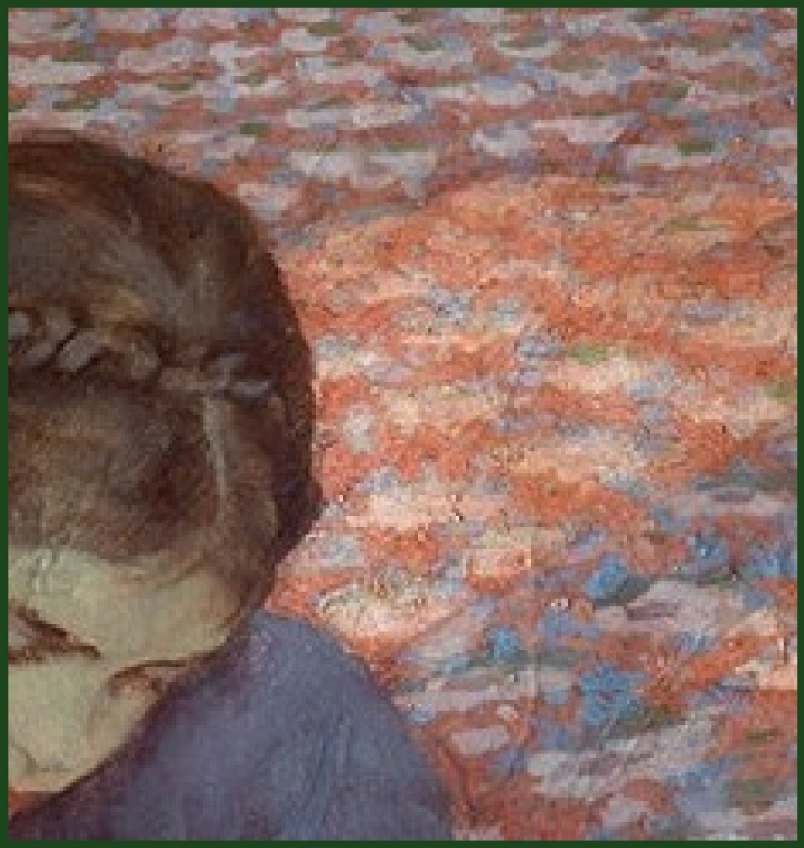
The Italian Law Journal

Vol. 06 No. 02 (2020)



EDIZIONI SCIENTIFICHE ITALIANE

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THE ITALIAN LAW JOURNAL

An International Forum for the Critique of Italian Law

Vol. 06 – No. 02 (2020)

www.theitalianlawjournal.it

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ISSN 2421-2156 December 2020 DOI 10.23815/2421-2156.ITALJ

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The Italian Law Journal is sponsored by 'Harvard Italian Law Association' (HILA), by 'Società Italiana degli Studiosi del diritto civile' (SISDIC) and by 'Società Italiana per la ricerca nel diritto comparato' (SIRD).

Essays

An Anthropological Reading of Surrogacy and the Role of Supreme Courts

Salvatore Aceto di Capriglia*

Abstract

Far from being confined within the narrow confines of law, the theme of surrogacy evokes delicate meta-legal questions arising from the evident axiological, moral, and religious implications. The patchwork of solutions adopted across the various legal systems provides legislators with food for thought, in the expectation of a regulatory intervention at national and international levels, to bring about a new and unavoidable child-centred change of perspective in the legal debate.

I. A Critical Assessment of the Attempts to Define the Phenomenon of the So-Called 'Surrogacy', Between the Interpretation of International Courts and the Principle of 'Puerocentrism'

The expression 'surrogacy'[1] indicates a delicate circumstance that has been effectively described[2] as 'the situation of a biological mother[3] (that is, of a woman

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[1] This contribution investigates topics covered in S. Aceto di Capriglia, 'I profili etico-giuridici concernenti la maternità surrogata. Un confronto tra modelli' *Le Corti salernitane*, 1, 3 (2019).

[2] In an arduous attempt to offer a single all-encompassing definition, it may be said that surrogacy, gestational substitution, supportive gestation, or 'womb-for-rent' – as it is sometimes improperly referred to with an evidently critical tone – is an assisted procreation technique in which a woman, variously called a 'woman who is pregnant for others', a gestational bearer, or a pregnant woman, undertakes gestation on behalf of one or more people who will be the parent or parents of the unborn child. Consent to the use of this technique is granted by means of a gestational surrogacy contract. In this contract, the future parent – or parents – and the woman who becomes pregnant for others set out in detail the procedure, rules, consequences, and possible contribution to the medical expenses borne by the pregnant woman, as well as any remuneration for her service. Fertilisation may be carried out using spermatozoa (gametes) and eggs provided by the sterile couple and donors through *in vitro* conception. For further information, see I. Corti, *La maternità per sostituzione* (Milano: Giuffrè, 2000), 15; F.M. Zanasi, 'Maternità surrogata', available at www.personaedanno.it, 21 January 2014; G. Cassano, *Le nuove frontiere del diritto di famiglia. Il diritto a nascere sani, la maternità surrogata, la fecondazione artificiale eterologa* (Milano: Giuffrè, 2000), passim; A.B. Faraoni, *La maternità surrogata. La natura del fenomeno, gli aspetti giuridici, le prospettive di disciplina* (Milano: Giuffré, 2002), passim; E. Trerotola, 'Bioetica e diritto privato. Crepuscolo del *mater semper certa* est nella prospettiva della maternità surrogata' *Il nuovo diritto*, 403 (2003).

[3] A hallmark of the choice of the woman who accepts and brings the pregnancy to full term is undeniable intentionality, as well illustrated by D. Danna, *Contract Children, Questioning Surrogacy*

who shares the experience of pregnancy with an unborn child) who consciously and freely chooses to undertake a reproductive project that is not destined to continue with her motherhood after the birth of the child but is meant to become the 'parental project' of others'.[4]

This definition does not embrace all the multifaceted forms that the phenomenon of surrogacy can assume in reality and which have been identified and examined in depth in the literature (both legal and otherwise).[5] In addition to considerable morphological differences, a comparison of the legal systems in which the practice in question is considered lawful, reveals a marked teleological heterogenesis.

In some legal systems, in fact, surrogacy is lawful solely if practised free of charge for altruistic purposes (such as in the case of a relative who agrees to become pregnant for reasons of affection and solidarity towards the future parents). In other legal systems, gestation on behalf of third parties for financial gain is also considered admissible. These are the cases in which the biological

(Stuttgart: Verlag, 2015), 39.

[4] B. Pezzini, 'Nascere da un corpo di donna: un inquadramento costituzionalmente orientato dell'analisi di genere della gravidanza per altri', available at www.costituzionalismo.it, 201 *(*2017), 'The experience of pregnancy for others manifests itself today as the drop point of the transformations in the sphere of sexual reproduction and the sphere of gender roles in family relations: here converge the effects of the deep changes that parental relationships have undergone and that have largely redefined the boundaries of maternal and paternal roles towards children, and those of technological medically assisted fertilisation processes, especially considering the practicability of heterologous fertilization with the use of female gametes unrelated to the couple of would-be parents'. The definition is also adopted by G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 94-95. It should be added that, according to the most recent orientation of the Joint Divisions of the Italian Court of Cassation, the essential feature of this figure is 'the fact that a woman lends her body (and possibly the eggs necessary for conception) for the sole purpose of helping another person or sterile couple to fulfil their desire to have a child, assuming the obligation to arrange for gestation and childbirth on behalf of the same, and agreeing to deliver the unborn child'. The reference is to the key judgment rendered by Corte di Cassazione 8 May 2019 no 12193, available at www.neldiritto.it. with an insightful commentary in G. Perlingieri, 'Ordine pubblico e identità culturale. Le Sezioni unite in tema di c.d. maternità surrogata' *Diritto delle successioni e della famiglia*, 377 (2019).

[5] It may be appropriate to list some of the more usual theoretical distinctions found in legal scholarship. In fact, *traditional* surrogacy occurs when the surrogate mother is the subject of artificial insemination with sperm donated by the father, which links the child to the father genetically. Then, there is *gestational* surrogacy, where an embryo produced from the eggs and sperm of the parents is implanted in the surrogate mother. More specifically, legal scholarship has categorised surrogacy into three groups of cases: one in which eggs are donated to a woman who becomes pregnant in order to bear her own child; true surrogacy, in which the oocyte of a woman who completes the pregnancy and hands over the new-born child to the client couple is fertilised; the loan of the uterus, in which the embryo is created *in vitro* using genetic material from the couple and subsequently implanted in the woman's uterus. At the end of the pregnancy, the mother hands the new-born baby to the couple. See, G. Cassano, *Le nuove frontiere del diritto di famiglia (*Milano: Giuffrè, 2000), 55 and T. Auletta, *Diritto di famiglia* (Torino: Giappichelli, 2014), 329-335.

mother agrees to complete the gestation in exchange for payment.[6] In the light of these various scenarios, it is immediately clear that complex institutional problems regarding lawfulness may arise.[7]

The tension between the practice in question and the fundamental rights of the human person enshrined in Art 2 of The Italian Constitution is evident, as is the risk, particularly germane to the case of surrogacy for financial gain, that the bodies of both the mother and the unborn child become mere commodities.[8] In more general terms, the lack of any standardised regulation of the phenomenon reflects the delicate meta-legal implications pertaining to the question of surrogacy. Under such circumstances, the interpreter of the law cannot avoid coming up against the precepts of religion, morals, and philosophy. In such a scenario, it is not surprising that a leading role should be attributed to international sources, and even more so to the hermeneutic activity of international courts, which undoubtedly enjoy a privileged standpoint with regard to the solution of issues that are at the same time both intricate and fascinating.[9] As a result of technological and scientific progress, we are now witnessing the introduction of new procreative techniques, in relation to which family law has great difficulty in maintaining its traditional role as a regulator. So, challenges to the so-called 'living law' are increasingly frequent. The 'living law' is called upon to address unusual requests for protection, related to factual situations not covered by positive law, which require the use of evolutionary and innovative, if not radically *creative* interpretations.[10] Moreover, intervention by the European Union in the field of family law can only be indirect: in this regard, not only is the general principle whereby the European Union's authority is characterised by the principles of attribution, subsidiarity, and proportionality always true, but it also emerges that the examination of the founding treaties and the Treaty of Lisbon itself reveals no exclusive jurisdiction on the part of the

[6] For an initial comparative analysis, please refer to K. Trimmings and P. Beaumont, *Legal Regulation at the International Level (*Oxford: Hart Publishing, 2013); and G. Tobin, 'To Prohibit or to Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' 63 *International Comparative Law Quarterly*, 352-357 (2014).

[7] Indeed, even in legal systems that allow surrogate motherhood, the debate is far from dormant, given that, as underlined by G. Perlingieri and G. Zarra, n 4 above, 97, proposals for review, or even abolition of the practice, are far from infrequent.

[8] On this point, see E. Olivito, 'Una visione costituzionale sulla maternità surrogata. L'arma spuntata (e mistificata) della legge nazionale', in S. Nicolai and E. Olivito eds, *Maternità, Filiazione, Genitorialità. I nodi della maternità surrogata in una prospettiva costituzionale (*Napoli: Edizioni Scientifiche Italiane, 2017), 7-14.

[9] This role has been readily picked up on in the more scrupulous scholarship, which has not failed to provide a critical contribution to the solutions gradually devised in judge-made law. On this point, without claiming to be exhaustive, C. Campiglio, 'Il diritto dell'Unione europea si confronta con la maternità su commissione' *La nuova giurisprudenza civile commentata,* I, 763-768 (2014). See also L. Chieffi, *La procreazione assistita nel paradigma costituzionale* (Torino: Giappichelli, 2018), 150, where the regulatory inadequacy in this regard is remarked.

[10] On this, see C. Campiglio, 'Norme italiane sulla procreazione assistita e parametri internazionali: il ruolo creativo della giurisprudenza' *Rivista di diritto internazionale privato e processuale*, 481-516 (2014).

EU Institutions.[11] The Lisbon Treaty, of course, endorsed the communitarisation of the ECHR,[12] crystallising the accession of the Union to the convention system, which made it possible to elevate the case law of the Court of Strasbourg to the rank of standard of constitutionality in relation to national norms.[13] It should be immediately clear that, contrary to some occasional claims, the ECHR has never been called upon to address the *quaestio iuris* of the admissibility of surrogacy. Rather, it has intervened to censure the behaviour of individual Member States in relation to the legitimation of the relationship between couples and the children born as a result of surrogate motherhood. This has been done by making use of the Art 8 of the Convention[14] as a normative standard, which protects the right to the peace of family life.[15] In other words, the hermeneutic work of the ECHR

[11] A. Pera, *Il diritto di famiglia in Europa. Plurimi e simili o plurimi e diversi* (Torino: Giappichelli, 2012), 30-38, insightfully observes that EU law has never dealt directly with family relationships, which have only caught the interest of EU sources insofar as they might affect economic freedoms. In any case, a very confused procedure has remained in place for the approval of resolutions involving family arrangements. It is subject to unanimous Council approval, a prior opinion from the European Parliament, and the power of veto from national parliaments. This reveals the concern not to jeopardise the legal traditions and the cultural identities of the individual member States.

[12] The institutional status of the ECHR has found itself at the centre of a tumultuous evolutionary path, being, until only a few years ago, attributed the rank of ordinary law, the importance of which was as an instrument of ratification. On this point, the famous *twin judgments* of the Corte costituzionale 24 October 2007 nos 348 and 349, *Giurisprudenza italiana*, 565 (2008), with commentary by, among others, B. Conforti, 'La Corte costituzionale e gli obblighi internazionali dello Stato in tema di espropriazione', and R. Calvano, 'La Corte costituzionale e la CEDU nella sentenza no 348/2007: Orgoglio e pregiudizio?' *Corriere giuridico*, 185-189 (2008), with a critique by R. Conti, 'La Corte costituzionale viaggia verso i diritti CEDU: prima fermata verso Strasburgo', and D. Tega, 'Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la CEDU da fonte ordinaria a fonte "sub-costituzionale" del diritto' *Quaderni cosituzionali*, 133-166 *(*2008). With these judgments, the Court clarified that ordinary courts do not have the power to set aside domestic law normally considered to collide with an ECHR standard, since 'the alleged incompatibility between the two is presented as a question of constitutionality, for any breach of Art 117 Constitution, which is of exclusive competence of the judge of the laws'. The Court clarifies that although ECHR provisions supplement the constitutional standard of said Art 117 (the so-called interposed ECHR provisions), they hold a sub-constitutional rank in the hierarchy of sources. Hence the need to subject them to a question of constitutionality.

[13] On the other hand, prior to the entry into force of the Lisbon Treaty, the relevance of the ECHR to the EU Court of Justice operated on a merely hermeneutical level, as the Convention was part of the ocean of widely recognised general principles of law. In this regard, see C. Amalfitano, 'Il rilievo della CEDU in seno all'Unione Europea ex art. 6 TUE', in L. D'Andrea et al eds, *La Carta dei diritti dell'Unione Europea e le altre Carte (ascendenze culturali e mutue implicazioni)* (Torino: Giappichelli, 2016).

[14] Which reads verbatim: 1 Everyone has the right to respect for his private and family life, his home and his correspondence. 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[15] The Eur. Court H.R., *Mennesson* v *France*, judgement of 26 June 2014, available at www.hudoc.echr.coe.it, is emblematic in this regard, as the Court found itself having to verify the

consists in verifying whether or not the legal restrictions on 'surrogacy' constitute undue intrusions by the State in the family life of the individuals involved. In carrying out this assessment, the reference standard adopted by the Court undoubtedly rests on the *best interest of the child*, and it is no coincidence that this standard constitutes the *leitmotiv* of numerous judgments.[16]

The conceptual outline described above is fully discernible in *Paradiso and Campanelli*,[17] a famous surrogacy case in which, in the opinion of the Strasbourg Court, the Italian public authorities had omitted to strike a reasonable balance between the interests at stake, and especially the *best interest* of the child. In particular, the Court was called upon to assess the appeal presented by an Italian couple who had been refused the civil registration of a certificate regarding a child born in Russia as a result of heterologous fertilization and therefore devoid of any genetic relationship with the intended mother. For the Court, the rejection and consequent decision to separate the child from the couple, and declaring it eligible for adoption, constituted a violation of Art 8 ECHR.[18]

Following its previous pronouncements,[19] the Strasbourg court reaffirmed

existence of an unlawful intrusion into private and family life – prohibited by Art 8 ECHR – following the refusal of the French Court of Cassation to register the civil status of two couples of spouses, who, due to the sterility of their partners, both resorted to gestation via implant (with oocytes not belonging to the surrogate mother) in the United States using the male gametes of the clients.

[16] As for the role of the *best interest of the child* in the rationale of the ECHR, see B. Casalini, 'Nel *best interest* dei bambini e delle madri surrogate', in *Cambio: rivista sulle trasformazioni sociali*, V, 9, 30-31 (2015), as well as L. Vizzoni, 'Quando il *best interest* del minore azzera la verità biologica. Riflessioni a partire dal caso Paradiso e Campanelli contro Italia', available at www.juscivile.it, 639 (2015).

[17] Eur. Court H.R., *Paradiso and Campanelli* v *Italy*, available at www.hudoc.echr.coe.it. In this regard, see I. Rivera, 'Affaire Paradiso e Campanelli c. Italie. La Corte Edu torna a pronunciarsi sulla maternità surrogata e sul best interest of child come linite all'ordine pubblico internazionale', available at www.federalismi.it, *Focus Human Rights*, 3-10 (2005), As well as O. Feraci, 'Maternità surrogata conclusa all'estero e convenzione europea dei diritti dell'uomo: riflessioni a margine della sentenza Paradiso e Campanelli C. Italia' 7 *Cuadernos de Derecho Transnacional*, 424 (2015).

[18] It should be noted that, at almost the same time as the *Campanelli and Paradiso* judgment, Italian justice had found itself facing the criminal implications of surrogacy, and, in good governance of the principles elaborated by the Court of Strasburg, had come to exclude the criminal aspect of this conduct. In this regard, see the Court of Cassation, Criminal Section VI, judgment no 48696 which states that 'the criminal offence referred to in Art 567, second paragraph, of the Criminal Code must be excluded in the case of declarations of birth made under Art 15 of DPR 396/2000 with regard to Italian citizens born abroad and made consular authority on the basis of the certificate drawn up by the Ukrainian authorities who designate them as parents, in accordance with the rules established by local law'. The ruling of the Supreme Court had been anticipated in some judgments of the ordinary courts, including Milan, with a judgment of 15 October 2013, and the Varese Court on 8 October 2014, both available at www.dirittopenalecontemporaneo.com. In scholarship see the comment of S. Tonolo, 'La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore' *Rivista di diritto internazionale privato e processuale*, 81-96 (2014).

[19] See Eur. Court H.R., *Moretti and Benedetti* v *Italy*, Judgment of 27 April 2010, available at www.hudoc.echr.coe.it; Eur. Court H.R, *Havelka and others* v *Czech Republic*, Judgment of 21 June 2007, available at www.hudoc.echr.coe.it; Eur. Court H.R., *Wallová and Walla* v *Czech*

the need for a decision-making process culminating in the adoption of fair measures regarding the private and family lives of the citizens able to take into account all the interests considered in Art 8. A *jus receptum* in the case law of the ECHR is represented by the necessity to place them in the context of a *democratic society*, in which it is the task of the public institutions to guarantee a fair balance between general and private interests. These can be linked teleologically to the right to respect for private and family life,[20] guaranteed, as mentioned, by Art 8 ECHR.[21]

It follows that, in order to legitimately adopt such an invasive measure of taking the child and entrusting it to the social services, it is necessary to establish that the minor is exposed to an immediate and not otherwise avoidable peril.[22] The Court clarified that the article in question does not only work in the negative sense, preventing arbitrary interference by public authorities to the detriment of the individual; it also has a positive meaning, acting as a source of obligations to ensure effective respect for family life. Once the existence of a family connection is clarified, the State is required to ensure that this link can be consolidated,[23] adopting *ad hoc* measures when necessary.

It should be emphasised that, following the Court's approach, in order to

Republic, 26 October 2006, available at www.hudoc.echr.coe.it.

[20] See, among many, Eur. Court H.R., *Wagner and JMWL*, Judgment of 28 June 2007, paras 133-134, available at www.hudoc.echr.coe.it; Eur. Court H.R., *Mennesson* v *France* n 15 above, para 81; Eur. Court H.R., *Labassee* v *France*, Judgment ot 26 June 2014, para 60, available at www.hudoc.echr.coe.it.

[21] Obviously, the extreme vagueness of the concept of private and family life escapes no one. On the other hand, the whole framework of the Convention is scattered with broad and indeterminate formulas, to the point that, for the most authoritative legal scholarship, it can be defined as *'a very generic catalogue'* of rights. The expression is used by V. Zagrebelsky, 'Corte, convenzione europea dei diritti dell'uomo e sistema europeo di protezione dei diritti fondamentali' *Il Foro Italiano*, I, 253-560 (2006). It must not be imagined that the noted general nature of the norms of the Convention is the result of faulty technique in the preparation of the rules; it is, in fact, a deliberate choice of the drafters of the ECHR, in order to create a framework with a view to favouring a case-study approach by the Court, while guaranteeing the necessary elasticity so that the rules can easily be adapted in the light of social, economic and cultural change. In this regard, see S. Bartole et al, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali* (Padova: CEDAM, 2001), 307.

[22] See Eur. Court H.R., *Scozzari and Giunta* v *Italy*, Judgment of 13 July 2000, para 148; Eur. Court H.R., *YC* v *United Kingdom*, Judgment of 13 March 2012, paras 133-138; Eur. Court H.R., *Pontes* v *Portugal*, Judgment of 10 April 2012, paras 74-80, all available at www.hudoc.echr.coe.it. See Eur. Court H.R., *Dewinne* v *Belgium*, Judgment of 10 March 2005; Eur. Court H.R., *Zakharova* v *France*, Judgment of 13 December 2005, all available at www.hudoc.echr.coe.it. The underlying principles of the aforementioned rulings are brought together and analysed in the literature by C. Masciotta, 'L'allontanamento del minore come *extrema ratio* anche in caso di maternità surrogata: la Corte di Strasburgo condanna l'Italia per violazione della vita familiare' *Rivista Aic*, 2-21 (2015).

[23] See Eur. Court H.R., *Eriksson* v *Sweden*, Judgment of 22 June 1989, para 71; Eur. Court H.R., *Olsson* v *Sweden*, Judgment of 27 November 1992, para 90, and, more recently, Eur. Court H.R., *Neulinger and Shuruk* v *Switzerland*, Judgment of 6 July 2010, para 140, all available at www.hudoc.echr.coe.it. See also G. Ferrando, 'Genitori e figli nella giurisprudenza della Corte Europea dei Diritti dell'Uomo' *Famiglia e diritto*, 1049 (2009).

constitute a family bond deserving of protection, the existence of a formal legal link among *partners* should be disregarded; in this way, the phenomenological concept of family life is reduced to any factual situation where family ties that need to be maintained and protected may emerge.[24]

A fortiori, it must be recognised that the scope of Art 8 ECHR has been much extended by the Strasbourg Court[25] to encompass the ability to establish and maintain family relationships not necessarily characterised by the bond of cohabitation, as well as the right to identity and legal status.[26] It is worth pointing out, however, that the broad interpretation of the concept of family life envisioned by the Court of Strasbourg, regardless of its abstract commendability,[27] refers to cases in which the existence of a genetic link between the child and at least one of those who claim to be his or her parents is ascertained, and where one of the possible forms of surrogacy is therefore present.

From this perspective, the role that must be attributed to Art 8 ECHR is clear, as in the case of Strasbourg case law, the interpretation of which performs a unifying function in the family law system: it allows the identification of a minimum level of protection, below which no adherent State may abut under penalty of infringing fundamental rights and freedoms.[28] The case is even more complex when no genetic link between the minor and the alleged parents is ascertained; in this case, the lack of a biological relationship with at least one of the parents inevitably involves a change of perspective, since it brings before the court a case that has numerous points of contact with adoption, which differs

[24] This phrase is first found in the historical at Eur. Court H.R., *Marckx* v *Belgium*, Judgment of 13 June 1979, available at www.hudoc.echr.coe.it.

[25] The Strasbourg Court proposes and develops in *Campanelli and Paradiso* v *Italy*, also through a learned survey of previous case law in this direction, stating that '*La notion de 'famille' visée par l'art. 8 ne se borne pas aux seules relations fondées sur le mariage, mais peut englober d'autres liens 'familiaux' de facto, lorsque les parties cohabitent en dehors de tout lien marital et une relation a suffisamment de constance*' (Kroon et autres v Pays-Bas, 27 October 1994, § 30, série A no 297-C; *Johnston et autres* v *Irlande*, 18 December 1986, § 55, série A no 112; *Keegan* v *Irlande*, 26 May 1994, § 44, série A no 290; *X, Y et Z* v *Royaume-Uni*, 22 April 1997, § 36, Recueil 1997 -II)'.

[26] As regards the scope of Art 8 ECHR in relation to the family, please refer to the contribution of G. Ferrando, 'Diritti delle persone e comunità familiare nei recenti orientamenti della Corte Europea dei Diritti dell'Uomo' *Famiglia persone e successioni*, 281 (2012).

[27] For a critique in this regard, see the study by F.D. Busnelli and M.C. Vitucci, 'Frantumi europei di famiglia' *Rivista di diritto civile*, 267-277 (2013), which highlights the role played by Art 8 ECHR in the broader phenomenon of the destructuring of the family. In particular, the increasingly frequent opposition, in the argumentative framework of the Strasbourg Court, between the traditional archetype of the family and a 'liberal' family model, which, in our reading, is based on an excessively broad reading of Art 8 ECHR, as a result of which the concept of family life loses its ontological identity, ending up being confused with one of the variants into which the notion of private life is subdivided, thus giving rise to an extremely individualistic vision, ignoring altogether the individual's membership of a family community.

[28] Thus, scholars have found in Art 8 ECHR a 'safety valve in the system, proving that it is well suited to a wide and multifaceted case history, which ranges from family reunification to the protection of de facto bonds, up to the recognition of the particular protection that the minor deserves' see. L. Vizzoni, n 16 above. In a similar vein, see G. Ferrando, n 16 above, 1049-1050.

from filiation, despite their similarities.[29] It comes as no surprise then, that in the cases just mentioned, the hermeneutic criterion of reference is not the value of the 'peace of family life', but the different principle of the best interest of the child, which constitutes a standard normally used in adoption cases.[30] Italian law has followed the interpretative orientation of the international courts, as illustrated by a number of judgments in which the Italian Supreme Court of Cassation, by reiterating the priority of the interest of the child, has found innovative solutions, mainly seeking to put into practice the legal protection of *de facto* families.[31] Nevertheless, two years after the ECtHR ruling, an appeal was lodged by the Italian Government before the Grand Chamber. The latter, with ruling[32] 24 January 2017 no 25358/12, overturned the approach of Strasbourg, recognising that the Italian authorities had not infringed Art 8 of the ECHR and the lawfulness of entrusting the child to social services before passing it on to another family. The detailed rationale did not underline the existence of a *de facto* family, nor did the court challenge the firm desire of the applicants, who had assumed their parental role from the start, to become actual parents. Rather, the focus was on the duration of the relationship with the child (six months starting from arrival in Italy preceded by a period of two months in Russia in the company of the intended mother). Although the Court rejected the principle that a family relationship must have a minimum duration in order to be defined as such, it nevertheless considered that the time elapsed had been too insignificant to cause permanent damage to the child as a result of being placed in the custody of other parents. The Court also ascertained the firm will of the couple to engage in prohibited behaviour in the country where they later decided to settle and the objective danger recognised by the Italian government to clearing customs, a

[29] P. Zatti, 'I nuovi orizzonti del diritto di famiglia', in G. Ferrando et al eds, *Trattato di diritto di famiglia,* under the direction of P. Zatti (Milano: Giuffrè, 2011), 3-19.

[30] This Gordian knot is also present in Italian case law, as may be seen from Judgment of Corte di Cassazione 11 November 2014 no 24001, *Il Foro Italiano*, 3408-3410 (2014), with a note by G. Casaburi, and in www.dirittoegiustizia.it, with a contribution by A. Di Lallo, 'Madre è colei che partorisce. Dichiarato lo stato di adottabilità del minore nato dall'accordo di maternità surrogata'. In this judgment, the Supreme Court, specifically due to the ascertained lack of biological relations with the minor, upholds the conflict between public order and surrogate motherhood – already prohibited by the law on medically assisted procreation, going to far as to affirm that choices on this matter fall into a sphere that is solely the province of the legislator, without the possibility of interference by any part of the judiciary.

[31] In particular, the case law of the Supreme Court has had occasion to apply the above principles, above all in relation to the issue of the possibility for homosexual couples to obtain custody of children. In this regard, see Judgment of Corte di Cassazione 11 January 2013 no 601, *Famiglia e diritto*, 570-585 (2012), with a contribution by F. Ruscello, 'La convivenza omosessuale di un genitore non può costituire ex se un ostacolo all'affidamento dei figli al medesimo genitore'. The same sensitivity has also underpinned decisions by ordinary courts, such as the Tribunale di Bologna 10 November 2014, *Nuova giurisprudenza civile commentata*, II, 387 (2015). See L. Balestra, 'Affidamento dei figli e convivenza omosessuale tra "pregiudizio" e interesse del minore' *Corriere giuridico*, 893-910 (2013).

[32] See https://tinyurl.com/y9jew899 (last visited 27 December 2020).

practice that risked overshadowing that of child trafficking. For these reasons, the Grand Chamber departed from the previous judgment, arguing that:

> 'The Court does not underestimate the impact which the immediate and irreversible separation from the child must have had on the applicants' private life. While the Convention does not recognise a right to become a parent, the Court cannot ignore the emotional hardship suffered by those whose desire to become parents has not been or cannot be fulfilled. However, the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Court accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case'.

While it is true that the merit of emphasising the notion of family life must be ascribed to the ECHR, it is also undeniable that the concept of best interest[33] of the minor is not found in the Convention,[34] whereas the Nice Charter refers to it expressly.[35] Therefore, the hermeneutic attitude of the Court of Justice of

[33] The expression '*best interest of the child*' appears for the first time in the international context in the United Nations Declaration on the Rights of the Child of 1959, to be taken up again in 1979 on the occasion of the beginning of the works for the drafting of the text of the Convention on the Rights of the Child. For a historical recognition of the concept of *best interest of the child,* see C. Focarelli, 'La convenzione di New York sui diritti del fanciullo e il concetto di "best interests of the child" ' *Rivista di diritto internaz*ionale, 981 (2010).

[34] R. Conti, 'Alla ricerca del ruolo dell'art. 8 della Convenzione europea dei diritti dell'uomo nel pianeta famiglia', available at www.minoriefamiglia.it.

[35] Art 24, para 2, states that, 'In all acts relating to children, whether they are carried out by public authorities or private institutions, the best interests of the child must be considered paramount'. The provision in question should be read in conjunction with the said paragraph, according to which, 'Every child has the right to maintain regular personal relationships and direct contact with both parents, unless this is contrary to its interests'. Furthermore, the Community legislator had attempted to affirm the centrality of the best interest of the minor within the family community. This was demonstrated by the European Parliament's resolution on the proposal for a Council regulation on jurisdiction, recognition, and enforcement of decisions in matrimonial matters and in questions of parental responsibility, containing a specific article dedicated to the Best interest of the child, stating, 'In all judicial decisions relating to children, the best interest of the child must be considered paramount'. The opinion on the proposal, delivered by the Economic and Social Committee on 18 September 2002, stressed that, 'the interests of the child are difficult to define, but there is no doubt that it should be paramount. Although it can sometimes be difficult to determine the child's best interests after listening to the effect of age, the immaturity or undue parental influence, it is important to always try and do it anyway. The parents' point of view (often in conflict) is not always useful to clarify what satisfies the best interests of the child, as they sometimes confuse their emotional needs with those of their children and othe times they use them

the European Union (CJEU) comes as no surprise, having been repeatedly called upon to negotiate the weight to be attributed to the interest of the child, in order to establish whether it should be understood as an absolute value, not susceptible to reconciliation with other possible interests of the parties. According to the consolidated case law of the Luxembourg Court, in matters of family unity, the interest of the child certainly rises to a primary rank, but this does not imply that it should be granted unconditional pre-eminence in cases of conflict with other needs, since the public authorities of the single States must recognise the power/duty to wait for a 'balanced and reasonable assessment of all the interests involved, taking into account especially those of the minors concerned'.[36]

A methodological consideration is required with regard to evaluating the hermeneutic contribution offered by the case law of international courts, underlining how both the Strasbourg and the Luxembourg courts recognise the existence of an unavoidable margin of discretion[37] to the by Member States, given that, as we have seen, the protection of the right to peaceful family life and promotion of the *best interest* of the child has never been semantically elevated to the extent of saying that they should always prevail.[38] Indeed, in *Labassee* v *France*, the applicants had challenged the refusal of the French authorities to register a birth certificate. It should be borne in mind that the refusal was rooted in the prohibition of recourse to surrogacy techniques. The parents, therefore, had not raised the issue of compatibility of the aforementioned ban with the ECHR, since the complaint was intended to raise the issue of possible violation of the rights of the child as a result of the lack of recognition of the *status filiationis* by French authorities and the failure to issue the pertinent documents.[39] So, the *thema decidendum* did not adhere at all to the issue of whether the ban on surrogacy operating in France was legitimate or not, and indeed, in an *obiter dictum,* the Court underlined the legitimacy of the French legislation prohibiting the transcription of civil status documents in surrogate motherhood cases. From this point of view, the Strasbourg judges observed no violation of Art 8 ECHR but, conversely, considered the refusal reasonable as a way of discouraging citizens

as a bargaining chip'. It was hoped therefore that the Commission would work in order to 'coordinate the settling of the issue by the various national courts, through cooperation in the European Judicial Network. The Committee also recommends that national governments ensure that the training of legal practitioners also includes practical knowledge of children's rights, as an integral part of human rights identified in them'.

[36] See CJEU, 6 December 2012, case C-356/11 and C-357/11, *Maahanmuuttovirasto,* where the correct interpretation of Art 7, para 1, letter *c*) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification is discussed.

[37] This statement is also shared in Spanish scholarship, commenting on *Campanelli* v *Italy*, see A.J. Sanchez Vela, '¿Ha variado el TEDH su Doctrina favorable a los convenios de gestación por sustitución realizados en países que legalmente los permiten? (A propósito de la Sentencia de la Gran Sala del TEDH de 24 de enero de 2017)' *La Ley,* 15-24 (2017).

[38] In these terms, Case C-540/03 *Parliament* v *Council* of 27 June 2006 and Case C-403/09 *PPU* v *Detiček* of 23 December 2009.

[39] See S. Aceto di Capriglia, n 1 above.

from using a method of procreation prohibited on the national territory. *Mutatis mutandis*, they did not deny that there is interference by the public authorities in the private lives of individuals, but they acknowledged the full legitimacy of such interference, this being considered in line with the goals set out Article 8 of the ECHR, ie the protection of the health, rights, and freedoms of others. Otherwise, the interference is unjustified if you look at it from the perspective of the minor, in whose legal sphere the failure to recognise the *status filiationis* and the refusal of citizenship may produce significant judicial effects, which are not justified by the exceptional requirements indicated by Art 8 of the Convention. See, for example, the *vulnera* that arise in relation to inheritance rights, or obstacles related to the recognition of parental relationships, to which the Court attaches a primary role in the structuring of the personal identity of individuals.[40]

We can therefore agree with those scholars stating that, in terms of filiation, the use of discretionary power by public-sector authorities is destined to be reduced, since the identity of the individual is more important. Nonetheless, it is worth pointing out that a discretionary limitation of the powers of the public authorities does not mean automatically denying them any possibility of intervention, which indeed becomes even more important, albeit within the limits established by the criterion of reasonableness.

If the case law of the international courts affirms that the decision to deny *status filiationis* to a child conceived through surrogacy is harmful to the right to peace of family life,[41] it is still risky to see, in such a claim, a general recognition of the legitimacy of such a practice, and, even less, the formulation of an obligation on the Member States to legitimise recourse to surrogate motherhood. In terms of interpretation, the hermeneutic contribution offered by international courts requires the interpreter to establish at least two fixed points of reference: the first is the recognition that judicial intervention regards aspects that, on a logical-legal level, arise after the decision to undergo gestation techniques on behalf of others, since, as we have seen, the *dicta* analysed do not prejudice the assessment of the lawfulness or illegality of such practices operated by individual national systems. Secondly, the perspective from which courts deal with the question of the infringement of the right to peaceful family life is not that of the parents, who, in order to fulfil their own parenting project, resort to practices prohibited by the laws that they live under. Rather, they consider the interests

[40] See Mennesson v France n 15 above, para 99, '*les effets de la non reconnaissance en droit français du lien de filiation entre les enfants ainsi conçus et les parents d'intention ne se limitent pas à la situation de ces derniers, qui seuls ont fait le choix des modalités de procréation que leur reprochent les autorités françaises: ils portent aussi sur celle des enfants eux-mêmes, dont le droit au respect de la vie privée, qui implique que chacun puisse établir la substance de son identité, y compris sa filiation, se trouve significativement affecté*'; in the same terms, see Labassee v France n 20 above, para 78.

[41] This happened in the aforementioned *Mennesson* v *France* case, referred to in M. Di Masi, 'Maternità surrogata: dal contratto allo "status" ' *Rivista critica di diritto privato*, 615-623 (2014).

of the children conceived by means of such practices, and this occurs, now, by referring Art 8 ECHR not to the entire familiar nucleus but only to children, by invoking the canon of *best interest*. In conclusion, from an examination of the international case law, a hermeneutic cue can be drawn that may be useful in choosing the correct methodological approach to adopt, requiring the problem to be addressed not from the perspective of the 'customer' couple, which can lead to the unreasonable assumption of a right to reproduce at all costs but a child-centred reading, focusing on the search for a legal framework able to satisfy the primary interests of the baby, regardless of how it was conceived.

II. A Comparative Overview

Clearly, the phenomenon of surrogacy involves very delicate meta-juridical aspects bordering the fields of morality, philosophy and religion. This makes the identification of a uniform solution by international courts impossible. The ample room left to the sensitivity of the national legislative bodies determines a range of inevitably diversified solutions, which requires comparative study not only on the theoretical plane, but also in terms of practical issues. A ban in some countries, in fact, does not entirely preclude couples from fulfilling their aspirations to parenthood, as they are able to take advantage of favourable legislation in foreign States, giving rise to the well-known phenomenon of *procreative tourism*.

Starting with an examination of the continental context, one study conducted by the European Parliament[42] reveals an interesting tripartite division within EU countries: in one group of Member States, the practice of surrogate motherhood is totally prohibited. A second group has legislation to regulate access to, and the legal consequences deriving from, surrogacy. Finally, a third group is characterised by a narrower prohibition on profit-making surrogacy agreements. Within the first group, Austrian law stands out in particular. Here, the prohibition of surrogate motherhood is not affirmed explicitly in law, but may implicitly be deduced from the provision whereby, in the event of *in vitro* fertilisation only the oocytes and spermatozoa of the cohabiting partner may be used, being implanted only in the woman from whose body they are taken.[43]

Under the German legal system, leaving aside criminal law,[44] the civil

[42] See Policy Department. Citizens' rights and Constitutionals affairs (2013). A comparative study on the regime in EU Member States, European Parliament.

[43] In this sense, Art 3 of the federal law with which assisted reproduction was introduced ('Bundesgesets mit dem Regelungen über die medizinich Fortpflanzung'). However, the donation of embryonic cells from a third party is allowed, provided that the agreement is officialised by means a notarial act and authorised by the judicial authority. On this point, see A. Ciervo, 'Il divieto di fecondazione eterologa davanti alla Corte di Strasburgo: un campanello d'allarme per la legge 40?' *Università degli Studi di Perugia. Dipartimento di Diritto pubblico*, 5-15.

[44] For this purpose, a complementary rule, called *Embryonen Schutzgesetz* (law for the protection of the embryo) is highlighted, which, unlike in Italy, criminalises the act whereby a doctor

consequences of recourse to surrogacy are directly inferred from the interpretation of the Fundamental Law, which is accompanied by the Guidelines on assisted procreation issued in 2006, containing a ban on gestation for others. Looking at the case law, it should be noted that the German courts have made some hermeneutical openings, as evidenced by some judgments handed down by the Federal Court of Justice,[45] which allowed a same-sex couple to have the birth certificate of a child conceived by means of a surrogate pregnancy transcribed in the civil registry.

The approach to the theme of pregnancy in French law is more systematic, starting from the taxonomic position of the institution, included in the *Code civil*.[46] In more detail, the combined provisions of Arts 16-7 and 16-9, express the absolute prohibition of surrogate motherhood, expressly defined by the legislator as a prelude to public policy.[47]

Moving on to examine the legal systems in which recourse to surrogacy is allowed and juridical consequences are also established, Greece, *in primis,* stands out because of its regulatory apparatus, with its significant ethical character, since recourse to 'gestation on commission' is subject to altruistic intentions. This is inferred from the combined provision of two laws[48] by virtue of which the practice in question is conceived as a tool to remedy serious pathologies suffered by the intended mother,[49] and no real asset is due to the pregnant woman, but a sum of money may be paid out as a reimbursement.

1. The Spanish Experience

The Spanish legal system is extremely interesting, since it allows us to observe a close similarity with the Italian system in terms of the underlying methodological approach to the problem of surrogacy. In Spain, there is a profound gap between the legal regulations concerning the various assisted fertilisation techniques and the current situation regarding childbearing for others, with the result that while the former is clearly provided for in law,[50] the latter is

facilitates surrogacy, excluding, on the other hand, any criminal implication regarding the conduct attributable to the leased mother or the 'clients'.

[45] On the *Bundesgerichtshof (BGH)* ruling, see the commentary by M. Costantini and M.P. D'Amico, *L'illegittimità costituzionale del divieto di "fecondazione eterologa"* (Milano: Giuffrè, 2014), 338-339.

[46] In fact, the *loi de bioétique* of 29 July 1994 (amended in 1994 and in 2011) brought a change to Chapter II of the *Code*, 'of the human body', revolving around Art 16, which states that 'the law ensures the primacy of the person, prohibits any attack on the dignity of the same and guarantees respect for the human being from the beginning of his life'.

[47] The first provision, in fact, states that 'all surrogacy agreements are null'; the second, on the other hand, seeks to specify that 'the provisions of this chapter regard public order'.

[48] These are, specifically, Law no 3089/2002 and Law no 3305/2005.

[49] Specifically, gestation for others is allowed when the woman has no uterus or ovaries, or if the woman suffers from potentially lethal illness. For completeness, it should be noted that in both cases, the Greek legal order precludes access to surrogate motherhood for homosexual couples.

[50] The topic is examined in depth in S. Aceto di Capriglia, 'La stepchild adoption e il fenomeno

strictly prohibited.

Indeed, Art 10, para 1, of law 26 May 2006 no 14,[51] in the light of the provisions of Art 10 of law 22 November 1988 no 35[52] on the subject of assisted procreation, establishes the total nullity of contracts expressing the *ex-ante* renunciation of the configuration of a subsidiary maternal relationship between the pregnant woman and the unborn child. It should be pointed out that the nullity in question must be ascribed to the dogma of virtual nullity, regardless of the provision or otherwise in favour of the woman who hands over the child.[53] As a result of successive prohibitions, once contractual nullity has been established, Spanish law prescribes that the *status filiationis* must be determined on the basis of natural childbirth;[54] it follows that the status of mother can only be attributed to the woman who gives birth to the child and never to the woman who commissioned the birth. This is because the Spanish legal system considers the commerce of motherhood and reproductive functions to be contrary to public order, so that the invalidity of contracts of this kind arises from the principle that the human body is inalienable in all its parts.[55] Some scholars state that such a contract is in conflict with the principles of human dignity. Far from being considered a merely ethical concern, this aspect constitutes a solid regulatory base, found in Art 10, para 1, of the Spanish Constitution of 1978, whose very purpose is to protect human dignity. However, although faced with such a rock-solid regulatory landscape, Spanish scholars strive to offer innovative readings in line with the approaches of international courts. *In primis,* they[56] complain that the majority position omits to find a balance between the principle of inalienability of family status, protected, as we have seen, by the prohibition of surrogacy, and the principle of free expression of human personality, from which one can derive an (alleged) right to reproduction. The main argument put forward in support of the anti-prohibitionist thesis is countered by the last part

delle coppie same sex nel diritto europeo contemporaneo', available at www.federalismi.it, 1-22.

[51] Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida, published in the Boletìn Official de Estado (BOE) on 27 May 2006 no 126.

[52] Published in the BOE on 24 November 1988.

[53] The normative provision states precisely that '*Será nulo de pleno derecho el contrato por el que se gestación, con or sin precio, a cargo de una mujer que renunciata a la filiación materna in favor of the contractor or a tercero*'. In this regard, see F. Pantalèon Prieto, 'Contra la Ley sobre Tècnicas de Reproducciòn Asistida' 5 *Jueces par la democracia*, 27-28 (1988).

[54] Art 10, para 2, of law no 14/2006 establishes that in this case '*La filiación de los hijos nacidos por gestación de sustitución será determinada por el parto*'.

[55] On this specific profile of damage to public order see the widespread arguments of V. Bellver Capella, 'Nuevas tecnologías? Viejas explotaciones. El caso de la maternidad subrogada internacional' *Revista de Filosofia, 19-52 (*2015); E. Corral Garcìa, 'El derecho a la reproducción humana. ¿Debe permitirse la maternidad subrogada?' 38 *Revista de Derecho y Genoma Humano*, 69 (2013).

[56] Among the many authors who have addressed the issue, see L. Àlvarez De Toledo Quintana, 'El futuro de la maternidad subrogada en España: entre el fraude de Ley y el correctivo del orden público internacional' 2 *Cuadernos de Derecho Transaccional*, 39 *(*2014); M.P. Garcìa Aburuza, 'A vueltas con los efectos civiles de la maternidad subrogada' *Revista Aranzadi Doctrinal*, 97-111 *(*2015).

of the above-mentioned Art 10, para 2, of Law 14/2006, which, in addition to establishing the nullity of surrogacy agreements and the consequent attribution of motherhood to the woman who gives birth to the child, is nevertheless open to the possibility that the 'customer' father may obtain recognition of paternity. Upon recognition, the partner of the biological father is entitled to adopt the child, and thus the 'intentional' mother will establish a parent-child relationship with a child born to another woman, acquiring the consent of the latter without making it necessary to activate the complex procedure of having the child declared eligible for adoption pursuant to Art 176 of the *Codigo civil*.

Therefore, Spanish legal scholarship, while not challenging the rationale underlying the ban, outlines, through systematic interpretation, ways of safeguarding their aspiration to parenthood, giving life to a delicate work of balancing, which, has also made headway in recent case law.[57]

The first part of the ruling of 2014 sets out the arguments whereby it can be argued that registering a relationship of filiation (not corresponding to biological reality) is in breach of the public order, not only by virtue of Art 10 of Law no 14/2006, but also of the supreme principals, including the dignity of women and children. In the light of these fundamental values, the generalisation of institutions such as adoption or assisted fertilisation can never be a prelude to the reification of pregnant women and unborn children. Such a scenario is considered all but remote; indeed, it is highly likely that, following the removal of the ban, the work of intermediaries may well be facilitated in their speculative intent to take advantage of the difficult situation in which some women find themselves, pushing them into surrogacy. Nor must we neglect the discriminatory effect that would probably ensue, given the high cost of those techniques, which would be accessible only to wealthy couples.[58] The Spanish courts also show awareness of the doctrinal principle[59] whereby affirming the absolute nullity of surrogacy agreements would

[57] This refers to the ruling adopted by the Supreme Court (see *STS,* 6 February 2014*,* in *Tol* 4100882) in a case relating to a male couple who had resorted to a surrogate motherhood procedure in California.

[58] This concern was promptly noted also in Italian doctrine, as acutely observed in G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 115-116. The authors textually specify: 'if it is true that – reasoning ex post facto by virtue of the need to balance the values at stake – it is possible to admit the recognition of surrogacy taking place abroad, it is also true that this leads to discrimination against poorer citizens who find it impossible to have children. The latter cannot – for economic reasons – bear the costs of procreative tourism (still a criminal offence in Italy) and will find themselves subordinated to those who, on the other hand, have this possibility and, going abroad, also escape criminal punishment'.

[59] On this point, reference should be made to the reflections of J. Ramòn De Verda y Beamonte, 'La filiaciòn derivada de las técnicas de reproducciòn asistida (un anàlisis crìtico de la experiencia jurìdica española, treinta años depuès de la aprobacìon de la primera regulaciòn legal sobre la materia)' *Diritto successioni e famiglia*, 334 (2018). Against M. Nùñez Bolaños et al, 'El interés del menor sustitución y los supuestos de discriminación en la maternidad subrogada, entre la realidad jurídica y la ficción' 29 *Derecho Privado y Constitución*, 259-260 (2015).

not be a *vulnus* in relation to the minor's interests.[60] Having said that, the Madrid Court, referring to Art 10, para 2, of Law no 14/2006, highlights that this provision constitutes a solid textual basis for offering legal recognition to the relationship between the 'client' couple and the child, firstly through adoption, which gives the biological father the chance to adopt the child with the consent of the pregnant woman, and secondly through the institution of the custody of minors in a state of moral and material abandonment. Simply on the basis of the above-illustrated *ratio decidendi*, in a subsequent decision[61] relating to an incident in the execution of the previous one, the Spanish Supreme Court denied that this ruling is in conflict with the principles established by the ECHR in the well-known *Mennesson* and *Labassee* case, which culminated in a judgment against France for infringing the right to peace of family life. The Court says that the French legal system had drastically interfered with the recognition of a legally significant relationship between the child and the 'intentional' parents, given the impossibility of both transcribing a birth certificate drawn up in the United States and of establishing a bond of parenthood through adoption.

Therefore, according to the Court of Madrid, the rulings of the Strasbourg court, rightly understood, do not require outright recognition of the parent-child relationship established by the birth certificate of the country where the birth took place, but merely require that the person born enjoys certain identity and a defined legal status in the State where (s)he will reside. This is already ensured in the Spanish system through the adoption procedure referred to in the aforementioned Article 10, para 2, of Law no 14/2006, which, as repeatedly stressed, legitimises the adoption by the biological father. Nor can the importance of some administrative acts be neglected, given their undoubted impact on the matter in question, since they grant a *minimum* legal protection to the relationship between the 'client' parents and children. In this context, the Regulation issued on 5 October 2010 by the General Directorate of Registrars and Notaries is of particular note;[62] it establishes a *summa divisio* between foreign judgments and mere administrative acts issued by foreign authorities.[63] In the guideline,

[60] Moreover, before addressing the substantive aspects of the question, it should be noted that, from the methodological point of view, it is certainly correct to see in the interest of the child a means to fill the legislative gaps, but at the same time, it is undoubtedly wrong to think that it can be used as a tool to arrive at solutions *contra legem;* and indeed, this solution contradicts the hierarchy of sources clearly outlined in Art 117, para 1, of the Spanish Constitution, which subjects the judiciary to the rule of law.

[61] ATS, 2 February 2015 no 335, appeal no 245 of 2012, available at www.poderjudicial.es.

[62] See J. Ramòn De Verda y Beamonte, 'L'impatto dei principi costituzionali e del diritto convenzionale europeo sullo status dell'embrione e della filiazione nel diritto spagnolo', in P. Perlingieri and G. Chiappetta eds, *Questioni di diritto delle famiglie e dei minori* (Napoli: Edizioni Scientifiche Italiane, 2017), 269.

[63] It should be pointed out that the distinction made in the *Instrucción* follows the interpretive route suggested in authoritative scholarship, see. A.J. Vela Sanchez, 'Los hijos nacidos de convenio de gestación por sustitución no pueden ser inscritos en el Registro Civil español, (A propósito de la Sentencia del Tribunal Supremo de 6 de febrero de 2014)' *La ley,* 1264, 9 (2014).

the GDRN did not hesitate to explain that the mere presentation of a birth certificate issued by a foreign Authority does not bestow eligibility for transcription in the Spanish register of births (still less, therefore, may it be possible when applicants submit a simple statement of the birth, accompanied by a medical certificate). On the other hand, as a necessary but not sufficient condition for the Spanish authorities to accept the application for registration of the birth certificate, prior issuance of a judicial ruling by the local court declaring the existence of a relationship of filiation is required. This ruling must therefore be subject to the *exaequatur* procedure governed by art 954 *et seq* of the *Ley de Enjuiciamiento Civil*[64] of 2000. In particular, only the intervention of a court can ensure the thorough verification of the capacity of the natural mother, as well as the integrity of her consent, especially with regard to lack of willingness (intentional defect, coercion or error). Last but not least, the court is considered the institution best suited to verify the existence of any contractual simulation, which in this case could constitute a legal screen behind which to hide egregious and illicit child trafficking. The solution proposed by the GDRN has not gained unanimous consent among scholars, who have focused their greatest criticism on the possibility that the *Instrucción* has the effect of encouraging illegal procreative tourism, which will consist in the absolute nullity of the contract, perfectly in line with the general principle that reproductive capacity and pregnancy cannot constitute the object of trade.[65]

Underlining the importance of the topic, and not only of the legal travail that accompanies legislative interventions *in subiecta materia,* it must be noted that on 14 February 2019 a new and more deeply innovative *Instrucción* was issued.[66] This *Instrucción*, in fact, introduced the possibility of allowing the recognition of the *status filiationis* even in the absence of a judicial ruling, solely on the basis of a foreign certification. In order to establish the relationship of filiation, the act in question considers the consent of the pregnant woman and a DNA test, demonstrating the biological origin of the minor with the 'client' father sufficient; thereafter, the intentional mother is entitled to initiate procedures pursuant to Art 177 of the *Código Civil* (on adoption).

However, the provision in question had a very short life, being repealed by a provision[67] of 18 February 2019. This, in turn, led to the revival of the *Instrucción*

[64] The reference is to Law 7 January 2000 no 1, published in the official bulletin of 8 January 2000 no 7, as modified by Law 30 December 2003 no 62, containing fiscal, administrative, and social measures.

[65] The opinion is shared, among others, by E. Corral Garcìa, 'El derecho a la reproducción humana. ¿Debe permitirse la maternidad subrogada?' *Revista de Derecho y Genoma Humano*, 48 (2013); J. Vela Sànchez, 'El interés superior del menor como fundamento de la incorporación de la filiación derivada del convenio de gestación por encargo' *Diario La Ley*, 8162, 3 October 2013.

[66] Found at http://www.migrarconderechos.es.

[67] For a critical comment on the repeal of the aforementioned *instrucción,* see the cutting reflections of A.J. Sanchez Vela, 'Análisis estupefacto de la Instrucción de la DGRN de 18 de febrero de 2019, sobre actualización del régimen registral de la filiación de los nacidos by gestación por

in 2010, obviously triggering arduous questions of intertemporal law,[68] resolved by the application of the *Instrucción* on 14 February only to requests for registration submitted in the very short lapse of time between the approval and the repeal of the aforementioned administrative act. On the other hand, for requests received after the repeal, the innovative *Instrucciòn* must be considered never to have existed, as it has never been published on the BOE.[69]

2. The Conventional High-Performance Family Model in the UK

In the United Kingdom, the problems linked to surrogacy took on prominent social importance as early as 1978, when the case related to the birth of Kim Cotton broke out[70] following *in vitro* fertilization, leading the intellectual community to invoke specific regulations. Hence, the succession of commissions[71] producing several acts, none of which was legally binding, but after them the practice, though non-regulated, could be considered socially tolerated. The *punctum individuationis* of the British discipline on surrogacy is undoubtedly represented by Art 2 of the Surrogacy Arrangements Act of 1985,[72] from whose reading it is easy to deduce a total ban on subrogation for profit.[73] As a result, the English legislator gave the institution of surrogacy a nuance of solidarity, as can be deduced from the penalty prescribed for mediation and sponsorship. Thus, there is no general principle of *pacta sunt servanda* in surrogacy agreements, which rely on the category of natural bonds, so refusal by the natural mother to hand over the new-born baby is not a technical failure, and does not give the intending parents the right to take legal action to obtain any forced transfer of the child.[74]

sustitución' *La Ley,* 7687, 1-15 (2019).

[68] On this topic, see G. Muñoz Rodrigo, 'La filiación y la gestación por sustitución: a propósito de las instrucciones de la DGRN de 14 y 18 de febrero de 2019' *Actualidad Juridica Iberoamericana*, 722-735 (2019). On the identification of the criteria for intertemporal conflicts, please refer to the valuable work of F. Maisto, *Diritto intertemporale* (Napoli: Edizioni Scientifiche Italiane, 2007), passim.

[69] In this sense M.B. Andreu Martìnez, 'Una nueva vuelta de tuerca en la inscripcion de menores nacidos by gestación subrogada en el extranjero: the Instrucción de la DGRN de 18 febrero 2019' *Actualidad Juridica Iberoamericana*, 64-85 (2019).

[70] In detail, Cotton's mother abandoned him before his father recognised the baby. Thus, the problem arose of regulating his fate, given the lack of any regulatory reference in this regard. The judge decided to accept the custody request, thus attributing to the client couple the powers/duties inherent in the care and maintenance of the minor, since, according to the court, only in this way could the primary and essential needs of the child be respected.

[71] The first of these is the 1984 Warnock commission, within which the Warnock Report (Human Fertilization and Embryology) was prepared, which expressed the hope of introducing an absolute ban on surrogacy. Subsequently, the *Brazier* commission took office, which, despite envisaging some openings, did not appear inclined to approve legislation that was openly favourable to gestation for others.

[72] For further information, see D. Morgan, 'Making Motherhood Male: Surrogacy and the Moral Economy of Women' *Journal of Law and Society*, 2, 12 (1985).

[73] On this point, kindly refer to S. Aceto di Capriglia, 'I profili etico-giuridici' n 1 above, passim.

[74] In this context, the learned analysis of C. Purshouse and K. Bracegirlde, 'The Problem of

A fundamental step forward was marked by the *Human Fertilization and Embriology Act* of 1990, which states that surrogacy agreements do not constitute a crime, although they have no legal value. This predication marked a turning point for the courts, which, in view of the surrogacy agreement, may nevertheless entrust the child to the client couple, whenever this solution might appear to be in the best interest of the minor.[75] In order to obtain the recognition of parental status, the client couple must ask the judicial authority to issue a special judicial order called the *parental order*,[76] which requires the presence of a guardian for the interests of the child. However, this must be done within six months of the child's birth, after which the client couple would lose all chances of being declared the parents of the child. Nonetheless, in dealing with the Gordian knot of the mandatory nature (or otherwise) of such a period, the British Courts have shown an approach that gives priority to the best interest of the child, even if this solution is in conflict with the requirement for legal certainty in fixing the conclusion cited above. This is the reason why[77] the issue of the required *parental order* made after the expiry of the six-month period was welcomed, explicitly stating that the interests of the child are superior to the peremptory nature of the deadline.

Once accepted, a birth certificate is drawn up making no mention of the existence of the *parental order,* it being understood that the child, upon coming of age, acquires the right to access to the original birth certificate, from which s/he will have the opportunity to learn the specific mode of conception.[78] Since the surrogate mother is *ipso jure* the parent of the child, only one of the members of the commissioning couple can appear as a parent, as the child cannot be the progeny of three people. It follows that the third member of the client pair will become a parent only upon issuance of the *parental order*. Should it be impossible to obtain the *parental order,* the only alternative is to have recourse to the *Adoption and Children Act of 2002*, to be implemented under the strict control

Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?' 26(4) *Medical Law Review,* 557 (2018). According to the authors, the non-coercibility of the obligations deriving from the surrogate motherhood 'contract' means that the debtor can freely decide to default in relation to the due service, refusing to deliver the minor. In such a case it would be possible to bring, according to this doctrine, the remedy of '*unjust enrichment*' (unjust enrichment, governed in Italian by Art 2041 Civil Code). For further details, see. G. Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd ed, 2015), passim; A. Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd ed, 2011), passim. With particular reference to the non-compelling nature of the obligation to transfer the minor, please refer to K. Wade, 'The regulation of surrogacy: a children's rights perspective' 29(2) *Child and family law quarterly*, 113–131 (2017).

[75] See P. Passaglia, 'La fecondazione eterologa' *Cortecostituzionale.it*, 59 (2014)

[76] In the aftermath of the 'Human Fertilization and Embryology Act' of 2008, this can also be issued to unmarried couples (civil partners and de facto cohabitants).

[77] See https://tinyurl.com/yx9swo52 (last visited 27 December 2020).

[78] The procedure appears to be more complex when the surrogate mother is from a foreign country and the client pair is British, since in this case a further problem arises with regard to verifying whether the conditions provided for by immigration law are respected. It should also be noted that a couple can only obtain the transfer of parental status if they reside in the United Kingdom.

of the social services.[79]

Until 2018, the procedure for issuing a *parental order* could only be initiated by couples united in marriage, cohabitants, or partners in a registered union, meaning that single persons, whether homo- or heterosexual, were excluded. This was brought to the attention of the British Supreme Court, under the suspicion that it was in conflict with Arts 8 and 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.[80] A constitutionally and conventionally-oriented reading of the legal framework of the *parental order* was requested, implying the need to understand whether the reference to a parental couple could also be applied to individuals.[81] After a complicated and slow juridical process, the British Court, while initially assuming a negative stance, declared the regulation to be in conflict with Art 8 ECHR, also subsequent to the intervention of the Health Secretary. At the same time, it also stated that more precise indications and a concrete solution could only come from the legislator.[82]

By accepting the pressing invitation of the judiciary, on 20 December 2018 the British Parliament issued the *Remedial Order* to the *Human Fertilization and Embryology Act* which, by supplementing regulatory section 54A of 2008, expressly expanded the area of application of the *parental order* to individuals, without any distinction regarding the sexual orientation of the applicant. Single individuals, therefore, may obtain a judicial order declaring establishment of the parental relationship under the same conditions as married or cohabiting

[79] For the purposes of adoption, a further court order is required, the so-called *adoption order*.

[80] In particular, the current legislation was challenged for its focus on the unreasonable situation whereby the child would allegedly not enjoy healthy and balanced growth within a mononuclear family, which evidently translated into discrimination against single people, taking into account that, according to an orientation increasingly shared in British social awareness, also the status of the single person should be regarded as a subjective situation deserving legal protection. See the previous *Ghaidan* v *Godin-Mendoza* case (2004) UKHL 30, [2004] 2 AC 557, available at the following address: https://publications.parliament.uk.

[81] According to English legal scholarship, this interpretation is the basis of the intellectual operation known as 'reading down', the foundation of which rests on an evolved meaning of the principle of non-contradiction, by virtue of which, in the interpretation of a rule, a meaning cannot be attributed to it that conflicts with constitutional and conventional values. As has been shown elsewhere, therefore, the hermeneutic test technique goes beyond the boundaries of the classical broad interpretation, posing as a form of constitutionally and conventionally oriented interpretation. On this point, please refer to S. Aceto di Capriglia, 'I profili etico-giuridici' n 1 above, fn 41, where reference is made to the contributions of foreign literature. More generally, with reference to interpretation techniques in Great Britain, please refer, among many, to D. Aviles, 'Arguing Against the Law. Non-literal interpretation in attic forensic oratory' *Dike*, 14, 19 (2011); E.T. Feteris, 'Strategic Manoeuvring with Linguistic Arguments in Legal Decisions: A Disputable Literal Reading of The Law' *International Journal of Law, Language & Discourse*, 106 (2012); B.S. Jackson, 'Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence' 13(4) *International Journal for the Semiotics of Law*, 433 (2000); E.A. Peters, 'Common Law Judging in a Statutory World: An Address' 43 *University of Pittsburgh Law Review*, 995 (1982); S.E. Fish, 'Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes without Saying, and Other Special Cases' 4(4) *Critical Inquiry*, 625 (1978).

[82] See para 30 of the judgment at issue.

couples, regarding which only the further assumption of the consent of the woman giving birth is required. Regulatory intervention is based on recognition of the socio-cultural importance of surrogacy; this recognition is clear in the preparatory work, as can be inferred from the examination of the considerations contained in the accompanying report.[83]

From the combined provisions of court rulings and the regulatory work that have affected the legal scenario in Great Britain in recent years, it emerges that the approach of the UK to the theme of surrogacy deserves a particular mention, since it is undoubtedly a *unicum* in the European panorama.[84] Indeed, in the English legal framework, the use of heterologous fertilization (allowed in the vast majority of European countries), as well as access to surrogacy, with no distinction based on the status of the applicant, which can be constituted both by a couple (married, cohabiting or in a civil partnership) or by a single person is fully granted. No importance is given to the sexual orientation of the person who initiates the procreative practices in question. It follows, therefore, that the dogma of biological descent is superseded, which results in the creation of a hitherto unknown family model, with its foundation in the Convention, thus constituting what is currently one of the most evolved mechanisms for the protection of human rights.

Of course, this is not a perfect system, and critical points can be detected within it, such as, for instance, the lack of legal instruments to oblige the pregnant woman to give her consent to the establishment of the *status filiationis* with the client(s). As a result, the aspiring parent risks seeing his or her aspiration to realise a parenting project hopelessly flounder, with intuitable existential consequences. Nevertheless, such a *status quo* should not necessarily be ascribed to any fault of the legislator, as it is the result of a deliberate political and legislative decision by the British Parliament, seeking to find a solution to the conflict of interests (between the ambition of the clients to become parents and the desire of the parturient to retain the child) in the hands of a prudent balancing operated by

[83] In this document, found at www.legislation.gov.uk, we read: 'Surrogacy has an important role to play in society, helping to create much-wanted families where that might otherwise not be possible. It enables relatives and friends to provide an altruistic gift to people who aren't able to have a child themselves, and can help people to have their own genetically-related children. The UK Government recognizes the value of this in the 21st century, where family structures, attitudes and lifestyles are much more diverse than in the past. Reflecting this approach, the Government recognizes the need to remedy the incompatibility in a reasonable time and has supported a project by the Law Commission to review all surrogacy legislation across the UK, which started in May 2018'. Ultimately, the British legislator appears fully aware of the role that gestation plays for others in English society, also and above all in relation to the profound changes that have affected family structures in the 21st century.

[84] On the subject, A. Stuhmcke, 'Looking backwards, looking forwards: judicial and legislative trends in the regulation of surrogacy in the UK and Australia' 18(1) *Australian Journal of Family Law*, 13 (2004). For a comparison with German law, see M. Daly and K. Scheiwe, 'Individualization and Personal Obligations – Social Policy, Family Policy, and Law Reform in Germany and the UK' 24(2) *International Journal of Law, Policy and the Family*, 177 (2010).

family judges, called upon to resolve specific cases.[85]

3. The Varied North American Model

It must not be imagined that the incoherence of the solutions offered in relation to the issue of surrogacy is a feature unique to a continental legal landscape, as can clearly be seen from a study of the North American context. This overseas fragmentation can be ascribed to the absence of rules specifically dedicated to the institute of surrogacy at federal level; the result, as may easily be understood, is a group of different solutions that reflect the different sensibilities (not just legal) characterising individual States.[86]

Indeed, although a *Uniform Parentage Act,* introduced in an attempt to identify a minimum set-up of family law for the various states of the Federation, does exist,[87] the absence of any specific reference to the issue of reproductive techniques must also be remarked. This has required a special hermeneutic effort by scholars, proceeding from the interpretation of constitutional precepts regarding the protection of privacy[88] and the principle of freedom to procreate.

[85] For further details, see also C. Dalton, 'When Paradigms Collide. Protecting Battered Parents and Their Children in the Family Court System' 37(2) *Family Court Review*, 273 (1999).

[86] In fact, alongside states where there is an absolute and unconditional ban, there are others where access to gestation for others is reserved to married couples, and states where there is absolute freedom, with no distinction regarding the applicant's qualities and personal characteristics, including, therefore, single individuals. In detail, the laws in force in California, Connecticut, Delaware, Columbia, Maine, New Hampshire, Nevada, Rhode Island, Vermont, Washington, South Dakota, and Arkansas (the latter only after an important 2017 legal precedent) are called *surrogacy-friendly* as they are more conducive to allowing surrogacy. Then there are states where surrogate motherhood is also permissible but with limitations, namely Alaska, Colorado, Georgia, Hawaii, Massachusetts, Missouri, Mississippi, Oklahoma, Oregon, Wisconsin, and Virginia. In Alabama, Florida, Texas, Kentucky, Utah and West Virginia surrogacy is accessible only to married heterosexual couples. In Illinois, Maryland, North Dakota, Tennessee, and Idaho the eligibility of surrogacy is subjected to the condition that at least one of the clients has made a contribution at the genetic level, providing the male or female gamete. There are also states with no *ad hoc* regulation, such as Montana, Kansas, North Carolina, and New Mexico, where scrutiny regarding the admissibility of the practice is delegated to the courts, with the consequence that it is conducted on a case-by-case basis. As for Ohio and Pennsylvania, a *parental order* can be requested only after the birth of the child, while in other states it is also admitted earlier. Iowa, Montana and Wyoming have no legislation on the subject, nor is there any sizeable body of case law, so it is not possible to claim either the lawfulness or unlawfulness of the institute. Commercial surrogacy is prohibited in Nebraska, while altruistic surrogate motherhood is envisaged within certain limitations. Finally, surrogacy is totally banned in Arizona, Indiana, Louisiana, Michigan, and New York. For an analysis of the legislation in force in the individual states, see P.R. Brinsden, 'Gestational Surrogacy' 9(5) *Human Reproduction Update*, 483 (2003); A. Nakash, 'Surrogacy' 27(3) *Journal of Obstetrics and Gynaecology*, 246 (2007); R. Deonandan, S. Green and A. Van Benium, 'Ethical concerns for maternal surrogacy and reproductive tourism' 38(12) *Journal of Medical Ethics*, 742 (2012); L. Linzer Schwartz, 'Surrogacy Arrangements in the USA: What Relationships Do They Spawn?', in R. Cook and S.D. Sclater eds, *Surrogacy: International Perspectives* (Oxford: Hart Publishing, 2003), 161.

[87] E. Falletti, *La filiazione. Questioni sostanziali, processuali, internazionali nell'analisi della giurisprudenza* (Matelica: Halley Editrice, 2007) 94-97.

[88] In the interpretation provided by the American Supreme Court, the right to privacy is

Starting from this, it is easy to understand the *favor* accorded to diverse reproduction techniques made possible by the progress of medical science, appearing as a fundamental instrument for the affirmation and realisation of human personality. Thanks to this *favor* we can observe in the US the existence of family models that are very different from the usual ones, based more on contract than on status. Since this is the *humus* in which the North American legal thought developed, the greater application of the *parental order* compared with the homologous institute operating in the British system comes as no surprise. This can be inferred from the non-existence of a fixed term of expiry for the purpose of issuing the aforementioned order, unlike the situation in Great Britain, where, as we have seen, application to the court must be presented within six months of the birth. Even more significant is the absence of any reference to motives of solidarity, since in the states that allow it, surrogacy may be the subject of a real contract; in other words, gestation for another is also allowed when it is supported by eminently lucrative purposes. This means that with it comes the opportunity to apply the legal regime of contract law in full (the so-called 'breach of contract'),[89] on the basis of which, in the event of default by the pregnant woman, the client/parents are entitled to avail themselves of the usual means of protection, including compensation. A further peculiarity of some states lies in the admissibility of a *pre-birth order,* ie a judicial order[90] constituting the *status filiationis,* which can also be recognised from the third month of gestation, therefore before birth. In practice, the Court orders the appropriate health facility to register the clients as parents directly on the birth certificate, so that the parental relationship is immediately established, and the mother maintains no legal and relevant relationship with the baby, even on a temporary basis. Since surrogacy has a clear commercial and patrimonial aspect in some North-American

understood in a sense that immediately brings to mind the reading of the right to peace of family life affirmed by the ECHR.

[89] See, on the subject D.E. Lascarides, 'A Plea for the Enforceability of Gestational Surrogacy Contracts' 25 *Hofstra Law Review,* 1221 (1997), S. O'Brien, 'Commercial Conceptions: A Breeding Ground for Surrogacy' 65 *North Carolina Law Review*, 127 (1986); M. Friedlander Brinig, 'A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' 81(8) *Virginia Law Review*, 2377 (1985); D.S. Mazer, 'Born Breach: The Challenge of Remedies in Surrogacy Contracts' 28 *Yale Journal of Law & Feminism*, 211 (2016); F. Berys, 'Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour' 42 *California Western Law Review,* 321 (2006); J.L. Dolgin, 'Status and Contract in Surrogacy: An Illumination of the Surrogacy Debate' 38 *Buffalo Law Review*, 515 (1990).

[90] Also called *declaration of parentage,* discussed by S.H. Synder and M.P. Byrn, 'The Use of Prebirth Parentage Orders in Surrogacy Proceedings' 39(3) *Family Law Quarterly*, 633 (2005); D.S. Hinson, 'State-by-State Surrogacy Law Actual Practices' 34 *Family Advocate*, 32 (2011-2012); T.L. Palmer, 'The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples' 8(5) *Rutgers Journal of Law & Public Policy*, 895 (2011); A. James, 'Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know until They Do' 10 *Indiana Health Law Review*, 175 (2013); J.J. Richey, 'A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act' 30 *Southern Illinois University Law Journal*, 169 (2005).

States, it is evident that it has a different relationship with contract law than in Great Britain, where it is interpreted as a natural obligation.

In terms of the practical consequences of co-application, it is evident that the US scenario is characterised by greater protection for the client, who has a legal position comparable with real credit rights; it cannot be denied, however, that, in the process, the North American system leads to a devaluation of the role ascribed to the pregnant woman who, in assuming the role of obliged entity, is more exposed to the risk of real commoditisation of her body.

In more general terms, legal interpreters have address one critical issue, namely whether the solutions proposed in the US involve the risk of producing a deflation of the existential and human value ascribed to the experience of pregnancy, which evidently raises questions about the ethical – but also the legal – regulation of the matter.[91]

III. The Italian Experience. Some Considerations on a Possible Surrogacy 'Agreement'

In the light of comparative developments, we must examine the wording of Art 12 of para 6 of Italian law 40/2004 that simply 'bans' surrogacy. The analysis of the debate that has developed in Italy in recent years has shown that legal practitioners are perfectly aware of the difficulties inherent in handling concepts that form the subject of general clauses,[92] which help to achieve the goal of adapting the interpretation of legal precepts to the existing socio-cultural reality at a precise moment in history, as well as to the specified inclinations of the child, so as to ensure the realisation of its concrete interest in the light of its specific and personal context.[93] Terms such as 'public order', the 'tranquillity of family life' and 'the best interests of the child' should be thought of as means for rendering rules and legally relevant principles a concrete reality and avoiding the danger of falling into judicial arbitrariness, with decisions that cannot be based

[91] Doubts that American scholarship has not failed to raise, as demonstrated, for example, by the contribution of R. Ber, 'Ethical Issues in Gestational Surrogacy' 21(2) *Theoretical Medicine and Bioethics*, 153 (2000).

[92] G. Ferrando, 'Diritti e interesse del minore tra principi e clausole generali' *Politica del diritto*, 167 (1998).

[93] In this regard, R. De Meo, 'La tutela del minore e del suo interesse nella cultura giuridica italiana ed europea' *Diritto di famiglia e delle persone*, 461 (2012). Focusing in particular on the evolution of the protection of minors after the demise of the patriarchal view of the family, see E. Moscati, 'Il minore nel diritto privato, da soggetto da proteggere a persona da valorizzare (contributo allo studio dell'interesse del minore)' *Diritto di famiglia e delle persone*, 1141 (2014). See also V. Scalisi, 'Il superiore interesse del minore ovvero il fatto come diritto' *Rivista di diritto civile*, 1463 (2016); P. Stanzione and B. Troisi, *Principi generali del Diritto civile* (Torino: Giappichelli, 2011), 64; S. Serravalle, *Maternità surrogata, assenza di derivazione biologica e interesse del minore* (Napoli: Edizioni Scientifiche Italiane, 2018) 97.

only on the evaluation of purely moral and social aspects.[94] This, as happened in the past, when the Supreme Court strongly advocated for[95] a notion of public order decidedly oriented towards safeguarding the autochthonous cultural identity and the internal coherence of the system.

Nonetheless, it is evident that, even after the judgment of the Joint Divisions,[96] the main issue remains unsolved. This concerns the legal framework to be applied to the consequences of the ascertained use of gestation practices for others, regarding which scholarship has not failed to underline the lack of effectiveness that characterises this aspect. In other words, the law does not combine the provision of effective remedies to the formal position of the ban on the use of surrogate motherhood techniques.[97] It is not surprising, therefore, that the attention of hermeneutists has recently been shifting from the level of admissibility of the practice to the consequences that the use of procreative techniques is likely to bring about in the juridical sphere of the new-born child. Other scholars are less tolerant and more critical of the solutions proposed by the Supreme Court. The Court has, of course, recognised the total illegality of surrogacy agreements,

[94] G. Perlingieri and G. Zarra, *Ordine pubblico* n 4 above, 49. It is proposed, ultimately, to move beyond the interpretation followed in the past even by the Supreme Court, which held that it was reductive to interpret 'public order' as being limited to constitutionally protected values. The most delicate question relating to such a vision, clearly highlighted by the authors, consists in the lack of solid and univocal references that can allow the interpreter of the law to identify with certainty the ethical-juridical canons of reference, which opens the way to possible arbitrary solutions, undermining legal certainty. The solution may be found in the balance between competing rules and principles, taking into account the specificity of the situation, the limitations of sovereignty arising under general international law, and European Union law, international obligations and conventions, the identification of insurmountable principles in our legal system, taking into account the so-called margin of appreciation that each State retains in the implementation of fundamental rights recognised by the ECHR (esp 57). An interesting distinction between the internal and international public order is also observed in F. Mosconi and C. Campiglio, *Diritto internazionale privato e processuale, I, Parte generale e limiti* (Torino: Giappichelli, 2013), 257, specifying that the two reference parameters are not antithetical concepts.

[95] This reading is found in numerous decisions of the Supreme Court, including Corte di Cassazione 12 March 1984 no 1680, *Giustizia civile*, I, 1419 (1989); Corte di Cassazione 14 April 1980 no 2414, *Foro italiano*, I, 1303 (1980); Corte di Cassazione 5 December 1969 no 3881, *Foro italiano*, I, 1977 (1970).

[96] The reference is to the fundamental judgment rendered by the Supreme Court: Corte di Cassazione 8 August 2019 no 12193, available at www.neldiritto.it.

[97] The position adopted by L. D'Avack, 'La maternità surrogata: un divieto "inefficace" ' *Diritto di famiglia e delle persone*, I, 139 (2017), is emblematic in regard. In addition to the lack of suitable instruments of protection in the event of the prohibition, also suggested regulatory solutions that would strengthen compliance with the prohibition itself: 'By way of example regarding filiation, it could have been explicitly forbidden to transcribe in Italy a foreign certification attributing paternity or maternity to the commissioning and non-biological parents following surrogacy; provide for the forfeiture of parental authority, pursuant to Art 569 of the criminal code; recognise criminal responsibility pursuant to arts 495 (false declaration in civil registry documents) and 567, para 2 (change of status); normally specify that surrogacy, even if carried out abroad by Italian citizens and not treated as unlawful in that country, is contrary to public order. Or again, consider the possibility of invoking Art 9 of the Italian Criminal Code, according to which the citizen who commits a crime abroad can be punished at the request of the Minister of Justice'.

whose prohibition has its roots in fundamental principles of public order, such as the right to the dignity of the pregnant woman,[98] but also the right of the child not to be the subject of trafficking.[99] Although a 'promotional' vision of the concept of public order open to developments coming from external legal systems as opposed to the 'traditional-defensive' one (considering the principle of public order to be deeply rooted in domestic law) is gaining increasing acceptance both in scholarship and in the courts, the existence of a core of inescapable standards including, at present, those that prohibit child bearing 'for others' must be acknowledged. However, suggesting recourse to the institution of adoption in particular cases as a remedy to ensure the *status filiationis* of the child looks like 'letting what was taken out through the front door back through the window'.[100] According to this doctrinal position, from which, in the abstract, we are not too far removed, a surrogacy agreement that is clearly and categorically forbidden for the above reasons must be considered absolutely null and void. Therefore any attempt to save its effects at all costs involves prejudice to the system in the light of the *quod nullum est, nullum producit effectum* principle.[101] The suggested recourse to adoption in particular cases would appear to force the issue because it lacks one of its ontological prerequisites, namely the state of abandonment of the child, which does not exist in this case; in practice, judges would thus perform an innovating function outside their role. In any case, while wishing to accept this interpretation, at least three fundamental points must be reiterated: the first is the already discussed ban on assisted reproduction, which, *rebus sic stantibus,* in Italy is to be considered unavoidable. The second is the need for the court to evaluate the question submitted to it 'case by case'. The third principle is the assessment of the suitability of adoption in the specific case.[102] Once again, there is an inescapable need to reconcile (according to reasonableness) the interests at

[98] This principle also reflects the Kantian dictum that the human being must always be considered as an 'end' and never a 'means' (cf I. Kant, *Fondazione della metafisica dei costumi*, trans by P. Chiodi (Torino: Laterza, 1970) 88); G. Resta, 'La dignità', S. Rodotà and A. Zatti eds, *Trattato di biodiritto* (Milano: Giuffrè, 2010), 167.

[99] See the Universal Declaration of the Rights of the Child of 20 November 1959, principles VI and IX, 'the child needs love and understanding for the harmonious development of his personality. He must, as far as possible, grow up under the care and responsibility of his parents and, in any case, in an atmosphere of affection and material and moral security. Except in exceptional circumstances, the young child must not be separated from his mother', and 'the child must be protected against all forms of negligence, cruelty or exploitation. The child shall not be subjected to any form of trafficking'. See also Art 21 of the Oviedo Convention of 1997, and Art 6 of the 2008 Istanbul Declaration.

[100] A.R. Vitale, 'La maternità surrogata nella sentenza delle Sezioni Unite Civili n. 12193/2019', available at centrostudilavatino.it.

[101] See ibid 'it would be mere *flatus vocis* to declare the surrogacy agreement (civilly and criminally) null and void and contrary to the dignity of the person if it were not also prevented from having effects, just as it would be vain to prevent slavery by declaring it contrary to human dignity if the profit gained from it were not also affected or if, even worse, the one who is enslaved were not freed'.

[102] See G. Perlingieri, 'Ordine pubblico e identità culturale' n 4 above, 340-341.

stake. The ECHR,[103] on the one hand, states that the position of a rigid and absolute prohibition on recognising a parent-child relationship between the child and the intended mother is incompatible with the pre-eminent and concrete interest of the former; on the other hand it highlights that this does not imply, per se, full recognition of a birth certificate drawn up abroad, since it falls within the discretion of the legislator to identify the legal means through which to translate the importance attributed to the relationship of filiation, also making use, for example, of adoption. In conclusion, we can constructively criticise the Joint Divisions for not having examined the intrinsic reasonableness of the solution found, which would imply a further hermeneutic verification, to assess the suitability of adoption in particular cases as the 'right remedy' under the circumstance.[104] The Gordian knot in this case concerns the decoding of the concept of the 'impossibility of pre-adoptive fostering', which, as said, constitutes the ontological presupposition for adoption in particular cases, which must include all the situations in which, despite the absence of a state of abandonment, the relationship established by the child with its carers is highlighted, regardless of the biological link and the existence of elements of extraneousness, thus assuming the role of 'social parents'.[105]

It is therefore clear, and the Joint Divisions of the Italian Supreme Court make no secret[106] about it, that, in the light of the multifaceted reproductive techniques

[103] See also the interesting considerations in G. Recinto, 'Il superiore interesse del minore tra prospettive interni "adultocentriche" e scelte apparentemente "minorecentriche" della Corte europea dei diritti dell'uomo' *Foro italiano*, I, 3669 (2017).

[104] On the delicate relationship between *favor veritatis* and *favor filiationis*, see G. Recinto, 'La decisione delle Sezioni unite in materia di c.d. maternità surrogata: non tutto può e deve essere "filiazione" ' *Diritto delle successioni e della famiglia*, 348-354 (2019).

[105] This interpretation of the concept of the impossibility of pre-adoptive foster care has made its way into the ordinary case law, as testified, *among many*, by the Tribunale per i minorenni di Roma 23 December 2015, *Rassegna di diritto civile*, 679 (2015), with a commentary by G. Salvi, 'Omogenitorialità e adozione (in casi particolari): segnali di apertura dei giudici minorili'; in the same terms the Tribunale per i minorenni di Firenze 8 March 2017, *Foro italiano*, I, 1034 (2017) and Corte d'Appello di Trento 23 February 2017, available at www.articolo29.it, stating that a family community is to be understood as an 'effective 'continuum' of values and affections instrumental to the development of the personality of its members, to be considered both in their uniqueness as individuals understood as a whole, and in the uniqueness of their being in a relationship', regardless of the existence of a biological link. For references in scholarship, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 132 and Id, 'Interferenze tra unione civile e matrimonio. Pluralismo familiare e unitarietà dei valori normativi' *Rassegna di diritto civile*, 101-113 (2018); and C. Ghionni, 'Figlio di due madri nato all'estero e compatibilità con l'ordinamento interno: l'interesse della persona minore d'età nella famiglia omogenitoriale' *Rassegna di diritto civile*, 316 (2018).

[106] Also attracting criticism from scholars, who did not hesitate to define the attitude of the Supreme Court as '*naïve*', insofar as it considers balancing as an activity reserved to the legislator; in this sense, they caution that, 'it is balancing activity, not foreseen by the legislator but performed by the interpreter of the law at the moment of application in regard to deciding whether and how to combine two distinct rules – such as the ban on surrogate motherhood pursuant to Art 12, para 6, law 40 of 2004 and adoption in special cases pursuant to Art 44, para 2, lett. *d*), legge 184 of 1983 - and to understand the scope of a standard and to what extent it is binding and operable, in

made possible by technological developments, it is no longer possible to adhere to the precedents approach proper to case law;[107] the need for a political synthesis is increasingly pressing, which obviously can only lead to a legislative intervention requested by several parties that can no longer be deferred.[108] However, given the delicate ethical, philosophical, and religious implications that regulatory intervention on this matter would bring with it, it is not difficult to predict that the legislative *vacuum* will persist, which opens a further front, namely a ruling on constitutionality. This prospect became concrete following the issue of Interlocutory Order no 8325 of 29 April 2020 by the first Civil Division of the Court of Cassation, which, not recognising the manifest groundlessness of the question of constitutionality, referred the relative judgment (concerning a question very similar to those already examined) to the Italian Constitutional Court. This is also in the light of the opinion expressed by the Grand Chamber of the European Court of Human Rights published on April 10, 2019.[109] The referral relates to the prohibition

> 'pursuant to Art 12(6) of Law 40 of 2004, Art 18 of Presidential Decree no 396/2000 and Art 64(1) lett *g*, of law no 218/95 insofar as these do not allow the recognition of a foreign court order regarding the inclusion of a child procreated through surrogate motherhood of the so-called non-

particular if in competition with other standards (such as, for example, Art 8 ECHR), and to analyse whether a remedy, such as adoption pursuant to Art 44, para 2, lett. *d*), is able to satisfy the interests and regulatory values involved', see G. Perlingieri, 'Ordine pubblico e identità culturale' n 4 above, 343. See also, Id, 'Ragionevolezza e bilanciamento nell'interpretazione recente della Corte costituzionale', in P. Perlingieri and S. Giova eds, *I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006-2016* (Napoli: Edizioni Scientifiche Italiane, 2018), 283.

[107] B. Pezzini, 'Riconoscere responsabilità e valore femminile: il "principio del nome della madre" nella gravidanza per altri', in S. Niccolai and E. Olivito eds, *Maternità Filiazione Genitorialità* n 82 above, 99.

[108] Waiting for which, as observed by A.M. Lecis Cocco Ortu, 'L'obbligo di riconoscimento della genitorialità intenzionale tra diritto interno e CEDU: Riflessioni a partire dal primo parere consultivo della Corte Edu su GPA e trascrizioni' *Genius*, 15 (2019).

[109] The French Court of Cassation formulated the questions it intended to submit to the Strasbourg Court with its request for an advisory opinion in the following terms: a) whether a State party to the Convention, refusing to transcribe a birth certificate of a child born abroad through surrogate parenting, insofar as such an act designates the intended mother as the legal mother, while allowing the transcription of a birth certificate designating the intended father as the legal biological father, exceeds the margin of appreciation available to it under Art 8 of the European Convention on Human Rights and whether a distinction must be made according to whether the child was conceived with the intended mother's gametes or not; b) in the event of a positive answer to one of the above questions, whether the possibility of the intended mother to adopt her spouse's (the biological father's) child enables compliance with the provisions of Art 8 of the Convention, constituting an alternative way of establishing a filial relationship. In its consultative opinion, the ECHR responded affirmatively to the first question and, in response to the second, stated that adoption by the intended mother can be considered acceptable as an alternative model for the establishment of the legal parentage relationship, provided that the procedures for adoption laid down in domestic law guarantee the effectiveness and speed of recognition and that it is in the best interests of the child.

biological intended parent in the civil registry, for reasons of public order'.

Obviously, a totally new scenario is expected, given that the Italian Constitutional Court has so far ruled only in relation to issues underlying the social formation of homosexual couples, or to cases in which one of the marriage partners decides to change sex,[110] without ever directly addressing the issue of the consequences that sex or sexual orientation may produce in the relationship with children.

More generally, the non-recognition or non-retention of the status of a son or daughter in relation to an individual born through surrogate motherhood seems to clash with a principle deriving from the systematic interpretation of the rules relating to parenthood: the principle that children may not suffer injury to their rights due to the conduct of third parties, even if such determinations are subject to the greatest disapproval by the legal system, to the point of being considered criminal offences. Even more significant are the observations made by the Court on the latitude of application of the penalties laid down in the event of infringement of the prohibitions by parents, given that, according to the Court, while, on the one hand it is certainly legitimate to punish parents for the conduct in question, conversely, extending this penalty

> 'beyond this circle, involving individuals totally without responsibility – such as the children of incestuous parents, mere bearers of the consequences of their parents' behaviour (...) – would not be justifiable if not on the basis of a 'totalitarian' conception of the family'.[111]

In Italy, this has become a very timely issue, given the new legislation produced over the years in the fields of adoption and civil unions, giving rise to the need for the hermeneutist to regulate a true 'intended parentage', where *favor filiationis* assumes paramount value over *favor veritatis*. However, these essential values must be balanced with the complications and problems that can arise from the use of special techniques such as surrogacy.[112] The nature of the procedure requires national legislators to protect the dignity of the pregnant

[110] In this regard, two judgments of the Italian Constitutional Court are of note: first of all, Corte costituzionale 15 April 2010 no 138, *Giurisprudenza Costituzionale*, 2715 (2010), referred to in A. Pugiotto, 'Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio', available at forumcostituzionale.it; M. D'Amico, 'Una decisione ambigua' *Notizie di Politeia*, 85 (2010), and R. Romboli, 'Il diritto "consentito" al matrimonio ed il diritto "garantito" alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice "troppo" e "troppo poco"' *Rivista AIC* (2010); secondly, see Corte costituzionale 11 June 2014 no 170, *Giurisprudenza Costituzionale*, 2694 (2014), on which see considerations by F. Biondi, 'La sentenza additiva di principio sul c.d. divorzio "imposto": un caso di accertamento, ma non di tutela, della violazione di un diritto', available at www.forumcostituzionale.it, 24 June 2014.

[111] On this point see F. Biondi, 'Quale modello costituzionale', in F. Giuffré and I. Nicotra eds, *La famiglia davanti ai suoi giudici* (Napoli: Editoriale Scientifica, 2014), 3.

[112] See G. Perlingieri, 'Ragionevolezza e bilanciamento' n 106 above, 716, with particular regard to the issues examined, see Id, 'Interferenze tra unione civile e matrimonio' n 105 above, 114.

woman in order to avoid the commoditisation of the human body, both that of the child and the woman giving birth. The most critical trait is clear if one considers that surrogacy does not entail the use of a 'separable' part of the body, as happens in the case of the donation of male or female gametes for the purpose of heterologous fertilization. On the contrary, it implies assuming the obligation of utilising the whole of someone's body for a fixed time period, in line with the wishes of the clients. This would cause an irremediable hiatus between the body and self-determination, which is not observed in natural procreation.[113] In this respect, the differences between the legal systems, with their different axiological orientations, are still broad, deep, often contradictory, and antithetical. Hence, it is extremely necessary for European and international institutions to attempt to align the various continental regulations.[114] Despite awareness of their different positions and cultural traditions, the countries of Europe (and beyond) must find common legal ground with respect to their initial opposing positions. In order to eradicate the regrettable and discriminatory phenomena of reproductive tourism (as they are only 'affordable' to the wealthy), it is of no advantage to prohibit the practice *tout court*, at least in the cases of sterile couples or those suffering from absolute or irreversible infertility (which may also include, in a particularly broad interpretation, male homosexual couples). However, as already happens in some countries, this practice should only be allowed without financial consideration and for purposes of solidarity.[115] The basic principles that should underpin the entire legislation are those fundamental to the Member States of the Union: first of all, respect for human dignity, the protection of personal identity, and the interest of the child.[116] What really matters is that the right to parenthood should be guaranteed not from an 'adult-centred' perspective, as a selfish act, but rather from a 'child-centred' one, placing the child at the core of the legal interest.[117]

[113] For these considerations, see A. Nicolussi, 'Diritto di famiglia e nuove letture della Costituzione', in F. D'Agostino ed, Valori costituzionali. Per i sessanta anni della Costituzione Italiana. Atti del Convegno nazionale dell'U.G.C.I. Roma, 5-7 dicembre 2008 (Milano: Giuffrè, 2010).

[114] Solution also suggested by L. Poli, 'Maternità surrogata e diritti umani: una pratica controversa che necessita di una regolamentazione internazionale' *BioLaw Journal – Rivista di Biodiritto*, 28 (2015). An attempt at harmonisation at European Community level is hoped for by C. Sànchez Hernàndez, 'La reproduccìon médica asistida en la jurisprudencia of the European Tribunal de Derechos Humanos: especial consideracìon desde la perspectiva de la seguridad jurìdica' *Revista de Derecho Privado*, 39-92 (2018).

[115] In some States, the use of surrogacy is allowed, provided that gestation is carried out by a woman within a certain degree of kinship with the clients, a widespread practice. See the recent C. Pizzimenti, 'Nebraska, the grandmother who acted as surrogate mother for her son and husband' *Vanity Fair* (3 April 2019).

[116] As P. Perlingieri teaches, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), passim.

[117] This is what State Attorney G. Palmieri emphasised in the hearing held on 18 June 2019 before the Constitutional Court, called to decide on the question raised by the Bolzano Court. In particular, he pointed out that the right to parenthood is not absolute; on the contrary, it can be balanced with other fundamental rights. Parents do not (only) have rights but duties towards their

The *quaestio iuris* that the States of Europe (and beyond) should really be asking themselves concerns first of all the legal nature of the agreement in place between the clients and the pregnant woman.[118] Since it is no longer possible to ban the procedure outright, the dilemma can no longer be avoided by hiding the issue behind criminal and virtual nullity. Given the need for regulation, the surrogacy agreement must be classified within the vast field of civil law and specifically that of contracts. The regulatory choice to be made in the coming years will be whether to qualify such contracts as gentlemen's agreements or, conversely, as legal contracts in the strict sense. In the former case, the parties to the parental agreement will concur that the consequent relationship will have a social, but not a legal, nature. This case would be particularly advantageous for the pregnant woman, because the gentlemen's agreement, characterised by an express desire not to legalise the relationship, involves extra-judicial penalties. Conversely, this agreement could be dangerous for the clients, who would run the risk of default. In any case, this would be a rather problematic interpretation of the matter, since in the continental legal tradition, although a gentlemen's agreement is not enforceable, it is linked to the pecuniary interests of the creditor and to an equally patrimonial content of the service.[119] This does not appear to be the compulsory burden of the pregnant woman, and certainly the patrimonial interest cannot be considered a credit interest, which, by observing the negotiation in the light of specific cause, would manifest itself as corresponding to the realisation of the parental project and the creation of a family. If this main interest is worthy of protection, reasons of substantial justice would suggest placing surrogacy arrangements within the field of contracts in the strict sense.

Critical issues would arise, however, when the legal definition of this contract is questioned: provided that the pregnant woman is only entitled, according to the main legal thinking, to reimbursement for the costs incurred, the category

children, and they have the obligation (legal as well as moral) to refrain from irresponsible behaviour prejudicial to them. For these reasons, not everything that is allowed by science and technology can be authorised by law.

[118] On this topic, see E. Crivelli, 'Gli accordi di maternità surrogata tra legalità ed affettività', in A. Apostoli et al, *Scritti in ricordo di Paolo Cavaleri* (Napoli: Edizioni Scientifiche Italiane, 2016), 213.

[119] For further information on these considerations, please refer to G. Cansacchi, 'Gentlemen's Agreement' *Novissimo digesto italiano* (Torino: UTET, 1968), VII, 796; R. Martini, 'Gentlemen's Agreement' *Digesto discipline privatistiche, sezione civile* (Torino: UTET, 1992), VIII, 639; S. Sica, *Gentlemen' Agreements e intento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1995), passim; L. Barchiesi, 'Gentlemen's Agreement', in G. Monateri et al, *Il nuovo contratto* (Bologna: Zanichelli, 2007), 461; N. Sapone, *La responsabilità precontrattuale* (Milano: Giuffrè, 2008), 561; G. Sicchiero, 'La risoluzione per inadempimento. Artt. 1453-1459', in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2007), 399; B. Gardella Tedeschi, 'Gentlemen's Agreement' *Rivista di diritto civile*, II, 731 (1990); G. Alpa, *Contratto e common law* (Padova: CEDAM, 1987), 48; F. Galgano, 'La categoria del contratto alle soglie del terzo millennio' *Contratto e impresa*, 919 (2000). In German law, see M. Huber, 'Zur Versicherung von Elementarrisiken: das englische Gentlemen's Agreement und seine Entwicklungsmöglichkeiten' *Vierteljahrshefte zur Wirtschaftsforschung,* 44 (2008).

of non-profit-making contracts, based on an altruistic and supportive principle, should be chosen. It would certainly be a very peculiar contract and an exception in the contractual field, since it is impossible to speak about a mutual interest, even in abstract terms. From a technical-legal point of view, then, by reversing the usual perspective, it is not impossible to think of a *surrogacy* contract structured in the same way as a contract with obligations only on the principal, pursuant to Art 1333 of the Italian Civil Code. In fact, a phenomenological structure of this kind could offer the pregnant mother greater protection, in that she herself willingly decides autonomously to commit herself without receiving a proposal in this sense from the clients. A pregnant woman enrolled on official ministerial lists could be put in contact, through a third-party organisation, with subjects aspiring to parenthood. She would decide the details of the start of gestation according to a contract which, by virtue of its own rules, would be terminated if the beneficiary did not express a contrary intention.[120] The latter, on the other hand, can always envisage a so-called preventive refusal within the established terms, which is consistent with the fact that this is a contract that is meant to be concluded '*intuitu personae*'. Even without wishing to indulge in such a hypothesis, there are certainly numerous ways in which this instrument could be acceptable in the Italian and other continental legal systems, and such a decision should be delegated to national Parliaments or supranational legislative assemblies. A further question, regarding the structure and legal nature of the contract in question, concerns the legal remedies that can be addressed. If it is considered a legal transaction, we should wonder whether the general discipline of Art 1218 of the Italian Civil Code might be applied, or if a derogation from a legislative source should prevail. Indeed, the pregnant woman undertakes to carry out the pregnancy on behalf of the clients (with an obligation that must be considered pertinent to means and not results, since the opposite situation would excessively aggravate the pregnant woman's legal position). It goes without saying that, if the service becomes impossible to carry out due to some non-attributable cause (miscarriage, unpredictable sterility), the provisions of Art 1256(1), of the Civil Code should apply. In the event of an only temporary impossibility (for various reasons, such as when a pregnant woman has had a pregnancy of her

[120] For further information on the structure for completing the contract with obligations borne by the proposer alone, strongly derogating from the traditional proposal-acceptance scheme, please refer to G. Benedetti, 'La categoria generale del contratto' *Rivista di diritto civile*, 652 (1991); E. Damiani, *Il contratto con obbligazioni a carico del solo proponente* (Milano: Giuffrè, 2000), passim; A. Rosboch, 'Conclusioni del contratto' *Rivista di diritto civile*, 910 (2000); A. Palazzo, 'Profili di invalidità del contratto unilaterale' *Rivista di diritto civile*, 587 (2002); R. Rolli, 'Antiche e nuove questioni sul silenzio come tacita manifestazione di volontà' *Contratto e impresa*, 257 (2000); G. Petrosini, 'Il contratto con obbligazioni a carico del solo proponente' *Rivista del cancelliere,* 295 (1973); A. Diurni, 'Il contratto con obbligazioni a carico del solo proponente: la tutela dell'oblato' *Rivista di diritto civile*, 681 (1998); A. Simionato, 'La fideiussione a titolo gratuito e i contratti con obbligazioni a carico del solo proponente (art. 1333 c.c.)' *Nuova giurisprudenza civile commentata*, 503 (1999).

own), para 2 of the same article may apply. Conversely, if a pregnant woman voluntarily interrupts the pregnancy, having changed her mind or decides not to hand over the child, it is not unreasonable that the latter should compensate, at least, the non-pecuniary damage suffered by the clients, as well as subjective, psychic and moral damages. On the other hand, in spite of the postulates found in English scholarship, the path of enrichment without just cause (Art 2041 of the Italian Civil code) seems untenable. Not only because it is applied exclusively on a subsidiary and residual basis[121] but because it is more correctly suited to patrimonial benefits and movements related to assets subject to economic evaluation, and this does not extend to an unborn child. The same instrument could at most be applicable if one chooses to consider the surrogacy agreement a natural obligation pursuant to Art 2034 of the Italian Civil Code. Lastly, it must be specified that, with specific regard to these types of contracts, compulsory execution or compensation in specific form will never be admissible, since this is a strictly voluntary, spontaneous and personal service. Even less likely is the provision of an accessory 'guarantee' for any 'defects' in the baby, which the clients will be required to accept in their family. In fact, the constitutive trait of the family bond is that the individual is recognised and accepted even if fragile or different from expectations. The new-born child cannot be considered a 'useful result', and therefore 'good'.[122] The contracting parties, the 'creditors' of the contractual service, could only seek compensation. Alternatively, the legislator could expressly fix a special allowance, quantified as a flat-rate payment or determined on an equitable basis by the court.

Comparative study reveals that the phenomenon is variously attested in the Western legal tradition. The range of proposed solutions counterbalances the rigid Italian situation, centred on para 6 of Art 12 of legge 19 February 2004 no 40 concerning assisted procreation, which simply bans and punishes the practice. However, this does not obviate the series of legal issues currently on the table before Italy's own judiciary, in particular the recognition of children born abroad following a surrogate pregnancy.[123] This is an extremely sensitive and controversial issue, and judges and legislators need a 'child-centred' perspective. The path to parenthood, albeit legitimately pursued by adults, must not, however, end in degrading techniques involving the manipulation of new-born babies, who would thus no longer be the subjects but the objects of a right exercised by adults.[124]

[121] As expressly stated in Art 2042 Civil Code.

[122] On this point cf U. Salanitro, 'Il divieto di fecondazione eterologa alla luce della Convenzione Europea dei Diritti dell'Uomo: l'intervento della Corte di Strasburgo' *Famiglia e diritto*, 988 (2010).

[123] The latest interesting ruling on the subject by the Joint Divisions is Judgment no 12193 of 2019 with an interesting first interpretation offered by G. Ferrando, 'Maternità per sostituzione all'estero: le Sezioni Unite dichiarano inammissibile la trascrizione dell'atto di nascita. Un primo commento' *Famiglia e Diritto*, 677 (2019) and G. Perlingieri, 'Ordine pubblico' n 4 above, 337.

[124] For C. Ciraolo, 'Certezza e stabilità delle relazioni familiari nella procreazione medicalmente assistita' *Ordine internazionale e diritti umani*, 822 (2016).

Birth must take place in the context of the exercise of the freedom to give life, and not that of a supposed absolute and irreducible right to parenthood, aimed at furthering the interests of mature individuals.[125] It is certainly desirable to endow the spirit of human solidarity with a range of possible solutions,[126] but the focus should shift from the right of parents to have their role recognised, to that of children to grow up supported and assisted by a personal and direct relationship with both the parties identified as parents (Art 24 Charter of Fundamental Rights of the European Union).[127]

[125] See also F.D. Busnelli, 'Il diritto della famiglia di fronte al problema della difficile integrazione delle fonti' *Rivista di diritto civile*, 1467 (2016).

[126] On this, see also C.M. Romeo Casabona, 'Las multiplas caras de la maternidad subrogada: ¿ aceptamos el chaos jurídico actual o buscamos una Solución?' *Folia Humanistica, Revista de Salud, ciencias sociales y Humanidades*, 5 (2018), showing how, in certain cases, surrogacy may also be a harbinger of positive values, such as solidarity and altruism. In order to support this thesis, a similarity is drawn between the donation of bodily organs and the 'donation' of motherhood. Opposing this view, see V. Bellver Capella, 'Tomarse en serio la maternidad subrogata altruista' *Cuadernos de Bioética*, 229 (2017), holding the opinion that such advanced practices may result in opening up to new and more complex problems. An opposite view is found in A. Aparisi Miralles, 'Maternida d subrogada y dignidad de la mujer' *Cuadernos de bioética*, 163 (2017).

[127] See L. Rossi Carleo, 'Maternità surrogata e status del nato' *Familia*, 967 (2002).

Essays

New Forms of Guarantee: The Unifying Role of Legal Principles and General Clauses

Marco Angelone*

Abstract

As regards the atypical guarantees, interpreters have to derive the discipline applicable to the particular case from the legal principles, the general clauses and the 'trans-typical' or 'meta-typical' rules. The unity of the (typical or atypical) guarantees in the existing legal system must be ensured in an axiological standpoint (ie in the prism of the 'constitutional legality') without however degrading the complexity and the peculiarities of the factual context. This factual context must be considered in order to identify the most proper rule to satisfy the interests to be protected by balancing the different normative values involved according to reasonableness.

I. The Superseding of the Distinction Between 'Typical' and 'Atypical' Guarantee and the Necessity to Derive the Law Applicable to New Forms of Guarantee Arising in Practice from Legal Principles, General Clauses and 'Trans-Typical' or 'Meta-Typical' Rules

This paper takes its cue from the proliferation – especially in light of commercial practice and international trade[1] – of new forms of guarantee[2] (traditionally unknown and falling outside the orthodoxy of the Civil Code) that have found their way into Italian law on the basis of freedom of contract[3] enshrined in Art 1322 of the Civil Code.[4]

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[1] G. Perlingieri, 'Garanzie «atipiche» e rapporti commerciali' *Rivista di diritto dell'impresa*, 21 (2017); C. Licini, 'Le tecniche moderne di garanzia nella prassi notarile' *Rivista notarile*, I, especially 1005 and 1010 (1996).

[2] See, in general, F. Mastropaolo and A. Calderale, 'Negozi atipici di garanzia', in F. Mastropaolo ed, *I contratti di garanzia*, I (Torino: UTET, 2006), 522; F. Fezza, 'Le garanzie personali atipiche', in V. Buonocore ed, *Trattato di diritto commerciale* (Torino: Giappichelli, 2006), passim; G. Bozzi, *Le garanzie atipiche*, I, *Garanzie personali* (Milano: Giuffrè, 1999), passim; M. Sesta, *Le garanzie atipiche*, I, *Vendita, cessione del credito, mandato a scopo di garanzia, contratto autonomo di garanzia* (Padova: CEDAM, 1988), passim.

[3] U. Breccia, 'Art. 1322', in E. Navarretta and A. Orestano eds, *Dei contratti in generale*, I, in E. Gabrielli ed, *Commentario del codice civile* (Padova: CEDAM, 2011), 127-128.

[4] The cited article provides: 'The parties can freely determine the contents of the contract within the limits imposed by law' (para 1). 'The parties can also make contracts that are not the types that are particularly regulated, provided that they are directed to the realization of interests worthy of protection according to legal order' (para 2) (translation by M. Beltramo, G. Longo and J.H.

There is little to be gained in backing up that statement by merely giving a list of the various types of new generation guarantee involved. By contrast, it is much more worthwhile to offer an analysis – that can only be an outline in this context – on the common legal principles[5] governing contractual arrangements that in a broad sense have a '*causa*' that entails the giving of guarantee (so-called '*causa cavendi*').[6]

Focusing on the functional element enables one, firstly, to go beyond the distinction between 'typical' and 'atypical' guarantee and the rigid typical-atypical dichotomy[7] that has become ever more evanescent[8] to the extent that nowadays it serves a more descriptive role,[9] as already demonstrated by the extension of the scrutiny as to worthiness (as provided by the aforementioned Art 1322, para 2, of the Civil Code)[10] to all contractual arrangements irrespective of how they may be legislatively classified.[11]

Secondly, the functional approach involves the definitive abandonment of the logic of subsumption[12] to the advantage of techniques that makes the

Merryman, *The Italian Civil Code and Complementary Legislation* (New York: Oceana, 1991), 285).

[5] Regarding the normative relevance of legal (values and) principles and their consequential binding effect on interpreters of the law, see recently P. Perlingieri, 'Legal Principles and Values' *The Italian Law Journal*, 125 (2017); N. Lipari 'On Abuse of Rights and Judicial Creativity' *The Italian Law Journal*, 64-69 (2017); G. Scaccia, 'Constitutional Values and Judge-Made Law' *The Italian Law Journal*, 187 (2017).

[6] L. Piazza, 'Garanzia. I) Diritto civile' *Enciclopedia giuridica* (Roma: Treccani, 1989), XIV, 3-5. Under the Italian Civil Code, the requirement of the 'causa' (see Art 1325 and Artt 1343-1345) correspond to the (concrete) essence of the contract.

[7] The meaning and the distinction between typical and atypical contracts within the Italian Civil Code is well summarized by M. Pargendler, 'The Role of the State in Contract Law: The Common-Civil Law Divide' 43 *The Yale Journal of International Law*, 153-160 (2018); J.H. Merryman, 'The Italian Style II: Law' *Stanford Law Review*, 422 (1966), and, making a comparison with common law systems, by G. Alpa, 'La libertà di scelta del "tipo" contrattuale nella prassi di *common law*. Note in margine a un dibattito' *Contratto e impresa*, 603-604 (2018).

[8] R. Clarizia, 'Il contratto tra *tipico* e *atipico*: la distinzione serve ancora?', in G. Cassano and R. Clarizia eds, *I singoli contratti. Tipici e atipici nell'evoluzione normativa e giurisprudenziale* (Milano: Giuffrè, 2017), 2; P. Perlingieri, 'In tema di tipicità e atipicità nei contratti', in Id ed, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), especially 391 and 413.

[9] A. Federico, 'Tipicità e atipicità dei contratti', in C. Perlingieri and L. Ruggeri eds, *L'incidenza della dottrina sulla giurisprudenza nel diritto dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2016), 176-177. In this sense, but in the field of '*mortis causa*' acts see G. Perlingieri, 'La disposizione testamentaria di arbitrato. Riflessioni in tema di tipicità e atipicità nel testamento' *Rassegna di diritto civile*, 456 but especially 461-462 (2016).

[10] On Art 1322, para 2, briefly, G. Iudica and P. Zatti, *Language and Rules on Italian Private Law: An Introduction* (Padova: CEDAM, 2012), 115; S. Landini, 'The Worthiness of Claims Made Clauses in Liability Insurance Contracts' *The Italian Law Journal*, 511, fn 4 (2016).

[11] In fact, the previous interpretation of the rule that presupposes that the control of dignity takes place only in the case of atypical contracts (see R. Sacco, 'Interesse meritevole di tutela' *Digesto (discipline privatistiche) sezione civile* (Torino: UTET, 2010), 783) has been exceeded. On this point see P. Perlingieri, 'In tema di tipicità e atipicità nei contratti' n 8 above, 396.

[12] In this regard, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 47. It should be clarified that the 'subsumption' is a

applicable regulatory framework depending on the actual interests enshrined in the contractual agreement.[13]

Nevertheless the most fashionable typological method[14] is often used 'in the negative'[15] to engineer a sort of 'escape' from type, operating as an expedient to circumvent the application of 'unwelcome' rules designed to safeguard needs not only worthy of protection but even the expression of values of constitutional rank.[16] In other words, the framing of a form of guarantee as falling within the realm of the 'atypical' often conceals the purpose of obliterating mandatory and

method for detecting the applicable law to an atypical contract and by virtue of which the latter is traced back to the legal type that most resembles it, so as to allow a direct and not analogical application of the related discipline.

[13] A. Fachechi, 'Il problema della disciplina applicabile tra tipicità e atipicità contrattuale' *Rassegna di diritto civile*, especially 1187-1188 and 1191-1192 (2016); R. Clarizia, 'Il contratto tra *tipico* e *atipico*' n 8 above, 12; D. Valentino, 'The Rent to Buy in Italy. *Mater artium necessitas*' *European Business Law Review*, 336 (2018).

[14] The typological method is not immune to criticism (see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 366 (and further bibliographical references therein)) because – although it favours a global view – it tends to isolate its qualifying elements in order to relate to the atypical contract a regulatory regime derived from several similar types (on this method is sufficient to refer, among legal scholars, to G. De Nova, *Il tipo contrattuale* (Padova: CEDAM, 1974), 140; and, among court decisions, to Corte di Cassazione 26 February 2004 no 3863, *Giurisprudenza italiana*, 271 (2005), with comment by R. Caterina, 'La costosa custodia: la qualificazione del contratto di parcheggio e le sue conseguenze' *Corriere giuridico*, 387 (2005); with comment by M. Viti, 'Metodi di qualificazione e disciplina applicabile al contratto di parcheggio' *Nuova giurisprudenza civile commentata*, I, 534 (2005); with comment by A. Arlotta, 'Parcheggio automatizzato e responsabilità del gestore' *Rassegna delle locazioni e del condominio*, 485 (2004); with comment by V. Amendolagine, 'Contratto di parcheggio ed inscindibilità dell'obbligazione di custodia del veicolo quale componente essenziale dell'accordo fondato sul «contratto sociale» tra le parti contraenti' *Foro italiano*, I, c. 2133 (2004); with comment by A.L. Bitetto, 'Il contratto di parcheggio: declino del potere normativo d'impresa e tutela del contraente debole nelle «*quick hand transactions*» (contratti di massa a conclusione rapida)!' *Responsabilità civile e previdenza*, 717 (2004); with comment by M. Gorgoni, 'Parcheggio e custodia: tra negazione dell'utilità della disciplina contrattuale di diritto comune e svalutazione del consenso'). Therefore, it is not possible to follow 'a method (…) which limits itself to framing and categorising cases without analysing and evaluating the interests pursued and the peculiarities of the concrete situation, with consequent forcings and distortions. Rather, it would be advisable to analyse the '*ratio*' of the specific provisions (…) to verify whether each, although belonging to a group to a group of rules designed for a certain contract, could still be compatible and adequate to satisfy the interests actually pursued by the parties (creditor and debtor) and underlying the agreement' (G. Perlingieri, 'La scelta della disciplina applicabile ai vitalizi impropri. Riflessioni in tema di aleatorietà della rendita vitalizia e di tipicità e atipicità nei contratti' *Rassegna di diritto civile*, 532-533 (2015)).

[15] F. Astone, 'Contratto autonomo di garanzia, polizza fideiussoria e fideiussione, tra qualificazione "negativa", e ricerca della disciplina applicabile ai contratti atipici e clausole generali' *Contratti*, 1241-1242 and 1246 (2010).

[16] It is well known that 'the economic operators often create very complex atypical contracts in order to raise a sort of smokescreen to hide the contractual terms that derogate mandatory rules and general principles': U. Majello, 'I problemi di legittimità e di disciplina dei negozi atipici' *Rivista di diritto privato*, 500 (1987); L. Bozzi, 'Le garanzie personali a prima richiesta', in G. Gitti, M. Maugeri and M. Notari eds, *I contratti per l'impresa*, I, *Produzione, circolazione, gestione, garanzia* (Bologna: il Mulino, 2012), 577.

imperative rules governing some kind of typical contract or general rules of contract.[17] This is reason for concern if considers that such an approach advances the agenda of a business world that – drawing new lifeblood from a global '*lex mercatoria*'[18] – instinctively tends to overlook the duty that the secured creditor (especially if a professional) has to safeguard the interests of the guarantor and the primary debtor, parties which more often than not (although not always) are the weak ones into the legal relation.[19]

In the matter of negotiated guarantee it is evident that rather than dwelling on a meticulous search for detailed rules[20] it is much more productive to derive the rules governing a given case from principles that informs the domestic legal order, general clauses and rules with a 'trans-typical' or 'meta-typical' vocation.[21] Which is what the very title of this work is getting at, linking the specific theme of 'atypical guarantee' to the doctrine of 'constitutional legality' and its formative values.[22]

[17] Perfectly captures the '*punctum dolens*' of the question, A. Federico, 'Tipicità e atipicità dei contratti' n 9 above, 174; as well as, in earlier times, P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 14 above, 343: 'the subsumption of the concrete contract in a regulation frame provided for a single and special contract makes it difficult or excludes the applicability to that specific context of a series of rules and principles in the general discipline of the contract (from Art 1321 to 1469-*bis* of the Civil Code) or even in the legal system'.

[18] It's now well known the subjection of the so-called '*marchands de droit*', real protagonists of the process of globalization in the juridical field, to the economic potentates, as denounced by Y. Dezalay, *I mercanti del diritto. Le multinazionali del diritto e la ristrutturazione dell'ordine giuridico internazionale* (1992), trans. M. Raiteri ed, (Milano: Giuffrè, 1997), passim. Hence the risk that the 'globalized right created by the merchant class may result in a new manifestation of the right of the strongest' (P. Rescigno, 'I contratti d'impresa e la Costituzione', in P. Sirena ed, *Il diritto europeo dei contratti d'impresa. Autonomia negoziale dei privati e regolazione del mercato* (Milano: Giuffrè, 2006), 28). In the same sense N. Lipari, *Diritto e valori sociali: legalità condivisa e dignità della persona* (Roma: Studium, 2004), 101; G. Rossi, *Il mercato d'azzardo* (Milano: Giuffrè, 2008), 89.

[19] U. Petronio, *La lotta per la codificazione* (Torino: Giappichelli, 2002), 54, warns against the injustices inherent in 'a pure and simple return to a system constituted by a right free from all legislative mediation, in which the relationships between subjects are established by the market and therefore by the contract, that may seem a model of freedom for everyone and that, instead, is an ephemeral and mystifying model. In fact, in the contemporary world under the guise of a renewed *lex mercatoria* (…), the free creativity of the parties, the presence of closed groups (…) endowed with a strong economic power (…) opens up the doors to the absolute hegemony of strong contractors and creates the conditions both for a renewed substantial legal inequality and for a concrete disappearance of some values of social solidarity'. However, see the different opinion of F. Galgano, *Trattato di diritto civile*, II, *Le obbligazioni in generale. Il contratto in generale. I singoli contratti*, N. Zorzi Galgano ed, (Padova: CEDAM, 3rd ed, 2015), 166.

[20] G. Perlingieri, 'Garanzie «atipiche» e rapporti commerciali' n 1 above, 45.

[21] These rules are contained in the discipline of a specific typical contract, but they have a scope of application that can be extended to include other different typical contracts as well as atypical contracts (as regards the distinction between typical/atypical contracts see n 7 above). On the dissemination of this kind of rules, see A. Federico, 'Tipicità e atipicità' n 9 above, 175.

[22] According with the method that aims to revisit the civil law in the light of the fundamental principles laid down in the Republican Constitution adopted in 1948: P. Perlingieri, 'Constitutional Norms and Civil Law Relationships' *The Italian Law Journal*, 17-49 (2015); Id, 'Giustizia secondo Costituzione ed ermeneutica. L'interpretazione c.d. adeguatrice', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 3; Id, 'Valori

At this point, adopting a necessarily pragmatic and relative approach, it is indispensable to give some emblematic examples that serve as a test to trial the method proposed hereafter and to show how it may prove to be useful to prevent or resolve disputes that arise between freedom of contract in matters of guarantee for credit and the legal system as a whole.

Merely for the sake of succinctness this work takes into account just 'traditional' good faith and more 'modern' proportionality, which in the author's opinion lend themselves however to producing the most fruitful and topical implications.

II. The Central Role Played by General Provisions on Good Faith and Correctness in Relation to the So-Called 'Independent' Guarantee with Particular Regard to the Obligations to Protect the Creditor *vis-à-vis* the Guarantor and the Primary Debtor

There is significant potential in what good faith (and inherent principle of solidarity according to Art 2 of the of the Italian Constitution)[23] expresses in relation to so-called 'independent' guarantees,[24] a form of guarantee that cannot exactly be labelled as 'new generation'[25] but which in the contractual landscape is certainly the most common atypical one and still raises unresolved problems.

Those who adhere to the traditional interpretation repeat as their 'mantra' that an independent contract of guarantee is governed by the rules applicable to Suretyship (ie the Artt 1936-1957 of the Civil Code concerning the so-called

normativi, e loro gerarchia' *Rassegna di diritto civile*, 787 (1999); Id, 'Complessità, e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 199 (2005); Id, 'Salvatore Pugliatti e il «principio della massima attuazione della Costituzione»' *Rassegna di diritto civile*, 807 (1996); Id, 'Produzione scientifica e realtà pratica: una frattura da evitare', in Id, *Scuole, tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 24-25.

[23] F. Piraino, *La buona fede in senso oggettivo* (Torino: Giappichelli, 2015), 12; A. Spangaro, *L'equilibrio del contratto tra parità negoziale e nuove funzionalizzazioni* (Torino: Giappichelli, 2014), 46-52; G. Recinto, 'Buona fede ed interessi dedotti nel rapporto obbligatorio tra legalità costituzionale e comunitaria' *Rassegna di diritto civile*, 271 (2002).

[24] F. Cappai, 'Le garanzie autonome nel commercio internazionale' *Il nuovo diritto delle società*, 22 (2016); G. Stella, 'Garanzie autonome e *uniform rules for demand guarantees*', in G. Gitti, F. Delfini and D. Maffeis eds, *Studi in onore di Giorgio De Nova*, IV (Milano: Giuffrè, 2015), 2861; L. Bozzi, 'Le garanzie personali a prima richiesta' n 16 above, 567.

[25] In Italy, the first publications about the topic date back to the works (still fundamental) of G.B. Portale, 'Fideiussione e *Garantievertrag* nella prassi bancaria', in G.B. Portale ed, *Le operazioni bancarie*, II (Milano: Giuffrè, 1978), 1044; Id, *Le garanzie bancarie internazionali* (Milano: Giuffrè, 1989), passim; and of F. Benatti, 'Garanzia (contratto autonomo di)' *Novissimo digesto italiano* (Torino: UTET, 1982), app., III, 918. See also F. Nappi, *La garanzia autonoma. Profili sistematici* (Napoli: Edizioni Scientifiche Italiane, 1992), passim; G. Meo, *Funzione professionale e meritevolezza degli interessi nelle garanzie atipiche* (Milano: Giuffrè, 1991), 93; F. Mastropaolo, *I contratti autonomi di garanzia* (Torino: Giappichelli, 1989), passim; G.B. Portale, 'Fideiussione e «*Garantievertrag*» nella prassi bancaria', in Id, *Le garanzie bancarie internazionali* (Milano: Giuffrè, 1989), passim.

'*Fideiussione*')[26] except for the rules governing the accessory essence of a surety.[27]

This method of reasoning – in terms not of principles but of individual rules – still has its roots today in the prevailing caselaw in the conviction that, for example, Art 1957 of the Civil Code cannot be extended to an independent contract of guarantee because the onus on the secured creditor to assert its claims in a timely manner against the primary debtor[28] thereby establishing a necessary link between the duration of the guarantee obligation and the primary obligation, presupposes that the suretyship is ancillary (ie dependent) in nature.[29] Indeed,

[26] Which embodies within the Italian legal system the paradigm of personal guarantee. In this sense E. Briganti, *Percorsi di diritto privato* (Torino: Giappichelli, 1994), 147.

[27] The sibylline ('self-evident', 'tautological' and 'circular', in the opinion of L. Pontiroli, *Le garanzie autonome e il rischio del creditore* (Padova: CEDAM, 1992), 38-39) nature of the aforementioned criterion that grants wide margins of discretion to the interpreter is all too evident. So much so that the lists of the provisions concerning suretyship compatible with the independent contract of guarantee are not completely coincident. Compare, for example, the point of view of F. Gazzoni, *Manuale di diritto privato* (Napoli: Edizioni Scientifiche Italiane, 12th ed, 2006), 1318; C.M. Bianca, *Diritto civile*, V, *La responsabilità* (Milano: Giuffrè, 2nd ed, 2012), 531; and G. Stella, *Le garanzie del credito. Fideiussione e garanzie autonome* (Milano: Giuffrè, 2010), 790.

[28] Art 1957 ('Maturity of primary obligation'): 'The liability of a surety remains in effect even after the primary obligation has matured, provided that creditor, within six months, has instituted an action against the debtor and has diligently pursued it' (para 1). 'This provision applies even if the surety has expressly limited his suretyship to the same period as that of primary obligation' (para 2). 'In such case, however, the action against the debtor shall be instituted within two months' (para 3). 'The action instituted against the debtor also interrupts prescription' (para 4) (the translation of the transcribed article is that provided for by M. Beltramo, G. Longo and J.H. Merryman, *The Italian Civil Code and Complementary Legislation* n 4 above, 415-416).

[29] Corte di Cassazione-Sezioni unite 18 February 2010 no 3947, *Rivista notarile*, I, 1239 (2010), with comment by F. Astone, 'Contratto autonomo di garanzia, polizza fideiussoria e fideiussione, tra qualificazione "negativa", e ricerca della disciplina applicabile ai contratti atipici e clausole generali' *Contratti*, 453 (2010); with comment by M. Lobuono, 'La natura giuridica della polizza fideiussoria: l'intervento delle Sezioni Unite' *Corriere giuridico*, 444 (2010); with comment by V. Carbone, 'Fideiussione e *garantievertrag*' *Corriere giuridico*, 1034 (2010); with comment by F. Rolfi, '*Garantievertrag* e polizza fideiussoria: il *grand arrêt* delle Sezioni Unite tra massime ed *obiter dicta*' *Giustizia civile*, I, 1349 (2010); with comment by A. Lamorgese, 'Il *Garantievertrag* secondo le Sezioni unite' *Giustizia civile*, I, 1365 (2010); with comment by G. Pasciucco, 'Le polizze fideiussorie e un'occasione di riflessione sulle clausole di pagamento «a prima richiesta»' *Giustizia civile*, I, 497 (2011); with comment by P. Tartaglia, 'Le polizze fideiussorie, il contratto autonomo di garanzia e le Sezioni unite' *Banca borsa e titoli di credito*, II, 279 (2010); with comment by G.B. Barillà, 'Le Sezioni unite e il *Garantievertrag* un quarto di secolo dopo: una pronuncia "storica" fa chiarezza sui differenti modelli di garanzie bancarie autonome' *Banca borsa e titoli di credito*, II, 425 (2010); with comment by F. Nappi, 'Un tentativo (non convincente) di "definitivamente chiarire" la differenza tra fideiussione e Garantievertrag' *Assicurazioni*, II, 483 (2010); with comment by M. Rossetti, '«Ei fe' silenzio, ed arbitro s'assise in mezzo a lor», ovvero fine dei contrasti sulla natura dell'assicurazione fideiussoria' *Giurisprudenza italiana*, 2038 (2010); with comment by F. Rocchio, 'Le garanzie autonome, e in particolare le polizze fideiussorie, viste dalle Sezioni unite' *Nuova giurisprudenza civile commentata*, I, 921 (2010); with comment by C. Puppo, 'La polizza fideiussoria al vaglio delle Sezioni unite. Tra autonomia e accessorietà della garanzia' *Studium iuris*, 805 (2010); with comment by F. Oliviero, '(In tema di) natura della polizza fideiussoria prestata dall'appaltatore in favore dell'amministrazione committente' *Corriere del merito*, 516 (2010); with comment by G. Travaglino, 'Natura giuridica della polizza fideiussoria stipulata dall'appaltatore a garanzia delle obbligazioni verso la p.a.' *Diritto ed economia dell'assicurazione*, 250 (2011); with comment by D.

it is argued that the addition of a clause of 'payment on first request' or an equivalent one entails an implicit exception to the rule in question unless otherwise agreed by the parties.[30]

That approach ignores (or does not fully grasp) that Art 1957 of the Civil Code cannot be said to be ontologically incompatible with an independent contract of guarantee even though there is a lack of ancillarity.[31] This is because that provision constitutes a direct emanation of the principle of protection of the guarantor and especially the general duty of good faith incumbent on the creditor[32] that is not open to dilution, not even – and more so – in the context of atypical transactions.[33] This means that even if in an independent contract of guarantee

Cerini, 'Le Sezioni Unite sulle polizze fideiussorie: un'occasione per una riflessione' *Diritto ed economia dell'assicurazione*, 276 (2011); with comment by C.F. Galantini, 'Le Sezioni Unite della Cassazione e le polizze fideiussorie: una decisione discutibile e inadatta al settore assicurativo' *Obbligazioni e contratti*, 98 (2011); with comment by V. Montani, 'Fideiussione e contratto autonomo di garanzia: *tertium non datur*' and A. Nastri, 'La polizza fideiussoria nel *genus* delle garanzie atipiche' *Obbligazioni e contratti*, 104 (2011).

[30] In this sense, Corte di Cassazione 12 February 2015 no 2762, *Notariato*, 173 (2015); and Corte di Cassazione 28 October 2010 no 22107, *Giustizia civile*, 929 (2011). The power to waive Art 1957 of the Civil Code is confirmed by Corte di Cassazione 20 January 2004 no 776, *Archivio civile*, 1341 (2004); Corte di Cassazione 27 March 2002 no 4444, *Contratti*, 708 (2002); Corte di Cassazione 9 December 1997 no 12456, *Giurisprudenza italiana*, 11 (1998); Corte di Cassazione 22 June 1993 no 6897, *Foro italiano*, I, 2171 (1993), with comment by G. Valcavi, 'Sul carattere interpretativo della norma che vieta le fideiussioni "*omnibus*" illimitate e sulla sua applicazione retrospettiva alle liti pendenti'; Corte di Appello di Milano 31 December 1999, *Giurisprudenza milanese*, 222 (2000); Corte di Appello di Milano 22 December 1987, *Banca borsa e titoli di credito*, II, 459 (1988); Corte di Appello di Milano 23 February 1982, *Giurisprudenza commerciale*, II, 625 (1983); Tribunale di Torino 8 May 2001, *Contratti*, 65 (2002), with comment by M. Di Clemente, 'Fideiussione senza limiti di tempo e deroga implicita all'art. 1957 codice civile'; Tribunale di Milano 9 November 1987, *Banca borsa e titoli di credito*, II, 462 (1988); Tribunale di Milano 2 April 1987, ibid 147. The opposite point of view is much less widespread: see, in legal scholarship, G. Valcavi, 'Sulla inderogabilità dell'art. 1957 c.c.' *Giurisprudenza italiana*, I, 460 (1990); and, among court decisions, Tribunale di Pordenone 11 maggio 1993, *Banca borsa e titoli di credito*, II, 565 (1994); as well as Tribunale di Milano 11 giugno 1986, ibid 216, with comment by F. Benatti, 'Sulla deroga all'art. 1957 c.c. nella fideiussione bancaria'.

[31] It is useful to recall the definitions given by Art 1:101 of the Book IV, Part G of the 'Draft Common Frame of Reference' (DCFR): 'a 'dependent personal security' (ie guarantee) is an obligation by a security provider which is assumed in favour of a creditor in order to secure a right to performance of a present or future obligation of the debtor owed to the creditor and performance of which is due only if, and to the extent that, performance of the latter obligation is due'; instead, 'an 'independent personal security' is an obligation by a security provider which is assumed in favour of a creditor for the purposes of security and which is expressly or impliedly declared not to depend upon another person's obligation owed to the creditor'.

[32] G. Panza, 'Fideiussione «*omnibus*» e validità delle deroghe agli artt. 1955, 1956 e 1957 c.c.' *Diritto e giurisprudenza*, 930 (1988); Corte di Cassazione 12 December 2005 no 27333, *Massimario del Foro italiano*, 953 (2006). See also the Comments to the Book IV («Obligations») of the Civil Code made by the Italian Minister of Justice to the Emperor King available in G. Pandolfelli et al, *Codice civile. Libro delle obbligazioni illustrato con i lavori preparatori e disposizioni di attuazione e transitorie* (Milano: Giuffrè, 1942), 606.

[33] Lately the same question has been studied under other angles by G. Perlingieri, 'Garanzie «atipiche»' n 1 above, 40-41; and by A. Fachechi, 'Il problema della disciplina' n 13 above, esp 1197.

one were to decide to totally rule out the applicability of Art 1957 of the Civil Code (which is the default situation in the forms and models in current use),[34] the creditor would not *per se* be free – short of infringing the protective obligations that it owes to the giver of personal guarantee[35] – to culpably behave in an indifferent and tardy manner:[36] trusting in the solvency of the guarantor, the creditor would not be entitled to refrain from promptly pursuing the primary debtor,[37] leaving the latter to dissipate its assets and only afterwards turning to the guarantor thereby effectively thwarting the guarantor's hope of subsequently recovering against the primary debtor.[38]

[34] Nevertheless G. Biscontini, *Solidarietà fideiussoria e «decadenza»* (Napoli: Edizioni Scientifiche Italiane, 1980), 198, suggests to evaluate case by case the worthiness of such terms.

[35] E. Capobianco, 'Profili generali della contrattazione bancaria', in E. Capobianco ed, *I contratti bancari* (Torino: UTET, 2016), 26.

[36] According to F. Astone, 'Contratto autonomo di garanzia' n 15 above, 1257-1258, 'the point is that – even if we want to affirm an absolute incompatibility between the Art 1957 of the Civil Code and the independent suretyship policy (ie as it should be done, taking into consideration the general conditions normally used in the market, where Art 1957 of the Civil Code is often subject to conventional exception) – this would not be a satisfactory conclusion that completely neglects the general duty of correctness of the creditor towards the guarantor: the non-application of the discipline of the suretyship cannot imply the irrelevance of the behaviours with which the secured creditor has or has not safeguarded the interests of the guarantor. From this point of view, the nature of the guarantee – independent or ancillary – should not have any particular impact: the fact that the creditor has the right to demand on first request and without exceptions the payment does not imply the possibility of neglecting the interests of the guarantor'.

[37] The timeliness of the creditor must always be appreciated according to reasonableness, taking into account the peculiarities of the specific case, since it cannot be said '*a priori*' – but only '*ex post*' – if and when the delay assumes a pathological and unfair connotation towards the guarantor. As it was possible to clarify elsewhere (M. Angelone, 'Interferenze tra ragionevolezza, proporzionalità e buona fede in tema di garanzie', in G. Perlingieri ed, *L'operatività dei principi di ragionevolezza e proporzionalità in dottrina e giurisprudenza* (Napoli: Edizioni Scientifiche Italiane, 2017), 87-88), if the secured creditor wears the clothes of a public administration, it would certainly be unreasonable to base the judgment on the correctness of its behaviour on the observance of the deadline of six (or even two) months fixed in general by the Civil Code, since this could be incompatible with the 'reaction times' that normally characterize the administrative activity.

[38] This conclusion is similar to the one reached by the (minority) judicial opinion which allows the applicability of the Art 1956 of the Civil Code to the independent contract of guarantee, since the release of the guarantor sanctioned by the aforementioned provision – where the creditor continues to make credit to the primary debtor even knowing or having been able to know a worsening of the assets of the latter such as to make 'considerably more difficult the satisfaction of the credit' – reflects 'a need to protect the guarantor that is disconnected from the ancillarity between the obligation of guarantee and that of the primary debtor, and can be considered worthy of protection even in cases where such connection is absent, being, in substance, the application of the general clause of good faith to the legal relations between the beneficiary of the guarantee and the guarantor'. In these words, Tribunale di Milano 28 July 2015 no 9100, available at https://tinyurl.com/y2n66dnr (last visited 27 December 2020); and previously Tribunale di Milano 7 March 2012, *Giurisprudenza italiana*, 2578 (2012), with comment by R. Secondo, 'Osservazioni in tema di fideiussione e contratto autonomo di garanzia'. Similarly, C.M. Bianca, *Diritto civile* n 27 above, 531; and G. Stella, *Le garanzie del credito* n 27 above, 683-684, who writes that the exception envisaged by Art 1956 of the Civil Code can also be opposed to the creditor by an independent guarantor, because it responds to an imperative logic of protection of the guarantor (reinforced by the fact that any derogation agreements are void) which is a corollary of the general canon of good faith (ibid 644-645 and 673).

This is how – leaving aside the example – the duty of good faith is key to ensuring in each case observance of the perceptive content of certain provisions (and the underlying constitutional values) even where the contracting parties wish to depart from the general law governing the type of contract.[39] It demonstrates that the applicable rules are not at the mercy of the contracting parties.[40]

Especially the creditor's duty to protect the guarantor and the primary debtor[41] 'must at all times be safeguarded and cannot in actual cases be neglected'.[42]

If one embraces that view in keeping with an axiological approach (scilicet respectful of the legal values that inspire the Republican legal system), one cannot but express some misgiving regarding a very recent judgment of the Italian Council of State. The decision is about an administrative matter originating from a town planning agreement entered into between a municipality and a citizen who had been granted a building permit and an associated independent contract of guarantee in connection with the payment of urbanization costs.[43]

In that case after the citizen had breached his obligations the municipal authorities culpably failed to proceed to collect the unpaid sums and likewise did not enforce the guarantee given by a credit institution in the interest of the debtor (holder of the building permit), which had an adverse effect on the debtor since it led to an increase in the outstanding amount as a result of the accrual of late payment interest and penalties. However, the court held that delay to be lawful because it found that the municipality was under no obligation to promptly enforce the independent guarantee with a view to not worsening the citizen's position. Of no avail was the citizen's objection that he thereby had to pay more.

On closer examination, the aforementioned decision testifies how easy it is to underestimate the scope of the duty of good faith, which should have led the municipality – in its capacity as a secured creditor, once the deadline for payment had passed and in the absence of particular impediments – to diligently seek

[39] It is worth pointing out that autonomy, freedom and right of self-determination are not absolute values, but values among other (constitutional) values. In this perspective, see F. Criscuolo, 'Constitutional Axiology and Party Autonomy' *The Italian Law Journal*, 357 (2017).

[40] How warns G. Perlingieri, 'Il controllo di «meritevolezza» degli atti di destinazione *ex* art. 2645 *ter* c.c.' *Notariato*, 26 (2014), it is necessary 'to avoid any form of 'abuse of the contractual autonomy' and, in particular, any form of 'abuse of the choice of type", having to 'admit that it is not possible to make the applicable law depend on the typical or atypical nature of the contract, since a provision must be applied if it is adequate to satisfy the agreements and the interests actually at stake' (Id, 'La scelta della disciplina' n 14 above, 544). Concerning the concept of 'contractual abuse of the type', see also R. Calvo, 'Equità e controllo del giudice sull'equilibrio contrattuale', in F. Volpe ed, *Correzione e integrazione del contratto* (Bologna: Zanichelli, 2016), 160-161.

[41] The duty in question is a source of new obligations: G. Santoni, 'Fideiussione *omnibus* ed eredi del fideiussore' *Banca borsa e titoli di credito*, I, 38 (1993); Corte di Cassazione 17 March 2006 no 5997, *Il Foro Italiano*, I, 1582 (2007); in more recent times, Tribunale di Milano 14 March 2017 no 2994, available at www.dirittobancario.it.

[42] F. Astone, 'Contratto autonomo di garanzia' n 15 above, 1259.

[43] Consiglio di Stato-Adunanza plenaria 7 December 2016 no 24, *Il Foro Italiano*, III, 129 (2017). The ruling was followed by Tribunale Amministrativo Regionale-Piemonte 13 March 2017 no 353, available at www.giustizia-amministrativa.it.

payment of the then outstanding amount from the guarantor. Indeed, that would have prevented futile and arbitrary harm to the debtor stemming from the charging of penalties.[44]

The solution proposed here (contrary to the one delineated by the Italian Council of State) finds further comfort if one considers the specific facts of the actual case, always to be borne in mind in view of the selection of the preeminent interests. In detail, the delay with which the local authority acted appears even more incorrect and indicative of a disregard for the protection that the debtor must be afforded[45] if one only considers:

- the fact that the creditor was a public body, which was under a duty to exhibit sincere cooperation in its dealings with others;[46]

- the virtually certain solvency of the independent guarantor (who was a bank) and therefore its ability to timely pay the outstanding sums to satisfy the local authority's claim;

- the paradoxical outcome which would end up meaning that a local authority could lawfully benefit from its own enduring inertia to the extent that such behaviour generates extra revenue (which goes against the duty to impose penalties having regard to the principles of reasonableness, graduality and proportionality);[47]

- the equally paradoxical outcome which would arise if the holder of the building permit were to be left exposed – through no fault of his own – to the

[44] The penalties imposed due to the non-payment of the urbanization costs are based on the need for the public administration to promptly dispose of the sums in order to quickly complete the urbanization works. Therefore, the municipality that decides not to immediately enforce the guarantee – aggravating without cause the debtor's position in disregard of good faith and correctness – does not pursue the public interest purpose in view of which the sanction is prepared, but the purpose of obtaining greater income to the detriment of the citizen.

[45] In fact, good faith directs the 'obligation to the protection of the interest of the negotiating partner as long as this does not collide with the interest of the obliged party'. This expression – very frequent in the Cassation's jurisprudence – was also used by Corte costituzionale, ordinanza 2 April 2014 no 77, *Il Foro Italiano*, I, 2036 (2014), with comment by E. Scoditti, 'Il diritto dei contratti fra costituzione giuridica e interpretazione adeguatrice'; by R. Pardolesi, 'Un nuovo super-potere giudiziario: la buona fede adeguatrice e demolitoria'; by G. Lener, 'Quale sorte per la caparra confirmatoria manifestatamente eccessiva?'; and by Corte costituzionale, ordinanza 24 October 2013 no 248, *I Contratti*, 927 (2014), with comment by G. D'Amico, 'Applicazione diretta dei principi costituzionali e nullità della caparra confirmatoria «eccessiva»'; *Giurisprudenza costituzionale*, 3770 (2013), with comment by F. Astone, 'Riduzione della caparra manifestamente eccessiva, tra riqualificazione in termini di "penale" e nullità per violazione del dovere generale di solidarietà e di buona fede'; *Il Foro Italiano*, I, 383 (2014), with comment by F.P. Patti, 'In tema di manifesta sproporzionalità della caparra confirmatoria'.

[46] The duty of sincere cooperation is the public projection of the canon of good faith that guides intersubjective legal relations in private law. This aspect is highlighted by S. Agosta, *La leale collaborazione tra Stato e Regioni* (Milano: Giuffrè, 2008), 103-104.

[47] See, *ex multis*, Consiglio di Stato 23 September 2014 no 4790, *Rivista giuridica dell'edilizia*, I, 980 (2014); Tribunale Amministrativo Regionale-Puglia, Lecce 14 May 2015 no 1598, available at www.giustizia-amministrativa.it; Tribunale Amministrativo Regionale-Lazio, Roma 5 March 2014 no 2544, *Foro Amministrativo*, 919 (2014).

very adverse consequences that he had wished to prevent by furnishing the legally required bank guarantee that went unenforced.

III. Legislative Confirmation of the Principle of Proportionality in the Matter of Guarantee Inferable from the Legalisation of a So-Called '*Patto Marciano*' and the New System for Providing Guarantee in Public Procurement. Proportionality and Merit of So-Called 'Covenants'

Turning now to the principle of proportionality that – even though it must be considered as already existing in the legal system and therefore also in civil law[48] – has recently been clearly confirmed in legislation on credit guarantees.[49]

Regarding real (ie collateral) guarantees, the introduction of the concept of a non-possessory pledge[50] afforded an opportunity to put the so-called '*patto marciano*' on a legislative footing.[51] Specifically, it is now provided that 'self-satisfaction' of the creditor's claim[52] is always achieved solely 'up to the amount of the secured sum' (Art 1, para 7, of the decreto legge 3 May 2016 no 59, converted

[48] P. Perlingieri, 'Sui contratti iniqui' *Rassegna di diritto civile*, 480 (2013); Id, 'Nuovi profili del contratto', in Id, *Il diritto dei contratti* n 8 above, 429. As regards the proportionality as an effective instrument for verifying the worthiness of the acts of negotiating autonomy, see also G. Perlingieri, 'Il controllo di «meritevolezza»' n 40 above, 17; F. Casucci, *Il sistema giuridico «proporzionale» nel diritto privato comunitario* (Napoli: Edizioni Scientifiche Italiane, 2001), 378; and F. Volpe, *La giustizia contrattuale tra autonomia e mercato* (Napoli: Edizioni Scientifiche Italiane, 2004), 88. In this sense Corte di Cassazione 28 April 2017 no 10506, *Guida al diritto*, 55 (2017), considers not worthy pursuant to Art 1322, para 2, of the Civil Code the 'claims made' clause which prevents late requests, since it realizes an unjust and disproportionate advantage of the insurer and places the insured in a condition of undetermined and uncontrollable subjection.

[49] R. Calvo, 'Equità e controllo del giudice' n 40 above, 170-171; S. Giova, *La proporzionalità nell'ipoteca e nel pegno* (Napoli: Edizioni Scientifiche Italiane, 2012), 11; Corte di Cassazione 12 July 2019 no 18791, *Fallimento e le altre procedure concorsuali*, 24 (2020), with comment by M. Costanza, 'Divieto del patto commissorio e operazioni di *leasing* e *lease back*'; ibid 1008 (2019), with comment by M. Ferro, '*Sale and lease back*, limiti del patto commissorio e inopponibilità al fallimento del credito del concedente creditore' Arbitro Bancario Finanziario-Roma 20 November 2014 no 7717, available at www.arbitrobancariofinanziario.it; Arbitro Bancario Finanziario-Milano 15 October 2014 no 6713, ibid.

[50] M. Campobasso, 'Il pegno non possessorio. «Pegno», ma non troppo' *Nuove leggi civili commentate*, 703 (2018); G.B. Barillà, 'Alcune osservazioni a margine del recepimento legislativo del pegno non possessorio' *Corriere giuridico*, 5 (2017); C. Abatangelo, 'Una nuova figura di pegno nel c.d. «decreto banche»' *Osservatorio del diritto civile e commerciale*, 19 (2017); S. Ambrosini, 'Il pegno non possessorio *ex lege* n. 119/2016', available at www.ilcaso.it; D. Giglio, 'Il divieto del patto commissorio ed il problema delle alienazioni in funzione della garanzia, alla luce delle novità introdotte dal d.l. 3 maggio 2016 n. 59' *Rivista di diritto dell'economia dei trasporti e dell'ambiente*, especially 216 (2016).

[51] D. Russo, 'Nuovi meccanismi marciani e divieto del patto commissorio' *Il Foro napoletano*, 159 (2018).

[52] A. Lepore, *Autotutela e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2019), 186-187; S. Addabbo, 'Destrutturazione del pegno ordinario e autotutela satisfattoria dell'interesse creditorio' *Rivista di diritto dell'impresa*, 357-388 (2018).

with amendments by Parliament into Law no 119 of 30 June 2016), meaning that any surplus there might be is to be paid over to the debtor or guarantor.[53]

Regarding personal guarantees, proportionality comes into play in the detailed system governing the giving of guarantee in public procurement as overhauled by the Italian Public Contract Code (decreto legislativo 18 April 2016 no 50). Specifically, Art 93 states that in the event of participation in a tender the offer must be accompanied by a fiduciary bond, called 'performance bond',[54] the amount of which is 'proportional and adequate to the nature of the services covered by the contract and the degree of risk connected to it'; Art 103 adds that the so-called 'Final guarantee'[55] given by the contractor at the time of subsequent signing of the contract must be 'progressively released according to the progress'

[53] A similar opening to the '*patto marciano*' can be found in Art 48-*bis* of the decreto legislativo no 385 of 1993 (also known as 'Law on Banking' or 'TUB') that provides that the loan agreement entered into between a trader and a credit institution can be secured by the transfer, subject to the failure to pay, of real estate assets in favor of the creditor with repayment to the debtor of any difference between the value of the credit and the estimated value of the assets. About the new regulation, see A. Cilento, *Il credito nelle crisi. Garanzia, sofferenze e regolazione bancaria* (Napoli: Edizioni Scientifiche Italiane, 2020), 99; A. Chianale, *Le garanzie reali* (Milano: Giuffrè, 2019), 572; A. Zoppolato, 'I finanziamenti alle imprese garantiti da trasferimento di bene immobile sospensivamente condizionato di cui all'art. 48-*bis* del testo unico bancario' *Nuovo diritto delle società*, 1329 (2018); G. D'Amico, 'La resistibile ascesa del patto marciano', in G. D'Amico et al eds, *I nuovi marciani* (Torino: Giappichelli, 2017), 9; S. Pagliantini, 'Sull'art. 48-*bis* T.U.B.: il «pasticcio» di un marciano bancario quale meccanismo surrogatorio di un mancato adempimento', ibid 42; A. Luminoso, 'Patto commissorio, patto marciano e nuovi strumenti di autotutela esecutiva' *Rivista di diritto civile*, 25 and 28-29 (2017); G. Iaccarino, 'Il rimedio del patto marciano nel diritto positivo' *Immobili e proprietà*, 104 (2017); G. Liace, 'Il finanziamento alle imprese garantito da trasferimento di bene immobile sospensivamente condizionato' *Banca impresa società*, 239 (2017); S. Ambrosini, 'La rafforzata tutela dei creditori privilegiati nella l. n. 119/2016: il c.d. patto marciano' *Il Diritto fallimentare e delle società commerciali*, I, 1075 (2016); D. Mari, 'Il patto marciano: un'analisi critica del nuovo art. 48-*bis* T.U.B.' *Rivista del notariato*, 1111 (2016); A. Scotti, 'Il trasferimento di beni a scopo di garanzia *ex* art. 48 *bis* T.U.B. è davvero il patto marciano?' *Corriere giuridico*, 1477 (2016); M. Buongiorno and E. Notarangelo, 'L'articolo 48 *bis* T.U.B. Prime note a margine dell'introduzione del patto marciano', available at www.dirittobancario.it.

[54] M. Corradino, I contratti pubblici (Milano: Giuffrè, 2017), 830; F. Caringella and M. Protto, Il codice dei contratti pubblici dopo il correttivo. Commento organico al Codice e alle linee guida ANAC alla luce del decreto correttivo del 19 aprile 2017, n. 56 (Roma: Dike giuridica, 2017), 449; P. Giammaria, 'Art. 93', in L.R. Perfetti ed, Codice dei contratti pubblici commentato (Milano: Wolters Kluwer, 2nd ed, 2017), 821; V. Capuzza, 'Art. 93. Garanzie per la partecipazione alla procedura', in G.M. Esposito ed, Codice dei contratti pubblici. Commentario di dottrina e giurisprudenza (Torino: UTET, 2017), I, 1210; V. Gorla, 'Cauzioni e fideiussione provvisorie', in D. Cerini ed, Assicurazioni e appalti: etica, legalità, responsabilità (Torino: Giappichelli, 2016), 72; E. Campagnano, 'Elenchi ufficiali, riduzione del numero di candidati e garanzie di partecipazione alla procedura (Artt. 90-93)', in M. Corradino and S. Sticchi Damiani eds, I nuovi appalti pubblici. Commento al d.lgs. 18 aprile 2016, n. 50 (Milano: Giuffrè, 2017), 406.

[55] M. Corradino, *I contratti pubblici* n 54 above, 837; F. Caringella and M. Protto, *Il codice dei contratti pubblici* n 54 above, 494; V. Gorla, 'Cauzioni e fideiussione provvisorie' n 54 above, 81; S. Bufardeci, 'L'esecuzione dei contratti pubblici (Artt. 100-113)', in M. Corradino and S. Sticchi Damiani eds, *I nuovi appalti pubblici* n 54 above, 461; M. Alesio et al, *Le procedure di affidamento* (Milano: Giuffrè, 2016), 263.

of the works, the services or the supplies.[56] The latter rule has a strong systemic impact since it dictates the automatic reduction of the guarantee provided so that with the passing of time a fair balance is maintained commensurate with the contractor's residual obligation. Which once and for all means that guarantee is to be viewed as a long-term legal relation[57] and hence not in a static but dynamic sense such that the disproportion between the amount of the secured debt and value of the guarantee given may well occur not only initially but also gradually in light of the ever decreasing amount of that debt.

Following on from the above and wishing at this point to mention a form of guarantee that is well known abroad but a relative newcomer in the Italian financial reality, the principle of proportionality plays a decisive role in assessing the merit of so-called 'covenants'.[58]

It is increasingly common for loan agreements with business enterprises[59] to contain specific 'covenants' imposing a series of behavioural obligations on the borrower[60] with the aim of minimising the risk of insolvency and securing

[56] The translation of both articles cited is the one available on the National Anti-Corruption Authority official website: www.anticorruzione.it.

[57] F. Longobucco, *Rapporti di durata e divisibilità del regolamento contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2012), 62, 216 and 249. So that it might not be so true (or, at least, always and in any case true) as to the contrary believed by F. Macario, *Garanzie personali*, X, *I singoli contratti* (Torino: UTET, 2009), 59, that – in continuity with the past (see, *ex multis*, M. Fragali, 'Fideiussione (dir. priv.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1968), XVII, 348) – does not include the suretyship between the long-term contracts because 'the temporal element does not appear suitable to identify its function'. In support of the opposite hermeneutical reconstruction, Arbitro Bancario Finanziario-Napoli 11 November 2013 no 5712, available at www.arbitrobancariofinanziario.it, ruled that '(i)n the past, indeed, the duration of the suretyship has been ignored, on the assumption that this personal guarantee covers an obligation that must be executed instantaneously upon the expiry of the primary obligation or even at a given term. In this perspective, it was included among the contracts with a delayed execution. However, it seems more correct to consider that the suretyship is intended to satisfy a lasting interest of the creditor, which must be appreciated on an on-going basis, aside from the expiry of the primary obligation and the fulfilment of the primary debtor. As a result, this approach also leads to include the suretyship between the so-called 'duration contracts' and, therefore, also to include the relative contractual relation in the sphere of application of Art 119 of the decreto legislativo no 385 of 1993 (also known as «Law on Banking» or «TUB»)'.

[58] Over the years, the number of studies dedicated to the topic has increased focusing both on legal (M. Mozzarelli, Business covenants *e governo della società finanziata* (Milano: Giuffrè, 2013)), passim; G. Piepoli, 'Profili civilistici dei *covenants*' *Banca borsa e titoli di credito*, I, 498 (2009); U. Patroni Griffi, 'I *covenants* finanziari' *Rivista di diritto societario*, 601 (2009); D. Galletti, 'I covenants e le altre garanzie atipiche nel private equity e nei finanziamenti bancari', available at www.aleasrv.cs.unitn.it, and economic profiles (F. Bazzana, *I* «covenants» *nei contratti di debito. Esistenza, condizioni di efficacia e prezzo* (Roma: Carocci, 2007), passim). Recently, covenants were also mentioned in the draft law no 1151 presented on 19 March 2019 on 'Delegation to the Government for the revision of the Civil Code'.

[59] The covenants can be related either to credit agreements negotiated on an individual basis (so-called 'private debt') or to bonds issued by a company (so-called 'public debt'). In the latter case they assume the specific denomination of 'bond covenants' (M. Palmieri, 'I bond *covenants*' *Banca Impresa Società*, 247 (2006)).

[60] These may have both positive ('affirmative covenants') and negative ('negative covenants')

performance of the obligation to repay the loan.[61]

Such 'behavioural guarantee' gives the lender power to influence business decisions to a certain extent,[62] for example, by requiring the debtor to maintain certain financial statement ratios for the entire duration of the loan, not to substantially modify the type of business carried on, to refrain from a change of control, to refrain from engaging in certain M&A type transactions, not to increase financial indebtedness, grant loans or provide personal guarantee beyond a set threshold and not to encumber the assets granted by way of guarantee in relation to the loan granted, etc.

Such management limitations (and any others that the myriad types of negotiations may conceive) can be very invasive[63] and thus must be subject to a rigorous review as to their worthiness in the light of the principle of proportionality.[64]

In fact, it is necessary to verify from time to time – and always according to reasonableness[65] – whether a correct balance is being struck between the lender's interest in the guarantee and control over the debtor on the one hand and the sacrificing of the debtor's freedom of economic initiative on the other hand in order to avoid that sacrifice becoming exorbitant or in any even unjustified (ie, in a word, unworthy). Any such assessment will have to take into account the specific circumstances of the single loan agreement because the validity or otherwise of the restrictions inherent in the covenants will depend primarily on the specific

content. See L. Picardi, *Il ruolo dei creditori fra monitoraggio e orientamento della gestione nella società per azioni* (Milano: Giuffrè, 2013), 89.

[61] However, there are those (as, for example, A.D. Scano, 'I *covenants* nei contratti di finanziamento all'impresa: garanzie o strumenti atipici di conservazione della garanzia patrimoniale?', in I. Demuro ed, *Le operazioni di finanziamento alle imprese. Strumenti giuridici e prassi* (Torino: Giappichelli, 2010), 100) who do not qualify the covenants as an atypical guarantee.

[62] G. Racugno, 'Il governo delle società cooperative. Il voto, i patti parasociali, i «*covenants*»' *Rivista delle società*, 157-158 (2014); E. Codazzi, *L'ingerenza nella gestione delle società di capitali: tra "atti" e "attività"* (Milano: Giuffrè, 2012), 16.

[63] In the English legal literature many authors have remarked that the influence on decision making processes can be so intense as to put it into the hands of the creditor – already during the physiological phase of the debtor-creditor relationship – large portions of the business activity (on this aspect see D.G. Baird and R.K. Rasmussen, 'Private debt and the missing lever of corporate governance' 154 *University of Pennsylvania Law Review*, 1227 (2006)). With regard to the repercussions in the internal legal system deriving from the possible interference of the financiers in the activity of the financed company, see G. Giannelli and A. Dell'Osso, 'I finanziamenti in *pool*', in E. Capobianco ed, *I contratti bancari* n 35 above, 1302; and R. Pennisi, 'La responsabilità della banca nell'esercizio del controllo in forza di *covenants* finanziari' *Rivista di Diritto Societario*, 627 (2009); L. Picardi, *Il ruolo dei creditori* n 60 above, esp 165.

[64] Also agrees G. Piepoli, 'Profili civilistici dei *covenants*' n 58 above, 507. Similarly, A.D. Scano, 'I *covenants* nei contratti di finanziamento all'impresa' n 61 above, 111-112.

[65] On the connotations of reasonableness and its fundamental role in legal interpretation, as intended in the text, see at least G. Perlingieri, 'Reasonableness and Balancing in Recent Interpretation by the Italian Constitutional Court' *The Italian Law Journal*, 385 (2018); and C. Crea, 'Dalla '*reasonableness*' al '*raisonnable*' nell'esperienza giuridica francese: '*far away so close*' o '*parler anglais sans le dire*'?' *Annuario di diritto comparato e di studi legislativi*, 743-768 (2017).

legal-economic function underlying the loan or the associated transaction.

For example, a project finance operation in which repayment of the funding is anchored to the revenues generated from the use of the infrastructure could well warrant the imposition of covenants on the so-called 'Special Purpose Vehicle' (SPV)[66] that are particularly strict,[67] further to which the management will be bound to act in a prudent and profitable manner so as to facilitate the attainment of the primary objective of repayment of the loan.[68]

In the same way outside the realm of lending, stringent restrictions on freedom of enterprise could be warranted in concrete in the context of insolvency proceedings, as could be the case for behavioural obligations assumed *vis-à-vis* creditors as a whole in relation to resolving a crisis as part of a recovery plan,[69] a restructuring agreement[70] or a composition with creditors.

IV. The Unitary Nature of the Law on Guarantee in the Current Legal System Should Be Construed from an Axiological Standpoint, Taking into Account the Circumstances of Each Actual Case and the Interests at Stake

In conclusion, it is worth reiterating that in identifying the rules applicable to types of guarantee not specifically regulated by law, it is fundamental to avoid

[66] This circumstance is very frequent, as suggest T.V. Russo, *Il* project financing (Napoli: Edizioni Scientifiche Italiane, 2007), 234 and 254; P. Carrière, 'Finanza di progetto (*project financing*) (diritto privato)' *Enciclopedia del diritto - Annali* (Milano: Giuffrè, 2007), I, 604-605; D. Scano, Project financing*: società e impresa* (Milano: Giuffrè, 2006), 103, 230 and 242; A. De Luca Picione, *Operazioni finanziarie nell'attività di direzione e coordinamento* (Milano: Giuffrè, 2008), 100-101; S.M. Sambri, Project financing. *La finanza di progetto per la realizzazione di opere pubbliche* (Padova: CEDAM, 2nd ed, 2012) 446; A. Davola, 'Le garanzie negative dell'obbligazione' *Responsabilità civile e previdenza*, 122-123 (2013).

[67] In such contexts – as explains G. Piepoli, 'Profili civilistici dei *covenants*' n 58 above, 511 – 'the adherence to the business plan built with the necessary rigorous economic and corporate constraints is fundamental. In fact, any deviation and inconsistency with this frame of reference may prejudice the achievement of the purpose and the repayment of the loan. Consequently, the creditor's interest in protecting the loan and guaranteeing the credit is extremely high, where the prejudice for the debtor is relatively minor'. In a broader perspective, T.V. Russo, *Il project financing* n 66 above, 282, examines the range of control powers that can be exercised over the deeds and activities falling within the project financing operations (including those due to the financiers: ibid 288), emphasizing the different degree of incisiveness depending on the concrete case.

[68] This objective is, in fact, primary in the operational phase of project finance. See in this regard, E. Guarnaccia and M. Antoci, 'Il *project financing*', in G. Cassano and R. Clarizia eds, *I singoli contratti* n 8 above, 146; R. Sciuto, 'La finanza di progetto', in S. Amorosino ed, *Manuale di diritto del mercato finanziario* (Milano: Giuffrè, 3rd ed, 2014), 497; P. Messina, *Le operazioni finanziarie nel diritto dell'economia. Finanza pubblica e finanza d'impresa* (Padova: CEDAM, 2011), 166.

[69] S. Ambrosini and M. Aiello, 'I piani attestati di risanamento', in L. Panzani ed, *Il fallimento e le altre procedure concorsuali*, IV (Torino: UTET, 2nd ed, 2014), 858-859.

[70] A. Pellegatta, 'La c.d. «nuova asseverazione» o «riattestazione». Mancata tenuta dei piani di risanamento e degli accordi di ristrutturazione. Profili di valutazione economica e legale' *Rivista di diritto privato*, 459 (2011).

a priori and generalizing solutions that an interpreter is often tempted to adopt born of an obsession to bring new developments in practice within already established legal categories.

On the contrary, it is necessary to pay attention to the circumstances of each case since the principles must always be adapted to meet the facts of the case and the interests involved. Therefore, depending on the content of the overall economic operation, on the nature of the fundamental legal relation that the guarantee supports (for example consider the value acquired by a guarantee linked to the sale of a building to be constructed that involves protection of the right to housing and savings), on the active or passive nature of the guarantee, on the legal form of the parties involved (different if the guarantor is a consumer/weak contracting party or a professional) and even on whether the secured creditor is a professional (bank, insurance company or other intermediary).

The unitary nature of the situations of guarantee in the current legal system must therefore be reconstructed from an axiological standpoint but without overlooking the complexity of reality and the special features of each single 'fact situation',[71] which must be preserved and appreciated so as to identify – in striking a balancing consistent with the reasonableness of the various needs involved – the most adequate rules to satisfy the interests to be protected.

[71] According to J.H. Merryman, 'The Italian Style I: Doctrine' *Stanford Law Review*, 49 (1965), the aforementioned locution can translate the legal concept of '*fattispecie*'.

Essays

A Model of Liability for Harm Caused to the Patient by Use of Bioprinting Technologies: A View into the Future

Dmitry E. Bogdanov*

Abstract

The rapid development of bioprinting technology creates serious challenges for the legal system, which is lagging behind scientific and technological progress in its development. Lawmakers and the judiciary will soon be forced to answer the questions posed by the new technological revolution. The main area of legal regulation is that bioprinting will have a serious impact on is tort liability, since the use of this technology will be associated with harm to the health of patients.

There is a question about rules to follow when compensating for harm to the patient. The article considers various models of liability for harm to the patient caused by the use of bioprinting technologies. The article concludes that the patient's voluntary informed consent to treatment using bioprinting technologies can be qualified as the patient's acceptance of the risk of possible adverse consequences that are beyond the control of the medical organization. Such consent may be qualified as a circumstance that is the basis for releasing a hospital from liability for harm caused to a patient when using bioprinting technologies.

I. Introduction

Currently, the world is facing the rapidly developing 3D printing technology designated in scientific literature as an example of additive technology.[1] This technology is based on the connectivity method, which is essence lies in the fact that a 3D printer through serial connection and layering of 'ingredients' (powders, metal, polymers, etc) ensures layer-by-layer printing of a new three-dimensional object. 3D printer operation is controlled by a computer with appropriate software; however, the printing itself is preceded by creation of a computer-aided model (prototype) of the future three-dimensional object (Computer Aided Design files or CAD files), which could be obtained, for example, by means of three-dimensional scanning.

* Professor of Civil Law, Kutafin Moscow State Law University. This study was financially supported by the Russian Foundation for Basic Research within the framework of the Scientific Project no 18-29-14027 mk 'Concept of Legal Regulation of Relations for Conducting Genomic Research in Creation and Use of Bioprinted Human Organs'.

[1] E.J. Kennedy and A. Giampetro-Meyer, 'Gearing Up for the Next Industrial Revolution: 3d Printing, Home-Based Factories, and Modes of Social Control' 46 *Loyola University Chicago Law Journal* (2015), available at tinyurl.com/yxexn2cr (last visited 27 December 2020).

3D printing technology development leads to 'digitalization' of the material world objects, boundaries between the physical world and the digital space are being erased, since distinction between a computer-aided prototype and its material embodiment is thinned to one click[2]. As noted by Lucas Osbourne, 3D printing is becoming the reason for overlaying worlds of atoms and bits on each other. With the spread and improvement in 3D printing technology, three-dimensional computer-aided templates for many products would become equivalent to their physical counterparts. Regulating relations associated with such files would appear to be a major challenge for the legal system seeking to adapt to the world of 3D printing.[3]

If three-dimensional printing (3D printing) digitalizes objects of the material world, which relates not only to high-tech products (for example, components and parts of spacecraft or aircraft), but also to everyday goods (for example, dishes or shoes), then bioprinting starts to digitalize a person and his body. Subsequently, this could lead to a kind of digitalizing the very existence of a person,[4] since it would directly depend on its digital embodiment in the corresponding CAD files (computer-aided design files), ie electronic templates both of the entire human body, as well as of its separate parts, individual tissues and organs.

Currently, 3D printing technology is already actively introduced in the area connected to a person 'digitalization' for health purposes. Thus, a number of corporations[5] are successfully developing the bioprinting technology for liver tissue and other human organs in order to provide toxicological testing of new medical preparations. Bioprinting helps to reduce risks of harm, as well as time required for testing new medical prescriptions and expenses related with this. The 3D printing technology is actively used in patients' recreation after suffering serious injuries, since this technology makes it possible to print individual prostheses and implants that consider individual physiological characteristics of each patient. Three-dimensional printing also makes it possible to restore the patient's appearance, as it is already actively used in face surgery. 3D printing is used in many leading medical centers before complex operations, which technique was initially practiced on a 3D model of the corresponding organ, for example, before transplantation.[6] Back in 2018, Roscosmos State Corporation, INVITRO and

[2] D.H. Brean, 'Patent Enforcement in Cyberterritories' 40 *Cardozo Law Review*, 2549 (2019), available at tinyurl.com/yn6ae68s (last visited 27 December 2020).

[3] L. Osborn, 'Regulating Three-Dimensional Printing: The Converging Worlds of Bits and Atoms' *51 San Diego Law Review*, 553 (2014), available at https://tinyurl.com/y5ay9y37 (last visited 27 December 2020).

[4] J. Train, 'To Bioprint or Not to Bioprint' 17 *North Carolina Journal of Law and Technology*, 123 (2015), available at https://tinyurl.com/y2qbm6an or https://tinyurl.com/y57codx7 (last visited 27 December 2020).

[5] For example, Organovo, Aspect Biosystems, TeVido Biodevices. See S.V Murphy and A. Atala, '3D bioprinting of tissues and organs' 32 *Nature Biotechnology'*, 773-786 (2014).

[6] M. Varkey and A. Atala, 'Organ Bioprinting: A Closer Look at Ethics and Policies' 5 *Wake Forest Journal of Law & Policy*, 275 (2015).

3D Bioprinting Solutions announced successful completion of the first stage of the Magnetic 3D-Bioprinter space experiment conducted on board the International Space Station (ISS). For the first time in space, human cartilaginous tissue and thyroid gland of a rodent were printed.

Nevertheless, most importantly, bioprinting aims at creating a new medical paradigm that would ensure overcoming the deficit of human organs and tissues in transplantology. There is a constant increase in the number of patients requiring spare-part surgery and the acute shortage of donor organs necessary for transplantation.

Legal literature tries to formulate definition of this technology; thus, Jasper Tran indicates that bioprinting is production or manufacture of a living organism using the ink made from living cells.[7]

Serious challenge to bioprinting technology is advanced by creating a replica of the human organ 'frame' repeating complex architecture. The living human cells would be layered on the human organ frame during the three-dimensional bioprinting. Thus, human organ frame creation (3D printing) is of utmost importance for bioprinting, since growth and division of living human cells would be taking place on it.

Bioprinting technology is able to revolutionize medicine, but this technology also poses serious risks, as we still are unable to imagine the entire picture of consequences and problems that will arise in connection with active introduction of this technology.[8]

If harm to the patient's life or health is caused by drawbacks of computer-aided design in creating a digital model (replica) of a human organ or of this organ frame, the question arises on the rules that should be followed when compensating the patient for harm. Tort liability is one of the main areas of legal regulation, which would be seriously influenced by 3D printing.[9] This predestinates the need in special studies aimed at determining models of liability for harm caused in the additive technologies.

[7] J. Train, n 4 above.

[8] E. Lindenfeld, '3D Printing of Medical Devices: CAD Designers as the Most Realistic Target for Strict, Product Liability Lawsuits' 85 *University of Missouri-Kansas City Law Review*, 1 (2016), available at https://tinyurl.com/y2n45jfx or https://tinyurl.com/y4j8jpg9 (last visited 27 December 2020). See also: M.H. Park, 'For a New Heart, Just Click Print: The Effect on Medical and Product Liability from 3D Printing Organ' 4 *Illinois Journal of Law, Technology & Policy*, 187, 191 (2015).

[9] J.M. Beck and M.D. Jacobson, '3D Printing: What Could Happen to Products Liability When Users (and Everyone Else in Between) Become Manufacturers' 18 *Minnesota Journal of Law, Science and Technology*, 143 (2017). See also: G. Howells, C. Twigg-Flesner and C. Willett, 'Protecting the Values of Consumer Law in the Digital Economy: The Case of 3D-Printing' in A. De Franceschi and R. Schulze eds, *Digital Revolution - New Challenges for Law* (München: C.H. Beck, 2019), available at https://tinyurl.com/yyjzu8qu (last visited 27 December 2020).

II. Current Practice of Compensation for Damage Caused by 3D Medical Products

Currently, court practice related to the issues of compensation for harm caused to the patients' life or health when using bioprinting technology is missing, since this is a new technology, but of the near future. According to forecasts, human heart effective bioprinting is expected in the next 15-20 years. At present, bioprinting of individual human tissues, blood vessels, etc. is already underway.[10]

However, there is already certain court practice on issues related to compensation for harm caused by defective medical devices, implants, etc, made using the 3D printing (additive technologies). Thus, judgement in the *Buckley* v *Align Tech., Inc.* (2015)[11] case examined a patient's lawsuit against the dental mouthguard producer, the device was individually manufactured using the 3D printing technology. The patient was not in direct contractual relationship with the producer of this medical product. It was manufactured by the dentist order to eliminate occlusion. The patient was referring to the fact that producer has advertised his medical products manufactured using the 3D printing technology misled her and other consumers that his product could eliminate occlusion.

The court rejected the lawsuit basing on the intermediary liability doctrine (intermediary doctrine).[12] The plaintiff argued that producer was obliged to carry out medical analysis of the dental prints for individual medical product 3D printing and, therefore, was obliged to warn the patient about consequences of using the dental mouthguard. Based on the intermediary doctrine, the court indicated that medical product was prescribed by a dentist and was manufactured to order by the producer, who was not a medical expert. The defendant was obliged to warn the dentist of any dangerous side effect, but he did not have a similar obligation with respect to the plaintiff.

Thus, the suit was dismissed for compensation for health harm caused by a medical product made using the 3D printing technology. Motives for lawsuit rejection reflect the peculiar approaches in tort law characteristic for the Common Law countries. It looks like rejection of the lawsuit, even in US law, is far-fetched in spite of using the intermediary doctrine. Since harm was caused by a medical product that should be safe for any end-user, regardless of whether such user was in a contractual relationship with product manufacturer. The fact that there was an intermediary between producer and consumer in the form of a doctor (medical organization) does not deprive a damaged person of the right to be compensated for harm under such circumstances.

[10] M. Little, and G. Wallace, 'Printing the future: 3D bioprinters and their uses' *Australian Academy of Science*, available at https://tinyurl.com/yxenqtv9 (last visited 27 December 2020).

[11] California Northern Court 29 September 2015, *Buckley* v *Align Tech*., *Inc*., no 5:13-CV-02812-EJD, 2015 WL 5698751.

[12] C.D. Edwards and B.K. Kim, 'The Learned Intermediary Doctrine in the WebMD Era' (2019), available at https://tinyurl.com/yyfmohmv (last visited 27 December 2020).

It should be noted that the rules of Product Liability Directive 85/374/EEC, the Civil Code of Russia and the Tort Liability Law of the PRC allow in similar situations for harm compensation on the part of the medical device producer.

Given that decision, several authors believe that 3D printing connected to using individual computer-aided data (CAD files) obtained by scanning patients for the three-dimensional printing of medical devices blurs the boundaries between professional medical services (treatment) and individualized production creating the basis for the intermediary liability doctrine.[13]

In another case (*Cristian* v *Minn Mining & Mfg. Co* (2001)),[14] involving compensation for harm by defects in a breast implant, the court indicated that the person, who developed the breast implant model, could not be held strictly liable for harm caused by the product, because he did not participate in the production process. Thus, the court limited the product liability for defective goods establishing that only the direct manufacturer should bear strict responsibility for the defective goods, but not the developer (designer, planner) of the given product model.

Richard Rubenstein in this regard points out that the US case law establishes strict liability rules for structural defects in regard to implantable medical devices are not applicable due to legal policy reasons. Richard asks a question about fairness of complete prohibition on application of rules governing strict liability for design (engineering) defects in regard to the 3D printed implants, where the process of computer-aided model design (CAD files) makes it possible to change the product structure for each individual patient. However, the author himself points out inability to answer this question, as the modern system of legal regulation is designed to regulate relations connected to mass production of traditional medical devices.[15]

Examples provided from law enforcement practices[16] indicate a problem in determining the model of liability for harm caused by additive technologies, in general, and bioprinting, in particular.

III. Modern Approaches to Determining the Model of Liability for Harm Caused to the Patient by the Use of Bioprinting Technologies

Modern literature is already taking attempts to elaborate a scientific response to new technological challenges forcing to rethink tort liability. So, Jamil Ammar thinks that in order to compensate for harm to a patient health caused by using

[13] J.M. Beck and M.D. Jacobson, n 9 above.

[14] US District Court, D. Maryland 9 January 2001, *Christian* v *Minnesota Min. Mfg. Co.*, 126 F. Supp. 2d 951.

[15] R.H. Rubenstein, '3D Printed Medical Implants: Should Laws and Regulations Be Revolutionized to Address This Revolutionary Customized Technology' *National Law Review* (2017), available at https://tinyurl.com/y7e3bth6 (last visited 27 December 2020).

[16] See n 13 and n 14 above.

the bioprinting technologies, it is possible to use three approaches in the liability area:

a) medical malpractice based on a guilt special delict;
b) violation of the contract warranty;
c) strict liability imposed regardless of the delinquent non-fault liability.[17]

However, as author points out, none of these theories completely suits the situations involving harm due to drawbacks in computer-aided design of the human organ three-dimensional models (CAD-Files).[18] Thus, strict liability imposed regardless of the delinquent guilt in US law is possible only in case of compensation for harm caused by defective goods (product liability)[19].

Scientific literature notes that over the latest time a global trend in product liability is establishment of strict (non-fault) standard for such liability.[20] Therefore, non-fault strict standard of liability for harm caused by defective goods is provided, for example, in Art 1 Product Liability Directive 85/374/EEC,[21] Art 1095 of the Civil Code of Russia, Art 41 of the PRC Tort Liability Law 2010.[22]

However, mass tragedies are becoming the trigger for development of legislation in product liability.[23] It was the lack of effective remedies in situations of massive harm to the health of exposed people by a particular product that led to establishment of strict non-fault liability for harm caused by low-quality goods. Thus, Kristie Thomas claims that it was the 'melamine scandal' that provoked inclusion in the new PRC Tort Liability Law rules detailing strict manufacturer liability for harm caused by defective goods. This scandal reminds of the crisis situation in product liability that occurred in Europe in 1960-1970 as a result of the so-called 'thalidomide catastrophe', which subsequently affected adoption of the Product Liability Directive 85/374/EEC.[24]

US courts are following similar logic, as a rule, applying the rules on strict liability only in situations of causing harm by mass product torts.[25] Despite the fact that the 'mass character' indicator is not provided as a prerequisite for

[17] J. Ammar, 'Defective Computer-Aided Design Software Liability in 3D Bioprinted Human Organ Equivalents' 35 *Santa Clara High Technology Law Journal*, 37 (2019), available at https://tinyurl.com/yyo77y2q (last visited 27 December 2020).

[18] ibid.

[19] N.D. Berkowitz, 'Strict Liability for Individuals? The Impact of 3-D Printing on Products Liability Law' 92 *Washington University Law Review*, 1019 (2015).

[20] G. Brüggemeier, Modernising Civil Liability Law in Europe, China, Brazil and Russia: Texts and Commentaries (Cambridge: Cambridge University Press, 2011).

[21] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

[22] K. Thomas, 'The Product Liability System in China: Recent Changes and Prospects' 63 *International & Comparative Law Quarterly*, 755-775 (2014).

[23] S.J. Campos, 'Mass Torts and Due Process' 65 *Vanderbilt Law Review*, (2012), available at https://tinyurl.com/y265c57v (last visited 27 December 2020).

[24] K. Thomas, n 22 above.

[25] J.K. Gable, 'An Overview of the Legal Liabilities Facing Manufactures of Medical Information Systems' 5 *Quinnipiac Health Law Journal*, 127, 147 (2001).

establishing strict liability in the Restatement (Second) of Torts, scientific literature indicates creation of incentives for ensuring safety and distribution of risks as goals for such liability.[26]

US courts are reluctant to extend the scope of strict liability upon defective products (product liability) to software (computer programs), since software is generally considered as a service, but not a product.[27] For comparison, the standard of strict non-fault liability in Russian law covers harm caused not only by defective goods, but also by works and services (Art 1095 of the Civil Code of the Russian Federation).

To illustrate the US approach, the court in the *Sanders* v *Acclaim Entm't* case[28] indicated that computer games were not a 'product' for the product liability purposes. Similar conclusion was made by the court in the case of *Wilson* v *Midway Games Inc.*[29] which involved the virtual reality technology. It is worth examining court position in the *James* v *Meow Media, Inc.*[30] case, where the court took a different approach indicating that software could be considered as tangible property for tax purposes and as a product in relation to the Uniform Commercial Code (UCC) objectives, but this did not mean that intangible thoughts, ideas and messages contained in computer video games, video files or online materials should be considered as products for the purpose of imposing strict liability. Thus, activities of software developers and website operators are not connected to 'products'.

US courts are taking conservative approach in regard to the 'product' definition relating to the question of admissibility of imposing the non-fault liability according to the product liability model.

It is interesting to note that the Australian law belonging together with US law to the Common Law system considers software as a 'product' for the purpose of imposing strict non-fault liability under the defective product liability model.[31]

Similarly, the US law enforcement practice addresses the problem of liability for harm caused by provision of medical services. Given that patients are receiving treatment services in hospitals, and activities of medical organizations, as a rule, are not connected to selling the products, the courts refuse to compensate harm caused to the patient according to the strict non-fault liability model (*Perlmutter* v *Beth David Hospital*).[32] Product liability model for harm caused by a defective

[26] E. Lindenfeld, n 8 above.

[27] J. Ammar, n 17 above.

[28] US District Court for the District of Colorado 4 March 2002, *Sanders* v *Acclaim Entm't*, 188 F. Supp. 2d 1264.

[29] United States District Court, D. Connecticut 27 Match 2002, *Wilson* v *Midway Games, Inc.*, 198 F. Supp. 2d 167, 173.

[30] United States Court of Appeals, Sixth Circuit 13 August 2002, *James* v *Meow Media, Inc.*, 90 F. Supp. 2d 798, 810.

[31] J. Nielsen and L. Griggs, 'Allocating risk and liability for defective 3D printed products: product safety, negligence or something new?' 42 *Monash University Law Review*, 712-739 (2017).

[32] Court of Appeals of the State of New York 31 December 1954, *Perlmutter* v *Beth David*

product does not cover such relations;[33] compensation for harm is carried out according to the model of special guilty tort (medical malpractice). It is noted in practice that any arguments in favor of establishing a strict standard of responsibility for medical organizations are outweighed by the generally useful nature of their activities related to saving lives and human health (*Cafazzo* v *Cent. Med. Health Servs., Inc.*, 668 A.2d 521, 527).[34] Thus, in one case, the court indicated that medical services are often experimental in nature, and when provided, certainty in result is missing, since it depends on factors beyond the control of a professional. Medical services are necessary for society and should be accessible for people (*Hoven* v *Kelble*).[35]

Bioprinting specificity is associated with combining 'products' and 'services', it is difficult in this area to differentiate activities of developers specializing in software used to create digital models (CAD files) of human organ analogues, as well as activities of medical organizations and manufacturers of medical devices.[36] Taking into consideration that computer-aided design plays a key role in bioprinting, the author believes that it is easier and cheaper to prevent harm to the patient health even at the stage of creating a human organ digital model imposing strict non-fault liability on the person performing such computer-aided design of a human organ. In this case, it is necessary to differentiate two groups of tortfeasors: first, medical organizations independently carrying out activities in bioprinting and controlling the process of human organs bioprinting; second, developers of software for creating computer-aided models of human organs (CAD files) used in bioprinting.[37]

It should be noted that earlier Eric Lindenfeld also pointed out the need to differentiate liability of developers of human organs computer-aided models (CAD files), who should be strictly liable regardless of their guilt and of responsibility of medical organizations and 3D printers manufacturers, which, in his opinion, should be liable according to the culpable standard.[38]

Another point to be made here is that in the US law enforcement practice is already visible allowing software qualification as a product in order to impose strict (non-fault) liability on its developers. Thus, judgement in the *Corley* v *Stryker Corp*[39] case is of interest for our study, as it addressed the issue of manufacturing a surgical disposable cutting guide, which was subsequently used in operating the patient. This guide was created using software based on a three-dimensional

Hospital, 123 N. E. 2d 792, 795.

[33] J. Ammar, n 17 above.

[34] Supreme Court of Pennsylvania 28 November 1995, *Cafazzo* v *Cent. Med. Health Servs., Inc.*, 668 A. 2d 521, 527.

[35] Supreme Court of Wisconsin 1 July 1977, *Hoven* v *Kelble*, 256 N.W. 2d 379, 392.

[36] E. Lindenfeld, n 8 above.

[37] J. Ammar, n 17 above.

[38] E. Lindenfeld, n 8 above.

[39] District Court, W.D. Louisiana 27 May 2014, *Corley* v *Stryker Corp*, 2014 WL 3375596 *1.

model (3D model) taking into account the patient individual anatomy. In this case, the court agreed with the plaintiff's claim that the software was defective, because in its design the cutting guide used during the operation was 'unreasonably dangerous due to alleged software defects'.

However, Jamil Ammar points out that introducing strict non-fault liability could be avoided by using the unavoidably unsafe product defense rule, which could possibly be applied to liability in bioprinting.[40]

Para 402A of the Restatement (Second) of Torts, which states that certain products may not be completely safe in their intended or normal use. The seller of such products is not strictly (non-fault) liable for their use adverse consequences. It is noted in literature that this rule is usually not applied to production, but to design drawbacks of a product, when a safer product design solution is missing.[41]

As a result of studying the US experience in tort liability, Jamil Ammar concluded that the standard of strict non-fault liability and the guilty standard are not fully applicable to torts in bioprinting, since the strict liability standard for developers of software used to create computer-aided models of human organs (CAD-Files) could increase security of such software, but reduce its effectiveness. The liability guilty standard is complicated by the need to prove the tortfeasor negligent delinquency. Therefore, the author proposes a third approach imposing liability on developers of defective software used in computer-aided modeling of human organs. This approach is based not on artificial distinction between products and services, but on differentiating the services rendered into administrative (technical) and proper medical services. Accordingly, strict non-fault liability should be assigned only for harm caused in provision of technical services. However, the author is not proposing criteria for separating these services; he believes that the nature of a service should be determined by the court in each specific dispute, ie ad-hoc differentiation. In his opinion, imposing strict non-fault liability on software developers and persons engaged in the development of computer-aided models of human organs (CAD files) is economically justified, because it makes it possible to prevent tort in bioprinting at the initial technological stage and at minimal cost.[42]

The source of inspiration for Jamil Ammar in elaborating the approach based on differentiating services between 'technical' and proper 'medical' services was to separate court decisions, where, in order to impose non-fault liability on a medical organization, the court indicated a different (non-medical) nature of the service provided (*Johnson* v *Sears, Roebuck & Co*, (ED Wis 1973).

Of course, disadvantage of this approach lies in the lack of a clear criterion

[40] J. Ammar, n 17 above.

[41] V. Schwartz, 'Unavoidably Unsafe Products: Clarifying the Meaning and Policy Behind Comment K' 42 *Washington & Lee Law Review*, 1139, 1141 (1985).

[42] J. Ammar, n 17 above.

for differentiating services between medical and technical. For example, there appears a question, whether technical or medical service would include processing data obtained on the basis of a patient computer tomography followed by its subsequent use in creating a three-dimensional model of a human organ and directly in the bioprinting. According to the author's logic, the court would have to answer this question, each time separately assessing circumstances on the case.

Developers of computer-aided models of medical devices (computer-aided designers) should be imposed with strict non-fault liability, and medical organizations should only be liable, if there is fault (negligence); this idea was also presented by other scientists. Moreover, Eric Lindenfeld expressly points out that even a minor mistake in the computer-aided design of medical devices could lead to fatal consequences; therefore, computer-aided model developers should be held liable regardless of their fault.[43]

Computer-aided design of a three-dimensional model of the bioprinted organ, as a rule, would be carried out not by the third-party companies, but directly by those medical organizations obtaining appropriate equipment and qualified personnel. Therefore, if the indicated scientific position is followed, there appears the need to differentiate the liability model of a medical organization depending on its type of activity, ie technical (computer-aided) preparation to bioprinting and proper medical activity connected to patient treatment using the bioprinted organ transplantation. If any defect is identified in the bioprinted organ computer-aided design, ie in the computer-aided replica content (CAD files) of the bioprinted organ, liability for the harm caused should occur regardless of the medical organization fault.

With regard to elaborating the medical organization liability model for harm caused to the patients' life or health, including that associated with using the bioprinting technology, the Chinese experience could be interesting, since the PRC legislation differentiates legal regulation of relations in product liability and in liability for medical malpractice.[44]

The PRC Tort Liability Law 2010 provides for three models, by which a medical organization could be held liable: guilty model, guilt liability model with presumptive guilt and strict (non-fault) liability model.[45]

The most acceptable standard of liability is established in regard to medical organization activities related to the patient diagnostics and treatment (Art 54 TTL). Chinese lawmaker, as grounds for exempting medical organization from liability, indicated inappropriate behavior of the patient (his close relative), who avoids cooperation with the medical institution in accordance with relevant procedures and standards, as well as complexity of treatment and diagnosis, taking

[43] E. Lindenfeld, n 8 above.

[44] H. Koziol and Y. Zhu, 'Background and Key Contents of the New Chinese Tort Liability Law' 1(3) *Journal of European Tort Law*, 328-361 (2010).

[45] L. Xiang and J. Jigang, *Concise Chinese Torts Law* (Springer, 2016), 96-97.

into account the current level of medicine (Art 60 TTL).[46]

Medical organization fault is presumed in case of violating information obligations; for example, medical risks and alternative medical treatment plans were not explained to the patient; patient's written consent was not obtained (Art 55 TTL); if a medical professional did not fulfill diagnostic and treatment responsibilities in accordance with the established standard (Art 57 TTL).

If the patient was harmed due to any defective medical product, medical instrument or transfusion of low-quality blood, the patient is entitled to demand compensation from manufacturer or institution that provided the blood, or demand compensation from the medical institution (Art 59 TTL). In such circumstances, liability is imposed according to the strict (non-fault) standard, a characteristic feature of product liability.

The legislation of the PRC, when elaborating the medical organization model liability, took into account the generally useful nature of medical activity connected to saving lives and health of people, as well as the legal nature of emerging relationship. Since medical services are often of experimental character, certainty or guaranteed result is missing, when they are provided, because it depends on many factors, including those not controlled by medical personnel. Therefore, as a basis for exemption from liability, it is indicated that difficulties in the patient diagnostics and treatment could be conditioned by the general level of medicine at the moment.

Considering the general level of medicine, as the basis for exemption from liability, recalls the rule provided for in Art 7(e) of the Product Liability Directive 85/374/EEC that, manufacturer in order to be exempted from liability could prove that the state of scientific and technical knowledge during introduction of goods in circulation did not allow to identify this defect in the product (Development Risk Defense). The purpose of this clause is to balance the interests of consumers in obtaining compensation for harm and the interests of manufacturers in relation to the possibility of innovative development.[47]

This logic could be extended to liability for harm caused to the patient in using the bioprinting technologies. The following factors indicate the need to establish a guilt liability standard: 1) positive result is not guaranteed to a patient in case of transplanting a bioprinted organ, since the result depends on factors not controlled by a medical organization; 2) experimental nature of the bioprinting technology; 3) socially beneficial effect of technology capable of saving many lives.

[46] M. Zhang, 'Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon' 10 *Richmond Journal of Global Law and Business* (2011) and *Temple University Legal Studies Research Paper No 2011-23*, available at https://tinyurl.com/yymw6twe (last visited 27 December 2020).

[47] L. Sterrett, 'Product Liability: Advancements in European Union Product Liability Law and a Comparison between the EU and U.S. Regime' 23 *Michigan State International Law Review*, 885 (2015).

IV. Prognostic View of the Model of Liability for Harm Caused to the Patient by the Use of Bioprinting Technologies

The question remains open, whether strict differentiation of the medical organization liability model is required depending on the type of its activity, ie technical (computer-aided) preparation to bioprinting and proper medical activity associated with patient treatment through the bioprinted organ transplantation. Is strict (non-fault) liability necessary for harm caused by a defect in the bioprinted organ computer-aided design, ie in the 'computer-aided replica' content of a bioprinted organ (CAD files)?

It appears that such an artificial division of stages in bioprinting in order to elaborate separate liability models is inappropriate. Bioprinting is not just kind of mass production of medical devices, this technology would always be aimed at bioprinting a unique human organ for a particular patient taking into account individual characteristics of his organism. In our opinion, scientific position of Jamil Ammar, according to which it is necessary to differentiate liability of a medical organization in bioprinting by setting the liability non-fault standard for harm associated with drawbacks in computer-aided design when creating a computer-aided replica of a bioprinted organ (CAD files)[48] is controversial. The indicated author used the approach developed by other authors for the purpose of establishing a model of liability for harm caused by defects in designing the computer-aided models (CAD files) of medical devices.[49]

Computer-aided design of medical devices manufactured using additive technologies based on inanimate nature materials, for example, of an individual joint endoprosthesis made of titanium and polymers, or a dental mouthguard made of thermophilic plastic, is not similar in complexity to computer-aided modeling of human heart, liver or kidney. Despite the fact that each dental mouthguard is being printed using thermophilic plastic based on a computer-aided model designed taking into consideration individual characteristics of a particular patient teeth and jaw structure, this is still massive, relatively simple and stream-fed technology.

Therefore, approach proposed by a number of authors[50] setting the liability non-fault standard for harm caused as a result of drawbacks in computer-aided design and defectiveness of computer-aided models (CAD files) is justified in the 3D printing of medical devices, but is not applicable in bioprinting of human organs.

Bioprinting is a new, breakthrough technology that could save millions of lives. This technology is more complex compared to three-dimensional printing

[48] J. Ammar, n 17 above.

[49] E. Lindenfeld, n 8 above. See also E. Lindenfeld, and J. Tran, 'Strict Liability and 3D-Printed Medical Devices' 17 *Yale Journal of Law and Technology Online* (2015), available at https://tinyurl.com/yxmqfmzy (last visited 27 December 2020).

[50] J. Ammar, n 17 above; E. Lindenfeld, n 8 above.

of medical products made from inanimate nature materials. In our opinion, if harm to the patient's health was caused by the presence of defects in the computer-aided model of a bioprinted organ, presumptive guilt model, which could be refuted by a tortfeasor, should be used. This model of guilt liability is basic for the Russian civil law, because according to Clause 2 of Art 1064 of the Civil Code of the Russian Federation, the person, who caused harm, is exempted from compensation for harm, if he proves that harm was caused not through his fault. The law may also provide for compensation for harm even, if the fault in causing harm is missing.

Thus, general rule in the Russian law is a model of tort liability with presumptive guilt, in which the burden of proving innocence rests with the person, who caused the harm. Guilt of causing harm is always assumed until proved otherwise. This distinguishes Russian law from the German law, since guilt in the Civil Code of Germany is presumed only in contractual, but not in the tort liability.

One of the main arguments provided by Jamil Ammar in favor of the liability strict non-fault standard for harm caused by defects in computer-aided design of a bioprinted organ model was a difficulty in proving the negligence (guilt) of the tortfeasor.[51] This argument is determined by specifics of the Anglo-Saxon tort law, in particular, by its basic tort based on guilt (negligence) of the tortfeasor (tort in negligence). To be held liable for such a tort, it is necessary to establish the tortfeasor duty to take care of the damaged physically person (duty of care), violation of such a duty, existence of harm and causal relationship between harm and duty violation.[52] However, these arguments are not working, if the liability model used is based on the tortfeasor presumed guilt.

In the prognostic aspect and in elaborating a fair model of liability for harm caused to a patient in connection with the use of bioprinting technologies, court position is of interest, which was expressed in judgement in the Wilkes v DePuy International Ltd case (2017); English literature pays serious attention to it.[53]

In this case, the damaged physically patient was subjected to surgery to replace the hip joint. Artificial joint (implant) was manufactured by the defendant. Three years after the joint replacement operation, the implant structural element broke due to 'material fatigue'. On this basis, the patient filed a lawsuit grounded both on the defendant tort in negligence and on the statutory rules of the Consumer Protection Act 1987 establishing strict (non-fault) liability standard. The judge in this case indicated that security is a relative category. Since, no product was absolutely safe; therefore, determination of the safety acceptable

[51] J. Ammar, ibid.

[52] M.A. Jones and Michael A., *Textbook on Torts 9-th ed* (Oxford: Oxford University Press, 2020).

[53] D. Nolan, 'Strict Product Liability for Design Defects' 134 *Law Quarterly Review*, 176-181 (2018) and *Oxford Legal Studies Research Paper No 22/2018*, available at https://tinyurl.com/yxpebefp (last visited 27 December 2020).

level was carried out taking into consideration the risk-benefit analysis. There was no evidence of a production defect in the implant and rejected the plaintiff's arguments that simple structural solutions could eliminate the risk of the implant early failure, since the alternative design proposed by the plaintiff had itself drawbacks, and the implant would become less convenient and more expensive. The damaged physically person was informed about the risk of the prosthesis destruction, as well as about dangerous factors increasing the risk level. The court pointed out that when assigning liability, it should be borne in mind that such consequences could be eliminated through the implant replacement operation and noted that it was necessary to take into consideration potential benefits for a particular patient from the use of medical goods and the risks that appeared with this patient.

Donal Nolan criticized position of the court and stressed that it was necessary to take into account benefits and risks not only for the individual patient, but also the 'global' benefits, as well as those risks that generally arise, when using these products.[54] Thus, it is proposed to take into consideration not only the risks posed by certain products and technologies, but also their benefits on the general social scale, as well as the fact that in order to obtain any beneficial effect, the patient could voluntarily assume those risks that arise, when using one or another product or technology in the course of treatment.

Australian authors also point out from this position and indicate voluntariness in accepting the risk of harm by the damaged physically person as the basis for exempting the tortfeasor of liability for harm caused by using additive technologies. Such voluntary risk acceptance is only possible, if the damaged physically person was provided with full understanding of the existing risks, and he directly or indirectly expressed the waiver of his right for protection in case of harm.[55]

In relation to the Russian law, rule of Para 3 of Art 1064 of the Civil Code of Russia could be pointed out, according to which compensation for harm may be refused, if the harm was caused at the request of or with consent of the damaged physically person, and actions of the harm tortfeasor were not violating the moral principles of society.

V. Conclusions

It looks like this norm (rule of Para 3 of Art 1064 of the Civil Code of Russia) would probably be of significant importance in resolving issues of liability for harm caused to a patient in connection to using the bioprinting technologies in treatment. Since the fact the patient is giving his voluntary informed consent to treatment using the bioprinting technologies could be qualified as taking by a

[54] D. Nolan, n 53 above.
[55] J. Nielsen and L. Griggs, n 31 above.

patient the risk of possible adverse consequences beyond the medical organization control, for example, rejection of the bioprinted organ by the patient's organism. Such consent could be qualified as a circumstance that eliminates unlawfulness of causing harm and creates the basis for exempting a medical organization from liability for harm caused to the patient when using the bioprinting technologies.

Gender Equality in the Judiciary: Experiences and Perspectives from Italy

Sara Cocchi* and Mariarosaria Guglielmi**

Abstract

Today, women represent more than a half of the Italian judiciary. However, despite the increasing number of women judges and prosecutors holding managerial positions in courts and Public Prosecutors Offices a closer look at the gender distribution of top-level offices and to the composition of judicial self-governing bodies (the High Council for the Judiciary, HJC, in particular) shows that the so-called 'glass ceiling' is far from being broken. By combining a detailed historical background with updated facts and figures, this article seeks to explore the path that women judges and prosecutors had to walk (and are still walking) to achieve full equality with their men colleagues, highlighting prominent achievements (eg the institution of the HJC Committee for Equal Opportunities and of local equal opportunity committees) and current challenges. Additionally, through continuous references to key international documents, the Italian experience is put in a wider international context with a view to show how the attainment of gender equality in the judiciary has now acquired unprecedented global relevance.

I. Introduction and Historical Background

The history of women's presence in the Italian judiciary is a fairly recent one. It takes the moves from the framework provided by the Constitution enacted in 1948 and develops through laws and regulations as well as through continuously evolving practices. Its different phases are characterised by initial doubts, slow-paced reforms, sudden leaps forward and work-in-progress debates. Also, it is a history having its own birth date: 1963, when the first law allowing women to exercise all judicial functions entered into force. Much has happened since the first women joined the ranks of the Italian judiciary, and much is still to be done to achieve full gender equality and representation in the judicial branch as well as in its self-governing bodies (the High Council for the Judiciary in the first place). These will be subjects for the second part of this article. Before that, and just like in any modern-day saga, in order to understand how the Italian experience has evolved, it is worth giving a glimpse to its prequel, ie the way this

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issue was debated in the Constitutional Assembly, and provide the reader with short historical background notes up to 1963.

In January 1947, while Sub-Commission II was discussing the main lines of the 'constitutional organisation of the State', women were not allowed to exercise judicial functions. Pre-Fascist legge 17 July 1919 no 1176 expressly excluded them from those professions and civil service positions 'implying (the exercise of) public jurisdictional powers'. A woman could graduate in Law, she could join the Bar, but could not become a judge or a prosecutor. Additionally, in 1941, the statute on the judiciary by the Fascist regime specified that only men, who were of 'Italian race' as well as members of the National Fascist Party, could pursue a career in the judiciary (Art 8).[1]

Women's participation in the exercise of judicial functions was surrounded by suspicion and prejudice in the Constitutional Assembly, too, where even some of the most brilliant intellectuals and prominent jurists of that time expressed mixed feelings towards it. In some cases, they strongly objected to even granting women any access to the judiciary at all. Women should not be allowed to join the judiciary because of their physiological lack of objectivity; they would not be fit to adjudicate in trials concerning 'crimes of passion' (this very argument will resurface in the discussion concerning the participation of women in juries); women are too emotional and do not possess the necessary 'temperament, strength, firmness, and ability to think critically' to perform judicial functions.[2] If allowed, women's contribution to the exercise of judicial functions should have been restricted to family law issues and juvenile criminal matters only.[3]

These are just a few examples of those biased views, as drawn from the Assembly's proceedings. However, the most conservative opinions did not prevail: the reference to further law provisions specifying the cases of women's access to judicial functions, originally included in the final draft,[4] was removed from the

[1] For more background information, see: G. Di Federico and A. Negrini, 'Le donne nella magistratura ordinaria' 2 *Polis*, August 1989, 179; C. Latini, '*Quaeta non movere*. L'ingresso delle donne in magistratura e l'art. 51 della Costituzione. Un'occasione di riflessione sull'accesso delle donne ai pubblici uffici nell'Italia repubblicana' *Giornale di storia costituzionale*, 143 (2014).

[2] See MP. Mannironi's speech at the Constitutional Assembly, Sub-Commission II, 10 January 1947, available at https://tinyurl.com/ydglm7nz (last visited 27 December 2020), 114.

[3] See MP Calamandrei's speech at the Constitutional Assembly, Sub-Commission II, 10 January 1947, available at https://tinyurl.com/ydglm7nz (last visited 27 December 2020), 113.

The views expressed by the mentioned MPs were largely part of a longstanding and widely shared trend according to which women were largely considered unfit to perform judicial functions and even to access legal professions at large. An interesting account of those views can be found in Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union, *Mapping the Representation of Women and Men in Legal Professions Across the EU*, August 2017, available at https://tinyurl.com/yafv7nbn (last visited 27 December 2020), 18.

[4] According to Art 98 of the final draft Constitution, '(t)he members of the judiciary are appointed by decree of the President of the Republic, upon designation of the High Council for the Judiciary, based on a public competition and a subsequent traineeship. Women might be appointed, too, in cases envisaged by the legislation on the judicial system' (Authors' translation).

text approved in December 1947. Today, the Italian Constitution does not contain any similar provision. Much to the contrary, its Art 51 stipulates that 'Any citizen of either sex is eligible for public offices and elected positions on equal terms, according to the conditions established by law'.[5] These provisions are complemented by Art 37, stating that working women shall enjoy equal rights and equal pay as men, and Art 106, according to which 'judges are appointed through competitive examinations'. Additionally, it is grounded upon the all-encompassing principle of formal *and* substantive equality enshrined in Art 3.

That being said, one might be inclined to think that, once the Constitution came into force, the regulatory context for women's participation in the exercise of judicial functions would change overnight and become immediately conducive to granting women full access to the judiciary. Easy enough to imagine, that was not the case. In any post-conflict legal order transitioning from a longstanding authoritarian regime to a new constitutional framework based on democracy and the rule of law, the existing legislation undergoes a painstaking upgrading process, (hopefully) resulting in its full alignment to the new constitutional values and architecture. That was also the case of Italy. Against the backdrop of still hostile scholarly and political opinions, the path leading to the approval of legge 9 February 1963 no 66, granting women full access to civil service, including the judiciary, was not a straightforward one. On the one hand, timid attempts were made to involve women in the exercise of judicial functions: legge 27 December 1956 no 1441 allowed women to serve as honorary judges in juvenile courts and lay members of the Courts of Assizes (though no more than three per panel). On the other hand, in 1957, the Council of State declared manifestly ill-founded (and therefore did not refer to the then recently established Constitutional Court) a question of unconstitutionality concerning the aforesaid Art 8 of the law on the judiciary of 1941 and specifically referring to the discriminatory presence of 'male sex' as a requirement for entering the ranks of the judiciary.[6] Significantly, the grounds for this decision – ie until a new law amends the existing legislation, the old law remains into force even though contrary to the Constitution – serve as a clear example of the then-raging debate concerning the Constitution as *lex superior* or mere *lex posterior*. The Constitutional Court itself was very cautious in striking the allegedly discriminatory legislation down. This attitude clearly emerges from a decision dating back to 1958,[7] stating that provisions limiting the number of women allowed to sit in *Corte d'Assise* as lay judges are not unconstitutional, as they aimed at ensuring the good functioning of the panels, on grounds of the different attitudes of men and women.

[5] All English translations of the Italian Constitution quoted in this text are taken from the *Constitution of the Italian Republic* edited by the Italian Senate and available at https://tinyurl.com/y8lkmyfg (last visited 27 December 2020).

[6] An in-depth account of those preliminary steps can be found in G. Di Federico and A. Negrini, n 1 above, 6-8.

[7] Corte Costituzionale 29 September 1958 no 56, *Giurisprudenza italiana*, 1313 (1958).

This state of play was to change dramatically at the beginning of the 1960s. A Constitutional Court decision dating back to 1960 struck down Art 7 of legge 17 July 1919 no 1176, excluding women from public offices implying the exercise of political rights and authorities.[8] Legge 9 February 1963 no 66 took care of repealing the remaining part of that article, the one excluding women from the exercise of judicial functions. Its Art 1 stipulates that women may have access to any offices, professions, and civil service positions, including the judiciary, in all roles, careers and categories, without any limitations and provided that the requirements prescribed by the law are fulfilled.

In May 1963, the first public competition for the selection of judges to be open to women took place, and eight qualified out of one hundred eighty six selected.[9] In 1965, the first twenty seven women entered the ranks of the judiciary, representing six per cent of persons recruited. From then on, the presence of women in the Italian judiciary has constantly increased. Nonetheless, criticalities and open issues remain, as we are going to discuss in the following pages.

II. Women in the Italian Judiciary: The State of Play

Since the 1970s, at a slow but steady pace, the presence of women in the Italian judiciary became more and more significant thanks to the interaction between several factors. Among them are the overall increase of university attendance, the growing percentages of female students in universities and in law schools in particular.[10] Between 1971 and 1981, women's presence in the judiciary increased from three per cent to ten per cent, but, not surprisingly, women were still extremely underrepresented in higher courts, as they obviously did not possess the length of service necessary for career advancements.[11]

While in the 1960s and 1970s women were mainly attached to civil sections of first instance courts or to juvenile courts[12] (thus seemingly confirming the largely common views recalled above), throughout the 1980s the presence of women in the judiciary – ie in courts as well as in prosecutors' offices – became more evenly spread. Fostered by an additional increase in the number of female students attending law schools, in 1987 competition-winning women outnumbered their men counterparts: out of three hundred new members of the judiciary,

[8] Corte Costituzionale 13 May 1960 no 33, *Giurisprudenza costituzionale*, 33 (1960).

[9] T. Addabbo et al, 'Le donne nella magistratura italiana: 1960-1990' *Università di Modena e Reggio Emilia, Dipartimento di Economia "Marco Biagi" Working Paper Series*, no 141, available at https://tinyurl.com/yacysd8g (last visited 27 December 2020), 13.

[10] As *Mapping the Representation of Women and Men in Legal Professions Across the EU* points out, in those years 'law within a couple of decades became a highly feminised subject' all across Europe, 20.

[11] Statistics on the 1970-1980 decade are provided by T. Addabbo et al, n 9 above, 15-22.

[12] ibid 15.

one hundred fifty six were women.[13]

Despite their growing presence and excellent performance in the public competitions, at the end of the 1980s women in the judiciary amounted to seventeen point four per cent and those holding managerial position were still very few.[14] Gender unbalances were hard to overturn in the judiciary's self-governing body, too: there was no representation for women in the High Council for the Judiciary (HJC) until 1981, when Parliament elected two university professors, and it took until 1986 to have the first woman judge to be elected as HJC member by her colleagues.

How about today? Since the mid-1990s, competition-winning women have always outnumbered their men counterparts with growing percentages, striking a remarkable sixty five per cent in the latest selection procedure, and since 2015 the presence of women in the judiciary has outnumbered that of men in general terms.[15] As of 9 February 2020, HJC statistics report that, out of nine thousand seven hundred ninety one members of the judiciary, five thousand three hundred eight are women (fifty four per cent), which is certainly a significant achievement. Among these, there are one thousand thirty two prosecutors (ie forty six per cent of prosecutors), while three thousand eight hundred eleven women (making up for fifty seven per cent of judges) exercise judicial functions. Additionally, one hundred twenty five women (eighty seven judges and thirty eight prosecutors) hold managerial positions,[16] while three hundred twelve (275 judges and thirty seven prosecutors) exercise semi-managerial functions. A total of one hundred four women judges currently serve as Court of Cassation judges and twenty three are assigned to the *Ufficio del Massimario*, ie the Court's office entrusted with the task of extracting, collecting and classifying the principles of law (maxims) laid out in the Court's decisions. Additionally, 16 women exercise managerial functions, as they preside over a Court's Chamber, while none of the twenty three women who serve as Deputy Prosecutors-General at the Court of Cassation currently hold managerial positions (such as *Procuratore Generale, Procuratore Generale Aggiunto*, *Avvocato Generale*).

Interestingly, the most recent HJC statistics also highlight that the presence of women judges and prosecutors in the various Districts of Court of Appeal (the key unit according to which the geographical distribution of courts is organised in Italy) varies with no particular pattern. In a few Northern and Southern districts alike women judges or prosecutors range between fifty two

[13] Consiglio Superiore della Magistratura, Ufficio Statistico, *Distribuzione per genere del personale di magistratura*, March 2019, available at https://tinyurl.com/y8nd8nsh (last visited 27 December 2020), 4. All statistics and data in this article are updated to July 2020.

[14] T. Addabbo at al, n 9 above, 21-22.

[15] See n 13 above, 4.

[16] These include 1st level managerial positions (such as Court President, Surveillance Court President, Court Prosecutor, etc) and 2nd level managerial positions (such as Court of Appeal President, Court of Appeal Prosecutor, etc).

and sixty four per cent,[17] thus contradicting another longstanding Italian commonplace. However, a closer look at the figures concerning managerial positions[18] reports a much less triumphant situation. Men hold almost three quarters (seventy two per cent) of the managerial positions within the Italian judiciary, while a slightly higher score applies to semi-managerial ones,[19] where women hold forty per cent of them. In both cases, women judges hold more managerial (thirty three per cent) and semi-managerial (forty two per cent) positions than women prosecutors (twenty two per cent and twenty seven per cent respectively). Percentages are generally higher in Courts of Appeal and lower in first instance court. When it comes to the Court of Cassation, percentages are strikingly lower, with women amounting to thirty five per cent.

The apex positions in the machinery of justice are no exception to this trend: in the past twenty years, no woman has ever held the position of General Prosecutor, President of the Court of Cassation, National Anti-Mafia Prosecutor, nor Vice-President of the HJC, where – by the way – women members are currently six out of the twenty four elected members.[20] However, on 15 July 2020, the HJC appointed Margherita Cassano as the first-ever woman Vice-President of the Court of Cassation by unanimous vote.

No better news come from the political-institutional side, with only two women out of seven Ministers of Justice in the past twenty years, with the first one to be ever appointed (Paola Severino) taking office only in 2011. A quick but significant off-topic comment: only six women judges have been appointed to the Italian Constitutional Court since it became operational in 1956, the last of whom in September 2020. On 11 December 2019, Professor Marta Cartabia was elected President of the Constitutional Court, thus becoming the first woman in Italy to hold this position. She ceased to hold office on 13 September 2020.

The most crucial (though probably not unexpected) fact emerging from the data discussed above is the still very limited percentage of women judges and prosecutors holding managerial and semi-managerial positions. Although in recent years the tendency seems to be pointing to a gradual convergence of the relevant disaggregated data, with percentages getting closer and closer all along the past decade, it is still striking that only one out of four managerial positions is held by women, with less encouraging percentages as far as prosecutors are concerned (one out of five). The relatively lower average age (forty eight) of

[17] See n 13 above, 6-7.

[18] ibid 8-10.

[19] These include 1st level semi-managerial positions (such as Court Section President, Adjunct Court Prosecutor, etc) and 2nd level semi-managerial positions (such as President of Court of Appeal Section, etc).

[20] The High Council for the judiciary includes two *ex officio* members, represented by the First President of the Court of Cassation and the General Prosecutor in the same Court; according to Art 104 of the Constitution, it is chaired by the President of the Republic, who generally exercises his functions through the Vice-President elected among the lay members.

women members of the judiciary compared to that of men (fifty two)[21] might suggest that oftentimes women are still a bit 'too young' (on average) to access positions that are generally attained also on grounds of length of service. However, while this argument could have weighted more in the 1970s or to some extent in the 1980s, nowadays the delay in granting women full access to the judiciary can shed light on the issue only to a limited extent. As the first woman judge to be ever elected to the Italian HJC by her peers (and the only woman to be ever elected President of the National Association of Judges and Prosecutors, ANM), Elena Paciotti, suggested that the blatant difficulties that women face in striking a balance between personal and work life, rooted in our cultural tradition and in the general condition of women in Italy, make them less willing to apply for managerial positions.[22] However, we shall not run the risk of oversimplifying this discussion: it cannot be only a matter of maternity leaves, or of reconciling private needs with schedules and extra working hours. A Constitutional Court decision of 2003 framed the picture within a broader context and connected such inequalities to

> 'the persistence of the historical effects of a time when women were denied or had limited political rights and to the persistence today of well-known economic, social and moral obstacles that can hinder the participation of women in the political organisation of the Country'.[23]

All of a sudden, those 'theoretical' and 'practical' obstacles, which may appear as a relic of a long-forgotten time, seem to resurface and retain their general validity, although they might assume different shapes and weights in the individual career of a woman member of the judiciary. Without going into further details, it is just worth recalling that the same general problems are far from being an exclusive feature of the Italian judicial branch.

The latest European Union report on gender distribution in legal professions points out that in all EU member States higher positions see the lowest proportion of women compared to lower ones. In this respect, seniority cannot be accounted to be the only reason for that, as initial selection and career advancement methods have surely played a crucial role in consolidating such uneven composition. Interestingly, civil law systems featuring a civil-service-like career system usually score better in achieving a gender-balanced composition than traditionally co-opt-based common law judiciaries.[24] However, the latest available European Commission for the Efficiency of Justice (CEPEJ) statistics

[21] See n 13 above, 1.

[22] E. Paciotti, 'Women in the Judiciary', in Permanent Mission of Italy to the United Nations eds, *Women and the Judiciary. Three perspectives*, 30 September 2015, New York, available at https://tinyurl.com/y99ypcgg (last visited 27 December 2020).

[23] Corte Costituzionale 10-13 February 2003 no 49, para 4 '*considerato in diritto*', available at tinyurl.com/14ryqs2b (last visited 27 December 2020).

[24] See n 10 above, 25.

on gender distribution in Council of Europe member States clearly indicate that much is still to be done, especially in apex courts.[25]

The same obstacles and issues are common to many other workplaces in the public as well as in the private sector,[26] and (to various degrees) to the rest of Europe, too.[27] In this respect, the approval of European Parliament and Council Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers[28] represents a notable step that will hopefully contribute to sizeable advancements across Europe and possibly in the judicial field, too.

Another cross-cutting issue that clearly emerges from the statistics above lies with underrepresentation of women in the Italian judiciary's self-governing body, ie the High Council for the Judiciary, with a quite recent history of women's presence and a still low number of women members from 1981 to present days (twenty nine). Until recently, women judges or prosecutors holding auxiliary positions at the HJC (eg in the Secretariat or the Research Department) are still very few compared to their male counterparts. As one of the few women to serve as a HJC member, Giovanna di Rosa maintained that women judges or prosecutors are not adequately represented in the judiciary's self-governing bodies (at the national as well as at the local level) because they are not enabled to assume the additional tasks and workload that this participation entails. Among these, she lists joining the meetings, contributing to the training of judges and prosecutors, taking on organisational and managerial offices. Lack of professionalism or poor preparation cannot account for that, of course. We have just seen that women have outnumbered men in every public competition since 1987, and, when performing their functions, they usually score better in the relevant evaluation exercises and are less subject to disciplinary measures. Again, the broader explanation she proposes points to the lack of 'cultural sharing' of the different duties that women traditionally (and of course, biologically) take on, not only by the society at large, but also by the institutions themselves.[29] These words seem to echo and complete those of the Constitutional Court, and again call for increased awareness and commitment from all the involved actors:

[25] The Council of Europe European Commission for the Efficiency of the Judiciary (CEPEJ) Statistics for the 2016 exercise highlight the generally low number of women holding top-level offices with reference to both judicial, available at https://tinyurl.com/yacot5w8 (last visited 27 December 2020) and prosecutorial, available at https://tinyurl.com/yacot5w8 (last visited 27 December 2020) functions.

[26] See L. Tria, 'La discriminazione basata sul genere, nei rapporti uomo-donna' *Diritti dell'uomo*, 5-19 (2012); M. D'Amico, 'La rappresentanza di genere nelle istituzioni. Strumenti di riequilibrio' 1 *giudicedonna.it*, (2017), available at https://tinyurl.com/ycb8ur2u (last visited 27 December 2020).

[27] European Commission, *2019 report on equality between women and men in the EU*, available at https://tinyurl.com/yy2tyobd (last visited 27 December 2020).

[28] Full text is available here: https://tinyurl.com/y767goaz (last visited 27 December 2020).

[29] G. De Rosa, 'Il contributo delle donne al governo autonomo della magistratura', in 'I primi 50 anni delle donne in magistratura: quali prospettive per il futuro. La violenza di genere nella società attuale' 162 *Quaderni del Consiglio Superiore della Magistratura*, 39 (2014).

families, society, judiciary, institutions, and – of course – women themselves.

On a broader level, quite interestingly, the need for such increased awareness does not seem to be less important in those judicial systems where women judges or prosecutors outnumber their men counterparts – as it is the case of Italy. In this respect, a recent Organisation for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) report has stressed the need for justice sector professionals to attain a more conscious perception of both direct and indirect gender-based biases affecting their everyday working environment and career. Moreover, the relevant needs assessment study highlighted that gender-based barriers hamper career advancements and consequently proportional representation of women in senior management positions even in those contexts where there are no striking gender imbalances.[30] This ultimately shows how a gender-sensitive approach to the performance of judicial functions leads (at least partially) to an increased representation of women judges in managerial positions and even self-governing bodies.

The two issues we have just outlined (and their mutual connections) seem to us the most prominent examples of how the so-called 'glass ceiling' – formally granting women equal access to the judiciary and allowing them to actively pursue a career in it – is in substance still far from being dismantled in its entirety. Nonetheless, in Italy measures have been adopted and are still being elaborated to challenge (and hopefully remove) this seemingly unbreakable structure. These measures consist in an interesting mixture of regulatory instruments and best practices aimed at redressing gender-based inequalities in accessing the judiciary, and top-level positions within the judicial branch in particular. In this respect, a crucial role was played by the Italian Women Judges Association (*Associazione Donne Magistrato Italiane*, ADMI[31]), established in 1990 for the purpose of

> 'studying legal, ethical and social problems regarding the condition of women in society, promoting the professionalism of women judges in order to guarantee the best possible justice to citizens and propose legislative changes for the attainment of full equality'.

III. Breaking the Glass Ceiling: An Overview on Recent Reforms and Best Practices

[30] OSCE, Office for Democratic Institutions and Human Rights (ODIHR), *Gender, Diversity and Justice. Overview and Recommendations*, 2019, available at https://tinyurl.com/ybe5kbxr (last visited 27 December 2020), 7.

[31] ADMI is a member of the International Association of Women Judges (IAWJ, www.iawj.org), founded in 1991 with the aim of promoting the inclusion of gender perspectives in the overall functioning of judicial systems, equal access to justice and unbiased application of laws as well as to facilitate the creation and strengthening of networks of women judges across the world.

The entry into force of legge 10 April 1991 no 125, aimed at realising equal opportunities in the work environment through the design and enactment of affirmative actions, paved the way to unprecedented discussion and opened up a season of renewed commitment. In order to increase the effectiveness of the policy approach underlying the new law, ie a combination of gender equality-based measures and interventions designed to specifically protect and promote women, in 1992 the HJC established the Committee for Equal Opportunities in the Judiciary.[32] To some extent, this can be considered the turning point in the increase of the Judiciary's self-awareness on gender issues.[33] Art 17 para 1 of the HJC Rulebook[34] entrusts it with the task of addressing the relevant HJC internal commission opinions and proposals aimed at removing obstacles to the achievement of full gender equality in the judiciary as well as promoting affirmative actions in this respect. The Committee for Equal Opportunities is chaired by the President of the 6th HJC Commission, that is competent on issues related to the overall organisation for the judiciary, with a function of advice and proposal. The Committee is comprised of two members of the HJC, six ordinary judges or prosecutors appointed by the associations of the Judiciary and two external experts appointed by the Committees dealing with gender issues within the Ministry of Labour and the Prime Minister's Office.

The Committee propelled the work of the HJC by promoting the adoption of innovative measures, taking action – in some cases – even before the legislator. That is the case of internal order no 160/96, recommending the managers of judicial offices to organise workloads and schedules of those judges and prosecutors who are pregnant or have children under the age of three without intervening on the 'quantitative' aspects, but making them compatible with the duties of assistance bestowed upon women workers. It will take another four years before Parliament extends those guarantees to all female workers through legge 8 March 2000 no 5, and another six years before protective measures and affirmative actions for the achievement of gender equality found full systematisation and consistency in the Code of Equal Opportunities (decreto legislativo 11 April 2006 no 198). This example highlights how the Committee has not only contributed to embedding gender perspectives and equal opportunities in the work of the HJC, but also to mainstreaming gender and equal opportunities discourses in the wider policy and regulatory debates through the years.

Among the most important innovations suggested by the Equal Opportunities Committee, it is worth mentioning the introduction of the function of 'district judge/prosecutor', assigned to the Courts of Appeal to replace the judges and

[32] HJC Committee for Equal Opportunities in the Judiciary: https://www.csm.it/web/csm-internet/csm/cpom.

[33] In 2000 a Committee for Equal Opportunities was also established within the National Association of Judges and Prosecutors (ANM).

[34] Available at https://tinyurl.com/ycn7bfnt (last visited 27 December 2020).

prosecutors serving in the district in case of temporary absence, eg due to maternity or illness leave.

Self-government initiatives did not stop at the central level. In 2008,[35] upon proposal of the HJC Committee for Equal Opportunities in the Judiciary, decentralised Equal Opportunities Committees were created within the judicial councils of every District of Court of Appeal (*Consigli giudiziari*) as well as (in 2009) within the judicial council of the Court of Cassation (*Consiglio direttivo*),[36] to perform consultative functions and formulate proposals. Local Equal Opportunities Committees are chaired by one member of the judiciary appointed from among those sitting in the local Judicial Council. At least a half of its judiciary members shall be women (performing either judicial or prosecutorial functions) and it is comprised of: a woman attorney-at-law appointed by the Equal Opportunity Committee of the local Bar Council; the Regional Assembly Delegate for Equal Opportunities; a woman representative from the district's administrative staff. As specified by HJC decision of 9 April 2008, local Committees perform their functions with regard to internal organisational matters, evaluation criteria and procedures, initial and on-the-job training of judges and prosecutors, awareness-raising measures on equal opportunities and the available regulatory options for maternity and paternity leaves, as well as to counter gender stereotypes that may affect adjudication and prosecution. Although there are significant differences between the different local contexts when it comes to the input provided by local Committees, it is worth stressing that by entrusting a member of the local Judicial Council with the task of chairing the Committee, the necessary connection with the local judiciary's self-governing body is ensured and even strengthened. At the same time, the presence of a member from the local Bar and from the local administrative staff equal opportunities committee makes the exercise of the Equal Opportunities Committee's functions in each District as inclusive as possible, while the broad composition of local Committees fosters a more comprehensive 'cultural sharing' of gender equality among legal professionals.

In 2007, the HJC signed a Constitutive Charter of the Network of Equal Opportunities Committees (EOC) of the legal professions. The Charter aims at connecting all the EOCs of the ordinary, administrative, accounting, military and tax administration judges, prosecutors and magistrates as well as the Bar EOCs, with a view to identify and pursue shared objectives in the different judicial sectors.

IV. Women in the Judiciary and Equal Representation in Self-Governing Bodies

[35] HJC Decision of 9 April 2008, available at https://tinyurl.com/y8mx5jr7 (last visited 27 December 2020).

[36] The Judicial Councils work as consultative bodies of the High Council for the Judiciary.

Underrepresentation of women in the judiciary's self-governing bodies, and the HJC in particular, shall be analysed against the backdrop of the general, we would dare say 'systemic', underrepresentation of women in public institutions, which even required the approval of a constitutional amendment to the previously mentioned Art 51 para 1 of the Constitution. Such amendment was indeed necessary to overcome Constitutional Court decision no 422/1995,[37] that struck down several electoral law provisions intervening in the making of the electoral list in such a way as to favour their gender-balanced composition, thus ultimately promoting equal representation of women in the Chamber of Deputies and in Regional and Municipal Councils. This controversial decision was grounded on two principles: firstly, formal equality as contained in Art 3 para 1 of the Constitution; secondly, the assumed 'neutrality' of any elected representative irrespectively of his/her sex, leading to the dismissal of any objection based on substantive equality as enshrined in Art 3 para 2 of the Constitution Such views were subsequently overruled by the already mentioned Constitutional Court decision no 49/2003,[38] but meanwhile they forced Parliament to intervene at a different level, ie, through constitutional amendment. The original Art 51 para 1 of the Constitution stipulating that '(a)ny citizen of either sex is eligible for public offices and elected positions on equal terms, according to the conditions established by law' was complemented in 2003 by the following words: '*To this end, the Republic shall adopt specific measures to promote equal opportunities between women and men*'. Comprehensibly criticised for its vague formulation and indefinite scope of action,[39] this sentence was subsequently clarified by another key Constitutional Court decision,[40] which made clear its inextricable connection with substantive equality and the Republic's duty to remove any obstacle that may hamper all citizens' full participation to the political, economic and social organisation of the Country. Following this and other Constitutional Court decisions, national and regional election-related legislation immediately reintroduced quotas, gender preferences and other mechanisms with the aim of boosting the representation of women in Parliament, as well as in the Regional and Municipal Councils. Many of these measures are still in force today.

Is there any lesson to be learned, or at least any hint to be drawn from the picture we have sketched so far? As the HJC remains the only constitutional body not to include any gender balance measures in its electoral law, the introduction of quotas in the election and appointment of HJC members have been repeatedly debated in recent years, and the consistent amendment of the existing legislation debated in an *ad hoc* ministerial commission. In this respect,

[37] Corte Costituzionale 6-12 September 1995 no 422, available at https://tinyurl.com/yaauma9t (last visited 27 December 2020).

[38] See n 23 above.

[39] M. D'Amico, n 26 above, 7.

[40] Corte Costituzionale 14 January 2010 no 4, available at https://tinyurl.com/ycymcmh2 (last visited 27 December 2020).

Associazione Dipendenti Ministero dell'Interno (ADMI) contributed to drafting the HJC electoral law amendment bill[41] proposed by the President of the Justice Committee of the Chamber of Deputies and fifty seven Members of Parliament at the end of the XVII legislature and introducing 'first affirmative actions to redress gender inequalities'. They featured alternation between female and male candidates in the electoral lists as well as compulsory double gender preference vote.

Although the proposed measures did not envisage the attainment of a perfectly gender-balanced composition of the HJC (but rather entailed mechanisms to be applied in the preliminary phases of the elections), in the end they did not make it to the final version of the bill on grounds of assumed incompatibility with the principle of judicial autonomy and self-government. However, the reform process was put on a hiatus and has not resumed ever since. Much more interestingly, recent modifications to the internal regulation and electoral system of National Association of Judges and Prosecutors (ANM) introduced a fifty per cent gender balance clause for the composition of electoral lists as well as a mechanism of seat distribution ensuring that each gender has at least thirty per cent of the plenum.[42]

Although nothing has been done for the HJC so far, the example of ANM demonstrates that the most valuable solutions (or at least, the most valuable attempts at solving controversial issues) are those stemming from the internal discussion of those who will be directly affected by them. As debatable and difficult to fine-tune as they may be, electoral quotas and gender-balance clauses are for sure mechanisms that self-government bodies (and Parliament) could and should take into account when reflecting upon possible corrections to the underrepresentation of women in national and local institutions, and in the HJC in particular.

V. The Road Ahead. Concluding Remarks

The picture we have just outlined shows very well the 'long and winding road' that women judges and prosecutors had to walk (and are still walking) to achieve full equality with their men colleagues. The situation has changed since 1963, but there is still a lot to do to permanently embed gender perspectives in the everyday life of the judicial branch at all levels. Affirmative actions[43] to

[41] Chamber of Deputies Bill no 4512/2017.

[42] See C. Lendaro, 'La rappresentanza di genere nelle istituzioni. Strumenti di riequilibrio. Introductory remarks' 1 *giudicedonna.it,* 4 (2017), available at https://tinyurl.com/ydgzgkfm (last visited 27 December 2020), for an extensive account of the various proposals in this respect.

[43] It is worth recalling the broad understanding and dynamic view that the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (1979) provides on such term. In this respect, Art 4 para 1 stipulates that: 'Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall

compensate historical disadvantages have certainly contributed to boost women's role in the judiciary but have sometimes even reinforced the archetypical perception of women's frailty and resurrected the usual stereotypical comparisons with men, without intervening on the overall social and institutional context that nurtures these very inequalities. Debate, therefore, is far from being over and the perfect remedial measures have not been identified yet.

However, it would be just too simplistic to call for a full, unquestioned alignment of men's and women's working, career and representation conditions without a careful, objective identification and enhancement of the relevant specificities and added values. Moreover, this is not the framework our Constitution designs for substantive equality. The Republic shall remove the obstacles hampering full participation of citizens to the political, economic and social life of the country, but primarily it has to remove those obstacles hampering the full development of the individual (Art 3 para 2). This latter sentence cannot be read but in one with Art 2, stipulating that

> '(t)he Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed'.

Substantive equality implies recognising and enhancing differences as the texture society is made of and aims at giving all 'equal opportunities' to express their potential and ultimately contribute to society itself. With specific regard to work, this is further clarified by Art 4, stating that

> '(e)very citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society'.

Women's contribution to the exercise of judicial and prosecutorial functions has been innovative under many aspects, and has often brought new arguments, reasoning and even unprecedented nuances into the legal debate. Advancements have been both tangible and intangible and range from the attainment of a more inclusive judicial decision-making process to even more grassroots impact, such as that on the very implementation of democracy and the rule of law, by increasing the legitimacy of judicial institutions through broadening their representativeness.[44] Pluralism, enhancement of differences and equal opportunities are the backbone of post-World War II constitutionalism. In such a

not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved'.

[44] International Development Law Organisation (IDLO), *Women delivering justice: contributions, barriers, pathways*, 2018, available at https://tinyurl.com/ycsr4nj7 (last visited 27 December 2020), 13.

multifaceted context as the one we are experiencing today, on the eve of unprecedented moral, social, and therefore legal, challenges, the presence of women in the judiciary is the added value that can contribute with its uniqueness to the continuous development of the rule of law in its substantive meaning.

As discussed here, the case of Italy is no exception. In performing their duties with professionalism and preparation, women judges and prosecutors were often called to face extremely sensitive issues, and they never backed down. It is here worth mentioning the case of Maria Gabriella Luccioli, one of those eight women to win the first public competition for entering the judiciary to be open to female participation, who guided the I Section of the Court of Cassation in adjudicating upon the interruption of end-of-life medical treatment and delivering the milestone 'Englaro decision' in 2007.[45]

Contrary to what some of those sitting in the Constitutional Assembly might have thought, no frailty was shown here, but balance, legal sensitivity and farsightedness were in turn key to perform such a crucial task.

[45] Corte di Cassazione 16 October 2007 no 21748, available at giurcost.org.

A Critical View on the Italian Ban of Surrogacy: Constitutional Limits and Altruistic Values

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Abstract

Despite the position of the Joint Divisions of the Italian Court of Cassation, which appears to hold that altruistic surrogacy is prohibited, a different – narrow – interpretation of the Italian ban on surrogacy is still possible. Altruistic surrogacy does not fall within the scope of the ban, according to the reasoning of the Italian constitutional judges in Judgment 9 April 2014 no 162, which declared it unconstitutional to forbid heterologous fertilization.

Doubts arise, first, from the broad interpretation of the right to physical and mental health, which the Constitutional Court attributed as a whole to couples and, second, from the inclusion of the right to reproductive freedom as part of the right to self-determination. As a fundamental right, its exercise may be limited only if there is a need to protect rights of the same level, such as to safeguard the dignity and health of the surrogate mother or the well-being of the child.

I. Introduction

In surrogate maternity a woman, who is not a member of a couple (whether or not she is also the donor of the oocyte), makes her uterus available to carry a pregnancy to term, agreeing to hand over the resulting child to the commissioning couple.

There are two types of surrogate maternity: *traditional surrogacy*, in which the fertilized ovum belongs to the surrogate mother, and *gestational surrogacy*, in which the surrogate mother, who carries the pregnancy to term, is implanted with an embryo, generated through in vitro fertilization, using samples collected from the requesting parents or from donors.[1]

In most cases, compensation is given to the surrogate mother for her time and energy, as well as for the sacrifices she makes and the many physical and emotional challenges she faces during the surrogacy process. It is, therefore, not surprising that surrogacy raises serious issues of commodification by allowing

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[1] In this case, some authors have highlighted that the legal system must make a tragic choice between the truth of childbirth and the genetic truth: S. Patti, 'Verità e stato giuridico della persona' *Rivista di diritto civile,* I, 242 (1988); A. Cordiano, 'Alcune riflessioni a margine di un caso di surrogacy colposa. Il concetto di genitorialità sociale al banco di prova delle regole vigenti' *Diritto di famiglia e delle persone*, 487 (2017).

contracts, sales, and money to manage these once non-commercialized areas of life.[2] This kind of commercialization of childbirth could have profoundly impacts on our society. Surrogacy also has the potential to exploit women instead of liberating them.[3] Accordingly, many states forbid commercial surrogacy, in order to safeguard women's dignity and protect the psychophysical health of children.[4]

The alternative to commercial surrogacy is altruistic surrogacy, in which the surrogate mother does not receive any other compensation for her services beyond reimbursement for medical costs and other reasonable pregnancy-related expenses. Usually, these arrangements are made between family members or close friends and are completed as independent surrogacies.[5]

[2] L. Del Savio and G. Cavaliere, 'The problem with commercial surrogacy. A reflection on reproduction, markets and labour' 7(2) *Biolaw Journal*, 73-91 (2016).

[3] A. Wertheimer, 'Exploitation and Commercial Surrogacy' 74(4) *Denver University Law Review*, 1215-1230 (1997); G. Corea, *The mother machine: reproductive technologies from artificial insemination to artificial wombs* (New York: Harper & Row, 1985), 343; M.G. Radin, 'Market Inalienability' 100(8) *Harvard law review*, 1849 (1987); J. Ballesteros, 'Los valores femeninos en bioética', in A. Parisi ed, *Por un femminismo de la complementariedad* (Pamplona: Eunsa, 2002), 68; J. Damelio and K. Sorensen, 'Enhancing autonomy in paid surrogacy' 22(5) *Bioethics*, 269 (2008); K. Brugger, 'International law in the gestational surrogacy debate' 35(3) *Fordham international law journal*, 665 (2012); J.L. Guzman and A.A. Miralles, 'Àproximaciòn a la problemàtica etica y jurìdica de la maternidad subrogada' 78 *Cuadernos de bioética*, 23, 259 (2012); M. Rizzuti, 'Maternità surrogata: tra gestazione altruistica e compravendita internazionale di minori' 2 *Biolaw Journal*, 91 (2015).

[4] Very few states allow commercial surrogacy. For example, in Georgia, Arts 143 and 144, law 'On Health Care', gives married heterosexual couples the right to have a baby through surrogacy: I. Khurtsidze, 'Legal regulation of surrogacy in Georgia' 10 *European Scientific Journal,* 165-169, (2016); in Israel, the Agreements for the Carriage of Fetuses Law (Approval of Agreement and Status of the New Born), 5756-1996 (Hebrew), allow surrogacy using in vitro fertilization to implant an embryo conceived from sperm of the husband of the contracting couple (only heterosexual couple) and an ovum, in a woman who carries child who is not genetically related to her: D.A. Frenkel, 'Legal regulation of surrogate motherhood in Israel' 20(4) *Medicine and Law*, 605-612 (2001); in Ukraine, Art 123 of the Ukrainian Family Code (amended 22 December 2006 no 524-V) expressly states that: *'if embryos created by assisted reproductive technology are transferred into the body of another woman, the contracting couple shall be the parents of the child'*; in Russia, only gestational surrogacy arrangements are permitted by the Federal Law of the Russian Federation no 323-FZ of 21 November 2011 'On the fundamentals of health protection of citizen in the Russian Federation': K. Svitnev, 'Legal regulation of assisted reproduction treatment in Russia' 20(7) *Reproduction biomed online*, 892-894 (2010); in the Nigerian Parliament there is a bill introducing commercial surrogacy: O.S. Adelakun, 'The concept of surrogacy in Nigeria: Issues, prospects and challenges' 18(2) *African Human Rights Law Journal*, 617 (2018). On the contrary, Countries like India: O. Timms, 'Ending commercial surrogacy in India: significance of the surrogacy (Regulation) bill, 2016' 3(2) *Indian Journal of Medical Ethics*, 99 (2018); J. Saran and J.R. Padubidri, 'New laws ban commercial surrogacy in India' 1 *Medico-Legal Journal*, (2020); Thailand: A. Stasi, 'Protection for children born through assisted reproductive technologies act, B.E. 2558: the changing profile of surrogacy in Thailand' 11 *Clinical medicine insights-reproductive health* 1-7 (2017); and Nepal: R. Abrams, 'Nepal bans surrogacy, leaving couples with few low-cost options' *New York Times* 2 May 2016, centers of the surrogacy international market once, now have introduced legislation with the aim of discourage the procreative tourism.

[5] For this reason, in some Countries altruistic surrogacy is allowed only among family members. In Brazil, altruistic surrogacy is regulated by a resolution of the Conselho Federal de Medicina (2.013/2013), which determines the conditions under which surrogacy is allowed. One of

Altruistic surrogacy does not raise the same issues of commodification as commercial surrogacy because of the absence of any economic benefit; therefore, the same requirements of safeguarding surrogate mothers' dignity and the welfare of children cannot justify an identical ban for altruistic surrogacy.

On this basis, a minority of states allows altruistic surrogate motherhood. Among the countries in which it is permitted, some allow for a gestational surrogacy with as little as 50% of genetic material taken from the intended parents while others require that the embryo be formed with 100% genetic material drawn exclusively from the intended partners.[6]

Italy is one of the countries that forbids surrogacy. Art 12, para 6, of legge 19 February 2004 no 40 provides significant penalties for people who carry out, organize or publicize surrogate motherhood.[7]

Many Italian couples unable to conceive naturally, both heterosexual and homosexual, have circumvented this prohibition by going to Countries that allow surrogacy and then returning to Italy with the resulting child. Problems arise, however, from the fact that Italian registrars are not permitted to lawfully process the applications of intended parents to register the foreign birth certificates recognizing them as parents of the child.[8] These complex cases have

these conditions is that the surrogate mother should be the mother, the sister, the daughter, the aunt or the cousin of one of the intended parents.

[6] Permanent Bureau of The Hague Conference on Private International Law (HCCH), Directorate-General for Internal Policies – Policy Department, Citizens' rights and constitutional affairs 'A comparative study on the regime of surrogacy in EU member States' 2013, available at https://tinyurl.com/y3s3uk4x (last visited 27 December 2020).

[7] For more details on the Italian Law no 40/2004 about assisted reproductive technology, see, among others: A. Santosuosso, *La procreazione medicalmente assistita. Commento alla legge 19 febbraio 2004, n. 40* (Milano: Giuffrè, 2004), passim; G. Ferrando, 'La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche' *Corriere giuridico*, 810-816 (2004); C. Casini et al, *La legge 19 febbraio 2004, n. 40, "Norme in materia di procreazione medicalmente assistita". Commentario* (Torino: Giappichelli, 2004), passim; M. Dogliotti, 'La legge sulla procreazione medicalmente assistita: problemi vecchi e nuovi' *Famiglia e diritto*, 117 (2004); M. Sesta, 'Procreazione medicalmente assistita' *Enciclopedia Giuridica* (Roma: Treccani, 2004), Agg XIII, 1-13; E. Quadri, 'Osservazioni sulla nuova disciplina della procreazione assistita' *Diritto e giustizia*, 224 (2004); M.R. Marella, 'Esercizi di biopolitica' *Rivista critica di diritto privato*, 3 (2004); M. Faccioli, 'Procreazione medicalmente assistita' *Digesto delle discipline privatistiche* (Torino: UTET, 2007), Agg III, 1051; G. Di Rosa, *Dai principi alle regole. Appunti di biodiritto* (Torino: Giappichelli, 2013), 39-129; L. D'Avack, 'La legge sulla procreazione medicalmente assistita: un'occasione mancata per bilanciare valori ed interessi contrapposti in uno stato laico' *Diritto famiglia e persone*, II, 793-812 (2004); G. Oppo, 'Diritto di famiglia e procreazione assistita' *Rivista di diritto civile,* I, 329 (2005); R.Villani, *La procreazione assistita* (Torino: Giappichelli, 2004); F. Gazzoni, 'Osservazioni non solo giuridiche sulla tutela del concepito e sulla fecondazione artificiale' *Diritto famiglia e persone*, II, 168-210 (2005); F. Ruscello, 'La nuova legge sulla procreazione medicalmente assistita' *Famiglia e diritto*, 628-642 (2004); T. Auletta, 'Luci, ombre, silenzi nella disciplina di costituzione del rapporto genitoriale nella fecondazione assistita' *Annali del Seminario Giuridico* (Milano: Giuffrè, 2005), V, 481-498 (2005); U. Salanitro, 'Norme in materia di procreazione medicalmente assistita', in G. Di Rosa ed, *Della famiglia,* IV, *Leggi collegate*, *Commentario codice civile Gabrielli* (Torino: Giappichelli, 2018), 1655-1824.

[8] This is a common problem in the countries that currently have a ban on surrogacy: recently,

been the object of numerous judgments by the European Court of Human Rights (ECtHR) (eg Case of *Paradiso and Campanelli* v *Italy*),[9] which has dealt

in Germany, see *Bundesgerichtshof* 10 December 2014, XII ZB 463/13, available at https://tinyurl.com/yxf77kcr (last visited 27 December 2020); Bundesgerichtshof 5 September 2018, XII ZB 224/17, available at https://tinyurl.com/y6hu6bms (last visited 27 December 2020); Bundesgerichtshof 20 March 2019, XII ZB 530/17, available at https://tinyurl.com/yxejeunk (last visited 27 December 2020). Concerning Spain, see *Tribunal Supremo* 6 February 2014 (Tol 4100882), available at https://tinyurl.com/y3aaypfo (last visited 27 December 2020). By reference to France, see Cour de Cassation 31 May 1991 no 90-20.105, available at https://tinyurl.com/yyjq2nf2 (last visited 27 December 2020). Many of the disputes on which the European Court of Human Rights has ruled in recent years came from the French legal system, which, for a long time, did not recognise relationships formed abroad between children born from surrogates and the intended parents, even in the case of biological fathers. Recently, however, the case law of the French Court of Cassation has changed course and has admitted both the transcription of the foreign birth certificates in the part in which it recognizes the parent-child relationship with biological fathers and to allow wives of biological fathers to adopt the child, even if she is not genetically related: see *Cour de Cassation* 5 July 2017 nos 824, 825, 826, 827, available at https://tinyurl.com/y2yolh9q (last visited 27 December 2020). Finally, the French Court of Cassation, in the *Mennesson* case, which came to the attention of the French judges after the recent Advisory Opinion of the European Court of Human Rights (see n 12 below), allowed for the transcription of an American foreign birth certificate concerning twins born to a surrogate, even in the part in which it recognized Mrs Mennesson as the legal mother of the twins: *Cour de Cassation* 4 October 2019 no 648, available at https://tinyurl.com/y2cye4j4 (last visited 27 December 2020), with note by A.G. Grasso.

[9] The case deals with a legal battle of an elderly married couple who could not conceive for years (either naturally or with the assistance of in vitro fertilization) and were unable to adopt a child in Italy (due to the shortage of children eligible for adoption). Finally, they decided to retain a company that brought them to a Moscow-based clinic for reproductive tourism, providing them with a service that was illegal in Italy but legal in Russia: conceiving an embryo from anonymous sperm and donated oocyte and paying a surrogate woman to carry the pregnancy and deliver the child. Although this was the outcome, the couple claimed that their intention had been for one spouse to be genetically related to the child, but that, for 'unknown reasons,' the child's genetic provenance was 'unknown' (something they found out through genetic testing back in Italy). Because there was no genetic link between either parent and the child, the Italian authorities started a formal investigation for 'altering civil status' and forgery. The State Counsel's Office asked for proceedings to declare the child abandoned and free for adoption. The applicants objected to such measures and asked to be permitted to at least adopt the child, but the Family Court decided to remove the child from them. The child was placed in a children's home in a place unknown to the applicants and had no official identity for more than two years. Afterwards, he was given a different name and birth certificate and was placed with a foster family that intended to adopt him. In the meantime, the couple now faced charges of double illegality: forgery of the child's birth certificate, and consequently bringing a child to Italy that was not theirs. The Italian authorities considered it necessary to take rather severe urgent measures to remove the child from the intended parents, despite the fact that no criminal liability had yet been established. The Second Section of the ECtHR ruled that removing the child from his intended parents – due to non-recognition of a foreign birth certificate – constituted interference with the applicants' right to private and family life, enshrined in Art 8 of the European Convention of Human Rights (ECHR). Then, the Grand Chamber of the ECtHR, to which the case was later referred, ruled that the immediate and irreversible separation of the child from his parents was tantamount to interference with their private life (specifically their right to personal development through their relationship with the child). Nevertheless, it also held that the opposite scenario would have been tantamount to legalizing the situation they had created in breach of important rules under Italian law. As a result, the Court decided that the national interests to prevent illegality and protect public order prevailed over the applicants' right to private life and concluded that there had been no violation of Art 8 of the ECHR. See Eur. Court H.R.,

on several occasions with questions relating to the recognition of a parental relationship between a child born through surrogacy and its intended parents[10] (the ECtHR recently issued its first Advisory Opinion on this precise subject).[11]

However, it is beyond the scope of this article to dwell on potential safeguards for the relationship established abroad between intended parents and surrogate children. These issues, long a topic of interest for Italian legal scholars,[12] seem to have recently reached a point of clarity, including in domestic and international case law, in the form of recourse to adoption or to registering foreign births in the Italian civil status registers.[13]

Paradiso e Campanelli v *Italia*, Judgment of 25 January 2015, *Il Foro Italiano,* IV, 117 (2015). Subsequently, Eur. Court H.R. (GC), *Paradiso e Campanelli* v *Italia*, Judgment of 21 January 2017, *Nuova giurisprudenza civile commentata*, I, 495 (2017), with note by L. Lenti, overturned the previous decision; also in www.*giustiziacivile.com*, 6 July 2017, 1-8, with note by A.G. Grasso. For more details, see E. Lucchini Guastalla, 'Maternità surrogata e best interest of the child' *Nuova giurisprudenza civile commentata*, 1729 (2017); G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 105.

[10] Eur. Court H.R, *Mennesson* v *France*, Judgment of 26 June 2014 *Il Foro Italiano*, IV, 561 (2014), with note by G. Casaburi; Eur. Court H.R., *Labassee* v *France*, Judgment of 26 June 2014, available at echr.coe.int; Eur. Court H.R., *Foulon* v *France*, Judgment of 21 July 2016, and *Bouvet* v *France*, both available at echr.coe.int; Eur. Court H.R., *D and Others* v *Belgium*, Judgment of 8 July 2014, available at www.echr.coe.int.

[11] Eur. Court H.R. Advisory Opinion of 10 April 2019, *Nuova giurisprudenza civile commentata*, 757-770 (2019), with note by A.G. Grasso; see also the recent opinion of S.A. González, 'Luces y sombras en el primer dictamen del TEDH sobre la gestación por sustitución', in *El Derecho internacional privado entre la tradición y la innovación. Libro homenaje al Prof. Dr. José María Espinar Vicente* (Madrid: Casa del libro, 2020), 101.

[12] See, among others, C. Campiglio, 'Il diritto all'identità personale del figlio nato all'estero da madre surrogata (ovvero la lenta agonia del limite dell'ordine pubblico)' *Nuova giurisprudenza civile commentata*, I, 1132 (2014); S. Tonolo, 'L'evoluzione dei rapporti di filiazione e la riconoscibilità dello status da essi derivante tra ordine pubblico e superiore interesse del minore' *Rivista di diritto internazionale*, 1070 (2017); A. Di Blase, 'Riconoscimento della filiazione da procreazione medicalmente assistita: problemi di diritto internazionale privato' *Rivista di diritto internazionale privato e processuale*, 839 (2018); A. Sassi and S. Stefanelli, 'Nuovi modelli procreativi, diritto allo status e principi di ordine pubblico' 1 *Biolaw Journal*, 377 (2019).

[13] The *Mennesson* and *Labassee* cases have made it clear that the domestic prohibition of surrogacy cannot prevent children from obtaining recognition of their relationship with their intended parents, since the fact that they were born by means of medically assisted procreation techniques illegal under domestic law is not, in itself, a sufficient reason to deprive them of the recognition of such an important bond. This principle, which was also followed in subsequent European Court of Human Rights judgements, was last confirmed by a recent Advisory Opinion issued by the Court at the request of the French Court of Cassation. According to the Advisory Opinion, the child's right to respect for private life requires that domestic legal systems provide a possibility of recognition of a legal parent-child relationship with the intended mother, even if she has no genetic link to the child. However, transcription of the birth certificate is not required in order to ensure compliance with this right because other means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests. Also, in the Italian context, despite the fact that the Joint Divisions of the Supreme Court of Cassation (see n 15 below) denied the registration of a foreign birth certificate listing an intended parent with no biological connection with the children as their legal father, on the ground that this would violate

Rather, the purpose of this article is to offer a different – narrow – interpretation of the Italian ban on surrogacy, which does not include altruistic surrogacy in the scope of the prohibition.

According to the current prevailing view, Art 12, para 6, legge no 40/2004 must be interpreted as an absolute prohibition banning any form of surrogate maternity, including altruistic surrogacy. This prevailing view among scholars is consistent with the position adopted recently by the Joint Divisions of the Italian Supreme Court of Cassation in Judgment 8 May 2019 no 12193, in the field of international public policy.[14] According to the Joint Divisions of the Civil Court of Cassation, in fact, the Canadian birth certificate of a surrogate child cannot be recognized in Italy because it goes against public policy.[15]

Despite the position of the Supreme Court of Cassation, some grey area remains about whether there is a true conflict between altruistic surrogacy and the dignity of women. Doubts about this were expressed most recently by the First Civil Division of the Court of Cassation in Order 29 April 2020 no 8325,[16] with which the Supreme Court referred to the Constitutional Court the question of whether the interpretation adopted by the Joint Divisions in Judgment 2019 no 12193 is consistent with the recent ECtHR Advisory Opinion of 10 April 2019.[17]

The Italian Constitutional Court has heard only one surrogacy case, which concerned a child born abroad through surrogacy whose birth certificate was originally transcribed in Italy stating that the child was the natural child of a couple

Italy's international public policy, they have, however, admitted the possibility for non-biological parents to adopt the children of their partners (ie stepchild adoption).

[14] Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, *Nuova giurisprudenza civile commentata*, I, 737 (2019), with note by U. Salanitro; also in *Il Foro Italiano*, I, 1951 (2019), with note by G. Casaburi; *Familia*, 345 (2019) with note by M. Bianca; *Famiglia e diritto*, 653 (2019) with notes by M. Dogliotti and G. Ferrando; *Corriere giuridico*, 1198 (2019) with notes by D. Giunchedi and M. Winkler. For more details on this recent ruling see G. Perlingieri, 'Ordine pubblico e identità culturale. Le Sezioni unite in tema di cd. maternità surrogata' *Diritto delle successioni e della famiglia*, 337 (2019); F. Ferrari, 'Profili costituzionali dell'ordine pubblico internazionale. Su alcuni "passi indietro" della Corte di Cassazione in tema di PMA' *Biolaw Journal*, 169 (2020); V. Barba, 'Gestación por sustitución y orden público internacional en el ordenamiento jurídico italiano' *Revista de derecho civil*, 69 (2020); G. Recinto, 'La decisione delle Sezioni Unite in materia di c.d. maternità surrogata. Non tutto può e deve essere 'filiazione" *Diritto delle successioni e della famiglia*, 347 (2019); M. Winkler and C.T. Schiappo, 'A Tale of Two Fathers' 1 *Italian Law Journal*, 559 (2019). See also Corte di Cassazione-Sezione penale VI 20 December 2018 no 2173, available at www.italgiure.giustizia.it.

[15] In Canada it is forbidden to pay the surrogate mother: Assisted Human Reproduction Act - S.C. 2004, c. 2 (Section 6).

[16] Corte di Cassazione 29 April 2020 no 8325, *Corriere giuridico*, 902 (2020), with note by U. Salanitro; also in *Famiglia e diritto*, 675 (2020), with notes by G. Ferrando and G. Recinto. According to the first civil section of the Court of Cassation the only instrument capable of safeguarding the rights of the child, as protected by the Italian Constitution and the European Convention on Human Rights, is the transcription of the foreign birth certificate in the registers of civil status.

[17] Eur. Court H.R. Advisory Opinion of 10 April 2019 n 11 above, 757.

of Italian citizens. When family court investigations revealed the surrogate origins of the child, a guardian was appointed for the child and the transcription of the birth certificate was challenged on the basis of fraud. The Judgment reveals an intention to defend the normative framework of legge no 40/2004 on this point: the Constitutional Court held that the constitutional relevance of the public interest in the dignity of surrogate mothers and human relations prevailed upon the couple's right to health and the right to self-determination.[18]

However, the restrictive position of the Constitutional Court of 2017 does necessarily apply to altruistic surrogacy, also in light of the fact that the case brought before the Constitutional Court concerned commercial surrogacy.

Regardless of how the Constitutional Court might rule, it is my view that altruistic surrogate maternity does not fall within the scope of the prohibition set out in Art 12, para 6, of legge no 40/2004, because the lack of a payment eliminates the threat to the human dignity of the women and children involved. This perspective allows for a different interpretation of the prohibition,[19] since commercial surrogacy is only prohibited in the supranational regulatory framework[20] and the wording of the prohibition of the domestic law is open to contrary interpretations.[21]

This article offers a different – narrow – interpretation of the Italian ban of surrogacy, in accordance with the reasoning laid out by the Italian

[18] Corte costituzionale 18 December 2017 no 272, *Il Foro Italiano,* I, 10 (2018), with note by G. Casaburi; also in *Nuova giurisprudenza civile commentata,* I, 540 (2018), with note by A. Gorgoni. For more details, see U. Salanitro, 'Azioni di stato e favor minoris tra interessi pubblici e privati' *Nuova giurisprudenza civile commentata*, I, 557 (2018).

[19] Criminal and Constitutional law scholars have also interpreted the Italian ban on surrogacy narrowly, to include only commercial surrogacy: F. Consorte, 'La procreazione medicalmente assistita', in A. Cadoppi et al eds, *I reati contro la persona, I, Reati contro la vita e l'incolumità individuale* (Torino: Giappichelli, 2006), 235; S. Niccolai, 'Alcune note intorno all'estensione, alla fonte e alla ratio del divieto di maternità surrogata in Italia' *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 51 (2017); and, for an opposite approach, F. Mantovani, 'Procreazione medicalmente assistita e principio personalistico' *Legislazione penale*, 337 (2005); G. Losappio, 'Commento alla legge 19 febbraio 2004, n. 40 – Norme in materia di procreazione assistita', in F. Palazzo and C.E. Paliero eds, *Commentario breve alle leggi penali complementari* (Padova: CEDAM, 2007), 2062.

[20] International legislation in this area is unanimous in banning commercial surrogacy but is silent on altruistic surrogacy: see Art 3 of the EU Charter of Fundamental Rights; Principle 15 set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), Report on Human Artificial Procreation, 1989; European Parliament resolution on the trade in human egg cells, P6_TA(2005)0074, 10 March 2005; Paragraph 20 of the Resolution on priorities and outline of a new EU policy framework to fight violence against women (2010/2209(INI)), 5 April 2011; Art 21 of the Oviedo Convention 1996; Arts 21 and 22 of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin 2006; Art 12 of the Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research 2005; Art 12 of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004.

[21] U. Salanitro, 'Ordine pubblico internazionale, filiazione omosessuale e surrogazione di maternita' *Nuova giurisprudenza civile commentata*, I, 737, 740 (2019).

constitutional judges in Judgment 2014 no 162 to declare the prohibition of heterologous fertilization unconstitutional. A number of general indicia make it plausible that the reasons for the decision extend beyond the case under consideration and even suggest that they point toward a rethinking of the constitutionality of the surrogacy ban.

This hypothesis, fleshed out in greater detail below, provides the basis for the subsequent analysis of the space the present rules leave for the implementation of the relevant interest, which is, in my view, one of constitutional and supranational relevance.[22]

II. Judgment 2014 no 162 of the Italian Constitutional Court: The Ban on Heterologous Artificial Fertilization Declared Unconstitutional

Legge no 40/2004, regarding medically assisted reproduction, has essentially been gutted over the years by different interventions by the Italian Constitutional Court.[23]

The most important of these was the Judgement 10 June 2014 no 162, in which the Court declared Art 4, para 3, legge no 40/2004 unconstitutional, specifically in the part in which it forbade access to heterologous fertilization.[24]

The constitutional judges declared the prohibition of heterologous fertilization unconstitutional because it does not allow couples suffering from serious pathologies to exercise their right to parenthood, in light of the fact that that they have no other way to overcome their disability. The Italian Constitutional Court held that this prohibition violated the rights to health and self-determination of sterile and infertile couples.

The notion of health referred to in Art 32 of the Italian Constitution must also be understood according to the comprehensive meaning of psychological health. Such a definition corresponds to the one adopted by the World Health Organization (WHO). The impossibility to form a family with children, together with one's partner, can have remarkable negative effects on the health of the

[22] Once the right of the infertile couple to have access to surrogacy is recognised as worthy of legal protection, it must be guaranteed through interpretation of the rules governing the establishment and by safeguarding of the legal status of the child accordingly. It is a subject that emerges as a consequence of the present essay, representing an ideal continuation of this article, and for which reference is had in order to make to a different and more complete work, though.

[23] In addition, see: Corte costituzionale 9 November 2006 no 369, *Famiglia e diritto*, 52 (2007), with note by A. Figone; Corte costituzionale 8 May 2009 no 151, *Il Foro Italiano*, II, 2301 (2009), with note by G. Casaburi; also in *Corriere giuridico*, 1213 (2009), with note by G. Ferrando; Corte costituzionale 5 June 2015 no 96, *Il Foro Italiano*, 2254 (2015), with note by G. Casaburi; also in *Corriere giuridico,* 186 (2016), with note by L. Iannicelli; Corte costituzionale 21 October 2015 no 229, *Il Foro Italiano*, XII, 3749 (2015).

[24] Corte costituzionale 10 June 2014 no 162, *Corriere giuridico*, 1062 (2014), with note by G. Ferrando; also in *Il Foro Italiano,* I, 2325 (2014), with note by G. Casaburi; *Famiglia e diritto*, 753 (2014), with note by V. Carbone.

couple.

Moreover, a couple's decision to have a child pertains to the most intimate and intangible sphere of human life and should not be repressed if other constitutional values are not violated.

In this context, prohibiting surrogate maternity could be detrimental to the right to health and self-determination of the couple. It can be also considered unconstitutional in that it prevents couples in which the woman is unable to have a child – for example because she no longer has a uterus or because she is ill and cannot carry the pregnancy to term – to become parents.

This controversial issue is the subject of my research. Hereafter follows a narrow interpretation of the Italian ban on surrogate maternity, following the reasoning the Italian Constitutional Court used to declare the prohibition of heterologous fertilization illegitimate.

However, it bears noting that, in heterologous fertilization, the need to protect the psychophysical health of the child only counterweight to the recognition of infertile couples' right to have access to assisted reproduction. It weighs all the more heavily where there is no genetic link with the intended parents and in light of the right of children to know their own origins.[25] On the contrary, when it comes to surrogacy, many other conflicting interests are at stake in addition to the present need to protect the child. Among these is the need to protect the dignity and health of the surrogate mother, which might justify a different balance of interests.

III. The Right to Health of the Infertile Couple

The Italian Constitutional Court, in case 2014 no 162, adopted a broad interpretation of the concept of health, ruling that heterologous fertilization was a tool useful for safeguarding the wellbeing of infertile couples and, therefore, a form of therapy that allows those who are unable to have children to become parents.[26] The concept is not limited to the physical sphere

[25] The Italian Constitutional Court has held that the interest of the children to know their own genetic origins does not create any obstacle to infertile couples' right to have access to assisted reproduction, since there was already legislation in place governing a similar issue, the right ofadopted children to know their genetic origins (Art 28, paras 4 and 5, legge no 183/1984).

[26] In doing so the Italian Constitutional Court overcame the traditional view, according to which heterologous fertilization could not be considered therapeutic because it does not cure the problem of infertility: M. Mori, 'Nuove tecnologie riproduttive ed etica della qualità della vita', in G. Ferrando ed, *La procreazione artificiale fra etica e diritto* (Padova: CEDAM, 1989), 274; M. Sesta, *'La filiazione'*, in T. Auletta ed, *Trattato diritto privato Bessone,* IV, *Filiazione, Adozione, Alimenti* (Torino: Giappichelli, 2011), 355; M. Sbisà, 'La riproduzione artificiale fra filiazione sociale e filiazione biologica', in C. Ventimiglia ed, *La famiglia moltiplicata. Riproduzione umana e tecnologia tra scienza e cultura* (Milano: Giuffrè, 1988), 144. For other authors, on the other hand, heterologous fertilization is a therapy for the psychological health problems of the infertile or sterile couple: G. Ferrando, 'Autonomia delle persone e intervento pubblico nella riproduzione assistita. Illegittimo il

alone, but is also related to psychological and relational elements.[27] This broad interpretation of the concept of health – confirmed by the most recent Judgement 23 October 2019 no 221, in which the Constitutional Court affirmed the constitutionality of the prohibition of to the use of medically assisted procreation by same-sex couples[28] – corresponds to the definition adopted by the World Health Organization (WHO), according to which health is 'complete physicial, mental and social well-being,' and 'not merely the absence of disease or

divieto di fecondazione eterologa' *Nuova giurisprudenza civile commentata*. 401 (2014); G. Casaburi, '«Requiem» (gioiosa) per il divieto di procreazione medicalmente assistita eterologa: l'agonia della l. 40/04' *Il Foro Italiano*, 2337 (2014).

[27] The turning point in the consideration of the right to health in Italian legal scholarship derives first of all from the work of Costantino Mortati, starting with his affirmation of a new dimension of disease, understood 'no longer (or not only) as an acute pathological state dangerous for society, but above all as mere instability of health in the broad sense' and, similarly, a new and broader conception of health, understood as 'a state, that is, a certain condition of well-being to be preserved in time or, better, a value perceived by the subject and generated by a complex and interdependent series of external and internal factors to the subject itself': C. Mortati, 'La tutela della salute nella Costituzione italiana' *Rivista degli infortuni e delle malattie professionali*, (1961). Mortati's thought found a broad echo in the later doctrine: L. Montuschi, 'Art. 32', in G. Branca ed, *Commentario alla Costituzione* (Roma: Treccani, 1976), 164; M.D. Cherubini, 'Tutela della salute e cc.dd. atti di disposizione del corpo diritto privato', in F.D. Busnelli and U. Breccia eds, *Tutela della salute e diritto privato* (Milano: Giuffrè, 1978), 81; D. Poletti and M. Zana, '*La tutela della salute nella legislazione speciale italiana'*, in F.D. Busnelli and U. Breccia eds, *Tutela della salute e diritto privato* (Milano: Giuffrè, 1978), 50; P. Perlingieri, 'Il diritto alla salute quale diritto della personalità' *Rassegna di diritto civile*, 1023 (1982); C.M. D'Arrigo, 'Salute' *Enciclopedia del diritto* (Milano: Giuffrè, 2001), Agg V, 1017; G. Alpa, 'Salute (diritto alla)' *Novissimo Digesto italiano* (Torino: UTET, 1996), App VI, 914; M. Bessone and V. Roppo, 'Diritto soggettivo alla "salute," applicabilità diretta dell'art. 32 della Costituzione ed evoluzione della giurisprudenza' *Politica del diritto*, 767 (1974), which specifically emphasize the importance of Mortati's thought; A. Simoncini and E. Longo, 'Sub art. 32', in R. Bifulco et al eds, *Commentario alla Costituzione* (Milano: Giuffrè, 2006), 655; V. Durante, 'La salute come diritto della persona', in S. Rodotà and P. Zatti eds, *Il governo del corpo*, I, *Trattato di Biodiritto* (Milano: Giuffrè, 2011), 584; A. De Cupis, 'Integrità fisica' *Enciclopedia giuridica* (Roma: Treccani, 1989), XVII, 1; Id, 'I diritti della personalità', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2nd ed, 1982), 114; R. Romboli, 'Sub art. 5', in A. Scialoja and G. Branca eds, *Commentario del codice civile,* I, *Delle persone fisiche*, (Bologna-Roma: Zanichelli, 1988), 235; M. Santilli and A. Giusti, 'Salute II) Tutela della salute – diritto civile' *Enciclopedia giuridica* (Roma: Treccani, 1991), XXVIII, 6; C.M. D'Arrigo, 'Integrità fisica' *Enciclopedia del diritto* (Milano: Giuffrè, 2000), Agg IV, 727; M.C. Venuti, *Gli atti di disposizione del corpo* (Milano: Giuffrè, 2002), 26; R. Romboli, 'La relatività dei valori costituzionali per gli atti di disposizione del proprio corpo' *Politica del diritto*, 568 (1991); B. Pezzini, 'Il diritto alla salute: profili costituzionali' *Diritto e società*, 50 (1983).

[28] Corte costituzionale 23 October 2019 no 221, *Il Foro Italiano*, I, 3782 (2019), with note by G. Casaburi; also in *Corriere giuridico*, 1460 (2016), with note by G. Recinto; *Nuova giurisprudenza civile commentata*, I, 548 (2020), with note by I. Barone. According to the Constitutional Court, if access to medically assisted procreation is justified by therapeutic reasons, it can be applied only when heterosexual couples present pathologies relating to fertility, and not to couples made up of persons of the same sex, even if one or both members are sterile, since, in their case, procreation as a pair would be physiologically impossible in any event. The Constitutional Court affirmed medically assisted procreation has a therapeutic function: a ruling that tends to reinforce the thesis, proposed here, that a restrictive interpretation of the prohibition of surrogacy is appropriate, since a blanket ban would absolutely deny the possibility of access to parenthood only to couples suffering from serious physical limitations.

infirmity'.[29] This notion of health testifies to the profound conceptual shift that the meaning of health and illness has undergone, mainly in the past few centuries.[30]

In the context of problems of infertility or sterility, the health issue affects not only the person directly interested, but also their partner. The sensitive issue of infertility, which may derive, for example, from the biological incompatibility of the partners,[31] affects them both because of the social, relational and psychological consequences that arise from the permanent impossibility to have children.[32]

Now that heterologous artificial fertilization has been accepted as a form of therapy, we may well ask if surrogate maternity may be considered a medical treatment for the psychological distress of the couple and, consequently, if the absolute prohibition which bans any form of surrogate maternity, including altruistic surrogacy, could be considered undue State interference in the right to health of infertile couples.[33]

IV. The Right to Self-Determination in Procreation

According to the Italian Constitutional Court, the decision to give life to a child, even when it is exercised through heterologous artificial fertilization, is non-coercible, because it constitutes an expression of the general and

[29] Some authors have criticised this definition of health: D. Callahan, 'The who definition of health' 1 *Hastings Centers Studies*, 77-88 (1973); M. Mori, *La fecondazione artificiale: una nuova forma di riproduzione umana* (Roma: Laterza, 1995), 31; G. Berlinguer, *Etica della salute* (Milano: Il Saggiatore, 1997), 19.

[30] M. Foucault, *Maladie mentale et personnalité* (Paris: Presses Universitaires de France, 1954), 62; P. Sgreccia, *La dinamica esistenziale dell'uomo* (Milano: Vita e Pensiero, 2008), 26; G. Federspil et al, *Filosofia della medicina* (Milano: Raffaello Cortina Editore, 2008), 235; G. Canguilhem, *Le normal et le pathologique* (Paris: Presses Universitaires de France, 1998), 9; L. Nordenfelt, *On the Nature of Health: An Action-Theoretic Approach* (Dordrecht: Kluwer, 1995), 24; J.C. Lennox, 'Health as an objective value' 20(5) *The journal of medicine and philosophy*, 499 (1995); A. Bowling, *Measuring health. A review of quality of life measurement scales* (Milton Keynes, UK: Open University Press, 1991), 1; P.A. Tengland, 'A Two-Dimensional Theory of Health' 28(4) *Theoretical Medicine and Bioethics*, 257-284 (2007); E. Sgreccia, *Manuale di bioetica* I, *Fondamenti ed etica biomedica* (Milano: Vita e Pensiero, 2012), 165.

[31] In these cases, although the two partners are fertile individually, together suffer a biological-reproductive incompatibility, which does not permit them to become parents: see PL. Righetti et al, *La coppia di fronte alla Procreazione Medicalmente Assistita* (Milano: Franco Angeli, 2009), 35.

[32] A. Trounson and C. Wood, 'Extracorporal fertilization and embryo transfer' 8(3) *Clinical Obstetrics Gynecology*, 681 (1981); S.R. Leiblum et al, 'The psychological concomitants of in vitro fertilization' 6(3) *Journal of Psychosomatic Obstetrics & Gynecology*, 165 (1987); D. Baram et al, 'Psychosocial adjustment following unsuccessful in vitro fertilization' 9(3) *Journal of Psychosomatic Obstetrics & Gynecology*, 181 (1988); P.L. Righetti, 'I vissuti psicologici nella procreazione medicalmente assistita: interventi e protocolli integrati medico-psicologici' *Contraccezione Fertilità Sessualità*, 163 (2001).

[33] B. Liberali, *Problematiche costituzionali nelle scelte procreative* (Milano: Giuffrè, 2017), 140; M. Di Masi, 'Maternità surrogata: dal contratto allo "status" ' *Rivista critica di diritto privato*, 642 (2014).

basic principle of self-determination.

The right of self-determination is quite difficult to define because it translates into legal terms the existential importance of the individual and individual choices.[34]

The legal origins of this right can be found in the American right to privacy,[35] which protects[36] citizens' 'sphere of sanctified isolation'[37] from interference by the public authorities. It protects, that is, the innermost and deepest dimension of existence,[38] an area within which the citizen can avoid any potential interference in decisions, and which includes the realm of reproduction.[39]

Despite its Anglo-Saxon origins, the right of self-determination did not come into European continental laws directly from the American judicial culture, but rather indirectly, through the decision of the ECtHR.

In particular, in the *Pretty* case, the judges underscored that,

> 'although no previous case has established as such any right to self-determination as being contained in Art 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle

[34] In doctrine the nature of constitutional law of the right to self-determination is controversial: S. Mangiameli, 'Autodeterminazione: diritto di spessore costituzionale?', in C. Navarini ed, *Autonomia e Autodeterminazione. Profili etici, bioetici e giuridici* (Roma: Editori Riuniti, 2011), 82; L. Antonini, 'Autodeterminazione nel sistema dei diritti costituzionali', in F. D'Agostino ed, *Un diritto di spessore costituzionale?* (Milano: Giuffrè, 2012), 11; A. Renda, 'La surrogazione di maternità e il diritto della famiglia al bivio' *Europa e diritto privato,* 421 (2015); M. Esposito, *Profili costituzionali dell'autonomia privata* (Padova: CEDAM, 2003), 93; M. Mazziotti, *Lezioni di Diritto costituzionale* (Milano: Giuffrè, 1993), II, 193; S. Rodotà, 'Il nuovo habeas corpus: la persona costituzionalizzata e la sua autodeterminazione', in S. Rodotà and M. Tallacchini eds, *Ambito e Fonti del biodiritto*, I, *Trattato di biodiritto*, 197 (2011); Id, 'Relazione introduttiva' *Nuova giurisprudenza civile commentata*, II, 103 (2016); P. Zatti, 'Rapporto medico-paziente e integrità della persona' *Nuova giurisprudenza civile commentata*, II, 406 (2008); A. Morrone, 'Ubi scientia ibi iura. A prima lettura sull'eterologa', available at www.forumcostituzionale.it, 1 June 2014, 4; G. Cricenti, 'Diritto all'autodeterminazione? Bioetica dell'autonomia privata' *Nuova giurisprudenza civile commentata,* II, 211 (2011).

[35] S.D. Warren and L.D. Bradeis, 'The Right to Privacy' 4(5) *Harvard Law Review*, 193 (1890).

[36] D. Barnard, 'The evolution of the right to privacy after Roe v Wade' 13 *American Journal of Law and Medicine*, 365-525 (1987); L. Miglietti, *Il diritto alla privacy nell'esperienza giuridica statunitense ed europea* (Napoli: Edizioni Scientifiche Italiane, 2014), 109.

[37] C.A. Mackinnon, 'Reflections on Sex Equality Under Law' 100 *The Yale Law Journal*, 1281-1328 (1991); L.C. McClain, 'Inviolability and Privacy: The Castle, the Sanctuary, and the Body' 7 *Yale Journal of Law & the Humanities*, 195-242 (1995).

[38] E. Shils, 'Privacy: its constitution and vicissitudes' 31 *Law and contemporary problems*, 281 (1966).

[39] R. Dworkin, Life's domination (London: HarperCollins, 1993), 148. For the US Supreme Court see: *Skinner* v *State of Oklahoma, ex rel. Williamson*, 316 U.S. 535 (1942); *Griswold* v *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v *Baird*, 405 U.S. 438 (1972); *Roe* v *Wade* 410 US 113 (1973); *Carey* v *Population Services International*, 431 U.S. 678 (1977). See also: *Davis/Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); *Goodridge* v *Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Lifchez* v *Hartigan*, 735 F. Supp. 1361 (N.D. Ill. 1990).

underlying the interpretation of its guarantees'.[40]

The ECtHR, which has dealt with the problems related to appeals concerning modern biomedical technology on several occasions,[41] has also argued that

> 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Art 8, as such a choice is an expression of private and family life'.[42]

In striking down Art 4, para 3, of legge no 40/2004, in the part in which it forbade recourse to heterologous fertilization, the Italian Constitutional Court appears to have endorsed the European Court perspective that human procreation does not necessarily have to be limited to the natural course.[43]

With the acceptance of this view, the conditions were laid for recognition of the right to have access to surrogacy in Italy as well. This is not only because surrogacy is included among artificial procreation techniques,[44] but also because it might be argued that, through surrogate maternity, couples may continue to exercise their right to procreate, at least whenever one of the two intended partners has a genetic link with the child.[45]

[40] Eur. Court H.R., *Pretty* v *The United Kingdom*, Judgment of 29 April 2002, *Il Foro Italiano*, IV, 57 (2003).

[41] Eur. Court H.R., *Evans* v *The United Kingdom*, Judgement of 10 April 2007, *Nuova giurisprudenza civile commentata,* I, 1238 (2007), with note by B. D'Usseaux; Eur. Court H.R., *Dickson* v *The United Kingdom*, Judgment of 4 December 2007, *Rivista italiana di diritto processuale penale*, 337 (2008).

[42] Eur. Court H.R., *S.H. and Others* v *Austria*, Judgement of 1 April 2010 *Famiglia e diritto*, 977 (2010), with note by U. Salanitro.

[43] E. La Rosa, 'Il divieto "irragionevole" di fecondazione eterologa e la legittimità dell'intervento punitivo in materie eticamente sensibili' *Rassegna giuridica della sanità*, 141 (2014); A. Vallini, 'Sistema e metodo di un biodiritto costituzionale: l'illegittimità del divieto di fecondazione "eterologa" ' *Diritto penale e processo*, 834 (2014); C. Nardocci, 'La Corte costituzionale decide per l'incostituzionalità della fecondazione eterologa e sospende il dialogo con la Corte europea dei diritti dell'uomo', in M. D'Amico and M.P. Costantini eds, *L'illegittimità costituzionale del divieto della 'fecondazione eterologa'* (Milano: Giuffrè, 2014), 116; for a partially differing point of view, see A. Ruggeri, 'La Consulta apre alla eterologa ma chiude, dopo averlo preannunziato, al "dialogo" con la Corte EDU (a prima lettura di Corte cost. n. 162 del 2014)', available at www.forumcostituzionale.it, 14 June 2014, 2.

[44] For this perspective, see: I. Corti, 'La maternità per sostituzione,', in S. Rodotà and P. Zatti eds, *Il governo del corpo,* II, *Trattato Biodiritto* (Milano: Giuffrè, 2011), 1481; L. Lorenzetti, 'Maternità surrogata' *Digesto discipline privatistiche* (Torino: UTET, 2011), 617; G. Casaburi, 'Osservazioni a Corte costituzionale n. 162/2014' *Il Foro Italiano*, I, 2341 (2014); for an opposite point of view, S. Niccolai, 'Alcune note' n 19 above, 52; C.C.W. Chan, 'Infertily, Assisted Reproduction and Rights' 20 *Best Practice* & *Research Clinical Obstetrics and Gynaecology*, 377 (2006); C. Straehle, 'Is There a Right to Surrogacy?' 33 *Journal of Applied Philosophy*, 150 (2016).

[45] In American legal scholarship, some authors have argued that the right to appeal to surrogacy is protected by the constitutional right to privacy, in the context of the 14th Amendment: J. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' 69(3) *Virginia Law Review*, 405 (1983); C. Spivack, 'The Law of Surrogate Motherhood in the United

V. Restrictions on the Right to Altruistic Surrogacy: *a*) The Polysemic Concept of Dignity

The Constitutional Court has held, in its already mentioned decision 22 November 2017 no 272, that surrogate motherhood 'offends in an intolerable way the dignity of women and undermines human relations deeply'.[46] Similar judgments have been expressed even more recently by the Joint Divisions of the Supreme Court of Cassation, which stated that the ban on surrogacy was introduced to safeguard fundamental legal interests, such as 'the constitutionally protected human dignity of the surrogate woman'.[47] The hypothesis of this paper, then, requires careful examination, because it is necessary to balance the rights of the partners with many opposing interests, above all the dignity of pregnant woman, especially in the wake of the judgment of the Supreme Court 2019 no 12193, which, unlike the case brought before the Constitutional Court, concerned altruistic surrogacy.

While the debate on human dignity may be as old as humanity itself,[48] but it was only with Kant that dignity took a weighty legal meaning,[49] leading to the recognition of its privileged legal status in the national constitutions which arose after the Second World War.

In the Italian Constitution only two articles explicitly mention dignity (Arts

States' 58 *The American Journal of Comparative Law*, 109 (2010); P. Nicolas, 'Straddling the Columbia: A Constitutional Law Professor's Musing on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy' 89 *Washington Law Review*, 1279 (2014). Other authors tend to deny the constitutional relevance of the right to surrogacy: L. Gostin, 'A Civil Liberties Analysis of Surrogacy Arrangements' 16 *Law, Medicine & Health Care*, 7-17 (1988); M. Schultz, 'Reproductive Technology and Intention-Based Parenthood: An Opportunity for Gender Neutrality' 2 *Wisconsis Law Review*, 297-398 (1990); S.B. Rae, 'Parental Rights and the Definition of Motherhood in Surrogate Motherhood' 3 *Southern California Review of Law and Women's Studies*, 219 (1994); R.J. Chin, 'Assisted Reproductive Technology Legal Issues in Procreation' 8 *Loyola Consumer Law Review*, 214 (1996); S. Ferguson, 'Surrogacy contracts in the 1990s: the controversy and debate continues' 33 *Duquesne Law Review*, 903-922 (1995); M. Field, 'Compensated surrogacy' 89 *Washington Law Review*, 1178 (2014).

[46] Corte costituzionale 18 December 2017 no 272 n 18 above, 10.

[47] Corte di Cassazione-Sezioni unite 8 May 2019 no 12193 n 14 above, 737; previously see also Corte di Cassazione 11 November 2014 no 24001, *Nuova giurisprudenza civile commentata,* I, 239 (2015), with note by C. Benanti; also in *Il Foro Italiano*, I, 3414 (2014), with note by G. Casaburi; *Corriere giuridico*, 471 (2015), with note by A. Renda.

[48] F. Viola, 'Dignità umana' *Enciclopedia Filosofica* (Milano: Bompiani, 2006), III, 2863-2865; P. Becchi, '*Il principio di dignità umana*' (Brescia: Morcelliana 2009), passim; U. Vincenti, '*Diritti e dignità umana*' (Roma: Editori Laterza, 2009), passim; A. Abignente and F. Scamardella eds, '*Dignità della persona*' (Napoli: Editoriale Scientifica, 2013), passim; M. Düwell et al eds, *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2014), 560-568; V. Scalisi, *L'ermeneutica della dignità* (Milano: Giuffrè, 2018), passim.

[49] I. Kant, *The Metaphysics of Ethics*, translated by J.W. Semple, edition with introduction by Rev Henry Calderwood (Edinburgh: T. & T. Clark, 1886) (3rd edition), available at tinyurl.com/8c6j69fm (last visited 27 December 2020).

3 and 4). If we compare this with the majority of the national constitutions,[50] we may form an impression that the concept of dignity in the Italian Constitution is radically irrelevant.[51] This conclusion would, however, be erroneous if we consider the preparatory works and the Constitution as a whole, which reveals the central role of dignity, understood as respect for any human being.[52]

With some degree of oversimplification, we might argue that two different conceptions of dignity exist: the subjectivist view and the objectivist one.[53] These two different conceptions correspond to two different ways to conceive of dignity in the American and European traditions.[54]

If we want to sketch, even as a broad outline, the main features of these different conceptions of dignity, we might say that, according to the first view, we cannot consider acts of limitation on someone's functional liberties to be legitimate if they are done in the name of that person's dignity or a superior interest. This view comes from the American tradition, where the concept of

[50] See Arts 13 and 24, para 2, of the Japanese Constitution; Art 10 of the Spanish Constitution; Art 23 of the Belgian Constitution; Art 13 of the Portuguese Constitution; Arts 2 and 7 of the Greek Constitution; Art 1 of the Czech Constitution; Art 30 of the Polish Constitution; Art 54 of the Hungarian Constitution; Art 12 of the Slovack Constitution; Arts 1, 7, 10, 25, 36 of the South African Constitution. Moreover, we find additional references to the value of dignity almost in all the Latin American Constitution: see G. Rolla, 'Profili costituzioni della dignità umana', in E. Ceccherini ed, *La tutela della dignità dell'uomo* (Napoli: Editoriale scientifica, 2008), 61.

[51] The German system and Art 1 of the German Constitution deserve special attention. This Article recognizes dignity not as a fundamental right, but as an objective rule which is not subject to comparisons or obligations, unlike fundamental rights. This differentiation has also brought about a change of terminology: where the fundamental rights in the German Constitution are classified as *unverletzlichen und unveräußerlichen* (inviolable and inalienable, the dignity, instead, is *unantastbar* (untouchable). Moreover, the German constituents has strengthened this provision by excluding it from the constitutional review (Art 79, para 3).

[52] V. Marzocco, 'La dignità umana tra eredità e promesse', in A. Abignente and F. Scamardella eds, *Dignità della persona* (Napoli: Editoriale Scientifica, 2013), 22; A. Ruggeri and A. Spadaro, 'Dignità dell'uomo e giurisprudenza costituzionale (prime notazioni)' *Politica del diritto*, 347 (1991).

[53] Some authors, most of them American, consider dignity to be a useless concept: H. Khuse, 'Is there a tension between autonomy and dignity?', in P. Kemp et al eds, 2 *Bioethics and biolaw*, *Four Ethical Principles* (Copenaghen: Rhodes International Science and Art Publishers and Centre for Ethics and Law, 2000), 6-74; J. Aldergrove, 'On dignity', in J. Aldergrove ed, *Why We Are Not Obsolete Yet. Genetics, algeny, and the future* (Burnaby, B.C.: Stentorian, 2000), passim; R. Macklin, 'Dignity Is a Useless Concept (It Means no More than Respect for Persons or Their Autonomy)' 327 *British Medical Journal*, 1419 (2003); S. Pinker, 'The Stupidity of Dignity: Conservative Bioethics' Latest, Most Dangerous Play' 1 *The New Republic* (2008); C. McCrudden, 'Human Dignity in Human Rights Interpretation' *European Journal of International Law*, 655 (2008); J. Smits, 'Human Dignity and Uniform Law: An Unhappy Relationship' 2 *TICOM Working Paper on Comparative and Transnational Law*, 1 (2008); A. Cochrane, 'Undignified Bioethics' 5 *Bioethics*, 234-241 (2010).

[54] B. Edelman, *La personne en danger* (Paris: Puf, 1999), passim; E.J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (Issues in Comparative Public Law) (Westport: Greenwood Publishing Group, 2011), passim; V.L. Raposo, *O direito à imortalidade* (Coimbra: Almedina, 2014), 333; V. Scalisi, *L'ermeneutica della dignità* n 48 above, 31; E. Poddighe, *Comunicazione e "Dignità della donna"* (Roma: Romatre-Press, 2018), 42.

dignity is connected to the notion of privacy[55] to the extent that they practically overlap.

In the European view, on the contrary, a person's intentions and their right of self-determination, however important, are subject to some limitations, like all other rights.[56] European Constitutions place the principle of solidarity at the top of the scale of values, and not the right to personal autonomy, which is overridden by solidarity when the two directly clash.[57]

If dignity is an attribute of liberty, then an individual can determine autonomously what is 'dignified' for him- or herself,[58] in which case dignity could not be applied as a limit to how the individual defines it.[59] If, on the other hand, we believe that liberty is an attribute of dignity, understood as a universal value, then the dignity of mankind can be used as a limit on individual behavior.[60]

For the purposes of this paper, the broader view of private autonomy and the objectivist view of dignity as non-overlapping is useful, because it is from this point of view that I believe we can most clearly consider the issue of the admissibility of surrogate motherhood under the Italian legal system.[61]

[55] *Lawrence* v *Texas*, 539 U.S. 558 (2003). See also G. Bognetti, 'The Concept of Human Dignity in European and US Constitutionalism', in G. Nolte ed, *European and U.S. constitutionalism* (Cambridge: Cambridge University Press, 2005), 85; N. Rao, 'On the Use and Abuse of Dignity in Constitutional Law' 14 *Columbia Journal of European Law*, 201 (2008).

[56] G. Resta, 'La dignità', in S. Rodotà and P. Zatti eds, *Trattato di Biodiritto*, I, *Ambito e fonti del biodiritto* (Milano: Giuffrè, 2011), 290; P. Zatti, *Maschere del diritto* (Milano: Giuffrè, 2009), 46; A. Ruggeri, 'Appunti per uno studio sulla dignità dell'uomo, secondo diritto costituzionale' *Rivista Associazione Italiana dei Costituzionalisti*, 6 (2011); J. Reis Novais, *A dignidade da pessoa humana* (Coimbra: Almedina, 2015), I, 78.

[57] F.D. Busnelli, 'Quali regole per la procreazione assistita?' *Rivista di diritto civile*, 583 (1996).

[58] For Pico della Mirandola it is for the individual alone to up to determine autonomously what is 'dignified' for him or herself: G. Pico della Mirandola, *Oratio de hominis dignitate* (1486), E. Garin ed of the latin text, english traslation by E. Forbes (Lexington: The Avil Press), 1953.

[59] X. Bioy, 'La dignité: questions de principes', in S. Gaboriau and H. Pauliat eds, *Justice, ethique et dignité: actes du colloque organisé à Limoges Le 19 et 20 novembre 2004* (Limoges: Presses Universitaires de Limoges et du Limousin, 2006), 65.

[60] B. Mathieu, 'La dignité de la personne humaine: Quel droit? Quel titulaire?' *Dalloz*, 285 (1996).

[61] Within the framework of the conflict between private autonomy and the objectivist view of dignity we can consider well-known court cases such as the French story involving 'Dwarf tossing.' For more details, see A. Massarenti, *Il lancio del nano e altri esercizi di filosofia minima* (Parma: Guanda, 2006), 7; E. Ripepe, 'La dignità umana: il punto di vista della filosofia del diritto', in E. Ceccherini ed, *La tutela della dignità dell'uomo* (Napoli: Editoriale scientifica, 2008), 35; G. Cricenti, 'Il lancio del nano Spunti per un'etica del diritto civile' *Rivista critica di diritto privato*, 21 (2009); M. Rosen, *Dignity. Its History and Meaning* (Cambridge: Cambridge University Press, 2012), 70; X. Bioy, '*La dignité: questions de principes,*' in A. Catherine, A. Cayol and J. M. Larralde eds, *Le corps humain saisi par le droit: entre liberté et propriété,* 83. The German Court decisions 'Peep-Show Fall' and 'Telefonsex' and also the French Court decisions SIDA-Benetton and 'Loft Story': see G. Resta, 'La disponibilità dei diritti fondamentali e i limiti della dignità (Note a margine della Carta dei Diritti)' *Rivista di diritto civile*, 836 (2002); M.R. Marella, 'Il fondamento sociale della dignità umana. Un modello costituzionale per il diritto europeo dei contratti' *Rivista critica di diritto privato*, 74 (2007); M. Gennusa, 'La dignità umana e le sue anime. Spunti ricostruttivi alla luce di una recente sentenza del Bundesverfassungsgericht', in N. Zanon ed, *Le Corti dell'integrazione*

In our legal system, which embraces the European conception of dignity, the legalisation of commercial surrogacy, unlikely in America, has not been allowed at all,[62] and what is still open for consideration is altruistic surrogacy. Some human behavior, in fact, may run contrary to the value of human dignity if carried out for profit-making, whereas, if it is based on solidarity, the same behavior could be recognised as worthy of protection. The typical example concerns organ and blood donation.

The same kind of reasoning could be applied to surrogacy, although there is no specific law that allows it. We may speak about the logic of gift, or of solidarity that arises as a sort of fraternal feeling.[63] This logic of gift would remain outside the *ratio legis* of the ban, because the lack of payment and the spontaneity of the gesture rules out an offense to the human dignity of women and children.[64]

Two earlier cases on surrogacy coming from the Italian courts suggest that this may be so: the Court of Monza, in a 1989 commercial surrogacy case, rejected the commissioning parents' request for sole custody of the baby,[65] but the Court of Rome, in an altruistic surrogacy case in 2000, granted the intended parents' request to continue with the artificial insemination procedure and implantation of the embryo in the surrogate mother's uterus.[66]

europea e la Corte costituzionale italiana (Napoli: Edizioni Scientifiche Italiane, 2006), 203.

[62] In the United States of America, only a few states – New York (NY Dom. Rel. Law § 122), Indiana (Ind. Code § 31-20-1-1), Michigan (Surrogate Parenting 199 of 1988, § 722.855, Sec. 5 e 722.859, Sec. 9), and Arizona (Arizona Revised Statute § 25-218) – prohibit commercial surrogacy contracts and make them unenforceable. In most other states – including California (Cal. Fam. Code §§ 7960-7962), Florida (FL Stat. § 742.15: Gestational Surrogacy Contract), Maine (Maine Parentage Act (Title 19-A, § 1932), and many others – paying surrogate mothers is allowed. Another another group of states has not regulated surrogacy fully and clearly, and it falls to the courts, with their case law, to permit or forbid payments that exceed the reimbursement of expenses on a case-by-case basis: A. Finkelstein et al, 'Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Law Making' Report of the *Columbia law school sexuality* & *gender law clinic* May 2016, 1-90, available at tinyurl.com/vjfoprvp (last visited 27 December 2020).

[63] J.M. Camacho, 'Maternidad subrogada: una práctica moralmente aceptable. Análisis crítico de las argumentaciones de sus detractores' 15 (2009), available at tinyurl.com/lmpx6ek9 (last visited 27 December 2020).

[64] A. Ruggeri and C. Salazar, ' "Non gli è lecito separarmi da ciò che è mio": Riflessioni sulla maternità surrogata alla luce della rivendicazione di Antigone' *Consulta OnLine*, 143 (2017); V. Scalisi, 'Maternità surrogata: come "far cose con regole" ' *Rivista di diritto civile*, 1100 (2017); B. De Filippis, 'Maternità surrogata o assistita, utero in affitto', in A. Cagnazzo ed, *Trattato di diritto e bioetica* (Napoli: Edizioni Scientifiche Italiane, 2017), 369; A. Gorgoni, 'La rilevanza della filiazione non genetica' *Diritto delle successioni e della famiglia*, 146 (2018); V. Barba, 'Gestación por sustitución' n 14 above, 94; for an opposite point of view, S. Serravalle, *Maternità surrogata, assenza di derivazione biologica e interesse del minore* (Napoli: Edizioni Scientifiche Italiane, 2018), 89.

[65] Tribunale di Monza 27 October 1989, *Foro italiano*, I, 298 (1990), with note by G. Ponzanelli; also in *Giurisprudenza di merito*, I, 240 (1990), with note by M. G. Maglio, *Nuova giurisprudenza civile commentata*, VI, 355 (1990) with note by A. Liaci, *Giurisprudenza italiana*, II, 296 (1990), with note by G. Palmeri, *Diritto di famiglia e delle persone*, 173 (1990), with note by M. Ventura.

[66] Tribunale di Roma 17 October 2000, *Famiglia e diritto,* 151 (2000), with notes by M.

Further support emerges from the lively scholarly debate that preceded the introduction of Legge 19 February 2004 no 40: while some prominent scholars maintained that the affront to dignity did not result from the onerousness of the agreement, but rather lay in allowing women to dispose of their own bodies,[67] the prevailing view was that the functions of conception and gestation should be unmarketable but not unavailable.[68]

Dogliotti and G. Cassano; also in *Giurisprudenza di merito*, I, 530 (2000), with note by A. G. Cianci; *Diritto di famiglia e delle persone*, I, 706 (2000), with note by L. D'Avack, *Rassegna di diritto civile*, 199 (2009), with notes by E. Capobianco and M. G. Petrucci, *Corriere giuridico*, 483 (2000), with note by M. Sesta, *Giustizia civile*, 1157 (2000), with note by G. Giacobbe; *Nuova giurisprudenza civile commentata*, I, 310 (2000), with note by A. Argentesi, *Bioetica*, 498 (2000), with notes by V. Finaschi, G. Ferrando, M.G. Giammarinaro.

[67] F.D. Busnelli, 'Quali regole per la procreazione assistita?' n 57 above, 570; G. Ponzanelli, 'Il caso Baby M, la 'surrogate mother' e il diritto italiano' *Foro italiano*, IV, 101 (1988); M.T. Carbone, 'Maternità, paternità e procreazione artificiale' *Diritto di famiglia e delle persone*, 877 (1993); F. Mantovani, 'Procreazione medicalmente assistita e principio personalistico' *Legislazione penale*, 337 (2005); D. Clerici, 'Procreazione artificiale, pratica della surroga, contratto di maternità: problemi giuridici' *Diritto di famiglia e delle persone*, 105 (1987); A. Finocchiaro, 'Non basta prospettare l'evoluzione scientifica per ritenere lecito l'accordo tra le parti' *Guida al diritto,* 82 (2000); M. Moretti, 'La procreazione medicalmente assistita', in G. Bonilini and C. Cattaneo eds, III, *Filiazione e adozione* (Torino: Giappichelli, 2007), 251; F. Santosuosso, *La fecondazione artificiale umana* (Milano: Giuffrè, 1984), 33; A. Trabucchi, 'Procreazione artificiale e genetica umana nella prospettiva del giurista' *Rivista di diritto civile*, I, 503 (1986); T. Auletta, 'Fecondazione artificiale: problemi e prospettive' *Quadrimestre,* 39 (1986); A. Piraino Leto, 'I procedimenti di procreazione tra libertà e diritto' *Diritto famiglia e persona*, 1333 (1987); M. Gorgoni, 'Individuo o persona: problemi di qualificazione e tutela giuridica alle soglie della vita' *Famiglia e diritto*, 345 (1994); M. Sesta, 'Norme imperative, ordine pubblico e buon costume: sono leciti gli accordi di surrogazione?' *Nuova giurisprudenza civile commentata*, II, 206 (2000); M. Calogero, *La procreazione artificiale* (Milano: Giuffrè, 1989), 113; N. Lipari, 'La maternità e sua tutela dell'ordinamento giuridico italiano: bilancio e prospettive' *Rassegna di diritto civile,* 575 (1986).

[68] S. Rodotà, *Tecnologie e diritti* (Bologna: il Mulino, 1995), 194; P. Zatti, 'La surrogazione nella maternità' *Questione giustizia*, 838 (1999); M. Mori, *La fecondazione artificiale, questioni morali nell'esperienza giuridica* (Milano: Giuffrè, 1988), 153; G. Criscuoli, 'La legge inglese sulla "surrogazione materna" tra riserve e proposte' *Diritto di famiglia e delle persone*, 1034 (1987); F. Prosperi, 'La gestazione nell'interesse altrui tra diritto di procreare e indisponibilità dello status filiationis', in C.A. Graziani and I. Corti eds, *Verso nuove forme di maternità?* (Milano: Giuffrè, 2002), 148; I. Corti, *La maternità per sostituzione* (Milano: Giuffrè, 2000), 193; P. Vercellone, 'La fecondazione artificiale' *Politica del diritto*, 400 (1986); S. Moccia, 'Un infelice compromesso: il testo unificato delle proposte di legge in materia di procreazione medicalmente assistita' *Critica del diritto*, 250 (1998); A. Manna, 'Sperimentazione clinica' *Enciclopedia del diritto* (Milano: Giuffrè, 2000), Agg IV, 1132; C. Pasquariello, *I confini penalistici della bioetica* (Napoli: Edizioni Scientifiche Italiane, 1999), 142; A. Cavaliere, 'Nè integralismi religiosi, nè bio-mercificazione. Le biotecniche nello stato sociale di diritto' *Critica del diritto*, 336 (1999); M. Dogliotti, 'Inseminazione eterologa e azione di disconoscimento: una sentenza d dimenticare' *Famiglia e diritto*, 185 (1994); R. Lanzillo, 'Fecondazione artificiale, «locazione di utero», diritti dell'embrione' *Corriere giuridico*, 639 (1984); M. Costanza, 'Legislazione e fecondazione artificiale' *Diritto famiglia e persone,* 1987, 1024; G. Baldini, 'Volontà e procreazione: ricognizione delle principali questioni in tema di surrogazione di maternità' *Diritto di famiglia e delle persone*, 775 (1988); M. Dogliotti and G. Cassano, 'Maternità 'surrogata,' contratto, negozio giuridico, accordo di solidarietà?' *Famiglia e diritto*, 159 (200); M. Mantovani, 'Fondamenti della filiazione, interesse del minore e nuovi scenari della genitorialità' *Nuova giurisprudenza civile commentata*, II, 262 (2003).

VI. *b*) The Health of the Surrogate Mother

The Italian ban could be interpreted as an absolute prohibition that forbids any variant of surrogate maternity, including altruistic surrogacy, whether or not there is evidence that this technique impacts the surrogate mother's health, which is protected under Art 32 of the Italian Constitution.

In reality, however, surrogacy does not entail any physical risks other than those associated with heterologous artificial fertilization,[69] connected with artificial insemination and the subsequent embryo implantation, nor does it subject the surrogate mother to risks of this kind that are different from the ones run by any woman during pregnancy or childbirth.[70]

Even so, since, during pregnancy, a unique relationship is formed between the pregnant woman and the unborn child,[71] we could hypothesize that there is a risk of psychological damage caused by separation from the new-born baby.[72] Indeed, multiple studies have noted that, in some surrogate mothers, their level of psychological distress is particularly high, even years after the 'delivery' of the child to the intended parents.[73] These studies, however, have focused primarily on cases of commercial surrogacy,[74] and they have also shown that

[69] From a feminist perspective, surrogacy should be prohibited even when there is no empirical evidence that demonstrates that it harms the psychological health of the surrogate mother because surrogacy would trigger biological processes that the surrogate mother would not be able to control: C. Overall, *Ethics and Human Reproduction: A Feminist Analysis* (Winchester, MA: Allen and Unwin, 1987), 127; H. Lindemann Nelson and J. Lindemann Nelson, 'Cutting Motherhood in Two: Some Suspicions Concerning Surrogacy' 4 *Hypatia*, 88 (1989). However, motherhood cannot be reduced to a mere biological event and this is also demonstrated by the fact that in all Western legal systems women have the right to abortion.

[70] See: V. Söderström-Anttila et al, 'Surrogacy: outcomes for surrogate mothers, children and the resulting families (a systematic review)' 22 *Human Reproduction Update*, 2, 260-276 (2016).

[71] The physical link between the expecting mother and the unborn child passes through the placenta, which is 'an organ built of cells from both the woman carrying the pregnancy and the fetus, which serves as a conduit for the exchange of nutrients, gasses and wastes. Cells may additionally migrate through the placenta, and may have a broad range of impacts, from tissue repair and cancer prevention to sparking immune disorders' S. Allan, 'Commercial surrogate and child: ethical issues, regulatory approaches, and suggestions for change' Working paper 30 May 2014, 4. It is scientifically proven that the maternal endocrine system determines the physiological components of the fetal body, its future mental capacity, disease susceptibility, and neurological structure, as well as several complex anatomical functions: B. Oxman, 'Maternal-Fetal Relationship and Non-Genetic Surrogates' 33 *Jurimetrics*, 3, 389 (1993).

[72] R. Bitetti, 'Contratti di maternità surrogata, adozione in casi particolari ed interesse del minore' *Nuova giurisprudenza civile commentata*, I, 179 (1994).

[73] H. Baslington, 'The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process' 7 *Journal of Health Psychology*, 1, 57-71 (2002); E. Blyth, 'I Wanted to Be Interesting. I Wanted to Be Able to Say "I've Done Something with My Life": Interviews with Surrogate Mothers in Britain' 12 *Journal of Reproductive and Infant Psychology*, 189-198 (1994); H. Ragone, *Surrogate Motherhood: Conception in the Heart* (Boulder, CO: Westview Pres, 1994), 189-198; O. Van den Akker, *The Complete Guide to Infertility: Diagnosis, Treatment, Options* (UK: Free Association Books, 2002), passim.

[74] H. Baslington, n 73 above, 57; J. Jadva et al, 'Surrogacy: The Experience of Surrogate Mothers' 18 *Human Reproduction*, 10, 2196 (2003); C.G. Kleinpeter and M.A. Hohman, 'Surrogate

the surrogate mother is less impacted by her separation from the child if she can establish and maintain a strong emotional bond with the intended parents,[75] and in particular with the intended mother.[76] Furthermore, no empirical evidence has been found to show that traditional surrogacy (carried out with the genes of the surrogate mother) causes more psychological problems than gestational surrogacy (where the surrogate mother carries a genetically unrelated child);[77] research suggests that the type of surrogacy does not affect the woman's psychological health.[78] The altruistic nature of a surrogacy agreement, therefore, reduces the risks of potential injury for the psychological health of surrogate mothers, since in these cases it is very likely that the surrogate mother, the intended parents, and the child will continue to remain in close contact over time.[79]

VII. *c*) The Best Interest of the Child

Some authors, in order to support the current interpretation of the Italian ban on surrogacy as an absolute, constitutional prohibition which extends to altruistic surrogacy, have stressed the need to safeguard the rights of the unborn child. They argue that such protection is necessary to prevent it from being exploited by the infertile couple for the purpose of satisfying their

Motherhood: Personality Traits and Satisfaction with Service Providers' 87 *Psychological Reports*, 3 Pt 1, 957 (2000); O. Van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' 21 *Journal of Reproductive and Infant Psychology*, 2, 145 (2003); A. Braverman and S. Corson, 'Characteristics of Participants in a Gestational Carrier Program' 9 *Journal of Assisted Reproduction and Genetics*, 9, 353 (1992); H. Hanafin, 'Surrogate Parenting: Reassessing Human Bonding' Paper presented at the American Psychological Association Convention, New York, August 1987.

[75] A.M. Fischer, 'The Journey of Gestational Surrogacy: Religion, Spirituality and Assisted reproductive technologies' 18 *International Journal of Children's Spirituality*, 3, 235-246 (2013); M. Hohman and C. Hagan, 'Satisfaction with Surrogate Mothering: A Relational Model' 4 *Journal of Human Behaviour in the Social Environment*, 1, 61 (2001); J.C. Ciccarelli and L.J. Beckman, 'Navigating Rough Waters. An Overview of Psychological Aspects of Surrogacy' 61 *Journal of Social Issues*, 1, 21-43 (2005).

[76] J. Jadva et al, n 76 above, 2196; E. Teman, *Birthing a Mother: The Surrogate Body and the Pregnancy Self* (Barkeley: University of California Press, 2010), passim; O. Van den Akker, 'Psychosocial Aspects of Surrogate Motherhood' 13 *Human Reproductive Update*, 57 (2007).

[77] G. Bernstein, 'Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy' 10 *Indiana Health Law Review*, 291 (2013); P. Trowse, 'Surrogacy: Is It Harder To Relinquish Genees?' 18 *Journal of Law and Medicine*, 3, 614 (2011).

[78] J. Jadva et al, n 76 above, 2196; C. Ciccarelli, *The Surrogate Mothers: A Post Birth Follow-Up Study* (Los Angeles: California School of Professional Psychology, 1997), passim.

[79] E. Blyth, n 73 above, 189; H. Ragone, n 73 above, 180; O. Van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' n 76 above, 145. The psychological problems nevertheless involved only a small amount of birthchild woman: J. Jadva et al, n 76 above, 2196; C.G. Kleinpeter and M.A. Hohman, n 76 above, 957; A. Braverman and S. Corson, n 76 above, 353; H. Baslington, n 73 above, 64.

desire to become parents.[80]

It bears noting immediately that any arguments based on safeguarding the unborn child's rights come up against serious limits on a logical and axiological levels, because the protection of these rights would, paradoxically, lead to the non-existence or non-birth of the potential child.[81]

Another common argument is that altruistic surrogacy should be prohibited to prevent that the child, once born, can be regarded as an object to be transferred, as this would encroach upon its dignity as a human being.[82] This argument too, is not convincing, as

> 'the fact that this might occur within the context of surrogacy does not detract from that life having come into being and therefore being accorded dignity through its very existence as a human'.[83]

I would add that the risk of commodification of the child is eliminated by the altruistic nature of the agreement and the inclusion of the child in the intended parents' family may be the best solution for the baby, since it is certain that the surrogate mother never intended to fulfil motherly duties toward the child.

The removal of the child from the surrogate mother has also garnered attention as a significant source of severe psychophysical injury for the baby, since it is very important for birth mothers to maintain a relationship with the children during the period of growth, particularly immediately following birth.[84]

[80] C. Chini, 'Maternità surrogata: nodi critici tra logica del dono e preminente interesse del minore' 1 *Biolaw Journal*, 185 (2016); E. Giacobbe, 'Dell'insensata aspirazione umana al dominio volontaristico sul corso della vita' *Diritto di famiglia e delle persone*, II, 593 (2016); G. Ballarani, 'The Same-Sex Parented Family Option: The View from Italian Case Law' 6 *The Italian Law Journal*, 1, 12 (2020).

[81] See J.M. Camacho, n 63 above, 15; V.L. Raposo, 'Quando a cegonha chega por contrato' 88 *Boletim da Ordem dos Advogados*, 27 (2012).

[82] E.S. Anderson, 'Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales' 8 *Health Care Analysis*, 1, 19 (2000); P. Otero, 'A dimensão ética da maternidade de substituição' 1 *Direito e política*, 87 (2012); S. Niccolai, 'Maternità omosessuale e diritto delle persone omosessuali alla procreazione. Sono la stessa cosa? Una proposta di riflessione' 3 *Costituzionalismo.it*, 50 (2015); C. Tripodina, 'C'era una volta l'ordine pubblico. L'assottigliamento del concetto di "ordine pubblico internazionale" come varco per la realizzazione dell'"incoercibile diritto" di diventare genitori (ovvero, di microscopi e di telescopi)', in S. Niccolai and E. Olivito eds, *Maternità Filiazione Genitorialità* (Napoli: Edizioni Scientifiche Italiane, 2017), 136; M. Aramini, *Introduzione alla bioetica* (Milano: Giuffrè, 2015), 266; E. Montero, 'La maternidad de alquiler frente a la summa divisio iuris entre las personas y las cosas' 1 *Persona y derecho*, 230 (2015); D. Rosani, 'The Best Interests of the Parents. La maternità surrogata in Europa tra Interessi del bambino, Corti supreme e silenzio dei legislatori' 1 *Biolaw Journal*, 127 (2017).

[83] K. Galloway, 'Theoretical Approaches to Human Dignity, Human Rights and Surrogacy', in P. Gerber and K. O'Byrne eds, *Surrogacy, Law and Human Rights* (Abingdon: Routledge, 2015), 25; J. Reis Novais, *A dignidade da pessoa humana* (Coimbra: Almedina, 2015), 120.

[84] M. Johansson Agnafors, 'The Harm Argument Against Surrogacy Revisited: Two Versions not to Forget' 17 *Medicine, Health Care and Philosophy*, 357 (2014); M. Tieu, 'Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers' 35 *Journal of Medical Ethics*, 172 (2009).

However, this observation is not decisive with respect to altruistic surrogacy, because the relationship that usually links the surrogate mother with the intended parents is generally sufficient to ensure affective continuity between the baby and the surrogate mother. Consequently, we may exclude potential injuries for the psychological health of the child resulting from separation from the birth mother.[85]

Moreover, these relationships could already be protected under the current rules of Italian family law. The rules that apply in the case of an unjustified interruption of relationships in conflict with the interest of the child, referred to in Arts 337-*ter* and 333 of the Italian Civil Code could also extend to the relationship between surrogate mother and child (the first or second provision would apply, depending on whether the surrogate mother is related to the intended couple or not).[86]

VIII. *d)* The Relevance of the Genetic Link Between the Intended Parents and the Child

Without a genetic connection between the intended parents and the unborn child, it might be argued that the infertile couple has no constitutional right to have access to surrogacy. Additionally, to allow surrogacy even when there is no genetic link between the intended parents and the unborn child could lead to the potential breach of criminal rules contained in Italian adoption legislation Legge no 40/2004.[87]

[85] V. Jadva et al, 'Surrogacy Families 10 Years on: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins' 27 *Human Reproduction*, 3008-3014 (2012); S. Imrie and V. Jadva, 'The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements' 29 *Reproductive Biomedicine Online*, 430 (2014); V. Söderström et al, n 70 above, 273; S. Golombok et al, 'Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' 54 *Journal of Child Psychology and Psychiatry*, 6, 653 (2013); S. Golombok et al, 'Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2' 47 *Journal of Child Psychology and Psychiatry*, 2, 220 (2006); K.H. Sheltona et al, 'Examining Differences in Psychological Adjustment Problems among Children Conceived by Assisted Reproductive Technologies' 33 *International Journal of Behavioural Development*, 385-392 (2009); S. Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14' 53 *Developmental Psychology*, 1966 (2017).

[86] See Tribunale di Milano, 1 August 2012, *Nuova giurisprudenza civile commentata*, I, 712 (2013), with note by F. Turlon; M. Gattuso, 'Gestazione per altri: modelli teorici e protezione dei nati in forza dell'articolo 8, legge 40,' available at giudicedonna.it, 1-54 (2014), 14; opposite to G. Biscontini, 'Intervento', in I. Corti and C.A. Graziani eds, *Verso nuove forme di maternità?* (Milano, Giuffrè, 2002), 61. In the US legal context see P. Laufer-Ukeles, 'Mothering For Money: Regulating Commercial Intimacy, Surrogacy, Adoption' 88 *Indiana Law Journal*, 4, 1254 (2013); R.F. Storrow, '*Surrogacy: American Style*', in P. Gerber and K. O'Byrne eds, *Surrogacy, Law and Human Rights* n 83 above, 215.

[87] Corte di Cassazione-sezione penale VI, 20 December 2018, no 2173 n 14 above.

However, requiring that the child's genetic material should come 100 % from the intended parents may be inconsistent with the current ability to use double heterologous methods and run counter to foreign systems that allow altruistic surrogacy, for which it is sufficient that 50% of the genetic material come from intended parents.[88]

This perspective is also confirmed by the *Mennesson*, *Labassee* and *Paradiso-Campanelli* cases of the European Court of Human Rights: even where there was only a genetic link on the paternal side, as in the *Mennesson* e *Labassee* cases, the European Court has recognized the existence of a family life union between the child and the intended parents and has, therefore, required states to legally recognise these types of family ties.[89] On the contrary, in the absence of a genetic link with either of the intended parents, as in the case of *Paradiso and Campanelli*, the ECtHR has considered it necessary to verify the child's best interest in maintaining the family relationship established with commissioning parents on the basis of the characteristics of that relationship (above all its duration).[90]

IX. *e)* The 'Costs' of Altruistic Surrogacy for Society

The prevailing interpretation of the Italian ban of surrogacy as an absolute prohibition which also includes altruistic surrogacy could be justified, on the one hand, because of the potential financial costs for the community of allowing couples to have access to surrogacy, and, on the other hand because of the high risk that apparently altruistic agreements could hide a reality of economic motives, with the consequent risk of exploitation of women (under the

[88] For instance, the Portuguese law (Law 22 August 2016, no 25, subsequently declared largely unconstitutional by the Tribunal Constitucional de Portugal 24 April 2018, no 225, available at www.tribunalconstitucional.pt and waiting to be reformed by Parliament) requires that half of the genetic patrimony of the baby comes from the social parents; in the United Kingdom, to obtain the parental order – which concretely determines the *status* of the child – the Courts require that one of the two parents be genetically related to the baby.

[89] Eur. Court H.R., *Mennesson* v *France*, Judgment of 26 June 2014, *Foro italiano*, IV, 561 (2014), with note by G. Casaburi; Eur. Court H.R., *Labassee* v *France*, Judgment of 26 June 2014, available at *echr.coe.int*; Eur. Court H.R., *Foulon* v *France*, Judgment of 21 July 2016, and *Bouvet* v *France*, both available at echr.coe.int; Eur. Court H.R., *D and Others* v *Belgium*, Judgment of 8 July 2014, available at echr.coe.int. Recently, Eur. Court H.R., Advisory Opinion of 10 April 2019 n 11 above, concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation (Request no P16-2018-001) – Arrêt 5 October 2018, no 638 (10-19.053), available at tinyurl.com/mb8z8tfj (last visited 27 December 2020).

[90] Eur. Court H.R., *Paradiso e Campanelli* v *Italia*, Judgment of 25 January 2015, *Foro italiano, IV,* 117 (2015). Subsequently, Eur. Court H.R. (GC), *Paradiso e Campanelli* v *Italia*, Judgment of 21 January 2017 *Nuova giurisprudenza civile commentata*, I, 495 (2017), with note by L. Lenti, overturned the previous decision; see E. Lucchini Guastalla, 'Maternità surrogata e best interest of the child' *Nuova giurisprudenza civile commentata*, 1729 (2017); G. Perlingieri and G. Zarra, 'Ordine pubblico interno e internazionale' n 9 above, 105.

precautionary principle).

This consideration is necessary because, in the legal systems of Continental Europe, the purpose of the welfare state is to ensure the implementation of the principle of legal equality, unlike in the American model, in which the downside of the right to be left alone is the substantial absence of public support for the development of the individual personality.[91]

It follows that, in the US system, people wishing to have abortions,[92] have sex reassignment procedures, or have access to assisted reproduction do so at their own expenses and not at public expense, whereas in the European legal systems, political society takes on the same choices as their own.[93] Under the European perspective, in fact, a couple's inability to procreate through natural methods and, therefore, to realize their parental project autonomously, assumes not only individual, but also social importance, in light of the substantive equality principle.[94]

However, the need to consolidate public finances cannot prevail over social needs, since in a democratic and social constitutional system (such as that of Italy and all the Countries of Continental Europe) financial equilibrium represents a recessive value with respect to the satisfaction of the social rights of persons.[95]

The prohibition of altruistic surrogacy could also be justified to impede the

[91] M. Paradiso, 'Au bon marché des droits. tra globalizzazione dei diritti e delocalizzazione della procreazione' *Rivista di diritto civile*, 988 (2018); M. Mazziotti, 'Diritti sociali' *Enciclopedia del diritto* (Milano: Giuffrè, 1964), XII, 804.

[92] An emblematic case regarding this is *Maher* v *Roe*, 432 U.S. 464 (1977), in which the Supreme Court held that the right to abortion does not give rise to a state obligation to bear the cost of abortions: see S. Holmes and C.R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton & Company, 1999), 35.

[93] However, it should be noted, first, that in the US system many families with overall low incomes receive tax rebates and subsidies to reduce insurance costs and, second, that the number of persons with private insurance coverage is very large, provided to them in many cases by employers, or by federal governments, through the Medicaid health insurance program. Nonetheless, although the number of people receiving insurance coverage has been expanded as a result of Obamacare, many people still remain without insurance coverage. But, in any case, we cannot fail to notice the difference between a system, such as the European system, and Italian in particular, which places the costs of health procedures, including those described above, at the expense of the whole community, regardless of the income of those in need, and a system, such as the American one, which for large sections of the population, certainly for the higher income groups, leaves the costs to be borne by those who access to the procedures.

[94] G. Ripert, *Le regime démocratique et le droit civil moderne* (Paris: Librairie Générale de Droit et de Jurisprudence, 1936), passim; A. D'Aloia, 'Storie "costituzionali" dei diritti sociali', in V. Baldini et al, *Scritti in onore di Michele Scudero* (Napoli: Jovene, 2008), II, 743; F.D. Busnelli and E. Palmerini, 'Bioetica e diritto privato' *Enciclopedia del diritto* (Milano: Giuffrè, 2001), Agg V, 142.

[95] D. Bifulco, *L'inviolabilità dei diritti sociali* (Napoli: Jovene, 2003), 212; M. Benvenuti, 'Diritti sociali' *Digesto discipline pubblicistiche* (Torino: UTET, 2012), Agg V, 267; M. Luciani, 'Sui diritti sociali' *Scritti in onore di Manlio Mazziotti di Celso* (Padova: CEDAM, 1995), II, (126). See also: Consiglio di Stato 20 July 2016 no 3297, available at www.giustizia-amministrativa.it; Tribunale Amministrativo Regionale Lombardia Milano 28 October 2015 no 2271, available at www.giustizia-amministrativa.it; Tribunale Vercelli 15 October 2018 *Giurisprudenza italiana*, 2390 (2019), with note by E. Falletti.

commission of potential abuses,[96] which would be difficult to detect,[97] as shown by the experience of countries that allow altruistic surrogacy.[98] In addition, there are some circumstance where, unlike in heterologous fertilization in which the donor remains anonymous and has no contact with the couple, the relations between the intended parents and the woman in surrogacy cannot be prevented, increasing the risk of economic contamination.[99] These complicating factors could lead to a *tout court* rejection of surrogacy as a precautionary measure.[100]

However, despite these critical aspects, the current prevailing interpretation of Art 12, para 6 of Legge no 40/2004, as an absolute prohibition that bans any form of surrogacy including altruistic surrogacy, is not justified, chiefly because it violates the rights of the infertile couple. It will be up to the legal system to find ways of avoiding the perpetration of possible abuses, through an extensive system of checks and balances, aimed primarily at preventing the risk that

[96] B. Sgorbati, 'Maternità surrogata, dignità della donna e interesse del minore' 2 *Biolaw Journal*, 120 (2016).

[97] According to one strain of feminist thought, any attempt to regulate the practice 'would not be enough to address the inherent wrongs in surrogacy,' because 'where there are laws governing surrogacy, loopholes, abuse, and enforcement problems remain:' A. Allen, 'Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human' 41 *Harvard Journal of Law and Public Policy,* 808 (2018); R. Klein, *Surrogacy: A Human Rights Violation* (Chicago: University of Chicago Press, 2017), 69; J. Lahl, 'Gestational Surrogacy Concerns: The American Landscape', in E. Scott Sills ed, *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (Cambridge: Cambridge University Press, 2016), 287 ; V. Calderai, 'The conquest of ubiquity, or: why we should not regulate commercial surrogacy (and need not regulate altruistic surrogacy either)' *Familia*, 404 (2018). Although we cannot ignore the influences that may bear on surrogate mothers, this view cannot be ensorsed, since it leads to the total denial of the rights of the sterile couple. Instead, we need to identify the risks and the problems in practice and try to draw up rules to resolve them.

[98] In United Kingdom, the Courts often validate cash payments which exceed the reimbursement of costs and which take the form of a real payment. It is not by chance that there are proposals from many authors to overcome the ban of commercial surrogacy, which is regarded as a ban in fact overcame and which forces many couples to go abroad to have access to surrogacy: E. Jackson, 'UK Law and International Commercial Surrogacy: 'The Very Antithesis of Sensible' 4 *Journal of Medical Law and Ethics*, 197 (2016). Also in the Canadian context many authors have proposed to overcome commercial surrogacy ban which is often bypassed by the parents going abroad: K. Busby, 'Is It Time To Legalize Commercial Surrogacy in Canada?' *Law and Policy, Medical Tourism, Reproduction*, 3 February 2015, 1; M. Deckha, 'Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding' 61 *McGill Law Journal*, 31 (2015). In Greece, despite the ban of commercial surrogacy, many of the surrogacies realized are, in fact, commercial. It is therefore hoped that this formalistic and hypocritical ban will be overcome in favour of full legalisation of surrogacy: A.N. Hatzis, 'From Soft to Hard Paternalism and Back: The Regulation' *Portuguese Economic Journal*, 21 July 2009, 9.

[99] In the event of a conflict between the surrogate mother and the intended parents, in the American doctrine some authors believe that the position of the surrogate woman should be protected, even to the detriment of the rights of intended parents: C. Spivack, n 45 above, 109; other authors believe that in the case of gestational surrogacy the rights of genetic parents should rather be protected: K. Bradley, 'Assisted Reproductive Technology after Roe v. Wade: Does Surrogacy Create Insurmountable Constitutional Conflicts?' 16 *University of Illinois Law Review*, 1902 (2016).

[100] U. Salanitro, 'Norme in materia di procreazione medicalmente assistita' n 7 above, 1780.

illegal payments are hidden behind the reimbursement of expenses.[101]

X. *f)* Limits of Public Policy

Particularly in light of some important recent case law,[102] it is worthwhile to focus on the possible contradiction between altruistic surrogacy and public policy, because the effects of surrogate motherhood could not be protected at the level of the establishment of the parent-child relationship if they were in conflict with it.

The Joint Divisions of the Supreme Court of Cassation, in its aforementioned decision no 12193/2019, pointed out that the notion of public policy is that combination of fundamental principles and values which characterise the ethical and legal attitude of our legal system at a given moment, and can be derived, both from the Constitutional Charter and from supranational sources, as well as from those ordinary rules considered to be expressions of the values enshrined in the Charter and, consequently, as instruments of implementation of the same constitutional principles. The Supreme Court thus resolved a conflict concerning the actual boundaries of the notion of international public policy, adhering to the second of the two guidelines which emerged previously in case law. The debate, which was also intense among scholars,[103] concerned whether the concept of public policy should cover only the principles established by the rules of the Constitution, European law and international conventions,[104] or even those in ordinary rules

[101] For example the English model, where the authorization of a third authority (Human fertilisation and embryology Authority) and the subsequent oversight of the court are necessary establish the future status of the child: E. Jackson, n 98 above, 197; or the Greek model, where the intervention of the Greek National Authority of Assisted Reproduction is required: A.N. Hatzis, n 98 above, 9; or the Portuguese model, where the surrogacy agreement parties must obtain the authorization of the National Council for Medically assisted procreation (CNPMA): R. Vale e Reis, 'Procriação medicamente assistida: a gravitas da jurisprudência' *Gestão Hospitalar,* 50 (2019).

[102] Corte di Cassazione-Sezioni unite 8 May 2019, no 12193 n 14 above, 737; Corte di Cassazione 30 September 2016 no 19599, *Corriere giuridico*, 181 (2017), with note by G. Ferrando; Corte di Cassazione-Sezioni unite 5 July 2017 no 16661, *Corriere giuridico*, 1042 (2017), with note by C. Consolo; also in *Nuova giurisprudenza civile commentata,* 1292 (2017) with note by M. Grondona; Cassazione 22 February 2018 no 4382, *Famiglia e diritto*, 837 (2018), with note by M. Dogliotti; Corte d'Appello di Trento 23 February 2017, *Nuova giurisprudenza civile commentata*, 994 (2017), with note by V. Calderai.

[103] See, among others, V. Barba, 'L'ordine pubblico internazionale' *Rassegna di diritto civile*, 403 (2018); C. Irti, 'Digressioni attorno al mutevole "concetto" di ordine pubblico' *Nuova giurisprudenza civile commentata*, II, 481 (2016); G. Perlingieri and G. Zarra, 'Ordine pubblico interno e internazionale' n 9 above, 64; A. Mendola, 'Interesse del minore tra ordine pubblico e divieto di maternità surrogata', *Vita notarile*, 673 (2015); F. Quarta, 'Illecito civile, danni punitivi e ordine pubblico' *Responsabilità civile e previdenza*, 1159 (2016).

[104] Corte di Cassazione 30 September 2016 no 19599 n 102 above, 181; Corte di Appello di Trento 23 February 2017 n 102 above, 994; Corte di Appello di Torino 29 October 2014, *Famiglia e diritto*, 822 (2015), with note by M. Farina.

that are exercises of legislative discretion.[105]

The prohibition of commercial surrogacy certainly has public policy value, as suggested by the existence of criminal sanction provisions, usually put in place to safeguard fundamental legal interests, such as the human dignity of the woman and the adoption system.[106] However, the points discussed above support the conclusion that a different assessment is required for altruistic surrogacy: on the one hand, because the absence of profit and the spontaneity of the gesture prevent the commodification of the woman's body, leaving her dignity intact and, on the other, because if there is a genetic link among the intended couple and the child, the conflict between surrogacy and adoption law must be ruled out, due to the fact that surrogacy of this kind falls completely outside the scope of the regulations governing the adoption of children, Legge 4 May 183 no 1984.

The recent decision no 2193/2019 of the Joint Divisions of the Supreme Court of Cassation[107] appears to oppose this conclusion, however. There, in relation to a case of altruistic surrogacy, the Court held that international public order was an obstacle to recognizing a parental relationship between the child and the intended parents. The Joint Divisions adopted the view that surrogacy is clearly opposed to the values of our legal system, a view already expressed by the Supreme Court itself and by the Constitutional Court, but previously in reference to cases of commercial surrogacy, in which, moreover, neither parent had genetic links to the child.[108] It is important to stress this point because the Joint Divisions of the Supreme Court of Cassation based their decision on the reasoning previously used in case law to criminalize cases of commercial surrogacy, without making any distinction between commercial surrogacy and altruistic surrogacy.

This is the least convincing aspect of the decision, which, not by chance, was taken up again by the latest order no 8325/2020 of the First Civil section of the Court of Cassation. The order referred to the Constitutional Court the question of whether the prohibition on recognizing a foreign judgement establishing a parent-child relationship between the surrogate-baby and the intended parents – in accordance with decision no 12193/2019 of the Joint Divisions of the Supreme Court of Cassation – violates the Italian Constitution, including in light of the principles of law established by the European Court of Human Rights.[109]

In this recent order, in fact, the Judges gave weight to the fact that the pregnancy in question took place in a country that permits only altruistic surrogacy

[105] Corte di Cassazione-Sezioni unite 5 July 2017 no 16661 n 102 above, 1042.

[106] Corte di Cassazione, 11 November 2014 no 24001 n 47 above, 239.

[107] Corte di Cassazione-Sezioni unite 8 May 2019 no 12193 n 14 above, 737.

[108] Corte di Cassazione 11 November 2014 no 24001 n 47 above, 239; Corte costituzionale 18 December 2017, no 272 n 18 above, 10.

[109] Corte di Cassazione 29 April 2020 no 8325 n 16 above, 902.

(Canada). According to the Court, this case, in which the surrogate-mother was inspired by selfless interests, must be distinguished from cases in which surrogacy is carried out with commercial aims. Different cases deserve a different assessment in axiological and normative terms,[110] the Joint Divisions of the Supreme Court of Cassation have so far treated them in the same way.

XI. Protection of Fundamental Rights and the Legal Relationship Between the Intended Parents and the Child: The Way Forward

The above analysis shows very clearly that there are valid reasons to conclude that the current interpretation of the ban on surrogate maternity is not convincing and that a different, narrow interpretation of the ban should be accepted.

From this point of view, recognizing a right to access altruistic surrogacy requires a coherent and harmonious interpretation of the rules establishing and protecting the legal status of the child. In this respect, it should be possible to establish the parent-child relationship not only with the father with whom there is a genetic link, but also with the intended mother.[111]

The issues that need to be resolved are extremely complex, and here I can only indicate some methods, drawn from my ongoing research and forthcoming, more extensive critical analysis of the subject.[112]

A distinction must be drawn, however, between the situations where the surrogate mother exercises her right to be named on the birth certificate, and the situation in which she intends to waive the filial relationship with the child, bringing the pregnancy to term anonymously.[113]

In the latter case, in the absence of any conflicts between the surrogate mother and the intended parents, there is no reason to prohibit the establishment of a filial relationship between the intended parents and the child.[114] Here there would be no need to resort to adoption, since this establishment would be based on the genetic link between the intended parents and the child or, in its

[110] L. Rossi Carleo, 'Maternità surrogata e status del nato' *Familia*, 391 (2002); M. Dogliotti, n 68 above, 159; opposite to, F.D. Busnelli, 'Nascere per contratto?' *Rivista di diritto civile*, 49 (2004).

[111] Once established, the legal relationship must be protected, in the child's interest, from any second thoughts by the surrogate mother.

[112] See A.G. Grasso, 'La costituzione del rapporto con la madre intenzionale nella surrogazione solidale', in U. Salanitro ed, *Quale diritto di famiglia per la società del XXI secolo?* (Pisa: Pacini, 2020), 345.

[113] In Italy it is possible for the mother-to-be to bring the pregnancy to term anonymously, unlike in other States (like Portugal, Belgium, Netherlands, Spain etc): Art 30, para 1, grants this possibility to the birth mother.

[114] T. Auletta, 'Fecondazione artificiale' n 67 above, 57; C.M. Bianca, *'Diritto civile,'* II, *La famiglia* (Milano: Giuffrè, 2017) 446; more recently, I.A. Caggiano, *Tipologie di procreazione, stadi di filiazione e conseguenza patrimoniali* (Pisa: Pacini, 2017) 72; A. Vesto, *La maternità tra regole, divieti e plurigenitorialità* (Torino: Giappichelli, 2018), 123.

absence, on the informed consent expressed by parents in advance of the treatment process (Arts 8 and 9, Legge no 40/2004), taking into account the best interests of the child and its right to have two parents.

Where, instead, the surrogate mother decides to make use of her right to be named on the birth certificate and decides to revoke her original consent to altruistic surrogacy, the conflict will likely be resolved in her favor, due to the absence of a specific domestic legislative framework.

Essays

Measuring (the Effects of) Measurements: Four Global Legal Indicators in Italy

Marta Infantino*

Abstract

Taking Italy as a case study, the paper aims to investigate the effects that global legal indicators – that is, quantitative collections of data purporting to compare and rank states' performances with regard to an array of legal issues – might have on domestic legal systems. To this purpose, the paper examines the changes brought to the Italian legal framework by four selected indicators: the 'Freedom in the World' Reports published by Freedom House, the 'Corruption Perceptions Index' annually released by Transparency International, the US Department of State's 'Trafficking in Persons' Reports and the World Bank's 'Doing Business' Reports. As the analysis will show, these indicators have variedly penetrated the Italian legal domain and have concurred with other hard and soft law instruments in promoting reform agendas, sets of arguments and beliefs, as well quantitative approaches to legal phenomena. While more can be done to understand the outcomes of global legal indicators, the study provides an empirical basis for the claim that global indicators have legal strings attached and fully deserve lawyers' attention.

I. Introduction

Global legal indicators may be described as collections of data often in numerical form, purporting to represent, compare, and rank the performance of states with regard to an array of legal issues.[1] These indicators are all around us, providing quantitative measurements in areas as diverse as rule of law, democracy, corruption, anti-trafficking, business-friendliness, human rights and development.

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[1] There is no unanimity on the definition of 'global legal indicators'. For some attempts of defining them, see M. Infantino, *Numera et impera. Gli indicatori giuridici globali e il diritto comparato* (Milano: Franco Angeli, 2019), 81-99; D. Restrepo Amariles and J. McLachlan, 'Legal Indicators in Transnational Law Practice: A Methodological Assessment' 58 *Jurimetrics Journal*, 163-167 (2018); D. Restrepo Amariles, 'Supping with the Devil? Indicators and the rise of managerial rationality in law' 3 *International Journal of Law in Context*, 465- 466 (2017); K.E. Davis, 'Legal Indicators. The Power of Quantitative Measures of Law' 10 *Annual Review of Law & Social Sciences*, 38-39 (2014); T. Krever, 'Quantifying law. Legal indicator projects and the reproduction of neoliberal common sense' 34 *Third World Quarterly*, 131-132 (2013); K.E. Davis, B. Kingsbury, S.E. Merry, 'Introduction: Global Governance by Indicators', in K.E. Davis, A. Fisher, B. Kingsbury and S.E. Merry eds, *Governance by Indicators. Global Power through Quantification and Rankings* (New York: OUP, 2012), 3-6.

The drive for quantification has largely passed unobserved in legal scholarship. Among the many issues that legal scholars have not yet explored, the impact of global legal indicators on domestic systems is one of them. As lawyers, we know that global legal indicators exist; we seldom quote or criticize them; we suspect they play a role in defining agendas for reform and shaping technical and lay opinion on political and legal matters. Yet, we have little empirical evidence supporting such suspicion. Although some studies have been carried out in this regard, very few have focused on the legal consequences of indicators, which are mostly limited to one indicator in one country only.

Against such a context, this paper stands out as an attempt to map the imprints that global legal indicators might leave on domestic legal frameworks. As a case study, the paper will examine the impact of four selected indicators (the 'Freedom in the World' Reports, the 'Corruption Perceptions Index', the 'Trafficking in Persons' Reports and the 'Doing Business' Reports) on the Italian legal system. The paper, therefore, aims to fill a gap in the literature, and to provide an empirical basis for the claim that indicators have legal strings attached.

In order to pursue such aims, the paper first provides a summary of the research on global legal indicators carried out thus far (section II) and of the reasons explaining the lack of empirical analysis of their legal effects (section III). This will set the ground for the paper's core analysis: after outlining the history, context and contents of the four indicators selected for the study in section IV, section V will delve into their concrete effect on the Italian legal system. The survey will allow us to sketch out some preliminary conclusions and hopefully to pave the way for further studies to come (section VI).

II. The State of the Art

Fuelled by a general paradigm shift towards quantification throughout the Twentieth century in management practices, by the globalization of American business-oriented and ranking-prone culture, and by technological advancements in the standardization, collection, and treatment of mass data,[2] global legal indicators made their appearance in the Seventies.

At the beginning of that decade, legal scholars involved in the Stanford-based Studies in Law and Development (SLADE) project collected a massive amount of empirical data on a small sample of countries in order to investigate the

[2] On such a paradigm shift, in general, see C. Shore and S. Wright, Audit Culture and the New World Order: Indicators, Rankings and Governing by Numbers (London: Pluto Press, forthcoming 2020); M. Strathern ed, Audit Cultures: Anthropological Studies in Accountability, Ethics, and the Academy (London: Psychology Press, 2000); A. Desrosières, La politique des grands nombres. Histoire de la raison statistique (Paris: La Découverte, 2nd ed, 2000), 26-59; M. Poovey, A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society (Chicago: University of Chicago Press, 1998); M. Power, The Audit Society: Rituals of Verification (Oxford: OUP, 1997).

relationship between law and development.[3] The project was swiftly discontinued; the information gathered was too much and too hard to manage. The lack of immediate results rapidly cooled down the enthusiasm of those involved and of the American development agencies that were funding the program.[4] The failure of an experiment of such a scale, marked the exit of legal scholars from the market of indicators. Yet, as legal scholars went out, new actors came in.

In parallel with the demise of the SLADE project, individuals and non-governmental organizations (NGOs) with an interest in global affairs began to build their own global legal indicators. The success of such experiments encouraged many international organizations and national agencies, especially since the Nineties onwards, to follow suit. For instance, of the four indicators selected for the present study, the first edition of the 'Freedom in the World' (FiW) report, assessing the condition of political rights and civil liberties around the world, was published by the New York-based NGO Freedom House (FH) in 1973.[5] In 1995, the Berlin-based NGO Transparency International (TI) launched its 'Corruption Perceptions Index' (CPI), measuring the perceived levels of corruption in countries.[6] In 2001, the US Department of State started its series of 'Trafficking in Persons' (TiP) Reports, tracking the efforts of States and the results in the fight against human trafficking.[7] In 2003, relying upon the 'legal origins' theory developed by a group of economists at the World Bank (the so-called LLSV group),[8] a team of the World Bank's Response Unit launched the 'Doing Business' (DB) reports to compare the climate for investment and business-friendliness in countries.[9]

The multiplication of quantitative legal measurements has given rise to substantial secondary literature. Secondary literature includes the thousands of works authored by statisticians, political scientists and economists, proposing refinements to this or that indicator or reworking the data they provide.[10] But secondary literature also includes a niche of critical scholarship, mostly led by

[3] J.H. Merryman, 'Law and Development Memoirs II: SLADE' 48 *American Journal of Comparative Law,* 713-727 (2000).

[4] D.M. Trubek, '*Law and Development: 40 Years after Scholars in Self- Estrangement* – A Preliminary Review' 66 University of Toronto Law Journal, 301-329 (2016).

[5] See https://tinyurl.com/yc5vrfph (last visited 27 December 2020).

[6] See https://tinyurl.com/ybswyxl7 (last visited 27 December 2020).

[7] See https://tinyurl.com/y7mdxgqg (last visited 27 December 2020).

[8] The acronym LLSV derives from the initials of the proponents of the theory: La Porta, Lopez, Shleifer, Vishny. The 'legal origins' theory purported to examine how a country's legal origin is a determinant of that country's economic performance: for the first studies in this direction, see R. La Porta et al, 'Legal Determinants of External Finance' 52 *Journal of Finance,* 1131-1150 (1997); R. La Porta, F.C. Lopez de Silanes, A. Shleifer, R.W. Vishny, 'Law and Finance' 106 *Journal of Political Economy,* 1113-1155 (1998).

[9] See https://tinyurl.com/y8ekubgy (last visited 27 December 2020).

[10] For a brief review of such literature, see J. Snyder and A. Cooley, 'Rating the ratings craze: From consumer choice to public policy outcomes', in A. Cooley and J. Snyder eds, *Ranking the World. Grading States as a Tool of Global Governance* (New York: CUP, 2015), 179-180.

political scientists, international relations experts and anthropologists.[11] Critical scholarship has highlighted that indicators silently work as technology for knowledge and governance, shaping people's and organizations' expectations, agendas, priorities and patterns of behaviour, and modifying the manner in which problems are framed, approached and answered. A few legal scholars – especially from the fields of law and development,[12] global administrative law[13] and comparative law[14] – have contributed to this critical strand of research,

[11] As to political science, see for instance D.V. Malito, G. Umbach and N. Bhuta eds, *The Palgrave Handbook of Indicators in Global Governance* (London: Palgrave, 2018); A. Broome and J. Quirk, 'The Politics of Numbers: The Normative Agenda of Global Benchmarking' 41 *Review of International Studies*, 5, 813-838 (2015) ; A. Cooley and J. Snyder, n 10 above; as to international relations, see J. Kelley, *Scorecard Diplomacy. Grading States to Influence their Reputation and Behavior* (New York: CUP, 2017); as to anthropology, see S.E. Merry, *The Seductions of Quantification. Measuring Human Rights, Gender Violence, and Sex Trafficking* (Chicago: University of Chicago Press, 2015).

[12] See for instance M.A. Prada Uribe, 'The Quest for Measuring Development. The Role of the Indicator Bank', in S.E Merry, K.E. Davis and B. Kingsbury eds, *The Quiet Power of Indicators. Measuring Governance, Corruption, and Rule of Law* (New York: CUP, 2015), 133-155; K. Pistor, 'Re-Construction of Private Indicators for Public Purposes', in K.E. Davis, A. Fisher, B. Kingsbury and S.E. Merry eds, n 1 above, 165-179.

[13] G. Gilleri, 'How Do You Perform Human Rights? Measurement, Audit and Power Through Global Indicators', in F. Fiorentini and M. Infantino eds, *Mentoring Comparative Lawyers: Methods, Times, and Places. Liber Discipulorum Mauro Bussani* (Cham: Springer, 2020), 175-196; R. Urueña, 'Indicators as Political Spaces. Law, International Organizations, and the Quantitative Challenge in Global Governance' 12 *International Organization Law Review,* 1-18 (2015); M. Riegner, 'Towards an International Institutional Law of Information' 12 *International Organization Law Review,* 50-80 (2015); S. Cassese and L. Casini, 'Public Regulation of Global Indicators', in K.E. Davis, A. Fisher, B. Kingsbury and S.E. Merry eds, n 1 above, 465-474.

[14] Unlike their colleagues, comparativists have mainly focused on the 'legal origins' theory underlying the DB reports, perhaps because the theory had a clear academic format and was more evidently connected to their field of studies. Comparativists' scholarship on indicators has thus disproportionately been devoted to demonstrate how simplistic, biased and untenable are the 'legal origins' theory's methodology, assumptions and conclusions: cf the contributions to special issues on the legal origins theory in 57(4) *American Journal of Comparative Law,* 765-876 (2009); 59(2) *University of Toronto Law Journal,* 179-235 (2009); 6 *Brigham Young University Law Review* 1413-1906 (2009); 166 *Journal of Institutional and Theoretical Economics,* 1-202 (2010); 11 *Annuario di diritto comparato,* 7-353 (2012). See also M. Bussani, 'Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law' 67 *American Journal of Comparative Law,* 701, 718-720 (2019); U. Kischel, *Comparative Law* (Cambridge: CUP, 2019), 134-143; R. Scarciglia, *Metodi e comparazione giuridica* (Padova: CEDAM, 2nd ed, 2018), 113-114; N. Garoupa, C. Gómez Ligüerre and L. Mélon, *Legal Origins and the Efficiency Dilemma* (New York: Routledge, 2016); R. Michaels, '"One size can fit all" – some heretical thoughts on the mass production of legal transplants', in G. Frankenberg ed, *Order from Transfer. Comparative Constitutional Design and Legal Culture* (Cheltenham: EE, 2013), 56-78; M. Bussani and U. Mattei, 'Diapositives versus movies – the inner dynamics of the law and its comparative account', in M. Bussani and U. Mattei eds, *Cambridge Companion to Comparative Law* (Cambridge: CUP, 2012), 3-12; N. Garoupa and C. Gomez Ligüerre, 'The Syndrome of the Efficiency of the Common Law' 29 *Boston University International Law Journal,* 287-335 (2011); H. Spamann, 'The 'Antidirector Rights Index' Revisited' 23 *Review of Financial Studies,* 467-486 (2010); M.M Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law' 52 *McGill Law Journal,* 55-81 (2007); Association Henri Capitant des amis de la culture juridique francaise, *Les droits de tradition civiliste en question. A propos des rapports Doing Business* (2 volumes, Paris: Société de

challenging respectively the assumptions and ideology underpinning such initiatives, their lack of legitimacy and accountability, and the methodological fallacies of their measurements. While the legal status of indicators remains debatable,[15] there is widespread consensus, in the critical perspective, that indicators conflate description with prescription, purporting on the one hand to depict countries' state-of-the-art, but, on the other hand, implicitly choosing one model as the most appropriate and campaigning for worldwide harmonization in that direction. In the legal sector, global indicators' purported description of the legal architecture of countries becomes functional to a neo-colonialist promotion of the superiority of one legal model over others.

Yet, even within critical literature, there has been very little groundwork done on the concrete uses and the practical effects of indicators on legal systems. Much of the evidence collected in this regard concerns scattered overviews of statutory reforms enacted here and there to comply with one indicator's implicit prescriptions.[16] Research devoted to specific legal consequences of global

législation comparée, 2006). There are few exceptions, such as the broader studies on indicators undertaken by M.M. Siems, *Comparative Law* (Cambridge: CUP, 2nd ed, 2018), 180-228; R. Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford: OUP, 2014), 16, 192-193, 288, as well as the author of this paper (see M. Infantino, n 1 above).

[15] Some claims that indicators 'hold an intrinsic normative quality' (D.V. Malito, N. Bhuta and G. Umbach, 'Conclusions: Knowing and Governing', in D.V. Malito, G. Umbach and N. Bhuta eds, n 11 above, 503-507) and might be qualified as 'unconventional transnational norms' (D. Restrepo Amariles, 'Legal indicators, global law and legal pluralism: an introduction' (2015) 47 *Journal of Legal Pluralism & Unofficial Law,* 9-17), while others hold that indicators are 'not legal instruments as such' (M. Riegner, n 13 above, 60).

[16] See for instance S.E. Merry, n 11 above, 150 (on legal reforms adopted in a few countries following the prescriptions of the TiP); A. Cooley, 'The emerging politics of international rankings and ratings. A framework for analysis', in A. Cooley and J. Snyder eds, n 10 above, 1, 34-35 (on legal reforms adopted by Azerbaijan following the DB); T. Besley, 'Law, Regulation, and the Business Climate: The Nature and Influence of the World Bank Doing Business Project' 29 *Journal of Economic Perspectives*, 99, 117 (2015) (on the legal reforms and administrative restructuring undertaken by Rwanda following DB's prescriptions); M. Serban, 'Rule of Law Indicators as a Technology of Power in Romania', in S.E Merry, K.E. Davis and B. Kingsbury eds, n 12 above, 199-221 (on anti-corruption reforms undertaken in Romania following the CPI); M. Akech, 'Evaluating the impact of corruption (perception) indicators on governance discourses in Kenya' 25 *International Law. Revista Colombiana de Derecho Internacional,* 91-154 (2014) (on the reforms undertaken by the Kenya government to measure corruption following Transparency International's guidelines); M. Zaloznaya and J. Hagan, 'Fighting Human Trafficking or Instituting Authoritarian Control? The Political Co-optation of Human Rights Protection in Belarus', in K.E. Davis, A. Fisher, B. Kingsbury and S.E. Merry eds, n 1 above, 344, 346-361 (on the criminal and administrative measures enforced by Belarus to comply with the TiP); S. Schueth, 'Assembling International Competitiveness. The Republic of Georgia, USAID, and the Doing Business Project' 87 *Economic Geography,* 51-77 (2010) (on the legal reforms enacted by Georgia to improve its DB's ranking); B. Arruñada, 'How Doing Business Jeopardizes Institutional Reform' 10 *European Business Organization Law Review,* 555-562 (2009) (on legal reforms adopted in Afghanistan, Bulgaria, Colombia and El Salvador following the DB). One should also consider that, following the first editions of the DB reports, the French government established the 'Fondation pour le droit continental' (https://tinyurl.com/y7hpg9yp, last visited 27 December 2020) with the aim of promoting the civil law tradition in the world and of drafting a French version of the DB indicator.

indicators is still missing. This is a gap worthy of being filled and yet hard to fill for the reasons we are now going to explore.

III. Methodological Challenges

Although critical literature on legal indicators is adamant in stating that indicators act as a technology for global governance, shaping the way in which legal problems, priorities and rules are framed, discussed and dealt with, there is very limited empirical evidence supporting such a claim. Take for instance the Italian case, one might find works attacking the assumptions and methodology of DB reports,[17] eventually highlighting the misconceptions and ill-consequences of the DB approach when applied to the Italian context.[18] None have checked what transformative changes, if any, global legal indicators have triggered in the Italian legal system.

Many reasons might explain such an empirical neglect. Global legal indicators do not present themselves as legal instruments, but rather as quasi-statistical descriptions of legal architecture and performance of countries vis-à-vis benchmarks that are often aligned with more or less binding legal sources, such as international conventions and soft law instruments by international organizations. The majority of legal scholars have therefore either overlooked indicators or simply considered them as quantitative data for their research. Since the legal debate on indicators has been so minimal, the few authors focussing on them have had to spend much of their efforts in explaining what indicators are and in demonstrating their significance. Further, much of the

The first edition of the 'Index de la sécurité juridique' was published in 2015; the second in 2018: B. Deffains and C. Kessedjian eds, *Index de la sécurité juridique. Rapport pour la Fondation pour le droit continental*, 2015, available at https://tinyurl.com/y7606sk9 (last visited 27 December 2020); B. Deffains and M. Séjean eds, *L'index de la sécurité juridique ISJ – The Index of Legal Certainty ILC* (Paris: Dalloz, 2018). See also the decision of the Supreme Court of Canada, *Hryniak v. Mauldin*, 2014 *SCC* 7, [2014] 1 *SCR* 87, para 24, referring to the 'Rule of Law Index®' of the World Justice Project to support the claim that 'ordinary Canadians cannot afford to access the adjudication of civil disputes'.

[17] In addition to the contributions to the 11th volume of the *Annuario di diritto comparato*, n 14 above (and in particular those of M. Graziadei, 'Presentazione', 7-16; A. Gambaro, 'Misurare il diritto?', 17-48; S. Cassese and L. Casini, 'La disciplina degli indicatori globali', 97-116; G. Napolitano, 'Le misurazioni nel (e del) diritto amministrativo', 117-138), see L. Antoniolli, 'The Magic of Numbers. Elucubrazioni sparse in tema di misurazione del diritto', in A. Candian, U. Mattei and B. Pozzo eds, *Un giurista di successo. Studi in onore di Antonio Gambaro* (Milan: Giuffrè, 2017), I, 37-50.

[18] R. Caponi, ' "Doing Business" as a Purpose of Civil Justice? The Impact of World Bank Doing Business Indicators on the Reforms of Civil Justice Systems: Italy as a Case Study', in C. Althammer and H. Roth eds, *Instrumentalisierung von Zivilprozessen* (Tübingen: Mohr Siebeck, 2018), 79-88 (hereinafter ' "Doing Business" '); L. Enriques and M. Gargantini, 'Form and Function in Doing Business Rankings: Is Investor Protection in Italy Still so Bad?' 1 *University of Bologna Law Review*, 1, 14-29 (2016); R. Caponi, 'Doing business come scopo del processo civile?' *Foro italiano*, V, 2015, 10-16 (hereinafter 'Doing business').

strength of indicators lies in their ability to frame their users approach to legal problems – that is, something very hard to trace through the methodological tools which lawyers are usually familiar with. The fact that global legal indicators often live in dense legal environments and concur to strengthen the force of other legal sources creates the additional difficulty of distinguishing processes of change driven by indicators from transformations prompted by other sources.

In spite of the obstacles in tracing the effect of global legal indicators, there is nevertheless much that could be done, even with traditional legal research tools, to find evidence of what global legal indicators do. For instance, the findings in this paper are based on a search for textual references to the four selected indicators in parliamentary debates, explanatory memoranda of laws, public administration's documents, judicial decisions, legal literature and NGO pamphlets. Needless to say, textual references to indicators are an imperfect proxy for their relevance. Such a method does not track cases in which indicators play a role that remains unverbalized and unwritten and by contrast places excessive emphasis on rhetorical and pays lip-service to indicators in support of certain arguments or conclusions. The focus on textual recurrences of global legal indicators further fails to consider the significance that indicators might have on legal activities and practices that are not documented, such as patterns of behaviour of bureaucrats and public officials. Moreover, proving correlations (not causation) between textual references to indicators and given legal outcomes is almost impossible, not in the least because indicators often work in combination with stronger legal sources to which the final outcome might also be credited. Nonetheless, in the absence of a better proxy, keeping track of textual references might still tell us something about the extent to which the four selected indicators have impacted the Italian legal system, if at all.[19]

Methodologically speaking, the choice of Italy as a case study was obviously dictated by the author's own educational background, while the choice of the relevant indicators was based on their prestige in their respective domains. Before getting to the results, however, some additional information about the history, contexts and contents of the selected indicators is needed. In the next section we will therefore briefly overview the four indicators herein analysed, the order of their appearance arranged from the oldest to the newest. All these indicators have experienced significant changes since they were first published, often as a response to outsiders' critiques;[20] the paper will at all times refer to

[19] On the limitations and benefits of the search for textual references, see G. Frankenberg, 'Comparing constitutions: Ideas, ideals, and ideology – toward a lawyered narrative' 4 *International Journal of Constitutional Law,* 439-459 (2006) (speaking about the textual study of constitutions).

[20] For instance, as a reaction to the claim that countries' ratings were not transparent, Freedom House started publishing in 2006 the disaggregated results for each country: N.K. Dutta, 'Accountability in the Generation of Governance Indicators' 22 *Florida Journal of International Law,* 401, 429 (2010). To respond to French critiques to the first edition of the report, the DB team incorporated in the second edition some of the proposed suggestions for improvement: see B.

the latest available edition.

IV. Four Global Indicators: An Outline

The oldest of the four indicators herein surveyed is Freedom House's FiW. The first FiW report was published in 1973 with the aim of evaluating states' performances with respect to democracy, rule of law and protection of political rights and civil liberties, along the lines of (the NGO's pro-US and anti-communist campaigns and) the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) of 1966.[21] According to the current version of the reports, each state is given a score between zero and one hundred, with zero being 'least free' and one hundred being 'most free'.[22] Countries' scores are determined by FH's in-house and external consultants; approximately one hundred and thirty people participated in the 2020 edition.[23] FH consultants work on the basis of a publicly available questionnaire investigating how each country deals with electoral and political processes, free speech, labour rights, civil justice, protection of property, and freedom of business.[24] Consultants answer the questionnaire relying upon their personal knowledge and contacts, media news, official government statements, NGO reports, scientific articles, and local visits. Answers are then translated into points, which are aggregated and determine a country's final score.[25] Unsurprisingly, the FiW has been the subject of much criticism, most of which has focused on the Index's restrictive emphasis on civil-political rights, its financial and ideological allegiance with the US government's views, and the obscure and heavily subjective methodology upon which it is based.[26] Yet, notwithstanding all these limitations, since its

Fauvarque-Cosson and A.J. Kerhuel, 'Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law' 57 *American Journal of Comparative Law,* 811, 814-815 (2009). After being subject to an internal review by the WB's Independent Evaluation Group in 2008, the DB team voluntarily underwent in 2013 a process of external review: see T.A. Manuel, 'Independent Panel Review of the Doing Business report' (2013), available at https://tinyurl.com/ya24u958 (last visited 27 December 2020).

[21] About the history and the mandate of FH, see for all C.G. Bradley, 'International Organizations and the Production of Indicators. The Case of Freedom House', in S.E Merry, K.E. Davis and B. Kingsbury eds, n 12 above, 27-74.

[22] The final results are shown in a map with green-yellow-purple colors, in which green is good and purple is bad: see https://tinyurl.com/u8by5pe (last visited 27 December 2020).

[23] See https://tinyurl.com/yaf95j73 (last visited 27 December 2020).

[24] The full questionnaire underlying the 2020 edition is available at https://tinyurl.com/y7cm3dhj (last visited 27 December 2020)

[25] n 24 above.

[26] See, among many others, S.S. Bush, 'The Politics of Rating Freedom. Ideological Affinity, Private Authority, and the Freedom in the World Ratings' 15 *Perspectives on Politics,* 711-722 (2017); C.G. Bradley, n 21 above, 60; S. Voigt, 'How (Not) to Measure Institutions' 9 *Journal of Institutional Economics,* 1, 20 (2013); W. Merkel, 'Measuring the Quality of Rule of Law. Virtues, Perils, Results', in M. Zürn, A. Nollkaemper and R. Peerenboom eds, *Rule of Law Dynamics in an Era of International and Transnational Governance* (Cambridge: CUP, 2013), 21-24; N.K. Dutta,

launch the FiW has been quoted by a multiplicity of academic articles to support arguments and test theories about democracy, development, economic growth,[27] and, most importantly, it has been used by international organizations, such as the World Bank (WB), and international donors, such as the US Millennium Challenge Corporation, as one of the criteria to determine and evaluate aid distribution.[28]

More than twenty years after the first edition of the FiW, the Berlin-based NGO Transparency International, founded by a German lawyer who had previously worked at the WB, published the CPI, an index measuring perceived levels of corruption in a country. The CPI annually 'ranks one hundred and eighty countries and territories by their perceived levels of public sector corruption according to experts and businesspeople, and uses a scale of zero to one hundred, where zero is highly corrupt and one hundred is very clean'.[29] Scores are determined by TI's team by aggregating the results of many expert opinion-based indicators on levels of corruption in the public sector and the quality of the institutional and legal framework to fight corruption.[30] In other words, CPI is a composite indicator, which mashes up data from thirteen different sources allegedly representing how corrupt experts perceive a country to be. A number of flaws underlying CPI's conception and structure have been, through time, highlighted by critical scholarship. Critiques are concerned with the unreliability of expert' opinions, the general weakness of perception-based surveys, and the narrow notion of 'corruption' the CPI embraces, chastising petty corruption by officials while turning a blind eye on corrupt activities carried out in connection with or by private businesses,[31] to mention but a few. Yet, CPI's success has been far-reaching. It is credited with having solidified in the global agenda the idea that corruption is an obstacle to economic growth[32] and having cemented the international consensus in the fight against corruption, paving the way for the adoption of the OECD Convention on Combating Bribery of

n 20 above, 442.

[27] Cf the literature mentioned by N.K. Dutta, n 20 above, 429; S. Voigt, n 26 above, 20; C. Arndt and C. Oman, *Uses and Abuses of Governance Indicators* (Paris: OECD, 2007), 23.

[28] S.S. Bush, n 26 above, 718-722; N.K. Dutta, n 20 above, 430.

[29] See https://tinyurl.com/yx88hoqq (last visited 27 December 2020). CPI's results too are presented in a colored map, with dark red meaning 'highly corrupt' and light-yellow meaning 'highly clean'; a ranking of countries, from the least to the most corrupt, is also available.

[30] Cf https://tinyurl.com/yx88hoqq (last visited 27 December 2020), under 'Methodology'.

[31] R.J. Beschel Jr, 'Measuring Governance: Revisiting the Uses of Corruption and Transparency Indicators', in D.V. Malito, N. Bhuta and G. Umbach eds, n 11 above, 161, 166-168; A. Cooley, 'How International Rankings Constitute and Limit Our Understanding of Global Governance Challenges: The Case of Corruption', in D.V. Malito, N. Bhuta and G. Umbach eds, n 11 above, 49, 51; M. Bukovansky, 'Corruption rankings', in A. Cooley and J. Snyder eds, n 10 above, 60, 73; S. Voigt, n 26 above, 20; T. Ginsburg, 'Pitfalls of Measuring the Rule of Law' 3 *Hague Journal on the Rule of Law*, 269, 273 (2011).

[32] M. Bukovansky, n 31 above, 73; K. Pistor, 'Advancing the Rule of Law: Report on the International Rule of Law Symposium' 25 *Berkeley Journal of International Law*, 7, 25-26 (2007).

Foreign Public Officials in International Business Transactions in 1997 and the UN Convention Against Corruption in 2003.[33] While it is hard to prove a direct causal link between the CPI and specific legal reforms, it is beyond doubt that legislative efforts against corruption (conceived à la CPI) have multiplied worldwide since 1995.[34]

On October 2000, under the Clinton administration, the U.S. Congress approved the Trafficking Victims Protection Act (TVPA),[35] charging a newly established body under the Department of State – the 'Office to Monitor and Combat Trafficking' – with the task of reporting yearly on efforts by States in the fight against human trafficking; according to the TVPA, a country's mis-performance was sanctioned with the withdrawal or cutting off of U.S. economic, humanitarian or military aid. The intense lobbying by the same administration before the UN led the UN General Assembly to adopt, one month later, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[36] In compliance with its institutional assignment, the Office to Monitor and Combat Trafficking published in 2001 the first TiP report.[37] Nowadays, TiP reports are prepared every year by around one hundred employees of the Office to Monitor and Combat Trafficking on the basis of the information collected, mostly through US embassies around the world about states' efforts and performances as to the three 'Ps' of the TVPA – prosecution of traffickers, protection of victims and

[33] M. Bukovansky, n 31 above, 72; K. Pistor, n 32 above, 31. In the meantime, following the OECD's and UN's example, several other regional conventions against corruption were adopted: see the 'Convención Interamericana contra la Corrupción' of the Organization of American States (OAS) of 1996; the 'Convention pénale sur la corruption' of the Council of Europe of 1999; the 'African Union Convention on Preventing and Combating Corruption' of the African Union of 2003; the 'Arab Anti-Corruption Convention' of the League of Arab States of 2010.

[34] A. Cooley, n 31 above, 49; R. Urueña, n 13 above, 7; C. Arndt and C. Oman, n 27 above, 48; K. Pistor, n 32 above, 31.

[35] Public Law, 106–386, 22 USC 7101.

[36] See General Assembly Resolution 55/25 of 15 November 2000. Many related regional acts have followed suit: see 'Resolution 1948 Fighting the Crime of Trafficking in Persons, especially Women, Adolescents, and Children' of the Organization of American States of 2003, the 'Declaration Against Trafficking in Persons Particularly Women and Children' of the Association of Southeast Asian Nations of 2004, the 'Convention on Action against Trafficking in Human Beings' of the Council of Europe of 2005, the 'Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children' of the African Union of 2006, the 'Arab Initiative for Building National Capacities for Combating Human Trafficking' of the League of the Arab States of 2010. In Europe, one should also add EU's Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, later replaced by the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

[37] US Department of State, Victims of Trafficking and Violence Protection Act of 2000. Trafficking in Persons Report, 2001, available at https://tinyurl.com/yaweuq3h (last visited 27 December 2020), 12.

prevention of trafficking –.[38] On the basis of such information, the TiP reports divide states into three tiers, devoted to countries fully, partially or not compliant with the TVPA, respectively.[39] Many features of the TiP reports have been subject to critique: from assumptions about the causes of, and remedies against, human trafficking, to the opaqueness and unreliability of the reports' sources, from the highly politicized nature of the assignment to tiers to the unilateral character of the countries' assessment.[40] Nevertheless, in spite of such critiques, the TiP reports have fast become 'the most influential and the most trusted indicator of a country's performance vis-à-vis human trafficking'.[41] Although it is hard to establish a clear correlation between the launch of the TiP and the number of reforms adopted worldwide since the 2000s to criminalize human trafficking, what is undeniable is that at the beginning of the Twenty-first century, less than ten per cent of the states covered by the TiP criminalized human trafficking, while nowadays more than seventy per cent of the world's countries have criminalized human trafficking and have set up specialized units and divisions to combat trafficking and to keep track of the data.[42]

Our fourth indicator, the DB, is the global legal indicator lawyers know best (although they often conflate it with the 'legal origins' theory it was inspired by). Since the first report in 2003, the DB ranks countries according to the business-friendliness quality of their regulatory environment, on the assumption that 'good' laws are conducive to economic growth. Thanks to the impressive

[38] J.G. Kelley, n 11 above, 98-111; J.G. Kelley and B.A. Simmons, 'Politics by Number. Indicators as Social Pressure in International Relations', 59 *American Journal of Political Science*, 55, 61 (2015); A.T. Gallagher, 'Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports' 12 *Human Rights Review,* 381-385 (2011) (for whom the US Department of State has self-proclaimed itself as the 'supervisor and arbiter of a complex international issue that remains both contested and controversial', with the result that '[t]he performance of governments with respect to trafficking is currently being assessed, not with reference to the international rules that states (including the USA) have collectively developed and freely accepted, but against criteria drawn up and imposed by US bureaucrats and politicians'; A.T. Gallagher and J. Chuang, 'The Use of Indicators to Measure Government Responses to Human Trafficking', in K.E. Davis, A. Fisher, B. Kingsbury, S.E. Merry eds, n 1 above, 326, 333-334.

[39] Within the second tier of partially compliant states, there is a sub-category (Tier 2 Watch List) referred to states where, notwithstanding the substantial efforts to combat human trafficking, the traffic remains high: U.S. Department of State, Trafficking in Persons Report, 2019, at https://tinyurl.com/y57hskmy (last visited 27 December 2020), 48. Tiers are graphically represented in a table and in several colored maps, in which tier 1 is green, tier 2 is yellow and tier 3 is brown.

[40] J.G. Kelley, n 11 above, especially 124-142, 296-218, 221-227; J.G. Kelley and B.A. Simmons, n 38 above, 68; A.T. Gallagher, n 38 above, 382-384; A.T. Gallagher and J. Chuang, n 38 above, 332-334.

[41] M. Zaloznaya and J. Hagan, n 16 above, 361. One might be tempted to explain the success of the TiP Reports in light of the sanctions established by the TVPA in case of a country's mis-performance. It should however be noted that the US government has rarely made use of the sanctions provided by the TVPA: J.G. Kelley, n 11 above, 91-92.

[42] See J.G. Kelley, n 11 above 11, Figure 1.1, and 55; J.G. Kelley and B.A. Simmons, n 38 above, 60; see also S.E. Merry, n 11 above, 150; A.T Gallagher and J. Chuang, n 38 above, 339-340.

resources available to the WB, the DB reports are based upon the answers to a questionnaire drafted by the DB team. The team is made up of roughly sixty people, mostly economists, working at the WB's Washington D.C. headquarters. Every year, the team sends the DB questionnaire to approximately fifteen thousand lawyers and government officials around the world.[43] The questionnaire investigates what would happen to a middle-size, nationally-owned enterprise based in the largest business city of a country's economy in a series of circumstances articulated along eleven dimensions – from obtaining a construction permit to getting electricity, from paying taxes to enforcing contracts. Questions range from purely factual, such as 'how many days are needed to get electricity?', to purely legal, such as 'is there a specialized commercial court?'. Responses are evaluated, assembled, weighted, and transformed into numbers by the DB team, producing a country's ranking for each of the eleven dimensions. Ten of these scores[44] are then aggregated to create the final 'Ease of Doing Business' score. In addition to ranking countries from the most to the least business-friendly, each edition of the DB also identifies the top ten reformers of the year, celebrating the countries which have reformed the most. The limits of DB are well-known. Through time, the DB has been criticized for aspects such as the fragility of the 'legal origins' theory and the US-centered bias of the DB questionnaire,[45] the emphasis it puts on official and formal law only,[46] and the unreliability and unrepresentativeness of expert opinions.[47] Further, many have attacked the simplified assumptions upon which the entire project is based, such as that less regulation is always good, rules can be easily transplanted, there is one 'right' solution to every business's legal problem.[48] This

[43] World Bank, *Doing Business 2020: Comparing Business Regulation in 190 Economies* (Washington DC: World Bank, 2019), available at https://tinyurl.com/y43yrex4 (last visited 27 December 2020), 23.

[44] The dimension which is left out from the aggregate score is the one on labor market regulations. The DB team stopped using this sub-index as a component of the final score in 2009, following the harsh critiques voiced by the International Trade Union Confederation and the International Labour Organization against the slippery slope towards deregulation that the sub-index favored. On this story, cf D. Collier and P. Benjamin, 'Measuring Labor Market Efficiency. Indicators that Fuel an Ideological War and Undermine Social Concern and Trust in the South African Regulatory Process', in S.E Merry, K.E. Davis and B. Kingsbury eds, n 12 above, 284-316; T. Krever, n 1 above, 134.

[45] Among the many, T. Besley, n 16 above, 99-120; N. Garoupa and C. Gomez Ligüerre, n 14 above, 304-331; R. Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' 57 *American Journal of Comparative Law*, 778, 786-787 (2009); B. Fauvarque-Cosson and A.J. Kerhuel, n 20 above, 821-823; Association Henri Capitant, n 14 above.

[46] Cf T. Besley, n 16 above, 102, 107; B. Fauvarque-Cosson and A.J. Kerhuel, n 20 above, 814-815; K. Pistor, n 32 above, 26-28.

[47] See for instance S. Voigt, n 26 above, 19-20; R. Michaels, n 45 above, 778.

[48] A. Broome, A. Homolar and M. Kranke, 'Bad science: International organizations and the indirect power of global benchmarking' 24 *European Journal of International Relations*, 514, 523 (2018); T. Krever, n 1 above, 132; N. Garoupa and C. Gomez Ligüerre, n 14 above, 304-305; B. Fauvarque-Cosson and A.J. Kerhuel, n 20 above, 823; R. Michaels, n 45 above, 788-789.

notwithstanding, the DB team estimates that, since the first edition of the DB, more than ten thousand articles using the DB data have been published online and in peer-reviewed journals, more than sixty countries have established teams, offices, and even ministries devoted to improving their performances in the DB, and more than one thousand and three hundred legal reforms have been carried out worldwide along the DB's lines.[49] Well-known are the cases of Georgia, Azerbaijan, and Rwanda, for which the setting up of a national team focused on the DB and the adoption of many DB-driven legal reforms have produced a corresponding jump in the ranking.[50] Competing in the DB's 'law reform Olympics'[51] has rapidly become a popular sport.

V. The Four Indicators' Journey to Italy

The World Bank's claim that the DB has inspired more than one thousand and three hundred legal reforms since its first edition has up until now gone unchecked. Equally lacking are large-spectrum studies of the legal change brought about in domestic legal systems by the DB and the other three indicators herein analysed. What is available is only some scattered evidence about how, in selected jurisdictions, these indicators – in particular, the CPI, the TiP reports and the DB reports – have prompted the enactment of new laws and reforms of public administration's structures and rules.[52]

On the basis of such insights, the following analysis aims to verify what effects, if any, the four indicators herein studied have had on the Italian legal system. Rather than focusing only on statutory reforms and rules and decisions of public administrative bodies, the search for textual references is extended to parliamentary debates, courts' judgments and reports, and legal scholarship. In spite of the methodological limits affecting the research, the results collected show that, to different extents, global legal indicators have many strings attached, some of which are quite unexpected. Let us see them in more detail, starting from the oldest indicator to the newest one.

1. The Freedom in the World Reports

At first sight, the FiW ranking and reports seem to have played little role both in parliamentary and academics debates.

Starting from the latter, references to the FiW reports in Italian legal

[49] World Bank, n 43 above, 25-27.

[50] See S. Schueth, n 16 above, 63-64 (Georgia); A. Cooley, n 16 above, 34-35 (Azerbaijan); T. Besley, n 16 above, 117 (Rwanda).

[51] V.L. Taylor, 'The Law Reform Olympics: Measuring the Effects of Law Reform in Transition Economies', in T. Linsey ed, *Law Reform in Developing and Transitional States* (New York: Routledge, 2007), 83-105.

[52] See n 16 above.

scholarship are scant. The FiW reports are seldom mentioned, most of the time uncritically, as an independent, quantitative assessment of political and democratic performance.[53] As to parliamentary debates, in the last twenty years of discussions at the Senate,[54] the FiW Index has been expressly mentioned only once;[55] of much more interest to senators, especially in the last ten years, has been the FiW's twin (and younger) index, 'Freedom of the Press' (an indicator measuring free speech and journalistic freedom), where Italy has historically scored low, thus fuelling parliamentary discussions about possible reforms and strategies for ranking improvement.[56]

By contrast, the rankings and reports annually published by Freedom House have been repeatedly and consistently used by Italian local asylum commissions and courts when deciding whether to grant refugee status and the right to asylum. Italian immigration legislation, largely inspired by European directives,[57] requires that the local asylum commissions operating under the Ministry of Interior evaluate the

> 'general situation of the requerants' country of origin (…) on the basis

[53] See for instance M. Volpi, 'Le forme di Stato', in G. Morbidelli, L. Pegoraro, A. Rinella and M. Volpi eds, *Diritto pubblico comparato* (Turin: Giappichelli, 5th ed, 2016), 290; S. Cassese, 'Global Standards for National Democracies' *Rivista trimestrale di diritto pubblico*, 701, fn 14 (2011); L. Bonanate, 'La democrazia nella concezione internazionalistica di Norberto Bobbio', in L. Ferrajoli and P. Di Lucia eds, *Diritto e democrazia nella filosofia di Norberto Bobbio* (Turin: Giappichelli, 1999), 177-182. Journalistic coverage of the FiW Index is also low, although the Index is often quoted by specialistic media and news websites, focusing on economics and geopolitics: among the latest publications, see for instance A. Figoli and M. Taddei, 'Freedom in the World 2020: un mondo sempre meno libero' *Lavoce.info*, 13 March 2020, available at https://tinyurl.com/y7pqbvn9 (last visited 27 December 2020); A. Pezzati, 'Il declino della democrazia: analisi di Freedom in the World 2018' *Geopolitica.info*, 7 March 2019, available at https://tinyurl.com/ya5tfujo (last visited 27 December 2020). See also Associazione per i diritti degli utenti e consumatori, 'La libertà nel mondo 2020: una lotta senza leader per la democrazia', 4 March 2020, available at https://tinyurl.com/yandoeuz (last visited 27 December 2020).

[54] All the searches in Parliamentary debates for this paper were carried out as to the XIV-XVIII legislatures (between 2001 and 2020), on the website of the Italian senate, through the search engine 'Lavori – ricerca nell'attività dell'Assemblea', available at https://tinyurl.com/y7zwpn8j (last visited 27 December 2020). The results are reported mentioning the surname of the senator(s) referring to the indicator. For the search for the FiW, the keyword was 'Freedom'.

[55] Transcript no 370 of 1 April 2003 (Vitali).

[56] See Transcript no 151 of 25 September 2019 (De Bonis); Transcript no 340 of 28 October 2018 (Fucksia); Transcript no 819 of 24 October 2012 (Alberti Casellati); Transcript no 806 of 3 October 2012 (Vita); Transcript no 332 of 10 February 2010 (Lannutti, Belisario, Giambrone); Transcript no 270 of 3 November 2009 (Finocchiato et alii).

[57] See Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status, later recasted and repealed by the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2005] OJ L 326, as well as the European Parliament and Council Directive 2011/95/EU of the of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 150.

> of the data provided by the Office of the United High Commissioner for Refugees (UNHCR), the European Asylum Support Office (EASO), the Italian Ministry of Foreign Affairs, also in collaboration with other international agencies and entities working in the field of human rights protection, or at least on the basis of the data directly acquired by the Commission itself'.[58]

The same data are also 'made available to the courts seized of setting aside the denial of refugee status by the commissions'.[59] In order to ease the work of commissions and courts, the Ministry of Foreign Affairs regularly publishes a list of countries of origin deemed to be safe, on the basis of the information provided by the national asylum Commission, which in turn relies on 'information sent by other EU Member States, by the EASO, by the ENHCR, by the Council of Europe and by other competent international organizations'.[60] Applicants coming from countries of origin included in the Ministry of Foreign Affairs' list of countries presumed to be safe might still apply for asylum, but they have to demonstrate that there are serious grounds to believe that, in spite of the presumption of safety, the country is not safe due to their particular situation.[61]

The assessment of the safety of the applicant's country of origin is of central significance in the asylum procedure. A Commission's finding that the country is safe for the applicant implies the denial of international protection.[62] The Commission's misevaluation of the situation in the applicant's country of origin might be a ground for appealing the decision before a civil tribunal, which will then check whether the commission's conclusions were sound; the civil tribunal's judgment, in turn, might be further challenged before the Court of Appeal and the Supreme Court.[63]

For our purpose, what is interesting to note is that the FiW scores and reports figure prominently among the sources used by the National and local asylum commissions and by courts to assess the safety of foreign countries. The National Asylum Commission quotes, inter alia, the FiW reports as a basis for its determination of the countries that are presumed to be safe, as if FH were a 'competent international organization' as required by Art 2bis, Legislative decree of 28 January 2008, no 25.[64] The FiW reports also feed the documents available on the UNHCR's and EASO's websites, which local asylum commissions

[58] See Art 8 decreto legislativo 28 January 2008 no 25.
[59] ibid.
[60] Art 2 bis decreto legislativo 28 January 2008 no 25.
[61] Art 9, section 2 bis, decreto legislativo 28 January 2008 no 25.
[62] Art 9 decreto legislativo 28 January 2008 no 25.
[63] Art 35 decreto legislativo 28 January 2008 no 25.
[64] National Asylum Commission, 'List of Safe Countries of Origin', 31 October 2019, available at https://tinyurl.com/ybspxdpu (last visited 27 December 2020) (FiW quoted for Ghana and Ukraine).

are invited to consult when making their evaluation.[65] Similarly, when required to verify the commissions' assessment of the safety of a foreign country, courts at all levels, including the Supreme Court, often rely on materials available at the UNHCR's and EASO's websites, which include FH's assessments as well as directly on FiW reports and rankings.[66] Incidentally, such a practice is fully in line with the one adopted by the European Court of Human Rights (ECtHR), which frequently assess the legality of states' decisions as far as immigration and expulsions are concerned taking into consideration the evaluations contained in the FiW reports.[67]

The overall picture emerging from the practices of Italian asylum commissions and courts is that the information and conclusions of the FiW reports are used, in combination with other sources, as reliable evidence of the political and human rights conditions of foreign countries. As a result, the clumsy researches carried out every year in New York by FH's one hundred-and-thirty consultants end up affecting Italian asylum commissions' and courts' determinations and, most importantly, the lives of asylum seekers in Italy.

2. The Corruption Perceptions Index

When assessing a country's safety for granting refugee status, Italian courts seldom rely upon the ranking of concerned countries in the CPI.[68] Occasional references to the CPI can also be found in the legal literature, with most of Italian authors making reference to the Index to explain the rationale and need

[65] Suffice it to look for references to the FiW scoring and reports within the materials collected at https://tinyurl.com/y7ohqjbs (last visited 27 December 2020) and https://tinyurl.com/y8765l3z (last visited 27 December 2020).

[66] As to first instance courts, see Tribunale di Firenze 5 February 2019 (Senegal); Tribunale di Bari 30 November 2018 (Gambia); Tribunale di Milano 2 October 2018 (Senegal); Tribunale di Perugia 25 July 2018 (Guinea); Tribunale di L'Aquila 10 May 2018 (Nigeria); Tribunale di Brescia 7 January 2018 (Senegal); Tribunale di Ancona 2 December 2017 (Pakistan); Tribunale di Lecce 1 May 2016 (Gambia). As to second instance courts, see Corte d'Appello di Venezia 2 January 2020 no 16 (Gambia); Corte d'Appello di Torino 2 October 2019 no 1592 (Bangladesh); Corte d'Appello di Potenza 11 July 2018 no 476 (Senegal). As to the Court of Cassation, see Corte di Cassazione 27 November 2019 no 30961 (China); Corte di Cassazione 27 November 2019 no 30952 (Guinea Cronacky); Corte di Cassazione 21 October 2019 no 26731 (Senegal). All decisions mentioned here and in the following footnotes are available on the electronic database dejure.

[67] Cf Eur. Court H.R., *Mawaka* v *the Netherlands* App no 29031/04, Judgment of 1 September 2010 (Democratic Republic of Congo); Eur. Court H.R., *H.S. and Others* v *Cyprus* App no 41753/10 and 13 other applications, Judgment of 21 July 2015 (Sirya); Eur. Court H.R., *S.H.* v *the United Kingdom* App no 19956/06, Judgment of 15 June 2010 (Bhutan). See also Eur. Court H.R. (GC), *Catan and Others* v *Moldova and Russia* App nos 43370/04, 8252/05 and 18454/06, Judgments of 19 October 2012 (where the FiW data about Moldova were used to assess whether there had been a violation of the right to education by Moldova and Russia).

[68] Corte d'Appello di Torino 13 March 2018 (Bangladesh); Tribunale di Roma 28 July 2018 (Armenia). For a different use of the CPI, as a benchmark to test the constitutionality of an administrative measure taken by Ukraine on the ground of the fight against corruption, see Eur. Court H.R., *Polyakh and Others* v *Ukraine* App nos 58812/15 and 4 others, Judgment of 24 February 2020 (Ukraine).

for reforms in the public administration sector[69] (exceptions are as rare as they are authoritative).[70] But the strongest impact of the CPI is visible, especially in the last decade, on media circles[71] and on parliamentary debates and on legislative measures.

While, before 2010, the CPI was mentioned only four times in the discussions at the Senate,[72] the use of CPI rankings in political debates at the Senate in the following years has risen enormously. In the decade 2010-2019, thirty-nine (either individual or collective) interventions by senators textually mentioned the CPI as evidence of corruption in Italy. Mentions were made either in support of governments' presentation of their plans, or in the context of a critique of governmental actions, or to provide an empirical basis for proposals of statutory reforms.[73] In the years between 2010-2012 in particular, there were as many as

[69] See for instance A. Pertici and M. Trapani, 'Presentazione', in A. Pertici and M. Trapani eds, *La prevenzione della corruzione. Quadro normativo e strumenti di un sistema in evoluzione* (Torino: Giappichelli, 2019), XI-XII; F. Caringella and R. Cantone, *La corruzione spiegata ai ragazzi che hanno a cuore il futuro del loro paese* (Milano: Mondadori, 2018) ['oracolo']; G. Piperata, 'L'attività di garanzia nel settore dei contratti pubblici tra regolazione, vigilanza e politiche di prevenzione', in F. Mastragostino ed, *Diritto dei contratti pubblici* (Torino: Giappichelli, 2017), 29-32; L. Tria, 'Il dialogo incessante tra le Corti europee e la Corte Suprema di Cassazione sui rapporti privatizzati di lavoro dei dipendenti delle pubbliche amministrazioni: il c.d. danno comunitario', in M. Cerreta and M. Riommi eds, *Le recenti riforme dei rapporti di lavoro delle pubbliche amministrazioni e della scuola pubblica* (Torino: Giapppichelli, 2016), 51, 90-92.

[70] See the analysis of S. Cassese, 'Misurare la corruzione serve per studiare interventi mirati', Corriere della Sera, 12 December 2017, available at https://tinyurl.com/ya5lhamf (last visited 27 December 2020).

[71] Media coverage of the CPI has always been extensive, with each new edition of the CPI being advertised by the major Italian newspapers. For the 2019 edition of the CPI, see for instance A. Foderi, 'Lo stato della corruzione in Italia non migliora, anzi', *Wired*, 23 January 2020, available at https://tinyurl.com/y7f5b7f8 (last visited 27 December 2020); F. Pinotti, 'Corruzione, l'Italia al 51mo posto nella classifica di Transparency International', *Corriere della Sera*, 23 January 2020, available at https://tinyurl.com/yaq5c735 (last visited 27 December 2020); Undisclosed author, 'Corruzione, l'Italia migliora (di poco). Quanti anni ci vogliono per diventare un Paese normale?', Il Sole24Ore, 23 January 2020, available at https://tinyurl.com/y8ky4zuj (last visited 27 December 2020); Undisclosed author, 'Corruzione: nel 2019 frena il miglioramento dell'Italia', La Repubblica, 23 January 2020, available at https://tinyurl.com/y8u8tkw5 (last visited 27 December 2020).

[72] The search was carried out on the Senate website mentioned at n 54 above (keyword 'Transparency International' and 'Corruption Perceptions'). See Transcript no 226 of 24 June 2009 (Serra); Transcript no 140 of 3 February 2009 (Biondelli); Transcript no 868 of 22 September 2005 (Drago); Transcript no 231 of 2 August 2002 (Martone et alii); Transcript no 868 of 22 September 2005 (Drago); Transcript no 231 of 2 August 2002 (Martone, Provera, Iovene, De Zulueta).

[73] These are the results on the Italian Senate's website with the keywords 'Transparency International' and 'Corruption Perceptions': Transcript no 82 of 23 January 2019 (Bonafede); Transcript no 901 of 18 October 2017 (Ricchiuti); Transcript no 846 of 27 June 2017 (Ricchiuti); Transcript no 800 of 4 April 2017 (Barani); Transcript no 787 of 16 March 2017 (Cotti et alii); Transcript no 785 of 15 March 2017 (Ricchiuti); Transcript no 545 of 1 December 2015 (Romani); Transcript no 436 of 23 April 2015 (Romani et alii); Transcript no 416 of 25 March 2015 (Albani), (Stefani); Transcript no 366 of 16 December 2014 (Airola); Transcript no 287 of 22 July 2014 (Lucidi); Transcript no 168 of 16 January 2014 (Mussini et alii); Transcript no 158 of 28 December 2013 (Nencini et alii); Transcript no 818 of 23 October 2012 (Lannutti); Transcript no 815 of 17 October 2012 (Serra); Transcript no 805 of 2 October 2012 (Giovanardi); Transcript no 778 of 27

twenty-five recurrences of references to the CPI in Senate's transcripts.[74]

As mentioned earlier, many of these references concern cases in which Italy's poor results in the Index were quoted as a reason for the enactment of a new law. In some instances – such as in the context of the adoption of laws ratifying international conventions – the mention of the CPI is nothing more than lip service, insofar as it involves the ratification of a treaty already signed by the Italian state. This is, for instance, the case of references to the CPI supporting the enactment of the Law of 3 August 2009, no 116 (on the ratification of the UN Convention against corruption of 2003)[75] and of the Law of 28 June 2012, no 110 (on the ratification of the Council of Europe's Criminal law convention on corruption of 1999).[76] More interesting are the references to the CPI in support of legislative measures not mandated (at least directly) by international legal obligations, such as in the case of reforms aimed at strengthening administrative supervision and accountability and harshening criminal laws on corruption among public officials. For instance, the CPI was mentioned to justify the adoption of the Law of 6 November 2012, no 190 (on the prevention and repression of corruption and illegality in the Public Administration),[77] which introduced new bribery offences, increased the punishment for already existing offences, and, most importantly, established the Anti-Corruption National Authority (ANAC), an agency charged with substantial powers to prevent, investigate and sanction instances of corruption in the public administration and to enact rules for the improvement of transparency in decision-making and the avoidance of conflicts of interests.[78] Similar references to the CPI in parliamentary debates supported the adoption of the Law of 27 May 2015, no 69 (on crimes against the Public Administration,

July 2012 (Pedica); Transcript no 731 of 24 May 2012 (Lannutti); Transcript no 718 of 8 May 2012 (Lannutti); Transcript no 705 of 4 April 2012 (Lannutti); Transcript no 691 of 14 March 2012 (Baio); Transcript no 567 of 15 June 2011 (Rutelli et alii); Transcript no 566 of 14 June 2011 (Giaretta); Transcript no 562 of 7 June 2011 (D'Ambrosio Lettieri), (Baio), (Vallardi); Transcript no 488 of 19 January 2011 (Finocchiaro et alii); Transcript no 487 of 18 January 2011 (Finocchiaro et alii); Transcript no 446 of 27 October 2010 (Perduca); Transcript no 358 of 14 April 2010 (Rutelli et alii), (Finocchiaro et alii), (D'Alia et alii); Transcript no 357 of 13 April 2010 (Belisario et alii), (Mazzatorta et alii), (Rutelli et alii), (D'Alia et alii), (Finocchiaro et alii); Transcript no 338 of 18 February 2010 (Belisario et alii).

[74] n 73 above.

[75] Transcript no 226 of 24 June 2009 (Serra). See also Transcript no 446 of 27 October 2010 (Perduca), referring to the CPI to support the enactment of the Law of 19 November 2010, no 209, on the ratification of the bilateral investment treaty between Italy and Malawi, made in Blantyre on 28 August 2003.

[76] Transcript no 691 of 14 March 2012 (Baio).

[77] Transcript no 815 of 17 October 2012 (Serra); Transcript no 566 of 14 June 2011 (Giaretta); Transcript no 562 of 7 June 2011 (D'Ambrosio Lettieri).

[78] For a description of the contents of such reform in English, see Roberto Pisano, Bribery & Corruption 2020 – Italy, Global Legal Insights, available at https://tinyurl.com/yaxqultg (last visited 27 December 2020). ANAC's powers are described (in English) on ANAC's website, available at https://tinyurl.com/y8zwlkkd (last visited 27 December 2020).

on Mafia organizations and on fraudulent accounting practices),[79] of the Law of 17 October 2017, no 161 (modifying the anti-Mafia code and establishing new prevention measures),[80] of the Law of 30 November 2017, no 179 (on the protection of whistleblowers in private and public employment)[81] and of the Law of 9 January 2019, no 3 (establishing measures to prevent crimes against the public administration and to improve transparency in the funding of political parties and movements – the so-called 'bribe-destroyer' Act).[82]

Reading an excerpt of the Minister of Justice's speech before the Senate presenting the text of the latter Act is illustrative of the role played by the CPI in the context of legal reforms.

> 'In the latest available ranking from Transparency International, Italy ranks 69th, and 85 percent of Italians are persuaded that institutions and politicians are corrupted. This is not an opinion: this is a fact. The circumstance that Transparency International deals with perceived corruption does not lessen the significance of its findings, because foreign investors who perceive a high level of corruption will refuse to enter a market that appears to be infiltrated by corruption and criminal networks. Fighting the social evil of corruption is at the same time a moral imperative and a crucial mission for any political action aiming to provide citizens with the perception of an efficient and functional public administration, in full compliance with Art 97 of the Constitution'.[83]

In the Minister's words, combating (the perception of) corruption becomes a moral imperative and a constitutional mission whose fulfilment (or not) is certified by CPI's scores. The CPI's aggregate of a plurality of indicators measuring business perception of the efficiency of public services thus silently becomes the benchmark for testing the health of the Italian state's public administration.

3. The Trafficking in Persons Reports

The Italian legislative framework on human trafficking has consistently grown in the last fifteen years. Following the adoption of the UN protocol against human trafficking of 2000, the EU' Council Framework Decision 2002/629/JHA and following Acts, as well as the 2005 Council of Europe's

[79] Transcript no 416 of 25 March 2015 (Albani).

[80] Transcript no 846 of 27 June 2017 (Ricchiuti).

[81] Transcript no 901 of 18 October 2017 (Ricchiuti).

[82] Transcript no 82 of 23 January 2019 (Bonafede); Transcript no 785 of 15 March 2017 (Ricchiuti). One should add to the list in the text the Legislative Decree of 25 May 2016, no 97 (modifying and simplifying dispositions on corruption prevention, openness and transparency), whose explanatory memorandum explicitly quoted Italy's ranking in the CPI: see Relazione illustrativa, available at https://tinyurl.com/yangrjx5 (last visited 27 December 2020).

[83] Transcript no 82 of 23 January 2019 (Bonafede), author's translation.

Convention on Action against Trafficking in Human Beings, Italy adopted several laws regarding the criminalization of human trafficking and the protection of trafficked victims.[84] Yet, neither the official explanatory memoranda accompanying such legislation, nor the parliamentary debate about them ever mention the US Department of State's TiP reports.[85]

Such limited attention devoted to TiP Reports seems to be confirmed by judicial practice and legal scholarship. Judicial databases only report one tribunal's decision-making reference to (only) the TiP reports in the context of judicial review of an asylum commission's denial of the status of refugee, in order to support the conclusion that the applicant's country of origin was unsafe.[86] As in the case of the FiW, instances of judicial use of the TiP reports can also be found before the ECtHR, which has, for instance, referred to the TiP findings, in combination with other data sources, to assess the legality of Italy's push-back policies on illegal immigrants[87] and the appropriateness of the protection provided by Croatia and Austria to victims of human trafficking.[88] As to scholars, citations of the TiP reports sometimes recur in Italian literature on migration law, prostitution and crimes against women, in which authors praise the TiP reports for the 'extensive research and expert opinions'[89] on which they are (allegedly) based and for the 'level of detail of the information they provide'.[90]

[84] See for instance the Law of 11 August 2003, no 228 (on measures against human trafficking), the Law of 16 March 2006, no 146 (ratifying the UN Convention and Protocols against transnational organized crime of 2000), the Law of 2 July 2010, no 108 (ratifying the Council of Europe's Convention on Action against Trafficking in Human Beings of 2005) and the Legislative Decree of 4 March 2014, no 24 (implementing the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims).

[85] This is curious, considering the TiP have been covered by media (and that the case of the CPI seems to suggest that media coverage goes hand in hand with attention in the political debate): see A. La Mattina and P. Mastrolilli, 'Gli Usa all'Italia: "Fate troppo poco contro i trafficanti"', *La Stampa*, 4 July 2019, available at https://tinyurl.com/y7jf8alk (last visited 27 December 2020); Undisclosed author, 'Migranti, Usa declassano l'Italia: "Meno arresti e indagini, Roma fa poco contro traffico di esseri umani"', *Il Fatto Quotidiano*, 20 June 2019, available at https://tinyurl.com/yble7zaj (last visited 27 December 2020); P. Bricco, 'La silenziosa lotta alla schiavitù di strada di suor Rita, Sorella Africa', *Il Sole24Ore,* 23 July 2018, available at https://tinyurl.com/y7lul2ns (last visited 27 December 2020); F. Polese, 'Rohingya, senza diritti e protezione. Ecco gli ultimi della terra', *Corriere della Sera*, 11 March 2015, available at https://tinyurl.com/y8xswz2c (last visited 27 December 2020).

[86] Tribunal of Bologna, 17 July 2019.

[87] Eur. Court H.R. (GC), *Hirsi Jamaa and Others* v *Italy*, App no 27765/09, concurring opinion of Judge Pinto de Albuquerque, fn 37 (on the TiP's findings about Italy).

[88] Eur. Court H.R., *S.M.* v *Croatia*, Judgment of 19 July 2018, App no 60561/14, § 45; Eur. Court H.R., *J. and Others* v *Austria*, Judgment of 17 January 2017, App no 58216/12, Concurring Opinion of Judge Pinto De Albuquerque, joined by Judge Tsotsoria, fn 178 (on the TiP's findings about Austria).

[89] G. Campani and T. Chiappelli, 'Trafficking and Women's Migration in the Global Context', in F. Anthias, M. Kontos, M. Morokvasic-Müller eds, *Paradoxes of Integration: Female Migrants in Europe* (Cham: Springer, 2013), 173.

[90] V. Biscotti and M. Tenca, *La tutela della vittima del reato* (Padua: Primiceri Editore, 2018), 85. See also, in equally uncritical terms, F. Resta, *Vecchie e nuove schiavitù* (Milano: Giuffrè, 2008),

Before concluding that TiP reports have had little impact on the Italian legal system, however, one should consider that the tier-grouping and the suggestions elaborated by the U.S. Department of State appear in the information webpage of the Parliamentary Bi-Cameral Anti-Mafia Commission,[91] in the National Anti-Mafia and Anti-Terrorism Authority's yearly reports about its activity,[92] in the Ministry of Interior's guidelines to Prefects about how to educate operators and civil society about human trafficking,[93] in the Ministry of Labour and Social Policies' annual reports on unaccompanied migrant minors,[94] and in the National Asylum Commission's explanations for the list of foreign countries of origins presumed to be safe.[95] In these documents, the quotation of the TiP reports is generally accompanied by the reference to other global reports, and above all to the Global Report on Trafficking in Persons yearly published by the United Nations Office on Drugs and Crime (UNODC).[96] While the TiP reports are rarely the only source of evidence and inspiration for administrative guidelines and policies, they undoubtedly contribute to the development of the vocabulary and informative background for public action. Interestingly this is mirrored in the private sector by the many references to the TiP reports that emerge from union syndicates' and NGOs' working documents and pamphlets promoting the cause of protection of migrant workers and victims of sexual exploitation.[97] It goes without saying that neither public

199; A. Annoni, 'L'attuazione dell'obbligo internazionale di reprimere la tratta degli esseri umani', in *Rivista di diritto internazionale*, 2006, 405, fn 2. Non-legal scholarship has been more critical: see D. Pangerc, 'Migrazioni illegali e traffico di esseri umani: le rotte balcaniche – il caso Bosnia', Università degli Studi di Bergamo, Scuola di dottorato in Antropologia ed Epistemologia della Complessità, a.y. 2009/2010, available at https://tinyurl.com/ybeay5ah (last visited 27 December 2020), 212-215; see also D. Pangerc, *Il traffico degli invisibili. Migrazioni illegali lungo le rotte balcaniche* (Catania: Bonanno, 2012).

[91] Parliamentary Bi-Cameral Anti-Mafia Commission, 'Traffico esseri umani e nuove schiavitù' (undated), available at https://tinyurl.com/y8y25q7j (last visited 27 December 2020).

[92] National Anti-Mafia and Anti-Terrorism Authority, 'Annual Report' (period 1 July 2015-30 June 2016), available at https://tinyurl.com/y7wf43ep (last visited 27 December 2020), 357-359.

[93] Ministry of the Interior, Department for civil liberties and immigration, 'Communication of 31 August 2007', available at https://tinyurl.com/y9o6wllj (last visited 27 December 2020), 13.

[94] Ministry of Labor and Social Policies, General Directorate for Immigration and Integration Policies, 'Report di Monitoraggio. I minori stranieri non accompagnati (MSNA) in Italia', 31 December 2019, available at https://tinyurl.com/ybxp2jkn (last visited 27 December 2020), 42 (on Serbia).

[95] National Asylum Commission, 'List of Safe Countries of Origin', 31 October 2019, available at https://tinyurl.com/ybspxdpu (TiP quoted for Ghana) (last visited 27 December 2020).

[96] https://tinyurl.com/y7b4osl5 (last visited 27 December 2020).

[97] See for instance B. O'Neill and A. Vicini, 'La tratta delle persone e la dignità del lavoro', available at *www.laciviltacattolica.it*, (last visited 27 December 2020), 455-466; Osservatorio interventi tratta, 'Dipartimento di Stato degli Stati Uniti d'America – Rapporto sulla tratta di esseri umani 2019', 24 September 2019, available at https://tinyurl.com/ybae8u6l (last visited 27 December 2020); Si.Cobas, 'Il decreto-Salvini bis è un attacco frontale alle lotte. E dà il via libera alle aggressioni poliziesche, padronali e fasciste. A quando la risposta che merita?', 27 June 2019, available at https://tinyurl.com/ydxhpxa3 (last visited 27 December 2020); Centro Studi GruppoAbele, 'Prostituzione e tratta delle persone', January 2019, available at https://tinyurl.com/y8jznamx (last

administration documents, nor private ones, ever acknowledge that the TiP reports are the unilateral and highly politicized by-product of the US federal department responsible for carrying out US foreign policy. Quite the contrary, in these documents the TiP reports are rather depicted as a neutral and reliable resource for information and technical analysis of both human trafficking data and states' performances in fighting trafficking.

4. The Doing Business Reports

Much more evident has been the transformative impact of the DB reports, which have rapidly become authoritative in Italian academic and political circles, prompting the enactment of several reforms and a deep restructuring of rules on business registration, security rights, competition, public procurement, administrative supervision of enterprises, and civil procedure.[98] As we will see, although there are no decisions quoting the DB reports, the latter played an indirect role in the management and organization of courts.

Let us start with legal scholarship. The DB reports have attracted considerable attention by Italian legal scholars in a variety of different areas, mostly concerning civil procedure and administrative law, but also including labour law and company law.[99] While the majority of such scholarship relies on the DB reports

visited 27 December 2020); ActionAid, 'Mondi connessi. La migrazione femminile dalla Nigeria all'Italia e la sorte delle donne rimpatriate', June 2018, available at https://tinyurl.com/ydbbvwnb (last visited 27 December 2020), 23; Caritas, 'Lavoro dignitoso per tutti. Dossier con documentazioni e testimonianze', no 4, May 2015, 25-26; Human Rights Watch, 'Italia/Libia. Scacciati e Schiacciati', September 2009, available at https://tinyurl.com/y6whmex9 (last visited 27 December 2020), 17; A. Pozzi and E. Bonetti, *Schiave: trafficate, vendute, prostituite, usate, gettate: donne* (Milano: San Paolo, 2010), 39; Gioventù per i diritti umani, 'Sensibilizzazione sulla tratta degli esseri umani', undated, available at https://tinyurl.com/y7ptnol3 (last visited 27 December 2020).

[98] The academic and political attention devoted to the DB reports has corresponded the attention devoted to the same reports by media: see, with regard to the latest edition of the DB, F. Sabahi, 'Uzbekistan-Italia: "Una partnership strategica lungo la via della Seta"', *Corriere della sera*, 13 February 2020, available at https://tinyurl.com/y855mbhw (last visited 27 December 2020); C. Arena, 'L'Africa continua a crescere: nel 2020 il Pil salirà del 4%', *L'Avvenire*, 31 January 2020, available at https://tinyurl.com/ya68mgas (last visited 27 December 2020); F. Gambarini, 'Le imprese italiane? Pagano quasi il doppio delle tasse rispetto ai giganti del web', *Corriere della Sera*, 4 January 2020, available at https://tinyurl.com/ya7xefvn (last visited 27 December 2020); Infodata, 'Imprenditori, la Cina nella top 10. Chi sono i nuovi miliardari?', *Il Sole24ore*, 1 January 2020, available at https://tinyurl.com/yarqzok7 (last visited 27 December 2020); Unnamed author, 'Anche il World Bank Group certifica il fallimento gialloverde', *Il Foglio*, 25 October 2019, available at https://tinyurl.com/y8tc37ub (last visited 27 December 2020).

[99] As to civil procedure, cf R. Caponi, 'Doing Business' n 18 above; P. Biavati, 'Le categorie del processo civile alla luce del diritto europeo' *Rivista trimestrale del diritto e procedura civile*, 1323, fns 23 and 28 (2018) (hereinafter Biavati, 'Le categorie'); V. Mirra, 'Il nuovo sistema ADR in ambito Consob: l'Arbitro per le Controversie Finanziarie, tra alte aspettative e primi riscontri operativi' *Rivista dell'arbitrato*, 615, fn 7 (2018); G. Alpa, 'Arbitration and ADR Reforms in Italy' *Diritto del commercio internazionale*, 259-270 (2017) (hereinafter Alpa, 'Arbitration'); Id, 'Commissione di studio per l'elaborazione di una organica disciplina volta alla « degiurisdizionalizzazione »' *Rivista trimestrale del diritto e procedura civile*, 793-813 (2017) (hereinafter Alpa, 'Commissione'); V. Mirra, 'I sistemi di Alternative Dispute Resolution trovano nuovo vigore: il recepimento della

as a source for information or as fact, a minority of legal scholars has either taken a cautiously critical stance against the DB reports or has explicitly focused on unveiling the biases and fallacies affecting the underlying methodology.[100]

The strongest effect of the DB reports has however taken the form of statutory reforms. In parliamentary debates, there is no mention of the DB reports in the Senate's transcripts until 2009. From that year onwards, the visibility of the DB rankings in discussions at the Senate has risen exponentially. Between 2009 and 2019, forty-nine (either individual or collective) interventions at the Senate have mentioned the DB reports (often in combination with other international quantitative sources, such as the OECD statistics on economic

Direttiva ADR e l'introduzione del nuovo "Arbitro per le Controversie Finanziarie"' *Rivista dell'arbitrato*, 693, fn 6 (2016); P. Biavati, 'Note sullo schema di disegno di legge delega di riforma del processo civile' *Rivista trimestrale del diritto e procedura civile*, 209, fns 4 and 5 (2015) (hereinafter Biavati, 'Note'); R. Caponi, 'Doing business' n 18 above; S. Lucattini, *Modelli di giustizia per i mercati* (Torino: Giappichelli, 2013), 40-41; L. Panzani, 'Le sezioni specializzate in materia d'impresa' *Giurisprudenza di merito*, 1785B-1794B (2012). As to administrative law, cf N. Rangone, 'Semplificazione ed effettività dei controlli sulle imprese' *Rivista trimestrale di diritto pubblico*, 882, fn 14 (2019); F. Costantino, 'Lampi. Nuove frontiere delle decisioni amministrative tra open e big data' *Diritto Amministrativo*, 799, fn 6 (2017); G. Napolitano, 'The Transformation of Comparative Administrative Laws' *Rivista trimestrale di diritto pubblico*, 997 (2017) (hereinafter 'The Transformation'); F. Costantino, 'Semplificazione e lotta alla corruzione nella Legge 241 del 1990' *Diritto Amministrativo*, 623, fns 44-53 (2016); M. Pilade Chiti, 'Evoluzioni dell'economia e riassetto delle giurisdizioni' *Rivista italiana di diritto pubblico comunitario*, 713, § 3.2 (2015); F. Basilica and F. Barazzon, *Diritto amministrativo e politiche di semplificazione* (Rimini: Maggioli, 2nd ed, 2014), 151-152; M. Clarich, 'Profili giuridici della "sicurezza economica" nell'età della crisi' *Giurisprudenza commerciale*, 346 (2012); G. Napolitano, 'I grandi sistemi del diritto amministrativo', in Id ed, *Diritto amministrativo comparato* (Milano: Giuffrè, 2007), 1, 54 (hereinafter 'I grandi sistemi'). As to labor law, cf V. Brino and A. Perulli, *Manuale di diritto internazionale del lavoro* (Torino: Giappichelli, 2nd ed, 2015), 3; C. De Martino, 'La dimensione dell'impresa nella disciplina dei licenziamenti individuali' *Rivista italiana di diritto del lavoro*, 652, fn 13 (2014); M. Tiraboschi, 'La disoccupazione giovanile in tempo di crisi: un monito all'Europa (continentale) per rifondare il diritto del lavoro?' *Diritto delle relazioni industriali*, 414-438 (2012); as to company law, cf L. Enriques and M. Gargantini, n 18 above; M. Cian, 'S.r.l., s.r.l. semplificata, s.r.l. a capitale ridotto. Una nuova geometria del sistema o un sistema disarticolato?' *Rivista delle società*, 1101, fn 3 (2012); P. Santella, 'La società privata europea', in G. Ferri jr and M. Stella Richter jr eds, *Profili attuali di diritto societario europeo* (Milano: Giuffrè, 2010), 290, 317-318; L. Enriques, 'Capitale sociale, informazione contabile e sistema del netto: una risposta a Francesco Denozza' *Giurisprudenza commerciale*, 607 (2005). See also C. Licini and G. Liotta, 'Utilità macroeconomica (ma non solo) dell'istituzione notariato' *Rivista del notariato*, 117-142 (2017); D. Siclari, 'European Capital Markets Union e ordinamento nazionale' *Banca, borsa e titoli di credito*, 481, fn 81 (2016); C. Licini, 'Utilità macroeconomica dell'istituzione-notariato. "Il valore netto dell'intervento notarile per l'intero sistema è superiore a zero"' *Rivista del notariato*, 1-12 (2015).

[100] See in particular, as to civil procedure, R. Caponi, 'Doing Business' n 18 above; P. Biavati, 'Le categorie' n 99 above; Id, 'Note' n 99 above; G. Alpa, 'Arbitration' n 99 above; Id, 'Commissione' n 99 above; R. Caponi, 'Doing business' n 18 above; in the field of administrative law, G. Napolitano, 'The Transformation' n 99 above; Id, 'I grandi sistemi' n 99 above; M. Clarich, n 99 above; as to labor law, V. Brino and A. Perulli, n 99 above; C. De Martino, n 99 above; on company law, L. Enriques and M. Gargantini, n 18 above; see also C. Licini and G. Liotta, n 99 above; C. Licini, n 99 above.

performance[101] and the World Economic Forum's Global Competitiveness Report),[102] with a peak of ten references both in 2012 and in 2014.[103] As in the case of CPI, the rationale and context of such citations vary; the most interesting references for our purposes are those made by government representatives to praise their own work or to set out their agenda, and those put forward to promote proposed statutory reforms.

As to the self-congratulatory statements, one can find a Minister of Justice reminding the Senate that

> 'the newly established rules electronic civil trials have produced a significant improvement of civil justice. It is not only me who says so. It is the Doing Business Report which says so, making Italy jump thirteen positions up as compared to last year'.[104]

Setting the government's agenda in light of the DB reports led a Prime Minister to state that

> 'we want to realize as soon as possible a reform of public management, in order to strengthen the competence of and incentives for an efficient administration. (…) This is the big goal we have to pursue. According to the latest Doing Business Report, Italy ranks 138th on fiscal complications'.[105]

[101] See https://tinyurl.com/y73abzyz (last visited 27 December 2020).

[102] See https://tinyurl.com/sbwsxjo (last visited 27 December 2020).

[103] These are the results of the search on the Italian Senate's website, between 2001-2020, with the keyword 'Doing Business': Transcript no 110 of 18 April 2019 (Bernini et alii); Transcript no 816 of 3 May 2017 (Buccarella); Transcript no 742 of 18 January 2017 (Buccarella), (Orlando), (Stefani et alii), (Giarrusso et alii); Transcript no 615 of 27 April 2016 (Comaroli et alii); Transcript no 616 of 27 April 2016 (Comaroli et alii); Transcript no 564 of 21 January 2016 (Albertini), (Orlando); Transcript no 496 of 3 August 2015 (Scalia); Transcript no 425 of 8 April 2015 (Torrisi); Transcript no 379 of 20 January 2015 (Stefani et alii); Transcript no 378 of 19 January 2015 (Stefani), (Stefani et alii); Transcript no 364 of 3 December 2014 (Munerato et alii); Transcript no 344 of 30 October 2014 (Lucherini et alii); Transcript no 333 of 16 October 2014 (Ginetti); Transcript no 291 of 24 July 2014 (Galimberti); Transcript no 219 of 1 April 2014 (Stefani); Transcript no 197 of 24 February 2014 (Renzi), (Fucksia); Transcript no 195 of 19 February 2014 (Giacobbe); Transcript no 172 of 22 January 2014 (Mattesini et alii); Transcript no 171 of 21 January 2014 (Buemi); Transcript no 150 of 11 December 2013 (Letta); Transcript no 62 of 9 July 2013 (Casellati); Transcript no 833 of 8 November 2012 (Passera); Transcript no 815 of 17 October 2012 (Patroni Griffi); Transcript no 786 of 3 August 2012 (Bubbico et alii); Transcript no 764 of 12 July 2012 (Perduca et alii); Transcript no 701 of 28 March 2012 (Del Pennino); Transcript no 693 of 15 March 2012 (Mazzatorta); Transcript no 674 of 14 February 2012 (D'Alia et alii); Transcript no 672 of 8 Feburary 2012 (Poretti); Transcript no 658 of 18 January 2012 (Bonino et alii); Transcript no 657 of 17 January 2012 (Severino di Benedetto), (Bonino et alii); Transcript no 488 of 19 January 2011 (Saia); Transcript no 487 of 18 January 2011 (Bugnano); Transcript no 468 of 6 December 2010 (Della Monica); Transcript no 317 of 20 January 2010 (Alfano); Transcript no 317 of 20 January 2010 (Galperti); Transcript no 216 of 26 May 2009 (Peterlini); Transcript no 215 of 26 May 2009 (D'Ambrosio).

[104] Transcript no 564 of 21 January 2016 (Orlando) (author's translation).

[105] Transcript no 150 of 31 December 2013 (Letta) (author's translation).

A year later, another Prime Minister put the same goal in a different way:

> '[t]he national interest of this country is to improve its position in international rankings. (…) We rank 126th in the Doing Business Index of the World Bank. This leads us to be perceived by foreigners only as a wonderful place to go to on holiday. But is there a country potentially more attractive than us? Is there any other country where one can enjoy a high quality of life and at the same time benefit from the genius, creativity and innovation of workers of all genders?'.[106]

References to the DB reports in the context of supporting or criticizing proposals for statutory reforms are even more abundant. The DB reports are, for instance, quoted in the parliamentary debates on approval of the Law of 18 June 2009, no 69 (on economic development, simplification, competitiveness and civil procedure),[107] of the Law of 4 April 2012, no 35 (converting into law the law-decree of 9 February 2012, no 5, on simplification and development),[108] of the already mentioned Law of 6 November 2012, no 190 (on fighting corruption),[109] of the Law of 21 February 2014, no 9 (converting into law the law-decree of 23 December 2013, no 145, on the 'Destination Italy' plan and on the internationalisation, the development and the digitalisation of enterprises),[110] and of the Law of 4 August 2017, no 124 (an act for market and competition).[111]

To the above list of statutory enactments somehow related to the DB reports, one should add the acts as regard to which the inspirational or aspirational value played by the reports is not evident from parliamentary debates, and yet clearly emerge from the explanatory memoranda accompanying the acts. For instance, the explanatory memorandum of the President of the Republic's Decree of 13 March 2013, no 59 (establishing a unified environmental authorization and simplifying the administrative process in the environmental sector for small and medium-sized enterprises) states that the introduction of a unified environmental authorization and the reduction of the administrative burdens in the environmental field are meant 'to contribute to the improvement of Italy's competitiveness and attractiveness for investment and to overcome some of the obstacles in doing business that justify our country's 87th place in the Doing Business ranking'.[112] A similar explanation is to be found in the explanatory

[106] Transcript no 197 of 24 February 2014 (Renzi) (author's translation).

[107] Transcript no 216 of 26 May 2009 (Peterlini); Transcript no 215 of 26 May 2009 (D'Ambrosio).

[108] Transcript no 701 of 28 March 2012 (Del Pennino).

[109] Transcript no 815 of 17 October 2012 (Patroni Griffi).

[110] Transcript no 195 of 19 February 2014 (Giacobbe).

[111] Transcript no 816 of 3 May 2017 (Buccarella).

[112] Explanatory memorandum of the President of the Republic's Decree of 13 March 2013, no 59, available at https://tinyurl.com/ybcxlnr6 (last visited 27 December 2020), sub 'article 9' and sub 'section VI'.

memorandum of the Law of 24 March 2012, no 27 (converting into law the law-decree of 24 January 2012, no 1, on competition, infrastructures development and competitiveness), which, *inter alia*, established the ordinary tribunals specialized section for merchants' disputes,[113] as well as in the explanatory memorandum of the Law of 10 November 2014, no 162 (converting into law the law-decree of 12 September 2014, no 132, adopting measures for alleviating the workload of the courts and reducing caseload pendency), which tried to facilitate the transfer of cases from courts to arbitral tribunals and the use of alternate dispute resolution mechanisms before judges[114] – all in conformity with the DB reports' suggestions. Finally, the reference to the need of aligning Italy with the 'most recent development in (…) the international domain (such as those suggested by UNCITRAL)',[115] contained in the explanatory memorandum of the Law of 30 June 2016, no 119 (converting into law the law-decree of 3 May 2016, no 59, on individual and collective enforcement procedures), which introduced in the Italian legal system non-possessory security rights for merchants, might very well include an implicit allusion to the DB reports as well.[116]

The overview of the reforms prompted by the DB reports would not be complete without considering how the reports have affected government political action. For instance, in the 'Plan for simplification' adopted in 2007, the government expressed the intention of

> 'establishing a path of measurable actions (…) converging to a unified and strategic goal, whose attainment could be easily measured. Our strategic goal is, inasmuch as enterprises are concerned, the improvement of the country's international competitiveness; its attainment will be assessed by the country's substantial improvement in international rankings (for instance, the 'Doing Business' reports of the World Bank)'.[117]

In 2012, the government initiated the setting up of a permanent roundtable on 'Doing Business: Regulatory Profiles', under the guidance of Professor Andrea Zoppini, which should have provided a forum for dialogue and exchange between the government and the public officials and lawyers involved in answering the

[113] Explanatory memorandum of the Law of 24 March 2012, no 27, available at https://tinyurl.com/ycss842z (last visited 27 December 2020).

[114] Explanatory memorandum of the Law of 10 November 2014, no 162, available at https://tinyurl.com/y7pe8482 (last visited 27 December 2020).

[115] Explanatory memorandum of the Law of 30 June 2016, no 119, available at https://tinyurl.com/y8p7g7x5 (last visited 27 December 2020). The United Nations Commission on International Trade Law (UNCITRAL) has notoriously promoted the establishment of non-possessory security rights: see for instance UNCITRAL Legislative Guide on Secured Transactions of 2010, available at https://tinyurl.com/ycgpfpat (last visited 27 December 2020).

[116] D. Siclari, n 99 above, fn 81.

[117] Presidency of the Council of Ministers, 'Action plan for simplifying and enhancing the quality of regulation', 20 July 2007, available at https://tinyurl.com/y834y785 (last visited 27 December 2020), 10.

World Bank's questionnaire, with the aim of making Italian law better understood by the World Bank.[118] The project, however, was soon discontinued. In 2016, the then Minister of Justice conferred to a Commission, directed by Professor Guido Alpa, the task of drafting a proposal for the reform of arbitration and alternate dispute resolution mechanisms, in order to promote Italy's ranking in the DB category, 'enforcing contracts'[119] (it should be noted that the DB equates contract institutions with the existence and effectiveness of mechanisms to enforce promises, with the result that the quality of contract law is measured in terms of the duration and cost of enforcing promises before courts[120]). In line with the government's request and the DB reports' prescriptions, the Commission issued a series of proposals favouring quasi-judicial dispute resolution processes, but also took quite a critical stance against the reports. According to the Commission's proposals,

> '[t]he DB's positions and judgments should be taken with caution: for instance, the 2015 report states that the Democratic Republic of Congo is a country respecting parties' freedom of contract to the greatest extent, essentially without any limit; yet, it is easy to counterargue that the limits to freedom of contract we have in Italy, which are tied to the protection of public order and fundamental rights and to the need of fighting crime, tax evasion and money laundering, are more than justified even though they imply a cost for business'.[121]

As many of the above statutory measures and governmental actions show, one of the main concerns raised by the DB reports in Italy has always been the excessive length of civil proceedings and the efficiency of civil justice, also because these aspects were already perceived as being highly problematic both inside and outside the country.[122] Italy's low score in the DB category on 'enforcing

[118] See Communication of the Justice under-secretary Andrea Zoppini about the establishment before the Ministry of Justice of a permanent roundtable on «Doing business: regulatory profiles», 2nd Justice Commission, Transcript no 17 of 17 April 2012, available at https://tinyurl.com/ybef3usv (last visited 27 December 2020).

[119] Decree of the Ministry of Justice of 7 March 2016 on the establishment of a Commission for the reform of arbitration and alternative dispute resolution mechanims, available at https://tinyurl.com/y8eopzya (last visited 27 December 2020).

[120] For such an explanation (and its critique), see M. Parglender, 'Comparative Contract Law and Development: The Missing Link?' 85 *George Washington Law Review,* 1717, 1719-1720 (2017).

[121] Ministry of Justice, 'Commission for the reform of arbitration and alternative dispute resolution mechanisms' (under the Presidency of Prof. G. Alpa), Regulatory Proposal and Explanatory Notes, 2017, available at https://tinyurl.com/y7233vxm (last visited 27 December 2020).

[122] At the domestical level, the history of Italian civil procedure has always been intertwined with critical complaints and proposals for reform: see V. Ansanelli, *Contributo allo studio della trattazione nella storia del processo civile italiano: 1815-1942* (Torino: Giappichelli, 2017), 17-30; B. Sassani, 'Il codice di procedura civile e il mito della riforma perenne' *Rivista di diritto processuale*, 1429-1449 (2012); F. Cipriani, 'Il processo civile in Italia dal codice napoleonico al 1942' *Rivista di diritto civile*, 67-88 (1996); M. Taruffo, *La giustizia civile in Italia dal '700 ad oggi*

contracts' has, thus, not only fuelled scholarly debates and made room for legislative interventions,[123] but also provided the judiciary with further occasions for reflection on the courts' own way of working. It is not by chance that data from the DB reports figure, alongside the statistics provided by the '*Commission européenne pour l'efficacité de la justice*' (CEPEJ), in almost every report of the First President of the Court of Cassation on the occasion of the opening of the Italian judicial year, as the starting point for assessing Italian courts' past performances and for setting future goals.[124] In the eyes of the First President(s) of the Court of Cassation, there is clearly little difference between the cautiously crafted CEPEJ data and the biased outcomes conveyed by the DB reports.

The only sector in which the DB has passed largely unobserved is litigation itself, with only one curious exception. Electronic databases report a decision by the Plenary of the highest administrative court – the Italian Council of State – making reference to the DB in the context of a request for judicial review of the award of a public contract. The Plenary of the Council of State was in particular asked to decide whether, in dealing with the challenges raised by the losing party against the award, the administrative tribunal was bound to follow the order of the challenges adopted by the applicant. In answering the question, the Council of State in 2015 noted that

> 'a widespread view maintains that, in determining the order of analysis of the claims, the court should take into the utmost account the satisfaction of the applicant's interests, especially when the latter is an entrepreneur. Such a view aims to protect the supranational and national principles of freedom of economic activity and fair competition, and suggests considering these principles as the (only or dominant) parameters for the regulation and management of the judicial process, along the lines of the yearly Doing

(il Mulino: Bologna, 1980), especially, 151-193. From an outer perspective, Italy has been chastised a number of times by the Eur. Court H.R. for the lengthiness of domestic civil proceedings: see the decisions against Italy cited by the Eur. Court H.R., Guide on Article 6 of the Convention – Right to a fair trial (civil limb), 31 August 2019, available at https://tinyurl.com/yb7unda6 (last visited 27 December 2020), 79-85. See also Italy's bad performance as to the disposition time of civil and commercial proceedings in the latest edition of the statistics collected by the Commission européenne pour l'efficacité de la justice (CEPEJ) under the Council of Europe: CEPEJ, European judicial systems Efficiency and quality of justice. CEPEJ Studies No 26, 2018 Edition (2016 data), available at https://tinyurl.com/y6v4jgtr (last visited 27 December 2020), 245-271.

[123] See the legal scholarship quoted at n 99 above and the legal reforms mentioned at n 113 and 114 above.

[124] See for instance G. Mammone, 'Relazione sull'amministrazione della giustizia nell'anno 2018', 25 January 2019, available at https://tinyurl.com/y9tk8n92 (last visited 27 December 2020), 20-21; G. Canzio, 'Relazione del primo presidente della Corte di Cassazione per l'apertura dell'anno giudiziario' *Cassazione penale*, 454B (2017); E. Lupo, 'Relazione sull'amministrazione della giustizia nell'anno 2011' *Giustizia civile*, 321 (2012); V. Carbone, 'Relazione sull'amministrazione della giustizia nell'anno 2009' *Giustizia civile*, 335 (2010); V. Carbone, 'Relazione sull'amministrazione della giustizia nell'anno 2008' *Giustizia civile*, 181 (2009); V. Carbone, 'Relazione sull'amministrazione della giustizia nell'anno 2007' *Giustizia civile*, 109 (2008).

> Business Reports of the World Bank (…) that since 2003 publishes indicators of national justice systems' performances. An uncritical adhesion to such an opinion, however, (…) would place excessive emphasis on economic indicators in the interpretation of procedural rules and would result in a reading of such rules as being too subservient to economic policy goals. (…) Viewing the administrative judicial process as a conflict between 'a private claimant versus the public administration' or 'a private interest versus the public interest', fails to consider that the administrative judicial process is meant to serve the general interest of civil society for the fair management of public affairs and of administrative procedure, also considering the latter's costs for the collectivity (…) In conclusion, it should be held that (…) it is for the administrative judge to determine the order of examination of the plaintiff's claims'.[125]

The highest judicial authority in administrative matters thus expressed its hostility for the business-oriented view embraced by the DB reports, rightly pointing out that the reports fail to consider the role played in the economy by administrative justice and by administrative law in general.[126] Yet, as the above illustrations about the pervasiveness of the DB reports in the legal literature, political debates and ordinary courts' self-reflection about their activity, such a critical stance has largely remained a cry in the dark.

VI. Preliminary Conclusions and Further Directions

In spite of its methodological limitations, the above research allows us to draw some preliminary conclusions.

First of all, the survey shows that the four selected global indicators herein analysed have had an impact on the Italian legal system. The FiW reports have become a primary source of information for local asylum commissions' and courts' assessments of the safety of countries of origin in the immigration context.[127] The CPI and the DB reports have provided a quantitative basis in support of legal reforms in the fields of public administration, criminal law, business law and civil procedure.[128] Less evident is the legal impact of the TiP reports, which however have played a role in shaping (the advocacy work of union and NGOs, and) administrative measures and practices in the immigration

[125] Consiglio di Stato 27 April 2015 no 5, § 9.2.

[126] Cf, along the same lines, N. Garoupa, C. Gómez Ligüerre, L. Mélon, n 14 above, 59-90; N. Garoupa and C. Gomez Ligüerre, n 14 above, 304-331; T. Krever, n 1 above, 134; S. Schueth, n 16 above, 59; D. Sokol, 'Competition Policy and Comparative Corporate Governance of State Owned Enterprises' 6 *Brigham Young University Law Review,* 1713, 1753-1800 (2009).

[127] See above, section V.1.

[128] See above, section V.2 and V.4.

and criminal sector.[129]

A second research outcome is that the effect of global legal indicators is much varied. The empirical evidence provided in the scanty literature about the transformative changes promoted by these indicators has already documented, although fragmentarily, that indicators can frame political expectations and drive reform agendas.[130] The impact of the CPI and the DB reports in Italy fully confirms this. However, the case of the FiW and TiP reports also show that global legal indicators might have more nuanced and unexpected results. Italian administrative and judicial bodies in the context of immigration routinely resort to the FiW and TiP reports as sources for user-friendly and updated data about, and as evidence of, the political conditions and human rights performances of foreign countries. The FiW and TiP reports' influence on the Italian legal system is thus indirect; yet, the evidentiary use of the FiW and TiP reports by asylum commissions and courts has a direct impact on applicants' lives.

Thirdly, the research also demonstrates that global indicators rarely operate in isolation and most often concur with other hard and soft law instruments in support of given arguments, approaches and reforms. We saw for instance that the FiW's focus on civil and political rights largely mirrors the contents of the UN ICCPR; further, the FiW reports are often quoted by asylum commissions and courts in combination with other similarly themed sources, such as those provided by the UNHCR and the EASO.[131] The CPI is the quantitative predecessor of a plethora of global and regional international treaties obliging signatory states to strengthen the criminal penalty for petty corruption in the public sector.[132] The TiP reports have developed in parallel with the multiplication of global and regional international conventions and measures on human trafficking, and their results are often associated with those offered by other data-providers in the field, such as the UNODC.[133] Even the DB reports, which under many points of view are an original product of the World Bank, have gained traction thanks to their alignment and combination with other initiatives – such as the OECD statistics, CEPEJ's results, and UNCITRAL's suggestions.[134]

All this calls for further research. Instances of the legal impact of indicators might be searched on a wider range of documents, including, for instance, materials from independent agencies and local authorities. The textual enquiry might be complemented by non-textual tools of inquiry (such as surveys and interviews) in order to test the undocumented effects of indicators, if any, on people's expectations, ways of thinking, practices and behaviours. More can be done to understand the varied outcomes of global legal indicators and the reasons

[129] See above, section V.3.
[130] n 16 above.
[131] See above, section V.1.
[132] See above, section V.2.
[133] See above, section V.3.
[134] See above, section V.4.

why some of them are able to penetrate the legal domain more deeply than others. It would also be interesting to take into account the transformative changes associated with indicators other than the four herein considered, as well as to enlarge the study to other countries, examining how different jurisdictions have reacted to the rise of global quantitative instruments. On a more theoretical level, empirical findings might help in understanding whether indicators could be classified as a source of global soft law and with what consequences in terms of their legitimacy, review and accountability. As this sketchy list makes it clear, the directions of possible research engagements with global legal indicators is wide; I hope this paper acts as a stimulus for further research in this area.

Hard Cases

Airbnb Ireland Case: One More Piece in the Complex Puzzle Built by the CJEU Around Digital Platforms and the Concept of Information Society Service

Jorge Morais Carvalho*

Abstract

In the Airbnb Ireland case the Court of Justice of the European Union (CJEU) is again called upon to rule on the concept of information society service, applying the test defined in the Uber Spain and Uber France cases. The CJEU concludes that Airbnb has neither created a new market nor exercises a decisive influence on the hosts, conclusions with which we disagree. The aim of this article is precisely to critically examine this judgment. The near future is also envisaged through an analysis of the Opinion of the Advocate General in the Star Taxi App case.

I. Introduction

The Airbnb Ireland judgement[1] comes in the context of a series of rulings of the Court of Justice of the European Union (CJEU) on the regulation of digital platforms, in particular on the question whether a platform lawfully operating in one Member State can automatically operate in another Member State or whether it can be subject to authorisation and operating requirements.

The Airbnb Ireland case is about a French legislation (Hoguet Act), which imposes a professional licence to carry out or support, even if in an ancillary capacity, among others, transactions on third party assets relating to the exchange, rental or sublease, seasonal or not, of empty or furnished buildings. According to the French authorities, this requirement applies to Airbnb. The case before the French courts eventually reached the Court of Justice of the European Union (CJEU), with Airbnb Ireland arguing that the imposition of a professional licence is contrary to European law, particularly in view of the principle of freedom of movement for information society services enshrined in Art 3 of Directive 2000/31/EC.[2]

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[1] Case C-390/18 *Airbnb Ireland*, [2019] EU:C:2019:1112.

[2] European Parliament and Council Directive 2000/31/EC of the of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal

The CJEU had already been called upon to rule on this issue in the Uber Spain[3] and Uber France[4] cases, which have now essentially set a course (and have been supplemented) in the Airbnb case. In the meantime, AG Szpunar, who was also responsible for the previous cases, has already delivered his Opinion in the Star Taxi App case,[5] allowing us to reflect on future developments in the matter. We will also refer to the Cali Apartments case,[6] although this case does not concern the digital platform itself, but the accommodation activity and the requirements relating to it.

One of the main criticisms that could be levelled at the CJEU is precisely that the decisions delivered in these cases could indirectly affect users' rights in the contractual relationship they establish with the platform. For instance, the exclusion from the scope of Directive 2000/31/EC may have the effect of allowing Member States to set more easily limits on the exercise of the activity in question, as in the Uber Spain and Uber France cases, but may radically prevent, without justification, the platforms concerned from having to comply with the rules on electronic contracts.

Following a framework of the Airbnb Ireland case, a study of the decision is undertaken, focusing on the qualification of Airbnb's activity as an information society service or accommodation service. The current state of play is then analysed, identifying the path taken so far by the CJEU and looking ahead to future decisions in this area.

II. Framework of the Airbnb Ireland Case

This section presents the Airbnb Ireland case, successively describing the Hoguet Act which gave rise to the case, the activity of Airbnb Ireland and the dispute itself.

1. The Hoguet Act

In France, the Hoguet Act,[7] which owes its name to the parliamentarian

Market ('Directive on electronic commerce') [2000] OJ L178/1

[3] Case C-434/15 *Asociación Profesional Elite Taxi* v *Uber Systems Spain, SL*, Judgement of 20 December 2017, EU:C:2017:981.

[4] Case C-320/16 *Uber France*, Judgement of 10 April 2018 EU:C:2018:221.

[5] Case C-62/19 Star Taxi App SRL v Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General, Consiliul General al Municipiului Bucureşt Opinion of Advocate General Szpunar of 10 September 2020, EU:C:2020:692. The court's decision was delivered on 3 December 2020 (Case C-62/19 Star Taxi App, Judgement of 3 December 2020, EU:C:2020:980), date on which this study was already being published. The decision essentially follows the opinion of the AG.

[6] Joined Cases C-724/18 and 727/18 Cali Apartments SCI and HX v Procureur général près la cour d'appel de Paris and Ville de Paris, Judgement of 22 September 2020, EU:C:2020:743.

[7] Loi n° 70-9 du 2 janvier 1970 réglementant les conditions d'exercice des activités relatives à certaines opérations portant sur les immeubles et les fonds de commerce, *Journal officiel de la République française. Lois et décrets* JORF (*version papier numérisée*) n° 0003 du 04/01/1970, 142.

who proposed it (Michel Hoguet), applies to all natural or legal persons who carry out or support, even if in an ancillary capacity, among others, transactions on third party assets relating to the purchase, sale, demand, exchange, rental or sublease, seasonal or not, of empty or furnished buildings, whether or not built (Art 1). These operations may only be carried out, under Art 3, by those who have a professional licence, whose attainment presupposes the fulfilment of certain requirements. The exercise of the activity in question without a licence constitutes a criminal offence (Art 14), especially sanctioned if the person concerned receives or holds money (Art 16).

2. Airbnb Ireland UC

Airbnb Ireland UC is a company established under Irish law, based in Dublin, which is part of the Airbnb group, composed of several companies owned directly or indirectly by Airbnb Inc, based in the USA.

In France, Airbnb Ireland provides an electronic platform enabling it to put in contact, on one side, hosts (professional or private) with homes to rent and, on the other side, people looking for such accommodation.

The payments are managed by Airbnb Payments UK Ltd, a company established under UK law, based in London.

Airbnb France SARL, a company established under French law, provides Airbnb Ireland with platform promotion services, in particular through advertising campaigns.

In addition to the provision of the platform, Airbnb Ireland also offers the hosts a number of other optional services such as the setting of the content of their offer, support with regard to pictures, the use of a tool to calculate the price, liability insurance and damage cover of up to eight hundred thousand euros.

Upon conclusion of the short-term rental contract, the guest transfers to Airbnb Payments UK the value of the rent plus six per cent to twelve per cent of that amount in respect of charges and the service provided by Airbnb Ireland.

Airbnb Payments UK will only transfer the rent to the host twenty four hours after the arrival of the guest.

Airbnb Ireland also offers a rating service with the possibility for each party to rate between zero and five stars, the rating being available on the platform.

According to the CJEU, each party to the short-term rental contract enters into two contracts, one with Airbnb Ireland for the use of the platform and the other with Airbnb Payments UK for payments made through the platform. This conclusion seems rather debatable to us, but we will not develop the subject further, as it goes beyond the scope of the study.

3. Dispute

The '*Association pour un hébergement et un tourisme professionnels*' (AHTOP) has lodged a complaint against Airbnb Ireland (hereinafter Airbnb)

for exercising activities of mediation and management of buildings and businesses without a professional licence under the Hoguet Act. Following the complaint, charges were lodged. Airbnb Ireland came to defend itself on the ground that it does not act as a real estate agent and that the application of the Hoguet Act is incompatible with European law, having regard to Directive 2000/31/EC.

The investigating judge of the *Tribunal de Grande Instance de Paris* decided to refer two questions to the CJEU for a preliminary ruling:

– Do the services provided in France by Airbnb Ireland via an electronic platform managed from Ireland benefit from the freedom to provide services established in Art 3 of Directive 2000/31/EC?

– Are the restrictive rules relating to the exercise of the profession of real estate agent in France laid down by the Hoguet Law enforceable against Airbnb Ireland?

III. Information Society Service vs Accommodation Service

According to the logic outlined by the CJEU,[8] the first question is essentially whether the activity carried out by Airbnb in France, which corresponds to that carried out by the company in most countries, constitutes an 'information society service' for the purposes of Art 2a of Directive 2000/31/EC, as opposed to an accommodation service (or, as will be seen below, a service in the field of accommodation).

An affirmative answer means that no Member State (in this case France) may, as a rule, impose restrictions on the exercise of the activity, such as requiring a professional licence, provided that the national provisions applicable in the country in which the service provider is established (in this case Ireland) are complied with.

In the Uber Spain and Uber France cases, the CJEU developed a reasoning on this issue, concluding in both decisions that Uber, as regards the UberPop service at issue in those cases,[9] does not provide services which can be qualified as information society services.[10] In both decisions, the CJEU considers that, in order to classify the service as an information society service, it is not sufficient

[8] This logic follows on from the Uber Spain and Uber France cases, but is debatable, as it is now clearer from the Opinion of AG Szpunar in the Star Taxi App case, a question developed later in this text.

[9] It remains to be seen what the CJEU would have ruled if the service in question had been another, namely that of UberX, where drivers are professionals. For the most part, it would certainly have concluded in the same line, but it would be interesting to see whether it would still qualify Uber's activity as intermediation, which would seem inappropriate to us. As far as services like UberX are concerned, it seems to us that Uber is the entity providing the services and is therefore not an intermediary in the carriage contract.

[10] This decision was, in essence, well received by legal experts and society, in particular in so far as it allows Member States to regulate the activity at stake. According to M. Sousa Ferro, 'Uber Court: A Look at Recent Sharing Economy Cases Before the CJEU' *EU Law Journal*, 74, 68-75 (2019), 'some of the differing views seemed to come from voices which professionally sided with Uber'.

that the conditions laid down in the concept, as defined in European law, are fulfilled; the service must also not form part of an overall service the main element of which is a service with a different legal classification.[11] According to the CJEU, the intermediation service provided by Uber (UberPop service) cannot be classified as an information society service because it is part of an overall service the main element of which is a transport service. The CJEU does not state that Uber provides transport services, which would appear to be incompatible with the qualification as an intermediary, but that it provides services in the field of transport.

Let us look at what the CJEU concludes with regard to Airbnb, dealing successively with the questions of the concept of information society service and the additional requirement laid down by the Court that it must not be integrated into an overall service the main element of which is a service with another legal qualification, in this case an accommodation service. At the end of this section, a brief reference is made to the decision of the CJEU on the second question raised.

1. Concept of Information Society Service

Art 2a of Directive 2000/31/EC does not directly define the concept of 'information society services' but refers to the definition contained in Arts 1-2 of Directive 98/34,[12] as amended by Directive 98/48.[13] However, this legislation was repealed by Directive 2015/1535,[14] so the relevant concept of information society service for the application of Directive 2000/31/EC is that set out in Article 1-1b of Directive 2015/1535.

An 'information society service' is to be considered 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

There are four conditions that should be met in order to comply with the concept: (i) remuneration; (ii) at a distance; (iii) by electronic means; (iv) at the individual request of a recipient of services.

The Court considers that the service is provided against remuneration (para 46), although the remuneration is received not by Airbnb Ireland but by another company in the same group (Airbnb Payments UK) and only the lessee pays.

[11] C. Busch, 'The Sharing Economy at the CJEU: Does Airbnb Pass the 'Uber Test'? – Some Observations on the Pending case C-390/18 – Airbnb Ireland' *Journal of European Consumer and Market Law*, 173, 172-174 (2018).

[12] European Parliament and Council Directive 98/34/EC of the of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L204/37.

[13] European Parliament and Council Directive 98/48/EC of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L217/18.

[14] European Parliament and Council Directive 2015/1535/EU of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1.

The different legal personality of the two companies in the Airbnb group should in our opinion be disregarded, not least because they appear before users as one and the same entity, a reasoning which should be used not only for this purpose but also to regulate the relationship between the different parties involved, in particular for the purpose of liability. The fact that it is only the lessee who pays the commission does not seem to us to rule out the verification of the assumption of remuneration.

There also does not seem to be any discussion as to whether the service is provided at a distance, ie without the simultaneous presence of the parties. In fact, none of the persons involved in the contractual scheme is physically and simultaneously present, and thus, the whole process takes place at a distance.

The same conclusion should be drawn as to whether the service is provided electronically, since the parties make contact through the electronic platform.

As regards the latter assumption, it is necessary that the service is provided 'at the individual request' of a recipient of services, defined in the aforementioned provision as a service 'provided through the transmission of data on individual request'. The recipients of the service are the users of the platform, ie the hosts and the guests. The host publishes an online advertisement while the guest sees and is interested in that advertisement (para 48). An individual request occurs whenever someone accesses the platform either to place an ad or to make a search among the ads placed.

The four conditions are therefore met.

2. Additional Requirement: Not to Be Part of an Overall Service Whose Main Component Is a Service Coming Under Another Legal Qualification

The CJEU holds that it is still necessary, in order to conclude that it is an 'information society service' for the purposes of Directive 2000/31/EC, that the intermediation service in question does not form part of an 'overall service whose main component is a service coming under another legal qualification' (para 50).

The case law outlined in the Uber Spain and Uber France cases is followed. As stated in para 40 of the decision in the first case cited, 'that intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service', thus ruling out the classification as an 'information society service'. The effect of that conclusion is devastating, since it does not simply rule out the application of the principle of freedom of movement laid down in Directive 2000/31/EC, but also rules out the application of all the provisions of the Directive, in particular those relating to contracts, which seems to be undesirable.[15]

[15] See M.Y. Schaub, 'Why Uber is an Information Society Service' *Journal of European Consumer and Market Law*, 109, 109-115 (2018).

Coming back to our decision, AHTOP argues that the activity 'forms an integral part of an overall service, whose main component is provision of an accommodation service', as Airbnb provides with services characteristic of the intermediation activity in real estate transactions (para 51).

While recognising that the service provided by the company is intended 'to enable the renting of accommodation', the CJEU considers that 'the nature of the links between those services does not justify departing from the classification of that intermediation service as an "information society service" and therefore the application of Directive 2000/31/EC to it' (para 52).

The Court has used several arguments to reach that conclusion, which will now be mentioned and critically analysed.

First, the intermediation service is dissociable from the property transaction itself, consisting in the provision of a structured list of the places of accommodation (para 53).

This statement is highly debatable,[16] since the ultimate purpose of making the list available is to conclude short-term rental contracts. It is an intermediation activity in the accommodation sector and not in a different sector. To reach this conclusion we would even waive the fact that additional services are typically contracted, such as those already mentioned, and which are successively disregarded for the purpose of changing the qualification of the Airbnb's activity in paras 59 to 63.

In para 64 it is stated that

> 'it is also paradoxical that such added-value ancillary services provided by an electronic platform to its customers, in particular to distinguish itself from its competitors, may, in the absence of additional elements, result in the nature and therefore the legal classification of that platform's activity being modified'.

We disagree as this does not seem at all paradoxical; on the contrary, if the platform stands out from its competitors by offering certain services, it is in the light of its offer that the analysis must be made and not in the light of those of its competitors. It would not shock a different qualification of Airbnb's activity vis-à-vis its competitors precisely because it offers distinct 'added-value' services. This 'added-value' may change the configuration of the business model and therefore the qualification of the company's activity.

The Court goes on to say that the intermediation activity, which presupposes 'the compiling of offers using a harmonised format, coupled with tools for searching for, locating and comparing those offers', is so relevant that the service 'cannot be regarded as merely ancillary to an overall service coming

[16] Similarly, A. Chapuis-Dopler and V. Delhomme, 'A Regulatory Conundrum in the Platform Economy, case C-390/18 Airbnb Ireland' *European Law Blog*, available at https://tinyurl.com/y9fbrj6y (last visited 27 December 2020).

under a different legal classification, namely provision of an accommodation service' (para 54).

While Airbnb does not provide accommodation services but acts as an intermediary between hosts and guests, it also seems clear for us that it provides services in the field of accommodation (in a connection with the concept of 'services in the field of transport' in Uber's cases). It would therefore perhaps be justified to subject it to the regulations to which other companies providing intermediation services in the field of accommodation are subject to, whether or not such services are provided exclusively at a distance and by electronic means. We do not intend to go against the idea of the Court that the success of Airbnb's business model lies in the unique characteristics of its intermediation activity, namely the presentation of offers in a harmonised manner and the search tools. It seems nevertheless that the fact that this is an original presentation of the accommodation does not detract from the qualification as an intermediary in a specific sector, which is that of accommodation,[17] and that it is not intermediation in general, with no obvious link to a sector.

It is also argued that the service in question is not indispensable for the provision of accommodation services from the point of view of hosts and guests (para 55). There is no way to contradict this statement, not least because short-term rental contracts were already concluded before the existence of this intermediation platform. In addition to the channels mentioned in that paragraph, the contact could also be personal, close to the place of accommodation, as in many summer holiday locations. It follows, moreover, that digital platforms are only one more channel of intermediation in accommodation services, which is the channel that currently dominates the market. To consider this channel as being outside the domain of accommodation means to favour it, from a regulatory point of view, over other channels. This could be one of the problems of qualifying this activity as a *mere* information society service.

In any case, even if we consider that it is not indispensable for the provision of accommodation services, it is indisputable that Airbnb and other platforms that have followed its model have completely revolutionised this market, which has gone from being small to becoming massive in many tourist locations, and is even a central element of urban policy in most large European cities which have changed as a result of the success of these platforms.

We therefore disagree with the CJEU decision where it argues that Airbnb has not created a market.[18] While identifying the creation of a market is a complex

[17] T. Rodríguez de las Heras Ballell, 'The Airbnb Ireland Case: The Importance of Business Model in the Platform Economy' *Andersen Tax and Legal*, 1, available at https://tinyurl.com/ybmnvnhp (last visited 27 December 2020) states that 'it is, in fact, an innovative model that competes with other real estate brokerage businesses'.

[18] Similarly, C. Busch, n 11 above, 173; L. Van Acker, 'C-390/18 - The CJEU Finally Clears the Air(bnb) Regarding Information Society Services' *Journal of European Consumer and Market Law*, 79, 77-80 (2020); A. Chapuis-Doppler and V. Delhomme, 'Regulating Composite Platform

task, Airbnb has at least reconfigured a small market, making it a very significant and relevant market.

The last argument is that the company does not fix or limit the price, but only makes an optional service available to the hosts to estimate the price (para 56). This difference is useful for the court as it clearly distinguishes Airbnb from Uber. The question is whether it is sufficient for this purpose not to fix or limit the price so that it is no longer a service in the field of accommodation.[19]

The Court even makes an explicit distinction between the intermediation service provided by Airbnb and the intermediation services provided by Uber (para 65), which is very useful and interesting, in order to draw the line between what is a mere information society service, a line which, according to the case-law of the CJEU, is between those two activities, which we consider to be open to criticism.

The key criterion, according to the Court, is the 'level of control' (para 66) or the 'decisive influence' (para 67) as regards the provision of the service in the main contract (accommodation or transport).[20]

It appears from para 68 that the services provided by Uber in the decisions referred to (UberPop) constitute the borderline for being regarded as a mere information society service. According to the Court, the evidence in the case does 'not establish that Airbnb Ireland exercises such a decisive influence over the conditions for the provision of the accommodation services to which its intermediation service relates'. It therefore appears necessary for it to exercise 'such' an influence, ie at least the same level of influence or control. And there is no doubt that Uber, even on the UberPop service, exercises greater control over the contract than Airbnb.[21]

We believe, however, that the line should be drawn at another point, considering that we are not dealing with a mere information society service in

Economy Services: The State-of-play After Airbnb Ireland' 5/2020' 1 *European Papers*, 411-428; E. Murati, 'Airbnb and Uber: Two Sides of the same coin' *Medialaws*, available at https://tinyurl.com/y7oyb5pf (last visited 27 December 2020).

[19] A. Chapuis-Doppler and V. Delhomme, n 18 above, 11, refers to a 'minimalist approach' which 'appears overly simplistic'.

[20] L. Van Acker, n 18 above, 80; C. Busch, n 11 above, 174. A. Chapuis-Doppler and V. Delhomme, n 16 above, consider, on the contrary, that the CJEU has not indicated that this is the determining criterion, leaving open the question of the relative importance of the two criteria.

[21] M. Sousa Ferro, n 10 above, 75, calls attention to the fact that 'this decisive influence test may turn out to be a convenient way for the Court to distinguish those activities which it believes MSs should have control over, from those which it believes they shouldn't. But one can't help find it somewhat artificial'. According to the author, 'there is no real reason to justify distinguishing between Uber and Airbnb, for example'. A. Chapuis-Doppler and V. Delhomme, n 18 above, 11, even say that this part of the decision 'albeit crucial, is so short that it is hardly convincing', indicating that the Court 'cherry-picked the facts of the case to conclude that Airbnb provides an ISS'. It is also interesting to note that before the Airbnb Ireland case, there were those who predicted that the CJEU's ruling on Airbnb would be that it has a decisive influence on the accommodation service, see P. Hacker, 'UberPop, UberBlack, and the Regulation of Digital Platforms After the Asociación Profesional Elite Taxi Judgment of the CJEU' *European Review of Contract Law*, 93, 80-96 (2018).

situations where the company managing the platform, although not exercising as significant control over the user service provider as in the case of Uber, still plays a very important role.[22]

Airbnb provides intermediation services in the accommodation sector and has significant control over the hosts, who are dependent on it (for carrying out the activity) in most cases.[23] This control will, moreover, as a rule be more relevant to hosts than that of other older intermediaries operating in this market, who will be subject in France to the rules imposed by the Hoguet Act. In many countries, the public authorities themselves work directly with Airbnb and other digital platforms to better implement public policies in the accommodation sector, retaining these applications, for instance, tax payments to be paid by hosts and/or guests.[24] In the light of the CJEU ruling, such practices are likely to be contrary to European law as they restrict the free movement of information society services.[25]

The main problem with this decision is that the European Union, on the one hand, does not want to regulate in a harmonised way the provision of intermediation services in the field of accommodation and, on the other hand, does not respect the differences in the approach of the different Member States, accepting that they regulate the subject.[26] This situation leads to different treatment between companies acting through digital platforms and companies acting through other channels.

3. Direct Effect of the Directive

We will be briefer in considering the CJEU's answer to the second question, namely whether the French rules at issue in the case can be invoked against Airbnb.

Since French law, contrary to European law, provides for a licence to pursue an activity, the question is whether European law is directly applicable, with the relevant entities in the Member State refraining from applying domestic law, or

[22] E. Murati, n 18 above.

[23] This dependence has, moreover, already been recognised by the European Parliament and Council Regulation 2019/1150/EU of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57 of the Recital 2 states that 'given that increasing dependence, the providers of those services often have superior bargaining power, which enables them to, in effect, behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users'.

[24] C. Busch, 'Regulating Airbnb in Germany' *Journal of European Consumer and Market Law*, 41, 39-41 (2019).

[25] E. Murati, n 18 above.

[26] In this respect, with regard to Uber, see M. Sousa Ferro, n 10 above, 75. A. De Franceschi, 'Uber Spain and the «Identity Crisis» of Online Platforms' *Journal of European Consumer and Market Law*, 4, 1-4 (2018) refers that 'it may be now time to reconsider the competence of the EU Member States do regulate the conditions under which intermediation services such as *Uber* are to be provided'. Already following the Airbnb Ireland case, see L. Van Acker, n 18 above, 80; A. Chapuis-Doppler and V. Delhomme, n 16 above.

whether, on the contrary, national law should continue to apply until it is amended.

What is at stake is essentially the obligation for a Member State wishing to impose a measure restricting the free movement of an information society service to notify the European Commission and the Member State in which the service provider is established in advance.

The CJEU maintains that this is a clear, precise and unconditional obligation and must therefore be recognised as a provision having direct effect, which may be relied on by individuals before national courts (para 90). The Court thus concludes that

> 'an individual may oppose the application to him or her of measures of a Member State restricting the freedom to provide an information society service which that individual provides from another Member State, where those measures were not notified in accordance with that provision'.

IV. Summary of the CJEU Case Law

In the Uber Spain and Uber France cases, the CJEU established case-law according to which a service provided by a digital intermediation platform, in order to be classified as an information society service, and therefore Directive 2000/31/EC to be applicable, must not only comply with the conditions which must be met in order to fulfil the concept (remuneration; at a distance; by electronic means; at the individual request of a recipient of services), but also not to form an integral part of an 'overall service whose main component is a service coming under another legal qualification'.

To answer this last question, the CJEU created a test which includes two decision criteria: (i) whether the platform has created a new market; (ii) whether the platform exercises a decisive influence on the service providers registered with it with regard to the conditions under which the service is provided.[27]

In the case of the UberPop service, the CJEU considers that the platform, on the one hand, has created a new market (in the field of urban transport) and, on the other hand, has a decisive influence on drivers, the latter conclusion being that it sets the price. The UberPop service is therefore not qualified as an information society service and restrictions may be imposed.

In the case of Airbnb, the CJEU considers that the platform has neither created a new market nor exercises a decisive influence on the hosts, conclusions regarding which we have already expressed our disagreement. The service provided by Airbnb is therefore qualified as an information society service and

[27] The Court does not seem to indicate three criteria, see P. Hacker, n 21 above, 85, but only two, which are intended precisely at answering the question of whether the service is part of an overall service whose main component is a service coming under another legal qualification.

no restrictions can be imposed.

We believe that, with the case law in the Airbnb Ireland case, it is difficult for any other intermediation platform not to qualify as an 'information society service' since the boundaries of both the concept of creating a new market and of decisive influence are drawn very close to one extreme.

In his Opinion in the Star Taxi App case, AG Szpunar, points out that the guidance previously given by the CJEU in 'specific circumstances (...) are not necessarily intended to apply in different circumstances'.

With a view to attempting to provide an insight into the future development of the issue, we will now undertake an analysis of the latter case and of the Opinion of the AG.

V. Prospects in Light of the Opinion of the AG in the Star Taxi App Case

The case concerns a smartphone application (Star Taxi App), which brings taxi users and taxi drivers together. After the search is made by the client, the application generates a list of taxi drivers, leaving the choice up to the client. The price is paid at the end of the trip directly to the driver. The company that manages the platform concludes a contract with each taxi driver, under which the latter is obliged to pay a monthly price and the latter is obliged to provide an application and provide a smartphone on which the application is installed. No quality control of the vehicles or taxi drivers is made by the platform, which only guarantees the inclusion of authorised and licensed taxi drivers.

The dispute arises when the Star Taxi App is sanctioned for failing to apply for authorisation under the Romanian law for the activity of 'taxi dispatching' ('activity related to the transport by taxi consisting in receiving customer bookings by telephone or other means and forwarding them to a taxi driver via a two-way radio'). The company disagreed with the application of the penalty and appealed to the court, which decided to refer several questions to the CJEU.

The Romanian court asks, in essence, whether the national legislation at issue in the case is compatible with European law, specifying, inter alia, whether the activity carried out by the company is to be regarded as an information society service.

Not surprisingly, the AG applies the test used in the Uber Spain, Uber France and Airbnb Ireland cases, concluding that it is an information society service. On the one hand, the conditions necessary for the concept to be fulfilled are met. On the other hand, the activity in question does not constitute an overall service the main element of which is a service with another legal qualification. The AG considers that not only does the platform not create a new market, but it also does not have a decisive influence on taxi drivers. As we noted in relation to the CJEU decision on Airbnb, it is unlikely that any digital

intermediation platform would not be qualified, with the test currently applicable, as providing an information society service.

The Opinion of the Advocate General is particularly interesting in this case because of the following reasoning.[28]

A very significant difference between the Star Taxi App case and the Airbnb Ireland case stems from the fact that the Star Taxi App holder is established in Romania, the country in which it intends to operate and in which the dispute takes place, while the company managing Airbnb is established in Ireland, and the dispute arises from operating in another Member State, in this case, France.

Qualified as an information society service in both cases, Directive 2000/31/EC applies. In the case of Airbnb Art 3 of the Directive is applicable. A Member State may not restrict the free movement of services provided by a person established in another Member State if the national provisions applicable in that other Member State are complied with. In the case of Star Taxi App Art 4 applies, which enshrines the principle of non-authorisation, which does not however, affect the 'authorisation schemes which are not specifically and exclusively targeted at information society services'. According to the Advocate General, that provision is intended 'to prevent unequal treatment between Information Society services and similar services which do not fall within that concept' (para 68). The Advocate General concludes in the Star Taxi App case that the Romanian rule is acceptable 'provided that the services governed by those provisions are found to be economically equivalent' (para 77).

The application of different provisions of the Directive, which are radically opposed in similar cases from the point of view of the unequal treatment of information society services and equivalent services other than information society services, whether or not the company is established in another Member State, in turn creates a situation of inequality which should be avoided, not least as an incentive to relocate.[29] When the sole purpose of changing the place where a company is established to another Member State may be to change the legal basis of the analysis in relation to Directive 2000/31/EC, it follows that the solution reached by the CJEU will certainly not be the most desirable to achieve the objective of justice.

Given that Art 4 of Directive 2000/31/EC does not apply to the Romanian legislation involved in the case, the AG then examines the compatibility of the authorisation scheme provided for therein with Directive 2006/123/EC which will apply because there is no conflict between the two directives in the case. The AG considers that it is for the Romanian court to assess whether the conditions laid down in Arts 9 and 10 of Directive 2006/123/EC[30] have been

[28] A. Jabłonowska, 'AG Opinion in Star Taxi App and the Limits of the Principle Excluding Prior Authorisation: Was Uber Spain really necessary?' *Recent Developments in European Consumer Law*, available at https://tinyurl.com/ych2jwbr (last visited 27 December 2020).

[29] E. Murati, n 18 above.

[30] In the Cali Apartments case, the main issue addressed by the CJEU also concerns the

complied with, but maintains that making the issuing of the authorisation 'subject to requirements that are technologically unsuited to the applicant's intended service' (namely 'to have a two-way radio, a secure radio frequency, staff holding a radio telephony operator certificate and a licence to use radio frequencies', a requirement apparently laid down by the Romanian legislation) will breach the criteria set out in Art 10. Such requirements are not acceptable if they apply in the context of an intermediation service through an application for smartphones, as they make access to the market concerned inadmissible.

The CJEU decision follows the Opinion of the AG. We shall now see to what extent the effects of the Airbnb Ireland judgement can be mitigated in the future with regard to the unequal treatment of intermediaries operating through digital platforms and intermediaries operating through other means.

application of these provisions, the Court concluding, among other aspects, that 'national legislation which, for reasons intended to ensure a sufficient supply of affordable long-term rental housing, makes certain activities consisting in the repeated short-term letting, for remuneration, of furnished accommodation to a transient clientele which does not take up residence there subject to a prior authorisation scheme applicable in certain municipalities where rent pressure is particularly severe is (i) justified by an overriding reason relating to the public interest consisting in combating the rental housing shortage and (ii) proportionate to the objective pursued, inasmuch as that objective cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective'.

The Environment, Health, and Employment: Ilva's Never-Ending Story

Marisa Meli*

Abstract

The article describes briefly the history of the Ilva steel plant with particular attention to the facts occurred in the first decade of the new century and analyses deeper both the interventions of the Constitutional Court and the European Court of Human Rights, following the entrance in the market of the new globalized firm, Arcelor Mittal.

I. The Mirage of Ilva's New Deal

The year 2018 should have been a turning point in the history of Taranto for its steel manufacturing site. Ilva, the historical steel plant, known as one of the largest in Italy and in Europe, had been undergoing an insolvency process. The mandate for the commissioners was to improve the factory to attract potential purchasers that would enable the plant to continue to operate. In the meantime, the hope was that the sale of Ilva's assets could help accelerate the urgent environmental clean-up work on the site. This was necessary to protect the health of inhabitants in Taranto and to maintain employment rates.

At the end of 2018, a new firm entered the market, ArcelorMittal, the largest producer of flat carbon steel both in Europe and worldwide. It completed the transactions necessary to acquire Ilva and to put the steel plant on loan.

This has been the second radical change for the Italian firm.

The first change had occurred in the 1990s, when the industry had shifted from public to private ownership, the Riva Group. The second change was no less significant: Taranto became the local seat of a multinational company, and this implied alterations to the relationship with the local population and with the entire nation. The ex Ilva became a globalized firm: ArcelorMittal, known as the steel giant, is one of the world's five largest producers of iron and metallurgic coal. Having already asserted its presence in sixty countries, it strengthened its European presence by landing in Italy.

The European Commission, according to the European Union (EU) Merger Regulation, has approved the acquisition, subject to some conditions.[1]

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[1] More precisely, at the condition of removing Marcegaglia Group (a significant Italian competitor) from the consortium purchasing Ilva and to reduce some presence of AM enterprises in

The same approval came from the labour union, which despite some scepticism, resulted in a positive answer from the referendum consultation.[2]

At the beginning of 2019 everything seemed to be ready for the New Deal.

II. A New Deal also for the Environment and for Health

In the meantime, two important judgements affirmed that the deal had to address appropriate concern towards the serious ecological harm that the steel plant caused to the local population.

This was expressed by the Italian Constitutional Court on the one hand, and by the European Court of Human Rights on the other.[3] Even though they referred to facts that occurred before the arrival of ArcelorMittal, both decisions looked to the future, stating that from then on there would not be anymore tolerance towards the ineffective answers such as those offered in the past.

In both judgements, the Court accused the State of questionable conduct.

The Constitutional Court stated that in taking action to safeguard the continuity of production within sectors that are strategic for the national economy, the Italian government had not complied with the requirement to strike a reasonable and proportionate balance between all relevant constitutional interests when it issued the many decrees so called 'save-Ilva'. This was because the government left out any measure aimed at protecting both the health, the environment, and the bodily integrity of workers.

A few months later, the European Court of Human Rights adopted a landmark decision recognizing that Italy failed to protect the right to private life (Art 8) and the right to an effective remedy (Art 13) of the citizens who were dramatically affected by the extreme pollution levels caused by Ilva's activities.

Both Courts called on Italy to implement, as soon as possible, all the necessary measures in order to ensure protection of the environment and public health. It is definitely time to remedy this public health crisis and to put an end to the years of impunity that benefited Ilva.

III. A Quick Look to the Past

To understand how groundbreaking both these judgments are, it is necessary

Eastern European countries. See European Commission, Decision of 17 April 2019, available at www.ec.europe.eu.

[2] In the daily press: 'Ilva. Siglato l'accordo al MISE. Da Arcelor l'ok a 10.700 assunti' *il Sole 24 Ore*, available at https://tinyurl.com/y93zrh6k (last visited 27 December 2020); 'Ilva, nel referendum tra I lavoratori vince il sì all'accordo col 93%' *Il fatto quotidiano*, available at https://tinyurl.com/y8m6uxmc (last visited 27 December 2020).

[3] Corte Costituzionale 16 November 2018 no 58, *Il Foro Italiano*, 1073 (2018); Eur. Court H.R., *Cordella et al* v *Italy*, Judgment of 24 January 2019, available at www.hudoc.echr.coe.it.

to know what happened during the last decade. More generally, it is necessary to go back to the past and to briefly examine the history of the industrial site.[4]

The history goes back to the 1960s. The steel plant was created in 1965, located in the south of Italy and organized as a State-controlled company (Italsider). In accordance with the prevalent industrial development model of that time, despite the fact that it was a large-scale emission intensive industrial site, it was located very close to residential areas. After all, at that time, nobody paid particular attention to the social costs of production and the unique creed was the mirage of economic development and social well-being.

As in other tragic realities, industrialization was connected to the idea of raising production and transforming economically depressed areas for the national economy. In the case of Taranto, the project was also related to the growing European Coal and Steel Community (ECSC). The south of Italy was seen as the local arm of the great expansion of the European iron and steel industry. At that time, this was considered a winning move. And for a short period it was. This was the time of rising consumerism. Steel was essential for the production of many new consumer goods. These new productions were initially successful and the local community forged its new identity around it.

Did the factory, with its blast furnace, pollute at the time?

Surely it did. Probably even more than today, because at that time there were no elementary rules established to protect the environment and human health. But nobody was willing to see the dark side of industrial growth. As previously mentioned, the common creed was the mirage of economic development. An economic mirage that really occurred but was short lived.

The process of development started with the steel plant but seemed to slow down by the beginning of the 1980s. And when a mirage starts to vanish, intolerance begins.

As in other parts of Italy, it was time to discover the environmental damage, to investigate the increasing death rates, and to reveal the unsafe working conditions.

In Taranto, the community started to perceive a degradation in the suburbs, which was only revealed as the damage was expanding into the city. This is particularly true in the Tamburi neighbourhood (Tamburi), built in the shadow of the industrial site.

The 1980s saw the initial death tolls. Additionally, at this time a series of

[4] It is always very interesting to read the current events in the light of the historical reconstruction. In this case S. Romeo, *L'acciaio in fumo* (Roma: Donzelli, 2019) is strongly suggested. This is an extremely depth and documented history of the relationship between the industrial steel plant and Taranto's community. For a more general overview of the history of industrialization in Italy, see S. Adorno and S. Neri Serneri, *Industria, ambiente e territorio. Per una storia ambientale delle aree industriali in Italia* (Bologna: il Mulino, 2009); S. Luzzi, *Il virus del benessere. Ambiente, salute, sviluppo nell'Italia repubblicana* (Bari: Laterza, 2009).

steel sector crises began, which led to the promise of a new industrial plan and of closing the blast furnace.

In 1990, the areas were identified as areas with 'high environmental risk'. As in many other Italian industrial sites, however, no concrete project of remediation followed.

A few years later, in line with the policy of the time, the industry was privatized. When it happened (with the Riva Group), the factory had already broken the relationship with the local community; the industry was perceived as a cluttered extraneous body.

During this time there were several criminal proceedings against Ilva's management for serious ecological harm, as well as for its failure to prevent accidents in the workplace.

Despite the well-known dangers of air pollution, the dumping of hazardous materials, and the emission of particles, Ilva's management continued its production without paying any attention to the consequences.

IV. The History of Ilva's Unsustainable Development

The history just described reflects the history of most of the industrial sites in Italy.

However, Ilva's history diverges from the others at the end of the 1990s.

At that time, attention was focused on paying for social costs of production, and there was an increase in environmental legislation, mostly thanks to the efforts of the European Community.

But in Taranto, the new property did not invest in the environment, or at least, did not invest enough, probably due to the crisis of the industrial sector.

To reduce emissions, it is necessary to take measures for containment, giving priority to the reduction of emissions of hazardous substances and metals. Another priority is the large deposit of coal, coke, and other minerals necessary for production. They are exposed to weather conditions, and particularly with wind, the deposits can disperse fine dust and dangerous particles. Emissions from other parts of the production process are similarly problematic. In accordance with new European rules, these risks should be reduced with the adoption of Best Available Technologies, but Ilva's production is far from meeting these standards.

The Riva Group has always claimed that compliance costs were prohibitive. However, looking at the economic and financial performance of the Group, it is hard to accept that it was unable to bear the costs of investing in plant renovations since 1995.

The method of production appears to belong to another era. It has forced local mayors to forbid children from playing in open spaces and to order farmers to put down their animals because they were contaminated. In the meantime, the epidemiological data revealed a connection between deaths, sickness rates, and

the industrial site.

This continued until the dawn of the new century, when the relationship between industry and the environment was reconfigured and based on the idea of sustainable development, as affirmed in one of the fundamental rules of the European Treaty (Art 3) and in the European Charter of Human Rights (Art 37). Moreover, according to Art 191 of the Lisbon Treaty, the EU policy contributes to protecting the quality of the environment and of human health, with regulations based on the precautionary principle, the prevention principle, and the polluter pays principle.

Under these new conditions, it seems unbelievable that the biggest steel industrial plant continues to operate in such conditions.

Immediately after the beginning of the new century, in Taranto, the situation became unacceptable according to today's standards. Nevertheless, nobody has adequately intervened, neither the Riva family, nor the public authorities.

The lack of compliance with the elementary rules is well known. Contamination rates among the local population have led to unacceptable and intolerable levels of sickness and chronic illness.

In 2002, the Agenzia Regionale per la Protezione dell'Ambiente (ARPA, the regional agency for environment protection) Report showed that there has been an increase of cancer diagnoses.

In 2005, the High Court found that the management of Ilva was responsible for air pollution, the dumping of hazardous materials, and the emission of particles.[5]

The European Commission, thanks to a petition received from a citizen worried about the conditions of production,[6] started an infringement proceeding, that has been transposed in a decision by the European Court of Justice (ECJ).[7] The ECJ concluded that Italy failed to properly apply EU legislation, with particular reference to the lack of implementation of the Integrated Pollution Prevention and Control (IPPC) Directive,[8] which required a special (integrated) permit from the Integrated Environmental Authorisation (IEA). Ilva did not have such authorisation and nevertheless continued production.

V. Arm Wrestling Between Judicial and Political Powers: The First Intervention of the Constitutional Court (2013)

What follows is the backdrop to the fateful year 2012. As already described,

[5] Corte di Cassazione 24 October 2005 no 38936, *Rivista giuridica dell'ambiente*, 309 (2006).

[6] Petition 30 September 2011 no 60/2007.

[7] Case C-50/10 *Commission* v *Italy*, Judgment of 31 March 2011, available at eur-lex.europa.eu.

[8] The European Parliament and Council Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control (2008) OJ L24/8 is based on a new regulatory model that aims to control together emissions on air, water and soil, waste treatment, energetic efficiency and accidents prevention. It has been introduced in our environmental code with decreto legislativo 29 June 2010 no 128, adding Arts 29-*bis* to 29-*quattuordecies*.

the Italian judiciary had the will to investigate and to intervene, while the public administrative powers did not. There have been several judicial challenges relating to serious environmental crimes and failure to prevent accidents in the workplace.

In July 2012, the prosecutor of Taranto ordered the seizure of the hot working area (meaning blast furnace, mineral parks, the coke plant, the steel mill, the area for managing steel materials and the agglomeration area).[9] This was only the first of several orders, that also concerned finished products or half-processed products. On one more occasion, there was a threat to halt all production activities.

The intention of the judges was to offer a prompt solution to safeguard the multitude of people affected. At the same time, the measures adopted were generating a new conflict: production could not stop because thousands of people would lose their jobs.

The entire country was worried, and so was Europe.

The steel sector was undergoing a crisis, and not just in Taranto.[10] The prospect of closing the biggest industry frightened the European economy because of increasing competition with other economic realities.

The European Parliament intervened with a motion for a resolution to the crisis of the sector.[11]

This motion underlined the necessity to support the steel industry and to make it competitive and responsive to changing market conditions. It emphasized how essential the steel industry is for growth and prosperity in Europe and asked the Commission to take any reasonable step to support it.

In a second resolution,[12] based on a petition of citizens worried about the extremely elevated levels of dioxin emissions from Ilva, the European Parliament stressed that both the Italian authorities and the existing plant owners have a pressing legal obligation to secure a drastic reduction in harmful emissions. The Parliament had admitted that the privatisation of the plant has not led to any

[9] It occurs on 7 August 2012. For a deeper focus on this period see R. Colombo and V. Comito, *L'Ilva di Taranto e cosa farne* (Roma: Edizioni dell'Asino, 2013); A. Bonelli, *Good Morning Diossina. Taranto, un caso italiano ed europeo* (Brussels: Green European Foundation, 2014); A.F. Uricchio ed, *L'emergenza ambientale a Taranto: le risposte del mondo scientifico e le attività del polo "Magna Grecia"* (Bari: Cacucci, 2014); and M. Meli, 'Ambiente, salute, lavoro: il caso Ilva' *Le Nuove leggi civili commentate*, 1017 (2013).

[10] In the same period also the steel plant in Cornigliano closed the doors. See more in R. Tolaini, 'Il peso dell'acciaio. Siderurgia e ambiente e Genova, 1950-2005', in S. Adorno and S. Neri Serneri, n 4 above, 113.

[11] Doc no B7-0541/2012 of 5 December 2012, available at www.europarl.europa.eu.

[12] In line with what has been affirmed by the European Commission, Communication Tackling the Challenges in Commodities Markets and on Raw Materials COM (2011) 25 final of 2 February 2011. The Communication is part of a more general intervention plan, the well known 'Europe 2020': European Commission, Communication Europe 2020. A European strategy for smart, sustainable and inclusive growth (2010) 2020 of 3 March 2010. With more specific reference to the industrial activities see also European Economic and Social Committee, Opinion on A Stronger European Industry for Growth and Economic Recovery - Industrial Policy Communication Update COM (2012) 582 final of 11 July 2013.

improvement in environmental security. Nevertheless, considerations for the future of the steel industry come into play, as the industry employs thousands of workers and is a crucial economic sector of the EU. In conclusion, the Parliament has called on European institutions to work together with all the parties involved in order to ensure a policy that coherently integrates economic objectives with social and environmental priorities. The goal is to build a modern, competitive, and sustainable European steel industry which fully complies with EU environmental law. Above all, it has called on the Italian authorities to ensure the environmental restoration of the polluted steel plant site as a matter of extreme urgency.

According to the European institutions, therefore, production must necessarily continue, but while seeking to restore the site and to improve environmental performance.

The Italian government, with considerable delay, has attempted to cope with this double aim.

Its late action followed the judiciary intervention but with concerns regarding the seizure orders: too many people would lose their jobs and the economy would collapse. The Government enacted therefore a first decree, the so-called 'save Ilva' (decreto legge 3 December 2012 no 207) which, in recognizing Ilva as a plant of 'national strategic interest', allowed it to restart production, notwithstanding the judicial ban.[13]

At the same time, the Government imposed a re-examination of Ilva's permit. This meant that the continuation of the steel plant's activity was permissible under certain conditions: the company had to modernise the plant in order to satisfy the requirements set out in the new IEA. More precisely, the Minister of the Environment was asked to approve the company's new remediation plan, a detailed set of conditions and measures under which Ilva would be permitted to operate.

Under these conditions, the Government could authorise the continuation of the activity for a period of thirtysix months, while Ilva fulfilled the conditions required for the permit. A Guarantee commission was tasked with checking the proper enforcement of the decree.

For the prosecutor of Taranto, the Government had risked too much by going against its own decision. In its opinion, the legal solution adopted excessively sacrificed the local population's right to health and of the environment. It therefore called for the intervention of the Constitutional Court.[14]

But the Court reached a different conclusion. It rejected the question of constitutionality, considering that the legislator had struck a reasonable and proportionate balance between health, environment, and employment in drawing up the decree.

Indeed, the Court knows very well that the right to health is a fundamental

[13] Decreto legge 3 December 12 no 207.

[14] Corte Costituzionale 9 April 2013 no 85, available in English at tinyurl.com/3nffgtv8 (last visited 27 December 2020).

right and has on many occasions recognized it as a fundamental value that cannot be balanced with others.[15] What the Court has added, is that together with the obligation to protect health, there are some duties for the State including the duty of protecting labour. The State must therefore protect all of the constitutional values and the decree was the right attempt to achieve this balance.

According to the Court, the continuation of business activities was conditional upon compliance with specific limits set out in administrative measures relating to the integrated environmental authorisation and was backed up by legislation providing for specific controls and sanctions.

The reasonable and proportionate balance consists in the re-examination of the IEA, as the protection of the environment and human health will not necessarily end production but will combine production with improvement of environmental performance.[16]

In conclusion, according to the Court, it is not true that the Government only tried to avoid the crisis, because the prospect of an environmental restoration has not yet been abandoned.

VI. The IEA Review as a Pre-Condition for the Prosecution of the Firm's Activity

The Court's ruling of 2013 sparked many comments and perplexities.[17] On the whole, it may be considered a balanced judgment. It was considered balanced to the extent a rule that intervenes in such a critical and exceptionally serious situation, can actually be considered as such, since also required equally exceptional interventions of each of the different branch of state power, including the judiciary and the public administration. As such, it was capable of giving rise to many different conflict situations. The interests at stake were, however, so great that the Court found itself in a very difficult situation.

And yet, the Court managed to make a balanced ruling, starting from the premise on which its reasoning was based: the review of the IEA.

[15] Since the famous judgment of Corte Costituzionale 10 July 1974 no 247, *Giustizia costituzionale*, 2371 (1974) on Art 844 Civil Code. For the historical evolution R. Ferrara, 'Il diritto alla salute: I principi costituzionali', in S. Rodotà and P. Zatti eds, *Trattato di biodiritto* (Milano: Giuffrè, 2010), I, 3.

[16] Coherently, when the decree was transposed into law (legge 24 December 2012 no 231) other guarantees were introduced to protect the environment and health. At the same time another decree was adopted (decreto legge 7 August 2012 no 129), with new urgent dispositions for Taranto's Territory restoration and requalification, allowing news funds and instruments for the purpose.

[17] Between many others see U. Salanitro, 'Il decreto Ilva tra tutela della salute e salvaguardia dell'occupazione: riflessioni a margine della sentenza della Corte costituzionale' *Corriere Giuridico*, 1041 (2013)*;* G. Amendola, 'La magistratura e il caso Ilva' *Questione Giustizia*, 9 (2012); V. Onida, 'Un conflitto fra poteri sotto la veste di questione di costituzionalità: amministrazione e giurisdizione per la tutela dell'ambiente' 3 *Rivista AIC* (2013); P. Pascucci, 'La salvaguardia dell'occupazione nel decreto "salva Ilva". Diritto alla salute vs. diritto al lavoro?' *Working Papers Olympus*, 27 (2013).

According to the Court, the emergency decree (subject of appeal) before being issued was a mere authorization for the continuation of Ilva's activity. Regardless of the damage it already caused to environment and health, it was instead actually issued with the specific intent to properly remedy past errors, trying to bring back business activity following a new sustainability path.

It was not, therefore, a question of giving unconditional priority to the economy over public health, but to proceed with the attempt to avoid the closure of the company. It dictated the conditions to be followed in order to continue the activity, trying to properly adapt it to the requirements of the European legislation.

According to some, in this way the Court would have operated in blind reliance on the work of the public administration, which was competent to issue the IEA.[18]

But perhaps this was not the case. The IEA precisely defines the conditions of sustainability and development and it is obvious that the Court has confidence in the public administration's competence to achieve this balance.

The fact that, in concrete terms, the attempt actually failed and the situation has not at all been resolved, only shows how difficult, if not impossible, it is to address a situation in which the rules had already been ignored for so long. It has to be shared the fact in itself of having attributed confidence to a last and late attempt, operating a presumption of reasonableness about the public authorities work.

It was also reasonable to grant Ilva a period of 36 months to adapt to the new requirements of the IEA to avoid closure, since it was clear that the adaptation process could not take place overnight and necessarily required some time.

The problem, if anything, was related to the following situation: what happens in the meantime? It allowed the exercise of an activity that causes damage to the environment and people, and was in contempt of constitutional regulations for the time deemed necessary? And, above all, did this not recognize a sort of immunity for the company?

According to the Constitutional Court this was not the case.

The contested decree, in fact, referred to the rules of the Environmental Code also with regard to any non-compliance with the requirements of the IEA, and so consequently would apply the relevant sanctions, including criminal ones.

Nor, on the other hand, would the continuation of the activities affect past criminal liabilities, which remain in the investigation phase (there is still an ongoing proceeding) and with respect to which the 'save-Ilva' decree does not, in any way, intend to interfere.

The decree, in other words, does not create immunity by postponing any corrective or sanctioning intervention until the expiration of thirtysix months. On the contrary, the very appointment of a guarantor to monitor compliance with the adjustment measures imposed, shows a strengthening of the control measures, rather than a suspension.

[18] T. Guarnier, 'Della ponderazione di un "valore primario". Il caso Ilva sotto la lente della Corte Costituzionale' *Diritto e Società*, 173 (2018).

According to the Court, this also applies to damage to health or, more generally, to the condition of discomfort that the community is forced to suffer due to living in unhealthy environmental conditions and with the fear of contracting diseases. These inconveniences cannot, of course, automatically disappear as a result of the adjustment to comply with the requirements of the IEA.

According to the Court, this does not mean that the rights of the citizens are cancelled or not considered at all. The latter, if they ever feel their rights have been violated, can always refer to the competent Court in order to obtain the remedial and sanctioning measures provided by law. This right would not in any way be affected by the emergency decree, but like any legal claim it would continue to be included in the reference normative context, which, as already clarified, does not reset or even suspend the legality control. Rather, it brings it back to the verification of compliance with the requirements of environmental and health protection contained in the IEA reviewed.

This very last passage of the reasoning is considered quite delicate, since on one hand the Court does not prejudice the maintenance of the guarantees to protect private rights and interests, including the constitutional ones, while on the other hand it seems to subordinate such protection to the failure to comply with the new conditions for the exercise of business activities which have been set out by the revised IEA. To sum up, what it seems to say is that private individuals can only assert their reasons when they demonstrate that the company has not actually complied with the new imposed requirements.

According to the Court,

> 'the re-examined IEA indicates a new point of equilibrium, which allows the continuation of the productive activity under different conditions, by which the activity itself must be considered lawful within the maximum time span (thirtysix months), considered by the legislator necessary and sufficient to remove the causes of environmental pollution and consequent dangers to the health of the population, even with extraordinary investments adopted by the concerned company'.

According to some, what has actually been stated by the Court represents a retreat of previously established principles, which recognize the protection of the right to health in the ordinary Court regardless of compliance with administrative requirements.[19]

Reasoning in this way, however, does not consider the very peculiar situation that the Court had to examine.

The alternative was whether to block everything or to restart. The path that was actually chosen was to restart under new conditions.

This does not mean impunity. Ilva will pay for all of the damages it has

[19] U. Salanitro, *Il decreto Ilva* n 17 above.

produced and will continue to be held responsible if it disregards the given instructions. As long as this does not happen, it is necessary to give the chance to restart without stopping production by raising the objection of the risk it introduces to society: risk, in fact, that it was actually and properly trying to avoid. This is precisely the balance of interests that the Court is talking about.

Without any doubt, a compromise was necessary, at least at that stage, and did not require sacrificing the citizens' right to health, by giving a concrete way to restart an activity in compliance with the new conditions imposed by the IEA.

Of course, it is unfortunate to note that this choice was made without concern about the hardships suffered up to that moment by the population and that adaptation to the newly imposed measures would not be able, all of a sudden, to cancel everything.

In our system, within the context of identifying a solution for inter-private conflicts of much smaller scope, the general rule recognizes that for the needs of production, entries that exceed normal tolerability are required, but only upon payment of a fair indemnity that can compensate for the decrease in value forced to suffer (Art 844 of the Italian Civil Code).

This, of course, applies within the scope of available rights. But, more so, the actual choice to continue with production in compliance with the new conditions should have pushed the State to adopt some specific solutions to address the discomforts of the community, starting from the premise that in order to properly restart, an adjustment period is necessary. I am thinking of the realization of specific contrast works or, in the most serious cases, even the temporary placement of the most exposed communities in safer sites.

This would allow the progressive adaptation to the conditions of the IEA which, as the Court rightly points out, represents the indispensable tool to 'achieve levels of air quality that do not lead to significant negative impacts on human health and to the environment' and which, from this point of view, represents the right way forward.

None of this has been done. In any case, the weak point turned out to be its concretization: the owner (the Riva group) has not even been able to start the imposed adjustment measures, with the consequence that other intervention measures were instead necessary.

VII. An Unsuccessful Attempt: The End of Riva's Era

In fact, nothing went in the direction the Constitutional Court had imagined.

The following year (2014) the review of the IEA was replaced by the adoption of a Recovery Plan, through a new decree law that provided new deadlines. With the new decree, which entrusts the fate of the company to the appointment of an extraordinary commissioner, it also recognized the immunity of the same commissioner for criminal or administrative liability related to the measures

put in place in execution of the plan for the first time.

Therefore, all the precautions that the Constitutional Court had recommended were removed: the continuation of the business activity implies a suspension of the rules and of the control over legality.

In 2015, Ilva is placed in extraordinary administration and, as already mentioned, from that moment on, the sale procedure began. A new decree law further extended the implementation of the Plan (by 2023) and the provision of immunity is extended to new buyers.

That moment represented the end of the Riva era.

This history shows how myopic it is to only pursue financial advantages through industrial activity, without paying the right attention to environment and human health. Nowadays, only by adequately investing in new production techniques, modern and sustainable firms can be competitive and win. The steel industry structurally is a 'dirty' industry and so, even if this is not easy, it is actually possible. The steel enterprises that have invested in this direction and have pioneered the best available technologies are now enjoying competitive advantage in a global marketplace, and they are supported, rather than fought, by local communities.

In Europe there are some examples, in Duisburg or in Austria, that show how can steel actually be produced in a different way. Certainly, even these factories are suffering from the economic crisis of the sector, but none of them went bankrupt for not having considered sustainability as a driver of their business model.

On the contrary, in Taranto the battle is still on-going.

The situation in Taranto is still the same: the steel plant continues to pollute.

This means that there are other European warnings, with new infringement procedures[20] and other judicial interventions, with new threats of closure. The Government, on the other side, attempts to save the situation again with other 'save-Ilva' decrees.

VIII. The Second Intervention of the Constitutional Court (2018)

A new tug-of-war between judicial and executive power is thus grafted. The Government so intervenes with new urgent measures.

The decree, as usual, was followed by a new seizure, due to a work accident that occurred in the second blast furnace and caused the death of a worker.[21] The Government again allowed production, despite the judicial order. This time, the

[20] See European Commission, Infringement Procedure 16 October 2014 no IP/14/1151. To understand the attention paid by the European Parliament to the Italian problem see the paper commissioned by the European Parliament's Committee on Environment, Public Health and Food Safety, G.M. Vagliasindi and C. Gerstetter eds, *The ILVA Industrial Site in Taranto* (European Union, 2015).

[21] Decreto legge 4 July 2015 no 92.

authorisation to continue is conditioned upon a submitted plan, where Ilva's management assures to take some exceptional measures to ensure workers' safety.

The Court reached a different conclusion this time.[22] It confirmed on the one hand that, in theory, the legislator is not precluded from taking action to safeguard the continuity of production within sectors that are strategic for the national economy in order to guarantee the respective employment levels. On the other hand, however, it emphasized that the balancing operation must comply with the canons of proportionality and reasonableness, so as not to enable the absolute prevalence of any one of the values involved or to completely sacrifice any of them.

This time, according to the Court, the legislator has not complied with the requirement to strike a right balance. In allowing the continuation of the activity, despite the seizure of the industrial plant for health and safety offences, the legislator has not complied with the requirement to strike a reasonable and proportionate balance between all relevant constitutional values.

In fact, the judgment is not in contradiction with the previous one, as has been noted.[23]

In the previous case, the continuation of business activity was conditional upon compliance with specific limits set out in administrative measures related to the IEA and was subordinated to specific controls and sanctions.

Now, the continuation of business activity is conditioned exclusively upon the unilateral presentation of a 'plan', by the very same private party whose property has been seized by the judicial authorities. Furthermore, in this case, there is not any certainty of any requirement for immediate and timely measures capable of promptly repairing the danger to workers.

Differently from the previous intervention, the legislator has ended up with excessively privileging the interest in continuing production activity, entirely disregarding the inviolable constitutional rights associated with the protection of health and life (Art 32 Constitution), as well as the right to work in a safe and non-hazardous environment (Arts 4 and 35 Constitution). Furthermore, private enterprise must be conducted in such a manner that does not cause harm to safety, freedom, and human dignity (Art 41 Constitution).

Therefore, according to the Court, the decree 'save-Ilva' this time does not comply with fundamental values and does not consider the limits that the Constitution imposes on business activity. In contrast with the previous case, this time the legislator ended up excessively privileging the continuity of production, entirely disregarding the inviolable rights of human health and life.

It is a strong recognition of the right to health as a fundamental value that cannot be balanced with other economic interests. Again, the Court agrees that

[22] Constitutional Court 23 March 2018 no 58, available in English at https://tinyurl.com/1rj5gpx8 (last visited 27 December 2020).

[23] G. Amendola, 'Ilva e il diritto alla salute: la Corte costituzionale ci ripensa', available at questionegiustizia.it, 10 April 2018.

it could be counterbalanced in some circumstances necessary to protect other constitutional values, such as employment. But that balance requires that both interests are taken into consideration and protected and must also operate in a proportional and reasonable way. This balance must be achieved without the absolute prevalence of one interest over the other, as occurred in the last government provision that allowed the continuation of Ilva's activities without any proper assurance.

The measures adopted by the Italian government were undoubtedly aimed at preserving the company's productive capacity, employment rates, and the potential to attract purchasers that would ensure the continued operation of the plant. All these measures were implemented without paying attention to the fact that production continues to generate pollution, negatively affects the health of the surrounding environment, and that the operations necessary to actually repair the damage caused to the territory were incomplete.

In conclusion, according to the Court, it is important to protect employment, production, and the economy, but all this cannot be detrimental to the environment and human health. The trade-off between economic and labour interests and safeguarding fundamental rights cannot be accomplished solely to the detriment of the latter.

The Court ruled that the decree was illegitimate, but what is more interesting is to examine what the Court states when looking towards the future:

> 'only the prompt removal of any factors that constitute an hazard for the health, body integrity and life of workers is in fact a minimum and indispensable prerequisite for the compliance of production activity with constitutional principles'.

It is clearly a warning to the Italian State.

IX. The Final Warning of the European Court of Human Rights

The warning of the Court of Strasbourg is even more peremptory.

The Court has responded to some complaints submitted by citizens in 2013 and 2015. If the process of adaptation to the IEA review had been correctly initiated, the answer probably would have been different. But, as it has already been said, this was not the case and the pollution continued in Taranto. The complaint of 180 applicants actually comes to the attention of the Court and it concerns their complaint about the effects of toxic emissions from Ilva steelworks on the environment and on their health, and about the ineffectiveness of their available domestic remedies.

According to the Court, the responsibility of the Italian State is twofold.

On the one hand, national authorities have failed to take all the necessary measures to provide the effective protection of their citizens.

The Court recalls the doctrine of positive obligations, which in this case implies the recognition of a duty upon the State to take active steps in order to safeguard the rights of the Convention.[24]

This kind of duty exists even when the damage is caused by third parties, if the State is tasked with regulating and controlling such activity. This is exactly the case, because the State has not taken any reasonable step to control Ilva's activities. More specifically, the Court affirmed that, looking at the European Convention on Human Rights (ECHR), there have been violations of Art 8 (right to respect for private and family life). The Court recognised the credibility of several alarming scientific reports, concluding that national authorities had failed to take all the necessary measures to provide effective protection of the applicants.

On the other hand, the Court identified a violation of Art 13 of the Convention, which contains the general principle to obtain a judicial national remedy for alleging conduct that is detrimental or threatens to degrade a right guaranteed by the Convention.

According to the Court, with regards to the right to a healthy environment, there is no effective remedy enabling people to complain to the national authorities. For the applicants, and more generally for all the people involved, it has been impossible to obtain measures meant to secure the decontamination of the area contaminated.

The Court emphasized how the work necessary to clean up the factory and the site affected by environmental pollution was urgent, and the environmental plan approved by national authorities, which set out the necessary measures and action to ensure environmental and health protections, ought to be implemented as soon as possible. The European Court, in other words, aims to put an end to years of impunity that benefited Ilva, emphasizing that it is time for the Italian government to fulfil the rights of the population to live in a healthy environment.

It is clearly another warning to the Italian State.

Moreover, in this case, the Court was asked by applicants to give a pilot-judgment. That is a procedure aimed at indicating the right way to solve the problems, imposing on national authorities the type of remedial measures to take.

The Court considered this kind of judgment unnecessary (or, maybe, too difficult). It preferred to confirm the existence of human rights' violations and giving to the Committee of Ministers of the Council of Europe the task to monitor the Italian government so that it may urgently start its action for the decontamination of the site and for the improvement of healthy work conditions.

[24] J.F. Akandji-Kombe, Positive Obligations Under the European Convention on Human Rights (Council of Europe, 2007); A.R. Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights (Oxford: Oxford University Press, 2004).

X. New Efforts to Balance the Environment, Health, and Employment

The two pronouncements, which came as soon as the new management of Ilva took office, reopened a wound that had never actually healed: how was it possible that for many years what actually happened in Taranto was allowed to happen, to the extreme consequence of having to put on two different scales, interests that, according to our constitutional design, were certainly not imagined as antagonistic between them at all: the right to work, already recognized and protected by the opening provisions of our Constitution, related to parameters of dignity that does not allow the concept of working as carried out to the detriment of the most elementary conditions of the workers themselves and the surrounding community.[25] Only a truly short-sighted policy has been able to pull the rope for so long, forcing the Constitutional Court itself into a very difficult equilibrium.

At the same time, the two pronouncements have identified a situation that has already changed and represents, from this point of view, an indispensable key to interpreting the present, in order to evaluate the choices that have accompanied the evolution of the situation in Taranto.

Upstream there is, again, a political choice: to continue with steel production.

In theory, a different choice could also have been made.

It should mean that with ArcelorMittal's leaving a new era would start, with the end of the steel industry in Taranto. A real reboot, where de-industrialisation does not only mean dismantling the enormous site. It should mean also a long-term program, with different new possibilities for land-use.[26] Surely a traumatic turning point, even if not less traumatic than the shift from the naval industry to the steel one, and the opportunity to return to the entire city of Taranto coast with its new potential. Even the employees could be engaged in new activities guiding the transition towards a different goal.

Concretely, it would be a difficult step. It is sufficient to think about the many de-industrialised sites in Italy that are still waiting for restoration and for a new intended use.

In any case the choice was to continue.

Judgments become the new lasses to look at the solution adopted.

They following facts occurred in 2015. With the insolvency procedure and the appointment of new commissioners a new era began and it then culminated with the arrival of ArcelorMittal.

In 2017 the steel plant obtained a new IEA, with a scheduled program and

[25] See S. Laforgia, *Diritti fondamentali dei lavoratori e tecniche di tutela. Discorso sulla dignità sociale* (Napoli: Edizioni Scientifiche Italiane, 2018); P. Tomassetti, *Diritto del lavoro e ambiente* (Bergamo: ADAPT University Press, 2018).

[26] U. Mattei, 'Ilva, servirebbe un piano di cura eco-tecnologica', available at *ilfattoquotidiano.it*, 16 November 2019.

closely monitored.[27] The program comprehends to complete all the measures prescribed in the Environmental Plan, though the deadline for implementing the measures provided in the plan was extended to August 2023. Within the same period, ArcelorMittal could decide to buy the company (at the moment it has only rented the plant). It also invested (2.5 billion) to modernize the plant and to clean up the site.

This agreement has been subject to varied opinions.

For some, it has not done very much. It only achieved little steps towards remediation, that are not sufficient to change the current situation and the deadline for completion is too far. Instead, the time was ripe to request a meaningful effort, like imposing a de-carbonisation process.

According to others, it was the best solution for the time, because due to technical and economic factors, it would not have been possible to ask for any further commitment. The facts are still too recent to completely understand if this has actually been a winning choice.

Seen from the perspective of the indications given by the Constitutional Court in 2013, in some ways it could once again appear as a balanced solution, because once again the continuation of the business activity is subordinated to the attempt to bring production back within the canons of sustainability. But in many other respects there is the doubt that the choice was this time based on a reasonable balancing of the interests involved.

But in many other respects it is doubtful that the choice was this time based on a reasonable and stable balancing of the interests involved.

It is clear, in fact, that the 'accelerator foot' has been pushed too far in favour of the enterprise. First of all, the deadline for the implementation of the recovery plan has been delayed. Above all, however, the choice of immunity has a really heavy weight, which has led to the disappearance of what the Constitutional Court had considered a firm point: such as the continuation of the activity without deactivation of control, sanctions, rules. This time, it has declared itself willing to suspend the judgement on the company's liability, allowing the adjustment process to take place outside any risk and control.

The choice has been the subject of a new appeal and the case is currently pending before the Constitutional Court. But it is very doubtful that the Constitutional Court will be able to acquit the legislator without denying itself.

On the other hand, it is not the only forcing.

The whole situation in Taranto was probably harder than what the globalized enterprise had considered at the very beginning.

Dealing with a multinational firm the answer is simply: it is better to leave and to invest elsewhere without fearing the entrance of new competitors. For everybody the situation would be the same, always with the same difficulties.

[27] With a Permanent Observatory for the Environmental Plan Monitoring, at the Environmental Minister, see www.osservatorioilva.minambiente.it.

On one side, the lasting crisis of the steel industrial sector and the competitive pressure of emerging countries. On the other, the too costly remediation and the renovation of the steel plant.[28] The economic activity is not profitable enough to complete all the investments required while maintaining the jobs. Nobody in these conditions could guarantee the employment level. The steel production in Taranto seems to be condemned to the same destiny, it is not possible to escape from the enormous costs for the previous faults.

This time the State has taken on itself some commitments, that again, it's not yet possible to know the details, but according to the latest reports, are moving towards financing green investments and ensuring the employment rate.

The obvious conclusion is that if the steel industry in Taranto must go on, its continuation cannot be solely put in private hands. The presence of the State is necessary in the search for a model of social and environmental sustainability that the market cannot reach. Obviously, State intervention goes beyond its tasks and its duties to protect human health and the environment. Employment rates and production are on the agenda as necessary goals that are not possible to leave to the fluctuations of the market.

Actually, the Government is aware of its innovative role. In a recent interview, the Economy Minister declared: 'Stop with taboos. The State must intervene when the market fails'.[29]

We can agree with his conclusions, but it is necessary to specify that in this case, there are no market failures. On the contrary, the market worked perfectly in the case of Ilva at first, it put aside an enterprise that was only apparently working, because within its production costs, it was not able to counter the social costs imposed on the community. But also, in ArcelorMittal's experience, the market correctly functioned by not allowing the continuation of a losing enterprise and setting the end of the steel plant.

In such cases, State intervention instead of correcting the market prevents the market from working, because there are some interests that are too important to protect.

This is maybe the most important conclusion to reach for the entire story.

According to our Constitution, the State must entrust the interests of the whole community, like employment and productivity, and it can interfere with the market to protect them.

For many years these basic principles have been outdated and replaced by the idea that the State must only regulate the market without any positive interference, according to the prevailing model of the European Union.

The entire story teaches us that when there is an environmental and human health crisis on one side, and occupational and industrial crisis on the other, this prevailing model could not support the right answers.

[28] S. Romeo, 'L'Ilva e la crisi della siderurgia', available at *rivistailmulino.it*, 15 November 2019.
[29] In his interview, 24 December 2019, available at www.repubblica.it.

XI. Beyond the Emergency: Statements on Environmental and Health Protection. Hazardous Emissions and the Right to a Healthy Private Life

Beyond these aspects involving the political, or economic policy dimension, it is important to see how the principles affirmed by the Courts affect more strictly the legal field and, in particular, the health and environmental protection profile.

From this point of view, it is especially taken into account the ruling of the Strasbourg Court, whose established principles take on a value that goes way beyond the concrete case and whose principles are not so easy to read, requiring instead a systematic framing effort.

The Court found itself deciding at a time when, in fact, nothing had changed with respect to the uneasy situation experienced by citizens of places of residence which were particularly exposed to harmful emissions of Ilva. It took into great consideration the many reports, from which it clearly emerged both the poor air quality conditions and the increase in the mortality rate, as well as the increased risk of incidence of certain diseases. Nevertheless, it saw a profile of a violation of the ECHR, without calling into question the right to health, but in relation to the right to private and family life (Art 8).

The same thing had already been done in the past, through an evolutionary interpretation of the text of the Convention, believing that the right to private life could also include the well-being, determined by environmental conditions (the healthiness of the places where private life takes place). With reference to Italy, the same principle had already been affirmed following a complaint filed by some citizens living in Somma Vesuviana, who complained about the precarious living and working conditions of their life caused by the state of neglect of the area and to the amount of waste abandoned on the roads, which is part of the wider and sadly known phenomenon of the 'land of the fires'.[30]

As it is well known, the Campania affair also had serious consequences, not only from an environmental point of view, but also for public health and because of the loss of many human lives. But the appellants, before the Court, complained about the serious state of deterioration and about the conditions of the places where their private and working lives were normally carried out. The Court identified such protection in Art 8 ECHR.

The violation of this right stemmed from the fact that the situation had degenerated as a result of the repeated failure to comply with the most elementary rules governing the waste management activities and that, therefore, the State had failed to fulfil its obligations to take all the appropriate measures suitable to ensure the effective protection of its citizens.

In the case of Ilva, the Court considered that the absence of adequate

[30] Eur. Court H.R., *Di Sarno and others* v *Italy*, Judgment of 10 January 2012, available at www.hudoc.echr.coe.it.

measures and the previous events were also caused by more recent episodes: such as the failure to comply with the measures imposed by the IEA review and the postponement of the deadline to 2023, for the implementation of the Environmental Recovery Plan. Particular attention, in this context, was also given to the fact that the immunity was attributed to the people in charge of ensuring appropriate compliance with the measures and also to the future purchasers of the company.

In Taranto, as in Naples before, there has been a serious and repeated disapplication of the rules. The inevitable conclusion is that the Italian State has failed in its obligation to protect the right to private and family life of its citizens, by not guaranteeing them an adequate level of well-being and environmental health.

XII. The Right to an Effective Remedy and the Italian System

Another important conclusion that has been reached by the Court (not unlike what was already stated in the Neapolitan case) is that this right to environmental healthiness, in our legal system, would not have adequate instruments of protection, with the consequent violation of Art 13 ECHR (right to an effective remedy).

This is one of the most interesting and delicate aspects of the whole affair, which is grafted onto one of the most complex problems concerning the regulation of environmental damage, namely the difficulty of distinguishing between the collective dimension and the individual dimension of the damage.

According to the Court, the absence of adequate protection measures would be given, first of all, by contingent reasons, such as the economic and financial difficulties of the company, which made impossible any attempt of guaranteeing an actual protection.

But, above all, it is due to structural reasons. These include the peculiarity of our constitutional system which does not allow, unlike in other countries, direct access to the Constitutional Court for citizens who consider their rights damaged.[31]

But this is especially because of the national discipline on environmental damage, which only recognizes the State's legitimacy to act, excluding any direct power of action for citizens who are victims of the harmful action.

This being the case, it could not even be possible to identify a problem of 'exhaustion of internal remedies', such as to justify the Court's intervention.

This aspect, referring above all to the last of the arguments adduced (the first one is only relevant in the context of the Constitutional choices related to

[31] Like in Germany, with the *Verfassungbeschwerde*, or in Spain, with the *Recurso de amparo*. Some references in M. Meli, ' "Sistema internazionale" e sua incidenza nell'ordinamento interno' in *Atti 5° Convegno Annuale SISDIC, L'incidenza del diritto internazionale sul diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2011) 413.

balancing the powers of the State) deserves careful consideration.

XIII. Is Air Pollution an Environmental Damage?

In our legal system, in fact, the environmental damage action may only be exercised by the State (namely, by the Ministry of the Environment), while instead local authorities and natural or legal persons who are or could probably be affected by the environmental damage can only file complaints and give information to the Ministry of the Environment, submitting them to the Prefectures, territorial Government offices (Art 309 of the Italian Civil Code).

This is so in the new legislation, implementing the 2004 European Directive, even if it is not too different from the old regulations on environmental damage from this point of view (introduced for the first time in our legislation by Art 18, legge 8 July 1986 no 349, establishing the Ministry of the Environment) except for the fact that, alongside the legitimacy of the State, it recognized the legitimacy of local and regional authorities as representative subjects of the damaged community.[32]

When passing by the old legislation to the new ones, however, the notion of environmental damage has radically changed.

If before, the environmental damage notion was generically referred to as a damage to the environmental resources, without any particular delimitation. In the new legislation (Art 300, para 2) and even before that, already within the European directive, the environmental damage is defined in a very precise and circumscribed manner.

Pursuant to Art 300, para 2 of the Italian Civil Code (which makes an explicit reference to the text of the directive), environmental damage is identified as deterioration that can be caused to: a) protected species and natural habitats; b) to inland waters, coastal waters and those included in the territorial sea; c) to the soil, through any contamination that creates a significant risk of harmful effects, even indirect, on human health, following the introduction of substances harmful to the environment into the ground, the soil or the subsoil.[33]

In the case of Ilva, the industrial activity has posed many problems, from

[32] It is sufficient to recall M. Libertini, 'La nuova disciplina del danno ambientale e i problemi generali del diritto dell'ambiente' *Rivista critica del diritto privato*, 547 (1987).

[33] U. Salanitro, *Il danno ambientale* (Ariccia: Aracne, 2009), 39; B. Pozzo, 'La responsabilità civile per danni all'ambiente tra vecchia e nuova disciplina' *Rivista giuridica dell'ambiente*, 815 (2007); Id ed, *La responsabilità ambientale* (Milano: Giuffrè, 2005); Id, 'La nuova direttiva 2004/35 del Parlamento Europeo e del Consiglio sulla responsabilità in materia di prevenzione e riparazione del danno' *Rivista giuridica dell'ambiente*, 11 (2006); Id, 'La direttiva 2004/35/CE e il suo recepimento in Italia' *Rivista giuridica dell'ambiente*, 1 (2010); F. Giampietro, *La responsabilità per danno all'ambiente* (Milano: Giuffrè, 2006); E. Gallo, 'L'evoluzione sociale e giuridica del concetto di danno ambientale' *Amministrare*, 261 (2010). See also M. Meli, 'Il principio chi inquina paga nel codice dell'ambiente', in I. Nicotra and U. Salanitro eds, *Il danno ambientale tra prevenzione e riparazione* (Torino: Giappichelli, 2010), 69.

an environmental point of view, so many that the area in which Ilva is located, was recognized and declared in the early 1990s as a high environmental risk area and was subsequently included in the Sites of National Interest (SIN) in order to properly identify a remediation program (like most industrial sites in Italy).

But the main problem on which the whole story is related to, is air pollution linked to iron and steel processing and, in particular, to the emissions of dioxin, heavy particulate matter, benzopyrene, deriving from the use of obsolete plants (in particular in the coking plant, the so-called Blast furnace).[34]

Complaints received by the European Court refer to this type of pollution and a problem of the same type is at the base of the seizure proceedings initiated by the judicial authorities (from 2012).

It is clear that this is not related to the discipline of environmental damage, as above described. In other words, it is obvious that air pollution can cause damage to the ecosystems: particulate matter and acid rain can certainly have repercussions on the protection of water resources, land and biodiversity, that fall within the scope of the legislation on environmental damage.

What is not considered here is the specific aspect related to air quality and the effects it may have on the health and life quality of the individuals involved.

It results that, regarding the problems identified by the Court, it is completely irrelevant that in our legal system the action for environmental damage can only be exercised by the State.

This, of course, doesn't make it easy to answer to the question of whether, and in what way, the health and well-being of citizens is adequately protected.

In this regard, a recent ruling by the Court of Cassation reached a different conclusion, considering that, in spite of the normative data, the notion of environmental damage should be extended in order to also include air pollution.[35]

The judging body, in order to support the proposed interpretation, uses various arguments, first of all the fact that the environmental damage notion, dictated by Art 300, para 2, would only have an illustrative and exemplary value, compared to the provision of para 1, according to which 'environmental damage is any significant and measurable deterioration, direct or indirect, of a natural resource'.

This is, to date, an isolated and, to tell the truth, unconvincing opinion. Both because it values a textual data which is actually identified as a result of the overlapping of two different regulations (domestic and European); and, above all, because it does not consider that the whole structure of the discipline is now modelled on the European one, which essentially revolves around the idea of restoring the environmental resources which have been attacked.

[34] An overview in M. Neglia ed, The Environmental Disaster and Human Rights Violations of the Ilva Steel Plant in Italy (Paris: FIDH, 2018).

[35] Corte di Cassazione 14 November 2018 no 51475, available at https://tinyurl.com/yboqkrh7 (last visited 27 December 2020).

From this point of view, not to indicate the air among the possible resources that are subjected to aggression appears as a very precise choice, as it is not possible to proceed with its restoration with any adequate repair measures (primary, complementary and compensatory).[36]

It is true, however, that the European Parliament itself is considering the possibility of revising this choice, suggesting that the field of application of the directive should also be extended to air pollution.[37]

From this point of view, the Supreme Court's ruling was intended to be as an anticipation of this evolutionary trend, by providing for the condemnation of those responsible to actually pay compensation for damages rather than to order restoration measures (that as it has been said is impossible).

This, however, gets to the heart of the problem reported by the Court: would such compensation be an adequate instrument of protection, regarding the violation of the rights mentioned by the Court? And could it be an adequate instrument of protection, if the legitimacy of the action for environmental damage was also recognized to other parties than the State, such as representative bodies of the damaged community?

In other words, in this case are we facing collective damage or an individual and private one?

XIV. Environmental Damage and Private Damages

It has always been clear, since the entry into force of the first environmental damage regulations (1986), that this case concerned the damage to the so called common interests, usually represented as widespread interests that concern the community as a whole, as well as the fate of future generations.

It has always been equally clear that the same damage can result in a reflected damage, or a direct and demonstrable damage to the health of specific persons or to the rights of public or private individual property, and that it can continue to find protection within the ordinary protection instruments.[38]

This is confirmed today by the provisions of Art 313, para 7 of the Environmental Code, according to which 'in any case, the right of persons

[36] On environmental remediation critera see more in U. Salanitro, *Il danno ambientale* n 33 above; V. Giampietro, 'Danno ambientale: breve disamina degli eterogenei criteri di risarcimento' *Ambiente&Sviluppo*, 811 (2010); M. Franzoni, 'Il nuovo danno all'ambiente' *Responsabilità civ*ile, 785 (2009); M.C. Alberton, 'La valutazione e la riparazione del danno ambientale nell'esperienza dell'Unione Europea e degli Stati Uniti: problemi, soluzioni, prospettive a confronto' *Rivista italiana di diritto pubblico comunitario*, 867 (2010). See also the European project REMEDE, available at http://www.envliability.eu/index.htm.

[37] See European Parliament, 'Report on the application of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage', 11 October 2017.

[38] Recently, on the issue see P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2019), 275.

damaged by production of environmental damage, in their health or in their property, to take legal action against the person responsible for the damage in order to protect the law and the interests damaged' remains unaffected.

The provision refers to the general rule on civil liability, which is represented in our system by the general clause of injustice of damage, pursuant to Art 2043 of the Italian Civil Code. However, it textually mentions both property right and health right, on which there has never been any doubt that it could be a reflected damage (and that it can actually be protected separately from the action for the environmental damage).

There are also some concrete examples with respect to Ilva.

With reference to property rights, recently, the Court of Appeal of Lecce permitted compensation of damages suffered by some owners in Tamburi, due to the powder that depreciated the value of their buildings.[39]

The City of Taranto also acted against Ilva for the damage to the image of the town and its goods, there are pending analogous requests from some farming corporations.[40]

But considering the aspect that more closely concerns us, it is obvious that, among the private reflected damage, the right to health comes first and foremost.

Without any doubt, the right to health is recognised and protected. But undoubtedly, as shown by the Smaltini case (which also concerns the city of Taranto and which has come before the European Court),[41] this right is quite difficult to protect, where those who take legal action complain about the onset of certain pathologies strictly linked to industrial emissions, due to the well-known problems connected to the assessment of the causal link.

On the other hand, it has to be said that our judicial power today tends to broaden the health damage notion, to the actual point of even including within the health damage, the discomfort of having to undergo regular medical examinations, even in the absence of an established or medically ascertainable injury.[42]

Likewise, especially as a preventive measure, it also tends to give importance to the fear of contracting diseases or of being exposed to undesirable consequences by disagreeing with the emergence of a new work or activity that can be a source of danger.

This principle was for the first time affirmed by the jurisprudence in the 1970s and it is still prevailing. At that time, with reference to an issue concerning the need to stop the construction of a nuclear power plant, the

[39] Corte d'Appello di Lecce 31 January 2018 no 45. Ilva must pay damages to the owners of one of the stabiles of Tamburi equal 20 percent estate value for each owner (about twelve thousand/sixteen thousand euro for each).

[40] tinyurl.com/ybfoq9s7 (last visited 27 December 2020).

[41] Eur. Court H.R., *Smaltini* v *Italia*, Judgment of 24 March 2015, available at www.hudoc.echr.coe.it.

[42] Corte di Cassazione-Sezioni unite 21 February 2002 no 2515, *Giurisprudenza italiana*, 691 (2003) for what concerns the toxic cloud arised from Seveso accident.

Supreme Court affirmed for the first time a principle that is still applied today, concerning the jurisdiction of the ordinary court (despite the fact that it was a public work), due to the fears, advanced by the plaintiff according to whom that work, if realized, could actually cause a danger to people's health.[43]

Another leading case, considered of extreme importance, emerged shortly afterwards. It concerned the construction of a water purification plant and the Supreme Court considered the applicants' concern to be equally well-founded, on the basis of the observation that the activity that was carried out could affect, although not exactly people's health, but the wholesomeness of the environment and therefore the applicants living and working conditions, as a source of malodorous fumes and noises that could harm their psychophysical well-being.[44]

From that moment on, it seemed that the right to a healthy environment had to be affirmed: the right to carry out a private life in healthy and environmentally safe conditions are relevant as such, beyond and independently of the occurrence of a real damage to health.

At that time the debate was very lively, but it ended up being overtaken by the first regulation on environmental damage. This regulation absorbed into its sphere of action every profile related to environmental health conditions, considering them within a collective dimension, and recognising the legitimacy of the State and local authorities as representative bodies of the damaged community.

Today, however, the question arises again.

In our legal system it is in fact proposed again, for reasons related to the new environmental damage regulations which, as previously stated, by limiting the action legitimacy to the State, has recognised a constitutional legitimacy problem, as it is no longer considered appropriate to ensure a sufficient level of protection of the 'social dimension of the damage'.[45]

But more generally it is also proposed in the world, because, the fact that

[43] Corte di Cassazione-Sezioni unite 9 March 1979 no 1463, *Il Foro Italiano*, 2909 (1979).

[44] The reference is to the well known judgment of the Corte Cassazione 6 October 1979 no 5172, *Giurisprudenza italiana*, 859 (1980). Look at S. Patti, *La tutela civile dell'ambiente* (Padova: CEDAM, 1979), one of the many comments of that period. Nowadays, there are many judiciary interventions on this subject: Tribunale di Modena 5 May 2004, available at lexambiente.it, has recognized that people afraid for the construction of a power line are not only entitled to sue for injunction, but also for compensation. The judgment has been very criticized by M. Libertini, 'La responsabilità d'impresa e l'ambiente', in *La responsabilità dell'impresa*, *Quaderni di Giurisprudenza Commerciale* (Milano: Giuffrè, 2006), 225. But other similar interventions are Corte di Cassazione 12 October 2006 no 23735 and Corte di Cassazione 21 March 2006 no 6218, both available at https://tinyurl.com/yaecflsw (last visited 27 December 2020), and more recently Corte di Cassazione-Sezioni unite 23 April 2020 no 8092, available at https://tinyurl.com/oejvyol (last visited 27 December 2020), for what concerns damage complained for an incinerator.

[45] Corte costituzionale 1 June 2016 no 126, *Foro amministrativo*, 1466 (2016). The Court was asked about legitimacy of Art 311 environmental code, just because the State action could not protect adequately the local community involved in the environmental damage. U. Salanitro, 'Il danno ambientale tra interessi collettivi e interessi individuali' *Rivista di diritto civile*, 246 (2018).

the social dimension of the damage is passing to a private dimension, is a clear sign of the actual times. Nowadays, like many other transformations, even rights that we would have once called 'social' rights, become individual rights, freedom rights, human rights. This is how the environmental right appears in many recent Constitutions, but also in different important international sources, including the Aarhus Convention which, in its Preamble, recognises the right of each person to live in an environment which is appropriate for their health and well-being.

In any case, the matter acquires specific importance when referred to the question that interests us, since air pollution does not fall within the scope of the legislation on environmental damage.

Facing this legal vacuum, the interpreter has to ask himself which is the specific meaning to assign to the Court. And if and in what way, in particular, the protection of the citizens of Taranto (or, better to say, of the areas more contiguous to Ilva) can obtain the recognition of a right to a healthy environment, based on Art 8 ECHR.

The problem arises because if on one hand, on the background the world has changed, on the other hand, there will always be the same problems.

Saying that each individual has a right to live in a healthy and protected environment means giving importance to a need for protection that it is not exclusive, but common to all people in the same conditions. This situation clearly is halfway between an individual and a collective interest. The problem is not numerical, especially since, with the entry into force of the class action, all actions to protect homogeneous rights can be brought together in a single judgement. But this is the real problem: can we talk about homogeneous rights? Considering that the class action leads to an efficient use of the procedural system, but it is not useful to widen the sphere of the protected legal positions by recognising rights that did not exist before.[46]

To answer the question, it should be further clarified that the European Court has not recognised the existence of an infringement of the applicants' right to health, or at least not directly. The Court has given importance to the fact that citizens are forced to live in unhealthy and dangerous conditions.

The Court has identified a differentiated position for the inhabitants of those municipalities indicated in the Reports as high-risk areas (and it did not accept the appeal filed by citizens living in different municipalities). But, even within a limited territorial limit, it recognized importance to the considered environmental conditions, regardless of whether they resulted in an actual damage to anyone's health.

A situation, therefore, that within that perimeter continues to affect the whole community.

[46] Look at the Introduction of B. Sassani, *Class Action* (Pisa: Pacini editore, 2019).

XV. Environment, Health, and Human Rights

What is then the actual meaning that should be recognized in the Court's words? What is the 'right of a private and family life', as referred to environmental condition, about?

Abstractly, the actual recognition of the right recognized by the Court to the citizen could take three different ways:

a) According to a first reading, it is possible that the recognition made by the Court is only relevant within the State-citizens relationship. It should not be forgotten, in fact, that the aim of the Court's intervention was to note the violation of human rights by the Italian State, in breach of its positive obligations. On this basis, the assessment expressed by the Court would exhaust its relevance as a strong argument supporting the public administration responsibility that has actually failed to optimise the use of 'common resources', allowing some privileged actors (Ilva) to make an excessive and reckless use.

As much as in the context under review, this is even more true where regulatory measures are imposed by European standards, the non-implementation of which has been repeatedly highlighted by the Court of Justice and other European institutions.

However, this interpretation, appears to be extremely weak compared to the fact that, traditionally, the recognition of a right by the Court, even if through an extensive interpretation of the textual data, is also effective in the field of peer-to-peer relations;

b) According to a different interpretation, which wanted to give to the Court's interpretative contribution a meaning that goes way beyond the only decision, the recognition of the right to a healthy environment would be relevant within the framework of the regulation of environmental damage. In particular, it would impose an interpretation according to which the legitimacy to act, in addition to the one recognised to the State, should also be recognised to other bodies (territorial or not), as representative of the damaged community. This requires however an extensive interpretation of the environmental damage legislation that includes air pollution. Moreover, it would mean that these damages suffered by local population are 'social damages', and that only a representative body is entitled to sue;

c) According to a third and more convincing reading, its own meaning should be given to the reconstruction of the Court, such as the recognition of a real human right to a healthy environment, definitively overcoming the objection that the environmental dimension, because of its own pervasiveness, cannot represent a completion of the sphere of protection of everyone's personality.

This last reading is undoubtedly more in line with the language of the Court (that is asked to protect human rights) and it also is the most evocative one, because it affirms the idea that the protection of the environment belongs to each individual's personal sphere and that the human being has to be at the

centre of the reflection and before all other economic interests.

As argued here, however, considering the dogmatic framework, it presents many problems, at least if we speak about a right to a private life, as the Court does.

This could be because every reconstruction going through human rights recalls the idea of the incompressible nature of human rights. With the consequence that when those rights intersect with the use of environmental resources common to all, these rights might end up with interfering with the choices made by the public regulator, paralysing any use (even legitimate) of environmental resources and thus ending up creating an uncontrollable litigation, in which the judges will define the conditions to use the resources and not the bodies actually in charge of it.

The rather complex theme shows how the chapter on private environmental law has yet to be written, defining the assumptions but also the content of the protection of these new rights. Of course, the situation is different when the right involved is about health.

And so, without any doubt, is what's happened in Taranto. Even if the Court has considered the right based on Art 8 ECHR, it is quite evident that it is not question of living a decent family and working life, but it directly affects the right to health of the citizens (in the broader meaning that health has assumed in our internal courts). There is a concrete and real risk of getting sick, which, although common, cannot lose sight of the private and individual dimension of damage.

Concerning this right, the Court tells us today that there has been a violation. But what the Court tells us most of all is that there still is a violation and there will be as long as the implementation of the recovery plan is not successful.

This means that if a first attempt to restart, surrounded by all the precautions that the Constitutional Court had identified, was unsuccessful, this cannot legitimise any other attempts to the bitter end, in which all the rules related to control and responsibility of the company are suspended and in which the needs of production become the only objective to be pursued.

The citizens have achieved their moral victory against the State.

But this cannot be enough. The game is still open.

Hard Cases

Legal System and Sports System: Two in One?

Antonio Panichella*

Abstract

This paper explores the relationship between sports justice and state justice. It focuses on the judgment of the Constitutional Court no 160 of 2019, which declared that Art 2 para 1, letter b) and para 2 of decreto legge 19 August 2003, no 220 on sports justice was not unlawful. Art 2 does not allow an appeal to the state judge for disputes concerning technical and disciplinary sports sanctions; the state judge can only decide on compensation for damages.

In this decision the monist and pluralist theories of the legal system are highlighted; through their analysis we want to reach the conclusion of the necessary unity of the legal system, as also the technical and disciplinary provisions of the sports legal order can damage the fundamental rights of the person, and thus determine a protection request before the state judge.

I. Introduction

The issue examined by the Constitutional Court concerns the problem between sports justice and state justice. This problem is part of the wider debate about the relationship between sports and legal systems.

By the judgment of 25 June 2019 no 160, the Constitutional Court claimed that the provisions that prevent recourse to the administrative judge for annulment of sports technical or disciplinary measures are lawful. The jurisdiction of the State Court remains in matters of compensation.[1]

The case arose from the appeal brought by a registered sports manager who had been disqualified for three years by the Italian Football Federation (FIGC). After losing the appeals before the sports justice bodies, he approached the state justice. The state judge was asked to annul the sports measure. The Regional Administrative Tribunal of Lazio, referred the issue to the Constitutional Court, arguing that sports disciplinary decisions can be qualified as administrative measures, suitable as such to affect legitimate interests. For this reason, their holders may not be denied state judicial protection in the case where their rights and interests are affected by sports measures. Moreover, the state judge who requested the declaration of unconstitutionality argued that there was no equivalence between the elimination of the measures and the simple compensation.

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[1] Corte costituzionale 25 June 2019 no 160, *Giurisprudenza costituzionale*, 543 (2019).

Howewer, the Constitutional Court rejected the claim of unconstitutionality since the choice to exclude state jurisdiction was the result of a reasonable balancing between opposing interests made by the legislator. The legislator correctly balanced the principle of effective judicial protection with the requirements of safeguarding sports autonomy. The same conclusions were reached by the Constitutional Court a few years ago with the judgment 11 February 2011 no 49.[2]

In recognizing and promoting the principle of autonomy of the sports system, the 2003 decree law 'is without prejudice to cases of relevance for the Republic's order of subjective legal situations connected with the sports system'.

This law also provides that some matters are reserved to the sports system (such as the application and compliance with the regulatory organizational and statutory rules of the sports system), while others are subject to the jurisdiction of the ordinary judge. Disciplinary offences and the imposition of the relevant sanctions, on the one hand, and the asset relationships between clubs, associations and athletes, on the other hand, are reserved to the sports judge.

At the same time the law provides that

> 'any other controversy concerning acts of CONI or of Sports Federations not reserved to the courts of the sports system pursuant to article 2, is governed by the code of administrative procedure',

without prejudice to the sports preliminary ruling in all federal statutes.

The most controversial aspects of the provisions referred to, regard two profiles that are strongly intertwined: 1) matters pertaining to the sports system and 2) the scope of the 'safety clause' in cases of relevance for the state's legal order of subjective legal situations connected with the sports legal order. Therefore, the question of identifying the selection criteria in cases of relevance for the state legal order of subjective legal situations connected with sports system, is crucial.[3]

II. Jurisdiction Theories. The Theory of the Plurality of Legal Orders

The issue examined by the Constitutional Court on sports and state justice must necessarily be analized in the light of the legal literature relating to regulations and state legislation.

The relationship between sports and state legal orders lies at the heart of the contrast between unitary theories and pluralistic theories.[4]

[2] Corte costituzionale 11 February 2011 no 49, *Il Foro Italiano*, I, 2602 (2011).

[3] T. Mauceri, 'Sui rapporti tra giustizia sportiva e ordinamento statale' *La nuova giurisprudenza civile commentata*, II, 594 (2019); E. Maio, *Clausola compromissoria e meritevolezza nel sistema della giustizia sportiva* (Napoli: Edizioni Scientifiche Italiane, 2020), 16-68.

[4] For a detailed examination about the theories of legal order, see: S. Romano, *The Legal Order*, Edited and Translated by Mariano Croce (New York: Rourledge, 2017), original version 'L'ordinamento giuridico' of the 1918; W. Cesarini Sforza, 'La teoria degli ordinamenti giuridici ed il

Starting from the analysis of the pluralist theories, it must be highlighted that they start form Santi Romano's institutional theory.[5] In his opinion every legal order is an institution and consequently every institution is a legal order.[6] Law arises when the social group becomes an organized group, that is, it becomes institutionalized in such a way as to create an organization that allows it to become a legal order.[7]

Then this theory was examined by Cesarini Sforza.[8] At this point the dual nature of the phenomenon of the sports order emerges: in the state's view the institute of the contract is important as the sports order arises from an act of contractual autonomy.[9] In the internal perspective of the sports order the institutional nature emerges as a system of objective law that is asserted by the means available to the organization.[10]

The crucial point is just this double qualification between 'imperial deed' (atto d'imperio) and 'contract'. In light of this assumption, the requirement not to appeal to the state judge in sports disputes is interpreted, like all statutory

diritto sportivo' Il *Foro Italiano*, V, 1381 (1993); M.S. Giannini, 'Prime osservazioni sugli ordinamenti giuridici' *Rivista di diritto sportivo*, 16 (1949); L. Di Nella, *Il fenomeno sportivo nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1999).

[5] A. Sandulli, 'Santi Romano and the Perception of the Public Law Complexity' *Italian Journal of Public Law*, 1-38 (2009); M. Croce, 'Whither the state? On Santi Romano's *The legal order*' *Ethics & Global Politics*, available at https://tinyurl.com/y8ofrjat (last visited 27 December 2020).

[6] S. Romano, *The legal order* n 4 above. The work of S. Romano is divided in two parts: the first is dedicated to the concept of legal order, the second to the plurality of legal orders and their relationships. According to S. Romano, the legal order as a set of norms is a restricted interpretation, because the process of objectification, which gives rise to the legal phenomenon, doesn't start from the issuiance of rules, but prior to that; norms are merely a display of the legal order, one of various displays.

[7] S. Romano, 'Gli interessi dei soggetti autarchici e gli interessi dello Stato', in *Studi di diritto pubblico in onore di Oreste Ranelletti* (Padova: CEDAM, 1930), 122; see also Id, 'Oltre lo Stato', in Id, *Scritti minori* (Milano: Giuffrè, 1950), 351. S. Romano's theory has also had a large prominence in the international law, in fact F. Fontanelli, 'Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations' *Transnational Legal Theory*, 67-117 (2011), observes that S. Romano's particular conception of law as an institution can be helpful in the current debate on the unity and systematisation of international law, whereas his reflections on the plurality of legal orders contained early kernels of insight for present-day research on the fragmentation of international law and the rise of atypical global governance regimes.

[8] W. Cesarini Sforza, 'Il diritto dei privati', in Id, *Il corporativismo come ordinamento giuridico* (Milano: Giuffrè, 1942), 29.

[9] We should really have a separate discussion for Cesarini Sforza, since he used the law created by social groups as an example of the notion of law. Cesarini Sforza's theses do not seem to confirm the subsequent evolution of the relations between the State system and that of the social groups, despite the fact that the text of Art 36 of the Civil Code was very probably formulated from the point of view of legal pluralism, as is pointed out by G. Volpe Putzolu, *La tutela dell'associato in un sistema pluralistico* (Milano: Giuffrè, 1977), 7, and A. Fusaro, *L'associazione non riconosciuta. Modelli normativi ed esperienze atipiche* (Padova: CEDAM, 1991), 79.

[10] F. Criscuolo, *Autonomia negoziale e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2008), 12; E. Del Prato, *I regolamenti privati* (Milano: Giuffrè, 1988), 27.

provisions, as a contract clause.[11]

According to this model, a number of institutions are admitted alongside the State, the only institution that pursues general interest of the whole community. These institutions – often set up in a spontaneous form, as an expression of the private association – pursue collective interests in various sectors: these 'social formations' ('formazioni sociali') are recognized as 'sectoral regulations' (military order, order of the various professions, ecclesiastical order, university system, sports order, etc).

These systems, within the decentralization of functions, carry out their activities with a certain autonomy. Autonomy that is realized in the faculty of establishing their own organization and putting in place their own rules.[12]

It should be added that the perception of the necessity of an ordering structure, aimed at regulating the sports phenomenon, matured together with the acquisition, by the latter, of an increasingly complex character.[13] In particular, the emergence of growing and articulated technical regulation in sectors unknown to the state system, constituted – according to the theorists of the plurality of orders – the demonstration of the indispensability, as well as of the autonomy, of the sports legal dimension.[14]

In this view the State could either frame this sports phenomenon within it, and absorb the private order, or not recognize the effectiveness, by ignoring it.[15]

A significant problem regards the effects produced by the regulatory provisions and by the decisions of sports order in the state order. The state judge first should control the legality of the act of the private order and secondly compliance of the effect of the act with state law.[16] When the 'civil effects' do not emerge, the state order is not interested in sports rules.

Cesarini Sforza gives an example of qualification of the civil effects. The award of the national champion title in a sport is the responsibility of the sports order: these are the only technical rules that can indicate whether or not to assign this encomium. A different scenario arises when the title of national champion was necessary as a condition to benefit from a testamentary provision. A fact

[11] P. Femia, 'Due in uno. La prestazione sportiva tra pluralità e unitarietà delle qualificazioni' *Fenomeno sportivo e ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 2010), 268.

[12] M.S. Giannini, 'Prime osservazioni sugli ordinamenti sportivi' *Rivista di diritto sportivo*, 17 (1949).

[13] S. Shatku, 'The Sports Law in the Context of the Plurality of Law Systems and the New Concept of Professional Sport Work in European Area' *Academic Journal of Interdisciplinary Studies*, 359-362 (2014).

[14] P.F. Luiso, La giustizia sportiva (Milano: Giuffrè, 1975), 11; M. Tortora, C.G. Izzo and L. Ghia, Diritto sportivo. Giurisprudenza sistematica di diritto civile e commerciale, Fondata da W. Bigiavi (Torino: UTET, 1998), 198-206.

[15] W. Cesarini Sforza, 'Il diritto dei privati' n 8 above, 65, highlights that only these two situations are supposable, since it is conceivable that the State forbids 'another order as such'. There will remain certain facts that the State could consider criminal and for this reason prohibit them criminally.

[16] With regard to this aspect, L. Di Nella, n 4 above, 87, points out the critical issues of the pluralist model.

usually non-qualifiable in the state sphere (as the award of the national title is irrelevant to the legal order) becomes qualifiable if it produces civil effects.[17] At this point the state judge would have to put in place the legality judgment of the act of the sports authority and compliance with state rules and principles.

III. Monist Theory and Criticism of Statutory Pluralism

Pluralist theory shows a number of inconsistencies. Among the many, the relations between the orders, of course, deserves to be described. In fact, if one wants to support a parallelism between the orders, it is actually not that. If, in fact, with respect to a parallel order the State must choose between irrelevance and relevance, there is no parallelism any more, as an asymmetry would emerge. It is the State that decides whether or not to give relevance to an order, whether to qualify or not a fact or an act within the sports system in state government.[18]

In addition to the criticism on theoretical approach of the plurality of regulations, there is a very serious and substantial problem about the fundamental rights of the person. It is not acceptable that certain facts or acts that affect the full development of the human person and his fundamental rights – only because they are considered aspects related to technical and regulatory rules of a sport – are not considered by the State order.

In general, while the regulatory sources of the two orders are distinct and independent from each other, the respective rules cannot be. Whether national institutions remain 'articulations' of the world sport organization, either they become 'derivative order', the relative rules are always hierarchically framed in a single system, that is 'Italian-European'.[19]

In that legal system the legality of the same rules and therefore the qualification of acts and facts work and depend. The idea that there are spaces governed only by rules of the state system is not acceptable, since these rules often integrate with sports regulations, recalling and preuming them. It is true that we try to guarantee associationism (Art 18 of the Italian Constitution)[20] and social formation (Art 2 of the Italian Constitution), and it is undeniable that sport is one of the most important forms of associationism for civil, social and cultural progress. But it should not be overlooked that social formations are protected

[17] W. Cesarini Sforza, 'Il diritto dei privati' n 8 above, 55.

[18] L. Di Nella, n 4 above, 86. G.U. Rescigno, *Corso di diritto pubblico* (Bologna: Zanichelli, 1995), 204, highlights that if recognition, indifference and opposition to the sporting order depend on the State 'all equality between one and the other ceases'.

[19] L. Di Nella, '*Sub* art. 1', in A. Blandini et al eds, *Codice di Giustizia Sportiva F.I.G.C. annotato con la dottrina e la giurisprudenza* (Napoli, Edizioni Scientifiche Italiane, 2016), 20.

[20] Art 18 Constitution: 'Citizens have the right to form associations freely, without authorisation, for ends that are not forbidden to individuals by criminal law. Secret associations and those associations that, even indirectly, pursue political ends by means of organizations having a military character, are prohibited'.

and guaranteed as the personality of the individual is expressed in them.[21]

Also outside the scope of disciplinary sanctions, however, it is quite possible that the inconsistent application of technical rules may result in the infringement of fundamental rights. It is emblematic the case of the boxing match in which the referee, wrongly assessing the conditions of one of the boxers does not carefully apply the technical rule for which he must end the match whenever he thinks that one of the two boxers is in a state of evident physical or technical inferiority (therefore unable to continue) and so he does not prevent an injury to health.[22]

That is way the theorists of the uniqueness of the legal systems distance themselves from an indifference of the state legal order, but at the same time they do not even accept the thesis of the absorption. Sport has its own specificity and for this reason it needs a system of self-produced rules. But everything must necessarily move within a single order system. In fact, thanks to the subsidiarity and specificity of sports, it is possible to select the interests that are worthy of protection for the legal order expressed by federal regulations, and sanction those that, on the other hand, contrast with it.

In the different monist perspective, the plurality of the sources of law, and not the plurality of legal systems, is valued. Among the sources there are also those originating from contractual autonomy of sports federations that must be integrated into the more complex but unitary order system. This integration must take place through the principle of horizontal subsidiarity, in accordance with the 'axiological hierarchy' inferable from the Constitution as a source of law at the top of the system, and according to the principle of specificity of European sports.[23]

Then Cesarini Sforza's thesis does not seem to be acceptable. Considering his example, the title of national champion should not affect the State unless consequences in civil sphere depend on it.[24] But even if no 'civil effects' in the way described by the author emerge, the assignment of a title affects the dignity and full development of the human person, guaranteed by Art 2 of Italian

[21] It is observed, for example, in Corte Costituzionale 11 february 2011 no 49, *Giurisprudenza costituzionale*, 189 (2011) that 'the autonomy of the sports order finds ample protection in Art 2 and 18 of the Italian Constitution, as it cannot be doubted that sports associations are among the most widespread social formations where man carries out his personality and that everyone should have the right of freely associate for sports purposes'. Cf P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 189; M. Angelone, 'The «civilization» of sport disciplinary justice' *Actualidad Juridica Iberoamericana*, 9-32 (2015).

[22] For the illustration of the rule and some cases that actually occurred, see: G. Agrifoglio, 'Pugilato e sport da combattimento. Divieto di disporre del proprio corpo o libertà di scegliere il proprio modo di vivere?' *Europa e diritto privato*, 755-793 (2018).

[23] A. Lepore and A. Redi, '*Sub* art. 4', in A. Blandini et al eds, *Codice di Giustizia Sportiva F.I.G.C.* n 19 above. The subject of sports specificity is also evoked by the Eur. Court H.R., *M. Azzopardi* v *Malta*, judgement of 15 January 1998, Reports of judgements and decision 97-37522, available at www.echr.coe.int./ECHR/EN/hudoc.

[24] W. Cesarini Sforza, 'Il diritto dei privati' n 8 above, 55.

Constitution.[25]

For these reasons, being values expected at constitutional levels, they concern the State. However difficult to define, authoritative doctrine designates the notion of 'sport' as the set of individual and essential aspects of sport that distinguish it fundamentally from any other sector of activity and provision of services.[26]

The European Commission, complying with the statements of the European Parliament, that aimed at establishing a new definition of sport – as an activity inseparable from the education and training of the young, from free time, from the social recovery, from marginalized and disabled persons (considering sport as an autonomous associative activity based on civil values such as sound competition, fair play, solidarity, fair competition and team spirit) – noted this and reiterated four fundamental points to build a 'right': a) the multifaceted character of sport; b) its pyramidal organization (the broader part is made up of the players and clubs where they play. The clubs are affiliated to the National Federations responsible for management at national levels); c) the moral values it expresses; d) the mutual sporting dependence between the teams or athletes.

In fact, the 'specificity' of the sector which also emerges from the case law of the Union, can justify an autonomy, but never an independence.[27] The sports order in fact enjoys its own apparatus, its own self-produced rules and its own justice in order to guarantee that specificity of the phenomenon and adjust it properly.

However there is, at the same time, an effective protection that exceeds the special regulation. On this matter art 165 TFUE constitutes a tool to guide the judge in the interpretation of European and International regulatory acts to be applied in sports.

Some judgments of the Court of Justice are very significant: emblematic is the Bosman case in which the prohibition of discrimination based on nationality, the freedom of movement for workers, the freedom of job stability, the principle of mutual recognition of professional qualifications and the freedom of the provisions of services, found application.[28]

[25] Art 2 of Italian Constitution expected that 'The Republic recognizes and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled'.

[26] J. Zylberstein, 'La specificità dello sport nell'Unione Europea' *Rivista di diritto ed economia dello sport,* I, 59-70 (2008). See E. Zucconi Galli Fonseca, 'Arbitrato dello sport: l'attesa decisione della Corte Suprema tedesca nel caso *Pechstein' Rivista dell'arbitrato*, 131-145 (2017).

[27] P. Perlingieri, 'Riflessioni conclusive', in Aa.Vv., *Fenomeno sportivo* n 11 above, 716, observes that you cannot discuss about sports order, since it does not have an autonomous legitimacy, but it makes use of that offered by the same legal system that recognizes and guarantees it, recognizing on the specificity of the phenomenon, autonomy but not independence.

[28] Case-415/93 Bosman v Royal Club Liegeois of 15 December 1995, *Il Foro Italiano*, IV, 1 (1996), IV, con note di S. Bastianon, Bosman, il calcio e il diritto comunitario, and of G. Vidiri, Il «Caso Bosman» e la circolazione dei calciatori professionisti nell'ambito della Comunità europea. For a detailed analysis of implications of Bosman case cf P. Antonioni and J. Cubbin, 'The Bosman Ruling and the emergence of a single market in soccer talent' 9 *European Journal of Law and*

Equally important is the decision on the Meca Medina case in which the Court of Justice took the opportunity to clarify that 'the sports rules where they also qualify as technical-disciplinary rules and therefore are different from those having an immediate economic impact, have relevance for the Community law in accordance with Arts 49, 81 and 82 EC Treaty (now Arts 56, 101 and 102 TFUE), as the sport activity is considered and not the legal nature of the sports rules.[29]

These judgments show that there is no artificial limit to the submission of federal rules to the principle of specificity and to the consequent proportionality check by the Italian-European system.[30]

From these decisions a European tendency towards unitary theories of ordering emerges, precisely because of the possibility of effective state protection, if the specific sports rules may infringe the fundamental rights of the person.

On this line it is certainly relevant the decision on the Casey Martin case. He was not allowed to take part in a competition for able-bodies athletes by the International Golf Federation because, due to a pathology, he needed a car to move around the field. The Federation believed that walking on the golf course represented a characterizing element of this sport. After losing all the internal appeals to the sports system, Martin appealed to the Oregon Court. The Court rejected the US-PGA's argument, notably that walking would be a fundamental element of the game, as it is not confirmed by the definition of golf contained in the international regulation.

Moreover, the Court decided that the expulsion of Casey Martin also violated the chance equality in sport.[31] The utilization of the golf-cart, actually compensated for the player's handicap.[32] The decision concerns the fundamental issue of human rights. The sports legal order had put in place an unreasonable decision that undermined constitutionally guaranteed fundamental rights and this could not

Economics, 73-157 (2000): discusses the effect of the ruling by the European Court of Justice in the Bosman case which delivered freedom of contract to professional soccer players. The result is examined in the context of modern investment theory where contracts between club and player are considered as options to renegotiate the contract or to sell the player to another party. The effects of the ruling are reconsidered in this light and the reaction of the soccer world to these effects are discussed. Cf S. Gardiner and R. Welch, 'Bosman – There and Back Again: The Legitimacy of Playing Quotas under European Union Sports Policy' 17 *European Law Journal*, 828-849 (2011); M. Thill, 'L'arret Bosman et ses implications piu la libre circulation de sportifs a l'interieur de la UE dands des contexts factuels differente de ceux l'affaire Bosman' *Reveu du Marchè commun et de l'Union europeenne*, 105 (1996).

[29] Case-519/04 David Meca-Medina e Igor Maicen v Commissione of 18 luglio 2006, *Rassegna di diritto ed economia dello sport*, 85 (2007). Cf A. Duval, 'Lex Sportiva: A Playground for Transnational Law' 19 *European Law Journal*, 822-842 (2013).

[30] L. Di Nella, '*Sub* art. 1', in A. Blandini et al eds, *Codice di Giustizia Sportiva F.I.G.C.* n 19 above, 20.

[31] F. Schauer, 'The dilemma of ignorance: PGA Tour, INC. v Casey Martin' *The Journal of Legal Studies*, 267-297 (2001).

[32] US DC Oregon, Courthouse of Eugene 27 novembre 1997, cited by D. Bryant, *Ticket to ride: Casey Martin* v. *PGA TOUR, INC*, available at https://tinyurl.com/yccom9e7 (last visited 27 December 2020)

be justified on behalf of an autonomy of the sports system.

IV. The Italian Legislation and the Interpretation of the Courts

A position of freedom of social formations towards the State emerges from Arts 2 and 18 of the Constitution. Attention must be paid to the formula of the provision of Art 2 of the Constitution, which is inconsistent with the perspective of the independence of intrastate orders as opposed to the State order. It is the affirmation of the personalistic principle, which according to the prevailing doctrine involves the clear pre-eminence of recognition and protection of inviolable human rights over the pluralistic principle, and also the fact that the latter is instrumental in the implementation of the former: in other words, Art 2 contains the explicit anchoring of the principle of social pluralism to the recognition and promotion of individual personal rights, according to an idealistic personal dimension and reference.[33]

The rights recognized by Art 2 of the Constitution are in fact the hard core of the inviolable principles of our legal system; as it has been pointed out by careful doctrine, they constitute a definite limit to every surrender of sovereignty from Italian State with respect to both the community and canonical systems, as well as the international and of course the sports systems.[34]

In view of the above it is necessary, as this point, to examine the primary rules of the Italian system and analyze a very important rule in the relationship between sports and state regulations.

It is the subject of the decision in comment of the Constitutional Court which expressed itself for a second constitutionality text, after that of 2011. Art 1, para 2, of decreto legge no 220 of 2003,[35] stipulates that the relationships between the sports and state orders

> 'are regulated according to the principle of autonomy, except the cases of relevance of subjective law situations linked to sports order for the legal system of the Republic'.

At the same time, Art 2, para 1, provides that

> 'in accordance with the principles referred to in art 1, the regulation of matters concerning: a) compliance and application of regulatory, organizational

[33] G. Pastori, 'Il pluralismo sociale della Costituzione repubblicana ad oggi: l'attuazione del pluralismo sociale nel trentennio repubblicano', in Id et al eds, *Il Pluralismo sociale nello Stato democratico* (Milano: Giuffrè, 1980), 60.

[34] P. Perlingieri, 'Riflessioni conclusive' n 27 above, 716.

[35] Cf G. Manfredi, 'The State System and the Sports System in Italy: Legal Pluralism and International Law' (Relations between the State system and the sports system, Florence, 2 December 2011) *Ius Publicum* (2015), available at https://tinyurl.com/ybq5wuhb (last visited 27 December 2020).

and statutory rules of the national sports system and its articulations in order to ensure the proper conduct of sports activities; b) relevant disciplinary behavior and the imposition and application of the related disciplinary sports sanctions, is reserved to the sports system'.

The legislation seems, to a certain extent, not to pose particular problems, as the cases relevant to the state system are subject to review by the state judge, who can intervene, without problems, in the sports system. This seems to be a full stance in the unitary sense of the order in implementation of European principle of specificity.

The problems instead emerge and are not insignificant with regard to the provision of Art 2 of decreto legge 19 August 2003 no 220, that is in the relationship between the 'safety clause' (clausola di salvezza), relating to subjective legal situations recognized by the state legal system, and the reserve of the matter used in this article in favour of sports justice bodies.

Several jurisprudential guidelines have formed regarding the problem of jurisdiction. The first case law of the Lazio TAR did not doubt that the technical disputes – those provided for in point of letter a) of Art 2, para 2, decreto legge no 220 of 2003 – should be considered reserved to the sports justice organs, but reached a different conclusion as to disciplinary disputes, that is to say, those provided in point of letter b). For such disputes, as provided in the legislation text, a reserve should be recognized in favour of sports justice, but such a reserve was not absolute, as it is precisely the same *decreto legge* that 'saved the cases of relevance of subjective law situations linked to the sports order for the law order of the Republic'.[36]

Lazio TAR believed it could recognize an external relevance in the damage of the economic interests or of the integrity of the applicant. Thus, it introduced a distinction between acts of sports bodies of internal significance, reserved to sports justice, and acts of external significance, appealable before the state judge in compliance with the sports preliminary ruling.

A second direction, as opposed to the previous one, was expressed by the Administrative Justice Council for the Region of Sicily by judgment of 8 November 2007 no 1048. According to judges in Sicily, the legislator's intention to exempt the matters listed in Art 2 from state jurisdiction, excluding at the

[36] To illustrate my print the following decisions can be seen: TAR Lazio 28 July 2004 no 4332, *Rivista di diritto ed economia dello sport*, 20-45 (2005): the appeal against a financial penalty against a sports cardholder was accepted; TAR Lazio 21 April 2005 no 2244, www.dirittocalcistico.it (2005): this decision upheld the appeal against a disciplinary sanction to penalize a Serie D football club in rankings (3 points); TAR Lazio 28 April 2005 no 2801, *Rivista di diritto ed economia dello sport*, 30-46 (2006): with this decision (*Guardiola* v *FIGC*) the admissibility of the appeal against a disciplinary sanction of four month disqualification paid by a Serie A footballer was recognized; TAR Lazio 14 December 2004 no 13616, *Giustizia amministrativa*, 34-46 (2005), with this decision the admissibility of the appeal against a disciplinary sanction of 12 month disqualification borne by a footballer of the championship of Eccellenza was recognized.

root the possible existence of legal situations relevant for the organization of the Republic, would not be doubtful. So no importance should be attributed, for these purposes, to the further consequences that can derive indirectly from acts that law considers suitable for the sports system and reserved to it. The College did not ignore, nor the legislator could ignore, when he issued the decreto legge no 220 of 2003, that the application of the regulation and the imposition of the most serious disciplinary sanctions almost always produce very significant indirect financial consequences.[37]

The Council of State decided to endorse the opinion of the Council of Administrative Justice of Sicily, as more adhering to the letter of the law, in which there is no trace of any distinction due to the patrimonial consequences of the sanctions, nor of any relevance of such consequences, for the purpose of the existence of a legal protection by state law.[38] For this reason, it considered the hermeneutic efforts attempted by the Lazio TAR and by part of the doctrine unjustified.[39]

V. Nature of the Sanctioning Measures in Light of the Decisions of the Constitutional Court

The analysis of the two judgments of the Constitutional Court,[40] that due to

[37] Administrative Justice Council for the Sicily Region 8 November 2007 no 1048, *Rassegna di diritto ed economia dello sport*, 383 (2008), considers technical or disciplinary measures not detrimental in terms of subjective rights or legitimate interests.

[38] Consiglio di Stato 25 novembre 2008 no 5782, *Diritto e processo amministrativo*, 1417 (2010), with a note of F. Goisis, 'Verso l'arbitrabilità delle controversie pubblicistiche-sportive'.

[39] For a reconstruction of the jurisprudential procedure see G. Alfano, 'Riflessioni sull'esercizio del potere disciplinare nell'ordinamento della F.I.G.C.' *Rassegna di diritto ed economia dello sport*, 12-32 (2017). The administrative courts following the position of the Council of State changed their orientation respecting the nomofilactic fiunction of the latter. See, above all, TAR Lazio 6 September 2016 no 9563, *Il Foro Italiano,* III, 599 (2016), according to which 'the claim for compensation was unfounded. It was proposed to the Italian Football Federation by a sports club that complained about the damage deriving from the measure by which, a special commissioner of the defendant had assigned the 'scudetto', revoked to the injured party, to another team, as the elements of the offense were not configurable, since an irrefutable assessment had already occurred regarding the legitimacy of the aforementioned provision'; TAR Lazio 9 May 2016 no 3055, *Il Foro Italiano*, III, 289 *(*2016): 'the claim for damages falls within the jurisdiction of the administrative judge who can incidentally rule on sports justice measures for those purposes without cancelling them, but declaring their illegitimacy *incidenter tantum* pursuant to Art 133, para 1, letter a), no 1 and letter z) code of administrative process in the same way as the ordinary judge can do towards administrative measures pursuant to Arts 4 and 5 of code of administrative process regulators of the relationship between administrative jurisdiction and ordinary jurisdiction. The decision of the federal sports justice bodies – that sanctions an athlete with suspension from sport – is illegitimate if the fundamental principles of law of procedure on the acquisition of evidence are not respected during the sports process itself. The home federation must therefore compensate the athlete for all damages – assets and not assets, including damages from loss of chance and image – suffered by the same due to the illegitimate sentence'.

[40] See the above mentioned judgment and the one referring to 11 February 2011 no 49 of

their subject we can define 'twins', raises an interesting issue with regard to the nature of the sanctioning measures and also technical measures of sports federations. The alternative should be the contractual or administrative nature of these acts. A clear position on the matter does not emerge from the two judgements of the Constitutional Court.[41]

The regulatory provisions confer jurisdiction on the administrative judge. The choice of the legislator makes it clear that he preferred to qualify the nature of the interests involved in the manifestation of the sports phenomenon.

In this way, disciplinary sanctions would assume the nature of 'administrative acts'. The solution is not agreeable. If these acts were considered acts of an administrative nature they would all be subject to annulment by the administrative judge; on the contrary, they are subject to the scrutiny of sports judges, and only compensation for the person affected by the disciplinary act remains the responsibility of the state judge.

In the same way it does not appear feasible to qualify the nature of these measures, as contractual since they should be subject to the protection of the ordinary judge who must put in place a judgment of lawfulness and compliance with the fundamental principles of the system.

It appears clearly that the Constitutional Court, in its two judgments, did not take any position regarding the nature of the disciplinary measures. The Court appears to have proposed a situation in which the relevance for the state system of such sanctions is similar to that of 'historical facts' (fatti storici); as such, they are likely to cause harm, but they certainly cannot be cancelled in court.[42]

According to some authors, framing technical and disciplinary measures as 'historical facts' would also solve the problem of effective protection that would be achieved by the person injured by the illegitimate sanction, before the ordinary judge. This is due to the fact that the administrative judge is called to rule only on authoritative acts, expression of the exercise of a public power, through the compensation for equivalent.[43]

The proposed solutions do not seem satisfactory. Whatever the nature of the disciplinary sports sanctions, the interpreter would not be allowed to remove this exercise of power from the state jurisdiction. Above the phenomenon investigated, as an instrument of development and realization of the person, control of the legal system would be unavoidable. The individual interests

Constitutional Court.

[41] M. D'Ambrosio, '*Sub* art. 14', in L. Di Nella, '*Sub* art. 1', in A. Blandini et al eds, *Codice di Giustizia Sportiva F.I.G.C.* n 15 above, underlines that 'constitutional judges limited themselves to affirming that sporting disciplinary sanctions can be harmful both on subjective rights and on legitimate interests, thus leaving the debate completely open'. Cf E. Maio, *Clausola compromissoria* n 3 above, 100; M. Pittalis, *Sport e diritto* (Padova: CEDAM, 2019), 656-667.

[42] G. Alfano, 'Riflessioni sull'esercizio del potere disciplinare' n 39 above, 25.

[43] G. Santagada, 'Le sanzioni disciplinari sportive: se non sono annullabili non sono «atti amministrativi» ma «fatti storici» non arbitrabili e la domanda risarcitoria si propone davanti al giudice ordinario' *Rivista trimestrale di diritto e procedura civile*, 1009 (2012).

involved in the associative life, even if left to the internal management of the federations as part of the private autonomy recognized by the Constitution, must be regulated in a way which is necessarily respectful of the values that the Constitution itself has enshrined.[44]

VI. Conclusive Remarks

The problem therefore concerns the compatibility of sports justice with the state monopoly of jurisdiction enshrined in Art 102 of the Constitution.

In fact, the Constitution establishes that the judicial function must be exercised by ordinary magistrates or by persons who assume this qualification on the basis of constitutional norms, and norms on the judicial system of the State.

Exclusive ownership of judicial power is therefore reserved to public bodies. However, attribution of the protection of rights and interests, related to the performance of sports activities to sports justice bodies, does not seem to conflict with the framework of constitutional values, without prejudice to the exclusive right of the state jurisdiction to protect subjective legal situations (subjective rights and legitimate interests) that find their origin and their foundation in the laws and acts having the force of the law of the State.[45]

The clause providing for the legal constraints set in Art 2, para 2, of legge no 280 of 2003 has the nature of free or 'not-ritual' (non rituale) arbitration, as with it the parties intend to deny the award the typical enforceability that, instead, belongs to the ritual award, issued pursuant to Art 825 of the Code of Civil Procedure, ie the decision relating to the arbitration carried out following the specific rules set forth in book VIII of the same code.

It is, therefore, thanks to a legal negotiation that we intend to entrust the resolution of the dispute to a third and impartial party.

The constraint of sports justice, therefore, does not appear against the Constitutional position only where it provides the possibility of recourse to the jurisdiction of the State, once the endo-associative justice has been exercised. Only then, the constraint is legitimate.

A different decision by the Constitutional Court would have been desirable. The right of defense, the possibility of acting to defend one's rights and interests, cannot be guaranteed only through compensation.

Sports, technical and/or disciplinary measures that affect the fundamental

[44] P. Perlingieri, Il diritto civile nella legalità costituzionale n 14 above.

[45] M. Cimmino, 'Personal Rights and Sport Injuries: The Civil Liability Between Risk and Negligence' 5 *The Italian Law Journal*, 2, 410 (2019): 'The sports phenomenon is in fact a form of manifestation of the human personality, necessary for the growth and maturation of human beings as individuals and as members of the social groups to which they belong. It finds its maximum expression in private sports law associations established pursuant to Book I of the Civil Code to promote values such as loyalty and fairness, respect for rules, legality, integration and protection of diversity and democracy'.

rights of the person can be invalidated within the limits of the State. It would be an irrational abdication, as the balancing put in place by the legislator seems to be irrational. The legislator, aprioristically, considered that technical and disciplinary measures could be excluded from State jurisdiction. The balancing operated by the legislator first and by the Constitutional Court afterwards is not convincing, as sports measures, being capable of causing prejudice to the inviolable rights of the person, need to be invalidated. This can take place either through the cancellation by the TAR or declared null by the ordinary judge as they do not comply with the principles of the system.

Jurisdiction remains in the prerogatives of the legislator, but the inevitable outome is thatin fact there is no instrument for the protection of the rights and interests of under contract athletes who cannot be invalidated or cancelled by a sports measure that is detrimental to their fundamental rights.[46]

[46] L. Di Nella, 'La tutela della personalità dell'atleta nell'organizzazione sportiva', in L. Di Nella et al eds, *Fenomeno sportivo e ordinamento giuridico* n 11 above, 67-126. Cfr R. Alexy, *Theorie der Grundrechte* (Baden-Baden: Duncker & Humblot GmbH, 1985), 100; P. Perlingieri, 'Riflessioni conclusive', in L. Di Nella et al eds, *Fenomeno sportivo e ordinamento giuridico* n 11 above, 718, highlights that it is necessary to talk about the specificity of the sectorial order, but not of indipendence as, otherwise 'the fundamental rights and values absolutely guaranteed by the Constitutional order, would be at risk'.

Hard Cases

Irreducible Life Sentences and Rehabilitation. A Point of Juncture Between Strasbourg and Rome

Alessandra Santangelo*

Abstract

The comparison between the recent Strasbourg Court case law and the Italian Constitutional Court judgments on irreducible life sentences pinpoints the emphasis on rehabilitation as prominent penological ground for incarceration, enhancing human dignity both at the national and supranational level. The judgment in *Viola* v *Italy* highlights that the domestic penitentiary regime suffers a structural problem which jeopardises the prisoners' hope for future release. In this framework, the reluctant attitude of national legislator forces the judiciary to adopt substitute remedies: in order to comply with the 'Viola doctrine', irreducible life sentences are gradually assuming a different outline eventually consistent with the Constitution itself.

I. Irreducible Life Sentences Under Arts 4-*bis* and 58-*ter* of the Penitentiary Act

The paper focuses on the Italian regime of irreducible life sentences. The national discipline of life imprisonment reflects recent amendments by the case law of both the Strasbourg Court[1] and the Italian Constitutional Court.[2] Enhancing the rehabilitation principle, those judgments have designed new boundaries for long-life sentences, fostering human dignity as an undeniable guarantee – even during detention – 'which lay at the very essence of the Convention system'.[3]

After a brief premise which illustrates the national regime, the article is divided into three sections. Firstly, the decision in *Viola* v *Italy* is analysed by assessing the requirements whole-life sentences need to respect in order to comply with the European Convention of Human Rights (ECHR). Then, the attention turns towards the most recent national case law which addresses the issue in relation to both adult and children's Courts. The paper argues that rehabilitation-based arguments espoused by the ECHR's judges prompted an equal evaluation at the national level, easing the definition of a common notion able to strengthen fundamental guarantees for the convicted subjects. In particular, the Constitutional

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[1] Eur. Court H.R., *Marcello Viola* v *Italy*, Judgment of 13 June 2019.

[2] Corte costituzionale 4 December 2019 no 253, available at www.giurcost.org.

[3] As the Strasbourg Court affirmed in Eur. Court H.R. (GC), *Murray* v *The Netherlands*, Judgment of 26 April 2016, para 101.

Court has been compelled to select among conflicting alternatives and declare unlawful the provisions exclusively inspired by deterrence or social defence.[4] In this light, the paper considers the interpretative shortcomings this process implies as it affects the boundaries and rationale rehabilitation infers when the most serious crimes are involved. Finally, few considerations address future challenges: as the current Italian discipline is not deemed to comply with the Convention, not only the national judges but also the legislator are asked to subvert the previous perspective in order to prevent Strasbourg Courts' further interferences.[5] In this view, the ECtHR case law has provided a considerable impulse. In order to comply with the 'Viola doctrine', irreducible life sentences are gradually developing a frame which is eventually consistent with the Constitution itself.

In fact, in accordance with Arts 22 and 176 of the Italian Criminal Code, the general regime of life imprisonment allows the convicted individual to become eligible for parole,[6] thereby ensuring the review of sentences after a set period of time (26 years).[7] On the contrary, Arts 4-*bis* and 58-*ter* of the Penitentiary Act[8] imply a special regime for prisoners who have been convicted for serious crimes, mainly connected to Mafia-type associations,[9] one that paves the way for *de*

[4] In this view, national scholars have deeply examined the so called 'penal populism' which exploits criminal measures as instruments of deterrence to the detriment of fundamental guarantees: see G. Silvestri, 'Corte costituzionale, sovranità popolare e "tirannia della maggioranza"' *Questione giustizia*, 22, 23 (2019); M. Donini, *Populismo e ragione pubblica. Il post-illuminismo penale tra lex e ius* (Modena: Edizioni Mucchi, 2019), 8, 52; G. Insolera, 'Il populismo penale', available at www.discrimen.it. As for the role performed by human rights Courts contrasting penal populism, see A. Dyer, 'Irreducible Life Sentences: What Difference have the European Convention on Human Rights and the United Kingdom Human Rights Act Made?' 16 *Human Rights Law Review*, 541, 584 (2016), where the Author stressed that 'the UK and Strasbourg jurisprudence concerning irreducible life sentences provides some reason for optimism concerning the ability of human rights charters, and other strong human rights guarantees within a jurisdiction, to achieve desirable change in the criminal justice area'.

[5] On several occasions, the Strasbourg Court has already verified if national provisions – adopted after the Court declared a violation of fundamental guarantees – respected the ECHR standards: see Eur. Court H.R. (GC), *Hutchinson* v *United Kingdom*, Judgment of 17 January 2017; Eur. Court H.R., *Dardanskis and Others* v *Lituania*, Decision of 18 June 2019, para 23.

[6] E. Dolcini, 'La pena detentiva perpetua nell'ordinamento italiano. Appunti e riflessioni' *Diritto penale contemporaneo*, 1, 7 (2018).

[7] One could argue that the Italian general provisions concerning life imprisonment are in compliance with the Convention, as per the decision Eur. Court H.R. (GC), *Vinter and Others* v *United Kingdom*, Judgment of 9 July 2013, Reports of Judgments and decisions 2013-III, 369, para 72. In particular, the Strasbourg judges referred to the Italian norms as an example of rational balancing between security interests and human dignity of the convicted (§ 117).

[8] Legge 26 July 1975 no 354.

[9] More precisely, the special regime originally applied only to the most serious crimes connected to Mafia-type and terrorist associations. Then, the legislator started extending the number of offences which could involve the more rigorous treatment, including truly varied penalties. In this perspective, scholars have deeply criticised the amendment recently adopted by the Parliament including in the list of crimes several less harmful offences committed by public officials: D. Pulitanò, 'Tempeste sul penale. Spazzacorrotti e altro' *Diritto penale contemporaneo*, 235, 237 (2019); V. Manes, 'L'estensione dell'art. 4-*bis* ord. pen. ai delitti contro la p.a.: profili di illegittimità costituzionale' *Diritto penale contemporaneo*, 105, 107 (2019).

facto irreducible life imprisonment. As a matter of fact, the law prohibits to apply prison leaves, parole, or grant any other sentence reduction if prisoners do not cooperate with a judicial authority. In particular – according to the above-mentioned Art 58-*ter* – adequate cooperation needs to provide public authorities with relevant information, thereby facilitating the collection of evidence or identifying other criminals or, even, preventing the offence from producing further harmful consequences. Those requirements shall not apply when cooperation is impossible or unenforceable, depending on the concrete circumstances of the case as long as the prisoners are able to prove all the connections with Mafia-type associations have been severed.[10]

However, it is quite evident that the rigorous model provided by this special regime generates several concerns in relation to the ECHR principles, namely the prohibition of inhuman or degrading treatment under Art 3.

II. The Strasbourg Court's Judgment *Viola* v *Italy*

In June 2019, the Strasbourg Court shook the very core of the Italian penitentiary system. In particular, the Court stated that the special regime provided by Arts 4-*bis* and 58-*ter* of the Penitentiary Act violated Art 3 ECHR, unlawfully undermining the applicant's human dignity.[11]

Briefly. Marcello Viola was sentenced – after two different proceedings – to life imprisonment with daytime isolation for two years and two months, being identified as one of the highest organisers of a Mafia-type association involved in cruel conflicts with rival clans from mid-1980s until 1996. In particular, he was convicted for Mafia-type association as well as several connected crimes such as murder, abduction and unlawful possession of firearms. Considering the high danger to society, the former years of imprisonment were held under a rigorous penitentiary regime (Art 41-*bis* Penitentiary Act), almost completely isolating the prisoner. Nonetheless, this strict treatment was discontinued when judges considered the applicant's everyday behaviour indicative of a critical reflection on his criminal experience and a gradual rehabilitation.[12] Thus, Mr Viola applied twice for prison leave and, subsequently, for parole. In doing so, he was demanding that his process towards rehabilitation would eventually be recognised. However, all the applications were rejected, claiming Mr Viola was still dangerous to public security as he did not cooperate with judicial authorities.

In this light, a closer analysis of domestic penitentiary laws could be useful

[10] In accordance with the equality principle, these exemptions to irreducible life sentences under Art 4-*bis* and 58-*ter*, Penitentiary Act, were firstly recognized by the Italian Constitutional Court (Corte costituzionale 22 February 1995 no 68 and 19 July 1994 no 357) and, secondly, expressly provided by the legislator, adding to Art 4-*bis* a further specific para (1-*bis*).

[11] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 137.

[12] ibid paras 6-16.

for a better understanding of the issue. In fact, by requiring that the prison regime shall be tailored to individuals and sufficiently flexible towards alternatives to custody,[13] the Italian system provides several measures which facilitate the prisoners' progressive connections to the outside word. In other words, while during detention rehabilitation improves, the convicted person is entitled to benefit of measures conferring him – step by step – alternatives to custody so that he is gradually reintegrated within the society.[14] Nonetheless, Mr Viola's requests were rejected since he was ineligible for any non-custodial measure having chosen not to cooperate with the judicial authorities. In accordance with Arts 4-*bis* and 58-*ter* of the Penitentiary Act, national law prescribed an irrebuttable presumption that non-cooperating prisoners were still tied to the Mafia circles and, consequently, too dangerous to gain any alternatives to custody. Thus, Mr. Viola applied to the Strasbourg Court contending he could not afford any prospect of release.

In this regard, the Court deeply examined national law requirements, particularly wondering whether the choice to cooperate with local authorities could have been considered free and deliberate as well as if it necessarily implied ongoing connections with the criminal association.[15] In particular, the judges acknowledged that lack of cooperation could be reconnected to different factors: either the prisoner could fear to endanger his life and the lives of his relatives or he could refuse to provide further information able to exacerbate his judicial status according to the right to silence and the principle *nemo tenetur se detegere*.[16] Besides, it has been proved on several occasions that members of Mafia-type associations have cooperated with judicial authorities not being rehabilitated but, rather, aiming to exploit the alternative measures even though they preserved dangerous links with the criminal sphere.[17]

[13] The Italian Constitutional Court has recently confirmed that those principles are directly connected to rehabilitation, a 'Constitutional imperative' each penalty needs to pursue in accordance with Art 27, para 3, Constitution: see Corte costituzionale 11 July 2018 no 149, commented by – among others – A. Pugiotto, 'Il "blocco di costituzionalità" nel sindacato della pena in fase esecutiva (nota all'inequivocabile sentenza n. 149/2018)' *Giurisprudenza costituzionale*, 1646 (2018); F. Fiorentin, 'La Consulta svela le contraddizioni del "doppio binario penitenziario" e delle preclusioni incompatibili con il principio di rieducazione del condannato' *Giurisprudenza costituzionale*, 1657 (2018); M. Pelissero, 'Ergastolo e preclusioni: la fragilità di un automatismo dimenticato e la forza espansiva della funzione rieducativa' *Rivista italiana di diritto e procedura penale*, 1359 (2018).

[14] F. Della Casa, 'Ordinamento penitenziario', in A. Falzea, P. Grossi and E. Cheli eds, *Enciclopedia del diritto* (Varese: Giuffrè, 2008), 809.

[15] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 100, where the Court highlights the different circumstances examined in the previous judgment *Ocälan* v *Turkey* (Judgment of 18 March 2014, Reports of Judgments and decisions, 2005-IV, 131, paras 200-202) where domestic norms excluded any possibility to reduce life sentences.

[16] ibid para 117.

[17] ibid para 119. On this issue, see G.M. Flick, 'I diritti dei detenuti nel sistema costituzionale fra speranza e delusione' *Cassazione penale*, 1047, 1048 (2018); M. Bontempelli, 'Diritto alla rieducazione e libertà di non collaborazione' *Rivista italiana di diritto e procedura penale*, 1527 (2017); F. Palazzo, 'L'ergastolo ostativo nel fuoco della *quaestio legitimitatis*. Relazione introduttiva', in G.

According to the Strasbourg Court,[18] life imprisonment would be incompatible with human dignity if national provisions were to

> 'forcefully (…) deprive a person of his freedom without striving towards his rehabilitation and providing him with the chance to regain that freedom at some future date'.[19]

Although the Convention could not oblige Signatory States to achieve rehabilitation, they had the duty to ensure each prisoner the prospect of being released, thereby providing a chance to social reintegration.[20]

Against this background, the irrebuttable presumption of danger to society the domestic law prescribed for non-cooperating prisoners infringed Art 3 ECHR as it lacked any rational and empirical bases. In particular, each prisoner needed the chance to prove that his personality had changed during detention,[21] accomplishing rehabilitation so that detention was no longer justified. Otherwise, the evaluation of dangerousness would be blindfolded as it would constantly refer to the time when the offense was committed, ignoring the changes and resocialising efforts the convicted made under custody.[22]

Furthermore, the Court stressed that the crimes committed by the applicant were undoubtedly among the most dangerous to harm public security, considering the permanent and deeply rooted nature of the extremely violent Mafia-type association. Nonetheless, Art 3 ECHR bans in absolute terms inhuman or degrading treatments[23] and it could not be derogated neither in case of offences

Brunelli, A. Pugiotto and P. Veronesi eds, 'Per sempre dietro le sbarre? L'ergastolo ostativo nel dialogo tra le Corti' 1 *Forum Quaderni Costituzionali*, 10 (2019).

[18] As for a deeper analysis of the Strasbourg Court case law on irreducible life sentences, examining Eur. Court H.R. (GC), *Kafkaris* v *Cyprus*, Judgment of 12 February 2008, see D. van Zyl Smit, 'Outlawing Irreducible Life Sentences: Europe on the Brink?' 23 *Federal Sentencing Reporter*, 39, 41 (2010).

[19] Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 101. Analogous principles had been already stated in Eur. Court H.R. (GC), *Vinter and Others* v *United Kingdom* n 7 above, paras 113 and 87, where the judges rule that 'an Article 3 issue would only arise when it could be shown: (i) that the applicant's continued imprisonment could no longer be justified on any legitimate penological grounds; and (ii) that the sentence was irreducible *de facto* and *de jure*'. As for the issues concerning the notion of rehabilitation shared by the Strasbourg Court, see A. Martufi, 'The path of offender rehabilitation and the European dimension of punishment: New challenges for an old deal?' *Maastricht Journal of European and Comparative Law*, 1, 4 (2019).

[20] Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 104. In this regard, 'a possibility of being granted a pardon or release on compassionate grounds for reasons related to ill-health, physical incapacity or old age does not correspond to the notion of "prospect of release" as formulated in the *Kafkaris* judgment' (ibid para 100).

[21] E. Dolcini, n 6 above, 11, where the Author stressed that the irrebuttable presumption also violates the right to self-determination, preventing the prisoners from freely deciding whether to cooperate with the judicial authority.

[22] In fact, it is quite different recognising some further benefits to those who cooperate instead of punishing harder the non-cooperating prisoners: ibid 12.

[23] N. Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' 15 *Human Rights Law Review*, 721 (2015), where

entangled to such a hideous phenomenon.[24]

Therefore, the Court required the Italian legal order to adopt all the initiatives necessary to amend national relevant provisions, according to the margin of appreciation the Convention recognised to the domestic level.[25] In this regard, a structural problem has been highlighted, directly encouraging the Italian Parliament to take actions in order to reform the penitentiary system in compliance with the ECHR guarantees. Accordingly, the Strasbourg Court identified a political concern: the legislative power should correct the unlawful provisions and rationally assess prison laws,[26] avoiding further discriminations the involvement of judicial remedies could bring about.[27]

Nonetheless, as explained in the sections below, several questions have been raised when national authorities started following suit.

III. The Enforcement at National Level

1. One First Step: Prison Leaves Towards Rehabilitation

The Italian Constitutional Court was already called on to deal with irreducible sentences under Arts 4-*bis* and 58-*ter* of the Penitentiary Act. In particular, the Court in a relevant precedent stated that this special regime was consistent with the Constitution since prisoners exerted a free choice whether to cooperate with judicial authorities or not.[28] Accordingly, the rigorous prison treatment could be legitimised by the prisoner's deliberate choice not to severe the connections

the Author recognises among the fundamental components of Art 3 ECHR the fact that 'whether the victim or potential victim is an innocent child or a cold-blooded murderer, they enjoy the protection of Article 3 alike'.

[24] In this regard, it is necessary to observe that the dissenting opinion written by Judge Wojtyczek stressed the exceptional circumstances which characterised Mr Viola's application. According to his view, Art 3 ECHR may be derogated when such dangerous offences are involved as the ones connected to any Mafia-type association in order to pursue the preeminent interest of public security: Id, *dissenting opinion*, para 1.

[25] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, paras 140-144, where the Court specified its power for the purposes of Art 46 ECHR.

[26] As for the interconnections with rule of law and separation of powers, see D. Galliani, 'Una cinquina di problemi in materia di ergastolo ostativo' *Rivista italiana di diritto e procedura penale*, 1522, 1523 (2017).

[27] On this issue, see F. Fiorentin, 'La Consulta' n 13 above, 1660. In particular, it has been stressed that decisions involving rights and duties pertain to the political sphere so that – in Civil Law legal orders – they shall be adopted not by the judiciary but by the Parliament: M. Luciani, 'Costituzionalismo irenico e costituzionalismo polemico' *Giurisprudenza costituzionale*, 1643, 1663 (2006). As for the hypothesis that the solution to this problem could be offered by the Italian Constitutional Court: V. Zagrebelsky, 'La pena detentiva "fino alla fine" e la Convenzione europea dei diritti umani e delle libertà fondamentali. Relazione introduttiva', in G. Brunelli, A. Pugiotto and P. Veronesi eds, n 17 above, 15, 25.

[28] The Court stated that considering the serious crimes they committed, the irrebuttable presumption of dangerousness had to be regarded as lawful: Corte costituzionale 9 April 2003 no 135, available at www.giurcost.org.

with Mafia-type association, encumbering cooperation with the judiciary.

However, the Strasbourg Court highlighted the misleading aspects of the national approach, pointing out that the refusal to cooperate could depend on different reasons.[29] Even though the legislative presumption could comply with the Convention considering the offences involved, its irrebuttable nature infringed the absolute prohibition of inhuman or degrading treatment: every prisoner should at least be afforded an effective prospect of release.[30]

This conclusion, on closer inspection, recalls the most recent case law of the Italian Constitutional Court in relation to whole-life sentences.[31]In particular, national judges have already declared long-life sentences unlawful whether the strict conditions provided by Art 58-*quater* of the Penitentiary Act apply.[32] This judgment is particularly relevant in that it stresses rehabilitation as a Constitutional imperative, being an irrevocable aim for every penalty to be regarded as lawful notwithstanding the category of penalties committed.[33]

In this framework, the decision no 253 of 2019 strengthens the judicial approach, enhancing a common perspective between national and supranational jurisdiction.[34] However, it is important to stress that the judgment exclusively concerns prison leaves provided by Art 30-*ter* Penitentiary Act and it does not investigate whether the same prohibition is legitimate in relation to the other alternatives to custody.[35] The Court states that the absolute prohibition for non-cooperating prisoners to apply for prison leaves infringes the Constitutional principles on three specific grounds.

[29] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 117. Actually – as recognized by the Strasbourg Court itself – the Italian Constitutional Court in the past showed a more lenient approach admitting that on certain circumstances cooperation could be determined not by rehabilitation but rather by opportunistic aims, namely the intention to benefit from the alternatives to custody national law allowed: Corte costituzionale 11 June 1993 no 306, available at www.giurcost.org.

[30] ibid paras 128-130.

[31] F. Palazzo, 'L'ergastolo' n 17 above, 5-6. As for the trend the Constitutional Court has followed reducing life imprisonment in order to ensure the protection of fundamental guarantees: see F. Fiorentin, 'Sicurezza e diritti fondamentali nella realtà del carcere: una coesistenza (im)possibile?' *Diritto penale e processo*, 1596, 1602 (2019).

[32] The provision stated that, in case of specific serious crimes, no beneficial measures – alternative to custody – could be applied for 26 years even though the prisoners had been completely resocialised. Thus, relying on rehabilitation for the purposes of Art 27, para 3, Constitution, the Constitutional Court declared the regime unlawful: Corte costituzionale 11 July 2018 no 149 n 13 above.

[33] ibid.

[34] In particular, the Constitutional Court is required to assess whether the rigorous treatment prescribed by Art 4-*bis* and 58-*ter*, Penitentiary Act, complies with rehabilitation and equality in so far as it prevents the application of prison leaves: Corte costituzionale 4 December 2019 no 253 n 2 above.

[35] As already mentioned, the Italian penitentiary system includes several benefits which help the prisoners to be gradually reintegrated within the society (ie prison leaves, outside work, parole): G. Neppi Modona, 'Ordinamento penitenziario', in R. Sacco ed, *Digesto discipline penalistiche* (Torino: UTET, 1995), 41, 50.

In the first place, the right to silence implies that during custody the prisoners have no obligation to facilitate investigative initiatives or judicial activities. While the democratic legal order recognises the principle *nemo tenetur se detegere*, it would be incoherent demanding the convicted persons to provide useful information which risks worsening their individual position.[36] Thus, if cooperation could be regarded as a condition to improve the prisons' treatment, it could never become an element sufficient to heighten punishments.[37]

Secondly, national judges observe that prison leaves represent a unique measure: being the first step of the reintegration process into the society, they constitute a sort of turning point.[38] In fact, in order to apply those measures, the judge is required to provide a positive evaluation on the applicant's personality, taking into account the rehabilitation process he is pursuing and his dangerousness to public security. In other words, once those measures are prescribed, the prisoner begins to regain his freedom.[39]

Thus, the irrebuttable presumption freezes rehabilitation at its very beginning, bringing about an unlawful treatment in contrast with Art 27, para 3, Constitution. Besides, according to the Court, prison leaves are not able to affect either the conditions of release or the penalty's actual scope.[40] In particular, overruling the previous case law which stated the retroactive effect of less favourable penitentiary norms,[41] the Constitutional Court has distinguished among the penitentiary measures in order to apply the ECHR broader definition of criminal charge.[42] In fact, according to the Grand Chamber's judgment *Del Rio Prada* v *Spain*,[43] the rules that enforce penalties shall not be excluded from the legality

[36] Corte costituzionale 4 December 2019 no 253, n 2 above, para 8.1.

[37] Otherwise '*carceratus tenetur alios detegere*', in accordance with the suggestive expression forged by the Constitutional judges (ibid para 8.1). Besides, after a significant period spent in custody, cooperation might become less useful as the information available to the convicted subjects referred to a moment distant in time, not reflecting the actual status of the criminal circles: D. Pulitanò, 'Problemi dell'ostatività sanzionatoria. Rilevanza del tempo e diritti della persona', in G. Brunelli, A. Pugiotto and P. Veronesi eds, n 17 above, 153, 157. In fact, the Constitutional Court expressly considered the hypothesis where, during custody, the association had been completely eradicated and cooperation consequently became unenforceable.

[38] F. Della Casa, n 14 above, 809.

[39] Corte costituzionale 4 December 2019 no 253 n 2 above, para 8.2.

[40] Corte costituzionale 26 February 2020 no 32, where the Court affirms that the principle of legality applies to penitentiary measures which are able to affect the conditions of early release and the penalty's actual scope.

[41] The judicial approach which applied the principle of *tempus regit actum* to penitentiary rules had been upheld by the majority of national judges, see – *inter multis* – Corte di Cassazione Sezioni Unite 30 May 2006 no 24561.

[42] V. Manes, 'Common-lawisation of Criminal Law? The Evolution of *Nullum Crimen Sine Lege* and the Forthcoming Challenges' 8 *New Journal of European Criminal Law*, 334, 340 (2017). On the autonomous notion of criminal matters, see A.M. Maugeri, 'The Concept of Criminal Matter in the European Courts' Case Law – The Protection of Fundamental Principles v. Political Compromise' 1 *European Criminal Law Review,* 4 (2019).

[43] Eur. Court H.R. (GC), *Del Rio Prada* v *Spain*, Judgment of 21 October 2013, where the Court claimed that the calculation of the total term of imprisonment based on the more severe

principle under Art 7 ECHR if they retain a substantially punitive scope.[44] In this perspective, it has been excluded that the prison leaves' regime could be considered 'criminal in nature' and assisted by the *nullum crimen* guarantee: the short periods spent outside the penal institution are temporary and conditioned to specific requirements not being able to affect the custodial terms of penalty's enforcement.[45] Thus, it seems even more urgent to extend the legal reasoning of judgment no 253 to the other measures able to alter the *status* of imprisonment, allowing national long-life sentences to be considered *de iure* and *de facto* reducible (see para IV below).

Lastly, the Court states that the law under scrutiny undermines the idea that prisoners' personality does not remain unchanged but, rather, evolves during detention so that the sentence shall be reviewed when the convicted person has re-examined his past criminal experiences, shaping a new identity.[46] Even though the special regime could seem reasonable considering the tragic events that brought to the Capaci's massacre – requiring the Italian jurisdiction to promptly react in order to challenge Mafia associations – the Constitutional Court declares the irrebuttable presumption of dangerousness unlawful. Notwithstanding the criminal behaviour committed in the past, the State shall ensure every prisoner the hope to regain his freedom towards rehabilitation.[47]

'Parrot doctrine' adopted by the national Supreme Court fell within the scope of Art 7 ECHR and was unlawfully applied to the detriment of the applicant's rights which prevented the retrospective application of criminal law. On the impact of this ECHR judgment on national legal order, see C. Ruiz Miguel, 'The "Del Rio Prada" Judgments and the Problem of the Enforcement of ECtHR Decisions', in M. Pérez Manzano and Others eds, *Multilevel Protection of the Principle of Legality in Criminal Law* (Switzerland: Springer, 2018), 213.

[44] Eur. Court H.R. (GC), *Del Rio Prada* v *Spain* n 43 above, para 81, where the judges state that 'to render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision'. Even though the Strasbourg Court firstly denied that penalties enforcement's rules fell within the scope of Art 7 ECHR (*Uttley* v *United Kingdom*, Judgment of 25 November 2005), the judicial approach had been overruled as shown by *Kafkaris* v *Ciprus*, Judgment of 12 February 2008. Thus, on the judicial process from *Kafkaris* v *Ciprus* to *Del Rio Prada* v *Spain*, see S. Sanz-Caballero, 'The Principle of *Nulla Poena Sine Lege* Revisited: the Retrospective Application of Criminal Law in the Eyes of the European Court of Human Rights' 28 *European Journal of International Law*, 787 (2017).

[45] As for the critical aspects of the Constitutional Court's legal reasoning, see V. Manes and F. Mazzacuva, 'Irretroattività e libertà personale: l'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale' *Sistema penale*, 23 march 2020, available at https://tinyurl.com/yckdt63h (last visited 27 December 2020).

[46] More broadly, this aspect has been stressed as one of the main characteristics of the European approach towards criminal sentences, considerably different from the American perspective: J. Kleinfeld, 'Two Cultures of Punishment' 68 *Stanford Law Review*, 933 (2016).

[47] Similarly, considering the Grand Chamber's judgment *Vinter and Others* v *United Kingdom*, it has been observed that under Art 3 ECHR '[n]o matter what they have done, [prisoners] should be given the opportunity to rehabilitate themselves while serving their sentences, with the prospect of eventually functioning as responsible members of free society again': D. van Zyl Smit, P. Weatherby and S. Creighton, 'Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?' 59 *Human Rights Law Review*, 65 (2014).

Moreover, national judges rule that, if the prisoner has been convicted for crimes related to Mafia-type associations, prison leaves could be granted exclusively where the applicant is able to demonstrate that he has no actual connection with such a dangerous criminal sphere as well as there are no risks that in the future he could rebuild similar links. A special burden of proof has been established to avoid the risk of undermining public security, fighting against the most dangerous criminal organisations.

In this regard, according to the ECHR, legislative presumptions do not contrast with fundamental guarantees when they are rebuttable.[48] As for the national level, automatic measures imposed by the Parliament comply with the Constitution exclusively when they preserve actual connections with the empirical sphere,[49] complying with the standard of *id quod plerumque accidit*.[50] Thus, the choice not to automatically infer a prisoner's dangerousness to society from the lack of cooperation seems consistent both with national and supranational guarantees. However, the Court identified a particularly rigorous burden of proof in order to exclude actual and future links between the interested person and the criminal organization.[51] In fact, some scholars persuasively observe it is so demanding that the presumption remains irrebuttable in nature.[52] It seems extremely difficult to demonstrate that there will be no risk of future links with unlawful associations, particularly as the burden of proof rests on the private parties.[53] Furthermore, the Court has extended the judicial outline to all the crimes ruled by Art 4-*bis* even though some offences do not imply any reference to criminal organizations.[54] The goal is avoiding unreasonable discriminations against those offences which are deemed to be less dangerous to the society. At the same time, the general extension of the judicial rule has questioned the actual object and limits of that specific burden of proof. In fact, the report the Parliament's Anti-Mafia Commission recently presented to the national legislator has suggested several alternatives to regulate this specific aspect,[55] aiming to

[48] Eur. Court H.R., *Marcello Viola* v *Italy*, n 1 above, para 131. Accordingly, see also Eur. Court H.R., *Pantano* v *Italy*, Judgment of 6 November 2003, para 69, considering the legitimacy of legislative presumptions in relation to pre-trial measures in case of offences related to Mafia-type associations.

[49] For a deeper analysis, see the recent work V. Manes-V. Napoleoni, La legge penale illegittima. Metodo, itinerari e limiti della questione di costituzionalità in materia penale (Torino: Giappichelli, 2019), 270, 284.

[50] On the issue, see Corte costituzionale 21 July 2010 no 265, available at www.giurcost.org.

[51] Corte costituzionale 4 December 2019 no 253, n 2 above, para 9.

[52] M. Ruotolo, 'Reati ostativi e permessi premio. Le conseguenze della sent. n. 253 del 2019 della Corte costituzionale', 12 December 2019, available at https://tinyurl.com/yckdt63h (last visited 27 December 2020), where the presumption is described as 'almost-irrebuttable'.

[53] S. Talini, 'Presunzioni assolute e assenza di condotta collaborativa: una nuova sentenza additiva ad effetto sostitutivo della Corte costituzionale' *Consulta OnLine*, III, 729, 741 (2019).

[54] Corte costituzionale 4 December 2019 no 253, n 2 above, para 12.

[55] Commissione parlamentare d'inchiesta sul fenomeno delle mafie e sulle altre associazioni criminali, anche straniere, 'Relazione sull'istituto di cui all'articolo 4-*bis* della legge n. 354 del 1975 in

assess the potential infringement of fundamental guarantees as the last section tries to explain.

2. A Second More 'Radical' Step in Relation to Children's Courts

Two days after the decision no 253 of 2019, the Constitutional Court published an even more radical judgment in relation to sentences served by minors who had been convicted for offences connected to Mafia-type associations.[56] In fact, even though a legislative reform had been recently approved in order to enhance the best interests of the child,[57] national legislator chose to extend the special regime provided by Arts 4-*bis* and 58-*ter* Penitentiary Act even to children's sentences.

In this regard, the Court examined several International Conventions[58] and the EU most recent provisions which enforced the role of rehabilitation to further juvenile protection and well-being.[59] Accordingly, the young age of the prisoners represented a crucial element each jurisdiction needed to consider in order to allow the young persons to critically reflect on their criminal past and reconstruct their personality, achieving social reintegration. Having already undermined some rigorous aspects of the special penitentiary regime,[60] the Court stated that the legislative option was incoherent with its previous case law and inconsistent with the general scope that governed the development of penalties' enforcement. In this view, the Constitution prevented normative solutions which were based exclusively on deterrence and social defence,

materia di ordinamento penitenziario e sulle conseguenze derivanti dalla sentenza n. 253 del 2019 della Corte costituzionale', available at www.senato.it.

[56] Corte costituzionale 6 December 2019 no 263, available at www.giurcost.org.

[57] Decreto legislativo 2 October 2018 no 121. In particular, the legislator aimed to organise the minors' prison rules so that they would enhance the juvenile personality and ensure that the young convicted ones gained the best chances to social reintegration. The main scope was providing minors' sentencing with rules autonomous from the adults' prison system. However, the legislator also extended the special regime under Art 4-*bis* and 58-*ter*, Penitentiary Act, to Children's Courts.

[58] In fact, the Court decided according to International law. In particular, the Court refers to – among others – the so called 'Beijing Rules' assessing minimum standards to enforce specific guarantees for juvenile justice (29 November 1985) and the United Nations' Convention on the Rights of the Child (20 November 1989).

[59] As for the EU legislation, it is particularly important to recall the Directive EU/2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings which states that 'Member States should be able to derogate from the obligation to carry out an individual assessment where such a derogation is warranted in the circumstances of the case, taking into account, *inter alia*, the seriousness of the alleged criminal offence and the measures that could be taken if the child is found guilty of such an offence, provided that the derogation is compatible with the child's best interests' (recital no 40).

[60] Corte costituzionale 22 February 2017 no 90, which declared unlawful the provisions requiring the condemned young person to be detained while alternative measures were under judicial scrutiny in case Art 4-*bis* applied. On the relevant outlines of the decision – in relation to the notion of 'best interests of the child' – see M. Bertolino, 'I diritti dei minori fra delicati bilanciamenti penali e garanzie costituzionali' *Rivista italiana di diritto e procedura penale*, 1, 21, 37 (2018).

clarifying the thresholds of legitimate penalties.

Thus, the judgment's legal reasoning demonstrates that insurmountable legislative obstacles against resocialisation infringe rehabilitation for the purposes of Art 27, para 3, Constitution:[61] national judges have declared unlawful the norm itself which extended the entire regime under Arts 4-*bis* and 58-*ter* Penitentiary Act to minors' sentences. In this peculiar field, the Constitutional Court has not only extended its judgments to all the measures of early release but also excluded any presumptive provision, even the rebuttable ones. As a result, the different penitentiary regime provided for young prisoners implies further interpretative questions concerning the interconnections among national and supranational dimension.

3. Interpretative Unsolved Questions

The issue at stake raises some questions relating to the rationale and boundaries of rehabilitation whether the most serious crimes are involved. In fact, the decision pronounced by the Court on prison leaves is not to be taken for granted. Few months before, the judgment no 188 saved the legitimacy of the list provided by Art 4-*bis*, stating that it ensured social defense. The legislator had discretionary selected those crimes which were deemed to represent dangerous threats to public security: the worsen penitentiary regime aimed to appease public opinion.[62] However, this approach seems inconsistent with the ECHR's case law: the Strasbourg judges point out that the tackle to the most hideous crimes cannot justify derogations from Art 3 ECHR which prohibits in absolute terms degrading or inhuman treatments.[63] The enhancement of deterrence and public security could not override rehabilitation unless the penalty would misplace its legitimation.[64]

On one hand, the judgment no 253 has enhanced a common interpretation of rehabilitation between the national and the supranational level. On the other, it requires further explanation on the rationale of the most severe regime

[61] On the issue, see recently A. Pugiotto, 'Due decisioni radicali della Corte costituzionale in tema di ostatività penitenziaria: le sentenze nn. 253 e 263 del 2019' *Rivista AIC*, 1, 501, 502 (2020).

[62] Corte costituzionale 18 July 2019 no 188, available at www.giurcost.org.

[63] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 130. In fact, as already mentioned, while criminal sanctions undoubtedly entail punitive outlines, International and European criminal policy has recently focused on social reintegration, identifying rehabilitation as a fundamental guarantee at the supranational level: in this perspective, the Strasbourg Court's Grand Chamber considers 'Rules 6, 102.1 and 103.8 of the European Prison Rules, Resolution (76) 2 and Recommendations Rec (2003)23 and Rec (2003)22 of the Committee of Ministers, statements by the Committee for the Prevention of Torture, and the practice of a number of Contracting States' as well as 'Article 10 § 3 of the International Covenant on Civil and Political Rights': Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 101.

[64] In this perspective, see again Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 101, affirming that '[w]hile punishment remained one of the aims of imprisonment, the emphasis in European penal policy was now on the rehabilitative aim of imprisonment'.

reserved to those particularly dangerous crimes so that the Constitutional case law does not incur potential incoherencies. In other terms, it is essential to clarify whether – according to the Court – aims of deterrence or public protection could overtake rehabilitation in some specific circumstances or, rather, it has to prevail the idea that – despite the serious crimes committed in the past – each person might change his attitude and rebuild his personality, nurturing the hope for social reintegration. Actually, the Constitutional Court has recently specified that the recalled decision no 188 of 2019 refers to a different legal reasoning:[65] in this view, it is possible to perceive a specific attempt to distinguish among the material facts and preserve the inner coherence of the case law related to those serious offences.

However, even claiming the predominance of rehabilitation, further questions arise in relation to the different penitentiary regime prescribed for adults and minors. In fact, according to the Constitutional Court, while prison leaves could be granted if the detained person meets specific standards of proof, no presumptions – not even rebuttable – apply to young age prisoners which have been condemned for the same crimes. When minors are involved, it is well-known, the Constitutional case law has continuously enhanced the role played by rehabilitation in order to foster a process of personal development and education.[66] In fact, the preeminent best interests of the child have allowed national judges to evaluate rehabilitation in order to ensure that imprisonment would be a measure of last resort, fostering flexible training programs as well as aiding the child to assume a constructive role in the society.[67]

Nonetheless, the recent general emphasis on Art 27, para 3, Constitution, enhances individualized programs even in case of adults sentenced to life imprisonment,[68] sharing the approach adopted at the supranational level. In fact, although it is not expressively recognised, 'there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved'.[69] The Strasbourg Court's Grand Chamber has clearly stated that in jurisdictions whose very essence is

[65] Corte costituzionale 12 March 2020 no 52, para 3.2, available at www.giurcost.org.

[66] In this perspective, it is possible to recall several decisions of the Constitutional Court; among the main issues, it seems interesting to mention the judgment which declared long-life sentences unlawful in relation to young age prisoners (sentence 28 April 1994 no 168) or the one which required the legislator to take action in order to distinguish among minors and adults as for unacceptable restrictions of rehabilitation (25 March 1992 no 125).

[67] On the interconnections between constitutional and conventional law, see E. Lamarque, *Prima i bambini. Il principio dei* best interests of the child *nella prospettiva costituzionale* (Milano: FrancoAngeli ed, 2016), 37, 87. In order to examine the moral foundation of children's rights in relation to the 'adult-centric' Western tradition of human rights, see J. Tobin, 'Justifying Children's Rights' 21 *International Journal of Children's Rights*, 395 (2013).

[68] See, as for a broader analysis, A. Pugiotto, 'Il "blocco di costituzionalità"' n 13 above, 1646.

[69] Eur. Court H.R. (GC), *Vinter and Others* v *United Kingdom* n 7 above, para 114.

protecting human dignity even life sentences shall pursue rehabilitation.[70] A periodical review of the sentence is required so that the detained person is encouraged to 'develop himself or herself to be able to lead a responsible and crime-free life'.[71]

Therefore, while common minimum standards emerge between the penitentiary regimes of young and adult prisoners – both of which are equally expected to respect prisoners' dignity – the process followed by the Constitutional Court entails some uncertainties. In particular, the choice not to extend the more lenient rules adopted for young prisoners demands a specific rationale. In this light, even though there is no doubt education plays an essential role, rehabilitation became the preeminent penological ground[72] for juvenile justice as well as for adults' imprisonment. Thus, the Constitutional Court should clarify whether rehabilitation exerts – at the national level – different functions depending on the age of the convicted person or, rather, other aspects became relevant in order to uphold the more favorable regime applied to minors.[73]

Moreover, focusing on the Constitutional Court's judgment on prison leaves, the rebuttable presumption the judges introduced in order to face the threat of Mafia-type associations requires further attention. In fact, the innovation suggested by the Court risks impinging on the separation of powers[74] as it considerably affected the previous legislative regime, adding specific standards of proof.[75] In particular, the Court adopted a proactive approach, trying to develop through the peculiar standard of evidence a balanced solution to face an extremely dangerous phenomenon to the society. Even though several alternatives were consistent with the Constitution, national judges stressed previous normative references in order to transform the unlawful regime.[76]

In this perspective, the issue does not directly affect the European sphere: when criminal charges are involved, the autonomous notion the Strasbourg Court

[70] ibid para 113, where the supranational judges recall the German Federal Constitutional Court's case law affirming that 'it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom'. Thus, '[i]t follows from this strong emphasis on human dignity that life sentence prisoners should now be able to claim as a matter of right that they should be given opportunities for rehabilitation': D. van Zyl Smit, P. Weatherby and S. Creighton, n 47 above, 69.

[71] Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 103.

[72] See, in particular, Corte costituzionale 28 April 2017 no 90, para 5.

[73] Considering the need to clarify the notion of rehabilitation when dangerous phenomena such as Mafia-type associations are involved, see – recently – G. Fiandaca, 'Ergastolo ostativo e 41-*bis* ord. pen. L'interazione virtuosa tra giudici ordinari e Corte costituzionale' *Giustizia insieme* (2020).

[74] As for the risks implied by judicial activism in the criminal field whether Civil Law paradigms are involved, see F. Palazzo-F. Viganò, *Diritto penale. Una conversazione* (Bologna: il Mulino, 2018), 56.

[75] Considering the outlines that a new idea of legality could exert upon the Civil Law's separation of powers, see V. Manes, 'Common-lawisation' n 42 above, 338.

[76] Considering the judgment at stake as an example of judicial law-making, F. Fiorentin, 'Preclusioni penitenziarie e permessi premio' *Cassazione penale*, 3, 1019, 1023 (2020).

adopted – interpreting Art 7 ECHR – equalizes law and case law.[77] Nonetheless, once the ECHR judges recognized the structural problem jeopardizing the Italian penitentiary regime, the input provided under Art 46 ECHR required the Parliament not the judiciary to undertake the renovation of domestic penitentiary rules.[78] In other words, taking into account the national margin of appreciation, the Strasbourg Court strove to prevent judicial activism so that the judiciary would not be forced to exert a 'countermajoritarian role'.[79] Besides, although identifying a similar structural problem as the Russia's penitentiary system infringed Art 3 ECHR, the Court has recently stated under Art 46 ECHR that 'the choice of instruments remains fully at the discretion of the respondent Government'.[80] This cautious approach stresses the self-restraint of ECHR judges and, at the same time, it emphasises the opposite intrusive approach adopted towards the Italian government.[81]

IV. Future Perspectives

As already mentioned, the decision no 253 strictly respects the *thema decidendum* raised by the applicants, by only examining prison leaves. This choice certainly reflects the procedural norms governing Constitutional trials but, at the same time, provides an interesting signal against judicial activism.

[77] It is well-know, this notion has been clarified by the Strasbourg Court in several judgments; among the most relevant cases, see Eur. Court H.R., *S.W. and C.R.* v *United Kingdom*, Judgments of 22 November 1995; *Cantoni* v *France*, Judgment of 11 November 1996, para 29; *Cöeme and Others* v *Belgium*, Judgment of 22 June 2000, para 145; most recently, *Contrada* v *Italy*, Judgment of 15 Apil 2015, para 60 and *Navalnyye* v *Russia*, Judgment of 17 October 2017, para 54, all available at www.hudoc.echr.coe.int.

[78] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 143.

[79] On this issue, see, among others, L.R. Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' 67 *The American Journal of Comparative Law*, 109 (2019), where the Author observes Constitutional Courts not only exert a countermajoritarian role but also satisfy social needs not provided by legislators and develop new approaches that enforce a 'civilizing process'. As for the role performed by Constitutional Courts as countermajoritarian authorities, see also the considerations of R. Cotterrell, *The Politics of Jurisprudence. A Critical Introduction to Legal Philosophy* (New York: Oxford University Press, 2003), 160, relating to Ronald Dworkin's theoretical achievements.

[80] Eur. Court H.R., *N.T.* v *Russia*, Judgment of 2 June 2020, para 70. The Court examines the compliance of a special correctional regime imposed by the Russian government with the prohibition of inhuman and degrading treatments. In details, the judges unanimously declared the violation of Art 3 ECHR since the applicant's '[…] isolation, limited outdoor exercise and lack of purposeful activity […] resulted in intense and prolonged feeling of loneliness and boredom, which caused significant distress to the applicant and due to the lack of appropriate mental and physical stimulation could result in institutionalisation syndrome, that is to say the loss of social skills, and individual personal traits. This amounted to treatment prohibited by Article 3 of the Convention' (para 52).

[81] On the ECHR judges' expanding role in the definition of remedial measures under Art 46 ECHR, see A. Mowbray, 'An Examination of the European Court of Human Rights' Indications of Remedial Measures' 17 *Human Rights Law Review,* 451 (2017).

However, waiting for the legislator to intervene,[82] national penitentiary's regime is not to be regarded as consistent with the ECHR: the adults' special discipline of life sentences under Art 4-*bis* is not *de iure* et *de facto* reducible for the purposes of Art 3 ECHR. In fact, non-cooperating prisoners are currently allowed to apply only for prison leaves, being national judges unable to further assess the rehabilitation process in relation to penitentiary measures which affect the actual scope of penalty.[83] Notwithstanding the serious offences involved,[84] the chance to apply for prison leaves does not represent an adequate measure to enhance prisoners' human dignity.

Therefore, it is not surprising that those arguments have persuaded the Italian Supreme Court to refer the issue again to the Constitutional Court in order to extend the rule provided for prison leaves to releases on parole.[85] Although in several judgments the Italian Supreme Court confirmed that irreducible imprisonment under Art 4-*bis* was lawful since it depended on the deliberate choice to cooperate with public authorities,[86] this last decision has overruled the previous case law. In particular, national judges expressively recall both the Constitutional and the ECHR case law maintaining a violation not only of national provisions but also of the international obligations binding upon the domestic law.[87]

In this framework, it is highly likely that the Constitutional Court would include releases on parole,[88] challenging the previous legislative approach in order to comply with the rules prescribed by the Strasbourg judges. However, this scenario would be inconsistent with the remedy suggested under Art 46 ECHR. In particular, even though the judicial remedy did not infringe the legality principle under the Convention, a Parliament's reform would represent the more suitable remedy in order to balance the opposite interests in accordance with the rule of law governing civil law's paradigm.[89]

Therefore, it seems relevant that – even if no draft legislation has seriously been considered yet – recalling the urgent call made by the Strasbourg Court and the Constitutional Court, the Anti-Mafia Commission presented several

[82] F. Palazzo, 'L'ergastolo' n 17 above, 4.

[83] Corte costituzionale 26 February 2020 no 32 n 40 above.

[84] F. Palazzo, 'Crisi del carcere e culture di riforma' *Diritto penale contemporaneo*, 4, 7 (2017), where the Author examines the danger that penal populism might entail exacerbating prisons' rules.

[85] Corte di Cassazione 3 June 2020 no 18518, available at https://tinyurl.com/yckdt63h (last visited 27 December 2020).

[86] See, for instance, Corte di Cassazione 22 March 2016 no 27149, available at www.italgiure.it.

[87] Corte di Cassazione, n 85 above, para 20, where the Court recognized the violation of rehabilitation under Art 27, para 3, Constitution, as well as Art 117 Constitution, which requires to respect EU and international laws.

[88] Stating that the decision no 253 of 2019 has already started the process which would lead to a general reform of irreducible life sentences, see A. Pugiotto, 'Due decisioni' n 61 above, 517. As for the possibility the Constitutional Court would have to extend its case law, see F. Fiorentin, 'Sicurezza' n 31 above, 1605.

[89] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 143.

recommendations to the Parliament in order to transform the penitentiary laws in relation to Art 4-*bis*.[90] On one hand, the report encourages the domestic legislator to regulate in details the burden of proof necessary to have access to penitentiary measures despite the prisoner's lack of cooperation with public authority. The main goal would be to distinguish Mafia-type associations from other offences so that the burden of evidence reflects the peculiar categories of crimes ruled by Art 4-*bis*.[91] On the other, it requires the Parliament to coordinate the remedies adopted for adults and minors, considering the outlines reached by the Constitutional judges.[92]

In conclusion, the interconnections between Rome and Strasbourg have endorsed the efforts to eradicate criminal organisations[93] avoiding unlawful limitations of human dignity for the purposes of Art 3. As a result, the guarantees involved have reached more developed standards, enhancing the actual rationale of the Constitutional principles. Moreover, the judicial synergism among national and supranational judges could encourage the domestic legislator to start a process[94] that would hopefully instruct a general reform, obviating precarious solutions inevitably dependent on fortuitous contingencies such as the Courts' temporary composition.

[90] Relazione n 55 above.

[91] ibid 31.

[92] ibid 36.

[93] The Strasbourg Court undoubtedly recognises that 'States also have a duty under the Convention to take measures to protect the public from violent crime and that the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public': Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 111.

[94] In this perspective, a positive example is offered by the case *Torreggiani* v *Italy* (Judgment of 8 January 2013): after the Court condemned the national jurisdiction identifying a structural violation of the ECHR guarantees in relation to prison overcrowding, the Parliament adopted several measures which led the Strasbourg Court to recognize the efforts the domestic law made to be consistent with the Convention (*Stella and Others* v *Italy*, Decision of 16 September 2014, paras 41-42, 53-54). In this regard, see G. Giostra, 'Questione carceraria, insicurezza penale e populismo penale' *Questione Giustizia*, 11 (2014); A. Martufi, 'La Corte EDU dichiara irricevibili i ricorsi presentati dai detenuti italiani per violazione dell'art. 3 CEDU senza il previo esperimento dei rimedi *ad hoc* introdotti dal legislatore italiano per fronteggiare il sovraffollamento' *Diritto penale contemporaneo* (2014), available at www.archiviodpc.dirittopenaleuomo.org; F. Favuzza, 'Torreggiani and Prison Overcrowding in Italy' *Human Rights Law Review*, 153 (2017).

Corporate and Financial Markets Law

Financial Crisis, Excessive Pay and Fat Cats.
Why Employment Scholars Should Start Reflecting on Regulation of Executive Remuneration

Giovanni Gaudio*

Abstract

In the aftermath of the 2007-2008 financial crisis, flawed variable pay structures of executives were blamed by many for contributing to the build-up of the global financial turmoil, as they allegedly incentivized them to engage in excessive risk-taking. Legislators around the globe decided to regulate remuneration structures of the fat cats in the financial industry with a view to better align their compensation with effective risk management practices. Since 2010, several Directives have been adopted at EU level, imposing on financial institutions a combination of mandatory norms regarding how the variable part of remuneration is to be paid out. Although this topic has been widely investigated by corporate governance researchers, it has been largely neglected by labour law scholars. This article tries to fill this gap, analysing the issues of mandatory pay structure in the financial industry through the lenses of employment law.

> *Heads, you become richer than Croesus; tails, you get no bonus, receive instead about four times the national average salary, and may (or may not) have to look for another job … Faced with such skewed incentives, they place lots of big bets. If heads come up, they acquire dynastic wealth, if tails come up, OPM [other people money] absorbs almost all losses.*
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> A.S. Blinder, *After the Music Stopped. The Financial Crisis, the Response, and the Work Ahead* (London: Penguin 2013), 82

I. The Regulation of Executive Remuneration in the Financial Industry in the Aftermath of the Financial Crisis – Adding an Employment Law Perspective

Regulation of executive remuneration is on the rise. In the aftermath of the

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I am most grateful to Stefano Liebman, Gaetano Zilio Grandi, Maurizio Falsone, and Pietro Fazzini for support, discussions, and feedbacks on this article. The usual disclaimer applies.

2007-2008 financial crisis, media and the public opinion started to pressure legislators, both in the US and in the EU, to regulate pay of the fat cats[1] in the financial industry in order to align their remuneration with prudent risk-taking.[2] The reasons behind this political pressure are not difficult to understand, after all. On the one hand, financial institutions registered disastrous performance throughout the crisis. On the other, high-ranked executives, as well as traders and brokers, were granted, immediately before the financial breakdown of 2007-2008, astonishing bonuses and lavish severance payments.[3] Remuneration plans rewarded risk-taking for high returns, but they did not punish for losses. This created perverse incentives because there was no personal downside to risk-taking.[4] As a result, flawed, variable pay structures of certain individuals at financial institutions were blamed for contributing to the build-up of this global financial turmoil, as they allegedly incentivized these workers to focus on short-termism and excessive risk-taking.[5] Although it is still controversial whether there was an actual causal link between reckless risk-taking and the crisis,[6] regulating the remuneration structure in the financial sector became a key topic in the agenda of many politicians in search for consensus.[7]

The first result of this political pressure was the adoption, at the international level, of the 2009 Financial Stability Board (FSB) principles for sound

[1] This expression, originally used to describe rich political donors, it is also commonly used to indicate people with a lot of money, especially someone in charge in a company who has the power to increase her/his own pay – among many, see B. Wedderburn, *The Future of Company Law: Fat Cats, Corporate Governance and Workers* (London: Institute of Employment Rights, 2004).

[2] K.J. Murphy, 'Regulating Banking Bonuses in the European Union: A Case Study of Unintended Consequences' 19 *European Financial Management*, 631, 635 (2013).

[3] G. Ferrarini, 'CRD IV and the Mandatory Structure of Bankers' Pay' 289 *ECGI Working Paper*, 3, 20 (2015).

[4] K. Berman and K. Knight, 'Lehman's Three Big Mistakes' *Harvard Business Review*, 16 September 2009, available at https://tinyurl.com/y232qaqv (last visited 27 December 2020) and A.S. Blinder, *After the Music Stopped. The Financial Crisis, the Response, and the Work Ahead* (London: Penguin, 2013), 82.

[5] D.W. Diamond and R. Rajan, 'The Credit Crisis: Conjectures about Causes and Remedies' 99 *American Economic Review*, 606, 607-608; L.A. Bebchuk and H. Spamann, 'Regulating Bankers' Pay' 98 *Georgetown Law Journal*, 247, 255-259 (2010); and, above all, the empirical analysis conducted by L.A. Bebchuk, A. Cohen and H. Spamann, 'The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000-2008' 27 *Yale Journal of Regulation*, 27, 257 (2010).

[6] While certain scholars argue that flawed bonuses incentivized executives to take excessive risks, D.W. Diamond and R. Rajan, n 5 above, 607-608; L.A. Bebchuk and H. Spamann, n 5 above, 255-259; and, above all, L.A. Bebchuk et al, n 5 above, 257, others remain sceptical, K.J. Murphy, 'Pay, Politics and the Financial Crisis' 16 February 2012, available at https://tinyurl.com/yb50ec9p (last visited 27 December 2020); K.J. Murphy, n 3 above, 635-636, and argue that arguments for regulating executives' pay were rather weak in absence of a clear empirical evidence of a relation between excessive pay and the financial crisis, G. Ferrarini, n 3 above, 5-9 and 17-18, and P. de Andrés, R. Reig and E. Vallelado, 'European banks' executive remuneration under the new European Union regulation' 22 *Journal of Economic Policy Reform*, 208 (2019).

[7] G. Ferrarini, n 3 above, 20.

compensation practices.[8] The FSB principles set out international standards, to be implemented by financial institutions, aimed at better aligning compensation with effective risk management practices. In addition, they provide that pay-out schedules shall be sensitive to the time horizons of risks, in order to avoid short-termism and create incentives to produce value in the long run. The FSB principles have been implemented in different jurisdictions along different routes. While the US, especially at the beginning, has preferred the use of standards rather than rules, the EU has immediately adopted a stricter approach in regulating compensation in financial institutions, implementing the FSB principles through a series of mandatory rules on pay structure of both top executives and other risk-taking or high earning staff at various hierarchy levels of the relevant institution.[9]

Since 2010, several Directives have been adopted at EU level, applying to a wide spectrum of financial institutions such as banks, investment firms and insurance companies,[10] with the aim of promoting sound and effective risk management and avoiding excessive risk-taking. In particular, these Directives impose a combination of mandatory rules regarding how the variable part of remuneration – the one subject to an individual or institution's performance – is to be paid out. More specifically, financial institutions have to adopt remuneration

[8] K.J. Murphy, n 6 above; K.J. Murphy, n 3 above, 642-643, and G. Ferrarini and M.C. Ungureanu, 'Executive Remuneration', in J.N. Gordon and W.G. Ringe eds, *The Oxford Handbook of Corporate Law and Governance* (Oxford: OUP, 2018), 334, 357-358.

[9] G. Ferrarini and M.C. Ungureanu, n 8 above, 358-362.

[10] For the banking industry, the first rules were contained in Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies (2010) OJ L 329 (CRD III) and then in Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (2013) OJ L 176 (CRD IV), as amended by Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (2019) OJ L 150 (CRD V): in particular, Arts 92-94 of CRD IV as amended by CRD V.

For investment firms, these rules are provided by Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (2011) OJ L 174 (AIFM) and Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (2014) OJ L 257 (UCITS V).

For insurance companies, see Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (2009) OJ L 335 (Solvency II), as supplemented by the Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2015] OJ L 12.

policies that provide the following rules:[11]

- the pay-out of variable remuneration must be balanced between cash and share or share-linked financial instruments;

- awards in shares or share-linked financial instruments must be subject to an appropriate retention policy;

- a substantial portion of variable remuneration must be deferred over a multiyear period;

- *ex post* risk adjustments mechanisms have to be implemented, in order to enable institutions to reduce or reclaim variable remuneration – which has not already been vested/paid ('malus') or has already been vested/paid ('claw-back') – when it becomes clear that the individual or the institution's performance upon which the award was calculated has been misstated.

In addition, although this last mandatory rule has been introduced only in the banking sector, a cap on variable remuneration has been imposed, so that banks have to set a maximum ratio between fixed and variable remuneration components.[12]

As a result, these mandatory rules have strongly limited the private autonomy in determining the structure of remuneration packages agreed in the individual contracts of executives in the financial industry. However, although the EU or national regulators can impose administrative sanctions on institutions and/or individuals responsible for the violation of mandatory provisions regarding pay structure,[13] there are no indications as to the contractual remedies that may be triggered in case of infringement of these regulations. In other words, there are no specific provisions governing possible antinomies between the mandatory rules contained in these Directives and the terms of an employment contract which, although freely bargained between an employing financial institution and one of its executives, have been agreed in violation of these regulations.

[11] For an overview on the mandatory rules regarding pay structure in the banking sector, although this is not updated to the latest amendments provided by CRD V, G. Ferrarini, n 3 above, 22-23.

[12] On the possible shortcomings of such a rule, K.J. Murphy, n 3 above, 642; G. Ferrarini, n 3 above, 31-38; P. de Andrés, R. Reig and E. Vallelado, n 6 above.

[13] For example, the powers of the European Central Bank (ECB) and national regulators to impose sanctions in case of violation of CRD. The power of the ECB to impose sanctions for the infringement of the mandatory rules regarding pay structure lies on: Art 9 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (2013) OJ L 287, Arts 25-35 and Art 129 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (2014) OJ L 141 and, more generally, Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions (1998) OJ L 318. Also, national regulators are entitled to impose sanctions: for instance, the power of Bank of Italy to proceed in this respect lies on Art 144 and following of decreto legislativo 1 September 1993 no 385.

This article, thus, tries to understand which rules govern such an antinomy. In absence of any contractual remedy provided at EU level, this answer has to be necessarily searched in the domestic laws of the Member States under the obligation of transposing into national legislation the abovementioned Directives. In investigating this issue, it is to be further considered that this discipline intersects the legislation in the field of employment law,[14] which provides an apparatus of mandatory norms protecting people at work, including those employed by financial institutions. This is a fundamental point of attention in analysing the issues of mandatory pay structures in the financial industry. Employment law, in continental European legal systems mainly, has traditionally evolved as a distinctive and autonomous legal subject to the extent that it widely provides special mandatory rules partially departing from general contract law in limiting the principle of freedom of contract, as the parties to a contract of employment cannot normally derogate from a worker-protective floor of mandatory rights.[15] The topic of executive remuneration has been extensively investigated by corporate governance researchers,[16] but it has been largely neglected by labour law scholars.[17] This is surprising also in light of the fact that employment legal practitioners have often been the ones engaged by financial firms to advise them in adapting to the latest regulatory interventions the remuneration packages of those individuals employed by financial institutions.[18]

Therefore, this article tries to contribute to the academic debate on the issues of mandatory pay structure in the financial industry analysing them through the lenses of employment law. In other words, it aims to add an original perspective to the broader discussion on this topic that has so far involved

[14] For the purposes of this article, the expressions 'employment law' and 'labour law' will be used interchangeably.

[15] For this comparative remark, M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: OUP, 2011), 58-74. This fundamental point will be extensively discussed at Section IV below.

[16] The debate among corporate governance scholars substantially started in the US after the 2001 Enron scandal and produced extensive research on this topic, as the influential book written by L. Bebchuk and J. Fried, *The Unfulfilled Promise of Executive Compensation* (Cambridge, MA: HUP, 2004), and it has restarted after the 2007-2008 financial crisis, as can be seen from the academic articles cited in the fns above.

[17] With the important exception, in Italy, of L. Nogler, 'La Direttiva "CRD III" e i "paracadute d'oro"' *Rivista Italiana di Diritto del Lavoro*, 2, 143 (2012) and, more recently, G. Sigillò Massara, 'Politiche di remunerazione e severance payment nel settore bancario: disciplina italiana e profili di costituzionalità' *Massimario di Giurisprudenza del Lavoro*, 1, 161 (2019).

Having said that, it has to be pointed out that this topic has been investigated by employment scholars, which have only focused on the possible roles for employees in company law: B. Wedderburn, n 1 above and, more recently, W. Njoya, 'The Problem of Income Inequality: Lord Wedderburn on Fat Cats, Corporate Governance and Workers' 44 *Industrial Law Journal*, 394 (2015). Nevertheless, these scholars have not focused on the implications of mandatory norms regarding pay structure under a purely employment law perspective.

[18] As an example, among many, see Freshfields Bruckhaus Deringer LLP, 'Executive reward. Handling the pressures on pay', December 2017, available at https://tinyurl.com/yc37wwzs (last visited 27 December 2020).

corporate scholars only. Conversely and at the same time, this article tries to understand whether these peculiar legislative interventions may add a new analytical dimension for labour scholars to the study of both the functions of remuneration and the role of inderogable norms in employment law, with any conclusion being clearly narrowed down solely to the financial sector.

The scope of the following analysis is limited by a twofold extent. First, although these issues arise in all the Member States, this article analyses them using Italian law as a case study. Nevertheless, it is assumed that the proposed solutions can be adapted also in other legal systems, because the terms of the problem seem to be the same at least in continental European countries.[19] Second, although the mandatory rules on pay structure are contained in several Directives applying to firms in the financial industry in a wider sense, this research will mainly deal with the ones provided by the latest version of the Capital Requirement Directive (CRD) in the banking industry,[20] as this is the specific sub-domain, among those regulated at EU level, where private autonomy have been more limited by stricter mandatory norms.[21] However, the general results of this research can be relevant to the financial sector in its broadest sense, as rules regarding executive remuneration are not only provided by EU law for banks, investment firms and insurance companies, but also by corporate governance codes mostly applied by listed companies throughout Europe.

The rest of the article is structured as follows. Section 2 clarifies the different meanings, functions, and legal implications that certain legal terms may have in regulations on pay structure in the financial industry as opposed to employment laws. Section 3 reflects on the structural participative nexus that regulation on variable pay establishes between employers in the financial industry and their executives due to the pivotal role played by the concept of risk in the normative structure of CRD and other related Directives. The analysis of this concept is instrumental, in Section 4, to deal with one of the main issues of this article, that is how to solve the possible antinomies between the mandatory rules regarding pay structure and the terms of an employment contract agreed in violation of these regulations. While addressing this legal problem, Section 4 extensively examines the peculiar features of regulatory interventions on pay structure from an employment law perspective in terms of reverse inderogability. Section 5 concludes.

[19] The nature of the norms at EU level regarding pay structure in the financial industry are mandatory in character and, as such, they have to be implemented in each Member State. In addition, similarly to Italy, also in other continental European Member States, employment laws provide for an inderogable floor or rights and generally forbid downwards derogation to mandatory law by way of an individual agreement between the parties to a contract of employment, M. Freedland and N. Kountouris, n 15 above, 62-66.

[20] See n 10 above.

[21] M. Cera and R. Lener, 'Remunerazioni e manager. Uomini (d'oro) e no. Editoriale' *Analisi Giuridica dell'Economia*, 2, 241, 245 (2014).

II. The Intersection Between Regulation of Executive Remuneration in the Financial Industry and Employment Law – Handling with Care the 'False Friend' Issue

The intersection of legislations regulating pay structure in the financial industry and employment laws raises an issue that is first terminological and then conceptual. There are several similar or even identical terms used both in the financial and in the employment legal jargon which can be labelled as 'false friends'. They seem to refer to the same legal concepts, but rather they have different meanings and legal implications.

This false friend issue is highly dependent on two variables. The first one can be classified as the domain specificity variable, which operates along a horizontal level. The similar or even identical terms are used in discrete legal domains, where legal definitions have been crafted by lawmakers along distinct policy rationales to face different legal problems. Therefore, these terms do not always have the same meaning within these two discrete legal domains. On the contrary, they will have to be interpreted in line with the idiosyncratic features and aims characterising the specific legal context at stake. The second variable can be labelled as the multi-layered integration variable, which conversely operates on a vertical level.[22] Both regulatory interventions on pay structures and employment laws are composed of two discrete though inter-related levels, namely an EU law layer and a domestic or Member State layer. Obviously, these two levels of regulation are mutually interactive. However, the

> 'effective normative outcomes … necessarily occur at the national level and are inevitably distinctive or specific to each Member State in their fine texture',

although they all are to conform to the mandatory norms formulated at the EU level.[23] Therefore, several terms used at EU level are shaped in a distinctive form when Directives are transposed at national level, because they have to be filtered through path-dependent, jurisdiction-specific and pre-existing legal concepts as they evolved within each Member State's legal tradition.[24]

For all these reasons, the exegetic process of ascribing a specific legal meaning to several similar or even identical terms is a rather complex exercise. This shall be cautiously conducted bearing in mind the abovementioned twofold intersection. Therefore, in order to avoid terminological and taxonomical confusion, this Section analyses two core terms used by CRD to regulate pay structure, and then

[22] The idea of multi-layered regulation has been developed by M. Freedland and N. Kountouris, n 15 above, 410-420 in the different context of personal work relations. However, it can be easily used to build an analytical framework regarding the intersections between the EU and national regulatory layers relevant to the topic of this article.

[23] M. Freedland and N. Kountouris, n 15 above, 418.

[24] ibid, 418.

compares them with similar or even identical terms used in employment law. First, the EU layer of regulation will be considered and, then, the domestic legislation, using Italy as a case study. This comparative exercise will then implicate a further limitation of scope of this article, as there are certain rules in the regulation of pay structure in the financial industry that do not necessarily intersect employment laws. This happens because the relevant personal and objective scopes have been framed around discrete concepts.

The first term to be analysed is 'staff', which is used by CRD to identify the individuals whose pay structure is regulated by the mandatory rules set by this Directive. According to the latest version of this Directive, Member States have an obligation to ensure that regulated institutions comply with the strict mandatory requirements set by CRD in terms of pay structure of those 'categories of staff whose professional activities have a material impact on the institution's risk profile'. These shall at least include: a) 'all members of the management body and senior management'; b) 'staff members with managerial responsibility over the institution's control functions or material business units'; and c) 'staff members entitled to significant remuneration in the preceding financial year', provided that certain specific conditions are met (the so-called 'material risk takers' or MRTs).[25] Italian regulation transposing CRD has duly followed the same pattern, specifying that the notion of MRTs includes board members, employees and other categories of workers engaged by the institution through a various range of agreements.[26]

The criteria to identify the individuals falling within the scope of CRD are both over-inclusive and under-inclusive compared to the ones generally used to frame the personal scope of application of labour laws. Both at EU and at national level, employment laws can be considered as largely rooted around the traditional binary between employment and self-employment, where only employees, as performing their services under the direction of an employer, are entitled with a full range of employment rights.[27] On the one hand, they are

[25] Art 92, para 3, CRD.

[26] Bank of Italy Circular 17 December 2013, no 285, 'New prudential supervisory instructions for banks', 25th update published on 23 October 2018, part 1, title IV, chapter 2, section I, para 3.

[27] The framing concept of employment law at EU level is the one of 'worker' that, although partially fragmented among several sub-domains of EU employment law, mainly 'reproduces the traditionally binary divide between subordinate employment and autonomous self-employment embedded in the labour law systems of the original founding member state' as noted by N. Kountouris, 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' 47 *Industrial Law Journal*, 192, 199 (2018). For a very recent European comparative perspective on similarities and differences between Member States on setting the boundaries between subordinate employment and autonomous self-employment, which is far more complex than the one presented in this article, see N. Kountouris and V. De Stefano, *New trade union strategies for new forms of employment* (ETUC, 2019), 19-21, available at https://tinyurl.com/ybyhexz7 (last visited 27 December 2020). On the same topic, with reference to the Italian legal system, E. Gramano and G. Gaudio, 'New trade union strategies for new forms of employment': Focus on Italy', 10 *European Labour Law Journal*, 240, 241-242 (2019).

over-inclusive because they explicitly take into account, among others, board members and commercial agents that, at least under Italian law, are considered self-employed workers and, as such, fall outside the scope of employment law. On the other hand, they are under-inclusive because not all employees working for an employer in the banking industry have a material impact on the institution's risk profile. Thus, those employees not classified as MRTs are mostly falling outside the scope of CRD and national legislation transposing it, because the stricter mandatory norms regarding pay structure apply only to MRTs.

The second term to be analysed is 'remuneration', which is used by CRD to determine the objective scope of the regulation and refers to the amounts received by those categories of staff falling within the scope of CRD. This notion is practically all-encompassing and includes any benefit, monetary or non-monetary, awarded to staff on behalf of the employing institution, both during and upon termination of the employment relationship, including the so-called golden parachutes. The most important distinction for the purposes of CRD regulation is the one between fixed and variable remuneration, as only the latter is subject to mandatory norms regarding pay structure. In particular, remuneration is considered fixed when it is based on predetermined criteria that substantially do not depend on performance and do not provide any incentive for risk assumption. Conversely, all remuneration that is not fixed is considered variable. In this respect, with a view to avoid potential circumventions of CRD, the European Banking Authority Guidelines on sound remuneration policies (EBA Guidelines)[28] provides that a number of remuneration components, such as role-based allowances or severance payments, shall be considered variable remuneration for the purposes of CRD also when they do not clearly depend on performance and do not apparently provide any incentive for risk assumption. Italian regulation transposing CRD has duly followed the same pattern. The Italian regulation specifies that remuneration shall be considered as variable where it is not unequivocally characterized as fixed. In addition, it provides that several remuneration components shall be considered variable also when they do not clearly depend on performance and do not apparently provide any incentive for risk assumption.[29] Moreover, along the same route followed by the EBA Guidelines, it provides so not only with reference to role-based allowances and severance payments, including those sums agreed in a settlement agreement to avoid a labour dispute, but also with regard to the sums paid in consideration of non-compete covenants or other similar side agreements, generally adopting a more prudent approach compared to the minimum requirements imposed

[28] EBA/GL/2015/22 Guidelines on sound remuneration policies under Arts 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Art 450 of Regulation (EU) No 575/2013 published on 21 December 2015.

[29] Bank of Italy Circular 17 December 2013, No. 285, 'New prudential supervisory instructions for banks', 25th update published on 23 October 2018, part 1, title IV, chapter 2, section I, para 3.

under CRD and EBA Guidelines.[30]

The term 'remuneration' – together with others like 'salary', 'wage' or 'pay' – is also widely used in employment legislation, both at EU[31] but above all at the national[32] level, to indicate the sums paid by an employer to an employee within an employment relationship. The concept of remuneration under Italian regulation transposing CRD can be deemed as generally over-inclusive than the one under Italian employment laws, above all because it does not include neither as fixed nor as variable remuneration certain kind of sums paid to an employee such as, *inter alia*, those agreed in a settlement agreement to avoid a labour dispute or the ones paid in consideration of non-compete covenants or other similar side agreements.

This terminological introduction is functional to show the existence of a false friend issue that will have to be handled with care during this investigation. Similar or identical terms in the two discrete legal domains at stake have different meanings that refer to discrete concepts, also in relation to the criteria to frame the scope of each regulation. Nonetheless, these distinct concepts partially overlap. This thus justifies the opportunity of analysing this topic from an employment law perspective.

III. The Participative Function of Variable Remuneration – Unveiling the Structural Participative Nexus Between Employers and Their Executives in the Financial Industry

The first point of attention for labour scholars is that regulatory interventions on pay structure may add an important analytical dimension to the study of the functions of remuneration.

Italian employment lawyers have underlined that remuneration has at least a twofold function. On the one hand, it has a social function with reference to those components known as minimum wage[33] and those related to income

[30] R. Lener, L. Capone and G. Gaudio, 'Il 25° aggiornamento delle disposizioni di vigilanza di Banca d'Italia in materia di politiche e prassi di remunerazione' *dirittobancario.it*, 27 December 2018, 4-7 and 23-25, available at https://tinyurl.com/y84hr7x5 (last visited 27 December 2020).

[31] Note that the EU has no competence in matter of pay, as provided by Art 153, para 5, of the Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 and, thus, there is no secondary legislations in the field of employment law directly regulating pay. However, remuneration has been constantly used by the European Union Court of Justice as one of the main criteria to characterize the notion of worker in the free movement of workers context and then in other related employment law EU regulatory domains: N. Kountouris, n 27 above, 198-199.

[32] For sake of completeness, it must be pointed out that, under Italian employment laws, there are multiple notions of remuneration depending on a specific subdomain at stake: for a complete review of this topic, *see* E. Gragnoli and S. Palladini eds, *La retribuzione* (Milano: UTET, 2012).

[33] Note that in Italy there is not primary legislation setting a minimum wage, which has conversely been guaranteed by Courts combining Art 36 of the Constitution setting out the right to a fair wage and salary provisions included in sectoral collective agreements: for a recent article in English, see E. Menegatti, 'Wage-setting in Italy: The Central Role Played by Case Law' *Italian*

support payments made by an employer when the employee's performance is suspended in time of particular need because she/he is, for example, on sick or parental leave.[34] On the other, it has a contractual function with reference to almost all its components, as the salary is paid by an employer in consideration of the performance of an employee's tasks.[35] Having said that, it is interesting to further investigate, within the legal domain of labour law, the functions of variable pay, which can be defined as those sums paid or financial instruments awarded by an employer to its employees, provided that certain objectives related to the individual or employing institution's performance are met, operating with the mechanics of a condition precedent to the employment contract.[36] Therefore, variable pay cannot have a social function as defined above, because it can be awarded only above the minimum wage.[37] Accordingly, variable remuneration may have, at a first sight, a purely contractual function.

However, even this classification may be not analytically accurate. Not all variable remuneration is specifically awarded in consideration of the employee's obligation to work for her/his employer. This is true for those variable payments made once an employee has met individual targets strictly based on her/his working performance. But it would be inaccurate to ascribe a purely contractual function to those sums or financial instruments awarded to an employee when it is the employing institution – and not specifically the individual – to meet certain performance targets. Therefore, the latter variable payments have a different and more nuanced function, namely a participative one, as the workforce shares, to a certain extent, the business risk with its employing institution.[38] In other words, those variable payments establish a participative nexus between employers and employees beside the traditional one set up by the contract of employment.

This participative nexus is even more tangible when an employer decides to award part of the variable remuneration not in cash but in financial instruments, above all when these are equity of the employing institution. In the latter case, the participative nexus is indeed structural under a purely legal standpoint, because an employee becomes a shareholder of her/his employing institution. Awarding equity as compensation means that employees are also legally entitled to exercise their voice, provided that there are no or limited deviations from the general default corporate law rule that each share carries one vote in the shareholders' meetings.[39] Therefore, using shares as variable remuneration further

Labour Law e-Journal, 2, 53, 61-63 (2019).

[34] R. Del Punta, *Diritto del lavoro* (Milano: Giuffrè, 2018), 561-562.

[35] G. Zilio Grandi, *La retribuzione. Fonti, struttura, funzioni* (Napoli: Jovene, 1996), 399-437.

[36] E. Villa, 'La retribuzione di risultato nel lavoro privato e pubblico: regolazione ed esigibilità' *Rivista Italiana di Diritto del Lavoro*, 2, 451, 470-475 (2013).

[37] F. Pantano, 'Azionariato dei lavoratori', in E. Gragnoli and S. Palladini eds, *La retribuzione* (Milano: UTET, 2012), 754, 784.

[38] G. Zilio Grandi, n 35 above, 432.

[39] On the general default rule one-share–one-vote and its deviations, see L. Enriques et al, 'The Basic Governance Structure: Minority Shareholders and Non-Shareholders Constituencies', in

reinforces the abovementioned participative bond between an employer and its employees, making it structural under a corporate law perspective.

Before the enactment of various Directives like CRD in 2010, there were no specific mandatory norms regulating variable remuneration. Thus, the decision of implementing pay structures having a participative function was left to an optional business decision of an employer to be then agreed by the parties to a contract of employment. Since 2010, the legal landscape in the financial industry has changed starkly. CRD and other Directives provide that the pay-out of variable remuneration, related to a blend of individual and company targets to be met, must be balanced between cash and shares or share-linked financial instruments and that the latter must be subject to an appropriate retention policy – ie, the employee cannot sell them for a specific period – spreading over time and thus reinforcing the participative nexus between executives and financial institutions. Therefore, there are mandatory norms that expressly ascribe a participative function to variable remuneration and make it stable over time. Due to these developments, the law overrides the will of the parties to a contract of employment establishing a structural participative nexus between them. Furthermore, these regulations can contribute in setting up a novel form of industrial[40] – or, more correctly, managerial – democracy. In this respect, above all if executives manage to take advantage of corporate law collective action mechanisms such as proxy votes,[41] they may exercise even greater influence in deliberations through forming voting blocs. Consequently, they may play a significant role in the governance structure of financial institutions, above all in those with dispersed ownership.

This structural participative nexus between employers in the financial industry and their executives constitute the inevitable corollary of the rationale behind these legislative interventions, which aim at better aligning the interests of material

Kraakman et al eds, *The Anatomy of Corporate Law* (Oxford: OUP, 2017), 80-83.

[40] The expression 'industrial democracy' has been firstly used to indicate a form of worker participation mainly referred to union activity through collective bargaining. This weak form of worker participation is different from employee involvement in management through the co-determination of certain company decisions. Although financial participation has not been traditionally considered as an authentic form of workers participation as it has mainly pursued aims that are individual in nature – additional income in the interest of employees and higher productivity in the interest of employers – it can be claimed that this is not the case with regulation of executive remuneration in the financial industry. This is why financial participation in the employing institutions become structural: not for all individuals employed by them, but only for their executives, thus establishing a form of managerial democracy. On the intrinsic and even polysemic nature of expressions as 'worker participation' and 'industrial democracy', see M. Biasi, 'On the Uses and Misuses of Worker Participation: Different Forms for Different Aims of Employee Involvement' 30 *International Journal of Comparative Labour Law and Industrial Relations*, 459 (2014).

[41] On shareholders' coordination mechanisms, see J. Armour et al, 'The Basic Governance Structure: The Interests of Shareholders as a Class', in Kraakman et al eds, *The Anatomy of Corporate Law* (Oxford: OUP, 2017), 58-62.

risk takers with the ones of their employing institution to create value in the long run. This implies a strong correlation between variable remuneration awarded to executives and the risks which are assumed by the employing institution. The concept of risk is pivotal in the normative structure of CRD and other related Directives. On the one hand, it contributes to establish the abovementioned participative nexus between executives and their employers. On the other hand, the strong correlation between variable remuneration and risk is to be adjusted to the time horizons of risk to achieve the legislative aim of promoting sound risk management and avoiding short-termism. This is the policy reasons behind the introduction of certain limits to an unconditional correlation between variable pay and risk, such as the need of applying retention policies, deferral strategies and *ex post* risk adjustments mechanisms. This is instrumental to safeguard two interests. First and foremost, the immediate and individual interest of the regulated institution to be protected from potential excessive risk-taking of their executives. Second, the broader and superindividual interest to safeguard the stability and soundness of the financial system as a whole.

IV. The Unidirectional Structure of Employment Norms' Inderogability Reversed – Liberating Employers in the Financial Industry from Private Autonomy

The fact that mandatory norms regarding pay structure in the financial industry are protecting both an individual and a superindividual interest is instrumental to deal with the most important technical issue arising from the introduction of CRD and other related Directives. Namely, how to solve possible antinomies between the mandatory rules contained in the relevant Directives, as transposed in the Member States, and the terms of an employment contract which, although freely bargained between an employer operating in the financial industry and one of his executives, have been agreed in violation of these regulations. Before trying to offer an answer to this question, it is necessary to better understand the nature of the mandatory norms regarding pay structure that, as it will be argued below, can be defined as characterized by inherent inderogability. This Section thus begins by offering an overview of the notion of inderogability and then examines the role that this doctrine, with regard to hierarchy of sources in labour law and the relationship between mandatory rules and contractual autonomy, has traditionally played in the emancipation process of employment law from general contract law. Then, it continues analysing the peculiarities of the inderogability of rules regarding pay structure and concludes trying to understand how to solve a possible antinomy between them and the terms of an employment contract.

It has been traditionally well known among Italian employment scholars

that mandatory rules[42] can be characterized as inderogable when the legal system is providing certain remedies, such as nullity and partial nullity, which can trigger the automatic substitution/insertion mechanism, according to which the nullity of a single clause does not cause the invalidity of the entire contract as mandatory rules automatically replace, by virtue of law, the void clauses.[43] In other words, the classification of a mandatory norm as inderogable is to be made looking at the consequences that the legal system provides when they are violated.[44]

The legislator usually provides such consequences when the interest safeguarded by a certain mandatory norm is not purely individual, but rather superindividual, so that it can be described as a public interest. In this respect, the fact that the law provides not only private but also public law sanctions, such as criminal or administrative ones, in case of violation of a certain mandatory norm can be regarded as an index of the fact that it safeguards a public interest and, as such, can be characterized as inderogable. Therefore, the inquiry on the inderogable nature of a mandatory norm, also when the law does not explicitly provide nullity or partial nullity as remedies, is a teleological exercise, because it essentially depends on searching the purpose behind a certain rule and on assessing whether it protects a public interest.[45]

Employment scholars have pointed out that inderogability is an essential

[42] Mandatory rules are different from default rules because only the latter are susceptible to disapplication, modification, or limitation. Therefore, mandatory rules can be defined as the ones that cannot be contracted out by the parties to an agreement. However, while all inderogable norms are mandatory, the opposite is not true. The concept of inderogable norms is more nuanced than the one of mandatory norms because, as it will be seen below, it constitutes a subcategory of mandatory norms for which the legislator provides peculiar consequences in case of their violation.

At least for the purposes of this article, the concept of inderogability shall also be distinguished from the one of nonwaivability, that are often used as interchangeable terms: on this topic, see recently G. Davidov, 'Nonwaivability in Labour Law' 40 *Oxford Journal of Legal Studies*, 3, 482 (2020). On the one hand, the term inderogability refers to the hierarchical relationships between different sources of employment rights, namely law, collective bargaining agreements and individual contracts of employment. On the other, nonwaivability refers to the power of an employee to waive a specific right, unilaterally or through a settlement agreement with her/his employer. The main difference is that inderogability refers to both accrued and future rights, while nonwaivability strictly refers to those rights already accrued by a certain employee: on this point, M. Novella, *L'inderogabilità nel diritto del lavoro. Norme imperative e autonomia individuale* (Milano: Giuffrè, 2009), 246-349 and R. Del Punta, n 34 above, 341-366.

[43] The relevant Italian provisions are Arts 1418 and 1419 of the Civil Code for nullity and partial nullity respectively, and Arts 1419, para 2, and 1339 of the Civil Code for the automatic substitution/insertion mechanism that can be triggered in case of partial nullity.

[44]The following paras mainly relies on M. Novella, n 42 above, 106-108. The need to look at the consequences of the violation of a mandatory norm to characterize it as inderogable is also stressed by C. Cester, 'La norma inderogabile: fondamento e problema del diritto del lavoro', *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 119, 341, 344-346 (2008).

[45] M. Novella, n 42 above, 130-139; A. Albanese, 'La norma inderogabile nel diritto civile e nel diritto del lavoro tra efficienza del mercato e tutela della persona', *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2, 165, 171-173 (2008); C. Cester, n 44 above, 347-348.

feature of most part of labour mandatory norms. Employment law, mainly in continental European legal systems like Italy,[46] has traditionally evolved as a distinctive and autonomous legal subject to the extent that it widely provides special mandatory rules partially departing from general contract law in limiting the principle of freedom of contract, as the parties to a contract of employment cannot normally derogate from a worker-protective floor of mandatory rights.[47] Although the role of inderogability in labour law has become more porous and has been partially revisited in the last decades,[48] it characterizes so many employment norms that the majority of Italian scholars claim that it can be still regarded as the genetic heritage of employment law when comparing it to general contract law.[49]

This happens due to the asymmetric nature of the relationship behind the contract of employment, where one party, the employee, is subordinated to the managerial powers of the other party, the employer. Employment law provides

[46] For this comparative remark, M. Freedland and N. Kountouris, n 15 above, 58-74, that also point out how this general trend has not regarded common law systems. This is also the reason why the English term inderogability has been coined relatively few years ago, when Lord Wedderburn borrowed it from the Italian term '*inderogabilità*', although for the slightly different purpose of investigating the relationship between collective and individual agreements under English law, see B. Wedderburn, 'Inderogability, Collective Agreements, and Community Law' 21 *Industrial Law Journal*, 245, 250-251 (1992) and, more recently, S. Deakin, 'Labour Standards, Social Rights and the Market: "Inderogability" Reconsidered' *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 140, 549 (2013).

[47] M. Freedland and N. Kountouris, n 15 above, 58-74 and, more recently, G. Davidov, n 42 above.

Note that inderogability of employment norms can also be observed, although in a slightly different fashion, at international and supranational level. The idea of inderogability is coherent, for example, with core labour concepts developed within the context of private international law, eg Art 6 of the 1980 Rome Convention on the law applicable to contractual obligations: see S. Sciarra, 'Norme imperative nazionali ed europee: le finalità del diritto del lavoro' *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 109, 39, 40 (2006). The same idea of a bedrock of employment rights that cannot be derogated *in peius* is also a common feature of non-regression clauses contained in the majority of employment law Directives at EU level, ie, those making clear that Member States are not precluded from adopting higher levels of protection compared to the minimum standards imposed by EU secondary legislation: see, among many, C. Cester, n 44 above, 398 and 410.

[48] This point has been constantly raised in all the research conducted on this topic by Italian scholars in the last decades: for a summary of the debate, M. Novella, n 42 above, 382-440. For a stronger position, according to which inderogability cannot be regarded anymore as an essential feature of employment norms, M. Tiraboschi, 'Persona e lavoro tra tutele e mercato. Mercati, regole, valori', AIDLaSS Conference, 13-14 June 2019, 23-27, available at https://tinyurl.com/ybq5nqkl (last visited 5 October 2020).

With regard the academic debate outside Italy, the same point has been stressed, with specific reference to the evolution that has characterized EU law in the last thirty years, by S. Deakin, n 46 above.

[49] C. Cester, n 44 above, and R. De Luca Tamajo, 'Il problema dell'inderogabilità delle regole a tutela del lavoro: passato e presente' *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 140, 715, 723-724. For a critical view, M. Tiraboschi, n 48 above, 23-27. In general, for the first comprehensive theorization of inderogability among Italian scholars, R. De Luca Tamajo, *La norma inderogabile nel diritto del lavoro* (Napoli: Morano, 1976).

a series of mandatory norms limiting these powers and thus protecting employees that these cannot even decide to contract out because, if they agree otherwise, such an agreement will be null. Therefore, due to the asymmetric nature of the employment contract, the individual interest of the employee often turns into a superindividual interest to be protected.[50] This is why employment laws often protect goods that have been recognized by legislators as having an overriding public and societal value, so that this justifies a departure from the principle of freedom of contract. In this respect, labour law can be described as a legal subject that turns against the principles of free market embedded in most part of general contract law.[51] Employment law in its classical dimension is, thus, based on the denial of employees' private autonomy on the assumption that any space granted to freedom of contract can allow employers to regain a complete and undesirable domination of the employment relationship.[52] As a result, employment law has been often described as generally characterized by a protective afflatus towards employees, a principle that has been constructed by scholars through inductive reasoning after having observed that many employment norms have a prominent protective dimension under a teleological point of view.[53]

In light of the above, employment law norms have been regarded as unidirectional, because inderogability is a technique used by the legislator in favour of only one of the parties to an employment contract, namely the employee.[54] Therefore, downwards derogation from employees' rights by way of individual agreement is not permitted (the so-called 'prohibition of derogation *in peius*'). Conversely, upwards derogation is permitted by individual bargaining as employment norms generally establish a protective bedrock or floor of rights (the so-called 'admissibility of derogation *in melius*'). As a result, in case of antinomy between a mandatory employment norm and the terms of a contract of employment, the latter prevails over the former only in case of derogation *in melius*, due to the protective purposes, safeguarding public interests, behind most part of employment norms.

That being said, it is necessary to understand whether mandatory norms regarding pay structure provided by CRD and other related Directives in the financial industry can be regarded as inderogable. There are various elements that confirm this hypothesis. It has already been noted how these mandatory norms have been enacted to safeguard two interests. Obviously, they protect the individual interest of the employing institution to not engage in excessive risk-

[50] R. De Luca Tamajo, n 49 above, 733.

[51] R. Del Punta, 'Ragioni economiche, tutela dei lavori e libertà del soggetto' *Rivista Italiana di Diritto del Lavoro*, 4, 401, 413-414 (2002).

[52] R. Del Punta, n 34 above, 356. For a recent overview on the several justifications behind inderogability/nonwaivability of employment laws that goes beyond the Italian context, G. Davidov, n 42 above.

[53] M. Novella, n 42 above, 139-142 and 146-149, and R. De Luca Tamajo, n 49 above, 733-734.

[54] M. Novella, n 42 above, 142-143.

taking in the short term. However, this individual interest is instrumental to defend the superindividual interest of safeguarding the financial system as a whole. In this respect, it can be thus claimed that the EU legislator, in the aftermath of the financial crisis, has enacted CRD and other related Directives in order to clarify that the stability and soundness of the financial system is a good to be given public and societal value. This is further confirmed by the fact that the ECB and national regulators, such as the Bank of Italy, are entitled to impose administrative sanctions on institutions and/or individuals responsible for the infringement of mandatory provisions regarding pay structure.[55]

These are strong arguments to claim that mandatory norms regarding pay structure in the financial industry are characterized by inherent, albeit reverse, inderogability. As a consequence, the parties to a contract of employment may trigger the automatic substitution/insertion mechanism according to which the nullity of a single clause of the contract regarding variable remuneration does not cause the invalidity of the entire contract as norms regarding pay structure automatically replace, by virtue of law, the void clauses. However, in absence of an explicit indication of the legislator in this respect, this conclusion would be the product of a teleological exercise, which would essentially depend on searching the purpose behind the regulation of executive remuneration and characterising it as protecting not only a private but also a public interest. In other words, it would be a matter of interpretation and this could inevitably raise issues in terms of legal certainty.[56]

Having said that, it has to be pointed out that, since 2015, there are no doubts that nullity and partial nullity are the remedies to be triggered if private parties violate mandatory rules regarding pay structure. Since then, the Italian legislator has expressly provided the nullity of any contract or clause agreed in violation of the norms regarding pay structure, also clarifying that the invalidity of a single clause does not cause the nullity of the entire contract because the provisions contained in the null clauses are substituted with the mandatory norms regarding pay structure.[57] In other words, also with a view to guarantee legal certainty, the remedies of nullity and partially nullity have been explicitly extended to the infringement of mandatory norms regarding pay structure, definitely confirming their inderogable nature. This has recently been confirmed by the Court of Appeal in Milan.[58]

[55] See n 13 above.

[56] In this respect, note that the scholar that analysed this issue before 2015 concluded that the automatic substitution/insertion mechanism was only one of the possible technical tool to solve the possible antinomy between the individual contracts of employment and the mandatory provisions regarding pay structure contained in CRD III: see L. Nogler, n. 17 above, 147-152.

[57] Art 53, para 4-*sexies*, of decreto legislativo 1 September 1993 no 385, amended by Art 1, para 19, letter f), of decreto legislativo 12 May 2015 no. 72.

[58] Corte d'Appello di Milano 5 November 2020, a summary of the decision is available at https://tinyurl.com/y7fu49r8 (last visited 27 December 2020).

The characterization of mandatory norms regarding executive remuneration as inderogable is interesting for labour lawyers for the following two reasons.

The first reason is one of practical nature. This classification offers employment lawyers the technical tools to solve an antinomy between mandatory rules regarding pay structure and the terms of an employment contract agreed in violation of these regulations. In this respect, it can be claimed that an employer does not need to collect employees' consent to modify the clauses of a contract of employment when they are in breach of inderogable norms regulating their variable remuneration. The adjustment is automatic. This is justified by the fact that the change in the contractual terms regarding variable pay constitutes a mere acknowledgement of the partial nullity of these specific clauses contained in the contract of employment. In other words, there is no need for an employer to bargain with the employee new terms and conditions regarding pay when they are in conflict with mandatory regulatory provisions: a situation that may happen, for example, because the relevant EU or national regulations have been updated providing for stricter norms, a member of the staff becomes a MRT or, more simply, the parties of the contract of employment agreed to certain clauses in violation of mandatory norms regarding pay structure.

However, this conclusion suffers from an important limitation. It has been already said that many employment norms are characterized by inherent inderogability in favour of employees and that, conversely, rules regarding executive remuneration are structured as inderogable norms in favour of employers. This means that there may also be antinomies between conflicting inderogable norms. EU Directives do not provide any specific criteria to solve such an antinomy, except for a general provision contained in CRD that is quite vague and cannot be generalized because it is specifically referred to *ex post* risk adjustment mechanisms and not to all the norms regarding executive remuneration thereby provided.[59] Likewise, Italian regulation transposing CRD and other related EU Directives do not offer any indication on how to solve such an antinomy. In lack of any specific provision setting the criteria to solve possible antinomies between those clashing inderogable norms, it thus seems necessary to assess each conflict on a case-by-case basis to decide which norm shall prevail by recurring to a proportional balancing to clear the tension between the two public interests or values at stake.

The second reason is one of a more theoretical nature. The characterization of norms regarding executive remuneration as inderogable seems to add an

[59] The reference is to Art 94, para 1, letter (n), CRD, according to which: '*without prejudice to the general principles of national contract and labour law* (emphasis added), the total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the institution occurs…'. Similar indications are provided by paras 148, 154, 244 and 269 of the EBA Guidelines, but only with reference to *ex post* risk adjustments mechanisms and severance payments.

analytical dimension to the study of inderogability in employment law. It has been already pointed out how mandatory norms regulating pay structure share with employment mandatory norms the feature of safeguarding both an individual interest and a superindividual or public interest. It has also been reported how employment norms' inderogability has always been regarded as unidirectional in favour of the employee. The peculiar feature of executive remuneration norms' inderogability is that their unidirectional structure seems to be reversed. This is why they safeguard the individual interest of the employing institution to not take excessive risks in the short term which, conversely, undermines the conflicting interest of an executive to obtain her/his variable remuneration immediately and in cash only, without being subject to any retention policy, deferral mechanism, *ex post* risk adjustments mechanism or cap. Therefore, the overriding public interest of protecting the financial system through the implementation of sound remuneration practices prevails over the one of protecting people at work and justifies a limitation of the private autonomy of the parties to a contract of employment.

Notwithstanding the above, it needs to be understood whether the twofold mechanism of prohibition of derogation *in peius* and admissibility of derogation *in melius* characterising employment inderogable norms can be automatically used in relation to executive remuneration inderogable norms or whether it is necessary to implement some adjustments. In other words, the issue here consists in understanding if the parties to a contract of employment can agree on terms and conditions regarding variable remuneration that would end up in a downwards or upwards derogation from the parameter set by inderogable norms regarding pay structure.

In order to try to offer a solution to this technical dilemma, it may be useful to go back in time and analyse the so-called emergency employment legislation in force between the 1970s and the 1980s in Italy.[60] In the aftermath of the 1973 oil crisis, the Italian legislator enacted a series of legislative interventions to stem wages, aimed, in turn, at pursuing the wider, albeit temporary and contingent, economic policy objective to combat spiralling inflation. These mandatory norms substantially imposed quantitative restrictions on pay increases, in most cases indicating a specific parameter to be respected, so that private autonomy of industrial relations actors in setting the level of wages in collective bargaining agreements was resolutely limited.[61] The Italian Constitutional Court acknowledged the inderogable nature of these mandatory norms as they were functional to safeguard the public interest behind the legislative intervention.[62] However, in

[60] The expression 'emergency employment legislation' was coined by Italian employment scholars after the first measures had been enacted in the aftermath of the 1973 oil crisis: see R. De Luca Tamajo and L. Ventura eds, *Il diritto del lavoro dell'emergenza* (Napoli: Jovene, 1979).

[61] The reference is above all to Art 2 of decreto legge 1 February 1977 no 12. Other examples of these provisions are contained in legge 29 May 1982 no 297 and legge 12 June 1984 no 219.

[62] Corte costituzionale 23 June 1988 no 697, available at www.dejure.it.

light of its temporary and contingent nature, the Court also held that these measures were legitimate but just for the period during which the need of combating spiralling inflation actually persisted.[63] Nevertheless, the most interesting point for the purposes of this investigation is that the Italian Constitutional Court also pointed out that the inderogability of these mandatory rules showed a distinctive structure if compared with traditional employment inderogable norms because they actually established an equilibrium point between conflicting interests that could not be derogated neither *in peius* nor *in melius*.[64] Accordingly, inderogable norms enacted in the aftermath of the 1973 oil crisis could not be categorized as genuinely unilateral. On the one hand, it is clear they were not enacted to benefit employees. On the other, their structure was not authentically reversed compared to traditional employment norms. Although they introduced a prohibition of downwards derogation in the interests of employers, they actually did not implement the very distinctive mechanism of employment norms' unidirectional inderogability, because upwards derogation, in this case in the interest of employers, was not permitted. For this reason, they have been categorized as absolute because the legislator set a fixed parameter that could never be modified by private autonomy.[65]

This normative and judicial saga has one important element in common with inderogable norms regarding executive remuneration. Both legislative measures are breaking the traditional structure of employment inderogability to the extent they are not benefiting employees but rather employers due to overriding public interests that justified their adoption. Consequently, it might be thought that this important similarity would allow us to conclude that also mandatory norms on pay structure can be characterized as absolute inderogable norms and that they thus cannot be modified by private autonomy neither *in peius* nor *in melius*.

However, such an analogical reasoning would be superficial and fallacious. There are two paramount elements that starkly distinguish inderogable norms adopted in the aftermath of the oil crisis and those enacted after the more recent financial crisis. First, inderogable norms adopted during the oil crisis were temporary and contingent to the need of combating a persisting side-effect of the economic downturn, namely spiralling inflation. Conversely, the ones enacted more recently have been adopted to contrast one of the alleged causes of the financial crisis, namely reckless risk-taking by certain individuals at financial institutions that, in absence of such regulations, had perverse incentives to focus on the short term. Therefore, in the latter case, there is still – and most likely there always will be – a persistent public interest which still needs to be

[63] Corte costituzionale 26 March 1991 no 124, *Massimario di Giurisprudenza del Lavoro*, 175 (1991).

[64] See n 62 above.

[65] M. Novella, n 42 above, 143.

safeguarded to avoid the same mistakes that led to the financial crisis. Second, inderogable provisions contained in executive remuneration regulations do not establish any equilibrium point between conflicting interests. They rather provide a minimum floor that cannot be derogated *in peius* but can be derogated *in melius* from an employers interests' perspective. The letter of CRD is clear when, for example, it provides that a substantial portion of variable remuneration shall be paid in financial instruments and deferred over a multiyear period, further specifying that the relevant quota is to be in any event equal to at least 50% and 40% of the variable components of executive pay respectively.[66] Therefore, the legislator has not predetermined a fixed parameter to be respected. Rather, it has established a normative floor, thus admitting upwards derogations that may more incisively benefit employers' interests.

It has been seen how employment norms' unidirectional structure depend on their protective purpose towards employees. Likewise, the characterization of executive remuneration norms in terms of reverse inderogability is the product of a teleological exercise recognising that these legislative interventions have a prominent protective dimension towards the stability and soundness of the financial system, which in turn necessarily implies safeguarding the immediate interests of employers over the ones of their executives. Therefore, it can be concluded that these norms can be authentically described in terms of reverse inderogability. In other words, the regulation of variable remuneration in the financial industry is aimed at liberating employers – rather than employees – from private autonomy.

V. Conclusion – Employment Norms' Inderogability in Evolution

The analysis conducted in the previous Sections has tried to add an employment law perspective to the study of regulation of executive remuneration in the financial industry.

Preliminarily, it has been shown how there is a false friend issue to be handled with care when comparing several terms used by executive remuneration regulation, on the one hand, and employment law, on the other. These terms, despite being very similar or even identical, refer to different concepts within these discrete but intersected legal domains, also in relation to the criteria to frame the scope of each regulation. In addition, it has been observed how these concepts partially overlap with reference to certain categories of employees, ie, executives having a material impact on the institution risk profile, and to certain components of their total compensation, ie, variable remuneration, that can be generally defined as the one depending on performance criteria and that does

[66] Art 94, para 1, letters (l) and (m), CRD and Bank of Italy Circular 17 December 2013, no 285, 'New prudential supervisory instructions for banks', 25th update published on 23 October 2018, part 1, title IV, chapter 2, section III, paras 3 and 4.

provide for risk assumption. Accordingly, the normative overlap is limited both to the employers operating in the financial sections, and to the executives employed by the same (that have a material impact on the institution risk profile), with specific reference to the variable part of their compensation packages.

This finding has thus confirmed the insight that can be fruitful, from employment lawyers, to further investigate this topic, bearing in mind the above limitations in scope. In particular, the analysis has shown how this normative intersection can be interesting for at least two reasons.

The first reason is that variable remuneration in the financial industry, due to mandatory norms regarding pay structure, is characterized by a participative function. There are specific norms that force financial institutions and their executives to set up pay structures that allow to award variable remuneration only provided that the relevant institution has met certain performance targets. Moreover, it is mandatory to award a substantial part of variable remuneration in financial instruments and a part of them cannot be sold by each beneficiary before the end of a retention period. Therefore, the law overrides the will of the parties to a contract of employment establishing a structural participative nexus between them, beside the traditional one set up by the contract of employment, in order to better align the interests of executives with the ones of their employing institution to create value in the long run. While this choice used to be left to private autonomy, this is now mandatory in the financial industry. This may have increased the role of executives as a constituency with greater voice, that may in turn lead to novel forms of managerial democracy in financial institutions.

The second and more important reason is that these norms, like most part of employment ones, are characterized by inderogability. Labour lawyers are used to regard employment inderogable norms as unidirectional in favour of employees, as they operate through a twofold mechanism, that consists, on the one hand, in the prohibition of downwards derogation and, on the other, in the admissibility of upwards derogation. Conversely, it has been observed how executive remuneration norms in the financial industry are characterized by the same structure of employment norms, although it has been reversed. Rather than being unidirectional in favour of employees, they protect the immediate interests of employers in light of the predominant public interest of safeguarding the stability and soundness of the financial system as a whole. Therefore, in case of an antinomy between the inderogable norms regarding pay structure and the terms of an employment contract entered into by a financial institution and one of its executives, it is possible to trigger the automatic substitution/insertion mechanism when private autonomy has illegitimately derogated to the mandatory normative floor established by the law to protect the interests of financial institutions, as well as the financial system as a whole, to promote sound risk management and avoid short-termism.

Two useful conclusions may be drawn from these findings. First, the debate among employment scholars over inderogability can offer, to a more general legal audience, precious insights on the technical tools to solve the potential antinomies between the terms of a contract of employment and the mandatory norms regarding pay structure. There rules also establish a structural participative nexus between financial institutions and certain executives, who may end up being a constituency with greater voice in their corporate governance structure. Second, this analysis can be of help to labour lawyers, because it may add an original dimension, albeit limited to employers and top-ranked executives in the financial industry, to a pattern already well-known to those employment scholars that have scrutinized the evolution of the inderogability concept in labour law.

It is undisputed that the classical conception of employment norms' inderogability is increasingly under pressure and subject to a downward trend started immediately after it reached its peak. The golden age of inderogability in continental European countries as Italy ended at the dawn of cyclical economic downturns that started to slow down the economic boom registered after World War II. The persisting crisis of inderogability has followed different paths. First, many inderogable norms have become more porous with reference to several legislative interventions that have increasingly admitted controlled downwards derogations through collective bargaining agreements or even through individual contracts of employment. Thus, it can be said that these norms are still in favour of employees, although their inderogability rate is weakened as the law increases the space for collective or individual private autonomy to freely bargain terms and conditions of employment. Second, labour laws have remained loyal to inderogability as a technical legal tool, but they have sometimes bent its classical pro-labour structure to other policy objectives different from the ones of unconditionally protecting employees.

This second path can be in turn described as a biphasic evolutionary process. Initially, legislators have reassessed the structure of inderogable employment norms establishing an equilibrium point between labour rights and other policy objectives. This happened in Italy in the aftermath of the 1973 oil crisis, when the legislator decided to adopt inderogable norms, that have been described as absolute, because they could not be subject to neither downwards nor upwards derogation. This research has shown how, more recently, this trend, although limited to certain sectors, has gone even further. The analysis of the regulation of executive remuneration in the financial industry has revealed how the structure of inderogable norms has been reversed in presence of a public interest that has been considered prevailing over the ones of certain employees, due to the overriding policy objectives that have characterised the legislative interventions in the financial sector after the 2007-2008 crisis. Therefore, these regulations can be interesting for labour lawyers, as they show how legislatures, even in legal domains that are only partially intersecting employment laws, have been

loyal to a classical labour law technique, traditionally used to protect workers, that has yet been employed, upside-down, in the immediate interest of the other party to the employment contract.

Nevertheless, this structural inversion, in any case applicable to financial institutions and their top-ranked executives only, does not seem to represent a real danger for the social afflatus behind the teleological justification of several employment norms, especially when considering that one of the classical theoretical bases for their inderogability has been the imbalance of bargaining power between an employer and its employees. After all, this change in inderogability direction is evidently less problematic when an employer negotiates a remuneration package not with the archetypical blue-collar worker in assembly-line production, but rather with a fat cat at the top of the corporate food chain.

Corporate and Financial Markets Law

Contractual Principle of *Intra Vires* and Information as a Function of Proper Corporate Governance

Dario Scarpa*

Abstract

The principle of *intra vires* implies a certain conceptual relativism: it must be anchored to both the size and the specific activity of a corporate enterprise, which are the primary parameters for the evaluation and classification of companies. An adequate corporate structure is the result of business choices; intra vires should be regarded as a general clause in corporate organisation, and therefore as a mandatory criterion of the management activities for which directors are responsible. The principle of intra vires and information are the key elements to be taken into account in the corporate governance of a company, both in the performance of business activities and when the company's corporate purpose and interests are being pursued. Here, the economic method applied to the law, so that the legal form must correspond to the economic substance of the regulated phenomena, translates into the information method in business law according to which the legal form must match the informative content of the regulated phenomena.

I. The Nature and Effectiveness of the Principle of *Intra Vires* as It Applies to the Structure of Companies

The phenomenology of company practice leads to an emphasis on the fact that the changes in corporate circumstances and situations in terms of size or sector that might take place in the course of a long-term corporate arrangement or transaction are different: they may depend on events the occurrence of which is unsure, or even unpredictable, or they may be theoretically predictable, although the extent, the moment when the effects will be seen, the means of producing the same effects and their duration may remain uncertain.[1] To this must be added other circumstances that may disrupt the economy of the corporate arrangement or transaction and the organisational structure of an entity, which are fully

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[1] See H.M. Holtzmann, 'Arbitration in Long-Term Business Transactions', in C.M. Schmitthoff ed, *International Commercial Arbitration. Documents and Collected Papers* (London: British Institute of International and Comparative Law, 1975). On this topic, see S. Bratus, 'Arbitration and International Economic Cooperation Towards Industrial, Scientific and Technical Development' 27 *The Arbitration Journal*, 230, 239 (1972). We suggest a reading of G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 5; F. Galgano, 'Le forme di regolazione dei mercati internazionali' *Contratto e impresa,* 353 (2010); M. Franzoni, 'L'interprete del diritto nell'economia globalizzata' *Contratto e impresa,* 366 (2010).

accomplished through the acts and decisions of the board of directors or supervisory board, or the resolutions passed at shareholders' meetings.[2]

There being the need to adopt a cyclical system for giving intra vires to company structures in the broadest sense so as to take account of the occurrence of circumstances that were not foreseen at the time a corporate arrangement or transaction was entered into, which can substantially unbalance the position of the regulation of interests of subjects participating in the genesis of a company as contracting parties, it is necessary to lean in the direction of attributing significance to any contingent fact that may affect the cost-effectiveness of performance of the corporate arrangement or transaction.[3]

As we intend to demonstrate later in our discussion, the provision of a contractual clause on corporate intra vires requires close collaboration among the various corporate bodies and is inextricably linked to compliance with the principle of loyal cooperation and good faith. As a result, shareholders will tend to accept any provision that might render the principle of contractual efficacy among the parties adequate to the changing needs of the company, given the potential benefits that can be identified in the body of the agreement by virtue of adding a clause that may generate the certainty that the corporate structure will be given intra vires. An intra vires clause may, therefore, be applicable where there is an imbalance in the dimensions of the various business sectors of corporate activity.

But then, one might reflect that from the perspective of the intention to make a hermeneutically correct distinction between clauses and principles of corporate governance that have a similar contractual genesis and effectiveness, consideration should be given to the fact that the intra vires clause reflects a generally recognized principle in the various legal systems, postulating – and here there is considerable scope for innovation – a further attenuation of the principle of contractual effectiveness among the parties by waiving what is a generally widespread rule across various national legal systems,[4] as well as in

[2] See A. Frignani, *Factoring, Leasing, Franchising, Venture Capital, Leveraged Buyout, Hardship Clause, Countertrade, Cash and Carry, Merchandising, Know-how, Securitization* (Torino: Giappichelli, 1996), 393. On this topic, see P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti' *Rassegna di diritto civile*, 334 (2001); Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 441; M. Franzoni, 'Il contratto nel mercato globale' *Contratto e impresa*, 69 (2013); F. Marrella, 'Lex mercatoria e principi Unidroit. Per una ricostruzione sistematica del diritto del commercio internazionale' *Contratto e impresa/ Europa*, 29 (2000).

[3] H.J. Berman, 'Excuse for Non-performance in the Light of Contract Practices in International Trade' 63 *Columbia Law Review,* 1413, 1420 (1963), which defines the 'decline of faith in contract', is in agreement. See P. Perlingieri, *Il diritto* n 2 above, 31.

[4] With a few isolated exceptions, including Italian law, which in Arts 1467-1469 of the Civil Code provides for termination due to the occurrence of excessive burden, which gives the part affected by an economic imbalance the opportunity to seek rescission of the contract if performance by one of the parties has become prohibitively burdensome as a result of the occurrence of extraordinary and unforeseeable events. See F. Galgano, 'Libertà contrattuale e giustizia del contratto'

the business practice of corporate matters. More specifically, if one wished to undertake a detailed study of a *trait d'union* between intra vires clauses and corporate contractualism, given the fact that they are present in long-term contractual relationships, the requirements for contractual typologies that give intra vires to the structures within a corporate organisation would seem to coincide: corporate intra vires clauses undoubtedly have a wider radius of application. The reasoning behind this is not that situations of unexpected inequality in corporate structures must be compensated for, but rather that the manner in which the contract is performed should be adequately regulated, thereby ensuring that the company's organisational structure enjoys the necessary flexibility.[5] Taking into account the interpretation that corporations are also institutions, it is possible to obtain the same results in legal terms.

As a result, the correction of effects developed by events that produce intra vires is possible, while at the same time, even in the absence of events or effects so sudden as to trigger the protections provided for cases of deadlock during the organisational life of the corporate entity, shareholders and corporate bodies are provided with a legal tool to permit the evolution of corporate relations through an agreed management of the new situation, with the ultimate goal of refining and completing the contractual outcome of pursuing the corporate purpose.

One might infer that corporate discipline considers that a cause of providing for intra vires consists of any form of organisational imbalance brought about by the occurrence of ordinary and extraordinary events the nature of which must not be assessed in the abstract but in the light of the decision that a legal and economic operator would have decided to formulate ex ante in order to protect itself when managing and controlling a corporate structure.

If one wished to attempt a systematic reconstruction of the means whereby a corporate organisation is given intra vires, one might argue (correctly) that corporate contingencies, in the broadest and most inclusive sense of the term, determine whether it is possible to subsume any alteration in the initial governance of the interests of corporate contracting parties within the category of the circumstances for contributing intra vires.

Any reflection on the range of the intra vires phenomenon must begin by highlighting the legal significance of so-called contingencies and structural changes: that is, circumstances that given the absence of agreed rules, suddenly appear in the life and growth of business and result in an organisational imbalance between the company's original regulatory conditions and subsequent economic and business-related developments in the field when the developing obligations

Contratto e impresa/Europa, 509 (2005); Id, 'Dai principi Unidroit al regolamento europeo sulla vendita' *Contratto e impresa/Europa*, 1 (2012).

[5] On this subject, in most studies, the sphere of application of renegotiation clauses is unjustly limited to the situations envisaged in the intra vires clauses, while in reality, especially in the discipline of contracts that support international investment, the field of agreed renegotiation is much wider.

are actually performed.[6]

II. The Interests Protected by Application of the *Intra Vires* Principle

In the heterogenesis of corporate adjustment modalities, the real scope of application of the provision of intra vires clauses must be stressed: making a corporate structure adequate is the hypothesis of a prognostic consideration of the interests pursued by the parties with the prospect of a possible future assessment of the governance agreed at the outset. In the phenomenology of *intra vires*, one must recall the application methodology of corporate structures: in the case of a proposal to make it compulsory to adjust structures if circumstances occur that bring about a clear change in a company's requirements, the shareholders are under no obligation to set it in motion: only the board of directors or supervisors and the general meeting as bodies will give notice of the need to make changes to the entity (and will put these changes into effect).

Because it is our intention to discuss the issue of intra vires clauses included in the contract by the parties that contain precise parameters with which the parties must comply when making changes to the company, or that establish that a decision on the changes to be made must be referred to an outside evaluation, we must show, in a systematic way, that in the dynamic of adjusting the synallagma, a heteronomous intervention aimed at restoring the proportionality between a corporate structure and its corporate-productive dimensions is the natural remedy to be adopted in the event that the structure of the entity must be altered.[7]

As a result, in the light of the conceptual notion of intra vires as the correct step to remedy an alteration that has occurred in the physiology of the management of a company, and given the nascent obligation to carry out a systemic study of the positive genesis of the phenomenon, it should be noted that the conduct of corporate bodies must not violate the general obligation of contractual cooperation; this leads to a breach of the duty to perform the

[6] See J. Dewez et al, 'The Duty to Renegotiate an International Sales Contract under CIGS in Case of Hardship and the Use of the Unidroit Principles' 19 *European Review of Private Law*, 101, 101-154 (2011); A.H. Puelinckx, 'Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances' 3 *Journal of International Arbitration*, 47 (1986); S. Rodotà, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 2004), 111; C.M. Schmitthoff, 'The Law of International Trade', in C.M. Schmitthoff ed, *The Sources of the Law of International Trade* (London: Stevens & Sons, 1964), 3-38; Id, 'Hardship and Intervener Clauses' *The Journal of Business Law*, I, 82, 87 (1980); M.E. Storme, 'Applications possibles et caractères généraux des principes de droit uniforme des contrats' *Revue de Droit International et Droit Comparé*, 309, 309-325 (1995).

[7] See M.A. Eisenberg, 'The Board of Directors and Internal Control' 19 *Cardozo Law Review*, 237 (1997), with further reference to L. Cunningham, 'Compilation. The Essays of Warren Buffett: Lessons for Corporate America' 19 *Cardozo Law Review*, 1, 40 (1997). See P. Perlingieri, 'L'informazione come bene giuridico' *Rassegna di diritto civile*, 328 (1990).

obligation fairly and in good faith, based on the fairness, clarity and consistency of the parties' conduct in accordance with the general principle that ratifies the subsequent conduct of the party.

Good faith as a supplementary source of contractual governance represents the moment when the dynamics of identified changes are stabilized so as to operate as a limitation to misconduct, or rather, conduct that does not pursue the corporate purpose, in compliance with the correlated principle of another person's benefit in relation to personal interest. The behavioural model described above represents the first hermeneutical acquisition of concretization of the concept of *intra vires*: the principle of intra vires may, in a first approximation, derive from respect for contractual fairness, loyalty and good faith.

If we now attempt to make a comparison in corporate practice, we see that corporate contracting parties and members of the management and control bodies must comply with so-called fair dealing as a behavioural manifestation of good faith (good faith and fair dealing). In common law, the phenomenology of heterointegration separates remedies into judicial and non-judicial remedies: a remedy involves a balance of interests on the part of the court. Here, we believe that it is possible to reach a conclusion on whether damage can be compensated and the so-called balance of power, which leads to the possibility of granting an injunction being subordinated to an assessment of its severity. As a result, to follow this line of argument, we see that the remedial model represents a solution that can be adopted by agreement at the time of reconstruction of the system.[8] This means, however, that from the perspective of a comparative study, the principle of intra vires will come to the rescue of an assessment by a third party of the need to integrate the conduct of the person who has the task of proceeding with the request to adjust the corporate structure.[9]

To summarize the potential normative tensions relating to intra vires clauses, one might rightly take the position that the contractual provision will lead to a certain predictability of the immediate consequences of any changes to the corporate structures brought about by unforeseen or unpredictable events, and as a result encourage a considerable level of prevention of impasses in the organisational management of the company. Ultimately, *intra vires* clauses are designed to address events that have already occurred – so-called contractual

[8] On this subject, we recall that: It is true that more and more international long term agreements contain provisions according to which is considered as an event of force majeure any event beyond the control of the parties which renders the performance of the agreement very difficult and/or more expensive than anticipated or any event which cannot be overcome by the use of reasonable means at reasonable costs. Such provisions, when agreed upon, leave no doubt as to the intent of the parties. They clearly reflect that the parties intended to avoid that the impossibility to perform be considered as the sine qua non requirement for force majeure. However, in order to be accepted, such exceptions to the common law of force majeure must be expressly provided for; they should not be presumed or implied.

[9] See E. Brodsky and M. Adamski, *Law of Corporate Officers and Directors* (New York: Clark Boardman Callaghan, 1984-2006), para 2.02, 3.

and/or company contingencies – with regard to the conclusion of the binding obligation, where the parties have excluded the risk that they might occur during the stage when the obligation was being created.

One phase where a corporate intra vires clause might find practical application whether or not it is expressed in the corporate contract may be the time prior to dissolution of the company. If one reads the body of laws relating to dissolution, one can – by means of extensive interpretative investigation – understand those situations in which a corporate structure, and in particular corporate governance, malfunctions. When this happens, the duty of the corporate bodies – or rather the directors – to attempt to adapt the corporate structure to the functional change that has taken place arises automatically.

If the function of company law is to ensure the timely performance of the company's objects, or rather, the pursuit of the corporate purpose desired by the shareholders, this function must be performed with account being taken of the interests and de facto premises on which the designated regulation is based, so that any modification of these interests and premises cannot but assume legal significance and lead to an adjustment of the designated models.

Here there is a need for systemic reflection: the principle of *intra vires* relates to the existence of special circumstances relating to the progress of ongoing corporate equilibriums that affect the benefits of a transaction for individual shareholders: from a conceptual point of view, we see that when making adjustments, the interests of one shareholder or another are based on certain specific circumstances that have been indicated in the agreement. Correspondingly, we see that the principle of intra vires implies the positive representation of a specific circumstance, and a change in the undifferentiated state of affairs within which a transaction is concluded; this represents the normal context within which economic transactions are carried out, as they consist of an indeterminate series of inter-related factors, against the background of practical representations made by the managers of the company.[10]

If we think systematically about the value of company intra vires as a legal phenomenon affected by a provision on contingencies, even making the natural ontological distinction regarding the moment of occurrence of the events, we can identify the essence of the institution under review in a practical analysis of the imbalances in the original scheduled structure of interests, in full compliance with the law.

In principle, the specific objectives sought by shareholders when agreeing on duration, with the provision of an intra vires clause, are treated as being capable of affecting the corporate structure for the emphatic reason that the security and fluidity of legal transactions can be improved. One must therefore admit the

[10] See on this subject K.J. Hopt and P.C. Leyens, 'Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy' 1 *European Company and Financial Law Review*, 135 (2004).

relevancy of the intra vires clause, which we believe may affect corporate contractual relations, and constitute the objective condition precedent. Treating *intra vires* in an operational context permits the emergence of interests other than those that are typically found in company contracts, thereby highlighting the fact that intra vires in the sense of a structural function may justify the significance of aims that are not supported by the corresponding contractual precepts.[11]

The natural interrelation between the operativeness of the principle of intra vires and its ontological belonging at the causal moment does not require the conventional identification of the underlying corporate interests, which assume their legal significance implicitly, because they can be protected even in the absence of express statutory requirements. This conceptualization offers legal evidence to specific interests of the contracting parties through the determination of the actual cause of the intra vires and provides the governance that is most likely to guarantee the level of protection that the management and control body deems necessary.

III. Contractual Balance and Administrative Actions as Evidence of Corporate *Intra Vires*

Now that the affirmation of the principle by which the rules requiring fairness and intra vires have the value of real legal commands has been unconditionally accepted, with methodological rigour, it is now necessary to give effect to the meaning of the corporate solidarity which immediately intervenes by means of these rules to give conformity to the legal relations among private parties, and since it refers to the parties to the contract, to classify it as corporate solidarity. The principle of intra vires becomes specific in the principle of protection, in the sense of the obligation on the part of every operator to protect the utility of the corporate structure over and above the obligations that are specifically imposed by the contract, to the extent that the managerial conduct of intra vires does not involve an appreciable sacrifice for this person, or, as one might say – drawing inspiration from the common law experience – within the limits of reasonableness, understood as a parameter for the practical determination of a standard of correctness that is compatible with human nature and its unavoidable impulses.

The criterion to which one should aspire in order to give actual content to the requirement of intra vires, and to be able to assess the legitimacy of the *exceptio doli* – or the lack thereof – at the time a relationship begins, is the congruity of corporate action with the economic balance attained by the interested parties. The manner in which services must be performed, to the

[11] J. Hirschleifer, 'Where Are We in the Theory of Information?' 63 *The American Economic Review,* 31 (1973); J. Hirschleifer and J.G. Riley, 'The Analytics of Uncertainty and Information. An Expository Survey' 17 *Journal of Economic Literature,* 1375 (1979).

extent they have not been formally agreed – subject to compliance with the laws, such as those regarding the exercise of discretionary powers, and taking account of the ancillary services that are not provided for in the contract itself but that must also be performed – depends on their consistency with the contractual schedule and the economic equilibrium that the contract entails: the rules of negotiation therefore become a sort of independent organism that has the capacity to evolve in order to pursue its ends effectively.

Following changes in organisational and market conditions, the corporate contract that was entered into with the expectation that it would be able to meet certain needs rather than others is now revealed to be inadequate to fully satisfy the interests of the shareholders. But it is precisely these instances of solidarity that permeate corporate action under the intra vires clause and justify its application. Given the function of cognitive action to gain awareness of the economic significance of a company transaction, which is the preliminary moment for application of the management rule adjusted for contractual risk, the criterion for the allocation of risks can be determined by extensive interpretation, when the practical circumstances of the case so permit.[12]

It is our intention to functionalize the corporate contract to a particular structure of interests, thereby connoting its economic expansion through the intra vires clause, and to explain all the factors that go to make up its economic basis: the interpretative solution lies in an equitable balance of conflicting interests, even where these interests are assessed according to objective parameters. We must consider that the axiological framework of a discipline represents an ontologically different moment from that when the methods by which the recurrence of the values that underlie them must be ascertained in cases of external realities.

The principle of intra vires lends itself to being applied both in the case of a misrepresentation of an assumed fact that the directors had in mind at the time they took a decision and where the factual elements are modified at a later date. The institute in question is a valid tool for protecting cases that it is difficult to subsume into the law, or situations in which the event is such that if it does not occur, the entire structure of contractual regulation desired by the shareholders of the company might be overturned. Company practice must provide appropriate and specific clauses aimed at creating an effective system of contractual protection of the efficiency of the company's structural organisation.[13]

[12] Note, 'Disclosure of Future-Oriented Information Under the Securities Laws' 88 *Yale Law Journal*, 338, (1978).

[13] See M.J. Novak and M. McCabe, 'Information Costs and the Role of the Independent Corporate Director' 11 *Corporate Governance. An International Review*, 300, 301 (2003).

IV. Contractual Preconceptions and Corporate *Intra Vires*: A Necessary Combination

Based on what we have affirmed to this point, we now wish to attempt an operation of hermeneutic subsumption of intra vires clauses into the concept of presupposition, in the sense of a legal phenomenon of a condition that lacks contractual expression at the time the interests are regulated. From the phenomenology of the causal element of the contract, understood as a tension towards manifestation of the true substance of the designated interests, it must be inferred that the division of corporate clauses into primary and secondary elements leads to the conclusion that changes to the initial circumstances of the company formation phase should be treated as a fundamental element of the regulations in the articles of association, so that emphasizing a factual change in circumstances will give rise to the legal requirement to adjust the means by which companies are structured and organized.

The reasoning behind this is as follows: from the perspective of a desire to frame the legal situation of intra vires within the economic dimension of a fact-pattern, especially taking into account the reason why the contractual provision of intra vires' services is included in the services that are agreed at the outset, systematic rigour must be applied in order to arrive at an attempt at a hermeneutic transaction that will succeed in framing intra vires from the perspective of a presupposition. In our attempt to subsume the principle of intra vires within the concept of presupposition, we must look at how changes in corporate structures should be framed from the viewpoint of an institution's equity and financial well-being, in relation to both circumstances that prove to be unpredictable at the time the company agreement is concluded and circumstances that emerge as deficient because after the memorandum of understanding has been concluded – and contrary to expectations – they do not occur, or cease to exist.[14]

If one makes a systematic argument in terms of presupposition and occurrence as closely-linked phenomena, it is possible to continue to ask questions regarding the relevance of presuppositions in contractual situations affecting companies: the moment of intra vires in a company structure must lead the process of objectification of management positions to its new dimensional conditions, in such a way that the sought-after objectification can adjust the

[14] H. Eidenmüller, 'Free Choice in International Company Insolvency Law in Europe' 6 *European Business Organization Law Review*, 423 (2005); Id, 'Wettbewerb der Insolvenzrechte?' 35 *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 467 (2006); Id, 'Abuse of Law in the Context of European Insolvency Law' 6 *European Company and Financial Law Review*, 1 (2009); W.G. Ringe, 'Strategic Insolvency Migration and Community Law', in W.G. Ringe et al eds, *Current Issues in European and Financial Law* (Oxford and Portland: Hart Publishing, 2009), 71; A. Engert, 'Solvenzanforderung als gesetzliche Ausschüttungssperre bei Kapitalgesellschaften' 170 *Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht*, 296, 318 (2006); B. Pellens et al, 'Geplante Reformen im Recht der GmbH: Konsequenzen für den Gläubigerschutz' 37 *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 381, 423 (2008).

outcomes of corporate action.

Given the concept of an economic transaction evoking the differing physiognomies offered by a negotiating tool that, considering the finite size of the fact-pattern, is characterised in terms of flexibility and openness with respect to issues that were not originally contemplated by the shareholders, a long-term contract qualifies as a situation with its own genetic code, in accordance with the information that was originally mutually conveyed by the company bodies in homage to the values that must permeate the company contract through continuous adaptation to the changing nature of the realities involved in its principal intervention. The external circumstance assumes legal significance when according to objective indices it turns out to have been the factor that gave rise to the change in the corporate organisation.[15]

The result of this is that it becomes the basis for the corporate contract as objectively evaluated in the determinations that contextualize it, so that, being directly associated with the agreed negotiating schedule, it may be considered to be common to both partners and shareholders, in the most congruous meaning of the term, in the sense of the highest level of contractual intra vires in terms of data that are exogenous to the corporate structure. The legal corollary to be arrived at from the application of the principle of intra vires, as the outcome of a study of the institution of presupposition in corporate governance, is that if the supervening circumstance does not exist at the time of conclusion of the corporate contract, or where it is lacking at a later date even though it was present at the genesis of the contract, the corporate contract must be considered to have been modified, in that legally speaking it has been provided with intra vires, and as a result includes a causal basis that has the capacity to attain the purpose for which it was objectively concluded, in compliance with the typical so-called *expressio causa*.

We should recall that the corporate contract, or the articles of association of a joint stock company, has the typical physiognomy of an open contract, in that is provides, both empirically and legally, for the natural possibility to make subjective changes to the entity's management structure. Nevertheless, since creating an entity leads to a subjective change between companies and shareholders with regard to the so-called *piercing the corporate veil* or *lifting the corporate veil*, in taking corporate action in pursuit of the corporate purpose, the natural persons in the corporate structure acquire significance, with a

[15] W. Schön, 'The Future of Legal Capital' 5 *European Business Organization Law Review*, 429, 447 (2004); Id, 'Balance Sheet Test or Solvency Tests - or Both?' 7 *European Business Organization Law Review*, 181, 182 (2006); C. Alonso Ledesma, 'Algunas reflexiones sobre la function (la utilidad) del capital social como técnica de protección de los acreedores', in *Estudios de Derecho de Sociedades y Derecho Concursal, en homenaje al Profesor García Villaverde* (Madrid: Marcial Pons, 2007), I, 127; P. Santella and R. Turrini, 'Capital Maintenance in the EU: Is the Second Company Law Directive Really that Restrictive?' 9 *European Business Organization Law Review*, 427 (2008).

corresponding, though subordinate, decline in corporate intra vires in the subjectivist sense.

The negotiated basis and recognition of the legal significance of the phenomenon of intra vires must be interpreted as moments in the evolution of the corporate contract and the related corporate governance structure, from a vision of this fact pattern that is rigidly confined within its structural conformation to the vision of an economic transaction that expands towards the horizon of the other interests that might be objectively associated with the corporate contract. The significance of the economic transaction means expressing the need for a more reasonable (ie adequate) evaluation in each contract, and not limiting it to the merely instrumental aspect, given the need to extend its hermeneutic scope to its teleological connotation: the aim that must be achieved is to rationalize the organisational structure – that is, to tend towards guarantees in relation to both the expectations of the shareholders and the no less important requirement that the institution must function properly as the ideal system for the allocation of resources – since it should be noted that contractual regulation takes the form of requirements related to the will of the parties and above all, based on criteria of reasonableness, of the precepts can be derived from the economic substance, in the sense of as a synthesis of will and the need for corporate agreement.

In the pursuit of contractual transparency as an implicit requirement of contractual practice, intra vires was developed to implement the demands of good faith, regardless of the technical and legal instrument employed, and it therefore exists in perfect harmony with the principles of fairness and reasonableness. The sustainability of an affirmation of intra vires when the economic basis of a relationship fails requires the proposition of a particular interpretation of legal rules in order to encourage patterns of conduct that are believed to be more efficient for the corporate system, or in order to ensure the maximization of investments: in other words, what is required is respect for the economic principle that substance must prevail over form.

Now, however, we need to respond to a possible objection of the system: what relationship is created between corporate intra vires and the binding nature of a contract, if, that is to say, the principle of intra vires can go beyond the limitations of the binding effect, or rather, the regulatory considerations of the shareholders. Here, the need to test the principle of the absolutely binding nature of a contract is supported by the legal-economic theory of the incomplete contract.[16] This contractual theory places major emphasis on the need for the flexibility of corporate regulations in contexts such as that of companies in

[16] On this subject, see A. Schwartz, 'Le teorie giuridiche dei contratti e i contratti incompleti', in D. Fabbri et al eds, *L'analisi economica del diritto* (Roma: La Nuova Italia Scientifica, 1997), 37 and in Italian literature, R. Pardolesi, 'Regole di default e razionalità limitata: per un (diverso) approccio di analisi economica al diritto dei contratti' *Rivista critica del diritto privato*, 451 (1996).

which the speed of progress of economic traffic, the speed of economic events and the intensification of interconnections among economic players make the risks of future disturbances in the original structural equilibrium subject to constant implementation, both qualitatively and quantitatively.

If we want to offer a full response to this objection, we must therefore hypothesize that given the particular nature of the corporate contract as an agreement that organizes a corporate structure that governs an economic activity, the rule of the majority principle in the adoption of corporate will and the legislative tendency to treat the interests of the company as prevailing over those of individual shareholders, the principle of intra vires should prevail over the binding nature of contracts in the actual performance of corporate business; this illustrates, inter alia, the statutory and legal freedom in favour of an individual shareholder to withdraw from the company when he or she is faced with decisions that bring about a substantial contingent and legal metamorphosis in the corporate organisation in the sense of a union of corporate substance and legal form.

V. The Proceduralisation of Information Tools as a Function of the Protection of Corporate Interests

The methodological approach to the regulation of corporate organisation as a system of economic and legal rules must be treated as supplementary and complementary to the economic analysis of corporate regulations. The methodological contribution of interdisciplinary research, between pure corporate law, business law and contract law, consists in a functional study of a corporate organisation's data that with regard to the form of administration and control a joint stock company results in a functional interpretation of normative data and intra-company fact patterns. As we have seen, this is a principle of general application, which covers all areas of the economic analysis of law.

In fact, the method of applying economics to the law, where the legal form must correspond to the economic substance of the phenomena being governed, results in the information system in business law whereby the legal form must correspond to the informational substance of the phenomena being governed. All economic decisions are characterised de facto by the presence of information; they therefore develop in conditions of uncertainty and occur over time. Economic science is classified by elements of time, information and uncertainty.[17] In an economic system, the simultaneous presence of information and technological advancement creates externalities that place the emphasis on certain effects

[17] For comparative purposes, see G.J. Stigler, 'The Economics of Information' 69 *Journal of Political Economy,* 213 (1961); J. Hirschleifer, 'The Private and Social Value of Information and the Reward to Inventive Activity' 61 *The American Economic Review*, 561 (1971); Id, n 11 above; J. Hirschleifer and J.G. Riley, n 11 above; G.A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' 84 *Quarterly Journal of Economics*, 488 (1970).

that had initially been calculated as being secondary.

The study and research of the economic analysis of law, together with the development of economic theory, lead to the creation of a natural relationship between the efficiency of regulated markets and the positive governance of information flows of the corporate structure, since the question of the efficiency of the allocation of financial instruments stands alongside informational efficiency, or rather the objective of providing sufficient information to make the investment decisions taken by investors rational.[18]

If we reflect on the relationship between the cost of disclosure requirements faced by intermediaries and issuers and the liquidity status of the securities market, then as an economic corollary, we come to determine that the breadth and depth of disclosure requirements, which characterize the financial market physiologically, must be appropriate not to the size of the issuer, but conversely to the various degrees of liquidity of the securities and their reference market. Clearly, the proceduralisation of tools of information involves an analysis of the true risk level of financial instruments for third parties.

Given the mandatory nature of corporate disclosure and its functions, we believe that the costs of corporate disclosure should be evaluated in relation to the issuers' ability to respond to the need for disclosure expressed by investors so that they can be in possession of the information elements necessary to base their decision-making processes regarding their investment choices on the principle of the optimal allocation of their savings.[19] Corporate information must have a pricing function: that is, corporate information must be available to investors at a low cost in order to reduce the expenses they incur to gain possession of them, and so that the price of securities can be calculated accurately. The governance function (namely, the corporate information) contributes to the good governance of the company in three respects: enforcement, education and compliance or explanation.

The adoption of a principle of proportionality when establishing the extent of the disclosure obligation due from issuer companies requires an imposition of information regulations that differentiates the scope of disclosure requirements in relation to both the number of shareholders of the issuer company and the varying degrees of liquidity of the securities: this allows the obligatory cost of the information to be regulated on the basis of the effective need for investor protection and a reduction in the regulatory burden for smaller listed companies that have less liquidity in the market in which their securities are placed.

[18] See P. Abbadessa, 'Diffusione dell'informazione e doveri di informazione dell'intermediario' *Banca, borsa e titoli di credito*, I, 305 (1982); M. Belcredi, *Economia dell'informazione societaria* (Torino: UTET, 1993), 4; P. Demartini, *Informazione, imprese e mercati finanziari efficienti. Spunti di riflessione in una prospettiva multidisciplinare* (Milano: Franco Angeli, 2005), 32; G. Ferrarini, 'Informazione societaria: quale riforma dopo gli scandali?' *Banca Impresa Società*, 411 (2004).

[19] See G.A. Akerlof, n 17 above; S. Bozzolan, *Trasparenza informativa e mercato finanziario* (Milano: McGraw-Hill, 2006), 2.

VI. Crowdfunding and the Protection of Company Creditors and Third Parties

A study of the organisational methods of markets other than stock exchanges for the purpose of crowdfunding and the so-called private markets in financial instruments requires an ad hoc discipline that can clarify application of the financial markets law in this sector, on the one hand, and overcome the trade-off between the benefits of widespread distribution financial instruments, web permits and the costs of protecting the solicited investors on the other. Crowdfunding is not regulated as a phenomenon applicable to issuers in general: on the contrary, there is specific, organic legislation for innovative start-ups, through rules and funding arrangements that can exploit the potential of computer networks.

Based on economic theories, innovation has a crucial role for the success of the specific business. Consequently, changes should not only be considered as a need coming from external factors, but as necessary events which should occur in the company life.

Information economics deals with contractual relationships that occur in conflict situations characterized by asymmetric information; it does not directly address the causes that underlie individual decisions, but rather the effects, and deals with the form taken by individual decisions when placed in an interactive context. Information relating to a company's performance and its future prospects is not distributed uniformly between insiders and outsiders, which results in information asymmetry in favour of the former. The presence of asymmetric information does not absolutely require that the law intervene to correct it by proposing various remedies that can be traced in the dynamics of the market. The regulation of information is evident both in the imposition of specific obligations to inform the public and in the provision of sanctions in the event of false or omitted information.[20]

The term 'asymmetric information' refers to the fact that information is distributed among the various actors involved in a given context in different ways and in different quantities.[21] The presence of asymmetric information hinders the achievement of a social optimum through free contracting among parties. In the absence of an optimal model that permits the problem of asymmetric information to be resolved, it would be appropriate to identify a solution that is geared towards a plurality of responses based on a model in which individual remedies carry out a complementary function. In an economic

[20] See H. Hansmann and R. Kraakman, 'The Essential Role of Organisational Law' 110 *Yale Law Journal*, 387-440 (2000); and Id, 'Il ruolo essenziale dell'*organisational law*' *Rivista delle società*, 21-85 (2001). On this topic, see G. Rossi and A. Stabilini, 'Virtù del mercato e scetticismo delle regole: appunti a margine della riforma del diritto societario' *Rivista delle società*, 1 and 4 (2003).

[21] It is a well-known fact that information asymmetry leads to two problems: moral hazard and adverse selection.

environment in which constraints of reputation and market mechanisms play a dominant role, the legal requirement for information is a tool for correcting organisational dysfunctions, while sanctions play the role of guarantors that the system will function.[22]

Confirming the results of research on the improved circulation of information within listed companies, it is possible, as we have said, to configure three different sets of informational rules: one on the organisational structure of the company, one on decision-making processes and the legal allocation of activities common to corporate organisations and the relevant internal controls, and one the legal actions of the company in the market.

The principle of the responsibility of directors in joint stock companies finds its logical collocation in information systems. The internal information process is, in fact, aimed at the proper management of enterprises, while informational tension towards the exterior meets the minority shareholders' and third parties' need for information and control for an exact reconstruction of the company's assets and the individual relationships created in the exercise of the company's activities. In a joint stock company, a business belongs to the shareholders: that is, to those who risk their investments. These people expect effective management, and are willing to risk losses, according to the characteristics of the commercial activities selected in the articles of association. Management of the company depends on the shareholders in shareholders' meetings; they hold the managed interest that makes fiduciary appointments by resolutions to appoint directors. Given that according to the theory of agency, a director is an agent and a shareholder is the principal, if an agent wishes to reduce his or her liability, he or she must make the shareholders aware of decisions regarding company business before putting them into effect. There may be inverse proportionality between directors' liability for their management actions and the information they receive and convey.

In the management of joint stock companies, the availability of information not only plays a fundamental role in decision-making processes, but also supplements one of the directors' duties, which is to act in an informed manner; a breach of this duty is relevant to the area of responsibility. The conceptual notion of corporate organisation as an information system can be seen at the bases of the legal system. The economic theory of organisations must be linked to the economic theory of information. In this regard, one must be aware of the information asymmetries that exist in corporate organisations among the various

[22] It is interesting to read S.J. Grossman and J.E. Stiglitz, 'Information and Competitive Price Systems' 66 *The American Economic Review*, 246-253 (1980); Id, 'On the Impossibility of Informationally Efficient Markets' 70 *The American Economic Review*, 393-408 (1980); J.E. Stiglitz, *Informazione, economia pubblica e macroeconomia* (Bologna: il Mulino, 2002). And again, A.T. Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts' 7 *Journal of Legal Studies,* 1 and 4 (1978); H. Beales et al, 'The Efficient Regulation of Consumer Information' 24 *Journal of Law and Economics*, 491-539 (1981).

actors who combine to create a corporate organisation that in the pursuit of a common goal, through diverse patterns of conduct, may create uncertainty in decision-making processes, since not all the agents who take part in decision-making processes have the same information available to them. Information therefore becomes the basis for the notion of corporate organisation, and assumes the role of the interpretive key for the governance of corporate organisations.[23]

VII. European Systems of Control and Administration, Between the Principle of *Intra Vires* and Information

The topic of systems of administration and control has aroused particular interest in Italy since the approval of the company law reforms enacted by decreto legislativo 17 January 2003 no 6. These reforms profoundly reshaped the internal organisation of Italian joint stock companies by introducing the possibility of choosing from among three models. Besides the Italian model, the reform now allows a choice to be made between two additional models: the dual system or the one-tier system. An explanation of the role of a director within a company cannot be provided without examining and understanding the system of management and control adopted by the company in question. The traditional system was the only possible model in the Italian legal system until the entry into force of decreto legislativo 17 January 2003 no 6, even though authoritative voices had been expressing the hope that new corporate governance rules would be introduced by Italian companies through careful use of their statutory independence for some time.

The above-mentioned model is based on a distinction between boards of directors and supervisory boards, where the former deal with management and the latter control the managers (without, however, being entitled to go into the merits of the choices made).[24] Both bodies are appointed by shareholders' meetings, and therefore end up being the expression of the will of the majority of the shareholders or of a sole shareholder with absolute control. This system of management and control has often been the subject of criticism regarding the monitoring role that must be played by the supervisory board. In fact, although directors still have the duty to oversee general management performance, the body that primarily had the function of internal controls and supervision of management was the board of supervisors. With regard to the latter's actions,

[23] See A.T. Kronman, n 22 above, 4; H. Beales et al, n 22 above, 491; R. Schulze et al, *Informationspflichten und Vertragsschluss im Acquis communautaire* (Tübingen: Mohr Siebeck, 2003), with a review by S. Troiano in *Rivista di diritto civile*, I, 94-98 (2005); C. Heurteux, *Les informations des actionaires et des épargnants. Etude comparative* (Paris: Sirey, 1961); E. Balate and J. Stuyck eds, *Pratiques du commerce. Informations et protection du consommateur* (Brussels: Story-Scientia, 1988).

[24] On this topic, F. Denozza, 'La nozione di informazione privilegiata tra "Shareholder Value" e "Socially Responsible Investing" ' *Giurisprudenza commerciale*, I, 585 (2005).

systems of governance used in other countries were often considered to be more appropriate for ensuring more effective and better-developed controls. The two-tier system (one of the two alternative models to the traditional form permitted by the company law reforms) is taken from the experience of various continental European legal systems. It is most of all a feature of Germany (and so is often also called the 'German model'), where it was one of the tools used to attempt to create the famous *Sozialmarktwirtschaft* (the social market economy).

The German model was devised to permit comparison and agreement among the interests of the major stakeholders through the system known as *Mitbestimmung* (co-management or co-determination), which ensures broad stakeholder representation in the governance of an enterprise. This model is based on the distinction between a management board and a supervisory board. The former has skills and functions that are roughly similar to those of a board of directors in the traditional Italian model. The latter combines the skills that belong to the supervisory board and ordinary shareholders' meetings in the traditional model: namely, the control of corporate management, the approval of balance sheets, the appointment and removal of directors and the promotion of corporate liability actions against them.[25] The main difference compared with the traditional Italian model, based on the distinction between a board of directors and a supervisory board, is that in the latter case, both bodies are appointed by shareholders' meetings, while in the two-tier system, shareholders' meetings only appoint the supervisory board, which in turn appoints the management board.

It is thanks to this appointment procedure, as provided in the German and Dutch legal systems, that the presence of representatives of minority shareholders in the supervisory body is ensured; this leads to de facto continuous supervision and the negotiation of management options. The single-tier model (the second of the alternatives to the traditional model prescribed by the company law reforms) is derived from the common law and is a characteristic of the British and American systems (in fact, it is it also called the 'Anglo-Saxon model'). The main feature of this model is that it does not provide for the existence of two bodies, one for management and one for management control, as is the case with the two-tier model, but only for a single body, the board of directors, within which

[25] The law on joint management (*Mittbestimmungsgesetz*) of 4 May 1976, which strengthened the principles that were already a part of the *Betriebverfassungsgesetz* 1952, establishes that in enterprises with a legal personality with more than two thousand employees, the supervisory board must be structured in such a way as to ensure the presence of representatives of the shareholders and employees – in equal numbers – so as to ensure representation of the interests of the two categories and joint decisions in the administrative decisions that are within the powers of the *Aufsichtsrat*. Favourable terms are, however, reserved for representatives of the shareholders, who are generally responsible for appointing the President of the *Aufsichtsrat* by a vote in favour of two-thirds of the members of the Council, except in the case of a special resolution. See K.J. Hopt, 'Direzione dell'impresa, controllo e modernizzazione del diritto azionario: la relazione della Commissione governativa tedesca sulla *corporate governance*' *Rivista delle società*, 182 (2003).

committees dedicated to specific areas are created.[26]

There may be a remuneration committee, which decides on directors' and managers' salaries, except for those of the independent directors who make up the committee, which are decided by the board of directors. There may be a nomination committee, which proposes candidates for election as members of the board to shareholders' meetings and communicates the personal and professional characteristics of the candidates so as to ensure that all the shareholders can exercise an informed, reasoned vote. Finally, the committee that merits the most attention, which replaces the traditional model of the supervisory board in the Italian system (or the supervisory board in the two-tier system) in carrying out the true internal control function is the audit committee, a term that is translated into Italian as the committee for management control, or the internal control committee. This committee is the fulcrum around which the operation of the model under review revolves and is also the element that permits the financial and legal literature to define the one-tier model using the term 'monitoring model'.

VIII. Share Capital and Net Worth of Companies as a Function of *Intra Vires* and Information

The interpretative will surrounding the undertaking of legal research on share capital intends to, and must, adopt a vision of the requirements of share capital and company funding in positive and productive terms: if one reads it in both systemic and corporate terms, one is led to consider how the rules on so-called real capital, or better, the system of making contributions to joint stock companies, currently represents the typical moment of application of the principle of corporate intra vires. In the desired methodology, which is to investigate and interpret corporate regulations from the point of view of compliance with the principle of intra vires of corporate structures, it is necessary to proceed with an extension of the concept of intra vires beyond the narrow confines of management and control to arrive, *de plano*, at an understanding of how the principle of *intra vires* must even affect the dogmatic acquisition of joint stock company governance: share capital must be properly framed within the productive perspective.[27]

As a result, abandonment of the almost axiomatic criterion of share capital

[26] J.M. Nelissen Grade and M. Wauters, 'Reforming Legal Capital: Harmonisation or Fragmentation of Creditor Protection?', in K. Geens and K.J Hopt eds, *The European Company Law Action Plan Revisited* (Leuven: Leuven University Press, 2010), 26; H. Eidenmüller, 'Free choice' n 14 above, 423; Id, 'Wettbewerb' n 14 above, 467; Id, 'Abuse' n 14 above, 1; W.G. Ringe, n 14 above, 71; A. Engert, n 14 above, 318; B. Pellens et al, n 14 above, 423.

[27] M. Miola, 'Legal Capital and Limited Liability Companies: the European Perspective' 2 *European Company and Financial Law Review*, 413 (2005); F. Denozza, 'A che serve il capitale? (Piccole glosse a L. Enriques-J.R. Macey, *Creditors Versus Capital Formation: The Case against the European Legal Capital Rules*)' *Giurisprudenza commerciale*, I, 585 (2002).

as a natural form of guarantee for creditors follows in the form of a conceptual denial. If one reflects on legislative modelling in this area from an economic viewpoint, it seems that one might take the position that the legal requirements relating to constraints on share capital do not initially have the purpose of ensuring that the creditor class is guaranteed; rather, it seems correct to think that it is also the desire of the regulatory tension to bring about the improved functioning of enterprises by securing the structural soundness of the corporate organisation as a preliminary benefit to ensure adequate corporate continuity based on the size of the company.

If we take the core of this argument, and abandon the clarificatory uncertainties, we might justifiably make the case that it is a requirement of the necessary business functionality to make advance plans for investments in the enterprise at regular intervals for long-term periods, so that the enterprise is adequately organized; in hermeneutics that take account of comparative reflections,[28] solvency and balance sheets tests can represent moments in time in which it is possible to approach the concept of intra vires in the share capital of a joint stock company, as a criterion that underlies both the protection of creditors who develop legal relationships with the entity, and above all, the correct form of organisation of the corporate structure in the sense of a continuous, periodic need to adjust the financial resources of the company to the real activities and size that pursuit of the corporate purpose requires.[29]

Control of the quantity and quality of the risk financial resources for the genesis and life of a corporate structure to be allocated to a company is the necessary antecedent to identification of the principle of intra vires and effectiveness of capitalisation, thereby provoking an easing of the system governing the formation and control of share capital, the so-called *Kapitaleinbringung*, through the link to continuity of the structural support of risk offered by the rules on the preservation of capital.[30] If we reflect on this, we see that the system of funding by shareholders is an indicator of the legislative tension towards obtaining an adequate system of share capital: management of a company means entrusting the company's solvency not to an investment decision resolved by the use of legislative requirements, but to an occasional decision: that is, one that is generated by a current financial assessment.

If one reads the laws carefully, one can correctly note indications of the

[28] On this subject, for a widely-used analysis, see L. Enriques and J. Macey, 'Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules' 86 *Cornell Law Review*, 1165-1204 (2001); and on the related discussion, P.O. Mülbert and M. Birke, 'Legal Capital – Is There a Case Against the European Legal Capital Rules?' 3 *European Business Organization Law Review*, 695 and 698 (2002).

[29] See P. Santella and R. Turrini, n 15 above, 427; J.M. Nelissen Grade and M. Wauters, n 26 above, 26.

[30] See on this subject H. Eidenmüller, 'Free Choice' n 14 above, 423; Id, 'Wettbewerb' n 14 above, 467; Id, 'Abuse' n 14 above, 1; W.G. Ringe, n 14 above, 71.

tension towards acceptance of intra vires as the defining principle behind corporate governance and practice. It must be remembered that with regard to transactions carried out in the name of the company prior to registration, those who took the actions have unlimited joint and several liability towards third parties, as do sole shareholder founders and those shareholders who have taken the decision in the articles of association or a separate document to authorize or permit the conclusion of the transaction. Where, following registration, a company approves a transaction carried out during that period of time, the company is also liable, and is required to identify those who took the action. Therefore, if we apply contrary reasoning, we cannot but realize that the law provides for the need to adapt a company's capitalisation to the requirement to protect persons who have established legal relationships with the managers of the legal entity that is being formed; nor should we forget the negative prescription that provides that issuance of the shares is prohibited prior to registration, since they cannot be the subject of a public offering as financial products.

From the viewpoint of wishing to demonstrate that the principle of intra vires is implicitly present in the underlying legislation, including as a function of the capitalisation and funding of a company, it is worth considering that with regard to contributions, a person who contributes assets in kind or in the form of receivables must submit a sworn declaration prepared by an expert appointed by the courts of the judicial district where the company has its registered office that must include a description of the goods or receivables granted, a declaration that their value is at least equal to that attributed to them for the purposes of calculating the share capital and any premium and the evaluation criteria applied: by way of a corollary interpretation, the tension of the regulations that ensure that share capital must be created correctly in order to obtain an adequate capitalisation of the company cannot but be a consequence of this. Among other things, if we wish to continue our reading of the provision, the fact of intra vires appears to be even more stressed, since directors are required to check the evaluations within a specific time period, and, if there are reasonable grounds, must proceed with a revision of the estimate.

Corporate and Financial Markets Law

The Spanish Reform of Director's Duties and Liabilities

Mauricio Troncoso Reigada*

Abstract

Spain has introduced one of the most far-reaching European reforms in the area of directors' liability over the last few years. This article analyses and assesses this reform, which affects directors' duties as well as their liability, and which may serve as a model for amendments to the legislation in place in other countries, primarily in Europe and North and South America.

I. Introduction

Spain has introduced one of the most far-reaching European reforms in the area of directors' liability over the last years, set out in *Ley 31/2014, de 3 de diciembre, por la que se modifica la Ley de Sociedades de Capital para la mejora del gobierno* corporativo (*Act 31/2014 of 3 December amending the Companies Act to improve corporate governance (hereinafter 'the Reform')*.

Act 31/2014 includes nearly all the recommendations contained in the report entitled 'Study of proposals for legislative amendments'[1] drafted by the Government's Expert Commission on Corporate Governance. Other provisions introduced by the Reform were taken from the 'Proposal for Mercantile Code' of June 2013, drafted by the country's General Codification Commission at the behest of the Ministry of Justice.[2] Yet other provisions set forth in the Reform were formerly voluntary recommendations laid down in the 'Code of good governance for listed companies' (adopted in 2006 and updated in June 2013), which were now placed on a statutory (and consequently binding footing) for all companies.

The changes introduced by the Reform amending the Companies Act (*Ley de Sociedades de Capital*, hereinafter 'LSC')[3] refer to the two bodies around

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[1] The Expert Commission's Report is available (in Spanish) at https://tinyurl.com/y55eks97 (last visited 27 December 2020).

[2] The Proposal is available (in Spanish) at https://tinyurl.com/y9t58eqt (last visited 27 December 2020).

[3] Real decreto legislativo 20 July 2010 no 1, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital. The Ministry of Justice (Ministerio de Justicia) has published an 'unofficial'

which companies are structured. Some provisions affect the rules on the general shareholders' meeting and shareholders' rights with a view, as stated in the statute, to 'reinforce the role (of the general meeting) and encourage shareholder participation' (Preamble, section IV). Other provisions refer to the company's administrative body and, more specifically, in connection with listed companies, to the board of directors. Their aim is to 'regulate certain aspects to which increasingly greater importance is being attached, such as governing body transparency, egalitarian treatment of all shareholders, risk management, and board member independence, participation and professionalization' (Preamble, section V).

This Article presents a discussion of the most prominent changes introduced by the Reform *vis-à-vis* the regulation of directors' duties (II below) and the provisions governing their liability (III below).

II. Directors' Duties

1. Introduction. Fiduciary Duties

a) Fiduciary Duties and General Thrust of the Reform

Directorship of a company entails the assumption of a series of fiduciary responsibilities or 'duties'. These duties are rules of conduct that present a template for the exercise of directors' responsibilities and serve as a basis to establish liability where such criteria go unmet. There are essentially two fiduciary or 'behavioural' duties: the duty of care and the duty of loyalty.[4]

The approach to directors' duties has changed radically in recent years, in both legal doctrine and positive law.[5] Up to fairly recently, directors' duties have been traditionally and predominantly viewed as the premise or grounds for the corporation or a third party claiming liability for damages. In the wake of the corporate governance movement, however, a new approach has emerged, whereby directors' duties are regarded as an ideal instrument to secure the objectives pursued by that movement.[6] This new approach stresses not the *ex-post* effectiveness of such duties in the event of non-compliance, but their power as an *ex-ante* deterrent. They play a normative role,[7] by aligning directors' and

English translation of Act https://tinyurl.com/y97bhdo7 (last visited 27 December 2020).

[4] See J. García de Enterría, 'Los deberes de conducta de los administradores. Deber de diligencia y deber de lealtad', in J. García de Enterría ed, *La reforma de la Ley de Sociedades de Capital en materia de gobierno corporativo* (Cizur Menor: Clifford Chance-Thomson Reuters Aranzadi, 2015), 62.

[5] A synthesis of these changes in legal doctrine and positive law can be found in J.O. Llebot, 'El deber general de diligencia (art. 225.1 LSC)', in F. Rodríguez Artigas et al eds, *Junta General y Consejo de Administración en la Sociedad Cotizada* (Cizur Menor: Revista de Derecho de Sociedades-Thomson Reuters Aranzadi, 2016) II, 320-323.

[6] A pioneering study in Spanish legal doctrine was authored by C. Paz-Ares, 'La responsabilidad de los administradores como instrumento de gobierno corporativo' *InDret*, 4, 3 (2003).

[7] The theoretical grounds for the new regulation of directors' duties are to be found in agency

shareholders' interests in terms of value creation and distribution (which is also the primary aim pursued by the corporate governance movement).[8] Moreover, the existence of an effective scheme for establishing directors' liability that identifies and penalises a breach of a director's fiduciary duties is an essential element in the generation of trust on securities markets.[9] Accordingly, the regulation of directors' fiduciary duties is now an essential element in any corporate governance system.

The duty of care is associated with value creation: it calls upon directors to maximise value, and, when they fail to do so, their acts constitute mismanagement. The duty of loyalty, which is related to the distribution of that value, aims to minimise the risks of undue distribution. Failure to comply with this duty constitutes misappropriation.[10]

The Reform amending the LSC includes many provisions set out in the June 2013 Proposal for Mercantile Code. It focuses primarily on two matters. First, it defines the content of the duty of care while on the other it reinforces the duty of loyalty by reformulating its overall content and main channels for fulfilment. The new regulation is binding not only on listed companies, (for which no specific provision is established) but on all companies. The Reform was clearly informed and inspired, however by the singularity of circumstances surrounding listed companies.[11]

b) Differential Treatment of Negligence and Disloyalty

Although both duties contribute to define what is expected of directors, the Reform purposes to treat them with differing rigour and consequently penalise their non-compliance with different degrees of penalty. Essentially, the principle underpinning the Reform is that the law should be lenient and tolerant toward a breach of the duty of care, ie, towards negligence (hence the introduction of the business judgement rule, discussed later), but strict and severe toward breach of the duty of loyalty, which ultimately consists in disloyal conduct (explaining, also as discussed later, the possible direct standing of corporate liability action by a minority shareholder in the event of such infringements).[12]

That philosophy is supported by a number of considerations, including

cost theory.

[8] J. García de Enterría, n 4 above, 63. As pointed out by C. Paz-Ares, 'Anatomía del deber de lealtad', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 427, the goal of any corporate governance system 'is to align the incentives of insiders (management, directors and, as appropriate, control shareholders) with those of outsiders (minority shareholders)'. Similarly, J. Alfaro, 'Artículo 225. Deber general de diligencia', in J. Juste ed, *Comentario de la reforma del Régimen de las Sociedades de Capital en materia de Gobierno Corporativo (Ley 31/2014). Sociedades no cotizadas* (Cizur Menor: Thomson Reuters-Civitas, 2015), 313-317.

[9] J. García de Enterría, n 4 above, 63

[10] See C. Paz-Ares, n 8 above, 427; J. Alfaro, n 8 above, 317.

[11] J. García de Enterría, n 4 above, 62.

[12] See J. García de Enterría, n 4 above, 63; C. Paz-Ares, n 8 above, 434.

those set forth below.

First, the two conducts constitute different degrees of jeopardy for company equity. Unlike disloyal conduct, negligent behaviour does not normally entail any significant earnings for the perpetrator. The 'earnings' are normally confined to a savings of time and effort, with no material benefit. Moreover, the directors involved must assume part of the costs of their sloth because, if the company falters, they lose their jobs and consequently their main source of income. Therefore, directors have greater incentive to appropriate company assets than to manage them negligently, while fraudulent conduct is much more detrimental to the integrity of company equity than negligence.[13]

Secondly, the likelihood of commission for each conduct also varies. Breach of the duty of care not only entails no benefit for directors, but usually generates visible effects that can be recognised and penalised by shareholders and the market. In principle, then, directors have no incentives to carry them out. Inherent in disloyal conduct, in contrast, is the incentive afforded by the opportunity to benefit personally, albeit at the expense of shareholders, so the probability of them being displayed is greater. Moreover, the very nature of disloyal acts, which tend to be concealed behind ordinary and formally legitimate operations, hinders their identification and persecution. For all the foregoing, disloyalty is more likely or foreseeable than negligence, that is a breach of the duty of care.[14]

Thirdly, companies (listed companies in particular) have powerful market mechanisms with which to penalise director negligence (reputation, forfeiture of future job opportunities and so on). No market mechanisms are in place, however, that would constitute an alternative to liability rules as effective penalisation for fraudulent conduct.[15]

Last but not least, the degree of legal uncertainty attached to each conduct also differs. The possibility of court error (misclassifying conduct and imposing undue liability) is scant in the case of the duty of loyalty, for loyalty is a moral conceit, for which human beings in general and judges in particular are well prepared. Conversely, negligent conduct poses serious risk of error, for judges are not business management experts.[16] The likelihood of misjudging such behaviour is therefore greater. If it were severely penalised, directors would tend to adopt overly conservative business strategies to minimise the possibility of their governance being deemed negligent.

In our opinion, that difference between how breach of the two types of duties is appraised ('lenient and tolerant toward breach of the duty of care', but 'strict and severe toward breach of the duty of loyalty') is mirrored as well in the nature, mandatory or otherwise, of the regulation in question. Hence, the legislator

[13] See J. Alfaro, n 8 above, 317.
[14] See J. García de Enterría, n 4 above, 63-64.
[15] ibid 317-318.
[16] ibid 318.

explicitly provides that the rules governing the duty of loyalty are mandatory (Art 230.1 LSC), which is not incompatible with the likewise explicit provision on the possible dispensation, for certain cases, from compliance with this duty in connection with certain instrumental obligations designed to elude conflicts of interest. On the other hand, nothing is said in this respect about the duty of care. Such 'eloquent silence' should be interpreted as an indication that these are dispositive provisions (with the probable exception of gross dereliction). Consequently companies are free to limit directors' liability for failure to comply with this duty in their articles of association.[17] Nevertheless, provisions limiting liability for breach of the duty of care cannot exempt directors from liability for direct damage to third party equity (Art 241 LSC, non-contractual liability proceedings).[18]

[17] See C. Paz-Ares, n 8 above, 446; J. Sánchez-Calero, 'La reforma de los deberes de los administradores y su responsabilidad', in M. Alba Fernández et al eds, *Estudios sobre el futuro Código Mercantil: Libro Homenaje al profesor Rafael Illescas Ortiz* (Getafe: Universidad Carlos III de Madrid, 2015), 911. J. Alfaro, n 8 above, 324, deems that although the articles of association cannot abolish this duty entirely (as that would be tantamount to leaving performance of the contract to directors' discretion), articles provisions that limit directors' liability for breach of the duty of care are valid. J. Juste also appears to acknowledge this possibility in 'Artículo 230. Régimen de imperatividad y dispensa', in J. Juste ed, *Comentario* n 8 above, 361, 416; Id, 'Artículo 236. Presupuestos y extensión subjetiva de la responsabilidad' ibid 443-446. J.O. Llebot, n 5 above, 340, in turn, deems that the duty of care could be overruled.

J. Hernando, 'La business judgement rule' *Revista de Derecho Mercantil*, 299, 355-360 (2016), adopts a different approach to the content of the articles, drawing a distinction between the possibility of modulating directors' duty of care and the possibility of exonerating or limiting their liability for failing to comply with this duty.

In connection with the former, Hernando deems that regulation of the duty of care, like that of the duty of loyalty, is *ius cogens* and consequently cannot be addressed in the articles (The grounds for that argument lie in the imperative wording of Art 225 LSC. Moreover, in the author's opinion, thinking that shareholders could empower the directors to act with a standard of care less strict than demanded of a reasonable business person would be as senseless as believing that directors could be released from the duties of gathering the information needed to perform their assigned tasks, devoting suitable time to their responsibilities or adopting measures that would ensure good company management and control).

Nonetheless, the author believes the solution to the second problem is different and that directors' liability to the company for breach of this duty can be regulated by the articles, where it may be excluded or limited. The reasoning is that 'while it is true that the possibility of excluding directors' liability (but not the duty per se) from the articles constitutes a radical departure from Spanish Company Law tradition, it is in fact in line with the general provisions on contractual liability set out in the Spanish Civil Code. Thus, Art 1102 provides that the action to enforce liability arising from wilful misconduct shall not be waived, *contrario sensu* whereas in the event of guilty negligence it may'. Hernando adds that this rationale is consistent with the fact that the possibility of compromise or waiver of the corporate liability action (by the General Meeting unless shareholders representing five per cent or more of the share capital object) has always been acknowledged, along with the possibility that the articles (see Arts 60 *j*) and 161 LSC) may vest the General Meeting with more management powers.

[18] As rightly noted by J. Juste, n 17 above, 447. See also J.O. Llebot, n 5 above, 341, who writes that as modification in the articles of the duty of care is one of the instances of voluntary exclusion of the applicable law pursuant to Art 6, para 2, of the Civil Code, it is subject to the limit established in the legal text itself, to the effect that the change may not jeopardise third party (such as company

2. The Duty of Care[19]

a) Modulation of the Duty of Care in Keeping with the Nature of the Position and Functions Performed

aa) Directors, as managers of others' wealth, are bound by the duty of care, which entails securing the maximum value for that wealth.[20]

The standard set out in Art 225.1 LSC defining the degree of care is that of an 'orderly (ie, reasonable and prudent) businessman', an allusion to the degree of dedication, skill, foresight and knowledge required to manage any company.[21] That standard is comparable to those of other legal systems[22] and determined in keeping with each specific company's size, the industry in which it operates and the business conducted.[23]

bb) The Reform modulates directors' general duty of care by associating it with 'the nature of the position and duties attributed to each' (Art 225.1 LSC).[24]

This change is particularly relevant to the board of directors. Despite its collegiate nature and the fact that its members are jointly and severally liable for violations of the duty of care (Art 237 LSC, not amended), distinctions can now be drawn among the functional specialisations characteristic in practice of the most complex forms of business administration, such as in listed companies.[25]

Nevertheless, all the board members are bound by the duty of care as regards the board's non-delegable powers.[26] Even in that area, however, the degree of

creditor) interests.

[19] For a comprehensive analysis of this duty after the Reform see J.O. Llebot, n 5 above, 319-341.

[20] See C. Paz-Ares, n 8 above, 427; J. García de Enterría, n 4 above, 64; J. Alfaro, n 8 above, 317.

This opinion is not unopposed. In Spanish legal doctrine, for instance, J. O. Llebot, n 5 above, 328, deems that the objective, rather than maximising the value of the company, should be to maximise profits or positive results, for that alone ensures business profitability and suitable incentives to conduct such activity in the interest of all concerned, while guaranteeing the company's on-going presence on the market.

[21] J. García de Enterría, n 4 above, 64, and J.O. Llebot, n. 5 above, 328, believes that the adjective 'reasonable' applied to an entrepreneur is an indication that the lawmaker decided to require average behaviour, ie, behaviour displayed by most business people.

[22] See for example in German Law, with regard to the *Aktiengesellschaft* (AG) §93(1) Satz 1 *Aktiengesetz* which provides, Die Vorstandsmitglieder haben bei ihrer Geschäftsführung die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters anzuwenden 'or concerning the *Gesellschaft mit Beschränkter Haftung* (GmbH) §43(1), which reads, Die Geschäftsführer haben in den Angelegenheiten der Gesellschaft die Sorgfalt eines ordentlichen Geschäftsmannes anzuwenden'.

[23] See J. Alfaro, n 8 above, 319. This author contends that, while no specific expertise is needed to be a director, compliance with their obligations requires them to acquire the skills needed to perform their duties. That, in turn, depends on the business conducted by the company and each director's specific role: being an executive officer is hardly the same as being a member of the auditing committee, for instance (see J. Alfaro, n 8 above, 321).

[24] This provision aims to improve on the former legislation, criticised for not taking the differences in board members' roles in corporate management into consideration (cf J. Sánchez-Calero, n 17 above, 899).

[25] See J. García de Enterría, n 4 above, 64-65.

[26] On this matter J.O. Llebot, n 5 above, 337-339.

skill and dedication (care) demanded of executive directors cannot, obviously, be required of non-executive directors. The former must be subject to a higher standard of care than the latter, for they are entrusted with the company's actual management, whereas non-executive directors engage primarily in control and supervision. In addition, the existence of certain commissions under the aegis of the board (mandatory in listed companies, such as the auditing commission and a single joint or two separate appointment and remuneration committees, (see new Art 529-*terdecies*.2 LSC) means that the duty of care incumbent upon the directors sitting thereon is extensive to the tasks entrusted to such committees (see new Arts 529-*quaterdecies*.4 and 529-*quindecies*.3 LSC).[27] In other words, while all members are bound by a duty of care, that duty is not identical for all, but must be delimited in keeping with the responsibilities in fact entrusted to each.[28]

cc) In addition to this modulation of the duty of care, the Reform introduces two explicit specific descriptions of it.[29] On the one hand, directors are bound to devote due effort to their position (Art 225.2 LSC). That obligation also entails having the skills required to manage the company and hence to be personally qualified to perform the duties inherent in the position to which they are appointed in the company at issue.[30] Attendant upon that obligation is the duty to adopt the measures necessary for good governance and control (Art 225.2 *in* fine

[27] See J. Sánchez-Calero, n 17 above, 900; J.O. Llebot, n 5 above, 339.

The same author (cf J.O. Llebot, n 5 above, 333-334) deems that account should be taken not only of the nature of the specific position (for instance, when administration is vested in a board of directors, being CEO or a member of the executive committee) or in listed companies, of director status (executive director is not the same as proprietorship director or independent director), but also the nature of any supplementary position that may be assumed by the director (which would logically be applicable, to come back to the example of a board of directors, to executive directors; who, for instance, in addition to being directors is chief financial officer).

[28] J. García de Enterría, n 4 above, 65. J.O. Llebot, n 5 above, 334-335, notes that the duty of care is incumbent not only upon *de jure* directors, but also upon anyone subject to directors' liabilities: (a) *de facto* and shadow directors (Art 236.3 LSC); (b) the person, whatever their position, who has the highest management role in the company, when no permanent delegation powers of the board exist in one or more directors (without prejudice to the actions of the company based on their legal relation to said person) (Art 236.4 LSC); and (c) natural persons representing a body corporate director (Art 236.5 LSC).

[29] Concerning them see V. Mambrilla, 'Las concretas manifestaciones del deber general de diligencia de los administradores', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 360.

J.O. Llebot, n 5 above, 332, contends that the duty of independence (*ex* Art 226.2 LSC) and compliance with the law (*ex* Art 225.1 LSC) must be added to those two, noting that directors' personal liability for breach of the law is set out in the Penal Code ad many provisions of administrative law. Nonetheless, the duty to comply with the law stemming from the duty of care laid down in Art 225.1 LSC refers not to the establishment of such personal liability, but to requiring directors to guarantee company compliance with all applicable legal provisions, for if it fails to do so the company itself may incur liability (see J.O. Llebot, n 5 above, 332-333).

[30] As pointed out by J. Sánchez-Calero, n 17 above, 901. See in the jurisprudence the Judgement of the Tribunal Supremo 7 June 2017 no 360, available at https://tinyurl.com/go9gzxz (last visited 27 December 2020).

LSC).[31] On the other hand, directors are bound by the duty to demand from and entitled to the right to obtain from the company the information needed to comply with their obligations (Art 225.3 LSC). Both are essential, bearing in mind that directors' duty of care refers to means, not to outcomes.[32]

The degree of information they must obtain depends on the gravity and urgency of the decision to be adopted by the board. One consequence of this duty to be informed is the obligation to adopt a critical attitude toward the information received from company managers, usually referred to as the duty to investigate. That said, inasmuch as directors should be able to trust corporate information, they would not be held liable when they adopt decisions or fail to take action on the grounds of data furnished by outside experts or company managers or employees. This is especially true in large companies, in which sheer size prevents directors from acquiring detailed knowledge of all aspects of company business.[33]

b) Duty of Care and the Business Judgement Rule

aa) The most significant change in respect to the duty of care has to do with the inclusion of the Anglo-Saxon and more specifically the US conceit known as the business judgement rule, translated in the LSC as *protección de la discrecionalidad empresarial*, which back-translates literally as 'protection of business discretion'.[34] The new text of Art 226.1 LSC provides that:

> 'Where strategic and business decisions are subject to protection of business discretion, the standard of care of an orderly businessman will be understood to be met by directors adopting decisions in good faith, with no personal interest in the object of the decision, with sufficient information and in keeping with proper decision-making procedures'.

bb) The *object* of the rule, then, is strategic and business decision-making.[35]

[31] J. Sánchez-Calero, n 17 above, 901, interprets this second clause of Art 225 LSC to mean that directors must be diligent not only in their individual tasks, but also in the general organisation of company governance, ie, the duty to establish the policies that guide company management and monitor them.

[32] This interpretation of the duty of care as a means- rather than and outcomes-related obligation has been reinforced with the inclusion in Spanish law of the *business judgement rule* (see J. Hernando, n 17 above, 321).

[33] See J. Alfaro, n 8 above, 322.

[34] J. García de Enterría, n 4 above, 65. In connection with this rule and its acceptance in Spanish law, see J. Hernando, n 17 above, 313; and A. Roncero, 'Protección de la discrecionalidad empresarial y cumplimiento del deber de diligencia', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 383-419.

[35] Regarding the objective scope, in the absence of limitations or nuances, directors have been argued to be protected by the rule wherever the decision can be defined as a business decision, irrespective of the industry involved, parties possibly affected, financial magnitude or other factors (see J. Hernando, n 17 above, 336-337).

Strategic and business decisions must be understood to include all decisions related to any business directly or indirectly engaged in by the company. The company purpose is the natural realm in which directors should act (Art 234.1 LSC), adopting both strategic and ordinary management decisions through which innovation and the assumption of risk characteristic of business activity are channelled. (such as acquisitions or investments or the launch of a new product or service).[36]

Strategic and business decisions are understood to be subject to the business judgement rule when, while lying within the competence of company directors, they are unregulated and require opting for the most suitable and optimal of the alternatives that will best serve the company's interests, in keeping with criteria of prudence and sound judgement. Decisions based on compliance with legal or statutory obligations or unrelated to the company purpose consequently lie outside the bounds of strategic and business decisions and hence of the scope of the business judgement rule.[37]

cc) By introducing this rule, the *legislator assumes* that, provided the aforementioned requirements are met, directors are deemed to comply with the duty of care to which they are bound.[38] Therefore, even where such decisions ultimately prove to be erroneous or even ruinous for the company, they cannot be regarded as negligent nor used as grounds to establish directors' legal liability.[39] Hence, the business judgement rule creates an area of judicial immunity around such decisions[40] (a 'safe harbour' for directors).[41]

[36] See J. García de Enterría, n 4 above, 65; J. Hernando, n 17 above, 337.

[37] See J. Hernando, n 17 above, 337.

[38] As J. Hernando, n 17 above, 333 argues, although the law maker does not specify what sort of presumption is at issue, it should be understood to be an absolute or *iuris et de iure* presumption. Therefore, if the requirements stipulated are met, the provision cannot be nullified.

[39] Nor does the law maker specify whether the presumption is applicable to anyone who claims liability from directors, irrespective of the jurisdiction and branch of law on which it is grounded, or whether, on the contrary, it can only be alleged in the realm of corporate liability.

In light of this legal vacuum some authors have stated that, while its inclusion in the LSC argues in favour of its application to the latter only, the general wording in which it is couched and the fact that it is not included in Chapter V of the LSC (which governs liability), but in Chapter III (on duties), would provide grounds for contending that the 'protection of (directors') business judgement' covers a wider radius than corporate liability (see J. Hernando, n 17 above, 336).

[40] See J. García de Enterría, n 4 above, 66.

[41] Inasmuch as application of this rule is made contingent upon the presence of certain premises, it would seem to be better regarded as a safe harbour (further to J. Alfaro, 'Artículo 226. Protección de la discrecionalidad empresarial', in J. Juste ed, n 8 above, 313, 327) than as a presumption (on the differences with respect to the requirements for application, and in particular to the burden of proof, between formulating the business judgement rule as a safe harbour (as in German law, for instance: see §93 *Aktiengesetz*) or as a presumption (as, paradigmatically, in Delaware) see J. Hernando, n 17 above, 324 and 339.

That means that it is not automatically applicable to liability claims in connection with the breach of the duty of care (in which case the burden of proof of directors' negligence would lie with the plaintiff). Rather, the directors, to benefit from the protection afforded by the rule, must prove that the circumstances required for its application are in place (see J. Hernando, n 17 above, 329).

It has formalised a principle roughly outlined by previous case law, which had already denied that 'the review of the intrinsic wisdom of the economic aspects (of business decisions) can be made subject to court control'.[42]

dd) Its fundamentals lie on different reasons.[43]

i. Given the uncertainty surrounding directors' management performance, this rule attempts to prevent strict rules on negligence-related liability from obstructing the risk-taking inherent in any business activity (ie, directors' decisions which, while risky, as befits any mercantile endeavour, enhance company profits, maximising share value).

ii. That circumstance is reinforced by the difficulties normally attendant upon determining, in retrospect, whether the hypothetical economic damages stemming from a business decision can be attributed to mere risk or to negligence.

iii. That, in turn, should be viewed against the backdrop of the peril inherent in judging such decisions; given the absence of technical rules (*lex artis*) with which to objectively evaluate them; judges' usual lack of technical expertise; and the flagrant risk that their review may be affected by 'retrospective bias' or the tendency to associate the cause of economic loss with negligence in the decision to which it can be traced.[44]

iv. Lastly, this rule also aims to avoid discouraging skilled individuals from accepting the position and to furnish an incentive for directors to perform their duties honestly and in a manner that is in the company's best interest.

ee) Application of this rule is nonetheless contingent upon *compliance with a series of requirements* laid down in Art 226.1 LSC.[45] These requirements are set forth below.

i. Directors must have acted with *sufficient information*, ie, decisions must be adopted with suitable and sufficiently pondered and reasoned supporting data. Thus, obtaining the information required for due compliance with directors' responsibilities is not only one of their rights but, as specified in new Art 225 LSC, an explicit duty.[46]

ii. Directors must act within the framework of a *suitable decision-making procedure*, ie, further to company rules governing decision-making.

iii. Directors must *act in good faith and on matters in which they have no*

[42] See eg before the reform, the Judgments of the Tribunal Supremo 12 July 1983 and 17 January 2012 no 991; Judgements of the Audiencia Provincial de Sevilla 18 March 2015 no 115, 21 May 2015 no 206 and 6 October 2015 no 340; Judgement of the Audiencia Provincial de Vizcaya 24 March 2014 no 203; Judgement of the Audiencia Provincial de La Rioja 18 February 2015 no 36; Judgements of the Audiencia Provincial de Granada 20 April 2012 no 174 and 5 December 2014 no 303, all available at https://tinyurl.com/go9gzxz (last visited 27 December 2020).

[43] On the *raison d'être* for this rule, see J. García de Enterría, n 4 above, 66; J. Hernando, n 17 above, 320-321.

[44] See C. Paz-Ares, n 8 above, 31.

[45] Cf J. García de Enterría, n 4 above, 66-67. For further detail see J. Alfaro, n 42 above, 330.

[46] See Judgement of the Tribunal Supremo 26 November 2014 no 653, available at https://tinyurl.com/go9gzxz (last visited 27 December 2020).

personal interest. That excludes participating in decisions in which they have a direct or indirect interest, as well as any affecting other directors or related parties and in particular any associated with dispensation from obligations deriving from the duty to avoid conflicts of interest (see Art 226.2 LSC). Where directors' impartiality is compromised, their action must be judged in keeping with the parameters not of the duty of care, but of the stricter and more rigorous duty of loyalty.

The absence of these requirements does not, per se, lead to director liability. The implication is merely that, if the business judgement rule is not applicable, judges would be empowered to review management performance in depth and determine whether it complies with the standard of care practised by a prudent and reasonable businessman, as defined in Art 225.1 LSC.[47]

3. The Duty of Loyalty[48]

The legislation governing the duty of loyalty is, as noted earlier, mandatory.[49] Consequently, company articles of association cannot override the obligations laid down in Arts 228 and 229 LSC (although the *General Meeting* or *the administrative body* may grant a dispensation in connection with the instrumental obligations set out in Art 229 LSC on a case-by-case basis). Nevertheless, the articles of association should, logically, be able to add to the provisions on the duty of loyalty by introducing new obligations or prohibitions.[50]

a) Reformulation of the Duty of Loyalty

The other duty incumbent upon directors is the duty of loyalty, the former standard for which was the 'loyal representative'. With the Reform, this standard has been reformulated, however, and directors are now required to act 'with the loyalty of a faithful representative, in good faith and in the company's best interest'

[47] See in this sense J.O. Llebot, n 5 above, 340.

[48] Regarding this duty see especially C. Paz-Ares, n 8 above, 427.

[49] As C. Paz-Ares explains, n 8 above, 446-447, that is based on two types of reasons that lie in different domains. 'The first is positioned internally. If shareholders decide to exempt directors from their duty of loyalty, actually (or at least normally) they would be exempting them from liability for wilful misconduct in the event of non-compliance. That clashes with the very notion of commitment inherent in the definition of contract (such is the justification underlying Art 1102 Civil Code and, ultimately also, Art 1256 Civil Code). The second reason is external. Waiving the protection afforded by loyalty is (or under certain circumstances could be) tantamount to an atypical configuration of the ownership of the assets entrusted to directors for management. That destroys the so-called 'categorisation' function, which seeks to establish typical bounds (hence the principle of *numerus clausus* in property rights) to minimise third party transaction costs in business conducted with the company'.

According to J. Sánchez-Calero, n 17 above, 911 shareholders' agreements that limit this duty are likewise contrary to law.

[50] Legal doctrine appears not to have paid much attention to this possibility (see for instance J. Juste, n 17 above, 415-417).

(Art 227 LSC).[51] Although the law maker does not define what is meant by company interest, requiring directors to act in the company's best interest underscores the notion that it is not sufficient to make just any effort to serve such interests; rather, directors must act in a manner that most effectively ensures their defence.[52]

Faithful or loyal representatives are those which are taken for the purpose of furthering and defending their principals' interests, and subordinating their own personal interest thereto, particularly when conflicts arise,[53] This duty is required, not only of loyal representatives, but also of anyone who assumes management of someone else's interests.[54]

While the duty of care focuses on value creation, the duty of loyalty deals with the distribution of value, preventing directors from performing their duties for their own benefit to the detriment of shareholders.[55] The rule is a general provision, by virtue of which conduct not explicitly set out in the implementing regulations or in connection with subjects not identified therein can still be regarded as disloyal.[56]

b) Reformulation of Its Fulfilment

The Reform essentially undertakes to detail and systematise the various existing formulations of the duty of loyalty and to add others.[57]

More specifically, it establishes two groups of related obligations: (a) *'basic'* or *substantive* obligations deriving from this duty (Art 228 LSC), which indisputably constitute absolute and unconditional prohibitions; and (b) a suite of *instrumental obligations* referring to the 'duty to avoid conflicts of interest' (Art 229 LSC), which embrace relative prohibitions that, as such, may be lifted 'in special cases' (Art 230.2 LSC).[58]

aa) The *substantive obligations*[59] include a few already stipulated in the LSC, such as:

- the duty of secrecy (Art 228.b) LSC);[60]

[51] See J. García de Enterría, n 4 above, 67-68.

[52] See J. Sánchez-Calero, n 17 above, 903-904.

[53] See J. García de Enterría, n 4 above, 68.

[54] For further detail see J. Juste, 'Artículo 227. Deber de lealtad', in Id ed, *Comentario* n 8 above, 363.

[55] See J. García de Enterría, n 4 above, 68.

[56] Cf J. Juste, n 54 above, 367.

[57] See J. García de Enterría, n 4 above, 68. As has been rightly noted, the enforceability of the duty of loyalty is reinforced by the fact that the Reform lists the primary obligations stemming therefrom (see C. Paz-Ares, n 8 above, 437, who also discusses the reasons for such explicit provisions, see 437-438).

[58] See J. García de Enterría, n 4 above, 68.

[59] See in this connection J. Sánchez-Calero, n 17 above, 902; J. Juste, 'Artículo 228. Obligaciones básicas derivadas del deber de lealtad', in Id ed, *Comentario* n 8 above, 378 *et sequentes*; C. Paz-Ares, n 8 above, 438-442.

[60] For the content of this duty after the Reform, see S. Suárez, 'El deber de secreto de los

- the duty to abstain from discussing or voting on matters in which they have a direct or indirect conflict of interest (Art 228.c) LSC) (although 'decisions affecting their status as directors, such as appointment to or revocation of positions on the board of directors or analogous, will be excluded from the aforementioned obligation to abstain from voting').[61]

The new obligations include:

- the general duty to refrain from using their powers 'for purposes other than those for which they were granted' (Art 228.a) LSC);[62]

- the obligation to act at all times to 'further to the principle of personal liability with freedom of criterion or judgement and independence from third party instructions or relations' (Art 228.d) LSC), which is a rule of particular significance for proprietorship directors and, in general, for any directors related to shareholders or third parties.[63]

bb) The duty to avoid conflicts of interest.[64]

In addition to the non-revocable basic obligations described above which constitute its core, the duty of loyalty entails a series of instrumental obligations stemming from directors' general duty to refrain from placing themselves in situations in which their interests might clash with those of the company (Art 228.e) LSC).[65] Accordingly, the new rules do not confine directors' obligation to abstaining from voting in such cases (as per Art 228.c) LSC especially), but establishes the duty to avoid the vote altogether. In other words, the Reform prohibits them from creating such risk *ex ante*. It therefore introduces the 'no

administradores de las sociedades de capital' *Revista de Derecho de Sociedades*, 45, 359 (2015).

[61] Although this duty was included in the former legislation (cf former Art 229.1 II LSC, that provided that 'The director concerned shall abstain from participating in agreements or decisions concerning the operation involved in the conflict'), the wording has been improved in the new version. As noted by J. Sánchez-Calero, n 17 above, 905, the new text is more precise, for in addition to reiterating that abstention is in order in situations involving direct or indirect conflict, it adds other criteria that establish its applicability more precisely. The director must, for instance, abstain not only from voting, but from participating in the debate, an indication that he/she must leave the administrative body meeting as soon as the agreement at issue is tabled. It also states that the director must abstain not only when personally affected by the conflict, but also when related parties are involved.

[62] As J. Sánchez-Calero, n 17 above, 904, explains, this mandate is closely related to the type of administrative system of the company. That means, among others, that account must be taken of the objective scope of the powers vested in the director; those entrusted, for instance, with a given area of business, act disloyally if they use those powers outside such area.

[63] Cf J. García de Enterría, n 4 above, 69.

[64] On this matter see J. Juste, 'Artículo 229. Deber de evitar situaciones de conflicto de interés', in Id ed, *Comentario* n 8 above, 396 and for a more exhaustive discussion, P. Portellano, *El deber de los administradores de evitar situaciones de conflicto de interés* (Cizur Menor: Thomson Reuters Aranzadi, 2016), passim.

[65] Cf J. García de Enterría, n 4 above, 69. As C. Paz-Ares, n 8 above, 442, explains the so-called *conflict of duties* should be likened to *conflict of interest*. 'Such equivalence is justified because in both cases the risk of breakdown of due objectivity and, hence, of undermining the integrity of the protected interest is similar. So much so that the *conflict of duties* is usually called a *conflict of interest on behalf of others*'.

conflict' rule, ie, avoiding situations in which directors' loyalties are divided (between serving the company or some other interest).[66]

These instrumental obligations also some of those addressed in the former legislation, which have been subject to some technical improvements[67] (Art 229 LSC contains a non-exhaustive list of examples of situations that directors should avoid to elude conflicts of interest).[68] Such situations, in particular, involve, in particular:[69]

- the prohibition of using the company name and invoking their status as directors, although only (as the LSC now stipulates) when such use or invocation is to their own undue benefit in private transactions (Art 229.1.b) LSC);[70]

- the prohibition of taking personal advantage of the company's business opportunities (Art 229.1.d) LSC);

- the prohibition of competing with the company for their own- or third-party concerns or interests (Article 229.1.f) LSC);[71]

- the obligation to notify the other directors and, where necessary, the board of directors or, in the event of a sole director, the general meeting, of any direct or indirect conflict of interest situation that they or any related party may have with the company's interests (Art 229.3 LSC).[72]

[66] See J. Juste, n 64 above, 397-398. See also A. Díaz, 'Deber de lealtad y conflictos de intereses (observaciones al hilo del régimen de las operaciones vinculadas)', in A. Carrasco et al eds, *Las reformas del régimen de sociedades de capital según la ley 31/2014* (Madrid: Gómez-Acebo & Pombo, 2015), 28. This author deems that where the director has an indirect interest (through a third party), the duty to elude the conflict should be commensurate with the director's ability to control the third party.

[67] On the innovations entailed in the Reform in connection with such instrumental obligations, see C. Paz-Ares, n 8 above, 443.

[68] The fact that this duty of loyalty is mandatory should not, naturally, be construed to mean that the list cannot be enlarged upon in the articles of association.

[69] See J. García de Enterría, n 4 above, 69-70.

[70] The former wording of this prohibition was broader, for it stated only that 'directors may not use the company's name or invoke their status as directors thereof for operations for their own private benefit of that of related parties' (cf former text of Art 227 LSC). As a result, some authors deemed that the rule was intended to ban operations with the director or related parties, even though the reference in the literal wording is not to directors' business dealings with the company, but to their own private dealings (see J. Juste, n 64 above, 400).

This interpretation, now referring to Art 227.1.b) LSC, continues to be defended by some authors after the Reform (see I. Ramos, 'El deber de abstenerse de usar el nombre de la sociedad o la condición de administrador para influir indebidamente en la realización de operaciones privadas' *Revista de Derecho de Sociedades*, 44, 303 (2015)), whilst the inclusion of Art 229.1.a) LSC (which bans doing business with the company) should have put an end to the debate. Another argument for disregarding that approach lies in what the present author believes to be the very significant exclusion by the law maker of the possibility of dispensation from the provisions of Art 229.1.b) LSC which, in the aforementioned interpretation, would entail banning the company from granting dispensation for self-dealing.

[71] In connection with this prohibition as an instance of special conflict of interest deriving from the duty of loyalty, see S. Gómez, 'La prohibición de competencia del órgano de administración frente al interés de la sociedad representada' *Revista de Derecho Mercantil*, 297 (2015).

[72] See in this regard Judgement of the Tribunal Supremo 7 April 2016 no 222, available at

New prohibitions have also been added to this list, such as:[73]

- the prohibition to conduct business with the company other than in ordinary transactions of scant significance (understood to be those that need not be reported to furnish a true and fair view of the company's net worth, financial position or results) concluded under standard conditions for clients (Art 229.1.a) LSC);[74]

- the prohibition to use company assets (including confidential company information) for private purposes (Art 229.1.c) LSC));

- the prohibition to derive advantage or remuneration from third parties in connection with the performance of their role, outside of mere courtesies (Art 229.1.e) LSC).[75]

The LSC explicitly stipulates that these prohibitions are also applicable when the beneficiary is a party related to a director (Art 229.2 LSC). The term 'related party' must be interpreted as broadly as possible. For natural persons, it includes not only kinship, but joint involvement in other businesses, and for corporate bodies, membership in a group or any other manner of inter-company association.[76] This legal provision must also be interpreted as a reference to *id quod plerumque accidit* (that which usually happens), whereby the pursuit of non-personal interests or interests not associated with related parties also constitute a breach of the duty of loyalty.[77]

Directors must report any action that may entail non-compliance with the duty to avoid conflicts of interest and such information must be included in the

www.poderjudicial.es.

[73] See J. García de Enterría, n 4 above, 70.

[74] For further discussion about the content of this prohibition after the Reform, see A. Díaz, n 66 above, 28-34. See also C. Paz-Ares, n 8 above, 437, fn 38), who deems that defining relevance on the grounds of the impact on financial statements, as in Art 229.1.a), is a major error.

[75] This issue has prompted considerable legal debate in other countries a propos of certain types of remuneration favoured by hedge funds and private equities (cf C. Paz-Ares, n 8 above, 444, and especially Id, 'La anomalía de las retribuciones externas de los administradores. Hechos nuevos y reglas viejas' *Revista de Derecho Mercantil*, 290, 85 (2013)).

[76] See in this sense J. Sánchez-Calero, n 17 above, 910.

[77] Cf J. Juste, n 54 above, 367. C. Paz-Ares, is particularly critical of the delimitation of related parties in n 8 above, 445. This author stresses that the literal wording of Art 231.1 LSC (not amended by the Reform) includes only kinship (sections a), b) and c) and companies under the director's control (d). The provision therefore 'opens an inordinate gap, from a value perspective, in the definition of related parties, for it leaves out three especially significant cases: (i) entities in which the director performs executive duties or holds a significant share; (ii) entities in which the director's related parties perform executive duties or hold a significant share; and (iii) shareholders who appointed the director or fostered his/her appointment (such as, for instance, managers in the parent company appointed as directors in a subsidiary). That value contradiction must be rectified hermeneutically, with a systematic interpretation of the legal provisions and an 'economic appraisal' of reality (*wirtschaftliche Betrachtungsweise*)'. In that author's opinion, the fact that the legal notion of related party cannot be extended is no obstacle to achieving the result sought through the notion of conflict of interest that is normatively relevant. This notion covers (i) conflicts with either own-interest or others' interest (*arg. ex* Art 228e) LSC); (ii) both direct and indirect conflict (*arg. ex* Art 229.3 LSC); and (iii) both upward and downward conflicts (*arg. ex* Art 529ter.1 h) LSC)'.

notes to the company's financial statements (Art 229.3 LSC).[78]

c) Dispensation

Unlike the 'basic' obligations laid down in Art 228 LSC, this second group of obligations may be eligible for dispensation or waiver, given their instrumental and accessory nature, although never as a general policy and only 'in special cases'[79] (Art 230.2 LSC). By way of exception to this premise, the very formulation of the prohibitions laid down in Art 229.1. b LSC to 'use the company name or invoke their status as directors to exert undue influence on private transactions'[80] precludes dispensation or waiver. In other words, the company may, on a case-by-case basis, authorise directors to engage in an operation involving a conflict of interest.[81] That would be the case, for instance, of authorisation to use company assets, seize a business opportunity or conduct a business transaction with the company.

The award of dispensation does not revoke the duty of loyalty, but merely entails company admission that in a given specific case a director's actions do not risk damaging company interests[82] (or even that they may favour such interests).[83]

The legislator establishes rules on dispensation that are easy to administer and, at the same time, fairly difficult to elude. New Art 230 LSC revolves around three basic rules: (i) a procedural rule that ensures or attempts to ensure the independence of the body awarding the dispensation from the director involved; (ii) a fairness rule that attempts to guarantee that the transaction is fair, either because it is innocuous for company equity (for instance, a business opportunity rejected by the company or the dispensation of the non-competition obligation based on a forecast of greater benefit than anticipated harm) or because it is conducted under market conditions; and (iii) a transparency rule.[84]

Of the three, the most important probably is the procedural rule, the purpose of which, as noted, is to ensure the independence of the body awarding the dispensation. Competence to grant such authorisation therefore depends on the

[78] Regarding the substance of this notification duty see J. Juste, n 64 above, 411-412.

[79] See J. García de Enterría, n 4 above, 70. The rationale behind such ad hoc dispensation principle, by virtue of which certain transactions can be authorised on a case-by-case basis, lies in the ability of so-called 'related party dealings' to create value by reducing transaction costs (cf C. Paz-Ares who in n 8 above, 447, notes that 'insiders, given the private information at their disposal and their lower monitoring costs, can offer the best terms. They are also often the only ones willing to support the company financially or in other ways (so-called propping) or in a better position to generate synergies or allocate resources more efficiently between inter-related business operations, etc)'.

[80] See J. Juste, n 17 above, 417.

[81] J. Sánchez-Calero, n 17 above, 912 notes that dispensation can also be granted to a director's related parties when affected by the ban laid down in Art 229.2 LSC.

[82] Cf J. Juste, n 17 above, 415.

[83] See n 77 above.

[84] Cf C. Paz-Ares, n 7 above, 447.

significance of the operation.

aa) The general meeting is the sole body competent to award dispensation in the cases of greatest consequence (Art 230.2 II LSC),[85] including:

- dispensation from the prohibition to derive advantage or remuneration from third parties;[86]

- transactions between the director and the company for a value greater than ten per cent of the company's assets;

- in limited liability companies, the grant of any manner of financial assistance, including company guarantees in a director's favour or when intended to establish a relationship for services or works with the company.

The general meeting is also the sole body that can grant dispensation from the prohibition to compete. In this case, however, the new rules stipulate that the operation must not be expected to be detrimental[87] to the company or that any such detriment must be expected to be offset by the benefits afforded by the dispensation. The dispensation must, moreover, be granted by an explicit and separate general meeting decision (Art 230.3 I LSC). The Reform also enables any shareholder to raise a proposal to the general meeting to dismiss directors competing with the company, in case the risk of harm to its interests became relevant (Art 230.3 II LSC).

bb) In all other cases, authorisation may also be granted by the administrative body,[88] providing the following conditions are guaranteed (Art 230.2 III LSC):

- The independence of the directors from the applicant for dispensation.

- The operation is harmless to the company's assets or, where appropriate, that it is carried out under market conditions and that the process is transparent.

It should be noted that the award of the dispensation does not exempt directors from their liability in any way whatsoever. The sole implication is that

[85] Further to new Art 190.1 e) LSC, when directors with conflicts of interest are also shareholders, they may not vote. See in this regard J.M. Embid, 'Los supuestos de conflicto de interés con privación del derecho de voto del socio en la Junta General (art. 190.1 y 2 LSC)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, I, 114-117.

[86] C. Paz-Ares, n 8 above, 448, deems that this exclusive power refers at least to the part of the remuneration controlled by the General Meeting, but considers (cf fn 58) that 'in respect of the remuneration not linked to the duties of the position, such as consideration for the executive tasks performed by executive directors, the body competent to grant dispensation is the board of directors. In this regard, Art 230 LSC should be subordinate to the respective teleological reduction (see C. Paz-Ares, n 75 above, 125-126)'.

[87] The notion of damage should be interpreted broadly to include both loss and *lucrum cessans* (see J. Sánchez-Calero, n 17 above, 914).

[88] In the opinion of C. Paz-Ares, n 8 above, 448, authorisation may also be granted by 'another company body comprising independent directors only. This term should be interpreted not in respect of rules on reporting on corporate governance (see Art 529-*duodecies*.4 LSC), but on the understanding that its members are not tied by any particular bonds to the directors at issue other than the collegiate relationships deriving from membership in the same body. In listed companies, a report from the Auditing Commission (*arg. ex* Art 529-*quaterdecies*.4. g).3 LSC), or as appropriate the Appointments and Remuneration Commission, is normally necessary as well (see last paragraph of the aforementioned provision)'.

the operation is no longer subject to the stricter duty of loyalty, but to the laxer duty of care (although the decision to grant authorisation does not accord the beneficiary the privileged protection conferred by the business judgement rule, further to new Art 226.2 LSC).[89]

III. Directors' Liability

1. Purpose of the Reform

The regime governing directors' liability aims to lower the costs of monitoring directors' conduct via provisions which, by requiring restitution or indemnity for the damage caused by misconduct, serve as an incentive to manage companies in their owners' interests.[90]

The Act on Reform of the LSC introduces amendments to the directors' liability regime with a view to reinforcing directors' fiduciary duties, especially the duty of loyalty, and facilitating the exercise of liability actions.[91]

The Reform adopts essentially three mechanisms:

(i) enlarging the number of people subject to directors' liability by explicitly extending it to those in comparable positions;

(ii) elasticising the requirements for standing to bring a corporate liability action;

(iii) clarifying the judicial remedies that can be demanded of directors.

2. Objective Scope of Liability

The material prerequisites for claiming directors' liability are:[92]

- the existence of illicit or unlawful conduct on the part of directors;
- the existence of damage to company assets, in corporate liability actions, or to the net worth of shareholders or third parties, in individual liability actions; and
- the existence of a causal link between such action or omission and the damage caused.

The first of these requirements can, in turn, be split into two elements:

(a) the existence of an unlawful act or omission on the part of the directors;

[89] See in this regard C. Paz-Ares, n 8 above, 453, who also notes that the burden of proof lies with the plaintiff.

[90] J. Alfaro, n 8 above, 317.

[91] Cf T. Cid and T. García, 'El régimen de responsabilidad de los administradores', in J. García de Enterría ed, *La reforma de la Ley de Sociedades de Capital en materia de gobierno corporativo* (Cizur Meror: Clifford Chance-Thomson Reuters Aranzadi, 2015), 72.

[92] See by way of example of case law, the Judgements of the Tribunal Supremo 4 April 2003 no 345, 26 December 2014 no 732 and 3 March 2016 no 13, all available at https://tinyurl.com/go9gzxz (last visited 27 December 2020); and of legal doctrine V. J. Quijano, 'Los presupuestos de la responsabilidad de los administradores en el nuevo modelo del consejo de administración (arts. 236.1 y 2 LSC9)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 596.

(b) the existence of a criterion for the attribution of liability.

The Reform has specifically affected the objective scope of the directors' liability, because it has introduced changes that have an impact on these last two issues.

a) First, the delimitation of the unlawful conduct of directors has been affected as a result of changes in the rules governing directors' duties (introduction of the business judgement rule, broadening of the notion of related party, etc).

b) Secondly, new provisions have been added to establish when these conducts are to be attributed to directors of a company.

aa) the Reform first added, at the end of Art 236.1 I LSC, a phrase explicitly stating that directors shall be liable 'whenever negligence or wilful misconduct is involved'. With this specificity, the legislator clarified that the principle of fault-based liability, which is the general rule of liability, is also applicable with respect to the liability of directors, a position that had already been maintained by the courts and by the majority of the legal doctrine.[93] The wording adopted means all forms of negligence fall within it, both because of their content (culpa *in comittendo, in omittendo, in vigilando, in eligendo, in instruendo*, etc) and because of their severity (grave, slight, etc).[94]

bb) Secondly, the Reform has introduced the presumption that directors are guilty 'unless proven otherwise, when the act is contrary to the law or the articles of association' (cf the new Art 236.1 II LSC). This rebuttable presumption is a reversal of the burden of proof, but only in cases where the conduct is contrary to legal provisions or the articles of association. In these cases, therefore, the plaintiff must prove that the act is contrary to them and the causal link with the damage, while the defendant director must prove the absence of wilful misconduct or negligence.[95]

cc) Finally, it is necessary to comment regarding the ineffectiveness of general meeting exoneration of directors' liability foreseen in Art 236.2 LSC. Although this provision undergoes no formal change (so that it continues to provide that 'Under no circumstance shall the fact that the act or agreement has been adopted, authorised or ratified by the general meeting waive liability for the detrimental

[93] See for all, J. Quijano, n 92 above, 603; J. Juste, n 17 above, 447-448; M.I Grimaldos, 'La reciente redacción del artículo 236 de la Ley de Sociedades de Capital: ¿nuevos presupuestos? ¿nuevos responsables?' *Revista de Derecho de Sociedades*, 44, 233, 236-237 (2015)**;** J. Hernando, n 17 above, 313, 344. Prior to the Reform, the notion of liability for conduct contrary to law or the articles of association prompted intense doctrinal debate. Whereas one group of authors deemed liability to be strict in such cases, the majority opinion was to continue to require wilful misconduct or guilty negligence as a criterion for establishing liability (see a recent reference to this debate in M.I. Grimaldos, 235-236).

[94] See by way of example J. Quijano, n 92 above, 603-604, stating that the latter distinction will be taken into account when quantifying the damage.

[95] Cf J. Quijano, n 92 above, 604, who further deems that the rebuttable presumption of Art 236.1. II LSC is applicable as well to acts contrary to company regulations.

agreement'[96]), there is an indirect impact of the Reform on this issue. Insofar as the application of this provision has been *de facto* altered as a result of the fact that the legislator has broadened the powers and possibilities of intervention of the general meeting in management affairs (see paradigmatically the new wording of Art 160 f of the LSC); and has introduced 'additional powers' of the general meeting of the listed company) by new Art 511-*bis* LSC.[97]

3. Subjective Scope of Liability

Another fundamental change in the directors' liability regime has been the extension and clarification of its subjective scope.[98] This has been carried out in a three different ways.

a) The first extension and clarification involves the concept of *de facto* administrator. Thus, although the LSC already provided for the extension of the directors' liability regime to de facto directors prior to the Reform, new Art 236.3 LSC has specified the content of this figure, indicating that it includes both (a) the *de facto* director in a narrow sense (at times called 'notorious *de facto* director'), understood to be 'persons who in actual practice perform a director's duties without any appointment or whose appointment is null or expired, or by virtue of some other appointment';[99] and (b) the shadow director,

[96] Unofficial English translation of Art 236.2 LSC, Ministry of Justice (Ministerio de Justicia), https://tinyurl.com/y97bhdo7 (last visited 27 December 2020).

[97] Thus, legal doctrine deems that such exoneration may very likely be enforceable in certain cases: for instance, where the shareholders who themselves approved the instructions attempt to bring corporate liability action against the directors (see J. Juste, n 17 above, 452-453). More broadly, such exoneration would be justified in connection with matters for which competence is attributed to the General Meeting or which require its approval. In such cases the directors (as a general rule although with a few exceptions) would be obliged to implement those decisions, if validly adopted, and should not incur liability for any damages they may cause (see J. Quijano, n 92 above, 611). J.O. Llebot, n 5 above, 336, appears to support that view, deeming that directors are not subject to the general duty of care in instances where, pursuant to the provisions of Art 161 LSC, the General Meeting decides to issue instructions to the administrative body or makes the directors' decisions on certain matters contingent upon its authorisation. In these instances, directors would only be bound by the duty of care in respect of the measures taken to implement the decisions adopted by the General Meeting.

[98] For further detail see J. Juste, n 17 above, 453-462; M.I. Grimaldos, 'Presupuestos y extensión subjetiva de la responsabilidad. Solidaridad: artículos 236 y 237. Otras acciones por infracción del deber de lealtad: artículos 227.2 y 232', in L. Hernando ed, *Régimen de deberes y responsabilidad de los administradores en las sociedades de capital* (Hospitalet de Llobregat: Bosch, 2015), 328-329; I. Sancho, 'La extensión subjetiva del régimen de responsabilidad a los administradores de hecho y ocultos y a la persona física representante del administrador persona jurídica (art. 236.3 y 5)', in F. Rodríguez Artigas et al ed, *Junta General y Consejo de Administración en la Sociedad Cotizada* (Cizur Menor: Revista de Derecho de Sociedades-Thomson Reuters Aranzadi, 2016), II, 613-625.

[99] According to legal doctrine (by way of example, J.O. Llebot, n 5 above, 335), *de facto* directors are those who perform tasks characteristic of directors but have no valid appointment as such, ie, no legitimate power to do so. Such lack of legitimacy may be attributable to the absence of an appointment (someone only with powers of attorney, for instance), its invalidity (for example an irregular appointment) or its expiration.

ie the person 'under whose instructions directors act'.[100] The latter raises more practical uncertainties,[101] given the provision's breadth and possible application to groups of companies (legal doctrine has actually likened *de facto* directors to directors of the dominant company relative to its subsidiaries)[102] or even to the relations between creditor institutions and distressed companies.[103]

It is important to point out, however, that the new provision does not really imply any extension of this figure, but merely makes a simple clarification, because in fact it has merely incorporated the broad concept of a *de facto* administrator that had already been used by doctrine and jurisprudence.[104]

The Reform has thus contributed to establishing a broad and flexible definition of the term director, adopting a material rather than a formal approach to the concept. A director is anyone who acts as such, either directly, performing tasks characteristic of directors, or indirectly, handing down management instructions to a company's formally appointed directors. This premise defines the scope of directors' liability fairly, for such liability is required of anyone who, performing a director's duties, compromises company or third-party assets. It eliminates the need for directors to hold the title as such to be held liable for their actions.[105]

b) Secondly, new Art 236.4 LSC foresees, under some circumstances, the application of the directors' liability regime to the principal manager. Accordingly, where the company has a board of directors and there has not been a permanent delegation of powers to one or more managing directors,

[100] C. Paz-Ares, n 8 above, 449, fn 60, notes that shadow directors may only be regarded as *de facto* directors where they act as such on a routine basis. 'The legal definition should be construed as set out in the Expert Commission's proposal, ie, to refer to persons 'under whose instructions directors are used to acting'. It refers, then, not to sporadic instances, but to continuous and general practice'.

[101] Cf T. Cid and T. García, n 91 above, 75.

[102] See in this regard the comments of M.I. Grimaldos, n 98 above, 319-320; I. Sancho, n 98 above, 621-623; and E. Moreno, 'La responsabilidad de la sociedad matriz como administrador de hecho', in A. Díaz-J.C. Vázquez ed, *Estudios sobre la responsabilidad de los administradores de las sociedades de capital a la luz de sus recientes reformas legislativas y pronunciamientos judiciales* (Cizur Menor: Thomson Reuters Aranzadi, 2018), 253.

[103] As C. Paz-Ares, n 8 above, 449, fn 62, notes, with the recent crisis this new figure has been frequently used in the context of financial institutions that include in their financing or refinancing agreements certain clauses vesting them with the power to approve or veto the borrower company's management decisions. In that author's opinion, however, application of this figure to these cases must be taken *cum grano salis*.

The issue of shadow directors is closely related to the extension of directors' fiduciary duties to controlling shareholders (see C. Paz-Ares, n 8 above, 449; and more recently M. Sáez Lacave, 'Reconsiderando los deberes de lealtad de los socios: el caso particular de los socios de control de las sociedades cotizadas' *InDret* (2016)).

[104] See regarding case law I. Sancho, n 98 above, 619. V. también J. Juste, n 17 above, 454; Id, 'Acción social de responsabilidad contra los administradores: nuevos sujetos responsables', in F. Rodríguez Artigas et al eds, *Estudios sobre Derecho de Sociedades. Liber Amicorum Profesor Luis Fernández de la Gándara* (Cizur Menor: Thomson Reuters Aranzadi, 2016), 434.

[105] See M.I. Grimaldos, n 98 above, 320-321.

> 'all provisions regarding directors' duties and liabilities shall be applied to the person, whatever their position, who has the highest management role in the company, without prejudice to the actions of the company based on their legal relation to said person'.[106]

The *rationale* of the extension only for these managers is to be found in the distinctive features of the board of directors (or to be more precise, of the board without delegation of powers) in comparison with the other possible forms that the administrative body may take (existence of a sole director, or of several directors acting jointly or acting jointly and severally). Thus, unlike the latter, the board is the only one that does not have a permanent character. Accordingly, the legislator has probably presumed that, in these cases, unless one or more managing directors were appointed, there must necessarily be a person who is in charge of the company's management, with that permanent nature that the board lacks. This is certainly the role of managing directors, but as their appointment is optional, in the absence of it, the law will require the person in charge of the day-to-day management to comply with the duties of a director and to be liable as such. In other words, as has been said in very expressive terms, this person is going to be treated as if s/he were some sort of *de facto* managing director.[107]

c) Finally, the other extension of the subjective scope of directors' liability is the one concerning the natural person representing directors who are legal persons. Thus, new Art 236.5 LSC has regulated the legal status of this representative stating that this person

> 'must meet the legal requirements established for directors, shall be subject to the same duties and shall be jointly and severally liable with the corporate director'.[108]

Therefore, the Reform has practically treated the legal status of this representative as that of the corporate director

> 'with the exception that the provision does not directly affect the internal relations between them and that, where applicable, the remuneration

[106] For an analysis of the new provision, see E. Valpuesta, 'Equiparación con el administrador de la persona que tenga atribuidas facultades de la más alta dirección (art. 236.4 LSC)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 633-659.

[107] Cf J. Juste, 'Acción social de responsabilidad contra los administradores: nuevos sujetos responsables', in F. Rodríguez et al eds, *Estudios sobre Derecho de Sociedades. Liber Amicorum Profesor Luis Fernández de la Gándara* (Cizur Menor: Thomson Reuters Aranzadi, 2016), 439-440.

[108] On this provision, see I. Sancho, n 98 above, 626-631.

Nonetheless, company interests could conceivably be adversely affected by body corporate director failure to fulfil its directorship duties to the exclusion of its natural person representative. In such cases legal doctrine deems that the representative, like other directors, may be exonerated under Art 237 LSC (see J. Juste, n 17 above, 462).

entitlement belongs only to the corporate director'.[109]

Certainly, even before the Reform, and despite the fact that the law did not state so, legal doctrine understood that the natural person representative had to comply with the legal requirements demanded in order to be a director and was subject to the same duties.[110] However, and this is the essential change with respect to the former situation, the majority of the authors understood that, in the absence of specific regulation,

> 'the natural person representative of the corporate director could not be held liable as a director *vis-à-vis* the managed company, since only the corporate person held the post and there was no direct contractual relationship between the managed company and the natural person'.[111]

4. Directors' Joint and Several Liability

a) The Reform has not modified the wording of Art 237 LSC, so this provision continues to establish the joint and several liability in those cases in which the administrative body that adopted the resolution or performed the harmful act is made up of a group of persons. Only those members of the administrative body

> 'who prove that having taken no part in its adoption or implementation, they were unaware of its existence or, if aware, took all reasonable measures to prevent the damage or at least voice their objection thereto'

are exempted from this liability.

Such joint and several liability may be equated to establishing a rebuttable presumption (*praesumptio iuris tantum*) of fault for all the members of the administrative body, and liability for all except those able to substantiate the existence of a cause for exoneration.[112] Besides, this entails a reversal of the burden of proof, inasmuch as the plaintiff is released from the need to identify the specific directors who should be held materially liable for the illicit act or omission.[113]

b) However, even though the wording of Art 237 of the LSC has not been amended, the Reform has had an indirect impact on the rule of joint and several liability of directors provided for in it. Since legal doctrine considers that the

[109] Cf J. Juste, n 107 above, 445.

[110] Cf J. Juste, 'Administrador persona jurídica', in C. Alonso ed, *Diccionario de Derecho de Sociedades* (Madrid: Iustel, 2006), 143

[111] Cf J. Juste, n 107 above, 443; I. Sancho, n 98 above, 626-627.

[112] See, by way of example J. Hernando, n 17 above, 345**;** J. García de Enterría, 'La composición del consejo de administración de las sociedades cotizadas: la función de los consejeros ejecutivos y dominicales', in F. Rodríguez Artigas et al eds, *Estudios sobre Derecho de Sociedades. Liber Amicorum Profesor Luis Fernández de la Gándara* (Cizu Menor: Thomson Reuters Aranzadi, 2016), 576.

[113] Cf T. Cid and T. García, n 91 above, 76.

application of this rule (as is generally the case for the entire directors' liability regime) must take account of the specific features of the different ways of organising the company's administration (sole director, several directors acting jointly or acting jointly and severally, or a board of directors), it is clear that, if the Reform has introduced important changes with respect to the regulation of the board of directors, (especially regarding that of listed companies), these changes must be reflected in the application of the liability regime, and as far as we are concerned here, from the rule of solidarity, to this form of administration.[114]

In this regard, it has been noted[115] that the fact that the Reform, on the one hand, has given legal relevance to the differentiation of internal and individual positions of directors and, on the other, has strengthened the supervisory role of the board as a whole, has an effect (a) in assessing the concurrence of the premises of unlawfulness (since this differentiation of functions makes possible that the content of fiduciary duties may be different in each case, which, in turn, allows for a differentiated application of the liability regime); and (b) in the extension of solidarity (since this differentiation also has an impact on whether or not the grounds for exemption can be applied).

5. The Exercise of Corporate Liability Action

One of the goals of the Reform, as has already been pointed out, was to tighten up the directors' liability regime in general, and more particularly, regarding conduct that might breach the duty of loyalty.[116] To this end, the legislator has introduced some changes concerning the exercise of corporate liability action against directors.

a) First, for listed companies, the Reform has lowered the percentage of share capital needed to request the calling of a general meeting to decide on whether corporate liability action should be taken and, in the event of company refusal or inaction, to bring such action in defence of the company's interest.

This reduction is the outcome of a double amendment. The first one is the removal of the requirement set out in Art 239 LSC that, in order to be able to make this request or bring this action, it is necessary to hold five per cent of the share capital, and its substitution with the need to be in possession of the same percentage as, in general, is necessary to request the calling of the general meeting. This change certainly has no impact on unlisted companies, since Art 168.1 LSC, which has not been amended, still stipulates that five percent of the share capital is required to call a general meeting. However, it does have it with respect to listed companies. In effect, and this is the second of the amendments, the Reform has introduced Section a) into Art 495.2 LSC, which has reduced this percentage for listed companies, leaving it at three percent of the share capital.

[114] Cf J. Quijano, n 92 above, 607-608.
[115] Cf ibid 608-610.
[116] Cf T. Cid and T. García, n 91 above, 76-77.

The result, in the end, is that the percentage of share capital necessary to make such a request or exercise such action is now lower in listed companies (three percent is enough) than in unlisted companies (which is still five percent).[117]

b) Secondly, the Reform has introduced the possibility that the aforementioned minority may also directly bring a corporate liability action 'when it is based on the breach of the duty of loyalty without the need to submit the decision to the general meeting' (cf new Art 239.1 II LSC).[118] Therefore, a clear distinction has been made between directors' disloyal and negligent conduct, a distinction which is based on the Reform's intention to be strict and severe with respect to breaches of the duty of loyalty, but benign and tolerant with respect to those of the duty of diligence.[119] This aim, no doubt to be welcomed, does not prevent the new literal wording from raising some doubts, which have rightly been raised by legal doctrine. Thus, it has been pointed out as being inaccurate that Art 239.1 II LSC states this direct bringing of an action can take place 'without the need to submit the decision to the general meeting'. The inaccuracy would result from the fact that this assertion may wrongly lead one to believe that, in order to bring this action, it would be necessary to make a prior request to the directors to convene the general meeting, when the truth is there is no need to make this request, nor is there any need to wait for the meeting to be held, in the event that the meeting was called.[120]

c) Finally, the Reform, with the aim of lifting or lessening a possible impediment to the bringing of corporate action by minority shareholders, has modified Art 239.2 LSC stating that

> '(i)n the event of total or partial estimation of the claim, the company shall be obliged to reimburse the claimant for the necessary expenses incurred within the limits provided for in Art 394 of Act 1/2000, of 7 January, on Civil Procedure, unless the latter has obtained reimbursement of these

[117] Nonetheless, these percentages have been deemed to be impossible to attain in large corporations, even where not listed (cf J. Hernando, n 17 above, 353).

C. Paz-Ares, is also critical of this provision in n 8 above, 451, arguing that standing requirements should have been relaxed further to concur with the percentages laid down in the LSC for challenging corporate decisions: one percent in non-listed and zero point one percent in listed companies (Arts 206.1 and 495.2 b) LSC).

[118] As J. Juste notes in 'Articulo 239. Legitimación de la minoría', in J. Juste ed, *Comentario* n 8 above, 465, the conversion of subsidiary into direct legal capacity has no effect on the nature of the action, which is regarded as being exclusively instituted by the company (for the intents and purposes of the right to the results of a favourable sentence) (see also 468).

[119] See above II.A).2. This distinction between breaches of the duty of loyalty and those of the duty of diligence is not shared by A. Marina, 'Legitimación y prescripción de las acciones de responsabilidad (arts. 239 y 241bis LSC)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 680.

In the event that the claim against directors is based on both the breach of the duty of loyalty and the perpetration of unlawful acts, shareholders are likewise bound by the procedures laid down in Art 239.1 I LSC (cf J. Juste, n 118 above, 469-470).

[120] See in this regard J. Juste, n 118 above, 468.

expenses or the offer to reimburse the expenses has been unconditional'.[121]

This right to reimbursement merits some comment.[122] Firstly, it is applicable both where shareholders bring corporate liability action according to the derivative standing laid down in Art 239.1 I LSC and where they do so pursuant to the direct and active standing provided for in Art 239.1 II LSC. Secondly, in the absence of any indication to the contrary and bearing in mind that the aim of the provision is to establish the right to reimbursement, the provision's reference to a partially upheld claim must be understood as referring to the indemnity claim. That would only be the case when the finding calls for payment of at least part of the alleged damages. Partially upheld confined to concurrent claims, such as mere declarations about the prerequisites for claiming liability, would therefore be excluded. Thirdly, by analogy to the provisions of Arts 54.4 II and 72.1 *in fine* of the Bankruptcy Act (which acknowledge creditors' active derivative standing to bring non-personal nature actions of the creditor as well as revoke actions), the expenses to be reimbursed must be understood to be limited to the sum obtained by the company as a result of the legal proceedings. Fourthly, the right to reimbursement arises when the award is final or, where appropriate, when the proceedings are brought to an end by means of a settlement in which the directors assume the obligation to indemnify or as a result of the deposit of the sums claimed.

Creditors' derivative standing to bring corporate liability action remains. The Reform does not modify that scheme, under which creditors may bring corporate liability action against directors when it is not brought by the company or its shareholders, although only in the case that company's assets are insufficient to pay their credits (Art 240 LSC). This is, in any event, a hypothesis with limited practical significance, inasmuch as the insolvency regime generally takes precedence over directors' liability one in such cases.

[121] These provisions have nonetheless been criticised. In n 17 above, 354-355, J. Hernando deems that the Reform only apparently solves the problem of the expenses incurred by the minority when bringing corporate liability action. Prior to the Reform, the plaintiffs had to assume the cost of bringing action and could only recover expenses if the ruling upheld their claim in its entirety and the directors were both sentenced to pay the costs and solvent. In Hernando's opinion, the text of Art 239.2 LSC 'mitigates but does not eliminate that obstacle. Given the technical complexity of such cases, they require expert reports, which must be paid in addition to solicitors', barristers' and courtroom fees. Not all these expenses are regarded as transferable to the defendant if sentenced to pay court costs and in any event, the problem usually lies in defraying such expenses prior to bringing action and to the issue of the final sentence, which is when costs can be recovered'. C. Paz-Ares (n 8 above, 450 fn 64), in turn, is critical of the rule for calculating the costs laid down in Art 239.2 LSC. This author observes that inasmuch as the plaintiffs act not only in their own interest, but to the benefit of all shareholders, the problem of collective action is aggravated and can only be overcome with a more generous rule on costs than set out in the provision cited.

[122] For further detail see J. Massaguer, 'Artículo 239. Legitimación de la minoría', in J. Juste ed, *Comentario* n 8 above, 471-476.

6. Statute of Limitations Period for Liability Actions

The Reform also regulates the statute of limitations period for liability actions, settling some of the issues that were formerly the object of debate in connection with the application of Art 949 of the Commercial Code (which provides that 'Action against companies' managers or directors may not be brought when four years have lapsed since the date of their dismissal or resignation for whatsoever reason').

Two main issues were debated in this regard.[123] One was whether this provision was applicable to all director liability actions (the solution ultimately adopted in case law)[124] or only to corporate or individual liability action stemming from a contractual relationship: ie, excluding individual liability actions of a non-contractual nature, to which the one-year term laid down in Art 1968 of the Civil Code would be applicable (the prevalent view in legal doctrine).[125] The other was the day from which the term should be computed, deemed by case law to be the date of the director's resignation or dismissal for any valid cause (as stipulated in Art 949 of the Commercial Code),[126] but by part of legal doctrine as the day on which action could be brought.[127]

This question is now settled in new Art 241-*bis* LSC,[128] which establishes a single, four-year statute of limitations period for both corporate and individual

[123] Regarding this question see J. Massaguer, 'Artículo 241bis. Prescripción de las acciones de responsabilidad', in J. Juste ed, *Comentario* n 8 above, 478-479

[124] See legal doctrine laid down in Judgement of the Tribunal Supremo 20 July 2001 no 749, available at https://tinyurl.com/go9gzxz (last visited 27 December 2020).

[125] On the irrationality of applying the term set out in Art 949 of the Commercial Code to individual action stemming from direct damages to shareholders or third parties, see the remarks of A. Carrasco, 'El nuevo régimen legal de prescripción de las acciones de responsabilidad contra los administradores sociales', in A. Carrasco et al eds, *Las reformas del régimen de sociedades de capital según la ley 31/2014* (Madrid: Gómez-Acebo & Pombo, 2015), 9-10.

[126] By way of example, see Judgements of the Tribunal Supremo 26 October no 986, 12 March 2010 no 24 and 11 November 2010 no 700, all available at https://tinyurl.com/go9gzxz (last 27 December 2020). Nonetheless, applying this rule was ticklish in certain instances, such as when the director's dismissal was not registered at the (Spanish) 'Mercantile Registry', or when the lack of such registration was replaced by knowledge of the events by the plaintiff (cf A. Carrasco, n 125 above, 9) or when a *de facto* director is involved.

[127] Cf J. Massaguer, n 123 above, 479.

[128] For further details on the regulations introduced by this provision, see A. Marina, 'Legitimación y prescripción de las acciones de responsabilidad (arts. 239 y 241bis LSC)', in F. Rodríguez et al eds, *Junta General y Consejo de Administración en la Sociedad Cotizada* (Cizur Menor: Revista de Derecho de Sociedades-Thomson Reuters Aranzadi, 2016), II, 685-687; and J. Massaguer, n 123 above, 479-487.

That notwithstanding, some authors hold a favourable opinion of Article 949 of the Commercial Code and even deem that 'the new wording of Art 241bis LSC (...) should lead to the conclusion that it is a quasi-declaratory rule, inasmuch as it does not substantially alter the former situation governed under Art 949 CC' (see J. Alfaro, '¿Cuál es el *dies a quo* para calcular el plazo de 4 años de prescripción de las acciones de responsabilidad contra los administradores?', entry in the author's blog dated 18 December 2014, available at https://tinyurl.com/y5jwbz9q (last visited 27 December 2020).

liability actions[129] and specifies that the statute runs from the date on which action can be brought.[130]

Controversy has also arisen around the scope of the new rule in connection with the applicability or otherwise of Art 241-*bis* LSC to the so-called 'liability for debts' set out in Art 367 LSC.[131] The possibility of this application is rejected by some authors on the grounds of first the respective position of each article[132] and second on the view that as the liability referred to in Art 367 LSC constitutes a passive assumption of debt, the statute of limitations period should be the same as for the main action against the company, of whom the directors are 'legal guarantors'.[133] Other authors acknowledge that the special legal nature of directors' joint and several liability under Art 367 LSC precludes its treatment as typical liability for damages. They nonetheless deem there to be no reason to break the uniformity of criterion on this issue applied to date in case law, whereby the statute of limitations period for this action is governed not by Art 241-*bis* LSC but by Art 949 of the Commercial Code.[134]

7. Compatibility of the Corporate Liability Action with Other Actions

Finally, the Reform also systematises the consequences of directors' breach of the duty of loyalty, which isnecessary given the absence of a consensus in legal doctrine and case law. Although some authors and judges deemed that companies could only file for liability, further to the general doctrine on

[129] That does not mean that the way to determine the *dies a quo* is the same in corporate as in individual liability action (for the differences, see A. Carrasco, n 125 above, 10-11).

Moreover, in A. Carrasco's opinion (*Reformas*, 12) the four years term laid down in new Art 241bis LSC does not necessarily apply to all individual liability actions, even though this has been the law maker's intention. The author reasons that as civil suits for damages, such actions are subject to the statutes of limitation established in regional civil law (eg, where Catalonian law prevails, the applicable term is 3 rather than 4 years, as laid down in Art 121.21d of the regional Civil Code).

[130] See, however A. Carrasco's remarks in n 125 above, 10, related to the start date for computing the term and in particular the effect of (legal, doctrinal and jurisprudential) subjectivisation of statutes of limitation on that date.

[131] For a synthesis of this discussion, see M. García-Villarubia, 'La prescripción de las acciones de responsabilidad de administradores. El supuesto de la responsabilidad por deudas sociales y la responsabilidad de los liquidadores' *El Derecho. Revista de Derecho Mercantil*, 31 (2015), available at https://tinyurl.com/yxq7hty8 (last visited 27 December 2020).

[132] Art 241-*bis* LSC is included under Title VI ('Company administration'), Chapter V ('Directors' liability') of the LSC, whereas Art 367 LSC is found under Title X ('Winding up and liquidation'), Chapter I ('Winding up'), Sub-chapter 2 ('Winding up for causes provided by law or in the articles of association').

[133] By way of example, see A. Carrasco, n 125 above,10.

[134] Cf R. Cabanas, 'Sobre el nuevo sistema de cómputo de las acciones de responsabilidad contra los administradores' *Diario La Ley*, 8513, Sección Tribuna, 7 April 2015, Ref. D-133. J. Massaguer, n 123 above, 482, likewise supports applicability, based not only on the uniformity of criterion in case law but also on the legal vacuum, the equivalence of the reasoning between both cases (given the coincidence of the circumstances prompting the action), the object of the remedy sought, the narrow margin of the yearly term and the clear existence in this realm of the *pro actione* principle.

contracts, the remedies open to them are much broader.[135]

First, new Art 227.2 LSC attributes companies' status as claimants not only for damages (through corporate liability action), but also for unjust enrichment.[136] The aim of the latter action, which often largely overlaps with claims for damages, is to ensure that all the earnings obtained by a disloyal director are attributed to the company, while requiring the director to individually bear the losses that such conduct may cause.[137] Insofar as it supplements the content of the duty of loyalty, the new articles is also a substantive rule, for it implicitly bars directors from earning any remuneration resulting from their position except as owed them by the company as consideration for their services.[138]

Secondly, the new wording of Art 232 LSC, in turn, stipulates that the bringing of a corporate liability action against disloyal directors

> 'is not incompatible with bringing actions for dismissal, removal of effects or, as appropriate, cancellation of the acts or agreements concluded by directors in breach of their duty of loyalty'.[139]

Lastly, companies may, in addition, file for restraining orders to oblige directors to refrain from prohibited conduct where it has not yet been consummated (claim deriving from the entitlement to demand specific compliance with the non-competition duty binding on directors).[140]

[135] See J. Alfaro. 'La reforma del gobierno corporativo de las sociedades de capital (XIII). El deber de lealtad de los administradores', blog entry of 1 July 2014, available at https://tinyurl.com/y5xqg94s (last visited 27 December 2020).

See also in this regard observations by C. Paz-Ares, n 8 above, 455-457, especially in connection with the possibility of bringing action for unjust enrichment prior to the Reform.

[136] New Art 227.2 LSC provides that 'Directors' infringement of the duty of loyalty shall determine not only the obligation to indemnify for the damage caused to company assets, but also to return to the company the unfair gains obtained'. See in this regard, J. Juste, n 54 above, 370.

Regarding the action for damages, it is convenient to point out, as C. Paz-Ares, n 8 above, 455, fn 71, notes that the profit that the company may have earned from the operation is not deducted in the calculation of damages in such suits, for the *compensatio lucri cum damno* principle is not acknowledged in Spanish law, as inferred in Art 1686 of Civil code.

[137] See J. Alfaro, 'La reforma del gobierno corporativo de las sociedades de capital (XIII). El deber de lealtad de los administradores', blog entry of 1 July 2014, available at https://tinyurl.com/y5xqg94s (last visited 27 December 2020).

New Art 227.2 LSC is not confined to regulating the amount of the indemnity, as might be thought at first glance, but also essentially stipulates that the company may not only sue disloyal directors for damages, but also for unjust enrichment.

[138] Cf J. Juste, n 54 above, 371.

[139] For more on this provision, see J. Massaguer, 'Artículo 232. Acciones derivadas de la infracción del deber de lealtad', in J. Juste ed, *Comentario* n 8 above, 427; J.I. Peinado, 'Las acciones derivadas de la infracción del deber de lealtad (art. 232 LSC)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 575-588

[140] See J. Alfaro, n 137 above. This author notes that directors 'dealings with third parties or shareholders must be regarded as null and void insofar as they are contracts aim to prejudice a third party' (the company). Hence the company may bring action to prevent the director from conducting such dealings, if not already undertaken, or otherwise to require their interruption and nullification

IV. Conclusion

The Reform has introduced major changes concerning directors' legal status by modifying the two pieces that make it up: the regulation of directors' duties and their liability regime.

The Reform was intended to correct the inefficiencies of the previous regulation, as well as to update it, in order to convert directors' legal status into a tool that would improve the corporate governance. To this end, the content of directors' duties has been clarified and their liability scheme has been re-strengthened.

In relationship to the first element of this legal status, that relating to directors' duties, the Reform has profoundly modified the regulation of the duty of care as well as the duty of loyalty. Three fundamental adjustments have been introduced regarding the duty of care. First, its content has been made more specific, indicating that it includes the requirement to fulfil the legal and statutory duties, to have an adequate devotion to their duties, to gather the information needed and adopt the measures required for a good management and control of the company. Secondly, the Reform specifies that the standard of compliance can vary for each director, since the nature of the position and functions of the director must be taken into account. Thirdly and most importantly, its implementation has been softened due to the newly introduction in our legal system of the so-called 'business judgement rule'.

Equally significant are the changes made by the Reform with respect to the regulation of the duty of loyalty. Thus, its general content has been re-formulated by eliminating the inaccuracies of the previous diction. Similarly, it has been clarified that its infringement not only gives rise to the obligation to compensate for the damage suffered, but also to return to the company any unjust enrichment. Lastly, the main obligations that derive from this duty of loyalty have been collected, making it easier to identify the conducts that pose a breach thereof.

Concerning the second element of directors' legal status, their liability regime, the Reform has introduced important changes, most of which essentially aimed to strengthening it. Therefore, it has been clarified that the general rule for attribution of responsibility also applies to the directors' liability, which means that they will only be liable responsible if there is fraud or negligence.

Secondly, the subjective scope of application of this liability regime has been broadened, since it covers not only the director strictly speaking, but also the de facto director, the hidden director, the main executive of the company (in certain cases) and the natural person representative of the legal person director. In addition, the requirements and legal standing cases for filing corporate liability actions have been made more flexible by lowering the percentage of

of the effects thereof. In this respect, legal doctrine may be of substantial assistance in connection with the application of the rules governing action that can be brought in the event of unfair competition as laid down in Act 3/1991 on Unfair Competition.

capital demanded in listed companies and removing its subsidiary nature in cases where it is based on a breach of the duty of loyalty, which facilitates its exercise by the minority; this fact is also favoured by the introduction of a reimbursement right in the event of total or partial estimation of the claim.

Finally, the remedies against directors in the event of breach of the duty of loyalty have been clarified. Thus, it is explicitly stated that these are not only limited to the action for damages, but also included the actions for challenging, dismissal, removal of effects or, as appropriate, cancellation of the acts or agreements concluded by directors.

In conclusion, although there are issues relating to the Reform that may be subject to criticism (the delimitation of related parties, the percentage of share capital that is still necessary to be able to bring the corporate liability action, the generalization of the dies a quo of the statute of limitations period to individual liability actions or the type of expenses that can be refunded), the general opinion that the Reform is very positive as a whole, since it has meant an important modernization of the legal statute of directors. This improvement has placed the Spanish legislation among the most advanced regulations within our neighbouring countries.

Symposium: PSPP (*BVerfG*, 5 May 2020) and the Future of the European Integration

Editorial

Gino Scaccia* and Giuliano Vosa**

Abstract

While introducing the participants to the *Symposium*, the *Editorial* aims to highlight the main consequences of the PSPP judgment as regards the future inter-institutional activity at the national and supranational levels and offers a key to ease the troublesome communication between the German Federal Constitutional Court and the Court of Justice. Particularly, the authors suggest that the two courts speak two different languages when it comes to a judicial review of the conferral: Luxembourg refers to proportionality, whereas Karlsruhe has actually in mind an essentiality scrutiny. Essentiality is a concept that, despite looking quite anew in the European legal discourse, is not unknown at all to judicial reasoning at German and at the EU level, and may help strengthening the communicative bridges between the national courts and the Court of Justice.

I. Introduction

Welcoming fellow colleagues who have taken the trouble to participate in the *Symposium* organized by *The Italian Law Journal* is as gratifying as it is challenging. Diversity in contributions is what was sought, and diversity has come, in the form of four parallel works to which our own, presented hereinafter, only pretends to be a complement.

First, a brief presentation of the participants offers both an introduction and the occasion to warmly express our gratitude, both personal and on behalf of the *Journal*, for their commitment.

Francesca Bignami wonders whether the German court has acted beyond the limits of what a court should do: the fact that non-elected, isolated judges, on the basis of a solely German conceptual architecture, have taken a decision with innumerable consequences on the economy of other States and on the Eurozone as a whole is the point of departure of her criticisms. Andrea Guazzarotti builds on the PSPP rationale to draw conclusions about the role the ECB is called on to play in the overall EU economic governance – on one hand,

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a *sui generis* position based on the Treaties, on the other hand the mismatch with a non-finished political Union, which requires national economies to adjust to a framework that may not suit them well. Finally, Claudia Amodio analyzes the PSPP in context and delves into the conceptual tools that have shaped the journey from statehood to Europeanisation in Germany and France. The comparison, while offering a further prism to look into the effects of the *BVerfG*'s stance, unveils certain peculiarities of both positions that would have perhaps gone unnoticed otherwise.

To introduce one's own work sounds perhaps naïve, and self-assuming for sure; hence, it may be not the politest action, particularly when dealing with a hotly disputed matter. Then, asking for pardon beforehand, we hope that it will be useful to set the scene of a debate whose implications have not been fully enumerated.

II. Walking on the Rope: Between the Old Abyss and a New Dawn

The ruling of the *Bundesverfassungsgericht* (*BVerfG*) on the Public Sector Purchase Programme (PSPP)[1] has broken loudly into the European scene. While eventually absolving the *Quantitative Easing*, albeit with a slight penance imposed on the European Central Bank (ECB), it leaves shrouded in mist the destiny of the future measures aimed at recovering the economy from the Covid-19 shock. Considering the overall circumstances, this alone would largely suffice for the case to secure a landmark status in the history of the European integration. The result would be utter misfortune, should it certify the Union's fall into the abyss of confirmed inequality – which would render the project unsustainable in the medium-long run and virtually guarantee its demise. Or, perhaps, the result would be providential: the reasoning the judgment conveys points to a Euro-unitary constitutional balance and offers arguments for the political actors involved to endorse it – actually, it urges them to do so – and to take responsibility for their actions.

Thus, the over-used metaphor of a rope over the abyss is to be once more deployed to account for the situation that Europe – as a political entity, a legal order and a social community – is faced with today. Should the old cleavages – creditor-debtor, North-South, frugality-lavishness, and the like – eventually prevail in the political bargain, PSPP would have marked the last stage of an ill-fated common destiny. Else, a more profound reading of the arguments the *BVerfG* strives to construe would help drive Europe beyond its own constitutive restraints, towards a shining dawn. Another over-used metaphor, one may say; but, again, a well-fitting one. To be sure, the new day could also entail a firm halt at the

[1] Bundesverfassungsgericht, Judgment of the Second Senate, 5 May 2020, 2 BvR 859/15 (2020).

European integration; but it would do so on the basis of mutual respect for equal States and citizens, as the Europe's constitutional path requires.

Hence, it seems appropriate to target the immediate political consequences of the PSPP judgment and then to analyze the apparently convoluted reasoning that may contribute to, rather than jeopardize, the European project.

The events are well-known. In *Weiss*,[2] the Court of Justice (ECJ) pursuant to a preliminary question referred to by the *BVerfG*,[3] held the PSPP compatible with the ban on monetary financing (the *no-bailout* clause: Art 123 TFEU); however, according to the Karlsruhe judges, Luxembourg failed to perform a sufficiently solid proportionality scrutiny[4] and only offered an 'objectively arbitrary'[5] interpretation of the Treaties, thereby exceeding its powers. As a result, the *Weiss* ruling was held to be *ultra vires*, and declared non-binding within the German legal system. Against this legal background, the *BVerfG* set a three-month period for the Federal Government and the *Bundestag* 'to take steps seeking to ensure that the ECB conducts a proportionality assessment in relation to the PSPP';[6] meanwhile, the domestic institutions concerned, including the *Bundesbank*, should refrain from implementing the programme.

The European Commission felt the need to issue a statement in the immediate aftermath of the judgment to declare that 'the rulings of the European Court of Justice are binding on all national courts' and '[t]he final word on EU law is always spoken in Luxembourg, nowhere else'. President Ursula von der Leyen went as far as to declare that she could not rule out the possibility of launching an infringement procedure against Germany.[7] The German Government[8] and the *Bundesbank*,[9] as well as the ECB's Governing Council, promptly assured that they would take the ruling into due account.[10] As the Italian Minister of Economy Roberto Gualtieri predicted,[11] it is highly likely that the clarifications requested by the Karlsruhe court will quickly reach the German institutions and the *Bundesbank* will continue to take part in the PSPP; all the more so, if one considers the paradoxical consequences that would arise should the ECB fail to provide a satisfactory reply, or a reply at all. According to the PSPP judgment, the *Bundesbank* would have to stop participating in the programme, and also to

[2] Case C-493/17, *Weiss*, Judgement of 11 December 2018, available at www.eurlex.europa.eu.

[3] Bundesverfassungsgericht, Order of the Second Senate, 18 July 2017, 2 BvR 859/15 (2017).

[4] Bundesverfassungsgericht n 1 above, 140.

[5] ibid 118.

[6] ibid 232.

[7] Statement 20/846, https://tinyurl.com/y58td6j8 (last visited 27 December 2020) issued by the President of the EU Commission Ursula von der Leyen, 10 May 2020.

[8] See reports at https://tinyurl.com/y3e2ob2w (last visited 27 December 2020).

[9] See the Statement of the Bundesbank President Jens Weidmann, 5 May 2020, available at https://tinyurl.com/y3re2262.

[10] See https://tinyurl.com/y9fjto9n (last visited 27 December 2020) - Press Release of the ECB Council of Governors, 5 May 2020.

[11] See 'Bce, Gualtieri: "Sentenza della Corte costituzionale tedesca non ha conseguenze sul piano di acquisto di titoli di Stato"' *Il Fatto Quotidiano*, 5 May 2020.

sell the 'illegitimately acquired' bonds held in portfolio (which the Italian newspaper *MilanoFinanza* estimates at 533 billion euros).[12] This could eventually cause a price decrease of the German bonds, a possible increase in the (currently negative) yields and a reduction in the spread with the bonds of other Member States – all such consequences looking highly undesirable for Germany.

Rather, it seems arguable that the real target of the *BVerfG*'s ruling was not the PSPP as such, but the new purchasing programmes, including those designed to tackle Covid-19. It is, ultimately, the ECB's *independence* – which in the ECJ's view leads to an entirely teleological, self-asserted reading of the Bank's mandate – that is at stake.

The ECB's press release mentioned above appears to confirm this claim by a twofold statement. On the one hand, it emphasizes that the ECB respected the *Weiss* rationale and acted within its mandate as defined thereby; on the other hand, it reaffirms the Bank's full commitment to doing 'everything necessary' ('whatever it takes' in more modest clothes?) to ensure that inflation rises to levels consistent with its medium-term objective (under 2%) and that the monetary policy actions aimed at ensuring stability are 'transmitted to all parts of the economy and to all jurisdiction of the euro area'. How could one explain this outspoken claim since the *BVerfG* asked for explanations only about past operations? It is apparent that the ECB intended to comfort financial operators and to prevent turbulence on public debt bonds and on the ever-more-heated debate on measures of financial support put in place to overcome the Covid-19 crisis.

Paras 217 ff of the judgment supply further evidence of this claim. The *BVerfG* lists the elements that should be taken into account concerning the PSPP's compliance with the ban on monetary financing. These elements are: 1) previous determination of the purchase volume; 2) distribution of that volume according to the key for the subscription of the ECB's capital; 3) limit of 33% for purchases of a particular issue of bonds of a government of a Member State, as identified by international securities identification number (ISIN). It is easy to verify that such elements are nowhere to be found in the Pandemic Emergency Purchasing Programme (PEPP).[13] Thus: while ordering the Government to question the PSPP, Karlsruhe *de facto* anticipates that the PEPP is highly suspected to be incompatible with the *Grundgesetz*.

Such constraints are formulated as paradigms for all ECB's measures of financial aid; in this light, they offer *ex ante* criteria for a 'dialogue', or rather a thorough confrontation, with the ECJ. The *BVerfG*, in fact, imposes on the ECB constitutional constraints that would be enforceable even in the case – as the PSPP – of a previous ECJ judgment taking a diverging view. It will always be

[12] See E. Dal Maso, 'Che cosa accade se la Bundesbank è costretta a vendere 533,9 miliardi di Bund' *MilanoFinanza*, 6 May 2020.

[13] See details at https://tinyurl.com/y3eyqbyx (last visited 27 December 2020).

possible for the *BVerfG* to declare that the Luxembourg Court has operated in breach of the principle of conferral should ECB's financial support programme be found compatible with EU law without a thorough review being carried out on the basis of such constraints.

Against this background, the PEPP could be a target for likely successful constitutional complaints before the *BVerfG*, which obviously increases uncertainty about the ECB's powers to embrace debtor States with its safety net. This could fuel the widespread political hostility towards both Eurobonds and a solidarity-driven use of the Euro-budget; consequently, it seems highly likely that debtor States would be prompted to resort to the ESM as the only available *parachute* – to be sure, one that comes with strict conditions.

To sum up: the *BVerfG*'s judgment influences the political bargaining in a twofold respect. First: it ties the ECB's mandate to its own constitutional review, as any ECJ judgment could be declared *ultra vires* if deemed inadequately motivated. Second: it puts a leash on forthcoming monetary operations aimed at tackling the Covid-19 crisis. Then, the ESM – with the 'strict conditionality' envisaged in Art 136 TFEU – becomes the most likely accessible solution for the States most severely hit by the pandemic. To say it brutally: the *BVerfG* paves the way for *Troika* to kick in.

Indeed, the letter sent on 7 May from Commissioners Dombrovskis and Paolo Gentiloni to the Eurogroup President Mario Centeno seems to ward off the risk, proposing to scrap usual conditions for using the ESM in recovering economies from Covid-19.[14] It states, in fact, that the only requirement to access ESM funds devoted to Pandemic Strategic Support will be for euro-area Member States

> 'to use this credit line to support domestic financing of direct and indirect healthcare, cure and prevention related costs due to the COVID-19 crisis'.

Additionally,

> 'there is no scope for activating Articles 3(3) and 3(4) of Regulation (EU) No. 472/2013, relating to additional reporting and information on the financial system'

and the Commission

> 'will not conduct *ad hoc* on-site missions in addition to the standard ones that take place regularly within the framework of the European Semester'.

[14] See it at https://tinyurl.com/yyw5hl93 (last visited 27 December 2020).

Yet, the wording of the ESM Treaty itself, and the spectre of another *BVerfG*'s judgment that may oppose such a soft, 'de-conditionalised' version of the ESM, do not guarantee that a political agreement of this sort matches the German standards for constitutional legality.

These remarks do not come free from a taste of inconsistency: a programme awaited as the ultimate chance to rescue Europe from the abyss is eventually held illegal under either national constitutional law or Union law altogether. One senses that a way out exists, and can be found in the very reasoning of the *BVerfG*, which, although far from flawless, contains a set of useful guidelines for a refreshed understanding not only of the PSPP case, but of the crisis as a whole[15] – a constitutional crisis, an economic crisis and a 'crisis of mind'.[16]

The argument we seek to offer here can be reported as follows: what the *BVerfG* basically did is overlap loose proportionality and embryonal 'essentiality'. Keywords and the conceptual framework of a well-known type of scrutiny (the proportionality test) that proves to be unsuitable for this case replace keywords and the conceptual framework of a largely unknown type of scrutiny that yet amounts to what the *BVerfG* (and the Union, perhaps) needs. Poor links between the two are unavoidable, and neither the assertive tones used by the *BVerfG* nor the laconic statements delivered by the ECJ help clarifying the issues at stake and clearing out the scene for debate. Thus, an effort to disentangle the knots of an uneven dialogue could be useful in this respect.

In the first place, it is necessary briefly to introduce the concept of 'essentiality'.

Essentiality comes from the *Vorbehalt des Gesetzes* (*riserva di legge*, *reserve de loi,* due legal basis) under German constitutional law, and leads to an essentiality theory (*Wesentlichkeitstheorie*) that sets requirements for a legislative delegation lawfully to empower a delegated secondary act.[17] Such requirements are laid down in Art 80 *Grundgesetz*: content, purpose, extent (*Inhalt*, *Zweck*, *Ausmaß*). A legislative authorization (*Ermächtigungsgesetz*) must match these requirements in such a way as to possess an adequate normative density (*Regelungsdichte*) *vis-à-vis* the secondary act. Consequently, if the legislative authorization fails to meet the essentiality threshold, the delegation is invalid; likewise, if the secondary act goes too far in interpreting the mandate laid down in the legislative authorization, then the respective legislative density becomes too low and the secondary act is invalid as adopted *ultra vires*.[18]

[15] A.J. Menéndez, 'The Existential Crisis of the European Union' 14:5 *German Law Journal – Special Issue: Regeneration Europe*, 453 (2013).

[16] I. Pernice, 'Multilevel Constitutionalism and the Crisis of Democracy in Europe' 11:3 *European Constitutional Law Review*, 541, 547 (2015).

[17] J. Staupe, *Parlamentsvorbehalt und Delegationbefugnis* (Berlin: Duncker & Humblot, 1986), 27.

[18] F. Ossenbühl, 'Vorrang und Vorbehalt des Gesetzes' in J. Isensee and P. Kirchhof eds, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, V (Heidelberg: Müller Verlag, 2007) 183-222.

As a parameter for judicial scrutiny, legislative density is by no means a rigid threshold but a highly dynamic, mutable one – which explains the harsh criticism raised in the German constitutional scholarship.[19] Yet, suitable indicators can be derived from the pertinent *BVerfG*'s case-law: whereas subjective criteria stem from an interpretation of the legal text(s) concerned, objective criteria are to be found in the interferences with the area of fundamental rights.[20]

In other words, essentiality in German constitutional law gives rise to a criterion for judicial review that matches an evaluation of the sensitivity of a matter to be regulated with an interpretation of the legislative basis that supports the regulation – sensitivity being crucially understood as interference with fundamental rights.[21]

A combination of *Grundgesetz* articles works as a positive constitutional anchorage for this theory: 1(1) – the untouchable human dignity; 19(2) – the essential content of the rights to be protected by the public authorities; 20 – people's sovereignty; 38(1) – right to vote; and 79(3) – the eternity clause. A systematic reading of all these provisions leads to the conclusion that, in the name of human dignity (understood as individual and collective self-determination), it is for the sovereign people (by means of parliamentary representation, and through the other ways provided for in the constitution) to set the essential content of the rights to be protected by German authorities, so that these rights are genuinely recognized by public bodies and not merely conceded (*octroyés*) by authorities whose activity is immune from the public control.[22] Eventually, under Art 79(3), this idea becomes a supreme principle of the German Basic Law, meaning that it cannot be overthrown unless the entire *Grundgesetz* is deemed replaced by a new political-legal order.

This criterion builds on a doctrine of the constitution as a whole that calls into question both the people's sovereignty and the judicial adjudication – separation of powers and protection of rights.[23] Interestingly, this very background is displayed in the celebrated formula that enshrined the relationships between the newborn European Union and the Member States, thereby pointing to a Euro-unitary cornerstone of constitutional balance.

Article F of the Maastricht Treaty stated as follows:

[19] A review thereof in G. Scaccia, *La riserva di legge nell'esperienza tedesca* (Roma: Al.Sa., 2002) 101.

[20] See, in particular, *BVerfG*, 49, 89 – *Kalkar I*, 8 August 1978, §§ 72-73; updates in G. Vosa, ' "Nuovi elementi essenziali", ovvero del posto della normativa delegata nella sistematica delle fonti del diritto europeo' *Rivista Italiana di Diritto Pubblico Comunitario*, 682, 707 (2014).

[21] More references in G. Vosa, Il principio di essenzialità. Profili costituzionali del conferimento di poteri tra Stati e Unione europea (Milano: Franco Angeli, 2020), 218.

[22] See C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013), 51, 106.

[23] See A. Ruggeri, 'L'integrazione europea, attraverso i diritti, e il "valore" della Costituzione', in A. Ciancio ed, *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa* (Roma: Aracne, 2014), 473-496.

> 1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Respect for each State's self-government by democratic principles matches compliance with the equivalent standards for fundamental rights that the *BVerfG* itself raised in *Solange II* as a condition for Community law to enjoy 'priority in application' (*Anwendungsvorrang*) over national law, even of a constitutional rank.[24] Noteworthy, in this light, the divide between economic and monetary policy is tracked in wholly ordoliberal terms: the former is political, and is left to the Member States, the latter is unpolitical[25]– presumptively non-sensitive for all Member States – and is entrusted to an independent body endowed with the necessary technical expertise.[26]

This assumption seemingly confirms that essentiality lies at the ground not only of the German constitution, but eventually of the Euro-unitary constitutional balance underpinning the newborn European Union. [27]

Whereas Lisbon confirmed that Union law respects the equality among citizens (Art 9 TEU) and among Member States as regards their 'fundamental political and constitutional structure' (Art 4(2) TEU),[28] the Maastricht constitutional balance holds presumptively valid for all Member States that ratified the relevant Treaty; thus, the *BVerfG* is led to argue that any measure developing and implementing the EMU amounts to a constitutionally compatible development or implementation of such equilibrium on both a German and Euro-unitary level. Karlsruhe is prompted to do so until evidence to the contrary arises that directly affects the German constitutional order; in fact, as far as the *réseau judiciaire euro-unitaire*[29] encompassing the ECJ and the national courts is concerned, the *BVerfG* would intervene to defend Germany only if the *Grundgesetz* were directly threatened by any EU law measure affecting

[24] See J. Kokott, 'Report on Germany' in A.-M. Slaughter, J.H.H. Weiler and A. Stone Sweet eds, *European Courts and National Courts. Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1997), 77-131.

[25] L. Buffoni, 'La politica della moneta e il soggetto della sovranità: il caso 'decisivo'' 2 *Rivista AIC*, 1-33 (2016).

[26] O. Chessa, La Costituzione della moneta. Concorrenza, indipendenza della banca centrale, pareggio di bilancio (Napoli: Jovene, 2016), 61.

[27] Reference in G. Vosa, *Il principio di essenzialità* n 21 above, 204, 370.

[28] L. Besselink, 'National and constitutional identity before and after Lisbon' 6:3 *Utrecht Law Review*, 36-49 (2010).

[29] A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur* (Bruylant: Bruxelles, 2009), 341.

sensitive national interests. Nevertheless, when defending Germany, the *BVerfG* looks at Germany as an EU Member State: a tile in the Europe's *constitutional mosaic*[30] whose lynchpin is the constitutional balance just described.

In this vein, the *BVerfG*'s case-law on the EMU unveils more profound implications. The ESM and the implementation thereof do not jeopardize the Maastricht equilibrium so long as the *BVerfG* finds that no legal rule restrains the *Bundestag*'s budgetary sovereignty: hence, the 'rescue under conditionality' model introduced as a response to the 2008 crisis is presumptively compatible with the *Grundgesetz* as far as the (executives of the) Member States agree to it, which led the *BVerfG* to uphold the ESM Treaty's constitutionality in the first place. Conversely, *Gauweiler* signposts the end of such a presumption, for that equilibrium is clearly disrupted: an independent ECB enters the realm of economic policy to violate the *no-bailout* clause, thereby affecting the interests of Germany as a Member State on an equal footing with the others.

In this line, one is prompted to delete the image of a *BVerfG* merely defending Germany's domestic ordoliberal commitment and replace it with an image of a *BVerfG* imposing Germany's ordoliberal commitment on the whole Union. Three key reasons suggest such a Euro-unitary perspective.

First: the arguments the *BVerfG* deploys are ultimately grounded on the concept of human dignity, hence, obviously *universalisable*[31] – ie valid for all Member States on an equal footing – in line with a pluralistic vision of the Union.[32] These arguments point to a general principle of EU law stemming from German constitutional law and, as far as the *reserve de loi* is concerned, from the constitutional traditions common to Member States – which would make essentiality a principle of *European constitutional law* in the strictest sense.[33]

Second: Karlsruhe showed readiness to depart from the orthodox ordoliberal moorings already in the ESM judgment, as it highlighted that 'not all the *Stabilitätsgemeinschaft* expressions are covered by the eternity clause'.[34] The *BVerfG* expressly pointed out that there can be other ways to shape the EMU that would be compatible with the *Grundgesetz*, provided that the bodies endowed with the 'responsibility for the integration'[35] take the necessary political initiatives

[30] N. Walker and S. Tierney, 'A Constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism', in N. Walker, J. Shaw, S. Tierney eds, *Europe's Constitutional Mosaic* (Oxford: Hart Publishing, 2011), 1-18.

[31] M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker ed, *Sovereignty in Transition* (Oxford: Hart Publishing, 2003), 501-538.

[32] M. Goldoni, 'Constitutional Pluralism and the Question of the European Common Good' 18 *European Law Journal*, 385-406 (2012).

[33] M. Fichera and O. Pollicino, 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions. Which Language for Cooperative Constitutionalism in Europe?' 20:8 *German Law Journal*, 1097-1118 (2019).

[34] *Bundesverfassungsgericht* 12 September 2012, 2 BvR 1390/12, 118 (2012).

[35] '*Integrationsverantwortung*' in light of Art 23(1) *Grundgesetz*: see *Bundesverfassungsgericht* 30 June 2009, 2 BvE 2/08, 236 (2009).

and modify Union law. To be sure, the German judges did not *ex ante* request a Treaty amendment (or a constitutional reform as a support in national law) for such a modification to comply with the *Grundgesetz*. However, they did offer a criterion to figure the rank and wording of the positive laws that would be requested: the *irreversibility* of the commitment Germany would subscribe to. In this light, an irreversible commitment would be the highest burden for Germany's sovereign autonomy, and would require a change of the constitution.[36] In other words: the more intense the burden placed on the German sovereign autonomy, the more solid in rank and content the legal basis underpinning such burden must be.

This line of reasoning underpins the concept of *structurally significant violations of the conferral* – ie interpretations of the mandate provided for in the Treaties that are not supported by a sufficiently solid legal basis in the Treaties – which was introduced in *Honeywell*[37] and is clear-cut in *OMT-II*[38] where the Karlsruhe judges explain both the universalizable value of the 'fundamental democratic content of the right to vote'[39] backed by human dignity and the necessity to provide sufficient democratic legitimation for acts based on 'legitimation strands'[40] other than unanimity, hence requiring careful account of their parliamentary support in order for the Treaty provisions not to amount to a 'blanket authorization'.[41]

If the 'essentiality prism' is deployed to look at the ECJ and at the *BVerfG* reasoning simultaneously, their misunderstandings can be detected and named as communicative problems between two different conceptual schemes – so that the real political issues are unveiled and duly, openly debated.

Having this framework in mind, some apparently insurmountable disagreements between the two courts can be reconciled, or at least explained.

In the *BVerfG*'s view, the principle of proportionality is respected when the monetary policy objective and the economic policy effects are 'identified, weighed and balanced against one another'; it is instead violated when the monetary policy objective is pursued 'unconditionally' and economic policy effects are 'ignored'.[42] From the ECJ's viewpoint, a comparison with *Gauweiler* reveals a contradiction: in the OMT referral,[43] the *BVerfG* held that the ECB would act beyond its mandate should the frontier of economic policy be trespassed, whereas in PSPP the ECB is requested to 'identify, weigh and balance' the economic policy effects stemming from the carried monetary operations to

[36] Bundesverfassungsgericht n 34 above, 119.
[37] *Bundesverfassungsgericht* 6 July 2010, 2 BvR 2661/06 (2010).
[38] *Bundesverfassungsgericht* 16 June 2016, 2 BvR 2728/13 (2016).
[39] ibid 123.
[40] ibid 131.
[41] ibid 134.
[42] Bundesverfassungsgericht n 1 above, 165.
[43] *Bundesverfassungsgericht* 14 January 2014, 2 BvR 2728/13 (2014).

prove that the conferral has not been violated. Therefore, one may wonder whether the *BVerfG* considers an ECB measure entering economic policy as a *per se* violation of the conferral, or if a proportionality assessment must be carried out to 'identify, weigh and balance' the effect of such measures and the benefits they entail. The object of the balancing is problematic: to which extent should the conferral – ie the penetration in the economic policy realm – be taken into account? In other words: if the measure were in itself proportionate as regards its content, could it be declared disproportionate anyway due to the violation of the conferral, or is the latter assessment absorbed in the former? The question goes to the core of the proportionality test: Can a measure be subjected to balancing when the rights and interests as stake are far from tangibly appreciable[44] – as is the case when 'sovereignty' comes under scrutiny via the concept of conferral?

The essentiality prism makes it apparent that the point is simply ill-formulated, under the perspective of Karlsruhe. The *BVerfG* identifies the threat to the *Grundgesetz* in the abrupt political sensitivity of the ECB's activity, which would undermine the ordoliberal architecture set in Maastricht without a sufficiently solid anchoring in the Treaties (and in German law, should it be the case). This is why there seems to be discontinuity from the OMT referral to the PSPP judgment. In the former, the *BVerfG* is still led to presume the compatibility of the EMU's 'rescue under conditionality' developments with the *Grundgesetz*, and asks the ECJ to confirm it; in the latter, what it needs is a proof of such a compatibility, which can be no longer presumed. In *OMT*, the *BVerfG* asks the ECJ – with vaguely peremptory tones – to confirm that the ECB cannot enter the economic policy domain. In *Weiss* the question is slightly different: the ECJ is called to confirm that either the ECB does not enter economic policy by violating the *no-bailout* clause, or at least it does so in a manner that proves proportionate with regard to the effects sought. To put it clearly: in *Weiss*, the *BVerfG* asks the ECJ to offer a solid motivation on whose grounds Karlsruhe could argue that the burden placed on the German sovereign autonomy, yet existing, is acceptable in comparison to the benefits achieved. The amount of this burden is clear-cut: the deviation from the Maastricht constitutional balance ratified by the *Bundestag*, which goes – *in parte qua* – to the detriment of the German ordoliberal approach. In the *BVerfG*'s view, a

[44] See V. Kosta, 'The Principle of Proportionality in EU Law: An Interest-Based Taxonomy', in J. Mendes ed, *EU Executive Discretion and the Limits of Law* (Oxford: Oxford University Press, 2019), 198-219; T. Endicott, 'Proportionality and Incommensurability', in G. Huscroft, B.W. Miller and G. Webber eds, *Proportionality and the Rule of Law. Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2016), 311, 317, who distinguishes incommensurability from incomparability and define the latter 'the impossibility of finding rational grounds for choosing between two alternatives'. A distinguished critic to the incommensurability of 'apples and oranges', can be found in the concurring opinion of Justice Antonin Scalia: US Supreme Court, *Bendix Autolite Co* v *Midwesco Enters*, 'Scotus', 486 US 888 (1988).

motivation of this sort would make less invasive the new task carried out by the ECB, based on the mandate provided in the Treaties and confirmed by the *Grundgesetz*. This would lower one of the steps of the essentiality review, which could lead the *BVerfG* to conclude that no *structurally significant* violation of the principle of conferral occurred. However, this motivation must be all the more convincing, due to the remarkable political dissent caused by the extraordinary monetary operations carried out by the ECB – a point that the *BVerfG* specifically underscores in the OMT referral as revealing the no-longer-unpolitical nature of those measures, and that the ECJ explicitly downgrades in *Gauweiler*.[45]

This passage explains why the *BVerfG* censures as 'not comprehensible'[46] and 'arbitrary from an objective perspective' the proportionality assessment performed by the ECJ[47] and detects a lack of 'the minimum democratic legitimacy necessary'.[48] Obviously, phrased as such, the passage looks like a mere substitution of one's own standard for another as a yardstick for Union law review. For that reason, the passage has attracted numerous, well-founded criticisms, as the *BVerfG* appears to arbitrarily claim the last word on the interpretation of the Treaties from a self-assessed 'objective perspective',[49] although the Treaties themselves provide otherwise. However, if the essentiality perspective is embraced, the picture is rather different: the ECJ implements a loose proportionality scrutiny in order to leave a broadened margin for discretion to the ECB, but it does so precisely when the *BVerfG* requires strict scrutiny, and a thorough motivation in support thereof.

In this line, the mismatch is obvious. Luxembourg deploys proportionality in reviewing both the formal and the substantive legality of the measures, with the clear-cut objective of leaving the ECB with broad margins for discretion. From the ECJ's standpoint, no breach of Union law takes place, as Art 5 TEU makes proportionality applicable to the exercise of the conferred powers and not to the conferral as such. Yet, seen from Karlsruhe's perspective, this looks like an odd confusion purposely carried out to pre-empt both scrutinies at once: proportionality is rendered 'meaningless'[50] while no review is carried to measure the adequacy of the legal basis with regard to the intensity of the effects sought. In this light, the respective positions unveil the hidden question: whether the ECB is to be allowed discretion in light of its independence even though the Maastricht pillar thereof – the presumed unpolitical nature of the activities performed – has been crushed. This is a highly political question, which – this

[45] Case C-62/14, *Gauweiler et al v Deutscher Bundestag*, Judgment of 16 June 2015, available at www.eurlex.europa.eu.

[46] Bundesverfassungsgericht n 1 above, 140, 116.

[47] ibid 112.

[48] ibid 113.

[49] In Hegelian philosophy, 'objective thinking', in the full sense, amounts to God: G.W.F. Hegel, *Enciclopedia delle scienze filosofiche* (Roma-Bari: Laterza, 2002) § 1, 3.

[50] Bundesverfassungsgericht n 1 above, 127.

is the *BVerfG*'s point – must be addressed by the political bodies bearing responsibility for the integration.

Eventually, the *BVerfG* strives to soften the most severe consequences of the declared unconstitutionality and resorts to the *Solange II* doctrine as for the notion of 'lawful judge'[51] under the *Grundgesetz* – a qualification given to the ECJ on the condition that the Community respect equivalent standards in the protection of fundamental rights.[52] Yet, the link between proportionality and the *ultra vires*/identity review leads nowhere, given the differences in scope between the two instruments. Proportionality questions whether a legitimate authority has duly justified its actions, whereas the *BVerfG* seeks to challenge the very same ECB's authority in the plural Euro-unitary constitutional mosaic – and, consequently, the authority of the ECJ to the extent that the latter jeopardizes the balance undergirding that mosaic.

In short, the conflict paints the picture of a struggle between two judges that are part of an 'alliance'[53] among supreme courts – to quote the President of the *BVerfG* himself[54] – and both bring arguments to defend positions whose political sensitivity exceeds the attitudes of the multilevel judicial circuit.[55] The ECJ seems willing to stretch the boundaries of the Union's legality to maintain that the turn from the Maastricht equilibrium to the 'rescue under conditionality' approach complies with the Euro-unitary constitutional balance;[56] yet the *BVerfG* appears utterly reluctant to do so. In the latter's view, this turn implies a departure from the equality of citizens and States as to their ability to fix the content of substantive rights.

Austerity measures have indeed caused a by-product of that sort: whereas 'creditor States' force their taxpayers to throw money in the rescue funds with little guarantee of return, which entails increasing domestic inequalities, 'debtor States' force their taxpayers to accept austerity policies resulting in increasing domestic inequality, too. One may argue, with Wolfgang Streeck[57] and Agustín Menéndez,[58] that such a scenario fosters a switch from the social-democratic

[51] *Bundesverfassungsgericht* 22 October 1986, 2 BvR 197/83, 56 (1986).

[52] E.R. Lanier, '*Solange*, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge' 11 *Boston College International & Comparative Law Review*, 1, 30 (1988).

[53] J. Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' 23 *European Journal of International Law*, 335, 348 (2012).

[54] A. Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*' 6 *European Constitutional Law Review*, 175, 198 (2010).

[55] M. Dani, J. Mendes, A.J. Menéndez, M.A. Wilkinson, H. Schepel and E. Chiti, 'At the End of the Law. A Moment of Truth for the Eurozone and the EU', in https://tinyurl.com/yxrzzs2r, (last visited 27 December 2020).

[56] M.A. Wilkinson, 'The Euro is Irreversible! …Or is it? On *OMT*, Austerity and the Threat of "Grexit"' 16:4 *German Law Journal*, 1049, 1072 (2015).

[57] W. Streeck, 'The Rise of the European Consolidation State' *MPIfG – Max Planck Institute for the Study of Societies, Discussion Paper* 1/2015, 1, 14.

[58] A.J. Menéndez, 'The Crisis of Law and the European Crises: From the Social and

State to a *Konsolidierungsstaat*; and add that this switch is the result of genuine executive-driven actions[59] relentlessly underpinned by a narrative of 'moral hazard'.[60] As a result, political radicalization keeps on intensifying, which makes it difficult to gain a comprehensive understanding of the overall scenario.

To be sure, the *BVerfG* is the constitutional court of *one* of the Member States. Therefore, it cannot stand against inequalities that impinge on other Member States' sovereign autonomy but respect Germany's own. It must declare itself satisfied if the Maastricht conditions are met for Germany and cannot react should such conditions be violated for Member States other than Germany.[61] This might be perhaps a case calling for the ECJ intervention.[62] However, the universal value of the arguments Karlsruhe puts forward when called on to defend Germany as a Euro-Member State allows all Member States to claim an equal treatment *vis-à-vis* their peers and the institution of the Union, so that a more reasonable compromise can be attained with the suitable display of political responsibility from all sides. The German legal hegemony in European law[63] would entail, in such a case, a positive effect: strengthening the constitutional anchorage for democratic law-making.

If this is the outcome of the know-it-all European lesson coming from Karlsruhe, then the perceived arrogance and one-sidedness of the ruling might really lead Europe to a new beginning, whether or not helpful to an even closer Union. In light of the current negotiations aiming at a common recovery from the economic and social outcomes of the pandemic, there is enough room to hope that the blow suffered gives the chance for a better mutual understanding.

Democratic *Rechtsstaat* to the Consolidating State of (Pseudo-)technocratic Governance' 44 *Journal of Law & Society*, 56, 78 (2017).

[59] S. Fabbrini, 'Intergovernmentalism and its Limits: Assessing the European Union's Answer to the Euro-Crisis' 46 *Comparative Political Studies*, 1003, 1029 (2013).

[60] M. Fourcade, P. Steiner, W. Streeck and C. Woll, 'Moral Categories in the Financial Crisis' *MaxPo – Max-Planck-Sciences-Po Discussion Paper* 13/1, 1, 27 (2013).

[61] The striking comparison with the judgment on the ESM Treaty delivered by the Estonian Supreme Court is significant in this respect: see C. Ginter, 'Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty' 9 *European Constitutional Law Review*, 335, 354 (2013).

[62] D. Curtin, 'Challenging Executive Dominance in European Democracy' 77 *Modern Law Review*, 1, 32 (2014).

[63] See the debate opened by Armin von Bogdandy, at https://tinyurl.com/y3ddq43q (last visited 27 December 2020).

Short Symposium on the PSPP

The German Right to Fiscal Stability and the Counter-Majoritarian Difficulty: The PSPP Judgment of 5 May 2020

Francesca Bignami*

Abstract

The PSPP litigation involved the European Central Bank's (ECB's) Public Sector Purchase Programme for the purchase of government bonds on the secondary market with the aim, among others, of combating deflation. Although the Court of Justice of the EU (CJEU) found the PSPP lawful, the German Federal Constitutional Court (FCC) disagreed: On May 5, 2020, the FCC held that the CJEU's judgment was not binding in Germany and that the PSPP was unlawful and required further ECB action to bring it into compliance with German law.

This article contributes to the growing scholarship on the PSPP litigation by analyzing the CJEU and FCC judgments as examples of what I call the 'ordinary politics' of constitutional adjudication—defending constitutional rights and principles while at the same time respecting the constitutional prerogatives of the political branches and successfully navigating the 'counter-majoritarian difficulty'. Based on a careful analysis of the CJEU's and FCC's jurisprudential trajectories in the domain of economic and monetary policy, I argue that the FCC's PSPP judgment is particularly counter-majoritarian. Over the past ten years, the FCC has fashioned, seemingly whole cloth, what I call a 'right to fiscal stability' and this right imposes additional procedural hurdles on the German government domestically that tip the scales in favor of EU austerity politics. My counter-majoritarian argument applies not only to judicial interference with decisions of German elected officials to participate in EU bailout funds; It also applies to judicial interference with the bond-buying programs (eg PSPP) of European central bankers, who enjoy their own form of accountability and legitimacy in the EU and global financial systems. Indeed, because of the decline of the traditional parties of the center-right and the center-left and the fragmentation of the political spectrum, contemporary German politics have become especially vulnerable to this destabilizing, austerity-inducing effect of constitutional law. In response to the pandemic-induced economic crisis, there have emerged a number of promising policy experiments in EU-wide solidarity, supported by the German government as well as the vast majority of Member States. For German constitutional law to operate as a potential barrier to greater EU economic solidarity, above and beyond the incredibly contentious politics, appears to be a particularly acute form of counter-majoritarianism that calls for jurisprudential recalibration.

I. Introduction

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It is a commonplace that constitutional courts are political actors.[1] That is, they are created to settle disputes involving the overtly political institutions of the jurisdiction. They do so based on the supreme law of the constitution, whose guarantees are generally extraordinarily open-textured. The combination of the type of dispute and the type of law, makes it impossible for constitutional courts to rely exclusively on the commonly accepted legal sources and interpretive techniques of their jurisdictions to reach their decisions. Rather, moral and political considerations also figure. The legitimacy of courts derives in large part from their ability to play this role and defend constitutional principles while, at the same time, not usurping the rightful prerogatives of other actors in the constitutional system, most prominently, but certainly not exclusively, the elected legislature. In the American tradition, the delicate task facing constitutional courts comes under the heading of the 'counter-majoritarian difficulty',[2] in the French tradition, under the specter of the *gouvernement des juges*.[3]

Beyond what one might call ordinary politics, which are common fare for constitutional courts in any jurisdiction, European courts are also engaged in another type of politics – existential politics. That is, they have been called upon to take sides on the issue of where the ultimate, sovereign authority lies in the European legal system – in the EU Treaties, as interpreted by the EU's constitutional court (European Court of Justice of the European Union (CJEU)), or in Member State constitutions, as interpreted by their domestic constitutional courts.[4] In the Anglo-American legal tradition, this can be styled as a fundamental debate over Europe's rule of recognition.[5] In EU law, it can simply be referred to as the supremacy issue. What has priority, a pronouncement of the CJEU, based on the EU Treaties, or a pronouncement of a Member State constitutional court, based on the national constitution? Similar to much of the ordinary politics of constitutional courts, there is no good answer in the positive law to the supremacy question. In many respects, this legal ambiguity is willful, and the EU has thrived on it. For their part, Europe's constitutional courts have been quite skillful at avoiding the existential question. Yet the very possibility of discord, in what for all intents and purposes, appears to be a relatively well-functioning legal system, has driven an extensive scholarly literature on constitutional pluralism – seeking to explain the very existence of the system, as well as to develop principles rooted in moral and legal commitments to values such as

[1] A. Stone Sweet, 'Why Europe Rejected American Judicial Review – And Why It May Not Matter' 101(8) *Michigan Law Review*, 2744-2780 (2003).

[2] A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 2nd ed, 1986), 16-17.

[3] E. Lambert, Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis; l'expérience américaine du contrôle judiciaire de la constitutionalité des lois (Paris: Giard, 1921).

[4] For purposes of this article, I set aside the difference between concentrated review in a specially designated constitutional court and judicial review by a supreme court of general jurisdiction and used the term 'constitutional court' for both the CJEU and Member State courts.

[5] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2nd ed, 1976).

pluralism and tolerance, to mediate existential conflicts should they occur.[6]

For the most part, the PSPP litigation has been analyzed as an example of existential politics and constitutional pluralism. As will be familiar to the readers of this article and special issue, the PSPP litigation involved the European Central Bank's (ECB's) Public Sector Purchase Programme for the purchase of government bonds on the secondary market, with the aim, among others, of combating deflation. The German Federal Constitutional Court (FCC) had doubts as to the lawfulness of the PSPP and referred, in July 2017, a series of questions to the CJEU.[7] In the *Weiss* judgment, decided in December 2018, the CJEU gave its preliminary ruling, finding that the PSPP was legal under the EU Treaties in all respects.[8] The FCC, however, disagreed, and in its judgment of 5 May 2020, held that the CJEU's judgment was not binding in Germany and that the ECB's PSPP was unlawful and required further action to bring it into compliance with German law.[9]

It is not hard to understand why this quite spectacular series of judgments has been scrutinized for what it can reveal on the supremacy issue. The *PSPP* litigation represents a rare instance in which the existential question has resulted in direct conflict and where neither the CJEU nor the national court, has backed down. Moreover, it is the only such instance involving the German FCC, probably the most powerful domestically and the most prestigious internationally of Europe's constitutional courts. Last, the PSPP judgment comes at a very bad time for the European judiciary, since the CJEU has been forced to take on a role in policing judicial independence and rule-of-law fundamentals in Hungary and Poland.[10] The PSPP judgment undermines the CJEU's legitimacy and its claim to supremacy. It has already been used by the governments of Poland and Hungary to push back against the CJEU decisions condemning them for rule-of-law violations.[11]

Although the supremacy issue is undoubtedly critical, this article contributes to the debate by shifting attention away from existential politics and toward the ordinary politics of the two constitutional courts in the PSPP litigation. The existential politics lens can sometimes harden positions, in favor of either EU or

[6] See, eg, N. Walker, 'Constitutional Pluralism Revisited' 22(3) *European Law Journal*, 333-355 (2016).

[7] Bundesverfassungsgericht 18 July 2017, 2 BvR 859/15 (hereinafter *PSPP* order), available at https://tinyurl.com/y6garx3q (last visited 27 December 2020).

[8] Case C-493/17 *Weiss and Others* (hereinafter *Weiss* judgment).

[9] Bundesverfassungsgericht 5 May 2020, BvR 859/15 (hereinafter *PSPP* judgment), available at https://tinyurl.com/yyprxyr7 (last visited 27 December 2020).

[10] See F. Bignami, 'Introduction: EU Law, Sovereignty, and Populism', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), 15-20; K. Lane Schepele and R.D. Kelemen, 'Defending Democracy in EU Member States: Beyond Article 7 TEU', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), chapter 15.

[11] S. Biernat, 'How Far Is It From Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland' 21(5) *German Law Journal*, 1104-1105 (2020).

Member State supremacy.[12] Ordinary politics and the ever-present shadow of the counter-majoritarian difficulty can, instead, be a useful alternative yardstick for assessing constitutional judgments. Analyzing how the EU and German courts perform the task of applying constitutional norms while, at the same time, recognizing the constitutional prerogatives of the legislative and executive actors of their respective, and overlapping, constitutional systems, can serve as a helpful vantage point. A fine-grained analysis of their jurisprudence in a specific policy area can reveal how they exercise their powers, indicate whether something has gone wrong in the overall constitutional balance of powers, and suggest how the path can be reversed if need be.

It can be argued that this form of counter-majoritarian analysis and self-correction has already occurred in another EU policy area, the free movement of posted workers. The CJEU's *Viking* and *Laval* judgments[13] came under heavy criticism for their neoliberal bent and the CJEU has since signaled a shift towards greater tolerance for the policymaking prerogatives of the political branches.[14] My argument in this article is that the jurisprudence of the German court on economic and monetary union (EMU) might be ripe for a similar form of recalibration. By establishing what I call a right to (EU) fiscal stability, the German decisional law that culminated in the PSPP judgment has tipped the scales in domestic, German politics in favor of Euroskeptics and against economic solidarity. In light of the importance of Germany in the evolving EU politics on EMU, the result is that the German jurisprudence has tipped the scales at the EU level too. Yet the German right to fiscal stability is based on constitutional and treaty text, and judicial precedents, that are far from unequivocal. When seen from the perspective of the counter-majoritarian difficulty, the German jurisprudence on EMU has come to occupy an outsized domain in the political space of EMU and risks stifling legitimate German and EU debate and undermining the policymaking prerogatives of the other constitutional branches.

The rest of this article proceeds as follows. In the next section, I briefly review the PSPP litigation from the standpoint of existential politics and the supremacy issue. Then I turn to the ordinary politics of constitutional adjudication: In the third section, I analyze the evolving jurisprudence that culminated in the PSPP decisions of the two constitutional courts. In the fourth and concluding section, I suggest that the German *PSPP* judgment together with the earlier judgments on which it rests have expansively pushed the boundaries of German

[12] See generally V. Perju, 'Against Bidimensional Supremacy in EU Constitutionalism' 21(5) *German Law Journal*, 1006-1022 (2020).

[13] Case C-341/05 Laval un Partneri v Svenska Byggnadsarbetareförbundet; Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.

[14] U. Öberg and N. Leyns, 'On Equal Treatment, Social Justice and the Introduction of Parliamentarism in the European Union', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), chapter 7.

constitutional law. There is a good argument to be made that this EMU jurisprudence interferes with the constitutional prerogatives of the legislative and executive branches and that it might be time to scale back.

II. Existential Judicial Politics

Where does the ultimate legal authority in the EU system lie? Early on, in the well-known legal trajectory that began with *Vand Gend en Loos* and *Costa* v *ENEL*, the CJEU asserted the supremacy of EU law.[15] As might be expected, many Member State constitutional courts have taken the opposite view, and have sided with their national constitutions and national law. There is also a third answer possible, which rests in between the absolutes – constitutional pluralism. This scholarly literature on the dueling supremacies of EU and national law dates mostly to the post-Maastricht era when the expansion of EU competences led to a much greater risk of head-to-head conflict between constitutional courts. Beyond description, the focus has been on working out a set of principles that can serve to mediate and accommodate the contesting supremacy claims of the EU's and the Member States' legal orders – principles such dialogue, subsidiarity, and participation.[16]

In national constitutional courts, one important strategy for maintaining the supremacy of national law has been to refrain from sending questions to the CJEU through the preliminary reference system (Art 267 TFEU), a procedure that de facto recognizes the authority of the CJEU. This was the approach that was followed by the German FCC for decades. In 2010, however, in the *Honeywell* judgment,[17] the FCC indicated a change of heart, and outlined the procedure by which it would request preliminary rulings under Art 267 TFEU. This is the procedure that it used, for only the second time, in the PSPP litigation. In *Honeywell,* the FCC first repeated the power, established in its *Maastricht*[18] and *Lisbon*[19] judgments, to review EU acts for being in breach of the competences contained in the EU Treaties (ultra vires review) or for infringing the core of German constitutional identity that cannot be assigned to an international organization (identity review).[20] Ultra vires review, the FCC

[15] K.J. Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe (Oxford: Oxford University Press, 2001).

[16] See generally M. Avbelj and J. Komárek eds, *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012).

[17] Bundesverfassungsgericht 6 July 2010, 2 BvR 2661/06 (hereinafter *Honeywell* judgment), available at https://tinyurl.com/yylaxc2a (last visited 27 December 2020).

[18] Bundesverfassungsgericht 12 October 1993, 2 BvR 2134/92, 33(2) *International Legal Materials*, 395-444 (1994) (hereinafter *Maastricht* judgment).

[19] Bundesverfassungsgericht 30 June 2009, 2 BvE 2/08 (hereinafter *Lisbon* judgment), available at https://tinyurl.com/y6lpohk7 (last visited 27 December 2020).

[20] *Honeywell* judgment, para 55.

said, is to be coordinated with the CJEU, by giving the CJEU the first cut at the issue of whether the EU act is compliant with the competences set out in the Treaties.

The *Honeywell* procedure bears some of the marks of constitutional pluralism. First, the FCC acknowledges the CJEU's authority to assess EU law based on the higher law guarantees in the EU Treaties. Second, the FCC indicates a certain amount of deference to the EU legal system while nonetheless reserving its power in the last instance to assert its interpretation of the EU Treaties based on Germany's incorporation of the EU Treaties into domestic law. This EU deference is articulated as an EU act being ultra vires only if the act is

> 'manifestly in violation of competences and (...) the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute (the EU Treaties) under the rule of law (...)'.[21]

More specifically, with reference to an act, ie judgment, of the CJEU, the FCC says that the judgment will be considered ultra vires only after making allowance

> 'for the Union's own methods of justice to which the Court of Justice considers itself to be bound and which do justice to the 'uniqueness' of the Treaties and goals that are inherent to them (...)'.[22]

Further, the CJEU 'has a right to tolerance of error'.[23] There are two types of error that the FCC has in mind and that will be tolerated: a doctrinally acceptable, ie among scholars and courts, difference in legal interpretation; or a decision with relatively little significance for competences or fundamental rights.

The *Honeywell* framework is what was used to define the essential procedural and doctrinal steps of the PSPP litigation. When the ECB's PSPP was challenged in a number of individual complaints before the FCC, it suspended the proceedings and referred the questions involving the interpretation of the PSPP and the EU Treaties to the CJEU. Before doing so, the FCC ascertained, following the criteria in the *Honeywell* judgment, that the ECB's alleged violations of law would 'constitute a manifest and structurally significant exceeding of competences'.[24] The Court also explained, based on the CJEU's earlier *Gauweiler* decision[25] involving ECB competences, why the facts of the PSPP gave rise to 'strong indications that the PSPP Decision does not fall within the ECB mandate'[26] and,

[21] *Honeywell* judgment, para 61.
[22] *Honeywell* judgment, para 66.
[23] *Honeywell* judgment, para 66.
[24] *PSPP* order, para 64.
[25] Case C-62/14 *Gauweiler and Others* v *Deutscher Bundestag* (hereinafter Gauweiler judgment).
[26] *PSPP* order, para 114.

if so, would constitute an ultra vires act under German constitutional law. The CJEU, however, disagreed and found that the ECB had acted within its mandate and had not exceeded its competences.

When the case went back to the FCC, it expressly rejected the CJEU's holding and asserted the supremacy of German law, resulting in the *PSPP* judgment. Again, the FCC's analysis tracked the doctrinal framework set down in *Honeywell*. This time, there were two ultra vires EU acts – the CJEU's judgment, *and* the ECB's PSPP program. The CJEU's judgment was not simply wrong, but manifestly and structurally significantly wrong. Its proportionality analysis was 'not comprehensible from a methodological perspective',[27] ie manifestly wrong, and because of its failure to cabin in the PSPP program with proportionality, the effects for economic policy resulted in 'a structurally significant shift in the order of competence to the detriment of the Member States'.[28] As for the ECB's PSPP, it too met the standards of manifest and structurally significant exceeding of competences and so it too constituted an ultra vires EU act.[29]

This assertion of German supremacy was not the last word. In a press release issued three days later, the CJEU issued a rebuttal asserting EU supremacy:

> 'In general, it is recalled that the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law'.[30]

In short, the *PSPP* litigation was based on a constitutional pluralism framework in which, in the words of the *Honeywell* judgment, the inevitable tensions between the two constitutional courts were to be 'harmonised cooperatively' and 'relaxed through mutual consideration'.[31] In the end of the day, however, the result was competing declarations of supremacy.

The existential politics of the German *PSPP* judgment have provoked a variety of reactions from the legal academy. There are a couple of different strands. There is a direct call for EU supremacy from some EU law scholars, against constitutional pluralism, or at least a version that would not allow for

[27] *PSPP* judgment, para 153.
[28] *PSPP* judgment, para 154.
[29] *PSPP* judgment, para 165.
[30] CJEU, 'Press release following the judgment of the German Constitutional Court of 5 May 2020,' Press Release no 58/20, Luxembourg, 8 May 2020 (citations omitted).
[31] *Honeywell* judgment, para 57.

the FCC to declare a CJEU judgment without binding force in Germany.[32] Probably the more common response, however, is to embrace constitutional pluralism, and to argue for the merits or the demerits of the result that it produced in this particular instance. For instance, Matthias Ruffert argues that, in light of the scarce democratic accountability of the ECB, the FCC's call for a better proportionality assessment of the economic policy effects of its bond-buying program was sound.[33] Others point to a string of legal and political defects that undermine the FCC's final judgment.[34]

III. Ordinary Judicial Politics

1. Assessing the Counter-Majoritarian Difficulty

The existential judicial politics of the *PSPP* litigation are essential for appreciating both the debate in the legal scholarship and for understanding the procedural and doctrinal tests employed in FCC's *PSPP* judgment. Now, I switch to the specific contribution of this article – unpacking the ordinary politics of the two constitutional courts and their navigation of the counter-majoritarian difficulty. To assess how the FCC and the CJEU exercised their constitutional functions in the concrete domain of economic and monetary policy, it is useful to ask how closely they stuck to the positive law. The more embedded in their legal sources, the less likely that constitutional adjudication intrudes upon the constitutional prerogatives of the political branches, the more expansive their adjudication, the more likely that they trespass on the policymaking functions of the other branches.

The set up for my analysis is obviously, for some perhaps painfully, naïve. But it is useful, particularly in the face of the technical and institutional complexities of the PSPP litigation. To be sure, all constitutional courts, almost by definition, can be accused of the counter-majoritarian difficulty.[35] Furthermore, the use of positive law to take the gauge of the acuteness of the difficulty may seem like a futile exercise. Again, almost definition, constitutional courts do not operate with a comprehensive set of written rules or a thick body of case law but rather rely on an open-textured set of sources – the vague written provisions of their respective supreme laws, their decisional law as it has been set down from

[32] R.D. Kelemen et al, 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' *Verfassungsblog* 26 May 2020, available at https://tinyurl.com/y6d2usgp (last visited 27 December 2020).

[33] M. Ruffert, 'Seul un contrôle credible et approfondi des fait fondant la politique de la BCE peut engendrer la confiance' *Le Monde*, 13 May 2020.

[34] See, eg, M. Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' 21(5) *German Law Journal*, 979-994 (2020).

[35] See generally L. Solum, 'Legal Theory Lexicon: The Counter-Majoritarian Difficulty' *Legal Theory Blog*, 9 September 2012, available at https://tinyurl.com/y6xfuhkx (last visited 27 December 2020).

case to case, and the scholarship and other writings of their legal establishments. It is therefore undeniable that the line between legitimate adjudication based on positive law and illegitimate displacement of the constitutional functions of the other branches is by no means self-evident. At the same time, it is possible, as I do here, to analyze the output of courts in a specific policy space and assess how closely their judgments are justified by reference to standards of legal reasoning or, instead, appear to tread on the policymaking prerogatives of the political branches.

There is a distinctively American flavor to this concern for the counter-majoritarian difficulty of unelected constitutional judges striking down the policy decisions of legislative and executive actors.[36] At the same time, it is important not to exaggerate the difference. This yardstick for evaluating the judgments produced by constitutional courts is firmly rooted in republican theories of government and constitutional law. The powers of the French courts, including the constitutional court, are more limited than elsewhere because of the centuries-old wariness of the *gouvernement des juges*.[37] Even in jurisdictions like Germany, where the suspicion of constitutional adjudication is decidedly less pronounced, there are numerous legal doctrines for limiting the power of the constitutional court *vis-à-vis* other constitutional bodies.[38] In short, the notion of the need for judicial restraint in constitutional adjudication involving the political branches is not unique to American constitutional law and it is certainly known to the courts involved in the PSPP litigation.

Now for the legal analysis: Proportionality is the legal question at the heart of the *PSPP* judgment. In its *PSPP* judgment, the FCC ruled against the CJEU's proportionality assessment of the economic policy effects of the PSPP, adopted based on the EU's competence for monetary policy. The proportionality test comprised the familiar three steps of (1) *suitability* of the PSPP for accomplishing the monetary policy aims; (2) *necessity* of the PSPP for accomplishing those aims; (3) balancing between the PSPP's monetary policy benefits and its economic impact, to safeguard against a disproportionate burden on the economic competence (*strict-sense* proportionality). Although the FCC was generally critical of the CJEU's proportionality analysis, it found greatest fault with the third prong of the test. It defined the economic competence that was burdened in the narrow, fiscal sense – the balance sheets of countries and commercial

[36] W. Sadurski, 'Constitutional Review in Europe and the United States: Influences, Paradoxes, and Convergence' Sydney Law School Research Paper no 11/15, 2 February 2011, available at https://tinyurl.com/yyah3xcd (last visited 27 December 2020).

[37] See, eg, D. Terré, 'Le gouvernement des juges', in Id ed, *Les questions morales du droit* (Paris: Presses Universitaires de France, 2007), 167-191, chapter 2.

[38] See, eg, Bundesverfassungsgericht 9 February 2010, 1 BvL 1/09, available at https://tinyurl.com/y5bbb558 (last visited 27 December 2020), paras 133, 141 (*Harz IV* judgment); Bundesverfassungsgericht, 2 BvR 2728/13, Dissenting Opinion of Justice Lübbe-Wolff on the Order of 14 January 2014, available at https://tinyurl.com/yyknkvfa (last visited 27 December 2020), paras 15-23 (hereinafter *OMT* Order).

banks – and in the broader, economic and social sense – rates of return and risk-taking in pension plans, asset bubbles, and so on.[39] This defect, following the doctrinal test of *Honeywell*, was considered manifest and structurally significant. The result was that the CJEU's judgment upholding the legality of the PSPP was not binding in Germany and that the PSPP was in violation of the principle of proportionality.[40] The remedy ordered was for 'the Federal Government and the Bundestag to take steps seeking to ensure that the ECB conducts a proportionality assessment in relation to the PSPP'.[41] The FCC gave the ECB three months to adopt a decision demonstrating the proportionality of the PSPP. After that time, in the absence of such a decision, the Bundesbank would not be permitted to participate in the bond-buying program.[42]

Why did the CJEU and the FCC takes different stands on proportionality? For that, a detailed analysis of their legal doctrine, as it has evolved in the EMU area is necessary. To get a handle on the issue, one good way of focusing the mind is to take a step back and ask a more basic question – why should a proportionality assessment of an instrument of *monetary policy*, which no one doubts is at least in part designed to increase money supply and combat deflation, examine that instrument's effect on *economic policy*? There are two different answers – one under EU law, the other under German law.

2. German Law

I start with German law because that is where it all begins. Without the twists and turns of the German jurisprudence discussed below, it is unlikely that the ECB's PSPP would have ever ended up in court, to wit the CJEU. In German law, a proportionality analysis of the ECB's monetary instrument must take into account its economic effects because of the burden that is placed on what I call the 'right to fiscal stability.' Below I demonstrate that over the past decade there has developed in German constitutional law a right to (EU) fiscal stability. This is traceable to the FCC's Lisbon judgment, in which the FCC said that parliamentary control over fiscal policy was one element of the unamendable core of the German Basic Law and that it was not merely a principle, but a fundamental right that could be litigated by individuals in the FCC. The converse, in German constitutional law, is that EMU has been conceptualized as a price and *fiscal* 'stability union',[43] which essentializes the Stability and

[39] *PSPP* judgment, paras 139, 171, 172, 173.

[40] *PSPP* judgment, para 177.

[41] *PSPP* judgment, para 232.

[42] *PSPP* judgment, para 234. In the aftermath of the judgment, the ECB furnished (via the Bundesbank) the German government and Bundestag with a number of documents showing the considerations behind the PSPP, leading to a parliamentary decision saying that the ECB had shown the proportionality of the program. M. Wendel, n 34 above, 981.

[43] Stability is an extraordinarily slippery term. In the CJEU, it is used to refer to *price* stability and, in a new concept introduced in the judgment upholding the ESM, 'the *financial* stability of the

Growth Pact, and creates a very high, German legal hurdle for any EU action that would loosen the austerity character of the EMU.

The German right to fiscal stability has been developed by the FCC in a line of cases that began with the *Lisbon* judgment and then accelerated in a series of judgments addressing different elements of the EU's response to the euro crisis – the Greek Rescue Package and the European Financial Stability Facility (EFSF),[44] decided in 2011, the European Stability Mechanism (ESM),[45] decided in 2014, the Outright Monetary Transactions program (OMT),[46] decided in 2016, and, now, the Public Sector Purchasing Programme (PSPP), decided on 5 May 2020. Some even turn the clock back further, to the *Maastricht* judgment, in which the concept of stability was used to analyze and uphold Germany's conferral of economic and monetary powers in the Maastricht Treaty.[47] There, however, stability was defined primarily as *price* stability, ie monetary policy designed to avoid inflation and, in theory, deflation. The Stability and Growth Pact element of Maastricht Treaty figured in the judgment, but as simply one tool, albeit an important one, for the achievement of *price* stability.[48] My account, therefore, begins with the *Lisbon* judgment.

In the *Lisbon* judgment, the FCC said that because real, viable democracy was only possible at the level of the (German) state, and because democracy was a core and unamenable guarantee of the Basic Law (Art 20, paras 1 and 2, in conjunction with Art 79, para 3), there were constitutional limits on parliament's ability to transfer of powers to the EU, limits which could not be overcome by constitutional amendment.[49] The Court identified five areas as comprising the 'inviolable core content of the constitutional identity of the Basic

euro area as a whole'. Case C-370/12 *Pringle*, para 142. 'The financial stability of the euro area as a whole' means the objective of preventing situations like the freezing up of the banking system, the exit of members from the euro area, and other types of shocks. In the FCC, by contrast, the term indicates price stability and *fiscal* stability, ie the obligation to avoid excessive deficits, in line with the use of the term in the Treaty on Stability, Coordination, and Governance (also known as the Fiscal Compact). See V. Borger, 'The ESM and the European Court's Predicament in Pringle' 14(1) *German Law Journal*, 137-138 (2013). When the CJEU wishes to indicate the taxing and spending power, it does not use 'stability' but rather prefers 'sound budgetary policy', *Pringle*, para 143. In the academic literature, the taxing and spending element of EU law has been referred to as the 'disciplinary framework' applicable to the Member States. M. Goldmann, 'The European Economic Constitution after the PSPP Judgment: Towards Integrative Liberalism?' 21(5) *German Law Journal*, 1070 (2020).

[44] *Bundesverfassungsgericht* 7 September 2011, 2 BvR 987/10 (hereinafter *EFSF* judgment), available at https://tinyurl.com/y6ddj8ef (last visited 27 December 2020).

[45] *Bundesverfassungsgericht* 18 March 2014, 2 BvR 1390/12 (hereinafter *ESM* judgment), available at https://tinyurl.com/yddgz6m3 (last visited 27 December 2020).

[46] *Bundesverfassungsgericht* 21 June 2016, 2 BvR 2728/13 (hereinafter *OMT* judgment), available at https://tinyurl.com/y3843gtp (last visited 27 December 2020).

[47] See, eg, M. Ruffert, 'The Future of the European Economic and Monetary Union: Issues of Constitutional Law', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), 35.

[48] *Maastricht* judgment, paras 432, 435.

[49] *Lisbon* judgment, para 240.

Law'[50] – including, critically for this analysis, 'fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia,* by social policy considerations'.[51] At the time, there were a number of criticisms that were levelled in the legal scholarship, including the dearth of support, historical or otherwise, for the Court's singling out of the policy areas that belonged to the inviolable core.[52]

Notwithstanding some of the initial skepticism with which the so-called 'identity lock'[53] was received in the legal literature, soon thereafter the fiscal identity lock made its first concrete appearance. The occasion was the *EFSF* judgment.[54] At issue were German fiscal transfers to the emergency rescue funds that were created in the early days of the EU's sovereign debt crisis. To preserve German constitutional identity (and democracy) in the fiscal domain, the FCC held that there were both quantitative and procedural limits on German contributions to the EU rescue funds.[55] On the issue of how much is too much, it was significant that the Court said that there was a limit – but 'only a manifest overstepping of extreme limits is relevant' and this had not occurred in the present case.[56] On the procedure, the Court said that the 'Bundestag must specifically approve every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level' and that

> 'it must be ensured that sufficient parliamentary influence will continue in existence on the manner in which the funds made available are dealt with'.[57]

In the *EFSF* judgment, the FCC not only elaborated on how to preserve constitutional identity in the fiscal arena, but it also, for the first time, articulated

[50] *Lisbon* judgment, para 240.

[51] ibid para 252.

[52] See, eg, D. Halberstam and C. Möllers, 'The German Constitutional Court says "Ja zu Deutschland!" ' 10(8) *German Law Journal*, 1250 (2009).

[53] P. Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' 48(2) *Common Market Law Review*, 405 (2011).

[54] See D. Grimm et al, 'European Constitutionalism and the German Basic Law', in A. Albi and S. Bardutzky eds, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Report* (The Hague: TMC ASSER PRESS, 2019), 423-26. The authors explain the three types of German constitutional review of EU acts: fundamental rights, ultra vires, and constitutional identity, what is sometimes referred to in the legal literature as 'identity lock' review.

[55] Even though I use the term rescue funds for convenience purposes, it should be recalled that all of the EU economic measures discussed here are based on capital contributions from Member States that are used as guarantees for raising funds on the financial markets, which are then distributed as loans to Member States in distress. In other words, these are *not* direct transfers, but must be paid back.

[56] *EFSF* judgment, para 131.

[57] ibid para 128.

the implications of this identity lock for its emerging understanding of EMU as premised on EU *fiscal* stability:

> 'The treaty conception of the monetary union as a stability community is the basis and subject of the German Consent Act (German law incorporating Maastricht Treaty into German legal system) (...). Further central provisions on the design of the monetary union (beyond those on currency stability) also safeguard constitutional requirements of democracy in European Union law. In this connection, particular mention should be made of the prohibition of direct purchase of debt instruments of public institutions by the European Central Bank, the prohibition of accepting liability (bailout clause) and the stability criteria for sound budget management (...) *Although in this connection the interpretation of these provisions is not essential, it is nevertheless possible to derive from them the fact that the independence of the national budgets is constituent for the present design of the monetary union* (...)'.[58]

In other words, German constitutional identity was preserved not simply by virtue of the fact that there were constitutional limitations on how much and through what procedure German fiscal resources could be transferred to EU bodies. Constitutional identity could be considered safe also because the EU Treaties did not admit the possibility of fiscal solidarity among Member States. Under the Treaties, according to the FCC, national budgets had to be independent and the only type of EU fiscal policy contemplated was disciplinary fiscal policy.

Soon afterwards, the same identity lock objections were made to the ESM (and, directly related, the new Art 136, para 3, TFEU). In the *ESM* judgment, the FCC further articulated the constitutional identity limits on the transfer of budgetary powers. On the one hand, the quantitative dimension dropped out of view. On the other hand, the procedural dimension was reinforced: the German government's participation in the ESM was conditioned on extensive *Bundestag* accountability and every new German contribution to the ESM and new Memorandum of Understanding setting out the terms of a bailout loan was conditional on Bundestag approval.[59] As in the *EFSF* judgment, the FCC also took the opportunity to elaborate on the implications for the EU's (fiscal) stability union. It made clear that the potential for fiscal transfers through the ESM was to interpreted restrictively and that there remained the (fiscal) 'stability-directed orientation of the monetary union'.[60]

Both the EFSF and ESM cases involved the fiscal side of the EU's response to the euro crisis. In the OMT and PSPP cases, the monetary side was at issue. Formally speaking, these cases were not constitutional identity challenges, as in the EFSF and ESM cases, but ultra vires challenges: the claim was that the ECB

[58] *EFSF* judgment, para 129 (emphasis added).
[59] *ESM* judgment, paras 135-171.
[60] ibid paras 129-134.

exceeded its recognized Treaty competence for monetary policy and interfered with the competence for economic policy.[61] Technicalities aside, however, the German judgments in both cases were shaped by the earlier *EFSF and ESM* judgments and the emerging right to fiscal stability.

In the OMT litigation, a number of constitutional complaints were brought against the ECB's OMT program of 6 September 2012. The OMT bond-buying program was one of the ECB programs announced (but not actually implemented) to implement Mario Draghi's famous 'Whatever it takes' speech from earlier that summer.[62] The case was the first to make use of the *Honeywell* framework discussed above for obtaining a preliminary ruling from the CJEU in an ultra vires challenge.[63] In the FCC's order making a preliminary reference to the CJEU, the identity lock for fiscal policy and the corresponding EU (fiscal) stability union were in full view. There it expanded on the logic that was already evident beginning in the *EFSF* judgment.

As the reader will recall, under *Honeywell*, for the FCC to find an EU act to be ultra vires, the EU act must be (1) manifestly so and (2) structurally significantly so. In the *OMT* order, the FCC found in the affirmative on both scores because of the identity lock and fiscal stability. First, on the requirement that the ECB's OMT program be a 'manifest' transgression of monetary competence and an interference with economic competence: As it did in the *EFSF* passage reproduced above, the FCC interpreted the TFEU to preclude any economic competence aside from the Stability and Growth Pact, ie austerity policies.[64] Admittedly, something might be lost in the English translation of the *OMT* order, but this formulation of EU economic policy is more categorical than the actual Treaty articles. Second, and tellingly, was the explanation of why an economic policy dimension to the ECB's program would be structurally significant for Germany:

> (Economic policy effects would) lead to a considerable redistribution between the budgets and the taxpayers of the Member States and can thus gain effects of a system of fiscal redistribution, which is not entailed in the integration programme of the European Treaties. On the contrary, independence of the national budgets, which opposes the direct or indirect common liability of the Member States for government debts, is constituent

[61] In the cases and the EU Treaties, the economic competence is generally specified by reference to the fiscal component of economic policy. As will become evident later in the discussion, the FCC in the *PSPP* judgment has recently broadened its understanding to also include the effect that monetary policy has on interest rates, asset prices, and investment choices.

[62] Speech by M. Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012, available at https://tinyurl.com/qd3hnuc (last visited 27 December 2020).

[63] I. Pernice, 'A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU' 21(1) *Maastricht Journal of European and Comparative Law*, 3-13 (2014).

[64] *OMT* order, para 39.

> for the design of the monetary union (...).[65]

In sum, because fiscal policy is at the core of German constitutional identity, EU monetary policy with economic policy implications that go beyond the fiscal stability variety would be a manifest and structurally significant transgression of EU competences.

In the CJEU's preliminary ruling, issued in the *Gauweiler* judgment, the proportionality principle surfaced for the first time, something that has since become the key to understanding the PSPP litigation. In the FCC's *OMT* order, the preliminary analysis of the ECB's bond-buying program had been based on a center-of-gravity test. The FCC had indicated that it believed that overall the OMT program fit more in the economic policy box than it did in the monetary policy box and hence it could potentially be ultra vires.[66] The CJEU, by contrast, did not seek to locate the OMT program's center of gravity. Rather, it introduced proportionality, and in particular the last step of strict-sense proportionality, to address the concern of ECB bond-buying veering into the domain of economic policy. This was based on the TEU's principle of conferral (Art 4 TEU), in tandem with the principle of proportionality (Art 5 TEU).

The Advocate General's opinion is most illuminating on how German ultra vires review was accommodated by EU proportionality analysis. First, he considered the elements of the OMT program that supported the conclusion that it was specifically and narrowly designed to achieve monetary policy goals. Then, he turned to the strict-sense part of the test and weighed OMT's monetary policy 'benefits' against the 'costs.' On the cost side were all of the dangers to EU (fiscal) stability identified in the FCC order. In the words of the Advocate General:

> 'it is a measure which exposes the ECB to a financial risk, together with the moral hazard arising from the artificial alteration of the value of the bonds of the State concerned'.[67]

Ultimately, the Advocate General concluded in favor of proportionality. The CJEU followed the Advocate General – although on the strict-sense part of the test, in contrast with the Advocate General, the Court was vague on what the costs were and did not name the effect on ECB solvency and Member State budgetary discipline as something that was suspect.[68] The CJEU therefore avoided entrenching in EU constitutional law the specifically German conceptualization of EU fiscal policy.

[65] *OMT* order, para 41.
[66] *OMT* order, para 69.
[67] Case C-62/14, Opinion of the Advocate General, *Gauweiler and Others* v *Deutscher Bundestag*, para 186.
[68] *Gauweiler* judgment, para 91.

Back in Karlsruhe, the FCC's final *OMT* judgment followed the CJEU and decided in favor of German participation in the OMT program. In the judgment, however, the FCC criticized what it saw to be the CJEU's lax judicial review.[69] The FCC got around this reservation by codifying into the OMT program the parameters of the proposed bond purchases that the CJEU had taken into account in its proportionality assessment[70] – but that the CJEU did not itself necessarily require in the future implementation of the program should future circumstances change and there be other means of limiting the program.

Before turning to the PSPP litigation, the most recent episode in this saga, it is necessary to cover the admissibility issue in German constitutional law, what can also be called standing. The vast majority of the German constitutional cases discussed so far have been brought through individual constitutional complaints based on the right to vote under Art 38, para 1 of the Basic Law. Ordinarily, in German law, the right to vote does not give rise to an entitlement to bring a constitutional complaint against decisions of parliament or other state bodies. It does not equate to a fundamental right to participate, via parliamentary representatives, in the decisionmaking process of government bodies; consequently, an alleged violation of the right to vote cannot be used to challenge their policy output. However, since the *Maastricht* judgment, this rule has been progressively relaxed in the EU context because of the perceived danger to democracy of transferring powers to the undemocratic EU.[71] The right to vote has been connected to the principle of democratic self-determination in Art 20, paras 1 and 2.[72]

Because of the expanding standard of admissibility, individuals can now challenge EU acts in both constitutional identity review and ultra vires review. So far, the principal example of such litigation has been the EMU cases canvassed in this article. Calling something a 'fundamental right' has implications not only for court access, but also affects the substantive analysis of how (and how much) that 'fundamental right' can be used to push back against government action. It is because of both the court-access and substantive elements of how German constitutional law has evolved in the EMU domain that this article speaks of a 'right' to fiscal stability. The German right gives the democracy principle very significant constitutional bite in the EU arena as compared to the ordinary reach of the principle in German constitutional law on strictly national issues.

And so we arrive at the PSPP litigation. The FCC's initial order requesting a preliminary ruling largely tracked the reasoning of its earlier *OMT* order, just applied to the ECB's new PSPP. For the same reasons relating to the identity

[69] *OMT* judgment, para 181.

[70] *OMT* judgment, para 190 (CJEU's parameters are 'legally binding').

[71] *EFSF* judgment, paras 100-102; *OMT* order (Justice Lübbe-Wolff, dissenting), paras 15-23.

[72] See I. Feichtner, 'The German Constitutional Court's *PSPP* Judgment: Impediment and Impetus for the Democratization of Europe' 21(5) *German Law Journal*, 1092 (2020).

lock over fiscal policy and the right to fiscal stability, it found that if the PSPP were held ultra vires, this would be a 'manifest and structurally significant exceeding of competences.'[73] The FCC also conducted a preliminary assessment on the PSPP's impact on economic policy. The Court pointed to the economic policy effects of the ECB's massive bond buying program:

> 'Member states can deliberately use low-yield government bonds as a means of budgetary policy' and 'the activities of commercial banks are factually subsidized.'[74]

Such effects, in its view 'could prove to be disproportionate in relation to the legitimate monetary policy objectives pursued.'[75]

As explained in the introduction, the CJEU responded to the FCC's preliminary reference in the *Weiss* judgment and found the PSPP to be legal. For the time being, the specifics of the *Weiss* judgment are bracketed, and will be covered in the next section. The focus here is on how the German right to fiscal stability led the FCC to reject the CJEU's proportionality analysis when the case went back to Karlsruhe.

First, in the *PSPP* judgment, the FCC requires that there be a hard line drawn between monetary policy and economic policy so that the impact of the bond-buying program on economic policy, ie the burden on the German right to fiscal stability, can be assessed.[76] There is an implicit on-off switch in the PSPP judgment – exclusive EU competence for monetary policy, virtually no competence for economic policy. This is coherent from the standpoint of the German decisional law canvassed earlier in this section. However, from the perspective of the system of competences in the EU Treaties, it is far from evident that such a hard line can be drawn. That is why the FCC itself waivers in how it characterizes EU power over economic policy – from something that 'in principle remains a competence of the Member States',[77] to 'limited conferral upon the EU of the competence to coordinate general economic policies, with the Member States retaining the competence for economic policy at large',[78] to the assertion that, even though it might not be possible to say exactly how, economic policy must be different from monetary policy since 'the Union only has an exclusive competence for monetary policy (but not for the matters of economic policy)'.[79]

The fact is that the EU does has extensive power over economic policy – although, to date, it has been economic policy of the austerity variety, which has

[73] *PSPP* order, para 64-68.
[74] ibid para 122.
[75] ibid para 122.
[76] *PSPP* judgment, para 127.
[77] ibid para 120.
[78] ibid para 127.
[79] ibid para 142.

been applied through the European Semester and which has legal and political bite mostly in debtor Member States.[80] When the FCC says that ECB monetary policy should not have effects on economic policy, it has in mind a specific type of economic policy more in line with Keynesian ideas. The austerity variety of economic policy, by contrast, is fully in line with, and indeed required by, the concept of (fiscal) stability union that we saw in the *EFSF* judgment, the *ESM* judgment, the *OMT* order, and the *PSPP* order. At the EU level, however, it is hard to see how a general competence analysis can draw a strict line between the two types of economic policy. To be sure, there are the specific Treaty provisions that the FCC relied on to develop its concept of (fiscal) stability union – the provisions that serve as the basis for the European Semester (Art 121 TFEU), that establish the Excess Deficit Procedure (Art 126 TFEU), that bar ECB financing of national debt (Art 123 TFEU), and that prevent the EU and Member States from assuming liability for the debt of other Member States (Art 124 TFEU). But to draw the conclusion, based on these specific Treaty articles, that all other types of EU economic policy are precluded, is an interpretive stretch. It is neither dictated by the Treaty text, nor, to the extent that original meaning serves as an interpretive tool in EU law, the intent of all the Treaty signatories.

Second, in the *PSPP* judgment, the FCC requires that the proportionality test include a full-fledged, strict-sense third step and directs the ECB to furnish one. In the proportionality principle, regardless of whether German or EU law is in play, a full-blown analysis on the third step is generally reserved for important rights or interests that could potentially outweigh what has already been established to be a legitimate and essential public policy measure.[81] Under EU law it is not immediately apparent what that important right or interest would be. But it is under German law – the right to fiscal stability. According to the FCC, on the third step, the economic policy effects, ie the burden on the German right to fiscal stability, must be fully assessed.[82] The assessment of the economic policy burden should be broad-ranging – not just the impact on the debt burden and fiscal liability of governments, but also more generally on social and economic policy. And this economic policy burden must be balanced against the monetary policy benefits of combating deflation.

Certain commentators have taken the FCC's broad definition of economic policy to be a promising sign that the FCC is moving away from a purely austerity-

[80] See P. Tsoukala, 'Post-Crisis Economic and Social Policy: Some Thoughts on Structural Reforms 2.0', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020), chapter 3.

[81] See generally R. Stacey, 'The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication' 67(2) *American Journal of Comparative Law*, 435-476 (2019).

[82] *PSPP* judgment, para 139.

oriented vision of monetary union.[83] It should be noted, however, that this more comprehensive balancing, which looks not just at the incentives to run high budget deficits, but also at the effect of low interest rates on different types of investments, is done by necessity from Germany's perspective. What do low or indeed negative interest rates do to the savings of German pensioners? To the prices of real estate in Berlin? And so on. This national perspective is still in tension with an EU-wide economic and monetary policy, which might, say, sacrifice returns on pensioner savings in one country, in order to protect the solvency of governments (and their public pensions plans) in another country. In fact, the broader articulation of economic policy in the *PSPP* judgment can be said to draw on the logic of the identity lock for fiscal policy. The *Lisbon* judgment singled out the social, redistributive dimension of fiscal policy as something that had to remain within the prerogatives of the German parliament and German voters. By requiring that the ECB provide a full statement of the economic consequences of monetary policy to the German government and parliament, the ECB's social and economic trade offs are squarely put in the accountability ambit of German voters and their representatives.

Third, in the *PSPP* judgment, the FCC calls for 'full judicial review' of the impact of the ECB's bond-buying program on economic policy.[84] This standard is required because it is

> 'imperative that the mandate of the ESCB [European System of Central Banks] be subject to strict limitations given that the ECB and the national central banks are independent institutions which means that they operate on the basis of a diminished level of democratic legitimation'.[85]

Here, the FCC repeats directly parts of its previous OMT judgment in which is was skeptical of the CJEU's light-touched review of the earlier OMT program.[86]

Again, from the perspective of EU law, it is not self-evident that the ECB should be subject to stringent judicial review, since it can be characterized as a both a constitutional body – since it is created by the primary law of the EU Treaties – and a technical or administrative body – since its legitimacy derives in large part from the fact that it possesses the economic expertise necessary for monetary policy. Even under German law, it is not immediately apparent why a constitutionally established authority with responsibility for managing a technocratic policy area should be subject to a tough standard of review. There are many examples in German law of relatively independent and technocratic administrative bodies that are subject to deferential standards of review.[87] The

[83] M. Goldmann, n 43 above, 1075.
[84] *PSPP* judgment, para 143.
[85] ibid para 143 (citations omitted).
[86] *OMT* judgment, paras 183-89.
[87] See, eg, Bundesverfassungsgericht 12 November 2008, BvR 2456/06 (deference to nuclear

most on point, however, is the Bundesbank before the ECB was established. It was highly independent (albeit as set down by parliamentary law, not expressly guaranteed in the Basic Law) and its policy decisions largely escaped constitutional control.[88]

As with the rigid separation between monetary and economic policy and the strict-sense prong of proportionality, the answer to the question 'why stringent review' is to be found in the right to fiscal stability. In the German legal theory known as essentialness (*Wesentlichkeitslehre*), the legislative delegation of power to an administrative body is especially suspicious when a fundamental right might be affected by the exercise of that power.[89] The Parliament is required to carefully set out the content, purpose, and scope of the powers conferred and the courts are to hold administrative bodies to that standard. In addition, as explained earlier, the ability of individuals to litigate constitutional complaints against administrative bodies turns on the violation of a fundamental right – which now exists in the economic policy domain. Before the jurisprudential trajectory that began with the *Lisbon* judgment, central bank operations were not conceived as affecting fundamental rights because the effect on the right to property – the right most obviously impacted by potentially inflationary policies – was considered too remote.[90] Now that there is the right to fiscal stability, the ECB does not enjoy the same freedom from judicial review as did Germany's central bankers in earlier days. It is important to note that what drives the 'full judicial review' standard for the ECB is the right to democratic self-determination *over fiscal matters*, not the right to democratic self-determination *tout court*. Hence the democratizing impetus of this jurisprudence is secondary to the underlying suspicion of EU fiscal policy.[91] There are plenty of highly independent authorities in the EU system, but they have not, or at least not yet, been singled out for stringent judicial review, because they do not operate in the identity lock arena of fiscal policy.

3. EU Law

I now turn to CJEU's *Weiss* judgment. To the frame the analysis, I ask the

waste licensing decision), available at https://tinyurl.com/y6zsssko (last visited 27 December 2020).

[88] D. Lorenz, 'The Constitutional Supervision of the Administrative Agencies in the Federal Republic of Germany' 53(2) *Southern California Law Review*, 550-551 (1980); R.W. Strohmeier, 'Das Europaische Wahrungssystem (EWS) und Seine Auswirkungen auf die Autonomie der Deutschen Bundesbank' 25 *German Yearbook of International Law*, 352-275 (1982); M. Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' 15(2) *German Law Journal*, 267 (2014).

[89] U. Kischel, 'Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law'46(2) *Administrative Law Review*, 231 (1994).

[90] Bundesverfassungsgericht 31 March 1998, 2 BvR 1877/97, para 87; Deutscher Bundestag, Sachstand: Die Verfassungsbeschwerden gegen den "Euro-Reggungsschirm, WD 3-3000-282/11 (2011), 7.

[91] Cf I. Feichtner, above n 72, 1098-99.

same question as in the previous section on Germany: Why, under EU law, should a proportionality assessment of an instrument of monetary policy examine that instrument's effect on economic policy? The positive law background for the case is not simply the earlier *Gauweiler* judgment, narrated in the previous section, in which the CJEU upheld the OMT program. It is also the EU law on judicial review of EU acts generally speaking, outside of the context of an ultra vires challenge to an ECB act. Typically under EU law, and different from the German constitutional analysis, competence and proportionality are separate grounds for challenging the validity of an EU act like the PSPP. In the legal analysis, first comes competence, then proportionality. This doctrinal scheme is a product of the longstanding framework for judicial review of the validity of EU acts contained in Art 263 TFEU. It is also used in adjudicating the more recent principles of conferral and proportionality, first recognized by the Maastricht Treaty (Art 3b EC Treaty) and since elaborated in the Lisbon Treaty (Arts 4 and 5 TEU).

Under EU law, the issue of competence is address by examining whether the Treaty provision offered as the legal basis for the act is the proper legal basis. Most often, the litigant challenges the act on the grounds that an alternative Treaty provision and policy objective was applicable-generally a Treaty provision that requires unanimity voting in the Council and therefore one that would stymie action or a Treaty provision that bars the type of act adopted. Very often such litigation involves internal market acts, since the mandate for internal market harmonization is quite broad and involves qualified majority voting in the Council, unlike Treaty provisions in other policy areas that can specifically bar certain types of measures and that can impose significant procedural hurdles to adopting EU acts. The CJEU examines whether the EU's asserted legal basis is supported by the reasons listed in the act's preamble, by the content of the act, by the plausibility (or implausibility) of the connection between objectives and content, and, sometimes, by additional material produced in the litigation.[92] The Court generally does not examine the plausibility of the alternative policy objective and Treaty provision, even in those cases where there is a claim that the EU institution's choice of legal basis was designed to circumvent a prohibition on action contained in another Treaty provision.[93] When examining the EU's asserted legal basis, there is no deference, since assessing whether there is a mandate for action is a pure legal question of interpretation of the Treaty.

In the EU law of judicial review, the competence analysis, also known as legal basis analysis, may be followed by a proportionality test. This test mirrors the proportionality test that has been used for ECB bond-buying programs. The

[92] See, eg, Case C-84/94, *UK* v *Council*, para 25; Case C-217/04, *UK* v *European Parliament and Council*, para 42; Case 317/04, *European Parliament* v *Council*, paras 67-69; Case C-270/12, *UK* v *European Parliament and Council*, para 113; Case C-358/14, *Poland* v *European Parliament and Council*, paras 31-70.

[93] See, eg, Case C-376/98, *Germany* v *European Parliament and Council*, paras 79, 85.

CJEU sometimes follows a two-part scheme (appropriate and necessary), but other times also includes a strict-sense step involving balancing and the requirement that 'disadvantages caused must not be disproportionate to the aims pursued.'[94] When applying this proportionality test to assess the validity of EU acts, the CJEU generally employs the deferential 'manifest error' standard of review.[95]

The *Weiss* judgment follows this classic sequence of first scrutinizing the legal basis of the PSPP and then analyzing its proportionality.[96] The CJEU examines the monetary policy legal basis offered by the ECB. Based on the enumeration of exclusive competences in Art 3 TFEU and the text contained in the specific provisions of the TFEU's Title on Economic and Monetary Policy, the CJEU concludes that:

> the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that, without prejudice to that objective, the ECSB is to support the general economic policies in the Union with a view to contributing to the achievement of its objectives, as laid down in Art 3 TEU.[97]

Thus we see that there is no categorical separation of monetary and economic policy, as the FCC says there should be. There is also no bar on ECB measures aimed at price stability also having indirect effects on economic policy, and in particular, economic policy of the non-austerity variety.[98] But that is because the Treaty text does not contain such a bar, with the exception of Art 123 TFEU prohibiting ECB purchasing of government debt, which the CJEU takes up in a separate portion of the judgment. In short, the CJEU declines to take up the FCC's invitation to construe EMU as a (fiscal) stability union. Rather, it takes a more open-ended view, as seems appropriate for the EU Treaties, which were signed by the nineteen members of the euro area, and which contain a number of ambiguities as to the exact scope of monetary and economic competences.

To conclude the competence analysis, the CJEU goes on to examine the specifics of the PSPP. It finds that the aims and the substance of the program come within the monetary policy competence. The Court examines the reasons contained in the ECB act to ascertain that it pursues the aim of combating deflation and maintaining an inflation rate at around two percent. It also finds that the purchase of government bonds on secondary markets is a permissible means for accomplishing this end. On this competence step of the analysis,

[94] See, eg, Case C-331/88, *Fedesa*, para 13.
[95] *Fedesa*, paras 15, 16
[96] *Weiss* judgment, paras 46-70 (competence), paras 71-100 (proportionality).
[97] ibid para 51.
[98] ibid paras 60, 66.

there is no deference to the ECB.

The CJEU then takes up the proportionality issue and analyzes the appropriateness and necessity of the measure, as well as the potential disproportionate disadvantages, ie strict-sense proportionality.[99] In the interest of space, I jump straight to the issue of disproportionate disadvantages, since that is the main bone of contention between the two constitutional courts. On this score, the CJEU relies both on the minutes of ECB Governing Council meetings, incorporating by reference the Advocate General's discussion, and the reasons and requirements contained in the ECB act. The main disadvantage that it considers is the financial exposure of participating central banks and Member States in the event of default on the government bonds held by the ECB.[100] Based on the PSPP requirements that limit the liability of Member State central banks for defaults on debt issued by other Member States, the CJEU finds that exposure is adequately limited and therefore the burdens do not outweigh the benefits to price stability.

The *Weiss* judgment's strict-sense step is fully in line with how the CJEU does proportionality balancing of policy objectives against countervailing economic interests in other cases. The closest analogue is when an EU act aimed at environmental protection or market harmonization is challenged based on the economic burdens for market actors in one of the Member States. The Court generally checks that the EU act is tailored to the policy objective, and then lets it pass.[101] Of course, the FCC's *PSPP* judgment shows how inadequate this analogue is under German constitutional law – the German right to fiscal stability is far weightier than the economic interests of market actors. Further, as the *PSPP* judgment makes clear, the German right to fiscal stability is aimed not only at avoiding financial liability, but also includes interests such as sound budgetary policy in other Member States, interest rates for savers and pensioners, and guarding against potential asset bubbles. However, under the generally applicable standards of EU law, it is difficult to make the case for treating the PSPP's economic implications for one Member State as categorically different from the economic burdens that all Member States experience, at one time or the other, because of common EU policies.

The last thing to note about the CJEU's proportionality analysis is that it applies the familiar 'manifest error of assessment' standard. The rationale for this standard is linked to the technical expertise of monetary institutions.[102] This discretion afforded to the ECB is completely in line with other litigation that has challenged ECB acts in the CJEU.[103] It is also in line with CJEU

[99] *Weiss* judgment, paras 71-78 (appropriateness); 79-92 (necessity); 93-99 (strict sense).

[100] ibid, paras 93-99.

[101] See, eg, Case C-86/03, *Greece* v *Commission*, para 95; Case C-358/14, *Poland* v *Parliament and Council*, para 102.

[102] *Weiss* judgment, para 25.

[103] *Gauweiler* judgment, para 68; Case T-79/13, *Accortini and Others* v *ECB*, para 68.

proportionality review of EU acts in a variety of other policy areas. Take one – environmental law. There, the manifest error standard is applied to the (independent) Commission[104] and to the (political) Council.[105] Again, the manifest error standard does not live up to the FCC's call for more rigorous review of the independent ECB. But again, under EU law, it is hard to discern any principled ground for singling out the ECB for stricter judicial review. There are hundreds of public bodies operating in the EU system, all with greater or lesser independence from Member State governments and the EU institutions. Their policy determinations are generally subject to proportionality review based on the manifest error standard. To treat the ECB any different would, from the perspective of EU law, be highly problematic and could itself give rise to a claim of unfounded and lawless adjudication by the CJEU.

IV. The FCC's Counter-Majoritarian Difficulty

It is time to return to the counter-majoritarian difficulty. How has the EMU jurisprudence of the two constitutional courts evolved and how are their respective judgments in the PSPP litigation situated in that jurisprudence? How closely do the two courts adhere to their constitutional law sources and, conversely, how ready have they been to push the boundaries of those sources and occupy the policymaking space allocated to the political branches in their overlapping constitutional systems? The answer to these questions can help evaluate how the two courts have navigated the counter-majoritarian difficulty and the ordinary politics of constitutional adjudication.

First the CJEU: Its approach in the *Weiss* judgment to judicial review of the ECB and the PSPP might strike some as light-touched. Yet this approach is squarely within the bounds of its Treaty text and its precedents. The way in which the Court unpacks the legal grounds of competence and proportionality is extraordinarily familiar from its many decades of judicial review of EU acts, both ECB and acts adopted by other EU bodies. The standards of review the Court used to assess the competence and proportionality challenges – no deference on competence and manifest error for proportionality – are also consistent with decades of CJEU decisional law. In *Weiss,* the CJEU performs in classic fashion its constitutional function of policing the boundaries laid down in the Treaties and allocating prerogatives as between the different institutional and Member State actors.

By contrast, the previous section brings to light the expansive nature of German constitutional adjudication. The FCC's bold legal trajectory took just over ten years to culminate in the *PSPP* judgment – from the *Lisbon* judgment's

[104] See, eg, Case T-614/13, *Romonta GmbH* v *European Commission*, para 63.
[105] See, eg, Case C-86/03, *Greece* v *Commission*, para 88.

identity lock for fiscal policy, to the *EFSF*'s concept of EMU as a *fiscal* stability union, to the line of cases working out how to safeguard the identity lock and the corresponding right to fiscal stability in the *ESM* judgment and the (technically speaking, ultra vires review) *OMT* and *PSPP* judgments. It might be true that the challenge to German democracy from European integration is unprecedented. The response, however, has been to fashion constitutional rights and remedies seemingly whole cloth, without being able to rely on much by way of conventional legal sources.

In light of this willingness to push the boundaries of German constitutional law, it is fair to ask how acute the counter-majority difficulty has been. How have the FCC's judgments affected the politics of the eurozone and the constitutional prerogatives of the other branches of government? The *Lisbon* and *EFSF* judgments undoubtedly strengthened Germany's hand in framing the EU response to the euro crisis as bailouts in return for austerity. The ratcheting up of the disciplinary aspect of EMU in the first two years of the euro crisis, culminating in the Fiscal Compact (Treaty on Stability, Coordination, and Governance), bears the unmistakable imprint of the German constitutional jurisprudence.[106] As Nicolas Jabko relates, EU leaders

> 'continued to stress its (the Treaty's) 'no bail out' provisions – as the German chancellor needed to cover herself from adverse rulings by the sovereignty-conscious German constitutional court'.[107]

As for monetary policy and the ECB's bond-buying programs, it is widely known that top Bundesbank officials and the German member of the Executive Board were opposed to quantitative easing. At least in part, the considerable lag between the US Federal Reserve's adoption of quantitative easing and the ECB's adoption of similar policies can be put down to resistance from German central bankers.[108] While German economic thinking on price stability is separate from the law, the fact is that elements of the economic orthodoxy were transferred to the legal design of EMU and this law, as it played out in the FCC's jurisprudence, was used to influence ECB policy.[109] The aftermath of Draghi's 'Whatever it takes' speech vividly illustrates this point: when the Bundesbank lost in the ECB, and the OMT program was announced, it got a second chance to press for stability before the sympathetic FCC in the OMT litigation.[110]

[106] See M. Ruffert, above n 47, 41-42; R. Dehousse, 'The Euro Crisis and the Transformation of the European Political System', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press), 138.

[107] N. Jabko, 'Politicized Integration: The Case of the Eurozone Crisis', in F. Bignami ed, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press), 105.

[108] V. Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler' 53(1) *Common Market Law Review*, 148 (2016).

[109] M. Goldmann, n 43 above, 1068-71.

[110] V. Borger, n 108 above, 170-73.

Not only does the German jurisprudence impact EU politics, but it also tips the scales internally, in German politics. In the EMU cases, many of the individual complainants have been members of anti-European political parties or party wings.[111] More to the point, the constitutional standards set down in the judgments tip the balance in German political debates towards an austerity version of EMU. The procedural restrictions on fiscal transfers and the suspicion of the ECB's bond-buying activities are unquestionably outcomes that limit EU lending and increase national debt burdens. From a political perspective, it does not come as a surprise that the German legislature and executive would favor limiting intra-EU fiscal transfers and that they would support conditionality. It does not come as a surprise that they might prefer higher interest rates for German pension plans, even though the consequence might be a more punishing debt burden for other Member States. But it does seem strange that a constitutional court would entrench this position as a higher law, constitutional baseline based on the aggressive jurisprudential trajectory chronicled in this article.

The constitutionalization of EU fiscal stability makes it much harder for German political parties and their voters to move away from austerity, towards solidarity, if the circumstances change and their elected leaders come to view it in Germany's best interests. A sympathetic view of the constitutional jurisprudence on the right to fiscal stability and the identity lock might point to the fact that it only requires procedure, not substance – parliamentary participation, not austerity. In important respects, however, process can dictate outcome. The prospect of repeated constitutional litigation, repeated parliamentary votes, and repeated parliamentary scrutiny can easily derail an emerging consensus in such a sensitive policy area. It is also necessary to keep in mind the decline of the traditional parties of the center-right and the center-left and the fragmentation of the political spectrum. This development renders contemporary German politics especially vulnerable to the destabilizing effect of the FCC's EMU jurisprudence.

One possible retort to the counter-majoritarian critique is that it doesn't apply to the German judgments on the OMT and the PSPP. After all, unlike the German government that was involved in deciding on euro crisis bailout funds, the ECB is specifically designed to be counter-majoritarian – independent of elected officials. Still, the ECB is more accountable than the German constitutional court, and accountable in a way that contributes to making good monetary policy. The ECB is the object of a diffuse form of accountability involving many important players, elected and unelected, in the EU and global financial systems.[112] It is embedded in financial policymaking networks that are comprised of a mix

[111] F.C. Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's *ultra vires* Decision of May 5, 2020' 21(5) *German Law Journal*, 1121 (2020).

[112] See generally R.O. Keohane, 'Accountability in World Politics' 20(2) *Scandinavian Political Studies*, 82-84 (2006); D. Zaring, 'The Emerging Post-Crisis Paradigm for International Financial Regulation', in F. Bignami and D. Zaring eds, *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Cheltenham, UK: Edward Elgar, 2016), chapter 19.

of technocratic economists and politically accountable personnel from finance ministries. To go back to the ECB's first foray into unconventional monetary policy, Draghi's July 2012 speech and the OMT program that was subsequently announced, it is difficult to believe that there weren't strong political signals giving the green light for the change in ECB policy. Moreover, the ECB is emmeshed in global networks of central bankers that are critical to its success as one of the central players in global financial markets. In short, the ECB enjoys a distinct form of accountability and legitimacy that deserves consideration in a counter-majoritarian analysis – and therefore deference from a constitutional court.

The EU's response to the coronavirus crisis will be the next test of the German right to fiscal stability and the FCC's counter-majoritarian difficulty. Compared to the euro crisis, the EU response has been remarkably swift. On the monetary side, the policy is consistent with earlier developments. The ECB has undertaken yet another massive bond-buying program, called the Pandemic emergency purchase programme (PEPP). On economic policy, by contrast, there are signs of departure from the disciplinary aspects of the euro crisis years. The proposed Multiannual Financial Framework for 2021-2027, which is being finalized as this goes to press, will be nearly double of what it was in the last MFF cycle, and will include a euro 750 billion Recovery Plan. Unlike the ESM, more than half of the Recovery Plan (euro 390 billion) will be grants and even though grants and loans will be tied to conditions, it will not be the same discipline-driven conditions of ESM loans. Additionally, part of the funding will come from new EU own resources, meaning that the EU will have new direct revenue-raising powers in addition to customs duties – the Financial Transaction Tax and revenue from the Emissions Trading System. Both the PEPP and the Recovery Plan will raise significant issues under the German constitutional law that has been discussed in this article: the PEPP could potentially trigger many of the same objections as the PSPP; the Recovery Plan will add a new twist to German constitutional scrutiny because of the outright fiscal transfers, the looser conditionality, and the new revenue-raising powers.

The nature and the speed of the EU's response to the current economic crisis are promising signs of solidarity in response to the commonly experienced catastrophe of the pandemic. Yet all of these elements of EU coronavirus policy have implications for the German identity lock for fiscal policy and the right to fiscal stability. It appears misplaced, to say the least, for German constitutional law to operate as a hurdle to these experiments in greater solidarity, above and beyond the incredibly contentious EU politics that have always operated as a barrier to greater integration in economic and distributive matters. Should the German government, together with the vast majority of other Member State governments, decide that a more robust, EU economic policy is necessary for EU prosperity and security, which of course is essential to German prosperity and security, then it would seem that constitutional law's rightful role is limited.

Without greater judicial deference to the calculations of the political branches as to what type of economic policy is best for social stability and security, there is the risk of a particularly acute counter-majoritarian difficulty.

In any area of law, the process of reconsidering and recalibrating the jurisprudence of courts must begin somewhere. On this point it seems fitting to conclude with one of the dissenting opinions from the decision to take the OMT case. There, Justice Lübbe-Wolff said:

> 'That some few independent German judges – invoking the German interpretation of the principle of democracy, the limits of admissible competences of the ECB following from this interpretation, and our reading of Art. 123 et seq TFEU – make a decision with incalculable consequences for the operating currency of the euro zone and the national economies depending on it appears as an anomaly of questionable democratic character'.[113]

Together with other forms of legal reflection, her dissent might serve as a jumping-off point for the future development of the EU's economic constitution.

[113] *OMT* order (Justice Lübbe-Wolff, dissenting), para 28.

'It's the (Asymmetric) Economy, Stupid!'
Some Remarks on the *Weiss* Case of the *Bundesverfassungsgericht*

Andrea Guazzarotti*

Abstract

Drawing on the *Weiss* case of the BVerG, the article aims to criticize the irenic vision behind the construction of a 'denationalized' monetary policy entrusted to the ECB. In the absence of a European political union, and in the opposition of many to the creation of such a union, it was better to imagine an ECB devoted to pursuing the best possible monetary policy from a technical point of view (the vision from nowhere). The economic crisis which began in 2008 showed that, under the curtain of secrecy and the aura of technicality, the ECB is constantly called upon to mediate conflicting national economic interests. This mediation leaves winners and losers on the battlefield. It is, therefore, questionable that the search for transparency and the stronger judicial scrutiny sponsored by the BVerG towards the ECB policy choices could solve the original flaws of the EMU's architecture. It is even more so, if the solution advanced by the BVerG to the structural problems of the EMU is to put European debtor States under the control of the ESM, whose democratic credentials and transparency are highly disputable. The 'Idealtyp', patronized by the BverG, of central banking exclusively devoted to contrast inflationary pressures, could appear to be more in line with the original intent of the European Treaties and with Art 88 of the German Constitution. However, in a time in which global deflationary tendencies are the most dangerous enemy of the biggest national central banks, such a model of central banking can only exacerbate the growing economic asymmetries among Member States in the EMU.

I. Introduction

Drawing on the *Weiss* case of the BVerG, the article aims to criticize the irenic vision behind the construction of a 'denationalized' monetary policy entrusted to the ECB. Indeed, the promoters of that vision intelligently denied the dichotomy between an ECB, called upon to pursue the interests of the Member States and an ECB, called upon to pursue purely European interests. The 'denationalization' of monetary policy that such theories had in mind (and perhaps still have) did not coincide at all with the ECB's vision as the incarnation of the Central Bank of a future 'European federal state'. This is maybe due to the consciousness that, for the ECB capability to pursue purely European interests, it would be necessary to have political institutions capable of effectively synthesizing

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these European interests. In the absence of such political institutions, and in the opposition of many to the future affirmation of a European federal state, it is better to imagine an ECB devoted to pursuing the best possible monetary policy from a technical point of view (the vision from nowhere). This reading was backed, before the entry into force of the Treaty of Lisbon, by the fact that the ECB was not on the list of Community institutions (Art 7.1 TEC).

The economic crisis that began in 2008 laid bare the illusory nature of the ECB's vision, given the strong asymmetry of the monetary choices made by both Trichet and the first Draghi and the influence exerted on these choices by German interests. Subsequent efforts by the ECB itself to prevent the break-up of the Eurozone witnesses the ECB's laborious efforts to mediate national interests under the veil of the secrecy of its decision-making process.

The duty of transparency, which seems to be imposed today by the BVerG on the motivation of the ECB's choices, could neutralize the benefits of this secrecy, rising the political degree of the mediations among divergent national interests that the ECB is called to carry out almost every day; a political degree that may not be sustainable by an institution like the ECB.

In addition, the whole structure of the decision in the *Weiss* case seems to be aimed at isolating the position of the individual national Central banker, called upon to choose between 'two masters' and to give priority to his national constitutional duties. This is to undermine the legal architecture of the ECB, perceived as a single institution, not merely the sum of a plurality of national Central Banks.

The trial by fire of the European economic crisis has shown as unrealistic the hypothesis of a Central Bank completely independent of the economic choices of political power, even within the 'non-state', that is the EMU. The return to purity of a totally independent monetary policy, sponsored by the BVerG in the *Weiss* case refers, in fact, to a central banking model that did not even exist in Germany before the euro. As mercilessly reconstructed by the economic historian, Marcello de Cecco, that model had a resounding denial with the German government's choice in favor of the reunification of Germany.

The shortcomings in the functioning of the Eurozone machinery also lie in the fact that the economic choices of the European political institutions are practically non-existent and that, as a result, this vacuum has ended up being filled by the ECB's monetary policy. But even if the Eurozone were to evolve towards a political and fiscal Union, capable of supranational economic choices, the model of a Central Bank purely devoted to combating inflation, in perfect isolation from the demands of politics, would not be viable, certainly not at a time when the biggest central banks in the world are called upon to fight against global deflation (Tooze).

II. Transparency, as a Minor Form of Accountability of the ECB. But For All?

At the time of Draghi's famous announcement of the OMT programme in 2012, in spite of the fierce opposition from the President of the Bundesbank, the German Chancellor Merkel stated, immediately after that announcement, that she had no doubt about the nature of this programme and that it was fully within the ECB's mandate.[1] The factual basis of such an endorsement by the German Chancellor in favor of the ECB remained unclear.

It is almost certain, however, that there has been informal and confidential coordination between economic policy choices (those of the German government, in the first place, but also of the other governments of Eurozone) and monetary policy choices of the ECB (or at least of its President).

Something similar had already happened with the Security Market Programme by Trichet, Draghi's predecessor at the presidency of the ECB. Shortly before the creation of the first European bailout fund, he denied that the ECB would purchase government bonds on secondary markets. Once the bailout fund had been created, Trichet abruptly reversed his decision, in order to facilitate the task for creditor countries.[2] The same happened with Draghi's OMT programme; once the ESM had been set up, as a proxy for market discipline upon 'relaxed governments' of the South, the ECB announced something that seemed unconceivable just shortly before, namely the selective purchase of public securities on secondary markets for potentially *unlimited* quantities.[3]

Put in this perspective, the aim of the BVerG in the *Weiss* judgment – Case no 2 BvR 859/15 – seems to be that of unveiling such informal and opaque coordination among the heads of the political institutions (national, rather than of the EU) and those of the ECB.

If we look at the (provisional) outcome of the whole affair, it seems that, after the *Weiss* case, it will be no longer possible for the ECB to persuade only the head of the German government on the legitimacy of ECB's unconventional monetary policy. The whole Government and, most of all, the national Parliament of the Eurozone hegemon country need being involved in the ECB's decision-making process, at least in the form of a detailed illustration of the reasons supporting such monetary policy decisions.

As for the monetary policy, the BVerG gained from the ECB something similar to what is prescribed only in the area of banking supervision; not only does the ECB have to report to the European Parliament, but it must do so also

[1] 'I acknowledge that what the ECB has done is motivated by monetary policy issues. I have no reason to doubt that, so stated Chancellor Merkel': A. Mody, *Eurotragedy. A drama in nine acts* (New York: Oxford University Press, 2018), 314.

[2] K. Tuori, 'Has Euro Area Monetary Policy Become Redistribution by Monetary Means? 'Unconventional' Monetary Policy as a Hidden Transfer Mechanism' 22 *European Law Journal*, 857 (2016).

[3] ibid 860-861.

to national parliaments.[4] It is not clear, however, if this democratic takeover was made for the benefit of every national parliament of the Eurozone or only of the most powerful one.

It is fair to say that, after the *Weiss* case, it will be more difficult, if not impossible, for an ECB President to refuse any cooperation, in terms of transparency, with a national parliament, as it was the case with Trichet and the Irish parliament.[5]

In such a sensitive field as monetary policy, however, economic constraints count more than legal constraints. After the democratic win of the BVerG over the ECB, even the Italian Parliament could potentially make a claim for the same degree of accountability of the ECB. But will it really be able to do so? What will be the reaction of financial markets in case of a hard confrontation between the Italian Parliament and the ECB? Would the former be strong enough to hazard a hike in treasury bonds' interest rate? As for monetary policy effects in the Eurozone, the right to national constitutional identity, as enshrined in Art 4(2) TEU, seems deeply asymmetric.

III. Unveiling the Façade of ECB as a Unique Institution

The litigation on the *Weiss* case is an opportunity to reflect on the role of the Bundesbank in the German political-institutional system. The rebellion by the German members of the ECB's Governing Council to Trichet's Security Market Programme, along with the outspoken opposition of the President of the Buba (Bundesbank) to both the OMT and the Draghi's PSPP (Public Sector Purchase Programme), marked a clear split between the visions of the German monetary authorities and the German government. The latter, faced with the worsening of the financial crisis in southern Europe, preferred to support the ECB Presidency, overtly declaring the OMT programme compliant with the ECB's institutional mandate.[6] If the national monetary authority is the 'master' of the 'technical' monetary policy, which has to be exercised fully independently, such a denial of the President of the Buba by the German Chancellor would have appeared as an infringement to the constitutional prerogatives of the Buba itself.

[4] D. Curtin, 'Accountable Independence' of the European Central Bank: Seeing the Logic of Transparency' 23 *European Law Journal*, 37 (2017); in the area of banking supervision, reporting is due not only to the (European) Parliament, as with monetary policy (Art 20 SSM Regulation) but also to national parliaments (SSM Regulation, Recita 56, Art 21)

[5] ibid 42: 'ex-President Trichet refused to appear before the Irish Banking Inquiry [parliamentary committee] to answer questions about what happened and the precise role of the ECB. He claimed professional privilege three years after he left the bank'; 'According to the findings of the Irish parliamentary inquiry, the ECB actually 'contributed to the inappropriate placing of significant banking debts on the Irish citizen'. Moreover, the ECB had 'direct involvement in terms of significant decisions taken by the Irish Government in the period under investigation'.

[6] A. Mody, n 1 above, 314.

In the light of German historical precedents, however, such an assessment of institutional relations between the Buba and the German government seems inaccurate. On the eve of German reunification, the President of Buba, Poehl, frankly took a position against the project of the German government. From this perspective, however,

> 'he duly withdrew, so as not to run the position of being put in the minority, in the Buba Council, by members representing the Länder and who are chosen by the German Parliament, even if formally appointed by the President of the Republic. And indeed, the way in which Germany's monetary reunification was achieved is the perfect antithesis of the principles set out for twenty years by German monetary authorities. In 1990, however, the two German governments threw their hearts over the hurdle, and Governor Poehl had to choose between accepting the political will from his own government or resigning. When put to the test, the autonomy of the German central bank proved to be a paper tiger'.[7]

At the historical juncture of German reunification, it sufficed

> 'a Chancellor representing a party that does not need to rely upon the autonomy of the Central Bank to obtain the confidence of international markets, to show the whole world the precariousness of the actual foundations of the autonomy of the Buba itself'.[8]

Today, this scenario is complicated by the institutional development of national central banks in the Eurozone, so that the Buba itself, although still independent, is no longer able to stand alone against the choices of its own national government.

At least formally, today the Buba is nothing more than one of the ECB's executive organs, which, far from being a mere 'constellation of coordinated [national] bodies', constitutes a single institution.[9]

According to a 'strict interpretivist' interpretation of the Treaties and, above all, of the ECB Statute (Arts 9.2 and 14), the relationship between National Central Banks (NCBs) and the ECB is of 'functional subordination', at least in the field of monetary policy.[10]

Pursuant to this functional subordination, the NCBs, under Arts 130 and

[7] M. de Cecco, 'L'unificazione monetaria europea in prospettiva storica', in Id ed, *Monete in concorrenza* (Bologna: il Mulino, 1992), 16-17.

[8] ibid 16.

[9] T. Padoa Schioppa, 'Presentazione', in C. Zilioli and M. Selmayr eds, *La Banca centrale europea* (Milano: Giuffrè, 2007), IX.

[10] S. Antoniazzi, *La Banca centrale europea tra politica monetaria e vigilanza bancaria* (Torino: Giappichelli, 2013), 9 and 33 ('subordinazione funzionale'); C. Zilioli and M. Selmayr, n 9 above, 128-130.

131 TFEU and Art 7 of the ECB Statute, are fully independent from their own national governments and therefore they do not represent national interests within the European System of Central Banks (ESCB).[11]

This functional subordination and independence of NCBs are backed by two exceptional powers. The first is the infringement procedure before the ECJ that the ECB can issue against a NCB (the only case in EU law in which the infringement procedure, directly by the ECB and not by the Commission, is directed against a national institution and not against the Member State: Art 35.6 ECB Statute and Art 271, letter *d* TFEU). The second is the special action for annulment that both the ECB and a National Central Banker can bring before the ECJ against national acts aimed at lifting the National Central Banker from office (Art 14.2 ECB Statute).[12]

The BVerG stepped into this complex framework. If we look at the independence guaranteed to the ECB and the Buba by Art 130 TFEU and Art 88 of the German Constitution, it is not clear what the BVerG means when it calls upon the constitutional duty for the German Government and Parliament to ensure that the ECB remains within the limits of the mandate set out in the Treaties.[13] However, from a political perspective, the BVerG strategy is not difficult to understand.

Ordering the Buba and the German Government and Parliament to rebel against the ECB, if, within three months, the ECB had not adopted acts to demonstrate the legitimacy of its previous Quantitative Easing programme (the PSPP),[14] the BVerG is probably trying to insulate a national element within the ECB, and thus to undermine its unity, which is the essence of the ECB 'supranational' nature.

Subject to such specific constitutional obligations, which the BVerG declared as prevailing over EU law, the Buba played the role of a 'diligent party' and was enabled by the ECB's Governing Council to pass on to the German Government and Parliament the preparatory acts of the decisions on the PSPP, so that those acts became 'relatively' unsealed.[15]

In spite of this (provisional) appeasing epilogue, it cannot be hidden that the 'federal' architecture of the ECB had been put under siege for the first time. Although formally anchored to the supremacy of the National Constitution over

[11] C. Zilioli and M. Selmayr, n 9 above, 38-39.

[12] ibid 149-153. See the annulment of the suspension of the Latvian central banker issued by the ECJ in joined cases C-202/18 e C-238/18 *Rimsevics and ECB* v *Latvia*, Judgment of 26 February 2019, available at www.eur-lex.europa.eu.

[13] M. Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' 21 *German Law Journal*, 983 (2020).

[14] *Weiss*, § 232.

[15] The ECB's documents cannot be viewed except by the Members of the German Parliament and Government; such limitation has given rise to the reaction of the applicants in the *Weiss* case, who are now planning to launch another action before the BVerG in order to obtain the full declassification of these acts. See https://tinyurl.com/ybyukb96 (last visited 27 December 2020).

the (legislative order of execution of the) European Treaties, and even if inspired by the duty to protect the interests of savers, together with the dogma of market discipline, the BVerG's claim to scrutinize the ECB's actions highlights the fragility of the ECB's legitimacy as a 'neutral' and democratically irresponsible institution called upon to carry out politically sensitive mediations.

IV. The Political Costs of ECB's Transparency in an Inexistent Political Union

The BVerG, almost paradoxically, declared itself as a paladin of the independence both of the ECB and the Buba.[16] One can speculate on the real intention of the BVerfG and criticize its consistency,[17] but this assumption represents an institutional construction not devoid of a certain degree of elegance.

For the BVerG, the independence of the ECB is a double-edged sword. On the one side, it implies a narrow interpretation of the mandate entrusted to the ECB (monetary policy alone, not economic or fiscal), so as not to affect political bodies charged with economic policy at national level and preserve democracy (*Weiss*, § 143). On the other side, interpreting the ECB's independence as preventing any 'systemic' effect on national economy (such as lowering spreads and reducing the cost of public debt for some Member States) it enables the ECB itself (and NCBs in the ESCB) to resist pressures from national governments (*Weiss*, § 161), so that limiting the ECB's room for maneuver goes in favor of the ECB itself and its ability to make 'free' choices.

The way in which the BVerG designs the role of the ECB in its relationship with the political institutions of the Eurozone and with Member States is well-defined and shows geometrical symmetry. However, it completely ignores the criticism of the ECB for preferring to sacrifice, at the end of Trichet's mandate, the needs of southern European countries to those of Germany (allegedly exposed to the risk of inflation).[18] Such an ECB, only devoted to control inflation in the euro's core countries, but not to prevent the risk of falling deflation in the periphery of the Eurozone, has nothing 'symmetric' about it, even if only looking at the primary objective of 'price stability' (which should also mean preventing deflation). In the light of the facts, the BVerG's elegant theory of the ECB's independence (aimed at protecting both democracy within Member States and freedom of the ECB) reveals itself as artificial and biased.

The idea expressed at the very beginning of the ECB's history, that the ECB belonged neither to Member States nor to the (former) European Community,

[16] *Weiss*, § 142-3, § 161.

[17] S. Poli and R. Cisotta, 'The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission' 21 *German Law Journal*, 1084-1085 (2020).

[18] A. Mody, n 1 above, 291-296.

but that it was 'a truly supranational central bank'[19] relied implicitly upon the reductionist view that money is only a medium of exchange and not an institution of power.[20]

This way of thinking helped to bypass the huge obstacle of a single monetary policy for different national economies, namely a monetary policy that would inevitably favour someone at the expense of others, in the absence of a compensation chamber where national interests are balanced, that is, without any institutional instrument to sublimate nationalist conflicts to political ones through the mediation of transnational political parties.[21]

The focus on the primary objective of price stability, as the *lex specialis* capable of insulating monetary policy from the whole panoply of EU objectives (such as employment, growth, environmental protection, etc: Art 3 TEU, referred to by Art 127.1 TFEU), was apt to divert the attention from that huge obstacle. The comparison is meaningful between Art 3 TEU, referring to 'social market economy', and Art 119 TFEU, together with Art 2 of the ECB Statute, in which the adjective 'social' disappears and only remains, as for monetary policy, the obligation for the ESCB to act in accordance with an open and free-competition market economy.[22]

That idyllic vision of a completely 'denationalized' and depoliticized monetary policy was formally anchored to the fact that the ECB, in addition to having a legal personality distinct from the European Community itself, was not formally part of the European institutions (Art 7.1 TEC).[23]

Even after the ECB has entered the list of EU institutions (Art 13 TFEU), [24] its institutional identity remains unclear. It could be a piece of a federal identity *in progress* within which the Governors of National central banks are called upon to pursue the collective 'supranational' good, untethered from their national ties. More realistically, however, ECB could perform the role of a 'neutral' compensation chamber for divergent national economic interests called upon to surrogate the powers of an overtly political institution, with the advantage of being able to operate behind the shield of the 'technicality' of its decisions and the secrecy of its working method.

Today, this advantage is partially undermined by the intervention of the EU's most powerful National Constitutional Court, which has burdened the

[19] C. Zilioli and M. Selmayr, n 9 above, 40.

[20] G. Ingham, *La natura della moneta* (Roma: Fazi Editore, 2016).

[21] S. Mantovani, 'La moneta europea tra economia e politica' 58 *Stato e mercato*, 80 (2000).

[22] R. Bin, L'indipendenza delle banche centrali come principio costituzionale, Relazione all'ICON·S Italian Chapter Inaugural Conference. "Unità e frammentazione dentro e oltre lo Stato", Roma, 23-24 novembre 2018, available at https://tinyurl.com/y7lymwd4 (2018) (last visited 27 December 2020).

[23] C. Zilioli and M. Selmayr, n 9 above, 43.

[24] Even after the Lisbon Treaty, the ECB keeps its own legal personality, distinct from the EU's one (Art 282 TFEU); the same is to say for its distinct extra-contractual liability (Art 340.3 TFEU) and its distinct balance sheet (ibid 45).

ECB with the obligation of a 'qualified' transparency, at least to the benefit of the German Government and Parliament.

V. Mediating National Conflicts at Frankfurt

During the economic crisis, begun in 2008 and before the litigation in the *Weiss* case, European scholars had highlighted that a single monetary policy was unable to be fit for all Eurozone economies.[25]

The objective of price stability, in its apparent uniqueness, implies the hard work of mediation. The recent history of the European economic crisis has dramatically made it clear that inflationary pressures in some states and dangerous deflationary tendencies in others may have occurred at the same time. This inevitably suggests the power of the ECB to balance opposing interests and to negotiate among national claims.[26]

The views of certain US scholars, as far as this key problem is concerned, are even more drastic than the European ones, in their assumption that the claim to apply a 'One-Size-Fits-All' Monetary Policy in nineteen different countries is a real 'European tragedy'.[27] The author in question considers the unconventional monetary policy operations implemented by the Draghi's ECB as a (too late) attempt to balance the heavy losses imposed on the southern European states (plus Ireland) by the previous ECB policy aimed at raising interest rates.[28]

This monetary policy was openly inspired by the intention to second the point of view of Germany, which feared an inflationary flare-up, due to the rise of energy prices in those years. That restrictive monetary policy stance continued during the first period of Draghi's mandate, when the ECB denied the need for a drastic and quick reduction of interest rates.[29]

Now, let us

> 'imagine a hearing in the Spanish or the Italian constitutional court on the question of whether or not their governments were remiss in not demanding to see the reasoning that justified the ECB's decision in 2008 or 2011 to raise interest rates just as the European economy was sliding into first one and then a second recession. Were German concerns about inflation at those critical moments weighed against the damage that would

[25] F.W. Scharpf, 'Monetary Union, Fiscal Crisis and the Preemption of Democracy' 11/11 *Discussion Paper* (2011), available at https://tinyurl.com/ybfulzt8 (last visited 27 December 2020); C. Kaupa, *The Pluralist Character of the European Economic Constitution* (Oxford-Portland: Bloomsbury Publishing, 2016), 292.

[26] C. Kaupa, n 25 above, 292.

[27] A. Mody, n 1 above, 320; see also B. Eichengreen, Hall of Mirrors. The Great Depression, the Great Recession, and the Uses – and Misuses – of History (New York: OUP, 2015), 8, 370-371.

[28] A. Mody, n 1 above, 313.

[29] ibid 304-307. For a different reading of the German preference for a restrictive monetary policy in 2011, see S. Cesaratto, *Sei lezioni di economia* (Reggio Emilia: Imprimatur, 2016), 263.

> be done to the employment opportunities of millions of their fellow citizens in the Eurozone? Would Karlsruhe have heard a case brought on those grounds by an unfortunate German citizen who lost his or her job as a result of those disastrously misjudged monetary policy moves?'.[30]

If we adopt the substantive perspective of Tooze and Mody, according to which the ECB mediation between national interests leaves winners and losers on the battlefield, we become skeptical about the assumption that unconventional monetary policies deserve a stricter scrutiny than conventional ones.[31] But we also became skeptical about the idea that the problem to address is the ECB's accountability and that its solution lies in tightening the scrutiny (even the judicial one) of it.[32] Surely, this is not the solution to Eurozone dysfunctions.

If, by this perspective, we analyze the choices which the ECB made in handling the economic crisis begun in 2008, it becomes possible to question the whole approach of the BVerG in the *Weiss* case. Entirely abstracting from the asymmetrical effects on the Member States caused by a single monetary policy, the BVerG puts its spotlight exclusively on the fact that compliance with the narrow limits of the ECB's mandate implies a 'full judicial review' (*Weiss*, § 143), and that such a judicial review can be carried out, as a form of subrogation, by a national constitutional court.

Contrary to this approach, it is fair to say that a court with jurisdiction for the supranational level should be better equipped to interpret the monetary policy of the supranational central bank than a national constitutional court, due to the tricky balancing among national interests, which might require amending the previous 'conventional' monetary operations with following 'unconventional' ones. Still, it is quite possible that a supranational court understands better than a national constitutional court the complicated task of a supranational Central Bank responsible for deciding a single monetary policy for such differentiated economic areas, which perhaps explains the U.S. judicial deference to the Fed.[33]

Perhaps the choice of the CJEU not to enquire in too much detail about the reasons for the supranational Central Bank's line of conduct in such a fragmented context is also tantamount to avoiding the exposure the clash of national interests and thus to amplify fragmentation and nationalistic cleavages among European citizens.

[30] A. Tooze, 'The Death of the Central Bank Myth' *Foreign Policy*, 17 (2020).

[31] K. Tuori, n 2 above, passim.

[32] M. Dawson, A. Bobić and A. Maricut-Akbik, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' 25 *European Law Journal*, 91 (2019).

[33] S. Egidy, Judicial Review of Central bank Actions: Can Europe Learn from the United States?, in Building Bridges: Central Banking law in an Interconnected World. ECB Legal Conference 2019, 53-76, available at https://tinyurl.com/ycv8gn55 (last visited 27 December 2020).

One might even suspect that the national governments of such an 'incomplete' monetary union, in the absence of adequate political space wherein these kind of conflicts can be balanced, would intentionally prefer leaving the 'dirty work' to the ECB. In other words, they prefer that the clash of national economic interests be managed behind the curtain of 'technical discretion', rather than exposing its eruption in public. Such conflicts of interest, indeed, prevent a real supranational economic policy in the Eurozone and force monetary policy to step in by means of unconventional operations.[34]

It is also plausible, however, to imagine that the choice of the German Constitutional Court consciously serves to show such a monetary policy model as unsustainable, aiming to overcome the heterogeneity of national economies through a comeback to homogeneity, as it was originally intended by its own country (a 'Northern' Euro as opposed to a 'Southern' Euro). For this Constitutional Court, the option of breaking up monetary union is not a constitutional taboo, as it can inevitably be in the constitutional systems of debtor states.

The condition posed by the German Government at the time of Maastricht to its citizens for allowing the transfer of monetary sovereignty, namely that the ECB would never operate indirectly redistributive policies and that it would pursue the sole objective of combating inflation[35], was in fact 'constitutionalized' in Art 88 GG.[36]

This makes it perfectly plausible that the Constitutional Court of such a national legal system should, without too many qualms, balance the constitutional interests at stake; the protection of German savers, cloaked under the veil of democracy, against Germany's continued membership of the euro, thus ignoring that the Treaties' drafters purposely did not provide for the option of a selective exit from the Eurozone alone (in order to support the credibility of the new supranational currency, conceived as 'irrevocable').[37]

However, what annoys the audience not in tune with the BVerG, especially that in South-European countries, is that the legal-constitutional argument instrumentally reverses the burden of the choice in question: the breakdown of monetary union. In the BVerG approach, in fact, the only option left to 'debtors' Member States is to submit themselves first to the financial market discipline; then to the European Stability Mechanism (ESM). The only option is of losing their own democratic sovereignty; it is an option that, after the well-known Greek events (but, in Italy, even after the 'commissioners' by the Monti government), no pro-European party seems able openly to defend before the national constituency,

[34] A. Tooze, n 31 above, 20.

[35] ibid 10.

[36] C. Zilioli and M. Selmayr, n 10 above, 51-52; A. Guazzarotti, 'La sovranità tra Costituzioni nazionali e Trattati europei' *DPCE online*, 350-353 (2020).

[37] See the former Protocol n 24 on the transition to the third stage of the EMU: C. Zilioli and M. Selmayr, n 9 above, 39.

without suffering a hemorrhage of votes. Assuming that, *if debtor countries want to lower spreads and make their public debt sustainable, they have to submit to the ESM*,[38] it is tantamount to imposing on them the clear choice of whether to remain in the euro as vassals or exit. Against this background, the fundamental right to democracy recognized to the benefit of every German citizen by the German Constitution would be dispensable for the citizens of debtor countries.

Exiting Euro by the South European countries would be very painful, especially for Italy, as it should repay the previous euro-denominated debt with a new national currency greatly devalued against the euro.[39]

The opposite would happen if Germany and its satellites (the Netherlands, Austria, Finland, and Belgium) were to leave euro. 'There really will be no losers', as the depreciation of the euro following this kind of exit will enable the remaining States to 'continue to pay their debts in the new cheaper euro, which will also give them a much-needed boost in competitiveness and a chance to jump-start growth'.[40]

According to this American interpretation of the euro-dilemma, the choice for Germany to leave the euro would not be negative for Germans, even if that would cause a reflation of the Deutschmark which would make German exports less competitive.[41] If we can agree with Mody that '(t)hat is actually a desirable outcome for the world', giving the unbearable amount of German current account surplus, it is more difficult to think that 'Germanexit' represents a desirable outcome 'for Germany, too'.[42] According to Mody, '(p)erhaps the greatest gain will be political. Germany plays the role of a hegemon in Europe but is unwilling to bear the cost of being a hegemon'. Indeed, the BVerG belongs to those who do not want to pay the cost of a German hegemony in Europe. The political problem is that the German legal struggle to escape such cost, while at the same time profiting from the benefit of the single currency, seems more oriented to letting the Southern countries pay the bill for a possible exit, than to put this burden on German shoulders.

VI. A Different Type of Central Bank for a Different Kind of Union?

According to the dominant narrative supported by the 'Europeanist' doctrine, the current Eurozone framework highlights a 'gap' in the lack of a supranational Central Bank fit for accomplishing the key function of 'lender of last resort', as is the case for the most influential central banks in the world. Reasonable as it

[38] *Weiss*, § 170-1.
[39] A. Mody, n 1 above, 447.
[40] ibid 447.
[41] ibid 448.
[42] ibid.

may appear, this opinion is biased.

This mainstream narrative, by putting the spotlight on the shortcomings of the European Monetary Union, ends up neutralising, or at least minimising, the nationalistic conflict. What this vulgate covers is the hidden face of the question, well highlighted by US literature. The latter, as cited, is highly critical of the ECB *à la* Trichet, accused of raising rates at a time when Southern Europe (and Ireland) desperately needed an expansionary monetary policy. But this happened in accordance with the interests of the hegemonic country in the Eurozone, Germany, where there were signs of inflation rising above the fateful threshold (unwritten in any EU legal act, including the ECB Statute) of 2%. This was mainly due to the rise in energy prices, a volatile component of inflation measure that is usually sterilized in the US.[43]

The problem, in other words, does not lie so much or above all in the absence of legal tools in the European Treaties (and in the ECB Statute) empowering the central bank to carry on effective monetary policies, thus forcing the central bank to use 'unconventional' tools. The problem is also, and above all, the ECB's inability to manoeuvre (conventional or unconventional) tools so as not to penalise some Member States and not to benefit others.

The first (dominant) narrative seems aimed at absolving those who, especially in Italy, portrayed European monetary integration as a piece of an inevitable march towards the political-fiscal union, highlighting what remains to be done and explaining that the ECB's choices are limited by primary law. The second narrative points to prove mercilessly that symmetrical monetary policy for different national economies is impossible; as a result, the ECB gives priority to the needs of national hegemonic economies and ends up increasing divergences among stronger and weaker economies.[44]

Against this background, the debate over both the ECB's unconventional measures and the caselaw of the BVerG could turn out to be little more than a smokescreen, when compared to the bitter reality. If we accept the second narrative, it is easier to share the view of those who argue that the function of central banks and especially that of the ECB, is to regulate the speed with which capital is centralised in the 'core' states.[45] Italy, moreover, is an example of how little a central bank alone can do to help narrow the gaps among national regions with deeply different economic structures.

Many years ago, Michel Foucault wrote that the never-ending 'diplomatic' logic underlying the balance of power among the various Italian national entities prevented Italy in the seventeenth century from developing tools and institutions of the Polizeistaat, on which the welfare state institutions had been later grafted,

[43] ibid 315-318.

[44] '(T)he ECB's monetary policy stance could serve only some of the member states and would necessarily neglect the others': A. Mody, n 1 above, 320.

[45] E. Brancaccio, O. Costantini and S. Lucarelli, 'Crisi e centralizzazione del capitale finanziario' *Moneta e credito*, 53-79 (2015).

in France and elsewhere in Europe.[46] Unfortunately, this condition of 'permanent diplomacy' and lack of the democratic version of the Polizeistaat, ie the welfare state, characterizes the E(M)U today and is likely to go on featuring it in the future, despite the novelties induced to face the pandemic crisis.

Perhaps implementing the 'Next Generation EU'[47] will invalidate this pessimistic prediction. However, if we will ever witness the birth of a 'federal' development of the E(M)U as a consequence of the 'Next Generation EU' programme, this will not happen without a patronising monetary policy, as was the case for the recent history of German reunification. Without overcoming the legal architecture of the ECB, the one the BVerG vigorously upheld in the *Weiss* case[48], no solution could be found to the serious and growing divergence among national economies forced into a single monetary policy.

[46] M. Foucault, Sicurezza, territorio, popolazione. Corso al Collège de France (1977-1978) (Milano: Feltrinelli, 2007), 228-229.

[47] Available at https://tinyurl.com/y6kxhenw (last visited 27 December 2020).

[48] O. Chessa, 'Il paradosso di Karlsruhe. Primato del diritto costituzionale nazionale e separazione tra politica monetaria e politica economica, Liber Amicorum per Pasquale Costanzo' *Consulta OnLine*, 5-6 (2020).

Short Symposium on the PSPP

The Wind of Change. On Some EU-Related Transformations of German and French Judicial Discourses

Claudia Amodio*

'Et même,
à la fin de chaque vérité,
il faut ajouter
qu'on se souvient
de sa vérité opposée'.
(Pascal, *Pensées*, 1669)

Abstract

The 'transformative power of Europe' is a promising standpoint to shed light on national attitudes and beliefs formed in the course of centuries, as well as on paths taken by legal systems more recently.

The paper seeks to unravel some – more or less cryptic – legal changes driven by the EU integration process in both the German and the French judicial discourse.

In doing so, it argues that the *souveraniste* stance taken by the *Bundesverfassungsgericht*, as well as the 'constitutional identity' turn of the *Conseil constitutionnel*, contain the seeds of a new representation of what German and French constitutional judges consider to be their role in the relationships between EU law and domestic law.

I. Introductory Remarks

Irritating as it might be,[1] the German Federal Constitutional Court (hereafter: *BVerfG*) judgment of 5 May 2020 has at least the merit of not being ambiguous on how and to what extent EU responses in time of crisis – among which the Public Sector Purchase Programme (hereafter PSPP) launched by the European Central Bank (hereafter: ECB) in 2015 – represent a major test for the EU's cohesion, triggering Member States' different integration paths and their ability

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[1] According to the *Frankfurter Allgemeine Zeitung* even the president of the *BVerfG*, Andreas Voßkuhle, admitted that the decision, supported by the overwhelming majority of the Senat, 'could have an "irritating" effect in times of the coronavirus crisis', available at https://tinyurl.com/y74pcped (last visited 27 December 2020).

to overcome national sensitivities.[2]

Like every clash between domestic and EU law, it could be studied from multiple perspectives. A suggestion underlying this paper is that a focus solely on the 'orthodox', 'true' point of view of the EU institutions would miss the broader picture in which national actors operate.

The 'irritating effect' is indeed one of the most notable side effect of the creation of a supranational organization,[3] and we would do well to remember that it can be observed not only in relation to the *acquis*, expectations or requirements of the EU integration process, but also in respect to the legal, institutional, cultural and economic environment of Member States, as Gunther Teubner has brilliantly demonstrated.[4]

In many cases the reconfiguration of integration paths at the national level might be better explained through the 'legal irritants' metaphor, rather than the 'legal transplants' one. Hence, focusing on EU membership as a medium through which legal integration is implemented and experienced, but also contested and rejected, ought to be regarded by comparative law scholars as both a challenge and a goal to be embraced.

Comparative law is neither primarily about legal harmonization, nor about promoting legal diversity. It rather seeks to 'unpack'[5] legal systems on their own terms, in the very same way that the actors in these systems – hence their self-representations – do. In this vein, its main object is an 'interpretive social practice that both reflects and constitutes a community's commitment to governing itself in accordance with certain ideals'.[6]

Thus, whilst it is the job of EU legal scholars to look at the relationships between national legal systems and EU from the point of view of the European integration process, it might be the task of comparative lawyers, and particularly of those interested in inquiry into legal style and legal mentality, to take on the 'transformative power of Europe'[7] as a promising standpoint to shed light on

[2] See A. Supiot, 'La refondation de l'Europe ne pourra se faire sans sortir des Traités actuels' *Le Figaro*, available at https://tinyurl.com/y9xqv43r (last visited 27 December 2020).

[3] As F. Martucci, 'La BCE et la Cour constitutionnelle allemande: souligner les paradoxes de l'arrêt du 5 mai de la Cour constitutionnelle allemande' *Le club des jurists*, available at https://tinyurl.com/y6rjo8gx (last visited 27 December 2020), pointed out: '*Les Européanistes s'en offusqueront, les Internistes s'en réjouiront; l'inextricable nœud constitutionnel est celui de la prémisse fondamentale, les Traités pour les uns, la Constitution pour les autres. Dans la quête de spécificité de l'Union, on peut voir dans cette confrontation la tension inhérente à tout système d'intégration constitutionnelle*'.

[4] I am obviously referring here to G. Teubner's seminal study 'Good Faith in British Law or How Unifying Law Ends Up in New Divergences' 61 *Modern Law Review*, 11-32 (1998).

[5] G. Marini, 'Taking Comparative Law Lightly. On Some Uses of Comparative Law in the Third Globalization' 3 (1) *Comparative Law Review*, 15, 1-20 (2012).

[6] C. Valcke, Comparing Law: Comparative Law as Reconstruction of Collective Commitments (Cambridge: Cambridge University Press, 2018), 97.

[7] T.A. Börzel and T. Risse, 'The Transformative Power of Europe: The European Union and the Diffusion of Ideas' 1 *KFG Working Papers, Free University Berlin*, 1-28 (2009).

attitudes and beliefs formed over centuries, as well as on paths taken by national legal systems more recently.[8]

The paper seeks to unravel some (more or less cryptic) legal changes driven by the EU integration process in both the German and the French legal system.

The following section briefly shows that neither of the two EU founding members have ever driven the cause of European unity. As we point out, while every clash between domestic law and EU law may very well end up with a deepening of such unity, cutting through some of the rhetoric surrounding the functionalist narrative of crises seems necessary in order not to underestimate the extent to which national contexts and commitments could represent a brake on the integration process.

The third section, far from being an in-depth analysis of the 5 May judgment (something which we shall leave to more authoritative contributors), is an attempt at hatching some discontinuities in what Mitchel Lasser has famously described as 'a judicial self-portrait'.[9] Given the eminent role (and collective perception) of the *BVerfG* in the German legal process, we contend that its shift towards the most *souveraniste* side of the legal discourse spectrum has interestingly produced, in a somewhat Gaullist fashion, a new self-representation of the German constitutional judges, and arguably of the country as a whole in its relationship with the rest of Europe.

The paper then goes on to analyze French proceedings related to the ratification of EU Treaties as well as relevant *Conseil constitutionnel*'s rulings on European matters. Our aim is to offer some insights on the traditionally emblematic place accorded in France to sovereignty (fourth section) as well on some more recent developments epitomized by growing references to French constitutional identity (fifth section).

II. Looking Beyond the Functionalist Narrative of 'Crises': A Tale of National Sensitivities and Commitments

From the start of the PSPP judgment debate, it has been evident that the discussion ought to be neither just about technicalities of the *BVerfG*'s legal reasoning nor the ruling's impact in the wider context of Member States' cooperation in the EU.[10] Deeper arguments concerning Germany's self-

[8] With respect to the French legal style and mentality, see C. Amodio, *Au nom de la loi. L'esperienza giuridica francese nel contesto europeo* (Torino: Giappichelli, 2012), 211.

[9] See Mitchel de S.-O.-l'E. Lasser, 'Judicial (Self-)Portraits: Judicial Discourse in the French Legal System' 104 *Yale Law Journal*, 1325-1410 (1995), brilliantly showing that to a large extent, French judges do something different from what their formalist self-representation would lead us to think.

[10] Among the most recent and useful additions to the already voluminous literature on the ruling, see the Special Section on 'The German Federal Constitutional Court's PSPP Judgment' 21 (5) *German Law Journal* (2020).

representation are clearly in play.

By the mid-1970s, in its *Solange* decisions, the *BVerfG* famously refused to accept the unconditional primacy of European law, particularly over the fundamental rights of the *Grundgesetz* (hereafter: *GG*).[11] This is still remembered as both a disruptive moment of resistance by a major national institution to European Court of Justice (hereafter: ECJ) attempts to establish the principle of autonomy of the European legal system, and the clearest expression of a broader reluctance to transfer sovereign competencies to a set of institutions lacking basic rights provisions. Over the decades *BVerfG*'s restrictive readings of the primacy of EU law, unanimously regarded as a crucial factor in the establishment of the counterlimits doctrine, have played an equally important, albeit less frequently acknowledged, role in pushing the issue of recognition of fundamental rights protection at the EU level.[12] With the Treaty of Maastricht, such concern eventually became a priority on the EU agenda in order to seek consensus on an unprecedented process of creating a political unity out of the original economic unity, albeit the former was – and to a large extent still is – functionally connected to the latter.[13]

It has been argued that the functionalist thinking indeed underlying the European integration process and discourses since the beginning, deliberately implies both incompleteness and a blurring view of political accountabilities and functions.[14] From this perspective, the *BVerfG*'s restrictive reading of the EU monetary policy mandate and its *ultra vires* position can be ultimately interpreted as an explosive response to the functionalist teleology famously epitomized, at the peak of the European sovereign debt crisis, in the former ECB President Mario Draghi's promise to do 'whatever it takes' to preserve the Eurozone.[15]

Certainly, the *BVerfG*'s refusal to accept the ECJ's verdict as for the proportionality of the PSPP came up to significantly blur the separation of functions between the ECJ and national courts enshrined in Art 267 TFEU. However, it did so on the assumption that the ECJ (and, upstream, *a fortiori*, the PSPP, which is in turn the form taken in recent years by the 'whatever it takes' promise) carries itself a blurring view of the separation between monetary

[11] Bundesverfassungsgericht 29 May 1974, 52; Bundesverfassungsgericht of 22 October 1986, 197, both published in Decisions of the Bundesverfassungsgericht, Federal Republic of Germany: International Law and Law of the European Communities 1952-1989, (Baden-Baden: Nomos, 1992), respectively 275 and 625.

[12] For a very stimulating reassessment of the topic, B. Davies, 'Internationale Handelsgesellschaft and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence', in F. Nicola and B. Davies eds, *EU Law Stories: Critical and Contextual Histories of European Jurisprudence* (Cambridge: Cambridge University Press, 2017), 157-177.

[13] E. Spolaore, 'What Is European Integration Really About? A Political Guide for Economists' 27 (3) *The Journal of Economic Perspectives*, 125-144 (2013).

[14] ibid 133.

[15] On the problematic issue of ECB's market neutrality approach see eg A. Guazzarotti, '«Neutralità va cercando, ch'è sì cara»! Il Tribunale costituzionale tedesco contro la politicità dei programmi di *quantitative easing* della BCE' 43 (2) *DPCE Online*, 2811-2825 (2020).

and economic policies under EU law. One that, in the *BVerfG*'s view, would in any case 'lead to the *de facto* suspension or undermining of the principle of conferral'.[16]

It could even be contended, from a functionalist point of view, that such clashes are not a bug but a feature, serving the European integration purposes by creating pressure for necessary solutions and further developments.[17]

While it is still uncertain whether the 5 May judgment will urge EU institutions to provide a clear economic (and political) impact assessment of their monetary policy,[18] it is retrospectively true that the several crises the European continent has witnessed have ultimately led to significant progress and enabled European integration to take its current shape. Basically, there would be no European integration process without the historical crisis in which France and Germany cooperation was set up. The apparent disproportionate relationship between high ideals (the goal of sustainable peace in Europe, notably regarding Germany) and means to achieve them (the establishment of a partial common economic system) in which its genealogy lies, were largely contingent and fairly reflect that particular historical crossroad.[19]

But 'functionalist' reasons do not explain everything. More than high ideals were – and still are – at work. To a large extent, French concerns about Germany's reconstruction echoed France's distinctive geopolitical interests and ideas regarding its role in postwar European reorganization. This is to say that Franco-German

[16] Bundesverfassungsgericht 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, 112, available at https://tinyurl.com/y7mdvhqg (para 158) (last visited 27 December 2020). Interestingly enough, there are striking analogies between the reasoning in 5 May judgment and what the *Bundesverfassungsgericht* already stated in the Lisbon Treaty ruling: 'As a supranational organization the European Union must comply (…) with the principle of conferral exercised in a restricted and controlled manner'). See the para 298 of Bundesverfassungsgericht 30 June 2009, 2 BvR 182/09, 239–42, available at https://tinyurl.com/yab9lbqc (last visited 27 December 2020).

[17] As highlighted by G.W. Ball, 'Forward', in F. Duchêne ed, *Jean Monnet: The First Statesman of Interdependence* (New York: Norton, 1994), 4, there is a 'well-conceived method in (the) apparent madness' of launching of a deliberately incomplete supranational integration process.

[18] As G. Scaccia has observed more generally: 'The main question is how to think about these clashes normatively and how to understand them, not just as a sign of sovereigntist/populist resistance to EU law, but rather as an attempt to re-politicize it'. G. Scaccia, 'The Lesson Learned from the Taricco Saga: Judicial Nationalism and the Constitutional Review of E.U. Law' 35 (4) *American University International Law Review*, 823, 821-877 (2020).

[19] Perhaps the most interesting attempt to clarify this apparent disproportion in light of its neofunctionalist premises is provided by E.B. Haas, *The uniting of Europe: political, social, and economical forces, 1950-1957* (Stanford: Stanford University Press, 1958), passim. Ten years ago, in his rather pessimistic paper on Eurozone crisis, Timothy Garton Ash persuasively identified 'five great driving forces of the European project', namely 'the memory of war', 'the Soviet threat to western Europe', 'American support for European integration in response to the Soviet threat', 'the Federal Republic of Germany, wanting to rehabilitate post-Nazi Germany in the European family and also to win its European neighbours' support for German unification', and 'France, with its dual-purpose ambition for a French-led Europe' (T. Garton Ash, 'Europe is sleepwalking to decline. We need a Churchill to wake it up' *The Guardian*, available at https://tinyurl.com/y9clfaxy (last visited 27 December 2020)).

partnership was formally created on an equal footing but actually French-led. Interestingly enough, the nature of Franco-German relationship eventually changed and became increasingly asymmetrical in favor of Germany. To put it bluntly: European integration, formerly the most effective means for Germany's reconstruction from the ashes of World War II, is today Germany's most successful way of exerting soft power beyond its borders.[20]

Most importantly, neither of the two EU founding members have always driven the cause of European unity. Without a doubt, whereas the extensive use of the word 'crisis' is a constant in European integration narrative,[21] some of the most stinging challenges in its 68-year history have come from France or Germany.

Shortly after the creation of the first European Communities, few ideas have played such a decisive role as Charles de Gaulle's opposition to supranationalism. Three moments, in particular, have become touchstones of the legal scholarship as regards as the Gaullist 'intergovernmental' views of the tension between national sovereignty and European integration process: the failure of the Fouchet Plan (1961-1962), the two unilateral vetoes of the British application for membership (1963 and 1967), and the Empty Chair Crisis in 1965.[22] What is immediately noticeable about these events, as different as they may be, is that de Gaulle succeeded in identifying himself with (hence bringing to light) a deep-rooted feature of French political and constitutional culture, namely a strong belief in the self-determination and in the political impetus of the Nation,[23] whose sovereignty could both act as a brake to the integration process and transform its essence. As it has recently been observed by a French scholar, 'at base Europe is at the service of a national cause'.[24] This feature is hardly contradicted by the French debate on the European constitution and its rejecting result in the 2005 referendum.

In France like in Germany, the Constitution stands as the supreme norm, but a close look at the EU-related case law of the *Conseil constitutionnel* will reveal that domestic constitutional limits refer more to the procedural requirement to amend the Constitution before Treaties ratification, rather than to the inalienable

[20] Compare D. David, 'Paris and Berlin: History and the long term' 4 *Politique étrangère*, 87-98 (2019).

[21] L. Warlouzet, 'European Integration History: Beyond the Crisis' 44 (2) *Politique européenne*, 98-122 (2014).

[22] See, among others, A. Moravcsik, 'de Gaulle and European integration: historical revision and social science theory' 8 (5) *CES Germany & Europe Working Papers*, May 2008, 1-84 (2008).

[23] See M. Volpi, *La democrazia autoritaria. Forma di governo bonapartista e V Repubblica francese* (Bologna: il Mulino, 1979), passim, highlighting some continuities between the General's political action and a Bonapartist tradition inclined to personalize to the extreme the link between Nation and State.

[24] O. Rozenberg, 'France in quest of a European narrative' 4 *Les Cahiers européens de Sciences Po*, 5, 1-15 (2016).

substantive core of the domestic legal order.[25] It is therefore of utmost relevance that the *Conseil constitutionnel* has recently rephrased its reservations to EU law, finding in the 'French constitutional identity' a new yardstick against which to conduct its review.[26]

Since the history of Germany stands in contrast, in many respects, with that of France, the term 'sovereignty', so crucial in France, does not figure in the *GG*, which indeed from the beginning was distinguished by its 'visionary openness towards Europe'.[27] As reported by eminent German scholars, Art 24 *GG*, the original constitutional 'integration provision' dealing with the transfer of sovereign powers to international organizations, was even described in 1948 by one of its drafters as a 'very nice answer' to the Art 15 of the Preamble of the 1946 French Constitution, which only enabled 'limitations' to national sovereignty.[28]

Rather than an identity based on a sovereign national state, thoroughly discredited by Nazism, the Federal Republic of Germany developed an attitude famously referred to as 'constitutional patriotism', that is a deep identification amongst German citizens with *GG* values[29]. The *Solange* doctrine on the examination of EU acts against fundamental rights enshrined in the *GG* perfectly shows how constitutional patriotism can be deployed to defend the ethos of a citizen-centred democracy at the national level.

Not later than 10 years ago described by its own President as being 'neither engine nor brake' of European integration,[30] the *BVerfG* is actually, above all, the 'watchdog' of domestic fundamental principles in legal practice,[31] enjoying a very high prestige within the German political system.[32] Its prestige and hence its proactive commitment in the rule-making process – quite different from those featuring the *Conseil constitutionnel* – should not be forgotten when assessing the potentially disruptive scope of the 5 May judgment.

[25] See below para IV.

[26] See below para V.

[27] F. Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' 10 (8) *German Law Journal*, 1219, 1219-1240 (2009).

[28] D. Grimm et al, 'European Constitutionalism and the German Basic Law', in A. Albi and S. Bardutzky eds, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (The Hague: T.M.C. Asser Press), 410, 407-492 (2019).

[29] J. Habermas, *Droit et démocratie entre faits et normes* (Paris: Gallimard, 1997), passim.

[30] As reported by W. Lehmann, 'European Democracy, Constitutional Identity and Sovereignty: Some Repercussions of the German Constitutional Court's Lisbon Judgment', available at https://tinyurl.com/y98k5mt7, (last visited 27 December 2020).

[31] F. Fontanelli, '*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 Åklagaren v. Hans Åkerberg Fransson' 9 (2) *European Constitutional Law Review*, 2013, 315-334.

[32] Accordingly, the German Federal Constitutional Court is often compared to the United States Supreme Court, as recalled by S. Haberl, 'Comparative Reasoning in Constitutional Litigation: Functions, Methods and Selected Case Law of the German Federal Constitutional Court', in G.F. Ferrari ed, *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems* (Leiden-Boston: Brill, 2019), 295-324.

III. Has the *BVerfG* Become Gaullist? The PSPP Judgment as a New Germany's Self-Portrait

The PSPP reasoning might well be framed in a *Solange* fashion: *as long as* there is no meaningful review either at the stage of competence allocation or in the exercise of the competence for institutions of the EU, (i) the objection of *ultra vires* before the *BVerfG* might arise and (ii) the *BVerfG* will carry out such a review according with its own proportionality standards.[33]

Nevertheless, its comparatively more threatening tone, together with the very core of constitutional complaints directed against the EU, question the accuracy of this account, suggesting a 'new course' of the *BVerfG*'s EU-related case law.

Looking at the list of judicial reservations made in the 5 May judgment, one comes indeed to the conclusion that according to the *BVerfG*, the ECJ's main failure was to hand an EU institution with reduced democratic legitimacy (the ECB) nothing less than a *Kompetenz-Kompetenz*.[34] This to say that in the *BVerfG*'s view the allocation of competences itself (and not only its exercise) is far from being beyond dispute, as it might conceivably touch upon the essence of the principle of democracy as protected by the *GG* and particularly by its Art 79 (the so-called eternity clause).[35]

This shift towards the most *souveraniste* side of the legal discourse spectrum as regards to EU integration process is not unprecedented: it echoes concerns of 'creeping enlargement of competences' (*schleichende Kompetenzerweiterungen*) already present in the Maastricht debate and in *BVerfG*'s judgments on the European Arrest Warrant I and the Lisbon Treaty.[36]

In the context of the establishment of the European Union under the Maastricht Treaty, Germany has legitimized its participation in the European integration by specific constitutional clauses which were introduced in the *GG*. The same situation occurred in France, although it should be noted that in the shadow of General de Gaulle's will, the drafters of the Constitution of the Fifth Republic adopted in 1958 provided for a procedure specifically allowing the *Conseil constitutionnel* to review a draft treaty before its ratification. As a result,

[33] According to J. Ziller, 'The Unbearable Heaviness of the German Constitutional Judge on the Judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 Concerning the European Central Bank's PSPP Programme' (5), available at https://tinyurl.com/ycve48fg (last visited 27 December 2020), as from the Maastricht judgment 'the *BVerfG* (...) gradually extended the *Solange* reservation to the constitutional identity of Federal Germany - as did several other constitutional courts, including the Italian one with its doctrine of *controlimiti*. What is new (in the PSPP judgment) is the extension of the *Solange* reservation to methods of legal interpretation'.

[34] See eg D. Grimm, 'A Long Time Coming' 21 (5) *German Law Journal*, 946, 944-949 (2020).

[35] Compare on this topic A. Engel et al, 'Is this Completely M.A.D.? Three Views on the Ruling of the German FCC on 5th May 2020' (140), available at SSRN: https://tinyurl.com/y93dhfsf (last visited 27 December 2020).

[36] J. Ziller, n 33 above, 4.

the French Constitution has significantly been amended since 1992, typically according to the *Conseil constitutionnel*'s finding that a Treaty transferring further competences to the EU affects 'the essential conditions for the exercise of national sovereignty'.[37] Shutting down creeping supranationalism was clearly a major issue also in Germany, where the most relevant change effected in 1992 was to ensure that constitutional implications of subsequent transfers of sovereignty be legitimated by a constitutional amendment procedure, whether implicit or explicit.[38] All in all, in both legal systems, the already existing principles of openness towards international law (Art 24 *GG* and Art 15 of the Preamble of the 1946 French Constitution respectively) appeared to be no longer a sufficient constitutional basis for their constitutional participation in the European integration.

In the *BVerfG*'s judgment on the Maastricht Treaty the *Staatenverbund* neologism (that is, a 'compound of states' close to a confederation)[39] was even coined to make clear that the dangers of the creeping supranationalism have to be addressed by relaunching the idea, once famously supported by de Gaulle, of an 'intergovernmental community'.[40]

Such a linguistic invention eventually reappeared in both the European Arrest Warrant[41] and the Lisbon Treaty rulings,[42] coupled with an even more explicit 'gaullist' *topos arguendi*: the qualification of Member States as 'masters of the treaties' and the construction of European competences as ultimately delegated by the sovereign 'constituent power' of the Member States.[43] Although both judgments are careful enough not to specify a *referendum* requirement, the *BVerfG* clearly suggested that a creation of a European federal state would transcend the existing domestic constitutional order and would consequently require that the exercise of 'the pre-constitutional (revolutionary?) right to give oneself a constitution' be ensured.[44]

[37] See below para IV.

[38] D. Grimm et al, n 28 above, 415.

[39] See Bundesverfassungsgericht 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92, B.2.c5, available at https://tinyurl.com/ybltc8jx (last visited 27 December 2020).

[40] Compare the translation of the neologism Staatenverbund provided by the European Commission for Democracy through Law (better known as the Venice Commission), which in the Guidelines for the presentation of précis - Revised version 1998, speaks indeed of an 'intergovernmental community', available at https://tinyurl.com/y7lrlkv5 (last visited 27 December 2020).

[41] Bundesverfassungsgericht 15 December 2015, 2 BvR 2735/14, 36, 38, 40, available at https://tinyurl.com/y7n5shum (last visited 27 December 2020).

[42] Bundesverfassungsgericht 30 June 2009, 2 BvR 182/09, 239–42, n 16 above.

[43] Notably enough, in the Lisbon Treaty ruling, this expression recurs in not less than six sentences, one of which invokes '(t)he obligation under European law to respect the constituent power of the Member States as the masters of the treaties'.

[44] Bundesverfassungsgericht 30 June 2009, 2 BvR 182/09, 239–42, para 179. In the following paragraphs, the Court significantly stated that 'faith in the constructive force of the mechanism of integration cannot be unlimited' and made up another linguistic invention: 'the individual Member State's constitutional responsibility for integration' (para 238). Eventually the *Bundestag* followed

It is essentially in accordance with this approach that in the PSPP judgment the *BVerfG* pushes the *Bundestag*, the national parliament, to step up its involvement in EU decisions to come. Indeed, the *BVerfG*'s self-proclaimed right to decide as a court of last instance whether an EU institution violates its competences under the Treaties is built upon an even stronger emphasis on the essence of the EU as 'the multi-level cooperation of sovereign states, constitutions, administrations and courts'.[45]

Here again, the ruling seems to be departing from the *Solange* doctrine as *BVerfG* intensified his *souverainiste* approach by exclusively focusing on restricting the transfer of competences to the European level and gives itself a power whose activation completely depends on its will. Its reasoning is indeed unquestionably marked by a desire to protect national interests in a field – that is, economic policy – in which a somewhat old-fashioned idea of national self-determination is considered to be essential for the German growth model. It is undoubtedly interesting, and perhaps ironic, that the prevailing macroeconomic message underlying the restrictive reading of the EU monetary policy comes from a country whose contribution since the enactment of stability mechanisms has been crucial to make the separation between monetary policy and economic policy less obvious than what it was under the Maastricht Treaty.[46] In fact, as we have previously stressed, no country has been more performing than Germany in creating a relatively cooperative economic structure in which its own interests flourish.

Britain's Prime Minister Harold Macmillan once remarked that when de Gaulle says 'Europe', he actually means 'France'.[47] Perhaps today it would not be exaggerated to say that when the Karlsruhe judges say 'Europe', they really mean 'Germany'. Surprising as it may be, given German political history since 1945, their last *souverainiste* shift might easily be explained by their quest for the safeguard of the German ordoliberal approach to monetary and economic policy, which is largely drawn on the premise of an independent, inflation-targeting *Bundesbank*.[48]

the *BVerfG* by enacting a new package of legislation, including the so-called 'Responsibility for Integration Act'. On 'sovereign statehood' as the 'new leitmotif" of the *BVerfG*, see D. Thym, 'From Ultra-Vires-Control to Constitutional-Identity-Review: The Lisbon Judgment of the German Constitutional Court', in J.M. Beneyto and I. Pernice eds, *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Baden-Baden: Nomos, 2011), 31.

45 Bundesverfassungsgericht 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, 112, para 111.

46 P. De Grauwe, *Economics of Monetary Union* (Oxford: Oxford University Press, 2013), passim.

47 Such a famous statement is reported, among others, by the richly documented J. Lacouture, *de Gaulle*, vol. 3 (Paris: Seuil, 1986), 315.

48 This is actually a two-decades-long quest, since in the Maastricht judgment already, the *BVerfG* gave price stability and central bank independence a constitutional significance (not less than the one entailed in the eternity clause), that they had never had before under the Basic Law: see M. Goldmann, 'The European Economic Constitution after the PSPP Judgment: Towards

There is nothing new about the risk of conflict between the *BVerfG* and the ECJ, but the impression 'that something unimaginable has occurred'[49] is widely shared. At some point in the sixties, the French veto of the British application for membership, as well as the Empty Chair policy, were no longer just a sword of Damocles hanging in the air. Whether we like it or not, the same holds true today for the *ultra vires* review, long thought to be an instrument of last resort.

IV. French Proceedings and *Conseil Constitutionnel*'s Rulings Related to the Ratification of EU Treaties as a Means to Enforce a Certain Idea of Sovereignty (and of a Constitution)

> 'France can always modify its Constitution. It therefore retains its sovereignty'.[50]

This statement, made by a former President of the *Conseil constitutionnel* in the context of the ratification of the Maastricht Treaty, is perhaps not easy to interpret,[51] but it fairly reflects the French attitude of apprehending the tension between national sovereignty and European integration process from a very peculiar, voluntarism-b(i)ased, perspective.

Old fashioned as this perspective might appear given the *status* of the EU (exceeding by far that of a 'classic' international organization), to claim such perspective's death would amount, in fact, to little more than wishful thinking with respect to the French *perception* of the EU as a unified system of rules and institutions *ultimately* emanating from States' own free will.

Classical international legal voluntarism might be (and indeed has been) criticized on several grounds, especially from being overly obsequious to State sovereignty.[52] Yet, due to its constitutional history, this is still a very powerful framework in France. As the previously referred statement eloquently sums up, there is no contradiction between such a voluntarist paradigm and the power of a State to use its present sovereign powers to limit (even substantially) its future sovereign powers, since this is *precisely* an attribute of sovereignty. Moreover, this view includes conceiving the Constitution as (above all) a means of sovereignty

Integrative Liberalism?' 21 (5) *German Law Journal*, 1069, 1058-1077 (2020). See also A. Supiot, n 2 above.

[49] D. Grimm, n 34 above, 944.

[50] F. Luchaire, 'La Constitution pour l'Europe devant le Conseil constitutionnel' *Revue du droit public et de la science politique en France et à l'étranger*, 58, 51-58 (2005).

[51] Compare O. Beaud, 'La souveraineté de l'État, le pouvoir constituant et le Traité de Maastricht. Remarques sur la méconnaissance de la limitation de la révision constitutionnelle' *Revue française de droit administratif,* 1057, 1045-1068 (1993).

[52] eg T. Christakis, 'Human Rights from a Neo-Voluntarist Perspective', in J. Kammerhofer and J. D'Aspremont eds, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), 421.

and having faith in the Nation as the sole bearer of State sovereignty.[53]

There are several respects in which de Gaulle, the uncontested founding father of the Fifth Republic, succeeded to incarnate these ideas once he came to power. He 'adjust(ed) the previous regime'[54] in many purely domestic matters, to such an extent that the President of the Republic became the central institution of the renovated parliamentary system. His understanding of constitutional procedures and institutions has left a lasting mark on the Fifth Republic. He even conceived the constitutional judge as the 'watchdog' of the executive power, whose main role in the context of its *ex ante* review of constitutionality was to prevent Parliament from violating the limits that the rationalized parliamentarianism fostered by the new Constitution had imposed on the legislative power. Accordingly, the Constitution was not meant to be invoked by individuals. Pursuant to the original drafting of Art 61 Constitution, statutory laws may be challenged before the *Conseil constitutionnel* only by the President of the Republic, the Prime Minister, the President of the *Assemblée Nationale*, the President of the *Sénat*.[55]

But de Gaulle also managed to inscribe in the Constitution his distinctive position vis-à-vis of both the (at the time nascent) European integration process and the State's statehood. His essential concern was to ensure that the last word over any future supranational development be given to the French Nation.

While the Constitution of the Fifth Republic appears to have rested upon the premises of the monist tradition underlying the Preamble of the 1946 Constitution,[56] the primacy granted to international law over national laws by virtue of Art 55[57] is far from being the only feature to take into account when assessing French approach to the relationship between domestic legal order and European law.

[53] As it is well-known, these ideas owe their currency to Emmanuel-Joseph Sieyès, whose landmark *pamphlet* J-E. Sieyès, 'Che cos'è il Terzo Stato?' (1789), in Id, *Opere e testimonianze politiche*, G. Troisi Spagnoli ed, (Milano: Giuffè, 1993), I, 1, was to a great extent the theoretical impetus behind the French Revolution of 1789. On the significance attached by Sieyès to the Nation and to the Constitution, see G. Rebuffa, *Costituzioni e costituzionalismi* (Torino: Giappichelli, 1990), 41 and L. Jaume, 'Constituent Power in France: The Revolution and its Consequences', in M. Loughlin and N. Walker eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008), 67-86.

[54] G. Carcassonne, *La Constitution* (Paris: Seuil, 2013), 19.

[55] The *Conseil constitutionnel* has become increasingly active since 1974 following an amendment to the Constitution which allowed sixty Members of the *Assemblée Nationale* or sixty Senators (the so-called *bloc d'opposition*) to submit legislation for constitutional scrutiny. On the evolution of the French *ex ante* review of constitutionality, from its difficult start in 1958 to its close relationship with the material core of the Constitution, see C. Amodio, n 8 above, 131.

[56] Which is made part of the Constitution of 1958 by the Preamble of the latter, together with the French Declaration of the Rights of Man and of the Citizen and, since 2004, the Charter for the Environment.

[57] Art 55 Constitution provides that 'treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'.

Interestingly enough, and according to some commentators in a self-contradictory manner, French Constitution fluctuates between two principles. On the one hand, the openness towards international law underlying the Preamble of the 1946 Constitution and Art 55 Constitution; on the other, the emphasis on French constitutional sovereignty enshrined in Art 54 Constitution.[58] 'Limiting the consequences of the monist system, which were perhaps considered too harsh', has been even described by a former Member of the *Conseil constitutionnel* as the foremost goal of de Gaulle's mark on the drafting of Art 54 Constitution.[59]

Because de Gaulle's main fear was creeping supranationalism, he set in Art 54 Constitution a rather procedural boundary to any future transfers of sovereign powers, introducing the possibility of the constitutionality review of a draft treaty to take place before its ratification, so that in the case of a finding of unconstitutionality by the *Conseil constitutionnel*, a treaty cannot be ratified unless the Parliament convened in Congress, ie a joint session of both the *Assemblée Nationale* and the *Sénat*, enacts a constitutional amendment. To this end, Treaties may be referred to the *Conseil constitutionnel*, before their ratification, by the President of the Republic, the Prime Minister, the President of the *Assemblée Nationale*, the President of the *Sénat*, sixty Members of the *Assemblée Nationale* or sixty Senators.

Art 11 Constitution, providing that international treaties may be a possible subject of a referendum, was also drafted in strict accordance with the view of activating Nation's supreme sovereign powers (hereby directly and not through its democratically elected representatives), although the decision to hold a referendum falls within the discretionary power of the President of the Republic and it has typically operated as a (possible) lightning rod.[60]

All in all, a referendum only occurred three times in relation to European matters,[61] whilst there is a long succession of *Conseil constitutionnel* decisions starting in 1970 and ending in 2007 rendered in the framework of its *ex ante* review of EU agreements' constitutionality.[62] Following from Art 54 Constitution,

[58] N. Quoc Dinh, 'La Constitution de 1958 et le droit international' *Revue de droit public*, 515-564 (1959) and A. Pellet, '«Vous avez dit "monisme"»? - Quelques banalités de bon sens sur l'impossibilité du prétendu monisme constitutionnel à la française', in D. de Béchillon et al eds, *L'architecture du droit – Mélanges en l'honneur de Michel Troper* (Paris: Economica, 2006), 827-857.

[59] N. Lenoir, 'Les rapports entre le droit constitutionnel français et le droit international à travers le filtre de l'article 54 de la Constitution de 1958', in P.M. Dupuy ed, *Droit international et droit interne dans la jurisprudence comparée du Conseil constitutionnel et du Conseil d'État* (Paris: Éditions Panthéon-Assas, 2001), 20.

[60] Interestingly enough, this very same function is deemed to be fulfilled, in Germany, by the *BVerfG*: see D. Thym, n 44 above, 32. For an interesting comparative overview of the debate about direct democracy in EU related matters, see S. Seeger, 'From Referendum Euphoria to Referendum Phobia - How EU Member States Framed Their Decision on the Ratification Procedure of the Constitutional Treaty in Comparison to the Treaty of Lisbon' *Hebrew University International Law Research Paper* (2008).

[61] S. Seeger, n 60 above, 7.

[62] O. Beaud, 'Le Conseil constitutionnel sur la souveraineté et ses approximations' 10 *Jus*

it has indeed become a classical feature of French practice that when the *Conseil constitutionnel* finds that a EU Treaty affects 'the essential conditions for the exercise of national sovereignty',[63] the Constitution is modified in order to make it compatible with supranational provisions transferring further competences to the EU.

As from 1992, each ratification of EU Treaties, with the sole exception of the Treaty of Nice, has been the occasion of deploying such two-steps procedure: (i) a judgment of the *Conseil constitutionnel* and (ii) a revision of the Constitution, namely of its Title XV which was indeed introduced in 1992 in the context of the Maastricht Treaty ratification under the title 'European Communities and European Union'.[64]

The primacy of the Constitution is regularly recalled by the *Conseil constitutionnel* in its decisions. However, the frequency of EU-related constitutional amendments shows some inconsistencies. 'A Constitution' – it has been argued –

> 'is not a scrap of paper and it is deplorable that the French Constitution has to be changed every time France envisages the ratification of a treaty by which it transfers powers to an international organ'.[65]

In this regard, following the Italian model, a long-standing proposal to introduce, once and for all, a 'general Europe clause' in the Constitution,[66] has even been advanced.

The constant practice (as well as the ease) of amending the Constitution in order to advance further in the integration process, may indeed be interpreted, if not as 'a sign of a *de facto* primacy of international law',[67] at least as an expression of a 'certain idea' of the Constitution. Could it be contended that the latter is actually constructed as nothing more than a vehicle to assert sovereignty and to formalize the stage of integration at the EU level and its current decision-making asset?

The question arises neither in *a vacuum*, nor just in relation to EU matters, rather in the more general context of the development of the French constitutional

Politicum, 175-226 (2019).

[63] In its case law prior to 1992, the constitutional judge used to draw a distinction between limitations of sovereignty which were allowed, and transfers of sovereignty which were not. L. Burgorgue-Larsen et al, 'The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved', in A. Albi and S. Bardutzky eds, *National Constitutions in European and Global Governance*, n 28 above, 1190, 1181- 1223.

[64] Since the revision enacted in the context of the ratification of the Lisbon Treaty, the Title XV of the French constitution is named 'On the European Union' and consists of Arts 88-1 to 88-7.

[65] A. Pellet, 'A French Constitutional Perspective on Treaty Implementation', in T. Franck ed, *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (New York: Transnational Publishers, 2000), 293.

[66] G. Carcassonne, n 54 above, 377.

[67] L. Burgorgue-Larsen et al, n 63 above, 1218.

debate.

When considering the long arc of such development, most historians agree that it ultimately rests on the idea of organizing the structures of government.[68] Since the time of the 1789 Revolution, whatever the constitutional design choice was, the acknowledgement of the sovereign constituent power of the Nation has played a great, essential role, to such an extent that it does not dissolve on the adoption of a Constitution.[69]

This is to say that such 'logic' primacy of sovereignty over the Constitution became part of the political DNA of France long before its participation in the European integration process. In fact, the latter made the historical commitment to national sovereignty-as-constituent power just more palpable; and the French peculiarity according to which the constituent power relates to the Constitution not only *before* but also *after* its adoption, just more flagrant. In de Gaulle's view, few ideas fit better than these with its EU integration process-related position.

Of course, even the very peculiar role conferred by Art 54 Constitution to the *Conseil constitutionnel* had to carry on (hence to be displayed according to) such long-standing heritage. Up to its decision related to the Treaty establishing a Constitution for Europe (the Rome Treaty), asserting national sovereignty and calling for the intervention of the constitutional legislator, was indeed the main feature of the *Conseil constitutionnel* EU-related case law, the other being a significant reluctance to draw a clear differentiation between constituent and constituted sovereignty.

V. An Ongoing Change in French Understanding of the Constitutional Limits to European Integration Process: From Sovereignty to Constitutional Identity

Against the background described above, it comes as no surprise that constitutional identity and constitutional rights have traditionally not been an important part of the French constitutional judges' reasoning toolbox. The first meaningful potential conflict between the *Conseil constitutionnel* and the ECJ on these topics arose only in 2004, as the implications of a 'European Constitutionalism beyond the State'[70] had become more evident with the drafting

[68] M. Fioravanti, *Costituzione* (Bologna: il Mulino, 1999), 71.

[69] One of the most famous tenants of this approach is the former Member of the *Conseil constitutionnel* George Vedel, who notably wrote: 'The derived constituent power has the same nature as the initial constituent power: the constitution prescribes only a procedure (which can by the way be revised (…)), it cannot limit its exercise (since even the prohibition relating to the republican form of government in Art 89, last paragraph, loses its validity if revised). G. Vedel, 'Schengen et Maastricht: à propos de la décision n° 91-294 DC du Conseil constitutionnel du 25 juillet 1991' *Revue française de droit administratif*, 179, 173-184 (1992).

[70] J. Weiler and M. Wind eds, *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2003).

of the Treaty establishing a Constitution for Europe.

In the Constitutional Treaty judgment[71], the *Conseil constitutionnel* refined its previously developed toolbox on some crucial points, on which eventually the subsequent judgment on the Lisbon Treaty[72] widely relied.

In both rulings, while at first sight reiterating the classical view according to which domestic constitutional limits to the EU integration process refer essentially to the procedural requirement (enshrined in Art 54 Constitution) to amend the Constitution, the *Conseil constitutionnel* actually opened the door for more substantive hierarchies, expressing its 'interpretative reservations' about the binding character of the EU Charter of Fundamental Rights as well as the principle of EU primacy. Thereby, the *Conseil constitutionnel* 'rebranded' itself as the master of the interpretation of EU law principles, warning that these will be considered compliant with the French Constitution only *as long as* they are interpreted in a strictly defined way.[73]

The *Conseil constitutionnel* judgments guide the way.

A first crucial point they made relates to the French deep-rooted notion of individual rights, which notably implies a strong disregard for any form of collective (including religious) identity. Accordingly, the *Conseil constitutionnel* recalled French constitutional proscription of 'any recognition of collective rights of any group defined by origin, culture, language or beliefs are thus respected', and made this stance a condition for France's acceptance of the EU Charter of Fundamental Rights' binding character.[74]

Echoing the very same concern of defending the formal republican principle of equality before the law, the *Conseil constitutionnel* offered also a rather restrictive reading of the 'right of everyone, whether individually or in community with others, to manifest religion or belief in public', serving the declared aim of 'reconcil(ing) the (EU) principle of freedom of religion and that of secularism (the famous French *laicité*)'.[75]

Furthermore, as to the regards to the principle of EU primacy, the *Conseil constitutionnel* stated in its Constitutional Treaty judgment that such a principle did not require any constitutional amendment insofar as 'any greater

[71] Conseil constitutionnel 19 November 2004, decision no 2004-505 DC, available at https://tinyurl.com/y9dsj8my (last visited 27 December 2020).

[72] Conseil constitutionnel 20 December 2007, decision no 2007-560 DC, available at https://tinyurl.com/y98l5h44 (last visited 27 December 2020).

[73] On these 'interpretative judgments of dismissal' see M. Cartabia, '"Unità nella diversità": il rapporto tra la costituzione europea e le costituzioni nazionali' 10(3) *Diritto dell'Unione Europea*, 607, 583-611 (2005).

[74] Conseil constitutionnel 19 November 2004, decision no 2004-505 DC (cons 16). Not content to have 'neutralized' every possible collective aspect of EU fundamental rights, the *Conseil constitutionnel* goes further and even deems this typically French stance in line with «the constitutional traditions common to the Member States». See also Conseil constitutionnel 20 December 2007, decision no 2007-560 DC (cons 12).

[75] Conseil constitutionnel 19 November 2004, decision no 2004-505 DC (cons 18).

scope than which it previously had' could be detected.[76] In doing so, he read the national identity clause included in the EU Treaties as containing an implicit limit to the primacy of EU law whenever that law would affect national constitutions, or at least their fundamental structures.[77]

The 'interpretative reservations' are one of the most interesting techniques that frequently pop up in constitutional interpretation processes, making it possible to ensure that the application of a statutory law not yet come into force will satisfy certain constitutional requirements without undermining its publication.[78] By applying such technique to EU law, the *Conseil constitutionnel* added an important footnote to the ongoing tension between constitutional limitations to EU integration process and EU integration process-related constitutional transformations. Despite raising potential constitutional issues, it avoided not only treaty censorship but also the call to amend the Constitution in matters that it identifies as part of the substantive core of the French constitutional order.

Like every other legal discourse, the one arising from 'interpretative reservations' conveys an attempt to construct reality by means of language.[79]

In this vein, the most important novelty of the judgments on the Rome Treaty and Lisbon Treaty is that hereby the *Conseil constitutionnel* deploys a narrative (and a self-representation, too) other than what the binary scheme 'conformity-non conformity' would have allowed. While it feels the need to openly challenge EU provisions (hence to call for the intervention of the constitutional legislator) only with respect to those pertaining to the EU functioning,[80] which by their nature limit the room for a *francisée*[81] interpretative construction, it raises in a rather *Solange* fashion the issue of domestic constitutional rights as a new yardstick against which to conduct its review. In

[76] Conseil constitutionnel 19 November 2004, decision no 2004-505 DC (cons 12). As The principle of EU primacy was repealed from the Lisbon Treaty, in the subsequent judgment on the Lisbon Treaty, the *Conseil constitutionnel* did not elaborate on it.

[77] See among many A. Levade, 'Le cadre constitutionnel du débat de révision de la constitution. Commentaire de la décision n° 2004-505 DC du 19 novembre 2004 «Traité établissant une Constitution pour l'Europe»', available at https://tinyurl.com/ydhxszbd (last visited 27 December 2020) and M.-C. Ponthoreau, 'Identité constitutionnelle et clause européenne d'identité nationale. L'Europe à l'épreuve des identités constitutionnelles *nationales*' *Diritto pubblico comparato ed europeo*, 1581, 1576-1588 (2007).

[78] In the more general context of constitutional adjudication, the way constitutional judges use the technique of interpretative reservations is an important subject of comparative inquiries: see eg T. Di Manno, *Le Juge constitutionnel et la technique des décisions interprétatives en France et en Italie* (Paris: Economica, 1999).

[79] R.H. Weisberg, 'Diritto e letteratura' *Enciclopedia delle scienze sociali* (Roma: Treccani, 1993), available at https://tinyurl.com/yckoeqr9 (last visited 27 December 2020).

[80] It must be pointed out, however, that the revision procedure enacted in 2004 was meant to be effective under the condition of the coming into force of the Constitutional Treaty.

[81] I owe this untranslatable word to one of the most skeptical scholars about the onthological possibility of 'legal tranplants': P. Legrand, 'L'hypothèse de la conquête des continents par le droit américain (ou comment la contingence arrache à la disponibilité)' 45 *Archives de philosophie du droit*, 41, 37-41 (2001).

doing so, the *Conseil constitutionnel* engages in a 'reconstructive enterprise' perhaps 'more real'[82], in any event more substantive, than the one focused on asserting the sovereignty of the French Nation.

A French scholar even went as far as to argue that 'thanks to Europe France has become aware of its identity'.[83]

Interestingly, another set of French constitutional judge decisions, dealing with the obligation to transpose an EU directive, entails the seeds of a new representation of what would be acceptable to give up, and what would not, in the name of European integration.

For the sake of simplicity, we will break the *Conseil constitutionnel*'s reasoning down into three steps.

In a first move, the *Conseil constitutionnel* holds that such obligation follows not only from EU law but also from the 'integration provision' (Art 88-1 Constitution) conferring constitutional standing to the French participation in the EU.[84] This statement, driven more by the aim to gain further room for *manoeuvre* in the dialectic between EU law and domestic law (in addition to the one related to the ratification of the Treaties) rather than to protect the enforcement of EU law by means of French constitutional law, allows the *Conseil constitutionnel* to foreshadow what has been defined as a 'conditional immunity' of EU directives.[85]

The *Conseil constitutionnel* indeed clearly suggests, in a second move, that a non-transposition of EU directives would be possible on the ground of an expressly contrary provision of the French constitution.[86]

The third part of this set of decisions evokes, without further clarification, a more general (counter)limit to the constitutional obligation to transpose EU directives, namely 'a rule or principle inherent to the constitutional identity of France'.[87]

This 'identity' turn of the *Conseil constitutionnel*, premised on the tenet

[82] For a provocative essay on these matters, J.S. Peters, 'Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion' 120(2) *Publications of the Modern Language Association of America*, 442-453 (2005).

[83] E. Dubout, '«Les règles ou principes inhérents à l'identité constitutionnelle de la France»: une supra-constitutionnalité?' *Revue française de droit constitutionnel*, 453, 451-482 (2010).

[84] This construction was first announced by the Conseil constitutionnel 10 June 2004, decision no 2004-496 DC (cons 7).

[85] See F. Picod, 'La costitutionnalité du droit communautaire dérivé…à la française' *Il diritto dell'Unione europea*, 869, 869-884 (2004) and F. Chaltiel, 'Nouvelles variations sur la constitutionnalisation de l'Europe - A propos de la décision du Conseil constitutionnel sur l'économie numérique' *Revue du marché commun et de l'Union Européenne*, 452, 450-454 (2004).

[86] See Conseil constitutionnel 1st July 2004, decision no 2004-497 DC (cons 18), available at https://tinyurl.com/y8o9r4yr (last visited 27 December 2020).

[87] Conseil constitutionnel, decision no 2006-540 DC of 27 July 2006 (cons 19), available at https://tinyurl.com/y7lkvw5g (last visited 27 December 2020). and Conseil constitutionnel 30 November 2006, decision no 2006-543 DC (cons 6), available at https://tinyurl.com/yckjoqhe (last visited 27 December 2020).

that the respect of the substantive core of the French constitutional order is a necessary precondition for EU directives to be transposed, obviously raises the questions of what exactly falls under the 'constitutional identity' of France and what would be the consequences of a finding of unconstitutionality.

As for the first issue, while most legal scholars mention the principles already referred to in the *Conseil constitutionnel* judgments on the Rome Treaty and Lisbon Treaty – such as religious neutrality and equality before the law – others embrace a more extensive reading, according to which the obligation to transpose EU directives may be entrenched by any principles requiring 'France (to) be an indivisible, secular, democratic and social Republic' (Art 1 Constitution).[88]

All in all, it seems accurate to say that the referred judgments lead to significantly deepen the French debate on 'constitutional identity' as well as on the relationship between EU law and domestic constitutional law.[89]

However, only at first sight did these developments have the effect of erasing the difference between the French model of (counter)limits and that of other European legal systems equally based on post- World War II constitutions.

As for the second issue previously referred to (that is, what would be the consequences of a finding of unconstitutionality), it is worth highlighting that in its most recent rulings dealing with the obligation to transpose EU directives, the *Conseil constitutionnel* paid further homage to the constitutional legislator's full discretion as to whether to modify the Constitution, as made clear by the following statement: 'the transposition of a directive cannot run counter to a rule or principle inherent to the constitutional identity of France, *except when the constituting power consents thereto*'.[90]

One cannot but notice in the latter formula the mirror of a more general dilemma surrounding French constitutional theory. Indeed, what led the *Conseil constitutionnel* to be so careful not to give a 'red lines' *status* to the French constitutional identity, is that Art 89-5 Constitution, stating that 'the republican

[88] A helpful survey of the debate can be found in F.X. Millet, *L'Union européenne et l'identité constitutionnelle des Etats membres* (Paris: Lextenso, 2012), 166. See also A. Levade, 'Identité constitutionnelle et exigence existentielle: comment concilier l'inconciliable', in J.-C. Masclet et al eds, *L'Union européenne: Union de droit, Unions des droits Mélanges en l'honneur de Philippe Manin* (Paris: Pedone, 2010), 109-128, and J. Rossetto, 'La primauté du droit communautaire selon les juridictions françaises: A propos des relations entre le droit communautaire et le droit constitutionnel national', in J. Rossetto and A. Berramdane eds, *Regards sur le droit de l'Union européenne après l'échec du Traité constitutionnel* (Tours: Presses universitaires François-Rabelais, 2007), 71-90.

[89] To be sure, all these issues were dealt with by the Commission that in 2008 was convened by the former President Sarkozy to identify potentially useful amendments to the Preamble of the current Constitution: see Comité de réflexion sur le préambule de la Constitution, 'Redécouvrir le préambule de la Constitution: rapport au Président de la République', 2009, available at https://tinyurl.com/y79sc5hm (last visited 27 December 2020).

[90] Conseil constitutionnel 27 July 2006, decision no 2006-540 DC (cons 19), n 87 above. A slightly different formulation can be found in Conseil constitutionnel 30 November 2006, decision no 2006-543 DC (cons 6), n 87 above.

form of government shall not be the object of any amendment', has not been given an enforceable status in France.[91]

The argument of hierarchy within the French constitution would require the so-called 'supraconstitutional norms' not to be overstepped either by EU law or by the constitutional legislator. Recent decisions dealing with the obligation to transpose EU directives critically suggest that the *hard core* of the legal order is actually not untouchable. The same holds true for case law concerning, more generally, limits to constitutional amendments. Once again, we are facing what has been tellingly named

> 'a strange understanding of the supremacy of the Constitution: on the one hand, the constitutional legislator is 'sovereign' and stands higher than the Constitution whilst on the other hand the Constitution (or more precisely some of its fundamental principles) stands higher than EU law'.[92]

Such a deferential attitude toward the constitutional legislator obviously limits the practical consequences of the *Conseil constitutionnel*'s call for constitutional identity. This is yet not very surprising, given that enforcing the material limit on constitutional revision would require putting the French constitutional judges into a role they are not (and do not feel) legitimate enough to play.[93]

Limited practical consequences, however, do not undermine the relevance of the *Conseil constitutionnel*'s shift toward a *Solange* line of reasoning.

VI. Conclusion

All in all, a Franco-German comparative insight suggests that not only with respect to domestic matters but also in relation to European matters, the *BVerfG* 'has assumed an expansive role that casts it, at least in part, as a positive legislator prone to dictating (Constitution-oriented) policy',[94] whereas the *Conseil constitutionnel,* whose legitimacy is in any event much weaker than that of its

[91] A clear position was taken by the *Conseil constitutionnel* on purely internal matters in a 2003 case, where it succinctly dismissed the proceeding on the ground that it had no power to rule on the constitutionality of constitutional amendments: Conseil constitutionnel 26 March 2003, decision no 2003-469 DC, available at https://tinyurl.com/yb4ytbvd (last visited 27 December 2020). On this '*a minima*' construction of the Art 89 (5) Constitution, see eg S. Pierré-Caps, 'La questione della revisione costituzionale in Francia: la sovranità del potere costituente alla prova del metodo', in S. Gambino and G. Ignazio eds, *La revisione costituzionale e i suoi limiti: fra teoria costituzionale, diritto interno, esperienze straniere* (Milano: Giuffrè, 2007), 326.

[92] F. Hourquebie and M.-C. Ponthoreau, 'The French Conseil Constitutionnel: An Evolving Form of Constitutional Justice' 2 *The Journal of Comparative Law*, 279, 269-284 (2008).

[93] Compare, on the *BVerfG*' s undisputed right to review constitutional amendments, C. Möllers, '«We Are (Afraid of) the People»: Constituent Power in German Constitutionalism', in M. Loughlin and N. Walker eds, n 53 above, 87-106.

[94] M. Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts' 2(2) *International Journal of Constitutional Law*, 640, 633-668 (2004).

German counterpart,[95] has constructed the French Constitution, yet deeply marked by the classic concept of national sovereignty (or perhaps, ironically, because of that), in a much less defensive way.[96] In short, the 'integrating effect of the Constitution', one of the salient features of constitutionalism so tellingly pointed out by Professor Ponthoreau, is by no doubt less visible in the French legal system than in the German one.[97]

Interpreted against this background, Germany's *souveraniste* self-portrait emerging from the 5 May judgment should be seen as its own new legitimation, with no need for likes. It is the work of a powerful national decision-maker already facing the future head on.

By contrast, the evolutionary character of *Conseil constitutionnel*'s call for constitutional identity cautions against drawing now definitive conclusions, and so does the fact that judicial activism is not easily assumed by French constitutional judges. Nevertheless, we would well to recall and to put in the very same broad context another major development of French constitutional law, that is the 2008 enactment of the constitutional revision introducing an *ex post* judicial review.

Without entering into a detailed description of the new *ex post* judicial review procedure, which is too articulate to be addressed here,[98] it should suffice to underline that the high-degree of penetration of European law within the French legal order, as well as the EU's constitutional *momentum*, are the events that mostly influenced this major legal change, hitherto leading to the end of the most famous French exception, namely the reluctance to conceive the *Conseil constitutionnel* as the guardian of constitutional rights and values.

Indeed, not only have concerns been expressed about the denationalization of fundamental rights protection,[99] but also about the limited relevance of the

[95] See among many M. Troper, 'Fonction juridictionnelle ou pouvoir judiciaire?' 16 *Pouvoirs*, 5-15 (1981), L. Favoreu, 'La légitimité du juge constitutionnel' *Revue internationale de droit comparé*, 557-581 (1994) and H. Roussillon, 'Le Conseil constitutionnel: une légitimité contestée', in J. Raibaut and J. Krynen eds, *La légitimité des juges* (Toulouse: Presses de l'Université Toulouse 1 Capitole, 2004), 119-126.

[96] Compare J. Gerkrath, 'Direct effect in Germany and France - A Constitutional Comparison', in J. Prinssen and A. Schrauwen eds, *Direct effect: Rethinking a Classic of EC Legal Doctrine* (Groningen: Europa Law Publishing, 2002), 134, 128-154.

[97] M.-C. Ponthoreau, 'La Constitution comme structure identitaire', in D. Chagnollaud ed, *Les 50 ans de la Constitution 1958-2008* (Paris: LexisNexis, 2008), 31-42.

[98] For further references, see C. Amodio, 'L'effet intégrateur de la Constitution en France, entre formes de présence du passé et nouveaux paradigmes en quête de reconnaissance' *Annuario di diritto comparato e di studi legislativi*, 699, 679-708 (2019).

[99] L. Burgorgue-Larsen, 'Les occupants du «territoire constitutionnel». Etat des lieux des contraintes jurisprudentielles administrative et européenne pesant sur le Conseil Constitutionnel français', in D. Rousseau ed, *Le Conseil constitutionnel en questions* (Paris: L'Harmattan, 2004), 45-75 and F. Jacquelot, 'La Convention européenne des droits de l'Homme et le procès incident de constitutionnalité: les perspectives croisées de la «priorité» en France et en Italie', in L. Gay ed, *La question prioritaire de constitutionnalité – Approche de droit comparé* (Bruxelles: Bruylant, 2014), 442, 439-458.

asserted supremacy of the French Constitution if not supplemented by jurisdictional measures of enforcement, such as the possibility for individuals to challenge *ex post* the constitutionality of legislative provisions that violate their rights.[100] In addition to that, there has been a notable trend to place greater emphasis on French constitutional principles as opposed to EU ones.[101]

To conclude, legal changes driven by the EU integration process may be more or less cryptic.

The pressure of EU supranationalism has already led to a new representation of what German constitutional judges consider to be their role in the relationships between EU law and domestic law.

French developments also suggest an ongoing change, particularly in the understanding of the Constitution-society relations. The integrating effect of the Constitution has now better chances to emerge. We cannot altogether exclude that the *Conseil constitutionnel*'s enhanced legitimacy will have, in turn, an impact on the coming relationships between EU law and the national Constitution.

[100] See 'Intervention de M. Jean-Louis Debré, Président du Conseil constitutionnel devant le Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Vème République', available at https://tinyurl.com/ya5czfdr (last visited 27 December 2020).

[101] See 'Déclaration de M. Nicolas Sarkozy, Président de la République, sur la place du Conseil constitutionnel dans les institutions de la Cinquième République', available at https://tinyurl.com/ybldkh99 (last visited 27 December 2020).