal*, 31, 34 (2011).

observers that the US production apparatus was able to restart more easily because it was less tied to bank financing.[61] The undisputed centrality of banking operators in the European economy[62] has turned out to be extremely inappropriate, when suffering companies lacked the necessary help from banks. In short, the need to limit bank financing with respect to self-financing or other methods of corporate borrowing constitutes a sufficient reason to seek to strengthen private placement, which constitutes, in any case, a technique that is merely complementary to the bank loans or to the regulated markets.[63] Once this has been clarified, we can add that interest in this financing instrument has long been increasing in almost all markets;[64] currently, the reserved placement has enjoyed tremendous growth since the nineties until 2007,[65] when it was severely hit by the crisis of 2008. Certainly, its spreading within the European countries now looks rather constrained: in a nutshell, in 2014 private placement issues reached six point six billion against the fifty registered in the USA,[66] and the US data are still more significant if we take into account that in US private placements constitute only zero point three percent of GDP and in that specific market only under four percent of the total bonds were subscribed.[67]

VIII. *(Cont'd)* The Prospects for a Change at the Regulatory Level

Undoubtedly, at the European Union level, the development of the private placement market is really important because of the undoubted centrality, in the European economic system, of small and medium-sized enterprises. In fact, there are surveys showing that two out of three people are employed at European SMEs,[68] and surveys tell us that in Europe medium-sized companies get, from the capital market, a funding that is one fifth of that given in the United States. It seems then correct to say that any reform should not necessarily pursue unitary aims, but rather strive to respect the regional peculiarities. If it is in fact correct that in general the European capital market is strongly fragmented[69] also because of the enormous differences at the macroeconomic level, it is also true

[61] W. Ringe, n 35 above, 4.

[62] N. Anderson et al, 'A European Capital Markets Union: Implications for Growth and Stability', 18, available at https://tinyurl.com/yxcfpyyj (last visited 28 May 2019).

[63] N. Branzoli and G. Guazzarotti, n 45 above, 5.

[64] H. Liang and W. Jang, 'Information Asymmetry and Monitoring in Equity Private Placements' 53 *The Quarterly Review of Economic and Finance*, 460 (2013).

[65] K. Wruck and Y. Wu, 'Relationship, Corporate Governance, and Performance: Evidence from Private Placements of Common Stock' 15 *Journal of Corporate Finance*, 30 (2009).

[66] N. Branzoli and G. Guazzarotti, n 45 above, 11.

[67] ibid 16.

[68] N. Véron and G.B. Wolff, 'Capital Markets Union: A Vision for the Long Term' 2 *Journal of financial Regulation*, 130-153, 138 (2016).

[69] K. Lannoo, 'Which Union for Europe's Capital Markets?', 1, available at https://tinyurl.com/yxjrxs2t (last visited 28 May 2019).

that there is a similar lack of homogeneity in private placement transactions, considering that only the English, the German (which alone represents fifty percent of the European one) and finally the French markets (which is a quarter of the European one) look developed enough. Nevertheless, we actually need a greater harmonization of the markets active in the EU Member States: it is well known that the home bias that usually affects European investors[70] has so far led to a private placement market essentially articulated on a national basis. With this in mind, the right measures would be:

- a reform aimed at improving information on creditworthiness, perhaps through the creation of a European rating agency, as the US NAIC;
- a reform aimed at endorsing, as far as possible, national risk centers (or even at launching a European one);
- a reform aimed at standardising the access to information about the business system.

[70] N. Véron and G.B. Wolff, n 68 above, 140-141.

Alternative Dispute Resolution Regulation: A Work of Modern Art?

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Abstract

Scholars and judges are confronted with the potential interferences between mediation in civil and commercial matters and alternative dispute resolution for consumer disputes, in view of the possible implementation models in the individual Member States. The modern work of the related regulations, the apparent contradictions and the overlapping of the scopes worry the interpreter in need of certainties. Any effort to systematise the whole range of provisions collides with the current trend of the Court of Justice to adapt the domestic regulations to the ADR directive formal provisions.

I. ADR for Consumer Disputes and Compulsory Mediation: The Regulatory Framework

The European legislator welcomes developments towards alternative justice and this is reflected in an extremely complex regulatory framework.[1] Given that

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[1] Alternative justice is highly recommended by European institutions since the early 1990s, at first only with regard to consumer disputes – where the gap between the extent of damage and the cost of process is particularly marked – and then for all civil and commercial matters. The Commission Green Paper on 'Access of consumer to justice and the settlement of consumer disputes in the Single Market' [COM(93) 576 def, 16 november 1993] shows openness to ADR systems; then they are also mentioned in Directive 97/7/EC, on the protection of consumer on respect of distance contracts, following the Action Plan published by European Commission in the previous year (14 february 1996) on out-of-court settlement of consumer disputes. In this respect, see, with a special focus on the principles applicable to the responsible bodies, Commission Recommendations 98/257/EC and 2001/310/EC. Commission Green Paper on 'Alternative dispute resolution in civil and commercial law' [COM(2002) 196 def, 19 april 2002] refers ADR to the whole area of civil and commercial disputes; see then the proposal for the directive of 22 october 2004 [COM(2004) 718 def] (annotated by E. Minervini, 'La proposta di direttiva comunitaria sulla conciliazione' *Contratto impresa/Europa*, 427 (2005); N. Giudice, 'Dalla Comunità europea una scelta "flessibile" per il futuro della mediation' *Contratti*, 102 (2005)), and the following Directive 52/2008/EC (annotated by E. Minervini, 'La disciplina comunitaria della conciliazione in materia civile e commerciale' *Contratto impresa/Europa*, 45 (2009)). Mediation could turn disputants into more 'psycologically and morally individuals' according to R.A. Baruch Bush and J.P. Folger, *The Promise of Mediation. The Tranformative Approach to Conflict* (San Francisco: Jossey-Bass, revised edition, 2005). Among the authors favourable to ADR mechanisms, R.F. Peckham, 'A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution' *Rutgers Law Review*, 253 (1985); F.E.A. Sander, 'Varieties of Dispute Processing' *Federal Rules Decision*,

the scope of the relevant rules is often unclear, the interpreter has to deal with the difficult task of composing such puzzle.

Recently, scholars and judges have been confronted with the potential overlap between mediation in civil and commercial matters (as regulated under the Directive 2008/52/EC) and alternative dispute resolution for consumer disputes (as regulated under the Directive 2013/11/EU), in view of the possible models of implementations in the individual Member States.

Pursuant to Art 3, para 1, '(s)ave as otherwise set out', the ADR directive shall always apply in the event of concurrence and conflict

> 'with a provision laid down in another Union legal act and relating to out-of-court redress procedures initiated by a consumer against a trader, the provision of this Directive shall prevail'.

Even if aimed to 'ensure legal certainty' (recital 19), this declaration of prevalence does not really dispel the doubts raised by the potential overlapping of Directives 2008/52/EC and 2013/11/EU, as far as that overlapping is acknowledged, with no further specifications, in Art 3, para 2, ADR Directive.

Assuming that the primary purpose of ADR directive is to provide a single, exclusive and harmonized system for consumer disputes – binding the Member States as to achievement of the objective pursued by that directive and to improvement the quality standards –, such legal framework should affect *all* the ADR systems considered by Directive 2013/11/EU, including the dispute resolution mechanisms regulated under Directive 2008/52/EC.

Nevertheless, the single provisions are not in line with the intention (expressed in recital 19) to secure that procedures for mediation in civil and commercial matters are compliant with the quality standards laid down by ADR directive.

The problem arises mainly from the authority of Member States to make compulsory the use of mediation procedures (as Italy, Belgium, Greece and other Countries have actually done),[2] whether before or after judicial proceedings

111 (1976). O.M. Fiss, 'Against Settlement' *Yale Law Journal*, 1073 (1984), is highly skeptical about the settlement as a practice preferable to judgment on a wholesale and indiscriminate basis, and intends mediation as a 'problematic technique for streamlining dockets'; the author investigates ADR limitations. Mediation and other kind of alternative justice are not intended to be the best practice in the opinion of T. Grillo, 'The Mediation Alternative: Process Dangers for Women' *Yale Law Journal*, 1545 (1991). R. Delgrado et al, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' *Wisconsin Law Review*, 1359 (1985), refers to ADR the risk of disadvantaging minority disputans. For an investigation on the topic, see also S.B. Glodberg et al, *Dispute Resolution. Negotiation, Mediation, and Other Processes* (Austin: Aspen Law & Businnes, 1994); A.W. McThenia and T.L. Shaffer, 'For Reconciliation' *Yale Law Journal*, 1660 (1985); C. Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem-Solving' *UCLA Law Review*, 754 (1984); C. Menkel-Meadow, 'Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Case)', 1995, available at https://tinyurl.com/yxzb5qgd (last visited 28 May 2019); D.N. Smith, 'A Warmer Way of Disputing: Mediation and Conciliation' *American Journal of Comparative Law*, 205 (1978).

[2] Germany, Netherlands, Poland and Portugal have no general mandatory mediation. In

have started (Art 5, para 2, Directive 2008/52/EC). The Directive 2013/11/EU – which does not contain any provision about that, even admitting the potential interference between the regulations – leaves room for manoeuvre and appears to allow compulsory ADR for consumer disputes.

As a matter of fact, Art 1 ADR Directive, ensuring that consumers can file a complaint with an ADR entity 'on a voluntary basis', does not prevent national law from making participation in such procedures mandatory, even upon condition that 'such legislation does not prevent the parties from exercising their right of access to the judicial system'.

The prospect of this happening casts doubts regarding the compatibility between the mandatory use of mediation proceedings and the ADR ontological voluntary basis. The ADR Directive ensures the freedom to choose whether or not to take part into an ADR procedure and the possibility of withdrawing from it at any stage (Art 9, para 2, letter *a*); quite the opposite, many domestic regulations in compulsory mediation (the Italian regulation, among others)[3] allow the parties to withdraw from the mediation procedure just by relying on a valid reason.

Italy requires the use of mediation as a precondition for the admissibility of legal proceedings in banking, financial and insurance sectors, so dividing the ADR for consumer disputes into two different groups:[4] a group of compulsory ADR for clients of banks, financial intermediaries and insurance agencies,[5] and a group of ADR, on a voluntary basis, for all the disputes about other sales and service contracts.

In light of the above, a general concern might be noticed about the correct interpretation of Arts 1 and 3 ADR Directive. The real convenience to allow Member States to restrict the mandatory use of mediation procedures to the disputes not considered by ADR Directive should be investigated.[6]

France participation in a mediation process can only take place on a voluntary basis. Mandatory mediation is also provided in non-European Countries: as an example, the Turkish new Act on Labor Courts settles a mandatory mediation in labor disputes, as a condition precedent to court litigation.

[3] With regard to Italian regulation, see Art 8, para 4-*bis*, decreto legislativo 4 March 2010 no 28.

[4] Tribunale di Verona 26 January 2016, *Contratti*, 543 (2016), with note by N. Scannicchio, 'La risoluzione delle controversie bancarie. ADR obbligatoria e ADR dei consumatori'.

[5] E. Minervini, *L'Arbitro Bancario Finanziario. Una nuova «forma» di A.D.R.* (Napoli: Edizioni Scientifiche Italiane, 2014), 21, gives a clear notion of 'client'.

[6] Recently, Case C-75/16 *Menini and Rampanelli* v *Banco Popolare*, Judgment of 14 June 2017, *Foro italiano*, IV, 551 (2017), with note by A.M. Mancaleone, 'La mediazione obbligatoria nelle controversie bancarie alla luce della direttiva 2013/11/UE sull'Adr dei consumatori'. Arguing about compulsory mediation in divorce cases or other family matters, T. Grillo, n 1 above, claims that 'Although mediation can be useful and empowering, it presents some serious process dangers that need to be addressed, rather than ignored. When mediation is imposed rather than voluntarily engaged in, its virtues are lost. More than lost: mediation becomes a wolf in sheep's clothing. It relies on force and disregards the context of the dispute, while masquerading as a gentler, more empowering alternative to adversarial litigation. Sadly, when mediation is mandatory it becomes

II. The View of the Court of Justice

Through the implementation of the ADR Directive, Italian legislator introduced a new set of provisions in the Consumer Code (decreto legislativo 6 August 2015 no 130, hereinafter Consumer Code). She chose to preserve the existing compulsory mediation for civil and commercial matters (Art 141, para 6, letter *a*), Consumer Code)[7] and the existing precondition for the admissibility of legal proceedings in the electronic communications sector prescribed under Art 1, para 11, legge 31 July 1997 no 249 (Art 141, para 6, letter *b*), Consumer Code), and for the matters reserved to the competence of the Italian Authority for Electricity, Gas and Water Supply System under Art 2, para 24, letter *b*), legge 14 November 1995 no 481. In other words, Art 141, para 6, Consumer Code would seem to rule out, from the implementation of ADR Directive, all the consumer disputes which are already ruled by Directive 2008/52/EC.

At the same time and in apparent contradiction, Art 141, para 4, Consumer Code requires that Title II-*bis* shall also apply to mediation for consumer disputes.

It concerns the mediation procedures in banking, financial and insurance sectors. Particularly, it concerns all disputes reserved to the competence of 'Arbitro Bancario e Finanziario' (ABF) (set up under Art 128-*bis* Testo Unico Bancario)[8] and to the competence of 'Arbitro per le Controversie Finanziarie' (set up by Consob resolution 4 May 2016 no 19602). All the proceedings in compliance with guidelines of Art 5, para 1, decreto legislativo 4 March 2010 no 28 (as recently modified) should be added.[9]

Italian compulsory mediation seems to (at least apparently) contradict the provision of ADR Directive, thereby leading judges to doubt whether,

> 'through the reference to Directive 2008/52, (the Italian legislator) intended to save, implicitly, the right of Member States to opt for a

like the patriarchal paradigm of law it is supposed to supplant. Seen in this light, mandatory mediation is especially harmful: its messages disproportionately affect those who are already subordinated in our society, those to whom society has already given the message, in far too many ways, that they are not leading proper lives'. See also L.V. Katz, 'Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin' *Journal of Dispute Resolution*, 1 (1993); D. Golann, 'Making Alternative Dispute Resolution Mandatory: The Constitutional Issue' *Oregon Law Review*, 487 (1989); L. MacGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Right-Based Approach through the ECHR' *The European Journal of International Law*, 607 (2015).

[7] N. Scannicchio, n 4 above, 543.

[8] About the competences of the Arbitro Bancario Finaziario, E. Minervini, *L'Arbitro* n 5 above, passim; A.V. Guccione and A.C. Russo, 'L'arbitrato bancario finanziario' *Nuove leggi civili commentate*, 491 (2010); B. De Carolis, *L'arbitrato bancario finanziario come strumento di tutela della trasparenza* (Roma: Banca d'Italia Eurosistema, 2011), 29; G. Finocchiaro, *L'arbitro bancario finanziario tra funzioni di tutela e di vigilanza* (Milano: Giuffrè, 2012), 74; V. Sangiovanni, 'Regole procedurali e poteri decisori dell'Arbitro Bancario Finanziario' *Società*, 955 (2012); A. Berlinguer, 'L'ABF tra giudizio e media-conciliazione' *Rivista dell'arbitrato*, 36 (2013).

[9] Relating to alternative justice in banking and financial disputes, see A. Fachechi, 'La gestione delle controversie finanziarie: il nuovo ACF' *Foro napoletano*, 377 (2017).

compulsory mediation instead of ADRs for consumers in those cases where those are set up'.[10]

One may argue that the Italian legal framework is less favourable for consumers than ADR Directive, especially in relation to the freedom of the parties (or, at least, of the consumer) of whether or not to take part in the ADR procedure and the freedom of withdrawing from it at any stage (Art 9 ADR Directive).

The Tribunale di Verona expresses her concern to the Court of Justice, even with reference to some specific aspects of the domestic regulation.[11]

The Court of Justice uses a remarkable methodological approach in going beyond the mere wording of Art 1 ADR Directive. She decides on the basis of a systematic interpretation, target-oriented to the objectives pursued by the directive and expressed in its preliminary recitals.[12]

The voluntary nature of the procedure – explicitly ensured to mediation in civil and commercial matters, where not compulsory (Art 3 letter *a*) Directive 2008/52) – does not mean that the parties are free to choose whether or not to use that process, but it means that 'the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time' (recital 13 to Directive 2008/52). With this line of reasoning, the European legislator does not contradict herself in admitting that the proceeding could be 'suggested or ordered by a court or prescribed by the law of a Member State' (Art 3 letter *a*)) or in allowing the individual Member States to make 'the use of mediation compulsory' (Art 5, para 2).

In other words, the voluntary nature of the procedure is not about whether the procedure is mandatory or optional, but it is always about the guarantee of the parties' right of access to the judicial system. In this respect, the Court excludes that the provision of the mediation as a precondition for the admissibility of legal proceedings disregards the objectives pursued by the directive.[13]

[10] Tribunale di Verona 26 January 2016, n 4 above.

[11] ibid.

[12] Case C-75/16, Judgment of 14 June 2017, n 6 above.

[13] Before 2017, the Court of Justice has already ruled about the compatibility of compulsory mediation with principle of effective judicial protection (Art 6 Cedu), with special regard for the Italian procedural rules for settlement disputes between telecoms operators and end-users. In Case C-317/08 *Rosalba Alassini* v *Telecom Italia SpA*, Judgment of 18 march 2010 and Case C-320/08 *Multiservice Srl* v *Telecom Italia SpA*, Judgment of 18 march 2010, available at www.curia.europa.eu, judges establish that mandatory out-of-court settlement procedure does not totally impede nor make extremely difficult the exercise of rights, above all if *i*) the outcome of the settlement procedure is not binding on the parties, *ii*) the period for time-barring of claims is suspended, *iii*) the procedure involves no substantial delay in the legal process; *iv*) it involves no cost or at least involves very low costs; and *v*) there are alternatives to mediation process offered over internet. On the basis of 'Alassini case', J. Davies and E. Szyszczak, 'ADR: Effective Protection of Consumer Rights?' *European Law Review*, 695 (2010), pay attention to the system of compulsory ADR implemented by United Kingdom for telecommunication disputes.

In her reasoning, the Court of Justice balances the interests involved and acknowledges that the fundamental rights should be subject to restrictions in respect of 'objectives of general interest'. The judges focus on the role of the principle of proportionality and warn against restrictions which are 'intolerable' and unreasonable and infringe 'upon the very substance of the right guaranteed'.[14]

So, if the principle of effective judicial protection is respected, Member States are free to choose the means they deem appropriate for the purposes of ensuring the access to judicial system (recital 45 to ADR Directive). *Inter alia*, the outcome of the settlement procedure should not be binding and the period of prescription for the right to access to the judicial system should stop running.

The Court concludes that

> 'the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that the procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purpose of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or give rise to very low costs – for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires'.[15]

On the other hand, but following the same reasoning, the ADR Directive would not prevent the domestic legislator from requiring the consumer taking part in a ADR procedure to be assisted by a lawyer nor from denying to consumers

[14] Along the same lines, the Court of Justice has consistently held that 'it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed' (Cases C-317/08 and C-320/08, Judgments of 18 march 2010, para 63, n 13 above). Above reasonableness as a fundamental criterion in balancing principles, see Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge* v *Republik Österreich*, Judgment of 12 June 2003, available at www.curia.europa.eu; and C-36/02, Judgment of 14 October 2004, available at www.curia.europa.eu. In literature, G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), *passim* and 102: fundamental rights are protected in different ways with regard to the interests involved and the particular factual circumstances, on the basis of the balancing with the competing rights with which they interfere. P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2004), 13, claim that, whereas the 'rule' is a norm which requires a set of specific conducts for its implementation, the principle is a norm which imposes the maximum achievement of a value and could be implemented at different levels. In that view, there would never be a conflict between principles related to a case, as far as all of them could be implemented at the same time but at different levels. The problem is understanding the criteria of preferences; the solution sets upon the argumentative criterion of reasonableness.

[15] Case C-75/16, Judgment of 14 June 2017, para 61, n 6 above.

the right to withdraw from mediation procedure irrespective of the existence of a valid reason.

III. The View of the Italian Constitutional Court. A Few Critical Remarks

To sum up, the Court of Justice assumes that the voluntary nature of ADR procedure is compatible with any form of compulsory mediation, as long as the parties are not prevented from exercising their right of access to judicial system.

Albeit on the basis of a different reasoning, Italian Constitutional Court proposes a similar interpretative solution. When constitutional judges are questioned about the compliance of the compulsory nature of mediation with the fundamental right of defence, they exclude the contrast.[16] Following the Constitutional Court case-law, the implementation of Art 24 of the Italian Constitution[17] does not imply the 'immediacy' of legal action;[18] the access to justice could be postponed for the purpose of safeguarding 'general'[19] or 'social'[20] interests, avoiding abuses of rights or pursuing superior objectives of justice.[21] Any possible postponement should not prevent or make extremely difficult the exercise of rights.[22]

Both the European Court and the Italian Constitutional Court acknowledge that the access to justice could be subject to conditions, in so far as those conditions do not impede the recourse to dispute resolution proceedings based on the guarantees of a due process.

Even if this solution could be theoretically followed, it does not seem sufficient to solve the problem.

[16] Corte costituzionale 30 November 2007 no 403, *Giustizia civile*, I, 307 (2008), and, among others, Corte costituzionale 19 December 2006 no 436, available at www.cortecostituzionale.it.

[17] About the implementation of the fundamental right of defence, A. Pizzorusso, 'Garanzia costituzionale dell'azione' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1992), VIII, 608.

[18] Corte costituzionale 18 January 1991 no 15, *Diritto del lavoro*, II, 167 (1992); Corte costituzionale 22 October 1990 no 470, *Foro italiano*, I, 3057 (1990); Corte costituzionale 11 December 1989 no 530, *Giustizia civile*, I, 309 (1990).

[19] Corte costituzionale 16 June 1964 no 47, *Foro italiano*, I, 1334 (1964); Corte costituzionale 13 July 1970 no 130, *Foro italiano*, I, 2289 (1970); Corte costituzionale 9 July 1974 no 214, available at www.cortecostituzionale.it; Corte costituzionale 20 April 1977 no 63, *Rivista dei dottori commercialisti*, 740 (1980); Corte costituzionale 21 January 1988 no 73, available at www.cortecostituzionale.it; and Corte costituzionale 4 March 1992 no 82, *Foro italiano*, I, 1023 (1992).

[20] Corte costituzionale 15 July 2003 no 251, available at *www.cortecostituzionale.it*.

[21] Corte costituzionale 23 November 1993 no 406, *Foro italiano*, I, 3214 (1993); Corte costituzionale 22 April 1997 no 113, *Giustizia civile*, 1087 (1997); Corte costituzionale 4 July 1996 no 233, *Giustizia civile*, I, 2466 (1996); and Corte costituzionale 23 June 1994 no 255, *Foro italiano*, I, 3327 (1994).

[22] Corte costituzionale 13 July 2000 no 276, *Giurisprudenza costituzionale*, 675 (2000).

Intending mediation as a mandatory preliminary step do not infringe, in itself, the right of defence, but, as far as the right to access the justice is postponed, it is unavoidably restricted. The legitimacy of that restriction cannot be verified *a priori*, once and for all. The interpreter should verify, in each case, whether and, if so, to what extent the right of direct action (Art 24 of the Italian Constitution and Art 6 Cedu) and the reasonable duration of trial (Art 111 Constitution and Art 6 Cedu) could be restricted and conditioned.

To this end, the specific proceeding should give the parties a guarantee of accessing the justice of the Courts or appealing subsequently. It should be also verified that the limitation of the right of free access to justice finds a reason in interests protected by constitutional requirements which are equally (or more) relevant. That balancing has to evaluate the functioning of the specific proceeding, the purpose of the related regulation and the nature of the single dispute and of the interests to be protected, taking also into account that – with reference to ADRs for consumer disputes – the ontological imbalance of negotiating power in b2c relationships could easily turn out into an imbalance of defence power.[23]

The reference to a 'general interest', with no further specifications, is not sufficient to legitimate the filter. Quite the opposite, the combination of different needs could be solved only through an adequate balancing.[24] So, a conditioning is possible only if it meets interests allocated at a higher level of the hierarchy of values.

On top of that, in order to make sense, the choice to make mediation compulsory should also fit for all the purposes of the legislator. Otherwise, the

[23] Italian scholars use to express that concern arguing about the combination of limited active legitimation and declarations of a 'protective nullity' (*nullità di protezione*) on Courts' own motion. The weaker party, usually not provided with economic resources sufficient for a proper defence, could not be able to adequately assess the means of protection provided by legal system (S. Monticelli, 'Limiti sostanziali e processuali al potere del giudicante *ex* art. 1421 c.c. e le nullità contrattuali' *Giustizia civile*, II, 295 (2003), and Id, 'La rilevabilità d'ufficio condizionata della nullità di protezione: il nuovo "atto" della Corte di Giustizia' *Contratti*, 1119 (2009)). Indeed, the Court own-initiative should be subordinate to the specific circumstance that party's inactivity is not a specific choice, but depends on a deficiency in defence capability (S. Polidori, 'Nullità di protezione e interesse pubblico' *Rassegna di diritto civile*, 1019 (2009), and Id, 'Nullità protettive, neoformalismo ed eccessi di protezione: applicazioni in tema di esercizio abusivo dell'azione di nullità per vizio di forma nel campo dell'intermediazione finanziaria' *Annali della Facoltà di Economia di Benevento*, 56 (2012)). Both limitation in active legitimation and Courts own-initiative are 'protection techniques serving the same ideology'; they get along with each other to adequately protect the weaker party and guarantee the economic public policy (G. Perlingieri, *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici* (Napoli: Edizioni Scientifiche Italiane, 2010), 18. About the topic, see also E. Minervini, 'La nullità per grave iniquità dell'accordo sulla data del pagamento o sulle conseguenze del ritardato pagamento' *Diritto della banca e del mercato finanziario*, I, 199 (2003); A. Gentili, 'Le invalidità', in P. Rescigno ed, *Trattato dei contratti* (Torino: UTET, 1999), I, 2, 1542; G. Chiovenda, 'Le riforme processuali e le correnti del pensiero moderno', in Id, *Saggi di diritto processuale civile* (Milano: Giuffrè, 1993), I, 385, e M.G. Civinini, 'Poteri del giudice e poteri delle parti nel processo ordinario di cognizione. Rilievo officioso delle questioni e contraddittorio' *Foro italiano*, V, 3 (1999).

[24] § 2 above.

restriction would be unreasonable and expose the Member States to the risk of condemnation by European Court of Human Rights for the excessive duration of civil trials.

IV. The Legitimacy of the Postponement and the Balancing of Interests

At first glance, the option for compulsory ADR would aim to optimising the resolution proceeding, looking for a reduction of costs and time required for the judgment. Some scholars claim that this purpose – certainly worthy of attention – is not supported by any Constitutional provision and, for this reason, it cannot legitimate the barrier to accessing the justice of the Courts.[25] As a matter of fact, it is questionable whether needs related to the structure of the proceeding, even if achievable,[26] could justify the weakening of fundamental rights granted by Constitution.

It is hard to believe that ADR for consumer litigations, compulsory or not, could actually correct the contradiction between the heavy increase in disputes (due to the frequent market failures characterizing financial, banking and insurance situation for the last few years) and the inefficiencies of the justice of the Courts.[27]

It seems more likely that the *favor* for alternative justice is related to the idea that one of the ineradicable components of b2c relations is the fear of consumer for her normal inability to understand the details and the risks of each transaction, especially in financial, banking and insurance sectors. Indeed, investors and savers do not have any sufficient technical knowledge and so they

[25] L.P. Comoglio, *sub* art. 24, in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zannichelli, 1981), 36.

[26] The proposal for a Directive (com(2004) 178 final, 22 october 2004), followed by Directive 2008/52/EC, clarifies that this is not the unique nor principal purpose. Compulsory mediation could be a benefit in that way, but 'mediation has a value in itself as a dispute resolution method (…) which deserves to be promoted independently of its value in off-loading pressure on the court system'. So that 'the availability of ADRs in general can not in any way detract from the obligation of Member States to maintain an effective and fair legal system that meets the requirements of the European Convention of Human Rights, which forms one of the central pillars of a democratic society'. The correct functioning of mediation postulates the correct functioning of the justice of the Courts, in the view of D. Dalfino, 'Mediazione, conciliazione e rapporto con il processo' *Foro italiano*, V, 101 (2010). See also C. Vaccà, 'La Direttiva sulla conciliazione: tanto rumore per nulla' *Consumatore diritto e mercato*, 122 (2008). For a study about the function of ADR and ODR, A. Fachechi, 'La giustizia alternativa nel commercio elettronico. Profili civilistici delle ODR' (Napoli: Edizioni Scientifiche Italiane, 2016).

[27] Neverthless, many scholars use to consider ADR a solution for justice inefficiencies. On the topic, G. Romualdi, 'Problem Solving Justice and Alternative Dispute Resolution in the Italian Legal Context' *Utrecht Law Review*, 52 (2018). According to L.P. Comoglio, 'Mezzi alternativi di tutela e garanzie costituzionali' *Rivista di diritto processuale*, 370 (2000), the alternative justice started from the important Conference named in honour of Roscoe Pound (USA, 1976) and his indictiment of civil justice distortions (R. Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' *American Law Review*, 729 (1906)).

are induced to simply rely on the other party's reassurances, hoping the business to describe accurately and honestly the concrete possibilities of failures (rather than to provide all information about the negotiation, as far as consumers would not be able to handle them).[28]

This consumer – aware, on one side, of her own weak negotiation position and, on the other side, of the known cumbersome and length of process – is discouraged over the possibility of adequately managing the relationship with the business in its potential pathological stage and over the possibility of obtaining a compensation for the potential damages. This is particularly the case of minor damages (where keeping the damage is more convenient than trying to remove it) and of the transnational dispute (where there is a general concern about competent jurisdiction and applicable law).

That lack of consumer's confidence affects negatively the performance of individual market sectors and holds back their development.

Actually, the Directive 2013/11/EU does not aim to rectify the malfunction of justice of the Courts, but it aims to create consumer confidence in market, promote the market and ensure its correct functioning.

The European legislator pays special attention to consumer's confidence. She agrees with the need to build a properly functioning ADR infrastructure for consumer disputes and a properly integrated online dispute resolution (ODR) framework for consumer disputes arising from online transactions.[29] ADR and ODR are necessary in order to achieve the Single Market Act's purpose of boosting citizens' confidence in the internal market (recital 11). Consistently, the legislator admits that the development, within the Union, of properly functioning

[28] More details in A. Fachechi, n 9 above, 377.

[29] On the idea that '(t)he more relationships that are formed online and the more transactions that take place, the more disputes are likely to occur', E. Katsh, 'Dispute Resolution without Borders: Some Implications for the Emergence of Law in Cyberspace' available at https://tinyurl.com/yy44stym (last visited 28 May 2019). D.R. Johnson, 'Dispute Resolution in Cyberspace' available at https://tinyurl.com/y5f63u3r (last visited 28 May 2019), assumes that the increase in disputes is accompanied by a certain increase in time spent on electronic communications. See also P. Cortés, *Online Dispute Resolution for Consumers in the European Union* (London-New York: Routledge, 2011); M. Wahab, 'Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement' *International Journal of Law and Information Technology*, 128 (2004); E. Katsh, J. Rifkin and A. Gaitenby, 'E-Commerce, E-Dispute, and E-Dispute Resolution: In The Shadow of "eBay Law" ' *Ohio State Journal of Dispute Resolution*, 725 (2000); P. Cortés and F. Esteban de la Rosa, 'Building a Global Redress System for Low-Value Cross-Border Disputes' *International and Comparative Law Quarterly*, 412 (2013); M. Imbrenda and A Fachechi eds, *Meccanismi alternative di risoluzione delle controversie* (Napoli: Edizioni Scientifiche Italiane, 2015). A complete reconstruction of existing ODR model framework is operated by M. Conley Tyler, '115 and Counting: The State of ODR 2004', in M. Conley Tyler, E. Katsh and D. Choi eds, *Proceedings of the Third Annual Forum on Online Dispute Resolution. International Conflict Resolution Centre in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP)*, 2004, available at https://tinyurl.com/yxup7hnj (last visited 28 May 2019) and G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (The Hague: Kluwer Law International, 2004).

ADR is essential to strengthen consumers' confidence in the internal market, including in the area of online commerce (recital 15). That aim is confirmed by the symmetrical regulation 524/2013/EU (ODR regulation):

> 'in order for consumers to have confidence in and benefit from the digital dimension of the internal market, it is necessary that they have access to simple, efficient, fast and low-cost ways of resolving disputes which arise from the sale of goods or the supply of services online. This is particularly important when consumers shop cross-border' (recital 2).

Moreover, 'being able to seek easy and low-cost dispute resolution can boost consumers' and traders' confidence in the digital Single Market' (recital 7). After all, the Communication 13 April 2011 ('Single Market Act – Twelve levers to boost growth and strengthen confidence – 'Working together to create new growth') mentions ADR regulation among the 'twelve levers to boost growth and strengthen confidence in single market'.

Definitely, the objective is to strengthen the credibility of the market sector through a justice system easily accessible and (more or less) free of charge, independent, impartial and transparent and so attractive for consumers and businesses, as well.[30] The objective is to build a justice system suitable for giving the perception of a secure market (also thanks to the supervision of the competent Authorities; Art 141-*octies* Consumer Code).[31]

As mentioned above, the postponement of the access to justice is legitimate when it is an instrument of best protection of parties' interests. In the view of that, the introduction of a condition to legal action – of course, with the minimum requirements expressed in Art 141-*bis* ff. Consumer Code – could serve the interests of the weaker party to a contract.

Compulsory ADR, for disputes with a high technical complexity, could activate that virtuous circle which starts from the strengthening of consumer's confidence and leads to the development of the single market sector, solely to benefit (non only of businesses, but also) of the consumers. Public interest in correct functioning

[30] Recital 19 to ADR directive confirms that ADR and mediation are in a relationship of gender to species: '(t)his Directive is intended to apply horizontally to all types of ADR procedures, including to ADR procedures covered by Directive 2008/52/EC'. See F. Luiso, 'Il modello italiano di mediazione. Il «giusto» procedimento di mediazione (contraddittorio, riservatezza, difesa, proposta)' *Giurisprudenza italiana*, 214 (2012).

[31] Art 141-*octies* Consumer Code refers to the authority of Consob the supervision over the area of the disputes between investors and intermediaries due to the violation of relevant disclosure requirements, good faith and transparency obligations (letter *b*), and to the authority of Banca d'Italia the supervision over the area of disputes under the competences of the Arbitro Bancario Finaziario (letter *e*). The fragmentation of the competences required a coordination, with the Ministero dello Sviluppo Economico as single contact point. See A. Fachechi, *sub* art. 141 *octies*, in G. Perlingieri, E. Capobianco and L. Mezzasoma eds, *Codice del consumo annotato con la dottrina e la giurisprudenza*, forthcoming.

of the market and market single participants' interest are highly interdependent.[32]

On the other hand, ADR are not truly alternative to jurisdiction of any State Court nor to arbitration proceeding, even when they have a 'decisional nature'.[33] To the benefits of a quick and cheap resolution system, ADR sacrifice other values, fundamental to the justice of the Courts and of the Arbitral Board. Streamlined ADR proceedings are particularly attractive and convenient, but the simplification is difficult to reconcile with the principles of due process; the implementation of those principles would necessarily imply many formal constraints and so make the ADR more burdensome.[34]

However, the introduction of simpler and less expensive resolution systems could led to a certain compensation when, without them, the damaged party would choose to keep the damage; ie, when the justice of the Courts is not a possible way, as far as its length and the costs are inadequate as compared with the extent of the damage. In such cases, the being compulsory of the mediation, on one side, would imply a fake postponement of the access to justice, because the access would actually never take place, and, on the other, seeking to raise consumers' attention on the existence of alternative justice systems, would facilitate the management of the pathological stage in b2c relationship.

Lastly, the principle of subsidiarity (Art 118 Constitution) could also legitimate compulsory ADR; indeed it implies a significant restriction to government intervention with regard to substantive rules and procedural law: the access to justice of the Courts should be the last chance to solve the dispute for available rights protection.[35]

V. The Right of Withdrawing from the Proceeding

[32] P. Perlingieri, 'L'incidenza dell'interesse pubblico sulla negoziazione privata' *Rassegna di diritto civile*, 933 (1986), describes the consequences of the heightened opposition of public interest and individual interest. On the impossibility in considering a single contract as an isolated business see R. Di Raimo, 'L'art. 14 della direttiva 2005/29/CE e la disciplina della pubblicità ingannevole e comparativa', in G. De Cristofaro ed, *Le «pratiche commerciali sleali» tra imprese e consumatori. La direttiva 2005/29/Ce e il diritto italiano* (Torino: Giappichelli, 2007), 292.

[33] O. Fiss, n 1 above: 'Parties may settle while leaving justice undone'.

[34] A. Fachechi, n 9 above, and Ead, 'Natura arbitrale delle ODR aggiudicatorie. In particolare, la procedura UDRP', in P. Perlingieri et al eds, *L'autonomia negoziale nella giustizia arbitrale, Atti del X Convegno nazionale SISDiC*, (Napoli: Edizioni Scientifiche Italiane, 2016), 249, and in E. Minervini ed, *Online Dispute Resolution (ODR)* (Napoli: Edizioni Scientifiche Italiane, 2016), 75. O.M. Fiss, n 1 above, holds that the purpouse of adjudication is not exactly the same of the settlement function: Courts are intended not only to 'maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpreter those values and to bring reality into accord with them. This duty is not discharged when the parties settle'.

[35] About the implementation of principle of subsidiarity, see M. Nuzzo ed, *Il principio di sussidiarietà nel diritto privato* (Torino: Giappichelli, 2014); and D. De Felice, *Principio di sussidiarietà e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008).

It could be also questioned whether ADR proceeding for consumer disputes, as regulated, does not actually prevent the access to justice.

It is interesting to analyze problems arising from the consequences provided where parties fails to participate in mediation without a valid reason. Regarding compulsory mediation, Art 8, para 4-*bis*, decreto legislativo 5 march 2010 no 28, establishes that, in the potential subsequent trial about the same dispute, the judge might infer from that behaviour the existence of evidence under Art 116, para 2, Code of Civil Procedure and must order the party to pay to the State treasury an amount equal to the *contributo unificato* payable in respect of the proceeding.

In the different case of withdrawing from the existing proceeding, the Italian consumer law ensures the right only to consumer (Art 141-*bis*, para 6, Consumer Code); instead, the regulation on compulsory mediation does not contain any provision in this regard. There appears to be no real conflict with the guidelines provided by European legislator.

Based on the decision of the Court of Justice, ADR Directive 'must be interpreted as precluding a provision of national law to the effect that consumers may withdraw from a mediation procedure only in the event that they demonstrate the existence of a valid reason in support of that decision, on pain of penalties in the context of subsequent legal proceedings',[36] but the same directive

> 'does not preclude national legislation which entitles a consumer to refuse to participate in a prior mediation procedure only on the basis of a valid reason, to the extent that he may bring it to an end without restriction immediately after the first meeting with the mediator'.[37]

In the light of all above, the findings of the Court of Justice – where she states that a regulation providing that a consumer could withdraw from a mediation only relying on a valid reason is an unacceptable restriction of the right of access to justice, in opposition to the purposes of ADR Directive – only partially persuade.

Permitting the arbitrary cancellation of the mediation could affect and dismiss the benefits of the condition required for legal action.

Significantly, Art 141-*quater*, para 5, Consumer Code, in allowing the parties to withdraw from mediation at any time, specifies that, where the business has an obligation to attend the proceeding, the right to withdraw from it is provided only to consumer. It seems reasonable that the provision of mediation as a preliminary condition of legal action matches the obligation to attend it seriously; the right to withdraw should be ensured only if the it is the best way to meet the consumer protection.

[36] Case C-75/16, 14 June 2017, n 6 above, para 66.
[37] Case C-75/16, 14 June 2017, n 6 above, para 70.

After all, Art 9, para 2 (a), ADR Directive, in allowing the parties (or the sole consumer, *ex* para 3) to withdraw from the proceeding at any time, subordinates the exercise of that right to dissatisfaction with the performance or the operation of the procedure.

Otherwise, if the restriction concerned only the formal access to alternative procedure and did not pursue the aim of mediating, requiring a condition for legal action would be of limited value.

VI. The Assistance of the Lawyer

Pursuant to Art 8 (b) (and Art 9, para 1) ADR Directive, the parties have access to the procedure without being obliged to retain a lawyer or a legal advisor. In Italian legal system, the provision is implemented under Art 141-*quater*, para 3(c), Consumer Code (entitled 'transparency, efficiency, equity and freedom'), allowing parties to access the procedure representing themselves, with no prejudice to their right to independent advice or to be represented or assisted by a third party at any stage of the procedure.

Some scholars claim that there is no need for a technical defence because of the 'negotiation' nature of the procedure, also considered that the parties could retain a legal advisor when it is required by the nature of the dispute, the complexity of the questions or the interests involved.[38]

The obligation to be represented by a lawyer – as a guarantee of the right of defence, as far as the weaker party could not be able to adequately assess the existing forms of protection – would imply a certain increasing of the cost of the procedure[39] and a loss of its speed (it takes time to choose a lawyer and it takes time for her to study the dispute points).

Employing a legal advisor, even if optional, would lead the other party to retain a defending lawyer, not to be in a unfavourable position, even when she is highly motivated to minimize the cost of the procedure.

Quite the opposite, in compulsory mediation the assistance of a lawyer is required under Art 5, para 1-*bis*, decreto legislativo no 28 of 2010.[40]

[38] P. Bartolomucci, 'La nuova disciplina delle procedure di risoluzione alternativa delle controversie in materia di consumo: il d.lgs. n. 130/15 e le modifiche del codice del consumo' *Nuove leggi civili commentate*, 494 (2016).

[39] N. Scannicchio, 'La risoluzione delle controversie bancarie' n 4 above, 549. About ADR and ODR funding sources and some related problems, see M.G. Bowers, 'Implementing an Online Dispute Resolution Scheme: Using Domain Name Registration Contracts to Create a Workable Framework' *Vanderbilt Law Review*, 1284 (2011); E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflict in Cyberspace* (San Francisco: John Wiley & Sons Inc, 2001); L.M. Ponte, 'Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions' *Albany Law Journal of Science and Technology*, 441 (2002).

[40] According to D. Dalfino, 'Mediazione civile e commerciale', in S. Chiarloni ed, *Commentario al codice di procedura civile* (Bologna: Zanichelli, 2016), 275, the absence of a lawyer does not

The formal contradiction between regulations, identified by the Court of Justice (in pointing out that 'national legislation may not require a consumer taking part in an ADR procedure to be assisted by a lawyer'),[41] could be justified in the light of the complexity of the procedure in financial, banking and insurance sectors.

Indeed, the parties could do without a legal advisor only where the procedure aims to help them in reaching an agreement. Instead, a technical defence is necessary when the procedure is a real 'pre-trial' and requires the taking of evidence and any briefs.[42]

Definitely, the choice of allowing the parties to access the procedure without retaining a legal advisor could ensure flexibility and accessibility to procedures; on the other side, in those disputes which are too complex to be easily accessible to consumers representing themselves, the obligation of the assistance of a lawyer could increase the level of protection pursued by ADR Directive.

VII. Concluding Remarks

The modern work of the alternative justice regulation, the above described apparent contradictions and the overlapping of the scopes worry the interpreter in need of certainties. Any effort to systematise the whole range of provisions sits at odds with the current trend of the Court of Justice to adapt the domestic regulations to the ADR Directive formal provisions, sometimes not considering that it is 'the aim to be achieved' that should remain unchanged, not the means provided to that aim.

Far from being able to solve the mentioned problems once and for all, the mandatory nature of mediation and the related rules (right of withdrawing form the proceeding, assistance of a lawyer, etc) should be considered legitimated when they can best serve parts' interests. Given the (more or less) evident aporias of the legal system, identifying the applicable rule is about investigating the dispute-settlement scheme more adequate to guarantee the access to justice with regard to the variable modulation of consumer relations.

imply the inadmissibility of the legal action, but affect the effectiveness of the settlement. This would not be enforceable in the view of A. Lupoi, 'Ancora sui rapporti tra mediazione e processo civile, dopo le ultime riforme' *Rivista trimestrale di diritto e procedura civile*, 19 (2016).

[41] Case C-75/16, 14 June 2017, n 6 above, para 65.

[42] M. Bottino, 'La nuova normativa europea in materia di risoluzione alternativa delle controversie dei consumatori' *Contratto impresa Europa*, 406 (2014); V. Vigoriti, 'Superabili ambiguità. Le proposte europee in tema di ADR e ODR' *Nuova Giurisprudenza civile commentata*, 313 (2012).

Short Symposium on the ADR

The Adoption of the Directive on Alternative Dispute Resolution for Consumer Disputes in Italian Law

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Abstract

The essay analyses some of the legal problems associated with implementing Directive 2013/11/EU on the alternative dispute resolution of consumer disputes in the Italian legal system. The author explains important jurisprudential cases and focuses on two judgments of the Italian Constitutional Court and the Court of Justice. The aim of the essay is to underline the 'dialogue' between these Courts regarding alternative dispute resolution (ADR). In fact, both Courts propose a systematic and axiologically oriented interpretation of the Italian-European discipline, and, inspired by the principle of proportionality, both Courts operate a balancing of the principles involved in order to implement the values that inform the Italian legal system.

I. Regulatory Framework

On 3 September 2015, the decreto legislativo of 6 August 2015 no 130[1] entered into force in Italian law, implementing Directive 2013/11/EU on the alternative dispute resolution for consumer disputes (Directive on consumer ADR), which amended Regulation (EC) no 2006/2004 and Directive 2009/22/CE. The Italian legislator introduced the new regulation on consumer Alternative Dispute Resolution (ADR), through the modification of two legal texts already in force for more than a decade: decreto legislativo of 6 September 2005 no 206, so called Consumer Code, and the decreto legislativo of 8 October 2007 no 179,[2] entitled

> 'Establishment of reconciliation and arbitration procedures, compensation system and guarantee fund for savers and investors in the implementation of Art 27, paras 1 and 2, of the law of 28 December 2005 no 262'.

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[1] For some initial considerations on the saga in the Italian legal system, see T. Galletto, 'Adr e controversie dei consumatori: un difficile equilibrio' *Foro padano*, II, 79 (2015); O. Desiato, 'Le politiche dell'Unione Europea in favore della «degiurisdizionalizzazione» e i più recenti interventi del legislatore italiano in tema di ADR per i consumatori' *Responsabilità civile e previdenza*, 1802 (2016); M. Angelone, 'La «degiurisdizionalizzazione» della tutela del consumatore' *Rassegna di diritto civile*, 723 (2016).

[2] Subsequently, Art 10, para 12, of decreto legislativo 3 August 2017 no 129, abrogated this regulatory act: the provisions referred to in the text have now been included in the decreto legislativo 24 February 1998 no 58, so called Testo Unico della Finanza.

Art 1 of the decreto legislativo no 130 of 2005 inserted after the Art 140-*bis* of the Consumer Code, Title II-*bis*, is entitled 'Out-of-court settlement of disputes'. The collocation of new legislation in this part of the Consumer Code is consistent with its structure. Part V of the Consumer Code already provides for certain specific tools for consumer protection; however, these relate to judicial protection. In particular, the representative associations at a national level are governed by Title I;[3] in Title II[4] the modalities of access to justice in a collective form are regulated. Furthermore, precisely by virtue of the decreto legislativo no 130 of 2015,[5] from 9 January 2016 this form of protection of the collective interests of users and consumers can also be exercised in the field of online dispute resolution (EU Regulation, 21 May 2013 no 524).[6] Therefore, the new regulation of ADR is part of a set of safeguards already partially outlined by the national legislator.

Art 1, para 2, of decreto legislativo no 130 of 2015, modified the content of Art 141 and has identified in detail the scope of the objective and subjective applications of the new legislation. The following articles regulate: 'Obligations, Duties and Requirements of ADR Bodies', 'Joint Negotiations', 'Transparency, Effectiveness, Equity and Freedom', 'Effects of ADR Procedure on Limitation and Prescription Terms', 'Information and consumer assistance', 'Cooperation', 'Competent authorities and single point of contact', 'Information to be transmitted to competent authorities by dispute resolution bodies', and 'Role of competent authorities'. Moreover, Art 1-*bis*, of the decreto legislativo no 130 of 2015 introduces Arts 5-*bis* and 5-*ter* to decreto legislativo no 179 of 2007. In these two articles, new forms of ADR are regulated for the subjects in respect of which the National Commission for Companies and the Stock Exchange (CONSOB) carries out its supervisory activity. In particular, these subjects

> 'must adhere to out-of-court dispute resolution systems with investors other than the professional clients referred to in Art 6, paras 2-*quinquies* and 2-*sexies* referred to in decreto legislativo no 58 of 24 February 1998'.

The procedures for implementing these ADR systems are defined by a specific CONSOB regulation.

The new regulations adopt long portions of the text of the Directive on consumer ADR, but they are not an absolute novelty in the Italian legal system.

[3] Arts 136-138.

[4] Arts 139-140-*bis*.

[5] Art 2, para 1.

[6] For further details see: E. Minervini ed, *Le Online Dispute Resolution (ODR)* (Napoli: Edizioni Scientifiche Italiane, 2016), passim; M. Imbrenda and A. Fachechi eds, *Meccanismi alternativi di risoluzione delle controversie nel commercio elettronico* (Napoli: Edizioni Scientifiche Italiane, 2015), 1; T. Rossi, 'Effettività della tutela nella recente regolamentazione europea di Adr e Odr' *Rassegna di diritto civile*, 831 (2014); A. Spedicato, 'Il regolamento europeo n. 524/2013. L'istituzione della piattaforma Odr - I nuovi strumenti di risoluzione alternativa delle controversie nel mercato unico europeo' *Nuova procedura civile*, 76 (2013).

The internal legislator had already intervened in numerous sectors to regulate ADR systems, also due to the endemic slowness, costs, and risks of going to trial in Italy. A systematic reading of the legal system demonstrates the legislator's preference for the resolution of disputes 'outside of court',[7] also through the negotiating instrument. In addition to the specific regulation on the settlement contract, included in Arts 1965-1976 of the Civil Code, it is worth considering, for example, settlements governed by Art 208, of the decreto legislativo of 18 April 2016 (so called Procurement Code) or the numerous hypotheses of conciliatory agreements in labour and family law. However, the presence of various sources of regulation can create difficult problems in coordinating the various disciplines,[8] as will be analysed in the following paragraphs. A careful assessment of the current functions of the different ADR systems compared to the objectives of Directive on consumer ADR will allow for a critical re-reading of the recent jurisprudence of the Court of Justice on the matter.

An important novelty, also on a systematic level, concerns the addition of the letters *v-bis* and *v-ter* to Art 33 of the Consumer Code, entitled 'Unfair terms in agreements between a professional and a consumer'. By virtue of the new regulations, clauses that have as their object or effect

> 'to impose on the consumer wishing to access an out-of-court dispute resolution procedure provided for in Title II-*bis* of section V to apply exclusively to a single type of ADR entity or to a single ADR entity are presumed to be vexatious until proven otherwise';[9]

as well as 'making the out-of-court dispute resolution procedure excessively difficult for the consumer foreseen by Title II-*bis* of Section V'.[10] Regarding the latter provisions, Italian doctrine has noted the importance of the need to anchor the presumption of harshness of the predetermination clauses of the ADR body to the need for effective protection, which can actually guarantee these remedies.[11] This doctrine also reported that these provisions demonstrate how the legislator

[7] The suggestive expression, capable of describing an extremely complex phenomenon, is in the title of the recent monograph by E. Del Prato, *Fuori dal processo. Studi sulle risoluzioni negoziali delle controversie* (Torino: Giappichelli, 2016).

[8] It is also worth considering how the same configurability of a unitary ADR system, even with the specificities of each sector, is rather controversial under Italian doctrine. For various positions, see, for example, T. Rossi, *Effettività della tutela* n 6 above, 846, e S. Viotti, 'Brevi spunti per una configurazione unitaria delle Alternative Dispute Resolution (ADR)' *Giustizia civile*, II, 828 (2013). Claiming that ADR systems are not useful, A. de la Oliva Santos, 'Adr o la riscoperta dell'acqua calda' *Rivista trimestrale di diritto e procedura civile*, 507 (2016).

[9] Art 33, para 2, letter *v-bis*, of the Consumer Code.

[10] Art 33, para 2, letter *v-ter*, of the Consumer Code.

[11] See: G. Recinto, 'Foro del consumatore e clausole di predeterminazione dell'organismo ADR: le novità derivanti dal d.lgs. 6 agosto 2015, n. 130, e l'occasione per ripensare la relazione tra strumenti di deflazione del contenzioso, da un lato, e giustizia, statale o privata, dall'altro' *Nuove leggi civili commentate*, 125 (2016).

has finally abandoned a vision of progressive 'judicialization' of these procedures. The radical distinction between so-called conciliatory models (when the definition of the dispute is entrusted exclusively to an agreement of the parties) and properly awarded models (when the definition of the dispute is left to the determination of a third party, unrelated to the dispute) is firmly supported. From this point of view, even mandatory mediation does not properly belong to 'alternative systems of justice'; it simply takes the form of a 'conflict resolution system'. Otherwise, arbitration can be considered a 'contracting instrument', qualifying as 'private alternative justice'.[12]

In this regulatory context, constitutional principles, including those established at the European level, assume a decisive role. These principles represent the point of reference for the interpreter and are the foundation of the specific rules of the ADR sector. The resolution of disputes must respect, according to the cases, the principles of the 'fair trial', if it is based on strictly decision-making systems, and the principles that guarantee the 'fair contract' (also in relation to the possible weakness of one of the parties), if it is based on conciliatory systems or in any case due to contractual autonomy.

II. The Implementation of Directive 2013/11/EU and Directive 2008/52/EC in the Italian Legal System

The regulatory framework outlined above is completed, with regard to the mediation systems aimed at conciliation, with Directive 2008/52/EC, at the European level, and with the aforementioned decreto legislativo no 28 of 4 March 2010 (on mediation aimed at reconciling civil and commercial disputes) ('decreto legislativo no 28'), in the Italian legal system. With reference to the coordination of these last two measures with ADR for consumers, the Court of Verona, with an

[12] G. Recinto, 'La natura giuridica del *settlement* tra giusto processo e giuste *Online Dispute Resolution*' www.dirittifondamentali.it, 7 January 2015. In these terms, see P. Perlingieri, 'Sui modelli alternativi di risoluzione delle controversie' *Rivista giuridica del Molise e del Sannio*, 93 (2014); Id, 'Sulle cause della scarsa diffusione dell'arbitrato in Italia' *Giusto processo civile*, 657 (2014); Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 37; Id, *Arbitrato e Costituzione* (Napoli: Edizioni Scientifiche Italiane, 2002), 19. Also T. Rossi, *Arbitrabilità e controllo di conformità all'ordine pubblico* (Napoli: Edizioni Scientifiche Italiane, 2017), 62; M. Marinaro, 'La proposta "mediata" non è aggiudicativa ma solo facilitativa' *Guida al diritto*, 64 (2015); A. Tartaglia Polcini, *Modelli arbitrali tra autonomia negoziale e funzione giurisdizionale* (Napoli: Edizioni Scientifiche Italiane, 2002), 260. In a different sense, however, it has been noted how the Directive on consumer ADR introduces a proceeding, whose structure is basically 'litigation-decisive', similar to what happens in arbitration and in the declaratory judicial process: F.P. Luiso, 'La direttiva 2013/11/Ue, sulla risoluzione alternativa delle controversie dei consumatori' *Rivista trimestrale di diritto e procedura civile*, 1302 (2014). See also, E. Minervini, 'L'arbitrato e gli strumenti alternativi di composizione dei conflitti', in L. Ruggeri and L. Mezzasoma eds, *L'arbitro nella moderna giustizia arbitrale* (Napoli: Edizioni Scientifiche Italiane, 2013), 11.

order dated 28 January 2016,[13] proposed a preliminary ruling for the Court of Justice. The Veronese judge decided to turn to the Court, since, in domestic law, some provisions for civil and commercial mediation (and included in decreto legislativo no 28) seem to be in conflict with the Directive on consumer ADR. In many cases, the scope of application of the various disciplines is the same: these are disputes between professionals and consumers in the banking, financial, and insurance sectors. In particular, the Court of Verona asks whether the Directive on consumer ADR must be interpreted:

a) as precluding national legislation, such as that at issue in the main proceedings, which provides, first, for mandatory recourse to a mediation procedure, in disputes referred to in Art 2, para 1, of that directive, as a condition for the admissibility of legal proceedings relating to those disputes;

b) that, in the context of such mediation, consumers must be assisted by a lawyer; and

c) that consumers may avoid prior recourse to mediation only if they demonstrate a valid reason in support of that decision.

According to internal regulations on mediation aimed at the reconciliation of civil and commercial disputes, the parties are obliged to attempt reconciliation (Art 5, para 1-*bis*, of decreto legislativo no 28) and to be assisted by a lawyer (Arts 5, para 1-*bis*, and 8, para 1, of decreto legislativo no 28). Furthermore, pursuant to Art 8, para 4-*bis*, of decreto legislativo no 28,

> 'from the failure to participate without justified reason to the mediation process, the judge can infer arguments in the subsequent trial pursuant to Art 116, second para, of the Code of Civil Procedure. The judge condemns the constituted party that, in the cases provided for in Art 5, has not participated in the proceedings without justified reason, to the payment at the entrance of the Member State budget of a sum of the amount corresponding to the unified contribution due for the judgment'.

Instead, the Directive on consumer ADR provides for 'voluntary'[14] ADR systems,[15] to be carried out without the assistance of lawyers or consultants[16] and requires Member States to ensure that the parties have the possibility to withdraw from the procedure at any time, if they are not satisfied with the performance or operation of the procedure.[17] A problem arises since Art 141

[13] The provision was published in *Contratti*, 537 (2016), with a note by N. Scannicchio, 'La risoluzione delle controversie bancarie. ADR obbligatoria e ADR dei consumatori'.

[14] On the meaning of the term refer to para III.

[15] Art 1, European Parliament and Council Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) no 2006/2004 and Directive 2009/22/EC [2013] OCJ L165/13.

[16] Art 8(b) and Art 9, para 1(a) of the Directive on consumer ADR, n 15 above.

[17] Art 9 para 2(a) of the Directive on consumer ADR, n 15 above.

para 6 of the Consumer Code[18] (which, as previously mentioned, transposes the Directive on consumer ADR), shall apply without prejudice to certain provisions that require the compulsory procedures for out-of-court dispute resolution; among these is precisely Art 5, para 1-*bis*, of decreto legislativo no 28.

The Court of Verona also posed another question as to the relationship between the two directives cited. The referring court asked, in essence, whether Art 3, para 2, of the Directive on consumer ADR, insofar as it provides that that directive applies 'without prejudice to' Directive 2008/52, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for a mandatory mediation procedure in the disputes referred to in Art 2, para 1, of the Directive on consumer ADR. On this point the Court of Justice,[19] with the ruling of 14 June 2017, preliminarily specified that the 2008 directive applies to cross-border disputes, although it allows the Member States to extend the related regulation also to internal mediation procedures. Where a Member State decides to make use of this option, as the Italian legislator did with the enactment of decreto legislativo no 28, the scope of the 2008 directive remains, of course, unchanged. Consequently, the Court of Justice considered it unnecessary to rule on this specific issue.

On the other issues previously illustrated, however, the European Judges have taken a very important position for the Italian legal system, since similar problems have already been addressed by the Italian Constitutional Court, with regard to some of the norms of decreto legislativo no 28. The latter legislative provision had been the subject of heavy criticism by the Constitutional Court in 2012 and its content, following the sentence of 24 October-6 December 2012 no 272, had been distorted.[20] Subsequently, the Italian legislator intervened again to change the text of decreto legislativo no 28 (at that point devoid of many provisions declared unconstitutional); thus, the decreto legge of 21 June 2013 no 69,[21] substantially restored the provisions declared unconstitutional and redefined many other aspects of the discipline of these forms of ADR.[22]

[18] This provision is strongly criticised by O. Desiato, n 1 above, 1807; N. Scannicchio, n 13 above, 556, defining it as 'improvised' and 'botched'.

[19] Case C-75/16, *Livio Menini and Maria Antonia Rampanelli* v *Banco popolare – Società Cooperativa*, [2017] EU:C:2017:457, *Nuova giurisprudenza civile commentata*, 1634 (2017), with a note by F. Ferraris, 'Adr e consumatori: rapporti e interferenze', and *Il Foro italiano*, IV, 566 (2017), with notes by A.M. Mancaleoni, 'La mediazione obbligatoria nelle controversie bancarie alla luce della direttiva 2013/11/Ue sull'Adr dei consumatori', and N. Scannicchio, 'La risoluzione non giurisdizionale delle controversie di consumo. Rimedi alternativi o diritti senza rimedio?'.

[20] The ruling was published in *Giustizia Civile*, I, 10 (2013). Obviously, this ruling was the object of a great deal of attention from the doctrine: *ex multis*, C. Besso, 'La Corte costituzionale e la mediazione', note to the Corte costituzionale 6 December 2012 no 272, *Giustizia civile*, 605 (2013); F.P. Luiso, 'L'eccesso di delega della mediazione obbligatoria e le incostituzionalità consequenziali', note to the Corte costituzionale 6 December 2012 no 272, *Società*, 71 (2013).

[21] Converted with modifications from the legge 9 August 2013 no 98.

[22] On the innovative profiles of the new discipline, see: D. Dalfino, *Mediazione civile e commerciale* (Bologna: Zanichelli, 2016), 91; G. De Luca, 'Il quadro normativo di riferimento

Before describing the position of the Court of Justice, it is worth reconstructing the position of the Italian Constitutional Court in the logic of a 'loyal collaboration between the Courts',[23] in order to better understand the correct interpretation of the provisions currently in force. In both decisions, it is possible to notice complementary arguments useful for the identification of the inspiring principles of the various disciplines.

III. The Positions of the Italian Constitutional Court and the Court of Justice

With the aforementioned sentence of 2012, the Italian Constitutional Court declared the unconstitutionality of Art 5, para 1, of decreto legislativo no 28,

> 'in the part in which it introduces, on the part of those who intend to exercise an action related to disputes in the matters expressly listed, the obligation of the prior experimentation of the mediation process, provides that the experiment of mediation is a condition of the admissibility of the judicial request and that the objection can be raised by the defendant or taken over by the court'.

Furthermore, the Court declared consequentially unconstitutional a whole series of other provisions incompatible with the alleged non-obligatory nature of the mediation procedure.

Although, as already mentioned, the obligatory nature of the mediation procedure was subsequently reintroduced by the internal legislator, it is appropriate to give a few brief references to the reasons that led the Constitutional Court to take this decision. Since coming into force, the decreto legislativo no 28

dopo il "decreto del fare" (decreto-legge 21 giugno 2013, n. 69)', in A. Maietta ed, *La nuova mediazione civile e commerciale* (Padova: CEDAM, 2014), passim; E. Cavuoto, 'La nuova mediazione obbligatoria: una scommessa già persa?' *Giusto processo civile*, 531 (2014); G. Reali, 'La mediazione obbligatoria riformata' *Giusto processo civile*, 729 (2014); G. Spina, 'Le novità introdotte alla disciplina della mediazione civile dal c.d. decreto del fare convertito in legge' *Nuova procedura civile*, 36 (2013); A.D. De Santis, 'La mediazione finalizzata alla conciliazione delle controversie civile e commerciali' *Il Foro italiano*, V, 265 (2013); F. Ferraris, 'La novellata mediazione nelle controversie civili e commerciali: luci e ombre di un procedimento «revitalizzato»' *Contratti*, 951 (2013); U. Carnevali, 'Nuova mediazione civile e commerciale e «decreto fare»' *Contratti*, 977 (2013).

[23] On these profiles, reference should be made to P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), passim, 28. See also: G. de Vergottini, *Il dialogo transnazionale fra le Corti* (Napoli: Editoriale Scientifica, 2010), passim; G. Vettori, 'Diritti, principi e tecnica rimediale nel dialogo fra le Corti' *Europa e diritto privato*, 237-256 (2011); R. Caponi, 'Giusto processo e retroattività di norme sostanziali nel dialogo tra le Corti' *Giurisprudenza costituzionale*, 3753-3777 (2011); R. Cosio and R. Foglia eds, *Il diritto europeo nel dialogo delle corti* (Milano: Giuffrè, 2013), passim.

has received numerous criticisms by the doctrine;[24] some judges of merit then submitted various questions of legitimacy to the Court, mainly in relation to the obligatory nature of the mediation procedure and the consequent non-admissibility of the claim filed in court without the prior experience of the reconciliation procedure. Following eight re-ordination orders, the Constitutional Court declared the non-compliance of the legislative novella with Arts 76 and 77 of the Constitution. The latter Articles govern the cases in which the Government exercises its legislative function. In particular, Art 76 of the Constitution provides that the government cannot be delegated the legislative function, 'if not with determination of principles and criteria and only for a limited time and for defined objects'. As a '*decreto legislativo*', decreto legislativo no 28 was issued by the Government by virtue of an enabling act, namely, Art 60 of the enabling act ('legge delega') of 18 June 2009 no 69. The Constitutional Court found that there was no reference to the mandatory reconciliation procedure in the enabling act. The same Court also analysed in detail Directive 2008/52/EC and held that even in the latter there were no references to the obligation. Art 5, para 2 of Directive 2008/52/EC provides that

> 'this Directive is without prejudice to national legislation which makes recourse to mediation mandatory or subject to incentives or sanctions, both before and after the start of the judicial proceedings, provided that this legislation does not prevent the parties from exercising the right of access to the judicial system'.

In short, from the European discipline 'no explicit or implicit option is envisaged for the compulsory nature of the institution of mediation'; European law

> 'does not impose or even recommend the adoption of the mandatory model but limits itself to establishing that national legislation which makes recourse to compulsory mediation remains unaffected (…). The EU regulations are neutral with regard to the choice of the model of mediation to be adopted, which remains delegated to the individual Member States, provided that the right to appeal to the courts competent for the judicial definition of disputes is guaranteed'.

In a consistent sense, the Constitutional Court also recalled the resolution of the European Parliament of 25 October 2011 (2011/2117-Ini) and the resolution of the European Parliament of 13 September 2011 (2011/2026-Ini). Lastly, the Constitutional Judge reviewed a precedent of the Court of Justice and, more precisely, the ruling of 18 March 2010, delivered in Joined Cases C-317/08, C-318/08, C-319/08, and C-320/08. In this ruling, at para 65, it can be read that

[24] For example: G. Scarselli, 'L'incostituzionalità della mediazione di cui al d.leg. 28/10' *Il Foro italiano*, V, 54 (2011).

> 'In the first place (…) no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives'.

Nevertheless, according to the Constitutional Court, this does not deny the normally optional nature of the reconciliation proceedings. What the Court of Justice stated in para 65

> 'cannot constitute a precedent, either because it is an *obiter dictum*, or because the aforementioned ruling intervenes on a conciliatory procedure concerning a well-circumscribed type of dispute (those concerning electronic communications services between end users and providers of such services), where the mediation discussed here concerns a significant number of disputes, which makes the two procedures not comparable with the structural differences that characterize them'.

In European law, therefore, according to the Italian Constitutional Court, there is no general principle that imposes the obligation of ADR procedures.

In conclusion, the Constitutional Court declared a conflict with Arts 76 and 77 of the Constitution, due to the excess of delegation of every provision of decreto legislativo no 28, which referred to the binding nature of the reconciliation procedure. This explains why, a few years later, the Italian legislator was able to reinstate the same provisions in a new regulatory provision: this time a '*decreto legge*' was issued, then converted into a 'law' by the Parliament, in accordance with Arts 76 and 77 of the Constitution.

The position taken by the Court of Justice, with the decision of 14 June 2017, C-75/2016, continues, in a certain sense, the 'dialogue' with the Italian Constitutional Court on the mandatory nature of ADR proceedings. Before discussing the position of European Judges on this point, it is worth mentioning two aspects of decreto legislativo no 28, censured by the Court of Justice, since they are incompatible with the Directive on consumer ADR. In particular, according to the Court of Justice, in an ADR procedure between professionals and consumers, the latter cannot be obliged by national legislation to be assisted by a lawyer or a consultant (para 65); moreover, the Member States cannot restrict the right of consumers to withdraw from the mediation procedure only if they demonstrate the existence of a justified reason to support that decision (para 69). Therefore, penalties of any kind cannot be imposed on the consumer who has chosen to withdraw from the procedure in the context of subsequent judicial proceedings. Moreover, these provisions are also reported in the internal regulatory act transposing the 2013/11/EU directive, respectively

in Art 141-*quater*, para 4, letter *b*), of the Consumer Code, and Arts 141-*bis* and 141-*quater*, para 5, letter *a*), of the Consumer Code.

However, the most important question concerns the mandatory nature of the mediation procedure. Art 5, para 1-*bis*, of decreto legislativo no 28, provides that the mediation procedure is a condition for the prosecution of a legal action relating to the dispute that is the subject of the procedure itself. This rule can also be applied, as mentioned, to disputes between professionals and consumers in some sectors (for example, in the banking, financial, and insurance sectors). Thus, the Court of Justice had to establish whether this provision is in conflict with the Directive on consumer ADR, which in Art 1 provides for consumers to present complaints 'on a voluntary basis' before ADR bodies *vis-à-vis* professionals. The Court of Justice has explicitly considered it appropriate to reaffirm the principle that imposes a logical-systematic interpretation of each provision.

> '(I)n interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part' (point 47).

The meaning of the term 'on a voluntary basis', therefore, has been identified not only in light of the wording of the directive as a whole, but also in relation to Directive 2008/52/EC. In both directives, the Member States are allowed to adopt legislation that requires mandatory recourse to mediation,

> 'whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system'.

In this perspective, Recital 13 of Directive 2008/52/EC has significant hermeneutic value, for which the voluntary nature of mediation consists in the fact that 'the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time'. The interpretation given by the Court of Justice is also axiologically oriented, as the optional or compulsory nature of the mediation system is not relevant; however, it is necessary to implement the value expressed by the superordinate principle (also of a constitutional nature), that is to say, the parties' right of access to the judicial system. Therefore, the problem is to understand, in light of the principle of proportionality, to what extent the provision of an ADR procedure as a condition for the admissibility of legal proceedings may affect the principle of effective judicial protection.[25] The Court of Justice, by virtue of this principle, admits that fundamental rights, since

> 'fundamental rights do not constitute unfettered prerogatives and may

[25] On these issues, see: Joined Cases C-317, C-318, C-319 and C-320/08 *Alassini* v *Telecom Italia Spa*, [2010] ECR I-2213.

be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed' (point 54).

In the legislation submitted to the Court of Justice, this proportionality with regard to the purpose can be ensured, *inter alia*, by the non-binding nature of the ADR procedure and by the fact that the limitation and expiry periods remain suspended during the ADR procedure. Furthermore, it is necessary that the ADR procedure drawn up by the internal legislator does not entail a substantial delay for the filing of a judicial action and does not generate substantial costs for the parties.

IV. The Principle of the Physiological ADR in Italian-European Law

Although, *prima facie*, the recent orientation of the Court of Justice seems to contrast with that expressed by the Italian Constitutional Court in the aforementioned ruling of 24 October-6 December 2012 no 272, the analysis of the respective motivations reveals a common argumentative path. In fact, both Courts propose a systematic and axiologically oriented interpretation of the Italian-European discipline; both Courts operate a balancing of the principles involved, inspired by the principle of proportionality, in order to implement the values that form the legal system. The two rulings on the compulsory nature of ADR procedures, on the other hand, are opposed, because there are several questions to each of the Courts: the Court of Justice assessed the compliance of the internal standard with respect to the two directives mentioned, in light of the European law; the Italian Constitutional Court has assessed the conformity of the particular legislative act of transposition, the 'decreto legislativo', with respect to the 'enabling act' issued by the Italian Parliament, in light of Arts 76 and 77 of the Constitution and of European law. Both rulings, however, contribute to the correct interpretation of the entire Italian-European discipline of ADR systems and seem to place themselves, in a relationship of continuity, in the correct spirit of 'loyal collaboration between the Courts'. In fact, as substantially affirmed by the Italian Constitutional Court (and shared by the Court of Justice), European law does not impose any obligation on Member States to make ADR procedures mandatory; consequently, the choice on the obligation of these procedures must be adopted by a legislative act of the Parliament and, in the case of delegation to the Government, this choice must be made explicit in the 'enabling act'. Moreover, as substantially stated by the Court of Justice, once the State has opted for the mandatory ADR procedure for some disputes between

professionals and consumers, it is necessary to assess, proportionately, whether this choice reasonably limits the fundamental right of access to justice.

The guidelines expressed by the Courts in the rulings analysed are relevant from many points of view, although, as mentioned in the previous paragraph, they do not solve all the problems of coordinating the various transposing legislations.

In the Italian-European legal systems, the principle of the 'physiological alternative resolution of disputes' has been affirmed and this emerges, among other things, also from these rulings: the 'alternative' composition (in reconciliation or decision-making) of disputes is a value, but the fundamental principles involved from time to time, expressive of higher values, must always be respected. The reference, primarily, is to Arts 6 and 13 of the European Convention on Human Rights, Art 47 of the Charter of Fundamental Rights of the European Union, and Arts 24 and 111 of the Constitution. In order to resolve the normative antinomies that have been taken into account, however, it is indispensable to also keep in mind the principle of 'effective protection of the weak contractor' and the principle of substantial equality: the first considers the best protection for the consumer; the second one excludes unreasonably deteriorating treatments for different categories of consumers.

The jurisprudential guidelines described so far also contribute to the ongoing debate on the identification of the general principles applicable to any system for negotiating settlement of disputes as well as the careful balancing of the parties' interests, especially when weak contractors are involved. The principle of 'physiological alternative dispute resolution', if correctly understood, constitutes a useful reference parameter for identification of the applicable discipline.

V. Concluding Findings: The Problems of Coordination Remain Unresolved

On the matter brought to the Court of Justice,[26] however, in the Italian doctrine[27] some additional doubt was raised regarding the (mere) question on the compulsory nature of the procedure. In brief, it has been observed that the problem of the incompatibility of domestic law with the Directive on consumer ADR does not lie so much in the mandatory nature of the procedure. The problem is in the fact that the application of decreto legislativo no 28 imposes

[26] It is worth mentioning that the Tribunale di Verona 28 September 2017, *Il Foro italiano*, I, 328 (2018), with a note by A.M. Mancaleoni, 'Mediazione obbligatoria nelle controversie dei consumatori: le ricadute di Corte giust. causa C-75/16', in application of the principles indicated by the Court of Justice, considered that 'the consumer can appeal to the body of mediation without the assistance of the lawyer and may, after the first meeting, withdraw even in the absence of a justified reason without suffering detrimental consequences'. *Contra* Tribunale di Vasto 9 April 2018, available at www.dejure.it, considers the assistance of the lawyer to be necessary, arguing both from the textual provision of the provision and the particularly low cost of such assistance.

[27] N. Scannicchio, n 13 above, 555.

rules that are very different from those imposed to protect the consumer. In fact, decreto legislativo no 28 does not refer at all to the subject of consumption and, therefore, does not consider the specific needs of consumer protection or, in effect, of the market. The consequence is that, in Italy, the discipline is not uniform. In general, consumers can make use of the ADR models referred to in the Directive on consumer ADR, with all the protections foreseen, and, even if they do not opt for ADR, they can still go to court. On the other hand, in the banking, financial, and insurance sectors, consumers can use (even or only?) the ADR models provided by the decreto legislativo no 28. These models, however, have a different structure, a different function and, therefore, different rules. Under decreto legislativo no 28, these consumers, before referring to a judge, must have gone through the ADR procedure, because the latter is a condition for obtaining the judicial request. However, if that were the case, what would be the use of the Consumer Code in the banking, financial and insurance sectors? The aforementioned doctrine called for the Court of Justice to answer these questions, too; the recent ruling, however, does not take a position on the point.

These aspects lead to a critical consideration of the recent sentence issued by the Court of Justice. Even in Italy (as in many other jurisdictions), an articulated ADR system has been consolidated. The reference, in addition to the legislative provisions already cited, can be made to the decreto legge no 132 of 2014, entitled 'Urgent measures for the de-disciplinization and other measures to define the backlog in civil trials'. A process of 'dejudicialization' is currently underway, aimed at encouraging systems that allow for the resolution of disputes without contacting the judicial authorities. The functions of all the current obligatory procedures for out-of-court dispute resolution must be compared with the objectives of the Directive on consumer ADR. Without a doubt, the latter aims to promote new forms of ADR, but takes into account, first of all, the need to protect the weak contractor, in application of Arts 2 and 3 of the Constitution. Therefore, if it is accepted that mediation is mandatory for consumers in the banking, financial and insurance sectors, these consumers, like all others, must also be granted the protections provided for in the Directive on consumer ADR.

The Fake Implementation of a Fake Consumers' ADR Directive? A Case Study on Rights' Enforcement by Regulatory Powers in Italy

Nicola Scannicchio*

Abstract

This paper considers the ADR Directive 2013/11 within the recent EU framework which entrusts enforcement of individual rights to regulatory powers of standardization and certification, administered by public and private bodies, under the supervision of European Authorities. Such 'regulatory private law' should circumvent the difficulties in creating a European uniform law of contract. The essay moves from the CJEU decision C-75/16 as the basis of a common interpretation to consider certification of Consumer ADR entities as a general condition for application of the entire directive, included the procedural and substantive rights of the parties. The Italian model of (strict) mandatory ADR shows that the outcome of this approach, as to rules' harmonization, rights' enforcement and competition's protection, is deeply negative at least in the case of compulsory mediation. It is submitted that there is no statement in the decision that allows the mainstream interpretation. The CJEU reached its conclusions about the consumers' rights to withdraw and self-defense on constitutional grounds well different and separated from those allowing compulsory consumer mediation and the registration pre-requirement. The resulting findings seem to show that some conclusions about 'regulatory private law', namely the attitude of the new trend to ensure administrative enforcement of individual interests *sub specie* of private rights of consumers, should be reconsidered.

I. Introduction. The Regulatory Approach to the Consumer ADR Industry. The Restriction to the Field of Application and the Prejudice to the Harmonization Range of the CADR Directive

According to the Court of Justice of the European Union (CJEU) decision in case C-75/16,[1] the Directive 2013/11/EU[2] (Consumer Alternative Dispute Resolution Directive, hereafter CADR Directive) does not apply to all disputes involving consumers, but only to procedures that satisfy three cumulative conditions. The third condition is that

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[1] Case C-75/16 *Livio Menini and M. Antonia Rampanelli* v *Banco Popolare Società Cooperativa*, Judgment of 14 June 2017, available at www.eur-lex.europa.eu.

[2] European Parliament and Council Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) no 2006&2004 and Directive 2009/22/EC [2013] OJ L165/63.

> 'the procedure must be entrusted to an ADR entity, that is to say, in accordance with Art 4(1) (h) of that directive, an entity (…) which is entered on the list drawn up in accordance with Art 20(2) of Directive 2013/11, a list which is notified to the European Commission'.

The Court declared such condition to be a 'pre-requirement' for application of the CADR Directive.[3]

However, in applying the above decision, the referring court observed that Art 7 of the Directive, which allows consumers to stay in the proceeding without lawyers' assistance, was enforced by the CJEU 'irrespective of the nature of the procedure', whenever it is initiated by a consumer. Therefore, according to the national court the rule applies also to procedures and entities that did not register according to the CADR rules.[4]

In the referred case, the Italian decreto legislativo 4 March 2010 no 28, regulated the concerned register, in alleged implementation of the Directive 2008/52/EC.[5] Contrary to Arts 7 and 9 of the CADR Directive, this last procedure requires legal assistance and provides for a punitive treatment in case of withdrawal and/or refusal of a proposed settlement. Two subsequent lower Courts' decisions followed the decision of the referring Court.[6]

This paper discusses the *legal* consequences of the registration pre-requirement and criticizes its extension to the entire field of application of the CADR Directive to the extent that the entry in such register becomes a condition

[3] CJEU case C-75/16, n 1 above, para 40. The first and second requirements are: '(i) the procedure must have been initiated by a consumer against a trader, (ii) in accordance with Art 4(1)(g) of directive 2013/11, that procedure must comply with the requirements laid own in that directive and, in particular, in that respect, be independent, impartial, transparent, effective, fast and fair (…)'.

[4] Tribunale di Verona 28 September 2017, available at https://tinyurl.com/y6g3genb (last visited 28 May 2019).

[5] European Parliament and Council Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial disputes [2008] OJ L136/3.

[6] Tribunale di Vasto 9 April 2018, available at www.ilcaso.it. In this case the Court accepted the redundancy of the register pre-requirement. However, according to the judge, the amount of the lawyers' fee is not so high as to hinder the parties' access to justice. Verona Court of first instance (n 4 above) extends instead the CADR rule about legal assistance to the case of assisted negotiation. As a matter of fact, according to the legge 10 November 2014 no 162, the assisted negotiation is a 'contract by which the parties commit themselves to cooperate in good faith so as to put an end to their dispute amicably with the assistance of their lawyers'. See E. Silvestri, 'Too much of a good thing: Alternative Dispute Resolution in Italy' 21 *Nederlands-Vlaams tijdschrift voor Mediation conflict management*, 74, 81 (2017). In all claims under fifty Euros, the claimant has a duty to propose an attempt for coming to an agreement. It is therefore a legal obligation to contract in good faith. However the said statute re-named this mandatory offer/ acceptance practice as a 'legal procedure' and made it mandatory. As far as parties, assisted by their lawyers, ought to seek an agreement, this is exactly the case of 'direct negotiation between the consumer and the trader' where, according to Art 2 (e), the CADR Directive, does not apply. It is not a 'mediation' either. However, being a 'procedure' and being 'mandatory', assisted negotiation became an 'ADR procedure' in Italy. See N. Scannicchio, *Accesso alla giustizia e attuazione dei diritti* (Torino: Giappichelli, 2016), 175.

(also) of the substantive and procedural rights of the consumer party. Such argument will be developed around three grounds. These are listed below in order of increasing generality. They are:

(i) The CJEU statement about the registration's requirement regards only one of the questions referred to the Court, namely the one about the vertical relationship between the two directives about 'civil and commercial' and 'consumer' Alternative Dispute Resolution (ADR). Its generalization to the other problems submitted by the referring judge (namely, the right to withdrawal and the possibility of self-defense) weakens the position made to consumer parties by the directive procedural and substantial rules. It is submitted that the Court resolved different questions by using different premises.

(ii) The reduction of the harmonization goals, up to complete failure of the directive effectiveness. Such effect may follow whenever a voluntary CADR system concurs with a mandatory one, under different rules. Both European mediation directives allow Member States to enact compulsory forms of dispute resolution. The generalization of the certification condition enables States to keep outside the CADR Directive field of application as many entities and registers, as they like. In fact, it reduces the effect of the CADR Directive to the State duty to enact a register that had already been 'suggested' by two recommendations. However, as shown by the Italian model, this asset becomes fatal to the directive effectiveness any time its own regulations compete with a mandatory ADR system, where different rules and a different register apply.[7]

(iii) Both the above-mentioned difficulties stem from the same reason, namely in the connection between the generalization of registration pre-requirements to the entire content of the directive and the full regulatory approach followed by the Commission in framing it. The Commission applied to entities the same means generally used to regulate an industry.[8] This is self-evident in the transformation of procedural and substantive positions and 'principles' in 'quality criteria' of the service (procedure) and the product (settlement) to be supplied. Following such an approach, the certification's system becomes the cornerstone for regulation of entities, access to CADR and organization of the parties' rights and duties. Such premise strongly influences the reasoning about the relationship between the two mediation directives 2008/52/EC and 2011/13/EU. This relationship is conceived as if they regulate two different industries on the same market.

[7] This point is discussed in para IV. See E. Storskrubb, 'Alternative Dispute Resolution in the EU: Regulatory Challenges' 24 *European Review of Private Law*, 7, 19-26 (2016) about the particular difference between these two forms of ADR in consumer disputes. I have dealt analytically with the structural differences that voluntary and mandatory CADR present in the most important rules of the directive procedure. See N. Scannicchio, 'Compulsory Consumer ADR and the effectiveness of the European Directive2013/11/EU. European Harmonization or Italian Colors?', in S. Leible and R. Miquel Sala eds, *Legal Integration in Europe and America* (Jena: JenaerWissenschaftliche Verlagsgesellschaft, 2018), 178-193.

[8] H. Schulte-Nölke, 'The Brave New World of EU Consumer Law –Without Consumers, or Even Without Law?' 4 *Journal of European Consumer and Market Law*, 135 (2015).

However, the transformation of substantive and procedural rules in standard features of a product that can be 'regulated' by competent agencies, moves their content and enforcement from the civil (contractual) law to administrative powers. Such 'government' of private rights had been labeled as 'regulatory private law'.[9] It was in fact already ostensible that the difficulty to reach a uniform law of contract, had led the Commission to govern economic behavior through regulations enacted and enforced by European and national authorities.[10]

Therefore the analysis of the two grounds defined above, under (i) and (ii), tries to offer insights in the *modus operandi* of such development and related merits and risks. It is submitted that the said construction does not deal with the necessity that a civil right regards a relation among individuals on the market and that its relationship to the public power is subject to the rule of law. This being a paramount topic, the conclusive paragraph is devoted to showing the specific devices by which this deprivation effect operates into the CADR Directive, as an example of a wider problem.

II. The Registration of CADR Entities in the Scholarship and in the Italian CADR Model

Before the Court's pronouncement, most legal scholars – generally the more sympathetic to the Commission effort – did not devote much interest to the registration requirement.[11] Part of this attitude was perhaps due to the fact that

[9] See H.W. Micklitz, 'The Transformation of Enforcement in European Private Law: Preliminary Considerations' 23 *European Review of Private Law*, 491-492 (2015). The whole issue four of this volume is devoted to this topic: see O. Cherednychenko, 'Editorial - Public and Private Enforcement of European Private Law: Perspectives and Challenges' 23 *European Review of Private Law*, 481, 483. See also, in critical perspective, N. Scannicchio, n 6 above, 159; Id, n 7 above, 212.

[10] On this point see H. Schulte-Nölke, n 8 above.

[11] It is clear that a pre-requirement is a restriction to the operation of rules. It implies that the scope of the rule will be limited. Therefore, under such pro-active perspective, it will be presumed that entities shall willingly satisfy all pre-requirements. This position is well and largely summarized by P. Cortés, 'The New Landscape of Consumer Redress', in Id, ed, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press, 2016), particularly 20, 34. See also C. Hodges et al, *Civil Justice Systems: Consumer ADR in Europe* (Oxford: Hart Publishing, 2012). N. Creutzfeldt, 'Implementation of the Consumer ADR Directive' 5 *Journal of European Consumer and Market Law*, 169–175 (2016), seems to suggest that Member States have a duty 'to provide ADR entities for nearly every c2b dispute'. According to M. Piers, 'Europe's Role in Alternative Dispute Resolution: Off to a Good Start?' *Journal of Dispute Resolution*, 269 (2014): 'In the Directive on Consumer ADR, the Commission *imposes* rules regarding ADR procedures (…) – and – (…) goes further, requiring that the Member States provide the option for the consumer to submit a dispute to ADR'. ibid 276-277, 301. See also, F. Tereszkiewicz, 'The EU Online Dispute Resolution Platform for Consumer Disputes: a step towards an EU Digital Single Market' 4 *judicium.it*, 1-11 (2016). All these writers raise the impression that the directive applies to almost all consumer complaints.

Case C-75/16 is now enshrined in the Judicial Training Project, co-funded by the justice programme of the European Union, *Roadmap to European Effective Justice (Re-Jus): Judicial*

many considered the CADR Directive as a signpost of the changing asset between EU and private law, as mentioned above in the paper.[12] The fact that a pre-condition, inserted among the monitoring task of the managing Authorities, might make all the concerned rights subject to the will of the authorities, ADR entities and concerned professionals, may seem striking.[13] However, in front of the solemnity of the principles and the magnitude of expectations raised by the preparatory work, one might not even notice it. This conclusion seems consistent neither with the enthusiasm shown by its supporters and declared in Arts 1 and 3 of the Directive nor with its promotion and harmonization aims. In fact, the celebrated innovation would add almost very little to the previous recommendations, namely, the duty to institute a register that might remain empty (as often had the one already considered–but not imposed – in the previous provisions).[14]

Therefore, many saw in the certification system a way to create trust in consumers and incentives for the entities (eg access to the Online Dispute Resolution, ODR, platform, increased reliability, etc). Some noted that this device might reduce the number of available entities. These authors did not tribute high priority to the nature and legal significance of the listing requirement.[15] Only among a small number of civilians and private international law experts, generally critical both with the directive and with its results, it was found the statement that the Directive is applicable *only* to disputes to be resolved '(…) through the intervention of an ADR entity (…) that is listed in accordance with Art 20(2)'.

Training Ensuring Effective Redress to Fundamental Rights Violations, available at www.rejus.eu. However, notwithstanding the coordinator partner of the research being the Italian University of Trento, such report does not note the radical restriction imposed by the certification requirement to the application of the directive. See *Re-Jus Casebook, effective Justice in Consumer Protection,* 162, 169-72 (2018), available at https://tinyurl.com/yxpy7m2x (last visited 28 May 2019).

[12] See ns 4-8 above. Almost all the quoted articles contain a section about ADR, where the general impact of the CADR Directive is taken for granted.

[13] For a critical appraisal of the directive's impact see E. Silvestri, n 6 above, 88; G. Wagner, 'Private Law Enforcement Through Adr. Wonder Drug Or Snake Oil?' 51 *Common Market Law Review*, 165, 176-177 (2014); N. Scannicchio, 'La risoluzione delle controversie bancarie tra ADR obbligatoria e ADR dei consumatori' *I contratti*, 540, (2016).

[14] Commission Recommendations 98/257/EC of 17 April 1998, [2008] OJ L115/31 and 2001/310/EC of 19 April 2001, [2001] OJ L109/56. S*ee* again E. Silvestri, n 6 above, 86.

[15] This aspect is present in A. Biard, 'Monitoring Consumer ADR Quality in the EU: A Critical Perspective' 2 *European Review of Private Law*, 171 (2018), who criticizes the directive as unable to supply clear information about certified and uncertified entities. See also A. Fejős and C. Willet, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' 24 *European Review of Private Law*, 33, 34, 44; J. Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' 24 *European Review of Private Law*, 81, 95-97; R. Miquel Sala, 'ADR in Germany Following the Verbrauchertsreitbeileigungesetz', in S. Leible and R. Miquel Sala eds, *Legal Integration in Europe and America* (Jena: JenaerWissenschaftliche Verlagsgesellschaft, 2018) 298-299. Some commentators, for example, support the introduction of a duty to participate of traders. This conclusion, should not the Directive apply in a general fashion, would imply the desertion of all professionals from the compliant entities.

This was considered a 'strong, hidden restriction to application of the directive'.[16]

After the decision in the case C-75/16, the approach of the experts does not seem to have changed much. The perceived effect of the decision is that it allows Member States to set up a mandatory complaint (also) in the consumer field and confirms the freedom of withdrawal and of legal assistance in consumers' ADR. However, commentators did not insist very much upon the dependence of these two last features from a certification pre-requisite. Therefore it is often difficult to ascertain whether the limitation of the duty to complain to certified entities implies the general application of the other two selected features to any consumer dispute, or accepts that, in case of want of registration under Art 20, also the right to withdraw and to self-defense shall be excluded.[17]

The Italian model of mandatory consumer complaints follows the last alternative. Some scholar defined it as '(…) a robust, if not coercive, form of compulsory mediation that has all the markings of an arbitration process'.[18] Here, the CADR implementation decreto legislativo 6 August 2015 no 130 applies

[16] M.B.M. Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' 24 *European Review of Private Law*, 61, 71 (2016). 'Any ADR institution that does not meet one or more of these requirements falls outside the definition of an ADR entity. The result is not that such an ADR institution is illegal or that its decisions cannot bind the parties, but merely that the ADR Directive is not applicable'.

[17] The judgment did not receive much scholarly attention, even in Italy. N. Silvestri, n 6 above, 87, has commented it in English as a decision that 'does not strike one as an example of crystal-clear legal reasoning'. An extensive comment of the case is in N. Scannicchio, n 6 above.

[18] J.M. Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation?' 37 *North Carolina Journal of International Law and Commercial Regulation*, 981, 1004 (2012). This definition regards the first version of the Decree (decreto legislativo 4 March 2010 no 28). The Italian Constitutional Court struck down this version, n 9 above. In that edition, the parties could not withdraw from the procedure but in case of a 'justified reason'. The final version of the Decree reduced the condition to a 'first encounter' between parties, where they must intervene personally and may decide whether to initiate the procedure or refuse to continue, without justification. See however n 4 above. This Italian solution has been presented as a model that that satisfies the principle of access to justice, without sacrificing the incentive to mediate (see G. G. De Palo and R. Canessa, 'Sleeping – Comatose Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union' 16 *Cardozo Journal of Conflict Resolution*, 713, 752-753 (2014). However, Italian ADR supporters generally forget to inform the international audience that, if parties decide to continue, (and, according to many judges, even if they do not, *see* text above) the duty stands as it was in the first version. Therefore, fines, double taxation, charges of further evidence, supplementary fees and disadvantages (imposed in the subsequent trial) shall affect the *willing* parties (those who decided to continue). Albeit, the unwilling ones will be freed from the barrier to sue, without consequences. This seems a very singular way to incentive parties to mediate. See also the study of the European Parliament, Directorate-General for Internal Policies, "Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of mediations in the EU' 41-42 (2014), available at https://tinyurl.com/n30aes6 (last visited 28 May 2019). In the Menini case, the Italian Government almost falsified the content of the law, assuming that only the absence to the first mandatory meeting triggers all charges. Simple reading both versions of the Decree disproves this conclusion. See n 34 below. For an extended description of the Italian mediation system before and after the CADR Directive see N. Scannicchio, n 6 above, 1-202. For a full description in English of the implementation process in Italy, *see* Id, n 4 above, 147-219.

to voluntary mediation only. This Statute leaves the bulk of consumers' complaints under the previous compulsory system,[19] which had been devised for the civil and commercial mediation (decreto legislativo 4 March 2010 no 28, so called[20] implementation of the directive 2008/52/EC). That system relies on its own register and uses a procedure not compliant with the new directive. This arrangement should justify the conclusion that, under the European Court pre-requisite, the CADR Directive procedural rules (in particular as to legal assistance and right of withdrawal) should depend entirely on the register where the concerned ADR entity is certified.[21] As discussed above, a number of judgments rejected such conclusion. However, to the extent that this general approach seems accepted in Italy as normal CADR practice and European Institutions did not raise any objections, this paper will consider the wider construction of the certification requirement as the mainstream opinion on the CJEU ruling.[22]

It is worth stressing that many foreign studies of the Italian mandatory system presume that the content of the 'mandate' is the power of the Court either to enforce a clause of the contract or to submit parties to a preventive attempt to settle, when the judge thinks it is reasonable. However, the Italian mandatory mediation is a *statutory*, not a *judicial* one. The Decree provides the judge with a power that is supplementary and additive to the condition to sue. According to the Decree, the power of the Court arises in cases excluded from that condition. Where the Decree applies instead, the duty is dependent solely on law. The Court may send back the case to the 'legal' mediation of the Decree, either on its own motion or on party request. This is different from the 'judicial' mediation provided for by the Code of Procedure, which may resemble the model of the

[19] The Decree covers financial, banking and insurance contracts. It may however apply to any contract submitted to a consensual mediation clause. ADR is mandatory also in telecommunication, energy and gas sectors, under procedures that comply with the directive. However, the Decree influenced also those sectors. For example, both procedures admit now also complaints of the professional against consumers. See para IV and n. 48-51 below.

[20] The Italian Act of delegation for enacting the mediation Decree, recalled the legge 18 June 2009 no 69, Art 60. That law had instituted ADR procedures in the banking, financing and corporations' sectors. The same Italian Constitutional court denied that the Government was implementing the directive 2008/52/EC. The Court stated, 'The option in favor of the mandatory mediation model, undertook by the contested rules, cannot find ground in the referred provisions (…)': Corte Costituzionale 6 December 2012 no 272, *Rivista di Diritto Tributario*, 75 (2013), para 12.2. See also Italian Bar Association Council, 'Consulta chiarisce che obbligatorietà non è imposta da UE', press release 6 December 2012, available at https://tinyurl.com/yywow6ga (last visited 28 May 2019). On these bases, the CJEU declared the *non sequitur* of a request for preliminary ruling about the implementation of Directive 2008/52/EC. The referring court doubted that the mandatory obligation, as ruled in Decree 2010/28, was contrary to the freedom of access to justice. CJEU, case C-492/11 *Ciro Di Donna* v *Società imballaggi metallici Salerno S.r.l.*, Judgment of 27 June 2014, available at www.eur-lex.europa.eu.

[21] See E. Silvestri, n 6 above, 89. See N. Scannicchio, 'La risoluzione non giurisdizionale delle controversie. Rimedi alternativi o diritti senza rimedio?' *Foro italiano*, V, 570 (2017).

[22] After the CJEU decision, lawyers, ADR entities, Authorities and most national courts of first instance simply continued as if the case had never been decided. See para IV and n 33 below.

multi door courthouse.[23] The 'judicial' mediation rests under control of the Judge, lies on different rules and relies on consent. Italian judges rarely use the powers to mediate framed by the code of procedure. This habit is even more pronounced in the light of the fact that their dockets contain too many undecided case (judicial mediation requires the time of the judge). However, instead of the judicial attempt (or procedure), that presumes the actual jurisdiction of the Court, many judges use the legal duty to mediate (that is a barrier to access to the Court) as if it were a judicial attempt.

Consequently, many judges refuse to consider the party choice not to continue after the first meeting as a remedy to the barrier. Notwithstanding a clear decision of the Council of State, many courts decided that the first encounter must be a 'true encounter', as if it were ruled by the Procedural Code and were held before them. In such fashion, parties should always try at least to attempt the mediation in order to respect the procedural requirements of good faith.[24]

III. The Register Pre-Requisite in the CJEU Decision. The Uncertainty on the ADR Directives' Field of Application and the 'Law of the Registry'

One common critique to the decisionC-75/16 is that it does not resolve the main issue linked to the uncertainty of the text of the directive: to separate the range of application between the two European provisions insisting on the same matter of ADR. The certification in different registers of entities operating under each directive becomes the answer to such unresolved problem.[25] However, the

[23] See E. Silvestri, n 6 above, 81.

[24] The Italian *Consiglio di Stato* is very similar to the French *Conseil d'etat*. It is the administrative counterpart of the Italian *Corte di Cassazione* in civil law cases. It decides all final appeals from administrative courts of first instance. See Consiglio di Stato 15 November 2015 no 5230, *Diritto e Giustizia*, 58 (2015). The Council decided that this attitude is in 'front-facing collision with the letter of the law'. This judiciary attitude results in a development very similar to the approach of English courts after Milton Keynes (see J.M. Nolan-Haley, n 18 above, 999, *commenting Halsey* v *Milton Keynes General NHS Trust* [2004] EWCA Civ. 576). Such approach is much discussed in England, under the label of mandatory mediation. In fact, it changes a voluntary choice into an obligation, by transferring to the Court the parties' power to decide whether it is reasonable or not to attempt a settlement. See Hong-Lin Yu, 'Carrot and Stick Approach in English Mediation - There Must Be Another Way' 8 *Contemporary Asia Arbitration Journal,* 81, 112 (2015).

Such British 'mandatory' mediation concerns the judges' power to apply the good faith principle to a mediation procedure that parties had already agreed, while in Italy it is the statutory rule to compel the parties, even in the case they had agreed on it in a contract. In submitting one party to the judicial risk he had chosen to avoid, under the threat of sanctions, these decisions create one of the greatest obstructions to access of justice and diffusion of ADR. That is, the fear that the same judge that imposed a failed attempt to settle, will decide the case. See J.F. Roberge and D. Quek Anderson, 'Judicial Mediation: From Debates to Renewal' 19 *Cardozo Journal of Conflict Resolution*, 613, 625-6 (2019).

[25] The confusion and contradiction in paras 1 and 2 of Art 3 create this issue. See E.

Directive rule about certification (Art 20), alike the one about mandatory participation, does not track a sharp edge. As the main aim of this paper is to show that the CJEU conclusion about the substance of the procedure has been decided on a different ground than the registration pre-requisite, Art 20 will be discussed briefly in what follows.

The fact that the provision about registration in not exactly made with black letters law is well shown by the lack of any clear reference to certification as a pre-requisite, of application of the procedure and of the rights of the parties. It is, in fact, required to the entities. Art 1 binds States to enact procedures that respect a number of basic principles. It does mention neither registers nor even entities. Arts 2 and 3 regulate the 'field of application' of the Directive. This should be the right place to enact conditions for such application.[26] However, it does not refer to any certification requirement. Here, the pre-requirement of the 'redress mechanism' is to be of 'high quality, transparent, effective and fair (...)'.

The equivalence between 'ADR entities' and 'entities registered according to Art 20', comes out in the definitions' paragraph (Art 4). After that, the wording 'ADR entities' is repeated as a litany all along the Directive.

However, Art 20 lies in another section of the Directive. This section regulates the relationship between States, Authorities and entities. It affects the conditions for management of the ADR system. Its reading may suggest that it requires certification in order to exploit incentives and advantages set up by the Directive. Art 20 does not regard the application of the procedural and substantive right and duties of consumer and entities in the ADR proceeding.

It appears therefore a purely speculative option to decide whether the wording 'ADR entity' is used as a synonym of the lengthy wording in Art 4 (h), in order to subordinate any effect of the Directive rules to the occurrence of a registered entity. In fact, it might represent as well an elliptical *resume* of the State substantive obligation to ensure that '(...) consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms'. What seems beyond dispute is that the directive does neither forbid, nor compel to construct the certification as a general pre-requirement of application. However, at the same time, it invokes an interpretation that implements the States' main obligation. This obligation is contained in Arts 1 and 2, not in Art 20 (2).

In order to solve this dilemma it is useful to detect the reason why the European Court shared the regulatory approach of the Commission and chose to construct the registration as a general pre-requirement. As noted above, the Court divided its reasoning on the second question in two parts. In the first part, the Court had to decide whether the CADR Directive allows Member States to

Silvestri, n 6 above, 88; N. Scannicchio, ibid, paras 3-4. See also para V below.

[26] The article, on the contrary, establishes that the directive does not apply to 'disputes between traders' and 'procedures initiated by a trader against a consumer' (Arts 2.2 (d) and 2.2 (g)).

enact a duty to complain also in consumer disputes. Therefore, the Court had no need to venture in the area relative to the requirements for application of the directive. Rather, it just had to decide on the nature of the Consumer disputes' resolution to resolve that issue. Moreover, it resolved it by applying another directive. Why did the Court argument go that far as to make the certification process a pre-requisite for all the directives?[27]

The answer to this question is that the Court did not share such conclusion. It declared the registration pre-requisite a mean to preserve the ADR entities of the previous directive 2008/52/EC.

In the first question, the Court ditched any demand about the range of application of the 'civil and commercial' mediation Directive and the 'consumer' one. The cross-border range of application of the first and the national application of the second where the basis to exclude any clash between the converging Directives. However, moving on to the main issue, the Court returned to the 2008/52/EC Directive as containing the 'general framework' that operates in the CADR Directive, to justify the export of the duty to complain. As far as the two procedures rely on the same set of principles, this reasoning rises the issue of distributing competences between the entities subject to each directive, whatever their field of application in relation to the rest may be. The latter remains largely unidentified and common to both directives.[28] The safeguard of the entities already operating in the civil and commercial mediation is another requirement of the CADR Directive.[29]

The Court declared the registry pre-requisite as a mean to preserve the ADR entities created under the previous directive 2008/52/EC. The new directive realizes in some way a pre-recognition of the commercial entities created under the old one and of their registration. This allows them to (continue to) mediate also Consumer cases under the new rules. To this end, the decision uses the certification tool. However, enlisting of the ADR entity in the registry of Art 20(2) is not intended as the 'pre-requisite' of all rules of the CADR Directive 'in general'. Such enlisting is relied upon in order to relieve the bodies already operating under the 2008/52/EC Directive from the certification charges imposed to the CADR entities. Put differently, the Court ruled that different registers apply to different directives. That is the actual meaning of the statement.

This is further confirmed by the fact that, when discussing the right to legal assistance and the right to withdraw from the procedure, the CJEU left aside the registration 'pre-requirements'. The Court solved those questions on completely

[27] The German government denied the relevance of the request for preliminary ruling. It pointed out that the order for reference did not state 'whether the mediation procedure instituted by Legislative Decree no 28/2010 is in fact an "ADR procedure", taking place before an "ADR entity", as those terms are defined in Art 4(1)(g) and (h) of Directive 2013/11'. The Court, in affirming its jurisdiction, had already dealt with the point.

[28] See n 14 above.

[29] Art 3 and whereas 19-21.

different grounds. Instead, the solution proposed by the referring judge in order to submit all consumers disputes to the new directive was more straightforward. However, the Court, according to the Directive, had to preserve the Countries (and the Entities) who had relied upon the previous rules, from the burden of modifying the administrative framework that affects the recognition, liabilities and conditions of the ADR 'industry'. Therefore, it decided not to follow the national judge.[30]

However, it was not difficult to foresee that the register pre-requisite, understood in the general terms here described, could lead to a significant loss the effectiveness of Directive 2013/11/EU, the promotion and diffusion of the certified ADR entities and, consequently, the incentive of the bodies to comply with the directive and to request registration.[31] The single reasonable justification for not dealing with such difficulties is that the Court had carefully excluded that the duty to complain could threat the low costs principle and the consumer party freedom in *any consumers'* dispute.

IV. The Application of the Low Costs Rule and of Freedom of Withdrawal to Unregistered CADR Entities

In the second part of the question, after the elaborate recognition of the State power to enact a duty to complain in Consumer ADR, the Court dealt exclusively with the minimal requirements that justify such compulsory condition. As of para 51, the Court declared that the relevant problem in mandatory mediation is the detection of minimal guarantees for effective judicial protection, access to justice and effectiveness of the directive. In paras 54-61, the Court refers to *Alassini*[32] and sets out those minimal requirements. Thereinafter, it applies those principles to both the decreto legislativo 4 March 2010 no 28 and the CADR implementation act, without any reference to lists and even entities prerequisites. In particular, at para 62 the Court invites the referring judge to verify whether:

> 'in particular Art 5 of Legislative Decree no 28/2010 and Art 141 of the Consumer Code, as amended by Legislative Decree no 130/2015, does not prevent the parties from exercising their right of access to the judicial system, in accordance with the requirement of Art 1 of Directive 2013/11, in that

[30] However, in approving the Italian system because of a certification pre-requisite, the decision opened to national law the way to generalized exemption of the whole of consumer entities from the substantive requirements of the directive. In the same way allowed the submission of a large part of consumer's complaints to a national mandatory procedure, not compliant with the CADR directive.

[31] See para IV and ns 49-53 below, how such features might even generate a pressure to move the whole of the entities towards the mandatory regime, in order for gaining the economic and legal coverage guaranteed by those rules.

[32] Case C-317/08 to C-320/08 *Alassini and others* v *Telecom Italia SpA and others* [2010], available at www.eur-lex.europa.eu.

that legislation meets the requirements set out in the previous paragraph'.

This statement refers to *both* Italian acts of implementation of both directives, whatever the mediation procedure they regulate may be. It would make no sense if both proceedings were not subject to those same conditions, when initiated by consumers. Even less sense it would make if the register pre-requisite excluded such a minimal guarantee. It is in fact very clear from the submitted question – the Court's account of relevant legislation and from the defendant State observations – that the claim is subject to the first act and the entities, if ever listed, cannot pertain to any register under the second.[33] It seems clear that, in this part of the decision, the Court does not refer to the CADR Directive because the entity is 'presumed' registered. It does, because it contains those minimal principles.[34]

The Verona Judge of first instance felt concerned with the doubts expressed above. After recognizing the constitutive value of the 'list' as to the endorsement of an ADR entity according to the CADR Directive, it kept on distinguishing among the CJEU conclusions. Surprisingly, the result of such interaction is that the prohibition of the directive related to the duty of legal assistance will resist, notwithstanding the absence of a properly enlisted ADR entity. However, as the judge accepts that the CADR Directive cannot apply to unlisted bodies, she draws her conclusion from

> 'the assessment of compatibility of mandatory mediation rules with the principle of effective judicial protection laid down in Arts 6 and 13 CEDU and Art 47 of the Charter of Fundamental Rights of the European Union'.

1. Legal Assistance

In particular, according to the referred decision, the duty of legal assistance would result contrary to the fourth requirement of *Alassini*; namely, that the duty to complain in ADR either does not create costs, or limits costs to symbolic fees.

On this point, according to the national judgment, the European Court ruling

[33] According to para 62 of the decision, as quoted above, the 'legislation that should meet the requirements' for judicial protection includes the decreto legislativo no 28/2010. Moreover, the CADR register of Art 20, which by declaration of the Italian Government did not exist, may include only (voluntary) entities that respect the CADR rules about legal assistance and withdrawal. Therefore, there is nothing to be ascertained about. Finally, under the decreto legislative 6 August 2015 no 130 only voluntary bodies may access that register. These do not need to meet requirements that justify compulsory mediation.

[34] Since the beginning the decision detaches the obligation to complain, which affects the relationship between the directives, from the 'detailed rules' of consumer's protection within the CADR procedures. Also the 'Roadmap to European Effective Justice (Re-Jus)' does not register that the limitation of the rule of Art 8 (against the prohibition of legal advice) only to the complaints submitted to certified entities is not consistent with the final judgment of the referring Judge. The Judge applied the rule after expressly stating that the directive (ie its article 8) could not regulate the submitted case. See *Re-Jus casebook* n 11 above.

> 'did not mean to consider the different methods of operation provided in national law for the procedure, in this way suggesting that such requirement is '*imprescindibile*''.

In this context, by '*imprescindibile*' it is meant that the rule cannot be disposed of or derogated from by any regulation and, of course, by any regulatory list's requirement. Thus, such rule operates by its own virtue into any contract, law or regulation and, therefore, it applies to ADR entities and procedures, like those provided for by decreto legislativo no 28/2010, even if not registered under the CADR Directive.[35] It goes without saying that if the no-lawyers rule applies into a procedure for 'civil and commercial mediation' (when that procedure operates at consumer demand), the same should be applied to any consumer claim (not subject to a binding decision), where the cost effectiveness prerequisite has not been observed.

This authoritative restatement of the rule is in contradiction of the mainstream opinion about the 'constitutive' nature of registration, supported by Italian competent Authorities, on behalf of the Government, commercial ADR entities, judges, lawyers, and even consumer's associations trying to regain a lost market.[36] The source of this opinion is not in legal materials, decrees or judgments. It is in the advisory council of a private association (with many economic interests in such scientific issue) to its members. The same source underlies the administrative deliberations of *independent* competent authorities. It appears, at first view, that they intend such independency as related to their relationship with the law, rather than to their separateness from the government. Today, five years after the CADR Directive entered in force,

[35] There is of course a problem about the different level, where the low costs' rule and the freedom of lawyer rule operate. Art 8 of the CADR Directive treats the two matters in different paragraphs. As my concern in this note aims to the constitutive role of registers, I will not address this problem here. As to this last topic, it is enough to know that the low cost's principle – with lawyers or without – may operate out of the list requirement.

[36] J.M. Glover, 'Disappearing Claims and the Erosion of Substantive Law' 124 *Yale Law Journal*, 3081, 3052-3092 (2015), points out that statutory intervention on mediation and arbitration is 'trans-substantive'. It does not affect permanent qualified rights of a single group or category of citizens. Moreover, the holders of these rights will be concerned only in the event they have a reason to sue. By contrast, the ADR revolution is supported by strong groups of repeat players with a permanent interest to it. The traders, the lawyers, the ADR entities as an 'industry', a great part of the judiciary (interested both to decrease the charge of cases and to participate to arbitration procedures). Moreover, Governments have all their stake in the mediation diffusion. The legislative accent on the 'private agreement' as a (better) way to enforce rights is, by itself, a mean – sometimes even declared – to decrease the citizens' attention from the statutory nature of their rights, from their trust in the ability of the Courts to enforce them and from their interest in the funding of the justice system (ibid, at 3080); See also K.A. Sabbeth and D.C. Vladeck, 'Contracting (Out) Rights' 36 *Fordham Urban Law Journal*, 807, 803- 838 (2009). An analytical appraisal of the social forces that dominate the ADR issue is in J. Resnick, 'Diffusing Dispute: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' 124 *Yale Law Journal*, 2804-2939 (2015).

> 'The draft decree on institution of the specialized register of Consumer entities has not yet been decided (...) therefore the procedure for recognizing ADR entities cannot be described.'[37]

The Italian Bar Association (*Ordine degli avvocati*), it is respectfully submitted, is wrong on all its arguments.[38] The Bar was one of the strongest supporters of the mandatory nature (also) of consumer ADR. The Court declared that it might be mandatory. There is no way, now to subtract mandatory consumer complaints to the CADR Directive because national implementation applies only to 'voluntary' entities. Such argument cannot stand, not even by invoking the National non-compliance with the CADR register's implementation. Moreover, the issue that, in absence of such register, the Directive cannot apply to Consumer ADR suffers a decisive objection. On this topic both, the national and the European court did not build their reasoning on the CADR application 'pre-requisite' of registration. They drew their conclusion direct from the respect of the rights to judicial protection and access to justice. It seems all too obvious that these minimal requirements set out the balance between the protection of individual rights and the public interest (which allows mandatory procedures) in any consumer dispute. These rules cannot change according to where the ADR entity is enlisted. This is why the Tribunal of Verona declared '*imprescindibile*' the rule that consumers cannot be obliged to retain a lawyer or a legal advisor.

2. Right of Withdrawal

In the referring judge final decision, the flaw is another. It is respectfully submitted that the outcome of the referred question about legal assistance holds, on the same ground, for the freedom of withdrawal. In fact, on this point too, the European Court 'did not consider the different methods of operation provided in national law for the procedure (…)'. Moreover, on this topic, the Court did not even refer immediately to the CADR Directive provisions (as it had done before, as expression of the minimal requirement of costs). It expressly connects its statement to the principle that 'the outcome of the ADR procedure is not binding (…)' (para 57) and draws its conclusion from that same principle (para 66):

[37] See MISE, n 41 below, Section II, 6.1

[38] As noted above, this is the reading of the Italian Bar Council. See Consiglio nazionale forense (CNF), ufficio studi, *La sentenza della Corte di Giustizia Europea, scheda US 56/2017*, 10, available at https://tinyurl.com/y3ns5t4t (last visited 28 May 2019). The CNF Report suggests that the CJEU decisions does not concern any proceedings under the decreto legislativo no 28/2010, raising two central arguments. (i) The Directive implementation law regards only voluntary procedures (this is not true, see para V). Moreover, the Directive certainly applies to mandatory procedures). (ii) The implementation law sends the CADR entities to the register set up according to Art 20 of the CADR Directive. This list is different from the Ministry of Justice registry of civil and commercial entities. The report concludes triumphantly 'at this date the Ministry of Justice did not enact any register of (consumer) ADR Entities'. This, again, is not true. The register exists, but it hosts only the parithetic, voluntary, entities see n 45 below.

> 'It is necessary to take the view that such a limitation restricts the parties' right of access to the judicial system, contrary to the objective of Directive 2013/11, recalled in Article 1 thereof. *Any* withdrawal from an ADR procedure by a consumer must not have unfavorable consequences for that consumer in the context of proceedings before the courts relating to the dispute which formed, or which ought to have formed, the subject matter of that procedure'.

Only because of this general ground, the Court concludes that such consideration 'is supported' by the wording of the CADR Directive, Art 9(2) (a). In substance, the CJEU did apply the withdrawal rule directly to the non consumer and noncertified procedures of the decreto legislativo no 28/2010, as far as the complaining party is a consumer. The withdrawal's power should *a fortiori* operate into the CADR implementation law, also in mandatory procedure held before entities not registered according to Art 20.[39] Both the Advocate General and the Court (para 66), derive their conclusion immediately from Art 1. Throughout their reasoning there is no reference whatsoever to certification pre-requirements. The arguments have been framed in so large a fashion to suggest that they might apply also outside the CADR Directive, even to commercial ADR as regulated by the decreto legislativo no 28/2010.[40] It seems that at least application of Art 1 should be a condition for all other 'pre-requisites' of the CADR Directive.

3. Lawyers and Withdrawal Under Voluntary and Compulsory ADR

In this respect, there is at last one more reason for why the outcome of the Tribunale of Verona cannot stand alone as to the first detailed question (legal assistance), without necessarily have to reach the same conclusion in relation to the second (freedom of withdrawal). Regardless of whether the freedom of representation of Art 8(b) linked to cost effectiveness or not, it is shared opinion that its function is to ease and speed up the procedure, preserving it from

[39] Further decisive evidence that the withdrawal rule is independent from any list pre-requisite may be found in the General Advocate Conclusions in Case C-75/16 n 1 above. See n 35. Since the beginning of her statements about the availability of mandatory consumer complaint (para 81), the Advocate moves from the consideration that in *Alassini* a 'different' procedure was at stake. She adds, soon after (para 86), that the legislation at issue 'may jeopardize the opportunity for the parties to assert their rights effectively before a court following that procedure…' The' legislation at issue' here covers both, Italian decrees and Directives' provisions, with no reference to the extension of their field of application. The Opinion concludes therefore that 'such legislation…. does not meet the condition laid down in Art 1 *in fine* of directive 2013-11'.

[40] See Case C-75/16, n 1 above, paras 94-96. The Advocate General connects here the freedom to withdraw from the procedure to 'each of the parties... or at least the consumer'. Para 96 states that such condition 'would lose its effectiveness if it was permissible for Member States, *whilst formally recognizing the right of parties to have access to a court, to jeopardize the possibility for those parties to validly assert their rights through the judicial system'*. As a consequence '… withdrawal from the ADR procedure should not entail adverse consequences for the party who has withdrawn -*at least* if he is the consumer'.

formalities and technicalities. This is another signal that the directive declares the State power to enact compulsory mediation, but regulates only the voluntary one.

As observed above, when the mandatory alternative is chosen, things deeply change. The duty to complain is enforced by sanctions that float throughout the procedure. The effect of these provisions does not always manifest immediately and, instead, will heavily affect the parties in the subsequent lawsuit. In this framework, I am afraid that legal assistance should be most welcome, to the point of becoming another constitutional condition for effective judicial protection. In fact, the Italian *Consiglio di Stato* declared it a condition for constitutional validity of the whole decreto legislativo no 28/2010 under the right to defense clause. Likewise, in the same judgment, the right to withdraw after the 'informative' meeting represents a constitutional condition to preserve access to justice.[41] There is a strong link between access to justice and right to defense and the same link exists – reversed – between the free choice about legal assistance and the compulsory nature of the CADR. So that it may be concluded that the Directive does not want the duty of legal advice because it does not like the mandatory mediation. The Court in *Alassini* did not adjudicate on a difference between registers. Rather, on the difference between voluntary and mandatory mediation and on the general constitutional requirement that allows restrictions of the access of justice in mandatory ADR procedures.

It remains to be seen whether in a peer (b2b) procedure, alike the one of the decreto legislativo no 28/2010, access to justice may be further restricted, by increasing costs and disadvantages of the forthcoming judicial action. In this case, it seems that also the right to legal defense should be further enhanced. This circumstance, however, could not be a reason for submitting the minimal requirement established in *Alassini* for consumer's disputes to those same restrictions (and consequential enhanced protection). It is the reason, before than the law, to explain why consumer's access to justice cannot be further restricted when the duty to mediate takes her away from the protective framework of the independent Authority, to a private procedure afflicted by even harsher effect than those considered in that framework.

On the contrary, the Verona judgment, in preserving the CADR procedure only from the duty to be represented (consequential to the list requirement), left consumers alone with all those technicalities that the directive intended to avoid by making lawyers unnecessary. For instance, all sanctions remained untouched, together with the heavy effects that the party discovers and has to cope with, if he/she decides to sue. This is again in conflict with the effective judicial protection and the other conditions required in *Alassini*, apart from costs. That procedure was mandatory. However it was under the control of a public authority and there

[41] See n 20 above. These are surely the most important issues proposed by compulsory mediation. However they influence almost all of the detailed rules of procedure. See ns 8, 12-14 above.

were no sanctions in case of withdrawal.[42] As stated in the general Advocate's Opinion: '*Alassini* did not need to deal with the problem of withdrawal'.

V. The Registration Pre-Requisite, the Failure of CADR Harmonization and the Crisis of Voluntary Mediation

The Verona referring Court of first instance was bound to follow the European Court decisions. However, the judge discovered that, under the rule of the decreto legislativo no 28/2010, the 'competent Authority' did not create any 'special section' devoted to consumer matters in the general registry of entities.[43] According to the national judge, two consequences follow from this finding. First, at the time of the case Italy had neither implemented the 2013/11/EU Directive, nor instituted any list for CADR entities regulated under the decreto legislativo no 28/2010 or decreto legislativo no 130/2015. Second, the Directive could not apply to the dispute he should refer to mediation, as far as there were no entities compliant with the requirement of Art 20(2). However, the judge overruled the Registry requirement as to the refusal of legal assistance. Both conclusions have been questioned above.[44] However, what is important to underline here, is that such interpretation of the CJEU decision allows any Member State to escape all the provisions of the CADR Directive. It is enough to insert national entities into

[42] The proceeding before independent authorities in the concerned sector is the only case where mandatory CADR may increase the effectiveness of the directive. These procedures satisfy the conditions that the same founders of the access to justice movement, M. Cappelletti and B. Garth, required for the effectiveness of ADR in unbalanced relationships. See E. Storskrubb, n 7 above, 15, 19. This aspect may be easily seen in their features: (i) they are generally additive, ie their aim is not to decrease the judicial claim but to add remedies for cases which would not even arrive to any Court; (ii) their procedure is asymmetric, only the professional party may be bound to participation or to the solution; (iii) in most countries they enjoy a reserve or a prevalence against private entities (eg consumers may divert the dispute toward the Authorities, or the Authority may detach the procedure from the private entity, or the Authority may be invoked to adjudicate the issues in case of professional's refusal to agree, the Authority may ensure mass enforcement of serial violations, etc). Moreover, *Alassini* did not care of registers at all. Judgments are public. Therefore, anybody can verify that the Court made the right decision in the wrong case and on a wrong register. See N. Scannicchio, n 7 above, paras 5.2-5.3 and fns 456-457.

[43] The general register administered by the Ministry of justice does not host Consumer ADR 'entities'. It registers only consumption's mediators. However, it is certain that consumer related ADR and procedures of the decreto legislativo no 28/2010 have an entry in the general register of the Ministry of justice, even if they do not sit in a special section.

[44] I have shown above that the Court of Verona overreached the limits of the certification requirement as intended by the CJEU. According to the present submissions, the last was right in assuming that pre-existing entities did not need to follow the new certification procedure. In any case, it seems clear from the Directive that neither States nor entities are under any obligation to apply or to accept enlistment in any register. Furthermore, existing entities cannot be compelled to register under the directive. The only obligation, under the European Court decision, seems related to the necessity of a 'residual entity' that may satisfy the state obligation under Art 5. The Italian implementation decree does not supply any residual entity. As to the CADR Directive register, at the time of the judgment it had been enacted. Seen n 45 below.

a different register, not regulated by its Art 20. As noted above, the Italian legislation sends the most important consumer disputes, all consumer contracts containing a mediation clause and all claims and appeals where the Judge so requires to entities enlisted in a different registry, enabled by the previous Decree. This behavior may completely frustrate the harmonization, insofar as these uncertified entities do not need to comply with CADR requirements and, should they do, have no obligation to collect, communicate and report any information to any authority set up under the 2013/11/EU Directive. These features may affect also the ADR promotion aim and, if they operate under a mandatory complaint regime, they surely do. Both European mediation directives permit the enactment of compulsory forms of dispute resolution. However, both eminently provide for voluntary ADR proceedings.[45] The general application of the registry pre-requirement not only will avoid the costly information and management duties, but also the even more costly necessity to satisfy the substantive rules of procedure, introduced by the 'quality criteria' to not compliant/unregistered bodies. Allowing a fair withdrawal and supplying the mediator with the competence of a lawyer has a cost.[46]

By applying the 'law of the registry' where the chosen entity is inserted, Italy derogated from the CADR Directive rules on the mass of consumer contracts. Those who welcome such solution forget that, under such mandatory system, consumers do not choose.[47] It is to be pointed out that in case of mandatory ADR, consumers can ask for the directive compliant bodies enlisted in the CADR register of MISE (subject to the CADR duties of information and related costs). However, if they find one, such procedure does not satisfy the condition to sue. In most cases, consumers *must* apply to an entity certified by the Ministry of Justice registry according to the decreto legislativo no 28/2010, to satisfy it.[48] This creates a significant increase of legal expenses and judicial risks. The mandatory system procedure, moreover, provides for tax rebates and immediate execution of agreements, without exequatur.

By this way, the pre-requirement generalization creates a legal barrier that supplies strong economic incentives to the not included private bodies. It puts at disadvantage the (European) voluntary CADR entities in favor of the (national)

[45] It is worth stressing that in the ELI/ENCJ statement of 5 September 2018 on *The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute,* recognizes that 'Mandatory ADR does, however, bring with it certain complexities… .' that are beyond the scope of their project on (voluntary) mediation and merit a specific approach. Therefore they 'recommends that the whole issue of making ADR processes mandatory should be considered further in a future project'.

[46] See ns 2 and 8 above, the above consideration is common to all the quoted Authors.

[47] See eg G. De Palo and R. Canessa, n 18 above. See also E. Silvestri, n 6 above, 89, considers the above attitude a 'sensible' solution. However, she does not take position about its consequences on the application of the rules about legal assistance and right of withdrawal.

[48] Decreto legislativo no 28/2010, Arts 1(e), 2 *bis*(5) and 16(1). See ns 4 and 15 above, about the detrimental effects of deserting or abandoning the procedure.

mandatory ones. Finally, such arrangement forces consumers to waive the protection of the directive and generates, by itself, a global loss of their effectiveness. Verona's Court of first instance is right in assuming Italy's default of the Directive. However, it is astray as to pertinence of the infringement to the institution of a register.

Subsequent developments evidence the submitted conclusion. Since 2015 the Italian Ministry of economic development (MISE), which provides for registration and monitoring of CADR entities as the competent Authority and the contact point, began to institute the CADR register of *voluntary* ADR entities.[49]

This is the only list of Consumer ADR entities that might operate in the same fields covered by the decreto legislativo no 28/2010for commercial and civil mediation. However, this register can contain only the famous (or infamous) 'parithetic' entities (ie entities created by agreements between consumers' associations and single or associated traders). By law, such entities should satisfy all the safeguards provided for by the Consumer ADR directive (I will lay merciful hands on the administrative procedure for the assessment of the features required by Art 20).[50] These entities cover now about ten percent of Consumer

[49] MISE (General Direction for Market, competition and Consumers, Division XI), decreto direttoriale 21 December 2015 that implements the registry of Art 20(2). To this register may apply:

a) parithetic negotiations' entities, for sectors where either there is no regulatory agency, or the same Agency does not maintain a register.

b) Other entities 'not enlisted in the register of ADR entities in Consumer matters, regulated by Art 16(2)(4) of decreto legislativo 4 March 2010 no 28'. This is the 'fake' section of consumer entities, which ought to have been enacted in the Ministry of Justice Registry, recalled by the Verona decision (see para III, n 31 above). This entry contains now the 'orphan' entities created by the Commerce Chambers to operate under the 2013/11 Directive implementation law. A second MISE decreto direttoriale 1 February 2017, extends the deadline for application to 30 June 2017. The resulting list may be found here, at https://tinyurl.com/yy8q2ajn (last visited 28 May 2019).

At the moment, apart from entities set up by the chambers of commerce, there are only three ADR bodies in this register. All were instituted by agreement between consumers' associations and big corporations and all bring the name of the related corporation (NetComm, Trenitalia, Poste Italiane). The majority of the parithetic entities remains outside the CADR registry, likely because of the management costs implied by the massive monitoring and information duties consequent to registration. Moreover, the CADR implementation law admits to the register only entities, which practice *voluntary* procedures, whereas many such entities operated in the protected sectors, where the procedure was already mandatory (communications, Banks, Energy, water supply etc). Sectoral competent authorities (see below) have recognized some of them.

[50] The MISE register for directive compliant entities reflects such confusion. However some entities already certified under the previous decreto legislativo 28/2010, applied to the CADR registers of some Competent Authorities. Therefore, we find in the Commission ODR entries a number of entities (Intesa, ADR Center and Academia) registered also in the previous Decree's registry for mandatory procedures. Also the entities of many Italian commerce chambers applied to both registers. All these bodies prepared a second consumer procedure that complies with the CADR directive. However, their web site does not clearly instruct the user about which regulations refer to what directive. Finally, the mandatory procedure is in some way neutralized from the punitive framework of the Decree. This remains a problem of the complainer/defendant, in case his/her complaint falls under the mandatory condition. Therefore the consumer shall deal with the intricacies of two interwoven Decrees, where may happen that the Competent

ADR cases. After the directive, they are swiftly losing traction.[51] They compete in the same fields with the entities enlisted in the general register of civil and commercial mediation (where the consumer section is still missing) under the decreto legislativo no 28/2010.[52] These 'civil' entities can satisfy the preliminary condition to sue, ask an indemnity for the first meeting when the parties refuse the attempt to agree and take advantage of the punitive consequences that settlements' refusal imposes to parties. They can operate in all fields, may accept all claims (from consumer and professionals) and do not need to satisfy any CADR requirement (application, monitoring and control is ensured by prerequisites laid down in a Decree of the Ministry of justice, at conditions different from the decreto legislativo no 130/2015). In fact, the request of preliminary ruling was advanced because the application of the described procedure to consumer complaints, does not allow freedom of withdrawal and obliges parties to retain legal assistance. Therefore, the so-called 'promotion' of ADR compliant entities by the mere manoeuver on a register causes a global disincentive for the economic standing, the attraction of the public and the legal strength of the agreements of the voluntary entities which comply with the directive. So far, only a few voluntary entities applied to the CADR register. Most parithetic bodies remained outside the 2011/13/EU directive. The number of claims presented to such bodies – both registered and unregistered – decreased swiftly after the decreto legislativo no 28/2010 entered in force and further after he CADR Directive implementation law.[53]

One striking, but foreseeable, by-product of such impairment of the consensual procedure is the steady passage of entities from the voluntary to the mandatory privileged model. The Bank of Italy (ABF) and the CONSOB (ACF) have long established their ADR bodies in order to protect consumers. These

authority for the register of the voluntary procedures admits or, as point of contact, sends to the EU Commission, a number of entities that practice a mandatory one.

[51] Istituto Scientifico per l'arbitrato la mediazione e il diritto commerciale (ISDACI), *Tenth Report on Diffusion of Alternative Justice in Italy*, 2017, available at https://tinyurl.com/y2w504j3 (last visited 28 May 2019). According to ISDACI (a joint center of the Union of Chambers of Commerce, the Milan Commerce Chamber and the Arbitration Chamber of Milan) the number of complaints in ADR was 275.000 in 2017, with a steady decrease (four per cent) of mandatory complaints and a slight increase in voluntary procedures. It is to be stressed that the ten per cent of voluntary ADR comprises both Professional's and Consumer's ADR. On the other hand, banking, Insurance and Financial procedures are all mandatory. They cover almost the thirty per cent of the ADR complaints and treat, in a substantial amount, Consumer's complaints.

[52] See n 34 above.

[53] Apart from the Autorità per le garanzie nelle comunicazioni (AGCOM), that attracts the bulk of consumer complaints of lesser amount, the most important Entity of Italian CADR is the Bank of Italy ADR Body, ABF. It attracts almost the twenty percent of claims of the whole ADR sector. The ABF Procedure is adjudicative. It is mandatory for professionals. The decision is not binding. It is supported only by reputational sanctions. The ABF site mentions all Companies that did not comply with the decision. In 2011, only two companies were on the list. In 2016 and 2017, seventy four professionals did not comply. In 2018, there were four hundred and one mentions (see https://tinyurl.com/y2hh2mch (last visited 28 May 2019)).

received voluntary complaints and required the mandatory participation of professionals. Both bodies were, however, transferred to the mandatory system by the decreto legislativo no 28/2010. Despite these provisions, both have resisted the consequent changes in their procedure. It is not yet clear whether the appeal before the ABF meets the condition of admissibility or not. In the second case, pursuant to the Decree, the complaint to ABF does not allow access to the court. In the first, withdrawal from the attempt or failure to appear should result in fines and penalties. However, the respective regulations do not refer to this issue.

The implementation of the CADR Directive changed this state of the art. The decreto legislativo no 130/2015 indicated that the Bank of Italy is the competent authority in the sector. Following this requirement, the Bank has recently amended the regulations about management and procedure of the controlled entity (ABF), in order to comply with the CADR Directive.

However, in the reorganization process, the Bank lost contact with the main legal problem raised by the implementation law. As noted above, this law (decreto legislativo no 130/2015) applies only to entities that conduct voluntary procedures Art 7 of this act, on the other hand, expressly saved the rule (Art 5, decreto legislativo no 28/2010) which submits complaints to ABF and ACF to the condition of admissibility. Therefore, strangely enough, the competent authority for voluntary mediation in the banking sector hosts an entity (its own) which carries out a mandatory mediation, pursuant to the decree on voluntary procedures. Moreover, the Bank of Italy did not set up any register, as ordered by both Art 20 of the Directive and Art 141(10) of the national Decree. The Bank acknowledges only its own entity as complying with the Directive.[54]

The evolution of the ADR entities and procedures in the Communication and Energy market supplies anothersignificant example of such decline of voluntary mediation. In this area, a number of voluntary bodies received the ability to meet the condition of acceptability attributed to the Co-Re-Com, the entity of the Communication's Authority.[55] However, the implementing law

[54] See Banca d'Italia, 'Consultazioni, Modifiche alle disposizioni sull'arbitro finanziario', available at https://tinyurl.com/y4gh3uzy; https://tinyurl.com/y68ulba3 (last visited 28 May 2019). Moreover, the Bank of Italy did not set up any register, as ordered by both Article 20 of the Directive and Art 141(10) of the national Decree. The Bank acknowledges only its own entity, as complying with the directive. See https://tinyurl.com/yyqrxj97 (last visited 28 May 2019).

The ABF model is at odds with the Italian law, not instead with the Directive. This last, in fact, admits mandatory consumer mediation if the procedure complies with its requirements and the ABF does. Therefore, at the moment it is the only entity which conducts a mandatory procedure recognized under the CADR Directive. What is at odds with the Directive is all the rest of the CADR in the banking sector, controlled by the Bank of Italy.

[55] AGCOM, Resolution 24 April 2018 no 203, *Regulation on the procedures for resolving disputes between users and electronic communications operators*, Art 3, available at https://tinyurl.com/y5r6ccqy (last visited 28 May 2019). One might cast some doubt that voluntary mediation, even if carried out by a body that complies with the directive, can satisfy the condition for claiming in court, when such function is reserved by law to the sectoral competent Authority. The argument in *Alassini* was that the duty to complain in front of the Authority increases its

quoted above reserves its scope and registers to 'voluntary' procedures. It is therefore rather strange that the register of the competent sectoral Authority infringes the provision requiring verification of conformity to the directive in question. According to the MISE, it certifies as 'voluntary' procedures that, by definition of the same Authority, satisfy a compulsory condition.As a result, in the final part of the report, required by Art 20, para 6, MISE (the Italian Point of contact), submitted to the Commission that:

> 'The use of ADR in consumption disputes is mandatory in all cases operated by a joint negotiating body (company /consumers)'.[56]

This statement is very surprising for an ADR procedure that, in the words of the implementation law: 'applies to *voluntary procedures* for alternative dispute resolution'. It is also surprising that the quoted sentence comes from the same competent Authority that regulates such 'voluntary' procedures and hosts the register of the related 'voluntary' entities. There is not a word about such significant legal consequence in Art 141-*ter* (which regulates these negotiations), or elsewhere in the consumer code. The alternative explanation is that the Ministry for economic development has become a primary source of law and exercises its power in its reports. This, however, should be at odds with the Italian Constitution.

VI. Back to the Directive. Management of the Entities and (Horizontal) Rules of the Contract

The considerations provided above also suggest an approach to Directive 2013/11/EU that, without prejudice to the objective pursued by the Court, makes it possible to overcome the antinomy between the administrative dimension of certification and the substantive value of the principles.

If such considerations and the facts from which they derive may hold some merits, they open an alternative that appears promising for the harmonization of consumer ADR. This approach cannot only lead to greater protection of consumers' interest in the cooperative dimension, but also improve the effectiveness of the directive, promoting an easier passage of all consumption's entities to the 'certified' principles of the CADR Directive.

It seems self-evident that this Directive contains two different sets of rules split in two different parts. On the one hand, there are organization and

power to control the sector. Therefore, it also increases the effectiveness of the rights established by the directives on electronic communications (not by those on mediation). The argument does not hold any longer if the authority can delegate its task, without delegating also its powers, to a private entity. See n 37 above.

[56] MISE, 'Prima Relazione sullo sviluppo e sul funzionamento degli Organismi attivi nella risoluzione delle controversie extragiudiziali in materia di consumo', available at https://tinyurl.com/yy8q2ajn (last visited 28 May 2019).

management provisions. These rules set up the system of entities and competent authorities as well as their powers and duties about registration and monitoring. The same also ensure the flow of information between the actors. On the other hand, there are rules that affect the respective position of parties between each of them and toward the ADR entity.[57] The Court itself clearly separated the problems of competence, linked to the regulation of the state power to enable mandatory procedures, from the specific questions that such procedures raise once they have been enacted.

The described separation may well be translated into the divide between those rules of the directive that originate the obligations of the Member States towards the Union, the entities and their citizens (which pertain to their vertical relationship), as opposed to those that concern the horizontal relationship between parties (and between them and the entities). The certification procedure belongs to the first group; the dispute's procedure to the second.

Most rules about legality, efficiency, equity and the like, as connected to the directive effectiveness and individual judicial protection, constitute public order rules, whose infringement nullifies any decision of any entity whatsoever, be that registered or not. This is especially true for the orders about lawyers and freedom of withdrawal. These provisions regard the individual position of the parties. They might not have horizontal direct effect, as far as their satisfaction requires the member countries' action. However, should citizens have or not a right to the enactment of some registers, they certainly have a right to the implementation of the substantive 'principles' about effective judicial protection.[58] In the national statutory systems, the liberty to choose about lawyers and withdrawal from the ADR procedure remains a 'right', whose infringement might well originate an action for damages under the *Francovich* jurisprudence. These rights should become subject to second tier regulatory decisions that distribute entities in multiple registers. This frustrates any harmonization effort.

Finally, apart from its structure, in the Directive there is positive reference to support the conclusion that the horizontal relation treatment cannot be jeopardized by a list. Recital 18 of the directive states that:

[57] Broadly speaking, the system management set of rules is grouped in Arts 13-25; Arts 8-12 regulate the individual position of the parties. Arts 6 and 7 have a mixed content.

[58] I have dealt with the issue of horizontal effect long time ago, see N. Scannicchio, 'European Law as a source of national Private Law', in N. Lipari ed, *Trattato di diritto privato europeo* (Padova: CEDAM, 2nd ed, 2003), I, 215-232. The conceptual and positive framework of such effects does not seem to have changed very much. According to Hartkamp, the proposal submitted above would realize a 'horizontal indirect effect', where the rules about lawyers and withdrawal would operate as a shield. See A. S. Hartkamp, 'Horizontal Effects of EU Law', in A.S. Hartkamp et al eds, *The Influence of EU Law on National Private Law* (Deventer: Kluwer, 2014), 58. See also C. Timmermans, 'Horizontal Direct/Indirect Effect or Direct/Indirect Horizontal Effect: What's in a Name?' 3-4 *European Review of Private Law,* 677-681, 673-686 (2016). Recently, D. Gallo, 'La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti diretti orizzontali', in E. Moavero Milanesi and G. Piccirilli eds, *Attuare il diritto dell'Unione Europea in Italia* (Bari: Cacucci, 2018), 17.

> 'This Directive should be without prejudice to Directive 2008/52/EC (…), which already sets out a framework for systems of mediation at Union level for cross-border disputes, without preventing the application of that Directive to internal mediation systems. *This Directive is intended to apply horizontally to all types of ADR procedures, including to ADR procedures covered by Directive 2008/52/EC.*'

I cannot see either how or why the European Parliament could refer to the horizontal relations in 'all types of ADR procedures (…) including ADR procedures covered by the directive 2008/52/EC', by presuming that this horizontal effect suffered the condition of a list still to be enacted by regulators: a list that moreover could not affect 'vertically' another directive. The recital refers to 'all ADR procedures', included those of other directives, provided with another different register or even without any. The recital and the directive refer also to procedures that work outside their field of application, to confirm that it applies, for example, also to '(…) redress procedures contained in other Union legal acts which shall apply in addition' to Art 13 of the CADR Directive.[59] There is no need whatsoever to modify the 'vertical' regulatory framework of Directive 2008/52/EC and change its pre-requisites and its registers, in order to apply 'horizontally' the consumers' rights on legal assistance and withdrawal to its procedures, when a dispute is initiated by a consumer. The first task is completely left to the internal law and to free choice of the Member States and their entities. However, the second is not.[60]

VII. Regulatory Enforcement of Individual Rights and the Rule of Law

A number of years have passed since a growing number of scholars began raising the question about the limits beyond which the rule of law may be stretched, in order for meeting the growing need to increase the range, financial dimension and ease of application of administrative powers of regulation. It seems that this task requires expanding the powers and decreasing the controls of European and national government executive branches, authorities, agencies and even private associations and bodies supporting them.[61]The threshold of the rule of law, as a fundamental defense of democracy, was further narrowed by the increase and crisis of the sovereign debt and by the need to cope with the consequences of globalization.[62] Under the wave of privatization and liberalization the control of

[59] Art 3, para 3.

[60] According to E. Storskrubb, n 7 above, 25 such conclusion is so obvious as to exclude any further discussion.

[61] A trend already well developed and furtherly theorized in the famous Commission of the European Union, *European Governance: A White Paper*, COM (2001) 428 final, 25 July 2001, available at https://tinyurl.com/zoas5ez (last visited 28 May 2019).

[62] M. Storme, 'Debt and democracy: 'United States then, Europe now?' 49 *Common Market*

legality moved from the exercise of public services for the protection of named individual interests (education, wellbeing, information, communication, energy etc), towards general as well generic interest's matrices, grouped under the anonymous matrix of financial growth, economic development and market innovation, under supervision of regulatory Authorities as guardians of competition.[63]

During this time, the democratic accountability of such decision-making has raised the interest of many scholars. The exercise of sovereign power was re-labeled, while interesting debates arose about the differences between the classic idea of 'government' and the concept of 'governance' of economic and social activities.[64] However, there is no sign that the state of the relationship among

Law Review, 1833–1840 (2012), quoting the Nobel Prize lecture of T.J. Sargent. On the object matter of Storme's editorial see, CJEU, Case C-370/12 *Thomas Pringle* v *Government of Ireland*, Judgment of 27 November 2012, EU:C:2012:756 available at www.eur-lex.europa.eu. See also B. de Witte and T. Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: Pringle' 50 *Common Market Law Review*, 805–848 (2013). In Italy, the decline of law had been registered since the end of the last century. See R. Bin, 'Lavoro e costituzione: le radici comuni di una crisi', in G. Balandi and G. Cazzetta eds, *Diritto e lavoro nell'Italia repubblicana* (Milano: Giuffrè, 2009), 279. As to the Italian legal scholars' predilection in building a new season of 'individual common rights' (based on further State regulation and further debt), in the middle of the shift from the 'community' to the 'Inter-governmental' perspective in European policy, see recently, G. Di Plinio, 'Il finto 'effetto Marx'. Resistibile ascesa, deriva keynesiana e irresistibile declino del marxismo giuridico italiano' *federalismi.it*, 21 November 2018, 2-12.

[63] On the origin, development and effect of such evolution under the economic and legal point of view see A. Supiot, 'A legal perspective on the economic crisis of 2008' 149 *International Labor Review*, 151 (2009); P.F. Kjaer, 'European crises of legally-constituted public power: From the 'law of corporatism' to the 'law of governance' ' 23 *European Law Journal*, 417–430, paras 4-5 (2017), available at https://tinyurl.com/yxdly2so (last visited 28 May 2019).

[64] P.F. Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation* (Oxford: Hart Publishing, 2010). Appreciation of such governance varies from the suggestion it should be 'good' (see R. Grzeszczak, *Challenges of Good Governance in the European Union* (Nomos: Baden-Baden, 2016) to the consideration of its impermeability to judicial review, with the annexed suggestion to abandon the vocabulary of representative democracy. See E. Korkea-aho, *Adjudicating New Governance. Deliberative Democracy in the European Union* (London: Routledge, 2015). As a matter of fact, when it is considered that after all, for about two thousand five hundred years, civil law has been the primary mean for 'governance' of economic and social individual relationships, all these reviews seem to be directed to substituting law with administrative discretion in the performance of such task. As a consequence, such a construction assumes the aim to social, economic or otherwise defined 'efficiency' as a substitute to the rule of law, for the legitimation of public power's exercise. *See* in fact K. Isaksel, *Europe's Functional Constitution. A Theory of Constitutionalism Beyond the State* (Oxford: Oxford University Press, 2016). The Author proposes a third constitutional pillar 'good administration/efficient government' (under the rule of law, administration is good if it follows the law). *See* also the review by K. Tuori to the book by W. Schroeder ed, *Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation* (Oxford: Hart Publishing, 2016) in 6 *Common Market Law Review*, 1898 (2017) about the substitution of the one with the other: 'The macroeconomic constitution is not about the activities of individual economic subjects but about macroeconomic objectives and aggregate values, as well as actions of Member States and EU institutions'. He concludes that: 'the Eurozone crisis produced a massive rule-work, but this can hardly be deemed conducive to strengthening the EU as a Rechtsgemeinschaft or reinforcing the rule of law sub-principle of legality'.

'law, legislation and liberty' suffered any changes, since the description it received in the past century by Buchanan:

> 'most Americans feel that individual liberty has been reduced. Regulations and controls have become ubiquitous, and, once installed, these seem impossible to remove or even to modify, despite widespread citizen complaint'.[65]

Only the concerned continent should be changed.

Meanwhile, in the effort to circumvent the difficulty in reaching a uniform law of contract, through directives and regulations, the Member States of the EU continue to entrust Authorities of ambiguous nature with the establishment, regulation and protection of consumers and citizens' rights. However, these entities share a unanimous feature. They are bound to consider those rights as the 'quality' of a product or a service. Moreover the content of these rights must be ascertained as a result of cost/benefit assessment of relevant public interests or of sectoral 'policies'. Finally their (uniform) enforcement, or even existence, must be subjected to the needs of 'governance' and, consequently, depend on the 'regulated' behavior of the participants to the concerned 'industry'.[66]

This is the point where the danger that public debts create to democratic processes meets the present work. The implementation of the CADR Directive shows that it is precisely the regulatory approach of the Commission that transfers the entire regime of mediation from the domain of the law (or contract) to that of the administrative regulation of the market. In this way, the content and distribution of rights moves from the realm of the rule of law, and ultimately of the democratic legislative process, to that of discretionary decisions by delegated, second level, authorities charged with the (public) interest to reduce the states' expenditure. This means that, such authorities hold the power to subvert the order outlined above, through the manoeuver on the scope of an unclear directive and the discretionary space created by the inscription in lists of various origins.[67]

From the point of view of legislative techniques in civil law systems, the problem generated by the massive use of the regulatory function in this area is twofold. Firstly, such reconstruction of the conflict of individual interest and of their regulation and resolution as the object of a 'business', presumes an analogous idea of the rights, of the judiciary system and of the law itself.[68] In fact, also the judiciary enforcement of rights must be considered as an 'industry'. A public or

[65] J.M. Buchanan and R.E. Wagner, *Democracy in deficit* (New York: Academic Press 1977), 192. See M. Storme, n 62 above.

[66] See H. Schulte-Nölke, n 8 above, 137-138.

[67] See para IV above.

[68] This, again, is self-evident in the way mediation has become an instrument for budgetary policy. It has been moved from its main objective of resolving disputes by consent, to that of reducing State expenses by force. This move brings the by-product of hiding the State's inadequacy in performing its own duties toward the citizens.

private good or service (decisions and procedures) provided to users (parties and their lawyers), whose object is the lengthy and costly resolution of conflicts between them. This approach introduces also the idea – which especially the most assiduous supporters of the 'industry' use to justify its social utility – that those users should pay an appropriate share.[69] This objective may be accomplished by increasing the related costs and risks. However, the same objective is more easily performed either by adopting the supermarket 'self-service' method (ADR), or by making the service subject to standards and certification directly entrusted to the concerned producers (standardization). In this way, not only the market, but also the law that governs it, comes to be 'privatized'.

In the second place when under the private regulatory law label it is said that such regulatory action performs an administrative enforcement of (quasi) private rights, the breadth of such transformation is under-estimated. Regulatory enforcement moves the content of subjective, substantive and procedural rights out of the sphere of assessments about compatibility of the administrative action with the law (legitimacy). Such assessment now regards the conformity of the administrative action to the public interest (opportunity), to the proper policy and to the system efficiency as determined by the regulators. This, in turn, implies the sacrifice of fundamental rights to any 'general' need, fuelled from time to time by budgetary constraints or by congruity with various political choices. Rights, in other words, must leave way to policy-legitimated interests, which can be changed according to the regulators' necessities. The label 'regulatory private law' substantially describes the actual shift from individual rights to administrative interests as the object of enforcement of European law and national implementing provisions.[70]

In principle, there is no difficulty in supplying private rights with administrative

[69] See eg G. De Palo and R. Canessa, n 18 above, 726. If we look at the relationship between the global costs of imposed ADR and the total decrease of the State expense for the Judiciary, the whole operation should be considered the charge of a tax. Instead of paying globally for the services of justice, some citizens (the actual users) will pay a specific sum for mediation. See J.M. Buchanan, *Public Finance in Democratic Process: Fiscal Institutions and Individual Choice* (Chapel Hill: University of North Carolina Press, 1987), chapter 10. He treats this kind of regulations as fiscal tricks. Notably, the theory of such illusions was developed by Italian scholars in Italy, where Buchanan found it.

[70] This is clear in the same definition of such object. It is in fact framed as 'A body of regulatory conduct of business rules of EU origin, to be observed by businesses when dealing with their (potential) clients (…) – that – (…) do not belong to the realm of traditional private law – and – is subject to public enforcement (…) It 'concerns the relationship between a particular business and an administrative agency (…) sets standards of behaviour in the relationship between a business and its (potential) client (…) [and] (…) also aim to protect the latter (…)' See O. Cherednychenko, n 9 above, 486 and the Authors quoted in ns 8-10 above. There is nothing of private or 'quasi private' in such definition, apart from the insistence of the regulation on the 'behaviour' of professionals and their (potential) clients. What is missing is precisely any 'private' right and, therefore, the eventuality of forcing such position as a duty of the parties. What remains is either a claim (?) toward the administrative agency to enforce such administrative obligation by its 'order' or, alternatively, the possibility to 'persuade' them to respect a 'behaviour', not a right.

enforcement under a policy choice, when the legislator thinks it is the case. However, it should be recognized that, in this case, the enforcement does no longer regard a law and/or a right. Rather, it becomes merely a claim concerning the correct operation of the administrative decisions' procedure. The problem, therefore, arises when such a process begins to 'substitute' rights.

In fact, in translating from ADR to rights and judgments, such regulatory approach, forgets some qualities of these intangible entities. As stated above, their content and management come to be considered the 'product' and the 'service' of the (administration of) justice industry. However, the lack of these qualities, as recently restated, renders such approach 'untenable' in a liberal democracy based on the rule of law.[71]

In the ADR case, the false premise underpinning the constitutive quality of registration stems from the inference that access to justice is simply an 'individual' interest and judicial decisions serve a private interest of the parties: therefore both should be submitted to the 'public' interest to decrease litigation frequency, times and costs, as far as a public body recognizes such a necessity.

However, this is neither the exclusive nor the paramount function of this interest. Trials and procedures do not serve at all only claimants and defendants. This may be all that ADR entities and competent authorities look at and are interested in. On the contrary, access to justice is constructed as an individual prerogative in the name of general interests too.[72] In addition, these interests hold much greater weight than the public utility of lesser spending in litigation.

Such inference forgets that the right of access to justice rests on the same foundation and social utility that sustains the legitimacy and constituency of economic freedom and market efficiency, as pursued by the same mandatory mediation's supporters: the individual freedom of choice as a means to the general development of the entire society. By access to justice, law exploits the self-interest of parties in order to reach its own ends: the enforcement of rights' economic value and the legal order of society as general interests. The single difference between the economic and the legal aspect of such foundation is that market efficiency and competition support such freedom as the material prerequisite of economic value. The rule of law[73] and access of justice support the entitlements to that value and make it subject to a democratic process. That

[71] *R. (UNISON)* v *Lord Chancellor* [2017] UKSC 51, [2017] 3 W.L.R. 409 *per* Lord Reed, para 67. See M. Elliott 'The rule of law and access to justice: some home truths' 77 *The Cambridge Law Journal*, 5-8 (2018), for a comment.

[72] The following arguments have been discussed in depth in my previous works on this topic. See N. Scannicchio, n 6 above, 157-167, 194; Id, n 7 above, 173. However, in these pages I have re-framed them up according to the statements of Lord Reed in *Unison* (n 69 above), where those concepts were expressed with great force and clarity. I strongly suggest reading them directly from the source, at paras 64-75.

[73] Alternatively, if preferred the *Rechtsgemeinschaft* or the *Rechtsstaat* principle. The difference is not relevant here, as the aspect that concerns this paper is the legality control over administrative action.

is, they establish its legitimacy.

'Public' interests may and must be entrusted into public (or even private) bodies, agencies and entities, in order to ensure a common advantage (and must be implemented through discretionary power compatible with such objective). Access to justice, however, is not simply a 'public interest'. It is a something that all citizens must be granted with. In other words, it is a right, which everybody is individually entitled to as a person, not only as a member of the public. Put differently, access to justice is a common and general interest, whose protection is due to each individual. That, the fact that, in the name of a paramount general interest, the power to file a case in court lies with all and each individual constitutes the reason why it is a 'fundamental' right.[74]

Moreover, the public interest in the reduction of disputes and public expenses does not compete solely with the general interest underlying the due process. As it appears crystal clear in the authors that built our western civilization,[75] it also concurs with the general interest underlying all the substantial rights conferred by the law; as well as with those established by consumer protection directives, often with rules defined as of public order by the CJEU. In fact, all those prerogatives – such as the right of withdrawal, the replacement of goods bought, compensation for damages, the extent of interest on credit, etc – do not lie with individuals exclusively for their pleasure to fuel conflicts and protect their utility. They do, because through them the law also protects the underlying general interests. Those same directives, in fact, invariably invoke those same interests (whether they affect competition, market innovation, environmental protection, or – as in the Italian consumer code – the 'fundamental' nature of some consumer rights related to personal conditions). Indeed, it is precisely the effective protection of these general interests to come into play when the rules of mediation create

[74] Rule of law and access to justice may be required to be in equilibrium with the public interest to budget reduction. However, they remain fundamental rights that stand on a different level than the public interest and cannot be subject to discretionary options. As stated in the General Advocate *opinion* such equilibrium cannot match the imbalance created by a provision that, after compelling the party to attempt a settlement, does not allow them to retire without sensible, punitive consequences. To defend such arrangement as a correction of a fundamental right in the name of a public interest is too difficult. In fact, the CJEU refused. However, the certification pre-requirement left the entire question to national governments and authorities.

[75] It should be quite useless to quote here a chain of writers that – limiting the object to Economics, Sociology and Law – goes from Adam Smith to Hayek and Coase, from Veblen to Weber and Simmel, from Gladstone to Rudden and Calabresi. The link between the entitlement to individual rights and the achievement of general interests is in the same idea that connects the recognition of citizens' freedoms to the wealth of the nations. The history and development of such connections is very well shown in F. Wieacker, 'Sulle costanti della civiltà giuridica europea' *Rivista trimestrale di diritto pubblico*, 13 (1986). The recent specification of the same connections is clearly described by G. Ingham, *Capitalism* (Cambridge: Polity Press, 2008). However, it is not necessary to read all classics to see this link in civil law. It is enough to ask why an individual claim against an invalid contract can, all over the (democratic) world, generally be advanced by 'anybody' (provided he/she owns a relevant interest) and why this rule applies also when voidness of the contract stems from the infringement of a rule of 'public order'.

barriers to access to justice.[76] It is, therefore, with their effectiveness, rather than with efficiency of mediation, that the advantages in disputes' resolution costs and speed ought to be compared. Otherwise, the advantages of mediation will accrue from the sacrifice of all the rest.It remains to be seen whether the reduction of the Ministry of justice budget may balance the loss of all general interests protected by law in the whole of B2C contracts.

1. The Enforcement of Rights Without Private Law. One Step in the Future, or Fifty Years Backward?

It is written into European Treaties that directives bind Member States to achieve the results the Union purports into their internal law. Such proposition, in consumer directives, generally resulted in enacting some consumer rights, provided with sufficient remedies.[77] It was with the purpose of ensuring fast and uniform implementation of European law that *Van Gend en Loos* transformed the State obligations into the rights of citizens, leaving in their hands to obtain through judicial remedies what the Commission's administrative enforcement of directives could never have reached.[78]

Three years ago, the half century of that decision was celebrated.[79] In that occasion it was also celebrated the decisive role played by an Italian Professor of civil law, who had been appointed to the *international* European Court by mere chance. In the ceremony, Prof Trabucchi's *referendaire* unveiled that, after the decision had been released, Prof Trabucchi rushed into the translation offices of

[76] See F. Whilman, *Private Enforcement of EU Law Before National Courts* (Cheltenham: Elgar Publishing, 2015), chapters 10-11.

[77] If the register pre-requisite of application, referred to in the opening statements of the CJEU decision, is intended as a general condition of all the rules of the directive, there are no rights or remedies conceded to consumer by this directive, either immediate or depending on a State action. There is no right to question the State for not enabling complying ADR entities, because only the entities have a right to be inserted in a registry; there is no right to application of the *substance* of the directive because Arts 8-12 apply only to registered entities. There is no right to enforce the 'guarantee to complain before an entity provided with the prescribed requirements'. In fact this 'outcome' of the directive does not rely on the directive, the Law of the State or even either the law of contract. It lies in the hands of regulatory agencies, Administrative entities and their management of lists and procedures. There are no 'subjective rights', but individual interest to be enforced before administrative tribunals by authorities and ADR entities. So far their decision, In Italy, is to deprive consumers of the quality requirement, compelling them to complain before not compliant entities, if they want to protect their access to justice. The only obligation of the member state is to set up one residual entity and, even for that, one must rely upon the powers and will of a Ministry.

[78] N. Scannicchio, 'Le Fonti del diritto privato europeo', in N. Lipari ed, *Trattato di diritto privato europeo* (Padova: CEDAM, 2st ed, 2003), I, 136. More recently, M. Cremona 'The judgment, Framing the argument', in A. Tizzano, J. Kokott and S. Prechal eds, *Van Gen den Loos,* 1963-2013, Actes du Colloque, (Luxembourg: Office des publications de l'Union européenne, 2013), 23, concludes that the decision '… laid the foundation not only for its own doctrines of individual rights and direct effect but also opened the way for the creative use in the future of the preliminary ruling procedure to develop Community law through the 'vigilance of individuals'.

[79] *Van Gend en Loos* n 78 above.

the Court.[80] He was very angry and, when requested, he questioned the office as to why in the Italian translation they had referred to 'individual rights'. He asked to change the translation, by referring to *diritti soggettivi* (subjective rights).

When answered that the terms where 'equivalent' Prof Trabucchi became even angrier (if possible).[81] He made clear that in Italy 'regulations' existed (administrative law and administrative Courts). These may affect all 'individual rights', in such a way that these 'rights'(legitimate interests) may be enforced only as far as any 'public body' deems them to be compatible with any 'public interest', detected as relevant at their discretion. On the contrary, 'subjective rights' must be enforced within the civil courts and their entitlement cannot be so easily encumbered by 'regulations'.[82] The mainstream opinion, that generalizes the certification as a pre-condition of the CADR directive rules on consumers' procedural and substantive rights, implies that the same Court that pronounced *Van Gend en Loos* to subtract the economic rights of European citizens to State discretion, should have submitted their 'subjective rights' and their judicial protection to administrative action, under the control of regulatory agencies and administrative bodies.[83]

The fate to be subject to such administrative dominance of the 'public good', that judge Trabucchi would avoid to Italy would be now common to all European countries by will of their institutions.[84]

The Union is steadily moving from the establishment and enforcement of individual rights to regulation, standardization and certification of qualities and outcomes of products, services and processes. Since it was clear that the attempt to build an European law of contract was doomed to fail, in the higher levels of the EU institutions spread the opinion that, in order to free economic activities from the necessity to deal with a wide number of national civil law rules, the reform of contract law was a too hard and lengthy effort. Therefore, recent directives pursue the said goal of leveling market conditions adopting standardization and certification procedures. These sub-law rules generally will be set up by public and often private bodies, that will provide to their monitoring and enforcement

[80] P. Gori, *Souvenirs d'un survivant,* ibid 34.

[81] I have met him personally, therefore I took the freedom to add some realism to what, according to Prof. Gori, ibid, happened '*au sein du cabinet*' of Prof Trabucchi.

[82] See on the point J. Ziller*, Les réactions des milieux institutionnels, nationaux et scientifiques de l'époque*, ibid 34, 44-45.

[83] N. Scannicchio, n 78 above. Recently the fifty years of that decision were celebrated in *Van Gen den Loos* n 78 above, 23. M. Cremona, ibid, concludes that the decision ' (…) laid the foundation not only for its own doctrines of individual rights and direct effect but also opened the way for the creative use in the future of the preliminary ruling procedure to develop Community law through the vigilance of individuals'.

[84] See P. Gori, n 80 above, 34, on the role of Prof Trabucchi in the making of the decision. See n 91 below, how the final outcome of the abandonment of his approach is that the 'rights' recognized to consumers by eg the unfair practices directive, may be enforced only by competent authorities, whose decisions may be consequently attacked only before administrative courts (where there is no mediation and the average cost of entry is around five thousand pounds).

under the control of eminent Authorities.

Such trend towards 'less law and more enforcement' is clearly visible in recent directives affecting private law and has been well described.[85] However, what has been considered above suggests that, as far as 'more enforcement' is concerned, such executory outcome should still be speculated upon.

One fundamental pre-condition for welcoming the regulatory approach to private law, in the word of their supporters, is that 'the quest for effective remedies has gained priority and overcomes any doubts about systemic coherence'.[86] In other words, for a number of reasons, the theory presumes that administrative enforcement of 'private rights' increases their effectiveness and the spread of European law. However, as far as the rule of law fades into the efficiency of the regulatory power, its validity will be measured towards the objectives of the regulator, rather than in reference to rights. In fact, enforcement does no longer relate to 'legal' compatibility, but to 'efficient' governance and results. This implies the presumption that such regulator is bound by definition to pursue an identified interest, that he is impartial and fully informed and that he knows what actions efficiency commands in a given situation.

There are many doubts, that this is always the case.[87] As noted above, such process of administrative enforcement changes the nature of its object from being a right to becoming an interest subject to opportunity assessment, so as to raise the question about 'what' interests, at the end, is enforced (ie those interest of the user or those of the authority?). This further complicates the legality control, because the 'law' that governs the regulatory powers rarely contains a precise definition of the individual rights that limit their discretion. These agencies possess strong and specific prerogatives, bordered by 'general frameworks', general clauses and very large ends and 'principles' of public interests. They become rule makers, enforcers and judges of their same regulations, to the extent that the rule of law that should control regulators' powers vanishes into those they have established

[85] See H. Schulte-Nölke, n 8 above, 137-138.

[86] G. Bellantuono 'Public and Private Enforcement of European Private Law in the Energy and Telecommunications Sectors' 4 *European Review of Private Law*, 664, 649-688 (2015). See also n 66 above.

[87] See eg J.M. Buchanan, *The limits of liberty* (Chicago, London: University of. Chicago, 1975), 101. With particular reference to the EU regulatory framework see S. Whittaker 'Distinctive features of the New Consumer Contract Law' 133 *Law Quarterly Review*, 47, 47-72 (2017); and T. Arvind and L. Sirton, *The Curious Origin of Judicial Review*, ibid, 91. Both submit that the 'new' role of such administrative action determines further expansion of public action at the expense of individual rights. About the economic and social incentives that structurally produce a bias of regulators towards regulated see D. Carpenter and D. Moss, *Preventing Regulatory Capture: Special Interest Influence And How To Limit It* (Cambridge: Cambridge University Press, 2013); L. Zingales and R.C. MacCormack, *Preventing economists' capture,* ibid, 124, observe that 'Regulatory capture is so pervasive precisely because it is driven by standard economic incentives, which push even the most well-intentioned regulators to cater to the interest of the regulated. These incentives are built in their positions'.

for themselves.[88]

In the framework of 'traditional' private law of *Van Gend en Loos*, either effectiveness or efficient decision making of administrators must rely first on compatibility with rights and law. According to Prof Trabucchi, regulations did not entail more enforcement of individual rights of citizens (consumers). They just empowered public bodies to encumber those rights and, by that, to falsify competition. Accordingly, it has been observed that

> 'Whether this vanishing connection entails any drawbacks, for example, on the ground that traditional common law principles help identify the boundaries of public powers, is an open question (…)'.[89]

Such an open question regards the historical, legal and social foundation of European legal civilization and its future.[90] In depth reflection should be devoted to 'close' it, before welcoming the evolution, just because it is a 'transformation' and, therefore, it is 'new'.

However, leaving to economic and behavioral sciences such theoretical realm, it seems certain that the 'less law', in the ADR sector under examination, did not produce at all 'more enforcement', either in consumer contracts or in CADR proceedings. Under the Directive and the supposed EU Court's trust in certificates, the Italian way to mandatory consumer mediation did almost completely supersede the CADR Directive commitments, by submitting the greater part of consumer disputes to not compliant ADR procedures. This happened under the benevolent eyes of all Italian regulators, without any observations of the European Authorities. The 'rights' to transparency, efficiency, neutrality, independence, etc, re-dimensioned to evaluation criteria of the 'quality of the product' by the supervisory authorities, became prey to administrative decisions, also with regard to access to justice and right to defense.

In considering the aggregate effect of the Directive and of the commented CJEU decision, it is legitimate the doubt whether such regulatory trend may co-exist with private right's enforcement and European law uniformity. The judges of *Van Gend en Loos* were convinced that, in many occasions and in the right hands, law and subjective rights, enforced by European citizens, could be the most efficient mean to reach uniformity and development. Under the present regulatory framework is well visible the particular interest of national governments to preserve the equilibrium of their balance sheet, of their own ADR market and entities, of their own policy of the Judiciary and even of their mercantilist attitude to consider competition as an option (for their friends). It may even be suspected

[88] ECHR, (App no 18640/10, 18647/10, 18663/10, 18668/10 et 18698/10) *Grande Stevens et al v Italy*, 4 March 2004. See M. Gargantini, 'Public Enforcement of Market Abuse Bans' 1 *Journal of Financial Regulation*, 149, 149-158 (2015).

[89] G. Bellantuono, n 86 above.

[90] See F. Wieacker, n 75 above, 8-15.

– with great loss of the Union image – that the vagueness of the certification pre-requisite reflects the common interest of Member States to subtract themselves and their 'industries' to any infringement procedure. It should be added that this is not at all the sole occasion where European regulators disregarded effectiveness of a European directive.[91] The source of the effective European rights in consumer

[91] The Unfair Commercial Practices Directive states, at Art 11, that Member States should give consumers the power to: a) take legal action against unfair commercial practices and/or (b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings… .

This is a horizontal, full harmonization Directive, whose specific object is a contractual relation to be concluded, agreed upon or even executed. It seems therefore obvious that such action or 'appropriate' legal proceedings should come from a party and produce a remedy for the infringed rights.

Art 27 of the Italian Consumer Code empowered the antitrust regulatory Authority (AGCM) for enforcing Art 11 of the Directive. AGCM can suspend, forbid or vary the unfair practices and may issue fines and sanctions. It has exclusive competence on the matter and may act on its own motion, or at the request of interested subjects. However, both legal opinion and Court decisions, recognize the Authority is not a properly 'administrative' body (administration is the entity it is 'independent' from). Even less it is a 'Jurisdiction', where a civil action or administrative review can be lodged. Hence, even if there were one remedy, it would not be 'appropriate' to repair infringements of a contract. The AGCM regulation of such 'proceeding', does not contemplate powers to initiate complaints or legal activities of any kind. The interested party may 'request an intervention' by the Authority (AGCM Del. 1 April 2015, no 25411, G.U. 23 April 2015, n 94). Such request, as may be deduced from the Authority instructions, is not considered neither a suit nor a complaint, but as a simple notice. In fact, such instructions advise that 'after sending a 'notice' to the authority, no further communication will follow, but in the case of the eventual opening of an inquiry… '. (https://tinyurl.com/y4qzaucl (last visited 28 May 2019)).

The regulation empowers the Authority to proceed against the concerned professional. However, there are no provisions about the standing of the requiring party. The consumer is entitled to receive a 'communication' when the proceeding initiates. Moreover, such duty of communication may be disposed of by publication of the inquiry in the Authority Bulletins (Italian parties are famous for daily consulting the ACGM Bulletin at sunrise). Finally, the Authority did empower itself to *non sequitur* if the professional dismissed the practice by himself (or accepting the Authority's moral suasion), if the practice diffusion was either minimal or occasional, if the practice does not fall within the scope of its present priorities. No relief or damages is due to the 'reclaiming consumer', in any case either. The Italian civil code does not contain any remedy specific to 'unfair practices'. The only remedy is either the general *actio doli* or the alike general remedy of pre-contractual liability.

It seems clear that the Authority regulations cover exclusively the behavior of firms on the market (ie its traditional field of competence). There is no sign of consumer protection and relief in contractual relationships. National Authorities, requested the majority of the few CGUE decisions about unfair practices. However, whether the reason for this evolution is the proficiency of the regulatory control or the absolute lack of national civil remedies, remains to be seen. In the Italian electronic communications sector, the infamous case of contract clauses reducing to four weeks the monthly length of the subscription is still pending before administrative Courts. The case originated by the order of the sectoral authority, which in 2017 inhibited the practice, fined the providers and imposed restitution to consumers. Presently, the Administrative Courts annulled the fine and suspended the restitution. Neither the extensive regulatory effort, nor the subsequent enactment of a dedicated provision of law (legge no 192 of 2017, Art 19, S 15) obtained from the concerned firms any re-payment. The single executed provision against the practice was, at the end of 2018, the injunction, ordered by a civil law Court, to dismiss the unfair practice. Many professionals had in fact maintained the illegal clauses in their contracts. See Tribunale di

and contractual matters, still lies in the judgments of the European and national Courts that should be decreased. It is the case to recall that the entire mandatory artifact aiming to avoid claims and judgments, is founded on a single judgment in a single claim. Scholars, Governments and Commissions invoked *Alassini* in some thousands of papers: a judgment is being used – with great interpretative freedom – to assert the needless quality of all others. If Mr *Alassini* had one euro for everyone who used *his own* decision, he would be the richest Italian ever to have lost a case. This being the proof, if necessary, that such decision, as all others, is not the 'resolution of a private dispute'. It contains the law of the matter, which equally applies to everybody in general, individually.

Milano, ordinanza 4 June 2018, available at https://tinyurl.com/y5fdz9ef ((last visited 28 May 2019). Along the whole proceeding the professionals based their main defense on the exclusive competence of administrative Courts and Authorities. The Milano court felt the duty to reassure the opposing professionals that in Italy still exists the civil law of contract. However, it refused to concede restitution as an *interim* measure.

A Tale of Two Fathers

Matteo Winkler and Kellen Trilha Schappo*

C'est étonnant comme la façon de
présenter les choses peut en fait les changer.
Valentina Mennesson

Abstract

This article comments on the judgment no 12193 rendered by the Sezioni Unite of the Corte di Cassazione on 8 May 2019, where the recognition and registration, in Italy, of a foreign parental order inscribing the nonbiological parent as the children's legal father were denied on the ground that they violated the prohibition of surrogacy under Italian law, which was considered to be of public policy. It scrutinises this judgment in two steps. First, it criticises the court's methodology in the construction of the notion of public policy both in general and with particular regard to the surrogacy ban. Second, it examines whether the best interests of the children involved were sufficiently taken account of, and it finds that they were not. It concludes that, contrary to what the law prescribes, this judgment failed to give voice to the children born via surrogacy abroad and living with parents of the same sex.

I. Introduction

This article comments on the judgment rendered by the *Sezioni Unite* of the *Corte di Cassazione* on 8 May 2019 concerning the legal status of children born via foreign surrogacy.[1] In this judgment, the *Sezioni Unite* denied the recognition and registration (*trascrizione*) of a foreign parental order inscribing the intentional parent, ie the one with no biological connection with the children, as the children's legal father in their birth certificate on the ground that such a recognition violated the domestic ban on surrogacy and therefore Italy's international public policy (*ordine pubblico*).

The importance of this judgment is twofold. First, in line with previous

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[1] See Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, available at www.dejure.it.

decisions of the same court, it recognised that there is no conflict between being a parent and being homosexual.[2] Second, it discussed in depth the role of the surrogacy ban in the construction of the public policy exception *vis-à-vis* the recognition of a foreign parental order, which is specifically the object of this article.[3]

After describing in detail the legal and factual background of the case (section II), this article builds on the judgment of the *Sezioni Unite* in two directions. On the one hand, it scrutinises the way the court construed the notion of public policy both in general and with particular regard to the surrogacy ban (section III.1). On the other hand, it criticises the relevance of the best interests of the children born via foreign surrogacy in the reasoning of the court (section III.2). It concludes that the court's reasoning is barely foolproof as it not only fails in several methodological respects, but also denies the children born via surrogacy their 'voice' in court.

II. Factual and Legal Background

1. The Procreative Project

Two Italian men decided to found a family. As pregnancy was obviously barred, at least for the moment,[4] they considered two options: adoption and

[2] This is not obvious as it appears to be. For decades, courts have denied gays and lesbians the right to be parents, for example by rejecting the petition for custody filed by a parent who came out after a relationship with a person of the opposite sex. Moreover, homosexuality is commonly used by the latter person to seek denial of custody for the former spouse or partner after he or she came out as a homosexual. For a discussion on the argument that '*Être homosexuel ou être parent, il faut choisir*', see M. Gross, *Idées reçues sur l'homoparentalité* (Paris: Le Cavalier Bleu, 2018), 41-56. The European Court of Human Rights (ECtHR) clarified in this regard that denying custody to a father on the sole ground of him being homosexual is a violation of the right not to be discriminated based on sexual orientation under Arts 8 and 14 of the European Convention on Human Rights (ECHR). See Eur. Court H.R, *Salgueiro da Silva Mouta* v *Portugal*, App no 33290/96, Judgment of 21 December 1999, ECHR 1999-IX. The same right exists in joint adoption: Eur. Court H.R., *E.B.* v *France*, App no 43546/02, Judgment of 22 January 2008, ECHR 2002-I. See P. Johnson, *Homosexuality and the European Court of Human Rights* (New York: Routledge, 2012), 131-134.

[3] Half of the judgment is actually dedicated to a different issue – the standing of both the city mayor and the *Ministero dell'Interno* as parties to the recognition proceedings. We will not engage in a discussion on this issue as it concerns the functioning of the civil status registry and has no impact, strictly speaking, on the private international law provisions that this article aims at discussing.

[4] The idea of a 'pregnant man' was already present in the classical world in myths like that of Dionysus, who was born from Zeus' thigh. See D.D. Leitao, *The Pregnant Male as Myth and Metaphor in Classical Greek Literature* (Cambridge: Cambridge University Press, 2012), 58-99. Discussions surpassed the myth in the 1980s, when reproductive technologies seemed to offer the concrete possibility of having pregnancy by men. Both the media and academic literature have debated, in particular, both the cases of trans women and cisgender men undergoing pregnancy through an uterus transplant and a parallel hormone treatment, some crucial aspects of

surrogacy abroad.[5] The former is statutorily barred in Italy, as the law on adoption of 1983 restricts the access to adoption to married couples[6] and same-sex couples cannot marry under today's Italian law.[7] An alternative could be to

which are addressed by A. Alghrani, *Regulating Assisted Reproductive Technologies* (Cambridge: Cambridge University Press, 2018), 220-265, especially 240-245.

[5] See M.M. Winkler, 'Same-Sex Families Across Borders', in D. Gallo, L. Paladini and P. Pustorino eds, *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Springer, 2014), 381-396, especially 385-393. The alternative we use here is just for the sake of clarity as to the legal options available and in no case implies taking a position on 'procreative choices' or 'pro-choice' political stances. See T. Murphy, 'The Texture of Reproductive Choice: Law, Ethnography, and Reproductive Technologies', in T. Murphy ed, *New Technologies and Human Rights* (Oxford: Oxford University Press, 2009), 195-221, especially 202-213. The alternative between adoption and surrogacy raises the question of surrogacy as an option of last resort. Besides the case of a single person seeking the help of a surrogate mother to found a family, surrogacy is generally resorted to by opposite-sex couples with fertility issues and by same-sex couples. Although some commentators would prefer to restrict the access to surrogacy to the former, restricting the reproductive options to opposite-sex couples could be morally as well as legally questionable. Additionally, the argument according to which adoption, as it concerns children who have already been born, would reflect a couple's altruism while surrogacy would be a mere expression of the intentional parents' selfishness, is definitely questionable. In fact, this argument is usually made only for infertile couples, while the fertile couples' preference for natural procreation is not equally condemned. For a meaningful discussion on all these questions, see E. Jackson, *Regulating Reproduction. Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001), 293-295.

[6] In this specific regard, Art 6, para 1, legge 4 May 1983 no 184 (*Diritto del minore ad una famiglia*) provides that only couples who are married since at least three years can adopt a child. Scholars explain the rationale behind this provision by arguing that limiting adoption to married (heterosexual) families represents, among the different possible options available (adoption by single individuals or by unmarried couples), the optimal solution for the child. This solution, however, is far from being universally recognised, for globally speaking only fifteen countries restrict adoption to married couples only whereas at least a hundred countries allow single individuals to adopt. See the report of the ECOSOC, *Child Adoption: Trend and Policies* (New York: United Nations, 2009), 38-39. Additionally, some countries that limited adoption to couples of the opposite sex have recently changed their laws as a result of constitutional reviews. For example, in 2014 the Constitutional Court of Austria struck down Art 191(2) of the Austrian Civil Code and Art 8(4) of the Federal Act on Registered Partnership (*Eingetragene Partnerschaft-Gesetz*), which restricted joint adoption to opposite-sex couples, based on Arts 8 and 14 of the European Convention on Human Rights (ECHR) and the principle of equality. See Constitutional Court (Austria), 11 December 2014, G119-120/2014-12. Similarly, with a ruling of 2015 the Constitutional Court of Colombia declared some provisions regarding joint adoption unconstitutional to the extent that they did not include same-sex couples. The constitutional scrutiny concerned, in particular, Arts 64, 66 and 68 of the law no 1098 of 2006 (*Codigo de la infancia y la adolescencia*) regulating, respectively, the effects of joint adoption, consent to adoption and the conditions to adopt. The Court reasoned that such provisions contrasted with the best interest of the child as affirmed by Art 44 of the Constitution. The Court, on the other hand, made no reference to the principle of equality. See Constitutional Court (Colombia), 4 November 2015, C-683/15, available at https://tinyurl.com/yy5fb5kx (last visited 28 May 2019).

[7] Same-sex couples, however, can enter a civil partnership in Italy. See legge 20 May 2016 no 76, regulating registered partnerships between persons of the same sex and cohabiting couples (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*), on which see M. Winkler, 'Italy's Gentle Revolution: The New Law on Same-Sex Partnerships' 1 *Digest – National Italian American Bar Association Journal*, 22-31 (2017) and N. Cipriani, 'Unioni Civili: Same-Sex Partnerships Law in Italy' 3 *The Italian Law Journal*, 343,

obtain an adoption abroad and subsequently file with a domestic court for the recognition of the foreign adoption in Italy. In this case, however, the already mentioned law of 1983 requires the couple to have resided in the foreign country for at least two years, a condition that is barely possible to fulfill for Italian couples living in Italy on a permanent basis.[8]

The remaining option is then surrogacy. As Art 12, para 6, of legge 19 February 2004 no 40 on medically assisted procreation punishes surrogacy (*maternità surrogata*) with harsh criminal sanctions,[9] the two men opted for Ontario, Canada, one of the various 'surrogacy-friendly' jurisdictions that exist today in every continent.[10]

346-349 (2017). Legge no 76 of 2016 did not amend the provisions concerning adoption but, with a wording that sounds obscure, stated that the enhanced equality between civil partnership and marriage operates '(w)ithout prejudice of what is currently provided and allowed in respect of adoptions by existing laws'. On adoptions in legge no 76 of 2016 see E. de Gotzen, 'Recognition of Same-Sex Marriages, Overcoming Gender Barriers in Italy and the Italian Law No. 76 of 2016 on Civil Unions. First Remarks' *Cuadernos de derecho transnacional*, 194, 198-201 (2017).

[8] See Art 36, para 4, of legge no 184 of 1983, n 6 above, regulating the *special* proceedings for the recognition of foreign adoptions and requiring, to this end, that the Italian citizens seeking recognition 'demonstrate that, at the moment of the adoption order, they continually resided (in the foreign country) since at least two years'. This provision does not apply when the petitioners are foreigners, in which case the *ordinary* recognition proceedings under Art 41, para 1, legge 31 May 1995 no 218, n 16 below, applies. See in this regard Corte costituzionale 7 April 2016 no 76, *Rivista di diritto internazionale*, 949 (2016), concerning an American woman seeking the recognition of an adoption order issued by Multnomah County, Oregon, in respect of the child of her female spouse. The order had declared the child's full adoption and parental responsibility by the woman in conjunction with the child's biological mother. Ibid 950. The Court highlighted that, by requiring a residence connection with the foreign country, Art 36, para 4, aims at preventing Italian citizens from circumventing the adoption regime established by international and domestic law – a need that was absent from the case at issue. Ibid 957. See C.E. Tuo, 'The Italian Regime of Recognition of Intercountry Adoptions of Children in Light of the ECHR: What about Singles?' *Cuadernos de derecho transnactional*, 357 (2015).

[9] See Art 12, para 6, of legge 19 February 2004 no 40 (*Disposizioni in materia di procreazione medicalmente assistita*), punishing surrogacy with jail time from six months to two years and with a fine ranging from six hundred thousand to one million euro. According to I. Kriari and A. Valongo, 'International Issues regarding Surrogacy' 2(2) *The Italian Law Journal*, 331, 332-333 (2016), this prohibition is based on the protection of the dignity of the surrogate woman mandated by Art 2 of the Italian Constitution. On the criminal aspects of foreign surrogacy with specific regard to the declaration made by the intentional parents about the birth of the child see Corte di Cassazione 10 March 2016 no 13525, *Diritto penale e processo*, 1085 (2016). See also Corte Costituzionale 23 November 2017 no 272, available at www.cortecostituzionale.it.

[10] For a classification of jurisdictions as 'friendly', 'neutral' and 'anti-surrogacy' jurisdictions see K. Trimmings and P. Beaumont, *General Report on Surrogacy*, in K. Trimmings and P. Beaumont eds, *International Surrogacy Arrangements. Legal Regulation at the International Level* (Oxford: Hart Publishing, 2013), 439-549, especially 443-464; for an update see K. Trimmings and P. Beaumont, 'Parentage and Surrogacy in a European Perspective', in J.M. Scherpe ed, *The Present and Future of European Family Law* (Cheltenham: Edward Elgar Publishing, 2016), 231-283; C. Fenton-Glynn, 'Creating International Families: Private International Law and the Industry of Parenthood', in G. Douglas, M. Murch and V. Stephens eds, *International and National Perspectives on Child and Family Law. Essays in Honour of Nigel Lowe* (Cambridge: Intersentia, 2018), 167-178.

Surrogacy in Canada is regulated by the *Assisted Human Reproduction Act* of 2004 and is permitted insofar as the surrogate mother does not receive any compensation, not even a reimbursement.[11] The provinces regulate all the remaining aspects of surrogacy such as the surrogacy arrangements, which are for example prohibited in Quebec but allowed elsewhere, and the establishment of parenthood.[12] Regarding the latter issue, Ontario has no specific law, but the precedent *JR* v *LH* of 2002 is considered to provide a 'roadmap' for post-birth parental orders.[13]

In that regard, whereas the biological father obtained a first parental order from the Ontario Superior Court, the intentional father applied for a second parental order in a subsequent moment, presumably under Ontario's *Children Law Reform Act*, which allows 'any person having interest' to apply for a declaration of parentage within the child's first birthday.[14]

While the Civil Status Office (*Ufficio di stato civile*) ('CSO') of the Comune di Trento agreed to register the first birth certificate (the one reporting the biological father as the children's sole parent), it refused to amend the latter based on the second parental order, allegedly on the ground that 'under the current law, parents must be of different sex'.[15] The two men then decided to start proceedings in order to obtain recognition.

2. The Recognition Proceedings

The recognition and registration of foreign deeds is subject to the requirement that such deeds do not conflict with 'public policy' (*ordine pubblico*).[16] The petitioners presented two arguments in this regard. First, they argued that the circumstance that they were two parents of the same sex was immaterial for the well-being of their children. They recalled previous judgments of the *Corte di Cassazione* stating not only that growing up with two parents of the same sex is not detrimental to the children's mental and physical health, but also that consolidating the latter's legal kinship with both parents who are taking care of

[11] See *Assisted Human Reproduction Act*, SC. 2004 c 2, Arts 6(1) and 12(1), lett c. On this provision see S. Carsley, 'Reconceiving Quebec's Laws on Surrogate Motherhood' 96(1) *Canadian Bar Review*, 120, 125-129 (2018). For an in-depth analysis of the rationale behind these provisions, especially the argument of exploitation, see A. Cattapan, 'Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation' 29(3) *Canadian Journal of Law and Society*, 361 (2014).

[12] See Art 541 of the Civil Code of Quebec, declaring the 'absolute nullity' of the surrogacy arrangements. The problem of the establishment of parenthood, however, remains currently debated in this state. See I. Cote, J.-S. Sauve, 'Homopaternité, Gestation pour Autrui: No Man's Land?' *Revue Générale de Droit*, 27, 43 (2016).

[13] See *JR* v *LH*, OJ No 3998, para 29, [2002] OTC 764 (Ont. Sup. Ct.). On its function as a 'roadmap' see K. Busby, 'Of Surrogate Mother Born: Parentage Determination in Canada and Elsewhere' 25(2) *Canadian Journal of Women and the Law*, 284, 299 (2013).

[14] See Art 13(1) and (5) of Ontario's *Children Law Reform Act*, RSO 1990.

[15] See Corte d'Appello di Trento 23 February 2017, *Corriere giuridico*, 935-939 (2017).

[16] See Arts 65 and 67, legge 31 May 1995 no 218, 35 *International Legal Materials*, 765 (1996).

them was clearly in their best interest.[17]

Second, the petitioners argued that their children, as Canadian citizens, were entitled to maintain the family status they had acquired in Canada. This argument based on the cross-border continuity of personal and family status has been used quite successfully in courts as part of the child's best interest argument.[18] Continuity is also strictly connected with the intrinsic openness of the Italian system of private international law.[19]

The appellate court found that adding a second father to the children's birth certificates was not contrary to public policy and therefore ordered the CSO to amend their birth certificate accordingly.[20] This conclusion was mainly based on the judgment released by the first division (*Sezione prima*) of the *Corte di Cassazione* on 30 September 2016 (no 19599), which found that registering a foreign birth certificate indicating two women as a child's mothers was not contrary to public policy.[21] Although we will indulge over this judgment in a subsequent section, it is important to stress here that the appellate court referred to the notion of public policy delineated by the *Sezione prima* without distinguishing the related factual backgrounds, hence assimilating a case of female artificial procreation with that of a surrogacy. This point is crucial because, as we will see later in this article, the *Sezione prima* had been pretty clear in maintaining that the case pending before it was not a surrogacy.[22]

[17] The Supreme Court qualified as a 'prejudice' the fact of 'believing that it is harmful for the well-balanced development of a child to live in a family centred on a couple of the same sex'. Corte di Cassazione 11 January 2013 no 601, *Giurisprudenza italiana*, 1036 (2016) (further reference to Italian case law on this issue is provided n 24 below). The statement of the Supreme Court has served as a kernel of the argument in favour of the legal recognition of same-sex parents in courts and to oppose claims that growing up with two parents of the same sex is harmful for children. For a review of the academic literature in this regard see F. Ferrari, *La famiglia inattesa. I genitori omosessuali e i loro figli* (Udine: Mimesis, 2015), 147-168. While a large body of research have addressed children with two female parents, the literature on children growing up with two male parents has been covered only recently in Italy. See in this regard the remarkable research of N. Carone et al, 'Italian Gay Father Families Formed by Surrogacy: Parenting, Sigmatization, and Children's Psychological Adjustment' 54(10) *Developmental Psychology*, 1904, 1913-1914 (2018), concluding that 'it would be unrealistic to consider children born to same-sex parents through assisted reproduction at risk of developing psychological problems' and that it 'is empirically unfounded for policymakers to ban intended gay and lesbian parents from accessing fertility treatments and to deny gay father and lesbian mother families the same civil rights and social benefits granted to heterosexual parent families'.

[18] For an in-depth analysis of this problem in American federalism see A. Koppelman, *Same Sex, Different States. When Same-Sex Marriages Cross State Lines* (Ann Arbor: Sheridan Books, 2006), 72-73. See also Eur. Court H.R., *Wagner and J.M.W.L.* v *Luxembourg*, App no 76240/01, Judgment of 28 June 2007, para 110, available at www.hudoc.echr.coe.it.

[19] See C.E. Tuo, n 8 above, 366.

[20] Corte d'Appello di Trento 23 February 2017, n 15 above, which also addressed a procedural issue concerning the standing of the *Comune di Trento* and of *Ministero dell'Interno* to be parties in the proceedings.

[21] See Corte di Cassazione 30 September 2016 no 19599, *Il diritto di famiglia e delle persone*, I, 52 (2017).

[22] ibid 73-74.

Additionally, the appellate court adhered to the petitioners' argument that the lack of cross-border recognition of their legal kinship with both fathers was prejudicial to the children. It observed, indeed, that such a lack of recognition caused 'an evident harm' to the latter in preventing the nonbiological father from being legally responsible for the children's well-being.[23]

Finally, the appellate court rejected the government's claim that the nonbiological father could resort to the second parent adoption (*adozione in casi particolari*) in order to legally consolidate his kinship with the children. It must be reminded, in this respect, that the second parent adoption is available since 2014 to all intentional parents of children, both in opposite-sex and same-sex families, under Art 44, para 1, letter *d*) of the law of 1983 on adoption.[24] The court observed, however, that the concrete availability of this remedy has been challenged by certain courts and therefore the access to it is 'not so uncontroversial as it appears to be'.[25]

3. The Judgment of the *Sezioni Unite*

The case landed in the *Sezioni Unite*, a nine-judge panel representing the entire court, on the ground that the questions submitted to the court entailed 'extremely delicate and relevant legal issues'.[26] Besides these merely procedural aspects, the *Sezioni Unite* engaged in a continuity-and-change dynamic with the judgment of *Sezione prima*.

[23] Corte d'Appello di Trento 23 February 2017, n 15 above, 938.

[24] Second parent adoption was first made available in the context of same-sex families by a judgment of the Tribunale per i minorenni di Roma 30 June 2014, *Nuova giurisprudenza civile commentata*, I, 109 (2015), affirmed by Corte d'Appello di Roma 23 December 2015, unreported. The statutory basis of such a remedy, which is considered residual in the domestic adoption system, laid on Art 44, para 1, letter *d*) of legge no 184 of 1983, n 6 above, which states that a person can adopt a child 'in the event of an ascertained impossibility of preadoption placement'. The main contribution of the reported judgment of the Tribunale di Roma was to affirm that the requirement of the impossibility of preadoption placement (*impossibilità di preaffidamento adottivo*) was to be intended not simply as a *factual* impossibility, but also as a *legal* one, meaning that the fact for same-sex couples of not having access to marriage was not an obstacle for accessing second parent adoption. In 2016, the Supreme Court ratified the conclusions reached by the Tribunale di Roma. See Corte di Cassazione 30 June 2016 no 12962, *Nuova giurisprudenza civile commentata*, I, 1213-1219 (2016).

[25] Corte d'Appello di Trento 23 February 2017, n 15 above, 939. As a matter of fact, domestic courts disagree on the main point of the *legal* impossibility of preadoption placement as the requirement for the access to second parent adoption by the nonbiological parent of a child. See for example Tribunale per i minorenni di Milano 17 October 2016, unreported; Tribunale per i minorenni di Torino 9 and 11 September 2015, reversed by Corte d'Appello di Torino 27 May 2016, *Nuova giurisprudenza civile commentata*, 205 (2016).

[26] Corte di Cassazione 22 February 2018 no 4382, *Famiglia e diritto*, 837 (2018), para 7. As a matter of procedure, the Sezioni unite can be seised in the event of a 'difformity' between individual sections regarding the same legal question and, additionally, when the petition 'presents a question of utmost importance'. Art 374, para 2, of the Code of Civil Procedure.

a) Continuity with Precedents

A first point on which both the *Sezioni Unite* and the judgment no 19599/2016 agreed was the old-fashioned theoretical distinction between the so-called 'domestic' and 'international' public policy. According to this distinction, the concept of domestic public policy (*ordine pubblico interno*) refers to those mandatory provisions of domestic law that set a limit to private autonomy, for example by prohibiting certain contractual terms, whereas the international public policy (*ordine pubblico internazionale*) represents a general limit to the effects of foreign laws that is for courts to determine on a case-by-case basis.[27]

The two judgments also agreed on acknowledging that, together with the bunch of fundamental rights recognised at the supranational level, the Constitution represents a first layer of principles and provisions that are relevant for the notion of international public policy. Hence the notion encompassed 'the ensemble of *fundamental principles* that characterise the national legal system in a certain moment'.[28]

Finally, both cases concerned the implementation of a procreative project within a couple of the same sex with one partner only being genetically linked with the children involved, a circumstance that triggered private and family life considerations under Art 8 of the European Convention on Human Rights (ECHR). It is worth recalling now that in *Mennesson* v *France* and *Labassee* v *France*, both decided in 2014, the European Court of Human Rights (ECtHR) has stated that all children born from surrogacy have a right to identity which requires the recognition of the legal kinship with the parent they are biologically connected to.[29]

b) Departure from Precedents

The *Sezioni Unite* and the *Sezione prima* disagreed in two respects. First, as resumed in Table I below, the *Sezioni Unite* distinguished the factual

[27] Based on this distinction, 'there is no coincidence between the mandatory provisions of the Italian legal system and the principles of public policy that limit the application of a foreign law'. Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, n 1 above, 25-27. For a recent analysis see G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 48-78; O. Feraci, *L'ordine pubblico nel diritto dell'Unione Europea* (Milano: Giuffrè, 2012), 27-31.

[28] See Corte di Cassazione 4 May 2007 no 10215 (regarding discretional termination of a labour contract), available at www.dejure.it; Corte di Cassazione 11 November 2000 no 14462 (regarding divorce), available at www.dejure.it. Moreover, see Corte d'Appello di Napoli 13 March 2015, *Foro italiano*, I, 297 (2016), for which 'the concept of (international) public policy embodies the 'fundamental principles' that characterise the Italian legal order, including the principles of sovranational origin and, in particular, those arising from the European Convention on Human Rights' (the case concerned the recognition of a same-sex marriage entered into in France).

[29] See Eur. Court H.R., *Mennesson* v *France*, App no 65192/11, Judgment of 24 June 2014, available at www.hudoc.echr.coe.it and *Labassee* v *France*, App no 65941/11, Judgment of 24 June 2014, available at www.hudoc.echr.coe.it.

background of its own case from that of 2016 in terms of 'division of procreative labour'.[30]

Table I. – Differences of factual background in judgment no 19599/2016 compared to that of *Sezioni Unite*.

	Sezione Prima **(judgment no 19599/2016)**	***Sezioni Unite*** **(judgment no 12193/2019)**
Technique	Medically assisted procreation	Gestational surrogacy
Content of the deed	A foreign birth certificate mentioning two women as the child mothers	A foreign birth certificate mentioning as the father one man with no biological link with the children
Individuals involved	The egg-supplier (the genetic mother = *the spouse*) The sperm supplier (anonymous donor) The gestational carrier (*the other spouse*)	The egg-supplier (the genetic mother ǂ the partner) The sperm supplier (*the father*) The gestational carrier (surrogate) The father's partner (*the intentional father*)

In this regard, the female couple giving birth to the child in Spain resorted to no external contribution except that of the anonymous sperm donor, whereas the gay couple received two external contributions – from the egg donor and the gestational carrier, which remained excluded from the result of the process. Moreover, in the latter case the intentional parent offered no genetic contribution to the process.[31] The *Sezioni Unite* reproached the lower court of not having considered these crucial differences.

Second, as indicated in Table II, the *Sezioni Unite* criticised the notion of public policy that was delineated by appellate court on the basis of the judgment of *Sezione prima* by differentiating the role played by both supranational law and domestic statutes.

[30] This term is employed by J.H. Déchaux, 'The Challenges of the New Reproductive Technologies: How Kinship Enters Politics', in Brigitte Feuillet-Liger, Thérese Callus and Kristina Orfali eds, *Reproductive Technology and Changing Perceptions of Parenthood around the World* (Bruxelles: Bruylant, 2014), 311-332, 316.

[31] This obviously does not mean that the intentional father's contribution to the procreative project is irrelevant. Indeed, research shows that in the context of same-sex families intentional parents play an essential role in the representation and construction of parenting, and that children got attached to both fathers during their childhood. See N. Carone. R. Baiocco, V. Lingiardi, K. Kerns, 'Child Attachment Security in Gay Father Surrogacy Families: Parents as Safe Havens and Secure Bases during Middle Childhood' 1 *Attachment & Human Development*, 1 (2019).

Table II. – Differences regarding the notion of public policy.

Source	Court of Appeals	*Sezioni Unite* no 12193 of 2019
Supranational law	ECHR, Charter of Fundamental Rights, EU Treaties	Conventions and international and supranational sources
Statutes	Constitutionally mandated and constitutionally bound statutes	Statutes 'permeated' of fundamental principles

The most appalling change concerned the definition of public policy regarding the Constitution as 'the ensemble of supreme and/or fundamental principles of our Constitution (…) that cannot be subverted by the legislator'.[32] In this way, the Court limited the public policy review of foreign laws to 'constitutionally mandated laws' (*leggi costituzionalmente necessarie*) – laws that the Parliament is commanded to pass by the Constitution – and 'constitutionally bound laws' (*leggi a contenuto costituzionalmente vincolato*) – laws whose content is expressly fixed by the Constitution. The key to understand this notion of international public policy is embedded in the constitutional notion of legislative discretion.

The *Sezioni Unite* departed from this definition and stated that international public policy also embraces statutory provisions that 'incarnate' the above mentioned principles. The surrogacy ban is 'certainly' one of these 'constitutionally mandated laws' and, as a result, the petitioners cannot benefit from the judgment no 19599/2016.

III. Comment

1. The Confirmation of the Public Policy Exception as an Obstacle to the Recognition of a Legal Kinship Resulting from Surrogacy

International surrogacy agreements have become a concrete possibility for infertile couples willing to hire a third woman to carry and deliver a child on their behalf. Surrogacy is indeed a matter in which national regulations widely differ:[33] from very liberal solutions, to a limited practice and even its total prohibition, as it is the case in Italy under the legge no 40 of 2004.[34] Intended

[32] Corte di Cassazione 30 September 2016 no 19599, n 21 above, 63.
[33] For an overview, see K. Trimmings and P. Beaumont, *General Report* n 10 above.
[34] Art 12, para 6, of legge no 40 of 2004, n 9 above.

parents might hence compare the risks and costs involving surrogacy in each one of these scenarios, and finally decide to have their child in another country – because it is simpler, because it is less expensive, or simply because the practice is illegal in their State of origin.

Issues such as the one at stake in the judgment no 12193 of 2019 appear when the situation enters in contact with the country of origin of the intended parents, who require the recognition of the legal kinship between them and the child born of surrogacy.[35] The kinds of reactions towards these requests, again, vary from a country to another. It ranges from a full recognition to tolerating a *de facto* family life without recognising its legal effects, and in some countries it can materially deprive the intended parents from the possibility of living in their home State with the child (by denying citizenship or by taking the child away in order to entrust her to another family).[36]

As far as it concerns the refusal of recognition of the legal kinship linking the child to the intended parents, some decisions could invoke not only public policy exception, but also *fraude à la loi* (evasion from law), insofar as by going abroad to have access to surrogacy, the intended parents willingly avoided the application of mandatory laws.[37] The main technique used, however, remains the public policy exception, as far as it can justify the refusal of recognition without characterising all the requirements of *fraude à la loi*.

Public policy is a fundamental technique in conflict of laws. In order to benefit from the continuity, the predictability and the harmony of solutions that characterise private international law, it is fundamental to respect the threshold fixed by a State to its own tolerance towards other legal systems. Three elements of international public policy are central to the analysis of the judgment no 12193 of 2019: its 'content', its difference from other techniques and its implementation, which necessarily entails a concrete assessment of an eventual lack of conformity.

a) The Content of Public Policy: Limiting a State's Tolerance Towards Norms and Decisions Coming from Other States

In order to verify the compatibility between a foreign ruling and public policy requirements, the Italian judge refers to 'the ensemble of fundamental principles

[35] These effects do not, thus, immediately concern the surrogacy agreement, since intended parents are not requiring anything related to the performance of the agreement by their counterparties. Of course the children would not be in this world without the service offered by the surrogate, but the petitioners in the recognition proceedings are not asking for the enforcement of an illicit agreement or the application of foreign law on surrogacy. Rather, the foreign ruling whose recognition is sought relates to the new legal kinship among the parties – family law effects of the surrogacy agreement that are somehow linked, but remain distinct from it.

[36] For decisions in this sense, see Corte di Cassazione 26 September 2014 no 24001, *Foro italiano*, I, 3408 (2014) and Eur. Court H.R., *Paradiso and Campanelli* v *Italy*, App no 25358/12, Judgment of 24 January 2017, *Recueil Dalloz*, 897 (2017).

[37] On this question, see below.

that characterise the national legal system in a certain moment'.[38] The diametrically opposed views of the 2019 *Sezioni Unite* and 2016 *Sezione prima* rulings regarding the extent of the public policy control illustrate how difficult circumscribing this definition can be.

But is it necessary and useful to identify a list of principles constituting international public policy? There is something misleading in limiting the public policy exception to (more or less) fundamental norms to which a rule or decision coming from another legal system should comply in order to be received in the forum.

First of all, this list is open to constant mutability. Under the appearance of some predictable set of principles to which judges might refer, the definition can actually be borrowed and adapted to the solution the panel intents to reach. If there is a feeling that the foreign norm should not be admitted, then these principles (or the 'certain time' taken into consideration to delineate them) will appear in a way that forbids any reception. If, on the other hand, the panel intends to adopt a opener position regarding a particular matter, even departing from previous case law, than the definition will be called to evolve. There is no legal certainty in assimilating (international) public policy to a crystallised list of principles. On the contrary, it only provides the illusion of an abstract appreciation in decisions that involve sensible issues and where the role played by the judge is necessarily critical.

Public policy should instead be taken for what it is. The cornerstone of a discipline that welcomes foreign norms, while imposing limits on their tolerance. The appreciation of such limits involves not only a list of norms and principles, but rather, as the Italian judge invokes himself, values, norms, principles and practices deeply woven within the legal system, which characterise its own essence. In order to be rejected, a norm should be shocking, incompatible with this core.

Such evaluation shall necessarily take place concretely. It is indeed the situation at hand that shall collide with the legal system's core, not the law under which it was created. The Italian law on private international law refers to the contrariety of the *effects* of a rule (Art 16) or decision (Art 64) to public policy.[39] For example, a foreign law admitting marriage at the age of fourteen shall be deemed contrary to public policy in many jurisdictions. However, if this same law is applicable to a thirty-years-old couple, its effects will not trigger a reaction, since it would be a marriage as any other. Reviewing the content of foreign norms and controlling the law applied by the foreign judge would not be consistent with the principles of private international law, and would deprive its

[38] See n 28 above.

[39] See legge no 218 of 1995 n 16 above, Art 16, para 1: 'No foreign law shall be applied whose effects are incompatible with public policy (*ordre public*)' and Art 64, para 1: 'A judgement rendered by a foreign authority shall be recognized in Italy without requiring any further proceedings if: (…) *g*) the provisions of the judgement do not conflict with the requirements of public policy (*ordre public*)'.

techniques of most of their interest in terms of coexistence among different legal systems.

In this sense, the cosmopolitan standpoint adopted by the *Prima sezione* in the 2016 ruling is not sheltered from criticism. On the contrary – in a liberal effort to enlarge the scope of international public policy (in the direction of the so-called '*ordre public véritablement international*')[40] – the judges added unnecessary complexity to the technique, opening the way for imprecisions that could later justify the reassessment of public policy as a stricter obstacle for recognition.

By taking the public policy exception for what it is – a limit to be assessed by confronting the effects of the norm whose reception is sought to the legal system's core – and applying it concretely, the *Sezione prima* would have been able to reach the same results without distorting the method. The criticism addressed to this solution by the ruling of the *Sezioni Unite* is hence not in itself improper. Judges can apply the public policy exception taking inspiration from previous case law but still as it is: a technique closely related to the concrete situation. The effort to list a series of principles that are necessarily encompassed by international public policy, while providing the (unnecessary?) illusion of a neutral and abstract decision-making, actually dangerously converts the subjective role of the judge into a creative delimitation of the tolerance towards foreign norms, crystallised in rules that do not match with the spirit of the public policy exception.

So the cosmopolitan effort of looking *above* for the inspiration of public policy is not consistent with the purpose of delimiting the openness towards foreign legal systems. On the contrary, a truly liberal move would simply consist in cutting this wall shorter, in the sense of desensitising the legal system and welcoming with less obstacles norms coming from abroad. Such a move can clearly be observed in rulings involving international commercial law,[41] and in particular arbitration[42] (a matter in which vulnerable parties might claim some extra protection from their home State, and are on the contrary deprived of

[40] In the sense of a public policy that transcends national legal systems and is proper to international relations – also called transnational public policy. An account of this approach and its practice is given by Pierre Lalive as soon as 1986 ('Ordre public transnational ou rééllement international at arbitrage international' *Revue de l'Arbitrage*, 329 (1986)), and is diffused, mainly, in the area of international arbitration (which can be seen as constituting a legal system on its own: see particularly E. Gaillard, 'Aspects philosophiques de l'arbitrage international' *Recueil des cours de l'Academie de droit international de la Haye*, 49 (2008)).

[41] See for instance C. Seraglini, 'L'affaire Thalès et le non-usage immodéré de l'exception d'ordre public (ou les dérèglements de la déréglementation)' 295 *Gazette du Palais*, 5 (2005); E. Loquin, 'Le contrôle du seul "caractère flagrant, effectif et concret" de la violation de l'ordre public international par la sentence' *Revue trimestrielle de droit commercial*, 518 (2008).

[42] A liberal move on the public policy exception in commercial matters can be illustrated by the abandonment of exequatur proceedings in the Brussels 1 *bis* regulation, in the generous case law involving *exequatur* of arbitral awards under the New York Convention and even the limited conditions imposed by the Rome 1 Regulation to depart from the applicable law according to its provisions.

resourceful tools against big players in international litigation).[43] However, in matters that historically raise more awareness of the forum, such as personal status and family law, such a delimitation can have the opposite effect. Indeed, as the evolution of the case law here analysed illustrates, more conservative judges can take the same reasoning to a parochial delimitation of the content of international public policy, then raising an obstacle to recognition that is harder to deconstruct in future rulings.

b) International Public Policy and Other Private International Law Techniques

International public policy is not the only method tribunals can raise when opposing the effects of a surrogacy realised abroad. In France, cases involving international surrogacy have initially been tackled under the lens of the *fraude à la loi* exception. According to this technique, effects will not be given to a foreign rule or decision as far as the parties artificially made their application possible. The classic case regards a French princess who, willing to divorce in a time when it was not allowed by French law, took the German citizenship in order to have German law applicable under French private international law norms. To avoid this application, the judge raised the fact that the manipulation of the connecting factor was an obstacle to the reception of the foreign norm.[44] More recent cases involving repudiations deal with husbands seising foreign tribunals in order to repudiate their wives under the application of a more friendly regime.[45] In this case the *fraude* does not aim at avoiding a law (through the manipulation of the connecting factor) but rather a judgment. In Italy, however, the legge no 218/1995 does not provide for this technique,[46] and also in France judges shifted their argument in surrogacy cases to public policy. *Fraude à la loi* is indeed a declining technique, due to its complexity as well as the possibility of achieving the same purpose (a refusal of recognition or the

[43] Particularly regarding consumers arbitration and the matter of access to justice, as well as international litigation involving multinationals and individuals harmed by their activities.

[44] Cour de Cassation 18 May 1878, *Princesse de Bauffremont* v *Prince de Bauffremont*, *Clunet - Journal de droit international*, 505 (1878).

[45] See for instance Cour de Cassation 30 September 2009 no 08-16.141, *Clunet - Journal de droit international*, 13 (2010) and, more recently, Cour de Cassation 20 June 2012 no 11-30.120, *Bulletin*, I, 137 (2012).

[46] Italian private international law does not clearly provide for a specific mechanism of *fraude à la loi*, but the evasion can be considered broadly under Art 1344 of the Italian civil code and through the principle *fraus omnia corrumpit*. Without presenting this methodological distinction, a thesis draws upon the various manifestations of fraud at the national and international level: S. Falletta, *La frode alla legge nel diritto interno e nel diritto internazionale privato* (Fisciano: Università degli Studi di Salerno, 2014), 147-165. Italian decisions, even when considering the evasion, place it under the umbrella of public policy in order to justify a refusal of recognition. See for example O. Lopes Pegna, 'Riforma della filiazione e diritto internazionale privato' *Rivista di diritto internazionale*, 394 (2014).

non application of foreign law) through the public policy exception.[47] The mere attempt to avoid the application of the *lex fori* shall not hence preclude the recognition of the effects of the situation resulting from the application of foreign law.

On the other hand, when applying the public policy exception, the ruling of the *Sezioni Unite* invokes the violation of the law prohibiting surrogacy as a 'public policy principle'. This solution, which borrows from previous case law on the same issue,[48] is based on the fact that the ban on surrogacy safeguards 'fundamental values, such as the surrogate's human dignity and the adoption regime'. By lifting Art 12, para 6, of the legge no 40/2004 at the level of 'fundamental value', the Italian judge does not however properly characterise the conditions for an obstacle in the name of international public policy, since it focuses on its hypothetical content rather then the concrete appreciation that should be at the heart of the public policy control – what is, as discussed above, in contrast with the spirit of the technique and of the whole private international law discipline.

Rather, by invoking norms that should be seen as *components* of international public policy, the judge proceeds to a control of the conformity to overriding mandatory rules of the forum, which can be assimilated within the international public policy exception.[49] These rules apply necessarily whenever a situation falls within their scope. In the case at stake, the prohibition of surrogacy, as a public law norm, has necessarily a territorial application – while always applying to facts taking place within the forum, it cannot expand its scope to activities localised outside its boundaries. On the other hand, the adoption regime is a private law norm that can have a role to play in the private international law technique, by stepping out when foreign law is applicable or by applying to transborder facts as far as the characteristics of a situation make it applicable. Concretely, however, adoption was not a question. The intended parents did not evade from norms that should in any case apply since they were not contemplating

[47] Since *fraude à la loi* obeys to different criteria, it remains however useful when the forum cannot assess the incompatibility between the situation and public policy.

[48] Corte di Cassazione 11 November 2014 no 24001, *Foro italiano*, I, 3408 (2014).

[49] That's the conclusion reached by the International Law Association in its New Delhi resolution of 2002: P. Mayer, 'Recommandation de l'association de droit international sur le recours a l'ordre public en tant que motif de refus de reconnaissance ou d'exécution des sentences arbitrales internationales' *Reveu de l'Arbitrage*, 1061-1068 (2002). See also P. Mayer, 'L'étendue du contrôle, par le juge étatique, de la conformité des sentences arbitrales aux lois de police', in J.-P. Ancel et al eds, *Vers des nouveaux équilibres entre ordres juridiques: mélanges en l'honneur d'Hélène Gaudemet-Tallon* (Paris: Dalloz, 2008), 459-477; on a narrower approach on overriding mandatory provisions (lois de police) that could be concerned by this control, see L.G. Radicati di Brozolo, 'Arbitrage commercial international et lois de police: Considérations sur les conflits de juridictions dans le commerce international' *Recueil des Cours de l'Académie de Droit International de La Haye*, 1-501, especially 341, § 54 (2005). For an overview, K. Trilha Schappo, *Les angles morts d'un monde juridiquement hétérogène: essai sur l'exercice stratégique de la volonté en droit international privé* (Paris: IEP Paris, 2016), 122.

an adoption. Certainly, the decision of taking part in a surrogacy abroad was also due to the fact that adoption is foreclosed in the case of a same-sex couple. The judge would in this case assimilate surrogacy and adoption as analogous means to build a family, which is questionable.[50] In any case, a public policy exception based upon the application of overriding mandatory provisions is not free from any balancing with competing principles, such as the best interests of the child.

c) The Concrete Appreciation of the Conformity to International Public Policy also Contemplates Balancing the Different Interests at Stake

A rigid approach on a necessarily concrete technique can be at the origin of blind spots involving the protection of vulnerable interests.[51] This is the case for children involved in surrogacy-related litigation in different States of the world.[52] From a technical point of view, the public policy exception copes badly with the automatic and neutral architecture of the savignian tradition inspiring private international law regimes around the world. It constitutes an ultimate defence of the legal system against foreign rules and decisions incompatible with its essence. As such, its intervention is necessarily concrete, flexible and adaptable from case to case, since it is by definition an obstacle to the principles of harmony, coordination and cooperation upon which the whole private international law discipline is based.

Applying the public policy exception concretely involves (as the text of the legge no 218/1995 and other private international law norms around the world suggest) assessing the conformity of the *effects* the reception of the foreign norm entails. The judge should appreciate these effects regarding public interests but also regarding the private interests at stake. In cases involving surrogacy, these interests are: the collective repulsion of surrogacy techniques (entrenched in the constitutional protection of the human being's dignity); the interests of the intended parents and their will to constitute a family; the interests of a child born in spite of her will and abandoned by the natural mother in a foreign State.

The interests of the intended parents, although legitimate according to the Italian Constitutional Court,[53] lose pertinence when the means used to reach

[50] See on this alternative, n 6 above.

[51] Disregarding the rights of the child in order to avoid the recognition of any effects of an international surrogacy can trigger the ECHR – this kind of decision is indeed at the heart of surrogacy-related proceedings in front of the ECtHR.

[52] Similar solutions are found in States where surrogacy is prohibited, such as France, Spain, Germany and Japan.

[53] Corte costituzionale 10 June 2014 no 162, available at www.cortecostituzionale.it: 'the determination of having a child, which concerns the most intimate and intangible aspect of the human being, is incoercible, as far as it does not harm other constitutional values'.

their goal went bluntly against public policy norms of their home State. Although these individuals (in spite of being a same-sex couple or not) have a right under Art 8 of the ECHR to the protection of their private and family life, this protection cannot shield them against the reaction of a State whose law has been willingly evaded.

The collective interests enshrined in a State's legislation prohibiting surrogacy do not necessarily amount to an international public policy obstacle to recognition. As it has been lengthily discussed and explained (with a certain consensus) in literature and case law (although practical applications can vary), national and international public policy are very distinct. While national public policy consists of those norms individuals cannot deviate from, international public policy presents the limits to the reception of norms coming from other legal systems. It is sometimes presented as a subset of national public policy, but as we discussed above, viewing it through these lens (as sets of norms requiring compliance) is misleading. In spite of their similar denomination, the technique beneath national and international public policy is not the same. Differently from national public policy (under the shape of mandatory norms), international public policy cannot be approached as a list of norms with which parties shall always comply. It must be evaluated after hypothetically applying the foreign norm and observing its effects. Do they collide with the legal system's fabric, which is woven with its principles, culture, practices and (also) norms? Are these effects shocking? Is it impossible to amalgamate this situation within the legal system? In the affirmative, the legal system will have to limit its openness towards foreign norms, because their effects would be intolerable. On the contrary, if the effects of the reception of a legal norm can mingle within this fabric, nothing should oppose their recognition. One should keep in mind that private international law in its most traditional roots is about the protection of individual interests through continuous and harmonised solutions. Hindering this goal should be justified within its own logics, otherwise the regime as a whole becomes meaningless.

In this sense, judges dealing with the recognition of the effects of surrogacy proceedings realised abroad are faced with a family and a child. The formers claim they are the parents of the latter. They present on their behalf a foreign ruling certifying this legal kinship. The mere existence of same-sex couples is not anymore a matter raising public policy concerns under Italian law.[54] In what would the reception of this family within the Italian legal system be shocking? In what are its effects different from similar familiar arrangements resulting from an adoption[55] or other procreative technologies?[56]

[54] See Corte di Cassazione 11 gennaio 2013 no 601, n 17 above.

[55] The possibility for the non biological parent to adopt the child has been presented as a condition to preserve her rights under Art 8 ECHR by a recent advisory opinion of the Strasbourg Court: Eur. Court H.R., Advisory opinion of 10 April 2019 (Request no P16-2018-001). The *Sezioni Unite* also considered this possibility when denying recognition of the Canadian ruling. On the possibility to properly safeguard the child's rights through adoption, see below.

Judges and commentators insisting on the rejection of any recognition to these families invoke the fact that admitting to give effect to their legal kinship would encourage other intended parents to take the same path. But is the refusal of recognition discouraging intended parents to realise a surrogacy abroad? Is it enough to sacrifice the interests of the child in the name of some hypothetical deterrent effect that is hardly visible in practice?

The incompatibility between the legal kinship resulting from a surrogacy and the Italian legal system is also presented as resulting from the constitutional protection of the dignity of the human being, that in this case concerns the surrogate. However, it is impossible to achieve a proper protection of surrogates in third States. First of all, a neat refusal of *any* kind of surrogacy ignores the various different regulatory models that exist for the practice – and the different levels of protection available. Concretely, the situation of a surrogate in India or in Ukraine is not the same as a surrogate in California or in Canada.[57] One could also consider whether the couples had access to commercial surrogacy, or whether on the contrary if the surrogate took part in the construction of their family for free. The capacity of these women to decide by themselves is not the same in these different scenarios, but as far as their will is free and unbound, the philosophy of private international law would require a legal system to respect and trust the foreign legislator. An abstract 'protection' of the foreign surrogate that ignores the concrete conditions in which the child was born is not productive. On the contrary, distinguishing each case might be at the origin of a virtuous turn towards States in which surrogacy is better framed (and surrogates, better protected), if it could ensure intended parents that the legal kinship resulting from the practice might be more easily recognised. As it is, children's interests are sacrificed in the name of a hypothetical unattainable goal. If the objective is to guarantee that the human dignity of surrogates is safeguarded, States should think about methods to frame reproductive tourism as such, through cooperation and common norms,[58] before the judge has to face the *fait accompli*.

Finally, situations such as the one at stake in the ruling of the *Sezioni Unite* raise concerns regarding the interests of the child (or children) whose legal kinship with the intended parents is contended. These children are the fruit of a practice necessarily culminating in their abandonment by the surrogate mother. Besides their intended parents, they have no other family. When recognition is denied, these children simply fall short of rights towards adults that should be responsible for raising them and offering the material conditions for life. Judges turning a blind

[56] Corte di Cassazione no 30 September 2016 no 19599, n 21 above.

[57] See, for example, on the situation in India: K. Desai, 'India's Surrogate Mothers are Risking their Lives. They Urgently Need Protection' *The Guardian*, 5 June 2012, available at https://tinyurl.com/apfpjcy (last visited 28 May 2019).

[58] A model of cooperation in international surrogacy is already under discussion at The Hague Conference on Private International Law (see the work on https://tinyurl.com/y64pfovg (last visited 28 May 2019)). On this kind of regulatory effort, see C. Fenton-Glynn, n 10 above.

eye to these family arrangements (that will not cease to exist, as acknowledged in all recent case law) are depriving these children rights to claim maintenance, to take part in a succession, to benefit from the visits of an intended parent strained after a break up with the genetic father. It is hardly arguable that children are better off in these conditions, or that the above-mentioned goals can justify such treatment. If a legal system is convinced that this family situation is unsuitable, it should take the consequences of this choice and trust the child to another family through adoption. But even in this case, the European Court of Human Rights made clear that it would be incompatible with Art 8 of the ECHR if one of the intended parents is also the genetic father of the child. And whenever it might not be the case (even after a medical error, eventually), it is difficult to surely assess that such a solution would be the most suitable for the child, taking into account the length of the procedure and the age at which this child would finally have a stable family life.

The interests of the child, while being less safeguarded than collective interests or even the interests of the surrogate (at least in theory), are the ones whose protection shall be guaranteed according to international conventional norms to which Italy is bound. So not only these interests should be taken into account when assessing the concrete compatibility of a situation to international public policy, their protection should be paramount as it is mandated by norms hierarchically superior to Italian domestic law (and henceforth private international law). This proportionality check is however not the main concern to the *Sezioni Unite*. On the contrary: it is trusted by the judges to the legislator, when drafting national norms on the matter. Thus from a concrete public policy check, the judge arrives to an abstract balancing of the different interests at stake, to the detriment of children's rights.

In its *avis consultatif* issued on 10 April 2019, the ECtHR affirmed that States are not bound to recognise foreign birth certificates resulting from surrogacy, but that children should be afforded with means to have a link with the intended parent that is not also the genetic father.[59] In Italy, the regime of secondparent adoption (*adozione in casi particolari*) will fulfil this role. It cannot, however, afford the same protection to children's rights, as it will be discussed below. So the concrete appreciation of public policy does not sufficiently consider the interests of the child, which in these cases are sacrificed in an unbalanced safeguard of

[59] Whose legal kinship should always be recognised in the name of the child's respect to family and private life, particularly regarding the right to having an identity (v. Eur. Court H.R., *Mennesson* v *France*, n 29 above). On a reflection for new family law solutions in order to displace the center of the debate on surrogacy from the child's condition, see A. Chaigneau, 'Pour un droit du lien: le débat sur la gestation pour autrui comme catalyseur d'un droit de la filiation renouvelé' *Revue trimestrielle de droit civil*, 263 (2016). On how existing regimes (in this case, for international adoptions) can inspire a new framework for international surrogacy, see S. Mohapatra, 'Adopting an international convention on surrogacy – a lesson from inter country adoption' 13 *Loyola University Chicago International Law Review*, 25 (2015).

objectives that exist in theory, but are unattainable in practice.

2. The Role of the Best Interest of the Child, or the Lack Thereof

a) Methodological Remarks

One of the clearest element of discontinuity between the judgment of *Sezione Prima* and that of *Sezioni Unite* concerns the consideration given to the best interests of the children involved. Whereas for the former those interests dictated the outcome of the case (the recognition of the Spanish birth certificate indicating the two mothers as the child's legal parents), for the latter they cannot be prioritised over the surrogacy ban, resulting in the nonrecognition of the children's legal kinship with the intentional father.

It must be recalled, at the outset, that the taking account of such interests is binding for domestic courts under Art 3, para 1, of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989 and entered into force on 2 September 1990, which so reads:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.[60]

Although the indeterminacy of the child's best interests has been traditionally believed to generate 'anxieties and dilemmas'[61] and lead to unpredictability,[62] national and supranational courts, with the assistance of the UN Committee on the Rights of the Child, have developed a toolbox of hermeneutic devices aimed at disarming the uncertainty resulting from this provision.

In particular, the UN Committee's *General Comment No 14* has clarified that the best interests should be construed as a child's substantive right, an

[60] Art 3, para 1, of the Convention on the Rights of the Child, adopted in New York on 20 November 1989 and entered into force on 2 September 1990. See S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1999) 85-99.

[61] J. Eekelaar and J. Tobin, 'Article 3. The Best Interests of the Child', in J. Tobin ed, *The UN Convention on the Rights of the Child* (Oxford: Oxford University Press, 2019), 73-107, 76.

[62] On this criticism see E.E. Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities', in E.E. Sutherland and L.A. Barnes-Macfarlane, *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (Cambridge: Cambridge University Press, 2016), 21-50, 37-38. See also T. Kaime, *The Convention on the Rights of the Child* (Groningen: Europa Law Publishing, 2011), 104-105, describing the best interests of the child 'as a rather nebulous and ill-defined standard that opens a plethora of considerations and priorities'. For a discussion see S. Parker, 'The Best Interests of the Child – Principles and Problems', in P. Alston ed, *The Best Interests of the Child. Reconciling Culture and Human Rights* (Oxford: Clarendon Press, 1994), 26-41, 29.

interpretative principle and a rule of procedure.[63] First, children have a *substantive right* to have their interests 'assessed and be taken as a primary consideration'.[64] This obviously does not mean that their interests should prevail at all times – as well as having one's own day in court does not imply winning the case. Second, to qualify the best interests as an *interpretative principle* means, in a plurality of options, to choose the alternative that best suits the child's interests.[65] Third, as a *rule of procedure* the best interests rule requires the decision-maker to show that the child's interests, 'including psychological and physical well-being and legal, social and economic interests', have been taken into account.[66]

Oxford law professor John Eekelaar drew an interesting and yet problematic distinction in the application of the best interests rule between 'decisions that are directly about children and decisions that affect children indirectly'.[67] The sense of this distinction is that, whereas the former decisions seek 'the best outcome for the child', in the latter

> 'the focus of the decision-maker should be on reaching the best solution for the issue to be decided rather than on what outcome would be best for the child'.[68]

Behind this distinction lies the fear that the best interests rule may actually result, in some circumstances, in a *subversion* of the rule of law. This is particularly evident in the scholarly debate regarding cross-border surrogacy, in which context anti-surrogacy legislation is often opposed to and prioritised over the best interests rule. In support of this argument it has been affirmed that the

> '(b)est interests (rule) is not a trump card, a grundnorm, a high level principle (, but) a statutory rule that needs to be interpreted consistently

[63] See for example *General Comment No 14 on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (Art 3, para 1)*, CRC/C/GC/14 (2013), para 6, intending the best interests as 'a threefold concept' comprising of 'a substantive right (…), a fundamental interpretative principle and (…) a rule of procedure'. For a commentary of this comment see U. Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?', in E.E. Sutherland and L.A. Barnes-Macfarlane eds, n 62 above, 51-66, 56-59.

[64] *General Comment No 14*, n 63 above, para 6(a);

[65] See J. Eekelaar and J. Tobin, n 61 above.

[66] U. Kilkelly, n 63 above, 61.

[67] J. Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' 23 *International Journal of Children's Rights*, 3 (2015) and 'Two Dimensions of the Best Interests Principle: Decisions about Children and Decisions Affecting Children', in E.E. Sutherland and L.A. Barnes-Macfarlane eds, n 62 above, 99-111, 99. Eekelaar draws this distinction based, *inter alia*, on the above mentioned *General Comment No 14* n 63 above, para 19, regarding the definition of the word 'concerning' contained in Art 3(1) of the New York Convention based on whether the decision affect 'a child, children as a group or children in general' directly rather than indirectly.

[68] J. Eekelaar, 'Two Dimentions' n 67 above, 100.

with other – equally valid – statutory rules'.[69]

In domestic judicial practice, this approach is clearly reflected, for instance, in the judgment released by the Spanish Tribunal Supremo in 2013 in a case involving two children born from a gay couple via surrogacy in California, which emphasised the danger that

> '(t)he indiscriminate invocation of the "interest of the child" would serve (…) to make a clean slate of any violation of other legal rights taken into consideration by the national and international legal system'.[70]

This argument is clearly functional to the nonrecognition of the child's legal kinship with the intentional parent.

There are plenty of reasons for disagreeing with this argument. First, it is important to stress that the best interests rule is a truly binding provisions for domestic courts and not, as it has been claimed, 'an aspiration and a guide to state action'.[71] Indeed, this rule is so pervasive that even professor Eekelaar has been forced to recognise that

> 'if the "best" ' solution to the issue in question is considered to have a sufficiently detrimental effect on the child's interests, it may need to be modified or even abandoned'.[72]

Second, courts cannot relegate themselves as simple legislators' agents, but are required to take an action, as Art 3 of the New York Convention prescribes, that puts the child's interests above all others. There is nothing intimately subversive in weighting some interests over the others if this operation is commanded by a bunch of international law provisions. As an English family court ruled in 2008 in the famous case *Re X and Y (Foreign Surrogacy)*, regarding a twin couple that the conflict of English and Ukraine law had made stateless and parentless, trumping the legislative policy for the sake of the interests of the children involved 'is both humane and intellectually coherent', as

> 'the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (ie the child concerned)'.[73]

[69] K.M. Norrie, 'Surrogacy in the United Kingdom: An Inappropriate Application of the Welfare Principle', in E.E. Sutherland and L.A. Barnes-Macfarlane eds, n 62 above, 165-179, 178.

[70] Tribunal Supremo 6 February 2014 no 853/2013, *Revue critique de droit international privé*, 531 (2014), paras 4.7-4.8.

[71] K.M. Norrie, n 69 above, 179.

[72] J. Eekalaar, 'The Role of the Best Interests Principles', n 67 above, 5.

[73] *In re X and Y (Foreign Surrogacy)*, [2008] EWHC 3030 (Fam), para 24. The court therefore considered that '[t]he difficulty is that it is almost impossible to imagine a set of

Third, it is worth recalling that, while 'primary' does not certainly mean 'absolute', even when in the court's view other interests may abstractly displace the child's interests, Art 3 still 'imposes an onerous burden on a decision-maker to justify any interference on the basis of evidence rather than speculation and assumption'.[74] This enhanced reasoning requirement is the direct result of ther binding character of the best interests rule.

Finally, we should not forget that, although both provisions require to prioritise the child's interests over all others, the standard set by Art 8 of the ECHR is higher than that of Art 3 of the New York Convention, materialising in a 'robust' judicial protection.[75] As the ECtHR has stated on multiple occasions, ultimately in its advisory opinion of 10 April 2019, 'whenever the situation of a child is in issue, the best interests of that child are paramount', thus imposing an analysis *in concreto* which looks at the 'practical reality' of *that child* and not a that of other children or of children in general.[76]

Despite this overwhelming criticisms, professor Eekelaar's distinction remains useful to examine the assessment of the *Sezioni Unite* about the children's best interests. As seen earlier, the *Sezioni Unite* have relegated these interests to the very last part of its ruling, stating that they not only 'are deemed to wane in the event of surrogacy', but can be properly implemented via the secondparent adoption. We will challenge both assumptions separately.

b) The Child's Best Interests and Public Policy

The first assumption made by the *Sezioni Unite* is that the surrogacy ban contained in Art 12, para 6, of Italian legge no 40/2004 trumps the child's best interest. By this conclusion, the *Sezioni Unite* displayed not a judgment about the children involved, but a judgment affecting children in general, departing from

circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order'. The case concerned an English opposite-sex couple who resorted to surrogacy in Ukraine and subsequently asked for a parental order to the English court under section 30(7) of the *Human Fertilisation and Embryology Act 1990*. This provision subjected the issuing of the parental order to the condition that nothing had been paid to the surrogate except 'for expenses reasonably incurred'. The couple, however, had paid the surrogate a lump-sum of 25.000 euro at the children's birth, giving rise to a clear case of commercial surrogacy against which, as the court said, 'there is a wholly valid public policy justification lying behind Section 30(7)'. Ibid, para 20. The combination of the Ukraine law – for which the children involved were legally the children of the English couple though born in Ukraine, hence foreigners to Ukraine law – and the above mentioned prohibition of commercial surrogacy sanctioned by English law made the children stateless and parentless. See E. Walmsley, 'Commentary on *Re X and Y (Foreign Surrogacy)*' in E. Stalford, K. Hollingsworth and S. Gilmore eds, *Rewriting Children's Rights Judgments* (London: Hart Publishing, 2017), 89-104, 93.

[74] J. Eekelaar and J. Tobin, n 61 above, 97.

[75] C. Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law* (Oxford: Hart Publishing, 2017), 147.

[76] See Advisory opinion of 10 April 2019, paras 38 and 52, n 55 above.

the practical reality of children born via foreign surrogacy who will continue living with the intentional parents notwithstanding. We find this conclusion inconsistent with the need for an evaluation *in concreto* that is prescribed by the law.

The public policy exception interacts with the best interests rule not only as one of the 'principles and rules' that compose the the public policy exception, but also as a counter-limitation (*controlimite*) to the public policy exception, meaning that, if the nonrecognition infringes upon certain children's interests, public policy cannot operate and recognition is therefore the correct solution.[77]

The *Sezioni Unite* assumed that the best interests rule was a public policy provision in the former sense, which must nonetheless be balanced against the surrogacy ban. This was also the position of the Spanish *Tribunal Supremo* in the case of 2013 mentioned earlier, which weighted the children's interest to the recognition of the foreign birth certificate listing the two male petitioners as the legal fathers against other values such as

> 'the respect for the dignity and the moral integrity of the surrogate woman, the avoidance of the exploitation of the state of need in which young women may be found in poverty and the prevention of the commodification of pregnancy and kinship'.[78]

In searching 'the solution that least harms the children', the *Tribunal Supremo* stressed 'the dignity of the children not to be transformed into an object of commercial traffic'.[79] In so doing, however, it transformed the 'best interest of the child' in the 'least interest of the child', as the narrative of dignity that the Tribunal engaged with is the result of a 'prejudice'.[80]

Following this line of criticism, the *Sezioni Unite* could be reproached for having completely ignored the multiple harm to the children resulting from the nonrecognition of the foreign parental order. To begin with, from a general viewpoint, it is hard to understand how the perpetuation of the invisibility of the

[77] This was the position of the Corte d'Appello di Trento 23 February 2017, n 15 above, which considered that 'the lack of recognition of the kinship with the (parent-partner) would result in an evident prejudice for the children, whose rights would not be recognised in Italy with regard of (the parent-partner); nor would such a prejudice be excluded by the possibility, for the children, to enforce these rights against the other parent, thus preventing (the parent-partners) to exercise the parental liability toward them; the children would then be also prejudiced in that they loose the family identity that has been legitimately acquired in (Canada), as the family relationship with (the parent-partner) established there has no relevance here'. Among scholars see G. Rossolillo, 'Identità personale, maternità surrogata e superiore interesse del minore nella più recente giurisprudenza della Corte europea dei diritti dell'uomo' *Diritti umani diritto internazionale*, 202, 207 (2015). Against this characterisation see G. Perlingieri and G. Zarra, n 27 above, 88-90.

[78] Tribunal Supremo 6 February 2014 no 853/2013, paras 4.7-4.8, n 70 above.

[79] ibid para 4.8.

[80] A. Calvo Caravaca and J. Carrascosa Gonzáles, 'Comentario de la sentencia del Tribunal Supremo de 6 de febrero de 2014 (247/2014)', *Comentarios a las sentencias de unificación de doctrina: civil y mercantil*, 395-410, 402 (2016).

intentional father could be in the interests of the children involved.[81] More specifically, the nonrecognition impacts the child's interests: (i) not to live in a situation of legal uncertainty about parentage;[82] (ii) to access the citizenship of the intended father;[83] (iii) to stay in the intended father's country of residence;[84] (iv) to inherit under his estate;[85] (v) to preserve the relationship with him in case of family disruption or death of the biological father;[86] (vi) to enforce support obligations against the quitting father. Despite the fact that each of these interests represent a violation of the child's right to identity and private life,[87]

[81] On the problem of the 'invisibility' of the parent-partner in American family law see M.H. Weiner, *A Parent-Partner Status for American Family Law* (New York: Cambridge University Press, 2015), 32-61.

[82] On this point, the European Court of Human Rights observed that, '(w)hile it is true that a legal parent-child relationship with the (intentional parents) is acknowledged by the French courts in so far as it has been established under Californian law, the refusal to grant any effect to the US judgment and to record the details of the birth certificates accordingly shows that the relationship is not recognised under the French legal system. In other words, although aware that the children have been identified in another country as the children of the (intentional parents), France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children's identity within French society.' Eur. Court H.R., *Mennesson* v *France* n 29 above, para 96; similarly Eur. Court H.R., *Labassee* v *France* n 29 above, para 75. The distinction between acknowledgement and recognition of a foreing status is to be understood with regard to the argument raised by the French government that the interference with the petitioners' family life was limited to the civil-status document and did not extent to all other aspects of such a life. See Eur. Court H.R., *Mennesson* v *France* n 29 above, para 71 and Eur. Court H.R., *Labassee v France* n 29 above, para 71.

[83] In the case before the *Sezioni Unite*, the problem did not arise as the legal kinship with the biological father had been recognized with no difficulties, resulting in the children acquiring the father's Italian citizenship (in addition to that of Canada's). Italian citizenship is acquired as a result of the simple legal kinship (*iure sanguinis*) according to Arts 1, para 1, letter *a*) and 2, para 1, of legge 5 February 1992 no 91. In general, the uncertainty about the children's citizenship 'is liable to have negative repercussions on the definition of their personal identity'. Eur. Court H.R., *Mennesson* v *France* n 29 above, para 97; similarly Eur. Court H.R., *Labassee* v *France*, n 29 above, para 76. On 25 January 2013, the French Ministry of Justice had issued a circular entitling children born abroad via surrogacy to apply for French citizenship certificates based on the foreign birth certificates provided that one of the parents was French. The Conseil d'Etat rejected a motion for annulment of this circular. See Conseil d'Etat 12 December 2014 no 367324, *Association Juristes pour l'enfance et autres*, available on *Dalloz*. On a more general stance, although the ECHR contains no provision regarding citizenship, the European Court of Human Rights has found that citizenship, insofar as it impacts an individual's social identity, can be brought within the scope of Art 8. See Eur Court H.R., *Genovese* v *Malta*, App no 53124/09, Judgment of 11 October 2011, para 33, available at www.hudoc.echr.coe.it.

[84] Under Italian law, the residence of a child is jointly determined by the parents. However, if one of the parents the child live with is not legally recognised, the other can take the decision to move to another country unilaterally, thus disrupting the life of the child and his/her environment.

[85] The inheritance rights of the child depend on whether the intended parent has expressly designated such a child as a legatee, with actual inheritance being submitted to a tax duty as per a third party. See Eur. Court H.R., *Mennesson* v *France*, n 29 above, para 98; Eur. Court H.R., *Labassee* v *France*, n 29 above, para 77.

[86] For a dramatic example of litigation following the disruption of a female couple and a child intrastate abduction see M.M. Winkler, n 5 above, 386-387.

[87] See Advisory opinion of 10 April 2019, n 55 above, para 40; A. Calvo Caravaca and J.

the *Sezioni Unite* balanced none of these interests against the surrogacy ban.

Finally, the arguments developed in support of the prevalence of the surrogacy ban *vis-à-vis* the best interests rule are centred exclusively on the parents' conduct, as the multiple references to the procreative project and, to a lessen extent, to the dignity of the surrogate demonstrate.

This point was addressed by the German Federal Supreme Court (*Bundesgerichtshof*, BGH) in a case of 2014 regarding the recognition of a parental order issued in favour of the two intentional fathers in California.[88] After considering that the general preventive function of the surrogacy ban does not necessarily materialise in a principle of international public policy, the BGH observed that the child was simply the result of the circumvention of such a ban and therefore cannot be held responsible for it.[89] Moreover, insofar as the surrogate mother acted voluntarily – both by undertaking the surrogacy and waiving her parental rights – and her parental rights were terminated lawfully, her human dignity cannot be said to be violated.[90] Concerning the dignity of the child, the BGH observed very briefly that it cannot be violated because the child owns his/her own existence to the surrogacy arrangement.[91]

Compared to the *Sezioni Unite*, the BGH deconstructed the arguments in support of the surrogacy ban and reviewed them against the best interests of the child involved in the case. We find this being the essence of the hermeneutic operation commanded by Art 3 of the New York Convention. By contrast, the *Sezioni Unite* refused to engage in such an operation by taking a decision not *in concreto*, but as affecting children in general and relegating its own role as that of a mere executor of legislative intent. Finally, this decision was made having in mind the behaviour of the intentional parents and not the needs of the children involved. In fact, it is extremely naïve to claim that gay couples wishing to have children will surrender any attempt to resort to foreign surrogacy after realising that their children's kinship with their intentional fathers will not be legally recognised. As Sylvie Mennesson commented, 'the fear of the police has never stopped them'.[92]

c) The Child's Best Interests and the Secondparent Adoption

For the *Sezioni Unite*, the court's obligation to take account of the best interests of the child was fulfilled by allowing the parents to access the

Carrascosa Gonzáles, n 80 above, 405-406.

[88] Bundesgerichtshof 10 December 2014 no XII ZB 463/13, *Deutsche Notar-Zeitschrift*, 296 (2015).

[89] ibid paras 45-46.

[90] ibid paras 39, 41.

[91] For a criticism see S.L. Gössl, 'The Recognition of a "Judgment of Paternity" in a Case of Cross-Border Surrogacy under German Law. Commentary to BGH, 10 December 2014, AZ. XII ZB 463/13' *Cuadernos de derecho transnacional*, 448, 461-462 (2015).

[92] Eur. Court H.R., *Mennesson* v *France*, n 29 above.

secondparent adoption (*adozione in casi particolari*). In contrast to this view, we argue that the recognition of a full legal kinship between the children and the two fathers offered a better protection to the integrity of the family compared to the secondparent adoption. Academic research has demonstrated in this regard that the freestanding status of the intentional father is detrimental to both the children and the father himself, undermining the former's legal security and the latter's self-esteem.[93] However, the ability of the secondparent adoption to correct this problem by fully ensuring the children's well-being is very limited.[94]

First, the sole individual entitled to file for secondparent adoption is the intentional father, whether or not into a civil partnership, whereas neither the child nor the biological father has standing in this regard.[95] Therefore, whereas in the event of a fully recognised legal kinship the children could claim material support through the biological parent acting on their behalf, the freestanding intentional father could quit the family at any time and bear no support obligation toward the child.

In turn, this point raises the spectre of discrimination. Compare a child born of two women with a child born of two men through surrogacy. As a result of the judgment of *Sezioni Unite*, the former child has two parents whereas the latter has just one, at least for the first years of his/her life and until the intentional father has obtained a secondparent adoption. Because for any child it is a pure luck to be born within a couple of women rather than within a couple of men, the different legal treatment resulting from the judgment of *Sezioni Unite* entails a discrimination based on the sex and the sexual orientation of the parents, which is prohibited.[96] By making children born via foreign surrogacy 'new phantoms', the *Sezioni Unite* reinforced an idea of illegitimacy that has been espunged by Italian law since almost a decade.[97]

Furthermore, under Italian law the secondparent adoption does not consolidate a full legal relationship with the family of the intentional father. This flaw is the

[93] See F. Ferrari, n 17 above, 77.

[94] In this specific regard, Art 3(2) of the New York Convention of 1989 on the Rights of the Child states engages States Parties to 'ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents and shall take all appropriate legislative and administrative measures'.

[95] In Italian judicial practice, the fact that the child's parents are in a civil partnership – or in a foreign same-sex marriage, for what it matters – is not a condition to access the secondparent adoption, but a circumstance that reinforces the court's finding of the stability of the family.

[96] See Art 2(1) of the New York Convention, prescribing that children are not discriminated within the jurisdiction of the States Parties based on their parents' 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.

[97] In fact, '(t)he resort to surrogacy abroad subjects these families to legal disabilities that recall the disadvantageous treatment of children born out of wedlock received under what are now considered discriminatory legal regimes that violate human rights norms'. R.F. Storrow, 'The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy' 20(3) *Journal of Gender, Social Policy & the Law*, 561, 568 (2012).

result of a provision of the law on adoption that fills the gaps of the secondparent adoption regime by referring to the provisions on adult adoption contained in the Civil Code.[98] Courts have acknowledged in this regard that full adoption ensures 'a bunch of rights which is broader and more beneficial than that of (the secondparent adoption)'[99] and that such a regime 'exposes itself to constitutional scrutiny'.[100]

Finally, not all Italian courts are actually open to grant secondparent adoption to same-sex couples. As we noted above, the Court of Appeals of Trento had addressed this point and concluded for the insufficiency of the secondparent adoption to realise the children's interest to their full extent. The *Sezioni Unite*, however, spoke as if secondparent adoption is a reality in Italian law – which is not. In this regard, in its advisory opinion of 10 April 2019 the ECtHR has stated that access to secondparent adoption in the context of children born via foreign surrogacy must be *effective* – thus enabling the relationship to be recognised – and *sufficiently rapid* so that the child is not kept for a lengthy period in a position of legal uncertainty about its identity regarding the relationship with his/her intentional parent.[101] With couples queing outside courtrooms for two-three years before obtaining a first instance decision on the adoption of their children, this judicial practice hardly could be said to fulfil these parameters.

IV. Conclusions

The judgment of the *Sezioni Unite* will certanly divide the commentators on the question of its departure from the previous case law of the *Sezione Prima* in matters related to the offspring of same-sex couples. While some will likely identify a fundamental difference between the case of a couple of women having a baby through assisted reproductive technologies and a couple of men resorting to surrogacy, others will see in the decision of the court a conservative turn willingly distinguishing itself from previous liberal decisions.

After presenting the specific factual and legal background of the case, we analysed its two main aspects – the public policy control and the role played by the child's best interest – in order to reach a mixed conclusion. Although indeed the facts of the case differ from those of the 2016 *Sezione Prima* decision on the

[98] See Art 54 of legge no 184/1983, which refers to Art 300, para 2, of the Civil Code, stating that '(The) adoption does not result in a civil relationship between the adopted and the relatives of the adoptee'.

[99] Corte d'Appello di Milano 1 December 2015, *Il diritto di famiglia e delle persone*, 155 (2016), which recognised the adoption order of a child by her intentional mother issued by a Spanish court. The couple had resorted to the CSO of Milan, which however had refused to register the adoption order on the ground of the nonexistence, in Italian law, of a secondparent adoption with full legitimacy effects. The Corte d'Appello, as we said, rejected this conclusion, seeing no obstacles to the recognition.

[100] Tribunale per i Minorenni di Firenze 8 March 2017, available on the portal www.articolo29.it.

[101] Advisory Opinion 10 April 2019, para 54, n 55 above.

point that it involved the participation of a surrogate, the decision of the *Sezioni Unite* also distinguishes itself in more conservative methodological choices.

On the one hand, the scope of international public policy is extended towards norms of national law, which had been set aside by the 2016 ruling when assessing the reach of the exception. The technique used in both rulings is however misleading as far as it is articulated around the identification of a content proper to international public policy. While it can provide an idea of predictability through a neutral and abstract determination of the exception, in practice the panel can also mould this same definition, leading to a solution more difficult to challenge in future litigation. Besides, a reasoning centred on the content of international public policy loses sight of its implementation, which should in any case be *in concreto*. It is indeed the compatibility between the effects of the foreign norm and the legal system's legal core that should be determined through the public policy control, and not an abstract examination of the intent of the national legislator. From this point of view it is questionable whether the exception has been opposed to a situation whose effects concretely contrast with the legal system's core. The solution fails, moreover, to achieve the objectives that it pursues, while insufficiently considering the best interests of the child.

More particularly, regarding this issue, we chose professor Eekelaar's methodological approach to guide our analysis. The *Sezioni Unite* incorporated the question among the elements of the international public policy control, which failed in concretely considering the negative impact of the lack of recognition on the situation of the children. Moreover, the court suggested that these interests will be ensured through secondparent adoption – adjusting somehow the solution to the freshly issued ECtHR advisory opinion according to the children's rights under Art 8 of the ECHR would be safeguarded as far as the legal kinship with the intentional intended parent could be ensured through other means such as the secondparent adoption.

Under the current state of Italian law, however, the requirements listed by the ECtHR (an effective and sufficiently rapid solution) remain unfulfilled, insofar as it does not arise clearly from the tribunals' practice that secondparent adoption would be conceded to same-sex couples, while not conferring a protection that is comparable to the recognition of the legal kinship established by the foreign legal system. The *Sezioni Unite* left the 'voice' of the children born via surrogacy abroad basically unheard, leaving this issue open to further litigation in the future.