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From Pluralism to the Material Constitution and Back

Mariano Croce and Marco Goldoni*

It is a pleasure and an honour for us to produce this Introduction to the symposium that *The Italian Law Journal* has kindly devoted to our recent book *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford: Stanford University Press, 2020). The book was written with at least a twofold aim in mind. First, it was meant to revive the theoretical potential of the long-lost tradition of legal institutionalism (sadly an almost unknown one in Anglo-Saxon academia). As Stefano Pietropaoli argues convincingly in his discussion, legal institutionalism offers an invaluable entry point to the debate on the nature of legal orders as well as institutions that is not constrained by the conventional opposition between natural law and legal positivism. Santi Romano, Carl Schmitt, and Costantino Mortati possibly represent the pinnacles of the institutionalist stream of thought,[1] and yet they remain relatively unknown in the Anglo-Saxon world (with the notable exception of Schmitt, who however is seldom studied as a representative of legal institutionalism).[2] Because of this, such a rediscovery is not only of a lost tradition, but of authors whose contribution to legal science can be deemed to be of the highest sophistication. Yet, the book is not a general introduction to the legal thought of these jurists. Rather, it offers an analysis of the main building blocks of their legal thinking, and it does so by asking a specific question: How did these theorists address the challenge of the rising pluralism that was unfolding before their eyes? The question is of great salience today because it offers a way into the contemporary question of the multiplication of legal orders and institutions and the reconfiguration of the state authority that derives from it.

We are very grateful to Stefano Pietropaoli, Dario Martire, and Marco Brigaglia for having engaged with the book in stimulating ways.[3] Pietropaoli's

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[1] Given the specific angle of the analysis, a systematic treatment of the work of Maurice Hauriou (indisputably another giant of legal institutionalism) was not included in the volume because of his limited engagement with the issue of pluralism.

[2] Evidence of this neglect is the recent translation (only after one hundred years from its original publication) of Santi Romano's *The Legal Order* (Abingdon: Routledge, 2017).

[3] We regret that other three scholars who were invited to contribute to the symposium

comment revolves around the red thread of the notion of order, which he defines in terms of an obsession. It is indeed an effective perspective for an analysis of legal institutionalism for at least two solid reasons. The first is dictated by the historical context, and it relates to the challenge of pluralism. Romano, Schmitt and Mortati (among others) were concerned that the lush normativity of social groups could undermine the political unity of the state. Social and legal orders were thus threatened by the lively effervescence of movements, unions, parties, and other forms of association. The second reason is that reference to *order*, as opposite to *system*, allowed legal institutionalists to criticise normativism in its legal positivist variation. Legal systems are conceived as comprised of cluster of norms, often hierarchically assorted, with an ultimate norm performing the function of maintaining the unity of the system itself. Legal orders obviously also comprise norms, but these are not the only building blocks. Crucially, legal institutionalists believed that norms were necessary but not sufficient instruments for the ordering of social life. In other words, norms could not, by themselves, account for the phenomenon of social ordering. As is well known, social organisation through institutions is at the centre of the institutionalist conception of ordering. This starting point allowed legal institutionalists to thematise the degree of autonomy of law from politics while remaining focused on the issue of societal order. Pietropaoli is right in identifying in the main organising axes of the book (juristic vs political conceptions of law; material vs nomic normativity) our way of mapping the different positions adopted by Romano, (the institutionalist) Schmitt, and Mortati on the status of law in relation to politics. While all these three authors share a concretist understanding of the relation between social formation and legal ordering, their views on the autonomy of law differs under interesting and insightful respects. Pietropaoli summarises this spectrum of views with reference to the role of legal science:

> 'Romano advances a "juristic" conception that emphasizes the role played by legal science in the composition of tensions crossing the social world. Schmitt moves, in a "political" perspective, from an idea of legal science as the interplay of norm, decision, and concrete order. Mortati, combining the work of its predecessors in an original way, looks at legal science as instrumental in the consolidation of institutional facts'.

One of the stakes of the mapping is indeed the identification of *legal science as an active ordering force*. This affects the other organising axis of the book: the connection between *materiality* and *nomic force*. According to Romano, Schmitt and Mortati, legal science is always productive of some form of ordering, but its

could not meet the deadline. Still, our informal conversations with them have been theoretically enriching and have provided us with materials to think about for our future project. This is even more regrettable because the unavailability of their contributions makes this symposium gender imbalanced.

relation *vis-à-vis* social matter varies significantly. Romano is the most radical among legal institutionalists as he denies any active role for matter (ie, matter is not nomic in itself) and emphasises the autonomy of legal knowledge. Schmitt believes that nomic force is intrinsic to the substance of social practices and in his institutionalist phase maintains that legal practice and science operate as a selective device that restrains the innate pluralist of society's self-differentiating mechanisms. Mortati supported the view that legal knowledge strengthens or consolidates nomic force.

Our main argument in the book is that the working of legal science is closely connected to the status of pluralism in contemporary legal orders (with their tendency to proceed by relentless processes of mitotic separation and autonomisation). The rise of pluralism does not only concern the stability of already established legal orders, but also the status of official legal science (which is to say, the knowledge that is practiced by legal experts). Dario Martire takes up this double challenge in his contribution by focusing on the constitutional level. He notes that one of the most precious insights by legal institutionalists can be found in the attention paid to the fact of pluralism. After reconstructing the distorted reading of Romano put forward by the institutionalist Schmitt, Martire emphasises the 'fruitful' continuity of Romano's work with that of later representatives of Italian legal institutionalism. His suggestion is that two figures – Mortati and, perhaps even more incisively, Massimo Severo Giannini – have provided a potential solution to the riddle of pluralism. Martire suggests that while existing versions of pluralist legal theories such as global legal pluralism and constitutional pluralism do not offer a way out of the impasse brought about by the pluralist impact over positive legal orders, there is a constitutional way of stabilising the order without quashing pluralist impulses. In Martire's view, Giannini's work redeems Romano's institutional theory ('theoretically pluralist, ideologically monist', Martire notes, quoting Bobbio with approval – and this is certainly something we cannot agree on) by dismantling the overlapping of institutions on social groups. This is a valuable addition to the string of theories we have juxtaposed in the volume, in that Giannini, by taking his cues from Romano's conception of the institution, identifies the main unit of analysis in the notion of the internal order, which comes to be seen as comprised of sectoral legal orders and general legal orders (like the State legal order). Giannini contributes extra elements to the notion of organisation, and this allows him to formulate the thesis of the 'simultaneous interaction' between organisation and legislation. This means that organisation and rules are mutually implicated: a modification of one entails an automatic modification of the other. According to Martire, Giannini's revision of the notion of legal order is of great help for accounting for, and accommodating, legal pluralism. Not only are legal fields like international law and canon law revisited, but other systems are enlightened

with a legal beam.[4] Finally, Martire notes that some of the insights of this Romano's pupil (and of other authors gravitating around legal institutionalism, like Adriano Olivetti and Gaspare Ambrosini) inspired some of the solutions imagined by the Italian Constituent Assembly during the drafting of the republican constitution.

Marco Brigaglia is one of the most renowned experts and interpreters of Mortati's work.[5] His comment zooms in on the question of continuity in Mortati's legal thought, in direct conversation with our book. According to Brigaglia, legal orders are understood by Mortati as will-based (rather than pure reason or desire). In a nutshell, Brigaglia identifies a close connection between the establishment of a normative will and legal ordering (connection aptly named, by Brigaglia, as 'will to order'). Two conditions must be met for identifying a normative will as the ground of a legal order: 1) the will should not switch randomly from one direction to another (its aim ought to be stable); 2) the will should be integrated by a rational plan concerning the organisation of activities for pursuing the aim. In other words, the 'external' ordering of social groups reflects a psychological internal structure. While the intensity of the connection between 1 and 2 can change according to the specificity of the aims pursued by a legal order, the structural aspects of Mortati's idea of the legal order have persisted throughout his life. The material organisation of social order (the aggregation of a multiplicity of interests) might be more or less tight, but it always requires bearing and committed subjects gathering around fundamental political aims. Nonetheless, Brigaglia detects an important shift in the last phase of his thought, and it is not by chance that this turn is concomitant with Mortati's change of attitude toward the development of the Italian constitutional order. With the perspective of a weakening of social organisation and a lack of transparency of its substance, for Mortati it becomes extremely difficult to achieve the level of centralised political coordination that is necessary for stabilising the legal order and avoiding the nefarious effects of centrifugal social forces. In other words, in this last phase of Mortati's work, it gets increasingly difficult to identify the fundamental aims of an order and even more difficult to pinpoint the bearing subjects of the legal order. Brigaglia notes that with the increase of social complexity comes the weakening of the material constitution and this opens up a new space of intervention for the jurists. In Mortati's last writings, juristic science abandons the political conception of the legal order to become one of the true sources of the law. In this new context, Brigaglia notes, jurists are 'unbounded' and 'they may recover their true task, the task of creatively searching for latent paths of integration within current social arrangements'.

This latter point allows us to specify the second aim behind our book to

[4] Famously, Giannini's work contributed to the recognition of sport associations as legal systems.

[5] See his monograph *La teoria del diritto in Constantino Mortati* (Milano: Giuffrè, 2006).

which we alluded in the first paragraph. Brigaglia aptly points out that the increase of social complexity makes it very difficult to preserve the political unity (in both Schmitt's and Mortati's grasping of this notion) of the legal order. Indeed, the book ends with the suggestion that, under current conditions of legal development, Romano's theory of institutionalism offers the most promising insights for analysing contemporary legal institutions. It is indeed in the weakening of the capacity of organised politics to make order of social complexity that other forces find a space for moulding societal formation. When the formal structure of the state, comprising its political forces (to build on Mortati's language), becomes patently insufficient as an ordering engine (in favour, to stick to Mortati's language, of other less defined entities, such as the ruling class), other forms of societal ordering emerge and grow. Legal knowledge (as practiced by judges and experts belonging to different agencies and even legal firms) is one of these ordering forces, but clearly not the only one.[6] In the final pages of our book, we hint at a way of reducing this complexity by looking at the continuity between Romano's institutionalism and Luhmann's systems theory. This is also the first building block of our future project, which aims at updating the main tenets of the three authors examined in the volume by 'contaminating' legal institutionalism with contemporary conceptions of ordering such as societal constitutionalism and the new materialisms.[7] The main intent is to rethink the two organising axes of the book (political vs juridical conceptions of the law; matter vs nomic force) by taking up thorny contemporary issues of pluralism (for example, new forms of kinship or the expansion of monetary pluralism). However, before plunging into this new exploration, we had to pave the way for it by retrieving the rich and sophisticated path broken by Romano, Schmitt, and Mortati.

[6] Another obvious candidate is technology, as already adumbrated, more than twenty years ago, by L. Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

[7] See, for an introduction to societal constitutionalism, P. Blokker and C. Thornhill eds, *Societal Constitutionalism* (Cambridge: Cambridge University Press, 2017); on new materialism, see C. Vismann, *Files: Law and Media Technology* (Stanford: Stanford University Press, 2008); B. Latour, *The Making of Law* (Cambridge: Polity, 2010). We have already started doing methodological work in preparation of the future volume: see, for example, M. Croce, *Bruno Latour* (Roma: DeriveApprodi, 2020); M. Goldoni and M. Wilkinson eds, *Cambridge Handbook on the Material Constitution* (Cambridge: Cambridge University Press, forthcoming 2022).

The Will to Order:
In Conversation with Mariano Croce and Marco Goldoni on Costantino Mortati's Account of the Legal Order and the Material Constitution

Marco Brigaglia*

Abstract

In this article, taking my cue from the insightful analyses contained in the book The Legacy of Pluralism, by Mariano Croce and Marco Goldoni, I reconstruct in outline Costantino Mortati's conceptions of the law as a legal order and of the material constitution. I focus on the problems pointed out by Croce and Goldoni: the emergence of legal normativity, the problem of radical pluralism, and the role of jurists *vis-à-vis* politics. In sections II, III, and IV, I describe the general framework that, however much detailed and adjusted over time, Mortati adamantly maintained from his earlier works in the 1930s to his last ones in the mid-1970s. In section V, I describe the significant shifts that took place in the way he fine-tuned his general framework in an attempt to capture the changing events of Italian politics. On the basis of my account, I will argue in favor of an interpretation of the view Mortati had of the role of jurists *vis-à-vis* politics significantly different from the one defended by Croce and Goldoni.

I. Premise

The Legacy of Pluralism, by Mariano Croce and Marco Goldoni,[1] is a beautiful, insightful book. Taking their cue from the problem of radical pluralism and the crisis of the liberal state, with the relative homogeneity of its ruling class, the authors guide the reader to the roots and paths of 'classic' legal institutionalism – one of the main alternatives to formalistic and normativistic views of law in Continental legal theory between the closing decades of the 19th century and the first half of 20th century – focusing on the thought of three leading institutional jurists: Santi Romano (1875-1947), Carl Schmitt (1888-1985), and Costantino Mortati (1891-1985).

In the attempt to conceptualize the relation between the law of the state

* Associate Professor of Legal Philosophy, University of Palermo. This work was cofunded under the project titled *The Dark Side of Law*, PRIN (Progetto di Rilevante Interesse Nazionale), Grant no 2017AMRES2. I wish to thank Filippo Valente, whose insightful suggestions helped me improve the quality of the manuscript. Mine is, of course, the responsibility for any mistake.

[1] M. Croce and M. Goldoni, *The Legacy of Pluralism* (Stanford: Stanford University Press, 2020).

and the phenomenon of radical pluralism, these authors, Croce and Goldoni maintain, developed illuminating perspectives on two of the main issues in legal philosophical inquiry.

The first issue concerns the *role of jurists in relation to politics*: whether and to what degree, in the context of contemporary states, the role of jurists is, and ought to be, 'conditional on (or independent from) the political structure of society'.[2] This is what Croce and Goldoni call the opposition (a continuum, rather than a sharp distinction)[3] of juristic and political understandings of the law.[4] According to political conceptions,

> 'the legal realm and its operators are granted limited autonomy. For the law to be produced, applied, and amended, political power and procedures are needed. The relation with politics is intrinsic'.[5]

According to juristic conceptions,

> '(t)he law does not need political power either to be produced and amended or to be applied. The relation with politics, as it were, is extrinsic'.[6]

The second issue concerns the *emergence of (legal) normativity*. Under what conditions does a social practice come to acquire a normative dimension? What is the threshold beyond which it makes sense to call a normatively structured practice 'legal'? This is, roughly, what Croce and Goldoni call the interplay between *matter* (or *materiality*) and *nomic force* (or *nomic power*),[7] respectively understood as 'the set of practical activities a certain entity engages in' and 'the entity's potential for producing normativity'.[8]

One of the book's aims, Croce and Goldoni state, is to offer an approach that will be 'effective in reviving knowledge of three authors who (with the partial exception of Schmitt) have been largely neglected in the Anglophone tradition'.[9] This is an enormous and praiseworthy endeavor they have been engaged in for years. In addition to yielding a long series of original contributions, it has led to the first English translation of Santi Romano's seminal book *L'ordinamento giuridico*[10] (*The Legal Order*), by M. Croce[11] – the first since 1918! – and to the first English

[2] ibid 4.
[3] ibid 4-5.
[4] ibid 4.
[5] ibid 4.
[6] ibid 4.
[7] ibid 4.
[8] ibid 5.
[9] ibid 7.
[10] S. Romano, *L'ordinamento giuridico* (Macerata: Quodlibet, 2018). The first edition appeared in 1917-18, and the second one, supplemented with new notes and comments, in 1946.
[11] S. Romano, *The Legal Order*, edited and translated into English by M. Croce (Abingdon-New York: Routledge, 2017).

translation (in progress) of Costantino Mortati's most famous work, *La costituzione in senso materiale*[12] (*The constitution in a material sense*), by M. Goldoni.

This is not the place to dwell on the reasons for the lack of knowledge of, and interest in, such important chapters of Continental legal theory on the part of Anglophone scholars. But, as the publication of *The Legacy of Pluralism* shows, it is never too late.

In this paper, I will focus on the author I am most familiar with, Costantino Mortati.[13] I will attempt to provide a general reconstruction of his conception of the law as a legal order, and of his understanding of the 'constitution in a material sense' – hereinafter, the material constitution – paying special attention to the issues that occupy a prominent place in Croce and Goldoni's book: the emergence of legal normativity, the problem of radical pluralism, and the role of jurists *vis-à-vis* politics. As we shall see, these three issues essentially translate as follows in the context of Mortati's work: the role of the 'will' of a collective entity – a 'dominant political force' bearer of the material constitution in the case of states – understood as the source of the normativity of the legal order; the degree of integration of the dominant political force; and the degree to which jurists' activities are conditional upon that force.

I very much appreciated the interpretation of Mortati's ideas developed in Croce and Goldoni's book. They are able to convey the sense and import of Mortati's work, and its place in the context of Continental legal theory in the first half of the 20th century. The reconstruction they provide of his peculiar understanding of the legal order and the material constitution are accurate and, in my view, correct. Although the approach I take is somewhat different from theirs, most of what I will say is consistent with their account, and seeks to complement rather than criticize it. There is, however, a significant point of divergence. They see Mortati's theory as a paradigmatically political conception of the law,[14] to which, they maintain, he remained loyal throughout his career.[15] I will argue instead in favor of a more nuanced interpretation, one that sees Mortati's views as shifting from a paradigmatically political conception to a juristic one. As I see it, this shift is part and parcel of a wider adjustment that Mortati's ideas went through in his attempt to capture over time the transformations of the Italian political context.

What comes into play here, then, is the issue of the degree of continuity or discontinuity in Mortati's thought[16] – whether, over the course of his long career, his core ideas remained substantially the same or came under radical revision.

That question cannot be answered neatly. There is a significant strand of

[12] C. Mortati, *La costituzione in senso materiale* (Milano: Giuffrè, 1998, originally published in 1940).

[13] See M. Brigaglia, *La teoria del diritto di Costantino Mortati* (Milano: Giuffrè, 2001).

[14] M. Croce and M. Goldoni, n 1 above, 6, 147.

[15] ibid 153.

[16] ibid 141.

continuity in the core claims about the legal order and the material constitution, but there are also important changes – as I see them, adjustments rather than revisions – in the ways Mortati framed his views over time,[17] under the influence of changing political conditions. He originally elaborated his account taking as paradigms the one-class regimes of 19th century liberal states, their crisis, and the emergence of the one-party regimes of the first half of the 20th century. Once the political context radically changed, he readjusted the aspects of his theory more strictly linked to the original paradigms, while maintaining other, more general ideas.

These developments suggest a two-layered interpretation.

On the first layer, we find a broad conception of the legal order and of the material constitution, refined over time in order to achieve such a level of generality as to account for the most diverse kinds of social and political arrangements. Although this conception was formulated in the most explicit, comprehensive, and systematic form at the end of his career, it builds on some core views that Mortati adamantly maintained since his earlier works, and can therefore be considered as a strand of continuity in his thought. Sections II, III, and IV will be devoted to its reconstruction.

On the second layer, we find the changing forms taken by Mortati's core views when applied to concrete, and highly diverse, political arrangements. This is the strand of discontinuity in his thought discussed in section IV. It is to this layer, I will argue, that Mortati's views on the role of jurists *vis-à-vis* politics need to be situated. Rather than remaining loyal to a political conception, he moved along the continuum between the political and the juristic conception depending on the specific features of the political context at hand.[18]

[17] Although Croce and Goldoni (ibid 141) seem to agree with this general diagnosis, we do not seem to share the same view of what the relevant changes are and how significant they are (see n 18 below and accompanying text). In spite of this misalignment in our views, we all belong in the large group of commentators who see Mortati's theory of the material constitution as one that, from the outset, was meant to apply not just to Fascist, totalitarian, or one-class states, but to modern states at large. See eg G. Zagrebelsky 'Premessa', in C. Mortati ed, n 12 above, VII-XXXVIII; M. Fioravanti, 'Dottrina dello Stato-persona e dottrina della costituzione. Mortati e la tradizione giuspubblicistica italiana', in M. Galizia and P. Grossi eds, *Il pensiero giuridico di Costantino Mortati* (Milano: Giuffrè, 1990), 45-185, especially 165-185; S. Bartole, 'Giudici, funzione giurisdizionale e interpretazione del diritto: glosse ad alcuni testi di Costantino Mortati', in M. Galizia and P. Grossi eds, *Il pensiero giuridico di Costantino Mortati* (Milano: Giuffrè, 1990), 511-533; P. Grossi, *Scienza giuridica italiana. Un profilo storico: 1860-1950* (Milano: Giuffrè, 2000), 292; G. Della Cananea, 'Mortati and the Science of Public Law: A Comment on La Torre', in C. Joerges and N. Singh Ghaleigh eds, *Dark Legacies of Law in Europe* (Oxford and Portland: Hart Publishing, 2003), 321-335.

[18] The two-layered interpretation of Mortati's trajectory I will be defending in this paper is an update on one I provided years ago, arguing for a reading of relevant changes and adjustments, on top of a significant underlying continuity in the core views (M. Brigaglia, n 13 above, 199-200). Interestingly enough, M. Croce and M. Goldoni, n 1 above, 221, no 18, have understood me to advance a claim about discontinuity in his thought, while, in a review of my work, I have on the contrary being criticized for allegedly defending its continuity, failing to appreciate how deeply

A caveat. In this paper, I will take a merely exegetical stance. My concern is to provide a charitable but truthful reconstruction of Mortati's views, and not to assess them by pointing out their weaknesses or strengths. What motivate my reconstruction, however, are a conviction that contemporary legal scholars have a lot to learn, for good or ill, from this controversial chapter in the history of Continental legal theory, and the hope of kindling some curiosity in them, so that they may want to find out more about it. This would be a modest contribution to Croce and Goldoni's enormous endeavor.

II. The Legal Order as a Normatively Organized Practice

Mortati's notion of the material constitution is part of a wider understanding of the law as a legal order, very much indebted to Santi Romano's seminal account,[19] whose ideas, however, are developed in different, original directions.[20]

In a first approximation, Mortati's legal order can be described as a normatively organized practice that on the whole is teleologically oriented toward a certain configuration of interests, the 'aim' of the practice.

The state, Mortati maintains, is best conceived as a legal order – a highly structured and nested one that in a superior unity embraces a plethora of overlapping practices, many of which count as such as legal orders with a more restricted scope. This unity, constitutive of the very existence of the state and of its identity, is obtained through the efforts of a political force in a dominant position of power, a force that on the whole succeeds in coordinating those many divergent practices within a more comprehensive organization, oriented toward a unitary aim. This aim is the material constitution of the state, its 'basic norm' – in a sense very different from Kelsen's.

Mortati initially developed his views as an account of the state and of its material constitution. His wider account of the legal order came later, in an attempt to transform the framework developed with reference to the state into a

his positions changed through time, S. Pajno, 'Recensione a M. Brigaglia, *La teoria del diritto di Costantino Mortati*' *Rivista di diritto costituzionale*, 424-431 (2007).

[19] S. Romano, *L'ordinamento* n 10 above.

[20] See M. Croce and M. Goldoni, n 1 above, 136. They also offer an insightful account of how Mortati was able to creatively develop ideas drawn from other leading Continental legal scholars of his time – Schmitt, Hariou, Smend, Heller, and even Kelsen. On locating the genesis and role of Mortati's theory in the history of Italian and Continental legal theory see also F. Lanchester, 'Costantino Mortati e la 'dottrina' degli anni trenta', in F. Lanchester ed, *Costantino Mortati, costituzionalista calabrese* (Napoli: Edizioni Scientifiche Italiane, 1989), 89-134; D. Schefold, 'Mortati e la 'dottrina tedesca' ', in F. Lanchester ed, *Costantino Mortati, costituzionalista calabrese* (Napoli: Edizioni Scientifiche Italiane, 1989), 111-134; M. Fioravanti, n 17 above; F. Lanchester, 'Il periodo formativo di Costantino Mortati', in M. Galizia and P. Grossi eds, n 17 above, 187-229; I. Staff, 'Costantino Mortati: Verfassung im materiellen Sinn' *Quaderni fiorentini per la storia del pensiero giuridico*, 265 (1994); M. La Torre, 'The German Impact on Fascist Public Law Doctrine. Costantino Mortati's 'Material Constitution', in C. Joerges and N. Singh Ghaleigh eds, *Dark Legacies of Law in Europe* (Oxford and Portland: Hart Publishing, 2003), 305-320.

general conception of the legal domain in all of its forms. As hinted above, this conception was presented in the most systematic form at the end of his career,[21] but it implicitly lay in the background from the beginning. The entire evolution of Mortati's views happened along the lines of this conception. What follows is a sketchy – but I hope accurate – reconstruction of its basic contours.

A legal order is (i) a network in which the activities of a plurality of individuals are, as a whole, stably coordinated toward a certain aim – call such a network an 'organized practice'[22] – (ii) and in which the coordination is sustained and strengthened by means of normative pressures.[23] In short, the legal order is a normatively organized practice. Let us have a closer look at both aspects, the organizational and the normative.

Very roughly, the basic elements making up the organization of the practice are as follows: (i) a collection of coordination mechanisms (shared habits and routines, decision-making procedures, division of roles and tasks, explicit rules, etc) combined in an (ii) organizational structure, the overall framework within which the coordinated activities unfold; (iii) the aim, a certain view about the specific way in which the practice should be organized in order to foster a certain coherent and sufficiently determined configuration of interests;[24] and, finally, (iv) a critical number of participants in the practice who are disposed to make the sustained effort needed to ensure that the activities unfold within the bounds of the organizational structure and are oriented toward the aim. Call them 'custodians'.[25]

In a legal order, custodians carry out their task, at least in part, by means of normative pressures.[26] They cannot, however, be reduced to formal authorities.

[21] See, in particular, C. Mortati, *Istituzioni di diritto pubblico. Tomo I* (Padova: CEDAM, 9th ed, 1975), chapters 1 and 2.

[22] The expression 'organized practice' is mine. Mortati's preferred term, borrowed from Santi Romano, is 'organization'. This noun, however, is to be interpreted in the broad sense indicated in the text, as referring not only to intentionally and centrally coordinated groups of people, but also to non-intentionally and non-centrally coordinated networks of activities – as with certain widely followed rules of etiquette sustained by normative pressures (ibid 12). See n 46 below and accompanying text.

[23] The above definition applies, more precisely, to the most important kinds of legal orders, social ones. Differently from S. Romano, n 10 above, 70, even individual existence, for Mortati, counts as a legal order if properly organized. C. Mortati, n 21 above, 5, fn 1. See below, section III.

[24] See C. Mortati, n 12 above, especially 87-113.

[25] The term 'custodian' does not belong to Mortati. He instead speaks of 'authorities' (n 21 above, 6). This is a term he uses in two senses. In a first, broad sense, acting as an authority simply means acting as a custodian, whether this role is distributed among all participants (or a large number of them) or is concentrated in the hand of a restricted group. The latter are 'authorities' in the narrow sense (ibid 11-12). The same ambiguity can be found in the idea that the organization of the practice implies at least a minimal 'differentiation' of roles. In the first, broad sense, this simply means that one and the same person may take on two different roles: the role of mere participant or the role of custodian. In the second, narrow sense, it means that only a restricted number is entitled to, and has the power to effectively exercise, the function of custodian.

[26] Normative pressures may involve, but do not necessarily involve, coercion (resort to physical force). Although Mortati refers to 'sanctions' as an essential feature of the legal order,

Many legal orders are not formalized, and even in highly formalized legal orders, as we shall see, the custodial task necessarily exceeds, according to Mortati, any possible formalization.

In fully developed legal orders, moreover, the custodial task concerns not only single activities, or steps thereof, within an organizational structure taken as a given, but also the organizational structure itself, which could and should be adjusted in order to restore or improve the overall realization of the aim. Let us call 'stewards' those custodians who are engaged in the highly flexible, prospective, and creative task of monitoring the practice as a whole, adjusting its organizational structure. The stewardship task within the organization of the state is what Mortati calls 'government'.[27]

In complex legal orders, custodial tasks are carried out by a large number of people, driven by very different motivations. In bureaucratically organized legal orders, for instance, much of the custodial task is carried out by employees in a chain of command – individuals strongly motivated to execute directives coming from higher levels simply in virtue of their source, and, to a certain degree at least, independently of the merits of their content. A distinctive feature of Mortati's approach, however, is the emphasis he puts on the custodial and especially the stewardship role played by those who are deeply committed to the aim, and are therefore strongly and independently motivated to be actively and flexibly engaged in its pursuit. These people are, in Mortati's terms, the 'bearers' of the aim.

The aim is the core of the legal order, the proper *telos* that informs the entire organization of the practice and governs its development, imparting a unitary character to it. If all the stuff out of which the organized practice is made counts as a unitary legal order, it is only because, on the whole, the practice is coordinated toward a single, sufficiently determined aim. This is particularly true in the case of complex legal orders such as states, which are made by a congeries of different, overlapping, potentially diverging practices, and whose organizational structure is often articulated into quite independent branches.[28]

But the aim does not work on its own, or by means of spontaneous or blind mechanisms. The aim works through its bearers – through their engagement as custodians and stewards of the practice, and through the capacity for effective influence – or power – they have within it. This makes it possible to describe the legal order in intentional terms, as sustained by the 'will' of a collective entity,

he understands this notion in a very broad sense, including by way of simple expressions of disapprobation (n 21 above, 12). See on this point M. Croce and M. Goldoni, n 1 above, 151-152.

[27] C. Mortati, *L'ordinamento del governo nel nuovo diritto pubblico italiano* (Milano: Giuffrè, 2000), originally published in 1931. See M. Croce and M. Goldoni, n 1 above, 155-161; M. Fioravanti, n 17 above, 114-142; T.E. Frosini, 'Mortati e l'indirizzo politico (negli anni Trenta), in M. Galizia ed, *Forme di stato e forme di governo: Nuovi studi sul pensiero di Costantino Mortati* (Milano: Giuffrè, 2007), 561-591.

[28] See, eg, C. Mortati, n 12 above, 136-137.

the group of people who, in a dominant position of power,[29] 'bear' the aim.[30] (In the next section, I will come back in greater detail to Mortati's notion of 'will', and to the ascription of a will to collective entities.)

A final aspect of a legal order's organization worth dwelling on is its stability. A certain degree of stability is a definitional feature of the organized practice, and hence of the legal order. But the required stability is not homogenously distributed throughout the organization. The maximum degree of stability is required at the level of the aim. The aim should, in the first place, remain structured around the same core interests – and, as we shall see, this implies the stability of the 'will' of its bearers. In the second place, the practice as a whole should remain oriented toward the aim – and this implies the maintenance of the dominant position of the aim's bearers. A certain degree of stability is also required for the overall organizational structure and for some of its nodes. Organizational details, coordination mechanisms, and the activities concretely carried out are instead more flexible, allowing for a rapid adaptation of the practice to the constantly changing circumstances.

Such an interplay of stability and flexibility confers a dynamic character on the legal order: the order can be subjected to significant change and yet still maintain its identity, because of the persistence of the aim, of its bearers, and of some key components of its organizational structure.

Among the many factors contributing to the stability of the legal order are the cultural homogeneity of the participants in the practice, the attunement of their attitudes and habits to the organizational structure, and a self-reinforcing distribution of power that favors the aim's bearers (they are in a dominant position of power, and this very fact tends to increase the extent of their domination). The crucial stability factor, however, is the normativity that permeates the practice at any level of its organizational structure.

The kind of normativity Mortati has in mind essentially amounts to the fact that some people tend to have negative attitudes toward those who deviate from given patterns of behavior, to apply pressures for conformity, and to feel justified in, or even committed to, doing so. Patterns of behavior linked to this cluster of dispositions count as 'norms'.[31]

[29] So as to emphasize the relevance of the element of power in Mortati's conception of the legal order, Croce and Goldoni (n 1 above, 147) call it 'realist intitutionalism'. This label aptly sums up much of what Mortati added to classic institutionalism, while also conveying the sense he had of his own contribution. C. Mortati, n 21 above, 27. See also A. Catania, 'Santi Romano e Costantino Mortati' *Sviluppo economico*, VI, 45 (2002).

[30] Mortati openly endorsed an intentional model of the legal order, captured by the motto '*ubi voluntaris ordo, ibi ius*'. See C. Mortati, n 21 above, 5, no 1.

[31] Mortati seems often to conceive norms in imperativistic terms, as commands. See M. Croce and M. Goldoni, n 1 above, 151. In my view, Mortati's imperativism is better seen as a form of psychologism very close to certain versions of contemporary expressivism: a pattern of behavior N counts as a norm 'accepted' by X, if X has, regarding N, a cluster of psychological attitudes similar to the ones elicited by an imperative that prescribes N. See A. Gibbard, *Wise*

Norms permeate a legal order's organization from the bottom up: not only by way of explicit and formal rules, but also by way of implicit and informal norms.

Most of the single patterns of behavior and decision-making out of which the organizational structure is made have the status of norms. Some of them are formal rules, ie, rules explicitly prescribed by formally identified authorities through formally regulated procedures, supported by formally regulated pressures. In fact, most legal orders in contemporary societies involve complex systems of formal rules, including rules that regulate the production and enforcement of other rules. Such systems of formal rules, however, emerge from, and are interpreted by means of, a background of 'implicit norms' (in Mortati's terms, '*norme inespresse*').[32] I suggest to interpret this notion as follows: implicit norms are patterns of behavior that are regularly followed without any explicit prescription, often in a spontaneous, almost automatic fashion, but are nevertheless normative insofar as, outside any formal regulation, their violation tends to elicit pressures for conformity perceived as justified, and this very fact increases the probability that those patterns of behavior will be followed, thus reinforcing their regularity.[33]

This, it seems to me, is one of the main tenets of the institutional accounts of both Santi Romano[34] and Carl Schmitt.[35] The legal order's normative dimension cannot be reduced to systems of formal rules, but also involves a fine-grained background of implicit norms. The custodial function, necessary for the existence of a legal order, cannot entirely rely on formal authorities, but needs to also rely on the sparse activities of informal custodians.

What Mortati adds to this picture is his emphasis on, and treatment of, the aim's normative status.[36] As hinted above, a critical group of people within a legal order – the aim's bearers – are strongly and independently motivated to actively engage in its pursuit. It is because of this motivation that they tend to apply pressures, felt as justified, to maintain the practice within the bounds of its organizational structure (custody), and to adjust the latter in order to improve or restore its capacity to achieve the aim (stewardship).

Again, the function played by the bearers of the aim cannot be reduced to that of formal authorities. In complex legal orders such as states, as we shall see, the bearers of the aim are not single individuals, but rather members of more or less organized interest groups – political forces – in a dominant position of power. Usually, top formal authorities are recruited from the ranks of the

Choices, Apt Feelings (Oxford: Clarendon Press, 1990).

[32] C. Mortati, n 21 above, 10; n 12 above, 97-98.

[33] For an account of the differences between explicit rules and implicit norms, I refer the reader to M. Brigaglia, 'Rules and Norms: Two Kinds of Normative Behaviour' 30 *Revus*, 33 (2016).

[34] S. Romano, n 10 above.

[35] C. Schmitt, 'I tre tipi di pensiero giuridico', in Id ed, *Le categorie del politico* (Bologna: il Mulino, 1972), 245-275. This chapter is a later version of the essay *Über die drei Arten des Rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlangsanstalt, 1934), revised by the author on the occasion of its Italian translation.

[36] See in particular C. Mortati, n 12 above, 105-107.

dominant political forces. But the latter determine the behavior of the former, and not the other way around.[37]

Again, the aim's normative status may be either explicit or implicit. It might be the case that the aim is partially formulated in an explicit set of principles that prescribe advancing the relevant configuration of interests. But it might also be the case that no such explicit formulation exists. The role of explicit formulations is in any case limited.[38] The bearers often lack full awareness of their own aim, especially of the very complex aims pertaining to comprehensive legal orders such as states. First, some of the relevant interests do causally contribute in producing, in a regular and predictable way, the normative attitudes of their bearers, but they do so unconsciously. Second, the aim results from the composition of different, often conflicting interests. This composition is for the most achieved by specifying which interests should prevail over others in the event of conflict. Such a specification cannot be exhaustively made in advance, but is a work in progress, continuously adjusted in the face of new, unexpected circumstances. Finally, the aim emerges from the unpredictable, dynamic interactions of different bearers, who on the one hand share some core interests but otherwise may have further competing interests. In such a context, a formulation produced at any given moment is destined to be later reinterpreted or reformulated, on the basis of a more accurate awareness of the aim, of its progressive specification, or of a new consensus resting on a different distribution of power among the bearers of the aim.

This is, roughly, what the normative dimension of Mortati's legal order amounts to.

If we wanted to stress the importance and pervasiveness of the normative element, we could simply describe the legal order as a normative order, an organized network of norms and normative behaviors: not an 'ideal' – ie, merely conceived – but rather a 'positive' – ie, effectively realized – normative order, and a 'concrete' one, that is, an order whose structure essentially depends on a background of implicit norms, and is by no means reducible to systems of explicit rules; not only a 'formal' normative order, which simply allocates normative powers, but a 'material' one – in one of the senses in which Mortati uses this expression – that is, an order that imposes substantive constraints on any activities falling within its scope. Constraints of this kind are ultimately teleological: they depend on the aim's normative status. The legal order is in this sense a teleological normative order, a functional unity hinging on the aim, which normatively governs its entire existence and fixes its identity: the legal order can be treated as a unity because, as a whole, and to varying degrees of integration, the multiplicity of organized behaviors out of which it is made is normatively oriented toward a single aim.[39]

[37] See eg ibid 121.
[38] ibid 115-123.
[39] ibid 82.

To convey the role of the aim as the normative foundation of the legal order *qua* a unitary normative practice, Mortati often refers to it as the legal order's 'fundamental norm', or its 'constitution', or, better yet, its '*material* constitution', to distinguish it from the formal one. In its broadest sense, his most famous notion refers precisely to the foundational normative role of the aim in *any kind* of legal order. In its more specific and more usual sense, it refers to the foundational normative role of the aim in *a specific type* of legal order, the state. I will come back to this shortly.

III. The 'Will' as the Source of the Legal Order

As hinted above, Mortati represents the legal order in intentional terms, as an order propped up or sustained by the 'will' of a collective entity: a legal order exists thanks to the efforts of a collective entity in a dominant position of power, an entity which 'wants' the practice to be organized in such a way as to foster a certain configuration of interests, and which to this end puts in an effort, and succeeds at it. The aim, constitutive of a legal order, is the content of the will of a collective entity, the aim's bearer.

On the other side, in the aim lies the normative foundation of the whole legal order. The aims' normative force relies on the fact that it is the content of the will of a collective entity in a dominant position of power. The will, Mortati argues, is capable of conferring normative force on its content, because it is in itself normative – it is a 'normative fact', defined by Mortati as 'a fact which has in itself its own law and the guarantees of its persistence in the future'[40] (English translation by Croce and Goldoni).[41]

In the previous section, I indirectly suggested that this quite obscure passage is best interpreted as a convoluted way of conveying the crucial role that, within the practice, is played by the normative attitudes and behavior of a certain, more or less organized, group of people. I will now attempt to further clarify this point.

In a few pages of an early work published in 1935,[42] Mortati draws a sketchy but insightful account of what counts as an individual's 'will'.

X, an individual, can be said to properly 'want' something P if she is not only affectively inclined toward P (a mere 'desire' for P) but has also devised a strategy to obtain P and is able and ready to exert effortful self-control in order to act according to the strategy.

X's will is rational if (i) it does not chaotically switch between different, unstable directions but is stably oriented toward the realization of a coherent

[40] C. Mortati, 'La costituente', in C. Mortati ed, *Raccolta di scritti. Tomo I* (Milano: Giuffrè, 1972, originally published in 1945), 3-343, 12.

[41] M. Croce and M. Goldoni, n 1 above, 176.

[42] C. Mortati, 'La volontà e la causa nell'atto amministrativo e nella legge', in C. Mortati ed, *Raccolta di scritti. Tomo II* (Milano: Giuffrè, 1972, originally published in 1935), 471-613, 476-480.

and sufficiently determined configuration of interests – X's aim – and (ii) X has developed a more or less articulated and rational plan about how to organize some of her own activities in order to achieve her aim.

X's will is normative, in Mortati's sense, if (i) X feels committed to executing the plan – adjusting it whenever required by the ever-changing circumstances, and keeping her will focused on the aim – and (ii) that sense of commitment reinforces stability and strength of X's will, thus contributing to motivating X to orient her efforts toward the aim.

The normative structuring of X's will can be described in terms of a self-directed norm prescribing that X pursue the aim.[43] Such a norm, Mortati adds, is self-warranted and self-sustained: its justification, as well as its efficacy, rests on the very existence of the will it is part of, and from which it draws its motivational force.

Once a will of this kind – a peculiar psychological structure – is in place, it will regularly cause X to effectively act in pursuit of the aim, executing and updating her plans. X's behavior, in other words, will acquire a stable order. However, such an 'external', observable order has its source in, reflects, and is explained by the 'internal' order of X's attitudes, the fact they have reached the stage of a rational and normative will. This, Mortati maintains, is the simplest form of legal order – the intentional order of (a part of) individual existence, sustained by her *will to order*.

Mortati extends the same pattern of explanation to social legal orders. In particular, he represents social legal orders as having their source in the will of a collective entity, the bearer of the aim. And he seems to imply that the notion of will he applies to collective entities is closely linked to the just-sketched notion of the will of an individual.[44] He does not explain, however, what the relevant link is, or what the conditions are under which one can legitimately ascribe a certain will, and the related intentional actions, to a certain group of people.

In my view, the best way of interpreting his ideas is as follows. A certain will and certain intentional actions may be ascribed to a collective entity if (i) the activities of the group as a whole, in virtue of their level of coordination, are strictly analogous to those of an individual who has a will of the same content as that ascribed to the collective entity, and (ii) a critical number of its members, individually, want and feel committed to act, and effectively act, in pursuit of an aim sufficiently close to the content of the will ascribed to the collective entity.

[43] In Mortati's imperativistic terms, a self-directed and self-binding *command* (C. Mortati, n 12 above, 89). This means, basically, that X's will is captured in an abstract representation that produces the typical psychological effects of an imperative issued by an external authority, that is, a motivation, and a sense of commitment, to conform (see above, n 31). This also applies to political forces: their 'will' to achieve a certain political aim functions as a self-directed norm or command, binding them to act in pursuit of the aim. C. Mortati, n 12 above, 155. See on this point G. Zagrebelsky, n 17 above, XXXIII.

[44] see eg C. Mortati, n 21 above, 3-4; n 27 above, 9.

Condition (i) establishes a functional analogy between the will of a group and that of an individual. Condition (ii) anchors the legitimacy of this analogy to the existence of the appropriate individual wills within the group.

The latter definition covers a spectrum of importantly different situations.

At one end of the spectrum, we have the case of a group of people whose members want and feel committed to the pursuit of closely similar aims through largely compatible actions. They lack any intentional coordination, or else their attempts to coordinate are sparse, improvised, not centrally guided. Even so, their actions converge, by means of spontaneous and reliable mechanisms, toward a tacit strategy conducive to a result P sufficiently close to their individual aims. In this case, the group as a whole can be ascribed the will to achieve P, which counts as the aim the group as a whole is a bearer of. Apply this to a group of custodians and stewards, and you will have a possible path – call it 'bottom-up' – for the emergence or maintenance of a legal order, through the spontaneous coordination of the intentional efforts of a collective entity, which counts as the bearer of the aim.[45]

At the other end of the spectrum, we have the case of a group of people intentionally and centrally coordinated toward a certain aim, one that to a significant degree corresponds to the interests and views of the group's members, where the correspondence is usually greater at the level of the leaders, and lesser at the level of the executors. Frequently, the common aim will be construed by way of discussions and negotiations, and some disagreement may remain among the members. Still, a critical number of them will accept the common aim as their own, and will feel committed to its pursuit. The sense of commitment is reinforced by the feeling of belonging to the organized group, a feeling accompanied by social emotions (loyalty in particular) and by expectations of reciprocal pressures for conformity, further motivating members to pursue the aim and reducing the load on their self-control. Again, in such a context the group as a whole can be ascribed the will to pursue the aim. Apply this to a group of custodians and stewards, and you have a very different path – call it 'top-down' – for the emergence or maintenance of a legal order, by way of intentional coordination of the intentional efforts of a collective entity, that counts as the bearer of the aim.

Between the two extremes, we have a fine-grained spectrum of intermediate possibilities: on the one side, the coordination of the group at hand may be more or less intentional or centralized, and be more or less effective; on the other side, different forms of coordination may combine in countless ways.

If my interpretation is correct, beneath the seemingly unitary claim that the legal order is sustained by the will of a collective entity, the bearer of the aim,

[45] Saying that a legal order may emerge or be maintained from the bottom up, thanks to the spontaneous – ie, non-intentional and non-centralized – coordination of a group of custodians, does not imply that the legal order emerges or is maintained through the spontaneous coordination of all participants, where 'spontaneous' is understood to mean 'free from any pressures'. Resort to pressures, normative ones in particular, is a conceptual feature of Mortati's legal order.

lies a spectrum of very different possibilities as to the degree to which the collective entity's coordination is intentional and centralized. Briefly put, the collective entity that is the bearer of the aim may be *more or less* organized— implying that where the coordination is intentional and centralized, the organization is greater.

Mortati's conception of the legal order, I claim, develops along this spectrum. At the one end of the spectrum, we have legal orders sustained by collective entities having such a low level of organization that it is a bit of a stretch to describe them as unitary agents. Think of customary practices. At the other end of the spectrum, we have legal orders sustained by collective entities with a relatively high level of organization.[46] It is at this end of the spectrum that one can find highly developed legal orders such as states. But the organization of the political forces sustaining the state, the bearers of its material constitution, as well as their integration, also comes in degrees. This is something that Mortati acknowledged slowly, in an attempt to adjust his theory so as to account for the ways in which the Italian political situation was changing. These adjustments, as will shall see, left traces in his vocabulary. The political forces that are bearers of the material constitution were at first referred to as 'parties' (corresponding to the highest degree of organization and integration), then 'classes' (a lower degree of organization) and parties in a constitutional 'compromise' (the minimal degree of integration compatible with the existence of a stable material constitution). These shifts are very important in this context, because, as we shall see (below, sect. V) they reflect important changes in the ways in which Mortati treated radical pluralism, and, in particular, in his view of the role of jurists.

IV. The Material Constitution as the Will of the Dominant Political Force

The notion of a legal order just sketched is very general indeed: it covers *any* social practice with the requisite organization, stability, and normativity.

There are many possible, sensible criteria for distinguishing between types of legal orders. One of the most important is the aim's degree of specificity or generality.[47] Some legal orders – eg, sports associations – have very specific aims, and embrace only the well-defined range of activities closely connected to those aims. Other legal orders have quite general aims, encompassing complex networks of interests, relevantly connected to a wide, open-ended range of activities. That is the case with 'political' legal orders.

Political legal orders are aimed at organizing in a certain, specific way the overall existence of a given community, so as to foster a certain, sufficiently determined and hierarchically ordered configuration of interests. Such an aim

[46] In Mortati's terms, we have, on the one side, 'fluid', 'sparse', 'horizontal' legal orders, and, on the other side, 'concentrated', 'authoritative' (vertical) ones (C. Mortati, n 21 above, 11-12).

[47] C. Mortati, n 21 above, 19.

is too complex, articulated, and dynamic to be specified in detail once and for all. It is better seen as an outline, sufficiently determined so as to endow the legal order with its peculiar identity, but amenable to being integrated and modified so as to embrace new interests emerging within that community, and new organizational formats required by its unpredictable changes.[48] Given the nature of their aim, then, political legal orders potentially embrace whatever possible activity within that community.

The most important kinds of political legal orders are states. The state is defined by Mortati as the political legal order with supreme authoritative and coercive power over the overall existence of a community living in a certain territory.[49] In this otherwise traditional definition of the state, the originality of Mortati's contribution lies precisely in his conception of the legal order. The state exists as a legal order only insofar as the jumble of practices out of which the life of that community is made are effectively integrated, to a sufficient extent, into a more comprehensive organization, oriented toward a specific, political aim – a sufficiently determined view about the way in which the community as a whole should be organized, and about the configuration of interests that should be promoted within it.[50]

The political aim that effectively informs the life of the state as a whole, giving it the unitary character of a legal order, is what Mortati calls the state's 'material constitution'. The aim of a legal order, recall, does not work on its own, by means of spontaneous mechanisms. It works through its bearers, their engagement as stewards of the practice, and the dominant position of power they hold within it. This is particularly true in the case of the material constitution. Here the notion of a 'political force' enters the scene. A political force is a collective entity structured around a certain political aim. Once a political force has gained a dominant position of power – granting it sufficiently wide and deep control over the community so as to keep it, on the whole, within the bounds of its aim – the community becomes a state proper, a unitary legal order, and the aim acquires the status of the state's material constitution. The material constitution is, in this sense, the aim of the dominant political force – the content of its 'will'.[51] The only difference between a merely political aim and an aim that has

[48] C. Mortati, n 12 above, 74, 117, 206.

[49] C. Mortati, n 21 above, 23; Id, n 12 above, 54-55.

[50] As M. Fioravanti (n 17 above, 134) puts it, this is a 'new conception of the unity of the state' as a 'teleological unity'; 'the state exists only insofar as (…) it constitutes a teleological unity' (ibid 146) (my translation).

[51] In other words, the material constitution is the *existential unity* of the aim and its bearer, the dominant political force. C. Mortati, *Le forme di governo* (Padova: CEDAM, 1973), 7. This idea, Mortati argues (n 12 above, 42), determines Schmitt's correct but vague and deceptive claim that the core of the constitution lies in a 'people's decision for a form of political existence', C. Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1928). Instead of a 'people', we have a dominant political force. Instead of a decision, we have a normative will. See A. Catania, 'Mortati e Schmitt', in A. Catelani and S. Labriola eds, *La costituzione materiale. Percorsi culturali e*

acquired legal status, becoming a material constitution, is that the latter does not simply exist 'ideally', as the content of a will, but also exists 'positively' – ie, it has, to a sufficient extent, effectively informed the life of the state.[52]

Apart from some scattered attempts to elaborate a general taxonomy of historical types of states,[53] Mortati was almost exclusively concerned with a single one: modern states, ie, the Western-type states formed after the French Revolution.[54]

Modern states have two important features. The first is a huge, centralized but finely articulated authoritative apparatus – apart from the top institutions (an elected parliament, king or president, premier, etc), the various branches of the administrative apparatus, the judiciary, the military, etc – capable of reaching into almost every fold of the state community. The second feature is the 'politicization' of the community – the spread of political ideas among large masses, their increased pressure to take active part in the government, the emergence of a 'public opinion', the grant of active electoral rights to much wider classes of citizens, the increased role of elected assemblies in shaping the activities of state's apparatuses.[55]

These two features put peculiar constraints on political forces. In order to realize their aim, political forces need to gain control of the state's apparatuses and to obtain the active or passive consent of large masses. To this end, political forces tend to organize themselves around an attractive political program, a sketchy formulation of the form of society they purport to realize and of the interests they prioritize.[56]

Crucially, an important part of political struggles in the context of the modern state – aside from the attempts to gain economic and cultural hegemony, and to infiltrate the state's apparatuses – is electoral competitions. To participate in these competitions, attempting to gain access to, and control of, the parliament, political forces tend to organize into formal parties.

However, the political forces as such – which Mortati, in his early years, misleadingly called 'parties' – are much wider than the formal parties that represent them in electoral competitions: call the latter 'parliamentary parties'. First, Mortati maintains, some parliamentary parties are better seen as 'factions' of one and the same political force: they share a core political aim, even if they disagree on less central issues.[57] Second, the political forces extend much beyond

attualità di un'idea (Milano: Giuffrè, 2001), 109-128.

[52] Politics pertains to the formation of the aim, and to the processes leading it to acquire the status of a material constitution. Once this happens, we are in the realm of law (C. Mortati, n 12 above, 107, 161).

[53] See C. Mortati, n 21 above, part I, chapter 5; C. Mortati, n 51 above.

[54] C. Mortati, n 12 above, 70.

[55] ibid 70.

[56] ibid 71.

[57] ibid 72-73, 101-102; C. Mortati, 'Sindacati e partiti politici', originally published in 1952, now in Id, *Raccolta di scritti. Tomo III* (Milano: Giuffrè, 1972), 83-103, 87; Id, *Istituzioni di*

the parliament. They result from the coordination and integration, more or less intentional and centralized, of a plurality of interest groups.[58]

This, in broad outline, is Mortati's conception of the material constitution. Let me add some further details to the picture.

I begin by briefly attempting to better clarify how Mortati conceives the structure of the political aim, and hence of the material constitution, and the sense of his claim that this constitution encompasses the whole existence of the community. Both points can be easily misinterpreted. Mortati, we have seen, conceives the political aim, and hence the material constitution, as an outline that needs to be specified, but is, at the same time, sufficiently determined to place constraints on its subsequent specifications.[59] What Mortati has in mind here is, in important respects, similar to what contemporary constitutional courts imply when, in the whole body of constitutional principles, they isolate some principles that are more fundamental than the others, so fundamental that they cannot be legitimately revised even by constitutional laws: a revision would entail a change in the form of state, and hence a change in the whole framework of constitutional legitimacy.[60] This set of 'hyper-fundamental' principles, it is further maintained, provides the normative standard for reinterpreting the whole constitutional framework, for recognizing within it new principles that have hitherto not been expressly stated, and for deciding how to balance principles when new, unforeseen conflicts arise between them.[61] In sum, constitutional principles are conceived as a dynamic hierarchy hinging on some core values, and this is very close to how Mortati envisaged the material constitution.[62]

diritto pubblico (Milano: Giuffrè, 5th ed, 1960), 69.

[58] On this notion of party, and its difference from mere parliamentary parties, see C. Mortati, n 12 above, 71-73; Id, 'Sulla posizione del partito nello Stato', originally published in 1941, now in Id, *Raccolta di scritti. Tomo III* (Milano: Giuffrè, 1972), 497-515, 507. For useful comments see S. Bartole, 'Costituzione materiale e ragionamento giuridico' *Diritto e società*, 605, 610 (1982); S. Bonfiglio, 'Mortati e il dibattito sul concetto di regime durante il ventennio fascista', in F. Lanchester ed, *Costantino Mortati, costituzionalista calabrese* (Napoli: Edizioni Scientifiche Italiane, 1989), 394-407, 407; P. Grossi, n 17 above, 221.

[59] C. Mortati, n 12 above, 74.

[60] See, eg, Corte costituzionale 15-29 December 1988 no 1146.

[61] For an account of this interpretive framework, with special attention to the jurisprudence of the Italian Constitutional Court, I refer the reader to R. Guastini, *L'interpretazione dei documenti normativi* (Milano: Giuffrè, 2004), 298-306, and G. Pino, *Diritti e interpretazione* (Bologna: il Mulino, 2010), 146-163.

[62] Needless to say, the similarity does not extend to the background assumptions about the nature of constitutional principles and their normative force. While in the referred conceptions they are usually conceived as 'objective' (moral) values, for Mortati the only thing that matters is that they are (part of) the content of the 'will' of the dominant political force. On the application of Mortati's views to the Italian Constitutional Court see in particular C. Mortati, *Istituzioni di diritto pubblico. Tomo II* (Padova: CEDAM, 9th ed, 1976), 1470-1474. For useful comments see A. Pizzorusso, 'La giurisdizione costituzionale secondo Mortati', in M. Galizia and P. Grossi eds, n 17 above, 535-566; F. Politi, *Sentenze di accoglimento e indirizzo politico*, in M. Galizia ed, n 27 above, 827-860.

Let us come to the comprehensive nature of the state's aim – an aim that sometimes, in an infelicitous choice of terms, Mortati calls 'total'. Indeed, this might have the ring of a totalitarian ideology, and, in Mortati's earlier works, comes packaged with a rhetoric riddled with totalitarian marks. But the substance is not necessarily totalitarian. Again, what Mortati has in mind is something very similar to the process that leads courts to apply constitutional principles to private relationships.[63] The constitution is treated as a general project concerning the overall life of the community at hand, which should, as far as possible, be informed by some favored values – Mortati's political aim, or material constitution. Some material constitutions attach great value to the autonomy of individuals; others – like totalitarian ones – do not. Regardless, both are, in Mortati's sense, 'total'.

Another important point about the material constitution is that – as with the overall aim of any legal order, as we have seen – it cannot be fully captured by the formulations contained in its formal statement, or in other documents.[64] Mortati was keenly aware of the limits of formal conceptions of the law. He pointed to the inescapable role of implicit norms and juristic constructions in legal interpretation,[65] and underlined how substantive principles tend to function as constraints on the discretionary powers of legal authorities at any level, as well as on private autonomy.[66] Crucially, he stressed the role of the material constitution as the implicit normative standard underlying the most controversial public law institution, the state of exception. The state of exception is something different from a *coup* or a revolution, insofar as it involves the direct intervention of a political force, outside the formal distribution of power, to protect or restore the threatened material constitution.[67]

In sum, it is the material constitution that governs the institutional and the legal dynamics of the state, as well as its overall existence. In Maurizio Fioravanti's words, Mortati's state as a legal order appears as a great network of discretionary powers, both public and private, held together not only by a unitary criterion for the formal attribution of normative powers, but also, and especially, by a substantive,

[63] See eg Corte costituzionale 24 June 1970 no 122. See R. Guastini, n 61 above, 306-309.

[64] C. Mortati, n 21 above, 34; n 12 above, 115-123.

[65] See eg C. Mortati, n 12 above, 152-187.

[66] See in particular C. Mortati, n 27 above; see also 'Note sul potere discrezionale', originally published in 1936, now in Id, *Raccolta di scritti. Tomo III* (Milano: Giuffrè, 1972), 999-1020. See C. Bersani, 'Appunti su amministrazione e costituzione in Costantino Mortati', in M. Galizia ed, n 27 above, 141-171; G. Della Cananea, n 17 above, 329-331; M. Fioravanti, n 17 above. According to Fioravanti, the crucial shift Mortati contributed to is that from a view of the administration as a normatively organized body functioning in a politically neutral way to a view of the administration as shaped by, and oriented toward, a political aim, the material constitution.

[67] C. Mortati, n 27 above, 14, 133-148; n 12 above, 152-155; n 40 above, 32; Id, 'Dottrine generali sulla costituzione', originally published in 1962, now in Id, *Raccolta di scritti. Tomo II* (Milano: Giuffrè, 1972), 79-242; Id, 'Brevi note sul rapporto tra costituzione e politica nel pensiero di Carl Schmitt', originally published in 1973, now in Id, *La teoria del potere costituente* (Macerata: Quodlibet, 2020), 129-152, 136-137. On this aspect see L. Carlassare 'Stati d'eccezione e sospensione delle garanzie costituzionali secondo Mortati', in M. Galizia and P. Grossi eds, n 17 above, 479-490.

teleological normative constraint, the material constitution.[68] It is the material constitution, its overall effectiveness, that provides the basic criterion by which to fix the identity of the state, its political regime, and to determine, beyond the appearance of mere changes in the form of government, whether what has come about is a change in the deep political regime – what Mortati calls the 'form of the state'.[69]

Borrowing Kelsen's phrase, one could refer to the material constitution as the state's 'basic norm'. Mortati's basic norm, however, is very different from Kelsen's.[70] While Kelsen's basic norm simply confers on the supreme authority the power to issue norms of any content whatsoever, Mortati's basic norm usually also establishes teleological constraints: these are substantive (or 'material', in a first sense of this term), and they apply to formal authorities as well as to informal custodians and stewards. While Kelsen's basic norm is a 'presupposed', nonpositive norm, a mere condition for the intelligibility of the legal order *qua* a unitary entity, Mortati's basic norm is not merely 'ideal' but 'positive', ie, effectively realized, to a sufficient extent. Finally, the existence of Mortati's basic norm is a matter of sheer social facts (it is 'material' in the second sense of this term): it merely exists as a (largely implicit) normative standard stably embedded in the attitudes of a critical number of the members of the state community and, specially, in the attitudes of the members of the dominant political force that bears it. In a nutshell, Mortati's basic norm, the material constitution, is a complex socio-psychological fact, crucially involving a network of power relations.

In this perspective, the formal existence of the state as a fictive person to which rights and duties are imputed should be carefully distinguished from the material existence of the state as a legal order. The latter cannot be simply inferred from the former. Some formally existing states, then, are not states in a material sense: they just have the appearance of a state.

On closer inspection, the state's material existence is a matter of degree, because it depends on the effective establishment of a material constitution, and the effective establishment of a material constitution is, in many respects, a matter of degree.[71] Where a sufficiently integrated political force has become dominant, the state exists in full. Where the dominant political force is not sufficiently integrated, or where its hegemony is limited and unstable, the state exists, so to speak, faintly. This point, as we will see in a while, has very important consequences on Mortati's conception of the role of jurists.

A final observation concerns the different types of pluralism that can be found in Mortati's framework, and the attitudes he had toward each of them.

[68] M. Fioravanti, n 17 above, 147.

[69] C. Mortati, n 12 above, 186-200.

[70] C. Mortati, n 21 above, 25. For Mortati's treatment of Kelsen's views, see C. Mortati, n 12 above, 22-25; n 21 above, 24-25. For an accurate analysis of the relations between Mortati and Kelsen, see V. Frosini and F. Riccobono, 'Mortati e Kelsen' *Materiali per una storia del pensiero giuridico*, XXIX, 407 (1999).

[71] C. Mortati, n 12 above, 116, 131.

The first type of pluralism lies in the plurality of legal orders. The notion of a legal order endorsed by Mortati implies that nested within a state is a multiplicity of overlapping legal orders.[72] Any practice unfolding within the state's borders ranks as a legal order so long as it exhibits the proper degree of organization, stability, and normativity: this applies not only to organizational units of the state apparatus but also to private companies, illegal organized practices such as the Mafia, and so on. The state exists insofar as the activities of the many subordinate legal orders are on the whole integrated, to a sufficient extent, within its organizational structure, and effectively informed by its material constitution.

The second type of pluralism lies in the presence, within the state, of different political forces, bearers of incompatible political aims. This is what Croce and Goldoni call 'radical pluralism'. In the modern state, radical pluralism is, according to Mortati, an undeniable matter of fact, arising from the high degree of politicization of large masses.[73] There is simply no way to avoid it. What can be avoided, and should be avoided in order for the state to exist, is a clash in which adversary political forces cannot work out their differences, and none of them achieves the requisite dominant position of power. If the latter happens, the state community has no stable material constitution, and the state as a legal order does not exist, or it exists faintly. In the best case, the state apparatuses keep running, but they cannot go beyond ordinary administrative activity – and this usually means the (unstable) conservation of the old order.[74] In the worst case, they begin to veer and swerve in different, unstable, uncoordinated directions, while the degree of independence of local powers increases, as does the level of outright fighting, inexorably leading to covert or overt civil war.

The third type of pluralism, closely connected with the former, lies in the possibility of a state with a pluralistic material constitution, resulting from the contribution of different political forces, bearers of different, largely incompatible aims. I will come back to this peculiar political situation in next section. For the moment, it suffices to note that, according to Mortati, this possibility exists only insofar as formerly adversary political forces come to be integrated into a unitary whole, by way of a compromise that finds a new, accepted synthesis among their different political visions.[75] When this happens, the new material constitution cannot be said to be 'radically pluralistic', because the component political forces have left their radical oppositions behind. On the other hand, the new material constitution can indeed be said to be 'pluralistic' insofar as the integration is still

[72] C. Mortati, n 21 above, 11-18. Here Mortati follows S. Romano, n 10 above, chapter II.

[73] Mortati expends much effort in arguing that the material constitution, especially in the context of the modern state, cannot be conceived as the expression of the will of the community as a whole, because there is no such thing. The community is the theater of countless political conflicts, which cannot be resolved except where one force (or else a group of forces that have come to an agreement) prevails over the others. See C. Mortati, n 12 above, 33-51.

[74] C. Mortati, n 21 above, 38.

[75] C. Mortati, n 40 above, 37-40.

incomplete and fragile (the former divisions are still salient, and powerful).[76] Regimes where a rotation exists among different parliamentary majorities are no exception to this rule. In these regimes, according to Mortati, the rotating parliamentary parties are typically 'factions' belonging to a single, not fully integrated, political force.[77]

V. The Shifts in Mortati's Thought in the Context of Italian Political Affairs

The framework outlined in the previous sections is sufficiently general to cover the entire development of Mortati's thought – in it lies the strand of continuity in his work. Within this framework, however, important shifts in focus, terms, and concepts occurred over the years. I have already hinted at some of them. Now we are in a position to explore them in greater detail.

The most important changes concern the following aspects: (i) the presupposed degree of organization and integration of the dominant political force; (ii) the presupposed level of transparency of the material constitution; (iii) the degree of effectiveness of the material constitution (and hence the degree of existence of the state); and (iv) the role of jurists and their relation to the political forces.

The shifts in Mortati's views result from his attempts to adjust his theory to the changes in Italian political and constitutional affairs, which changes he experienced from within, first as a member of the Constituent Assembly (1946–1948),[78] then as a judge of the Constitutional Court (from 1960 to 1972).

Following a suggestion from Mario Dogliani,[79] I will break Mortati's trajectory down into three periods.

The first period unfolds during the one-party Fascist regime, until its fall, on July 25, 1943. The most representative work of this period is *La costituzione in senso materiale*[80] (1940). Other important contributions are *L'ordinamento del governo nel nuovo diritto pubblico*[81] (1931) and *La volontà e la causa*

[76] In other words, although Mortati assumes that, for a material constitution to exist, it should be supported by a *sufficiently integrated* political force, he sees this integration as a matter of degree, and so allows for the possibility of a *certain degree* of political pluralism within the dominant political force. This is precisely what happens in the case of a constitutional compromise between former political adversaries. This point is overlooked by those who interpret the material constitution as an all-or-nothing matter: either the political force is fully integrated (monistic) and the material constitution does exist, or political forces are not integrated (pluralism) and the material constitution does not exist. See eg G. Zagrebelsky, n 17 above, XXXIII-XXXIV (in a different passage of the same work, however, Zagrebelsky comes closer to my interpretation, ibid XXX).

[77] C. Mortati, n 12 above, 72-73.

[78] Elected from the ranks of the Catholic Party (DC, Christian Democracy), Mortati was a member of the so called *Committee of the 75* (Commissione dei 75), the restricted group entrusted with drafting the constitution.

[79] M. Dogliani, *Introduzione al diritto costituzionale* (Bologna: il Mulino, 1994), 332-343.

[80] C. Mortati, n 12 above.

[81] C. Mortati, n 27 above.

nell'atto amministrativo e nella legge[82] (1935).

The second period goes from the liberation of Italy from the Nazi-Fascists in 1945 and the works of the Constituent Assembly to the late 1950s. The opening years are those in which a constitutional compromise was reached among political forces divided by deeply conflicting interests and views, but allied in the fight against Nazi-Fascism. These forces, later called 'Constitutional Arch' (*Arco costituzionale*), were basically the Communist Party (PCI), the Socialist Party, the Catholic Party (DC, Christian Democracy), the Liberal Party (PLI), and the Republican Party (PRI). The following decade is marked by the beginning of the Cold War and the emergence of the postwar bipolar world order. Its most apparent consequence in Italian politics was a split in the Constitutional Arch: on the one side were the Communists, on the other the pro-NATO parties, DC, PLI, and PRI, together with the right-wing Socialists (PSDI), and in between were the left-wing Socialists (PSI). (The PCI Communists, for all their electoral strength, together with the varied galaxy of far-left communist parties, were excluded from government from 1947 all the way to 1996, this thanks to a changing set of unstable alliances the other parties forged under the so-called *conventio ad excludendum*.) But the 1950s were also the season when the new constitutional order set up under the compromise among political forces within the Constitutional Arch began to find room in the work of state apparatuses. In particular, in 1956, the newly established Constitutional Court came into operation, and in its first pronouncement,[83] it made clear that it would interpret its review powers as extending to any law found to be in contrast with any norm contained in the Constitution – a doctrine the Court understood to also apply to laws enacted before the Constitution's entry into force, and to include, in particular, cases of conflict with its most controversial part, Title III, devoted to economic relationships. This meant that liberal and Fascist legislation could be invalidated if judged to be incompatible with the societal project outlined in the Constitution – a project, recall, that was the result of the compromise between the forces within the Constitutional Arch. The most representative work of this period is *La costituente*[84] (1945).

The third period, in the 1960s and in 1970s, is the age of the enhanced contrast between workers organizations and left-leaning extra-parliamentary political movements on the one hand, and economic elites and government on the other. These are the so-called Years of Lead, plagued by continuous violent confrontations between far-left and far-right movements, and terrorist actions by both far-left and far-right underground organizations – the latter, in particular, responsible for a series of massacres, some of which realized with the involvement of part of internal and foreign secret services, and with unconcealed support, or

[82] C. Mortati, n 42 above.
[83] Corte Costituzionale 5 June 1956 no 1.
[84] C. Mortati, n 40 above.

lack of serious contrast, from some sectors of the state apparatuses.[85] In these years, at least one right-leaning coup was attempted (the so-called Golpe Borghese), and at least another one was planned (the so-called Golpe Sogno). The most representative works of this period are the entry 'Costituzione dello Stato'[86] (1962), *Brevi note sul rapporto fra costituzione e politica nel pensiero di Carl Schmitt*[87] (1973), and the 9th edition of *Istituzioni di diritto pubblico*[88] (1975).

In the first period (1931–1943), Mortati's political force is referred to as a 'party' (a term that, as noted, is meant in a sense different from the usual one).[89] The terminological point betokens a conceptual one. Political forces as parties are conceived as highly organized and deeply integrated. The organization is supposed to rely on a militant elite, strongly attached to the aim, and capable of steering the whole organization toward taking over the state's apparatuses. This picture is tailored to the mass-based parties of the first half of the 20th century—especially to the reality and the ideology of the Italian Fascist party—and is deeply influenced by the Leninist model for parties.

In this period, Mortati also takes for granted the transparency of the material constitution and of the political forces behind it. The political force is the party as it presents itself in the political arena. Its aim is clearly manifest not only in the formal constitution but also in the party's various declarations of intents, and, above all, in the clear directions taken by its politics.[90]

What could the position of jurists be in a similar framework? The reconstruction of the law which jurists are engaged in requires, at any step, decisions about the criteria for identifying legally valid rules and interpreting them, as well as for assessing the legal correctness of both private and public activities. The material constitution places normative constraints on these decisions: it establishes the formal criteria that ought to be followed in identifying formally valid legal rules, but also the substantive criteria for determining their content, solving their antinomies, filling their gaps, and justifying derogations from them, as well as the criteria for assessing the legal correctness of any possible arrangement or activity, on top of, and sometimes against, what is prescribed by formally valid rules.

The material constitution, recall, has both a political nature and a legal status. On the one hand, it is a political aim, a view about the overall organization of the statal community and the configuration of interests that should be promoted within it. On the other hand, it is the only normative standard that can be said to be 'legal' in a positive sense, that is, *effective* – it is, recall, the political aim

[85] See, among all, M. Dondi, *L'eco del boato. Storia della strategia della tensione 1965-1974* (Roma-Bari: Laterza, 2015); B. Tobagi, *Piazza Fontana. Il processo impossibile* (Torino: Einaudi, 2019).

[86] C. Mortati, 'Dottrine generali' n 67 above.

[87] C. Mortati, 'Brevi note' n 67 above.

[88] C. Mortati, n 21 above.

[89] C. Mortati, n 12 above, 71-73.

[90] ibid 138-144.

that has come to inform, to a sufficient degree, the life of the state community, prevailing over other conflicting views, thanks to the dominant position of power achieved by the political force that bears it. It is the material constitution, therefore, that ultimately fixes the boundaries of the 'positive' law, the law as it effectively is. If jurists want to operate within these boundaries, they need to let their operations be guided, in the last resort, by the material constitution.

Jurists may accept to move within the frame of the material constitution because they endorse it. But they may also accept it simply because they subscribe to a conception of their role on which they are bound to operate within the boundaries of 'positive' law, and the boundaries of 'positive' law are ultimately fixed by the material constitution. In both cases, they act as custodians of the material constitution. In the former case, they are a proper part of the political force. In the latter case, they carry out their activities as jurists detached from their own political preferences, according to the demands of the professional identity they have paid allegiance to. If, instead, they openly or covertly adopt standards that are incompatible with the material constitution, they are simply moving outside the boundaries of positive law. Their activity cannot count as legal science properly, that is, as a science of positive law. It is, at most, political activity, carried out in the name of a political aim which has not reached the legal status of a material constitution.

Such an account of the role of jurists is a paradigm of a political conception of the law: the space of operation of jurists *qua* legal scientists is entirely fixed by the material constitution, that is, by the will of the dominant political force. Up to this point, Croce and Goldoni are perfectly right.

In the second period (from 1945 to the late 1950s), Mortati's picture of the political force widens as to include the possibility of a compromise between formerly opposed forces[91] – an idea clearly inspired by the Constitutional Arch and the work of the Constitutional Assembly. The compromise is 'material', for it deals with the aim. It cannot be reduced to an agreement to keep 'fighting it out', only in the parliamentary arena rather than with guns. According to Mortati, a formal compromise of this latter kind could only work against a backdrop in which the main electoral forces have come to a sufficient degree of substantive agreement on the political aim.[92]

The political force arising from a material compromise is marked by a weak, unstable integration. The old oppositions are still present, though they are tempered by the new, emerging agreements. The material constitution does exist, but it is faint, and its degree of effectiveness tends to be relatively low. It is an extremely delicate period of change, jeopardized by the many forces

[91] C. Mortati, n 40 above, 37.

[92] C. Mortati, 'Brevi note' n 67 above, 150; n 51 above, 67; n 21 above, 37. On this point see M. Dogliani, n 77 above, 336-337.

attempting to disrupt the compromise from both sides.[93] In such a time, the role of the formal constitution, which usually channels the compromise, is of the most importance. The document's emotional salience strengthens the compromise, and the authoritative force that legal texts in general, and the formal constitution in particular, tend to have on jurists may help in securing their allegiance to the fragile material constitution.

And the jurists' allegiance is needed. While, in the abstract, the roles that jurists might take on are the same as the ones discussed above, their scope of action and their importance is, in a similar context, much larger. They can effectively contribute to helping the faint material constitution work its way into the legal practice, thereby increasing its effectiveness. Here the decisions made by even small numbers of jurists may have significant consequences. In face of a deeply established political force they are individually averse to, single jurists cannot but bear witness to their aversion, without relevant practical consequences. But under a material compromise, the situation is much more unstable, and even individual choices may make a big difference. The very existence of the material constitution is sensitive to attitudes and behavior of a relatively small number of jurists. We are not within a juristic conception of the law, but neither are we within the paradigm of a political conception.

The third period (the 1960s and 1970s) opens with a terminological turn. What in the first period was called 'party' is now called 'class'. The once 'dominant party' becomes the 'ruling class'.[94] Again, the terminological point betokens a conceptual one. Classes are represented by Mortati as having a much lower degree of organization – sparse groups that share quite similar and largely compatible interests, which tend to converge toward a common aim, to a significant extent through bottom-up processes. For a class to become the ruling class, it first needs to be the case that its component groups occupy local positions of power, and second that they find some form of top-down, intentional coordination. The relative weight of top-down processes, however, is much lesser here than it was in former parties, as is the degree to which shared interests and views are integrated into a coherent political project.[95]

The political force's lower degree of organization and integration corresponds to a much lesser transparency, if not opacity, of its consistency and of its aim. In particular, publicly declared political programs are suspected of not corresponding to the interests around which the class coalesces – they are formulas designed to attract consent, but what comes through from a critical number of members of the class is an inadequate commitment to them.[96] The possibility of a deep political dissimulation – so deep as to also affect the consciousness of the very same class,

[93] C. Mortati, n 40 above, 39.

[94] C. Mortati, 'Dottrine generali' n 67 above, 130-131. Croce and Goldoni give this terminological shift the importance it deserves (M. Croce and M. Goldoni, n 1 above, 177).

[95] See G. Zagrebelsky, n 17 above, XXX; S. Bartole, n 17 above, 526-527.

[96] C. Mortati, n 21 above, 406.

most of whose members misrepresent their true motivating interests (false consciousness) – calls into question the very prospect of reliably identifying the material constitution. What is it that matters more: a declared project of societal transformation which part of the ruling class is committed to, or the interest in preserving the actual distribution of power, which seems to drive the class as a whole?

Finally, in his last period Mortati concretely faces the possibility of a material constitution even fainter than the one created by a material compromise – so much fainter, in fact, that perhaps it does not even exist. To Mortati's eyes, the deeply conflicting views existing within the parliament and within society jeopardize the very possibility of a stable integration. The material unity of the state collapses into a melee of local powers and conflicts.[97] It is the triumph of radical pluralism, but, in Mortati's view, it is also the collapse of the state.

In a similar context, however, jurists are finally unbounded. They may recover their true task, the task of creatively searching for latent paths of integration within current social arrangements – the task of identifying deep social needs that are not consciously perceived, bringing them to awareness, endowing them with a legal status, and in this way helping to make it so that from the very structure of social practices a proper material constitution may emerge. In this way juristic science, Mortati says,

> 'discloses its true essence as an active part of the legal experience, as the true source of the law. Its influence is the more effective the more its inquiries are able to reach into the living texture of society, to capture the most pressing needs, and to find the solutions that satisfy them the most'.[98]

Mortati plumps for a juristic model of the law. And this model, quite surprisingly, is now proffered as capturing the 'true essence' of the jurists' role.

[97] C. Mortati, n 21 above, 37-38.
[98] C. Mortati, 'Brevi note' n 67 above, 152 (my translation).

Institutionalism and Plurality of Legal Orders Between Legitimacy and Constitutional Axiology

Dario Martire*

Abstract

This paper addresses the issue of legal pluralism and the plurality of legal systems starting from the book 'The legacy of pluralism. The continental jurisprudence of Santi Romano, Carl Schmitt and Costantino Mortati'. In particular, through the valuable leitmotif introduced by the Authors, consisting of the double relationship between 'juristic and political conceptions of law' and between 'matter and nomic force', the contribution of the doctrine following the publication of 'L'ordinamento giuridico' by Santi Romano is analysed, with particular attention to the comparison with Carl Schmitt and Costantino Mortati, focusing on the axiological innovation of the Republican Constitution.

I. Legal Pluralism and Plurality of Legal Orders

The scholarly influence that the institutionalist theories of Santi Romano, Carl Schmitt and Costantino Mortati have had on twentieth-century legal science and constitutional law is clearly a complex topic,[1] which, however, the authors of '*The legacy of pluralism. The continental jurisprudence of Santi Romano, Carl Schmitt and Costantino Mortati*' analyse with originality and through a precious *leitmotiv*, consisting of the dual relationship between '*juristic and political conceptions of law*' and between '*matter and nomic force*'.

The reason is quickly stated. According to the Authors

> 'it is vital to keep in mind the distinction between the juristic and the political because it is at the heart of our account of Romano's, Schmitt's, and Mortati's theories. For the juxtaposition of these authors epitomizes the movement from one end to the other hand of the continuum. We will account for the relationship of the juristic to the political by exploring how these three jurists conceptualized pluralism'.

Legal pluralism is therefore at the heart of the discussion and requires, in

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[1] On the relationship between Santi Romano and the early masters of the republican age, including Costantino Mortati, see C. Pinelli, 'La Costituzione di Santi Romano e i primi maestri dell'età repubblicana' *rivistaaic.it*, 1-26 (2012).

the author's opinion, a distinction with the different – but obviously related and often used as equivalent – concept of plurality of legal orders. The latter, according to Corsale's definition, corresponds to

> 'a factual situation, ascertained and possibly described, or hypothesized and possibly demonstrated, of coexistence of a multiplicity of legal orders whose reciprocal relations give rise to problems to be analysed with the tools of legal science or sociology (according to the purposes that such an analysis aims for)'.

On the other hand, the expression 'legal pluralism' traditionally refers to one or more theoretical models, marked by an evident anti-statism, whose starting point is represented by the ascertainment of a plurality considered impossible to eliminate, as a constant datum of legal experience.[2]

The distinction, apparent at first glance, often conceals a desire to address the issue from a purely legal rather than socio-political perspective. However, it will be useful when we tackle the problem of pluralism through the prism of the Constitution. The distance between the constitutional rules, which incorporate legal pluralism in various forms, and the plurality of systems, will thus be evident. Its recognition will only be possible through a careful interpretation of both the theory itself and the constitutional principles. As Corsale argues,

> 'the essential feature of the pluralist model is the recognition of the plurality of legal orders and the consequent definition of the relationship between these systems and the State'.[3]

The Authors of the Volume also argue that

> 'Constitutional pluralism is one of the other streams of thought that have addressed questions of ordering under conditions of pluralization of legal sources. According to this approach, the tension between order and pluralism would be managed by constitutionalizing the relation between legal orders. These streams of thought have clearly enriched the debate but, with a few notable exceptions, they have fallen prey of two important epistemic limits. They have adopted – quite controversially – the point of view of the global order and have not addressed the issue of how legal orderings, in conditions of rising pluralism, shape societal formations'.

With the recognition of social pluralism in the Constitution, pluralistic theories have indeed had new applications. And yet, if on the level of the general theory of public law there have been many developments of Santi Romano's theory,

[2] M. Corsale, 'Pluralismo giuridico' *Enciclopedia del diritto* (Milano: Giuffrè, 1983), XXXIII, 1003.

[3] ibid 1014.

starting with Massimo Severo Giannini's review, constitutionalists have not tackled the issue in a general perspective, with the exception of a specific work by Gaspare Ambrosini and some ideas found in the 'Institutions of public law' by Costantino Mortati, both Constituent.[4] The subject of the transformation of constitutional orders is a widely known issue, on which Italian legal doctrine has dwelt since '*Lo Stato moderno e la sua crisi*'. The authors have the merit of having analysed the problems inherent in pluralism. They have highlighted the connections and differences also and above all with Costantino Mortati. The author has sought, particularly in his work on the function of government and on the material Constitution, the tools through which to channel social and political change into the relationship between fact and law, with specific reference to the Constitution.

The theory of the plurality of legal orders, which constitutes an indispensable precedent in this perspective, has had developments and applications in multiple fields of law that could perhaps find strong dissent even from the Author of '*L'ordinamento giuridico*'. However, Gino Giugni, a few years after contributing to the development of Romano's theory through the development of the 'inter-union judicial system', warned that 'doctrines walk on their own feet and by their own strength, independently of the authors who enunciated them'.[5]

From this viewpoint, in this author's opinion, it is indispensable to add a piece to the important work of the Authors, marked by the 'solutions' proposed by the Constitution to the same problems inherent to pluralism, which have occupied the scholars of public law since the beginning of the 20th century. First, however, it will be necessary to retrace some of the stages of institutionalism and the plurality of legal orders as they have asserted themselves in reality and as they have been used by legal doctrine.

II. Universal Order and Particular Orders

While on a theoretical level it is a notion that became established in the 20th century, the plurality of legal orders is nevertheless a phenomenon that characterises all medieval legal experience. In the Middle Ages, as Santi Romano put it,

> 'that society was broken up into many different communities, often independent or weakly connected. Here the phenomenon of the plurality of legal orders became so evident and impressive that it was impossible not to take it into account'.[6]

[4] These issues are the starting point for my work published in September 2020: D. Martire, *Pluralità degli ordinamenti giuridici e Costituzione repubblicana* (Napoli: Jovene, 2020).

[5] G. Giugni, 'Il diritto del lavoro', in P. Biscaretti Di Ruffia ed, *Le dottrine giuridiche di oggi e l'insegnamento di Santi Romano* (Milano: Giuffrè, 1977), 178.

[6] S. Romano, *L'ordinamento giuridico* (Florence: Sansoni, 2nd ed, 1967), 108; the Author thus concludes: 'Apart from others, which were also markedly autonomous, it is sufficient to recall

The Middle Ages are characterised by an unquestionable juridical pluralism, at the basis of which, however, lies the problem of the split between legitimation and effectiveness; by virtue of the unitary principle of legitimation, the power of the local authorities derives from the emperor, whose power in turn derives from God.

The question of the legitimacy of power represents, in the author's opinion, the fundamental pivot of the relationship between the general order and autonomous bodies, which allows us to investigate the relationship between the former and the latter which coexist with it, but which precede it chronologically and logically. As we shall see later, the problem of legitimation and the related relations will be central also in the debate in the Constituent Assembly, where the Constitution will assume the role of the sole legitimating element of state power, of autonomous orders, as well as of orders that are axiologically opposed to it.

In the feudal political view, on the other hand, the *potestas* of the Empire is not the power of the political institution but, rather, *principium ordinis*, the source of legitimation of society. In this perspective, the related *potestas* of particular orders repeats (and it cannot be otherwise) from that ordering principle its own legitimacy and juridicity.

This representation (mostly ideal and abstract) ends up constituting a *fictio* in contrast to reality. In reality, however, in contrast to the formal sovereignty of the emperor, the effective sovereignty of the particular orders is affirmed, which therefore legitimise themselves.[7]

The problem of pluralism and the plurality of legal orders therefore already arises in the context of the universal order of the *societas christiana*. The legal orders that are the expression of late medieval legal particularism do not have totalitarian pretensions. They are not antagonistic to common law. Within their scope and order, they supplement, specify and even go so far as to contradict common law. They never go so far as to contradict it (nor do they ever want to). On the contrary, they presuppose it, placing themselves in a dialectical position – ie in a patently or latently close relationship – with this immense wealth circulating everywhere and constituting the *ius*, the *ius* par excellence; and then appearing, with different characteristics, in the system affirmed with the emergence of the modern State.[8]

The system just described, characterized by a 'coexistence' between the various orders, goes into crisis, as widely known, with the advent of the modern sovereign State. The Peace of Westphalia in 1648 marked the beginning of a process – which, conventionally, would end in the mid-20th century – aimed at affirming the supremacy of the State over every other entity and organisation. The State progressively but inexorably acquires, according to Weber's teaching,

Church law, which certainly could not have been considered as part of the law of the State'.

[7] F. Modugno, *Legge - ordinamento giuridico - pluralità degli ordinamenti. Saggi di teoria generale del diritto* (Milano: Giuffrè, 1985), 188-189.

[8] P. Grossi, *L'ordine giuridico medievale* (Roma-Bari: Laterza, 2004), 226.

the monopoly of the exercise of force[9] and, consequently, the instrumental monopoly of juridical production, until the definitive affirmation of the equivalence between statehood and juridicality.[10]

In the absolute State, intermediate bodies therefore continue to exercise power and to be protagonists of a pluralism marked by ordinal autonomy. The main point, however, that differentiates this form of state from the medieval order is precisely the foundation of orders other than the general one. In fact, intermediate bodies lose their self-legitimisation as described above, since it is the Sovereign who attributes to them the fraction of *iurisdictio* within which to exercise their power.

For this reason,

> 'in the transition from the Middle Ages to the modern era, marked by the crisis of the universal order, the particular orders that constituted its pluralistic structure suffered two different fates: either they were destined to take the place of the universal order and to transform themselves into as many self-validating sovereign orders, or, on the contrary, to be compressed and subordinated within the scope of the former, while continuing to constitute its articulated and pluralistic internal structure'.[11]

III. Santi Romano's Theory. From the Crisis of the Modern State to the Plurality of Legal Orders

The problem of the split between legitimacy and effectiveness in the medieval order then arises in clearly different terms for the modern State, which constructs a different legitimacy from the imperial one, linked moreover to a different notion of effectiveness.[12] The State constitutes a

> 'rigorously unitary reality, where unity means, on the material level, the effectiveness of power over a territory guaranteed by a centripetal apparatus of organisation and coercion, and, on the psychological level, a totalitarian will that tends to absorb and make its own every manifestation, at least inter-subjective, that takes place in that territory'.[13]

[9] M. Weber, *Economia e società. Teoria delle categorie sociologiche* (Milano: Edizioni Comunità, 1995), I, 53.

[10] The confirmation of the gradual nature of this path is found in the passage of the first theorist of state sovereignty, Jean Bodin. See J. Bodin, *I sei libri dello Stato (1576)* (Torino: UTET, 1988), III, VII, II, 286 (translated by M. Isnardi Parente and D. Quaglioni).

[11] F. Modugno, *Legge* n 7 above, 190.

[12] See ibid 199.

[13] P. Grossi, *Un diritto senza Stato (la nozione di autonomia come fondamento della costituzione giuridica medievale)* (Milano: Giuffrè, 1996), 270.

The *potestas* of *princeps* becomes *summa legibusque soluta*, it is self-legitimising and finds no justification except in itself. The modern state, with respect to individuals and communities, is

> 'an entity in its own right that reduces the various elements of which it is composed to a unity. It is not confused with any of them. It stands before them with a personality of its own, endowed with a power, which it does not repeat except by its very nature and strength. Its strength is the strength of the law'.[14]

The end of the wars of religion, first the Peace of Augsburg and then the Peace of Westphalia, sealed the principle of *cuius regio eius religio* and, with it, of an international order based on a plurality of state orders linked to a given territory.

The modern State is then first of all the result of a legal order pluralization, of what has been called monotypic plurality. By virtue of it, we transition from the one order (the original universal order) to the multiplicity of orders, which nevertheless all present themselves as being of the same type. This legal order plurality is therefore linked to a multiplicity of territories, within which state legal orders with equal characteristics are affirmed: sovereignty, independence, exclusivity, impenetrability.[15]

If, therefore, on the one hand the so-called monotypic pluralism of legal orders is a consequence of the disintegration of the Empire, on the other hand, first the absolute State and then, even more clearly, the liberal state represent forms of negation of the plurality of legal orders, in its so-called polytypical expression.

The achievement of modern legal unity is the result of a conception of sovereignty as external and internal independence and, secondly, of a link between the state and individuals (who later became citizens) marked by profound abstractness.

The pretended unity, indivisibility and unlimitedness of sovereignty, proper to the absolute state, becomes a typical characteristic also of the order established following the French Revolution. From the prince, sovereignty is attributed to the nation, to the people, to individuals (no longer subjects but citizens). Its relative meaning remains unchanged, the result of the abstract link between the State and the individual. The monopoly of force and law is also linked to the (also modern) dogma of the clarity and completeness of the legal order itself: law is and must be an exclusive product of the State.

The first consequence of the uniqueness/exclusivity of the legal evaluations

[14] S. Romano, *Lo Stato moderno e la sua crisi* (Milano: Giuffrè, 1969), 7-8.

[15] The distinction between monotypic and polytypic pluralism is by A.E. Cammarata, *Formalismo e sapere giuridico* (Milano: Giuffrè, 1963), 136, and taken up both by V. Crisafulli, *Lezioni di diritto costituzionale* (Padova: CEDAM, 1984), 16, and by F. Modugno, *Legge* n 7 above, 190; see then F. Modugno, 'Pluralità degli ordinamenti giuridici' *Enciclopedia del diritto* (Milano: Giuffrè, 1985), XXXIV, 1; on the principle of exclusivity see C. Pinelli, *Costituzione e principio di esclusività. Percorsi scientifici* (Milano: Giuffrè, 1989), I.

of the State is constituted then by the negation of the so-called intermediate communities or social groups, by the negation of polytypical pluralism.[16]

Throughout the 19th century the supremacy of the bourgeois class and the liberal ideology connected with it, on the one hand entails political unity and formal and abstract equality, while on the other hand and by opposition it determines a social pluralism that 'in the same way as the only state legal order is disavowed as legal pluralism'.[17]

The internal and impenetrable structural unity of the modern state, as has been effectively asserted, rests, however, on a fiction, in the

> 'purported identity of State, nation and people, in the attribution of sovereignty to that mythical entity that had been the "nation" '.[18]

The transformation of society, triggered by the industrial revolution in the second half of the 19th century, led to the crisis of the modern state through the emergence of a multiplicity of social systems. The clear dividing line between political and civil society generates that tendency, highlighted by Santi Romano in his 1909 Pisan prolusion, of 'a very large series of social groups to constitute each an independent legal circle'.[19]

The problems relating to the organisation of work caused by the entry of large-scale industry into commerce and the production system highlight the phenomenon of so-called integral trade unionism. This term describes all those organisations (not only workers' and/or revolutionary organisations) whose main aim is to bring together individuals belonging to the same profession or having the same economic interest in order to oppose and overthrow the general state order.

The inadequacy of the state constitutional structure is, in Santi Romano's view, made evident by the excessive simplicity of the modern State legal order. The latter

> 'believed it could overlook a number of social forces, which it either deluded himself into thinking had disappeared or to which it attached no importance, considering them mere historical survivals, destined to disappear in a very short time'.

[16] It is not surprising then that the Le Chapelier Law, the expression of an antipluralist and anti-associationist ideology, dates from June 1791. Moreover, the Declaration of 1789 had replaced the rights and privileges of the classes with the principle of submission to a unitary right for all citizens. The recognition of individual freedoms and equal rights, in that perspective, is closely linked to the unity of the nation, which necessarily entails the elimination of the 'bodies' and 'orders' typical of the *Ancien Régime*.

[17] F. Modugno, *Legge* n 7 above, 192.

[18] S. Romano, *Lo Stato moderno e la sua crisi* n 14 above, 9-13; F. Modugno, *Legge* n 7 above, 194-195; P. Ridola, *Democrazia pluralistica e libertà associative* (Milano: Giuffrè, 1987), 136.

[19] S. Romano, *L'ordinamento giuridico* n 6 above, 113 and Id, *Lo Stato moderno* n 14 above, 12. On the Pisan prolusion and on the crisis of the State, see C. Pinelli, 'La Costituzione di Santi Romano' n 1 above, 5.

This organisation is therefore 'totally deficient in regulating, indeed often in failing to recognise, the groupings of individuals'.[20]

The legal irrelevance of the intermediate bodies referred to by Romano is the basis for the separation and non-recognition of these phenomena by the state legal order. The latter tends to relate exclusively to the individual

> 'apparently armed with an endless series of emphatically proclaimed and inexpensively extended rights, but in fact not always protected in their legitimate interests'.[21]

It is in this non-recognition that the problem of the polytypical multiplicity of social systems within and even outside the territory subject to the sovereignty of states takes root.

The crisis of social homogeneity at the basis of the liberal system induced legal science, and first of all Santi Romano, to develop a theory aimed at overcoming Kelsenian normativism and the statist point of view, considered insufficient to describe social reality.

In the doctrine of Santi Romano there are two theories, which according to Bobbio should be kept distinct: the theory of law as an institution, which is opposed to the normative theory, and the theory of the plurality of legal orders, which is opposed instead to the monistic or statist theory. According to the author

> 'there is in fact no necessary link between the theory of the order and pluralism, just as there is between the theory of the norm and monism. There is no incompatibility between order theory and monism, just as there is none between norm theory and pluralism. Although the most well-known institutionalist theories are in fact also pluralist, the conjunction between institutionalism and pluralism as well as that between normativism and monism is not a rule. Augusto Thon, the prince of normativists, is also a pluralist. The prince of institutionalists, Maurice Hauriou, Romano's main if soon to be abandoned source, has no interest in the pluralistic consequences of his doctrine. Staying close to home: Croce is well known to be a convinced pluralist, but if I had to answer the question of whether he was an institutionalist or a normativist I would feel awkward'.[22]

In the sphere of Romano's theories, it is in fact possible to discern a basic ambiguity, characterized by the two souls that seem to coexist in his thinking. On the one hand, in an evidently statist context, which the author himself

[20] S. Romano, *Lo Stato moderno e la sua crisi* n 14 above, 13-14.

[21] ibid 14.

[22] N. Bobbio, 'Teoria e ideologia nella dottrina di Santi Romano', in P. Biscaretti Di Ruffia ed, *Le dottrine giuridiche di oggi e l'insegnamento di Santi Romano* (Milano: Giuffrè, 1977), 25; on Hauriou see the recent work by C. Pinelli, 'Il diritto come "édifice artisique" ', in A. Salvatore ed, *La personalità giuridica di Hauriou* (forthcoming).

contributed a great deal to reinforcing, there is clearly a plurality of social groups. On the other hand,

> 'modern public law does not dominate, but is dominated by a social movement, to which it is hardly adapting, and which meanwhile governs itself with its own laws'. Therefore, that 'luminous conception of the State (...) seems to have been eclipsed for some time now, becoming more intense by the day, so that it might not be entirely superstitious to draw unhappy omens from it'.[23]

The Pisan Prolusion and '*Lo Stato moderno e la sua crisi*' then represent in Romano the moment of fear towards such social orders and as proof of this, we can detect for the first time the absence of criticism of French revolutionary constitutionalism. For Romano, saving the modern State means first and foremost carrying out the work of 'juridical construction', which presupposes a different attitude towards modern constitutions. Their shortcomings are a good thing today, as this will enable the fight against them to take on a different character. This will happen when it will see that it is taking place in a field where there are no trenches to be torn down but only defences to be erected. Those new edifices, once constructed,

> 'will not contrast with the solid and severe architecture of the modern State, but will rest on the same foundations and form an integral part of it'.[24]

Romano's attitude changes completely in '*L'ordinamento giuridico*'. Here he carries out a theoretical work that goes beyond the positive law. On a theoretical level, he asserts a superiority not only of the state system, but also of other systems that he does not hesitate to define as original. However, it is significant that in the section on the relationship between legal systems there is no significant reference to social systems, but only to the State, the international legal system, the church and even private international law.

This is the framework for the thesis of Santi Romano, whose pluralistic theoretical model already contains the premises for bringing the plurality of legal orders back to the unity of the State. As has been rightly observed in the conclusion, it states that, whatever social transformations are taking place, one cannot renounce the principle of a superior organisation that unites, conciliates and harmonizes the minor organisations into which the former is being specified. This superior organisation must yet again be the 'modern State'.[25] Theoretically pluralist, ideologically monist, Bobbio will say.[26] One can only agree.

[23] S. Romano, *Lo Stato moderno e la sua crisi* n 14 above, 387 and 383.
[24] ibid 391.
[25] N. Bobbio, 'Teoria e ideologia nella dottrina di Santi Romano' n 22 above, 41-42.
[26] ibid 42.

The first part of the work, on the other hand, is aimed at explicating the concept of legal order closely connected to that of institution. From the notion of legal order, understood precisely as organisation and institution, Romano deduces that 'there are as many legal orders as institutions'.[27]

One of the main innovations of this work, compared to the Pisan Prologue, lies in the object of its analysis. What was previously contemplated in factual terms and in terms of social pluralism, in 'The Legal Order' becomes legal pluralism, plurality of legal orders. Where there is organisation and institution there is also objective law. This, therefore, cannot be anything but plural.

The observed plurality of legal orders leads Romano to question the relationships that may exist between the various orders. For Romano it is indeed essential to maintain a juridical point of view.

A further consideration then concerns the relationships between the two parts that make up Romano's volume. While on the one hand there is the institutionalist theory that embraces the institution and the social body, on the other hand, in the second part, there is an analysis that presents many aspects that can be traced back to the normative moment, to the relations between orders understood this time as relations between rules.

For Giannini,

> 'the majority of jurists did not accept the equivalence between organised groups and the legal order, as they attributed relevance only to the normative element. Santi Romano himself left the notion of organisation undeveloped. In his later work, he only emphasised the normative element. Probably if he had been able to complete his work, he would have developed the aspects pertaining to the organisation as well'.[28]

In fact, Romano observes that the analysis of the relations between orders is resolved in the legal relevance that one order has with respect to another, a relevance that is determined when 'the *existence* or the *content* or the *effectiveness* of one order is conditioned with respect to another order, and this on the basis of a *juridical* title'.[29]

For Romano, the thesis based on the assumption that original orders are exclusive and, in themselves, unique, cannot be accepted. The principle that each original order is always exclusive must be understood in the sense that it may, and not necessarily must, deny the legal value of any other. In other words, one order may ignore or even deny another order. A system may take it into account by giving it a character other than that which it attributes to itself. It can therefore be considered as a mere fact. It is not clear why it cannot

[27] S. Romano, *L'ordinamento giuridico* n 6 above, 106.

[28] M.S. Giannini, 'Sulla pluralità degli ordinamenti giuridici', in C. Gini ed, *Atti del Congresso internazionale di sociologia*, IV, (Roma: Istituto Poligrafico dello Stato, 1950), 467-468.

[29] S. Romano, *L'ordinamento giuridico* n 6 above, 145.

recognise it as a legal order, albeit to a certain extent and for certain effects, and with such qualifications as it may see fit to confer on it.[30]

The 'juridical titles' by which one order acquires relevance for the other can be of five types: a) the state of subordination of one order with respect to another; b) the state of presupposition; c) the condition of independence of one with respect to the other, but of dependence of both with respect to a third party superior to them; d) the state of partial subordination, in relation to some aspects of content or effectiveness; e) the succession of one with respect to the other.

The confirmation of the consideration for which the second part of the volume is marked by the normative aspect is to be found in the very words of the Author when he states that 'a greater unfolding of these principii could be obtained only after having outlined a theory of the sources of the legal orders'.[31]

IV. Santi Romano and Carl Schmitt

> 'The decisive problem of our current historical context concerns the relationship between State and politics. A doctrine formed in the sixteenth and seventeenth centuries, inaugurated by Nicolò Machiavelli, Jean Bodin and Thomas Hobbes, attributed an important monopoly to the State: the classical European State became the sole subject of politics. State and politics were inseparably related to each other, in the same way as, in Aristotle, "polis" and politics are inseparable. The classical profile of the State vanished when its monopoly of politics disappeared and new, different subjects of political struggle, with or without State, with or without State content (*Staatsgehahe*) took over'.[32]

Carl Schmitt started from this point to reason on the crisis of the liberal state and highlighted the change in politics, which changed from state to party politics and consequently posed the fundamental question of its unity.

In the context of the relationship between '*juristic and political conceptions of law*' highlighted in the introduction, the Authors argue that

> 'It is evident that Romanos conception dwells in one end of the continuum and Mortati on the other, while Schmitt moved from the former to the latter. It is interesting to note, thus, that these authors' understanding of pluralism was significantly affected by the role they attributed to the juristic, and in particular to legal knowledge'.

Schmitt positions himself, therefore, somewhere between the 'juristic' and

[30] ibid 146. See also C. Pinelli, *Costituzione e principio di esclusività* n 15 above, 19.
[31] S. Romano, *L'ordinamento giuridico* n 6 above, 146.
[32] C. Schmitt, *Le categorie del politico* (Bologna: il Mulino, 1972), 23-24.

the 'political' conceptions. In fact, as Bobbio pointed out, Schmitt was among the first to grasp the importance of Santi Romano's theory of the legal order. His theoretical reconstruction of institutionalism, however, showed some problems because it was exposed, on the legal level, in a very imprecise way compared to that formulated by Romano, which, as we have seen, already presented some ambiguities; moreover, as the Authors also state, he arrived at an 'institutionalist' orientation only depending on overcoming the decisionist perspective he had developed in the 1920s.

The doctrine usually includes in the area of institutionalism the theses that, more or less directly, presuppose the concept of Constitution in the material sense, as opposed to that of the Constitution in the formal sense. This is because, very generally speaking, the state legal order is based on certain substantive principles, which are to be found in society or, as they say, in the 'political' sphere. In the original version of Schmittian decisionism, the Constitution represents the total decision on the type and form of the political unity of a people, whose foundation is not normative, but purely existential. All other rules are based on compliance with that fundamental political decision.

As Bobbio noted, taking his cue from Gurvitch, the peculiarity of the pluralist model in contesting statualism consists in denying legitimacy to an exclusive relationship between the political dimension and the legal dimension.[33] In other words, the pluralistic model contains, within itself, the contestation of the thesis of the so-called autonomy of the politician.

After all, the Authors hit the nail on the head when they claim that

> 'It is our claim that Schmitt's overall theory was profoundly affected by his thoroughgoing revision of the role of the order in the creation and maintenance of a political community. Needless to say, at no point was he a supporter of the idea of a system, as he fiercely chastised the systematic idea of law advocated by his fiercest intellectual adversary, Hans Kelsen. However, Schmitt's critical take on the concept of a system changed significantly at the end of the 1920s, as he gave an institutional twist to his theory of law and politics. This chapter will investigate this major theoretical change whereby Schmitt dispensed with his famed theory of the exception and put forward a theory of the concrete order. The scrutiny of the different types of criticisms he leveled at the normativity of the system will allow us to show that his main concern was with pluralism as an ongoing threat of dissolution. While Schmitt's persisting obsession was with the homogeneity of the political community, he importantly changed his mind as to how it can be attained and how it should be preserved. This analysis will also shine a light on the difference with Santi Romano's idea of order, especially as to

[33] N. Bobbio, *Prefazione a G. Gurvitch, La dichiarazione dei diritti sociali* (Milano: Edizioni di Comunità, 1949), 16.

how their disagreeing conceptions of it led to disagreeing conceptions of pluralism'.

Juxtaposing Schmitt with Romano, however, raises a number of questions, already highlighted years ago by the doctrine.[34] These are undoubtedly two profoundly different 'jurists' who, moreover, started from different premises and set themselves different objectives. Romano proposed a *tout court* legal point of view, immune from sociological and political interconnections. The same certainly cannot be said for Schmitt. Giannini, in his report to the Conference 'The Legal Conception of Carl Schmitt' in 1986, anticipating his own conclusions, even claimed that 'Carl Schmitt's conception in the legal sense probably does not exist, because Schmitt is essentially a political scientist'.[35] If this were the conclusion, surely analysing the theses of Santi Romano, Schmitt and Mortati would make little sense.

Without reaching such conclusions, however, there is no doubt that the political contamination of Schmittian thought is so strong as to contrast it sharply with that of Romano and Mortati. After all, it seems to me that the Authors' conclusion is similar, especially when they state that

> 'depoliticization of conflict through the juristic point of view could not be farther from Schmitt's institutionalism, which ironically the latter somewhat regarded as the continuation and the overhaul of Hauriou's and Romano's institutional theories. Therefore, moving on to Schmitt's conception of law will also be of help in better understanding Romano's pluralist institutionalism'.

The Authors use an analysis of the Plettenberg political scientist's texts to argue that

> 'we concerned ourselves with Schmitt's telling revision of his own legal theory, and the comparison with Romano's proved enlightening in a few junctures. While either was always reluctant about the notion of law as system, Schmitt was the one who pushed the notion of law as order to the extreme. Romano was obviously on the side of the order versus the system, but his view made no room for the idea that law incorporates a form of life and promotes social homogeneity. While for Romano the task of law is that of making orders compatible with each other through technical forms of negotiation, Schmitt tasked law with preventing the rise of an order *vis-à-vis* another within state borders. The law, Schmitt believed, is an instrument

[34] See for all A. Catania, *Il diritto tra forza e consenso* (Napoli: Edizioni Scientifiche Italiane, 1987), 137.

[35] M.S. Giannini, 'La concezione giuridica di Carl Schmitt: un politologo datato' *Quaderni costituzionali*, 447 (1986).

> for the leader and his loyal officials to tease out the institutional standards that feed into the ethnic homogeneity of the people and shore it up. The order, then, graphs onto a form of life that has an ethical and an ethnic nature. Therefore, it is hardly surprising that two theories of law as order, despite many key aspects in common, came to irreconcilable visions of pluralism'.

There is no doubt that such visions of pluralism are irreconcilable. There is equally no doubt that Santi Romano

> 'transmitted to the young his map like the greatest Masters, whose strength does not consist in imparting doctrines, but in indicating the different relevance of the objects of knowledge. The result was partial assimilations, adaptations, and distances that increased as we approached the subject of the constitution. At the time, in spite of growing disquiet, it was not easy to foresee the coming end of a world; yet from those reactions arose constructs that would soon aid, in the way of jurists, the advent of a new one'.[36]

Among these there was Costantino Mortati, who is probably the scholar who most sought to fuse the two approaches to Italian public law – the historical-political approach of Franco-British origin and the legal-positivist approach of German origin – into a theory of the Constitution. From this point of view, the continuity with Romano is certainly more fruitful.

V. Santi Romano and Costantino Mortati. Plurality of Legal Orders and the Italian Constitution

Romano's institutionalist theory famously had extremely formalistic traits. However, as has been rightly stated,

> 'to infer the consequence of its reversal "in concrete legal thought" appears to be the fruit of a deterministic dialectic'. The only one to support it was, as we have seen and as the Authors report, 'not by chance always and only in a strictly theoretical way, Schmitt, praising Romano for having seen in the state organization "the concrete order" productive of rules. Not so Romano himself, who was able to follow from the inside, starting from that premise, "the movements" that were taking place there, and even less so his young followers or students, who (...) all moved away from the premise more or less quickly'.[37]

[36] C. Pinelli, 'La Costituzione di Santi Romano' n 1 above, 1.

[37] Ibid 20; C. Schmitt, n 32 above, 260. On the formalism of S. Romano see M. Dogliani, *Indirizzo politico. Riflessioni su regole e regolarità nel diritto costituzionale* (Napoli: Jovene, 1985), 164-165.

Mortati, already in his first work, *L'ordinamento del governo* (1931), studied what he called 'grey zones' of constitutional law, in which the relationship between law and politics appeared more problematic and connected. Here the reference to the anti-formalist methodology was evidently stronger and would lead him, in his later studies, to identify the political party as the origin of all institutional arrangements and to a position very close to Romano's institutionalism.

The Constitution in the material sense is understood as the set of fundamental political goals supported and implemented by the dominant political forces and, therefore, as the basis for the validity of all other rules of the legal system. It then addresses the issue of principles and values that can be deduced from a given historical and social framework, which are binding on institutional actors. This reflection, together with that of other young public law experts (among them, Carlo Esposito, Vezio Crisafulli and Massimo Severo Giannini) will be decisive in preparing the debate at the Constituent Assembly and the subsequent development of Italian constitutionalist doctrine.

As far as we are concerned, Mortati's reflections will be decisive for the knowledge of Emmanuel Mounier's personalism, which will strongly influence Catholic politicians and jurists (in particular Giuseppe Dossetti) and, consequently, constitutional principles (starting from Art 2 Constitution).

Christian-social pluralism, the German organicist conception, as well as Santi Romano's 'constitutional' pluralism are present in Mortati's reflections and are already evident in the reports to the first subcommittee (Constitutional Problems) entitled 'On the Declaration of Rights. General considerations' and 'On subjective political rights',[38] in which he hypothesizes a system of rights, referring not only to individuals, but also to groups, the autonomy of local authorities, and the recognition of political, professional and economic associations.

Like him, although with different outcomes and developments, Giannini – a pupil of Romano's – deals with another of Romano's notions that remained in the background for many years,[39] that of internal order, divided into the two forms of sectional legal order and, later, of state legal order.

Giannini's works, as well as Mortati's, are a useful tool to understand the connection between the doctrinal developments of that time and what will be affirmed in the Republican Constitution, in relation to the pluralism of the legal order. On the one hand, Giannini is one of the authors who most innovates Romano's theory. On the other hand, the social pluralism that will be the subject of disputes within the Constituent Assembly and that will result in many constitutional provisions also has Giannini among its architects. In fact, he was to be the author, together with Adriano Olivetti, of the constituent project

[38] G. Amato and F. Bruno, 'La forma di governo italiana: dalle idee dei partiti alla Costituente' *Quaderni costituzionali*, 49 (1981).

[39] At least until the work of V. Bachelet, *Disciplina militare e ordinamento giuridico statale* (Milano: Giuffrè, 1962).

dedicated to the problem of local autonomies.

It is also necessary to note how the development of the sectional order proceeds hand in hand with the development of Romano's theory of the legal order in the strict sense. The connection between institution and social body justifies, in its perspective, the criticisms of indeterminacy, apriorism and tautologism made by the doctrine of the time, which, however, were initially overcome on the basis of the relative simplicity of the systems taken into consideration.

The first applications of the pluralistic theory of law in the field of international law and canon law (themes already dealt with, as we have seen, by Romano), since they were 'collected' systems, made it possible to set aside the problem of determining the institution. The inadequacy of the theory comes to light, however, when Giannini sets out to analyse the sporting phenomenon. This implies a deeper understanding of the elements of the legal system. In a later work he will configure the legal system as a liminal legal notion, whose content can only be derived from other realities, especially sociology. Since these are liminal concepts,

> 'the legal qualifications which are applied by means of such a concept are not creative of legal reality, but merely a recording: it is the facts which require the rights to take on some of their *data* as content of *legal qualifications*'.[40]

There are three constituent elements of legal orders: plurisubjectivity, normativity, and organisation. The first is constituted by the existence of a determined number of subjects (individuals, entities) bound together by the respect and observance of a series of rules, considered binding for all. This body of rules represents the legislation. The organisation, on the other hand, is that grouping of people, of personal services and of real services, of all those services that are performed through things or means.

The peculiarity of its reconstruction lies in the consideration that organisation and legislation are linked by 'very close ties'; by virtue of a sociological conception, that is called simultaneous interaction. The organisation sets the rules; the rules create the organisation, so 'any modification of one is a modification of the other'.[41]

As I have always argued, of the three elements of the legal order, plurisubjectivity is the one that, as structured by Giannini, appears most controversial. Although it is, like the others, an indispensable element, it differs

[40] M.S. Giannini, 'Sulla pluralità degli ordinamenti giuridici' n 28 above, 458. On this and other aspects of Giannini's theory see C. Pinelli, 'Massimo Severo Giannini costitutionalista' *Rivista trimestrale di diritto pubblico*, 853-854 (2015).

[41] M.S. Giannini, 'Prime osservazioni sugli ordinamenti giuridici sportivi' *Rivista di diritto dello sport*, 13 (1949), as well as Id, 'Gli elementi degli ordinamenti giuridici' *Rivista trimestrale di diritto pubblico*, 219 (1958).

from the other two in that it is 'the raison d'être of an order, as well as its reason for existing' and at the same time as

> 'the legally inert datum of the order (...) a necessary feature of the order, but (...) characteristic of it: it is, after all, precisely the legislation and the organisation that qualify the individual as a subject: *the subject in itself, legally, does not exist*; there will exist realities, natural or artificial, to which the offices of the order, in application of the order's rules, will recognize the quality of subject, by means of an appropriate procedure'.[42]

Giannini, for that matter, shared the pluralistic inspiration of Adriano Olivetti's ambitious design.[43] The latter, certainly distant from the plurality of Romano's orders, represented that current of thought that was the expression of a pluralism and of an open, post-state, non-organicist communitarianism.

The debate in the Constituent Assembly and the resulting rules confirm the connection with the pluralistic approaches (including Romano's) affirmed at the beginning of the twentieth century.

The question that took on fundamental importance was first of all the relation between public power, generically understood, and society, its interests and its organisation. The connection with what was widely discussed throughout the first half of the 20th century and illustrated by the Authors in the Volume is immediately evident.

According to Gaspare Ambrosini, an illustrious Constituent, the Italian Constitution placed the doctrine of the plurality of legal systems at the base of the State's relations and behaviour *vis-à-vis* social groups. From the fact that the Constitution places alongside man as an individual, the 'social groupings' of which he is naturally part for the achievement of common purposes with other men, it follows that these groupings must be considered as entities correlatively and naturally endowed with irrepressible rights and guarantees.[44]

According to Ambrosini, the plurality of legal orders, as theorized by Santi Romano in '*L'ordinamento giuridico*', not only represented for the Constituents a constant point of reference in the debate, but was also acknowledged by the constitutional rules, starting from Art 2 of the Constitution.

According to the author, the Republican Constitution recognises the principle of pluralism. It is an irrepressible characteristic of the human being. This overturns the approach of the general order to social (and even legal) orders, of

[42] M.S. Giannini, 'Gli elementi degli ordinamenti giuridici' n 41 above, 221. See D. Martire, 'Pluralità degli ordinamenti giuridici e Costituzione repubblicana. Spunti di riflessione alla luce dell'esperienza costituzionale' *Diritto pubblico*, 868 (2017) and Id, *Pluralità degli ordinamenti giuridici e Costituzione repubblicana* n 4 above, 4 e 55.

[43] A. Olivetti, *L'ordine politico delle comunità. Le garanzie di libertà in uno stato socialista* (Milano: Edizioni di Comunità, 1970).

[44] G. Ambrosini, 'La pluralità degli ordinamenti giuridici nella Costituzione italiana', in G. Abbamonte et al eds, *Studi in onore di Giuseppe Chiarelli*, I (Milano: Giuffrè, 1973), 5.

relations to sociality and the spontaneity of the formations set up by individuals, and thus of the State in relation to groups. The connection with the studies of Mortati, Giannini and Romano referred to above is evident.

The Constitutional system creates an order that recognises the rights of the individual as an individual, but also as an individual in society. A subject, therefore, open to interaction with others, with an intrinsic relational dimension. An approach, therefore, that overcomes the individual-group dichotomy and, on the level of principles, the personalism/pluralism dichotomy, seeking to reduce the multiple social realities to unity, through a continuous process of reunification between the social and the juridical.

In the debate on Art 2 of the Constitution, there was opposition between those who emphasised the artificial character of the State and those who, instead, extolled the social aspect of man. Abandoning La Pira's project, which was too imbued with ideologism, both philosophical and religious, insofar as it was linked to an organicism of society, the Dossetti agenda was directed towards saving its essential presuppositions: a) the essential precedence of the human person over the State and the latter's role in serving the former; b) the recognition of the necessary sociality of all persons, destined to complete and perfect themselves through a natural economic and spiritual solidarity, first and foremost through intermediate communities; c) the affirmation of the existence of both the fundamental rights of persons and the rights of communities prior to any concession by the State. The result was a compromise rule that recognized the autonomy of social groupings and the connection of that group autonomy with individual rights.[45]

As Ridola stated,

> 'it would be a mistake, however, for anyone to draw the conclusion, from an examination of the preparatory work, that the recognition of a collective dimension of the exercise of fundamental rights remained extraneous to the constitutional text'.[46]

Despite not being accepted, the subsequent amendment tabled by Moro, aimed at affirming the protection of the collective profile that had been lacking in Art 2, was recovered in Art 18 of the Constitution.[47] After all, constitutional jurisprudence will soon embrace this perspective.[48]

If, then, the collective profile is intrinsically connected to the individual profile, attention should be given to that connection that Art 2 Constitution poses with the

[45] See E. Rossi, *Le formazioni sociali nella Costituzione italiana* (Padova: CEDAM, 1989), 32; P. Ridola, n 18 above, 208.

[46] P. Ridola, n 18 above, 210.

[47] L. Basso, 'Intervento sull'art. 18 Cost.', available at https://tinyurl.com/4rdabmxu (last visited 31 December 2021).

[48] Just think of the two rulings on the sports order, nos 49 of 2011 and 160 of 2019.

social, considered certainly prior to the State and, for this reason, recognized and not granted. The use of that term cannot, in fact, be underestimated, representing the compromise between the need for unity, proper to any pluralism, and the necessary 'social freedom' of the individual. And so the reason for the institutional recognition by the Constitution finds its foundation in the recognition of the inseparability of the two dimensions, individual and collective, of the rights of the person and, therefore, of the dimension of axiological originality of each institution. That originality, proper to the group that becomes an order, constitutes the presupposition of the constitutional recognition, operated through Art 2 Constitution which, through such recognition, legitimises but at the same time re-qualifies originality in autonomous terms, as a distinct but not impenetrable order.

The Constitution then explicitly addresses the issue of pluralism and attributes, *statically*, *relevance to the social and legal order considered in itself*, as an original system distinguished by *aseity* and *axiological speciality* (originality); on the other hand, the relevance legitimises and *dynamically modifies the nature of the orders*, reclassifying them as *derivative* and subjecting them to constitutional purposes and principles.

The Authors of '*The Legacy of Pluralism. The continental jurisprudence of Santi Romano, Carl Schmitt and Costantino Mortati*' state that

> 'a related claim is that these accounts were not only able to favor an alternative juridico-political scenario at the time – their considerations on how the state should cope with radical pluralism are particularly relevant to present-day politics as well'.

I am convinced that these words are confirmed by the perspective taken by the Constitution and, no less importantly, by the experience of the Republic.

The Obsession with Order

Stefano Pietropaoli*

Abstract

The book by Mariano Croce and Marco Goldoni retraces in a punctual, detailed way, and consistent with the methodological and theoretical premises they directly expounded, the question of the dynamics amongst law and politics in three great figures of modern legal thought. Their focus is on the way Santi Romano, Carl Schmitt and Costantino Mortati address the difficult relationship between the centripetal attraction of a supreme political entity and the centrifugal plurality of social life. Pluralism represents for all three of these authors a problem and a challenge, which calls into question the role of the state and its relations with non-state normative entities. The teaching of these masters, apparently distant in time, can indeed be highly instructive for addressing contemporary issues.

I. Three Lawyers, One Obsession

Mariano Croce and Marco Goldoni deal with a topic of primary relevance for legal and political philosophy, proposing an in-depth and largely innovative reading of three great figures of twentieth-century continental legal philosophy: Santi Romano, Carl Schmitt, and Costantino Mortati.

In the essay I'm going to discuss, points of contact and differences between 'three towering figures of Continental jurisprudence' emerge clearly. The thesis that I will try to support from the reading of the text is that these three figures, although very different from each other, developed their theories on the basis of a common problem, that I would call an 'obsession with order'. The fuel of this obsession is the apprehension about the outcome of the trial they perceive as decisive: the challenge of pluralism. And while giving a different interpretation of the same term, all three explore the salvific nature of the 'institution', as a 'barrier to contingency, a measure for the survival of that which wants to resist the wear and tear of time and the ravages of fortune'.[1]

Although chronologically contiguous, each of the three authors can be inscribed in a specific stage of twentieth-century history. I am not claiming that the work of these authors does not embrace even very broad periods (for example, Schmitt's essays cover the Wilhelmine era, the Weimar Republic, the

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[1] M. Croce, 'Dentro la contingenza. Santi Romano e Karl Llewellyn sui modi dell'istituzione' *Quaderni fiorentini per la storia del pensiero giuridico moderno*, I, 181 (2021) (my translation).

National Socialist regime, the Federal Republic). I mean something different: each of them contributed in a crucial way to the interpretation of a particular moment — of crisis — of the twentieth century, regardless of the date of their scholarly contributions, which sometimes may have been contemporary, sometimes later, and sometimes even earlier.

Santi Romano is the interpreter of the crisis at the beginning of the century, revealed in the swarming of antiparliamentary, socialist, communist and anarchist movements, and in the emergence of new political subjects — such as trade unions and corporations — capable of activating energies outside the perimeter of liberal state; a stage, therefore, in which the state is questioned in its wholeness, and in particular in its capacity to definitively and unquestionably structure social reality through its juridically strongest instrument: the statute.

Carl Schmitt, on the other hand, is the interpreter of the end of the Weimar Republic, of the failure of parliamentarianism and of the inability of liberalism to provide political answers to a troubled time, in a political scenario that was about to be invaded by National Socialist ideology. This Schmitt cannot be reduced to the cliché of 'Schmitt the decisionist'. With respect to the doctrine elaborated in the 1920s, he undertakes a rethink: a decisive and resolute 'turning point', which must not, however, be interpreted as a moment of total rupture with his previous intellectual performance. This turning point is expressed in Schmitt's adhesion to a model *lato sensu* 'institutionalist', albeit 'with different characteristics compared to the canon of authors such as Maurice Hauriou and Santi Romano.

Finally, Costantino Mortati is the interpreter of the crisis of the immediate post-war period and of the problem of founding a new democratic state and a new constitution: a 'material' constitution that can be placed alongside the formal constitution, noting that law is not a set of inert legal forms but is a construction animated by historical substances. In the changed context — a pluralistic context — of the post-World War II period, Mortati felt the need to identify new mediation tools, capable of regulating the (very high) tensions crossing society and making them converge towards a new constitutional pact. The need to put an end to the civil war took the form of the decision to coexist peacefully, founding a pluralistic constitutional democracy, within which political conflicts were possible but where it was no longer possible to identify absolute enemies.

Three crucial moments, therefore, which obliged to reflect on what was, however, a sole problem: building or rebuilding a legal-political order that was endangered, faltering and fading.

It strikes me as particularly interesting that the figures of these scholars have long been sidelined, especially in the Anglo-Saxon world. But also in the continental histories of the philosophy of law they have often been underestimated. There are many reasons for such an oblivion. The main one, it seems to me, is the difficulty of placing these thinkers in the theoretical grid that is still considered the primary reference point for legal theorists today: the opposition between

natural law and legal positivism. Romano, Schmitt and Mortati are authors who are even more interesting in that they cannot be ascribed to this 'great dichotomy'. All three are — to varying degrees — interpreters of that 'classic legal institutionalism' which, as Croce and Goldoni claim, stated a 'counterhistory' of law. This is an awkward counterhistory, because it forces us to think about law from a perspective that is far removed from the nirvana of normativism, in which state and law do not coincide, and in which the relationship between politics and law is iridescent and capable of hybridising in very different ways.

II. A Reading Key

From the very first pages of their volume, Croce and Goldoni make it clear that their theoretical interest in these three protagonists of twentieth-century legal science is driven by the need to clarify the 'double relation of juristic versus political conceptions of law and the interplay between matter and nomic force'. The theme, in other words, is the degree of autonomy (striated: from absolute dependence to full independence) of law in relation to politics.

Outlining a rigorous theoretical distinction, the authors define juristic conceptions as those approaches that tend to minimize the dependence of law on politics. In this perspective, the world of law and the world of politics are separate realities. Law, therefore, is independent of politics at both the substantive and procedural levels. As the authors note, this independence is reconstructed by the supporters of this approach, almost exclusively on the basis of the idea that law is a science, an autonomous knowledge based on the concrete analysis carried out by a class of experts who, over the centuries, have developed an armory of properly 'juridical' concepts and categories, clearly distinguishable from the domain of another knowledge. Law is thus essentially a 'law of the jurists', who oversee the production and application of legal norms.

On the opposite side, advocates of political visions claim that law is always linked to the political structure of society. Law does not originate from an internal source, but is triggered by political decisions. Proponents of this approach do not unanimously share a common view on the degree of dependence of law on politics, but they do find common ground in the absence of an effective autonomy of legal reality, which is necessarily dependent on decision-making and institutional processes outside of it.

The distinction between juristic and political conceptions proposed by Croce and Goldoni is absolutely essential to framing the differences and points of contact between Romano, Schmitt and Mortati. If the three authors are in some ways connected by an openness towards concreteness as a criterion for the construction of the legal system, the results they achieve are different (and in some cases irreconcilable).

The primary difference concerns the understanding of the role of legal

science. Romano advances a 'juristic' conception that emphasizes the role played by legal science in the composition of tensions crossing the social world. Schmitt moves, in a 'political' perspective, from an idea of legal science as the interplay of norm, decision, and concrete order. Mortati, combining the work of its predecessors in an original way, looks at legal science as instrumental in the consolidation of institutional facts.

Their understanding of the relation between the juristic and the political affects, latterly, the different way they deal with the connection between matter and nomic force. In Romano, matter is not nomic in itself, because its normative charge needs a particular type of knowledge (in this regard, the authors meticulously reconstruct his attention to the autonomy of legal science and to methodological issues). The law makes normative entities compatible within a pluralist framework. In Schmitt's concrete-order thinking, nomic force is an innate property of social practices that people produce in everyday life. Law is a selective machinery, that does not produce normativity but restrains the pluralist trend towards self-differentiation in a monist framework. Mortati thinks that legal knowledge plays the function of consolidating nomic force, but political aggregation does not 'require' it, because political aggregation itself produces the institutional facts that serve as a recognition grid for the nomic force of an institution.

In the following pages, I will try to retrace the itinerary proposed by the authors, dwelling on what seem to me to be the most important stages of their interpretative proposal.

III. Santi Romano

Santi Romano is the architect of the most original theoretical approach developed in Italy in the first half of the 20th century: the so called 'dual theory' of institutionalism and legal pluralism. *Pace* the academical philosophers of law, Romano was an expert in administrative law. It was certainly not legal philosophy — in its various forms — that made a decisive contribution to the development of Italian administrative law, but rather the opposite.

As Maurizio Fioravanti has so effectively argued,

> 'Santi Romano's approach to the problems of the state was not originally that of general theory, but that of administrative law and its science, which was apparently more circumscribed and modest, but in fact very fertile'.[2]

If this is not the time to examine the complex developments of the 'working

[2] M. Fioravanti, *La scienza del diritto pubblico. Dottrine dello Stato e della Costituzione tra Otto e Novecento* (Milano: Giuffre`, 2001), I, 406 (my translation). Also by the same author, see Id, 'Per l'interpretazione dell'opera giuridica di Santi Romano: nuove prospettive della ricerca' *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 169-219 (1981).

hypothesis' formulated by Fioravanti, we can at least grasp one aspect of it. The theory elaborated by Santi Romano can be interpreted as the coherent outcome of a reflection originated not by purely speculative concerns, but by the concrete need to systematize those institutions of positive law that he considered to be at the basis of the 'administrative state'.

Beyond the many different assessments of Romano's work, one thing seems undeniable: Romano opened the way for a 'different conception of law'[3] based on the groundbreaking notion of institution. Criticizing the theses sustained by a wide range of positivists, Santi Romano asserts that understanding law as a complex of norms is only an expedient. In order to understand what a legal system really is, it is necessary to capture its 'characteristic note', the 'nature of this whole', the *quid* that allows it to be recognized in its own unity. Because the legal system cannot be the mere sum of its parts but it is a unity. A unity that for Romano is not artificial but rather spontaneous, effective, 'concrete'.[4] The legal system of a state is therefore not the sum of the rules produced by the competent legislative body, represented by the official collections of laws and other normative acts. The legal order in Romano is something far more living and animated. It consists of the numerous mechanisms or gears linked to authority and force that 'produce, modify, enforce, guarantee legal norms, but cannot be identified with them'.[5]

Law is law if, before being a norm, it is 'an organization, a structure, a position of the very society in which it develops and that this very law constitutes as a unity, as an entity in its own right'.[6] Romano thus comes to introduce the concept of 'institution' as a sufficient and necessary concept to express that of law: 'Any legal order is an institution, and vice versa, any institution is a legal order: the equation between the two concepts is necessary and absolute'.[7] Law is therefore an institution, a system understood in its unity and complexity.

In Romano's perspective, only a properly juristic approach can express the profound sense of law: a law that is seen as an indispensable tool for reducing and governing social conflicts. In the magmatic context of the early years of the twentieth century, crossed by the explosion of pluralistic instances of various kinds, law is called upon to ensure the conditions of peaceful coexistence between subjects with conflicting interests. The vision of a 'neutral' law emerges, a law capable of going beyond contingency, which cannot and must not be the privilege of predetermined subjects.

A problematic element of this reconstruction is inherent in Santi Romano's biography. The Sicilian jurist's attention to the emergence of pluralistic instances

[3] A. Sandulli, *Costruire lo Stato: la scienza del diritto amministrativo in Italia, 1800-1945* (Milano: Giuffrè, 2009), 156.

[4] Cf A. Salvatore, 'A Counter-Mine that Explodes Silently: Romano and Schmitt on the Unity of the Legal Order' *Ethics & Global Politics*,' 50-59 (2018).

[5] S. Romano, *The Legal Order* (Abingdon, UK: Routledge, 2017), 7.

[6] ibid 13.

[7] ibid.

should be read in the light of the consideration that he was not just a jurist, but a scholar of administrative law (so much so that he became president of the Council of State during Fascism).[8] In other words, Romano's acknowledgement of the new social complexity produced by pluralistic instances should be read within the project of constructing a public law system referable, in the first instance, to the State, the 'unique' subject of the modern legal tradition. It would be this need that would guide Romano towards purely juridical positions, capable of overcoming the sociological or realist implications connected to other approaches. While starting from a historical-empirical point of observation, Romano would attempt to elide all extra-legal elements from his elaboration: a proposal that would thus aspire to be an 'aproblematic' theory of positive law.

Compared to the interpretation just mentioned (and that we can consider largely dominant, not only in Italy), Croce and Goldoni offer a very different analysis. Through a detailed reconstruction of some passages of *The Modern State and Its Crisis,*[9] read in parallel with some well-known places in *The Legal Order*, the authors confirm that in Romano social tensions are absorbed through the order: but this order is 'neither an act of fabrication nor a compromise between social forces'.

Santi Romano focuses on the organization in its totality, neutralizing the voluntaristic moment of the state on the one hand and the naturalistic drifts on the other. In other words, his approach recovers the idea of a law inherent in the concreteness of the order: a law in which the sovereignty of the state persists but is limited, and which does not admit a superior law over the State-person. He brings out a pluralist vision, diagnosing the social conflicts that new social actors can generate.

Several scholars have seen as a counterbalance to this position the anxiety to compress (and even conceal) the dynamic moment that marks society, which Romano wants 'pacified' *ab origine*: but this is not the only possible route of interpretation. Romano certainly rejects the normativistic solution, marked by the centralization and monopolisation of legal production, but in the face of the danger of disorder he does not entrench himself in the position of a state that is in any case capable of 'deactivating' pluralist tensions thanks to its being an order and organization. Croce and Goldoni's interpretative proposal moves within the different perimeter of a constitutional state that is capable of absorbing (and not rejecting) social tensions, thanks to a law that is not 'a stable body of norms and principles that is created as the outcome of a process of organization but *the process of organization itself*' (p 60).

With this move, Romano achieves a further result. Through the definition

[8] Cf G. Melis, 'Il Consiglio di Stato ai tempi di Santi Romano', in A. Romano ed, *La giustizia amministrativa ai tempi di Santi Romano presidente del Consiglio di Stato* (Torino: Giappichelli, 2004), 58, 39–58.

[9] S. Romano, 'Lo Stato moderno e la sua crisi,' in Id ed, *Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale* (Milano: Giuffre`, 1969)

of law as order-institution-organization, Romano can build an exquisitely publicist legal method, capable of freeing itself from the secular yoke of private law science. As already mentioned, Romano maintains that rules always come after organization: they are a means of the activity of the system, and not an element of its structure. Behind this assertion can be grasped the thesis in favour of the primacy of public law with respect to private law. As an identity qualification of the system, public law — which does not coincide with state law — appears as a stable but elastic element for its objective legal qualification, while the (private) norms that govern subjective legal relations are labile. It's a reversal of the traditional theoretical perspective, in which public law was the most volatile (and 'political') and private law the most stable. But this stability of public law is ensured by its peculiar elasticity, not by its rigidity.

In his intention (his obsession?) of pacifying the system, Romano conceives of an organization that is already given, but which does not disregard the effectiveness that consists in the behaviour of the members of the community. The law, with his compositional force, ceaselessly produces new conformations of the social: the order can be always 'reinvented' as new issues arise. In Romano — already in *The Modern State and Its Crisis* — law is the *locus* where 'reality can be renegotiated and reframed' in an incessant manner (p 61).

Again, the reading key proposed by the authors allows us to see in Romano's juristic method a law that does not correspond to a body of rules but is, instead, a process:

> 'the law from the juristic point of view is the process of finding the *legal* answer to both recurrent and emerging problems, whether normal or exceptional ones' (p 96).

Even exceptional problems are therefore susceptible to legal responses. And even the phenomenon commonly considered as the most remote from order — revolution — presents a series of institutions, connected in an embryonic state organization (insofar as it wants to replace the existing state). Romano goes so far as to say that revolution is violence, but still legally regulated violence. His obsession with order thus seems to go to the very edge of legal reality. But, as the authors argue, this is not the case, for the simple reason that law as a process of which Romano speaks 'has no specific boundaries' (p 96).

In Romano's perspective, the law and just the law guarantees the composition of contrasting forces. For this reason, his approach is wholly 'juristic': only a law as autonomous as possible from politics could satisfy his demand for order.

IV. Carl Schmitt

Carl Schmitt is generally remembered as the champion of decisionism and exceptionalism. In March 1922, Schmitt published the first edition of *Political*

Theology,[10] which is often considered the manifesto of Schmitt's theory.

In that book Schmitt compared two antithetical theoretical models: decisionism and normativism. But in 1933, in the preface to the second edition, Schmitt made a clear change in this orientation:

> 'I now distinguish not two but *three* types of legal thinking; in addition to the normativist and the decisionist types there is the institutional one. I have come to this conclusion as a result of discussions of my notion of 'institutional guarantees' in German jurisprudence and my own studies of the profound and meaningful theory of institutions formulated by Maurice Hauriou'.[11]

What in 1933 was a minimal but significant hint became the specific subject of an essay the following year: *On the Three Types of Juristic Thought*.[12] In Schmitt's reconstruction, each of these three models — normativism, decisionism, and institutionalism — is linked to a different conception of law, which can therefore be understood as a norm, a decision, and finally as an order. And, with respect to the preface to the second edition of *Political Theology*, in *On the Three Types of Juristic Thought* the name of Maurice Hauriou is joined by that of Santi Romano.[13]

This 'turning point' in Schmitt's theoretical path was expressed in his adhesion to an 'institutionalist' model. This is a very clear paradigm shift, claimed many times by Schmitt himself, but often forgotten in the numerous studies dedicated to him.

It is precisely to 'Schmitt the institutionalist' that Croce and Goldoni turn in their book, proposing an alternative interpretation of his thought compared to the vulgate.[14] According to the authors, Schmitt's adhesion to institutionalism profoundly affected the whole structure of his thought. To support this hypothesis, they also conduct a detailed examination of his writings prior to the 1930s, tracing scattered traces of an institutional inflection, which show how the problem of the concrete constitution of the social is a recurrent trope in his theorizing.

While the decisionist approach saw social normativity as totally dependent on political contingency (according to the scheme whereby the decision creates

[10] C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2006).

[11] ibid 3-4.

[12] C. Schmitt, *On the Three Types of Juristic Thought* (Westport, CT: Praeger, 2004).

[13] The two authors are remembered by Schmitt as 'masters and predecessors' in one of his last interviews with Fulco Lanchester: cf 'Un giurista davanti a se stesso' *Quaderni costituzionali*, 19 (1983).

[14] Mariano Croce has been conducting for several years, often in collaboration with Andrea Salvatore, an important series of studies in this perspective: the most extensive and structured outcome can be considered M. Croce and A. Salvatore, *The Legal Theory of Carl Schmitt* (Abingdon, UK: Routledge, 2013). But I would also like to mention the recent M. Croce and A. Salvatore, *L'indecisionista. Carl Schmitt oltre l'eccezione* (Macerata: Quodlibet, 2020).

normality), the institutionalist turn allows for a reassessment of the moment of effectiveness (normality is material). Certainly – unlike Romano – legal thinking for Schmitt reflects a particular juristic-political conformation: but this conformation is not the expression of the will of a capricious sovereign, because it is instead the manifestation of concrete and institutional practices. The legal order is no longer the creation *ex nihilo* of legal normality through a decision. While in the previous exceptionalist framework, normality was the product of a groundless decision on the part of a sovereign, in the institutional thinking, normality becomes the lynchpin of a society's concrete order (p 122).

Croce and Goldoni consider *Political Theology* as the expression of a transitory phase in Schmitt's thinking. Already in *The Concept of the Political*[15] – a seminal text almost invariably read in tune with *Political Theology* – it is in fact possible to detect a paradigm shift. Croce and Goldoni propose a different reading from the mainstream one, insisting on the attention that Schmitt in that essay devotes to the dynamics with which a human community comes into life. Schmitt, in their opinion, intends to address the problem of the innate plurality of social life by proposing a particular reconstruction of the generative moment of social groups. Taking up a thesis supported by Ernst-Wolfgang Böckenförde,[16] Croce and Goldoni argue that Schmitt's aim is to 'relativize' domestic conflicts, making possible an effective peaceful coexistence in accordance with procedural standards of argumentation and public discourse.

Contrary to readings that crush the perspective on the problem of the enemy and war,[17] the authors insist on the question of the jurisgenerative force of a community conceptualizing itself as a group facing an incipient threat: in other words, Schmitt's problem – his obsession – is that of the friend and the community's internal stability.

As early as 1928 Schmitt seems to be aware that the decisionist perspective was incapable of telling what a friendship relation is: it couldn't identify the bonds that hold a community together, explain how they are formed and how they put together the members of a given political reality. His idea of the sovereign decider had underrated the eruptive force of social practices: the order is not created *ex nihilo*.

With great theoretical acumen, the authors follow this path, also through the rereading of often forgotten texts such as *Freiheitsrechte und institutionelle Garantien der Reichsverfassung* (1931) and *Grundrechte und Grundpflichten* (1932), up to the fundamental 1934 essay *On the Three Types of Juristic Thought*.

[15] C. Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 2007).

[16] E.W. Böckenfo¨rde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory' 10(5) *Canadian Journal of Law & Jurisprudence*, 5-19 (1997).

[17] For more on this subject, see M. Croce, 'The Enemy as the Unthinkable: A Concretist Reading of Carl Schmitt's Conception of the Political' 43(8) *History of European Ideas*, 1016-1028 (2017).

Re-reading that text – which can be considered the clearest formulation of Schmitt's theory of the concrete order – it is possible to see how Schmitt had profoundly re-evaluated that 'thinking by norms' which twelve years earlier, in *Political Theology*, he unhesitatingly branded as a form of 'degenerate positivism'. His theory of the *konkrete Ordnung* now attempts to express a synthesis between the legal order and decision. This is an important twist, which will have decisive consequences on the development of Schmitt's thought. The combination of decisionism and institutionalism in Schmitt's theoretical path would later have two fundamental theoretical outcomes: the formulation of the *Großraumtheorie* in response to the crisis of state sovereignty, and the reflection on the end of the *jus publicum europaeum* and the consequent approach to a 'Nomos theory'.

The 'institutionalist' path followed by Schmitt does not, however, coincide with that of Romano. As the authors demonstrate, Schmitt forces the reading of *The Legal Order*, causing the text to say something that Romano did not aim to say. In Romano, the legal order is associated to a spontaneous mechanism of self-production. Unlike Romano, Schmitt sees the legal order as nothing more than the shelter of a concrete social form: legal rules are instrumental in promoting some lifestyles. The legal order gives unity to the norms and produces them as the result of a process of generalisation of exemplary conduct. The result is that the order secures a substantive, ethical, even ethnic unity. But, as the authors point out, this is not what Romano meant.

Whereas in Romano the institution coincides with law, in Schmitt the institution has not a legal but a 'protolegal' nature and must be preserved by 'legal' means. Portrayed as reiterated and recognizable patterns of conduct, institutions are social strategies capable to turn individuals into agents sharing interactional practices: what can be said to be 'friends' (p 124).

In *Political Theology* normality explained nothing and the exception everything. In the institutional frame designed by *On the Three Types of Juristic Thought*, the legal order is based on 'institutional standards', behavioral models stabilized by legal norms. The legal order is called upon to protect the uniformity of that concrete order. In this sense, normality is different from normativity: 'though the former is the cradle of the latter, these two spheres remain distinguished and distinguishable' (p 131).

That is not all: the law, besides being the product of a selection of institutional standards drawn from practice, is managed by practitioners through the recourse to 'general clauses'. But these general clauses are related to the overall vision of a leader and to the constant scrutiny by loyal officials who secure social homogeneity by selecting practices in accordance with the instructions of the leader himself. Order is the result of a process of social selection under the guidance of a political head: 'this makes Schmitt's institutionalism an 'institutionalist decisionism', as the conjunction of an antipluralist state monism with an amended decisionism' (p 133).

Schmitt's obsession with order is thus revealed not in the ablation of the concrete dimension of social life, but in the sublimation of the natural plurality of social subjects into political unity. Political power, in his vision, is called upon to fulfil the function of governing the complexity and plurality of society to exclude those practices that could jeopardise the political homogeneity: without this consistency, order cannot stand.

V. Costantino Mortati

Costantino Mortati's work can be read as an attempt to take seriously Romano and Schmitt 'by going *with them, beyond them*' (p 136). Mortati follows in the wake of Romano and Schmitt, proposing a third original institutionalist reading. In his view, Romano's approach is juristic but not realist; Schmitt's approach is realist but not juristic. Therefore, Croce and Goldoni qualify his theory as *realist institutionalism*:

> 'when he addresses original and autonomous legal orders, his theory pivots on the synthesis between the legal order and the political system' (p 147).

The most common doctrines of the constitution appeared to Mortati unproductive. Hence the spring of his research, which moves from the firm belief that, to locate the historically concrete basis of the constitution, one cannot stop at abstract formulas that, rather than clarifying, conceal the real constitutional processes. In the rejection of positivistic formalism, Mortati's name, as well as that of Santi Romano and Carl Schmitt, can rightly be compared to that of Hermann Heller, Rudolf Smend, Maurice Hauriou and Léon Duguit: all well-known authors with whom Mortati, in the pages of *La costituzione in senso materiale*, opened a dialogue.

The crisis of the state at the turn of the century had already made it impossible to rest on the certainties of the liberal order. The sovereignty of the state now seemed to waver, crushed by the mass of corporate pressures, fed by the representation they were able to obtain from parliamentary representation and multiplied by the impact that the enlargement of suffrage had on the structure of the political forces in parliament. The state, in its unity, had become a problem. There was an urgent need to understand how to regenerate it. An answer came from fascism.

During the years of Mussolini's regime, Mortati had already insisted on the centrality of the political party as a material constitutional force.[18] Having moved

[18] Argues for a strong link between Mortati and Fascism M. La Torre, 'The German Impact on Fascist Public Law Doctrine: Costantino Mortati's Material Constitution', in C. Joerges and N. Singh Galeigh eds, *Dark Legacies of Europe* (Oxford: Hart, 2003), 305-325. For a balanced

beyond the historical borders of fascism and projected into the new constitutional coordinates of democracy, that intuition was recovered and enriched on a theoretical level. After the fall of the fascist regime and the end of WWII, Mortati was elected as member of the Constituent Assembly in 1946 – contributing to the writing of crucial articles of the Italian Constitution[19] – and, later, became a judge at the Constitutional Court. His effective contribution to Italy's constitutional development is consistent with a basic tenet, well outlined by Croce and Goldoni:

> 'Mortati believed legal thought to be instrumental in the establishment of a particular political-constitutional setting, in the sense that it contributes to identifying those institutional facts that bring the legal order about' (p 7).

Mortati also has his obsession: rebuilding and stabilizing a legal order in a country without political homogeneity and exposed to centrifugal pressures. In the new post-war era, the constitution is called upon to perform the very difficult task of integrating a divided society into the unity of state life.

For nineteenth-century constitutionalism, the state was the driving force behind the constitution and politics: both were derivatives of each other. Mortati's new vision overturns this perspective: politics is the determining force of the constitution and the state. In substantial continuity with Carl Schmitt,[20] Mortati argues that the political cannot be defined on the basis of the State, but that what can be called the State must be understood on the basis of the political. The legal order, in Mortati, does not grow from the outside of society. Rather, it's embedded in societal formation (and *vice versa*).

Mortati, in this regard, affirms that a concrete state cannot be thought of as existing if not as the legal organisation of a community ordered according to a political idea. The 'politicization' of law – and particularly of constitutional law – is accompanied by an awareness of the necessary enhancement of the material content of the constitution. The political end, which is the animating spirit of the 'material constitution', is not limited to certain areas, because there is no problem of collective life which, when it becomes the terrain of a political struggle for dominance, cannot at some point become 'constitutionalized'. The state is the theatre of a never-ending political contest that results in the constitutionalisation of hegemonic forces.

and particularly detailed general framework, cf I. Stolzi, *L'ordine corporativo. Poteri organizzati e organizzazione dei poteri nella cultura giuridica dell'Italia Fascista* (Milano: Giuffre`, 2007).

[19] Cf F. Bruno, 'Costantino Mortati e la Costituente', in F. Lanchester ed, *Costantino Mortati. Costituzionalista calabrese* (Napoli: Edizioni Scientifiche Italiane, 1989), 135-156.

[20] Cf A. Catania, 'Mortati e Schmitt', in A. Catelani and S. Labriola eds, *La costituzione materiale. Percorsi culturali e attualità di un'idea* (Milano: Giuffre`, 2001), 109-128. For an overview see M. Croce and A. Salvatore, *The Legal Theory of Carl Schmitt* (Abingdon, UK: Routledge, 2013), 124-139.

The key passage of Mortati's constitutional vision is in the elaboration of the idea that, in political society, what counts are the relationships that are factually established and that already give it an order, based on domination and oriented towards certain political ends. Society, from a constitutional point of view, is not an organic unity or an undifferentiated whole, but is a reality structured on the basis of the fundamental differentiation between the dominant and the dominated.

The category of 'differentiation' plays a central role in Mortati's theory (here, in some ways, not too distant from Gramsci's notion of hegemony). This differentiation is built as much on material force as on ideological force. The moment a force in the field asserts its superiority, a new constitutional order is determined: what Mortati calls the constitution in the material sense. The notion of constitution in the material sense lends itself to being adapted to the most varied contexts and the ever-changing forms of political domination, surviving even the declining era of party politics. The party, understood as the political formation historically known by this name, is by no means an essential ingredient of the doctrine of the material constitution: in Mortati's thought, what is essential is differentiation.

The constitution is the achievement of the 'winning side'. This position is not far from the Schmittian political idea, but it does not match it. Schmitt's theory appears to Mortati unable to maintain order and stability, because it does not underline the necessity of institutional constraint. Mortati's vision, in fact, evidently tends to concede not a little to pluralism, although it highlights how pluralistic-social states are exposed to the danger of a loss of any normative and directive function of the constitution. The constitution emerges from a social organisation that must already be politically ordered, albeit in broad terms, according to a distribution of the forces operating in it in positions of supra- and subordination.

The problem is to conjoin the plurality of social interests recognised by the Constitution with the spirit of transformation outlined in the Constitution itself: to coordinate and route specific interests in accordance with the general interest inferable from the essence of the constitutional project. Pluralism is tenable only within the normative framework of a material constitution embedding fundamental aims, and desirable only if its energy can consolidate political unity. Pluralism can be tolerated, but only if instrumental in achieving principles and values at the core of the legal order.

Mortati's solution is open to an integration of pluralism into the legal order. Nevertheless, Mortati's realist institutionalism provides the background for understanding the issue of pluralism in a distinctive, but not authentically 'pluralist', way. In Mortati's perspective, the ruling class can never encompass the whole of society: the profound meaning of the constitution rests on the differentiated dominance of one party. Mortati seems to be able to combine the

static unitary institutional moment with the dynamic pluralistic one, without sacrificing sovereignty as the political will of the subjects within the legal system. Pluralism as a social instance finds its place in the parties; the unity of the institution is realized through their constitutionalization: the party is a factor of social integration, it synthesizes and gives voice to the pre-legal social reality, but it is also a direct actor and participant in the constitution of the political orientation of the state.

In the reality of constitutional life, every form of state is the result of a struggle for differentiation, which incessantly aggregates and disintegrates the ruling classes: groups, prevailing by virtue of the *de facto* power exercised, which seek in the constitution the appropriate instrument for the protection of their interests. In *La costituzione in senso materiale*, those dominant political forces, the 'bearers' of the constitution, are identified in the parties, as an instrument of involvement and integration in the life of the state.

This perspective can be defined as realist, in the meaning that it does not attribute the genesis of the constitutional order to abstract entities such as the people or the nation, but to actually dominant forces. And it is a perspective in which there is a constant concern – or obsession – for the consolidation of the principles of associative life that best serve the stabilisation and a disciplined development of power.

Mortati's realist institutionalism combines political realism and legal institutionalism: a 'peculiar blend' that regognizes the supremacy of the constitutional order and the importance of a material constitution producing 'fundamental political aims whose normative strength would serve as an internal limit for its political bearers' (p 178).

His solution addresses the problem of pluralism, but not in a really pluralist way. As stated by the authors, Mortati's approach undervalues the factors that have a 'horizontal' impact on societal formation. His attention is not focused on an understanding of the material background of the legal order but is seized by the question of the autonomy of the political.

Mortati recognises that the structure of society is striped and striated, but this recognition is exclusively functional to the construction of political unity. In other words, Mortati stresses the importance of certain forms of pluralism, opening spaces for political participation, but these are limited by the need of homogeneity necessary for a well-functioning constitutional order.

Like Romano and Schmitt, Mortati also pushed the boundaries of legal thought, dealing with issues such as the state of siege and the declaration of war. As the authors point out, even in the face of emergency and exception, Mortati attempts to save the constitutional order by claiming that such extraordinary moments can – and must – also be governed *contra legem* but *secundum constitutionem*. The pluralist challenges could only be tackled by consolidating the supremacy of the constitution. And only this 'political law' can

ensure the stability of a perimeter within which a certain degree of pluralism, preserving the necessary vitality of political action, can coexist with the need for order. Pluralism is admissible to the extent that it serves to strengthen the order, but it is not an end to the order itself.

VI. Conclusions

The book by Mariano Croce and Marco Goldoni proposes a reading of the work of three great protagonists of twentieth-century legal thought, through a new and extremely interesting key.

Their focus is on the way Romano, Schmitt and Mortati address the difficult relationship between the centripetal attraction of a supreme political entity and the centrifugal plurality of social life. Pluralism represents for all three of these authors a problem and a challenge, which calls into question the role of the state and its relations with non-state normative entities.

If the problem is the same, the answers are different. This diversity is linked not only to the different approaches with which these authors attempt to give an answer to the problem of pluralism, but also to the particular historical moment in which this problem comes to their attention. In other words, each of them captures and portrays the specific form taken by the legal order as a response mechanism to the challenge of social pluralism. They diverge on the degree of political direction needed to govern the tension between the state and other actors. But they converge on the need to reflect on what the role of law might be in ensuring or restoring order.

Through the 'double key' juristic *versus* political and matter *versus* nomic force, Croce and Goldoni highlight how the relationship between social facts and the legal order is conceived by Romano, Schmitt and Mortati as a relationship consisting not (only) of norms, but of institutions. What changes between these scholars is the role attributed to the law/politics dynamic.

Thus, Romano becomes the champion of a vision fiercely opposed to the idea that the political is the condition of existence of the legal order, and instead exalts its autonomous semiotic force, which must be kept separate and protected from the political. His obsession with order is an obsession with an order that is continually being constructed, thanks to a law that is not only capable of governing social tensions, but also ceaselessly produces new forms of social life.

The distance between Romano's juristic institutionalism and Schmitt's political concrete-order thinking can thus be grasped. According to Schmitt, pluralism is not consubstantial to order, but is always a danger that only a political vision of law can curb. And if it is no longer demiurgic decisionism that guides Schmitt in this perspective (with the miracle of the sovereign who confers nomic force to whatever he pleases), there is however the idea that social practices, in order to have normative power, must be compatible with a

basic vision of an apparatus of power (the general clauses responding to the leader's view of the community) that guarantees the inalienable political homogeneity, without which no order is thinkable.

Finally, Mortati summarises the theories of his two predecessors with originality. His political conception of law captures the fundamental interplay of material and nomic force. If Mortati, like Schmitt, emphasises the need to ensure the homogeneity of the social body, unlike Schmitt he interprets it as a juristic construction: it's a juristic act that requires juristic wisdom. As the authors so effectively state:

> 'The political and the juristic coincide when it comes to the inception of the material constitution: normative facts furnish the material content that political forces are meant to turn into the set of fundamental aims that enliven the legal order. The political is juristic' (p 195).

Croce and Goldoni's interpretative proposal retraces in a punctual, detailed way, and consistent with the methodological and theoretical premises they directly expounded, the question of the relationship between law and politics in three great figures of modern legal thought. This is a study that reads the works of Romano, Schmitt and Mortati in an original way, and in a perspective that goes far beyond mere reconstruction. It is not, therefore, a 'rediscovery' conducted only with philological taste and in an 'antiquarian' perspective. Nor is it just an attempt to fill the gap in knowledge of these authors in the English-speaking world. The teaching of these masters, apparently distant in time, can indeed – as the authors claim – be highly instructive for addressing contemporary issues. Croce and Goldoni's text confirms that to do history of the philosophy of law and politics *is to do* philosophy of law and politics.

Essays

Dealing with the Dieselgate Scandal in the US and EU

Francesca Bertelli*

Abstract

Courts decisions following the VW diesel emissions scandal, widely known as 'dieselgate', reveal a serious lack of European harmonization in the enforcement of Consumer Law thereby undermining consumer protection and uniformity across member states. This article presents an overview of the legal implications of the cheating emission scandal in the US and EU. Focusing on the EU perspective on the 'dieselgate' scandal, the essay analyses the first Italian judgment that awarded limited compensation to the buyer of a vehicle who was misled by the emission cheating device. The outcomes of the Italian litigation, especially when compared with successful US class actions, suggest that there is a need to strengthen consumer rights in Europe. The article further suggests that sustainability declarations contained in advertisements need to be better regulated.

I. Introduction

The Volkswagen (VW) dieselgate scandal involved the installation of manipulated software aimed at misrepresenting the level of polluting emissions measured during mandatory homologation tests. This scandal has triggered a large number of governmental and private actions against VW around the world addressing diverse issues such as consumer rights, competition law and environmental law with regards to effects on air quality, caused by the high levels of nitrogen oxides (NO_x) and carbonic anhydride (carbon dioxide, CO_2) produced by diesel vehicles.

This article compares the legal approaches to the scandal taken by the courts in the US and Europe.

In the US, collective redress mechanisms have been pivotal for the enforcement of consumer rights, enabling an efficient and cost-effective dispute resolution. Three partial settlements have been signed by Volkswagen and approved by the US District Court in the Northern District of California. Overall, the settlements achieved a high level of buyers' protection. The European litigation, by way of contrast, provided weaker consumer protection and revealed a lack of harmonisation between EU member States.

Additionally, from an environmental perspective, in the US two mitigation trusts were created, funded by Volkswagen pursuant to these settlements. The

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aim of creating these trusts was to financially support eligible mitigation actions to offset the excess emissions caused by the VW vehicles. These trusts implemented 'Precaution' and 'Polluter Pays' principles. In Europe, no significant mitigation measures have been required to the automaker and the general interest to a public health and a healthy environment has been neglected.

This article outlines the main features of the dieselgate case in Part II, identifying the main parties harmed by VW's misconduct. It then highlights the benefits of the adoption of the US approach in addressing the harm caused to the various claimants.

The article then offers an overview of the piecemeal EU enforcement approach in Part III, with a specific focus – in Part IV – on the different arguments used by the German Federal Court and the Italian Tribunals in order to recognize the right to compensation for damages to the owners of cars affected by the cheating-emission device. This discussion suggests that there is a dangerous lack of uniformity in dealing with the issues raised by dieselgate within the EU single market.

Lastly, the relationship established by the Unfair Commercial Practices directive between the *green claims* used by VW in commercial communications and the average consumers' reasonable expectation, encourages a broader reflection on the nature of CSR declarations disseminated by corporations.

II. Throwback 2015: The *Abgasskandal* in the US

More than five years ago a 'pandemic' scandal concerning polluting emissions of diesel vehicles, whose echo is still noisy, exploded in the US under the name of 'dieselgate'.[1]

The whole story began with the analysis of the results of an independent study promoted by the International Council for Clean Transportation (ICCT), aimed at investigating the rate of fuel consumption of diesel motors. During the research, the Center for Alternative Fuels Engines and Emissions (CAFEE) of the University of West Virginia, supported by the California Air Resource Board (CARB), discovered that the levels NO_x emitted by the diesel-powered vehicles object of their studies were significantly higher than the previously detected ones during test drives and didn't respect producers' declarations. Indeed, out

[1] M. Frigessi di Rattalma, *The Dieselgate: A Legal Perspective* (Cham: Springer, 2017), IX; G. Pedrazzi, 'Civil and Consumer Law' ibid, 114, who underlines the correlations between corporate and social responsibility, tort liability, environmental liability, contractual defective products, warranty, false information, and misleading advertising in the dieselgate scandal; B. Gsell and T. Möllers, *Enforcing Consumer and Capital Markets Law in Europe* (Cambridge: Intersentia, 2020) for a comparative analysis of the enforcement of consumers and competitors rights following the dieselgate scandal; G. Sonari Glinton, 'How a Little Lab in West Virigina Caught Volkswagen's Big Cheat' *NPR*, available at https://tinyurl.com/fvkk57ew (last visited 31 December 2021).

of the testing sequences and in ordinary driving conditions, polluting emissions exceeded legal limits.

In the first instance, Volkswagen tried to ascribe the observed inconsistencies to a technical problem and started to recall some car for a voluntary update of their software engines.

Despite this, VW recalls were not sufficient to avoid the intervention of Governmental Agencies, whose investigations ascertained the installation of a 'defeat device' in a series turbocharged direct injection (TDI) diesel motors produced between 2009 and 2015 – 11 million worldwide, roughly 500,000 in the United States – that, due to the manipulating software, were autonomously activating their emissions-control program after specific driving-sequences indicating the execution of a laboratory testing and deactivating it in real-word driving conditions, during which the emitted NO_x was up to thirty eight times higher.

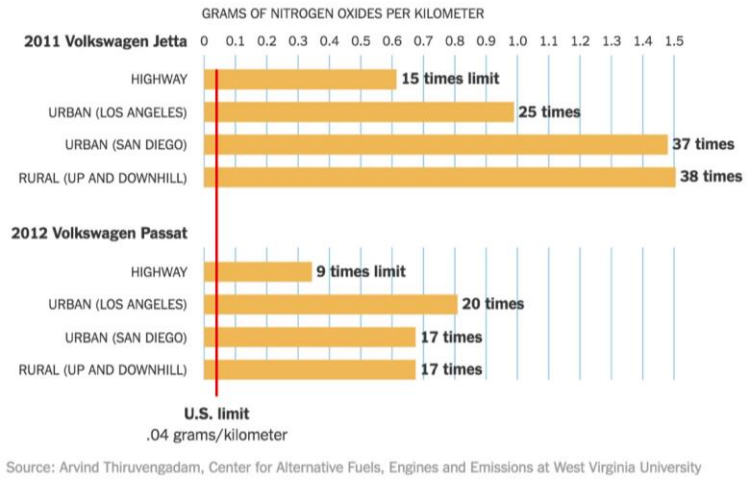

Figure 1. - Average emissions of nitrogen oxides in on-road testing.

In September 2015 the Environmental Protection Agency (EPA) issued a notice of violation of the Clean Air Act[2] to Volkswagen Group (Volkswagen AG, Audi AG, Dr. Ing. h.c. F. Porsche AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, and Porsche Cars North America, Inc., – hereinafter referred to as 'VW'). Shortly after, the CEO of Volkswagen AG, Martin Winterkorn, admitted the installation of the manipulating device though affirming his unawareness and, apologizing with VW stakeholders,

[2] The Clean Air Act (CAA - 1963) is the US federal law controlling air pollution at national level. Extended in 1970 and lastly amended in 1990, the CAA is incorporated into the US Code as Title 42, Chapter 85 (available at https://tinyurl.com/fvxjh8ww (last visited 31 December 2021).

resigned.[3]

The criminal profiles of the emissions scandal are self-evident but, for sake of clarity, they lie outside the subject matter of the present analysis, which will be focused on the dieselgate implications according to consumer and capital market law. Indeed, these two profiles demonstrate that, even if the case in point concerns clear violations of mandatory rules and legal limits, in more general terms the dieselgate scandal has:

a) raised awareness over the environmental responsibility of both corporations and consumers;

b) highlighted the problems surrounding the misleading use of green marketing strategies;

c) emphasised the need to further explore the relationship between sustainable development and private law.

In the US, the multidimensional nature of interests harmed by VW misconduct brought to a 'concert of Government and consumer claims'[4] and to a large number of lawsuits filed both in the form of mass and individual claims, especially with respect to the profile of deceptive practices.

Whereas the Federal Bureau of Investigation (FBI) and the Criminal Division of the United States Department of Justice pursued VW and its board for criminal behaviors, the civil suits against VW were filed by the United States Department of Justice Environment and Natural Resources Division on behalf of EPA. The US Customs and Border Protection (CPB) also started investigations for the importations of vehicles based upon false statements about the conformity with environmental laws and legal requirements for emissions[5] and the US Federal Trade Commission (FTC) submitted a claim for unlawful deception under the Federal Trade Act.

A coordinated multi-district and highly integrated process at the Department of Justice has obliged VW to a monetary commitment that exceeds 20 billion dollars and resolved the allegations that Volkswagen violated the Clean Air Act ('CAA') by the sale of diesel motor vehicles equipped with 'defeat devices' with

[3] Despite public declarations, it has been observed that the silent awareness of top-board members was one of the most shocking profiles of the scandal, highlighting the need for a reconstruction of internal assets and for better protocols. See F.J. Cavico and B.G. Mujtaba, 'Volkswagen Emissions Scandal: A Global Case Study of Legal, Ethical, and Practical Consequences and Recommendations for Sustainable Management' 4 *Global Journal of Research in Business and Management*, 411-433 (2016).

[4] A.J. Schmitz, 'Enforcing Consumer and Capital Markets Law in the United States', in B. Gsell and T. Möllers eds, *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal* (Cambridge – Antwerp – Chicago: 2020), 342.

[5] A.J. Schmitz, n 4 above, 344; Custom and Border Protection Statement 12 January 2017 'CBP Joins DOJ, FBI, and EPA in Announcing a Settlement Against Volkswagen as a Result of Their Scheme to Cheat U.S. Emissions Test', available at https://tinyurl.com/ts3zukps (last visited 31 December 2021); J.C. Cruden et al, 'Dieselgate: How The Investigation, Prosecution, and Settlement of Volkswagen's Emissions Cheating Scandal Illustrates the Need for Robust Environmental Enforcement' 36 *Virginia Environmental Law Journal*, 134, 118 -184 (2018).

three partial settlements, avoiding the issue of multiplication of civil enforcement claims against VW.[6] A first partial settlement, the so-called '2.0 liter partial settlement', was approved by the United States District Court (USDC) for the District of Northern California in October 2016. Shortly after, in 2017, the USDC for the District of Northern California also approved a second and a third settlement, respectively addressing vehicles containing 3.0 liter diesel engines (the '3.0 liter partial settlement') and setting out civil penalties, mitigation measures as well as injunctive relief to prevent future violations of environmental law.

Along with the aforementioned agreements, the following measures have been established:

a) a Civil Penalty, imposing Volkswagen to pay 1.45 billion dollars for the alleged civil violations of the Clean Air Act, whose final aim is to protect human health and the environment by reducing harmful emissions from mobile sources of air pollution;

b) a complex operation composed of buyback; trade it; approved software update with extension of warranties covering the emissions control system; early lease termination at no cost; restitution – to which eligible consumers could join using an online portal.[7] The eligibility criteria and main choices available for car owners and lessees were therein summarized in 'Buyback of your car (or early lease termination) + Cash' or 'Modification to your car to improve emissions. Keep your car + Cash (Modification must be approved by EPA and CARB)'. With the buyback-update operation VW undertook the duty to retire defeated cars or perform an approved emissions modification on the eighty five percent or more of the affected TDI vehicles, with a dedicated eighty five percent recall rate for California. Additionally, in order to ensure that the threshold was met, the settlement also established a penalty for each percentage point failed. This penalty comprised a payment to the created mitigation trusts (see *infra* sub c), swinging from 85 million dollars for the national recall target of 2.0 TDI engines to 13.5 million dollars for the recall target specifically established for California;

c) mitigation measures, consisting of strategies of environmental remediation through the creation of dedicated funds. Under the '2.0 liter partial settlement' VW funded with $2.7 billion 2 established mitigation trusts[8] and, under the '3.0

[6] To access timeline and documents leading to the signed settlements, see US Environmental Protection Agency 'Volkswagen Clean Air Act Civil Settlement', available at https://tinyurl.com/y3wnk273 (last visited 31 December 2021).

[7] See Volkswagen/Audi/Porsche Diesel Emissions Settlement Program, available at https://tinyurl.com/2zmtvp3c (last visited 31 December 2021).

[8] Two mitigation trust agreements have been created pursuant to the settlements and administered by an independent trustee, one for US states, Puerto Rico, and the District of Columbia and one for federally recognized Indian tribes. For more information about the trusts, see the Environmental Mitigation Trust Agreements for the Volkswagen Clean Air Act Settlement, available at https://tinyurl.com/yysc5x43 (last visited 31 December 2021).

liter partial settlement', gave an additional $225 million contribution to the to the mitigation trust funds, whose purpose is to offer financial support to eligible actions aimed at replacing diesel emission sources with cleaner technology, such as

> 'projects to reduce NOx from heavy duty diesel sources (…) replacement or repower of medium and heavy-duty trucks, school and transit buses (…) engine repower for freight switcher locomotives, ferries, tugs, forklifts, and port cargo handling equipment (…) ocean going vessel shorepower (…) charging infrastructure for light duty zero emission passenger vehicles'[9];

d) investments in Zero Emission Vehicles (ZEV) – quantified in 2 billion dollars investments for ZEV charging infrastructure and in the promotion of ZEV – as reparation measures to restore the harm caused to consumers who purchased defeated vehicles under the mistaken belief that such vehicles were produced by a company more environmentally friendly than others;

e) internal restructuring and adoption of protocols to prevent future violations, leading to the replacement of top level VW executives and to a deep remodeling of the internal processes. This included, among other things, the establishment of a steering committee to ensure compliance with the Clean Air Act; the creation of a 'whistleblower system' to allow everyone to signal anomalies in vehicles production and-or homologation procedures; and periodical audit of employees to gauge (also) environmental compliance.

A latere, a separate settlement agreement and a specific order intervened at the Federal Trade Commission (FTC) and VW agreed to pay compensation for damages – repairing, in total, more than 14 billion dollars – for 'deceptive acts or practices affecting commerce' causing the misrepresentation in consumers' beliefs that the offered cars were conform to emissions standards and more sustainable than others, in breach of Section 5(a) FTC Act 15 USC § 45(a).[10]

In its complaint, the FTC affirmed that Volkswagen marketing campaigns promoted the supposedly 'clean' attributes of its cars through advertisements, online ads and social media campaigns targeting ethical-environmentally friendly consumers.[11]

According to § 22 ff of the FTC complaint, 'Volkswagen USA targeted much

[9] US Environmental Protection Agency, n 6 above.

[10] F. Henning-Bodewig, 'Corporate Social Responsibility, the VW Scandal and the UCP Directive' 5 *Journal of European Consumer and Market Law*, 153-154 (2016); A.J. Schmitz, n 4 above, 345; *Federal Trade Commission* v *Volkswagen Group of America, Inc.*, Case 3:16-cv-01534, N.D. Cal., whose materials are available at https://tinyurl.com/3hwy3pxu (last visited 31 December 2021).

[11] *Federal Trade Commission* v *Volkswagen Group of America, Inc.* n 10 above, especially FTC complaint, available at https://tinyurl.com/4c97dyet (last visited 31 December 2021). See also N. Mansouri, 'A Case Study of Volkswagen Unethical Practice in Diesel Emission Test' 5 *International Journal of Science and Engineering Applications,* 211-216 (2016).

of its 'Clean Diesel' advertising at 'progressive' and 'environmentally-conscious' consumers. Volkswagen USA's marketer studied their targets' psychology, concluding that such consumers 'rationalize themselves out of their aspirations and justify buying lesser cars under the guise of being responsible'. According to Volkswagen USA, such consumers understood purchasing an eco-conscious vehicle as part of being 'responsible'. For example, Volkswagen promotional materials repeatedly claimed that its 'Clean Diesel' vehicles have low emissions, including that they reduce nitrogen oxides (NOx) emissions by ninety percent and have fewer such emissions than gasoline cars'.

Overall VW communication about its diesel vehicles falsely claimed that diesel cars (later discovered affected by the device) were in compliance with federal emission standards – with claims such as '50-state compliant clean diesel'; 'Clean Diesel (…) meet the strictest EPA standards in the U.S.'; were low-emissions vehicles and were also 'green' choices for consumers, induced to believe in a serious commitment of the auto-maker in building eco-conscious product.

Considering the damage suffered by consumers as a result of VW violations of the FTC Act consisting in unlawful acts and practices, which also unjustly enriched the defendant, the Court was asked to grant injunctive relief in order to avoid the prosecution of the unjust enrichment to the detriment of consumers and public interests, as well as equitable jurisdiction ancillary reliefs – rescission; reformation of contracts; restitution and price refunding; disgorgement of profits – to prevent further misconducts and offer a redress for the wrongs provoked by the violations of the enforced legal provisions.

In addition to governmental actions, consumers sued Volkswagen with individual claims. Consumers claims have been as much consolidated as possible in order to avoid an inefficient multiplication of lawsuits.[12] The amount of the compensation paid to VW customers varies between 12,500 dollars and 44,000 dollars, depending on age and distance driven for each vehicle.

Investors and shareholders also promoted class actions against VW, claiming that the company was liable for securities fraud related to the cheating emission device, since the omission of the material fact of the installation of the manipulation software misled their investment choices.

Anyhow, one of the two shareholders class actions against VW was dismissed by the Court because claimants 'failed to prove they relied on allegedly misleading

[12] A.J. Schmitz, n 4 above, 347; J.C. Cruden, n 5 above, 131; *Fiol* v *Volkswagen Group of America, Inc.*, no 15-cv-04278-CRB (N.D. Cal.), available at https://tinyurl.com/tm366mpc (last visited 31 December 2021), following which lawsuits have been brought in seven different jurisdictions; as well as US v Volkswagen, 16-CR-20394 -SFC-APP (E.D. Mich.), available at https://tinyurl.com/s2v4nem (last visited 31 December 2021). See also House of Representatives One Hundred Fourteenth Congress 'Preliminary transcript of the Hearing Before the Subcommittee on oversight and investigations of the Committee on Energy and Commerce' - Volkswagen's Emissions Cheating Allegations: Initial Questions, 8 October 2015, available at https://tinyurl.com/398x9rjb (last visited 31 December 2021).

statements'; while the other is still pending.[13]

The outcome obtained by consumers through collective redress' instruments show how class actions may be powerful in the US. They also testify that class actions are an integral means for *stakeholders* (including a wider range of beneficiaries than the ones protected by consumers law in EU)[14] to obtain remedies in mass business-to-consumer claims, allowing individuals belonging to the 'class' to obtain remedies without the need to actively join the litigation, and making enforcement as cost-effective as possible.[15]

The overseas eruption of the dieselgate[16] did not preclude its loud explosion in Europe nor has it hidden the global dimension.

III. The Rise (and Fall?) of the Dieselgate in EU

On the European side, a few months after the EPA notification concerning the violation of the Clean air Act, a Resolution of the European Parliament, strongly condemned cheating manufactures that deceived and misled consumers regarding polluting emissions,[17] pointing out that

[13] See N. Iovino, *VW Scores* Win in Emissions Cheating Securities Suit' *Courhouse New Service*, 2 March 2018, available at https://tinyurl.com/drwj969s (last visited 31 December 2021). Additionally, see also A.J. Schmitz, 'Addressing the Class Claim Conundrum with Online Dispute Resolution' *Journal of Dispute Resolution*, 361 (2020), available at https://tinyurl.com/7yeaycum (last visited 31 December 2021), whose view suggests that the dichotomy between the structure of EU and US class actions should inspire the re-framing of class action and renew the consideration of a global online dispute resolution (ODR) to promote mass claims and an effective consumer protection on a worldwide level.

[14] Cf, inter alia the Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement, US District Court Northern District of California, In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, And Products Liability Litigation, MDL no 2672 CRB, 25 October 2016, available at https://tinyurl.com/2skzxy54 (last visited 31 December 2021), 6, FTC v Volkswagen Group of America, Inc., no 3:16-cv-01534, MDL no 2672 CRB (JSC), available, together with technical details, at https://tinyurl.com/3hwy3pxu (last visited 31 December 2021) where the beneficiaries of the agreement are indicated as: Eligible Consumers, meaning 'any Eligible Owner, Eligible Lessee, Eligible Former Owner, or Post-September 2015 Purchaser, as defined by this Order, who has not excluded himself or herself from the 3.0L Settlement Program'; Eligible Owner; Eligible Lessee; Eligible Former Lessee and Owner, meaning the person who has bought or leased an Eligible Vehicle from a Covered Lessor as of 18 September 2015, and/or 2 November 2015, and who surrendered the Leased Eligible Vehicle on or before 31 January 2017.

[15] See A.J. Schmitz, 'Addressing the Class Claim Conundrum' n 13 above, 363.

[16] For an overview of the enforcement after the cheating-emissions scandals, in Latin America, Australia and China, see the contribution of C.L. Marques et al eds, n 4 above, 291, 257 and 315; for a first comparison of the US and EU consequences of the dieselgate, see also E Mujkic and D Klingner (2019), 'Dieselgate: How Different Approaches to Decentralization, the Role of NGOs, Tort Law and the Regulatory Process Affected Comparative U.S. and European Union Outcomes in the Biggest Scandal in Automotive History' *International Journal of Public Administration*, available at https://tinyurl.com/5ey4434t (last visited 31 December 2021).

[17] See European Parliament Resolution of 27 October 2015 on 'Emission Measurements in the Automotive Sector' (2015/2865(RSP), available at https://tinyurl.com/pwcp2ssy (last

> 'air pollution causes over 430.000 premature deaths in the EU yearly and costs up to an estimated EUR 940 billion annually as a result of its health impacts (…) NO_x is a major air pollutant which causes, inter alia, lung cancer, asthma and many respiratory diseases, as well environmental degradation such as eutrophication and acidification'.[18]

The EU Parliament immediately underlined the urgency for companies 'to take full responsibility for their actions and to cooperate fully with the authorities in any investigations' and declared to support the EU Commission in further investigations and interventions plans.

An EU-wide action plan agreed by VW and the EU Commissioner Vera Jourová in 2016 was established. It was based on an information, recall and update procedure – to be executed according with the solutions approved by the German Federal Motor Transport Authority (KBA), that *illo tempore* was responsible for the homologation of VW vehicles in EU – based on the installation of a flow transformer for the reduction of polluting emission and their realignment with legal standards.

A 'Trust Building Measure' was also signed, through which Volkswagen declared its commitment to solve any possible problem in terms of fuel consumption or performances encountered by owners after the update/removal of the cheating software.

Investigations in Member States were warmly encouraged and supported at the European level both by the European Parliament and the European Commission, which is still monitoring the mandatory and voluntary recall procedure and publishing regularly its progressive follow-up.[19]

The Commissioner for Justice and Consumers, Didier Reynders, has recently experimented some 'moral suasion' technique to encourage VW to offer fair compensation to all the affected EU consumers, stressing out that 'there is a strong interest in a fair and comparable treatment of all affected consumers throughout the Union', but it has been fruitless so far.[20]

visited 31 December 2021).

[18] About the impact of diesel engines polluting emission on air quality and public health, see J.E. Jonson et al, 'Impact of Excess NOx Emissions From Diesel Cars on Air Quality, Public Health and Eutrophication in Europe' 12 *Environmental Research Letters*, 18 September 2017, available at https://tinyurl.com/369y2b3h (last visited 31 December 2021); E. Rajneri, 'Illeciti lucrativi, efficacia dissuasiva dei rimedi e responsabilità sociale d'impresa. Riflessioni a margine del "dieselgate" ' *Rivista critica di diritto privato*, 402 (2017).

[19] According to the latest version of the Report of the European Commission on the 'State of play of the recall actions related to NOx emissions - Revision 16' – updated on the 27 January 2021 – EU wide total of recall rates for the VW EA189 engines shifts from eighty four percent for VW cars to seventy seven percent for Skoda cars using the same engine. The latest report, as well as it previous versions, are available at https://tinyurl.com/ats6kkry (last visited 31 December 2021).

[20] See Letter from Commissioner Reynders to Volkswagen on Compensation, 18 August 2020, Ares(2020)s4604327, available at https://tinyurl.com/5jh82y7w (last visited 31 December

The European Consumer Organisation (BEUC) has bitterly noted that

> 'With a few exceptions, Dieselgate has been a failure of public enforcement (…) only few authorities had fined Volkswagen: the Italian Competition and Market Authority imposed a €5 million fine on Volkswagen AG and Volkswagen Italia in 2016 for unfair commercial practices. In November 2017, the Dutch Authority for Consumers and Markets also fined VW €450,000. Volkswagen appealed, and the case is currently reviewed by the Rotterdam Court. In December 2019, the Rotterdam Court decided to suspend the proceedings to wait for the CJEU decision in case C-693/18 seeking clarifications on the notion of 'defeat device'.

In January 2020, the Polish Office of Competition and Consumer Protection (UOKiK) imposed a € 27 million (PLN 120 million) fine against Volkswagen Poland for issuing false information in advertising materials'.[21]

The main Belgian consumers associations launched a collective action against the VW in 2016, declared admissible in late 2017 and shaped as an 'opt-out' proceeding in which all the consumers-owners of defeated vehicles are automatically represented in the class action unless they requested to drop out.

In Austria, the *Verein fu¨r Konsumenteninformation* collected the interest of 10,000 consumers and sued VW in front of 16 different regional courts. The Austrian proceedings are still pending since they were suspended after the request for a preliminary ruling, referred in March 2019, by the Landesgericht Klagenfurt to the European Court of Justice in order to seek for clarification concerning international jurisdiction according to point 2 of Art 7 of the European Parliament and Council Regulation (EU) 1215/2012. The EU Court of Justice has finally established, in July 2020, the competency of the Austrian judge, confirming previous rulings on that point.[22] According to the EUCJ, the recalled norm should be interpreted considering that the concept of the 'place where the harmful event occurred' used as connecting factor is intended to cover both the place where the damage occurred and the place of the event

2021).

[21] See BEUC – The European Consumer Organisation, *Five Years of Dieselgate: A Bitter Anniversary 2015-2020: A Long and Bumpy Road towards Compensation for European Consumers*, 6, available at https://tinyurl.com/2y4d8fv9 pointing out the weakness of the European public and private enforcement systems and the discrepancies between the generous compensation received by US consumers and the very poor one awarded in EU; BEUC – The European Consumer Organisation, *Volkswagen Dieselgate Four Years Down the Road. An Overview of Enforcement Actions And Policy Work By Beuc and its Members since the Dieselgate Scandal*, 17 September 2019, available at https://tinyurl.com/uk9s6e6w (both last visited 31 December 2021).

[22] Cf case C-343/19, preliminary ruling under Article 267 TFEU from the Landesgericht Klagenfurt; case C-189/08 Zuid-Chemie; case C-451/18 Tibor-Trans, available at www.eur-lex.europa.eu.

giving rise to it. Thus, the defendant may be sued, at the option of the applicant, either in Germany or in the member state where the car was bought.

A second interpretation of the EU Court of Justice has been requested by the Vice-President responsible for investigation at the Tribunal de grande instance de Paris. This preliminary ruling concerned the possibility of considering the cheating software installed on VW involved vehicles according to the definition of 'defeat device' and 'emission control system' provided by Arts 3, point 10 and 5, point 2 of the European Parliament and Council Regulation (EC) no 715/2007.

Other pending proceedings – such as that promoted by Dutch Consumentenbond in the Netherlands - have been suspended pending the decisions of the EU Court of Justice. Therefore, at present it is still impossible to have a final EU perspective on the *enforcement* of VW scandal, whose definition remains uncertain. The lack of uniformity in proceedings and approaches adopted across the member states, anyhow, already gives rise to some concerns about the effectiveness of consumer protection in EU.

For this reason, the German decision of the *Bundesgerichtshof*[23] (BGH), which is the very first EU High Court pronouncing its judgement and the decision of the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato, hereinafter AGCM), whose prompt reaction anticipated other EU public authorities, offer some suggestions and deserve deeper analysis.

In particular, a comparison between the German landmark decision, the qualitative content of US settlements and the Italian two-rails of enforcement – administrative through the intervention of the AGCM; private with the first decision following an individual claim and according compensation for damages to a consumer – is useful. Indeed, it clearly allows to identify some urgent needs to be addressed in EU in order to ensure an effective consumers protection,[24] but also scratches some other profiles that should be taken into consideration when Private Law meets the concept of 'sustainability'.

IV. The Italian Case

a) Public Enforcement

After the approval of the program of intervention and the procedure for the update of the installed cheating software by the German Federal Motor Transport Authority (KBA),[25] Volkswagen started with a recall and update of the involved engines. The intention of this was to ensure the compliance with the class of emission for which homologation was released, but whose impact

[23] BGH, 25 May 2020, n VI ZR 252/19, available at www.dejure.org.

[24] ibid 476.

[25] See KBA Press Release, 16 October 2015, available at https://tinyurl.com/jda8xzuk (last visited 31 December 2021).

on other performances of the vehicles – such as fuel consumption; power and durability – is still debated, regardless of Volkswagen reassuring messages and declarations.

According to each national consumer legislations, claims against the automaker started flourishing across Member States.[26] In Italy, initiatives following the emission scandal have been developed both through public and private enforcement. Private enforcement has occurred at collective and individual level. The AGCM, solicited by an Italian consumers association, was responsible for public enforcement.

The national discipline of unfair commercial practices, as implemented by the Italian legislator when Directive of the European Parliament and of the Council of 11 May 2005 no 29 (UCPD) came into force, has substantially transposed the EU source into the Italian system. B2c unfair commercial behaviors are now regulated by Arts 20-27 of the Italian Consumer Code.

Actually, the slowness encountered on the side of private enforcement in the collective judicial proceeding, as well as in individual tort lawsuits, didn't affected the binary of public enforcement and the pronounce of the AGCM has been the first administrative decision on the dieselgate in EU.

In its ruling, the AGCM has considered de plano the installation of the manipulating device as misleading according to Art 20, para 2, of the Italian Consumer Code, but it has also given a sharp interpretation of the whole marketing strategy adopted by VW and of its collateral benefits on the Italian importer. Specifically, ascertained the violation of rules for homologation procedures, the advertisement and public communications in which VW presented the company as environmentally friendly, socially responsible and characterized by a keen interest in selling and producing eco-sustainable products, have been judged as behaviors conflicting with the general duty of good faith and fair dealing imposed to professionals. Thus, the whole conduct has been considered for its distorting potential on the economic determinations of consumers, with regard to the specific product and the average consumer, who could be – in the opinion of the AGCM and in accordance with recent behavioral studies – a

[26] J.M. Carvalho and K. Nemeth, '«Dieselgate» and Consumer Law: Repercussions of the Volkswagen scandal in the European Union' 6 *Journal of European Consumer and Market Law*, 35 (2017); ivi also S. Passinhas, '«Dieselgate» and Consumer Law: Repercussions of the Volkswagen Scandal in Portugal', 42; T. Riehm and L. Lindner, '«Dieselgate» and Consumer Law: Repercussions of the Volkswagen Scandal in Germany', 39; as well as C.A. Caine, '«Dieselgate» and Consumer Law: Repercussions of the Volkswagen Scandal in the United Kingdom', 85; C. Dybus and J. Lemmen, '«Dieselgate» and Consumer Law: Repercussions of the Volkswagen Scandal in the Netherlands', 91; E. Camilleri, 'Consumatore - qualità pubblicizzate e affidamento del consumatore. Spunti per il caso dieselgate?' *Nuova giurisprudenza civile commentata*, 704 (2016); E. Rajneri, n 16 above, 397; I. Garaci, 'Il dieselgate. Riflessioni sul private e public enforcement nella disciplina delle pratiche commerciali scorrette' *Rivista di diritto industriale*, 61 (2018); I. Garaci and E. Montinaro, 'Public and Private Law Enforcement in Italy of EU Consumer Legislation after Dieselgate' 8 *Journal of European Consumer and Market Law*, 29 (2019). For a quick overview on the enforcement in EU, se also BEUC reports, n 18 above.

'critical consumer'.[27]

Taking into account the nature, the potential misleadingness of the conduct leading to the manipulation of polluting emission by the defeat device, as well as the multinational character and economic power of Group, the AGCM underlined the seriousness of VW misconduct.

In any case, the final determination of the amount of the administrative fine has not been consistent with the need for an effective penalty, neither in a sanctioning nor in a deterring perspective, due to the monetary limitations imposed by Art 27 Consumer Code. As a consequence, a group whose annual billing in 2015 was roughly 215 billion has been marginally hit by the public enforcement remedy, since the AGCM was only enabled to establish the inhibitory measure and condemn VW to pay the administrative fine of 5 million euros, the maximum possible amount for the case in point according to the aforementioned legal provision.

Regardless of the criticalities represented by efficacy, effectivity and efficiency connected to administrative-public remedies, in more general terms the arguments followed by the AGCM during the explanation of its ratio decidendi showed some unresolved issues in consumer and capital market law. With specific regard to the casus decisus, instead, the ruling represented an important logical premise for structuring the Italian private enforcement trough collective actions and individual claims.

The wide range of remedies available in Italy to react to behaviors collectable under the name of 'unfair commercial practice' is a consequence of the EU legislative policy of the legislator of directive 2005/29, who has deliberately left member States free to lay down penalties for infringements of national provisions adopted in application of the Directive and to take all necessary measures to ensure their effective, proportionate and dissuasive enforceability (Art 13).

The definition of 'unfair commercial practice' appears now as an umbrella term grouping all those activities or omissions in contrast with professional

[27] Cf L. Becchetti and L. Paganetto, *Finanza etica. Commercio equo e solidale* (Roma: Laterza, 2003) 121; F. Forno and P. Graziano, *Il consumo critico* (Bologna: il Mulino, 2016); F. Forno and P. Graziano eds, 'Il consumo responsabile in Italia' 3 *Social Cohesion Papers*, 2 (2018); F. Forno and P. Graziano eds, 'Il consumo responsabile in Italia. I primi dati dell'indagine 2020', 1 (2020); more generally, on the phenomena of ethical consumerism, see J.H. Antill, 'Socially Responsible Consumers: Profile and Implications for Public Policy' *Journal of Macromarketing*, 18 (1984); A. Attalla and M. Carrigan, 'The Myth of the Ethical Consumer – Do Ethics Matter in Purchase Behaviour?' *Journal of Consumer Marketing*, 560, (2001); EU Commission, *Behavioural Study on Consumers' Engagement in the Circular Economy*, 2018, available at https://tinyurl.com/v9akxu9x (last visited 31 December 2021); IBM Institute for Business Value, *Meet the 2020 Consumers Driving Change*, 2020, available at https://tinyurl.com/zvrpf5vz (last visited 31 December 2021); The Nielsen Company , The Sustainability New Insights On Consumer Expectations, October 2015, available at https://tinyurl.com/yc75wnsj (last visited 31 December 2021).

'diligence' as defined by Art 2, sub lett h) of the UCPD.[28] Consequently, the UCPD allowed to advocate consumers rights threatened by VW conduct through a second binary of purely private enforcement.[29] In turn, it has been split in two branches in which the qualification of VW conduct as unfair and misleading behavior ex Art 20 and following of the Italian Consumer Code was crucial to the demonstration of the wrong suffered by other market players.

b) Private Enforcement

On the one hand, the first branch of private enforcement has been carried on by Altroconsumo – as representative association of consumers' interests – through a class action, which has recently been defined by the Tribunal of Venice.[30] The Tribunal, in admitting the collective claim,[31] relied upon the evaluation made by the AGCM. After the appeal presented by the defendant, the Court of Appeal of Venice has confirmed the position of the Tribunal, whose pronouncement has concluded the class action in July 2021.

As far as the causa petendi is concerned, the class action has its roots in the same wrongful behaviors investigated and ascertained by the AGCM. Indeed, Altroconsumo claimed for damages contesting the overall conduct of the automaker and its subsidiaries which, obtaining the homologation of their vehicles with fraud during the mandatory tests of polluting emissions and advertising at the same time their environmental vocation in marketing strategies and commercial communications, has harmed collective interests of consumers to a free self-determination.[32]

[28] According to the provision, professional diligence means 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'.

[29] The reclutancy of the Italian legislator in regulating the binary of private enforcement has been criticized by many authors, see, eg C. Granelli, 'Le «pratiche commerciali scorrette» tra imprese e consumatori: l'attuazione della direttiva 2005/29/CE modifica il codice del consumo' *Obbligazioni e contratti*, 778 (2007). In more general terms, on the usage of private remedies see M.R. Maugeri, 'Violazione della disciplina sulle pratiche commerciali scorrette e rimedi contrattuali' *Nuova giurisprudenza civile commentata*, 477 (2008); C. Camardi, 'Pratiche commerciali scorrette e invalidità' *Obbligazioni e contratti*, 408 (2010); G. De Cristofaro, 'Le conseguenze privatistiche della violazione del divieto di pratiche commerciali sleali: analisi comparata delle soluzioni accolte nei diritti nazionali dei Paesi UE' *Rassegna di diritto civile*, 880 (2010); A. Gentili, 'Pratiche sleali e tutele legali: dal modello economico alla disciplina giuridica' *Rivista di diritto privato*, 37 (2010); N. Zorzi, 'Le pratiche scorrette a danno dei consumatori negli orientamenti dell'Autorità Garante della Concorrenza e del Mercato' *Contratto e impresa*, 433 (2010); A. Fachechi, *Pratiche commerciali scorrette e rimedi negoziali* (Napoli: Edizioni Scientifiche Italiane, 2012).

[30] Tribunale di Venezia 7 July 2021, available at https://tinyurl.com/5dzb4wk7 (last visited 31 December 2021), on which Al. Palmieri and C. Sacchi offer a first overview in their comment 'Condotta illecita plurioffensiva e danni risarcibili nell'azione di classe relativa al Dieselgate'.

[31] Tribunale di Venezia 25 May 2017, *Il Foro Italiano*, I, 2432 (2017).

[32] Statement of Claim - Altroconsumo, 26, available at https://tinyurl.com/s7k4zt4j (last visited 31 December 2021)

The petitum is the hold liable VG AG and VGTI to pay for a compensation based on the pecuniary and non-pecuniary losses suffered by consumers as the result of their unlawful conducts, said to be clearly in conflict with constitutional rights and duties.[33]

The pivotal issues to address and the main criticalities to tackle were related, since the submission of the class action, to the determination of the exact amount of the compensation, whose request was made asking for:

a) the restoration of economic and non-economic interests wounded by VW misconduct. To determine the amount of the due compensation equity rules were recalled: the claim suggested to apply the provision of Art 1226 of the Italian Civil Code and pay back to consumers the fifteen percent of the purchase price, taking into consideration the economic damage consisting in the negative impact of the scandal on the market value of VW vehicles and its supposed degrowth with respect to the original purchasing request after the cheating emission scandal;

b) the non-pecuniary damage suffered by consumers due to (i) the threatening to which their contractual freedom and right of economic self-determination were exposed and (ii) the prejudice consequent to the infringment of some fundamental human rights (such as freedom, justice, health and environment).[34]

The claimant also affirmed that VW misconduct was still producing negative consequences on consumers with regard to the impairment of their freedom to contract and right of self-determination. In fact, on the technical side, VW group couldn't immediately fix the manipulating device on the vehicles and, at informational level, the automaker didn't produce any evidence of the real levels of polluting emissions produced by the involved engines, nor proof of the consequences of the update on other performances, with the result that comprehensively cars had a poorer quality than reasonably expectable.

Thus, the monetary redress has been requested estimating the higher price paid for the involved vehicles in consideration of the legitimate trust arisen by VW professional statements. Indeed, public declarations advertising environmental and ecological qualities allowed to hypothesize that, if consumers had known the real polluting impact of VW tdi cars, they would have paid less for them or they would have decided to buy a good with the same features, but for a lower price. Overall, with transparent information materials, consumers could also have taken different purchase choices, buying from a producer respecting higher environmental

[33] ibid 32.

[34] ibid 27; S. Dadush, 'The Law of Identity Harm' *Washington University Law Review* 96, 803 (2019). On the Italian enforcement of the dieselgate scandal, see also M. Gaboardi, ' "Italy" Enforcing Consumer and Capital Markets Law', in B. Gsell and T.M.J. Möllers eds, *Enforcing Consumer And Capital Markets Law* (Cambridge (UK): Intersentia, 2020), 151; G. Bevivino, 'L'impatto sul mercato delle regole, legali e convenzionali, relative ai rapporti fra imprese e stakeholders' *Mercato Concorrenza Regole*, 491 (2019).

standards.[35]

The claimants has referred to the inconsistency between the legitimate expectations of the average consumer on the environmental qualities of the commercialized vehicles and the real levels of polluting emission detected in ordinary driving conditions on the delivered goods only incidentally and ad adiuvandum to the main argument, which has been based on tort law in order to affirm the joint liability of the seller and the producer, rather than on the seller's breach of contract because of the lack of compliance with requirements for conformity of goods.[36]

The choice to consider VW responsibility toward consumers through the lens of tort law has been followed by the BGH as well, which has anchored VW responsibility toward consumers to § 826 BGB, regulating intentional damage contrary to public policy. It is self-evident that the undertaken path of tort liability finds its justification in a legal strategy aimed both at enlarging the pool of subjects interested in opting-in the class action as much as possible, and at reinforcing the position of consumers since acting against the sole seller for a breach of contract (caused by the delivery of a good with a material defect or not in conformity with the contract) could have been less effective than affirming producer's and seller's joint liability.[37]

Nevertheless, the undertaken path of tort liability is not straight and the right to obtain compensation for damage has met some hurdles related to the vague formulations of claimant's requests and, to a major extent, to the need to recognize the non-patrimonial interests involved in the case.

Defining the class action, indeed, the Tribunal of Venice[38] has focused its attention on the economic damage, which has been equitably estimated in 3000 euros – the 15 percent of the average price of VW cars with the cheating-emission device sold in Italy – for each owner of a defeated vehicle who joined the class action and no space has been given to the wound provoked on consumers' freedom of self-determination in purchase choices.

At individual level, consumers' interest in buying a sustainable good must be subject to an economic evaluation in order to ensure the access to an

[35] ibid 29.

[36] ibid.

[37] In Italy, joint liability for torts is regulated by art 2055 of the Italian Civil Code. See, *ex multis*, M. de Acutis, 'La solidarietà nella responsabilità civile' *Rivista di diritto civile*, 525 (1975); M. Orlandi, *La responsabilità solidale Profili delle obbligazioni solidali* (Milano: Giuffrè, 1993), 104; Id, 'Obbligazioni soggettivamente complesse ed equivalenza tra le prestazioni'*Rivista di diritto civile, 2006, Atti del convegno per il cinquantenario della rivista. Il diritto delle obbligazioni e dei contratti: verso una riforma? Le prospettive di una novellazione del Libro IV del Codice Civile nel momento storico attuale, Treviso – Palazzo dell'Università. 23-24-25 marzo 2006* (Padova: CEDAM, 2006) 182; A. D'Adda, *Le obbligazioni plurisoggettive* (Milano: Giuffrè, 2019) 47 and 65; Id, 'La solidarietà risarcitoria nel diritto privato europeo e l'art. 2055 c.c. italiano: riflessioni critiche' *Rivista di diritto civile*, 279 (2006).

[38] Tribunale di Venezia, 7 July 2021, n 30 above.

effective remedy and to properly address the essence of the wrong suffered by consumers who expected the regularity of the homologation procedure carried out and who trusted seller's declarations on their low environmental impact. The mentioned harm, indeed, affects fundamental rights and constitutional freedoms.

At super-individual level, the public interest in a safe and healthy environment and the need to promote sustainable development empowering consumers ethical choices could be protected by strengthening consumers protection when their purchase choices are misled by greenwashing strategies such as the ones involved in VW scandal.[39]

The reasoning of the decision of the AGCM have been used also in the first Italian decision on an individual claim against VW AG and VW Italia, in which the judge has motivated the existence of a ground for compensation literally recalling and transplanting some of the arguments on which the decision of the Competition Authority was based.[40]

Both the collective and the individual action, then, are built on the contested unlawfulness of VW behaviors, reconstructed in terms of unfair commercial practice, but the conceptual efforts required to the Judges appear inseparably linked with the need to understand what kind of damage could and should be compensated once ascertained that criteria for the affirmation of the extra-contractual liability of the producer and the national seller are met.

Actually, a claim based on the patrimonial loss and therefore on the economic damage could barely be accepted and, in any case, it would hardly offer an effective compensation to the consumer especially considering that:

- the KBA has officially approved the modification and update of the engine;

[39] For the analysis of the greenwashing and CSR communication on consumers behaviors, see eg B. Sjafjell, 'Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers' *The George Washington International Law Review*, 977 (2010), 189; Y. Chen and C. Chang, 'Greenwash and Green Trust: The Mediation Effects of Green Consumer Confusion and Green Perceived Risk' *Journal of Business Ethics*, 489 (2013); P. Seele and I. Lock, 'Instrumental and/or Deliberative? A Typology of CSR Communication Tools' *Journal of Business Ethics*, 401 (2015); A. Beckers, 'The Regulation of Market Communication and Market Behaviour: Corporate Social Responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms' *Common Market Law Review*, 475 (2017); J.P. Nehf, 'Regulating Green Marketing Claims in the United States', in A. do Amaral Junior, L. de Almeida and L. Klein Vieira eds, *Sustainable Consumption The Right to a Healthy Environment*' (Cham: Springer, 2020), 189.

With more specific regard to consumers empowerment in transition to sustainability through a real disclosure of 'green' information, see V. Mak and E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' *Journal of Consumer Policy*, 22 (2020); H.W. Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' *Journal of European Consumer and Market Law*, 229 (2019); E. Van Gool and A. Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' *Journal of European Consumer and Market Law* (2021), in course of publication.

[40] Tribunale di Avellino 10 December 2020 no 1855, unpublished at the time of the drafting of this essay.

- VW has guaranteed that the update is not going to influence negatively other performances of the involved vehicles;

– the market value of VW cars – new and used – has not shown signs of a lasting or persisting decrease as consequence of the dieselgate scandal.

The minor gravity of the strictly economic damage suffered after the purchase of a defeated car, which has always been suitable for its main purpose, which has been updated –aligning polluting emissions with legal standards without apparently compromising other qualities – together with the need to recover the real injury provoked by the fraud, instead, suggest moving a step further.

In this perspective, an effective EU enforcement could be ensured if the right of self-determination, the non-economic interest of the average consumer as well as the public interest to a safe environment are adequately balanced. The non-patrimonial interests involved have their roots in fundamental rights and appear as the key factor through which an effective remedy could be granted in the case in point.[41]

The heart of the legal provisions aimed at avoiding those professional conducts and declarations could materially distort, with regard to the product, the economic behavior of the average consumer whom they reach or to whom they are addressed – assumes a key role in the determination itself of the required remedy.

If the purchase choice has been made relying on VW declarations concerning polluting emissions, class of homologation and sustainability of the car, the conclusion of the sale contract has wounded the consumer in a permanent way: the limited rationality and knowledge of the consumer have been abused and, altering the 'integrity' of the final purchase decision the professional conduct has undermined consumers' private autonomy and, in so doing, their constitutional freedom.

Only starting from the observation – duly pointed out by the pronouncement of the BGH –[42] according to which the final aim of the whole legislation prohibiting unfair b2c commercial practices in the internal market is to protect the value of the human being and its fundamental rights, the perspective shifts and become fruitful: Personal freedom is also expressed through the authenticity of

[41] P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, IV, *Attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 2020) 321, 326 and 334, who affirms that environmental damages should be read in a solidarity and sustainability perspective that balances values and principles involved and highlights that the environment is a fundamental element of human development and an integral mean of the human being, to whose protection everyone shoud be entitled (*'(s)e l'ambiente è aspetto essenziale dello sviluppo della persona e se ciascuno ha diritto ad un habitat che garantisca la qualità della vita, a ciascuno va riconosciuto il diritto di agire affinché ciò si realizzi. L'interesse è protetto dalla stessa Carta costituzionale: la protezione dell'ambiente riguarda la qualità della vita in quanto diritto che è parte integrante dello status personae'*).

[42] BGH, 25 May 2020, n 23 above

economical choices,[43] whose defense encompasses the duty of the professional to behave according to good faith and fair dealing when 'playing' on the market-field.[44] Thus, the non-pecuniary prejudice suffered by consumers who - relying on the lawfulness of its homologation and on public declarations coming from professionals operators – bought a car supposedly less polluting than others available from VW's competitors, could ensure the award of an adequate monetarily compensation.

The recalled need to ensure the protection of consumers right to self-determination and to offer an effective remedy to react to its undue compression has inspired the ratio of the decision of the German Federal Court (BGH) of the 25th May 2020,[45] that can be considered the European milestone of the dieselgate scandal.

On the contrary, the essence of consumers legislation, as well as the main interests involved in the case in point and their nature have not been completely understood by the first Italian decision awarding compensation to a consumer who bought one of the defeated vehicles. Despite being a victory for Italian consumers, the achieved remedy is partial and the followed arguments have some downsides as they prevent a complete restoration of the suffered harm. Moreover, without a careful reading 'between the lines', the decision risks creating a dangerous misunderstanding about the possibility to consider and quantify the non-patrimonial damage.

The decision of the Tribunal of Avellino is the first Italian pronounce on a buyer's individual claim. Its content is not groundbreaking and its possible, if not desirable, that the decision will be overruled.[46]

[43] See N. Irti, *L'ordine giuridico del mercato* (Roma-Bari: Laterza, 1998), 78, with reference to the 'autenticità della scelta negoziale' protected by consumer law; A. Gentili, n 27 above, 65.

[44] On pre-contratual liability in Italy see, *ex multis*, L. Mengoni, 'Sulla natura della responsabilità precontrattuale' *Rivista di diritto commerciale*, 360 (1956); F. Poliani, 'La responsabilità precontrattuale della banca per violazione del dovere di informazione' *I Contratti*, 450 (2006); V. Roppo and G. Afferni, 'Dai contratti finanziari al contratto in genere: due punti fermi della Cassazione su nullità virtuale e responsabilità precontrattuale' *Danno e responsabilità*, 29 (2006); C. Scognamiglio, 'Regole di validità e regole di comportamento: i principi e i rimedi' *Europa e diritto privato*, 599 (2008); Id, 'Responsabilità precontrattuale e «contatto sociale qualificato»' *Responsabilità civile e previdenza*, 1950 (2016); C. Amato, *Affidamento e responsabilità* (Milano: Giuffrè, 2012), 92; G. Capaldo, 'Tutela del cliente e gestione d'impresa nei contratti bancari, in A.R. Adiutori ed, *Governo dell'impresa e responsabilità dei gestori. Giornata di studio in ricordo di Salvatore Pescatore*, Roma 15 maggio 2009 (Padova: CEDAM, 2012), 359; Id, 'L'informazione', in A. Colavolpe and M. Prosperetti eds, *Il mercato e il risparmio* (Padova: CEDAM, 2012), 73 and 81; F. Piraino, *La buona fede in senso oggettivo* (Torino: Giappichelli, 2015), 5 and 192; Id, 'La natura contrattuale della responsabilità precontrattuale (ipotesi sull'immunità)' *I Contratti*, 35 (2017); Id, 'La responsabilità precontrattuale e la struttura del rapporto prenegoziale' *Persona e mercato*, 126 (2017); A. Zaccaria, '«Contatto sociale» e affidamento, attori protagonisti di una moderna commedia degli equivoci' *Jus civile*, 185 (2017).

[45] BGH, 25 May 2020, n 23 above.

[46] See I. Garaci and E. Montinaro, n 26 above.

However, the decision is symptomatic that, so far, the Italian legal system has not included entirely effective remedies to enforce consumers rights after the dieselgate scandal, especially considering that neither the individual claim, nor the collective action have led judges to pay attention to the non-economic loss suffered by consumers and that no importance has been given to the environmental damage.

The same conclusion can be transposed to several other European legal systems. Anyhow, the discrepancies among the Italian and the German solution, together with the need to empower consumers position within the European single market, suggest a few reflections on the principle of 'sustainable development' and the interpretative function it may assume.

The Italian leading case affirmed the joint liability of VW AG – as producer – and VW Italia – as importer –, and awarded compensation for patrimonial damages, determined in the 20 percent of the purchase price, to the buyer-consumer of a car involved in the emission scandal.

As has happened in Germany in the lawsuits filed against the producer – thus bypassing the direct contractual relationship between the buyer and the seller – throughout the motivation, the judge repeats several times that the ground on which VW liability can be established shouldn't be found in the provisions of the Italian Consumer Code regulating the lack of conformity of the delivered good (Arts 128 et seq of the Italian Consumer Code) but, rather, it must be found in in the unlawfulness of the complex of behaviors which has led the AGCM to punish VW for unfair commercial practices (Art 20 et seq of the Italian Consumer Code).

Some profiles of the motivation and the broader or narrower extension given to the main issues involved are surprisingly naïve and disclose in advance the weakness of a decision which has not taken a firm position on the main problem arisen by the prejudice provoked by VW unfair behaviors: the non-patrimonial interests hurt by VW conducts in the case in point.

Across the articulation of the main points on which the decision is based, the juxtaposition between the virtuosity used to tackle some false (or already extensively discussed) problem and the 'brevitas' characterizing the exclusion of compensation for non-patrimonial loss is self-evident.

The Tribunal, in particular:

a) redundantly establishes that a person who has a professional activity can be considered 'consumer' when acting for purposes which are outside his trade, business, craft or profession and, in so doing, goes over the debate on the meaning of 'consumer'. This forgetting that the tension between a notion of consumer bound to a subjective status has been overcome for years in favor of another concept, giving relevance to the function underpinning the 'act of consumption';[47]

[47] On the definition of 'consumer', see eg, G. Benedetti, 'Tutela del consumatore e autonomia contrattuale' *Rivista trimestrale di diritto e procedura civile*, 17 (1998); N. Irti, n 41 above, 49; E. Gabrielli, 'Sulla nozione di consumatore' *Rivista trimestrale di diritto e procedura civile*, 1149

b) unnecessarily clarifies that the compensation for damages consequent to the unfair commercial practices can be awarded regardless of the existence of a contractual obligation between the plaintiff and the defendant;

c) superfluously specifies that no relevance should be given to who materially elaborated and disseminated misleading information, given that the unfairness of the commercial behaviors is the summatory of a complex of intersecting conducts;

d) needlessly reconstructs the ratio that under some circumstances, according to the Italian legal system, recognizes the possibility to award compensation according to an equitable evaluation of the judge.

Without any reconstructive effort and laying the assessment of the AGCM, the decision affirms that the dissemination of false and misleading information concerning the environmental impact, as well as the contradictions and misalignments between the discovered unlawful conducts and the green claims used by VW advertisement, allow to qualify without any reasonable doubt VW conduct as unfair and thus, due to the negative way in which they affected consumers' right to self-determination, justify the right to compensation.

Almost no space is given to the single voices of the compensatory remedy. The existence of an economic loss is stated considering that the involved vehicle, in judge's view, will certainly have a lower value on market due to the installation of the cheating device. The compensation for non-patrimonial damage has been denied even if it has been affirmed that the consumer has been injured in its free self-determination by misleading messages (literally, in the decision 'leso nella sua libera determinazione da messaggi ingannevoli') or held up on informative omissions connected with the installation of the defeat device. The rejection of the non-patrimonial request for compensation has been hastily motivated recalling a fragment of a 'precedent' (Corte di Cassazione 11 November 2008 no 26972)[48] deciding on compensation for existential damage,

(2003); Id, 'I contraenti', in P. Sirena ed, *Il diritto europeo dei contratti d'impresa. Autonomia negoziale dei privati e regolazione del mercato* (Milano: Giuffrè, 2006), 113; R. Alessi, 'Diritto europeo dei contratti e regole dello scambio' *Europa e diritto privato*, 939 (2000); S. Mazzamuto, *Il contratto di diritto europeo* (Torino: Giappichelli, 3rd ed, 2017), 104 ss.; F. Bartolini, 'Il consumatore: chi era costui?' *Danno e responsabilità*, 388 (2019).

[48] Many Italian authors have dedicated their attention to the case, see eg, F.D. Busnelli, 'Le Sezioni Unite e il danno non patrimoniale' *Rivista di diritto civile*, 97 (2009); F. Gazzoni, 'Il danno esistenziale, cacciato, come meritava, dalla porta, rientrerà dalla finestra' *Diritto di famiglia*, 73 (2009); S. Landini, 'Danno biologico e danno morale soggettivo nelle sentenze della Cass. SS. UU. 26972, 26973, 26974, 26975/2008' *Danno e responsabilità*, 19 (2009); E. Navarretta, 'Danno non patrimoniale: il compimento della «Drittwirkung» e il declino delle antinomie' *Nuova giurisprudenza civile commentata*, 81 (2009), also published online in *Persona e mercato*, 3 April 2009, available at https://tinyurl.com/2hnkmv7w (last visited 31 December 2021); P. Perlingieri, 'L'onnipresente art. 2059 c.c. e la «tipicità» del danno alla persona' *Rassegna di diritto civile*, 520, 2009, who underlines that non-patrimonial damages must be compensated everytime the unlawful conduct has injured an interest or a value inherent the the human being which has not an immediate monetary value.

whose appropriateness in the concrete case can be easily questioned.

Neither the nature of recognized damage, nor the entity of the awarded monetary compensation are, indeed, fully convincing, especially when it is clearly stated that the will to protect the authenticity of consumers' choice is the final purpose of the legislator.

The limited dimension of the awarded compensation and the total lack of any evaluation of the contractual repercussions of VW conduct look somehow hasty, when not superficial. This is especially true considering the effects of the decision of the BGH – recognizing VW liability according to the provision of § 826 (intentional damage contrary to public policy)[49] – on the sale contract between the re-seller and the buyer-consumer, as well as the impact that the transposition of the recent EU directive 27 November 2019 no 2161 will possibly have on the private enforcement following unfair commercial practices.

Precisely, recital 16 of the new Directive, recommending that Member States 'ensure that remedies are available for consumers harmed by unfair commercial practices in order to eliminate all the effects of those unfair practices', suggests that

> '(a) clear framework for individual remedies would facilitate private enforcement. The consumer should have access to compensation for damage and, where relevant, a price reduction or termination of the contract, in a proportionate and effective manner. Member States should not be prevented from maintaining or introducing rights to other remedies such as repair or replacement for consumers harmed by unfair commercial practices in order to ensure full removal of the effects of such practices. Member States should not be prevented from determining conditions for the application and effects of remedies for consumers. When applying the remedies, the gravity and nature of the unfair commercial practice, damage suffered by the consumer and other relevant circumstances, such as the trader's misconduct or the infringement of the contract, could be taken into account, where appropriate'.

Moreover, its Art 3, amending Directive 2005/29/EC, introduces a provision dedicated to individual redress, according to which

> '1. Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the

[49] § 826 BGB is one of the main provisions regulating German tort law. According to the norm 'A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage' ('*Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet*').

> conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances. 2. Those remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law.'

The neglect of the contractual dimension characterizing the Italian decision, therefore, goes beyond the necessary choice to abandon the provisions regulating the obligation of the seller to deliver goods in conformity with the sale contract, and embraces a broad evaluation of the value of precontractual information.

Anyhow, if the argument connected to the threatened (non-pecuniary, but certainly economically evaluable) right to self-determination had been adequately developed – following the example of the German federal court - and the interests in conflict had been properly compound, there could have been more effective solutions even through the path of extra-contractual liability. An appropriate valorization of the non-patrimonial profiles affected by a misconduct that injured economic actors due to the relevance acquired by public declarations on the market tempers the risk for an inadequate remedy and enhances the poli-functional nature of tort liability within the Italian legal system.[50]

On the contrary, the probable fear for an overestimation of the non-economic prejudice suffered by consumers has led, in the case in point, to its opposite: to the complete abnegation of the non-patrimonial damage.

The ratio of the exclusion is unhappy and allows to wish the judge who will decide upon the class action could, instead, weight and balance the nature and kind of the involved rights differently, especially considering that the international

[50] See P. Perlingieri, 'La responsabilità civile tra indennizzo e risarcimento' *Rassegna di diritto civile*, 1061 (2004); Id, 'Riflessioni sul danno risarcibile per lesione di interessi legittimi' *Rivista giuridica del Molise e del Sannio*, 115 (2004); Id, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 115 (2012); F. Addis, 'Risarcimento del danno contrattuale. Riflessioni su «sistema e prospettive nell'interazione fra gli ordinamenti tedesco e italiano in Europa» secondo Stefan Grundmann', in P. Pollice and L. Gatt eds, *I Processi di armonizzazione nel diritto privato europeo. Riflessioni e colloqui su taluni recenti tendenze nel sistema tedesco* (Napoli: Edizioni Scientifiche Italiane, 2008), 1; P. Pardolesi, 'La responsabilità civile 3.0 e l'insostenibile leggerezza del suo DNA polifunzionale' *Rivista di diritto privato*, 121 (2018); Id, 'Danno non patrimoniale, uno e bino, nell'ottica della Cassazione, una e Terza' *Nuova giurisprudenza civile commentata*, 1344 (2018); C. Scognamiglio, 'Principio di effettività, tutela civile dei diritti e danni punitivi' *Responsabilità civile e previdenza*, 1120 (2016); Id, 'I danni punitivi e le funzioni della responsabilità civile' *Corriere giuridico*, 912 (2016); G. Ponzanelli, 'Polifunzionalità tra diritto internazionale privato e diritto privato' *Danno e responsabilità*, 419 (2017), M. Astone, 'Responsabilità civile e pluralità di funzioni nella prospettiva dei rimedi. Dall'«astreinte» al danno punitivo' *Contratto e impresa*, 276 (2018); L.E. Perriello, 'Polifunzionalità della responsabilità civile e atipicità dei danni punitivi' *Contratto e impresa. Europa*, 432 (2018); F. Di Ciommo, 'Tanto tuonò che piovve. La cassazione abbandona le tabelle milanesi ritenendole inadeguate a considerare il danno morale' *Foro italiano*, I, 2022 (2020).

principle of sustainable development is immediately linked to VW scandal and could play a hermeneutical role in the composition of interests of the economic actors involved in the lawsuit.

The installation of the cheating device, indeed, is not simply conflicting with the superindividual interest to a healthy environment, which is by the way protected, inter alia, by Arts 2 and 9 of the Italian Constitution. It also obstacles the achievement of a true sustainable development, which is engaging public and private actors in the implementation of strategies capable of combining economic, social and environmental growth 'without compromising the ability of future generations to meet their own needs', and that can be interpreted as a post-modern derivation of the constitutional principle of solidarity.[51]

V. Concluding Remarks

The analysis of the EU dimension of the dieselgate scandal, with a specific focus on the Italian case-law – read in connection with the different conclusions

[51] See WCED, *Report of the World Commission on Environment and Development: Our Common Future*, available at https://tinyurl.com/5njm356j (last visited 31 December 2021), whose definition of sustainable development states that:

'1. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and

- the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

2. Thus the goals of economic and social development must be defined in terms of sustainability in all countries - developed or developing, market-oriented or centrally planned. Interpretations will vary, but must share certain general features and must flow from a consensus on the basic concept of sustainable development and on a broad strategic framework for achieving it' and '15. In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations'.

See also the well-known art 3.3 TUE, stating that '3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance'.

For further implications of the meaning of sustainable development from an historical, political and legal perspective, see M. Pieraccini and T. Novitz, *Legal Perspectives on Sustainability* (Bristol: Bristol University Press, 2020). See also R. Gerlagh and A. Keyzer, 'Sustainability and the Intergenerational Distribution of Natural Resource Entitlements' *Journal of Public Economics*, 315 (2001); R. Hiskes, *The Human Right to a Green Future. Environmental Rights and Intergenerational Justice* (Cambridge: Cambridge University Press, 2009); M. Libertini, 'Concorrenza e coesione sociale' *Persona e mercato*, 71 (2015); N. Lipari, 'Il ruolo del terzo settore nella crisi dello Stato' *Rivista trimestrale di diritto e procedura civile*, 637 (2018); M.S. Richter, 'Long-Termism', a study for *Scritti in onore di Vincenzo Di Cataldo*, 2020.

reached by the German Federal Court in recognizing a consumer's right for compensation – stress out the urgent need for a more uniform enforcement of consumers and capital markets law in Europe.

Indeed, on the one hand, the ineffectiveness of the penalties imposed to VW in EU, considering that VW was the main car producer in the world at the time of dieselgate testifies that the public enforcement-remedies currently available in the EU fail to perform a deterring function, nor has a reparative and precautional one. Additionally, an overview of the arguments followed by the Courts in order to affirm VW liability highlights that the main public interest involved in the case, which is the environmental one – functional to the protection of human beings has been neglected. This means that the accorded remedies have only marginally kept into consideration the environmental damage and the need to repair it. No implementation of environmental law principles such as the Polluter Pays and Precaution ones has been given.

Beyond individual rights and homogeneous collective interests, the Dieselgate has a public relevance that should be addressed in a restorative and precautionary perspective, in order to mitigate the environmental harm caused VW misconduct and protect general interests.[52]

On the other hand, the lack of harmonization between the remedies awarded so far to EU consumers certainly represents the other critical issue in European law uncovered by the emissions scandal. This deficit undermines the effectiveness of the advocacy of consumers' rights, exposing them to the risk of discriminations within Member States on the mere ground of the jurisdiction that, case by case, will decide upon the consequences of same wrongful conduct. This, therefore, threatens the coherence of the whole EU private law system.[53]

Thirdly, the grey zone in which greenwashing is still confined requires a positive intervention to regulate the use of green claims in order to prevent market failures based on the abuse of sustainability information as a market strategy.

A wise hermeneutical use of the principle of sustainable development could help in challenging all these criticalities.

Indeed, the principle has potentialities far greater than a merely programmatic function. If used as interpretative criteria, it could represent a hermeneutical tool through which the full and 'integral development' of people can be pursued,[54]

[52] See the famous Report of the World Commission on Environment and Development: Our Common Future, 1987, available at https://tinyurl.com/5njm356j (last visited 31 December 2021).

[53] See B. Gsell and T. Möllers 'The Diesel Emission Scaldal – Perspectives of Consumer Law and Capital Markets Law Enforcement: An Intradisciplinary Analysis', in B. Gsell and T. Möllers eds, n 1 above, 472.

[54] See N. de Sadeleer, 'Environmental Principles: From Political Slogans to Legal Rules', in N. de Sadeleer ed, *Environmental Principles, Modern and Post-Modern Law. Principles of European Environmental Law* (Oxford: Oxford University Press, 2002); V. Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' *The*

as well as a key concept able to explicit the relationship existing between economic freedom, private autonomy, and social purposes of economic activities.[55]

It has been widely noticed and, during the pandemic, it has become crystal-clear that the sustainability is a challenge that starts from the roots of the economic system and requires to abandon traditional models. Legal professionals are invested with the duty to analyze the criticalities of the contemporary reality and to offer concrete solutions to tackle them, trying to drive what has already been called 'difficile e fertile tempo di transizione' (difficult but fruitful time of transition).[56]

The need to balance the three pillars of sustainable development, ensuring economic growth, environmental conservation and social progress is a major challenge in which consumers and business activities are fundamental characters, but also where jurists shouldn't avoid their responsibilities for the achievement of a greater welfare.[57] Non-economic or sustainability information disclosure and their communication through various channels, in this perspective, can represent a first *trait-d'union* to introduce the non-economic interest to sustainable development in contractual relationships between private actors.

The dieselgate scandal offers an example of a concrete case in which the integration of the concept of sustainability in the evaluation of professional behaviors could lead to a stronger enforcement of consumer rights and, at the same time, to the implementation of the principle of sustainable development though private law.[58]

European Journal of International Law, 347 and 393 (2012), who notes that 'Sustainable development may thus have a hermeneutical function whether as a customary principle or as a conventional rule, and its characteristics make it a particularly useful interpretative tool. The more flexible and vague the content of the rule used as a hermeneutical reference, the wider the margin of appreciation for the judge in determining the sense of the rule interpreted. Because sustainable development is a notion the content of which varies, its elasticity grants the judge an appreciable degree of liberty, authorizing value, or circumstantial choices to be made. It is therefore a valuable hermeneutical tool weighing upon the interpretation of other rules'; Papa Francesco, *Fratelli tutti. Lettera enciclica sulla fraternità e l'amicizia sociale*, 2020, spec. §§ 66, 107, 110, 114.

[55] On the origins and function of Art 41 of the Italian constitution and on its relationship with the economic model and with the European system, see eg N. Irti, n 41 above, spec. 18, 28, 68; as well as the collected work *Il dibattito sull'ordine giuridico del mercato* (Roma-Bari: Laterza, 1999), with particular attention to the essays *ivi* collected of L. Elia, 17; M. Draghi, 81. See also M. Nuzzo, *Utilità sociale e autonomia privata* (Napoli: Edizioni Scientifiche Italiane, 1975), spec. 26 and 84.

[56] P. Grossi, *Ritorno al diritto* (Roma-Bari: Laterza, 2015), 95; see also G. Benedetti, '«Ritorno al diritto» ed ermeneutica dell'effettività' *Persona e mercato*, 3 (2017), also published in *Rivista internazionale di filosofia del diritto*, 512 (2017) and in *Rivista trimestrale di diritto e procedura civile*, 763 (2018).

[57] See L. Bruni and S. Zamagni, *L'economia civile* (Bologna: il Mulino, 2015) 118; A. Punzi, *Diritto certezza sicurezza* (Torino: Giappichelli, 2017), 127; N. Lipari, n 49 above, 642 and 644; G. Capaldo, 'Linee evolutive in tema di soggetti per una società sostenibile' *Persona e mercato*, 335 (2020).

[58] A clear illustration of the opportunity to contribute to sustainable development through civil law is offered by a recent judgement of The Hague District Court (The Hague District Court, 26 May 2021, case C/09/571932 / HA ZA 19-379 Vereniging Milieudefensie et al v

Royal Dutch Shell), which has ordered Royal Dutch Shell (RDS) to reduce the CO2 emissions of the Shell group by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy. See, especially, § 4.4.14 and § 4.4.17, stating that '(i)t can be deduced from the UNGP (United Nations Guiding Principles) and other soft law instruments that it is universally endorsed that companies must respect human rights (…)' and that '(t)he duty to respect human rights requires that companies: a. avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; b. seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'. The District Court has imposed a 'reduction obligation' on the Dutch company enforcing Art 162 of the Dutch Civil Code, interpreted in the meaning that acting in conflict with what is generally accepted according to unwritten law – in the case in point an unwritten standard of care - is unlawful. According to § 4.4.2 of the judgement, the court has included in the 'unwritten standard of care', *inter alia*: the policy-setting position of RDS in the Shell group; the Shell group's CO2 emissions; the consequences of the CO2 emissions for the Netherlands and the Wadden region; the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region; the UN Guiding Principles; RDS' check and influence of the CO2 emissions of the Shell group and its business relations; what is needed to prevent dangerous climate change; possible reduction pathways; the twin challenge of curbing dangerous climate change and meeting the growing global population energy demand; the responsibility of states and society.

Essays

‘Much Ado About Nothing?’ The New Policy on Early Medical Abortion (EMA) in Italy

Elena Caruso*

Abstract

The paper comments on new rules on EMA introduced in August 2020 in Italy. It argues that, despite being an improvement in EMA policy in comparison to the previous situation, these new rules do little to address the significant enduring barriers to EMA in many areas of the country.

I. Introduction

In August 2020, the Italian Minister of Health released a circular updating the medical abortion protocol for EMA, to reflect the ‘use of the most modern techniques, which are more respectful of the woman’s physical and mental integrity and less risky for the termination of pregnancy’, as required by the Italian Abortion Law (legge 22 May 1978 no 194).[1] EMA indicates an abortion provoked by pills (generally a combination of mifepristone and misoprostol, or only misoprostol) in the early stage of a pregnancy.[2] These new rules made changes to previous national guidelines on medical abortion dating back to 2010, which limited access to this procedure to up to seven weeks of pregnancy and recommended that the woman was ‘detained’ (‘*trattenuta*’) in the hospital for the administration of the two abortifacients and ‘until the abortion has occurred’, requiring a three-day of inpatient treatment.[3] According to the new

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[1] Art 15, Legge 22 May 1978 no 194, ‘Norme per la tutela sociale della maternità e sull’interruzione volontaria della gravidanza’, Gazzetta Ufficiale no 140 of 22 May 1978. Ministero della Salute, ‘Aggiornamento delle “Linee di indirizzo sulla interruzione volontaria di gravidanza con mifepristone e prostaglandine” ’, 12 August 2020, available at https://tinyurl.com/yfubaf3v (last visited 31 December 2021). See also these two commentaries on the new EMA policy in Italy: F. Grandi, ‘L’aggiornamento delle “Linee di indirizzo sull’interruzione volontaria di gravidanza con mifepristone e prostaglandine”: l’ultima trincea dell’effettività del servizio di interruzione di gravidanza’ *Osservatorio AIC*, 5–24 (2020); M.P. Iadicicco, ‘Aborto farmacologico ed emergenza sanitaria da Covid-19’ *Quaderni Costituzionali*, 823–826 (2020).

[2] See, for example: World Health Organization, *Medical management of abortion* (Geneva: World Health Organization, 2018).

[3] Ministero della Salute, ‘Linee di indirizzo sulla interruzione volontaria di gravidanza con

regulation, medical abortion can now be performed up to nine weeks of pregnancy and can be conducted as an outpatient treatment in hospitals and health centres.[4]

This last explicit reference to health centres ('*consultori*') is a novelty in Italian abortion services, as the role of these public facilities has been up to now largely limited to confirming a pregnant person's intention to have an abortion in a document/certificate, which is required to access a procedure which take place mainly in public hospitals (ninety-five point two percent, 2018 data).[5] In addition, this direct indication of health centres as places in which performing medical abortions gives new weight to a legal provision in legge no 194/1978, which already admits this possibility but has remained up to now substantially a 'dead letter'.[6]

Nevertheless, this commentary addresses scepticism about the real impact of these formal policy changes in substantially improving EMA access in the country, as an effective implementation of these national guidelines strongly depends on regional initiatives regarding *inter alia* abortion providers' medical training and the reorganisation of health centres.[7] To make this argument, the paper will firstly offer some general background to abortion access in Italy (Section II). Secondly, it will highlight regional inconsistencies in the implementation of EMA services across the country since they first became nationally available following the authorisation of mifepristone in 2009 and the above-mentioned national guidelines on EMA in 2010 (Section III). Thirdly, it will explore the impact of the Covid-19 pandemic on this framework and how new guidelines on EMA have failed to address significant inconsistencies in their local implementation (Section IV). Lastly, it will conclude that the new policy is unsatisfactory in failing to reduce existing regional gaps in services and fully to overcome barriers to EMA services in the country, especially in a pandemic context (Section V).

II. Abortion Access in Italy

In Italy, abortion access is mainly regulated by legge no 194/1978. According to it, a woman can have an abortion up to ninety days of gestation, if the continuation of the pregnancy, the birth or motherhood risks seriously affecting

mifepristone e prostaglandine', 16 July 2010, available at https://tinyurl.com/yn7669p5 (last visited 31 December 2021).

[4] See Ministero della Salute, n 1 above.

[5] See Art 5 legge no 194/1978. On official data of the Italian Minister of Health on abortions which are performed in public hospitals, see: Ministero della Salute, Relazione del Ministero della Salute sulla attuazione della legge contente norme per la tutela della maternità e interruzione volontaria di gravidanza (Legge 194/1978). Dati definitivi 2018, 2 July 2020, Table 23.

[6] Art 8, Law 194/1978. According to official data, in 2018 no abortion has been practiced in a public health centre ('*ambulatorio pubblico*'), see: Ministero della Salute, Relazione del Ministero della Salute sulla attuazione della legge contente norme per la tutela della maternità e interruzione volontaria di gravidanza (Legge 194/1978). Dati definitivi 2018 n 5 above, Table 23.

[7] Arts 10 and 15 legge no 194/1978.

her physical or mental health.[8] According to legge no 194/1978, a physician must certify the pregnancy and the woman's desire to terminate it in a document ('*documento*') and 'invite her to reflect for seven days'.[9] If the woman's request is evaluated as 'urgent', the doctor may issue a certificate ('*certificato*'), which allows her to end the pregnancy immediately.[10] After ninety days of pregnancy, a gynaecologist has to testify that one of two other, more onerous conditions are met for an abortion to be legal.[11] The first is the presence of a risk to the woman's life, linked with the pregnancy or the birth; in this case the abortion can be performed even after the viability of the foetus and the medical doctor has to attempt to save the foetus' life.[12] The second is the presence of a foetal anomaly which risks seriously compromising the women's physical or mental health.[13] Where a pregnant person is under eighteen years of age, legge no 194/1978 requires a parental authorisation ('*assenso*') or a judge's approval to the procedure.[14]

Once the woman became legally entitled to have an abortion, beyond gestational age which limits *when* she can have an abortion, further barriers exist regarding *who* can perform the procedure and *where* it can take place. Indeed, legge no 194/1978 requires that abortion can only be performed by a gynaecologist in public hospitals, private clinics and medical facilities (such as health centres) that have been specifically authorised.[15] The majority of Italian gynaecologists (sixty nine percent) refuse to perform abortion on conscientious grounds, a possibility recognised by legge no 194/1978 for medical personnel directly involved in the procedure.[16] Unlike other medical services in the Italian public health system, abortion is subject to a special regulatory framework that limits the possibility of delivering abortion services in private health care facilities.[17]

In addition, although as I observed above legge no 194/1978 includes an explicit preference for 'use of the most modern techniques' for abortions, official data show how the 'obsolete method' of dilation and curettage (D&C) is still

[8] Art 4 legge no 194/1978.

[9] Art 5, para 4, legge no 194/1978.

[10] Art 5, para 3, legge no 194/1978. According to official data, in 2018, forty-four point one percent of all documents or certificates were released in health centres and the 'urgency' was certified in twenty-one point three percent of total abortions. See: Ministero della Salute, Relazione del Ministero della Salute sulla attuazione della legge contente norme per la tutela della maternità e interruzione volontaria di gravidanza (Legge 194/1978). Dati definitivi 2018 n 5 above, Tables 16 and 18.

[11] Arts 6 and 7, legge no 194/1978.

[12] Art 6, para 1, lett. a, and Art 7, para 3, legge no 194/1978.

[13] Art 6, para 1, lett. b, legge no 194/1978.

[14] Art 12, legge no 194/1978.

[15] Art 8, legge no 194/1978. See Ministero della Salute, n 5 above, Table 23.

[16] Art 9, legge no 194/1978. On the data on conscientious objection among medical personnel, see Ministero della Salute, n 5 above, Table 28.

[17] Arts 10 and 19, legge no 194/1978.

practiced in the country.[18] Indeed, ten point eight percent of total abortions in Italy are still performed via D&C, with regional peaks of thirty-seven point eight percent in Sardinia, twenty seven point five percent in Abruzzo, twenty five percent in Friuli Venezia Giulia, and twenty-four point one percent in Aosta Valley.[19] In Section III, I will further focus on this issue of abortion techniques, by exploring the case of medical abortion.

As such, this problematic socio-legal framework helps to explain why abortion is often 'a denied right' for women and pregnant people in Italy.[20] Indeed, international human rights bodies, including those within international organisations such as the United Nations and the Council of Europe, and international non-governmental organisations such as Human Rights Watch have raised concerns that the current state of abortion access in the country may violate international human rights standards.[21] Recently, in March 2021, the European Committee of Social Rights (ECSR) found that abortion access in Italy does not conform with the European Social Charter (ESC),[22] confirming the findings of its earlier reports in 2013 and 2015.[23] Respectively almost eight and six years on from those two decisions, the ECSR observes that women and pregnant people still face multiple obstacles to access abortion in Italy.[24]

In more detail, in both cases, the ECSR laments a violation of Art 11 ESC (right to health) alone and in conjunction with Art E ECS (non-discrimination).

[18] Art 15, legge no 194/1978. According to the World Health Organization 'D&C is an obsolete method of surgical abortion and should be replaced by vacuum aspiration and/or medical methods' see: World Health Organization, *Safe abortion: technical and policy guidance for health systems Second edition* (Geneva: World Health Organization, 2012), 31. However, according to the Italian Minister of Health's official data, the majority of total abortions (forty seven percent 'Karman' plus sixteen point six percent '*isterosuzione*') in Italy are carried out via vacuum aspiration, see: Ministero della Salute, n 5 above, Table 25.

[19] Ministero della Salute, n 5 above, Table 25.

[20] Magistratura Democratica, 'Verso l'8 marzo - Diritto d'aborto, diritto negato', *Questione Giustizia*, 8 March 2017, available at https://tinyurl.com/4xvaxz2s (last visited 31 December 2021).

[21] UN Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fifth periodic report of Italy' (28 October 2015) E/C.12/ITA/CO/5; UN Human Rights Committee, 'Concluding observations on the sixth periodic report of Italy' (1 May 2017) CCPR/C/ITA/CO/6; UN Committee for the Elimination of All Forms of Discrimination against Women, 'Concluding observations on the seventh periodic report of Italy' (24 July 2017) CEDAW/C/ITA/CO/7. See also Human Rights Watch, 'Italy: Covid-19 exacerbates obstacles to legal abortion', 30 July 2020, available at https://tinyurl.com/4xvaxz2s (last visited 31 December 2021).

[22] ECSR, 'Follow-up to decisions on the merits of collective complains. Finding 2020', 25 March 2021,187-195, available at https://tinyurl.com/be52pz6a (last visited 31 December 2021).

[23] ECSR, International Planned Parenthood Federation-European Network (IPPF-EN) v. Italy, Complaint No 87/2012, decision on the merits of 10 September 2013, Resolution CM/ResChS(2014)6; ECSR, Confederazione Generale Italiana del Lavoro (CGIL) v Italy, Complaint No 91/2013, decision on admissibility and the merits of 12 October 2015, Resolution CM/ResChS(2016)3. See also: ECSR, 'Follow-up to decisions on the merits of collective complaints. Findings 2018', 31 December 2018, available at https://tinyurl.com/bdda6388 (last visited 31 December 2021).

[24] ECSR, n 22 above.

These violations are grounded in a lack of abortion providers, due to a high number of conscientious objecting gynaecologists; and in the fact that women and pregnant people are forced to travel within Italy and abroad to access abortions.[25] The second decision of 2015 also included a labour law part concerning discrimination (Art 1, para 2, ESC) and moral harassment (Art 26, para 2, ESC) against non-objecting doctors.[26]

Significantly, official sources from the Italian Government also confirm problems with access to abortion in Italy. According to the last available data published by the Italian Minister of Health, the number of illegal abortions performed outside the Italian National Health Service (*Servizio Sanitario Nazionale*) is estimated to be between ten thousand and thirteen thousand every year.[27] But other data also attests that women and pregnant people need to seek safe abortions outside formal healthcare services in Italy, despite its 'liberal' legal framework. Women On Web, an international telehealth abortion service, is reported to have received four hundred and seventy three requests from Italy in 2019, a number that significantly increased when the Covid-19 pandemic started.[28] Yet, another recent study illustrates how, especially due to gestational age limits, women and pregnant people from Italy still travel to other European countries to have abortions.[29]

In sum, while legge no 194/1978 partially legalised abortion under certain circumstances, at the same time it also introduced a series of barriers which substantially obstructs abortion access in the lived reality of many women and pregnant people in the country.[30]

III. EMA, Italian Style

Italy's EMA policy offers a good example of some of the difficulties encountered in keeping pace with scientific and clinical advances in the regulation of abortion, and also the significant impact of formal rules in effectively shaping

[25] ECSR, n 23 above.

[26] ibid.

[27] Ministero della Salute, n 5 above, 19.

[28] See Women on Web data reported by dr Rebecca Gomperts in 'Dalla dott.ssa Rebecca gomperts di Women on Web', in C. Settembrini, *Obiezione respinta! Diritti alla salute e giustizia riproduttiva*, (Novate Milanese: Prospero Editore, 2020), 175-182; A.R.A. Aiken et al, 'Demand for self-managed online telemedicine abortion in eight European countries during the COVID-19 pandemic: a regression discontinuity analysis', *BMJ Sexual & Reproductive Health*. Published Online First: 11 January 2021.

[29] S. De Zordo et al, 'Gestational age limits for abortion and cross-border reproductive care in Europe: a mixed-methods study' *BJOG: An International Journal of Obstetrics & Gynaecology*, 838– 845 (2021).

[30] Nevertheless, this problematic framework regards also other countries with a 'liberal' legal framework. See *ex multis*: K. Killinger et al, 'Why women choose abortion through telemedicine outside the formal health sector in Germany: a mixed-methods study', *BMJ Sexual & Reproductive Health*, Published Online First: 23 November 2020.

abortion access in the country. EMA was introduced in Italy in 2009 after the authorisation of mifepristone (Mifegyne) by the Italian Medicines Agency (Agenzia Italiana del Farmaco, hereafter AIFA).[31] Before this date, some gynaecologists were already offering EMA through two procedures involving medicines that were not licensed in Italy (such as mifepristone before December 2009): by importing these pills from abroad or starting a trial test for their use.[32] When the pharmaceutical corporation Exelgyn requested authorisation for Mifegyne in Italy, AIFA had limited discretionary power to examine the application, according to a mutual recognition procedure for a medicine already authorised in another European Union country.[33] Nevertheless, the Italian Ministry of Health, in Berlusconi's fourth Cabinet, tried to obstruct and influence this process.[34]

This pressure can be seen, for instance, in five press statements that AIFA released between 30 July and 2 December 2009 regarding the authorisation of Mifegyne in Italy.[35] For its part, AIFA claimed to be in 'harmony' ('*sintonia*') with the Ministry of Health's position on this matter.[36] Significantly, in various communications, AIFA noted its marginal role in this procedure and repeatedly underlined that 'it did not introduce' mifepristone in Italy.[37] Nevertheless, AIFA eventually succeeded in setting anomalous limits on the use of mifepristone, such as the 'restriction within fourty nine days of pregnancy, instead of the current sixty three' and the need for hospitalisation ('*ricovero*') to access it.[38] In so doing, AIFA proudly claimed to put an 'end to the illusion that medical

[31] AIFA, 'Autorizzazione all'immissione in commercio del medicinale per uso umano "Mifegyne"'. Estratto determinazione no 1460 of 24 November 2009. Gazzetta Ufficiale no 286 of 9 December 2009.

[32]Legge 23 December 1996 no 648, 'Conversione in legge del decreto-legge 21 ottobre 1996, no 536, recante misure per il contenimento della spesa farmaceutica e la rideterminazione del tetto di spesa per l'anno 1996', *Gazzetta Ufficiale* 23 December 1996 no 300; Legge 8 April 1998 no 94 'Conversione in legge, con modificazioni, del decreto-legge 17 February 1998 no 23, recante disposizioni urgenti in materia di sperimentazioni cliniche in campo oncologico e altre misure in materia sanitaria', Gazzetta Ufficiale 14 April 1998 no 86; A. Carapellucci et al, *RU486: Una vittoria radicale* (Turin: Associazione Radicale Adelaide Aglietta, 2009). See also the interview to dr Emilio Arisi who practiced medical abortion at the Santa Chiara hospital of Trento before December 2009: E. Cusmai, 'Ru486, gli ospedali danno già la pillola per abortire' *Il Giornale.it*, 9 January 2008 available at https://tinyurl.com/2p9fhv4e (last visited 31 December 2021).

[33] Decreto legislativo 24 April 2006 no 219, 'Attuazione della direttiva 2001/83/CE (e successive direttive di modifica) relativa ad un codice comunitario concernente i medicinali per uso umano, nonché della direttiva 2003/94/CE', Gazzetta Ufficiale 21 June 2005 no 142. See also: AIFA, 'L'AIFA non ha introdotto la RU486 in Italia ma l'ha regolamentata a tutela della donna', press release, 28 August 2009.

[34] AIFA, 'CdA AIFA: pienamente coerente con indicazioni Ministro Sacconi Delibera Assunta 30 luglio scorso', press release, 2 December 2009.

[35] See the AIFA press releases' archive available at https://tinyurl.com/5d6vuj9p (last visited 31 December 2021).

[36] AIFA, n 34 above.

[37] See, for instance: AIFA, n 33 above.

[38] Ibid.

termination of pregnancy is a simple, quick and inexpensive event'.[39]

Eventually, in November 2009, AIFA licensed Mifegyne subject to these specific restrictions, which are unjustified by reliable scientific evidence but were rather driven by explicit anti-choice beliefs. A few months later, the Italian Superior Health Council confirmed the necessity ('*ritiene necessario*') of certain restrictions contained in this authorisation, including a three-day inpatient treatment ('*ricovero ordinario*') to undergo EMA, a provision later included in the above mentioned Italian Ministry of Health's national guidelines on this matter.[40] As result, the barrier to access up to seven weeks of pregnancy and the recommendation of three-day inpatient treatment in hospital delineated a policy which is incongruent with those adopted within other European Union states: an EMA 'Italian style'.

Once medical abortion with mifepristone and prostaglandin officially became a national practice, some hospitals could rely upon experienced providers and cooperation with local institutions, while in other contexts the application of new rules was less immediate.[41] An Italian Health Ministry's report on the implementation of the new procedures in an initial two-year period attested to these important regional inconsistencies.[42] Notably, while three thousand eighty three medical abortions were undergone in Emilia-Romagna in 2010-2011, only two medical abortions were reported in Marche in the same time period.[43] Moreover, with regard to the requirement of three-day inpatient treatment, the same report also showed that the majority of women and pregnant people voluntarily left the hospital after the first day, to return after 48 hours to take the prostaglandin.[44]

Also to avoid the waste of resources caused by imposing unnecessary inpatient treatments of three days (in terms of costs, available appointments), some regions (such as Emilia-Romagna, Tuscany, Lazio, Puglia, Lombardy, Umbria) progressively overcame national guidelines and permitted medical abortion as an outpatient treatment in hospital (the so-called 'day-hospital'), by exploiting the generic reference to hospitalisation ('*ricovero*') in AIFA's authorisation of Mifegyne.[45] This means that these regions interpreted '*ricovero*' as requiring the administration of pills in a hospital setting, with the patient then free to leave after taking the mifepristone, to return then back to the hospital for swallowing the prostaglandin.

This local regulation contributes to delineate two 'Italies' with regard to EMA

[39] Ibid.

[40] Ministero della Salute, n 3 above.

[41] C. Flamigni and C. Melega, RU486. *Non tutte le streghe sono state bruciate* (Rome: L'Asino D'Oro, 2010), 137-150.

[42] Ministero della Salute, 'Interruzione volontaria di gravidanza con mifepristone e prostaglandine. 2010-2011', 28 February 2013.

[43] ibid 4.

[44] ibid 16.

[45] AIFA, n 31 above.

policy: one which formally applied national recommendations for a three-day inpatient treatment and another which actively regulated medical abortion as an outpatient treatment in hospital, distancing itself from national guidelines. According to the most up to date available data on this matter (2018), four of the six regions with a medical abortion rate higher than the national rate (twenty point eight per cent) are those with regional guidelines permitting EMA as an outpatient treatment (Emilia Romagna, thirty-six point nine per cent; Tuscany, twenty-nine point three per cent; Lazio, twenty five point two per cent; Puglia, twenty seven point eight per cent).[46] Although there is no direct correspondence between local rules and number of medical abortions provided, these data suggest that a policy closer to scientific evidence could play a part in improving access to EMA.

IV. The Covid- 19 Pandemic

The inadequacy of this national EMA policy definitively exploded in an Italian paradox during the Covid-19 pandemic, as the global scientific community and pro-choice movements endorsed reducing unnecessary hospitalisation in favour of implementing telehealth services.[47] Telemedical medical abortion is indicated as the most suitable way to terminate an early pregnancy during a pandemic.[48] Nevertheless, given the requirement to stay in a hospital to take both courses of abortion pills (as in practice women and pregnant people were asked to go to the hospital at least twice: once for the mifepristone and once for the misoprostol), during the pandemic's first phase before August 2020, in Italy surgical abortion became in some cases a preferable procedure in the context of the pandemic, as it required only one access to medical facilities.[49]

With the Italian Ministry of Health apparently paralysed regarding any improvement of EMA policy, two regions intervened in the matter with opposite outcomes. Tuscany led by President Enrico Rossi (Democratic Party) agreed a new protocol to extend access to medical abortion up to nine weeks, while also allowing the provision of these services in health centres.[50] In so doing, Tuscany anticipated the contents of a new policy that only a few weeks later, in August 2020, would be introduced at the national level. Conversely,

[46] Ministero della Salute, n 5 above, Table 25.

[47] See, for example: J. Todd-Gher and P.K. Shah, 'Abortion in the context of COVID-19: a human rights imperative' *Sexual and Reproductive Health Matters*, 28, 28-30 (2020).

[48] M. Prandini Assis and S. Larrea, 'Why self-managed abortion is so much more than a provisional solution for times of pandemic' *Sexual and Reproductive Health Matters*, 28, 37-39 (2020).

[49] Human Rights Watch, n 21 above; E. Caruso and G. Zanini, 'Access to medical abortion in Italy is characterized by "unnecessary burdens" and "unjustified barriers"- this has stayed the same during the pandemic' *International Campaign for women's right to safe abortion*, 16 June 2020, available at https://tinyurl.com/4xnd8vad (last visited 31 December 2021).

[50] See Regione Toscana, 'Delibera della Giunta Regionale con oggetto "protocollo operativo per l'Interruzione Volontaria di Gravidanza farmacologica" ', 29 June 2020 no 827.

Umbria, led by President Donatella Tesei (Matteo Salvini's League Party), reversed the previous regional decision on medical abortion performed as a day-care procedure, approved in December 2018 by the former Democratic Party's president Catiuscia Marini.[51] President Tesei's decision inflamed public opinion on the unnecessary restrictions place on medical abortion in the country and contributed to building momentum towards an updated EMA protocol in August 2020.[52]

Therefore, the Italian case illustrates how the Covid-19 pandemic worsened an already problematic framework with regard to abortion access, especially during the first lockdown in Spring 2020,[53] but at the same time forced some long overdue changes to the regulation of EMA, which has often failed to keep pace with new clinical realities.[54]

However, although these new national guidelines on EMA are an improvement on previous policy, they are flawed in two significant respects. The first strongly emerges in light of comparative study with the implementation of abortion services in other Western countries.[55] For instance, while in England the UK Government temporarily authorised the home use of both pills at home and it is now in discussion to keep it permanently, the Italian guidelines still remain problematic in this point. Indeed, they expect women and pregnant people to go to hospitals or health centres at least twice to take the two abortifacients and they do not include explicit reference to abortion at home or via telemedicine.[56] This is despite the fact that, addressing the Italian Superior Health Council in June 2020, the Italian Society of Obstetricians and Gynaecologists underlined the safety of self-administration of misoprostol and advocated for the de-hospitalisation of medical abortion.[57]

The second critical point is that these national guidelines are likely to have

[51] See Regione Umbria, 'Deliberazione della Giunta Regionale con oggetto "interruzione volontaria di gravidanza con metodica farmacologica" ', 4 December 2018 no 1417; Regione Umbria, 'Deliberazione della Giunta Regionale con oggetto "linee di indirizzo per le attività sanitarie nella fase 3" ', 10 June 2020 no 467.

[52] See, for example A. Cangemi, 'Aborto farmacologico, donne in piazza contro obbligo di ricovero in ospedale deciso da Tesei' *Fanpage*, 19 June 2020, available at https://tinyurl.com/mwbdpwus (last visited 31 December 2021).

[53] See n 49 above.

[54] See Section III above.

[55] This has been for instance the case of England, in which the UK Government temporally introduced telemedical medical abortion, see: Department of Health and Social Care, 'Temporary approval of home use for both stages of early medical abortion', 30 March 2020, available at https://tinyurl.com/mrythvcb (last visited 31 December 2021). Available data show that this new service has been successful, see for instance: A. Aiken et al, 'Effectiveness, safety and acceptability of no-test medical abortion (termination of pregnancy) provided via telemedicine: a national cohort study' 128(9) *BJOG: An International Journal of Obstetrics & Gynaecology*, 1464-1474 (2021).

[56] Ministero della Salute, n 1 above.

[57] Società Italiana di Ginecologia e Ostetricia (SIGO), opinion to the Italian Superior Health Council, 25 June 2020, attachment in Ministero della Salute, n 1 above.

only a moderate impact in effectively overcoming regional gaps in access to EMA. Indeed, even with intervention to limit regional initiatives, such as the one above mentioned in Umbria, local differences in this sector will probably endure as the effective implementation of these new national guidelines remains largely dependent on each region's initiative. Especially in some territories led by right-wing governments (such as Marche) there has been strong opposition to the adoption of these national guidelines, in particular with regard to health centres directly providing medical abortions.[58] In the opposite direction, on 26 January 2021, Lazio, led by Nicola Zingaretti (Democratic Party), published in its regional gazette a new EMA protocol which permits, after one visit to hospital or health centre (for a scan and swallowing the mifepristone), self-administration of misoprostol at home.[59] In so doing, Lazio's new rules constitute the most advanced protocol on EMA in the country and in addition one of the most liberal interpretations, at least on paper, of Art 8 of legge no 194/1978. Indeed, the autonomous initiative of Lazio in this field remains for now an isolated and virtuous case, which suggests an enduring local difference in EMA access in Italy.

V. Conclusions

This commentary illustrates that, while the Covid-19 pandemic has exacerbated EMA access especially in the first lockdown in Spring 2020, at the same time it also pushed to some changes on EMA policy. These changes significantly intervened after ten years of struggle to overturn previous guidelines dated back to 2010, which were scientifically ungrounded and embedded by anti-choice ideology. For this reason, although the new Italian guidelines on EMA introduced quite modest changes compared with the more decisive 'telemedical turn' seen in some other countries, many pro-choice gynaecologists and activists have publicly endorsed the Italian Minister of Health's decision on EMA of August 2020.[60]

[58] See the newspaper's news: 'Marche, il centrodestra contro l'aborto farmacologico nei consultori. La Regione si rifiuta di applicare le linee guida del ministero', *Il Fatto Quotidiano*, 27 January 2021, https://tinyurl.com/4jy7638a (last visited 31 December 2021). The Italian pro-choice network 'Rete Italiana Contraccezione e Aborto' is monitoring on its website the lack of regional implementation of EMA national guidelines, see: Rete Italiana Contraccezione e Aborto, 'Linee di indirizzo aborto farmacologico 2020 e adeguamenti da parte delle Regioni. I documenti che testimoniano l'inadempienza dei governi regionali', *Rete Italiana Contraccezione e Aborto*, 14 February 2021, available at https://tinyurl.com/ycy5v3bd (last visited 31 December 2021).

[59] Regione Lazio, 'Direzione salute ed integrazione sociosanitaria. Atti dirigenziali di gestione. Determinazione 31 dicembre 2020 no G16542 con oggetto 'Istituzione del Tavolo di lavoro Regionale sulle Interruzioni Volontarie di Gravidanza e approvazione documento tecnico allegato "Protocollo operativo per la interruzione volontaria della gravidanza del primo trimestre con mifepristone e prostaglandine, in regime ambulatoriale o di DH". Aggiornamento del Catalogo Unico Regionale (CUR)', Bollettino Ufficiale Regione Lazio, 26 January 2021, no 8(2).

[60] SIGO, 'Nuove regole sull'aborto farmacologico: la Società Europea sulla Salute Riproduttiva plaude al lavoro delle istituzioni e dei ginecologi italiani' *Società Italiana di Ginecologia e Ostetricia*, 10 September 2020, available at https://tinyurl.com/2p8jnnhv (last visited 31 December

Further, the role played by the regions in implementing these national guidelines suggests that they are likely to have only a quite moderate impact in effectively improving EMA access, as women and pregnant people are still required to attend a hospital or medical facility. Further, these new national rules do not address enduring regional gaps in access to EMA, with the positive experience of Lazio offering an isolated example. As such, women and pregnant people will probably continue to travel across the country to overcome local differences with regard to EMA access, although the current pandemic has also affected this possibility.[61]

Nevertheless, despite this problematic context, with some exceptions, the abortion debate in Italy remains dominated by the issue of conscientious objection,[62] which accepts a high level of medicalisation of the procedure.[63] Yet, feminist and radical leftist circles are also committed to advocating for the local implementation of new national EMA guidelines and only recently are starting to explore topics such as self-managed abortion or telehealth abortion services.[64] The presence of legge no 194/1978, which is still perceived by many prominent activists as a good piece of legislation,[65] seems to represent one of the obstacles for a radicalisation of the pro-choice debate in the country, obstructing moves to push for better access to EMA at the national level.

However, a few voices have recently shared a public concern for the scientific, ethical and legal limits of legge no 194/1978.[66] Indeed, on the occasion of the 43th anniversary from its approval in May 1978, Dr Lia Quartapelle, a Democratic

2021); Non Una di meno, press release on Facebook, 8 August 2020, available at https://tinyurl.com/376btf5f (last visited 31 December 2021).

[61] Human Rights Watch, n 21 above; ECSR, n 22 above.

[62] See for example the recent case of Molise where there the continuation of abortion services is at risk because the only one non-conscientious objector gynaecologist is going to retire, see 'Il problema del Molise con l'obiezione di coscienza' *Il Post* 27 July 2021, available at https://tinyurl.com/2c5xjzcx (last visited 31 December 2021).

[63] Nevertheless, in January 2020 a group of midwives and pro-choice activists launched a petition online which claims an active role of midwifery in providing abortion services, https://tinyurl.com/2p8mdrev (last visited 31 December 2021).

[64] See, 'ITALY- telemedical abortion: experiences and new prospects – a webinar', in International Campaign for women's right to safe abortion, 17 February 2021, https://tinyurl.com/2v293nh8 (last visited 31 December 2021). See also the recent initiative of the pro-choice organisations 'Rete Italiana Contraccezione e Aborto' and 'Associazione Vita di Donna Onlus' on providing the document ex Article 5 through telemedicine Rete Italiana Contraccezione e Aborto, 'La "certificazione" per interruzione volontaria di gravidanza è online', Rete Italiana Contraccezione e Aborto, 8 July 2021, available at https://tinyurl.com/4m72ayr4; and the 'Libera di Abortire' campaign available at this website: https://tinyurl.com/mry2kz7f (last visited 31 December 2021).

[65] See, for example, the position of LAIGA, the Italian association of pro-choice gynaecologists, 'Interruzione di gravidanza, la mappa degli ospedali che applicano la 194', *Ansa.it*, 31 May 2021, available at https://tinyurl.com/yewh2krp (last visited 31 December 2021).

[66] See, for example, A. Pompili, 'Legge 194: è ora di cambiarla per dare maggiore autodeterminazione alle donne' *MicroMega*, 14 May 2021, available at https://tinyurl.com/2p8nwh5n (last visited 31 December 2021).

Party MP, together with 'AMICA - Associazione Medici Italiani Contraccezione Aborto' and 'Luca Coscioni' Associations came together to call for legge no 194/1978 to be updated with regard to the mandatory waiting period, gestational age limits, and the conscientious objection rights of medical personnel.[67]

VI. Post Scriptum

While this article was in press, the Italian Minister of Health released a new report on legge no 194/1978's implementation in 2019, which also includes some preliminary data of 2020.[68] The data of 2019 delineates a similar situation to the one of the 2018. However, there is an increment of the use of medical abortion from the national rate of twenty point eight per cent of 2018 to the twenty four point nine per cent of 2019.[69] With regard to 2020, the Italian Minister of Health shared the results of two national surveys: the first focuses on the organisation of abortion services in every region during the pandemic and the latter on the regional implementation of the new EMA policy of August 2020.[70] The self-reported data from the Regions significantly confirm not simply that in four Regions there was a reduced number of facilities delivering abortion services during the pandemic, but that medical abortion services were more affected than surgical abortion ones.[71] Indeed, four Regions self-declared that one or more facilities had autonomously interrupted to provide medical abortions, while two Regions self-reported that at least one facility in their territory had autonomously quitted to perform surgical abortions.[72] With regard to the second survey, only one Region self-declared to have already implemented the new EMA policy in 2020, while thirteen Regions referred their plan to do so in 2021.[73] However, the same Italian Minister of Health remarked that

> '[o]f course, the 2020 data will have to be confirmed during 2021 and this will allow to evaluate the effects of the new guidelines on the timing and procedures for carrying out the abortions'.[74]

[67] See: A. Roma, 'Aborto, la proposta delle associazioni 43 anni dopo la legge 194: "Aggiorniamo la norma. Diritto non è ancora garantito a tutte le donne" ' *Il Fatto Quotidiano*, 20 May 2021, available at https://tinyurl.com/mwa7d6mx (last visited 31 December 2021).

[68] Ministero della Salute, 'Relazione del Ministero della Salute sulla attuazione della legge contente norme per la tutela della maternità e interruzione volontaria di gravidanza (Legge 194/1978). Dati definitivi 2019 e dati preliminary 2020', 16 September 2021.

[69] Ministero della Salute, n 68 above, Table 25.

[70] ibid 13-16.

[71] ibid.

[72] ibid.

[73] ibid.

[74] ibid 16.

Essays

Digital Data and Privacy Between Partners: A Critical Approach to a Technological Family Law Issue

Elisa de Belvis*

Abstract

The author reflects upon the possibility to read the rules of the Italian Civil Code in a way which gives them new effectiveness in function of the specific requests for protection connected with the use of technologies. The main theme is represented by the right to privacy between spouses and the need of a balance between the aforementioned personal right and the matrimonial duties. A reconstruction of the spouse's right to privacy is provided, especially considering the spread of technology and digitalization and the involvement of them in family life. The third section is dedicated to the interpretation of the matrimonial duty of fidelity in accordance with the social developments and regarding the so called 'digital adultery'. The civil procedure rules regarding the collection of digital evidence are also considered.

I. Introduction

The spread of technology and digitalisation has deeply changed many aspects of our lives: not only at a practical level, but also determining new habits. The technological progress has increased the potentiality linked to many of human actions. Nowadays, it is possible to reach results that were not assessable in nature[1] or through the medium of the instruments that has been commonly used when the digital era was yet to come.[2] This brings to jurists the problem to analyse how those results can find a place in our legal system, according to the general principles which govern it.

As we stated at the beginning of the article, the use of technology has also determined new habits, among which there are different ways to start and live relationships, to communicate thoughts and feelings and to express many intimate aspects of each personality.

As Glossators taught us '*ex facto oritur ius*',[3] which means that the legal practitioner cannot escape the continuous confrontation with reality and its

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[1] As in the field of medical assisted reproduction.

[2] As for the invention of near-instant photography or of wiretapping software which makes (even highly sensitive) personal information be accessed easily.

[3] C.M. Bianca, 'Ex facto oritur ius' *Rivista di diritto civile*, 786 (1995).

evolution in customs, values and social feeling.

This is especially true in the area of family law, as issues related to the use of technologies require a verification of the adequacy of each domestic legal system, in terms of its ability to provide answers to new juridical questions that rise from the interaction between the spread of digitalization and family life. Among other things, one of the situations in which family relationships are challenged the more by the digital context is the family crisis.[4] Therefore, jurists cannot escape but to analyse the legal consequences of the new behaviours that the use of technology brings within family dynamics.[5]

More specifically, it is important to understand whether an effort must be made to innovate, necessarily with the intervention of the legislator, or whether it is possible to identify effective legal instruments to be used in the already existing rules, the contents of which can be enhanced through interpretation[6] to make them suitable to cover new conducts linked with the use of digital devices. In sum, we think the latter option appears to be practicable, at least to a broad extent and without prejudice to the work of normative implementation which is appropriate when dealing with specific topics connected to the subject under discussion.[7]

As to the new questions that rise from the interaction between the spread of digitalization and family life and that are related to the family crisis, we will mainly consider whether the online conduct of a spouse, in spite of its virtual nature, may be legally qualified as a breach of the matrimonial duties with the consequent personal and patrimonial effects in civil proceedings; whether the evidences of this conduct may be freely collected by the other spouse even through an access, eventually unauthorized, to the digital devices and accounts of its partner or whether this activity may violate a right to privacy, if it exists,

[4] B. McDaniel and S. Coyne, 'Technoference: The Interference of Technology in Couple Relationships and Implications for Women's Personal and Relational Well-Being' 5 *Psychology of Popular Media Culture*, 85 (2014).

[5] The sociological outcomes of the role of technology in family dynamics has been the object of many recent studies. The studies that provided the background of the present paper are the following ones: J. Lin et al, 'Am I Overwhelmed with this Information?' A Diary Study of Couples' Everyday Account Sharing' *Conference Companion Publication of the 2020 on Computer Supported Cooperative Work and Social Computing* (2020); C.Y. Park et al, 'Share and Share Alike: An Exploration of Secure Behaviors in Romantic Relationships' *Fourteenth Symposium on Usable Privacy and Security*, 83 (2018); Kaspersky Lab, *Connected Love: Privacy in Relationships and the Boundaries of Personal Space* (2018), available at https://tinyurl.com/c42sxu39 (last visited 31 December 2021).

[6] In accordance with Art 12 of the Disposizioni preliminari al Codice Civile if an issue cannot be decided recalling an express provision, the judge shall look at the dispositions that provide a discipline for the similar issues; if the issue remains dubious, it shall be decided in accordance with the general principles of the legal system.

[7] The Italian Legislator has taken into consideration the role of the technology in numerous reforms in all the legal fields, both adapting the pre-existent provisions and introducing new cases and types of offences (eg, the Digital Administration Code, Decreto legislativo 7 March 2005 no 82; the Cyberbullying Act, Legge 29 May 2017 no 71).

between spouses; and, finally, whether the evidences thus collected, when actually violating the spouse's right to privacy, are assumed to be judicially admissible in family proceedings.

II. Marriage in the Digital Era: What About the Content and the Meaning of the Traditional Matrimonial Duties?

In order to pursue our attempt to find out an answer to those questions, we have to analyse the nature of marriage and, consequently, the content and the meaning of the rights and duties which derive from it in light of the new perspectives introduced by the spread of technologies.

The Italian civil code provides for a series of rights and duties which pertains to the *status* of spouse:[8] as stated in Art 143, spouses have both a duty of loyalty to each other and a duty of collaboration to pursue the family interests. On the other hand, according to Art 2 of the Italian Constitution every person, as an individual, is entitled to a series of inviolable rights (as, among the others, the right to dignity and to privacy) that the Republic recognises and guarantees even in the social groups (as family is) where human personality is expressed.[9]

From a theoretical perspective, this means that each spouse is assumed to have the duty to respect and support the partner in the exercise of its own inviolable and fundamental rights because those rights pertain to it as an individual even within a matrimonial bond. This is true because marriage represents a context where each spouse realizes its personality, talents and aspirations in a higher level than it could do without the partner.

Furthermore, this duty to respect and support the spouse while exercising its inviolable rights and freedoms can be seen as a matrimonial duty, not as an additional duty with reference to the ones expressly mentioned under Art 143 of the Italian civil code (that, for a doctrine, represent only a minimum content in order to shape the spiritual and material *communio*[10] without complete it) but as a direct consequence of the fulfilment of the above-mentioned duties of loyalty and collaboration.

Nevertheless, the concrete exercise of those rights and freedoms is compatible with the nature of marriage itself and the specific matrimonial duties established by the law. In case of conflict, even if the spouse is abstractly entitled to a personal right, this one has to be balanced with the fulfilment of the matrimonial duties

[8] In accordance with Art 143 Civil Code, from the marriage come the mutual duties of fidelity, moral and material assistance, collaboration in the family's interest and cohabitation. Both the spouses have the duty to contribute to the family's needs, in accordance with their wealth and their professional and domestic capacities.

[9] In accordance with Art 29 Constitution, the Italian Republic expressly recognizes the family as a natural society built on the marriage.

[10] P. Zatti, 'I diritti e i doveri che nascono dal matrimonio e la separazione dei coniugi', in P. Rescigno ed, *Trattato di Diritto Privato* (Torino: UTET giuridica, 1982), II, 22.

that lay upon the spouse itself;[11] and there could be cases where the duties that derive from marriage shall be considered as legally prevalent and, consequently, the exercise of the personal right as limited.

This happens frequently with specific reference to each spouse's right to privacy. Marriage is one type of relationship where the expectation of privacy within the couple is low and has to be low not only from a practical perspective, linked with the circumstance that the spouses share many intimate spaces, especially at home, but above all due to the intrinsic nature of the bond they have established. According to our legal system, marriage creates a '*consortium omnis vitae*',[12] a special reciprocal relationship – which is spiritual, material and legal – that in the Italian civil law context still represents a *unicum*: in fact, even if the legislator introduced the Civil Unions between same sex partners and the legal relevance of Cohabitance (legge no 76/2016), the latter legal institutes still present differentiations from marriage and are able to create a bond between partners which is less tight.[13]

Therefore, as for the preliminary question about the existence (or not) between spouses of the same right to privacy that occurs with reference to non-related people, according to our opinion, it is indubitably that each spouse is entitled to this right, as an individual and within the family (according to Art 2 Italian Constitution). However, when the right to privacy concerns information and circumstances (even in the form of data) that have significance, in an objective and relevant way, for the family interests and life, the concrete exercise of it shall be limited due to the prevalence of an opposite and specific right to know that must be recognized in favour of its partner.

III. The Spouse's Right to Privacy and the Partner's Duty to Respect It

In order to choose the discipline that is suitable to be applied in governing the situations connected with the use of technology and given the peculiarity of the marital nexus, it shall be recognised the right of each spouse to know even highly sensitive personal information of the partner who is burdened with the correspondent duty to disclosure.[14]

[11] P. Zatti, *Trattato di diritto di famiglia: Famiglia e matrimonio* (Milano: Giuffrè, 2011), I, 733; T.A. Auletta, *Riservatezza e tutela della personalità* (Milano: Giuffrè, 1978), 190; M.F. Tommasini, 'Riservatezza e Controllo nei Rapporti tra Coniugi. L'acquisizione "Interna" di Dati Riservati" ' *Comparazione e Diritto Civile*, available at https://tinyurl.com/4s9nwym4 (last visited 31 December 2021).

[12] 23.2.1. Modestino in S. Schipani et al, *Iustiniani Augusti Digesta Seu Pandectae* (Milano: Giuffrè, 2014), I, 161.

[13] *Ex multis*, G. De Cristofaro, 'Le "Unioni civili" fra coppie del medesimo sesso. Note critiche sulla disciplina contenuta nei commi 1°-34° dell'art. 1 della l. 20 maggio 2016, n. 76, integrata dal d.lgs. 19 gennaio 2017, n. 5' *Nuove leggi civili commentate*, I, 101 (2017).

[14] M.F. Tommasini, n 11 above.

A duty of disclosure of everything would be relevant in order to determine a free and fully informed matrimonial consent is legally established before marriage. Any right to privacy cannot be exercised with reference to facts and circumstances even connected with sensitive personal information of the spouse: the partner has the right to know whether the former is impotent or unable to consummate the marriage or incapable of entering into and sustaining a proper or normal marriage relationship due to a physical or psychiatric illness or personality disorder or due to its sexual orientation.[15] The deliberate violation of this duty of disclosure about some personal quality that can objectively and gravely perturb conjugal life causes both personal and patrimonial effects.

As for the personal effects, we can mention the right to ask, depending on the circumstances, the Civil Court to declare the annulment of the marriage, under Art 122, para 3, Italian Civil Code,[16] or the Ecclesiastical Court to declare the marriage is null and void, under canon 1098 Code of Canon Law,[17] or to opt for a separation and then a divorce proceeding; those rights can be also linked with the one to free itself in order to marry another person with whom share a new family.

As for the patrimonial consequences, they are linked with the end of the marriage which frees the spouse from the fulfilment of the matrimonial duties to pay for the support of the partner, or from any limitation of its power to dispose of its wealth by will.

The same duty of disclosure can be considered as current also during marriage and, as a consequence of this, the exercise of the partner's right to privacy as limited.

Given the aforementioned premises, we shall interrogate ourself in order to determine if the consideration of privacy within matrimony take a distinction when considering shared devices and accounts or personal ones.

In fact, there may be different scenarios which may lead to the valorisation of multiple elements: each spouse may have their own devices; on a shared device there may be multiple accounts protected or not by different passwords; a spouse may access a personal account from the partner's device etc. Therefore, if the device and the account are shared,[18] both spouses have equal rights to access them,[19] and no invasion of privacy may occur. However, this

[15] Corte di Cassazione 07 March 2006 no 4876, available at www.leggiditalia.it; Corte di Cassazione 11 October 2001 no 12423, *Famiglia e Diritto*, 580 (2001).

[16] Corte di Cassazione 10 May 2005 no 9801, *Famiglia e Diritto*, 365 (2005).

[17] A. Stankiewicz, 'La fattispecie di errore doloso prevista dal can. 1098', in P.A. Bonnet et al eds, *Diritto matrimoniale canonico* (Città del Vaticano: Libreria Editrice Vaticana, 2003) II, 187.

[18] The issue of technological devices and accounts falling under the community property regime has arisen also on the other side of the Atlantic. See S.B. Richardson, 'Privacy and Community Property' 95 *The North Carolina Law Review*, 729 (2017).

[19] This is in accordance with the provisions regarding the use of the shared property in accordance with Art 1102 Civil Code. In the case of the device or the account falling under the matrimonial property provisions (Art 177 Civil Code), we shall recall the dictum of Corte di

scenario may seem more related to the recent past times, when desktop computers were the only ones available for domestic environments and, therefore, shared between all the components.

Nevertheless, some local courts[20] pointed out that the mere circumstance that the device is shared does not always justify the access by a spouse: in fact, a full, voluntary, and aware availability ('*messa a disposizione*') by the owner of the data is required.

A common eventuality in domestic environments is represented by the presence of a personal device in which the data are not protected by password. When this circumstance occurs, the outcome is to be found interpreting the nature of marriage and the legal consequences that derive from it.

Thus, even if the device itself is not shared, shared is the environment where the couple lives. According to this approach, the Civil Court of Roma[21] stated that it is the nature itself of marriage that implies a weakening of the privacy of each spouse and the creation of a shared environment governed by a rule of implicit consent to let the partner know the personal data and correspondence of the other. This is true except when there is an express and 'specific activity' to avoid that. However, in that case, as we will notice later, we have to face another problem: does this sort of activity be compatible with the nature of the matrimonial bond or represent a breach of the legal duties that derive from it?

The theory of the implicit consent is applied to solve our problem in various circumstances. The Court of Torino[22] stated that if the digital device is left in a shared space without a password, the spouse can access it because it does not appear any violation of the partner's privacy. The same outcome has been reached by the Appellate Court of Trento[23] that stated that privacy is not violated when the spouse secretly accesses the partner's smartphone looking for adultery evidence, as the cohabitation lessen the privacy between spouses.

Finally, there is the case in which the data are protected by password and the spouse accesses the device unbeknown to the owner or against its will: is there or not a violation of its privacy?

As we have already noticed, in such a context, we shall verify if the complete seclusion of one another from such important spheres of daily life, as online activities are nowadays together with personal data created and stored in digital devices and published in various accounts, has to be intended as the mere exercise of the right to privacy that pertains to each spouse individually considered or may represent a breach of matrimonial duties.

Cassazione 07 March 2006 no 4890 that, confirming the 1998 Corte Costituzionale's principle (17 March 1988 no 311) stated that the matrimonial property does not provide quotas and the spouses are owners *in solido* of the goods.

[20] Tribunale di Larino 09 August 2017, available at www.leggiditalia.it.

[21] Tribunale di Roma 30 March 2016 no 6432, available at www.dejure.it.

[22] Tribunale di Torino 08 May 2013, *Giurisprudenza Italiana*, 2480 (2014).

[23] Corte d'Appello di Trento 09 March 2015 no 249, available at www.osservatoriofamiglia.it.

In order to correctly balance the subjective and personal dimension of the right to privacy with the matrimonial duties which legally shape the relationship between the spouses, we have to distinguish on the basis of the nature and the content of the information. Thus, each spouse has a full right to privacy, but it is up to them, in order to preserve the family cohesion and to respect the family duties, to share all the personal data and information that are related to the family interests and life.

IV. The Duty of Fidelity and the Legal Relevance of the Digital Adultery

The considerations provided in the sections above lead us to focus on the duty of fidelity and the consequences that the technological progress may infer to it. In fact, we must interrogate whether the digital devices are relevant just in order to uncover adultery or whether an adultery perpetrated solely through them has the same juridical relevance of a physical relation. In order to reach a scientific justifiable outcome, we shall consider the evolution that has characterised the concept of 'fidelity' as a matrimonial duty under the law.

When the Italian Civil Code entered into force,[24] the duty of fidelity laid on the spouses to guarantee that the children born during the marriage were biological descendants of the husband. Fidelity could be summarised up as the exclusivity of the sexual relationship and the infidelity that betrayed the matrimonial duty was essentially the physical one.[25]

Since the seventies of the last century, the notion of a different type of infidelity, more sentimental, rose up in doctrine,[26] linked to the value of trust and devotion: each spouse has the duty to be loyal and the legal relevance of this duty has to be intended in a broader sense, including – both in doctrine and in case law[27] – any kind of platonic relationship.

In 2008, the Italian Supreme Court[28] expressly described the duty of fidelity not as a mere abstention from any extramarital sexual relationship but as a commitment not to betray each other's trust, not to fail the spiritual dedication to the spouse. Furthermore, case law considered a breach of duty of loyalty also the attempts made by a spouse to organise an intercourse, even when the plan does not reach the purpose due to the lack of interest from the

[24] The Civil Code entered into force on 16 April 1942.

[25] Corte Costituzionale 18 April 1974 no 99, *Il Foro Italiano*, 1574 (1974). See also C. Gangi, *Il matrimonio* (Milano: Giuffrè, 1953), 257.

[26] *Ex multis* F. Santoro-Passarelli, 'Dei doveri e dei diritti che nascono dal matrimonio. Note introduttive agli articoli 143-146', in G. Cian et al eds, *Commentario al Diritto italiano della famiglia* (Padova: CEDAM, 1992), II, 507.

[27] Corte di Cassazione 13 July 1998 no 6834, *Corriere Giuridico*, 1015 (1998); Corte di Cassazione 14 April 1994 no 3510.

[28] Corte di Cassazione 11 June 2008 no 15557, *Nuova giurisprudenza civile commentata*, 1286 (2008).

other person.[29]

In this scenario, it is evident that a platonic relationship may also take place online and also the case law pointed this out. Therefore, it happens clear to us that technology can play two different roles in adultery: on one side, it can represent a vehicle to find a person with whom a relationship may find explication in the physical world;[30] on the other, it can be the instrument to commit adultery, when the relationship remains purely virtual even though anyway legally relevant.[31]

V. Digital Evidence Collected by a Spouse Violating the Partner's Right to Privacy and Their Admissibility in Family Proceedings

The relevance of the digital instruments and the right to privacy between spouses needs to be considered not only at a substantial level but also on the procedural one. In fact, having us pointed out that technology may both represent a vehicle to find a person with whom having an intercourse but also the dimension where the adultery takes places, we have to investigate if the evidences collected accessing the spouse's devices and accounts unbeknown to the owner or against its will may be judicially acquired in family proceedings.

Based on substantial law, we have already noticed[32] that this conduct does not represent a violation of the spouse's right to privacy. This conclusion deserves now a more detailed justification. First, there are cases where no right to privacy is concerned. In fact, we have already mentioned,[33] if the evidence is collected from a shared device or from a personal device, password-unprotected and located in a shared environment (as the theory of the implicit consent prescribes),[34] the spouse cannot hold against its will the admission of it any right to privacy. Moreover, a third case may be added to the aforementioned category: the right to privacy neither concerns shared data, such as posts, pictures and data shared on Facebook or anyway published by the spouse on the Internet. These data represent information deliberately shared with everyone (if the social profile is public) or, however, with a group of people (if there is any kind of access restriction).[35]

Secondly, and more important for our purposes, there are cases in which it would be possible, abstractly, to argue of a right to privacy upon the spouse whose device is accessed by the other one. In these circumstances, we can note that a person, by contracting marriage, does not lose its right to privacy as an individual and the constitutional, civil, administrative and criminal protection

[29] Corte di Cassazione 16 April 2018 no 9384, *Famiglia e Diritto*, 637 (2018).
[30] See note 27.
[31] Tribunale di Milano 22 June 2012, available at www.leggiditalia.it.
[32] See *supra* paragraph 3.
[33] See *supra* paragraph 3.
[34] Tribunale di Roma 30 March 2016 no 6432, available at www.leggiditalia.it.
[35] Tribunale di Santa Maria Capua Vetere 13 June 2013, as recalled by M. Gradi, 'Diritto alla prova e tutela della privacy nel processo civile' *Rivista di Diritto Processuale*, 1101 (2019).

of this right is ever available. As for the criminal liability, it is connected with the activity of the person who wiretaps or hidden any type of video or recording device without the victim's knowledge or permission or installs any type of software on the victim's computer or telephone or spies on the victim by logging into its email accounts. The conduct is covered not under Art 616 Italian Criminal Code that punishes the violation of correspondence (that protects the communication considered in a static perspective, as materially represented) but under Art 617-*quarter* Italian Criminal Code that punishes wiretapping (that protects the communication considered in a dynamic perspective, as a flow).[36]

When the concrete case concerns the conduct of a spouse, however, the Court may rule for a dismissal of the case and for the exclusion of the unlawfulness of the behaviour according according to Art 51 Italian of the Criminal Code.[37] This points out the link between the legal relevance of an act of invasion of privacy with the objective characteristics of the concrete conduct.

This is the solution adopted also under the Canadian Privacy Law. According to a recent decision of the Ontario Court of Appeal,[38] the new common law tort 'intrusion upon seclusion' is a subset of the broader invasion of privacy category, which includes other recognized and potential causes of action. It is committed by the one who intentionally (or recklessly) intrudes, physically or otherwise, upon the seclusion of another or his (or her) private affairs or concerns. But the author of the conduct is subject to liability only if the invasion of the other's privacy would be highly offensive to a reasonable person.

An act which represents an invasion of a third party's privacy is illegal not *per se,* but only if the activity shown to be 'highly offensive' to a 'reasonable person',[39] and that there is room in the Canadian legal system to appreciate the nature, incidence and occasion of the wrongful act; any relationship, whether domestic or otherwise, between the parties; and the conduct of the parties, both before and after the wrong.

According to some Italian case law, when the invasion of the spouse's privacy is committed by its partner, the conduct of that partner could not deserve punishment. As we have already noticed, this is not because there is anything in Italian law which suggests that the right to privacy is limited to unmarried

[36] Corte di Cassazione 22 January 2019 no 2905, available at www.leggiditalia.it; Corte di Cassazione 22 January 2019 no 2942, available at www.leggiditalia.it.

[37] Art 51 Criminal Code states that it cannot be considered unlawful the conduct of a subject that acts to exercise a right: therefore, the author suggests that, if one of the spouses does not share with the other the information that can be considered relevant for the family life (in accordance with the duty of loyalty under Art 143 Italian Civil Code), the latter shall be considered allowed to reach the information by itself.

[38] *Jones* v *Tsige*, 32 ONCA (2012); K. Cooligan and D. Hohnstein, 'Intruding Upon the Seclusion of Personal Email - What the Common Law Tort for the Invasion of Privacy Might Mean for Snooping Spouses and the Electronic Evidence that they Obtain' 34 *Child and Family Law Quarterly*, 135 (2014).

[39] *Jones* v *Tsige*, ibid, para 19.

individuals,[40] but because this conclusion is a logical and axiological consequence of the intrinsic nature of the institution of marriage, which is a very peculiar bond even before being an institution.

As Justice William O. Douglas of the US.Supreme Court argued 'Marriage is an association that promotes a bilateral loyalty, not commercial or social projects'; it is 'intimate to the degree of being sacred'.[41] The concept of sacred recalls the one of sacrifice. And quoting Justice Anthony Kennedy of the US Supreme Court 'No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family'.[42]

Following the same perspective, the Italian Supreme Court stated in 2008[43] that marriage implies for each spouse the duty to sacrifice every personal interest which conflicts with the commitments made to and the perspective shared with the other in respect of a life in common. Thus, the spouse does owe an individual right to privacy, but the exercise of this right knows the limits that derive from the intrinsic essence of that *consortium* with the other spouse where the former has chosen to live.

Every activity, even an online activity, which is incompatible with the very nature of the matrimonial bond represents a breach of the legal duties that derive from it. The specific activity made by the spouse to avoid the partner knowing the former's personal data and correspondence, seems not to be compatible with the marital duties when the content of the information is relevant for the family life and the balance between the spouses.

The breach of matrimonial duties represents the basis to our reflections to the processual perspective. The evaluation upon the admissibility of the evidence collected by a spouse violating the partner's right to privacy is remitted to the Judge.[44] The right to privacy that pertains to every individual (even married, as we have noticed) shall be balanced with the right of defence which the other spouse is entitled to.

This right becomes relevant when the plaintiff starts a separation or divorce proceeding, or is involved in it, and asks the Judge to consider the online activity of the defendant which violates the matrimonial duty in order to establish the legal conditions and patrimonial consequences linked with marital separation or divorce. Or when, apart from a matrimonial proceeding, the plaintiff suits the spouse seeking an order of non-contractual damages, as a legal remedy linked with the violation of Art 2043 of the Italian Civil Code.

[40] This is the perspective mainly followed in the Common Law systems in order to state that the conduct of the spouse is inadmissible and illegal.

[41] *Griswold* v *Connecticut*, 381 US (1965), para 18.

[42] *Obergefell* v *Hodges*, 576 US (2015).

[43] Corte di Cassazione 11 June 2008 no 15557, *Nuova giurisprudenza civile commentata*, 1286 (2008).

[44] Autorità Garante per la Protezione dei dati personali, 13 December 2005, available at www.garanteprivacy.it.

VI. Conclusions

It is quite possible to read the rules of the Italian Civil Code in a way which gives them new meaning in function of the specific requests for protection connected with the use of technologies. There are provisions which can today find a new scope of application and prove to be effective means in a double sense: in a protective perspective and in a repressive one.

In a protective perspective, because of their suitability to safeguard both interests which are new (due to their derivation from the use of technologies, *eg* the interest of accessing the data that the other spouse has publishes on the Net or stored in its device) and interests which were already previously recognized (*eg* duty of fidelity within matrimony), but that find at present new ways of expressing themselves in connection with the digital context (*eg* the commitment not to betray the entire sphere of the other spouse's trust).

The repressive perspective is linked with their usefulness to ensure an *effective enforcement* of sanctions with respect to new harmful conducts linked to online activities (*eg* digital adultery).

The aforementioned reflections bring up more questions, more legal challenges that require to further the hermeneutical approach in order to categorise the new digital phenomena and to investigate the necessity of a legislative intervention.

Regarding the theme of the regulation of digital goods, such as social accounts, we shall ask ourselves if and how the matrimonial property regime may find an application. This seems to deserve an accurate investigation, especially when the social account switches from a mean of personal representation in the digital world to a platform used to influence consumers and, consequently, a source of income for the family.

If the patrimony of the spouses is regulated by the community property regime, Art 178 Italian Civil Code[45] may find application: in fact, even if the social media account of a spouse has been created for a personal scope and has acquired a business relevance at a later time, the increase of the followers may be considered a goodwill.

On the procedural side, some authors are not fully convinced by the appropriateness to leave to the discretion of the civil judge the decision upon the admissibility of every evidence and consider the necessity of a legislative intervention regarding the (in)admissibility of illegally acquired evidence in civil proceedings, in consideration of the absence of an explicit provision in the

[45] In accordance with Art 178 Civil Code, the goods functional for the exercise of the business created by one of spouses after the marriage and the growths of the business, even created prior to the marriage, shall fall under the *comunione de residuo* (shared property that still exist after the dissolution of the community property) if they still exist. The fulfillment of the provision requires a comprehensive evaluation that consider the rights of the spouse that on one hand may have not directly participated in the management but, on the other, may have cooperate to the growth of the business.

Italian Code of Civil Procedure. We still believe that the concrete evaluation of the judicial authority represents the best balance between the rights of the parties involved.

In conclusion, it may be relevant to note that the case law and the legal doctrine is concerned to argue about limits, about duties, about sacrifice while the field of Family Law finds itself exposed to multiple instances coming from the society, which are in general directed to the recognition of new rights and freedoms: nevertheless, we shall underline that these rights and freedoms often prove to be not only conflicting among themselves, but also not always oriented to the protection of the weaker subject.

Essays

‘Offers They Can’t Refuse’: Assessing the Impact on Business and Society At-Large of the Recent Fortune of Anti-Discrimination Laws and Policies

Riccardo de Caria*

Abstract

The article considers the relationship and balance between freedom of economic initiative and obligations deriving from anti-discrimination laws. After providing a theoretical framework for the problem of the limits to contractual autonomy arising from the horizontal application of fundamental rights (*Drittwirkung*), the work focuses on its most recent developments, especially in relation to case law, from a comparative perspective. It identifies the paradoxes and logical inconsistencies that characterise traditional approaches and puts forward an alternative conceptual framework.

> ‘[W]ithout discrimination of some sort, society would simply cease to exist and very important possibilities of free association and group formation would disappear’
>
> H. Arendt, *Reflections on Little Rock*, in *Dissent*, Winter 1959, 45, 51

I. The Reference Context: The Horizontal Application of Fundamental Rights

Anti-discrimination law has progressively broadened the scope of protection limited to certain categories individuals, both through legislation and case law.

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This path towards what Italian legal philosopher Norberto Bobbio called 'the age of rights[1]' is generally welcomed by observers. In this paper, however, I consider certain problematic aspects of this trend, with particular reference to freedom of contract and economic initiative.[2]

Like any expansion of positive freedoms,[3] anti-discrimination laws do not only expand the scope of rights, and although this goes often unseen, they also restrict other rights and freedoms. The problem to be addressed is therefore how to define the balance between the freedom to do business and the right not to be discriminated against, and to assess what really happens. In other words, the discussion follows two levels. On a prescriptive level, it discusses the possibility of reconciling the protection of economic freedom and the promotion of anti-discrimination, and the public policy options available to implement this reconciliation (see para II). From an analytical viewpoint, I consider how certain relevant legal systems have concretely balanced certain freedoms and rights (para III). I will then carry out an in-depth examination of an apparently new field – covering the sharing economy, namely online speech and artificial intelligence. This is in order to verify if and to what extent what I propose to define as *discrimination 2.0* poses new issues and if this, in turn, requires a new regulatory framework (para IV). Section V concludes by comparing the level of what should be with that of what is, and outlining the possible future evolution of the discipline in this field.

Before embarking on any discussion from a theoretical point of view, it is worth mentioning that the application of the prohibitions of discrimination to relations between private individuals is the result of the doctrine of *Drittwirkung*, ie the horizontal application of fundamental rights.[4] It was theorised for the first

[1] N. Bobbio, *The Age of Rights* (Cambridge: Polity, 1990).

[2] Cf D. Ramos Munoz, 'Do Fundamental Rights Conflict with Private Law?' 6 *European Review of Private Law*, 1031 (2018). In the Italian scholarship, see, among others, B. Cecchini, *Discriminazione contrattuale e tutela della persona* (Torino: Giappichelli, 2016); G. D'Amico, 'Problemi (e limiti) dell'applicazione diretta dei principi costituzionali nei rapporti di diritto privato (in particolare nei rapporti contrattuali)' *Giustizia civile*, 3, 443 (2016); G. Carapezza Figlia, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' *Rivista di diritto civile*, 61(6), 1387 (2015), as well as Id, *Divieto di discriminazione e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2013); D. Maffeis, *Offerta al pubblico e divieto di discriminazione* (Milano: Giuffrè, 2007); but also the very recent entry by P. Femia, 'Discriminazione (divieto di)' *Enciclopedia del Diritto. Contratto* (Milano: Giuffrè, 2021), 1, 499.

[3] As opposed to natural rights: see K. Campbell, *Legal Rights*, in E.N. Zalta ed, *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), available at https://tinyurl.com/yckk5u6t (last visited 31 December 2021).

[4] M. Borowski, *Drittwirkung*, in R. Grote, F. Lachenmann and R. Wolfrum eds, *Max Planck Encyclopedia of Comparative Constitutional Law* (last updated February 2018), available at https://tinyurl.com/y6hx2b4c (last visited 31 December 2021); see also, among many other studies, the now classic study by A. Clapham, *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1993). In the Italian scholarship, it is worth mentioning at least three recent books published in its series *Studies in Law and Social Sciences*, in F. Mezzanotte ed, *Le «libertà fondamentali» dell'Unione europea e il diritto privato* (Roma: Roma Tre-Press, 2016); A.

time in a comprehensive manner by German case law, in a famous case (*Lüth*), which affirmed the legitimacy of a film boycott initiative on the assumption that the boycotter's freedom of expression also applied to his relations with the authors of the film.[5] The doctrine of *Drittwirkung* has since evolved profoundly. On the one hand, it has progressively extended its scope of application to an ever wider range of situations, involving in particular relations between private individuals beyond the freedom of expression.[6] Moreover, it has influenced the European Court of Justice in developing the (different) theory of the horizontal direct effect of general principles of European law.[7] Due to an intrinsic institutional limitation, there has been less room for development of the doctrine in the European Court of Human Rights.[8]

However, relatively little attention has been devoted to analysing the interference that such a wide horizontal application of certain fundamental rights (particularly social rights) has on economic rights, in particular on the freedom to conduct a business, currently guaranteed by Art 16 of the Nice Charter 16. In the case law of the Court of Justice of the EU (CJEU), the term *Drittwirkung* appears only once and completely marginally, but it is referred to slightly more numerously in opinions of Advocates General.[9]

Indeed, important judgments, including those of the CJEU, which I will discuss below, and which have sanctioned a considerable extension of the scope of application of the *Drittwirkung*, have not addressed the question of the effects of such extension on the freedom to conduct a business. In a similar vein, the *Handbook on European non-discrimination law* by the European Union Agency for Fundamental Rights (FRA), the European Court of Human Rights and

Zoppini and P. Sirena eds, *I poteri privati e il diritto della regolazione* (Roma: Roma Tre-Press, 2018); F. Caggia and G. Resta eds, *I diritti fondamentali in Europa e il diritto privato* (Roma: Roma Tre-Press, 2019).

[5] BVerfGE 7, 198 - *Lüth*.

[6] See, among many others, several essays in A. Sajó and R. Uitz eds, *The Constitution in Private Relations: Expanding Constitutionalism* (Utrecht, Eleven: 2005); as well as M. Florczak-Wątor, 'Horizontal Dimension of Constitutional Social Rights' 9(5) *International Journal of Law and Political Sciences*, 1386 (2015).

[7] On this topic, see, among many other writings, M. De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law' 18 *Maastricht Journal of European and Comparative Law*, 109 (2011); P. Cabral and R. Neves, 'General Principles of EU Law and Horizontal Direct Effect' 17(3) *European Public Law*, 437 (2011). The main subject of these writings is the case *Seda Kücükdeveci v Swedex GmbH & Co KG (C-555/07*, 19 January 2010), which together with the earlier case C-144/04 *Werner Mangold* v *Rüdiger Helm*, Judgment of 22 November 2005, available at www.eur-lex.europa.eu is the main case involving the horizontal application of the principle of equality and non-discrimination.

[8] See on this subject M. Florczak-Wątor, 'The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State' 17(2) *Int'l and Comparative Law Review*, 39 (2017), as well as the bibliography referred to therein.

[9] C-248/83 *Commission of the European Communities* v *Federal Republic of Germany*, Judgment of 21 May 1985 available at www.eur-lex.europa.eu.

the Council of Europe[10] does not mention the freedom of economic initiative.

An excellent study on freedom of enterprise[11] by the same European Union Agency also does not even mention *Drittwirkung* or the horizontal direct effect of fundamental rights (although it does mention anti-discrimination law).

There seems to be no particular connection between these two areas. It is the intention of this paper to contribute to filling what appears to be an important theoretical gap with considerable practical repercussions.

II. The Theoretical Problem of the Limits to Economic Freedom Arising from Anti-Discrimination Law

The 'narrative' that accompanies anti-discrimination laws in regard to private individuals tends to overlook the effects of these laws on contractual and business freedom. For example, ever since the Treaty of Amsterdam gave the European Union specific powers to fight discrimination, the European Union, with Council Directive 2000/43/EC of 29 June 2000 implemented the principle of equal treatment between persons irrespective of racial or ethnic origin[12] and established the nullity of contractual clauses contrary to the principle of equal treatment. Art 14(b) of this Directive stipulated that

> 'any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended'.

Neither Directive 2000/43, nor the directives that later took up this clause almost without a change in 2000 and 2006,[13] address the issue of its impact on freedom of contract and enterprise. Admittedly, the issue had emerged in Council Directive 2004/113/EC of 13 December 2004, which applies the principle of equal treatment between men and women to the enjoyment and supply of goods and services.[14] Recital 14 of this Directive stated that 'All individuals enjoy the

[10] Available at https://tinyurl.com/2uchy7ex, last visited 31 December 2021.

[11] FRA, 'Freedom to conduct a business: exploring the dimensions of a fundamental right', 2015 available at https://tinyurl.com/mrx7r3kc, last visited 31 December 2021.

[12] OJ L 180, 19 July 2000, 22-26.

[13] Respectively Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, 16-22, Art 16(b); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26 July 2006, 23-36, Art 23(b). The only notable reference is a fleeting mention in the former Directive to the freedom of association of churches and other religious organisations.

[14] OJ L 373, 21 December 2004, 37-43. In addition to the provisions quoted immediately

freedom to contract, including the freedom to choose a contractual partner for a transaction. An individual who provides goods or services may have a number of subjective reasons for his or her choice of contractual partner. As long as the choice of partner is not based on that person's sex, this Directive should not prejudice the individual's freedom to choose a contractual partner'. On this basis, Art 3(2) of this Directive stated that

> 'This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex'.

In this way, general freedom of contract was recognised, as well as that subjective reasons that may induce an economic operator to prefer to conclude a contract with one partner rather than another should not be questioned. However, it was also stipulated that freedom of contract must give way when the choice is based on the gender of the person excluded from a contractual relationship. Thus, there was no balancing act, but the prohibition of discrimination prevailed in all cases, to the detriment of freedom of contract.

Along the same lines, there was the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation,[15] which stated, this time only in the recitals, that 'All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction'. It also specified that

> 'This Directive should not apply to economic transactions undertaken by individuals for whom these transactions do not constitute their professional or commercial activity'.[16]

Although the United States has never adopted the terminology used in continental Europe, it has mostly adopted similar legislation. Even in the US legislation there is no trace of a thorough reflection on the effects of anti-discrimination legislation on freedom of contract and business.[17] After all, the

afterwards in the text, Art 13(b) of this Directive also takes up – substantially without a change – the above-mentioned provision on the nullity of discriminatory contractual terms.

[15] COM/2008/0426 final.

[16] It also includes the provision on the nullity of discriminatory contractual clauses.

[17] The legal scholarship, however, is far more substantial: beyond Epstein's own writings, including the 1992 seminal book quoted in n 19 below (and, on the opposite side, his many critics, including the one also quoted in n 19), see, among many other writings, D.E. Bernstein, 'Defending the First Amendment from Antidiscrimination Laws' 82 *The North Carolina Law Review*, 223 (2003), based on several chapters of Id, *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws* (Washington: Cato Institute, 2003); Id, *Only One Place of Redress. African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* (Durham: Duke University Press, 2011), (see also the review of the same book by D.M. Douglas, 'Contract Rights and Civil Rights' 100(6) *Michigan Law Review*, 1541 (2002)); H. Collins, 'The Vanishing Freedom To Choose A Contractual Partner' 76(2) *Law and Contemporary*

Civil Rights Act of 1964 states that consumer preferences are not a legitimate basis for discrimination, which is a clear sign of the political choice to let the reasons of equality prevail over those of economic freedom. Section 201 of this Act clearly stated that

> 'All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this Section, without discrimination or segregation on the ground of race, colour, religion, or national origin'.

Also, Section 701 of this Act declared it unlawful for employers

> 'to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex, or national origin'.

Therefore, even in the United States, since 1964, the legislator seems to have made a clear choice that sacrifices the freedom of contract and enterprise and protect categories more vulnerable to discrimination.[18]

Yet, it seems possible to make certain fundamental objections to the line of thought that has inspired the widespread emergence of anti-discrimination law. In an important work that was much criticised at the time of its publication and unjustly placed on the fringes of contemporary debate,[19] Richard Epstein listed several objections with regard to labour relations by arguing that a free-market context can remedy discrimination more effectively than coercive intervention;[20]

Problems, 71 (2013). From the opposite perspective see, among many, J.S. Brubaker, 'A Realistic Critique of Freedom of Contract in Labor Law Negotiations: Creating More Optimal and Just Outcomes' 5(1) *Washington University Jurisprudence Review*, 107 (2012); D.P. Weber, 'Restricting the Freedom of Contract: A Fundamental Prohibition' 16(1) *Yale Human Rights & Development Law Journal*, 51 (2013).

[18] According to some authors, however, these categories must be extended by interpretation: thus, for example, with reference to '*immigration status*', see D.P. Weber, n 17 above.

[19] R.E. Epstein, *Forbidden Grounds. The Case against Employment Discrimination Laws* (Cambridge: Harvard University Press, 1992). For a debate between the same author and a well-known critic, see R.A. Epstein, E. Chemerinsky, 'Should Title VII of the Civil Rights Act of 1964 be Repealed?' 2 *Southern California Interdisciplinary Law Journal*, 349 (1993), continued in R.A. Epstein, 'A False Sense of Social Reality: A Response to Erwin Chemerinsky', and E. Chemerinsky, 'Professor Epstein's Strange Sense of Social Reality: Of Course, All Laws Prohibiting Employment Discrimination Should Not Be Repealed' *Southern California Interdisciplinary Law Journal*, respectively 445 and 453 (1993). A strong critique from both a philosophical and economic perspective can be found in S.A. Besson, 'Discrimination and Freedom of Contract: Philosophical and Economic Foundations of the Law against Racial Discrimination in Employment' 3 *Interdisciplinary Law Journal of Discrimination and the Law*, 269 (1999).

[20] On the other hand, it remains the case that many types of discrimination do not derive from the market, ie, from the free choices of economic operators, but from the choices of the legislator, who entrenches the prejudices of an often minoritarian part of the population. This

and also respect individual freedom while doing so.

In a system free from coercive interference, there are no regulatory barriers to entry, firms do not enjoy rents, monopolistic situations are very rare and, in any case, unstable. Inefficient choices can involve high costs. Discrimination may generate losses and competitors wise enough to accept all talents win. Similarly, the victims to discrimination will find employers willing to compensate them adequately for the added value they generate.[21]

In addition, there are even more eminently theoretical and ideological considerations in the methodological tradition of the Austrian school of economics.[22] First of all, the fact that the power to exclude is an ineliminable component of the right to property, thus denying it implies irremediably compromising the latter:[23] after all, anyone who is against the discriminatory conduct of an enterprise can contribute to modifying its behaviour in the many ways that respect the principle of freedom available, starting with not buying its goods or services.[24]

Furthermore, it can be noted that 'Laws that interfere with the natural association of people simply exacerbate animosities and harmful discrimination' and that 'Laws that prohibit discrimination are inherently discriminatory when

is evident from studies such as the powerful R. Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright Publishing, 2017).

[21] Tony Blair was not so far from this approach when he coined the call to 'hire your best employer'. This conclusion is also confirmed by the studies of G.S. Becker, The *Economics of Discrimination* (Chicago: The University of Chicago Press, 2nd ed, 1971). See also A. Moran, 'Black Capitalists Used Markets to Fight Racism' *Liberty Nation*, 23 August 2018, available at https://tinyurl.com/ms73mn4 (last visited 31 December 2021), as well as Bartleby, 'Companies can appeal to workers and consumers with liberal messages' *The Economist* online, 24 January 2019, available at https://tinyurl.com/2sack33w (last visited 31 December 2021), and L.H. Rockwell Jr, 'The Economics of Discrimination', 12 July 2003, available at https://tinyurl.com/yc2xkf35 (last visited 31 December 2021); see also the Sears affair: B. Hunter, 'When Sears Used the Market to Combat Jim Crow', 19 October 2018, available at https://tinyurl.com/bdf5bj5b (last visited 31 December 2021).

[22] In addition to the writings quoted in the following notes, see. L.H. Rockwell Jr, 'Repeal '64' 13(5) *The Free Market* (1995). On the difference between the Austrian and the neoclassical (and in particular the Chicago school) approaches, see J.T. Salerno, 'The Market Isn't a Schoolmarm: The Austrian School versus Chicago' *Mises Wire*, 12 October 2018, available at https://tinyurl.com/2p8dbkrc (last visited 31 December 2021, who critically quotes the seminal article by G.J. Stigler and G.S. Becker, 'De Gustibus Non Est Disputandum' 67(2) *The American Economic Review*, 76 (1977).

[23] See R. McMaken, ' 'Discrimination' Isn't About Religion, It's About Private Property' *Mises Daily*, 2 April 2015, available at https://tinyurl.com/*2p9ajmta* (last visited 31 December 2021); L.M. Vance, 'The Right to Discriminate Is a Basic Property Right', 24 March 2017, available at https://tinyurl.com/44ectu2t (last visited 31 December 2021); but see also R.J. Barro, 'So You Want to Hire the Beautiful. Well, Why Not?' *Business Week*, 16 March 1998 (on the subject of the latter article, see L. Tietje, S. Cresap, 'Is Lookism Unjust?: The Ethics of Aesthetics and Public Policy Implications' 19(2) *The Journal of Libertarian Studies*, 31 (2005)).

[24] See also R.M. Ebeling, 'Markets, Not Government, Improve Race Relations', 5 September 2017, https://tinyurl.com/2p8a2zcm (last visited 31 December 2021); B. O'Neill, 'Inflating Away Our Human Rights', 14 December 2009, https://tinyurl.com/yckh32hz (last visited 31 December 2021).

applied to only one side of a prospective or existing association;'[25] and that any economic system cannot function without discrimination, ie without the possibility of choosing among scarce resources. Without choice, the efficient use of productive factors gives way to disorder and chaos.[26] Finally, anti-discrimination laws are paradoxically an advantage for entrepreneurs who would discriminate, because they prevent them from damaging themselves with their choices motivated by unjustified prejudices.[27]

In the end, all anti-discriminatory constraints severely limit contractual and entrepreneurial freedom (and, correspondingly, freedom of association). Indeed, strong theoretical and empirical arguments have emerged in literature claiming that economic freedom must prevail over egalitarian requirements. Let us now consider how operational rules meet this principle.

III. Recent Significant Case Law on the Intersection Between Anti-Discrimination Law and Economic Freedoms

Let us turn our attention to how the set of provisions mentioned above is applied in practice by case law, and start our analysis from Europe. A first case where economic freedom was taken into account and even seemed to prevail was *Achbita*.[28] Here, the CJEU ruled that

> 'the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief'

(although it might constitute indirect discrimination). The Court expressly stated that

[25] L.E. Carabini, *Liberty, Dicta & Force: Why Liberty Brings Out the Best in People and How Government Brings Out the Worst* (Auburn: Mises Institute, 2018), Chapter 5. On the subject of freedom of association, see D. R. Henderson, The Joy of Freedom: An Economist's Odyssey (Hoboken: Prentice Hall, 2001), 89: 'Freedom of association applies to not just employees, but also to employers. Just as you and I should be free to work, or not to work, for anyone we wish, so employers should be free to hire, or not to hire, anyone they choose. There should be no legal privileges; freedom of association applies to all'. See also, by the aforementioned R.A. Epstein, 'Two Conceptions of Civil Rights' 8(2) *Social Philosophy and Policy*, 39 (1991), as well as 'Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation', 2 January 2016, available at https://tinyurl.com/2p95mxhf (last visited 31 December 2021).

[26] See W. Block, *The Case for Discrimination* (Auburn: Ludwig von Mises Institute, 2010).

[27] See J. Newman, 'Discrimination Against Discrimination: Why We Don't Need Anti-Discrimination Laws', 26 July 2016, available at https://tinyurl.com/yckz6mmd (last visited 31 December 2021). On the difficulty of estimating the costs of quotas, see M. Levin, 'Quotas and the Bottom Line' 16(5) *The Free Market* (1998).

[28] Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding* v *G4S Secure Solutions NV*, Judgment of 14 March 2017, available at www.eur-lex.europa.eu.

> 'An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Art 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers'.

On the contrary, the European Court of Human Rights a few years earlier in the case of *Eweida and Chaplin* v *the United Kingdom*[29] (quoted, however, in an unconvincing manner in *Achbita*) seemed to go in the opposite direction. In *Eweida*, the Strasbourg Court found that the United Kingdom had violated the religious freedom of a Christian employee of British Airways. The company had not allowed her to wear a cross on her work uniform, putting her on unpaid leave until an agreement was reached (the UK courts had rejected the case brought by the woman to obtain payment of the salary lost during that period). In this case, therefore, the freedom of enterprise seemed to succumb to the desire not to discriminate on the basis of religious faith.[30]

The decision taken in *Achbita* is also contrary to the conclusion reached by the CJEU itself in *NH* v *Associazione Avvocatura per i diritti LGBTI - Rete Lenford*.[31] Here, the Luxembourg judges stated that

> 'statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned'

violated the prohibition of discrimination in recruitment established by EU law, which must prevail in this case over freedom of expression,

> 'provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical'.

This judgment does not contain any reference to Art 16 of the Nice Charter, nor a discussion of the possible repercussions of its conclusions on freedom of contract. By contrast, the link was held to be not merely hypothetical even though the statements were made in a radio interview in a very irreverent and provocative broadcast. As a result, the lawyer (Mr Taormina) who uttered these words lost

[29] 15 January 2013, no 48420/10, 59842/10, 51671/10, and 36516/10, available at www.eur-lex.europa.eu.

[30] For certain comparative observations on the two cases see, among many other writings, J.H.H. Weiler, 'Je Suis Achbita!' 15(4) *International Journal of Constitutional Law*, 879 (2017).

[31] Case C-507/18, Judgment of 23 April 2020 (in Italy, the case is also known as the *Taormina* case, from the name of the defendant/appellant in the original proceeding in domestic courts).

the case in Italy, against an association of lawyers supporting LGBTI rights.[32]

It is interesting to compare the CJEU decision in the *Associazione Avvocatura per i diritti LGBTI* case with the ruling of the German Federal Constitutional Court in the so-called *hotel ban* case, which was a direct appeal on constitutional grounds against a hotel owner who denied entry to the hotel to a politician from the far-right NPD party.[33] Based also on a decision just over a year earlier on a so-called *stadium ban*[34] – where limits had been set to the horizontal applicability of fundamental rights with regard to the exclusion of a football fan from access to a stadium – the German courts excluded that the plaintiff had a right to enter the hotel that had informed him that it did not want to receive him.

In the balancing act between property and freedom of economic initiative (expressly mentioned), on the one hand, and the horizontal application of freedom of thought in the light of the principle of equality, on the other, the Federal Constitutional Court somewhat surprisingly gave preference to the former. This was also based on the consideration that the appellant had the possibility of going to other hotels. Clearly, the appellant did not belong to a protected category, so the question remains whether the case would have been decided in the same way if he belonged to a minority group.[35]

Let us now consider the most relevant (recent) American cases on the subject.

The theoretical background is the question whether the Federal constitution also prevents discrimination in private relations. In a nutshell, originally the US Supreme Court stated in the *Civil Rights Cases*[36] that the (XIIIth and) XIVth Amendment did not allow Congress to pass laws prohibiting racial discrimination in relationships between private individuals. Such perspective was confirmed a few years later in the infamous *Plessy* v *Ferguson*[37] case, where the US Supreme Court notoriously upheld the so called Jim Crow laws, ie the laws of several southern States establishing racial segregation in all governmental establishments.

[32] Rete Lenford, 'La Cassazione rigetta il ricorso di Taormina', 16 December 2020, available at https://tinyurl.com/ycknkpz7 (last visited 31 December 2021).

[33] BVG, Order of 27 August 2019, 1 BvR 879/12. It is also worth mentioning a case concerning an alleged hotel discrimination suffered by a Jewish singer wearing the Star of David, whose development will need to be monitored (see the article 'Germany: Jewish musician files lawsuit against hotel over antisemitism claim' *Deutsche Welle*, 8 October 2021, https://tinyurl.com/45uy2ysn (last visited 31 December 2021)).

[34] BVG, Order of 11 April 2018, 1 BvR 3080/09.

[35] The German case can be compared with an important Czech case, where a hotel owner had introduced a policy that Russian citizens would only be accepted in his hotel if they signed a declaration condemning the Russian annexation of Crimea in 2014. After such conduct had been deemed discriminatory by the administrative authorities and the Supreme Administrative Court of that state, the Czech Constitutional Court overturned the judgment, stating that nationality was not a protected category and relying among other things on the existence of similar alternative accommodation nearby for Russian citizens unwilling to sign such statements: judgment of 30 April 2019, see https://tinyurl.com/yc2stkjw (last visited 31 December 2021).

[36] 109 US 3 (1883).

[37] 163 US 537 (1896).

However, more recently this case-law was (more or less explicitly) overturned, in parallel with the emergence of the so called state action doctrine, according to which private entities can also be caught by the XIV[th] Amendment, as long as it was found that they perform some governmental function.[38] This new line of cases[39] was initiated by *Shelley* v *Kraemer*,[40] where the Court still stated, in line with the *Civil Rights cases*, that the XIVth Amendment 'erects no shield against merely private conduct, however discriminatory or wrongful',[41] but eventually found that the judicial enforcement of contractual clauses preventing black people from purchasing property was unconstitutional, thus opening the door for the legislative ban and/or the judicial review of discriminatory contracts and more broadly discriminatory acts by private individuals and businesses.[42]

Moving on to more recent cases, I would first like to recall an American case which is not included in the list of cases concerning wedding vendors, but which has close similarities. It is *Stormans, Inc* v *Wiesman*. Wiesman concerned the Washington State regulation imposing a twofold obligation on all pharmacies in that State. One obligation was to stock and sell emergency contraceptives. Moreover, if any of the pharmacists employed personally objected to selling these products due to his/her/their religious convictions, at least one other pharmacist should have been available to sell them.

The Stormans family, who owned a supermarket and pharmacy (Ralph's Thriftway), along with several other pharmacists, challenged the legality of this regulation in court. The District Court held that it did indeed violate the plaintiffs' religious freedom, which is protected by the First Amendment.[43] However, the Court of Appeals for the Ninth Circuit overturned the decision,[44] upholding the regulation despite the plaintiffs' willingness to name other pharmacies available

[38] References to such a doctrine are featured in several footnotes in the next section, in connection with the debate on whether private internet platforms should be deemed state actors and regulated as such.

[39] That includes *Brown* v *Board of Eduction* (1954); *Heart of Atlanta Motel, Inc* v *United States* (1964); *Jones* v *Alfred H. Mayer Co* (1968), all available at www.eur-lex.europa.eu.

[40] 334 US 1 (1948).

[41] 334 US 13 (1948).

[42] *Shelley* v *Kraemer* has given rise to considerable attention and debate from legal scholarship, both at the time it was issued and more recently. See, among many other writings, L. Henkin, 'Shelley v Kraemer: Notes for a Revised Opinion' 110(4) *University of Pennsylvania Law Review*, 473 (1962); B. McAffee, 'Shelly v. Kraemer: Herald of Social Progress and of the Coming Debate Over the Limits of Constitutional Change' in *Scholarly Works*, 542 (1987); and consider also the exchange of ideas initiated by David E. Bernstein's article for Cato Unbound, 'Context Matters: A Better Libertarian Approach to Antidiscrimination Law', 16 June 2010, available at https://tinyurl.com/ycx2y8cy (last visited 31 December 2021), which prompted replies and counter-replies by Sheldon Richman, Jason Kuznicki, Jeffrey Miron, as well as by the same Bernstein (the links to all these contributions is available on the web page of the original article by Bernstein cited just above).

[43] 854 F. Supp. 2d 925 (findings of fact and conclusions of law); *Stormans Inc* v *Selecky*, 844 F. Supp. 2d 1172 (WD Washington 2012) (opinion granting injunction).

[44] 794 F. 3d 1064 (2015).

to sell emergency contraceptives, and the existence of more than thirty such pharmacies within five miles. The pharmacists applied for certiorari to the US Supreme Court, but the Supreme Court rejected it, despite a dissent signed by Alito and concurred by Chief Justice Roberts and Thomas,[45] who called for much stronger protection of religious freedom.

However, in recent years the most important cases have mainly dealt with wedding vendors who refused to provide services related to unions or marriages between homosexuals. As will be seen, the courts have largely tended to qualify these behaviours as illegitimate. These were regarded as 'offers (of money) that (the businesses concerned) cannot refuse'.

I will now follow a chronological order and limit myself to cases where there has been some form of interaction with the US Supreme Court, even if only in the form of a denial of certiorari or a decision to not consider the case at all, or where there was at least a ruling by a state Supreme Court.

The first case to mention is *Elane Photography, LLC* v *Willock*.[46] On the basis of her religious beliefs, a photographer refused to provide services at Mrs Willock's same-sex civil union ceremony. Invoking a New Mexico law that prohibits companies from refusing to render services on the basis of sexual orientation discrimination, Willock appealed to the state's Human Rights Commission, arguing that the photographer should be subject to the same rules as hotels and restaurants.[47] The Commission ruled in her favour, and Elane Huguenin's appeal was rejected by every court in the state, most recently by the Supreme Court.[48] Since the US Supreme Court did not agree to review the case,[49] the state Supreme Court ruling became final.[50]

[45] 579 US _____ (2016), Alito, J., dissenting.

[46] Before the recent wave of new cases, there was a case that ended with a settlement, dating 2003-2004, concerning a refusal to print invitations to a same-sex wedding in Canada by a printing company (Starfish Creative Invitations) in Seattle, Washington State. The defence of the discriminated bride and groom was taken on by the ACLU, on whose site one can find news of the settlement agreement that closed the case: ACLU, 'Following ACLU Intervention, Refusal to Print Invitations to Same-Sex Wedding Ends with Apology and Agreement not to Discriminate', 12 February 2004, available at https://tinyurl.com/4an4stnk (last visited 31 December 2021). Another noteworthy case is that of the Görtz Haus Gallery, an art gallery and restaurant in Grimes, Iowa, whose Mennonite owners were sued for discrimination by a homosexual couple who had been denied the use of their premises for the celebration of their marriage. The two had to accept an agreement that involved the payment of a sum of money and, above all, a commitment not to discriminate in future concessions of their premises. On this basis, they had to choose between accepting to host homosexual marriages, or not hosting marriages (even heterosexual) at all. Having opted for the second alternative, favouring their faith, they were soon forced to close their business: see G. Rodgers, 'Struggling Görtz Haus to Close Without Wedding Business' *Des Moines Register*, 22 June 2015.

[47] See the reconstruction by E. Volokh, I. Shapiro, D. Carpenter, G. Latner, 'Elane Photography v Willock', 13 December 2013, available at https://tinyurl.com/5ym5vrkz (last visited 31 December 2021).

[48] 309 P. 3d 53 (NM 2013).

[49] 134 S. Ct. 1787 (2014).

[50] A similar case (involving video-makers), decided in the opposite manner by the United

In June 2018, the most famous of these judgments came from the US Supreme Court in *Masterpiece Cakeshop* v *Colorado Civil Rights Commission*.[51] It concerned a bakery in Colorado whose owner, Jack Phillips, had refused, on the basis of his religious convictions, to make a wedding cake for a homosexual marriage. The marriage would have been celebrated in a US State where same-sex marriages were legal, while in Colorado they were not. The bride and groom sued Mr Phillips before the State Civil Rights Commission, which obtained from an administrative court a sentence condemning him to make cakes for homosexual weddings and to reorganise his business so as to comply with the ban on discrimination based on sexual orientation.

Phillips appealed the decision to the Colorado Court of Appeals, which ruled against him, and the Supreme Court of Colorado did not grant certiorari. However, the case was considered by the US Supreme Court, which overturned the state ruling in a 7-2 decision, which included liberal Justices Kagan and Breyer. It should be noted, however, that the decision was based on the fact that the Court had found in the case file the existence of hostile treatment by the Commission towards Mr Phillips' religious beliefs, consisting of strong statements such as the comparison to slavery and the Holocaust, and questionable references to cases about same-sex marriage. This was sufficient for the judges of the Supreme Court to reverse the decision of the State judges.

The Court, therefore, did not answer the thorny question of the relationship between anti-discrimination law on the one hand, and freedom of expression, religious freedom and economic freedom on the other. Furthermore, it avoided taking a stand on whether or not the making of a (personalised) wedding cake was a form of speech. Unsurprisingly, the decision was welcomed by groups that had defended the couple and argued that discrimination is not adequately protected by the First Amendment.[52]

A few weeks after *Masterpiece Cakeshop*, the US Supreme Court decided the *Arlene's Flowers Inc* v *Washington* case. The dispute brought together three different cases. Once again, it regarded a refusal to provide services for a same-sex wedding on the basis of religious objections: Barronelle Stutzman, owner of Arlene's Flowers, had refused to provide flowers for the wedding of a same-sex couple.

Ms Stutzman lost her case in the state of Washington, where the Supreme Court unanimously held that her choice did not constitute a form of speech –

States Court of Appeals for the Eighth Circuit, arose in *Telescope Media Group v Lucero*, 936 F. 3d 740 (2019).

[51] 584 US ___ (2018).

[52] NAACP, 'Supreme Court Reaffirms Core Anti-Discrimination Principles in Masterpiece Cakeshop Case', 4 June 2018. Justice Kennedy wrote, on the matter, that if one were to generalise the possibility of refusing service to homosexuals solely on the basis of their sexual orientation, it would generate against them 'a community-wide stigma inconsistent with the history and dynamics of civil rights laws'.

protected as such by the First Amendment – but rather was discrimination, prohibited by Washington state law.[53] Upon hearing the case, the US Supreme Court simply granted certiorari, vacating the earlier ruling and remanding the case 'to the Supreme Court of Washington for further consideration in light of *Masterpiece Cakeshop*'.[54] However, a year later, the Supreme Court of Washington again unanimously ruled in favour of the couple,[55] essentially holding that Ms Stutzman's action was conduct and not speech, that there was no evidence of anti-religious bias against her in this case,[56] and that anti-discrimination legislation did not conflict with freedom of speech, association, or religion. Ms Stutzman filed a new petition for writ of certiorari to the US. Supreme Court,[57] which this time denied certiorari with a 6-3 decision.[58]

A few days after the Washington Supreme Court's new ruling, the US Supreme Court decided to grant certiorari, vacating the judgment and remanding the case for further consideration in light of *Masterpiece Cakeshop*, in a case from Oregon, *Klein* v *Oregon Bureau of Labor and Industries*. This case also stemmed from a refusal by the owners of a bakery, Mr and Mrs Klein, to bake wedding cakes for same-sex weddings due to their religious beliefs.

The homosexual couple complained to the Oregon's Bureau of Labor and Industries about unjustified discrimination against them. This led to the imposition of a $135,000 fine on Mr and Mrs Klein by an administrative court. This high amount was presumably also due to the fact that Mr and Mrs Klein had published the original complaint on Facebook, thus making known the identities of the two brides, who were then targeted online with death threats.[59]

The decision of this court was later confirmed by the Oregon's Bureau of Labor and Industries, which essentially prohibited the Kleins from advertising any intention to discriminate in their business. The Oregon Court of Appeals dismissed the Kleins' appeal, confirming the penalty and its amount, also on the

[53] 389 P. 3d 543 (Washington 2017).

[54] 138 S. Ct. 2671 (2018).

[55] 441 P. 3d 1203 (Washington 2019).

[56] The Court, however, gave a restrictive interpretation of *Masterpiece Cakeshop*, arguing that the neutrality obligation it established applied only to *adjudicatory bodies*, whereas in the present case the alleged prejudice was in the hands of the Attorney General of the State of Washington, thus *Masterpiece Cakeshop* would not have been applicable in this case. For a critique of this reading of US Supreme Court precedent, see 'Washington Supreme Court Limits Masterpiece Cakeshop to the Context of Adjudications' 133 *Harvard Law Review*, 731 (2019).

[57] The full appeal is available at https://tinyurl.com/282y4ejz (last visited 31 December 2021).

[58] See https://tinyurl.com/mr4cv8dk (last visited 31 December 2021).

[59] It should also be added that a fundraising campaign in support of Christian bakery crowdfunding was soon banned by the well-known GoFundMe platform, as well as another in support of the Stutzman florist, which was at the centre of a similar affair as the one mentioned above. On the occasion of these campaigns, the GoFundMe website modified its *terms of service* by adding the campaigns it considered 'discriminatory' among those not allowed on its platform: cf A. Ohlheiser, 'After GoFundMe shuts down Christian bakery crowdfunding, it bans 'discriminatory' campaigns' *Washington Post*, 1 May 2015.

grounds that the Kleins' refusal was not an act of speech and therefore the strong First Amendment guarantees against compulsory speech did not apply. The Oregon Supreme Court refused to reconsider the case, while the US Supreme Court sent the case back to the Court of Appeals, where it has been pending since January 2020.[60]

Dating back to September 2019, however, we find an Arizona Supreme Court ruling with a different perspective, in *Brush & Nib Studio, LC* v *City of Phoenix*, Joanna Duka and Breanna Koski, the two owners of a studio that designs handicrafts, and prints customised wedding invitations and other anniversary-related artwork, decided to pre-emptively challenge an ordinance of the City of Phoenix, Arizona, that prohibited them (under penalty of fines and imprisonment)[61] from discriminating in their choice of contractors, and consequently to refuse to perform their work for any future same-sex marriage for which their services were required (as well as to publicly display their religious beliefs on which such refusal would be based).

Their firm, Brush & Nib, lost both in the first instance[62] and on appeal,[63] being held to be subject to the rules (considered legitimate) prohibiting discrimination in places of public accommodation, without the possibility of invoking the First Amendment. Yet, the Arizona Supreme Court overturned the two previous decisions and ruled in favour of the plaintiffs, albeit by a narrow 4-3 majority.[64] In the end, it prevailed that, in this case, the main activity in which the plaintiffs were involved (and only that activity), namely the handwriting of invitations celebrating an imminent marriage, must necessarily be considered a form of expression, protected as such by the First Amendment and therefore prevailing over the need to combat discrimination.[65]

[60] This case and *Masterpiece Cakeshop* differ in fact from a UK case concerning a refusal, again based on religious objections, to bake a cake with the explicit message '*Support Gay Marriage*': in this case, *Lee (Respondent)* v *Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)*, [2018] UKSC 49, the UK Supreme Court unanimously held the refusal to be lawful. Mr Lee subsequently brought his case before the European Court of Human Rights, but the latter found the application inadmissible in a decision issued on 6 January 2022.

[61] The decision to impose a criminal penalty, including a prison sentence, even if it is an alternative to a fine, on 'anyone who denies a person or a group of persons a service offered and intended for the public on account of their race, ethnicity, religion or sexual orientation' was also recently made by Switzerland, with an amendment to the Military Penal Code that was approved in a popular referendum on 9 February 2020: see https://tinyurl.com/2p8ayus3 (last visited 31 December 2021).

[62] The judgment is available at https://tinyurl.com/ywm65pjp (last visited 31 December 2021).

[63] The judgment is available at https://tinyurl.com/4uem3dzn (last visited 31 December 2021). This judgment was published only four days after *Masterpiece Cakeshop,* but it already took the latter into account by specifying that, in this case, there was no evidence of prejudice against the applicants.

[64] 448 P. 3d 890 (Arizona 2019).

[65] This case therefore appeared less divisive in the libertarian community itself, bringing back to the same positions legal scholars and centres who had dissented in *Masterpiece Cakeshop*,

While there is some dispute as to the applicability of this ruling (not least because of the hypothetical nature of the dispute),[66] or to what other situations it applies (the order itself remains in effect), the Arizona Supreme Court decision makes clear that

> 'Our holding today is limited to Plaintiffs' creation of one product: custom wedding invitations that are materially similar to the invitations contained in the record. [...] Nothing in our holding today allows a business to deny access to goods or services to customers based on their sexual orientation or other protected status'.[67]

This is in line with the US Supreme Court's decision eg in *Jaycees*. In *Jaycees*

> (a state's 'strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services [...] plainly serves compelling state interests of the highest order')[68]

and reaffirmed in *Hurley* (prohibitions against discrimination in access to public places

> 'are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments')[69]

for example. Eugene Volokh and his (homosexual) colleague Dale Carpenter, authors of an amicus brief of the Cato Institute in support of Brush & Nib (while in *Masterpiece Cakeshop the* Cato Institute had supported the reasons of the baker, and the two lawyers those of the discriminated couple, believing that the preparation of a cake was not an expressive activity that involved the application of the First Amendment). In an impromptu commentary on the ruling, Carpenter wrote: 'those whose very calling is to put pen to paper should not be required – on pain of government-imposed fines, jail, or loss of their livelihoods – to speak in violation of their consciences' (D. Carpenter, 'Free speech for thee and for me', 16 September 2019, available at https://tinyurl.com/5n6ev5z6, last visited 31 December 2021). The *Brush & Nib* case *is* quite similar to the Irish case of Beulah Print and Design, in which the company refused to print invitations for a same-sex wedding: this company was consequently ordered by the Workplace Relations Commission (WRC) to pay two thousand five hundred euros to the gay groom who had requested the service: see G. Deegan, 'Firm told to pay gay man €2,500 over refusal to print civil ceremony invites' *The Irish Times*, 8 February 2019.

[66] See P. Bender, 'Comment on Brush & Nib Studio v City of Phoenix' *Arizona State Law Journal*, 2 October 2019.

[67] §§ 112-113.

[68] 468 US at 624.

[69] 515 US at 572. The Court cites some of its precedents in support: *New York State Club Assn, Inc* v *City of New York*, 487 US 1, 11-16 (1988) (unanimously upholding the extension of anti-discrimination prohibitions to a number of social clubs that had a number of ties to the outside world that did not make them 'distinctly private', including the participation of outsiders in club events and the financing of clubs, as well as their pursuit of a business activity such as hosting public dining events)*;* United States Jaycees, 468 US 609 (in which a unanimous 7-0 decision ruled that Minnesota legislation which, in order to prevent discrimination in access to

(but indirect confirmation also comes from cases such as *Hobby Lobby*, where the Court stated that the affirmation of the illegality of the contraceptive mandate at the head of private corporations did not provide any protection to possible discrimination in the workplace more or less conveniently motivated on the basis of religious beliefs.)[70]

The decision also provides guidance on when conduct should be classified as speech:[71] drawing on its own precedent,[72] the Arizona Supreme Court essentially identifies three possible categories: so-called 'purely expressive activity', or 'pure speech', which falls under the strong protection of the First Amendment;

the economy, required the Jaycees' business group to include women in its membership, did not violate the associational freedom of this organisation); and *Heart of Atlanta Motel, Inc* v *United States*, 379 US 241, at 258-262 (1964) (which unanimously upheld the legality of prohibitions on racial discrimination in hotels and motels, based on the Constitution's Commerce Clause). The latter case is discussed by the Court in Brush & Nib together with Newman v Piggie Park Enterprises, Inc, 256 F. Supp. 941 (D. S.C. 1966), affirmed in part and reversed in part on other grounds, 377 F. 2d 433 (4th Cir. 1967), affirmed as modified on other grounds, 390 US 400 (1968) (per curiam), explaining that there was no conflict between these cases and his own decision: 'Those cases did not involve compelled speech, but rather business owners who refused to serve African-Americans based solely on their race, a practice Plaintiffs expressly condemn, and that our holding clearly neither permits nor condones'.

On the other hand, it is worth pointing out that *Hurley* is also quoted by the Arizona Supreme Court as a case in which 'the Supreme Court rejected any suggestion that a public accommodations law could justify compelling speech' (§ 107: as the US Supreme Court wrote in that case, '[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government' 515 US at 579), a sign of a certain ambiguity inherent in this series of cases, to which I will return in the concluding section. (*Hurley* is a case in which the Supreme Court unanimously affirmed the right of a private group, commissioned by the mayor of Boston to organise the celebrations of St Patrick's Day and Evacuation Day, to exclude from the parade a group of homosexual activists who wanted to participate with their banner).

[70] *Burwell* v *Hobby Lobby Stores*, 573 US 682 (2014).

[71] On this subject, see extensively C. Mala Corbin, 'Speech or Conduct? The Free Speech Claims of Wedding Vendors' 65 *Emory Law Journal*, 241 (2015).

[72] *Coleman* v *City of Mesa*, 284 P. 3d 863 (2012): this is a case in which the products made by a tattoo studio were held to be 'expressive activity' (see below in the text) and therefore 'protected free speech' (355), as did the US Supreme Court in *Brown* with regard to video games (564 U.S. at 790), and this with regard to both the finished product and the creative process. In *Coleman*, the Arizona court also made clear that the 'degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away' 230 Ariz. at 360 ¶ 31 (alteration in original) (quoting *City of Lakewood* v *Plain Dealer Publ'g Co*, 486 US 750, 756 no 5 (1988))' (a case concerning a city's discretion to grant space to private publishers to place their newsracks). In *Brush & Nib, the* Court also referred to a number of US Supreme Court precedents consistent with this statement: 'Likewise, the Supreme Court stressed in *Riley* that 'a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak' 487 US at 801; see also *Hurley* [quoted here, a few notes above], 515 US at 573-74 (1988) (stating the right to autonomy of speech and freedom from compelled speech is 'enjoyed by business corporations generally', including 'professional publishers'); *Joseph Burstyn, Inc* v *Wilson*, 343 US 495, 501 (1952) (holding that motion picture companies that operate for profit are 'a form of expression whose liberty is safeguarded by the First Amendment')'.

so-called 'non-expressive business activities',[73] which do not generally enjoy such protection; and finally, the intermediate category of 'conduct that is 'sufficiently imbued with elements of communication' '.[74] In order to determine whether the conduct in question 'contains an expressive element', it is necessary to refer to the two-part test established by the US Supreme Court and commonly known as the 'Spence-Johnson test': '(1) whether the speaker intends to convey a 'particularized message'; and (2) the 'likelihood [is] great' that a reasonable third-party observer would understand the message'.[75]

From these premises, it follows that 'A business does not forfeit the protections of the First Amendment because it sells its speech for profit'.[76] Nevertheless, simply because a business creates or sells speech does not mean that it is entitled to a blanket exemption for all its business activities. Like other organizations and associations, no business 'is likely ever to be exclusively engaged in expressive activities,' and even the most expressive business will be engaged in non-expressive business activities.[77]

Finally, one month after the Arizona case, the Kentucky Supreme Court issued its ruling in *Baker* v *Hands On Originals*, concerning a printer who had refused to print t-shirts requested by an LGBTQ association for the annual Pride Celebration in Lexington-Fayette County, Kentucky. While the Kentucky Court of Appeals had ruled that the county ordinance prohibiting gender-based discrimination by places of public accommodation violated the owner's freedom of expression (for one judge, also his religious freedom), the Supreme Court of that State did not overturn the ordinance, and simply stated that it did not apply to groups such as the one that had promoted the case (Gay and Lesbian Services Organization, which therefore lacked *standing*), but only to individuals.

Considered as a whole, in my opinion the cases of the wedding vendors can

[73] Italics added.

[74] The courts recall *Texas v Johnson*, 491 US 397, 404 (1989) (recalling in turn *Spence* v *Washington*, 418 US 405, 409 (1974)).

[75] *Spence*, 418 US *at* 410-11; *Johnson*, 491 US at 404.

[76] § 66. Then follows the passage quoted in n 65 above.

[77] § 67. The reference is to the judgment mentioned in n 69 above *Roberts* v *US Jaycees*, 468 US 609, 635 (1984) (O'Connor, J., concurring in part and in the judgment), quoted earlier in the text. The decision further references case law: '[t]hus, for example, in *Pittsburgh Press Co* v *Pittsburgh Commission on Human Relations*, 413 US 376, 385-88, 390-91 (1973), the Supreme Court held that while the First Amendment protected the content of articles published by a newspaper, it did not protect the newspaper's facilitation of illegal hiring practices by publishing gender-specific employment advertisements. See also *Arcara* v *Cloud Books, Inc*, 478 US 697, 698-99, 705-06 & n 3 (1986) (holding that adult bookstore owner, who allowed prostitution to be solicited on his business premises, was engaged in "nonspeech' conduct' that 'manifest[ed] absolutely no element of protected expression,' and stating that 'First Amendment values may not be invoked by merely linking the words 'sex' and 'books"); *Hishon* v *King & Spalding*, 467 US 69, 78 (1984) (stating that while law firms may engage in free speech and freedom of association, there is no free speech protection to engage in discriminatory employment practices)' (cf, with regard to the latter case, the aforementioned *Taormina* case).

also be compared to a Polish case of a boycott of a company by another company:[78] following homophobic statements on Facebook by a politician and owner of a beer company, Marek Jakubiak, a beer house in Warsaw run by LGBT activists announced its decision to stop selling that brand, and also carried out the demonstrative action of spilling the contents of some bottles in the street. The boycott by the café owners was sanctioned, both in the first instance and on appeal: the judges decided to limit the freedom of enterprise and expression of thought of the latter, favouring the position of the brewer, who they considered to have been unlawfully harmed.[79]

[78] In turn, Poland has also had an important case on the issue of refusing to serve homosexuals: the employee of a printing house (not the owner) was fined for refusing to print posters for an LGBT group, and the conviction was upheld by the Supreme Court, but the Constitutional Court later declared the provision on which the conviction was based unconstitutional (cf Reuters, 'Poland rules in favour of printer convicted over refusing LGBT posters', 26 June 2019, available at https://tinyurl.com/ycy39scd (last visited 31 December 2021). This was followed by a huge wave of boycotts of LGBT people by local communities in a territory that in total occupies about a third of Poland, also driven by a pro-government magazine, which started to distribute stickers aimed at making an area that had declared itself LGBT-free recognisable; in turn, this initiative gave rise to a court case, which is currently pending, as well as a precautionary decision by the district court of Warsaw to order the newspaper to stop distributing the stickers, with a decision on the merits of the case pending (but the newspaper continued the campaign by simply changing the text to the Polish equivalent of the 'LGBT Ideology-Free' zone): cf K. Knight, 'Polish Court Rebukes 'LGBT-Free Zone' Stickers', 1 August 2019, available at https://tinyurl.com/2p9aan5e (last visited 31 December 2021).

[79] Polish Helsinki Foundation for Human Rights, 'Bottoms Up: Poland Beer Boycott 'Unlawful' ', 6 April 2018, available at https://tinyurl.com/n6vh7tv5 (last visited 31 December 2021). On the subject of boycotts, one area worth mentioning is the so-called *Anti-BDS* laws, ie laws aimed at countering the Boycott, Divestment, and Sanctions movement against Israel.

Typically, these laws aim to regulate the allocation of public funds so that they do not reach entities that boycott Israel, and there is an open debate as to whether or not this is compatible with the First Amendment. (An issue of controlling the work of public entities so that it is not discriminatory also arose in the lawsuit filed by five Texan citizens against the city of San Antonio, on the basis of a law specifically enacted to protect the members and supporters of religious organisations from retaliation (Senate Bill 1978), owing to the decision of the city council to exclude the well-known fast food chain Chick-fil-A from the possibility of opening a restaurant in the airport of that city, as a reaction against the positions expressed in the past by its owners against the rights of LGBT people and in particular homosexual marriage. However, the application was rejected, most recently by the Fourth Court of Appeals of Texas, due to the non-retroactivity of the quoted law on which it was based: No 04-20-00071-CV, 19 August 2020; see also *Garcetti* v *Ceballos*, 547 US 410 (2006), for an affirmation of the lawfulness of restrictions on the expression of one's thoughts by public employees in the work context).

Finally, it is also worth mentioning the campaign undertaken in June 2020 against Facebook by large companies including Coca Cola, Verizon, Amazon, Unilever, and Patagonia, consisting of the decision to suspend advertising on the social network in order to push it to remove more offensive content. Facebook was deemed to be deliberately inactive on this front, in order to increase its traffic for profit (a move that contributed to greater interventionism on the part of Facebook, with the consequent question of whether or not it was exempt from editorial liability in light of the well-known Section 230 – on this topic, see the concluding section). A similar initiative was taken in April 2021 by a number of Premier League football clubs and FIFA to protest against insufficient activity by major social media outlets against the dissemination of racist posts.

Finally, three more cases from 2020 deserve attention, one concerning business-to-business relationships, and two others concerning employment relationships. The first, *Comcast Corp* v *National Association of African American-Owned Media et al*,[80] concerned a dispute between an African American entrepreneur's (Byron Allen) television production company and the Comcast network. Allen had been unable to reach an agreement with Comcast to include his channels in Comcast's offerings, and had filed a lawsuit claiming that he had been discriminated against because he was African American.

After having lost at first instance, Allen won the case in the Ninth Circuit Court, which in parallel upheld a decision in his favour in a similar case against the Charter company. In these two decisions, the Ninth Circuit Court held that the First Amendment does not give networks absolute editorial discretion in choosing which channels to offer, since they cannot make these decisions in a discriminatory manner.

The US Supreme Court, however, unanimously reversed the decision in *Comcast* (the *Charter* case went its own way and was not consolidated), narrowing the scope of anti-discrimination law by affirming the principle that the burden was on the plaintiff to prove that racial considerations were the only reason why a particular agreement was not reached ('but-for test').[81]

As mentioned earlier, another two relevant 2020 cases relate to employment law.[82] The first, *Bostock* v *Clayton County, Georgia*,[83] was consolidated with *Altitude Express, Inc* v *Zarda* and *R.G. & G.R. Harris Funeral Homes Inc* v

By contrast, with regard to the emerging cryptocurrency sector, it was Facebook, Google, and Twitter that imposed restrictions on advertising investments in this area: they were in turn sued in a class action in Australia, which is currently ongoing (see https://tinyurl.com/2p8fkspy, last visited 31 December 2021).

[80] 589 U.S. ___ (2020).

[81] This case can be likened to *Manhattan Community Access Corp* v *Halleck*, 587 US ___ (2019), in which the US Supreme Court ruled that a private network operating public access television channels is not a '*state actor*' and therefore not subject to the restrictions that the First Amendment imposes on the government, but instead has discretionary editorial choices in granting or not granting space to certain programmes and producers. Also, on the subject of access regulation in the field of television programmes, one may finally recall the (different) case C-622/17, *Baltic Media Alliance Ltd* v *Lietuvos radijo ir televizijos komisija*, Judgment of 4 July 2019, available at www.eur-lex.europa.eu, where the Court of Justice of the EU held that it did not constitute an infringement of European law for the Lithuanian television market regulator to impose on a television programme distribution company to make available a channel predominantly intended for the Russian-speaking minority only in premium packages, on the basis of an alleged public policy reason, ie the programming of content deemed to incite hatred against the Baltic States. (The decision was thus aimed singularly at protecting against possible discrimination against the majority, by a minority descended from past rulers).

[82] With regard to defining the scope of the employer's obligations to respect the identity of employees, a relevant issue is also that of the personal pronouns chosen by employees: see T. Sherman, 'All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns' 26 *William & Mary Bill of Rights Journal*, 219 (2017).

[83] 590 U.S. ___ (2020).

Equal Employment Opportunity Commission. Mr Bostock, an administrative employee who had promoted a gay softball league at work, complained that he had been fired by Clayton County because of his homosexual orientation. Mr Zarda, a skydiving instructor (who later died in a tragic base jumping accident, so the case was continued by his heirs), had a similar complaint: he complained that he had been dismissed from Altitude Express because of his homosexual orientation, which was revealed to a client to make her feel more comfortable. Another case regarded Ms Aimee Stephens being dismissed from her job by the Harris Funeral Homes group shortly after she sent notice of her impending sex change. (She also died before the decision was made and her case was continued by her heirs).

The Supreme Court addressed the question whether the prohibition of discrimination in employment relationships 'because of sex' contained in Title VII of the Civil Rights Act of 1964 includes discrimination on the basis of sexual orientation and gender identity. By a majority of six-three, the Supreme Court ruled in the affirmative, thus extending protection from discrimination to homosexual and transgender people. The majority opinion was written by originalist Justice Gorsuch and was concurred by Chief Justice Roberts, who were joined by the four progressive justices in service at the time. The opinion was based on interpretative considerations and did not address the legitimacy of the legislation. The task of the justices was to interpret the law, rather than subject it to constitutional review.[84]

[84] The *Bostock* case was then the subject of one of the executive orders of Joe Biden's first day as President, which extended its scope by expressly guaranteeing transsexuals protection from discrimination in some areas, including the housing sector ('Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation', 20 January 2021). Also, with regard to the housing sector, the Department of Justice under the new President Biden dropped the appeal in the case *Massachusetts Fair Housing Center* v *HUD*, thus leaving in place a preliminary injunction that had postponed the application of new, more restrictive rules, desired by the previous Trump administration, which would have made it more difficult to bring actions against discrimination, and in particular those based on the assertion of a disparate impact of only apparently neutral rules (a possibility that the Supreme Court recognised as being granted by the Fair Housing Act in *Texas Dept of Housing and Community Affairs* v *Inclusive Communities Project, Inc* 576 US 519 (2015)).

On the subject of discrimination in labour relations, mention should also be made of the case of *Stacey Macken* v *BNP Paribas London Branch* (2208142/2017 & 2205586/2018, 30 August 2019), in which the Employment Tribunal of London held that BNP Paribas had discriminated against the plaintiff by, among other things, paying her less than a male colleague of equal rank (an issue already the subject of the historic case brought, and successfully settled, by Betsy Wade, who recently passed away, and six other female colleagues, against the New York Times). Lastly, I would like to mention the bill called the *'BE HEARD' Act*, presented in the previous legislature and openly supported by the current President Biden. It would considerably broaden the scope of anti-discrimination law with regard to small businesses, among other things by removing the limit on punitive and compensatory damages and as a consequence greatly increasing the bill for legal fees (cf H. Bader, 'This Proposed Law Would Flood Small-Business Employers with Ruinous Lawsuits', 3 August 2020, available at https://tinyurl.com/3t2sxmnr (last visited 31 December 2021).

The last case to be mentioned is *Our Lady of Guadalupe School* v *Morrissey-Berru*, consolidated with *St. James School* v *Biel*.[85] In both cases, Catholic school teachers had had their contracts not renewed and claimed they had been discriminated against on the grounds of age and disability, respectively.[86] The Court referred to its own precedent of eight years earlier, *Hosanna-Tabor Evangelical Lutheran Church and School* v *Equal Employment Opportunity Commission*,[87] in which it had unanimously ruled on the so-called ministerial exception, ie the fact that the protection of religious freedom in the First Amendment prevented the government from interfering with how religious congregations chose their 'ministers'.

In his opinion in *Hosanna-Tabor*, Chief Justice Roberts stated that four elements were relevant to determine whether a person qualified as a minister of a church:

> 'the formal title given [...] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church'.

In the *Our Lady of Guadalupe* cases, the question arose as to whether teachers with some religious duties in educating students (such as teaching religion, and worshipping and praying with the children), but whose primary role was not religious teaching, should fall within the ministerial exception. With a seven-two majority, the Court ruled in the affirmative, holding that this exception should also apply to persons who were not religious leaders but who had nevertheless assumed a contractual obligation to promote the Catholic faith in all areas related to their teaching.[88] The result was a significant reduction in

[85] 591 U.S. ___ (2020).

[86] In the area of disability discrimination, *Gil* v *Winn-Dixie Stores* (No 17-13467, 11th Cir April 7, 2021) and *Robles* v *Domino's Pizza,* LLC, 913 F. 3d 898 (9th Cir January 15, 2019), in which two Circuit Courts of Appeals ruled in opposite ways, the question was decided whether or not websites equate to a place of public accommodation, and thus are required to be accessible by blind persons based on the *Americans with Disabilities Act* (ADA). The 9th Circuit court had given a positive response, in a case – still pending – in which the US Supreme Court has since denied Domino's Pizza's request for certiorari on the decision (140 S. Ct. 122 (2019), *Domino's Pizza* v *Robles*, 7 October 2019); the 11th Circuit court has more recently ruled otherwise. A similar issue was also at the heart of an only seemingly trivial class-action lawsuit that was filed with the District Court of the Eastern District of New York in January 2020 by a deaf man against the popular website Pornhub for discrimination, due to the alleged lack of subtitles in many videos, which ended with a settlement between the parties (*Suris* v *Mindgeek Holdings Sarl et al*).

[87] 565 US 171 (2012).

[88] The case is therefore different from the one (worthy of mention however) involving the famous Italian university professor Franco Cordero, who in the early 1970s was excluded from teaching at the Catholic University of Milan, where he was employed, after publishing a book that was not appreciated by the hierarchies. Cordero challenged the withdrawal of his teaching authorisation by the Sacred Congregation for Catholic Education before the Council of State, which raised a question of legitimacy before the Italian Constitutional Court of the provision of the Concordat between Italy and the Catholic Church that made the authorisation necessary.

the scope of anti-discrimination law with regard to religious organisations, although some questions remained open, such as whether churches could give weight to extracurricular conduct that was not in line with the school's religious teachings.[89]

In conclusion, an opposite story to those just mentioned comes from Poland. During the 2019 day against homophobia and transphobia, the Polish branch of the Swedish multinational Ikea published an article on its intranet supporting the LGBT battle, instructing employees to adopt a series of LGBT-friendly behaviours towards customers belonging to the LGBT community. One employee commented on the article in a very critical way, quoting passages from the Bible that strongly condemned homosexuality. After he refused to delete the comment, he was fired. In this case, therefore, the dismissal was not against a member of a protected category, as is typically the case with homosexuals, but against a person who expressed discriminatory views against members of the homosexual community. Two legal proceedings were opened, one civil against Ikea to

However, the Italian Constitutional Court then gave precedence to the Catholic university's freedom of religion and association and held that the question was not well-founded (judgment no 195 of 29 December 1972). Associational freedom also prevailed before the American Supreme Court, in the case *Boy Scouts of America* v *Dale*, 530 U.S. 640 (2000), where the exclusion of a scout leader from his organisation because of his coming out as a gay man was considered legitimate. A final case worthy of mention is the practice, which became widespread in 2016, of some American football players kneeling during the national anthem, as a sign of protest against racism: with regard to this practice, there was much debate as to whether it was a constitutionally protected form of expression, or whether the NFL, the private association organising the tournament, could legitimately prohibit it (cf J. Miltimore, 'Law Professor: Stop Saying Football Players Have a 'Constitutional Right' to Kneel During the National Anthem. They Don't, in Intellectual Takeout', 26 September 2017, available at https://tinyurl.com/yp7cpy83, last visited 31 December 2021).

[89] Such an issue was, for example, at the heart of the case C-68/17, *IR* v *JQ*, Judgment of 11 September 2018, in which the Court of Justice of the EU ruled on the reviewability of the dismissal of a divorced Catholic doctor who had remarried, by a hospital run as a corporation by a Catholic organisation. This judgment is in line with the judgment of the same Court of Luxembourg in *Vera Egenberger* v *Evangelisches Werk für Diakonie und Entwicklung e.V.* C-414/16, Judgment of 17 April 2018, which had also restricted the scope of freedom of choice of its employees by a religious institution only to cases in which the request to adhere to the beliefs of that organisation had a close connection with the tasks to be carried out (not so, obviously, in the present case, in which a woman with no religious affiliation had had her application rejected for a position in which she would have had to perform research, curiously enough precisely on anti-discrimination law). For a unitary comment on these two cases, cf A. Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights' 15(2) *European Constitutional Law Review*, 294 (2019); see also E. Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle' 22 *Cambridge Yearbook of European Legal Studies*, 208 (2020).

On the subject of religious freedom, mention should also be made of the recent judgment of the US Supreme Court in the case of *Fulton* v *City of Philadelphia*, 593 U.S. ____ (2021), in which the judges unanimously ruled that the decision of the City of Philadelphia to stop contracting with a Catholic foster care agency, Catholic Social Services, because of the latter's refusal to include homosexual couples among those eligible for providing foster care, was unlawful on the grounds of violation of religious freedom.

challenge the dismissal,[90] and one criminal against the Ikea manager responsible for the decision.[91] The cases are currently pending.[92]

IV. Discrimination 2.0: The (Only Apparent) Novelty of Situations Generated by New Technologies (in Particular: Sharing Economy, Online Speech, Artificial Intelligence)

The framework outlined in the previous sections presents the different limits encountered by businesses or private organisations in exercising a refusal on the basis of the convictions of their owners and directors: be it to perform a certain service (the cases of the wedding vendors); or to enter into contractual relations with another organisation (*Comcast*); or to hire (*Associazione Avvocatura per i diritti LGBTI*); or maintain an employment relationship with an employee (*Bostock*, *Our Lady of Guadalupe*); or to accept certain modes of performance from the latter (*Achbita*).

Many cases are recent or very recent, showing how the subject is evolving in many jurisdictions, but they do not have to do with new technologies. At the present time, though, the technological revolution has raised many issues that are intertwined with the outlined legal and jurisprudential framework. I refer, in particular, to certain (attempted) 'refusals' or otherwise controversial choices by businesses to perform a certain service, in the context of the sharing economy, online speech, and artificial intelligence.

It seems appropriate to argue that despite the disruptive impact of the advent of new technologies on business and on the lives of citizens, many of the problems they raise are not radically new, or at least do not necessarily require new rules, since the existing ones can also be validly applied to the new realities.[93] However, it

[90] D. Avery, 'Ikea Sued By Worker Fired for Posting Anti-Gay Bible Quotes, Attacking "Promotion of Homosexuality" ' *Newsweek*, 8 July 2019.

[91] A. Wądołowska, 'Prosecutors charge IKEA manager in Poland who fired employee for homophobic messages' *Notes from Poland*, 28 May 2020, available at https://tinyurl.com/y9w3xab8 (last visited 31 December 2021).

[92] The case can be likened to *Maya Forstater* v *CGD Europe and others*, in which the Employment Tribunal in London (2200909/2019, 18 December 2019) held that the non-renewal of a tax and public policy researcher's consultancy contract at a think tank was justified for having published a series of tweets critical of a proposed law to allow people to choose their gender.

[93] See R. de Caria, 'Old Is Sometimes Better: The Case for Using Existing Law to Face the Challenges of the Digital Age' 4(2) *Cambridge Law Review*, 68 (2019) (after all, already in 1876 the US Supreme Court, in a famous case concerning public utilities, wrote that '[p]roperty [...] become[s] clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large': *Munn* v *Illinois*, 94 U.S. 113, 126 (1876)). Oppositely, in 'Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy' 67 *Stanford Law Review Online* 121, 123 (2015), M. Todisco speaks of a 'soft spot of the law' with reference to the status of Airbnb users. It must be said that the first cases concerning the same internet law are by now in turn old: think of the well-known *LICRA* v *Yahoo!* case of 2000, originating from the request of two French Jewish associations

seems possible to detect a double novelty, which requires some additional comments.

On the one hand, the advent of new technologies has *quantitatively* multiplied the opportunities for interaction, and thus the number of contractual relationships (sharing economy), the opportunities to express one's thoughts (online speech), the tools for a generalised and automated application of discriminatory criteria, for instance in labour relations (artificial intelligence).

In the past, properties were rented only for longer periods (and hotels were perhaps too expensive), and there were well-known cases of adamant preclusion to rent properties to members of certain categories. Yet, in many cases, law and commercial practice offered tools to overcome distrust, such as references, guarantees, and security deposits. These had a cost in terms of time and money, but precisely for long periods were still efficient because of the reduction in transaction costs that they allowed. With Airbnb bursting onto the scene, many of these mechanisms are not immediately applicable: eg, reputational ranking tools are not entirely suitable to replace letters of reference. Therefore, not only are the opportunities for discrimination multiplying, but even the remedies devised in practice are not necessarily transferable *sic et simpliciter* to the new reality of very short-term rentals.

Similarly, the world of social media has led to an explosion in the number of opportunities for anyone to express their opinion, and consequently the possible instances of discriminatory expressions, both by social media users and by the social media themselves, with the consequent need, moreover, for the latter to rely on artificial intelligence mechanisms, in the impossibility to carry out human control over the large number of profiles and expressions hosted by the same.

Finally, artificial intelligence makes it possible to discriminate automatically and universally: this applies to tools to control online speech, as well as algorithms used in the automated selection of staff to be hired or, for example, in the assignment of tasks to riders in home delivery companies.

But the new technologies also bring about profound changes on a *qualitative* level, stemming from one fact in particular, namely the intermediation of platforms. The relationship no longer takes place directly between landlord (possibly through a real estate agency) and tenant, but passes through a platform with its terms and conditions. Thus, it is the social media that offer their online space and that can possibly ban from that space discriminatory expressions of thought potentially prohibited by law, or that are simply unwelcome. As for artificial intelligence, certain discriminatory considerations are automatically reproduced when included in algorithms, whereas they can be mitigated or nuanced more carefully if compared with the choices made by humans.

This double novelty is reflected in some significant case law. The first case to be mentioned is an attempt to promote a class action by Gregory Selden, an

to order the American multinational to stop the auctions of Nazi memorabilia on its website.

African American to whom a homeowner refused to rent his flat because it was no longer available. However, Selden was then told that the accommodation was available when he submitted a similar application, for the same dates, with two different fictitious profiles in which he had assumed a caucasian identity.

This case, which turns out to be just one example of a trend towards discrimination by many other hosts of Airbnb and the like[94] – on which much literature has begun to focus[95] – is particularly interesting because Mr Selden sued not the allegedly racist host, but the platform directly, claiming that its terms and conditions made discrimination easier, proving the point I made earlier that platform intermediation can raise new issues.

In this case, however, a clause in the terms and conditions – i.e., the one that provides for the obligation to refer disputes with the platform to arbitration – paralysed Mr Selden's initiative: the *United States District Court for the District of Columbia* considered it valid and ordered that his case be brought under that procedure.[96] This left open some very interesting and crucial questions: what role do the general terms and conditions of platforms play in regulating events such as these? Can platforms legitimately impose the horizontal application of anti-discrimination law in contractual relations between two parties that come into contact through them? Or conversely: can they legitimately not impose such application, leaving their users free to discriminate? It is no coincidence that in this case the lawsuit was filed against Airbnb, not against the individual racist owner who would probably be exposed to liability himself:[97] a clear sign that the platform's involvement is direct.

As for online speech, similar issues arise in relation to cases of discrimination (or non-discrimination): can social media exercise a form of private censorship on user-generated content? By contrast, can they legitimately not exercise it, or are they required to do so? In general, this is a very broad field, which deserves consideration in a more general discourse. Here, I will limit myself to some brief comments on so-called net neutrality and to the analysis of an interesting Italian case (with strong links to certain American decisions).

[94] See B. Edelman, M. Luca and D. Svirsky, 'Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment' 9(2) *American Economic Journal: Applied Economics*, 1 (2017); F. Gouveia, T. Nilsson and N. Berggren, 'Two Gentlemen Sharing': Rental Discrimination of Same-Sex Couples in Portugal', IFN Working Paper No 1318 (2020), available at https://tinyurl.com/mr277w46 (last visited 31 December 2021); see also R. Fisman and M. Luca, 'Fixing Discrimination in Online Marketplaces' *Harvard Business Review*, December 2016.

[95] Cf N. Brown Hayat, 'Accommodating Bias in the Sharing Economy' 83(2) *Brooklyn Law Review*, 613 (2018); N. Schoenbaum, 'Intimacy and Equality in the Sharing Economy', in N.M. Davidson, M. Finck and J.J. Infranca eds, *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge: Cambridge University Press, 2018), 459-470; D. Smith, 'Renting Diversity: Airbnb as the Modern Form of Housing Discrimination' 67(3) *DePaul Law Review*, 581 (2018).

[96] *Selden* v *Airbnb Inc*, 2016 WL 6476934 (D.C.D. 1 November 2016).

[97] As is indeed the case for traditional leases: see eg the judgment of the Augsburg District Court of December 2019 (Az: 20 C-2566/19), which ordered monetary compensation for discrimination by a landlord who intended to rent only to Germans.

When dealing with contractual discrimination in relation to the internet, it is necessary to make at least a reference to the question of whether service providers may apply differentiated conditions to their customers. Of course, the willingness of some providers or their customers to pay a premium service in order to have their content conveyed more quickly plays an important role. Clearly, this kind of discrimination has nothing to do with those aimed at a specific group of people which I have discussed so far, and is dealt with by anti-discrimination law. Nevertheless, the issue of net neutrality is relevant to our discussion because it also relates to a limitation of contractual autonomy aimed at pursuing equal treatment between a disadvantaged group and another with greater possibilities.

In an extensive and decades-long debate, it is worth mentioning the *Mozilla* v *FCC* case, in which a number of US states and internet companies challenged the Federal Communications Commission's decision, in line with the political agenda pursued by the Trump administration, to withdraw the rules, up to that moment in force, imposing net neutrality. In a *per curiam* decision, the United States Court of Appeals for the District of Columbia Circuit ruled that Supreme Court precedent *Brand X* required it to recognise the communications agency's authority to abolish the net neutrality requirement at the federal level, while at the same time affirming the right of individual states and local authorities to (re)impose such a requirement.[98]

The *Brand X*[99] precedent is of interest, because in it the Supreme Court acknowledged that it was within the FCC's margin of discretion, which the courts had to follow, to classify cable internet service providers as an 'information service' rather than a 'telecommunications service'. As a result, they were not subject to the non-discrimination and 'must-carry' rules imposed on telecommunications companies as common carriers. The division of the Court was anomalous and crossed typical ideological lines: the majority opinion of the Court was written by the conservative Justice Thomas and was joined, among others, by the liberal Justice Breyer. However, the conservative Justice Scalia, the liberal Justice Souter, and the liberal champion Ginsburg, dissented. This case thus appears to be a clear testimony of how the subject lends itself to unexpected ideological alliances and divisions, a fact that is being reproduced more and more often, as I will observe further below.

When considering the issue of discrimination in relation to online speech, the most emerging concern is that of the power of platforms to exclude certain content or certain producers of that content *en bloc*.[100] The subject is vast, but

[98] No 18-1051 (D.C. Cir.).

[99] *National Cable & Telecommunications Ass'n* v *Brand X Internet Services*, 545 U.S. 967 (2005).

[100] On the identity of the underlying issue between the wedding vendor cases and the question of whether platforms can be treated as a 'public square', see R. McMaken, 'Ann Coulter Comes Out in Favor of Anti-Discrimination Laws' *Mises Wire*, 25 August 2018, available at https://tinyurl.com/2p8fhv8b (last visited 31 December 2021): 'The Masterpiece Cake Shop

here I would like to focus on an Italian case that concerned the exclusion from Facebook of an extreme right-wing political group, Casapound, and of the personal page of its administrator.

Confirming its own previous pre-court single judge decision,[101] the Court of Rome in its collegiate composition[102] ordered Facebook to reactivate the profiles in question:

> 'if the position of the provider is ascribable to the freedom of enterprise [...], that of the user is ascribable, in the face of objections relating to the opinions expressed on the platform, to the freedom of manifestation of thought [...] and, in the face of objections relating to the nature and purposes of the association, to the [freedom of association] and therefore to values that in the constitutional hierarchy are certainly placed at a higher level. It must be concluded that the contractual discipline cannot lawfully consider as a cause of termination of the relationship manifestations of thought protected by [the Constitution], nor allow the exclusion of associations [equally] protected by [it]'.[103]

In other words, since the freedoms of expression and association are superior to the freedom of economic initiative,[104] and since it appears that Casapound

case is a perfect illustration of how calling for government-enforced 'free speech' on social media platforms is the same thing as demanding that baker Jack Phillips bake cakes containing certain messages'.

[101] Court of Rome, business department, ordinance issued on 12 December 2019, available at https://tinyurl.com/2p892sdn (last visited 31 December 2021).

[102] Court of Rome, ordinance issued on 29 April 2020, available at https://tinyurl.com/39u73h3b (last visited 31 December 2021).

[103] The analogous case of the political group Forza Nuova was decided differently by the Court of Rome, department of civil rights and immigration rights (order of 23 February 2020). In this case, the Italian judges held that Facebook was even obliged to intervene. (Along the same lines, see: Court of Trieste, 27 November 2020, according to which it is necessary to 'take into due account the position of guarantee that Facebook concretely assumes in managing its pages, and its duty to remove unlawful content published by third parties by exercising its power of management: it is a scheme of possible liability due to a position. In case of inaction, therefore, there could also be criminal liability of the manager, given that the administrator of a Facebook page stores the user's information and can be equated with the host provider under Article 14 of Directive 2000/31/EC'). In a somewhat intermediate position there is, instead, the Court of Siena ordinance issued on 19 January 2019, according to which Facebook, as a private entity, could legitimately remove a user for the dissemination of similar extreme right-wing messages deemed to be in violation of the platform policies: according to the judges of Siena, Facebook cannot 'seriously be compared to a public entity in providing a service, albeit of undoubted social importance and socially widespread, however purely private'. On the other hand, the fundamental rights that the plaintiff believed to have been violated are instead 'certainly freely exercisable in different contexts, public and, however, suitable for the broadest expression of one's personality'.

[104] C. von Bar, 'Ole Lando Memorial Lecture: Contract Law and Human Dignity. Second Ole Lando Memorial Lecture. Vienna 2020' 28(6) *European Review of Private Law*, 1195 (2020). In a similar vein, M. Zalnieriute, 'From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN' 21 *Yale Journal of Law & Technology* 278 (2019).

had not crossed the boundaries of legality, the principle of non-discrimination and the horizontal application of fundamental rights (although not expressly mentioned) impose a restriction on Facebook's ability to exclude undesirable profiles (but not in violation of any positive law). Hence, the door is open to a paradoxical expansion of the opportunities for expression for highly controversial movements to which Facebook was no longer willing to make itself available.

This is one of the paradoxes I will consider in the concluding section. It relates to the one arising from a ruling such as in the *Packingham* case, in which the US Supreme Court unanimously (8-0, without Justice Gorsuch's intervention) declared illegitimate a North Carolina law prohibiting access to social media for convicted sex offenders *en bloc*.[105] In this case, the exclusion by the social media site was imposed by law, so the question of whether they could exclude the subject in question voluntarily remains unresolved. Yet, the Court's affirmation that social media sites are now comparable to public places seems to require a negative conclusion, with the paradoxical consequence that the limitations to the freedom to conduct business based on non-discrimination requirements end up favouring subjects who certainly do not enjoy the favours of the promoters of anti-discrimination legislation.

Finally, let us consider the operation of anti-discrimination prohibitions in the context of artificial intelligence.[106] In this context, I would like to draw attention to another Italian case and to two new regulations, one American and one European, both already approved but not yet in force as I write, and still under discussion. Both the judicial decision and the legislation relate to labour relations.[107]

The Italian case is the historic order of 31 December 2020 of the Court of

[105] 582 U.S. ___ (2017).

[106] In itself, a topic that has already been debated for several years: see, as early as fifteen years ago, E. Goldman, 'Search Engine Bias and the Demise of Search Engine Utopianism' 8 *Yale Journal of Law & Technology*, 188 (2006). The relevance of the topic has already led, among other things, to the creation of an Algorithmic Justice League, https://tinyurl.com/yzw979rk (last visited 31 December 2021).

[107] I would like to point out that the potential discriminatory use of artificial intelligence also arises with regard to the moderation of online speech itself: see Cambridge Consultants, 'Use of AI in Online Content Moderation, 2019', available at https://tinyurl.com/2p85yzw2 (last visited 31 December 2021). However, when applied to the real estate market and the sharing economy in this context, artificial intelligence has given rise to a number of issues, which have led to the opening of several cases against Facebook for having allegedly devised its algorithms in such a way that the targeting of ads (in the field of real estate, but also with regard to job offers and credit) could also be calibrated on the basis of discriminatory criteria. Five cases brought between 2016 and 2018 were closed with a settlement in March 2019 (see https://tinyurl.com/4a8ud8fm, last visited 31 December 2021); a few days later, the U.S. Department of Housing and Urban Development brought forward an action to contest Facebook for violation of anti-discrimination law in real estate ads for sale or lease (*U.S. Dep't of Housing and Urban Development* v *Facebook*, HUD ALJ, FHEO No 01-18-0323-8, available at https://tinyurl.com/yj8dzwvv, last visited 31 December 2021); in August 2019, a further case along the same lines, *Vargas* v *Facebook Inc.* was brought (where in January 2021, however, the judge ordered the plaintiffs to provide more details, on pain of dismissal of the case).

Bologna, concerning a challenge by certain trade unions to the actions of the delivery company Deliveroo.[108] For the first time in Europe,[109] a judge established the discriminatory nature of the algorithm (called Frank) used by the delivery company to distribute deliveries among its riders, since it penalised, for subsequent deliveries, even those who were unavailable due to illness or to strike. The contractual freedom of the platform was thus expressly restricted, and the judge ordered the company to modify the algorithm so as to avoid its discriminatory effects.

This is also the aim of the new local law of the city of New York, which will come into force in 2022, and which has imposed a 'bias audit' on all those who sell artificial intelligence-based software used in the process of selecting candidates for a job, aimed at ascertaining in advance that there are no discriminatory criteria in the way it is designed[110] – a fact that several studies have begun to register.[111]

Similarly, the recent proposal for a regulation on artificial intelligence[112] has devoted attention to avoiding discriminatory use of AI: as far as businesses are concerned, this implies the choice to classify as 'high-risk' the use of AI tools

> 'in employment, workers management and access to self-employment, notably for the recruitment and selection of persons, for making decisions on promotion and termination and for task allocation, monitoring or evaluation of persons in work-related contractual relationships',

and this is done in order to avoid that these systems can

> 'perpetuate historical patterns of discrimination, for example against women, certain age groups, persons with disabilities, or persons of certain racial or ethnic origins or sexual orientation'.

The Commission generally acknowledges that its proposal contains some limitations, such as to the freedom to conduct business, but considers that

> 'Those restrictions are proportionate and limited to the minimum necessary to prevent and mitigate serious safety risks and likely infringements

[108] Court of Bologna, labour department, ordinance issued on 31 December 2020, available at https://tinyurl.com/4nxs8skr (last visited 31 December 2021).

[109] At least according to the triumphant declarations of the trade unions: see ' "L'algoritmo di Deliveroo è discriminatorio": sentenza del Tribunale di Bologna' *La Repubblica*, 2 January 2021.

[110] See 'Bias In Recruitment Software To Be 'Illegal' In New York, Vendors Will Need Bias Audit', Artificial Lawyer, 12 March 2020, available at https://tinyurl.com/3tc6uw3r (last visited 31 December 2021).

[111] See LSE News, ' "Big data" from online recruitment platforms show discrimination against ethnic minorities and women - and sometimes men', 20 January 2021, available at https://tinyurl.com/nekwaj3s (last visited 31 December 2021).

[112] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final.

of fundamental rights'.

V. Conclusion: Opposing Progressive and Conservative Logical Short Circuits and Proposals to Overcome Them

The analysis carried out has made it possible to draw an up-to-date picture of the main problems arising in courts as a result of the horizontal application of certain fundamental rights – under the banner of anti-discrimination law – as well as certain legislative developments on both sides of the Atlantic.

The picture that emerges is not a single-colour one, but one that is both forward-looking and resistant. It is difficult to identify a logically coherent line that unites all the events and regulations considered, even within individual legal systems.

However, it seems clear that there is a current tendency, both in Europe and in the United States, to increase the forms of interference with contractual freedom for reasons linked to the application in relationships between private individuals of a political agenda aimed at the pursuit of substantial equality. In this way, horizontal direct application appears to be expanding not only in those countries that have incorporated it into their constitutions, such as Colombia, but also in those that historically had limited themselves to indirect application.[113] This may perhaps be the logical thread that, despite appearances, sometimes unites different and distant legal systems, in prohibiting private operators from refusing to provide a service, and more generally from discriminating against those with whom they enter into relations.

As expressly stated by Italian judges, freedom of economic initiative tends to be considered secondary, especially in continental Europe, compared to other fundamental rights, as well as to the principle of equality. As we have seen, however, this leads to some paradoxical consequences, both from a progressive and a conservative perspective.

Indeed, as mentioned in the previous section, it seems a clear contradiction that the express subordination of economic freedoms to other rights – in a

[113] See R. Poddar, 'Constitutional Responses to Communalism in South Asia: The Case of India' *The International Association of Constitutional Law - l'Association Internationale de Droit Constitutionnel Blog*, 14 November 2019, available at https://tinyurl.com/2p86n5vx (last visited 31 December 2021). The author quotes a number of cases from the Supreme Court of India in which so-called *anti-exclusionary constitutionalism*, which in his view should prevail over contractual autonomy, has been applied in the context of relationships between private individuals: *Vishakha* v *State of Rajasthan* (13 August 1997); *IMA* v *Union of India* (12 May 2011); *Indian Young Lawyers Association* v *State of Kerala* (28 September 2018). On the other hand, in *Zoroastrian Cooperative* v *District Registrar* (15 April 2005), the Court upheld the religious freedom of the Zoroastrian minority, declaring legitimate the bylaws of a real estate cooperative society that, under the banner of 'communalism' typical of that society, discriminated against non-Zoroastrians in the sale of housing.

social scope – and the refusal to recognise the private nature of social media, leads to more space being given to neo-fascist formations and sex offenders. Or, from another perspective: one has to realise that one can get more restriction on hate speech, whether anti-democratic or simply false, by leaving private individuals the power to decide which speech to allow and which not. It is certainly true that social media *per se* would tend to have an incentive to maximise interactions and thus minimise restrictions, and that the censorship-prone attitude they have shown more recently can be explained by various forms of pressure and interference from regulators.[114] However, it seems to me that mainstream social media wholeheartedly embrace this new role of gatekeepers and censors. On the other hand, even if one of the social media were to shirk this task,[115] the progressive short-circuit would be reproduced, because any intervention by the regulator aimed at functionalising the platforms and forcing them to remove certain posts and/or users would clash with the constitutional need to leave extremists, racists, homophobes, and anti-democrats[116] free to express themselves.

Nevertheless, an incredible turnaround is also what led the Democratic majority of the California State Legislature to vote for a constitutional amendment which, by repealing the previous amendment of 1996 that had banned discrimination and affirmative action on the basis of race, ethnicity or gender in certain areas of the public sphere, including selection in universities, proposed to legitimise discrimination on the basis of those categories, in a paradoxical twist and overcoming of the principle of equality[117] (the proposal was then rejected by California voters in a referendum in November 2020).[118]

However, there is also the conservative short-circuit, which is evident in America: when conservatives invoke or even take measures against the liberal prejudices of traditional and new media, they betray private autonomy, which

[114] This consideration can be found, for instance, in M. Bassini, *Internet e libertà di espressione. Prospettive costituzionali e sovranazionali* (Canterano: Aracne, 2019), 237, who correctly notes that platforms per se would have an interest in maximising content and interactions, and therefore in not censoring anything. Most likely, the practice of so-called jawboning by members of Congress also plays a role: see D.E. Bambauer, 'Against Jawboning' 100 *Minnesota Law Review*, 51 (2015), as well as *Association of American Physicians and Surgeons* v *Schiff*, 2021 WL 354174 (D.D.C. 2 February 2021).

[115] Which, according to some, actually still happens too often: see C. Gartenberg, 'English soccer teams have started a four-day social media boycott to protest online abuse' *The Verge*, 30 April 2021, available at https://tinyurl.com/yckme3b4 (last visited 31 December 2021).

[116] The reference to L.C. Bollinger, *The Tolerant Society. Freedom of Speech and Extremist Speech in America* (Oxford: Oxford University Press, 1986).

[117] See The Wall Street Journal, *A Vote for Discrimination*, 25 June 2020.

[118] An almost entirely similar case also occurred in the State of Washington: see The Wall Street Journal, 'Washington's Affirmative Repudiation', 13 November 2019. It is also worth mentioning *Romer* v *Evans*, 517 U.S. 620 (1996), in which the U.S. Supreme Court held that an amendment to the Colorado Constitution, approved by the voters of that state and aimed at preventing public authorities from discriminating against homosexuals and bisexuals, was unconstitutional because it was contrary to the principle of equality guaranteed by the 14th Amendment.

from this perspective should remain sacred even for companies pursuing a progressive agenda. This is what has happened with former President Trump's Executive Order on social media,[119] aimed at reducing the areas in which the latter are exempt from editorial liability on the basis of the famous Section 230 of the *Communications Decency Act*[120] (but paradoxically destined, according to many observers, to prove a boomerang for authors, such as Trump himself, of content that is not always factually well-founded).[121] However, it is also the case of the strong controversy against the decision of many platforms to deactivate Donald Trump's accounts,[122] or of Amazon, Google, and Apple to

[119] Executive Order 13925 of 28 May 2020, 85 FR 34079, *Preventing Online Censorship*. This act was revoked by the new President Biden with a new Executive Order, 14029 of 14 May 2021, 86 FR 27025, *Revocation of Certain Presidential Actions and Technical Amendment*. It may be noted that, from a progressive point of view, there is a certain contradiction in (again) widening the scope of irresponsibility of platforms, when from this perspective one would normally call for greater interventionism on their part, and the use of tools to sanction any inactivity in removing unwanted content. A lawsuit against this executive order had been filed by an organisation funded by Facebook, Google, and Twitter, but it was deemed to lack standing: see Reuters, 'U.S. court dismisses lawsuit that had challenged social media executive order', 12 December 2020, available at https://tinyurl.com/2p8dyz4z (last visited 31 December 2021). Trump then sent a final political signal against Section 230 by vetoing the *National Defense Authorization Act* for 2021 in December 2020, partly because of the failure of this provision to be repealed by the bill (Congress reapproved the bill, however, the only case of a veto override of his presidency: see T.B. Lee, 'House overrides Trump veto, defying demand to repeal Section 230' *Ars Technica*, 29 December 2020, available at https://tinyurl.com/352hdvw7 (last visited 31 December 2021).

[120] 47 U.S.C. § 230. For a defence of Section 230 against opposing attacks from progressive and conservative sides, see E. Nolan Brown, 'Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away' *Reason*, 29 July 2019, available at https://tinyurl.com/3h2jfdun (last visited 31 December 2021); for a different perspective, see E. Goldman, 'Why Section 230 Is Better Than the First Amendment' 95 *Notre Dame Law Review*, 33 (2019).

[121] See P. Baker and D. Wakabayashi, 'Trump's Order on Social Media Could Harm One Person In Particular: Donald Trump' *The New York Times*, 28 May 2020.

[122] Such protests match Trump's own previous invectives against social media when they had deactivated some far-right profiles (see M. McGraw, 'President Trump amplifies far-right voices in protest of Facebook ban, ABC News', 5 May 2019). Significantly, in a further testimony of the paradoxical positions to which this matter often leads, it was an extreme left-wing politician such as Bernie Sanders who spoke out against Trump's censorship, also on the basis of his opposition to the alleged excessive power of tech companies (see J. Guynn, 'Bernie Sanders against Donald Trump Twitter ban: "Tomorrow it could be somebody else" ', USA Today, 24 March 2021). On the other hand, it must be acknowledged that the self-exile from the platforms that had banned the President, decided by some Republicans as a sign of protest, was a method that respected the principle of contractual autonomy: see M. Price, 'Republicans in one NC county go dark on social media to protest sites banning Trump' *The Charlotte Observer*, 11 January 2021. A very different assessment can be made, however, of the law promoted by the Republican governor of Florida, recently passed, which prohibits platforms from blocking political candidates for more than 14 days, as well as removing journalistic accounts on the basis of shared content: see J.D. McKinnon, 'Florida's New Law Bars Twitter, Facebook and Others From Blocking Political Candidates' *The Wall Street Journal*, 25 May 2021. The enforcement of this law was recently suspended by a preliminary injunction finding a likely violation of the platforms' freedom of expression: United States District Court for the

hinder the new social media Parler, which had introduced itself as the social network of free speech, free of censorship and bans on expression,[123] or of GoFundMe to exclude certain campaigns considered discriminatory from its platform,[124] or against the decision of Harvard (a private university) to revoke the admission of Kyle Kashuv, a well-known survivor of a massacre in a Florida high school, very active on Twitter on conservative positions and in defence of the right to bear arms,[125] after some of his racist writings had been made public.

A conservative short-circuit can also be seen, in my opinion, in the legal initiatives of the German *botel ban* case and *Comcast*, *Freedom Watch* and *PragerU*[126] cases in the US, and in Jakubiak's case against the café that excluded his beer in Poland, as well as in the UK's controversial *Online Safety Bill*.[127] This recent bill proposes, on the one hand, to prohibit platforms from excluding 'journalistic' content, or in any case content of alleged 'democratic importance', in a direct challenge to the censorship tendencies allegedly inspired by a liberal bias of the web giants. On the other hand, it provides for significant penalties to be imposed on them in the event of failure to remove certain content falling into the category of so-called 'lawful but harmful content', thus considerably extending the obligations of control and interference by these subjects.

Lastly, the conservative resentment towards platforms has found its way to the United States, not only through a bill imposing a so-called '*fairness doctrine*'[128] and a white paper by the Department of Justice aimed at accepting the requests repeatedly expressed by then President Trump,[129] but even to the Supreme

Northern District of Florida, Tallahassee Division, *Netchoice, LLC et al* v *Ashley Brooke Moody et al*, Case 4:21-cv-00220-RH-MAF, 30 June 2021.

[123] See eg J. Nicas and D. Alba, 'Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters' *The New York Times*, 9 January 2021.

[124] See S. Smith, 'GoFundMe Removes Christian Grandma-Florist Barronelle Stutzman's Fundraising Page; 2nd Christian Business Facing 'Ruin' Removed From Site This Week' *The Christian Post*, 29 April 2015: it is the same article, moreover, that reminds us of the existence of alternatives: 'Although Stutzman's GoFundMe page was taken down, supporters can still offer their donations through an Alliance Defending Freedom online fundraising campaign. Likewise, Franklin Graham's Samaritan's Purse has set up an online fundraising avenue for Sweet Cakes by Melissa'.

[125] For a reconstruction of the case and a critique, see Z. Slayback, 'Stop Glorifying Harvard; Kyle Kashuv Will Probably Be Fine' *Fee.org*, 21 June 2019, available at https://tinyurl.com/yc46upt3 (last visited 31 December 2021). The case, *Students for Fair Admissions* v *President and Fellows of Harvard College,* was dismissed in the first instance by the United States District Court for the District of Massachusetts and on appeal by the First Circuit Court of Appeals.

[126] On the latter two, see n 127 below.

[127] The full text is available at https://tinyurl.com/2p8t84xy (last visited 31 December 2021).

[128] This is Republican Senator Hawley's bill, called the *Ending Support for Internet Censorship Act* (S.1914 - 116th Congress (2019-2020)), and eloquently directed 'To amend the Communications Act of 1934 to provide accountability for bad actors who abuse the Good Samaritan protections provided under that Act'.

[129] US Department of Justice, 'Section 230 - Nurturing Innovation or Fostering Unaccountability?', June 2020. For a critique of this initiative and the one mentioned in the

Court, with the words penned by Justice Thomas that complete a trajectory that began with *Brand X*. In a well-known case concerning whether then-President Trump had the right to block users who made unwelcome comments, Thomas wrote in his *concurring opinion* that

> 'Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties'[130]

and that

> 'There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner'.[131]

Faced with such paradoxes and short-circuits, a much more sustainable and coherent perspective would be one aimed at affirming the principle that social media, as private entities,[132] and as such protected by the First Amendment,[133]

previous footnote, see J. Czerniawski, 'A "Fairness Doctrine" for the Internet Could Backfire on Conservatives' *Fee.org*, 13 July 2020, available at https://tinyurl.com/2nu39tfw (last visited 31 December 2021).

[130] *Biden* v *Knight First Amendment Institute*, 593 U. S. _____ (2021), Thomas, J., concurring, p. 2 of the *slip opinion*.

[131] *Biden* v *Knight First Amendment Institute*, 593 U. S. _____ (2021), Thomas, J., concurring, p 6 of the *slip opinion*. See also the statements of a well-known American conservative opinion-leader (and jurist), Ann Coulter: R. Kraychik, 'Ann Coulter: "We Need to Apply the First Amendment to Social Media Companies" ' *Breitbart*, 22 August 2018, available at https://tinyurl.com/2p9a2at4 (last visited 31 December 2021). For a critique, see D. Root, 'Clarence Thomas Declares War on Big Tech' *Reason*, July 2021 issue, available at https://tinyurl.com/3e62z6vr (last visited 31 December 2021).

[132] If from a formal point of view their private nature is undoubted, many argue the need to consider *social media* as *state actors*, therefore subject to the same obligations of non-discrimination and protection of freedom of expression as state bodies. However, the indications coming from the US Supreme Court, apart from the very recent hint of Justice Thomas just mentioned, seem to lead to exclude that such an eventual equalization can take place through case law. In *Marsh* v *Alabama*, 326 U.S. 501 (1946), the Court held that a company-town, although privately owned, exercised a 'public function', and therefore could not prevent the distribution of religious leaflets; similarly, in *Amalgamated Food Employees Union Local 590* v *Logan Valley Plaza*, 391 U.S. 501 (1946), the Court held that a company-town, although privately owned, exercised a 'public function', and therefore could not prevent the distribution of religious leaflets; similarly, in *Amalgamated Food Employees Union Local 590* v *Logan Valley Plaza*, 391 U.S. 308 (1968), the Court held that the spaces of a private shopping mall were like the pavements of a city, and therefore that the First Amendment protected union picketing in such areas. *Tanner*, 407 U.S. 551 (1972), concerning the distribution of political leaflets also in a shopping centre; thus, in *Hudgens* v *National Labor Relations Board*, 424 U.S. 507 (1976), in a similar case in *Logan Valley*, the Supreme Court decided that the Constitution offered no protection for demonstrators, although such protection may be offered under certain conditions by the legislature; thus, in *Pruneyard Shopping Center* v *Robins,* 447 U.S. 74 (1980), the Supreme Court held that a Californian

have the right to discriminate against anyone and should not be obliged to discriminate against anyone or anything, as opposed to what is invoked from a progressive perspective. Correlatively, a contract law defence seems much more promising for conservatives: exclusions can perhaps be much more effectively challenged on the basis that all platforms have always tended to promote themselves as generalist and open to all, with very general indications about the

shopping centre could not prevent students from carrying out distributing political leaflets, since the California Constitution provided for protection of freedom of expression in the affirmative, and not only in the negative, as the federal Constitution does. On this subject, see in general S. Jaggi, *State Action Doctrine*, in R. Grote, F. Lachenmann, R. Wolfrum eds, *Max Planck Encyclopedia of Comparative Constitutional Law* (last updated October 2017), available at https://tinyurl.com/2p9cmwhe (last visited 31 December 2021).

[133] See E. Goldman, 'Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)', 26 February 2018, available at https://tinyurl.com/5jba7rs8 (last visited 31 December 2021), responding to H. Whitney, Search Engines, 'Social Media, and the Editorial Analogy', 27 February 2018, available at https://tinyurl.com/yx8stpwt (last visited 31 December 2021). Goldman himself ('Are Social Media Services "State Actors" or "Common Carriers"?', 12 February 2021, available at https://tinyurl.com/39pszput, last visited 31 December 2021) makes the following point: 'Google is protected by the First Amendment's free speech and free press clauses. Thus, any regulatory mandate that Google include or exclude information in its search index is almost certainly unconstitutional. See, eg, *Search King Inc* v *Google Technology Inc*, 2003 WL 21464568 (W.D. Okla. 2003); *Langdon* v *Google Inc*, 474 F. Supp. 2d 622 (D. Del. 2007); *Zhang* v *Baidu.com Inc*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014); *Google Inc* v *Hood*, 96 F. Supp. 3d 584 (S.D. Miss. 2015) (vacated on other grounds); *e-ventures Worldwide* v *Google Inc*, 2017 WL 2210029 (M.D. Fla. 2017); Eugene Volokh & Donald M. Falk, *First Amendment Protection For Search Engine Search Results*, April 20, 2012; see also *Martin* v *Hearst Corporation*, 777 F.3d 546 (2d Cir. 2015) (publication cannot be obligated to remove article about an expunged arrest). Furthermore, Section 230 (both (c)(1) and (c)(2)) statutorily immunize search engines for their indexing decisions, including their refusal to de-index content (even if that content is tortious). See, eg, *Maughan* v *Google Technology* Inc. App. 4th 1242 (Cal. App. Ct. 2006); *Murawski* v *Pataki*, 514 F. Supp. 2d 577 (S.D.N.Y. 2007); *Shah* v *MyLife.Com* Inc., 2012 WL 4863696 (D. Or. 2012); *Merritt* v *Lexis Nexis*, 2012 WL 6725882 (E.D. Mich. 2012); *Nieman* v *Versuslaw Inc.*, 2012 WL 3201931 (C.D. Ill. 2012); *Getachew* v *Google Inc.*, 491 Fed. Appx. 923 (10th Cir. 2012); *Mmubango* v *Google Inc.*, 2013 WL 664231 (E.D. Pa. 2013); *O'Kroley* v *Fastcase Inc.*, 831 F.3d 352 (6th Cir. 2016); *Fakhrian* v *Google Inc.*, 2016 WL 1650705 (Cal. App. Ct. 2016); *Despot* v *Baltimore Life Insurance Co.*, 2016 WL 4148085 (W.D. Pa. 2016); *Manchanda* v *Google Inc.*, 2016 WL 6806250 (S.D.N.Y. 2016); *Mosha* v *Yandex Inc.*, 2019 WL 5595037 (S.D.N.Y. 2019); see also *Yeager* v *Innovus Pharmaceuticals Inc.*, 2019 WL 447743 n.6 (N.D. Ill. 2019) ('no 'right to be forgotten' exists under United States law')'. See also *S. Louis Martin* v *Google Inc.*, Superior Court of the State of California, County of San Francisco, CGC-14-539972, 13 November 2014. The issue is intertwined with the right to be forgotten as referred to in the famous Case C-131/12 *Google Spain*, judgment of 13 May 2014, followed by *CNIL* (Case C-507/17, judgment of 24 September 2019), which circumscribed its application from a territorial point of view; on the contrary, the Supreme Court of British Columbia in Canada, in *Equustek Solutions Inc.* v *Jack* (2014 BCSC 1063, 13 June 2014), with a judgment echoing the well-known French judgment in the mentioned case *LICRA* v *Yahoo!*, extended applicability beyond the relevant jurisdiction, risking to lay the conceptual foundations for the possibility of some authoritarian regimes to force web companies to remove unwelcome content, a powerful additional weapon of discrimination in their hands, albeit implemented through platforms: see Z. Graves, 'The dangerous proliferation of the "right to be forgotten" ' *HuffPost*, 18 June 2014, available at https://tinyurl.com/ysvn8e2w (last visited 31 December 2021).

type of content not allowed.[134]

[134] This reflection was developed by S. Thobani, 'L'esclusione da Facebook tra lesione della libertà di espressione e diniego di accesso al mercato' *Persona e Mercato*, 426 (2021) (the work is a comment on the ordinance of the Court of Trieste mentioned in n 96 above, on which see also S. Martinelli, 'Facebook - FNAI e la chiusura dell'account Facebook di un'associazione: quale tutela?', forthcoming in *Giurisprudenza italiana*, 2021; see also the approach followed by the Court of Siena, in the order mentioned in the same footnote). This approach seems to be a valid argument in support of judicial initiatives such as that of the famous conservative columnist Candace Owens against two Facebook fact checkers (Lead Stories and USA Today), after some of her posts had been reported by them as containing false statements on COVID, with the consequent demonetisation of the page and therefore loss of money for Owens and her company: see https://tinyurl.com/ycyzaata (last visited 31 December 2021). Owens's lawsuit is not based on freedom of expression but is entirely private. The strategy chosen by Prager University, another conservative organisation that sued YouTube for restricting access or demonetising a few hundred of its videos, was different; the institution claimed, among other things, that by doing so YouTube had violated PragerU's First Amendment rights, abusing the protection granted to it by *Section* 230, which should have obliged it, as a '*public forum*', to grant space to all those who requested it. However, the courts rejected the suit, both in the first instance (No 17-CV-06064-LHK, 26 March 2018) and on appeal (No 18-15712, 9th Cir. 26 February 2020), confirming the (only) private nature of YouTube, also in light of *Halleck*, and thus excluding its nature of '*state actor*', as already affirmed by the same appellate court twenty years earlier with respect to AOL: *Howard* v *America Online*, No 98-56138, 29 March 2000, which in turn recalls on this point *Accord Thomas* v *Network Solutions Inc.*, 176 F.3d 500, 511 (D.C.Cir.1999) and *Cyber Promotions Inc* v *America Online Inc.* 948 F. Supp. 436, 443-44 (E.D.Pa.1996) (see also *Green* v *America Online*, 318 F.3d 465 (3d. Cir. 2003)); a parallel initiative in a California Superior Court was no more successful (see https://tinyurl.com/yckhnc4m, last visited 31 December 2021). The same fate was met, both in the first instance (*Lewis* v *Google LLC*, 2020 WL 2745253 (N.D. Cal. May 21, 2020)) and on appeal (*Lewis* v *Google LLC*, 2021 WL 1423118 (9th Cir. April 15, 2021)), by the similar initiative of the conservative pundit Bob Lewis against Google, for having removed, restricted, or demonetised some videos of his YouTube channel dedicated to denouncing misandry (male hatred). Failed initiatives challenging the constitutionality of Section 230 also include *American Freedom Defense Initiative et al* v *Lynch*, 2016 WL 6635634 (D.C. 9 November 2016) and *Richard* v *Facebook Inc*, C/A No 2018-CP-2606158 (S.C. Court of Common Pleas 22 May 2019). Other cases that have ruled out the 'state actor' nature of web giants (and some smaller entities) are: *Rutenberg* v *Twitter, Inc*, 2021 WL 1338958 (N.D. Cal. 9 April 2021); *Daniels* v *Alphabet Inc.*, 2021 WL 1222166 (N.D. Cal. 31 March 2021) (but see also, for other cases excluding a must-carry obligation on the part of platforms, *Doe* v *Google LLC*, 2020 WL 6460548 (N.D. Cal. 3 November 2020)); *Twitter* v *Superior Court ex rel Taylor*, A154973 (Cal. App. Ct. 17 August 2018), as well as *Langdon* v *Google Inc*, quoted in the previous note); *Plotkin* v *The Astorian*, 2021 WL 864946 (D. Ore. 8 March 2021), relating to a newspaper; *DeLima* v *Google Inc.*, 2021 WL 294560 (D.N.H. Jan. 28, 2021); *Divino Group LLC* v *Google LLC*, 2021 WL 51715 (N.D. Cal. 6 January 2021), a case brought by the same lawyers who filed *PragerU*, but in which LGBT youtubers complained of discrimination; *Atkinson* v *Facebook Inc.* 20-cv-05546-RS (N.D. Cal. 7 December 2020); *Belknap* v *Alphabet Inc*, 2020 WL 7049088 (D. Ore. 1 December 2020); *Perez* v *LinkedIn Corp*, 2020 WL 5997196 (S.D. Tex. 9 October 2020); *Zimmerman* v *Facebook Inc*, 2020 WL 5877863 (N.D. Cal. 2 October 2020); *Wilson* v *Twitter*, 2020 WL 3256820 (S.D. W.V. 16 June 2020); *Tulsi Now Inc.* v *Google, LLC*, 2:19-cv-06444-SVW-RAO (C.D. Cal. 3 March 2020); *Federal Agency of News LLC* v *Facebook Inc.*, 2020 WL 137154 (N.D. Cal. Jan. 13, 2020); *Fyk* v *Facebook Inc*, No C 18-05159 JSW (N.D. Cal. 18 June 18 2019); *Williby* v *Zuckerberg*, 3:18-cv-06295-JD (N.D. Cal. 18 June 2019); *Ebeid* v *Facebook Inc*, 2019 WL 2059662 (N.D. Cal. 9 May 2019); *Freedom Watch Inc* v *Google Inc.*, No 19-7030 (D.C. Cir. 27 May 2020) (also unsuccessfully attempting to plead antitrust violations, while there is no mention of Section 230); *DeLima* v

The paradoxes and contradictions certainly do not only concern online speech. The American case-law on wedding vendors, from which we started, seems by now to be oriented in the majority towards the recognition of the full legitimacy of the restrictions to contractual freedom imposed by the anti-discriminatory law, so much so that some states, such as Indiana and Arkansas, have wanted to issue special laws to reaffirm instead the right of wedding vendors to refuse their services for religious reasons. The only judgment of the Supreme Court that has gone in a different direction has not exactly affected a general (and in itself entirely appreciable) judicial deference towards the choices of the legislature. On closer inspection, in the United States the question of the relationship between anti-discrimination legislation and economic freedoms has tended to not be posed in terms of constitutionality, or of the compatibility of the former with the latter. The cases concerned, more than anything else, question an interpretative nature, without prejudice to the self-restraint, also of the Supreme Court, for the decisions taken by the legislator. The picture does not seem to be affected by rulings such as *Comcast* and *Halleck*, since labour law cases such as *Bostock* confirm the respect of the legislator's choices.

For its part, Europe, with rulings such as *Achbita* and *Associazione Avvocatura per i diritti LGBTI*, also presents a partly contrasting picture, but undoubtedly anti-discrimination law is being progressively expanded, both in terms of protected categories and prohibited conduct, both through legislation and case law. This progressive extension of the application of fundamental rights to relations between private individuals, which has led to a profound departure from the original conception of the doctrine of *Drittwirkung*, also

YouTube, Magistrate R&R: *DeLima* v *YouTube, LLC*, 2018 WL 4473551 (D.N.H. 30 August 2018), District court approval of R&R (*verbatim*): 2018 WL 4471721 (D.N.H. 18 September 2018); *Johnson* v *Twitter Inc.*, No 18CECG00078 (Cal. Superior Ct. 6 June 2018); *Nyabwa* v *Facebook*, Dist. Court, SD Texas, Civil Action No 2:17-CV-24, January 26, 2018; *Shulman* v *Facebook Inc*, 2017 WL 5129885 (D. N.J. 6 November 2017); *Quigley* v *Yelp*, 2017 U.S. Dist. LEXIS 103771 (N.D. Cal. 5 July 2017); *Forbes* v *Facebook Inc*, Dist. Court, ED New York, No 16 CV 404 (AMD), 18 February 2016; *Buza* v *Yahoo Inc*, 2011 WL 5041174 (N.D. Cal. 24 October 2011); *Young* v *Facebook*, 2010 WL 4269304 (N.D. Cal. 25 October 2010); *Estavillo* v *Sony Computer Entertainment America*, 2009 WL 3072887 (N.D. Cal. 22 September 2009); *Jayne* v *Google Internet Search Engine Founders*, No 07-4083 (3rd Cir. 7 February 2008); *Murawski* v *Pataki*, 2007 WL 2781054 (S.D.N.Y. 26 September 2007), also quoted above, n 126 above; *Langdon* v *Google*, quoted above and in the previous note; *KinderStart.com LLC* v *Google Inc*, C 06-2057 JF (N.D. Cal. 16 March 2007); *McNeil* v *VeriSign Inc* 2005 WL 741939 (9th Cir. 1 April 2005), concerning ICANN; *CompuServe Inc.* v *Cyber Promotions Inc* 962 F. Supp. 1015 (S.D. Ohio 1997); *America Online Inc* v *Cyber Promotions Inc.* 948 F. Supp. 436 (E.D. Pa. 1996); *Name.Space Inc* v *Network Solutions Inc*, 202 F.3d 573 (2d Cir. 2000); *Island Online Inc* v *Network Solutions Inc* 119 F. Supp. 2d 289 (E.D.N.Y. 2000); *Nat'l A-1 Adver.* v *Network Solutions Inc* 121 F. Supp. 2d 156 (D. N.H. 2000); *Thomas* v *Network Solutions Inc* 176 F.3d 500 (D.C. Cir. 1999). The primary source for this very large selection of cases (many of them *pro se*) is Prof. Goldman's extraordinary Technology & Marketing Law Blog, https://tinyurl.com/25w9ra2e (last visited 31 December 2021). On this subject, see also the authoritative study by J. Peters, 'The 'Sovereigns of Cyberspace' and State Action: The First Amendment's Application – Or Lack Thereof – To Third-Party Platforms' 32 *Berkeley Technology Law Journal*, 989 (2017).

leads to paradoxical outcomes, or at least worthy of discussion: it is one thing to state that freedom of thought also covers criticism of a film and calls to boycott it, and quite another to limit an entrepreneur's ability to choose his collaborators or clients. This opens up scenarios of cascading problems: how should the law treat the wedding vendor who performs their service, because they are obliged to do so by law, but does so at a lower quality level than normal, perhaps not for voluntary retaliation, but because an artist or even just a craftsperson will certainly not be inspired to do their job to the best of their ability if forced to do it unwillingly, having received a request that 'they can't refuse'? Not to mention the closures of a business which, as we have seen, are expressly considered preferable to the owner's choice to serve only a few or are (considered as) an inevitable consequence of this decision: the members of the discriminated class do not see their own faculty of choice improved, but all the others see it diminished.

This leads to a further consideration: without prejudice to the criticisms set out in section II, the practical consequence of such a marked extension of the anti-discrimination prohibitions is a sort of generalised, but completely abnormal and misunderstood application of competition law. When, in the hypothetical silence of the terms and conditions, a host decides not to rent its property to members of a certain class, the imposition of renting to all (as the only alternative to not renting) ends up treating each individual host as a monopolist in a dominant position.[135] It is as if the relevant market is being restricted in a totally unconscious way to the single neighbourhood, or even to the single building, as if any operator is being treated as a 'gatekeeper' as in the European Commission's draft of the *Digital Markets Act*,[136] as if there really were no alternative when, instead, the

[135] This argument has been developed eg by the already frequently quoted R.A. Epstein, 'The Problem With Antidiscrimination Laws' defining ideas, 13 April 2015, available at https://tinyurl.com/2p86rhcv (last visited 31 December 2021). See in this respect also the debate on ProMarket between L. Zingales, 'The Silent Coup', 11 January 2021 (according to whom, substantially in line with Bernie Sanders's position recalled above, n 115 above, the 'over the top' companies that had just banned Trump from their platforms 'are not random private companies, they represent (as the telephone in the past) a basic infrastructure of communication') and C. Amenta, M. Boldrin and C. Stagnaro, 'Digital Platforms May Be Monopolistic Providers, But They Are Not Infrastructure', 26 January 2021 (according to whom 'From an economic point of view, an infrastructure should be regulated insofar as it is a natural monopoly. Each of the TAGAF may be a de facto monopolistic provider in its own markets [...] but there is nothing natural in this'). With regard to search engines, the reflection has been developed by G.A. Manne, 'The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment', in B. Szoka and A. Markus eds, *The Next Digital Decade. Essays on the Future of the Internet* (Washington D.C.: TechFreedom, 2010), 419-434. With regard to digital stores of companies such as Apple and Google, the issue is at the centre of the legal dispute pending before the United States District Court for the Northern District of California between Apple itself and the video game company Epic Games (*Epic Games Inc.* v *Apple Inc.*). The issue is also at the heart of the Google Shopping case, decided by the General Court on 10 November 2021 largely in favour of the European Commission (*Google and Alphabet* v C*ommission*, T-612/17). Finally, see the judgment of the Czech Constitutional Court quoted in n 35 above.

[136] COM/2020/842 final, 15 December 2020.

cases where there are no real options seem to be limited to extreme situations[137] in which, in any case, it is questionable whether private property should be functionalised to the point of requiring individual owners to take responsibility for such situations, which should instead be borne more appropriately, if at all, by the community of reference, possibly through general taxation.

Similarly, it is difficult to imagine that a homosexual lawyer would not find alternative employment or collaboration to that of the law firm of Mr Taormina, considering that there are over two hundred forty five thousand lawyers active in Italy[138] (moreover, the discrimination in that case was only theoretical, as there was not even a concrete case of a gay lawyer being discriminated against, just as in the Deliveroo case there was not a single rider discriminated against, but the case was brought by the trade unions in a generic way, once again testifying to the progressive extension of the scope of anti-discrimination law).[139]

In the end, the most appropriate way to deal with these problems seems to be to first of all clarify at a logical and conceptual level the scope of the application of fundamental rights: the prohibited restrictions are those carried out by public authorities (as we always underline, the First Amendment establishes that it is Congress that 'shall make no law [...] abridging the freedom of speech', and therefore does not set limits to restrictions by private individuals). This makes it very easy to solve the problem of online speech, as I reserve the right to discuss in more detail elsewhere.

It is certainly possible to imagine an effect vis-à-vis other private individuals (third-party effect), but the only way to avoid ending up in a logical short-circuit and an intellectual dead-end is to rely on robust protection of property rights (and the right to exclude inherent in it since Roman times) and contractual autonomy. Adequate respect for economic freedoms implies that I always have a right to express my opinion, but not if I am in the home of others who do not like it (and have the power to throw me out for it). I always have a right to self-determination, religious or sexual, or to dress as I like, but I do not have a right

[137] Such as those recounted in the report by M. Frazier, 'When No Landlord Will Rent to You, Where Do You Go?' *The New York Times Magazine*, 20 May 2021.

[138] These are the most recent data, contained in CENSIS, 'L'impatto della pandemia sulla professione' (2021) available at https://tinyurl.com/ypx4nusz (last visited 31 December 2021).

[139] It is then possible to doubt the obligation to contract even for monopolists (see D.T. Armentano, *Antitrust. The Case for Repeal* (Auburn: Ludwig von Mises Institute, 2007), 100, but certainly the cases we are describing do not qualify as cases of market power by any reasonable market definition. Moreover, as recalled in the preceding sections, the existence of alternatives as elements capable of excluding the harmfulness of contractual discrimination has been emphasised not only in cases of small operators – as in the case of the Polish hotel that had excluded Russians – but also with regard to Facebook – thus as the Court of Siena in the passage quoted in n 96 above. The important decision of the US Supreme Court in *Packingham*, as previously mentioned, stated instead that social media have now acquired the nature of a public place, and therefore must be subject to the same regime; thus, also the *Stormans Inc.* v *Wiesman* case was finally decided in the sense that the existence of alternatives (in this case, a large number of nearby pharmacies willing to sell emergency contraceptives) was not relevant.

to be employed or to obtain a service, the lease of a property, etc. from others who are uncomfortable with my choices, however hateful and bigoted this discomfort may be.

The possible temporary difficulty of finding alternatives could be solved much more effectively with market solutions, compatible with a legal order based on freedom.[140] Moreover, as Frédéric Bastiat made clear in *The Law*,

> 'it is impossible for me to separate the word *fraternity* from the word *voluntary*. I cannot possibly understand how fraternity can be *legally* enforced without liberty being *legally* destroyed, and thus justice being *legally* trampled underfoot'.[141]

Any 'imposed fraternity' can only compress liberty in an unacceptable way, besides having paradoxical consequences on the economic level such as the restriction of supply for all.

After all, discrimination is now a term with a deterrent meaning, but on closer inspection it is possible to recover its neutral meaning:

> 'Discrimination was said by Gautama Buddha to be the greatest essential human virtue. Truly it is a blessing – a blessing that is also in harmony with Judeo-Christian ideals. It is necessary to progress and to the advancement of civilisation. Many of the leading problems of our day [...] stem from a thought-disease about discrimination. It is well known that discrimination has come to be widely scorned. And politicians have teamed up with those who scorn it, to pass laws against it – as though morals can be manufactured by the pen of a legislator and the gun of a policeman. What is this thing, this discrimination, which has become so widely dubbed as an evil? Discrimination is the exercise of choice. It necessarily arises from knowledge and wisdom. And the greater the knowledge and wisdom, the higher the degree of discrimination'.[142]

[140] Cf C. Rocci, ' "Abito giusto", ecco il patto tra inquilini e padroni per battere il "non si affitta agli stranieri" ' *La Repubblica*, 10 May 2021.

[141] F. Bastiat, 'The Law', Foundation for Economic Education, Irvington-on-Hudson, 1998 (1850), available at https://tinyurl.com/edxvt56y (last visited 31 December 2021).

[142] F.A. Harper, 'Blessings of Discrimination' 7(1) *In Brief* 1, 4-5 (1951). Cf also the words of the Italian writer P. Mastrocola, *La scuola raccontata al mio cane* (Modena: Guanda, 2004), 13, here translated into English: 'to discriminate is a verb I do not like much. Nothing should ever be discriminating. And to think that, in itself, 'discriminate' is such a harmless verb. It comes from *discrimen*, which means division, line of separation, interval, distance. And so, it just means to divide, to separate, to distinguish. What is the problem? It means that I do not put everything together in the same place, but I choose. Do we have any idea how many discriminations we make every day? [...] Instead, we immediately and automatically attach a negative meaning to the verb discriminate'.

Essays

The Three Myths of Tort Law in the Chinese Civil Code

Hao Jiang*

Abstract

This article raises three doctrinal myths within Chinese tort law upon the enactment of Chinese Civil Code. These myths led to difficulties in understanding Chinese tort law. More specifically, it is unclear what is the exact scope of rights protected under tort law, if personality rights claim is an independent basis of claim and when and to what extent liability in equity, a special liability without fault, can be imposed. These three myths came from three different root causes, namely: the incoherence in legal transplants, the practical implications of having an independent personality rights law outside torts, the clash between commutative justice, the foundation of Western tort law and distributive justice, the bedrock of Chinese legal tradition.

I. Introduction

2020 was the year when Chinese civil law made history. On 28 May 2020, the first Chinese Civil Code since 1949 was enacted and became effective on 1 January 2021. It contains one thousand two hundred and sixty articles that are divided in seven books: the general provisions, property, contracts, personality, family law, succession and torts. In a break with civilian traditions, the Chinese Civil Code divides the book on obligations into contracts and torts; it absorbs law of unjust enrichment into the book on contract as quasi-contracts. Moreover, a book on law of personality stands on its own, which includes an enumerated list of personality rights protected by Chinese law with a focus on privacy and data protection as an effort to keep Chinese civil law up-to-date to tackle the legal challenges posed by the advancement of technology. In its appearance, Chinese civil law, and tort law in particular does not differ much from its Western counterparts and reflects influences from French, German and Anglo-American law.[1] In contrast, not much of the Code reflects Chinese traditional moral

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[1] For example, Art 1615-1 is a general fault liability clause that replicates French Civil Code Arts 1240-1241; Art 533 and Art 580 both deal with change of circumstances. Art 533 took the German doctrine of *Störung der Geschäftsgrundlage* (destruction of the basis of transaction) as in BGB 313 yet Art 580 created a common law- inspired concept of frustration of purpose; such a doctrine does not operate as a cause to excuse the liability for breach of contract but rather as a cause to excuse performance. Art 151 resembles the doctrine of unconscionability in American law. See generally, H. Jiang, 'The Making of a Civil Code in China: Promises and Perils of a New Civil Law'

philosophy.

In his seminal piece, the Legal Formants, Rodolfo Sacco taught us that appearance does not tell us much and that a simple reading of statutes is a poor and incomplete way of understanding the law.[2] When dealing with a country as old and sophisticated as China, one can easily miss the whole picture by focusing only on the written statutes.

In reality, massive legal transplants led to logical contradictions, Chinese moral philosophy still plays an important part in Chinese tort law and the legal innovation needs a better roll-out plan. In this article, I will briefly describe the codification history of Chinese tort law and address the three myths in Chinese tort law, respectively created by incompatible legal transplants, legal innovation and the traditional Chinese moral philosophy. More specifically, I will explore the problems raised by the unclearly defined scope of rights to be protected under tort law, the implications of personality rights as an independent body of rights outside tort law and the distributive justice-inspired liability base: the liability in equity.

II. A Brief Legislative History

After World War II and the Chinese Civil War, the Civil Code of the Republic of China ('ROC') was abolished along with other ROC codes and laws upon the founding of the People's Republic of China in 1949. No official law (neither statutes nor case law) was in place to deal with private law until the economic reform at the end of the 1970s. The first set of rules regarding torts appeared in the 1986 General Principles of Civil Law.

In the first three decades of the Communist regime, tort law was missing along with the private ownership of means of production and contractual transactions. Tort law lost its practical significance when private ownership and contractual freedom were deemed to be illegitimate, and when the protection of private law rights also had to give way to massive political changes taking place during political campaigns such as the anti-rightists campaign and the Cultural Revolution in those thirty years. Though there were civil rights protected by the 1954 and 1975 Constitutions, these bills of rights bore little practical significance, due to the lack of implementing legislation. As a result, the Constitutions were barely applicable in practice. In this period of time, tort law only existed in customs, with some special types of tort in special statutes such as the Environment Protection Law and the Patent Law.

In the late 1970s, after the Cultural Revolution, upon the adoption of the

[2] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' 39(1) *The American Journal of Comparative Law*, 27 (1991). ('The statutes are not the entire law. The definitions of legal doctrines by scholars are not the entire law. Neither is an exhaustive list of all the reasons given for the decisions made by courts').

reform and openness policy, China reintroduced private ownership in both rural and urban areas through the introduction of a land contract system and urban business households. Through such programs, farmers were allowed to retain the surpluses of grain above their assigned quotas and business households were allowed to operate small-scale businesses. Financial incentives and autonomy were introduced to improve the proficiency and profitability of state-owned enterprises. At the same time, China grew to become the world's second largest recipient of foreign direct investment. All of these changes called for more protection of private ownership and personal liberty, which was essential to stimulate sustainable economic growth. Private law was reintroduced as a result under the framework of European continental civil law. Thus, contemporary Chinese law recognizes four sources that give rise to an obligation: tort, contract, unjust enrichment and *negotiorum gestio*.[3]

As noted above, the first piece of written law that introduced the general principles and rules of tort law was the General Principles of Civil Law (GPCL), which became effective on 1 January 1987. Though GPCL also provides the foundation of Chinese tort law, rules on various perspectives of tort law were fragmentary and can be seen in various parts of the GPCL, which was therefore lacking an organized logical structure on tort law. After years of the drafting process, the Tort Liability Law (TLL), as the first post-1949 tort law code and part of China's continued effort in completing its own civil code, was enacted in 2009 and became effective on 1 July 2010. Other than these two major statutes, several of the Supreme Court's judicial interpretations (which are issued in a codification-like form and are not case specific), the Supreme Court's replies to lower courts' specific inquiries on the interpretations of particular points of law, and several special statutes also deal with tort law. The interpretations on tort law can be seen in: the Supreme Court's Opinions on the implementation of General Principles of Civil Law (1988); the Supreme Court's notice regarding several issues in the application of the Tort Liability Law (2010); the Supreme Court's interpretations regarding issues arising in the adjudication of personal injury cases (2003); the Supreme Court's interpretations on adjudicating moral damage claims arising out of tort liability (2001); the Supreme Court's replies regarding whether a trademark owner can be sued as a defendant in a product liability litigation (2002); and the Supreme Court's replies regarding whether a victim's moral damage claim against a criminal defendant can be accepted by people's courts (2002). Statutes that regulate specific tort law issues include: the Trademark Law (1982); Patent Law (1984); Environment Protection Law (1989); Copyright Law (1990); Product Quality Law of the PRC (1993); Law on the Protection of Consumer Rights (1993); Marine Environment Protection Law (1999); and Right *in rem* Law (2007). The General Provisions of Civil Law was enacted in 2017,

[3] See for example 魏振瀛 (Wei Z.), 民法 (Civil Law) 301 (Higher Education Press/Peking University Press 2000).

which would become the first book of Chinese Civil Code in 2020. The book of torts in Chinese Civil Code superseded the Tort Liability Law as the main source of Chinese tort law since January 2021. Most features of Chinese tort law will remain but certain significant changes have been made.

Contemporary Chinese tort law has adopted the fault liability regime with the supplements of strict liability and 'liability in equity'. Though tort law damage is still considered compensatory in nature, punitive damages are allowed in certain areas such as products liability if the producer's intention or knowledge of the defect can be proved.[4] The victim can also recover for moral damages arising out of torts to personal rights and interests that have caused her severe mental distress.[5] In addition, a departure from BGB § 831, vicarious liability is based on non-fault liability following the Anglo-American and French traditions – an employer will be jointly liable for the tort committed by an employee during the course of employment even if the employer has exercised due care in the selection and control of the employee.[6]

III. Myth No 1: What Is the Scope of Rights Protected under Chinese Tort Law?

Every tort law system has to deal with a fundamental question – do all legal rights have to be protected by tort law? If one only looks at the wording of civil codes, one might be under the impression that there are tort law systems that protect all legal rights from being infringed while other systems might only protect a select list of rights enumerated in the civil code. These two representative positions can be drawn from the French and German civil codes. The French Civil Code provides that

> '(a)ny human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it. Everyone is liable for harm which he has caused not only by his action, but also by his failure to act or his lack of care'.[7]

On the other extreme, the German Civil Code is very specific about the scope of rights protected. § 823 (1) BGB provides that

> '(a) person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.'

[4] See Chinese Civil Code Art 1207 (modifying from TLL Art 47).

[5] See Chinese Civil Code Art 1183 (modifying from TLL Art 22).

[6] For example, see Supreme Court's Interpretations on Personal Injury Cases Art 9.

[7] French Civil Code Arts 1240-1241. Codice Civile adopted the same approach. Art 2043 provides that 'Qualunque fatto doloso, o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno'.

Chinese law, through TLL Arts 2 and 6, appears to have adopted both. As a result, it is unclear whether a constitutional right or a right to pure economic loss can be protected by Chinese tort law. The apparent contradiction in Chinese tort law might come to an end in 2021 when the Civil Code becomes effective. Civil Code Art 1165 endorsed Art 6 of the Tort Liability Law, taking the French approach which had already great influence in the existing judicial practice. It provides: '(w)here an actor harmed another's civil interests and caused damage through his fault, he shall be liable in tort'. However, this supposedly remarkable change seems to have gone unnoticed among legislative and scholarly commentaries. One prominent commentator, Zhou Youjun, a member of the drafting committee, commented that dropping Art 2[8] does not change the law as the interests protected by tort law are still limited to persons and property as indicated elsewhere in the Code.[9] His view was confirmed by his other article on the innovations of tort law in the Civil Code. Zhou, when commenting on the new Art 1165-1, only mentioned the fact that it lays down the fault liability principle.[10] Another drafter, Meng Qiang, in an email exchange, when asked about pure economic loss, expressed his opinion that it should not be protected barring exceptional circumstances as allowing relief will unduly burden the defendants. However, it might receive more protection in the future as Chinese economy progresses and people continue to prosper financially. Again, the perplexing messages call for clarification for the exact scope of protected interests.

Does the doctrinal difference mean that French civil law protects all possible legal rights without limitation, while German law protects only the enumerated rights and ignore those rights that are not specified in the Code? By examining actual cases in each jurisdiction, it appears that this is not the case. Let us take German tort law, for example.

According to the enumerated list set forth by § 823 (§1) of the German Civil Code, along with the wording of Art 253 of the same code, a plaintiff was not supposed to recover for injuries to her dignity or privacy.[11] However, in a 1954 case the German Federal Court protected one's right to privacy by declaring a

[8] 'Harming civil rights and interests will lead to liability in tort. Civil rights and interests used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interest'. TLL Art 2.

[9] For example, Art 3 mentions person and property interest, Art 1164 mentioned civil interests, Art 1167 mentioned safety of person and property. 周友军 《民法典侵权责任编的制度发展》(Zhou Y., *The Institutional Development of Civil Code Book on Tort Liability*), available at https://tinyurl.com/7rec9fbu (last visited 31 December 2021).

[10] 周友军 (Zhou Y.)《民法典侵权责任编的守成与创新》*Compliance and Innovation of the Tort Liability Part of the Civil Code*)，当代法学》2021年第一期 (1 Contemporary Jurisprudence (2021)).

[11] See J. Gordley et al, An Introduction to the Comparative Study of Private Law, Readings, Cases and Materials (Cambridge: Cambridge University Press 2021), 324.

newspaper had violated the 'another right' under § 823 (§1) by publishing a letter written by a lawyer on his client's behalf.[12] Since such a right is supposed to be protected by the Constitution, the court reasoned that

> 'Arts 1 and 2 of the German Constitution protect human dignity and personal freedom, and without a civil action, this protection would be incomplete'.[13]

Still, most systems would only allow individuals to sue the state for infringement of constitutional or fundamental rights outside tort law and normal civil litigation. Does Chinese law impose civil liability to protect rights granted by public law? One of the leading tort law textbooks in China has argued that only civil rights and interests should be protected by Chinese tort law; therefore, rights and interests protected by public law shall not fall within the scope of rights protected under Art 2 (§2).[14] One typical example listed in the book was the right to receive education, which, in my opinion, is a constitutional right that shall not be remedied by imposing tort liability.[15]

Yet, in a most famous Chinese case that indicated the promise of the judicialization of the Chinese Constitution, the case of Qi Yuling, the Chinese Supreme Court imposed tort liability on the defendant's infringement of the right to receive education, which is a constitutional right.[16]

In this case, the plaintiff, Qi, went to junior high school with the defendant, Chen. Both of them graduated in 1990 and took the same entrance exam in order to further their education at a vocational business school, with guaranteed job upon graduation provided that they graduate from this vocational business school.[17] Qi did well and was supposed to receive the notice of admission from the business school; however, Chen, who did not do well, conspired with her father along with the junior high school to intercept Qi's notice of admission without Qi knowing, and forged documents that would allow Chen to use Qi's name to attend the vocational school.[18] Chen subsequently attended this vocational business school under Qi's name. Chen graduated and started working at the Bank of China's local branch – the guaranteed employment. Qi, since graduating from junior high school, struggled to find stable employments and had to work temporary jobs in

[12] ibid 325.

[13] BGH, 25 May 1954 – I ZR 211/43, BGHZ 13, 334.

[14] 王利明，周友军，高圣平(Wang L., Zhou Y. and Gao S.),《中国侵权行为法教程》(*Textbook on the Tort Liability Law of China* (Beijing Shi: People's Court Press, 2010), 61).

[15] ibid.

[16] A large amount of scholarly attention has been devoted to this case, whose significance was compared to that of *Marbury* v *Madison* in the U.S. Before this case, the Constitution was not cited as a source of authority in China. See generally R.J. Morris, 'China's Marbury: *Qi Yuling* v *Chen Xiaoqi* – The Once and Future Trial of Both Education & Constitutionalization' 2 *Tsinghua China Law Review*, 273, 274 (2012).

[17] See Supreme Court Gazette 2001 no 5, 158-161.

[18] ibid.

factories. Qi discovered the identity theft by chance.

The plaintiff did not realize the identity theft until 1998, when she immediately sued for torts that violated her right to name as well as the right to receive education. The trial court only recognized the tort towards her right to name because the right to receive education was not a right protected by civil law. The reason to bring the constitutional claim is simply that the tort towards one's right to the name is a one-time offense and the damage permitted by law does not reflect the decades of income disparity. On appeal, the provincial high court petitioned to the Supreme Court to seek interpretation on whether violation of a constitutional right can be remedied by imposing civil liability since the right to receive education is not a listed right under the GPCL. The Supreme Court in its reply expressly stated that the infringement of the plaintiff's constitutional right to receive education had resulted in the damage. Therefore the defendant was obliged to bear civil liability.[19] As a result, not only did the plaintiff recover losses arising out of the damage to the right to name, which included the tuition to repeat the junior high and additional tuitions for another trade school; through the claim on right to education, she was also entitled to the consequential economic loss, which included all the salaries Chen earned under Qi's name along with the moral damage.[20]

This case proved that Chinese courts were able to expand the protection of rights outside a seemingly definite list of rights to be protected by tort law. Such a practice is exceptional as it allows private parties to recover in a constitutional claim from another through civil litigation. It should, however, be noted that the Supreme Court's interpretation mentioned above was abolished in 2008 by a Supreme Court notice stating that this 2001 interpretation 'discontinued to be applicable'.[21] This controversial issue seemed to have finally been cleared by a fellow drafter, Zhou Youjun, who explained that public law rights are not within the 'civil interests'[22] protected by tort law under Art 1164, which provides that 'this book

[19] 法释〔2001〕25号Supreme Court Interpretation no 25 (2001). Zuigao Renmin Fayuan Guanyu Yi Qinfan Xingming Quan de Shouduan Qinfan Xianfa Baohu de Gongmin Shou Jiaoyu de Jiben Quanli Shifou Ying Chengdan Minshi Zeren de Pifu, Fa Shi [2001] 25 Hao (最高人民法院关于以侵犯姓名权的手段侵犯宪法保护的 公民受教育的基本权利是否应承担民事责任的批复, 法释[2001]25 号) [Reply on Whether the Accused Shall Bear Civil Liability for the Infringement of the Citizen's Fundamental Rights of Receiving Education under the Protection of the Constitution by Means of Infringing the Right of Name, Judicial Interpretation No. 25 [2001]] (promulgated by the Judicial Comm. Sup. People's Ct., June 28, 2001, effective Aug. 13, 2001).

[20] See Supreme Court Gazette no 5 (2001), 158-161.

[21] See Supreme Court Judicial Interpretation no 15 (2008). See Guanyu Feizhi 2007 Niandi Yiqian Fabu de Youguan Sīfa Jieshi` (Di Qi Pi) de Juedi`ng, Fa Shi〔2008〕15 Hao (关于废止 2007 年底以前发布的有关司法解释(第七批)的决定, 法释〔2008〕15 号) [Decision on Abolishing Some Judicial Interpretations (the Seventh Batch) Issued Before the End of 2007, Judicial Interpretation No. 15 [2008]] (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 8, 2008, effective Dec. 24, 2008) SUP. PEOPLE'S CT. GAZ., Feb 1, 2009, at 7.

[22] 周友军 《民法典侵权责任编的制度发展》(Zhou Y., *The Institutional Development of Civil Code Book on Tort Liability*), available at https://tinyurl.com/7rec9fbu (last visited 31 December 2021).

regulates civil relations arising from harms to civil interests'. Unfortunately, the myth is not yet solved. There were calls to revive the *Qi Yuling* case in 2020 right after the passage of the Code. There was a surge of similar cases where people discovered that they lost the opportunity to attend college because their fellow classmates stole their identities. Still, the view among practitioners is that without resorting to right to education, damages can only be nominal.[23] According to these commentators, the practice people had seen from the Qi Yuling case could be revived by the Civil Code through personality rights law.[24]

What about pure economic loss? It is not clear whether Chinese law recognizes economic right as a right under the protection of tort law. The Civil Code on its face dropped the German approach that enumerates the rights but kept the French approach as we have seen in Art 1615. Commentators still think the protected interests are limited to personal and property rights. The principal drafter, Wang Liming, made it clear that only absolute rights are protected by tort law rather than relative rights such as contractual rights. According to Wang, pure economic loss is not an absolute right and therefore shall not in principle be remedied by tort law unless the causation was proximate and loss is certain and foreseeable[25] It is almost like saying the nature of the harm does not matter. Physical or not, recovery is permitted so long as causation and damage can be proved. Through a thorough study of existing cases and interviews with judges, it is abundantly clear that the French approach is widely used in judicial practice as judges and practitioners were almost never bound by the exclusionary rule on recovery of pure economic loss as in German law.

I interviewed twenty-seven elite Chinese judges enrolled in the master and doctoral programs at City University of Hong Kong. It became clear that even when the German approach was in the law, it never stopped the judges from rewarding damages for pure economic loss as in France. Overwhelmingly with the exception of two judges, they either do not appreciate why law should only protect rights of property and person or they consider economic right as a property right. For the judges who did recognize pure economic harm, they were not sure whether economic right shall be protected by law. Overwhelmingly, judges would allow parties to recover from pure economic loss citing Art 6 instead of Art 2.

Having done a survey of close to one hundred cases identifying pure economic loss since the promulgation of TLL, less than a dozen of them did so correctly. Others confused pure economic loss with physical loss. The confusion towards recovery for pure economic loss is evident. Out of these cases, courts only awarded pure economic loss in four cases. Within these four cases, the grounds

[23] A cluster of identity theft cases in college admission found: Civil Code had shown the roadmap in how to deal with them, available at https://tinyurl.com/8htc2mmx (last visited 31 December 2021).

[24] ibid.

[25] 王利明，周友军，高圣平(Wang L., Zhou Y. and Gao S.), 《中国侵权行为法教程》 *Textbook on the Tort Liability Law of China* n 14 above, 60-63.

for relief were highly questionable. For example, in two cases, pure economic loss was deemed an indirect loss that shall be remedied.[26] In another case, the court recognized that pure economic loss is a civil interest and shall be protected by law. [27] In another, pure economic loss caused by intentional act shall lead to liability in tort.[28] In cases where recovery for economic harm was rejected, reasons unrelated to the nature of the harm were given. In several cases, causation was not found.[29] In some other cases, damage was not certain.[30] In others, the harm was not foreseeable[31] and the act was not intentional[32].

In some cases, the court does not think it was a problem to extend the protection of tort law into rights of expectancy, such as an economic right. They do care, however, whether causation can be established between the act and damage and the certainty of the extent of the damage. In a recent case decided in 2018, the court was not bothered by the fact that part of the claims was based on the economic loss.[33] They awarded partial damages citing Art 6 of Tort Liability Law, which bears the French view. In this case, plaintiff's production activities at their pig farm were interrupted by the three defendants and resulted in the loss in revenue.[34] The defendants dug a hole and damaged the road leading to the farm and used a tractor to block the way so that baby pigs could not be delivered to the farm. The interruption lasted from early 2016 until late 2017, the plaintiff sued for the loss of profit in the amount of RMB one hundred and fifty thousand yuan. The court recognized defendants' conduct as a tort and that the loss resulted was a pure economic loss. However, the court did not award the whole damage. They reasoned that the plaintiff did not fulfill their duty to mitigate the damage as they did not start repairing the road until after two months. In addition, the alleged profit could have been affected by uncertain market conditions and the cost. As a result, only partial alleged damage of RMB twenty thousand was awarded.

On the other hand, there are courts that expressly denied recovery for pure economic loss when the loss was in connection to a physical loss. In a case decided in 2016, after a car wreck, the court awarded plaintiff damages resulting from the personal injuries sustained but did not allow recovery of a paid tour that

[26] （2017）京03民终5262号; ((2017) Jing 03 Min Zhong No 5262); (2017)苏04民终3967号. ((2017) Su 04 Min Zhong no 3967).

[27] （2014）渝一中法民终字第06265号. ((2014) Yu Yi Zhong Legal Explanation Min Zhong no 06265).

[28] （2017）粤0224民初615号. ((2014) Yue 0224 Min Zhong no 615).

[29] Eg（2017）黔0303民初137号.((2017) Qian 0303 Min Chu no137); （2016）鄂08民终219号.((2016) E 08 Min Zhong no 219).

[30] Eg,（2016）粤06民终9266号. ((2016) Yue 06 Min Zhong no 9266).

[31] Eg,（2016）苏06民终4451号. ((2016) Su 06 Min Zhong no 4451).

[32] Eg,（2016）黔0303民初5006号((2016) Qian 0303 Min Chu no 5006); （2016）黔0303民初5005号 ((2016) Qian 0303 Min Chu no 5005);（2016）黔0303民初5004号 ((2016) Qian 0303 Min Chu no 5004).

[33] (2017) 粤 0224 民初 615 号 ((2017) Yue 0202 Min Chu no 615).

[34] ibid.

plaintiff could no longer go to due to the accident.[35] The court maintained that such a loss is independent of property and person and originates from the contractual relationship between the plaintiff and the travel agency. The court furthered reasoned that the law shall limit the scope of potential victims and the extent of the pure economic loss given their uncertainty and unforeseeability. Strikingly, the court did not recognize that the economic loss in this case stemmed from a physical harm but it seemed clear to the court that pure economic loss cannot be recovered by law. However, if it was that clear, the court could have stopped right there. Yet, it might be that the difficulty in providing relief really lies in the uncertainty of damage and the lack of proximity of causation. Such a practice seems to be no different than the French courts. Supposedly, French law would allow plaintiffs to recover from pure economic loss. However, courts also found it necessary to limit the recovery of pure economic claims resorting to other doctrinal barriers. When a plaintiff is suffering from a loss that comes from a risk that should be borne by himself, claim for economic loss would be denied. Such loss is either 'hypothetical',[36] when a man who was about to close a deal was injured and the deal went sour, or 'indirect'[37] when the debtors were both killed and creditor could not collect debt.

The contradictory positions taken by Art 2 and Art 6 led to a clash between court decisions. In another recent case where a driver negligently drove a truck into the power line cutting off the electricity in the neighboring area and causing the interruption of production in a bottling factory, the appellate court and the trial court were at odds as to whether economic loss shall be remedied by tort law.[38] Citing Art 6, the trial court allowed full recovery of economic and property loss of RMB one hundred eighty-seven thousand and one hundred. The decision was reversed by the appellate court on the ground that tort law should only protect rights that are of property and person in nature, citing Art 2. As a result, appellate court held that only loss related to the loss of bottles and waste of diesel fuel due to the loss of electricity could be recovered in the amount of RMB fifty-seven thousand. Still, the court was of the view that the loss of profit could not be recovered because it was uncertain or had not been accrued. The outcome might be different if loss of profit were certain.

[35] (2016)黔0303民初5005号((2016) Qian 0303 Min Zhong no 5005).

[36] Cour de cassation (Cass.) (Supreme Court for Judicial Matters) 2e civ., 12 June 1987 (cited in J. Gordley et al, *An Introduction to the Comparative Study of Private Law, Readings, Cases and Materials* 410 (Cambridge: Cambridge University Press, 2021)).

[37] Cour de cassation (Cass.) (Supreme Court for Judicial Matters) 2e civ., 21 February 1979 (cited in J. Gordley et al, *An Introduction to the Comparative Study of Private Law, Readings, Cases and Materials* (Cambridge: Cambridge University Press, 2021), 410.

[38] (2016)鄂08民终219号 ((2016)Er 08 Min Zhong No.219).

IV. Myth No 2: What Are the Limits to the Application of Liability in Equity?

1. An Overview of Liability in Equity

The fault liability regime is a reflection of commutative justice or corrective justice,[39] while liability in equity is a liability based on distributive justice[40] – the foundation of the traditional Chinese legal system. Where a harm that is not subject to strict liability is suffered but neither party was at fault, there would be no recovery under Western tort laws as doing so would be tantamount to imposing liability on a party for a harm caused by accident. However, letting the victim bear the entire damage has never been the solution preferred by the distributive justice system which China traditionally embraces. Distributive justice promotes the even distribution of losses. Therefore, liability in equity became a liability regime that reflects traditional Chinese values and supplements the fault liability regime that is borrowed from the West. In the new Code, the law tries to limit the unbridled application of liability in equity yet all that is said is that its application must be 'according to law'. Here comes the second myth: what does 'according to law' entail and what are the exact limits imposed on liability in equity?

This principle first appeared in Art 132 of the GPCL, which provides that '(w)here no party was at fault in resulting in the harm, civil liability can be, according to the actual situations, shared among the parties'.[41] This rule is rephrased in Art 24 of the TLL, which provides that '(w)here neither the victim nor the actor is at fault for the occurrence of a damage, both of them may share the damage based on the actual situation'.[42] The allocation of damages here is an allocation based on the property statuses of the parties. The rule, in part a legal transplant from Art 406 of the 1922 Russian Civil Code, adheres to the traditional Chinese philosophy of distributive justice.[43]

2. Social Status as the Determining Factor in Finding Liability in Imperial China

Throughout Chinese history, distributive justice rather than commutative justice has been the core standard in Chinese tort law.[44]

On the one hand, in absence of the principle of commutative justice, which relies on the objective, reasonable person standard and the duty of care, tort liability functioned to determine property status and provide restitution when there was

[39] ibid 171.
[40] ibid.
[41] GPCL Art 132.
[42] TLL Art 24.
[43] See Wang Liming et al, n 14 above,171.
[44] See generally Deng Feng, *Corrective Justice in Confucian Legal Tradition: A Nonexistent Concept* (undated) (unpublished manuscript), 5, https://tinyurl.com/muespu85 (last visited 31 December 2021).

damage to another's property.[45] The idea was to share the loss evenly. As a result, negligence and fault became irrelevant in determining liability.

On the other hand, parties' social statuses became a factor in determining liability. To aid the weak and suppress the strong has always been the sound governance policy in both governing the country and adjudicating cases. Even for robbers, robbing the rich to aid the needy (劫富济贫) was heroic and commendable behavior for outlaws.[46] In the chapter on the law of punishment of Han Shu (汉书), a leading historical account of the West Han Dynasty, it was pointed out that a sound governance policy should support the weak and suppress the strong (扶弱抑强).[47] Hai Rui (海瑞), perhaps the most well-known judge in imperial China, commented on this philosophy in adjudicating indeterminable cases:

I suggest that in returning verdicts to those cases it is better to rule against the younger brother rather than the older brother, against the nephew rather than the uncle, against the rich rather than the poor, and against the stubbornly cunning rather than against the clumsily honest. If the case involves a property dispute, it is better to rule against a member of the gentry rather than the commoner so as to provide relief to the weaker side. But if the case has to do with courtesy and status, it is better to rule against the commoner rather than against the gentry: the purpose is to maintain our order and system.[48]

All of these efforts were made to help realize distributive justice. What will be the policy benefits in advancing distributive justice? Confucius gave a strong argument:

> 'the head of the state or family shall not be concerned about poverty as much as they should be concerned about uneven distribution (不患贫，而患不均) … there is no poverty in even distribution of wealth (均无贫)'.[49]

3. Financial Status as the Determining Factor in Finding Liability Under Liability in Equity

Though liability in equity is a rule largely unknown to the West and consistent with traditional Chinese philosophy, it is not a complete innovation by the drafters of the GPCL and TLL. Similarities can be drawn from Russian civil law. Art 406 of the Russian Civil Code of 1922 provided that:

> '(i)n situations where, in accordance with Arts 403–405, the person causing the injury is not under a legal duty to recover, the court may

[45] See ibid 28.

[46] See Xinhua Dictionary of Chinese. It is considered a positive term. Other similar variations of the phrase include 'kill the wealthy to aid the needy' (杀富济贫).

[47] See Book of Han Dynasty, Chapter of Punishment (汉书 刑罚志).

[48] Ray Huang, *1587: A Year of No Significance: The Ming Dynasty in Decline* (New Haven: Yale University Press, 1981), 131.

[49] See 《论语季氏》(Analects, Chapter of Ji Shi).

> nevertheless compel him to recover the injury, depending on his property status and that of the person injured'.

Here, Arts 403–405 of the Russian Civil Code of 1922 respectively dealt with fault liability; presumption of fault for ultra-hazardous activities, wild animal keepers and building constructors; and liability for people with limited or no civil capacity. Liability in equity was also a supplement to fault liability where the determining factor in finding liability outside fault was the relatively superior property status.

In China, there are a few unstated rules regarding how liability in equity should be applied. Scholars emphasize that the loss shall be fairly allocated.[50] The wording 'actual situations' of Arts 132 GPCL and 24 TLL, according to the interpretation of the commentary published by the Supreme Court, refers to the comparison between the financial statuses of the victim and the alleged tortfeasor.[51] The allocation of liability is thus based upon the property status of the parties,[52] and directly related to their respective 'ability to shoulder the loss'.[53] Yet losses that can be compensated under a fault liability regime – such as moral and punitive damages – cannot be recoverable under a rule of liability in equity.[54]

Though civil liability can be imposed through liability in equity, it is controversial as to whether this liability is the outcome of a legal obligation or of a moral one.[55] It has been argued that this form of liability is a 'moral aid'[56] that is 'based on the charitable moral sentiment of certain people'.[57] According to this view, liability in equity cannot be imposed by law, but should be the result of a voluntary negotiation between the parties.[58] Under the leading opinion, however, liability in equity is still a liability imposed by law with a socialist moral foundation.[59] It is argued that the obligation to assume this liability is mandated by law rather than based upon the parties' agreement – judges have the discretion to enforce this liability when the situation warrants its application.[60] Also, the scope of application of such liability shall be limited to the circumstances expressly provided by law.[61] Such circumstances include harms caused by people with limited or no civil capacity where such persons have property,[62] or harms caused by people with full

[50] See Wang Liming et al, n 14 above, 168.

[51] 奚晓明(Xi Xiaoming), 《中华人民共和国侵权责任法条文理解与适用》(Interpretation and Application of the Tort Liability Law of People's Republic of China) 185 (People's Court Press).

[52] See Wang Liming et al, n 14 above, 168.

[53] ibid 169.

[54] ibid 174.

[55] ibid 167.

[56] ibid

[57] ibid

[58] ibid

[59] ibid

[60] ibid

[61] ibid

[62] See TLL Art 32 (now Civil Code Art 1188).

civil capacity but under temporary loss of consciousness,[63] or harms caused by objects thrown out of a building or construction by an unknown person.[64]

However, in China's judicial practice, the application of liability in equity is not limited to the above circumstances.[65] Rather, the application is extensive and with very few limitations. It seems that, when there is a loss and a deep pocket, damage is often awarded in the absence of fault in adherence to distributive justice and principles of equity. In a 2011 case, the seller of an electronic car received 20 percent of damage for his personal injury, which was reduced from the trial court's 50 percent award, without proof of either causation or fault on the part of the defendant.[66] After the completion of delivery, without the knowledge or consent of the buyer (a factory), the seller volunteered to carry a part of an electronic car on the factory's premises to facilitate assembly.[67] The part dropped and hit the plaintiff, which is when he sustained injury.[68] The appellate court held that neither party was at fault, nor did the defendant cause the injury.[69] Nevertheless, the court awarded 20 percent of the damages applying Art 24 of the TLL after taking into account the parties' 'actual situations'.[70] The unstated reason behind the decision was simple – the defendant had a deep pocket and the losses needed to be distributed.

Such an unbridled application of liability in equity has been constrained in recent years. In a case where the plaintiff was injured in a casual pick-up basketball game by a fellow player, the defendant was initially found liable by the trial court citing liability in equity.[71] The appellate court overruled the case and held that the defendant was not liable because the plaintiff had assumed the risk of injury by signing up to play basketball. Had a participant of a sport been held liable for causing sports-related injuries, it would be detrimental to the growth of the entire sports industry. In a recent case[72] a doctor warned a 69- year-old man not to smoke in the elevator and a quarrel between the two resulted. Ten minutes later, the old man later died of a heart attack.[73] The doctor was sued for wrongful death.[74] The trial court ruled that the doctor was not at fault and yet was partially liable based on liability in equity. The appellate court overruled the decision and

[63] See TLL Art 33.

[64] See TLL Art 87 (now Civil Code Art 1254).

[65] It has been argued that liability in equity is more about sharing the liabilities and losses than about establishing liabilities. So the application of the principle of liability in equity shall not only be limited to the circumstances provided by law. See Wang Liming et al, n 14 above, 177.

[66] See *Hu* v *Guanshan Huifu Brick Factory*, (2011) 衡中法民一终字第403号(Heng Zhong Fa Min Yi Zhong Zi No 403 (2011)

[67] See ibid

[68] See ibid

[69] ibid

[70] ibid

[71] 2016）京01民终495号 ((2016) Jing 01 Min Zhong No 495).

[72] 2017）豫01民终14848号 ((2017) Yu 01 Min Zhong No 14848).

[73] ibid

[74] ibid

held that the doctor was not liable because there was no causation.[75] This case caused widespread concern[76] and its ripple effect led to a minor legislative change. To warn judges of the danger of abusing the doctrine, the Civil Code reframed the rule: the wording 'based on the actual situations' has been changed to 'according to law'.[77] One of the drafters, Meng Qiang, in an email exchange clarified to me the meaning of the new rule: the relief to be given by liability in equity must come from a harm to one of the protected interests of the tort law. This means that liability in equity cannot remedy pure economic loss. Also, other requisite elements need to be present, despite the absence of fault, in finding liability.

Though sharing the same rule, the Russian courts have been much more cautious in applying this liability regime. One Russian commentator observed: '(w)e know of many cases where the Supreme Court refused to apply Art 406 and know of none where they would have applied it'.[78] Art 406 of the Russian Civil Code of 1922, as the Russian textbook just mentioned describes, might have applied only in exceptional cases, where, given the disparity between the parties' financial statuses, it would have appeared extremely unjust to let the victim bear the entire damages.[79] In such cases, courts might impose part or full damage upon the defendant.[80] In imposing this liability, the Russian Supreme Court held that causation was essential[81] and disqualified actions against the government citing this rule,[82] for the obvious reason that the government is always the deeper pocket.[83]

The deeper resonance of liability in equity with traditional Chinese moral philosophy, as compared with the Russian one, may explain why the principle has enjoyed a wider recognition in China. Still, the scope and limits in the application of liability of equity needs to be better crafted; a vague statement such as 'according to law' will likely lead to the abuse of judicial discretion.

V. Myth No 3: Can Personality Rights Law Operate Outside Tort Law?

Perhaps, the biggest structural innovation in the Code is to have an independent book on personality rights, rights that are of their own category independent of

[75] ibid

[76] See for example 电梯劝烟猝死案二审宣判 **法院判决**：劝烟者无责，不用赔钱 (Second Trial of Case of Sudden Death after Elevator Quarrel due to Smoking: The Persuader is not responsible, does not have to pay), available at https://tinyurl.com/yckhp56s (last visited 31 December 2021).

[77] Civil Code Art 1186.

[78] V. Gsovski, *Soviet Civil Law* (Ann Arbor: Michigan University of Press, 1946), 527, (quoting Varshavsky, *Obligations arising from injury*, in Russian, 1929, 170).

[79] See ibid 527.

[80] See ibid

[81] See ibid

[82] ibid (quoting R.S.F.S.R Supreme Court, Civil Division, Report for 1926, Collection of rulings, 3d, 1932).

[83] ibid.

rights protected by torts and property law. Art 990 provides:

> 'Personality rights are rights enjoyed by civil subjects including the right to life, the right to body, the right to health, the right to one's name, the right to name, the right to one's image, the right to honor, the right to reputation, the right to privacy etc.'

Zhou Youjun praised this innovation as an illustration of Chinese ingenuity in making its own civil law and an implementation of the constitutional protection of human dignity.[84] However, when seeking the protections from the Civil Code, one will encounter practical difficulties: what will the basis of a personality rights claim be and what forms of remedy will be available to such a claim? Supposedly, all the rights within the scope of personality rights are already protected by tort law. Yet, according to the principal drafter of the Code, Wang Liming, personality rights alone are a basis of claims independent of tort law.[85] According to him, personality rights are unique: 'such rights are spiritual in nature and can only be exercised by civil subjects who have an exclusive enjoyment over such rights'.[86] If it is really such an exclusive category, does a party still have a tort law claim in addition to that of personality rights? Will a party still have such a claim when elements necessary for tort liability are lacking, such as subjective culpability or causation?

Liang Huixing, a prominent scholar who opposed an independent book on personality rights, argued that parties will now have to establish claims under both tort law and personality rights law.[87] Wouldn't that make it harder to get relief? Meng Qiang, a fellow drafter, explained to me that after the Code was enacted that personality rights law would be directly applicable and sufficient in itself as the basis of claim (*Anspruchsgrundlage*).[88] But again, violation of personality rights is either part of tort law or not. If it is, is it beneficial to allow parties to circumvent tort law and obtain relief? If it is not, are we really going to say these traditional tort law protected rights (right to one's health and body, right to privacy, right to one's name and honor) are now only protected by personality rights law? Does that mean monetary damage under tort law is out of the question? According to Wang Liming's definition, personality rights are rights that non-alienable, non-inheritable and not property based[89]. However, if

[84] 周友军 (Zhou Y.), 《民法典人格权编评析》 (*A Commentary on the Civil Code Book on Personality Rights*), available at https://tinyurl.com/em2764hr (last visited 31 December 2021).

[85] 王利明，程啸，朱虎 (Wang L., Cheng X. and Zhu H.), 《中华人民共和国民法典人格权编释义》(*Annotations on Personality Rights of Civil Code of the People's Republic of China*), 中国法制出版社(China Legal Publishing House), 9 (2020).

[86] ibid 7.

[87] 梁慧星(Liang H.), *Suspend the Codification of Separate Provisions of Civil Code*, available at https://tinyurl.com/ytnyz6ta (last visited 31 December 2021).

[88] An email exchange between the author and Meng Qiang, a member of the drafting group.

[89] Wang L., Cheng X. and Zhu H., n 85 above, 7-8.

we go around tort law, the relief is clearly insufficient in compensating the loss. Take invasion of privacy. When privacy is invaded, merely stopping the ongoing harm, as the remedies provided for in the personality rights section of the code, is often not sufficient to negate the damage already caused. When private information or pictures have been disclosed, limiting the remedy to unpublishing the information or issuing an apology to undo the influence will undercompensate the harm that has caused the reputational damage or mental distress to the plaintiff. Invariably, it is almost necessary to seek additional financial relief under tort law. Should there be two separate claims? We do not have a good answer.

When the questions were posted, Meng Qiang responded to me in a perplexing and perhaps conflicted tone:

> '(p)rotection of personality rights has its own unique features that are independent of tort law and so it deserves to be standing on its own. But of course, in order to get relief under personality rights law, the elements of tort law need to be satisfied. It will not be harder for the plaintiff to get relief because the civil rights/interests under the Code are open-ended and allow the judges to be creative'.[90]

Such a response will only add to the confusion. First, by requiring the claim to satisfy tort law and personality rights law, it narrows the scope of protection by definition. Second, if the scope of rights is open-ended under the tort law and civil rights and interests under the tort law totally covers personality rights, then everyone could just use tort law instead of resorting to the book of personality rights.[91] If that were the case, the book of personality rights becomes declaratory in nature only. It appears that the only circumstances where an independent body of personality rights can add to what tort law already does is to either allow claims that are outside the scope of rights protected by civil law such as right to education as discussed above, or treat the personality rights claims as non-tort claims. It appears that, according to Meng Qiang, the personality rights are still rights protected by tort law and a personality rights claim has to meet all tort law elements. According to Wang Liming, having an independent book of personality rights would ensure comprehensive protection of personality rights beyond regular tort law such as the availability of the non-monetary remedies such as elimination of bad publicity (消除影响), restoration of reputation (恢复名誉), injunction or cessation of harm (停止侵害).[92] However, even without an independent book of personality rights, such non-monetary remedies have long

[90] ibid

[91] Even Wang Liming himself recognized the need for personality rights to be protected by tort law while emphasizing that they are two different bodies of law. He claims '(i)nfringement over personality rights is a tort and requires remedies under tort law; yet the personality rights law has a profound impact on tort law and expanded the scope of protection under tort law'. ibid 21-22.

[92] ibid 9.

been in Chinese tort law since 1986 General Principles of Civil Law.[93]

VI. Conclusion

There is no doubt that China has enacted a modern and innovative Civil Code that is bound to be influential. History has been made. Now that the drafting process is over, we have moved on to the more challenging task: interpreting the Code. This article addresses the three important doctrinal areas in tort law that would puzzle any tort lawyer. Therefore, it is crucial to know whether Chinese tort law protects all civil law rights or only the enumerated ones; whether there are limitations; if so, what are such limitations that permit courts to give relief to harm caused by accidents using liability in equity simply because the defendants can pay; and how and if personality rights can operate on their own independent of torts.

[93] See《民法通则》第134条 (The General Principles of Civil Law Art 134) for a complete list of forms of remedies in Chinese civil law.

Essays

Subsidiarity and the New Frontiers of Freedom of Contract

Filippo Maisto*

Abstract

The principle of subsidiarity is a suitable basis for legitimating a ruling that contracts concluded in place of public acts are binding. In this way, freedom of contract extends to new forms, namely: 'contracts substitutive of administrative measures'; 'contracts as an alternative to judicial settlements'; and 'contracts as sources of legal rules'. This extension of the freedom of contract runs counter to theories predicting the 'death of contract' and the 'fall of freedom of contract'. This paper aims to reconstruct the systematic framework of these legal reasonings.

I. Introduction

This paper develops the argument that contracts can pursue public interests in terms of the principle of subsidiarity in five conceptual steps.

First step: I establish the fundamental theorem of assessment according to subsidiarity.

Second step: the paper identifies the decisions that can potentially change the system concerning the sources of legal rules.

Third step: I pinpoint the decisions that can potentially increase the area of freedom of contract.

Fourth step: I will refute the doctrine that contracts cannot pursue public interests.

Final step: the paper will explain why judicial decisions inferred from the principle of subsidiarity are compatible with the higher value of legal certainty.

Conclusion: I will tie up the results of the analysis by claiming that these decision-making techniques imply that the distinction between 'private law' and 'public law' can be considered superseded.

II. The Historical Evolution of the Subsidiarity Principle

Subsidiarity is a very deceptive category. Metaphorically, the expression

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'principle of subsidiarity' evokes the idea of supporting,[1] which misleadingly reflects a natural inclination for self-restraint.

This moderate characterisation is not accidental. Historically, horizontal subsidiarity could first be found in some political statements by the Catholic Church, especially the Encyclical *Rerum Novarum* of Pope Leo XIII (15 May 1891).[2] In this document, the Catholic Church declared its intention to provide fundamental public services. In the period between the unification of Italy and the Lateran Pact, ecclesiastical institutions felt the need to use a reassuring tone as if to say, 'We wish to provide essential public services, but we don't want to replace the State'. In this context, subsidiarity is a manifesto of political action rather than a technique of legal assessment.

The subsidiarity principle became a decision-making tool in European Union law (initially, Art 3B EC Treaty, then Art 5 EC Treaty, and now Art 5 EU Treaty).[3]

III. The Logical Sequence of Assessment According to Subsidiarity

The EU-law principle of subsidiarity is not only concerned with 'vertical' subsidiarity. More broadly, it establishes the fundamental theorem that must work in any application of the principle of subsidiarity both vertically and horizontally.

This precept can lead to a preliminary ruling concerning the validity/suitability of a public act carried out by a subject typically considered incompetent or inadequate to fulfil public interests. Consequently, a court will order the enforceability of the envisaged actions, or in any case, what is pursued by the act in question. The term 'vertical' subsidiarity is used if the otherwise incompetent subject is a public institution. 'Horizontal' subsidiarity regards acts originating

[1] Cf R. Carleo, 'La sussidiarietà nel linguaggio dei giuristi', in M. Nuzzo ed, *Il principio di sussidiarietà nel diritto privato* (Torino: Giappichelli, 2014), 3.

[2] For a thorough discussion, C. Martinez-Sicluna Y Sepúlveda, 'Il principio di sussidiarietà ed il suo fondamento classico', in G.P. Calabrò and P.B. Helzel eds, *La nozione di sussidiarietà tra teoria e prassi* (Napoli: Edizioni Scientifiche Italiane, 2009), 19 et seq; M. Ayuso, 'L'ambigua sussidiarietà', in G.P. Calabrò and P.B. Helzel eds, *La nozione di sussidiarietà tra teoria e prassi*, 35 et seq.

[3] Art 5 TEU: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'. For an analysis: P. Caretti, 'Il principio di sussidiarietà e i suoi riflessi sul piano dell'ordinamento comunitario e dell'ordinamento nazionale' *Quaderni costituzionali*, 3 et seq, especially 10 (1993); G. Strozzi, 'Il ruolo del principio di sussidiarietà nel sistema dell'Unione europea' *Rivista italiana di diritto pubblico comunitario*, 1-2 (1993), 59 et seq, especially, 69; P. Vipiana, *Il principio di sussidiarietà "verticale"* (Milano: Giuffrè, 2002), 45 et seq; P. Femia, 'Sussidiarietà e princípi nel diritto contrattuale europeo', in P. Perlingieri and F. Casucci eds, *Fonti e tecniche legislative per un diritto contrattuale europeo* (Napoli: Edizioni Scientifiche Italiane, 2004), 143 et seq; F. Ippolito, *Fondamento, attuazione e controllo del principio di sussidiarietà nel diritto della Comunità e dell'Unione Europea* (Milano: Giuffrè, 2007), 163 et seq.

from a non-institutional subject. The condition for invoking the principle of subsidiarity is to prove that these judicial solutions fulfil a public policy goal in the best way.

Through this possible legal reasoning, the principle of subsidiarity may have a substantial impact on the system of the sources and the self-regulatory acts of civil law. Instead, case law demonstrates an ambivalent attitude towards the use of these decision-making techniques.

Some decisions, however, seem to make powerful creative use of the subsidiarity principle. In the field of 'vertical' subsidiarity, the solution of '*chiamata in sussidiarietà*' is emblematic. This technique is used to obtain a preliminary ruling on the validity of a statutory law of the State establishing the claims that can be brought before a court relating to a matter reserved to regional legislation. The Italian Constitutional Court conceived this 'monumental' work of interpretation,[4] and decisions of this weight have profoundly changed the system of the distribution of legislative powers between the State and Regions.[5]

The concept of 'horizontal' subsidiarity was used in decisions concerning banks[6] and the Third Sector Code/decreto legislativo 3 July 2017 no 117.[7] From this was derived the premise that banking foundations and non-profit associations are private parties.[8] The combination of 'horizontal' and 'vertical' subsidiarity has given rise to preliminary rulings on the ability of central statutory law to establish limits and controls on the activities of these subjects.

In case law, on the other hand, many 'missed opportunities' can arise. Indeed, there have been no instances of this approach in such decisions, even though recourse to the principle of subsidiarity would be particularly suitable.

First, we must consider the legal reasoning concerning the question of the legitimacy of regional private law.[9] Subsidiarity can be invoked to justify a decision that a regional statutory law establishing enforceable claims in intersubjective

[4] The leading cases are Corte costituzionale 1 October 2003 no 303, *Il Foro Italiano*, I, 1004 (2004); Corte costituzionale 13 January 2004 no 6, *Giurisprudenza costituzionale*, 104 (2004).

[5] See: R. Ferrara, 'Unità dell'ordinamento giuridico e principio di sussidiarietà: il punto di vista della Corte costituzionale' *Il Foro Italiano*, I, 1018 (2004); S. Gambino, 'Repubblica delle autonomie e sussidiarietà', in G.P. Calabrò and P.B. Helzel eds, n 2 above, 160 et seq; R. Rolli, 'Il principio di sussidiarietà nel diritto pubblico', in G.P. Calabrò and P.B. Helzel eds, n 2 above, 202 et seq Especially S. Papa, *La sussidiarietà alla prova: i poteri sostitutivi nel nuovo ordinamento costituzionale* (Milano: Giuffrè, 2008), 141, observes how these jurisprudential guidelines have changed the system of division of legislative powers between State and Regions.

[6] Corte costituzionale 29 October 2003 no 300 and no 301, *Il Foro Italiano*, I, 1324-1326 (2006). In the same matter more recently, Corte costituzionale 21 December 2016 no 287, *Banca, borsa titoli di credito*, II, 167 (2017).

[7] Corte costituzionale 12 October 2018 no 185, *Giurisprudenza costituzionale*, 2051 (2018).

[8] For an analysis of these decisions: D. De Felice, *Principio di sussidiarietà ed autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008), 152 et seq.

[9] On the legal framework in place before the reform of "*Titolo V*" of the Italian Constitution, S. Giova, *"Ordinamento civile" e diritto privato regionale* (Napoli: Edizioni Scientifiche Italiane, 2008) 39, 61.

relationships is valid despite the State having exclusive competence concerning the '*ordinamento civile*' (Art 117, para 2, let *l)*, of the Italian Constitution).[10] The Italian Constitutional Court has adopted these innovative solutions – grounded, however, in technical reasons other than the subsidiarity principle.[11]

Second, it is worth examining certain decisions in the domain of private international law[12] concerning the application of a foreign statute law contrary to the connecting factors provided for in Italian statute law.[13] Transnational Courts have taken such decisions without referring to the principle of subsidiarity.

Third, certain potential decisions involving the application of provisions of the *lex mercatoria* not complying with the rules of Italian statute law must also be considered.[14] Specifically, the principle of subsidiarity might motivate a ruling that the unilateral promises in use in international business practices but not provided for by statute law are binding notwithstanding Art 1987 of the Italian Civil Code.[15] What is actually used to reach these solutions, instead of the principle of subsidiarity, is the artifice that international arbitration awards are unappealable, as authoritatively proposed by Francesco Galgano.[16]

[10] The counter-argument that the State alone is competent with regard to '*ordinamento civile*' has been used by the Italian Constitutional Court: Corte costituzionale 24 October 2016 no 228, *Il Foro Italiano*, I, 3701 (2016); Corte costituzionale 16 January 2013 no 6, *Corriere giuridico*, 1057 (2013); Corte costituzionale 11 March 2011 no 77, *Il Foro Italiano*, I, 1294 (2011). In opposition to this jurisprudential orientation the theory was elaborated that there is a *genus ad speciem* relation between '*diritto privato'* and '*ordinamento civile*': G. Alpa, 'L'ordinamento civile nella recente giurisprudenza costituzionale' *I Contratti*, 186 (2004); F. Ghera, 'Ordinamento civile e autonomia regionale: alla ricerca di un punto di equilibrio' *Giurisprudenza costituzionale*, 1182 (2011); A.M. Benedetti, 'Proprietà e diritto privato regionale (a proposito di Corte cost. n. 228/2016)' *Diritto civile contemporaneo*, 3 February 2017.

[11] For example, see Corte costituzionale 24 February 2017 no 41, *Il Foro Italiano*, I, 2566 (2017).

[12] These decisions reflect the transition from the Savigny's formalistic conception of private international law (F.C. von Savigny, *Sistema del diritto romano attuale*, VIII, trans. V. Scialoja, (Torino: UTET, 1898), 27 et seq) to a functionalistic theory. From this angle, G. Carella, 'Specificità del metodo conflittuale e materializzazione del diritto internazionale privato. Atti della Società Italiana degli Studiosi del Diritto Civile', in *Il diritto civile oggi. Compiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 59 et seq, uses the expression 'materializzazione del diritto internazionale privato'.

[13] European Court of Justice, Grand Chamber, Case C-353/06, *Grunkin-Paul* v *Standesamt Niebüll*, Judgement of 14 October 2008, available at www.curia.europa.eu; European Court of Justice, Case C-148/02 *Garcia Avello* v *Gov. Belgio*, 2 October 2003, available at www.eur-lex.europa.eu. Regarding the execution in Italy, Tribunale di Bologna 9 June 2004, *Diritto di Famiglia*, 441 (2004). For a thorough analysis, F. Maisto, *Personalismo e solidarismo familiare nel diritto internazionale privato* (Napoli: Edizioni Scientifiche Italiane, 2011), 92. On this issue see also Corte costituzionale 21 December 2016 no 286, *Il Foro Italiano*, I, 1 (2017).

[14] On this theory, F. Maisto, 'Promesse unilaterali', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2014), 66 et seq. For an extension from *lex mercatoria* to *lex electronica/informatica/digitalis*, P. Laghi, *Cyberspazio e sussidiarietà* (Napoli: Edizioni Scientifiche Italiane, 2015), 117. The same solution is proposed on the basis of different arguments by F. Bravo, 'Ubi societas ibi ius e fonti del diritto nell'età della globalizzazione' *Contratto e impresa*, 1345 and 1386 (2016).

[15] See F. Maisto, n 14 above, 63 et seq.

[16] See F. Galgano, 'Globalizzazione dell'economia e universalità del diritto' *Politica del*

IV. The Role of the Principle of Subsidiarity in Expanding Freedom of Contract

Certain potential decisions explain the role of the principle of subsidiarity in expanding freedom of contract.

Freedom of contract has a specific meaning in the sense of the principle of contractual autonomy of the parties.[17] This argument is used to justify, with regard to a contract, the decision to enforce the execution of the actions intended by the interested parties in the absence of a specific statutory provision.[18] In constitutional terms, the principle of freedom of contract can justify a preliminary ruling on the invalidity of a statutory provision establishing limits on the enforceability of contracts relating to some intersubjective relationships.[19] In the light of the *Drittwirkung* of fundamental principles, this technical ground justifies the decision that the benefits agreed by the concerned parties can be claimed even in the event of a contrary provision in statutory law.[20]

Horizontal subsidiarity could be the legitimating factor for decisions concerning the enforceability of the benefit provided for in an agreement on assets subject to the domain of public administration, a solution compliant with the conception of contracts substituting administrative measures.[21] These words are not merely descriptive, however. According to the logic of subsidiarity, these agreements are contracts. Subsidiarity principle legitimises acts that the otherwise incompetent subject ordinarily performs in matters within its competence; hence, as private parties ordinarily use contracts, the agreements legitimised by horizontal subsidiarity are contracts. This reconstruction corresponds to the concept that an EU directive or a national statute law do not change their nature when legitimised by vertical subsidiarity. Therefore, the principle of horizontal subsidiarity makes an evolutionary interpretation of Art 11, legge 7 August 1990 no 241 on '*convenzioni urbanistiche*', appropriate.[22] The same operation also applies to other, more specific,

diritto, 190 (2009). Galgano's theory is ultimately followed also by F. Sbordone, *Contratti internazionali e lex mercatoria* (Napoli: Edizioni Scientifiche Italiane, 2008), 114.

[17] About the polysemy of the category, H. Dagan and M. Heller, 'Freedom of Contracts' *Columbia Law & Economics Working Paper 458*, 2 (2013). They write: 'Freedom of contracts is the sum of two components, which together constitute contractual autonomy: the familiar freedom to bargain for terms within a contract, and the long-neglected freedom to choose from among contract types'.

[18] Following the classic exposition delivered by Sir George Jessel MR, when contracts 'entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice' (A. Chrenkoff, 'Freedom of Contract: a New Look at the History and Future of the Idea' 21 *Australian Journal of Legal Philosophy*, 36 (1996).

[19] D.E. Bernstein, 'Freedom of contract' *George Mason University Law and Economics Research Paper Series*, 08-51.

[20] Below, note 43.

[21] On the category of 'contracts substitutive of administrative measures', F. Maisto, *L'autonomia contrattuale nel prisma della sussidiarietà orizzontale* (Napoli: Edizioni Scientifiche Italiane, 2016), 128.

[22] This is a new interpretation of the Art 11, legge 7 August 1990 no 241, that conflicts with

statutory provisions such as Art 306-*bis* of the '*Codice dell'ambiente*', concerning environmental settlement arrangement.[23] This interpretation allows the use of the rules established for contracts relating to pre-contractual liability, personal incapacity, and vices of will, as well as damages for breach of contract, etc.

Horizontal subsidiarity can justify a ruling that certain alternative dispute resolution agreements are binding. Such an assessment is based on the precept that contracts other than judicial settlements are allowed.[24] This category has a broad field of application. Principally, it might justify recourse to the rule of contractual autonomy. Indirectly, it could justify considering that the statutory provisions establishing limits to arbitration (for example, decreto legislativo 12 April 2006 no 163, Art 241, para 1) and other forms of alternative dispute resolution are incompatible with the Italian Constitution.

Above all, the principle of horizontal subsidiarity could be used to justify the decision to enforce agreements regarding planned actions usually reserved by law. This decision supports the theory of the validity of contracts as sources of legal rules.[25] Mostly, these agreements envisage actions binding on the third parties; for example, condominium regulations; association bylaws; general contractual terms and conditions;[26] collective labour agreements;[27] bylaws of sports federations;[28]

the reconstruction offered by administrative law scholars: G. Greco, 'Il regime degli accordi pubblicistici' *Autorità e consenso nell'attività amministrativa* (Giuffrè: Milano, 2002), 161; G. Greco ed, *Accordi amministrativi tra provvedimento e contratto*, (Torino: Giappichelli, 2003), 86; F.G. Scoca, 'Autorità e consenso' *Diritto processuale amministrativo*, 436 (2002); V. Cerulli Irelli, 'Note critiche in tema di attività amministrativa secondo moduli negoziali' *Diritto Amministrativo,* 224 (2003); G.D. Falcon, *Le convenzioni pubblicistiche. Ammissibilità e caratteri* (Milano: Giuffè, 1984), 205.

[23] For the contractual nature of this agreement, M. Meli, 'La nuova disciplina delle transazioni nelle procedure di bonifica e di riparazione del danno ambientale concernente i siti di interesse nazionale' *Nuove leggi civili commentate*, 456, 480 (2016). *Contra*, U. Salanitro, 'Dal "contratto" all'"accordo": la riforma della "transazione" ambientale' *Giustizia civile*, 411, 421 (2017).

[24] On the category of 'contracts alternative to judicial settlements', F. Maisto, n 21 above, 129.

[25] On the category of 'contracts as sources of legal rules', F. Maisto n 21 above, 130. See also: N. Lipari, 'La formazione negoziale del diritto' *Rivista di diritto civile*, I, 307 (1987); N. Lipari ed, *Le fonti del diritto* (Milano: Giuffrè, 2008), 166; G. Alpa, *Il contratto in generale* (Milano: Giuffrè, 2014), 293. Skepticism is expressed by E. del Prato, 'Principio di sussidiarietà sociale e diritto privato' *Giustizia civile*, 387 (2014). At the other extreme, for R. Di Raimo, *Autonomia privata e dinamiche del consenso* (Napoli: Edizioni Scientifiche Italiane, 2003), 105 and 108, in accordance with the principle of subsidiarity, all contracts are sources of law.

[26] See also M. Orlandi, 'Le condizioni generali di contratto come fonte secondaria?', in F. Macario and M.N. Miletti eds, *Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto* (Milano: Giuffrè, 2006), 347 et seq.

[27] See N. Lipari, *Le fonti del diritto* (Milano: Giuffrè, 2008) 171; M. Cerioni, 'Prime riflessioni sulle fonti dell'autonomia privata' *Annali della Facoltà giuridica di Camerino* (Napoli: Edizioni Scientifiche Italiane, 2012), 147.

[28] See M. Cimmino, 'Sussidiarietà orizzontale e ordinamento sportivo', in M. Nuzzo ed, n 1 above, 225 et seq.; G. Santorelli, *Sussidiarietà e regole di validità dei contratti sportivi*, in M. Nuzzo, n 1 above, 235 et seq. For a different opinion, M.P. Pignalosa, 'Ordinamento sportivo e fonti private' *Jus Civile*, 6, 665 et seq (2017).

and professional ethical codes.[29] The category also contemplates agreements organising events regarding the relationships between the parties; for example, agreement on the choice of applicable law (*lex voluntatis*) under the Rome Convention of 1980.[30]

This interpretation differs from the one proposed by a famous scholar of Italian private law, Mario Nuzzo.[31] Nuzzo considers it correct to use subsidiarity to justify the decision that agreements in place of public acts are binding. However, he does not consider these agreements to be contracts. He argues that contracts are incompatible with the pursuit of public interests, a proposition that is deeply rooted in Italian legal tradition,[32] but such an argument must be disproved. From this perspective, an opposite view arises from an analysis of the role of the contract in allocating resources according to the Italian Constitution.

In ancient civilisations, agreements (more specifically, barter) were simply a way of appropriation that avoided violence.[33] In modern civilisations, contracts play a fundamental role in the organisation of civil coexistence. The traditional ethical foundations – ie, *pacta sunt servanda*[34], *solus consensus obligat*[35], *qui dit contractuel dit juste*[36] – differ from the constitutional model of intersubjective relationships. They can only annul immoral agreements: for example, when a thief offers to sell the stolen property back to the victim of the crime. They do not explain the actual reason why contracts are generally binding in modern society. In a free market system, someone enters into a sale-and-purchase contract because he needs something of value from someone else, who, under the law, has a surplus. From a general perspective, the enforceability of contracts depends on a political choice regarding resource allocation. Such considerations lead to an appreciation of the compliance of freedom of contract with the liberal allocative system reflected in

[29] See A. Bellelli, 'Il problema della giuridicità delle regole deontologiche delle professioni', in M. Nuzzo, n 1 above, 79 et seq; E. del Prato, 'Regole deontologiche delle professioni e principio di sussidiarietà', in M. Nuzzo, n 1 above, 91 et seq.

[30] See F. Sbordone, *La "scelta" della legge applicabile al contratto* (Napoli: Edizioni Scientifiche Italiane, 2003), 184.

[31] M. Nuzzo, n 1 above, XVI, and R. Carleo, 'La sussidiarietà nel linguaggio dei giuristi', in M. Nuzzo eds, n 1 above, 9.

[32] For example, see L. Cariota-Ferrara, *Il negozio giuridico nel diritto privato italiano* (Napoli: Morano, 1948), 281.

[33] For E. Betti, *Teoria generale del negozio giuridico* (Napoli: Edizioni Scientifiche Italiane, 1994), 45, n 4 (based on Herodotus, *Ἱστορία*, IV, 196), there is no difference between the practice of ancient barter and the modern bilateral contract.

[34] 'Pacta et promissa semperne servanda sint, quæ nec vi nec dolo malo, ut prætores solent, facta sint' (Cicero, De officiis, 3, 92, 24).

[35] G. Astuti, 'Contratto (diritto intermedio)' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), IX, 779, refers to S. Pufendorf (*De jure naturæ et gentium*, III, 5-6, v. 2) and H. Grotius (*De jure belli ac pacis*, II, 11-12).

[36] See A. Fouilée, *La science sociale contemporaine* (Paris: Hachette, 1885), 410; J.F. Spitz, '"Qui dit contractuel dit juste": qualques remarques sur une formule d'Alfred Fouilée' *Revue Trimestrielle de droit civil*, 281 et seq (2007).

the combined provisions of Art 3 and Art 23 of the Italian Constitution.[37] This assessment also affects the ability of contracts to maximise the interests of the parties according to the theory that each person must be considered the best judge of his own interests[38] and to the provisions of Arts 41 and 42 of the Italian Constitution.[39] Lastly, bilateral contracts must be considered able to produce marginal utilities according to bargain theory.[40] Essentially, in compliance with constitutional principles, the reason contracts are binding is not rooted in the sense of honour of individuals but in their role in pursuing public policy goals.[41]

The above analysis disproves the argument that contracts are incompatible with the pursuit of public interests. At this point, there is no reason why agreements in place of public acts should not be deemed contracts. Furthermore, the logic of subsidiarity implies that such agreements are indeed contracts.[42]

The notion that these agreements are contracts can be applied in terms of the following legal reasoning. As contracts, they fall under Art 1372, para 2, of the Italian Civil Code (corresponding to the doctrine of privity of contract). For this reason, it is not correct to use the argument that the events planned by the agreements are binding for third parties because these acts are beyond the scope of Art 1372, para 2, of the Italian Civil Code. Instead, a decision-making operation of this kind is a derogation from the aforementioned legal provision. Therefore, the principle of subsidiarity can legitimise the decision that contracts as sources of legal rules are enforceable even though there is a statutory provision to the contrary. Of course, there must be the need to realise a higher interest of the community in the best way possible. The said balancing of interests concerns the following hypotheses: a collective labour agreement establishing standards that are higher than the standard protection of gender equality; a sports law agreement that

[37] See F. Maisto, n 21 above, 119. On the relation between freedom of contract and the principle of equality: F. Galgano, 'Teorie e ideologie del negozio giuridico', in C. Salvi ed, *Categorie giuridiche e rapporti sociali* (Milano: Giuffrè, 1978), 67; C. Donisi, *Il problema dei negozi giuridici unilaterali* (Napoli: Jovene, 1972), 28.

[38] See G. Osti, 'Contratto' *Novissimo digesto italiano* (Torino: UTET, 1959), IV, 478; R. Di Raimo, n 25 above, 12; F. Di Ciommo, *Efficienza allocativa e teoria giuridica del contratto* (Torino: Giappichelli, 2011), 4, 16.

[39] See L. Mengoni, 'Autonomia privata e Costituzione' *Banca, borsa titoli di credito*, I, 2 (1997); A. Gambaro, 'Freedom of Contract and Constitutional Law in Italy, in A.M. Rabello and P. Sarcevic eds, *Freedom of Contract and Constitutional Law* (Jerusalem: Sacher Institute for Legislative Research and Comparative Law, 1998), 169 et seq.

[40] See R. Sacco, 'Contratto, autonomia, mercato', in R. Sacco and G. De Nova, 'Il contratto', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 2004), 17. On the origin of the '*bargain theory*', O.W. Holmes, *The common law* (Boston: Little, Brown & Co, 1881), 230.

[41] See P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), IV, 30 and 45; and before, Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 396; Id, 'La sussidiarietà nel diritto privato' *Rassegna di diritto civile*, 688 (2016); Id, '«Controllo» e «conformazione» degli atti di autonomia negoziale' *Rassegna di diritto civile*, 208 (2017).

[42] See P. Perlingieri, *Il diritto civile* n 41 above, 29.

allows professional competitions to take place notwithstanding a general statutory prohibition (for example, '*Protocolli FIGC per allenamenti e partite delle squadre di calcio professionistiche durante l'emergenza Covid-19*') or a code of ethics for journalists establishing a wider range of restrictions in order to protect privacy.

V. Compliance of the Direct Application of the Principle of Subsidiarity with a Legal Methodology Bound by Values

In sum, subsidiarity can legitimate a decision that contracts concluded in place of public acts are binding. Such 'demiurgic' rulings entail the direct application (*Drittwirkung*) of the principle of subsidiarity.[43] From the perspective of legal theory, the system of the hierarchy of statutory law provisions has transformed into a hierarchy of values. There are many technical objections, but there is one critical substantive issue. The need for cultural support for law[44] makes the reluctance of courts to adopt these decision-making techniques suspect. However, the orientation in this sense in the case law does not depend on the fear of losing the benefit of legal certainty.[45] In fact, courts still adopt these solutions, bringing forward arguments that diverge from subsidiarity when those are needed in order to pursue fundamental public policy goals.

From a broader perspective, the opposite theory that directly applying the principles promotes legal certainty is – counterintuitively – correct.

Traditionally, the axiological decision-making method is criticised on two grounds: the unpredictability of rulings and the lack of ideological neutrality of rulings, so the formalistic decision-making method is preferred. Nevertheless, such conceptual constructs must be historicised.

According to this line of thought, the above-mentioned public policy goals have no weight in the formalistic theory of *Begriffsjurisprudenz*. The base of this dogmatic architecture (*Begriffspyramide*) is the 'struggle for existence'[46] between legal concepts.[47] The conceptual pyramid of legal subjectivity is particularly significant. In the beginning, only the *Quirites patres familias* were considered

[43] The core of direct application of principles is to establish the enforceability of events incompatible with a specific statutory provision which however remains in force. On this definition, see G. D'Amico, 'Appunti per una dogmatica dei princìpi', in G. D'Amico and S. Pagliantini eds, *L'armonizzazione degli ordinamenti dell'Unione europea tra principi e regole. Studi* (Torino: Giappichelli, 2018), 18.

[44] See A. Falzea, 'Dogmatica giuridica e diritto civile' *Rivista di diritto civile*, I, 773 et seq (1990); Id, *Introduzione alle scienze giuridiche* (Milano: Giuffrè, 2008), 395.

[45] From a different perspective, R. Carleo, n 1 above, 13.

[46] The expression is the title of the third chapter of C. Darwin, *On The Origin of Species* (London: John Murray, 1859). In this book, Darwin also uses the words 'struggle for life'.

[47] On legal Darwinism in Italy: P. Cogliolo, *La teoria dell'evoluzione nel diritto privato. Prelezione al corso di Diritto romano letta il 21 novembre 1881* (Camerino: Savini, 1882); G.P. Chironi, *Il darwinismo nel diritto. Discorso pronunciato per la commemorazione di C. Darwin tenuta nella R. Università di Siena il 21 maggio 1882* (Siena: Lazzeri, 1882).

holders of individual rights; gradually, women, minors, foreigners, and slaves were also exceptionally granted individual rights; then, under the influence of Christianity, all human beings were considered to be holders of fundamental rights; in this way, the struggle between the above concepts established the legal capacity of natural persons. In later times,[48] the dogma of the exclusive subjectivity of human beings conflicted with the need to assign individual rights to exponential organisations of human interests, and this conflict spawned the category of the legal person; subsequently, the distinction between an organisation with personality and an organisation without personality brought about the concept of the legal subjectivity of collective entities.[49] At this point, the pyramid had a new step: the paradigm of legal subjectivity in a broad sense. It is easy to notice that the 'struggle for existence' between legal categories precludes both the predictability and neutrality of rulings because courts are legitimised to apply the solution obtained from the 'original' concept or the 'antagonistic' concept according to the preferred balance of powers.

The predictability and neutrality of decisions were actually pursued in the formalistic method of subsumption proposed by the 'pure theory of law' (*Reine Rechtslehre*)[50] and the 'construct of *Tatbestand*'.[51] This system worked when statutory law held a position of primacy. At that time, the only problem was that the ideal of Justice was compromised by the inadequacy of statutory provisions for borderline cases or changes in the socio-economic context ('*summum jus summa injuria*' and '*dura lex sed lex*').[52]

Currently, the 'multilevel' character of sources of law often prevents subsumption from providing predictable rulings. An emblematic case is that of unpaid fees due to an agent who is not enrolled in the register: under Italian statutory law, he would have no right to a claim (Art 4, Law no 204, 9 May 1985 and Art 1418, para 1, of Italian Civil Code); according to the EU statutory provisions he is entitled to claim the entire commission.[53] The formalistic method was unable to provide a predictable ruling because subsumption was possible under both legal provisions. To complicate the issue, an Authority could establish the right to a partial commission.

Above all, the formalistic decision-making method adapted to the need to prevent the injustice of rulings. In borderline cases, decisions incompatible with

[48] F. Galgano, *Lex Mercatoria* (Bologna: il Mulino, 1993), 76, refers to the establishment of the British East India Company on 31 December 1600.

[49] On the subjectivity of algorithms, G. Teubner, *Soggetti giuridici digitali? Sullo status privatistico degli agenti software autonomi* translated by P. Femia (Napoli: Edizioni Scientifiche Italiane, 2019), 109.

[50] H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Leipzig/Wien: Franz Deuticke, 1934).

[51] See E. Betti, n 33 above, 8, n 2.

[52] From a different perspective, F. Ricci, 'Potere "normativo" dei privati, clausole generali, e disciplina dei contratti', in M. Nuzzo eds, n 1 above, 602.

[53] Case I-02191 *Bellone* v *Yokohama s.p.a.,* Judgement of 30 April 1988, available at eur-lex.europa.eu, which refers to CEE directive 18 February 1986 no 653, before transposition.

the traditional legal categories are justified using the sophistical argument that 'the exception proves the rule'.[54] In this way, however, the unpredictability and discretionary nature of rulings increase.

In epistemological discussions,[55] new considerations preferring the axiological method of decision-making method are gaining ground, being better able to combine the justice of court decisions with predictability and impartiality. At the present, courts cannot provide standardised decisions allowing to achieve the result of their absolute predictability. Instead, they can make rulings in compliance with a system of politically approved values achieving the goal of their relative predictability.[56] From this perspective, the analysis of interests makes it possible to identify arbitrary decisions. Thus, judicial discretion is controlled, and the unpredictability of rulings is limited. In this sense, the direct application of principles is compatible with the higher value of legal certainty.

The above considerations confirm that case law reflects the axiological decision-making method more than the formalistic one.[57]

In conclusion, the fact that courts are reluctant to adopt the principle of subsidiarity is not a cultural aversion to the method of direct application of principles (*Drittwirkung*). This trend depends, rather, on the 'original sin' of subsidiarity:[58] the misrepresentation that this principle has a natural inclination to self-restraint persuaded the courts not to use its full potential.

VI. Concluding Remarks: Subsidiarity as a Revolving Door Between Private Law and Public Law

The precept 'according to the principle of subsidiarity' can be used to justify the enforceability of contracts in place of public acts. From this perspective, freedom of contract extends to new forms, namely: 'contracts substituting administrative measures'; 'contracts alternative to judicial dispute resolution'; and 'contracts as a source of legal rules'.

[54] From the criminal and public law standpoints: G. Fornasari, 'Antinomie giuridiche, norme di civiltà e l'ideologia dell'eccezione', in S. Bonini, L. Busatta and I. Marchi eds, *L'eccezione nel diritto* (Napoli: Editoriale Scientifica, 2015), 417; C. Casonato, 'Eccezione e regola: definizioni, fisiologie e patologie, responsabilità', in S. Bonini, L. Busatta e I. Marchi eds, *L'eccezione nel diritto* (Napoli: Editoriale Scientifica, 2015), 423. From a perspective of general theory, C. Nitsch, 'La regola e l'eccezione. Su defettibilità, ambiguità e vaghezza delle norme giuridiche', R. Brighi and S. Zullo eds, *Filosofia del diritto e nuove tecnologie. Prospettive di ricerca tra teoria e pratica* (Aprilia (LT): Aracne, 2015), 341 et seq.

[55] The discussion was prompted by the acute intellectual provocations of: N. Irti, 'Calcolabilità weberiana e crisi della fattispecie' *Rivista di diritto civile*, I, 987 et seq (2014); Id, 'La crisi della fattispecie' *Rivista di diritto processuale*, 36 et seq (2014); C. Castronovo, *Eclissi del diritto civile* (Milano: Giuffrè, 2015).

[56] See N. Lipari, 'I civilisti e la certezza del diritto' *Ars interpretandi*, 2, 55 (2015).

[57] See P. Perlingieri, n 41 above, 78, 249.

[58] *Retro* para 2.

This expansion of freedom of contract is opposed to the learned metaphors of the 'death of contract'[59] and the 'fall of freedom of contract'.[60] The reason contracts are binding is not the simple need to protect individual reliance. Thus, freedom of contract is not a mere reflection of tort law.[61] Such an argument cannot be used to motivate a ruling establishing the exclusion of the liability for breach of contracts when agreements pursue public interests.

The concept that contracts can fulfil public interests is a fragment of a more general theory. It focuses on the idea that public functions can be implemented by intersubjective cooperation in the place of public acts. At the same time, subsidiarity also legitimises the adoption of administrative measures to protect individual interests (for example, administrative sanctions against unfair commercial practices or anti-competitive behaviour).[62] The metaphor encapsulates very well the theory that subsidiarity is a 'revolving door' between private law and public law.[63]

The aim to fulfil public interests can be considered a specificity of legal realism in Italian civil law. Nevertheless, this legal methodology helps bring the civil and common law ever closer.[64]

[59] G. Gilmore, *The Death of Contract* (*Columbus:* Ohio State University Press, 1974).

[60] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

[61] See: C. Amato, *Affidamento e responsabilità* (Milano: Giuffrè, 2012), 26; L. Moccia, 'Promessa e contratto (spunti storico-comparativi)' *Rivista di diritto civile*, I, 845 et seq (1994).

[62] See A. Jannarelli, 'I "principi" nel diritto privato tra dogmatica, storia e postmoderno' *Roma e America. Diritto romano comune*, 34, 178,186 (2013); E. del Prato, n 25 above.

[63] The reasons for moving beyond the 'private law/public law' distinction are examined amply in P. Perlingieri, n 9 above, 138; C. Mazzú, *La logica inclusiva dell'interesse legittimo nel rapporto tra autonomia e sussidiarietà* (Torino: Giappichelli, 2014), 16. Differently, C. Cicero, *Diritto civile e interesse pubblico* (Napoli: Edizioni Scientifiche Italiane, 2019), 184, proposes a *tertium genus*, namely the '*diritto privato della pubblica amministrazione*'.

[64] On the role of the method of legal realism in the US, see G. Tarello, *Il realismo giuridico americano* (Milano: Giuffrè, 1962).

Essays

The Bounded-Rationality Model in Italian Over-Indebtedness Regulation

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Abstract

In recent decades, the basic rational-actor model – which also influenced law – has been questioned by cognitive psychology studies, whose results are now finding support from technologies dedicated to neuroscience. Cognitive psychologists propose a different decision-making paradigm, asserting that economic choices are often conditioned by biases and heuristics, on the assumption that the 'real man' is boundedly rational. This model has been grafted into studies on the economic analysis of law, giving birth to behavioural law and economics.

In Italian law, where an over-indebtedness regulatory system has only recently been introduced, few scholars have yet adopted this approach to observe the phenomenon. This work thus focuses on Italian legislation, questioning the desirability, outcomes, and limits of an approach to over-indebtedness inspired by the theory of bounded rationality.

I. Introduction

Research in the contemporary cognitive sciences raises questions of such importance as to erode the very pillars of our thinking, such as free will, responsibility, and individual boundaries. These disciplines open up fascinating new scenarios, depicting human behaviours as automatic responses of the brain, uninfluenced by the will.[1]

Such discoveries may even bring into question a number of legal assumptions[2]

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[1] See M. Gazzaniga, *La mente inventata. Le basi biologiche dell'identità e della coscienza* (Milano: Guerini e Associati, 1999), 125.

[2] Neuroscience has also contributed to this framework, giving rise to complex and profound reflection. For the interaction between Neuroscience and Law, see: J. Greene and J. Cohen, 'For the law, neuroscience changes nothing and everything' 359 *Philosophical Transactions of the Royal Society*, B, 1775 (2004); A. Santuosso ed, *Le neuroscienze e il diritto* (Como-Pavia: Ibis, 2009); A. Bianchi, G. Gulotta and G. Sartori eds, *Manuale di neuroscienze forensi* (Milano: Giuffrè, 2009); L. Arnaudo, 'Diritto cognitivo. Prolegomeni a una ricerca' *Politica del diritto*, 1 (2010); Id, *La ragione sociale. Saggio di economia e diritto cognitivi* (Roma: Luiss University Press, 2012); I. Merzagra Betsos, 'Il colpevole è il cervello: imputabilità, neuroscienze, libero arbitrio: dalla teorizzazione alla realtà' *Rivista Italiana di Medicina Legale*, 1, 175 (2011); E. Picozza et al, *Neurodiritto. Una introduzione* (Torino: Giappichelli, 2011); F.G. Pizzetti, *Neuroscienze forensi e diritti fondamentali. Spunti costituzionali* (Torino: Giappichelli, 2012); L. Palazzani and R. Zannotti eds, *Il diritto nelle neuroscienze. Non "siamo" i nostri cervelli* (Torino: Giappichelli, 2013); A. Farano, 'Percorsi della responsabilità: le neuroscienze cambiano tutto o niente?' *i-lex*, 18, 189-199

in terms of the basic Rational Actor model, which has also influenced the law. According to this paradigm, actions are freely chosen, and people are responsible for every choice they make. A similar assumption underpins notions such as culpable causation, for example. However, modern research suggests that actions are *not* freely chosen, and consequently, taking a radical stance, one might even advance the hypothesis that people should *not* be responsible for their choices, implying that the law would need to explore different solutions beyond traditional culpable causation.

The need to adopt new models and solutions involves not only criminal law – where the impact of such studies seems to have been stronger – but also civil law.

In particular, in recent decades, the basic rational-actor model has been put into question by cognitive psychology, whose results are now finding support thanks to dedicated neuroscience technology.[3] Even in the second half of the twentieth century, cognitive psychology began to explore decision-making processes, previously explained only by economic models,[4] on which the law itself had drawn.[5] These paradigms assume that decision-makers are likely to make good choices, whose outcomes satisfy them. Cognitive psychologists have presented a body of evidence to show that economic choices are often conditioned by biases and heuristics, namely that the decision-maker is led to take mental shortcuts, selecting a merely satisfactory, rather than an optimal, solution. From this perspective, although people do not act in an 'irrational' way, their conduct diverges in a systematic and predictable way from the 'rational choice' of traditional economic analysis. People would appear to have a 'bounded rationality,' making them subject to prejudice and over-simplifications. They thus miscalibrate risks, focusing on immediate information and underestimating future costs, prioritising quick benefits.

In the field of economics, this new way of looking at decision-making processes has led to the adoption of a different methodology. Intersecting with psychology, it marks the birth of behavioural economics[6] and allows for a decision-making

(2013). See for the relationship between neuroscience and civil law L. Tafaro, *Neuromarketing e tutela del consenso*, (Napoli: Edizioni Scientifiche Italiane, 2018), 12.

[3] Neuroscience technology can display the activities of the encephalon and consequently allow scholars to identify more precisely the specific operational functions of its various areas and their functional relationships. Among these technologies, fMRI (Functional Magnetic Resonance Imaging) is used in experiments involving highly complex cognitive tasks, including decision-making.

These technologies have been – and still are – applied to experiments in cognitive psychology, strengthening the results already obtained in this field. Joshua Greene and his team, for instance, used fMRI in the well-known Trolley dilemma in order to identify the neuronal basis for participants' responses, noting the activation of different areas of the brain as the proposed scenario changed.

[4] See R. Caterina, 'Paternalismo e antipaternalismo nel diritto privato' *Rivista di diritto civile*, 787 (2005).

[5] A. Zoppini, 'Le domande che ci propone l'economia comportamentale ovvero il crepuscolo del 'buon padre di famiglia' ', in G. Rojas Elgueta and N. Vardi eds, *Oltre il soggetto razionale* (Roma: Roma Tre Press, 2014), 13-14.

[6] See H.A. Simon, 'A Behavioral Model of Rational Choice' 69 *Quarterly Journal of Economics*, 99-100 (1955); A. Tversky and D. Kahneman, 'Judgment under uncertainty. Heuristics and biases'

model that proves more compatible with information access and the computing capabilities that living things – including humans – really possess.[7] In the space of twenty years, this model has been grafted into studies on the economic analysis of law, shaping it and giving birth to behavioural law and economics,[8] which aims to shed light on bounded rationality, and thus to identify an intervention strategy.[9]

This method has also been adopted in the area of over-indebtedness. It was initially applied by American scholars as an alternative to the traditional approach influenced by previous decision-making models: the *homo oeconomicus* of neoclassical economics and the classic law and economics models.[10]

In Italian law, where over-indebtedness regulation has only recently been introduced, few scholars have sought to analyse the field from a behavioural law and economics[11] approach, while – as we will try to demonstrate – such an approach seems to have had greater resonance in case law.

The Italian legislature has not been wholly insensitive to the suggestions from cognitive psychology, particularly in the consumer credit sector.[12] Conversely, cognitive psychology does not seem to have had the same impact on the first Italian civil insolvency regulation. The consumer model assumed in the previous regulation, based on community law, initially appears to differ from that envisaged in the new one, which is wholly Italian. As we will try to argue, the former regulatory framework seems to assume that the debtor has bounded rationality and problems of self-control; the new one appears to assume that the consumer is a perfectly rational entity, capable of predicting failure and potentially self-limiting.

Such a paradigm emerges from the very first decisions, and appears to be endorsed by the Supreme Court of Cassation.[13] However, in the last three years a

185(4157) *Science*, New Series, 1124-1126 (Sep. 27, 1974).

[7] See H.A. Simon, n 7 above, 99.

[8] See C. Jolls, C.R. Sunstein and R.H. Thaler, 'A Behavioral Approach to Law and Economics' *Stanford Law Review*, 50 (1998); C.R. Sunstein ed, *Behavioral Law and Economics* (Cambridge: Cambridge University Press, 2000).

[9] In this sense, see G. Grisi, 'Gli obblighi informativi quali rimedio dei fallimenti cognitivi', in G. Rojas Elgueta and N. Vardi eds, n 5 above, 59, who clarify that *behavioural law and economics* is not only a method but also a key to understanding reality and a path leading to an intervention strategy.

[10] For an exhaustive treatment, see R. Posner, *Economic Analysis of Law* (Boston: Little, Brown & Company, 1992).

[11] In this direction, see E. Pellecchia, *Dall'insolvenza al sovraindebitamento. Interesse del debitore alla liberazione e ristrutturazione dei debiti* (Torino: Giappichelli, 2012), 21-25, containing several references to behavioural economics. For a critique of the traditional approach, see G. Rojas Elgueta, 'L'esdebitazione del debitore civile: una rilettura del rapporto civil law-common law' *Banca Borsa Titoli di Credito*, 310 (2012). On this topic, see also U. Morera, 'Irrazionalità del contraente investitore e regole di tutela', in G. Rojas Elgueta and N. Vardi eds, n 5 above, 210.

[12] See below, para III.2.

[13] Corte di Cassazione 10 April 2019 no 10095, *Giurisprudenza commerciale*, 240 (2020), with a commentary by F. Pasquariello and M. Ranieli, *L'omologazione del piano del consumatore sovraindebitato*.

different approach has become established.[14] In principle it is isolated, seeking to enhance the connection between consumer credit and over-indebtedness. More specifically, it aims to influence the creditor's behaviour as a means of assessing the worthiness of the insolvent debtor, with a view to accessing the benefits associated with insolvency proceedings. This aim leads us to question the desirability, outcomes, and limits of extending an approach inspired by the theory of bounded rationality, already underlying the regulation of consumer credit, to the law of over-indebtedness. It should be recalled, furthermore, that the two regulations, both of them slow to emerge, appear distinct in terms of both characteristics and *ratio*, although they will certainly converge on several fronts.

In order to do this, we must first explore the traditional approach to over-indebtedness and the influence of the basic rational-actor model. We shall then study the impact of the new human paradigm as theorised by cognitive psychology. Subsequently, we shall examine Italian law, exploring scholarship and case law, aiming to highlight the influence of the 'real' human actor, and also reflecting on the connection with consumer-credit regulation.

II. The Main Approaches to Over-Indebtedness

1. The Traditional Approach: The Debtor as a Perfectly Rational Decision-Maker

We may now move on to analyse the various approaches to over-indebtedness. Starting from the traditional perspective, it is clear that this approach is based on a perfectly-rational-debtor model, in line with the paradigm of *homo oeconomicus* typical of neoclassical economics – and compatible with the rational decision-maker in *law and economics*. In this perspective, we can divide the insolvent into two groups: on one side, the 'dishonest' debtors, and on the other, the 'honest but unfortunate' debtors, whose financial distress is due to supervening events, attributable to bad luck alone.[15] The latter should enjoy the benefits of personal insolvency proceedings, while the former should be excluded; in short, they should bear the consequences of their respective life choices. From this point of view, these proceedings evidently have an ethical value, and (full or partial) discharge of debt seems to be a privilege limited to cases of so-called passive over-

[14] See below, para III.2.

[15] The aforementioned model was present in British law, which has always tended to distinguish between fraudulent and 'unguilty' insolvents. More recently, this model has been envisaged in European Parliament and Council Directive 2019/1023/UE of 20 June 2019 on preventive restructuring frameworks, the discharge of debt and disqualifications, and measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt [2019] OJ L172/18. Although this directive does not directly concern personal insolvency, Recital no 21 stresses the desirability of extending its provisions on discharge to the consumer, excluding dishonest debtors, however (see Recital no 78).

indebtedness.[16]

The economic analysis of law adds a further element to the construction outlined above. Debtors are described as seeking to maximise their own profit, as calculating and potentially opportunistic figures who tend to select the most convenient option for themselves in terms of the relationship between the costs and benefits arising from their choices. Essentially, if a breach of contract were more advantageous for the debtor, he or she could take on a loan in full awareness of the impossibility of honouring the debt and trusting precisely in its future discharge.

By taking this approach, a regulatory system centred on discharge would involve the risk of debtor-side moral hazard, since the awareness of the possibility of obtaining an easy fresh start would work in favour of contracting the debt, even when the party is aware of not being able to honour the debt due to his or her income and financial situation.[17]

In this light, a regulatory system characterised by easy discharge would therefore contribute to exacerbating the problem of over-indebtedness rather than solving it. It would also encourage disorderly use of credit and cause an increase in the number of insolvency proceedings. Furthermore, a regulatory system of this kind would lead to further problems. In particular, lenders would tend to increase interest rates, thus raising the cost as a safeguard against the risk of debtor-side moral hazard.[18] This, however, would make access to credit more difficult. In reality, the *favor* extended to the 'honest but unfortunate' debtor appears to be not so much a benefit as an instrument to neutralise the feared risk of moral hazard.

Examining different European laws, we can observe the tendency of legislators to make discharge conditional on an assessment of the defaulting party's behaviour. For example, Danish bankruptcy law provides for assessment of the causes of over-indebtedness and states that the debtor cannot benefit from the effects attached to the crisis-settlement plan if he or she has acted irresponsibly, namely taking on debts: a) while not realistically being in a position to them pay back; b) assuming a risk disproportionate to his or her financial standing; c) ahead of the crisis settlement proceeding. In Swedish law, a government authority will evaluate the reasonableness of the settlement plan and must reject the application if it emerges

[16] On the distinction between active and passive over-indebtedness, see D. Cerini, *Sovraindebitamento e consumer bankruptcy. Tra punizione e perdono* (Milano: Giuffrè, 2012), 10; S. Cotterli, 'Credito e debito dopo la crisi: strumenti per famiglie e microimprese' *Banca impresa società*, 484 (2016); F. Pasquariello, 'Le procedure di sovraindebitamento alla vigilia di una riforma' *Le nuove leggi civili commentate*, 766 (2018). Active over-indebtedness occurs when the default is due to imprudent and negligent behaviour by the insolvent party; passive over-indebtedness is when the default is simply due to unfortunate events, for example, disease, job loss, or divorce. However, we may observe that the two forms of over-indebtedness cannot always be clearly distinguished, so the specifics of each case must be taken into account.

[17] See W.H. Meckling, 'Financial Markets, Default, and Bankruptcy: The Role of the State' *Law & Contemporary Problems*, 14 (1977).

[18] See T.J. Zywicki, 'An Economic Analysis of the Consumer Bankruptcy Crisis' 99 *Northwestern University Law Review*, 1464 (2005).

that the debt is due to speculative behaviour or a disproportionate risk on the part of the consumer. Moreover, in French law private settlement proceedings require an assessment of the consumer's *bonne foi* (*Code de la consommation*, Art L. 330-1), while in Belgium access to settlement proceedings is permitted only if the debtor has not clearly been the cause of his or her over-indebtedness (Art 1675/2, Law 5 July 1998).

This traditional approach, initially underpinned by ethical issues, seems to be compatible with law and economics analysis, which offers proven tools potentially able to stem the risk of moral hazard and consequently neutralise all the detrimental consequences that uncontrolled discharge could have on the credit market and more generally on the well-being of the community.

2. The Behavioural Law and Economics Approach: The Debtor as a Subject with Bounded Rationality

In this neoclassical view, the debtor seems to be a sort of 'Nietzschean superman'[19] capable of performing complex arithmetical calculations and acting strategically, always selecting the option that will lead to maximum profit.

This model, however, clearly seems to be far removed from the 'real' man; as cognitive psychology suggests, the 'real' man is a bounded rational agent, not oriented towards maximising his profit or conditioned by biases, heuristics and emotional states. Thus, the birth of a new model built around actual human behaviour brought about a reinterpretation of over-indebtedness through the lens of behavioural law and economics[20] in an attempt not only to overcome insolvency but also to prevent it.

Some exploration in this direction had already been carried out by a number of American scholars in the policy debate on bankruptcy reform (Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).[21] This approach acknowledges the 'real debtor' – along the lines of the 'real man' outlined in cognitive psychology, a figure prone to falling into over-indebtedness because of an intrinsic inability to select the appropriate level of debt.[22] It acknowledges the cognitive errors and flawed reasoning that naturally characterise his actions. According to this view, the rise in

[19] In these terms see S. Block-Lieb and E.J. Janger, 'The Myth of the Rational Borrower: Rationality, Behavioralism and the Misguided Reform of Bankruptcy' 84 *Texas Law Review*, 1492 (2006).

[20] See T.H. Jackson, 'The Fresh-Start Policy in Bankruptcy Law' 98 *Harvard Law Review*, 1393 (1985) and the later R. Korobkin and T. Ulen, 'Law and Behavioral Science: removing the Rationality Assumption from Law and Economics' 88 *California Law Review*, 1051 (2000); J. Niemi, I. Ramsay and WC Whitford eds, *Consumer Bankruptcy in Global Perspective*, (Oxford and Portland, Oregon: Hart Publishing, 2003); O. Bar-Gill, 'Seduction by Plastic' 98 *Northwestern University Law Review*, 1273 (2004); S. Block-Lieb and E.J. Janger, n 19 above, 1481; D.G. Baird, 'Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor' 73 *University of Chicago Law Review*, 17 (2006).

[21] See on this point S. Block-Lieb and E.J. Janger, n 19 above, 1481.

[22] ibid.

the number of personal insolvency proceedings should be considered together with the parallel expansion of consumer credit, also affected by the bounded rationality of debtors. Borrowers may be affected by overconfidence and excessive optimism,[23] which can lead them to underestimate the possibility of falling into a state of over-indebtedness despite it being statistically much more likely than is commonly thought.[24] Even the most informed and educated can fall into the trap of underestimating future costs, such as interest charges, short-sightedly focusing on immediate benefits[25]. Above all, there may be problems of self-control, with consumers accruing large amounts of debt through a series of transactions, albeit of modest value in themselves, but adding up to figures that they would not otherwise have borrowed.[26]

In this context, financial services companies, far from being victims, stand to benefit from borrowers' cognitive errors, highlighting the short-term advantages of their loan agreements while concealing the long-term costs[27]. Moreover, creditors can turn the information asymmetries typical of loan agreements along with debtors' bounded rationality to their advantage, resorting to expedients to outsource the costs of insolvency and possible discharge.

The legislature should not focus therefore on moral hazard from the borrower's side but from that of the lenders. Consequently, over-indebtedness should be prevented by prior intervention regarding consumer credit legislation rather than merely by managing the phenomenon after the fact.

III. The Italian Legal Context. Worthy Debtor Assessment in Over-Indebtedness Proceedings

In the light of this clarification, we now examine the Italian over-indebtedness regulatory system, focusing in particular on one of the three proceedings regulated

[23] The risks are actually higher than those generally perceived by debtors, and this bias can lead to a distortion of any cost-benefit analysis while negotiating loan agreements (see O. Bar-Gill, n 20 above, 1378). In fact, over-optimism may lead debtors to fail to consider the risk of some future exogenous shock affecting their ability to repay the debt (O. Bar-Gill, n 20 above, 1400, 1405 and 1407).

[24] See C.R. Sunstein, 'Boundedly Rational Borrowing' 73 *University of Chicago Law Review*, 252 (2006).

[25] This phenomenon is known as *hyperbolic discounting* (see O. Bar-Gill, n 20 above, 1396-1397) or '*myopia*' (see C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above).

[26] On this point see O. Bar-Gill, n 20 above, 1399; T.A. Sullivan, E. Warren and J.L. Westbrook, *The Fragile Middle Class - Americans in Debt* (New Haven-London: Yale University Press, 2000), 130. These scholars believe that credit card users are likely find themselves in this position since the feeling of loss is less marked in their case.

[27] See O. Bar-Gill, n 20 above, 1376; C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above, 267-268; A. Elliott, *Not Waving but Drowning: Over-indebtedness by Misjudgment* (London: Centre for the Study of Financial Innovation, 2005), also available at https://tinyurl.com/2p8epbst (last visited 31 December 2021).

by legge no 3 of 27 January 2012,[28] known as the consumer insolvency plan proceeding. As we shall shortly see, these proceedings require an assessment of consumer behaviour that appears to presuppose the basic Rational Actor model.[29] We shall also examine the position of a bounded rational debtor who has borrowed money without being aware of the related risks and has slipped into insolvency. Lastly, we shall reflect on the wisdom of allowing such a person, with problems of self-control, to access full or even merely partial discharge.

1. In Scholarship and Case Law: The Prevalence of the Traditional Approach to Over-Indebtedness and the Basic Irrelevance of Bounded Rationality in Worthy Debtor Assessment

Firstly, we have to reconstruct the figure of the worthy debtor according to legge no 3, and especially Art 12-*bis*, which – in the context of the consumer insolvency plan proceeding – requires a decision on debtor worthiness. The court has to ascertain that the defaulting party has not accrued debts without having a reasonable chance of repaying them and/or has not negligently become over-indebted, for example, by entering into credit agreements inappropriate to his or her means.

Approval of the plan is subject to the outcome of this assessment, which makes the worthiness of the applicant an essential requirement – albeit not the only one – for accessing the benefits that this kind of insolvency proceeding can provide.

This assessment is a requirement of the assets-liquidation process, where Art 14 *terdecies*, para 2, provides that the applicant cannot be discharged when the over-indebtedness is the consequence of entering into credit agreements beyond his or her means and without due care.

These provisions are often considered in conjunction with Art 9, para 3-*bis*, of legge no 3/2012, which seems to confirm the importance assigned to the causes of

[28] Legge 27 January 2012 no 3 and further modification establishes three proceedings: 1) over-indebtedness crisis settlement agreements ('accordo di composizione della crisi'), regulated by Arts 6 to 12, 13 and 14, which are accessed through a plan applied by the debtor and accepted by sixty percent of creditors; 2) the consumer insolvency plan ('piano del consumatore'), regulated by Arts 6 to 8, 12-*bis* and 12-*ter*, 13, 14-*bis*, for consumers who present a plan prepared by the debtor with the assistance of a Crisis Settlement Body (the plan does not require creditors' approval and is validated by the Court); the assets liquidation process ('liquidazione del patrimonio'), regulated by Art 14-*ter* et seq, which implements a compulsory liquidation of all debtor's assets through a simplified procedure (at the end of this proceeding the debtor can apply for discharge).

[29] See on this point E. Pellecchia, 'Chi è il consumatore sovraindebitato? Aperture e chiusure giurisprudenziali' *La nuova giurisprudenza civile commentata*, 1230-1232 (2016); G. Falcone, 'Il trattamento normativo del sovraindebitamento del consumatore' *Giurisprudenza Commerciale*, 132-134 (2015); R. Bocchini, 'Sovraindebitamento del consumatore – La meritevolezza dell'accesso al credito nel sovraindebitamento del consumatore' *Giurisprudenza italiana*, 1569 (2017); R. Di Raimo, 'Debito, sovraindebitamento ed esdebitazione del consumatore: note minime sul nuovo diritto del capitalismo postmoderno' *Rivista di diritto bancario*, 291 (2018); R. Landi, 'Consumatore sovraindebitato e giudizio di meritevolezza' *Il Foro napoletano*, 312 (2018); C. Poli, 'La meritevolezza del debitore-consumatore e l'inadempimento del creditore all'obbligo di valutare il merito creditizio' *Le Corti fiorentine*, 27 (2018); F. Pasquariello, 'Le nuove procedure' n 16 above.

debt within this regulatory framework. That provision states that the settlement plan must be accompanied by a detailed report drawn up by a Crisis Settlement Body, indicating the causes of the indebtedness and the diligence employed by the consumer in voluntarily assuming his or her debts (letter a), as well as an explanation of the reasons for the debtor's inability to satisfy them (letter b).

These rules are meant to act as a filter for those entitled to the benefits provided by this kind of proceeding. From a traditional perspective, they should lead to the exclusion of opportunistic debtors from these benefits, preventing creditors from protecting themselves against the risk of insolvency by increasing the cost of loans or otherwise discharging the risk itself onto the community. An example might be loan securitisation and subsequent introduction on the financial market.[30] The rules also seem to exclude from discharge those who have excessive levels of debt due to negligence not necessarily due to opportunistic behaviour. These people could have avoided their financial distress if only they had acted prudently according to the canons shaped around *homo oeconomicus* delivered by neoclassical economics.

On examining Italian legal scholarship and case law, we can detect the influence of this traditional model of man on the common understanding of the worthy debtor, revealing the image of a perfectly rational agent, capable of self-limitation and becoming aware of the risks associated with new borrowing.

In an attempt to define this figure, some judgments refer to a debtor able to orient his choices according to rational criteria;[31] or else to an agent normally able to understand his choices and to evaluate the consequences of an economic commitment in a fully autonomous manner.[32] According to this view, the debtor appears to be very different from the 'real' man of behavioural economics.

The models mentioned here also seem to have influenced other decisions, which equate the worthy consumer to the prudent individual neither inclined to excessive accumulation of debt nor prone to over-indebtedness and therefore ready to join the circuit of consumption once again.[33] In this light, the decision whether to assume a debt would require careful and cautious reflection. The decision will take account of the economic sacrifice arising from the obligation and the debtor's income and financial situation, evaluating the present circumstances and those

[30] See on this point, R. Natoli, *Il contratto 'adeguato'. La protezione del cliente nei servizi di credito, di investimento e di assicurazione* (Milano: Giuffrè, 2012), 157, explaining that joint securitisation to credit derivatives produces a volatile combination with effects on the credit system. See also G. Rojas Elgueta, 'L'esdebitazione' n 11 above, 310, highlighting the resistance of lenders to the effects of discharge.

[31] See in this regard, Tribunale di Treviso 25 January 2017, available at www.dejure.it.

[32] See Tribunale di Cagliari 11 May 2016, available at https://tinyurl.com/ymys348z, where the judge holds that, although the provision regarding the worthiness of the debtor did not appear to be modelled on a particularly prudent and far sighted person, it would not seem to refer to a naive individual unable to make choices based on rational criteria.

[33] See Tribunale di Torino 30 September 2015; Tribunale di Larino 24 May 2016; Tribunale di Treviso 21 December 2016; Tribunale di Santa Maria Capua Vetere 14 February 2017 available at www.dejure.it; Tribunale di Treviso 25 January 2017 n 31 above; Tribunale di Novara 25 July 2017, available at Ilfallimentarista.it, 30 March 2018.

reasonably and prudently envisaged for the future.[34] In particular, it would be necessary to comply with the 'prudential rule of one third of the income'.[35] This would mean that any loan agreement should not absorb more than one third of the applicant's monthly income, and if the debtor decides to enter into a loan agreement regardless, he or she cannot be considered worthy.

Lastly, some rulings adopted an 'arithmetical' method, seeking to reconstruct the debtor's income situation at the time the obligations were assumed, in order to identify the percentage of income that the debtor should have allocated to repayments.[36] In this 'retrospective'[37] scenario, the consumer could benefit from the plan if the solidity of his assets and the amount of projected income reasonably allowed the assumption of further obligations, yet over-indebtedness occurred all the same, as a consequence of unforeseeable events.[38]

Such decisions, studded with references to calculations, arithmetic, and reasonableness, seem to exclude the 'honest but not unfortunate debtor' from the consumer insolvency plan.

We may note that case law excludes from the consumer insolvency plan proceeding all those who have assumed obligations without the likelihood of being able to honour their debt on account of mere (inherent) bounded rationality, rather than because of some addiction. On the one hand, some courts have approved plans presented by persons with a gambling addiction,[39] while other rulings have rejected proposals from debtors who, in the context of behavioural law and economics, could be considered victims of cognitive error or suffering from problems relating to self-control[40]. In one particular case,[41] for example, the applicant had borrowed thirty-thousand euros to repay prior debts and subsequently accrued a debt burden of one hundred thousand euros using revolving credit cards. According to the court, the characteristics of such cards are not such as to prevent the beneficiary from realising that he was spending money that was not his, which would have to be repaid. In this case, the borrowing was reckless and negligent and was not proportionate to the means available and the personal situation of the applicant, who was therefore considered unworthy.

Similarly, the court[42] dismissed a plan presented by a debtor who had opened

[34] See Tribunale di Treviso 25 January 2017 n 31 above.

[35] See Tribunale di Treviso 21 December 2016 n 33 above; Tribunale di Santa Maria Capua Vetere 14 February 2017 n 33 above; Tribunale di Novara 25 July 2017 n 33 above.

[36] See Tribunale di Ascoli Piceno 4 April 2014, *Il Foro italiano*, I, 318 (2015), and also in Ilfallimentarista.it, 15 May 2014, commented by P. Bosticco, *Risanamento della crisi da sovraindebitamento del consumatore e par condicio creditorum*.

[37] See R. Landi, n 29 above, 312.

[38] See Tribunale di Udine 4 January 2017, available at www.dejure.it.

[39] See Tribunale di Torino 8 June 2016, available at www.dejure.it.

[40] See Tribunale di Cagliari 11 May 2016 n 32 above; Tribunale di Rimini 19 April 2018, available at www.ilcaso.it; Tribunale di Vibo Valentia 30 October 2019, available in www.ilcaso.it.

[41] See Tribunale di Rimini 19 April 2018 n 40 above.

[42] See Tribunale di Vibo Valentia 30 October 2019 n 40 above.

five credit lines from 2016 to 2018 amounting to approximately one hundred-and-seventy thousand euros. The court justified its decision by noting the presence of objectively negligent behaviour. Despite his lack of specific knowledge, the debtor could reasonably have been expected to realise the worsening of his situation and should therefore have refrained from assuming further obligations.

In other words, problems of self-control seem to be relevant in assessing the debtor's worthiness only when they arise from a psychological condition and not as a mere manifestation of (physiological) bounded rationality.

Nonetheless, under legge no 3/2012, 'honest but not unfortunate' debtors can try other ways to get out of over-indebtedness. Since they do not meet the worthiness criterion, they have no access to proceedings reserved for consumers, nor are they eligible for discharge (through the assets-liquidation process). These debtors could try to meet their debts by signing onto over-indebtedness crisis settlement agreements, which are regulated by Arts 6-12 as well as Arts 13-14 of legge no 3/2012. In this case, approval of the plan does not depend on an assessment of the debtor's worthiness but approval by a majority of the creditors.

In addition, Art 8 states that the proposed agreement may impose restrictions on access to the consumer credit market, the use of forms of electronic payment, and access to credit and financial instruments. From the *behavioural law and economics* standpoint such limitations can help stem self-control problems and reduce other forms of flawed reasoning as a way of avoiding further debt.

Turning now to case law, there have been a number of decisions accepting a request to enter into an over-indebtedness crisis-settlement agreement formulated by the applicant when presenting the plan despite a lack of worthiness.[43]

But this is not all. There have also been decisions approving proposals from consumers who have become over-indebted due their particular emotional state and needs.[44] Here, however, the case law seems to have given rise to some ethical[45] questions, as suggested by frequent references to the 'honest but unfortunate debtor'. So, from this perspective, legge no 3/2012 provides the court with a set of 'ethical guidelines', enabling judges to distinguish an 'innocent' and therefore worthy debtor from a 'guilty' one, not entitled to benefit from the consumer insolvency plan, having assumed obligations without due care and diligence.[46] In this context, the 'reasons for indebtedness' – to which legge no 3 of

[43] See Tribunale di Cagliari 11 May 2016 n 32 above.

[44] See in this sense for example Tribunale di Avellino 23 December 2019, available at www.ilcaso.it. The court affirmed that the plan cannot be approved when the loan is not used to satisfy immediate necessities or to pay back old debts but in order to pursue unworthy aims or to benefit some creditors to the detriment of others. Thus, we can infer that if the borrower used the sum to satisfy such immediate necessities or to repay old debts, he should be regarded as worthy.

[45] See Tribunale di Ascoli Piceno 4 April 2014 n 36 above; Tribunale di Pistoia 28 February 2014, *Il Foro italiano*, I, 321 (2015), with a commentary by A.M. Perrino, and *Banca Borsa Titoli di Credito*, 537 (2014), with a commentary by E. Pellecchia.

[46] See in this sense Tribunale di Pistoia 28 February 2014 n 45 above. For an opposite view, see A.M. Perrino, n 45 above, 335.

2016 alludes – were given particular weight when assessing plans submitted by debtors who had borrowed money despite not being able to repay their debts, due to the need to treat a serious illness. For instance, one plan was approved[47] on the assumption that the over-indebtedness arose due to the poor health of the applicant's child. Because of this circumstance, the father, who was already in debt, borrowed a further amount even though there was no reasonable perspective of repayment. One of the creditors opposed approval, asserting that the debtor was not worthy, since he had obtained the last – and most substantial – loan despite being in evident financial distress. Nevertheless, the court affirmed the worthiness of the consumer, noting that the debts had not been contracted to meet 'mere expenses', but precisely in order to support his son's health-related expenses.

Exploring Italian case law, we can observe two main lines of reasoning. The first, a blander approach, gives weight to ethical arguments, tending to approve the plans of debtors acting under emotional pressure and trying to cope under unfortunate circumstances. The latter, stricter, position leads to rejecting plans when the applicant should have been aware of the risk of over-indebtedness. But we can note that in these cases, unfortunate events – such as illness or job loss – were not among the factors contributing to the debt;[48] even if alleged, they had not been proven,[49] or at any rate were not decisive.[50] At times, the insolvency was even ascribable to fraudulent behaviour.[51] However, it seems that the courts applying the more lenient approach have given less consideration to emotional states than to the (worthy) intended use of the loan.

2. A Different Approach to Over-Indebtedness Based on Studies in Cognitive Psychology

A step towards adopting a different approach to over-indebtedness, giving greater consideration to what we could define as the 'real' debtor[52], could lie in a connection with the consumer credit regulations contemplated under Arts 121-126, of decreto legislativo no 385 of 1 September 1993, the Consolidated Law of Banking and Credit Laws (hereinafter Banking Consolidated Law or BCL). This is for two basic reasons.

a) The Connection Between Over-Indebtedness and Credit Consumer Regulation

Firstly, there is a connection between over-indebtedness and consumer credit.

[47] See Tribunale di Pistoia 27 December 2013, available at Ilfallimentarista.it, with a critical comment by G. Rojas Elgueta, 'I presupposti di accesso alla procedura di 'piano del consumatore'.

[48] See Tribunale di Novara 25 July 2017 n 33 above.

[49] See Tribunale di Santa Maria Capua Vetere 14 February 2017 n 33 above.

[50] See for instance Tribunale di Treviso 25 January 2017 n 31 above.

[51] See Tribunale di Larino 24 May 2016 n 33 above.

[52] On the 'real' debtor, see above, para II.2.

In reality, debt is not, in itself, synonymous with insolvency; nevertheless, imprudent use of credit can lead to over-indebtedness. The transition from indebtedness to over-indebtedness does not necessarily depend on the imprudent behaviour of the borrower but can also be ascribed to misconduct by lenders seeking to manipulate consumers. The aggressive persuasiveness of advertising campaigns, the promotion of purchasing in instalments, new financing systems such as revolving credit cards, and refinancing operations are just some examples of how credit providers' behaviour can fuel the phenomenon of over-indebtedness.[53]

Indeed, decreto legislativo no 14 of 12 January 2019 – the Corporate Crisis and Insolvency Code (hereafter CCIC) – which replaces current over-indebtedness regulation, contains some provisions that expressly emphasise credit service provider behaviour in the context of personal insolvency proceedings. In particular, implementing Art 9, para 1, lett. *l)* of the Decree[54], the Italian legislature introduced a procedural sanction preventing creditors from opposing approval of an insolvency plan if its conduct had a causal impact on the applicant's over-indebtedness. More specifically, Art 69, para 2, CCIC, establishes that any creditor who culpably brings about or aggravates the debt situation or violates the principles of Art 124-*bis* BCL may not oppose or challenge approval or assert causes of inadmissibility not due to the fraudulent behaviour of the debtor[55]. Art 68, para 3, CCIC, therefore requires the Crisis Settlement Body to indicate in the report annexed to the application whether the lender has considered the creditworthiness of the consumer, assessed in relation to his or her disposable income, after deducting the amount necessary to maintain a decent standard of living. The same provision can be found in Art 283, para 5, CCIC, regarding the discharge of those who have neither income nor estate (referred to in the Italian text as *incapienti*). Furthermore, concerning the proceeding referred to as 'lesser agreements' (the former Over-Indebtedness Crisis Settlement Agreement), Art 76, para 3, CCIC, provides that the Crisis Settlement Body must indicate whether the creditor had really considered the creditworthiness of the applicant before agreeing to lend.[56]

aa) Consumer Credit Regulation from a Behavioural Law and Economics Perspective. Specifically, Art 124-*bis* of Legislative Decree no 385 of 1 September 1993

[53] See M. Gorgoni, 'Spigolature su luci (poche) e ombre (molte) della nuova disciplina dei contratti di credito ai consumatori' *Responsabilità civile e previdenza*, 760 (2011).

[54] Legge 19 October 2017 no 155.

[55] However, Art 70 CCIC states that each creditor can submit observations within twenty days of the court order to publish the application and the plan that has been deemed admissible. Art 69 CCIC does not prohibit this faculty, so the creditor may offer background information regarding the debtor's worthiness, in the hope of persuading the court to reject the plan.

[56] We may note that Art 124-*bis* BCL is not mentioned in this provision as this rule concerns consumer credit agreements, and consumers are excluded from the 'minor arrangement' proceeding (see Art 74, comma 1, CCIC).

The second reason for a joint reading of the two disciplines cited above is that consumer-credit regulation lends itself well to a behavioural law and economics approach. With this perspective in view, a number of provisions that often appear in discussions surrounding the model of rationality underpinning the law become particularly important.[57] One example is the Banking Consolidation Act relating to the Annual Effective Global Rate in consumer credit,[58] notably to para 1 of Art 124 BCL, which requires credit institutions to provide the information necessary to allow a comparison of the various credit offers available on the market, thus allowing an 'informed and aware' decision. Also of note is para 5, which requires professional operators to provide all necessary explanation, so as to allow the consumer to assess whether the contract and the ancillary services offered are 'suited' to his or her needs and financial situation[59]. Lastly, Art 125-*bis* BCL, which requires the operator to communicate in a 'clear and concise' manner.[60] As for the most recent Consumer Mortgage Credit regulation,[61] para 2 of Art 120-*novies* BCL is of interest as it contains the same rule as that found in Art 124 BCL, as does para 3, which establishes that consumers have the right to a 'reflection period' of at least seven days in order to compare the various offers on the market and make an 'informed' decision.[62]

The aforementioned provisions are sometimes invoked as an example of provisions aimed at remedying market failures. Biases themselves are regarded, from this perspective, as causes of these failures, but there is some doubt that the tools traditionally used to remedy market failures are able to correct cognitive errors. Nor can it be overlooked that, from a different point of view, the very possibility of providing a solution to the problem of market failures is currently being discussed.[63] However, we can observe that consumer-credit legislation seems to denote a certain confidence in the possibility of remedying the aforementioned failures from the perspective of a weak paternalism[64] or libertarian philosophy[65],

[57] See A. Zoppini, n 5 above, 11; A. Gentili, 'Il paradigma dell'economia cognitiva ed il diritto contrattuale', in G. Rojas Elgueta and N. Vardi eds, n 5 above, 99.

[58] See A. Gentili, n 57 above, referring to Art 123 BCL in particular.

[59] ibid.

[60] See A. Zoppini, n 5 above, 19, seeking to demonstrate that, from the legislator's point of view, the consumer should be able to understand, elaborate, and incorporate a very small amount of information.

[61] The reference is to European Parliament and Council Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property [2014] OJ L60/34. This act was implemented by decreto legislativo 21 April 2016 no 72, which introduced Section I *bis* within Title VI of the Banking Consolidated Law.

[62] The aforementioned provision seems to give importance to the '*cooling off period*', on which see n 66 below.

[63] See on this point V. Roppo, 'I paradigmi di comportamento nella disciplina del contratto', in G. Rojas Elgueta and N. Vardi eds, n 5 above, 41-42.

[64] See on this theme C.R. Sunstein and R.H. Thaler, 'Libertarian Paternalism is not an Oxymoron' 70 *University of Chicago Law Review*, 1159 (2003); R.H. Thaler and S. Benartzi, 'Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving' 112 *Journal of Political Economy*, 164 (2004); C.F. Camerer et al, 'Regulation for Conservatives: Behavioral

considered preferable to forms of strong paternalism,[66] concerning which scholarship – including (and especially) in the US – has shown considerable dissent,[67] considering that such paternalism would lead to forms of intervention that would not leave any margin of appreciation to the party, depriving him or her of freedom and removing any self-responsibility.

It appears uncertain which of the two aforementioned aspects – weak or strong paternalism – inspired the rule found in Art 124-*bis* BCL. This provision reproduces almost word for word the text of Art 8 of the Consumer Credit Directive,[68] which requires lenders to assess the creditworthiness of the consumer before concluding the contract. The assessment must be based on information obtained, where appropriate, from the applicant and, where necessary, after consulting the relevant database.

This provision has always been controversial. Some scholars argue that under Art 124-*bis*, the lender has an obligation to inform the consumer[69] only at the outcome of the assessment, or to warn him or her of the risks attaching to default on payment and to over-indebtedness. More specifically, the obligation to

Economics and the Case for "Asymmetric Paternalism" ' 151 *University of Pennsylvania Law Review*, 1211 (2003); C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above, 249-256, 254; I. Ayres, *Carrots and Sticks: Unlock the Power of Incentives to Get Things Done* (New York: Bantam, 2010).

[65] According to the classification proposed by C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above, 254-256, we should more properly talk about 'paternalism with liberty'. Indeed, this pre-eminent scholar contrasts paternalism 'with liberty' and strong paternalism, distinguishing further between asymmetrical paternalism, libertarian paternalism, and debiasing through law. In particular, asymmetrical paternalism encompasses policies aimed at correcting cognitive errors of some people, without significantly affecting those who are not prone to making the same errors. We can think for example the 'cooling off period', that is a period of reflection allowed to the person who must take a decision. During the negotiations, for instance, a party could be obliged to hold firm his proposal for a certain period, so as to allow the counterparty to better evaluate whether to conclude the contract. Libertarian paternalism concerns instead reinforces in order to encourage people to choose the most desirable option, without significantly compressing their freedom. Finally, debiasing through law means removing cognitive errors by means of regulation. The latter would be the softest form of paternalism, since the subject would be free to take his decision, once errors have been corrected. See on such policy C. Jolls and C.R. Sunstein, 'Debiasing Through Law' (John M. Olin Program in Law and Economics Working Paper no 225, 2004).

[66] In favour of this form of paternalism see S. Conly, *Against Autonomy. Justifying Coercive Paternalism* (Cambridge: Cambridge University Press, 2012), passim. This scholar believes that coercive paternalism would be justified when necessary to avoid serious prejudice. In this perspective, a strong measure may be acceptable depending on the cost of the intervention, considering its social and psychological consequences. Thus, a paternalistic measure would seem acceptable if it gives more than it takes.

[67] See especially C.R. Sunstein, 'Boundedly Rational Borrowing' n 24 above, 267. In Italian scholarship see U. Morera, 'Irrazionalità del contraente' n 11 above, 208.

[68] European Parliament and Council Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66.

[69] See G. Piepoli, 'Sovraindebitamento e credito responsabile' *Banca Borsa Titoli di Credito*, 1, 38 (2013), who notes that, although the Credit Consumer Directive does not establish a duty to refuse the contract, the purpose - consumer protection - would be at least to create an obligation to inform the consumer of the result of the creditworthiness assessment.

assess creditworthiness has been read in conjunction with Art 124 BCL and has been made functional to the implementation of the obligations to inform that they contain. This is especially true of the obligation to provide the consumer with adequate explanation in compliance with para 5 of Art 124 BCL,[70] so as to allow him to reach a decision that is not only 'informed' but also 'aware';[71] this is linked to the obligation to behave 'fair[ly] and [in] good faith' prior to entering into an agreement, to use a term typical of the civil law tradition, again with a view to placing the consumer in a position to make a well-considered and unbiased choice in his or her best interests.[72]

From this point of view, the rule appears to have been inspired by weak paternalism[73] insofar as it leaves room for self-responsibility, so the consequences of the choices would still lie with the borrower-consumer.

The interpretative choice of limiting the relevance of the creditworthiness assessment to the pre-contractual stage may have been confirmed in the approval process of the Consumer Credit Directive.[74]

It is widely known that the first proposal for a new Directive, aiming to focus on responsible lending over responsible borrowing, dedicated an entire article, number 9, to the first of the two. Alongside the obligation to consult centralised databases and examine the answers provided by the consumer or the guarantor, to request the constitution of sureties, to verify the data provided by the credit intermediaries and to select the type of credit to offer, the same article introduced a further obligation for the lender to assess the consumer's solvency, as a condition for concluding the contract. Ultimately, a solution marked by strong paternalism was emerging, given that, due to the obligation to refrain from granting

[70] See in this sense G. Carriero, *sub* Art 124, in F. Capriglione ed, *Commentario al testo unico delle leggi in materia bancaria e creditizia* (Padova: CEDAM, 2018), 2152, stating that para 5 of Art 124 BCL lays down true and proper obligations of solidarity, which require the intermediary to pursue the customer's interest.

[71] The aforementioned opinion seems to be confirmed within the amended proposal for a directive, since this clarifies that the creditor should not only implement the obligations to inform, but also provide further explanations so that the consumer can make a decision in full knowledge of the facts (see 'Proposition modifiée de Directive du Parlement Européen et du Conseil relative à l'harmonisation des dispositions législatives, réglementaires et administratives des Etats membres en matière de crédit aux consommateurs abrogeant la directive 87/102/CE et modifiant la directive 93/13/EC').

[72] Here the reference is to E. Pellecchia, *Dall'insolvenza* n 11 above, 88-89, noting that, although the text of Art 124-*bis* is scanty, the creditworthiness assessment takes place in the pre-contractual phase, which is ruled by good faith and fairness. In this perspective, the creditworthiness assessment should be instrumental to an accurate representation of the loan. The lender should elaborate the information gained and warn the consumer about the risks involved in the operation in order to counteract the overconfidence bias.

[73] In this sense E. Pellecchia, *Dall'insolvenza* n 11 above, 90. However, this scholar believes that this policy is preferable in any case.

[74] See on this theme G. Piepoli, n 69 above, 38; G. Falcone, ' "Prestito responsabile" e valutazione del merito creditizio' *Giurisprudenza Commerciale*, 1, 147 (2017). In the literature on over-indebtedness, see E. Pellecchia, *Dall'insolvenza* n 11 above, 67; L. Modica, *Profili giuridici del sovraindebitamento* (Napoli: Jovene Editore, 2012), 227.

the lender credit, the consumer could not have chosen to conclude the contract in any case, despite his poor solvency. From this perspective, the consumer is also protected from himself: Once made aware of the risks, he cannot consider himself free to make any decision, let alone one least suited to his best interests. In the final text, however, the rule relating to an assessment of creditworthiness was moved to the section concerning the lender's obligations to inform, thus giving the impression of seeking to shift the measures aimed at preventing over-indebtedness towards a stance of weak paternalism.[75] The term 'paternalism' is apt since the behaviour of the consumer would in any case be influenced through the information given, while 'weak' refers to the fact that he or she would also be left free to make all the decisions.

Nevertheless, some scholars believe that, despite the definitive text of the directive, the obligation to assess the creditworthiness goes far beyond a mere connection with the obligation to inform the consumer. Rather, it amounts to a duty to reject a credit agreement whenever an assessment reveals the 'uncreditworthiness' of the applicant.[76]

From this perspective, the obligation to assess creditworthiness continues to take on much greater significance, more in line with the spirit of coercive paternalism, given that some cognitive errors, such as the tendency to excessively disregard future costs, may also be found among more informed and educated consumers.

A similar approach is adopted by the EU Consumer Mortgage Credit Directive, probably in response to the crisis of the 2000s. On the other hand, the Consumer Credit Directive was adopted when the crisis – caused in part by the irresponsible behaviour of lenders – had not yet revealed its more serious consequences. Therefore, the changes that characterised the economic, political, and social context would suggest a joint reading of the two regulations, giving more strength to the opinion that the regulatory framework deriving from the implementation of Directive 2008/48/EC leads to a duty to reject credit agreements with borrowers who are uncreditworthy.

[75] See 'Proposition modifiée de Directive du Parlement Européen et du Conseil relative à l'harmonisation des dispositions législatives, réglementaires et administratives des Etats membres en matière de crédit aux consommateurs abrogeant la directive 87/102/CE et modifiant la directive 93/13/EC'.

[76] See in favour of such an obligation G. De Cristofaro, 'La nuova disciplina comunitaria del credito al consumo: la direttiva 2008/48/CE e l'armonizzazione "completa" delle disposizioni nazionali concernenti "taluni aspetti" dei "contratti di credito ai consumatori"' *Rivista di diritto civile*, 274 (2008); S. Larocca, 'L'obbligo di verifica del merito creditizio del consumatore', in V. Rizzo et al eds, *La tutela del consumatore nelle posizioni di debito e credito* (Napoli: Edizioni Scientifiche Italiane, 2010), 233. More recently, from a different perspective, R. Di Raimo, 'Ufficio di diritto privato e carattere delle parti professionali quali criteri ordinanti delle negoziazioni bancaria e finanziaria (e assicurativa)' *Giustizia civile*, 1, 206 (2020). But for the opposite opinion, see D. Maffeis, 'Molteplicità delle forme e pluralità di statuti del credito bancario nel mercato globale e nella società plurale' *Le nuove leggi civili commentate*, 4, 745 (2012), and with a different argumentation G. Piepoli, n 69 above, 59. After a long and complex reflection, the opposite opinion is also expressed by L. Modica, n 74 above, 239-303, 283.

b) The Connection Between Over-Indebtedness and Consumer-Credit Regulations in More Recent Guidelines: The Substantive Relevance of Bounded Rationality for the Purpose of Worthy Debtor Assessment. Critical Remarks

Lastly, we need to clarify whether the provisions examined above are able to justify a link between the conduct of the lender and a decision on consumer behaviour with regard to over-indebtedness procedures, so as to make even the debtor with limited (innate) self-control creditworthy. From this point of view, it is possible to evaluate the usefulness of behavioural law and economics in interpreting the discipline of over-indebtedness.

Some scholars, and case law in particular, seem to recognise that creditor behaviour can influence debtors' worthiness assessment, especially with regard to Art 124-*bis* BCL[77] However, the arguments presented in support of this opinion appear to differ.

In some rulings, the very fact that the creditor has lent a sum to the consumer, given the obligation to assess the creditworthiness of the borrower, has been said to demonstrate that there was, at the time of borrowing, a reasonable chance of repayment, as mentioned in Art 12-*bis*, para 3 of Law no 3 of 2012.[78] The creditor's behaviour would therefore be given importance on a purely probative level, based on the predictability of the over-indebtedness situation. The reasoning would appear to be as follows: if the lender, at the end of the investigation, granted the loan, it means that there were prospects of repayment, because the lender would have had no interest in providing a loan, knowing that it would not have been possible to recover the sums granted. This argument is perhaps somewhat naive – essentially for two reasons. In the first place, the assessment of creditworthiness is a prognostic judgment based on more or less objective circumstances, so that the assessment can be made even after some time, obtaining the same result as if it had been carried out before concluding the contract: therefore it is not necessary to surmise anything in this regard, as the circumstance can easily be proved simply by carrying out the assessment, albeit *ex post*. Secondly, it is well known that creditors are led to protect themselves against the risk of default, for example, through the application of high interest rates or by securitising loans and their re-entry into the financial circuit. Consequently, the fact that the creditor has granted the credit in any case, despite the low creditworthiness of the applicant, does not demonstrate that there were prospects of repayment, as

[77] See R. Di Raimo, 'Debito' n 29 above, 174; R. Bocchini and S. De Matteis, 'Sovraindebitamento: profili civilistici nella legge delega di riforma della crisi d'impresa e dell'insolvenza' *Il Corriere Giuridico*, 5, 662 (2018); F. Pasquariello, 'Le nuove procedure di sovraindebitamento' n 16 above, 767; R. Landi, n. 29 above, 317; S. Cotterli, 'Credito e debito dopo la crisi: strumenti per famiglie e microimprese' *Banca impresa società*, 3, 489 (2016). See, in case law, Tribunale di Napoli 7 November 2017; Tribunale di Napoli 18 May 2018, available at *www.ilcaso.it*; Tribunale di Napoli 21 December 2018, available at www.dejure.it.

[78] See Tribunale di Napoli 18 May 2018 n 77 above.

the lender could have granted the credit and later resorted to the tools mentioned as a safeguard against default.

In other cases, the focus is on the expectation of the debtor-consumer, who would not have the necessary skills to foresee over-indebtedness and would therefore trust in the ability of the lender (in most cases a bank) to assess his or her solvency, implicitly counting on the probability that the lender would refrain from concluding the contract to someone with a low credit rating.[79] The very fact of having obtained the loan, from this point of view, becomes an element to justify the behaviour of the borrower, who could benefit from the plan 'on the basis of the combined provisions' of Arts 12 para 2 of Law no 3/2012 and 124-*bis* BCL;[80] in fact, by requiring the lender to verify the creditworthiness of the consumer, this argument would also imply an obligation to refrain from concluding the contract. More precisely, the consumer could not be held liable for having turned to an entity – that is, the intermediary – a 'holder of an office in private law'[81] ('*titolare di un ufficio di diritto privato*'[82]), and therefore having 'relied on' the ability of the lender to correctly check his potential solvency and on the fact that he is not authorised to grant credit to an unworthy borrower.[83]

In order to affirm the existence of an obligation on the part of the lender not to grant credit to non-solvent borrowers, decisions taken in accordance with this guideline often refer to the regulations on financial intermediation, under which, according to the majority of scholars, the intermediary has the same obligation to abstain. Basically, there is a parallel between traditional lending activity and the activity of the financial intermediary, so the obligation of abstention imposed on the latter is placed analogously on the lender.

In this regard, it should be remembered that cognitive psychology studies found

[79] See Tribunale di Napoli 21 December 2018 n 77 above.

[80] ibid

[81] See, in this regard, Tribunale di Napoli Nord 21 December 2018 n 77 above. In the legal literature, see R. Di Raimo, 'Ufficio' n 76 above, 200, who, examining Art 124-*bis* BCL, notes that the banking sector is becoming increasingly closer to the financial market, so that credit intermediaries too would be holders of an initiative that would have limitations with respect to this purpose; in particular, the intermediary would have to directly pursue the interest of its client (so the former would not simply support the latter in order to pursue his interest for himself) and even maintain market integrity. Taking the opposite stance, see D. Maffeis, n 76 above, 730, who believes that when the bank acts as a lender, it would not be mandatory, so it would not be obliged to pursue the interest of its client nor to take his place in order to value the expediency of the contract. In short, in this context the rule of *caveat emptor* would be enforced. For a different opinion again, see R. Natoli, n 30 above, 155.

[82] See on this figure A. Cicu, *Il diritto di famiglia (teoria generale)* (Roma: Athenaeum, 1914), 120; F. Messineo, *Contributo alla teoria della esecuzione testamentaria. Critica delle teorie, elementi costitutivi e indole dell'esecuzione* (Padova: CEDAM, 1931), 68; A. Candian, 'Del c.d. "ufficio privato" e, in particolare, dell'esecutore testamentario' *Temi*, 379 (1952); F. Carnelutti, *Teoria generale del diritto* (Camerino- Napoli: Edizioni Scientifiche Italiane, 1998), 152. See, for a different point of view, S. Pugliatti, *Esecuzione forzata e diritto sostanziale* (Camerino- Napoli: Edizioni Scientifiche Italiane, 1978), 23; R. Di Raimo, 'Ufficio' n 76 above, 192.

[83] See Tribunale di Napoli 21 December 2018 n 78 above.

very fertile ground in financial intermediation long before encroaching on the credit sector, and it would appear that these studies had an influence on the legislature itself, which would eventually opt for the obligation to abstain, taking into account that information and advice obligations alone would be insufficient to protect the client-investor from concluding business that goes against his interests. An implicit consideration of limited rationality, and in particular of self-control problems, could therefore be said to condition the judgments in question, thus introducing the bounded-rationality model underlying the disciplines of consumer credit and financial intermediation within the legal regime of over-indebtedness procedures.

This reasoning seems to lead in fact to doing away with an assessment of the consumer's creditworthiness in bankruptcy proceedings; if consumers are not capable by nature of curbing their inclination to take on debts, they cannot therefore be expected to answer for this innate tendency.

Some scholars believe that the worthiness assessment will be superseded[84] as it is not envisaged in the provisions that will replace the current legislation.[85] Indeed, when the legislature drafted the Crisis and Insolvency Code, it made no secret of its aim to facilitate access to proceedings reserved for consumers,[86] encouraging – at least hypothetically – their profitable use.[87] Accordingly, the number of worthy consumers should increase, since we could also consider 'worthy' those who have contributed to their own default through negligence, as long as the negligence is not gross.

Nevertheless, there is no denying that the new law continues to require an assessment of the debtor's behaviour. Indeed, Art 69 provides that the consumer cannot have access to the proceeding if he has contributed to the situation of over-indebtedness through gross negligence, bad faith, or fraud. The law therefore excludes from the proceeding those who have exhibited 'culpable'

[84] The reference is to L. Modica, 'Effetti esdebitativi (nella nuova disciplina del sovraindebitamento) e *favor creditoris*' *I Contratti*, 4, 472 (2019); S. De Matteis, 'L'interesse del debitore all'esdebitazione', in R. Bocchini and S. De Matteis, 'Sovraindebitamento: profili civilistici nella legge delega di riforma della crisi d'impresa e dell'insolvenza' *Il Corriere giuridico*, 5, 656 (2018). However, upon examining the new regulation we can note several textual references to worthiness. See in particular, Art 283 CCIC, which refers to the debtor as 'persona fisica meritevole' (worthy person) and states that a court must assess the worthiness of the debtor in order to grant discharge (more precisely, para 7 reads: 'assunte le informazioni ritenute utili, valutata la meritevolezza del debitore e verificata, a tal fine, l'assenza di atti in frode e la mancanza di dolo o colpa grave nella formazione dell'indebitamento, [il giudice] concede con decreto l'esdebitazione'). This provision also refers to fraud, bad faith, and gross negligence, as does Art 69 CCIC with regard to the requirement to access consumer solvency plan proceedings, so it is possible to formulate a uniform definition of worthiness as a judgement on the debtor's behaviour designed to exclude bad faith, fraud, and gross negligence.

[85] The particular reference is to Art 69 CCII. On this point see L. Modica, 'Il piano del consumatore sovraindebitato: tentativi di riforma e prospettiva europea' *Europa e diritto privato*, 3, 617 (2016).

[86] See the explanatory memorandum of decreto legislative 12 January 2019 no 14.

[87] See F. Pasquariello, 'Le nuove procedure' n 16 above, 764, claiming that the worthiness requirement would be too stringent in the context of legge no 3 of 2012.

behaviour,[88] that is – in the meaning used in criminal law[89] – 'blameworthy',[90] both by way of wilful misconduct (in this context, more correctly, bad faith and fraud) and (gross) negligence,[91] in relation both to the time of assumption of each individual debt and the time to follow.

If we accept the position criticised above, which leads to considering the consumer worthy solely because he has obtained the loan, the reference to gross negligence would in fact be neutralised, since the insolvent person would almost always be admitted to the settlement procedure, and the judgment on the debt behavior would be reduced to an assessment of bad faith or fraudulent behaviour. Such a solution would appear to be in contrast with the rationale of the whole over-indebtedness regulatory system, a rationale that the majority of the legal literature and some case law relate to market protection.[92]

The changes that have recently affected this regulation suggest greater attention to the person of the debtor, also by reason of the connection with Consumer Credit regulation, intended (among other things) to protect debtors.[93] Nevertheless, in the opinion of the writer, the interests of the debtor must be balanced in the over-indebtedness regulatory system with those of the creditor class, also taking into account the systemic impact that (full or partial) discharge may entail.[94]

Even within the new regulatory framework, the interest of the creditor class appears to be anything but marginal. The most recent law on over-indebtedness – like the previous one – requires an assessment of the economic feasibility of the plan and its legal admissibility.[95] The cramdown is maintained, which is why, following the opposition eof the creditor, a court can approve the plan only when the creditor can be satisfied by the execution of the plan to an extent no less than by liquidation.[96] People with very low income (in Italian: *incapiente*) face a limitation in

[88] See Tribunale di Napoli 18 May 2018 n 76 above.

[89] See on this topic G. Vassalli, *Colpevolezza*, in *Enciclopedia giuridica* (Roma: Treccani, 1988), VI.

[90] See R. Landi, n. 29 above, 309, who refers to blamewrorthy over-indebtedness (quote: 'rimproverabilità del sovraindebitamento'). See in case law Corte di Cassazione 10 April 2019 no 10095 n 13 above.

[91] See Tribunale di Treviso 25 January 2017 n 31 above.

[92] See, among many, C. Camardi, *Certezza e incertezza nel diritto privato contemporaneo* (Torino: Giappichelli, 2017), 74; L. Modica, 'Effetti esdebitativi' n 84 above, 474.

[93] See in this sense Case C-565/12, *Fesih Kalhan* v *LCL Le Crédit Lyonnais SA*, [2012] ECLI:EU:C:2014:190; more recently, Case C-58/18, *MS* v *BB SA*, [2019] ECLI:EU:C:2019:467; Case C-679/18, *OPR-Finance s.r.o.* v *GK*, [2020] ECLI:EU:C:220:167, all available at www.eur-lex.europa.eu.

[94] See in this sense P. Femia, 'Esdebitazione, responsabilità, estinzione parziale', in E. Llamas Pombo et al eds, *Il consumatore e la riforma del diritto fallimentare. Atti della Giornata di studio,* Terni, 18 maggio 2018 (Napoli: Edizioni Scientifiche Italiane, 2019), 244, who remarks the difference between the traditional approach of civil law and the alternative one, which is referred to as systemic and seems to characterise the Code of Crisis and Insolvency.

[95] Art 70, para 7, CCIC.

[96] Art 70, para 9, CCIC, as provided by Art 12-*bis*, para 4, Law no 3/2012.

addition to the merit requirement;[97] they can expect to access this benefit only once, and this subject is not expected to offer any utility, either directly or indirectly, even in the future.[98] This means that: a) the party must be devoid of assets and income; and b) there must be no possibility that his financial and income situation will improve in the future. If this situation changes – so that significant benefits were to arise in the next four years that would allow the creditors to be satisfied to an extent of not less than ten percent – the *incapiente* would be required to pay.

The interest of the debtor must therefore relate to other instances, so that the opinion that the insolvent person should always be able to benefit from a consumer's insolvency plan or obtain discharge does not appear sustainable; otherwise, one would have to admit that the interests of the creditor class are marginal. Nevertheless, some signals to the contrary emerge in the examined case law. It is true that the legal framework containing the regulation of over-indebtedness, namely the Law on Usury, would suggest that this regulatory system is oriented towards the protection of the debtor, which would lead to favouring any solution giving prevalence to the interest of the latter. However, using the same criterion, one might be led to endorse a different opinion. In fact, the provisions relating to the plan were introduced by legge no 3/2012 with the so-called *decreto crescita*, with the barely veiled aim of keeping the demand for goods high and not of protecting the over-indebted consumer. Nor can it be overlooked that the new regulation has subsequently merged into the Corporate Crisis and Insolvency Code: over-indebtedness proceedings – it is now almost undisputed – are fully included in insolvency proceedings, which serve to protect creditors.

c) The Actual Contribution that Can Be Given by a Behavioural Law and Economics Approach to Italian Over-Indebtedness Regulation

In light of the above considerations, it would appear that the contribution of behavioural law and economics to the Italian discipline of over-indebtedness, although not negligible, should not be overestimated. There is no doubt that a creditor's behaviour – and in particular the breach of Art 124-*bis* BCL – can sometimes affect a decision on worthiness, but it is the opinion of the writer that the screening should be conducted on a case-by-case basis, having regard for the peculiarities of the individual conflict. For example, when the creditor commits an error of assessment or – less probably – fails to check the potential solvency of the debtor, and if the risk of insolvency was not apparent to the consumer but could have been detected by an attentive and qualified professional when the contract was concluded, a breach of Art 124-*bis* BCL may affect the decision on worthiness, given

[97] This provision is expressly invoked by Art 283 CCIC (paras 1 and 5).
[98] See Art 283, para 1, CCIC.

that a careful investigation might have allowed the borrower to better weigh the risks of the loan.

It is also possible that the risk of insolvency is evident even to the less expert eye of the borrower and that the lender has correctly ascertained the likely inability to repay. At this point, we can imagine two further situations: one where the creditor has failed to inform the customer of the negative outcome, and another where the lender has informed the customer of this result and both have decided to enter into the contract anyway. We argue that insolvent consumers may be allowed access to the insolvency procedure only if they acknowledge that they are ill – and, if necessary, treatable[99] – and not victims of 'normal' bounded rationality.

Ultimately, it becomes necessary to ascertain whether the cognitive error is confined to the terrain of the 'normal' or has gone beyond this, leading to a state of illness. The 'honest but not unfortunate' debtor does not always seem, therefore, to be authorised to access the procedure reserved for consumers, even in accordance with the provision intended to replace Law no 3/2012.

This outcome may seem paradoxical. In fact, it was understood that the connection established by the civil code linking the crisis between over-indebtedness and consumer credit may have lent itself in the abstract to a reading of over-indebtedness in terms of behavioural law and economics. It was also observed that the approach characterising Law no 3/2012 left the 'real' debtor in limbo, being able to access debt relief benefits only with the consent of the creditor by means of a crisis settlement agreement. Now, the Crisis and Insolvency Code expressly excludes the consumer from the homologous procedure known as the 'lesser agreement'; thus, self-control problems, enhanced by the discipline of the consumer code, are practically ignored by the legal regulations on over-indebtedness.

Nonetheless, persons we might refer to as 'honest but not unfortunate' debtors who have fallen into default due to their natural inability to plan their own income and expenditure flows find within the legal system some tools for dealing with insolvency while not being able to access the benefits of over-indebtedness proceedings.

According to the current law, without considering the asset liquidation procedure – which may not in fact be an optimal solution for the debtor – the debtor may seek compensation at the individual level by addressing the creditors who have contributed to the default, neutralising their claims and thus reducing exposure. This is because the lender must not have acted contrary to the best interest of the consumer, thus deviating from the proper exercise of the office entrusted to it. The decision regarding the creditor's behaviour is in itself independent of the borrower's behaviour, since the conduct of the latter cannot change the fact that creditors are obliged to exercise their office in a proper manner. This solution has received little attention,[100] but it could prove to be very fruitful insofar as it would

[99] See Tribunale di Torino 8 June 2016 n 39 above.

[100] In current case law there would appear to be only one precedent: Tribunale di Macerata

allow the over-indebtedness crisis to be resolved without participating in a crisis settlement proceeding.

De iure condendo, the legislature could focus on establishing a moratorium on debts instead of discharge, restricting the content of the proposal (which is now free) for some parties, so as to allow full repayment of the debt, albeit lengthening the time, but excluding creditors whose behaviour has contributed to over-indebtedness. One might also envisage making the minor arrangement available to the consumer (again), while still leaving the creditors with the possibility of deciding whether the proposal is acceptable.

IV. Conclusions

Lastly, it would appear that there may be room in the over-indebtedness regulation for those we have described as 'real debtors', analogous to the 'real man' in cognitive psychology. However, this room may become more limited than recent trends in the case law might lead one to believe as protections for 'real debtors' have proven to be capable of effectively eliminating the limitations – necessary as they may be – regarding the debtor's behaviour for the purposes of gaining access to debt relief. Limitations of this kind are required in several jurisdictions, where it seemed appropriate to preclude access to debt relief or, more generally, to procedures with non-debt benefits to those who had knowingly become indebted. Basically, an attempt was made to prevent over-indebtedness through the introduction of measures aimed at neutralising the risk of opportunistic conduct by debtors, who otherwise would be naturally inclined to over-indebtedness in the expectation of a subsequent discharge.

Such an approach has inevitably been limited in the light of the different decision-making paradigm based on the 'real' man, typically prey to bounded rationality. The development of this model has led to no longer focusing on the opportunistic conduct of debtors but on the irresponsible conduct of lenders who have appeared inclined to exploit biases and heuristics that would condition the choices of consumers to their advantage.

The focus has therefore shifted from settlement procedure regulation to credit consumer regulation on the assumption that effective action to combat over-indebtedness can only succeed by making lenders responsible.

This is precisely the lens through which we have examined Italian law, in an attempt to measure the impact of bounded-rationality theories on both over-indebtedness and consumer-credit legislation.

As for the regulation of over-indebtedness procedures, the survey revealed that the influence of traditional decision-making models was prevalent on this

24 May 2018, *Nuova giurisprudenza civile commentata*, 10, 1423 (2018), with a commentary by F. Salerno, 'La violazione dell'obbligo di verifica del merito creditizio: effetti (anche) civilistici'.

front. As regards the consumer-credit regulation, the conclusions are specular: the legislature itselfseems to have considered the theories of bounded rationality, demanding conduct from lenders that can stem the potential problems caused by consumers' cognitive errors.

The over-indebtedness reform seems to have fully established the connection between over-indebtedness procedures and consumer credit regulations, to the extent that the new over-indebtedness legislation contains some provisions that recall rules concerning the obligation to verify creditworthiness in the phase preceding the conclusion of the contract. In the course of these reflections, however, the question arose whether – and to what extent – this connection might affect the interpretation of over-indebtedness procedure legislation. From a radical perspective, it may be possible to consider the debtor worthy of access to the procedure by viewing him as a victim of biases that the lender should have corrected. One might also come to appreciate that, consequently, the debtor will be able to benefit from over-indebtedness procedures; this needs to be stated, although in both the previous legislation and the one about to come into force, various provisions emphasise the liability of the insolvent.

Such an extreme conclusion recalls the naturalistic fallacy, the illusory claim to be able to derive a rule of conduct from the ascertainment of a given reality, that is, a value judgment from a factual judgment.[101]

The assumption criticised here must deal with the logic behind the rules, the human need that they protect, and the practical purpose they intend to pursue.[102] In the case of over-indebtedness, it is not so much a question of protecting insolvent debtors, although these can benefit from the effects of consumer solvency plans or discharge, but rather of favouring a recovery of consumption without unduly sacrificing the interest of the creditor class.

The phenomenon of over-indebtedness and the complexity that characterises it do not allow us to draw up a solution exclusively focused on the relationship between a single debtor and creditor. From a more systemic perspective, the benefits associated with over-indebtedness proceedings do not appear to benefit or protect 'innocent' debtors but seem to constitute a means to reintroduce the insolvent into the consumption circuit, with a consequent increase in the demand for goods: in short, the insolvent person, freed from debts, can consume once more and, in order to do so, have access to credit again.

That said, there is no denying that experiments in cognitive psychology clearly impose a different over-indebtedness 'narrative'. This new narrative should not, however, cause us to move beyond the traditional approach but rather to supplement and enrich it in fruitful dialogue without losing sight of the conflicts of interest that may actually arise. From this perspective, the findings of cognitive

[101] See N. Bobbio, *Il positivismo giuridico. Lezioni di filosofia del diritto* (Torino: Giappichelli, 1979), 209.

[102] See M. Allara, *Le nozioni fondamentali del diritto civile*, I (Torino: Giappichelli, 1958), 111.

psychology studies – nowadays confirmed through the application of technologies dedicated to neuroscience – may contribute to a real improvement in consumer protection, through the measures adopted to prevent the default *ex ante* rather than addressing it *ex post*. However, the legislature and the interpreter should not blindly adhere to the results produced by these important disciplines and thus avoid the risk of homologising their fundamental activities.

Essays

Bitcoin: Civil Law Topics and Issues

Carla Pernice*

Abstract

The essay aims to examine some legal issues in the civil sphere related to a new digital asset, Bitcoin, also in light of the most recent italian case-law that has dealt with the matter in order to propose adequate regulatory proposals pending the comprehensive regulation of these innovative technological assets.

I. From the Origins of Bitcoin: What it is and How it Works

The crisis that has damaged the world in recent years has led to a progressive erosion of the trust traditionally placed in national institutions, first and foremost, in legal tender, inducing the community to re-appropriate functions traditionally falling within the realm of national sovereignty. Hence the birth of privately regulated payment instruments, among which the most famous is Bitcoin, which aim to create a parallel economy managed by the community itself and without any intermediation by public authorities.[1]

Bitcoin is a digital and complementary[2] currency based on cryptography (so-called cryptocurrency). Its main characteristics are: the use of cryptographic techniques for its coining (ie 'mining'); the decentralization of the possibility to

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[1] Bitcoin was originally designed to overcome the shortcomings of the trust-based banking system that gives banks and States a prominent role. Satoshi Nakamoto, the pseudonym used in the original Bitcoin proposal, saw these institutions as being inherently corrupt. His goal was to eliminate the need for them by creating a peer-to-peer system in which transactions are proven by a decentralized network of computers rather than intermediaries: 'commerce on the Internet has come to rely almost exclusively on financial institutions serving as trusted third parties to process electronic payments. While the system works well enough for most transactions, it still suffers from the inherent weaknesses of the trust-based model. Completely non-reversible transactions are not really possible, since financial institutions cannot avoid mediating disputes. (...) What is needed is an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party', S. Nakamoto, 'Bitcoin: A Peer-to-peer Electronic Cash System', available at https://tinyurl.com/2p9dt2cv, 1. M.R. De Ritis, 'Bitcoin: una moneta senza frontiere e senza padrone? Il recente intervento del legislatore italiano' *giustiziacivile.com*, 9 (2018), writes that Bitcoin is 'un sistema monetario privato (...) che intende attribuire al 'popolo' un potere sottrattogli da tempo'.

[2] Complementary currencies are defined as currencies that are intended to complement official money.

create new money; and the absence of central authorities and financial institutions responsible for the control and management of the creation and exchange of the virtual currency. Its advent is linked to two needs: on the one hand, creating a universal unit of account able to keep up with the globalization of trade and, on the other, availing of an alternative to legal tender whose value cannot be determined through monetary policies.

In traditional payment systems, a monetary authority guarantees the quantity, the quality and the value of money, while banks and other intermediaries exercise control to prevent the risk of double spending.

The Bitcoin system offers an alternative option based on the decentralization of these functions, which are entrusted to cryptographic technology and network users. IT makes it possible to reproduce on the digital level some characteristics of real currencies such as limitedness (or scarcity) and purity (or homogeneity), avoiding the need in this way to ascertain the qualities of the transferred asset.[3] The users monitor and authorize each exchange through a distributed system of control (Distributed Ledger Technology, also known as DLT) made possible by the blockchain, a public register shared by the 'nodes' in the network updated as soon as someone makes a change.[4]

However, the real peculiarity of Bitcoin is the following: it is a global and self-referential currency because it represents nothing else but itself. Unlike other tokens in circulation, Bitcoin does not entail a claim against those who have generated it or third parties (so-called second class token) and nor does it confer other different rights (so-called class three token) but rather grants an economic purchasing power that can be exercised against those who decide to join this innovative payment system.[5]

[3] The advent of minting, which is a different concept from that of monopoly, has its roots precisely in the need to guarantee the weight and purity of the precious items used as the first form of money (so-called commodity money). The imprint of sovereign power to the commodity means of exchange allowed the transition from weighing to counting, thereby significantly reducing transaction costs in trade. However, using gold and silver coins had serious drawbacks: first of all, the risk of theft and for example the difficulty of trading with distant markets. The next step was therefore the advent of banknotes, a monetary certificate that those who deposited gold with a merchant received, which attested to the possession of a given quantity of precious metal. Letters of exchange, by committing the issuer who had received a certain sum of money to return an equivalent of the local currency by means of its representative in the place and date agreed, allowed merchants to make payments in places located in different commercial zones without the need for excessive stocks of money.

[4] Nodes are the computers connected to the Bitcoin network that are responsible for storing and distributing an updated copy of each block. For more information on DLT and blockchain see M. Lehmann, 'Who Owns Bitcoin? Private Law Facing the Blockchain', available at https://tinyurl.com/2p8mnhkd (last visited 31 December 2021); A. Wright and P. De Filippi, 'Decentralized Blockchain Technology and the Rise of Lex Cryptographia', available at https://tinyurl.com/ycka3m8m (last visited 31 December 2021).

[5] According to the most widely accepted although not unanimously agreed terminology, it is possible to distinguish between three types of tokens depending on the 'function' performed by cryptographic tokens:

Although twelve years have passed since its appearance, Bitcoin is a phenomenon that continues to be characterized by a disorganized, deficient and difficult regulatory framework. And this is not by chance. Bitcoin was born away from public regulation precisely in order to escape it. The multifaceted and changing nature of this new digital asset – sometimes used as a medium of exchange, sometimes as an investment asset – on the other hand does not make things easier for lawmakers.

The absence of intermediaries prompted European and Italian legislators to extend customer due diligence obligations under anti-money laundering laws to exchangers and web wallet providers in order to prevent their possible use for illegal purposes.[6] However, regulation under the general law is still lacking. It can thus be problematic to identify the characteristics of Bitcoin and the applicable rules, especially if the legal classification of Bitcoin is still unclear.

This essay aims to examine some civil issues related to this new digital asset in the light of the Italian legal system. After examining the main arguments denying the monetary nature of Bitcoin (Section 2), contrary to the view espoused in this work, we will proceed to examine the Italian case-law that has dealt with the matter and in particular: the pecuniary obligation expressed in cryptocurrencies (Sections 3-4); the deposit (Section 5) and the sale of Bitcoin (Section 6). Furthermore, although there have not yet been any rulings on the matter, some issues related to succession involving cryptocurrencies will be addressed (Section 7). The essay will be wrapped up with some concluding remarks on the case-law to date (Section 8), which testifies to a significant openness by the Italian courts towards considering Bitcoin to be monetary in nature.

- Payment tokens (also called class one tokens): means of payment that allow the purchase of goods and services on a plurality of online platforms, including different from the one on which the token originates. These tokens have no embedded rights or liabilities and perform a similar function to traditional currencies, although their volatility sometimes determines their use for investment purposes (an example is Bitcoin).

- Utility tokens: digital currencies with limited expendability, which allow the purchase of goods and services only within the system from which they originate. These tokens are often issued to facilitate the development of innovative projects. The token taker, through the purchase of the token, assumes at the same time the role of financier and that of future user, providing the company with a suitable customer base to support its development. These assets have been compared to vouchers.

- Security tokens (also known as class three tokens): digital tokens representing economic rights (such as the right to participate in the distribution of future dividends) and/or administrative rights (such as the right to vote on certain matters). These assets have been compared to financial instruments (stocks and bonds). On this point FINMA, 'Practical Guidance for the handling of applications relating to subordination in respect of initial coin offerings (ICOs)', edition of 16 February 2018, available at https://tinyurl.com/jh8cw5sv.

[6] See decreto legislativo 25 May 2017 no 90 and European Parliament and Council Directive 2018/843/EU of 30 May 2018 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

II. Legal Classification of Bitcoin: Towards a Functional Notion of Money

Although Bitcoin acts in practice as a means of payment, the Italian academic community has long been reluctant to recognize its legal standing as money. Some authors view Bitcoin as new form of property, others as an IT document and others again as an asset like gold.[7]

The objections raised to classifying Bitcoin as money are mostly linked to an institutional conception of money. For example, in a decision the Supreme Court ruled that only a universally accepted means of payment that is an expression of public power could be classified as 'money'.[8] This reconstruction is not persuasive for two reasons. First of all, it postulates that money is a universally accepted means of payment. However, because a good endowed with universal use does not exist, it would be more accurate to use a theory of relative currency.[9] Moreover, some currencies do not enjoy general recognition even in their issuing country, where there may be a preference to resort to more stable currencies.[10] Furthermore, a

[7] Compare P.L. Burlone and R. De Caria, 'Bitcoin e le altre criptomonete. Inquadramento giuridico e fiscale', 4 (2014), available at https://tinyurl.com/2p9es4ah (last visited 31 December 2021), who believe that 'in assenza di creazione di una apposita figura giuridica ad opera del legislatore nel diritto italiano attuale Bitcoin possa correttamente essere inquadrato come una nuova categoria di bene immateriale'. In this vein also M. Krogh, 'Transazioni in valute virtuali e rischi di riciclaggio. Il ruolo del notaio' *Notariato*, 158 (2018) and, recently, M. Cian, 'La crittovaluta. Alle radici dell'idea giuridica di denaro attraverso la tecnologia: spunti preliminari' *Banca borsa titoli di credito*, 315 (2019). For S. Capaccioli, *Criptovalute e Bitcoin: un'analisi giuridica* (Milano: Giuffrè, 2015), 142, Bitcoin is a 'new property'. G. Arangüena, 'Bitcoin una sfida per policymakers e regolatori' *dimt.it*, 29 (2014), writes that Bitcoin could be considered an IT document 'recante dati e informazioni giuridicamente rilevanti e sottoscritto da una progressione di firme elettroniche attestanti (…) l'avvenuta validazione della propria o dell'altrui legittimazione al perfezionamento di una certa transazione'.

[8] Corte di Cassazione 2 December 2011 no 25837, *Giustizia civile*, 29 (2011): 'può essere qualificata "moneta" soltanto il mezzo di pagamento universalmente accettato che è espressione delle potestà pubblicistiche di emissione e di gestione del valore economico'. In this vein also B. Inzitari, 'La natura giuridica della moneta elettronica', in S. Sica, P. Stanzione and V. Z. Zencovich eds, *La moneta elettronica: profili giuridici e problematiche applicative* (Milano: Giuffrè, 2006), 25.

[9] L. Mosco, *Gli effetti giuridici della svalutazione monetaria* (Milano: Giuffrè, 1948), 27, writes 'la storia economica ci insegna che le cose assunte come danaro nel mondo degli affari sono svariatissime secondo i tempi e i luoghi'.

[10] Recently, to this effect, Berlin Court of Appeal judgment of 25 September 2018, available at https://tinyurl.com/pxm46m7c (last visited 31 December 2021), which with regard to the comparability of Bitcoin to foreign currencies notes that 'Ferner ist die Voraussetzung einer allgemeinen Anerkennung nicht herleitbar. Es gibt Devisen, die sich keiner allgemeinen Anerkennung erfreuen. Es ist allgemein bekannt, dass es teilweise Fremdwährungen gibt, die selbst im Ausgabestaat nur ungern angenommen werden, da man eher auf stabilere Fremdwährungen (z. B. US-Dollar) zurückgreifen möchte. Diese Fremdwährungen erfreuen sich auch in Form von Devisen keiner allgemeinen Anerkennung Diese Fremdwährungen erfreuen sich auch in Form von Devisen keiner allgemeinen Anerkennung. Selbst das vom Gesetzgeber genannte Beispiel des ECU belegt dies. Dieser war nicht allgemein anerkannt. Er wurde nur vielmehr von einem bestimmten Kreis von Personen und Einrichtungen genutzt. Für den allgemeinen Rechtsverkehr war er mehr oder weniger bedeutungslos. Der Rechtsverkehr nutzte vielmehr die jeweiligen nationalen Währungen. Demnach müsste es genügen, dass eine

sovereign imprint does not constitute an indispensable requirement of the concept of money.[11] The issuance monopoly is a relatively recent development. The option of granting a single entity the power to coin money was still at the center of a heated debate in the first half of the 19th century between three currents of thought: the classical banking school, the currency school (or metallism) and the free banking school.[12] The notion of money does not presuppose a necessary connection with a government, as it is just something that circulates and that is used for exchange. Money is 'normally' but not 'necessarily' subject to a State monopoly: when it is, it is 'currency', a form of non-refusable payment under penalty of public sanctions.[13] The difference between money and currency lies in the type of

bestimmte Gruppe die fragliche Einheit nutzt. Eine allgemeine Anerkennung ist nicht zu fordern. Eine solche beschränkte Gruppe von Nutzern von Bitcoin lässt sich erkennen. Allein die Tatsache, dass einige Händler Bitcoin zu Zahlungszwecken akzeptieren belegt dies'.

[11] F.A. Mann believes that only money issued by the State can be defined as so. His thinking on the matter is reported by C. Proctor, *Mann on the Legal Aspect of Money* (Oxford: Oxford University Press, 2012), 15. In Italy Mann's line of thinking seems to be endorsed by B. Inzitari, 'La moneta', in B. Inzitari, G. Visentini and A. Di Amato eds, *La moneta-la valuta* (Padova: CEDAM, 1983), 6. The statist theory of currencies is contrasted by the Savigny theory, later developed by Nussbaum, according to which society decides which currency to adopt (cf. A. Nussbaum, *Money in the Law* (Chicago: Foundation Press, 1939), 28. In truth, the contrast between the two views is more apparent than real considering that even the most rigorous defenders of the statist theory, like Knapp, argue that the State is the regulatory source and the oldest organizer of a payment community (G.F. Knapp, *The State Theory of Money* (London: Macmillan & Company Limited, 1924), 128, writes: 'any other payment community may create money of its own'). Just as the proponents of the society theory of money are forced to recognize the centrality of the State in the promotion and defense of money.

[12] According to those who espouse the latter view (the free banking school, in particular Hayek, who wrote the famous book *Denationalisation of Money* (London: Institute of Economic Affairs, 1976) and Friedman, whose theories are expressed in the book 'Should There Be an Independent Monetary Authority?', in L.B. Yeager ed, *In Search of a Monetary Constitution* (Cambridge Massachusetts: Harvard University Press, 1962) the issuance of banknotes had to be free and the banking system had to function according to the principles of free trade even on crucial issues such as the issue of monetary means convertible into gold. It was hoped that all banks would have issuing power and the role of a central monetary authority (central bank) was not recognized. This extreme approach was refuted both by the members of the classical banking school (Fullerton, Tooke and John Stuart Mill) and from those of the metallism school (a doctrine born in Great Britain in the first half of the nineteenth century, advocated by a group of statesmen and economists including R. Torrens, S.J. Lloyd, McCulloch and Lord Overstone), both in favor of the establishment of a central bank with monopoly power over the issue of money.

However, while the latter proposed the establishment of certain rules of proportionality between the variations in the quantity of banknotes in circulation and gold reserves, the former did not consider it necessary because it was considered sufficient to simply maintain the gold convertibility rule in order to keep the price level constant. Undeniably, the Bitcoin project has its roots in Hayek's thinking. However, it differs from this in that the value of the free currency is not guaranteed by an underlying (gold). In this respect, Bitcoin evokes the Keynesian proposal advanced during the Bretton Woods agreements, which provided for the creation of a supranational entity that would issue a universal circulation currency, the bancor, which is not convertible into gold, from which it differs, precisely, because of the absence of an issuing center. For further information on the historical evolution of money, refer to C. Pernice, *Digital currency e obbligazioni pecuniarie* (Napoli: Edizioni Scientifiche Italiane, 2018), 9-34 and further bibliography there.

[13] In Italy the refusal to accept legal tender coins, originally punished with the stigma of

underlying consent: social in one case, legal in the other. This does not mean that the two phenomena cannot overlap: if a State granted legal tender status to an asset already used as medium of exchange in society, the two concepts would intertwine. Historical and economic experience shows that legislative decision did not determine the classification of a given good as money but rather afforded official recognition to a good that already served as such.[14] This is what happened in Japan where Bitcoin has been recognized as a means of payment since April 2017, and in San Salvador, the first country in the world that recently announced its intention to use Bitcoin as legal tender.

Money is primarily a social and economic institution that arose spontaneously among people, who, in the course of history, have identified goods to serve as a store of value to be used as a medium in the exchange of goods. It was born out of a need to overcome the practical inconveniences of bartering, without an agreement expressed by people and without a legislative act.[15] Nonetheless, historical evidence confirms the will, or perhaps the need, to acquire control of this choice, which ended up leading to the imposition of 'fiat money'.[16] However, nothing rules out that the

criminal law, is today punished with an administrative sanction pursuant to Art 33(a) of legge 24 November 1981 no 689, which decriminalized Art 693 of the Criminal Code. C. Viterbo, 'Debito in valuta estera e clausola oro' *Giurisprudenza civile commentata*, 195 (1957), writes as follows in this regard: 'È un pregiudizio antico, di cui la letteratura economica si è liberata solo in tempi recenti, e quella giuridica non ancora del tutto, quello secondo il quale la moneta sarebbe tale perchè lo Stato gli conferisce il corso legale. La moneta è invece un fenomeno puramente economico, indipendente da ogni intervento statale o legislativo. Per convincersene basti pensare che l'oro è giunto ad esser moneta senza l'intervento della legge o dello Stato, e spesso seguita ad esserlo anche contro la volontà degli organi costituiti. La moneta è soltanto quel bene che, giunto ad avere attraverso ad un processo storico, che potremmo chiamar di sublimazione, un valore di scambio tanto prevalente su quello d'uso da far passar questo in seconda linea, circola al solo fine di facilitare la circolazione, cioè lo scambio, degli altri beni. In questa definizione, che è modernissima e che ritengo esatta e completa, lo Stato e la legge non c'entrano per nulla, come si vede. Perciò il corso legale non costituisce affatto un elemento essenziale della moneta, almeno nel senso che non possa esistere moneta senza che lo Stato le abbia conferito il corso legale. Il corso legale conferisce solamente alla moneta un plus: il cosiddetto potere liberatorio'.

[14] L. Mosco, n 9 above, 28, who talks about the 'social creation' of money and remarks that: 'lo Stato, almeno normalmente e salve le eccezioni che si possono verificare in tempi eccezionali, attribuisce la qualità di denaro ad un bene che già nel commercio ha acquistato tale funzione'. T. Ascarelli, *La moneta* (Padova: CEDAM, 1928), 13, 44 and 50, observes that money 'ha natura necessariamente convenzionale' and 'l'obbligo di accettazione proprio delle valute è uno degli strumenti tecnici attraverso i quali lo Stato considera una determinata merce denaro o meglio valuta'.

[15] On the origin of money, see C. Menger, *Il metodo nella scienza economica* (Torino: UTET, 1937), 110 and Id, *Principi di economia politica* (Torino: UTET, 1976), 345.

[16] The entire history of money cannot be outlined here. However, it may be useful to briefly explain the reasons that led to the advent of fiat money and the monopoly of issue. The birth of fiduciary money can be traced back to the thirteenth century when banks, increasing the practice of granting loans to the State during wars in the form of bearer bonds, appropriated the right to expand credit without a matching increase in deposits. This power granted to banks, which made them arbitrators of circulation and monetary stability and therefore custodians of a function of public interest, gave rise to a series of problems whose solution was gradually identified in the course of the nineteenth century in establishing the monopoly of issue. However, the most crucial step taken by governments in the evolution and spread of paper money came with the affirmation of

community can contribute to the exercise of monetary sovereignty by according trust to a means of exchange other than legally imposed ones. Moreover, the principle of subsidiarity, currently a facet of positive law, provides for the devolution of sovereign functions to the levels of government closest to the citizens.[17] And also in this sense, empirical experience confirms this possibility. On a national level there have been attempts to establish local currencies, such as the Sardex, the Neapolitan Scec, the Messina Zanclon, the Ecoroma, the Promessa of Pisa, the Palanca of Genoa, the Venetex, the Lombard Link, and some regulatory attempts as well.[18] In Europe, following the Great Recession, since 2008 the experiences of complementary currencies that have as their common denominator the promotion of the local economy have multiplied, often on a municipal basis, like the Swiss Wir or the German Planet Heart. Over the last few years, well over 5,000 complementary currencies with distinct functions and purposes have been created worldwide, and some today propose to avail of to this tool to overcome the Covid-19 emergency.

> 'If money serves only (as such, that is, regardless of any competing uses) as an instrument of exchange, if its usefulness is entirely in the possibility of exchange',

then it is clear that the status of money cannot be denied to anything that fulfills this function.[19]

So, it is preferable to accept a functional definition of money, which focuses on the typical utility associated with the asset in question. Moreover, as one

forced currency (ie inconvertibility) and with the attribution of the nature of legal money to notes issued by institutions (ie non-refusable form of payment). From that moment on, the value of money came to depend solely on the policy of the State.

[17] The principle of subsidiarity is codified in Italian law (Art 118 of the Constitution) and in EU law (Art 5 TEU).

[18] At Italian level, an attempt to regulate complementary currencies initially took place with the proposal of an amendment to decreto legge 23 December 2013 no 145 (which, after defining Bitcoin' complementary electronic cryptocurrency used as a means of exchange without the purpose of a store of value on electronic communication networks', required that for transactions exceeding 1,000 euro in value the Bitcoin payment operation had to come under anti-money laundering law). Subsequently, through a bill presented on 30 July 2014 on 'delegation of authority to the government to regulate the issue and circulation of complementary currencies', which can be consulted at www.camera.it. Today there are hundreds of complementary currency systems around the world such as the Berkshares of Berkshire (Massachusetts), the Toronto dollar, the Salt spring dollar, the Ithaca hour, the Fureai kippu. See 'Dossier sulle monete complementari', at https://tinyurl.com/eud39h2p (last visited 31 December 2021); G. Lemme, 'Criptomoneta e distacco dalla moneta legale: il caso Bitcoin' *Rivista di diritto bancario*, 5 (2016); F. Di Vizio, 'Le cinte giudiziarie del diritto penale alla prova delle valute virtuali degli internauti' *dirittopenalecontemporaneo.com* (2018).

[19] T. Ascarelli, *La moneta* n 14 above, 51-56, who believes that money is by definition such only for the fact of carrying out the aforementioned task 'sicché nessun oggetto può aprioristicamente e necessariamente venire incluso, così nessuno può venire escluso da questa categoria'. G. Stammati, 'Moneta' *Enciclopedia del diritto* (Milano: Giuffrè, 1976), XXVI, 474, observes that the definition of money as anything that generally functions as a medium of exchange, derived from the definition of the main monetary function, which is intermediation of exchanges.

authoritative author has stated,

> 'things, (...) are not considered abstract, but (...) are appreciated and differentiated with regard to their aptitude to satisfy the needs of social life'.[20]

In order to properly classify entities/things, it is necessary to ascribe to them

> 'the classification best suited to a certain appreciation of their suitability to satisfy human needs, and therefore of the economic-social function proper to them as goods'.[21]

The difference between money and other goods is that it does not satisfy the immediate need of the counterparty: its advantage is that it can be used as a medium in the trade of goods and services. Money is neither a consumer good (not immediately fulfilling an individual need) nor a capital good (not used for the production of other goods) but a good that offers solely the utility that it can be used as a medium of exchange. Currencies were born to be exchanged: this is their very value and nature. Therein is the root of its relevance for legal purposes and therein lies the distinction between pecuniary debts and common debts of things. Contrary to other goods, money postpones the immediate satisfaction of the counterparty's need: its utility lies in the possibility to use it for a subsequent purchase of goods or services due to its high level of acceptance.

Therefore, money can be defined as any good chosen by a given community to convey internally a lasting credit[22] and that, due to its common acceptance as a

[20] E. Betti, *Teoria generale del negozio giuridico* (reprint, Napoli: Edizioni Scientifiche Italiane, 2002), 232.

[21] E. Betti, *Istituzioni di diritto romano* (Padova: CEDAM, 1947), I, 352.

[22] The economic and legal literature is actually divided between those who classify money as a means of exchange (this was the concept established by the Physiocrats and since then generally adopted by economists: money is an intermediate commodity used for the purpose of indirect exchanging) and those who show that at its origins is the need to have proof of a credit (in this sense G. Boccardo, *Biblioteca dell'economista* (Torino: UTET, 1879), VI, 21: 'finché le cose permutate sono d'ugual valore, non vi ha alcun bisogno di moneta. Se accadeva che fossero uguali gli scambi di prodotti o servigi tra coloro che vi addivenivano, la cosa era fatta. Ma spesso doveva accadere che quando taluno abbisognava un prodotto o un servigio dal suo vicino, questi non abbisognasse nello stesso tempo di un'ugual quantità di prodotti o di servigi, o fors'anche di nulla avesse bisogno (...). Se dunque tra di essi avveniva un'operazione con disuguaglianza di risultato, restava una certa quantità di prodotto o servizio dovuto dall'uno all'altro, e ciò costituiva un debito del quale il creditore avrebbe desiderato avere prova'. Boccardo refers that: E. Burke, *Reflections on the Revolution in France* (London: James Dodsley, 1790), defines gold and silver as the two metals recognized as representatives of the lasting and conventional credit of mankind; N. Baudeau, *Introduction à la Philosophie économique* (Paris: Libraire Paul Geuthner, 1771), states that currency is a kind of bill of exchange, payable at the request of the bearer; according to A. Smith, *Wealth of Nations* (London: Edwin Cannan, 1776), II, 2, a Guinea can be considered as a bill of exchange for a certain amount of necessary things and useful things traded on all the merchants in the neighborhood; E. Torton, *An inquiry into the nature and effect of the paper credit of Great Britain* (London: George Allen & Unwin, 1802), 260, writes that money, of

medium of exchange, usually satisfies the other tasks traditionally expected of money: common measure of value and store of value.[23]

The growing spread of Bitcoin confirms that it can be characterized as a collectively recognized medium of exchange. The interest of those who receive or transfer a virtual currency is the same as those who make transactions through legal currencies: to obtain or to grant purchasing power *vis-à-vis* those who decide to join the circuit. The utility conferred by virtual currency is to function as an medium of exchange, similar to what happens for legal currency.[24] The difference is linked to the type of guarantee recognized, which in this case is not legal but real, ie given by the market.

If there are no doubts that Bitcoin can be considered as a medium of exchange, that is not so as regards treating it as money in light of two functions traditionally performed by the latter. In this regard, the extreme volatility of its value does not allow the cryptocurrency to serve as a unit of account or a store of value. However, if the instability of Bitcoin exposes the holders to high risks,[25] this also happens

whatever nature, is an order on commodities representing the lasting and conventional credit of mankind). Both approaches appear to be correct, explaining two typical functions of the asset in question: as a functional entity, money is everything that is exclusively recognized as an exchange asset; as a share of conventional wealth, it represents a lasting credit that can be spent within a specific social body. That is, money is a means of exchange that incorporates the right to a service, which consists in the provision of a fraction of all the goods and services produced by the social body that recognizes that money as a means of exchange.

[23] An essential requirement of money is its suitability to serve as an instrument of exchange. Naturally, it has an accessory role, albeit immanent to the functions of measure of value and store of value. The necessity or desirability of their coexistence has been debated, and although the three functions tend in fact to concentrate on the same object, historically they have not always coexisted. According to T. Ascarelli, *La moneta* n 14 above, 50, a consistent and rigorous consideration of money should first and foremost 'fissare un fine che serva da elemento discretivo nell'indagine e rispetto al quale gli altri rimangano subordinati: voler tener contemporaneamente e sullo stesso piano conto di tutte le funzioni che in una determinata epoca compie un determinato oggetto-denaro è certo doveroso ai fini di molte indagini economiche, ma è pretesa inconciliabile con la coerenza del sistema quando si voglia formulare un concetto del denaro che abbia valore metastorico, ciò che non può farsi se non postulando un determinato fine come essenziale'. In particular, Ascarelli refers to the works of Menger who tends to place the function of medium of exchange at the forefront and to define money in relation to this function. So on p. 53 he writes: 'a me sembra come il concetto del denaro proprio nel nostro diritto positivo sia quello di strumento di scambio, (...) finché pertanto venga assolta la funzione di strumento di scambio, può anche venir assolta quella di misuratore di valore'. Similarly, V. Lojacono, *Aspetti privatistici del fenomeno monetario* (Milano: Giuffrè, 1955), 17, according to whom money is both a means of exchange and a means of payment, but it is a means of payment only because and as long as it is an instrument of exchange.

[24] See Case C-264/14 *Skatteverket* v *David Hedqvist*, judgment of 22 October 2015, available at www.curia.europa.eu, para 49: 'Transactions involving non-traditional currencies, that is to say, currencies other than those that are legal tender in one or more countries, in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, are financial transactions', and paragraph 52 'it is common ground that the 'Bitcoin' virtual currency has no other purpose than to be a means of payment and that it is accepted for that purpose by certain operators'.

[25] On the risks of virtual currencies see ECB, 'Virtual currency schemes', available at

with legal currencies, although to a different extent. Think of the German monetary crisis, when the paper mark lost its function as a measure of value or the extraordinary inflation in Europe after World War II. As has recently been noted by the German courts, there are also extremely weak and volatile currencies in the world, but this does not prevent them from being considered as currencies.[26] Among other things, unlike legal currencies, Bitcoin is deflationary so it could be a better store of value than legal currencies susceptible to inflation.

It is also undeniable that through its unit of account Bitcoin offers the possibility of expressing goods and services in a reference framework making them comparable. When money is accepted as an medium of exchange, a relationship arises with the traded good that expresses a measure of value.[27] Therefore, it can be concluded that Bitcoin is money (not currency) and consequently we can point to certain effects and obligations of paying in Bitcoin as pecuniary obligations. With this, it should be borne in mind, it is not intended to advocate the *exclusive* or *wholesale* application of the rules predicated on pecuniary obligations. Depending on each specific case and the associated protection required, all the rules in the legal system, even though they well have been designed for other contexts,[28] may

https://tinyurl.com/2wm47htk (last visited 31 December 2021); ECB, 'Virtual currency schemes – a further analysis', available at https://tinyurl.com/uae49ny9 (last visited 31 December 2021); Banca d'Italia, 'Avvertenza sull'utilizzo delle cosiddette 'valute virtuali", available at https://tinyurl.com/w8ah4xu7 (last visited 31 December 2021); FATF, Virtual currencies key definitions and potential AML/CFT Risks, available at https://tinyurl.com/3kjnyzee (last visited 31 December 2021).

[26] Berlin Court of Appeal judgment of 25 September 2018 n 10 above: 'Es gibt demnach auch äußerst schwache oder wertunbeständige Devisen. Dass diese ungern und deswegen selten international verwendet werden, ändert nichts an ihrer Einordnung als Devisen. Der Gesetzgeber hat keine Vergleichbarkeit zu „wertstabilen Devisen" oder "häufig und gern verwendeten Devisen" vorausgesetzt. Eine Vergleichbarkeit mit Devisen ist also nicht schon deswegen abzulehnen, weil Bitcoin erheblichen Wertschwankungen unterliegen'.

[27] B. Inzitari, 'Obbligazioni pecuniarie', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 2011), 3, writes that 'in quanto strumento di scambio il danaro manifesta la capacità di esprimere, rispetto ai beni con i quali è posto in relazione (…) equazioni omogenee in termini di valore'.

[28] E. Betti, *Teoria generale dell'interpretazione* (Milano: Giuffrè, 1955), II, 824, writes 'la ricognizione della valutazione originaria immanente e latente nella lettere della legge e costituente la *raio iuris* della norma è indispensabile per accertare in quale misura essa abbia subito modificazioni col sopravvenire di mutamenti nell'ambiente sociale (...) giacché solo attraverso il tramite di essa (...) è legittimo procedere ad un adattamento ed ad una trasposizione del testo legale nella viva attualità, e bilanciare giustamente l'interesse statico alla stabilità, conservazione e certezza con l'esigenza dinamica di rinnovamento nell'indirizzo sociale. (...) così l'interpretazione della legge viene a trovarsi dinanzi a un duplice compito: a) ricercare la valutazione originaria immanente alla norma nella sua concatenazione con l'intero ambiente sociale in cui fu emessa (...) b) ricercare se la norma ha maturato un esito sociale ulteriore, ancorché non intenzionale, consistente nel comporre il conflitto fra altre categorie d'interessi all'infuori di quelli previsto'. In making the original idea of the legislative wording coincide with the present reality, the interpreter 'deve cercare di conoscere quali interessi in gioco siano stati considerati, raffrontati e comparativamente valutati nello loro entità tipica e quali di essi abbiano determinato la composizione del conflitto nel senso statuito'.

operate to the extent that that are compatible and appropriate to the disputed case.[29]

III. Bitcoin and Art 1278 of the Civil Code

In particular, when Italian law applies,[30] Bitcoin can be regulated by Art 1278 of the Civil Code, which governs pecuniary obligations expressed in money that does not have legal tender standing in the State. The Civil Code does not use the expression 'debt of foreign currency', unlike other legal systems. Art 1278 uses broader wording: 'money that is not legal tender in the State' can include not only foreign legal currency but also: 1) money originally legal tender in the State but no longer in circulation (this case is regulated under Art 1277, para 2, of the Civil Code); 2) money with intrinsic value but not in circulation when the debt arose;[31] 3) and contractual money that is not associated with a specific currency system.[32]

[29] On the compatibility assessment and on the distinction between compatibility and adequacy criteria, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 91, especially note 230; Id, 'Il patto di famiglia tra bilanciamento dei principi e valutazione comparativa degli interessi' *Rassegna di diritto civile*, 190 (2008); Id, 'La scelta della disciplina applicabile ai c.dd. "vitalizi impropri". Riflessioni in tema di aleatorietà della rendita vitalizia e di tipicità e atipicità dei contratti' *Rassegna di diritto civile*, 532 (2015); Id, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013), especially 85 and 118. In a nutshell, it can be said that while a judgment as to compatibility calls for a formal (or logical-rational) evaluation and entails a duty to avoid the coexistence of contradictory rules with respect to the same case and at the same time, on the other hand a judgment as to adequacy must be made on a functional and axiological basis. On the possibility of applying, for example, the law governing the offer of financial products, see C. Pernice, *Digital currency e obbligazioni pecuniarie* n 12 above, 272 and *infra* in the text.

[30] Art 1278 of the Civil Code is applied if three conditions are met: that the law that governs the relationship is Italian; that the currency payable is not Italian; and that the payment is to take place in Italy. The literature on this point is almost unanimous. Cf T. Ascarelli, 'Obbligazioni pecuniarie', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1959), 368; B. Inzitari, *La moneta* n 11 above, 159; D. Sinesio, *Studi su alcune specie di obbligazioni. Artt. 1277-1320 codice civile* (Napoli: De Frede, 2004), 27; U. Breccia, 'Le obbligazioni', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 1991), 295; Corte di Cassazione 7 November 1956 no 4174, *Foro italiano*, 600 (1956).

[31] The hypothesis of currency with intrinsic value and legal tender is in fact regulated by Art 1280 of the Civil Code.

[32] Art 1278 of the Civil Code states that if a monetary obligation is expressed in a money that is not legal tender in the State, the obligor has the option to pay in legal currency, at the exchange rate on the day of the expiry and the place established for the payment. Similarly, albeit with reference to currency, Art 6.1.9 (Currency of payment) of the Unidroit Principles states: '(1) *If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless*

(a) that currency is not freely convertible; or

(b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment,

On the other hand, it is significant that the most widespread interpretation adopted by Italian scholars and case-law, influenced no doubt by the Minister of Justice's report accompanying the Civil Code,[33] sees Art 1278 of the Civil Code as exclusively linked to debts expressed in a foreign currency.[34] However, this is a narrow view that is not reflected in the actual wording and that neglects the historical *precedents* of the provision in question. In fact, Art 39 of the Commercial Code of the Kingdom of Italy of 1882 (a rule considered applicable also in civil matters, which the legislator of 1942 clearly took inspiration from) provided that it was possible to pay with the currency of the country, not only when the currency indicated in the contract had a mere 'commercial' form (Art 39) but also when the currency had no form at all.[35] In a meeting of 30 May 1940 concerning the regulation of pecuniary obligations it was highlighted that there was no reason to prohibit contracting with a currency that is not legal tender in the territory of the State, since the law must also refer to contracts where the services were expressed in crazie, Tuscan shields, Lucca shields, Paoli etc (ie non-State coins).[36] Moreover, a specific reference to 'foreign currencies' was present both in the wording of the law on cheques and in the one on bills of exchange, just prior to the adoption of the Civil Code.[37] If the legislator had wanted to limit

even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment' (emphasis in italics added).

[33] See *Relazione d'accompagnamento*, para 592, 126: 'la possibilità di prestare moneta diversa da quella dedotta è anche considerata quando il debito pecuniario è espresso in moneta estera; in tal caso il codice civile, come già l'art. 39 cod. comm., autorizza, nell'atto di pagamento, la sostituzione della moneta straniera con moneta nazionale (art. 1278). La moneta straniera diviene infungibile solo per volontà delle parti, cioè quando queste convengono la clausola "effettivo" (art. 1279)'.

[34] See A. di Majo, 'Le obbligazioni pecuniarie' *Enciclopedia del diritto* (Milano: Giuffrè, 1979), XXIX, 279; T. Ascarelli, 'Divisa e divisa estera' *Novissimo digesto italiano* (Torino: Utet, 1938), V, 88; Id, 'Obbligazioni pecuniarie' n 30 above, 368; E. Quadri, 'Le obbligazioni pecuniarie', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1984), IX, 503; Corte di Cassazione 2 December 2011 no 25837, *Giustizia civile*, 29 (2012).

[35] Art 39 stated: 'Se la moneta indicata in un contratto non ha corso legale o commerciale nel Regno e se il corso non fu espresso, il pagamento può essere fatto colla moneta del paese, secondo il corso del cambio a vista nel giorno della scadenza'. About this rule compare T. Ascarelli, *La moneta* n 14 above, 107; C. Vivante, *Trattato di diritto commerciale* (Milano: Vallardi, 1906), IV, 71, which, however, links the commercial form to market trading (ie those resulting from an official stock exchange list). *Contra* G. Pacchioni, 'Appunti critici sui pagamenti dei debiti convenuti in moneta estera' *Diritto commerciale*, 27 (1923), who notes that the commercial form is not always supported by the main market.

[36] This is the opinion expressed by Barcelona, which Asquini disagreed with. See Lavori preparatori del codice civile (anni 1939-1941). Progetti preliminari del libro delle obbligazioni, del codice di commercio e del libro del lavoro. Volume II. Progetto preliminare del libro delle obbligazioni (Roma: Libreria dello Stato, 1942), 24.

[37] See Art 47 of Regio decreto no 1669 of 1933 and Art 39 of Regio decreto no 1736 of 1933.

the scope of Art 1278 of the Civil Code only to money having legal tender in other States, it could have stated so expressly. Therefore, the expression used in Art 1278 cannot probably be considered entirely casual.

In reality, as has rightly been observed, Art 1278 of the Civil Code codifies the principle according to which in these cases the debtor has the option of paying his or her debt using the national currency instead of the agreed one (*una in alia solvi potest*).[38] The rationale of the rule is to simplify the debtor's position when the creditor has not disclosed an interest in obtaining the monetary medium of a specific economic system thanks to the so-called 'effectivo clause'.[39]

This principle seems to be applicable beyond the cases of foreign debt because it strikes the best balance between the parties' interests every time the object of the obligation is a currency that is not legal tender in the State.

Therefore, Art 1278 of the Civil Code can regulate contractual payment systems and cases in which the exchange takes place between an asset with a use value and one with just an exchange value but not subject to a monopoly by any sovereign authority. In these cases there is no barter in which the exchange value is based on the use-value of the goods traded, but there is a sale because the utility to the seller is given by the advantages that subsequent purchases can provide.

This view, suggested a couple of years ago in one of the first writings dealing with the topic, was recently adopted also by Italian scholars and case-law.[40] For example, the *Marcianise* arbitration award of 14 April 2018.[41] The case concerned a price to be paid in part in cryptocurrencies. The arbitrator found a similarity between the case of foreign currency debt, regulated by Art 1278 of the Civil Code, and that of cryptocurrencies debt, not subject to specific regulation,

Both provisions in the first paragraph refer generally to the possibility of paying the cheque or bill in 'currency that is not the currency of the place of payment' and then establish in paragraph 2 that 'the value of the foreign currency is determined by the customs of the place of the payment'. It would seem that only the rule on the determination of the value is limitedly designed solely for foreign currencies. However, it should be noted that paragraph 3 of both provisions, in recalling 'the previous provisions', refers verbatim to the 'effective payment clause in foreign currency'.

[38] B. Inzitari, 'Obbligazioni pecuniarie' n 27 above, 182.

[39] See the comment under Art 6.1.9 (Currency of payment) of the Unidroit Principles: 'As a general rule, the obligor is given the alternative of paying in the currency of the place for payment, which may have definite practical advantages and, if that currency is freely convertible, this should cause no difficulty to the obligee. If, however, the currency of the place for payment is not freely convertible, the rule does not apply. *Parties may also exclude the application of the rule by agreeing that payment is to be made only in the currency in which the monetary obligation is expressed (effectivo clause). If it has an interest in the payment actually being made in the currency of account, the obligee should specify this in the contract*' (emphasis in italics added). On the distinction between *money of contract* and *money of payment*, see A. di Majo, 'Le obbligazioni pecuniarie' n 34 above, 243; B. Inzitari, ibid 188, which refers to N. Nussbaum, *Das geld in Theorie und Praxis des deutschen und auslandichen Rechts* (Tu¨bingen: Mohr, 1925), 360; E. Quadri, 'Le obbligazioni pecuniarie' n 34 above, 505.

[40] Now, in this sense M.F. Campagna, 'Criptomonete e obbligazioni pecuniarie' *Rivista di diritto civile*, 183 (2019).

[41] At www.giustiziacivile.com, with a note by M.R. De Ritis, 'Obbligazioni pecuniarie in crittovalute'.

and stated that, in the absence of explicit regulation, Art 1278 of the Civil Code could also apply to pecuniary obligations expressed in cryptocurrencies. This is because both cases concerning pecuniary obligations have to be paid in currencies that are not legal tender in Italy. Consequently, while the creditor of a sum determined in cryptocurrency cannot request payment in Italy's legal tender, the debtor can pay in the agreed currency or legal currency.[42]

One aspect that was not investigated by the arbitral award but which would nevertheless be interesting to investigate is how the rule should operate in such circumstances, also provided for by Art 1278 of the Civil Code, further to which the payment in legal currency must take place 'at the exchange rate on the day of expiry and in the place established for the payment' given that there is no 'official' exchange rate for Bitcoin. In this regard, it should be noted that just as there are no theoretical obstacles to bringing contractual currencies within the scope of application of Art 1278 of the Civil Code, likewise there is nothing in the wording that would preclude interpreting the 'exchange rate' as the one used in commercial practice. Any solution espoused by authoritative literature, which in the past had opted for an extensive interpretation of 'money not having legal tender in the State' and which consistently affirmed that

> 'the reference in Art 1278 to the 'exchange rate' must be understood as referring to a market rate of coins resulting from free (but legitimate) negotiations in which the coins are considered as commodities (against a price in currency)'.[43]

In the event that there is no official exchange rate, pursuant to Art 1278 of the Civil Code one could well refer to the exchange rate practiced on the markets.

This solution is supported not only by the previous rules contained in Art 39 of the Commercial Code[44] but also by the rules governing bills of exchange and cheques. In fact, Art 47 of Regio decreto no 1669 of 14 December 1933 and Art 39 of Regio decreto no 1736 of 21 December 1933 provide that when the currency of the security is not the one in effect at the place of payment, the sum can be paid in the currency of the country at the value of the expiry day 'determined by the customs of the place of payment', where the reference to customs obviously dispenses with the need for an official rate exchange. Rather, it must be said that since cryptocurrencies are traded in virtual markets that apply significantly different exchange rates, it could be difficult to identify a reference market.

[42] On the need to consider the obligations regulated by Art 1278 of the Civil Code optional and not alternative, refer to C. Pernice, *Digital currency e obbligazioni pecuniarie* n 12 above, 60 and further bibliography there.

[43] T. Ascarelli, 'Obbligazioni pecuniarie' n 30 above, 377. On the need to consider the currency exchange contract as a purchase contract, refer to C. Pernice, *Digital currency* n 12 above, 64 and further bibliography there, as well as more recently M. Cian, 'La crittovaluta' n 7 above, 331.

[44] Art 39 in fact stated that in the absence of an exchange rate, reference should be made to 'corso della piazza più vicina' (prices of the closest exchange).

Presumably the only reasonably applicable criterion would be to apply the average exchange rate of the platforms 'lawfully' located where the obligation must be fulfilled.[45]

Lastly, it is necessary to determine the moment at which to refer to the exchange rate, a question that could appear of no small importance in view of the fluctuations in value that virtual currencies sometimes encounter even during the same day. Assuming that the payment is timely,[46] there are three viable solutions: when the payment is made; the average rate on the day of maturity; and the exchange rate at the beginning of the expiry day.

The first solution would seem to find support in Art 39 of the Commercial Code, which referred to money not having legal tender as 'exchange rate at sight on the day of maturity' and in para 592 of the report accompanying the Civil Code that reads

> 'The possibility of lending a currency other than the one envisaged is also considered when the pecuniary debt is expressed in foreign currency; in this case the Civil Code, as already Art 39 of the Commercial Code did, authorizes *in the act of payment* the replacement of the foreign currency with the national currency (Art 1278 of the Civil Code)' (emphasis in italics added).

Except that in Art 1278, or rather the report that accompanied its adoption, does not refer to the moment of the *exchange* but to that of the *choice*, which according to case-law can operate even during the course of the relationship and without the need for a specific form.[47]

[45] See Art 6.1.9 of the Unidroit Principles (in note 31) which refers to 'the applicable rate of *exchange prevailing* there when payment is due'. For textual references to the 'average of exchange rates' and to 'free and lawful negotiations', see T. Ascarelli, 'Corsi di cambio e parità della lira' *Foro italiano*, 704 (1953); Corte d'Appello di Genova 8 September 1952, ibid; Corte d'Appello di Roma 15 May 1952, and Corte d'Appello di Roma 26 February 1952, *Foro italiano*, 1413 (1952). In this regard, it should be remembered that Italian law requires 'service providers relating to the use of virtual currency' to register in a special section of the currency exchange register.

[46] Due to the vastness and complexity of the subject, for further analysis of the damage caused by the delay in performance of the obligations expressed in non-legal tender currency, reference should be made to C. Pernice, *Digital currency e obbligazioni pecuniarie* n 12 above, 66 and further bibliography there. Compare the Unidroit Principles (in note 33).

[47] Corte di Cassazione 22 January 1998 no 55, available at *De Jure online*: 'in tema di adempimento di obbligazioni pecuniarie determinate in valuta estera, l'art. 1278 c.c., nel limitarsi ad attribuire al debitore la facoltà alternativa di pagare in moneta avente corso legale, non indica anche le specifiche modalità secondo cui tale facoltà abbia ad essere esercitata, restando, per l'effetto, rimessa al debitore ogni determinazione circa i tempi e le forme della relativa scelta, con la conseguenza che, svincolata da ogni rapporto di contestualità con l'effettivo pagamento, quest'ultima ben può manifestarsi *per facta concludentia*, posti in essere in qualunque tempo dall'obbligato prima del concreto adempimento, purché risulti inequivoca, secondo il prudente apprezzamento del giudice di merito, la volontà di pagare in moneta nazionale anziché estera. Deve, pertanto, ritenersi espressione legittima della ricordata facoltà di scelta l'offerta (non formale), in corso di causa, da parte del debitore, di una somma di denaro in moneta nazionale – sempreché non ostino alla inequivocità di tale manifestazione di volontà altri elementi che ne

However, the wording of Art 39, although apparently more problematic, is not insurmountable. In fact, numerous reasons militate in the opposite direction. Before dwelling on the point, it is necessary to digress a little in order to clear the field of possible misunderstandings. One could in fact think that by anchoring the moment of the exchange to that of payment, one could offer the debtor room for trickery as he or she could select the most convenient moment to exercise the *facultas solutionis* in order to pay a smaller sum than the one contractually agreed. Apart from the observation that such a conclusion would postulate unlikely predictive capabilities,[48] it must be noted that in truth the problem is more apparent than real given that when the debtor pays he or she will always offer the creditor a sum in legal currency suitable for purchasing the equivalent in virtual currency (and the other way around). The decrease in the debtor's assets, whatever the chosen means of payment and the time selected for fulfillment, will always be the same.

For example, the obligation provides for the payment of one hundred Bitcoins on 1 May. At 09:00 a Bitcoin is worth ten euros; at 18:00 a Bitcoin is worth one euro. If the debtor fulfills at 9:00 he or she will have to give the creditor one hundred Bitcoins or a thousand euros. If he or she pays at 18:00 he or she will transfer one hundred Bitcoins or one hundred euros. The circumstance that the value of Bitcoin changes during the day has a relative impact since both at 09:00 and at 18:00 the debtor will send the creditor an equivalent purchasing power expressed in legal currency provided for the agreed amount in contractual currency. For his or her part, the debtor will be impoverished by the same value at any time he or she fulfills. Because even if the debtor paid at 18:00 (when the exchange rate is apparently favorable to him or her) in national currency, he or she would not gain a greater advantage than if he or she decided to pay in contractual currency. The economic strain on him or her would be the same. To be clear, if the *facultas solutionis* were not used or, for example, the effective payment clause was envisaged, if the debtor did not possess the Bitcoins, the debtor would always spend one hundred euros to buy them and send them to the creditor. In other words, whatever the currency and the chosen moment, the debtor will in any case provide the creditor with the same economic purchasing power.

It is a corollary of the nominalistic principle – which also applies to obligations expressed in currencies not having legal tender (including foreign currencies)[49] and

contrastino la apparente significazione – così che il giudice di merito, vincolato a detta scelta, dovrà, in sede di emanazione della sentenza, disporre necessariamente il pagamento in valuta nazionale, senza che possa spiegare influenza, sul contenuto della pronuncia, la richiesta – formulata dall'attore in citazione e non modificata per tutto il corso del procedimento – di pagamento in valuta estera, così come originariamente convenuto tra le parti'.

[48] No one can know if the exchange rate during the day will change to one's advantage or disadvantage.

[49] On the applicability of the nominalistic principle to the cases referred to in Art 1278 of the Civil Code, see T. Ascarelli, 'Messa fuori corso della valuta e debiti pecuniari' *Foro italiano*, 73 (1953); Id, *La moneta* n 14 above, 284; M. Giuliano, 'Considerazioni sul principio nominalistico in obbligazioni pecuniarie di moneta straniera nel caso di rinnovamento monetario' *Temi*, 897

which basically characterizes all relationships entailing obligations and not only pecuniary ones – given that, unless otherwise provided, in contracts envisaging deferred performance, the '*nomen*' of the promised performance is what counts rather than the value of the agreed assets.[50] This does not mean that an excessive change in the value of the services covered by an obligation is always irrelevant. The system offers various remedies in this regard, both legal (like supervening excessive onerousness)[51] and contractual (reference to indexation clauses), and it simply means that the feared 'risk' is inherent in any relationship entailing an obligation. A similar problem could also arise in the reverse hypothesis, that is, when the debtor decides to fulfill in contractual currency. Even in this case the system could

(1963); F. Mastropaolo, 'Obbligazioni pecuniarie' *Enciclopedia giuridica* (Roma: Treccani, 1990), XXI, 11, which in this regard cites D. Barbero, *Sistema del diritto privato italiano* (Torino: UTET, 1962), II, 44; E. Quadri, 'Le obbligazioni pecuniarie' n 34 above, 509; Corte di Cassazione 30 March 1966 no 842, *Foro italiano*, 1539 (1966); Corte di Cassazione 16 September 1980 no 5275, *Giurisprudenza italiana*, 1678 (1981); Corte di Cassazione 25 February 2005 no 4076, *Diritto dei trasporti*, 638 (2006).

[50] C. Viterbo, n 13 above, 196-197 writes: 'il principio nominalistico della moneta, di cui tanto spesso si ragiona come di un principio speciale, non è in fondo che l'applicazione nel campo della moneta del principio secondo il quale le variazioni nelle qualità, anche essenziali, della cosa nella obbligazione a termine durante il decorso del termine stesso non affettano il contratto se non vi è vera e propria trasformazione della cosa stessa, o se le trasformazioni non sono avvenute per colpa del debitore. E ciò che vale per una cosa determinata, vale naturalmente anche per il *genus*, quando cause generali ne modifichino la qualità: come sarebbe ad esempio, se l'eccezionale umidità della stagione modificasse il potere dolcificante di tutto lo zucchero esistente. Del resto, gli stessi principi si applicano alle merci acquistate dai commercianti per rivenderle, cioè in considerazione del loro valore, analogamente a quanto avviene per la moneta, senza ricorrere al principio nominalistico; pur senza che si sia mai pensato che l'aumento o la diminuzione di valore delle medesime potesse avere una influenza sul contratto'.

[51] On the possibility of applying the arrangement to monetary inflation, see E. Betti, *Teoria generale del negozio giuridico* n 20 above, 489, especially note 12; A. Riccio, 'Dell'eccessiva onerosità', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 2010), 135; R. Franceschelli, 'La svalutazione monetaria come causa di risoluzione dei contratti per eccessiva onerosità' *Temi*, 130 (1949); E. Favara, 'Svalutazione monetaria ed eccessiva onerosità' *Giurisprudenza completa della Corte suprema di Cassazione – Sezioni civili*, 278 (1953); R. Granata, 'Brevi cenni in tema di eccessiva onerosità dipendente da eventi di portata generale e in specie da svalutazione monetaria' *Giurisprudenza completa della Corte suprema di Cassazione – Sezioni civili*, 58 (1954); E. Quadri, 'Congiuntura economica e svalutazione monetaria: osservazioni in tema di risoluzione per eccesiva onerosità' *Diritto e giurisprudenza*, 809 (1975); Id, 'Le obbligazioni pecuniarie' n 34 above, 464 (with particular reference to the possibility of resorting to additional tools such as good faith or unjustified enrichment); M. Lipari, 'La risoluzione del contratto per eccessiva onerosità: la struttura del giudizio di prevedibilità e la rilevanza dell'inflazione' (cited in Corte di Cassazione 15 December 1984 no 6574) *Giustizia civile*, 2795 (1985); F. Macario, 'Inflazione, fluttuazione del mercato ed eccessiva onerosità' (cited in Corte di Cassazione 13 February 1995 no 1159) *Corriere giuridico*, 595 (1995); O. Cagnasso, 'Appunti in tema di sopravvenienza contrattuale e svalutazione monetaria (nota a Trib. Torino, 14 dicembre 1979)' *Giurisprudenza italiana*, 416 (1980); N. Irti, 'Inflazione e rapporti tra privati' *Giustizia civile*, 310 (1981); P. Greco, 'Debito pecuniario, debito di valore e svalutazione monetaria' *Rivista di diritto commerciale*, 108 (1947); R. Pardolesi, 'Indicizzazione contrattuale e risoluzione per eccessiva onerosità' *Foro italiano*, 2147 (1981); A. di Majo, 'Il controllo giudiziale del principio nominalistico (profili comparatistici)', in C.M. Mazzoni and A. Nigro eds, *Credito e moneta* (Milano: Giuffrè, 1982), 773.

detect the trend in value within the day, and it is all too obvious that if the creditor requested the service at 09:00 he or she would obtain a 'real' value very different from what he or she would receive if he or she made the request at 18:00.

What leads one to reject the exchange-rate-at-the-time-of-payment argument is rather a need for certainty in legal transactions, the same that animates the nominalistic principle (now endorsed by most of the world's legal systems):[52] if the moment of the exchange were linked to that of payment, both the debtor and the creditor would not be able to assess the exact amount of the performance due. This circumstance also explains why the proposal, albeit authoritatively suggested, to refer to the average of the exchange rate on the day of expiry, is difficult to implement.[53] And also why it is difficult to implement the proposal, again authoritatively suggested, of distant reference to the average of the exchange rate on the day of maturity. The benchmark would be reconstructed only *ex post* with inevitable damage to the security of relationships.

Indeed, considering that the service becomes payable on a given day, and that fulfillment can be requested from the beginning of the same, the most reasonable solution appears to be the exchange rate at the beginning of the day of expiry, regarding the estimated value of the platforms located in *locus solutionis*.[54] Moreover, this is the practice used for bank transfers, which in determining the date of execution of the transfer refer to the currency of the beginning of the day of the transfer.

IV. The Acceptance Obligations of Virtual Currencies

If, with reference to the cases referred to in Art 1278 of the Civil Code, scholars and the courts believe that the nominalistic principle can be applied, it is certain that for currencies other than those having legal tender in the State the so-called debt discharge principle cannot operate,[55] given the principle of strict

[52] In France, for example, this principle is codified in Art 1343 of the French Civil Code.

[53] T. Ascarelli, 'Obbligazioni pecuniarie' n 30 above, 384, note 6.

[54] Corte di Cassazione 25 September 2015 no 19084, available at cortedicassazione.it, has applied the 'exchange rate in force at the maturity of the obligation, that is, at the time (...) in which the credit matured and became collectable, with consequent tendential irrelevance of the subsequent fluctuations in the exchange rate'.

[55] The debt discharge principle requires the acceptance of legal currency also by those who do not adhere to the national economic circuit pursuant to an explicit legislative provision designed to safeguard the legal value of money in a system in which the State guarantees its usefulness (interesting in this regard is the passage contained in Tribunale di Ivrea 24 February 1947, *Foro italiano*, 520 (1947): 'la moneta corrente, sebbene sia economicamente priva di apprezzabile valore intrinseco, è pur sempre un bene in quanto assume, in forza di un atto d'imperio dello Stato, funzione di mezzo di scambio, così come gli altri beni i quali a tal funzione possono adempiere invece in virtù della loro connaturata utilità'). This explains the inadmissibility of exceptions to the operation of the rule in question, considered to belong to the fundamental principles of monetary public order that distinguish every modern economic system. On this aspect M. Semeraro, *Pagamento e forme di circolazione della moneta* (Napoli: Edizioni Scientifiche

legality that governs all sanctions under public law, be they criminal or administrative.[56] The debt discharge principle requires acceptance of legal currency also by those who do not adhere to the national economic circuit under penalty of the infliction of administrative sanctions. In contractual payment systems, the sanction could thus only be civil, although the legal basis for the non-refusal of cryptocurrency may be different. In this regard, four hypotheses must be distinguished.

The first occurs when the parties have explicitly and previously agreed that the fulfillment must be achieved through the giving of cryptocurrencies. In this case, there are no doubts regarding the dutiful acceptance of this form of payment. The refusal to receive the cryptocurrency by the creditor would be unlawful and the provisions under Arts 1206 *et seq* of the Civil Code would be applicable (*mora credendi*).

A further case could be that in which the debtor is about to make a purchase from a retailer that advertises Bitcoin as a payment tool. In this circumstance, the indication of the possible solution of fulfillment takes the form of an offer to the public concerning executable contracts, as regards the payment of the price, through the sponsored means of payment. Once the agreement is finalized, in this case contemporaneously with the purchase, the merchant will not be able to revoke the consent previously expressed in this regard, so that even in this case the Bitcoin payment can no longer be refused. Unlike the case examined above, however, the offeror can freely revoke the consent given to the payment in Bitcoin as long as the agreement has not been validly concluded, according to the time rules set out in Art 1328, para 1, of the Civil Code, and in compliance with the formal requirements referred to Art 1336 of the Civil Code. The debtor, however, should be given the right to pay his or her debt in legal tender currency in accordance with Art 1278 of the Civil Code.

Italiane, 2008), 26; P. De Vecchis, 'Moneta e carte valori' *Enciclopedia giuridica* (Roma: Treccani, 1990), XXIII, 14.

[56] In criminal matters, the *nulla poena sine lege* principle is recognized in Art 25 of the Constitution, Art 1 of the Criminal Code, Arts 5 and 7 ECHR and Art 49 of the Nice Charter. As for administrative sanctions, Art 1 of legge 24 November 1981 no 689, headed 'Principio di legalità', provides as follows: 'Nessuno può essere assoggettato a sanzioni amministrative se non in forza di una legge che sia entrata in vigore prima della commissione della violazione. Le leggi che prevedono sanzioni amministrative si applicano soltanto nei casi e per i tempi in esse considerati'. The most recent legislative developments and case-law that have ruled out equating Bitcoin with legal currencies must therefore be interpreted in this perspective. Reference is made in particular to the Fifth Anti-Money Laundering Directive (on this aspect see C. Pernice, 'Crittovalute e Bitcoin: stato dell'arte e questioni ancora aperte', in F. Fimmanò and G. Falcone eds, *Fintech* (Napoli: Edizioni Scientifiche Italiane, 2020), 533; Id, 'Crittovalute: tra legislazione vigente e diritto vivente' *rivistsaianus.it*, 43-80 (2020); V. De Stasio, 'Le monete virtuali: natura giuridica e disciplina dei prestatori dei servizi connessi', in M. Cian and C. Sandei eds, *Diritto del Fintech* (Vicenza: CEDAM, 2020), 216 and to the Berlin Court of Appeal judgment of 25 September 2018, n 10 above. In the ruling of the German court it is evident that the lack of equivalence is dictated by the principle of determinacy and typicality that governs criminal prosecution ('jedenfalls aus strafrechtlicher Sicht unter Beachtung des Bestimmtheitsgebots').

Another case again is that in which the buyer wants to make a payment in Bitcoin to a person who normally uses cryptocurrencies, but who has not assumed an explicit obligation to receive them as payment or who has not sponsored this form of payment. The question that arises is to understand whether in the absence of an express contractual obligation, where the payment method has not been specified, the creditor may or may not be 'forced' to accept the digital currency. In other words, one might ask whether the payment in virtual currency can be relevant for the 'fulfillment', with all that follows in terms of *mora debendi* and discharge of the obligation. All parties assume that the payment will be made in a legal currency which is accepted by the State. It is true that '(w)here a monetary obligation is not expressed in a particular currency, the payment must be made in the currency of the place where the payment has to be made',[57] but in this regard, it is also necessary to bear in mind that in order for a payment in Bitcoin to be made, the debtor must know the creditor's public key (similar to what happens for bank transfers). Where the parties have not agreed on the basis of an agreement prior to or coeval to the exchange, the key can be known only when the creditor has communicated it on other occasions.

However, in these cases, it could be argued that joining the Bitcoin economic circuit allied to the principle of good faith means that this form of payment cannot be refused just like in the first two hypotheses examined above. In its objective meaning, in fact, good faith requires the parties to model their behavior according to the rules of loyalty, honesty and correctness, obliging them to behave in a manner which although not entailing an 'appreciable personal sacrifice' still ensures that the other party will be able to properly fulfill his or her obligation.[58] If the creditor has the necessary tools to carry out transactions with the cryptocurrency and has not expressed the desire to obtain a particular currency, it may have no legitimate grounds to refuse this form of payment. The interest of the creditor of a debt of money takes the form of gaining an abstract economic interest. The fact that this is conferred through pecuniary means other than legal tender currency entails an effort for the recipient that nonetheless falls within the limits of its good faith duty to safeguard the interests of the debtor. This is because if the creditor wishes to obtain a specific currency, it can do by exchange.[59]

[57] See Art 6.1.10 of the Unidroit Principles (Currency not expressed): 'Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made'.

[58] Under this principle, each person is therefore required to carry out all legal and/or material acts that are necessary to safeguard the interest of the counterparty to the extent that they do not involve an appreciable sacrifice on their own part. It consists of the effort that each party must make, without going so far as to make an appreciable sacrifice, so that the other party can perform correctly. Amongst many, Corte di Cassazione 9 March 1991 no 2503, *Foro italiano*, 2077 (1991), and Corte di Cassazione 16 October 2002 no 14726, *Danno e responsabilità*, 174 (2003).

[59] On the subject see Tribunale di Verbania 18 June 1982, in P. Cendon ed, *Commentario al codice civile* (Torino: Giuffrè, 2009), 1827: 'l'oro, sia sotto forma di monete che di lingotti, deve ritenersi un mezzo di pagamento alla stregua delle valute aventi corso legale nei rispettivi Stati';

From a different interpretative perspective, it could then perhaps be argued that joining the Bitcoin system constitutes acceptance of an open regulatory contract with which the parties accept to receive the cryptocurrency as payment for the exchange of goods and services. In this sense Bitcoin, although it is not legal tender according to the traditional understanding of the term, could be considered legally current in the community that has chosen the medium itself to convey credit internally. In this regard, the definition offered by the English Oxford Dictionary is interesting, which describes currency as a money system in widespread use in a particular country, placing the emphasis not on State issuance but on its use as a medium of exchange within a given territory.[60]

Finally, when the parties usually settle their own trading operations in Bitcoin, it may also be recognized as a trade custom pursuant to Art 1340 of the Civil Code.

V. Deposit on Exchange Platforms

Bitcoin, like fiat currencies, is a fungible and consumable legal asset whose value in use rests entirely in its utility as a medium of exchange.[61] In this regard, the objection of those who assert that the computer code that uniquely identifies each virtual currency would make each piece of cryptocurrency unique and unrepeatable is not persuasive.[62] The fact that a generic good can be recognizable does not detract from the fact that it is perfectly replaceable with others of the same kind. Consider

Corte di Cassazione 9 December 1983 and 15 December 1987, ibid: 'la normativa valutaria considera mezzi di pagamento non soltanto quelli la cui circolazione è imposta dalla legge, come i biglietti di Stato e quelli di banca a corso legale, ma anche ogni altro innominato mezzo valutario tra cui i metalli preziosi e le monete auree, ed infine ogni altra *res* avente una quotazione ufficiale in un consistente mercato, tale da consentire la sua pronta convertibilità in biglietti di banca od in merce o servizi equivalenti al suo valore intrinseco, obiettivamente determinato dalle quotazioni di mercato'; Tribunale di Milano 24 April 1992, *Orientamenti della giurisprudenza del lavoro*, 313 (1992) holding that a cashier's check (like legal tender currency) could not be refused under Art 1277 of the Civil Code due to its easy transformation into legal tender currency; Corte di Cassazione-Sezioni unite 18 December 2007 no 26617, *Foro italiano*, 503 (2008), with a note in favor by G. Lemme, 'La rivoluzione copernicana della Cassazione. La moneta legale, dunque, non coincide con la moneta fisica' *Banca borsa titoli di credito*, 553 (2008) according to which the expression 'money having legal tender in the State' referred to Art 1277, paragraph 1, of the Civil Code it must be understood with reference 'to all the means of payment in use in the State', including therefore also bank money. See T. Ascarelli, 'Messa fuori corso della valuta' n 49 above, 72 note 2, that in regard to the *facultas solutionis* pursuant to Art 1278 of the Civil Code writes: 'La facultas solutionis (...) si fonda sulla considerazione che il denaro viene sempre considerato come strumento di scambio, sì che (salvo clausola contraria) può ammettersi che per il creditore sia indifferente ricevere la specie pattuita o il suo equivalente in valuta'.

[60] www.oed.com.

[61] M. Semeraro, n 55 above, passim, believes that because money has no use value (ie is unsuitable for immediately and directly satisfying a human need), it cannot be classified as a legal good.

[62] G. Gasparri, 'Timidi tentativi giuridici di messa a fuoco del "Bitcoin": miraggio monetario crittoanarchico o soluzione tecnologica in cerca di un problema?' *Diritto dell'informazione e dell'informatica*, 428 (2015).

that each banknote is identified with a serial number: this circumstance does not in any way undermine the undisputable definition of money as a fungible asset.[63] Bitcoin, in fact, represents the first form of cash in the digital age. From which it follows, where the recipient has the power to use them, there is the possibility of classifying the deposit of cryptocurrencies as an irregular deposit, similar to what happens for bank current accounts.

Although cryptocurrencies arose with the aim of creating a medium of exchange as an alternative to fiat currency without the intermediation typical of traditional payment systems, it is frequent for users to turn to platforms that offer preparatory services for the use and exchange of virtual currencies. The digital currency network has thus seen the proliferation of third parties and commercial companies engaged in brokerage services in the use of cryptocurrencies that offer remunerated custody and mediation services in the transfer, purchase and management of virtual currencies.[64] For this reason, in order to cover all possible areas of development of virtual currencies and in an attempt to offer an initial embryonic regulation of the phenomenon, Italian and EU laws have adopted a particularly broad notion of 'providers of services relating to the use of virtual currency' which includes internally any natural or legal person who provides third parties, amongst others, 'services functional to the use, exchange, storage of virtual currency and their conversion from or into legal tender currencies'.[65] In combining, and therefore distinguishing, the following services, the legislator has evidently taken note of the ecosystem that has been created around cryptocurrencies: exchange platforms that offer the possibility of creating virtual wallets (web wallets) to keep cryptocurrencies (*rectius* the keys that allow its handling);[66] companies that provide services to

[63] On the point, A. Caloni, 'Bitcoin, Profili civilistici e tutela dell'investitore' *Rivista di diritto civile*, 159 (2019), especially note 41.

[64] On the point, N. Busto, 'Bitcoin tra "disintermediazione" e "iperintermediazione"' *Ciberspazio e diritto*, 320 (2016).

[65] Art 1(2)(f) of decreto legislativo no 231 of 2007, as amended by decreto legislativo no 125 of 4 October 2019, defines 'prestatori di servizi relativi all'utilizzo di valuta virtuale: ogni persona fisica o giuridica che fornisce a terzi, a titolo professionale, *anche online,* servizi funzionali all'utilizzo, allo scambio, alla conservazione di valuta virtuale e alla loro conversione da ovvero in valute aventi corso legale *o in rappresentazioni digitali di valore, ivi comprese quelle convertibili in altre valute virtuali nonché i servizi di emissione, offerta, trasferimento e compensazione e ogni altro servizio funzionale all'acquisizione, alla negoziazione o all'intermediazione nello scambio delle medesime valute*' (in italics the parts introduced by decreto legislativo no 125 of 2019). With a view to a more incisive oversight of operators in virtual currencies, through the latest anti-money laundering directive the EU legislator has instead chosen to omit the requirement of 'professionalism' in the exercise of activities subject to authorization and supervision.

[66] See the definition offered by the Fifth Anti-Money Laundering Directive of 'custodian wallet provider' referred to Art 1(2)(d) ('means an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies') and today implemented in Art 1(2)(*ff-bis*) of decreto legislativo no 231 of 2007 ('prestatori di servizi di portafoglio digitale: ogni persona fisica o giuridica che fornisce, a terzi, a titolo professionale, anche online, servizi di salvaguardia di chiavi crittografiche private per conto dei propri clienti, al fine di detenere, memorizzare e trasferire valute virtuali'). A greater awareness of the phenomenon immediately emerges. The activity carried out by these persons falls within the scope of safeguarding

facilitate transactions, or sell equipment to enable payment through electronic funds transfer or that offer security services for virtual currency deposits.[67]

These are extremely opaque activities that are totally unregulated from a legal point of view (except for the obligations of registration and customer due diligence in accordance anti-money laundering law),[68] although – already *prima facie* – the similarities between these activities and those carried out by authorized operators and intermediaries in the banking and financial sector appear evident.

In this regard, in a previous study,[69] this author already highlighted the partial groundlessness of the opinion of those who object to the impossibility of equating web wallets with payment accounts due to the fact that

> 'while in the case of the payment account the money enters the full availability of the service provider, the quantity of virtual currency present in the digital wallet remains in the exclusive domain of the owner, holder of the address and private encryption keys'.[70]

As for the alleged difference between payment accounts and web wallets, it is true

private cryptographic keys on behalf of their customers, in order to hold, store and transfer virtual currencies: therefore, not custody of cryptocurrencies but, indeed, of private keys.

[67] Art 1(2)(ff) of decreto legislativo no 231 of 2007 addresses and therefore distinguishes use, custody, exchange and conversion. The definition is probably dictated by the need to cover all possible areas of development of virtual currencies, but in practice it is not easy to decipher. As regards custody, strictly speaking, the keys that allow the virtual currencies' movement are stored in web wallets, but not the virtual currencies themselves. But paper wallet or hardware wallet custody services are also conceivable. Conversion refers to the 'exchange' of virtual and fiat currencies. More problematic is ascribing an independent meaning to the terms 'use' and 'exchange'. 'Functional services for the exchanges' could perhaps include intermediation activities in the trading of virtual currencies against virtual currencies and sites that allow the acquisition of goods or services in cryptocurrencies. But the same activities could also fall within the concept of 'functional services for the use' of virtual currencies. On the subject, see the draft decree of 31 January 2018 adopted by the Ministry of Economy and Finance which can be consulted at *dt.tesoro.it*, which in Art 2(2) brings 'commercial operators who accept virtual currency as consideration for any performance relating to goods, services or other utilities' under the umbrella of service providers relating to the use of virtual currencies.

[68] Regarding this matter, there is a further difference between the original rules set out in the amended decreto legislativo no 231 of 2007 and the Fifth Anti-Money Laundering Directive. Pursuant to Art 3(5)(i) of decreto legislativo no 231 of 2007 (original version) 'Service providers relating to the use of virtual limited to the performance of the conversion of virtual currencies from or into fiat currencies' are obliged to comply with anti-money laundering legislation. The Fifth Anti-Money Laundering Directive, on the other hand, took care to extend the obligations of providers engaged in exchange services between virtual currencies and fiat currencies also to 'custodian wallet providers'. Following the reform made by decreto legislativo 4 October 2019 no 125, which introduced subparagraph *i-bis* into Art 3, likewise Italian law expressly provides that 'custodian wallet providers' are subject to the obligations set forth in the field of anti-money laundering.

[69] C. Pernice, *Digital currency* n 12 above, 273 and recently, Id, 'Crittovalute e Bitcoin' n 56 above, 528.

[70] L. D'Agostino, 'Operazioni di emissione, cambio e trasferimento di criptovaluta: considerazioni sui profili di esercizio (abusivo) di attività finanziaria a seguito dell'emanazione del D. Lgs. 90/2017' *Rivista di diritto bancario*, 14 (2018).

that cryptocurrencies (present, mostly, in the blockchain) are less often deposited in digital wallets but rather private keys. However, this circumstance often grants the manager of the web wallet the economic availability of the values held.[71] After all, the web wallet is not that different from the functioning of a bank account: the public key is similar to IBAN; the private key to the code that the account holder must enter from time to time to move money. The available balance is only virtually present on the account, just like the Bitcoins are not really placed in the web wallet. The system of custody of values and management of the transaction register is different: not centralized and institutional but distributed and private.[72]

These views have been endorsed in Court of Florence judgment no 18 of 21 January 2019.[73]

The case before the court originated from the fraudulent theft of a very significant amount of cryptocurrencies from an exchange platform called Bitgrail managed by the company BG Services s.r.l. Following the shortfall and having ascertained the inability of the company managing the platform to return the value of what had been stolen, the plaintiff creditor noted the state of insolvency of the company and requested that it be declared bankrupt. For its part, the defendant debtor argued that it could not be considered to owe the value of the stolen cryptocurrencies just because it had put them on the exchange platform as a regular deposit since the platform manager had no right to use the sums deposited by users. The defendant added that BG Services s.r.l. had put in place all the measures required by ordinary diligence.

In its judgment the Florentine court classified virtual currencies as fungible goods

> 'because (...) they are of the same nature and the same quality, belonging to the same IT protocol' – similar to money – and as 'consumable because of their use (when they are spent) and (...) subject to the same *ratio* as other assets that allow payments to be made'.[74]

[71] M. Krogh, 'La responsabilità del gestore di piattaforme digitali per il deposito e lo scambio di criptovalute' *Diritto internazionale*, 150 (2019), notes that 'è possibile che all'esterno *l'exchange* si presenti come gestore decentralizzato ma di fatto abbia la possibilità di ingerirsi nella gestione dei portafogli (*wallet*) attraverso la conoscenza delle chiavi private dei clienti stessi'.

[72] The web wallet service provider recalls the figure of the ancient private banker. This is another aspect that recalls the ideology of denationalization of money advocated by Hayek on the basis of which the idea of creating decentralized currencies was developed.

[73] Tribunale di Firenze 21 January 2019 no 18, *Le Corti Fiorentine*, 90 (2019), with a note by this author, 'Piattaforme digitali e deposito di crittovalute: il Tribunale di Firenze decide sul fallimento di Bitgrail'.

[74] Similarly, in a case of capital contributions of virtual currencies the Corte d'Appello di Brescia in its judgment 30 October 2018, *Società*, 26 (2019), with notes by F. Murino, 'Il conferimento di token e di criptovalute nelle S.r.l.' and F. Felis, 'L'uso di criptovaluta in ambito societario. Può creare apparenza?', stated that 'cryptocurrency must be equated on a functional level to money, in fact it serves as the euro, to shop'.

The court found that the exchange could have access to the sums it held, concluding that the relationship between the exchange and the user had to be classified in terms of irregular deposit with the consequent applicability of Art 1782 of the Civil Code according to which

> 'If the deposit has as its object a quantity of money or other fungible things, with the right for the depositary to use it, the latter acquires title thereto and is required to return as many of the same kind and quality'.

Therefore, the exchange had obtained ownership of the cryptocurrencies deposited and the ensuing obligation, in respect of the deposits made by users on the platform, to return the *tantundem eiusdem generis*. It was able to claim in its defense, unlike what happens for regular deposits, that it had adopted all the measures required by ordinary diligence.

It is interesting to note in the reasoning of the judgment, the constant reference to the lexicon of banking relationships: the court-appointed expert compares the user to the account holder, the transactions to wire transfers and the hash, ie the signature, to the 'CRO code' typical of electronic funds transfers.[75] While the court itself, in investigating the relationship between exchange and user, cited the case-law on the deposit of money.[76]

[75] The court-appointed expert explains that 'Ogni volta che il nodo riceveva una richiesta di eseguire una transazione da BitGrail, ne generava il codice, lo firmava con le chiavi private e segrete in esso memorizzate e la trasmetteva verso gli altri nodi della rete, propagando così pubblicamente la transazione e "attivando" quindi la transazione così come un bonifico viene "attivato" nel momento in cui viene comunicato, come minimo, al destinatario dei fondi. Nel mondo della *blockchain* distribuita, il "bonifico" viene comunicato a tutti i nodi che, chi prima chi dopo, lo segnano nella loro, *blockchain* in locale e propagano ulteriormente la notizia del trasferimento così che tutti i nodi vengono raggiunti e aggiornati'.

[76] One can read in the judgment that 'le richieste di prelievo da parte degli utenti BitGrail comportavano una sorta di "bonifico" dal conto unico generale BitGrail al conto indicato dall'utente (...). Alla luce di tali circostanze, deve affermarsi la natura irregolare del deposito, in quanto BG Services S.r.l. aveva facoltà di disporre della cosa depositata *ex* art. 1782 c.c. e ne acquisiva conseguentemente la proprietà non sussistendo apposita clausola derogatoria sul punto (cf Corte di Cassazione 22 March 2013 no 7262: "in caso di deposito irregolare di beni fungibili, come il denaro, che non siano stati individuati al momento della consegna, essi entrano nella disponibilità del depositario, che acquista il diritto di servirsene e, pertanto, ne diventa proprietario, pur essendo tenuto a restituirne altrettanti della stessa specie e qualità; e ciò, salvo che al negozio sia stata apposta un'apposita clausola derogatoria") (...). Proprio in ragione della loro fungibilità (...) le valute (ovviamente divise per specie) non recavano elementi distintivi circa la loro appartenenza ai singoli utenti, dando così luogo ad un deposito irregolare, cui consegue lo specifico obbligo per il depositario di mantenere sempre a disposizione dei depositanti la quantità integrale, con un coefficiente di cassa del 100%'.

Reasoning similar to that found in the Florentine judgment appears in a recent ruling by the Tribunal de Commerce de Nanterre of 26 February 2020. The case concerned a Bitcoin loan, granted by Paypium, a French exchange platform, in favor of Bitgrail, a British market-maker company operating in the field of cryptocurrencies. With regard to the legal classification of the relationship between Bitspread and Paymium, the French Court, given the fungible and consumable nature of Bitcoin, applied the regime governing consumer loans. In French law there are two

VI. The Sale of Virtual Currencies

The sale of Bitcoin, as is the case with precious metals, can fall within two distinct legal cases: sale of movable property or sale of financial products.[77] It is

types of loan. Pursuant to Art 1874 of the French Civil Code 'Il y a deux sortes de prêt: Celui des choses dont on peut user sans les détruire. Et celui des choses qui se consomment par l'usage qu'on en fait. La première espèce s'appelle 'prêt à usage'. La deuxième s'appelle 'prêt de consommation". The *prêt de consommation* pursuant to Art 1892 of the French Civil Code is 'un contrat par lequel l'une des parties livre à l'autre une certaine quantité de choses qui se consomment par l'usage, à la charge par cette dernière de lui en rendre autant de même espèce et qualité'. The *prêt à usage*, so-called *commodat*, pursuant to Art 1875 of the French Civil Code is 'un contrat par lequel l'une des parties livre une chose à l'autre pour s'en servir, à la charge par le preneur de la rendre après s'en être servi'.

As for consumption, the Court of Nanterre notes that 'BTC is 'consumed' during its use, both to pay for goods or services, and to exchange it for other currencies or lend it, just as it happens for fiat currencies, although it is not legal tender. BTC is therefore consumable by reason of its use'.

On fungibility it states that BTCs are fungible because they are of the same species and of the same quality, in the sense that the BTCs all come from the same IT protocol and are subject to an equivalence relationship with the others to BTC allowing one to make a payment pursuant to the old Art 1291 of the French Civil Code, which became Art 1347-1 of the same code, which provides in its second paragraph: 'Obligations involving a sum of money are fungible, even in different currencies, provided that they are convertible or have as their object a quantity of things of the same type'. For more information on this case and, more generally, on the rules governing digital resources in the French legal system refer to C. Pernice, 'Le risorse digitali nell'ordinamento giuridico francese' *Diritto del mercato assicurativo e finanziario*, 265 (2020).

[77] Although Bitcoin was conceived as a means of payment, it is often used as an investment tool. Recital 10 of the Fifth Anti-Money Laundering Directive: 'Although virtual currencies can frequently be used as a means of payment, they could also be used for other purposes and find broader applications such as means of exchange, investment, store-of-value products or use in online casinos'. The possibility of using the same good for different purposes is a fairly frequent possibility. In fact, different hopes can be placed in the same good since it can be used for different purposes. This is the case of money that can be used as an instrument of exchange, as a commodity (think of numismatic coins) or as a speculative good.

T. Ascarelli, 'Obbligazioni pecuniarie' n 30 above, 581, underlines the decline of the conception of money as a good set aside for future exchange for consumption purposes. The prevailing view excludes the possibility of bringing the trading of virtual currencies within the category of transactions involving financial instruments as the list contained in Section C of Annex I of the Financial Services Law is considered as exhaustive. On the other hand, many question the possibility of resorting to the atypical notion of financial products which includes, pursuant to Art 1(1)(u) of the Financial Services Law in addition to financial instruments, also 'any other form of investment of a financial nature'.

On financial instruments and the relationship between them and the category of atypical financial products, see F. Annunziata, 'Sub art. 94', in P. Marchetti and L. Bianchi eds, *La disciplina delle società quotate* (Milano: Giuffrè, 1999), 86; R. Costi and L. Enriques, 'Il mercato mobiliare', in G. Cottino ed, *Trattato di diritto commerciale* (Padova: CEDAM, 2004), VIII, especially 34; V. Comporti, 'La sollecitazione all'investimento', in A. Patroni Griffi, M. Sandulli and V. Santoro eds, *Intermediari finanziari, mercato e società quotate* (Torino: UTET, 1999), 553; L. Salamone, 'La nozione di strumento finanziario tra unità e molteplicità' *Rivista di diritto commerciale*, 712 (1998); A. Lupoi, 'I prodotti finanziari nella realtà del diritto: rilevanza del rischio finanziario quale oggetto dell'operazione d'investimento' *Rivista trimestrale di diritto dell'economia*, 69 (2017); A. Niutta, 'Prodotti, strumenti finanziari e valori mobiliari nel t.u.f. aggiornato in base alla MIFID (con il d.lgs. n. 164/2007)' *Rivista trimestrale di diritto dell'economia*, 807 and

no coincidence that the most recent notion of virtual currencies provided by domestic legislation refers to the possibility of using cryptographic tokens both as a means of exchange and as investment instruments.[78] The point that we now intend to develop is to understand when an offer of Bitcoin can constitute an investment proposal subject to the rules of the Financial Services Law (decreto legislativo 24 February 1998 no 58). To do this, it is necessary to first specify what is meant by financial product. The exact definition of the concept is of primary importance because the offer to the public of financial products is subject to precise rules of conduct whose non-observance can lead to the application of administrative and even criminal sanctions.

According to the public authority responsible for regulating Italian financial markets, Consob, whose rules in this regard have been upheld by the Supreme Court,[79] an atypical financial product is any investment of a financial nature implying the coexistence of the following three elements: (i) the investment of capital; (ii) the expectation of a return of a financial nature; and (iii) the assumption of risk directly connected to or related to the investment of capital.

More in detail, the supervisory authority contrasts financial investments (ie atypical or unnamed financial products) to 'consumption investments': the former occur every time 'the saver (...) confers his or her money with an expectation of profit', income that must be promised upon the establishment of the contractual relationship and must be uncertain, that is, subject to risks related to the activity that the investment concerns; the latter, on the other hand, include

> 'the purchase of goods and the provision of services which, even if concluded with the intention of investing one's own assets, are essentially aimed at procuring the investor the enjoyment of the asset, transforming one's cash into real assets suitable for directly satisfying the non-financial

especially 833 (2009); V.V. Chionna, 'Strumenti finanziari e prodotti finanziari nel diritto italiano' *Banca borsa titoli di credito*, 1 (2011); Id, *Le forme dell'investimento finanziario* (Milano: Giuffrè, 2008), 189; A. Pomelli, 'I confini della fattispecie "prodotto finanziario" nel Testo unico della finanza' *Giurisprudenza commerciale*, 103-120 (2010); E.M. Mastropaolo and S. Praicheux, 'Qualità degli strumenti finanziari e loro applicazione ad altri beni e contratti, nel diritto francese e italiano' *Banca borsa titoli di credito*, 196 (2002).

[78] As has been observed 'La definizione giuridica del Bitcoin sembrerebbe variare a seconda dei contesti e dei modi in cui tale valuta virtuale viene impiegata, quindi le riflessioni convergono nell'ammettere che senza una valutazione del caso concreto sia impossibile concettualizzare – a priori – una definizione generale e sempre valida delle valute virtuali' (G.M. Nori, 'Bitcoin, tra moneta e investimento' *Banca Impresa Società*, 18 (2020)).

[79] Amongst many, Consob DAL/97006082 of 10 July 1997, DIS/98082979 of 22 October 1998, DIS/99006197 of 28 January 1999, DIS/36167 of 12 May 2000, DIN/82717 of 7 November 2000, DEM/1043775 of 1 June 2001 and DTC/13038246 of 6 May 2013, available on the supervisory authority's website. Corte di Cassazione 19 May 2005 no 10598, available at ilcaso.it; Corte di Cassazione 15 April 2009 no 8947, *Giustizia civile – Massimario*, 626 (2009); Corte di Cassazione 17 April 2009 no 9316, *Giurisprudenza commerciale*, 103 (2010); Corte di Cassazione 5 February 2013 no 2736, *Contratti*, 1105 (2013); Corte di Cassazione 12 March 2018 no 5911, *dirittoegiustizia.it* (2018).

needs of the saver himself or herself'.

There is a further step, however, which is often not properly highlighted in studies dedicated to the topic: the notion of financial product does not include operations that lead to the purchase of material assets for investment purposes where this is achieved through an increase in the value of the asset itself over time (as in the case, for example, of investment funds in works of art and precious metals) and not as a result of management by others or of a repurchase obligation by the issuer or third parties. The circumstance, therefore, that a *res* can be appreciated as a result of the trend of the asset's prices over time is not sufficient to denote the existence of a financial return, as the operation must be included in an economic initiative conducted by others.[80] On the basis of that view, the supervisory authority, called upon to resolve some disputes concerning virtual currencies, has, for example, suspended the activities of a company that remunerated the holders of cryptocurrencies against term deposits.[81] Similarly, again on the subject of cryptocurrencies, Consob considered that the sale of extraction packages with the obligation to repurchase by the selling company constituted a financial investment.[82]

However, just some months ago, there was news of a landmark judgment of the Supreme Court that allows the sale of Bitcoin advertised with information suitable to enable savers to evaluate whether or not to join in the initiative and accompanied by promotional messages with particular emphasis on the profit achievable from investing in cryptocurrencies.[83] The decision deserves attention and clarification. It is no coincidence that in the aftermath of the news, *rectification* comments appeared regarding the alleged revolutionary significance of the decision. In fact, at first glance the Supreme Court would seem to have included currency exchange operations among financial products but on closer examination this is not actually the case. From the text of the judgment it is not possible to know with absolute certainty the type of activity carried out by the convicted person. However, on a key point there can be no doubt: the conversion of Bitcoin into legal currency

[80] See Corte di Cassazione 5 February 2013 no 2736, 79 above, according to which, the purpose of a financial contract presupposes 'la prospettiva dell'accrescimento delle disponibilità investite, senza l'apporto di prestazioni da parte dell'investitore diverse da quelle di dare una somma di denaro'; Tribunale di Verona 23 May 2019, *Giurisprudenza italiana*, 2450 (2019), with a note by B. Petrazzini, 'Diamanti da investimento: la responsabilità della banca collocatrice', where it is specified that in financial investments 'il capitale investito (...) viene gestito da colui che ha proposto l'investimento'; M. Miola, 'Sub art. 94', in G.F. Campobasso ed, *Testo Unico della finanza. Commentario* (Torino: UTET, 2002), 798, which defines a financial investment as 'un investimento del risparmio' aimed at 'aspettativa di un reddito, non influenzabile in modo decisivo dall'investitore e con assunzione di un rischio pur esso finanziario, in quanto derivante dalla stessa operazione di impiego di capitali'.

[81] Consob Resolution 29 May 2019 no 20944, available on the supervisory authority's website.

[82] Consob Resolution 1 February 2017 no 19866 and 20 April 2017 no 19968, both available on the supervisory authority's website.

[83] Corte di Cassazione 17 September 2020 no 26807, *dirittobancario.it* (2020).

(and vice versa) cannot be equated to the sale of financial products.

Exchange contracts, in fact, are reconstructed as sales contracts due to the fact that in relation to the interest of the buyer, money does not perform the function of price.[84] Indeed, legal counsel for the appellant before the Supreme Court claimed that for the currency exchange, decreto legislativo no 90 of 2017 contains special provisions that remove this activity from the scope of application of the legislation on financial instruments. This is because self-referential virtual currencies, as also confirmed by European case-law,[85] are a means of payment, although their trading may in certain cases constitute an investment offer. But for this to happen, it is not enough that the sale be carried out through advertising campaigns that place a particular emphasis on the income that can be earned from Bitcoin purchases. It is necessary, and this is the point we wish to underline, that there be a 'transfer in space and time of purchasing power',[86] a constraint on the enjoyment of the asset, a repurchase obligation. An example will better help clarify the concept.

Let's examine cases on the sale of precious items. The fact that an operator proposes an investment in gold or diamonds by leveraging the particular profitability of these assets, whose value is presumably destined to appreciate over time, does not therefore only determine the application of the Financial Services Law. As stated before: the circumstance that a *res* may increase its value due to the trend of the asset's prices is not sufficient to affirm that there is a 'financial return'. And the result is no different even in the event that the sale is proposed to the 'public' by disclosing the purchase conditions. We have seen, in fact, that the financial nature of an operation presupposes management by others, a reliance on the sums invested, which in the present scenario is not the case. In order for there to be a financial investment, the operation must be structured in such a way as to 'tie up' the resources used not entailing just the mere use of capital (a recurring circumstance in any sale).[87]

[84] On the need to consider a currency exchange contract as a contract, refer to C. Pernice, *Digital currency* n 12 above, 64 and further bibliography there, as well as, more recently, M. Cian, 'La crittovaluta' n 7 above, 331. In a nutshell, it can be noted that the exchange contract is a peculiar one as from a structural point of view there is an exchange of money for money. Therefore, prima facie, it would not seem to fall within either barter (good for good) or sale (good for money). However, this contract is treated as a purchase and sale since, on the one hand, money is considered as an asset in kind and not as consideration and, on the other hand, money acts as a price. And as it has been authoritatively argued that what characterizes a sale is the existence of 'consideration for a price'. In other words, there is a sale if the money performs its function as a price or as a measure of the economic value of the consideration or performance by the other party (Cf P. Perlingieri, 'Cessione del credito', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1982), 60; G.B. Ferri, 'La vendita', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 2000), XI, 183; D. Rubino, 'La compravendita', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1962), XXIII, 234; C.M. Bianca, 'La vendita e la permuta', in F. Vassalli ed, *Trattato di diritto civile* (Torino: UTET, 199), VII, 1017.

[85] Case C-264/14 n 24 above.

[86] E. Franza, 'La commercializzazione di oggetti preziosi presso gli sportelli bancari' *dirittobancario.it*, 5 (2017).

[87] 'La vendita di oggetti preziosi non è riconducibile ad un'attività d'investimento di natura

Thus, in the case of diamonds, the Supreme Court has classified as an investment contract the purchase and deposit of precious items to be returned at the end of the calendar year with the payment of the amounts originally paid for them together with an additional sum for the custody carried out.[88] These 'ready to run' operations are deemed to be of financial nature not because of the type of asset involved but because of the purpose of the contract. It is not then Bitcoin (nor the diamond rather than gold) in itself that constitutes an instrument or a financial product, since it could, if anything, constitute the underlying of such transactions.[89] The volatility of the value of Bitcoin poses protection requirements, especially as regards information, similar to those found pertaining to financial investments, so this characteristic alone cannot warrant a broad interpretation of the notion of financial product relying solely on the effects of the transaction on the market. A series of constitutional principles would be violated, such as that of legal certainty and *nulla poena sine lege stricta*.[90]

But the thesis already falters on the empirical level. What rules should in fact be applied to the sale of goods whose original stable value becomes oscillating

finanziaria, se non quando al trasferimento di proprietà del bene (...) è collegato un contratto che riconosce una o più opzioni dell'acquirente', Tribunale di Verona 23 May 2019, n 80 above.

[88] Corte di Cassazione 5 February 2013 no 2736, n 79 above, where one can read that 'l'investimento di natura finanziaria comprende ogni conferimento di una somma di denaro da parte del risparmiatore con un'aspettativa di profitto o di remunerazione, vale a dire di attesa di utilità a fronte delle disponibilità investite nell'intervallo determinato da un orizzonte temporale, e con un rischio. Ora, quel che nella specie la società Diamond proponeva al pubblico era proprio il "blocco" di parte dei risparmi per un anno con la prospettiva del "guadagno" in conseguenza di ciò. Il meccanismo negoziale attraverso cui si perveniva a questo risultato veniva descritto come la consegna in affidamento di un diamante del valore ipotetico di 1.000 euro, chiuso in un involucro sigillato, contro il versamento in denaro della stessa somma e l'impegno della società, dopo dodici mesi, di "riprendersi" il diamante, restituendo il capitale di 1.000 euro e corrispondendo l'importo di 80 euro a titolo di custodia. La causa negoziale è, dunque, finanziaria, in quanto la ragione giustificativa del contratto, e non il suo semplice motivo interno privo di rilevanza qualificante, consiste proprio nell'investimento del capitale (il "blocco" dei risparmi) con la prospettiva dell'accrescimento delle disponibilità investite, senza l'apporto di prestazioni da parte dell'investitore diverse da quella di dare una somma di denaro'. Similarly, on the subject of gold bars and coins, see Consob Resolution 11 September 2018 no 20576. On the subject of selling works of art, see Corte di Cassazione no 5911 of 12 March 2018 n 79 above.

[89] Tribunale di Verona 23 May 2019, n 80 above: 'il diamante non può essere considerato uno strumento finanziario'. On the inapplicability of the rules dictated by Arts 21 *et seq*. of the Financial Services Law to the sale of diamonds as not qualifying as an investment service, see Tribunale di Parma 26 November 2018 and 21 January 2019, *dirittobancario.it* (2019).

[90] Corte di Cassazione of 15 April 2009 no 8947, n 79 above: 'gli investimenti di natura finanziaria, per essere assoggettati ai controlli (...) in quanto prodotti finanziari, debbono rispondere a caratteristiche economico-giuridiche che, se pur non tali da consentirne la riconduzione alla gamma delle fattispecie tipiche (di strumenti finanziari) elencate nel citato comma 2 (dell'art. 1 del TUF), siano quanto meno oggettivamente analoghe'. This is to avoid that, given 'l'estrema genericità della previsione normativa, che in palese contrasto con il principio di legalità e tipicità dell'illecito amministrativo dettato dalla L. 689 del 1981, art. 1', might 'assoggettare a sanzione amministrativa, a mera discrezione della Consob, una vasta gamma di condotte di operatori commerciali, ogni qual volta le offerte (o richieste) rivolte al pubblico prospettassero la particolare remunerativitá di operazioni negoziali finalizzate al conseguimento di un reddito qualsiasi'.

(and vice versa)? A more careful study of the case recently decided by the Supreme Court confirms the assumption. The *indicted* platform did propose the sale of Bitcoin as an investment, but mentioned the so-called contract for difference derivative instruments through which other financial products are traded. The portal therefore did not function as a simple intermediary for the sale of crypto currencies, but played an active role in informing and proposing investments, among other things extremely risky, associated with virtual currencies. From this perspective, the Supreme Court judgment is to be endorsed.

VII. Bitcoin and Succession Law

The problems that Bitcoin poses in regard to the development of the law are many and interesting. If on the one hand there are no doubts that the economic nature of this new digital good means that it can fall within succession law, on the other hand, the absence of a specific regulatory framework leaves doubts as to the exact rules applicable to it.

From a legal point of view one could ask whether Bitcoin can be considered as money also for the purpose of the rules on hotchpot, and therefore whether Art 751 of the Civil Code or rather Art 750 of the Civil Code, respectively dedicated to the collation of money or different goods, should apply. The problem is not only theoretical but determines important practical consequences. Just consider that according to the prevailing case-law in the former case the nominalistic principle would operate whereas in the latter case the value of the good upon the date of death should be taken into account.[91] Similarly, one might ask whether Bitcoin can be considered money for inheritance tax purposes. In this regard, Art 9 of the Capital Acquisitions Tax Law (decreto legislativo 31 October 1990 no 346) provides that 'money, jewelry and furniture are considered included in the hereditary assets for an amount equal to 10 per cent of the total net value'.[92]

From an operational point of view the main problem concerns how the heirs can access the funds that are part of the deceased's estate. The only title that allows one to transfer (ie to use) Bitcoin is the private key. Even if it is possible to trace the Bitcoin holder through the address/public key, the deceased's heirs cannot spend it without the private key. In this regard it is important to specify

[91] Compare A. Albanese, 'Due (antiche) questioni in tema di collazione: l'intestazione in nome altrui; i frutti del bene ereditario' *Famiglia, Persone e Successioni*, 249 (2008); Corte Costituzionale 17 October 1985 no 230, *Rassegna di diritto civile*, 473 (1986), with a note by C. Licini, 'Reintegrazione della quota di legittima, collazione del denaro donato e principio di razionalità'; Corte Costituzionale 21 January 1988 no 64, *Giurisprudenza costituzionale*, 181 (1988); Corte Costituzionale 27 July 1989 no 463, *Giurisprudenza costituzionale*, 2145 (1989); Corte di Cassazione 28 February 1987 no 2147, *Vita notarile*, 747 (1987); N. Cipriani, 'Collazione del denaro e illegittimità dell'art. 751 c.c.' *Rassegna di diritto civile*, 1 (2013).

[92] See R.M. Morone, 'Criptovalute e successione italiana', in F. Fimmanò and G. Falcone eds, *Fintech* (Napoli: Edizioni Scientifiche Italiane, 2020), 458.

that if an owner loses his or her public key, it is possible to recreate it using the private key. On the contrary, it is impossible to regenerate the private key from a public key or an address. If the owner loses his or her private key, any Bitcoin found at this public address will be inaccessible. So to ensure that the Bitcoins pass to the heirs the deceased must disclose the private key to them.

Unfortunately, however, it is difficult to transmit this key without exposing it to persons other than the designated recipients. For example, the insertion of the key in a will could be problematic since it must be shown to all heirs, and by them to further persons for the purposes of attending to bureaucratic formalities on many occasions.

A solution could be to insert the key of a further encrypted file containing the key of the Bitcoin wallet in a will or to leave potential heirs a key that can unlock the funds only if used in conjunction with the one in possession of a designated executor. Another solution could be to form a paper wallet and hence print the keys and keep them in a place accessible, after the death of the deceased, only to the heirs.

The situation is even more complicated when the deceased leaves no instructions regarding the private key. In this case, the issues concerning how the heirs can access the funds forming part of the deceased's estate are more complex because the pseudonymity of the addresses (public key) could make the identification of the deceased owner problematic. In this regard, it is necessary to distinguish between situations in which the cryptocurrencies are directly or indirectly held.

When the cryptocurrencies are stored in a web wallet, the access to the private key of the Bitcoin wallet can be obtained with the collaboration of the wallet provider, who is obliged to cooperate with the user's heirs to put them in possession of that which is theirs by succession law. Since wallet providers are – under the recent Directive 2018/843/EU – subject to the customer due diligence obligations further to anti-money laundering law, the risk of anonymity is practically excluded. In this case, for the heirs who do not know the account access credentials, it will be sufficient to contact the portfolio manager to recover the private key, as long as they know the public address or at least the manager who holds the cryptocurrencies. The heirs will be able to prove their status and take possession of the funds held by contacting the intermediary or the depositary, exactly as occurs for depository banks regarding sums of money. The intermediaries, in turn, will be required to deliver the sums (*rectius* the keys) only after the proof of submission of the declaration of succession to the tax authorities. Many legal systems give the successor a claim against the third party to turn over possession to them.[93]

[93] In Italy, for example, see Art 460 of the Civil Code further to which the person called upon to accept an inheritance but who has not yet accepted it and is therefore not yet the possessor, can bring a possessory actions to protect the estate, without any need for material possession. The heir may also carry out acts of preservation, supervision and temporary administration, and may obtain authorization from the courts to sell assets which cannot be preserved or the preservation of which involves serious expense. The heir may not perform the acts indicated in the preceding

However, this is not sufficient. One must also combat the risk that the person in possession of the private key first uses it for a self-serving transfer before handing it over to the heir or representative. This can easily be achieved by supplementing the obligation to transfer the private key with the obligation to refrain from any use, disposition or sharing of the information with third parties.

Where the keys are communicated in apps on the phone, on the computer (software wallet) or on flash drives (hardware wallet), or printed in a paper wallet, in the absence of instructions from the deceased the heirs will be able to access the funds forming part of the deceased's estate only if they are able to find a way to access the devices in which the Bitcoins are stored. Otherwise, there will be no way to fully get hold of the tokens that they have legally inherited, and they will never be able to use them again.

To overcome this problems, there are some services that aim to manage the inheritance of Bitcoin with a 'keep-alive' system that sends emails to the account owner and transfers the funds to another (previously specified) wallet in case of no response within a given period. Some are studying smart contracts that in case of the owner's death automatically transfer the keys to the Bitcoin address of the designated heir. However, this mechanism risks clashing with the prohibition against succession agreements under Art 458 of the Civil Code. In this case, in fact, there are those who, in line with prevailing Italian literature and case-law, detect signs of a prohibited succession agreement pursuant to Art 458 of the Civil Code: the existence of an agreement aimed at regulating a future succession, the irrevocability of the transfer (a circumstance implicit in smart contracts whose execution is unstoppable) and the existence of a residual.[94]

VIII. Conclusion

These are some of the issues and problems regarding Bitcoin that an interpreter is called to solve in the absence of a clear regulatory framework, an arduous task indeed. However, those who wish to simplistically relegate the phenomenon to the 'mysterious', placing it in a sort of forgotten corner of financial regulation are guilty of unqualified laziness. In order to offer adequate protection to the interests involved in this new virtual reality in the absence of specific legislation on the matter, the only solution is to resort to the correct use of the interpretative tools that take account of reality. The absence of public regulation does not mean a 'regulatory void'.

First of all, there are the general principles and in any case, pending more developed legal thinking, nothing excludes the possibility of applying existing

paragraphs when a receiver has been appointed under Art 528 of the Civil Code. Where the inheritance has been accepted, the heir will take over the contractual actions formerly vested in the deceased.

[94] Corte di Cassazione 16 February 1995 no 1863, *Giustizia civile*, 1501 (1995).

rules in so far as they are compatible. The focus is on understanding which are the most suitable, and this choice, at this moment, can only be made on the basis of an analysis of the *ratio iuris* underlying existing law and the facts of each case. Until such time as laws are enacted, one must hope for the reasonableness of national courts in applying their domestic law to Bitcoin. In this regard, the case-law outlined above testifies to a significant readiness by the Italian courts to treat Bitcoin as money.

The recurring argument is that it, like fiat money, serves only to make purchases and hence its utility lies entirely in its function as medium of exchange. This does not mean advocating the *exclusive* or *wholesale* application of the rules laid down in the matter of pecuniary obligations. Because of the specifics and protection needs underlying each individual case, all the rules present in the legal system compatible and appropriate to regulating Bitcoin should apply. Thus, by way of example, Art 1277 of the Civil Code will not be applicable as regards the part thereof enshrining the principle that the offer of legal tender discharges one's debt, given the principle of strict legality that governs all sanctions under public law. Art 1277 should by contrast apply as regards the part thereof codifying the nominalistic principle, which is a general principle of relations entailing an obligation. Also applicable is Art 1278 of the Civil Code which governs pecuniary obligations expressed in a currency not having legal tender in the State. Furthermore, Bitcoin, like traditional money, lends itself to being held and used as an investment, in which case, respectively, the rules on irregular deposits and on sale of financial products should come into play.

The hope for the future is that the regulation of the virtual currency market will be conducted in a rational and proportional manner, respecting the flexibility that characterizes peer-to-peer money, so as to strengthen the price stability of virtual currencies and the confidence that users place in them.[95]

[95] G. Lemme, 'Criptomoneta' n 18 above, 39, argues that with a State imprimatur a virtual currency could be considered a currency in all respects.

Essays

The Right to Know One's Genetic Origins: A Right in Need of Regulation

Sabrina Praduroux*

Abstract

Leaving aside the evergreen ethical debate surrounding anonymous childbirth and donor insemination, this article analyses them adopting a fundamental rights approach.

This approach brings out the growing importance accorded by Italian courts to the right to know one's genetic origins, which calls into question the right to anonymity of the anonymous mother and the gamete donor. Faced with this irreconcilable tension, the legislature is called upon to rethink the regulation of anonymous childbirth and donor insemination so as to ensure a proper balance between the fundamental rights and interests of the persons concerned, in the light of the principles developed by both the Constitutional Court and the European Court of Human Rights.

I. Introduction

Family law is arguably one of the branches of law most exposed to evolution linked to socio-cultural changes.

In the last decades, the very notion of family itself underwent a rather radical evolution in the Italian legal order, as in many other Western legal systems, due to changing ethical standards and cultural values, as well as to scientific developments. The explosion of divorces and the legal recognition of same-sex civil partnerships multiply family configurations, whereas the development of assisted reproductive technology questions the traditional paradigm of parenthood.

In particular, in the establishment of parenthood the biological link is losing ground to the will of being parents. Bio-medical developments and the transformation of family give rise to a wide range of cases, from surrogacy and donor insemination to same-sex adoption, in which the normative weight of biological truth is diminished.

This does not mean, however, that biological truth has become completely irrelevant in law. Indeed, while the concept of family increasingly moved away from the paradigm of biological truth, the right to know one's biological origins asserted itself as the core of the fundamental right to personal identity.[1]

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[1] As remarked by G. Matucci, 'La dissoluzione del paradigma della verità della filiazione innanzi all'interesse concreto del minore (Nota a sent. Corte costituzionale 18 dicembre 2017 no 272)' *Forum di Quaderni Costituzionali*, 15 February 2018, 1-14, formerly, the ascertainment of

As it emerges from the jurisprudence of the Italian Constitutional Court:

> 'the legislative and systemic evolution of the concept of family, which has been such as to confirm the legal significance of the parent-child relationship as a social fact, even where it does not coincide with biological parentage, also features express recognition by this Court that 'the issue of genetic origin is not an essential prerequisite for the existence of a family'.[2]

Nonetheless, the Court expressly acknowledges that 'the biological facts relating to procreation constitute 'an essential component' of the child's personal identity, which contributes, alongside other components, to defining its content'.[3]

The right to know one's genetic origins was expressly recognized for the first time at the international law level by the United Nations Convention on the Rights of the Child of 1989,[4] and subsequently reiterated by the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993.[5]

Around the same years, the European Court of Human Rights (ECtHR) affirmed that the right to know one's origins, which is not explicitly mentioned in any of the provisions of the European Convention on Human Rights (ECHR), is an implied right under Art 8 (Right to respect for private and family life) of the Convention.

At the national law level, the Italian Constitutional Court first, in the late 1990s, acknowledged that the biological truth of procreation is an essential component of the child's personal identity in terms of a child's right to determine biological paternity;[6] then, it recognized the right to know one's genetic and biographical heritage among the substantive personality rights protected by the Constitution.

Against this background, the article identifies anonymous childbirth and donor insemination as two cases in which the exercise of the right to know one's genetic and biographical heritage is hindered by the principle of anonymity that underpins the regulation of these two legal institutions, and investigates how the courts managed to accommodate the competing interests involved through the chiaroscuro of Italian family law.

biological origins was first and foremost the expression of an objective requirement of the legal system to ensure the certainty of status; whereas today, it is the expression of a subjective need.

[2] See Corte costituzionale 18 December 2017 no 272, para 4.1.6 of Conclusions on points of law. English version available at www.cortecostituzionale.it

[3] ibid.

[4] See, in particular, Art 7, which prescribes that 'the child shall have (...) as far as possible, the right to know and be cared for by his or her parents'.

[5] Art 30 lays down an obligation upon the Contracting State to ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, is preserved, and made accessible to the child, or his or her representative, under appropriate guidance, in so far as is permitted by the law of that State.

[6] See, Corte costituzionale 14 May 1999 no 170, especially para 4 of Conclusions on points of law, available at www.cortecostituzionale.it

II. The Family as a Point of Fact

Art 29, para 1, of the Italian Constitution recognises 'the family as a natural society founded on marriage'.

The family that the members of the Constituent Assembly had in mind was the traditional one, consisting of two parents, of different sexes, and the biologically-related children under their care.[7]

However, today, in interpreting the concept of family to decide which individual interests and inter-personal relationships deserve protection, Italian courts and the legislature shall also take into account international sources of law, as required by Art 117, para 1, of the Constitution. Among the latter, the ECHR is, unquestionably, of significant relevance to the issues covered by this study.[8]

The ECHR contains two articles that deal directly with family issues: Art 12, which guarantees the right to marry and found a family, and Art 8, which protects everyone's right to his private and family life, his home and his correspondence.

The ECtHR has, so far, abstained from giving a general definition of the concept of 'family'. Indeed, within the ECtHR case law on Art 8, the notion of 'family life' is an autonomous concept,[9] essentially based upon the actual existence in practice of close personal ties. Therefore, following the autonomous concepts doctrine, the Court does not look for a definition of family, but focuses on the different factors, to be appreciated in the light of the circumstances of each given case, that come into play to measure the strength of personal ties.[10]

The ECtHR has consistently stressed that the question of the existence of a family life is first and foremost a point of fact, which depends on the establishment of close personal ties, not limited only to relationships based on marriage.[11]

[7] Indeed, it was based on the notion of marriage as defined by the Civil Code of 1942, which only allowed (and still allows) marriage between two persons of a different sex. During the preparatory work of the Constitution there was considerable discussion on the opportunity to provide for the indissolubility of marriage, in order to bar the introduction of divorce in the national legal order. However, the opinion of those who considered that the decision on the indissolubility of marriage was a matter of legislative policy to be left to the ordinary legislator prevailed. The issue of same-sex unions, on the contrary, was not debated at all. See V. Falzone et al, *La Costituzione della Repubblica Italiana illustrata con i lavori preparatori* (Roma: Colombo, 1948), 65.

[8] It is sufficient here to recall that the Constitutional Court has consistently affirmed that the ECHR, as interpreted by the ECtHR, may serve as a constitutional parameter in the judicial review of national legislation. See Corte costituzionale 24 October 2007 nos 348 and 349. English version available at www.cortecostituzionale.it.

[9] See L.A. Sicilianos, 'La 'vie familiale' en tant que notion autonome au regard de la CEDH', in J. Casadevall et al eds, *Mélanges en l'honneur de Dean Spielmann* (Oisterwijk: Wolf Legal Publishers, 2015), 595-602.

[10] As noted by G. Letsas, 'The Truth in Autonomous Concepts: How To Interpret the ECHR' *European Journal of International Law*, 291, 279-305 (2004), the autonomous concepts doctrine embraced by the ECtHR is based on 'the idea that in legal practice there are no shared-criteria or ready-made definitions', which entails a case-by-case approach.

[11] Eur. Court H.R. (GC), *Paradiso and Campanelli* v *Italy*, Judgment of 24 January 2017, available at www.hudoc.echr.coe.int. See especially para 140, where the Grand Chamber made

The importance accorded by the ECtHR to *de facto* ties does not, however, mean that the legal aspects of a case are irrelevant in deciding whether a given relationship between two or more persons falls within the scope of the family life limb of Art 8. Thus, for instance, with regard to cases in which the relationship at issue is not based on a biological link, the ECtHR refers to the conformity of the applicants' conduct with the law as a factor to be considered in order to ascertain whether a *de facto* family life exists.[12]

In a very different scenario, legal aspects outweighed the factual ones in the *Evers* case.[13] In this case, the applicant relied on Art 8 to challenge national authorities ban to contact V, the mentally disabled daughter of his former partner and with whom he fathered a child, maintaining that he and V constituted a family as they were indeed a couple with a common child.

The ECtHR resorted to findings of domestic courts stating that V was incapable of acting in law and V's child was the result of a severe violation of V's personality rights, to conclude that the relationship between the applicant and V did not 'constitute a family link which would fall under the protection of Art 8 of the Convention under its 'family life' head'.[14]

Therefore, we can conclude that family life is first and foremost a point of fact, however de facto interpersonal ties are protected as long as they comply with domestic legislation aimed at protecting the rights of the person.

Furthermore, from this excursus on the ECtHR case-law, we can also conclude that marriage and biology are only two out of a variety of legal determinants of family and parentage.[15]

clear that: 'The notion of 'family' in Art 8 concerns marriage-based relationships, and also other *de facto* 'family ties' where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy'. The case at issue concerned the removal, by Italian authorities, of a child born abroad as a result of a surrogacy arrangement that was (and even today is) unlawful under Italian law, and brought to Italy by the applicants acting outside any standard adoption procedure. The ECtHR concluded that the conditions enabling a recognition of a *de facto* family life had not been met, by pointing out, in particular: the absence of any biological tie between the child and the intended parents, the short duration (less then a year) of the relationship between the applicants and the child, and, finally, the uncertainty of the ties from a legal perspective. Five out the seventeen judges of the Grand Chamber however expressed a different view in their dissenting opinion attached to the judgement, and maintained that despite the relatively short period of cohabitation, the applicants had acted as parents towards the child and, therefore, their relationship amounted to a *de facto* family life.

[12] See para 156, *Paradiso and Campanelli,* v *Italy*, above, in which the Court distinguished the case at stake from similar cases pointing out that the applicants engaged in conduct that was contrary to Italian law, whereas in the other cases therein mentioned the child's placement with the applicants was recognized or, at least, tolerated by national authorities.

[13] Eur. Court H.R., *Evers* v *Germany* Judgment of 28 May 2020, available at www.hudoc.echr.coe.int.

[14] ibid, para 58.

[15] For a more exhaustive illustration of which interpersonal relationships may be regarded as 'family life' attracting the protection of Art 8 of the ECHR, see D. Coester-Waltjen, 'The Impact of the European Convention on Human Rights and the European Court of Human Rights on European Family Law', in J.M. Scherpe ed, *European Family Law. The Impact of Institutions*

With regard to the Italian legal order, it appears that the influence of the ECtHR jurisprudence on the evolution of family law is twofold: on one hand, it paves the way for the protection of non-traditional families,[16] on the other it fosters the recognition of new fundamental rights impinging upon family ties.[17]

III. The Right to Know One's Genetic and Biographical Heritage as a Fundamental Constitutional Right

In the text of the 1942 Civil Code personality rights found a very marginal place in Arts 5 (right to bodily integrity), 6 (right to a name) and 10 (right to the protection of one's image), which protect those attributes of personality that are susceptible to economic exploitation.

The reason for this is that throughout the first half of the 20th century, the thinking on personality rights was strongly influenced by a dogmatic approach that hindered their inclusion in the category of subjective rights. Personality components, such as one's name and image, therefore, were not considered as objects of subjective rights, but rather as the prerequisite of a right to stop harmful behaviour and obtain compensation for the damage suffered.[18]

A gradual paradigm shift in the interpretation of the Civil Code – and civil law in general – from a purely economic standpoint to one based on personalism and solidarity, was, first and foremost, the result of the entry into force of the Constitution in 1948.[19] As a matter of fact, from the second half of the 20th century, Italian courts and the legislature began to shape civil law rules within the axiological constitutional framework, developing at the same time a greater awareness about threats to individual freedom and dignity posed by private parties.

and Organisations on European Family Law, (Cheltenham-Northampton: Edward Elgar, 2016), I.

[16] For an analysis of the actual contribution of the ECtHR case law to the development of new family models, and the recognition and protection of personal ties not falling within the traditional family concept, see A. Nocco, 'Il diritto di essere figlio di due mamme: come la CEDU aiuta i giudici a (in)seguire le trasformazioni della famiglia' *Minorigiustizia*, 129-135 (2015); M.C. Zarro, '*Gli effetti sul diritto civile del dialogo tra Corte EDU e Corte costituzionale con particolare riferimento alle relazioni familiari e alla filiazione' Rassegna di diritto civile*, 256-288 (2018).

[17] For a narrative of the evolution of family law rules in the light of the legal recognition of new (fundamental) rights, such as the right to change sex, the right of access to medically assisted procreation techniques, and so forth, see, V. Scalisi, 'Le stagioni della famiglia nel diritto dall'unità d'Italia a oggi' *Rivista di diritto civile*, II, 1287-1318 (2013).

[18] Cf G. Pino, 'Teorie e dottrine dei diritti della personalità. Uno studio di meta-giurisprudenza analitica' *Materiali per una storia della cultura giuridica*, 250, 237-274 (2003).

[19] The incorporation of constitutional values into civil law had a revolutionary effect as stressed by A. Proto Pisani, 'La tutela giurisdizionale dei diritti della personalità: strumenti e tecniche di tutela' *Il Foro Italiano*, 19/20, (1990), remarking that: 'la scelta costituzionale di attribuire alla persona valore centrale nel nostro ordinamento (…) ha determinato una vera e propria rivoluzione copernicana nel sistema dei diritti privati' (the Constituent Assembly's decision to recognize the primacy of the person in our legal system (...) has led to a real Copernican revolution in the system of private rights).

This new awareness and legal culture centred on the person, rather than on property, has been fostered by the proliferation of international and supranational human rights law, as well as by the dynamics of cross-fertilization and dialogue among court belonging to different legal systems.[20]

These changes have paved the way for the development, in the Italian legal culture, of the category of personality rights as an autonomous category, to which the right to know one's genetic origins -as a facet of the right to personal identity- also belongs.

The Italian Constitutional Court referred, for the first time, to the right to personal identity as one of the rights that form the 'irretrievable heritage of the human person' protected by Art 2 of the Constitution, in the 1990s. The very first decision dealt with the protection of a person's surname.[21] In this case, the Court acknowledged that the surname should enjoy special protection as it is a means of personal identification, and, as such, it constitutes an essential and inalienable component of one's personality.

This ruling inaugurated a jurisprudential orientation that gave increasing importance to the right to personal identity[22] and that culminated in the affirmation of the child's right to know his or her origins and to have access to his or her parental history, as a 'significant element within the constitutional system ensuring protection for the person'.[23]

In its case law, the Constitutional Court has developed, over the years, a broad conception of the right to personal identity, including therein the protection of *de facto* (and intended) family relations, while affirming the primary and inviolable interest of knowing one's biological identity and parentage.

From a substantive point of view, the right to know one's biological and biographical origins as it resulted from the Constitutional Court case law is consistent with that worked out by the ECtHR, on the basis of Art 8 of the ECHR.

Within ECHR law, the right to know one's biological and biographical origins achieved recognition under the notion of the right to private life, at first as everyone's right to establish details of his or her identity as an individual human being.[24]

[20] Cf G. Palmeri, 'I diritti emergenti della persona', in L. Vacca ed, *Il Codice Civile ha 70 anni ma non li dimostra* (Napoli: Jovene, 2016), 25-37.

[21] Corte costituzionale 3 February 1994 no 13, para 5.1 of Conclusions on points of law, available at https://www.cortecostituzionale.it. The Court declared the unconstitutionality of the legislation on civil status records in so far as it did not recognize to a person, in the event of the rectification of civil status documents for reasons not attributable to him, the right to retain his original surname, which was to be regarded as a distinguishing feature of his personal identity.

[22] For a study on the jurisprudential evolution of, and the doctrinal debate on, the right to personal identity, see G. Pino, *Il diritto all'identità personale: interpretazione costituzionale e creatività giurisprudenziale* (Bologna: il Mulino, 2003).

[23] See Corte costituzionale 22 November 2013 no 278, para 4 of Conclusions on points of law. English version, available at www.cortecostituzionale.it.

[24] Eur. Court H.R., *Gaskin* v *The United Kingdom*, Decision of 13 November 1987, available at www.hudoc.echr.coe.int. The case concerned the applicant's claim to access public care records containing information about his past.

Subsequently, the ECtHR referred expressly to the interest of knowing the truth about the identity of one's parents as a 'vital interest' of every human being.[25]

The corresponding right is framed by the ECtHR as a claim to be entitled, in the name of biological truth, to know one's personal history by gaining access to information about his or her origins and related identifying data.[26] Such a right is not absolute, and it has to be weighed in concrete cases against countervailing fundamental rights of third parties and/or the public interest. Therefore, States enjoy a certain margin of appreciation in accommodating competing rights and interests underlying claims to know one's biological and biographical origins.

As a matter of fact, since the margin of appreciation doctrine is a variable geometry doctrine, it is difficult to forecast the precise discretion left to States. On the basis of the ECtHR case law, if we consider the right to know one's genetic origins as a particularly important facet of an individual's existence or identity, we can maintain that the margin allowed to the State will be narrow; but keeping in mind that the margin will be wider where the case raises sensitive moral or ethical issues.[27]

IV. Anonymous Childbirth is Tested Constitutionality

The Italian legislature took into consideration the right to know one's origins when it reformed the legislation on adoption in 2001,[28] and then again in 2003.[29] As a result of these reforms, the right to access information concerning one's origins and the identity of one's biological parents is today recognised to: a. adoptees over the age of twenty-five; b. adoptees over the age of majority when there are serious and proven reasons concerning their psycho-physical health; c. minors when there are serious and proven reasons.[30] An exception is however provided

[25] Eur. Court H.R. (GC), *Odièvre* v *France*, Judgment of 13 February 2003, para 29, available at www.hudoc.echr.coe.int. For an analysis of the ECtHR case law on this subject matter, see R.J. Blauwhoff, *Foundational Facts, Relative Truths. A Comparative Law Study on Children's Right to know their Genetic Origins* (Antwerp-Oxford-Portland: Intersentia, 2009) 64-100; V. Lorubbio, *The Best Interests of the Child tra Europa e America Latina: emersioni giurisprudenziali comparate* (Torino: Giappichelli, 2021), 43-52.

[26] Cf Eur. Court H.R. (GC), *Odièvre* v *France*, n 26 above, especially para 28.

[27] Cf Eur. Court H.R. (GC), *Dubská and Krejzová* v *the Czech Republic*, Judgment of 15 November 2016, especially para 178, available at www.hudoc.echr.coe.int.

[28] In Italy adoption is regulated by legge 4 May 1983 no 184. The original text of this statute did not contain any rules dealing with the access by adoptees to information concerning the identity of their biological parents. The statute was amended in 2001 by legge 28 March 2001 no 149 that introduced rules allowing adoptees access to data concerning their biological parents, subject to authorisation by the Juvenile Court. The possibility for an adoptee to know the identity of his or her biological parents was, however, excluded if one of the parents had declared that he or she did not wish to be named, or had expressed consent to the adoption on condition that he or she will remain anonymous.

[29] See decreto legislativo 30 June 2003 no 196.

[30] In a recent judgment the Court of Cassation by adopting a teleological interpretation of

with regard to the identity of women who opted for anonymous birth.[31] Allowing this exception, the legislature held on to the principle of absolute anonymity that informs the legal institution of anonymous birth.

Italy is one of the few countries where anonymous birth is legally accepted.[32] More specifically, Art 30 of decreto del Presidente della Repubblica 3 November 2000 no 396, recognizes the right of a woman, regardless of her marital status,[33] to give birth in anonymity, except for the mother of a child born as a result of medically assisted procreation techniques.[34]

To make effective this right the legislation establishes a one-hundred-year ban on the release of a full copy of the medical records relating to the birth, where they include personal data identifying the mother who has opted to give birth anonymously.[35] Furthermore, the rules governing the adoptee's right of access to information concerning his or her origin and the identity of his or her biological parents expressly exclude access to information with regard to the anonymous mother.[36]

This regulation presents critical issues that undermine both its conformity with the ECHR and its constitutionality, as declared by both the ECtHR and the Constitutional Court.

The ECHR in itself does not prevent a State from allowing the practice of anonymous birth,[37] but the ECtHR has set the boundaries of the margin of

the article that regulates the right to know one's genetic origins -namely Art 28, paras 4 and 5 of legge no 184 of 1983-, extended its scope as to include the identity of any adult biological siblings, provided that he or she consents to the disclosure of his or her identity. See Corte di Cassazione 20 March 2018 no 6963, available at https://tinyurl.com/2p88dpy3 (last visited 31 December 2021). For comments see, A. Cocco, 'Do Adopted Children Have a Right to Know Their Biological Siblings?' *The Italian Law Journal*, 531-546 (2018); J. Long, 'L'adottato adulto ha diritto a conoscere l'identità dei fratelli biologici, se essi vi consentono' *La nuova giurisprudenza civile commentata*, 1227-1234 (2018).

[31] See, Art 28 of legge 4 May 1983 no 184.

[32] For a comparative overview on which countries, and to what extent their legislation, enable pregnant women to give birth under anonymity and to retain anonymity, see J. Sosson, et al, *Adults and Children in Postmodern Societies. A Comparative Law and Multidisciplinary Handbook* (Cambridge-Antwerp-Chicago: Intersentia, 2019). For an exhaustive explanation of the Italian anonymous childbirth legislation, see A. Vesto, *La maternità tra regole, divieti e plurigenitorialità. Fecondazione assistita, maternità surrogata, parto anonimo* (Torino: Giappichelli, 2018), 185-231.

[33] This interpretation is corroborated by an *obiter dictum* of the Constitutional Court in which it stated that any woman giving birth has the right to declare that she does not wish to be named in the birth certificate, even when the circumstances suggest that she is married. See Corte costituzionale 5 May 1994 no 171, para 5 of Conclusions on points of law, available at www.cortecostituzionale.it.

[34] See Art 9, para 2, legge 19 February 2004 no 40.

[35] See Art 93, para 2, decreto legislativo 30 June 2003 no 196. During that period, the request for access to the medical records may however be granted, taking appropriate precautions to avoid the mother being identified.

[36] See Art 28, para 7, legge 4 May 1983 no 184.

[37] Eur. Court H.R. (GC), *Odièvre* v *France* n 26 above, in which the Court found that the French system of anonymous birth complied with the Convention. The French regulation of anonymous childbirth differs from the Italian one as it provides for the woman who gives birth

appreciation enjoyed by the State in balancing the conflicting interests of the mother, who asked to remain anonymous, and the child, who wishes to know his or her biological origins.

The Italian regulation does not, according to the ECtHR, respect those boundaries, as it does not guarantee any balance between the interests of the anonymous mother and those of the child. This is the ground on which the ECtHR based its ruling in the *Godelli* v *Italy* case, in which it condemned Italian law for not providing the applicant -a woman born of an anonymous mother- for the opportunity to have her mother contacted to verify whether she wanted to maintain her anonymity.

Indeed, in its decision the Court stressed the fact that, once a woman opts for giving birth anonymously, she is not given, under Italian law, any possibility to change her mind later and withdraw anonymity.[38]

The irreversibility of the mother's choice for anonymity at the time of the birth had already been challenged, some years earlier, before the Italian Constitutional Court, which defended the contested regulation maintaining that it was the result of a reasonable comparative assessment of the fundamental rights at stake. Indeed, according to the Constitutional Court, only the irreversibility of anonymity could effectively guarantee that the birth takes place in optimal conditions for both the mother and the child.[39]

anonymously the option of breaching, at any time, the secret about her identity, allowing the child to have access to it. Seven out of the seventeen judges of the Grand Chamber, did not, however, agree with the view of the majority according to which an appropriate balance had been struck between the mother's right to privacy and the right of the child to have information on his or her origins. Indeed, in their joint dissenting opinion they stressed that: 'the mother's refusal is definitively binding on the child, who has no legal means at its disposal to challenge the mother's unilateral decision. The mother thus has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance'.

[38] Eur. Court H.R., *Godelli* v *Italy* Judgment of 25 September 2012, available at www.hudoc.echr.coe.int. The ECtHR finally found a violation of Art 8 ECHR, on the ground that 'the Italian authorities failed to strike a balance and achieve proportionality between the interests at stake and thus overstepped the margin of appreciation which it must be afforded' (para 58 of the judgment). This judgment has been widely commented upon by scholars, who have expressed opposing view on the legitimacy of the institution of anonymous childbirth in itself. According to some authors, the ECtHR should take into consideration the approach developed by the Committee of the Rights of the Child, which has consistently condemned States that practise systems of anonymous birth. Others defend that practice by pointing out -as did the ECtHR judge András Sajó in his dissenting opinion in *Godelli* v *Italy*- that the possibility of giving birth anonymously allows the State to fulfil its obligation to protect the right to life, granted by Art 2 ECHR, which could here be declined as the right to give birth and to be born in safe conditions. For the first opinion, see C. Simmonds, 'An Unbalanced Scale: Anonymous Birth and the European Court of Human Rights' 72 *The Cambridge Law Journal*, 263-266 (2013); for the second opinion, see M. Cesare, 'Il parto in anonimato al vaglio della Corte Europea dei Diritti: una condanna davvero convincente?' *Rivista AIC*, 20 November 2012, 1-5.

[39] Corte costituzionale 25 November 2005 no 425, available at www.cortecostituzionale.it. For comments, see: A. O. Cozzi, 'La Corte costituzionale e il diritto di conoscere le proprie origini in caso di parto anonimo: un bilanciamento diverso da quello della Corte europea dei diritti dell'uomo?' *Giurisprudenza costituzionale*, 4602-4611(2005); F. Eramo, 'Il diritto all'anonimato

The same issue has been brought before the Constitutional Court again in 2013, and this time the Court reversed its previous decision, expressly referring to the ECtHR case law.[40]

This time the Constitutional Court acknowledged the excessive rigidity of the provision establishing the irrevocable mother's right to anonymity. In particular, it pointed out that:

> 'whilst the choice to remain anonymous legitimately prevents the establishment of "legal parenthood", which inevitably creates stability for the future, it does not appear to be reasonable that such a choice must necessarily and definitively exclude also a relationship of "biological parenthood": this is because, as regards the latter, the choice may be revocable (on the initiative of the child), precisely because it reflects the reasons why the choice was made and may be maintained'.[41]

della madre partoriente' *Famiglia e diritto*, 130-134 (2006); J. Long, 'Diritto dell'adottato di conoscere le proprie origini: costituzionalmente legittimi i limiti nel caso di parto anonimo' *La nuova giurisprudenza civile commentata*, 549-560 (2006); L. Trucco, 'Anonimato della madre 'versus' 'identità' del figlio davanti alla Corte costituzionale' *Il diritto dell'informazione e dell'informatica*, 107-120 (2006).

[40] Corte costituzionale 22 November 2013 no 278, available at www.cortecostituzionale.it. For comments, see: A. Ambrosi, 'Interesse dell'adottato a conoscere l'identità della madre biologica versus interesse della madre all'anonimato: un nuovo punto di equilibrio' *Studium iuris*, 667-675 (2014); T. Auletta, 'Sul diritto dell'adottato di conoscere la propria storia: un'occasione per ripensare alla disciplina della materia' *Il Corriere giuridico*, 473-487 (2014); B. Barbisan, 'Apprendimento e resistenze nel dialogo fra Corte costituzionale e Corte di Strasburgo: il caso del diritto all'anonimato della madre naturale', available at www.dirittticomparati.it, 9 May 2016, 1-13; V. Carbone, 'Un passo avanti del diritto del figlio, abbandonato e adottato, di conoscere le sue origini rispetto all'anonimato materno' *Famiglia e diritto*, 15, 11-23 (2014); G. Casaburi, 'Il parto anonimo dalla ruota degli esposti al diritto alla conoscenza delle origini' *Il Foro Italiano*, 8-19 (2014); B. Checchini, 'Anonimato materno e diritto dell'adottato alla conoscenza delle proprie origini' *Rivista di diritto civile*, 709-725 (2014); S. Favalli, 'Parto anonimo e diritto a conoscere le proprie origini: un dialogo decennale fra CEDU e Corte costituzionale italiana', available at www.forumcostituzionale.it, 9 December 2013, 1-10; E. Frontoni, 'Il diritto del figlio a conoscere le proprie origini tra Corte EDU e Corte costituzionale. Nota a prima lettura sul mancato ricorso all'art. 117, primo comma, Cost., nella sentenza della Corte costituzionale n. 278 del 2013', available at www.osservatorioaic.it, December 2013, 1-8; G. Lisella, 'Volontà della madre biologica di non essere nominata nella dichiarazione di nascita e diritto dell'adottato di conoscere le proprie origini' *Il diritto di famiglia e delle persone*, I, 27, 13-39 (2014); J. Long, 'Adozione e segreti: costituzionalmente illegittima l'irreversibilità dell'anonimato del parto' *La nuova giurisprudenza civile commentata*, I, 285, 289-296 (2014); V. Marcenò, 'Quando da un dispositivo d'incostituzionalità possono derivare incertezze' *La nuova giurisprudenza civile commentata*, 279-289 (2014); M.G. Stanzione, 'Identità del figlio e diritto di conoscere le proprie origini' *Famiglia e diritto* 190-198 (2015); S. Stefanelli, 'Reversibilità del segreto della partoriente e accertamento della filiazione' *Giurisprudenza costituzionale*, 4031-4056 (2013); S. Taccini, 'Verità e segreto nella vicenda dell'adozione: il contributo della Corte costituzionale' *Le nuove leggi civili commentate*, 405-442 (2014); L. Trovato, 'Il desiderio di conoscere le proprie origini. Un diritto irrinunciabile, secondo la sentenza della Corte costituzionale n. 278/2013' *Questione giustizia*, 214-228 (2013); F. Zanovello, 'Anonimato materno e diritto dell'adottato a conoscere le proprie origini: la parola al legislatore' *Studium iuris*, 1183-1191 (2019).

[41] See Corte costituzionale 22 November 2013 no 278, para 5 of Conclusions on points of

The Constitutional Court, therefore, declared the unconstitutionality of Art 28 para 7 of Legge 4 May 1983 no 184 as far as it did not provide for a procedure enabling the judge to contact the anonymous mother, at the request of the adopted child, for a possible withdrawal of anonymity, through a process regulated by law and ensuring maximum confidentiality to the mother.

V. The Italian Supreme Court as Surrogate Legislature

According to constitutional rules, the pieces of legislation that are declared unconstitutional cease to have effect from the day following the publication of the decision, and thus they can no longer be applied.[42]

Although several years have passed since the ruling of the Constitutional Court no 278 of 2013 declaring Art 28 para 7 of Legge no 184 of 4 May 1983 partly unconstitutional, the article has not yet been amended by the legislature.[43] Therefore, since November 23rd, 2013 Italian courts have had to decide on the requests to disclose the identity of their biological mothers, brought by adopted persons born of anonymous mothers, in a legislative vacuum.

Against this legislative gap, first instance and appeal courts developed contrasting solutions: some courts decided to consult the anonymous mother and ask her consent to the disclosure of her identity; others, on the contrary, held that they had to wait for the intervention of the legislature.

This contrast has been resolved by the Joined Chambers of the Court of Cassation with the ruling no 1946 of 2017, which has recognized to ordinary courts the power to consult anonymous mothers to ask whether they intend to remain anonymous.[44]

The Court of Cassation took care to clearly and precisely delimit the scope of action of the ordinary courts, reminding them of the difference between their powers and those of the legislature. Based on the assumption that the Constitutional Court judgment of 2013 is an 'additive judgment',[45] the Court of Cassation stated that the ordinary courts are called upon to seek the rule to apply to the specific

law. English version available at www.cortecostituzionale.it.

[42] See Art 136 of the Constitution and Art 30 para 3 of legge 11 March 1953 no 87.

[43] Actually a draft bill was submitted to Parliament on 19 June 2015 but the parliamentary term ended before the bill became law. The text of the bill is available at www.senato.it.

[44] Corte di Cassazione-Sezioni unite 25 January 2017 no 1946. For comments, see: P. Di Marzio, 'Parto anonimo e diritto alla conoscenza delle origini' *Famiglia e Diritto*, 740-755 (2017); M. N. Bugetti, 'Sul difficile equilibrio tra anonimato materno e diritto alla conoscenza delle proprie origini: l'intervento delle sezioni unite' *Corriere giuridico*, 624-634 (2017); J. Mineo, 'Parto anonimo e diritto a conoscere le proprie origini: le Sezioni Unite dettano le concrete modalità di azione in seguito all'intervento della Corte costituzionale' *Il Diritto di Famiglia e delle Persone*, 435, 413-452 (2018).

[45] The so-called 'additive judgments' (*sentenze additive*) are rulings where the Constitutional Court declaration of unconstitutionality concern an omission of the legislature, namely a provision is declared unconstitutional not because of what it provides for, but rather for what it does not provide for.

case within the applicable law - of which the binding principle declared by the Constitutional Court in its additive ruling is also a part -, while leaving the legislature with the task to establish a general discipline. Indeed, according to the Court of Cassation, Constitutional Court additive judgments play a dual function: on the one hand, they provide guidance to the legislature in remedying the unconstitutional omission; on the other hand, they guide ordinary courts in identifying the rules that can be applied in the medium term, extrapolating them from the existing general legal framework and from the principle set out in the additive judgment itself.

Thus, to draw the conclusions from the Court of Cassation judgment, awaiting for the revision of the existing legislation, ordinary courts must grant to adopted persons born of anonymous mothers, the right to consult them to inquire about the possibility to allow their identity to be revealed to their biological children.[46]

If the anonymous mother confirms her wish to remain anonymous, her identity cannot be revealed to the child who asked for it and the latter cannot make the request again in the future. In other words, the adoptee's right to know his or her biological origins meets an insurmountable limit in the will of the anonymous mother.

In conclusion, it appears that the Court of Cassation acted as a surrogate legislature by identifying itself the principles that shall guide the exercise of the right to consult the anonymous mother about a possible withdrawal of anonymity, without limiting itself to the analogical application of existing rules.

This attitude of the Italian Supreme Court also emerges from the decisions concerning the right to know the identity of the biological mother after she is dead*, that are* discussed below.

VI. The Enforcement of the Right to Know One's Genetic Origins after the Death of the Anonymous Mother

The Joined Sections of the Court of Cassation to support, in the above discussed judgment, the adoptee's right to consult the biological mother who opted for anonymous birth, put forward an argument based on its case law allowing adopted persons to know the identity of their biological mother after her death.

In two judgments delivered in 2016, the Court of Cassation affirmed that, after the death of the mother, the interest in protecting her anonymity no longer prevails over the child's right to know his or her biological origins.[47] More precisely,

[46] For this purpose ordinary courts may have recourse to the procedure provided for by the legislation on adoption applied to disclose the identity of biological parents to adult adoptees, in cases where the mother did not opt for anonymity. See, Art 28 paras 5 and 6, legge 04 May 1983 no 184. Based on this article, some courts have adopted their own guidelines, see for instance, those of the Juvenile Court of Emilia-Romagna, available at www.tribmin.bologna.giustizia.it.

[47] See, Corte di Cassazione - I 21 July 2016 no 15024 available at https://tinyurl.com/2x3fmehc (last visited 31 December 2021) and 09 November 2016 no 22838 available at

the Court stressed that the assessment of the actual relevance of anonymity plays a central role in ensuring the equilibrium between the competing interests at stake; consequently, the reversibility of anonymity is a condition of legitimacy of the institution of anonymous childbirth as such. It follows that given the impossibility to verify the actual will of the mother, due to her unavailability or death, the choice for anonymity cannot be crystallised, since this would lead, on the one hand, to the definitive extinction of the child's fundamental right to know his or her genetic origins and, on the other, to an unjustified difference in treatment between children born of women who have chosen to be anonymous but are no longer alive, and children of women who can be questioned about the choice for anonymity made when giving birth.

Furthermore, the mother's right to anonymity is a personal and inalienable right and, as such, it expires at her death, without prejudice to her social identity.

To sum up, the Court of Cassation ruled that the right of the adopted person - born of a woman who opted for anonymous birth - to have access to information concerning her or his origins and the identity of her or his biological mother may be enforced after the latter's death, without prejudice to the rights to image and reputation and other interests of primary constitutional importance of any third parties concerned (descendants and/or relatives of the woman).

These judgments paved the way for the Court of Cassation to declare, in a subsequent case, the admissibility of the action to establish maternity brought by a man born of an anonymous mother, who was not given up for adoption.[48]

To decide the case, the Court resorted to the balancing approach. It considered the plaintiff's interest in ascertaining a status filiationis corresponding to the biological truth as an essential component of his -constitutionally protected- right to personal identity. This interest, reasoned the Court, as important as it can be, shall nonetheless be balanced against the mother's right to remain anonymous, which is aimed to guarantee other constitutionally protected values, especially life and health.

Following the reasoning of the Court of Cassation, the death of the mother is to be seen as a decisive factor when it comes to tip the scale between these

https://tinyurl.com/2p8kx2r6 (last visited 31 December 2021). For comments, see: E. Andreola, 'Accesso alle informazioni sulla nascita e morte della madre anonima' *Famiglia e Diritto,* 15-32 (2017); V. Carbone, 'Con la morte della madre al figlio non è più opponibile l'anonimato: i giudici di merito e la Cassazione a confronto' *Corriere giuridico,* 29-38 (2017); M.G. Stanzione, 'Scelta della madre per l'anonimato e diritto dell'adottato a conoscere le proprie origini' *La nuova giurisprudenza civile commentata,* 319-329 (2017).

[48] Corte di Cassazione 22 September 2020 no 19824, available at www.cortedicassazione.it. For comments see, M. N. Bugetti, 'L'accertamento della maternità nei confronti della madre che si sia avvalsa dell'anonimato' *Corriere giuridico,* 1478-1482 (2020); A. Mendola, 'Azione di accertamento dello stato di figlio e limiti al diritto all'anonimato materno' *Famiglia e Diritto,* 163-173 (2021); C. Ingenito, 'Il diritto all'identità dei figli in due recenti pronunce della Corte Costituzionale e della Corte di Cassazione' *BioLaw Journal-Rivista di BioDiritto,* 337-358 (2021). It is important to stress that the fact that the child born of an anonymous mother had not been adopted is conclusive, as adoption removes all the legal effects of biological filiation.

competing interests: indeed, the mother's right to anonymity may in no way be sacrificed or curtailed during her lifetime; whereas, with regard to the period after her death, it may be curtailed or weakened in order to provide full protection for the child's right to ascertain his or her parentage.

Such an accommodation of the mother's and child's competing interests effectively means that the protection of the rights of the heirs and descendants of the woman who has opted for anonymity must also avoid impeding the rights of the child who claims his or her status.

Accordingly, in the present case, the fact that the action for the ascertainment of maternity was brought after the death of the mother was one out of two fundamental grounds for declaring the admissibility of the action. The other ground concerned the behaviour of the mother who, despite choosing to remain anonymous, had treated the child as her own, and this filial relationship was also known within the circle of her social relations.

The judgment of the Court of Cassation should be view favourably as far as it fills a gap in the law, which makes no provision on the effect of the choice for anonymity with regard to the admissibility of actions aimed at the recognition of legal maternity for the case in which the unadopted child of an anonymous mother becomes aware of her identity.[49] However the application by analogy of the principle about the weakening the mother's right to anonymity after her death, developed by the same Court in the above-mentioned judgments delivered in 2016, is open to criticism. Indeed, as it has already been noted by others, the subject-matter of the cases is different (knowledge of one's origins, on the one hand, and the establishment of parenthood, on the other), and therefore the rules applied in one case cannot be applied by analogy to the other. As a matter of fact, the cases appear to be antithetical: the 2016 judgments concern persons who are precluded from having their biological parentage established (since they are adopted children) and who wish to know the identity of their respective biological mothers, who are unknown to them; the 2020 judgment, on the other hand, concerns a person who knows the identity of his mother and wishes to have his parentage established.[50]

[49] In the silence of the law, the Tribunale di Milano rejected an action for judicial declaration of maternity brought by a woman born of anonymous childbirth, and that had been recognised by her biological father, who disclosed to her the identity of the biological mother. The Tribunale indeed declared the plaintiff's application inadmissible, stressing the need to comply with the twofold rationale behind the institution of anonymous childbirth, namely the need to safeguard the legitimate family and the honour of the mother, on the one hand, and to prevent recourse to abortion or infanticide in order to avoid unwanted births, on the other. See, Tribunale di Milano, 14 October 2015 no 11475, available at www.biodiritto.org. For comments see, M. N. Bugetti, 'Sull'esperibilità delle azioni ex artt. 269 e 279 c.c. nei confronti della madre che abbia partorito nell'anonimato' *Famiglia e Diritto,* 476-495 (2016). As remarked by the Tribunale di Milano, in the present case the right to know one's origins was not at stake, as the plaintiff was recognised by her father and declared herself certain of the identity of her biological mother.

[50] Cf M. N. Bugetti, 'L'accertamento della maternità' n 49 above.

VII. Donor Insemination: Towards the End of Absolute Anonymity?

Like children born of anonymous mothers, children conceived with a donated gamete cannot access information about their biological parent(s).[51]

The Italian legislation on medical assisted procreation expressly prohibits the use of heterologous medically assisted procreation techniques,[52] and provides for a specific administrative fine to be imposed on anyone who contravenes the prohibition.[53] In 2014, this prohibition has been declared unconstitutional insofar as it applies to couples diagnosed with an illness that is the cause of absolute and irreversible sterility or infertility.[54]

According to the Constitutional Court, the repeal of the prohibition did not create a legislative vacuum, as there is no uncertainty as to the cases in which it is legitimate to resort to heterologous medically assisted procreation. Therefore, as a result of this decision, married, or *de facto*, couples formed by two living persons of different sexes have the right to access to heterologous medically assisted procreation techniques within the limits established by the Constitutional Court.

Furthermore, the Court referred to the legislation on organs donation[55] as a reference text from which to extrapolate the general principles to be applied in the procurement and distribution of gametes.

Among the principles therein established, the Constitutional Court referred, *inter alia*, to the principle of anonymity of the identity of the donor and expressly addressed the question of the right to genetic identity, without however providing clear recommendations.[56] As a matter of fact, the Court merely referred to its own jurisprudence on the rights to know one's origins in the context of adoption and anonymous childbirth, expressly acknowledging the diversity of the cases.

The principle of donor anonymity has actually been transposed to the field of gamete donation. In fact, according to the guidelines adopted on 4 September 2014 by Conferenza delle Regioni e delle Province autonome, donors do not have the right to know the identity of the persons born as a result of heterologous fertilisation, and the latter cannot have access to the identity of the donors.[57]

[51] For a discussion on the role of genetics in defining parental relations and personal identity, see T. Penna, 'Nati da dono di gameti: il diritto di accesso alle origini tra *Cross Border Reproductive Care*, pluralismo giuridico e genetica' *BioLaw - Journal Rivista di BioDiritto,* 55-74 (2021).

[52] Legge 19 February 2004 no 40. Art 4 para 3. This provision has been the object of a repeal referendum that was held in 2015, but the quorum required by Art 75 of the Constitution for the referendum to be valid was not reached.

[53] Art 12 para 1 of legge 19 February 2004 no 40.

[54] Corte costituzionale 16 June 2014 no 162, English version available at www.cortecostituzionale.it. For comments see, E. Prascina, 'The Prohibition of Gametes' Donation: When the Constitutional Court 'Decides to Decide' ' 2 *The Italian Law Journal*, 213-236 (2016).

[55] Decreto legislativo 6 November 2007 no 191.

[56] The common utilitarian argument put forward to support the gamete-donors anonymity doctrine is that its abolition would seriously undermine donation.

[57] See, Documento sulle problematiche relative alla fecondazione eterologa a seguito della sentenza della Corte Costituzionale no. 162/2014, available at www.camera.it

Consistently with the guidelines, the law setting up a register of gamete donors provides that personal details of donors are kept in such a way as to ensure their anonymity.[58]

To date, there is no specific regulation concerning the right of persons *born* as the *result of heterologous* artificial insemination to know one's genetic origins.[59] Italian courts have not yet ruled on cases involving this issue, and the doctrine is not unanimous in acknowledging the need to recognize the right to know one's genetic origins to persons born as a result of heterologous fertilisation.[60]

Nevertheless it is possible to make some observations concerning the way forward to regulate the issue of anonymity of gamete donors consistently with constitutional principles.

The Constitutional Court reference, in its judgement no 162 of 2014, to adoption rules on access to the identity of biological parents shall be considered as the first indication that legislation on donor insemination providing for the absolute anonymity of donors would unlikely pass the constitutionality test. Moreover, such a legislation could hardly be considered as compliant with ECHR law, which, as well known, amounts to a parameter of constitutionality.

The ECtHR has not yet ruled on issues dealing explicitly on donor anonymity and the right to know one's origins in the context of medically assisted reproduction.[61] It is, however, plausible to argue that it will look unfavourably on legislation that grants absolute anonymity to donors.

Indeed, even though the right to know of one's origin is not an absolute one

[58] See, Art 1 para 298 of legge 23 December 2014 no 190.

[59] In the previous parliamentary term, several bills to regulate heterologous medically assisted procreation were submitted to the Parliament; however, any of them was adopted. For a survey of the various draft bills, see, D. Rosani, 'Il diritto a conoscere le proprie origini nella fecondazione eterologa: il caso italiano e l'esperienza straniera' *BioLaw Journal - Rivista di BioDiritto*, 235, 211-239 (2016).

[60] In favour see: A. Nicolussi, 'Fecondazione eterologa e diritto di conoscere le proprie origini. Per un'analisi giuridica di una possibilità tecnica' *Rivista AIC*, 22 February 2012, 1-18; L. Poli, 'Il diritto a conoscere le proprie origini e le tecniche di fecondazione assistite: profili di diritto internazionale' *GenIus*, 43-55 (2016); D. Rosani, 'Il diritto a conoscere le proprie origini nella fecondazione eterologa: il caso italiano e l'esperienza straniera' n 58 above; L. Bozzi, 'La parabola del diritto a conoscere le proprie origini. Brevi riflessioni' *La nuova giurisprudenza civile commentata*, 170-178 (2019). Against, see: A. Morace Pinelli, 'Il diritto di conoscere le proprie origini e i recenti interventi della Corte Costituzionale. Il caso dell'Ospedale Sandro Pertini' *Rivista di diritto civile*, 242-272 (2016); A. Musumeci, ' "La fine è nota". Osservazioni a prima lettura alla sentenza n. 162 del 2014 della Corte costituzionale sul divieto di fecondazione eterologa', available at www.associazionedeicostituzionalisti.osservatorio.it, 1-11 (2014).

[61] Currently two cases are pending against France, whose legislation provides that both identifying and non-identifying information about the donor remains inaccessible to the donor-conceived child at all times. In both cases, the applicants were born as a result of artificial insemination using donor sperm. They claim that French legal rules on egg and sperm donation, preventing them to obtain information concerning the identity of their respective biological fathers infringe their right to know their genetic origins and are discriminatory. See, Eur. Court H.R., *Gauvin-Fournis* v *France* (communicated case) no 21424/16 and *Silliau* v *France* (communicated case) no 45728/17, available at www.hudoc.echr.coe.int.

and the ECtHR, relying on the margin of appreciation doctrine, leaves States with room to manoeuvre in balancing it with others' rights,[62] the Parliamentary Assembly of the Council of Europe in its Recommendation no 2156 of 12 April 2019 gave a clear signal on the direction to take,[63] which the ECtHR is unlikely to ignore.

In this Recommendation, the Parliamentary Assembly acknowledged that most States have traditionally favoured anonymous donation models,[64] nevertheless, it stressed the relevance acquired in recent decades by the right to know one's origins, and affirmed the principle according to which: 'anonymity should be waived for all future gamete donations in Council of Europe member States'.[65]

Recommendation no 2156 of 2019 would therefore offers to ECtHR a solid basis for narrowing the margin of discretion left to States by relying on the European consensus standard.

All that considered, it is safe to maintain that the paradigm of absolute donor anonymity shall be abandoned by the Italian legislature.

VIII. Conclusions

Anonymous childbirth and donor insemination are two legal institutions that are diametrically different in their assumptions, as the first gives legal recognition and protection to the desire of a pregnant woman not to become a parent, while the second gives legal recognition and protection to the desire of infertile persons to become a parent. Nonetheless, they share a common result, namely, to allow the birth of a child that would not otherwise have been born, and the common feature of not attributing normative weight to genetic links in establishing the *status filiationis* of the child. This leads to a mismatch between biological and legal truth, where the latter prevails as far as family and inheritance rights are concerned.

Courts, more than the Italian legislature, have nevertheless taken seriously biological truth, by recognising the fundamental right to know one's genetic and biographical heritage. This right puts into question the principle of anonymity, which is a pivotal principle of both anonymous childbirth and donor insemination. When seeking to erode this principle in order to enforce the right to know one's

[62] For a deeper analysis of the ECtHR approach, see S. Besson, 'Enforcing the child' s right to know her origins: contrasting approaches under the convention on the rights of the child and the European convention on human rights' *International Journal of Law, Policy and the Family*, 150-152 (2007).

[63] Recommendation 2156: Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, 12 April 2019, available at www.assembly.coe.int.

[64] As far as European States are concerned, they can be distinguished in three groups: States that grant access to identifying information; States that allow both open-identity and anonymous donation, and States that hold on to absolute anonymity. For an overview of the different legislation, see E. Decorte, 'Donor Conception: From Anonymity to Openness', in K. Boele-Woelki and D. Martiny eds, *Plurality and Diversity of Family Relations in Europe* (Cambridge: Intersentia, 2019), 143-172.

[65] n 64 above, point 7.1.

genetic origins, the courts however have found themselves confronted with a conflict of opposed interests, all of which are of constitutional significance.

The present article found that the legislature was in quandary when it came to regulate new issues resulting from the combination of scientific possibilities and cultural factors.[66] The *défaillance* of the legislature has nonetheless given way to a fruitful dialogue between courts -including the ECtHR-, which has made it possible to respond promptly to new demands for the protection of the fundamental right to know one's biological and biographical origins.

However, the activism of the courts has not diminished, but rather it has made even more evident and urgent, the need for the intervention of the legislature. The issues raised by the courts and awaiting precise regulation are indeed manifold: ranging from the precise definition of the scope of the right to know one's origins to the regulation of the legal effects of anonymous childbirth with regard to unadopted children, and from the regulation of the practical aspects inherent in the search for the anonymous mother to the regulation of the enforcement of the right to know one's origins after the death of the anonymous mother.

[66] Bio-law, in particular, is a special field of law in which judge-made law plays a central role, in part because of the lack of legislative regulation. See, A. D'Aloia, 'Giudice e legge nelle dinamiche del biodiritto' *BioLaw Journal - Rivista di BioDiritto,* 105-113 (2016).

Essays

Recent Normative Developments in Women's Political Representation in the Italian Regions

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Abstract

The paper aims to analyse the mechanisms of gender equality implemented by Italian regions in their electoral laws. If in recent years, at national and local level, the state legislation has introduced effective measures which have partially redressed the historical under-representation of women in the elected assemblies, at regional level the picture is very different. The percentage of women in regional councils is still on average very low, although this varies from region to region. This heterogeneous scenario – *inter alia* – depends on delays in the implementation of the mechanisms – gender quotas and double gender preference – provided by legge 15 February 2016 no 20. Autonomy does not mean more attention for gender equality, as shown by the inertia of some ordinary as well as special regions.

To resolve such inertia, the government has recently used its substitutive power (laid down in Art 120, para 2, of the Italian Constitution), introducing the double gender preference in the Apulian electoral system. Such an intervention has raised several legal problems, but emphasises the key importance of the principle of gender equality in the current Italian constitutional system. The differentiated implementation of gender quotas and double gender preference by regions may endanger the legal unity of the Republic, the principle of equality, and the right to vote and stand for election, all of which require protection by the state.

I. Introduction

The slow growth in women's participation in political decision-making has increased calls for more efficient mechanisms to achieve a gender balance in political representation, such as gender quotas.[1]

The use of specific measures to redress women's historical under-representation

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[1] E. Lépinard and R. Rubio-Marín, *Transforming Gender Citizenship: The Irresistible Rise of Gender Quotas in Europe* (Cambridge: Cambridge University Press, 2018). Scholars do not agree on the definition and classification of gender quotas. In short, it is possible to distinguish between constitutional or legal compulsory quotas and voluntary party quotas. This notion also includes legislated 'reserved seats', which regulate by law the gender composition of elected bodies, by reserving a certain number or percentage of seats for women, implemented through special electoral procedures. In order to explore the different approaches, see: D. Dahlerup, *Women, Quotas and Politics* (London: Routledge 2006); D. Dahlerup et al, *Atlas of Electoral Gender Quotas* (Stockholm: International Institute for Democracy and Electoral Assistance, 2013); P. Norris, *Electoral Engineering: Voting Rules and Political Behavior* (Cambridge, New York: Cambridge University Press, 2004); R.E. Matland, 'Electoral quotas: frequency and effectiveness', in D. Dahlerup ed, *Women, Quotas and Politics* (London: Routledge, 2006), 275.

in the elected assemblies has also become a usual feature of Italian electoral systems, at all levels of governments. However, the path leading to this result has been long and tortuous.[2] It began in 1993 and 1995, when Parliament modified the existing electoral systems, introducing two mechanisms – electoral gender quotas and alternating rank order – designed to promote a greater presence of women in the elected bodies, at local, regional and national level.[3] The life of these promotional measures was short, since in September 1995 they were declared unconstitutional by judgment no 422 of the Constitutional Court, which stated that only the principle of equality in its formal sense was applicable in electoral matters. Any mechanism aimed at ensuring reserved quotas for women in the candidates' lists as a means of promoting women's political representation was judged objectively discriminatory, by diminishing for some citizens 'the concrete content of a fundamental right in favour of other citizens belonging to a group deemed disadvantaged'.[4] The right to stand in elections recognised by Art 51 of the Constitution is absolute and must be guaranteed according to full equality.[5] Nevertheless, the Court continued to state that such measures would not be deemed unconstitutional if adopted voluntarily by political parties, associations or groups taking part in the elections.

This closing approach of the Constitutional Court led, in the early 2000s, to several significant constitutional reforms aimed at affirming the constitutional duty of the State and regions to adopt policies and actions for gender-balanced representation.[6] More precisely, constitutional legge 18 October 2001 no 3 rewrote Art 117 of the Constitution, providing that

[2] A. Donà, 'Eppur Si Muove. The Tortuous Adoption and Implementation of Gender Quotas in Conservative Italy', in E. Lépinard and R. Rubio-Marín eds, n 1 above, 186.

[3] More exactly, legge 25 March 1993 no 81, relating to the direct election of mayors, presidents of the provinces and members of municipal as well as provincial councils, established that in the candidates' lists neither gender could normally account for more than two-thirds. A similar rule was established by legge 23 February 1995 no 43 relating to the system for the election of regional councils. Finally, as for the election of the Chamber of Deputies, the so-called *Mattarellum* law provided that the candidates' lists, presented at the regional level for the allocation of 25% of the seats with proportional representation system, had to be formed by candidates in alternating gender order (recently, M. D'Amico, *Una parità ambigua. Costituzione e diritti delle donne* (Milano: Raffaello Cortina Editore, 2020)).

[4] Para 6 of the Conclusions on points of law.

[5] The Court highlighted that affirmative actions and special measures are admissible only in the economic field, not in the political one. This judgement was extensively criticized by legal scholars. See, among many: G. Cinanni, 'Leggi regionali e azioni positive in favore delle donne' *Giurisprudenza costituzionale,* 1995, 3283; U. De Siervo, 'La mano pesante della Corte sulle «quote» nelle liste elettorali' *Giurisprudenza costituzionale,* 1995, 3268; L. Carlassare, 'L'integrazione della rappresentanza: un obbligo per le Regioni', in L. Carlassare et al eds, *La rappresentanza democratica nelle scelte elettorali delle regioni* (Padova: CEDAM, 2002), 22; L. Gianformaggio, 'Eguaglianza formale e sostanziale: il grande equivoco', in A. Facchi et al eds, *Eguaglianza, donne e diritto* (Bologna: il Mulino, 2005), 229.

[6] Together with some international and European milestones, such as 1995 UN Beijing Platform for Action, EU Amsterdam Treaty and Charter of Fundamental Rights of the European Union (A. Donà, n 2 above, 186).

> 'regional laws shall remove any hindrances to the full equality of men and women in social, cultural and economic life and promote equal access to elected offices for men and women' (para 7).

Similarly, legge costituzionale 31 January 2001 no 2 imposed on the electoral laws of regions with special status to promote 'equal conditions for access to electoral consultations'. Finally, legge costituzionale 30 May 2003 no 1 added wording to the first paragraph of Art 51 of the Constitution, under which 'the Republic promotes equal opportunities between women and men by means of specific measures'.[7]

This new constitutional framework paved the way for legislative adoption of electoral gender quotas and for a change in constitutional case law, which occurred with judgment no 49 of 2003 that rejected the claim of unconstitutionality raised by the government regarding some provisions of the electoral law of the Valle d'Aosta Region. The challenged rules merely stated that the electoral lists had to include 'candidates of both genders' and the regional electoral office had to declare invalid any list submitted that did not meet this requirement.[8]

The jurisprudential overruling was motivated not only by the new constitutional rules, but also by the full awareness of the great heterogeneity of the so-called positive actions.

The measure under scrutiny was not considered a 'deliberately unequal legislative measure' aimed either at favouring individuals belonging to disadvantaged groups or at offsetting these disadvantages through advantages directly attributed. According to judgement no 49 of 2003, these forms of 'result oriented' mechanisms are not constitutionally lawful when they interfere with rights, such as the right to stand for election, which must be guaranteed equally to all citizens.

In contrast, the rule introduced by the Valle d'Aosta electoral law simply provided that both genders had to be included in the candidates' lists, without directly attributing the result (ie, the election of female candidates). In this type of measure there is a 'natural' uncertainty between candidacy and election results, due to ample freedom of choice that allows voters to deny the result to the persons favoured by the protection rule.[9] The choice by voters of the list and/or of the candidates, and their election, shall be in no way conditioned by the gender of the candidates. The voter may cast preference votes, and the order in which candidates on the same list are elected is determined by the number of preferential votes obtained by each of them. Thus, the equality of chances between lists and between candidates on the same list is not impaired.

As emphasised by the Constitutional Court, these measures establish a constraint not with regard to the right to vote or to the right of eligible citizens'

[7] M. Midiri, 'Art 51', in R. Bifulco et al eds, *Commentario alla Costituzione. Tomo I: artt. 1-54* (Torino: UTET giuridica, 2006), 1016.

[8] Arts 3-*bis* and 9 of legge regionale no 3 of 1993, as modified by legge no 21 of 2002.

[9] A. D'Aloia, Eguaglianza sostanziale e diritto diseguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale (Padova: CEDAM, 2002).

standing for election, but to the expression of free choices by political parties and groups, which present electoral lists, precluding them (only) from presenting lists made up of candidates of the same sex. However, pursuing the constitutionally enshrined goal of ensuring women's more equal representation is considered a valid reason to limit such autonomy.

Thus, having a neutral structure and a merely promotional nature the measure of the Valle d'Aosta Region was ruled lawful.

The Constitutional Court's new approach has been confirmed by other rulings. In particular, judgment no 4 of 2010 rejected the question of constitutionality relating to the rule of Campania's electoral law, which introduced, for the first time in the Italian as well as European legal system, the so-called 'double gender preference'. According to this mechanism, the voter may cast one or two preferential votes, but, in this latter case, preference votes have to be related to one male candidate and one female candidate of the same list, under penalty of cancellation of the second preference. The government challenged these mechanisms because they would have infringed the principle of formal equality and the right to vote and to stand for election. In other words, the government considered the double preference of gender a measure aimed at obtaining a result and, therefore, an unconstitutional affirmative action.

On the contrary, the Constitutional Court ruled this measure constitutionally lawful, considering that it only promotes the achievement of effective equality between women and men in the access to elected offices, without, directly or indirectly, affecting the outcomes of citizens' electoral choices. The double gender preference merely introduces an additional – certainly not compulsory – option for the voter, which enlarges the range of electoral choices. Basically, the voter is free to indicate no candidate, only one or two candidates, and if the second preference is of the same gender, it is simply not counted, leaving the first one valid.

Lastly, judgment no 81 of 2012 established another important principle,

> 'stating that political discretion (even at regional level) is limited by the existence of legal constraints deriving from the regulatory, constitutional and legislative framework'.[10]

[10] On the judicial developments relating to equality between women and men standing for elected office, see, recently, State Council judgment 4 June 2021 no 4294, which has referred the questions of constitutional legitimacy of Art 71, para 3-*bis*, of decreto legislativo 18 August 2000 no 267 in the part in which it does not provide for the necessary representation of both genders in the electoral lists in municipalities with a population of less than 5,000 inhabitants, and of Art 30, letter *d*)-*bis* and letter *e*), decreto del Presidente della Repubblica 16 May 1960 no 570 in the part in which it excludes from the sanctioning regime of the 'exclusion of the list', the electoral lists submitted in violation of the necessary representation of both genders in reference to municipalities with fewer than 5,000 inhabitants due to the violation of Arts 51, paras 1, 3, para 2, 117, para 1, Constitution in reference to Art 14 European Convention on Human Rights (ECHR), and Art 1 Additional Protocol no 12, to the Constitutional Court.

Thus, all institutions must comply with the principle of gender equality, including ordinary and special regions.

In the light of this regulatory and case law framework, this article analyses the most recent normative developments of gender promotional mechanisms at regional level, where the composition of legislative assemblies is still very unbalanced from a gender viewpoint. The percentage of female members in regional councils is on average 17.7% (in March 2020), very far from the percentage recorded at the European Union (EU) level, equal to 33.5%, as well as at national (about 36%) and local level.[11] This scenario is, indeed, rare in the European context where the high achievers at national level are also the high achievers at regional level, with Finland, France, Spain and Sweden approaching gender parity.[12] Indeed, the data of Italian regions vary widely from region to region,[13] depending – *inter alia* – on the different measures of gender equality effectively introduced in their electoral laws. As we will see, the broader regional autonomy in electoral matters, introduced by the 1999 constitutional reform, does not necessarily translate into the adoption of more incisive measures for the promotion of women's representation. The paper therefore examines the potential remedies for the inertia of those regions that fail to implement the abovementioned constitutional and legislative principles. Particular attention will be given to the 'Puglia case' and to the government's choice to trigger, for the first time, the substitutive power provided by Art 120, para 2, Constitution in order to forcibly implement the measures of gender equality in the Apulian territory. Furthermore, the paper deals with the same issue with reference to the special regions, which have wider powers in electoral matters, according to their respective special statutes. In conclusion, the results of the regional election of 20-21 September 2020[14] are considered, looking at how the electoral rules on gender equality have affected female representation in regional councils.

II. Ordinary Regions and Electoral Mechanisms to Promote Gender Equality

As mentioned, female representation in regional councils varies from region

[11] The presence of women is 33.6% in the assemblies of municipalities with a population of up to 15,000 inhabitants and about 31.4% in municipalities with a population of more than 15,000 inhabitants (Camera dei Deputati, Servizio Studi, 'La partecipazione delle donne alla vita politica e istituzionale' *Dossier no 104*, 2020 available at https://tinyurl.com/2wdurke4 (last visited 31 December 2021) and Senato della Repubblica, Ufficio Valutazione Impatto, 'Parità vo' cercando 1948-2018. Settanta anni di elezioni in Italia: a che punto siamo con il potere delle donne?', 2018, available at https://tinyurl.com/2p87vxb8 (last visited 31 December 2021).

[12] European Parliament, 'Women in politics in the EU. State of play', Briefing, 2019, available at https://tinyurl.com/2p84pzsj (last visited 31 December 2021).

[13] From 9.5 of Basilicata to 38.1 of Umbria.

[14] Elections held in Puglia, Campania, Liguria, Marche, Toscana, Veneto and Valle d'Aosta.

to region. It depends – *inter alia* – on electoral rules adopted and on different implementation of the state provisions aimed at ensuring gender balance in the regional assemblies.

Since 1999 ordinary regions have concurrent competence in regional electoral matters. According to new Art 122, para 1, Constitution,

> 'the electoral system … shall be established by a regional law in accordance with the fundamental principles established by a law of the Republic, which also establishes the term of elective offices'.

This reform has introduced a form of electoral federalism, in which the State has the power to identify the fundamental principles of the matter and the regions the power to regulate it in detail, complying with state principles. These principles were established by legge 2 July 2004 no 165, without providing principles of gender equality, despite Art 117, para 7, Constitution having already provided that regional laws promote equal access to elected offices for men and women. However, this principle was introduced in many regional statutes[15] and, consequently, in several regional electoral laws.[16]

Only legge 23 November 2012 no 215 included, among the fundamental principles of the framework law no 165 of 2004, the promotion of equality between men and women 'through the provision of measures to encourage access for the under-represented gender to elected office' (lett c-*bis*). This new principle in fact did not succeed in pushing regional legislatures to change their electoral rules and in 2016 further state lawmaking was necessary.[17] Such a principle was translated into stricter rules by legge 15 February 2016 no 20, which greatly limited regional powers in this field, channeling regional implementing choices towards essentially predefined solutions.[18] This law did not establish mere principles, but specific measures, at first glance contradicting the model of concurrent legislative power, which reserves only the definition of the fundamental principles to the State.[19] However, this approach can be justified in the light of long-standing constitutional jurisprudence, according to which 'positive actions' require a uniform application throughout the country and cannot be subject to

[15] See: Art 6 St. Puglia; Art 2, para 2, letter d) St. Calabria; Art. 6, para 6, and 19, para 2, St. Lazio; Art 4, lett. f), St. Toscana; Art 13 St. Piemonte; Art 3 St. Marche; Art 2 St. Emilia-Romagna; Arts 7 and 42, para 3, St. Umbria; Art 2 St. Liguria; Art 6 St. Abruzzo; Art 11 St. Lombardia; Art 1, paras 2 and 5 St. Campania; Art 6, letter c) and Art 34, para 3, St. Veneto; Art 6 St. Molise; Art 6 St. Basilicata.

[16] E. Catelani, 'La tutela delle pari opportunità negli statuti e nella legislazione elettorale', in E. Catelani and E. Cheli eds, *I principi negli statuti regionali* (Bologna: il Mulino, 2008), 244.

[17] M. D'Amico, n 3 above.

[18] D. Tega, 'La l. 15 febbraio 2016, n. 20: l'ultima tappa verso il riequilibrio della rappresentanza politica' *Studium Iuris,* 1 (2017).

[19] G. Maestri, *L'ordinamento costituzionale italiano alla prova della democrazia paritaria* (Roma: RomaTre-Press 2018).

differences in relation to their geographical and political areas.[20] Nevertheless, this issue has not been clarified as no region has decided to challenge the law in front of the Constitutional Court.

More exactly, legge no 20 of 2016 has provided that the principle of promoting equal opportunities in the access to elected regional offices is to be implemented in three possible ways, designed in a manner which takes into account the type of electoral system in force.

Thus, (1) if the regional electoral system provides the chance to cast preference votes, it has to establish legislated gender quotas, in such a way that same gender candidates do not exceed 60% of the total in each list, and allow at least two preferences for candidates of different gender, under penalty of the cancellation of preferences after the first.

(2) In case the regional electoral rules do not allow the expression of preference votes (so-called closed lists), the alternating order between candidates of different gender has to be provided, together with a legislated gender quota of 40%.

(3) In case of single-member constituencies, the electoral law shall provide for the balance between candidates presented with the same symbol in such a way that candidates of one sex do not exceed 60% of the total.

The new state discipline provided regions with a range of possibilities, leaving them the choice to implement the solution corresponding to the electoral system adopted. It is clear that the three solutions are able to produce very different outcomes: for example, the mandated alternation of candidates by gender on closed lists allows the election of more women than gender quotas of 40% in open lists. Yet, the effectiveness of the quota mechanism applied to single-member constituencies depends on the political parties' decisions about the assignment of 'winnable' constituencies.

The mechanisms proposed by state legislation are basically electoral gender quotas and, relating to the open list system (solution no 1), the gender double preference. Both are constructed as gender-neutral, which means that they aim to redress the under-representation of women and men, setting up a maximum for both sexes. As emphasised by the administrative jurisprudence, gender quotas are

> 'not only formalistically aimed at guaranteeing a balanced composition of the lists, but dynamically and theologically intended to ensure a balance in the composition of the political assembly'.[21]

[20] Judgment no 109 of 1993 (para 2.2). It is also worth noting that the constitutional case law does not accept a strict and unitary notion of fundamental principles. In several cases, the Constitutional Court has ruled as lawful specific state provisions in concurrent matters on the grounds they were linked to the fundamental principle by a strong relationship of coessentiality and necessary integration. See, recently: judgment no 64 of 2020 (M. Di Folco, 'Profili problematici dell'intervento sostitutivo del Governo nei confronti della regione Puglia per imporre la doppia preferenza di genere' *Osservatorio sulle fonti,* 1191 (2020)).

[21] Regional Administrative Court for Lazio 31 January 2013 no 1108.

In any case, legislated gender quotas provide a percentage at least of 40%, but include neither placement mandates nor strong enforcement mechanisms, leaving regions free to introduce zipper list systems and to set sanctions, such as the rejection of the lists or financial penalties.[22] The effectiveness of quotas depends, significantly, on their design.[23]

If the electoral system provides open lists, there must be at least two preference votes relating to candidates of different gender. Thus, a single preference voting system is not allowed, whereas regional rules can abstractly increase the number of persons to be indicated. This new mechanism does not reserve a share of seats to the underrepresented sex, but redresses the under-representation of women in decision-making assemblies, through a second preference vote. Thanks to this, greater gender balance of assemblies is encouraged, but it is not imposed. Like quotas, the double gender preference is a neutrally worded anti-discrimination measure, as it does not affect, directly or indirectly, the results of elections. The gender-difference rule for the second preference does not give candidates of either sex a better chance of being elected, given the reciprocal and equal conditioning of the two genders. Under this rule, there are no candidates who are more favoured or disadvantaged than others, but only an equality of opportunity that is able to promote a better gender balance in representation on the regional councils. It is, therefore, a mere promotional measure.

However, unlike gender quotas, it does not interfere with the stage of 'candidacy', but with the more sensitive one of right to vote and its freedom, being the voter unable to cast two preference votes in favour of persons of the same gender.[24] According to ruling no 4 of 2010, this interference is, nevertheless, legal, as the voter may decide not to use the second preference vote and choose only one male or female candidate.

After all, since the 1991 referendum onwards the Italian electoral scenario has been mainly characterised by single preference voting systems on open lists, and the chance of a second preference vote is not a constraint for voters, but an additional option, which the previous system did not provide.

All ordinary regions have opted for proportional representative systems, with open lists and preference voting,[25] with the initial exception of the Toscana legge elettorale no 25 of 2004, which opted for a system of closed lists, in which

[22] The sanction system cannot be inferred from constitutional and state legislative provisions. For this solution: Regional Administrative Court for Puglia 16 January 2021 no 95; State Council 25 June 2021 no 4860.

[23] L.A. Schwindt-Bayer, 'Making Quotas Work: The Effect of Gender Quota Laws On the Election of Women' XXXIV *Legislative Studies Quarterly,* 5 (2009).

[24] M. Olivetti, 'La c.d. «preferenza di genere» al vaglio del sindacato di costituzionalità. Alcuni rilievi critici' *Giurisprudenza costituzionale,* 84 (2010).

[25] For a recent complete picture of the regions' electoral choices, including majority bonus and threshold clauses, see: Camera dei Deputati, 'Leggi elettorali regionali. Quadro di sintesi' *Documentazione e ricerche*, 3 August 2020 no 109, available at https://tinyurl.com/2p97k8sw (last visited 31 December 2021).

the provincial candidates were elected according to their position on the list.[26] As a result of this, a vote cast by a voter, intended to determine the overall composition of the regional assembly, was a vote in favour of a list, without the right for of the voter to decide on the election of his or her own representatives.

> 'The election of candidates is dependent not only, obviously, on the number of seats obtained by the list of origin, but also by the order in which candidates are presented within the list, which is essentially decided by the parties'.[27]

To avoid this violation of the voters' right to choose, the Toscana Region adopted contextually regional law no 70 of 2004 aimed at encouraging and promoting the democratic participation of citizens in the selection of candidates for the regional elections, through the provision of (optional) primary elections.

However, after that the Constitutional Court judgment no 1 of 2014 declared the provision of closed lists established by the national electoral law to be unconstitutional, as 'these rules deprive voters of any possibility to choose their own representatives, which is left entirely to the parties', the Toscana Region changed its electoral rules, introducing open lists and preference voting.[28]

Thus, given that – since 2014 – all ordinary regions have opted for proportional representative systems, with open lists and preference voting,[29] both mechanisms – gender quotas and double gender preference – set by solution no (1) – should have been implemented. However, implementation has been very heterogeneous. Some regions anticipated the 2016 state regulations;[30] others promptly adapted their own electoral discipline to the new principles.[31] A few regions have designed more incisive mechanisms than those established by state legislation, ie the

[26] See: legge regionale 13 May 2004 no 25 ('Rules for the election of the regional council and the president of the regional government'). Relating to gender equality Art 8, para 4, provided that 'No more than two thirds of constituency candidates of the same gender can be presented in each provincial list'.

[27] Cf Corte costituzionale 13 January 2014 no 1, para 5.1 of the Conclusions on points of law.

[28] Legge regionale 26 September 2014 no 51. See: M. Rosini, 'Novità e criticità della nuova legge elettorale della Regione Toscana' *Le Regioni*, 1237 (2014).

[29] For a recent complete picture of the regions' electoral choices, including majority bonus and threshold clauses, see: Camera dei Deputati. 'Leggi elettorali regionali. Quadro di sintesi' *Documentazione e ricerche*, no 109 of 2020, available at https://tinyurl.com/3tctwsck (last visited 31 December 2021).

[30] Namely, Campania (legge regionale 27 March 2009 no 4); Emilia-Romagna (legge regionale 23 July 2014 no 21); Toscana (legge regionale 26 September 2014 no 51) and Umbria (legge regionale 4 January 2010 no 2, amended by legge 23 February 2015 no 4).

[31] Lazio (legge regionale 13 January 2005 no 2, as amended by legge 3 November 2017 no 10); Lombardia (legge regionale 2 December 2016 no 31); Abruzzo (legge regionale 2 April 2013 no 9, as amended by legge 16 July 2018 no 15); Basilicata (legge regionale 20 August 2018 no 20); Veneto (legge regionale 16 January 2012 no 5, amended by legge 25 May 2018 no 19); Marche (legge regionale no 27 of 2004, amended by legge no 36 of 2019); Molise (legge regionale 5 December 2017 no 20).

Toscana Region (together with Lombardia and Veneto), which has strengthened the gender quota mechanism, with district lists composed of candidates in alternating gender order (the so-called zipper system), under penalty of rejection. These three regions, plus Emilia-Romagna and Lazio, have also established that candidates of each gender have to be equally present in every district list, where the number of candidates is identical.

Furthermore, the impact of these gender quotas is stronger thanks to the adoption of effective sanctions: in most regions non-compliance causes the rejection of the lists, whilst in some cases financial penalties are provided.

In June 2020, 11 (out of 15) ordinary regions adopted the double gender preference as well. The only variant to this measure was introduced in Toscana, where the voter does not have to write the candidates' names, but may simply draw an X next to the name(s) on the ballot paper (so-called 'facilitated preference').[32]

Four regions – Calabria, Liguria, Piemonte and Puglia[33] – have so far not adjusted their electoral laws to the promotional gender equality rules. The consequences of the inertia were clearly shown in the results of the recent elections in Piemonte (26 May 2019) and Calabria (26 January 2020): in the former only eight women out of fifty one members were elected and, in the latter, two women out of thirty members, plus the president, Jole Santelli.[34]

These results reveal that women remain significantly under-represented because of a lack of quotas or other electoral measures, such as double gender preference, aimed at promoting effective gender equality in political representation.

III. State Principles and Legislative Inertia of Regions: What Remedy?

What actions can be put in place to remedy the prolonged inertia of some regions, which undermines the achievement of effective gender balance in regional assemblies?

Firstly, the judicial route. Legal steps have been taken against the regulatory inertia of the Calabria Region. In particular, two lawsuits were trigged: one against the decree calling for new elections issued by the president of the region, and the other against the electoral results. In the first case, the Regional Administrative Court for Calabria declared the complaint inadmissible due to lack of jurisdiction of the administrative judge.[35] The second case, which contested

[32] Art 14, para 3, of legge regionale no 51 of 2014 specifies that the second preference is that expressed in favour of the candidate, who is placed next in the order of the list. Thus, the list order chosen by political parties becomes very important.

[33] At that time (June 2020) Liguria and Piemonte did not have their own electoral law and continued to apply the 1995 state law, which did not provide gender equality rules.

[34] U. Adamo, 'Principio di pari opportunità e legislazione elettorale regionale. Dal Consiglio calabrese una omissione voluta, ricercata e «votata». In Calabria la riserva di lista e la doppia preferenza di genere non hanno cittadinanza' *Le Regioni,* 403 (2020).

[35] Regional Administrative Court for Calabria, 27 December 2019 no 2158, available at

the results of the regional election of 26 January 2020, was declared *improcedibile* because of the sudden death of the president and the consequent resignation of the executive board and dissolution of the regional council (*ex* Art 126, para 3, Constitution).[36]

This unfortunate event impeded a ruling on the merit of the issues, including the request to raise the question of constitutionality to the Constitutional Court in order to reverse the Calabria Region's failure to implement the principle of gender equality, through an 'additive' judgment. Nevertheless, the judicial path may represent an effective way to solve cases of regional failure to comply with a fundamental principle: an incidental question of constitutionality could be raised both in an administrative case of challenging electoral results and in a case relating to the elector's right to vote by a constitutionally compliant law.[37]

The judicial path can also force politically regional assemblies to adapt their legislation to state principles. This was the case of the regional council of Calabria, which has recently changed its electoral law, introducing a gender quota of 40% and double preference.[38] As a result of these changes, in the election of 3-4 October 2021, for the first time, six women (out of thirty) were elected member of the regional council of Calabria.

Another way to remedy inertia at the regional level could be the self-application of state principles, if they are detailed, as in this case.[39] According to this interpretative proposal, with legge no 20 of 2016 laying down binding rules of direct applicability in the regulation of preferences and candidacies, any public administration or court should apply directly such rules. They would be of '*cedevole*' nature, with the potential for regional lawmakers to re-legislate the matter.[40]

However, this proposal does not seem to be confirmed by the constitutional case law relating to another principle of legge no 165 of 2004, formulated in detailed terms. In fact, the rule on the non-immediate re-eligibility, at the end of the second consecutive term, of the president of the region elected by direct universal suffrage, has been considered not self-applicable by the courts.[41]

The government has opted for a third path: the use of substitutive power, provided by Art 120, para 2, Constitution. More exactly, in June 2020, four years after the adoption of legge no 20 of 2016, the government decided to take action against those regions that had so far not adapted their electoral laws to the principle of gender equality.

https://tinyurl.com/yckvzhrc (last visited 31 December 2021).

[36]Regional Administrative Court for Calabria 5 November 2020 no 1758, available at https://tinyurl.com/mt8yay72 (last visited 31 December 2021).

[37] F. Corvaja, 'Preferenza di genere e sostituzione legislativa della regione Puglia: il fine giustifica il mezzo?' *Quaderni costituzionali*, 609 (2020).

[38] Legge regionale 19 November 2020 no 17.

[39] L. Trucco, 'Preferenza di genere e sostituzione legislativa della regione Puglia: quando il fine potrebbe già avere il mezzo' *Quaderni costituzionali,* 605 (2020).

[40] These state *'cedevole'* nature rules would apply until they are replaced by regional laws.

[41] M. Di Folco, n 20 above, 1191. See: Corte d'Appello of Milano 20 May 2011 no 1404.

First, with a letter of 5 June 2020 the Minister for Regional Affairs and Autonomies, through the president of the State-Regions Conference, urged these regions, also in view of the next round of elections, to implement into their electoral laws the principles set by legge no 20 of 2016, aimed at ensuring a balance in representation between women and men in regional councils.

Second, at the meeting of the Council of Ministers on 25 June 2020, the same Minister outlined a survey carried out on regional legislation regarding the election of regional councils. This survey stressed that the electoral laws of some regions had not adopted the provisions introduced by legge no 20 of 2016. Their electoral systems, in fact, did not allow for the expression of the second preference reserved to a candidate of a different gender or did not provide for electoral gender quotas. The non-compliant regions were precisely those mentioned above: Calabria, Liguria, Piemonte and Puglia. Among these, Liguria and Puglia were due to vote on 20-21 September 2020. The same criticism was levelled at two regions with a special status, Friuli Venezia Giulia and Valle d'Aosta, and the Autonomous Province of Bolzano. However, the consequences for special autonomies have differed (see below).

Third, through a note on 3 July, the President of the Council of Ministers invited these regions to adapt 'with the utmost urgency' their electoral laws to the aforementioned principles introduced by legge no 20 of 2016.

This approach produced some effects. The Liguria regional council decided to comply with the government's request and unanimously approved legge 21 July 2020 no 18 (laying down 'Provisions concerning the election of the President of the Regional Government and of the Regional Council – Legislative Assembly of Liguria').[42] It provided – among other things[43] – that each voter may cast up to two preferences and, in this case, the second preference must concern candidates of a different gender or will be cancelled. A limit of 60% for same-sex candidates is introduced in the formation of lists in order to ensure adequate representation of both sexes.

In contrast, the inertia of Puglia continued and, consequently, the President of the Council of Ministers, with a provision of 23 July 2020, trigged the procedure for the exercise of the substitutive power. The measure established a short deadline, in theory compatible with the start of the electoral process in the region,[44] within

[42] Starting from 1999 and until the entry into force of legge regionale no 18 of 2020, Liguria continued to apply the transitional regulations introduced by Art 5, para 1 of legge costituzionale no 1 of 1999; it approved only sporadic interventions on very limited profiles (such as Art 13 of legge 29 December 2014 no 41, concerning the subscription of lists). See: B. Caravita, 'Le Regioni di fronte alla questione della legge elettorale', in B. Caravita ed, *La legge quadro n. 165 del 2004 sulle elezioni regionali* (Milano: Giuffrè, 2005).

[43] Indeed, legge regionale no 18 of 2020 has reformed the entire electoral system (L. Trucco, 'Preferenza di genere' n 39 above).

[44] Several scholars have pointed out the mortification of the scope for cooperation with the region imposed by the very tight deadline established by the government (L. Trucco, 'Dal mar ligure allo Ionio: norme elettorali "last minute" e rappresentanza di genere di "mezza estate" '

which the regional council was to modify its electoral law, implementing measures on the promotion of equal opportunities between women and men in the access to elected offices. In the absence of such legislative intervention, the government would take over the implementation of the constitutional principle to apply to 2020 regional elections.

Notwithstanding this warning, the Apulian regional council did not approve the amendments requested by deadline of 28 July 2020, leaving its electoral rules unchanged.

As a consequence, for the first time, the government exercised its substitutive power through the adoption of decreto legge 31 July 2020 no 86 ('Urgent provisions on gender equality in electoral consultations in regions with ordinary statute'), promptly converted, without amendments, into legge 7 August 2020 no 98. This Law established that in the Puglia Region for the election of the regional council on 20-21 September 2020, in place of the existing rules that were in contrast with the principles of legge no 165 of 2004, the following provisions had to be applied: (a) each voter may cast two votes of preference for candidates of different gender, and the appropriate ballot paper consequently prepared; (b) in case two preferences are cast for candidates of the same gender, the second one is annulled.

The Prefect of Bari was appointed extraordinary commissioner with the task of providing the necessary steps to implement this decree, including the recognition of the regional provisions incompatible with those introduced by decree-law, without compromising the principle of the concentration of electoral consultations.

Thus, on 3 August 2020, the Prefect issued a provision identifying the regional rules to be considered applicable.[45] On the same day, the president of the region, through own decrees, called the elections, established the number of seats allocated to each constituency, set the rules for the composition and subscription of the lists and established the model ballot paper.[46]

On 20 and 21 September, the voters of Puglia had the chance, for the first time, to cast two preference votes for a man and a woman. Finally, the mechanism was applied, albeit through the robust instrument of state interference in the sphere of the region's decision-making autonomy.

IV. Some Remarks on the Use of the Extraordinary Substitute Power Against Regional Legislative Inertia

The abovementioned event is interesting for several reasons and raises a number of legal questions.

Consulta On Line, 10 August 2020).

[45] Measures of the Prefect of Bari as Extraordinary Commissioner prot. 82022 of 3 August 2020.

[46] Decreto del Presidente della giunta regionale nos 324, 325, 326 and 327 of 3 August 2020, respectively.

The government substitutive power was introduced by the constitutional reform of 2001 to counterbalance the extension of regional competences. The reform enables government to replace regional bodies (or metropolitan cities, provinces and municipalities) if: (1) they fail to comply with international treaties and rules or EU legislation; (2) in the case of serious danger for public safety and security; (3) whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities (Art 120, para 2, Constitution).

This power was implemented by Art 8 of legge no 131 of 2003, establishing its procedural steps 'in compliance with the principle of subsidiarity and the principle of loyal cooperation'. The first step is precisely the assignment to the bodies concerned of a reasonable time period to take the necessary measures.

We do not intend to analyse all the problematic aspects of the first use of this state power,[47] but only those directly related to the principle of gender equality. Frankly, the need to implement such a principle through the use of government's substitutive power may seem surprising in this period marked by critical problems in the state-regions relationship, generated by the Covid-19 pandemic.[48] However, the use of this power stresses the importance of the principle of gender equality in the current Italian constitutional context. Equally, it raises some questions: can non-implementation of the principle of promoting gender equality justify the triggering of substitute power by the government? Which of the prerequisites of Art 120, para 2, Constitution can it be attributed to?

Government reasoning leading to the use of the substitute power is not completely clear. The preamble of decreto legge no 86 of 2020 refers to the need to 'guarantee the effective respect of the principle of access to elected offices in conditions of equality under Art 51, para 1, of the Constitution'. In such a way, it intends to protect the 'legal unity of the Republic'. Similarly, Art 1, para 2, of the same decree states that the measures are adopted 'in order to ensure the full exercise of political rights and the legal unity of the Republic'.

Therefore, the main reason for the state's intervention seems to be the

[47] For an analysis of all the problematic aspects raised by the decree-law, see: P. Colasante, 'Il Governo "riscrive" la legge elettorale della Regione Puglia con la doppia preferenza di genere: profili problematici dell'esercizio del potere sostitutivo sulla potestà legislativa regionale' *Federalismi.it,* 9 September 2020; D. Casanova, 'Riflessioni sulla legittimità della sostituzione legislativa da parte del Governo ex art. 120 Cost. Note critiche a partire dal decreto legge n. 86 del 2020' *Nomos,* 1 (2020); M. Cosulich, 'Ex malo bonum? Ovvero del decreto-legge n. 86 del 2020 che introduce la doppia preferenza di genere nelle elezioni regionali pugliesi' *Federalismi.it*, 9 September 2020; R. Dickmann, 'L'esercizio del potere sostitutivo con decreto-legge per garantire l'espressione della doppia preferenza di genere in occasione delle elezioni regionali in Puglia del 2020' *Forum di Quaderni costituzionali,* 15 October 2020; T. Groppi, 'La Costituzione si è mossa: la precettività dei principi costituzionali sulla parità di genere e l'utilizzo del potere sostitutivo del governo, nei confronti della Regione Puglia' *Federalismi.it*, 9 September 2020.

[48] ibid 103.

protection of the legal unity of the Republic, with an evident shift, respect to the warning act of 23 July, which referred, instead, to the fact that the provisions of principle on equal opportunities

> 'are among the essential levels of benefits concerning civil and social rights that must be guaranteed, pursuant to Art 120, para 2, of the Constitution, on the entire national territory'.[49]

This change of perspective was grounded on the legal opinion of Advocates of States, who – without in-depth motivation – connected the principle of gender equality to the protection of the legal unity of the Republic and, more doubtfully, to the protection of an essential level of benefits concerning rights.

It is not simple to define the concept of 'legal unity'. According to the constitutional case law, legal unity clearly refers to interests and values, 'naturally' belonging to the State, which has ultimate responsibility for maintaining the unity and indivisibility of the Republic guaranteed by Art 5 of the Constitution.[50] The Constitution, therefore, requires that, regardless of the distribution of administrative competences, as implemented by state and regional laws on the various issues, the government can always intervene, in place of the competent bodies, to guarantee these essential interests, when there is a pressing need for sufficient homogeneity in the normative system. Thus, legal unity represents an *extrema ratio* clause, used in defence of the fundamental needs of equality, security, legality, which could be jeopardized by the non-exercise or illegitimate exercise of regional competences.

Effectively, this notion is not dissimilar to the protection of rights. The impairment of legal unity would lead to disharmony and imbalances between the various territories, which would acquire even greater importance were such an impairment to affect citizens' civil and social rights, which the Constitution provides enhanced protection for in terms of unity, resulting from the combined provisions of Arts 117, para 2, lett. m) and 120, para 2, Constitution.[51]

Clearly, this picture highlights the unresolved and ambiguous character of Italian regionalism, as configured by the reform of Title V: significant regional competences, a quasi-federal system, but without any clear instruments to protect the unitary needs. Therefore, interpretative arrangements are required to prevent the paralysis or disintegration of the whole system: which is what the Constitutional Court has tried to do, with some difficulties, in its re-reading of the 2001 reform.[52]

To conclude, does non-implementation of the principle of gender equality by

[49] On this perspective, see Le Costituzionaliste, 'Il mancato adeguamento delle leggi elettorali alle prescrizioni statali sulla parità di genere' *Rivista del Gruppo di Pisa*, 103 (2020).

[50] See the two leading cases of the Constitutional Court no 43 of 2004 and no 236 of 2004; and C. Mainardis, *Poteri sostitutivi statali e autonomia amministrativa regionale* (Milano: Giuffrè, 2007).

[51] See judgment no 121 of 2012, available at www.cortecostituzionale.it.

[52] T. Groppi, n 47 above, 1.

the Puglia Region endanger the 'legal unity' of the Republic, as stated in decree law no. 86 of 2020?

The answer 'yes' seems the most convincing, which can be reconciled with the preceptive nature of Arts 51, para 1, and 117, para 7, Constitution. Gender equality in the access to elected office is not a mere programmatic, open-ended constitutional principle or objective, which regional lawmakers are fully free to implement, but it is a preceptive rule, having binding effects, since it represents one of the essential aspects of the Republic, as a unitary State. In the light of this, the government can act as protector of the principle of gender equality.

Furthermore, heterogeneous regional approaches would cause a different application of the constitutional principle of gender equality, and the more general principle of equality pursuant to Art 3 Constitution. Such principles intend also to guarantee, throughout the national territory, the equal attribution, to each voter, of the chance of expressing a double gender preference. In short, in the government's reading of the normative framework, affirmative measures cannot be subject to differences regarding the geographical and political areas of the country.

V. Gender Equality and Regions with Special Autonomy. Something Different?

As mentioned in its preamble, the decreto legge no 86 aimed to protect the 'legal unity of the Republic' through the exercise of government's substitute powers. On the basis of this reasoning, the decree law should have applied to all regions that did not introduce the double gender preference. In contrast, its rules applied only to Puglia, despite the fact other regions had not established in their legislation such a mechanism.

This choice may be explained in the light of the government's urgent intention to intervene only in the area of the electoral laws of the regional councils, which had to be elected on 20-21 September 2020. The decree law stressed the 'imminent electoral deadlines', which were the basis for the need 'to intervene urgently'. However, among the seven regional councils to elect, the Apulian one was not the only one whose electoral discipline provided for single preference voting without the double gender preference.

Indeed, this mechanism was also missing (and still is) in the Valle d'Aosta electoral rules. Legge regionale 12 January 1993 no 3 establishes 'equal conditions between genders', but these 'conditions' merely consist in a gender quota of 35%. The electoral system offers voters the chance to cast one preference vote for a candidate on the list they vote for.

Notwithstanding this normative scenario, the electoral rules of Valle d'Aosta were not affected by the government intervention. What were the reasons for this different treatment?

The only plausible reason can be found in the special status of the Valle d'Aosta

Region, which implies a different normative framework in electoral matters compared to ordinary regions. If the latter have concurrent legislative competence, special regions have the exclusive power to adopt their electoral law, as provided by the current text of their respective special statutes.[53] In other words, in adopting their electoral rules, special regions have to be 'in harmony with the Constitution and the principles of the legal order of the Republic', but they are not bound to respect the fundamental principles laid down in state acts. Formally, therefore, the electoral rules of special regions need not comply with the legislative principles established by legge no 165 of 2004.

Nevertheless, in exercising this exclusive competence, electoral laws of special regions have to promote 'equal conditions for access to electoral consultations'.[54] A closer look reveals this formula to be 'analogous, though not identical'[55] to that of Art 117, para 7, Constitution, because it refers to equal access to electoral competitions and not to elected offices. This could lead to a weaker interpretation of the principle, aimed at excluding the introduction of 'strong' affirmative actions, such as gender quotas.[56]

Regardless of this reconstruction, what is certain is the evident delay in the adoption of mechanisms to promote gender equality by special regions: only Sardegna and the Autonomous Province of Trento have introduced gender quotas and gender double preference. Both have built such instruments in a stricter way, providing equal quotas[57] and the alternation of candidates of different gender in the lists. The remaining special regions and the Autonomous Province of Bolzano have implemented only the mechanism of gender quotas, often reducing their size[58] and the relative penalties.[59]

This situation raises a significant question: have special regions the power not to implement the principle of gender equality, as stated by legge no 20 of 2016?

To answer this, we have to take into account the legislative power of special regions in electoral matters which expressly limited by the 'principles of the legal order of the Republic', must, in some cases, comply with principles of state legislation.

According to judgment no 143 of 2010, these regions cannot avoid the

[53] See: Art 12 St. Friuli-Venezia Giulia; Art 15 St. Sardegna; Art 47 St. Trentino Alto Adige/Südtirol; Art 15 St. Valle d'Aosta; Arts 3 and 9 St. Sicilia, as modified by legge costituzionale no 2 of 2001.

[54] See n 46 above.

[55] Judgement no 49 of 2003, available at www.cortecostituzionale.it.

[56] S. Mabellini, 'Equilibrio dei sessi e rappresentanza politica: un revirement della Corte' *Giuriprudenza costituzionale*, 372 (2003); *contra* M. Cosulich, *Il sistema elettorale del Consiglio regionale tra fonti statali e fonti regionali* (Padova: CEDAM, 2008).

[57] See: Art 25, para 6-*bis*, legge provinciale Trento no 2 of 2003, as amended by legge no 4 of 2018, and Art 4, para 4, legge regionale Sardegna no 1 of 2013, as amended by legge no 1 of 2018.

[58] It is case of Valle d'Aosta electoral law, which provides a gender quotas equal to 35%; Sicilia and Autonomous Province of Bolzano, with quotas equal to 1/3.

[59] For example, Sicilia (G. Maestri, n 19 above).

application of the principles set out in legge no 165 of 2004, which are expressions of the unchanging need for uniformity imposed by Arts 3 and 51 Constitution, unless 'specific local conditions' apply. For example, on the incompatibility of regional councilors, legge no 165 of 2004 codifies principles of a general nature, which may be self-imposed even on regions with special status.

This conclusion can be accepted also with reference to the principle of gender equality, as stated by legge no 20 of 2016. It is the legislative translation of a principle of a constitutional nature, whose implementation is not optional for special regions.

The real problem, thus, is not about the '*an*' of introduction of mechanisms to achieve a more balanced representation in legislative assemblies of special regions (their introduction is, in fact, mandatory), but the '*quomodo*' of their implementation. Special regions must surely implement the constitutional principle of gender equality, but it is questionable that they are obliged to introduce the specific and detailed instruments provided by legge no 165 of 2004, as amended in 2016. According to some scholars, it is not correct to include specific instruments, such as gender quotas and double gender preference, among the general principles of the Republic's legal system that represent the only one constraint of the electoral legislation of special regions.[60]

On the contrary, we believe that legislated gender quotas and – relating to preferential voting systems on open lists – double gender preference have acquired the nature of general features of the current Italian legal system in electoral matters. As long-standing case law states, the general principles, which limit the exclusive legislative competence of special regions, are

> 'guidelines and directives of general and fundamental nature, which may be inferred from the systematic connection, the coordination and inner rationality of the rules which, at a given moment in history, form the pattern of the legal system in force'.[61]

This definition could include gender quotas and gender preference, which represent a *leitmotiv* of all Italian electoral systems.

According to this interpretative proposal, special regions are required to implement the two instruments, which in our electoral systems usually concretize the principle of gender equality. However, they are not required to comply with all the detailed rules of legge no 20 of 2016, such as the size of quota and the number of preferences. Thus, for example, the electoral system of the Autonomous Province of Bolzano could continue to provide four preference votes, but should

[60] M. Di Folco, n 20 above. This interpretative solution was accepted by the Offices of the Camera dei deputati, 'Equilibrio della rappresentanza tra donne e uomini nei Consigli regionali', Dossier 30 September 2015 no 346, available at https://tinyurl.com/b46j2t8v (last visited 31 December 2021).

[61] Judgment no 6 of 1956, available at www.cortecostituzionale.it.

introduce a differentiated-gender rule.

This interpretative suggestion is able to protect the 'legal unity' of the Republic, invoked by the government in decreto legge no 86 of 2020, which cannot be subject to exceptions in some geographical areas of the country, as an expression of the fundamental principle of unity and indivisibility of the Republic (Art 5 Constitution), without deleting the autonomy of special regions.

VI. Conclusions

The paper has analysed the difficult path of the Italian regions towards the implementation of the constitutional principle of gender equality in their electoral legislation. On the one hand, in the last ten years, the state approach has been open to the introduction of measures to redress female under-representation in EU and national parliaments, in local executive bodies and assemblies and in regional legislative assemblies.[62] On the other hand, in some regional contexts, such as Liguria, Calabria and Puglia, the implementation of gender quotas and double gender preference has been neither simple nor quick, whilst in Piemonte and some special regions so far they have not been introduced at all.

Such a heterogonous situation can be observed even in the outcomes of the regional elections of 20-21 September 2020. Compared to previous ones, the number of female members elected has increased in Veneto (from 11 to 17), Toscana (from 9 to 16), Puglia (from 4 to 8) and Marche (from 6 to 7). In no case was equal representation reached, even though in Toscana and Veneto a good percentage of women was elected, 40% and 34%, respectively. Notwithstanding the increase in the number of women elected, the female component of the regional councils of Marche and Puglia remains low (23.3% and 16%).

A different trend, characterized by a decrease in the number of women elected, can be noted in Campania (from 11 to 9) and Liguria (from 6 to 3)[63], in the latter case, despite the introduction of gender quotas and double gender preference. The single-preference voting system of Valle d'Aosta has produced even more unsatisfactory results: the regional council is 90% of male.[64]

This picture highlights how electoral mechanisms, such as gender quotas and double gender preference, *can* have a key role in reducing disparity between men and women in the election to public offices and effectively contribute to an increase in the number of women elected. However, the capacity of these mechanisms to lead to rapid change should not be over-estimated, as it depends

[62] M. D'Amico, n 3 above.

[63] The percentages are equal to 18% and 9.68%, respectively [E. Aureli, 'La parità di genere nell'accesso alle cariche elettive nelle elezioni regionali del 2020. Analisi e prospettive' *Federalismi.it,* 18 (2020)].

[64] M. Perrone, 'Regionali, le elette sono appena il 23%. Hermanin (+Europa): «Donne rimosse dalla politica»' *Il Sole24ore,* 23 September 2020.

on many factors, not least the design of the quota system. Thus, the success rate of female candidates is higher where rules concerning rank order and effective sanctions for non-compliance are provided. Only in such cases – Toscana and Veneto – have women reached a significant percentage, likely able to fulfil a substantive representation, which should change the style of politics and place women's issues on the formal political agenda and legislation.[65]

In the case of less strictly designed regulations, gender quota mechanisms are not sufficient to solve by themselves the gender gap in Italian regional politics, as shown by the results in Liguria and Puglia, which used for the first-time gender quotas and/or double gender preference. These mechanisms do not automatically lead to higher representation of women, only reserved seat systems could guarantee a certain number of women being elected, but, as said, constitutional case law has judged them unlawful.

Any promotional measure aimed at balancing gender representation in political offices is, in fact, unlikely to overthrow informal barriers to women's political participation, present in the political, cultural and social context. For example, the double gender preference may be ineffective when faced with the lack of commitment of political parties and candidates to apply it properly.[66]

In short, formal rules are important, but not sufficient, as they need to be complemented by other conditions in order to level the playing field for women. First and foremost, good-faith compliance of the political parties. They are the gatekeepers to gender balance in political decision making since they control the selection process. For example, they have a key role in the functioning of gender quotas, avoiding that female candidates are all placed at the bottom of the list.

In some regional contexts political parties have been less prepared to reduce their right to decide over own lists, avoiding or delaying the introduction of gender equality mechanisms. This scenario shows that autonomy (including special autonomy) does not mean necessarily more attention for gender equality. Electoral federalism has, therefore, not been used by all regions to achieve a more balanced representation of their citizens of female gender. This approach in not isolated, but it can be noted in other cases, such as the regulation of the 'maso chiuso'.[67]

Legal analysis alone cannot explain the reasons for differing attitudes of

[65] D. Dahlerup, 'The story of the theory of critical mass' 2 *Politics & Gender,* 511 (2006). See, also: European Commission for Democracy to through Law (Venice Commission), 'Report on the impact of electoral systems on women's representation in politics', 2009, available at https://tinyurl.com/2p8ecyru (last visited 31 December 2021).

[66] A. Deffenu, 'Parità di genere e istituzioni politiche prime note per un bilancio', in B. Pezzini and A. Lorenzetti eds, *70 anni dopo tra uguaglianza e differenza. Una riflessione sull'impatto del genere nella Costituzione e nel costituzionalismo* (Torino: Giappichelli, 2019), 38.

[67] See judgment no 193 of 2017, available at www.cortecostituzionale.it. The regulation of the Autonomous Province of Bolzano provided that in the succession of farmsteads (so-called 'maso chiuso') between co-heirs of the same degree, males had priority over females (Art 5 of Autonomous Province of Bolzano no 33 of 1978, repealed by legge no 18 of 2001, but applicable to the case to trial). Such a rule was declared unconstitutional for violating the principle of equality.

State and regions, or of each region towards the principle of gender equality, since the study of these reasons implies an interdisciplinary approach, which also looks at the features of the local organization of political parties and of the regional public opinion and communities. However, legal analysis stresses the basic principle of equality gender and its main implementation instruments – gender quotas and double preference – should be introduced in a homogenous manner on the national territory in order not to jeopardize the right to vote and to stand in elections and, thus, ultimately the legal unity of the Republic. In the current constitutional context it is such an important value that it justifies the launch of extraordinary substitutive power by the government.

Essays

Antidiscrimination Law in the Italian Courts: New Frontiers on the Topic in the Age of Algorithms

Raffaello Santagata de Castro*

Abstract

In Italy, as in many other countries, the recent pandemic has enriched the debate regarding the problem of discrimination in the workplace. Social and economic restrictions introduced by the Government in order to slow the spread of Covid-19 have exacerbated existing inequalities, especially those relating to gender, and created new ones. The aim of this article is to examine what role anti-discrimination law can play in addressing these inequalities and consider how the law should respond to the new challenges. The article provides an analysis and critique of current judicial approaches to discrimination law. Particularly, it contains an in-depth examination of recent case law on discriminatory dismissal and discrimination on the ground of trade union membership, dealing with some conceptual and enforcement-related issues. First, it raises the difficulty in drawing a bright line distinction between direct and indirect discrimination (paras 3 and 3.1). As an example, the article analyzes the recent and relevant ruling of the Tribunal of Bologna on discrimination by algorithm. Finally, this topic will be taken into account with regard to other problems, such as those of burden of proof, statistical evidence (para 4), legal standing, and collective interest bodies entitled to bring enforcement proceedings (para 5).

I. Introduction

In Italy, as in many other countries, discrimination in the workplace has gained much attention during the pandemic. Social and economic restrictions introduced by the Government in order to slow the spread of Covid-19 have exacerbated existing inequalities, especially those relating to gender (for example, with the rise of remote working during lockdown, mothers have been spending more time on household responsibilities for childcare and domestic work), and created new ones.[1]

The pandemic has also compounded the inequalities and forms of discrimination that are often hidden from view, such as those related to the increasing use of algorithms[2] in employment decision-making.[3] Even before the

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[1] M. Campbell, S. Fredman and A. Reeves, 'Palliation or protection: How should the right to equality inform the government's response to Covid-19?' 20(4) *International Journal of Discrimination Law*, 183–202 (2020).

[2] An algorithm is a process or set of rules used in calculations or other problem operations. According to definition proposed by two American legal scholars it can be defined as 'a formally specified sequence of logical operations that provides step-by-step instructions for computers to

pandemic, some scholars[4] pointed out that the spread of algorithmic systems and artificial intelligence (AI) in work-related decisions, especially in recruitment and selection processes, may jeopardise the goals of antidiscrimination law, as the algorithm is a potential source of discrimination.[5] A human element, stemming from the programmers and users, is present in all algorithms, including those used to evaluate candidates for hire or to make employment decisions. This human element gives rise to the risk that the algorithms can

> 'reproduce existing patterns of discrimination, inherit the prejudice of prior decision makers, or simply reflect the widespread biases that persist in society'.[6]

A good example is platform work, where algorithms are used to determine platform

act on data and thus automate decision'. See S. Barocas and A.D. Selbst, 'Big Data's Disparate Impact' *California Law Review*, 671, 674 (2016). This word is of Latin origin ('*Algorismus*'). It originates from the Arabic word 'the man of Kwarizm' referring to a 9th century mathematician. On the the impact of AI and automation on 'professional' jobs see F. Pasquale, *New Laws of Robotics. Defending Human Expertise in the Age of AI* (Cambridge: Belknap Press, 2020) where the author argues that the choice to entrust algorithms to assume tasks can be functional to a neoliberal goal that prioritizes efficiency and productivity above any other human value.

[3] A.R. Givens, H. Schellmann and J. Stoyanovich, 'Tackle the Big Problem With Hiring Workers in 2021' *The New York Times*, 17 March 2021: 'People of color, women, those with disabilities and other marginalized groups experience unemployment or underemployment at disproportionately high rates, especially amid the economic fallout of the Covid-19 pandemic. Now the use of artificial intelligence technology for hiring may exacerbate those problems and further bake bias into the hiring process. (…) In most cases, vendors train these tools to analyze workers who are deemed successful by their employer and to measure whether job applicants have similar traits. This approach can worsen underrepresentation and social divides if, for example, Latino men or Black women are inadequately represented in the pool of employees'.

[4] I. Ajunwa, 'The Paradox of Automation as Anti-Bias Intervention' 41 *Cardozo Law Review*, 1671 (2020); P. Hacker, 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law' *Common Market Law Review*, 1146-1150 (2018); M. Kullmann, *Discriminating job applicants through algorithmic decision-making* (Deventer: Kluwer, 2019), 5. See also Id, 'Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law' 34(1) *International Journal of Comparative Labour Law & Industrial Relations*, 1-21 (2018). The key question addressed in this article is to what extent EU equality law is fit to provide platform workers with sufficient legal means to address any discriminatory or biased automated decision taken by an employer.

[5] This has been also underlined by the European Commission in its European Commission Gender Equality Strategy 2020-2025, which recognised that '[w]hile AI can bring solutions to many societal challenges, it risks intensifying gender inequalities' and that '[a]lgorithms and related machine-learning, if not transparent and robust enough, risk repeating, amplifying or contributing to gender biases that programmers may not be aware of or that are the result of specific data selection'. European Commission (2020), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A Union of Equality: Gender Equality Strategy 2020-2025' COM(2020) 152 final (Brussels 2020).

[6] S. Barocas and A.D. Selbst, 'Big Data's Disparate Impact' n 2 above. On the different types of algorithms and their functions and uses see J. Gerards and R. Xenidis, *Algorithmic discrimination in Europe: Challenges and opportunities for gender equality and non-discrimination law* (Luxembourg: Publications Office of the European Union, 2021), 43.

workers' pay, depending on supply and demand, quality ratings, and workers' availability; several factors taken into account by these algorithms can negatively affect gender equality in pay. In the well-known case of the multinational food delivery company *Deliveroo*, an algorithm was used to elaborate the reputational ranking (in other words a 'score') on which a rider's future job opportunities and remuneration were based, however, the company had significant discretion to choose selection (hiring) criteria which could disproportionately exclude a protected class (of riders) from work opportunities and hide this bias through automated hiring (see para 3.1).

The aim of this article is to examine what role antidiscrimination law can play in addressing these inequalities and consider how the law should respond to the new challenges. The article provides an analysis and critique of current judicial approaches to discrimination law. This leads to the question of whether or not there is a need to modify existing legal concepts of discrimination as a result of the emergence of algorithms.

The article starts with an analysis of the new judicial approach taken by the Italian *Corte di Cassazione* (Supreme Court) on discriminatory dismissal and explores the traditional reluctance of the courts of first and second instance to give up the regulatory model laid down in the general rules of civil law, ie Article 1345 of the Italian Civil Code (para 2). There follows an in-depth analysis of the case law on discrimination on the ground of trade union membership, touching on some conceptual and enforcement-related issues. These issues concern the dividing line between direct and indirect discrimination (paras 3 and 3.1), and range from the attribution of the burden of proof and the important role that the courts play with regard to statistical evidence (para 4), to implications for legal standing, and the relationship between the different enforcement proceedings which collective interest bodies are entitled to bring in the absence of an identifiable complainant (para 5). For each of these issues, the analysis will focus on the recent and relevant ruling of the Tribunal of Bologna regarding discrimination by algorithm and will take into account the more sophisticated techniques adopted by the new Law no 31/2019 on class action with regard to the question of legal standing.

II. Discrimination Law and Delays in Italian Case Law. The Example of Discriminatory Dismissal

Over the last few decades, Italian labour courts have played a fairly marginal role in antidiscrimination law and have failed to grasp the importance of the topic. Discrimination, and key concepts related to it, have been addressed mainly by labour law scholars. Questions relating to this topic have seldom reached the courts and employment tribunals for interpretation. However, the most recent reforms have marked a turning point and revitalised the debate in the courts as well. It is commonly known that the so-called 'Fornero reform' Act (92/2012) first,

and then the 'Jobs Act' (Decree 23/2015, implementing Act 183/2014), have made the law on dismissal increasingly flexible and, above all, have reduced the array of remedies available in cases of unfair dismissal (Art 18 of the Worker's Statute).

These reforms have not changed the conditions that dismissal must fulfil to be found discriminatory. But the former universalistic system, whereby courts could order the reinstatement of employees in all cases of unfair dismissal (Art 18 of the Workers' Statute) has been repealed and replaced by a new and more flexible system, where reinstatement is no longer the general rule, and this severe remedy can be applied in only very few cases, such as, for example, when dismissal is found to be discriminatory, or null and void for an unlawful and decisive reason (the so-called *licenziamento ritorsivo* or retaliatory measure).

The progressive dismantling of traditional employee safeguards against unfair dismissal resulting from these reforms has increased the importance of discriminatory dismissal (as well as null and void dismissal for breach of binding regulations); discriminatory dismissal – namely dismissal based on one of the prohibited grounds of discrimination (such as gender) – remains the main area of possible reinstatement of an employee. Therefore, the courts have been urged to focus on antidiscrimination law, and discriminatory dismissal has been conceived as the 'last bastion' of the protective employment legislation system.[7] For a long time, the Italian *Corte di Cassazione*[8] held the view that discriminatory dismissal could be considered similar to the different case of dismissal on unlawful grounds and could fall within the scope of application of general rules of civil law, ie, Art 1345 of the Italian Civil Code.[9]

The result of this approach was the complete blurring of the distinction between discriminatory and retaliatory dismissal, ie dismissal with the primary aim of deterring a worker from invoking the right to judicial protection (or as a reaction to a complaint within an undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment).

In other words, unlawful dismissal (so called *licenziamento per motivo illecito*) had been widely understood as including both discriminatory and retaliatory dismissal, and courts were reluctant to apply European discrimination law in both cases.

The application of Art 1345 of the Italian Civil Code has had two important consequences.

First, the courts did not focus on the reason for the perpetrator's action but

[7] See for example M.V. Ballestrero, 'Tra discriminazione e motivo illecito: il percorso accidentato della reintegrazione' *Giornale di diritto del lavoro e delle relazioni industriali*, 249-250 (2016).

[8] See Corte di Cassazione 8 August 2011 no 17087, *Rivista giuridica del lavoro e della previdenza sociale*, 326 (2012); Corte di Cassazione 18 March 2011 no 6282, available at www.dirittoegiustizia.it.

[9] According to this article, 'a contract is unlawful when the parties are led to conclude it solely by an unlawful motive common to both' ('*Il contratto è illecito quando le parti si sono determinate a concluderlo esclusivamente per un motivo illecito comune ad entrambe*').

on the perpetrator's subjective *motive* and in so doing had made the claimant's burden of proof more onerous.

This might be the case of unconscious discrimination stemming from stereotyping, which occurs when the employer treats the employee less favourably because of a protected characteristic without meaning to do so or realising that he or she is doing so.

Second, the courts held that the victim is required not only to establish that the treatment received is caused by a prohibited ground but also, under the aforementioned Art 1345, that the ground is the *only* and *determinant* one, so discrimination could never arise if there is any fair reason for dismissal.[10]

In other cases, the courts found that the overlap between discriminatory dismissal and retaliatory dismissal is justified by the fact that the list of grounds on which discrimination is prohibited must not be understood to be exhaustive.[11]

This approach has been questioned by Italian legal scholars. Some experts[12] have pointed out that this view is inconsistent with the concept of discrimination provided in EU antidiscrimination law, where the test for causation is an objective one. The courts must interpret Italian law consistently with the words 'on the ground of' (a particular characteristic) used in the EU Directives. It is a settled principle that persons can directly discriminate on particular grounds whether they do so consciously or unconsciously. The intention or motive of the defendant to discriminate ('subjective state of mind') is not required and is not a necessary condition of liability. Otherwise, as pointed out in some British judgments,

> 'it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy'.[13]

Furthermore, the implications of such an approach seem odd because the courts – through reference to the said Art 1345 – came to reject the view that the more favourable regulation on the burden of proof is applicable in the case in

[10] For example, in cases where the Supreme Court held that retaliatory dismissal is similar to discriminatory dismissal. See Corte di Cassazione 8 August 2011 no 17087, n 8 above; Corte di Cassazione 18 March 2011 no 6282, n 8 above.

[11] Corte di Cassazione 18 March 2011 no 6282, n 8 above, according to which 'the prohibition of discriminatory dismissal - provided for by Art 4 legge 15 July 1966 no 604, by art 15 legge 20 May 1970 no 300, and by art 3 legge 11 May 1990 no 108 - leaves room for extensive interpretation so that the area of individual prohibited reasons also includes retaliatory dismissal'; recently also Corte di Cassazione 3 December 2015 no 24648, *Giustizia Civile Massimario* (2015).

[12] See, among recent studies, M. Barbera, 'Il licenziamento alla luce del diritto antidiscriminatorio' *Rivista giuridica del lavoro e della previdenza sociale*, 151 (2003); A. Lassandari, 'Considerazioni sul licenziamento discriminatorio', in O. Bonardi ed, *Eguaglianza e divieti di discriminazione nell'era del diritto del lavoro derogabile* (Roma: Ediesse, 2017), 193-194, and further references. See also M. Biasi, 'Il licenziamento per motivo illecito: dialogando con la giurisprudenza' *Lavoro, Diritti, Europa*, available at www.lavorodirittieuropa.it.

[13] See *L. Goff in R* v *Birmingham City Council*, ex parte EOC [1989] AC 1155.

which discrimination reaches its peak, namely where the loss of a job is at stake; in this case, the employee should be required to prove that the discriminatory reason is the only and determinant one when the decision was made, so that the existence of another reason for dismissal could avoid the test of whether dismissal is discriminatory even though there is a ground of discrimination.

However, this argument too is not fully convincing: in fact, antidiscrimination law requires the respondent to rebut the presumption of discrimination by showing that its decision is not justified by extraneous objective elements irrelevant to any discrimination.

All forms of employer decisions are covered by EU and Italian antidiscrimination law: hiring, training, disciplinary measures, dismissal and so on; if the discriminatory measure is a dismissal, the applicable principle should be the same.

Therefore, discriminatory dismissal may not be confused with retaliatory dismissal and cannot come under the scope of application of Art 1345 because European and Italian antidiscrimination law do not require the protected characteristic to be the whole or main reason.

Only recently the Italian Supreme Court has appropriately started to modify its stance and acknowledge full autonomy in the case of discriminatory dismissal with respect to null dismissal for violation of mandatory norms and retaliatory dismissal.[14]

In the case in point, a female worker (employed by a professional firm) had been dismissed for objective reasons because she had announced her intention to take time off work for medical procedures related to assisted reproduction.

The ruling is important for at least two reasons.

First, the Court made it clear that the dismissal can be classified in terms of direct gender discrimination because there is a causal connection between the dismissal and maternity, even if in the specific case it is only potential (her intention to take time off work had only been announced, but not yet realised).

Second, the Court, adjusting its long-standing position, explicitly held that there is a clear distinction between discrimination and unlawful motive (*unico e determinante: nozione di carattere soggettivo*).

The ruling represents an important step forward because the Supreme Court helps to overcome the misunderstanding of the overlap between two different

[14] Corte di Cassazione 5 April 2016 no 6575, *Argomenti di diritto del lavoro*, 1221 (2016); M.T. Carinci, 'Il licenziamento discriminatorio alla luce della disciplina nazionale: nozioni e distinzioni' *Rivista italiana di diritto del lavoro*, 721-722 (2016); D. Izzi, 'Il licenziamento discriminatorio secondo la più virtuosa giurisprudenza nazionale' *Il lavoro nella giurisprudenza*, 748 (2016). L. Lazzeroni, 'Licenziamento discriminatorio, motivo illecito determinante e procreazione assistita: cronaca di un diritto in evoluzione' *Diritti lavori mercati*, 303-326 (2016); S. Scarponi, 'Licenziamento discriminatorio: una svolta della Cassazione in un caso riguardante la procreazione medicalmente assistita' *Rivista giuridica del lavoro e della previdenza sociale*, 459 (2016); A. Vallebona, 'Licenziamento discriminatorio e per motivo illecito: l'orientamento della Cassazione è condivisibile' *Massimario di Giurisprudenza del lavoro*, 854 (2016).

kind of dismissals: discriminatory dismissal and retaliatory dismissal on unlawful grounds.

This approach has been confirmed in a recent ruling where the *Corte di Cassazione* draws a neat distinction between discriminatory dismissal and retaliatory dismissal:[15] as a consequence, in the latter case the Court requires the claimant to establish that the employer was motivated only by an unlawful intent when making the decision. The employer may rebut the inference by showing that the dismissal is supported by a just cause (as defined in Art 2119, Civil Code) or by justifiable reasons.

In cases of discriminatory dismissal, on the contrary, matters are quite different.

Following the established jurisprudence of the CJEU, the respondent may not rebut the presumption of discrimination by merely showing that there is a justifiable reason for the dismissal according to the Act on protection against dismissals: thus, the employer must prove that the dismissal is *exclusively* based on objective facts unrelated to any discrimination on prohibited grounds.[16]

As Sandra Fredman has pointed out,

> 'the process of determining whether the discrimination is on (prohibited) grounds (…) is not one of determining motive or intention. Instead, it is to establish facts from which a presumption of discrimination can be inferred. Notably too, the process of rebutting the presumption is very similar to that of justification in indirect discrimination'.[17]

However, differences of opinion exist within the labour courts of first and second instance: while some judgments are in accordance with the more recent approach of the *Corte di Cassazione*,[18] some others seem to disengage from these

[15] Corte di Cassazione 7 November 2018 no 28453. According to the Court in case of retaliatory dismissal the employee has to prove that the unlawful reason was the only and determinant one when the decision was made. However, the court allowed the employer to discharge the burden of proof by showing that the dismissal is supported by just cause (as defined in Art 2119, Civil Code) or by justifiable reasons. In case of discriminatory dismissal, on the contrary, the fact that the employer was motivated *only* by the discriminatory intent is irrelevant; the dismissal could also be based on objective facts unrelated to any discrimination on prohibited grounds (*L'allegazione del carattere ritorsivo del licenziamento impugnato comporta a carico del lavoratore l'onere di dimostrare l'illiceità del motivo unico e determinante del recesso, sempre che il datore di lavoro abbia almeno apparentemente fornito la prova dell'esistenza della giusta causa o del giustificato motivo del recesso, ai sensi dell'art 5 della l. n. 604 del 1966. La prova della unicità e determinatezza del motivo non rileva, invece, nel caso di licenziamento discriminatorio, che ben può accompagnarsi ad altro motivo legittimo ed essere comunque nullo*).

[16] C-427/16, *CHEZ Elektro Bulgaria*, ECLI:*EU*:C:2017:890, see, by analogy, judgments in *Coleman*, C-303/06, EU:C:2008:415, para 55, and *Asociația Accept*, C-81/12, EU:C:2013:275, para 56.

[17] S. Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?', in H. Collins and T. Khaitaned ed, *Foundations of indirect discrimination law* (Oxford: Hart, 2018), 31.

[18] Corte d'Appello di Roma 15 May 2020 no 1081. The Court held that in case of discriminatory dismissal it is for the claimant to prove that the protected characteristic (ground) is the reason

views. In fact, although discriminatory dismissal is not the same as retaliatory dismissal, courts sometimes still seem to use these categories interchangeably.

This approach can be seen in some recent rulings. One example is a case decided by the Court of Cagliari where the employee was dismissed for poor performance because he was frequently absent from work due to short periods of sickness. It is significant that the court[19] did not consider null and void the dismissal as discriminating against the employee due to disability, arguing that the intention to discriminate

> 'should be the determining and exclusive motive of the employer; and this must be evaluated at the moment of the formation of the will rather than its externalisation (which as a rule has formally lawful features)'.

The claimant failed to meet the burden of proof. On the contrary, the elements of proof that the employer produced to justify the dismissal were considered sufficient to exclude that the employer's decision was determined by the intention to eliminate an inconvenient sick employee whose illness forced him to take time off work.

It is also interesting to note that the Rome Court of Appeal[20] looked at the issue again. It made a reference to Supreme Court decisions taken prior to 2016 and clarified that retaliatory dismissal could be classified in the same category as discriminatory dismissal, given that the two acts have strong similarities with regard to the structure.

In both cases, inconsistencies between some statements can result in misconceptions and misunderstandings. Though the first judgment seems convincing at first sight, it becomes far less so upon closer inspection: first of all, if the case is within the scope of application of prohibition on discrimination on the ground of disability[21] – and according to the Court this is in no doubt[22] – the

for the less favourable treatment; at the same time, it added that such a *prima facie* case might be made out when there is a significant and strong causal link between the protected ground and the (less favourable) treatment. If such facts are proved, the employer must then prove that the reason for the treatment was not because of claimant's protected ground; but the court requires a body of consistent evidence to discharge that burden of proof (*In tema di licenziamento discriminatorio, in forza della attenuazione del regime probatorio ordinario, incombe sul lavoratore l'onere di allegare e dimostrare il fattore di rischio e il trattamento che si assume come meno favorevole rispetto a quello riservato a soggetti in condizioni analoghe, deducendo al contempo una correlazione significativa tra questi elementi, mentre il datore di lavoro deve dedurre e provare circostanze inequivoche, idonee ad escludere, per precisione, gravità e concordanza di significato, la natura discriminatoria del recesso*). See also Corte d'Appello di Ancona 22 November 2019 no 369.

[19] Tribunale di Cagliari, 6 July 2020, no 511, available at www.dejure.it.

[20] Corte d'Appello di Roma 30 September 2020 no 1898, available at www.dejure.it; see also Tribunale di Brescia 14 August 2020 no 302, Tribunale di Venezia 23 September 2019 no 550, where there threatened dismissal cannot be shown to be due to trade union activity.

[21] On the notion of disability in Italy, see S. Giubboni, 'Disabilità, sopravvenuta inidoneità, licenziamento' *Rivista giuridica del lavoro e della previdenza sociale*, 621 (2016); M. Peruzzi,

burden of proof should be reversed once a *prima facie* case of discrimination has been made out, and a *prima facie* case of this kind might be made out also where the prohibited ground is not the only ground on which the dismissal is based. Indeed, it is relevant only that there is a causal connection between dismissal and disability.

Second, it should not be sufficient for the respondent to prove that the dismissal may be justified where the absence (and the impossibility to perform) of the employee objectively affects the organisation of the company and its good functioning.[23] In such a case it is also necessary for the employer to prove that the causal connection between dismissal and objective facts (unrelated to any discrimination on disability) is exclusive.

Third, in the field of disability law, the issue of the burden of proof is particularly relevant: in order to rebut the presumption of discrimination the employer could prove that there is no causal connection between dismissal and the claimant's protected characteristic (disability); it is not sufficient to prove that he or she has no possibility of recovering the employee(s) for production purposes, even by resorting to professional retraining, transfers, lay-offs or short-time leave. The respondent has to prove that it has complied with the duty of reasonable accommodation or adjustment. The duty to provide reasonable accommodation under Directive 2000/78 arises 'in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training'. In such circumstances, the accommodation measures required by the employer include 'adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources'.[24]

III. Discrimination on the Ground of Trade Union Membership

Recent developments in the case law of the courts in Italy show that national legislation prohibiting discrimination in employment has often been applied to other important work-related fields, such as discrimination on the ground of trade union membership.[25]

La prova del licenziamento ingiustificato e discriminatorio (Torino: Giappichelli, 2017) 81, 196.

[22] According to the Court of Justice of the European Union, disabilities caused by an illness – if they entail long-term effects – should be covered by the provisions of the framework Equality Directive. The CJEU holds that 'the concept of "disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life': Case C-13/05 *Sonia Chacón Nava*, Judgment of 11 July 2006, available at www.eurlex.europa.eu.

[23] However, the established case law of the Supreme Court upheld this view. Corte di Cassazione 4 October 2016 no 19775; Corte di Cassazione 6 October 2015 no 19923

[24] Recital 20 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[25] In 2018, an interesting case was decided by the Tribunal of Bergamo after a legal action that had been brought by a trade union challenging the discriminatory nature of an extinction

In Italy the right not to be discriminated against for trade union membership finds a basic source of protection in Title 2 of the Workers' Statute (Act no 300 of 1970). This Act not only reaffirms for all employees the so-called 'positive trade union freedom', ie 'the right to form trade unions, to join them, to remain and be active in union activity' (art 14), but also protects employees against any kind of discrimination resulting from the use of trade union freedom.

Accordingly, Art 15 – which can be considered the 'prototype' or 'the forerunner' of antidiscrimination legislation – declares null and void any act or agreement in any way discriminating against employees because of union affiliation or non-affiliation,[26] religious, or political beliefs.[27]

For many years these provisions have rarely been used in practice, perhaps largely because, under closer scrutiny, the widespread presence of imperative rules made it easy to hold up unilateral decision-making by the employer.

It is worth noting that the employer's discretionary powers are limited by the employees' fundamental rights derived from the Constitution, and the general clauses played an important role in specifying these rights and subjecting employer's decisions to judicial control.[28] In particular, it should be pointed out that general clauses have in fact made up for the lack of antidiscrimination legislation in order to grant protection against evident and excessive abuses of the employer's powers. For many years the ordinary action of nullity provided for by Article 15 of the Workers' Statute therefore assumed limited importance in Italian case law.[29]

A good example was the case decided in 1981 by the Italian Supreme Court, dealing with an anti-union collective discrimination which arose because the

clause included by Ryanair in contracts signed with pilots and flight attendants. The Tribunal condemned Ryanair for breaching anti-discrimination legislation, with wide reference to EU law and CJEU case law.

[26] Particularly, the Statute refers to acts intended (a) to subordinate the employment of a worker to the condition that he belongs or does not belong to a trade union or that he ceases to belong to it; (b) to dismiss a worker, discriminate against him in the assignment of (jobs or in job classifications, in transfers, in disciplinary sanctions, or to otherwise prejudice him because of his union affiliation or activity or his participation in a strike).

[27] According to case law (see above the famous Fiat case) the notion of 'belief' to which the national non-discrimination rules on the ground of belief implementing European law (leg. Decree 216/2003) refer must be interpreted in a broad sense so as to also include the philosophical belief. In Italy crieteria for determining what is a philosophical belief have not been provided. However, the concept expressed by the expression '*convinzioni personali*' is different from the formulae used in other jurisdictions, such as the German '*Weltanschauung*'. This could mean that within this term it must not be necessarily included only those philosophical (or spiritual) convictions wich in some way have to do with the fundamental problemsof existence and also touch upon the religious sphere.

[28] G. Fontana, 'Statuto e tutela antidiscriminatoria (1970-2020)', in M. Rusciano, L. Gaeta and L. Zoppoli eds, *Mezzo secolo dallo statuto dei lavoratori. Politiche del diritto e cultura giuridica* (Napoli: Editoriale Scientifica, 2020), 209.

[29] Most frequently, the discriminatory acts have been sanctioned and removed using the special emergency procedure as set out in Art 28 of Act no 300, which gives the tribunal the power to issue, cease and desist orders in any case of anti-union activity on the part of the employer. See T. Treu, *Condotta antisindacale e atti discriminatori* (Milano: Franco Angeli, 1974).

employer granted collective economic benefit (the so-called 'anti-strike bonuses') in addition to regular wages to workers who did not take part in strike action. This discriminatory practice violated Art 16 of the Workers' Statute, which prohibits the employer from granting any collective economic benefit that is discriminatory due to the motives indicated in Art 15. The Court argued that

> 'the acts with which the employer has granted economic benefit (…) to a small number of employees are not null and void as such […] unless the employee can prove that those acts are due *to an unlawful ground*'.

At that time, this was the prevalent view not only with reference to conditions and benefit, but at every stage, including hiring, transfers, promotions,[30] job classifications[31] and so on. Furthermore, as noted above, until some years ago it was also applied to dismissals.[32]

This view has long hindered the expansion of antidiscrimination protection: since every discriminatory act needs to follow the regulatory model laid down in general rules of civil law, ie Art 1345 of the Italian Civil Code, the act should fulfil stringent conditions to be found to be discriminatory.

In particular, as mentioned above, the courts held that under Art 1345 the victim is required to prove that the prohibited ground is the only and determinant ground, so that the effectiveness of the prohibition laid down in Art 15 of the Worker's Statute is rather problematic because, as explained above, there is no discrimination if the employer's act is justified by any fair reason.

Only after European Directives 2000/43 and 2000/78 came into force did the non-discrimination legislation – affirmed in Decree 215 and 216/2003 implementing them – start to play a more decisive role.

In the case discussed in the previous paragraph, the Supreme Court adopted a new approach more consistent with EU antidiscrimination law.

This position did not change when, in January 2020 (see ruling no 1/2020 published on 2 January 2020) the Italian Supreme Court had to decide on the lawfulness of an automobile company's behaviour, which, on the occasion of a collective transfer, had moved 316 workers from one place of work to another, 77 of whom belonged to the trade union which had taken legal action.

The court of appeal had adopted a very questionable approach apparently based on the (implicit) assumption that the objective reasons given by the company in support of the collective transfer and, therefore, the criteria applied for selecting the employees are, in themselves, able to justify the employer's act thus excluding the existence of unlawful discrimination in all cases in which the transfer is justified.[33]

[30] Corte di Cassazione 17 October 1983 no 6086.

[31] Corte di Cassazione 2 December 1996 no 10378.

[32] *Ex plurimis* Corte di Cassazione 13 June 1984 no 3521.

[33] The Court seems to lean in this direction when it states that 'le ragioni del disposto trasferimento collettivo, lungi dal costituire il frutto di un intento antisindacale, corrispondevano ad una

This approach – which seems to require proof of an unlawful intention to discriminate – was rejected by the Supreme Court because it was understood to be incompatible with the usual approach to the definition of (direct) discrimination adopted in EU law. The judicial doctrine of intent applied in the USA – where the intention to discriminate is usually understood as a criterion for distinguishing between direct and indirect discrimination[34] – has not been favoured in EU antidiscrimination law. The EU approach – like that of the UK– looks at the effects rather than intentions: the focus is on the adverse effects of a rule or a practice for both direct and indirect discrimination, with the surprising result that where, in the absence of any discriminatory intention or motive, a rule or a practice which has an adverse impact on 100 per cent of the protected group must be classified as direct discrimination.

This explains why the Supreme Court does not consider the possibility of justifying practices that tend to have a discriminatory effect. The ruling of the Court is in accordance with both EU and Italian law because, unlikely indirect discrimination, leaving aside some specific exceptions mentioned in legislation such as necessary occupational qualification for a job, justification for direct discrimination is not generally permitted by the law.

1. D*iscrimination* by *Algorithm:* Can Facts Be Classified as Direct Discrimination?

The same conclusion could be drawn with reference to another interesting case of anti-union discrimination, where the Bologna Tribunal has, indeed, considered (but refused) the availability of a justification for a rule.

A legal action was brought before the Court by a trade union (according to Art 5 Decreto legislativo no 216 of 2003) challenging the discriminatory nature of an algorithm-driven practice whereby the company *Deliveroo* placed its riders at a disadvantage in terms of their reputational ranking (in other words their 'score') in cases of cancellation or cancellation of the booking of a work session (slot) with less than 24 hours' notice (so-called late cancellation), regardless of what the reason for the cancellation of the booked session might be.[35] The Court found that the system of access to bookings determined by the defendant's algorithm placed at a particular disadvantage any rider who joined a strike and therefore did not cancel the booked session at least 24 hours before it started. These riders had been treated less favourably than other employees with respect to conditions

esigenza comprovata di razionalizzazione del processo industriale e di ottimizzazione dell'organizzazione aziendale'.

[34] H. Collins and T. Khaitan, 'Indirect Discrimination Law: Controversies and Critical questions', in H. Collins and T. Khaitan eds, *Foundations* n 17 above, 20.

[35] Tribunale di Bologna 31 December 2020. On this ruling see M.V. Ballestrero, 'Ancora sui rider. La cecità discriminatoria della piattaforma' *Labor*, 19 January 2021; A. Perulli, 'La discriminazione algoritmica: brevi note introduttive a margine dell'ordinanza del Tribunale di Bologna', available at www.tinyurl.com/4nssasx8 (last visited 31 December 2021).

for access to employment since their score worsened, and they therefore lost their position in the priority group and the advantages associated with it.

The Court held that there had been no direct discrimination (on the basis of union activity) but there had been an indirect one: in the Court's view the provision adopted by Deliveroo (and in particular the contractual rules on the early cancellation of booked sessions) is to all appearances neutral because it is applied to all riders (and so-called late cancellation has the same consequences for everyone) but has a disparate negative impact upon those who participate in strikes.

For the court, the employer who treats riders who do not participate in a booked work session for unimportant reasons in the same way as those who do not participate because they join a strike (or because they are sick, have a disability, or assist a disabled person or a sick minor, and so on) in practice discriminates against the latter, who will have a low score priority and thus little chance of choosing and booking work sessions.[36]

Another question that arises is whether this provision serves a legitimate aim in a proportionate way.

It is generally understood that justification defences should be subject to a high level of scrutiny before being accepted.[37] The employer should therefore have been required to demonstrate that the practice based on algorithms is justified by the needs of the job in question and consistent with business necessity, and that there exist no other less discriminatory alternative practices with less disparate impact but able to serve the employer's legitimate needs.

However, this did not happen in the case at hand.

Deliveroo argued that the 'tracking' system of cancellations developed by the company is to be considered legitimate, 'since there is a relationship between the client and self-employed workers'. But according to the Court, this argument is not convincing and cannot justify the discrimination stemming from the fact that the algorithm does not differentiate between reasons for riders making late cancelations. In conclusion, the Court had no doubts that the provision cannot be objectively justified by a legitimate aim.

The ruling is interesting to the extent that the Court found an indirect form of discrimination.[38] This conclusion raises the thorny question of what exactly

[36] 'Trattare nello stesso modo chi non partecipa alla sessione prenotata per futili motivi e chi non partecipa perché sta scioperando (o perché è malato, è portatore di un handicap, o assiste un soggetto portatore di handicap o un minore malato, ecc.) in concreto discrimina quest'ultimo, eventualmente emarginandolo dal gruppo prioritario e dunque riducendo significativamente le sue future occasioni di accesso al lavoro'.

[37] S. Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2011), 191.

[38] Generally speaking, it could happen that, as some scholars pointed out, the courts, in light of the difficulties in tracking differential treatment based on protected grounds in 'black box' algorithms, might use the notion of indirect discrimination as 'a conceptual 'refuge' to capture the discriminatory wrongs of algorithms'. See J. Gerards and R. Xenidis, *Algorithmic discrimination* n 6 above, 11, where the authors hold that 'this development might reduce legal certainty if it leads, by default, to the generalisation of the open-ended objective justification test

the difference may be between direct and indirect discrimination. Clearly, this distinction is hard to draw on a conceptual level.[39] EU law does not provide a consistent and precise division between the two legal categories, which explains why there have been different opinions on classifying the facts in this particular case: some labour scholars uphold the Court's view,[40] while some others argue that the facts could be classified as direct discrimination.[41]

According to the first approach direct discrimination could occur only if the platform expressly uses membership in a protected group as a reason for the differential treatment, such as the assignment of lower scores. But this is not the case.

These scholars argue that the algorithmic score itself, or the criteria that drive it, can be considered as the neutral criterion that, under European antidiscrimination directives, may put a protected group at a particular disadvantage.

Accordingly, they assume that disparate impact on a protected group can be linked to a specific neutral factor and conclude that, in that case, it is the algorithm that caused it, regardless of whether or not the decision maker knows that. As a matter of fact it has been held that such knowledge is irrelevant and does not generally change the formal neutrality of the practice.[42]

In my opinion it is necessary to view the situation from a different perspective, because there are strong arguments in favour of direct discrimination.

Even though the protected characteristic is not an explicit reason for *Deliveroo*'s labeling decisions, it is important to consider whether these decisions are affected by implicit bias, stereotypes or prejudices: in fact, these subjective components could be not entirely irrelevant in defining the demarcation between direct and indirect discrimination.

Generally speaking, while indirect discrimination concerns a disproportionate disadvantage imposed on a protected group by an action (or rule or practice) and focuses on its impact, direct discrimination has to do with an individual disadvantage,[43] and its focus is on a perpetrator's actions and the reason for treatment. There is no doubt that a link between the less favourable treatment and the reason for it is necessary and sufficient. Because of the absence of a requirement of intent the concept of direct discrimination potentially covers situations where the perpetrator was not conscious of the discrimination.

applicable in indirect discrimination cases as opposed to the narrower pool of justifications available in direct discrimination cases'.

[39] H. Collins and T. Khaitaned, *Indirect Discrimination Law* n 34 above, 18.

[40] M.V. Ballestrero, n 35 above.

[41] See now M. Barbera, 'Discriminazioni algoritmiche e forme di discriminazione', available at https://Labourlaw.unibo.it/article/view/13127 (last visited 31 December 2021).

[42] See P. Hacker, n 4 above where the a. holds that situation 'would only be different if the intent to discriminate was shown to be a guiding motive of the decision maker; the neutral practice would then only be a pretext for a decision directly related to the sensitive criterion – but that is unlikely to be proven in court'. See also M. Kullmann n 4 above, 5.

[43] H. Collins and T. Khaitaned, *Indirect Discrimination Law* n 34 above, 18.

However, the boundary between direct and indirect discrimination should not be considered a rigid one.

If the treatment is not explicitly related to a protected characteristic but to a different reason that is closely connected to one of the protected characteristics mentioned in the discrimination law, then it should also fall under the direct discrimination provisions. In such situations the criterion used is somehow intrinsically discriminatory. This can be seen, for example, in the case of sex discrimination in relation to pregnancy: the CJEU has established the rule that discrimination is grounded on sex where it is attributable to an attribute (pregnancy) which can be demonstrated only by women.[44]

In *Chez* the CJEU also went further: it found that the same facts could give rise to both direct and indirect discrimination. Although 'the process of determining whether the discrimination is on the ground protected is not one of determining motive or intention',[45] the CJEU gave the national Court some hints indicating that the facts are deemed to point towards a *prima facie* case of direct discrimination, such as indications that measures are based on stereotypes or prejudices instead of actual facts.

It is interesting to note that the Italian court takes into account the intentions of the employer and underlines the degree of 'heinousness' of the platform: for the court

> 'the platform can choose to remove the blindfold that makes it 'blind' or 'unconscious' with respect to the reasons for the rider's failure to work and, if it does not it, it means that the decision maker has *deliberately* chosen to treat alike all reasons apart from an accident at work or cases attributable to the employer (such as a malfunction of the app, which prevents log-in),

[44] This is what some legal scholars called 'proxy'. See E. Ellis and P. Watson, *EU antidiscrimination Law*, 164 (Oxford: EU Law library, 2012), 164; J. Gerards and R. Xenidis, *Algorithmic discrimination in Europe* n 6 above, 64, where the a. notice that 'usually there is an almost 100% overlap here between the 'actual' protected ground and its proxies, meaning that the use of the proxy covers almost exactly the same group of persons as using the actual ground would do. Similarly, when there is a close connection between individual preferences and affinities, and protected grounds, belonging to a group with a certain 'affinity' (eg having an interest in particular religious matters) might be nearly the same as belonging to a group characterised by a particular personal trait (eg adhering to a certain religion)'. It is also noteworthy that the concept of direct discrimination extends to situations where a person is treated unfavourably because he or she is associated with a protected group, without sharing the protected characteristic himself or herself. This has become known as discrimination by association and has been confirmed by CJEU in Coleman, where an employee was subjected to detrimental treatment by her employer because she had to care for her disabled child. This finding is important because it also means that a person should not need to share a protected characteristic to be recognised as a victim of direct discrimination based on that ground. On the problematic application of the concept of direct discrimination in cases where protected grounds are ascribed, perceived or assumed, especially in the context of algorithmic discrimination see, recently, J. Gerards and R. Xenidis, *Algorithmic discrimination in Europe* n 6 above, 70-72.

[45] S. Fredman, n 17 above, 54.

regardless of whether or not they are protected by the law'.[46]

According to the court, there is clear evidence of the intention to put riders at a disadvantage on the ground of union activity: Italian law does not require proof of intention, but there is no doubt that this element reflects the strength of the causal link between the treatment and the reason for it.

Following established EU case law, measures such as the one at issue in this case could constitute direct discrimination: even though the protected characteristic (belief) is not the explicit reason of the labeling decisions, the decision not to differentiate the reasons for the rider's failure to work may have been influenced by implicit stereotypes. The algorithm seems to be designed – intentionally or not – in such a way that the selection criterion used is somehow intrinsically discriminatory. There is no intermediate neutral practice between the negative labeling and the result. Riders who participate in strikes are forced to cancel their reservation too late and therefore they are directly discriminated against on the ground of union activity. The less favourable treatment is a direct consequence of the biased labeling and should fall under the 'disparate treatment'; this can be demonstrated by finding a similarly situated person who does not participate in strikes and who has been treated more favourably than the complainants.

Moreover, direct discrimination is established if it is proved that Deliveroo's adoption of the contractual rules on the early cancellation of booked sessions has the effect of excluding 100 per cent of the riders who strike but none of the comparative group. This means that on the contrary, those rules must be classified as indirect discrimination only where their exclusionary effect is less than 100 per cent but is disproportionate.

IV. The Burden of Proof. Inconsistencies Within Italian Antidiscrimination Law

In Italy the expansion and effectiveness of antidiscrimination protection has been hindered not only by the case law of the Supreme Court, which, as noted above, long applied the regulatory model laid down in general rules of civil law, especially with regard to discriminatory dismissals (see paras 1 and 2), but also by the flaws in the formulation of some of the procedural provisions of antidiscrimination law.

EU and Italian law provide for a number of important procedural guarantees aiming to facilitate individual litigation and improve the effectiveness of access to

[46] 'Quando vuole la piattaforma può togliersi la benda che la rende 'cieca' o 'incosciente' rispetto ai motivi della mancata prestazione lavorativa da parte del rider e, se non lo fa, è perché ha deliberatamente scelto di porre sullo stesso piano tutte le motivazioni – a prescindere dal fatto che siano o meno tutelate dall'ordinamento – diverse dall'infortunio sul lavoro e dalla causa imputabile ad essa datrice di lavoro (quale evidentemente è il malfunzionamento della app, che impedisce il log-in)'.

justice for victims of discrimination. In particular, Italian law establishes a special allocation of the burden of proof in discrimination cases. The burden of proof is essentially reversed in view of the fact that with regard to discrimination in employment, the existence of unlawful discrimination is often extremely difficult to prove,[47] as the power relations between the employer and each employee are unequal[48] and 'obtaining evidence in discrimination cases, where the relevant information is often in the hands of the defendant,[49] can be very problematic'.[50]

In other words, this shifting of the burden *ensures that complainants are not required to prove facts which are beyond their capacity of proof*. Workers who appear to be the victims of discrimination on the grounds of, in particular, sex, age, or origin, could lack any effective means of enforcing the principle of equal treatment.

In Europe, the CJEU developed a gradual line of case law in relation to equal pay, from *Danfoss* (1989) onwards, and this case law has been confirmed on other aspects of discrimination in all non-discrimination directives.

According to EU law, contrary to the general allocation of the burden of proof, the claimant has only to make out a *prima facie* case of discrimination or, in the words of the EU legislator, has to prove 'facts from which it may be presumed that there has been direct or indirect discrimination'. If such facts are proved, then the burden of proof shifts to the respondent, who must prove that no discrimination has occurred (for example see Art 8, 1 RED).

Since the wording of the provision on the special allocation of the burden of proof is similar across the protected grounds, the national case law has to develop parallel lines of jurisprudence.

However, despite this, as in the EU in general, there is not yet a clear understanding of what would amount to a presumption of discrimination in Italy. Indeed, the issue of what the exact requirements are for establishing a *prima facie* case of discrimination is still highly controversial.

Some of these uncertainties are due to the fact that the various Italian legal

[47] In this respect N. Cunningham, 'Discrimination Through the Looking-Glass: Judicial Guidelines on the Burden of Proof' (35)3 *Industrial Law Journal*, 279 (2006) pointed out that 'employers make innumerable decisions in relation to which it is simply impossible for a tribunal to say with any reasonable degree of confidence whether they were or were not influenced, consciously or unconsciously, by unlawful discrimination'. The difficulty of proving reasons for acting is such that 'if the burden is on complainants, significant numbers of those who have in fact suffered unlawful discrimination will be unable to prove their claims and will fail to secure any redress ('false negatives')'.

[48] K. Henrard, 'The First Substantive ECJ Judgment on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle' *Jean Monnet Working Paper Series*, 19 (2009). More recently, Ead, *The Effective Protection against Racial Discrimination and the Burden of Proof: Making up the Balance of the Court of Justice's Guidance* (Uladzislau Belavusau: Hart publishing, 2019), 95.

[49] K. Duffy, 'Anti-discrimination Law: Shifting the Burden of Proof', paper presented at ERA Seminar: The EC Anti-Discrimination Directives 2000/43 and 2000/78, 5.

[50] See, for example, the Explanatory Memorandum of the Race Directive, COM (1999) 566.

provisions regarding the various fields of discrimination (sex, age, religion, and so on) define in very different ways the kind and weight of evidence from which a court should infer discrimination.

Particularly, there are differences concerning the allocation of the burden of proof between claims of race and ethnic origin discrimination (Art 4, Legislative Decree 215/2003), and religion or belief, disability, age and sexual orientation discrimination claims (Art 4, Legislative Decree 216/2003).

As for the latter category, the facts the claimant needs to establish have to satisfy more stringent presumptions: in particular they have to be '*gravi, precise e concordanti*'.

As regards the first category, the criteria to evaluate the facts are more flexible because the law requires the 'precision' and the 'concordance' of the presumptions, but not the 'gravity'.

It should be stressed that these differences have now disappeared to some extent. In 2011, common rules on the burden of proof were codified into a single comprehensive regulation, whereby the burden of proof is essentially shifted to the respondent if the complainant proves facts, including statistics, from which it may be presumed that there has been discrimination. This was achieved through Art 28(4) of Legislative Decree 150/2011.

In any case, despite the more stringent rules laid down in Art 4 of Legislative Decree 216/2003, the general tendency of the Italian courts is to extend the employee's right to use statistics to show a *prima facie* case or a disparate impact.

This view was held by the Court of Appeal of Rome in an interesting case (the *Fiat, Fabbrica Italia* case) decided in 2012, when, for the first time, the ground of trade union membership was understood to be included in the wider ground of belief, so that anti-union discrimination, banned in Italy since 1970, is also prohibited by the rules on discrimination on the ground of belief implementing European law. The case had been brought before the court by the trade union Fiom, using the special procedure provided for in Legislative Decree 150/2011 and contesting anti-union discrimination in hiring against one hundred and forty-five workers that were members of the trade union. The employer – who refused to hire them because of their being union members – argued that the selection criteria adopted were objective and impartial and could not be judged as unlawful. The Court of Appeal replied that the proof was based on statistical evidence of discriminatory hiring: statistics could be helpful in establishing evidence of a *prima facie* case because they showed that the chances of hiring workers belonging to the FIOM were only one in 10 million.

This approach has also been adopted by the Supreme Court. In the aforementioned ruling no 1/2020, for instance, the Court clarified that reference to statistics should be understood in the broader and more common sense of probability, regardless of precise scientific rigour. Statistical techniques do not necessarily need to use scientific methods to be able to become autonomous sources

of evidence. Their use is necessary to determine appropriate comparator groups. It should be sufficient to prove that the difference in treatment between the groups is statistically significant for the burden of proof to shift on the respondent.

The result is that the Courts play an important role in Italy because it is up to them to determine whether the data are statistically significant.

But this seems to be in accordance with the ECJ case law according to which statistics can establish a presumption of discrimination,[51] and this presumption can be established with the help of comparisons.[52]

In any case, it is important to note that difficulties in demonstrating disparate treatment or obtaining the means to show the statistical proof of disparate impact could increase in view of the rising use of algorithms in employment decision-making.[53]

These systems operate with no built-in transparency or accountability to check that the criteria are fair to all job applicants. The opacity of machine learning, referred to as a black box,

> 'mak(es) it all but impossible for disadvantaged parties to prove their claim, irrespective of whether the bias is the result of intentional masking or unintentional processes'.[54]

Victims of algorithmic discrimination are therefore in a very difficult legal position. In cases of indirect discrimination, it is up to the plaintiff to show that the algorithmic process produced a disparate impact on the protected group (and therefore there is a statistical disparity between the two groups of workers), but he will often not even be in a position to know the data and the algorithmic output.

Therefore, in the United States, some legal scholars have proposed passing laws to help plaintiffs overcome difficulties in satisfying the burden of proof in establishing a claim when they have experienced bias through an automated hiring system.

In the United States the key difference between direct and indirect discrimination regards intent: while disparate impact looks at the effect, disparate

[51] Case C-127/92, *Dr Pamela Mary Enderby* v *Frenchay Health Authority and Secretary of State for Health*, [1993] ECR I-5535; Case C-237/94, John O'Flynn v Adjudication Officer, [1996] ECR I-2617.

[52] See, for instance, Case C-226/98, *Birgitte Jørgensen* v *Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg*, [2000] ECR I-02447, para 29.

[53] I. Ajunwa, 'The Paradox of Automation as Anti-Bias Intervention' 41 *Cardozo Law Review*, 1672, (2020). See also Id, 'The Auditing Imperative for Automated Hiring' 34 *Harvard Journal of Law & Technology*, (forthcoming 2021) where Ajunwa argues that USA needs a federal law that would mandate data retention for all applications (including applications that were not completed) on hiring platforms and that would require employers to conduct internal and external audits so that no groups of applicants are disproportionately excluded. The audits would also ensure that the criteria being used is actually related to job tasks.

[54] P. Hacker, 'Teaching fairness to artificial intelligence: existing and novel strategies against algorithmic discrimination under EU law' 55 *Common Market Law Review*, 1146-1150 (2018).

treatment is intentional: in other words, 'proving clear intent is necessary when attempting to make a disparate treatment case under Title VII' of the Civil Rights Act of 1964;[55] in the absence of intent, Title VII requires a clear demonstration of disparate impact with no possibility of arguing business necessity for the disparity.[56]

In the Italian legal system things are very different, but the problem that arises is the same: the power imbalance and the information asymmetry that exists between the employer and the employee in the context of automated hiring would seem to upset the balance between the freedom of employers to recruit the people of their choice and the rights of job applicants.[57]

Some years ago, a similar and thorny question came before the CJEU: how can a job applicant enforce observance of the principle of equal treatment when his application for a job has been rejected by an employer who failed to provide any information whatsoever as to the recruitment procedure and its outcome or why was the application unsuccessful?

The Court was in no doubt: EU antidiscrimination law (Directives 2000/43, 2000/78 and 2006/54) must be interpreted as not entitling a worker with a plausible claim that he meets the requirements listed in a job advertisement and whose application has been rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.[58]

[55] I. Ajunwa, 'The Paradox of Automation as Anti-Bias Intervention' n 53 above, 1727.

[56] Title VII of the Civil Rights Act protects the job applicant against discrimination on the basis of sex, race, colour, national origin, and religion. See Civil Rights Act of 1964 para 7, 42 USC para 2000e2 (2018). Plaintiffs must establish that 'a respondent uses a particular employment practice that causes a disparate impact on the basis of [a protected characteristic] and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.' 42 USC para 2000e-2(k)(1)(A)(i).

In USA the New York City Council is debating a proposed new law that would regulate automated tools used to evaluate job candidates and employees. The bill 'would require vendors that sell automated assessment tools to audit them for bias and discrimination, checking whether, for example, a tool selects male candidates at a higher rate than female candidates. It would also require vendors to tell job applicants the characteristics the test claims to measure. This approach could be helpful: It would shed light on how job applicants are screened and force vendors to think critically about potential discriminatory effects. But for the law to have teeth, we recommend several important additional protections' A. Reeve Givens, H. Schellmann, J. Stoyanovich, 'Tackle the Big Problem With Hiring Workers in 2021' *The New York Times*, 17 March 2021.

[57] A possible problem that may arise with proving discrimination is that an employer qualifies its algorithms as business secrets. According to M. Kullmann, n 4 above, 11, it 'could be argued that it is the employer who should justify why he prefers hiring a particular candidate over another, this should also apply to an employer who uses an algorithm that prefers the one over the other. The rejected job candidate should be given access to the algorithmic model and data model based on which the algorithm has decided, or the employer should at least provide insight into why that decision can be objectively justified, in order to assess whether there indeed has been discrimination. It is suggested that where an employer is unable to explain why the software did decide in a particular way, and this might be even more difficult where unsupervised machine-learning algorithms are involved'.

[58] *Case* C-415/10 *Meister* [2012] EU:C:2012:217. See also Opinion of Advocate General *Mengozzi* delivered on 12 January.

However, after refusing to endorse the existence of a right to information, the Court also held that

> 'it cannot be ruled out that *a refusal of disclosure* by the [employer], in the context of establishing [facts from which it may be presumed that there has been discrimination], could risk compromising the achievement of the objective pursued'

by the directives on equal treatment and thus depriving the provisions concerning the burden of proof, in particular, of their effectiveness.[59]

According to the Court it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to consider when establishing facts from which it may be presumed that there has been direct or indirect discrimination.

It is also worthy of note that the case of the employer's refusal to grant any access to information is very similar to that of automated hiring. In both cases the employer continues to be the only party in possession of the evidence upon which the substance of an action brought by the unsuccessful job applicant ultimately depends and, therefore, its prospects of success.

This is why it is not at all surprising that in the United States some legal scholars have proposed a new burden-shifting theory of liability (discrimination *per se*) in order to challenge the problem of the algorithmic bias of automated hiring platforms. The idea is that it is up to the claimant to assert that a hiring practice is so egregious as to amount to discrimination *per se*, and this would shift the burden of proof from the claimant to the respondent (employer), who must then prove that the treatment is non-discriminatory. For example, employers could be required to conduct internal and external audits that would ensure that the criterion used is actually related to the tasks required by the job.

The ruling of the Bologna Court shows that the increasing use of automated hiring platforms requires adequate safeguards to avoid the job applicant being entirely dependent on the good will of the employer when it comes to obtaining information and preventing unlawful employment discrimination.

V. Legal Standing and Collective Bodies. The Role of National Courts and the Legitimate Interest in Bringing an Action

Italian law has not only introduced a large variety of specific procedural instruments and rules to facilitate individual judicial enforcement of antidiscrimination law but has also entrusted collective and/or public interest bodies dedicated to the assistance of victims of discrimination with the important task of engaging in court proceedings if they demonstrate a legitimate interest.

[59] Case C-104/10 *Kelly* [2011] ECR I-6813, para 39.

A major characteristic of the Italian system is that the legal regulation of judicial procedures for enforcing equality is greatly fragmented and diversified, especially with reference to collective/public complaints.[60]

The Legislative Decrees nos 215 and 216, enacted in 2003 in order to implement the so-called second-generation non-discrimination Directives in Italian Law, have contributed to multiplying rules with regard to court actions and the types of entities entitled to act on behalf of victims of discrimination. This scenario also remains fragmented as a result of Legislative Decree no 150/11 (Art 28). The harmonization intervention carried out by the legislator in 2011 has mitigated the fragmentation concerning the procedural instruments to combat discrimination. But there are still different rules regarding gender and other grounds of discrimination, and this different treatment is not always reasonable or easy to understand.

Of course, the topic has been addressed in EU antidiscrimination Directives (2000/43/EC, 2002/73/EC and 2004/113/EC) according to which legal entities have to be entitled only to *engage* in court proceedings on behalf (or in support) of the victims of discrimination.[61] EU law does not require public/collective interest bodies to also be necessarily entitled *to bring* a discrimination claim.[62]

However, in *Feryn*[63] the Court went on to argue that even though Member States are only obliged to grant legal standing to public interest bodies to engage 'either on behalf or in support of the complainant with his or her approval' in court proceedings, *they are not precluded* from enabling public/collective interest bodies to have *locus standi* (legal standing) also to bring judicial proceedings in the absence of a complainant who claims to have been the victim of discrimination.

This is the logical implication of a broad interpretation of the concept of discrimination: the CJEU introduced the concept of collective discrimination, holding that the existence of direct discrimination is not subordinated to the identification of a complainant who claims to have been the victim (see para 23): as a matter of fact, the effect of statements revealing discriminatory recruitment policies could hamper the emergence of a socially inclusive labour market and

[60] With regard to court actions, see F. Guarriello, 'Azioni in giudizio', in L. Gaeta and L. Zoppoli eds, *Il diritto diseguale. La legge sulle azioni positive. Commentario alla Legge 10 aprile 1991, n. 125* (Torino: Giappichelli, 1992), 196; L. Curcio, 'Le azioni in giudizio e l'onere della prova', in M. Barbera ed, *Il nuovo diritto antidiscriminatorio: innovazione e continuità* (Milano: Giuffrè, 2007), 529.

[61] Member States should ensure 'that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement' of European rules.

[62] K. Riesenhuber, *Europäisches Arbeitsrecht: eine systematische Darstellung* (Munich: C.F. Müller, 2009), 191.

[63] *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding* v *Firma* Feryn *NV* (C-54/07) EU:*C*:2008:397.

thus, in the Court's opinion, go counter to the aim of the Directive.[64]

In some non-binding legal instruments and documents, the EU Commission seemed to continue on this path, passing an important recommendation in 11 June 2013 on injunctive and compensatory collective redress mechanisms.[65] The EU Recommendation also deals with the crucial question of whether or not entities should have the standing to bring representative actions. Unlike non-discrimination Directives, the Recommendation expressly provides that all Member States should have collective redress systems at the national level even though the legal standing to initiate representative collective actions is granted only to representative entities that have been designated in advance or entities that have been certified on an *ad hoc* basis.[66]

Even though those sources mainly take into account the fields of competition and consumer law, where the 'supplementary private enforcement of rights granted under Union law in the form of collective redress is of value', it is possible to argue that the principles set out in them can extend to the field of the social rights granted under Union law and in particular to discrimination cases (ie, beyond consumer law).[67]

It is important to stress that Italian non-discrimination law has gone beyond the minimum originally required by EU anti-discrimination Directives (2000/43/EC, 2002/73/EC and 2004/113/EC).

As explained above, the legal regulation of judicial procedures for enforcing equality is very fragmented and diversified. For example, in the field of equality between women and men at work, Italian law, on the one hand, grants legal standing to different entities to bring a complaint of discrimination with the consent of the worker concerned, including trade unions, associations and organisations engaged in antidiscrimination law, or Equality Advisers (*consiglieri di parità*)[68] (Art 38 of decreto legislativo no 198 of 2006). On the other hand, in

[64] The aim of that Directive is 'to foster conditions for a socially inclusive labour market' and that 'objective would be hard achieved if the scope of the Directive were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceeding against the employer'.

[65] COM (2013) 401 final, 11 June 2013. See also the resolution adopted by the European Parliament 'Towards a Coherent European Approach to Collective Redress', 2011/2089 (INI).

[66] In addition, or as an alternative, the Recommendation states that the Member States should empower public authorities to bring representative actions (points 4-7).

[67] According to the Court's settled case-law, 'national courts are bound to take (recommendations) into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions': AG Sharpston delivered on 31 October 2019 Case C-507/18 *NH* v *Associazione Avvocatura per i diritti LGBTI – Rete Lenford*) ECLI:EU:*C*:2020:289.

[68] This proceeding is structured along the lines of Art 28 of the Workers' Statute: the Court can issue an immediately enforceable judicial order, not only to put an end to the discriminatory behaviour and to remove the effects the conduct has had thus far, but also to redress the damage caused by the discriminatory act. The failure to comply with the order or judgment in the trial of opposition is a criminal offence.

order to combat gender discrimination, in 1991, the legislator allowed *public* bodies (and only them) to bring proceedings on *their own behalf* (obviously without the approval of a victim) (Act no 125). The Equality body can act '*in its own name*' to challenge labour market discrimination (Art 37 of decreto legislativo no 198 of 2006)[69] and is entitled also to carry out conciliation proceedings (Att. 15(*1-a*), decreto legislativo no 198 of 2006).

Focusing here on discrimination due to trade union membership, as mentioned above, there is no doubt that this type of discrimination is also prohibited by the national non-discrimination rules on the ground of belief implementing European law. Indeed, the notion of '*belief*' to which the legislation refers must be interpreted in a broad sense so as to also include the meaning of the relationship between the social partners and the mode of relating to the employer.[70]

So, with reference to discrimination on this ground (but it is the same for age, sexual orientation, religion and disability), the standing to initiate legal proceedings – originally granted only to nationally representative trade unions – has been extended to any trade union, association and organisation 'representative of the infringed right or interest': Art 5 decreto legislativo 216/2003). However, it should be pointed out that the bodies engaged in non-discrimination law only have the power to bring actions before the courts as representatives of the victims because they have been granted the standing to act '*either on behalf or in support of the complainant*'.[71] Only, and exceptionally, in the event of collective discrimination, where no victims to support or represent are identifiable, does Italian law allow these entities to act on *their own behalf* (art 5, 2, decreto legislativo no 216/2003).

However, there are some gaps in Italian regulation on this topic.

First of all, the legislator did not lay down the criteria to determine *which* organisations have 'a legitimate interest in ensuring that the provisions of Directives are complied with' and '*are representative of the infringed right or interest*'. This requirement is very vague.

Only in some sectors does the law require registration in a register approved by ministerial decree (for example, discrimination on grounds of race and ethnic origin: Art 5 of Legislative Decree No 215 of July 9, 2003).

This means that the courts play a significant role: they have the power to undertake a double investigation to ascertain that: a) it is impossible to identify a complainant who claims to have been the victim of discrimination; and b) the

[69] See P. Widmann, 'La tutela processuale contro le discriminazioni con particolare riferimento ai d.lgs. 215/2003 e 216/2003', in A. Viscomi ed, *Diritto del lavoro e società multiculturale* (Napoli: Editoriale Scientifica, 2011), 632.

[70] For example, M. Aimo, 'Le discriminazioni basate sulla religione e sulle convinzioni personali', in M. Barbera ed, *Il divieto di discriminazioni basate sulla religione e sulle convinzioni personali* (Milano: Giuffrè, 2007), 48-49. Cf Corte d'Appello di Roma 9 ottobre 2012, available at www.dejure.it.

[71] See D. Schiek, 'Enforcing (EU) Non-discrimination Law: Mutual Learning between British and Italian Labour Law' 28(4) *The International Journal of Comparative Labour Law and Industrial Relations*, 502 (2012): 'equality rights are conceptualized as individual rights'.

association is truly representative of the interest in question[72].

However, for reasons of legal certainty, practicability, and simplicity, the legislator should not only require a direct relationship between the main objectives of the entity and the rights granted under European Union law that have allegedly been violated, but they should also clarify the criteria that the entity has to fulfil to be considered '*representative*' and be entitled to bring enforcement proceedings. Furthermore, in accordance with the EU Recommendation mentioned above, the organisations should be not-for-profit and, secondly, have sufficient capacity in terms of financial resources, human resources, and legal expertise to represent multiple claimants and act in their best interest.

Additionally, there is still no clear understanding of the relationship between the different enforcement proceedings before which collective interest bodies are entitled to bring a case in the absence of an identifiable complainant.

In cases of discriminatory acts against workers because of their union activity (dismissals, transfers) – whenever these measures indirectly affect the rights of the unions and prejudice their position within the firm – not only are trade unions entitled to bring an action under antidiscrimination legislation but also (according to the prevailing opinion among judges and labour law scholars) enjoy standing to initiate different proceedings on their own behalf under Art 28 of the Worker's Statute.

In both cases, collective bodies have the right to bring enforcement proceedings without acting in the name of a specific complainant or in the absence of a complainant claiming to have been the victim of discrimination.

However, as far as Art 28 is concerned, it is important to stress that this provision does not allow a union to bring an individual case before the Court or to act (also) on behalf of workers who may be injured by the employer's behaviour: unions act only in their own collective interest, and can do so even without or against the complainant's consent.[73]

Art 28 only protects collective interests, as interpreted by the trade union organisation itself, and the union has direct legal standing to initiate legal proceedings in order to defend its right; the interests of the individual workers affected by the employer's behaviour are not formally considered by the legislator in this article (the individual worker affected by discrimination being easily dissuaded from suing the employer for obvious reasons).

[72] Corte di Cassazione 20 July 2018 no 19443, available at www.dejure.it.

[73] For the Constitutional Court, it is a matter of 'interessi collettivi dei quali il sindacato è titolare e gestore autonomo, e con il quale esso non agisce in rappresentanza dei lavoratori colpiti dai suddetti comportamenti, tant'è che può esperire il ricorso anche in caso di inerzia o contraria volontà di questi', Corte costituzionale 24 March 1988 no 334, available at www.giurcost.org.

In the legal scholarship, see, for instance, M.G. Garofalo, *Interessi collettivi e comportamento antisindacale dell'imprenditore* (Napoli: Jovene, 1979), 203; M. Pedrazzoli, 'La tutela cautelare delle situazioni soggettive nel rapporto di lavoro' *Rivista trimestrale di diritto e procedura civile*, 844 (1973). More recently, see M. Falsone, 'Tecnica rimediale e art. 28 dello Statuto dei lavoratori' *Lavoro e Diritto*, 565 (2017)

On the contrary, in the case of antidiscrimination legislation, the union is involved in a different way because it is entitled to act on behalf of victims of discrimination: the power is bestowed upon it in the interest of the particular employee to not be discriminated against. Indeed, a trade union does not bring an action to defend its rights as an autonomous entity; it brings claims to defend the rights of persons to whom non-discrimination duties are owed.

The situation seems to be not very different from that of the class action introduced by the new Law No 31/2019.[74]

According to this law, class actions are available to protect 'individual homogeneous rights': the subjects entitled to bring the claim are, first of all, the individual users or consumers who have suffered damage due to the conduct of the defendant; non-profit organisations and associations listed in a public registry of the Ministry of Justice and whose purpose it is to protect such rights are entitled to bring the claim *on behalf* of class members.

As a rule, the subjects entitled to bring the claim in discrimination cases are also the individual victims. It is significant that collective actions can be initiated by representative entities and trade unions only in the absence of a complainant claiming to have been the victim of discrimination (Art 5.2, Legislative Decree no 216 of July 9, 2003).

In this case, it is the Italian legislation at issue which provides the right to take action (*locus standi*) because where there is no complainant or identifiable victim the standing of associations to act is *not* governed by EU law.[75]

As the CJEU has pointed out,[76] the aim of the national provision is to enforce the substantive rights that derive from EU law (protection from discrimination), thus trade unions are granted standing to sue on behalf of victims and can, therefore, claim individual rights.

In the case mentioned above concerning riders, the Bologna Court clarified that it is for national courts to verify that an association can satisfy the criteria established to have a legitimate interest to bring actions to enforce the rights and obligations stemming from Directive 2000/78.

According to the Bologna Court, there is no doubt that the aims of the Trade Union Filt Cgil correspond to those of an association with a *legitimate interest* to enforce the rights and obligations deriving from Directive 2000/78.

[74] On 12 April 2019, Parliament approved a new law expanding the scope of class actions. The new law amends the Code of Civil Procedure (CCP) by incorporating class actions into that Code (CCP, Art 840(a), para 1, added by Law no 31, Article 1(1)). Previously, class actions only appeared in Italy's Consumer Code, and applied only to consumer actions. Moreover, the Law provides that class actions are available to protect 'individual homogeneous rights', a broad category that can cover many types of disputes. (CCP Art 840(a), para 2). The legal basis for standing in a class action is set out in Art 140(a) of the Consumer Code; see G. d'Andria, '*Class/Collective Actions in Italy: Overview*' *Thomson Reuters Practical Law* (2019).

[75] See also A.G. Sharpston delivered on 31 October 2019, Case C-507/18 *NH* v *Associazione Avvocatura per i diritti LGBTI — Rete Lenford* n 67 above.

[76] Case C-507/18, CJEU (Grand Chamber), 23 April 2020.

In the case of trade unions, the legitimate interest to take a legal action is *in re ipsa*: as the right to strike is a typical expression of trade union activity, any form of direct and indirect discrimination in the exercise of this right might be considered an illegal interference with union freedom.

This means that in all discrimination cases the individual and collective spheres are closely related: in fact, unions, and generally speaking legal entities, can have their own legitimate interest, which is related to the statutory aim of the entity and substantive rights that derive from EU law, provided that the employer's behaviour could cause direct prejudice to both interests.

From what has been explained so far it follows that the special emergency procedure of Art 28 of Act No 300, which can be evoked in Italy to penalise and remove discriminatory acts, has essential features similar to those of procedural remedies under antidiscrimination legislation to enforce substantive rights deriving from EU law.

It would be wrong to focus the attention only on the different legal standing which the union has to initiate legal proceedings in each of two procedures because what matters is that, on one hand, prohibited conduct in case of discrimination on the ground of personal belief is capable of simultaneously harming both workers' and unions' rights and, on the other hand, the Supreme Court is of the opinion that the special procedure of Art 28 of Act no 300 can be used not only in all cases of employer's behaviour capable of limiting and violating the unions' rights, but also in case of acts of discrimination carried out by the employer directly against individual employees as long as they indirectly affect the rights and interests of the unions.[77]

Therefore in case of dismissals, transfers or other discriminatory acts against workers because of their union activity, the system provides the right to take different actions because the employer's behaviour affects both individual and collective interests.

Even though the parties' *petitum* (ie subject of the party's claim during the trial), and *causa petendi* (ie the ground of a claim) can be different in part, there is no doubt that the two procedural remedies can mutually influence each other so that the action proposed under antidiscrimination legislation may to a certain extent have some effects on the other and vice versa.[78] In other words, it is not

[77] T. Treu, *Condotta antisindacale e atti discriminatori* (Milano: Franco Angeli, 1974), 17-19; U. Romagnoli, 'Aspetti processuali dell'art 28 dello Statuto dei lavoratori' *Rivista trimestrale di Diritto e procedura civile*, 1309 (1971).

[78] This approach could be useful considering that some gaps can be found also in art 28 of Workers' Statute. For example in some judgments courts held that this provision does not allow a union to act (also) on behalf of self employed or bogus self employed workers. According to these questionable rulings Art 28 may be used only by trade unions of employees who carry out their work in a subordinate position. See Tribunale di Firenze 9 February 2021, decreto *Nidil CGIL Firenze, Filt CGIL Firenze e Filcams CGIL Firenze* v *Deliveroo Italy s.r.l.*, available at www.dejure.it; According to B. Caruso, *Statuto, conflitto, relazioni sindacali e organizzazione del lavoro, nel settore pubblico, oggi*, WP C.S.D.L.E. 'Massimo D'Antona'.IT – 437/2021 (available

possible to mark a clear dividing line between the two procedural remedies: the prohibited conduct is the same because there is in fact a structural interdependence between collective interest and individual interest.

This idea is in line with a new approach in the Court's case law. Indeed, in the recent ruling mentioned above (no 1/2020), the Italian Supreme Court also argued that the special allocation of the burden of proof applies in all discrimination cases with reference both to individual and collective claims, including the emergency procedure provided for in Art 28 of Act no 300 (Worker's Statute), which enables trade unions to sue employers in their name in any case of anti-union activity on the part of the employer.

It may appear striking that the Court uses a special guarantee, designed to facilitate individual litigation and improve the effectiveness of the access to justice for victims of discrimination, in an emergency procedure like that provided for in Art 28.

As explained above, this type of action – like others provided in other jurisdictions[79] – is still highly problematic because trade unions, due to their role, can only bring a case to defend their collective interest[80] but cannot do anything on behalf of individuals.

However even though a trade union is not allowed to initiate proceedings to defend interests other than its own,[81] the individual and collective spheres could be considered closely related, especially where the individual workers have suffered damage due to the conduct of the defendant. This standpoint will contribute to the building of a coherent body of EC non-discrimination law and boost concomitant effective protection against discrimination.

VI. Conclusion

The in-depth analysis of the Italian case law on discrimination demonstrates

at http://csdle.lex.unict.it) 'lo statuto è norma di attuazione di tutte le norme della Costituzione che riguardano il lavoro tra cui anche l'art 35 nel cui perimetro rientra sicuramente il lavoro autonomo, a maggior ragione, se economicamente dipendente; che, infine, rientra nel principio e nella prassi dell'autonomia sindacale, tutelata dall'art 39 primo comma, la scelta dell'interesse collettivo da tutelare con gli strumenti che mette a disposizione l'ordinamento statutale tra cui, non ultimo, proprio l'art 28 dello statuto'.

[79] For example, in Germany according to para 17.2 AGG, if an employer commits a 'gross violation' of the provisions concerning protection against discrimination, trade unions and workers' councils are granted the standing to bring a discrimination case and are entitled to apply for an injunction to stop the violation of rights granted under this Act (the so-called *Unterlassungsansprucht*)

[80] This does not concern individual rights related to the order forcing an employer to stop the discriminatory behavior (*Unterlassung*) because para 17.2 allows a workers' council or a trade union to apply for a judicial order requiring the employer to stop the behaviour or to adopt or to remove specific measures.

[81] BAG 1 ABR 75/88 AP Nr. 53 zu para 112 BetrVG 1972. E. Kocher, H. Pfarr, *Kollektivverfahren im Arbeitsrecht. Arbeitnehmerschutz und Gleichberechtigung durch Verfahren* (Baden-Baden: Nomos, 1998), 51.

that Italian equality law still does not seem fit to challenge our increasingly algorithmic society.

In Italy the courts have held a view that has long hindered the expansion of antidiscrimination protection: until some years ago, for example, they still applied to dismissals the regulatory model laid down in the general rules of civil law, ie Article 1345 of the Italian Civil Code. The implications of such an approach seem odd because the courts – through reference to the said Art 1345 – came to reject the view that the more favourable regulation on the burden of proof is applicable precisely in the case in which discrimination reaches its peak, namely where the loss of a job is at stake: in this case, the employee was required to prove that the discriminatory reason is the only and determinant one when the decision was made, so that the existence of another reason for dismissal could allow the employer to avoid the test of whether dismissal is discriminatory, even though there was a ground of discrimination. As a result, the claimant's burden of proof for establishing a claim for direct discrimination had become too heavy.

The increasing use of algorithms and AI, especially in labour market recruitment and selection processes, can adversely affect the right not to be discriminated against, enshrined in the EU Charter of Fundamental Rights, because of specific characteristics of these systems, such as opacity, complexity, dependency on data, and autonomous behaviour. In order to address the challenges and concerns raised by these systems, recently, EU institutions launched some important initiatives: on 21 April 2021, for example, the EU Commission published a proposal[82] which sets out a robust and flexible legal framework aimed at prohibiting certain AI practices, laying down requirements for high-risk AI systems and obligations for the relevant operators, and laying down transparency obligations for certain AI systems. It is significant that according to the Commission the areas in which the use of AI systems deserves special attention are employment, worker management and access to self-employment: AI systems used in these areas should

> 'be classified as high-risk, since those systems may appreciably impact future career prospects and livelihoods of these persons'.

But the need to ensure the compatibility of AI systems with fundamental rights may also suggest the development of new techniques of protection against algorithmic discrimination.

The objective could be to create a legal framework that provides a consistent and clear division between existing key concepts of discrimination, and in particular direct and indirect discrimination.

Until now the jurisprudence of the Italian courts on this issue has been

[82] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence Act) and amending certain union legislative acts (COM(2021) 206 Final).

problematic: even though an algorithm can be designed – intentionally or not – in such a way that the selection criterion used is a direct consequence of biased labeling, there has been a reluctance to classify the case as direct discrimination.

This approach is in line with the emerging consensus in the literature on algorithmic discrimination, where numerous legal scholars have claimed that the concept of indirect discrimination would be a better conceptual fit for algorithmic discrimination than that of direct discrimination where AI systems are not sufficiently transparent, explainable and documented. However, it is important to emphasise the danger of an improper and extensive use of the legal concept of indirect discrimination in this regard. The statutory definition of indirect discrimination includes a wide possibility of justification defence, either by reference to a test of proportionality or business necessity or some other balancing mechanism, and this broad scope of justification (which has doubtful moral foundations) increases the risk that the victim of discrimination by algorithms is left in legal uncertainty.

However, in AI systems used in employment it might be thought that, if the ground for the decision is one hundred per cent correlated with an adverse effect on a protected group, the less favourable treatment should fall under the category of 'disparate treatment' as it is somehow 'intrinsically' discriminatory.

On the other hand, the development of algorithms in employment decision-making and automated hiring platforms also raises the troubling question of the effectiveness of antidiscrimination protection.

The first rulings decided by the courts show that there is a need for adequate safeguards for victims of algorithmic discrimination: generally, it is extremely difficult, and sometimes quite impossible, to establish a *prima facie* case of discrimination without access to the data and the algorithms. Antidiscrimination law alone does not provide such access.

However, antidiscrimination law could help to fill some gaps and the weaknesses of some Italian procedural remedies, as until now there is still no clear understanding of the relationship between the different enforcement proceedings before which collective interest bodies are entitled to bring a case in the absence of an identifiable complainant.

Some types of collective action like that provided for in Art 28 of the Worker's Statute are still highly problematic because trade unions, due to their role, can only bring a case to defend their collective interest but cannot do anything (only) on behalf of individuals. Furthermore, according to some recent rulings the legal standing to initiate this collective action is not granted to trade unions whose purpose it is to protect the collective interests of self-employed or bogus self-employed workers. Therefore, there is still a general need to improve the effectiveness of the access to justice for victims of discrimination and in this regard antidiscrimination law could play a crucial role.

Essays

Unlawful Data Processing Prevention and Strict Liability Regime Under EU GDPR

Emilio Tosi*

Abstract

This essay provides an in-depth analysis of the new special regulation on civil liability for unlawful processing of personal data and compensation for pecuniary and non-pecuniary damages – enacted pursuant to Art 82 of the *General Data Protection Regulation* (GDPR) – with respect to the protection of the fundamental personal rights to confidentiality and protection of personal data. An axiological reading – through the prism of the new principle of accountability – of the new GDPR's strict liability regime, and in particular of the rediscovery of the remedy of subjective moral damages and of its sanctionatory nature, is proposed in the light of the GDPR, the Italian Privacy Code, the Civil Code and the most recent case law of the Supreme Court of Cassation (San Martino 2019).

I. Foreword

The *General Regulation for the Protection of Personal Data*, EU Regulation 27 April 2016 no 679, which can be considered, given its transnational vocation, as a global legal benchmark in the area in question, as the General Data Protection Regulation (hereinafter, for the sake of brevity, GDPR), has recently introduced a new uniform regulatory structure for the processing of personal data.[1]

The protection of the individual, the protection of personal data and the regulation of liability for unlawful processing are central legal topics in the socio-economic context of *digital surveillance capitalism*.[2]

Civil liability for unlawful processing of personal data, as is known, has been analysed in jurisprudence both in regard to the historical Law of 31 December 1996 no 675, the first organic Italian regulatory text concerning protection of confidentiality and protection of personal data and, subsequently, in the light of

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[1] Let us refer on this point to the writer's recent monographic study: E. Tosi, 'Responsabilità civile per illecito trattamento dei dati personali e danno non patrimoniale', in G. Alpa ed, *Temi di Diritto Privato e di Diritto Pubblico* (Milano: Giuffrè, 2019); to which we may add the *Privacy Digitale* collection of studies, E. Tosi, *Diritto delle Nuove Tecnologie* (Milano: Giuffrè, 2019).

[2] S. Zuboff, 'Big other: surveillance capitalism and the prospects of an information civilization' 30 *Journal of Information Technology* (2015); and most recently: S. Zuboff, *Il capitalismo della sorveglianza* (Roma: Luiss University Press, 2019). See also *Garante per la Protezione dei dati personali, La società sorvegliata*, proceedings of the conference of 28 January 2016 (Roma, 2016).

Legislative Decree of 30 June 2003 no 196, so-called *Privacy Code*.[3]

The present study intends to record the independent distinctive traits of the European regulations on civil liability for unlawful processing of personal data with regard to the common rules on civil liability for unlawful acts,[4] more precisely to highlight their special and objective nature.

The examination of the subjective and objective profiles of this special

[3] See *ex multis* on the subject of the safeguarding of privacy and protection of personal data: G. Alpa and G. Conte, *La responsabilità d'impresa* (Milano: Giuffrè, 2015); V. Cuffaro and V. Ricciuto, *Il trattamento dei dati personali* (Torino: Giappichelli, 1999); G. Buttarelli, *Banche dati e tutela della riservatezza* (Milano: Giuffrè, 1997); F. Bravo, *Il "diritto" a trattare dati personali nello svolgimento dell'attività economica* (Padova: CEDAM, 2018); V. Franceschelli, 'Sul controllo preventivo del contenuto dei video immessi in rete e i provider. A proposito del caso Google/Vividown' *Rivista di diritto industriale*, 347 (2010); G. Finocchiaro, *Privacy e protezione dei dati personali. Disciplina e strumenti operativi* (Bologna: Zanichelli, 2012); V. Scalisi, *Il diritto alla riservatezza* (Milano: Giuffrè, 2002); C.M Bianca and F.D. Busnelli, *La protezione dei dati personali* (Padova: CEDAM, 2007); R. Panetta, *Libera circolazione e protezione dei dati personali* (Milano: Giuffrè, 2006); V. Cuffaro et al, *Il Codice del Trattamento dei dati personali* (Torino: Giappichelli, 2007); V. Sica, *La libertà fragile. Pubblico e privato al tempo della rete* (Napoli: Edizioni Scientifiche Italiane, 2014); D. Poletti and P. Passaglia, *Nodi virtuali, legami informali. Internet alla ricerca di regole* (Pisa: Pisa University Press, 2017); P. Perlingieri, 'Privacy digitale e protezione dei dati personali tra persona e mercato' *Il Foro Napoletano*, 481 (2018); C. Perlingieri and L. Ruggeri, *Internet e diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015); R. Pardolesi, *Diritto alla riservatezza e circolazione dei dati personali* (Milano: Giuffrè, 2003); G.M. Riccio, 'Diritto all'oblio e responsabilità dei motori di ricerca' *Diritto dell'informatica*, 753 (2014); F. Di Ciommo, 'Quello che il diritto non dice. Internet e oblio' *Danno e Responsabilità*, 1101 (2014); R. Tommasini, 'Riservatezza e Banche dati: il problema del controllo' *Diritto alla riservatezza e libertà di informazione* (Torino: Giappichelli, 1999); S. Tobani, 'Il danno non patrimoniale da trattamento illecito dei dati personali' *Diritto dell' informatica*, 427 (2017); F. Viterbo, *Protezione dei dati personali e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008); P. Manes, *Il consenso al trattamento dei dati personali* (Padova: CEDAM, 2001); G. Resta and A. Salerno, 'La responsabilità civile per il trattamento dei dati personali', in G. Alpa and G. Conte eds, *La responsabilità d'impresa* (Milano: Giuffrè, 2015), 684; N. Zorzi Galgano, *Persona e mercato dei dati. Riflessioni sul GDPR* (Padova: CEDAM, 2019), passim.

[4] On the subject of civil liability and compensation for damage in general see *ex multis* (no exhaustivity asserted): G. Alpa and G. Conte, *La responsabilità d'impresa* (Milano: Giuffrè, 2015); G. Alpa, *La responsabilità del produttore* (Milano: Giuffrè, 2019); G. Alpa and M. Bessone, *La responsabilità del produttore* (Milano: Giuffrè, 1999); G. Alpa and M. Bessone, *La responsabilità. Rischio d'impresa - assicurazione - analisi economica del diritto* (Milano: Giuffrè, 1980), II, 1; G. Alpa and M. Bessone, 'I fatti illeciti', in P. Rescigno ed, *Trattato Diritto Privato* (Torino: UTET, 1982), XIV, 295 et seq; C.M. Bianca, *Diritto Civile*, *La Responsabilità* (Milano: Giuffrè, 2011), 575; F.D. Busnelli, 'Illecito civile' *Enciclopedia giuridica*, (Roma: Treccani, 1989), XV, 1; F.D. Busnelli, 'Itinerari europei nella "terra di nessuno tra contratto e fatto illecito": la responsabilità da informazioni inesatte' *Contratto e impresa*, 539 (1991); M. Franzoni, 'L'illecito' *Trattato della Responsabilità civile* (Milano: Giuffrè, 2010), 941; C. Salvi, La *responsabilità civile* (Milano: Giuffrè, 1998), 110; E. Quadri, 'Considerazioni sugli orientamenti della giurisprudenza in tema di danno alla persona dopo l'intervento delle Sezioni Unite' *Il Foro Napoletano* (2012), 501; S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964), 89; D. Poletti, 'La dualità del sistema risarcitorio e l'unicità della categoria dei danni non patrimoniali' *Responsabilità civile e previdenziale*, 75 (2009); P. Perlingieri, 'La responsabilità civile tra indennizzo e risarcimento' *Rassegna di diritto civile*, 1066 (2004); P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961), 11; P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2017), 405.

liability regime clearly reveals the GDPR's role of safeguarding personal dignity and privacy through the protection of personal data in the society of digital surveillance capitalism.

In this respect the compensation of material and non-material – ie pecuniary and non-pecuniary – damages shall be eased and increased in order to balance overpower of data controllers and digital disruptive technologies versus the fundamental rights of the weaker party – the data subject – to personal dignity, privacy and personal data protection.[5]

Acknowledgement of these fundamental rights, even in the global digital society of surveillance capitalism, is to be no more underestimated: the fragility of the individual *versus* the Big Tech is astonishing and needs to be counterbalanced non only through sanctions but also through full compensation of damages and beyond.

Through the endorsement of *in re ipsa* damage doctrine, enhancement of personal data protection, dignity and fundamental rights can be easier achieved.

An interpretative reading is conducted, with a constitutionally oriented axiological approach, through the prism of the new *principle of accountability* placed by the GDPR at the foundation of the overall rationale of prevention and corporate risk management in relation to the processing of personal data.[6]

A constitutionally oriented axiological method of interpretation leads the jurist through the path of deeper attention to highest ordinamental values and in particular to the fundamental rights of person set forth by the Italian Constitution and the EU Charter of fundamental rights.[7]

It requires a broader functional analysis of the legal rules enshrined in the constitutionally integrated framework of legal sources, both Italian and European.

The GDPR's rules, indeed, do not only protect data: they protect at last personal dignity. The unlawful processing of personal data at its highest level infringes the personal dignity of the human being, including privacy and data protection related fundamental rights.

In this respect the fundamental principles set out by Art 2 of Italian Constitution, under which the Republic recognizes and guarantees the inviolable rights of the person – first of all personal dignity but also privacy in its broader meaning– together with the general solidarity principle.

[5] See Arts 7 and 8 of the Charter of Fundamental Rights of the European Union; see also Art 16(1) of the Treaty on the Functioning of the European Union (2012 OJ C 326) and Art 39 of the Treaty on the European Union (2012 OJ C 326). See H. Kranenborg, 'Article 8 – Protection of Personal Data' in S. Peers et al eds, *The EU Charter of Fundamental Rights – A Commentary* (Londra: Hart Publishing, 2014) 223; H. Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU* (Berlino: Springer Verlag GmbH: 2016).

[6] The accountability principle is expression of general precaution principle. See on this latter: F. De Leonardis, *Il principio di precauzione nell'amministrazione del rischio* (Milano: Giuffrè, 2005); U. Izzo, *La precauzione nella responsabilità civile* (Padova: CEDAM, 2007), 642.

[7] P. Perlingieri, *Il Diritto Civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2020).

Furthermore, at the European level these fundamental rights are typically declined by the legislator: see in this respect Arts 7 *Respect for private and family life* and 8 *Protection of personal data* of the EU Charter of fundamental rights, under which privacy and data protection are expressly mentioned and become specific fundamental rights of the person under the general legal umbrella of the broader principle of personal dignity.

Through privacy and data protection risk prevention, enforcement and strict liability regime, GDPR ensures easier access to judicial remedy by the data subject: through strengthening the restoration remedy of pecuniary and not pecuniary damages the European legislator finally protects personal dignity, which is fundamental right both under the Constitution and the EU Charter.

The aforesaid *principle of accountability*, which will be addressed more thoroughly below, accompanies and strengthens personal fundamental rights protection – which benefit of constitutional rank – through the traditional general principles of *lawfulness*, *proportionality*, *fairness* and *transparency*.

The only regulatory framework for civil liability in the area of unlawful processing of personal data is, at present, represented exclusively by Art 82 of the GDPR, which, in paragraph 1, reads as follows:[8]

> 'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered'.

It seems that civil liability for the unlawful processing of personal data, according to the preferable and predominant doctrinal orientation, must be framed in terms of non-contractual liability:[9] indeed a *special liability regime*, for reasons that we shall see, further beyond the common framework of Aquilian rules delineated in Art 2043 of the Italian Civil Code.

[8] The new Privacy Code, amended (for harmonisation) by Legislative Decree no 101 of 2018, registered the repeal of the well-known Art 15 which governed, in the pre-existing internal regulation, the system of civil liability regarding unlawful processing of personal data.

[9] See in doctrine, *ex multis*, in terms of non-contractual liability: G. Resta and A. Salerno, *La responsabilità civile per il trattamento dei dati personali* n 3 above, 653; E. Lucchini Guastalla, 'Il nuovo regolamento europeo sul trattamento dei dati personali: i principi ispiratori' *Contratto e impresa*, 106 (2018); E. Navarretta, 'Commento *Sub* Art 9', in C.M. Bianca and F.D. Busnelli eds, *Tutela della "*privacy*". Commentario alla L. 31 dicembre 1996, n. 675* (Milano: Giuffrè, 2011), 323; and most recently, M.L. Gambini, *Principio di responsabilità e tutela aquiliana dei dati personali* (Napoli: Edizioni Scientifiche Italiane, 2018); *contra*, in terms of *contractual liability for breach:* F.D. Busnelli, 'Itinerari europei nella "terra di nessuno tra contratto e fatto illecito": la responsabilità da informazioni inesatte' *Contratto e impresa*, 539 (1991); *social contact liability*: C. Castronovo, 'Situazioni soggettive e tutela nella legge sul trattamento delle informazioni personali' *Europa e diritto privato*, I, 677 (1998). Finally, see the novel position that attempts to overcome the opposition contractual/extra-contractual liability by evoking the dual nature of this special liability: thus A. Bravo, 'Riflessioni critiche sulla natura della responsabilità da trattamento illecito dei dati personali', in N. Zorzi Galgano ed, *Persona e mercato dei dati* (Milano: Giuffrè, 2019), 383.

The problem of qualification, however, is bound to lose significance in the context of *European private law*:[10] the purpose of the EU regulation in question is precisely that of harmonising the regime of liability for unlawful acts in such a strategic sector, attenuating the peculiarities and legal traditions of the Member States' respective systems.[11] In this perspective, the EU Court of Justice's case law will therefore be fundamental.[12]

It is thus a question of a new special subsystem of civil liability directly regulated by European private law: seen in this perspective, the overcoming of the common requirement of *injustice of the injury* and the re-emergence of the subjective non-pecuniary moral damage, the compensability thereof and the rediscovery of the original function deserve particular attention.[13]

Since regulatory reference material is lacking, it is necessary to clarify – after having preliminarily highlighted its special nature, the subjective and objective profiles of the liability regime foreseen under the GDPR – the following central

[10] See on this point N. Lipari, *Le categorie del diritto civile* (Milano: Giuffrè, 2013), 194, who warns that while overcoming, in European private law, the traditional distinctions proper to individual States in European private law, still: 'The outlook of EU sources does not automatically lead to a necessary uniformity of national regulations (...) but the trend line is henceforth clearly drawn'. On the complex, almost paradoxical dynamics of relations between individual States' laws and European law in terms of *droit pluriel*, the system's porosity and post-modern law: G. Alpa, *Diritto Privato Europeo* (Milano: Giuffrè, 2016), 8.

[11] F.D. Busnelli, 'Itinerari europei nella "terra di nessuno tra contratto e fatto illecito: la responsabilità da informazioni inesatte' *Contratto e Impresa*, 539 (1991); C. Castronovo, *Responsabilità civile* (Milano: Giuffrè, 2018), 41; A. Di Majo, 'Fatto illecito e danno risarcibile nella prospettiva del diritto europeo' *Europa e Diritto Privato*, I, 19 (2006).

[12] Ex multis EUCJ Joined Cases C-293/12 and C594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others; Case C-362/14 Maximillian Schrems v Data Protection Comr.; Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González; Case C-311/18, Maximillian Schrems v Data Protection Comr.

[13] On the subject of *non-pecuniary damage* in general and of *moral damage*, see *ex multis* (no exhaustivity asserted): M. Astone, 'Danni non patrimoniali, Art. 2059 c.c.', in F.D. Busnelli ed, *Commentario Codice Civile* (Milano: Giuffrè, 2012); G. Bonilini, *Il danno non patrimoniale* (Milano: Giuffrè, 1983), 299; M. Franzoni, 'Il danno' *Trattato della Responsabilità civile* (Milano: Giuffrè, 2010); E. Navarretta, *Il danno non patrimoniale. Principi, regole e tabelle per la liquidazione* (Milano: Giuffrè, 2010); E. Navarretta and D. Poletti, 'Il danno non patrimoniale e la responsabilità contrattuale', in E. Navarretta ed, *Il danno non patrimoniale. Principi, regole e tabelle per la liquidazione* (Milano: Giuffrè, 2010), 98; G. Ponzanelli, *Il "nuovo" danno non patrimoniale* (Padova: CEDAM, 2004); G. Ponzanelli, *Il risarcimento integrale senza il danno esistenziale* (Padova: CEDAM, 2007); F. Quarta, *Risarcimento e sanzione nell'illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013); A. Ravazzoni, *La riparazione del danno non patrimoniale* (Milano: Giuffrè, 1962); R. Scognamiglio, *Responsabilità civile e danno* (Torino: Giappichelli, 2010); C. Scognamiglio, 'Il sistema del danno non patrimoniale dopo le decisioni delle Sezioni Unite' *Responsabilità civile e previdenziale*, 261 and 266 (2009); D. Messinetti, 'I nuovi danni. Modernità, complessità della prassi e pluralismo della nozione giuridica di danno' *Rivista critica di diritto privato*, 552 (2006); D. Messinetti, 'Danno giuridico' *Enciclopedia del diritto, Aggiornamento* (Milano: Giuffrè, 1997), III, 469; V. Scalisi, 'Danno alla persona e ingiustizia' *Rivista di diritto civile*, 152 (2007); V. Scalisi, 'Illecito civile e responsabilità: fondamento e senso di una distinzione' *Rivista di diritto civile*, 657 (2009).

theoretical and practical legal issues:

(i) compensation of damages deriving from unlawful processing, more precisely from mere *unlawful conduct*, as damage *in re ipsa*; (ii) broadening of the scope of damages by unlawful data processing that can be compensated: criticism of the case law's double filter of gravity and seriousness of the injury; (iii) reinterpretation of the bipolarity of pecuniary and non-pecuniary damages with consequent enhancement, and rediscovery, of the original deterrent-sanctioning function of the *subjective moral damage* under Art 2059 Civil Code; (iv) strengthened data subject's protection of the fundamental rights – the weaker party of the asymmetric relation established with the data controller – of personal data and privacy through broad and easier access to liability remedy and damages – both pecuniary and non-pecuniary – restoration even beyond full restoration in order to obtain a deterrent effect for prevent further infringements.

II. Special Nature of the Civil Liability for Unlawful Data Processing Under GDPR

Seen in the perspective of unitary safeguarding of personal rights, as is known, the processing of personal data has been recognised as having amulti-offensive potential, which may infringe many fundamental personal rights and interests deserving protection: rights to privacy, personal identity, protection of personal data, image, and the right to be forgotten.[14]

The GDPR, in order to achieve such a broad safeguarding function, presents a special model of liability for unlawful processing of personal data which – in the face of the significant business risk involved in the massive processing of personal data – strengthens the protection of the data subject from unlawful processing by following the path drawn by the previous domestic regulations set out in Art 15 of the old Privacy Code.

The need to rewrite the previous legal frame of data protection infringement

[14] G. Alpa, 'Privacy', in G. Alpa ed, *I precedenti, La formazione giurisprudenziale del diritto civile* (Torino: UTET, 2000), I, 259, and most recently G. Alpa, 'L'identità digitale e la tutela della persona. Spunti di riflessione' *Contratto e impresa*, 723 (2017); G. Alpa and G. Resta, 'Le persone fisiche e i diritti della personalità', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 2006); G. Finocchiaro, *Il diritto all'anonimato* (Padova: CEDAM, 2008); G. Finocchiaro, 'Identità personale (diritto alla)' *Digesto delle discipline privatistiche*, *Aggiornamento* (2010), 721; C.M. Bianca and F.D. Busnelli, *La protezione dei dati personali* (Padova: CEDAM, 2007); C. Mignone, *Identità della persona e potere di disposizione* (Napoli: Edizioni Scientifiche Italiane, 2014); P. Rescigno, 'Personalità (diritti della)' *Enciclopedia giu*ridica (Roma: Treccani, 1991), XXIV; S. Rodotà, *Elaboratori elettronici e controllo sociale* (Bologna: il Mulino, 1973); S. Rodotà, 'Persona, riservatezza, identità. Prime note sistematiche sulla protezione dei dati' *Rivista critica di diritto privato*, 583 (1997); V. Zeno Zencovich, 'I diritti della personalità', in N. Lipari and P. Rescigno eds, *Trattato di diritto civ*ile, *Le fonti e i soggetti* (Milano: Giuffrè, 2009), 495; A. Zoppini, 'I diritti della personalità delle persone giuridiche (e dei gruppi organizzati)' *Studi in onore di P. Schlesinger* (Milano: Giuffrè, 2004), I.

liability rules comes from far.[15]

The Directive 95/46 did not fully harmonize national privacy laws, and even within Europe, countries adopted different rules to attract Big Tech industry with signals of weak enforcement and competitive tax regimes.

Furthermore, Directive 95/46 did not contain any provision on data processor liability, with the exception of a duty of non-action under Art 16.[16]

Therefore, and quite significantly, under the previous regime, processors were regarded as duty-less subjects, in substance protected by data controllers' umbrella.

By introducing Art 82 GDPR, the EU legislator tries to solve – or at least to reduce – the debate over (i) the nature of liability; (iii) the burden of proof imposed on data subjects, and (iii) the extension of recoverable damages.[17]

This article only apparently seems to replicate what was already provided under Art 23 of the previous Directive 95/46.

Indeed, the main innovation of Art 82 of GDPR, in comparison with Art 23 of repealed Directive 95/46, relates not only to the imposition of cumulative liability as such between data controller and data processor) and imposition of an increasing number of obligations directly upon controllers and processors, but also to the fact that the GDPR set up a favourable burden of proof regime for the weaker part, namely the data subject.

The strict liability model of EU data protection law is consistent with the *Principles of European Tort Law* (PETL),[18] provided one takes into account the 'general' liability of controllers and the 'proportional' liability of processors. In many ways, the changes introduced by the GDPR constitute a special codification of general tort law principles.[19]

[15] See on the liability regime debate: B. Van Alsenoy, 'Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation' *JPITEC*, 277 (2016), and latest B. Van Alsenoy, *Data Protection Law in the EU: Roles, Responsibilities and Liability (Cambridge; Intersentia: 2019).*

[16] Art 16 of Directive 95/46, which specifies that the processor may not process personal data '*except on the instructions of the controller*', which is a requirement directly applicable to processors.

[17] G.M. Riccio, 'Certification mechanism and liability rules under the GDPR. When the harmonization becomes unification', in De Franceschi and A. Schulze eds, *Digital Revolution - New Challenges for Law* (München: Beck, 2019), 140; E. O'Dell, 'Compensation for Breach of the General Data Protection Regulation' *Dublin University Law Journal (ns)*, 97-164; D. Leczykiewicz, 'Compensatory Remedies in EU Law: The Relationship Between EU Law and National Law', in P. Giliker ed, *Research Handbook on EU Tort Law* (Cheltenham: Edward Elgar, 2017).

[18] The PETL were presented at a public conference on 19 and 20 May 2005, in Vienna. The print version of the Principles including a commentary thereto were published by Springer and are now distributed by Verlag Österreich. It should be noted that, as an academic piece, the PETL do not enjoy legal authority as such. Nevertheless, the PETL offer an interesting frame of reference when assessing any regulation of liability at European level, as they reflect what leading scholars have distilled as 'common principles' for European tort law liability. For additional information see http://www.egtl.org.

[19] The cumulative liability regime of Art 82(4) of the GDPR reflects the Principles of European Tort Law (PETL) regarding multiple tortfeasors. According to Art 9:101 of the PETL, liability is solidary 'where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons'. The same provision also stipulates that where persons are

Art 82 GDPR, to ensure maximum protection for the individual concerned by data processing, refers to conduct of the data controller that may be contrary to any provision of the regulation itself and of delegated acts, including internal regulations.

It cannot be overlooked that the framing the remedy of compensation pursuant to Art 82 GDPR within the more general context of the Aquilian liability pursuant to Art 2043 of Civil Code, minimising the special character thereof, benefits from the approval of the most recent case law regarding unlawful processing of personal data, which links compensation to the importance of the harm done to the data subject, thus adhering to the general parameters of *unlawfulness of the conduct and injustice of the damage* traditionally required by the Courts.[20]

Violation of the procedural rules prescribed for the protection of the personal right to the safeguarding of data would, therefore, on the basis of such orientation, be a necessary – but not sufficient – condition to activate the obligation of compensation.

However, the traditional general prerequisite of injustice of the damage must be overcome:[21] the violation of the right to protection of personal data does not seem to require – unlike in the common regime – proof by the injured party of

subject to solidary liability, the victim may claim full compensation from any one or more of them, provided that the victim may not recover more than the full amount of the damage suffered by him. See I. Gilead et al, 'General Report – Causal uncertainty and Proportional Liability: Analytical and Comparative Report', in I. Gilead et al eds, *Proportional Liability: Analytical and Comparative Perspectives, Tort and Insurance* Law (Berlino: De Gruyter, 2013), 1 et seq. The term is used to signal that each party's liability exposure is limited to their proportional share in causing the damages. In case of joint and several liability, each party can be held liable by data subjects for the full amount. See also H. Koziol and R. Schulze eds, *Tort Law of the European Community* (Berlino: Springer, 2008) 27-28; C. van Dam, *European Tort Law* (Oxford: Oxford University Press, 2013) 359-360.

[20] Thus Corte di Cassazione 7 October 2015 no 20106, available at at www.cortedicassazione.it, (for the purposes of a finding of liability with award of damages), the mere allegation, the proof of unlawful conduct and the specific injustice of the damage are required; Corte di Cassazione 20 January 2015 no 824, available at at www.cortedicassazione.it, according to which 'the compensation for non-pecuniary damage cannot derive from the mere infringement of the provisions of Decreto Legislativo 30 June 2003 no 196, Arts 11-15 and Art 2050 Code Civil albeit comprising unjustified violation of the fundamental right to the protection of personal data; it is required that such violation have concretely caused an damage which, in going beyond the aforementioned threshold of tolerability, renders its effect significantly appreciable and the remedy constitutionally worthy'; Corte di Cassazione 15 July 2014 no 16133, *Danno e responsabilità*, 339 (2015); Corte di Cassazione 10 May 2001 no 6507, *Responsabilità civile e previdenziale*, 1177 (2001), with a note by P. Ziviz, *I "nuovi danni" secondo la Cassazione.*

[21] Subsequently to the teachings of S. Rodotà and P. Schlesinger, respectively, in relation to damage *non iure* – in the absence of grounds of justification – and *contra ius* – harmful to subjective legal situations – the concept of *injustice* of damage takes into account, as now generally agreed, both qualifications in the dual perspective of attention to the position of both the injured and the injuring party. See on this point respectively: S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964), 16; P. Schlesinger, 'La "ingiustizia" del danno nell'illecito civile' *Jus*, 342 (1965), For a critique of the unjust damage as damage *non iure*, see C. Castronovo, *La nuova responsabilità civile* (Milano: Giuffrè, 2006), 24, according to whom 'the qualification of *non iure*, meaning unlawfulness of the conduct, cannot be ascribed to the injustice'.

objectively assessable prejudicial consequences.

The violation of a fundamental right of the person – such as that to the confidentiality and protection of personal data – is always to be deemed significant in light of a constitutionally oriented axiological reading: to strengthen its protection, the compensation for damage is *in re ipsa*, since it is an automatic consequence of an illegal conduct, ie not compliant to the GDPR's protective mandatory principles.[22]

On the other hand, Art 82 of the GDPR, in order to strengthen the protection of the injured party – as Art 15 of the Privacy Code previously did – omits reference to the further clause of injustice: the *ipso iure* removal of this aspect from the judicial assessment comes from the express omission of the specific common requirement.[23]

Thus, on the basis of an authoritative jurisprudential orientation, the structure of the liability changes from a common rule into a special rule: the assessment of the injury as an effect of harmful conduct is no longer significant, but more simply the illegal conduct *ex se* is significant.[24]

This marks the shift from the *paradigm of common liability*, which is grounded in the assessment of the damage as a consequence of the harmful conduct as per Art 2043 of Civil Code, to the *paradigm of special liability*, in which the damage is identified *tout court* with the illegal conduct: *ergo*, once the violation of the rule of conduct is proved, the damage is proved, at least in terms of existence of a right to protection.[25] The aspect of the *gravity of the damage*

[22] The prevailing case law on the subject seems to be oriented in this direction: see *ex multis* Tribunale di Potenza 27 January 2010, *Danno e responsabilità*, 131 (2011); Tribunale di Mantova 27 May 2008, www.ilcaso.it; Tribunale di Milano 5 June 2007, *Guida al diritto*, 41, 56 (2007); Corte d'Appello di Milano, 19 June 2007, *Diritto dell'informatica*, 1101 (2007); Tribunale di Latina, 19 giugno 2006, *Il Foro Italiano*, I, 324 (2007); Tribunale di Roma, 12 March 2004, *Danno e responsabilità*, 879 (2005); Tribunale di Milano, 8 August 2003, *Danno e responsabilità*, 303 (2004).

[23] In the repealed Art 15 of the Privacy Code, as in the pre-existing Art 18 of Law 31 December 1996 no 675, use was made of the indeterminate reference to harm caused to others by a processing of personal data with neither a definition of the unlawful processing nor an invocation of the injustice of the damage as a selective criterion of the compensable harm, but expressly referring to the repealed Art 11 of the Privacy Code on the processing procedures and the requisites of the data for a reconstruction of the objective content of such unlawful processing. See on this aspect, in jurisprudence: E. Navarretta, 'Commento Sub art. 1 del D Lgs., 30 giugno 2003, n. 196', in C.M. Bianca and F.D. Busnelli eds, *La protezione dei dati personali* n 3 above, 250, which shows the indeterminacy of the principles as per Art 11 of the Privacy Code, deeming that the unlawful conducts originate from a definition of illegality ascribable to the *non jure* area.

[24] D. Messinetti, 'I nuovi danni' n 13 above, 552. According to the illustrious author, 'the question of personal damage, brought back to the conduct's reprehensible character in itself, in consideration of the special nature of the injured value, proposes anew the significance of the person's juridical value in its plainest dimension: the illegal conduct'.

[25] According to the jurisprudence favourable to acknowledgement of the special nature of such liability for unlawful processing, only the *conduct's unlawfulness* is significant, there being no need to demonstrate the injustice of the damage since this is presupposed by the law, and consequently the compensation for the *damage's effect* or the damage *in re ipsa* is configurable. These considerations have been formed in relation to civil liability pursuant to Art 15 of the previous Privacy Code: but now analogous considerations may be pertinent for Art 82 of the GDPR, also in light of the GDPR's recital 146, which expressly evokes the concept of *harmful*

will therefore be significant exclusively in terms of *quantum debeatur*.

The more traditional approach rigidly anchored in the common Aquilian rules – based on fault – does not, it is repeated, seem convincing in that it tends to minimise the special nature of the strict liability subsystem set out in the area of personal data protection[26] – which is not based on fault but on the mere infringement of GDPR rules – and, consequently, to lessen the potential of the deterrent function and the function of protection of the data subject, weaker party in an asymmetrical relationship with the data controller.

All the more so now when the purpose of the GDPR is, if anything, precisely the opposite, ie to harmonise, at EU level, the regime of strict liability for unlawful acts in the strategic sector of data processing, attenuating the legal peculiarities and traditions of the Member States' respective legal systems.

III. Subjective Profile: Typical Roles of Personal Data Recipients

As regards the subjective profile, it is useful to summarize the types of relevant actors foreseen by the GDPR and concerned by the new special regime of strict civil liability for unlawful processing of personal data.[27]

event. The question of liability for illegal processing, therefore, is posed in terms of autonomy with respect to the traditional legal model as per Art 2043 Civil Code, insofar as it is built in function of conduct reprehensible in its unlawfulness, assessed *ex ante* through the prescription of principles and rules of conduct regarding the processing's legality which discount further ascertainment of causation of an unjust damage, rightly presupposing same by reason of the breach of the guideline regarding the processing's legality. See in this regard: E. Lucchini Guastalla, 'Il nuovo regolamento europeo sul trattamento dei dati personali: i principi ispiratori' *Contratto e impresa*, 106 (2018); E. Lucchini Guastalla, 'Privacy e Data Protection: principi generali', in E. Tosi ed, *Privacy Digitale* (Milano: Giuffrè, 2019), 88; D. Messinetti, 'I nuovi danni' n 13 above, 543; F. Bilotta, 'La responsabilità civile nel trattamento dei dati personali', in G. Panetta ed, *Circolazione e protezione dei dati personali* (Milano: Giuffrè, 2019), 445 ; F. Colonna, 'Sistema della responsabilità civile da trattamento dei dati personali', in R. Pardolesi ed, *Diritto alla riservatezza e circolazione dei dati personali*, n 3 above; A. Thiene, 'Segretezza e riappropriazione di informazioni di carattere personale: riserbo e oblio nel nuovo Regolamento europeo' *Nuove leggi civili commentate*, 443 (2017); G. Ramaccioni, *La protezione dei dati personali e il danno non patrimoniale* (Napoli: Jovene, 2017), passim.

[26] See on this subject: G. Alpa, *La responsabilità civile*' (Milano: Giuffrè, 1999), 206; G. Alpa, 'Nuove figure di responsabilità civile di derivazione comunitaria' *Responsabilità civile e previdenizale*, 5 (1999); G. Alpa, *Il diritto privato nel prisma della comparazione* (Torino: Giappichelli, 2004), 269, who evidences the multiplication of subsystems of EU origin with respect to the general model of liability outlined by the civil code and the prevalence of their special character over traditional law.

[27] G. Finocchiaro, *Il nuovo Regolamento europeo sulla* privacy *e sulla protezione dei dati personali* (Bologna: Zanichelli, 2017), 12; G. Finocchiaro, 'Introduzione al Regolamento europeo sulla protezione dei dati' *Nuova giurisprudenza civile commentata*, 1 (2017); E. Lucchini Guastalla, 'Il nuovo Regolamento Europeo sul trattamento dei dati personali: i principi ispiratori' *Contratto e Impresa*, 106 (2018); V. Cuffaro, 'Il diritto europeo sul trattamento dei dati personali' *Contratto e Impresa*, 1098 (2018); A. Mantelero, 'Responsabilità e rischio nel Regolamento UE 2016/679' *Nuove leggi civili commentate*, 144 (2017); V. Ricciuto, 'La patrimonializzazione dei dati personali. Contratto e mercato nella ricostruzione del fenomeno' *Diritto dell'informazione e*

The applicable legal regime is, indeed, differentiated by the GDPR according to the different subjective qualification of the injuring party, as follows: Data Controller (Art 24 GDPR); Data Processor or Sub-Processors (Art 28 GDPR); and person in charge of the protection of personal data, so-called *Data Protection Officer* (DPO – Art 37 GDPR).

The Controller (Art 24 GDPR) is liable for damages caused by its processing that breaches any rule prescribed by the regulation in question. Similar liability also exists in the case of multiple Joint Data Controllers, whose liability is thus cumulative.

The principle of cumulation, albeit on the basis of different prerequisites of application, applies also in the case of multiple Data Processors.

The Sub-Processors, on the other hand, are significant only in the *internal relations* between Processor-Sub-Processors, the liability of the Processor alone having external effects.

On the other hand, on the basis of the special rules examined here the new role of the DPO does not appear to be directly liable towards third parties: nothing excludes, however, legal action on the basis of the common rules of the *Aquilian* liability.[28]

In all the aforementioned cases –multiple Controllers of the same processing and multiple Processors – there arises, with an external effect, a true and proper joint and several obligations – undifferentiated – of compensation for the entire damage suffered by the data subject, irrespective of the effective causal contribution of the individual subjects involved in the data processing chain, which is typical of an objective liability.

For the internal effects, however, different causal concurrence will be important in determining the harmful event resulting from the unlawful data processing.

In the light of an increased safeguarding of the data subject having suffered damage from the unlawful processing of personal data – to whom the new European legislation intends to ensure full and effective compensation for the damage suffered – the rule of joint and several liability for compensation for the damage caused by the data processing, laid down in Art 82(4) GDPR, must apply in the case where more controllers, more processors or more of both are involved.

The foregoing is consonant with the provisions of the Civil Code (Art 2055), pursuant to which if the damage is imputable to more than one person, each is jointly and severally liable for the whole of the damage towards the injured party, who thus is not affected by the possible insolvency, untraceability or non-imputability of any of the injuring parties.[29]

dell'informatica, 689 (2018); M.L. Gambini, *Principio di responsabilità e tutela aquiliana dei dati personali* (Napoli: Edizioni Scientifiche Italiane, 2018), passim; M.L. Gambini, *Dati personali e Internet*, (Napoli: Edizioni Scientifiche Italiane, 2008), passim; S. Rodotà, *Tecnologie e diritti* (Bologna: il Mulino, 1995).

[28] On this profile see, more thoroughly, E. Tosi, *Responsabilità civile* n 1 above.

[29] Pursuant to Art 2055 Code Civil, not only are all those having contributed to the

Finally, the previous generic invocation of 'whoever causes injury' adopted first by Art 18 of Law no 675 of 1996 and then by Art 15 (now repealed) of the Privacy Code is to be deemed superseded: the need to conform the national legislation to the GDPR's requirements calls, therefore, necessarily to activate only for the *data subjects as identified* under the regime of special liability set forth by aforementioned Art 82.

On the other hand, the common rules of civil liability pursuant to Art 2043 of Civil Code continue to apply to other offenders not defined by the regulation in question.

IV. Objective Profile: The Illegality of Conduct in the Light of Accountability Principle

As regards the objective profile, Art 82, para 1, GDPR refrains from identifying a subset of more serious instances of unlawful conduct, confining itself to invoke 'an infringement of this Regulation', hence any breach of the GDPR's rules of conduct,[30] thus ensuring the maximum possible protection for the data subject.

Processing not conforming to the GDPR – more precisely, unlawful processing as giving rise to the right to compensation – in view of recital no 146

> 'also includes processing that infringes delegated and implementing acts adopted in accordance with this Regulation and Member State law specifying rules of this Regulation'.

The new special civil liability regime outlined by Art 82 GDPR[31] contains a

commission of the single unlawful act jointly and severally obliged to compensate, but also the authors of several acts or omissions, constituting distinct unlawful acts all causally linked to the damage, are so obliged. In this regard, *ex multis* in case law: Corte di Cassazione 3 May 2016 no 8643, *Giurisprudenza italiana*, 2345 (2016); Corte di Cassazione 24 September 2015 no 18899, *Pluris Banche dati giuridiche*; Corte di Cassazione 25 September 2014, no 20192, *Responsabilità civile e previdenziale*, 2058 (2014); Corte di Cassazione 12 March 2010 no 6041, *Massimario giustizia civile*, 360 (2010); Corte di Cassazione 18 July 2002 no 10403, *Il Foro Italiano*, I, 2147 (2003); Corte di Cassazione 4 June 2001 no 7507, *Repertorio del Foro Italiano*, 'Responsabilità civile', no 38 (2001).

[30] See recital no 75 according to which: 'The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage, in particular: where the processing may give rise to discrimination, identity theft or fraud, financial loss, damage to the reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonymisation, or any other significant economic or social disadvantage; where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data'. See, besides, recital no 83 of the GDPR.

[31] See on the new civil liability for the processing of personal data, in addition to E. Tosi, *Responsabilità civile* n 1 above, passim; M.L. Gambini, *Principio di responsabilità* n 9 above, passim; M. Ratti, 'La responsabilità da illecito trattamento dei dati personali nel nuovo Regolamento', in R. Finocchiaro ed, *Il nuovo Regolamento europeo* n 27 above, 615

reference to the *act* consisting in whatsoever activity qualifiable as data processing not in conformity with the rules therein, pursuant to the broad notion outlined in Art 4(2) GDPR.[32]

An act – more precisely, activity of personal data processing – which, it is repeated, becomes illegal whenever it is conducted in breach of the GDPR mandatory rules.

To be recalled *ex multis* (no exhaustivity asserted) are the fundamental principles[33] applicable to the processing of data (Art 5 GDPR), which substantially confirm principles already known in the 'old' Privacy Code:[34] (a) lawfulness, fairness and transparency; (b) limitation of purpose; (c) data minimisation; (d) accuracy; (e) storage limitation; (f) integrity and confidentiality.

The EU reform also introduces the new fundamental *principle of accountability* (Art 5 GDPR), establishing the Controller's liability.[35]

The *accountability principle*[36] is an expression of the general *precaution principle*,[37] the strengthened liability under Art 2050 Civil Code and especially

[32] Precisely: 'any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction'.

[33] See in general G. Alpa, 'I principi generali', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2nd ed, 2006), passim.

[34] The jurisprudence formed under the repealed Art 15 of the Privacy Code – now replaced on this specific point by Art 82 GDPR – enhanced the close connection with the Privacy Code as a whole: the latter states principles and conditions of lawfulness of the processing of personal data and sets forth the procedures and limits within which it may be affected. In this perspective, the remedy of compensation becomes an instrument for fastening the aforementioned protection system, designed to ensure abidance by the regulatory framework. See in this respect: D. Messinetti, *I nuovi danni* n 13 above, 564; G. Ramaccioni, *La risarcibilità del danno non patrimoniale da illecito trattamento dei dati personali* (Napoli: Jovene, 2017), 268; F. Di Ciommo, 'Il danno non patrimoniale da trattamento dei dati personali', in G. Ponzanelli ed, *Il nuovo danno non patrimoniale* (Milano: Giuffrè, 2004), 274; S. Sica, 'Commento Sub artt. 11-22', in S. Sica and P. Stanzione eds, *La nuova disciplina della* privacy *(d.lgs. 30 giugno 2003, n. 196)*, (Bologna: Zanichelli, 2005), 8; F. Colonna, 'Il sistema della responsabilità civile da trattamento dei dati personali', in R. Pardolesi ed, *Diritto alla riservatezza* n 3 above; G. Resta and A. Salerno, *La responsabilità civile* n 3 above, 660.

[35] See also recital no 74 of the GDPR.

[36] G. Buttarelli, 'The accountability principle in the new GDPR' (Luxembourg, 30 September 2016:), during a speech as EDPS at the European Court of Justice stated about accountability principle meaning that: it helps in moving data protection from theory to practice. Accountability goes beyond compliance with the rules it implies culture change. As such, accountability needs to be embedded in the organisation'.

[37] See *Communication on the precautionary principle* COM/2000/0001 final wich states as follows: 'The precautionary principle is not defined in the Treaty, which prescribes it only once - to protect the environment. But in practice, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community. (…) The precautionary principle should be considered within a structured approach to the analysis of risk

established under European law under Art 191 of TFUE specifically for environmental protection from scientific and technical uncertainty.[38]

The *precaution principle*[39] is based on the acknowledgement of the scientific and technological failure to foresee every risk with reference to development of new technologies: the *black swan effect* using an emblematic expression of Nassim Taleb.[40]

Evaluation and *ex ante* risk management under GDPRcan be duly applied also to data processing in the digital surveillance society.

Not only adequate technical and organizational measures of data processing risk prevention but even broader measures of *precaution* related not only to a probable risk but also to a mere possibility, provided that the risk is typical of data processing as assessed on a case-by-case basis.[41]

Furthermore, Art 5(2) GDPR states that, in addition to having to guarantee compliance with the aforesaid principles in order to *manage and prevent the risk* associated with the processing of personal data, the Controller must be able to *demonstrate* such compliance: it is deemed that in this complex articulation of duties – referred mainly to data controller but also to the data processor – the

which comprises three elements: risk assessment, risk management, risk communication. The precautionary principle is particularly relevant to the management of risk. (…). Recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined'.

[38] The principle is not new but is emerging in the international debate before GDPR enactment: Working Party ex Art 29 of Council Directive 95/46/EC, 'Opinion 3/2010 on the principle of accountability' (Bruxelles, 2010); OECD *'Guidelines on the Protection of Privacy and Transborder Flows of Personal Data'* (Parigi, 1980): '*A data controller should be accountable for complying with measures wich give effect to the principle stated above*' (Art 14). Furthemore: The Center for Information Policy Leadership, *Data Protection Accountability: The Essential Elements A Document for Discussion,* (Galway, 2009) part of a wider set of studies *Accountability-Based Privacy Governance Project* (Galway, 2009-2013). Accountability it is one of the main concepts of the *APEC Privacy Framework* (Singapore, 2015) and its cross border privacy rules. In this respect also *Binding Corporate Rules* ('BCRs'), which are used in the context of international data transfers, reflect the accountability principle.

[39] The *precaution principle* is already included in civil liability strentghened regime under Art 2050 Code Civil for dangerous activities. See on precaution principle: A. Vivarelli, *Il consenso al trattamento dei dati personali nell'era digitale* (Napoli: Edizioni Scientifiche Italiane: 2019), 184; F. De Leonardis, *Il principio di precauzione nell'amministrazione del rischio* (Milano: Giuffrè: 2005); U. Izzo, *La precauzione nella responsabilità civile* (Padova, CEDAM, 2007), 642; E. Del Prato, 'Il principio di precauzione nel diritto privato: spunti' *Rassegna di diritto civile*, 34 (2009).

[40] N. Taleb, *Black Swan* (New York: Random House, 2007).

[41] The precaution principle is an elastic one and is connected also to objective liability doctrine: it can be minimized or maximized by legislator. At its severe consequences can be, ipothetically, even cover the unforeseen and unforseable. But this extreme extension interpretation is not endorsed by authoritative doctrine on liability: see P. Troimarchi, *La responsabilità civile: atti illeciti, rischio e danno* (Milano: Giuffrè, 2019), 74, wich criticizes extremist lectures of precaution principle because even strict liability has to be fair and economic sustainable by entrapreneurs. Otherwise, the concept itself of objective or strict liability – ie liability without fault – will be hinderend if automatically extended by law to cover, at any economic cost, the unknown at the state of the art technnology and insofar the incalculable risks too.

essence of the new *principle of accountability* may be perceived.

Art 6 of the GDPR also establishes parameters of lawfulness of the processing – in addition to the general principles outlined in Art 5 – essentially, as already noted, for the purposes of the related assessment of the illegality of conduct: *principle of fairness, transparency, accuracy and proportionality*.

An innovative and at the same time insidious principle in terms of compliance in that it may be determined, case by case, concretely in relation to the type of data processed and to the Controller's procedures and organisational structure.

In application of this principle, the Controller, pursuant to Art 24 GDPR, must implement, as well as periodically review and update, *adequate technical and organisational measures* so as to guarantee and *be able to demonstrate* that the processing operations are conducted in compliance with the new regulation.

For this purpose, it is incumbent to take into account the assessment parameters prescribed by the GDPR, among which: (i) nature of the processing and of the data processed; (ii) scope, context and purpose of the processing; (iii) associated risks, with differentiated probability and gravity for the rights and freedoms of natural persons; (iv) quantity of data processed and number of data subjects; (v) state of the technology; (vi) economic sustainability.

On the basis of the rules of accountability – which mark the shift from the previous regulatory model inspired by the prevailing, if not exclusive, significance of the *ex-post liability* to an evolved and complex regulatory model centred on the valorisation, first and foremost, but not only, of the *imposition of responsibility*, conscious and documented, *ex ante* – the principles set down by the new regulation cease to be mere formal and abstract obligations and become adaptable and flexible obligations in relation to the actual demands of application that have emerged – case by case, concretely – from the necessary preliminary analysis and the specific, more precisely personalised self-diagnosis of each individual Controller.

In substance, the introduction of the *principle of accountability* entails the burden of adopting a new *preventive and responsible* approach in data protection management on the part of individual business organisations, marking the emergence of complex *administration and prevention duties differentiated* on the basis of the *specific risk* associated with the particular personal data processing put into practice.

V. Liability Objectification for Unlawful Data Processing

Art 82(3) GDPR, in establishing that Controllers or Processors are exempted from liability if they demonstrate that the harmful event *is in no way ascribable* to themselves, follows – in strengthening the extension of liability for unlawful processing of personal data – the path already drawn by EC Directive 95/46, which in its Art 23 called for the fixing of a similar liability regime based on proof

of no imputability of harmful event.[42]

Jurisprudence and prevailing case law in regard to the nature of the special liability for unlawful processing of personal data – emerged under the repealed Art 15 of the Privacy Code but, insofar as compatible, applicable to the new, analogous (in many respects) regime prescribed by Art 82 GDPR prefer the qualification in terms of *strict liability*,[43] more precisely presumption of liability *tout court* for the injuring party who will be bound, in order to avoid the burden of liability, to provide proof of unforeseeable circumstances, force majeure, or act of a third party or of the injured party.[44]

According to another jurisprudential and case law orientation, it should be rather qualified as an *aggravated liability*[45] in a strict sense, based on the presumed

[42] Aforesaid Directive's recital no 55 further exemplified the aforesaid principle in specifying that 'any damage which a person may suffer as a result of unlawful processing must be compensated for by the controller, who may be exempted from liability if he proves that he is not responsible for the damage, in particular in cases where he establishes fault on the part of the data subject or in case of force majeure'.

[43] On the objective nature of liability pursuant to Art 2050 Civil Code see, in general without specific reference to the processing of personal data, in the jurisprudence: G. Alpa and M. Bessone, *La responsabilità del produttore* (Milano: Giuffrè, 1999); G. Alpa and M. Bessone, *La responsabilità. Rischio d'impresa – assicurazione – analisi economica del diritto* (Milano: Giuffrè, 1980), II, 1; M. Franzoni, 'Responsabilità per l'esercizio di attività pericolose', in G. Alpa and M. Bessone eds, *La responsabilità civile* (Torino: UTET, 1987), II, 462, since the case law does not seem inclined to consider the examination of the diligence practised in adopting preventive measures; P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961), 11; P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2017), 405: it is a matter of a particular example of strict liability, more precisely of an objectively avoidable liability for risk, based on business risk; M. Comporti, *Esposizione a pericolo e responsabilità civile*, (Napoli: Edizioni Scientifiche Italiane, 1965), 176.

[44] See, in favour of the qualification of the liability for unlawful data processing in terms of strict liability: M. Franzoni, 'Responsabilità derivante da trattamento dei dati personali', in G. Finocchiaro and F. Delfini eds, *Diritto dell'informatica*, (Milano: Giuffrè, 2014), 831; G. Resta and A. Salerno, *La responsabilità civile per il trattamento dei dati personali*, n 3 above, 670, interpret the reference to Art 2050 Civil Code in the sense of the mere inversion of the burden of proof in favour of the injured party and extension of the duty of care incumbent on the injuring party; F. Colonna, 'Il danno da lesione della privacy' *Danno e Responsabilità*, 18 (1999); P. Ziviz, 'I danni non patrimoniali', in P. Cendon ed, *Il diritto italiano nella giurisprudenza* (Torino: UTET, 2012), 367. See in this regard *ex multis*: Tribunale di Bari 23 July 2010, *Responsabilità civile e previdenza*, 864 (2010); Tribunale di Pordenone 16 April 2010, *Danno e responsabilità*, 215 (2011); Tribunale di Lecce 5 August 2008, *Responsabilità civile e previdenza*, 2541 (2009); Corte di Cassazione 14 May 2013 no 11575, *Guida al diritto*, 57, 33 (2013); Corte di Cassazione 17 December 2009 no 26516, *Massimario Giustizia civile*, 12, 1704 (2009); Corte di Cassazione 4 May 2004 no 8457, *Il Foro Italiano*, I, 2378 (2004). See in this regard, in the related case law: Corte d'Appello di Milano 11 April 2017 no 1519, unpublished; Tribunale di Trento 11 September 2015 no 863, unpublished.

[45] On the nature of the liability pursuant to Art 2050 Civil Code see, in general, in the jurisprudence: C.M. Bianca, *Diritto Civile*, *La Responsabilità* n 4 above, 709. Likewise, in the prevailing case law one notes some decisions that expressly admit the presumption of fault to be borne by the injuring party in the case as per Art 2050 Civil Code: Corte di Cassazione 5 July 2017 no 16637, *Massimario Giustizia civile* (2017), for which, in a matter of liability for exercise of a dangerous activity, in order to overcome the presumption of fault placed on the party exercising

fault of the subject performing tasks of personal data processing and on the inversion of the burden of proof onto the injured party: the injuring party may escape the burden of liability only by demonstrating, in this case, that it has adopted all appropriate measures – of prudence, care and diligence – to avoid the damage in accordance with the principles and rules of personal data processing prescribed by current legislation (thus, previously, the *Privacy Code* and the implementing legislation; now the GDPR, the *harmonised Privacy Code* and the implementing legislation compatible with the new EU regulatory framework).[46]

It has, however, been acutely observed that the debate between objectification and aggravation of the liability – 'our continuing to wonder whether it is a question of attenuated strict liability or of liability for presumed fault' – risks turning 'into a sterile doctrinal dispute – with no basis in case law': such jurisprudential view opts for an intermediate solution in terms of liability the contents of which may be entrusted only to the 'living law' called upon to supplement the content of the exonerating proof.[47]

At this point it is a matter of correctly framing the regime of liability for the unlawful processing of personal data laid down in Art 82 GDPR, between subjective and objective reading.[48]

As has been said above, the GDPR regulates solely the processing of data carried out in the exercise of business and professional activity in a broad sense – those effected by the natural person for the exercise of merely personal or domestic activities are excluded –, introducing principles and rules of conduct that are very structured and penetrating from the viewpoint of the fundamental, and immanent, principle of *ex ante* imposition of liability that permeates the entire EU regulatory apparatus in view of a diligent and mindful management of

such activity by Art 2050 Civil Code the simple proof of the unforeseeability of the harm is not sufficient, the injuring party having, instead, to prove that the harm could not have been avoided via the adoption of the preventive measures which the standards of the activity or common diligence imposed; Corte di Cassazione 20 May 2016 no 10422, *Massimario Giustizia civile* (2016).

[46] F. Macario, 'La protezione dei dati personali nel diritto privato europeo', in V. Cuffaro and V. Ricciuto eds, *Il trattamento dei dati personali* n 3 above, 48, n 104 and 108, expresses himself in terms of aggravated liability for presumed fault. See the most recent rulings of the Court of Cassation, which discern in Art 15 of the Privacy Code a hypothesis with inversion of the burden of proof regarding the injuring party's liability, more precisely: presumed fault: Corte di Cassazione 25 January 2017 no 1931, *Responsabilità civile e previdenza*, 837 (2017), with a note by F. Foglia, 'Unlawful reporting in Central Risks and in *re ipsa* damages'.

[47] F.D. Busnelli, 'Il "trattamento dei dati' personali" nella vicenda dei diritti della persona: la tutela risarcitoria', in V. Cuffaro et al eds, *Trattamento dei dati e tutela della persona* (Milano: Giuffrè, 1999), 185.

[48] Among the first commentaries will be noted: (*i*) for an *objective reading*: E. Tosi, 'Responsabilità civile per trattamento illecito dei dati personali' n 25 above, 619 and 650; A. Parisi, 'Responsabilità e sanzioni', in S. Sica et al eds, *La nuova disciplina europea della* privacy (Padova: CEDAM, 2016), 300, according to whom the European legislator, in the 'amended regulation has in a certain manner, in turn, transposed the severity of Italian law, deeming it, in this matter, more adequate'; (*ii*) for a *subjective reading*: M. Ratti, 'La responsabilità da illecito trattamento' n 31 above, 618 and 628; M.L. Gambini, *Principio di responsabilità* n 9 above, 75.

the risks associated with data processing in order to mitigate the harmful potential with respect to the fundamental rights of the person, including the rights to the safeguarding of personal data, confidentiality and personal identity.

Such analytical behavioural obligations, which contribute to the outlining of a model of abstract conduct that is diligent and compliant with the GDPR, as has been observed in the jurisprudence, operate ambiguously between the objective level, as elements constitutive of the offence, and the subjective level, colouring the requisite of the fault of the processing's author with a peculiar content of specificity that ends up being translated into objective fault.[49]

The foregoing has been noted at least in those cases where the rules adopt a precise definition of the obligations placed on controllers and processors of data. Similarly to what is prescribed in the contractual context, an abstract model is outlined that is made up of mandatory guidelines for conduct to be followed in personal data processing, laid down by the GDPR: the infringement of these mandatory rules constitutes in itself negligence or incompetence irrespective of subjective evaluations regarding the conduct's unlawfulness.[50]

Furthermore, it seems proper to include in the scope of application strict objective parameters of liability for unlawful processing pursuant to Art 82 GDPR by reason of the *principle of accountability* emerging from the combined provisions of the GDPR's Arts 5.2 and 24.1.

The *obligation of preliminary analysis and prevention of the differentiated risk*, of varying probability and gravity owing to the data processing conducted, shall be evaluated under most rigorous criterion of *qualified contractual diligence* pursuant to Art 1176, para 2 of Civil Code in correlation with the fulfilment of the regulations' reinforced analytical obligations, emerging in the overall structure of the GDPR, incumbent on data controllers and processors.

Indeed, the ordinary criteria for evaluating non-contractual conduct are not deemed adequate and sufficient:[51] standing in relief, with reference to the special

[49] See in this respect ibid 76.

[50] Thus G. Visintini, *I fatti illeciti*, II, *L'imputabilità e la colpa in rapporto in rapporto agli altri criteri ali imputazione della responsabilità* (Padova: CEDAM, 1998), 163; G. Visintini, 'Dal diritto alla riservatezza alla protezione dei dati personali' *Diritto dell'informazione e dell'informatica*, 8-9 (2019). On the process of objectification of civil liability in general one may see: F.D. Busnelli, 'Nuove frontiere della responsabilità civile' *Jus*, 41 (1976); G. Alpa and M. Bessone, 'I fatti illeciti', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1982), XIV, 295; G. Alpa, 'Relazione introduttiva Seminario di Pisa' *Responsabilità civile e previdenza*, 675 (1977); S. Rodotà, 'Relazione di Sintesi seminario Pisa' *Responsabilità civile e previdenza*, 3 (1978); V. Zeno Zencovich, *La responsabilità civile da reato* (Padova: CEDAM, 1989), 33 and 57; C. Salvi, *La responsabilità civile* (Milano: Giuffrè, 1998), 110; C.M. Bianca, *Diritto Civile*, 5, *La Responsabilità* n 4 above, 575.

[51] For arguments in favour of extensive application of Art 1176 Civil Code also in matters of tort, again placing the notion of diligence within that of fault via the reference to negligence, imprudence and incompetence, see in general: L. Mengoni, 'Obbligazioni "di risultato" e obbligazioni "di mezzi". Studio critico' *Rivista del diritto commerciale* I, 205 (1954); L. Corsaro, 'Colpa e responsabilità civile: l'evoluzione del sistema italiano' *Rassegna di diritto civile*, 298 (2000); A. Ravazzoni, 'Diligenza' *Enciclopedia giuridica* (Roma: Treccani, 1989), XI, 1; M. Bussani, *La colpa*

civil liability concerned, is the data processing conduct required under the GDPR, to be pursued with qualified diligence, further reinforced by the duty of analysis and differentiated prevention of the associated risk.

It is the Data Controller, in view of the economic analysis of the law and of the *principle of accountability* pursuant to Art 5.2 of the GDPR, who can, and must, in the analysis of the associated risk prior to the start of processing – thus before the occurrence of the harmful event –, better than anyone else, check the cost-benefit analysis of the choices made for technical and organisational adequacy under the GDPR.[52]

This complex task falls to the Data Controller in order to foresee and exclude, or at least reasonably mitigate, the risk of a burden of strict civil liability for unlawful *ex post* processing not adequately assessed – during the *ex ante* analysis of the risk associated with the processing – with consequent compensation for damage, pecuniary and non-pecuniary, in particular, suffered by the data subject-injured party.

It is therefore deemed necessary to embrace the qualification of civil liability for the unlawful processing of personal data governed by Art 82 GDPR in terms of *strict liability* for business risk arising from the activity of processing of personal data in breach of the rules of conduct designed to protect the data subject.

In the regulatory framework outlined by the GDPR, there is registered, as must again be pointed out, a significant change of perspective in light of the principle of accountability by virtue of which it is the Controller's duty to analyse and manage the differentiated risk associated with the data processing activity, in the implementation of *civil liability's general principles of prevention and precaution* up to the limits of the socially, economically and legally acceptable business risk, account being taken of the standards of the technology involved and of the costs of such implementation, inclusive of the *typical risk*, even if rare.

Excluded, on the other hand, insofar as it is unreasonable and disproportionate, is the *atypical* risk, which therefore does not fall within the precautionary duty.[53]

VI. Violation of the Fundamental Rights to Privacy and Protection of Personal Data: Non-Pecuniary Damage from Unlawful Processing and Admissibility of Claim for Damage *in Re Ipsa*

soggettiva. Modelli di valutazione della condotta nella responsabilità extracontrattuale (Padova: CEDAM, 1991).

[52] P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961), 50.

[53] On the basis of the principle of business risk and the correlated efficiency parameter, also from the point of view of the economic-legal, cost-benefit analyses, 'liability must be ascribed to those who have control over the general conditions of the risk and are able to translate the risk into cost by inserting it harmoniously into the game of profits and losses, with the instrument of insurance or self-assessment': one may see in this regard P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2017), 415.

Art 82.1 GDPR expressly allows that

> 'Any person who has suffered *material or non-material damage* as a result of *an infringement* of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered'.[54]

The expression used in the Italian translation of the GDPR – 'material or immaterial damage' – is certainly not well-chosen: it would have been more correct, legally, to invoke 'pecuniary or non-pecuniary damage'.

Despite lexical inaccuracy aside, the statement of material or immaterial damage is certainly comparable with the previous regulation before harmonisation set forth by Art 15.2 of the Privacy Code – and even earlier by Art 29.9 of Law no. 675 of 1996, the first Italian law on protection of personal data – which expressly allowed compensation for *pecuniary damage* as well as for *non-pecuniary damage*.

This provision is particularly significant because it still enables compensation for personal injury even when the pecuniary damage is marginal or absent: as a rule, in fact, what is significant in the unlawful processing of data is the *damage of non-pecuniary nature* consequent to a violation of fundamental rights to confidentiality, protection of personal data and personal identity.

Assessment of offensiveness that has already been assessed *ex ante* – in a general and abstract manner – by the EU legislator: the provision in Art 82.3 GDPR satisfies, indeed, even the most restrictive readings going back to Art 2059 of Civil Code and overcomes, for the good, the problem of quantum solved by the legislator pro-actively.

The non-pecuniary damage is an injury which arises exclusively in cases of offences, either expressly foreseen by law, in accordance with the principle of specificity of the subjective moral damage with a sanctioning function or, more generally, in the case of infringement of constitutionally qualified personal rights or interests, including those of economic nature.

As already noted, breach of the rules of conduct governing processing as per Art 82 GDPR entails in itself a compensable injury: however, such a reading – an acceptable one – of the *unlawful conduct* and of the *damage in re ipsa* does not, at the moment, seem to enjoy the approval of current case law, where the contrary interpretation in favour of the *damage as consequence*, in application of the general rule of Art 2043 of Civil Code, prevails.[55]

[54] For a recent study of the special civil liability delineated by the GDPR and, particularly, regarding the emergence of non-pecuniary damage under moral damage in the area of compensable harm from unlawful processing of personal data for the safeguarding of the individual's fundamental rights to privacy and protection of personal data: E. Tosi, 'Responsabilità civile' n 1 above, 199. One may also see, in the jurisprudence on the new civil liability for the processing of personal data: M.L. Gambini, *Principio di responsabilità* n 9 above, passim; M. Ratti, 'La responsabilità da illecito trattamento dei dati personali' n 31 above, 615.

[55] One may see *ex multis* Corte di Cassazione 4 August 2011 no 17014; Corte di Cassazione 15 July 2014 no 16133; Corte di Cassazione 8 February 2017 no 3311. Most recently, Corte di

In its ruling no 207 of 8 January 2019, the Supreme Court restated the impossibility of recognising non-pecuniary injury *in re ipsa*, even in a case of infringement of inviolable rights such as that to the safeguarding of personal data, confirming, moreover, that not even the violation of the fundamental right to data protection escaped the ascertainment of the 'gravity of the violation' and the 'seriousness of the injury' as a non-pecuniary loss, of a personal nature, actually sustained by the data subject.[56]

This questionable orientation underestimates the special character of the liability regime in question and does not note the differences, for the purposes of the burden of proof, between the question of existence of an injury arising from unlawful processing – which is *in re ipsa* in the breach of the data processing rule, more precisely in the *unlawful conduct* – and the quantum of the damage, which is indeed the object of proof, although proof is facilitated by presumptions and fair and just award.

Moreover, for the protection of this fundamental right the aforesaid ruling of the Court of Cassation deems it necessary to apply the *balancing* of compensation for damage *with the principle of solidarity* pursuant to Art 2 of the Constitution, which the *principle of minimal tolerance* of violation is intrinsic to.

The extension of this criterion (elaborated within the realm of civil liability, in general, in order to check frivolous litigations), to the special provision in question,

Cassazione 8 January 2019 no 207 has reaffirmed, along the traditional path, unacceptable for the reasons set forth in the present study, the dominant orientation: 'In the event of unlawful processing of personal data for unlawful reporting to the central credit register, the damage, whether pecuniary or non-pecuniary, cannot be considered *in re ipsa* for the fact itself of the performance of the dangerous activity. Even within the context of application of Art 2050 Civil Code, the damage and particularly the 'loss', must always be alleged and proved by the party concerned' (Corte di Cassazione 25 January 2017 no 1931), and also 'In the event of unlawful processing of personal data, in the present case for unlawful reporting to the central credit register (...) the non-pecuniary damage can never be *in re ipsa*, but must be alleged and proved by the plaintiff, on pain of a denaturing of the functions of Aquilian liability. The plaintiff's position is, however, facilitated by the burden of proof more favourable, as described in Art 2050 Civil Code, than under the general rule of Aquilian damage, as well as by the possibility of demonstrating the damage even via simple presumptions alone and by fair and just compensation' (Corte di Cassazione 5 March 2015 no 4443). For the fundamental rights of the person, in fact, the balancing with the principle of solidarity pursuant to Art 2 of the Constitution, of which the principle of minimal tolerance of damage is an intrinsic precipitate. *Contra,* see: Corte di Cassazione 30 July 2014 no 17288; Corte di Cassazione 24 May 2010 no 12626, available at www.cortedicassazione.it.

[56] 'The 'gravity of the violation' concerns the determinative moment of the harmful event, as a prejudicial impact on the right selected – whether by the legislator or the interpreter – as deserving of Aquilian protection and its import is bound to reflect on the injustice of the damage, which cannot be predicated as such when minimum offensiveness of the damage itself obtains. The 'seriousness of the injury', on the other hand, concerns the level of the consequences of the violation, ie the area of the obligation of redress, which centres on the reality of the loss suffered (the so-called injury-consequence): the 'non-serious' prejudice excludes the existence of a loss of usefulness deriving from a violation, even when the latter has surpassed the threshold of offensiveness'.

seems rather to be the result of an 'unjustifiable hermeneutic mistake'.[57]

For this reason, also in light of the evident *sanctioning-deterrent function* of the liability for unlawful processing of personal data emerging from the GDPR,[58] the orientation in favour of the theory of the *damages's effect* is deemed preferable, albeit absent from the most recent case law, according to which the damage *ex se* of protected property occurs *ipso iure* as a result of the *unlawful conduct* – in the matter at hand the fundamental right to privacy and the fundamental right to protection of personal data – without the need to give further proof of the *injustice of the damage* in order to obtain compensation.[59]

As has been noted, the current case law of the twin rulings of the United Sections of San Martino 2008,[60] which elaborated the aforementioned *double filter* – of the *grave offence* and of the *serious damage* –, is of a different opinion which, it is reiterated, is not acceptable in such context of application, in this writer's opinion, it being a question, indeed, of fully protecting against the infringement of fundamental personal rights and not, on the contrary, of limiting, by recourse to artificial conceptual expedients, the compensation for the non-pecuniary damage.

As concerns the burden of proof, the united sections of the Court of Cassation have, however, admitted – to counterbalance and facilitate the difficult proof of non-pecuniary damage and of its calculability – testimony and documentary and prima facie evidence.

The inherent contradiction in terms contained in the joint rulings of San Martino 2008 is evident, for they incorrectly allow that the infringement of a fundamental personal right may be qualified as *trivial* in the absence of the aforementioned double filter of admissibility.[61]

[57] Thus, textually, A. Thiene, 'Segretezza',n 25 above, 443.

[58] A. Di Majo 'La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente' *Europa e Diritto Privato*, II, 289 (2006).

[59] See, in this regard, *ex multis*: Tribunale di Napoli 29 November 2013 available at www.giustiziacivile.com; Tribunale di Milano 23 September 2009, *Corriere del merito*, 19 (2010); Corte d'Appello di Milano 19 June 2007, *Corriere giuridico*, 1319 (2001); to which may be added Corte di Cassazione 1 December 1999 no 13358, *Danno e responsabilità*, 322 (2000); Corte di Cassazione 19 May 1999 no 4852, *Il Foro Italiano*, I, 2874 (1999); Corte di Cassazione 18 April 2007 9233, *Danno e responsabilità*, 151 (2008).

[60] Corte di Cassazione-Sezioni unite 11 November 2008 no 26972. With this decision – along with three other associated rulings (Corte di Cassazione-Sezioni unite 11 November 2008 nos 26973; 26974; 26975), all handed down at the same time and better known as *joint rulings of San Martino 2008* – the united sections of Cassation not only settled the previous disagreements on the compensation of the so-called existential injury, but also, more generally, thoroughly reviewed the prerequisites and the content of the notion of '*non-pecuniary damage*' pursuant to Art 2059 Civil Code The decision first of all reaffirmed that non-pecuniary damage could be compensated only in the cases provided by law: on the one hand, in cases where compensation was expressly prescribed, for example should the unlawful act comprise the elements of an offence; on the other hand, in cases where compensation for the damage in question, although not expressly prescribed by an ad hoc law, must be admitted on the basis of a constitutionally oriented interpretation of Art 2059 Civil Code, because the unlawful act had seriously infringed a right directly protected by the Constitution.

[61] On the problem of the difficult calculability of non-pecuniary damage, see V. Di Gregorio,

Indeed, this assessment will never affect the quantum, since the infringement of a fundamental right protected by the Constitution cannot be considered either insignificant or futile, but solely on the level of the award a quantification may be admitted through monetisation of the discomfort of the person consequent to the fundamental right's violation.[62]

The heart of the problem is, therefore, to ensure the criterion of pain and suffering, the *just* non-pecuniary compensation – that is, non-income related – consequent to the actual existence and gravity of the non-pecuniary prejudice, biological damage and non-pecuniary damage, in accordance with the principle of *full compensation for the damage*.[63]

Attentive jurisprudential study has criticised this approach articulated between pecuniary damage under Art 2043 of Civil Code and non-pecuniary under Art 2059 of Civil Code, noting, correctly, the appropriateness of valorising a different bipolar reading which, in order to ensure respect of the hierarchy of sources and values, will consider Art 2043 of Civil Code as a

> 'central rule (concerning any damage, pecuniary or not, provided it be unjust), and to limit the function of Art 2059 of Civil Code to that of sanctioning and its scope of application only to cases of subjective moral injury'.[64]

The case law provision of the aforementioned *double filter* to admit compensation for non-pecuniary damage deriving from infringement of constitutionally protected fundamental rights seems, therefore, irrational and

La calcolabilità del danno non patrimoniale. Criteri di valutazione e discrezionalità del giudice (Torino: Giappichelli, 2018), 95: '(...) the vagueness of the boundary between prima facie evidence and damage *in re ipsa* in the field of non-pecuniary damage from damage to reputation does not allow a clear demarcation between the two regimes of production of evidence, considering that, as for other types of damage, the signs to ascertain existence of damage on the basis of presumptions also represent the parameters of the *quantum*'.

[62] See in this regard F. Quarta, *Risarcimento e sanzione nell'illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 127, according to whom the argument of the modest magnitude of the damage 'is lacking in persuasiveness already starting from the consideration of the – supreme – rank of the interests involved, but it is even less persuasive if one notes that such a criterion of discernment is, indeed, inoperative for damages of pecuniary nature, always reputed significant, without quantitative limits'. Conte voices similar perplexities in F. Quarta 'Il difficile equilibrio tra l'essere e l'avere: considerazioni critiche sulla nuova configurazione del danno non patrimoniale' *Giurisprudenza italiana*, 1030 (2009).

[63] On this point see in the jurisprudence P. Perlingieri, 'L'onnipresente art. 2059 c.c. e la "tipicità" del danno alla persona' *Rassegna di diritto civile*, 520 (2009), according to whom 'the category of the person does not lend itself to disaggregations and splittings, to relative and distinct categories of injuries having only a descriptive and nominalistic value', the importance here lying only in the guarantee of full compensation for the damage sustained. In the same sense in case law: Corte di Cassazione 24 March 2011 no 6750; Corte di Cassazione 13 January 2016 no 336 (available at www.cortedicassazione.it), which confirmed the inadmissibility of the autonomous category of existential damage; Corte di Cassazione 13 May 2011 no 10527, *Il Foro italiano*, I, 10, 2708 (2011).

[64] On the sanctioning function of Art 2059 Civil Code see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 85.

must be rejected.

In summary, this critical conclusion is grounded, on the one hand, in the unjust nature of the regulatory asymmetry prescribed for pecuniary damage, which is not subject to the check for admissibility through the *double filter*, and non-pecuniary; on the other hand, in the unjust nature of the compression of the safeguarding reserved for the fundamental personal rights of constitutional level, with the reversal of the hierarchy of sources as a result of which the Constitutional rule would be in a position subordinate to Art 2043 of Civil Code.

The application of the aforesaid special liability, similarly to what occurs for cases of offences, as has already been noted, allows compensation for the damage, pecuniary or non-pecuniary, suffered by the data subject with the mere ascertainment of the *unlawfulness of the conduct* in breach of the GDPR, there being no need to prove the additional common requisite of *injustice of the damage*.[65]

The regulation of compensation for non-pecuniary damage is, traditionally, placed under the strict provision of Art 2059 of Civil Code. While Art 2043 of Civil Code. submits compensation for pecuniary damage to the principle of atypicality of the Aquilian offence, in the sense that harm to whatsoever interest protected by law may generate the obligation to pay compensation for pecuniary damage, Art 2059 of Civil Code., conversely, states the opposite rule according to which compensation for non-pecuniary damage is admitted only in the typical cases foreseen by the law, as precisely in the case at hand given the express provision of Art 82.1 GDPR.

Furthermore, it has recently been affirmed by an attentive doctrinal study that Art 2043 of Civil Code can be the venue of remedy in compensatory function – for both pecuniary and non-pecuniary damage: the compensation with a sanctioning function for *subjective moral damage* within the scope of Art 2059 of Civil Code might enable the obtaining – with account taken of the gravity of the conduct and of the damage – of an *ultra-compensatory* award, more precisely, one in addition to the full compensation.[66]

[65] Thus E. Tosi, 'Responsabilità civile per illecito trattamento dei dati personali' n 1 above, 247. See, in the same regard: V. Roppo, 'La responsabilità civile per trattamento di dati personali' *Danno e resposanibilità*, 663 (1997); E. Lucchini Guastalla, 'Trattamento dei dati personali e danno alla riservatezza' *Responsabilità civile e previdenza*, 632 (2003).

[66] On the point of the rediscovery of the original *ultra-compensatory* sanctioning function of Art 2059 Civil Code, see in particular F. Quarta, 'Una proposta di rilettura dell'art. 2059 c.c. quale fonte di sanzione civile ultracompensativa', in S. Di Raimo et al eds, *Percorsi di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2012), 301; F. Quarta, *Risarcimento* n 13 above, 146; to which may be added F. Quarta, 'Ingiustizia del danno e analitica della responsabilità civile' *Rivista di diritto civile*, 29 (2004); E. Navarretta, 'Bilanciamento di interessi costituzionali e regole civilistiche' *Rivista critica di diritto privato*, 625 (1998). Conclusions further confirmed, as has already been noted in the course of the present study, by the recent decision of the Corte di Cassazione-Sezioni unite 5 July 2017 no 16601 made in regard to the recognisability of foreign rulings for punitive damages, which in opting for a more modern multi-purpose reading repudiated a mono-functional reading of civil liability.

According to this evocative reinterpretation of the compensable damage – grounded in a new functional bipolarity, on the one hand compensatory and, on the other, sanctioning – nothing would seem to preclude a use of civil liability, source of obligation, for the sanctioning of a certain type of conduct, with the award of ultra-compensatory damages, provided – let it be reiterated – that the offence be distinctive and that such remedy be expressly provided by law.

Even when remaining in the compensatory field it appears, therefore, possible to attempt a rereading of the overall phenomenon which, although governed by the general *principle of solidarity*, rediscovers the original *ultra-compensatory sanctioning function*, which is compatible with it, to remedy the *subjective moral damage* foreseen by Art 2059 of Civil Code. – with account taken of the objective and subjective gravity of the injuring party's conduct – without prejudice to the *compensatory* function of full reparation of the damage – pecuniary and non-pecuniary – under Art 2043 of Civil Code.[67]

VII. Strengthened Person Fundamental Rights Protection Integrated Approach: Law Remedies and Sanctions Converging of European Consumers and Data Subject Regulations

The digital surveillance society's pervasive 'attacks' on the effective protection of the fundamental rights to privacy, protection of personal data and personal identity thus necessitate a new, more modern and less traditional repeated approach, inclined to valorise the particular *preventive, deterrent and sanctioning* function embedded in the rules of compensation for damage arising from the unlawful processing of personal data pursuant to Art 82 of the GDPR, as well as from the regulation in its overall structure.[68]

The fragility of the safeguards of fundamental personal rights in the digital context must be counterbalanced by a legal instrument that will be adequately protective and sanctioning.

The progressive *capitalisation of the right to exclusive use and control of personal data* and the *asymmetry of the data processing relationship* accentuate this regulatory need: in recent EU legislation a steady, emblematic convergence of the regulations on consumer protection and on the protection of personal data has been registered.[69]

[67] On the atypical nature of the non-pecuniary damage G. Perlingieri, 'Sul giurista che "come il vento non sa leggere"' *Rassegna di diritto civile*, 400 (2010), according to whom it is not correct 'to consider the damage to the person typical and that to property atypical because the hierarchy of legal values would thus be disrupted'.

[68] D. Messinetti, 'I nuovi danni' n 13 above, 549.

[69] V. Ricciuto, 'I dati personali come oggetto di operazione economica. La lettura del fenomeno nella prospettiva del contratto e del mercato', in N. Zorzi Galgano ed, *Persona e mercato dei dati* n 3 above, 95; V. Ricciuto, 'La patrimonializzazione dei dati personali. Contratto e mercato nella riscostruzione del fenomeno' *Diritto dell'informazione e dell'informatica*, 689 (2018); to which

Digital content and digital services are, in fact, often provided online in the context of contracts that do not prescribe the consumer's payment of a price but rather his communication of personal data to the operator.[70]

The sanctioning perspective also emerges in the framework delineated by the recent directive (EU) 2019/2161 which amends directive 93/13/EEC and directives 98/6/EC, 2005/29/EC and (EU) 2011/83 for better application and modernisation of EU rules on consumer protection by introducing a pecuniary sanction system similar to that prescribed by Art 83 GDPR.[71]

This functional, protective and sanctioning approach in the digital context cannot, however, disregard adequate valorisation of and compensation for non-pecuniary damage, in particular moral injury, which must be facilitated and not, on the contrary – as has been critically remarked above – artificially filtered by case law.

The special nature and multifunctionality[72] of civil liability for unlawful processing of personal data introduced by Art 82 GDPR (compared with the ordinary regime as per Art 2043 of Civil Code.) having been acknowledged, it is a matter, in conclusion – with general admission of the *reintegrative-compensatory function*[73] – of enhancing, in the light of the observations made in the course of

may be added, most recently, P.F. Giuggioli, 'Tutela della privacy e consumatore', in E. Tosi ed, *Privacy digitale* n 1 above, 263.

[70] To be noted on this point are the recent directives (EU) 2019/770 on certain aspects of contracts for the supply of digital content and digital services and directive 2019/2161/UE which amends directives 93/13/EEC (unfair terms in consumer contracts), 98/6 (indication of prices on consumer products), 2005/29 (unfair business-to-consumer commercial practices in the internal market) and 2011/83 (consumer protection in distance contracts) for a better application and a modernisation of EU rules on consumer protection. By way of example, after the amendment made by directive (EU) 2161/2019, directive (EU) 83/2011 will apply not only, as is currently the case, to service contracts, including digital service contracts which require the consumer to pay or undertake to pay a price, but also to contracts for the supply of content online irrespective of whether the consumer pays a price or provides personal data as consideration.

[71] Directive (EU) 2019/2161 introduces, among other sanctioning provisions, the new Art 24 of directive (EU) 83/2011, which establishes as follows: 'Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive (…) 3. Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least four per cent of the trader's annual turnover in the Member State or Member States concerned. For cases where a fine is to be imposed in accordance with paragraph 3, but information on the trader's annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be at least two million'.

[72] For a teleological-functional reading of the civil liability system, in general, see the jurisprudence: S. Rodotà, *Il problema della responsabilità civile* n 4 above, 89; P. Perlingieri, 'La responsabilità civile tra indennizzo e risarcimento' n 4 above, 1066.

[73] One may see in this regard: E. Navarretta, 'Commento *sub* Art 29, Tutela della "privacy" ' in C.M. Bianca and F.D. Busnelli eds, *Tutela della* "privacy" n 9 above, 693; M. Franzoni, 'Dati personali e responsabilità civile' *Responsabilità civile e previdenza*, 908 (1998); F. Di Ciommo, 'Il danno non patrimoniale' n 34 above, 274; G. Comandè, 'Commento sub Art 15', in C.M. Bianca and F.D. Busnelli eds, *La protezione dei dati personali* n 3 above, 362; G. Resta and A.

this study, the additional *preventive-dissuasive-sanctioning function* with respect to other conduct prejudicial to the rights of the injured party or of other potential sufferers of such effects harmful to their person.

Indeed Art 82 GDPR, as formulated, while embedding a marked deterrent and sanctioning function with respect to the compensation of *subjective moral damage* deriving from unlawful processing of personal data, does not introduce a category of *punitive damages*, a task left to the national legislators and thus remaining in the sphere of civil liability.[74]

In favour of an interpretation strongly characterised by the preventive-deterrent-sanctioning function of the GDPR as a whole are the robust administrative pecuniary sanctioning framework of Art 83[75] – on the basis of which the sanctions must be *effective, proportionate and dissuasive* – as well as the penetrating powers (investigative, corrective-sanctioning, authorising and consultative) bestowed on the supervisory authorities by articles 57 and 58 of the GDPR.[76]

With particular reference to the compensatory remedy, which in this broader context must be correctly framed, the following functional aspects of the GDPR are significant:

– the centrality assumed, in the exemplification of the offence and in the judgment on liability, of the principles of fairness, lawfulness and transparency as related to multiple articulated behavioural duties which the subjective figures of the processing must necessarily fulfil;

– the strengthening and broadening of the typical substance of the duty of qualified diligence and protection required of the data controller and the data processor;

– the innovative principle of accountability whereby, in valorising qualified diligent conduct in a preventive and even precautionary perspective as regards

Salerno, *La responsabilità civile* n 3 above, 658; A. Di Majo, 'Il trattamento dei dati personali tra diritto sostanziale e modelli di tutela', in V. Cuffaro et al eds, *Trattamento dei dati e tutela della persona* (Milano: Giuffrè, 1999), 238; P. Ziviz, 'Trattamento dei dati personali e responsabilità civile: il regime previsto dalla l. 675/1996' *Responsabilità civile e previdenza*, 1307 (1997).

[74] In private law as well the principle borrowed from criminal law *nulla poena sine lege* applies; thus G. Bonilini, 'Pena privata e danno non patrimoniale', in F.D. Busnelli and G. Scalfi eds, *Le pene private* (Milano: Giuffrè, 1985), 311. In this sense see also M.L. Gambini, *Principio di responsabilità* n 9 above, 134-135.

[75] Violation of the provisions of Art 83 GDPR is subject to administrative fines of up to €10,000,000 or, for companies, of up to two per cent of the previous year's total worldwide revenue if greater than said amount (article 83.4); the most serious violations are subject to administrative fines of up to €20,000,000 or, for companies, of up to four per cent of the previous year's total worldwide revenue if greater than said amount (Art 83.5 and 83.6). Each supervisory authority ensures that the administrative fines imposed pursuant to Art 83, para 4, 5 and 6 will be *effective, proportionate and dissuasive* in each individual case. When deciding, in each individual case, whether to impose a fine and to fix the amount thereof, the Supervisory Authority will take due account of the evaluation parameters of infringements set by Art 83.2 GDPR.

[76] On the penetrating and heterogeneous powers of the independent supervisory authorities for the protection of personal data see G. Busia, 'Il ruolo dell'autorità indipendente per la protezione dei dati personali', in N. Zorzi Galgano ed, *Persona e mercato dei dati* n 3 above, 306.

management of the risks associated with the processing of personal data, the special rule of typical liability delineated in Art 82 GDPR is also reflected, emphasising new functions;

– the heavy burden of exonerating proof borne by the injuring party: proof of absence of imputability, *in any manner*, of the harmful event;

– full compensability of pecuniary damage and non-pecuniary damage, in the latter case also ultra-compensatory remedy.

Nothing prevents *de iure condendo* the legislators of individual member states – in accordance with Art 84.1 GDPR – from assessing the appropriateness of further strengthening the protection rules by prescribing real punitive damages, not existing to date, which must be *effective, proportionate and dissuasive*.

Further forcing the construction, such general canons set down with reference to the *administrative fines* under the same Chapter VIII of the regulation in question, together with means of recourse and liability, as per Art 83.1 GDPR, could easily be applied also to the compensatory remedy.

Compensation for unlawful processing of personal data, as well as being *full* in relation to the injury suffered, could be quantified by the judicial authority, through analogy – at least, it is reiterated, as regards subjective moral damage alone –, in order to satisfy the requirements of *effectiveness* and *proportionality* to the gravity of the harmful conduct and of *dissuasiveness against future engagement in illegal conduct*: more precisely, in an *ultra-compensatory* perspective.[77]

A*n axiological-functional reading* of this remedy, as has been observed, in the sphere of civil liability, although one may not speak, it is reiterated, of punitive damages in the strict sense, may cause a re-emergence and valorisation of the ultra-compensatory nature – proper to Art 2059 of Civil Code. since its original codification, as is stated in the *Relazione al Codice Civile*[78] – which would allow an award of *differential damages* in addition to the compensation for harm suffered:

> 'the adequacy of the reaction, no longer to the suffering endured by the injured party, but to the reprehensible nature of the injurer's conduct'.[79]

It is thus clear that Art 2043 of Civil Code can be the venue of redress in the compensatory function – both for pecuniary and non-pecuniary damage: the compensation with a sanctioning function for *subjective moral damage* within

[77] It will also be useful, in a perspective of ultra-compensatory remedy for subjective moral damage, to refer to the assessment parameters set by Art 83.2 GDPR for analysis of conduct punishable by fine.

[78] *Relazione del Ministro Guardasigilli al Codice Civile*, 803 (*G.U.* 4 April 1942 no 79-*bis*). Significant offences against the legal order – in the sense clarified by the *Relazione* in regard to Art 2059 Civil Code – are at present no longer limited to the criminal offence but comprise violations of the person's fundamental rights and constitutional interests: the higher the rank of the fundamental right violated and the more significant the injuring party's conduct, from both the objective and subjective points of view, the graver such offences will be.

[79] F. Quarta, 'Una proposta di rilettura dell'art. 2059 c.c. n 25 above, 317.

the scope of Art 2059 of Civil Code could allow the acknowledgement – with account taken of the gravity both of the conduct and of the injury – of an *ultra-compensatory* burden, more precisely an addition, with a sanctioning function, to full compensation.[80]

For the foregoing reasons it seems proper to conclude with a multi-functionality nature of liability articulated, on three levels, by the special regime outlined in Art 82 GDPR: (i) remedial-compensatory; (ii) preventive-deterrent; (iii) dissuasive-sanctioning.[81]

The enhancement of the specific sanctioning-deterrent – more precisely, *ultra-compensatory* – function of the *subjective moral damage* is also reflected in the appropriate broadening, in this axiological-functional perspective, of the meshes of justiciability of the special compensatory remedy in the specific context of unlawful processing of personal data – with respect to all compensable damages, both pecuniary and non-pecuniary – following the ascertainment of the injuring party's *unlawful conduct* alone, more precisely, of the damage *in re ipsa*.

A *function that is protective* of the *weaker subject* – the *data subject* – which comes not only through the enhancement of the *ultra-compensatory sanctioning function* of the *subjective moral damage* but also through the *facilitation of the injured party's access* to the compensatory remedy.

Indeed, the more concrete the possibility for those harmed by unlawful processing to easily accede to the compensatory remedy pursuant to Art 82 GDPR – in its triple function of *compensation, prevention and sanction* –, the better both the prevention of the risk of unlawful processing and the deterrence of operators (ie the processing's subjective roles, Controller and Processor) from such conduct will be, thus the better will they comply with the general statute laid down by the GDPR.

The compensatory remedy, with particular reference to a fundamental personal right lesion, is a controversial instrument, given the intrinsic difficulty involved in translating the values of the person offended into a pecuniary benefit: for this reason, in the specific context, the non-pecuniary damage's sanctioning function, as against the traditional compensatory function, deserves enhancement.[82]

With the 2019 San Martino rulings – eleven years on from the well-known joint rulings of the United Sections of San Martino 2008 – the Third civil section

[80] According to G. Bonilini, *Il danno non patrimoniale* n 13 above, 299, it seems possible to deduce from the writings preparatory to the enactment of the Civil Code of 1942 a propensity to punish the injuring party's conduct rather than to satisfy the injured party.

[81] In this regard see M.L. Gambini, *Principio di responsabilità* n 9 above, 136. In general: P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 115 (2011) for whom civil liability 'cannot have a single function, but a plurality of functions (preventive, compensatory, sanctioning, punitive) that may coexist with each other'.

[82] On the reasons for the scarce success in applying the compensatory instrument, considered a remedial technique of closure, one may see, more thorough, R. Pardolesi, 'Dalla riservatezza alla protezione dei dati personali: una storia di evoluzione e discontinuità', in R. Pardolesi ed, *Diritto alla riservatezza e circolazione dei dati personali* (Milano: Giuffrè, 2003), I, 27.

of Cassation, along the path traced by its own 2018 *Decalogue*, continues the work of reconciling the various orientations, largely seeking to ensure a uniform interpretation of the law, aimed at redrawing the contours of the new *personaldamage Charter*.[83]

Among these will be mentioned Corte di Cassazione 11 November 2019 no 28989 which – while reaffirming the entirety and unity of the assessment for *non-pecuniary damage* requiring rigorous proof in order to avoid unjust duplications[84] – admits the autonomous enhancement, with respect to biological harm, of that component of the *subjective moral damage* which is the expression of a violation having no organic basis and is thus extraneous to the medico-legal determination.[85]

The rebirth of the *subjective moral damage* due to the San Martino 2019 rulings argues in favour of the multifunctional reading of civil liability: a reading further confirmed by the famous decision of United Sections Supreme Court of Cassation no. 16601/2017 which, in a case regarding the recognisability of foreign rulings awarding punitive damages, repudiated a mono-functional reading of civil liability[86] in establishing the important legal principle according to which 'in

[83] The important decisions of San Martino 2019 address various problems of civil liability, some of which are limited to the specific context of healthcare, others being of general relevance: informed consent (Corte di Cassazione 11 November 2019 no 28985); the healthcare facility's recourse against the worker having engaged in serious misconduct (Corte di Cassazione 11 November 2019 no 28987); the question of differential damage (Corte di Cassazione 11 November 2019 no 28986) and remedy for non-pecuniary damage (Corte di Cassazione 11 November 2019 nos 28988 and 28989); the burden of proof borne by the patient in suits against a healthcare facility in contractual matters (Corte di Cassazione 11 November 2019 nos 28991 and 28992); the damage resulting from loss of chance (Corte di Cassazione 11 November 2019 no 28993); issues related to the non-retroactivity of the substantive rules and, to the contrary, the retroactivity of the Insurance Code's criteria for assessment of damages (Corte di Cassazione 11 November 2019 nos 28990 and 28994), available at www.cortedicassazione.it.

[84] The reference of the ruling in Corte di Cassazione 11 November 2019 no 28989 (available at www.cortedicassazione.it) raises perplexity as to the need to ascertain the *minimum damage threshold*, in the sense of demanding a rigorous demonstration 'of the gravity and seriousness of the damage, and of the suffering endured by the injured party'. As already noted critically with regard to San Martino 2008, it is important not to superimpose the burden of proving the harm suffered by the injured party upon that – altogether different – relating to the application of the additional filter intended to exclude the admissibility of *trivial injuries* from the area of protection: a filter unacceptable as concerns the safeguarding of fundamental personal rights.

[85] Again Corte di Cassazione 11 November 2019 no 28989 highlights, moreover (recalling the previous rulings of Corte di Cassazione 27 March 2018 no 7513, and Corte di Cassazione 28 September 2018 no 23469), available at www.cortedicassazione.it, the fact that as regards non-pecuniary damage from damage to health, on the other hand, duplication is not constituted by 'the joint award of damages for the biological damage and of a further sum as compensation for injuries having no medico-legal basis, because they have no organic basis and are extraneous to the medico-legal determination of the percentage degree of permanent disability, being represented by *inner suffering* (such as, for example, distress of the soul, shame, loss of self-esteem, fear, despair). It follows that, when there is deduced and proved the existence of one of these injuries not having a medico-legal basis, they must be the object of a separate assessment and award'.

[86] On the various functions of civil liability see: C. Salvi, 'Il paradosso della responsabilità civile' *Rivista critica di diritto privato*, 123 (1983); C. Salvi ed, «Danno», in *Digesto delle discipline*

the current legal system, civil liability does not have the sole task of restoring to its former state the material sphere of the person having suffered an injury, for the functions of deterrence and sanction are internal to the system'.[87]

This important principle elaborated by the United Sections of the Court of Cassation, applies *a fortiori* to the multifunctional reading with reference to special civil liability pursuant to Art 82 GPDR.

In this perspective it can be registered an enhancement of the *deterrent and sanctioning function* which is fully compatible, indeed appropriate in light of the *principle of ex ante accountability*, of the marked preventive and precautionary nature in the perspective of analysis, management and mitigation of operational and differentiated risks associated with the processing of personal data.

In order to ensure the effectiveness of the compensatory remedy provided by Art 82 GDPR there must, therefore, occur a progressive abandonment of the unjustified filters of the prevailing case law on harm to the person arising from unlawful data processing, which betray the dominant consequentialist view of the offence.[88]

This legal provision is particularly significant because it allows to remedy personal injury always, even when the pecuniary damage is marginal or absent: what is significant, above all, in the unlawful processing of personal data is the harm of the *non-pecuniary damage* resulting from violation of the fundamental rights to confidentiality, protection of personal data and personal identity.

For the foregoing reasons, it seems proper to welcome the proposed re-reading of the *ultra-compensatory damages for subjective moral damage* under Art 2059 of Civil Code – autonomous with respect to the *compensatory remedy for non-pecuniary damage* under Art 2043 of Civil Code – in order to safeguard the fundamental rights to confidentiality and protection of personal data and identity.

Finally, there is no shortage of original attempts in jurisprudence, which can

privatistiche, sezione civile (Torino: UTET, 1989), V, 66; C.M. Bianca, *Diritto Civile*, 5, *La Responsabilità* n 4 above, 5; P.G. Monateri, 'La responsabilità civile', in R. Sacco ed, *Trattato di diritto civile* n 14 above, 3; G. Alpa, 'La responsabilità civile' *Trattato di Diritto civile* (Milano: Giuffrè), IV, 131; M. Barcellona, 'Funzione e struttura della responsabilità civile: considerazioni preliminari sul "concetto" di danno aquiliano' *Rivista critica di diritto privato*, 211 (2004); P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 115 (2011); D. Messinetti, 'Danno giuridico' n 13 above, 483, for whom 'the balancing of interests is a selective operation indispensable for the activation of the compensatory function'; G. Ponzanelli, 'Pena privata' *Enciclopedia giuridica* (Roma: Treccani, 1990), XXII, 1, warns that the choice between the various functions depends 'on the extension that must be attributed to the illustration of non-pecuniary damage by Art 2059 Civil Code'; C. Scognamiglio, 'Le Sezioni Unite della Corte di Cassazione e la concezione polifunzionale della responsabilità civile' *Giustiziacivile.com*, 1, (2017).

[87] Corte di Cassazione-Sezioni unite 5 July 2017 no 16601. *Contra*, the reading of the institute of civil liability also in sanctioning terms, see the Court of Cassation's previous orientation: Corte di Cassazione 19 January 2007 no 1183, *Corriere giuridico*, 497 (2007); Corte di Cassazione 12 June 2008 no 15814; Corte di Cassazione 8 February 2012 no 1781, *Il Foro Italiano*, I, 1449 (2012); Corte di Cassazione 11 September 2012 no 15163 available at www.cortedicassazione.it.

[88] Thus A. Thiene, 'Segretezza' n 25 above, 443-444.

merely be mentioned in this study as they fall outside the purpose of this paper, to go, for a more effective protection of the rights of the person – beyond the limits of the remedies of damages restoration, *compensatory and ultra-compensatory* – including the *restitutive remedies against undue enrichment*[89] and the *management of agency without authority*,[90] in order also to obtain retrocession of wealth unduly obtained through unauthorised commercial exploitation of personal data.

The re-emergence and rebirth of *subjective moral damage* ultimately translates into a *just reinforced protection*, through the enhancement of the *deterrent-sanctioning function* of observance of the rules of *lawfulness, fairness and transparency* in the processing of personal data, *directly* protective of the injured data subject – the weaker party in the *asymmetrical relationship* of data processing – more precisely, of the human person and the dignity of the same and, *indirectly*, of the *lawfulness, fairness and transparency* of the market and of the legal system in general.[91]

It is a common purpose of legislation and jurisprudence to increase protection of the fundamental rights of the person – to privacy, personal data and dignity – against pervasive power of *digital surveillance capitalism*.

The main path to follow to rebalance an asymmetric relationship and protect the weaker party from the superpower of the Data Controller – under an economic, contractual, technological and information point of view – is, at the end, that of progressive convergence and intersection of the protective, personal and collective, remedies and sanctions regulations on *consumer protection* and *personal data subject protection* laws.

[89] See A. Thiene, 'La tutela della personalità: dal neminem laedere al suum cuique tribuere' *Rivista di diritto civile*, 387 (2014). In this regard see also the considerations of A. Nicolussi, 'Autonomia privata e diritti della persona' *Enciclopedia del diritto* (Milano: Giuffrè, 2011), 147; and P. Sirena, 'La restituzione dell'arricchimento e il risarcimento del danno' *Rivista di diritto civile*, 75 (2009), according to whom the reference to the sum of money which the holder of the right could have requested in order to grant the right of exploitation of the attributes of his personality is closely connected to the principle of restitution of unjust enrichment.

[90] For the recovery of profits gained from the usurpation of another's exclusive right, Arts 2028 et seq of the civil code, to be applied not only in the traditional case of solidarity-based management of a third party's property intended to procure a benefit for the absent owner, but also in the hypothesis of predatory management leading to the appropriation of wealth to which the owner is entitled. See in this regard: P. Sirena, *La gestione di affari altrui. Ingerenze altruistiche, ingerenze egoistiche e restituzione del profitto* (Torino: Giappichelli, 1999), 65.

[91] The enhanced safeguarding provided by the GDPR, in fact, is intended not only to protect the data subject's fundamental rights and individual freedoms but also to protect collective interests and the market in general: in this sense, the provision of Art 80 GDPR enabling the data subject to mandate associations active in the field of personal data protection to lodge complaints and exercise the rights referred to in Arts 77, 78 and 79 on his behalf, and, where provided for by Member State law, to bring action for damages pursuant to Art 82. Furthermore, wrongful exploitation of data subjects-consumers-users' personal data may also entitle them to bring Class Actions pursuant to Art 140-*bis* Consumer Code. for the purposes of ascertaining liability for damages suffered by consumers, in order to protect homogeneous individual rights as well as collective interests.

Corporate and Financial Markets Law

Long-Lasting Companies and the Withdrawal Right in Italy

Paolo Butturini*

Abstract

In Italian corporations and limited liability companies, the withdrawal right is provided by law when the entity has perpetual duration. Sometimes, case law and scholars hold that this right should exist also when the duration is very long, as happens in partnerships. However, in light of applicable rules and the general principles underlying them, this opinion is not valid. This article analyzes the evolution of the debate and finds a persuasive solution to the issue also in light of a comparative view.

I. Introduction

1. The Withdrawal Right in Italian Company Law

To understand the specific issue with which this article is dealing, it is necessary to provide some introductory notes about the withdrawal right in Italian company law. First, I will briefly analyze the connection between it and the rules about transfer of interest, as the withdrawal right becomes particularly crucial in cases where selling interests is difficult. Secondly, I will describe how the withdrawal right works, its effects, and its importance in company law. This brief analysis will provide context for the specific issue examined in the article.

Under the Italian Civil Code, both the shares of a corporation (the Italian *società per azioni*, or s.p.a.) and the interests of a limited liability company (hereinafter LLC; the Italian *società a responsabilità limitata*, or s.r.l.) are usually freely transferable. Excluding transferability is normally forbidden for corporations, as shares are naturally transferable; there is only a limited exception, which is the possibility of providing a temporary ban of five years in the articles of incorporation (see Art 2355-*bis*, para 1, of the Civil Code). Excluding transferability is permitted for LLCs, but with the counterbalance of a specific withdrawal right (Art 2469, para 2, Civil Code). Conversely, the general rule in the partnership

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regime allows selling of interests only with the unanimous consent of all partners. Changing a partner is considered a case of modification of the partnership agreement, which requires unanimous consent unless otherwise provided in the partnership agreement itself (Art 2252 of the Civil Code).[1] Despite the difference in interest transfer regulations between corporations and LLCs on the one hand, and partnerships on the other, the withdrawal right is important in both cases. For partnerships it is often the only way partners have to leave the venture. It is also important for LLCs and often corporations, given that the ability to sell interests provided by law does not mean it is actually possible to do so, as finding a purchaser for shares or interests in an LLC may in practice be very difficult.[2]

Against this background, we must briefly describe how the withdrawal right works and its main implications. It should be noted that the company law reform enacted in Italy in 2003 did profoundly alter these withdrawal regulations. First, it substantially broadened the number of cases in which this right is provided by law, usually to members that do not approve specific resolutions amending a company's articles. Second, it modified the criteria for liquidation of interests, which now refer to their fair value rather than their book value. Further, the procedure for liquidation is now precisely regulated. It involves various steps including the offering of an interest to other shareholders or third parties; the duty of the company to buy it and – even if at least theoretically a last-resort option – winding up of the company in case it cannot afford the reimbursement of fair value.[3] In short, exercising of the withdrawal right is nowadays more achievable, as its scope of application has been broadened and the rules of liquidation have been changed to now favor the dissenting member.

Although the reduction in legal capital and the possible winding up of the company are the last alternatives provided by law as possible outcomes of the exercising of the withdrawal right,[4] they are actually the most likely to be used.[5]

[1] This is a commonly accepted principle: see, for instance, G.F. Campobasso, *Diritto commerciale. 2. Diritto delle società* (Torino: UTET Giuridica, 10th ed, 2020), 100. The relevant difference between partnerships and corporations from this perspective is underscored – with regard to the peculiar issue of the withdrawal right – by L. Salvatore and E. Simoncelli, 'Termine di durata delle società di capitali eccedente la normale aspettativa di vita dei soci e possibilità di applicazione analogica dell'art. 2285 c.c.' *Rivista del notariato*, III, 1229, 1232 (2007).

[2] With regard to corporations, see C. Angelici, *La riforma delle società di capitali* (Padova: CEDAM, 2003), 9; C. Angelici and M. Libertini, 'Un dialogo su voto plurimo e diritto di recesso' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 1, 2-3 (2015). With regard to limited liability companies (LLCs), see P. Revigliono, *Il recesso nella società a responsabilità limitata* (Milano: Giuffrè, 2008), 11; L. Enriques et al, 'Il recesso del socio di s.r.l.: una mina vagante nella riforma' *Giurisprudenza commerciale*, I, 745, 748 (2004).

[3] M. Ventoruzzo, 'Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law' 4 *European Company and Financial Law Review*, 47, 61 (2007).

[4] ibid.

[5] Winding up will often be difficult to avoid after the withdrawal right has been exercised: L. Enriques et al, n 2 above, 748.

This is because the intermediate option of finding a purchaser for the interest has likely been already unsuccessfully explored by the shareholder before exercising their withdrawal right.[6] The connection between the exercise of this right and a company winding up is therefore clear and relevant, as it could emerge whenever a company has insufficient net worth to acquire an exiting shareholder's or member's interest.

Because of its possible consequences, the withdrawal right has been effectively defined as a 'time bomb',[7] which perfectly describes it in many situations. Its impact may depend on many circumstances that are difficult to foresee: for instance, the company's net worth, the share percentage of the exiting member, and the actual possibility of finding a purchaser. In light of the abovementioned potential consequences, it is not only shareholders and members, but also creditors and third parties related to the company that will have a keen interest in knowing if and when the withdrawal right can be exercised.

2. The Withdrawal Right in Long-Duration Companies

The existence of the withdrawal right when a company has a very long-term duration is a relatively new issue in Italian law concerning corporations and LLCs.

Under Art 2285, para 1, of the Civil Code, which is currently in force, such a right is provided to members where the partnership has perpetual duration and where the partnership ends when one member dies. The equivalence of these two cases, which are actually very different, has led to recognition of the existence of the withdrawal right when a very long-term duration is established – and in particular when members cannot expect to be alive at the end of the partnership, given the length of the term.[8] The focus then becomes defining whether it is the average estimated life expectancy[9] or the specific estimated life of members[10]

[6] A. Paciello, 'Il diritto di recesso nella s.p.a.: primi rilievi' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 417, 436–437 (2004).

[7] L. Enriques et al, n 2 above, 745.

[8] See Corte d'Appello di Bologna 5 April 1997, *Società*, 1032 (1997); Corte d'Appello di Napoli 17 January 1997, *Il nuovo diritto*, 197 (1997); Tribunale di Milano 13 November 1989, *Giurisprudenza commerciale*, II, 524 (1992); Tribunale di Milano 30 October 1986, *Società*, 396 (1987). Among scholars, see P. Piscitello, 'Recesso del socio' *Rivista di diritto societario*, 42, 43 (2008); G. Cottino et al, 'Le società di persone', in G. Cottino ed, *Trattato di diritto commerciale* (Padova: Cedam, 2004), III, 265; O. Cagnasso, 'La società semplice', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 1998), 241; P. Marano, 'Il requisito della durata nelle società di persone' *Giurisprudenza commerciale*, II, 526, 527 (1992).

[9] See Corte d'Appello di Napoli 17 January 1997 n 8 above, 199; P. Piscitello, n 8 above, 43, in particular excluding the existence of the withdrawal right in the case of an older member in a partnership having a duration that does not exceed the average estimated life expectancy.

[10] See Corte d'Appello di Bologna 5 April 1997 n 8 above, 1033; Tribunale di Milano 13 November 1989, n 8 above, 525; G. Cottino et al, n 8 above, 265, holding that the withdrawal right exists where the duration exceeds the estimated life expectancy of one member; P. Revigliono, n 2 above, 215, specifying that only a member whose estimated life expectancy is lower than the duration will be entitled to withdraw; F. Angiolini, 'Il recesso *ad nutum* tra società

that should be considered relevant.

Since the 2003 company law reform, corporations and LLCs are allowed perpetual duration, and withdrawal regulations have changed substantially, as seen above. In particular, when a corporation or company has an indefinite existence, Arts 2437, para 3, and 2473, para 2, of the Civil Code now provide shareholders and members with the right to withdraw, and to obtain a fair value for their shares or interests. However, unlike Art 2285, para 1, Arts 2437, para 3, and 2473, para 2, of the Civil Code do not establish any rules covering situations where the duration coincides with a member's life.

Two questions arise from this difference between the partnership and company rules.

The first is whether shareholders or LLC members are entitled to withdraw if the company will last until the death of one of its shareholders or members. As this seems to occur infrequently, this question is interesting but perhaps not particularly relevant. Indeed, the response to this question is generally negative.[11]

The second question is whether such a right exists when a corporation or LLC does have a finite duration, but a very long one, exceeding shareholders' or members' estimated life expectancy. This is not an uncommon case, according to some statistics.[12] This issue, as will be shown below, is extremely relevant.

This paper aims to analyze this issue, starting with the evolution of the debate in Italy, and offering a persuasive solution, also on the basis of a comparative view.

Aside from the relatively low number of long-lasting companies in use, there are other reasons to deem this issue important. Given the crucial impact of the exercise of the withdrawal right on a company's life,[13] there is a clear need for legal certainty about the scope of the application of such a right – not only for domestic investors and stakeholders, but also for foreign ones. This is indeed

di persone e società di capitali' *Notariato*, 288 (2009).

[11] See Tribunale di Chieti 17 February 2011 no 109, *Vita notarile*, 1622, 1629 (2011); Tribunale di Forlì 16 May 2007, in E. Loffredo and G. Racugno eds, 'Rassegna di giurisprudenza. Società a responsabilità limitata' *Giurisprudenza commerciale*, II, 241, 256 (2008); G. Zanarone, 'Della società a responsabilità limitata', in F.D. Busnelli ed, *Il Codice Civile. Commentario* (Milano: Giuffrè, 2010), 799; L. Salvatore and E. Simoncelli, n 1 above, 1231; L. Delli Priscoli, *L'uscita volontaria del socio dalle società di capitali* (Milano: Giuffrè, 2005), 149.

Conversely, some scholars uphold the existence of the withdrawal right in this case: P. Revigliono, n 2 above, 215; M. Ventoruzzo, 'Sindacati di voto «a tempo indeterminato» e diritto di recesso dei paciscenti nelle società a responsabilità limitata' *Giurisprudenza commerciale*, I, 573, 597 fn 81 (2006).

[12] In a survey of four hundred LLCs, the duration of twenty-two of them was until two thousand one hundred (G. Figà Talamanca, *Studi empirici sulle società di capitali* (Padova: Piccin, 2010), 160); given that Italy has around one million seven hundred thousand LLCs (see M. Stella Richter jr, 'In tema di recesso dalla società a responsabilità limitata' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 273, 276 (2020)), a long duration could be expected in approximately eighty five thousand LLCs.

[13] An effective description of these outcomes is provided in Tribunale di Milano 28 June 2019 no 6360, 7, available at www.giurisprudenzadelleimprese.it, where they are defined as 'always significant, often dangerous, sometimes explosive'.

crucial not only to shareholders and members, but also to creditors and third parties in general, who should be aware in advance when this right can be exercised.

There are further implications regarding the choice of the period of duration for a company that can be explored from the perspectives of both members and their legal experts. Shareholders or members will presumably consider the choice of giving the company a long term a meaningful one; for example, as a way to show creditors (and third parties in general) their willingness to carry on the business through the company for a long time. A short duration might be considered a sign of members' lack of confidence in their company's future development. This will of course depend on the kind of business to be undertaken by the company. In some rapidly evolving fields, nobody could reasonably expect a long-term perspective and particular attention to be paid to a company with long period of duration. Other circumstances will also affect members' decisions in regard to the company's term. In situations where selling shares or interests might be difficult, a very long company duration will presumably be accepted by members only if they do not plan to sell in the future. This will depend on the amount of their investment relative to their net worth.

Legal advice will be helpful if based on prospective investors' answers to questions about their goals,[14] trying to predict the possible consequences of their choices, and managing risks arising from these. The main consequence of a member or shareholder exercising their withdrawal right stems from the duty of the company to pay them the fair value of their shares or interests if other members (or investors) are not interested in purchasing them.[15] The existence of withdrawal options is consequently one of the key points consultants will carefully clarify for members. Doubt regarding such options – for example, if they could arise when the company duration is very long – should be highlighted to members as a possible source of future conflict, in order to enable them to decide whether the risk is worth it. Among the important transactional skills a business lawyer should develop is the ability to minimize risks arising from a contract,[16] and the

[14] Some examples can be found in P. Butturini and S. DeJarnatt, 'Taking on the Role of Lawyer: Transactional Skills, Transnational Issues, and Commercial Law' 44 *Southern Illinois University Law Journal*, 225, 246-247 (2020).

[15] For more details about this, see M. Ventoruzzo, n 3 above, 61, describing various alternatives to the reduction of the capital.

It is true that the rules aim at making it possible for a company to continue its existence after withdrawal, providing for the possibility of selling the interest to other members or third parties, in case other members are not interested in it. However, it is also true that winding up a company is clearly indicated as a possible outcome of this proceeding, in case nobody is interested in purchasing the interest and the company does not have enough assets to buy it: see Arts 2437-*quater*, para 6, and 2473, para 4, of the Civil Code.

[16] D. Snyder, 'Closing the Deal in Contracts – Introducing Transactional Skills in the First Year' 34 *University of Toledo Law Review*, 689, 694 (2003); L. Pantin, 'Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum' 41 *Ohio Northern University Law Review*, 61, 71 (2014); R. Arnow et al, 'Teaching Transactional Skills in Upper-level Doctrinal Courses: Three Exemplars' 10 *Transactions: the Tennessee Journal of Business Law*, 367, 372 (2009).

impact of potential losses.[17]

Although recent developments in the debate about the withdrawal right from a long-lasting company demonstrate a clear trend towards the exclusion of such a right, adequate awareness of this issue is required. I will therefore start my analysis with the opinion upholding the existence of the withdrawal right in relation to a long-lasting company.

II. The Withdrawal Right As a Consequence of Long Duration for Corporations and LLCs

There are clear differences between withdrawal rules for partnerships on the one hand, and corporations and LLCs on the other, as outlined above. Nonetheless, case law and scholarly opinion positing that shareholders and members should be entitled to withdraw in case of a long duration are normally based on the need to avoid a life-long relationship between members and the company.[18] Even if this is not always clearly stated,[19] the premise underlying this conclusion would be that the Art 2285, para 1, of the Civil Code applies by analogy both to corporations and LLCs because of a supposed lacuna in their regulation. As a consequence, Arts 2437, para 3, and 2473, para 2, of the Civil Code should be applied not only when the entity's governing documents provide for a perpetual duration, but also when they provide for very long duration. There is also an alternative argument to reach the same conclusion. Some scholars argue that references to perpetual duration in Arts 2437, para 3, and 2473, para 2, of the Civil Code should be construed as encompassing very long duration as well, even in the absence of an actual lacuna in such rules.[20] It is meaningful to note that

[17] L. Del Duca, 'Keep It Simple, Smarty: Tips for Transactional Training Programs' 48 *Uniform Commercial Code Law Journal*, 1, 5 (2018).

[18] See Tribunale di Varese 26 November 2004, *Giurisprudenza commerciale*, II, 473 (2005); F. Annunziata, 'Art 2473', in L.A. Bianchi ed, *Società a responsabilità limitata*, in P. Marchetti et al eds *Commentario alla riforma delle società* (Milano: Egea, 2008), 495; O. Cagnasso, 'La società a responsabilità limitata', in G. Cottino ed, *Trattato di diritto commerciale* (Padova: CEDAM, 2007), 162; A. Morano, 'Analisi delle clausole statutarie in tema di recesso alla luce della riforma della disciplina delle società di capitali' *Rivista del notariato*, 303, 312 (2003); A. Bartolacelli, 'Profili del recesso *ad nutum* nella società per azioni' *Contratto e impresa*, 1125, 1129-1130 (2004).

[19] However, it seems probable that such an application is the reason for other similar opinions: see E. Ntuk, 'Art 2328', in G. Cottino et al eds, *Il nuovo diritto societario. Commentario* (Bologna: Zanichelli, 2004), 72. The same happens sometimes in case law, where a long duration is treated as a perpetual one without specific justification: see Corte d'Appello di Milano 21 April 2007, *Società*, 1121, 1123 (2008).

[20] Sometimes the need for interpretation of these rules that widens their scope of application is explicitly held (S. Patriarca, 'Disciplina della s.r.l. e società di persone: alla ricerca delle reciproche influenze', in P. Benazzo et al eds, *Il diritto delle società oggi* (Torino: UTET, 2011), 275, with regard to Art 2473 of the Civil Code); other scholars do not expressly refer to this, but reach the same conclusion (M. Ventoruzzo, 'I criteri di valutazione delle azioni in caso di recesso del socio' *Rivista delle società*, 309, 329 (2005)).

these two alternatives were recently proposed as substantially similar by a prominent company law scholar, affirming the priority to apply to corporations and LLCs the same regime established for partnerships, to protect interests related to this issue.[21]

A different basis used to argue the existence of the withdrawal right in the case of a very long duration would be the general private law prohibition of perpetual contracts,[22] meaning that such a duration could consist in a violation of this principle.[23]

Despite the variety of arguments proposed by scholars and case law, the Italian Supreme Court when reaching the same conclusion (ie considering a very long duration equivalent to a perpetual duration) adopted quite a different approach. Shifting the focus to contractual issues in the case of a very long duration for a particular company (whose final year was 2100), the court held it was impossible to understand the members' actual intention in choosing between a perpetual and fixed duration. Accordingly, it argued that the company's long duration was equivalent to either a perpetual one or was a way to evade its consequences (ie the existence of withdrawal right). Accordingly, each member of the company was deemed to be entitled to withdraw.[24]

The same principle was adopted in a subsequent judgment of the Supreme Court, although it expressly excluded the relevance of a duration (the final year was 2050) exceeding members' estimated life expectancy.[25] Other case law applies

[21] See O. Cagnasso, 'Tre "variazioni" in tema di recesso del socio di società di capitali' *Giurisprudenza italiana*, 127, 131 (2019).

[22] Tribunale di Roma 19 May 2009, *Il Foro Italiano*, I, 3567, 3569 (2010); P. Revigliono, n 2 above, 212–213; E. Bergamo, 'Il diritto di recesso nella riforma del diritto societario' *Giurisprudenza italiana*, 1098, 1102 (2006).

[23] N. Ciocca, 'Il recesso del socio dalla società a responsabilità limitata' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 165, 196–197 (2008).

[24] Corte di Cassazione 22 April 2013 no 9662, *Giurisprudenza commerciale*, II, 802, 803 (2014). The solution proposed by this judgment has been generally criticized by scholars: M. Stella Richter jr, 'Ancora in tema di recesso e di «modificazioni dello statuto concernenti i diritti di voto e di partecipazione»' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, II, 149, 149-150 (2017); P. Butturini, 'Società di capitali con termine (particolarmente) lungo e diritto di recesso *ad nutum*' *Contratto e impresa*, 909, 922-926 (2016). A different opinion is held by C. Frigeni, 'Il diritto di recesso', in C. Ibba and G. Marasà eds, *Le società a responsabilità limitata* (Milano: Giuffrè Francis Lefebvre, 2020), 1078 (sharing the need to avoid the possibility to evade perpetual duration's consequences).

[25] Corte di Cassazione 29 March 2019 no 8962, *Società*, 633 (2019). In this case, the LLC duration was established to 2050. While sharing in general terms the principle held by the former judgment of the Supreme Court (Corte di Cassazione 22 April 2013 no 9662, n 24 above) about excessive duration, the court denied the possibility of withdrawing to a member born in 1963, holding that his estimated life expectancy at the end of the company's term was not relevant, as 87 years (the age the member would be in 2050) is longer than the average estimated life expectancy in Italy. In this way, one of the possible outcomes of the rule stated by judgment 9662/2013 is actually excluded. As it is difficult, if not impossible, to define the concept of excessive duration itself, a member's estimated life expectancy might be one criterion to use. However, judgment 8962/2019 rejected this hypotethical criterion.

such a principle to companies lasting until 2100, always without providing further basis.[26]

It is worth now turning to the opposite opinion and examining its grounds.

III. Other Scholarly Analysis

1. The Non-Existence of a Withdrawal Right

Some scholars and case law hold the opposite opinion to the analysis described above – not only criticizing the basis for the adverse theory, but offering additional reasons to consider that a long duration for a company does not provide for the existence of a members' withdrawal right.

The possibility of applying also to corporations and LLCs the rule established with regard to partnerships in Art 2285, para 1, of the Civil Code, is often argued. Such a possibility has to be criticized for two reasons. First, at-will withdrawal cases should be considered exceptional for both corporations[27] and LLCs.[28] Second, the absence of a specific withdrawal right case when the company's duration is very long, in light of the difference between the applicable rules, is clearly a result of legislative choice.[29]

In general terms, if the absence of a specific provision in a rule cannot be considered a legislative lacuna, then the possibility of applying a different rule – in this case Art 2285, para 1, of the Civil Code – should be excluded. Moreover, transplanting a partnership rule to the different context of corporations and LLCs should not be allowed in this case, given the differences between these entities.[30]

[26] Quoting Corte di Cassazione 22 April 2013 no 9662, n 24 above, is deemed sufficient to uphold the existence of the withdrawal right in the case of long duration of a company (in all such cases, until 2100): see Tribunale di Milano 30 June 2018, *Giurisprudenza italiana*, 126 (2019); Tribunale di Torino 30 November 2017 no 5806, 3, available at www.giurisprudenzadelleimprese.it; Tribunale di Torino 5 May 2017 no 2363, 4, available at www.giurisprudenzadelleimprese.it; Tribunale di Bologna 14 November 2013, *Rivista di diritto societario*, 127, 128 (2016).

[27] A. Daccò, 'Il recesso nelle s.p.a.', in O. Cagnasso and L. Panzani eds, *Le nuove s.p.a.* (Bologna: Zanichelli, 2010), 1418; S. Cappiello, 'Recesso *ad nutum* e recesso "per giusta causa" nelle s.p.a. e nella s.r.l.' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 497, 526 (2004).

[28] G. Zanarone, n 11 above, 799.

[29] This is underscored both by case law (Tribunale di Milano 19 June 2019 no 5972, 16-17, available at www.giurisprudenzadelleimprese.it; Tribunale di Chieti 17 February 2011 no 109, n 11 above, 1629, and Tribunale di Cagliari 20 April 2007, *Rivista giuridica sarda*, 375, 377 (2009)) and scholars (L. Salvatore, 'Il «nuovo» diritto di recesso nelle società di capitali' *Contratto e impresa*, 629, 635 (2003)).

[30] This is also emphasized by both case law (Tribunale di Milano 28 June 2019 no 6360, n 13 above, 5; Tribunale di Milano 19 June 2019 no 5972, n 29 above, 16; Tribunale di Napoli 10 December 2008, *Notariato*, 285 (2009)) and scholars (C. Frigeni, n 24 above, 1076; F. Angiolini, n 10 above, 289; V. Di Cataldo, 'Il recesso del socio di società per azioni', in P. Abbadessa and G.B. Portale eds, *Il nuovo diritto delle società. Liber amicorum Gianfranco Campobasso* (Torino: UTET, 2006), 229-230; M. Stella Richter jr, 'La costituzione delle società di capitali', in P. Abbadessa and G.B. Portale eds, *Il nuovo diritto delle società. Liber amicorum Gianfranco Campobasso*

This is another obstacle to establishing an actual similarity between the two different withdrawal regimes. Once again, such a similarity would be required to apply this rule outside of its intended context.

An articulation of the difference between partnerships and corporations (or LLCs) is worthy of more attention. Undeniably, in the case of a very long duration, members or shareholders would be bound to a relationship potentially exceeding their estimated life expectancies. However, shareholders and LLC members, unlike partnership members, have limited liability and other options for exiting a company – in particular, selling their shares or interests.[31] It is also worth noting that case law explicitly applying Art 2285, para 1, of the Civil Code to corporations demonstrates an inherent contradiction, as it literally refers to the different case of partnerships at the same time arguing for the absence of differences concerning the need for protection of the shareholder.[32]

Some criticisms also arise concerning the possibility of construing Arts 2437, para 3, and 2473, para 2, of the Civil Code as applicable to the long duration case, rather than only the perpetual duration case to which they literally refer. As mentioned above, in this way the same conclusion – that is, the possibility of withdrawing because of the length of a company's duration – is reached without claiming the existence of a legislative lacuna in those rules, by asserting the need for a broader construction of the statute.

Widening the scope of application of a rule is permitted in Italian law if it can be argued that, in light of the context and the general principles underlying it, such a rule was not perfectly drafted.[33] The articles of the Civil Code that we have been discussing do not seem imperfectly drafted with regard to this specific point. In other words, the absence of a withdrawal case arising from a very long duration, as stressed above, does not represent an involuntary omission, which theoretically could be corrected through a broad interpretation; on the contrary, it reflects a specific choice made in enacting the reform. This is confirmed through an examination of the reports of the commissions in charge of reform drafting.[34]

(Torino: UTET, 2006), 299; V. Calandra Buonaura, 'Il recesso del socio di società di capitali' *Giurisprudenza commerciale*, I, 291, 300-301 (2005)).

[31] The difference between partnerships and corporations (or LLCs) with regard to rules about selling of interests is duly underscored: Tribunale di Napoli 10 December 2008, n 30 above, 286; M. Stella Richter jr, 'Il diritto di recesso e il controllo della logica della Cassazione' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 603, 606 (2015); M. Stella Richter jr, n 30 above, 299, points out that shareholders' estimated life expectancy cannot count, as shareholders themselves can frequently change as a result of share sales.

[32] Tribunale di Varese 26 November 2004, n 18 above, 473, argues the need for the shareholder not to be permanently bound to the company, even after accounting for the difference between withdrawal regulations for partnerships and corporations.

[33] A. Trabucchi, *Istituzioni di diritto civile* (Padova: CEDAM, 49th ed, 2019), 63.

[34] During the process of the reform drafting, there was a debate about the possibility of providing shareholders with the withdrawal right in the case of a duration longer than fifty years; however, this case was ultimately not mentioned in the rule (see L. Delli Priscoli, 'Recesso ed esclusione dei soci', in C. D'Arrigo et al eds, *Partecipazioni sociali e strumenti di finanziamento*.

Further, with specific regard to company law issues, the Supreme Court held that the withdrawal right concerning corporations should be available only when specifically provided by law. Consequently, the rule establishing particular cases cannot be interpreted in a way that widens its scope of application, in order to protect third parties' and creditors' interests.[35]

As to the general private law prohibition of perpetual contracts, its applicability to corporations and LLCs cannot be taken as given for two reasons. The first takes into consideration the peculiarities of the relationship between shareholders and members and companies, which involves limited liability and free transferability of shares or interests.[36] The second reason takes into account the consequences arising from the exercising of the withdrawal right and the need to protect creditors.[37]

Finally, the judgment of the court that a long duration makes it impossible to understand actual members' intention about it – and consequently that it should be treated as a perpetual one – does not consider that members may actually desire a long, but not perpetual duration. When incorporating a company (or purchasing interests), shareholders or members should indeed be aware of the long duration of any company in which they are investing.[38]

It is also useful to debate the need to protect members' freedom to leave the company[39] – not only because members and shareholders normally have other ways of achieving this goal, but also because investing in a long-duration company is the investor's individual choice. Recognizing that such an interest should include the existence of a withdrawal right because of the long duration means giving members and shareholders a chance to change their initial intention. However, this would affect not only the company itself – by reducing its financial resources through payment of the fair value for shares – but also its creditors and third parties interested in it. In other words, the protection of a supposed interest that

Recesso e patti parasociali (Milano: Giuffrè Francis Lefebvre, 2019), 357; M. Vietti et al eds, *La riforma del diritto societario. Lavori preparatori testi e materiali* (Milano: Giuffrè, 2006), 866); thus, the absence of a similar provision depends on a precise legislative choice.

[35] See judgments Corte di Cassazione 1 June 2017 no 13875, *Banca borsa e titoli di credito*, II, 143 (2018), and Corte di Cassazione 22 May 2019 no 13845, *Giurisprudenza commerciale*, II, 415 and 434 (2021); their importance with regard to our topic is duly considered by Tribunale di Milano 19 June 2019 no 5972, n 29 above, 16.

[36] V. Caridi, 'Recesso "libero" del socio e durata della società' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 603, 704 (2019); V. Calandra Buonaura, n 30 above, 299; S. Cappiello, 'Art 2437', in G. Bonfante et al eds, *Codice commentato delle nuove società* (Milano: Ipsoa, 2004), 846.

[37] Tribunale di Cagliari 20 April 2007, n 29 above, 378; G.F. Campobasso, 'La costituzione della società per azioni' *Società*, 283, 287 (2003).

[38] This is underscored by Tribunale di Milano 28 June 2019 no, n 13 above, 4-5; V. Caridi, n 36 above, 705; F. Ciusa, 'Il recesso *ad nutum* in s.r.l. con durata determinata al 2100' *Giurisprudenza commerciale*, II, 804, 812 (2014); S. Patriarca, n 20 above, 276 fn 91.

[39] Some scholars uphold the existence of such an interest, variously referring to 'substantive' issues: O. Cagnasso, n 21 above, 131; M. Ventoruzzo, n 20 above, 329; P. Revigliono, n 2 above, 212-213. However, the protection of various other interests should always be taken into due consideration, as will be soon shown in this subsection.

could much more efficiently be protected by members themselves through closer attention when initially investing in a company, harms other, more relevant interests, described below.

The opinion that there is no withdrawal right in the case of a long company term has bases other than criticism of the opposite theory that we have discussed. As mentioned, some of these involve interests relevant to company regulations in general and others involve specific company law rules.

Company regulations tend to protect fundamental interests, such as the need for certainty in company law and the protection of creditors. Allowing a case of at-will withdrawal right not expressly provided by law would harm both of these interests. It would make unclear the regime applicable to corporations and LLCs,[40] and be dangerous for creditors, since a member's withdrawal outcome would probably result in diminution of the company's net worth, the only protection for creditors in the absence of member liability.[41] This issue is not considered crucial by a judgment holding that finding a purchaser for an interest in a company with perpetual duration should be easy, given that the withdrawal right is always present. Accordingly creditor protection should not be an obstacle to the existence of such a right even when a company's duration is long but not perpetual.[42] However, even assuming that the indefinite existence of a company makes it easier to sell shares or interests, this is not the case when the duration is finite, albeit very long. In this case, a third party could not be sure about the possibility of exercising the withdrawal right, as this depends on a peculiar construction of the regulation.

Taking then into consideration the specific relevant company law rules, it should be stressed that for corporations, the withdrawal right can be excluded by a company's articles for shareholders who do not approve an extension of duration, under Art 2437, para 2, of the Civil Code.[43] The mere existence of such a right is

[40] L. Della Tommasina, 'La nozione di società contratta a tempo indeterminato: il regime del disinvestimento tra società di capitali e società di persone' *Rivista delle società*, 102, 115 (2020), with particular regard to creditors' need for clear and unambiguous information about companies; F. Ciusa, n 38 above, 811; L. Delli Priscoli, n 11 above, 150; S. Cappiello, n 27 above, 527.

[41] Corte di Cassazione 21 February 2020 no 4716, *Il Foro Italiano*, I, 1617, 1619 (2020); Tribunale di Milano 28 June 2019 no 6360, n 13 above, 7; Tribunale di Milano 19 June 2019 no 5972, n 29 above, 16; Tribunale di Chieti 17 February 2011 no 109, n 11 above, 1628; Tribunale di Terni 28 June 2010, *Giurisprudenza italiana*, 2551 (2010); Tribunale di Cagliari 20 April 2007, n 29 above, 378; Tribunale di Forlì 16 May 2007, n 11 above, 256; M. Rubino De Ritis, 'Lunga vita alle società di capitali, senza recessi!' 3 *giustiziacivile.com*, 12 (2020); M. Morgese, 'Sulla legittimità del recesso *ad nutum ex* art. 2473, 2° comma, c.c., in caso di società con durata superiore alla normale vita umana' *Rivista di diritto societario*, 127, 143 (2016); F. Ciusa, n 38 above, 812; G. Zanarone, n 11 above, 799; A. Daccò, n 27 above, 1418; P. Piscitello, n 8 above, 45.

[42] Tribunale di Roma 19 May 2009, n 22 above, 3569.

[43] V. Caridi, n 36 above, 705; D. Galletti, 'Art 2437', in A. Maffei Alberti ed, *Il nuovo diritto delle società* (Padova: CEDAM, 2005), 1511; V. Calandra Buonaura, n 30 above, 300; A. Paciello, 'Art 2437', in G. Niccolini and A. Stagno d'Alcontres eds, *Società di capitali. Commentario* (Napoli: Jovene, 2004),1115, consequently considering as possible a very long duration for a company (literally, an 'abnormal' length).

debatable with regard to LLCs, since Art 2473 of the Civil Code does not mention it at all.[44] This means that a minority member could be forced to accept a longer duration for the company. This situation can be deemed even worse than that of a very long duration initially established in a company's articles, which is negotiated by all members or shareholders.

Moreover, as already mentioned, both corporation shares and LLC interests are usually freely transferable. While excluding transferability is normally forbidden for corporations – with the only exception being a temporary ban (see Art 2355-*bis*, para 1, of the Civil Code) – it is permitted in LLCs, albeit with the counterbalance of a specific withdrawal right (Art 2469, para 2, Civil Code). Consequently, shareholders or members of a long-lasting company do not have to wait for its end to sever their relationship with the entity, but are allowed to sell their shares or interests. Of course this option can be problematic, as the actual ability to sell depends on many factors. Nonetheless, this should lead members and shareholders to carefully consider the implications of a very long duration when investing in a company. The mere concrete difficulty of selling shall not be considered a reason to uphold the existence of a withdrawal right in such cases. Sometimes case law has explicitly held that what matters in excluding the right to withdraw in the case of a long duration is the simple possibility of selling an LLC interest without depending on other members' consent (as happens in partnerships).[45]

2. A Unified Solution for Corporations and LLCs

Some further arguments which exclude the possible relevance of the differences between corporations and LLCs need to be considered. These entities have so far been jointly considered in this paper, and this choice requires a brief explanation.

The 2003 company law reform profoundly altered the LLC regulations; in particular by allowing peculiar choices in a company's articles, like clauses apt to govern some aspects of company life in a way more similar to partnerships than to corporations. As an example, an operating agreement could establish that LLC governance follows partnership rules (see Art 2475, para 3, of the Civil Code). In light of this peculiarity of LLCs, some scholars identify a possible connection between long duration and the withdrawal right, which belongs to partnership regulations, as mentioned above. Such a connection may exist in the case where an LLC company's articles provide for those choices, and consequently make the

[44] However, some scholars argue that the corporation rule should apply to LLCs too, by analogy (G. Zanarone, n 11 above, 806; P. Revigliono, n 2 above, 225-226; E. Bergamo, n 22 above, 1112), while others reach the opposite conclusion (V. Caridi, n 36 above, 705; M. Ventoruzzo, 'Recesso da società a responsabilità limitata e valutazione della partecipazione del socio recedente' *Nuova giurisprudenza civile commentata*, II, 434, 447 fn 42 (2005); D. Galletti, 'Art 2473', in A. Maffei Alberti ed, *Il nuovo diritto delle società* (Padova: CEDAM, 2005), 1904; G. Gabrielli, 'La disciplina del recesso nel nuovo diritto societario' *Studium Iuris*, 729, 732 (2004)).

[45] Tribunale di Chieti 17 February 2011 no 109, n 11 above, 1628.

LLC an entity resembling a partnership more than a corporation.[46] However, this opinion is not correct, both in light of some factors specifically concerning LLC regulation, and of the fundamental need for certainty in company law.

Considering LLC regulation, it has to be underscored that the features distinguishing an LLC from a partnership are the free transferability of interest and liability regime. As I have noted above these features are indeed directly or indirectly connected to a company's duration.[47] Neither is actually relevant to justifying the existence of the withdrawal right in the case of long duration. From the exclusion of free transferability of interests, a specific withdrawal right case arises. There is neither the need nor the possibility to apply a rule similar to Art 2285, para 1, of the Civil Code in this case. The liability regime cannot be modified by an LLC operating agreement – converting members' limited liability to unlimited liability would not be allowed.

Turning now to the importance of certainty in company law, even hypothetically allowing for the possibility of distinguishing one LLC from another in light of the specific contents of their operating agreements would be difficult, and is not consistent with such a general and fundamental interest. The outcome of the analysis of each LLC operating agreement would indeed be almost impossible to predict,[48] and this is the second reason to object the analyzed opinion.

Finally, it is interesting to note that a recent judgment (4716/2020) of the Supreme Court discussed below, which excludes the withdrawal right for a corporation with a long duration, expressly mentions in general terms both corporations and LLCs as entities that should be treated in the same way to this specific end.[49]

3. Judgment 4716/2020 of the Supreme Court and Its Importance to the Debate

This recent judgment of the Supreme Court is an important milestone in this debate. It refers to a long-lasting corporation with a final year of 2100, which is the final term most commonly taken into account by relevant case law. The judgment addresses all the crucial issues related to the link between duration and the withdrawal right and undertakes an in-depth analysis of both the applicable rules and underlying interests. From this perspective, its approach is quite different – and definitely preferable – to that adopted in previous Supreme Court judgments. Hopefully, in particular from the perspective of the abovementioned relevant interests related to the issue, such an approach and the consequent

[46] L. Salvatore and E. Simoncelli, n 1 above, 1236; V. Calandra Buonaura, n 30 above, 301.

[47] See para III, 1; conversely, there is no connection between the issue and other LLC features that could be regulated in a way more similar to that for partnerships, such as their governance system.

[48] Tribunale di Milano 28 June 2019 no 6360, n 13 above, 6; M. Gatti, 'Sul recesso del socio da s.r.l. avente durata "eccessiva" ' *Giurisprudenza commerciale*, I, 607, 619-620 (2017).

[49] Corte di Cassazione 21 February 2020 no 4716, n 41 above, 1620.

solution will be confirmed in future case law. In particular, the court upheld the absence of a withdrawal right for shareholders of a corporation, whose articles established a long duration (until 2100), at the same time excluding the withdrawal right in the case of an extension in the duration.[50]

Some comments are important in relation to the reasoning behind the conclusion reached by the court and the possible relevance of some specific features of the case. The court took into adequate consideration both the specific rule about the withdrawal right for a corporation and the general principles and interests related to the need for certainty and creditor protection. In particular, the court stated that existence of the withdrawal right must be considered limited to the specific case mentioned in Art 2437, para 3, of the Civil Code, that is, the perpetual duration of the company, for two reasons. The first reason involving to respect the exact wording of the norm and the second, the protection of the fundamental needs of creditors and third parties through the exclusion of the possibility of applying the different rule provided by the Civil Code for partnerships.[51] With specific regard to this point, the vagueness of criteria that would be necessary to apply this rule is also highlighted as an obstacle to such an application, because of the ongoing need to protect companies' creditors.[52] Unlike judgment 9662/2013 of the same court, which basically shifted the focus to contractual issues, this most recent judgment is in line with case law and scholars, and adopts a specific company law approach to reach a well-explained conclusion, which hopefully will be upheld in the future.

One final remark is worth making about this judgment. As noted above, in this case the corporation had a long duration and its articles excluded the withdrawal right in case of extension of the term. It is necessary to consider whether this clause is relevant when reaching the conclusion of the absence of the withdrawal right because of long duration. In case it is, shareholders or members willing to give their company a long duration without uncertainty about the withdrawal right might also expressly exclude such a right in the case of an extension. This makes it reasonably certain that any future, hypothetical litigation arising from long duration would be decided following the principle held by judgment 4716/2020 of the Supreme Court. However, the presence of such a clause in a company's articles should not be considered necessary to apply the abovementioned principle – not only because it is mentioned in the judgment when describing the features of the case and is no longer recalled when providing the solution, but also because postponement is actually unlikely in the presence of a very long company term.

After exploration of the state of the art about the topic in Italy, the next step is a brief comparative view of the issue.

[50] ibid 1619.
[51] ibid 1619.
[52] ibid 1619–1620.

IV. Comparative Perspectives: Company Duration and Withdrawal Rights in Other Legal Systems

In this section I briefly analyze, using a comparative approach, the link between long duration and withdrawal rights. This can be useful in order to get some possible further arguments to propose an appropriate solution to the problem, and is important in order to provide a basic understanding of what a foreign entrepreneur interested in investing in an Italian company might expect.

With regard to the first point, comparative law can make an important contribution to the correct interpretation of domestic regulations, both as a means to fill legislative lacunas[53] and as a possible source of legal reasoning.[54] This is particularly true with regard to company law,[55] and there are examples of the application of foreign company law to Italian disputes. As an instance, United States (US) business judgment rule is frequently invoked in cases of director liability;[56] similar phenomena are evident with regard to the French regulation of share allotment and US prospectus liability case law.[57] These references are extremely meaningful for two reasons. First, they confirm the application of principles inspired by foreign law in Italian case law, which is also well known in other countries,[58] and probably even underestimated, as the comparative influence is not always explicit in such a case law.[59] Second, they reflect another general

[53] See, in general terms, P.G. Monateri and A. Somma, '«Alien in Rome». L'uso del diritto comparato come interpretazione analogica ex art. 12 preleggi' *Il Foro Italiano*, V, 47, 50 (1999), which underscore that the rule mentioned in the title of the article can be applied also to foreign law; with regard to company law, see G.B. Portale, 'Il diritto societario tra diritto comparato e diritto straniero' *Rivista delle società*, 325, 326 (2013).

[54] A. Gambaro, 'Il diritto comparato nelle aule di giustizia ed immediati dintorni' *L'uso giurisprudenziale della comparazione giuridica* (Milano: Giuffrè, 2004), 10.

[55] G.B. Portale, n 53 above, 326.

[56] A. La Mattina, 'Il giudice italiano e il diritto societario straniero' *Diritto del commercio internazionale*, 933, 935 (2009). The concept itself of business judgment rule, despite being clearly a foreign one, is commonly used by company lawyers and scholars in Italy: see, for instance, L. Benedetti, 'L'applicabilità della *business judgment rule* alle decisioni organizzative degli amministratori' *Rivista delle società*, 413 (2019); C. Angelici, 'Interesse sociale e *business judgment rule*' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 573, 585 (2012); P. Piscitello, 'La responsabilità degli amministratori di società di capitali tra discrezionalità del giudice e *business judgement rule*' *Rivista delle società*, 1167 (2012); C. Angelici, '*Diligentia quam in suis* e business judgement rule' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, I, 675 (2006).

[57] A. La Mattina, n 56 above, 934-935; see also G. Alpa, 'L'uso del diritto straniero da parte del giudice italiano', in A. Somma, *L'uso giurisprudenziale della comparazione nel diritto interno e comunitario* (Milano: Giuffrè, 2001), XVII.

[58] See B. Markesinis and J. Fedtke, 'The Judge as Comparatist' 80 *Tulane Law Review*, 11, 26-27 (2005).

[59] G. Alpa, 'Il giudice e l'uso delle sentenze straniere. Modalità e tecniche della comparazione giuridica – La giurisprudenza civile', in G. Alpa ed, *Il giudice e l'uso delle sentenze straniere. Modalità e tecniche della comparazione giuridica* (Milano: Giuffrè, 2006), 41; V. Vigoriti, 'L'uso giurisprudenziale della comparazione giuridica' *L'uso giurisprudenziale della comparazione giuridica* (Milano: Giuffrè, 2004), 8; A. Somma, n 57 above, 17.

and important trend, which is the possible role of common law regulations (eg, the US and United Kingdom ones) in the construction of Italian rules.[60]

Turning now to the second point, analyzing foreign jurisdictions is also important in order to understand the point of view of foreign entrepreneurs interested in investing in Italian companies. Analyzing how the issue is dealt with in their countries may reveal whether the uncertainty arising from the Italian debate might be a 'surprise', apt to diminish a long-run foreign investor's interest in Italian companies. As I discuss later, this is highly relevant to our goal to achieve an appropriate solution to the problem, given that the unpredictability of rules applicable to Italian companies might result in a substantial lessening of their competitiveness against foreign companies, which would conflict with one of the fundamental goals of the 2003 company law reform.

1. US Uniform and State Regulations

Analyzing the link between long duration and withdrawal rights in US rules requires the making of a distinction between corporations and LLCs. From this perspective, the US system differs from other jurisdictions examined here. It is also interesting to briefly consider the evolution of regulations in these two types of companies with regard to duration and its potential link to withdrawal rights, as this is meaningful for a comparative view of the issue.

Focusing on corporations, it is worth highlighting that, despite the traditional affirmation of their natural perpetual duration,[61] limits to companies' terms were not uncommon among US jurisdictions. In the 1950s, some states established strict rules about this issue, with a twenty- or thirty-year maximum – even if the common trend was towards corporations having a perpetual existence.[62] It is also meaningful to note that, some decades later, this general trend has come to pass in the form of a reduction in the number of state laws providing limited duration; most used to have a 99-year term.[63] At the same time, the perpetual or longest duration for a corporation has been shown to be the best choice from the perspective of a person interested in a business acquisition, with the consequent suggestion by scholars to amend the company's articles to provide a similar duration if a limited one is established.[64] This provides for a very interesting

[60] V. Vigoriti, n 59 above, 20; P.G. Monateri and A. Somma, n 53 above, 53; G.B. Portale, n 53 above, 327.

[61] See the description of an 1819 case in which immortality is defined as a characteristic of corporations, in L.W. Hein, 'The British Business Company: Its Origins and Its Control' 15 *University of Toronto Law Journal*, 134 (1963).

[62] F.A. Wright and V.D. Baughman, 'Past and Present Trends in Corporation Law: Is Florida in Step' 2 *Miami Law Quarterly*, 69, 83 (1947) highlight this general trend and mention various limitations of company's duration in United States (US) jurisdictions, with a range of 20–100 years (fn 23).

[63] R.W. Doty and P.M. Renfro, 'Procedures for Corporate Record Searches' 8 *Creighton Law Review*, 803, 810–811 (1974).

[64] R.W. Doty and P.M. Renfro, n 63 above, 811; it is interesting to note that no attention is

comparison, as the perspective of an Italian lawyer would likely be the opposite in light of the abovementioned consequences of a perpetual duration, and of the risks potentially arising from a long one.

Nowadays, the perpetual duration of a US corporation is common both in the uniform model legislation,[65] and at the state level,[66] always without a link between this duration and the specific case of a member's withdrawal right.[67]

With regard to the regulation of LLCs, it is necessary to begin by emphasizing that the state statutes in the US vary much more than do the states' corporation statutes.[68] Consequently, the aim of the following notes is to offer not an all-encompassing analysis of the issue, but some examples that seem meaningful for a comparative approach.

LLC statutes tend to show a similar evolution towards the general achievement of perpetual duration (considered an important feature for doing business).[69] Different rules on the topic were in force around the 1990s,[70] or sometimes even later.[71] However, the context of this trend and its possible explanation differ from that for corporations, and the same is true for the link between perpetual duration and the chance for a member to leave the company (through withdrawal

paid to withdrawal rights or similar member rights depending on a company's duration.

[65] See Model Business Corporation Act (MBCA) §3.02.

[66] See the example of Delaware, as the leading US state in corporate law: Delaware Corporation Act § 102(b)(5). See also New York Business Corporation Law § 202(a)(1); Pennsylvania Business Corporation Law § 1306(a)(6) and § 1914(c)(2), which allows the board of directors to amend the articles providing for perpetual existence, without requiring the approval of shareholders.

[67] See MBCA § 13.02; Delaware Corporation Act § 262; New York Business Corporation Law §§ 623 and 806; Pennsylvania Business Corporation Law § 1571.

[68] See, for example, Alan Palmiter et al, *Corporation: A Contemporary Approach* (St. Paul: West Academic Publishing, 1st ed, 2010), 136.

[69] An LLC's limited life is deemed an outdated and antibusiness feature: R.K. Smith, 'Utah Should Adopt a Modified Version of the Revised Uniform Limited Liability Company Act' 2 *Utah Law Review OnLaw*, 12, 14 (2013). Perpetual duration is nowadays the LLC statutory norm: see J. MacLeod Heminway, 'The Death of an LLC: What's Trending in LLC Dissolution Law' *Business Law Today*, available at https://tinyurl.com/yckjtztc (last visited 31 December 2021).

[70] See examples of national regulations amended to permit an indefinite duration for a company in place of the original limits, in A.G. Donn, 'Unincorporated Business Entity Statutory Developments' 2(6) *Journal of Passthrough Entities*, 15, 16 (1999), referring to the cases of Delaware, Florida, New York, Minnesota, and North Carolina; similar remarks also apply to South Dakota, as, prior to 1 March 1998, its legislation provided for a 30 year duration: see P.G. Goetzinger et al, 'The South Dakota Limited Liability Company Act: The Next Generation Begins' 44 *South Dakota Law Review*, 207, 225 (1999); perpetual duration, unless otherwise stated, is the current rule: see SD Codified L § 47-34A-203(5) (through 2011); and with regard to Wyoming, comparing the 1989 regulation, which established a 30 year duration (see Wyo stat. § 17-15-107(a)(ii) (1989), quoted by J.A. Rodriguez, 'Wyoming Limited Liability Companies: Limited Liability and Taxation Concerns in Other Jurisdictions' 27 *Land & Water Law Review*, 539, 546 (1992)) and the current one (Wyo Stat § 17-29-104(c) (2015)), allowing for perpetual duration.

[71] See the example of Utah Revised Limited Liability Company Act (2001), establishing a maximum duration of 99 years (Utah Code ann § 48-2c-403(4)(c)): see R.K. Smith, n 69 above, 14, underscoring that LLCs' perpetual existence is in general a common feature, provided by almost all LLC statutes.

or dissociation rights).

The root of rules that previously provided LLCs with limited duration is tax regulation: the rules were originally established to qualify LLCs as partnerships for tax purposes.[72] This approach changed after the enactment of the so-called 'check the box' regulation.[73] From a comparative perspective, this is important, as the original reason to limit a company's duration was totally different from the contemporary need to avoid perpetual duties, sometimes deemed relevant in Europe (as happens in France, and is supposed to happen in Italy).

LLC regulations should also be considered with regard to the evolution of rules about a member's withdrawal or dissociation. A warning about the relevance of these rights is at this point necessary. The ability to withdraw becomes important in essentially two cases: where the LLC operating agreement prohibits the transfer of the interest; and where selling the LLC interest might be difficult because of the absence of a market.[74] In as far as an at-will exit from the company is permitted, a long term or indefinite duration would be naturally counterbalanced by such a right. The link between perpetual duration and dissociation right has been highlighted in the past,[75] as has the function of a limited duration as a 'safety valve' to avoid a member being 'locked into' the company.[76]

However, when examining the evolution of withdrawal and dissociation regimes, it is possible to exclude the need for counterbalancing the length of the relationship between members and the company with specific cases of exit. Reviewing the rules in force in the 1990s, state statutes typically provided members withdrawal rights only unless otherwise specified in the operating agreement and the possibility of giving the company a long duration did not affect this issue.[77]

[72] R.K. Smith, n 69 above, 13–14, in general terms and with specific regard to Utah regulations.

[73] Prior to this, a limited duration was commonly established in almost all LLC statutes (D.S. Kleinberger, 'The LLC as Recombinant Entity: Revisiting Fundamental Questions through the LLC Lens' 14 *Fordham Journal of Corporate & Financial Law*, 473, 487 fn 190 (2009)); after this time, uniform and state regulations were modified in this regard (J. MacLeod Heminway, n 69 above; R.K. Smith, n 69 above, 13-15).

[74] When analyzing current regulations, attention is thus paid also to the interest transfer regime, if relevant.

[75] See the example of Florida, mentioned by A.G. Donn, 'Withdrawal and Cash-out from Partnerships and LLCs' 1(4) *Journal of Passthrough Entities*, 13, 15 (1998). It is worth noting that nowadays a different regulation applies, as an LLC has an indefinite duration (Florida Revised Limited Liability Company Act, § 605.0108 (3)), and there are no specific cases of dissociation right depending on this (under §§ 605.0601/0602 of the mentioned Act).

[76] D.S. Kleinberger, n 73 above, 489-490, referring to both perpetual duration and the absence of the transferee's right to seek dissolution.

[77] See various state statutes mentioned by R.R. Keatinge et al, 'The Limited Liability Company: A Study of the Emerging Entity' 47(2) *Business Lawyer*, 375, 418 (1991), with regard to withdrawal rights, which exist unless otherwise specified in the operating agreement, and 421, with regard to duration; a cross-check of these data makes it clear that there is no connection between long duration and withdrawal rights, as the statutes in which a mandatory period of duration is not provided do not impose withdrawal rights. The same is true in the specific case of South Dakota: see P.G. Goetzinger et al, n 70 above, 225, which mention perpetual duration as the default rule, and 236, with regard to member dissociation from the LLC, which is always possible unless

Since then, the general trend has been in the direction of removing the default right to withdraw and obtain the value of the interest.[78] In the current regulations, both uniform and state ones,[79] perpetual duration is the default rule for LLCs. Under these statutes, the establishment of any member dissociation regime often depends on specific provisions contained in the operating agreement.[80] Under the uniform statute, dissociation is not imposed by a mandatory rule,[81] and – even more interestingly – does not imply the right of dissociated members to have their interests to be purchased by the company.[82] Once dissociated, they lose their rights as members and become transferees. The main danger arising for a company from a member's exit, which is the duty to pay their interest, is, in this way, avoided. Of course, this approach raises a 'lock in' issue,[83] which has to be taken into careful consideration by members and their advisors. There are also different remedies provided by the uniform statute: for example, applying for dissolution of an LLC may resolve the issue, but only in the case of oppressive misconduct.[84] This is completely different from a withdrawal right that depends on the company duration, considering both the scope of application and the effects.

otherwise provided by the operating agreement.

[78] A.G. Donn, n 75 above, 15, underscores that withdrawal rights became a default rule in Uniform Limited Liability Company Act (ULLCA) and proposes examples of state statutes in which there is no default right to withdraw; the trend is thus confirmed: see further examples in A.G. Donn, n 70 above, 16, referring to Florida, Indiana, New York and North Carolina.

[79] See Revised Prototype Limited Liability Company Act (RPLLCA) § 104(b) and before Revised Uniform Limited Liability Company Act (RULLCA) § 104(c); regarding state statutes, some examples are New York Limited Liability Company Law § 701(a)(1); Virginia Limited Liability Company Act § 13.1-1009; North Carolina Limited Liability Company Act § 57D-2-01. Perpetual duration is deemed 'the LLC statutory norm': J. MacLeod Heminway, n 69 above, provides further examples, such as Delaware Limited Liability Company Act § 18-801(a)(1) and the abovementioned case of Florida.

[80] In some states, withdrawal rights can be accorded by the operating agreement (see New York Limited Liability Company Law, § 606(a); Texas Business Organizations Code, Title 3, Section 101.107, which can be amended by the operating agreement in light of Section 101.054; with regard to appraisal right, that is not the same, but does have a similar function: Delaware Limited Liability Company Act, § 18-210) or can be excluded by it (Maryland Limited Liability Company Act § 605(1)).

As mentioned above, it seems relevant to also review the interest transfer regime in these cases. All of these statutes provide for the possibility of excluding transfers in the operating agreement: New York Limited Liability Company Law, § 603(a); Texas Business Organizations Code, Title 3, Section 101.108, which can be amended by the operating agreement in light of Section 101.054; Delaware Limited Liability Company Act, § 18-702(a); Maryland Limited Liability Company Act § 603(a).

[81] See the Revised Prototype Act Comment referring to RPLLCA §§ 601-602, in 'Revised Prototype Limited Liability Company Act' 67(1) *Business Lawyer*, 117, 171 (2011).

[82] The same solution is proposed also in some state statutes: see, for instance, Virginia Limited Liability Company Act § 13.1-1040.2. It is worth highlighting that under this statute it is also possible to exclude the transfer of interest in the operating agreement (see § 13.1-1039).

[83] D.S. Kleinberger, n 73 above, 488-490 underscores the differences between LLCs and close corporations from this perspective, and clarifies that 'the transferee is "locked in" to its status in perpetuity'.

[84] See J. MacLeod Heminway, n 69 above.

In terms of a comparison, the habit of predicting the abovementioned 'lock in' issue understandably leads US entrepreneurs interested in investing in Italian companies to pay attention to operating agreement clauses, but not to expect an at-will withdrawal right from a company simply because of the very long length of its duration.

Accordingly, in the US nowadays, both corporations and LLCs can have perpetual duration, or the longest duration, in the absence of a specific withdrawal or dissociation case for the member. As highlighted below, a US investor participating in an Italian company with indefinite duration will presumably not be expecting the possibility of withdrawing from it because of the absence of a final term. This will likely happen in the case of a long-lasting company as well, even if the existence of a withdrawal right is in this case debatable, as presented above.

2. France

Focusing now on other civil law systems, French company law provides for a maximum duration of companies, which is ninety-nine years, following Art L210-2 *Code de commerce*. This rule is deemed by scholars to have been established in light of a general principle that forbids perpetual duration duties, and consequently perpetual duration companies.[85] However, the rule has been criticized as harmful to companies and enterprises, as well as being unnecessary for allowing a member to leave the company in case they want to.[86]

Before the introduction of this rule, a member was entitled to ask for the dissolution of the company in the case of perpetual duration.[87] Case law normally provided the member with the same right in the case of a company duration longer than the member's estimated life expectancy.[88] However, this principle was rarely applicable to corporations and SARLs (*société à responsabilité limitée*, the French equivalent of an LLC), and, in particular, applied in the presence in the operating agreement of restrictions to the freedom of selling interests.[89] This is understandable in light of the relevant difference between long-lasting contracts and long-lasting companies. Indeed, members can in general sell their interest and consequently end their relationship with the company without waiting for the end of its duration period. When this opportunity is limited by the operating

[85] M. Cozian et al, *Droit des sociétés* (Paris: LexisNexis, 32nd ed, 2019), 301.

With regard to Italian regulations, the actual applicability of this general principle to corporations and LLCs has been debated above, para III, 1.

[86] R. Libchaber, 'Réflexions sur les engagements perpétuels et la durée des sociétés' *Revue des sociétés*, 437, 454–456 (1995).

[87] ibid 438, referring to the previous Art 1869 *code civil*, repealed by law reforms in 1966 and 1978.

[88] ibid 448-449.

[89] ibid 452, about corporations, and 452 fn 39, about LLCs. This specific feature of the LLC operating agreement is not deemed relevant by R.M. Kohler, 'The New Limited Liability Company Law of France' 24(2) *Business Lawyer*, 435, 437 (1969), who simply refers to the possible dissolution of a SARL (French LLC) having an existence in excess of a human life.

agreement, the need to protect members from a perpetual or longest duration of the company therefore arises. However, the right to ask for the company's dissolution is totally different from a withdrawal right, which is usually provided to members in other jurisdictions under similar circumstances. Therefore, the tool that was once common in the French legislature to protect this interest is peculiar.

A final comment about French regulation is important for our comparison. As mentioned above, following some recent Italian cases, a member is not entitled to withdraw if the company's duration is established until 2100.[90] In light of the similarities between Italian and French systems, it is worth examining whether this case law is somehow connected to the French rule, being this rule hypothetically taken into account when considering such a duration as not implying member withdrawal rights. Although it is sometimes difficult to discover comparative influences in domestic disputes,[91] this does not seem to be the case. This is not only because terms were in those cases fixed to end in 2100, but they were actually longer than 99 years, given the date of incorporation of those companies. Furthermore, the most probable analytical basis for those cases will probably be found in the opinion (expressed by the same court) that upheld the possibility of giving a company a duration until 2100 when the possible length of the company term was a debatable issue.[92]

V. Conclusion

As we have discussed, the decision of the Italian Supreme Court 4716/2020 plays a crucial role in the debate about the absence of a member's withdrawal right when a long duration is established in the company's articles. However, the issue cannot be considered definitively resolved, at least until the same Supreme Court confirms this opinion through a peculiar kind of decision, adopted by the so-called *Sezioni unite*, which can provide substantial certainty regarding the solution. Before this happens, the issue must be considered controversial, and entrepreneurs and consultants must be aware of the risks arising from a long duration.

This is true not only with regard to the Italian scenario, but also for foreign investors potentially interested in an Italian company. The point of view of these investors must be taken into account not only in light of the obvious economic development needs of the Italian system, but also because of one of the specific goals that the company law reform of 2003 aimed to achieve. Improving the ability of Italian companies to compete with foreign companies was one of the

[90] See, in particular, Tribunale di Milano 28 June 2019 no 6360, n 13 above, 3; Tribunale di Milano 19 June 2019 no 5972 n 29 above, 13.

[91] As the comparative influence is not always clearly expressed: see G. Alpa, n 59 above, 18; A. Somma, n 57 above, 17.

[92] See 'L'omologazione degli atti societari negli orientamenti del Tribunale di Milano' *Notariato*, 386, 389 (2000).

main principles established by legge no 366/2001, which was the starting point for the aforementioned reform.[93]

This raises two questions. Is there a connection between Italian companies' competitiveness and the theory that enables a member to withdraw when a long-term duration is established? If the answer is yes, can such a theory be deemed to be in contrast (also) with this general goal of the company law reform?

We can provide an answer to the first question on the basis of the comparative view carried out here. Foreign jurisdictions tend to permit companies' perpetual duration without counterbalancing it with specific withdrawal rights. Moreover, perpetual duration is often taken as a given,[94] and even in jurisdictions where a limited duration was common some decades ago, the trend towards this indefinite existence of companies is clear.[95] The same is true where perpetual duration is forbidden but the maximum duration limit is close to a century.[96]

It is possible to claim that an investor coming from a country in which company duration is not linked to withdrawal rights will find it somewhat surprising that in Italy not only is such a right explicitly provided when the company has indefinite

[93] See Art 2, para 2, a), legge 3 October 2001 no 366. The relevance of this law (so-called *legge delega*) in providing insights for the interpretation of the company law reform is commonly highlighted (G.M.C. Rivolta, 'Autonomia privata e strumenti per l'esercizio delle imprese minori' *Rivista delle società*, 1274, 1281-1282 (2010); G. Zanarone, n 11 above, 8-9) and is consistent with the general principle regarding this issue (R. Guastini, 'L'interpretazione dei documenti normativi', in A. Cicu et al eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2004), LI, 173-176).

[94] See the cases of the United Kingdom (UK) and Spain.

In UK company law, perpetual life of companies is deemed an obvious feature (see, for instance, A. Dignam, *Hicks & Goo's Cases & Materials on Company Law* (Oxford: Oxford University Press, 7th ed, 2011), 598), and even if it is for sure possible to fix a limited duration, this is unlikely (P.L. Davies et al, *Gower's Principles of Modern Company Law* (London: Thomson Reuters, 10th ed, 2016), 1157; A.J. Boyle et al, *Boyle & Birds' Company Law* (Bristol: Jordan & Sons, 2nd ed, 1987), 781). There are no member withdrawal cases related to company duration. Companies' perpetual existence has a long history: see L.W. Hein, n 61 above, 139, noting that the concept of perpetual existence is older than the concept of separate existence, and 140, dating at 1844 the opportunity for companies to be given perpetual duration through the process of registration.

Spanish regulations on this issue are substantially similar to those in the UK, and totally different from those in force in the other civil law systems analyzed. Spanish companies normally have perpetual duration (this happens in the vast majority of companies: E. Valpuesta Gastaminza, *Comentarios a la ley de sociedades de capital* (Madrid: Wolters Kluwer, 2018), 125), unless otherwise provided by company articles; there are no withdrawal cases related to company duration (see *Texto refundido ley sociedades de capital*, Art 25 – about perpetual duration, and Art 346 – about the absence of withdrawal rights connected to duration). The same approach was adopted in the former regulations (see *Ley de sociedades de capital* (1995), Art 14 – perpetual duration, and Art 95 – absence of withdrawal rights connected to duration). It is actually difficult in these cases to find any reference to perpetual duration, as it is probably considered an obvious feature of a company. This can make even more difficult for investors from these countries to understand the peculiar Italian law developments.

[95] See the case of the US, in particular for LLCs, but with the abovementioned peculiarities (above, para IV, 1).

[96] See the case of France (above, para IV, 2).

duration,[97] but sometimes also when the term is very long, even if this is debatable. Further, it is possible to consider this 'surprise' not only disappointing, but also apt, from a long-term perspective, for lowering foreign investors' trust in Italian regulation, and thus Italian companies' competitiveness.

There may of course be many other obstacles to such competitiveness arising from other Italian rules. However, focusing only on this issue, allowing the withdrawal right, except in cases explicitly established by law, may be dangerous to the company itself and to its members and, in general terms, could discourage potential members from investing in the company.

Accordingly, if providing a member with withdrawal rights when the company's duration is long can harm the reputation of Italian companies abroad and affect their ability to compete with foreign companies, it is also possible to answer the second question in the affirmative. Of course there are many more reasons to reject the opinion permitting a member's withdrawal right when the company has a long duration. However, once the existence of a possible contrast between such an opinion and the general principle discussed here is established, there is even more of a justification; it consists precisely in the need for clarity and certainty, which is crucial in business and company law, and the lack of which can play an important role in diminishing foreign investors' interest in Italian companies.

The wisdom of the idea of linking perpetual duration and withdrawal rights could probably be debated. The absence of such a link in other jurisdictions seems to be meaningful. However, the explicit choice of Italian legislature in this direction does not harm certainty. On the contrary, this crucial interest is threatened when the existence of a different rule is upheld despite the clarity of such a choice.

In conclusion, the comparative perspective provides further reasons to reject the existence of member withdrawal rights from long-lasting companies – both corporations and LLCs. A further development of case law on the issue – hopefully confirming this rejection – could be extremely useful for Italian companies and their advisors, as well as to foreign ones.

[97] Although the link between perpetual duration and withdrawal rights is sometimes emphasized abroad also, this was in the past and cannot be considered common knowledge among entrepreneurs and consultants: see the abovementioned case of Florida regulations (above, para IV, 1) and associated discussions in A.G. Donn, n 75 above, 15.

It is important to emphasize that such a link seems highlighted only in this case, despite the number of regulations potentially including it. Further, the US model and national regulations both tend to permit perpetual duration nowadays, without providing members with specific withdrawal or dissociation rights.

Malebolge

Commons and Patent Law at a Crossroad

Manolita Francesca*

Abstract

The commons and the nature of the interests inspiring a – more or less organized – community of people provide the conceptual background to make sense of the concept of 'appropriation', in line with the principle of subsidiarity. The goal is to open up to a variety of interests that motivate the individual members of the multitude to participate, next to (or even substituting) the public authorities, in new models of welfare projects, among which healthcare is crucial.

I. Introduction

The *commons* and the nature of the interests inspiring a – more or less organized – community of people provide the conceptual background to make sense of the concept of 'appropriation', in line with the principle of subsidiarity. Here, according to the classics, appropriation is understood as 'the transfer of goods from one person to another (...) to allow those most in need to benefit from them'.[1] It is a multiplier of value/utility, a distributive tool, grounded not only on mere exchange – eg, a contract of sale – but involving association contracts too. The goal is to demonstrate that predictive rationality, inherent to the classical notion of appropriation, often fails to meet past and present needs that arise in the realm of welfare.[2]

II. Commons. Discrete Rationality vs Dialectic Rationality

Rivalry vs Sharing is the dichotomy on which, in recent years, commentators have theorized the existence of a third type of assets: the *commons*.[3] The point

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[1] F. Carnelutti, *Teoria giuridica della circolazione* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1981), 1.

[2] M. Francesca, 'Beni comuni e razionalita` discreta del diritto', in G. Perlinglieri and A. Fachechi eds, *Ragionevolezza e proporzionalita`* (Napoli: Edizioni Scientifiche Italiane, 2017), 473.

[3] G. Hardin, 'The Tragedy of the Commons' 162 *Science*, 1263 (1968); M.A. Hedler, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' 111 *Harvard Law Review*, 622 (1998); E. Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990). See also P. Grossi, *Un altro modo di possedere. L'emersione di forme alternative di proprietà alla coscienza giuridica*

of arrival of such framing – due also to the exponential growth of a notable line of scholarship difficult to summarise in few words[4] – remains uncertain, although it has led to a subtle construction and deconstruction of the contents of its natural antagonist, ie property rights, subject to appropriation and typically read through the lenses of 'rivalry'.[5] Most scholars have relied on the distinction between public assets and privatised public assets,[6] thus fostering a renewed role for the social function of ownership embedded in the Italian Constitution.[7]

However, that of 'commons' is a liquid concept, constantly in progress, which can hardly be reduced to a single regulatory formula. What one can certainly rely on is its non-conflictual nature, ie the absence of rivalry. From this angle, commons are the non-negotiable bottom line of legal civilisation,[8] suitable for justifying instances of 'civic expropriation',[9] as well as promoting a new type of 'functionalized state-ownership',[10] alongside with a revitalisation of the social function inherent in private ownership as opposed to purely proprietary egotism.[11]

Knowledge, natural sites, cultural heritage, environmental resources, and a wide variety of other goods fall within this category. However, the increase in wellbeing, produced by the widespread availability of such resources, highlights the need to revisit the traditional tenets on which 'appropriation' is rooted.[12]

postunitaria (Milano: Giuffrè, 1977).

[4] V. Cerulli Irelli and L. De Lucia, 'Beni comuni e diritti collettivi' *Politica del diritto*, 6 (2014); L. Rampa and Q. Camerlengo, 'I beni comuni tra diritto ed economia: davvero un tertium genus?' *Politica del diritto*, 253 (2014).

[5] See M. Musella, 'Produzione e valore non patrimoniale: beni ambientali e culturali. Brevi riflessioni di un economista', in *Benessere e regole dei rapporti civili. Lo sviluppo oltre la crisi – Atti del 9° Convegno Nazionale SISDiC* (Napoli: Edizioni Scientifiche Italiane, 2015), 23; F. Viola, 'Beni comuni e bene comune' *Diritto e società*, 381, 387 (2016).

[6] G. Napolitano, 'I beni pubblici e le «tragedie dell'interesse comune' *Annuario. Analisi economica e diritto amministrativo (2006). Atti del Convegno annuale (Venezia, 28-29 settembre 2006)* (Milano: Giuffrè, 2007), 125; A. Algostino, 'Riflessioni sui beni comuni tra il «pubblico» e la Costituzione (25 novembre 2013)', available at https://tinyurl.com/yj34paky (last visited 31 December 2021). On the dichotomy see also M.R. Marella, 'Il diritto dei beni comuni. Un invito alla discussione' *Rivista critica di diritto privato*, 103 (2011); L. D'Andrea, 'I beni comuni nella prospettiva costituzionale: note introduttive' *Rivista AIC* (2015); Q. Camerlengo, 'La controversa nozione di bene comune' *Diritto e società*, 558 (2016).

[7] U. Mattei, 'Una primavera di movimento per la «funzione sociale della proprietà»' *Rivista critica di diritto privato*, 531 (2013); M.R. Marella, ibid 551, 568 (2013); G. Carapezza Figlia, 'Concetto di beni comuni' *Rassegna di diritto civile*, 1068 (2011). In general terms, P. Perlingieri, 'Proprietà, impresa e funzione sociale' *Rivista di diritto dell'impresa*, 208 (1989); P. Grossi, 'I beni: itinerari tra 'moderno' e 'post–moderno'' *Rivista trimestrale di diritto e procedura civile*, 1059, 1064 (2012).

[8] L. Nivarra, 'La funzione sociale della proprietà: dalla strategia alla tattica' *Rivista critica di diritto privato*, 503 (2013).

[9] U. Mattei, n 7 above, 531.

[10] L. Nivarra, n 8 above, 526.

[11] U. Mattei, n 7 above, 531.

[12] Corte di Cassazione-Sezioni unite 14 February 2011 no 3665, *Politica del* diritto, 2 (2011), with note of S. Lieto, 'Beni comuni, diritti fondamentali e Stato sociale. La Corte di cassazione oltre la prospettiva della proprietà codicistica'; M.R. Marella, O*ltre il pubblico e il privato. Per*

Commons, described in this manner, may be everything and the opposite of everything: governed by rationality and, at the same time, contradicted by the very same rationality.

Ostrom demonstrates, through the prisoner's dilemma, that the exclusionary structure of a relationship between two parties for the realisation of a competing interest often constitutes an inefficient, non-rational model of conflict-management.[13] The same model is, on the other hand, used to explain Hardin's theory on the tragedy of the commons:[14] the innate selfish inclination of individuals shows all its destructive capacity precisely in the forms of collective management. From this point of view, the interest in property constitutes the predominant factor on which rational decision-making is based.

The feeling is that current speculations around the commons are only the argumentative basis of a deeper juxtaposition between two competing concepts of rationality: a conformative-dialectic rationality *versus* the one based on discrete states.[15] Which, on turns, ends up mirroring the interplay between predictive rationality – which shapes the function of any norm[16] – and behavioural rules.[17]

Suffice it to think about knowledge, and about its qualification as an intangible asset, to unveil the outlines of an infra-systemic clash.

III. *Commons* and Scientific Discoveries: A Difficult Coexistence

The case of *Myriad Genetics*, a genetic research company that discovered

un diritto dei beni comuni (Verona: Ombre Corte, 2012); M. Barcellona, 'A proposito dei beni comuni: tra diritto, politica e crisi della democrazia' *Europa e diritto privato*, 617 (2013); F. Marinelli, *Diritto privato dell'economia* (Torino: Giappichelli, 2016), 99; S. Patti, 'La funzione sociale nella 'civilistica italiana' dell'ultimo secolo', available at https://tinyurl.com/yep3mpz7 (last visited 31 December 2021); A. Di Porto, 'Per uno statuto della proprietà dei beni destinati all'uso pubblico' *Diritto e società*, 551 (2016). See also G. Calabresi, 'Introduzione', in *Benessere* n 5 above, 7, 9. See also S. Rodotà, 'Note critiche in tema di proprietà' *Rivista trimestrale di diritto e procedura civile*, 1252, 1312 (1960).

[13] E. Ostrom, n 3 above, 16.

[14] G. Hardin, 'Collective Action as an Agreable N-Prisoner's Dilemma' 16 *Behavioral Science,* 472, 481 (1971); L. Rampa and Q. Camerlengo, n 4 above, 253; S. Nespor, 'Tragedie e commedie nel nuovo mondo dei beni comuni' *Rivista giuridica dell'ambiente*, 665 (2013); G. Resta, 'La conoscenza come bene comune', available at https://tinyurl.com/yeqa8gdr (last visited 31 December 2021).

[15] A.M. Turing, 'Computing machinery and intelligence' 59 *Mind*, 433-460 (1950).

[16] ibid; P. Femia, 'Pluralismo delle fonti e costituzionalizzazione della sfera privata' *Il diritto civile oggi. Compiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 189,193.

[17] N. Irti, 'Capitalismo e calcolabilità giuridica (letture e riflessioni)' *Rivista delle società*, 801 (2015); A. Zoppini, 'Le domande che ci propone l'economia comportamentale ovvero il crepuscolo del «buon padre di famiglia»', in G. Rojas Elgueta and N. Vardi eds, *Oltre il soggetto razionale. Fallimenti cognitivi e razionalità limitata nel diritto privato* (Roma: Roma Tre Press, 2014), 11; A. Gentili, 'Il ruolo della razionalità cognitiva nelle invalidità negoziali', available at https://tinyurl.com/yj6tjols, 75 (last visited 31 December 2021).

the location and sequence of two genes whose mutation produces a high risk of breast and ovarian cancer, is now well known. The Company patented the discovery by developing a series of tests for quantifying the increased risk in patients. The matter came before the US Supreme Court, which overruled the lower court's decision and endorsed the patentability of the cDNA synthetically constructed.[18]

It was on 13 June 2013 when the Supreme Court modified its own position, stating that the laws of nature, natural phenomena and abstract ideas are not patentable as instruments of scientific and technological research ('A naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated').[19] The Supreme Court thus leaned towards discrete rationality, embodied by knowledge.

Knowledge is included among the commons as a constituent element based on participation. At the same time, it still represents the subject-matter on which the market appetites are concentrated. With respect to the *Myriad* judgment, clearly political in nature, one wonders if an overt advocacy of knowledge within the doctrine of commons[20] would have altered the outcome reached by US Supreme Court.

The issue of pharmaceutical patents is sadly evident today.[21] The world's population and the global economy, prisoners of COVID 19, are now prisoners of pharmaceutical patents on vaccines and their scarcity. The entire commons category and its theoretical underpinnings have not stopped the profit-maximisation process and have not impacted on the patentability of knowledge even in cases of mass diseases.

One should perhaps take a step back and point out that, in 1978, the Italian Constitutional Court[22] recognised the need to extend patent protection to scientific discoveries in medicine. The Court noted that it was not about «encouraging (or not preventing) 'price increases' of medicines as a consequence of the exclusive rights held by the patent holder, because the prices of pharmaceutical products are determined and adjusted on the basis of state laws and of regulations issued

[18] *Association for Molecular Pathology* v *United States Patent and Trademark Office*, 653 F.3d 1329 (Fed. Cir. 2011). See G. Resta, n 14 above.

[19] *Association for Molecular Pathology* v *Myriad Genetics*, 689 F. 3d 1303 (2013).

[20] M. Heller, 'Tragedy of the anticommons: property in the transition from Marx to market' 111 *Harvard Law Review*, 622 (1998); L. Nivarra, 'Anticommons and legal standards' *AIDA*, 260 (2013); A. Pradi, 'I beni comuni digitali nell'era della proprietà intellettuale', in A. Pradi and A. Rossato eds, *I beni comuni digitali* (Napoli: Edizioni Scientifiche Italiane, 2014), 7; see also W.I.U. Lenin, *L'imperialismo come fase suprema del capitalismo* (Reggio Calabria: Lotta Comunista, 2001); G. Colangelo, *Mercato e cooperazione tecnologica. I contratti di patent pooling* (Milano: Giuffrè, 2008).

[21] M. Francesca, ' "Uno studio in rosso". Sicurezza, sistemi e alterità artificiali' *Actualidad Jurídica Iberoamericana*, 54 (2021).

[22] Corte costituzionale 20 March 1978 no 20, available at C*onsulta online*; C. Casonato, 'I farmaci, fra speculazioni e logiche costituzionali' *Rivista AIC online*; R. Pardolesi, 'Sul divieto di brevettazione di farmaci' *Il Foro Italiano*, 809 (1978).

by the Inter-ministerial Committee on Prices (Art 33 decreto legge 26 October 1970 no 745). Besides, the experience of the other Countries, where the patents on pharmaceutical products (or at least on the manufacturing process) are permitted, shows that it is not possible to establish a causal link between patentability and price levels, since the market for pharmaceuticals is largely corrected by regulation, which must take into account not only the cost of raw materials, labour and packaging, but also the distribution of the drug, the incidence of research, as well as other factors».

The legislation on patents then in force consisted of decreto regio 29 June 1939 no 1127 (which allowed the implementation and enforcement of an exclusive right to such an extent as it did not endanger the needs of the country) and of Art 54 of the same law as amended by Art 1 of decreto presidenziale 26 February 1968 no 849.

Both provisions have been repealed by decreto legislativo 10 February 2005 no 30. However, it is worth recalling that the previously mentioned Art 54, in case of gross disproportion between the patent-holder's exclusive rights and the needs of the Nation, recognised the right to a 'compulsory licence for the non-exclusive use of the patent, in favour of any interested party upon request'. The system was hence capable of counteracting the scarcity of the product induced by the patent-holder's right.

This is where we come from. The system today is no longer capable of self-adjustments. Albeit grounded on the needs of a single nation-state, the adjustments allowed under the old rules had at their core an aggregate rationality, suitable for balancing competing interests and explaining the transformative function of regulation.[23]

In the current microcosm, driven by purely market factors, the typical twenty-year patent for pharmaceutical products is no longer renewable for as many years, but only up until five years. The time is considered necessary overall for the recovery of research and development costs, from the filing of the patent application to the actual marketing of the product. In short, the mechanism is designed to ensure that the costs for scientific research and development on the product, up until its marketing, are effectively covered.

It is clear that we are in a very peculiar market, so much so that the EU Court of Justice has established a new principle, that of competition on the merits,[24] which has had a therapeutic effect on a market heavily influenced by

[23] ibid.

The question of compulsory licences provided for in Art 31 of the TRIPs Agreement adopted in Marrakech on 15 April 1994, concerning trade-related aspects of intellectual property rights, ratified by Italy with legge 29 December 1994 no 747, are substantially limited to some countries in particularly poor conditions, as also established in the objectives of the Declaration on the trips agreement and public health, Doha, 9-14 November 2001.

[24] Case C-457/10 *P AstraZeneca AB e AstraZeneca plc* v *European Commission*, Judgement of 6 December 2012 available at www.eurlex.europa.eu. See also Autorità garante della

dominant positions. In short, the Court recognises the state of the art, especially in the pharmaceutical market, and seeks to find a solution to the problem by considering that those claims which are misleading or lacking in transparency give rise to an abuse of a dominant position, discouraging 'competition on the merits'. In particular, the Court functionalises the so-called competition on the merits to the interests of consumers, even when the product is protected by patents and the company's market position is a dominant one. The Court's message is clear: it seeks to strike a balance between the single market player's legitimate expectations and the benefit that can be derived by the end users.[25]

IV. Insufficiency of the Proprietary Paradigm *Vis-à-Vis* the Emergence of Social Interests

History and recent court decisions show that everything can be apprehended and that everything is measurable in economic terms. The problem is just about choosing the right measure.[26] Yet, at the very moment when the commons are defined on the basis of their conceptual distance from other goods, they are indirectly qualified as 'goods', subject to be apprehended just like any goods (whether public or private). Such a definition 'by distance' does not differentiate the commons from all other apprehensible goods and, in short, does not accurately reflect the underlying interests.[27]

So, it is perhaps worth forcing the border fence that figuratively surrounds the attempts to qualify the commons.

The proposal by the Rodotà Commission ('for the amendment of the Civil Code on public assets' – 14 June 2007) included the commons among the assets whose ownership does not exclude others from drawing utility therefrom and makes them functional to the exercise of human rights, also with a view to a more efficient reorganisation of public assets. New goods, notably intangible and financial assets, are now included among commons.

The feeling is that in this field a continuous mimicking of the traditional model is occurring, either by addition or by subtraction.

Undoubtedly, the category of commons risks being too limited in what it covers or too broad, in the latter case ending up absorbing or even replacing

Concorrenza e del Mercato, 11 January 2012, no 23194, A431, Ratiopharm/Pfizer, available at www.agcm.it; *contra* Tar Lazio 3 September 2012 no 7467, confirmed by Consiglio di Stato 12 February 2014 no 693, available at www.dejure.it qualifying the matter in terms of abuse of right. In general, see C. Osti, 'What's in a Name: The Concept of Abuse in Sui Generis Abuses', in G. Pitruzzella et al eds, *Competition Law and Intellectual Property. A European Perspective* (Alphen aan den Rijn, Kluwer Law International, 2016) 235.

[25] Case C-457/10 n 24 above.

[26] C. Mignone, *Identità della persona e potere di disposizione* (Napoli: Edizioni Scientifiche Italiane, 2014), 227, 233.

[27] See L. D'Andrea, n 6 above, 13.

individual statutes or disciplines. However, it is equally clear that the new benchmark is now by and large represented by sustainability, aimed at improving the quality of life and fostering a new concept of wellbeing, as such no longer depending on purely economic factors.[28]

It is obvious that not every discovery causes the same bewilderment which arose from the *Myriad Genetics*' DNA patent or more recently with respect to the COVID-19 vaccines; of course, this would not be the case with the research carried out by Nobel Prize laureate Elinor Ostrom, or with the discovery of a new fibre that allows fabric to change colour at will. In short, the goals and interests underlying a discovery/invention will certainly influence the decision on the granting of a right to exclusive appropriation. Such a link may be better understood by adopting a systematic approach.

V. Multitude, Pharmaceutical Patents, and Patterns for Action

The appropriative models, confirmed and valorised by the industrial revolution, are showing their limits in the face of the new demands grounded on relationality[29] as fundamental aspects of social wellbeing.

It is no coincidence, then, that the word 'multitude'[30] is almost a fitting match in the link between the commons and the realization of social interests, to which these goods would be ontologically projected. Outside the perspective of the class struggle against the domination of the individual's subjectivity, the 'multitude' can now be appreciated along the lines of experience-sharing, comprising the whole range of individual interests jointly headed towards the common good.[31] All this is to be contrasted against to the 'multitude' – created *in vitro* – of 'consumers' and 'professionals' who trade for the realization of their own interests.

In short, it is a new phase in the evolutionary process of the constitutional system, not solely entrusted to the public sphere,[32] but fuelled also by private actors, whose growing role in the provision of socially beneficial goods and services has earned them political momentum, as creators of wellbeing.

Ostrom herself takes into account different organizational models with respect to the governance of assets capable of producing plural benefits: from contract

[28] P. Perlingieri n 7 above, 218.

[29] A. Barbera, 'Art 2', in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli, 1975), 71.

[30] M. Barcellona n 12 above, 629.

[31] E. Rossi, 'Le finalità e gli strumenti della democrazia partecipativa nell'ordinamento giuridico italiano' *Diritto e società*, 493 (2016); R. Di Maria and F. Romeo, 'I beni confiscati alla criminalità come "beni comuni": brevi considerazioni tra diritto pubblico e privato', ibid, 589; P. Femia, 'Il civile senso dell'autonomia' *The Cardozo Electronic Law Bulletin*, 4 (2019).

[32] P. Perlingieri, 'La sussidiarietà nel diritto privato' *Rassegna di diritto civile*, 687 (2016).

to associationism,[33] the point of convergence is social welfare. Within this context, the subsidiary role played by private actors is revitalised, by promoting an osmotic relationship between social and individual interests. Individual interests, albeit grounded on profit-seeking, have the merit of objectivising an interest – thus making it evident on the normative and social dimensions – which may variously affect the public sphere (eg, hindering the transmission of knowledge, the protection of life or of other goods of cultural, historical or communitarian importance). Regulation of private relationships has, hence, a political value; moreover, it allows an adaptation of the existing regulations to the needs of collective wellbeing (those under construction in the new control-rooms).

There appear to be two viable solutions, each grounded on a peculiar conception of multitude.

The first one situates the multitude in the contractual arena, with the important specification that contract rules can no longer be considered stranger to market regulation, especially but not solely for the purposes of assessing abusive, anti-competitive practices.[34] To this aim, individual consumers and even consumer associations, as established by Art 140-*bis* of the Consumer Code on class action, are now provided with a direct cause of action. Probably the most difficult task today is to overcome the shortcomings of current consumer law,[35] within which the private right of action on issues concerning pharmaceutical products is constrained by the product liability regime.

However, with a view to providing the primary good with adequate protection, it is useful to recall that remedies ought to be derived from the system as a whole.[36] The root of conflict should be reconceptualised: the clash is now between defective pricing (due to a gross disproportion between the production costs and the right to protection of life)[37] and the need to counter mass diseases effectively (which may eventually have an impact on the duration of the patent).[38] This is similar to what occurred in South Africa in a court case concerning access to antiretrovirals, necessary for the treatment of AIDS.[39]

According to the second solution, instead, the multitude should acquire

[33] E. Ostrom, n 3 above, 79.

[34] Autorità Garante della Concorrenza e del Mercato, 27 February 2014, *La Roche* and *Novaritis*, available at www.agcm.it.

[35] A. Quarta, 'Il diritto privato nell'era della *sharing economy*', in M. Francesca and C. Mignone eds, *Finanza di impatto sociale. Strumenti, interessi, scenari attuativi* (Napoli: Edizioni Scientifiche Italiane, 2020), 239.

[36] P. Perlingieri, 'I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici', in Id ed, *La persona e i suoi diritti - problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1972), 73; G. Perlingieri, '«Sostenibilità», ordinamento giuridico e «retorica dei diritti». A margine di un recente libro' *Foro napoletano*, 101 (2020).

[37] R. De Giorgi, 'Niklas Luhmann e i paradossi del diritto', in R. De Giorgi ed, *Temi di filosofia del diritto* (Lecce: Pensa Multimedia, 2015)161.

[38] G. Teubner, 'La matrice anonima. Quando "privati" attori transnazionali víolano i diritti dell'uomo' *Rivista critica di diritto privato*, 9 (2006).

[39] M. Francesca, n 21 above.

enough financial leverage to ensure the production of indispensable goods for meeting basic needs, including of course the so-called life-saving medicines. The implementation of such a measure takes time, of course. But it is important first, and once for all, to overcome the idea that the pursuit of non-lucrative aims is the sole justification for the provision of welfare services by private (non-state) undertakings/subjects.

The second fundamental theorem of welfare economics is grounded on the distinction between the concepts of equity and efficiency (which were jointly accounted for in the recent reform of third sector law in Italy and, more generally, in the policies favouring direct investments by public authorities).[40] Equity (described by economists as 'a better division of the pie') has often shown its weaknesses, and the corrective measures promoting a return to efficiency have failed as well. The transition, at this point, should be forced to follow the path of efficiency, that is, by widening the 'welfare pie'.

Notably, given the indisputable demand for public services, it is perhaps necessary to consider the possible rearticulation of supply: an uneven demand may be met by an equally uneven supply. It is clear, however, that the new mapping of supply requires taking a more attentive look at the solidarity principle, also in the traditional 'second sector', typically driven by efficiency and profit-seeking.

In short, it is not a question of excluding the lucrative nature of the activity, but quite the opposite.

As early as the 19th century, Arsène Dupuit, an engineer of the Administration of the *Ponts et chaussées*, studying the suitability of public works, concluded that only public services could be free of charge, as they were financed through taxation.[41] The central role of taxation has been reaffirmed, more recently, in the regulation (through tax-cuts) of 'third sector' service-providers.

Instead, to understand the new starting point illustrated in these pages, it is sufficient to observe that private undertakings operating in the third sector of the economy may as well be motivated by egotistical levers that are decidedly different from empathy.[42] This is what we learned in the past few months with vaccines: knowledge, which was finally patented, required high intellectual and experimental costs.

So now the question is: how do we ensure stability in the supply of solidarity, without ethical biases? The profit motive, the main selfish lever, can,

[40] F. Reganati, 'Efficienza allocativa e politiche di incentivazione', in *I rapporti civilistici nell'interpretazione della Corte costituzionale. Iniziativa e impresa* (Napoli: Edizioni Scientifiche Italiane, 2007), 317.

[41] C. Pace, 'Stato, mercato ed esternalizzazione dei servizi pubblici' *Quaderni dei Convegni delle Settimane culturali di Sperlonga* (Roma: Arbor Sapientiae, 2001), 53.

[42] M. Francesca, 'La rilevanza dei fatti di sentimento nel diritto privato: associazionismo, terzo settore e tutela dei diritti sociali', in R. Di Raimo et al eds, *Percorsi di diritto civile. Studi 2009/2011* (Napoli: Edizioni Scientifiche Italiane, 2012), 41.

like others, be the subjective and objective driving force for the stabilization of socially useful activities, capable of broadening and diversifying supply (which, until now, has not always been consistent with the variety of demand and, most of all, with societal needs).[43]

Indeed, it is a matter of applying the facts to the theories, rather than the theories to the facts, accepting the variety of interests that motivate the individual members of the multitude to participate, next to (or even substituting) the public authorities, in new models of welfare projects,[44] among which healthcare is crucial.[45]

Government bonds (Bot, BTP, Cct and Ctz) have always been part of this overarching logic: that of incentivising investors to devote part of their savings in supporting public spending, in exchange for a secure (financial) return.

On the whole, the individual interest remains in the background as opposed the paramount interest to sound public spending. In the microeconomics of the systems of production of socially relevant goods, the contracts of partnership – whether 'co-operation covenants' or 'Social impact bonds' – can be placed on an equal footing. 'Social impact bonds', in particular, are financial instruments aimed at the creation of collective wealth, which, like traditional government bonds, use the egotistical capital leverage of some non-institutional investors who bet on the achievement of a socially relevant result, usually taken on by a third sector entity.

Where the target company, financed through a Social impact bond, is a public-private partnership, it is important that the financial instrument does not end up influencing the management model. In other terms, the company pursuing a socially relevant goal should not be forced to optimise its performance on the sole basis of market-driven parameters.[46] This would exclude the possibility of witnessing a new *Myriad Genetics* case and allow us to get prepared to deal with possible new pandemics with a more solid control of the means of defence, by of course remunerating the producers of knowledge but at the same time retaining the possibility that a not-for-profit entity takes the lead of a joint action in the common interest through the results of scientific

[43] M. Musella, 'Finanza sociale e sviluppo dell'economia civile. Una introduzione', in M. Francesca and C. Mignone eds, n 35 above, XIII; N. Riccardi, 'Sviluppo economico e ricadute sociali', ibid, XVII.

[44] L.R. Perfetti, 'I diritti sociali. Sui diritti fondamentali come esercizio della sovranita` popolare nel rapporto con l'autorita`' *Diritto pubblico*, 101, 113, 119 (2013); Id, 'L'attitudine della giraffa. Per una teoria dei diritti sociali come esercizio della sovranita`, nella stagione della crisi del welfare pubblico', in M. Francesca and C. Mignone eds n 35 above, 61.

[45] C. Mignone, 'Finanza alternativa e innovazione sociale: prolegomeni ad una teoria dell'«impact investing»', in *Benessere* n 5 above, 343; Id, 'Investimento a impatto sociale: etica, tecnica e rischio finanziario' *Rassegna di diritto civile*, 924 (2016).

[46] C. Mignone, 'Meritevolezza dell'iniziativa, monetizzazione del benessere e nuovi modelli di welfare sussidiario' *Rassegna di diritto civile*, 133 (2017); N. McHugh et al, 'Social impact bond: un lupo travestito da agnello?', available at *rivistaimpresasociale.it*, 3 (2014).

research.

In an era of budgetary constraints, suffice it to remember, as Manzoni observed, that even Donna Prassede, so devoted to the cause of solidarity, in truth had an innate need to satisfy herself by exercising social control. And within the multitude it is not unlikely to find one (or more) Donna Prassede.

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Inter-Legality: On Interconnections and 'External' Sources

Gianluigi Palombella*

Abstract

The development of legal governance interweaves a number of layers of legalities mutually exclusive and reluctant to partake in a global overarching and harmonising architecture. An array of legal 'software', self contained legal regimes pierce the veil of State systems. This article explains, also through a number of judicial cases at the Italian, European and International Courts, what a theory of inter-legality can contribute to the understanding of and how it can cope with inter-systemic issues and the overlapping of self-related normativities. It looks at the uneasiness of State legal orders *vis à vis* external sources and draws the lines of inter-legality as a method in adjudication and legislation, eventually turning to the inter-legal character of human rights.

I. Setting the Scene: Coping with Legal 'Software'

In introducing the issue of 'global law' Neil Walker observed that using such an expression is 'not only rhetorical and structural' since it conveys a deeper epistemic import: after all, 'global law (…) indicates a new mood. It registers as a state of contestable becoming rather than corrigible achievement'.[1]

Taken from there, the perspective of global law hints at transformations that might have well changed our attitude toward legality and its limits. The features that legality shows bear a variety of typologies, or *formats*: the State-centered law, as much as the transnational regulatory law, the *jus-gentium* type (evoked today through trans-states general principles, jus cogens norms, common legal traditions, common codes of legality, and so forth), as well as a neo-medieval overlapping of laws, orders, regimes all endowed with simultaneous validity. Those formats of law[2] are born in different histories, and yet they seem to resurface simultaneously, all and at the same time, in our legal universe. Of course, none of them features in its pure original setting and none would bring, of itself, the key vault. To think of a return of medievalism would be rather inapposite, mistaken, if not naïve; and the persisting and effective law of the State would

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[1] N. Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2014), 26, 27.

[2] G. Palombella, 'Formats of Law and their interweaving', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019), 23-41.

play its role in proving such a mistake. Nonetheless, the dense regulatory and community layers in extra-state law, the flourishing of the threads of norms and jurisgenerative entities beyond the State – years ago named 'Global Administrative Law'[3] – are part of the reason why even State law would hardly be the icon of the present legal world. And we should agree that to evoke some 'global law' seems to question 'many of our state-centric or otherwise jurisdiction-centric premises about law as a settled form and about the grounds of its authority and legitimacy'.[4]

Questions concerning transnational rule of law and justice, the plurality of regulatory regimes, the segmentation of international law, communication among legal orders were barely known[5] and not reflected upon in the lessons of the most illuminating and influential legal theorists of the last century, like Kelsen, or Hart. The concept of law was (and still is) essentially connected with the 'hardware' notion of 'a system'. Truly, as the argument went,

> 'the compulsory nature of the rules in force, whatever their remote origin may be, appears henceforth as the effect of th(at) centralizing will (…) a true and proper subject (…) the State'.[6]

It follows that juridical relations however created by individuals' transactions or groups' agreements are still dependent of the State's will, one granting for itself that 'exclusiveness rendered necessary in order to assure the unity of the system'.[7]

The idea of such a structured and stable 'system'[8] often hinges also upon a genetic configuration of law, endowed with its own grammar, language, and 'anatomic' morphology.

To put it differently, law has been mainly conceived of as endowed with its hardware, one that ensures its basic existence, pointing to predefined typology of rules, their formal hierarchical bonds, and the like. Of course, the hardware is a legal but 'given' structure and the primary facility: yet it is simply silent and empty, without its enabling software. The latter allows us making sense of the thing, transforming some structural potential into a working machinery. Law

[3] The seminal works being B. Kingsbury et al, 'The Emergence of Global Administrative Law' 68 *Law and Contemporary Problems*, 15-62 (2005); S. Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' 37 *New York University Journal of International Law and Politics*, 663-694 (2005).

[4] N. Walker, n 1 above, 26.

[5] A similar point is made by W. Twining, 'Schauer on Hart' 119 *Harvard Law Review Forum*, 129, 122-130 (2006): 'Contemporary legal theory needs to tackle issues related to legal traditions, non-state law, pluralism, multiculturalism, human rights, transnational justice, diffusion of law, problems of comparison and generalization, and our collective ignorance about other traditions and cultures. Until recently, hardly any of these topics were dreamt of in Hart's legal philosophy or those of most of his followers'.

[6] G. del Vecchio, 'On the Statuality of Law' 19 *Journal of Comparative Legislation and International Law*, 8, 1-20 (1937).

[7] ibid 9.

[8] Classic theoretical work on this issue J. Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 2nd ed, 1980, reprinted 2003).

resembles, as well, the idea of such a software,[9] generated by real world practice, and developed in conjunction with a typology of hard system through principles and rules, regulations, legislation, custom, contracts, treaties, judicial decisions and the like.

When we face the multiple normative entities inhabiting the global sphere, we are bewildered with such a legal software, that – unfortunately – thrives on lacking pre-given, all-harmonising devices and missing a corresponding system-facility of reference. Despite being often produced by institutionalised authorities, it has broken into functional spheres our territorial law, now crossed by vertical supranational and horizontal transnational lines: as often noted, all that generates a 'pluralism[10] of self contained regimes',[11] aimed at controlling sets of specialised issues, despite the fact that their field/scopes[12] actually 'overlap' due to the interconnections and mutual interfering among their objects and subject-matters.[13]

When at issue is global law, meant as the dis-ordered array of jurisgeneration sourced from uncoordinated entities at sub-State, State, regional, international and supranational levels, we therefore realise that software is increasing, around the kernel of many distinctive rationalities, highly complex regulations, from commerce to environment, from the law of the sea to internet domains, from labour to telecommunications, energy to human rights, intellectual property to the law of war. Tellingly, at that level, the very divide between public and private law fades away.[14]

In coping with these coupled phenomena, 'system fading and regulatory proliferation', we are thus witnessing 'software' self-expansion at the expense of traditional 'hardware' (that is, system-related) premises.

This prompts legal reasoning to run after – and to focus upon – the former, at times also in the vain attempt to find the latter. Any positivist understanding of law in the XIX and XX centuries would have moved the other way round,

[9] Needless to say, I am not referring here to the so called soft-law (whatever it is taken to mean), but to law *sans phrase*.

[10] In the literature about pluralism and transnationalism, see D. Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream' 31 *New York University Review of Law and Social Change*, 641 (2007).

[11] Literature on 'self-contained regimes' developed adopting the expression coined in the 80s of last century within international relations studies: S.D. Krasner, 'Structural causes and regime consequences: regimes as intervening variables', in S. Krasner ed, *International Regimes* (New York: Cornell University Press, 1983), 1-21; B. Simma, 'Self-contained Regimes' 16 *Netherlands Yearbook of International Law*, 111-136 (1985). See also B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' 17 *The European Journal of International Law*, 483-529 (2006).

[12] It is this overlapping that was held to define *legal* pluralism, in the path breaking work of S.E. Merry, 'Legal Pluralism' 22 *Law and Society Review*, 869 (1988).

[13] This generates of course the well-known phenomena of regimes collision, uncertainty, forum shopping and enhanced judicial discretion.

[14] Early study and still relevant, J. Resnik, 'Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century' 11 *International Journal of Constitutional Law*, 162 (2013).

from the available hardware (system structure) in order to validate every permissible software (law & rules). But that would be fit to the traditional patterns of legality, based mainly on constitutional law in national polities. We are forced to make sense of the available software instead, sourced by 'external' and heterogenous entities, come to terms with it, and then try to conceive, maybe, of some imagined hardware.

It is worth noting that the metaphor can help understanding what a de-coupling of the terms in its pair entails. The layers of normativities bear different features: State law perpetuates the hardware/software pairing, its political and social embeddedness, building on formal coordination and hierarchic logics, so to reflect the unity of State's tasks as a general-ends entity.[15] Contrariwise, self-contained regimes, like the World Trade Organisation, or regulatory hybrid entities like the International Commission for Assigned Names and Numbers, are dis-embedded. In principle, their deracinated nature reflects the lack of the structured facility of a system of law(s), as we know it.

The pursuit of a compensatory,[16] overarching containment of such self-replicating *software* sourced by thousands of regulatory spheres points to draw threads of coherence:[17] it does so by building on some meta-constitutional device (the law of the laws,[18] the constitution of the constitutions, *et cetera*). Aspirational coherence, then, would be artificially created by simply writing down the codes of a further meta-software (the software of the software(s)), one that might avail of some 'kelsenian' organising form. However, it implies as well – and is 'allegedly' justified by – a number of 'substantive' underpinning assumptions working as the fundamental norm of a world legal system (like for example the primacy of environmental values in the world order).[19]

Needless to say, a further all-encompassing software can only replicate its

[15] As I have submitted elsewhere, a state is a 'general ends' entity, and accordingly it bears the responsibility for the entire comprehensive safety of the community (G. Palombella, 'Theory, Realities and Promises of Inter-legality: A Manifesto', in J. Klabbers and G. Palombella eds, n 2 above, 369. Supporting similar point: J. Raz, *Practical Reasons and Norms* (Oxford: OUP, 3rd ed, 1999), 150.

[16] A. Peters, 'Compensatory constitutionalism: The Function and Potential of Fundamental International Norms and Structures' 19 *Leiden Journal of International Law*, 579-610 (2006).

[17] For criticism about it, see R. Deplano, 'Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry' 6 *European Journal of Legal Studies*, 67-89 (2013).

[18] Full awareness of the array of complexity and variety in the present legality setting, K.C. Culver and M. Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford-New York: Oxford University Press, 2010), that is however considered to point to some 'law of the laws' by W. Waluchow, 'Legality's Frontier' 1 *Transnational Legal Theory*, 575-585 (2010).

[19] L. Ferrajoli, *Perché una costituzione della Terra?* (Torino: Giappichelli Editore, 2021). For the wider thread of world constitutionalisation, see the manifesto of the journal *Global Constitutionalism*, A. Wiener et al, 'Global constitutionalism: Human Rights, democracy and the rule of law' 1 *Global Constitutionalism*, 1 (2012). On an internationalist view, cf Ph. Allott, 'The Emerging of a Universal Legal System', in A. Nollkaemper and J.E. Nijman eds, *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007), 63.

dis-embedded and deracinated nature, let alone the ungranted status of its substantive premises. At the same time, each of the involved legalities (be they national, regional, international or 'global') would be (and have actually been) reluctant to some once-for-all forfeiture of their ultimate authority within their own functional/territorial sphere. For instance, 'resistance' by State high Courts to international norms or decisions has become a recurrent issue, in a large and increasing number of cases[20] in recent years.

On another hand, by advancing their rational regulation of different sectors of global issues, concerning, say, trade, environment, human rights, intellectual property, extra-state regimes' jurisgenerative outputs get presumptive primacy over local idiosyncratic interests. State polities are hardly capable of preventing entities like the International Standardisation Organisation from defining the requirements that must be complied with, and in truth the associative nature (consent-based) of many global regimes has become fictitious to the eyes of those who cannot afford to be left out.[21] In many ways regulations crosscut legal borders and in fact work as part of the 'law' to be applied inside a legal system, without the exit choice being an option. The overwhelming software affects the hardware, then, without being invited to do so.

II. The Problem of External Source

Phenomena of interference from external regulators are simply part of ordinary reality, where along with international law, European law, a bulk of supranational entities are endowed with a de jure or de facto authority, either resting on States' agreements or on private or hybrid (if not also self-authorised) sources. In general, compliance with 'external' rules is an ordinary request that

[20] Even inside the European Union, that is not just a problem due to 'illiberal' states (like Hungary and Poland: on which see G. Palombella, 'Illiberal, democratic, non arbitrary? Epicentre and circumstances of a rule of law crisis' 10 *Hague Journal on the Rule Law*, 5-19 (2018)). Reluctance and resistance have been voiced traditionally by the Federal Constitutional Court of Germany, since Maastricht and Lisbon, and up to the latest disruptive decision concerning the unconstitutionality of Quantitative Easing mechanism decided by the European Central Bank, and considered to be fully legitimate under European Law by the European Court of Justice: see Public Asset Purchasing Program (PSPP) judgment (Bundesverfassungsgericht 5 May 2020, available at https://tinyurl.com/ycxd7nsw (last visited 31 December 2021).

[21] It is to be noted that, increasingly, global governance avails of rationalization functions that are partially changing its previous landscape, making, for example, prominent the role of epistemic authorities (see M. Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford: Oxford University Press, 2018). Critically against this view, V. Pouliot, 'Global governance in the age of epistemic authority' 13 *International Theory*, 144-156 (2021). In some ways resistance looks rather unreasonable when an issue appears de-politicised: the chain of responsibility in decision-making vanishes when some scientific or similar evidence is taken to neutralize alternatives. On that cf G. Palombella, 'Two threats to the rule of law: Legal and Epistemic (between technocracy and populism)' 11 *Hague Journal on the Rule of Law*, 383-389 (2019).

might jeopardise rooted fundamental beliefs or interests of a country. In that very sense, external software, devoid of the mentioned 'democratic' legitimacy, might happen to turn dysfunctional *vis à vis* the addressed system (hardware), to which it does not belong. The dynamics of such tensive, or 'irritating' encounters resembles the one described in the 80s of last century by Jurgen Habermas with regard to the colonising dysfunctional regulatory intrusion of the welfare state into some basic areas of the community: the welfare state did work by over-writing social relations and social interactions by purposive programs, implementing constitutional commitments to equality, and prompting legal interventionism: by introducing into previously free domains of social life new conditions for legalised opportunities and entitlements,[22] and even by providing for new distributive rights, such a juridification re-writes the pre-existing contents of social interactions.[23] According to Habermas,[24] precisely in order to introduce new social protections' programs into spontaneous life world, law had to enter deeply in the detailed, daily, personal and social sphere once left free from legal control.

In his words, when law is functioning as a regulative *medium*, it purports to optimise 'system integration' through imperatives of administrative efficiency, performance driven protocols, which jeopardise life world values, in spheres like school law, social security, cultural reproduction, fields of moral sensitivity which extend to criminal law, constitutional law, bioethical concern, and so forth.

As Habermas wrote, the 'point is to protect areas of life that are functionally dependent on social integration through values, norms and consensus formation: and to protect them from falling prey to the system imperatives of economic and administrative subsystems that grow with dynamics of their own. And finally to defend them from becoming converted, through the steering medium of the law, to a principle of socialization which is for them dysfunctional'.[25] In other words, the risk of 'colonization' of the 'life world'.

It should not come as a surprise then, that the Federal Constitutional Court of Germany, some decades later – although on an altogether different setting – raised an argument whose logic is impressively the same. The Court reacted to the Lisbon Treaty of the European Union by arguing that some areas of social life are to be held immune from European 'juridification' and be kept under the State competence:

[22] To take an example, codification of industrial relations in labour law could both enhance opportunities and powers of the workers (eg as to labour unions, co-determinations, strike), and at the same time could be felt, as it was said by Kirchheimer since the 30s, as a de-politization of social classes relations, channelling them within disciplined operational processes (O. Kirchheimer, *Funktionen des Staates und der Verfassung* (Frankfurt am Mein: Suhrkamp, 1972), 79.

[23] J. Habermas, 'Law as Medium and Law as Institution', in G. Teubner ed, *Dilemmas of Law in the Welfare State* (Berlin: De Gruyter, 1986), 209-211. [Original in *Theorie des kommunicativen Handelns* (Frankfurt am Mein: Suhrkamp, 1981), bd II, 522-47.]

[24] ibid 203-220.

[25] ibid 220.

> 'The principle of democracy as well as the principle of subsidiarity, (…) require factually to restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner, particularly in central political areas of the space of personal development and the shaping of living conditions by social policy. In these areas, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required. Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)' (para 251-2).[26]

The German Court objected against *ultravires* acts and against the violation of state 'identity'. Moreover, in the mentioned areas, the stance taken was to make democracy prevail as a sovereign right of the German people.

To return to our metaphor, that is another and even clearer way to say that the basic, material structure of the State legal system, its hardware, are held to be protected from the rationalising, coordinative, and finally technocratic strength of extra-state sourced legal 'software'.

Of course, albeit controversial in the case of the European Union, it is a common place that current extra-states normativities and regulations lack democratic and substantive legitimacy. Although that kind of legitimacy is *not* essential to their function, especially with regard to global legal regimes, the issue might often become relevant when overlapping and conflicts emerge, and cases arise where the substantive outcomes are contested by the addressees or are met with 'resistance' by States or their highest courts.

III. What Inter-Legality Stands for?

Such problems are not a question of the European Union order only. They are just part of the evolving setting of law into its inter-legal character. When the case arises, the resolution of a global authority like the Security Council might well be at odds with the norms protecting individual human rights by the European Convention. A similar case would not be under the United Nations system more than it would be controlled by the European Court of Human Rights and the Convention's law. Likewise, when a State (Italy) was asked to

[26] Bundesverfassungsgericht 30 June 2009 (2 BvE 2/08, paras 1-421), available at https://tinyurl.com/2p8hpr47 (last visited 31 December 2021).

accept a decision of the International Court of Justice[27] stating the immunity of another State (Germany) in cases of war crimes, the inter-legal nature of the tussle emerged: the Italian Constitutional Court's answering decision[28] rejected its international obligation Art 94 UN Charter) in order to preserve supreme principles[29] protecting, in its constitutional order 'and' in the inter-states system, human rights and access to justice. The regulatory obligations sourced in World Trade Organization (WTO) rules, decades ago, preventing India – due to its obligation to comply with the pharmaceutical patent system – from providing cheap pharmaceutical remedies against HIV spreading, was clearly at odds with the constitutional right to health protection. The WTO rule was then dysfunctional to the substantive interest of Indian population and its constitutional commitments.[30] Even in the relations between the EU and WTO rules and between the latter and EU member States the strength and the effect (whether direct or otherwise) of WTO arrangements might be uncertain, contested, and somehow open to a variable assessment, where in context considerations might be more valuable than pre-fixed and rigid parameters. As has been noted, some

[27] International Court of Justice 3 February 2012, *Jurisdictional Immunities of the State (Germany* v *Italy: Greece Intervening)*, available at https://www.icj-cij.org/en/case/143 (last visited 31 December 2021).

[28] Corte costituzionale 22 October 2014 no 238, available at https://tinyurl.com/yeykke4a (last visited 31 December 2021).

[29] The reference to 'supreme principles' is considered by a Harvard Note: 'Constitutional Courts and International Law: Revisiting the Transatlantic Divide' 129 *Harvard Law Review*, 1362 (2016), not a rejection of International Law (in the American-style exceptionalism), but a unique kind of exception, justified by the alleged 'supreme' character of those very principles.

[30] See the comment written in 2000, R. Gerster, 'How WTO/TRIPS threatens the Indian pharmaceutical industry' *Third World Network*, available at https://tinyurl.com/5wr4ufzw (last visited 31 December 2021). For resolutions reached later, see E. 't Hoen, J. Berger, A. Calmy and S. Moon, 'Driving a decade of change: HIV/AIDS, patents and access to medicines for all' 14 *Journal of International AIDS Society*, 15 (2011) available at https://tinyurl.com/4fumyu2y (last visited 31 December 2021). Notably, the article recalls that the Doha Declaration made clear that the TRIPS Agreement 'can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all' (ibid). See the Declaration on the TRIPS Agreement and Public Health. WT/MIN(01)/DEC/2, Ministerial Conference. 2001. At the present time, prompted by the COVID emergency, in October 2020, South Africa and India submitted a proposal to the WTO for a temporary waiver, allowing Member States not to apply some Intellectual Property rules with regard to medicines and technologies associated with the fight against COVID 19; in May 2021 the US announced they will support and partake in the negotiations. However, the TRIPS agreement (Art 73, security exception) has established 'flexibilities' allowing some intellectual property rights to be suspended on national basis. The situation remains highly complex, though. As has been noted, 'Article 73(b)(iii) is not a realistic option for a number of states': the point has been made that 'in the absence of domestic manufacturing capacity, most of the flexibilities in the TRIPS Agreement (including the most extreme one ie the national security exception) may not be useful to some countries during a pandemic such as COVID-19'. Beyond intellectual property rights, some least developed states should better be helped so 'to boost their domestic manufacturing capacity' (E. Kolavole Oke, 'Is the National Security Exception in the TRIPS Agreement a Realistic Option in Confronting COVID-19?' *European Journal of International Law: Talk!*, 2020, available at https://tinyurl.com/2p989fzj (last visited 31 December 2021).

years ago,

> 'it appears that the ECJ is locked in its own reasoning about direct effect, cannot renounce its power, but just restrain itself on an *ad hoc* basis and therefore remain ambivalent in its reasoning and at risk of being criticized as inconsistent or activist. If this is so, it is because (…) direct effect is itself an ambivalent tool which can be used either as a sword to open legal orders or as a shield to keep them closed, and the Court uses it both ways'.[31]

The mentioned cases, and a longest and ever-increasing series of others, are inter-legal by default.

The overlapping of two or more legal disciplines (eg Security Council resolutions v primary rules of the European Union and fundamental rights; constitutional norms banning prisoners' right to vote v rights enshrined in the European Convention on Human Rights;[32] environmental protection and right to information v construction of nuclear plant eg in the Irish Sea as in Mox Plant cases,[33] to recall a few) concerning the same subject-matter, which creates a situation of objective inter-legality, is the case in point where regulations from other equally 'valid' sources are to be assessed, given that hierarchical solutions or formal primacies, if any, are hardly working. In a nutshell, that is what the descriptive import of the concept of inter-legality amounts to.

Private international law is sometimes invoked for its alleged capacity to manage such or similar circumstances through venerable 'conflict of laws' doctrines and canons. However, that would be highly misleading, since they ultimately revolve around the applicable state system of laws, making for second-order rule determining the mutually exclusive jurisdiction-based norms. Even compared with the increasing need for overarching global and inter-regimes frames, 'conflict of laws' remains somehow a parochial understanding – as Neil Walker aptly puts it – 'of boundary maintenance separately sponsored by each

[31] H. Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?' 25 *European Journal of International Law*, 162, 151-173 (2014).

[32] K. Dzehtsiarou, 'Prisoner voting saga. Reasons for challenges', in H. Hardmand and B. Dickson eds, *Electoral rights in Europe* (London: Routledge, 2017). With special regard to the UK branch of the saga – started with the decision ECtHR, *Hirst* v *United Kingdom (No. 2)* (2006) 42 EHRR 41 – see E. Adams, 'Prisoners' Voting Rights: Case Closed?', *U.K. Const. L. Blog* (30th January 2019), available at https://tinyurl.com/2p8vxseh (last visited 31 December 2021).

[33] The case (concerning Ireland's complaints with reference to radioactive emissions and right to information regarding the UK Nuclear Plant at Sellafield – the Irish Sea) was famously contended upon among a number of jurisdictions and fora of adjudication, including the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), the UN Convention for the Law of the Sea, the European Union law and the European Court of Justice. 'Mox Plant': Case C-459/03 *Commission* v *Ireland*, judgment of 30 May 2006, available at www.eurlex.europa.eu; United Nations Convention on the Law of the Sea (UNCLOS) Arbitral Tribunal, Order no 6 of 6 June 2008. See N. Lavranos, 'The Epilogue in the Mox Plant Dispute: An End without Findings' 18 *European Energy and Environmental Law Review*, 180 (2009).

domestic legal order according to its own standards of fairness and propriety'.[34]

To inter-legal contest the conception of law as system-based is unprepared. Its categories are shaped in order to face intra-systemic issues: it starts from the current notion of the validity of norms, to be 'recognised' through the fundamental norm – or the rule of recognition – of the legal order, which is thereby a bordered and exclusive device, unable to account for the legal value of 'external' legalities. However, what if a single object is disciplined by a plurality of legalities, which no further, comprehensive system of law encompasses? What if the issue is precisely 'in-between', as an inter-systemic problem, that would not be solved, given its material and legal complexity, from either of the relevant legalities alone?

We are used to think that 'monism' or 'dualism' – traditional doctrines of the relationship between domestic and international law[35] – might do the job. But such doctrines would beg the question: through different avenues, they would both answer by translating one legality into the other, that is, by some kind of assimilation or incorporation: the inter-systemic point would simply be domesticated to the known one-system logic or otherwise through the assumption that what happens in one system remains irrelevant to the other. Admittedly, doctrines of legal pluralism were born to amend monism and dualism and their weakness, making for the recognition of the plurality of legal systems.[36] Unfortunately, once the plurality comes to the fore, pluralism provides for no legal means through which the relations among systems can be treated. The tussle among different and self-related legalities can only be addressed through negotiations – which they have no legal duty to start – that are managed on the political stage. Pluralism gives no 'legal' answer to the enmeshing of laws on the ground.[37]

A deeply different prescriptive rationale is brought about instead by a theory of intra-legality. The tasks of inter-legality as a prescriptive method is to attenuate jurisdictional self-containedness, opening the path to a full consideration of the reasons stemming from the diverse legal perspectives involved. An inter-legal perspective does not simply 'arbitrate' contestations among different legalities, by reference to their self-related and inward-looking arguments. It shifts its attention toward their (dys)functionality in the given context of the case.

A theory of inter-legality would shift the focus from the tussle among different systems to the function of delivering justice – or avoiding injustice – in the issue

[34] N. Walker, n 1 above, 108.

[35] See J.E. Nijman and A. Nollkaemper eds, *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007).

[36] Among the huge literature, see for example, M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, translated by N. Norberg (Oxford and Portland: Hart Publishing, 2009). R. Michaels, 'Global Legal Pluralism' 5 *Annual Review of Law and Social Science*, 243-262 (2009). N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

[37] See G. Palombella, 'Theory, Realities, and Promises of Inter-Legality' n 15 above, 363.

at stake. Although the things in themselves might well be suggesting some justice-related way out, the point of justice should not be overestimated as a 'substantive' resolution key. There is no substantive conception of justice required here: the methodological thrust of an inter-legal perspective only consists of a fundamental obligation of fairness meant as a due consideration of all the normativities involved, and disallowing formal shields capable of preventing such consideration of the plurality from taking place. The methodological justice-related premise of inter-legality amounts to avoiding one-sided decision making, to accounting for the full range of legal claims raised, and to abiding by a culture of justification, all things considered, through the focus of the given context. As a prescriptive method, it assumes that the plurality of legalities disciplining the case must be taken into account, as a whole. Looking at the law of the case simply means to accept that multiple and even uncoordinated sources fall into the same place, making for a composite interweaving of norms as a third ground irreducible to any of its contributing, and separate, legalities. Such a plurality sheds light upon different rationales deserving a balanced consideration: they are all generative of the resulting normative fabric, which constitutes the composite law of the case. The law of the case should emerge out of, say, a global regime regulation and of a state domestic law, and the like. It can be assessed not by answering the recurrent question (itself related to the well known gate-keeping[38] attitude of high courts) as to which legal system, or legal regime, must prevail, but by asking which normative claim, on the ground, can be provided with a better in-context-justification of a legal character.[39] Again, the tussle is not to be addressed through some kind of further morality, but by the positive law made available through the different legalities relevant for it. The implications of such a method are premised upon a mixed notion of law, one that can easily account for a pattern of legality based on the idea of legal system, but along with the recognition of other formats of law equally relevant. The rationale of inter-legality lies in the understanding of law even if deprived of systemic clothes, and in treasuring, after all, the variety of formats of law[40] that have presently come to the forefront, whether newly generated, as those associated with the label of 'Global administrative law' or emerged through centuries, much beyond the single – and relatively limited in time – experience of the State.

IV. About Rights and Inter-Legality

[38] See, for instance, F. Snyder, 'The Gatekeepers: The European Courts and WTO Law' 40 *Common Market Law Review*, 313 (2003).

[39] See more at length on the problem G. Palombella, 'Senza identità: Dal diritto internazionale alla corte costituzionale tra consuetudine, *jus cogens* e principi supremi' 35 *Quaderni Costituzionali*, 815-830 (2015).

[40] See n 2 above.

Some fields of law have been better vehicles than others in offering food for thought to inter-legal assessments. The series of controversies around security and access to justice has been quite instructive. Courts' decisions whether giving priority to human rights or to security concerns should be appraised not just due to the agreeability of their choice, but even more than that, due to the legal reasoning and justification, that is, the legal road they have taken. The path breaking and milestone case, that works as a revealing example where inter-legality was clearly at stake, was brought by Mr Kadi[41] at the Court of Justice of the European Union. Making a long story short, the Court declared that the rights to judicial protection and to property had been infringed by the EU regulation freezing his assets in compliance with a resolution of the UN Security Council (Sanction's Committee), issued against him as included in a black list of Al Quaeda affiliates. While the effect of the Court's decision was the protection of fundamental rights in the EU, the price of that was the disregard of art 103 of the UN Charter that imposes upon the EU the obligation to implement United Nations Security Council (UNSC) resolutions. The Court took a 'dualist' stance, upon the pretension that what happens in one order (the EU) does not interfere against the international legal order.[42] The logic of the two legalities being like two separate circles,[43] was clearly contrasting against the reality, and the case at stake, in its concrete structure, proved the interconnection between the Security goal on one side and the protection of fundamental rights in the EU, on the other. The balancing and comprehensive consideration of the two sides would have been a more credible and better justified reasoning.

As I have submitted elsewhere,[44] one can easily compare such a reasoning with another case, itself involving rights to defence against security concerns. At the European Court of Human Rights,[45] Switzerland was held responsible for infringing the convention, although it was under the obligation Art 25 UN Charter) to do so due to a resolution of the UN Security Council concerning the global fight against Islamic terrorism.[46] According to the Court apparently conflicting

[41] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation* v *Council & Commission*, judgments of 8 September 2008, available at www.eurlex.europa.eu.

[42] Criticism against this decision because of its disregard for international law: G. de Burca, 'The Road Not Taken: The EU as a Global Human Rights Actor' 105 *American Journal of International Law* (2011), 649-693.

[43] H. Triepel, *Vo ̈lkerrecht und Landesrecht* (Leipzig: C.L. Hirschfeld, 1899), 111.

[44] G. Palombella, 'The principled, and winding, road to Al-Dulimi. Interpreting the interpreters' 6 *Questions of International Law*, 15-29 (2014).

[45] Eur. Court H.R., *Al-Dulimi* v *Switzerland*, judgment of 26 November 2013, available at www.hudoc.echr.coe.it. But see also, three years later, Eur. Court H.R. (GC), *Al-Dulimi and Montana Management Inc.* v *Switzerland*, Judgment of 21 June 2016, available at www.hudoc.echr.coe.it.

[46] The Swiss Federal Tribunal (Schweizerisches Bundesgericht, 2A.783/784/785/2006, judgments of 23 January 2008) had maintained that it was not entitled to revise the legality of Security Council resolutions except in the event (it was not) of violation of a *jus cogens* rule (as

obligations from the UN Charter and the ECHR must be at their best harmonised and reconciled (Art 31 (3) (c) VCLT) (para 112). The Court engages in a revision of the legality of the Security Council resolution and in a 'proportionality' judgment, that is, a contextual evaluation between two different international regimes, beyond the limits of its strict jurisdiction, since both and mutually independent sources had to be accounted for as the law of the case. Importantly the Grand Chamber decision substantially confirmed the reasoning on 21 June 2016. The reference to Art 31.3 (c) of the Vienna Convention may be found in para 134 of the Grand Chamber's judgment. Moreover, paras 138 of the Grand Chamber's Judgment reads as follows

> '(…) when creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law'.

Although endowed with different priorities, trade law, security law, environmental law, humanitarian law are so often entangled as to require an inter-legal method to be developed. Predictably human rights especially have been generating the need for a better understanding of a novel notion of the law. Their straightforward primacy is not the relevant point in this issue: valuable arguments might be raised to justify the safeguard of countervailing goals. But, admittedly, human rights controversies might often trigger more careful appreciation of the complexity of overlapping legal sources. The traditional understanding of rights as negative freedoms *vis à vis* the public, governmental power, has been largely reshaped through decades, not only including 'positive' rights to well-being, social protection, and even to a healthy environment, but also by extending the responsibility to private parties and allowing for constitutional rights' horizontal effect.[47] The announced universality and indivisibility of human rights[48] implies legal interconnections both among the levels of protection granted to all individuals (equality), and among different categories of rights (mutual

in the reasoning of the CFI in *Kadi* v *Council EU and Commission EC* (n 1) n 39 above).

[47] Although mainly with reference to the US constitutional system, still important S. Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' 102 *Michigan Law Review*, 387-459 (2003). With reference to EU law, E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union. A Constitutional Analysis* (Oxford: Oxford University Press, 2019).

[48] For example, see C. Norchi, 'Human Rights: A Global Common Interest', in J. Krasno ed, *The United Nations: Confronting the Challenges of a Global Society* (Boulder: Lynne Rienner, 2004). Interestingly, E. Daly and J. R. May, 'The Indivisibility of Human Dignity and Sustainability', in A. Sumudu Atapattu et al eds, *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge: Cambridge University Press, 2020), 23-38.

implication of rights), and finally the blurring of the conceptual separation (opposition) between public goals and individual rights.[49]

Demanded universality and indivisibility of rights are coexisting with their thick, local, and at times idiosyncratic particularity. The extraordinary increase of demands for rights' protection,[50] as for example at the European Court of Human Rights, shows clearly the transnational strength of deontology and universalism. Nonetheless, the adjudication of rights in national contexts has to meet further conditions, which are connected with the cultural and legal interpretation of their concrete content and scope.[51] This brought the margin of appreciation doctrine, since years adopted by the European Court, to be eventually established by Protocol 15[52] of the Convention. A margin of appreciation is to be left to a Member State especially when consensus among (the majority of) member states is unreached.[53] In any case no margin of appreciation can be granted should the State have failed the proportionality test, that the Court itself would always purport to control.

While substantive divergences arise[54] and at issue is the interpretation and the protection of a right, the Court can acknowledge or deny a margin of appreciation. Criticisms as to the discretionary use of the margin are understandable.[55] Moreover, at times, Judges voice their thoughts, concerning the need to leave some room to signatory States, under the label of 'democratic' contributions.

[49] A. Sen, 'Elements of a Theory of Human Rights' 32 *Philosophy and Public Affairs*, 315 (2004).

[50] A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' 1 *Global Constitutionalis*, 53-90 (2012).

[51] How this would suggest a conceptual distinction between right as 'human' rights and rights as 'fundamental' rights is explained in G. Palombella, 'Arguments in favor of a functional theory of fundamental rights' 14 *International Journal for the Semiotics of Law*, 299-326 (2001).

[52] Art 1: At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

[53] On the use of the premise of consensus and the margin of appreciation see more recently, N. Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' 25 *European Public Law*, 445-480 (2019).

[54] Think of Eur. Court H.R., *Hirst* v *the United Kingdom (no 2)*, judgment of 6 October 2005, available at www.hudoc.echr.coe.it, and the ample follow up in the vexed question of prisoners' right to vote. And also the crucifix in the public schools: Eur. Court H.R., *Lautsi* v *Italy*, judgment of 3 November 2009, available at www.hudoc.echr.coe.it; and the reverse in Eur. Court H.R. *Lautsi and Others* v *Italy*, judgment of 18 March 2011, available at www.hudoc.echr.coe.it.

[55] G. Itzcovich, 'One, None and One Hundred Thousands Margins of Appreciations: The Lautsi Case' 13 *Human Rights Law Review*, 306 (2013); S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006).

Accordingly, the complexity of the issue becomes an interesting setting for understanding what an inter-legal conception implies.

The Italian Constitutional Court engaged on a disputed issue *vis à vis* the European Court, in order to decide about a challenge to the Italian legislation modifying the arrangements applicable to the calculation of pensions for workers who have spent part of their working life in Switzerland. The enactment required that the Italian pension was to be calculated on the basis of the actual level of Swiss contributions, thus resulting in lower amounts. The Constitutional Court had to face the previous ECHR decision in the *Maggio and others* v *Italy* case (May 31, 2011) according to which with the mentioned legislation the Italian State had infringed Art 6 (1) of the Convention and the applicants' rights by intervening in a decisive manner in ongoing proceedings so to insure a desired outcome, notwithstanding the absence of reasons of compelling general interest.

The Italian Constitutional Court[56] maintained – and justified – a different view according to which a Convention's right can only be seen and adjudicated through an 'in-context' perspective. In the Court's reasoning, the doctrine of the 'margin of appreciation' concerning the content and scope of a right should be upheld here because 'the protection of fundamental rights must be systemic and not piecemeal across a series of uncoordinated provisions in potential conflict with one another' (para 4.1). Being the 'systemic' assessment relevant here, a public and compelling interest can well be taken into a balancing exercise, as possible justification of a retrospective legislation. Accordingly,

> 'a law which takes account of the fact that contributions paid in Switzerland are four times lower than those paid in Italy, and hence applies an adjustment in order to bring the contributions into line with disbursements, to equalize treatment in order to avoid inequality and to strike a sustainable balance within the pension system in order to guarantee those who receive disbursements, is inspired by the principles of equality and proportionality' (para 5.3).

In this very sense, rights are capturing inter-legality concerns, due to their mixed belonging in different legalities. But, more in depth, it should be noted how human rights, as part of international law commitments, appear to be exposed to a double-level understanding, in between a thin or universalizable overlapping consensus among the international community and a thick[57] and

[56] ICC, Judgment no 264/2012.

[57] M. Walzer, *Thick and Thin. Moral Argument at Home and Abroad* (Notre Dame-London: University of Notre Dame Press, 1994): Minimalism 'consists in principles and rules that are reiterated in different times and places, and that are seen to be similar even though they are expressed in different idioms and reflect different histories and different versions of the world. (…) In context, everyday, they provide contrasting perspectives; seen from a distance, in moments of crisis and confrontation, they make for commonality'. (ibid 16). For Walzer, 'with thickness comes qualification, compromise, complexity, and disagreement' (ibid

'situated' determination in national contexts. The very fact that rights are not referred to States as such, but to 'individuals' living in separate communities, generates the need for such a second-level comprehension, which also depends on the normative bases in each polities' legal system. Given the lack of its own constituency in terms of a corresponding polity, second-order legalities, regional or global regimes are always and structurally wanting as regards their effectivity.

However, that would be too heavy an argument, undermining the deontological strength of human rights obligations and their *raison d'être*. It is in fact their valuable function that of countering majoritarian disregard of human rights, wherever it takes place: it would be senseless to renounce the critical force of human rights due to sheer deference to those very legal systems that are allegedly responsible for their infringement. Democracy and sovereignty should not have their 'pound of flesh' here. This is, by the way, a moral reason for an inter-legal assessment to be pursued.

Notably, when the inter-legal perspective is taken to matter, the epistemic focus shifts from the question about which legality has to prevail, or the question whether democracy is enough a good to cancel a human right, toward the deeply different question concerning what can be the interpretive choice that prevents the core meaning of that right – eg enshrined in the European Convention – from being misconceived and nullified in the context of a given community (eg the Italian polity and its legal system).

I would uphold the doctrine of the margin of appreciation insofar as it can potentially foster such an inter-legal perspective and due to the methodological attention it purports to pay to the reasons-giving from *both* legalities involved. It is to be born in mind, however, that interpreting the margin of appreciation this way would not be consistent with justifying it as a democracy-protecting shield, that is, a kind of price to be paid to institutional (international) relations among Member States and the need for (*political*) legitimacy of the European Court. The gist of inter-legality is in fact to bridge the gap among different legalities through *legal* means, and due to respect for the normative pretentions brought about by them. If the tussle concerns how to understand the relation between rights of an individual to due process guarantees on one side and equality in a given context, on the other, this is not to be addressed in terms of institutional deference nor in the view to displace one legality for the sake of the other.

After all, the thrust of inter-legal theory lies in avoidance of unilateral, one-sided decision making: its holistic vein upholds the whole of the normative stakes at issue. But its all-things-considered assessment rests on the available legal setting in the composite context of the case. From that point of view, 'holism' is

18). The way in which some ideals (of truth or justice) exist is already in context, they were born 'thick', although those ideals are commonly shared at their thin (less defined, specified) level. Minimalism allows for 'encounters', but 'these encounters are not- not now, at least- sufficiently sustained to produce a thick morality' (ibid 18).

contingent upon te legal arrangements (as the positive law) relevant in context: a monist, substantive, global order of law is not premised to it.

Interlegality - Symposium

The Importance of Being a Case. Collapsing of the Law upon the Case in Interlegal Situations

Alberto di Martino*

Abstract

The article aims at delving into the concept of a concrete 'case' within the general framework of the theory of interlegality. The argumentation starts from the acknowledgment that it is not possible to identify in advance and in abstract terms the rule governing the case, and according to which it should be adjudicated: in the interlegal scenario no other ordering criterion can be ascertained but for a reference to the interplay of regulatory claims in respect of the 'facts of the case'. The analysis firstly focuses upon the concept of the case from a theoretical point of view. It then highlights the relationship between facts as empirical ground and the case as the result of the qualification by multiple normativities. Lastly, after stressing the importance of ascertaining facts in order not to misunderstand the content and import of legal cases, it explains why in the interlegal scenario a paradigm shift can be acknowledged: from the abstract rule valid in a given jurisdiction, to the centrality of the case for the identification of the law governing it.

I. Introduction

The present article aims at delving into the concept of a (concrete) 'case' as a key device of the theory of interlegality. The 'case' appears to operate as the endpoint of many converging lines, along which multiple legal qualifications claim to validly and legitimately regulate a given concrete situation of life. At the same time, it is not possible to identify in advance and in abstract terms the rule governing the case, and according to which it should be adjudicated: in the interlegal scenario no other ordering criterion can be ascertained but for a reference to the interplay of regulatory claims in respect of the 'facts of the case'.

The *Lebenssachverhalt*, that is the concrete, complex situation of life relevant for the law, can be depicted as a pitch on which a game of rules must be played. All the convergent legal qualifications that have a bearing on the decision of the adjudicating body (be it a judicial authority in classical sense, or any other body vested with adjudicatory powers)[1] must be taken into account. Then, the

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[1] Self-contained regimes can provide for such authorities: think for instance of the WTO, the International Commission for Assigned Names and Numbers, as well as the Facebook's Oversight Board.

choice depends ultimately on the physiognomy of the case. Whenever multiple rules belonging to different legal orders legitimately claim to be applied to the facts they refer, none of them can be deemed *in abstracto* to be *the* exclusive rule (nor *the* exclusive legal order) set forth for the given situation.

On the contrary, it is the case that frames the remit where the multiple concurrent legal qualifications interfere with each other: sometimes converging, sometimes diverging, sometimes being dramatically opposite. The rule of the case does not stem by its own virtue, for example from a simple, mechanical act of subsuming concrete facts under an abstract provision. The rule for the case depends on the features of the case. They guide the adjudicating body through the choice among multiple, legitimate parameters of legal qualification.

The argumentation will unfold through the following steps. After a preliminary consideration of the importance of the case within the general framework of interlegality (§ 2), the analysis will focus upon the concept of 'case' from a theoretical point of view, and in particular as contrasted with the seemingly corresponding concept of 'fact': consider the recurring expression 'facts of the case', which is commonly used as a longer locution equivalent to the label 'case'. This part of the analysis will be carried out without reference to any specific body of law. However, the account will benefit from a renewed attention that legal scholars, following a methodological debate among historians, devote to the importance of the situation of the case in crafting specific interpretive solutions especially in the framework of international criminal law (§ 3). The main gist of § 3 is therefore to highlight the relationship between the facts as empirical ground attracting legal qualifications and the case as the meeting point between the facts and their qualifications. The last section points out the importance of ascertaining facts in order to understand the actual content and import of legal cases. It then focuses on the relation between facts and rules in the framework of interlegal affairs, as contrasted with the seemingly parallel but different concept of 'case-law' which refers to a merely domestic point of view. This section furthermore aims at explaining why in this context a paradigm shift – from the rule for the case to the case of the rules – can be acknowledged. Far from being a tongue twister, this phrasing exposes how in issues of interlegality, where no single rule or single legal order may claim exclusive right to 'rule the case', there is no room for 'insulated and self-referential legality'; what matters is plurality, that is, the composite law relevant to the case and governing it:

> 'the interpretive outcome results less from the application of a valid rule than from a more open and nuanced itinerarium, where the reconstruction of the facts at hand is the occasion for the interpreter to arbitrate different rationales and countervailing principles on the basis of the investigation of the legality imbuing the issues and the features of the case'.

The following analysis provides evidence of the influence of casuistic logic, where the case is central to set out the concrete application of the rules, upon the theorization of the category (§ 4).

II. Interlegality Universe: Movement of Expansion, Principle of Inclusion, Gravitational Force of the 'Case'

Interlegality is the theory crafted to highlight and address those situations in which the entitlement to set forth the rule relevant and applicable to the case at hand is shared by multiple legal orders.[2] These situations are neither exceptional nor limited to certain topics or branches of law. Each converging legal order may produce legal effects by its own, so that the scenario focusing on the case is composed of all legal sources that refer to the concrete situation, irrespective of the (im)possibility of grading those sources according to ordering principles such as that of hierarchy, because they pertain to discrete and possibly uncoordinated sources.

In these situations, the law relevant for the case at hand is produced by various actors. Each actor, however, may not claim to be the sole originally legitimate source ruling the case and therefore producing legal effects.

As long as the law has been conceived of as valid within –and limited to– State's boundaries, the world of sources could be described as a stationary universe governed by an 'exclusionary principle'. In this universe, only domestic law – where appropriate, at constitutional level – can vest a source with the power of jus-generation: in fact, with the legitimacy of being a legal 'source'. Suffice for present purposes to define a legal source, through a general proposition, as any fact that embeds normative propositions, that belongs to a given legal order by virtue of a superior rule or principle of that legal order.[3]

Within the remit of a domestic legal order, the applicable rules of law are defined according to recognizable criteria of priority, such as hierarchy or competence, setting the sources' architecture. According to Italian law, for instance, the principle of hierarchy traditionally governs the relation between parliamentary law and governmental regulations, therefore deemed to be 'subordinated' to legislation; the principle of competence (either shared or exclusive) underpins the division of legislative capacity, entrusted either to the State or to the Regions as political-administrative territorial entities of a unitary State. The encounter with international and supranational law has only partially shaken this architecture. In domestic legal orders a 'principle of inclusion' emerged, namely, the mandatory

[2] J. Klabbers and G. Palombella eds, *The Challenge of Interlegality* (Cambridge: Cambridge University Press, 2019).

[3] 'Any fact that embeds normative propositions, and determines the bindingness (adoption-worthiness) of these propositions, by virtue of such an embedment': this is the definition provided by G. Sartor, *Legal Reasoning. A Cognitive Approach to the Law* (Dordrecht: Springer, 2007), 657.

consideration of those legal orders in the list of the applicable law. Nevertheless, their relation to the domestic system has long been debated. Indeed, the very relations between international and supranational law, on the one side, and, on the other, domestic law, have long time appeared as regulated by identifiable principles, even though these were represented as opposite. Both monistic and dualistic theories as conceptual reading keys to the relationship between national and international legal orders, belong at close sight to the same interpretive account.[4] The one differs from the other as to which ordering principle coordinates those discrete orders, but they do not put into question that an ordering criterion does actually exist.

As regards supranational law of the European Union, the content and the scope of application of the primacy principle (*primauté*) may be contentious, but again there is no question as to its existence.

In a multi-centered reality such as the contemporary law's architecture,[5] on the contrary, the fixed structure of the sources as well as the ordering principles and the types of relationship among different legal orders are radically put into question. Alongside the movement of expansion spreading through the universe of normativity's sources an implicit 'rule of inclusion' governs the universe of human relations. This rule bestows equal legitimacy on different sources controlling those relations.

One might acknowledge a movement of expansion, because the regulated domains of human life are deeply interwoven despite being heterogeneous. Mireille Delmas-Marty dubbed this interconnectedness and entanglement of legal spaces as 'enchevêtrement des espaces normatifs'.[6] Such entanglement affects every body of law and specialized discipline, from the law of contracts to environmental law, from labour law to company law, up to criminal law, a remit traditionally seen as the most closely related to jealous state sovereignty, and still perceived as its last shrine.

One paradigmatic example is that of the regulation of the Internet. Many global actors claim a legitimate power to regulate this space: from public actors – legal orders in a strict sense, national, supranational, international – to private entities that exert regulatory powers vested with full legitimacy.

At the same time, this universe is governed by a 'principle of inclusion' as its centripetal force: all sources may legitimately claim to rule the human relations

[4] On the traditional doctrines of monism and dualism as explanation of the relationship between domestic and international law see for instance: J.E. Nijman and A. Nollkaemper eds, *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007).

[5] See only M. Delmas-Marty, Vers un droit commun de l'humanité (Paris: Textuel, 1995); M. Delmas-Marty ed, Trois défis pour un droit mondial (Paris: Seuil, 1998); M. Delmas-Marty ed, Études juridiques comparatives et internationalisation du droit (Paris: Fayard, 2003); M. Delmas-Marty ed, Le pluralisme ordonné (Paris: Seuil, 2006).

[6] M. Delmas-Marty, Review of 'Julie Allard, Antoine Garapon, Les juges dans la mondialisation. La nouvelle révolution du droit' 28 *Critique internationale*, 187-189 (2005).

they refer to, irrespective of whether the social intercourse is directly concerning individual persons or is affecting human relations indirectly, especially through technology or legal fictions such as that of corporations. Therefore, it must be acknowledged that many factual situations become legally relevant according to multiple parameters of qualification, national, supranational, international. Furthermore, the nature of such sources and parameters is varied, different origins can be counted, including private regulations and disciplines. This happens whenever certain regulatory powers are explicitly conferred on non-State actors (mainly organizations), or the factual exercise by them is recognized. The multiplicity of qualifications that characterize the interlegal dimension of law is not only including (public) legal orders, but also other private entities and networks, whose legitimacy rests upon private autonomy as formal expression of entrepreneurial liberty and actual regulatory capacity.

If many uncoordinated sources are able to produce legal effects in respect of a given concrete situation, the 'law of the case' results from the interconnectedness of the convergent legalities, even without giving pre-defined priority to any of them. Therefore, the law no longer takes the form of the general, abstract rule, it rather appears to be composite and multiverse, its shape moulded from the features of the concrete case. As Gianluigi Palombella underlines,[7] the entire force of gravity of interlegal situations 'concentrates on the bottom of the concrete case', which attracts the sources for its qualification. The circumstances irradiating from the fact attract diverse legal orders and give birth to the interlegality phenomenon: to the unitary dimension of the fact corresponds the plurality of sources, in turn deriving from the necessity of ruling on it through this multifaceted array of legal –legally relevant– qualifications.[8] Interlegal law is the law of the concrete case. It has been conveniently stressed that the case, in turn, is not a no man's land, that is, it is not the venue of pure facts, incidents that transpire in the course of history. Due to the convergence of many legal sources that potentially rule the case, the case is a remit in which the plurality of regulative sources converges upon the facts. One should acknowledge that around the fact thickens a density of law; the legal question amounts to evaluating a fact coupled with this density of law.

As for the relationship between interlegality and rule of the case a preliminary clarification is due. Interlegality theory works as a *method* of dealing with a relevant case at all levels of jurisdiction: norm-production, adjudication, enforcement. All of these matters, and are to be taken into consideration.

While interlegality at the stage of adjudication is the prototypical situation, interlegal scenario can occur at the legislative level. In some instance legitimacy

[7] G. Palombella, 'Theory, Realities and Promises of Inter-Legality: A Manifesto', in Id and J. Klabbers eds, *The Challenge of Interlegality* (Cambridge: Cambridge University Press, 2017).

[8] See on this G. Palombella, in this short symposium.

is explicitly conferred on a foreign source by an unilateral decision[9] of the referring regulatory order. The referring order can be either one of a state, or of a supranational order, or even a private authority.

As for the first instance (domestic legal order), one might recall the provision enshrined in the US CLOUD Act, according to which:

> 'A provider of electronic communication service to the public or remote computing service, including a foreign electronic communication service or remote computing service, that is being required to disclose pursuant to legal process issued under this section the contents of a wire or electronic communication of a subscriber or customer, may file a motion to modify or quash the legal process where the provider reasonably believes – '…(ii) that the required disclosure would create a material risk that the provider would violate the laws of a qualifying foreign government in preventing any prohibited disclosure)'.[10]

The reference to a foreign legal order (*prise en compte*) may affect criminal law too, namely, the body of law still considered as the most closely related to the state sovereignty. This happens, for instance, whenever:

(*i*) a crime committed abroad can only be adjudicated following the double incrimination principle, that is the verification on whether the act amounts to a criminal offence in both (or more) countries concerned;[11]

(*ii*) a reason not to punish – irrespective of its domestic labelling (*Strafausschliessungsgründe/Strafaufhebungsgründe*; *cause di non punibilità*; *(non excusatory/exculpatory) defences*) [12] – that is applicable under the *lex loci* is admitted in the state claiming jurisdiction even if it is not concretely applicable

[9] It might be a domestic legal order (see for instance the US CLOUD Act quoted in the main text. As regards supranational law, see Art 45 of the European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 (General Data Protection Regulation); furthermore, Arts 15 and 16 of the Proposal for a regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters [17.4.2018, COM 2018/225/final]). As for private authorities, see for instance the ICANN, which enacted a Procedure for Handling WHOIS Conflicts with Privacy Law, available at https://tinyurl.com/5xau7edf (last visited 31 December 2021).

[10] Sec 103 (b).

[11] This a recurring provision in national criminal codes; on this issue see for instance D. Basak, Vor § 3, marg. nr. 13; § 7, marg. nr. 3, in H. Matt, J. Renzikowski, *Strafgesetzbuch. Kommentar* (München: Franz Vahlen, 2nd ed, 2020); F. Jessberger, *Der transnationale Geltungsbereich des deutschen Strafrechts* (Tübingen: Mohr Siebeck, 2011), 151.

[12] '(T)hose defenses that…are not all grounded in a lack of culpability of the defendant. Rather, a nonexculpatory defense is supported by some other important public policy consideration. A balancing of interests is involved, but the balancing is different from that which occurs with respect to those defenses falling into the justifications category…in the case of nonexculpatory defenses the outweighing benefit comes from foregoing conviction of the defendant. Perhaps the best example is the various statutes of limitations, legislative time limits on the commencement of criminal prosecutions (…)': W.R. LaFave, *Substantive Criminal Law* (St Paul: Thomson West, 2003[2]), II, 9.

for whatever reason;

(*iii*) the amount of prison time served in one state detracts from the time that has to be served in another state due to a sentence inflicted for the same facts in the latter (*Anrechnungsprinzip*).

Another instance of the legislative consideration of multiple legalities is, in Italy, a provision of the recently enacted bill laying down the crime of 'failure to comply with maritime interdictions': the component elements of the offence refer to international and supranational law sources. Indeed, more or less explicitly, they recall principles and rules imposed by general international law, international human rights law, and European law, setting out an intertwinement of sources that we may consider interlegal.

That said, the category of interlegality does not entail as such any substantive criterion for ruling the case, nor any result-oriented (content-oriented) solution of the case: interlegal argumentation does not *a priori* tilt toward a solution rather than a different one. From a conceptual point of view, this category recognises all the relevant legalities – all convergent 'normativities'– that are validly controlling the same case at stake. Only the pluralist method is defined in abstract, whereas the solution is commended to the umpire of the circumstances of the case (primarily, but not necessarily, the judge).

It frequently happens that the substantive criterion of the decision is committed to elastic if not vague, political-legal benchmarks such as the 'interests of justice', international 'comity' (which, incidentally, might be deemed vague only under a strict positivistic interpretive attitude, since its content in international relations has been shaped throughout a couple of centuries). Besides, many general clauses (*Generalklauseln*) are widespread in domestic as well as in international and supranational settings, irrespective of strict interlegal situations. They occur every time the universe of legal qualifications comes to terms with other axiological paradigms: think of the 'public interest', 'ordre public' (public order), 'boni mores' (*gute Sitten*, *buon costume*); good behaviour (*buona condotta*).[13]

To sum up, it is the concrete situation, the relevant case that stars as the 'Stone Guest' in Mozart's Don Giovanni[14] in the legal theatre of interlegality. The case comes back to reconquer its role central to this new category, pushing to the background the abstract and general legislative rule emanated by and within a domestic legal order. The principle of inclusion of multiple legalities (normativities) pivots on the concrete case, as a segment of reality which they claim to regulate. Eventually, this same principle of inclusion is the criterion of

[13] In the English system 'the former power to bind over an offender to be of good behavior is no longer available, since it was declared insufficiently certain but there remains the power to bind over an offender to do or not to do a specified act': see for instance A. Ashworth, *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 2015), 340.

[14] See also A. Puškin, *The Stone Guest*, 1839 (1830), available in English for instance in A. Pushkin, *The Little Tragedies* (transl. N.K. Anderson) (New Haven and London: Yale University Press, 2008).

adjudication of the case.

III. Fact, Case

1. From the Law as Circumference to the Case as Segment

The concept of concrete case (*Fall, Kasus*) remained traditionally shadowed indeed, at least as long as legal culture and political philosophy have stressed the importance of the general and abstract legislative provision, firstly, as the only true safeguard of the (formal) equality principle and, secondly, as the precondition of the judicial activity, conceived of as having only mechanical, syllogistic nature (judge as 'bouche de la loi'). The forcefully metaphor of the law as circumference was used at the outset of the French Revolution by the well-known Abby Sieyès, who wanted to underscore the fact that every citizen sitting on the circumference line occupies there 'des places égales', an equal standing.

In fact, the centrality of the legislative will, embodied in the parliamentary law (*loi*, *ley*, *legge*), was welded to a theoretical horizon whose ascent has to be traced back to the continental Enlightenment:[15] a philosophy bound by the principle of (formal) equality to be safeguarded within a given domestic legal system. The decline of this idea revealed the delusion of the general and abstract legal provision as the only effective safeguard for the equal treatment of citizens. Much ink has been spilled on the crisis of this vision, there is no room here for crocheting at the edge of great paintings. It must be rather pointed out that, the more the reality of the law detaches from the ideal centrality of the 'legislative law' as well as from the exclusivity of the domestic sources, or their exclusively public nature – the more legal culture must go off the beaten track, conceiving of the nature and the structure of the law and its application in new and unconventional ways.

On the one side, cultural attitudes that inform the Anglo-Saxon legal argumentative experience claim to be on the front stage (burst on the scene of continental culture);[16] but even where this cultural acquaintance is already present, the need arises for a rupture of a traditional image of the law. This is the necessity of overcoming the deeply entrenched habits of textualism and originalism, respectively as method and teleological horizon of the interpretation.[17] It is not

[15] In Italian, see A. Cavanna, Storia del diritto moderno in Europa. 1. Le fonti e il pensiero giuridico (Milano: Giuffrè, 1982), 479-610.

[16] See in Italian, above all, the presentation by U. Mattei, *Common Law. Il diritto angloamericano* (Torino: UTET, 1999) passim and especially 214 et seq. An interesting account of the historical evolution of the north-american private law in the 19th Century is provided by P. Karsten, *Heart versus Head: Judge-made Law in Nineteenth-century America* (Chapel Hill: The University of North Carolina Press, 1997) who underlines the continuity of judicial interpretive attitudes rather than creativity ('continuity, not change, characterized the 'creative era' ': chapter I, at the end).

[17] See a famous phrase of Felix Frankfurter, 'Some reflections on the Reading of Statutes'

by chance that recently, firstly in historical writings,[18] then among jurists too,[19] a new interest in casuistry sparkled. Casuistry is an age-old method of argumentation elaborated by Jesuits to address controversial moral and philosophical issues; in particular, it was elaborated as a method of conceiving of certain paths to derogate from the abstract and absolute precepts of the religious (catholic) morality in certain specified circumstances. As it is well known, casuistry fell into discredit after the criticisms raised against the casuists by the philosopher Blaise Pascal.

As some scholars have pointed out, in recent times casuistry is also applied for resolving legal problems.[20]

> 'In this respect casuistry takes as a starting point that the meaning of the law is not determined by abstract rules alone but develops on a case-by-case basis in interplay with the questions and issues raised in individual cases'.[21]

In order to understand the background of this kind of resurgence of casuistry as a method of dealing with complex moral issues it seems useful to recall a general distinction between theoretical and practical arguments

> 'Theoretical arguments are chains of proof, whereas practical arguments are methods for resolving problems. In the first, formal sense, an argument is a chain of propositions, linked up so as to guarantee its conclusion that in the second, substantive sense, and argument is a network of considerations, presented so as to resolve a practical quandary. Taken in these two contrasted senses, arguments operate in quite different ways and have different kinds of intellectual merits that they conform to different patterns and must be analyzed in different terms'.[22]

Consequently, theoretical arguments are structured in ways that are not dependent on the circumstances in which they happen to appear nor are to be

47 *Columbia Law Review*, 527-538 (1947)): '…I was indiscreet enough to say that I don't care what their (of a legislature) intention was. I only want to know what the words mean'; see furthermore the position of Oliver Wendell Holmes (*Collected Legal Papers*, New York: Harcourt, 1920). On the distinction between 'textualism' and 'literalism' see the explanations by A. Scalia, *A Matter of Interpretation. Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 23 et seq.

[18] See especially C. Ginzburg and L. Biasiori eds, *A Historical Approach to Casuistry. Norms and Exceptions in a Comparative Perspective* (London: Bloomsbury Academic, 2018).

[19] H. van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' 8 *Int'l Criminal Law Review*, 229-272 (2008).

[20] M. Cupido, 'Facing Facts in International Criminal Law' *Journal of International Criminal Justice*, 14, 1-20, 6 (2016).

[21] ibid 2.

[22] A.R. Jonsen and S. Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning* (Oakland CA: University of California Press, 1988), 34-35.

affected by the practical context of use.

> 'in the language of formal logic, the actions are major premises, the fact that specified the present instance are minor premises, and the conclusion to be 'proved' is deduced (follows necessarily) from the initial premises'.[23]

As regards practical arguments, by contrast, contextual argumentation is needed. This kind of arguments, indeed,

> 'involve a wider range of factors than formal deductions and are red with an eye to their occasion of use. Instead of aiming at strict entailment, they draw on the outcomes of previous experience, carrying over the procedures used to resolve earlier problems and we are applying them in new problematic situations. Practical arguments depend for their power on how closely the present circumstances resemble those of the earlier president cases for which this particular type of argument was originally devised… in the language operational analysis, the facts of the present case defined the grounds on which any resolution must be based, the general considerations that current weight in similar situations provide wear and that helps settle future cases'.[24]

The distinction is useful from the legal point of view, since legal arguments are of the type of the practical, contextual arguments. Their demonstrative force depends on the degree of similarity (analogy) between the present circumstances and the preceding cases, in relation to which the specific argument was conceived and applied. Based on this similarity, legal arguments are *demonstrative* not through the path of logics (that is, not in dianoetic Artisotle's sense): They express the *persuasive* force of the *practical* argumentation, [25] oriented toward the solution of a practical problem, the 'case' indeed. Application of the law is therefore never governed by a strict logical rigor; the judicial activity adapts the law to the features of the concrete case.

> 'The application of the law to individual cases cannot be reduced to a mechanical exercise based on deductive reasoning…No matter how detailed the law is, it will never be governed by strict logic…Instead, courts always maintain a certain degree of discretion to adjust the law to the specific features of individual cases'.[26]

[23] ibid 34-35 (italics in original).

[24] ibid 35.

[25] A. Garapon, *Les juges dans la mondialisation: la nouvelle révolution du droit* (Paris: Seuil, 2005).

[26] See also D. Jakobs, 'Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories', in J. d'Aspremont and Jorg Kammerhofer eds, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University

This account does not lead to maintain that interpretation of abstract rules is by itself structurally analogical, that is, based on the relationship '*a simili ad similem*'. Similarity is rather the result of the qualification process in respect of a case which appears similar to another because, through comparison, the actual, concrete reasons that confirm the similarity can be inferred, precisely through an argument from sufficient similarity.[27]

As van der Wilt puts it:

> 'the method of casuistry consists of comparing concrete situations and cases, in order to decide, by inductive reasoning, whether they are governed by the same moral or legal principle'.[28]

In fact, it may happen that there is no correspondence between the compared situations, and the case must be deemed different and therefore distinguished from the precedents. Affirmation, rebuttal, and possible sur-rebuttal of the similarity are nevertheless based on a common premise, that all these arguments must be rooted in the concrete features of the case: facts and value judgments.

The case is then back on the center of the law. In the interlegal situations, relevant for present purposes, two questions arise. First, the difference between facts and case, and the relationships between these two concepts, deserve some further clarification (§ 3.2). Secondly, the narrative of facts is of paramount importance: we need to delve into the issue of how empirical facts are considered and selected to become the object of legal qualifications. Indeed, any legal evaluation of the empirical facts submits them to the value-laden judgments that the legal qualification carries out. Such value-judgements can be different, and even opposite: better still, the very problem of the applicable law in the twisted scenario of multi-level regulatory sources, to which interlegality as a category aims to provide its more original contribution, arises precisely when value-judgment enshrined in different legal qualifications are leading to opposite conclusions. In this framework, the scope of the context in interpreting and applying the relevant law must be considered (§ 3.3). Eventually, this article will consider a suitable technique of describing the case starting from the narration of facts. To this aim, I will follow the approach suggested by André Jolles, an influential linguist of the first half of the twentieth Century (§ 4).

2. The Importance of Being a Fact

Press, 2014); L. Halpérin, *Profils des mondialisations du droit* (Paris: Dalloz, 2009), 275-285.

[27] On this aspect see M. Grabmair and K.D. Ashley, 'Facilitating Case Comparison Using Value Judgments and Intermediate Legal Concepts' *Proceedings of the 13th International Conference on Artificial Intelligence and Law*, 160 et seq (ICAIL 2011).

[28] H. van der Wilt, n 19 above, 265; Cf Id, 'Domestic Courts' Contribution to the Development of International Criminal Law: Some Reflections' 46(2) *Israel Law Review*, 207-231, 220-224 (2013).

The words 'fact' and 'case' are sometimes used as fungible ones, evoked rather than specifically reflected on. In a recent, thoughtful Italian handbook on 'general legal theory', for instance, the nouns 'case' and 'fact' shift from the one label to the other without providing a truly sharp conceptual framework. So Umberto Breccia defines the case as a fact, that is, a fragment of experience which is determined in time and space.[29] The case, it is maintained, is above all a fact of the life. As a fragment of life, it is subjected to – sometimes opposed – legal qualifications.

This account goes alongside a classical way of presenting the relationship between case and facts:

> 'A fact is nothing more than an occurrence at a certain point in time, that is able to modify the concrete reality. it may be legally relevant or not, depending on the legislative provision applicable to them…Facts, or occurrences –which is the same– have a distinct and clear autonomy from the material point of view, since they are separated from each other and individualized by their own nature. However, once taken into consideration by the legislator, they can relate to each other and be reduced in unity'.[30]

The shift from one term to the other is to be avoided. We might seize the opportunity for this conceptual clarification in the context of interlegality. An useful starting point is the account made by Gianluigi Palombella, who authored the *Manifesto* essay on Interlegality:[31] it is the circumstances surrounding the fact, irradiating from it, that attract different regulatory orders. While the fact is intrinsically unique or unitary, it faces the plurality of sources. The legal question arising from the convergence of multiple, non-coordinated regimes concerns precisely what is the legal regime of a *fact*. This statement goes along the specification that the first step of the interlegal argumentation has to be identified as assessment of the features peculiar to the *case:*

> 'the reconstruction of the *facts* at hand is the occasion for the interpreter to arbitrate different rationales and countervailing principles on the basis of investigation of the legality imbuing the issues and the features of the *case*'.[32]

The first, elementary significance of the noun 'fact' in the legal context is that of a life occurrence requiring for whatever reasons the intervention of the law. Recalling the importance of facts could sound trivial but is the starting point for any subsequent question as regards the law applicable to the facts and,

[29] U. Breccia, *Teoria generale del diritto* (Pisa: Pacini, 2019), 305, 405, 451.
[30] F. Gazzoni, *Diritto privato* (Napoli: Edizioni Scientifiche Italiane, 2019), 81.
[31] G. Palombella, n 7 above.
[32] ibid 383.

we should add up, as regards the assessment whether those facts are anyhow legally relevant. As Antonin Scalia puts it:

> 'Don't underestimate the importance of facts. To be sure, you will be arguing to the court about the law, but what law applies–what cases are in point, and what cases can be distinguished–depends ultimately on the facts of your case'.[33]

That said, the concrete fact is the object of multiple possible qualifications, that might lead to results which could be not only different but also opposite. Legal qualifications are in turn the content of a 'balance' by the judge. The subsumption of the facts under one possible legal qualification is only following the decision to be taken about what legal qualification is suitable for the facts of the case. Subsumption, however, is not the tool *through* which the decision is taken; nor the content of the decision is a *direct* consequence of this sole logical process. Too often there is no single rule of qualification applicable to the facts, acting as the general statement (so called major premise) that, in combination with the specific statement about the facts (so called minor premise), allows to deduce a logically sound conclusion. As said above, the facts attract multiple norms of qualification and the choice among them precedes the triggering of the very mechanism of subsumption.

As such, the qualification of the facts in light of abstract schemes is not neutral, since the qualification scheme carries in turn a value judgment. Even if the (hardly resolvable) philosophical issue of distinguishing between facts and values is far beyond the content and space limits of this article, we can underline in general terms the importance of an accurate reconstruction of the facts in light of the different schemes of value judgments that can be applied to this reconstruction.

Think for instance of the well-known *Melloni* case,[34] in which the Spanish Constitutional Tribunal and the Court of justice of the European Union strongly debated on the legitimacy of the refusal to execute an European Arrest Warrant emanated *in absentia* by an Italian judicial authority for enforcement purposes. Whereas the Italian legal order would not have admitted the repetition of the criminal trial in the specific case, the Spanish legal order required the mandatory presence of the accused at trial, and the repetition of the trial, of course with the presence of the suspect, in case of violation of such provision. The Spanish judges therefore considered that fundamental rights were protected in higher degree by their own legal order. Beside the different domestic legal orders, the law of the European Union were also relevant. It sets forth as a general rule that

[33] A. Scalia and B.A. Garner, *Making Your Case. The Art of Persuading Judges* (St. Paul, Minnesota: West Group, 2008), 9.

[34] Case C-399/11, *Melloni* v *Ministerio Fiscal*, [2013], ECLI:EU:C:2013:107.

> '(t)he executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision'.

However, European law provides for some exceptions[35] to the prohibition of a conviction in absentia: the warrant must be executed where the person concerned: in due time either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of the trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, has given a mandate to a legal counsellor, and – among other conditions – was indeed defended by that counsellor at the trial. 'Mr. Melloni fell under the scope of those exceptions exactly'.[36]

The EU law expresses a clear 'value judgement' by its own: the right to be present has a protective function, requiring the complete information about the trial, the right to legal assistance, and in general the right to defend oneself against the punitive power (*pretesa punitiva*) of the state.

The Spanish Constitutional Tribunal stressed that only the domestic legal standards were applicable, since 'the right to be preset at trial is traditionally considered part of the right to a fair trial in the Spanish Constitution',[37] without any consideration for the different approach taken by both the European legal order and the Italian one – the latter, in conformity with European rules.

The ECJ takes the opposite stance. It holds that fundamental rights enshrined in the state's constitution cannot prevail over secondary EU legislation compatible with the EU Charter of fundamental rights, even though the standard of protection guaranteed at domestic level is higher than that deriving from the Charter. Any different conclusion would undermine the principles of mutual trust and recognition that the EU legislation purports to uphold.

If we apply an interlegal perspective to contrasts such as the above, a different way of reasoning would be recommended, one that would better cope with the plurality of orders and their own different value judgements upon the case.

If one agrees – and in fact all competing legal orders did agree – upon the premise that the right to be present at the trial is a fundamental right of the individual concerned; and if one agrees that this right has nothing to do with other interests of non-individual nature (which, instead, might be relevant in other, discrete legal settings such as international trials for crimes under international law),[38] then it is clear that such a right is in fact safeguarded

[35] Art 4 *bis* 1 (a) e (b) of the Framework Decision 2002/584 on the European Arrest Warrant.

[36] V. Mitsilegas and L. Mancano, 'Melloni: Primacy versus Rights?', in V. Mitsilegas et al eds, *The Court of Justice and European Criminal Law* (London: Hart Publishing, 2019), 393, 393.

[37] ibid 394.

[38] W. Schabas, *An Introduction to International Criminal Court* (Cambridge: CUP, 2017),

whenever, in the concrete situation, it is/has been a specific, free choice of the individual not to be present at the trial, even if the legal order has put him/her in the condition to defend herself effectively.[39]

Anyone who has practical experience in whatever jurisdiction as a criminal attorney, or at least in jurisdictions where presence is not mandatory, shall know very well how absolutely important is to guarantee this kind of free choice even if the legal order – functionally personified by a public prosecutor or by a judge who might want to look the accused in the eyes – would have its institutional interest that the accused be present.

The clash between the domestic (Spanish) and the European courts has been read as a clash between different value judgments as regard the scope of the (secondary) European legislation in conflict with fundamental rights recognized at domestic highest level: on the one side, strongest safeguard of individual rights; mutual trust in light of cooperation duties of effectively enforcing European law, on the other side.

Both accounts are, however, unduly unilateral and, through this one-sidedness, they ended by letting out of sight the concrete case. In this case, the value that was shared explicitly or impliedly by each of the convergent legal orders – the right to free choice – was already has been safeguarded: the person concerned consciously chose not to participate in a trial which accordingly could be deemed to be legally 'fair'. This should have been considered sufficient for adopting an interlegal perspective, that is, the account that all different perspectives from which the case could be observed had to be taken simultaneously into account. An accurate consideration of the concrete case as well as of all the convergent legal orders allows for the conclusion that no real contrast exists between the duty to cooperate based on the mutual trust, which prevails in the argumentation of the ECJ, on the one side, and – on the other side – the higher standard of protection of fundamental rights, which prevails in the opinion of the domestic supreme court.

Indeed, what is the higher standard of protection of fundamental rights cannot be assessed solely in light of abstract legal provisions. It can only be maintained in the light of the features of the life occurrence in which those rights are claimed. The relevance of the perspective *in concreto* seems to be the majoritarian interpretive attitude in the case-law of international criminal tribunals and more generally in the framework of international criminal justice. As William Schabas recaps the issue at hand:

> 'Although the accused's right to be present at trial is recognized in the principal human rights instruments, international tribunals and monitoring

285-288.

[39] See also the specification made by the CJEU in Case C-108/16 *Openbaar Ministerie* v *Pawel Dworzecki* [2016] ECLI:EU:C:2016:346, paras 49-53.

> bodies have not viewed presence at trial as indispensable and have recognized that an accused may waive the right by failing to appear after notification of the proceedings'.[40]

Case-law of the European Court of Human Rights confirms this case-by-case approach, considering whether the accused actually waived his right to appear and to defend himself and especially assessing whether the waiver is unequivocal; at the same time, the Court stresses that elaborating a 'general theory' is beyond the judicial task –in fact, it is inappropriate.

> 'In the instant case, the Court does not have to determine whether and under what conditions an accused can waive exercise of his right to appear at the hearing since in any event, according to the Court's established case-law, *waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner*'.[41]

> 'It is *not* the Court's function to elaborate *a general theory* in this area … (T)he impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice. However, *in the circumstances of the case*, this fact does not appear to the Court to be of such a nature as to justify a complete and irreparable loss of the entitlement to take part in the hearing. When domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence' who is in (the accused's) position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge'[42].

The perspective on the concrete case, and the taking into consideration of all the legal sources is the most innovative if not revolutionary contribution of the category of interlegality.

3. From the Fact to the Case (*Case*, *Kasus*)

Once the concept of 'fact' and its relationship with the multiple legal qualifications has been clarified, the question arises as to how to conceive of the

[40] W. Schabas, n 39 above, 285-286 (and footnotes to the main text). Schabas comments as follows: 'the fact that common law jurisdictions make a number of exceptions, and allow for such proceedings (=in absentia) where appropriate, shows that this is not an issue of fundamental values so much as one of different practice' (286). The fundamental right, however, is not that of simply being present at trial, but that of the free choice without prejudice to fair trial principles.

[41] Eur. Court H.R., *Somogyi* v *Italy* (2 sec.), Judgment of 11 November 2004, Reports of Judgments and decisions 2004-IV, § 66.

[42] Eur. Court H.R., *Colozza* v *Italy*, Judgment of 12 February 1985, Reports of Judgments and decisions A89, § 29.

concept of 'case'.

It is submitted here that the fact, in the very moment it becomes subject to legal qualification, amounts to a 'case'. It is not the definitive result of the judicial subsumption – which is the decision *on* the case –, rather it must be viewed as a starting condition of the judicial activity that deals with the qualification process. The 'case' can be defined as the relation between the fact(s) and the concurrent legal qualifications, irrespective of the sources' nature. Some of them may be public, some others may derive their normativity from the relevance conferred to inter-private relations or even to ethical and/or social rules. The legal qualification of the fact(s) is always a tangled procedure in and through which the judge must always take into account the plurality of sources as well as the possibility that the facts at the end of the evaluation process cannot be qualified by any legal rule.

To put it in other terms, the fact reduced to the bone emerges, in its pure physiognomy, only if depurated from any value judgment carried by the claiming qualification. The case has its beginning at the very moment when the fact appears as the point of attraction of every possible qualification. Then, it has to be decided what is the most suitable one. In fact, a case originates at the very moment all possible qualifications of the facts are taken into consideration and contrasted with each other. If the case arises at the adjudication stage, those qualifications are taken into consideration by a judge (broadly, an adjudicator) in order to assess and –when needed– balance them in the activity of adjudicating the case that can lead to different end results, that is, to the decision of the case.

Technically, the contexts in which the assessment takes place may have specific denominations depending of the body of law concerned.

For instance, within the remit of criminal law the various types of convergence are labelled depending on the concrete situation as *concorso di norme*, *concorso di reati*, *concurso de normas*, *concurso de delítos*, *cumulative charging*, *multiple convictions*, *Idealkonkurrenz, Gesetzeskonkurrenz*, and similar nouns. Similarly, many labels are conferred to the legal-technical tools for providing a solution to these situations, that is, for choosing, assessing, balancing the diverse legal qualifications of a fact: principio di specialità (the special provision prevails over the general one), consumption, *prise en compte*, and similar ones. As said above, the application of these criteria may lead to multicolor results: from an offence to another, to the irrelevance of the fact from the point of view of the body of law concerned (in this example, criminal law).

As such, legal qualifications are not subjected to the logical step of subsumption, thus they are the object of a choice or, as appropriate, of a balancing: those activities are inevitably and legitimately performed by a judge. This means that, after a first step consisting in the subsumption of a fact under a relevant qualification – or rather and more frequently, among many convergent

ones –, the result(s) of this subsumption is in turn subjected to a further intellectual activity: either the choice between multiple results or a balance between the different qualifications and their respective results: this is the proper content of the legal 'argumentation'.

In light of the above, the judicial activity as assessment of, choice among, and weighing up of different plausible qualifications, does not 'say' (*ius-dicere*) the rule of the case trough a simple, logical subsumption process, it rather contrasts the results of various subsumption processes attracted (or sparkled, if one prefers to say so) by the concrete facts …of the case. This is tantamount to saying that the rule of the case originates as the result of the relationship between the relevant qualifications and the concrete fact(s): it is such relationship that frames the 'case'. This is the reason why it has been said that the case attracts the rule of decision.

With specific relation to the practical experience of international criminal tribunals, where the safeguard of coherence and consistency in applying the law is of paramount importance, Marjolein Cupido has maintained that

> 'the meaning of the law is not determined by abstract rules alone, but develops on a case-by-case basis in interplay with the questions and issues raised in individual cases'.[43]

It has been recalled that international tribunals adjudicating crimes under international law

> 'have regularly drawn up lists of factual indicators, which specify the facts that can be used to determine whether a judicial criterion applies in an individual case'.[44]

Indeed, Courts have always kept a sphere of discretion to carve the law alongside the specific features of individual cases. All that explains why facts must be adequately evaluated, they must be examined in light of the 'prototype' to which the rule has been enacted. Furthermore, the 'holistic functioning of facts'[45] must be stressed in the theoretical discourse. This expression shall mean that interpreters and adjudicators must consider the constant interaction among facts, including the so called 'attendant circumstances' or 'surrounding circumstances' and their 'added value' to the rational reading of the occurrence relevant for the law: 'facts are normally assessed in a holistic way, ie in combination with each other'. Facts, in sum, are necessarily selected and interpreted in light of their context.[46] Differences in the legal treatment of similar patterns of facts are

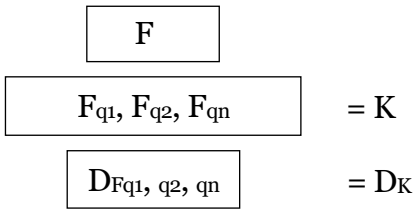
[43] M. Cupido, n 20 above, 2.
[44] ibid 4.
[45] ibid 13.
[46] T. Salmi-Tolonen, 'On the Balance between Invariance and Context-Dependence', in D. Kurzon and B. Kryk-Kastovsky eds, *Legal Pragmatics* (Amsterdam/Philadelphia: John Benjamin

not necessarily synonym of reasoning incoherence, they may be rather explained in light of the different contextual circumstances.

4. Interlocutory Conclusions on 'Fact' and 'Case'

The foregoing analysis can be recapitulated and sketched as follows. The empirical, concrete 'fact' must be dissected to its simple elements, its 'simple forms of appearance' ('*einfache Formen*'), in order to be subjected to the (multiple) legal qualification(s), each of them being capable of subsuming the facts under its own regulative principle. The 'case' arises in this very moment, that is, when facts meet abstract qualifications and their respective regulative criterion. It is up to the adjudicator to decide what is the 'rule of the case'.

We can represent these concepts through following scheme:



F= concrete fact
F_{qn}= fact subjected to abstract legal qualifications (subsumption)
K= case
D_K= decision of/on the case

The subsumption mechanism has no bearing either on the question concerning what are the convergent qualifications, or on what is the prevailing rule (the rule to be set forth in the decision of the case). The syllogism presupposes a different decisional moment, which is not of merely logical nature: it is steered by the features of the concrete case, which definitively affects the qualifications to be selected and used in taking the judicial decision.

The relationship between facts and norms, which emerges in the case and shapes its contours, asks the judge the legal question he/she has to respond. André Jolles, an important linguist of the first half of the twentieth Century, wrote that the case (Kasus) expresses a duty to decide, but does not entail by itself the answer to the legal problem, the content of the decision. What characterizes the form 'case' is that it raises the question, thus does not give any substantive answer: what happens in the case is the fact of weighing up

Publishing, 2018) defines the context as 'a matrix that surrounds the event being examined and provides resources for its appropriate interpretation' (237). The context may be of physical, linguistic, legal, socio-cultural nature.

(arguments), not the result of this weighing activity.[47]

5. Distinguishing Cases

Recalling the importance to be conferred to the facts of the case in the interpretative stage, especially in judicial settings, leads to another important aspect of the relevance of the contextual legal reasoning: how to distinguish cases. On the one side, the empirical occurrence (be it a 'brute fact' or an 'institutional fact' in light of Searle's theory)[48] deserves the utmost attention, and descriptive and axiological (value-laden) propositions must be kept discrete. On the other side, the binding nature of the paradigmatic case is closely related to the specular image of the precedent, that is, the recognition of a dissonant singularity, that suggests the necessity to 'distinguish' cases.

In other terms, it is obvious that relying on the 'precedent' requires to identify a previous decision based upon a cluster of cases either as a binding precedent (*stare decisis*), or as persuasive authority. However, it is crucial in this same context to establish whether the case at hand has to be differentiated from the precedents. In the common law the precedents are simply a starting point for the decision to be taken, as Ugo Mattei has explained to the Italian audience.[49]

Justice Antonin Scalia has clearly maintained that:

> 'there is another skill…that is essential to the making of a good judge. It is the technique of what is called "distinguishing" cases… Within such a precedent-bound common-law system, it is critical for a lawyer, or the judge, to establish whether the case at hand falls within a principle that has already been decided. Hence the technique – or the art, or the game – of "distinguishing" earlier cases. It is an art or a game, rather than a science, because what constitutes the "holding" of an earlier case is not well defined and can be adjusted to suit the occasion'.

[47] A. Jolles, *Einfache Formen: Legende, Sage, Mythe, Rätsel, Sprüche, Kasus, Memorabile, Märchen, Witz* (Halle: De Gruyter, 1930): on the concept of 'case' (*Kasus*) see specifically 171; quotation in the main text above at 198.

[48] J. Searle, 'How to derive "ought" from "is" ' *The Philosophical Review,* 43-58 (1964), (here the distinction between 'brute' or 'non institutional ' and 'institutional' facts: especially at 55). A critical analysis of Searle's account is provided by B. Celano, *Fatti istituzionali, consuetudini, convenzioni* (Roma: Aracne, 2010), especially First Part. See furthermore the original account of M. Ferraris, *Manifesto del nuovo realismo* (Roma-Bari: Laterza, 2012), 74, for example, on the relationship between epistemology and ontology as regards the 'social facts'); Id, *Documentalità. Perché è necessario lasciar tracce* (Roma-Bari: Laterza, 2009), Chapter Two provides a staunch criticism of Searle's account).

[49] For a specification as to the contingent character of the rule (sometimes dubbed 'a legend') of *stare decisis*, which is not decisive within the common law system, see U. Mattei, n 16 above, 214, especially 247-249.

IV. '*Einfache Formen*', Simplified Features: How to Describe a Case

1. Reducing the Occurrence to Its Simplest Component Elements

Given the importance of the facts as a material (as well as logical) premise for building a case, the closest attention is due to details in historical occurrences. It may sound trivial to recall that the first intellectual operation to be carried out is primarily that of setting out with humble and patient attitude the facts of the case, ie the actual state of things in their strict naturalistic sense. Facts are then going to be sifted into, and looked at through the lens of the specific legal narrative.

Narrative has to start from the simplest forms, as they have been dubbed by Jolles: units or items of which the fact(s) are composed, and that are dissected to the point in which they appear indivisible and therefore simple. Thereafter, facts' are assessed through norms and are made valuable-according-to-norms. Norms are contrasted and – if appropriate – balanced with other norms.[50]

To sum up, it is crucial to accurately split up the concrete fact in its simplest items (forms). It is not appropriate to stop at a level of typological similarities between cases: rather, it ought to decompose the occurrence into its simplest components, until the maximum degree of concreteness.

This activity of reducing facts to their simplest components may appear obvious, but its worth is twofold. First, it is of a significant practical import (4.2); second, it is to be premised to interlegal assessments. (4.3).

2. The Fact Behind the Case

Let's begin with the practical aspects.

It may happen that too hasty a qualification of the facts hampers the accurate consideration of the life occurrence at stake, with the consequence of erroneously building a case, that is, of describing a case that is not consistent with the fact(s) that support it.

A. The above mentioned *Melloni* case (*supra*, § III.2), is an example of that. Any accurate analysis of the concrete situation of the accused has been neglected due to the overwhelming claim raised by the national and the supranational legal orders, to unilaterally qualify the situation to be adjudicated. The individual concerned was worth of protection against the request of executing the European arrest warrant, on the understanding of the Spanish law; but he was to be released to the requesting judge in accordance with the *primauté* of European law and the mutual trust principle. However, he had in fact made an indisputably free choice not to be present at trial, all other principles of the fair trial having been safeguarded. Both judicial authorities were remiss *vis à vis* this very specific factual situation. The careful analysis of the 'simple items' of the matter would have led to the conclusion that the apparently diverging legalities, national and

[50] In the words of A. Jolles, n 48 above, 179 ('Norm gegen Norm').

supranational, could have been simultaneously considered and eventually found compatible: which is the added value of interlegality as a method.

B. Another instance of the interpretive added value provided by the pluralistic methodology inherent in interlegal reasoning arises from the consideration of a couple of different online hate speech cases, adjudicated in seemingly opposite terms by (different judges of) an Italian Tribunal. While the decision on one case gave prevalence to the right to free speech, that on the other gave prevalence to the prohibition against discrimination.[51] The common feature of the cases: the social network profile attributable to political exponents of extreme right-wing political parties was deactivated by the administrator of the social network according to internal procedures. This private sanction was motivated with the alleged violation of the rules of conduct of the 'community'. Why then the opposite decisions? In order to analyze the cases and to assess similarities and differences it would not be sufficient to focus only upon the relationship between the different sources of qualification, their convergence on the facts, the balance between freedom of thought and speech *versus* national, supranational, international standards against discrimination. This level of analysis still pertains to a value-laden layer of the argumentation. Prior to this logical step it ought to set out the facts in their simplest components (above, § 4.1). So, whereas the judgment that gave prevalence to the freedom of expression considered that it was *impossible*, on the ground of the gathered evidence, to assess *in fact* the discriminatory character of the association by itself as well as of the conducts charged, the judgment that decided to the opposite motivated by clear evidence that the concerned organization were in fact promoter of discriminatory initiatives as well as of true hate speech episodes.

It is therefore understandable that the two cases have been decided in different manner.

Clearly, it remains open to debate whether the facts have been set out properly, as well as whether the legal evaluation of such facts is appropriate. But it must be underlined that the abovementioned judgments result in different decisions because the 'cases' are different, not because they reach opposite conclusion on the same (type of) 'case'.

3. *False Friends*. The Case of the Rule and the *Case-Law*

The importance of the case as a concept within the theory of interlegality is closely connected with the legal pluralism as a prescriptive method that this category acknowledges. As Palombella writes:

[51] Tribunale di Roma, ordinanza 12 December 2019, no 59264, upheld by Tribunale di Roma, judgment of 27 April 2020, available at https://tinyurl.com/2fce2a6k (last visited 31 December 2021). See also Tribunale di Roma, ordinanza 23 February 2020, available at https://tinyurl.com/mrymt977 (last visited 31 December 2021).

> 'As a prescriptive method, (interlegality) assumes that the plurality of legalities disciplining the case must be taken into account, as a whole. Looking at the law of the case simply means to accept that multiple and even uncoordinated sources fall into the same place, making for a composite interweaving of norms as a third ground irreducible to any of its contributing, and separate, legalities…The law of the case … can be assessed not by answering the recurrent question … as to which legal system, or legal regime, must prevail, but by asking which normative claim, on the ground, can be provided with a better in-context-justification of a legal character'.[52]

The relationship between the special identity of the case and the multiple legal qualifications is a distinctive feature of interlegality, which cannot be equated with the 'case-law' as it is conceived of in the context of common law, as a subset of the latter.

'Case-law' conveys the institutional fact (in the sense of Searle) that judicial decisions are a primary source of law (irrespective of the declamatory tribute payed to the pre-eminence of the legislative law (statutory law).[53] Nonetheless – to fully grasp the specificity of interlegality as centered upon the case – it is useful to compare the concept of the case we have advocated above, with the realists' account according to which the law (of the case) does not stem from the general and abstract legislative rule but from the concrete activity of the judge who *creates* the rule of the case (*judge-made law*).[54] It is precisely the judge's act that amounts to the subject matter of the law (and of its study).[55]

It is well known that some realists such as Jerome Frank deny the normativity of the law, reduced to facts conceived of as the tribunals' decisions, which in turn result out of intuitions and are therefore essentially uncontrollable. Other accounts argue for the decision as a process that develops within the boundaries and alongside the limits set by the legal tradition, shared interpretive habits, and rules.[56]

Nonetheless, even this second account still revolves around the conception of the law as kind of art or discipline aimed at predicting how the judge will decide the case; the abstract rule as source of qualification of the case still remains shadowed.[57]

[52] G. Palombella, 'Interlegality: on interconnections and "external" sources', in this short symposium, § 3.

[53] Cf U. Mattei, n 16 above, 250, 274; G. Fassò (edition updated by C. Faralli), *Storia della filosofia del diritto*, III. *Ottocento e Novecento* (Roma-Bari: Laterza, 2001), 255, 269. It is beyond the scope of this article to recall the streams that went through the modern, and contemporary common law, from Langdell's legal formalism to the realism of Holmes and Llewellyn.

[54] See for all: A. Kronman, *The Lost Lawyer* (Harvard: Belknap Press, 1993).

[55] For any necessary reference see U. Mattei, n 16 above, 276 and fn 278; 274, fn 271.

[56] G. Palombella, *Filosofia del diritto* (Padova: CEDAM, 1996), 210-213, 211.

[57] The study of the cases and the study of the abstract legal rule bear the same importance

Interlegality looks at the normative reality from a substantially different point of view, from which the plurality of normative regimes is indisputable: precisely because of that, law possesses its inherent normativity irrespective and independently of any judicial decision. Rather, it is this normativity that claims to be recognized by the judge. Alongside with this, the interlegal situation requires to be acknowledged not only in its pluralistic dimension, but also in the very moment it arises from the ground, that is, from the case. The features of the case as defined above are the setting of the decision. The law relevant for it reveals itself primarily as it is composite, stemming from all legitimate sources, 'in the absence of an ordered structure of hierarchically defined assignments'.[58]

Inclusiveness of multiple legalities, rather than devolution to the judicial decision, is the cultural message this category intends to convey.[59] Only as a consequence, and subsequently, interlegality operates as a regulative prescription to the activity of the judge who concretely deals with a case characterized by multiple qualification. On this account, interlegality is less concerned with the nature of the judicial activity – whether it amounts to a creation of the rule of the case, or not – than it is with the requirement that 'the legal decisionmaker … account(s) for as many normativities as those involved in the case and … draw the 'just' solution from a composite perspective that is not merely one-sided'.[60]

Interlegality does not partake in the tussle between case law and law in books supporters. The new category is specifically interested in how the case is built up starting from the fact and from the legal qualifications. Indeed, the legal qualifications are acknowledged as sources irrespective of the judicial application.

Interlegality focuses onto the 'case of the rules' in interlegal situations. It ought to be recalled that every single legal order from which the rules stem is only one of the components that have a bearing on interlegal situations. What matters is the plurality of legalities that the actual situation carries with itself. The traditional picture of the relationship between the rule and the relevant subject matter is revolutionized: from the rule for the case to the case of the rules.

('pari importanza nello studio dei casi dell'analisi delle situazioni di fatto rispetto a quella della regola giuridica': so the account of J. Frank summarised by U. Mattei, n 16 above, 284 and fn 325).

[58] G. Palombella, n 7 above, 387.

[59] On the whole discussion on the relationship between the principle of legality in criminal law and its tension with the idea of judicial creativity see only O. Di Giovine, *L'interpretazione nel diritto penale. Tra creatività e vincolo alla legge* (Milano: Giuffrè, 2006). See furthermore V. Manes, *Il giudice nel labirinto. profili delle intersezioni tra diritto penale e fonti sovranazionali* (Roma: Dike, 2012). Interlegality rather suggests the metaphor of the judge sitting (or lost) in the prairie.

[60] J. Klabbers and G. Palombella, n 2 above, 3.

Interlegality - Symposium

Administrative Inter-Legality. A Hypothesis

Edoardo Chiti*

Abstract

The article discusses the possible relevance of inter-legality in the process of implementation of public policies. It opens by observing that inter-legality emerges, both as a situation and as a prescriptive criterion, not only in the context of judicial disputes, where it finds a highly fertile ground, but also in the policy cycle. It then focusses on the implementing phase of the policy cycle, with a view to examining the manifestations of inter-legality as a situation and the ways in which it may operate as a prescriptive criterion. It is argued that inter-legal situations are, in the implementing phase of the regulatory process, diverse and changing, in constant movement between the three macro-poles of joint responsibility, co-ordination of responsibilities and conflict of responsibilities. It is also suggested, as a matter of hypothesis, that inter-legality might operate as a meta-criterion allowing administrations to recognize and manage the complexity of inter-legality situations.

I. Inter-Legality in the Executive Phase of the Regulatory Process

Inter-legality can be reconstructed and critically discussed in the first place as a situation emerging in a specific case brought before a court, as well as a criterion to reach a decision on that case. While courts are used to approach the issue from their own legal order – be it a State, a supranational order such as the European Union (EU) or an international or global regime – the principles and rules potentially relevant for the solution of judicial disputes brought before them often stem from a much wider and composite *mélange* of sources. Since legal orders inevitably overlap and regulate beyond their own borders, a multiplicity of rules laid down by sources of different legal systems may be in principle and in practice applicable to a certain case and ought to be taken into consideration both by the parties and by the court. Such 'composite law', made up of norms laid down by diverse but functionally overlapping and inter-connected orders/regimes, forms the legal material bringing about inter-legality as a concrete legal situation. In this perspective, inter-legality is a legal occurrence manifesting itself in the context of judicial litigation. Yet, it is also the methodological criterion by which a decision on the case should be made. It recommends – or, better, prescribes – not to resort to purely formal doctrines, such as those governing the relationships between sources of different legal

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systems, but to take seriously the composite law potentially relevant for the solution of the judicial dispute. It is by taking the angle of the case, indeed, that courts may avoid the unilateral perspective of a single jurisdiction, reveal the richness and complexity of a situation in which several normativities are relevant to the case, and to engage in the identification of an appropriate balance.[1]

While there is no doubt that judicial litigation is a fertile ground for inter-legality, it is certainly possible to argue that inter-legality also affects other processes and dimensions of a legal order. As acknowledged by Palombella and Scoditti,[2] indeed, inter-legality emerges, both as a situation and as a criterion for its management, not only in the context of judicial disputes, but also in the policy cycle, that is, in the process of designing, steering and implementing public policies by political and administrative institutions.

As for the stage of policy formulation, the regulatory process may be said to be inter-legal because the elaboration and adoption of regulatory measures is inevitably conditioned by the regulatory responses provided by other orders/ regimes to similar issues. If – due the relevant subject-matters – such orders are called upon to govern sectors that are overlapping and interconnected in many ways, none of their political or regulatory institutions can realistically carry out their functions without taking into account the disciplines at work in other legal orders. Such regulatory inter-dependence is demonstrated and even accentuated by the proliferation of international and global regimes that promote, in sectors such as economic regulation, security and climate change, the mutual recognition and coordination of different 'legalities':[3] for example, the member countries of the World Trade Organization (WTO) are encouraged, within the framework of the General Agreement on Trade in Services (GATS), to adopt measures of unilateral and mutual recognition; and the Agreement on the Application of Sanitary and Phytosanitary Measures encourages signatories to

[1] The reference is, of course, to J. Klabbers and G. Palombella, 'Introduction. Situating Inter-Legality', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019), 1-3, where it is argued that '(i)t is the inter-legal sense of complexity that requires the legal decision-maker to account for as many normativities as those involved in the case and to draw the "just" solution from a composite perspective that is not merely one-sided. And if that is so, then "forum-shopping" becomes a less useful activity for the forum-shopper. Of course, all of this implies that the focus rests on individual cases, and therefore places judges (and other decision-makers exercising a quasi-judicial capacity) at the forefront'. For the extended elaboration of the theory of interlegality, G. Palombella, 'Theory, reality and promises of inter-legality. A Manifesto', ibid 363-390.

[2] G. Palombella and E. Scoditti, 'L'interlegalità e la 'nuova' ragion giuridica del diritto contemporaneo', in E. Chiti et al eds, *L'età dell'interlegalità* (Bologna: il Mulino, forthcoming), chapter 1.

[3] The features and ways of functioning of such international and global regimes are discussed by a rich literature, particularly from the point of view of Global Administrative Law; for an accurate and thoughtful account of the ongoing process of institutionalization of the globalized legal space, see S. Battini, 'The proliferation of global regulatory regimes', in S. Cassese ed, *Research Handbook on Global Administrative Law* (Cheltenham: Edward Elgar, 2016), 45.

base their regulatory measures on existing international standards, guidelines or recommendations developed by the relevant organizations, including the World Organisation for Animal Health.

With respect to this type of situations, we may wonder how inter-legality operates as a prescriptive criterion: if and at which conditions regulators should better consider normative measures, rationales and policies at work in other legal systems, and how they should acknowledge and value the plurality of legalities in the process of developing sectoral policies. While the issue falls outside the scope of this article, it is appropriate to stress that such situations of inter-legality are often addressed by envisaging, in the sectoral discipline itself, a number of technical solutions managing the relationship between 'internal' and 'external' sources. Regulators often clarify the relevance to be given, in a specific policy-domain, to principles and rules established by sources of other legal orders, as well as the criteria to solve possible conflicts between legal sources. These are sectoral provisions, tailored to the particular exigencies of the policy field. In the field of food safety, for example, the European Union (EU) has laid down a number of general obligations on free trade aiming at governing not only the import-export of food and feed but also the relationships between EU and non-EU legal sources: in this perspective, the EU legislator has established a (sectoral) principle of equivalence according to which food and feed imported from third countries must

> 'comply with the relevant requirements of food law or conditions recognised by the Community to be at least equivalent thereto or, where a specific agreement exists between the Community and the exporting country, with requirements contained therein'.[4]

How much this and other techniques for managing situations of inter-legality are consistent with inter-legality as a prescriptive criterion, it remains to be seen.

Similar considerations can be made with reference to the implementing phase of the regulatory cycle. To begin with, we easily find also in this phase, situations of inter-legality. Admittedly, the implementation process of a public policy takes place within a certain legal system and is governed by principles and rules laid down by sources of that system. Yet, administrations are usually to manage a plurality of procedural and substantive principles and rules of administrative law laid down by different legal systems. This is what happens, for example, in the case of independent Italian authorities, which are subject, in

[4] European Parliament and Council Regulation (EC) 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/24, Art 11; see also European Parliament and Council Regulation (EU) 2017/625 of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products [2017] OJ L95/142, applicable since December 2019.

their respective fields of action (ranging from competition to public utilities, such as transport, energy and communications), not only to domestic disciplines by sector, but also to principles and rules adopted by the EU, as well as to obligations dictated by international and global regimes. An example is provided by the field of financial markets, where the three competent independent authorities (the Bank of Italy, the *Commissione Nazionale per le Società e la Borsa* (CONSOB) and the *Istituto per la vigilanza sulle assicurazioni* (IVASS)) implement a composite law made up of EU and national provisions, as well as of measures elaborated by global regimes such as the International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS). Furthermore, domestic administrations are increasingly exposed to the administrative practices developed in other legal systems, to be taken into account in order to ensure the effective implementation of their domestic disciplines. This is indirectly confirmed by the multiplication of procedural and organizational links between administrations of different legal systems: for example, the Italian CONSOB and the United States (US) Public Company Accounting Oversight Board settled a cooperation agreement which provides, among other things, for the possibility of joint inspections on alleged violations of Italian law by US companies and US law by Italian companies: both authorities commit not only to mutual assistance, but also to facilitating and improving, through comparison and mutual learning, the performance they are entrusted with in their respective jurisdictions.[5]

If inter-legal situations frequently emerge also in the implementing phase of the regulatory process, how inter-legality operate in this phase as a prescriptive criterion? Empirically, one might easily observe that administrations, in spite of the apparent variety of technical arrangements, tend to manage inter-legality by relying on two main sets of doctrines: on the one hand, those relating to the relationships between domestic and external legal sources; on the other, the doctrines that can be traced back to the principle of legality, here understood in the loose but foundational sense of a precept requiring 'the administration to be able to point to some ground of lawful authority on which it can base its action'.[6] It remains to be verified, however, whether these two sets of essentially formal doctrines are actually capable of fostering the needed plurality of perspectives, instead of unilateral standpoints, in line with the recommendations of inter-legality.

Inter-legality is thus relevant, both as a situation and a possible criterion to

[5] Such cooperation has been formalized in the Statement of Protocol Between the Public Company Accounting Oversight Board of the United States and the Commissione nazionale per le società e la borsa, signed in 2016 and available at https://tinyurl.com/2s8ubj8f (last visited 31 December 2021). Similar agreements have been signed by PCAOB and the competent authorities of other European states, such as Finland and Austria.

[6] See P. Craig, 'Legality, Six Views of the Cathedral', in Id et al eds, *The Oxford Handbook of Comparative Administrative Law* (Oxford: Oxford University Press, 2021), 884.

deal with it, throughout the entire regulatory cycle. In the following pages, we will focus on the administrative phase of the process. By exploring the ways in which inter-legality presents itself and could operate in the regulatory process, we may grasp the variety of its manifestations and reflect upon its implications on the functioning of administrative institutions. Three inter-connected questions will be addressed. First, how do the political and administrative institutions of a legal order, when designing the process of administrative implementation of a sectoral policy, take into account the policy delivery techniques available in the same policy field in other legal orders? Second, how can we describe inter-legality as a 'situation' in the implementing phase of the regulatory process? Third and finally, what are the techniques used by administrations to handle the composite set of principles and rules potentially relevant for the adoption of administrative decisions? Is the application of formal criteria, in particular those relating to the relationships between sources of different legal systems, sufficient? Does inter-legality as a prescriptive criterion represent a useful addition?

II. Framing Implementation: Three Models of Recognition

It is appropriate to begin by examining the ways in which each legal order seeks to govern the interactions between the processes of administrative implementation of its own sectoral policies and the patterns at work in other legal systems regarding equivalent or related policies.

While the enormous variations among different solutions, together with the lack of large-scale empirical inquiries, suggest caution in any classificatory effort, we may tentatively identify three main groups of hypotheses, corresponding to different models of recognition:[7] (i) in the first group, the implementation processes of diverse legal orders are regulated in such a way as to support the *joint* administrative execution of political decisions, which have been, in turn, *jointly* elaborated by two or more legal orders; the underlying model of recognition may be described as one of 'joint responsibility'; (ii) in a second group, the implementation processes promote indirect convergence, rather than joint administrative execution; we may trace back such hypotheses to a model of 'co-ordination of different responsibilities'; (iii) finally, in a third group of cases the implementation processes of the legal orders at stake protect their regulatory policies and sustain open or latent competition; this is a model characterized by the 'conflict of responsibilities'.

Admittedly, such taxonomy provides a simplified and somehow artificial account of a rich and complex legal reality. Our purpose, however, is not that of presenting a typology of the administrative law techniques used by legal orders

[7] See E. Chiti, 'Shaping Inter-Legality. The Role of Administrative Law Techniques and Their Implications', in J. Klabbers and G. Palombella eds, *The Challenge* n 1 above, 271.

to govern the interactions between their implementing processes: for that, we may refer to the analytical frameworks provided by various strands of legal research, including Global Administrative Law.[8] Instead, we aim at ordering the various hypotheses on the basis of the type of recognition between different orders that they promote and sustain. This will help to shed some light on the changing manifestations of inter-legality as a legal situation.

The reality of institutional interactions in the world community provides a growing number of examples of the pattern of 'joint responsibility'. It is rather frequent, indeed, that different regimes establish linkages at both levels of political decision-making and administrative execution. Joint political decision-making may take a diversity of forms, ranging from a formalization of the relationships existing between the founding norms of the relevant legal orders to the establishment of composite working groups. But it always aims at reaching an agreement on a specific policy objective falling within the respective spheres of competence of the regimes at stake and may even imply a balancing between different and competing interests, such as for example security and human rights protection. As for the arrangements for joint execution, they may be organizational (as in the case of mixed administrative bodies) or procedural (as in the case of composite administrative proceedings). The overall result is that the administrations of the relevant regimes are called upon to operate as components of wider 'common administrative systems', meant as forms of composition of national and non-national bodies jointly responsible for the implementation of measures and policies jointly adopted by a plurality of regimes.

This happens, for example, when different orders give birth to a 'regime-complex', that is to a regime beyond the State that, although ultimately lacking an overarching architecture, may be represented as a system bringing a number of different institutions into a looser structure of distributed governance in a specific policy domain such as climate change, financial stability or food safety.[9] The sector of military security is a case in point. Over the last two decades, there has been a clear process of functional convergence between a plurality of international regimes responsible in the field of military security. Such a process of convergence stems from a complex game of forces: the ever closer 'horizontal' integration between the functional disciplines and policies of regional bodies operating in the area of security, such as the EU and the North Atlantic Treaty Organization (NATO); the 'vertical' framing of regional disciplines by United Nations (UN) law; and the unifying capacity of certain global institutions, such as the G8 and the Organization for Security and Co-operation in Europe (OSCE), which tend

[8] See eg P. Craig, 'Global networks and shared administration', in S. Cassese ed, *Research Handbook* n 3 above, 153; and the recent account by S. Cassese, *Advanced Introduction to Global Administrative Law* (Cheltenham: Edward Elgar, 2021), passim.

[9] On the notion of regime-complex, see eg R.B. Stewart et al, 'Reaching International Cooperation on Climate Change Mitigation: Building a More Effective Global Climate Regime Through a Bottom-Up Approach' 14 *Theoretical Inquiries in Law*, 273-304 (2013).

to develop strategies for global security within the UN framework.[10] As a result of the interactions between these forces, a number of different non-national regimes tend to operate in a functionally co-ordinated manner, with a view to the achievement of a common policy objective. Such policy objective is set, in overall terms, by UN law and consists in the security of the world community, broadly meant as the maintenance of the integrity of the global order and covering not only the interruption of hostilities between the fighting parties, but also the restoration of international legality and the protection of fundamental rights both in inter-state conflicts and in domestic crises within a given state.[11]

The second model – 'co-ordination of different responsibilities' – is characterized by a different structure. In this type of situations, the relevant legal orders have not established any form of functional or organizational co-ordination of their political decision-making processes. On the contrary, each legal order autonomously carries out its political decision-making process, according to its own choices and procedures. Accordingly, the implementing arrangements do not aim at allowing a joint administrative execution by the involved legal orders. Instead, the administrative bodies of each legal order operate in parallel, internally to their own systems. Powers of implementation are retained by each individual order, rather than shared or reciprocally co-ordinated within a wider framework. However, the administrative bodies of the various relevant legal orders operate on the basis of rules that are functionally oriented to ensure some operational convergence between themselves. This is due to the need to facilitate the performance of the executive functions that they are called to carry out within their jurisdictions.

This kind of co-ordination may be realized in many different ways, from informal exchanges of 'best practices' and *de facto* working relations, such as exchanges of information or reciprocal participation in the absence of a formalized instrument of co-operation, to more institutionalized techniques of mutual assistance in the exercise of their respective functions. It often implies, in any case, that the administrations of a certain regime are subject to rules laid down

[10] For this perspective, emphasizing the horizontal and vertical connections between the functional disciplines and policies of several organizations beyond the State, see E. Chiti, *L'amministrazione militare* (Milano: Giuffrè, 2007), 88; in the same vein, but paying specific attention to the role of the EU, see the contributions collected in B. van Vooren et al eds, *The EU's Role in Global Governance* (Oxford: Oxford University Press, 2013), part II.

[11] Such a broad understanding of global security, which goes beyond the traditional interpretation of the UN Charter, has been developed since the mid-Nineties by the General Assembly and the Security Council, that have interpreted the notions of 'threat to the peace', 'breach of the peace', and 'act of aggression' in such a way to include cases of severe violation of human rights. This has implied a shift from a merely negative approach, focused on responding to specific crises, to a conception of security as an emerging public policy characterized by an active promotion of fundamental rights and protection of individuals within the State borders and against any possible opposition by the States. On the tensions inherent in this definition of global security see E. Chiti, 'The European Security and Defense Administration within the Context of the Global Legal Space' 7 *NYU School of Law Jean Monnet Working Paper*, 1, 10 (2007).

by other orders' legal sources. This happens, for example, when a global regulatory system makes use of the 'borrowing regimes' technique, as in the case in which the Agreement on the Application of Sanitary and Phytosanitary Measures requires its Members to base their sanitary or phytosanitary measures on the Codex Alimentarius standards and other international regulatory measures. Co-ordination may also lead to the establishment of a common regulatory framework between administrations of different regimes, aimed at co-ordinating the individual responsibilities of each of the organizations involved in such a way as to enhance the effectiveness of their parallel administrative actions. This situation is illustrated by the agreements concluded by a European agency and an international regime or one of its internal bodies: for example, the Agreement between Interpol and Europol establishes several co-operation duties, such as reciprocal consultation on matters of common interest, as well as a detailed procedure for the transmission and processing of information.[12]

The third and last model of recognition of the implementing mechanisms available in other legal orders differs from those recalled above in so far as it accepts a 'conflict of responsibilities', instead of aiming at overcoming or attenuating it. This happens when two or more legal orders operate in a position of latent or open competition, both at the political and administrative level. In this kind of situations, often considered as the paradigmatic situation of regime interaction, leading to diversification and fragmentation in the global governance,[13] the political institutions of two or more regimes promote different policies in the same policy field, as the UN and the EU in their counter-terrorism activities or pursue conflicting goals, such as for example market integration and social protection, this group of cases replicate the rationale of the situation that has been previously characterized as co-ordination of different responsibilities. Each legal order autonomously elaborates its own political agenda and carries out its own mission and sectoral policy, without engaging in any attempt of convergence with the values, objectives and interests pursued by other regimes. At the

[12] Agreement between Interpol and Europol (5 November 2001) and Memorandum of Understanding on the establishment of a secure communication line between Europol and Interpol (11 October 2011) available on the Europol website.

[13] See eg C.R. Fernández-Blanco et al, 'Mapping the Fragmentation of the International Forest Regime Complex: Institutional Elements, Conflicts and Synergies' 19 *International Environmental Agreements: Politics, Law and Economics*, 187-205 (2019); H. Van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Cheltenham: Edward Elgar, 2014), passim; M.A. Young ed, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), passim. For a discussion of legal research on institutional fragmentation in the globalized legal space, as well as its relationships with overlapping studies on polycentricty and complexity, see R.E. Kim, 'Is Global Governance Fragmented, Polycentric, or Complex? The State of the Art of the Network Approach' 22 *International Studies Review*, 903-931 (2020). For a radically constructivist approach, A. Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' 15 *International Journal of Constitutional Law*, 671-704 (2017), arguing that the fragmentation-episode has now given way to an era of 'harmonization'.

administrative level, implementing powers are not only retained by each individual system, but they are also exercised on the basis of rules that are functionally oriented to exclude any form of operational convergence between the different systems. The relevant legal orders therefore operate both at the political and at the administrative level as rival and competing regimes.

In the case of the Agreement on the Application of Sanitary and Phytosanitary Measures and the Cartagena Protocol on Biosafety, for example, the implementing mechanisms available in the two regimes operate in parallel, reflect two diverging rationales (respectively, the need of a scientific assessment of the risks to human, animal or plant life or health and the principle of sustainable development), and are oriented to two different overall objectives, that of integration of domestic markets and that of environmental protection.[14] The co-existence of EU and international environmental management systems provides a further example. The EU has developed an Eco-Management and Audit Scheme (EMAS) as a voluntary management tool for organizations aimed at improving their environmental and financial performance and at communicating their environmental achievements to stakeholders and society in general.[15] Yet, the relationships between EMAS and other environmental management systems, such as the EN ISO 14001, a certifiable international standard adopted by the International Organization for Standardization (ISO), are competitive instead of co-operative. EMAS and EN ISO 14001 do not operate as two functionally complementary schemes, serving the same purposes through equivalent regulatory frameworks. On the contrary, the EU is developing its own political strategy towards a sustainable growth, to which EMAS is instrumental. EMAS' implementing arrangement, moreover, is designed in such a way as to induce private actors to join and comply with EMAS' requirements in alternative to other existing legal regimes. In addition to this, EU institutions consider EMAS more advanced than ISO/EN ISO 14001 and encourage EU and non-EU organizations that are already ISO/EN ISO 14001 certified to 'step-up' to EMAS.

III. Inter-Legality as a Plurality of Dynamic Situations

[14] G.R. Winham, 'International regime conflict in trade and environment: the Biosafety Protocol and the WTO' 2 *World Trade Review*, 131-155 (2003).

[15] European Parliament and Council Regulation (EC) 1221/2009 of 25 November 2009 on the voluntary participation by organizations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) no 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L 342/45. See also the Commission Regulation (EU) 2017/1505 of 28 August 2017, amending Annexes I, II and III to Regulation no 1221/2009 [2017] OJ L222/20. An account of the EMAS is provided by J. Clausen, et al, 'The State of EMAS in the EU. Eco-Management as a Tool for Sustainable Development' available at https://tinyurl.com/4eksdrfe (last visited 31 December 2021); M.S. Wenk, *The European Union's Eco-Management and Audit Scheme (EMAS)* (Heidelberg: Springer, 2005), passim.

The tripartition proposed above is a tentative classification of the ways in which a legal order, when designing the process of administrative implementation of a specific policy by sector, may take into account the policy delivery techniques available in the same field in other legal orders or regimes. Obviously, it is not alternative to other possible taxonomies and might be developed and articulated in further stages of the inter-legality research. For the purposes of this article, in any case, it may shed some light on the manifestations of inter-legality in the executive phase of the regulatory process.

From a structural point of view, a situation of inter-legality always requires that the administrations responsible for the execution of a public policy are called to handle a composite law, that is a plurality of norms laid down by sources of various regimes, all potentially relevant in the implementing process. The rationale for the relevance of such composite law, however, changes on the basis of the overall model of recognition chosen by a legal order in a certain policy field. The model of recognition, in other terms, provides a general rationale for the relevance of such composite law, which may affect the identification by public administrations and private actors involved of the potentially relevant principles and rules, both internal and external to the legal order, as well as of the possible patterns in which the various sources might be in principle composed.

More precisely, when a legal order supports the joint administrative execution of political decisions jointly elaborated with other legal orders, the composite law of principles and rules potentially relevant for the implementation process is framed in an institutional context which implies and sustains a shared commitment of all involved actors to identifying the potential value conflicts and to searching a convergence on some key values and goals of the relevant policy field. In case a model of indirect convergence is chosen, instead, the various components of the composite law potentially relevant in the process of execution of a certain policy may reflect different normativities and policy goals. Moreover, they co-exist in a wider framework functional to the co-ordination of different trans- or infra-sectoral responsibilities, with the purpose of minimizing the possible inconsistencies and tensions that may arise between two or more legal orders at the operational level. The composite law which gives concreteness to inter-legality as a legal situation, again, implies a conflict between different normativities and values when it emerges in implementing processes aimed at protecting the responsibility of the administration of the legal order from possible external interferences.

It is also important to add that inter-legality situations do not only reflect diverse rationales but are also dynamic and changing. The regulatory choices made by the political and administrative institutions, indeed, are neither stable nor fully coherent. Regulatory changes are a distinguishing feature of contemporary policy-making, even in polities oriented to ensure public policies' stability. This is due not only to the mutability of political orientation in the short time, but

also to the technical complexity of many policy domains. Moreover, it is far from rare that political and administrative institutions make, in the same policy field, different and even contradictory choices, for example by promoting at the same time a co-ordination of responsibilities and a regulatory conflict with other regimes. The stability of regulatory choices is also shaken by the complexity of the arabesque of linkages between legal orders, which escape the full control of political and administrative institutions and often lead to unexpected and even unpredictable outcomes, in a dynamic game that has been equated, in an ironic hyperbole, with the complexity of quantum mechanics.[16]

In this context, the three models of recognition discussed in the previous section – joint responsibility, coordination of responsibilities, and conflict of responsibilities – should not be taken as patterns to understand the overall rationale of the implementing process of a specific sectoral policy. Instead, they represent three macro-options orientating the single implementing choices taken by the relevant administrations. Accordingly, the situations of inter-legality are inevitably dynamic: the rationale for the relevance of a composite body of principles and rules in the implementing process changes together with the evolution of regulatory choices, on the one hand, and reflects the ambiguities and unsolved issues of the regulatory choices, on the other. In order to describe a situation of inter-legality, then, it is not sufficient to identify its basic rationale. It is also appropriate to reconstruct its dynamic trajectory, the movement through which an inter-legality situation gets closer or further from one of the three macro-options.

The mobile and dynamic character of inter-legality may be illustrated by an example concerning the Italian tax policy for large firms providing digital services. Differently from classic manufacturing, clearly constrained by the location of a factory, most multinational technology companies can assign value to low-tax jurisdictions, typically by placing in those jurisdictions the intellectual property underlying the services provided. This means that digital multinationals can make profit from services in a country without having any local dimension. In this case, there is a clear mismatch between the country in which value is created and the country where profits are taxed.

In order to tackle such phenomenon, which has a negative impact on public revenues, states different from those where digital multinationals are tax resident have developed policies aimed at re-establishing the principle that profits should be taxed where the value is actually created. Italy, for example, has adopted in 2018 a Digital Services Tax (DST), or '*imposta sui servizi digitali*' which imposes a three percent levy on the gross taxable revenues generated from several categories of services if their users are located in the Italian territory.[17] In the

[16] S. Battini, 'Il «caso Micula». Diritto amministrativo e entanglement globale' *Rivista trimestrale di diritto pubblico*, 325-341 (2017).

[17] Legge 30 December 2018 no 145; see also Legge 27 December 2019 no 160. See the

perspective of inter-legality, a policy of this kind can be traced back to the third of the macro-options previously identified, conflict of responsibilities. The Italian legislator has opted for a unilateral measure, which is consistent with the taxation scheme proposed by the European Commission but assumes that there is a strong divergence between the policy goals, interests and values of the Italian order and those of states with lower tax rates, hosting large multinationals. At the administrative level, the unilateral and non-cooperative approach taken by the Italian legislator implies that domestic administrations do not concur to the achievement of a common financial interest, apply a composite law or co-ordinate the exercise of their functions with the competent agencies of other involved states. Quite on the contrary, they are called to implement Italian law only and operate through proceedings oriented to safeguard their decision-making autonomy from possible external influences.

While the choice of the Italian legislator is clear and unambiguous, it would be a mistake to conclude that inter-legality is, in this implementing process of the Italian policy on digital taxation, a stable situation. In spite of the unilateralism of the new measure, unsurprisingly contested by the US government as discriminatory, unreasonable and inconsistent with international tax principles,[18] Italian political institutions also promote, in parallel, bilateral and multilateral initiatives. In particular, Italy has signed several conventions with other states and has sustained the efforts undertaken since 2013 by the Organisation for Economic Co-operation and Development (OECD) to address taxation matters related to digital economy. OECD, for example, has recommended its member states a number of specific actions that should be implemented in order to improve the operation of the international tax system (as in the *Base Erosion and Profit Shifting* (BEPS) project). Although those initiatives are far from successful, given the strong opposition of major countries of residence of digital companies, mainly the US and China, they illustrate that Italian political institutions follow, at the same time, two different political orientations: one oriented to the non-cooperative, defensive recognition of other legalities, another promoting the making of a system of joint responsibility, pursuing a common financial interest and co-ordinating the administrative capacities of the participating countries. In this context, Italian administrations are called to manage situations of inter-legality that respond to a double and contradictory rationale. They are responsible for the implementation of measures that are unilateral and defensive. But they cannot ignore that the legal framework leaves room to bilateral conventions and global measures, such as OECD's recommendations, which are oriented to the opposite goal of building some form of shared responsibility. Italian administrations

account by F. Gastaldi and A. Zanardi, 'The Digital Services Tax: EU Harmonisation and Unilateral Measures' available at https://tinyurl.com/4asj27wz (last visited 31 December 2021).

[18] Executive Office of the President of the United States, Section 301 Investigation. Report on Italy's Digital Services Tax, January 2021, available at https://tinyurl.com/7rxts5j8 (last visited 31 December 2021).

find themselves in the uneasy position to handle a plurality of domestic and international sources that may be combined in different substantive patterns, depending on which of the objectives – unilateral action or joint responsibility – is considered to be prevailing over the other.

IV. Inter-Legality as a Meta-Criterion

In the previous pages, it has been argued that inter-legality situations are, in the implementing phase of the regulatory process, diverse and changing. Inter-legality always implies a composite body of law, a set of principles and rules potentially relevant in the implementation of a sectoral policy. However, the rationale for the relevance of such composite law depends on the overall model of recognition chosen by a legal order in a certain policy field. Moreover, it is a dynamic rationale, which varies according to the evolution of regulatory choices and inevitably reflects their ambiguities. Inter-legality situations are in constant movement between the three macro-poles of joint responsibility, co-ordination of responsibilities and conflict of responsibilities.

While such characterization opens the field to further research on the micro-dynamics of inter-legality situations, it is now appropriate to ask how administrations are supposed to deal with such situations and whether inter-legality as a prescriptive criterion may be useful in this regard.

On a technical level, inter-legality situations raise two interconnected issues. The first relates to the identification of the norms that are relevant for the adoption of a specific measure in the implementing process. Such norms may be laid down by legal sources internal and external to the legal order where the policy at stake is in the process of being executed. The second issue concerns the prioritization of the relevant norms, which implies a passage from a composite law that may be structured in a variety of ways to a specific, context-dependent ordering of the relevant norms.

In order to deal with those issues, administrations traditionally rely on a number of well-established principles. A first obvious reference is to the principle of legality. In all contemporary legal systems, legality requires legislative authority for any administrative action. Yet, its meaning has become wider and richer over the years. In the Italian legal order, for example, the principle of legality should now be meant, on the basis of the constitutional framework and administrative case-law, as a principle requiring that legislative or secondary law provisions provide *ex ante* guidance as to the criteria for administrative action.[19] Moreover, as an effect of the opening of the Italian legal order to a multitude of regimes beyond the state, starting with the EU order, legality also

[19] See the overall reconstruction by S. Cassese, 'Le basi costituzionali', in Id ed, *Trattato di diritto amministrativo*, *Diritto amministrativo generale* (Milano: Giuffrè, 2nd ed, 2003), I, 174, 216-222.

implies that domestic administrations are subject to non-national norms. In such wise, legality widens the constraints on domestic administrations, which are no longer subject to national law only, but also to European, international and global norms.[20]

While this evolution over time has expanded the scope of the principle of legality, however, it has not been accompanied by a clarification of the ways in which that principle should operate as a criterion to order the different norms to which administrations are subject. In the wide meaning that is has gradually assumed, legality provides guidance as to what the relevant law should be, requiring domestic administrations to comply with procedural and substantive obligations laid down both by internal and external sources. But it does not provide any clear indication, either formal or substantive, as to the prioritization of the different relevant provisions, and even less when policy implementation is at stake requiring context-relevant choices. While it works by identifying the set of relevant principles and rules, it is less useful to orientate domestic administrations in managing inter-legality situations.

The criteria to order the norms relevant in the implementation of a sectoral policy are provided, instead, by the principles that a legal order has established to regulate the relationships between internal and external legal sources. It is on the basis of those principles that domestic administrations may establish an order between the various norms of the composite law that they are called to apply. This is the case, for example, of the principles of direct effect and supremacy, governing the relationships between EU and national sources in the European (integrated) legal order. It is the case, again, of the principle of 'limited direct effect' ruling the relations between EU sources and international treaties' norms according to the current case-law of the European Court of Justice.

Those principles provide a remarkable formal architecture, a number of criteria functional to rationalize the composite law that domestic administrations have to handle. At the same time, however, they present some rather apparent shortcomings, which clearly limit their capacity to guide administrative action. The main issue is connected to the hyper-complexity of the legal framework defined by the principles at work in the various orders. In that framework, indeed, at least three different paradigms co-exist: the first and most clear-cut concerns the relations between EU and Member states' sources; a second paradigm, clear on paper but certainly problematic in its concrete applications, applies to the relations between domestic and international sources, such as international treaties and measures adopted by international organizations; the third paradigm, highly elusive and not yet fully settled, regulates the relations between national and global sources. Each of the three models responds to a specific rationale. The first is obviously coherent with a supranational and

[20] ibid 221. See also, in the same vein, P. Craig, 'Legality' n 6 above, 884, arguing that legality is foundational in so far as it denotes the need for legal authority for any administrative action.

integrationist understanding of the European legal order, while the second is centred on the power of intermediation of states, which remain formally free to determine how and to what extent international obligations may produce effects within their national legal orders; and the main distinguishing feature of which is the attempt to restrain the power of state intermediation without eliminating it.[21] Domestic administrations, thus, find themselves in the uneasy position to apply a multiplicity of principles which vary according to the legal sources at stake, reflect different perspectives on the relations between legal orders, and may conflict with one another. If the composite law that domestic administrations have to manage is highly complex, the formal criteria that should rationalize that composite law are nonetheless complex. The long judicial dispute concerning the CONSOB sanctions proceedings for market abuse shows how difficult may be to manage a conflict between legislative, constitutional, EU (the Charter of Fundamental Rights of the European Union) and international (the European Convention on Human Rights) norms even when they say… almost the same thing.[22] Moreover, even when such criteria operate more smoothly and orientate administrative action in a rather clear manner, they remain primarily formal criteria. They order the various sources according to parameters that are independent from their substantive rationales and contents. They consider formal aspects, exemplified by the features of a directly effective norm, which do not guarantee that administrations are actually capable of solving at the administrative level the contradictions or instability of the regulatory choices made by the political institutions.

It is in such context that we may situate inter-legality as a prescriptive criterion. Our hypothesis – the hypothesis mentioned in the title of this article – is that inter-legality does not operate as a criterion conflicting with the principle of legality or with the doctrines regulating the relationships between internal and external legal sources, in an artificial juxtaposition between a formal rationale (the need to order relations between internal and external legal sources according to formal criteria) and a substantive one (the need to solve an issue from a non-unilateral perspective, capable of recognizing and taking into account the plurality of potentially relevant norms, values and interests at stake). Least of all, inter-legality should be used as an alternative to or substitute for principles governing relations between legal sources. Instead, inter-legality may

[21] For a discussion of these models, E. Chiti, 'Bringing Global Law Home', in S. Cassese ed, *Research Handbook* n 3 above, 439, 452.

[22] See in particular Corte di Cassazione 16 February 2018 no 3831; Corte costituzionale 21 February 2019 no 20; Corte costituzionale 21 March 2019 no 63; Corte Costituzionale 10 May 2019 no 112; Corte costituzionale ordinanza 10 May 2019 no 2019; on this jurisprudence, B. Randazzo, 'L'inversione della "doppia pregiudizialità" alla prova' *Giornale di diritto amministrativo*, 368-373 (2018); M. Allena, 'Le sanzioni amministrative tra garanzie costituzionali e convenzionali-europee' *Giornale di diritto amministrativo*, 373-383 (2018); N. Lupo, 'Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema "a rete" di tutela dei diritti in Europa' *federalismi.it*, 17 July 2019, 1-28.

be viewed, at least as a matter of hypothesis, as a meta-criterion, that is as a criterion capable of shaping the specific principles and rules through which the administrative system of a given order gives execution to its policies by sector.

In particular, we might hypothesize that such meta-criterion is functional to allow administrations to recognize inter-legality situations in all their complexity and richness. This means, first of all, to acknowledge that inter-legality situations are not characterized by purely structural features. Indeed, they are not simply characterized by the composite law, made up of norms laid down by diverse but functionally overlapping and inter-connected regimes, that an administration is called to manage in the implementation of a sectoral policy. Rather, they should be understood as situations in which the composite law may be relevant in a plurality of ways, each reflecting a specific (and changing) model of recognition of the policy delivery techniques available in the same field in other legal orders. Second, it should be acknowledged that 'cases' are a key component of this type of inter-legality situations. While such situations occur in the process of implementation of policies by sector, administrative action still focuses on cases, that is concrete situations shaped not only by the (public and private) interests at stake, as defined by the applicable law, but also by particular facts, contexts and demands of justice.[23] The case, in other terms, is not a situation which manifests itself in judicial litigation only, but one occurring, as stressed also by Palombella and Scoditti,[24] in the different context of the regulatory cycle and, in particular, of its executive phase, as exemplified by the obvious case of individualized decision-making, where administrative measures are not generally applicable rules, but are aimed at a particular individual or at a set of individuals. Third, inter-legality requires administrations to recognize and give value to the normative complexity of the case, as a composite set of norms is usually sustained and oriented by several co-existing normativities, not necessarily consistent or coherent with one another. Finally, administrations should distinguish between the various possible combinations of the relevant norms, opt for an intentionally plural approach, and identify, between the available combinations, the option best capable of ensuring a balance between the different normative claims underlying the case. In line with the overall ethos of the inter-legality theory, in any case, inter-legality should not be meant as a precept requiring administrations to endorse and apply some kind of theory of justice. More modestly, the objective of avoiding injustice or limiting unjust outcomes represents the moral horizon within which the recommendation to set aside exclusively unilateral perspective operates, together with the call to take into account the plurality of norms that are relevant in the case.

As a meta-criterion, inter-legality might inform some principles and rules

[23] On the notion of 'case' in the inter-legality theory, see A. di Martino, 'The Importance of Being A Case. Collapsing of the Law upon the Case in Interlegal Situations', in this symposium.

[24] G. Palombella and E. Scoditti, n 2 above, chapter 1.

of administrative action more open to recognize the normative complexity of the issue and capable of translating it into operational practices. This is the case, for example, of the principle of reasonableness and that of proportionality: the latter significantly and crucially requiring to consider whether a measure is necessary to reach a desired objective or whether such objective has been achieved by the least intrusive method, less impinging on the rights or interests of a private party. It is the case, again, of some instruments that are functional to make administrative action more reasoned, justifiable and predictable *vis à vis* equally entitled normative interlocutors, starting with the traditional triptych of procedural guarantees, transparency and duty to give reasons, largely consolidated in all western legal orders.

The hypothesis proposed above should be, of course, tested and developed in two different directions. The first is strictly normative: does the theory of inter-legality allow to develop a series of criteria of action that administrations may use to handle the multiplicity of potentially relevant norms? Does it provide concrete indications, as it seems to be the case for judicial action, or it should be further articulated? In particular, in which way can we identify and define the exigencies of recognition and valorisation of the normative richness of the case in the specific context of the implementation of hyper-complex policies as those at work in contemporary western polities? Second, research should engage in a reconstructive exercise: to which extent can inter-legality be said to be already present in the concrete practice and actual ways of functioning of the administrative systems of national orders? Which legal arrangements and techniques support and operationalize inter-legality?

V. Conclusions

This article has discussed the possible relevance of inter-legality in the process of implementation of public policies. We have first observed that inter-legality emerges, both as a situation and as a prescriptive criterion, not only in the context of judicial disputes, where it finds a highly fertile ground, but also in the policy cycle. We have then focussed on the implementing phase of the policy cycle, with a view to examining the manifestations of inter-legality as a situation and the ways in which it may operate as a prescriptive criterion.

The analysis has led to three main conclusions. First, inter-legality situations are, in the implementing phase of the regulatory process, diverse and changing. Inter-legality always requires that a composite body of principles and rules is potentially relevant. Yet, the rationale for the relevance of such composite law in the implementation of a sectoral policy depends on the overall model of recognition chosen by a legal regime in order to take into account the policy delivery techniques available in the same field in other legal regimes. Second, such rationale is dynamic and mobile: it varies according to the evolution of

regulatory choices and reflects their ambiguities and contradictions. It is thus appropriate to represent (and analyse) inter-legality situations as in constant movement between the three macro-poles of joint responsibility, co-ordination of responsibilities and conflict of responsibilities. The third and final conclusion is a hypothesis: the hypothesis according to which inter-legality might operate as a meta-criterion allowing administrations to recognize and manage the complexity of inter-legality situations, in particular by informing a number of principles and rules of administrative law common to most contemporary polities.

Interlegality - Symposium

From Conflictual to Coordinated Interlegality: The Green New Deals Within the Global Climate Change Regime

Gürkan Çapar*

Abstract

Climate change is one of the most wicked problems we have to deal with in the 21st century. No need to say, it is a problem of politics. The paper will first outline, taking a historical perspective, the institutional developments global climate change governance has been experiencing within the last two decades, with a particular focus on the contrast between Kyoto Protocol (KP) and Paris Agreement (PA) and their distinctive mode of governance. It is going to argue that the PA created an atmosphere not only for the flourishing of transnational and national actors but also for the popping up the Green New Deals all across the world.

The conflictual relationship between different national legal orders is likely to turn to a more coordinated one thanks to the fertile mode of governance established with the PA. In its final part, the article will analyze this turn to cooperative relationship, upon having shown the deficiencies of GAL and mere political approaches, through the lenses of inter- legality.

I. Introduction

The European Union (EU) launched its Green New Deal (GND) on December 2019 just before the explosion of the health crisis caused by COVID-19. With the pandemic emergency, other new GNDs have been launched across the world by major states such as the US, China, and India. Recently, South Korea has also followed this trend by giving GND a prominent place in its post-COVID-19 stimulus plan.[1] What is more, today the GND is a highly debated phenomenon even in countries where it is yet to be realized.[2] Unsurprisingly, the repercussions of the EU's GND have been felt even in countries where climate change is traditionally not an item on the agenda such as Turkey. Such plurality of GNDs raises a number of questions: What are the underlying reasons for this trend of

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[1] J.H. Lee and J. Woo, 'Green New Deal Policy of South Korea: Policy Innovation for a Sustainability Transition'12 (23) *Sustainability*, 10191 (2020).

[2] See for Latin America D.A. Cohen and T. Riofrancos, 'Latin America's Green New Deal' 52(4) *NACLA Report on the Americas*' (2020); for South Africa B. Bungane, 'S. Africa: SANEDI endorses Green New Deal for economic recovery' (2020), available at https://tinyurl.com/2p83823h (last visited 31 December 2021).

GNDs? Why are we witnessing the rise of GNDs? And is this trend a mere reflection of the global regulatory competition between global powers with respect to the question of how to regulate climate change regime (complex)? [3] Or does it result from the flexible and productive legal framework created by the Paris Agreement?

To address these questions, this article will first look at the climate change regime by taking an institutional perspective (§ II). In doing so, it will show how the institutional structure of the climate change governance system led by the United Nations (UN) and its mode of governance have undergone a process of transformation, not least in the period following the Copenhagen Accord (§ II.1 - II.2). By highlighting the differences between Kyoto Protocol and Paris Agreement, the article will argue that the mode of governance established with the Paris Agreement has provided a fertile ground for both empowerment and subjectivation of the nation-states (§ II.3), and this has in turn given rise to the flourishing of the GNDs all across the world because the states are obliged to honor their promises (nationally determined contributions) they pledged (§ II.4). In the second part, it, upon refuting the arguments deployed by political scientists, will shed light on the relationship between legalities within the global climate change regime by adopting a legal realist lens and benefiting from the theoretical approaches such as Global Administrative Law and Inter-legality (§ III). To this end, it will focus on the territorial, or state-based legalities within the global climate change regime, that is, it will dwell on infra-systemic inter-legality and disregard the impacts of the other sectoral regimes on climate change regime. Resting its analysis on infra-systemic inter-legality, the article will argue that we are experiencing a turn from conflictual to coordinated relationship between legalities under the global climate change regime, not least after the significant changes introduced with the Paris Agreement (§ IV). It will conclude by hinting at some possible ramifications of the GND for the EU.

II. The UN Climate Change Regime

1. Situating the Institutional Problems

Climate change is one of the gravest problems we must deal with in the 21st century. Needless to say, it is a problem of politics. It forces us to face the

[3] For the sake of linguistic simplicity, the article will use the term climate change regime; nevertheless, it should not come to mean that climate change regime is a full-fledged regime as exemplified by the WTO. Hence, the term is used during the article in the loose sense in a way that encapsulates integrated regimes, loosely coupled regime complexes, and the various modes of experimental governance situated between these two opposite poles. See for a very illuminating study that highlights these various modes of governance G. de Búrca, R.O. Keohane and C. Sabel, 'New Modes of Pluralist Global Governance' 45 *NYU Journal of International Law and Politics*, 723-786 (2013).

ineffectiveness of the international legal order established after the Second World War and our failure in how we are tackling global collective action problems. Traditional international law paradigm steeped in the idea of equality of states and unanimity rule for decision-making, on the one hand, and state's reluctance and diverging interests, on the other, are probably main reasons for this failure. It signals also how ineffective our international legal order, established after the Second World War, is in the face of today's highly challenging problems. Thus, it is not a coincidence that with the turn of the century we witnessed a Cambrian explosion of transnational organizations (TNO) as a complement to the ill-founded intergovernmental organizations (IGO)[4] of the cold-war period. By way of illustration, transnational organizations, controlled by non-state actors and performing administrative-like functions, has mushroomed in the last three decades, while the IGOs has remained static and fluctuated around Two Hundred and Fifty.[5] On top of this, states have circumvented formal and multilateral international treaties such as UN-led climate change regime and had recourse to informal, clublike structures to reach a decision that has a global effect despite the lack of participation. This trend shows that the gap created by the shortage of IGOs in addressing the new challenges of global governance has been filled by functionally equivalent institutions. In other words, the 21st century brings with it not only an apparent rise in the quantity of international organizations, transnational institutions, international agreements and treaties but also a qualitative change in the form of international authorities such that it has heightened the likelihood of collision of legalities, be it in the form of institutional or normative collisions.[6]

2. Institutional Developments Outside the UN-Led Climate Change Regime

Such 'institutional revolution'[7] was nothing more than an answer to the spatial revolution of the globalization displacing the states from their position of general ends entity.[8] On this account, states are either under-effective because

[4] K.W. Abbott, 'The Transnational Regime Complex for Climate Change' 30(4) *Environment and Planning C: Government and Policy*, 571-590 (2012); K. Dingwerth and J.F. Green, 'Transnationalism', in K. Backstrand, E. Lövbrand eds, *Research Handbook on Climate Governance* (Cheltenham Glos-Northampton Massachusetts: Edward Elgar Publishing, 2015), 155.

[5] K.W. Abbott, J.F. Green and R.O. Keohane, 'Organizational Ecology and Institutional Change in Global Governance' *International Organization*, 249 (2016); S. Battini, 'The Proliferation of Global Regulatory Regimes', in S. Cassese ed, *Research Handbook on Global Administrative Law* (Cheltenham Glos-Northampton Massachusetts: Edward Elgar Publishing, 2016), 47.

[6] See for a concise summary of the literature engendered by the fragmentation of international law C. Kreuder-Sonnen, M. Zürn, 'After Fragmentation: Norm Collisions, Interface Conflicts, and Conflict Management' *Global Constitutionalism*, 9(2), 241-267 (2021).

[7] K.W. Abbott, J.F. Green and R.O. Keohane, n 5 above, 271-272.

[8] 'A state is a "general ends" entity, and its job is to be responsible for the whole, without

they cannot cope with the global dimension of regulation by themselves or over-effective because their regulations may have extraterritorial effects (regulation without representation).[9] While states may address the effectiveness deficit by controlling the foreign regulations effecting its own legal order, they may wipe out the accountability deficit by paying heed to the outsiders' interest.[10] As a result, the international order established after the Second World War in which states are the main actors gave way to a more pluralist, even partially nonconsensual legal order with globalization.[11] In short, '(t)he national differentiation of law is now overlain by sectoral fragmentation',[12] and territorially bound legal jurisdiction is replaced or complemented by functionally determined jurisdictions that claim global validity. When it comes to climate change regime, transnational organizations come to the help of climate change legal order instituted by the Rio Declaration when it stops short of addressing the environmental problems. Alongside the formal legal institutions of the Rio such as the UN Framework Conventions on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD) we have witnessed the rise of transnational organizations such as ISO 14000 environmental management standards, Carbon NZero, and CarbonFree Certified, on the one hand, and clublike small, minilateral arrangements and temporary collaborations such as G7/G8, G20, and MEF.

The UNFCCC was supposed to be complemented and fleshed out with the further annual conferences of the Parties (COP). Thus, the Convention, adopting 'framework convention plus model, took on essentially a procedural form' and 'its substantial provisions were formulated in rather vague language'.[13] By analogy, it is the framework constitution setting the boundaries and general purposes of the climate change rather than a substantive one. For instance, Art 2 of the UNFCCC laid down that the objective of the treaty is to stop the

aiming to execute one particular function at the expense of others'. G. Palombella, 'Theory, Realities and Promises of Inter-Legality: A Manifesto', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019), 369. Raz also points to this feature of legal systems, claiming that legal systems are comprehensive, that is, they 'claim authority to regulate any type of behaviour. In this they differ from most other institutionalized systems. Sport associations, commercial companies, cultural organizations or political parties are all established in order to achieve certain limited goals and each claims authority over behaviour relevant to that goal only', J. Raz, *Practical Reasons and Norms* (Oxford: Oxford University Press, 3rd ed, 1999), 150.

[9] S. Battini, n 5 above, 49-50.

[10] ibid 53.

[11] See for the failure of consensual multilateralism and the turn to informal, non-consensual rulemaking N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' 108(1) *American Journal of International Law*, 1-40 (2014).

[12] G. Teubner and A. Fischer-Lescano, 'Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' 25(4) *Michigan Journal of International Law*, 1008 (2004).

[13] D. Coen, J. Kreienkamp and T. Pegram, *Global Climate Governance* (Cambridge: Cambridge University Press, 2020), 18.

greenhouse gas (GHG) emission 'at a level that would prevent dangerous anthropogenic (ie, human) interference with the climate system'. It was assumed that further conferences or treaties will put flesh on the bones of the framework treaty. The first attempt in this endeavour came with the Kyoto Protocol, ratified in 1997 and entered into force in 2005, aimed at operationalizing the UNFCCC's objectives. It set specific binding GHG emission reduction targets for the developed countries[14] by somehow under the spell of the success coming with the Montreal Protocol on Substances that Deplete the Ozone Layer, which is also embraced a top-down and highly prescriptive approach.[15] In turn, it failed to live up to its promises and Canada, Russia and Japan abstained from adopting new targets for the 2013-2020 period.[16] It was, as highlighted by Heyvaert, a

> 'paragon of regulatory precision, laying down quantified emission reduction targets relating to specific greenhouse gases, to be achieved within a well-defined timeframe'.[17]

In the face of this obvious failure of multilateralism and formal climate change regime, countries and transnational organizations headed towards different organizations or institutions to promote their own interests[18]. While 'fragmenters' resisted the UN-led formal climate change regime due to its strict mitigation targets and negative effects on economy, on the other are 'deepeners', which pushed forward for more ambitious measures and policies by dint of their dissatisfaction with the ineffective UN regime[19]. Under these conditions, the fora such as G7/8, G20, MEF, APP, and countless transnational organizations served the interest of both groups. They were used for either good cause in order to induce the recalcitrant states to take further actions or for bad reason in order to sidestep the UN regime and shy away from the Kyoto Protocol's strict provisions. While the EU and its member states exemplify the former, the United States (US) can be conceived of as the prime example of the latter. It was in this context that climate change problems gained significant traction outside the formal framework of climate change regime by virtue of transnational organizations and minilateral, clublike meetings in the first decade of the twenty-first century.

[14] B.A. Dikmen, 'Global Climate Governance Between State and Non-State Actors: Dynamics of Contestation and Re-Legitimation' 8 (Özel Sayı) *Marmara Üniversitesi Siyasal Bilimler Dergisi*, 64 (2020).

[15] D. Coen, J. Kreienkamp and T. Pegram, n 13 above, 18.

[16] D. Bodansky, 'Transnational Legal Order or Disorder?', in T.C. Halliday and G. Shaffer eds, *Transnational legal orders* (New York: Cambridge University Press, 2015), 293.

[17] V. Heyvaert, 'Regulatory Competition—Accounting for the Transnational Dimension of Environmental Regulation' 25(1) *Journal of Environmental Law*, 13 (2013).

[18] This phenomenon is couched in different terms such as contested multilateralism, regime shifting, counter-institutionalism, and competitive multilateralism. See eg, J.C. Morse, R.O. Keohane, 'Contested multilateralism' 9(4) *The Review of International Organizations* (2014).

[19] B.A. Dikmen, n 14 above, 64.

3. The Transnationalization of International Law with the Paris Agreement

a) Modus Operandi of Climate Change After the Paris Agreement

Although the Copenhagen Accord had bitterly shattered the hopes of environmental activist owing to its failure in concluding a new comprehensive agreement as a replacement of the Kyoto Protocol (KP), the following COPs set the stage for the landmark COP21 Paris Agreement (PA), which then transformed drastically the *modus operandi* of the climate change governance.[20] The PA explicitly stipulated that it would 'be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties'.[21] Thus, it was a further movement from the top-down approach of the KP towards a designed 'bottom-up architecture, consisting of national pledges and international scrutiny'.[22] In a nutshell, it was 'a transition from a 'regulatory' model of binding, negotiated emissions targets to a 'catalytic and facilitative' model that seeks to create conditions under which actors progressively reduce their emissions through coordinated policy shift'.[23] In the subsequent years following the CA, it is also telling to see the rise of transnationalism and regime complex scholarship, which portrayed the climate change governance as a regime complex consisting of 'loosely coupled system of institutions' without 'no clear hierarchy or core'[24] as opposed to a full-fledged regime with substantive treaty and high court exemplified with the World Trade Organization (WTO) and trade regime.

In the first instance, the PA dispensed with the idea that developed countries, which are mostly responsible for climate change, have to take necessary measures while developing countries are not obliged to make any effort due to their very limited contribution to it. By doing so, it dissolved the crude distinction between developed and developing countries, and instead embraced a more nuanced and cooperative approach to the principle of common but differentiated responsibility (CBDR).[25] Now, each country, irrespective of the degree of its economic development and contribution to the climate change, will certify its

[20] M. Fermeglia, 'Comparative Law and Climate Change', in F. Fiorentini and M. Infantino eds, *Mentoring Comparative Lawyers: Methods, Times, and Places* (Berlino: Springer, 2020), 238.

[21] Art 13 of the Paris Agreement, available at https://tinyurl.com/2p95jt7u (last visited 31 December 2021).

[22] D. Bodansky, 'Transnational Legal Order or Disorder?' n 16 above, 293.

[23] T. Hale, ' "All Hands on Deck": The Paris Agreement and Nonstate Climate Action' 16(3) *Global Environmental Politics*, 12 (2016); Id, 'Catalytic cooperation' 20(4) *Global Environmental Politics,* 73-98 (2020).

[24] R.O. Keohane and D.G. Victor, 'The Regime Complex for Climate Change' 9(1) *Perspectives on politics,* 9 (2011); see for the argument that Keohane and Victor dwell on international organizations in their analysis on climate change regime complex, thus theirs is an international regime complex rather than a transnational one, K.W. Abbott, n 4 above, 571-590.

[25] D. Coen, J. Kreienkamp and T. Pegram, n 13 above, 21

nationally determined contribution (NDC) to emission cuts every five years though it is incumbent upon the states to determine their own contribution to the global emission cut. In each five-year evaluation period, the countries will also be reviewed and evaluated as to their success in reaching the targets that was already set out by themselves. It, in doing so, refrained from giving a one-right-answer to the question to what extent developed countries should contribute to the GHG emission reductions *vis-à-vis* developing ones, and thereby kept its silence on the distributive questions at least for now.[26]

Second, it incorporated the transnational institutions into the UN-led climate change regime by considering them not 'as an alternative to the UNFCCC process, or as merely a helpful addition, but as a core element of its logic of spurring rising action on climate over time'.[27] This in fact contradicts with the traditional approach taken on by international environmental law scholarship whereby transnational actors may become an active member of international law only if their demands are mediated through states or the states serve as a transmission belt.[28] Hence, the PA signifies a turn to transnationalism, whose origins could be traced back to the Copenhagen Accord.[29] In other words, the agreement granted legal status to the transnational organizations, empowered and enlist them to help when the support of activists, journalists, scientist, civil societies, non-governmental organizations (NGOs), etc are in dire need. As poignantly stated by Slaughter,

> '(b)y the standards of a traditional treaty, it falls woefully short. Yet its deficits in this regard are its greatest strengths as a model for effective global governance in the twenty-first century'.[30]

In sum, the PA marks out a significant and very important moment of transition from hard to soft mode in climate change governance, as being also one of the prime examples for the global governance in the twenty-first century. It is not because it includes very important legal provisions in the formal treaty, but because it created a specific procedural structure that empowers transnational actors. As Bodansky recently put forward, the COPs has also undergone a significant transition during this period. And once it was centred around governments and their officials, now it is fair to say that

[26] R. Falkner, 'The Paris Agreement and the New Logic of International Climate Politics' 92(5) *International Affairs,* 1115 (2016).

[27] T. Hale, ' "All Hands on Deck" 'n 23 above, 13-14.

[28] D. Bodansky, 'Thirty Years Later: Top 10 Developments in International Environmental Law: 1990-2020' *Yearbook of International Environmental Law*, 19, available at https://tinyurl.com/yhmx29bw (last visited 31 December 2021).

[29] T. Hale, ' "All Hands on Deck" ' n 23 above, 13 (drawing attention to the increased scholarly interest in transnationalism)

[30] A.M. Slaughter, 'The Paris Approach to Global Governance' *Project Syndicate,* 28 December 2015.

> 'all the action was really in the Bonn zone. When you go to the Bula Zone, where governments are negotiating … it was just pretty dead… there was no energy whatsoever'.[31]

In a nutshell, today it is safe to say that transnational organizations hold a very important place, not least thanks to the framework set up with the PA, in climate change governance, even much beyond the legal framework.

The ways that transnational organizations may engage in the review process are three-fold: i) in the global stocktakes, ii) in the transparency framework (Art 13), and iii) compliance mechanism (Art 15).[32] Given that global stocktake should rest on the 'best available science' pursuant to Article 14(2), it falls to the NGOs to observe the extent to which it complies with this requirement by also benefiting from the Intergovernmental Panel on Climate Change (IPCC) reports. With respect to the transparency framework, it is still a matter of controversy to what extent the PA displays a departure from the Kyoto Protocol. While some argues that the PA by prioritizing transparency over compliance marks a shift from compliance to transparency or 'from selective coercion to collectively supported competition',[33] others are sided with the idea of 'accountability continuum',[34] claiming that the parties' obligations vary from mere procedural, transparency requirement to binding compliance mechanism. For instance, the parties are obliged to deliver a Biennial Transparency Report (BTR) beginning from 2024, in which they must provide sufficient information on how they are to achieve and implement their NDCs. Despite this binding procedural obligation, the BTRs are not designed to enhance compliance, so they are supported only with weak compliance mechanisms such as Technical Expert Review and Facilitative Multilateral Consideration of Progress.[35] By contrast, the communication of the NDCs is an obligation backed by a stronger compliance mechanism, in the breach of which the Art 15 Committee will automatically initiate the consideration of the case. Against this backdrop, the transnational actors may first nudge half-hearted states through 'naming and shaming'[36] and push national governments to more ambitious NDCs in the

[31] In Bonn/Fiji COP 23 (2017), due to the absence of a large enough conference area, the two different area are allocated respectively for governmental officials (Bula Zone) and non-governmental organizations (Bone Zone). See for the Prof. Daniel Bodansky's speech; Daniel Bodansky, COP26 Lecture 1 – Prof. Daniel Bodansky, 'Road to Paris and Glasgow' *Youtube,* uploaded by Durham University, 9 March 2021, https://tinyurl.com/5funmvcr (00:38:40 – 00:39:00) (last visited 31 December 2021).

[32] H. Van Asselt, 'The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance Under the Paris Agreement' 6(1-2) *Climate Law*, 99 (2016).

[33] A.M. Slaughter, n 30 above.

[34] C. Voigt and X. Gao, 'Accountability in the Paris Agreement: The Interplay Between Transparency and Compliance' 1 *Nordic Environmental Law Journal*, 31-57 (2020).

[35] Art 13 of the Paris Agreement.

[36] B.A. Dikmen, n 14 above, 74; see for the argument that states may also exert pressure to each other R. Falkner, n 26 above, 1121-1123.

upcoming terms. However, this is the role that has already been played by the transnational organizations from the first years of climate change governance.[37] Having said that, it can be argued that transnational organizations, when armed with the IPCC's scientific reports and the PA's transparency requirements, may play a very important role in rendering these formal reports such as the BTCs and NDCs accessible to the public.

In addition to this shift in the mode of governance, the PA is a compromise and a response to the demand of the deepeners, aiming to politicize and prioritize climate change, on the one hand, as well as of the fragmenters, escaping from the shackles of Kyoto Protocol and UN-led climate change regime.[38] Seen from this perspective, the PA is the outcome of a struggle between two sides, both of which searching for solutions outside of the UN framework. So, it is highly likely to consider the PA as a great achievement, especially when its aspiration towards gathering both minilateral fragmenters and transnational deepeners under the framework of the UN climate change regime is realized and acknowledged.[39] For whilst the procedural obligation of states to submit a more demanding pledge in the each successive five-year-period may be conceived of as a response to the counter-institutionalization demand of the recalcitrant states, the empowerment of transnational actors as the watchdog of the NDCs is the outcome of the politicization of the climate change and the pressure exerted by the deepeners states.[40] This new logic is described by Falkner as 'domestically driven climate change action'.[41] To sum up, the PA as the epitome of post-sovereign global governance, did not only allocate responsibility by either giving more leeway to the actors (states) within the formal treaty mechanism or integrating some into the formal treaty framework, but also imposes some procedural obligations on the actors. When it comes to state, they have to comply with some procedural rules in their NDCs and BTRs, and this open up a space for non-governmental organizations to step in. As such, it strikes a delicate balance between the IGOs and its transnational competitors. In some sense, international law has been transnationalized while transnational law has been internationalized

> 'through nonhierarchical 'orchestration' of climate change governance, in which international organizations or other appropriate authorities support and steer transnational schemes'.[42]

[37] H. Van Asselt, n 32 above, 94.

[38] B.A. Dikmen, n 14 above, 70-76.

[39] ibid

[40] ibid, see for the watchdog role of non-state actors K. Bäckstrand, J.W. Kuyper, B.O. Linnér, and E. Lövbrand, 'Non-state Actors in Global Climate Governance: From Copenhagen to Paris and Beyond' 26(4) *Environmental Politics* (2017).

[41] R. Falkner, n 26 above, 1118-1124.

[42] K.W. Abbott, n 4 above, 571; see for a very similar argument T. Hickmann, O. Widerberg, M. Lederer, and P. Pattberg, 'The United Nations Framework Convention on Climate Change

There is one final dimension that is worth mentioning. The institutional compromise between internationalism and transnationalism is not oblivious to the inherently problematic nature of the climate change with respect to sharing the responsibilities and burdens and allocating the resources. As it is out of question, climate change governance is, more than ever, beset with the question of how to distribute the responsibilities and burdens coming necessarily with the mitigative responses between developing and developed countries. Seen from the perspective of global justice, it is clear that while the Global North has been reaping the benefits of carbon-based industrialization, the Global South, in which almost eighty-five per cent of the world reside, bears the brunt of its negative impacts. To illustrate,

> 'between 1850 and 2002, countries in the Global North emitted three times as many GHG emissions as countries in the Global South, where approximately 85 per cent of the global population also resides'.[43]

What is more, today fifty per cent of the total GHG emission is caused by the wealthiest ten per cent.[44] This is why any measure taken against climate change should, from a normative perspective, take account of the parties' responsibilities and its subsequent distributive results. What is significant for the PA is that it not only contains provisions about mitigation, associated with diminishing or putting a halt on the GHG emission, but also includes clauses for adaptation and loss & damage policies, which are related to the distributive and corrective measures and pertain to impeding the negative consequences of climate change. Thus, it could be asserted that the PA signifies a turn towards distributive and burden-sharing policies. However, it is also essential to point to the fact that this compromise could only be realized after the countries such as China and India surpassed the majority of Western countries on the GHG emission.[45]

b) Politics of Paris Agreement

So far, the article has discussed the institutional dimensions and implications of the climate change regime. First, it has taken a historical perspective with a

Secretariat as an Orchestrator in Global Climate Policymaking' *International Review of Administrative Sciences,* 1 (2019), available at https://tinyurl.com/mrdrb7ku (last visited 31 December 2021); see for a study questioning the effectiveness of this orchestration S. Chan and W. Amling, 'Does orchestration in the Global Climate Action Agenda Effectively Prioritize and Mobilize Transnational Climate Adaptation Action?' 19(4-5) *International Environmental Agreements: Politics, Law and Economics*, 429-446 (2019).

[43] H.K. Paul, 'The Green New Deal and Global Justice' 28(1) *Renewal*, 64 (2020).

[44] ibid

[45] In 2006, China's total GHG emission exceeded the US, and today these countries total GHG emission almost amount to half of the world's total emission. See H. Ritchie and M. Roser, 'CO_2 and Greenhouse Gas Emissions' *Our World in Data* (May 2017), available at https://tinyurl.com/2p8d78u4 (last visited 31 December 2021).

view to casting a light on *the modus operandi* of these institutions and the dynamics between them. In that regard, it has shown how the institutional changes have been accompanied with, or even forced by, the defined and redefined peculiar roles assigned to each actor, be it IGOs or TNOs. To this end, it has outlined the trajectory of institutional evolution having been occurred in the last two decades within the global governance of climate change. It has also showed that while the deficiencies of the formal UN-led regime brought about counter-institutional (by fragmenter states) and progressive political (deepener transnational organizations and the EU) movements, these non-UNFCCC movements, by acting as a legal irritant[46], have later obtained formal recognition by the PA.

What is more, these institutional transformations brought with themselves some important changes in the legal instruments made use of by these organizations in the global climate change regime. By way of illustration, it is very rare to encounter legal obligations in non-obligatory sense in multilateral environmental agreements even though they may include a mix of soft and hard obligations.[47] However, the PA exemplifies a delicate 'mix of hard, soft and non-obligations, the boundaries between which are blurred, but each of which plays a distinct and valuable role'.[48] This is a remarkable shift from the predictable, clear and rule-based governance approach, which imposes important costs on national sovereignty, to a more vague and principled- and process-based approach. Needless to say, this is also a transformation in our conceptualization of law and rule of law.[49] It is a turn from formal understanding of Rule of Law introduced and advanced by Fuller to a more institutional and procedural one defended by Waldron. The upshot of this change is, for the purpose of this article, that the functioning of the institutions gained priority over the shape and form taken by these products at the end of the process. This change, seen from a normative perspective, can even be considered as a positive move towards the core idea of the rule of law, that is, the plurality of legalities is the *condicio sine qua non* for the ideal of rule of law rather than something that is to be suppressed for the sake of the uniform application of law.[50]

[46] Here, I am using irritation in the way it is conceptualized by Teubner. See G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies' 61(1) *The Modern Law Review,* 11-32 (1998).

[47] L. Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-obligations' 28(2) *Journal of Environmental Law,* 352 (2016).

[48] ibid 337.

[49] See for formal understanding of rule of law L.L. Fuller, *The Morality of Law* (New Haven, London: Yale University Press, 1969) (His eight principles for legality includes: 1. Generality, 2. Publicity, 3. Prospectivity, 4. Intelligibility, 5. Consistency, 6. Practicability, 7. Stability and 8. Congruence); see for an institutional and procedural approach to the rule of law J. Waldron, 'The Rule of Law and the Importance of Procedure' 50 *Nomos,* 3-31 (2011).

[50] See for the argument that the rule of law, in its essence, is an institutional ideal that requires at least two different legalities, namely legal duality, through which the sovereign legislature will be automatically constrained by the other legalities G. Palombella, 'The Rule of

It is a widely held assumption that with the rise of neoliberalism and the expansion of globalization, the differences among nation-states and cultures are going to gradually erode, and the world would end up being a more flattened global sphere in which states have less significant role to play.[51] Nevertheless, things have not gone as expected since neoliberalism and states, rather than being in opposition between themselves, have built up complementary relationship with neoliberalism. As taught by Foucault, neoliberalism and its market logic, rather than taking something away from government, transformed the ways through which states should/could pursue their own ends.[52] By the same token, geopolitics, having become highly popular following the 11 September 2001, corresponds to this idea that states pursue their own interest and that they do not shy away from using its political, economic, legal and even normative power. Thus, when seen through the lenses of geopolitics, global climate change regime, and in particular the Paris Agreement, are not only more understandable but also represent a projection as to the future of climate change governance.

In the climate change governance, the EU has been considered, particularly for the last two decades, as the forerunner of progressive climate policies.[53] It is the main polity going beyond the UN-led climate change regime, taking on diametrically opposed policies to the fragmenters such as the US and BASIC (Brazil, South Africa, India, and China) countries. With the fear of China's rising economic power, the US, not least with the turn of the century, left the environmental leadership to the EU for the sake of its own economic interests. It seems fair to say that the EU, with the intention to fill this gap, 'attempted to lead by example' and demonstrated its leadership ambition not only with words but also with deeds.[54] In the period spanning from Rio to Paris, the EU's

Law at home and abroad' 8 *Hague Journal on the Rule Law*, 1-23 (2016); see also for the criticism of Waldron's procedural conception of the Rule of law on the basis that it rests on an implicit cosmopolitan vision and global legal monism due to its treating individuals as the mere legitimate subject of international rule of law in disregard of the states, ibid 18; see for a further analysis of the international Rule of law that draws attention to the dangers posed by the transnational standard-setting organizations, which somehow bears always the potential of turning their epistemic expertise to practical authority Id, 'Two threats to the rule of law: legal and epistemic' 11 *Hague Journal on the Rule of Law*, 383-388 (2019); see for a similar criticism in support of margin of appreciation as the provider of the duality of legalities Id, 'Non-arbitrariness, rule of law and the "margin of appreciation": Comments on Andreas Follesdal' 10(1) *Global Constitutionalism*, 139-150 (2021).

[51] S. Roberts, 'Neoliberal Geopolitics', in S. Springer, K. Birch, and J. MacLeavy eds, *Handbook of Neoliberalism* (New York: Routledge, 2016), 433.

[52] M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (New York: Springer, 2008), 121 (translated by G. Burchell).

[53] A. Bradford, *The Brussels Effect: How the European Union Rules the World* (USA: Oxford University Press, 2020), 207-231.

[54] C.F. Parker and C. Karlsson, 'Climate leadership', in K. Backstrand and E. Lövbrand eds, *Research Handbook on Climate Governance* (Cheltenham Glos-Northampton Massachusetts: Edward Elgar Publishing, 2015), 195; see also a different argument focusing on the process following the US's withdrawal from the Kyoto Protocol and the EU's turn from carbon tax to

fundamental climate change policy was to sustain the system of Kyoto Protocol, if not, to replace it with a new one in the same top-down logic. As to the US, it was the supporter of a symmetrical treaty as opposed to asymmetrical KP discriminating developing countries at the expense of developed ones. Therefore, for the US,

> 'the new agreement should have a pledge-and-review structure that allows bottom-up, or 'nationally determined mitigation commitments', rather than top-down, binding targets and timetables, such as the EU has pushed for in the past'.[55]

As regards China, it has traditionally taken side with developing countries and presented itself as the representator of this bloc by endorsing the ideas such as climate justice, historical responsibility of the West, and distributive financial policies.[56] It therefore pushed forward an agreement that draws a distinction between developed and developing countries, thereby binding the former with top-down targets while granting the latter much discretion to set up its own climate change policies.[57] However, the rapid economic development of China and other BASIC countries have given rise to a discordance between these countries and the remainder of developing countries. For they have also became the perpetrator of climate change rather than being a victim thereof.

The EU took important lessons from its failure in shaping the global regulatory structure of climate change governance on the Copenhagen Accord (CA), which lays down non-binding pledge and review procedure and only concluded between the US and BASIC countries despite the EU's ambitions for a more top-down agreement.[58] As such, the EU, upon its enlightenment and realization that it should give up its 'normative agenda and unrealistic expectations', embarked on a novel strategy, which is more pragmatic and responsive to the geopolitical realities of the existing 'power constellations', in Durban (COP 17).[59] This strategy paid off, and the parties could reach an

the ETS and explain the global leadership with the domestic developments D. Ellerman, 'The Shifting Locus of Global Climate Policy Leadership', in C. Bakker – F. Francioni eds, *The EU, the US and Global Climate Governance* (London: Routledge, 2014), 41-57; see for a similar argument attributing the change of policies more to the domestic policies than to some normative reasons R.D. Kelemen and D. Vogel, 'Trading Places: The Role of the United States and the European Union in International Environmental Politics' 43(4) *Comparative Political Studies* 1-30 (2010).

[55] ibid 198.

[56] ibid 196.

[57] ibid 197.

[58] '… the EU was not even in the room when the final details on the Copenhagen Accord were hammered out' C.F. Parker, C. Karlsson, and M. Hjerpe, 'Assessing the European Union's Global Climate Change Leadership: From Copenhagen to the Paris Agreement' 39(2) *Journal of European Integration*, 247 (2017).

[59] K. Bäckstrand and O. Elgström, 'The EU's Role in Climate Change Negotiations: From Leader to 'Leadiator' 20(10) *Journal of European Public Policy,* 1369 (2013).

agreement on extending the KP at least up to 2020 with the support of developing countries. More importantly, the countries reached a compromise on the necessity to finalize a new legally binding treaty by the end of 2015 in the Durban COP after the traditionally reluctant states such as the US and China had voiced their supports.[60] The EU played a very important and essential role not only by acting as a mediator between the parties in the course of the negotiations but also by acting as a 'leadiator', to wit, a leader bridging the gap between the parties with its deeds outside the negotiations.[61] In the run up to the PA, the EU by showing a perfect example of its directional leadership, recalibrated its 2030 GHG emission targets to forty per cent reduction, compared to 1990, with its 2030 Climate and Energy Framework on October 2014.[62] It is only against this backdrop that the bilateral agreement concluded between the US and China as to the necessity of a new climate change treaty flared up the hopes for a positive outcome from the Paris.[63] In Paris, the EU, taking on an approach similar approach to that of Durban, advocated for a 'legally binding agreement with strong provisions for transparency and accountability, and a mechanism for raising the ambition over time'[64] and secured a 'hybrid set up with bottom-up reduction pledges combined with a top-down review of performance'.[65]

4. Global Green New Deal or Plurality of Green New Deals?

Although important developments have turned up in the global climate change regime for the last couple of years such as the enactment Global Pact for the Environment[66] and Paris Rulebook,[67] it is fair to say that none of them has become as influential as the recent rise of the Green New Deals (GNDs) across the world. These GNDs, bearing also the promise of a revolutionary transformation reminiscent of Roosevelt's New Deal, are by and large pursuing to achieve climate neutrality by 2050 'in a way that also expands decent job opportunities and raises mass living standards for working people and the poor throughout the world'.[68] It is in this potentially special makeover that to find novel and more

[60] ibid 1382.

[61] ibid 1380-1381.

[62] European Council EUCO 169/14 of 24 October 2014 on 2030 Climate and Energy Policy Framework.

[63] R. Falkner, n 26 above, 1114.

[64] European Parliament (2015) EU Position for COP21 climate change conference available at https://tinyurl.com/2tkfc3vx (last visited 31 December 2021).

[65] C.F. Parker, C. Karlsson, and M. Hjerpe, n 58 above, 249.

[66] See for the explanations about how unsatisfying the content of the treaty when compared to its title L. Kotzé, 'A Global Environmental Constitution for the Anthropocene?' 8(1) *Transnational Environmental Law*, 23-27 (2019).

[67] L. Rajamani, and D. Bodansky, 'The Paris Rulebook: Balancing International Prescriptiveness with National Discretion' 68(4) *International & Comparative Law Quarterly*, 1025 (2019).

[68] N. Chomsky, R. Pollin, and C.J. Polychroniou, *Climate Crisis and the Global Green New Deal: The Political Economy of Saving the Planet* (London: Verso Book, 2020), 54 (ebook version).

clean ways for energy production and the intervention of the state to the market bear significant importance.[69] As such, the GNDs have necessarily bearing on a manifold of diverse sectors ranging from industry to agriculture, from consumption to transportation, and they are therefore calling for comprehensive reconstruction of our relationship with environment as well as ourselves. It is also for this reason that it is revolutionary for international law in general as well as international environmental law.[70]

The IPCC's 2018 climate change report pays our attention not only to how a 1.5 °C increase in global average temperature is set to affect the climatic system in the world but also to the ways how to rein in global warming. True that this is not the first-time states are encountered with a scientific document that warn them against the negative environmental effects of the so far pursued policies, yet it is still plausible to assert that it rang the alarm bell that awakens the big powers from their sleep. For instance, the democrats in the US proposed a resolution for the Green New Deal, which will be later turned into the CLEAN (Climate Leadership and Environmental Action for Our Nation's) Future Act after having attracted fierce criticism from the more libertarian camps because of its highly transformative aspirations.[71] Even though the presidency of Donald Trump put a halt to the US Green New Deal, it may be assumed that with the election of Joe Biden the US will much probably return to the game as a much more motivated player. Joe Biden, in a way that bears out this assumption, made clear in his first speech following the Democrat Party's electoral victory that America is 'going to make sure that labor is at the table and environmentalists are at the table in any trade deals' that will be made.[72] Similarly, China, albeit still lacking a comprehensive Green New Deal regulation, clinched its aspiration to achieve climate neutrality by 2060.[73] Further, there is also significant pressure on China exerted particularly by the Global North about its position and responsibility for global climate change governance. To illustrate, the new trade agreement concluded between China and the EU includes provisions concerning China's policies on 'environment, climate change and combatting forced labor'.[74]

All these developments, when seen in conjunction with the EU's Green New Deal set in motion in December 2019, could be considered as part and

[69] ibid.

[70] See for the transformative character of climate change, E. Fisher, E. Scotford and E. Barrit, 'Legally Disruptive Nature of Climate Change' 80(2) *The Modern Law Review*, 173 (2017).

[71] J. Conca, 'Democrats' Green New Deal Becomes the CLEAN Future Act' *Forbes,* available at https://tinyurl.com/2dp9rvkn (last visited 31 December 2021).

[72] A. Fang, 'Biden says US needs to align with democracies after RCEP signing' Nikkei Asia', available at https://tinyurl.com/2vj3ff58 (last visited 31 December 2021).

[73] W. Changua, 'China's Great Green Reset: Carbon Neutrality by 2060' CGTN', available at https://tinyurl.com/2p9c7yhr (last visited 31 December 2021).

[74] European Commission Press Release of 30 December 2020 on 'EU and China reach agreement in principle on investment', available at https://tinyurl.com/2p93hspx (last visited 31 December 2021).

parcel of the new mode of governance initiated by the PA.[75] Even though some may lambast this assumption as a mere conjecture or speculation, when these developments are seen in connection with the PA and the other similar phenomena such as the rise of climate change litigations and the bourgeoning of domestic climate change regulations, it is much more defensible to connect the rise of GNDs to the PA's *mode* of governance. By means of illustration, the PA compels the states to participate in global decision-making process, to pinpoint their NCDs, to become part of the process, and to engage with the problems of climate change from their own perspective. As such, it empowers the states more than subordinating them to a treaty; it makes them active subjects of the UNFCCC and international law in general. It forces the states to contribute to the process of problem-solving, demand them to establish their own way of tackling climate change, and plan their own environmental policies.

What is more striking for the PA is that it has enabled the NGOs and any interested individual to have a say in the global climate change governance. To illustrate, the PA contains some procedural obligations incurred on the states, eg, to set up, communicate and uphold the NDCs and to provide transparency, and it by doing so provided jurisdictional data that may be used by the courts to hold the states responsible for their pledged NDCs.[76] Moreover, the NGOs may impel the government to provide reasons and justification in support of their climate change policies by bringing the transparency requirement to bear.[77] As it is already shown in the literature, the more the courts are furnished with the data such as scientific evidence and impact assessments the more they have a chance to engage in more in-depth and holistic analysis of the political decision-making processes than merely dealing with assumptions and outcomes.[78] As such, these procedural obligations that are to be observed by the states may have a functionally similar impact on the climate change litigations as impact assessments have in the EU legal order.[79]

[75] U. Von der Leyen, 'Political Guidelines for the Next European Commission 2019-2024' *A Union that strives for more: My agenda for Europe,16;* European Commission COM (2019)640 of 11 December 2019, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on 'The European Green Deal', Communication from the Commission, available at https://tinyurl.com/2hnsb99f (last visited 31 December 2021).

[76] L. Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' 9(1) *Transnational Environmental Law*, 28-30 (2020).

[77] ibid 35.

[78] 'The fact is, that courts have more opportunities to function as regulatory watchdogs and intensify their proportionality review in case legislators and regulators are prepared to provide more specific information about the aims of the drafts, the choice of regulatory instruments, and the methods of ex ante evaluations they apply'. J. de Poorter, 'A Future Perspective on Judicial Review of Generally Binding Regulations in the Netherlands: Towards a Substantive Three-Step Proportionality Test?', in J. de Poorter, E.H. Ballin, and S. Lavrijssen eds, *Judicial Review of Administrative Discretion in the Administrative State* (New York: Springer, 2019), 97.

[79] See for how the policy of Better Regulation and Impact Assessments, together with the

Seen in this light, it seems highly likely that the IPCC's climate change reports, coupled with the PA's procedural obligations, bears significant potential of empowering NGOs and civil society actors to act as a NDC watchdog in the post-PA period. As each state is obliged to pledge its NDC and are responsible for honouring their promises, any citizen have somehow power to urge them to fulfil these promises. For instance, fifteen children under the leadership of Greta Thunberg have brought a lawsuit before the UN Committee on the Rights of Child against five countries, arguing that those states, which are party to the Convention on the Rights of Child, have so far failed to do their best to protect the future generations from the catastrophic effects of the climate change crisis.[80] More importantly, they benefited from the PA, claiming that

> '(e)ach respondent has set inadequate emission reduction targets in its Paris Agreement pledges—and then failed to even meet these inadequate goals'.[81]

On top of this, they lent support to this argument by referring to the IPCC reports and paid attention to the fact that these policies are scientifically inadequate to attain the objectives set in the PA. As such, it can be said that there is an elective affinity between the PA and the rise of climate change litigations, for the latter could find a fertile ground to flourish only after the emergence of the former.[82] It is, nevertheless, highly crucial to emphasize that if PA is to live up to its promises it should enlist the support of NGOs and the other transnational actors to nudge the political actors and take advantage of the Urgenda-type climate change litigations.[83]

As stated above, climate change litigation is one of the phenomena that emanated from the fertile ground created by the PA. Aiming at holding the governments to account for their failure in honouring their pledges, they are showing up across the world as exemplars of this post-sovereign model.[84] The plaintiffs in these cases are by and large environmental NGOs, and they do follow a similar line of argument that is already exemplified in *Urgenda I*, according to which international norms, albeit lacks imposing a direct obligation on the states, has a 'reflex effect' on the national legal orders and may be used in

rise of administrative state in the EU, brings about openness, transparency, and participation, as well as the rise of evidence-based or procedural judicial review. A. Alemanno, 'Meeting of Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control' 17(3) *European Public L*aw, 485 (2011).

[80] https://tinyurl.com/2phh3bvv (Children Climate Case) (last visited 31 December 2021).

[81] Children Climate Case, para 21.

[82] G. Çapar, 'What have the Green New Deals to do with the Paris Agreement?: An Experimental Governance Approach to the Climate Change Regime' *Rivista quadrimestrale di diritto dell'ambiente*, 111-143 (2021).

[83] C.W. Backes and G.A. Van der Veen, 'Urgenda: the Final Judgment of the Dutch Supreme Court' 17(3) *Journal for European Environmental & Planning Law*, 318 (2020).

[84] L. Wegener, n 76 above, 18.

the interpretation of the open norms in the domestic legal orders.[85] In other words, they benefit from international (human rights) norms in order to support their claims in domestic legal orders, and thereby international norms are deemed to be 'an interpretive aid rather than being the source of obligations'.[86] Even though the Appeals Court in *Urgenda II*, expanding the function of ECHR, stated that Arts 2 and 8 are directly applicable in determining the degree of state's responsibility,[87] it is still a matter of controversy whether it is the best strategy to ground the responsibility of states in international human rights law rather than to base it on the UNFCCC and international environmental law in general. Nonetheless, the Dutch Courts in Urgenda saga prioritized the IPCC reports prepared by the United Nations Environment Program, the target set by the Paris Agreement, and the relevant COPs as part and parcel of the UNFCCC. And it turns out that the climate change regime and the PA has so far stand in the shadow of the arguments from human rights and international human rights regime.

In sum, the global GNDs are only one side of 'this global green movement in which transnational actors serve as the NDC watchdog'[88] in support of the courts that are functioning as gatekeepers. In a way bearing out this argument, we are observing positive climate change litigations in various domestic legal orders that demand governments to clarify how they are planning to reach their emission targets.[89] For instance, the French government is asked to make clear how it will reach its 2030 targets that it already committed to in the *Counseil d'Etat*' its *Grande-Synthe* decision in November 2020. Similarly, the *Bundesverfassungsgericht* (BVerfG) in April 2021, following in the footsteps of *Counseil d'Etat*, found some of the provisions of the German Federal Climate Act incompatible with fundamental rights because 'they lack sufficient specifications for further emission reductions from 2031 onwards' and 'irreversibly offload major emission reduction burdens onto periods after 2030'.[90] Here, it is of crucial importance to stress out that both ruling concerns the domestic regulations that purports to tackle climate change and legislated with the intention to materialize

[85] 'When applying and interpreting national-law open standards and concepts, including ... the general interest or certain legal principles, the court takes account of such international-law obligations. This way, these obligations have a 'reflex effect' in national law'. *Urgenda I*, para 4.43.

[86] R. Suryapratim, 'Urgenda II and Its Discontents' 13(2) *Carbon & Climate Law Review* 132 (2019); M. Minnesma, 'The Urgenda case in the Netherlands: creating a revolution through courts' in C. Henry, J. Rockström, and N. Stern eds, *Standing up for a Sustainable World* (Cheltenham: Edward Elgar, 2020), 144.

[87] R. Suryapratim, n 86 above, 133-134.

[88] G. Çapar, n 82 above, 113.

[89] Counseil d'Etat 19 November 2020 no 427301, available at https://tinyurl.com/y6erh4fa (last visited 31 December 2021).

[90] Bundesverfassungsgericht 29 April 2021 no 31/2021, available at https://tinyurl.com/ycx7eras (last visited 31 December 2021).

the targets set by the PA.[91] For this reason, it can be argued that the PA does not only have a reflexive effect on domestic legal orders and empower transnational actors as the watchdogs of the NDCs, but also have an indirect on national legal orders as it urges domestic governments to actively deal with climate change by making new legislations.[92] It is not hard to see that this trend of holding governments to account will probably spill over the global oil companies, and a recent case from the Hague District Court, which the Shell is ordered to reduce its CO2 emissions by forty-five per cent in 2030 compared to 2019, is a perfect harbinger of the things to come in the next decade.[93]

It is apparent from the foregoing that the GNDs or similar type of domestic regulations are popping up across the world and the main reason for that seems to be the PA and its specific mode of governance. One of the main arguments raised against the PA's normative impact on the GNDs comes from the realist camp,[94] arguing that it is a mere reflection of the geopolitical regulatory competition between different legal orders such as the US, the EU and China. So, it does have nothing to do with the normative framework established with the PA. In its description of the evolutionary track of the climate change regime, the article places significant importance to the political background against which the legal framework is constructed. In doing so, it in fact adopted a legal realist lens, accepting the claim that law is the outcome of the undergirding political struggles. In the next chapter, it will deal with the question of whether the rise of GNDs is more about the geo-politics and global regulatory competition than the normative framework established with the PA. In so doing, it will first outline the global regulatory competition, and then touch respectively upon (international) legal realism, global administrative law, and inter-legality to account for the rise of GNDs.

III. The Climate Change Regime from the Perspective of Law

1. The Approach of Political Science Scholarship

We are confronted with a climate change complex[95] instead of a full-fledged

[91] Art 1 of the Bundes-Klimaschutzgesets '... The basis of the Act is the obligation according to the Paris Agreement, under the United Nations Framework Convention on Climate Change, to limit the increase in the global average temperature to well below two degrees Celsius and...', available at https://tinyurl.com/mr2vurvk (last visited 31 December 2021).

[92] See for a study analyzing the recent proposal for the European Climate Law, A. Giorgi, 'Substantiating or Formalizing the Green Deal Process? The Proposal for a European Climate Law' *Rivista Quadrimestrale di Diritto Dell'Ambiente*, 6-18 (2021).

[93] See The Hague District Court 26 May 2021 no C/09/571932 / HA ZA 19-379, available at https://tinyurl.com/4bc56f9r (last visited 31 December 2021).

[94] See eg, S.M.G. Pratti, 'Bad Moon Rising: The Geen New Deals in the Globalization Era' *Rivista Quadrimestrale di Diritto Dell'Ambiente*, 144-162 (2021).

[95] Lederer classifies the scholars of global governance with respect to their analysis of

comprehensive regime due, *inter alia*, to the diversity of interest and uncertainty, which are exacerbated by the cross-cutting nature of climate change problem.[96] In their seminal article, Keohane and Victor foresaw that there are no grounds for hope that the efforts to form an integrated institutional climate change regime is likely to succeed. Nevertheless, this was not a reason for despair, because

> '(i)n settings of high uncertainty and policy flux, regime complexes are not just politically more realistic, but they also offer some significant advantages such as flexibility and adaptability'.[97]

To put it clearly, there is no need to put all the problems in one package. It is possible to address the same problems with a holistic lens without engaging in all of them at the same institution, at the same time, and at the same bargaining process. Therefore, a complex, the argument goes, reduces the political importance of bargaining process and gives way to more fragmented but coordinated approaches in the furtherance of climate change objectives. The best thing to be done, given these perennial political problems, is to take advantage of climate change complex under the orchestration of UNFCCC/Paris Agreement as an umbrella treaty.[98]

Written in a context where the disappointment created by the Copenhagen Accord[99] was still up in the air, they suggested a more promising path to follow: It is much better to embrace a pragmatic approach and set out to focus on sector-based problems than being obsessed with big treaties, names and institutions. We do not need a formal global environmental constitution in order to fulfil the functions served by the constitution. This is the backdrop against which the PA was ratified and seen from this perspective it represents a firm line of continuity with the logic adopted in the Copenhagen Accord, rather than being a radical rupture from the latter. As already alluded to above, the PA marks a critical turning point in the mode of governance, for it, by empowering the nation-states and watering down the density of the UN framework, replaced

climate change regime and put forwards that there are three different groups: those who are optimistic, agnostic and pessimistic. Whereas, for optimistic view, there are still functions to be performed by IGOs, the pessimistic and agnostic views give up their hope that the UN-led climate change regime may still have something to contribute. As to the regime complex, he argues that it falls under the rubric of agnostics along with the approaches like polyarchy, orchestration and regime interplay. Yet for me, it is more aligned with optimistic approach, not least when considered the latest studies of Keohane and Victor. See M. Lederer, 'Global governance' in K. Backstrand and E. Lövbrand eds, *Research Handbook on Climate Governance* (Northampton: Edward Elgar Publishing, 2015), 5-9.

[96] R.O. Keohane and D.G. Victor, n 24 above, 7-9.

[97] ibid 7.

[98] K.W. Abbott, n 4 above, 573; R.O. Keohane and D.G. Victor, n 24 above, 19.

[99] '…the Copenhagen climate summit proved to be a turning point, not only for climate change politics but also for regime literature, as a consensus emerged that international negotiations would not initiate a strong regime', M. Lederer, n 95 above, 4.

the top-down approach with the bottom-up one. By doing so, it found a delicate balance between international prescriptiveness and national discretion.[100] Thus, it seems fairly sound to argue that no matter how thin it is there is a global climate change regime under the orchestration of the UN framework. And the Green New Deals, even though they are to some extent related to geopolitics, are the outcomes of this regime (re)established with the PA; therefore, they operate within the UN legal framework with the aim to prevent an environmental catastrophe.

The heydays of intergovernmentalism, which explains the international organizations and global governance based on the self-interested choices and preferences of states, has been over a long time ago.[101] It is understandable to stress the importance of geo-politics and the counter-institutional tendencies of self-interested states at a time when international law is much more fragmented and institutionally much denser and more diversified than the cold-war era;[102] however, to reduce the level of normativity created by international organizations to mere politics is a step too far. It is true that the rise of global south has seriously undermined the Western liberal international legal order, which was established in the wake of the Second World War,, and this has sparked off the so-called crisis of international law.[103] Yet, law is, as stressed by Weber, has relative autonomy from society and politics, and it is, therefore, not warranted to reduce the normativity of law mere politics[104] even if the ontological question of international law,[105] namely the law-ness of international law still holds an

[100] L. Rajamani, and D. Bodansky, n 67 above, 1023-1040.

[101] See for intergovernmentalism and its critiques M. Cini, 'Intergovernmentalism', in M. Cini and N.P-S. Borragan, *European Union Politics* (Oxford: Oxford University Press, 5th ed, 2017), 65-79.

[102] Dyzenhaus also argues that 'we are in a period in which, as Hans Kelsen's former student and influential international lawyer Josef Kunz put it, the 'swing of the pendulum' is to an 'underestimation of international law' because of a sense of crisis--that we are living in an epoch marked by insecurity, in which 'realism' compels us to see that power not law rules' (citations omitted) D. Dyzenhaus, 'Kelsen's Contribution to Contemporary Philosophy of International Law' (April 8, 2020), available at SSRN: https://tinyurl.com/24u4v8wh (last visited 31 December 2021).

[103] Domingo attributes the current crisis of the international law to the fact that it places an undeserved and artificial place to the states without much consideration to the individual and human dignity. See, R. Domingo, 'The crisis of international law' 42 *Vanderbilt Journal of Transnational Law*, 1543.

[104] Klabbers warns international lawyers to be vigilant against any type of reductionism and 'jealously guard the relative autonomy of their discipline' J. Klabbers, 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity', 1 *Journal of International Law and International Relations,* 36 (2004/2005); see also for how law is relatively autonomous from underlying socio-political context and how he rejects Marxian deterministic account where law is determined solely by underlying socio-political structure, D.M. Trubek, 'Max Weber and the Rise of Capitalism' *Wisconsin Law Review*, 720, (1972).

[105] See for a study dealing with the question of the nature of international law, arguing that international law, rather than tackling this ontological question, should adopt a less robust methodology - prototype theory rather than metaphysical conceptual analysis – that may open

important place in international law scholarship.

In order to understand how law separates itself from politics and creates a normative domain that is at least relatively autonomous, it seems useful to bring into sharp focus how legal realism differs from both legal formalism and critical legal studies. As reminded by Leiter, law is not indeterminate in *latu sensu* or 'globally indeterminate'[106] from the perspective of legal realism. If anything, it should be determinate enough to lend itself to prediction in the sense that a bad man whose sole interest is staying out of jail and avoiding any behavior that will bring punishment might foresee the decisions of the courts.[107] For this reason, the indeterminacy of law concerns only the domain of adjudication, and it results from 'the existence of conflicting, but equally legitimate, interpretive methods'[108] even in the absence of any external political influence. It is, therefore, crucial to draw a distinction between indeterminacy in the strict and general senses. It is one of the main reasons for the failure in distinguishing legal realism from critical legal studies, which claim that law is *per se* indeterminate because it does not enjoy at least a relative autonomy from social and political domain. To the contrary, legal realist take law seriously and approach law inside even though they do not embrace an internal point of view,[109] and they never question the relative autonomy of law. Legal realism levels, at bottom, a criticism against legal formalism not against law as such; therefore, its critical dimension should not be conflated with critical legal studies and similar Marxian approaches that treats law as mere reflection of economy politics.[110] Thus, it steers a middle course between legal formalism and political reductionism, and thereby is compatible with any account of law giving a prominent place to the normativity of law such as legal positivism after H.L.A. Hart.[111]

Leiter argues that naturalism and pragmatism are the two foundational

a space for the conceptualization of international law. He, further, contends that 'A social practice is typically judged as falling within the category of "law" if it consists of rules purporting to coordinate behavior of actors and to settle their disputes (normativity); if it at least possesses institutions in charge of judging whether those rules were violated (institutionality); if the rules in question are guaranteed, normally through some form of coercive mechanisms ([coercive] guaranteeing); and if the rules are, overall, apt for inspection and appraisal in light of justice (justice-aptness)'. M. Jovanović, *The Nature of International Law* (Cambridge: Cambridge University Press, 2019), 4.

[106] B. Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' 76 *Texas Law Review*, 273 (1997)

[107] O.W. Holmes, Jr., 'The Path of the Law', 10 *Harvard Law Review*, 457 (1897).

[108] B. Leiter, n 106 above, 273.

[109] S.J. Shapiro, 'What is the internal point of view?' 75 *Fordham Law Review*, 1159 (2006).

[110] G. Shaffer, 'The New Legal Realist Approach to International Law' 28 *Leiden Journal of International Law*, 196 (2015)

[111] '... legal realism is not necessarily contrary to legal positivism … some legal realists will accept Hart's pedigree view on legal sources, while contending that those legal sources play only a partial role in determining how law acquires meaning and has effects.' G. Shaffer, n 110 above, 193-194.

philosophical commitments of legal realism.[112] Whereas naturalism corresponds to the idea that adjudication should 'be continuous with empirical inquiry in the natural and social sciences',[113] pragmatism is associated with anti-foundationalism, according to which justification of our beliefs should not rest on a foundation, no matter what it is, but should 'be accepted simply because they 'work' relative to various human ends'.[114] In short, naturalism is at odds with legal formalism because the latter disregards how law operates in reality, whereas pragmatism points to law's instrumental dimension, namely, how it is 'used, like a technology, to respond to and resolve problems encountered in the world.'[115] In similar lines, a bunch of scholars have recently militated for a new realist approach to the international law,[116] arguing that international lawyers should not grapple with the conceptual questions such as

> 'what is law in the abstract, or what is the relation of law to morals'; instead, they should concern themselves with inquiries such as 'how actors use and apply law in order to advance our understanding of three interrelated questions – how law obtains meaning, is practiced (the law-in-action), and changes over time'.[117]

Thus, they assert, taking issue with any type of reductionist approaches to the law, that international law should be seen through the lenses of socio-legal studies and treated 'as a semi-autonomous field constituted by internal and external factors that shape law's meaning, practice, and consequences',[118] ie, power and reason or apology and utopia. Shaffer also puts forward six key attributes of a legal realist approach to international law: International law should be i) empirical, ii) pragmatically oriented, iii) viewed in processual terms, iv) transnational, v) conditionally normative, and v) 'be reduced neither to universalist reason (of ideal liberal theory), nor to hegemony operating in the guise of law (from a critical or Marxist perspective)'.[119] All in all, the gist of legal realist approach to international law lies in the argument that law necessarily lay claims to legitimacy and normativity, but this potential is 'grounded in law's particular epistemologies, forms of reason-giving, and communicative practices, in tension

[112] B. Leiter, n 106 above, 274.
[113] ibid 285.
[114] ibid, 305.
[115] G. Shaffer, n 110 above, 202.
[116] See for the argument that there is nothing new in this so-called new legal realist approach, D. Bodansky, 'Legal Realism and its Discontents' 28(2) *Leiden Journal of International Law*, 267-281 (2015).
[117] G. Shaffer, n 110 above, 189.
[118] G. Shaffer, 'Legal Realism and International Law' *UC Irvine School of Law Research Paper*, (2018-55); see also for a realist construction of the concept of international law H. Dagan, 'The Realist Conception of Law', 57 *University of Toronto Law Journal*, 607 (2007)
[119] G. Shaffer, n 118 above, 200-206.

with power'.[120] And it is the task of international lawyers to investigate and carve out this potential by revealing how it is actualized.

Seen against this background it goes without saying that it is a mistake to read institutional and normative transformations that global climate change governance has undergone only through the lenses of political science, and to claim that it has only to do with geopolitics. It is, of course, about geopolitics, but it does not suffice to explain regulatory competition between legal orders and interaction of legalities within the climate change regime. As Raz emphasized, 'truth is not enough. A good theory of law is, of course, true. But it is not a good theory just because it is true'.[121] Hence, what we need is an adequate theory that goes beyond an external explanation and aims at seeing the normativity of law from the perspective of the participants who actively participating in the legal discourse.[122] It is true that law comes into existence in the end of a political process in which conflicting interests are put forward, yet as it clarified above it is a mistake to wither away the normativity of law.[123] The acceptance of something as a rule or norm has such drastic influence on the practical reasoning of the participants that it, converting the character of the arguments from political to the legal, transforms value into fact.[124] With Raz's parlance, this underlying first order (political) reasons became, from that time on, legal reasons, namely second order reasons even though they are not totally exclusive. It goes without a saying, when seen from this perspective, that the political realist approaches fall short of illuminating how the interaction between legalities give rise to novel normative frameworks independent of the political process itself. The climate change policies of different legal orders do not only compete with and shape each other's policies, but they also give shape to the global climate change governance. And most importantly, these legal interaction takes place in a relatively independent domain from the underlying political decisions,

[120] ibid, 207.

[121] J. Raz, *Between Authority and Interpretation*, (Oxford: Oxford University Press, 2009), 93.

[122] See for study arguing that international law should be studied with a scientific approach 'that examines the law from outside, seeking to explain how it came to be or what its consequences might be in the real world'. D. Abebe, A. Chilton, and T. Ginsburg, 'The Social Science Approach to International Law' 22 *Chicago Journal of International Law*, 1, 23 (2021), and a further criticism of this approach with the argument that the problems of international law cannot be solved by adopting an 'external' and therefore objective or privileged position. International law's structure and history make academics necessarily participants as well as observers. S. Chesterman, 'Herding Schrödinger's Cats: The Limits of the Social Science Approach to International Law' 22(1) *Chicago Journal of International Law*, 49 (2021).

[123] Jovanovic draws a distinction between two types of how questions of normativity: Whereas one of them is about how to determine the sources of international law, the other concerns itself with the question of how norms provide reasons for action. And he argues that law's normativity competes with the normativity of the other orders, so there is nothing as to the normativity of law. Here normativity is used in the same sense as it is put by Jovanovic. See M. Jovanović, n 105 above, Chapter 4 (78-155).

[124] J. Raz, n 121 above, 109, 115.

contestations and struggles.

As such, it is a necessity to give up political realist lenses and adopt a legal realist one to account for how different legal orders – the UN, the EU, the US, and China – interacts with each other. It is unquestionable that this interaction of legalities does not only take place in a specific regime such as climate change, but it also unfolds between different sectoral regimes. Nonetheless, this article confines itself with the analysis of the interaction of domestic legal orders within the climate change regime and their bearing on the global climate change regime with no regard to the influence of the other sectoral regimes on climate change. And thus, further study is required to bring into focus the inter-sectoral interaction of legalities. In short, whereas this study deals with what may be called infra-sectoral inter-legality, it clears the way for further studies that may tackle inter-sectoral inter-legality.

2. A Perspective from Global Administrative Law

The first potentially useful theoretical approach is that of Global Administrative Law (GAL), which provides an alternative to the traditional international law paradigm, arguing that international law is neither is about states nor founded on their consent. So, there is much more to see if the so far prevalent vantage point is altered.[125] From the point of view of GAL, this traditional paradigm, fails to come to grips with the challenges posed by globalization, for its conceptual blindness is ill suited for detecting the 'unnoticed rise of global administrative law'.[126] Today, 'many of the international institutions and regimes that engage in 'global governance' perform functions that most national public lawyers would regard as having a genuinely administrative character: they operate below the level of highly publicized diplomatic conferences and treaty-making'.[127] In some sense, it seems plausible to assert that GAL is defined by reference to what it is not: It is neither international nor national, then it should be global; it is neither constitutional nor judicial, then it should be administrative; it is not hard law obsessed with compliance; then it includes also soft law. Further, GAL presumes that there is a global administrative space

> 'populated by several distinct types of regulatory administrative institutions and various types of entities that are the subjects of regulation,

[125] See for a seminal article about the birth of GAL, S. Cassese, 'Administrative Law Without the State-The Challenge of Global Regulation' 37 *New York University Journal of International Law and Politics*, 663-694 (2005); see also for a concise summary of GAL S. Cassese, 'Global Administrative Law: The State of the Art 13(2) *International Journal of Constitutional Law*, 465-468 (2015).

[126] B. Kingsbury, N. Krisch, and R.B. Stewart, 'The Emergence of Global Administrative Law' 68(3/4) *Law and contemporary problems*, 15-18 (2005).

[127] ibid 18.

including not only states but also individuals, firms, and NGOs'.[128]

The point that connects these territorially dispersed global administrative bodies to each other is the idea that they should hold to account for their activities by benefiting from the tools we developed in our domestic administrative legal systems such as transparency, proportionality, participation, justification, and so on so forth. It is, therefore, not an exaggeration to contend that one of the core concepts of GAL is 'accountability'.[129]

However, there is one fundamental problem that seems to be highly challenging for the GAL scholarship is that they cannot still overcome the sector-based fragmentation of international law. As they placed their emphasis on developing infra-systemic administrative procedures that will force the global administrative bodies to behave like a responsible administrative agent reminiscent of domestic national legal orders, they cannot address the problem of 'the self-referentiality of global regimes'.[130] In other words, even though the global administrative law enables us to address the problem of accountability by somehow flattening the territorial borders,[131] yet it seems fair to state that it contributes to the erection of sectoral borders. As GAL concentrates more on the sector-specific accountability than the consent of territorial states, it overemphasizes the importance of output legitimacy at the expense of input legitimacy. Seen in this light, it goes without saying that global administrative bodies, which has neither demos nor a state to rely on, has only one thing to hold on to: accountability, namely output legitimacy. As such, it may be argued that the fact that global administrative bodies as members of the global administrative space are immune to a significant extent from the political influence of states may result in technocracy or juristocracy. It is my contention that this is the point, which is in stark contradiction with the realities of climate change governance, because it is impossible to belittle the importance of the role played by states in global climate change governance.

From the foregoing it may be implied that one of the weakest points of GAL is its assumption that there is a global administrative space composed of territorially dispersed yet sectorally connected administrative institutions, and this holds the potential to turn into a technocratic administrative governance without a necessary political or constitutional input. So, it seems valid to impugn the level of coordination presumed by the GAL scholarship between a manifold of geographically scattered administrative bodies, not least at a time when global regulatory competition between powerful states is much more

[128] ibid 19.

[129] N. Krisch, 'The Pluralism of Global Administrative Law' 17 (1) *European Journal of International Law*, 248 (2006).

[130] G. Palombella, ' "Formats" of Law and Their Intertwining', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-Legality* n 8 above, 35.

[131] ibid 37.

visible. Hence, it underestimates or does not stress out the importance of geopolitics. What is more, this endows GAL with some kind of output legitimacy as if it would bring a kind of order to the order(less) climate change regime.[132] In a similar vein, Chiti, by pointing to this 'stabilizing and legitimizing' aspirations of GAL, calls into question whether 'the reference to global administrative space bring about the risk of an idealization of GAL as an institutional project'.[133] GAL is therefore vulnerable to criticism coming from legal pluralism because no matter how much it puts emphasis on plural and multilateral aspect of global governance it still goes global by giving a prominent place to *global* administrative space. And this is a normative aspiration no matter how weak it is because it assumes that administrative bodies operating within the global administrative space either develop mechanisms of accountability or call each other to account in such a way that this creates order out of chaos. Chiti puts this dimension of GAL clearly as follows:

> 'the notion of global administrative space qualifies the regulatory organizations beyond the state as 'administrations' or 'institutions', thus referring to a unitary – though internally plural and fragmented – legal order in which the various systems operate as institutions'.[134]

Contrary to these optimistic presuppositions, the interaction between different administrative bodies or regulatory regimes may be conflictual and competitive as well as it may be complementary as exemplified so far by the climate change complex.

3. Inter-Legal Approach to Climate Change Regime

Inter-legality is one of the recent attempts aiming at coming to terms with the fragmentation of international law and its attendant consequences, that is, the existence of functionally differentiated multiple legal orders alongside domestic legal orders.[135] The scholarships of global legal pluralism, even though they have minute differences, set out to find a middle course between pluralism and universalism (globalism) without prejudice to neither of them. Yet, as

[132] D. Bodansky, 'Transnational Legal Order or Disorder?' n 16 above, 287.

[133] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' 13(2) *International Journal of Constitutional Law*, 489 (2015).

[134] E. Chiti, 'Shaping Inter-legality: The Role of Administrative Law Techniques and Their Implications', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-Legality* n 8 above, 298.

[135] J. Klabbers and G. Palombella, 'Introduction', in J. Klabbers and G. Palombella eds, *The Challenge of Inter-legality* n 8 above, 1-20; see for some other studies aspiring to tackle the problem of competing legal regimes N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010); T. Broude and Y. Shany eds, *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011); P. S. Berman ed, *The Oxford Handbook of Global Legal Pluralism* (Oxford: Oxford University Press, 2020).

poignantly argued by Lindahl,

> 'at issue in globalization is not only the unity and plurality of legal orders but rather processes of legal unification and pluralization that come about through inclusion and exclusion'[136]

because law by nature cannot include without excluding and cannot empower without disempowering.[137] Berman, in the same vein, aims at steering a middle course between two extremes, on the one hand, and reconciling them on the other. To this end, he proposes some

> 'pluralist procedural mechanisms, institutional designs, or discursive practices that maintain space for consideration of multiple norms from multiple communities'

such as

> 'margins of appreciation, complementarity, subsidiarity, zones of autonomy, hybrid participation agreements, reciprocal recognition, and so on'.[138]

As it may be inferred from these procedural tools, the only (global) value that may be tolerated, in Berman's global legal pluralism, is the ones that promote dialogue across differences.

Nevertheless, it is also very crucial not to miss the point that how law includes and excludes is as much important as its mere exclusion and exclusion. As argued by Palombella, when legalities interact with each other in a content-dependent way, it may lead in the end to 'a further and competing level of *recognition*' and 'offer a link between different legal orders, otherwise unavailable'.[139] It bears also significant importance to stress out that this does not amount to a coordinated or cooperative relationship between legalities rather than a conflictual one; instead, it draws our attention to the fact that when legalities interact the things or possibilities once invisible is rendered visible irrespective of the quality of the relationship. For instance, when legalities do not treat each other as a mere fact,[140] which is irrelevant to their own legal orders unless triggered by a rule of recognition, there will be a possibility that the confrontation between legalities may bring with it some

[136] H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018), 39.

[137] ibid 46-96.

[138] P.S. Berman, 'Understanding Global Legal Pluralism: From Local to Global, From Descriptive to Normative', in Id ed, *The Oxford Handbook* n 135 above, 25.

[139] G. Palombella, 'The Rule of Law Beyond the State: Failures, Promises, and Theory', 7(3) *International Journal of Constitutional Law*, 459 (2009).

[140] ibid 90.

'identifying common standards'.[141]

Despite their commonalities, all the foregoing approaches have a distinct way of engaging with the problem of fragmentation. Inter-legality, by embracing a descriptive approach to global legal reality, zoom in on the interactions between these legal orders.[142] As opposed to GAL, which implicitly presupposes a coordinated global administrative space, for inter-legality interaction does not come to mean that there is a 'coordinated effort or a joint enterprise'.[143] It has also a thin normative dimension, which springs from the perspective of law rather than an external normative reference point giving an answer to the questions of what a good society or just law is. Accordingly, it is about seeing the injustice glossed over, disguised, and even camouflaged behind one-dimensional, monolithic perspectives. Yet, this normative dimension thereof is beyond the scope of this study since it is more related to the judge's perspective and judicial decision-making than observing the interaction of legalities.[144]

If one were to describe inter-legality with one catchy word, it would most probably be 'recognition'.[145] Each legal order, irrespective of the quality of interaction, cannot but recognize the others due to inevitable interconnections between legal orders, resulting directly from the subject matter at stake. In other words, despite our attempts at categorizing the life into legal systems such as consumer law, anti-trust law, data protection law, and climate change law, it is not possible to comprehensively encapsulate the case at hand within one category (or system). Thus, any effort devoted to fit the interconnectedness and plurality of life into the bed of Procrustes, regardless of the quality and flexibility thereof, is doomed to failure.[146] The life is in and of itself interconnected, and inter-legality is a lens through which this interconnectedness is rendered visible. Thus, as drawn attention by Chiti, 'each legal order has its own administrative machinery responsible for' addressing the question of how to respond to the intersection of legalities or how to take the other legalities into consideration, in

[141] ibid 95.

[142] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 272; see for a study suggesting that balancing may be used as a legal tool in order to reach a conclusion in case of legal orders' interaction G. Encinas, 'Inter-legal Balancing' *Inter-legality Working Paper Series*, Working Paper No 02/2020 (2020).

[143] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 272.

[144] See for a study that takes an approach to inter-legality from the perspective of judges and adjudication and revealing the inherent connection between environmental and human rights legal orders T. Zhunussova, 'Human Rights and the Environment Before the Inter-American Court of Human Rights' *Inter-legality Working Paper Series*, Working Paper No 05/2020 (2020); see also for a comprehensive analysis of the same (Teitiota) case emphasizing the point of interaction between environment and human rights E. Sommario, 'When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Right's Committee's *Teitiota* decision' 77 *Questions of International Law*, *Zoom-in*, 51-65 (2021).

[145] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 276.

[146] E. Uzun, 'Hukuksal Pozitivizmi Doğru Okumak' (Reading Legal Positivism Carefully) 5(3) *Hukuk Kuramı*, 90 (2018).

the culmination of which 'trigger(s) the process of recognition that is the heart of inter- legality'.[147]

The rule of recognition is generally associated with the idea of legal system because it has a function to enclose legal system by serving as a validity criterion in discriminating law from non-law. Even though it is mostly assumed that there is only one rule of recognition in each legal system, Raz explicitly asserts that 'though every legal system must contain at least one rule of recognition, it may contain more than one'.[148] Recently, Ralf Michaels, somehow taking this argument seriously, put forward that there is also a rule of external regulation different from the rule of internal regulation.[149] Contrary to the latter that serves to enclose the legal system by functioning as an internal criterion of validity, the former is about recognizing external legal orders.[150] He further contends that the relationship between legal orders is not secondary to the definition of a concept of law in the first instance; on the contrary, inter-legality (interaction of legalities) is such 'engrained into the very nature of legal orders' that any understanding of law dealing with the conceptualization of law cannot but do 'work interlegality into the concept of law itself'.[151] This is why the rule of external regulation is not grounded in an asymmetric relationship between legal orders as exemplified in the approaches from legal positivism or weak form of legal pluralism.[152] If anything, each legal order is standing on equal footing with each other in this radically egalitarian paradigm.

In sum, if we put aside the questions such as what will be the legal status of external recognition for the existence of a legal system or whether external recognition will have a constitutive or declaratory nature, we can summarize the so far portraited picture as follows,

> 'A legal order, in this definition, requires not two but three kinds of rules. It requires primary rules as its content. It requires secondary rules for its operation. And it requires tertiary rules to establish its relation with other legal orders, whether they are called interface norms, linkage rules or something else'.[153]

[147] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 276.

[148] J. Raz, n 7 above, 147; see also a very similar argument made in the analysis of the relationship between the EU and member states Neil MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999), 117-118.

[149] R. Michaels, 'Law and Recognition – Towards a Relational Concept of Law', in N. Roughan and A. Halpin, *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017), 90.

[150] ibid.

[151] ibid 94-95.

[152] See H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) 44-48; J. Griffiths, 'What is Legal Pluralism? 24 *Journal of Legal Pluralism and Unofficial Law*, 1233-1235 (1986).

[153] R. Michaels, n 148 above, 108; see for a similar analysis D. von Daniels, *The Concept of*

Palombella also draws attention to the importance of process, arguing that

> 'the actual center of gravity of complex legal systems is not in its apex, … but in a special practice of recognition, which … offers, through time and circumstances',[154]

some common and shared principles even though we do still assign different meanings to them. In short, the process of inter-legality set in motion a process of confrontation and mutual recognition that a common shared ground of legality will begin to crystallize. This is why it is more important to focus on the quality of interaction between legalities rather than being content with detecting the level of de(fragmentation) of international law or of the institutional complexity of regimes. For, the existing institutional fragmentation, overlapping norms, or overlapping regimes may not always lead to a conflictual situation. To the contrary, this may even serve as a catalyzer for the flourishing of some procedural secondary norms, which may help the normativization process of international law. Hence, to adopt an internal perspective to the functioning of global regimes bears significant importance to address the questions of

> 'what actually happens at the interface of the fragments that compose the international legal system or between the elemental institutions that compose a regime complex. Do overlaps really result in interface conflicts?'[155]

As such, we may resort to a heuristic tool to analyze the interaction of legalities. Here, Chiti's three-fold classification of the way in which legalities accord recognition to and interact with each other: a) joint responsibility, b) coordinated responsibility, c) conflicts of responsibilities in either infra-sectoral or trans-sectoral inter-legality.[156] Joint responsibility is the type of administrative interaction in which 'there has been a process of interconnection between two or more legal orders at the level of their political decision-making'[157] so much so that they operate as if they are part of a 'common administrative systems'.[158] In the absence of such political consensus at the constitutional level that may guide the administrative machineries, the legal orders may try either to abstain from 'the possible inconsistencies, overlaps and tensions that may arise between

Law from a Transnational Perspective (Farnham: Ashgate Publishing, 2010), 158-166.

[154] G. Palombella, n 139 above, 466.

[155] C. Kreuder-Sonnen and M. Zürn, n 6 above, 249.

[156] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 276; see for a similar distinction (compatible, coordinated, and conflicting interaction between authorities) N. Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford: Oxford University Press, 2013), 48-59. Similarly, Kreuder-Sonnen and Zürn draw a distinction between cooperative and non-cooperative conflict management, see C. Kreuder-Sonnen and M. Zürn, n 6 above, 253-259.

[157] E. Chiti, 'Where Does GAL Find Its Legal Grounding?' n 133 above, 276.

[158] ibid 277.

them at the operational level and in the management of issues determined by their overlaps'[159] (coordinated responsibility), or 'to reciprocally protect their regulatory policies and choices'[160] even at the expense of a conflictual and competitional relationship (conflicts of responsibilities). The way in which Chiti classifies the types of interaction between legal orders can be utilized as a framework in our analysis of the relationships between various Green New Deals with an eye on their impacts on the UN-led climate change regime.

IV. In Lieu of Conclusion: Inter-legal Analysis of the Global Climate Change Regime

As aforementioned, a global climate change regime, orchestrated by the UN framework, has developed over the years, which includes the climate change policies of different national legal orders. Among them the legal orders such as the EU, the US and China bear significant importance because they have the power to shape the global climate change regime by merely regulating their own legal orders and leveraging their own market power. Taking a cue from Bradford's Brussels Effect, there may be a Beijing Effect or a Washington Effect one day.[161] According to Bradford's argument, the EU, by merely regulating its own market, has been regulating the global marketplace with the help of its market and regulatory power.[162] For her, what differs the EU from the US and China is its regulatory capacity, which is absent in the latter due to its recent economic rise.[163] When it comes to the US, the quality of its regulations, even though it has also as much regulatory capacity as the EU, differs significantly from the EU. For instance, 'the US authorities are often more mindful of the detrimental effects of inefficient intervention' whereas 'the EU is more fearful of the harmful effects of nonintervention'.[164] To this, we may add numerous other differences such as the EU's integration through law strategy as being an

[159] ibid 285.

[160] ibid 287-288.

[161] A. Bradford, n 53 above, 64.

[162] There are five components of the Brussels effect: market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility. See for explanations, A. Bradford, n 53 above, 25-63; see also M. Cremona and J. Scott eds, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press, 2019); I. Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Oxford: Hart Publishing, 2019).

[163] 'This is evident in the case of China, where the country's impact on global financial regulation has been limited, despite its vast capital reserves and extensive holdings of US treasuries. China's limited influence can be traced, in part, to its lack of effective and independent bureaucratic institutions overseeing national market rules in this area. Thus, acknowledging that sophisticated regulatory institutions are required to activate the power of sizable domestic markets means that few jurisdictions aside from the United States or the EU today have the capacity to be regulators with global reach' A. Bradford, n 53 above, 31.

[164] ibid 102.

uncompleted federation and the EU's becoming a regulatory state due to the scarcity of its budget. To put it differently, the EU, having neither purse nor sword, took advantage of the only thing it had: regulation.[165] Consequently, these created a culture for minimalist regulation in the US, while in the EU a race to the top has generally prevailed. As such, the EU has become the regulator of the globe in the policies ranging from data protection to market competition, from environment to consumer health and safety.[166]

It is fair to say that when it comes to climate change, the EU's unilateral approach to global regulation is likely to change because of the mode of governance and favorable climate created with the PA. The conflictual relationship between developing and developed countries, on the one hand, and between the US and the EU, on the other, is likely to turn into a cooperative one. One of the main reasons for this expectation is the obligations, primarily the obligation to pledge NDC for every five years, set out by the PA that empowers the state as an actor in climate change governance. Thus, it is not an exaggeration to assume that the countries will take somehow similar steps heading in the same direction to reduce net CO2 emissions to zero by 2050s even though their pace and policies varies. This is an observation that is not made for the first time by this article, even in 2016 Savaresi put forward that the PA

> 'marks a new season in international climate diplomacy, with the emergence of a cooperative spirit that will hopefully continue in the years to come, breaking away from the rancorous and largely circular and sterile rhetoric that has long characterised international climate negotiations'.[167]

To reach the purposes set by themselves, some countries such as the EU, the US, India, and South Korea have already adopted their own Green New Deal policies.[168] What is more, the EU, rather than leveraging its market power unilaterally, is more intended to use bilateral cooperation agreements on climate policy. On the 7th of October 2017, India and the EU signed a joint statement on clean energy and climate change, by means of which both countries

> 'are committed to lead and work together with all stakeholders to combat climate change, implement the 2030 Agenda for Sustainable Development and encourage global low greenhouse gas emissions, climate

[165] 'In the world where the United States projects hard power through its military and engagement in trade wars, and China economic power through its loans and investments, the EU exerts power through the most potent tool for global influence it has—regulation', ibid 24.

[166] ibid 99-231, for environment see chapter7.

[167] A. Savaresi, 'The Paris Agreement: A new beginning?' 34(1) *Journal of Energy & Natural Resources Law*, 26 (2016).

[168] J.H. Lee and J. Woo, n 1 above.

> resilient and sustainable development'.[169]

As for the relationship with the US, the (EU) Commission, with the intention to turn the election of Joe Biden into an opportunity, drew up 'A new EU-US agenda for global change' in which climate change is one of the most important headings alongside the COVID 19 measures. It is clear from the agenda that the EU makes a call for collective and collaborative action with the US by stressing out the importance of the stance that will be taken by the US for climate change policies. Last but not least, it is important to underline that the agenda touches also upon the EU-China relations and clearly underscores the importance of taking a similar approach against China, which 'is a negotiating partner for cooperation, an economic competitor, and a systemic rival'.[170] All of these emerging GNDs or similar environmental regulations can also be regarded as the outcome resulted from the mere interaction of legalities regardless of its communicative quality.

In the light of the foregoing, it is plausible to contend that the climate change regime will present an example of collaborative responsibility, for the threat of climate change is more than ever perceivable. Granted, the degree of collaboration will depend on the numbers of countries that are participating in the communication, yet in any case it is fair to expect a more collaborative relationship than the pre-Paris period in which conflict is definitely the word to describe the interaction between legalities. Further, it is all but impossible to cope with climate change without the contribution of China and the other BASIC countries; therefore, we 'need to welcome and embrace the pluralism and diversity of the climate change movements'[171] as long as they all move towards the same direction. Additionally, the mode of governance the PA established calls for active participation of nation states, and this in turn brings with it a collective but differentiated move towards Green New Deal policies. When it comes to the question of how different these Green New Deals are, Lee and Woo, in their study which they compare the Green New Deals of the EU, US, and South Korea, observed that they

> 'all share one goal—tackling the climate change crisis and shifting toward a sustainable society. They all offer solid frameworks around which to shape the policy ambition for large-scale investment programs to foster

[169] EU – India Joint Statement on Clean Energy and Climate Change, New Delhi (6 Oct 2017), available at https://tinyurl.com/2dasxhf3 (last visited 31 December 2021).

[170] European Commission JOIN (2020) 22 of 2 December 2020 Joint Communication to the European Parliament, the European Council and the Council on 'A New EU-US Agenda for Global Change', 8, available at https://tinyurl.com/56ytxxem (last visited 31 December 2021).

[171] J. Bloomfield and F. Steward, 'The Politics of the Green New Deal' 91(4) *The Political Quarterly*, 776 (2020).

> a green economic transition'.[172]

In the same vein, Bloomfeld and Steward put forward that

> '(d)espite the gulf between European and North American discourses, and between moderate and radical interventionism, there are striking similarities in the novel policy architecture shared by the two green deal proposals'.[173]

From this, it can be derived that, the Green New Deals point to the same direction: To reach the targets laid down in the Paris Agreement and to render the continent carbon-free by 2050 (2060). Post-Covid era provides us new opportunities that lacked in the post-2008 crisis period[174] because it showed us once again not only how fragile we are in front of the environment but also that we need solidarity to overcome these challenges. Thus, Covid-19 is more foundational than the mere economic crisis of 2008, for it directly has a bearing upon our lives.

From the foregoing it may be implied that in the global climate change regime, the interaction between different Green New Deals/legalities will probably be more collaborative and coordinated than the pre-Paris period. It is, however, important to emphasize that it seems highly unlikely that this may lead, in the short term, to the emergence of a full-fledged global climate change regime, that is, the constitutionalization of the regime.[175] Here, it may be useful to benefit from the three-fold distinction proposed by Kreuder-Sonnen and Zürn as to the cooperative ways to solve what they call (interface) conflicts, arising from the situations in which actors (in our context nation states) purport to justify their position 'with reference to different norms and rules of which at least one is associated with an international authority'.[176] They argue that when the conflict is solved neither 'within institutionalised procedures providing norms of meta-governance'[177] (constitutionalized conflict-management) nor with reference to conflict of norms or functionally equivalent norm (norm-based conflict-management), we are faced with a situation of decentralized conflict management in which actors 'show a willingness for mutual accommodation and political compromise in the process of handling positional differences'[178].

[172] J.H. Lee and J. Woo, n 1 above, 11.

[173] J. Bloomfield and F. Steward, n 171 above, 773; pay attention also to the illuminating figure showing the similarities between two green new deals in the same article.

[174] ibid 776-777.

[175] See for a highly illuminating study arguing that there are multifarious different types of experimental mode of governance, which is positioned between full-fledged integrated organizations such as the WTO and loosely coupled regime complexes. G. de Búrca, R.O. Keohane, and C. Sabel, Global Experimental Governance, *British Journal of Political Science*, 477-486 (2011).

[176] C. Kreuder-Sonnen and M. Zürn, n 6 above, 252.

[177] ibid, 257.

[178] C. Kreuder-Sonnen and M. Zürn, n 6 above, 258.

Seen in this light, it becomes almost apparent that the climate change regime suits very well the decentralized way of cooperative conflict-management.

The legalities, rather than competing whether to regulate or not, will cooperate in order to fight effectively against climate change. The treaties the EU signed with China and India and the message it sent to the US for an enhanced transatlantic collaboration are the first signs of this change in the quality of interaction between different legal orders. When it comes to the question of what factors contributed to this shift, it is essential to underscore the importance of the legal framework established with the PA alongside the opportunities created by the Covid-19. Green New Deal without a doubt requires revolutionary transformations in our economic, social, and political life. It will also necessitate some radical legal and institutional changes within the EU's substantive constitution which is founded on the ordoliberal idea that despite the economic integration and supranationalization of economic policies, the distributive and social policies should be confined to domestic level.[179] As aforementioned, it is a new deal demanding from the states more active intervention to the market in order to solve the crosscutting and complex problems of climate change. It is a problem that can be solved neither within the confines of territorial borders of states nor infra-systemic policies of global regimes. So, it rings also the bells for the EU and demands a constitutional change if the EU is serious and sincere in its aspirations that it announced explicitly in its GND as to being a global leader in climate change.

Thus, the GND poses also a constitutional challenge for the EU whose treaties represent the logic of ordoliberal policies with their significant focus on the self-operating and independent logic of the market. This is most obvious in the distribution of powers between the EU and member states with respect to the economic and monetary policies, granting the former exclusive competence on the area of monetary policy whereas leaving the latter's exclusive competence on determining their fiscal policies.[180] This creates a situation in which the EU cannot intervene in the market directly and makes only use of regulatory policies instead of social policies. With this logic comes also the no bail-out clause provision, namely Art 125 of the Treaty on the Functioning of the European Union (TFEU), stipulating that neither the EU nor the member states can take on the depts of another member state. As such, it becomes almost impossible to distribute responsibility between Member States on the one hand, and between the EU and Member States on the other. In this picture, solidarity becomes only an exception achieved at the expense of constitutional structure of the EU. From here arises the question whether the EU can be a leader of global climate

[179] C. Joerges and F. Rödl, 'Social Market Economy as Europe's Social Model' *European University Institute LAW*, 2004/08 (2004), available at https://tinyurl.com/yp4sy93w (last visited 31 December 2021).

[180] See Art 3 of the Treaty on the European Union (TEU).

change by bridging the gaps between developing and developed countries and being a leader not only with words but also with deeds while it still shies away from taking on distributive policies within its internal borders. It is my contention that the EU's GND could achieve its global aspirations only if the EU free itself from the shackles of the impossibly trinity: fiscal sovereignty, no-bailout clause, and independent monetary policy.[181] Therefore, the EU's Green New Deal will probably strike a fatal blow to the EU's constitutional/institutional crisis, which are further exacerbated with the measures taken to tackle economic crisis during the last decade.[182] On this account, no need to be a soothsayer to predict that the EU is going to/should enter in a new constitutional process with a view to aligning its Green New Deal policies with its substantive constitution. For the EU's GND is likely to function as a 'constitutional/institutional irritant' to the EU's substantive constitution, which is founded on the idea of 'monetary solidarity' forcing member states to be kept in solitary confinement when it comes to fiscal policies that necessarily demands (re)distribution.

[181] H. Beck and A. Prinz, 'The Trilemma of a Monetary Union: Another Impossible Trinity' 47(1) *Intereconomics* (2012) 39-43.

[182] See for the EU's multidimensional crisis, which is not only economical but also political and institutional E. Chiti and P.G. Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' 50(3) *Common Market Law Review*, 683 (2013).

Interlegality - Symposium

Inter-Legality and Surveillance Technologies

Sümeyye Elif Biber*

Abstract

On 19 May 2020, the German Federal Constitutional Court ruled that telecommunication surveillance of non-German individuals outside German territory violates the German Constitution. The reasoning of the Court entails a number of crucial questions both from the international and European human rights law perspective. The most important one being whether the German Federal Government is bound by the provisions of the German Constitution when it interferes with the rights of non-German individuals in a non-German territory. Relying on international human rights law, the Court answered affirmatively. The reasoning of the judgment has demonstrated a successful example of Inter-legality. Therefore, this paper aims at analyzing the judgment from such a perspective through a three-step analysis: Taking the vantage point of the affair – the case at hand – under scrutiny, understanding the relevant normativities controlling the case, looking at the demands of justice stemming from the case. It concludes that such an inter-legal reasoning provided the Court to close 'virtual legal black holes', and avoid injustice.

I. Introduction

On 19 May 2020, the German Federal Constitutional Court (hereafter: BVerfG) ruled that telecommunication surveillance of non-German individuals outside German territory violates the German Constitution.[1] In the judgment, the Court conducted a constitutional review on certain provisions (*Rechtssatzverfassungsbeschwerde*) of the German Act on Federal Intelligence Service (BNDG),[2] allowing German authorities to collect and process communication data between non-German nationals outside German borders.[3] The complainants, a group of journalists and NGOs, claimed that the provisions

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[1] BVerfG 19 May 2020 1 BvR 2835/17. Direct citations in the article to the Judgment refer to the official English translation of the Judgment, published on the website of the BVerfG, available at https://tinyurl.com/2s3cfjvb (last visited 31 December 2021). For another important judgments of the BVerfG assessing the constitutionality of surveillance regulations see BVerfG 20 April 2016 1 BvR 966/09 - 1 BvR 1140/09; BVerfG 14 July 1999 1 BvR 2226/94 - 1 BvR 2420/95 - 1 BvR 2437/95.

[2] Gesetz über den Bundesnachrichtendienst – BNDG of 20 December 1990.

[3] The constitutional complaint mainly challenged §§ 6,7 and §§ 13 to 15 BNDG. See BVerfG n 1 above, para 57.

of the BNDG violate their right to privacy, and the freedom of press.[4]

The Government objected that it is not bound by the German Basic Law when conducting surveillance activities on foreign individuals on foreign soils.[5] However, the Court found violations of Arts 5 and 10 of the German Constitution, and stated that the Legislature would need to revise the existing provisions in accordance with the German Basic Law until the 3 December 2021.[6]

The reasoning of the Court entails a number of crucial questions both from the international and European human rights law perspective. The most important among such questions is whether the German Federal Government is bound by the provisions of the German Constitution when it interferes with the rights of non-German individuals in a non-German territory. Relying on international human rights law, the Court answered affirmatively, raising three main arguments in favour of the accountability of the German Federal Government on foreign soils, mainly interpretating paras 2 and 3 of Art 1 of the German Constitution.[7]

Indeed, pursuant to Art 1, para 3, of the Basic Law, the Court stated that German authorities are comprehensively bound by the fundamental rights of the German Constitution without restrictions on the German territory (*Staatsgebiet*) or the German people (*Staatsvolk*).[8] In this context, by making references to the history of the Basic Law and applying to the teleological interpretation, the Court clearly emphasized that the Constitution aims at a comprehensive reading of the fundamental rights rooted in human dignity.[9]

Secondly, in the light of the second paragraph of Art 1 and the Preamble, the Court found that the Basic Law recognizes inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.[10] Thus, the fundamental rights of the Basic Law are placed in the context of international human rights guarantees. This requires that fundamental rights of the Basic Law must be interpreted in the light of Germany's international-law obligations.[11]

Finally, according to the Court, new technological developments and their usages require a comprehensive reading of para 3 of Art 1 to take into account

[4] Para 33. Arts 5, para 1, second sentence and 10, para 1. Art 5, para 1, 'Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt'. Art 10, para 1, 'Das Briefgeheimnis sowie das Post- und Fernmeldegeheimnis sind unverletzlich'.

[5] BVerfG n 1 above.

[6] ibid.

[7] Art 1, para 2, 'Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt'. Art 1, para 3, 'Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht'.

[8] BVerfG n 1 above, paras 87-89.

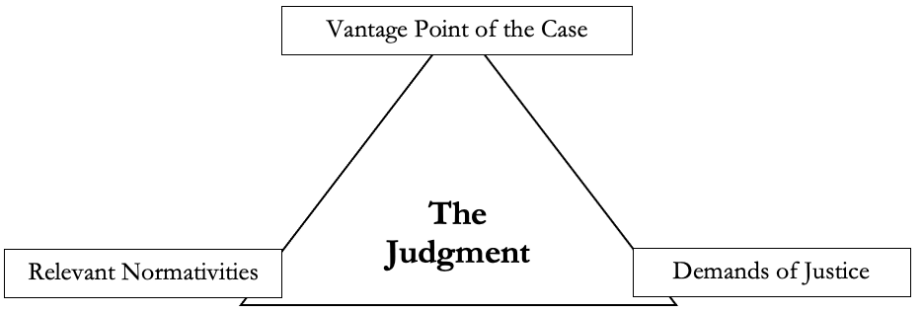
[9] ibid para 89.

[10] ibid § 94.

[11] ibid §§ 94-95.

the threats to fundamental rights and the resulting shifts in the powers.[12] This leads to the fact that German authorities are subject to international human rights obligations regardless of the territory in the context of new technologies which offer cross-border services.[13] In other words, such a comprehensive reading of the German Constitution is particularly highlighted for new technological developments allowing states powers to reach out into third countries.

I believe that this judgment can be considered as a successful example of inter-legal reasoning. Therefore, this study aims at analyzing the judgment from such a perspective,[14] through a three-step analysis: (i) taking the vantage point of the affair – the case at hand – under scrutiny, (ii) understanding the relevant normativities actually controlling the case, (iii) looking at the demands of justice stemming from the case.[15] The purpose of constructing such a three-step analysis is to provide judges an analytical way to apply to the perspective of inter-legality. The triangle below clearly sketches the three pillars of the concept:



It should be noted that there is no hierarchical relation between the three steps of the concept. They relate to each other and dynamically guide each other. However, the vantage point of the case is the most essential step of inter-legality.[16] Therefore, we will start our analysis with this pillar. Since the pillar of 'demands of justice' requires to reconnoitre the 'relevant normativities', it will be the final phase of our analysis. Subsequently, the analysis will provide concluding remarks.

[12] BVerfG n 1 above, § 105.

[13] ibid § 105.

[14] J. Klabbers and G. Palombella, *The Challenge of Inter-Legality* (Cambridge: Cambridge University Press, 2019).

[15] J. Klabbers and G. Palombella, 'Introduction Stating Inter-Legality', in Id and J. Klabbers eds, n 14 above, 1-20; G. Palombella, 'Theory, Realities, and Promises of Inter-Legality A Manifesto' ibid 363-390.

[16] J. Klabbers and G. Palombella, n 14 above, 2 ('the shift toward the construction of law from the angle of the case is essential to an inter-legality approach').

II. Taking the Vantage Point of the Affair – the Case at Hand – Under Scrutiny

The concept of inter-legality essentially focuses on the vantage point of the case.[17] In this context, Palombella addresses the essentiality of the angle of case at stake as follows:

> 'One that seeks to reach the layer controlling the case in its deepest fundus, ie the place where, one would say with Wittgenstein, 'I have reached bedrock, and my spade is turned'. To be required to think of law in terms of inter-connectedness, among many normativities'.[18]

To understand the vantage point of the case, the practice of strategic surveillance of the Federal Intelligence Service could be briefly summarized in five steps, namely (i) access to telecommunication data by intercepting signals from telecommunications networks, (ii) application to the diversion of data or other interception methods 'initiating a multi-step and fully automated process of sorting and analysis,' and following this, filtering data (DAFIS filtering mechanism), (iii) collecting and storing all traffic data that is left after the application of filtering mechanism without using any selectors,[19] (iv) screening data manually as to its relevance for the Federal Intelligence Service, (v) cooperating with other intelligence services.[20] Particularly, the filtering system is in dispute between the parties. Although Federal Intelligence Service has some parameters to identify data connected persons within Germany or German citizens, 'it is unknown how many telecommunications process are falsely categorized as purely foreign telecommunications' due to the use of intermediary services located abroad or due to the use of hotspots.[21] Therefore, this problematic filtering mechanism partially stems from the features of the technology being used.

In this context, the judgment clearly analyzed the features of the advanced surveillance technologies and fundamental differences from the traditional technologies in the past:

> 'In the past, the only purpose of gathering foreign intelligence was the early detection of dangers to avert armed attacks on German territory; measures directly targeting individuals were limited to a small group of persons, as a result of both the technical possibilities and the intelligence interest at the time (cf. BVerfGE 67, 157,178). Given today's possibilities of

[17] ibid 2.

[18] G. Palombella, *Theory* n 15 above, 380.

[19] It is a computer-based analysis through cross-checking and other methods. BVerfG n 1 above, para 21.

[20] BVerfG n 1 above, paras 16-26.

[21] BVerfG n 1 above, para 19.

> communication and the accompanying internationalisation, potential impending dangers (*drohende Gefahren*) originating from abroad have multiplied. Information technology makes it possible to communicate directly across borders, regardless of physical distance, and to coordinate without any delay'.[22]

Furthermore, the Court highlighted that in line with new technological developments, limiting the application of fundamental rights to the national borders would leave individuals vulnerable and cause the scope of the protection of fundamental rights to lag behind internationalization:

> 'In light of such developments, an understanding of fundamental rights according to which their protection ended at national borders would deprive holders of fundamental rights of all protection and would result in fundamental rights protection lagging behind the realities of internationalisation ([…]). It could undermine fundamental rights protection in an increasingly important area that is characterised by intrusive state action and where – in the field of security law – fundamental rights are especially significant in general. By contrast, in binding the state as the relevant actor, Art 1(3) GG accounts for such novel risks and helps bring them into the general framework of the rule of law that is created by the Basic Law'.[23]

According to the BVerfG, such kind of international dimension allowing communication within states and beyond states borders ambiguates the distinction between domestic and foreign.[24] This interpretation demonstrates that the BVerfG detects the vantage point of the case as virtual in the context of new technologies providing cross-border services. In other words, these technologies, which make time and space meaningless, actually virtualize the vantage point of the case. Therefore, these technologies confront courts with a case which is independent from the physical places or borders. In this context, an inter-legal approach becomes much more relevant because such a cross-border space provides a ground that potentially increases the interactions between legal systems. Such a dynamic and unpredictable ground also requires to consider that a legal system is better to be seen as interactional, not a system that is closed and structured.[25] This interactional way of understanding of legal

[22] BVerfG n 1 above, para 107.
[23] ibid para 110.
[24] ibid para 109.
[25] See the discussion on product versus practice models of law in W. Van der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Surrey: Ashgate Publishing, 2014), 10. According to Sanne Taekame, the product model of law generates a systemic conception of legal order, while a practice model of law addresses an interactional legal order. See the discussion in the context of inter-legality in S. Taekema, 'Between or

system requires to find out the relevant normativities controlling the case, the second pillar of our analysis.

III. Understanding the Relevant Normativities Controlling the Case

Inter-legality does not only capture the plural co-existence of legalities running on their own, it also presents a reality of the 'unavoidable interconnectedness of legalities'.[26] An inter-legal approach indicates that none of the legalities or regimes work effectively on their own. As Palombella argues, 'their functional isolation is a myth'.[27] Therefore, the only way to strengthen the effectiveness of a particular legality or a regime is to introduce it to their 'interlocutors'. For instance,

> 'the European Convention of Human Rights may well be conceived as a kind of constitutional legality, but its ordering strength depends on the ways 'other' legal systems accept and implement its normative clauses'.[28]

In this framework, as a consequence of the inter-connectedness of legalities, an inter-legality perspective provides a perspective to the observer to see that these legalities are not only connected but also interwoven.[29] For this reason, disregarding this interwovenness, or the reliance on only one legality might lead justice to remain always as a 'lame verdict'.[30] This suggests that it is not up to us the option to exclude or consider the normative characters of legalities, in a context where they are interwoven, interconnected, and de facto competing or concurring.[31] In other words, every relevant legality in a 'legal porosity'[32] context where multiple networks of legal orders force us to 'constant transition and trespassing'[33] has legally an objective say for justice due to their potential justice-related function.[34] In this way, the perspective excludes the monopoly or

Beyond Legal Orders Questioning the Concept of Legal Order', in J. Klabbers and G. Palombella, n 14 above, 69-88.

[26] G. Palombella, *Theory* n 15 above, 366.

[27] ibid 367.

[28] ibid 367; W. Sadurski, 'Partnering with Strasbourg: Constitutionalism of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' 9 *Human Rights Law Review*, 397 (2009).

[29] G. Palombella, *Theory* n 15 above, 365-368.

[30] ibid 386.

[31] ibid 363-390.

[32] S. Santos, 'Law: A Map of Misreading', in B. De Sausa Santos ed, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995), 473.

[33] ibid 473.

[34] Palombella emphasizes this point marking a difference from Santos's idea of inter-legality, as follows: 'it is true what Santos wrote that we live "in between". But inter-legality is not just a state of things we can exploit, and profit from contradictions and divergences among separate and mutually irrelevant normative orders. Not as a *subjective sociological* but as an *objective legal* notion, inter-legality allows us to consider the law as something different; we

hegemony of a particular legal order,[35] and invites all relevant legalities to reach an equilibrium, and dissolve the tension between them.[36] Indeed, such a perspective also stands by the rule of law that requires to consider diverse needs and ends, and 'prevents the law from turning into a sheer tool of domination'.[37] In this way, it gains a great potential to close 'legal black holes',[38] and answer the questions arisen from the inter-connectedness of legalities, and hence strengthen the culture of justification.[39]

The judgment of the BVerfG clearly engaged with this 'empirical reconnaissance'[40] takes place in the ecosystem of inter-legality by considering the interrelatedness of legalities within the framework of the case. In other words, the Court reconnoitered the relevant legalities creating an ecosystem of inter-legality on the basis of the case at stake.

According to the Court, the relevant normativities controlling the case are both the international norms and the German Constitution. Such a result

should pretend to avail of inter-legality also in a different sense', in G. Palombella, *Theory* n 15 above, 378.

[35] The term 'legal hegemony' has been widely discussed by legal experts after the well-known 'PSPP judgment' of the BVerfG, Judgment of the Second Senate 5 May 2020, 2 BvR 859/15, paras 1-237. According to the BVerfG, the review done by the Court of Justice of the European Union on the European Central Bank's decisions regarding the Public Sector Purchase Program does not satisfy the principle of proportionality. See some recent discussions about legal hegemony in A. von Bogdandy 'German Legal Hegemony' *Verfassungsblog,* available at https://tinyurl.com/2p87kp6d (last visited 31 December 2021). See some legal experts' ideas on whether German legal hegemony is a matter of concern in EU law in Id et al, 'German Legal Hegemony?', Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper no 2020-43, November 2020, 9, available at https://tinyurl.com/4jve6dmw (last visited 31 December 2021).

[36] G. Palombella, *Theory* n 15 above, 381-382.

[37] G. Palombella, 'The Rule of Law at Home and Abroad' 8(1) *Hague Journal on Rule of Law*, (2016).

[38] A. Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2008), 298 (arguing that judicial review eliminates legal black holes.) The term 'legal black hole' was coined by Johan Steyn in 2004. See J. Steyn, 'Guantanamo Bay: The Legal Black Hole' 53(1) *International and Comparative Law Quarterly*, (2004) ('The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the United States naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals'). In 2006, Dyzenhaus coined the term 'legal grey holes' to describe 'disguised black holes' that addresses situations in which 'there are some legal constraints on executive action - it is not a lawless void - but the constraints are so insubstantial that they pretty well permit government to do as it pleases'. He emphasized that they are worse than legal black holes ('since such grey holes permit government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes'). See D. Dyzenhaus *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 42.

[39] See an excellent discussion on the term 'culture of justification' and its relation with the principle of proportionality in M. Cohen-Eliya and I. Porat, 'Proportionality and the Culture of Justification' 59 *American Journal of Comparative Law*, 463 (2011).

[40] G. Palombella, *Theory* n 15 above, 382. Palombella uses the term 'reconnaissance' in both exploration and recognition sense.

stemmed from the interpretation of paras 2 and 3 of Art 1, that focuses on their 'multifaced nature'. In other words, the Court read the 'norm-text' of these provisions and recognized that the relevant norms are composed of more than one system-sourced positive law:

> 'In Art 1(2) GG, the Basic Law acknowledges inviolable and inalienable human rights as the basis of every community, of peace, and of justice in the world. The Basic Law thus places fundamental rights in the context of international human rights guarantees that seek to provide protection beyond national borders and are afforded to individuals as human beings. Accordingly, Art 1(2) and Art 1(3) GG build upon the guarantee of human dignity enshrined in Art 1(1) GG'.[41]

This tension-free and equilibrating reading of the Constitution implicitly follows the perspective of inter-legality that changes the 'usual, traditional perspective, a perspective that is limited by the political, legal and cognitive borders of a single self-contained system'.[42] In this sense, the perspective of inter-legality bears a resemblance to the structuring legal theory (SLT), founded by Friedrich Müller.[43] It identifies itself as a 'post-positivist' theory according to which legal norms are not identical with their text ('Rechtsnorm ist *un*gleich Normtext').[44] It sees interpretation or the application of law as a dynamic process in which the actual norms have to be constructed.[45] In this context, both the theses of SLT and inter-legality agree on the inadequacy of the norm-text and put the norm in a comprehensive and broad framework. In other words, by considering other relevant actors, they exclude the old-fashioned view that the only correct solution for every case can be found in legislation.[46]

Furthermore, such a perspective also demonstrates that the BVerfG changes its perspective to international law, at least in the context of surveillance technologies. It has been recognized by some scholars that according to the German Federal Constitutional Court,

> 'international law does feature only in their jurisprudence if and to the extent permitted by their domestic law. Therefore, when the Court applies international law or implements international decisions, they do so because

[41] BVerfG n 1 above, para 94.

[42] J. Klabbers and G. Palombella, *Introduction* n 15 above, 1.

[43] F. Müller and R. Christensen, *Juristische Methodik* (Berlin: Dunker & Humblot, 11th ed, 2013), 263. For the basic premises of his theory see M. Klatt, *Making the Law Explicit: The Normativity of Legal Argumentation,* (Oxford: Hart Publishing, 2008), 54-56 ('the text is only a 'guideline, as such it has no claim to normativity (…) the rule is not the beginning, but the product of the process of the application of the law').

[44] See further discussion about the SLT in M. Klatt, 'Contemporary Legal Philosophy in Germany' *Archiv fu¨r Rechts und Sozialphilosophie,* 519-539 (2007).

[45] ibid.

[46] ibid.

> domestic law requires it, not because they are organs of the international community.'[47]

However, in this judgment, there is no priority regarding the legalities at stake, the Court reads the Basic Law in the light of internationalization, relying on the principle of human dignity as a universal ideal.[48] Furthermore, the Court emphasized the responsibilities of the German state in a united Europe and the world.[49] The emphasis on the responsibility for the protection of fundamental rights of the German State also implies that sovereignty should not only be seen as something limited by fundamental rights, but also a responsibility for the protection of fundamental rights, placing the individual in its center.[50] In this way, sovereignty becomes a 'humanized state sovereignty' that is accountable for safeguarding humanity.[51]

Such a reading inevitably leads the BVerfG to focus on the relevant case-law of the European Court of Human Rights (ECtHR). It clearly cited the leading decisions as regards the territorial scope of the European Convention of Human Rights.[52] In the light of these cases, the BVerfG induced that the case-law of the ECtHR is largely based on the doctrine of 'effective control over territory', and it is still not clear on the protection against surveillance measures taken abroad by the Convention States:

> 'The European Court of Human Rights is mainly guided by the criterion of whether a state exercises effective control over an area outside its own territory; on this basis, it has in many cases affirmed the applicability of Convention rights abroad (cf in summary ECtHR [GC], Al-Skeini and Others v. the United Kingdom, Judgment of 7 July 2011, no 55721/07, §§ 132 *et seq*. with further references; cf also Aust, Archiv des Vo¨lkerrechts 52, 2014, p. 375, 394 *et seq*. with further references). However, there has been

[47] A. Paulus, 'National Courts and the International Rule of Law (Remarks on the book by André Nollkaemper)' 4 *Jerusalem Review of Legal Studies*, 5, 8-9 (2012).

[48] See a recent discussion about the judgment's universalist and international language in M. Milanovic, 'Surveillance and Cyber Operations', in M. Gibney et al eds, *Research Handbook on Extraterritorial Human Rights Obligations* (London: Routledge, forthcoming), 10-11, available at https://tinyurl.com/mraer6r2 (last visited 31 December 2021.) See also a wide discussion on the concept of human dignity in German constitutional law in A. Barak, 'Human Dignity in German Constitutional Law', in Id, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 225-242.

[49] BVerfG n 1 above, paras 94-95.

[50] A. Peters, 'Humanity as the A and Ω of Sovereignty' *European Journal of International Law*, 513–544 (2009).

[51] ibid.

[52] Eur. Court H.R., *Al-Skeini and others* v *United Kingdom,* Judgment of 7 July 2011, available at www.hudoc.echr.coe.it, para 132; Eur. Court H.R., *Big Brother Watch and others* v *United Kingdom,* Judgment of 13 September 2018, available at www.hudoc.echr.coe.it, spara 271; Eur. Court H.R., *Center for* Ra¨ttvisa v *Sweden,* Judgment of 19 June 2018, available at www.hudoc.echr.coe.it.

> no final determination as to whether protection is afforded against surveillance measures carried out by Contracting Parties in other states. In a decision that has not become final yet, the First Section of the European Court of Human Rights measured the implementation of surveillance measures targeting persons abroad against the standards of the Convention without any restrictions and found such measures to be in violation of the Convention. The complainants in this case included foreign nationals who were not present or resident in the state against which the applications were directed (cf. ECtHR, Big Brother Watch and Others v. the United Kingdom, Judgment of 13 September 2018, no 58170/13 and others, § 271). Similarly, a Swedish foundation challenged strategic foreign surveillance powers under Swedish law that exclude domestic communications. The European Court of Human Rights reviewed these powers without calling into question the Convention's applicability abroad (cf ECtHR, Centrum fo¨r Ra¨ttvisa v Sweden, Judgment of 19 June 2018, no. 35252/08). Both proceedings are now pending before the Grand Chamber'.[53]

It is worth noting that in the case of *Bankovic and Others* v *Belgium* the ECtHR made it clear that

> 'the Convention is a multi-lateral treaty operating (…) in an essentially regional context and notably in the legal space of the Contracting States. (…) The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contacting States.'[54]

However, in the context of foreign surveillance, the incoherency of the ECtHR's extraterritorial jurisprudence[55] has been highlighted by many human rights scholars. They argued that although the ECtHR has decided a number of major cases on the subject, the meaning of Art 1, which provides that 'the high Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this convention,' has still remained unclear.[56]

[53] BVerfG n 1 above, §§ 97-98.

[54] Eur. Court H. R, *Bankovic and Others* v *Belgium and Others*, Judgment of 10 May 2001, available at www.hudoc.echr.coe.it, para 80. See also ECtHR, 'Guide on Article 1 of the European Convention on Human Rights', updated on 31 December 2020, available at https://tinyurl.com/54fb29ae (last visited 31 December 2021).

[55] See a summary of ECtHR case-law regarding mass surveillance in ECtHR, 'Mass Surveillance – Factsheet', May 2021, available at https://tinyurl.com/bdfca7tu (last visited 31 December 2021).

[56] M. Milanovic, *Extraterritorial Application of Human Rights Treaties Law, Principles and Policy* (Oxford: Oxford University Press, 2011); S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction Under the European Convention' *The European Journal of International Law*, 1223-1246 (2009); M. Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' 56(1) *Harvard*

Finally, the BVerfG noted that the application of the Basic Law abroad was only meant to limit the actions of German state authority, and thus not violated the principle of non-intervention under international law:[57]

> 'the binding effect of fundamental rights does not amount to a violation of the principle of non-intervention or to a restriction of other states' executive or legislative powers. It neither imposes German law on other states, nor does it supplant the fundamental rights of other states. In particular, the binding effect of fundamental rights does not extend German state powers abroad, but limits potential courses of action of German state authority.'[58]

Following this reasoning, the Court highlighted that Art 53 of the European Convention on Human Rights allows it to provide further protection for fundamental rights by stating that 'the Convention does not rule out further-reaching fundamental rights protection by the Contracting Parties'.[59] This investigation leads the Court to focus on other relevant legalities to address the demands of justice stemming from the case, the third step of our analysis.

IV. Looking at the Demands of Justice Stemming from the Case

With regards to the third step guided by the first and the second, the Court implicitly applied to the doctrine of 'effective control over rights.' Different from the effective control over territory and over persons doctrines of the ECtHR, 'effective control over rights' is based on whether states have the effective control over the enjoyment of the rights.[60] Such a reading stemmed from the

International Law Journal, 81 (2015). See also ECtHR, 'Extra-territorial Jurisdiction of States Parties to the European Convention on Human Rights', July 2018, available at https://tinyurl.com/y5bv4u42 (last visited 31 December 2021).

[57] BVerfG n 1 above, paras 101-103.

[58] ibid para 101.

[59] ibid para 99. It should be noted that this article has a particular importance from the perspective of inter-legality. It substantially seconds inter-legal reasoning for two reasons. First, it considers that there might be relevant legalities related to the issue at stake. Second, it orients domestic courts to look for just solutions. Art 53 of the ECHR states that 'nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party'.

[60] See a recent discussion on the doctrine of effective control over rights in B. Çalı, 'Has 'Control Over Rights Doctrine' for Extraterritorial Jurisdiction Come of Age? Karlsruhe too, has spoken, not it's Strasbourg Court?' *Blog of European Journal of International Law,* available at https://tinyurl.com/28xkv596 (last visited 31 December 2021.) Compare with the debate on the concept of 'preserving legal space' of the ECtHR in M. Rojszczak, 'Extraterritorial Bulk Surveillance after the German BND Act Judgment' *European Constitutional Law Review,* 11-12 (2021) (arguing that the concept would prevent individuals from finding themselves in a 'legal vacuum' in the context of electronic surveillance).

reconnaissance of the link between human rights and fundamental rights. The Court found that the German state is accountable both on the ground of Basic Law and on the international conventions particularly citing the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights:

> 'This link between fundamental rights and human rights guarantees is incompatible with the notion that the applicability of the fundamental rights of the Basic Law ends at the national border, which would exempt German public bodies from having to adhere to fundamental rights and human rights when they act abroad *vis-a`-vis* foreigners. Such a notion would run counter to the Basic Law's aim of ensuring that every person is afforded inalienable rights on the basis of international conventions and beyond national borders – including protection from surveillance (cf Art 12 of the Universal Declaration of Human Rights, Art 17(1) of the International Covenant on Civil and Political Rights). Given the realities of internationalised political action and the ever increasing involvement of states beyond their own borders, this would result in a situation where the fundamental rights protection of the Basic Law could not keep up with the expanding scope of action of German state authority and where it might – on the contrary – even be undermined through the interaction of different states. Yet the fact that the state as the politically legitimated and accountable actor is bound by fundamental rights ensures that fundamental rights protection keeps up with an international extension of state activities'.[61]

It is important to note that although the Court did not establish a clear link between fundamental rights and human rights, it highlighted that fundamental rights cannot be seen as closed legal regimes because of their relation with human rights. In fact, the Court emphasized the existence of terminological distinction between human rights and fundamental rights, but it noted that this distinction 'cannot be used as an argument against the integration of fundamental rights into the context of universal human rights.'[62] Otherwise fundamental rights remain inadequate when the German public bodies act abroad *vis-à-vis* foreigners. In this sense, the link between fundamental rights and human rights is crucial, not allowing fundamental rights to be undermined through the interaction of different states.[63] In other words, human rights are 'fundamentally' relevant

[61] BVerfG n 1 above, para 96.

[62] ibid para 94.

[63] See an excellent discussion on the relation between human rights and fundamental rights in G. Palombella, 'From Human Rights to Fundamental Rights: Consequences of a conceptual distinction' *Archiv Für Rechts Und Sozialphilosophie*, 396-426 (2007) (arguing that human rights are deontological imperatives concerning that which we owe to human beings; fundamental rights, by contrast, are related to things that are capable of contributing to the existence of a society.)

when a 'domestic' issue concerning fundamental rights arises, have a great potential to provide further protection for fundamental rights.

Furthermore, according to the Court, given the realities of internationalized political action, such a universal reading of fundamental rights is inescapable; and thus, it results in legal responsibility of the German public authorities at the global level. Thus, the reconnaissance of the link between human rights and fundamental rights and the reliance on international human rights law provided the Court to apply implicitly the doctrine of effective control over rights.

The doctrine of effective control over rights has been adopted by several international institutions. The UN Human Rights Committee in its General Comment no 36 clearly noted that:

> 'In light of Art 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under Art 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner (see para 22 above)'.[64]

Similar approach can be found in the report on the 'Right to Privacy in the Digital Age' of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in the context of digital surveillance:

> 'Digital surveillance therefore may engage a State's human rights obligations if that surveillance involves the State's exercise of power or effective control in relation to digital communications infrastructure, wherever found, for example, through direct tapping or penetration of that infrastructure. Equally, where the State exercises regulatory jurisdiction over a third party that physically controls the data, that State also would

[64] UN Human Rights Committee, General Comment no 36, para 63. Art 6 of the ICCPR: '1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this art shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'

> have obligations under the Covenant. If a country seeks to assert jurisdiction over the data of private companies as a result of the incorporation of those companies in that country, then human rights protections must be extended to those whose privacy is being interfered with, whether in the country of incorporation or beyond'.[65]

In 2017, the Inter-American Court of Human Rights, in its advisory opinion on

> 'the Environment and Human Rights' also stated that extraterritorially affected victims are contingent upon the jurisdiction of the state of origin 'when the State of origin exercises effective control over activities carried out that caused the harm and consequent violation of human rights'.[66]

The doctrine has been also suggested by several human rights experts due to the facts surrounding surveillance technologies. They argued that in the context of communication surveillance, human rights obligations of a state are triggered if the state affects the rights of a person, regardless of whether that person has a connection to that state.[67] Furthermore, they argued that both the effective control over individual and control over territory doctrines are ill-suited to the nature of communication surveillance, where the control of a state over infrastructure and individual is virtual.[68] As Aronson makes the point,

> 'communications surveillance programs most often involve a state's collection and review of data from its own territory, even though the communications may originate and terminate in other states and the rights holders may be beyond the collecting state's jurisdiction. Some types of collection more clearly involve extraterritorial action – eg, a state's interception of communications traffic via equipment located in its embassies abroad – but the impact on rights occurs in a different manner from the exercise of "effective control" over persons or territory'.[69]

Although the BVerfG did not clearly refer to the doctrine of effective control over rights, reliance on international human rights law – by making general

[65] OHCHR, 'Report on the Right to Privacy in the Digital Age', UN doc A/HRC/27/37 (30 June 2014), para 34.

[66] Inter-American Court of Human Rights, 'Environment and Human Rights Advisory Opinion' OC-23/17, 15 November 2017, Series A No. 23/17, para 104(h).

[67] P. Margulies, 'The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism' 82 *Fordham Law Review*, 2137, 2148-2152 (2014) (arguing that a state exercises 'virtual control' over communications infrastructure when it practices surveillance activities); M. Land and J. Aronson, *New Technologies for Human Rights and Practice* (Cambridge: Cambridge University Press, 2018), 236-239.

[68] M. Land and J. Aronson, n 67 above, 236-239.

[69] ibid.

references to Art 12 of the Universal Declaration of Human Rights[70] and Art 17 of the International Covenant on Civil and Political Rights[71] regulating the right to privacy – and the universalist reading of the Constitution have enabled the fundamental rights protected under the Basic Law to reach beyond borders. Such an approach has enabled the Court to fulfil the demands of justice stemming from the case, namely the third step of our analysis.

V. Conclusion

The concept of inter-legality is developed in the light of the recent developments occurring in the world. Globalization and the regulation of the world have challenged the state-based setting of a Westphalian and Hobbesian order.[72] In this transformative, incomplete, or 'suspended' period, states have protected their hold on many issues regardless of whether regulated at the regional and global levels, and maintained their national roles effective as far as possible.[73] However, emerging cross border issues ranging from climate to security have started to decrease the power of states.[74] The increasing presence of extra-state regimes and international organizations have also been a clear sign that states have loosened the 'chain of control' in many issues.[75]

In this context, the World Trade Organization, the European Union, the United Nations Convention on the Law of the Sea, the European Convention on Human Rights, the Codex Alimentarius Commission, the World Intellectual Property Organization, the International Organization for Standardization draw our attention away from the restricted 'public' of states.[76] The most recent striking example could be the ongoing COVID-19 crisis that has first identified in December 2019 in China but hasn't stayed as a national issue within Chinese borders.[77] Indeed, the World Health Organization has played a significant role in the Crisis by publishing several documents and issuing statements.[78] This

[70] Art 12: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.

[71] Art 17(1): '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

[72] G. Palombella, *Theory* n 15 above, 363; J. L Dunoff and J. P. Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009); M. Tushnet 'The Inevitable Globalisation of Constitutional Law' 49 *Virginia Journal of International Law*, 985 (2009).

[73] G. Palombella, *Theory* n 15 above, 363.

[74] ibid.

[75] ibid, 364.

[76] ibid, 364-365.

[77] 'WHO announced COVID-19 outbreak as a pandemic on 11 March 2020', available at https://tinyurl.com/5eaa954a (last visited 31 December 2021).

[78] See the recent updates about the crisis at https://tinyurl.com/5eaa954a (last visited 31 December 2021).

has been a clear-cut and traumatic example that *ordre public* in this century is not something reducible to the national interest alone.[79]

The emphasis on the 'internationalisation' and the features of new advanced technologies highlighted in the judgment demonstrated that the BVerfG takes this transition into account. Reading the legal concept of human dignity as a universal ideal, emphasizing the link between fundamental rights and human rights, and the increasing internationalized political actions have become clear reasons for the Courts to introduce the German Constitution to its interlocutors. On the basis of this reading, the Court conducted an 'empirical reconnaissance'[80] among the relevant normativities controlling the case. It is worth noting that the Court pushed further its reasoning by accounting for international regimes of human rights, by considering the relevant case-law of the ECtHR and the relevant international conventions: engaging with 'other legalities' could not be considered a logical necessity, since the Court could have possibly reached to the same result by simply interpreting the inner rationale of the German Constitution as based on the defence of rights of persons *vis à vis* the action of the German State. But by gathering the composite law of the case, as sourced in more than one single venue, the Court demonstrated to be aware of 'what is passing by the real substance of the case in-between multiple legalities settings'.[81] Eventually, such an inter-legal reasoning provided the Court to close 'virtual legal black holes',[82] and avoid injustice.

[79] 'WHO chief warns against COVID-19 "vaccine nationalism" ', available at https://tinyurl.com/2htmaxwu (last visited 31 December 2021). See a recent paper discussing that the COVID-19 crisis has a risk reinforcing preexisting national dynamics in F. Bieber, 'Global Nationalism in Times of the COVID-19 Pandemic' *Cambridge University Press, Nationalities Papers*, 1–13 (2020).

[80] G. Palombella, *Theory* n 15 above, 382. Palombella uses the term 'reconnaissance' in both exploration and recognition sense.

[81] ibid 382.

[82] I am inspired by Steyn for the term 'virtual legal black holes', n 38 above.

Interlegality - Symposium

The 'Two Suns' of EU Digital Copyright Law: Reconciling Rightholders' and Users' Interests via Interlegality

Giulia Priora*

Abstract

Copyright law is an emblematic example of the restless relationship between law and technology. The discipline fundamentally aims at striking a fair balance between the interests of copyright owners and users and, as the ongoing process of EU copyright reform demonstrates, digital technologies play a key role in pursuing this objective. The EU transition towards a digital-based copyright paradigm shows how achieving a balanced and context-sensitive legal framework requires taking into account elements from coexisting legal systems as well as from the technological normative ecosystem. Providing concrete examples of the intertwined nature of copyright law and digital technologies when it comes to protecting clashing interests, the article illustrates the 'interlegal' pattern emerging from the CJEU, which unveils a composite understanding of law and offers meaningful insights into the future of the EU digital copyright legal framework.

I. Introduction

In 14th century Florence, poet and philosopher Dante Alighieri thought that 'a twofold directive' was necessary to mankind in order to achieve a 'twofold end', namely terrestrial and eternal happiness.[1] By doing so, he passionately endorsed the so-called theory of the two suns, according to which the State and the Church enjoyed separate and equally legitimate power to govern society. Looking at today's digital world, Dante's imagery is inspiring, to say the least. Within a staggering number of activities and transactions moving online, it is not hard to notice how our economic and social life is illuminated by 'two suns': law and technology. Both legal and technological rules play an essential role in governing our behaviors and interactions in the digital environment, creating incentives and disincentives, enabling or prohibiting certain actions, and they

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[1] See A. Henry ed and transl, *The De Monarchia of Dante Alighieri* (Boston: Houghton Mifflin Company, 1904), available at https://tinyurl.com/46828r22 (last visited 31 December 2021).

do so not without frictions.

Copyright law is a good example to showcase the interplay of these two dimensions. After having regulated for almost three centuries a wide range of creative sectors – including and not limited to literature, music, audiovisual, press, scientific publishing – the copyright discipline has faced an unprecedented need to adapt and re-state its validity in an Internet-dominated world. As we create and consume cultural and creative contents increasingly in a digital format, copyright legal systems are showing considerable difficulties in addressing new issues and ensuring legal certainty in the online world. The digital dimension represents, in fact, a major disruption in the way copyright rules are conceived, applied, and enforced for numerous reasons.[2] Among them, the Internet's consolidating capacity to self-regulate[3] and the substantial political influence of Internet-based actors serving as intermediaries in the markets of copyrighted content[4] are two distinctive features that make digital technologies not a mere piece of the contextual background of the copyright discipline, but one of the two 'suns' illuminating its evolution.

Against this backdrop, Dante's words become even more insightful. Both copyright legislations and Internet's operative rules pursue a 'twofold end', that is to protect rightholders and, at the same time, to enable access and wide dissemination of their works. To achieve such objective and ensure a sustainable balance between the interest of authors and users, the need is – in Dante's words – for a 'twofold directive', that is to say a coordinated and context-aware guidance stemming both from law, and from technology. This article aims to explore to what extent EU copyright law, in particular, has taken into consideration external and technological factors while addressing the needs and interests involved in the digital society. In this vein, the analysis retraces the most recent developments relevant to the discipline, which since 1991 has been moving towards an ever-higher degree of harmonization and, lately, modernization (Section 2).

[2] The disruptive impact of the digital dimension over copyright law has been so overwhelming to make some scholars wonder whether the discipline could survive the digital era at all. See, among others, E. Samuels, 'Can our current conception of copyright law survive the Internet age?' 46 *New York Law School Law Review*, 221-230 (2002); G.S. Lunney, 'The death of copyright: Digital technology, private copying, and the Digital Millennium Copyright Act' 87(5) *Virginia Law Review*, 813-920 (2001).

[3] The questions as to whether and to what extent the Internet can be considered a self-standing normative order has been subject to seminal studies across the spectrum of social sciences. Common denominator of most contributions is the emphasis on the Internet's overwhelming capacity to influence decision-making processes at both individual and collective levels, thus evolving towards – if not already displaying – a normative potential that distinctively characterizes the Internet as a 'non-neutral' technology. See, among others, L. Floridi, *The Fourth Revolution. How the Infosphere is Reshaping Human Reality* (Oxford: Oxford University Press, 2004); M.C. Ketteman, *The Normative Order of the Internet. A Theory of Rule and Regulation Online* (Oxford: Oxford University Press, 2020).

[4] B. Farrand, *Networks of Power in Digital Copyright Law and Policy. Political Salience, Expertise and the Legislative Process* (London: Routledge, 2014).

Attention is paid to the role and impact of digital technologies in this process of legal reform, inquiring into the expressed need to achieve copyright's objectives in a sustainable and effective way in the online environment (Section 3). Against this legislative background, the study unveils how the influence of both 'suns' in the evolution of the copyright discipline has recently led the Court of Justice of the European Union (CJEU) to develop a composite, or interlegal, interpretation of EU copyright rules (Section 4), shedding some light on how the future of the digital copyright legal framework in Europe may look like.

II. The One Sun: *Law* and the Quest for a Fair Balance

The copyright legal paradigm is notoriously associated with the protection of the author. In Continental Europe, where the discipline has taken the label of *droit d'auteur*, as well as in the Anglophone tradition, moral and economic rights of those creating original content have been at the forefront of the development of the discipline.[5] Subsequently, until very recently, the end-user has been the great absentee in the copyright discourse.[6] Across the national legal systems, the consumers of creative contents have been an unspoken stakeholder. Since the vague reference to the 'encouragement of learning' evoked in the very first copyright legislation – the Statute of Anne of 1710[7] – and the hints to the 'social utility' of protected works in the French Revolutionary Decrees of 1791 and 1793,[8] the pursuit of a greater public good has long remained the elephant in the room both in the common law and civil law copyright traditions. Along these lines, copyright has consolidated over the centuries in the form of a bundle of exclusive rights allowing authors to authorize and retain control over the exploitation of their works and, in turn, profit from it. At the same time, the need to enable society to access copyrighted content and flourish has determined the limits of such entitlements and, in particular, their limited duration and scope.

Even though the definition of these boundaries has been a key constitutive

[5] See, among others, the historical analyses of P. Baldwin, *The Copyright Wars. Three Centuries of Trans-Atlantic Battle* (Princeton: Princeton University Press, 2014), 126; J.C. Ginsburg, ' "Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law' 65 *Cambridge Law Journal*, 637-638 (2006).

[6] See J. Cohen, 'The place of the user in copyright law' 74 *Fordham Law Review*, 347-374 (2005).

[7] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c 19 (Statute of Anne) available in L. Bently and M. Kretschmer eds, 'Primary Sources on Copyright (1450-1900)', available at https://www.copyrighthistory.org (last visited 31 December 2021). See also M. Rose, 'The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company and the Statute of Anne' in R. Deazley et al eds, *Privilege and property: Essays on the history of copyright* (Cambridge: Open Book Publishers, 2010), 67-88.

[8] Report of Le Chapelier accompanying the Decree of 1791; Report of Lakanal accompanying the Decree of 1793, both available in L. Bently and M. Kretschmer eds, n 7 above.

moment of national, supranational, and international copyright systems,[9] the protection of copyright exclusive rights has progressively expanded over time. Not only their duration has been extended,[10] but also their expansive interpretation,[11] the recognition of additional sui generis and related rights,[12] and restrictive approaches towards permitted uses[13] have further promoted an author-centric perspective in copyright legislation. As a result, the role of end-users has remained marginalized, thus marking a fundamental imbalance in the protection of rights and interests involved.[14] The process of harmonization of national copyright rules initiated in 1991 in the EU[15] has perpetuated this imbalance, consolidating and uniformizing the central role of the exclusive rights to exploit one's own works,[16] ensuring their long duration,[17] and addressing only to a minimal extent their

[9] See M. Borghi, 'A Venetian Experiment on Perpetual Copyright' in R. Deazley et al eds, n 7 above, 137-156; G. Ghidini, *Rethinking Intellectual Property. Balancing Conflicts of Interest in the Constitutional Paradigm* (Chelthenham: Edward Elgar, 2018), 177-183.

[10] It has been argued that the current duration, internationally harmonized to a minimum of fifty years *post mortem auctoris* and crystallized in the EU to seventy years *post mortem auctoris*, virtually corresponds to a perpetual protection. See L. Zemer, *The Idea of Authorship in Copyright* (Farnham: Ashgate, 2007), 224; J. Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008), 11; D.R. Desai, 'The Life and Death of Copyright' 2 *Winsconsin Law Review,* 219 (2002).

[11] A phenomenon often described as a 'second strand of protection' or 'second enclosure', characterized by a 'persistent hegemony of the exclusionary model'. See, respectively, M. Ricolfi, 'Intellectual Property Rights and Legal Order' 2 *Global Jurist* (2002); J. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' 66 *Law and Contemporary Problems*, 33 (2003); G. Ghidini, n 9 above, 219.

[12] See, among others, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961.

[13] See M. Senftleben, 'From Flexible Balancing Tool to Quasi-Constitutional Straitjacket. How the EU Cultivates the Constraining Function of the Three-Step Test' in T. Mylly and J. Griffiths eds, *The Transformation of Global Intellectual Property Protection* (Oxford: Oxford University Press, 2021); T. Aplin and L. Bently, 'Displacing the Dominance of the Three-Step-Test: The Role of Global Mandatory Fair Use' in S. Balganesh et al eds, *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge: Cambridge University Press, 2021), 37-58; J.P. Quintais, 'Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law' 6 *AMI - tijdschrift v oor auteurs-, media- en informatierecht*, 197-205 (2017).

[14] M. Ricolfi, n 11 above ('The delicate balance of copyright is tilted; and is tilted in favor of holders and to the detriment of users').

[15] With the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 (Computer Programs Directive). See also Green Paper of the European Commission, 'Copyright and the Challenges of Technology - Copyright Issues Requiring Immediate Action' [1988] 172 final.

[16] Arts 2, 3 and 4 of European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167 (InfoSoc Directive).

[17] See Art 9 Berne Convention for the Protection of Literary and Artistic Works of 1886; Art 1 of Directive 2006/116/EC on the term of protection of copyright and certain related rights [2006] OJ L372/12 (Term Directive). See also Recital 11 Term Directive, which counterintuitively justifies the enhancement of the protection of rightholders listing also consumers and the whole society as beneficiaries ('The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance

limitations.[18] This has caused a substantial fragmentation across the EU with regards to permitted uses and protection of end-users' interests.

However, recent developments in EU copyright law show a growing sensitivity in this direction. The EU legislator has put forward an agenda of copyright modernization, aiming, among others, at taking end-users' interests more seriously. Epitomizing this shift is the notion of 'fair balance of rights and interests',[19] which has become a lighthouse of EU copyright law-making and its related interpretation. In this vein, since 2021 with the adoption of the Orphan Works Directive,[20] the EU legislator has strategically intervened to promote the use of orphan works, out-of-commerce content, and the public domain,[21] as well as to facilitate access to works by persons with visual impairments and other disabilities,[22] support cultural heritage institutions,[23] and foster education and scientific research across the Union.[24] The most recent 2019 CDSM Directive represents the most advanced recognition of the role of end-users within the EU copyright legal framework, stressing the need to strike a fair balance of rights and provide legal certainty to rightholders of creative content as well as its users.[25] As highlighted by Séverine Dusollier, the recent legislative steps undertaken towards a more balanced copyright protection in the EU not only help overcome the problem of legal fragmentation, but also unveil a deeper paradigmatic shift in the discipline: the EU's approach towards the boundaries of copyright protection and, in particular, of permitted uses seems to have 'mutated from mere limitations of exclusive rights to proper enabling devices sustaining socially-benefiting uses of works and creations',[26] thus raising the question of how – rather than whether – end-users' interests can be protected online.

and development of creativity in the interest of authors, cultural industries, consumers and society as a whole').

[18] See Art 5 InfoSoc Directive.

[19] ibid Recital 31 ('A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded'). See also Recital 6 of Directive 2019/790/EU on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130 (CDSM Directive).

[20] European Parliament and Council Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299 (Orphan Works Directive). See also European Commission Communication 'Copyright in the Knowledge Economy' COM (2009) 532 final.

[21] Respectively, Art 6 Orphan Works Directive and Arts 8, 9, and 14 CDSM Directive.

[22] Regulation 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L242/1; Directive 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled [2017] OJ L242/6.

[23] Art 6 CDSM Directive.

[24] ibid Arts 3-5.

[25] ibid Recitals 3, 6.

[26] S. Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition' 57 *Common Market Law Review*, 981 (2020).

III. The Other Sun: *Technology* and the Need for Effectiveness

The two main drivers of EU copyright reform can be identified in international legal obligations and the digital environment. Whereas the former places the EU process of copyright harmonization within a wider frame of coordinated trade, advancement of democratic values and social inclusivity,[27] the latter necessarily brings the discipline to face changes occurring outside the realm of blackletter law. In particular, the focus on digital technologies has strongly characterized the evolution of EU copyright rules. The EU legislator took up the challenge of the digital age and embarked on a journey of modernization of the discipline, specifically aiming at turning the EU single market into a prosperous and highly competitive digital economy.[28] It is thus by no means an overstatement to argue that the main push towards a more modern, more European, and more balanced copyright legal framework[29] comes from the Internet.

In fact, the advent of digital technologies has notably exacerbated the imbalance underlying copyright regulation, further polarizing the claims at stake: on the one side, rightholders seek stronger protection from digital piracy, while, on the other side, end-users advocate their rights and freedoms to access content and participate to the cultural life now that technology unprecedently enables them to do so.[30] Furthermore, copyright owners can rely not only on a stronger legal protection, but also on a decisive apparatus of collective representation and management of their rights. On the contrary, the end-users' efforts to plead their causes and secure their legitimate interests are inevitably more fragmented, and the legal scholarship has lagged behind in conceptualizing ways to provide them with equal legal footing, with the exception of a few pioneering attempts[31] and a few proposals dovetailing the copyright and consumer protection landscapes.[32] On top of the polarization of claims involved in the

[27] See, among others, World Intellectual Property Organization (WIPO) Copyright Treaty of 1996; WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled of 2013.

[28] European Commission Communication 'A digital agenda for Europe' COM (2010) 245 final/2; European Commission Communication 'Shaping Europe's digital future' (2020), available at https://tinyurl.com/47dv5dnb (last visited 31 December 2021).

[29] European Commission Communication 'Towards a more modern, more European copyright framework' COM (2015) 626 final.

[30] See K. Gracz and P. De Filippi, 'Regulatory Failure of Copyright Law Through the Lenses of Autopoietic Systems Theory' *International Journal of Law and Information Technology*, 1-33 (2014).

[31] See Z. Efroni, *Access-Right: The Future of Digital Copyright Law* (Oxford: Oxford University Press, 2011); M. Borghi, 'Exceptions as Users' Rights in EU Copyright Law' *CIPPM Jean Monnet Working Papers,* no 06 (2020). See also J. Cohen, n 6 above; J.C. Ginsburg, 'Authors and Users in Copyright' 1 *Journal of the Copyright Society of the USA*, 45 (1997); L.R. Patterson and S.W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens: University of Georgia Press, 1991).

[32] See N. Helberger and B.P. Hugenholtz, 'No place like home for making a copy: Private copying in European copyright law and consumer law' 22 *Berkeley Technology Law Journal*,

expanded digital markets of copyrighted contents, the Internet's ability to self-regulate – famously conveyed by Lawrence Lessig's expression 'code is law'[33] – adds to the picture, unveiling the non-neutral role of digital technologies and their embedded potential to side with either rightholders or end-users. In this specific regard, it is as counterintuitive as evident to observe how the protectionist approach embraced in the terms and conditions of online services and platforms,[34] the reliance on technological protection measures and lock-up mechanisms that more often than not fails to secure adequate room for the exercise of copyright limitations,[35] and the de facto enabling of a pay-for-access and on-demand culture[36] play in favor of the former, disfavoring end-users.

Against this backdrop, the EU legislator advances the agenda of copyright modernization putting emphasis not only on the need to strike a fair balance of rights and interests, but also to ensure that such balance is effectively achieved in the digital environment. In particular, the EU legislator expresses the intention to intervene on the permitted uses allowed *ex lege* by way of copyright exceptions and limitations, whose weakened role and fragmented regulation across the EU puts the interests of end-users and the public at large in jeopardy, especially in the digital environment. It is in this vein that already in 2001, with the InfoSoc Directive, attention was paid to the need to 'reassess' copyright provisions on permitted uses to make them fit for the transborder exploitation of works and cross-border activities.[37] Even more explicitly, the CDSM Directive aims to

1061-1098 (2007); J. Schovsbo, 'Integrating Consumer Rights into Copyright Law: From a European Perspective' 31(4) *Journal of Consumer Policy*, 393-408 (2008); Y. Benkler, 'From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access' 52 *Federal Communications Law Journal*, 561 (2000).

[33] L. Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999). See also L. Lessig, 'Code Is Law. On Liberty in Cyberspace' *Harvard Magazine*, 1 January 2000.

[34] See S. Dusollier, 'Sharing Access to Intellectual Property Through Private Ordering' 82 *Chicago-Kent Law Review*, 1393 (2007) ('Generally, use of private ordering mechanisms has been a way to expand the monopoly granted by the law and to constrain or prevent the free use of resources by the public'); M. Ricolfi, n 11 above ('What are the terms or conditions which are accepted under a click-wrap license? (...) You accept that you cannot re-sell or even lend for free the accessed material. Therefore, you give up the benefits conferred on you by the first sale doctrine. That you give up also any fair use defence you may have: you can neither reuse it in whole or in part, not even for the purpose of teaching nor you may quote from it, even for the purpose of discussion and criticism. The prohibition concerns protected as well as unprotected material and therefore concerns not only the form of representation of the work but its contents; it extends to the facts, to the ideas').

[35] See S. Dusollier, 'Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work' 27 *European Intellectual Property Review*, 201 (2005); N. Elkin-Koren and M. Perel, 'Accountability in Algorithmic Copyright Enforcement' 19 *Stanford Technology Law Review*, 473 (2016); M. Myška, 'The True Story of DRM' 2 *Masaryk University Journal of Law and Technology*, 267-278 (2009).

[36] See E. Lucchi, Digital Media and Intellectual Property. Management of Rights and Consumer Protection in a Comparative Analysis (Berlin: Springer, 2006).

[37] Recital 31 InfoSoc Directive ("The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct

'adapt' copyright exceptions and limitations to the digital environment,[38] introducing new EU-wide provisions protecting end-users' interests in the use of online tools for the purposes of research, innovation, education and preservation of cultural heritage,[39] and insisting on their 'effective application'.[40] Whereas the EU legislator lays the groundwork for a context-sensitive copyright legal framework and a digital recalibration of rights and interests at stake, the CJEU moves a step further inquiring into the interplay between EU copyright law and digital technologies in specific real-life scenarios. Even though without providing judgements in the merits, the Court's binding interpretation of EU copyright rules offers a snapshot of the response of the discipline to the Internet, and a detailed account of the contamination between law and technology in achieving an 'effective fair balance' in the online world, as illustrated in the following Section.

IV. The CJEU's Take: The Rise of an Interlegal Perspective

Over the past two decades, the CJEU has showed a strong commitment to filling legislative gaps and enhancing the harmonization of copyright rules.[41] Regularly reached by preliminary ruling requests concerning digital scenarios, the Court has developed a vast copyright case law and has consolidated patterns in its reasoning. Among them, both the notion of fair balance of rights and interests[42] and the emphasis on the effectiveness of EU copyright rules in the digital environment[43] have become essential building blocks of the interpretation of copyright law all across the EU. Both these elements, which respectively

negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities.').

[38] Recital 3 CDSM Directive.

[39] ibid Recital 5.

[40] ibid Recitals 16, 23, 70.

[41] The so-called third phase of EU copyright case law is characterized by a steep increase in preliminary ruling requests and what has been described as an activist approach by the Court. See C. Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' Centre for International Intellectual Property Studies Research Paper no 3, 8 (2016); J. Griffiths, 'Taking Power Tools to the Acquis. The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law', in C. Geiger, C. Allen Nard and X. Seuba eds, *Intellectual Property and the Judiciary* (Cheltenham: Edward Elgar, 2018).

[42] M. Favale, M. Kretschmer and P. Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of The Workings of The European Court of Justice' 79 *Modern Law Review*, 64 (2015).

[43] Among others, Joined Cases C-403/08 *Football Association Premier League Ltd* v *QC Leisure* and C-429/08 *Karen Murphy* v *Media Protection Services Ltd*, [2011] ECR I-09083 (FAPL), para 163; Case C-145/10 *Eva-Maria Painer* v *Standard VerlagsGmbH* [2013] EU:C:2013:138, para 133; Case C-476/17 *Pelham GmbH* v *Ralf Hütter* [2019] EU:C:2019:624, para 63; Case C-201/13 *Johan Deckmyn* v *Helena Vandersteen* [2014] EU:C:2014:2132, para 23; Case C-469/17 *Funke Medien NRW GmbH* v *Federal Republic of Germany* [2019] EU:C:2019:623, para 51.

evoke the 'twofold end' of protecting rightholders and users, and the need for a coordinated 'twofold guidance' by way of law and digital technologies in this direction, carry a particularly teleological flavor, prompting the Court to focus on the purposes of EU copyright law.[44] As vastly observed by the scholarship, this teleological turn leads to a considerable degree of flexibility in the judicial interpretation.[45] Investigating how this purpose-oriented flexibility plays out in the CJEU's reasoning, Joxerramon Bengoetxea identifies numerous patterns, differentiating between strictly teleological, functional, and consequentialist approaches.[46] While the former directly refer to the objectives set in EU primary legislation, the latter two place EU law within a broader picture adding to its literal and systematic interpretation considerations on the concrete effectiveness of its application.[47]

The recent CJEU's case law on EU copyright rules in the digital environment well showcases this expanding room for flexibility. Electing the notions of fair balance and effectiveness to guiding lines of its teleological interpretation, the Court acknowledges that (i) several legal systems have a say when it comes to regulating digital uses of protected content, thus calling for *regulatory consistency*, and that (ii) technology itself embeds regulatory aspects of more pragmatic nature, which determine the *technological viability* of EU copyright rules. By doing so, the CJEU takes into consideration the presence of multiple concurrent legal dimensions, whose interactions are not necessarily ruled by way of hierarchy of legal sources or conflict of law rules. It is for instance the case when the CJEU takes into consideration the European Court of Human Rights' (ECtHR) take on freedom of expression, or the national rules on permitted uses of copyright works set by specific Member State, to which the CJEU reminds the need to overcome fragmentation and align their legal approaches.[48] As illustrated more

[44] Inquiring into the rising teleological interpretation in the CJEU copyright case law are, among others, C. Sganga, 'A New Era for EU Copyright Exceptions and Limitations? Judicial Flexibility and Legislative Discretion in the Aftermath of the Directive on Copyright in the Digital Single Market and the Trio of the Grand Chamber of the European Court of Justice' 21 *ERA Forum*, 317 (2020); T. Rendas, 'Copyright, Technology and the CJEU: An Empirical Study' 49 *International Review of Intellectual Property and Competition Law*, 153 (2017).

[45] See E. Rosati and C.M. Rosati, 'Data-Based Case Law Applied to EU Copyright (1998-2018): A Quantitative Assessment' *Intellectual Property Quarterly,* 196, 210 (2019); M. Favale, M. Kretschmer and P. Torremans, n 42 above; M. Leistner, 'Europe's Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives' 51 *Common Market Law Review*, 595 (2014). See also, beyond the copyright legal landscape, J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford: Oxford University Press, 1993), 251.

[46] J. Bengoetxea, n 45 above, 204–251.

[47] ibid. See also G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing, 2012), 208.

[48] Among others, Case C-466/12 *Nils Svensson et al* v *Retriever Sverige AB* [2014] EU:C:2014:76 (*Svensson*), paras 6-7; *Pelham*, paras 63-64; Case C-516/17 *Spiegel Online GmbH* v *Volker Beck* [2019] EU:C:2019:625 (*Spiegel Online)*, paras 47-48; Case C-572/13 *Hewlett-Packard Belgium SPRL* v *Reprobel SCRL* [2015] EU:C:2015:750 (*Reprobel*), paras 38-39.

in details below, the Court accounts not only for legislative sources, but also for the Internet's 'rules of the game'. In particular, by considering how the digital context allows – or rather hinders – the protection of copyright owners' and end-users' interests, the CJEU increasingly acknowledges the concurrent role of technological norms in the pursuit of EU copyright's objectives, de facto advancing a composite idea of law.

This approach shows a remarkable affinity with the perspective offered by the notion of interlegality, as defined by Jan Klabbers and Gianluigi Palombella.[49] The notion refers to the overlapping of legal domains that are simultaneously 'all valid and applicable in principle', yet do not necessarily have to rely on each other.[50] Suffice to think of the influence exercised by policy approaches pursued by neighboring or otherwise influential foreign countries in the drafting of a national regulation over problems of global relevance, or the key role played by technological standards or social norms in certain critical Court decisions. The specific aim of interlegality is to capture the intertwined nature of concurrent normative orders that coexist and may contaminate each other during the formation or application of their rules, without a clear-cut imperative of doing so stemming from the positivist hierarchy of legal sources.

In other words, interlegal is any understanding of the law that encompasses considerations stemming from external but equally legitimate norms, contextualizing legal provisions in a more holistic way. The coordination of different 'legalities'[51] characterizing such an approach carries the potential of building bridges between regulatory domains, national jurisdictions, supranational legal orders, legal and technological norms – thus moving beyond the pluralistic view of parallel regulatory dimensions and stressing on the intertwined nature of the legal considerations required to assess, among others, any digital scenario. In this vein, interlegality offers a valuable theoretical entry point into EU digital copyright rules. As the following landmark CJEU decisions show, it serves both as a descriptive tool to observe its evolution and as a method to approach relevant issues avoiding the

> 'one-jurisdiction-at-a-time perspective – the perspective of mutual alternative or exclusion – but by showing the relevance of – and the caring for – all the relevant normativities actually controlling the case'.[52]

[49] J. Klabbers and G. Palombella eds, *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019). See also G. Palombella, 'Interlegalità. L'interconnessione tra Ordini Giuridici, il Diritto, e il Ruolo delle Corti' 18 *Diritto e Questioni Pubbliche*, 318-342 (2018).

[50] J. Klabbers and G. Palombella eds, 'Situating Inter-legality' n 49 above, 10.

[51] G. Palombella and E. Scoditti, 'L'interlegalità e la ragione giuridica del diritto contemporaneo', in E. Chiti, A. di Martino and G. Palombella, *L'era dell'interlegalità* (Bologna: il Mulino, forthcoming), 29-64.

[52] J. Klabbers and G. Palombella, 'Situating Inter-legality' n 50 above. See also G. Palombella, n 49 above, 324. On the theoretical affinity between the concept of interlegality and EU

1. Spiegel Online

In Spiegel Online, the CJEU has been consulted upon the interpretation of two EU copyright exceptions, ie Art 5(3)(c) and (d) InfoSoc Directive, to assess whether the non-authorized online publication of the full version of a politician's essay may fall within the scope of the permitted uses for the so-called informatory purpose. The Court outlines the trade-off between rightholders' and end-users' interests by highlighting how the right to copyright protection clashes with the fundamental freedom of information, and stressing with particular emphasis the crucial role of free press in the European democratic society.[53] Instructing national judges on how to strike a fair balance between the two in the online environment, the CJEU touches upon four different normative rationalities: (i) national law, as said exceptions are not subject to full harmonization;[54] (ii) EU law, as its objectives, effectiveness, and fundamental rights framework shall be safeguarded;[55] (iii) the ECtHR, which requires to qualify the information at stake based on its importance for the public and political debate;[56] and, lastly, (iv) the Internet, pointing out its structural necessity to make available and circulate information rapidly via the web to all users: if the authorization of the copyright owner were required to publish content about current events – the Court argues – the information would be provided to readers and society at large with a significant delay, thus jeopardizing the effectiveness of the related copyright exception.[57] Opening towards an inclusive understanding of the notion of current events[58] to safeguard information flows and public discussion,[59] the CJEU promotes a composite legal approach: the fragmented national copyright landscape, the ECtHR's take on the freedom of information, and even the required fast transmission of press content over the Internet become integral

copyright law, see G. Priora, 'Dall'armonizzazione all'interlegalità: la tutela dell'utente finale nella disciplina europea del diritto d'autore' in E. Chiti, A. di Martino and G. Palombella eds, *L'era dell'interlegalità* (Bologna: il Mulino, 2021), 441-464.

[53] Spiegel Online para 72.

[54] ibid paras 27-29.

[55] ibid paras 20-21, 37-48.

[56] ibid paras 44, 57-58 ('As is clear from the case-law of the European Court of Human Rights, for the purpose of striking a balance between copyright and the right to freedom of expression, that court has, in particular, referred to the need to take into account the fact that the nature of the 'speech' or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the public interest.').

[57] ibid para 71 ('When a current event occurs, it is necessary, as a general rule, particularly in the information society, for the information relating to that event to be diffused rapidly, which is difficult to reconcile with a requirement for the author's prior consent, which would be likely to make it excessively difficult for relevant information to be provided to the public in a timely fashion, and might even prevent it altogether.')

[58] ibid para 67.

[59] An interpretation that has indeed followed course before the German Supreme Court. See G. Priora and B.J. Jütte, 'No copyright infringement for publication by the press of politician's controversial essay' 15 *Journal on Intellectual Property Law and Practice* 8, 583-584 (2020).

part of the CJEU's balancing exercise between copyright protection and fundamental freedoms – a balance that becomes interlegal in its structure and highly sensitive towards the needs of the digital environment.

2. GS Media and VG Bild-Kunst

One of the main issues tackled by the recent CJEU copyright case law is the practice of linking to protected content already available online.[60] Particularly exhaustive reasonings in this regard have been provided in *GS Media*[61] and, more recently, in *VG Bild-Kunst*.[62] Both decisions address the need to strike a fair balance between the protection of the copyright owners of the content, and the end-users' freedom to access and link to it online. More precisely, the former case tackles hyperlinking, while the latter analyzes the practice of framing. On both occasions, the Court recalls that, according to Art 3 InfoSoc Directive, any of these linking practices would duly require authorization if it amounted to an act of communication by the user to a fairly large number of people, whom had not been addressed by the first publication of the work by the copyright owner.[63] However, the CJEU proceeds by emphasizing that the determination of the scope of the copyright holder's exclusive right of communication to the public requires an assessment based on 'several complementary criteria, which are not autonomous and are interdependent'.[64] In the haze of this vague sentence, the CJEU opts for embracing onto its reasoning considerations on the functioning of the Internet that are external and concurrent to EU copyright law.

More precisely, in *GS Media*, the Court reaches the conclusion that non-commercial digital users who hyperlink to protected contents do not require authorization from the respective copyright owners for three main reasons: (i) because the Internet is made of hyperlinks;[65] (ii) because Internet users hardly

[60] See, among others, *Svensson* paras 28-30; Case C-348/13 *BestWater International GmbH* v *Michael Mebes* [2014] EU:C:2014:2315 (*BestWater*).

[61] Case C-160/15 *GS Media BV* v *Sanoma Media Netherlands BV* [2016] EU:C:2016:644 (GS Media).

[62] Case C-392/19 *VG Bild-Kunst* v *Stiftung Preußischer Kulturbesitz* (VG Bild-Kunst) [2021] EU:C:2021:181 (VG Bild-Kunst).

[63] *GS Media* paras 35-38; *VG Bild-Kunst* para 32.

[64] *GS Media* para 34; *VG Bild-Kunst* para 34.

[65] *GS Media* para 45 ('(…) the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to the its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information'). See also Case C-161/17 *Land Nordrhein-Westfalen* v *Dirk Renckhoff* [2018] EU:C:2018:634 (*Renckhoff*), para 40. The point was eloquently developed also by Advocate General in the Opinion in *GS Media*, paras 54, 77-78 ('It is a matter of common knowledge that the posting of hyperlinks by users is both systematic and necessary for the current internet architecture. (…) If users were at risk of proceedings for infringement of copyright under Art 3(1) of Directive 2001/29 whenever they post a hyperlink to works freely accessible on another website, they would be much more

know or could possibly know whether the content they access online was published with or without the consent of the copyright owners;[66] and (iii) because the user hyperlinking to an unlawfully published work communicates it to an audience that, de facto, has already potential access to it.[67] Similarly, in *VG Bild-Kunst*, the balancing exercise between the protection of copyright owners and the users' interests in framing someone else's works in their website has been construed taking into account the Internet's own operative rules. According to the CJEU, the practice of framing someone else's work online does not requires specific authorization, unless the copyright owner has restricted use of it by way of technological protection measures (TPMs).[68] The consideration that TPMs are the *only* effective means available in the digital environment for the copyright owners to retain control over their work and for end-users to clearly ascertain the intentions of rightholders[69] is so central to the reasoning to evoke the interlegal approach priorly displayed by the *GS Media* decision: it is technology and its normative significance to open up the interpretation of EU copyright rules, hinting at a context-sensitive and composite idea of law.

V. Conclusion

The CJEU's reasoning in the cases illustrated above hints at an emerging trend within EU copyright law. The need to strike a fair and effective balance of rights and interests in the digital environment is key to the ongoing process of modernization of the discipline. How this goal will be eventually achieved remains yet to be seen. Thus far, what emerges is a growing attention dedicated to the multiplicity of concurrent legal systems attempting to regulate the digital dimension, and, even more curiously, to the Internet' operative rules. The rising awareness of the interconnection between law and digital technologies as well as the consolidation of the Internet as a self-regulating system of norms and practices are becoming integral part of the balancing exercise between copyright protection and other fundamental rights and freedoms. This inevitably prompts to a more holistic understanding of EU copyright law as a legal and technological matter – or, echoing the romanticism of Dante's words – towards the 'twofold

reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.').

[66] *GS Media* paras 46-47.

[67] ibid para 48. Following the judgement, this favorable approach towards hyperlinking by non-commercial Internet users has been further expanded by the EU legislator to all information society service providers with regards to their hyperlinking to press publications. See Art 15(1) third sentence CDSM Directive.

[68] VG Bild-Kunst paras 37-38 with reference to Svensson, BestWater, and Case C-301/15 *Marc Soulier and Sara Doke* v *Premier ministre and Ministre de la Culture et de la Communication* [2016] EU:C:2016:878 (Soulier), all cases regarding uses of works that were freely available online without TPMs implemented.

[69] VG Kunst-Bild para 46.

guidance' that is required to regulate our digital society under the light of its 'two suns': law and technology. Along these lines, the emerging trend in the evolution of EU copyright law seems to be of interlegal nature. As regulatory effectiveness and contextual awareness are ever more often deployed in the frontline of legal reasoning, the interpretation of EU copyright rules is taking into account multi-faceted elements stemming from concurrent legal and technological domains regulating the creation and consumption of creative content online. It is in these terms that interlegality promises to accompany and solidly support the future evolution of the discipline, proving to be both a valid theoretical framework to outline the existing interconnections between normative sources, and an 'emancipatory opportunity' in the interpretation of today and tomorrow's EU digital copyright law.[70]

[70] See G. Palombella, 'Theory, realities and promise of Inter-legality. A Manifesto', in J. Klabbers and G. Palombella eds, n 49 above, 371: 'Inter-Legality bears a conceptual emancipatory strength in this state of affairs insofar as it allows for scrutiny – not necessarily for unconditional acceptance – of normative claims, and its perspective refers to the legal assessment of countervailing reasons on a different stage of rightness other than sheer power.'