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In Memoriam

Rodolfo Sacco's Conception of The Comparative Law Method: A Brief Review

Katharina Boele-Woelki*

In this contribution to the memory of the world-renowned Italian comparative law scholar Rodolfo Sacco, I have revisited his book *Einführung in die Rechtsvergleichung*, which he co-authored with Piercarlo Rossi in 2017 in its third edition.[1] It was translated from Italian into German and thus belongs to the German-language literature on methodological aspects of comparative law. It is largely based on Rodolfo Sacco's numerous publications in various languages. An abridged version of the most important aspects of the book under review can be found in his article on 'Legal Formants: A Dynamic Approach to Comparative Law' published more than thirty years ago in the American Journal of Comparative Law.[2] It still belongs to the most important publications in this field.

I myself have encountered Rodolfo Sacco on several occasions, as a participant and speaker at numerous World Congresses of the International Academy of Comparative Law, lately in 2014 in Vienna, of which he was a titular member, as well as during the honouring of great comparatists, which was also bestowed upon him by the same Academy in Paris in 2016. Always immaculate in his appearance, a gentleman of the old school, among his entourage were many Italian scholars and students who literally held him high. A truly extraordinary sight to behold.

The *Einführung in die Rechtsvergleichung* is certainly not light reading, especially for beginners. Eclectic in parts, Rodolfo Sacco conveys his extensive experience in and advice on comparative law as well as on dealing with foreign law. His explanations repeatedly contain references to and comparisons with linguistics, and vivid and plausible examples are provided. Topics raised and

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[1] R. Sacco and P. Rossi, *Einführung in die Rechtsvergleichung* (Baden-Baden: Nomos Verlagsgesellschaft, 2017).

[2] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' *American Journal of Comparative Law*, 1-34, 343-401 (1991).

discussed at various world congresses, especially those of the International Academy of Comparative Law, are presented in detail, as are views of other comparative law scholars (eg Constantinescu, Gorla, David, Lambert, Strömholm, Ancel) who belong(ed) to Rodolfo Sacco's generation. These examples are refreshing and bring the methodological explanations to life, but they are snapshots from a time thirty to forty years ago.

Sacco and Rossi deal predominantly with well-known topics of comparative law, but supplement them with some focal points that are not found so prominently in other introductions to comparative law. The first section covers the real and perceived problems of comparative law (chapter 1), the subject matter of comparative law – here Sacco's well-known doctrine of fundaments has been developed – (chapter 3), some areas of application, including contracts and legal transactions, tort liability and the transfer of movable property (chapter 4), the role of comparative law in legal education (chapter 6) and the division into systems and families (chapter 7). Special chapters are devoted to comparative law and legal translation studies, as well as to the results of comparative law, whereby the authors distinguish between the contribution of comparative law to legal scholarship, the change of models, as well as its importance for the unification of law (chapter 5) and, finally, the presentation and discussion of significant models and moments/events in Roman legal systems (chapter 8). There, not only French and Italian law are subjected to an in-depth analysis, but also the Germanic legal system including an analysis of the form and content of the Civil Code of the former GDR. Not to be left unmentioned are the bibliographical references compiled at the end of the book, which include works on comparative law and comparative law studies themselves.

The book contains many important basic rules on comparative law in its first chapter, the content and subject matter of which cannot be emphasized often enough. I have selected five references/pieces of advice that seem important to me and will comment on them on the basis of my own experience.

> 1. Those who assume that comparative law is a method have too limited a conception of the comparative law method (because they do not understand that several methods can be used for comparative law and that there is not one pure method of comparative law).[3]

Many comparative law scholars agree with this statement. Nevertheless, a canon of requirements has emerged for the comparative law process, which consists of various elements or steps. A distinction must be made between description, analysis, explanation and evaluation. There is agreement that the comparative law process and the requirements to be met can be described as follows: Comparative law is a scientific method in which the rules of certain

[3] n 1 above, 19 no 45.

factual problems from at least two legal systems are set in relation to each other in order to (1) detect their similarities or differences, (2) explain the causes for the similarities or differences and (3) evaluate the respective solutions. Neither vertical nor horizontal comparisons that take place within one and the same legal system fall under this definition, but only those comparisons that are comprised of at least two systems representing national, regional or international legal systems. When talking about different methodological approaches,[4] there are different views when it comes to the final evaluation. Some are of the opinion that this step is one of the best in the entire comparative law process–[5] I agree with this opinion – others think that it is rather legal policy that is called for here and that the comparatist should not decide which of the compared legal systems contains the better solution to the problem posed.

> 2. (...) no science may predetermine the results of its research. Consequently, comparative research must not determine in advance what it will find.[6]

A comparative legal study is indeed a journey of discovery. What will be detected at the end of the journey is not clear at the very start. However, the traveller should not begin totally unprepared. At the beginning of the adventure a few practical guidelines might be of assistance in order to actually discover something which will be new and valuable for our legal knowledge. Much has been written about how to carry out comparative legal research. If, however, these writings, which usually contain instructions and recommendations, are not consulted before venturing into comparative legal research, the chances are high that the results will be disappointing and unreliable.

> 3. ... comparability between norms and legal systems of countries with different economic bases (must) be affirmed. The different systems are comparable, not because they are more or less the same or similar, but because the comparison is not afraid of differences, however great they may be.[7]

The fear of differences – however great they may be – does not therefore

[4] M. Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research, Sense and Nonsense of "Methodological Pluralism" in Comparative Law' *Rabels Zeitschrift für ausländisches und internationals Privatrecht*, 587-588 (2015); M. Van Hoecke, *Methodology of Comparative Legal Research, Law and Method*, available at https://tinyurl.com/yck8kuwf (last visited 30 June 2022); E. Örücü, 'Methodological Aspects of Comparative Law' *European Journal of Law Reform*, 29-42 (2006).

[5] D. Kokkini-Iatridou, 'Some Methodological Aspects of Comparative Law' *Netherlands International Law Review*, 143-194, 155 (1986). In the same vein: R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' *American Journal of Comparative Law*, 384 (1991).

[6] n 1 above, 16 no 24.

[7] ibid 29 no 18.

prevent the assumption of the comparability of systems. The *tertium comparationis* is to be determined. It depends on the presence of common elements. The elements may appear at different levels: structure, function and consequences. How big or small the differences or similarities actually are, results from the process of comparison. The answers to the questions to be asked in the legal systems to be compared – the process is synchronous – can first be listed in a table. This facilitates an overview and the subsequent formulation of the findings. When compiling a table, classification problems can arise. To what intensity must a commonality be present? When is the limit exceeded and must a difference be assumed? The table helps with a rough classification of the answers, while the necessary differentiations are made in the written elaboration. The classifications range from same, identical, similar, related, comparable, parallel and analogous, on the one hand, to different, unrelated, divergent, dissimilar, contradictory, diametrical and incompatible, on the other. It should also be noted that other legal systems are not only viewed through the lens of one's own legal system. Not everything that appears to be different at first glance leads to the conclusion, after a thorough investigation, that there are in fact different effects and results or that different effects and results are discernible despite (almost) similar formulations. As a rule, the legal systems examined correspond to each other in the result, even if they achieve this in different ways. Two warning functions are attributed to the *praesumptio similitudinis*. On the one hand, despite differences, commonalities should not be misjudged; on the other hand, established commonalities may ultimately prove to be false. Thus, a thorough investigation is needed to make the right determination. It follows that superficial quick scans covering many legal systems should be avoided. They bear the risk that problems and solutions within the legal culture and system of the respective legal field are not accurately grasped and thus may not be correctly related to one's own legal field.

> 4. Comparative law must also be aware that there are social and natural sciences that develop through comparison; it must join these sciences and, if possible, benefit from the experience of these comparative sciences.[8]

In our methodological discussions of today the question of combined or interdisciplinary comparative research is becoming increasingly important.[9] National, European and international research programmes require a multidisciplinary and/or a comparative approach. It is surprising, however, that the issue of combined comparative research has not yet been extensively discussed although the comparative approach has also been employed in other disciplines. A discussion of methodological aspects such as the reason for

[8] n 1 above, 21 no 58.

[9] Very illuminating: J. Husa, Interdisciplinary Comparative Law, Rubbing Shoulders with the Neighbours or Standing Alone in a Crowd (Cheltenham: Edward Elgar, 2022).

comparative research, functionality, comparability, typology, the accessibility of data, the selection and classification of cases, countries or jurisdictions, the explanation, assessment, measurement and evaluation has not yet taken place on a large scale. For this exercise the term comparative sciences has been coined. Exploring some methodological aspects of combined comparative research requires further definitions. How can different studies be connected?

In my view basically two approaches can be distinguished:[10] If combined comparative research consists of comparative legal research which includes at least two legal systems and research into the same problem from another or various other disciplines which is conducted in *the same countries* that have been selected for the comparative legal study, we can speak of a totally *synchronized comparative research*. This approach is time-consuming and requires expertise in not only legal research. If, however, combined comparative research consists of comparative legal research which includes at least two legal systems and research into the same problem from another or various other disciplines conducted in *only one of the countries* that have been selected for the comparative legal study or that has been undertaken in other countries, the term *restricted comparative research* might be appropriate. Due to time constraints this approach is often undertaken. In this case the interdisciplinary research only focuses on one's own jurisdiction.

In facing the high demands which are posed today as regards comparative legal studies and the involvement of or cooperation with other disciplines, we should be realistic. A great deal is possible but not everything. There are limitations and doubts. A too ambitious research design jeopardizes the quality of the research. Restricted comparative research is increasingly undertaken, but synchronized comparative research should be our ultimate goal. This can only be achieved through cooperation between the various disciplines resulting in large European and international research teams.

> 5. The comparison can measure the greatest and smallest differences. In doing so, it must not harbour any preferences, neither for one nor for the other. It must also not hunt exclusively for the Common Core of the various countries. Neither should it hunt exclusively for the particularities of the various legal systems.[11]

In respect of the unification and harmonization of in particular the law in Europe, 'hunting for the common core' has been one of the main points of discussion. Should, for example, the harmonisation or unification only be common core-based or is the use of the better law approach indispensable in order to achieve positive results that represent the highest standard of modernity? During

[10] K. Boele-Woelki, 'Combined comparative research in the field of family relations: Some reflections from the legal perspective' 10 *Journal of Family Research*, Special Issue, 238-256 (2015).

[11] n 1 above, 29 no 19.

the drafting process of harmonizing instruments such as the Principles of European Family Law, however, it became apparent that, to a certain extent, it is not obligatory to make a choice between the common core and the better law approach.[12]

After comparing the national solutions several approaches can be taken. If it was possible to elaborate a common core for a significant majority of the legal systems, this solution can be followed. However, should it be taken for granted that this common core reflects the best solution? Certainly not. One can be accused of short-sightedness if the common solutions are not assessed upon their merits. Hence, the comparative process does not consist of a simple adding up or deletion of the answers given in the national systems. In some cases an evaluation can lead to the final conclusion that the common core should be followed – in these cases the common core thus reflects the best solution; in other cases, however, this is not the case and deviating from the common core and choosing the better law approach instead must be justified. In those areas where it is not possible to derive general applied solutions, the decision as to which solution should prevail (the better law) is obviously also to be based on an evaluation. Hence, all approaches invoke the necessity of justifying the choices that are made. Nonetheless, when deviating from the common core or when no common core can be found and the best solution is to be selected more arguments based on certain values than in the case of following the common core are required.

The *Einführung in die Rechtsvergleichung* has not been written as one piece. The eight chapters each form an independent whole. This does not detract from the substantial content of the explanations. The problem areas addressed testify to a comprehensive knowledge of many legal systems, while the occasionally reproduced discussions with other professional colleagues complement Sacco's personal commitment to comparative law, his eagerness to debate and his engagement with and interest in other legal systems. Rodolfo Sacco has had a decisive influence on comparative law. He has provided important food for thought also for the future generation of comparative legal scholars. His work is aimed at all those who dare to look beyond their own legal system and embark on the exciting voyage of discovery.

[12] K. Boele-Woelki, 'The Working Method of the Commission on European Family Law', in Id ed, *Common Core and Better Law in European Family Law. European Family Law Series No. 10* (Cambridge: Intersentia, 2005), 14-38; also published in M.C. Andrini ed, *Un nuovo diritto di famigilia europeo* (Padova: CEDAM, 2007), 197-224.

In Memoriam

The Legacy of Rodolfo Sacco

James Gordley*

The influence of Rodolfo Sacco will endure. He united an extraordinary breadth of knowledge with a vision that has shaped the work of three generations of brilliant disciples. It has transformed the understanding of many scholars of what legal systems are and what it means to study them. Perhaps the best tribute to his work is to reflect, not only on how much we have learned from him, but on how much we can still learn.

In his vision, a legal system is not a coherent body of rules and doctrine resting on the texts that are authoritative in a given jurisdiction.

> '(L)iving law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges….' 'Borrowing from phonetics',

Sacco called them 'legal formants'. ('Legal Formants: A Dynamic Approach to Comparative Law' 39 *The American Journal of Comparative Law* (1991), Part I, 1-34; Part II, 343-40; I, 22). Some are 'cryptotypes,' which are 'rules' that one 'continually follows of which he is not aware or which he would not be able to formulate well'. They are like the unformulated rules a cyclist follows when he rides (ibid II, 384-85). '(T)he legal formants within a system are not always uniform and therefore contradiction is possible' (ibid I, 24). Often, they are borrowed from other legal systems without any thought about how they can be reconciled with prior norms. 'Several interpretations will be possible and logic alone will not show that one is correct and another false' (ibid I, 22).

This vision rests on five propositions which were stated formally and famously in a manifesto he sponsored: the *Tesi di Trento*. Comparative law is a 'science': its task is 'a better understanding of law' just as that of any comparative science is 'a better understanding of (its) data.' Comparative law will 'consider as real that which actually happened (*ciò che è concretamente accaduto*)'. Comparison

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depends on assessing the differences among legal systems. '(T)he comparative knowledge of legal systems' has the 'particular merit' of 'evaluating the coherence of the various elements present in any system…'. It evaluates the 'compatibility' of the 'operational rules' of the system with 'the theoretical propositions formulated to make the operational rules intelligible'. As a consequence, 'the knowledge of a legal system is not the monopoly of the jurist who belongs to that system…'. Although he has the advantage of 'an abundance of information' he 'more than any other' is likely to presuppose that 'the theoretical formulations of the system are fully coherent with (its) operational rules …'.

We still have much to learn from his program for comparative law. It is a corrective to approaches which credit each legal system with an internal unity based on doctrine or culture. It is also a corrective to the functional approach which I and many other scholars favor. The functionalist approach explains differences among the rules and doctrine of legal systems by underlying similarities in the purposes they serve. That approach is compatible with Sacco's. His approach, however, illuminates the differences. They arise from diverse and often conflicting 'formants' such as 'statutory rules, the formulations of scholars, and the decisions of judges' and also 'cryptotypes.' We will have 'a better understanding of law' if we do not lose track of the differences in the search for underlying similarities.

His work also suggests a far-reaching program for the study of domestic law. Like many other scholars, he observed that legal formalism survives in practice although it cannot be defended in theory. Like the American Legal Realists, the American Critical Legal Studies Movement, the German *Freirechtschule*, and French jurists since François Gény, he recognized that 'logic alone will not show that one (interpretation) is correct and another false'. Their critiques were primarily negative: they showed that a formalistic approach to law is impossible. The more skeptical concluded that the rule of law is impossible. With the notable exception of Karl Llewellyn, the less skeptical were more concerned with what judges and jurists ought to do than with what they were actually doing. They turned to sociological jurisprudence, *Interessenjurisprudenz*, or *libre récherche scientifique*. Sacco was concerned with 'the various elements present in any system,' with 'law as it actually happens'. Judges and jurists were resolving conflicts, not by logic, but in other ways, often by 'cryptotypes' – by rules that they themselves could not formulate. They were doing so even when they claimed to be doing so by logic alone. Law is not impossible because formalism is untenable.

It follows that to understand their own law, judges and jurists should pay attention to what they have actually been doing. Otherwise they will make the same mistake as a comparative law scholar who 'presuppose(s) that the theoretical formulations of the system are fully coherent with (its) operational rules'. They must acknowledge the limitations of logic, the conflicts among rules and doctrines in their own legal systems, the similarity between the problems they fact in

reconciling them and the conflicts judges and jurists face in other legal systems, often in harmonizing the same rules and doctrines.

If that were to happen, they, like comparative legal scholars, would no longer conceive of a legal system is in the same way. They could no longer regard national law as a self-contained and coherent body of rules and doctrine grounded on a distinct set of authoritative texts. They could not if rules and doctrines are not derived from authoritative texts, authoritative texts conflict and are sometimes disregarded, judges and jurists implicitly follow rules which they cannot yet articulate, and a legal system is a collage of rules and doctrines, some of them borrowed at various times and places, and many of them resembling those of other legal systems. In discrediting formalism, Sacco discredited positivism. Judges and jurists who accept his conclusions will realize that positivism never has existed in practice. If so, a legal system can no longer be regarded as 'national' in the same sense: as the creation of whatever national authority possesses sovereign power.

It does not follow that if Sacco's insights were accepted, national legal systems would disappear. Sacco observed that although

> '(u)niformity is often described as a patently good thing (…) both uniformity and particularity among legal systems have their pros and cons. The greater the number of particular legal institutions existing at a given time, the greater may be the probability of certain types of progress' (ibid I, 2).

Moreover, all rules may not be right for all nations. But if one takes Sacco's approach, national law must be reconceived. Some of its rules and doctrines address universal problems. Some are experiments from which others can learn, and some are adaptations to domestic conditions. Those considerations must be kept in mind when interpreting, harmonizing, and sometimes rejecting the 'various elements present in any system.' The study of comparative law will help one to do so. It has the 'particular merit' of 'evaluating the coherence of the various elements present in any system…'.

For the present, and at a minimum, the comparative study of law should be a prerequisite for the study of one's own law. Sacco envisioned a transnational curriculum for the law school of the University of Trento of which he was a founder. It is a dream of others as well, and it has yet to be realized.

Sacco left us more of value than we can readily assimilate. In that, he resembles great scholars of the past.

In Memoriam

Rodolfo Sacco: An Intellectual Portrait

Michele Graziadei*

Rodolfo Sacco, my academic mentor, was a uniquely talented teacher for generations of comparatists and civilists, in Italy and beyond, over the last fifty years. As a legal scholar he was endowed with such depth of mind and such insightful, innovative creativity that he literally revolutionized the way law should be understood and studied. Keen as he was on the study of legal thought and open to all forms of legal experience on a global scale, he authored more than four hundred publications and made a crucial contribution to establishing comparative law as a curricular subject in every Italian law faculty. His work is recognized worldwide as a vital, path-breaking legacy on the theory of law, notably of comparative law.

Academician of the Lincei, Member of the Institut de France, dr. h.c. of Geneva, McGill, Toulon, Paris II, titular member of the International Academy of Comparative Law, President of the International Association of Legal Science, Rodolfo Sacco received the highest academic honours in his lifetime, particularly on the occasion which saw him celebrated together with other great comparatists in the volume edited by K. Boele-Woelki and D.P. Fernàndez Arroyo, *The Past, Present and Future of Comparative Law - Le passé, le présent et le futur du droit comparé* (New York: Springer, 2018). His participation in the life of scientific societies has been intense, first in the Italian Association of Comparative Law and then in the SIRD – Italian Society for Research in Comparative Law, which he founded in 2010, and of which he was the first President. For a long time he was President of the Italian Group of the Association Capitant, thus promoting, among other events, the international Capitant days held between Turin and Como in 2016, on a theme particularly dear to him: *Concepts, intérêts et valeurs dans l'interprétation du droit positif* (Travaux de l'Association Capitant, LXVII, Brussels: Bruylant, 2017). He inspired and was the main initiator of *Isaidat - Istituto Subalpino per il diritto degli scambi transnazionali*, an organisation that since 1996 has conducted various

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research initiatives related to his studies.

Highlighting the most prominent moments and moves in the intellectual life of a scholar who was the animator and protagonist of such numerous, seminal and widely resonant scientific initiatives, first of all means finding the common threads in his writings, some of the underlying features being deeply rooted in his intellectual background. The discerning reader will indeed find further reasons to explore and appreciate Rodolfo Sacco's extraordinarily rich opus, beyond those presented here. In this short tribute, I shall be content to highlight a few of them, relating to legal theory, comparative law, and civil law.

After participating in the war of liberation against Nazi-Fascism as a partisan fighter and commander in northern Italy, Rodolfo Sacco returned to the University of Torino to complete his legal studies. His degree thesis, dedicated to *Il concetto di interpretazione del diritto* (*The Concept of Interpretation of Law)*, published in 1947 (reprinted in 2003, with a preface by Antonio Gambaro) developed ideas that broke with the conceptualism prevailing at the time. So much so that, with an unprecedented decision, Mario Allara, his thesis supervisor, did not join the jury awarding the degree and asked Norberto Bobbio to present the thesis to the commission. Sacco thus earned the law degree with distinction on 5 February 1946. This first work is still revolutionary in several respects. *Il concetto di interpretazione del diritto* turns the means of logic against both the conceptualist method and against the jurisprudence of interests, still in vogue at the time in some academic circles. By adopting a rigorous formal analysis, Sacco comes to reveal the subjective nature of the act of interpreting that is a feature of any interpretation. This conclusion would have satisfied supporters of the most radical variety of legal pluralism: 'every interpretation of law is without exception correct, provided it is not intrinsically contradictory', and therefore: 'every interpreter can create (...) law in his own way' (p 164). With the benefit of hindsight, here we find some of the key ideas presented in a more complete and elaborate manner in the foremost works of his maturity, such as his *Introduzione al diritto comparato* (1st ed, 1980, 5 editions with Giappichelli, 7th ed UTET, with P. Rossi, 2019). While beginning a career as a lawyer, his academic mentor was Professor Paolo Greco, who was a leading light of commercial law in Turin.

At the age of thirty-six, after his appointment as a professor in civil law, Sacco began his activity as professor of private law at the University of Trieste, where he also held the course of comparative private law (on this: F. Fiorentini, *Il diritto privato comparato*, in P. Ferretti et al eds, *Giuristi a Trieste, Per una storia della Facoltà di Giurisprudenza - 1938-2012* (Torino: Giappichelli, 2022), 23 ff). In the same year he published the monograph: *L'arricchimento ottenuto mediante fatto ingiusto: contributo alla teoria della responsabilità extracontrattuale* (Torino: UTET, 1959). This is the first work that genuinely highlighted his talent both as a scholar of a renewed civil law and as a comparative

legal scholar. The volume was bound to be the only relevant study on the subject in Italy for a long time, and is still considered an essential reference. His interest in comparative law, however, was already vivid earlier. The Istituto Universitario di Studi Europei (University Institute of European Studies), which had been active in Turin since 1952, was attended by René David, Josef Esser, and other leading leading scholars in comparative law. It was in this environment that Sacco first got in contact with comparative law and showed an interest in the problems relating to the harmonisation of law in Europe, publishing an essay on the subject in 1953 ('I problemi dell'unificazione del diritto in Europa' *Nuova rivista di diritto commerciale*, II, 49 (1953)). In the same years, he worked on the Italian translation of a classic of Soviet law: A.V. Venediktov, *La proprietà socialista dello Stato* (Torino: Einaudi, 1953) thanks to a collaboration with Vera Dridso. This translation had been commissioned by Norberto Bobbio, Einaudi's consultant, and is a first sign of his early interest in socialist law.

Starting in 1960, the *Faculté internationale de droit comparé* (Strasbourg) offered him the opportunity to lecture abroad. He soon became a *regulier* at the *Faculté*, where he was active for more than thirty years. That institution was a magnet for some of the most talented students coming to Strasbourg from all over Europe; there, they were exposed to the ideas of the leading comparatists of the day. A year later, Sacco was called to Pavia, to teach private law and then civil law, and, as a second subject, comparative private law. A few years later, he became Dean of the Pavia Faculty of Law.

A lecture at the University Institute of European Studies on *Définitions savantes et droit appliqué dans les sistèmes romanistes* delivered in 1964 (*Revue internationale de droit comparé*, 827 (1965)) gave Sacco the opportunity to draw some general conclusions on the mutual independence of legal propositions, legal doctrines, and operative rules. Thanks to the broader vision of law fostered by comparative studies, he brought to light the dislocations of the various elements of the law. In Sacco's words, it is therefore the task of comparative legal scholars to examine: '*jusqu'à quel point l'adoption de telle formule et l'adoption de telles solutions concrètes se conditionnent reciproquement*'. This statement can be considered the first enunciation of the famous theory of legal formants, which was elaborated in later works and constitutes one of this major contributions to legal theory and to comparative law. This theory rests on the vision of the legal system as something different from a coherent body of rules and doctrines. Rather, the law is best understood as the coming together of a variety of disparate elements, which do not necessarily have much in common if we look at their genealogy, form, legitimacy, etc... . These are the different formants of the law, as he labelled them. Socialist law was one of the fields in which this theory was then applied: R. Sacco, 'Il sostrato romanistico del diritto dei paesi socialisti' *Studi in onore di Giuseppe Grosso* (Torino: Giappichelli, 1971), IV, 737; Engl. transl. in *Review of Socialist Law*, 65 (1988); G. Crespi Reghizzi - R. Sacco, 'Le

invalidità del negozio giuridico nel diritto sovietico' *Rivista di diritto civile*, I, 179 (1979)). These contributions explored the massive permanence of civil law in the law of the Soviet Union despite the claims advanced by soviet lawyers that socialist law represented a complete break away from the law of capitalist countries.

In pursuing his research, Sacco always wanted to acknowledge a debt to Gino Gorla. In his modesty, sometimes he claimed that his task was simply to formulate what Gorla had demonstrated and discovered, but never properly described. In fact, from a very young age Sacco had passionately cultivated wide-ranging interests, and his unflagging curiosity always pushed him into new territories that had never been touched upon by comparative legal scholars in Italy. Until then, subjects such as African law and Islamic law had been entrusted exclusively to specialists in the sector or area. The first attempts to explore these fields were dedicated to Somali law (for a period, he was Dean of the Faculty of Law of Mogadishu, where he taught from 1969, and had pupils there). His research then embraced African law as a whole, with a volume appearing in his *Trattato di diritto comparato* in collaboration with some of his pupils (French translation published by Dalloz, 2009). The encounter with African law was of great importance for Sacco, and his contribution to this field of study was soon recognised by eminent scholars such as Michel Alliot and Etienne Le Roy. As Sacco remarks in the book - interview: *Che cos'è il diritto comparato*, edited by Paolo Cendon (Padova: Cedam, 1992), African law offers the European legal scholar: 'more teachings than any other legal family';

> 'suffice it to say that there abound systems without verbalization, systems not taught at university, areas of law not assisted by a legal language, all phenomena that we believe to have disappeared in Europe, so much so that our thinking finds it hard to conceive of them... there are so many phenomena in European law that we fail to perceive because we have an idealised, and therefore deformed, view of the legal institutions' (p 7).

Hence the comparative European scholar who studies African law is enabled to recognise those phenomena where they occur most clearly and becomes better equipped to deal with them when he returns to European law (p 127). The comparative study of law is thus in many ways an exercise in self-awareness that unveils those aspects of the law which elude lawyers trained in a single legal system. The comparative lawyer is then tasked with understanding the law 'as it actually happens', just like the legal historian, who would not exclude from his or her field of studies what deviates from the dominant narrative of the law.

The Italian translation of René David's work on comparative legal systems first appeared in 1967 (5th ed, 2004). The decision to translate David's work was to show why the training of legal scholars linked to the almost exclusive teaching of national legal systems was culturally disastrous and anti-historical. At a time when transnational exchanges were multiplying, and international relations were

intensifying, Italian law faculties still conceived legal education as by definition mostly based on the national law, although leading Italian scholars had already broken such shackles. As one could expect from Sacco, the contestation of that narrow approach was then followed by his constant action aiming to open up legal studies to new perspectives on legal education. Under his leadership, the Torino law Faculty launched in 1980 a new syllabus, in which comparative law was recognized as a key component in the formation of every law student (R. Sacco, 'Il diritto degli scambi transnazionali: Un nuovo piano di studi nella Facoltà giuridica torinese' *Foro italiano*, V, 77 (1981), and see for a critical view of subsequent reform initiatives: Id, 'La riforma delle facoltà giuridiche' *Foro italiano*, V, 254 (1986). The Turin syllabus paved the way for similar initiatives at the national level (R. Sacco, 'L'Italie en tête: À propos de l'enseignement du droit comparé' *Revue internationale de droit comparé*, 131 (1995)).

In this context, Sacco was elected by his colleagues to preside over the committee in charge of the organization of the studies at the newly established Faculty of Law of the University of Trento, that opened the doors to students in 1984. The syllabus for the law degree awarded by the new Faculty provided for a legal education largely based on comparative law, where each course on domestic law was matched by a parallel comparative law course. After some initial skepticisms, this new proposal met a huge success. The Trento Law Faculty is regularly among the top law schools in Italy, and one of the reasons for its success is the profound influence of Sacco's vision on the definition of its mission.

By the 1970's Sacco's reputation within the International Academy of Comparative Law was well recognised. His general report on *Le transfert de la propriété des choses mobilières détérminées par acte entre vifs en droit comparé*, delivered at the 10th congress of the International Academy (Budapest, 1978, also published in *Rivista di diritto civile*, I, 442 (1979)) was an excellent demonstration of his method. The theoretical problems related to the development of comparative law had in fact been the focus of the Italian report (*Les buts et les méthodes de la comparaison du droit*) prepared for the Tehran congress of the Academy, held in 1974.

Sacco first presented his *Introduction to Comparative Law* as a sort of critical supplement to René David's *Major Legal Systems of the World*. Actually, this work was a true theoretical manifesto for a new phase of comparative legal studies. It was translated into Chinese, French, Portuguese and German and the core arguments were presented to the English-speaking academic community in two famous, highly cited articles published in the American Journal of Comparative Law ('Legal formants: a dynamic approach to comparative law' 39(1) *American Journal of Comparative Law*, 1-34. 343-401 (1991)). This work represents a watershed in the field of comparative studies. The comparative study of law is for the first time systematically based on the understanding and description of the different formants that make up the universe of the law,

examined in their reciprocal relations. Within this framework, Sacco explored in depth the mutation and circulation of legal models, which remained one of his favourite themes. Here, the focus on language as a means of expressing the law leads Sacco to study and to critically address the considerable translation problems posed by law, and the linguisticity of legal discourse in itself. In brief, Sacco noted that the law as is practiced and the law as is stated in linguistic propositions may largely diverge, due to the limits of the human ability to describe a practice through the means offered by a language. Comparative law can and must therefore deal with latent phenomena that emerge under the lens of comparative enquiries. These elements – labelled by Sacco as 'cryptotypes' – reflect unexpressed cognitive styles, assumptions, expectations, and knowledge, including legal knowledge. Although not verbalised, cryptotypes operate and condition the dynamics of the law. The theories advanced in the *Introduction* soon became the methodological basis of the handbook *Sistemi giuridici comparati*, jointly authored with Antonio Gambaro (Torino: UTET, 1996, 4th ed, 2018; translated into French: *Le droit de l'Occident et d'ailleurs* (Paris: Dalloz, 2011)).

In 1975, Sacco published his masterpiece on contracts – *Il contratto* – first included in the *Trattato Vassalli* (Torino: UTET, 1975) 1-1019, published in subsequent editions with Giorgio De Nova's contribution in the *Trattato di diritto civile* edited by Sacco himself (4th ed, 2016). The volume on possession (*Il possesso)* in the *Trattato di diritto civile e commerciale* by Cicu and Messineo (1988), is also a classic on the subject. In the subsequent editions that quickly followed, Raffaele Caterina joined as co-author of this book.

Both works originate from a close comparison with a variety of foreign models, and represent powerful contributions to the renaissance of European private law on a theoretical level. Both works profoundly influenced judicial developments and academic thinking in Italy. Among the volumes published in the *Trattato di diritto civile,* Sacco's volume on *Il fatto, l'atto, il negozio* (Torino: UTET, 1995) is perhaps the least known. Some of the themes of that volume were first announced in an important essay entitled: 'L'occupazione, atto di autonomia ('Contributo ad una dottrina dell'atto non negoziale' *Rivista di diritto civile*, I, 343 (1994)). The decision to further deal with themes that are no longer fashionable among Italian *civilisti* reflects Sacco's intention to sail against the wind. The break with the classic civil law approach to legal concepts and categories such as *negozio giuridico* is evident, as is the distancing from the purely ideological critique of the intellectual legacy linked to that notion. The volume explores how some fundamental scholarly categories are put to the test by social interactions happening in real life, and how those forms fail to capture the complexity of social life, due to their idealistic foundations. The underlying thesis is that the theory underpinning those categories is an ex post facto rationalization of forms of decision-making and autonomy that at the beginning

of the origins of humanity were implemented without resorting to concepts or words. *Fatto, atto e negozio* is full of examples that illustrate the operation of living law, and its ways, far removed from the dry bones of dogmatic thinking. Sacco does not give up the possibility of bringing analytical order to this context, but he does not believe this can be done with the worn-out paraphernalia at the disposal of the dogmatist, or with less than credible word games. The work draws heavily on historical, linguistic, anthropological and ethological knowledge in a skilful and disruptive manner, which goes directly to the heart of the matter.

In the meantime, since 1986, Sacco had taken over the editorship of the *Digesto Italiano,* the oldest Italian legal encyclopedia. The new edition of the *Digesto italiano* as conceived by him was to contribute to the renewal of Italian legal culture. Therefore the new edition of this fundamental work, now running in over a hundred volumes is

> '... for an Italian jurist who is curious about all the rules of the legal system, including those of non-national production, who is curious about foreign data, interested in the rules governing transnational legal relations, aware of the contribution offered by comparative law to the knowledge of law and to a more adequate search for axiological data' (from the introduction to the first volume of the *Digesto - Discipline privatistiche* (Torino: UTET, 1987)).

From the late 1990s onwards, and as long as his strength would assist him, true to himself, Sacco cultivated the frontier themes that had always fascinated him. In the first place, he dedicated himself more intensely to the study of the problems related to the relationship between language and the law. These were addressed by producing research dedicated to the interpretation of multilingual law and the theory of legal translation (eg: R. Sacco, 'Lingua e diritto' *Ars interpretandi*, 117-134 (2000); Id, 'Riflessioni di un giurista sulla lingua (La lingua del diritto uniforme e il diritto al servizio di una lingua uniforme)' *Rivista di diritto civile*, I, 57 (1996); within the International Academy of Comparative Law he dealt with this theme at the Sidney World Congress, 1986). Multilingual law, that is the foundation of uniform and European law, most evidently shows how a plurality of linguistic devices conveys the same law to interpreters. The discussion of this problematic issue was the occasion to draw upon research conducted on multilingual legal systems, from Switzerland to Québec. Indeed, relations with Québec legal scholars, from the late Paul-André Crepau to Nicholas Kasirer, now a justice of the Supreme Court of Canada, were intense at the time, as were those with Jacques Vanderlinden and Olivier Moréteau, who both cultivated interests in similar subjects. The pioneering edited work: *L'interprétation des textes juridiques rédigés dans plus d'une langue* (Paris: L'Harmattan, 2002) brought into focus the theoretical importance of this research. The brief remarks first devoted to legal translation in the *Introduction to Comparative Law* are thus developed organically, focusing on all the aspects of the linguistic and legal

problems raised by legal translation. Legal translation poses problems related both to the law and to language. The law poses translation challenges, as the different formants emerging within a legal system convey different notions and concepts through the use of the same word (thus, for example, the notion of nullity in book one of our civil code is not the same notion in book four of the same code). Such differences in meaning become obvious when one considers words such as 'contract' or 'possession' in the different European languages. Other difficulties arise from the domain of language, since the language of the law in each jurisdiction usually evolves to express locally known concepts, unless the influence of foreign law brings in new concepts, and a new terminology. Hence the difficulty of translating into Italian terms or expressions referring to concepts unknown to Italian law (such as, for example, 'equitable interest'). Translations of similar terms nearly always require the creation of neologisms. Furthermore, the relationship between language and the law is not constant across borders, so that the degree of precision with which eg a legislative provision is formulated is not the same everywhere. The silent sources at work in the making of the law are silently at play here as well.

The research conducted on the relationship between language and the law was part of broader intellectual preoccupations. The title of the Lincei conference on *Le nuove ambizioni del sapere del giurista: antropologia giuridica e traduttologia giuridica* (proceedings edited by R. Sacco, Rome, 2010) bespeaks them. The research programme outlined in that conference went back to the insights first developed by Sacco through the study of law in an African context and in several other areas of the globe. This design was enriched by forays into cultural and social anthropology, ethology, and the cognitive sciences, since human behaviour, when studied on an evolutionary basis, brings in the contributions of these specialised fields of learning. *Anthropologia del diritto* (il Mulino, 1987, French translation, Dalloz, 2008, Spanish translation, 2018), subtitled as 'A contribution to a macro- history of law', outlined the key features of the law in contemporary societies. This study includes both those societies where the law works with concepts and a language of its own, thanks to the presence of huge apparatuses securing its administration and transmission, and those societies where lawyers do not occupy the central place they traditionally have in Western societies, and where writing, if known, is not used to lay down the law, in which power may be diffuse rather than centralised. This book explored what, in the domain of the law, pertains to nature, rather than culture. Culture indeed evolves and changes with a rapidity unknown to the biological constitution of human beings. The last chapter in this line of research is represented by the volume *Il diritto muto: Neuroscienze, conoscenza tacita, valori condivisi* (Bologna: il Mulino, 2015, a first, partial version of this study was made available in English, by the title *Mute Law* in the *American Journal of Comparative Law*, 43, 453 (1995), and in French, in the *Revue trimestrielle de droit civil*, 783 (1995); the

Spanish translation of the book appeared in 2016). This is a profound work, in which the reflections and research of a lifetime are brought together. The volume develops a multidisciplinary research approach on law by drawing upon findings made available by the life sciences, linguistics, and anthropology. *Mute Law* intends 'to lift the veils that conceal from today's man the survivals of that mute law that for two million years has dominated the social life of human beings' (from the preface to the Spanish edition of this book). The understanding of law as a social phenomenon is thus finally enriched by the study of that dimension of humanity which is rooted in nature, to be understood not as an invariable and invariant entity, but as a reality knowable through scientific enquiries dedicated to the study of all human groups, such as those linked to anthropology, linguistics, psychology, or biology.

It is not possible to remember Rodolfo Sacco and to pay tribute to his intellectual work, or in any way to speak of him, without mentioning the lasting impression he made on those who came to know him better. A generous personality, rich in humanity, capable of passions, he approached both students and younger colleagues with curiosity. As a teacher, he paid close attention to the learning needs of each one of his students. He quickly understood the difficulties of his younger colleagues and, whether they had grown under the influence of his teachings or not, often offered them the means to overcome them. Apparently inclined to seriousness, he showed a fine sense of humour in the more relaxed and informal conversations (see, eg, R. Sacco, 'Organizing a Scholarly Congress' 40 *Journal of Legal Education*, 279 (1990)); these were animated by an unparalleled capacity for observation, and by boundless knowledge, worn lightly, with a pinch of irony.

He left us with un *saluto allegro*, as he liked to say in his later years.

‘Stand by Your Rules’: The Problem of Rule Skepticism*

James Gordley**

Abstract

Some have thought of law as a body of rules which need no exceptions. Others have thought of rules as overgeneralizations. Eighteenth century rationalists and nineteenth century positivists went the first of these extremes. Twenty and twenty-first century skeptics went to the second. Medieval jurists saw the problem. Early modern jurists saw how it might be resolved.

Both civil and common lawyers are accustomed to regard the law as a collection of rules. For civil lawyers the rules are found primarily in codes. For common lawyers, they are found primarily in precedents: that is, the rules are inferred from the decisions in prior cases. The 19th century was an age of positivism. Civil and common lawyers believed that the rules are to be found in authoritative texts such as codes or precedents. The judge should apply these texts by logical exegesis to decide the cases that come before him. The positivist idea that judges can derive results from authoritative texts by logic alone has been criticized for over a century by both civil and common lawyers. But there is no generally accepted theory of how else should decide cases according to law.

In contrast to modern jurists, the Roman jurists and their medieval interpreters would not have agreed without severe reservations that law is a collection of rules. They thought that one could decide a case according to law without using a rule. If that is so, one might ask, what is the point of having rules? That question was asked by the Glossators in Bologna. We will begin with them and then see how modern lawyers arrived at the opposite conviction that one needs a rule in order to decide a case according to the law.

There is a rule recognized in Roman law: what belongs to no one becomes the property of the first to take possession. For example, a fish belongs to the first person to catch it.[1] But suppose one takes possession of something that cannot be owned by any person, such as a river, a free man, or, in Roman law, a

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[1] I. 2.1.12.

shrine.[2] He does not own it. So, with this rule, as with nearly every other, there are exceptions. If so, how can one trust a rule? Bulgarus, one of the earliest Glossators, concluded that one could not.

> '(A) rule loses its force when it fails in a particular case. Consequently, definitions in law are dangerous (…); there are few that cannot be undermined'.[3]

He was commenting on a Roman text which said

> '(T)he law is not taken from a rule, but a rule is made according to the law. Consequently, by a rule a brief description is given of things (*res* – facts or cases), and, as Sabinus said, a rule is a connection[4] of cases (*causae*) which loses it force when it becomes defective in any way'.[5]

He cited another text in which Pomponius said, '(i)n law, every definition is dangerous. It is rarely indeed that one cannot be undermined'.[6]

It is not surprising that Paul, Sabinus, Pomponius, and other jurists of the classical period of Roman law expressed doubt the value of rules. Their method was case-oriented.[7] I have described elsewhere how they refined general concepts, not by defining them, as a Greek philosopher might have done, but by giving particular examples of their scope.[8] To explain consent, they put cases of copper sold for gold or vinegar for wine.[9] To explain negligence, they put cases of tree branches cut over public streets,[10] muleteers losing control of their animals,[11] and fires that spread when stubble is burned on a windy day.[12] To explain when possession was transferred, they put cases of goods delivered to someone's

[2] I. 2.1.8; D. 1.8.6.3.

[3] F.W.K. Beckhaus, Bulgari: Ad Digestorum Titulum De Diversis Regulis Juris Antiqui Commentarius Et Placentini Ad Eum Additiones Sive Exceptiones (Bonn: Kessinger Publishing, 1856) to D. 50.17.1.

[4] In the version of the Digest that he was using, the word was not connection – *coniectio* – but *coniunctio,* which suggests a closer union or joining. Bulgarus' opinion would actually have been more faithful to the text if his version had said *coniectio*. As Conte noted, *coniunctio* sits more easily with the view that one *causa* means one *ratio*. E. Conte, '*Ordo Iudicii et Regula Iuris* Bartolus et les origines de la culture juridique (XII^{e} siècle)', in J. Chandelier and A. Robert eds, *Frontières de savoir en Italie à l'époque des premières universités (XIII^{e} – IV^{e} siècles)* (Roma: École française de Rome, 2015), no 157, 173.

[5] D. 50.17.1.

[6] D. 50.17.202 (vulg. 203).

[7] P. Stein, *Regulae Iuris From Juristic Rules to Legal Maxims* (Edinburgh: Edinburgh University Press, 1966), 102.

[8] J. Gordley, *The Jurists A Critical History* (Oxford: Oxford University Press, 2013), 13.

[9] D. 18.1.9.

[10] ibid

[11] D. 9.2.8.1.

[12] D. 9.2.30.3.

door[13] and land viewed from a nearby tower.[14] They thought that one could tell what result was right in a particular cases without first formulating a rule or definition. They must have been correct, or they could not have developed a body of law so sophisticated that we are still using it.

Yet Justinian's compilers were instructed to finish their work with a list of 'diverse ancient rules'.[15] That list comprises the last title of the Digest.[16] Curiously, the first item on the list is the passage just quoted which tells us that the law is not to be found in rules, but rules are taken from the law.

According to Bulgarus, the application of the rule on ownership by possession did not work in the case of the shrine because of a logical fallacy. He was familiar with Aristotle's works on logic. The fallacy, he said, is that of using the middle term of a syllogism in two different senses. The rule is that what belongs to no one belongs to the person who takes possession. A shrine belongs to no one. It would seem that a shrine must belong to whoever takes possession of it. But the term 'belongs to no one' has two meanings. In the case of the fish, it refers to what belongs to no man (although it might). In the case of the shrine, it refers to what belongs not to man but to god.[17]

One might think the solution would be to formulate rules more accurately. But that solution conflicts with Bulgarus' idea of how rules are made. A rule or a definition is a collection of particular cases.

> '(A) rule is like a collection of singulars forming a universal. For example, following nature it is laid down that wild beasts which previously did not belong to anyone belong to the possessor, like birds and fish. And when this is first laid down as to singulars, afterward it is laid down in common, as a universal, that what belongs to no one goes to the possessor'.[18]

Suppose that in the first case to arise, a person captured a wild bird. In the second, he caught a fish. In both cases, the appropriate result is that he owns it. We generalize: an object unowned by anyone belongs to the first to take possession of it. But in a third case, a person takes possession of a shrine. Our rule was made to apply to a bird and a fish. To say it applies to anything that no one else owns is to overgeneralize. Consequently, to apply the rule to a new case, we first must decide whether or not that case should fall within the rule. If so, following rules is not only dangerous. It seems to be futile. What would be the point of having rules?

An answer was given by Joannes Bassianus, Azo, and Accusius. To Bulgarus,

[13] D. 9.2.28.pr.; see D. 9.2.29.pr.
[14] D. 9.2.28.pr.
[15] P. Stein, n 7 above, 114-115.
[16] D. 50.17.
[17] Bulgarus, Ad digestorum titulum De diversis regulis to D. 50.17.65. [
[18] ibid to D. 50.17.1.

the word *causa* meant a particular case. In contrast, they said that 'one *causa* means one *ratio*' – that is, one reason or rationale. '(*C*)*ausa*, indeed, is said to be *ratio*'. Azo said, in a passage that may have been written or inspired by his teacher Bassianus:[19]

> '(T)his is the force of rules: given one *causa*, to attribute to one, many other things in which the same equity is found: for example, first it was laid down for fish that they belong to the possessor because they belonged to no one; and indeed for this *ratio*, it was so also for lions and other wild animals, because they belonged to no one: wherefore it was well and generally received that what belongs to no one goes to the possessor. The origin or birth of rules thus proceeds from this general source, whose rivulets flow into the various habitations of the law which may be so expressed: where there the *ratio* is the same, the law is the same. And so the force of rules is not that they make the law: rather a rule is constituted by the law'.[20]

According to this view, the cases of fish, lions and other wild animals were not simply collected in formulating a rule, the way one might throw various objects in a bag. The result in these cases had something in common: the same *ratio*, or, as Accursius was to put it, the same 'equity'.[21] Azo, perhaps following Bassianus, said that it is difficult for a jurist to frame a rule because of

> 'the jurist's inability to discriminate among men (…) or the mutability of human affairs, the weakness of the human mind, or the variety of wrongs'.[22]

Consequently, rule should be applied carefully but they should not be distrusted. Accursius concluded that although the rules do not make law 'in the cases (in which they are) laid down', nevertheless, 'in cases in which the equity is the same, and are not established in law, they do make law'.[23] He said: 'stand firmly by rules, as the Bolognese do by their Caroccio' – their war chariot – 'lest others wrest it from their grasp'.[24]

Bulgarus might have asked them what is the point of having rules if, as they agreed, one can see what result is appropriate in a particular case without them. He also might have asked them what is meant by saying that different cases call for the same result because the 'ratio' or 'equity' is the same.

In a debate over the same questions several centuries later, the Jesuit philosopher Francisco Suárez took a very different position as to rules of natural

[19] P. Stein, n 7 above, 140-141.
[20] Azo, *Summa Codicis* (Basel, 1563) to D. 50.17 § no 4.
[21] Glossa ordinaria to D. 50.17.1 to Regula est.
[22] Azo, n 22 above, to D. 50.17 pr. no 6.
[23] 21 above, to D. 50.17.1 to *Regula est.*
[24] ibid to D. 50.17.202 [vulg. 203] to *Omnis diffinitio.*

law. They have no exceptions. Human laws are framed by people of limited foresight and wisdom – a point made by Azo. Natural law, however, is based on reason, and reason never changes. If a rule seems to have an exception, it is because the rule was not fully and correctly stated.

Suppose the owner of a sword left it in another person's custody. As a rule, the custodian should give it back when the owner asks for it. Nevertheless, Cicero and St Augustine said that he should not do so if owner has become insane or wishes to harm someone else. Augustine's opinion was quoted by Gratian in the *Decretum* which became the basis for the medieval study of Canon law.[25] According to Thomas Aquinas, this case showed that rules do have exceptions.[26] Suárez believed that Aquinas was wrong. A rule laid down by human beings might have exceptions because it could not provide for every case that might arise. A rule of natural law was based on reason itself, and therefore was invariably correct.[27] A correct statement of the rule about returning property would provide for every case. It would indicate the circumstances in which the property should be returned and those in which it should not.[28] For example, the rule might say, return the property if the owner is sane and well intentioned but not if he is insane or bent on doing harm. Consequently, for Suárez, the rules of natural law were timeless and invariably correct.

According to Aquinas, the natural law was different for a person deciding what to do under one set of circumstances than for a person deciding what to do under another. Sometimes it required return of the sword; sometimes it did not.[29] For Aquinas, a rule of natural law exists within the mind of a particular human being who is trying to do what is right in the circumstances that he is confronting. For Suárez, a rule of natural law has an existence of its own which is timeless and unchanging. It prescribes what any human being should do under any set of circumstances that could possibly arise. It would prescribe that the sword should not be returned to a lunatic even if, in the entirety of human history, no lunatic had ever asked for the return of a sword.

For Suárez and for Aquinas, natural law is based on reason. For Suárez, however, reason is an invariable connection between premises and conclusions. For Aquinas, it is practical reason which, as Aristotle had said, does not reach conclusions with certainty. Practical reason begins with ends that every human being has an inborn capacity to recognize as worthy of pursuit: for example, knowledge or community with others. Aquinas called this capacity *synderesis*.[30] Practical reason proceeds by considering how these ends may best be achieved in the circumstances a person is confronting. The circumstances that matter

[25] *Decretum Gratiani* C. 22 q. 2 c. 14.
[26] T. Aquinas, *Summa theologiae* I-II, q. 94, a, 4; II-II, q. 51 a. 4; q. 120 a. 1.
[27] F. Suárez, *Tractatus de legibus et de legislatore deo* (Coimbra, 1612), 2, 13, no 6.
[28] ibid no 9.
[29] T. Aquinas, n 29 above, I-II, q. 94, a.4.
[30] ibid I, q. 79 a. 12.

may be too numerous to take into account. As Aquinas noted, 'actions are in singular matters'[31] and 'an infinite number of singulars cannot be comprehended by human reason'.[32] In such situations, practical reason must be aided by several kindred virtues that limit the circumstances that one takes into account. 'Memory' and 'experience' which are parts of practical reason, suggest 'what is true in the majority of cases'.[33] A person can seek advice from experienced people, and, indeed, 'stands in great need of being taught by others especially old folk (...)'.[34] In doing so, he employs the related virtue of *eubolia*, which is the seeking of counsel. Another virtue, *sinesis*, enables him to apply 'common rules' which have been devised for similar situations. Nevertheless, he needs still another virtue, *gnome*, to make exceptions to the common rules and to 'judge (...) according to higher principles'. *Gnome* is necessary because 'it happens sometimes that something has to be done which is not covered by the common rules of actions'.[35] Aquinas illustrated *gnome* with the example of the return of a sword when the owner has become insane or dangerous.[36]

A person who follows practical reason is following natural law. 'Law is a dictate of practical reason'.[37] He does so by deciding what must be done in particular circumstances. Consequently, the natural law only exists in the mind of a person who is taking account of a particular set of circumstances by drawing on his own memory, experience, knowledge of common rules, and ability to make exceptions.

Aquinas' explanation outlasted the Reformation. *Synderesis* was described in the same way by Anglicans, as Robert Burton (1557-1640), Richard Carpenter (1575–1627), and Robert Sanderson (1587-1663), by Lutherans such as Friedrich Balduin (1575-1627) and Johannes Olearius (1639-1713), by Calvinists such as Iohann Andreas van der Meulen, (1635-1702), and by Puritans such as William Ames (1576-1633).[38] Aquinas' explanation did not outlast Suárez. As Leroy Loemker observed, 'Suárez's *Disputationes Metaphysicae* (became) the academic

[31] ibid II-II, q. 47, a. 3.
[32] ibid ad 2.
[33] ibid 49, a. 1.
[34] ibid a. 3.
[35] ibid q. 51, a. 4.
[36] ibid
[37] ibid I-II, q. 91, a. 3, citing q. 90, a. 1, ad 2.
[38] R. Burton, The Anatomy of Melancholy, What it is, With all the kindes, causes, symptoms, prgnostickes and several cures of it (Oxford, 1621), 42; R. Carpenter, The Conscionable Christian: Or, The Indevour or Saint Paul to have an discharge a good conscience alwayes towards God and men (London, 1623), preface, 'To the Reader', 2; R. Sanderson, De obligatione conscientiae praelectiones decem: Oxonii in schola theologica habitae anno dom. MDCXLVII (London, 1686), Praelectiones I.xxxiv-xxxvi, IV.xiv; F. Balduin, Tractatus de casibus conscientiae (Wittenberg, 1628), I, iii; J. Olearius, Introductio brevis in theologiam casisticam, usibus studiosum Lipsiensium consecrate (Leipzig, 1694), viii, 9-10; I.A. van der Meulen, Forum conscientiae seu ius poli, hoc est tractatus theologico juridicus (Utrecht, 1693), Dissertatio praeliminaris I, 3-9; G. Amesius, Conscientia et eius iure vel casibus libri quinque (Amsterdam, 1630), I, 1-3; 2-5.

standard of doctrine for Protestant and Catholic Europe alike'.[39]

Before we get to that part of the story, in which, as Etienne Gilson said, 'Suarezianism consumed Thomism',[40] let us compare Aquinas' account of law as practical reason with that of the Roman jurists and Glossators in which, at least to begin with, 'the law is not taken from a rule, but the rule is taken from the law'. At first sight, they seem different. In Aquinas' account, one begins with ultimate ends naturally known through *synderesis*. One seeks the best means to these ends. It may be by achieving ends which are subordinate: they are means to these ultimate ends either instrumentally or as component parts of a larger whole. One asks how these ends may be achieved under the circumstances that one is confronting.

The Roman jurists refined general concepts by giving examples: a person took possession of land without physically entering it when he viewed it from a nearby tower; he remained in possession even when he left it momentarily to buy grain. On the basis of such examples, they tentatively formulated rules: a fish, a bird, and a lion belonged to the first possessor: one could say tentatively, what belongs to no one else belongs to the first possessor. Bassianus, Azo and Accursius said that the reason was that in these cases, the ratio for the decision or the *aequitas* was the same.

I suggest we can see this use of examples and tentatively formulated rules by the jurists as steps toward a fuller account which explains the law as the exercise of practical reason in determining the best way in which worthwhile ends are pursued. The way the human mind works, we are able to see the right solution in a particular case even though we only glimpse the ends that explain why it is the right solution. We can see that possession should be protected although we cannot fully explain why. We can recognize, however that whatever the reason may be, it applies just as well when a person views land from a tower or leaves the land temporarily. Before we can fully explain why the first possessor should become owner of fish, we recognize that the reason is the same with a bird or a lion, and that, over some range of cases, objects that belong to no one are owned by the first possessor. We pursue ends that we do not fully understand by first identifying particular results and formulating tentative rules. To explain that process would require another lecture. It is the problem Marco Martino addressed in an excellent article about the German scholar Viehweg.[41]

In the 18th century, Suárez' account of natural law became the foundation for the rationalism of Gottfried Wilhelm Leibniz and Christian Wolff. Like Suárez, they thought that natural law is timeless and invariable. They were clearer,

[39] L.E. Loemker, 'Introduction', in Id ed, *Gottfried Wilhelm Leibnitz Philosophical Papers and Letters* (University of Chicago Press: Chicago, 1st ed, 1956), 1, 17.

[40] E. Gilson, *Being and Some Philosophers* (Toronto: Pontifical Institute of Medieval studies, 2nd ed, 1952), 118.

[41] M. Martino, 'La topica, il sistema e il diritto globalizzato: a cinquant'anni dalla pubblicazione italiana di *Topik und Jurisprudenz*' *Rivista di diritto civile*, I, 1489-1518 (2013).

however, about the way in which this law is based on reason. They thought that law is like mathematics. Conclusions are to be drawn from definitions. The definitions and consequently the conclusions are certain. Anything that cannot be demonstrated in this way is subject to doubt. Leibniz' dream was to be able to say, whenever a question of law or morals arose, 'Sir, let us sit down and calculate the answer'. He said:

> 'The doctrine of law (*doctrina iuris*) belongs to those sciences that depend on definitions and not on experience, on demonstrations of reason and not of sense, and are matters of law, one can say, and not of fact. As, indeed, justice consists in some congruity and proportionality, we can understand that something is just even if there is no one who is acting justly, or who is being treated justly, in the same way that the concepts (*rationes*) of numbers are true even if there were no one to count and nothing to be counted, and we can predict that a house will be beautiful, a machine efficient, or a commonwealth happy if it comes into being even if it should never do so. We need not wonder, therefore, that the principles of these sciences possess eternal truth'.[42]

Consequently, as Suárez said, the natural law is timeless, invariable and not subject to any exceptions. The reason, however, why it could apply to a potentially infinite number of situations was the same as in mathematics. Beginning with a few definitions, could reach a potentially infinite number of conclusions.

'Then', Gilson said, 'Suárez begat Wolff'.[43] Christian Wolff wrote a multi-volume treatise on natural law in which he attempted to demonstrate the rules of private law in the same way as mathematics. We have all but forgotten the enormous influence that his work had on European jurists. His influence in Prussia has been described by Damiano Canale.[44] According to my teacher John Dawson, it marked the beginning of 'Germany's commitment to legal science'.

> '(T)he influence of Wolff was enormous even among those who reacted against it. His admirers set themselves to perfecting his system and working out its consequences; his opponents could not escape the net it cast. Its influence reached more gradually, and, in the end, incompletely to 'half-learned' or unlearned judges and practitioners; in the abundant legal literature that still poured forth, there was much that followed older styles and gave

[42] G.W. Leibnitz, *Elementa juris naturalis* in *Philosophische Schriften Erster Band 1663-1672* (Berlin: Akademie der Wissenschaften der DDR, 1990), 459-460. Loemker notes of that this passage 'already presupposes the distinction between possibility and existence made in his later thought (…)', G.W. Leibnitz, *Philosophical Papers and Letters*, I, L.E. Loemker ed (Chicago: The University of Chicago, 1956), 138 fn 5.

[43] E. Gilson, n 40 above, 112.

[44] D. Canale, La costituzione delle differenze Giusnaturalismo e codificazione del diritto civile nella Prussia del '700 (Giappichelli: Torino, 2000), 29-78.

only a pale reflection of the Wolffian synthesis. The agents for the transmission of his ideas were overwhelmingly law professors'.[45]

While Bulgarus' position verged on rule skepticism, the path marked out by Suárez led Leibniz and Wolff to the other extreme. All one needed was the right rule. They conceived of reason as Aristotle and Aquinas had conceived of theoretical reason: conclusions follow invariably from premises. Perhaps Bulgarus did as well. He was familiar only with Aristotle's works on logic. Aristotle's *Nicomachean Ethics*, which discussed practical reason, was not then available in Europe. Bulgarus knew, however that most legal rules do have exceptions. He concluded that rules should not be trusted. One cannot draw logical conclusions from them without getting the wrong answers. In contrast to the rationalists, Bulgarus believed that one could tell the right result in a particular case without using a rule.

In the 19th century, rationalism was discredited and natural law along with it. There were no timeless and eternal principles. The source of law is the texts laid down in each jurisdiction by those in authority. We call this approach 'legal positivism'.

In France, the authoritative texts were the provisions of the French Civil Code. In much of Germany, they were still the texts of Roman law. In the common law world, they were the decisions of judges. For the French positivists, cases were to be decided by deducing the correct result from the rule in the Civil Code. For the Germans and the common lawyers, reaching conclusions from authoritative texts was a two-step process. First, one had to formulate a rule that was implicit in the texts. Then one had to apply the rule to the particular case. Suppose, in a common law jurisdiction, the facts in one case were *a*, *b*, and *c*, and the result was *x*. The facts in another case were a and b but not c and the result was *y*. One could infer the rule that if facts *a* and *b* are present, whether the result should be *x* or *y* depends on whether fact *c* is present as well.

The positivists broke with the rationalists' account of natural law by denying that there are any timeless and eternal principles. Like the rationalists, however, they claimed that one must get from starting points to conclusions by logic alone. For the rationalists, the starting points were definitions like those of mathematics. The conclusion had the same certainty as these definitions. For the positivists, the starting points were authoritative texts. The conclusions had the same authority as these texts. For the rationalists, to allow one's own sense of the right result to influence one's conclusions would destroy their certainty. For the positivists it would destroy their authority.

Toward the end of the 19th century, positivism was discredited and by the same sort of argument that David Hume had used a century earlier to discredit

[45] J.P. Dawson, *The Oracles of the Law* (University of Michigan Law School: Ann Arbor, 1968), 237.

rationalism. Definitions describe the relationships of concepts to each other. One can extract a conclusion from a definition only if one first packs it into the definition. François Gény showed that one cannot, by logic alone, get from the rules in the French Civil Code to the result in a new case.[46] The German *Freirechtschule* said the same about interpreting the German Civil Code of 1900.[47] American Legal Realists such as Karl Llewellyn made a similar claim about the interpretation of decided cases.

Imagine two cases, Llewellyn said. In one, the facts are *a*, *b*, and *c*, and the outcome is *x*; in the other, the facts are *a*, *b*, and *d*, and the outcome is *y*. 'How, now,' he asked,

> 'are you to know with any certainty whether the changed result is due in the second instance to the absence of fact *c* or to the presence of the new fact *d*?'[48]

His point can be illustrated by the cases we have described. Suppose that in the first case to be decided a person took possession of a wild bird. The result: he owns the bird. In the second case, he took possession of a river, a free man or a shrine. The result: he does not own it. Suppose a third case arose in which he took possession of a fish. Llewellyn's point is that either of two rules would be logically consistent with the results in the first two cases: the possessor can only own a bird, or the first possessor cannot own a shrine.

Suppose that in the first case to be decided, a person entrusted with a sword refused give it back to an owner who was sane. In a second case he refused to return it the owner was insane. In a third case, he refused to return a comic book to an owner who had become insane. How does one know whether the rule is not to return swords to an insane person or not to return any sort of property to them? One cannot tell by logic alone.

This observation set off a crisis in American legal thought that has yet to be resolved. In any new case, the facts will be a bit different from those of any case previously decided. The judge can reach one result by saying that the difference matters, or the opposite result by saying that it does not. Either way the result is logical. Therefore, he must decide the case by something other than logic plus the authority of previously decided cases. He may be acting arbitrarily. He may

[46] F. Gény, *Methode d'interpretation et sources en droit privé positif* (Librairie générale de droit et de jurisprudence: Paris, 1899).

[47] eg P. Heck, 'Was is diejenige Begriffsjurisprudenz, die wir bekämpfen?' *Deutsche Juristen-Zeitung*, 1457-1458 (1909); S. Rundstein, 'Freie Rechtsfindung und Differenzierung des Rechtsbewusstseins' *Archiv für bürgerliches Recht*, 1, 5 (1910); E. Fuchs, 'Klassische Einwendungen gengen die soziologische Rechtslehre' *Monatschrift für Handelsrecht und Bankwesen*, 82, 87 (1911); M. Rumpf, *Gesetz und Richter: Versuch einer Methodik der Rechtsanwendung* (Liebmann: Berlin, 1906), 41.

[48] K.N. Llewellyn, The Bramble Bush Some Lectures on Law and its Study (New York: Hein, 1930), 52.

be acting according to his politics or the interest of a particular social class. In any event, the rule of law is impossible. That was claim the made by the more extreme Legal Realists and by the founders of the Critical Legal Studies movement in the 1970s at the Harvard Law School when I was studying there on a post-graduate fellowship.

Karl Llewellyn refused to go that far. He claimed, like Aquinas, and like Bulgarus, Azo, Bassianus and Accursius, that one could tell how to decide a case without following a rule. One could do so by what he called 'situation sense.' It was, he said, an

> 'opened, reasoned, extension, restriction or reshaping of the relevant rules (...) done in terms of the sense and reason of some significantly seen *type* of life-*situation*'.

That, at least, was how he summarized in a sentence

> 'what has cost me a 500-page book'.[49] 'Under the Grand and Only True Manner of deciding: (a) any rule that is not leading to a right result calls for rethinking and perhaps redoing; and, also and equally, (b) any result which is not comfortably fitted into a rule good for the whole significant situation type calls certainly for a cross-check and probably for more worry and still more work'.[50]

'Situation sense,' like practical reason for Aristotle and Aquinas, allows one to see the right result even though one cannot demonstrate it. The resemblance is strong enough that the organizers of a seminar for American judges once asked me to speak to them on the similarity between Lewellyn's situation sense and Aristotle's practical reason.[51]

Members of the Critical Legal Studies movement had an answer to Llewellyn. If a judge can see what result is right in a particular case, why does he need rules? They might have asked the same question of Aquinas or Aristotle. Bulgarus might have asked it of Bassianus, Azo, and Accursius.

One reason that Aristotle gave for deciding according to rules was negative:

> 'Whereas the law is passionless, passion must ever sway the heart of man. Yes, it may be replied, but then on the other hand an individual will

[49] K.N. Llewellyn, 'On the Current Recapture of the Grand Tradition', in K.N. Llewellyn ed, *Jurisprudence: Realism in Theory and Practice* (Routledge: London, 2017), 210-220, referring to K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown: Boston, 1960).

[50] ibid 221.

[51] The seminar 'Llewellyn and Aristotle on the Force of Reason' was presented at a symposium for judges on 'The Nature of the Judicial Function' sponsored by the Law and Economics Center of the School of Law, George Mason University, at Captiva, Florida, 3 December 2006.

be better able to deliberate in particular cases'.[52]

Similarly, according to Aquinas,

> 'because lawgivers judge in the abstract and about future events, while those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity, by which their judgment is perverted'.[53]

But Aquinas also gave a more positive reason for preferring government by rules to government by men. Rules are a store of wisdom and experience. As we have seen, he believed that in using practical reason, a person needed both *sinesis* which enables him to apply 'common rules' and *gnome* by which he which he 'judge(s) (...) according to higher principles' when 'something has to be done which is not covered by the common rules of actions'.[54] Similarly, he said of human law that 'it is easier for man to see what is right' when rules are made 'by taking many instances into consideration' than when 'judgment in each single case has to be pronounced as soon as it arises'.[55]

There will still need to be exceptions. Exceptions to human laws are made by exercising the virtue of 'equity' just as, by exercising that of *gnome*, a person makes an exception to 'common rules' by deciding according to higher principles. Aquinas used the example of the return of the sword to illustrate both. An exception is made when the purpose of the rule is no longer served. But equity, like *gnome*, presupposes a respect for rules. It arises from a recognition of the wisdom and experience to be found in the rules, not merely from fears about the neutrality and wisdom of judges.

If so, Llewellyn was right to say that 'any rule that is not leading to a right result calls for rethinking' and that 'any result which is not comfortably fitted into a (good) rule (…) calls certainly for a cross-check (…)'[56] Accursius was right to say that although we frame rules by looking at the results of cases, still, once framed, we can use them to decide new ones. So, as Accursius said, 'Stand by your rules' – like the *Bolognesi*.

[52] Aristotle, *Politics*, III.xv. 1286[a].
[53] *Summa theologiae* I-II, q 97, a 1, ad 2.
[54] ibid II-II, q 51, a 4.
[55] ibid I-II, q 97, a 1, ad 2.
[56] K.N. Llewellyn, n 49 above, 221.

Open Knowledge. Access and Re-Use of Research Data in the European Union Open Data Directive and the Implementation in Italy

Marta Arisi*

Abstract

This paper provides initial observations on the inclusion of scientific research data in the scope of the EU Public Sector Information Directive of 2019, Directive (EU) 2019/1024, also known as the Open Data Directive, related rules for the re-use of such data enshrined in Art 10, and the implementation in Italy with the decreto legislativo 8 November 2021 no 200. The work seeks to examine how the EU Public Sector Information rules on research data – and, to a lesser extent, data from cultural establishments – may contribute to the objectives of Open Knowledge, elected as an umbrella term with primary reference to Open Access, Open Science, and Open Data, given the difficulties of identifying exhaustive conceptual contours for them. In order to do so, the paper critically examines the exemptions and safeguards related to Intellectual Property and Personal Data protection and identifies the circumstances under which these may obstruct the re-use of research data.

I. Introduction

The present paper analyzes the inclusion of scientific research data in the scope of the Directive (EU) 2019/1024 on open data and the re-use of public sector information (PSI), also known as the Open Data Directive,[1] and related rules for the re-use of research data. The paper is informed by the concept of open knowledge and critically examines the mentioned rules from such perspective. This is to be understood as an umbrella term with primary reference to open access, open science, and open data, given the difficulties of identifying exhaustive conceptual contours for them, and since terms are often used interchangeably. Access and re-use of research data is the focus of the work, while data from cultural establishments is also briefly considered, due the latter are vital part of the open knowledge narrative. The analysis will especially consider the numerous intersections of the EU PSI subject matter with intellectual property and data protection laws and explore how related exemptions and

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[1] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L172/56.

safeguards may to some extent represent obstacles to the re-use of research data. The ultimate objective is to shed light on the rules recently introduced in Italy with the decreto legislativo 8 November 2021 no 200, transposing the Open Data Directive into national law, and potential discrepancies in relation to the objectives of open knowledge – that, to put it simply, calls for a more open re-use of research data and data from cultural establishments.

The work is structured as follows. Para II begins by tracing the development of EU public sector information rules, from the PSI Directive of 2003, Directive 2003/98/EC,[2] later amended in 2013 with Directive 2013/37/EU,[3] until the most recent Directive of 2019, and examining the debate that led to the introduction of the rules on research in Art 10. Para III focuses on the provisions that detail the scope of application of rules on scientific research, and relevant exemptions.

Para IV attempts to give a more detailed account of the rules on research data set out in the Open Data Directive and it is organized in three different sub-paras. After illustrating the core rules to be applied in sub-para 1, sub-para 2 and 3 critically examine the exemptions and safeguards related to copyright law and personal data protection. In addition, para V offers a brief overview of the PSI rules on data from cultural establishments as it seems useful to compare the status of research data and cultural data in the Open Data Directive, being reputed equally fundamental elements of open knowledge.

Finally, building on the previous paragraphs, the paper proceeds with a detailed analysis of the Italian transposition of the Open Data Directive in para VI. Brief conclusive remarks follow.

II. Public Sector Information Rules in the European Union

The present paragraph briefly describes the development of the PSI rules in the European Union, focusing on the lively debate on research data and the path that led to including it into its scope, while offering insights into the broader policy and legislative context of such amendment.

1. The Public Sector Information Directives in the European Union: Main Characteristics and Rationale

The acknowledgment of the potential of PSI in the EU should be primarily traced back to the Green Paper of the Commission in 1999,[4] but the first legislative

[2] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information [2003] OJ L345/90.

[3] Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information [2013] OJ L175/1.

[4] European Commission Communication, 'Public Sector Information: A Key Resource in Europe, Green Paper on Public Sector Information in the Information Society' [1998] COM(1998) 585 final. R. Sanna, *Dalla trasparenza amministrativa ai dati aperti, Opportunità e rischi delle*

action taken by the EU is the Directive of 2003. The Directive called on Member States to adopt a set of minimum harmonized rules (eg including redress mechanism, time limit for answering requests, fees, and transparent conditions thereof) governing the re-use of certain documents held by public sector bodies – despite relevant exclusions. At the same time, member States were also free to enact more permissive rules.

In the opinion of many, the subsequent reform of 2013 introduced an obligation for member States to make certain documents re-usable.[5] Such a mandate would emerge from the conjunct reading of Art 3(1) of the Directive,[6] as amended, and recital 8 of the PSI Directive of 2013.[7] However, on closer inspection, such an obligation for re-use would be rather limited: in particular, it would only apply to the documents that are not excluded by the scope of the Directive, which essentially referred to provisions to be detailed by Member States and was further circumscribed by several safeguards.

This still seems true after the latest overhaul of 2019, despite the material and subjective scope of the PSI rules having expanded. The Directive (EU) 2019/1024 on open data and the re-use of public sector information is a recast that brings together the amendments made to the previous acts and represents the output of a revision process started between 2017 and 2018.[8] The new essential elements of the Open Data Directive are the introduction of research data in its scope and the introduction of the principle of 'open by design and default' in Art 5(2) of the new Directive.[9] Most notably, the new Directive also has a different title, which includes – next to the re-use of public sector information – open data, although its open vocation remains to some extent unclear. This is more thoroughly discussed in relation to the topic of research data in para IV.

In the new Directive, the member States' obligation to allow re-use of public sector data remains substantially limited by a detailed scope of application, with

autostrade informatiche (Torino: Giappichelli, 2018), 1.

[5] ibid 253, 257; M. Van Eechoud, 'Making Access to Government Data Work' 9(2) *Masaryk University Journal of Law and Technology*, 61, 64 (2015).

[6] Art 3(1) of Directive 2003/98/EC, as amended, recites: 'Subject to paragraph 2 Member States shall ensure that documents to which this Directive applies in accordance with Article 1 *shall be re-usable* for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV'.

[7] Recital no 8 of Directive 2013/37/EU recites: 'Directive 2003/98/EC should therefore be amended to lay down *a clear obligation* for Member States to make all documents re-usable unless access is restricted or excluded under national rules on access to documents and subject to the other exceptions laid down in this Directive. The amendments made by this Directive do not seek to define or to change access regimes in Member States, which remain their responsibility'.

[8] See Procedure 2018/0111/COD, available at https://tinyurl.com/2p8ctbwv (last visited 30 June 2022).

[9] This recalls Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (hereinafter GDPR), Art 25 titled 'Data protection by design and by default.'

several exemptions and safeguards provided in Art 1. However, member States are specifically encouraged to go beyond the minimum requirements and apply the related rules to documents held by public bodies as well as private undertakings providing services of public interest,[10] while being exhorted to establish policies that would permit a more extensive re-use of data.[11] Ultimately, the new PSI rules also signal the intention to fit into the emerging technological context, since significant progress has been made from the first Directive of 2003, as for instance considering artificial intelligence applications, distributed ledgers, the Internet of Things and smart cities.[12] Provisions on dynamic data, subject to frequent updates, have been introduced.[13]

Even after the most recent evolutions, it remains true that the rationale of the EU PSI rules is strengthening the internal market as regards information services.[14] The underlying assumption is that if information retained by public sector bodies is free for re-use, it can generate positive and essential contributions to the EU Internal market.[15] The private sector could therefore benefit from re-use of public data not only because this would allow government oversight and democracy, but because it would enable data users to create innovation.

Authors underline the need to distinguish between what is usually regarded as an economic right (the re-use) versus a civic right (the access),[16] and suggest that the main goal of the PSI rules differs from the so-called Freedom of Information legislation (also FOI), aimed at enhancing transparency and participation of citizens in the *res publica*.[17] Although their different rationale may be evident, it

[10] Directive (EU) 2019/1024, recital 19.

[11] ibid recital 20.

[12] ibid recitals 3, 9, 13; European Commission Staff Working Document, Impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the re-use of public sector information SWD(2018) 127 final [2018], 7.

[13] Directive (EU) 2019/1024, Art 2(2)(e).

[14] Directive 2003/98/EC, as amended, recitals 3, 5, 9; Directive (EU) 2019/1024, recitals 7-9.

[15] COM(1998) 585 final n 4 above, 1; C. Sappa, 'Selected intellectual property issues and PSI re-use' 6(3) *Masaryk University Journal of Law and Technology*, 445, 447 (2012); K. Janssen, 'The influence of the PSI directive on open government data: An overview of recent developments' 28 *Government Information Quarterly*, 446, 447 (2011). See also T. Streinz, 'The Evolution of European Data Law', in P. Craig and G. de Búrca eds, *The Evolution of EU Law* (Oxfod: OUP, 3rd ed, 2021), 27: the author cites the European Commission Guidelines for improving the synergy between the public and private sectors in the information market (1989).

[16] P. Keller et al, 'Re-use of public sector information in cultural heritage institutions' 6(1) *International Free and Open Source Software Law Review*, 1, 2 (2014).

[17] In the EU, a right of access to documents of the Union's institutions, bodies, offices and agencies, is currently enshrined in Art 42 of the Charter of Fundamental Rights of the European Union [2012] OJ C326/391 and Art 15 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/1. The first EU Regulation on the matter appeared in 2001, two years before the first PSI Directive of 2003: Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43. Absent the EU competence to ensure access to documents held by public bodies at a national level, the matter of access to information from national public sector bodies has been primarily regulated at the national level. M. Salvadori, 'Right of Access to Documents: The Implementation of Article 42 of the Charter of

is not always easy to trace a strict line of separation between the FOI and PSI laws because of relevant overlaps.[18] However, one conspicuous observation is that PSI rules do not grant access to information, but only address re-use thereof. More specifically, as expressively reiterated in the Directive of 2003, later amended in 2013,[19] as well as in the new Open Data Directive,[20] the PSI rules build on national access regimes and are without prejudice to them, so that which public sector information can be accessed and ultimately re-used still remains determined by member States at the national level.[21] It seems plausible that the confusion between the two subject matters is currently exacerbated, since both are increasingly informed by open knowledge,[22] where the notion of open government data is becoming the subject of scholarly attention.[23] As an example, the relevant sets of rules for FOI and PSI may both refer to 'open' definitions, as in the case of Italy, described in para VI.

2. The Inclusion of Research Data and the Evolutions of the Public Sector Information Rules in the European Union

Documents held by educational and research establishments, such as schools, universities, archives, libraries, as well as by research institutes were excluded by the scope of the first PSI Directive of 2003.[24] The possibility to extend the scope of the Directive to both the educational and research sectors was supported by respondents to the public consultation opened in 2010.[25] Following a lively

Fundamentals Rights', in M. Biasiotti and S. Faro eds, *From Information to Knowledge - Online Access to Legal Information: Methodologies, Trends and Perspectives* (Amsterdam: IOS Press, 2011), 2-3.

[18] K. Janssens, n 15 above, 447 describes the possible origins of this confusion, to be also linked to the first years of the transposition by member States, and related risks for freedom of information rights. Proposing a conceptual distinction between access, dissemination and re-use of public sector information A. Cerrillo-i-Martinez, 'Fundamental interests and open data for re-use' 20(3) *International Journal of Law and Information Technology*, 203, 205-214 (2012).

[19] Directive 2003/98/EC, as amended, recital 9, Art 1(3).

[20] Directive (EU) 2019/1024, recitals 18, 23.

[21] J. Andrasko and M. Mesarcik, 'Quo Vadis Open Data' 12(2) *Masaryk University Journal of Law and Technology*, 179, 187 (2018).

[22] In particular, the FOI legislation in European Union seems to be evolving towards open models, according to Open Government, Open Government Data and also E-Government trends. F. Faini, *Data Society* (Milano: Giuffrè, 2019), 12-22. International Conventions on the subject matter have also appeared, most notably Council of Europe Convention on Access to Official Documents [2009], Council of Europe Treaty Series - No. 205.

[23] M. Dulong de Rosnay and K. Janssen, 'Legal and Institutional Challenges for Opening Data across Public Sectors: Towards Common Policy Solutions' 9(3) *Journal of Theoretical and Applied Electronic Commerce Research*, 1, 3, (2014); D. Arcidiacono and G. Reale. 'Open Data as a Commons? The Disclosure of Public Sector Information from a Comparative Perspective' *Rassegna Italiana Di Sociologia*, 235, 237-239 (2018).

[24] Directive 2003/98/EC, Art 1(2)(e).

[25] H. Richter, 'Open Science and Public Sector Information – Reconsidering the exemption for educational and research establishments under the Directive on re-use of public sector information' 9 *JIPITEC,* 51, 55 (2018); European Commission Staff Working Paper, Impact Assessment

debate, the rules were only partially amended in 2013 to cover data from cultural establishments.

The Staff Working Paper that preceded the reform of 2013 contains a few helpful insights in this regard. While the potential value of sharing research data and making it publicly available was not denied,[26] one initial argument presented to disallow research data from the scope of the Directive was that this material would be covered by intellectual property or other third-party rights.[27] This argument seems unconvincing because data should in principle be excluded by copyright, in line with the well-established idea/expression dichotomy, enshrined in the major international codifications.[28] The principle has been eroded in time by a controversial and well-discussed trend of closure in the most recent copyright reforms.[29] However, the dichotomy remains paramount to safeguarding public interests when discussing copyright, data and emerging applications, as emerges from the scholarly debate on copyright, text and data mining and algorithms.[30] Nevertheless, while the Working Paper acknowledged that Intellectual Property Rights (IPR) protection 'does not extend as far as pure research data', it added there are often unclear boundaries between types of data and the status of third-party rights, as well as differences in 'researchers' attitudes, patterns of behavior and needs or in the existence and robustness of available infrastructure'. Overall, this would imply that the burden to clarify the status of research data could exceed the related benefits.

Another main argument for excluding research data from the material scope of the Directive was the approach that the Open Access (hereinafter OA) debate was a separate, although parallel, discussion channel for disseminating and exploiting research findings and results.[31] Considering the initiatives on open knowledge at the time, the most important were identified in non-binding documents. The European Commission Communication 'Towards access to better

accompanying the document Proposal for a Directive of the European Parliament and the Council amending European Parliament and Council Directive 2003/98/EC on the re-use of public sector information, SEC(2011) 1152 final [2011] 67-69.

[26] ibid 33.

[27] ibid 17, 33.

[28] Most notably, Art 2 of the World Intellectual Property Copyright Treaty (1996) reports: 'Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'.

[29] J.P. Barlow, 'Selling Wine Without Bottles: The Economy of Mind on the Global Net' 18 *Duke Law and Technology Review*, 24 (2019); J. Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2008). The most important evidence thereof being the creation of *sui generis* database rights. The topic is linked to the emerging debate on data ownership in the EU: M.L. Montagnani and A. Von Appen, 'IP and Data (Ownership) in the New European Strategy on Data' 43 (3) *European Intellectual Property review*, 156 (2021).

[30] Discussing freedom of expression and Text and Data Mining: R. Ducato and A. Strowel, *Ensuring Text and Data Mining: Remaining Issues With the EU Copyright Exceptions and Possible Ways Out,* CRIDES Working Paper Series no 1/2021, 8-9.

[31] SEC(2011) 1152 final, n 25 above, 17, 34.

scientific information' of 2012[32] and the 'Recommendation on access to and preservation of scientific information' of 2012[33] promoted measures to ensure that the results of Europe's publicly funded research, including both publications and data, are accessible. Moreover, relevant steps were being taken as regards EU-funded projects (FP7 - Seventh framework program from 2007 to 2013 and most notably its successor Horizon 2020). Against this backdrop, the Working Document implied that only such initiatives could take into account the specificities and limitations of the research sector, while the 'generic' PSI debate, despite very close objectives, could not tackle the issue.[34] One last remark referred to the difficulties in establishing a clear terminology to limit the application of the PSI Directive – ie, with regard to research institutions.[35] Defining research institutes at EU level was considered an 'impossible endeavor', since member States' traditions differ, but also appeared disproportionate to the issue, failing the subsidiarity scrutiny.

A possible explanation for the recent changes may be primarily framed within the fostering of EU regulatory efforts to enhance open scientific research, to the point that the argument about OA being the separate channel to promote the wider availability and reuse of research data seems to have been superseded. In fact, commenting on the new proposal of the Directive, influential doctrine suggested the potential re-union of two worlds that were conceived as separate: the scientific OA world and the general PSI world.[36] First, the initial Recommendation on access to and preservation of scientific information of 2012 was replaced by the Recommendation (EU) 2018/790 of 25 April 2018 on access to and preservation of scientific information,[37] calling on member States to adopt measures for the dissemination of, and open access to, both scientific publications and research data resulting from publicly funded research activities. The Recommendation's objectives and goals resemble the new rules on research data set out in the Open Data Directive,[38] but only the latter is provided with binding force concerning the objectives. Second, the premise of the impact assessment conducted on 2018 and accompanying the proposal for a reformed

[32] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards better access to scientific information: Boosting the benefits of public investments in research [2012] COM(2012) 401 final.

[33] European Commission Recommendation 2012/417/EU of 17 July 2012 on access to and preservation of scientific information [2012] OJ L 194/39.

[34] SEC(2011) 1152 final, n 25 above, 27.

[35] ibid 34.

[36] H. Richter, n 25 above, 52.

[37] European Commission Recommendation (EU) 2018/790 of 25 April 2018 on access to and preservation of scientific information [2018] OJ L134/12.

[38] In particular, the latest Recommendation calls for the adoption of clear policies, to be detailed in national plans, for the management of research data resulting from publicly funded research, including open access, in Point 3 of the Recommendation. Point 4 declares that member States should ensure the implementation of policies and national plans by research funding institutions responsible for managing public research funding and academic institutions receiving public funding.

Directive[39] explicitly linked the reform to the EU international commitments for opening research data,[40] including the OECD Council Recommendation of 2010[41] and the G8 Open Data Charter in 2013.[42] The impact assessment criticized the insufficient availability of research data for re-use,[43] indicating different factors: the fact that policies are fragmented, not fit for purpose and partially outdated, scarce focus on re-use compared to access and incentives, and a complex reality of different data sharing cultures in the scientific community.[44] In addition, the Consultation on output between June 2017 and late January 2018 was in favor of reviewing the scope of the PSI Directive to include research establishments.[45] As a result, different policy options were presented in the impact assessment, including adding top-down European legislative open access mandate for both publication and research data in the PSI or, as a second option, covering only research data that would have been made available as a result of open access mandate; in any case, the assessment affirmed the need to update the recommendations on access to and preservation of scientific information.[46] The second, low intensity option was eventually chosen.[47]

In addition to this, the introduction of rules on research data in the PSI Directive of 2019 should also be examined considering how the EU policy and legislative initiatives have converged towards data driven innovation, while increasingly urgent discourses on data ownership are emerging.[48] From this perspective, the dispositions on research data in the new PSI Directive 2019 may enhance the role of research data in the data economy, an objective presented in the so-called EU Open Data Policy.[49] The Digital Single Market

[39] European Commission, Proposal for a Directive of the European Parliament and of the Council on the re-use of public sector information (recast) [2018] COM (2018) 234.

[40] SWD(2018) 127 final, n 12 above, 3.

[41] Organisation for Economic Co-Operation and Development (OECD) Recommendation Of The Council For Enhanced Access And More Effective Use Of Public Sector Information [2008] C(2008)36.

[42] G8 Open Data Charter and Technical Annex (2013), available at https://tinyurl.com/bddw3k46 (last visited 30 June 2022).

[43] SWD(2018) 127 final, n 12 above, 15.

[44] ibid 16.

[45] ibid 64-65.

[46] ibid 30-32.

[47] ibid 49.

[48] M.L. Montagnani, 'Dati e proprietà intellettuale in Europa: dalla "proprietà" all'"accesso" ' *Il diritto dell'economia*, 539 (2020); A. Wiebe, 'Protection of Industrial Data – a New Property Right for the Digital Economy?' 12(1) *Journal of Intellectual Property Law & Practice*, 62 (2017); H. Zech, 'A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data' 11(6) *Journal of Intellectual Property Law & Practice*, 460 (2016); V. Zeno-Zencovich, 'Do "Data Markets" Exist?' *MediaLaws.eu*, 23 July 2019, 17-18, available at https://tinyurl.com/2d6awywk (last visited 30 June 2022).

[49] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Open data - An engine for innovation, growth and transparent governance Communication [2011] COM(2011) 882 (also referred to as the EU Open Data Policy). This promoted the creation of an EU Open Data Portal; see

Strategy in Europe in 2015 also promoted a strong link with research and open science, envisioned in the launch of the European Open Science Cloud (EOSC).[50] Besides, it is noteworthy that the proposal for the new Open Data Directive was published the same day that the EU Commission also proposed the Communication Towards a Common European Data Space, together with a Guidance on Sharing Private Sector Data in the European Data Economy.[51]

Beyond the Open Data Directive, the cornerstone of such current developments should be identified in the Data Strategy of 2020.[52] This describes the data driven innovation potential as pervasive, also for the realization of the EU Green Deal,[53] and emphasizes the availability of data for the public good,[54] providing examples of both data generated by the public sector and data from the private sector. Most relevantly, considering public sector information, the proposal for a Data Governance Act[55] was presented in November 2020. Art 3 of the Proposal details measures that facilitate the use of some categories of data held by public sector bodies. Moreover, the proposal for the so-called Data Act[56] was published very recently in February 2022. This allows for public sector bodies to access and use data held by the private sector when this is necessary due to exceptional circumstances – ie, in case of a public emergency – or to implement a legal mandate if data are not otherwise available. On this point, initial reactions have outlined that the proposal introduces an exception to the general prohibition to re-use the obtained data, for the use of scientific research and in a public interest context.[57] These acts, once final and implemented, will therefore prove decisive in

European Union, Open Data Portal webpage, available at https://data.europa.eu.

[50] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe Communication Digital Single Market Strategy [2015] COM(2015) 192 final. This acknowledges the role of research in the data economy, linking this to Open Science and announcing the European Cloud initiative including the Open Science Cloud (EOSC). The latter was promoted with the European Commission Communication Building a competitive data and knowledge economy in Europe [2016] (COM(2016) 178 final.

[51] B. Gonzalez Otero, 'Evaluating the EC Private Data Sharing Principles Setting a Mantra for Artificial Intelligence Nirvana?' 10 *JIPITEC*, 65, 66 (2019).

[52] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data [2020] COM(2020) 66 final.

[53] ibid 1.

[54] ibid 6-8. More specifically, four key-cases are identified: 1) data of the public sector is used by the business; 2) data is used and shared from business-to-business; 3) data of the business is shared with the public sector; 4) different public authorities share the data.

[55] Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act) COM/2020/767 final.

[56] Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act) [2022] COM(2022) 68 final.

[57] F. Vogelezang and A. Takowski, 'Data Act: Business to Government Data Sharing' *Open future*, 23 February 2022, available at https://tinyurl.com/f8udecfz (last visited 30 June 2022). More specifically, Art 21 of the aforesaid proposed Regulation would permit that public bodies make data available to individuals and organizations that conduct scientific research, or statistics institutions, at

applying the provisions of the Open Data Directive.

III. Research Data and the Directive (EU) 2019/1024: Scope of Application and Relevant Exemptions

The scope of application of the Directive is primarily detailed in Art 1, while Art 2 contains definitions.[58] According to Art 1(1) the Directive applies to three main groups of documents: a) existing documents held by public sector bodies of the member States, b) existing documents held by certain public undertakings and, as recently introduced by the Directive of 2019, c) research data, pursuant to the conditions established under Art 10.

On the other hand, Art 1(2) details the documents to which the Directive does not apply. While Arts 1(2)(a) and (b) exclude certain documents held by public bodies or public undertakings, the following letters (c) to (d) contain more specific exemptions that essentially refer to the existence of rights and interests. Only a few of these exemptions are covered by the present paragraph. More specifically, this tries to outline which research data are covered by the scope of application of the Directive, what are the limitations deriving from intellectual property and data protection laws and, finally, whether there are other relevant limitations to re-use.

1. Research Data and Its Subjects

Art 1(1)(c) affirms that research data are amongst the documents to which the Directive applies, pursuant to the conditions set out in Art 10. Research data in Art 9 no 6 of the Directive is defined as 'documents in a digital form, other from scientific publication' that can either be collected or produced in the course of scientific research activities and used as evidence in the research process or, alternatively, be commonly accepted in the research community as necessary to validate research findings and results. The difference between research data and scientific articles is also found in recital 27, that provides a few examples: research data would include 'statistics, results of experiments, measurements, observations resulting from fieldwork, survey results, interview recordings and images', but also 'meta-data, specifications and other digital objects'.

Art 10 is the provision which defines not only conditions for access and re-use of research data but the material scope of application of related rules. As a premise, Art 10(1) calls on member States to adopt policies for making research data available addressed 'to research performing organizations and research funding organizations'; Art 10(2) on the other hand states that research data

least when these are no-profit or operate in the context of a public-interest mission.

[58] For instance, document (Directive (EU) 2019/1024 Art 2(1) no 6, research data (Directive (EU) 2019/1024 Art 2(1) no 9) or re-use (Directive (EU) 2019/1024 Art 2(1) no 11).

shall be re-usable for commercial and non-commercial purposes in accordance with Chapters III and IV. More precisely, Art 10(2) establishes two ground and cumulative conditions for the rules to apply: first, research data should be 'publicly funded'. What is deemed public funding (eg considering potential complementation by other sources of funding) is, however, not defined by the Directive nor otherwise easy to establish. Existing rules and criteria are difficult to identify and apply across member States, as well as at the national level, when they are present, for the subject matter may be regulated differently across different scientific fields or legal areas. Examples thereof are the so-called secondary publishing rights in copyright law.[59] Recital 28 seems of some relevance in this regard: building on the fact that open access policies would always be limited and not absolute, as for intellectual property reasons or national security reasons, recital no 28 affirms that certain obligations stemming from this Directive

> 'should be extended to research data resulting from scientific research activities subsidized by public funding or co-funded by public and private-sector entities'.

The recital could thus be interpreted that Member States should apply open policies when funding is even partly public, suggesting the introduction of flexible rules for the definition of what constitutes publicly funded research.

Second, for the rules to apply, researchers, research performing organizations or research funding organizations must have *already*[60] made the research data publicly available through an institutional or subject-based repository. According to recital 28, Member States could also extend the application to other data infrastructures, through open access publications, as an attached file to an article, a data paper or a paper in a data journal. The most striking aspect of this provision is that it refers to the behaviors of researchers, research performing organizations or research funding organizations. Commentators on the proposal observe how such a rule could impact the personal incentives and the informal norms of research communities, which traditionally represent the main drivers for disseminating scientific information and knowledge.[61]

One initial question to be answered is whether research data should be considered only the data produced by research organizations or include other types of organizations as well. The hereby described rules seem not to refer only to research organizations. The requirement that data is produced only by research

[59] See for instance ReCreating Europe - Rethinking digital copyright law for a culturally diverse, accessible, creative Europe, Horizon 2020 funded project, grant agreement n. 870626, Webinar: Secondary Publishing Right: Exploring Opportunities and Limitations. Video available at https://tinyurl.com/yc5h2trw (last visited 30 June 2022).

[60] This is further explained by recital 28, which links the reason for the requirement to the opportunity to avoid administrative burdens, but also not impose extra costs for the retrieval of the datasets, or require additional curation of data.

[61] H. Richter, n 25 above, 74.

organizations does not emerge in Art 1(1)(c), Art 9 nor Art 10. Moreover, considering exclusions, Art 1(2)(l) basically affirms that the Directive does not apply to the documents held by research performing organizations and research funding organizations (including organizations established for the transfer of research results), unless they are research data as defined by Art 1(1)(c), pursuant to the conditions further explained in Art 10. In addition to this, Art 1(2)(k) merely excludes that the Directive would apply to documents held by educational establishments of secondary level and below, and, in the case of all other educational establishments, documents other than those referred to in Art 1(1)(c). Therefore, a comprehensive reading of these provisions reasonably leads to the conclusion that when research is publicly funded, regardless of the type of organization, the related rules would apply.

Ultimately, it does not emerge clearly who the subjects are to which the obligations on re-use should apply. As mentioned above, Art 10(2) states that research data shall be re-usable for commercial and non-commercial purposes in accordance with Chapters III and IV. These Chapters include rules addressed to public sector bodies or public undertakings (ie Art 5 and following). What is more, recital 28 seems to confirm the research organizations targeted by the rules on research data are not public sector bodies or public undertakings only. The recital affirms that 'research performing organizations and research funding organizations could also be organized as public sector bodies or public undertakings'; in this case, the Directive should apply to such 'hybrid' organizations 'only in their capacity' as research performing organizations and to their research data.[62]

Overall, opting for a comprehensive reading of Art 10(1), Art 10(2), and related recitals 27 and 28, it seems realistic that a more precise definition of such subjects will to some extent be referred to member States, since they will address the open access policies to research performing organizations and research funding organizations for making publicly funded research more available. In addition, referring to recital 28, a positive element for enhancing re-use of research data is the interpretation that, on the one hand, member States may be required ('it is appropriate to set an obligation') to adopt and implement policies on publicly funded research data to be applied by all research performing organizations and research funding organizations.[63] On the other hand, Member States may possibly ('certain obligations stemming from this Directive should') extend the related obligations to scientific research activities

[62] S. Gobbato, 'Open Science and the reuse of publicly funded research data in the new Directive (EU) 2019/1024' 2(2) *Journal of Ethics and Legal Technologies*, 145, 153-154 (2020).

[63] Directive (EU) 2019/1024, recital 28: 'For the reasons explained above, it is appropriate to set an obligation on Member States to adopt open access policies with respect to publicly funded research data and ensure that such policies are implemented by all research performing organisations and research funding organisations […]'.

subsidized by public funding or co-funded by public and private-sector entities.[64] While this formulation of Art 10 allows for greater flexibility at the national level, the result can be criticized in terms of legal certainty and harmonization.

2. Relevant Exemptions for Research Data

As previously mentioned, only a few exemptions are covered in further detail by the present work, due to the importance of IPR in research data, and the delicate relationship between research and personal data protection. The present paragraph additionally explores what may be the other relevant exemptions prescribed by the Open Data Directive that would affect the application of the Directive to research data.

Considering intellectual property first, the related exemptions in the Directive are found in Art 1(2)(c), which excludes documents for which third parties hold intellectual property rights. Logos, crests, and insignia are excluded by virtue of Art 1(2)(g). Recital 54 confirms that documents covered by industrial property rights are excluded, such as patents, registered designs, and trademarks. Such limit of third-party intellectual property rights requires further attention for it seems partially unclear. The provision is first supported by recital 54, affirming that property rights of third parties are to be understood as being different from the intellectual rights held on materials by the public bodies themselves. It is also held that third parties' rights shall not be affected by the Directive; similarly, rights of public sector bodies or public undertakings shall not be affected by the Directive, and the exercise of the same rights shall not be limited by the Directive. What may generate some confusion, however, is the example provided by recital 55, explaining the case whereby a document is 'held' by cultural establishments,[65] 'if a third party was the initial owner'. In this case, the recital affirms, the document should be reputed a document for which third parties hold intellectual property rights for the purpose of the Directive. Therefore, this may be the case for all licensing agreements, even though these may allow for certain uses of the works, and more generally all cases in which intellectual property rights have not expired or have always been attributed to the subject concerned. Problematically, this excludes a great number of cases from the application.

A major exemption also regards data protection and privacy, as detailed in Art 1(2)(h). This provision essentially refers to national laws to define the extent

[64] Directive (EU) 2019/1024, recital 28: 'For that reason, certain obligations stemming from this Directive should be extended to research data resulting from scientific research activities subsidised by public funding or co-funded by public and private-sector entities […]'.

[65] Directive (EU) 2019/1024, recital 55 reports: 'If a third party was the initial owner of the intellectual property rights for a document held by libraries, including university libraries, museums and archives and the term of protection of those rights has not expired, that document should, for the purpose of this Directive, be considered to be a document for which third parties hold intellectual property rights […]'.

to which documents containing personal data could be included in the scope of the Directive. This excludes the documents – or parts thereof – where access is limited by national access regimes on grounds of personal data protection or otherwise deemed adverse for personal data protection and privacy concerns by national laws. More specifically, the Directive would not apply to documents to which access is excluded or simply restricted by virtue of those access regimes on grounds of protection of personal data, which may diverge across member States. Moreover, the Directive would also not apply to parts of documents that would be accessible by virtue of those national regimes and that contain personal data, when their re-use is defined by the law, alternatively, as 'incompatible with the law concerning the protection of individuals with regard to the processing of personal data',[66] or – as of 2019 – also 'undermining the protection of privacy and the integrity of the individual'. This should, however, be in accordance with Union or national law regarding the protection of personal data.

Focusing on research data, other exemptions which deserve to be mentioned are the following. Art 1(2)(d) excludes documents 'such as sensitive data'. The Directive would not apply when access is excluded by national access regimes on grounds of national security, but also statistical confidentiality and commercial confidentiality. On this point, it should be noted that it is not easy to grasp how such concepts would apply to research data as defined in the Directive. It is not immediately clear whether commercial secrecy could be perfectly identified within the EU subject matter of trade secrets, which are regulated by Directive (EU) 2016/943 on trade secrets.[67] Indeed, commercial confidentiality in the PSI Directive is defined as including business, professional or company secrets, while the Trade Secrets Directive refers to information that is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; second, such information has commercial value because it is secret and has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.[68]

Other relevant exemptions are presented in Art 1(2)(e) referring to the Directive on critical infrastructures[69] and Art 1(2)(f). These provisions reiterate that access to administrative documents remains governed at the national level:

[66] Art 29 Working Party, Opinion no 6/2013 on open data and public sector information ('PSI') reuse (2013), 10- 11.

[67] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1.

[68] Directive (EU) 2016/943 Art 2 no 1.

[69] Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection [2008] OJ L345/75.

those documents which can be accessed upon proof of particular interest should be excluded from the scope of application. Finally, it can be added that the documents subject to the so-called INSPIRE Directive, Directive 2007/2/EC,[70] and thus including spatial data, are expressively included in the scope of application of the Directive when they are held by public sector bodies and public undertakings, by virtue of Art 1(7).

IV. Research Data: Analysis of Art 10 of the Directive (EU) 2019/1024

The present paragraph attempts to give a more detailed account of rules for research data set out in Art 10 of the Open Data Directive. After illustrating the core principles and rules to be applied (sub-para 1), the objective is to critically examine safeguards and limits provided with reference to copyright law (sub-para 2) and data protection law (sub-para 3). The analysis tries to identify the circumstances under which these provisions may obstruct the re-use of research data.

1. Principles and Rules for the Re-Use of Research Data

The rules on research data in the Open Data Directive are accompanied by a set of principles in Art 10(1) and related recitals, including open access policies, open by default principle, FAIR principles, and the principle of 'as open as possible, as closed as necessary' (see also figure 1 below). A brief conceptual reordering of the complex interplay of different open concepts, primarily including open access, open science, open data, and open knowledge, shall help to understand which open practices the Directive effectively promotes.

The link between the new PSI rules on research data, open access and Open Science (OS) already emerged in examining the debate on their introduction. Both OA and OS are to be considered consistent with the freedom of scientific literature and research.[71] The first part of Art 10 calls on member States to

[70] Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) [2007] OJ L108/1.

[71] T. Margoni et al, 'Open Access, Open Science, Open Society', *Trento Law and Technology Research Group Research Paper no 27*, 1, 6-9 (2016). There is extensive literature on this point. For a very influential literature review on Open Science, B. Fecher and S. Friesike, *Open Science: One term, Five schools of thought*, RatSWD Working Paper Series, 2013. The main elaborations of the movement could be considered the so-called BBB Declarations - having been proclaimed, respectively, in Budapest, Berlin, Bethseda, which are all dated by the first years of the 21st century and refer to the Net as the emergent tool to access and share knowledge: Open Society Institute (OSI), Budapest Open Access Initiative in 2001; Max Planck Institute, Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities [2003]; Bethesda Statement on Open Access Publishing [2003]. Originally shaped by spontaneous initiatives from civil society and the academic community, Open Access and Open Science have also been subject to regulatory initiatives of non-binding nature. One prominent example is the Organisation for Economic Co-operation and Development (OECD) Council Recommendation concerning Access to Research Data from Public Funding [2006]

support the availability of research data by adopting national policies, as well as relevant actions, with the objective of making publicly funded research available: these are defined as 'open access policies'. These policies shall be addressed to research performing organizations and research funding organizations.

Art 10(1) affirms that these policies shall follow the 'open by default' principle. The principle can also be linked to Art 5 of the Directive on available formats, that calls on member States to encourage public sector bodies and public undertakings to produce and make available documents in accordance with the broader principle of 'open by design and by default'. Openness by default can be especially understood in relation to data and the movement for open data, after which the Directive is entitled. For instance, the International Open Data Charter calls on adherent governments and organizations to respect six main principles tantamount to data being open by default (1), timely and comprehensive (2), accessible and usable (3), comparable and interoperable (4), for improved governance and citizens engagement (5) and for inclusive development and innovation (6).[72] More generally, open data can be comprised under the OS and OA movements, but a definition proves elusive since it varies in the literature and open data embodies a multitude of concepts in the data-centric society – being also a buzzword – including the access, use and re-use of data in the digital domain.[73]

According to Art 10(1), policies shall also be compatible with the FAIR principles. While OA and OS address different scientific materials beyond publications, and possibly including research data, the FAIR Data principles – proclaiming that data should be Findable, Accessible, Interoperable and Re-usable – were originally elaborated by the Force1 group between 2014 and 2016[74] and they should be understood as specifically referred to scholarly data.

Art 10(1) also affirms that the policies would take into account the principle of 'as open as possible, as closed as necessary'. The principle should be linked to

C(2006)184. The latter was recently revised in 2021 in the course of the Covid-19 pandemic: Organisation for Economic Co-operation and Development (OECD) Council Recommendation concerning Access to Research Data from Public Funding [2021] OECD/LEGAL/0347.

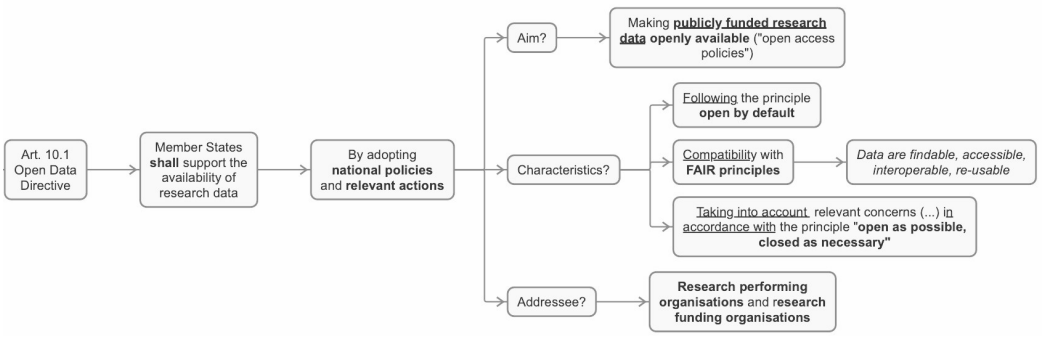
[72] International Open Data Charter [2015] available at https://opendatacharter.net/principles/. The Charter builds on the G8 Open Data Charter of 2013, n 42 above.

[73] The numerous definitions proposed, both in the regulations or by stakeholders, may further specify whether the adjective 'open' refers to a data format, the possibility to use data freely or subject to costs and for certain purposes (ie commercial purposes or not) at certain conditions (eg defined by a licenses), and the types of datasets that are targeted (eg data from the public sector, data shared by private parties, scientific research data, etc). As an additional example, next to the already mentioned Internal Open Data Charter, the Open Knowledge Foundation, a non-profit organization launched in 2004, defines Open data as 'the building block of open knowledge' – knowledge that is free to access, use, modify and share, while preserving provenance and openness. Cultural, science, finance, statistics, weather, environment are mentioned as open data categories. See Open Knowledge Foundation webpage, available at https://tinyurl.com/23ay6s2d (last visited 30 June 2022).

[74] M.D. Wilkinson et al, 'The FAIR Guiding Principles for scientific data management and stewardship' 12 *Scientific Data,* 1 (2016), available at https://tinyurl.com/8sahhsee (last visited 30 June 2022). See Force11 webpage, available at https://tinyurl.com/57yf9nfb (last visited 30 June 2022).

the EU Commission elaborations on open access to research data in the Guidelines for Horizon 2020; in particular, the Open Data Research Pilot acknowledges the possibility to opt out from research data sharing based on some incompatibility grounds.[75] In the text of the Directive, closure namely refers to the protection of rights and interest of others, the protection of personal data and confidentiality, security and legitimate commercial interests, and intellectual property rights.[76]

Figure 1. Graphic representation of Art 10(1) of the Directive (EU) 2019/1024.



For a more precise understanding of the duties and obligations regarding the re-use of research data in the Directive, briefly summarized as follows, the main reference is Art 10(2). This affirms that research data – when publicly funded and already made publicly available, as explained – shall be re-usable for commercial or non-commercial purposes in accordance with chapter III (describing conditions for re-use) and chapter IV (entitled to non-discrimination and fair trading). The article calls for mandatory action to be taken by member States ('research data *shall* be'). The mentioned rules are therefore applicable, notwithstanding the fact that they primarily address obligations directed at public bodies or public undertakings, with the uncertainties previously discussed in para III(1) as to subjects. Relevantly, Art 10(2) adds there should be no prejudice to Art 1(2)(c) (third intellectual property rights) and, as mentioned above, concludes that in this context legitimate commercial interests, knowledge transfer activities and pre-existing intellectual property rights 'shall be taken into account'.

[75] European Commission Guidelines on FAIR Data Management in Horizon 2020, III [2016], 3-4, available at https://tinyurl.com/2p8ay5b8 (last visited 30 June 2022); European Commission H2020 Online Manual, Chapter: Cross-cutting issues - Open access & Data management, available at https://tinyurl.com/3kc3sjcd (last visited 30 June 2022). See also A. Landi et al, 'The "A" of FAIR – As open as possible, as closed as necessary' 2 *Data Intelligence*, 47, 50 (2020).

[76] Directive (EU) 2019/1024, recital 27 introduces the principle 'as open as possible, as closed as necessary' in relation to the issue of rights and interests of others, and it urges that despite the certain obligations established by the Directive for member States towards the opening of publicly funded research, concerns related to the existence of rights on the data, rights of others or different interests, should be taken into account.

For chapter III, this means applying the rules as regarding formats, charging, transparency, licensing, arrangements for the search of documents. According to Art 5, member States shall first encourage the principle of 'open by design and by default' (Art 5(2)), which is one of the most relevant elements of innovation introduced by the Directive. There is also an obligation for public sector bodies and public undertakings that data should be made available in any pre-existing format or language and, where possible and appropriate, by electronic means, in formats that are open,[77] machine-readable, accessible, findable and re-usable (Art 5(1)). This is to the extent to which the creation of documents, adaptation of documents or provision of extracts does not involve disproportionate effort, going beyond a simple operation (Art 5(3)). It bears emphasis that Art 5 affirms the data should be made available together with their metadata. Finally, Art 5(1) adds that both the format and the metadata shall comply with formal open standards,[78] when possible, and namely standards laid down in written form that detail specifications for the requirements on software interoperability (Art 2 point 15) when possible. Nevertheless, regrettably, metadata is not defined in the Directive. More specific rules apply to dynamic data and high-value datasets,[79] but these are not detailed in the present work.

Re-use of documents is in principle free of charge according to Art 6, although the recovery of marginal costs is allowed. Such costs include not only those for the reproduction, provision, and dissemination of documents, but also – which seems crucial considering research data – the ones for anonymization of personal data and for the measures taken to protect commercially confidential information. This rule includes a few exceptions, as for cultural establishments (Art 6(2)), but more importantly Art 6(6)(b) explicitly states that the re-use of research data shall always be free of charge for the user.[80]

Different requirements for the conditions of re-use are detailed in Art 8: there shall be no conditions, unless they are objective, proportionate, non-discriminatory, justified on grounds of a public interest objective, and they shall

[77] Directive (EU) 2019/1024 Art 2 no 14 defines an open format as 1) platform-independent and 2) made available to the public without any restriction that impedes the re-use of documents.

[78] Directive (EU) 2019/1024 Art 2 no 15 defines open format standards as laid down in written form that detail specifications for the requirements on software interoperability.

[79] It should be questioned whether research data may fall under the category of high-value datasets under Directive (EU) 2019/1024 Art 14. This assessment is essentially based on their potential for generate significant socioeconomic or environmental benefits and innovative services, benefit a high number of users, and in particular SMEs, assist in generating revenues, and finally the potential to be combined with other datasets. Thematic categories are detailed in Directive (EU) 2019/1024 Annex I and correspond to 1) Geospatial, 2) Earth observation and environment, 3) Meteorological, 4) Statistics, 5) Companies and company ownership, 6) Mobility. Whether research data would fall under these categories, the principles detailed in Art 14 (namely: availability free of charge with a few exceptions, machine-readability, the provision via API and as bulk download) would apply, plus their re-use would be regulated by specific implementing acts of the Commission.

[80] This excludes the application of Directive (EU) 2019/1024 Art 7, that regards transparency of charging conditions.

not unnecessarily restrict possibilities for re-use. Conditions shall also not be used to restrict competition. The use of standard licenses is also encouraged.

Finally, Art 9 outlines, on the one hand, practical arrangements that Member States shall make to facilitate the search of documents and calls on member States to encourage public sector bodies to make practical arrangement for measures facilitating the preservation of documents made available for re-use. On the other hand, Art 9(2) mentions that the member States shall pursue cooperation efforts with the EU Commission to simplify access to datasets. Such efforts would include in particular the provision of a single point of access and the making available of suitable datasets (for the documents held by public bodies to which the Directive applies, as well as for the data held by the Union institutions) in formats that are accessible, readily findable and re-usable by electronic means.

Chapter IV contains rules on non-discrimination (Art 11) and exclusive agreements (Art 12). Non-discrimination means that applicable conditions for the re-use should not differentiate between comparable categories of re-use, including for cross-border re-use, while establishing a rule that the same charges plus other conditions applying to the re-use by a public sector body for commercial purposes should apply to other users for the supply of those documents for those activities. Exclusive arrangements – ie contracts or related arrangements that grant exclusive rights – are excluded unless an exclusive right is necessary for the provision of a service in the public interest, but these, together with periods of exclusivity exceeding 10 years, are subject to review.[81]

2. Re-Use of Research Data and Intellectual Property

Considering the re-use of research data and limits descending from intellectual property laws, the safeguards provided in Art 1(5) are particularly important. The provision affirms that the obligations imposed in accordance with the Directive shall apply only when compatible with the provisions of international agreements on the protection of intellectual property rights – the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty being mentioned. Since the documents in which third parties hold IPR are outside the scope of the Directive, this article suggests that further limitations to the re-use of documents may derive from intellectual property laws nevertheless. It should be remembered, as recital 54 clarifies, that intellectual property rights comprise related rights, including *sui generis* forms of protection. On this point, Art 1(6) states that the *sui generis* right for the maker of a database – provided for in Art

[81] According to Directive (EU) 2019/1024 Art 12 specific rules prescribing transparency and review also applies if there are legal or practical arrangements that, although they not expressly grant an exclusive right, seek or could reasonably be expected to lead to, a restricted availability for the re-use of documents.

7(1) of Directive 96/9/EC[82] – shall not be exercised by public sector bodies so they can prevent the re-use of documents or restrict re-use. Crucially, the final sentence of recital 54 also affirms that public sector bodies should exercise their copyright in a way that facilitates re-use. Above all, it should be remembered that the possibility to apply the *sui generis* right to databases created by public entities is argued in the doctrine.[83]

Art 1 combines with additional limits for the re-use of research data and IPR that emerge in different parts of the text. Besides recital 28 (whose contents were analyzed in para IV(1)), Art 10 recalls concerns of intellectual property rights and, in addition to expressively recalling the IP exemption of 1(2)(c), urges to take into account, *inter alia*, knowledge transfer activities and pre-existing intellectual property rights. The reference seems partially obscure as knowledge transfer is a typical dynamic of licensing IP considering, for instance, Universities' partnerships with private companies or public bodies, while pre-existing intellectual property rights seem to refer to a situation that pre-exists any contractual arrangement. What is more, how such circumstances should ultimately be taken into account is not specified.

Taken together, these provisions considerably restrict the extent to which scientific research data can be subject to re-use. In doing so, the complexities characterizing the context of IPR and research data are scarcely addressed,[84] despite the topic being acknowledged as a challenge in the preparatory works, and the fragmentation of policies and inconsistency of related sharing practices for research data (deeply affected by IPR and especially copyright) were pointed out as one reason for promoting legal change with the Open Data Directive.

As anticipated in para III(1), one main underlying issue regards the idea/ expression dichotomy. The definition of research data in the Directive regards documents other than scientific publications that are collected, produced, and used across different phases of scientific research, as well as accepted in the scientific community. While publications – ultimate target of copyright – are excluded, the definition includes documents in a digital form and this is a broad formula that points to a variety of materials potentially protected by copyright. This would include different media, including images (possibly also 3D digital models), videos or other types of texts that cannot be framed as scientific

[82] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20.

[83] Considering Italy, F. Faini, n 22 above, 123-124. For a thorough analysis whether public entities could be the subjects of database sui generis rights, including the case decided by the Court of Justice of the European Union Case -138/11, *Compass-Datenbank GmbH* v *Republik Oesterreich,* Judgment of 12 July 2012, available at at www.eur-lex.europa.eu, P. Guarda, *Il regime giuridico dei dati della ricerca* (Trento: Università degli Studi di Trento, 2020), 124-125.

[84] J.H. Reichman and R. Okediji, 'When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale' 96 *Minnesota Law Review*, 1362 (2012). More recently, in relation to the pandemic context, K. Walsh et al, 'Intellectual Property Rights and Access in Crisis' 52 *International Review of Intellectual Property and Competition Law*, 379 (2021).

publications. Specific attention should be attributed to code, eg considering computer programs or algorithms, whose copyrightability, together with patentability, is discussed. Indeed, despite recital 30 mentioning that the definition of document is not intended to cover computer programs, member States remain free to extend the application to them. Considering, more to the point, datasets, while in line with the idea/expression dichotomy principle their content should not be protected by copyright, they may still be protected if, by reason of the selection or arrangement of their contents, they are original (Art 1(2) of the Directive 96/9/EC). Even more importantly, *sui generis* rights can protect datasets in presence of investment (Art 7(1) Directive 96/9/EC).

A second underlying issue is that IPR in research are often characterized by shared, fragmented, and sometimes uncertain, authorship; this descends from the essentially cumulative nature of scientific knowledge and the free circulation of ideas, as well as the resort to contractual agreements for IPR management, eg in knowledge transfer. As a consequence, the limits imposed by the described IP safeguards in the Open Data Directive – and consequent activities required for compliance, such as rights clearance – seem rather severe, for the obligations for re-use on research data could be even more difficult to attribute. For instance, it could be difficult to establish whether and how Art 1(6) of the Directive – that encourages not exercising the *sui generis* rights to prevent or restrict re-use – would be applicable in the context of research data. As noted by distinctive authors, the proposal for a Data Act provides for an identical rule in Art 5(7):[85] although the proposal was eagerly awaited to amend the subject of *sui generis* rights on databases, in its current version it does not introduce other relevant provisions on this utterly controversial set of rights.

3. Re-Use of Research Data and Personal Data Protection

Safeguards for the respect of personal data protection laws are found in Art 1(4) of the Directive. This states that the Directive is without prejudice to Union and national law on the protection of personal data, in particular the Regulation (EU) 2016/679 (GDPR),[86] the ePrivacy Directive[87] and corresponding national law. Recital 154 of the GDPR mirrors this provision, as it affirms that the EU legislation on the re-use of public sector information does not affect the EU data protection provisions. Overall, this means that, given that some documents containing personal data would be excluded by the scope of application of the Directive *a priori*, in light of Art 1(2)(h), the Directive may still apply to documents

[85] P. Keller, 'A vanishing right? The Sui Generis Database Right and the proposed Data Act' *Kluwer Copyright Blog*, 4 March 2022, available at https://tinyurl.com/2p8dkab6 (last visited 30 June 2022).

[86] Regulation (EU) 2016/679, n 9 above.

[87] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

that contain personal data and, whenever this is the case, access and re-use of the documents should comply with data protection principles and rules.

A necessary premise is that the subject of Open Data and Data Protection can be considered to suffer a contrast at the conceptual level. Put more bluntly, it is difficult to see how opening to non-discriminatory re-use of data for any purpose (ie commercial and non-commercial) could be compatible with the principles of purpose limitation, data minimization, accuracy and possibly accountability, principles now enshrined in Art 5 of the GDPR.[88] Useful information about the interplay of PSI and Data Protection rules was set out by the Art 29 Working Party (hereinafter WP29, now European Data Protection Board, also EDPB), in 2003[89] and 2013.[90] During the preparation of the EU Commission Guidelines on the amended Directive of 2013 and the related consultation, the European Data Protection Supervisor (hereinafter, EDPS) also strengthened the WP29 considerations on PSI rules and data protection.[91]

As for the considerations advanced by the WP29, this first addressed the idea that because the re-use is a 'non-obligation' in the PSI Directive, related public bodies may decide to make the data available or not; it also underlines how such a decision is impacted by personal data, as data protection principles and rules should be subject to a dedicated assessment.[92] The option of making available data after anonymization is a crucial one according to WP29,[93] but it recalls that this comes with the critical need to assess and test risks of re-identification.[94] It is indeed a well-worn argument that the advance of technology, ie cryptography, has increasingly rendered complete anonymization impossible.[95]

[88] This issue has been described providing a fresh perspective on the Open Data Directive and the GDPR in the recent work of P. Guarda, n 83 above, 206; on Directive 2013/37/EU and the proposed GDPR M. Van Eechoud, n 5 above, 75-76. See also R. Ducato, 'Data Protection, Scientific Research, and the Role of Information' 37 *Computer Law & Security Review*, 36 (2020); F. Zuiderveen Borgesius et al, 'Open Data, Privacy, and Fair Information Principles: Towards a Balancing Framework' 30(3) *Berkeley Technology Law Journal*, 2073 (2015); I. Graef et al, *Spill-Overs in Data Governance: The Relationship between the GDPR's Right to Data Portability and EU Sector-Specific Data Access Regimes*, TILEC Discussion Paper DP 2019-005 (2021), available at https://tinyurl.com/23r7vrc7 (last visited 30 Jume 2022).

[89] Art 29 Working Party, Opinion no 7/2003 on the data protection concerns relating to PSI (2003). The objective of the Opinion was to providing guidance and examples on how to implement the amended PSI Directive with regard to the processing of personal data.

[90] Art 29 Working Party, Opinion no 6/2013 n 67 above.

[91] European Data Protection Supervisor, Comments in response to the public consultation on the planned guidelines on recommended standard licences, datasets and charging for the reuse of public sector information initiated by the European Commission [2013], available at https://tinyurl.com/zj3racrn (last visited 30 June 2022).

[92] Art 29 Working Party, Opinion no 6/2013 n 67 above, 3.

[93] ibid 3, 12.

[94] ibid 7.

[95] Art 29 Working Party, Opinion no 5/2014 on Anonymization Techniques (2014), 7-8; R. Ducato, 'La Crisi Della Definizione Di Dato Personale Nell'era Del Web 3.0. Una Riflessione Civilistica in Chiave Comparata' in M. Tomasi and F. Cortese eds, *Il Diritto e le definizioni* (Napoli: Editoriale Scientifica Italiana, 2016), available at https://tinyurl.com/rhfwe6hu (last visited 30 June 2022); S.

This is a central topic considering, for instance, that aggregated statistical data are presented as a typical example of PSI.

The WP29 mentioned that, when making data available under the PSI rules, public sector bodies will need a legal basis to make the personal data available for re-use (ie disclosure),[96] although in presence of a non-obligation to disclose, they would probably not be able to invoke the need to comply with the PSI Directive as a legal basis.[97] Under the GDPR, next to the necessity of the processing for compliance of a legal obligation (Art 6(1)(c) GDPR), another legal basis on which the public sector body may rely would be the consent of the data subject (Art 6(1)(a) GDPR) or necessity for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (Art 6(1)(e) GDPR). Both the former and the latter would nevertheless require the legal basis to be laid down in Union or national law (Art 6(3) GDPR) and more specifically, for the performance of a task or exercise of authority, the purpose of the processing should be determined by the law or be necessary (Art 6(3) GDPR).

Another major issue is that the so-called disclosure likely qualifies as a further processing of the data, for purposes that are different from the ones for which the data was collected: this is one primary example of the tension between the guiding principle of open data and the data protection principle of purpose limitation,[98] which requires that the purposes of the further processing should be compatible with the purposes for which the data has been initially collected.[99] Conditions for further processing and assessment thereof are now included in Art 6(4) of the GDPR.[100] On this point, the WP29 strongly recommended the adoption of detailed national provisions that would specify the purposes for which public sector bodies would be able to disclose data, but also invited the public sector bodies to conduct a dedicated assessment.[101]

Stalla-Bourdillon and A. Knight, 'Anonymous Data v. Personal Data - A False Debate: An EU Perspective on Anonymization, Pseudonymization and Personal Data' 34 (2) *Wisconsin International Law Journal*, 284 (2017).

[96] Art 29 Working Party, Opinion no 6/2013, n 67 above, 6-7.

[97] ibid

[98] P. Guarda, n 83 above, 206-207.

[99] Art 29 Working Party, Opinion no 6/2013, n 67 above, 6.

[100] Regulation (EU) 2016/679, Art 6(4) recites: 'Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Art 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, *inter alia* (…).'

[101] At the time, a Data Protection Impact Assessment was only recommended in the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, while it is today prescribed as mandatory in the Regulation (EU) 2016/679, Art 35. See Art 29 Working Party, Opinion no 6/2013, n 67 above, 6, 20.

Finally, the re-use of personal data by the users would also need a legal basis. The most appropriate legal basis for re-use is eventually identified by the WP29 in consent of the data subject or legal obligation.[102] Such processing would also need to comply with the principle of purpose limitation, although the WP29 specified that, when considering the compatibility of further use, the distinction between re-use for commercial or non-commercial purposes should not be decisive.[103] In particular, the WP29 underlined that even though the data would be available on the Internet, this would not mean that personal data could be processed for any purpose. As public sector bodies would be able to impose conditions for re-use, subject to a few requirements such as objectivity and non-discrimination between users, such conditions could limit the purposes of the re-use of personal data. Since the re-use could be difficult to monitor, however, this is another element that should fall into the dedicated data protection assessment.[104] For all these reasons, the WP29 supports the view that public bodies should put in place a rigorous licensing scheme that would specify purposes for which re-use is allowed[105] and foresee a data protection clause in their conditions, even when data is anonymized.[106]

More recently, the topic was tackled by the European Data Protection Board and European Data Protection Supervisor Joint Opinion 03/2021 on the Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act).[107] The document examines the relationship of the proposal for the Data Governance Act with the Open Data Directive and the GDPR. On this occasion, while critically examining the fact that data held by public bodies and protected on grounds of, *inter alia*, protection of personal data was included in the scope of the new proposed Regulation, the Opinion confirmed that the rules of the Open Data Directive appear consistent with the requirements governing protection of individuals' fundamental rights.[108]

For the purposes of the present work, there should be an investigation into how the elements hereby described would affect the context of re-use of research data according to Art 10 of the Open Data Directive. Numerous tensions characterizing data protection and public sector information are already mentioned in the WP29 Opinion of 2013[109] and indeed, the described data protection issues persist and continue to appear complex, compliance being

[102] ibid 19; the reference is to Directive 95/46/EC Art 7(a)-(f).

[103] ibid 21.

[104] ibid 20.

[105] ibid 19.

[106] ibid 25.

[107] European Data Protection Board and European Data Protection Supervisor (EDPB-EDPBS) Joint Opinion 03/2021 on the Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act) [2021] available at https://tinyurl.com/mtnvbmh9 (last visited 30 June 2022).

[108] ibid 18-20.

[109] Art 29 Working Party, Opinion no 6/2013, n 67 above, 23.

even more onerous, in the context of research data, as research activities frequently resort to personal data, involving a plurality of players acting in different capacities,[110] including public-private partnerships.

If research data contains personal data, the operations that are functional to allowing the re-use of this research data (ie the disclosure) would be tantamount to data processing activities that require an apt legal basis in Art 6 of the GDPR or equivalent in national laws. The same is true with regard to the re-use of research data by users, although limited purposes for the re-use of research data could be specified in the terms and conditions. It therefore seems helpful to consider the Data protection rules presenting a few specificities when personal data processing is for purposes of research, where research is defined under recitals from 157 and following of the GDPR. However, it should be acknowledged that the application of such provisions relies on the purposes of the processing, so they would impact data processing activities during the actual research phases. One first question is consequently whether the disclosure or even the re-use (eg when the conditions for re-use prescribe that data are re-usable for research purposes only) could be considered as falling under the research purposes.

As for the legal basis of personal data processing for purposes of scientific research in the GDPR, three of them are referred in the doctrine as the most relevant: the consent of the data subject (Art 6(1)(a) GDPR), the necessity of processing for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (Art 6(1)(e) GDPR) and the necessity of the processing for the purposes of the legitimate interests pursued by the controller or by a third party (Art 6(1)(f) GDPR).[111] Both letter e) and f) would require the basis to be laid down in Union or national law (Art 6(3) GDPR). However, it can surely happen that personal data protection processed for purposes of research falls under the special categories of data (Art 9 of the GDPR), a primary example being medical or biological research, for, amongst others, data concerning health[112] and genetic data. Art 9(2)(j) of the GDPR

[110] F. Di Tano, 'Protezione dei dati personali e ricerca scientifica: un rapporto controverso ma necessario' 1 *BioLaw Journal – Rivista giuridica di Biodiritto*, 71, 80-81, (2022).

[111] P. Guarda, n 83 above, 145-149. Relevantly, considering the PSI rules, for public sector bodies only the first two legal basis mentioned would be applicable, due to GDPR Art 6.1(f) excludes that the legitimate interest basis shall apply to processing carried out by public authorities in the performance of their tasks.

[112] One relevant example could be disclosure of research data collected by public sector bodies during the pandemic of Covid-SARS-19; if not correctly anonymized, research data to be disclosed and possibly re-used may comprehend datasets that amount to special categories of data under the GDPR, ie data concerning health; on this point cf. E. Sorrentino and A.F. Spagnuolo, 'Dati sanitari: aperti, accessibili e riutilizzabili' *MediaLaws.eu*, 16 December 2021, available at https://tinyurl.com/59wdppau (last visited 30 June 2022); T. Fia, 'Access to and Ownership of Data to Tackle COVID-19: Some Lessons (IP) Law Should Learn for Good', (2020), available at https://tinyurl.com/48vd9s96 (last visited 30June 2022). The topic is politically charged due to the greater controversiality of both public and private control of information during the pandemic (eg

would apply in this case. This provision prescribes that the processing would be allowed where necessary for the purposes of Art 89(1) of the GDPR (processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes), based in Union or national law, proportionate to the aim pursued, when it would respect the essence of data protection right and when appropriate and when specific measures are in place. For the sake of completeness, it should ultimately be remembered that processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes falls within Art 89 of the GDPR, which ties such processing to a few safeguards[113] and derogations.[114] Essentially, the further processing of data for the purposes mentioned will not be deemed incompatible with the original purposes for which data was collected, at least when such processing happens in accordance with Art 89 of the GDPR.

To conclude, despite access and re-use of research data under the Open Data Directive bringing consistent data protection challenges, the possibility to refer to extensively harmonized data protection rules across member States, embedded in the GDPR, may ensure greater legal certainty in the implementation and application of these rules. In this respect, the scenario seems different from what has been described in relation to the limits concerning the intellectual property subject in para IV(2). Moreover, key elements to navigate the described

number of infections, deaths, vaccines and Covid-SARS-19 variants), especially considering Intellectual property laws.

[113] The safeguards provided by Art 89 GDPR are aimed at protecting the rights and freedom and of the data subject and they primarily consist in technical and organizational measures, particularly to ensure data minimization (eg pseudonymization). The prescription of such safeguards suggests very strong care should be adopted to decide whether research data containing personal data (although pseudonymized) should be made available and should be open for re-use.

[114] Derogations, instead, regard the exercise of a few data protection rights. More specifically: access (Art 15 GDPR), rectification (Art 16 GDPR), restriction of processing (Art 18 GDPR), notification (Art 19 GDPR), portability (Art 20 GDPR), objection (Art 21 GDPR). Derogations should also be established by Union or national law, be necessary to fulfil the aim pursued and be provided only when the rights would seriously in impair the aimed purposes. This however means that the public sector body that engages in research would be still be accountable for data subjects and ensure to respect their right to receive correct information (Arts 13-14 GDPR) and, in the few prescribed cases (eg revocation of consent, absent another legal ground for processing), the right to erasure (Art 17 GDPR), despite the right is additionally limited when processing is for the purposes of Art 89 of the GDPR. Art 17(3) (d) of the GDPR specifies the right to erasure would not apply when the processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Art 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing. This implies, on one hand, that the public sector body should provide information that data will be, even partially, disclosed, plus on potential re-use. On the other hand, it would also mean that in case of erasure of personal data, whenever data have been made public by the public sector body (as with public disclosure), Art 17(2) GDPR would also apply. Consequently, the public sector body, as the controller, would be obliged to take reasonable steps, including technical measures, to inform other controllers processing the personal data that the data subject has requested they also erase any links to, or copy or replication of, the personal data.

context are first the need to occasionally look at the national provisions for compliance of personal data processing for research purposes (eg considering the legal basis), and the fact that relevant uncertainties are likely to arise in the concrete re-use of research data, requiring a case-by-case assessment, as concluded by both the EDPB, EDPS, as well as the doctrine.[115]

V. Data from Cultural Establishments in the Directive (EU) 2019/1024: A Brief Overview

Although data from cultural establishments are not the focus of the present article, careful consideration of the applicable rules in the Open Data Directive is complementary to analysis sketched so far. This is mainly because research data and cultural data can be considered equally fundamental to the umbrella concept of open knowledge and growing attention, in time, to 'open cultural data' or what can be loosely defined as 'open access' in the cultural sector,[116] well exemplified in the OpenGLAM initiative born around 2010,[117] together with many others.

The PSI Directive of 2003 did not apply to data from cultural establishments and public broadcasting organizations.[118] The exclusion from the scope of the Directive, as reported in the first proposal of 2002,[119] was based on the idea that the administrative burden would exceed the advantages, the presence of materials characterized by third-party copyright, as well as the special position of such establishments in the society, due to their cultural and knowledge mission.[120] The exclusion was debated following the first publication of the Directive and became of major momentum when the reform of 2013 was discussed.[121] Respondents to the public consultation opted for the inclusion.[122]

Building on studies conducted in the meantime, the Staff Working Document of 2011 concluded in favor of the opportunity to extend the scope of the PSI Directive, as the scenario for the digital exploitation of digital cultural assets had profoundly changed.[123] In particular, what was explicitly acknowledged was the need to amend the PSI rules in order to overcome the differences in rules and

[115] P. Guarda, n 83 above, 209.

[116] M. Terras, 'Opening Access to Collections: The Making and Using of Open Digitised Cultural Content' 39(5) *Online Information Review*, G. E. Gorman and J. Rowley (eds) special Issue 'Open Access: Redrawing the Landscape of Scholarly Communication', 733, 735-736, 742-743, (2015).

[117] See OpenGLAM website, available at https://openglam.org/.

[118] Directive 2003/98/EC, Art 1(2)(f).

[119] European Commission Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents [2002] COM (2002) 207 final.

[120] K. Janssen, n 15 above, 448.

[121] SEC(2011) 1152 final, n 26 above, 34-38.

[122] ibid 67-68.

[123] ibid 36-37.

practices across the member States relating to the exploitation of public cultural resources – differences that were barriers to realizing the economic potential of those resources in the Internal market.[124] Projects of digitization and availability of digital public domain were pointed out to hide great potential for developing products and services in the field of, amongst others, e-learning and tourism.[125] In doing so, the novel PSI Directive of 2013 was also recognized to reinforce the EU digitization policy for the cultural sector.[126]

At the same time, the document of 2011 acknowledged that ad hoc provisions had to be included due to the specificities of this sector –

> 'administrative complexities linked to IPR protection and the mission of public cultural institutions, which not only disseminate but also preserve the cultural heritage they hold'.[127]

One first principle consists in the fact that only public domain material with IPR clear status should be covered by the re-use, to avoid the administrative burden that would derive from right clearance activities. Second, cultural institutions should be able to recover their costs with a reasonable return on investment, to generate funds for making their collections available for re-use, as these are often insufficient.[128] As a result, the reform of 2013 extended the scope to the documents held by libraries, including university libraries, museums, and archives, while excluding other cultural establishments. This was in view of a performing arts specificity – the Directive currently cites orchestras, operas, ballets and theatres – and because almost all of the material detained by such establishments was reputed covered by third-party intellectual property rights.[129]

With regard to intellectual property rights, it is worthwhile noting that the general exclusion to documents in which third parties hold intellectual property rights would also apply.[130] On this point, authors argued about including in the scope of the Directive documents that were initially owned by third parties and that were only later acquired by cultural institutions, and thus questioned the reading of ex recital 9 of the PSI Directive of 2013, now recital 55 of the Open Data Directive (already mentioned in para IV(2)).[131] However, it was established

[124] Directive 2013/37/EU, recital 17.

[125] Directive 2013/37/EU, recital 15.

[126] SEC(2011) 1152 final, n 26 above, 27-28.

[127] ibid 37.

[128] ibid 37.

[129] Directive (EU) 2019/1024, Art 1(2)(j) PSI 2019, recital 65; Directive 2013/37/EU, Art 1(2)(f), recital 18.

[130] ibid Art 1(2)(c); Directive 2013/37/EU, Art 1(2)(b).

[131] P. Kelle et al, n 17 above, 4. On copyright and museums as subject to PSI rules see C. Sappa, 'Museums as Education Facilitators. How copyright affects access and dissemination of cultural heritage', in E. Bonadio and C. Sappa eds, *Art and Literature in Copyright Law: Protecting the Rights of Creators and Managers of Artistic and Literary Works* (Cheltenham: Edward Elgar Publishing, forthcoming).

that for documents in which cultural establishments hold intellectual property rights, the cultural institution could decide whether to allow re-use or not; member States shall ensure that these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in the Directive, where the re-use of such documents is allowed.[132]

Other ad hoc rules have been established for the relevance of strategic partnerships and the costs of digitization projects. Despite the general prohibition, cultural establishments are allowed to charge above marginal costs for the re-use; while not exceeding the cost of collection, production, reproduction, dissemination, preservation and rights clearance, a reasonable return on investment is possible.[133] In the new Directive, the possibility of charging is maintained for libraries, museums, and archives, and it would apply also in the case of high-value datasets.[134] What reasonable return on investment means has been further explained in the Guidelines of the EU Commission of 2014.[135] This would include a return rate, to be calculated not in reference to business risk, but being 'reasonable' instead, and placed slightly above the current cost of capital (ie considering the European Central Bank's fixed interest rate when in the euro-zone), while well below the rate for commercial players.[136] With regards to these conditions, a few scholars have argued for cautious interpretation and careful implementation of such a rule already under the previous Directive, since imposing conditions for re-use may alter the inner balance of copyright law, where there are examples of public domain works previously made available by cultural institutions without restrictions.[137] Next to ad hoc rules for charging, exclusive arrangements for digitization of cultural resources have been permitted, although subject to specific rules, as for the review of the exclusive rights duration or the provision of a copy of the digitized cultural resources.[138]

Time has passed, but regrettably the new Open data Directive still covers only certain types of cultural establishments. The relevant exemptions and limitations regarding intellectual property rights have also not changed, and it remains true that cultural establishments are subject to significant derogations. Amongst those, one that deserves particular attention in the Open Data Directive is on exclusive agreements. Contracts or other arrangements that would grant exclusive rights between libraries, museums, archives, and private partners concerning the digitization of cultural resources are allowed in order to give the

[132] Directive (EU) 2019/1024, Art 32; Directive 2013/37/EU, Art 3(2).

[133] Directive (EU) 2019/1024, Arts 6(2) and 6(4), recital 38; Directive 2013/37/EU, Arts 6(2) and 6(4).

[134] Directive (EU) 2019/1024, Art 14(4).

[135] European Commission Notice - Guidelines on recommended standard licences, datasets and charging for the reuse of documents [2014] 2014/C 240/01.

[136] P. Keller et al, n 17 above, 4.

[137] ibid 5-6.

[138] Directive (EU) 2019/1024, Art 12(2); Directive 2013/37/EU, Art 11.

private partner the possibility to recoup its investment (recital 49 and Art 12(2), second sub-para).[139] Nevertheless, it is far from obvious to assert what exclusive rights these provisions would refer to. The rights seem to be generally framed as rights to re-use the resources (eg in recital 48), but for the context of digitization projects, as also noted by other authors,[140] they seem to consist in the right to digitalize the resources, as it is in Art 12(3) and recital 49. Moreover, the same recital 49 may also be read as referring to IPR when it recites that the period of exclusivity should be as short as possible 'to comply with the principle that public domain material should stay in the public domain once it is digitised'.

While the new Open Data Directive does not meaningfully innovate the provisions on data from cultural establishments compared to the previous PSI Directive of 2013, its contents are remarkably complemented by the recent Commission Recommendation of 10 November 2021, on a common European data space for cultural heritage.[141] Following the previous Recommendation on the digitization and online accessibility of cultural material and digital preservation of 2011[142] and its evaluation in 2021,[143] as well as taking into account Covid-19 as a drive for digitization for cultural heritage institutions, the new Recommendation brings the cultural sector to the fore of the European Strategy for Data.[144] Relevantly, in provision no 18 the Recommendation affirms that the policies adopted by member States should seek to ensure that data resulting from publicly funded digitization projects become and stay FAIR. The result is that, despite having non-binding nature, the Recommendation provides persuasive elements that would deserve to be taken into account in both the implementation and application of the PSI rules. At the same time, the

[139] According to Directive (EU) 2019/1024, Art 12(3), first and second sub-paragraphs). Such agreements shall be transparent and public, and although the period should in principle not exceed 10 years, in case this happens the duration shall be reviewed during the 11th year and, if applicable, every 7 years after that. Since 'any public private partnership for the digitisation of cultural resources should grant the partner cultural institution full rights with respect to the post-termination use of digitised cultural resources' (recital 49 Directive (EU) 2019/1024) a copy of the digitized cultural resources shall be made available as the at the end of the exclusivity period (Art 12(3), third sub-paragraph, Directive (EU) 2019/1024).

[140] A. Wallace and E. Euler, 'Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments' 51(7) *IIC - International Review of Intellectual Property and Competition Law*, 823, 844 (2020).

[141] European Commission Recommendation of 10 November 2021 on a common European data space for cultural heritage [2021] C(2021) 7953 final.

[142] European Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation [2011] OJ L283/39.

[143] European Commission Staff Working Document Evaluation Of the Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation [2011] SWD(2021)15 final.

[144] In particular, SWD(2021)15 final, General Provisions no 10 recites: 'Where cultural heritage institutions enter into partnerships with the private sector, they should ensure that clear and fair conditions for reusing the digitised assets are laid down, in line with competition rules and with Directive (EU) 2019/1024, and in particular with the rules on exclusive arrangements laid down in Article 12 of that Directive, where relevant.'

PSI rules are confirmed to provide a substantial base of harmonization for realizing the EU Data Strategy in the field of cultural heritage.

VI. The Italian Implementation of the Directive (EU) 2019/1024

Moving on to the implementation of the new PSI rules in Italy, para 2 describes the provisions recently introduced by the decreto legislativo 8 November 2021 no 200, focusing on research data and providing a few insights into data from cultural establishments. Para 1 initially provides an introductory overview on the Italian regulatory framework on PSI.

1. Public Sector Information in Italy

The Italian rules on access and re-use of public sector information can be loosely described as being scattered across three main pieces of legislation.[145] Amongst those, the primary reference for the purposes of the present work is decreto legislativo 24 January 2006 no 36. This has transposed the Directive of 2003 and has been successively modified in accordance with the development of the EU PSI Directives.

Second, the decreto legislativo 7 March 2005 no 82, also known as Codice dell'amministrazione digitale (literally: code of digital administration), hereinafter CAD, should be considered, being the most important piece of legislation for the transition towards e-government.[146] Amongst others, a few provisions also target obligations of public entities for the access and re-use of data.[147] In particular, the CAD provides the main definitions of open data (more precisely, 'open-type' data), open format, and data ownership (*titolarità*),[148] as well as rules on licensing. Most notably, the principle currently enshrined in Art 52 is that in the absence of a general standard license, the documents and data that are published should be considered open data, according to the above-mentioned definitions of open format and open-type data, where the latter also implies that they can be re-used for commercial purposes.[149] This piece of legislation has included a provision on open data since 2012, when it was modified in accordance

[145] G. Luchena and S. Cavaliere, 'Il riutilizzo dei dati pubblici come risorsa economica: problemi e prospettive' *Rivista giuridica del Mezzogiorno,* 151, 160-166 (2020).

[146] F. Faini, n 22 above, 25. The CAD provides the key-provisions for the digitalization of information of the public sector, primarily considering the relationship with users and tools of 'digital citizenship', for instance digital identity, but also, more in general, rules for digital documents, signatures, transmission.

[147] Art 50 and following CAD.

[148] Art 1(1), (l-*ter*), (l-*bis*), and (cc) CAD. For further details on definitions provided in the CAD, see no 168 below.

[149] More precisely, under Art 1(1) (l-*ter*) of the CAD, data of open typology (*dati di tipo aperto*) are also available under the terms of a licence or regulatory provision that permits the use by anybody, also for commercial purposes, in a disaggregated format.

with the legge 6 November 2021 no 190, a delegation law that would have later converged in the other fundamental piece of legislation to be considered by the present overview, the decreto legislativo 14 March 2013 no 33, the so-called Decreto transparenza (literally: transparency decree). Afterwards, provisions on the re-use of data in the CAD were further amended in time, including by the legge 7 August 2015 no 124 – the so-called Legge Madia – that reshaped the digital administration. Conclusively, the link between the CAD and decreto legislativo 36/2006 is still particularly important today, and primarily regards the definitions of open data, open format, and others.[150]

Finally, the principle of transparency was already embedded as a principle in the legge 7 August 1990 no 241, detailing the rules on the administrative procedure and access to documents, but such national rules on administrative transparency have profoundly evolved in time[151] and now they are ultimately collected in the already mentioned Decreto trasparenza. This comprises the core rules for access to documents by citizens to protect their rights, promote participation, and favor distributed forms of control on the public. In particular, as a result of different reforms in time and more precisely after the decreto legislativo 25 May 2016 no 97 – possibly to be regarded as the Freedom of information Act of Italy [152] – Art 5(2) of the decreto legislativo no 33/2013 now provides further possibilities to access documents thanks to *accesso civico generalizzato*.[153] Aspects of the quality of the information, such as integrity and completeness, are mentioned in Art 6(2), while the re-use of data is targeted by Art 7 and 7-*bis*. In particular, Art 7 affirms that 'documents, information and data' that are subject to mandatory publication, made available also as consequence of the civic access, are published in open formats[154] and re-usable in accordance with, *inter alia*, the decreto legislativo no 36/2006. Art 7-*bis* contains a few limits concerning personal data protection.

Overall, it should be kept in mind that when discussing the national regulatory framework on PSI and open data, provisions of the decreto legislativo no 36/2006, the CAD and the decreto legislativo no 33/2013 overlap; this is in line with the parallel development of initiatives regarding public sector information and freedom of information and emerging trends on open data, also open

[150] For further details on definitions provided in the CAD, see n 168 below.

[151] R. Sanna, n 4 above, 37, 243.

[152] F. Faini, n 22 above, 87.

[153] Accesso civico generalizzato, provided by Art 5(2) d.lgs. 33/2013, is next to a simple civic access that regards documents subject to mandatory publication provided by Art 5(1) d.lgs. 33/2013. *Accesso civico generalizzato* covers documents which are not mandatorily published by public bodies, absent legitimization and motivation, and it is denied only in case of concrete prejudice to the protection of interests of public and private nature disposed by law and under circumstances detailed by Art 5bis of the d.lgs. 33/2013. F. Faini, n 22 above, 109-111; V. Pagnanelli, 'Access, Accessibility, Open Data. The Italian Model of Public Open Data in the European Context' *Giornale di Storia Costituzionale*, 205, 213 (2016).

[154] The definition of open format is provided by Art 1(1)(l-*bis*) of CAD; see note no 168.

government data, as described in para II. However, because the focus of the present work is the re-use of research data, the following analysis will focus on the related amendments to decreto legislativo no 36/2006 only.

2. Rules on Research Data and Data from Cultural Establishments Introduced by the Decreto Legislativo no 200/2021

A few days after the expiration of the implementation term for Directive (EU) 2019/1024, prescribed for 17 July 2021,[155] a draft of *schema legislativo* to implement the Directive was preliminary approved on 5 August 2021, in the meeting of *Consiglio dei Ministri* no 32, and subject to the approval of the Italian Parliament.[156] The decreto legislativo no 36/2006 has consequently been modified by the decreto legislativo no 200/2021, with amendments entered into force on 15 December 2021[157].

Art 1(2-*bis*) of the decreto legislativo no 36/2006 establishes that the rules of the decreto apply to research data under conditions described in Art 9-*bis*.[158] Importantly, this introduces in the legislative corpus the first binding rules to apply to the re-use of publicly funded research data, in the absence of other relevant national provisions in Italy. On this point, it should be mentioned that in the recent past the legge 7 October 2013 no 112 was enacted to implement the non-binding EU Commission Recommendation on access to scientific publications of 2012, promoting member States' actions as regard publicly funded research.[159] On the one hand, Art 4(1) of legge no 112/2013 has introduced an obligation for public entities to adopt, in their autonomy, measures to promote open access to the 'results' of publicly funded research when they are documented in articles published in scientific journals with at least two issues per year, and taking into account both the so-called Green and Golden OA opportunities.[160] On the other

[155] Directive (EU) 2019/1024 Art 17.

[156] Atto del Governo no 284, Schema di decreto legislativo recante attuazione della direttiva (UE) 2019/1024 relativa all'apertura dei dati e al riutilizzo dell'informazione del settore pubblico, documents available at https://tinyurl.com/mujzhbpm (last visited 30 June 2022). Such an approval was prescribed by Art 1 legge 22 April 2021 no 53, so-called European delegation Law 2019-2020.

[157] A first analysis of the amended decreto legislativo no 36/2006 is found in G. Cassano and M. Iaselli, 'Il riutilizzo dei dati pubblici: l'approccio del d.lgs. n. 200/2021' *Diritto di Internet*, 49 (2022).

[158] As a preliminary remark, the scope of application of the decreto legislativo no 36/2006 is defined in Art 1(1) as limited to documents which contain public data (*dati pubblici*) that are in the availability of public administration, bodies governed by public law and public and private enterprises (as further detailed by Art(2-*ter*) and (2-*quater*)). It should be remembered that the definition of public data (*dati pubblici*) (Art 2(d) of the decreto describes these are data which can be known by anyone) was instead removed in the CAD in 2016 (see Art 1(1)(n) CAD, now suppressed by decreto legislativo 26 agosto 2016 no 179). Exclusions follow in Art 3 of the decreto legislativo no 36/2006, while Art 4 provides for safeguards in respect to the compliance with relevant laws (including, *inter alia*, national data protection law, copyright law, industrial property law).

[159] R. Caso, 'La legge italiana sull'accesso aperto agli articoli scientifici: una prima panoramica' *Aedon,* (2013), available at https://tinyurl.com/2p98mf39 (last visited 30 June 2022).

[160] On further discussion on the legislative mandates for open access, and for particular reference

hand, Art 4(3) of legge no 112/2013 has prescribed that to optimize available resources and facilitate the retrieval and use of 'cultural and scientific' information, the Ministry of Cultural Heritage and Activities and Tourism and the Ministry of Education, Universities and Research would coordinate strategies for unifying the databases they manage. However, this law has resulted in the application of different practices across public bodies. Therefore, while fresh actions to enhance open science and open access are currently expected according to the national program for research (2021-2027), approved in 2021 but not yet implemented,[161] decreto legislativo no 200/2021 should be welcomed as having introduced groundbreaking elements in this backdrop.

The definition of research data now found under Art 2(1)(c-*septies*) of decreto legislativo no 36/2006 mirrors the one given in Art 2 of the Directive. Also, Art 3(1)(h-*sexties*) reiterates that the Directive would not apply to documents held by research institutions and organizations that fund research, including the research institutions that are engaged in the research results transfer, whenever different from documents that amount to research data.

Art 9-*bis* establishes specific rules for re-use of research data. Its para 1 first affirms that research data is re-usable for commercial and non-commercial purposes according to what is provided by the decreto. In this respect, it should be briefly mentioned that Art 5, concerning requests for re-use of documents, specifies in its para 6 that, as a way of derogation, educational establishments, organizations that perform research activities and those that fund research are amongst the subjects which define terms and conditions for re-use of data according to their regulations (*ordinamenti*). At any rate, Art 8 of the decreto replicates Art 8 of the Directive in prescribing that the re-use of all documents shall not be subject to conditions, unless these are objective, proportionate, non-discriminatory and justified on grounds of a public interest objective. Also concerning conditions for re-use, according to Art 7(9-*bis*)(b) the re-use of research data shall always be free of charge.

Art 9-*bis*(1) reiterates that research data is re-usable given the respect of laws on data protection, when applicable. On this point, it shall be considered that, in its Opinion on the implementation draft, the Italian Data Protection

to the Italian context and the proposal for a second moral right of publication in the so-called 'D.d.l. Gallo': disegno di legge proposal no 395 'Modifiche all'articolo 4 del decreto-legge 8 agosto 2013, no 91, convertito, con modificazioni, dalla legge 7 ottobre 2013, n. 112, in materia di accesso aperto all'informazione scientifica', documents available at https://tinyurl.com/2ttxmyhm (last visited 30 June 2022); R. Caso, La libertà accademica e il diritto di messa a disposizione del pubblico in Open Access 1(1) *Opinio Juris in Comparatione*, (2018); R. Caso and G. Dore 'Academic copyright, Open Access and the «moral» second publication right' *European Intellectual Property Review*, (2021), available at https://tinyurl.com/dt65m4r3 (last visited 30 June 2022).

[161] The National Program for Research (2021-2027) was approved with resolution no. 74 of 2020, Official Gazzette general series, 23 January 2021; R. Caso, 'Open Data, ricerca scientifica e privatizzazione della conoscenza', Trento Law and Technology Research Group Research Paper no 48, (2022), 24.

Authority (*Autorità Garante per la protezione dei dati personali*) asked to consider introducing in Art 9-*bis* a more precise reference to Art 105 of the Italian data protection act, decreto legislativo 30 June 2003 no 196 (known as *Codice di protezione dei dati personali*).[162] The referred provision prohibits the use of personal data processed for statistical purposes or scientific research in order to adopt decisions or measures concerning the person, or for personal data processing personal data for scopes of a different nature.

Art 9-*bis*(1) also affirms research data is re-usable in observance with the respect of commercial interests (*interessi commerciali*), and the respect of laws on intellectual property (legge 22 April 1941 no 633) and industrial property (decreto legislativo 10 febbraio 2005, no 30). Looking at these safeguards, one should remember that documents on which third parties have intellectual property rights and industrial rights, with reference to the same aforesaid laws, are already excluded by the scope of application of the decreto in light of Art 3(1)(h). The provisions in Art 9-*bis*(1) seem therefore to mirror the safeguards specified in Art 4(b) and (e) of the Decree, but for the additional reference to commercial interests. Such reference is worth further attention because the subject of trade secrets (*segreti commerciali*), as informed by the Directive (EU) 2016/943, is traditionally framed under the discipline of industrial property in Italy. Trade secrets are disciplined under Arts 98 and 99 of the decreto legislativo no 30/2005. For this reason, trade secrets are already mentioned in Art 9-*bis*(1). One possible interpretation is that the addition should be understood in relation to Art 1(2)(d) of the Open Data Directive, that excludes from the scope of application documents 'such as sensitive data when access is excluded by national access regimes on grounds of national security, statistical confidentiality and commercial confidentiality.' However, if this is so, the Italian transposition should be criticized in making no explicit reference to any specific national access regime. As corroborated by the Senate Dossier[163] the reference seems, however, to be to the final part of Art 10(2) of the Directive, that ambiguously concludes that in the context of research data 'legitimate commercial interests, knowledge transfer activities and pre-existing intellectual property rights shall be taken into account.' In this case, as in the first hypothesis, the Italian provision may be criticized for establishing a limit that appears excessively broad and introduces considerable legal uncertainty.

Art 9-*bis(*2) specifies the conditions under which the re-use rules would apply, in transposition of Art 10(2) of the Open Data Directive. The first requirement provides that research data is 'the result of research activities' that are financed

[162] Autorità Garante per la protezione dei dati personali, Provvedimento no 308 del 26 agosto 2021, Parere sullo schema di decreto legislativo recante 'Attuazione della Direttiva (UE) 2019/1024 relativa all'apertura dei dati e al riutilizzo dell'informazione del settore pubblico', 4.

[163] Dossier no 436, 9 Settembre 2021, 'Apertura dei dati e riutilizzo dell'informazione del settore pubblico', Atto del Governo 284, 20, available at https://tinyurl.com/4467btke (last visited 30 June 2022).

by public funds. Taking into consideration the aforementioned difficulties of interpreting the funding requirement at the national level, it should be considered that no provision within the decreto seems to support a more precise reading of it. However, the interpreter may resort to the legge no 112/2013 that refers to research funded by 50% or more by public funds in relation to (the promotion of) open access mandates for scientific publications.[164] The second requirement recites that data has already been made public, also by archiving in a public database (which represents an addition compared to the Open Data Directive), by researchers, organizations that conduct research activities and organizations that finance the research, by means of a database managed at the institutional level or subject-based database.

Finally, Art 9-*bis*(3) establishes that research data 'complies' with FAIR requirements: findability (*reperibilità*), accessibility (*accessibilità*), interoperability (*interoperabilità*), re-usability (*riutilizzabilità*). By incorporating the requirements in the provision, the Italian legislator seems to have gone beyond that prescribed by the Directive. On closer analysis of the Directive, Art 5 on available formats mentions almost coincident requirements to be applied 'when possible and appropriate', while the FAIR principles are only mentioned in Art 10(1) in relation to open access policies and actions that member States shall support for making publicly funded research data available. Since Art 6 of the decreto on available formats makes fewer requirements mandatory, it seems possible that the introduction of the FAIR requirements in Art 9-*bis*(3) reinforces the conditions for the re-use of research data as compared to other categories of data.

Looking at the first part of Art 6 of decreto legislativo no 36/2006, this prescribes that public administration, bodies governed by public law and public enterprises shall, in addition to making their documents available, make the metadata available 'when possible.' The absence of a more precise obligation in the Italian transposition always to make the metadata available can be considered a missed opportunity, although Art 5 of the Directive prescribes this merely 'when possible and appropriate'. What seems remarkable when comparing Art 6 of the decreto and Art 9-*bis*(3), the reference to FAIR principles in Art 9-*bis*(3) could be interpreted as prescribing an obligation to make metadata available in the context of the re-use of research data. This seems a desirable reading because the principles as originally conceived by their authors should be applied to both.[165]

Closer scrutiny of Art 6 of decreto legislativo no 36/2006 reveals that, other than prescribing the principle of open by design and by default (Art 6(4)), this affirms that data shall be made available according to the definitions of 'machine-readable format' and 'open format' (Art 6(1), referring to Art 2(c-*bis*) and (c-*ter*)), while complying with technical rules to be adopted by the Agenzia per l'Italia Digitale (literally: the Agency for Digital Italy, hereinafter AgID) (Art 6(1), referring

[164] L. 112/2013 was the conversion, with amendments, of decreto legge 8 agosto 2013 no 91.
[165] M.D. Wilkinson et al, n 74 above, 4.

to Art 12).[166] At the time of writing, these have not been updated accordingly but a series of seminars has been organized to prepare the launch of the open consultation on the new draft Guidelines.[167] This is worth mentioning since Art 5 of the Directive refers to formats that are not only open and machine-readable, but also accessible, findable, and re-usable. Finally, as for the other definitional provisions of the decreto, when comparing the decreto and the Directive, the references to the CAD provided by the decreto should also be considered.[168]

Overall, it seems that only the new detailed rules set out by the the AgID will allow for a comprehensive account of the standards, also technical standards, to be applied to research data and the Italian transposition. Therefore, the present contribution is limited to preliminary conclusions, while a more solid understanding of the new rules on research data should be deferred for future work and hopefully will be based on the practical application by relevant research bodies, ie considering empirical data and best practices that will follow. For the time being, the contents of Art 9-*bis* allow the consideration that the rules on research data seem to enhance re-use, compared to other categories of data. As

[166] Agenzia per l'Italia Digitale, 'Linee guida nazionali per la valorizzazione del patrimonio informativo pubblico', (2017), available at https://tinyurl.com/2p86fatd (last visited 30 June 2022). The document is within the objectives of Art 52 CAD.

[167] The seminar series are named 'Linee Guida per l'apertura dei dati e il riutilizzo dell'informazione del settore pubblico nell'ambito della strategia europea e il contesto nazionale in materia di dati' and they are part of the project 'Informazione e formazione per la transizione digitale per l'attuazione del Progetto Italia Login – la casa del cittadino' – PON Governance e Capacità Istituzionale 2014-2020. The fourth and last seminar is currently planned on the 15 June 2022.

[168] The definition of open format is in Art 2(1)(c-*ter*) of d.lgs. 36/2006, that refers to Art 1(1)(l-*bis*) of CAD. The CAD defines open as a format made public, exhaustively documented, and neutral in respect to the technological tools for the fruition of data. This seems partially different from the definition of open format prescribed by Art 2 no 14 of the Directive that establishes the format should be platform-independent and made available without restrictions impeding re-use. The definition of open format is actually similar to the one of open standard format in the Directive, given in Art 2 no 15 and referring to a standard in written form, detailing specifications for the requirements on how to ensure software interoperability. Furthermore, the decreto, contrary to the Directive, also defines open data (*dati di tipo aperto*) referring to the CAD: Art 21(c-*quater*) d.lgs. 36/2006 refers to Art 1(1)(l-*ter*) of CAD. The CAD provides the definition of open data with three key characteristics. First, open data are data available for everyone to use, also for commercial purpose, in a disaggregated format, according to a license or law disposition. Second, they are accessible through means of information and communication technologies, including public and private telematic networks, in open formats (within the meaning of Art 1(1)(l-*bis*) of the CAD), they are suitable for automatic use by computer programs and are provided with the relevant metadata. Third, they are either available at no cost by means of information and communication technologies, including public and private telematic networks, or available at marginal costs for reproduction and divulgation, given Art 7 of the d.lgs. 36/2006, as reformed in 2021, would apply. The decreto also contains a definition of 'data ownership' (*titolarità*) that closely mirrors the one introduced in the CAD after 2016 (Art 2(1)(i)). Art 1(1)(cc) of the CAD affirms that the data owner (*titolare*) is the subject that originally created for its own use or commissioned to another entity the document which represents the data, or the subject that owns (*disponibilità*) the document; the decreto adds the subject is the public body, who may have commissioned the document to another public or private subject. Relevantly, both the definition of open data and data ownership are not prescribed in the Open Data Directive, but they appear to ensure the consistency between the decreto, the CAD and other relevant laws applicable.

for the terms and conditions of re-use, Art 5(6) seems to introduce potential limits, but Art 8 would still prohibit the application of discriminatory conditions.

To complement this analysis on the re-use of research data, it is useful to mention that the provisions on data from cultural establishments in the decreto legislativo no 36/2006 have also been slightly amended by decreto legislativo no 200/2021. One amendment seems to introduce a limit for the re-use of cultural data that is not apparently mirrored in the text of the new Open Data Directive. The reference is to Art 1(2) of the decreto legislativo no 36/2006. The provision reaffirms the principle that the documents should be re-usable for commercial and non-commercial aims. For the documents held by libraries, including university libraries, museums and archives, however, an addition states that the re-use should be authorized according to a series of provisions relating to the Italian law for the protection of cultural goods and landscape (decreto legislativo 22 January 2004 no 42, known as Codice dei beni culturali e del paesaggio, also Codice Urbani) and protection of personal data (decreto legislativo no 196/2003). More precisely, references to a specific authorization according to those two laws were already present in the decreto legislativo no 36/2006 before 2021. The references to the Italian data protection law in Art 1(2) of decreto legislativo no 36/2006 have remained the same, and they namely refer to part II, title II, chapter III of the decreto legislativo no 196/2003 and thus Arts 101-103 on the processing of personal data for historic purposes. The references to the law for the protection of cultural goods and landscape on the other hand have changed. The previous provisions linked to Part II, Title II, Chapter III of Codice Urbani and thus Arts from 122 to 127, regarding the possibility to consult archives and protection of privacy. However, today the link is to Part II, Title II, Chapter I and Chapter III and thus Arts from 101 to 110, regarding all the existing constraints for the fruition of cultural goods. These include most prominently the authorization for the use of the goods (Art 107 Codice Urbani) and fees for its concession and reproduction (Art 108 Codice Urbani).

This amendment can be questioned, since it is not clear the extent to which the reference to such rules – limiting the use of the cultural good – may impact the use of related data. What seems undisputed is that the nature, as well as the rationale, of the rules to be followed for the re-use of cultural data have changed: the mentioned provisions concern limits for the use of cultural goods that do not relate anymore to the protection of privacy, but refer to the need to protect cultural heritage. When the use of the good has commercial purposes, these imply relevant burdens. On the contrary, if the activities are for purposes of study, research, free thought and creative expression, promotion of knowledge of the cultural heritage, they are defined free (*libere*) by Art 108, after this was recently reformed.[169] It

[169] Legge 29 July 2014 no 106 (conversion, with amendments, of decreto legge 31 May 2014 no 83) and legge 4 August 2017 no 124, have modified Art 108(3-*bis*) Codice Urbani; F. Minio, 'La libera riproducibilità dei beni culturali dopo l'emanazione della legge 4 agosto 2017, n. 124 (legge annuale per

also bears emphasis that such limits operate independently from the copyright status of the work, and thus also when the work is in the public domain. For these characteristics, the same provisions of the Codice Urbani are also highly debated – and criticized – in relation to the implementation of the new Art 14 of the Copyright Directive in the Digital single Market, Directive (EU) 2019/790 (CDSMD) seeking to allow free reproductions of works of visual arts in the public domain.[170] Regrettably, the new Art 32-*quater* of the legge no 633/1941, introduced within the implementation of the CDSMD in 2021,[171] specifies that the rule is without prejudice to the provisions on the reproduction of cultural goods set out in the Codice Urbani. This appears to weaken the most recent Government initiatives that support the opening of images of the Italian cultural heritage,[172] and this work appreciates how the newly introduced limits in Art 1(2) of decreto legislativo no 36/2006 may be criticized for the very same reasons.

The relationship between the digitization of cultural heritage, including the circulation of images from the public domain, and the re-use of data from cultural establishments remains inconsistently addressed by the described national laws, as amended. At present, consistent efforts to elaborate guidelines for managing both the reproductions of works of cultural heritage and related data and metadata, while navigating the current framework, can be found in the plan and guidelines for the digitization of cultural heritage provided by the Istituto centrale per la digitalizzazione del patrimonio culturale – Digital Library (part of the national Ministry of Culture).[173] The public consultation of these documents, now open until the 15 June 2022, seems therefore a chance to elaborate more comprehensive policies on the topic.

il mercato e la concorrenza)' *BusinessJus* 76, (2018); M. Modolo and A. Tumicelli, 'Una possibile riforma sulla riproduzione dei beni bibliografici ed archivistici' *Aedon*, (2016); G. Gallo, 'Il decreto Art Bonus e la riproducibilità dei beni culturali' *Aedon* (2014).

[170] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92; M. Arisi, 'Digital Single Market Copyright Directive: Making (Digital) Room For Works Of Visual Art In The Public Domain' 1(1) *Opinio Juris in Comparatione*, 1 (2020).

[171] Directive (EU) 2019/790 was transposed in Italy with decreto legislativo 8 novembre 2021, no 177.

[172] Risoluzione In Commissione Conclusiva di Dibattito 8/00126 of June 2021, available at https://tinyurl.com/2v2w8vyt (last visited 30 June 2022).

[173] Istituto centrale per la digitalizzazione del patrimonio culturale – Digital Library, Ministero della Cultura, 'Piano nazionale di digitalizzazione del patrimonio culturale 2022-2023 and, in particular Linee guida per l'acquisizione, la circolazione e il riuso delle riproduzioni dei beni culturali in ambiente digitale' (2022, version for public consultation), available at https://tinyurl.com/2s9dhf3s (last visited 30 June 2022). The initiative is part of the Piano Nazionale di Ripresa e Resilienza (also known as PNRR and named Italia Domani), that is the italian translation for the Recovery and Resiliency Facility part of the Next Generation EU program, Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I/23. The branch M1C3 of the PNR, dedicated to tourism and culture, entails objectives of digitization of cultural heritage under the strategy 1.1. All documents are available at https://tinyurl.com/3uj2yfmz (last visited 30 June 2022).

However, despite growing interest in how to make cultural heritage more open, in view of the above, following the implementation of the CDSDM and the Open Data Directive in Italy, it seems that national legislator remains rather reluctant to open data from cultural establishments. This frustrates the hopes of those commentators looking favorably at the potential of the PSI rules for cultural digital heritage,[174] while it also seems to dismiss the convergence of policy objectives suggested by the recent Commission Recommendation on a common European data space for cultural heritage. A fundamental discrepancy to be solved in the near future seems to rely on the fact that while current laws on the protection of cultural goods limit the use and re-use of cultural goods for commercial purposes, the PSI rules embrace, and actually promote, the re-use for both commercial and non-commercial purposes.

VII. Conclusions: An Open Directive?

Legal mandates are crucial to fully realize the re-use of publicly funded research data to promote Open Knowledge, for the need to provide relevant subjects with clear obligations and rules that would help them to conduct the complex balance between rights and interests that characterizes the research environment, with primary reference to intellectual property rights and personal data protection rights. From this perspective, the inclusion of research data in the scope of the Open Data Directive should be welcomed as a positive amendment to the PSI rules in the European Union. The new Directive represents a stronger initiative to promote an increasingly harmonized access to publicly funded research, when compared to the previous open access and open science initiatives, lacking a binding nature. Crucially, it also seems that the Open Data Directive will be complemented by a series of even more impactful legislative initiatives on data within the EU Data Strategy that will also address PSI and research data.

Nevertheless, looking more closely at the new PSI Directive of 2019 and the provisions on research data, it may be argued that their open vocation, despite the Directive being entitled after open data, remains at times frustrated by significant and detailed limitations, especially with regard to the relationship with intellectual property law, with detriment to legal certainty. More specifically, while the open data definitions imply that data is free from *legal* and technical barriers,[175] this paper has tried to describe how the new EU PSI rules on research data and, to some extent, data from cultural establishments appear often complex or difficult to interpret. Finally, this entails their scope of application and safeguards largely depend on the national implementation.[176]

[174] M.C. Pangallozzi, 'Condivisione e interoperabilità dei dati nel settore del patrimonio culturale: il caso delle banche dati digitali' *Aedon*, (2020).

[175] F. Zuiderveen Borgesius et al, n 88 above, 2079.

[176] S. Gobbato, n 62 above, 159.

This was confirmed by the analysis of transposed rules in Italy, where relevant uncertainties remain as for the scope of application, ie addressed organizations, and limits of re-use of research data, as well as for the re-use of data from cultural establishments. However, it should still be viewed favorably that the national legislator has addressed research data adopting targeted provisions, to date in the absence of mandatory provisions aimed at opening research data. As mentioned, the detailed rules to be set out by the AgID will allow for a comprehensive account of this reform and its practical application, but it seems already plausible to conclude that the hereby described complex national regulatory framework should be subject to further study in the very near future to complement the analysis sketched by the present paper. The EU project of further promotion of a Data Strategy, including the proposals for the Data Governance Act and Data Act aforementioned, suggests the attempt to strike a balance between openness and closure of data in both the public and private sector, so the Open Data Directive would only be the starting point of a new discussion on open knowledge and public sector information, the interplay of decreto legislativo no 36/2006, decreto legislativo no 33/2013, the CAD, personal data protection and intellectual property.

Essays

European Administrative Law: A Project and Its Methodological Roots

Mauro Bussani*

Abstract

The 'Common Core of European Administrative Law' project, launched six years ago and still ongoing, applies the ground-breaking methodology underpinning the longstanding 'Common Core of European Private Law' research. The basic aim of the 'new' initiative is that of testing, in action, whether and to what extent the comparative legal method successfully developed under the private law-centred project can be applied to the field of administrative law. This paper highlights the scientific premises and methodological roots of the European administrative law research, as well as its promises and challenges.

I. Straddling Public and Private Law: The Birth of a Project

A few years ago, professor Giacinto della Cananea and I started a series of scholarly discussions about current and prospective interactions across private and administrative laws in the European legal framework. In particular, the asymmetry between the private and the administrative law communities in the comparative law approaches and methodologies came as no surprise, droving us to imagine a gap-bridging scholarly initiative. We then developed the idea of applying the groundbreaking methodology underpinning the 'Common Core of European Private Law' project[1] to administrative law. Well aware of the mass of people and resources necessary to parallel the longstanding private law initiative, we applied for a European grant. We launched 'CoCEAL – The Common Core of European Administrative Law' research project. The project was appreciated by the most prestigious European research institution, the European Research Council. It generously funded our project with an 'Advanced Grant' for 'Excellent Science',[2] allowing us to start our in-depth investigations.

One of the aims of the project is that of testing whether, and to what extent, the comparative legal methodology successfully developed under the private law-centred initiative can be applied to the field of administrative law. Accordingly,

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[1] See below, sections II to V.

[2] 'The Common Core of European Administrative Law (CoCEAL)' has been funded by the European Research Council (ERC) under the Horizon 2020 Research and Innovation Programme, 'Advanced Grant' – 'Excellent Science' (G.A. n.694697)'.

this paper highlights the scientific premises and methodological roots of the European administrative law project. It will start by briefly describing the overall architecture (no II), and the methodology (nos III-IV) underlying 'The Common Core of European Private Law' research. After reviewing and dismissing a few critiques that have through time been moved to the 'Common Core' enterprise (no V), the paper will end by sketching the promises and challenges that the adoption of the 'Common Core' methodology entails for the comparative research on European administrative law (nos VI-VII).

II. The Experience of 'The Common Core of European Private Law' Project

'The Common Core of European Private Law' project was initiated in 1993 by professor Ugo Mattei and the author of this paper,[3] and has since then received quite a substantial attention in the comparative law literature.[4] During its life,

[3] For a more extensive and complete presentation of the project, see M. Bussani, '"The Common Core of European Private Law" Project Two Decades After: A New Beginning' 15(3) *The European Lawyer Journal*, 9 (2015); M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law' 3 *Columbia Journal of European Law*, 339 (1997-1998); M. Bussani, M. Infantino and F. Werro, 'The Common Core Sound: Short Notes on Themes, Harmonies and Disharmonies in European Tort Law' 20 *King's Law Journal*, 239 (2009).

[4] Among the many scholarly papers that have discussed the Common Core methodology and results, see, eg, H. Kötz, 'The Common Core of European Private Law' 21 *Hastings International and Comparative Law Review*, 785 (1998); O. Lando, 'The Common Core of European Private Law and the Principles of European Contract Law' 21 *Hastings International and Comparative Law Review*, 809 (1998); E. Hondius, 'The Common Core of European Private Law, Trento, 15-17 July 1999' 8 *European Review of Private Law*, 249 (2000); X. Blanc-Jouvan, 'Reflection on "The Common Core of European Private Law" Project' 1 *Global Jurist Frontiers*, No 1, Article 2 (2001); N. Kasirer, 'The Common Core of European Private Law in Boxes and Bundles' 10 *European Review of Private Law*, 417 (2002); W. Wurmnest, 'Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze – Ansätze internationaler Wissenschaftgruppen zur Privatrechtsvereinheitlichung in Europa' *Zeitschrift für Europäisches Privatrecht*, 714 (2003); D.J. Gerber, 'The Common Core of European Private Law: the Project and its Books' 52 *American Journal of Comparative Law*, 995 (2004); A. Lopez-Rodriguez, 'Towards a European Civil Code Without a Common Legal Culture? The Link between Law, Language and Culture' 29 *Brooklyn Journal of International Law*, 1195 (2004); A.L. Kjaer, 'A Common Legal Language in Europe?', in M. Van Hoecke ed, *Epistemology and Methodology of Comparative Law, Oxford-Portland* (Oxford and Portland, Oregon: Hart Publishing, 2004), 377; N. Jansen, 'Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht' *Zeitschrift für Europäisches Privatrecht*, 750 (2005); A. Colombi Ciacchi, 'Non-Legislative Harmonisation: Protection from Unfair Suretyships', in S. Vogenauer and S. Weatherill eds, *The Harmonisation of European Contract Law. Implications for European Private Laws, Business and Legal Practice* (London: Hart, 2006), 197-198; J.M. Smits, 'Convergence of Private Law in Europe: Towards a New Ius Commune?', in E. Örücü and D. Nelken eds, *Comparative Law: A Handbook* (Oxford-Portland: Hart, 2007), 219, 231; F.J. Infante Ruiz, 'Entre lo político y lo académico: un Common Frame of Reference de derecho privado europeo', in *InDret Privado. Revista para el Análisis del Derecho*, 14, 22 (2008); S. Nadaud, *Codifier le droit civil européen* (Bruxelles: Larcier, 2008), 137; A. Metzger, *Extra legem, intra ius: allgemeine Rechtsgrundsätze im europäischen Privatrecht* (Tübingen: Mohr Siebeck, 2009), 20; N.J. De Boer, 'Theoretical Foundations of the Common Core of European Private Law Project: A Critical Appraisal' 17 *European Review of Private*

the Common Core project has been involving more than three hundred scholars, mostly from Europe and the United States.[5]

In very simple terms, the Common Core project is seeking to unearth the common core of the bulk of European private law within the general categories of contract, tort, and property.[6] The goal is to search for existing commonalities and divergences in the different private laws of Europe (including the United

Law, 84 (2009); L. Antoniolli and F. Fiorentini eds, *A Factual Assessment of the Draft Common Frame of Reference* (Munich: Otto Schmidt/De Gruyter, 2010); L. Miller, 'The Notion of a European Private Law and a softer side to harmonisation', in M. Lobban and J. Moses eds, *The Impact of Ideas on Legal Development* (Cambridge: Cambridge University Press, 2012), 265, 274; T. Tajti, 'The unfathomable nature and future of the European private law project' 2 *China-EU Law Journal*, 69-77 (2013); D. Cabrelli and M. Siems, 'A Case-Based Approach to Comparative Company Law', in Iid, *Comparative Company Law: A Case-Based Approach* (Oxford-Portland: Hart, 2013), 1, 16-18; D. Nikolic, *Увод у систем грађанског права* (*Introduction to the System of Civil Law*) (Novi Sad: University of Novi Sad, Faculty of Law, 16th ed, 2020), 70-71; J. Basedow, 'Comparative Law and Its Clients' 62 *American Journal of Comparative Law*, 821, 829 (2014); F. Fiorentini, 'Un progetto scientifico che stimola e affascina l'Europa: "The Common Core of European Private Law" ' *Annuario di diritto comparato*, 275 (2014); M. Siems, Comparative Law (Cambridge (UK), New York, Melbourne, New Delhi, Singapore: Cambridge University Press, 2018), 31; C. Valcke, *Comparing Law Comparative Law as Reconstruction of Collective Commitments* (Cambridge (UK), New York, New Delhi, Singapore: Cambridge University Press, 2018), 6. See also M. Bussani and U. Mattei eds, *Opening Up European Private Law* (Berne-Münich-Durham (N.C.): Stämpfli, 2007); Iid eds, *The Common Core of European Private Law. Essays on the Project* (The Hague: Kluwer, 2003); Iid eds, *Making European Law. Essays on the 'Common Core' Project* (Trento: Quaderni del Dipartimento di Scienze Giuridiche, 2000). A few anthropological studies have been devoted to the Common Core: see A. Schreiner, 'The Common Core of Trento. A Socio-Legal Analysis of a Research Project on European Private Law', in A. Jettinghoff and H. Schepel eds, *In Lawyers' Circles. Lawyers and European Legal Integration* (The Hague: Elsevier, 2004), 125; G. Frankenberg, 'How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core', in M. Bussani e U. Mattei eds, *Opening Up European Law* n 4 above, 17.

[5] The research carried out under the Common Core flag is published in a dedicated series of volumes by Cambridge University Press (until 2018) and by Intersentia (from 2019 onwards). The CUP series comprises sixteen volumes: *Causation in European Tort Law* (M. Infantino and E. Zervogianni eds, 2017); *Protection of Immovables in European Legal Systems* (S. Martin Santisteban ed, 2015); *The Recovery of Non-Pecuniary Loss in European Contract Law* (V.V. Palmer ed, 2015); *European Condominium Law* (C. van der Merwe ed, 2015); *Unexpected Circumstances in Contract Law* (E. Hondius and H.C. Grigoleit eds, 2014); *Time-Limited Interests in Land* (C. van der Merwe and A.-L. Verbeke eds, 2012*); Personality Rights in European Tort Law* (G. Brüggemeier, A. Colombi Ciacchi, P. O'Callaghan eds, 2010); *Environmental Liability and Ecological Damage in European Law* (M. Hinteregger ed, 2008); *Precontractual Liability in European Private Law* (J. Cartwright and M. Hesselink eds, 2008); *The Enforcement of Competition Law in Europe* (T.M.J. Möllers and A.B. Heinemann eds, 2008); *Commercial Trusts in European Private Law* (M. Graziadei, U. Mattei and L. Smith eds, 2005); *Mistake, Fraud and Duties to Inform in European Contract Law* (Sefton-Green ed, 2005); *Security Interests in Movable Property* (E.-M. Kieninger ed, 2004); *Pure Economic Loss in Europe* (M. Bussani and V.V. Palmer eds, 2003); *The Enforceability of Promises in European Contract Law* (J. Gordley ed, 2001); *Good Faith in European Contract Law* (R. Zimmermann and S. Whittaker eds, 2000). Some books were published by Stämpfli and Carolina Academic Press: see *Property and Environment* (B. Pozzo ed, 2007); *The Boundaries of Strict Liability in European Tort Law* (F. Werro and V.V. Palmer eds, 2004).

[6] For a discussion on the content and scientific legitimacy of such categories, see A. Rosett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law' 40 *American Journal of Comparative Law*, 683 (1992).

Kingdom) – which, as it is well known, originate not only from the civil law and the common law heritages, but also from a number of other Western legal traditions or sub-traditions, depending on the taxonomy adopted.[7]

The project's aim is to draft the outlines of a reliable map of European private law.[8] The future use of this map is of no concern to the cartographers who are drafting it. However, if reliable, the map may be indispensable for whomever is entrusted with drafting legislation or pursuing legal harmonization at the European level. Indeed, for the transnational lawyer, the present European situation is comparable to the one of a traveller compelled to use a number of different local maps, each containing misleading information. The Common Core project wishes to correct this misleading information. It does not wish to force the actual diverse reality of the law into one single map to attain uniformity. The project is not concerned with drafting a city plan in order to affect change or predict future developments. Rather, the Common Core project seeks only to analyze the present complex situation in a reliable way. While a fundamental assumption of the Common Core project is that cultural diversity in the law is an asset, the project neither takes a preservationist approach nor does it push in the direction of uniformity. This is possibly the most important cultural difference between the Common Core project and the other remarkable 'integrative' private law enterprises which have been carried out in Europe in the last forty years with the aim of undertaking city planning rather than 'mere' cartographic drafting.[9]

[7] For instance, Scandinavian systems are considered a tradition per se by Zweigert and H. Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, T. Weir trans, 3rd ed, 1998). Scotland, Malta, and Cyprus are generally considered mixed legal systems. See E. Reid, 'Scotland', in V.V. Palmer ed, *Mixed Jurisdictions Worldwide. The Third Legal Family* (Cheltenham: Cambridge University Press, 2nd ed, 2014), 216; B. Andò, K. Aquilina, J. Scerri-Diacono, D. Zammit, 'Malta', in V.V. Palmer ed, *Mixed Jurisdictions Worldwide* n 7 above, 528; N. Hatzimihail, 'Cyprus as a Mixed Legal System' 6 *Journal of Civil Law Studies*, 38 (2013).

[8] These features bring the 'Common Core' project near to the 'Ius Commune Casebook for the Common Law of Europe' project, an initiative launched in 1994 by the late Professor van Gerven with the aim – in the short term – to produce a collection of casebooks covering the main fields of European law, and – in the long term – to 'uncover common general principles which are already present in the living law of the European countries' (W. van Gerven, 'Casebooks for the Common Law of Europe: Presentation of the Project' 4 *European Review of Private Law*, 67, 68 (1996)). However, what differentiates the two studies lies in their targets and their methods. The Common Core project is aimed at scholars, while the Casebooks project is for teaching purposes. Ultimately, the latter's goal is to provide students with a grasp of foreign law whilst educating them as common European lawyers, even though the casebooks mainly concentrate on the English, French and German systems, including materials from other European systems only if they provide original solutions. The Common Core project, too, may provide some useful materials for teaching purposes, but this is not its primary task. It investigates more specific areas of law, delving deeply into technical problems. Moreover, it focuses on all European legal systems, avoiding – as with the other project – placing an emphasis on systems that are, or could be, considered to be 'leading' or 'paradigmatic' ones.

[9] In the field of contract law, suffice it to think of the *Académie des giusprivatistes européens* and its draft 'Code Européen des Contrats' (G. Gandolfi ed, *Code Européen des Contrats. Avant-projet, Livre premier* (Milano: Giuffrè, 2001), of the so-called Lando Commission and its 'Principles of European Contract Law' (O. Lando and H. Beale eds, *Principles of European Contract Law, Parts I*

III. The Parents of the 'Common Core' Project

Let us go into some details of the 'Common Core' project, starting from its scholarly roots. The 'Common Core' project has two cultural parents: the experience of the Cornell project directed by Professor Schlesinger in the 1960s *(a)* and the dynamic comparative law methodology as principally developed by Rodolfo Sacco over the last forty years[10] *(b)*.

(a) At Cornell, Schlesinger launched his collective comparative research project on the 'Formation of Contracts' in 1957, which resulted in the publication under his general editorship of two monumental volumes in 1968.[11]

The fundamental problem that Schlesinger had to resolve in his worldwide comparative study was how to obtain comparable answers to the questions he wished to pose about different legal systems. The answers had to refer to identical

and II, Combined and Revised (The Hague: Kluwer Law International, 2000)); O. Lando, E. Clive, A. Prüm and R. Zimmermann eds, *Principles of European Contract Law, Part III*, (The Hague: Kluwer Law International, 2003), of the so-called 'Insurance Group' and its 'Principles of European Insurance Contract Law' (J. Basedow et al, *Principles of European Insurance Contract Law* (Köln: Sellier, 2nd ed, 2016), as well as of the so-called 'Acquis-Group' and its 'Acquis-Principles' (Research Group on the Existing EC Private Law ed, Principles of Existing EC Contract Law (Acquis Principles), *Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (Munich: Sellier, 2007); Id, *Contract II. Performance, Non-Performance, Remedies* (Munich: Sellier, 2008). The European Group of Tort Law published its 'Principles of European Tort Law' in 2005 (European Group on Tort Law, *Principles of European Tort Law* (Wien/New York: Springer, 2005), while the Commission of European Family Law has worked out three sets of 'Principles of European Family Law' (K. Boele-Woelki et al, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp: Intersentia, 2004); K. Boele-Woelki et al, *Principles of European Family Law Regarding Parental Responsibilities* (Antwerp: Intersentia, 2007); K. Bole-Woelki et al, *Principles of European Family Law Regarding Property Relations between Spouses* (Antwerp: Intersentia, 2013); K. Boele-Woelki et al, *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in De Facto Unions* (Antwerp: Intersentia, 2019). The efforts of the 'Study Group on a European Civil Code' covered the whole field of the law of obligations, plus certain aspects of the law of movable property, publishing eleven volumes of 'Principles of European Law' (the entire list of volumes is available at https://tinyurl.com/yc6a8ap9 (last visited 30 June 2022)).

But for the professor Gandolfi's initiative, all the projects mentioned above in this note have been relentlessly trying to set a compromise between the common law and the civil law rules to be adopted in the given context (see M. Bussani, 'Faut-il se passer du common law (européen)? Réflexions sur un code civil continental dans le droit mondialisé' *Revue Internationale de Droit Comparé*, 7 (2010)). Far from this approach, and focused on the civil law tradition only, is the 'Code européen des affaires/European Business Code' project promoted by the Association H. Capitant. See the main references at https://www.codeeuropeendesaffaires.eu/.

[10] See R.B. Schlesinger ed, *Formation of Contracts: A Study of the Common Core of Legal Systems*, 2 vols, (New York, London: Ocean publications/Stevens & Sons, 1968); R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law, Installment I' 39 *American Journal of Comparative Law*, 1 (1991).

[11] R.B. Schlesinger (ed), *Formation of Contracts* n 10 above. For a discussion of Schlesinger's (as well as Sacco's) fundamental contributions to comparative law research, see U. Mattei, 'The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence', in A. Riles ed, *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001), 238-256.

questions interpreted as similarly as possible by all those replying. Additionally, the answers had to be self-sufficient, needing no additional explanations and, hence, had to be on par with the most detailed rules. Thus, how to formulate each question in a uniform way to an Indian, a Spaniard, an Italian, a Pole, a German, a Norwegian, and so forth? How to obtain consistency?

These concerns led to working out one of the most critical, and significant methodological features of the research. Each question presented a case that asked the respondents about the results that would be reached under those circumstances, instead of asking about a doctrinal system. Each question was formulated with the aim of taking into account, for every legal system under review, any relevant factor affecting the answer, so as to guarantee that these factors would be considered in, and would therefore be comparable with the analysis of every other system. Thereby, another important objective was achieved. Often, the factors that operate explicitly and officially in one system are officially ignored and considered irrelevant in another system. These factors may still operate secretly, slipping silently in between the formulation of the rule and its application by the courts. For instance, it is well known among private law comparativists that there is a wide area of disagreement between legal systems in which offers are normally irrevocable, and legal systems in which offers are normally revocable. Yet, if one takes into consideration not only rules concerning revocability, but also the related rules dealing with the time when acceptance becomes effective, it becomes evident that courts in systems where offers are revocable are sensitive to the same policy concerns that in other jurisdictions make offers irrevocable.[12]

The work done at Cornell made it clear that, in order to have complete knowledge of a legal system, one cannot trust entirely what the jurists usually say, for there may be wide gaps between operative rules and the rules as commonly stated and described. This is why the Cornell methodology compelled jurists to think explicitly about all the factors that matter, regardless of whether they operate explicitly or implicitly, by forcing them to answer identically formulated questions. As a result, the respondents gave a very different picture of the law than did the monographs, handbooks or casebooks circulating in their own legal systems.

(b) The lesson learned from the Cornell Project was taken on and developed by Rodolfo Sacco. The core of his comparative law methodology is by now well known, having been translated into many languages.[13]

To sum up Sacco's theory,[14] a list, even an exhaustive one, of all the reasons given for the decisions made by the courts is not the entire law. The statutes are not the entire law nor are the definitions of legal doctrines given by scholars. In

[12] R.B. Schlesinger, 'Formation of Contracts – A Study of the Common Core of Legal Systems: Introduction' 2 *Cornell International Law Journal*, 1, 49-50 (1969).

[13] See R. Sacco, 'Legal Formants' n 10 above; R. Sacco, *La comparaison juridique au service de la connaissance du droit* (Paris: Presses Universitaires d'Aix-Marseille, 1991), 33.

[14] For the following remarks, see R. Sacco, 'Legal Formants' n 10 above, 21-27.

order to know what the law is, it is necessary to analyze the entire complex relationship between what Professor Sacco calls the 'legal formants' of a system, those formative elements that make up any given rule of law. Legal formants include statutes, general propositions, particular definitions, reasons, holdings, and so forth. All of these formative elements are not necessarily consistent within each system – only domestic jurists assume such coherence. To the contrary, legal formants usually conflict and may be in a competitive relationship with one another.

From this perspective, we must know not only how courts act, but we must also consider the influences to which the judges are subject. Such influences may have a variety of origins. They may arise because scholars gave wide support to a doctrinal innovation, or because of a judge's individual background. A judge appointed from an academic position will tend to emphasize scholarly opinion more than a judge who was a practitioner. Taking into account the contribution of different legal formants allows one to understand the reasons why similar rules in different legal systems are subject to different applications and interpretations,[15] or why different rules in two systems give rise to largely similar outcomes.[16] By delving into what the legal formants are, and how they relate to each other, we may ascertain the factors that affect operative outcomes, making clear the weight that interpretive practices and rhetoric (grounded in scholarly writings, legal debate aroused by previous judicial decision, etc) have in moulding those solutions. Herein lies the importance of distinguishing between the rule announced by the court and the rule as it is actually applied, or, as a common lawyer would say, between the court's statement of the rule and the holding of the case, the facts on which the court based its result.

All the above makes it clear that the notion of legal formant is more than an esoteric neologism for the traditional distinction between 'loi', 'jurisprudence' and 'doctrine', ie, between enacted law, case law, and scholarly writings. Within a given legal system, a legal rule is not uniform, in part because one rule may be given by case law, one by scholars, and one by statutes. Within each of these sources, there are formants competing with one another. This complex dynamic may change considerably from one legal system to another as well as from one area of the law to another. In particular, each legal system has certain legal formants that are clearly leading to different directions. Differences in formant

[15] One might think, for instance, of vicarious liability of parents for the harms caused by their children, which is enforced much more strictly in France than it is in Italy, despite similar code provisions (see Art 1242(4) of the Code civil – former Art 1384(4) in the original version of the Code – and Art 2048 of the Italian Civil Code): see F. Werro and V.V. Palmer eds, *The Boundaries of Strict Liability* (Durham, NC: Carolina Academic Press, 2004), 399-400; on this point see also M. Bussani, *La colpa soggettiva* (Padua: CEDAM, 1991), esp 16, 180.

[16] A good example is compensation for pure economic loss in Germany and Austria: see M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003), 148-154.

leadership are particularly clear in the distinction between common law and civil law. Awareness of those differences and of how they work in practice explains why the exploitation of a ripe factual approach in the 'Common Core' project is much more than a mere collection of decided cases.

IV. How to Do Projects with Details: The Framework of the Research

As in the Cornell project, the key tool of the 'Common Core' project is the questionnaire. The three principal areas of property, tort and contract, are divided into a number of topics. Each participant, when charged with the responsibility of editing a particular topic volume, is first required to draft a factual questionnaire and to discuss it at the topical sessions during the general meetings that take place every year. Editors of each project are required to follow the general guideline of drafting the questionnaires to a sufficient degree of specificity, so as to require the reporters to answer them in such a way that all of the circumstances affecting the law in his or her system are addressed, including circumstances that may not have any official role but have a practical impact on the operative rules.[17] This method also guarantees that rules formulated in an identical way (eg, by using an identical code provision), but which may produce different applications, will not be regarded as identical.

In answering the questionnaire, every contributor is asked to set her/his answers up on three levels, labeled 'Operative Rules', 'Descriptive Formants' and 'Metalegal Formants'. The level dealing with 'Operative Rules' is designed to be a concise summary of the basic applicable rules to the case and the likely outcome that would be reached under the law of the legal system concerned. Reporters are also asked to indicate whether that outcome would be considered clear and undisputed or doubtful and problematic.

The level called 'Descriptive Formants' has a twofold goal. On the one hand, its aim is to reveal the reasons which lawyers feel obliged to give in support of the operative rule presented under the previous heading, and the extent to which the various solutions are consistent either with specific and general legislative provisions, or with general principles (traditional as well as emerging ones). The reporter is therefore obliged to make clear whether the solution to the hypothetical case is endorsed by the other legal formants; whether all formants are concordant, both from an internal point of view (the source of disaccord may be minority doctrines, including dissenting opinions in leading cases, opposite opinions in scholarly writings, etc), and from a diachronic point of

[17] To make the simplest example, one could think of the impact of the presence/absence of a comprehensive health insurance system on the cases concerning damages for personal injury: for all, see D. Jutras, 'Alternative compensation schemes from a comparative perspective', in M. Bussani and A.J. Sebok eds, *Comparative Tort Law. Global Perspectives* (Cheltenham: Elgar, 2nd ed, 2021), 140, 143-152.

view (whether the various solutions are recent achievements or were identical in the past). On the other hand, the goal at this 'descriptive' level is to understand whether the solution depends on legal rules and/or institutions outside private law, such as procedural rules (including rules of evidence), administrative or constitutional provisions.

Finally, the level called 'Metalegal Formants' asks for a clear picture of the other elements that may affect the operative and descriptive patterns, such as policy considerations, economic factors, social context and values, as well as the structure of the legal process (eg, organization and competence of courts). From the 'Common Core' perspective, these are data a researcher can never leave out whenever the aim is to understand what the law is.

A further note on the reporters is necessary. For the purpose of comparative scholarship, a domestic lawyer is not necessarily the best reporter on his or her own system. A comparative knowledge of the law is of a different nature than an internal knowledge of it. The former is inherently theoretical, and the latter is practical (legal scholars acting within a legal system can themselves be seen as legal formants since they 'make' the law, though indirectly). Hence, a nationally-trained lawyer may control more information about the system than a comparative law-trained (or a foreign) one. Yet, lawyers who have not been exposed to legal cultures other than their own, may be less well-equipped to detect the hidden data and the rhetorical attitude of the system because they are misled by automatic assumptions. This is why the participants in the 'Common Core' project usually are comparativists, and, as comparativists, are asked to deal with the questionnaires as if they had to describe their own law.

That being said, each questionnaire, edited by one or more co-editors, is the embryo of a topical volume and is discussed within one of the three general areas in which the 'Common Core' project is organized, ie, property, contract or tort.[18] The responsibility of setting forth the organization and the agenda of the property, contract and tort areas is allocated to three Chairpersons, who coordinate the progress of the project under their supervision.[19] Scholars participating in one of the three areas work together, discussing the newly proposed

[18] Some questions have arisen regarding the cultural legitimacy of using the labels of property, contract and tort whose meanings themselves differ among legal systems. It is argued that these categories are not homogeneous among legal systems, and therefore, boundary issues may exist. For example, it is indeed easy to observe that 'nuisance' is classified as a tort in common law while 'troubles de voisinage' is classified as property in France (P. Catala and T. Weir, 'Delicts and Torts: A Study in Parallel. Part II' 38 *Tulane Law Review*, 221, 230-236, 243-248 (1964)). Yet, it is sufficient, however, to take a problem-solving approach to see that these two legal categories describe the same problem of boundaries between property rights. An objection to this tripartite scheme seems, therefore, rather formalistic. In this project, contract, tort and property are not used in any positivistic legal sense. Their role, besides that of labels useful to detect the areas of general expertise of the contributors, is to serve as meta-legal containers of problems that are fairly easy to locate on operational grounds.

[19] Current Chairpersons for the three group of property, contract and tort are, respectively, Filippo Valguarnera (Stockholm University), Aurelia Colombi Ciacchi (University of Groningen), Marta Infantino (University of Trieste).

questionnaires to help the editors reach the required level of facticity and the proper semantic level given the nature of each topic. The tentative answers and the progress status of the topical volumes are publicly analysed and discussed during the project's general meetings. Once responses to a questionnaire are complete, the editors of the project proceed to comparatively assess the national reports, and subsequently collect them in a volume, to be published in the dedicated series mentioned above.

V. Caveats

The 'Common Core of European Private Law' project has so far enjoyed a remarkable success, as demonstrated not only by the long list of scientific outputs and by the recognition it received in academic debates, but also by the fact that it is today the most long-standing and largest academic network dealing with European private law.[20] Needless to say, through time, the project has been challenged by a series of critiques that it is helpful to address here, in order to both clarify what the project is about, and clear the ground from possible misunderstandings.

First of all, the title of the project might easily misguide superficial observers – and actually misguided some of them[21] –, suggesting that the reference to 'the common core' of European private law means only, or foremost, a search for commonalities. However, nothing could be farther from the spirit of the project, whose title emphasizes commonalities over differences (not as much as for the sake of brevity) as a tribute to Schlesinger's path-breaking work.[22] Other misunderstandings have given rise to more substantial critiques. For instance, some commentators have stressed that the Common Core project, insofar as it relies upon Schlesinger's and Sacco's theories, as refined and revised by the project's editors, implies a methodological monism that provides too strict a framework for comparative research.[23] Others have challenged the project's methodological reliance on factual questionnaires, either because the factual focus of the questionnaire would allegedly over-emphasize judge-made law,[24]

[20] This is noted, for instance, by L. Miller, 'The Notion of a European Private Law' n 4 above, 274.

[21] For this observation, see F. Fiorentini, 'Un progetto scientifico' n 4 above, 277-278. Even less superficial observers might fall in the same trap: G. Frankenberg, 'How to Do Projects' n 4 above, 35 ('Ultimately they intend nothing less than to seek unity […] and to build a common European legal culture'); M. Reimann, 'Of Products and Process. The First Six Trento Volumes and Their Making', in M. Bussani and U. Mattei eds, *Opening Up* n 4 above, 83, 85-88; O. Lando, *The Common Core of European Private Law* n 4 above, 809.

[22] See above, no 3 (*a*).

[23] F. Fiorentini, 'Un progetto scientifico' n 4 above, 300; G. Frankenberg, 'How to Do Projects' n 4 above, 34-36.

[24] P. Legrand, 'Paradoxically Derrida: For a Comparative Legal Studies' 27 *Cardozo Law Review*, 631, fn 159 (2005) (calling the Common Core volumes 'snippety compilations' accumulating 'selected titbits extracted largely from legislative texts and appellate judicial decisions').

or because the discretionary choices made by specific projects' editors when drafting the factual cases composing the questionnaire would implicitly and inevitably channel national reporters' answers in pre-determined, largely convergent directions.[25] Still others have contested the naïveté of the Common Core project's claim to carry out a 'neutral' and 'purely descriptive' research, noting that this claim not only seems to be based on the over-simplistic assumption that there is something like a 'truth' of legal phenomena that can be described in objective terms by 'neutral' observers,[26] but also it aims at de-politicizing – more or less consciously – the project and its possible outcomes.[27]

Insofar as they refer to the unavoidable limitation of any collective and comparative enterprise – that of compressing individual creativity, biases and ideologies to put them at the service of guaranteeing the comprehensibility and comparability of the results –, these critiques are fully acceptable. As to the rest, the above critiques largely miss the mark. True, the project's methodological guidelines, as well as the ways in which questionnaires are framed and the instruction for a (as much as possible) neutral and descriptive approach, constrain national reporters in their own legal lingo. Yet, it holds equally true that none of these constraints can suppress reporters' subjective and cultural understanding of the factual cases, and their views on how their legal system would handle these cases. When writing their responses, national reporters convey not only their picture of the legal systems they represent, but also their own commitment to given schools of thought, methodological style, deeply embedded beliefs, hopes, and self-narratives. While this might limit, to a certain extent, the heuristic value of the substance of their answers[28] (could it be different?), it also enriches the scientific output of the project with meta-legal information that are usually out of the reach of comparative research activities. In other words, the balance struck by the Common Come project between methodological monism and pluralism, neutrality and political transparency, as questionable as it might be, always serves the project's final aim: getting more, and deeper knowledge.

[25] G. Frankenberg, 'How to Do Projects' n 4 above, 40-47; along the same lines, see also D. Cabrelli and M. Siems, 'A Case-Based Approach' n 4 above, 17-18. On the institutional rather than methodological levels, others have noted that the choice of the themes on which Common Core questionnaires focus could be less fragmented and more coordinated in light of the project's final cartographic aim: M. Reimann, 'Of Products and Process' n 21 above, 83, 92-93.

[26] G. Frankenberg, 'How to Do Projects with Comparative Law' n 4 above, 27, 36.

[27] See for instance D. Kennedy, 'The Politics and Methods of Comparative Law', in M. Bussani and U. Mattei eds, *The Common Core* n 4 above, 131, 175; V. Grosswald Curran, 'On the Shoulders of Schlesinger: The Trento Common Core of European Private Law Project' 11 *European Journal of Private Law*, 66 (2003); G. Frankenberg, 'How to Do Projects' n 4 above, 35 ('the Trentinos reveal their desire to move from archaeological and cartographic work to a colonizing project with political implications for legal science and education').

[28] This is emphasized, for instance, by N. Jansen, 'Dogmatik' n 4 above, 750-773.

VI. From Comparative Private Law to Comparative Administrative Laws

With that aim in mind, our current CoCEAL project started from the assumption that, like in the private law field, any comparative study of administrative law should not limit itself to a comparison between different institutions and rules, but should also entail the understanding of the (technical, political, social, and cultural) factors affecting the daily life of these institutions and rules.[29] The comparative research looks at administrative law in its actual making and re-making over time, as the by-product of many processes – from innovation to imitation and adaptation, to local frameworks and needs. Comparing administrative law institutions as they actually work in two or more jurisdictions, however, may not be enough. This kind of synchronic comparison should go hand in hand with the so-called diachronic comparison, that is, with the study of how institutions and rules changed through time.[30] In the field of administrative law too, comparative knowledge cannot but be historical knowledge, and more precisely knowledge of comparative history.[31]

The principal questions underlying legal comparative research on administrative law – besides those pertaining to the specific topics of the research, on which I will dwell in the next section – therefore are: how can we carry out a

[29] One can appreciate the results achieved so far by the project perusing the volumes already published by Oxford University press in a series devoted to the project and edited by Mauro Bussani and Giacinto della Cananea: G. della Cananea and R. Caranta eds, *Tort Liability of Public Authorities in European Laws*, (Oxford: Oxford University Press, 2020); G. della Cananea and M. Andenas eds, *Judicial Review of Administration in Europe* (Oxford: Oxford University Press, 2021); M. Conticelli and TH. Perroud eds, *Procedural Requirements for Administrative Limits to Property Rights* (Oxford: Oxford University Press, 2022). See also the following note, as well as M. Bussani and G. della Cananea eds, *La responsabilità civile delle autorità pubbliche in Europa. Alla ricerca di un nucleo comune* (Napoli: Editoriale Scientifica, 2022).

The project's website is http://www.coceal.it, and therein one can find further references to the ongoing research activities.

[30] R. Sacco, 'Legal Formants' n 10 above, 24-26. Indeed, a parallel (and, as such, distinct) avenue of our research is the study of some critical features of the evolution of administrative law in Europe. The underlying (and, to comparativists, obvious) idea is that synchronic comparison should go hand in hand with the diachronic comparison, that is, with the study of how institutions and rules have changed through time. For instance, the influence of the Austrian legislation on administrative procedure in other European countries in a period of the history of Europe (1924-1958) that is generally neglected in the 'standard' accounts of public law can enrich our understanding of how legal cultures interact notwithstanding important political changes and differences. In this respect, one can see some offspring of our research as presented in G. della Cananea, A. Ferrari Zumbini and O. Pfersmann eds, *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920-1970)* (Oxford: Oxford University Press, forthcoming 2023); G. della Cananea and S. Mannoni eds, *Administrative Justice Fin de siècle. Early Judicial Standards of Administrative Conduct in Europe (1890-1910)* (Oxford: Oxford University Press, 2021); A. Ferrari Zumbini, *Alle origini delle leggi sul procedimento amministrativo. Il modello austriaco* (Napoli: Editoriale Scientifica, 2020); Ead, 'Judicial Review of Administrative Action in the Austro-Hungarian Empire. The Formative Years (1890-1910)' 10 *Italian Journal of Public Law*, 9 (2018).

[31] S. Cassese, 'L'étude comparée du droit administratif en Italie' 41 *Revue de droit international et de droit comparé*, 879, 886 (1989).

comparative study of differences and similarities between legal systems? How can we draw comparisons? How can we get comparable information, given that every legal system has its own history, its own internal dynamics, its own approach to law, to the State, to the relations between public powers and citizens, as well as its own legal structures, rules and vocabulary?

The answer to these questions comes from the working methodology.

VII. Adjusting the 'Common Core' Methodology for the Comparative Study of Administrative Law

If our CoCEAL project aims at analysing in depth specific administrative law areas, we are well aware that administrative law, as a living, multifaceted legal discipline, expresses most of its characteristic features in the particular sub-systems/domains composing it.

This is why the main topic chosen for this comparative enterprise is administrative procedure. There are two reasons that justify this. First, the emergence of administrative procedures has characterized more or less all European legal systems. Second, the concept of administrative procedure is not neutral, because there is not a single underlying rationale, but a variety of rationales. From this perspective, the question to be addressed is not simply whether national systems of public law subscribe to the same standards of administrative law, such as the duty upon the public administration to give reasons, the duty to hear the addressees of its decisions, and to allow these addressees to have access to the files concerning them. It is also whether, that being the case, similarities are limited to the broad formulations of general principles or do they extend to certain mechanisms, in particular to administrative procedure, viewed as a central element of modern systems of public law.

The CoCEAL project therefore focuses on technical issues within the domain of administrative procedures. For each of the sub-topics, chosen by the general editors as worthy of a full-fledged analysis, one or more volume-editors draft a factual questionnaire. Once approved by the research group selected by the general editors, the questionnaire is answered by (comparative) lawyers for each of the legal systems under examination.[32] The methodological reliance on factual questionnaires enables the editors within this project to avoid any reference to dogmatic concepts that might give rise to diverging interpretations, or that might

[32] We have thought that a study in the field of public law in Europe could benefit from a consideration of EU law, with the *caveat* that we are less interested, in this respect, in the law that the EU applies to its Member States than to the law that applies to its institutions. What characterizes the EU legal order is not just the kind of distinction between public and private law that was drawn from civil law systems. It is also the fact that since the beginning the EU had its own administration and its own administrative law. This may challenge the idea according to which administrative law is consubstantial to the State, but it certainly raises interesting issues about the origins and adaptations of the principles and rules that govern the conduct of EU institutions.

have little (or no) meaning for some reporters. Moreover, the recourse to factual cases facilitates editors' subsequent process of comparing the answers received.

In their answers, reporters describe how each case would be solved under the law of the legal system they are concerned with. Following the Common Core style, reporters are also required, when outlining the possible outcomes, to explain which legal formants – statutes, doctrinal opinions, judicial trends, bureaucratic practices, and so on – are responsible for those outcomes, and to what extent. In other words, reporters have to go beyond conventional wisdom and rhetoric, in order to unveil the factors that, officially or not, have an impact on their legal system's law and outcomes.

Reporters are also asked to highlight any meta-legal factor – be it economic, social, institutional – that might influence the final result. Relevant meta-legal factors might be, for instance: the cost for accessing a given service, the dominant way of conceiving the relationship between citizens, civil society, and the administration, the cultural and sociological milieu of the administrative personnel, the organizational structure of courts, and the model of recruitment and selection of high- and low-ranking public employees. By offering such insights on the legal and meta-legal factors affecting the probable outcome of each case, answers to the questionnaires are expected to shed light on the characteristic features of legal systems, including the plurality of rules co-existing (and conflicting with one another) within them.

To illustrate, answers might provide precious information about the role played, in a legal system, by constitutional and fundamental rights litigation, or about the relationships, in the same legal systems, between the domestic legal order and supra-national ones. Further, answers might delineate the legislative and judicial approach to administrative law, the authority enjoyed by legal science, the contribution given by practitioners (from politicians, to high-ranking officials, to bureaucrats) to the daily law-making of administrative rules, and the way in which administrative law practice and science are perceived by the legal community and society as a whole. Good answers might also enlighten the scope of administrative law in the legal systems under review (especially vis-à-vis sovereign/political acts on the one hand, and other branches of law on the other hand), the structure and composition of the administration, the regime and classification of administrative acts, the principles (if any) informing the administrative procedure and administrative adjudication, as well as the models that are taken as a reference standard for comparison. It is therefore crucial that, when drafting the questionnaires, editors think about the issues and the problems that they want to deal with thoroughly. The selected issues and problems should be understandable by all reporters, and should be instrumental to unveil the (similar and diverging) characteristic features of the legal systems studied.

Questionnaires are made up of ten or eleven cases each, and should cover all the main issues and problems that are at the core of the legal area under

investigation. The cases in the questionnaire should be drafted as short plausible stories, whose ending always poses the same questions: how would this hypothetical case be solved under the concerned legal system? What legal rules would be applicable to the case? What legal remedy, if any, can be pursued by the characters of the story to obtain justice? Which meta- or extra-legal factors are important in determining the final outcome?

As far as we know, this is the first time that a collective effort of this sort is made in the field of administrative law.

The Brussels Effect of the European Union's External Action: Promoting Rule of Law Abroad Through Sanctions and Conditionality

Matteo Di Donato*

Abstract

This paper provides an analysis on the promotion of European law through the external action of the European Union. Starting from Arts 3(5) and 21 Treaty of the European Union (TEU), the research focuses on the instruments and techniques used by the Union to enact its policies. In particular, it tries to demonstrate how different means can provide extraterritorial effects and spread European principles to third countries all over the world. The article focuses on the specific fields of human rights and Rule of Law and takes into account restrictive sanctions – adopted under Art 215 Treaty on the Functioning of the European Union (TFEU) – and trade, cooperation and association agreements – based on Arts 216, 217 and 218 TFUE – highlighting how this kind of instruments can influence the promotion of Rule of Law abroad.

I. Introduction

Nowadays the European Union (EU) faces numerous challenges: the rise of new economic powers around the globe, the effects of the Euro crisis, the relations with its neighbours, the growth of European scepticism and populism, the refugee crisis, the exit of the United Kingdom and the lingering question of terrorism. However it still represents a global actor and a big regulatory power in the international community.[1] The force of its external action cannot be denied; it still displays its ability to influence other national legal orders and to spread its values worldwide. There is no decline of the European Union as many authors have suggested. This paper will demonstrate how the organization is able to implement Rule of Law through its foreign policy. The first part of the article will provide a general framework of the external action of the EU, giving a legal background in accordance with the Treaties provisions. The second part of the paper will examine a particular instrument of this sector: the restrictive sanctions adopted under TEU and TFEU provisions. In different cases the technique has proved its effectiveness and obtained successful goals. The third part of the

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[1] References are to the Introduction of A. Bradford, *The Brussels effect. How the European Union rules the World* (Oxford: Oxford University Press, 2020).

article will focus upon the trade, cooperation and association agreements. The international influence of the Union through its pacts is another way to illustrate what has been called *the Brussels effect*. With the consolidation of conditionality clauses the EU has managed to influence its neighbours and become a global regulatory power. A detailed overview on the phenomenon will be provided, considering the new tendencies of the conditionality mechanism. In the last part the article will analyse the influence of the EU external action under the conception of territorial extension. The EU rarely enacts extraterritorial regulation but usually tries to gain traction over activities that take place abroad; restrictive sanctions and human rights conditionality clauses are an example of this projection. In conclusion the article will assess if this behaviour could represent a new form of imperialism or a way to increase universal standards of life from an international oriented perspective.

II. The External Action of the European Union

Since the first treaties applying to the EU were enacted, the external action of the EU has represented an important tool to affirm its presence as a global player in the international community.[2] The origin of the external action of the Union occurred in the late 1960s, when the six founding members of the European Economic Community (EEC) decided to start a political cooperation (European Political Cooperation - EPC) in relation to foreign affairs matters.[3] Then the Davignon Report[4] and the foundation of the European Council[5] led to the first integration of the sector. The new institution of the European Council

[2] The process of the European integration is well known in literature. This is not the place for a deep analysis. For a historical background see T. Hartley, *The Foundations of European Union Law* (Oxford: Oxford University Press, 2014); M. Doni, *Droit de l'Union Européenne* (Bruxelles: ULB Editions, 2016); R. Schütze, *European Union Law* (Cambridge: Cambridge University Press, 2018); R. Adam and A. Tizzano, *Manuale di diritto dell'Unione Europea* (Torino: Giappichelli, 2020); C. Barnard and S. Peers, *European Union Law* (Oxford: Oxford University Press, 2020); A.M. Calamia, M. Di Filippo and S. Marinai, *Manuale breve di diritto dell'Unione Europea* (Milano: Giuffrè, 2020); U. Villani, *Istituzioni di diritto dell'Unione Europea* (Bari: Cacucci editore, 2020).

[3] In 1969 the six members and founders of the European Economic Community (France, Italy, West Germany, Belgium, Luxembourg and Netherlands) held an Aja summit to discuss the future of the Conference and decided to start a political cooperation in foreign affairs. See P. Koutrakos, 'Common Foreign and Security Policy: Looking back, Thinking Forward', in M. Dougan and S. Currie eds, *Fifty years of the European Treaties* (Oxford: Oxford University press, 2009), 159-179.

[4] Report by the Foreign Ministers of the European Community. To deepen: Davignon Report, *Bullettin of the European Communities*, XI, 1970, 9. Another step forward the integration was the ERTA Judgment (Case C-22/70 *Commission* v *Council of the European Communities*, [1971] ECR, 263) in which the Court recognized new powers with reference to the treaties provisions. This was a clear attempt to strengthen the external projection of the EU into the international community.

[5] The creation of the European Council followed the Paris Summit (which was held in December 1974 and hosted by the President of France Valéry Giscard d'Estaing). The new institution was supposed to be an informal forum for discussion between heads of State and Government. For an official chronology see www.consilium.europa.eu.

was considered a 'purely intergovernmental forum for the member States to discuss international issues of concern in a pragmatic and flexible way and aimed to promote and ensure solidarity and a harmonization of views'.[6] In 1987 the Single European Act created the first legal framework of the external action but it is only with the following treaties that it started to have a clear and precise background (EPCS).[7] Finally the Lisbon treaty put an end to the pillars structure and introduced a new system. It supported the role of the High Representative for Foreign Affairs and Security Policy and created the European Service for the external action (ESEA). Today the external action of the European Union is based on a detailed legal framework, finding regulation in Arts 21-46 (TEU) and in Arts 205-222 (TFEU) and other specific provisions.[8] In this legal structure we can find the principles and values governing the foreign projection of the Union and the instruments and techniques able to enact its policies. It cannot be denied that the evolution of human rights has affected this sector.[9] Art 3 TEU expressly states that

> 'The Union's aim is to promote peace, its values and the well-being of its people (…). In its relations with the wider world, the Union shall uphold

[6] P.J. Cardwell, 'The legalisation of European Union foreign policy and the use of sanctions', in *The Cambridge Yearbook of European Legal Studies* (Cambridge: Cambridge University Press, 2015) XXVII, 287-310.

[7] Since the Treaty of Maastricht (1992), the external action of the European Union has improved its legal framework and enriched its executive tools. It was based on an intergovernmental system. The intergovernmental method was opposed to the community method: it was a more political approach, characterized by intergovernmental decisions. The Treaties of Amsterdam (1997) and Nice (2001) introduced important changes with the creation of the High Representative for Foreign Affairs and Security Policy. However it was the Lisbon Treaty that modified the pillars structure in 2009. Then the external action of the Union experimented a sort of 'legalisation'. For an overview, C. Risi, *L'azione esterna dell'Unione Europea dopo Lisbona* (Napoli: Editoriale Scientifica, 2010); F. Munari, 'La politica estera e di sicurezza comune (PESC) e il sistema delle fonti ad essa relative' *Rivista di diritto dell'Unione Europea*, IV, 941-970 (2011); M.E. Bartoloni, *Politica estera e azione esterna dell'Unione europea* (Napoli: Editoriale scientifica, 2012); A. Lang and P. Mariani, *La politica estera dell'Unione Europea: inquadramento giuridico e prassi applicative* (Torino: Giappichelli, 2014); E. Sciso, R. Baratta and C. Morviducci eds, *I valori dell'Unione Europea e l'azione esterna* (Torino: Giappichelli, 2016).

[8] TEU norms describe the general framework of the external action of the Union and provide rules for the foreign policy and the common security policy. TFEU provisions take into account specific tools and procedures. For a deep analysis see A. Padurariu, 'Note sintetiche dell'Unione Europea', available at www.europarl.europa.eu, with particular reference to the role of the European Parliament in the external action of the Union; P. Van Elsuwege, 'Eu external action after the collapse of the pillar structure: in search of a new balance between delimitation and consistency' *Common Market Law Review*, 987-1019 (2010); A. Missiroli, 'The new EU foreign policy System after Lisbon. A Work in progress' *European Foreign Affairs Review*, 427-452 (2010); P. Perlingieri and F. Casucci, *I trattati dell'integrazione europea* (Napoli: Edizioni scientifiche italiane, 2010); F. Pocar and M.C. Baruffi, *Commentario breve ai trattati dell'Unione europea* (Padova: CEDAM, 2014).

[9] In the opinion of P.J. Cardwell this process of extension and application of human rights and Rule of Law to the external action of the European Union has influenced its 'legalisation', promoting the judicial control of the Court of Justice. See P.J. Cardwell, *The legalisation of European Union foreign policy* n 6 above, 287-310. The point will be analysed further.

> and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights',[10]

respecting the norms of international law, the Charter and the resolutions of the United Nations.[11] However, the main core of the European external action is now represented by Art 21 (TEU) that 'establishes a framework of guiding principles and objectives and externalizes the EU's internal constitutional values'.[12] The norm defines the values that the Union has to reflect in the wider world: democracy, Rule of Law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, those expressed in the United Nations Charter and in other international Conventions.[13] The provision plays an important role for different

[10] That is the literal version of Art 3(1) and Art 3(5) (TEU). The proposition affirms the willingness of the organization to play a leading role as global actor in the international community. It underlines its engagement in the promotion of peace, human rights and Rule of Law worldwide. The same Court of Justice has confirmed this proposal in the recent Case C-72/15 *Rosneft Oil Company*, Judgment of 28 March 2017, available at www.eur-lex.europa.eu. See B. Nascimbene and M. Codinanzi, *Giurisprudenza di diritto dell'Unione europea. Casi scelti* (Milano: Università degli Studi di Milano, 2020).

[11] At the beginning the Union merely implemented the sanctions fulfilling the United Nations resolutions. Then (from 1980) it tried to become more independent, elaborating a freestanding approach. This raised many different problems that will be analysed in para 2. For an example see: M. Savino, 'Kadi II, ultimo atto: un modello globale per la prevenzione amministrativa?' *Giornale di diritto amministrativo*, XI, 1052-1059 (2013).

[12] T.P. Holterhus, 'The Legal dimensions of Rule of Law promotion in Eu foreign policy: Eu treaty imperatives and Rule of Law conditionality in the foreign trade and Development Nexus' *Goettingen Journal of International Law*, IX, 71-108 (2018). On this topic see also: M. Bungenberg and C. Herrmann, *European Yearbook of International Economic Law, Special Issue on Common Commercial Policy after Lisbon* (New York: Springer Eds, 2013), 115; M. Cremona, *Structural Principles in EU external relations law* (Oxford: Hart publishing Ltd, 2018).

[13] Art 21 sets off: 'The Union's action on the International scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the Rule of Law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and International law. The Union shall seek to develop relations and build partnerships with third countries, and International, regional or global organisations, which share the principles, referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of International relations, in order to: [...] (b) consolidate and support democracy, the Rule of Law, human rights and the principles of International law; [...] The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the di different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies'. The framework is legally binding; there is no doubts that the European Court of Justice can now control the correct application of these principles. The point will be discussed later. For an initial overview about the judicial review on this sector see M.C. Lipari, 'La PESC, le misure restrittive e l'evoluzione dell'approccio del giudice europeo' *Contratto e Impresa Europa*, II, 832-845 (2014).

reasons: it seems to apply not only to EU external policies but also to the external aspects of EU internal policies.[14] Although Art 21 contains a general binding rule, there is no doubt that its role has gained much importance, as a legal criterion to found the judicial review of the European Court of Justice on the acts adopted in this sector.[15] Other norms define the external action of the Union, the strategic and leading role of the European Council, the functions of the Commission and of the High Representative for Foreign Affairs and Security Policy and express great attention to the decisions adopted by the Council.[16] They remark that all the acts adopted in this sector cannot assume a legislative form.[17] TEU and TFUE provisions regulate the specific instruments and techniques of the external actions such as the economical, cooperation and association agreements with third countries and the adoption of restrictive sanctions. References are from Art 205 to Art 222 (TFEU).[18] This is not the place for a

[14] In these terms see L. Bartels, 'The EU's human rights obligations in relation to policies with extraterritorial effects' *The European Journal of International Law*, IV, 1071-1091 (2015).

[15] Generally, the judicial review of the European Court is extremely limited or excluded in the external action of the Union. However, we have already analysed the process of legalisation of the sector. There is now a specific provision of the Treaty that sums up this orientation; it is Art 40 (TEU) that reads: 'The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter'. The European Court of Justice can exercise its judicial review on all the acts adopted in this sector.

[16] References are to Art 22: 'On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union. Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the member States. The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties. The High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council'. See also Arts from 25 to 31 (TEU) defining the related procedures. This is not the place to deepen the accurate role of the institutions in the execution of the external action of the Union. We can postpone to S. Gstöhl and S. Schunz, *The external action of the European Union, concepts, approaches, theories* (London: Red Globe Press, 2021); L. Daniele, *Diritto dell'Unione Europea* (Milano: Giuffrè, 2020).

[17] This is what Art 24 underlines. It expressly says that '(…) The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded'. In spite of this statement, it is without a doubt that the decisions of the European Council and of the Council have a binding force; they have to be implemented and executed by member States in their legal order.

[18] In particular, Art 206, regarding the common commercial policy, defines the principles and the aims of this action: 'By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the

detailed analysis of all the policies of the external action of the European Union; for our purpose it is enough to offer a general assessment on its principles and its legal framework.[19] It is undeniable that the EPCS has developed over the years and changed its influence and its force. The Treaties provisions and the strong authority of the European jurisprudence have completely changed a sector that was once dominated by political decisions and intergovernmental methods.[20] The promotion of EU law and values, thanks to the new legal framework, has gained the trust of many actors who do not consider it interference in domestic sovereignty anymore.[21] In the next paragraphs we will focus upon two foreign

progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'. Also Art 208 clearly expresses the values of the economical, financial and technical cooperation, stating that 'Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the member States complement and reinforce each other. Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries. The Union and the member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent International Organisations'. The regulation of humanitarian aids, restrictive sanctions and international agreements is provided in Arts 214, 215 and 216 (TFEU). This is not the place for a detailed analysis of these norms. We can postpone to C. Morviducci, 'I valori dell'azione esterna nella prassi Pesc', in E. Sciso, R. Baratta and C. Morviducci eds, *I valori dell'Unione Europea e l'azione esterna* (Torino: Giappichelli, 2016), 53-85; F. Cherubini, 'I valori dell'Unione Europea nella politica di cooperazione allo sviluppo', in E. Sciso, R. Baratta and C. Morviducci eds, *I valori dell'Unione Europea e l'azione esterna* (Torino: Giappichelli, 2016), 120-141; D. Gallo, 'I valori negli accordi di associazione dell'Unione Europea', in E. Sciso, R. Baratta and C. Morviducci eds, *I valori dell'Unione Europea e l'azione esterna* (Torino: Giappichelli, 2016), 142-166; M. Cremona, 'A quiet revolution: the changing nature of the EU's common commercial policy', in *The European Yearbook of International Economic Law* (New York: Springer, 2017), VIII, 3-34.

[19] For a detailed analysis on the matter see L. Daniele, *Diritto dell'Unione Europea* (Milano: Giuffrè, 2020). Traditional classifications divide the commercial policies, the cooperation and development policies, the association agreements and the EU neighbourhood policy. For a first overview see B.V. Vooren, *EU external relations law and the European Neighbourhood Policy, a paradigm for coherence* (London: Routledge, 2012).

[20] There are different cases that focus upon the 'legalisation' of the external action of the Union. For an example, we can recall the decision Case C-130/10 *Parliament* v *Council*, Judgment of 19 July 2012, available at www.eur-lex.europa.eu, where the Court of Justice made a general statement on the topic, saying that 'The duty to respect fundamental rights is imposed, in accordance with Art 51 of the Charter of Fundamental Rights of the European Union, on all institutions and bodies of the Union'. The same opinion can be found in Case C-581/11 *Muhamad Mugraby* v *Council of the European Union and European Commission*, Order of 12 July 2012, available at www.eur-lex.europa.eu, where the Court does not question the assumption that the organization could be accountable for human rights violations when it is giving execution to association agreements. On this matter, C. Hillion, 'A powerless Court? The European Court of Justice and the Common Foreign Security Policy' *The European Court of Justice and external relations law* (Oxford: Hart publishing, 2014), 65-90; see also L. Bartels, 'The EU's human rights obligations in relation to policies with extraterritorial effects' *The European Journal of International Law*, IV, 1071-1091 (2015).

[21] These effects demonstrate the growing influence of the external action of the Union. Many third countries decide to align their foreign policies to those of the Union. See www.consilium.europa.eu.

policy tools: restrictive measures and international trade, cooperation and association agreements. Then we will analyse how these instruments can uphold and enforce the respect for human rights and Rule of Law worldwide.

III. The Promotion of Rule of Law Through Restrictive Sanctions

Restrictive sanctions are significant measures of the EU foreign policy. Their legal framework is based on Art 215 (TFUE) that define the process of adoption of such sanctions.[22] The provision sets up that when the European Council defines a position, the EU Council, acting by a qualified majority on a joint proposal from the High Representative and the Commission, shall adopt all necessary means to implement the position. Then national member States have to comply with them and empower their effectiveness.[23] The role and the functions of EU sanctions have widened over the years and become more independent from the United Nations authority.[24] As a tool to react to gross and systematic violations of international law, restrictive sanctions now reflect a different way to defend and promote EU law and values.[25] It might be held that that they are not a simple retaliation against third States (or individuals) but a

[22] Art 215 reads: 'Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. The acts referred to in this Article shall include necessary provisions on legal safeguards'. See C. Portela, *European Union Sanctions and Foreign Policy: When and why do they work?* (London: Routledge, 2010); M. Russell, 'EU sanctions: a key foreign and security policy instrument', in *European Parliamentary Research Service* (europarl.europa.eu), Strasbourg (2018).

[23] Different analyses concern the meaning of the word 'shall'. The real meaning of the term is not clear. In reality, when the European Council takes a decision under Art 26 (TEU), the Council have to adopt all the measures to implement that position. See E. Neframi, 'The duty of loyalty: rethinking its scope through its application in the field of EU external relations' *Common Market Law Review*, II, 323-359 (2010). The role of the Parliament in this process is instead limited.

[24] The use of sanctions on the behalf of the United Nations started during the 1960s, against Rhodesia and South Africa. Before the constitution of the European Union, the States of the international community had to implement the measures by themselves. This caused a lot of problems in terms of coherence. For these reasons the EU decided to get the competence and created a legal framework of reference. EU Independent sanctions started in 1980 against the Soviet Union for its invasion of Afghanistan. See P. Koutrakos, *European foreign policy: legal and political perspectives* (Cheltenham: Edward Elgar editions, 2011) and N. Ronzitti, *Coercive diplomacy, sanctions and International law* (Leiden: Brill Nijhoff, 2016).

[25] This is confirmed by the analysis of D. Kochenov and F. Amtenbrink, *The European Union's shaping of the International Legal Order* (Cambridge: Cambridge University Press, 2014) and C. Eckes, 'EU restrictive measures against natural and legal persons: from counterterrorism to third country sanctions' *Common Law Market Review*, IV, 869-905 (2014).

new way to promote the respect of EU values abroad.[26] Owing to their potentially significant effects, restrictive measures need to be submitted to an intense judicial review of the Court of Justice.[27] Over the years EU Institutions have adopted many kinds of sanctions: including limitations on imports and exports of goods or services, embargoes of arms and any related materials on third countries and smart sanctions against individuals concerning freezes of funds and travel bans. The European Union has become the world's second most-active user of restrictive measures, after the United States of America.[28] Smart sanctions are the most common; they are able to target specific groups or individuals and to avoid humanitarian costs for the general population. Until today, the European Union has decided sanctions against or in relation to the Soviet Union (1980), Argentina (1982), China (1989), Myanmar (1990), Iraq (1990), Somalia (1992), Montenegro (1992), Serbia (1992), Haiti (1993), the Democratic Republic of the Congo (1993), Sudan (1994), the United States of America (1996), Afghanistan (1999), terrorism (2001), Zimbabwe (2002), Moldova (2003), Belarus (2004), Iran (2006), North Korea (2006), Lebanon (2006), Guinea (2009), Eritrea (2009), Libya (2011), Bosnia and Herzegovina (2011), Tunisia (2011), Egypt (2011), groups and individuals related to Al-Qaida and ISIL (2011), Guinea-Bissau (2012), the Central African Republic (2013) Syria (2013), South Sudan (2014), Ukraine (2014), Yemen (2014), Russia (2014), Burundi (2015), the non-proliferation of weapons of mass destruction (2016), Venezuela (2017), Mali (2017), the non-proliferation of chemical weapons (2018), cyber-attacks (2019), Nicaragua (2019), Turkey (2019), Russia (2022) and delineated a new global human rights sanctions regime (2020).[29] EU independent

[26] Some examples will be provided later.

[27] To safeguard the correct and homogeneous application of the measures, the decision of the Council is followed by specific regulations. The Council defines the guidelines for the implementation of restrictive sanctions. Then a Working Group reports the Best Practices to the COREPER every year. See R. Wessel, 'Resisting legal facts: are CFSP norms as soft as they seem?' *European Foreign Affairs review*, III, 123-146 (2015). In the opinion of P.J. Cardwell, *The legalisation of European Union foreign policy and the use of sanctions* n 6 above, 17, 'Best practices, which involve multiple actors, non-binding guidelines and continuous dialogue between stakeholders could be considered as an example new governance which has become prevalent in other areas of European integration and cooperation. (…) The institutionalised use of best practices is further evidence of a sophisticated level of engagement between actors which goes far deeper than periodic meetings between foreign ministers in a formal Council setting restricted to discussion of high politics only'.

[28] These data easily explain why sanctions are considered a central element of the external action of the European Union. Their role is increasing: UE measures influence foreign governments to respect human rights and Rule of Law. On the matter see again M. Russell, 'EU sanctions' n 22 above, 1, where he says: 'The declared purpose of EU sanctions is to uphold the International security order as well as defending human rights and democracy standards, by encouraging targeted countries to change their behaviour'.

[29] The measures involve limitations on imports and exports of goods and services, embargoes on arms, smart sanction such as travel bans and assets freeze. The aims are different: they react to gross violations of international law, human rights, Rule of Law, war and humanity crimes, cyber-attacks and terrorism. The list is continuously changing; for an instant update see sanctionsmap.eu. The execution of embargoes on arms is not a competence of the European Union; member States preserve

sanctions have managed to play an important role when the United Nations were unable or unwilling to take appropriate decisions or to defend human rights worldwide;[30] they often have reached successful goals, forcing foreign governments to modify their positions.[31] The alignment of non-member States to the application and execution of EU-imposed sanctions represents further proof of their influence. Many neighbour countries, in fact, tend to implement EU political decisions without being bound by them and this explain the EU leading role to sponsor human rights and Rule of Law. Third States have the possibility to align their position case-by-case, by accepting and listing their name at the end of a Council declaration. More than fourteen States usually agree to foster EU sanctions; it has been noted that

> 'a declaration issued in the name of the EU and its member States with fourteen additional countries in addition to the EU's twenty-eight brings the total to forty two States. This is over a fifth of the total number of States in the United Nations and can be presented beyond Europe as a truly continent-wide view'.[32]

The effectiveness of EU restrictive decisions is so strengthened by the alignment of other States. However in some cases, the Council has adopted a soft approach, avoiding damaging the EU commercial and economical relations with its biggest and strongest partners. Many authors have therefore condemned the Union for its 'double standards, leading to different treatments of countries with similar human rights and democratic records'.[33] Other forms of criticism have regarded their effects on human rights.[34] EU sanctions, instead of US sanctions, do not have extraterritorial effects: they can react to unlawful conducts abroad but they

their prerogatives in this sector (under article 346 TFEU). For this aspect see A. Pietrobon, 'L'efficacia delle misure di embargo sulle armi: luci e ombre dopo Lisbona' *Rivista di diritto commerciale internazionale*, III, 783-807 (2014).

[30] Due to the positions of Russia and China in the Security Council, the United Nations are often unable to adopt restrictive sanctions. See S. Poli, *Le misure restrittive autonome dell'Unione Europea* (Napoli: Editoriale scientifica, 2019).

[31] One of the most successful applications of EU sanctions was that against Iran. It forced the country to sign the nuclear deal in 2015. Although the withdrawal of the United States has changed the effectiveness of the Treaty, UN and EU restrictive measures were able to influence the Iranian engagement.

[32] P.J. Cardwell, *The legalisation* n 6 above, 307. With the withdrawal of the UK from the European Union the number of member States has lowered to 27.

[33] M. Russell, 'EU sanctions' n 22 above, 10. In the same report the author underlines how the European Union (who is participating in sanctions against Iran and North Korea) had a much weaker response to Indian and Pakistan nuclear tests; Iran was targeted more than Saudi Arabia, Tibet, or Russia (after its attack on Georgia) for human rights violations. See also Camera dei Deputati, Ufficio rapporti con l'Unione Europea, *Relazione sullo stato di diritto 2020. La situazione dello stato di diritto nell'Unione Europea e in Italia*, dossier no 44, Roma (2020).

[34] Sanctions inevitably harm the general population of the targeted States and impair the respect of human rights. On the topic see N. Ronzitti, *Coercive diplomacy, sanctions and International law* (Leiden: Brill Nijhoff, 2016).

apply only within the member States territory.[35] To mitigate their effects on human rights, the judicial control of the European Court has improved over the years, becoming more effective under Art 275 (TFUE).[36] Many cases have been reviewed by the ECJ, especially when EU sanctions have been executed on the basis of United Nations resolutions.[37] In different situations, in fact, the Court changed its first approach that considered the implementation of UN measures as a binding activity and claimed for more independence, declaring that the Union has to respect human rights, Rule of Law (as the due process of law), especially when it is fulfilling an international obligation on the basis of the United Nations Charter. The CJEU has increasingly realized a deeper review of sanctions, requiring the respect of individuals' rights of self-defense, access to documents and opposition. This has led to the promotion of a new European

[35] Such as limitations to the exportation and importation of products, assets freeze or travel bans. The European Union has always condemned the United States sanctions for their unilateralism. It reacts in different ways to neutralize them. For a detailed analysis See A.Z. Marossi and M.R. Bassett, *Economic sanctions under International law*, (Berlin: Springer, 2015). L. Lionello, 'La reazione europea alle sanzioni secondarie degli Stati Uniti. Cosa non ha funzionato nel caso iraniano?' *Rivista di diritto del commercio internazionale*, III, 483-514 (2019); C. Beaucillon, *Research Handbook on Unilateral and Extraterritorial Sanctions* (Cheltenham: Ed. Elgar Publishing, 2021). What the European Union complains the most is their unilateral decisions.

[36] The provision of the Treaty reads: 'The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union'. The judicial review is allowed to control the respect of the treaties norms and to monitor the protection of human rights and Rule of Law.

[37] The jurisprudence on restrictive sanctions is rich: we can recall the *Jusuf* and *Kadi* joined cases (Case C-402/05 P and Case C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council and Commission*, Judgment of 3 September 2008, available at www.eur-lex.europa.eu); the *Kadi* (II) (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi* v *Council, Commission and UK*, Judgment of 18 July 2013, available at www.eur-lex.europa.eu) and the *Selmani and Minin* (Case T-299/04 *Selmani* v *Council and Commission*, Judgment of 18 November 2005; and Case T-362/04 *Minin* v *Council and Commission*, Judgment of 31 January 2007, available at www.eur-lex.europa.eu). On the matter and for a deep analysis of case-law see E. Cannizzaro, 'Sugli effetti delle risoluzioni del Consiglio di Sicurezza nell'ordinamento comunitario: la sentenza della Corte di Giustizia nel caso Kadi' *Rivista di diritto internazionale*, 1075-1078 (2008); L. Paladini, 'Le misure restrittive adottate nell'ambito della PESC: prassi e giurisprudenza' *Rivista di diritto dell'Unione Europea*, II, 341-377 (2009); M.E. Bartoloni, 'Articolazione delle competenze e tutela dei diritti fondamentali nelle misure UE contro il terrorismo' *Rivista di diritto dell'Unione Europea*, I, 47-75 (2009); B. Nascimbene and I. Anrò, 'La tutela dei diritti fondamentali nella giurisprudenza della Corte di Giustizia' *Rivista italiana di diritto pubblico comparato*, II, 323-362 (2017). On the phenomenon of International constitutionalism see instead: A. Balsamo and G. De Amicis, 'Terrorismo internazionale, congelamento dei beni e tutela dei diritti fondamentali nell'interpretazione della Corte di Giustizia' *Cassazione Penale*, I, 401- 425 (2009); J. Klabbers, 'International Constitutionalism', in R. Schütze and R. Masterman eds, *The Cambridge companion to comparative constitutional law* (Cambridge: Cambridge University Press, 2019), 498.

constitutional identity that cannot be violated.[38] For these reasons, EU institutions have to comply with different needs: on the one hand they have to react against human rights violations and on the other hand they have to respect EU fundamental principles. On this path, the organization has worked on a new global human rights sanctions model similar to the US Magnisky act.[39] The new regime is linked to the strong legalisation of the sector and classifies the different violations on the basis of their intensity.[40] It has been described as a new way of 'supranationalism'.[41] Although the new reform confirms the key role of restrictive sanctions (as a tool to promote EU values), their mechanism has not really changed and new steps to achieve effective transnational governance should be implemented.

IV. The Promotion of Rule of Law Through Trade, Cooperation and Association Agreements: The Human Rights Conditionality Clauses

[38] The European constitutional theory developed with the Kadi decisions. See M. Savino, 'Kadi II, ultimo atto: un modello globale per la prevenzione amministrativa?' n 11 above).

[39] It is the 'Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act' of 2012, Public Law, 112-208. The new legal framework was adopted on December 7, 2020, and defines the new EU Human Rights Sanctions Regime (EU GHRSR). See the resolution of the European Parliament on the matter 2563/2021 (available at www.europarl.europa.eu). The Parliament 'Welcomes the adoption of the EU Global Human Rights Sanctions Regime (EU GHRSR) as an essential addition to the EU's human rights and foreign policy toolbox, which strengthens the EU's role as a global human rights actor by allowing it to take restrictive measures against legal and natural persons involved in serious human rights violations everywhere in the world; stresses that the new regime must form part of a broader, coherent and clearly defined strategy that takes account of the EU's foreign policy objectives; underlines that the strategy should also seek to identify specific benchmarks that are connected to the objectives, and detail how sanctions can help meet those benchmarks; regrets, however, that the Council has decided to apply unanimity instead of qualified majority voting when adopting the new regime, and reiterates its call for the introduction of qualified majority voting for the adoption of sanctions under the scope of the EU GHRSR. Welcomes the definition of the regime's scope with a list of specific serious human rights abuses, including those related to sexual and gender-based violence, and calls on the Commission to come forward with a legislative proposal to amend the current EU GHRSR legislation by extending its scope to include acts of corruption; urges the European External Action Service (EEAS) and the member States to employ flexibility in adapting it to emerging challenges and threats to human rights or abuse of state or emergency powers, including those related to COVID-19 restrictions or violence against human rights defenders; highlights that the EU's sanctions are targeted at persons violating human rights and are not intended to impact the enjoyment of human rights by the population'.

[40] For an overview, see the Guidelines published by the European Commission, available at www.ec.europa.eu or www.consilium.europa.eu.

[41] See H.V.D. Nienke, 'The proposed EU human rights sanctions regime, a first appreciation' *Security and Human. Rights Review*, XXX, 56-71 (2019); C. Eckes, 'EU global human rights sanctions regime: is the genie out of the bottle?' *Journal of contemporary European studies*, 255-269 (2021); C. Portela, 'The EU human rights sanctions regime: unfinished business?' *Revista General de Derecho Europeo*, 54-71 (2021); T. Ruys, 'The European Union global human rights sanctions regime', in American Society of Comparative Law eds, *International legal materials*, II (Cambridge: Cambridge University Press, 2021), 298.

Since the Lisbon Treaty, the European Union has been fully considered an actor of the international community.[42] It has the power to sign agreements and respond to its own obligations; in some cases the organization is also accountable for the damages caused by its own conduct.[43] The legal personality of the Union has given it the possibility to promote its relations with third States through international agreements. Their process of adoption refers to Art 218 TFEU: the Council authorizes the opening of the negotiations, defines directives and decides the signature of the agreements; the Commission or the High Representative of the Union for Foreign Affairs and Security Policy (which depends on the subjects) have the role to lead the negotiations. Generally, the European Parliament gives only an opinion but there are specific cases in which its consent is required.[44] Member States do not participate to the negotiations but when the content of the Treaty interfere with their national competences they can sign the agreements with the European Union Institutions.[45] Over the years international agreements have represented an important tool for the external action of the Union; as a matter of fact two types of pacts have been tied the most: the trade and the association agreements.[46] These instruments of foreign policy have promoted the reduction of poverty and the respect of human rights and Rule of Law.[47] Until today the European Union has in force

[42] Art 47 TEU reads that 'The Union Shall have legal personality'. Before the Lisbon Treaty, the European Court of Justice had already recognized the nature of the organization. For a historical background see L.J. Smith, 'The legal personality of the European Union and its effects on the development of space activities in Europe', in *Yearbook on Space Policy* (Vienna: ESPI, 2010), 199 and U. Villani, *Istituzioni di diritto dell'Unione Europea* (Bari: Cacucci editore, 2020).

[43] EU treaties have provided for the extra-contractual liability of EU Institutions. See Art 340 (TFEU). They refer to the general principles of the member States. For a deep analysis on the matter see R. Manko, 'Actions for damages against the EU' *European Parliamentary Service Research* (2018).

[44] Art 218 (TFEU) lists different situations. The consent of the European Parliament is required in case of: 1) association agreements; 2) agreements on the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; 3) agreements establishing a specific institutional framework; 4) agreements with important expenses; 5) agreements regarding the ordinary legislative procedure. Usually the Council decides with a qualified majority, but in some cases it adopts the unanimity rule. Commercial and cooperation policies can be implemented not only through international agreements but also through legislative acts, in accordance with the principles and the aims of the external action. See Arts 207, 209 and 212 (TFEU).

[45] On this topic see N. Zipperle, EU International Agreements. An analysis of direct effect and judicial review pre and post Lisbon (Switzerland: Springer Nature, 2017).

[46] Trade agreements are a classical tool of the external action. Association agreements tend to implement the cooperation with neighbourhood States. They support their adhesions to the Union.

[47] For a historical review see A. Lucchini, *Cooperazione e diritto allo sviluppo nella politica esterna dell'Unione Europea* (Milano: Giuffrè, 1999); F. Bonaglia, A. Goldstein and F. Petito, 'Values in EU development cooperation policy', in S. Lucarelli and I. Manners eds, *Values and principles in European Union foreign policy* (London: Routledge, 2007); A. Sari, 'The conclusion of International Agreements by the European Union in the context of the ESDP' *International and Comparative Law Quarterly*, 53-86 (2018); S. Angioi, *La tutela dei diritti umani e dei principi democratici nell'azione esterna dell'Unione Europea* (Napoli: Edizioni scientifiche italiane, 2012); T.P. Holterhus, 'The Legal dimensions of Rule of Law promotion in Eu foreign policy: Eu treaty imperatives and Rule of Law

more than ninety international agreements with third countries; they have been signed under the Common Foreign and Security Policy framework.[48] Among the association agreements we can report those with Tunisia (1998), Israel (2000), Jordan (2002), Chile (2003), Egypt (2004), Algeria (2005), Lebanon (2006), Albania (2009), Iraq (2012), Costa Rica (2013), El Salvador (2013), Honduras (2013), Guatemala (2013), Nicaragua (2013), Serbia (2013), Bosnia and Herzegovina (2015), Kosovo (2016), Georgia (2016), Moldova (2016) and ACP (2021).[49] Many of these Conventions contain the human rights conditionality clauses. The conditionality mechanism was firstly introduced with the IV Lomé Convention in the late 1990s, after a period of deep discussion between the parties involved.[50] Art 5 of the Pact considered the respect of human rights and Rule of Law as a fundamental element of its execution and used the Covenant as a tool to promote those rights.[51] Some years later EU Institutions confirmed this conception.[52] The conditionality mechanism can be seen in a positive or negative perspective: the first

> 'involves promising benefits if the recipient country meet the conditions (such as grants, loans, technical or financial aids), the second concerns the withdrawal and the suspension of the agreement if the recipient country does not'.[53]

Nowadays conditionality clauses contain complementary provisions that clearly define the mechanism and the measures that can be adopted.[54] Over the years the organization has promoted two kinds of conditionality clauses: the Baltic

conditionality in the foreign trade and Development Nexus' *Goettingen Journal of International Law*, IX, 71-108 (2018).

[48] The list can be found at www.eur-lex.europa.eu and www.ec.europa.eu.

[49] The catalogue is continuously changing. For a complete update see ec.europa.eu. The historical Cotonu Agreement was signed in Benin in 2000. The new Convention focuses upon the respect of democracy, human rights, Rule of Law, peace and security and contains a specific procedure of reconciliation (art 96). On the point see www.consilium.europa.eu.

[50] The first Lomé Convention was signed in 1975. Due to the continuous violations of human rights in Uganda, the Organization started to imagine a way to punish these events. The conditionality mechanism was discussed and new clauses were created. On this issue see A. Lucchini, *Cooperazione e diritto allo sviluppo nella politica esterna dell'Unione Europea* (Milano: Giuffrè, 1999).

[51] For a deep analysis see U. Villani, *Studi sulla protezione internazionale dei diritti umani* (Roma: Luiss University Press, 2005).

[52] See A. Moberg, 'The condition of conditionality – closing in on 20 Years of Conditionality Clauses in ACP-EU relations', in P. Wahlgren ed, *Law and Development, Scandinavian Studies in Law* (Gothenburg: Gothenburg University Publications, 2015), 60.

[53] The European Union adopts these measures against third States but it always tries to help the local population. See E. Fierro, 'The EU's approach to human rights conditionality in practice', in *International studies in human rights* (Leiden: Brill Nijhoff, 2003), 100.

[54] The EU Charter of Fundamental Rights expresses the respect for human rights and Rule of Law; sometimes there are references to other International Conventions. Conditionality clauses are now considered essential; this allows the parts to invoke and apply the sanctions.

and the Bulgarian one.[55] The first mechanically implies the suspension or the withdrawal from the agreement in the case of gross and systematic violations of human rights and Rule of Law; the second instead provides different techniques of dialogue and reconciliation. It is the Bulgarian model that has developed the most.[56] The European Union has adopted conditionality mechanisms in the IV Lomé Convention, the Baltic and Bulgarian trade agreements, the Cotonu and ACP association agreements, the cooperation agreements with Pakistan, Tajikistan, Chile, Vietnam, Indonesia, Syria, Israel, Albania, Serbia, Bosnia and Herzegovina, Lebanon, Ukraine, Colombia, Canada, Japan and Singapore.[57] The norms support the respect of democracy, human rights, Rule of Law and impose the non-proliferation of chemicals and weapons of mass destruction.[58]

[55] Baltic clauses were created during the trade agreements with Estonia, Latvia and Lithuania in 1992; the Bulgarian clauses during the cooperation agreements with Bulgaria in 1994. See P. Di Franco, 'Il rispetto dei diritti dell'uomo e le condizionalità democratiche nella cooperazione comunitaria allo sviluppo' *Rivista di diritto europeo*, III, Istituto Poligrafico e Zecca dello Stato, 549 (1995); K.E. Smith, 'The use of political conditionality in the EU's relations with third countries: how effective?' *European foreign affairs review*, 253-274 (1998); S. Angioi, 'Genesi ed evoluzione del principio di condizionalità nella politica commerciale e nella politica di cooperazione allo sviluppo della Comunità Europea' *Rivista internazionale dei diritti dell'uomo*, 458-492 (1999); F. Cherubini, 'I valori dell'Unione Europea nella politica di cooperazione allo sviluppo', in E. Sciso, R. Baratta and C. Morviducci eds, *I valori comuni dell'Unione europea e l'azione esterna* (Torino: Giappichelli, 2016), 120-141; M. Ventura, 'Condizionalità e realizzazione progressiva degli obblighi internazionali nelle relazioni esterne dell'Unione Europea' *Rivista di diritto internazionale*, I, 45-78 (2019).

[56] See E. Cannizzaro, 'The scope of EU foreign powers. Is the EC competent to concluded Agreements to third States including human rights clauses?', in E. Cannizzaro ed, *The European Union as an actor in International relations* (London: Kluwer Law, 2002), 297; P.A. Pillitu, 'Le sanzioni dell'Unione e della comunità europea nei confronti dello Zimbabwe e di esponenti del suo governo per gravi violazioni di diritti umani e dei principi democratici' *Rivista di diritto internazionale*, 55-110 (2003); C. Pinelli, 'Conditionality and enlargement in light of EU constitutional development' *European Law Journal*, 354-362 (2004); L. Bartels, *Human rights conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005); A. Di Marco, 'Le clausole di condizionalità politica alla luce degli accordi di associazione. Il recente caso siriano' *Quaderni Europei*, 1 (2011); D. Gallo, 'I valori negli accordi di associazione dell'Unione Europea', in *I valori dell'Unione Europea e l'azione esterna* (Torino: Giappichelli, 2016), 142-166.

[57] About the conditionality mechanism in neighbourhood policies see S. Poli, 'The principle of conditionality in the EU's relations with neighbours: its evolution and reconciliation with the principle of consistency' *Rivista di diritto dell'Unione Europea*, III, 525-550 (2018); M. Ventura, 'Condizionalità e realizzazione progressiva degli obblighi internazionali nelle relazioni esterne dell'Unione Europea' *Rivista di diritto internazionale*, I, 45-78 (2019). The list is not exhaustive. Here some references V. Dimier, 'Constructing conditionality: the bureaucratization of EC development aid' *European Foreign Affairs Review*, 263- 280 (2006); R. Petrov, 'Constitutional challenges for the implementation of association Agreements between the EU and Ukraine, Moldova and Georgia' *The European public law*, 241-254 (2015); L. Mckenzie and K. L. Meissner, 'Human rights conditionality in European Union trade negotiations: the case of the EU – Singapore FTA' *Journal of Common Market Studies*, IV, University Association for contemporary European Studies, 832-849 (2017); L. Mckenzie and K.L. Meissner, 'The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes' *Journal of European public policy*, IX, 1273- 1291 (2018); S. Velluti, *The EU as a global actor in an "inter-polar" World. The role of the EU in the promotion of human rights and International labours standards in its external trade relations* (Netherlands: Springer, 2020).

[58] The Syrian association agreement displays many innovations. For a detailed analysis see A. Di

The most famous conditionality clause is Art 96 of the ACP Agreements; it is a Bulgarian provision that defines different procedures of reconciliation. The European Union exploited the conditionality mechanism many times with ACP States, influencing their respect for human rights and avoiding prejudicial effects on the local population.[59] Nowadays the conditionality mechanism reflects the importance that EU Institutions confer on this tool to promote EU values and Rule of Law abroad. However rarely the Council has activated the mechanism, reacting to undemocratic regime changes or human rights violations.[60] The unanimity rule and the economical and financial interests lead the European Union to prefer other measures, like the targeted sanctions or the unilateral General Systems of Preference that easily provide more flexible solutions.[61] It cannot be denied that the consolidation of this tool has increased the influence of the external action of the Union.[62] The conditionality mechanism has been adopted also between member States and this can explain its strong political success.[63]

V. The Influence of EU External Action: Some Brief Reflections

The external action of the Union promotes human rights and Rule of Law in its relations with third countries. The values that the organization spreads abroad are referred to the fundamental rights of the Nice Charter and to the thick or substantial conception of Rule of Law.[64] They are part of the EU

Marco, 'Le clausole di condizionalità' n 56 above, 1.

[59] For a deep analysis on the topic see: A. Lucchini, Cooperazione e diritto allo sviluppo nella politica esterna dell'Unione Europea (Milano: Giuffrè, 1999); and L. Bartels, Human rights conditionality in the EU's International Agreements (Oxford: Oxford University Press, 2005).

[60] The European Union does not have an obligation. On this point see A. Moberg, 'The condition' n 52 above; D. Donno and M. Neureiter, 'Can human rights conditionality reduce repression? Examining the European Union's economic Agreements' *The review of International Organizations*, XXIII, 335-357 (2018); I. Zamfir, 'Human rights in EU Trade Agreements. The human rights clause and its application' *European Parliamentary Research Service* (2019).

[61] The European Union spends a lot to promote new agreements. For these reasons, the organization is usually reluctant to adopt sanctions. The GSPs are instead more convenient: they involve unilateral decisions and have more flexible mechanisms. However the international community does not consider GSPs in a good perspective. This is not the place for a deep analysis of the tool. For a detailed study see I. Borchert, P. Conconi, M. Di Ubaldo and C. Herghelegiu, *The pursuit of non-trade policy objectives in EU trade policy* (Firenze: European University Institute Research, 2020) and www.ec.europa.eu.

[62] For a general analysis see S. Lütz, T. Leeg, D. Otto and V.W. Dreher, *The European Union as a global actor. Springer texts in Political Science and International Relations* (Switzerland: Springer, 2021).

[63] EU Regulation 2092/2020 related to a general regime of conditionality for the protection of the financial statements of the Union. See M. Blauberger and V. Van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?' *Journal of European integration*, I, 1-16 (2021).

[64] As is well known, many authors suggest that what should actually be promoted is a thick, rather than a thin, conception of the Rule of Law. This is not the place for a detailed analysis on the

competences[65] and tend to have extraterritorial effects.[66] This result can explain the rise of the European Union as a global regulatory power; the organization has frequent recourse to its external action in terms of territorial extension, not to export its norms but in order to gain regulatory traction over activities that take place abroad.[67] What makes EU territorial extension more suitable than the US foreign policy is that it is internationally oriented; it refuses to apply unilateralism and purses objectives that have been universally agreed upon. Human rights conditionality clauses and restrictive sanctions display extraterritorial effects without developing extraterritorial regulation. This is what has been called the *Brussels Effect*.[68] European Institutions influence many countries and regional organizations that finish to adopt EU regulations in different ways 'by engaging in legislative borrowing, replicating EU Institutions, citing legal concepts and principles developed by European Courts'.[69] For these reasons the European Union has been described not only as a power in trade but also as a power through trade, emphasizing the EU ability to promote democracy, Rule of Law, human rights and other international standards.[70] The Brussels effect vests the EU with ideational power.[71] Having worked well for Europe, the EU principles and values

conception of Rule of Law but we can postpone to P. Holterhus, 'The Legal dimensions of Rule of Law promotion in Eu foreign policy: EU treaty imperatives and Rule of Law conditionality in the foreign trade and Development Nexus' *Goettingen Journal of International Law*, 71-108 (2018); I. Vianello, 'The Rule of Law as a relational principle structuring the Union's action towards its external partners', in *Structural Principles in EU external relations law* (Oxford: Hart pub Ltd, 2018), 225; M. Carta, *Unione Europea e tutela dello Stato di diritto negli Stati membri* (Bari: Cacucci editore, 2020); A. Sandulli, 'The double face of the Rule of Law in the European legal order: an administrative law perspective' *European papers – a journal on law and integration*, available at www.europeanpaeprs.eu, 237- 253 (2020).

[65] The duty to respect fundamental rights is imposed (in accordance with Art 51 of the Charter) on all institutions and bodies of the Union, especially when they are applying the EU legislation. See L. Bartels, 'The EU's human rights obligations in relation to policies with extraterritorial effects' *The European Journal of International Law*, 1071- 1091 (2015). With an opposite view see E. Cannizzaro, 'The EU's human rights obligations in relation to policies with extraterritorial effects: a reply to Lorand Bartels' *The European Journal of International Law*, IV, 1093-1099 (2015). See also E. Kassoti, 'The extraterritorial applicability of the EU Charter of fundamental rights: some reflections in the aftermath of the Front Polisario saga' *European Journal of legal studies*, II, 117-141 (2020).

[66] When enacting its policies, the European Union has to make human rights impact assessments. For an analysis of the risks of EU policies see C. Ryngaert, 'EU Trade Agreements and human rights: from extraterritorial to territorial obligations' *International Community Law review*, XX, 374-393 (2018). It is discussed if the EU external action can produce extraterritorial effects. It could be more appropriate consider the phenomenon under the concept of territorial extension.

[67] For an analysis on EU extraterritoriality effects see J. Scott, 'Extraterritoriality and territorial extension in EU law' *American Journal of Comparative Law*, 87-126 (2013).

[68] The regulatory power of the EU Institutions and its ability to influence other national legal orders has been called 'the Brussels effect'. See A. Bradford, *The Brussels effect. How the European Union rules the World* (Oxford: Oxford University Press, 2020). Here the author uses a restrictive definition, considering only the effects of market regulations.

[69] ibid 67.

[70] S. Meunier and K. Nicolaidis, 'The European Union as a conflicted trade power' *Journal of European Public Policy*, 906-925 (2006).

[71] This is the opinion of I. Manners, 'Normative power Europe: a contradiction in terms?'

represent a model to follow for other States that wish a similar level of integration and wellness.[72] Some authors criticize this behaviour and consider the EU practice as a new form of imperialism that tries to expand its normative identity abroad.[73] However it cannot be denied that the external action of the Union is internationally oriented to spread universal values and to serve global welfare (according to rules and objectives of worldwide Conventions). For these reasons, it has been said that 'the EU's comparative advantage lies in the power of its values and that the European experience has a great deal to offer'[74] and that 'the EU soft power of ideas and example should become one of the central pillars of the world'.[75]

VI. Conclusion

In spite of numerous issues, the European Union is still alive. This paper demonstrates the reached role of the organization into the international community and its ability to safeguard and promote human rights and Rule of Law worldwide. Restrictive sanctions and conditionality clauses have obtained successful results and their unceasing adoption is a proof of their persuasive influence. Although some improvements need to be made, 'the Brussel effect' is still exercising its normative power throughout the world and cannot be considered a simple form of a new imperialism. The international orientation of the EU foreign policy explains the willingness of the Union to increase awareness and human rights standards within third countries. The main purpose of the European Union is not to rule the world but to serve global welfare. The organization will continue to exercise its guidance not transplanting its own norms but through the influence of its action and through the participation in international institutions, transnational bodies and intergovernmental networks. The same European Court of Luxembourg will contribute to promote the thick conception of Rule of Law with judgements that will be a form of inspiration for foreign Courts. All the tools discussed in the paper can widely confirm this tendency and arise the hope for a better future. Restrictive sanctions and

Common Market Law Review, 235-258 (2002).

[72] This is the opinion of A. Arena, *Primacy: three (not so) unshakable certainties about a foundational principle of EU law* (New York: Conference at Columbia University, 2017).

[73] R.A. Del Sarto, 'Normative empire Europe: the EU, its borderlands and the Arab Spring' *Journal of Common Market Studies*, IV, 215-232 (2016). Against the EU's use of sanctions and conditionality see M. Bussani, *Il diritto dell'Occidente. Geopolitica delle regole globali* (Torino: Einaudi, 2010), 94-112; N.K. Dutta, 'Tradeoffs in Accountability: Conditionality Processes in the European Union and Millennium Challenge Corporation', in S.E. Merry, K. E. Davis and B. Kingsbury, *The Quiet Power of Indicators. Measuring Governance, Corruption, and Rule of Law* (Cambridge: Cambridge University Press, 2015), 156-196, and M. Bussani, 'Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law' *American Journal of Comparative Law*, 701-744 (2019).

[74] J.M. Barroso, 'Europe's rising global role', available at www.theguardian.com (2007).

[75] J. Stiglitz, 'Opinion on the EU's global role', available at www.theguardian.com (2007).

conditionality clauses should be implemented but their effectiveness is already trying to change the world. We do not know what will happen in the years ahead or whether the European Union will manage to face its external and internal conflicts and maintain its role into the international community but 'the Brussels effect' has already improved the life of millions of people, inspiring everyday policies for the protection of Rule of Law and fundamental human rights.[76] We hope it will foster the challenges of tomorrow and promote regulations that will transform global commerce, climate and the environment and consumers' health, improving international standards of life all over the world. Will God save 'the Brussels effect'?

[76] Agreeing with this view is A. Bradford, n 68 above. The EU extraterritorial effects on activities that take place abroad have improved many consumers' rights in areas such as competition law, data regulations, products liability and environmental protection.

Essays

Smart Contracts Operating on Blockchain: Advantages and Disadvantages

Ettore William Di Mauro*

Abstract

Moving on from the current national and transnational legal framework, the article will attempt to analyse the potential and critical issues arising from the application of blockchain and smart contracts to legal relations, especially for the protection of the so-called weak contracting party. The need to identify which rules to adopt implies a fundamental choice between the options of (a) considering smart contracts not only as an advanced technological tool but also as a means for carrying out the activity that must in any case be traced back to the person who benefits from and answers for it, and (b) the science fiction like scenario, but perhaps not that much, of enhancing the ability of smart contracts to make choices and therefore to be responsible for the activity performed.

I. Blockchain: Supporting Technology

The inspiration for smart contracts[1] is rooted in vending machines. Smart contracts are by no means a recent development[2] in that as far back as the late 1990s they began to spread rapidly in the United States with the advent of a supporting technology based on shared data ledgers: blockchain.[3]

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[1] The term 'smart contract' was coined by N. Szabo, 'Smart Contracts: Building Blocks for Digital Markets', available at https://tinyurl.com/muwd5jpc (last visited 30 June 2022), defining the new phenomenon as 'a set of promises, including protocols within which the parties perform on these promises' and recognising in the vending machine the precursor of the automatic contract; R. De Caria, 'The legal meaning of smart contracts' *European Review of Private Law*, 735 (2019).

[2] F. Di Ciommo, 'Smart contract e (non-)diritto: il caso dei mercati finanziari' *Nuovo diritto civile*, 257 (2019), recalls that, as Nick Szabo – who coined the expression 'smart contract' – made clear, he was inspired by vending machines for their invention. According to J.G. Landels, *Engineering in the ancient world* (Berkeley: Constable, 1978), 203, the idea thereof was conceived in even earlier times by a Greek mathematician.

[3] A. Cinque, 'Gli "smart contract" nell'ambito del "FinTech" e dell'"InsurTech" ' *Jus Civile,* 187 (2021); F. Bruschi, 'Le applicazioni delle nuove tecnologie: criptovalute, "blockchain" e "smart contract" ' *Il Dirittio industriale*, 162 (2020); I. Ferlito, '"Smart Contract". Automazione contrattuale ed etica dell'algoritmo' *Comparazione e diritto civile*, 661 (2020); P. Sanz Bayón, 'Key Legal Issues Surrounding Smart Contract Applications' *KLRI Journal of Law and Legislation*, 63 (2019); F. Scutiero, 'Smart contract e sistema di diritto, un connubio tutta da definire' *Il Foro napoletano*, 113 (2019); K. Kelly, *Out of control. La nuova tecnologia delle macchine, dei sistemi sociali e del mondo dell'economia* (Milan: Apogeo, 1996), 6; G. Rinaldi, 'Smart contract: meccanizzazione del contratto nel paradigma della blockchain', in G. Alpa ed, *Diritto ed intelligenza artificiale* (Pisa: Pacini giuridica, 2020), 343 ; J. Feliu Rey, 'Smart Contract Concepto, ecosistema y principales cuestiones de

The purpose of blockchain technology is to store and manage transactions by creating a database that is distributed to users of a network.[4] In other words, the blockchain is a shared[5] public ledger that can automatically update itself on each of the nodes in the chain, which are in fact computers. This ledger is made up of blocks, each of which represents a number of transactions and the source and time of execution of which are permanently recorded in an inalterable form using asymmetric key cryptography[6] and timestamping.

Derecho privado' *La Ley mercantil*, 1 (2018); M. Knecht, 'Mandala: A Smart Contract Programming Language', available at academia.edu (2021); M. Giuliano, 'La blockchain e gli smart contracts nell'innovazione del diritto nel terzo millennio' *Diritto dell'informazione e dell'informatica*, 989 (2018); F. Faini, 'Blockchain e diritto: la "catena del valore" tra documenti informatici, smart contracts e data protection' *Responsabilità civile e previdenza*, 297 (2020); G. Pascuzzi, *Il diritto dell'era digitale* (Bologna: il Mulino, 2002), 61-66; A. Palladino, 'Dall'homo loquens all'homo smart: la contrattualistica del terzo millennio' *De Iustitia*, 90 (2020); K. Werbach and N. Cornell, 'Contracts ex machina' *Duke Law Journal*, 314 (2017); F. Delfini, 'Blockchain, Smart Contracts e innovazione tecnologica: l'informatica e il diritto dei contratti' *Rivista di diritto privato*, 167 (2019); C. Pernice, 'Smart contract e automazione contrattuale, potenzialità dei rischi della negoziazione algoritmica nell'era digitale' *Diritto del mercato assicurativo e finanziario*, 117 (2019); G. Lemme, 'Gli smart contracts e le tre leggi della robotica' *Analisi giuridica dell'economia*, 133 (2019); A.U. Janssen and F.P. Patti, 'Demistificare gli smart contracts' *Osservatorio del diritto civile e commerciale*, 32 (2020); E. Giorgini, 'Algorithms and Law' *The Italian Law Journal*, 131 (2019); A. Nuzzo, 'Algoritmi e potere' *Analisi giuridica dell'economia*, 39 (2019); L. Avitabile, 'Il diritto davanti all'algoritmo' *Rivista italiana per le scienze giuridiche*, 315 (2017); A. Cinque, 'Gli "smart contract" ' n 3 above; F. Bruschi, 'Le applicazioni delle nuove tecnologie: criptovalute, "blockchain" e "smart contract"' *Il Diritto industriale*, 162 (2020).

[4] L. Parola et al eds, 'Blockchain e smart contract: questioni giuridiche aperte' *Contratti*, 681 (2018); M.L. Perugini and P. Dal Checco, 'Introduzione agli smart contracts', available at papers.ssrn.com (2016); M. Giaccaglia, 'Considerazioni su blockchain e smart contracts (oltre le criptovalute)' *Contratto e impresa*, 941 (2019); G. Rinaldi, 'Smart contract' n 3 above, 347; R. De Caria, 'The legal meaning of Smart Contracts' n 1 above, 732-733, defines blockchain as 'a type of database that takes a number of records and puts them in a block (rather like collating them on to a single sheet of paper). Each block is then 'chained' to the next block, using a cryptographic signature. This allows block chains to be used like a ledger, which can be shared and corroborated by anyone with the appropriate permissions'; K. Werbach and N. Cornell, 'Contracts ex machina' n 3 above, 324; P. Cuccuru, 'Blockchain ed automazione contrattuale. Riflessioni sugli smart contract' *Nuova giurisprudenza civile commentata*, 107 (2017); F. Faini, 'Blockchain e diritto' n 3 above, 299; M. Manente, 'Blockchain: la pretesa di sostituire il notaio' *Notariato*, 211 (2016).

[5] Distribution of a database to users of a network is the distinctive feature of distributed ledger technology (DLT), of which the blockchain is the best-known example. Distribution of operation of a database contrasts, as a concept, with the traditional logic of centralised data management (eg at banks and financial institutions for financial data and public bodies for personal data, etc) involving data that is controlled by one (single and superior) central authority. There is no hierarchy in DLT because all of the network users are on the same level and can only act with the consent of the majority.

[6] With asymmetric cryptography, each user has two keys (a public one and a private one) that are uniquely related. The private key is kept secret by its owner, while the public one, which is generated by the private key, is made available to the other party. The private key is required in order to decrypt the message that has been encrypted with the public key. This technical encrypting mechanism underpins the digital signature. The public key can be shared openly, eg as a result of it being sent along the network to someone else. But whilst it can encrypt a message, it cannot decodify it. Only the corresponding private key can decodify or release the hold on messages codified with the public key, hence the requirement for secrecy. Cf M. Giuliano, 'La blockchain' n 3 above, 999-1000.

Each block is irreversibly linked to the previous one using a particular logarithmic operation called a hash function, which forms the chain of blocks – ie the blockchain – that all of the nodes on the network have access to and can inspect. Before being added to the chain, each block is checked, validated and encrypted by a certain number of nodes, which are called miners, using a complex mathematical process.[7]

The blockchain means that the data relating to the transactions that have been recorded on a network can be verified, approved and archived on all of the nodes of that network, without a third party or central authority having to be involved.

The absence of a centralised control system could give rise to the risk of double spending, ie the same virtual resources being used for a number of transactions. The solution adopted is to have not one single platform but blocks of shared recording. Once executed, the transaction becomes permanent and cannot be altered unless there is a new and opposite transaction and agreement by all of the enabled nodes or the majority of them, which is difficult to achieve.

Smart contracts are widely used on this technological platform.

However, it should be clarified that the relationship between smart contracts and blockchain is not inseparable, ie smart contracts can work regardless of blockchain.

It was noted that '*what gets bundled up as blockchain technologies, smart contracts, encryption and distributed ledger, are separate concepts*'.[8] The three may be implemented together, but they do not need to be.

An automated recurring payment that someone sets up with a bank is an example of a smart contract. Blockchain is not needed to gain the benefits from smart contracts, because the latter can be set up on a centralised system, a bank's system or a platform dedicated to smart contracts used by individuals.[9]

Despite their independence, smart contracts find fertile ground in blockchain not only for simple operations, such as the transfer of virtual currency from one

[7] The hash is the 'chain' that links the individual blocks by means of a digital mechanism that is used in order to compress data in a specific format of certain length. The hash is a sequence of letters and numbers obtained by using a particular calculation algorithm to the sequence of bits that form the file or message. All the algorithm does is sequentially scan, one after another, all of the bytes that make up the file and, step by step, extract a series of 'intermediate hashes', each of which depends on the previous one, producing the definitive hash once the scanning is complete. Each step in the processing is influenced by the previous steps and establishes the status of the subsequent ones. This means that simply by modifying just one bit of the whole file alone, a different hash is obtained. To establish whether a message has been modified, all that is required is to see if the hashes of the two messages are the same. Another important feature of the hash is that it is impossible to trace back to the original message. The algorithm is designed to ensure that no one can work out what generated a certain hash. In the blockchain, the hash is used to create a link between each specific block. This is done by writing the hash of every previous block in the next block along the chain. When a block is created, a hash of data is created within it, and the hash that is created includes the hash of the previous block.

[8] H. Halaburda, 'Blockchain revolution without the blockchain', available at https://tinyurl.com/2eycn233 (last visited 30 June 2022).

[9] ibid 5.

person to another, but also for structurally more complex operations, such as the transfer of a virtual good (which nothing prohibits being the digital representation of a tangible good) introduced into the system against the transfer of a price.

In these cases, the transactions executed by the smart contracts form the blocks of the blockchain structure.

But first things first.

II. The Smart Contract Protocol

In spite of how fluid the subject is, the idea of this present work is to seek to reconstruct the advantages and disadvantages of this new technology within the Italian legal system in order to establish whether it is possible to consider the notion of contract in the legal sense as still very much alive or whether by contrast that notion is to be treated as outdated in view of the application of such technologies in everyday life.

Starting from the provisions of the so-called Simplification Decree of 2018, Italian law has sought to give a legal definition of smart contract. However, the legislation in question has chosen to regulate only smart contracts operating on blockchain, thus recognising only some of their potential.

It is common ground that smart contracts mean computer protocols whereby, once a pre-established condition that can be checked by computer has been satisfied, the system automatically executes a certain task.[10]

An example is a sale with reservation of title. Where payment of the price is not recorded, title is automatically transferred back to the seller in execution of the setting of the algorithm, thereby avoiding the time and cost of court proceedings.

The contractual terms are converted into computer code and put on a logical ledger based on the 'if-then' dual concept, pursuant to which where a certain event takes place ('if') it has the digitally related effect ('then'), which might be performance of the clauses agreed upon or adjustment of the payment or

[10] C.D. Clack et al, 'Smart contract templates: foundations, design landscape and research directions', (2021), available at *researchgate.net*, define smart contracts as 'an automable and enforceable agreement. Automatable by computer, although some parts may require human input and control. Enforceable either by legal enforcement of rights and obligations or via tamper-proof execution of computer'; K. Werbach and N. Cornell, *Contracts ex machina* n 4 above, 338. There are many definitions given by American authors. Just to name a few: R. O'Shields, 'Smart contracts: legal agreements for the blockchain' *North Carolina Banking Institute*, 179 (2017), defines it as 'self-executing electronic instructions drafted in computer code'; T. Hingley, 'A smart new world: blockchain and smart contracts', (2021), available at https://tinyurl.com/ym9rsjvp (last visited 30 June 2022), as 'a piece of computer code that is capable of monitoring, executing and enforcing an agreement' (last visited 30 June 2022); G. Jaccard, 'Smart contracts and the role of law', available at papers.ssrn.com, (2021) as 'a software, with which computer code binds two, or multitude, of parties in view of the execution of predefined effects, and that is stored on a distributed ledger'; L.W. Cong and Z. He, 'Blockchain disruption and smart contracts', available at papers.ssrn.com, (2021) as 'digital contracts allowing terms contingent on decentralized consensus that are self-enforcing and tamperproof through automated execution'.

service in line with events that have occurred in the meantime.[11]

Automation can be total or partial,[12] and the power to choose the algorithm, the content and the system used to establish that the pre-established conditions have been met is also liable to change.

In the case of a smart contract operating on blockchain, the input (the 'if') can be based on internal elements of the contract (eg a deadline) or elements outside the contract (eg the price of the goods), and can concern data from public or institutional sources or data which call for an extended system of confirmation: in the former case, the code will result in this check being carried out; in the latter case, checks to establish that the event has taken place will require help from an 'oracle',[13] a platform that 'interrogates' the network on the condition to be checked and provides confirmation when a certain number of positive responses has been reached.[14] In other words, it is a program outside the blockchain that links the network to reality.

An example can better clarify how smart contracts work on the blockchain platform. Let's take the sale of a licence. Suppose A creates a smart contract to which he annexes information x (the licence), programming so that the licence is transferred once €y has been paid.[15] The smart contract is launched by A into the blockchain. If B wants to purchase the licence, he simply has to interact with the protocol created by A and transfer €y. Once the conditions of the exchange have been satisfied, the algorithm releases the licence to B and transfers the money to A.[16] These movements will be recorded and shared on all nodes of the chain, which will be able to preserve their history and the origin of the licence.

This mechanism can also be used in the supply and payment for electricity and

[11] C. Pernice, 'Smart contract' n 3 above, 119, states that, once inserted in the blockchain, the smart contract works autonomously and becomes unstoppable. The implementation of the agreement is beyond the control of man who cannot interrupt performance.

[12] The parties can decide whether to entrust all or part of the execution to the algorithm.

[13] P. Cuccuru, 'Blockchain' n 4 above, 111, describes oracles such as blockchain-independent programs that monitor external data the decentralised system, such as share prices indices or the seller database, and communicate to the linked smart contracts the fulfilment of relevant conditions; L. Piatti, 'Dal Codice civile al codice binario: blockchain e smart contracts' *Ciberspazio e diritto*, 334 (2016); F. Scutiero, 'Smart contract' n 3 above, 122.

[14] C. Pernice, 'Smart contract e automazione contrattuale' n 3 above, 119.

[15] According to M.L. Perugini and P. Dal Checco, 'Introduzione agli smart contract' n 4 above, 10, the use of blockchain functions imposes some technical limits: indirect electronic commerce services cannot be performed by computer. All clauses relating to goods or services which, although purchased online, have a tangible consistency or must be performed in the material world are excluded from the application such as, for example, the delivery of a book or the cleaning service of an office or a restaurant; P. Cuccuru, 'Blockchain' n 4 above, 108, is of a different opinion. He believes that any type of information can be represented digitally, inserted and stored in a blockchain: intangible assets, rights, personal data, licences, wills and company financial statements.

[16] C. Pernice, 'Smart contract e automazione contrattuale' n 3 above, 120, describes another example. Let's imagine that a web marketing agency asks some sponsors to finance their video by guaranteeing a certain number of views in a given time. In this case, a smart contract will be created with an oracle that will have the task of communicating the number of views on YouTube.

in the use of musical content. In the first scenario, the reading on the electricity meter, which, in this case, is the oracle that links the code to external reality, results in an accurate bill being issued and payment being made promptly. In the second scenario, the users of a musical platform (eg UjoMusic) can listen to music and pay the artists directly, without having to go through an intermediary.[17]

The fact that a series of conditions is established, with the steps that each party is required to take being set out in detail once those conditions are met, means that in performing the contract, an immediate and automatic response is obtained from the system, without any kind of assessment[18] or intermediation.

This description seems to limit smart contracts to mere computer programs that execute performance already agreed in a pre-existing contract and that have little to do with the creation of the contract itself. However, it is necessary to verify whether it is possible to consider smart contracts as something more than that and give them legal relevance for the purposes of the formation of contracts.[19]

III. Attempts at Classification

Before embarking on an analysis of the regulatory framework, Italian legal scholars have long debated the legal nature of smart contracts, regardless of whether or not they are used on blockchain platforms.

The impact of information technology on the world of trade has led some in the academic legal world to the conclusion that what we are in fact witnessing here is the decline of the notion of agreement, in the sense that reciprocal dialogue between the parties is gradually disappearing and being replaced by substitutes for linguistic and verbal communication or by a simple exchange of payments and services, to the extent that the contract itself can be broken down into a combination of two unilateral steps, producing an '*exchange without agreement*'.[20]

[17] L. Parola et al, 'Blockchain e smart contract: questioni giuridiche aperte' n 4 above, 685.

[18] F. Scutiero, 'Smart contract e sistema di diritto' n 3 above, 123.

[19] S. Orlando, 'Profili definitori degli "smart contracts"', in R. Clarizia ed, *Internet. Contratto e persona, Quale futuro?* (Pisa: Pacini editore, 2021), 48.

[20] N. Irti, *Norma e luoghi. Problemi di geo-diritto* (Roma-Bari: Editori Laterza, 2006), 182, specifies that 'the decline of the agreement, resulting from the crisis of word and dialogue, reduces the contract to a combination of two unilateral acts: lawful acts, of expounding and preferring, requiring only the referability to an author and the natural capacity of understanding and volition. The parties to the exchange take decisions, which arise and remain separate'; G. Lemme, 'Gli smart contracts' n 3 above, 140 confirms Irti's thought, believing that the latter 'predicts the passage from *homo loquens* to *homo videns*: from the one who, through dialogue, contributes to the formation of the contract, to the one who passively suffers, without expressing himself with the spoken language, a hetero-formation of the contractual content'; A. Palladino, 'Dall'homo loquens all'homo smart' n 3 above, 2 (2020), believes that the needs of homo digitalis have been oriented towards the more complete objectification of the exchange, preferring dynamics aimed at reducing the element of the will and power of the parties to affect the negotiating structure, in order to mitigate the risks associated with information asymmetry and negotiation costs; U. Breccia, *Sub art. 1321*, in E. Gabrielli ed, *Commentario del codice civile* (Torino: UTET giuridica, 2011), 7; V. Roppo, *Il contratto del duemila* (Torino: Giappichelli

Other legal scholars deny that smart contracts are contractual at all, maintaining that they are merely as a tool for the conclusion and management of agreements, but nothing more. [21]

In essence, smart contracts are viewed as a translation into computer language of a contract, the performance of which is self-executing, which has been concluded in the traditional way for forming an agreement.[22] From this perspective, the functional advantage of using a smart contract lies solely in the fact that it could provide for an indefinite number of clauses that establish, at a given moment and taking into account the actual circumstances, what they parties' respective performance consists of. In other words, simple but highly digitalised vending machines.

Following in the footsteps of the academic legal world in America,[23] other

editore, 2011), 25. *Contra* G. Oppo, 'Disumanizzazione del contratto?' *Rivista di diritto civile,* 525 (1998). On this point see also P. Perlingieri, 'Metodo, categorie, sistema nel diritto del commercio elettronico', in Id ed, *Il diritto dei contratti fra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 652; C.M. Bianca, 'Acontrattualità dei contratti di massa?' *Vita notarile*, 1120 (2001).

[21] F. Di Ciommo, 'Blockchain, smart contract, intelligenza artificiale (IA) e "trading" algoritmo: ovvero, del regno del non diritto' *Rivista degli infortuni e delle malattie professionali* (2019), states that 'when the contract is concluded exclusively through the activity of one or more software programs, the automated ascertainment of the factual prerequisites for its conclusion will have to take place in accordance with rules predetermined by the parties in a framework contract or, in any case, in some form of contractual arrangement'; L. Parola et al, 'Blockchain' n 4 above, 685. Consider, for example, the purchase of a licence to use a work of intellectual property, or the transfer of any other data, such as the preferences of a certain category of people, inferred from their online activities, for advertising purposes. Suppose that A creates a smart contract, to which he attaches information x (the licence or the preferences), scheduling it to be transferred upon the fulfilment of certain conditions (eg a counter-performance in virtual currency y), and launches the protocol on a blockchain. At the moment when B intends to obtain x, it interacts with the protocol created by A, transferring, if the terms of the exchange are accepted, the sum y. As the terms of the exchange are fulfilled, the smart contract algorithm releases x to B and transfers y to A, eliminating the time gap between the linked performances, as well as any room for wilful default by the parties. The mechanism mimics escrow. See C. Pernice, 'Smart contract e automazione contrattuale' n 3 above, 133-134.

[22] D. Di Sabato, 'Gli smart contracts: robot che gestiscono il rischio contrattuale' *Contratto e impresa,* 378 (2017).

[23] For American jurists, smart contracts entail real contracts every time they contain an exchange of promises from which a *do ut des* and a contractual intention can be deduced. Cf S. Aceto di Capriglia, 'Contrattazione algoritmica. Problemi di proliferazione e prospettive operazionali. L'esperienza "pilota" statunitense' *federalismi.it*, 6-7 (2019); I. Ferlito, ' "Smart contract" ' n 3 above, 12. Other authors believe that smart contracts are independent of law: A. Savelyev, 'Contract law 2.0: 'smart' contracts as the beginning of the end of classic contract law', available at reaserchgate.net, 17 (2021); V. Zeno Zencovich, "Smart contracts', 'granular norms' and non-discrimination', H. Busch and A. De Franceschi eds, *Data Economy and Algorithmic Regulation: A Handbook on Personalized Law*, available at papers.ssrn.com, 1 (2020); R. Pardolesi and A. Davola, ' 'Smart contract': lusinghe ed equivoci dell'innovazione purchessia' *Il Foro Italiano*, 297 (2019); F. Di Ciommo, 'Smart contract e (non-)diritto. Il caso dei mercati finanziari' *Nuovo diritto civile*, 257 (2019); Id, 'Blockchain, smart contract, intelligenza artificiale (AI) e "trading" algoritmico: ovvero, del regno del non diritto' *Rivista degli infortuni e delle malattie professionali*, 1 (2019); P. Cuccuru, 'Blockchain ed automazione contrattuale' n 4 above, 110.; A.J. Kolber, 'Not-so-Smart Blockchain contracts and artificial responsibility' *Stanford Technology Law Review*, 198 (2018).

legal scholars[24] instead argue that smart contracts are capable of completely replacing contracts that are formed in accordance with traditional methods and that the computer code comprises the entire contract. Smart codes are legally binding upon the parties in accordance with Art 1372 of the Italian Civil Code and are, it is argued, thus self-sufficient, self-executing and self-imposed, with the result that they are conceivably beyond reach in terms of control by States and relevant legal jurisdiction.

An argument that is easier to accept, and closer to standard practice, is that they are part of the traditional legal system, highlighting a lack of conformity between the agreement reached by the parties and the codified protocol and, therefore, the need for the addition of further elements, of necessity, which express the parties' intention.[25] This position is based on the split contracting model or hybrid agreement, which involves a contract being drawn up at the same time in natural language together with a copy in code, or inclusion, in the wording of the contract, of certain codified and self-executable parts.[26]

Standard practice usually involves the contract being drawn up by means of a web interface, ie a form that contains (i) the wording in natural language and (ii) the parameters that can be put in computer code that relate to information to be obtained from external sources for any conditions that performance and/or amendment of the contract are subject to.[27]

IV. The Advantages

The possibility of encrypting information and making it permanent, traceable and self-executing, through the combined use of smart contracts with blockchain, has aroused the interest of the general public in these technologies enticed by the prospect of obtaining greater independence, savings and certainty as to transactions compared to traditional systems.[28]

In these terms smart contracts bestow definite advantages.

[24] M. Giuliano, 'La blockchain' n 3 above, 989; M. Durovic and F. Lech, 'The Enforceability of Smart Contracts' *The Italian Law Journal*, 493 (2019).

[25] L. Parola et al, 'Blockchain' n 4 above, 681; F. Di Ciommo, 'Blockchain' n 21 above, 4; F. Faini, 'Blockchain e diritto' n 3 above, 297; A. Stazi, *Automazione contrattuale e "contratti intelligenti"* (Torino: Giappichelli editore, 2019), 161; A. Palladino, 'Dall'homo loquens' n 3 above, 90. On the relevance of fulfilment in smart contracts, I. Ferlito, '"Smart contract"' n 3 above, 17.

[26] A. Stazi, *Automazione contrattuale* n 25 above, 161; V. Pasquino, 'Smart contracts: caratteristiche, vantaggi e problematiche' *Diritto e processo*, 245 (2017); P. De Filippi and A. Wright, *Blockchain and the Law: The Rule of Code* (Cambridge: Harvard University Press, 2018), 76-78; M. Giaccaglia, 'Il contratto del futuro? Brevi riflessioni sullo smart contract e sulla perdurante vitalità delle categorie giuridiche attuali e delle norme vigenti del Codice civile italiano' *Tecnologie e diritto*, 113 (2021).

[27] Often referred to as a smart contract but which, from a legal point of view, constitutes only the part relating to automatic performance.

[28] C. Pernice, 'Smart contract e automazione contrattuale' n 3 above, 121.

It does in fact seem that smart contracts based on blockchain technology can keep the risk of default to a minimum.[29] Trust in the voluntary performance of the counterparty becomes irrelevant when performance of the agreement is entrusted to a computer network that is very difficult to influence. Once launched in the blockchain, the smart contract is independent of a change of heart of a party because it only follows the instructions given to it automatically.[30]

A 'traditional' contract is guaranteed and protected by its legally binding character determined by an external normative source. In other words, as long as one of the parties is willing to suffer the legal consequences of its behaviour, it is basically free not to fulfil the signed contract.[31]

By contrast, in smart contracts, the effectiveness and guarantee of performance of the relationships derive directly from the code layer in which they are executed and the platform that hosts them, in our case, blockchain.[32]

The fact that a computer program can foresee innumerable variables, thereby 'neutralising' the risk of contingencies and ensuring definite fulfilment in the timeframe and manner envisaged by the algorithm, is an undoubted advantage. Upon the occurrence of a condition envisaged by the algorithm, the effect is inevitable because it is automatic.[33]

There could be various benefits to a mechanism along these lines. For example, firstly, the risk of fraud is drastically reduced: given that proper performance by A is dependent upon and inseparable from proper performance by B, the terms of the agreement are performed at the same time, which is ideal. So it would be impossible, for example, for one of them to withhold the payment of €y without delivering the goods x as promised, or for the payment of €y to be annulled once in receipt of x.

Secondly, performance of the agreement makes it possible to dispense with the intermediation of third parties, with a consequent reduction in costs and the possibility of error, with a drop in expensive litigation, the outcome of which always remains uncertain.[34]

[29] L. Parola et al, 'Blockchain e smart contract' n 4 above, 687; F. Scutiero, 'Smart contract e sistema di diritto' n 3 above, 127-129; E. Mik, 'Smart contract: Terminology, Technical Limitations and real-world complexity' *Law, Innovation and Technology*, 14-15 (2017).

[30] P. Cuccuru, 'Blockchain ed automazione contrattuale' n 4 above, 112.

[31] ibid 112; C.J. Goetz and R.E. Scott, 'Liquidated damages, penalties and the just compensation principle: some notes on an enforcement model and a theory of efficient breach' *Columbia Law Review*, 554 -558 (1977).

[32] The implicit normative character in digital ecosystems has been conceptualised by L. Lessig, *Code and other Laws of Cyberspace* (New York: Basic Books, 1999), 1; Id, *The future of ideas: the fate of the Commons in a connected world* (New York: Vintage, 2001), 246, specifies that a 'code layer' or a 'logical layer' is 'the space where code decide show content and applications flow, and where code could control how innovation develops'.

[33] D. Di Sabato, 'Gli smart contracts' n 22 above, 398.

[34] Cf R. De Caria, 'The legal meaning of smart contracts' n 1 above, 740-741; A. Savelyev, 'Contract law 2.0: "Smart" contracts as the beginning of the end of classic contract law' *Information and Communication Technology Law*, 18 (2017).

Thirdly, the high degree of certainty and security of transactions that smart contracts potentially offer when operating on blockchain[35] allows the parties to dispense with the need for penalty clauses or mechanisms to monitor the agreement, with obvious simplification of negotiations and savings in the overall economy of the deal.

Fourthly, computer language, characterised by being unequivocal and highly predictable, tends to eliminate those aspects of uncertainty deriving from the intrinsic ambiguity of natural language because it leaves no space for interpretation. The rigour and rigidity of the code prevents discordant interpretations of the contractual clauses, avoiding the emergence of disputes based on the different understandings of the wording used, especially in international trade.[36]

Finally, the use of the blockchain on smart contracts imbues them with formal certainty timewise in view of the stamp (timestamping), containing exact time and date, digitally affixed every time an instruction is inserted in the blocks shared by the network.[37]

In practice, all of the main advantages identified by fans of the blockchain technology applied to smart contracts tend to focus on improved efficiency in contractual relations, which translates into fewer resources being required in the negotiations phase and when the contract is performed, services and payments being provided and processed more swiftly and with more immediacy, and a significant reduction in the risk of disputes arising between the parties.

V. Disadvantages

However, like the advantages, the drawbacks of smart contracts operating on blockchain stem from the very characteristics of the decentralised architecture in which they operate.

Preliminarily, the problem of the comprehensibility and natural rigidity of the instrument arises. The immutability of the decentralised registers contained

[35] According to H. Halaburda, 'Blockchain revolution' n 8 above, 7, distributed ledgers are a special type of distributed databases, which have been known and used for three decades. But 'while previous distributed databases were permissioned and required a third party to manage the permissions and help maintain the database', blockchain (and its most widespread application Bitcoin) was the first that allowed for a permissionless distributed ledger.

[36] D. Di Sabato, 'Gli smart contracts' n 22 above, 398, specifies that the program can contain infinite variables, but only the programmed ones are relevant. There is no margin for an evaluation in terms of reasonableness; H. Surden, 'Computable Contracts' *UC Davies Law Review*, 634 (2012); P. De Filippi and A. Wright, 'Decentralized blockchain technology and the rise of lex cryptographia' *Social Science Research Network*, 24-25 (2015).

[37] In this way, hypothetical difficulties deriving from the uncertain temporal context of the agreement could be prevented. This feature is useful in the registration of goods (including material goods) of which to certify the origin or verify property. In this regard, a study by the UK Government Office for Science, *Distributed Ledger Technology: beyond blockchain*, available at assets.publishing.service.gov.uk/government, 56 (2021), is interesting, for the use of blockchain to trace the origin of diamonds and follow the chain of their sales.

in a blockchain would appear to hinder any external intervention (eg a court injunction) raising important issues of controllability and governability of the smart contracts,[38] which operate in it.

Most people undoubtedly lack the IT and computer programming skills required in order to write an agreement in bits. Translating an agreement into code is a complex task, and this is even more so the case when we consider the variety of interests that the parties wish to protect and the very many shades of meaning that contractual clauses can have.[39]

The negotiation and drafting of smart contracts thus necessarily require not only the collaboration and participation of persons able to write and read algorithms but, in the case of operations on blockchain, also of those able to manage the functioning of such a network and to bear the relative costs. From this perspective, the technical-digital inexperience of most contracting parties will have the opposite effect, reintroducing the very intermediation that it was intended to eliminate in the first place.[40]

Professional practitioners will no longer be called in to deal with performance of the agreement but to handle the design of the agreement itself. This will also result in an increase in that costs that will be transferred from the performance phase to the creation phase, leading to, in addition, the inevitable risk of the certainty and predictability that should be a feature of smart contracts and blockchain being undermined. Whilst transposing the contract into code, there is the potential for programmers and computer scientists to fail to express the parties' intentions properly and accurately, with the smart contract therefore having unexpected effects or ones that are different to what the parties actually decided. This is because they have a tendency to simplify the instructions that they are given in order to help the IT system understand and assist it in the execution phase.[41]

The aim on the part of those who devised smart contracts to significantly reduce human involvement to a minimum or even dispense with it altogether

[38] P. Cuccuru, 'Blockchain ed automazione contrattuale' n 4 above, 113-114; On the limits see R. De Caria, 'The legal meaning of smart contracts' n 1 above, 743; K. Werbach and N. Cornell, 'Contracts ex machina' n 3 above, 352.

[39] I. Ferlito, '"Smart contract"' n 3 above, 20; G. Rinaldi, 'Smart contract' n 3 above, 352-357; L. Piatti, 'Dal codice civile al codice binario' n 3 above, 337-338; G. Finocchiaro, 'Il contratto nell'era dell'intelligenza artificiale' *Rivista trimestrale di diritto e procedura civile*, 455-456; I. Morea, 'Il consenso', in A. Fusaro ed, *I vizi del consenso* (Torino: Giappichelli, 2013), 59.

[40] I. Ferlito, '"Smart contract"' n 3 above 20; M. Manente, 'Blockchain: la pretesa di sostituire il notaio' *Notariato*, 217-218 (2018); P. Cuccuru, 'Blockchain' n 4 above, 114.

[41] P. Cuccuru, 'Blockchain' n 4 above, 115, believes that the linguistic obstacle could become temporary over time. According to the author, one cannot rule out that the progressive spread of programming and computer skills, in legal and non-legal environments, can eliminate the problem of the comprehensibility of the code. Furthermore, the development of technology could allow computers to understand and process instructions expressed in natural language, a task they are currently unable to perform; D.K. Citron, 'Technological Due Process' *Washington University Law Review*, 1249 (2008).

does not appear to have been achieved.

Moreover, eliminating any form of input whatsoever in human relations in terms of interpretation cannot be put on a pedestal as an achievement of the third millennium. We cannot return to the elementary legal principle *in claris non fit interpretatio* – meaning that where something is clear, interpretation is not permitted – since the actual case in question hinges on interests that are always different and human dynamics are difficult to boil down into binary format.[42] Efficiency, automation and simplification are values that need to be balanced with other values that characterise the human person and can be found in the principles enshrined in the Italian Constitution and characterise our society, with dignity being first in line.

To claim to be able to translate all of the circumstances that might affect a contract in its 'real and actual life' into code seems ambitious and somewhat unrealistic, given the extent to which these circumstances cannot be foreseen and the fact that translating what are certain essential interpretative criteria into contractual arrangements, such as good faith and reasonableness, is, objectively speaking, an impossible task.[43]

Besides, if code is the computer translation of natural language, the incompleteness or the ambiguity of the latter will produce consequences also in the computer code. If the information is ambiguous, the input that represents it will be ambiguous too.[44]

With programmers and computer scientists involved in writing the algorithm, there is in point of fact an increased risk of intent and declaration not being fully in line with one another, as well as an increased danger of the party to the contract, especially the weak contracting party, finding that they have signed an agreement without being fully informed.

The additional costs, the difficulties in translation and the risks relating to the programmers' intervention might operate to discourage the use of smart

[42] C. Pernice, 'Smart contract' n 3 above, 123; P. Perlingieri, 'L'interpretazione della legge come sistematica ed assiologica. Il broccardo in claris non fit interpretatio, il ruolo dell'art. 12 disp. prel. c.c. e la nuova scuola dell'esegesi' *Rassegna di diritto civile*, 990 (1985); A. Gentili, *Il diritto come discorso* (Milano: Giuffrè editore, 2013), 3.

[43] I. Ferlito, ' "Smart contract" ' n 3 above, 21-22 specifies that foreseeing every eventuality in a complete way, without leaving room for interpretation, would require the drafting of very long contracts, with a consequent increase in the risk of incurring programming errors; J.I.H. Hsiao, 'Smart contract on the blockchain. Paradigm shift for contract law' *US-China Law Review*, 694 (2017), stresses that 'smart contract is based on a binary zero-sum logic that does not appear in all real-life contract case'; G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 35, highlights that legal certainty is not a given in the system but an objective that the jurist must strive to achieve; Id, 'Sul criterio di ragionevolezza', in C. Perlingieri and L. Ruggeri eds, *L'incidenza della dottrina sulla giurisprudenza nel diritto dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2016), 29; F. Faini, 'Blockchain e diritto' n 43 above, 307-308; D. Di Sabato, 'Gli smart contract' n 22 above, 399.

[44] C. Pernice, 'Smart contract e automazione contrattuale' n 3 above, 125; S. Capaccioli, 'Smart contracts: traiettorie di un'utopia divenuta attuabile' *Ciberspazio e diritto*, 37, 25-45 (2016).

contracts.[45]

In addition, the rigidity of the code and decentralisation, which should be strengths where smart contracts and the blockchain are concerned, by contrast present additional limitations.

There is a risk of a '*self-regulating online ecosystem*' emerging that is not subject to any form of external control whatsoever, even where this involves legitimate steps in order to correct malfunctions and safeguard the peremptory norms of a legal system.

Moreover, the irreversibility of automated relationships would seem to preclude the parties from resorting to self-defence tools in the face of unlawful, flawed or in any case unfair agreements,[46] especially when operating on blockchain because it is characterised by the immutability of the transactions recorded in it.

The inevitability of the effect upon the occurrence of the input implies, for example, a waiver of any defence of non-performance. This is inconsistent with Art 1341 of the Italian Civil Code which provides that conditions establishing limitations to the right to raise defences are invalid unless specifically approved in writing.

As performance is simultaneous, there is no requirement for enhanced measures to ensure compliance. As a breach is not considered possible, there can be no objection that one has been committed,[47] with the parties therefore 'forced' to waive that objection.

Another problem, for example, is liability, meaning the obligee's liability or liability for an unlawful act.

In light of developments in technology and the increasingly more sophisticated software being used in everyday life, working on the basis of a simple apportionment of liability between the various parties somehow involved in the use of a smart contract does not appear possible. There is a fundamental choice to be made here between (i) seeing the software as an advanced technological tool, with its work remaining the responsibility of human beings, or (ii) seeing the software as a 'person', who is credited with the work carried out, to the extent that we have algorithms with cognitive and learning skills.[48]

[45] However, it would seem that a large margin for the development of smart contracts exists in highly standardised and relatively simple agreements, prepared by professionals and companies who can cover the coding costs with large-scale application of the 'smart' codified clauses.

[46] P. Cuccuru, 'Blockchain' n 4 above, 116 adds that not only could the parties not, for example, refuse the service if the agreement is fraudulent or flawed but also, at the same time, the public authorities would have difficulty in ensuring compliance with political-legislative choices. Think of a smart contract that automatically releases, for a fee, the access key to child pornography material stored on the paid web.

[47] C. Pernice, 'Smart contract e automazione contrattuale' n 3 above, 134.

[48] On 26 October 2017 Saudi Arabia granted honorary citizenship to Sophia, a humanoid robot created by Hong Kong Hanson Robotics. Fitted with artificial intelligence and able to converse, Sophia recognises human emotions and responds in real time, smiling and changing her own facial expressions. Cf I. Ferlito, ' "Smart contract" ' n 3 above, 26; On the difference between natural and artificial see G. Zagrebelsky, *Intorno alla legge. Il diritto come dimensione del vivere commune*

This problem brings to light a further issue regarding identification of the data controller[49] and coordination with data protection law.[50]

Presumed anonymity, one of the defining elements of blockchain technology, is not absolute but relative.

Anyone can take part in the activities recorded on the database without needing to establish the identity of those carrying out the transactions, on condition that they have the access keys. Whoever is in dialogue with the database states that they are a certain person, but this statement is not validated in any way, with the result that no link is created between the computer profile and the 'real' one.

A hybridisation of the decentralised platforms would allow private or 'permissioned' blockchains to be created, and would provide a solution to the problem of identification, as access by potential users could be restricted to certain people, as is the case with digital signatures. The ability to identify the computers that carry out the smart contract processing activity, within the blockchain network, would ensure that regulatory measures, judicial decisions and parties' claims would have a concrete addressee. Identifiable nodes are essentially the meeting point between the blockchain, smart contracts and the legal system, providing an 'emergency entrance' platform whenever intervention is required or instructions need to be changed.[51]

(Torino: Einaudi, 2009), 40. The European Parliament has also commented on the matter in its Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. Aware of the existence of at least three levels of robotics, with distinct and growing levels of autonomy, ranging from robots that are operated completely remotely to those that learn from their experience, and of the various types of interaction with human beings and the environment that the machine is capable of with, and alarmed by the new scenarios emerging, the Parliament prompted the Commission to introduce regulatory measures in order to resolve the issues regarding who it is that actually does what the robots do and who is liable for the resulting loss and damage, placing heavy emphasis on the need for clarification on the possibility of the androids having legal personality in their own right.

[49] F. Scutiero, 'Smart contract e sistema di diritto' n 3 above, 133; F. Faini, 'Blockchain e diritto' n 3 above, 310; M. Giuliano, 'La blockchain' n 3 above, 1012.

[50] On this point, see M. Giuliano, n 3 above, 1010. He argues that the main characters of blockchain technology (transparency, sharing, decentralisation, disintermediation, irreversibility) should be reconciled with the principles contained in the GDPR (EU Regulation 2016/679) on the processing of personal data.

[51] P. Cuccuru, 'Blockchain' n 4 above, 116-117, believes that permissioned blockchain seems to be the structure that is best suited to the commercial exploitation of technology. An example of permissioned blockchain can be found in the Corda platform developed in the banking world. Participation within the platform is regulated and the central element is the so-called 'state object', a digital document that contains all the relevant information of a specific agreement between the parties, including its existence, content and current status. Consensus between the parties is reached only on the specific 'state object' and not on the entire ledger distributed as, instead, happens on a blockchain of permissionless type, for example Ethereum and Bitcoin. It is shared only by those who are allowed to see it, because they have a specific cryptographic hash that identifies the data of the operation and the persons involved. On this subject see R. Gendal Brown, 'The Corda Platform: an introduction', available at www.r3.com (2018,) which specifies that 'in contrast to other "permissioned" blockchain platforms, the Corda Platform is intended to allow multiple groups of participants (and associated applications) to co-exist and interoperate across the same open network'; J. Polge, J. Robert and Y. Le

But with any solution designed to transform the system into a permissioned system there is the risk of denying the fundamental essence of the blockchain architecture, which is in fact based on a permissionless system.

VI. Brief Outline of International and European Law

At international level, the very complexity of these new technologies has greatly discouraged States from regulating technologies and only a small number have adopted specific legislation on smart contracts, at least for the time being. One important example here is the State of Arizona, in the United States, which, in March 2017, amended its regulations on electronic transactions to in order to provide that smart contracts and blockchains have full legal effect.[52] Nevada,[53] Ohio[54] and Tennessee[55] then followed suit.

On a European level,[56] with its Resolution of 3 October 2018, the European Parliament highlighted the potential of blockchain technologies and, where

Traon, 'Permissioned blockchain frameworks in the industry: A comparison', available at *sciencedirect.com* (2021).

[52] Arizona House Bill No. 2417, An Act Amending Section 44-7003, Arizona Revised Statutes; amending title 44, chapter 26, Arizona Revised Statutes, by adding Art 5; relating to electronic transactions. In particular, it provides that (a) 'a signature that is secured through blockchain technology is considered to be in an electronic form and to be an electronic signature', (b) 'a record or contract that is secured through blockchain technology is considered to be in an electronic form and to be an electronic record' and that (c) 'smart contracts may exist in commerce. A contract relating to a transaction may not be denied legal effect, validity or enforceability solely because that contract contains a smart contract term'. Cf R. De Caria, 'The legal meaning' n 1 above, 738.

[53] Nevada Senate Bill no 398, An act relating to electronic transactions; recognizing and authorizing the use of blockchain technology; prohibiting a local government from taxing or imposing restrictions upon the use of a blockchain; and providing other matters properly relating thereto.

[54] Ohio Senate Bill no 220, An act to amend sections 1306.01 and 3772.01 and to enact sections 1354.01, 1354.02, 1354.03, 1354.04 and 1354.05 of the Revised Code to provide a legal safe harbor to covered entities that implement a specified cybersecurity program, to allow transactions recorded by blockchain technology under the Uniform Electronic Transactions Act, and to alter the definition of 'key employee' under the Casino Gaming Law.

[55] Tennessee Senate Bill no 1662, An act to amend Tennessee Code Annotated, Title 12; Title 47; Title 48; Title 61 and Title 66, relative to electronic transactions. Cf M. Durovic and F. Lech, *The enforceability of smart contracts* n 24 above, p. 499.

[56] Beyond the first analyses of the phenomenon carried out by its own institutions aimed at encouraging a harmonised set of rules between the various Member States on the subject of blockchain and smart contracts, the work drawn up by the *European Parliamentary Research Service*, entitled *How Blockchain Technology Could Change Our Lives*, highlights the need for legislators to work to harmonise and connect the rules of contract law with smart contracts. The establishment of an Observatory and Forum on blockchains, the *Blockchain4EU* project and the creation of the *European Blockchain Partnership* (EBP), pursue the aim of creating a shared infrastructure to improve access and use of cross-border digital public services within the European Union. Cf *European Commission launches the EU Blockchain Observatory and Forum*, available at europa.eu; P. Boucher, S. Nascimento and M. Kritikos, *How Blockchain Technology Could Change Our Lives* (Brussels: European Parliamentary Research Service, 2017), 4; S. Nascimento, A. Polvora and J.S. Lourenco, *#Blockchain4EU: Blockchain for Industrial Transformations* (Luxembourg: Publications Office of the European Union, 2018), 7.

smart contracts are concerned, reported that the Commission should carry out an in-depth assessment of the legal implications, suggesting that actual cases be examined in order to foster their use by means of legal coordination or mutual recognition between Member States regarding smart contracts.[57]

Subsequently, on 4 December 2018, the Southern European countries in EuroMed 7 (Italy, Cyprus, France, Greece, Malta, Portugal and Spain) signed a declaration setting out a commitment to establish a close technological partnership in order to promote the understanding of blockchain technologies and work jointly on their development, in accordance with fundamental European principles. This declaration identifies smart contracts as a potential turning point, capable of transforming the provision and enjoyment of services in areas such as '*certification of the origin of products, education, transport, mobility, maritime navigation, land registries, customs, business registers and health*'.[58]

Despite the approval on a group basis, however, Malta stands alone as the country with the most advanced and organised set of regulations in this field.[59]

Maltese legislation makes a distinction between smart contracts in the IT sense, defined as protocols for computers, and smart contracts that can amount to a legal commitment, being treated as outright contractual agreements that are drawn up and formed, in whole or in part, digitally. They are protected by means of the mechanisms within their computer code that prompt automatic execution of the agreed terms, or by going down the traditional route of the courts. In addition, the Maltese Government has established an important cornerstone on which to construct the legislative framework required by the blockchain operators, setting up an independent authority responsible for promoting and developing the full range of solutions and services that use innovative technologies.[60]

[57] EU Parliament, Resolution P8_TA-PROV(2018)0373 of 3 October 2018, Distributed ledger technologies and blockchains: building trust with disintermediation.

[58] Ministerial Declaration of Southern European Countries on Technologies Based on Distributed Registers, Brussels, 2018, 2, available at sviluppoeconomico.gov.it.

[59] The Maltese legal framework consists of three acts: Virtual Financial Assets Act, Malta Digital Innovation Authority Act and Innovative Technology Arrangements and Services Act.

[60] Art 8 of the *Malta Digital Innovation Authority Act*. Even France, although in a different way, has recognised the value of the new digital mechanism, applying it in deposit contracts, in the film and music sector to generate a more equitable distribution of the remuneration inherent in copyright among all stakeholders, who participate to the supply chain. Cf C. Waignier, 'Blockchains et smart contracts: premiers retours d'expérience dans l'industrie musicale' *Annales des Mines-Réalités industrielle*, 46-49 (2017). Furthermore, France has allowed the use of blockchain technology for minibons and for the registration and transfer of unlisted financial products as an alternative system to the traditional registration in accounting and corporate books, and with equal legal effects. In December 2018 the French Parliament announced its intention to finance the implementation of blockchain technology in public administration over the next three years, with the allocation of 500 million euros. Cf N. Richard and R. Bloch, 'Des parlementaires préconisent d'investir 500 millions dans la blockchain en trois ans', (2021), available at https://tinyurl.com/2strep66 (last visited 30 June 2022); S. Aceto di Capriglia, 'Contrattazione algoritmica. Problemi di profilazione e prospettive operazionali. L'esperienza "pilota" statunitense' *federalismi.it*, 32 (2019), notes that, in Spain, smart contracts are not considered real contracts but as an innovative method of conclusion or, alternatively,

VII. Italian Legislation

The position adopted by Italian law[61] in the wake of international developments has been welcomed with enthusiasm even if in practice the legislation has posed more questions than answers.

Art 8-*ter* (para 2) of decreto legge no 135 of 14 December 2018, converted into Law no 12 of 11 February 2019, states that a '*smart contract*' is 'a computer program that operates on technologies based on distributed ledgers and its execution automatically binds two or more parties on the basis of the effects that they established in advance. Smart contracts meet the requirement of written form by means of the computerised identification of the parties concerned, via a process that meets the requirements established by the Agency for Digital Italy with the guidelines to be adopted within ninety days of the date of entry into force of the law that this decree is converted into'. By '*written form*' in this respect is meant that, in line with Italian law, the contracts must be reduced to writing as a precondition to their validity.

As a preliminary step, in order to better understand the meaning of the rule, it seems appropriate to go back to Nick Szabo's original idea. According to the American computer scientist, there are many contractual clauses (such as warranties, acceptance of obligations and restrictions on title, etc) that can be incorporated into hardware and software.[62]

Szabo's view is that as a result of the combination of hardware and software installed on the same car, for example, the smart contract activates in order to disable the ignition if a certain number of instalments have been missed (where the car was purchased on a deferred payment basis).[63]

If this is the basic idea, we can see from a swift comparison with the Italian provision referred to above that the hardware component is not referred to. Art 8-*ter* simply defines a smart contract as a '*computer program*' (so just software), while the original idea was supposed to involve integration between software and hardware.

A vending machine in fact has a software component (which contains the instructions) and a hardware component that actually dispenses the product. And this is what should happen in the case of the car, where hardware is

as an additional form to the traditional ones (public deed, private contract or implied contract).

[61] I. Ferlito, '"Smart contract" ' n 3 above, 693. In October 2017 the National Council of Notaries presented the '*Notarchain*', a new method of archiving digital data in a dual mode: distributed registers (blockchain) and voluntary digital registers. There are other projects such as, for example, the '*Torrefazione Caffè San Domenico*' and the '*Wine Blockchain EY*', which use blockchain technology to trace the supply chain path of the finished product. See S. Morabito, 'L'applicabilità della Blockchain nel diritto dell'arte' *businessjus.com*, 2 (2018); G. Magri, 'La Blockchain può rendere più sicuro il mercato dell'arte?' *Aedon.mulino.it*, 2019; M. Giaccaglia, 'Considerazioni su blockchain e smart contracts (oltre le criptovalute)' *Contratti e impresa*, 941 (2019).

[62] N. Szabo, 'Formalising and Securing Relationships on Public Networks' *firstmonday.org*, 1997.

[63] N. Sazbo, 'Secure Property Title with Owner Authority' *fon.hum.uva.nl*, 2021.

required that actually stops the engine from physically being started 'executing' the inputs received.[64]

As a result, in order to make a smart contract 'run', it seems that a simple 'computer program' on its own is not enough: an additional device is needed that it will be programmed to act upon.[65]

Another problem that comes to light as a result of examining the provision in question is in the expression '*the effects established by the parties in advance*': while it seems to suggest the moment at which the agreement that preceded the smart contract was formed, it means the smart contract as the source of the legal constraint between the parties, and therefore conflicts with the pre-existence of a contractual arrangement. If the smart contract is already the source in law of a constraint, there is no need to establish an additional constraint.[66]

Finally, Article 8-*ter* recognises smart contracts as documents in writing, the result of which is to bring them closer to a genuine contract, but introduces the problem of the form that they must take.

Despite the fact that on the basis of its actual wording, Art 1325 of the Italian Civil Code seems to provide that a prescribed form is only essential where specified by law, with the contract otherwise being null and void, a 'generic' form of contract is 'always essential',[67] because the decision always needs to be externalised or declared.[68]

The general rule of the legal system remains liberty of form but not absence of form. This point takes on particular relevance when it comes to contracts for which a prescribed form is specified by law in order to be valid.

The function here is twofold: (i) it is an expression of the 'function of proof', ie its purpose is to have certainty about the exact content of the parties' declarations; (ii) it is an expression of the 'function of awareness', ie it calls the parties' attention to the importance of the step that they are about to take.[69]

In these terms, considerable difficulties arise in incorporating the agreement

[64] M. Manente, 'Smart contract e tecnologie basate su registri distribuiti' *Studio n.1 2019 DI del Consiglio Nazionale del Notariato*, 2 (2019).

[65] Indeed, the additional device may be a hardware device but also another software device, but the algorithm alone seems not to be enough. G. Rinaldi, 'Smart contract' n 3 above, 367-368, specifies that the same provision does not distinguish, for example, unlike the Maltese legislation, between smart contracts in the IT sense and smart contracts in the legal sense.

[66] M. Manente, n 64 above, 3.

[67] M. Giuliano, 'La blockchain' n 3 above, 1030.

[68] P. Perlingieri, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 9th ed, 2018), 512, specifies that, on the one hand, form is considered as the vehicle (declaration or conduct implying acceptance) that allows one to objectively recognise the structure of interests composed of the parties. On the other hand, form, as an autonomous requirement, is identified in the document (public deed, private deed or IT document) from which the manifestation of will results. Of the two notions, only the latter fulfils the requirement as to form for contracts, while the former addresses only the different issue of the necessary externalisation of the manifestations of the will of the contracting parties; N. Irti, *Studi sul formalismo negoziale* (Padova: CEDAM, 1997), 137.

[69] M. Manente, 'Smart contract e tecnologie basate su registri distribuiti' n 64 above, 4.

that the parties have reached: as is in fact the case with smart contracts, the document containing the contract cannot always be physically drawn up by the parties concerned, hence the need to identify a tool that is capable of properly representing the parties' decision to be bound in the contract, including where the document is prepared by third parties.

This tool normally takes the form of a signature, but smart contracts bring with them the problem of whom the document is attributable to and identification of the parties.[70]

The provision in question does not in fact specifically specify any form of signature, authorising the Agency for Digital Italy to establish the requirements to be met in order for the parties to be identified.[71]

The similarity, in terms of wording, between the formula used by Parliament for smart contracts and that already to be found in Italy's Digital Administration Code for digital signatures gives rise to additional questions.

Firstly, it is apparent from the wording used by Parliament that this 'identification process' appears to be something different and alternative compared to what the Digital Administration Code specifies.

A methodical reading of the provisions arguably gives rise to the problem of whether, in carrying out its task, the Agency for Digital Italy can require the use of digital signatures in order for a smart contract to be properly attributable or, as specified for a computer document, different and additional processes must be involved over and above affixing a signature.[72]

[70] A signature expresses three functions: indicative, because it allows to identify the author of the document; declarative, because it allows the assumption of authorship of the document; probative, because it demonstrates the authenticity of the document. Cf G. Petrelli, 'Documento informatico, contratto in forma elettronica e atto notarile' *Notariato*, 567 (1997); G. Casu, *L'atto notarile tra forma e sostanza* (Milano: Giuffrè, 1996), 148.

[71] This new 2018 provision appears to be in line with Art 20 (para 1-*bis*) and Art 21 (para 2-*bis*) of decreto legislativo 5 March 2005 n 82 - Italy's 'Digital Administration Code' - which states: 'A computer document meets the requirement of written form and is effective as specified by Art 2702 of the Italian Civil Code where a digital signature, another type of qualified electronic signature or an advanced electronic signature has been affixed or where, following computer identification of its author, it is formed by means of a process that meets the requirements established by the Agency for Digital Italy in accordance with Art 71, in such a way that guarantees the security and integrity of the document and guarantees that it cannot be modified and that it can clearly and unequivocally be attributed to the author. In all other cases, whether the computer document meets the requirement of written form and its evidential weight can be assessed freely in court proceedings, in relation to the characteristics of security and integrity and its inability to be modified' and 'Save in the case of an authenticated signature, the private agreements referred to in Art 1350 (first para, points 1 to 12) of the Italian Civil Code are, where done with a computer document, to be signed with a qualified electronic signature or with a digital signature and shall otherwise be null and void. The documents referred to in Art 1350 (point 13) of the Italian Civil Code drawn up as a computer document or formed via computer processes are to be signed with an advanced electronic signature, a qualified electronic signature or a digital signature or are to be formed in accordance with the additional procedures referred to in Art 20 (para 1-*bis*, first sentence) and shall otherwise be null and void'.

[72] M. Manente, 'Smart contract e tecnologie basate su registri distribuiti' n 64 above, 6, fn 4, highlights that it would be necessary to verify the compatibility of this approach with Regulation (EU)

Secondly, the authority delegated to the Agency for Digital Italy appears to be too wide to be able to say that it has exclusive responsibility for adopting measures in order to avoid a person being substituted, without any minimum legislative cover here.

It follows that the provision in question would appear to lack a mechanism whereby the parties' unequivocal expression of their intention can be proved,[73] even though there is a glimpse of this in the wording '*its execution automatically binds two or more parties*'.

The word 'execution' refers to the phase of the contractual arrangement after the contract was formed, where the parties make the payments and/or provide the services as required.

The provision thereby appears to be legal nonsense because execution, meaning performance, cannot give rise to constraints; if anything, it results in an obligation being discharged, not in it arising.

But if we look for the meaning of the word 'execution', which is contained in the provision in question, in a linguistic register other than the legal register, perhaps it does not necessarily fail to make any sense.

In computer language, 'execution' means the 'launch' of a programme,[74] ie where the instructions loaded are read and stored within the system.[75] The physical step involved in 'launching' the program could produce proof of acceptance by a party of the instructions contained in the programme, and so the 'joint launch' of the program, by the parties involved, could produce proof that agreement was reached.

It remains the case, however, that in terms of how the legislation has been drafted, confusion arises in terms of the terminology chosen.

And on a functional level, it will be even more difficult to demonstrate the statutorily prescribed 'cause' of a smart contract (ie, underlying reason – one of the perquisites that Italian law requires for a contract to be valid). A computer program can only contain execution-type instructions and not descriptive-type instructions, as they are not in fact instructions but the result of a process of interpretation that a computer's binary logic will never be able to carry out.

Indeed, if it is possible to imagine the cause of a smart contract that oversees the operation of a drinks vending machine, this cannot be done for one that simply contains the instruction for payment of an amount by one party to another.

no 910/2014 of the European Parliament and Council of 23 July 2014, in which the notion of 'electronic signature' is indicated as the set of data in electronic form, enclosed or connected by logical association to other electronic data and used by the signatory to sign.

73 G. Rinaldi, 'Smart contract' n 3 above, 371; M. Nicotra, 'L'Italia prova a normare gli smart contract, ecco come: pro e contro' *agendadigitale.eu,* 2019; M. Giuliano, 'Blockchain, i rischi del tentativo italiano di regolamentazione' *agendadigitale.eu*, 2019; M. Giuliano, 'La blockchain' n 3 above, 1031.

74 Literally 'the performance of an instruction or program'. See https://tinyurl.com/2cfyn3kt (last visited 30 June 2022).

75 M. Manente, 'Smart contract' n 64 above, 75; G. Rinaldi, 'Smart contract' n 3 above, 373-374.

The underlying reason for such a payment might in practice be found in numerous types of agreements (eg purchase and sale, secured loan or donation).

There is still room for an assessment of the extent to which the contract as a whole and the individual agreed terms translated into an equal number of 'if-then' formulas conform with the principles of good faith, propriety, reasonableness and proportionality.[76]

Smart contracts make unforeseen events less likely. But they cannot rule them out altogether.

The rigid nature of the IT tool, which will be the special quality behind the possible success of smart contracts, might in fact be its main defect.

And adaptation of the legal content to the particular case is in fact one of the most difficult application problems that these IT tools have to deal with.

VIII. Conclusion

In light of the foregoing, as matters currently stand the benefits associated with these new technologies appear to be 'overstated'[77] for several reasons.

Firstly, the fact that the parties are unlikely to be *au fait* with programming language casts doubt on whether the agreement between them would be intelligible, and also opens the door to bugs or errors in translation when transforming the interests that the parties intend to pursue into an algorithm. So the need to consult third parties, computer scientists and computer programmers in order to create a smart contract would prevent any significant saving in costs.

Secondly, it is not entirely true to say that smart contracts ensure an 'objective' view, eliminating if not completely reducing to zero the interpretation done by legal practitioners, with a simultaneous decrease in the number of disputes. Algorithmic negotiation does not fundamentally rule out the possibility of challenging the effect produced technologically; recourse to the courts is simply postponed to a later stage. On the contrary, the fact that it is impossible for the

[76] D. Di Sabato, 'Gli smart contracts' n 22 above, 401; C. Pernice, 'Smart contract' n 3 above, 124-125; F. Scutiero, 'Smart contract e sistema di diritto' n 3 above, 131. On the interpretation see E. Betti, *Interpretazione della legge e degli atti giuridici* (Milano: Giuffrè, 1949), 168; E. Betti, 'Interpretazione della legge e sua efficienza evolutiva', in Id ed, *Diritto, metodo, ermeneutica* (Milano: Giuffrè, 1991), 536; E. Betti, *Teoria generale dell'interpretazione* (Milano: Giuffrè, 1990), passim; P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 563; Id, *Interpretazione e legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2012), 113; Id, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile*, 317 (2010); Id, 'Controllo e conformazione negli atti di autonomia negoziale' *Rassegna di diritto civile*, 204 (2017); Id, 'Interpretazione e controllo di conformità alla Costituzione' *Rassegna di diritto civile*, 593 (2018); Id, 'Interpretazione ed evoluzione dell'ordinamento' *Rivista di diritto privato*, 159 (2011); N. Irti, 'Princìpi e problemi di interpretazione contrattuale' *Rivista trimestrale di diritto e procedura civile*, 1139 (1999); Id, 'Sulla positività ermeneutica' *Rivista di diritto civile*, 923 (2016).

[77] C. Pernice, 'Smart contract' n 3 above, 136; G. Rinaldi, 'Smart contract' n 3 above, 360-365.

parties to 'correct', in advance, the injustice of the programmed arrangement might paradoxically mean asking the courts to deal with matters that could have been remedied by agreement.[78]

These reflections lead to the conclusion that although smart contracts are advanced technological tools, they do not yet have that informational and legal structure that enable them to be considered contracts in a strict legal sense.

A smart contract can be considered prevalently as a support 'tool' or as a 'part' of a broader contractual agreement, perhaps drawn up in accordance with more 'traditional' forms, which takes care of and simplifies the aspect relating to the fulfilment of the agreed obligations.[79] But it will certainly be difficult to rise to the technical-legal status of contract contained in Art 1321 of the Italian Civil Code, which is still very much alive today.

[78] C. Pernice, 'Smart contract e automazione contrattuale' n 3 above, 13.

[79] M. Manente, 'Smart contract' n 64 above, 7; F. Di Ciommo, ' "Blockchain, smart contract", intelligenza artificiale (AI)' n 21 above, 4; C. Pernice, 'Smart contract' n 4 above, 137, considers that the most common areas of application seem to be in the insurance, banking and financial sector. A protocol, for example, could provide for the sale or acquisition of a certain number of shareholdings when a certain quotation is reached. In addition, smart contracts could be used to facilitate the collection of information in the banking and insurance markets in order to reduce the time and cost of mortgage disbursement and policy repayment procedures; S. Orlando, 'Profili definitori degli "smart contracts"' n 19 above, 49; M. Giaccaglia, 'Il contratto del futuro? Brevi riflessioni sullo smart contract e sulla perdurante vitalità delle categorie giuridiche attuali e delle norme vigenti del Codice civile italiano' *Tecnologie e diritto*, 113 (2021).

Essays

Art and Law: Authentication and Assessment Within the Italian Legal System

Giampaolo Frezza*

Abstract

The aim of this paper is to investigate specific matters linked to the so-called authentication and judicial verification of the authenticity of artwork in the Italian system. After an analysis of the so-called right of authentication and archiving of the work of art (Art 21, para 1, of the Constitution), the essay analyses the issue of court assessment of the artwork's authenticity, for the purposes of which a case-by-case assessment of the adequacy and reasonableness of the related claims is required.

I. Introduction

The purpose of the present essay is to analyse the relationship, within the Italian system, between art, and in particular contemporary art, and law.

After an overview of the principles and values underlying the relationship between art and law (section 2), the paper investigates specific matters linked to the so-called authentication and the judicial verification of the authenticity of artwork (section 3). Indeed, authentication is a private activity, mostly carried out by certifying bodies and qualified as a free expression of thought (Art 21 Constitution). Nevertheless, in some cases it can resemble an opinion to identify the applicable provisions. In addition, the authentication involves the intervention of a judge in order to protect the substantial legal situations that actually arise from the request for verification of the authenticity of the artworks. The clear closure of Italian case law in matters of admissibility of such claims needs to be reviewed with a view to assessing its adequacy and reasonableness (section 4).

II. Art and Law: Values, Principles and Rules

Art and beauty are the most tangible expressions of a cultural phenomenon, which plays a significant role in the Republican Constitution of 1948: it is highlighted in Arts 9 and 33. The application, coordination and interpretation of these legal provisions outlines an idea of artistic expression that operates within the social function of the legal system and individual freedoms. With

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regard to the first aspect, the State is required to ensure the conditions necessary for the implementation of artistic freedom (the aesthetic-cultural value is of primary importance in the Italian legal system). State and local authorities must contribute to the promotion of art as stated by the Constitutional Court.[1] With reference to the second profile, art is fully integrated into the framework of the fundamental rights of human beings, first and foremost those guaranteed in Arts 1, 2, 3, para 2 and 4, para 2 of the Italian Constitution.[2]

It appears therefore plausible to affirm, given the interpretation of the afore mentioned set of rules, that art is inherent to the legal system as a whole and it is linked to the primary value of the individual and his full and integral development (Art 2 of the Constitution).[3]

The enshrinement of these freedoms, *inter alia*, is useful to guarantee the effectiveness of judicial protection of all rights deriving from them, in the event that these interests are harmed by a wrongful conduct perpetrated by public and private subjects.[4] This is, in fact, particularly true in relation to copyright protection and, above all, to legal protection provided by the judicial system in favor of the person who can claim a (material or immaterial) property right on *res* 'work of art'. In relation to this last aspect, there is, in Italy, as well as in other legal systems,[5] a lack of protection, to which the jurist must give an answer,

[1] Corte costituzionale 9 March 1990 no 118, available at https://tinyurl.com/md5ary7h (last visited 30 June 2022); Corte costituzionale 18 December 1985 no 359, available at https://tinyurl.com/yhh2fy9b (last visited 30 June 2022); Corte costituzionale 24 June 1986 no 151, available at https://tinyurl.com/h4mhv2az (last visited 30 June 2022); Corte costituzionale 29 March 1985 no 94, available at https://tinyurl.com/3h9xtzy4 (last visited 30 June 2022).

[2] P. Perlingieri and R. Messinetti, 'Art. 9', in P. Perlingieri ed, *Commentario alla Costituzione italiana* (Napoli: Edizioni Scientifiche Italiane, 2001), 44; G. Bianco, 'Ricerca scientifica (teoria generale e diritto pubblico)' *Digesto*, *Discipline pubblistiche* (Torino: UTET giuridica, 1997), XIII, 360, with specific regard to Art 3 Constitution.

[3] P. Perlingieri and R. Messinetti, 'Art. 9' n 2 above. About the human person as a central value in the legal system, cf the several essays available in P. Perlingieri, *La persona e i suoi diritti. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), passim.

[4] F. Polacchini, 'La libertà di espressione artistica in una prospettiva multilivello', in Id, *La libertà di espressione artistica. Limiti giuridici e politically correct* (Bologna: Persiani, 2018), 18. The effectiveness of the protection of rights is a latent need in the legal system, which finds diversified points of emergence, the subject of an increasing attention by the literature: recently, cf F. Alcaro, 'Una riflessione su "fatto" e "diritto" (ed effettività)' *Rassegna di diritto civile*, 773-790 (2018); L. Corazza et al , *Fenomeni migratori ed effettività dei diritti* (Napoli: Edizioni Scientifiche Italiane, 2018), passim; G.R. Filograno, 'Regole limitative della responsabilità civile in tema di vigilanza bancaria ed esigenze di effettività nella tutela del risparmio popolare' *Foro napoletano*, 389-405 (2017); M. De Angelis, *L'effettività della tutela della salute ai tempi della crisi* (Napoli: Edizioni Scientifiche Italiane, 2016), passim; D. Siclari, *Effettività della tutela dei diritti e sistema integrato dei servizi sociali* (Napoli: Edizioni Scientifiche Italiane, 2016), passim; I. Prisco, 'Il rilievo d'ufficio della nullità tra certezza del diritto ed effettività della tutela' *Rassegna di diritto civile*, 1227-1257 (2010). See also, fn 7 below for furthermore indications.

[5] A. Donati, *Law and Art: diritto civile e arte contemporanea* (Milano: Giuffrè, 2010); A. Donati, 'La definizione giuridica delle opere d'arte e le nuove forme di espressione artistica contemporanea' *La rivista del consiglio*, 118-128 (2017-2018), where is available a comparatistic perspective on French and USA legal systems; L. Palandri, *Giudicare l'arte*, *Le Corti degli Stati Uniti e*

according the canons of interpretation, that we will try to identify in this paper.

The work of art, as a product of this activity, falls within the broader notion of 'cultural heritage', as defined by Arts 2 and 20 of the Code of Cultural Heritage: a concept that includes, in addition to the *res corporale*, a further dimension that goes beyond the material consistence of the 'Res' and that involves the aptitude to realize heterogeneous interests and constitutive values of a community, of a place, of an era.[6] We can, therefore, talk about the relevance of the *corpus mysticum* beyond the *corpus mechanicum,*[7] where the involved interests become, as effectively summarized, a 'meta-individual' value.[8] This has led to the enhancement of a dynamic profile of these assets, different from the static and structural profile on which the literature has been based, for years.[9] The focus has shifted, from conservation to enhancement,[10] representing a fulfillment of the plan outlined by the Constitution, as a result of, not only the economic and social progress, but by the increasing synergy between public and private sectors, as well.

Art, and in particular contemporary art, is nowadays an additional safe haven, implying significant investments. It therefore circulates as a form of wealth, but its guarantee of declaration of 'authenticity', does not appear to be informed by any principle that would attest to its certainty and security.[11]

la libertà di espressione artistica (Firenze: Firenze University Press, 2016), 71.

[6] S. Rodotà, 'Lo statuto giuridico del bene culturale' *Beni culturali, tutela, investimenti, occupazione, Annali dell'associazione Bianchi-Bandinelli*, 15 (1994). On the same topic, see T. Alibrandi and P.G. Ferri, *I beni culturali e ambientali* (Milano: Giuffrè, 2001), 25; M.P. Chiti, 'I beni culturali', in M.P. Chiti and G. Greco eds, *Trattato di diritto amministrativo europeo* (Milano: Giuffrè, 1997), I, 351; V. Cerulli Irelli, 'I beni culturali nell'ordinamento italiano vigente', in M.P. Chiti ed, *Beni culturali e comunità europea* (Milano: Giuffrè, 1994), 28; M. Comporti, 'Per una diversa lettura dell'art. 1153 c.c. a tutela dei beni culturali' *Le ragioni del diritto. Scritti in onore di L. Mengoni* (Milano: Giuffrè, 1995), I, 420; M. Ainis and M. Fiorillo, 'I beni culturali', in S. Cassese ed, *Trattato di diritto amministrativo (*Milano: Giuffrè, 2003), II, 1452.

[7] In Public Law literature, see among others M.S. Giannini, 'I beni culturali' *Rivista trimestrale di diritto pubblico*, 24 (1976). About trade of artistic work, M. Costanza, 'La circolazione delle opere d'arte: regole civilistiche di scambio', in M. Costanza ed, *Commercio e circolazione delle opere d'arte* (Padova: CEDAM, 1990), 6.

[8] A. Gambaro, 'Il diritto di proprietà', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1995), VIII, 2, 425, which highlights the emphatic nature of any legislative definition.

[9] A. Nervi, 'Il comodato di opera d'arte La sponsorizzazione culturale. I diritti di sfruttamento economico dell'opera d'arte e il merchandising museale', in P. Rescigno and E. Gabrielli eds, *Trattato dei contratti* (Torino: UTET, 2010), 13; F. Delfini and F. Morandi, *I contratti del turismo, dello sport e della cultura* (Torino: UTET, 2010), 539, 543, according to F. Santoro Passarelli, 'I beni della cultura secondo la Costituzione', in *Studi in memoria di Carlo Esposito* (Padova: CEDAM, 1973), III, 1324.

[10] L. Casini, 'La valorizzazione dei beni culturali' *Rivista trimestrale di diritto pubblico*, 651-707 (2001).

[11] In broad terms, see G. Vettori, 'Circolazione dei beni e ordinamento comunitario' *personaemercato.it*, 19 May 2008. With specific regard to the aim of this essay, see M. Costanza, *Commercio e circolazione di opere d'arte* (Padova: CEDAM, 1990), passim. On the rising of a legal principle related to its circulation and marketing, G. Frezza, *Arte e diritto fra autenticazione e accertamento* (Napoli: Edizioni Scientifiche Italiane, 2019), 28, where we argued that nowadays we are witnessing a growing and significant diffusion, at different levels of Italian-European sources, of

Moreover, the provisions set forth in Law no 106 of 2004 on the so-called legal deposit, mainly applicable to the *performance* of all contemporary art events, appear not being adequate to this purpose: such deposit, in fact, must be made at the Central Institute only for sound and audiovisual assets and concerns sound and video documents, totally or partially produced in Italy.

Nevertheless, if the aim is to guarantee the safe circulation of traditional artistic manifestations (ie, those that take the form of paintings or sculptures), some careful scholars – who calls into question, in this context, the principles of adequacy and reasonableness[12] – recalls the validity of the system introduced by legge no 1062 of 1971. The latter provides that the judge must avail himself of the help offered by technical experts designated by the Ministry for Cultural Heritage in criminal proceedings for counterfeiting, alteration, illegitimate reproduction for profit, trade and false declaration of authenticity of the copy in case of doubts on the authenticity of the artwork. However, an enhanced organization system would be beneficial in this regard, possibly ensured by special registers of listed experts subdivided by specific competences, and capable of assessing the artistic value of creative works, together with a strong involvement of the Public Administration which would exercise a coordination and oversight

legal rules enacted in order to guarantee the circulation of 'wealth', in its broadest sense, according to parameters of certainty and safety. According to Corte di Cassazione-Sezione penale III 31 March 2000 no 4084, *Cassazione penale*, 615 (2001), we can speak of a legally relevant interest in the regularity and honesty of exchanges in the art and antiques market. According to Tribunale di Lecce 30 April 2009, *Giurisprudenza di merito*, 2262 (2010), which has analyzed , from a criminal point of view, the original repressive legislation of the counterfeiting or alteration of artworks, contained in the legge of 20 November 1971, no 1062 (Arts 3 and 4), then transposed, substantially, into Art 127, decreto legislativo 29 October 1999 no 490, and, again, in Art 178 of the Italian Civil Code), the legal object of the crimes contemplated therein was represented not only by the protection of public faith (Corte di Cassazione-Sezione penale III 5 October 1984 no 8075), but also by the market of works of art, understood as an interest in the regularity and honesty of exchanges in the art and antiques market (Corte di Cassazione-Sezione penale III 31 March 2000 no 4084, talks about multi-offensive crime): for instance, we may consider EU rules on accreditation and market surveillance in the marketing of products or those on accreditation in accessing the activities of credit institutions, as well as the internal rules concerning the control of the issuance of metallic coins. We may also mention the 'safety' rules on product quality certifications, in particular industrial ones, and those related to financial markets, as well as the creation of 'certainties' through the emergence of the so-called independent bodies (*amplius*, A. Benedetti, *Certezza pubblica e "certezze" private* (Milano: Giuffrè, 2010), 89. Another example is represented by the set of Community derived rules on consumer protection merged into the Consumer code, which aims to protect the weak subject of the contractual relationship while, at the same time, implementing forms of control of the market and, within it, those relating to the circulation of consumer goods. Cf G. Perlingieri, *La convalida delle nullità di protezione e la sanatoria dei negozi giuridici* (Napoli: Edizioni Scientifiche Italiane, 2011), 35; I. Prisco, *Le nullità di protezione. Indisponibilità dell'interesse e adeguatezza del rimedio* (Napoli: Edizioni Scientifiche Italiane, 2012), 12; S. Polidori, *Nullità di protezione e sistematica delle invalidità negoziali* (Napoli: Edizioni Scientifiche Italiane, 2016), 9. Finally, rules on the circulation of real estate wealth must be taken into consideration (G. Frezza, 'Circolazione immobiliare e certezza del diritto' *Rivista di diritto privato*, 167-179 (2018)).

[12] Among all, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), passim.

role. Equally, the obsolete register of protected works could actually be very useful, at least in terms of presumption of the artistic nature of the creation registered therein. The protection of the artwork is, in fact, notoriously justified by private interests (such as the moral right of the artist), as well as public or collective interests (such as those relating to the protection of artistic heritage, of the cultural heritage and of market control). Contemporary artistic production, with the example of street art and the proposal to consider its 'works' as common goods,[13] above all, has the credit of having forcefully started the debate.

Though, the general public register of protected works has never been created; hence, mentioning a real registration obligation appears quite problematic nowadays.[14] A reasonable explanation may be found in the complexity of the procedure, which also foresees an onerous authentication, governed by specific regulations. Therefore, it is hoped that,

> 'in the face of the problems related to the conservation and documentation of contemporary works of art, it might be possible to consider adapting this register to the purpose of safeguarding and protecting contemporary artistic production, which is ephemeral and often made from materials that deteriorate quickly'.[15]

In addition, the enforcement, on 29 August 2017 of the *(legge annuale per il mercato e la concorrenza)* Annual law for market and competition (Art 1, paras 175 and 176), with the changes it made to the heritage code, cannot be ignored. Its aim is to simplify the control procedures concerning the circulation of items related to the antiques market. Together with the novelties regarding time (from fifty to seventy years) and threshold limit values beyond which there is an obligation to obtain prior authorization before the exportation of works, an electronic register has been introduced to guarantee certainty and security, which is characterized by technical features that allow eg real-time consultation by the Superintendent.[16]

Thus, a fact appears unquestionable: the principle of certainty and safety for legal transactions (including those involving works of art) is now objectively

[13] P. Virgadamo, 'La protezione giuridica dell'opera d'arte ai confini del diritto d'autore (e oltre): dalla logica mercantile all'assiologia ordinamentale' *Diritto di famiglia e delle persone*, 1493, 1478-1508 (2018).

[14] M.V. Sessa, 'La tutela degli interessi pubblici e privati nella riproduzione delle opere d'arte' *Foro amministrativo*, 1019-1060 (2001), which, not surprisingly, configures the interest as a collective interest.

[15] A. Donati, 'Autenticità, *Authenticité*, *Authenticity* dell'opera d'arte. Diritto, mercato, prassi virtuose' *Rivista di diritto civile*, 987-1025 (2015).

[16] This register is divided into two lists: the first one relates to the things for which exhibition to the export office is required; the second one relates to the things for which the certificate is issued electronically without the need to exhibit the thing to the export office, without prejudice to the right of the superintendent to request at any time that any of the things indicated in the list be shown to him for direct examination.

included in a series of rules based on the realization of a collective and super-individual interest, rather than a merely private interest.

Based on this rationale, careful scholars rightly refer to the need to protect 'public trust arising from the relationship characterized by professional *status*':[17] this need must necessarily inspire those who aim at a safe circulation of documents certifying the authenticity of artworks. The issue here is not just that of being able to freely express one's own thoughts and to exercise the activities related to the enjoyment of copyright, but it also concerns the matter of carrying out an activity shaped by super-individual values and principles.

This will not be a minor issue in the solution of the problems that arise in the world of art, especially as far as the circulation of artworks is concerned, an issue that we will deal with in the following paragraph.

III. The Right of Authentication and Free Expression of Thought

Our legal system lacks of legislation with regard to the so-called right of authentication and archiving of the work of art.[18] Ordinary legislation governs certain aspects related to the protection of the artwork. Art 2575 et seq of the Italian Civil Code, in fact, regulate the object, the purchase, the content, the subjects, the transfer of the right of use and the withdrawal of the artwork from the market, but provide nothing about cataloguing.

Indeed, legge no 633 of 1941 concerning copyright, does not contain, in this sense, a specific provision; it defines protected artworks, the subjects of copyright, the content and duration of this right and introduces specific rules regarding certain categories of works. Arts 144-155 et seq, in particular, regulate copyright on post-first sales of artworks and manuscripts, the contents of which is beyond the aim of the present study.[19]

Furthermore, the Law on protection of things of artistic or historical interest (legge no 1080 of 1939)[20] does not come to the rescue nor does the Presidential

[17] R. Calvo, 'Expertise degli strumenti ad arco e affidamento nel prisma della responsabilità senza contratto' *Contratto e impresa*, 1-8 (2010), in the context of the authenticity of stringed instruments. This essay tends to apply the safeguard obligations regime aimed at protecting third parties in the relationship between the latter and the 'certifier': this is the theory of the so-called contract with protective effects towards third parties.

[18] From a comparative perspective, see A. Donati, n 15 above, 1000. The author refers to the French experience: *loi* 11 May 1957 no 57-298, transposed into the intellectual property code, introduced an exception to the characteristic of the non-disposability of the moral right of the author, granting the artist the right to dispose of this subjective legal situation, thus being able to appoint, by will, a body that manages, after his death, the various forms in which this moral right is concretely expressed, including that of issuing certificates of authenticity.

[19] See also Art 144, para 1, legge 22 April 1941 no 633, replaced by Art 2, para 2, decreto legislativo 13 February 2006 no 118 (which implemented Directive 2001/84/CE), which provides, in favor of the author, a right to compensation on the price of each sale subsequent to the first transfer of the work. On copyright, recently, see P. Virgadamo, n 13 above, 1500.

[20] *Amplius*, V.M. Sessa, n 14 above, 2941, who, after having outlined the technical and legal

Decree no 19 of 1979, ratifying and executing the Paris Text of the Berne Universal Convention of 24 July 1971.[21]

A first regulatory clue can be found in Art 64 of the Code of cultural heritage (decreto legislativo 22 January 2004 no 42 Codice dei beni culturali e del paesaggio), according to which

> 'whoever carries out the activity of sale to the public, exhibition for the purpose of intermediation aimed at the sale of paintings, sculptures, graphics or objects of antiquity, or of historical or archaeological interest, or in any case usually sells the work of arts or objects themselves, has the obligation to deliver to the buyer the documentation certifying the authenticity or, at least, the probable attribution and origin of the artworks. Alternatively, a declaration may be issued in the manner provided by the laws and regulations on administrative documentation, containing all the available information on authenticity or probable attribution and origin. This declaration, where possible in relation to the nature of the art work and the object, shall be attached to a photographic copy of the same'.[22]

This is a typical legal effect,[23] specifying the obligation upon individuals who carry out public selling activities to deliver certificates of authenticity of the artist's artworks (also known in commercial language as the 'authentic photo').

Nevertheless, Art 64 of the cultural heritage code allows a first summary and descriptive classification of the 'archiving' concept: the declaration of 'accreditation',[24] made by a person engaged in the activity of sale to the public,

concept of a work of art, deals with the scope of applicability of legge 22 April 1941 no 633 and legge 1 June 1939 no 1089, including the time limits for the protection of the copyright.

[21] The Berne Convention for the Protection of Literary and Artistic Works was signed on 9 September 1886, completed in Paris on 4 May 1896, revised in Berlin on 13 November 1908, completed in Bern on 20 March 1914, revised in Rome on 2 June 1928, in Brussels on June 26, 1948, in Stockholm on 14 July 1967 and finally in Paris on 24 July 1971.

[22] As modified by decreto legislativo 26 March 2008 no 62. On the basis of consolidated case law, the provision in question applies to the case referred to in the text: indeed, according to the new code of cultural heritage, the works of living authors and those whose execution does not date back to more than fifty years are excluded from the general regulation on cultural heritage of the national heritage, but not from the specific regulation relating to the authentication and counterfeiting of works of art Tribunale di Lecce 20 April 2009, *Giurisprudenza di merito*, 2262 (2010).

Concerning the rule referred to in the main text, see B. Mastropietro, 'Mercato dell'arte e autenticità dell'opera: un "quadro" a tinte fosche?' *Rassegna di diritto civile*, 556 (2017), which analyses the problems related to the issue of authentication (of tangible and intangible works) by the author himself and by certified bodies and the artist's heirs. On cultural inheritance protection, see A. Mansi, *La tutela dei beni culturali e del paesaggio* (Padova: CEDAM, 2004), 173, with regard to the aspects of the marketability of such goods and those relating to the counterfeiting of artistic works.

[23] Corte di Cassazione 3 July 1993 no 7299, *Giurisprudenza italiana*, 1, 410 (1994); also available in *Giustizia civ*ile, I, 1925 (1994); and in *Diritto d'autore*, 424, (1994), with regard of the same duty pursuant to Art 2 legge no 1062 of 1971.

[24] P. Cipolla, 'La prova del falso d'arte, tra il principio del libero convincimento e l'obbligo di motivazione razionale' *Giurisprudenza di merito*, 2201-2214 (2010), which distinguishes the

containing all the available information on the authenticity or probable attribution and origin of the artwork in the absence of other documentation, or, in alternative, a documentation, different from the previous one, certifying the authenticity or at least the probable attribution and origin of the works.

This set of rules, however, does not allow to solve in our system the issue of the possible configuration of the right to authenticate, exclusively or not, on behalf of certain subjects. Different approaches to this problem may be identified.

According to one opinion,[25] this right may be considered as part of the author's moral right and can be exercised by the author himself during his lifetime: pursuant to Art 20 legge no 633 of 1941, in fact, the author can 'claim the authorship of the work and oppose any distortion, mutilation or other modification'; he can also oppose any 'act to the detriment of the work itself' that may cause 'prejudice to his honor and his reputation', so that he would be the only person entitled to the declaration of authenticity. Therefore, in order to be qualified as an expression of the author's moral right, the right of authentication should be transferred to the legitimate holder, and/or other categories of heirs referred to in Art 20 legge no 633 of 1941, as purchase *iure proprio* (and not *mortis causa*) on the occasion of death,[26] subject to the condition that the person called to inherit accepts the inheritance.[27] In commercial law, this approach suggests that the right of authentication would belong exclusively, in case of death of the author, to the categories identified by Art 23 legge no 633 of 1941, and in particular just to the legitimate holders (for instance, the surviving spouse and children).

A different perspective is offered by relevant case law, according to which

> '*expertise* is a document containing an authoritative opinion of an expert on the authenticity and attribution of an artwork. The document can be issued by anyone, on the market, considered competent, since it is not a right exclusively reserved to the artist's heirs, who cannot, therefore, attribute or deny to third parties, such as art critics or scholars, the right to release

authentication ('autenticazione'), proper to the author or expert, from the accreditation ('accreditamento'), which is of anyone; P. Cipolla, 'La falsificazione di opere d'arte' *Giurisprudenza di merito*, 2032 (2013); P. Cipolla, 'L'arte contemporanea, la repressione penale del falso e l'art. 2, comma 6, d.lgs. 29 ottobre 1999 n. 490' *Cassazione penale*, 2463 et seq (2002). Instead, he speaks of a sort of 'self-declaration' ('autodichiarazione'), A. Ardito, 'Commento all'art. 64', in A. Angiuli et al eds, *Commentario al codice dei beni culturali e del paesaggio* (Torino: Giappichelli, 2005), 190. According to another part of the scholars, this certificate would be aimed at guaranteeing the 'lawfulness' of the origin: A. Papa, 'Commento all'art. 64', in V. Italia et al ed, *Testo unico sui beni culturali* (Milano: Giuffrè, 2000), 177. For an analysis of the cited rule and more references, see A. Milione, 'Commento all'art. 64', in M.A. Sandulli ed, *Codice dei beni culturali e del paesaggio* (Milano: Giuffrè, 2006), 479.

[25] More references in G. Frezza, n 11 above, 39.

[26] Tribunale di Milano 1 July 2004, unpublished.

[27] Among others, A. Palazzo, 'Le successioni', in G. Iudica and P. Zatti eds, *Trattato di diritto privato*, (Milano: Giuffrè, 2000), I, 3; P. Perlingieri, 'I diritti del singolo quale appartenente al gruppo familiare' *Rassegna di diritto civile*, 90, 71-108 (1982); T. Ascarelli, *Teoria della concorrenza e dei beni immateriali* (Milano: Giuffrè, 1960), 761; A. Cicu, 'Successioni per causa di morte', *Parte generale*, in A. Cicu and F. Messineo eds, *Trattato di diritto civile* (Milano: Giuffrè, 1961), XII, 70.

> expertise on authenticity of the work of their relative. The formulation of judgments on the authenticity of a work of art made by a deceased artist constitutes an expression of the right to free expression of thought and, therefore, may be carried out by any expert accredited by the marketplace'.[28]

The above mentioned case law reiterates the concept according to which

> 'since the attribution of an artwork to an artist is mere expertise on a commercial level, it can be carried out by any accredited expert that operates in the marketplace'.[29]

It is therefore inherent to the right of free expression of thought, in compliance with Art 21, para 1, of the Constitution.[30]

The question then arises as to the legal qualification of this activity.

[28] Tribunale di Roma 16 February 2010, *Diritto di famiglia e delle persone*, 1730 (2011). See also Corte di Appello di Milano 18 April 2017 no 1654, unpublished; Tribunale di Roma 31 March 2010, unpublished; Corte di Appello di Roma 8 June 2010 no 3657, unpublished; Tribunale di Milano 17 April 2014 no 5552, unpublished.

[29] Tribunale di Milano 13 December 2004, IP special section, unpublished.

[30] The freedom of expression must be understood as a freedom with contents that cannot always be the same but must be evaluated '(...) case by case, avoiding (...) judgments pronounced *ex ante* on the basis of a perpetual edict': L. Paladin, 'Libertà di pensiero e libertà d'informazione: le problematiche attuali' *Quaderni costituzionali*, 12, 5-27 (1987); A. Di Giovine, *I confini della libertà di manifestazione del pensiero* (Milano: Giuffrè, 1988), 12; C. Visconti, *Aspetti penalistici del discorso pubblico* (Torino: Giappichelli, 2008), 243. In this vein, A. Morrone, *Il custode della ragionevolezza* (Milano: Giuffrè, 2001), 451, speaks of 'dialectic between constitutional provisions, legislative provisions and contexts'. More details available also in C. Caruso, 'Tecniche argomentative della Corte costituzionale e libertà di manifestazione del pensiero', in C. Valentini ed, *Costituzione e ragionamento giuridico* (Bologna: Archetipolibri, 2012), 169.

It is useful to remember that authoritative scholars generally place this freedom within the framework of the fundamental rights of the person (this is known to constitutionalists as the 'individualist' approach): C. Esposito, 'La libertà di manifestazione del pensiero nell'ordinamento italiano', in Id ed, *Diritto costituzionale vivente: Capo dello Stato ed altri saggi* (Milano: Giuffrè, 1992), 119, for whom when it is argued that Italian Constitution guarantees the right of expression of thought in an individualistic sense, it means that it is guaranteed to the individual as such regardless of the qualifications that the individual may have in any community and of the functions connected to such qualifications; it also means that it is guaranteed so that man can unite with the other man in thought and with thought and eventually operate together. P. Barile, *Libertà di manifestazione del pensiero* (Milano: Giuffrè, 1975), 81; A. Pace and M. Manetti, 'Articolo 21', in G. Branca and A. Pizzorusso eds, *Commentario della Costituzione. Rapporti civili* (Bologna: Zanichelli, 2006), 97.

On the relationship between freedom of thought and human dignity, see L. Scaffardi, *Oltre i confini della libertà di espressione. L'istigazione all'odio razziale* (Padova: CEDAM, 2009), 228. Regarding the relationship between Art 21 Constituion and the principle of equality, see: P. Caretti, 'Manifestazione del pensiero, reati di apologia e di istigazione: un vecchio tema che torna d'attualità in società multietnica', in Id et al eds, *Diritti nuove tecnologie trasformazioni sociali, Scritti in memoria di Paolo Barile* (Padova: CEDAM, 2003), 125 and A. Pizzorusso, 'Limiti alla libertà di manifestazione del pensiero derivanti da incompatibilità del pensiero espresso con princípi costituzionali', ibid 667. See also G. Nicastro, 'Libertà di manifestazione del pensiero e tutela della personalità nella giurisprudenza della Corte Costituzionale', available at https://tinyurl.com/54cwbj4y (last visited 30 June 2022). On the evolution of doctrinal and case law interpretation of Art 21 Constitution see F. Polacchini, n 4 above, 23-30.

According to part of the literature, the judgment expressed by a certifying body is considered as 'a personal opinion', therefore subjective, unsuitable to become objective evidence. From this point of view, in addition to being an expression of Art 21 of the Constitution, the 'opinion' also implements Art 33 Constitution, which implies that the declaration comes from freedom of teaching. In this sense, the 'opinion' is necessarily linked to the scientific dignity and authority of its author.

According to an additional point of view, 'the so-called archiving', not carried out by the author or by an expert of national importance, technically constitutes 'authentication' and falls within the category of accreditation, the value of which depends on the qualifications of the person granting it: it constitutes a simple private writing having an assertive content of an act not referable to the declarant and so attributable to the category of 'opinions'.[31]

We believe that a univocal legal classification of the activity, herein described, is not satisfactory, as it appears essential to contextualize it taking into account the peculiarity of the concrete matter which it refers to.[32] Indeed, beyond the *nomen iuris*, there is an incontrovertible fact: when an expert scholar writes a scientific essay (hence, the coordination with Art 33 of the Constitution), following a paper published by the opinion press or as an idea publicly expressed either through the so-called media or social media, this activity can be qualified as freedom of expression of thought. In these cases, the limits set out in para 6 of Art 21 Constitution will apply.

The case is, however, different– as is in the majority of concrete instances – where thought is expressed not as a purely subjective 'opinion' but as an objective assessment: expressing one's own idea, in fact, about the beauty of the artwork or its suitability to be considered as such, which is a purely subjective assessment, is quite different from verifying that the signature of the painting is an autograph, that the canvas corresponds to those usually used by the artist, that the graphic trait is ascribable to the artist, that the colors are of the same quality as those used by the artist, etc, which are all objective evaluations.[33]

This clarification may not seem quite relevant, but it will actually reveal its

[31] P. Cipolla, n 24 above, who clarifies the evidentiary value of a certificate of authenticity (and its characteristics).

[32] According to the method suggested by P. Perlingieri, 'Produzione scientifica e realtà pratica: una frattura da evitare' *Rivista di diritto commerciale*, 455-477 (1969), also available in *Studi in onore di Giuseppe Grosso* (Torino: Giappichelli, 1974), VI, 397, and in Id, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 1.

[33] In our opinion, a descriptive parallelism can be drawn between what is argued in the text and the activity of the seller-gallery owner of the work, whose behavior must always be informed of the obligations of diligence and correctness (Art 1176 of the Italian Civil Code) jointly and severally liable (Art 2055 of the Civil Code) for damages if the work sold is subsequently found plagiarized: Corte di Cassazione 26 January 2018 no 2039, *Rivista di diritto industriale*, 420 (2018). The principle that emerges from the reading of this ruling allows to affirm that the obligation to behave with the duty of qualified diligence pursuant to Art 1176 of the Italian Civil Code is always upon the experts of the art market.

significance in relation to our following reasoning: indeed, being the opinion 'incoercible', no action is given, in abstract, against those who, expressing their opinion, do not recognize the authenticity of the artwork. Coercion, in fact, against one's thought is unthinkable. The possibility, therefore, to bring proceedings before a court, in order to obtain a 'mandatory' filing, must be excluded, when different authorities express their negative opinion. Summarizing, the problem is connected with the existence or not of the right to a judicial assessment of the authenticity of the work, which will be discussed in the following paragraph.

IV. Judicial Assessment of the Artwork's Authenticity: The Negative Stance of the Italian Courts

Thus, we have come to the essential core of the matter, namely the analysis of the question concerning the admissibility of a claim for verification of the authenticity of a work of art.[34] As case law teaches, it can be prodromal in relation to the need to protect a substantial situation, such as the case relating to compensation for damages for tortious liability.[35] At times, this assessment may constitute the grounds of a request for protection aimed at eliminating a situation of uncertainty concerning the right of ownership (of the work of art).[36] Yet, in some cases, this claim is proposed *tout court*, ie regardless of its necessary connection to a subjective right, simply because the certifying body, accredited by the market – and therefore able to influence the economic and financial evaluation of the work – rejects the inclusion in its archive,[37] or errs in its dating.[38]

Finally, it should not be forgotten that the assessment of authenticity may constitute the requirement of a claim for termination of the sale contract of the artwork, either due to lack or defect of essential qualities of the goods sold, pursuant to Art 1497 of the Italian Civil Code; or in order to ascertain the delivery of *aliud pro alio* or seek for annulment of the contract for error on the essential qualities of the artwork, pursuant to Art 1429 no 2 of the Italian Civil Code.

Herewith, we shall exclusively deal with the case where such a claim is brought *tout court*, ie regardless of the protection of a subjective situation as a precondition.

[34] M.F. Guardamagna, 'L'azione di accertamento giudiziale dell'autenticità di un'opera. I recenti sviluppi giurisprudenziali' *Diritto di famiglia e delle persone*, 1588-1606 (2018).

[35] Corte di Cassazione 4 May 1982 no 2765, *Giustizia civile*, II, 1982, 1745, with the analysis of Di Majo, *Ingiustizia del danno e diritti non nominati*; also available in *Foro italiano*, I, 1, 1982, c 2864, with reflections of F. Macario.

[36] Corte di Appello di Milano 11 December 2002, *Diritto d'autore*, 224 (2004), with note of M. Fabiani.

[37] Tribunale di Milano 19 June 2006 no 127, *Repertorio Foro italiano*, *Diritti d'autore* (2008); Tribunale di Milano 18 January 2006 no 74, *Repertorio Foro italiano*, *Diritti d'autore* (2009); Tribunale di Milano 17 October 2007 no 142, *Repertorio Foro italiano*, *Diritti d'autore* (2009).

[38] Tribunale di Milano 14 July 2012 no 8626, *Danno e responsabilità*, 291 (2014).

According to a decision of the Supreme Court of Cassation[39] in relation to 'cognitive' judgments, the action of ascertainment cannot have as its object – except in the cases provided by the law – a mere factual situation. Instead, it must aim at the protection of a right that has already arisen from an actual and not simply potential harm. Therefore, the action aimed at obtaining the independent ascertainment of the authorship of a work of art is inadmissible.

However, case law appears to be based on two opposing positions. The Court of Milan, eg, has recently held this action admissible if based on indisputable (scientific and factual) elements. Contrarily, it declared inadmissible an order for inclusion in the general catalogue of an artist, edited by an institution that carries out artworks' archive activity, since it represents a free expression of thought and is unenforceable[40]. The Court of Rome, instead, has a different opinion, since it has issued, within a very short period of time, several judgements, with the same 'facto and the same 'motivations'. In particular, following the refusal to archive by the most accredited certification body, a claim was submitted on the grounds that the opinion given was the result of both incompetence and naivety and in breach of the most elementary principles of professional diligence; the request, however, was declared inadmissible by the judge.[41]

The reasoning behind these decisions can be summarized as follows:

a) the opinion issued by any certifying body represents a free expression of opinion (Art 21 of the Constitution);

b) the claim aimed, in these cases, to the ascertainment of the authorship of the artwork either in the event of discordance of opinion or in that of uncertainty. Hence, the question that arises is whether a judge has the power to ascertain, with the charisma of truth, such authenticity or not;

c) it must be ruled out that this power can be exercised pursuant to Art 72 of the Notary law, concerning the verification of the authenticity of the signature, as already clarified by previous case law;

d) in the absence of unquestionable evidence, such as photographic documentation of the artist while he/she is creating the artwork, it is only possible to ascertain in probabilistic terms whether a pictorial work is attributable to an author on the sole basis of the trait or signature;

e) therefore, no judicially enforceable law exists to ascertain the authenticity of an artwork[42]. On the matter, the Court of Rome states: 'if it is true that a judicial assessment aims at affirming the existence of a right as a legitimate prescriptive will when settling a dispute, this would imply an exclusive attention to a 'mere

[39] Corte di Cassazione 30 October 2017 no 28821, *Foro italiano*, 1, I, c 167 (2018).

[40] Tribunale di Milano 15 February 2018 no 4754, *Diritto di famiglia e delle persone*, 660-665 (2019).

[41] Tribunale di Roma 15 May 2017 no 9610, *Foro italiano*, I, c 3772 (2017); Tribunale di Roma 17 April 2018 no 7792; Tribunale di Roma 21 June 2018 no 12692.

[42] Tribunale di Roma 15 May 2017, *Foro italiano*, I, 12, c 3772 (2017), with opinion of G. Casaburi.

evaluation' or yet a determination of the existence or not of a lawful right. The assessment is not, actually, finalized to confer procedural truth and to implement a rule in a specific case but to ascertain a lawful right in abstract. Therefore, the focus must be on what is 'the right' (...)

> 'considered being the object of the judicial assessment. Clearly, such right cannot concern the ownership of the artwork, since it is undisputed that the pictorial work of art *sub iudice* belongs to the claimant, nor can it concern the moral right of copyright',

which belongs to the persons indicated by Art 20 of the copyright law;

f) in which case, again according to the abovementioned judge, the object of the claim is not to establish a right, but to verify the existence of a series of qualities of the good, such as the artistic trait, the colors, the use of a certain canvas or of typical subjects. The latter, all together, could lead to a judgement of probability related to an artist who worked according to well-known patterns.

Nowadays such case-law approach seems to be consolidated, although we have recently tried to identify reasons in favor of the admissibility of a claim of ascertainment,[43] from a structural and functional perspective.

V. A Possible Theoretical Reconstruction

We believe, above all, essential to propose a constitutionally oriented interpretation of the action of ascertainment and its object, emphasizing, as said by Wach and Chiovenda, how necessary it is to consider the 'prejudicial uncertainty',[44] so to evaluate the judicial protection requested, in view of the fact that the trial is useful 'not only for the protection of subjective rights, but first and foremost for the implementation of the legal system'.

In this perspective, we favor a hermeneutical approach in the context of which it is also possible to protect 'interests that are not legally relevant as subjective rights, for which the constitutional protection of Art 24 of the Constitution does not apply, if not with a functional profile'[45] so as to ensure a more suitable action adherent to the actual social reality.[46]

[43] G. Frezza, n 11 above, 76.

[44] G. Chiovenda, 'Azioni e sentenze di mero accertamento' *Rivista di diritto processuale civile,* I, 31 (1933); G. Chiovenda, 'Adolfo Wach' *Rivista di diritto processuale civile,* I, 366 (1926), also available in *Saggi di diritto processuale civile (1894-1937)* (Milano: Giuffrè, 1993), 263.

[45] G. Frezza, n 11 above, 91.

[46] According to F. Ferrari, 'Un inquadramento sistematico del diritto all'autenticità dell'opera d'arte: "Arte e diritto fra autenticazione e accertamento" di G. Frezza' *dirittodelleartiedellospettacolo.it* (2020), 'a similar phenomenon – now solved at a regulatory level, at least in the field of intellectual property – has also been placed in the past in the context of the discussion regarding the possibility of acting in a negative assessment even as a precautionary measure, as is now envisaged by Art 120 para 6 *bis* code of intellectual property. Precisely with reference to the negative assessment actions, with

Secondly, it must also be pointed out – herein appropriately and concisely – that the 1942 codification left behind the naturalistic idea of the concept of 'thing', that may also be suitable to comprise the work of art. At the same time, thanks to the contribution of the best civil law doctrine, a clear distinction between 'thing' and 'good' has been formulated. The 'thing' is conceived as a pre-juridical and neutral concept, while the concept of 'good' is the result of the legal qualification[47] and is intended as a legal synthesis between the usefulness of the thing (objective element) and the interest to protect the subjective legal situation (subjective element).[48] Thus, emphasizing just one of the two factors afore mentioned, to ensure the unity of the theoretical notion of good, is a formalistic, static and partial approach. The identification of the asset as an interest, which leads to the qualification of the situation of 'apprehension' of the same, must also be followed by the evaluation of the utility expressed by the 'thing', which, in the case of a work of art, is at the same time existential and patrimonial. Therefore, it seems that the inadmissibility of the action to ascertain the authenticity of the artwork leads to disregarding the importance of the 'utility' element of the notion of good, as seems to be argued by the case law herein criticized. Then, if works of art can be considered as *res* in the juridical sense (ie, a synthesis of interests and utility), it is necessary to affirm that the inadmissibility of ascertaining the authenticity of the work ontologically frustrates this element, linked to the notion of legal asset: indeed, a non-authentic work of art does not have the character of utility.

Finally, it seems essential to analyze how the owner *status* concerning the artwork is regulated: Art 832 of the Italian Civil Code defines the right of ownership as the faculty to enjoy and, separately, to dispose of the good.[49] This is clearly not a hendiadys, and, consequently, the two powers assume autonomous significance.

Relevant legislation, in particular, cannot be interpreted as the exclusive

respect to which the fear is evidently that of avoiding the reintroduction in the legal system of the non-compliance actions, in light of the lack of an ad-hoc rule, the object of the judgment would not concern the right itself, but mere questions (E. Merlin, 'Azione di accertamento negativo di crediti ed oggetto del giudizio' *Rivista di diritto processuale civile*, 1064-1082 (1997).

47 R. Nicolò, *L'adempimento dell'obbligo altrui* (Milano: Giuffrè, 1936; Camerino: Edizioni Scientifiche Italiane, 1978), 78; P. Perlingieri, *I negozi su beni futuri*, I, *La compravendita di cosa futura* (Napoli: Jovene, 1962), 45.

48 It is the well-known perspective of S. Pugliatti, 'Immobili e pertinenze nel progetto del secondo libero del codice civile', in Id, *Beni immobili e beni mobili* (Milano: Giuffrè, 1967), 192; Id, 'Riflessione in tema di "*universitas*" '*Rivista trimestrale di diritto e procedura civile*, 992 (1955). In this vein, G. Carapezza Figlia, *Oggettivizzazione e godimento delle risorse idriche. Contributo a una teoria dei beni comuni* (Napoli: Edizioni Scientifiche Italiane, 2008), 8-29, where is available a further analysis.

49 L. Barassi, *Proprietà e comproprietà* (Milano: Giuffrè, 1951); N. Irti, *Proprietà e impresa* (Napoli: Jovene, 1965); C. Salvi, 'Il contenuto del diritto di proprietà', in A. Gambaro, 'La proprietà', in A. Gambaro and U. Morello eds, *Trattato dei diritti reali*, I, *Proprietà e possesso* (Giuffrè: Milano, 2008), 295; F. Macario, 'Commento all'art. 832 c.c.', in E. Gabrielli ed, *Commentario del Codice Civile* (Torino: UTET, 2013), 291.

'right to alienate' the owned good (ie the artwork) but it consists, in agreement with a shared opinion, of the 'power of appropriation of the good's economic value'.[50] Since this approach is favored by the Constitution, belief towards the constitutional right to ownership has, in recent years, come about.[51]

Indeed, if the Civil Code focuses on the right of ownership through a variegated catalog of actions in its defense and different forms of protection[52], the

[50] C. Argiroffi, *Delle azioni a tutela della proprietà*, in P. Schlesinger ed, *Codice civile. Commentario* (Milano: Giuffrè, 2011), 24.

[51] P. Perlingieri, 'Introduzione alla problematica della «proprietà»', in Id ed, *Raccolta di lezioni* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1971-1972), passim; Id, 'Note sulla crisi dello Stato sociale e sul contenuto minimo della proprietà' *Legalità e giustizia*, 439 (1983); Id, 'Proprietà, impresa e funzione sociale' *Rivista di diritto dell'impresa*, 207-227 (1989); Id, 'Principio «personalista», «funzione sociale della proprietà» e servitù coattiva di passaggio' *Rassegna di diritto civile*, 688-697 (1999); Id, 'Introduzione a H. Rittstieg, La proprietà come problema fondamentale. Studio sull'evoluzione del diritto mercantile', in E. Caterini ed, *Traduzioni della Scuola di specializzazione in diritto civile dell'Università di Camerino* (Napoli: Edizioni Scientifiche Italiane, 2000), 9; P. Perlingieri, 'Conclusioni', in G. D'Amico ed, *Proprietà e diritto europeo* (Napoli: Edizioni Scientifiche Italiane, 2013), 325; Id, '«Funzione sociale» della proprietà e sua attualità', in S. Ciccarello et al eds, *Salvatore Pugliatti, I Maestri italiani del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2016), 187; Id, 'La «funzione sociale» della proprietà nel sistema italo-europeo' *Corti salernitane*, 175-195 (2016). About property right there are several theories in literature; on the one hand, the 'storic' perspective (P. Grossi, *Le situazioni reali nell'esperienza giuridica medievale* (Padova: CEDAM, 1968); P. Perlingieri, *Un altro modo di possedere: l'emersione di forme alternative di proprietà alla coscienza postunitaria* (Milano: Giuffrè, 1977); Id, *Il dominio e le cose. Percezioni medievali e moderne nei diritti reali* (Milano: Giuffrè, 1992); F. Vassalli, 'Della legislazione di guerra e dei nuovi confini del diritto privato', in Id, *Studi giuridici* (Milano: Giuffrè, 1960), II, 359; F. Vassalli, 'Per una definizione legislativa del diritto di proprietà', in Id, *Studi giuridici* above, 239; S. Romano, 'Sulla nozione di proprietà' *Rivista trimestrale di diritto e procedura civile*, 337 (1960)); on the other hand, the reconstructive perspective (S. Pugliatti, *La proprietà nel nuovo diritto* (Milano: Giuffrè, 1954); S. Rodotà, 'Note critiche in tema di proprietà' *Rivista trimestrale di diritto e procedura civile*, 1252 (1960); S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Bologna: il Mulino, 1981); P. Rescigno, *Lezioni su proprietà e famiglia* (Bologna: il Mulino, 1971); P. Rescigno, 'Per uno studio sulla proprietà' *Rivista di diritto civile*, I, 1 (1972); other scholars, furthermore, suggest an economic view of property right (R. Sacco, *La proprietà* (Torino: Giappichelli, 1968); U. Mattei, 'La proprietà', in R. Sacco ed, *Trattato di diritto civile*, *Diritti reali* (Torino: UTET, 2001), 6; A. Gambaro, *Il diritto di proprietà*, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1995), 1; A. Gambaro, *La proprietà*, in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 1990), 98). See also, in the last perspective, G. Calabresi and A.D. Melamed, 'Modelli di analisi economica e regole giuridiche nella disciplina della proprietà', in G. Alpa et al eds, *Analisi economica del diritto privato* (Milano: Giuffrè, 1998), 69; C.M. Rose, 'Il contributo dell'economica al diritto di proprietà', in G. Alpa et al eds, ibid 78; A. Pericu, '*Property rights* e diritto di proprietà', in G. Alpa et al eds, *Analisi economica* n 51 above, 102. See also, *ex multis*, F. Parisi, 'Private Property and Social Cost' 2 *European Journal of Law and Economics*, 149-173 (1995); H. Demsetz, 'Toward a Theory of Property Rights' 57 *American Economic Review*, 2, 347-359 (1967), also in the Italian translation E. Colombatto, *Verso una teoria dei diritti di proprietà*, in E. Colombatto et al eds, *Tutti proprietari la nuova scuola dei property rights* (Firenze: Le Monnier, 1980), 61; Y. Barzel, *Economic Analysis of Property Rights* (Cambridge: Cambridge University Press, 1997); A.A. Alcian, 'Some Economics of Property Rights' 30 *Il politico*, *4*, 816-829 (1965).

[52] These actions have as their object the mere ascertainment of the right of ownership and tend to 'eliminate any uncertainty about the legitimacy of the power of fact and law over the property or rather in the declaration of compliance of the state of fact with the rule of law' (L. Colantuoni, 'Le azioni petitorie', in *Trattato dei diritti reali, Proprietà e possesso* (Milano: Giuffrè, 2008), I, 983). The Italian

Constitution is suitable for outlining a relevant content element, to be understood as a synthesis between the patrimonial value of the asset (patrimonial legal situation) and the fulfillment of the value of the person (existential legal situation).

The ownership of a work of art represents the paradigmatic example of a situation that adds up, both the existential profiles (ie with merely aesthetic profiles related to the possession and enjoyment of the artwork) and patrimonial profiles. Nevertheless, this legal state of affairs cannot be statically understood, as seems to be argued by the case law referred to above and herein criticized, but rather, should be approached in a dynamic sense, as a power of disposition.

It is within this framework that the certifying institution, called upon for the archiving at the end of an intellectual operation, comes into play. As previously mentioned, issuing a negative opinion is an expression of freedom of thought, a pure and unquestionable opinion and, as such, unenforceable. We have already argued that this 'opinion' must necessarily be objectified in an opinion rendered with diligence, reliability and good faith. The refusal to file the application and the consequent request for judicial verification of authenticity, cannot be rejected on the basis of the assumption, typical of the above-mentioned case law, according to which rights but not facts are ascertained, such as whether the artwork is authentic or not. Thus, its immediate consequence would irremediably compromise the patrimonial aspect and disposal of the artwork itself and, more so, if the certifying body is the one most accredited by the art market.

Finally, this position could be qualified as 'dominant' and contradictory to the competition rules of the Italian-European system of sources of law[53], if considered from an economic-mercantile standpoint.

These three arguments (the constitutionally oriented interpretation of the assessment action; the work of art as a 'good' in the legal sense including *utilitas*; the functional concept of ownership of the artwork) may represent, with the obvious assistance of expert witnesses, solid points for the admissibility of the judicial ascertainment of the authenticity of the artwork.

legal system provides different types of mere assessment actions: for instance, the one referred to in Art 949 of the Italian Civil Code and to the action for the settlement of boundaries; hence the issue, in legal literature, regarding the admissibility of a general, atypical assessment action (ibid 984).

53 R. Mongillo, *Opere dell'ingegno, idee ispiratrici e diritto d'autore* (Napoli: Edizioni Scientifiche Italiane, 2012), 78; A. Pappalardo, *Il diritto della concorrenza dell'Unione europea* (Torino: UTET, 2018); A. Catricalà et al eds, *Concorrenza, mercato e diritto dei consumatori* (Torino: UTET, 2018); C. Fratea, *Il* private enforcement *del diritto della concorrenza nell'Unione europea* (Napoli: Edizioni Scientifiche Italiane, 2015).

Essays

The Principle of Solidarity in the Italian Constitution

Angelo Jr Golia*

Abstract

This article analyses the features of the principle of solidarity in the Italian legal system. It shows that in the Italian constitutional system the principle of solidarity is not directed towards the resolution of social conflict as such. Rather, the principle of solidarity – in combination with other principles – recognises, stabilises, and supports certain levels of conflict to the purposes of social integration via politicisation. After the introduction in section I, section II outlines the conceptual background of solidarity as a *legal* principle, recalling the most influential theoretical frameworks and the works of the Constituent Assembly in 1946-1947. Section III engages in a doctrinal analysis, exploring the personal and objective scope of application of the principle. Section IV, finally, offers an overview of the main applications of the principle in legislation and case law and concludes by referring to the spatial and temporal dimensions of solidarity.

I. Introduction

In most recent years, legal scholarship has witnessed a revival of the principle of solidarity. This trend can be observed not only in national and international legal discourses but also across different fields: (comparative) constitutional law, international law, EU law, legal theory. The reasons for this renewed interest may be individuated in distinct but interlinked phenomena, variably related to the growing spatial and temporal interconnectedness triggered by globalization: financial/economic crisis, climate crisis, global migrations, global supply chain disruption, and, most recently, a global pandemic.[1]

Such revival calls for an examination of the *legal* nature of the principle of solidarity, that is, of the analytical and normative elements underpinning solidarity *as a legal norm*. At the same time, the renewed interest for solidarity requires a careful consideration of the specific – historical, ideological, textual, social, economic – features in different legal systems. Only in this way may transnational

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[1] On such profiles, see especially sections V.5-V.6 below.

and comparative legal discourses accurately capture similarities and differences, to the purposes of broader legal reflections and policy proposals.

This article aims to contribute to such debate, by analysing the specific features of the principle of solidarity in the Italian legal system. It offers a relatively thorough and systematic conceptualization, capturing the intellectual, normative, and practical significance of such principle. The central argument is the following: in the Italian constitutional system, solidarity is a *meta*-principle, which encompasses all the constitutional norms aimed at the integration of the people to which the normativity of the Constitution is directed. Already at this introductory stage, such formulation requires some clarification.

Firstly, while solidarity has undoubtedly normative character, it has the legal nature of a principle, ie an 'optimization requirement' in the sense of Robert Alexy's theory of fundamental rights.[2] This means that it consists of an ought-to-be aimed at the maximization of a (social) result, in turn linked to certain values. With respect to the values emerging from the Italian Constitution - notably democracy, equality, personalism, pluralism, work – the principle of solidarity constitutes a sort of centre of gravity, which dynamically organizes social interactions, while at the same time *triggering* and *mediating* conflicts. In this sense, the prefix 'meta' utilized here indicates that the normativity of solidarity emerges mainly – though not exclusively – through other norms that also qualify as principles. As a principle, solidarity is typically subject to balancing,[3] which make its application a question of *quantum* and *quomodo* and not of *an*.[4]

Secondly, solidarity is a principle oriented mainly to the fulfilment of duties, namely 'of political, economic and social' character (Art 2 of the Constitution). Here, 'duties' should be understood as passive legal positions not necessarily correlative to individual rights. In this sense, it is part of the 'objective value system' of the Italian Constitution, which permeates the entire legal system, from public law to private law, from criminal law to procedural law, up to 'horizontal' contractual relations. In this same sense, while not all constitutional duties are based on the principle of solidarity, all duties of solidarity are to be considered constitutional.[5]

[2] R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), 47-48: 'principles are optimization requirements, characterized by the fact that they can be satisfied varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules.'

[3] A. Morrone, 'Solidarietà e autonomie territoriali nello stato regionale', in B. Pezzini and C. Sacchetto eds, *Il dovere di solidarietà* (Milano: Giuffrè, 2005), 27.

[4] B. Pezzini, 'Dimensioni e qualificazioni nel sistema costituzionale di solidarietà (a proposito di uguaglianza ed effettività dei diritti e tematizzazioni della differenza)', in Id and C. Sacchetto eds, n 3 above, 101.

[5] B. Pezzini, 'Dimensioni e qualificazioni' n 4 above, 99, fn 14. See also A. Pace, *Problematica delle libertà costituzionali* (Padova: CEDAM, 3rd ed, 2003), 56; F. Polacchini, *Doveri costituzionali e principio di solidarietà* (Bologna: Bononia University Press, 2016), 161, 183.

Thirdly, solidarity is aimed at integration. And yet, this integration is not axiologically neutral. In Lombardi's words, it is

> 'a fundamental criterion destined to mediate, through duties (...), that minimum of homogeneity without which political life would be reduced to bellum omnium contra omnes'.[6]

To use Smend's categories,[7] the principle of solidarity aims at integration at both the functional level[8] and at the material level.[9] In other words, the principle of solidarity and the constitutional and legislative norms that gravitate around it do not aim at *any* kind of social integration, potentially compatible with an authoritarian regime or with constitutional systems exclusively devoted to the protection of economic freedoms. On the contrary, they aim at the preservation and strengthening of an axiological system which belongs to the family of Western post-war constitutionalism but remains in many traits specific to the Italian constitutional experience. In particular, in the Italian legal system, solidarity does not pretend to resolve or deny social conflict. Rather, it *presupposes* and *exploits* social conflict in its dynamic, jurisgenerative potential, in its capacity to initiate processes of social and normative evolution.[10] Especially in economic relations, the application of the principle of solidarity implies that the treatment of different subjects may not conform to purely retributive criteria or theories of justice. Therefore, it may determine a transactional imbalance. In this sense, solidarity is not merely *compensation*, but rather *redress*.[11]

Paradoxical as it may appear, then, in the Italian Constitution of 1948, solidarity is (also) conflict. Solidarity does not overcome but rather presupposes – and productively exploits – distinctions, contrapositions of interests, claims, legal situations. It

> 'expresses a concept of a relational nature, aimed at the multiple forms through which a complex and non-homogeneous community manages to integrate itself into the state structure'.[12]

Further, the dynamic potential – both conflictual and integrative – of the principle

[6] G. Lombardi, Contributo allo studio dei doveri costituzionali (Milano: Giuffrè, 1967), 48.

[7] R. Smend, 'Constitution and Constitutional Law', in A. Jacobson and B. Schlink eds, *Weimar. A Jurisprudence of Crisis* (Berkeley: University of California Press, 2001 (1928)), 213-248.

[8] Related to the experience, to the fact of commonality so as to deepen the existence of both the community and the individual.

[9] Related to the participation in material values and conditions of co-existence.

[10] From a broader perspective but in the same direction, see most recently G. Martinico, *Filtering Populist Claims to Fight Populism. The Italian Case in a Comparative Perspective* (Cambridge: Cambridge University Press, 2022).

[11] For this distinction, see E. Christodoulidis, *The Redress of Law. Globalisation, Constitutionalism and Market Capture* (Cambridge: Cambridge University Press, 2021), 2.

[12] A. Morrone, n 3 above, 28.

of solidarity does not stop at the boundaries of the community defined by the territory or by the status of citizenship, nor does it take place in an a-temporal dimension. On the contrary, it embraces persons and communities outside those of the territorially identified nation-state; it penetrates the institutional dynamics of sub-state communities; and it extends over time spans beyond a single generation. In this way, solidarity contributes to projecting the normativity – vehicle, again, of *both* conflict *and* integration of the Constitution beyond the boundaries of the here and now.

The article proceeds as follows. After this introduction, section II outlines the conceptual background of solidarity as a legal principle, recalling the most influential theoretical frameworks and the works of the Italian Constituent Assembly of 1946-1947. Section III engages in a doctrinal analysis, exploring the personal and objective scope of application of the principle. Section IV offers an overview of the main applications of the principle in ordinary legislation and case law and concludes by referring to the spatial and temporal dimensions of solidarity.

II. Background

1. Conceptual Background

As an institute of civil law, solidarity dates back to the *obligatio in solidum* of Roman law.[13] In today's Italian law, one may find it within the general regulation of civil law obligations, under Arts 1292-1313 of the 1942 Civil Code; and, within the scope of tort law, in Art 2055 of the Civil Code. As is known, such institute concerns a situation where two or more persons (co-obligors) are liable in respect of the same liability, and a claimant (oblige/creditor) may pursue an obligation against any of them as if they were jointly liable. However,

> 'the person who has compensated for the damage has recourse against each of the others in proportion to the degree of fault of each and to the consequences arising therefrom. In case of doubt, the degree of fault attributable to each is presumed to be equal.'[14]

Of such civil law roots, public law scholarship usually emphasizes the communitarian aspect, which refers to an idea of solidity, totality, friendship between co-obligors,[15] both on the external side (towards the creditor) and on the internal side (in the presumption of equality of the degree of fault). However, to

[13] A. Guarino, *Diritto privato romano* (Napoli: Jovene Editore, 12th ed, 2001), 790-793. It is roughly equivalent to the joint and several liability of common law jurisdictions.

[14] Art 2055 Civil Code.

[15] S. Galeotti, 'Il valore della solidarietà' *Diritto e società*, 1-24, 3 (1996); F. Giuffré, *La solidarietà nell'ordinamento costituzionale* (Milano: Giuffrè, 2002), 10-11, fn 25.

the purposes of constitutional law, equally important is the profile of fragmentation, tension, and at least potential conflict between distinct though legally bound subjects. This profile emerges from the action granted to the co-obligor who compensated for the damage against the other co-obligors; and from the possibility that the exact degree of the individual faults may be determined in court.

From its Roman origins, the history of solidarity leads to the French Revolution. It had already re-emerged in the civil law vocabulary at the end of the seventeenth century[16] and for a certain period it had as a synonym 'solidity' (*solidité*).[17] Only with the French Revolution, however, the concept of solidarity assumed *also* a more socio-political meaning,[18] initially in the form of *fraternité*, the third principle of the Revolution along with *liberté* and *egalité*. In the wake of its closest conceptual (Christian) antecedents of *fraternitas* and *caritas*, the revolutionary concept was characterised by the overcoming of the particularism of belonging to a particular community. The *fraternité* of the Revolution was constituted *precisely* by its combination with equality and freedom: no longer a solidarity between subjects belonging to the same corporation, status, group, but rather between individuals considered in the abstract, without societal constraints and *therefore* legally equal.[19] In this context, the concept of *fraternité* was coherent with the *Loi Le Chapelier* of 1791,[20] which abolished trade organizations, corporations, and the first forms of trade unions, effectively establishing the principle of business freedom of the emergent bourgeoisie.

Because of such roots,[21] however, the concept of *fraternité* was still somewhat configured as a pre-political duty or a moral obligation,[22] detached from the – concrete, material, historically situated – conditions of interdependence rooted in structures of (social) power. The concept of *fraternité* did not capture class struggles and, as such, tended to an abstract indifferentiation.[23] This would progressively emerge during the post-Revolution years. In the Jacobin-Montagnard constitution of 1793 – which omitted *fraternité* and instead

[16] The concept being recorded in the 1694 *Dictionnaire de l'Académie Française*: see R. Zoll, 'Solidarietà' *Enciclopedia delle scienze sociali* (Roma: Treccani, 1998), VIII, 240.

[17] Term still used by Pothier in his *Traité des obligations* of 1761. I rely here on A. Supiot, *Grandeur et misère de l'Etat social* (Paris: Fayard, 2013), 43.

[18] S. Stjernø, *Solidarity in Europe. The History of an Idea* (Cambridge: Cambridge University Press, 2005), 25 ff.

[19] H. Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (Frankfurt: Suhrkamp, 2016), 9-20, 79-138; S. Giubboni, 'Solidarietà' *Politica del diritto* 525, 527-553 (2012); F. Pizzolato, 'Fraternità (principio di)' *Digesto delle discipline pubblicistiche* (Torino: UTET, 2012), Agg V, 379.

[20] Loi des 14-17 octobre 1791 sur les coalitions.

[21] R. Zoll, n 16 above, 242-243.

[22] See M. Ozouf, 'Fraternité', in F. Furet and M. Ozouf eds, *Dizionario critico della Rivoluzione francese* (Milano: Bompiani, 1988), 657.

[23] As Marx and Engels pointed out: K. Marx and F. Engels, *Marx-Engels-Werke* (Berlin: Dietz, 1960), VII, 21.

recognized *proprieté*[24] – duties constituted an instrument to strengthen the participatory elements of citizenship. Individuals would be excluded or included from the community, depending on their ethical-political behavior and revolutionary virtues.[25] In the constitution of 1795, duties constituted 'counterweights to a declaration of rights' and they were instrumental to property, in turn seen as a means for the 'determination of the subject and of order,'[26] and as an 'instrument of defense of the interests of the owners'.[27] Individualistic and reactionary impulses, then, absorbed the *fraternité* into the other components of the original revolutionary triad. In the Napoleonic proclamation of 18 Brumaire (9 November 1799), solidarity was again replaced by property. Further, Art 1202 of the 1804 French Civil Code provided that

> 'joint and several obligation is not to be presumed; it is necessary that it should be expressly stipulated. This rule is only suspended where the joint and several obligation takes place absolutely, by virtue of a regulation of the law'.[28]

'Solidarity' would reappear only in the 1840s, in a profoundly changed context, where workers' movements began to emerge as a political and ideological force, albeit with the different influences and intentions of their multiple authors and leaders.[29] These currents had the merit of 'thinking' individuals again in their social context, in their historically situated social interdependences, regardless of and often *beyond* the relationship with the state. These same movements would push rival lines of thought – notably the Catholic and the liberal – to a partial self-reinvention. The affinities of the thesis of solidarity with Catholicism already emerged in the work of the conservative Donoso Cortés,[30] and then entered – in the form of subsidiarity – into the Catholic social doctrine with encyclical *Rerum Novarum* of 1891. In 1860, Giuseppe Mazzini invoked as the foundation of the nation not the rights of the (bourgeois) individual, but rather the duties of man.[31] Likewise, currents of secular liberalism, emerged between

[24] See Art 2 Declaration of the Rights of the Man and of the Citizen of 1793.

[25] P. Costa, *Civitas. Storia della cittadinanza in Europa* (Roma-Bari: Laterza, 2000), II, 44-68. See Arts 20 to 23 of the 1793 Declaration of the Rights of the Man and of the Citizen and Arts 4 to 6 of the 1793 Constitution.

[26] As argued by P. Costa, *Cittadinanza* (Roma-Bari: Laterza, 2005), 93.

[27] G. Peces-Barba Martinez, 'Diritti e doveri fondamentali' *Digesto delle discipline pubblicistiche* (Torino: UTET, 1990), V, 153. See Arts 1-9 of the section 'Devoirs' of the Declaration of the Rights of the Man and of the Citizen of 1793.

[28] 'La solidarité ne se présume point; il faut qu'elle soit expressément stipulée. Cette règle ne cesse que dans les cas où la solidarité a lieu de plein droit, en vertu d'une disposition de la loi.'

[29] Cf M.-C. Blais, *La solidarité: Histoire d'une idée* (Paris: Gallimard, 2007); S. Stjernø, n 18 above, 42-58; R. Zoll, n 16 above, 240-241.

[30] J. Donoso Cortés, *Essay on Catholicism, Liberalism, and Socialism: Considered in Their Fundamental Principles* (Boonville: Preserving Christian Publications, 2014 (1851)).

[31] G. Mazzini, *Dei doveri dell'uomo* (Fano: Aras, 2022 (1860)).

the end of the nineteenth century and the beginning of the twentieth century,[32] framed solidarity as a principle of political action, aimed at compensating the structural difficulties of post-absolutist liberal states, designed around the interests of the bourgeoisie. From this perspective, solidarity was the essential condition for the realisation of the interests of both individuals[33] and collective actors.[34]

Importantly, this intellectual magma generated the conceptual framework of what would become the European social democracy. Already at the end of the nineteenth century, solidarism was considered as a third way between individualism/liberalism and socialism/collectivism.[35] In different formulations – but under the common influence of the sociology of Comte,[36] Fouillée,[37] Durkheim,[38] Izoulet,[39] among others[40] – the principle of solidarity was derived from the *factual necessity* of interdependence – no longer of individuals considered in the abstract, but rather of human persons on their social environment. This interdependence was considered as the source of an obligation, a *debt* towards the community, in turn leading to the configuration of the state as its guarantor, through economic redistribution and social inclusion.

This intellectual juncture was crucial. Solidarity, originally an institute of civil law, had now become a policy program, a political aspiration, and ultimately a principle of public law, through the intermediation of a state increasingly active in different social spheres. Such trajectory – already emerging in the works of Bourgeois,[41] Renouvier,[42] and von Stein[43] – was consecrated in public law theory by Léon Duguit, the first author to link *social* solidarity, the objective/ positive legal order (*règle de droit*), and the state structures in a coherent system. Particularly influenced by Durkheim, Duguit saw in social solidarity an objective norm, which binds public apparatuses (the *gouvernants*). Ultimately, the state would be only an instrument for the realization of solidarity.[44]

[32] See especially L. Bourgeois, *Solidarité* (Paris: Armand Colin, 1896).

[33] R. Zoll, n 16 above, 245.

[34] See L. Mengoni, 'Fondata sul lavoro: la Repubblica tra diritti inviolabili dell'uomo e doveri inderogabili di solidarietà' *Jus*, I, 3, 11 (1998); U. Volkmann, *Solidarität-Programm und Prinzip der Verfassung* (Tübingen: Mohr Siebeck, 1998), 76.

[35] R. Zoll, n 16 above, 245.

[36] A. Comte, *Discours sur l'esprit positif* (Paris: Carilian-Goeury et Dalmont, 1844).

[37] A. Fouillée, *La science sociale contemporaine* (Paris: Hachette, 1880).

[38] É. Durkheim, *De la division du travail social* (Paris: Alcan, 1893).

[39] J. Izoulet, *La cité moderne et la métaphysique de la sociologie* (Paris: Alcan, 1894).

[40] M.-C. Blais, n 29 above; R. Zoll, n 16 above, 240-247.

[41] L. Bourgeois, n 32 above.

[42] C. Renouvier, *Quatrième essai. Introduction à la philosophie analytique de l'histoire* (Paris: Ladrange, 1864).

[43] L. von Stein, *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage* (Darmstadt: Hildesheim, 1959 (1850)). See more generally F. De Sanctis, *Società moderna e democrazia* (Padova: CEDAM, 1986), 61-81.

[44] L. Duguit, *Le Droit social, le droit individuel et la transformation de l'Etat* (Paris: Alcan, 1908), 50; D. Grimm, *Solidarität als Rechtsprinzip. Die Rechts- und Staatslehre Léon Duguits in ihrer Zeit* (Frankfurt: Athenäum, 1973), 27-91.

However, many of such lines of thought still saw solidarity in an instrumental way. Solidarity, in other words, was valued primarily as a means for integration, of counter-action to the disruptive pressures of workers', socialist, and anarchist movements. In this period, the definitions of solidarity avoided any reference to antagonistic counterparts.[45] Von Stein's 'science of society', for example, aimed at 'rationalizing the intervention of the state within the socio-economic fabric' and at

> 'scientifically demonstrating to the ruling classes that such state intervention, directed at promoting the participation of individuals (who must nevertheless be components of different classes) in the welfare of the whole, was in their own interest'.[46]

In this context, solidarity – that is, the welfare benefits directly or indirectly provided by public apparatuses – was considered as a necessary tool for the state to preserve social peace but still outside its sources of legitimation.[47] Further, such services were reserved to the political community and linked to the status of citizen.[48] The introduction in the Bismarckian Germany of the Second Reich, between 1883 and 1884, of the first form of compulsory work insurance, was part of an overall illiberal regime, coherent with the ban of the Social Democratic Party.[49] In Italy, where Art 25 of Constitution of the Kingdom of Italy, dating back to 1848, limited the scope of the duties to citizens to tax obligations, the first forms of welfare legislation had paternalistic, if not repressive,[50] features, later further strengthened by Fascist corporatism.[51]

Ultimately, the nineteenth-century administrative-liberal state remained a self-limiting Leviathan, even when it instrumentally granted *itself* powers of social intervention or imposed duties of solidarity on its citizens.[52] In other words, *the state did not need solidarity to justify itself*: religion, monarchy, and nation still competed with human dignity, democracy and (substantive) equality as

[45] R. Zoll, n 16 above, 240.

[46] F. De Sanctis, n 43 above, 154 (my translation).

[47] M. Benvenuti, *Diritti sociali* (Torino: UTET, 2013), 5.

[48] R. Zoll, n 16 above, 246.

[49] Cf S. Giubboni, n 19 above, 535.

[50] Legge 15 April 1886 no 3818; legge 17 March 1898 no 80; legge 25 March 1917 no 481 which, by virtue of a debt of solidarity towards soldiers returned from the war, provided for the compulsory hiring of war invalids; and decreto legge luogotenenziale 21 April 1919 no 603, which introduced the first forms of compulsory insurance for workers.

[51] Regio decreto 4 May 1925 no 653; regio decreto 20 August 1923 no 2277; regio decreto 30 December 1923 no 2841; regio decreto 30 December 1923 no 3158; regio decreto 30 December 1923 no 3184; legge 14 June 1928 no 1312; regio decreto 13 May 1929 no 928; regio decreto-legge 23 March 1933 no 264; regio decreto-legge 4 October 1935 no 1827.

[52] In German and Italian theory, see C.F. von Gerber, *Über öffentliche Rechte* (Tübingen: Laupp, 1852); P. Laband, *Das Staatsrecht des Deutschen Reiches* (Tübingen: Mohr, 1911); S. Romano, 'La teoria dei diritti pubblici subbiettivi', in V.E. Orlando ed, *Primo trattato completo di diritto amministrativo italiano* (Milano: Società editrice libraria, 1900), I, 172.

the basis for justifying political power. In order for this transition to take place, the process of secularization had to develop further, leading the structures of modern states to seek new and more immanent bases of legitimation.

This process was by no means peaceful. Still in 1914, Robert Michaels – one of the thinkers who most contributed to the ideological foundations of Fascism – argued that 'for the formation of a solidarity group, the existence of a clear opposition is necessary; one is solidal only against someone'.[53] The first attempts at constitutionalization of social rights – the norms concretely operationalizing the principle of solidarity – date back to the Mexican constitution of 1917 (Arts 1-29), the German constitution of 1919[54] (Arts 135-165) and the Spanish constitution of 1931 (Arts 43-50). However, modern constitutionalism had to go through another world war and authoritarian drifts of various kinds, often triggered or accompanied by reactionary liberalism. Even the methodological and ideological disputes of German public law scholarship in the 1920s and 1930s can be read from this perspective. Indeed, the positions expressed by Schmitt, Smend, and Heller among others may more broadly be considered as a debate on the possibility for social integration and on justification of the power in the modern, secular state under conditions of market economy. In such scenario, public law scholarship had to address the issue of how state apparatuses contribute to inequality, alienation, and social exclusion. Even Catholic thought was increasingly oriented towards principles of social inclusion, first in the thought of the Pesch[55] and then in that of Mounier[56] and Maritain,[57] who would have had much influence on Christian-democratic movements.[58] In this regard, the encyclical *Quadragesimo Anno* of 1931 configured for the first time precise solidarity duties of public institutions.

However, only the constitutionalization of social rights made it possible for economic policies of social emancipation/inclusion to become part of the political functions of the modern state, making them a basis of legitimacy and finally making it a social State under the rule of law.[59] This emerges in the constitutions of the post-World War II period, and in particular in the preamble of the French Constitution of 1946, in Arts 1 and 20 of the 1949 Basic Law of the

[53] R. Michaels, 'Zum Problem: Solidarität und Kastenwesen', in Id ed, *Probleme der Sozialphilosophie* (Leipzig-Berlin: Teubner, 1914), 55.

[54] For a thorough analysis, see most recently M. Goldmann and A. Menéndez, 'Weimar Moments: Transformations of the Democratic, Social, and Open State of Law', *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* No. 2022-12 (June 20, 2022), available at https://tinyurl.com/28z87kcb (last visited 30 June 2022).

[55] H. Pesch, *Lehrbuch der Nationalökonomie* (Freiburg: Herdersche, 1905-1923).

[56] E. Mounier, *Qu'est-ce que le personnalisme?* (Paris: Éditions du Seuil, 1947).

[57] J. Maritain, Christianity and Democracy, the Rights of Man and Natural Law (San Francisco, Ca: Ignatius, 2012 (1977)).

[58] S. Stjernø, n 18 above, 203 ff.

[59] See E.W. Böckenförde, 'Die Politische Funktion Wirtschaftlich-Sozialer Verbände Und Interessenträger In Der Sozialstaatlichen Demokratie: Ein Beitrag Zum Problem Der, Regierbarkeit" ' *Der Staat*, IV, 457 (1976); and U. Volkmann, n 34 above, 52-75, 217 ff.

Federal Republic of Germany and, as will be seen, in the Italian Constitution of 1948. Importantly, in post-war constitutionalism, duties of solidarity no longer concern only citizens/individuals as members of a national (or racial) community. Rather, they are increasingly linked to the dignity of the human person and the values connected to it.

Unsurprisingly, in France, where constitutional culture remained largely attached to state-centred paradigms, the debate on the principle of solidarity had little impact on constitutional theory, finding more fruitful paths in legal sociology and labour law.[60] In the constitution of 1958, both the terms *solidarité* and *fraternité* refer mainly to the relations between peoples and therefore to be essentially collective in nature.

British and, more generally, Anglo-Saxon constitutionalism has followed different paths. Apart from the consideration that the US Constitution was drafted in 1787, it is of particular importance that, in these contexts, progressive movements and, in particular, the English Labour Party, were linked to the syndicalist tradition. The latter was significantly influenced by a liberal political culture emerged in England already in the nineteenth century, rather than continental Marxism. When the workers' movement was emerging, in fact, liberalism had already become the dominant ideology in England, contrary to what happened in Germany, Scandinavia and southern Europe.[61] The specific features of Anglo-Saxon socialism influenced the development of the political-legal vocabulary, where solidarity never became a *constitutional* principle. This even though the policies of economic redistribution typical of contemporary welfare state first emerged in the USA with the Roosevelt New Deal and in the UK with the Beveridge Plan.[62] Evidence of this juridical-cultural 'rejection' can be found in the failed Second Bill of (Economic) Rights, originally advocated by US President Roosevelt in 1944; the overall demonization (in the US) of political movements that closely linked class issues, solidarity, and civil rights; and, starting in the 1980s, the national and international success of neo-liberal political-economic doctrines.

2. Constituent Assembly

Turning now to the elaboration of the principle of solidarity at the Italian Constituent Assembly of 1946-1947, there is a first element to highlight. Although understood in an at least partially different way by the political forces involved, solidarity was the concept around which a general convergence between the Left and the Catholic wing. Such convergence was reflected in the formulation of what was to become Art 2 of the Constitution, that is, one of its axiological

[60] See A. Supiot, n 17 above.

[61] S. Stjernø, n 18 above, 132.

[62] 'Social Insurance and Allied Services', Report by Sir William Beveridge, November 1942 (Cmd 6404).

and normative cornerstones. This article was the result of a protracted elaboration, from which liberal components remained mostly excluded, perhaps in the conviction, still prevalent within the I Subcommittee of the Constituent Assembly, that the provision had a mostly philosophical or moral meaning, in any case to be transferred into a non-binding Preamble. The final text, as approved on 24 March 1947, provides that

> 'The Republic recognises and guarantees the inviolable rights of the human being (*uomo*), both as an individual and in the social groups where human personality is expressed. The Republic requires that the mandatory (*inderogabili*) duties of political, economic and social solidarity be fulfilled'.

In such provision, some fundamental connections emerge. Firstly, between rights and duties. Despite some resistance of socialist and liberal members, the formulation clearly linked the recognition and guarantee of 'inviolable' rights to the fulfilment of 'fundamental' duties, as two sides of the same coin. Secondly, between solidarity, the primacy of the person, and social pluralism. The constituents wanted to bind

> 'two conceptions of man and his relationality: that founded on the recognition of the individuality and unrepeatability of the individual and that founded on the recognition of the in-suppressible sociality of experience'.[63]

Costantino Mortati, referring to the paradigm shift from the previous liberal-individualistic regime, spoke in this regard of a passage 'from one to another types of homogeneity'.[64] Thirdly, between the political, economic, and social dimensions of solidarity. Here, too, the intention was to bring out the interdependence between the various dimensions of constitutional duties: no longer only in vertical relationships, that is, between the citizen – soldier, taxpayer, voter – and the state; but also in horizontal relationships, between human beings as such, both as individuals and as members of social formations (family, productive unit, religious confession, political party, territorial community, the international community itself).

In this regard, when it comes to the subject that 'recognizes and guarantees' rights and imposes duties, Art 2 significantly refers to the 'Republic', understood as the state-order or state-community, as distinct from the whole of the public apparatuses (the government or state-person). Likewise, the recognition/ guarantee of rights, on the one hand, and the imposition of duties, on the other hand, are not referred to the citizen but to the human being as such. In this case, the proposal to link the status of citizenship to a 'determined position of

[63] F. Polacchini, n 5 above, 20.

[64] C. Mortati, 'Articolo 1', in G. Branca ed, *Commentario alla Costituzione* (Bologna-Roma: Zanichelli, 1975), I, 9.

collaboration and solidarity'[65] did not find place in the constitutional text.[66] This element gives the principle of solidarity an apparent internationalist or, in any case, extra-territorial thrust – emerging also in Arts 10 and 11 of the Constitution – and leads the principle of solidarity to perform its integrative functions *beyond* the community residing on Italian territory.[67]

III. Personal Scope of Application

The debate on the personal scope of the duties of solidarity has generally focused on two questions. First, if they are applicable to public subjects or, more generally, to bodies that are part of the state-person or state-apparatus. Second, if they are applicable to foreigners and stateless persons. Here, we shall address such questions in accordance with the coordinates outlined above, namely, considering solidarity as an objective legal principle aimed at the maximization of certain social objectives.

1. Public Actors: Powers/Duties of Solidarity

Both oldest scholarship and the majority of contemporary one substantially agree in referring the principle of solidarity only to private (individual or collective) subjects. Undeniably, this position is supported by textual, historical, and systematic arguments. Indeed, Art 2 refers to the human being (*uomo*) and the development of their personality. Further, in the debates explicitly dedicated to solidarity, the constituents mostly referred to it in a social dimension, that is, in an extra-institutional sense. Finally, the constitutional text, in referring to positions of public bodies or organs which are the object of duties in a broad sense normally uses the terms task, function, relationship. More generally, the lack of means of enforce against the state many provisions referable to the principle of solidarity – for example, the right/duty to work under Art 4 of the Constitution[68] – has strengthened the idea that it cannot bind the public administration or, more generally, the government.

In more recent literature, this approach has been however questioned. First of all, if one reads the text beyond the conceptual lenses prevailing at the time of the Constituent Assembly, based on a stark separation state and society, Art 2 of the Constitution explicitly mentions 'man' in reference to the recognition and

[65] Put forward by Dossetti in relation to what was to become Art 22 Constitution.

[66] See D. Borgonovo Re, 'I doveri inderogabili di solidarietà', in D. Florenzano, D. Borgonovo Re and F. Cortese eds, *Doveri inviolabili, doveri di solidarietà e principio di eguaglianza* (Torino: Giappichelli, 2015), 75.

[67] See also section V.5 below.

[68] 'The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective. Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society.'

guarantee of rights, but is silent on the addressee of the 'requirement' for the fulfillment of the duties of solidarity. Secondly, several constitutional provisions certainly referable to the principle of solidarity translate into properly legal duties. Examples are Art 10, para 3, of the Constitution, concerning asylum seekers; Art 34, paras 3 and 4, concerning the provision of economic benefits to make the right to study effective for 'capable and deserving pupils, including those lacking financial resources'; Art 35, para 3, concerning the promotion of international agreements and organizations aimed at affirming and regulating labor rights; the reformed Art 81, para 6,[69] concerning the overall sustainability of public debt;[70] Art 119, para 3, concerning the institution of an equalization fund for territories with a lower fiscal capacity per inhabitant;[71] the recently reformed Art 9, protecting the environment, biodiversity and ecosystems, also in the interest of future generations, and requiring the government to introduce legal protection for animals.[72] All such provisions impose duties on public bodies without necessarily a corresponding right of other legal subjects – individual or collective – except in an indirect manner. A private individual or a trade union cannot bring political branches of the government to court directly when, for example, such branches do not take action to promote international conventions that affirm the rights of workers. Such norms serve the rights of private individuals only indirectly and their justiciability may emerge in the context of a judgment of constitutional legitimacy, but only after the constitutional bodies have somehow fulfilled their duty (unconstitutionally).

More generally, in Italian law, a legal situation qualifiable as a duty is not necessarily correlative to a right nor, more generally, to a justiciable claim of other subjects. At the same time, a duty may well be fulfilled through exercises of authority. In other words, when referred to public actors, the principle of solidarity may well be configured as regulating a power/duty, in the form of an act of administration or legislation. In Italian legal theory, it was especially Serio Galeotti who spoke, in this regard, of a vertical or 'paternal' solidarity,[73] emerging in all forms of social intervention aimed, under Art 3 of the Constitution, at

> 'removing obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the

[69] See Art 1 legge costituzionale 20 April 2012, no 1.

[70] See Corte costituzionale 7 April 2014, no 88.

[71] See Corte costituzionale 28 January 2004, no 16; Corte costituzionale 22 September 2005, no 219; Corte costituzionale 13 December 2006, no 451; Corte costituzionale 19 March 2007, no 105; Corte costituzionale 25 February 2008, no 45; Corte costituzionale 13 February 2012, no 22.

[72] See legge costituzionale 11 February 2022, no 1, which also modified Art 41 Cost (see sections V.2 and V.3 below).

[73] S. Galeotti, n 15 above, 11.

political, economic and social organization of the country'.[74]

On the contrary, precisely through solidarity the principle of equality in the formal sense can transcend the narrow confines of citizenship – to which Art 3, para 1, of the Constitution links it. In this regard, Luigi Mengoni saw solidarity as an 'objective legal principle complementary to the principle of equality enunciated in article 3'.[75] More generally, this approach helps trace the provisions recognizing social rights back to that same dimension enshrined in Art 2 of the Constitution.

Moreover, this holistic and teleological approach to the principle of solidarity helps place within a coherent framework two elements emerging from judicial practice. Firstly, the fact that courts have repeatedly recognised duties of solidarity upon public bodies. Secondly, the fact that courts – in an only apparently contradictory way – have referred to the solidarity of private individuals in terms of a duty, even when the related conduct is undoubtedly a spontaneous and incoercible act.[76] In the latter cases, the duties emerging from the principle of solidarity are not to be referred to private individuals, but more properly to the lawmakers or, in any case, to the political branches of the government.[77]

2. Private Actors: Rights/Duties of Solidarity

As far as the application to private actors is concerned, it should firstly be pointed out that the Constitution rejects the traditional irreconcilability between right and duty. The same legal situation may simultaneously give rise to and be shaped by both. This does not concern all the norms which constitute the manifestation of solidarity, but it does emerge from the provisions concerning to economic relations. Art 41, para 2, imposes a negative duty, namely that freedom of economic initiative must not be carried out 'in contrast to social utility or in such a way as to damage health, environment, security, freedom and human dignity'.[78] Similarly, Art 42, para 2, allows at least potentially for a functionalization of private property. But this also emerges from the provisions dedicated to work,[79] family and parental care,[80] health,[81] education,[82] voting.[83]

[74] Art 3, para 2, cost

[75] L. Mengoni, n 34 above, 1998, 13.

[76] As in the case of volunteering and community service, and even donations to beggars: see Corte costituzionale 15 December 1995 no 519. In relation to the overcoming of the conception of solidarity as a regulatory obligation imposed upon individuals, see also Corte costituzionale 17 February 1992 no 75, holding that volunteering and voluntary action represent 'the most direct realization of the principle of social solidarity'. See also section V.1 below.

[77] See Corte costituzionale 17 February 1992 no 75; Corte costituzionale 15 April 1992 no 202; Corte costituzionale 8 July 2004 no 228; Corte costituzionale 13 May 2015 no 119; Corte costituzionale 27 January 1972 no 12.

[78] This formulation follows the recent constitutional reform made with legge costituzionale 11 February 2022, no 1, which introduced the words 'health' and 'environment', thus explicitly constitutionalising such goods as limits to the freedom of economic initiative.

[79] Art 4, para 2, Constitution.

[80] Art 30, para 1, Constitution.

Welding together of rights and duties that emerge from the (meta-) principle of solidarity is particularly useful when it comes to the referability of duty – bound legal positions to non-citizens, that is, foreigners and stateless persons. In this context, it should be remembered that only Art 53, para 1, of the Constitution requires 'everyone' to fulfil the duty to contribute to public spending, while the other provisions expressing duties are addressed to citizens. However, scholarship generally argue that the question cannot be resolved in a general way for all duties, 'each of which shows a different preceptive scope, differently operating in the con-fronts of non-citizens'.[84] Here, too, a holistic/ teleological vision of the principle of solidarity comes to help. Indeed, if solidarity is conceived as the normative precept devoted to achieving integration *within* the (potential) conflict, then it seems natural that, as the multi-cultural characteristics of the Republic grow, duties of solidarity can also be demanded by those who are not citizens but are part of the political-social community, that is, of the Republic to which Art 2 of the Costitution refers. On the other hand, this development goes together with the extension of rights – including social rights – to non-citizens. At least in the Italian legal system, this involves a radical change in perspective, also supported by the case law of the Constitutional court:[85] in the pluralistic state, the fundamental question is no longer about what rights may be extended to non-citizens, but rather what rights may be limited to citizens.[86]

This perspective has been supported by the Constitutional court in decisions concerning the obligation of stateless persons to serve in the army,[87] to the limits of seizure of retirement pensions,[88] and to the right to family reunification in connection with the duties of parental care.[89] This same perspective is coherent with the view, expressed in most recent scholarship, that

> 'reasoning about potential constitutional duties of non-citizens means reflecting not on the specific legal obligations to which the system subjects them, but on the solidarity that can be asked them to the purposes of a better social coexistence'.[90]

[81] Art 32, paras 1 and 2, Constitution.

[82] Art 34, para 2, Constitution.

[83] Art 48, para 2, Constitution. See also F. Polacchini, n 5 above, 225-226.

[84] A. Morelli, 'I principi costituzionali relativi ai doveri inderogabili di solidarietà' *Forum quaderni costituzionali – Rassegna*, 20 April 2015, 1-29.

[85] See, eg, Corte costituzionale 15 November 1967 no 120; and, more recently, Corte costituzionale 9 July 2020, no 186.

[86] See E. Rossi, 'Art. 2', in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* (Torino: UTET, 2006), I, 107-111.

[87] Corte costituzionale 10 May 1999 no 172.

[88] Corte costituzionale 20 November 2002 no 506.

[89] Corte costituzionale 12 January 1995 no 28; Corte costituzionale 17 June 1997 no 203; Corte costituzionale 12 July 2000 no 376.

[90] F. Polacchini, n 5 above, 167-168.

IV. Objective Scope of Application

1. Solidarity as a Norm Granting Peremptory Nature to Other Norms

With regard to the specific normative content of the principle of solidarity, it should be reiterated that, in the Italian legal system, solidarity is configured as a meta-principle. This means that its normativity goes primarily through *other* constitutional norms with which it interacts dynamically. Here, such norms can only be recalled cursorily. However, some issues can be briefly addressed.

The first issue is the peremptory (*inderogabile*) nature of the duties of solidarity under Art 2 of the Constitution. The exact meaning of that 'mandatory' remains relatively underexplored. However, scholarship and jurisprudence[91] tend to agree that it constitutes the equivalent, in terms of duties, of the 'inviolability' which Art 2 itself attributes to rights.[92] This means that, while not all constitutional duties are necessarily to be qualified as duties of solidarity, those falling within the sphere of this principle are peremptory. Likewise, solidarity and the principles that apply to it are configured as supreme, particularly to the purposes of 'resistance' to constitutional revision or to the application of external normative sources (international and/or supranational) that may make them ineffective in their core normative content.[93] Put otherwise, the instrumentality of other constitutional norms to (the purposes of) solidarity grants them a peremptory/supreme nature.

2. Solidarity as a Norm 'Opening' the Set of Constitutional Duties

Another long-standing question linked to the solidarity principle in the Italian system concerns whether the list of the duties is exhaustive or not, that is, whether duties can be identified which go beyond those explicitly or implicitly recognized in the constitutional text and, if so, on the basis of which substantive and procedural conditions.[94] The generally negative answer given by the scholarship[95] probably derives from an approach linked to typical schemes of the

[91] Corte costituzionale 17 February 1992 no 75.

[92] See G. Lombardi, n 6 above; and C. Carbone, *I doveri pubblici individuali nella Costituzione* (Milano: Giuffrè, 1968).

[93] See B. Pezzini, n 4 above, 94. The reference here is to the so-called 'counter-limits' developed by the Italian Constitutional Court, that is, the 'supreme principles of the constitutional order' that prevail against any conflicting norm and even against constitutional reforms infringing upon their core normative value: see Corte costituzionale 18 December 1973 no 183; Corte costituzionale 5 June 1984 no 170; Corte costituzionale 13 April 1989 no 232. See also, for the application of the *controlimiti* theory, Corte costituzionale 22 November 2014 no 238; and Corte costituzionale 23 November 2017 no 24. For an early comparative perspective, see A.-M. Slaughter, A. Stone Sweet and J. Weiler eds, *The European Courts & National Courts. Doctrine and Jurisprudence: Legal Change in its Social Context* (Oxford: Hart, 1998).

[94] F. Polacchini, n 5 above, 182-185.

[95] G. Lombardi, n 6 above, 39; C. Carbone, n 92 above, 35; A. Cerri, 'Doveri pubblici'

liberal rule of law, which has influenced the same interpretation of (especially civil) rights. If limits to freedom are conceived as a compression of some (historical or ideal) pre-existing condition of freedom, they can arise only as an exception and from express provisions. Such approach, which was perhaps one of the reasons for the weak resistance of the liberal component to the inclusion of the duties of solidarity in the Constitution, is also based on Art 23 of the Constitution, according to which 'no obligation of a personal or financial nature may be imposed on any person except by law'. In the light of such provision, even those authors who have defended the possibility of extending the list of constitutional duties have considered that they

> 'are destined to be translated at the level of individual legal positions through precise obligations established, within the framework of the constitutional text, by the ordinary legislator'.[96]

The Constitutional Court, for its part, held that it is up to the legislator to identify the duties of solidarity which citizens are obliged to fulfill, as well as the ways and limits of fulfilling them.[97] In this way, the practical relevance of the debate on the open or closed nature of constitutional duties has been reduced. Only recently has a part of the scholarship begun to untie duties from their supposed function of mere limitation of freedom, explicitly opening up the possibility that they represent an open-ended list.[98]

Even in this area, however, the debate seems to still be linked to a narrow view of the principle of solidarity, where the latter is identified with the provisions concerning only duties upon private individuals. A broader and more holistic understanding of the principle may lead to outline the issue differently. Firstly, some constitutional provisions expressive of the principle of solidarity may be interpreted as directly binding private individuals, without the need for legislative intermediation, insofar as they require no 'obligation of a personal or financial nature' (for example, Art 54 of the Constitution concerning the duty of loyalty to the Republic).[99] Secondly, if one understands the principle as also directed to government bodies, there is no normative justification to consider the list of duties as closed-ended. Understood in this way, the principle of solidarity functions as a kind of continuous generator of new duties on the part of the political branches of the government, to be checked and, if necessary, adjudicated by the organs of constitutional guarantee, notably the Constitutional Court.

Enciclopedia giuridica (Roma: Treccani, 1989), XII, 1; F. Polacchini, n 5 above, 172-182.

[96] A. Barbera, 'Articolo 1', in G. Branca ed, n 64 above, 99.

[97] Corte costituzionale 15 July 1983, no 252.

[98] See S. Rodotà, *Solidarietà. Un'utopia necessaria* (Roma-Bari: Laterza, 2014), 42; F. Polacchini, n 5 above, 184-185.

[99] See A. Morelli, n 84 above, 6, 9.

3. Macro-Areas of Application and Overlaps

The approach just described also helps reconfigure the tripartition of duties of solidarity outlined in the Constitution itself. Indeed, Art 2 of the Constitution qualifies solidarity as 'political, economic and social'. These are conventional partitions which, in fact, almost always overlap, especially considering the increasing permeability between the state, the economy, and society at large that characterizes contemporary societies. However, if the principle of solidarity is seen as an *objective* normative precept, aimed at favoring integration around certain material values by sustaining and mediating conflict, one may argue that *political* solidarity concerns situations in which this purpose is carried out through (participation in) the determination of the – legislative or administrative – 'will' of the state-person. Economic solidarity is more specifically aimed at managing conflict and promoting integration, in the face of inequalities and imbalances permanently generated by the market economy, or in any case by the capitalist mode of production, which are also recognized in the Constitution. Social solidarity, finally, is a residual category, concerning cases in which conflict and integration take place outside of contexts specifically attributable to the state or the economy.

Thus, political solidarity does not only include the duties of loyalty to the Republic and the fulfillment of public functions with discipline and honor,[100] or the right/duty to vote,[101] or the defense of the homeland,[102] but also the norms related to vertical subsidiarity and the unity of the Republic in the decentralized order.[103] Economic solidarity includes not only the norms concerning the limits of freedom of economic initiative,[104] the social function of private property, its limitation and expropriation,[105] or the ability to pay taxes and the progressiveness of the tax system;[106] but also those relating to the introduction of means and apparatuses to guarantee the rights to assistance and social security,[107] the promotion of cooperation with a mutual character,[108] the public budget and the sustainability of the public debt,[109] the determination and management of the essential services concerning civil and social rights to be guaranteed throughout the national territory,[110] the forms of equalization and

[100] Art 54, paras 1 and 2, Constitution.

[101] Art 48, paras 1 and 2, Constitution.

[102] Art 52, paras 1, Constitution.

[103] Arts 5, 87 para 1, 95 para 1; 117; 118 para 1; and 120 para 2 Constitution. See F. Polacchini, n 5 above, 55-60.

[104] Art 41, para 2, Constitution.

[105] Arts 42 paras 2 and 3; 43; 44 Constitution.

[106] Art 53, paras 1 and 2, Constitution.

[107] Art 38 Constitution.

[108] Art 45 Constitution.

[109] Arts 81 para 1 and 6, Constitution, as modified by Art 1 legge costituzionale 20 April 2012, no 1.

[110] Arts 117, para 2, lett m), and 120, para 2, Constitution.

financial redistribution.[111] Social solidarity includes not only the rights/duties of parents to support, instruct and educate their offspring, but also the duty of the 'law' – here understood as the state-administration – to perform such duties in the event of their incapacity or, in a completely different field, the duty to encourage 'the autonomous initiative of citizens, both individuals and associations, to carry out activities of general interest'.[112] The examples could continue.

Likewise, there are certainly norms which fall into various forms of solidarity. Those on primary education under Art 34 para 2 or on health, 'fundamental right of the individual and interest of the community'[113] undoubtedly have profiles that fall within the scope of all three categories, insofar as the protection of one's health or education has effects of economic progress and political integration of broader scope. Emblematic examples, however, are those of the right/duty to work and fiscal solidarity.

In the Italian constitutional system, work is not only an activity aimed at ensuring livelihood or economic growth but it is also a 'socially useful activity',[114] an instrument for emancipation and the development of the human person in her social relations. In the original intentions of the First Subcommittee of the Constituent Assembly, it was even a qualified ground for participation in the determination of public policies.[115] As will be seen, such axiological density contributes to making difficult the introduction in Italy of universal income systems, unrelated to a specific work relationship.

Similar considerations apply to the duty to pay taxes under Art 53, para 1, which, going beyond the liberal vision of the tax as a service corresponding to the provision of benefits for the obliged, reconstructs it as a duty to contribute to the very subsistence of the State. In this way, the tax duty reflects the principle of solidarity both on the economic and on the political level.[116] The intrinsic political nature of fiscal solidarity also emerges in the progressiveness informing the tax system.[117] The latter expresses an axiological choice with respect to the distribution

[111] Art 119, paras 3 and 5, Constitution.

[112] Art 118, para 4, Constitution. See B. Pezzini, n 4 above, 96-98; F. Polacchini, n 5 above, 60-74. See also Corte di Cassazione 3 April 2015 no 6833.

[113] Art 32 para 1, Constitution.

[114] As Giuseppe Dossetti explicitly declared on 4 October 1946 at the Constituent Assembly: see Atti della Assemblea Costituente, Commissione per la Costituzione, I Sottocommissione, 4 November 1946, 195-196.

[115] Atti della Assemblea Costituente, Commissione per la Costituzione, I Sottocommissione, 15 November 1946, 385-398.

[116] Corte costituzionale 4 April 1963 no 45; Corte costituzionale 18 March 1965 no 16; Corte costituzionale 16 June 1965 no 50; Corte costituzionale 10 January 1978 no 6; Corte costituzionale 3-18 February 1992 no 51 In the same direction, see also Art 119, para 5, Constitution: '(I)n order to promote economic development, cohesion and social solidarity, to remove economic and social imbalances, to promote the effective exercise of personal rights, or to provide for purposes other than the normal exercise of their functions, the State allocates additional resources and makes special interventions in favor of certain municipalities, provinces, metropolitan cities and regions'.

[117] Art 53, para 2, Constitution.

of the tax burden, insofar as it tends towards a more than proportional impoverishment of assets of the subjects endowed with greater wealth and less than proportional impoverishment of the economically weaker subjects, and therefore produces redistributive and not retributive results. But fiscal solidarity also has a purely social profile, insofar as Art 53, para 1, of the Constitution establishes the ability to pay as a guarantee of the situations of private individuals with respect to taxation, insofar as it requires that the levy be linked to objective and non-arbitrary criteria; and at the same time provides special protection against potential unfavorable treatment of social groups considered worthy of protection (eg, religious denominations.)[118] In all these cases, (social) solidarity is configured as a barrier against arbitrary or unreasonable drifts of the taxing power of the state.

4. Normative Surplus

To conclude on the objective scope of application, one needs to emphasise what could be defined as the normative surplus of the principle of solidarity with respect to the other norms in connection with which it operates. Every time solidarity comes into play, where the conflict between interests and legal positions could lead to political, economic, or social disintegration, it shifts the normative balance towards integration, in respect of certain values. The objective normative value derivable from the principle of solidarity, then, serves primarily to make 'the balance between the reasons of economic calculation and those of social development unequal'.[119] Here again, the goal is not merely compensation, but rather *redress*. Its application implies or legitimizes asymmetrical outcomes – in purely retributive terms – but in any case aimed at redressing inequalities emerging, continuously and in ever different forms, from political, economic and social spheres, especially as a consequence of the capitalist mode of production.

At the level of its normative operationalisation, this consideration leads to break down the constitutional principle of solidarity into at least three directions: a) as a norm of conduct for private subjects, mostly through the intermediation of implementing legislation; b) as a norm relating to lawmaking; c) as a norm of legal interpretation for courts and other legal operators.

Further analysis of these guidelines, in connection with international and supranational sources, is developed below. In a broad sense, all the welfare legislation is an implementation of the constitutional principles of solidarity and substantial equality. Here, we will proceed in a necessarily fragmentary way, examining the regulatory fields which best show the Janus-faced character of the principle of solidarity, at one and the same time generating conflict and integration.

[118] Art 20 Constitution.

[119] M. Luciani, 'Economia (nel diritto costituzionale)' *Digesto delle discipline pubblicistiche* (Torino: UTET, 1990), V, 378. See also Corte costituzionale 19 November 2012 no 264.

V. Implementing Solidarity

1. Social Security, Healthcare, and Third Sector

A first point of emergence is the legislation on social security. The Constitution outlines an articulated system of welfare and social security protection, imposing promotional and affirmative action obligations upon the legislator and the public authorities, but also recognizing, from a personalistic and pluralistic point of view, the role of private individuals and social groups.

Starting in the 1960s – but building on earlier legislation[120] – lawmakers began to implement the constitutional system, drawing inspiration from a unitary model of social security. The latter was understood as

> 'a complex system through which the public administration or other public bodies achieve the public goal of solidarity by providing benefits (pecuniary or of other kinds) or services to citizens who are in need due to the occurrence of certain risks'.[121]

This model, then defined as 'solidaristic' in opposition to the mutualistic model,[122] is characterised by a tendency towards universal coverage; is centered on benefits provided by public bodies; and generally is based on the assumption that the distinction between assistance and social security has a merely organizational nature. Further, such model guarantees both insured workers and uninsured citizens 'adequate means for their living needs'.[123] It is funded in principle by general government budget, through a tax system based on progressive criteria,[124] and embraces the protection of the right to health,[125] the family, maternity, childhood, youth,[126] as well as work, with particular reference to that performed by women and minors.[127]

This model inspired several legislative measures: the extension of the automaticity of social security benefits – provided for in general terms by Art 2116 of the Civil Code in relation to the payment of contributions – to the social protection against disability, old age and in favour of survivors;[128] the commensuration of pensions to the last income;[129] the extension of social

[120] See section II.1 and n 50 above.

[121] M. Persiani, 'Sicurezza sociale' *Novissimo Digesto Italiano* (Torino: UTET, 1970), XVII, 304.

[122] Characterized by the general correspondence between risk and contribution and by a rigorous proportionality between contributions and social security benefits.

[123] As provided by Art 38 para 2 Constitution.

[124] Art 53 Constitution.

[125] Art 32 Constitution.

[126] Arts 30 and 31 Constitution.

[127] Arts 4, 35-37 Constitution.

[128] Art 27 para 2, regio decreto-legge 14 April 1939 no 636, as modified by Art 23-*ter* decreto legge 30 giugno 1972 no 267.

[129] Arts 7-18, legge 30 April 1969 no 153.

security protection beyond the category of employed workers;[130] the introduction of social pensions funded by the general public budget.[131] The very institution[132] of the National Health Service (*Servizio Sanitario Nazionale* - SSN), inspired by the principles of universality, equality and globality of healthcare, was regarded as the final affirmation of the 'solidaristic' model.[133]

The Constitutional Court has accepted the distinction between mutualistic and solidaristic models for classification purposes. In this context, it has repeatedly underlined that the solidarity-based model does not imply the necessary correspondence between contributions paid and benefits provided. For example, on the matter of pension ceilings, the Court has referred to the principle of solidarity as a corrective to that of proportionality of the pension to the personal contributions paid;[134] or to justify the higher withholding of contributions on supplementary special allowances, severance pay, as such institutes have a both retributive[135] (deferred) and redistributive[136] nature. However, the Court has never taken a position on the question of which model – mutualistic or solidaristic – is more coherent to the Constitution, especially to Art 38, para 4, according to which 'Responsibilities under this article are entrusted to entities and institutions established by or supported by the State'.[137] To be sure, it has stressed on several occasions that the principle of solidarity inspires the entire social security system, especially in its functional aspect.[138] However, it has deferred the choice of implementation and organisational instruments to the discretion of the political branches,[139] limiting itself, for example, to affirming that

> 'the principle of solidarity (...) does not allow the (...) funding (of private social security) to be entirely exempted from contribution to public

[130] Legge 2 August 1990 no 233.

[131] Art 26, legge 30 April 1969 no 153.

[132] Legge 23 December 1978 no 833.

[133] A further expansion of such model of healthcare, much later, could perhaps be identified in legge 8 November 2000 no 328, on the 'integrated system of interventions and social services' which, together with the case law of the Constitutional Court, contributed to extend it to non-citizens. See also below, at the end of this section.

[134] Corte costituzionale 27 June 1986 no 173; 26 November 1988 no 1008; 20 February 1990 no 72; 21 February 1990 no 99; 3 May 1990 no 243; 17 February 1992 no 73; 13 December 1993 no 453; 8 June 1994 no 240; 22 June 1994 no 264; 8 March 1995 no 88; 13 July 1995 no 369; 16 May 1996 no 166; 24 November 1997 no 362.

[135] Corte costituzionale 13 April 1977 no 62; 2 May 1984 no 132; 27 June 1986 no 173; 25 February 1991 no 96; 27 February 1991 no 119; 7 May 1997 no 127.

[136] Corte costituzionale 10 March 1993 no 99; 20 November 2002 no 506; 13 March 2003 no 87.

[137] Corte costituzionale 2 May 1984 nos 132 and 133; 23 January 1986 no 31; 25 June 1986 no 169; 7 May 1987 no 171; 26 October 1988 no 1008; 20 July 1995 no 390; 24 November 1997 no 362; 9 June 2008 no 202; 21 February 2018 no 67.

[138] Corte costituzionale 27 June 1975 no 187; 12 February 1976 no 30; 25 June 1986 no 169; 27 June 1986 no 173; 17 June 2002 no 259.

[139] Corte costituzionale 13 February 1969 no 22; 27 February 1991 no 119; 22 March 1995 no 99; 7 May 1997 no 127; 22 May 2002 no 227; 20 November 2002 no 506; 25 February 2008 no 47; 7 May 2012 no 119; 6 June 2017 no 194; 20 May 2020 no 122.

social security, especially if backed by medium-high incomes'.[140]

Starting from the early 1990s, this flexible stance of the Court has allowed lawmakers to reverse course and to (re)introduce mutualistic, retributive and privatistic elements. This inversion was also justified by the need to address limits that had emerged in a welfare model marked by familism, limited protection of social risks other than old age and disability, relative tolerance of informal work and tax evasion, low efficiency of public administration and poorly controlled public spending. This system began to falter with the first financial crises, in turn linked to the weakening of certain macro-economic assumptions essential to the model's survival: low unemployment, stable demographic trends and a strong network of intergenerational solidarity in family relationships.[141]

The legislator has thus created, for example, the system of the so-called health ticket, an instrument – introduced in 1989[142] and stabilized in 1993[143] – with which citizen participate in the financing of medical services in relation to the family economic situation and the health of family members. With a view to boosting the competitiveness of healthcare administrations, the decreto legislativo 30 December 1992 no 502 launched the regionalization of the SSN, confirmed and strengthened first by decreto legislativo 19 June 1999 no 229 and then by legge costituzionale 18 October 2001 no 3. The latter, by reforming Title V of Part II of the Constitution, has made the protection of health a matter of concurrent legislation between the State and the Regions: the State determines the 'essential levels of care', while the Regions have exclusive competence in the regulation and organization of health services in the financing of the health authorities. The regionalization of the SSN has, however, triggered processes of privatization and competition between the Regions, often causing significant imbalances between territories with different levels of income per inhabitant, and thus coming into tension with the ultimate goals of the principle of solidarity. Similarly, starting from law 8 August 1995 no 335 and, more recently, with law 28 June 2012 no 92, the funding of the social security system has gradually abandoned the wage-based method in favor of the contributory method.

The Constitutional Court, for its part, has played a crucial role in extending or legitimizing the application of the principle of solidarity to the overall system of social security. Significant examples are the extension of exemptions from the so-called health ticket;[144] the extension of the survivor's pension to the surviving spouse;[145] the payment to the separated spouse of part of the severance

[140] Corte costituzionale 24 September 1990 no 427.
[141] Corte costituzionale 22 October 2020 no 234.
[142] Art 1 decreto legge 25 November 1989 no 382, as modified by legge 25 gennaio 1990 no 8.
[143] Art 8, paras 14-16, legge 24 December 1993 no 537.
[144] Corte costituzionale 19 April 1993 no 184; 5 June 2018 no 172; 7 April 2020 no 91.
[145] Corte costituzionale 15 June 2016 no 174; 11 March 1999 no 70; 27 October 1999 no 419.

pay;[146] the extension of paid parental leave in cases when the child who is not (yet) co-habiting;[147] the non-suspension of contributions even in the absence of work;[148] the extension to foreigners of the attendance allowance or the civil invalidity pension,[149] or their admission to the national civil service.[150]

However, the Constitutional Court has also legitimized the 'sectorialization' of the social security system, arguing that

> 'the external solidarity of the entire community can only exceptionally and subsidiarily integrate the solidarity of specific categories by reason of the tendency to self-finance of category social security systems'.[151]

At the same time, the Court has generally legitimized measures of financial austerity adopted in the context as a consequence of the 2008 crisis. With some exceptions concerning measures restricting benefits connected to the exercise of certain professions;[152] regulations that provided for a solidarity contribution' imposed on a single category of citizens and acquired by the State;[153] and the lack of revaluation of medium-low pension treatments, the Court has generally rejected questions relating to measures to contain public spending, especially those relating to the freeze on salary increases.[154]

A line of case law in which the Janus-face of the principle of solidarity emerges in an evident way, is that relating to vaccination obligations in children and those required to carry out certain work activities. As the preservation of health is *also* a public interest, solidarity provides a basis for the limits[155] to the freedom of private individuals to refuse medical treatment.[156] At the same time, solidarity is the basis of the duty of public bodies to pay in any case a fair compensation – distinct and possibly further than the compensation for tort under Art 2043 of the Civil Code – if the vaccination results, directly or indirectly, in a health damage.[157]

Another interesting example is the legislation aimed at combating poverty

[146] Corte costituzionale 17 January 1991 no 23.

[147] Corte costituzionale 7 November 2018 no 232.

[148] Corte costituzionale 3 February 1992 no 52.

[149] Corte costituzionale 11 March 2013 no 40; 27 January 2015 no 22; 7 October 2015 no 230.

[150] Corte costituzionale 13 May 2015 no 119.

[151] Corte costituzionale 29 April 2015 no 88; 23 February 1995 no 78.

[152] Corte costituzionale 8 October 2012 no 223.

[153] Corte costituzionale 3 June 2013 no 116.

[154] Corte costituzionale 8 October 2012 no 223; 4 December 2012 no 304; 10 December 2013 no 310; 15 January 2014 no 7; 21 May 2014 no 154; 9 July 2014 no 219; 5 April 2016 no 96; 5 July 2016 no 173.

[155] Recognized under certain conditions by Art 32, para 2, Constitution.

[156] According to the general rules laid down in Art 33 legge 23 December 1978 no 833 and in specific fields by ad hoc provisions: see Arts 1 and 3 decreto legge 7 June 2017 no 73, as modified by legge 31 July 2017 no 119. See also Corte costituzionale 22 November 2018 no 5.

[157] Corte costituzionale 14 June 1990 no 307; 20 June 1994 no 258; 15 April 1996 no 118; 23 February 1998 no 27.

and income support. In this field, legislation has been particularly confused and disorganized, lacking coherent visions and long-term financial prospects. One thinks of the minimum integration income, introduced with Art 47 of legge 27 December 1997 no 449 and Art 1 of decreto legislativo 18 June 1998 no 237, and then expanded with Art 23 of legge 8 November 2000 no 328; of the 'income of last resort';[158] of the 'inclusion income',[159] up to the most recent 'citizenship income', introduced with Art 1 decreto legge 28 January 2019 no 4, as modified by legge 28 marzo 2019, no 26. Although to varying degrees, all these measures have mostly been configured as aimed at favouring access to the labour market, rather than at tackling the poverty of citizens in a state of need. Especially within the framework of the so-called citizenship income', the income support is closely linked to the availability to work.

At an axiological level, this approach can be traced back to an interpretation of the model of social security provided for in the Constitution, in which the welfare measures are linked to work *also* understood as a duty, as well as a narrow reading of the concept of involuntary unemployment under Art 38, para 2, Constitution. This explains the 'conditional' schemes to which these measures have generally been linked, both to determine admission to the benefit and to continue to receive it. Significantly, among other conditions, the beneficiary of the Citizenship Income is obliged, under penalty of forfeiture, to offer his or her availability for participation in projects managed by the municipalities, useful to the community, with the right to withdraw recognised only for the disabled or those no longer of working age. The axiological - one could say 'ethical' - orientation of these solidarity interventions also emerges in the conditions that exclude or suspend from the benefit those who at the time of the application or during pay-out are convicted, even if not definitively, of certain crimes.[160] In spite of such problematic profiles, underlined by the scholarship,[161] these conditions have been considered not unreasonable by the Constitutional court.[162]

A final example is the regulation of volunteering. The system in force in the pre-Republican era, headed by legge 17 July 1890 no 6972 (the so-called Legge Crispi) and regio decreto 30 December 1923 no 2841 of 1923, was inspired by criteria of strict state control, in a framework of public control of charitable and welfare institutions of private or religious origin. This system has undergone its first modifications only starting from the 1970s, with some transfers of administrative functions to the Regions,[163] but still within a rigidly public

[158] Art 3, para 101, legge 24 Decmber 2003 no 350.

[159] Art 1, decreto legislativo 15 September 2017 no 147.

[160] Art 7, para 3, decreto legge 28 January 2019 no, as modified by legge 28 marzo 2019 no 26.

[161] See eg M.A. Gliatta, '(Prima) il dovere e (poi) il diritto: alla ricerca degli "ossimori costituzionali" nella cura dei figli', in F. Marone ed, *La doverosità dei diritti. Analisi di un ossimoro costituzionale?* (Napoli: Editoriale Scientifica, 2019), 221.

[162] Corte costituzionale 20 May 2020 no 122.

[163] Decreto del Presidente della Repubblica 15 January 1972 no 9; decreto del Presidente della

framework.[164] The decisive push for a greater involvement of private entities – consistent with the 'social' inspiration that emerges from Arts 18, 19, 33 and 38 of the Constitution – came in 1988from the Constitutional court which declared the unconstitutionality of Art 1 of Legge Crispi, for breach of to Art 38, para 5, of the Constitution,[165] as it did not provide that regional and infra-regional welfare and charity bodies could continue to exist by assuming the legal status of private law, when they met the necessary conditions. This decision was followed by legge 11 August 1991 no 266. This law for the first time considered volunteering no longer as a phenomenon to be included (and controlled) in the public apparatus, but as a fundamental dimension of a solidarity-based state, 'an expression of participation, solidarity and pluralism'[166] having an autonomous constitutional importance. The same law defined volunteering as an activity 'performed in a personal, spontaneous and free way, through the organization of which the volunteer is part, without profit even indirectly and exclusively for purposes of solidarity.'[167] Almost immediately followed the decision 17 February 1992 no 75 of the Constitutional Court, a milestone for the principle of solidarity and for the discipline of volunteering, defined as

> 'the most direct realization of the principle of social solidarity, for which the person is called to act (...) for free and spontaneous expression of the deep sociality that characterizes the person itself. This principle, involving the original connotation of man *uti socius*, is placed by the Constitution among the fundamental values of the legal system (...)'.[168]

This judgment also stands out because, insofar as it imposes a general framework at the national level,[169] it highlights the integrative purposes that the principle of solidarity expresses among the various levels of government.

Since then, lawmakers has been committed to the promotion of the voluntary dimension of solidarity, regulating and incentivizing social interventions on the part of private entities, with a view to horizontal subsidiarity, later constitutionalized in Art 118, para 4, of the Constitution.[170] An expression of this trend were Art 4 legge 15 March 1997 no 59; Art 3 decreto legislativo 18 August 2000 no 267 (the so-called TUEL); the decreto del Presidente del Consiglio dei Ministri 30 March 2013; legge 8 November 2000 no 328 on social services,

Repubblica 24 July 1977 no 616.

[164] With the exception of legge 12 February 1968 no 132, which removed from the scope of application of general regulation of legge no 6972/1890 the institutions for the care and hospitalization of the sick, in order to integrate them into the healthcare system.

[165] Corte costituzionale 24 March 1988 no 396.

[166] Art 1, para 1, legge 11 August 1991 no 266.

[167] Art 2, para 1, legge 11 August 1991 no 266.

[168] Corte costituzionale 17 February 1992 no 75.

[169] See Corte costituzionale 15 April 1992 no 202; and 29 December 1993 no 500.

[170] With Art 4 of legge costituzionale 18 October 2001 no 3.

which introduced the discipline of Associations of social promotion, up to legge 6 June 2016 no 106 and the related decreto legislativo 3 July 2017 no 117 implementing it. These last two instruments stand out, in particular, for having defined in a more precise way the 'Third Sector' and the subjects that can be included into it[171] and, more generally, for having outlined 'a new economic and welfare policy, set on overcoming the dualism between State and market'.[172]

2. Strike

A second macro-area where the Janus-faced character of the principle of solidarity in the Italian constitutional system emerges is the right to strike. As an intrinsically conflictual conduct and a crucial instrument of self-protection of the collective claims 'of subaltern social groups that aim to redress their lack of social strength',[173] the Constitution turned the strike from a prohibited conduct[174] into a constitutional right, to be exercised 'within the laws that regulate it.'[175] This protection represents a manifestation of solidarity in several respects.

Firstly, it reinforces the solidarity among workers towards (and against) their employers. Art 4 of legge 15 July 1966 no 604 and then Arts 15, 16 and 24 of legge 20 May 1970 no 300 (so-called Statute of Workers) have rendered null and void any dismissal determined by participation in union activities, and sanction any related form of discrimination, or any conduct by the employer aimed at preventing or limiting the exercise of the right to strike. Secondly, the legal protection of strike indirectly strengthens and stabilizes the role of trade unions as social formations and even *political* actors, even beyond their strictly contractual/economic agendas. This function of the right to strike in the Italian legal system, which in some ways promotes and protects 'controlled' levels of social conflict, emerges also in the judicial practice. Indeed, courts have progressively extended the personal scope of application of the right to strike to self-employed workers and, above all, they have broadened the scope of lawful strike to cases such as political-economic strike (qualified as a right),[176] 'pure' political strike (qualified as freedom),[177] and 'solidarity' strike, that is, the strike

[171] Art 1 legge 6 June 2016 no 106; Art 1 decreto legislativo 3 July 2017 no 117.

[172] D. Caldirola, 'Stato, mercato e Terzo settore nel decreto legislativo no 117 of 2017: per una nuova governance della solidarietà' *Federalismi.it* (2018), 1. The new legislation has also been strengthened and clarified by the most recent case law of the Constitutional Court: see Corte costituzionale 20 May 2020 no 131 which, building on Corte costituzionale 17 February 1992 no 75, validated regional legislation broadening the range of actors to be included in the 'Third Sector' to the purposes of the participation to territorial and urban planning; and 23 February 2022 no 72, concerning the range of non-profit entities that can access specific kinds of public funding.

[173] G. Giugni, *Diritto sindacale* (Bari: Cacucci 2006), 230.

[174] Under the fascist penal code of 1930: see Arts 502-508, 330 and 333 Criminal Code.

[175] Art 40 Constitution.

[176] Corte costituzionale 13 December 1962 no 123; 12 December 1967 no 141

[177] Corte costituzionale 19 December 1974 no 290; 2 June 1983 no 165. See also Corte di Cassazione-Sezione lavoro 21 August 2004 no 16515.

carried out by workers in solidarity with the claims of other groups or individual workers, although not directly affected or interested in those claims.[178]

From the perspective of the principle of solidarity, the regulation of the strike is interesting with respect to its limits. Based on principles already outlined by the Constitutional Court in relation to Arts 330 and 333 of the Criminal Code,[179] with legge 12 June 1990 no 146, the legislator introduced a general framework to regulate the exercise of this right when it affects 'essential public services', a framework that has in turn been the subject of numerous modifications and interventions by the Constitutional Court.[180] These limits are defined as those 'aimed at guaranteeing the enjoyment of the constitutionally protected rights of the individual to life, health, freedom and security, freedom of movement, social assistance and social security, education and freedom of communication' (Art 1, para 1). Importantly, also in this case, the normative outlook of solidarity – in the form of conflict-driven integration between (the claims of) the workers and the broader community – is not axiologically neutral. Indeed, limitations to the right of strike in the field of 'essential public services' are not permissible to protect economic and property rights, even though they are constitutionally guaranteed.[181]

3. Economic Freedom and Private Property

Moving to economic freedom and private property, Arts 41 and 42 of the Constitution – which recognize them – repeatedly refer to their social utility, social aims and functions. However, the Constitution has not transformed them into public functions, as they are still configured as subjective rights.[182] However, these legal situations, and particularly the right to property, are not configured as an absolute ownership (dominion) over one's own assets and goods.[183] Indeed, lawmakers can introduce, 'following appropriate evaluations and the necessary balancing of the various interests, those limits which ensure their social function'.[184] In this regard,

> 'the social function of property reflects the aspiration to solidarity emerging from the overall constitutional system, giving it effectiveness even in the field that historically has created the greatest inequalities and injustices'.[185]

[178] Corte costituzionale 13 December 1962 no 123.

[179] Corte costituzionale 13 December 1962 no 123; 27 February 1969 no 31; 15 July 1976 no 222.

[180] Legge 11 April 2000 no 83; decreto legge 6 July 2012 no 95, as modified by legge 7 August 2012 no 135; legge 24 December 2012 no 228; decreto legge 20 September 2015 no 146, as modified by legge 12 novembre 2015 no 182. See also Corte costituzionale 20 February 1995 no 57; 4 July 2001 no 223; 10 July 2018 no 180.

[181] G. Giugni, n 173 above, 250-251.

[182] Corte costituzionale 15 July 1983 no 252.

[183] Corte costituzionale 9 May 1968 no 55.

[184] Corte costituzionale 15 July 1983 no 252.

[185] F. Polacchini, n 5 above, 77.

Importantly, the recent constitutional reform passed at the beginning of 2022, which modified Art 41 in order to explicitly constitutionalise 'health' and 'environment' as limits to the freedom of economic initiative,[186] may strengthen the solidarity potential *inherent* in the right to private property. However, it is still premature to assess whether the new formulation will bring any significant change in the interpretation and application of the right to property, especially from the perspective of solidarity

The solidaristic potential inherent in the right to private property – as understood by the Constitution – has been developed by the lawmakers especially in relation to real estate, historically more significant for the low- and middle-income segments of the population. This has happened notably through the regulation of the lease of urban real estate,[187] which has introduced the so-called fair rent for real estate used for residential purposes; and in the regulation of expropriation for public utility,[188] in recent years profoundly influenced by European law.[189]

In the context of the relationship with private property, it is also particularly interesting that the principle of solidarity is considered as the basis of the legitimacy for compulsory insurance for civil liability deriving from the circulation of vehicles;[190] as well as for the potential liability of the owner of the vehicle for violations committed by the driver.[191] With regard to economic initiative, the application of the principle of solidarity has significant socio-economic implications when it comes to the obligation on producers of certain kinds of medicines to apply a discount on the sale price to the distributors and from the latter to the final users.[192]

4. Civil and Criminal Law

The principle of solidarity has played a crucial role in 'constitutionalizing' several areas of civil and criminal law, especially those pre-dating the Constitution itself. In this context, it has performed its functions mainly as an interpretative criterion by both constitutional and ordinary courts. In this sense, the principle of solidarity has contributed to making the entire system coherent to the Constitution.

Proceeding only cursorily, one can recall the application of the principle in conjunction with those of good faith and fairness, as well as with the concept of

[186] See n 78 above.

[187] Arts 12 ff, legge 27 July 1978 no 392.

[188] Decreto del Presiente della Repubblica 8 June 2001 no 327.

[189] See section III.5 below.

[190] Corte costituzionale 5 March 1975 no 56; 24 March 1983 no 77; 10 December 1987 no 560; 20 April 1998 no 138.

[191] Corte costituzionale 25 January 2001 no 33; 1 July 200 no 319; 1 July 2003 no 323; 12 January 2005 no 27.

[192] Corte costituzionale 3 July 2006 no 279.

abuse of rights. While it is not necessarily true that good faith is a specification of the mandatory duties of solidarity under Art 2 of the Constitution,[193] solidarity certainly serves to (re)calibrate these concepts, so that they contribute to rebalance unbalanced contractual or social relations. In this context, the principle of solidarity has represented a fundamental legal basis for jurisprudence, in particular to broaden the area of non-pecuniary damage compensable according to Art 2059 of the Civil Code;[194] as well as to attract legal situations previously included in the area of tort liability under Art 2043 Civil Code into the area of liability for breach of contract under Art 1218 Civil Code (so-called liability from qualified social contact),[195] with significant changes in terms of, for example, burden of proof and statute of limitations. In this context, the main cases considered by courts are: the responsibility of the doctor employed by the healthcare facility towards the patient;[196] the responsibility the bank for false information to third parties and for the payment of non-transferable cheques to a subject with no legitimate title;[197] the responsibility of teacher and pupil;[198] the so-called pre-contractual responsibility.[199] Similarly, the principle of solidarity has been used to interpret Art 1385 of the Civil Code on the subject of the deposit, in the sense of allowing the judge to equitably reduce the amount due in the case of manifest disproportion.[200]

Further, before de facto family relationships were recognized in ordinary legislation with legge 20 May 2016 no 76, the principle of solidarity was used by courts to give them legal relevance. Thus, although the various forms of de facto cohabitation have never been equated with the marriage-based family, the Constitutional Court had since the 1980s used the principle to solidarity, for example, to legitimize the succession of the cohabitant or the de facto separated

[193] As argued once by the Italian Supreme Court: see Corte di Cassazione 27 October 2015 no 21782.

[194] See Corte di Cassazione 31 May 2003 nos 8827 and 8828; Corte di Cassazione-Sezioni unite 11 November 2008 no 26972; Corte di Cassazione 9 April 2009 no 8703; Corte di Cassazione 15 July 2014 no 16133.

[195] That is, a particular form of contractual liability that arises not from a 'contract' but from a 'social contact', ie from a relationship that is established between two subjects by virtue (not of an agreement between the parties) but of a legal obligation or as a consequence of another contractual relationship established between different subjects than those of the 'social contact.'

[196] Corte di Cassazione-Sezioni unite 30 October 2001 no 13533.

[197] Corte di Cassazione-Sezioni unite 21 May 2018 no 12477.

[198] Corte di Cassazione-Sezioni unite 27 June 2002 no 9346; Corte di Cassazione 19 September 2017 no 21593.

[199] That is, a form of liability arising from failure to comply with the obligations incumbent on the parties during the negotiations and the formation of the contract: see Corte di Cassazione 12 July 2016 no 14188.

[200] Corte di Cassazione 20 April 1994 no 3775; Corte di Cassazione 24 September 1999 no 10511; Corte di Cassazione-Sezioni unite 13 September 2005 no 18128; Corte di Cassazione 18 September 2009 no 20106. See also Corte costituzionale 21 October 2012 no 248; Corte costituzionale 26 March 2014 no 77.

spouse in the lease contract.[201] In criminal matters, in particular with reference to the crime of domestic abuse, the Court of Cassation has established that the term 'family' must be understood as referring to any consortium of persons among whom, due to close relationships and customs of life, relationships of assistance and solidarity have arisen for an appreciable period of time.[202] On the other hand, in the matter of regulation of patrimonial relations, the Supreme Court held that the concept of family should not be limited to that based on marriage, but can also include other de facto ties qualifiable as social formations under Art 2 Constitution.[203] Also in this field, however, the self-restraint of the Constitutional Court should be emphasized: for example, it has recently rejected questions of constitutionality aimed at decriminalizing the crimes of recruitment and aiding and abetting of prostitution voluntarily exercised, which were based on alleged duties of solidarity, preventing the criminal repression of the free economic exploitation of their sexual freedom.[204]

Still in the criminal sphere, the Supreme Court has now reached a consolidated position on the fact that the principle of solidarity constitutes the basis of omissive crimes, that is, criminal provisions requiring addressees not to refrain from performing actions harmful to the rights and interests of others, but the performance of positive actions, as an expression of an obligation of collaboration between the State and individuals. This applies both to the so-called 'proper' omissive crimes, in which there is a rule that expressly punishes the omission;[205] and to the so-called 'improper' omissive crimes, in which the charge is made by way of failure to prevent the event.[206] Similarly to what happens for vaccinations, however, the same principle of solidarity that imposes obligations of active conduct obliges, in case of errors relating to the unjustified breach of personal freedom, the payment of compensation, even in absence of fault or negligence. In this same way, we can explain the regulation on unjust imprisonment[207] which, supported and extended by constitutional case law,[208] imposes the obligation of compensation regardless of whether the judicial error is linked to fault or malice.

[201] Corte costituzionale 24 March 1988 no 404; 12 December 1989 no 559.

[202] Corte di Cassazione 22 October 2009 no 40727; Corte di Cassazione 22 May 2008 no 20647; Corte di Cassazione 24 gennaio 2007 no 21329.

[203] Corte di Cassazione 22 January 2014 no 1277. See also Corte costituzionale 14 April 2010 no 138; and Corte costituzionale 4 April 2009 no 140.

[204] Corte costituzionale 12 June 2019 no 141.

[205] Arts 570, 591 and 593 of the Criminal Code; Art 189 of the Codice della Strada. See Corte di Cassazione 23 April 2014 no 17621.

[206] Art 40, para 2, Criminal Code. See Corte di Cassazione 6 June 2014 no 23911; Corte di Cassazione 5 December 2014 no 25729; Corte di Cassazione 16 March 2015 no 11136.

[207] Art 314 of the Code of Criminal Procedure.

[208] Corte costituzionale 18 July 1996 no 310; 16 December 1997 no 446; 24 March 1999 no 109; 24 June 2004 no 230; 11 June 2008 no 219.

5. Solidarity and Space

As already underlined several times, the principle of solidarity in the Italian legal system aims at integration *within* and *through* the conflict, and its normative scope encompasses all fields where conflict emerges in relation to the values and/or interests of subjects that are in some way linked, or at least interdependent. As a consequence of globalization and transnationalisation processes, which have involved an ever-growing interdependence of political and social actors at the global level, the possibilities for the spatial application of the principle of solidarity expand.[209] At the same time, such processes, largely dominated by neo-liberal policies since at least the 1980s, have triggered dynamics of competition and individualization in most social sectors, which put under stress the ability of the principle of solidarity to perform its functions, especially because historically the institutions of the welfare state have had a purely territorial dimension.[210] Here, it is important to highlight the relationship between the principle of solidarity as understood in the Italian constitutional system, and its configuration in international and EU systems.

In this regard, besides the provisions defining the scope of solidarity in internal relations, the norms expressing the 'internationalist' scope of the principle and regulating cross-border movements are also axiologically oriented. Such orientation emerges from the conditions giving rise to the right of the foreigner to asylum, namely that she 'is prevented in his own country from effectively exercising the democratic freedoms guaranteed by the Italian Constitution';[211] from the conditions that make the consent to limitations of sovereignty legitimate;[212] or from the obligation to promote labour rights at the international level.[213] At the level of domestic legislation, this dimension has emerged especially in the regulation of international cooperation[214] and in the governance of immigration[215], albeit with its continuous and erratic modifications, often inspired by instrumental populist drives and short-lived political motivations.[216]

As concerns the case law, besides the decisions concerning the extension to foreigners legally resident of rights or duties recognized to citizens,[217] the decisions

[209] S. Rodotà, n 98 above, 84.

[210] S. Giubboni, 'Confini della solidarietà. I modelli sociali nazionali nello spazio giuridico europeo' *Politica del diritto*, 395, 398-399 (2011).

[211] Art 10, para 3, Constitution.

[212] Art 11 of the Constitution: 'Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations.'

[213] Art 35, para 3, Constitution.

[214] Legge 9 February 1979 no 38; legge 26 February 1987 no 49; legge 1 December 2018 no 132. See also Corte costituzionale 28 September 2005 no 360.

[215] See decreto legislativo 25 July 1998 no 286.

[216] See most recently decreto legge 4 October 2018 no 113, as modified by legge 1 December 2018 no 132; decreto legge 21 October 2020 no 130, as modified by legge 18 December 2020 no 173.

[217] See nn 87, 88, and 89 above.

on the duties of protection towards asylum seekers should be noted. In this field, the Constitutional Court has made it clear that, while the duty of solidarity as such does not prevent the State from introducing new crimes in the field of immigration, it must be the basis for the regulation of the prohibitions of expulsion and rejection; of family reunification, of the applicability to undocumented foreigners of the regulations on refugee status and international protection; as well as the non-punishability of the immigrant who does not comply with the order of expulsion for a justified reason (for example, extreme indigence).[218]

At the international level, multiple sources of both binding or non-binding law recognise or mention the principle of solidarity in various ways. In this field, a distinction is made between inter-individual solidarity[219] and the cooperation obligations of states as such, often in connection with other substantive or procedural rules, related to good faith and due diligence. Traditional international law, understood as inter-state law, focuses mainly on the latter. This emerges from Art 1 and Chapter IX of the 1945 Charter of the United Nations, Art 1 para 2, Art 2 para 1, and Art 11 of the International Covenant on Economic, Social and Cultural Rights of 1966,[220] as well as in instruments such as the 1970 Declaration on Friendly Relations of the UN General Assembly[221] or the 1972 Stockholm Declaration on the Human Environment.[222]

While such texts are not considered to be binding per se, they are today considered, at least in part, expressive of norms of customary international law and therefore legally relevant.[223] However, especially in recent times, the link between inter-state solidarity/cooperation and social welfare has begun to be consistently evoked in international law,[224] especially by those arguing that

[218] Corte costituzionale 13 November 1997 no 353; 2 July 2001 no 217; 13 January 2004 no 5; 23 February 2004 no 80; 27 September 2004 no 302; 25 January 2006 no 44; 3 May 2006 no 192; 17 May 2006 no 206; 5 June 2006 no 224; 7 May 2008 no 148; 13 December 2010 no 359; 9 July 2020 no 186.

[219] Arts 1 and 29 of the 1948 Universal Declaration of Human Rights.

[220] See Committee on Economic, Social and Cultural Rights, General Comment 3: The Nature of States Parties' Obligations (Art 2(1) ICESCR), 14 December 1990, E/1991/23, para 13; Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 ICESCR), 11 August 2000, E/C.12/2000/4, para 45.

[221] UN Doc A/RES/2625(XXV) 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. See J.E. Vinuales ed, *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge: Cambridge University Press, 2020).

[222] UN Doc A/CONF.48/14/Rev 1.

[223] See H. Keller, 'Friendly Relations Declaration (1970)' *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2009), online version; D. Shelton, 'Stockholm Declaration (1972) and Rio Declaration (1992)' *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), online version.

[224] Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011); Draft declaration on the right to international solidarity and Report of the Independent Expert on human rights and international solidarity (UN Doc. A/HRC/ 35/35 of 25 April 2017); Preamble of the Constitution of the International Labour Organization (ILO) (1919).

peace between states also depends on intra-state social peace. This trend has accelerated in the context of the global COVID-19 pandemic started in 2020.[225] Despite its persistent vagueness, such trend has prompted part of the scholarship to argue that solidarity is emerging in the form of a structural or even constitutional principle of the international legal order,[226] but this position is still contested.[227]

In EU law, the principle of solidarity has a relatively clearer normative scope,[228] and today it emerges mainly in three areas: financial solidarity and cohesion policies; fundamental rights; cooperation in migration governance. In these areas, the general goal is the construction of the so-called social Europe, ie the evolution of the welfare systems of member states towards the opening to all EU citizens, without restrictions based on nationality; the extension of non-discriminatory access to the welfare of the host member state even to economically inactive citizens; the cross-border portability of social security benefits guaranteed by each state regardless of nationality.[229] In the area of fundamental rights, solidarity is recognized in Art 2 TEU as one of the founding values of the Union; and Chapter IV of the Charter of Fundamental Rights of the EU (CFREU) is dedicated to it. Particularly relevant in this field are also Art 3, para 3, TEU;[230] Art 42, para 7, TEU on mutual defense; Art 80 TFEU on solidarity and fair sharing of responsibility in the field of asylum, immigration and border controls;[231] Art 222 TFEU (solidarity clause in case of a terrorist attack or of a natural or man-made disaster); Art 122 TFEU (financial assistance clause); Art 107, para 2, lett (a) and (c), and para 3 TFEU and Regulation (EU) No 651/2014 on regional state aid;[232] Art 174 ff TFEU on economic, social and territorial cohesion; Art 194 TFEU on energy policy.

However, the 'genetic' imprint of European integration, ie the construction

[225] A. von Bogdandy and P. Villarreal, 'Vaccinating Against Covid-19: Appraising the COVAX Initiative' 81 *Heidelberg Journal of International Law*, 81-116 (2021).

[226] See generally R. Wolfrum and C. Kojima eds, *Solidarity: A Structural Principle of International Law* (Berlin-Heidelberg: Springer, 2010).

[227] See A. Peters, 'Global Constitutionalism: The Social Dimension', in T. Suami, A. Peters, D. Vanoverbeke, and M. Kumm eds, *Global Constitutionalism from European and East Asian Perspectives* (Cambridge: Cambridge University Press, 2018), 277.

[228] For an overview, see most recently Philippe Van Parijs, 'European Values: Solidarity' 34 *Ratio Juris*, 95-105 (2021).

[229] Case C-85/96, *María Martínez Sala* v *Freistaat Bayern*, Judgment of 12 May 1998, available at www.eur-lex.europa.eu; Corte costituzionale 8 July 2020 no 182.

[230] '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.'

[231] See generally D. Thym and E. Tsourdi, 'Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions' 24 *Maastricht Journal of European and Comparative Law*, 605-621 (2017).

[232] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance [2014] OJ L 187.

of a common market has led to processes of competition between systems and a race to the bottom in terms of social protection. This trend has been legitimized by the EU Court of Justice with decisions such as the *Viking*[233] and *Laval*[234] judgments of 2007, which have greatly reduced the possibility of establishing forms of transnational solidarity between trade union movements and, therefore, the strike as an instrument of social demands and struggles at the European level.[235] This effect of European integration is well documented,[236] allegedly leading to the end[237] or at least crisis of social Europe.[238] It has also accelerated as a result of the policies of financial austerity and conditionality following the Eurozone crisis, based on the principles of fiscal and financial responsibility, which have scaled down the capacity of welfare states to redistribute wealth through expansionary economic policies.[239] Also with regard to the governance of migration, solidarity seems to emerge only episodically within the EU, that is, through emergency and intergovernmental mechanisms, which allow only exceptional interference with state competences. This same solidarity is mostly implemented in its vertical dimension – solidarity towards people seeking protection – and in a residual and limited sense. The principle of solidarity, in fact, appears mainly as an emergency tool under Art 78, para 3, TFEU, rather than as a 'systemic' norm under Art 80 TFEU.

Paradoxically, the member states that are most opposed to a fair distribution of responsibility for the reception of migrants are among those who benefit most from the solidarity expressed through the cohesion policy. With regard to the social rights recognized in the CFREU, Art 52, para 5, outlines a special regime for its 'principles'. The latter, unlike 'rights', may be implemented by the institutions of the Union and the member states in application of EU law and can be invoked before a judge only for the purpose of interpretation and control of the legality of the acts in question. The ratio of such a category of rules, which echoes that of the so-called programmatic norms rejected by the

[233] C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Judgment of 11 December 2007, available at www.eur-lex.europa.eu.

[234] Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Judgment of 18 December 2007, available at www.eur-lex.europa.eu.

[235] S. Sciarra, *Solidarity and Conflict. European Social Law in Crisis* (Cambridge: Cambridge University Press, 2018), 91 ss.

[236] A. Albi, 'Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-operative Constitutionalism' 9 *Vienna Journal of International Constitutional Law*, 291-343 (2015).

[237] K.D. Ewing, 'The Death of Social Europe' 26 *King's Law Journal*, 76-98 (2015).

[238] See generally S. Sciarra, n 235 above; and E. Christodoulidis, n 11 above, 365-430.

[239] M. Benvenuti, Libertà senza liberazione. Per una critica della ragione costituzionale dell'Unione europea (Naples: Editoriale Scientifica, 2016). See also P. Kjaer, G. Teubner, and A. Febbrajo eds, *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart, 2011).

Italian Constitutional Court,[240] would seem to be that of 'anesthetizing' the effects of the social rights of the CFREU and limiting their judicial application in the absence of legislative implementation.[241] To a lesser extent, even the individualistic tendencies inherent in the structure of the protection system centred on the European Convention on Human Rights (ECHR) – which, as we know, does not expressly protect social rights, except for trade union freedoms (art. 11) and the right to education (Art 2 Prot I) – seem to have an impact on the normative scope of solidarity. It is sufficient here to recall the conventional jurisprudence on the criteria for determining compensation for expropriation, centred on market value,[242] potentially in conflict with a 'solidaristic' vision of private property.

Nonetheless, there are signs of change in EU law. The 2020 economic crisis resulting from the COVID-19 emergency – defined as 'symmetrical' because it cannot be traced back to allegedly 'irresponsible' fiscal or financial conduct on the part of the member states – seems to have established for the first time genuine movements from fiscal responsibility to fiscal solidarity.[243] Significantly, in an updated interpretation of financial conditionality, the EU institutions seem to want to link such solidarity also to the respect for certain values, including the protection of human rights and the rule of law, and the willingness to participate in policies for the relocation of immigrants.[244] At the jurisprudential level, the Court of Justice has until recently been reluctant to make bolder use of the principle of solidarity.[245] However, in some decisions relating to border controls[246] energy policy,[247] and conditionality for the protection of the EU

[240] Corte costituzionale 5 June 1956 no 1.

[241] See S. Sciarra and A. Jr Golia, 'Italy: New Frontiers and Developments', in M. Bobek and J. Adams-Prassl eds, *The EU Charter of Fundamental Rights in the Member States* (Oxford: Hart, 2020), 239-256, at 252.

[242] Eur. Court H.R., *Scordino* v *Italia*, Judgment of 29 March 2006, available at www.hudoc.echr.coe.it.

[243] M. Ioannidis, 'Between Responsibility and Solidarity: Covid-19 and the Future of the European Economic Order' 80 *Heidelberg Journal of International Law*, 773-784 (2020). See European Parliament and Council Regulation (EU, Euratom) no 2092/2020 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget ('Rule of Law Conditionality Regulation').

[244] A. von Bogdandy and J. Łacny, 'Suspension of EU Funds for Member States Breaching the Rule of Law – A Dose of Tough Love Needed?' *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* no 2020-24, available at https://tinyurl.com/43bjdhdx (last visited 30 June 2022).

[245] D. Schiek, 'Solidarity in the Case Law of the European Court of Justice - Opportunities Missed?', in H. Krunke, H. Petersen, and J. Manners eds, *Transnational Solidarity. Concept, Challenges and Opportunities* (Cambridge: Cambridge University Press, 2020), 252.

[246] Joined Cases C-643/15 and C-647/15, *Slovakia* v *Council* and *Hungary* v *Council*, Judgment of 6 September 2017, available at www.eur-lex.europa.eu; Joined Cases C-715/17, C-718/17, and C-719/17, *Commission* v *Poland, Hungary, and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, Judgment of 2 April 2020, available at www.eur-lex.europa.eu.

[247] C-848/19 P, *Germany* v *Poland*, Judgment of 15 July 2021, available at www.eur-lex.europa.eu.

budget,[248] it has given significant signals, expanding the scope of justice of the principle of solidarity, read in connection with the principle of sincere cooperation enshrined in Art 4(3) TEU, and arriving at defining it as one of the fundamental principles of EU law underlying the entire legal system of the Union.[249]

Whether and to what extent the spatial interdependence, as emerging in the inter-national and supranational legal systems, strengthen or weaken the normativity of the principle of solidarity as understood in the Italian legal system, is a question that lends itself to different answers. On the one hand, given the impossibility that the Italian legal system can, on its own, sustain the challenges arising from global interdependence, it seems desirable that external legal systems should adopt a more axiologically and normatively dense vision of solidarity. From this point of view, it cannot be forgotten that in recent years the case law of the European Court of Human Rights has played an important role in ensuring the respect of the right to asylum[250] and the protection of social security and welfare benefits as proprietary claims, whose arbitrary or discriminatory denial, quantification or revocation is to be considered unlawful.[251] Similarly, the 1961 European Social Charter and the related 'case law' of the European Committee of Social Rights – especially the decisions developed in the context of the collective complaints procedure[252] – have provided support for decisions of the Constitutional Court in the area of trade union rights.[253] On the other hand, the principle of solidarity and the duties that are its manifestation lend themselves to being a limit against conflicting external sources of various kinds which, in different ways, risk compromising its core normative value.[254]

6. Solidarity and Time

The ever-expanding national budgets of modern states and, more generally, the techno-industrial capabilities achieved in the most economically advanced countries have led to inter-generational conflict as a new area of emergence of the principle of solidarity. Indeed, as never before, organized communities and states have the capacity to determine long-lasting and potentially irreversible consequences on society and the environment, both locally and globally, with an enormous impact on the enjoyment of rights by future generations. This new

[248] C-156/21, *Hungary* v *Parliament and Council*, Judgment of 16 February 2022, para 129, available at www.eur-lex.europa.eu.

[249] So-called 'rule of law conditionality': see C-848/19 P n 247 above, para 41.

[250] Art 3 ECHR; Art 4 Prot 4 ECHR; Eur. Court H.R., *Hirsi* v *Italy*, Judgment of 23 February 2012, available at www.hudoc.echr.coe.it.

[251] Eur. Court H.R., *Stec* v *United Kingdom*, Judgment of 12 April 2006, available at www.hudoc.echr.coe.it; Eur. Court H.R., *Moskal* v *Poland*, Judgment of 15 September 2009, available at www.hudoc.echr.coe.it.

[252] Introduced with the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 9 November 1995 (ETS No 158).

[253] Corte costituzionale 24 June 2015 no 178; 11 April 2018 no 120; 24 February 2021 no 59.

[254] See again the 'controlimiti' doctrine (n 93 above).

'power' creates problems for the modern liberal political theory, presupposing the ability of a community to decide at a given time on itself, and the tendential indifference of external and future communities to such decisions; and for modern constitutionalism itself, which emerged as a normative project that embraces multi-generational arcs.

Among various problems, one concerns the juridical qualification of the interests of those 'who do not yet exist' and of the relative weight to be given to them in any balancing with the juridical positions of those who instead are 'here and now'. In other words, it is a question of determining the legal qualification of a 'third party included' which, while not necessarily configuring itself as 'present' or as a human subject (the environment or non-human animals could be configured as objects of autonomous protection), can impose duties of solidarity and limitations on rights. This is obviously an ambiguous scenario that lends itself to manipulation, insofar as it can be used to limit present processes of social emancipation, of protection of social rights, and, more generally, of democratic self-determination. By this ambiguity are somehow affected also recent constitutional reforms, namely legge costituzionale 20 April 2012 no 1 that introduced the principle of overall budgetary balance into Art 81 of the Constitution[255] and re-centralised at the national level the armonization powers of public budgets;[256] and legge costituzionale 11 February 2022 no 1, tasking the Republic with 'the protection of environment, biodiversity, and ecosystems, also in the interest of future generations'.[257]

In judicial practice, concerns for the diachronic dimension of solidarity – especially of social rights – are not new.[258] The Constitutional Court has constantly recalled gradualism as a condition for the constitutional legitimacy of reforms in the field of social security and welfare,[259] but also the non-intangible nature of the principle of legitimate expectations as well as the reversibility of

[255] 'The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle. No recourse shall be made to borrowing except for the purpose of taking account of the effects of the economic cycle or, subject to authorisation by the two Houses approved by an absolute majority vote of their Members, in exceptional circumstances. Any law involving new or increased expenditure shall provide for the resources to cover such expenditure. Each year the Houses shall pass a law approving the budget and the accounts submitted by the Government. Provisional implementation of the budget shall not be allowed except by specific legislation and only for periods not exceeding four months in total. The content of the budget law, the fundamental rules and the criteria adopted to ensure balance between revenue and expenditure and the sustainability of general government debt shall be established by legislation approved by an absolute majority of the Members of each House in compliance with the principles established with a constitutional law.' See also the related implementing legislation: legge 24 December 2012 no 243.

[256] Art 117, para 2, lett. e), Constitution.

[257] See Art 9 Constitution.

[258] See only M. Caredda, Giudizio incidentale e vincoli di finanza pubblica. Il giudice delle leggi prima e dopo la crisi (Turin: Giappichelli, 2019), 132.

[259] See, eg, Corte costituzionale 8 June 1994 no 240.

acquired rights.[260] At the same time, the Court had to deal with a relative lack of available options in decision-making techniques, especially when it comes to the modulation of the temporal effects of declarations of unconstitutionality.[261] Indeed, the potentially disruptive effects on public budgets of such rulings[262] and considerations relating to the respect of the discretion of political branches were probably at the basis of a relative self-restraint of the Constitutional Court and, at the same time, of the 'creation' of new decisional techniques non explicitly recognized in the governing legislation. For example, this may explain the 'invention' and extensive use, between the end of the 1980s and the 1990s, of different kinds of decisions of unconstitutionality stating generic principles, to be further implemented in ordinary legislation.[263]

In more recent years, this relatively cautious attitude of the Court has been replaced by a more activist stance. First of all, following scholarly elaborations,[264] the Constitutional Court has begun to make explicit reference to the concept of solidarity or intergenerational equity, notably for questions of constitutionality having as a parameter the 'new' Art 81 of the Constitution on the overall budgetary balance.[265] Secondly, starting with judgment 9 February 2015 no 10, the Constitutional Court, explicitly referring to the principle of solidarity as a basis for justification,[266] has begun to modulate the retroactive effects of the decisions of unconstitutionality.[267] In this way, the principle of solidarity deploys its normative value even on procedural (constitutional) law, contributing to the overcoming of what has long been a taboo of constitutional and legal theory.

[260] Corte costituzionale 12 December 1985 no 349; 12 December 1996 no 417; 7 May 1997 no 127; 16 December 1998 no 457; 10 March 2015 no 56; 22 March 2018 no 89; 19 March 2019 no 108; 21 October 2019 no 240; 11 June 2020 no 135; 22 March 2022 no 136.

[261] See Art 136 Constitution and Art 30, para 3, legge 11 March 1953 no 87.

[262] Corte costituzionale 29 December 1993 no 495; 8 June 1994 no 240; 10 March 2015 no 70.

[263] See A. Jr Golia, 'Seguito delle additive di principio e auto-produzione del sistema giuridico' *Giurisprudenza costituzionale*, 2186 (2018).

[264] R. Bifulco, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale* (Milano: FrancoAngeli, 2008); R. Bifulco and A. D'Aloia eds, *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Napoli: Jovene, 2008); A. D'Aloia, 'Generazioni future (diritto costituzionale)' Enciclopedia del diritto (Milano: Giuffrè, 2016), Ann IX, 331; F. Polacchini, n 5 above, 188 and 197; G. Palombino, 'La tutela delle generazioni future nel dialogo tra legislatore e Corte costituzionale' federalismi.it, 5 August 2020, 242-272.

[265] Corte costituzionale 7 April 2014 no 88; 6 April 2016 no 106; 11 January 2017 no 6; 14 February 2019 no 18; 15 May 2020 no 115; 22 October 2020 no 237; 10 November 2021 no 235.

[266] This line of case law started before and somehow paved the way the mentioned legge costituzionale 11 February 2022 no 1 that 'constitutionalised' the interests of future generations. As we write, it is still premature to make an assessment on whether such constitutional codification of the principle of inter-generation solidarity will trigger a process of mutual reinforcement of the related case law of the Constitutional Court.

[267] Corte costituzionale 24 June 2015 no 178; 7 March 2018 no 71; 7 March 2018 no 74; 22 October 2019 no 246; 23 June 2020 no 152.

VI. Conclusion

This article aimed to contribute to the growing debates surrounding the principle of solidarity, by analysing the specific features of such principle in the Italian legal system. It offered a relatively thorough and systematic conceptualization, capturing the intellectual, normative, and practical significance of the principle. Being directed to a broader audience and aimed at offering a general overview, such analysis could not delve into the details of each of the analysed legal instruments. What is worth highlighting, again in this conclusion, is however the Janus-faced – simultaneously conflict-solving and conflict-generating – nature of the principle of solidarity in the Italian constitutional experience. Such nature constitutes a specificity deeply embedded in the legal and, more generally, socio-political history of Italy and has been unduly overlooked in comparative legal scholarship. However, this article did not only aim to fill this gap. It further – and more importantly – aimed at contributing to problematising the current discourses on the legitimacy of modern constitutional states, too often stuck in an unresolvable contraposition between allegedly 'legal' and 'political' constitutionalisms. A (partially) new conception of the principle of solidarity constitutes a conceptual move that may help exit from a scholarly dead end. In this sense, opening new spaces for social conflict *within* the legal perimeter of liberal democracy is the persistent challenge of modern constitutionalism, especially at a time of rising – both old and new – authoritarianisms and populisms.

Essays

Exploring the Possibility of Energy Justice in Italy

Luigi Maria Pepe*

Abstract

This research aims to look at energy justice taking an interdisciplinary approach for trying to address the problems and questions that arise from the Italian energy transition. While Italian energy policy and law have never been particularly constructive in terms of long-term policies, this historical moment presents an opportunity to rewrite its objectives and identify how the energy transition can be a just transition. Italy can pursue change in this regard through the energy justice metric which must be used in theory but also in practice to identify weaknesses and propose solutions within a legal system. Energy Justice must be the driving force behind a just transition for Italy and the entire society.

I. Introduction

In energy law studies researchers seldom ask themselves the basic question of what energy conceptually means for our society. Is it merely an essential resource for the economy, or does it have a deeper meaning and function? How do we conceptualize energy rather than physically describe it? Energy is a combination of risk and responsibility. Risk because, like all human benefits we enjoy, it involves a risk that must be reasonably assessed. In the same way, as we evaluate the lower risk method when travelling or receiving medical care, we must assess the lower risk method when approaching the energy activities. There is no such thing as progress without risk. Energy and its development hold several unavoidable implications. Responsibility, on the other hand, comes into play when it comes to the extraction and utilization of natural resources, as well as their distribution and spreading in the global economy. Responsible actions in the energy industry are required to control and reduce the environmental impact and the effects of climate change. In this contest, risk and responsibility find their expression in the innovative and deeply meaningful concept of energy justice as that kind of social justice that serves to shape the sector in a way more sustainable, fair, and equitable so that the advantages accrued do not have an irreversible impact on the environment and climate and they are equally spread and distributed.

Energy justice is not only a theoretical and interpretative concept but also

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has practical and applicative implications. Our society is full of injustices and inequalities, we just have to decide which sector to look at and which instrument to use to identify them. Energy justice now seems to have acquired such importance that it cannot be neglected by the public policies of any state that aims to combat climate change. The most important step in integrating energy justice with the public policy was taken by the United States of America in appointing Shalanda Baker, professor of public law, as deputy director for energy justice at the US Department of Energy, by the new Biden administration.[1] This not only symbolises the full recognition of energy justice as a new public policy to be pursued by all states but is an unequivocal admission that the energy sector is rife with inequalities and injustices and that these must be eliminated as soon as possible. And the fact that a professor of public law has been chosen is no accident. Law punishes, sanctions, constrains but also regulates legal relations in a society and identifies the objectives necessary for its preservation. As a result, today's energy law and policy scholars cannot avoid using the energy justice framework to examine individual aspects and elements of the energy world.

This research wants to clarify that energy justice is not the outcome of the energy transition, but it is a methodology, a metric through which it is possible to frame the energy transition decisions. This study uses the energy justice framework as a tool to explore Italy's energy transition, as well as the obstacles it faces and the potential solutions. As a result, the principles, aid not only in identifying and defining these problems but also in finding just and fair solutions. The energy sector, like our society, requires more justice, not just in terms of human rights, but also of responsibility and solidarity. We must protect our planet, making it safe for present and future generations without halting technological growth and innovation. The concept of sustainable development, which arose in the aftermath of the Rio Declaration, may have found a successor capable of having a significant impact on society and the energy industry. Energy justice must remain a topic of discussion among academic forums because it is only in this way that society can truly move towards a transition, a just transition.

I think it is important for scholars to realise that energy justice takes place in two ways: first, a new law is introduced to ensure justice happens; and second when we go to the national legal courts to advance justice on a certain issue. Researchers from all the disciplines need to realise what they are seeking and how new advancements might happen, ie which of the two ways mentioned above will be needed or maybe they both will.

In this worldwide scenario exploring energy justice in Italy is not a case. The recent health crisis caused by the COVID-19 virus has prompted European Institutions to provide large sums of money to the Member States for economic recovery. Most of the new funds will be used to implement green and sustainable

[1] Department of Energy Announces New Senior Leaders (energy.gov 2021), available at https://tinyurl.com/yfajbhwp (last visited 30 June 2022).

economy. The establishment of a new Ministry for the Ecological Transition in Italy demonstrates the importance of this commitment and the growing need to follow the sustainable energy pathway. So, this study may also benefit lawmakers, helping them in the implementation of energy justice within the Italian framework.

II. The Energy Justice Framework

1. General Background to Energy Justice

In recent years, energy has once again become a central issue in the public and academic debate. The combination of several factors, such as climate change, the gradual depletion of fossil resources, and the increasing precariousness of energy supplies mean that much of the global political agenda is focused on the transition to a low carbon economy.[2] European institutions as the real political and normative drivers of the Member States are moving substantially on two levels: environment and security. The first involves reducing emissions by replacing fossil fuels with renewable ones, saving energy and increasing energy efficiency; the second involves building new infrastructures to expand the number of supplier countries.[3] These twin goals embrace the need to ensure affordable and clean energy access for the world's population, as well as the need to address climate change by reducing the use of fossil fuels.[4] On the way to a transition to a low carbon economy, policymakers cannot overlook the injustices of the energy world if the aim is the consideration for social justice in terms of fairness in access to resources and technology allocation.[5] These injustices affect not only the society and the weaker classes but above all the environment and the ecosystem. So, a just society must be imagined not only as the result of the energy transition but also as a metric to shape all the decisions. The energy justice framework helps, therefore, to identify the weaknesses of an energy system and to transform these weaknesses into challenges. Only when these various obstacles are overcome, and injustices have eliminated the transition to a low-carbon economy can move forward.[6]

Before moving forward, a review of the energy justice framework is due.

The concept of energy justice has emerged in recent years in the social sciences studies as an analytical-interpretive, evaluative-normative tool applicable to socially relevant issues such as law and policy, the diffusion of technologies/production

[2] R.J. Heffron, *Energy Law: An Introduction* (Berlin: Springer, 2nd ed, 2021).

[3] X. Teng, L. Chun Lu and Y.H. Chiu, 'How the European Union reaches the target of CO2 emissions under the Paris Agreement' *European Planning Studies*, 1836-1857 (2020).

[4] Ibid, 1836-1857.

[5] D. McCauley, V. Ramasar, R.J. Heffron, B. Sovacool, D. Mebratu and D. Mundaca, 'Energy justice in the transition to low carbon energy systems: Exploring key themes in the social sciences' *Applied Energy*, 916-921, (2018).

[6] D. McCauley and R.J. Heffron, 'Just transition: Integrating climate, energy and environmental justice' 119 *Energy Policy*, 1-7 (2018).

systems, consumption and access to the energy market, activism, and participation in energy decisions.[7] It has been proposed to consider energy decisions as ethical and justice issues, and to reconsider how the energy system's dangers and externalities, as well as its benefits and advantages, are distributed within society, and whether decision-making reflects criteria of equity, inclusion, and representativeness.[8] Whatever the scope and objective of an energy justice framework are, it provides a useful tool for the researcher to analyse (and reflect on) where do injustices occur, who is impacted or neglected, and what mechanisms are in place to address them so that they are brought to light and reduced. The energy justice principles have been theorized with this purpose, of identifying all the aspects of the society where energy injustices occur, and which actions must be taken. The concepts that underpin the energy justice system fix distributive, procedural, and recognition concerns for energy goods. Furthermore, there are increasing questions about a restorative and cosmopolitan energy system in which the global influence of our behaviours and decisions is considered.[9]

2. Distributive Justice

Distributive justice refers to how the costs and benefits of change are spread not only between individuals and social classes (between groups and communities) but also geographically (between territories) and temporally (eg intergenerational justice). Reflecting on the entire energy system necessitates and forces one to consider how the costs and benefits of change are distributed over the energy cycle.

3. Procedural Justice

On the other hand, procedural justice applies to the demand for equal proceedings that include all involved parties in a non-discriminatory manner. Availability of information, accountability, integrity, inclusiveness and representativeness of the various interests at stake are all aspects of procedural

[7] K. Jenkins and R.J. Heffron, 'Energy justice: a conceptual review' 11 *Energy Research & Social Science*, 174-182, (2016).

[8] B.K. Sovacool and R.J. Heffron, 'Energy decisions reframed as justice and ethical concerns' 1 (5) *Nature Energy*, 16024 (2016).

[9] K. Jenkins, R.J. Heffron et al, 'Energy justice' n 7 above. Interesting is the role played by critical minerals in the international legal and political scenario. It is a fundamental objective to transition towards a low-carbon economy worldwide to achieve this ambition which inevitably pass through the need for new and more mineral extraction which is necessary for the technology for this low-carbon transition. These minerals are known as critical minerals. The importance of these minerals calls for a deeper examination of the extractive industries and the injustices are committed. Despite few works have been focused on this topic, the energy justice framework has pointed attention on these matters encouraging for example the Canadian government to appoint a Responsible for Enterprise that will assess and investigate the actions of Canadian overseas companies focusing on human rights abuses in mining, oil and gas and garments, see Office of the Canadian Ombudsperson for Responsible Enterprise (CORE), available at https://core-ombuds.canada.ca/core.

justice.[10] This necessitates not only that all potentially affected people be allowed to participate in the consultation that precedes decision-making and that their voices be heard, but also that effective processes of participation, access to knowledge and impartiality, and information-sharing by industries and governments be in place.

4. Recognition Justice

Recognition justice refers, instead, to the (non-)recognition or misrecognition of social groups and geographical areas, as 'the process of insult and degradation that devalues some people and some identities of place in comparison with others'.[11] Non-recognition can take several forms, including ignoring certain decisions that impact social groups and sectors of society, or misrecognition of individuals and groups, in which distortions of their views and desires are linked to multiple forms of non-recognition and devaluation. Non-recognition can also influence how procedures are followed (whether and how they are involved, treated and represented in decision-making) and how the impacts and costs of the energy system are distributed (how decisions reflect recognition of the concerns and opinions of different audiences by assessing and redistributing costs and benefits).[12]

5. Restorative Justice

Restorative justice is concerned about how it can be rectified if there is an injustice in the energy sector. This can be done in the form of the allocation of project revenues but also by returning the energy sites issues to their former use, especially in the extractive industries. Consequently, within the context of the project and the guidelines laid down in the law, the waste management and decommissioning strategy should be adequately finalized and cost-effective. In addition, restorative justice may aid in identifying where prevention needs to occur.[13]

6. Cosmopolitan Justice

Finally, the relation to cosmopolitan justice is based on the central belief that we are all people of the world. As the energy market evolves and energy demand rises, our decisions have a global impact that must be recognized and

[10] G. Walker, 'Beyond distribution and proximity: Exploring the multiple spatialities of environmental justice' 41 (4) *Antipode*, 614-636 (2009).

[11] D. McCauley, 'Advancing energy justice: the triumvirate of tenets' 32 (3) *International Energy Law Review* (2013).

[12] R.J. Heffron and D. McCauley, 'Achieving sustainable supply chains through energy justice' 123 *Applied Energy*, 435–437 (2014).

[13] R.J. Heffron, 'The role of justice in developing critical minerals' 7 *The Extractive Industries and Society*, 855-863 (2020).

accounted for. Recognition of our decision's cosmopolitan influence is beginning to spread and take place all over the world. There have been several recent strong examples of rising interest in legal action with cosmopolitan impact as a result of cross-border or overseas repercussions. In a 2019 Australian ruling, a judge argued that a coal mine should not be allowed to open because of the carbon dioxide emissions that would be caused elsewhere in the world.[14] This cosmopolitan approach to energy issues seems to be associated with the most recent theory of a cosmopolitan turn in public law systems and constitutional theory, which asserts that global issues and their consequences must be considered in legal practice and procedure to achieve a just society.[15]

III. Energy Poverty and the Just Transition: A Critical Review Through the Recognitive and Distributive Justice Metric

1. The International and European Scenario

The United Nations has established as the First Sustainable Development Goal the zero going of the worldwide poverty while as the Seventh Goal, the accessibility to reliable and sustainable electricity.

Reading and interpreting together these two goals, the United Nations is setting the goal and objective of fighting energy poverty. The United Nations has set a target of ensuring universal access to energy resources by 2030, with an emphasis on delivering modern and sustainable energy to all developing and least developed countries.[16] Governments and politicians are concerned about these goals because they presume and involve fighting one of the main and most difficult challenges of our century, energy poverty, where its abolition or reduction is seen as vital for social welfare.[17]

Energy poverty and the obstacles to access to energy services can have multiple faces nowadays and therefore, it is possible to produce effects even in developed countries. This is because energy poverty is linked not only with issues that are strictly related to the energy sector, such as energy security and energy prices but it is interconnected with social, employment and cultural problems of different nature and intensity throughout Europe. Therefore, the challenge of energy poverty calls for the implementation of social rights firstly

[14] *Gloucester Resources Limited* v *Minister for Planning* [2019] NSWLEC 7, available at https://www.caselaw.nsw.gov.au.

[15] M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State', in J. L. Dunoff and J. P. Trachtman eds, *In Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009), 69.

[16] The 2030 Agenda for Sustainable Development: The 17 goals, The United Nations, available at https://tinyurl.com/4y5jvkrr (last visited 30 June 2022).

[17] A.J. Bradbook and J.G. Gardam, 'Placing Access to Energy Services within a Human Rights Framework' 28 (2) *Human Rights Quarterly*, 389-415 (2016).

through a distributive and recognition justice initiative. Energy policies rather than being used to combat social inequality and make the change socially acceptable, have effectively excluded significant segments of the vulnerable population and marginalized areas from economic and quality-of-life benefits[18]. This is the result of ineffective policies that resulted mainly in short-term welfare measures which do not solve the problem but just postpone it. But today energy transition policies require initiatives as part of a long-term strategy aiming at solving the problems once for all.[19]

The European policies have identified the problem of energy poverty and the inequalities and disparities it brings, trying to set a common strategy and common guidelines. The European Green New Deal represents a new growth strategy aimed at transforming the European Union into a fair and prosperous society with a modern, resource-efficient and competitive economy that will not generate net greenhouse gas emissions by 2050 and where economic growth is decoupled from resource use. Among the various macro-objectives set out in the strategy, one is the duty of public policies to combat energy poverty as well as to secure the supply of clean, affordable and secure energy, consistent with the process of reducing emissions, with priority given to energy efficiency, ensuring affordable prices for consumers and businesses, in an interconnected and digitised European market.[20]

In the contest of the European Green New Deal, the European Union institutions have adopted a whole range of several initiatives to specifically address the problem, one for all the Next Generation EU, a fund which makes it possible for states to benefit from a temporary funding mechanism that allows for a large and timely increase in spending without increasing national debts.[21]

[18] C. Liddel and C. Morris, 'Fuel poverty and human health: A review of recent evidence' 38 *Energy Policy*, 2987–2997 (2020).

[19] F. Biddau, 'Questioni etiche e resistenze nella transizione energetica: quali sfide per le scienze sociali?', in F. Bertoni, F. Biddau and L. Sterchele eds, *Territori e resistenze. Spazi in divenire, forme del conflitto e politiche del quotidiano* (Roma: Manifestolibri, 2019).

[20] One for all it must be mentioned the European Climate Law which, in the broader contest of the European Green New Deal, formalizes the goal of making Europe's economy and society climate-neutral by 2050. The law also establishes an intermediate goal of cutting net greenhouse gas emissions by at least fifty-five percent by 2030 compared to 1990 levels. Climate neutrality by 2050 entails reaching net zero greenhouse gas emissions for all EU countries, primarily through emission reductions, green technology investment, and environmental protection. The law strives to ensure that all EU policies contribute to this goal, as well as participation from all sectors of the economy and society, see Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality, available at https://eur-lex.europa.eu/. For further readings see G. Claeys, S. Tagliapietra, G. Zachmann, 'How to make the European Green Deal work' 13 *Bruegel-Policy Contribution*, (2019). See also R. Miccù, *Lineamenti di diritto europeo dell'energia. Nuovi paradigmi di regolazione e governo multilivello* (Torino: Giappichelli, 2019), 192; G. De Maio ed, *Introduzione allo studio del diritto dell'energia. Questioni e prospettive* (Napoli: Editoriale Scientifica, 2019).

[21] To this end, the Commission proposes to issue bonds on behalf of the Union with different maturities on the capital markets and identifies several own financing measures consistent with EU

The measures indicated in the Next Generation EU Fund aim at fighting poverty in all its manifestations with ad hoc measures such as REACT-EU3 (forty-seven point five billion euros) to strengthen cohesion policy with actions in favour of the labour market, income support, strengthening of health systems and measures for small and medium enterprises;[22] an instrument for Recovery and Resilience to finance investments and reforms to promote economic, social and territorial cohesion (Art 175 Treaty on the Functioning of the European Union) and support green and digital transition. Greater attention must be paid to the Fund for a Just Transition.[23]

The main mechanism underpinning the European Green New Deal and the Next Generation EU is represented by the Just Transition Fund (JTF), which is designed to help the Member States achieve their 2050 targets. However, given that the JTF was also established to encourage certain countries to commit to the ambitious climate goals of the EU and, in particular, to achieve climate neutrality by 2050. The conditions for the allocation of JTF funds must be proportionate and adequately distributed accordingly to the greatest need for action, mainly because of the negative economic effects arising from the termination of high-impact operations. The Fund offers priority to coal- and carbon-intensive areas, where the urgent phase-out of coal by 2030 remains a priority and a challenge.[24] This is because, in a significant number of mostly Central and Eastern European countries, achieving deep decarbonisation in line with the Paris Agreement's objective of limiting global warming to two degrees Celsius and reducing energy poverty require a change in every sector of the EU economy and so it represents a far more difficult issue. The fund will prioritise regions with huge conventional energy sources impact. But its scope should be wide enough to start addressing

policies to combat climate change, such as emissions trading and the carbon border adjustment mechanism, and on global tax fairness, such as taxing the digital economy. Five hundred billion euros of the funds channelled through Next Generation EU will be used to finance the grant component of the Recovery and Resilience Facility and to reinforce other crucial crisis and recovery programmes. The remainder of the funds mobilised, ie two hundred fifty billion euros, will be made available to Member States in the form of loans under the Recovery and Resilience Plans after having developed tailor-made national recovery plans based on the investment and reform priorities identified in the framework of the European Semester, in line with national energy and climate plans, plans for a just transition, partnership agreements and operational programmes under EU funds, see European Commission, Directorate-General for Budget, The EU's 2021-2027 long-term budget & NextGenerationEU: facts and figures, Publications Office, 2021, https://tinyurl.com/5xx76268 (last visited 30 June 2022).

[22] ibid

[23] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, available at https://tinyurl.com/mpjz9u6s (last visited 30 June 2022).

[24] S. Tagliapietra, 'The European climate law needs a strong just transition fund' 10 *Bruegel-Blogs* (2020), available at https://tinyurl.com/usef8t4c (last visited 30 June 2022).

the transition needs of the rest of the economy as well. In addition, the JTF also provides for several other ranges of interventions, including the retraining of the employees in these sectors and their redeployment with a view to the transition to a zero-climate impact, the promotion, the reclamation and reuse of sites towards a circular economy, energy efficiency and renewable sources. Countries will have to submit 'territorial just-transition plans' to show that the funds are needed and where and how they will be spent. Countries will also have to demonstrate how they plan to fulfil their national climate objectives, as the proposal also mentions the need to be 'consistent with their National Energy and Climate Plans and the EU objective of climate neutrality by 2050'.[25] Furthermore, the JTF has also been designed and set up to mitigate the costs of social transition. The fund's stated objective is to

> 'alleviate the impact of the transition by financing the diversification and modernisation of the local economy and by mitigating the negative repercussions on employment'.[26]

The Just Transition Fund offers the opportunity for national policies to look at the energy injustices and at the regions and communities which need attention for deeper intervention. The JTF helps not only to recognize which entities need help but also to adequately distribute the funds accordingly to the different needs and expectations for the energy transition.

2. The Italian Energy Contest and the Ineffective Actions in the Energy Market

Despite the largest beneficiaries of the Just Transition Fund are Germany, Poland and Romania (although the highest aid intensity as a share of the population is in Estonia, Bulgaria and the Czech Republic) with still an energy economy strongly coal-based, Italy will set its own goals to address the inequalities and injustices of the energy industry trying to invest the fund coming mainly from the Next Generation EU and the Recovery Plan after the Covid-pandemic.

In this contest, Italy has tried to crystalize its energy transition policies as 'ecological modernisation', which emphasizes technical innovation as a way out of the crisis using market power as a tool to accelerate change.[27] The combination of technological innovation and market inclusiveness has resulted in policies that, for example, have encouraged the production of energy from renewable sources and the adoption of energy-efficient devices thanks to government

[25] Regulation (EU) 2021/1060 n 23 above.

[26] G. Claeys and A. Sapir, 'The European Globalisation Adjustment Fund: Easing the pain from trade?' 5 *Bruegel- Policy Contribution* (2018), available at https://tinyurl.com/2p9b5867 (last visited 30 June 2022).

[27] A. Machin, 'Changing the story? The discourse of ecological modernisation in the European Union' 28 (2) *Environmental Politics*, 208-227 (2019).

incentives and tax credit. Citizens and companies have had varying degrees of access to these policies as a result of how they were crafted. The decision was made to speed up the energy transition by stimulating the upper-middle class to opt for innovation: homeowners, households with stable incomes, savings and the spending power to make major investments, such as installing photovoltaic panels and structural energy-saving measures in their homes, buying a new car with ecological features, and buying homes in high energy classes.[28] For various reasons, these policies have been difficult for the lower and middle classes to access. Unemployed, precarious workers, families with low incomes and no savings: these are types of situations that for different reasons have problems accessing policies based on direct incentives or in the form of tax deductions.[29] The energy transition policies must be anchored to improve the quality of life of people who do not currently benefit from ecological modernisation.[30]

The Italian institutions have developed partial and insufficient responses, primarily based on three approaches: intervention on energy prices to reduce the cost of energy to the final consumer; activation of policies to ensure access to energy services for the most vulnerable sections of the population; and income support for the most vulnerable, through the introduction of energy bonuses.[31] On the first front, competitive energy markets were established through liberalization, which should have resulted in lower average energy costs. However, many companies' entry into the free market has not resulted in lower energy prices, and vulnerable consumers are becoming more susceptible to switching operators. In Italy, the free market is still very limited. Major monopolistic companies continue to prevent competitors from entering the market, inhibiting the formation of a competitive game aimed at drastically lower prices.

On the second and third front, the Italian Electricity and Gas Market Regulator (ARERA) has long tried to intervene with specific measures (payment instalments, maximum interest rates, prohibition of service suspension in cases of extreme hardship) to protect the most vulnerable consumers.[32] The energy and gas incentive, for example, is designed to help customers who are struggling financially (as measured by a set of indicators) or affected by serious health conditions, or already have access to anti-poverty measures such as citizenship income and the shopping card. The Electricity and Gas Market Authority has tried to confirm and strengthen the social bonus for families in difficulty, especially in

[28] G.E. Halkos and E.C. Gkampoura, 'Evaluating the effect of economic crisis on energy poverty in Europe' 144 *Renewable and Sustainable Energy Reviews* (2021).

[29] G. Carrosio, 'Povertà energetica: le politiche ambientali alla prova della giustizia sociale' 2 *Urbanit.it* (2020).

[30] S. Supino and B. Voltaggio, *La povertà energetica. Strumenti per affrontare un problema sociale* (Bologna: il Mulino, 2020), 365.

[31] M. Jessoula and M. Mandelli, *La povertà energetica in Italia: una sfida eco-sociale* (Bologna: il Mulino, 2019).

[32] ARERA, 'Rafforzamento dei meccanismi di sostegno per i consumatori vulnerabili', available at https://tinyurl.com/45ba42jh (last visited 30 June 2022).

this period where the Covid-pandemic has strongly affected the citizens' incomes and where the energy prices are rising fast. Based on the provisions of the Legge di Bilancio no 234 of 2021, the Government has allocated further resources for these interventions, thus allowing to lighten the impact of the rising of energy prices on twenty-nine million families and six million micro-businesses.[33]

These different approaches represent thus a downstream response that increases household purchasing power, but it is incapable of influencing consumption quality, improving energy efficiency rate, or possibly solving the energy poverty problem proportionally to the long-term strategy that requires the energy transition.[34] Moreover, according to studies by the Bank of Italy, only about one-third of those eligible benefit from this aid.[35] And in the latest report on the energy bonus made by the Electricity and Gas Market Regulator to the Minister of Economic Development in 2019, it emerged that the number of households that have obtained the bonus at least once, from the start of the mechanism to 31 December 2018, is two point nine million for electricity and about one point eight million for gas.[36] Despite the Energy Regulator's various initiatives to raise awareness of the tool among potential recipients, with information campaigns and projects aimed at involving other actors working with vulnerable citizens, the relationship between households that qualify for the electricity and gas bonus and those that receive the bonus has consistently been between thirty percent and thirty-five percent.[37] These percentages vary at the territorial level: in the southern regions, the average number of beneficiaries using this tool drops to twenty-one percent, while in the northern regions it rises to forty-three percent.[38]

Although the European framework has been clear on the objectives to pursue a just energy transition by providing huge sums of money as specified by the Green New Deal, the Next Generation EU, and the Just Transition Fund,

[33] Despite the interventions, however, the increase for the typical family in protection will still be plus fifty-five percent for the electricity bill and plus forty-one point eight percent for the gas bill for the first quarter of 2022. For two point five million families who are entitled, on the basis of ISEE, to the social bonus for electricity and for one point four million who benefit from the gas bonus, the tariff increases have been substantially offset: the amounts defined for the next quarter, thanks to the resources made available by the Budget Law, allow families in difficult conditions to protect themselves from the increase. The Authority, in fact, has increased the bonuses that, for the first quarter of 2022 alone, will support families in difficulty with around six hundred euros, see legge 30 December 2021 no 234.

[34] M. Jessoula and M. Mandelli, *La povertà energetica in Italia* n 31 above.

[35] I. Faiella, L. Lavecchia and M. Borgarello, 'Questioni di Economia e Finanza. Una nuova misura della povertà energetica delle famiglie' *Banca D'Italia*, 404 (2017), available at https://tinyurl.com/2p932792 (last visited 30 June 2022).

[36] Autorità di Regolazione Energia Reti Ambiente, 'Il bonus sociale elettrico e gas: stato di attuazione nell'anno 2019 Relazione al Ministro dello Sviluppo Economico', ARERA (2020), available at https://tinyurl.com/24zhukyc (last visited 30 June 2022).

[37] ibid

[38] ibid

Italy has mostly delivered welfare remedies that are useful in the short term but do not provide a solution or a vision for a long-term plan. The energy transition is a strategy that should be implemented over the medium to long term, rather than in the short term.

3. The Energy Trilemma. Which Development in the near Future?

As previously stated, existing downstream market devices, while providing welfare subsidies to offset the immediate impact and repercussions of the crisis on energy consumers, do not provide a suitable response to the subject of energy poverty and its future. On the downstream market, further initiatives may be looking at working to reduce energy demand and increase energy efficiency while enacting policies for renewable investments (such as solar panels for households) or tax credits and supports that can reach the lower classes rather than just those who have a certain turnover or income level. But to accomplish this, it must be created an integrated upstream policy and a legal framework that will easily help the downstream market initiatives handling inequalities and injustices with direct impact on social matters (fighting energy poverty), environmental (reducing greenhouse gas emissions), energy (increasing energy efficiency), and economic issues (boosting the industry renovation sector and creating new green jobs).

To my knowledge, the only effective way to combat energy poverty and deliver an important result towards the energy transition is to focus on energy security public policies. Energy security and the question of energy resources independence represents the legal and political dilemma of the century with implications on the political and economic national scenario. A country that cannot control its energy resources cannot control its future. Independence means that a country that manages its resources can keep under control the energy prices, the energy demand and balance both to create an efficient and trustworthy supply for companies and individual consumers.[39] All efforts to decrease energy poverty may find a temporary solution through welfare measures, but for a long-term solution, governmental policies that make Italy substantially energy independent must be accompanied and supported. Therefore, it becomes clear which constitutes the three key areas of the energy industry: energy poverty, energy security, and energy transition. These three elements share a genetic connection, and they make up the energy trilemma, in which energy poverty is a problem, energy security is a solution, and the transition is the desired outcome.[40]

How can this be done if Italy has always been strongly dependent on fossil

[39] B. Shaffer, *Energy Politics* (Philadelphia: University of Pennsylvania, 2009), 200.

[40] For a first theorisation of the energy trilemma in the academic literature see R.J. Heffron, *Energy Law* n 2 above. For the Italian edition just see R.J. Heffron (Italian edition by L.M. Pepe), *L'Energia attraverso il diritto* (Napoli: Editoriale Scientifica, 2021), 224. The use that needs to be made of the energy trilemma: it must be useful in identifying national challenges even in different legal systems, enabling public policies to balance the different needs and interests at stake.

fuels?[41]

The COVID 19 pandemic that has hit the world in 2020 has shown how Italy managed to reduce the share of hydrocarbons in its energy mix (around sixty percent). The new sharp drop in 2020, which brings the share of fossil fuels to its lowest level since 1961, is mainly attributable primarily to the drop in oil in transport, a consequence of the collapse of mobility, as well as the reduction in production activities. But, on the other hand, the collapse in oil consumption in 2020 has strengthened the position of gas, which has now reached thirty-seven point four percent, some seven percentage points more than the weight of oil.[42] Gas has been widely recognized as the least harmful fossil fuel and also as the resource that could accompany the transition. The problem is that the gas supply is mainly coming from foreign suppliers such as Russia or the US which export to Europe Liquefied Natural Gas (LNG).

Reducing reliance on Russian gas in the future does not appear to be simple, since it is unknown how long other suppliers, such as Algeria, would be able to maintain output or how reliable Libya will be. The collapse of European domestic production, along with the possibility that even Norway will have difficulty replacing its reserves, has contributed to the development of a rigid infrastructure that, if it goes unchanged, will result in an increase in the share of Russian gas imported.[43] This is today's picture, while other scenarios appear to be imaginative in comparison. So, assumption one is that gas demand will continue for a few years, and assumption two is that where we obtain it will be determined by the current infrastructure. And, because Italy decided to stop exploring and exploiting gas in the Adriatic Sea (apparently, the perforations could cause Venice to sink), we are compelled to look for other and diverse resources as part of a long-term strategy.

Renewable energy sources, on the other hand, may and must accompany the Italian energy shift. However, even though solar, wind, and biomass account for more than thirty percent of the energy mix, this rate does not appear to be a sufficiently favourable trend in the race to meet energy security requirements. In this regard, on 13 August 2021, the European Commission, following the

[41] A. Di Gregorio, 'Produzione e valore del comparto oil & gas in Italia nel periodo 2020-2050' *Esperienze d'impresa*, 1-18 (2019).

[42] ibid

[43] S. Tagliapietra, *L'energia del mondo. Geopolitica, sostenibilità, green new deal* (Bologna: il Mulino, 2020), 158. This geopolitical scenario was already clear several years ago with Europe trapped in the grip of Russian or North African gas. But with the steady closure of coal-fired power stations and the increase in energy demand, the energy mix has increasingly shifted to gas as investment in renewables has failed to keep pace with rising demand. The awareness of a dependence on gas by European states has inevitably led to an increase in its price, which has a knock-on effect on consumers' electricity bills, see also M. Verda, *Una politica a tutto gas, Sicurezza energetica europea e relazioni internazionali* (Milano: Università Bocconi, 2011); S.R. Schubert, J. Pollak and M. Kreutler, *Energy policy in the European Union* (London-New York: Palgrabe Macmillan, 2016); L.C.U. Talseth, *The politics of power: EU-Russia Energy Relations in the 21st Century* (London-New York: Palgrave Macmillan, 2017).

positive assessment of the National Recovery and Resilience Plan ('Piano Nazionale di Ripresa e Resilienza' – PNRR), granted Italy, as pre-financing, twenty-four point nine billion euros (of which eight thousand nine hundred fifty-seven billion euros in grants and fifteen thousand nine hundred thirty-seven billion euros in loans). A corollary of the PNRR has been the Decreto Semplificazioni *bis* (now Legge no 108 of 2021) which contains some significant improvements aimed at achieving the European goals of decarbonisation and increasing energy production from renewable technologies as set out in the 2030 National Integrated Energy and Climate Plan ('Piano Nazionale Integrato per l'Energia e il Clima 2030' – PNIEC).[44] A new Annex I-*bis* has been added to Part Two of Decreto Legislativo no 152 of 2006 (the 'Environmental Code') to identify the actions mentioned in the PNIEC, listing the works, plants, and infrastructures required to meet the PNIEC's targets (eg plants for the production of energy from renewable sources, energy efficiency projects, infrastructures for hydrogen production, transport and storage). The Decree also made several adjustments to the regulatory and normative components of the above-mentioned actions to accelerate and simplify their implementation. Arts 30 to 32 simplify authorization procedures for the installation of wind power plants, solar, geothermal, and biogas plants.[45] However, despite this broad set of normative and policy initiatives aimed at increasing renewable energy generation, it is believed that energy security, and thus the negative consequences on energy poverty, cannot be addressed and solved solely by relying on foreign gas supplies or renewable energy investments; not only will they fail to meet Italian energy demand in the short term, but they will also increase the country's reliance on foreign resources.[46]

New energy technologies must be explored and the success of the energy transition pass from the courage and audacity to admit and tackle the risks as well as the benefits that the energy industry provides to our society. Nuclear energy, for example, cannot be avoided anymore, and nuclear investments must be taken again into consideration for the Italian energy policies.[47] Since Italy is still

[44] Piano Nazionale Integrato per l'Energia e il Clima 2020, available at https://tinyurl.com/yc6d5h8s (last visited 30 June 2022).

[45] First and foremost, the Ministry of Culture must participate in the single procedure - and thus in the Conference of Services ('Conferenza di Servizi') convened by the Region or the Ministry of Economic Development to decide on the authorization requests - in relation to projects involving renewable energy plants and the works and infrastructures related to their construction and operation that are located in precluded areas. Furthermore, Art 32 of the Decreto Semplificazioni bis alters Art 5 of the Decreto Legislativo no 28 of 2011, identifying non-substantial interventions, and thus subject only to the procedure of the communication relating to the free building activity.

[46] L.M. Pepe and Aldo Arcangioli, 'The Scenario of Renewable Energy Sources in Italy and the Effects of COVID-19' 1 (2) *Global Energy Law and Policy*, 1-5 (2020).

[47] The story between Italy and nuclear power can be traced back to the period after the Second World War when Italy started the first nuclear program to provide electricity for a civil use. This project was visionary, and it managed to allocate in a short time period Italy as one of the leading countries in nuclear technology and electricity generation independence. But in the 1987, the

bounded to the obligation to create a national deposit for the nuclear waste produced in the past years according to the Euratom Treaty provisions, it would be wise to take the advantages and not only the disadvantages of such a resource/waste on our territory. The nuclear energy dilemma must be opened for discussion because it is only by keeping all the normative and political choices available that a just transition is possible. Furthermore, the European Institutions after adopting the 'Taxonomy Regulation'[48] providing that certain economic activities comply with climate change mitigation or climate change adaptation, in its delegated acts have specifically framed gas and nuclear power projects as green investments, so able to comply with technical screening criteria under which certain economic activities are qualified as contributing substantially to climate change mitigation and transition to a low carbon economy without causing significant harm to any of the other relevant environmental objectives.[49]

Solving the upstream dilemma of energy dependence on foreign supply must be at the centre of all the main public policies aimed at delivering a just energy transition.

It can be seen that the energy trilemma of energy poverty, energy security and energy transition can be balanced only through the energy justice metric and in this case recognition and distributive justice initiatives to make citizens'

referendum on nuclear power declared the irreversible Italian nuclear phase-out. Instead of focusing Italian energy policies on new sources or investing in new technologies, the result has been a steady increase in reliance on fossil fuels. In practice, the referendum merely replaced nuclear power plants with oil-fired thermal power plants, greatly increasing our dependency on crude oil imports and making the country extremely vulnerable to market fluctuations and the rise in the cost of crude oil, see L.M. Pepe, 'The Implementation of environmental and safety standards for the nuclear and mining waste management in Italy. Which role for the Public regulators?' *Amministrazione e Contabilità dello Stato e degli Enti Pubblici*, 1 (2020). For further and deeper analysis see L. Colella, *Il diritto dell'energia nucleare in Italia e in Francia. Profili comparati della governance dei rifiuti radioattivi tra ambiente, democrazia e partecipazione* (Roma: Aracne, 2017), 420.

[48] The EU taxonomy is designed to direct private investment toward the activities that are required to achieve the climate change mitigation goal. The taxonomy's classification does not dictate whether a certain technology will be included in a Member State's energy mix, but it does attempt to provide all conceivable solutions to help us expedite the transition and meet our climate goals. The Commission believes that private investment in gas and nuclear power can help with the transition, based on scientific advice and existing technology. The activities chosen in these two sectors are consistent with the EU's climate and environmental goals, allowing us to move quicker away from more polluting activities like coal production and toward renewable energy sources, which will be the key foundation for a climate-neutral future. See Regulation EU 2020/852 of the European Parliament and of the Council, available at https://tinyurl.com/528tndyd (last visited 30 June 2022).

[49] The technical screening criteria were included within the Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council (Taxonomy Regulation). Now The European Commission wil publish another Commission Delegated Regulation (EU) in order to amend the original Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors with the aim of including natural gas and nuclear power among the sustainable economic activities to pursue for the energy transition. This Delegated Regulation has been approved by the European Commission and it is waiting to be published in the European Official Journal see EU taxonomy Complementary Climate Delegated Act 2020.

rights bearers, energy rights bearers which must be defended and claimed in front of inefficient public policies. Those cannot disregard energy poverty as one of the main challenges of the energy transition and the need to tackle it not only with downstream actions which just solve the problem temporally, but it occurs long-term political decisions regarding the upstream market: renewables investments, reduction of foreign gas supply and the exploration of new technologies such as the nuclear power plants of new generation or hydrogen as well. That is only a long-term strategy that will be able to combat energy scarcity, provide sustainable energy supply and guarantee that disparities and inequalities will be tackled protecting the energy rights of the citizens.

IV. The Italian Legal System Through the Procedural Justice Metric

1. The Procedural Justice Questions

The implementation of an energy justice framework cannot avoid examining several aspects of procedural justice and how it would be possible to implement them within a legal contest. But what is exactly procedural justice, and how do we study it? Broadly, scholars speak about procedural equity as the ability for actors to have meaningful participation in decision-making processes that will affect them.[50] Other scholars describe procedural justice in the context of climate change and the capabilities of having the political power to shape decisions in the policy process.[51] In the energy justice, literature procedural justice has been described as concerning 'access to decision-making processes' which 'manifests as a call for equitable procedures that engage all stakeholders in a non-discriminatory way'.[52] A second approach to flushing out procedural justice in energy research is undertaken by those authors who believe the understanding of procedural justice aligns procedural justice theories with fairness and proportionality in the decision-making process.[53] In addition, they focus on transparency as well as the adequacy of legal protections, the legitimacy and inclusivity of institutions involved in decision-making. So procedural justice in the energy industry raises critical questions including Who gets to decide and set rules and laws, and which parties and interests are recognized in decision-making? By what process do they make such decisions? How impartial or fair are the institutions, instruments, and decisions involved?

These inquiries necessitate a thorough evaluation of several topics in the context of a legal situation. Procedural justice, particularly in the Italian legal

[50] D. Schlosberg, *Defining Environmental Justice: Theories, Movement and Nature* (Oxford: Oxford University Press, 2007).

[51] B. Holland, 'Procedural justice in local climate adaptation: political capabilities and transformational change' 3 (26) *Environmental Politics*, 391-412 (2017).

[52] K. Jenkins, R.J. Heffron, 'Energy justice: a conceptual review' n 7 above.

[53] B.K. Sovacool, R.J. Heffron, D. McCauley and A. Goldthau, 'Energy decisions' n 8 above.

framework, is thought to be primarily concerned with three aspects: access to environmental and energy information, participation in the decision-making process at both the authorisation and judicial levels, and procedural fairness in terms of decisions that the judicial body makes.

These three aspects of procedural justice can explain the importance of the implementation of these social justice instruments for the energy sector and the energy transition.

2. Access to Justice: Environmental and Energy Information and the Class Action: A Critical Overview

The Italian system appears to be very advanced in terms of providing various forms of information access: the traditional access by those who have a direct, concrete, and current interest;[54] the defensive access to protect a legally relevant position in judicial proceedings;[55] and then the Italian legal framework provides for an *ad hoc* form of access to information, tailored to the environmental and energy sector.

The birth of a systematic discipline on the subject of the right to access to energy and environmental information is usually attributable to the principles contained in the Aarhus Convention of 1998 on access to information, public participation in decision-making processes and access to justice in environmental and energy matters. The Convention has been ratified by Italy with Legge no 108 of 2001 but it is only with the Decreto Legislativo no 195 of 2005 that we will have a complete discipline based on the European Directives concerning the right of information and access to justice. Environmental information has a high value in the Italian legal system, both because its purpose is to disseminate data about environmental conditions and the current state of the resources that comprise the environment, and because it is granted to all who request it in the form of a subjective right to access the acts of public authorities that concern environmental procedures, without the need to declare any particular interest.[56]

The other, more problematic aspect of procedural participation is access to

[54] Art 22 Legge 241/1990, Code of Administrative Procedure.

[55] Art 24, para 7, Code of Administrative Procedure.

[56] Art 3 decreto legislativo 19 August 2005 no 195. A very broad notion of environmental information is outlined in the legislative decree that includes: the state of elements such as air and atmosphere; factors that may affect elements of the environment; reports on the implementation of environmental legislation; and cost-benefit analyses. Despite this broad notion and the ratio that characterizes the institute, there is no lack of limitations that have been mainly highlighted in judicial interpretation. In fact, the environmental information that can be accessed is only that which concerns factors or elements that could directly affect the environment and not any documentation that indirectly reflects this. In addition, even though the applicant is not required to have ownership and proof of interest, the latter may not submit requests that are characterized by obvious generality and in them must refer specifically to environmental matrices or factors referred to in art 2 of the decree, *ex multis* Consiglio di Stato 5 October 2015 no 4636 e Consiglio di Stato 17 July 2018 no 4339, www.giustiziamministrativa.it

justice, which is represented by interventions and compensation actions by the several stakeholders operating in the sector but, more specifically by all bearers of diffuse legitimate interests.[57]

Indeed, there is growing interest in broadening the legal standing of environmental associations defending the interests of nature and the ecosystem. This legitimacy could be defined as the possession of a qualified subjective legal situation protected by the legal system, or the plaintiff's special qualified position concerning the exercise of administrative power that distinguishes him from ordinary citizens. It follows, therefore, that the legitimacy conferred for the environmental protection in the case of associations of national and regional relevance, as provided by Art 18 of Legge no 348 of 1986, is wholly exceptional. Art 18(5) states:

> 'The associations identified on the basis of Article 13 of this law may intervene in legal proceedings for environmental damage and appeal to the administrative courts for the annulment of unlawful acts'.[58]

In addition to being able to intervene in administrative and judicial proceedings for the annulment of an illegitimate measure, they can bring class actions to obtain compensation for environmental damage through art 313 para 7 of the Environmental Code.[59]

[57] *Ex multis* see R. Ferrara, 'La protezione dell'ambiente e il procedimento amministrativo nella 'società del rischio', in D. de Carolis, E. Ferrari, A. Police eds, *Ambiente, attività amministrativa e codificazione* (Milano: Giuffrè, 2006), 344. Further more see the Adunanza Plenaria Consiglio di Stato, in its judgement of 25 February 2014, no 9, stated in point 8.1 that '*the issue of the legitimacy to appeal is declined in the sense that such legitimacy must be related to a situation and therefore deserving of protection, in a certain way*', available at giustiziaamministrativa.it.

[58] Then Art 13 tells us: 'The environmental protection associations of national character and those present in at least five regions are identified by decree of the Minister of the Environment on the basis of the programmatic aims and the internal democratic order provided for by the statute, as well as the continuity of the action and its external relevance, subject to the opinion of the National Council for the Environment to be expressed within ninety days of the request. After this period has elapsed without the opinion being expressed, the Minister for the Environment decides'.

[59] In fact alongside the exclusive power of the Ministry of the Environment (now Ecological Transition) to act judicially for compensation in case of environmental damages in specific proceedings also through the exercise of a civil action in criminal proceedings, art 313, para 7 entails the right of the person damaged by the fact producing environmental damage, in their health or in the property of their own property, to take legal action against the responsible party to protect the rights and interests harmed. This 'special' legislation on environmental damage goes hand in hand with the exclusive right to compensation for the public environmental damage of the Ministry of the Environment and as a matter of fact this special provision allows environmental associations to stand judicially '*iure proprio*', in trials for crimes that have caused damage to the environment, not as a public interest but, as any individual person, they can ask compensation for damage suffered directly and specifically, further and different from the general public damage to the environment as a public good and as fundamental right of constitutional importance. With respect to this special legislation, environmental associations can take part as civil plaintiffs in criminal proceedings with the right to compensation for the damage caused to the activity they actually carry out for the protection and enhancement of the territory, see Corte di Cassazione 19 January 2012 no 19439, available at

Despite this provision and the judicial attempts to expand its scope, it appears to be a marginal and residual instrument limited to a small number of cases in which environmental groups are successful in recovering damages for concrete and genuine prejudice. Perhaps it would be appropriate for our legal system to explore and trace a new path for this type of suitable protection for environmental ONG who want to see their efforts productive and protected. Perhaps one could follow the path traced by the Adunanza Plenaria in 2020 in which the Court, starting from the legitimacy of consumer associations to pursue legal action before the administrative judge, confirms the existence of a legitimating position of consumer associations as a position of a general nature;[60] this legitimating position does not depend only on an express legal provision, for example by the provisions of the Consumer Code, but it can also be extended beyond that, with regard, for example, to those associations that meet the requirements of legitimacy identified by administrative case law in environmental matters.

The Tribunal tells us that the legitimacy of consumer associations and civil actions for their protection can also be used by associations that protect differently, but still general, interests. The explicit recognition by the legislation of certain civil actions, such as those indicated in art 140 *bis* of the Consumer code are no longer exclusively reserved for consumers alone, but available to all those who complain of a violation of homogeneous individual rights, and so revealing the existence of a process of expansion towards the collective dimension.[61] More and more space is being structured around the concept of collective interest, which may be thought of as a simple summation of serial individual interests organized in a conscious and solidaristic super-individual dimension.

So given that the associations have the legitimacy to stand as well as in administrative law proceeding also as a civil party in criminal trials in case of environmental crimes[62], a further problem that has plagued the jurisprudence,

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[60] Adunanza Plenaria Consiglio di Stato 20 February 2020 no 6, available at www.giustiziamministrativa.it

[61] See S. Mirate, 'La legittimazione a ricorrere delle associazioni di consumatori tra "generalità" e "specialità" ' *Giornale di diritto amministrativo*, 4, 520-528 (2020); furthermore S. Franca, 'Il 'doppio binario' di legittimazione alla prova dell'Adunanza Plenaria. Quale spazio per la legittimazione soggettiva degli enti esponenziali di interessi collettivi?' *Diritto processuale amministrativo*, 4, 1030-1051 (2020).

[62] The environmental association, as well as other forms of association that claim to have been damaged by an act that is criminally relevant to the environment, are legitimately entitled to take action against the person responsible in order to obtain compensation for the direct damage they have suffered, which has damaged not only their assets but also the image of the association and has limited and/or made it impossible to achieve the association's purpose. This activity can be carried out not only through the exercise of civil action in the criminal proceedings dealing with the environmental crime, but also through the activation of autonomous civil proceedings for non-contractual liability against the responsible party. For the purposes of the liquidation of damages, it will be appropriate to provide the Judge with as many elements as possible not only to demonstrate the causal link between 'cause and effect', but also to prove the seriousness of the damage suffered, and, in particular, allow the Judge to 'calibrate' in a fair way the extent of the liquidation of damages,

resulting in opposing guidelines, is the extension of this legitimacy, ie, whether the local offices of these associations or non-recognized associations without a national or regional character may use this legitimacy to stand judicially. It should be remembered that energy justice seeks to make the energy world fairer and more equitable while remaining within the bounds of reason and proportionality. Energy development cannot be hampered by constantly new and more innovative barriers to its expansion. The problem of transition and investments also comes from here and from the many oppositions and class actions that associations, especially local ones, oppose to energy investments, even the green ones.[63]

As a result, the challenge is to strike a balance between the legitimacy to act of holders of diffuse interests, including local ones, and the development of a sector that has become critical to our society's daily well-being. Part of administrative jurisprudence has acknowledged the explicit recognition of a similar legitimacy to act for entities without a national relevance but, due to the circumscribed territorial context, are allowed to stand to protect interests concerning health and the environment in the event of inertia of a national or regional environmental association.[64] As a result, associations of any legal form, including the non-recognised ones by the Ministry of Environment, may intervene in administrative proceedings or form a civil party in a trial to seek compensation for public environmental damage. Although the courts have identified parameters and limits to this extended legitimacy by referring to concepts such as the body's organizational consistency and the requirement of the *vicinitas* (the connection between the body and the territory of reference), this judicial answer from the judges opens to a wide conception of legitimacy capable of slowing down administrative action and making many investments in the sector problematic.

A proliferation of popular actions by even non-recognized associations aimed at declaring illegitimate the granting of potential authorizations by public authorities or administrative judge decisions, or at obtaining compensation for environmental damages, for example in civil or criminal trials, if on the one

comparing the precedents of case law on the subject, see P. Dell'Anno, *Diritto dell'ambiente* (Padova: CEDAM, 2021), 400; B. Caravita (ed), *Diritto dell'ambiente* (Bologna: il Mulino, 2016), 382.

[63] Some studies have analyzed this phenomenon from a sociological point of view arguing that if on one hand people support renewable energy technologies from an environmental point of view, when it comes to welcome these investments in their territory, they show their opposition acting judicially through class action. Especially in the south of Italy several manifestations and protests took place against major investment proposal for offshore wind farms, see https://tinyurl.com/4ptz2nb5 (last visited 30 June 2022). For further readings on the sociological aspects of the 'environmental indecision' see for the international literature P.D. Wright, *Renewable Energy and the Public. From NIMBY to Participation* (London: Routledge, 2015), 368; for the Italian literature see V. Pepe, *Non nel mio giardino. Ambiente ed energia oltre la paura* (Milano: Baldini&Castoldi, 2013), 352.

[64] See *ex multis* Consiglio di Stato 2 October 2006 no 5760, Consiglio di Stato 23 May 2011 no 3107, Tribunale Amministrativo Regionale del Molise Sezione Campobasso 23 May 2009 no 249, all available at www.giustiziamministrativa.it; for the criminal case law see Corte di Cassazione-Sezione penale 7 May 2020 no 13843 e Corte di Cassazione-Sezione penale 18 September 2019 no 38596, available at www.dejure.it.

hand reinforces the intensity of a right and legitimacy exercised by national or regional associations already present in our legal system, on the other hand, it exacerbates the intensity of a right and legitimacy exercised by national or regional associations creating a problem for the economic initiatives towards the energy transition. It has been demonstrated in multiple situations how a non-national organisation was formed solely to delay an energy investment project, notwithstanding the lack of a stable link with the territory and the requirement of local community representativeness. An organization cannot be formed solely to challenge individual and specific measures.[65]

As a result, both public administrations and administrative courts must comprehend the clues and arguments coming from the bearers of diffuse interests on the one hand, while never absolutizing these arguments or the interests claimed by them without a fair balancing of the interests on the other. A balancing of interests that no longer involves a comparison between the public interest in protecting the environment and the landscape and the private interest in the free private economic initiative, but rather a comparison with another public interest of primary importance, namely energy investments to accelerate the energy transition and reduce energy inequity such as energy poverty.[66]

The administrative and judicial initiative and litigation must take into account the rise of this new public interest that is no longer secondary and it does not always have to be sacrificed.

These occurrences have frequently resulted in the suspension of approval procedures for investments in the wind power sector, for example. And the judge is increasingly deprived of effective and actual instruments, as well as skills and abilities for an analytical assessment of the facts and specific dynamics, as a result of these decisions. This raises the problem of judges' technical discretion, which will be discussed further down.

So in this sense, a reform on the access to justice and class actions in the environmental and energy sectors would be necessary, perhaps not looking at a judicial reform but maybe trying to prevent the increasing rise of disputes in front of the courts. If on one hand sometimes it is true that non-institutionalized ONG fails to carry out the balancing of interests required to undertake today by those working in the environmental or energy sectors, on the other hand, it

[65] Tribunale Amministrativo Regionale del Piemonte 25 September 2009 no 2292, Tribunale Amministrativo Regionale della Liguria 10 February 2017 no 95, available at www.giustiziamministrativa.it.

[66] It seems that the administrative courts are starting to accept and acknowledge this new interpretation. Recently, the Consiglio di Stato (Supreme Administrative Court) in a revolutionary decision regarding renewables investments, declared that the balancing of interests must not be carried out between the heritage and the private and economic interest, but between the heritage protection and another public interest given that 'the production of electricity from renewable sources is in fact an activity of public interest which also contributes not only to the protection of environmental interests but also, albeit indirectly, to that of landscape values', see Consiglio di Stato 12 April 2021 no 2983, available at www.giustizia-amministrativa.it.

would not make much sense to strengthen the right to participation for some associations and to attenuate it for others, thus undermining the legislator's *ratio legis* within the scope of Art 13 of the Law 349/1986.

Perhaps a balancing point could be found not in drawing a line between the two entitlements in front of the courts, but in making this right available to all citizens, whether individually or in groups, in the shape of a public debate that anticipates whichever decisions must be undertaken. The public debate has already existed in the Italian legal system since it has been introduced by the Art 22 of the Environmental Code as an instrument to provide for the involvement of territorial public bodies and civil society in decision-making processes on major infrastructure works that have an economic, social and environmental impact on the community.

This seems to be the most reasonable solution to draw a line between conflicting interests at stake by bringing citizens and associations into the tables and conferences of services with public authorities where the balancing between primary and secondary public interests takes place. And recently the Decreto Legge no 77 of 2021 (*Decreto Semplificazioni*) has expressly mentioned the importance of the public debate especially by establishing thresholds above which works linked to the National Recovery and Resilience Plan will have to be subjected to it, dictating measures to speed up the procedure.

So, institutionalising this procedure instead of exacerbating judicial remedies, perhaps following also the French model of the 'Dèbat Public',[67] would be useful not only to avoid further barriers to investments and social conflicts but also to pursue general objectives in terms of reducing the time taken by administrative action and the issue of transparency, guaranteeing democratic pluralism, improving public communication and empowering citizens.

3. The Italian Judicial System Towards a Just Transition

Procedural justice calls also for the understanding of who make the decisions and how to make these as fair and equitable as possible. A central role in decision-making lies undoubtedly within the policymakers and lawmakers which provides the general guidelines of a national energy policy. But, in practice, energy operations and activities are hampered by barriers erected by public authorities, first and foremost by competent ministries, and then by judges, who are tasked

[67] The reference is to the French experience of the 'Dèbat Public'. This was set up in France following virulent protests by local populations against the route of the Marseille-Lyon high-speed line. Governments decided that any major construction project should be subject to a prior public debate among all stakeholders. In order to implement the 1994 Barnier law, which was amended in 2002, an independent authority called the *Commission National du Dèbat Public* was set up to initiate and accompany the various stages of the debate on all preliminary projects for major infrastructures, see Y. Mansillon, 'L'esperienza del "dèbat public" in Francia' 3 *Democrazia e Diritto*, 101-114 (2006); J.M. Fourniau, 'Information, Access to Decision-making and Public Debate in France: the Growing Demand for Deliberative Democracy' 28 (6) *Science and Public Policy*, 441-445 (2001).

with performing a difficult procedural task: making judicial decisions that are as fair and proportional as possible and in line with the nation's current needs. As a result, it can no longer be disputed that the energy transition passes through public administrations as well as under the assessment of the courts.

Above all, judges' roles in environmental and energy economics appear to have become increasingly central and decisive in recent years, assuming roles not only as legal practitioners but also as technicians in specific sectors called upon to know, study, and examine interdisciplinary facts and dynamics.

In this contest, a part of the academic literature has landed to classify into three groups the set of courts among legal systems dealing with energy and the environment: systems that hand over environmental matters to ordinary courts, those that rely on the 'internal specialisation' of judicial bodies (the creation of green judges, without formal alterations to the judicial structure) and then, systems that create environmental courts or tribunals from scratch.[68] Italy belongs to the second group with the green and energy matters mainly devolved not to the ordinary judiciary but to a specialized judicial power, to be specific to the administrative jurisdiction. Art 133 of the Code of administrative procedure list the competencies that the administrative courts exercise exclusively, solving potentially any conflict of jurisdiction with the ordinary judicial. Art 133 *lett o)* states that:

> 'disputes, including those of a compensatory nature, relating to the procedures and measures of the public administration concerning energy production, regasifiers, import pipelines, thermoelectric power plants and those relating to transmission infrastructures included or to be included in the national transmission network or national gas pipeline network'.

It may well be observed that the energy matters are exclusively assigned to the administrative courts for both the legal position of the subjective rights (diritti soggettivi) and the legitimate interests (interessi legittimi).[69] In the energy

[68] D. Amirante, 'Giustizia ambientale e green judges nel diritto comparato: il caso del National Green Tribunal of India' *Rivista di Diritto Pubblico Comparato ed Europeo*, 4, 955-976 (2019).

[69] The evolution of administrative justice - from a power to a service for the citizen and for society – has imposed an increase in its effectiveness and efficiency, with the objective of full jurisdiction – not in a theoretical sense, but in a practical sense. This is because the administrative judge was born as an 'economic judge', in matters of public debt, which still today falls within his exclusive jurisdiction pursuant to art 133. And this genetic nature of his has only increased, consolidating more and more the extension of his control to the legal positions of both legitimate interests and subjective rights. It is immediately apparent that the review by the court has different degrees of intensity and argumentative models, depending on the matter and the type of act. The 'primacy' of the exclusive jurisdiction of the administrative judge with regard to public economic law seems to be explained, on the one hand, by the fact that the regulatory and allocative functions are performed through the exercise of a power in the proper sense, thus in line with the criteria dictated by the jurisprudence of the Constitutional Court, and on the other hand, because the multiplicity of the arbitrated items makes it extremely difficult to discriminate between the legitimate interests and the subjective rights of the various economic actors dealt with by it, see A. Pajno, 'Giustizia amministrativa e crisi economica', in

sector, in particular, the courts are being asked to evaluate all of the public authorities' actions from upstream to downstream, including energy transmission and power distribution.[70] This does not exclude them from dealing with other resources and related disputes, such as gas, coal, oil, and renewable energies.[71]

This has meant that administrative judges, especially in recent years, have started to deal with a significant and sometimes disproportionate volume of litigation concerning the energy sector due to its rapid economic expansion. As previously said, Italy does not have a substantial energy-producing capacity based on conventional resources, hence the majority of upstream investments are focused on renewable energies, resulting in increased authorisation procedures at ministries and other government agencies. In the majority of cases, administrative judges must deal with multiple case laws involving solar panels, wind turbines, transmission networks, distribution grids, and gas pipelines, which necessitates the ability to scrutinize not only binding and discretionary administrative activities but also administrative activities that are heavily influenced by technical discretion.

The judge will often then follow the acts and documents filed in court relying on his or her limited knowledge of the sector, or in other very rare cases, will make use of an expert witness's report according to Art 67 of the Code of Administrative Procedure. However, in comparison with civil proceedings, technical consultancy is increasingly rare and residual in administrative proceedings, probably due to the same limitations imposed on it by administrative judges.[72]

Considering the example of renewable energy investments such as wind farms or solar power plants which, produce energy without polluting the environment but on the other hand they often are hindered because of the potential impact

G. Pellegrino and A. Sterpa eds, *Giustizia amministrativa e crisi economica. Serve ancora un giudice sul potere?* (Roma: Carocci Editore, 2014), 408; F. Merusi, 'Il giudice amministrativo fra macro e microeconomia', in L. Ammannati, P. Corrias, F. Sartori, A. Sciarrone Alibrandi eds, *I giudici e l'economia* (Torino: Giappichelli, 2018).

[70] Among all the public bodies and the economic public bodies that play a decisive role in the energy sector, not only in the authorisation sector but also with regard to the economic incentives that many investments need, we can mention: the GSE, ARERA, the Ministries of Ecological Transition and Cultural Heritage and Economic Development, the Regions, the offices for the protection of the landscape and cultural heritage (soprintendenze) and many others.

[71] In Art 133 lett o) it is also specified the competence to deal with nuclear power but since the Italian nuclear power plants are not operative anymore, it should be interpreted as the competences to syndicate on the decommissioning operations and the ones regarding the national deposit.

[72] It must be emphasised that by resorting to those legal categories that govern civil proceedings, technical consultations known as percipient consultations (consulenze tecniche percipienti) are not permitted in administrative proceedings: those in which the consultant, subject of course to the immanent control of the judge, is called upon to ascertain the facts directly with the aid of specific technical expertise. On the other hand, in the administrative process, pursuant to art 67 of the Code of Administrative Procedure, so-called deductive technical consultancies (consulenze deducenti) are allowed, aimed at assessing ascertained facts that have already been acquired during the administrative procedure, Tribunale Amministrativo Regionale della Liguria 24 January 2014 no 137, available at giustiziamministrativa.it

on the landscape they may have. They are said to have the potential to sacrifice the visual impact (natural beauty), land subtraction for agriculture, and, in the vicinity of archaeological sites, the landscape from a historical-cultural standpoint.[73]

Faced with these hypotheses, the Public Administration to protect the landscape (in the case of the Ministry of Cultural Heritage or the Ministry for the Ecological Transition) has often intervened with comparative assessments of the interests at stake (landscape and environment vs. energy interests) letting prevail the conservation and preservation aspect based on environmental impact assessments.[74] This has inevitably led to the suspension or delay of investments and project finance initiatives.[75]

In addition to the various arguments that blame the administrative machine for the various problems concerning public spending and the stalling of the economy, some authors have also placed the administrative judge alongside it, described in turn as the 'vital organ' of the administrative machine that prevents any possibility of 'reversing the trend of expanding public spending and taxes'.[76] And this is because those institutions would have gained great authority, and appeal to the Regional Administrative Tribunal (TAR) would have been an easy and inexpensive means of reversing any decision that did not suit, which is now pervasive throughout the country. In short, the 'natural' relationship between economy and (also) administrative justice, which we have been examining thus far, would have been in jeopardy.

One agrees with those who believe that blaming the administrative justice system for the uncertainty, deadlock, and inefficiency that characterize the Italian system is at best ungenerous, given that the main causes of the crisis are an excessive number of laws, many of which are obscure and in conflict with one another, and an inefficient administration that avoids decision-making and conducts its operations in a timeframe incompatible with the needs of the public.[77]

This does not preclude assisting the administrative judge in identifying another judicial body that, due to the high level of technicality and sectorial knowledge required by this industry, might be better suited for handling this

[73] M. Marletta, 'The Role of Renewable Energy within the EU', in A. De Luca, V. Lubello and N. Lucifero eds, *The European Union Renewable Energy Transition* (Milano: Wolters Kluwer Italia, 2019), 3-40.

[74] G. Sigismondi, 'Valutazione paesaggistica e discrezionalità tecnica: il Consiglio di Stato pone alcuni punti fermi' 3 *Aedon*, 2016, available at https://tinyurl.com/mt7pjjed (last visited 30 June 2022).

[75] V. Lastrico and M.F. Gasparini, 'Il diritto ad un ambiente salubre tra standard di tutela e discrezionalità nell'utilizzo degli standard' *IRPA – Istituto di Ricerche sulla Pubblica Amministrazione*, 1-24 (2014).

[76] An authoritative politician (Romano Prodi), adding to the dose, has commented: 'if the TAR and the State Council were to be abolished, our GDP would immediately take on a conspicuous positive sign'.

[77] L. Torchia, 'Giustizia ed economia' 4 *Giornale di diritto Amministrativo*, 337-347 (2014); see also F. Patroni Griffi, '*Giustizia amministrativa: ostacolo o servizio?',* 81-90 (2014), available at /www.astrid-online.it.

massive number of significant energy lawsuits and possibly for a more concrete, proportional, and profound balancing of the public interests at stake.

4. A New Special Judge for the Energy Transition? The Case of the Superior Court of Public Waters

As previously stated, one of the procedural and legal issues that the energy industry faces is the lack of a judicial body to which the resolution of energy-related disputes is entrusted.[78] The new market dynamics and the new legal scenario opened by the energy systems have shown how the new disputes are extremely complex and technical and require multidisciplinary skills by judges.[79] The energy industry necessitates several competencies, from engineer to environmental and social ones, as well as economics, geology, and legal competences. So, the idea of a 'mixed jurisdiction' where a judicial body where a judicial panel is composed of technicians and experts in the relevant field, supervised and guided by a jurist does not see an abnormal proposal but instead new, innovative, reasonable and attractive and surely not isolated since the phenomenon of these mixed jurisdictions and the 'green judges' is spreading rapidly among the legal systems.[80]

In Italy, such a proposal must be framed having in mind the constitutional and legal provisions of the country. In fact, within the limit of the constitutional framework outlined by Arts 104-107 and in compliance with Art 102, para 2 of the Costituzione Italiana must not be overlooked the prohibition of creating new special judges in the judicial system.[81] The Legislator, in front of this express prohibition, had to broaden the administrative court's jurisdiction to cover all the rising disputes. It is evident from Art 133 of the Administrative Procedural Code, the need for the Legislator to refer these new conflicts to the court more able to deal with the multiple interests and public aspects involved (in terms of jurisdiction). But the Legislator cannot pretend from the administrative courts, competencies and deep awareness of emerging markets for which they are not trained.

The Italian legal system is familiar with the potential option of a specialised jurisdiction, which has already existed since the beginning of the last century.[82]

[78] S. Cassese, 'Verso un nuovo diritto amministrativo? *IRPA - Istituto di Ricerche sulla Pubblica Amministrazione*, 12 (2016).

[79] G. Napolitano, 'Il grande contenzioso economico nella codificazione del processo amministrativo' 6 *Giornale di diritto Amministrativo*, 667-682 (2011).

[80] See specifically the academic literature on the topic: D. Amirante, 'Giustizia ambientale' n 68 above; R. Macrory and M. Woods, 'Modernizing Environmental Justice – Regulations and the Role of an Environmental Tribunal' 72 (10) *Town and Country Planning*, 304-305 (2003); R. Jennings, 'Need for Environmental Court' 22 *Environmental Policy & Law*, 312 (1992); C. Warmock, 'Reconceptualising specialist environment courts and tribunals' 37 (3) *Legal Studies*, 391-417 (2017).

[81] A. Police, 'La mitologia della "specialità" ed i problemi reali della giustizia amministrativa' 3 *Questioni di giustizia*, (2015), available at https://tinyurl.com/mr43jjcv (last visited 30 June 2022).

[82] M. Renna and B. Marchetti, 'Il diritto amministrativo nel tempo post-moderno. I processi di

The case concerns the Superior Court of Public Waters and the relative Regional Courts. They came into being at a time when Italy was preparing for war and industrial development was taking hold and it was necessary to secure the sources of energy production for the machinery of the factories.[83] This type of judging body was born out of the economic need to regulate more efficiently the production of electricity from the exploitation of water resources. The system of jurisdiction over water took on a new and definitive structure deputed as a judge of appeal to hear disputes concerning both subjective rights and legitimate interests in all the conflicts involving the water source[84], in matters of legitimate interests, it maintained its nature as a judge of the single instance with 'direct cognition'. With the exponential increase of hydroelectric plants, especially small and medium-sized ones occurred in Italy since the early 2000s under the stimulus of a massive public policy of incentives for renewable energies and with the intensification of increasingly violent weather events, the 'Judge of Waters' today assumes a role in the system of administration of justice which is anything but secondary or marginal.[85] This is due both to the extent of the underlying economic interests and because of the fundamental strategic importance now unanimously recognised to the water resource, a precious asset and a right to be preserved for future generations.[86]

The legislator of the time (before the Constitution) decided to set up a new, so to speak, special jurisdictional body with a specialised and technical composition chaired by the President of the Supreme Court, composed of two State Councillors and two specialized members of the Superior Council of Public Works.[87] The result was the creation of a panel of judges at both central and regional levels made up of technicians in the sector (engineers, geologists) guided and monitored by a judge, by several judges. Energy is by its very nature an interdisciplinary subject and, as is only right and proper, the subjects or bodies that deliberate on it must also belong to the same interdisciplinary group. The aim was to let the judges, over time, acquire a piece of technical knowledge and specialisation that would guarantee a constant interpretation of legislation and guidance of administrative practice. Despite nowadays the Constitution prohibits the creation of special judges (Art 102 para 2), the Superior Court of Public Waters has been instituted before the Costituzione Italiana of 1948 and the scholars have argued that the Water Tribunals would not clash with the prohibition of the constitution

giuridificazione: soggetti, tecniche, limiti' 12 *Giurisprudenza.it*, 2766 (2017).

[83] S. Palazzolo, 'Acque pubbliche ed energia' *Rassegna giuridica Energia elettrica*, 342 (1996).

[84] V. Giomi, 'La controversa delimitazione della giurisdizione speciale del Tribunale superiore delle acque: punto di arrivo o punto di partenza?' 7 *Rivista nel Diritto*, 1426-1436 (2015).

[85] GSE, Rapporto statistico 2019 – Fonti Rinnovabili (GSE 2021), available at https://tinyurl.com/bdfpb93f (last visited 30 June 2022).

[86] V. Parisio, 'Acqua, servizio idrico, liberalizzazioni' *Foro amministrativo*, 1289- 1296 (2007).

[87] S. Palazzolo, 'Tribunali delle acque pubbliche' *Digesto delle discipline pubblicistiche* (Torino: UTET, 1997), 379.

since they do not constitute special courts but specialised organs of the ordinary judiciary.[88] And since the Superior Court of Public Waters and the relative regional sections continue to rule over water issues and hydroelectric power plants, it would be illogic or maybe not wise to not extend its jurisdiction to the remaining energy sector.

But which competencies would be transferred? In which legal situations would it rule?

A reform of the administrative process code could transfer the administrative judge's current exclusive jurisdiction under Art 133 lett (o) to the Court of Public Waters, which would gain jurisdiction over the resolution of energy-related disputes and rule in the same way that the administrative judge did under the exclusive jurisdiction granted by the Art 133.

The only significant difference would be that the new judicial body would decide by evaluating the facts with a group of energy experts, to make the judicial decision as fair and equitable as possible for the greater good of the public. This does not at all mean that the administrative justice system is not up to the task or that entrusting certain partial competencies to this court will solve the problems of litigation in the energy sector; it is only intended to put the spotlight on an instrument that is available in our legal system, the use of which could only bring benefits in terms of speeding up litigation in energy matters and relieving the administrative justice system of many disputes that, rather than on purely legal points, would find an easier solution with the participation of technicians, engineers, geologists and others in the decision-making panels.

This is a matter of great topical interest, which is becoming increasingly important as technology enters, or rather proliferates in law.[89] Following this path could result in the establishment of a specialized Tribunal primarily voted to resolve energy case law and possibly provide an effective boost for the energy investments that Italy requires. This will not only be a procedural remedy in the judicial system, but it will also be able to address issues of recognition, restorative and distributive justice, as well as the growing need for a cosmopolitan judge who considers not only his backyard in decision-making but the entire world and the impact that every single action can have on it.[90]

5. Special Judges and the Rise of Mixed Jurisdiction: A Comparative Analysis

As mentioned above, the model of mixed jurisdictions to protect

[88] G. Mastrangelo, *I tribunali delle acque pubbliche* (Assago: IPSOA, 2009).

[89] A. Paire, 'Appunti sul rapporto tra diritto e tecnica: il caso della giurisdizione sulle acque a cento anni dall'entrata in vigore del decreto legislativo luogotenenziale 20 novembre 1916, n. 1664, istitutivo del Tribunale delle Acque Pubbliche. Un «modello» (forse) da riscoprire?' *Il diritto dell'economia*, 547-567, (2018).

[90] R. Jennings, n 80 above.

environmental and energy issues is not a new or visionary model, but one that already operates in several national experiences. Next to the myth of the 'generalist judge' that predominates the Western context, where environmental courts are an exception and environmental litigation is normally covered by ordinary courts, following a pattern of assignment of environmental cases to different judicial bodies (civil, criminal, administrative or constitutional courts), depending on the specific subject matter dealt with in each case, it is possible to find another model prevailing in other experiences in which special courts oversee litigation in which substantive positions related to environmental, climate and energy issues emerge. Of course, environmental tribunals have several advantages: speed in evaluations, efficiency, trained and specialised judges, used to dealing with experts in the field. Normally, this model is easier to apply to new democracies based on recent constitutions, where the legal system can be based on the structural involvement of environmental issues among constitutional rights or the rights of the citizen.[91]

The most interesting feature of this new form of jurisdiction is that its 'mixed' character is manifested in its equal composition of both judicial members and experts in scientific and technological disciplines. The advantages and innovative aspects of this composition of the environmental judge are obvious. First of all, as regards technical and scientific expertise, it becomes an endogenous element of the judicial decision.[92] There is no longer recourse to external experts, who are occasionally involved, but the technical and scientific aspects of the environmental issue under consideration are all carried out within the panel, through interaction on an equal footing between members of the judiciary and experts. Secondly, the costs of technical-scientific expertise, which in environmental litigation are usually borne by the injured parties, ie the weaker interests in the process, are reduced to zero. In this sense, it has been rightly observed that providing the court with expertise produces real equality of arms and prevents strong and corporate interests from getting the better of the injured parties.[93]

On this basis, many legal experiences have arisen by creating special bodies, endowed with specific competencies regarding environmental and energy disputes. This phenomenon, since the beginning of the 2000s, has seen an impressive growth ending up in the spreading of Environmental Courts and Tribunals in

[91] A comprehensive view of the way in which the judiciary deals with environmental issues around the world obviously shows a large number of different options. Each state with its own legal system, its own history and its own specific configuration of environmental matters in the national legal system (constitutional relevance of the environment vs simple regulatory status, attributions to decentralised levels of organic or fragmented competences, etc), presents a number of variations, both in relation to the jurisdictions involved and to the distribution of jurisdiction. D. Amirante, 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' 441 *Pace Environmental law Review*, 441-469 (2012).

[92] D. Amirante, 'Giustizia ambientale' n 68 above.

[93] G. Pring and C. Pring, 'Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment' 301 *Oregon Review of International Law*, 302-329 (2009).

both occidental and non-occidental experiences.[94]

In Western countries, it is worth mentioning the Swedish environmental courts' system with the Regional Environmental Courts and the Environmental Court of Appeal.[95] Environmental courts have legal authority over both land use, natural resources and the environment, with civil and administrative powers but no criminal authority. Each regional environmental court must have a panel consisting of one law-trained judge, one environmental technical advisor, and two lay expert members, according to the Environmental Code.[96] In the panel's decision-making process, all four members are on an equal footing. Appeals from the five regional environmental courts are heard by the Environmental Court of Appeal in Stockholm.[97]

The judicial protection of the environment provided by these courts, although it is only one element of a broader and more articulated framework, has taken on considerable centrality because these courts have often played the role of 'pioneer' in the affirmation of many principles and institutions of environmental law. It is not surprising that the result has been to deal with environmental cases by ensuring easy access to justice for citizens, non-governmental organizations, and disadvantaged individuals and groups.

This outcome has resulted in a high level of credibility and full recognition by both the Swedish Federation of Industry and environmental NGOs,[98] especially thanks to the decision to transfer competencies and challenges relating to the natural resources, the environment and land use from the administrative courts and the National Licensing Board for Environmental Protection to the Environmental Courts. In fact, before the environmental courts' system, there

[94] In 2010, a comparative overview study on the subject, the authors have identified around 360 environmental courts and tribunals operating worldwide, most of them created in just five years (2005-2010). According to Pring and Pring, this dramatic increase has been brought about by a number of different factors, among which they identify: the development of new international and national environmental laws and principles, the recognition of the link between environmental rights and the protection of the environment, and the development of a new legal framework. and national environmental laws and principles, the recognition of the link between human rights and environmental protection, the threat of climate change and general dissatisfaction with existing general judicial forums, see G. Pring and C. Pring, *Environmental Courts and Tribunals: a guide for policy makers* (Nairobi: UN Environment-Law Division, 2016).

[95] Here Regional courts are linked to district (civil) courts, and the Environmental Court of Appeal is a division of the Stockholm Court of Appeal. Twenty regional boards and around two thousand and fifty local environmental bodies are also part of the environmental law system, see The Swedish Environmental Code 30-35, available at https://tinyurl.com/yc3bezvb (last visited 30 June 2022).

[96] The Minister of Justice is the one who appoints the judges. The court employs the judge and the technical advisor, who both work full-time as environmental judges, see The Swedish Environmental Code 30-35, available at https://tinyurl.com/yc3bezvb (last visited 30 June 2022).

[97] Four law-trained judges make up the Court of Appeal. If necessary, one of them can be replaced by a judge who has technical training in the subject matter of the appeal, see The Swedish Environmental Code 30-35, available at https://tinyurl.com/yc3bezvb (last visited 30 June 2022).

[98] B.J. Preston, 'Characteristics of Successful Environmental Courts and Tribunals' 26 (3) *Journal of Environmental Law*, 365-393 (2014).

was a National Licensing Board for Environmental Protection, which functioned similarly to a court of justice.[99] When the environmental courts took over the licensing board's most important role, balancing diverse interests against one another, they were given the task of weighing the harm to individuals against the economic benefits of the firm causing the harm, to find the most reasonable and proportionate balance point.[100] For a judge in an environmental case, this is a critical — and challenging — responsibility, because the consequences of a court's ruling frequently extend well beyond the interests of the parties directly concerned. And it has been acknowledged that finding the optimum equilibrium point is made easier by reserving the final decision to technical expertise and qualified judges. This expressly represents a testament to the Environmental Court's success in Sweden.

Another example worth to be mentioned can be explored by looking at non-occidental experiences which show that a mixed jurisdiction with sectorial competence is widespread over the world.

This particular example refers to the National Green Tribunal of India (NGT).

This judicial body was established in 2010 to fulfil a specific request of the Supreme Court to set up a judicial body for '*the effective and expedition disposal of cases relating to environmental protection and conservation of forest and other natural resources*'.

The requirement expressed by the Supreme Court did no more than interpret and describing a widely diffused issue in legal systems around the world, where the increased interaction between law and science certainly opens up new frontiers and challenges. In particular, we can recall the famous *A.P. Pollution Control Board* v *M.V. Nayudu* judgment of 1999, in which the Indian Supreme Court stated that the difficulties encountered by judges in dealing with cases based on scientific or technological issues were widespread.[101] The Indian Supreme Court stated that these difficulties faced by judges in dealing with cases based on highly complex scientific or technological issues have become an increasingly common phenomenon, and that uncertainty creates problems when scientific assessments are institutionalised within public policies or used as elements of decision-making by public administrations or judges.[102]

On these premises, a special and mixed jurisdiction was needed to comply

[99] There was a National Licensing Board for Environmental Protection, which functioned similarly to a court of justice, before Sweden implemented the environmental courts system. The board's chairman and his deputies were both lawyers who had previously served on an Appellate Court. A total of five water courts were also available. The Code developed an environmental court system to replace all six of these institutions, see U. Bjallas, 'Experiences of Sweden's Environmental Courts' 3 (1) *Journal of Court Innovation*, 178-184 (2010).

[100] C. Wang, 'A Comparative Analysis of Environmental Courts in Sweden and China' 9 *Fudan Journal of the Humanities and Social Sciences*, 607–626 (2016).

[101] *A.P. Pollution Control Board* v *M.V. Nayudu AIR* 1999 Supreme Court 812:1999 AIR SCW 434, available at www.main.sci.gov.in.

[102] G.N. Gill, 'A Green Tribunal for India' 22 (3) *Journal of Environmental Law*, 461-474 (2010).

with the application of environmental legislation and the achievement of its objectives. Therefore one of the main NGT's features is its constitution: it comprises both ordinary judges and expert members coming from the scientific and technical disciplines, with a 50 per cent ratio.[103] It represents, thus, a 'mixed jurisdiction' where members not having a legal background can adjudicate a case with their decisive vote.

The Court and the high level of expertise of its members have shown over time that they can use this knowledge to correctly balance the interests at stake, sometimes in favour of environmental protection and sometimes in favour of the economic development of a country without judicially blocking the energy investments that the country needs to meet its daily energy needs.

In this context, the debate around the Superior Court of Public Waters does not seem visionary or far standing from a legal design point of view. The case for special judges with the feature of mixed jurisdiction is actual and it has shown positive outcomes all around the world in both developed and developing countries.

The comparative exercise consistently demonstrates the value of investigating foreign legal experiences and normative answers to real-world problems to learn from them and adapt them to the national legal system. It is undeniable that the science of comparative law holds a genetic vocation to weighing the unity of peoples through the unity of laws.[104] This conception gives comparative law a universal and cosmopolitan purpose. And it is within this purpose that the rigorous technique of comparative law has evolved so quickly, particularly in the Italian academic literature.[105] As a result, comparative law can assist a national legal system by generating recommendations and remedies based on knowledge of other legal systems that are comparable to the own legal system or confront similar problems: a comparative law approach that aims to achieve legislative unification[106] and the conceptual creation of the '*common law of civilised mankind*', setting out universal principles and solutions to common problems that affect legal systems where the free use of arbitrariness coexists with the freedom of

[103] The 'technical' members of the Green Tribunal must be highly qualified and, in particular, hold a master's degree or doctorate in science, engineering and other technological subjects. They must also have at least fifteen years' experience in their respective fields and at least five years' experience in the environmental sector. Experts may also come from the administration and civil society, including NGOs, but must have similar characteristics to their scientific colleagues (fifteen years of working experience of which at least 5 years in the environmental field), see The National Green Tribunal Act, No 19 of 2010, 5(2)(b), India Code, vol 19 (2010).

[104] V. Pepe, *Giambattista Vico e la comparazione giuridica* (Napoli: Edizioni Scientifiche Italiane, 2020), 148.

[105] T.E. Frosini, *Diritto pubblico comparato. Le democrazie stabilizzate* (Bologna: il Mulino, 2019), 10.

[106] G. Gorla, 'Unificazione legislativa e unificazione giurisprudenziale. L'esperienza del diritto commune' *Foro italiano*, V, 91-120 (1977) 1; R. Sacco and A. Gambaro, *Trattato di Diritto comparato - Sistemi giuridici comparati* (Torino: UTET, 2018), 1-6.

each individual.[107] A cosmopolitan law of freedom aimed at the coexistence between individuals. A law born from the awareness of the cosmopolitan essence of our human, cultural and social evolution.[108]

V. Final Considerations

In today's society, the existence of climate change is a scientific certainty. It has an impact on national economies, resulting in high costs for individuals, communities, and countries that will become even more significant in the future. Energy development, the primary source of CO2 emissions, is undergoing an evolutionary phase right in front of everyone's eyes. The concept of energy justice is now well established, and there is a widespread conviction that it will pave the way for the energy transition and for making it a just transition. The stakeholders' goal is to identify which national measures and aspects should be prioritized to accelerate the process and make it real and concrete. This study was primarily voted to identify some of the numerous and major challenges that Italy may face as it transitions to a low-carbon economy. To ensure a just transition, the energy sector must be read and analysed through the energy justice framework, which is both a methodology and a metric used to shape lawmakers' decisions. All the energy justice principles carry elements and aspects on how the energy sector can be fair and equitable balancing all the several interests involved.

There are now significant actions to do to move forward and build on. More study is needed on energy justice, as well as the involvement of more stakeholders in the initiative. The studies must be critical of the energy industry, attempting to explain the flaws and putting energy justice into practice to address those weaknesses.

I have discovered that the Italian legal and judicial systems have some flaws in terms of recognition, distributive and especially procedural justice, and I am considering how to introduce instruments for a more equitable and proportional response to energy case law to achieve energy justice in practice. So energy justice is from theory to practice. As a result, researchers must accelerate efforts by pointing out flaws and answering, creating a 'perfect storm'.

One of the recent triggers is the appointment by the Biden Administration, within the first twenty-four hours of his presidency of a Deputy Director of Energy Justice, professor Shalanda Baker.

[107] C. Petteruti, *Diritto dell'Ambiente e dell'Energia. Profili di Comparazione* (Napoli: Edizioni Scientifiche Italiane, 2020), 12.

[108] Law cannot only look at social relations within a single community but it must explore contacts between multiple communities, especially how to make them more united in pursuit of the common good. These are the thoughts of the famous Neapolitan philosopher and jurist Giambattista Vico. See G. Vico, *Principi di Scienza Nuova. Intorno alla comune natura delle Nazioni* (Napoli: Belle Epoque, 2019), 560.

The institutionalization of energy justice by entrusting it to a US administration office symbolizes that there can be no energy transition without greater social justice. The initiatives of the US office are aimed at inclusivity and equality, which must accompany the transition to a future-friendly ecosystem. The clean energy revolution must lift all those who have been left behind and ensure that those who have suffered the most benefit first. It is no coincidence that this office has been led by a law professor to encourage public policies that look at the energy sector through the energy justice metric and also of stimulating the national court for the further implementation of energy justice in practice. And following the US example, an Italian energy justice office formed at the Ministry of the Ecological Transition formed in 2021, might assist Italian laws and policies in identifying and studying the different injustices that occur in the energy industry, to suggest solutions, as this study attempted. In these circumstances, there is a growing consensus that the energy justice framework is the only viable way to enforce the low-carbon transition. Only by following the directions of the energy justice principles, it will be possible to develop public solidarity within a new energy ethic that is not only superficial but also profound.

In reality, the research presented here aims to show that energy justice is based on the protection of human rights. All attempts to investigate energy justice in the Italian legal framework have revealed the rise of human rights and how they are sometimes not fully realized, necessitating greater protection: from energy poverty, access to modern energy services, and energy security to the access to justice, participation rights, and the right to a fair and equitable decision. All five parts of energy justice: procedural, distributive, restorative, recognition, and cosmopolitan regard these human rights as essential to accomplishing and implementing energy justice and the energy transition. In this instance, national courts provide a forum for resolving conflicts and ensuring the protection and fulfilment of human rights. The key justice concerns and how they should be resolved will be determined there. The conflict usually emerges as a result of the actions of a stakeholder in the energy sector, in a situation where there is no existing legislation on the subject or where the legislation is unclear. As a result, these national courts play a futuristic role, interpreting what justice is under the law and what it should be in light of current societal goals.[109]

These legal institutions must respond to current public policy and, in essence, they can be said to have the job of establishing and guiding the rules of the game in the energy sector. They define the boundaries of acceptable behaviour, which is usually set by the government or energy business. National courts provide a final option to hold a government or energy business accountable for their conduct and guarantee that the energy sector is just. And, to achieve these goals and objectives, national courts must be 'prepared' and 'well-equipped' to

[109] R.J. Heffron, 'Applying energy justice into the energy transition' 156 *Renewable and Sustainable Energy Reviews*, 111936 (2022).

make the fairest and equitable justice for the entire society and future generations. The creation of special judges with mixed jurisdiction could undoubtedly aid in preparing national judicial systems to respond to current societal needs, such as the need for more experts capable of interpreting environmental, climate, and energy legislation based on an interdisciplinary comparison capable of considering and integrating the various elements (scientific, political, administrative), as we observed in other countries.

In this context, the judicial protection of the environment, while representing only one element of a broader and more articulated framework, is of great importance because the courts will play the role of 'pioneer' in the affirmation of many principles and institutions of environmental and energy law.

And as pointed out by the 2018 Nobel Prize in economics, William Nordhaus – what is urgently needed, in the face of the global warming emergency, is not so much response in terms of technical-scientific elaboration, but rather the adoption of legal solutions that are as close as possible to the empirical – evidence on the trend in greenhouse gas emissions into the atmosphere.[110]

[110] W.D. Nordhaus, 'Projections and Uncertainties about Climate Change in an Era of Minimal Climate Policies' *National Bureau of Economic Research Working Paper No. 22933*, 2-49 (2016), available at https://tinyurl.com/2p8ttwsm (last visited 30 June 2022).

Facets of Power: A Few Thoughts in Light of Marco Brigaglia's Analysis of Foucault

Corrado Roversi*

Abstract

There is a common distinction in the socio-philosophical literature between two kinds of power: normative and causal. According to a widespread and still dominant conception – normativistic legal positivism – law has to do with normative powers, not causal ones. I will try to argue that this rigid distinction between domains seriously undermines the possibility of having a comprehensive account of what institutions are. The ontology of legal institutions is based on a complex intertwining between normative and causal aspects; hence, an artificial split between these aspects cannot but lead to a seriously limited understanding of how institutions operate in regulating social behavior. This I will show by reflecting upon what I take to be the most thorough, well-argued, and analytically deep treatment of the concept of power recently provided in Italian legal theory, namely, Marco Brigaglia's analysis of Michel Foucault in his recent *Potere: Una rilettura di Michel Foucault* (2019). The conclusion of my argument is that Foucault's conception of power – as analysed by Brigaglia – finds significant support from institutional ontology in showing that legal theory and legal science should broaden their focus when selecting relevant instances of power. But I will also show that jurists can teach social scientists to put up some boundaries by reflecting on the concept of intention and on the risk of hypostatizing it; otherwise, the concept of power risks becoming too vague and opening the door for all manner of conspiracy theories and fallacies concerning intention.

I. Introduction

In this paper, I will deal with the concept of power. There is a common distinction in the socio-philosophical literature between two kinds of power: normative and causal. Normative power is the capacity to produce normative effects on the basis of rules. Causal power is the capacity to produce factual effects on the basis of causal mechanisms. According to a widespread and still dominant conception – normativistic legal positivism – law has to do with normative powers, not causal ones. It focuses on the existence of norms and normative entities in the realm of what 'ought to be,' not on social behavior and its determinants, the latter instead falling into the realm of sociology, not that of law. Only by restricting the scope of legal science to the normative domain, normativists argued, can we account for the specificity of the legal perspective.

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I will try to argue that this rigid distinction between domains seriously undermines the possibility of having a comprehensive account of what institutions are. The ontology of legal institutions is based on a complex intertwining between normative and causal aspects; hence, an artificial split between these aspects cannot but lead to a seriously limited understanding of how institutions operate in regulating social behavior. With power this problem becomes apparent, because normative and causal powers, though conceptually distinguishable, are often ontologically connected. This I will show by reflecting upon what I take to be the most thorough, well-argued, and analytically deep treatment of the concept of power recently provided in Italian legal theory, namely, Marco Brigaglia's analysis of Michel Foucault in his recent *Potere: Una rilettura di Michel Foucault* (Power: A New Reading of Michel Foucault).[1]

The paper is organised as follows. In Section II, I introduce the problem, arguing that an exclusively normative conception of power like the one maintained by the traditional, legal-positivistic description of legal science can severely limit the scope and impact of legal expertise in contemporary society. In Section III, I present Marco Brigaglia's discussion of Foucault's notion of power as a contribution toward analytically reconstructing a broadened conception of power and bringing it to bear on contemporary legal theory. In Section IV, I argue that this broadened conception can find support in contemporary social ontology because it is implied by a complete understanding of the structure of institutional facts. In Section V, I highlight some possible risks of overinclusion of an excessively broad conception of power, by showing that it can be vague and that it calls for a strict methodology to distinguish intentional power from nonintentional, unintended outcomes. Hence, although legal theory needs to be supplemented with the work that other social sciences do in their analysis of causal factors, the latter sciences stand to gain a lot from legal analyses of the concept of intention.

II. Legal Knowledge and Its Limits

There is a student of mine who graduated in law and who for several years has been a regular participant in a reading group I started as a way for students to dive deep into issues in the philosophy of law. On one recent occasion he shared with me a concern he had about the kind of training he had received at law school. I will relate his words as if I had recorded the conversation: 'I am now working with economists, statisticians, managers, and I realize I don't know how I can contribute to their problem-solving as a jurist. It seems to me that as jurists we are not equipped to understand the real forces that drive the world; we are all consumed with rules that have a marginal impact and are systematically obsolete,

[1] M. Brigaglia, *Potere: Una rilettura di Michel Foucault* (Napoli: Editoriale scientifica, 2019).

while the world around us is being shaped by macroeconomic dynamics and technological advancements. As a jurist, I feel like I am moving about in an abstract world, lacking the analytic tools needed to make a real contribution.' I was struck by his confession, to be honest, particularly given his qualities as a person and his capacity as a student: I had been meeting with him regularly since his first year at *Giurisprudenza*, and I knew him to be deeply curious and enthusiastic. At first, I set the problem down to the abstract remove of legal education in Italian universities, a point of endless debate at department meetings, or when institutional committees sit down to address the quality of teaching, or when public education interfaces with private business to see how best to redesign its own programmes. But here he was not pointing out a failure of law schools to adequately train students to practice law, as if a law degree did not provide the skillset needed to draw up a contract or, more generally, to enter the legal profession or work for a government legal service department. Rather, the problem was that even with a solid grounding in the practical workings of the law, this knowledge was mostly irrelevant when it comes to making 'real world' decisions – decisions involving the long-term strategies a company should pursue or the way to go about pursuing these strategies or, in the public sector, decisions about the policies that public administration agencies ought to fashion looking to the future. His point was not about the inadequacy of training in law: It was about the irrelevance of law itself. What, then, could I offer in reply as a philosopher of law with a background in philosophy?

The problem is connected with the methodology of legal science, and on a deeper level with the very concept of law. My student lamented the fact that he could not understand the deeper factors that are shaping the world: Powerful global economic actors make decisions that will impact our lives for decades; deep-learning algorithms guide the choices that we as consumers are constantly asked to make; geopolitics is shaped by economic variables that are not explicit and are not a matter of public debate. What can a jurist do in this context? What kind of expertise can he or she bring to the table to better understand these crucial dimensions of contemporary social life? The short answer is none. And the reason is that these factors are causal mechanisms. Causal mechanisms are the object of descriptive sentences, which in turn are the content of descriptive science. According to a widespread conception, law, on the other hand, is a normative domain: It has to do with rules, rights, duties. As Hans Kelsen would say, legal science deals not with what happens in point of fact, but rather with what should happen. Hence, the jurist's specific problem is not that of understanding the world but rather of regulating it. It may be conceded here that there *is* a descriptive element in legal science, an element that (again drawing from Kelsen) consists in formulating *Sollsätze* (ought statements) about the normative content of legal provisions that are binding and enforced. The point, however, is the extent to which this normative content is ultimately relevant in shaping the social

world, or whether it captures something about its essential dynamics. Formalistic legal positivism – a paradigm that has several shortcomings but is still dominant, being the only one that makes the case for law as a distinct and separate science – conceives legal normativity as inherently context-dependent. Jurists, from this perspective, reason not about what should happen *in abstracto* but rather about what should happen given the framework of the legal system. Their rationality is necessarily bounded: Jurists are not moral philosophers. Hence, jurists certainly have a role to play in advising people – including managers, economists, and engineers – about the current legal boundaries within which they must make their practical decisions. But if the solution the legal system provides to a given problem is obsolete, this is nevertheless the legal solution to that problem. In a sense, it is this problem that gives point to the whole antiformalist project in legal theory, whose central tenet can briefly be summarised thus: Let us make it so that, through free and creative judicial activity, the law can adapt to new social circumstances and their underlying causal mechanisms. But then the deep rationale of legal positivism comes back into play: If we espouse the antiformalistic perspective, what difference is there between legal science and an exercise in moral arbitrariness on the part of the judiciary? So my student's dilemma is in large part the dilemma that jurisprudence has faced since the second half of 19th century. Should a jurist run on naïve, untested intuitions about what is relevant or be a specialist in something that quickly becomes irrelevant or patently obsolete? This 'should,' incidentally, is somewhat ambiguous: It can point to a moral problem or to an epistemic one. Is a jurist morally entitled to apply the result of arbitrary assumptions? On the other hand, which alternative in the aforementioned dilemma should a jurist choose to offer worthwhile knowledge? Morally speaking, the answer of course depends on the moral paradigm that we assume: Perhaps in a deontological framework, obsolescence should be preferred over arbitrariness; in a consequentialist one, perhaps the inverse is the case. From an epistemic point of view, however, this is a genuine dilemma – one that seems to be crucial for the future of legal science.

One thing is certain, and this takes us back to legal education. Even if jurists will never be specialists in the causal factors shaping the social world - the economic, technological, and psycho-sociological factors - they should consider it an important part of their knowledge to at least acquaint themselves with these factors, so as to be able to understand how the law, both judge-made and statutory, ought to be adapted to changing circumstances and be updated accordingly. To be sure, jurists will never be economists, sociologists, psychologists, or computer scientists, but they should not neglect to consider these kinds of expertise. Rather, they should actively engage with them, familiarizing themselves with the problems at stake and the methodologies they use: In this sense, the future of legal studies and of legal training can be said to rest on the need for them to develop on a much more interdisciplinary basis than is currently the case. That is the basic

premise behind Marco Brigaglia's book *Potere* and where his investigation enters the picture.

III. Brigaglia on Foucault Concerning Power

In some recent work, Brigaglia offers valuable insights arguing for the need to reframe our theoretical analysis of legal reasoning in light of contemporary cognitive science.[2] Causality, he argues, is not separate from normativity. Rather, causal factors connected with our cognitive framework shape the way in which normativity, and legal normativity in particular, works. This is an important way to attack the jurist's dilemma at a very deep theoretical level: Not only is normative reasoning made possible by causal forces – as all reasoning and all cognitive processes are – but these forces play a role in determining its outcome, for which reason a jurist should be mindful of them.

In *Potere*, Brigaglia addresses all these questions by bringing Foucault's thinking to bear on the matter. Perhaps no one has been more perceptive and compelling than Foucault in highlighting the limits of the legal way of thinking, especially when it comes to understanding power. Jurists understand power as a rule-based notion – the result of a power-conferring norm, of authority in a normative sense. Foucault, on the other hand, shows that power is a much broader notion, and that its content depends on causality: It is the social phenomenon by which people's behavior is influenced by the intentions of others. Next to normative power, other kinds of power exist that are not normative in nature, spanning from charismatic power to behavioral manipulation. Explaining power is, therefore, a problem that specifically brings the jurist's dilemma back into the picture: Should I restrict my knowledge to normative, rule-bound power, or should I be cognizant that there are other, much more controlling kinds of power that are not normative in nature? As a jurist, should I ignore the impact of policing by design in computer interfaces or of neuro-marketing, and focus only on explicit and legitimate authority?

Brigaglia makes explicit the distinction between two conceptions of power in Foucault: an ultra-radical conception (*concezione ultra-radicale*) and a pragmatic one (*concezione pragmatica*).[3] On the ultra-radical conception, power is always the outcome of a strategy of domination: It follows that for a proper understanding of society, we need to unveil the strategic agenda that powerful, unseen actors advance in order to manipulate social behavior. The pragmatic conception, on

[2] See in particular, apart from *Potere*: M. Brigaglia, 'Genealogia della normatività: La normatività come controllo' *Diritto e Questioni Pubbliche*, 18, 1, 59-103 (2018); cf also B. Celano, 'Ragionamento giuridico, particolarismo: In difesa di un approccio psicologistico' *Rivista di Filosofia del diritto*, 2, 317-343 (2017); M. Brigaglia and B. Celano, 'Rivoluzione cognitivista e teoria del diritto: Un programma di ricerca' *Diritto e Questioni Pubbliche*, 17, 2, 523-535 (2017).

[3] M. Brigaglia, n 1 above, section 1.3.

the other hand, sees power as no more than an ordinary and inevitable social phenomenon: This means that strategies of power are not inherently bad, and we should strive to understand them, not necessarily to counteract them, but to be able to analyse social phenomena. As Brigaglia argues, if Foucault's power is properly analysed, it can serve as an important analytical tool for social science. Brigaglia defines power as intentional influence on the action of others.[4] Depending on how well the intention translates into actual influence, power can come in varying degrees of strength and can, therefore, be quantified. Moreover, since it takes knowledge to shape that context so as to make power more effective, power and knowledge are necessarily connected: The deeper the knowledge of how to effectively influence people's behavior, the stronger and more pervasive the resulting power. What Foucault shows is precisely that power and science are not distinct domains, such that if jurists ignore the relevant sciences, they will narrow their field of vision.

Brigaglia shows how the whole of society, in Foucault's view, can be analysed as a 'network of power' (*rete di poteri*, *réseau de pouvoir*) that consists of 'power circuits' (*circuiti di potere*, an expression used by Brigaglia as a 'unique translation' of the French *dispositifs de pouvoir*): These circuits are plans under which contextual factors are put in place that can cause people to behave in one way or another.[5] While networks of power are the normal machinery of social life, domination and subjection (*dominazione e assoggettamento*, *domination et assujettissement*) are specific cases of networks. Domination happens when power is used to the detriment of the interests of the targets of power and in support of the interests of power-holders: Domination, in other words, happens as a form of privilege. Subjection, on the other hand, is power used to shape the very identity of the targets of power and to inhibit their free will.[6] Even though free will conceived as a subject's complete independence from external influences is impossible, because every subject is built within a background that in large part depends on the social context, Brigaglia's interpretation of Foucault shows how we can still gain an awareness of the way in which we are moulded by context and experiment with new ways of behaving against the backdrop of those inevitable premises. This is what Brigaglia calls 'freedom as authorship' (*libertà-autorialità*): an attitude of nurturing a constant disposition to self-awareness and self-creation (or modification, re-creation) aimed not so much at achieving complete autonomy – which would in fact be impossible – as at reducing our inevitable subjection to power circuits.[7]

Brigaglia very clearly identifies three kinds of power circuits in Foucault: normative, disciplinary, and governmental. In this explanation, we can see at

[4] ibid, section 2.1.
[5] ibid, section 3.3.
[6] ibid, section 3.4.
[7] ibid, section 4.5.

work Brigaglia's effort to combine analytical clarity in defining concepts with explanatory tools drawn from contemporary cognitive psychology. In particular, in order to clarify the logic and cognition behind normative power, Brigaglia introduces the so-called 'dual process' theory of decision-making developed, among others, by Daniel Kahneman, who describes human decisions as the outcome of an interaction between a System 1 of fast, automatic, unconscious reaction and a System 2 of slow, rational, and explicit thinking and processing.[8] Normative power is the kind of power circuit in which jurists specialise - so much so that Foucault qualifies these circuits as 'legal' (calling them *dispositifs juridico-légaux*) – and this normative power, Brigaglia explains, is the ability to shape the behaviour of others by laying down rules that are communicated to them. These rules – stating how we should act – can have meta-rules stating how important and entrenched those direct rules are. But the important point is that they are all processed in the slow and deliberate manner of System 2: They engage our working memory, which inhibits automatic reaction. Brigaglia can accordingly explain on cognitive grounds the thesis that Foucault expounds about the 'weakness' or ineffectual nature of normative power: Slow and explicit processing of information is extremely demanding, requiring an intensive use of cognitive resources, and this cognitive load means that, under normal circumstances, we tend to respond by reverting to automatic patterns, rather than consciously processing the rules, all the more so since our disposition to reason decreases whenever stress, as well physical and mental effort, increases (a phenomenon called 'ego depletion').[9] In Brigaglia's reconstruction, if disciplinary and governmental power circuits are typically more effective than normative ones, the reason is that they depend not on System 2 but on System 1. In the case of disciplinary power, this latter system is formed by way of a sort of behavioral engineering, a process through which individuals are conditioned to behave in a blind and automatic way by repetition, imitation, monitoring, and constant reinforcement. Here, power does not go through the rational decision-making process but moulds the background against which the unconscious, automatic process works, thereby achieving the desired effect in a way that is easy for agents to repeat *ad libitum*.[10] Governmental power likewise rests on automatic processes but does so drawing on already existing behavioral dispositions rather than trying to influence them: Foucault argues that this kind of power emerged from the crisis of the discipline-centred government typical of the 16th – and mid-17th – century 'police state' and was at the core of the 'invisible hand market' ideology, thus revealing a deep connection that governmental (as opposed to disciplinary) power circuits bear to liberal views. Brigaglia elaborates on this analysis by conjecturing that governmental power is analogous to Richard Thaler and Cass Sunstein's 'nudging' which is indeed based on a 'gentle' manipulation

[8] See D. Kahneman, *Thinking, Fast and Slow* (London: Penguin, 2011).
[9] M. Brigaglia, n 1 above, 207-210.
[10] ibid, section 6.1.4.

of the already established architecture of individual choices.[11] The cognitive machinery that Brigaglia deploys here to analyze Foucault's view is also helpful in making sense of the somewhat allusive and mysterious notion of 'bio-power' (*bio-potere*, *bio-pouvoir*).[12] Bio-power, as Brigaglia analyses it, consists in the ability to influence people's behavior by shaping not their reflective rational choice-making under System 2 but their non-reflective, automatic System 1, through which an immediate reactive response is triggered.

Brigaglia shows at length how the heuristic power of Foucault's view can be brought to bear on legal theory. In a discussion that provides much food for thought for anyone concerned about the limits of legal knowledge, Brigaglia identifies three limits of traditional legal theory.[13] The first lies in a fetishism of adjudication and a complete underestimation of administrative processes, which instead deserve to be examined theoretically in view of the key role they play in shaping the contexts in which decisions are made. The second lies in an exclusive focus on the rational aspect of decision-making, and hence on the justification of decisions rather than on their formation. In the consequences that flow from this exclusive focus lies the third limit of traditional legal theory: its overcommitment to logical methods of analysis and its disregard of psychological tools when it comes to understanding the way humans, and hence judges, make decisions. In this way, Brigaglia lays out a cognitive framework within which to understand Foucault, and, by way of Foucault, to show how cognitive science can provide valuable insights in solving political and legal problems.

IV. Three Layers of Institutional Power

Before elaborating on some of the themes and concepts introduced in Brigaglia's discussion of Foucault, I'd like to make explicit why I think this work deserves careful attention. Brigaglia's analysis is remarkably impressive in depth and breadth, coupling a thorough knowledge of legal theory with a broad, interdisciplinary understanding of the cognitive-psychological underpinnings of decision-making, while offering an encompassing account of Foucault that draws on the most authoritative secondary literature on his work. As befits a scholar formed in the tradition of the Palermo school of analytic legal philosophy, Brigaglia is so clear in singling out the most important conceptual elements of Foucault's work and in showing how they connect to form a larger picture that the outcome seems almost effortless, concealing the painstaking work that needs to go into

[11] ibid, section 6.2.2; see R.H. Thaler and C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven and London: Yale University Press, 2008). Brigaglia very helpfully also makes the connection between governmental power and the area of study referred to as behavioral law and economics: M. Brigaglia, n 1 above, 292; see C. Sunstein, *Behavioural Law and Economics* (Cambridge: Cambridge University Press, 2000).

[12] M. Brigaglia, n 1 above, section 6.3.

[13] ibid, section 8.2.

any such enterprise. In systematizing the main elements of power in Foucault – the definition of power and its main conceptual elements; the concepts of network of power and power circuits; the relation between power, domination, and subjection – Brigaglia not only gives us a compelling account deserving a permanent place in the literature on Foucault, but also offers a useful conceptual reconstruction for social theory and legal theory in general. This is analytic jurisprudence at its best, and even more importantly this is the kind of analytic jurisprudence that is helpful for legal scholars and legal studies teachers.

Drawing on *Potere*, I saw how I might help my perplexed and disheartened student. Perhaps I could suggest that his faith in the ability of law to guide action is not misplaced, but that it is only one part of the overall picture. Power can take many forms, and some of these can be more effective than power in the strictly legal sense, since they are built on cognitive structures that run deeper than formal power and act mostly unseen. This is not a reason to lose heart, however, because even though we cannot exercise complete freedom of will and be in a mode where we are constantly reflecting on our own behavior, we can exercise freedom as a disposition to be self-aware and devoted to constructing our own selves – an attitude that is worth cultivating and a virtue that lawyers ought to defend and foster. Jurists should be alert to the biological and psychological determinants of human decision-making and how these forces can shape the institutional context, primarily in judicial decision-making and in framing the ideal human subjects for which they draft laws. To this end, jurists would profit from working with psychologists and behavioral economists, and the understanding they can derive from this kind of cross-disciplinary work ought to be recognised as an integral part of the jurist's education. The same understanding would also enable jurists to see freedom, self-awareness, reflection, and the transparency of power as virtues and as basic normative principles to be upheld and practiced. So, perhaps, I would suggest to my student that he should go deeper into a study of psychology and economics, but also that he should not shy away from being a little bit more of a philosopher.

However, I would also advise my student to exercise care and stay true to his rigorous legal education when inquiring into social power, because this notion can trade precision for an illusion of explanatory power. As mentioned, Brigaglia defines power as the ability to intentionally influence the behavior of other people, or as the exercise of such an ability, arguing that once Foucault's conception of power is understood in the 'pragmatic' sense previously discussed, it can serve as an important heuristic tool.[14] My thesis, which is meant to qualify Brigaglia's conclusion, will be that the heuristic value of such a pragmatic conception can be diminished by the vagueness of some phenomena that Foucault traces to circuits of power, and in particular to governmental power. My argument will proceed as follows: I will first distinguish three ontological layers of institutions – institutional,

[14] M. Brigaglia, n 1 above, 21, 311-318.

meta-institutional, and para-institutional – which map onto three corresponding kinds of power; I will then connect Foucault's (and Brigaglia's) governmental power to para-institutional power, showing that this kind of power partakes of an inherent vagueness; finally, I will conclude that this vagueness can dilute the heuristic value of the concept of governmental power.

I have argued in previous works that the ontology of an institution can be fruitfully analyzed as an interlocking play of three metaphysically connected layers: an institutional, a meta-institutional, and a para-institutional layer.[15] The institutional layer comprises all the rules an institution consists of, be they authoritative or customary, regulative or constitutive. The meta-institutional layer provides the conceptual background – the broader and deeper social practice in which the institution is embedded, giving it its overall purpose and meaning. The para-institutional layer includes all the features of the institution that depend not on its actual rules but on the way these rules are practiced in a given social context.

This distinction, so stated, is quite abstract and may even seem obscure, but an example will clarify. Consider a game, such as chess or football. This game could be said to consist of – and be conceptually constituted by – rules. In the case of chess, there are constitutive rules that dictate how the chess pieces are to be arranged on the chessboard, how they can be moved, and what their role is in the game. In the case of football, the rules define the number of players, what the players can do, the way a goal is scored, and so on. Legal institutions are similarly defined by rules. Rules define, for example, how a specific tax is to be assessed, when it is due, who is subject to it, and so on, and in so doing, these rules constitute a specific institutional concept, say, the concept 'IRPEF' (short for *Imposta sul Reddito delle Persone Fisiche*) – Italy's personal income tax.

It would be pointless to abide by the rules of chess or football without knowing what competitive game-playing is, and impossible to understand IRPEF if we did not know what a tax is for, or what function taxation serves in our political community. The overall institution constituted by rules presupposes a deeper background, which clarifies its teleology and basic values. Some of this background can be made explicit (the duty to pay taxes in proportion to income is codified in Art 53 of the Italian Constitution), some is simply taken for granted (the very notion of a tax is presupposed by Art 53, just as no rulebook explains what game-playing is in laying out the basic rules of the game). Some concepts that are highly relevant for the institution are not constituted by the rules but rather presupposed: the rules of chess define how you can checkmate but do not explain what it means to win in a competitive game, just as Art 2 of Decreto del Presidente della Repubblica no 917 of 22 December 1986 defines who is subject

[15] See C. Roversi, 'Conceptualizing Institutions' *Phenomenology and the Cognitive Sciences*, 13, 1, 201-215; Id, 'Constitutive Rules and the Internal Point of View' *Argumenta: Journal of Analytic Philosophy*, 4, 139-156; Id, 'A Three-dimensional Ontology of Customs', in E. Frezet, M. Goetzmann, and L. Mason eds., *Spaces of Law and Custom* (London: Routledge, 2021).

to IRPEF but does not define what it is to be subject to duties under the law. These concepts – the overall conceptual background the institution presupposes to have a meaning – make up the meta-institutional layer: They are 'meta' in the sense that they define what might be described as the basic grammar of our social context and legal practice.[16]

Also distinct from the institutional layer is the para-institutional layer, which includes phenomena that are made possible not by an institution's structural features but by the way an institution is practiced. Consider, for example, the fact that in chess there is a slight first-move advantage or that the queen's gambit falls into two main types depending on the opponent's response, or again that football teams in a 5-3-2 formation typically rely on a counterattack strategy to win: these facts of course require the games' rules to be in place, and would not be possible but for these rules, but they are not constituted by these rules, as is the case with the rule that in chess bishops can move only diagonally or that in football a point is scored when the ball passes a goal line completely. So, because these distinctive facts are not constituted by rules but still depend on its institutional layer as adjuncts, I call them para-institutional, using the prefix para- in the same sense as it is used in terms such as paramedic, paralegal, or paralanguage, namely, as qualifying predicates or entities which in a sense attach to more fundamental entities, and which thereby become relevant for the concrete practice revolving around those foundational entities. Phenomena of this kind are relevant for law as well, and particularly for legal sociology. Consider the fact that (1) there are parliamentary strategies like filibustering, or that (2) there have been governmental practices like reiteration of decrees, or that (3) a perfect two-chamber system can lead to legislative gridlock, or that (4) tax efficiency is easier when a business is based on intangible assets, or that (5) a receipt-lottery scheme reduces tax evasion: These facts are all made possible by rules but not strictly constituted by them, and so are para-institutional rather than strictly institutional.

Para-institutional facts are all an effect of the institution's rules governing social behavior but can be explained in different ways depending on how they fit into the institutional scheme. Let us consider the examples just given. Examples (1) and (2) are strategies, and so are behavioral regularities based on prudential reasoning, but in a sense these strategies are not intended effects of the rules but, quite the contrary, are a distortion of the kind of behavior the rules are meant to foster. Let us, therefore, classify these ill or adverse effects as 'bad.' Examples (3), (4), and (5) are features of an institutional practice, but like (1) and (2), (3) and

[16] The distinction between an institution conceived as a system of constitutive rules and its broader meaning as a practice was first introduced by Hubert Schwyzer: see H. Schwyzer, 'Rules and Practices' *The Philosophical Review*, 78, 451-467 (1969). On this distinction see also G. Lorini, *Dimensioni giuridiche dell'istituzionale* (Padova: CEDAM, 2000), 263; A. Marmor, *Social Conventions: From Language to Law* (Princeton: Princeton University Press, 2009). On meta-institutional concepts see also G. Lorini, 'Meta-institutional Concepts: A New Category for Social Ontology' *Rivista di Estetica*, 54, 127-139 (2014).

(4) are based on strategic or prudential reasoning and are associated with behavioral regularities: The strategic behavior of parliamentarians in a perfect two-chamber system will frequently lead to an impasse, and the strategic behavior of businesspeople leads to a financialization of assets. One could question whether these, too, are 'bad' strategies or 'good' ones, so I will simply qualify them as strategies whose effect is 'neutral.' Example (5) is peculiar: The fact that a receipt-lottery scheme reduces tax evasion is the outcome of a behavioral regularity, but this is certainly a 'good' effect, namely, part of the reason the institution was framed in this way: Joseph Raz would place (5) – but not (1) through (4) – among the indirect functions of legal norms.[17] Moreover, one could question whether this effect depends on prudential reasoning: It seems to be instead based on behavioral dispositions and statistical illusions, because people will request receipt in view of a payoff that is highly unlikely.

Diverse as they may be, all these para-institutional facts depend on what Amedeo G. Conte calls 'nomotropic behavior,' namely, behavior that is not an instance of rule-following but is carried out in light of the rule, that is, given the context created by the rule. An example of 'nomotropism' given by Conte is that of the thief described by Max Weber – someone who does not abide by the law of property but nonetheless acts in light of that law when concealing the goods they have stolen.[18] Another example, drawn from the literature on urban planning, is unauthorized settlements 'built in one night' to make demolition less likely in some legal contexts.[19] As is clear, neither of these behaviors is an instance of rule-following, but both are carried out bearing the institution's rules in mind: They emerge from institutional practice as side effects. Like (1) and (2), these are 'bad effects'; but the concept of nomotropism applies just as well to (3) and (4) as 'neutral' effects and to (5) as 'good' ones, thereby capturing the basic phenomenon on which para-institutional facts depend. What I am proposing is that this nomotropic behavior – be it 'good,' 'neutral,' or 'bad' – is part of the ontology of an institution, that is, part of what that is in a given social context. To summarize: an institution is explained not simply by its rules but also by its axiological and teleological background and by its social effects depending on nomotropic behaviors, whether or not these are coherent with the institution's purpose. The ontology of an institution is the outcome of three, interlocking layers: meta-institutional, institutional, and para-institutional.

With that as background, we can now go back to the main question of power. For, as I will argue, those three interlocking layers provide the foundation on which rest three corresponding kinds of institutional power. Power can be exercised at

[17] See J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), chapter 9.

[18] See A.G. Conte, *Sociologia filosofica del diritto* (Torino: Giappichelli, 2011), 47

[19] See F. Chiodelli and S. Moroni, 'The Complex Nexus between Informality and the Law: Reconsidering Unauthorised Settlements in Light of the Concept of Nomotropism' *Geoforum* 51, 161, 164 (2014).

each of the three levels of institutional ontology. Institutional power is typically rule-constituted. Examples of institutional power are the power to enact, apply, and enforce laws or to appoint senators for life. These powers come with institutional duties and other rights, as well as with specific roles and statuses created by the institution in question. Meta-institutional power, for its part, depends not on the institution's rules but on an axiological and teleological background, that is, the broader practice in which that particular institution is embedded. When games are played in informal contexts, a player or a team has the power to quit whenever they want: This is an activity that people essentially engage in as leisure. Another example of meta-institutional power is the power a player has to propose changing, adapting, or simplifying the rules or even to propose 'house rules,' such as time limits in given contexts: if the players agree, this house rule can become part of the game in that context. Unlike institutional power, meta-institutional power can be applied to different institutions, provided that they all belong to the same meta-institutional background: In informal contexts, I can quit any match – chess, football, baseball, tic-tac-toe, or what have you. One interesting question is what meta-institutional powers, if any, there are in law. This is a difficult question that cannot be dealt with here.

What is most interesting for us in this connection, and what I will be dealing with in what follows, is the question of para-institutional power. Given that para-institutional facts depend on the way an institution affects nomotropic behavior, para-institutional power can be understood as the capacity to prompt a specific kind of nomotropic behavior in light of an institution's rule-constituted powers or statuses. Just like the category of para-institutional facts, that of para-institutional power encompasses different kinds of phenomena. Let me give some examples. Professors have several para-institutional powers connected with their institutional status, among which are (1) the power to have students work with them on the activities they introduce in class (particularly before an exam) or (2) the power to influence their students' beliefs in virtue of their role. Examples of para-institutional power in the legal domain include (3) policemen on duty influencing people's behavior by their mere presence; (4) tax deductions for home improvements prompting homeowners to make earthquake-safety upgrades to their homes; (5), once more, receipt lotteries having a role in reducing tax evasion; and (6) safer driving as a result of regulations requiring that zebra crossings be painted three-dimensionally. All these are instances of causal capacities to influence human behavior in virtue of institutional legal roles. A first, necessary clarification regards the causal mechanism that underlies the capacity. In some cases, para-institutional power is based on reasoning, and in particular prudential reasoning, as in cases (1), (3), (4), and (5): Here, it is assumed that people take account of the institutional powers connected with a given status and that they behave accordingly to maximize their benefits and minimize their costs. In other cases, the mechanism is less reflective and more automatic, as in case (2) or (6), where behavioral dispositions

are elicited by way of a sort of cognitive or perceptive suggestion. Let us then introduce a distinction between transparent and opaque para-institutional power, but it bears mentioning from the outset that this is more a matter of degree than a dichotomy: Is fear of sanction, as in (3), a prudential calculus or a behavioral reflex attitude? Is hope for a reward in a lottery, as in (5), rational or merely reactive, a kind of compulsion? Rather than positing a clear-cut distinction between transparent and opaque para-institutional powers, it makes more sense to speak of these powers as being more or less transparent or opaque.

Another distinction worth making is that between direct vs indirect para-institutional power. In (1), (2), and (3), causal influence on people's behavior is exercised directly, simply in virtue of someone having a given status endowed with normative powers and the factual capacity to exercise these powers. On the other hand, (4), (5), and (6) all involve influence by way of lawmaking power: A legislature can influence people's behavior not directly, by virtue of its being a lawmaking body, but indirectly, by way of its enacted laws. If we are to capture this distinction between direct vs. indirect para-institutional power, we need to appreciate that nomotropic behavior can be twofold: it can be explained in light of a status's constitutive rules or in light of the regulative rules enacted by people with that status. For example, when students work collaboratively in class activities, they are acting in light of the rules constituting the status of professors and giving them the power to give grades at exams. This is, therefore, a case of direct para-institutional power. On the other hand, when students attend classes regularly, they may well be acting in light of a rule the professor has introduced requiring extended reading lists for nonattending students: This is indirect para-institutional power.

If we overlay the distinctions between transparent vs. opaque and direct vs. indirect para-institutional power, we can introduce a taxonomy under which to impart some order among the previous examples. Case (1) exemplifies direct and transparent para-institutional power: Students are collaborative and kind to the professor because they are acting prudentially in light of the professor's institutional power to give grades (of course, this is a rather gloomy view of students, and I trust it is inaccurate). Case (2) exemplifies direct and opaque para-institutional power, because students here do not make a rational calculus but fall under the professor's aura of authority. Case (3) can be interpreted as exemplifying a direct para-institutional power falling somewhere between transparent and opaque: people adjust their behavior nomotropically in view of the policemen' capacity to react and enforce the law, and this can be seen both as a rational calculus or simply as a fear-induced gut reaction. Cases (4), (5), and (6) are all instances of indirect para-institutional power, because here people act nomotropically not in light of the institutionally empowered status but in light of the rules enacted by officials under that status. Case (4) is transparent, because people make a cost-efficiency calculus about tax deductions, whereas (6) is opaque, because car

drivers react to three-dimensional zebra crossings differently than to ordinary, flat ones. Case (5), like case (3), falls midway between transparent and opaque para-institutional power, because, as noted, it is not clear whether hoping to win a lottery is a rational calculus or simply an automatic, reflex attitude. An interesting question, though one I cannot deal with here, would be where in this framework we might locate 'nudge-like' regulations.

Let me come back now to Brigaglia's distinction between normative, disciplinary, and governmental power, a distinction Brigaglia builds in light of Foucault. I should more precisely trace out the relation between these three kinds and those I have identified (institutional, meta-institutional, and para-institutional). Normative power can be naturally mapped onto institutional, rule-based power, and in this sense it is a small wonder that Foucault should have called it 'juridico-legal'. But even disciplinary power can be institutional: A teacher's power to compel students to behave as instructed is certainly constituted by institutional rules, as is a military officer's power to shape the conduct of his rank and file under duty. Normative power could also be classified as meta-institutional if it hinges on customary rules entrenched in the deeper conventions of society. Thus, for example, Kelsen's idea that a constituent assembly's legitimate power must be presupposed can be seen as a way to construe a legal system's meta-institutional power as a kind of normative power. On a different construal, meta-institutional power can also be disciplinary, as is suggested by John Austin's concept of a 'habit of obedience' as the background against which sovereignty is exercised: This concept points to a disciplinary understanding of the meta-institutional background of law. Para-institutional power is instead by its very nature governmental. As discussed, Foucault argued that governmental power manifests as an ability to influence people's behavior, to which end it is necessary to know in advance how people are 'naturally' inclined to behave, for it is on the basis of this knowledge that they can be manipulated: This is very much the stuff of para-institutional power as the capacity to predict nomotropic behavior and frame the institution's rules accordingly. In example (5) above (the receipt-lottery example) para-institutional power is the power to motivate people to ask for receipts at checkout when they go to a coffee shop, thereby forcing these establishments to keep an accurate record of their transactions, and consequently making it more difficult for them to evade taxes. This is a power that seizes on the statistical illusion that predisposes people to hope in an unlikely outcome (here, winning a lottery) and to act accordingly: It is, therefore, a motivational power grounded in knowledge, because predicting nomotropic behavior requires a working knowledge of sociological factors, psychological motives, and statistical generalizations, and this very closely resembles Foucault's knowledge-based power as described by Brigaglia. As Brigaglia notes, governmental power in its soft form is based on nudging, and that goes for the receipt-lottery case as well.

V. The Vagueness of Social Power (and the Revenge of Legal Theory)

I can now state my point, that will focus in particular on governmental/para-institutional power. If the connection between governmental power and para-institutional power holds, then we will have to reassess the heuristic value of Foucault's notion of power, or at least this value comes out diminished relative to what Brigaglia argues it to be. That is because, whereas institutional power is a clearly defined entity – it is constituted by rules, and these rules are the explicit, formal rules of the institution – meta-institutional and para-institutional power are inherently vague. Meta-institutional power is vague because the rules, conventions, and presuppositions on which it is based are themselves vague, implicit, and nontransparent: They are part of the background, and for the most part they are taken for granted. Para-institutional power, for its part, is vague because the domain of nomotropic behavior is very broad, and it is not always clear whether or not a given institution's effects on nomotropic behavior are intentional, particularly when these effects are considered retrospectively (as they are in Foucault).

Let me elaborate on the receipt-lottery example and put some fiction into it to explain what I have in mind. Suppose that receipt lotteries prove to be highly motivating: The idea of participating in lotteries by sipping a morning coffee becomes a trend, supported by social-media hype, and people who would previously have had their coffee at home now begin to have it at their local coffee shop instead. There are two effects of this behavioral trend: (a) The income earned by coffee shops surges to a record high, while (b) tax evasion on that income drops to zero. Both are para-institutional facts, in that they are not contained in the institution's rules on social behavior but are nonetheless incident to those rules as an effect. But do they both involve power? In both cases, rules certainly had an essential role to play in getting people to behave as they did: Their behavior was in this sense nomotropic relative to the institution in question, for it came as a consequence of an institutional setup. But then we have to ask: Was that effect or influence deliberate and intended? As mentioned, Brigaglia provides a bare-bones notion of Foucault's power in terms of 'intentional influence.' Receipt lotteries were explicitly introduced to reduce tax evasion, so it is reasonable to assume that (b) depends on a kind of power. But it is equally reasonable to argue that increasing income from morning breakfast was not an intended effect – or at least it was not the primary intention – such that (a) seems not to be the effect of a kind of power. But the question is: How do we know this? Effect (a) is something a crafty politician could claim for themselves when elections come, or, more imaginatively, it could be framed as the intended effect of a conspiracy:

> 'What the government really wanted to do was to get people to drink more coffee at the coffee shop so as to support makers of professional espresso machines!'

Where should we draw the line between a researched, empirically grounded

explanation of what happened and a retrospective reconstruction in light of personal interests and a strong confirmation bias? And if it is not possible to draw this line in a reliable way, how can this notion of power be said to have genuine heuristic value? Nomotropism and para-institutional behavior are very broad phenomena: If there is no reliable way to avoid collapsing the effects of governmental power into simple nomotropic behavior, the very idea of power offers no analytic gain here.

Brigaglia concedes that Foucault can often be misinterpreted as falling into various kinds of fallacies concerning intentions. This is how an enthusiastic Foucauldian might read all nomotropic, para-institutional effects: In the receipt-lottery scenario, the dual effect of reducing tax evasion while increasing income from morning breakfasters might thus be understood as intentional. However, Brigaglia also cautions us against falling into the pitfall of ascribing an overly crude intentionalism to Foucault: This would be 'an uncharitable interpretation of him'.[20] In reality, he argues, Foucault assumes 'an objectivistic concept of circuits of power used with an intentionalistic focus'.[21] This, in his view, is helpful because in this way we do not assume that when Foucault describes crucial power circuits, he was thinking of these as intentional strategies (ibid). In this way, we can 'recalibrate' Foucault's boldest hypotheses by arguing that intentional strategies may have played a contributing role in power circuits without being a *conditio sine qua non* of their existence.[22]

Although this no doubt offers a deep and powerful interpretation of Foucault, it is not clear to me how it solves the problem of vagueness. Did the lawmakers intend to increase income from the morning-breakfast crowd? Was this part of a broad governmental power circuit to increase gross national product in order to bring down public debt? According to Brigaglia's analysis, Foucault would argue that this was an objective power circuit: These policies made it possible to reduce public debt by getting people to ask for receipts at the cash register. And he could avoid the intentionalistic fallacy by stating that intentionality played a contributing role in this mechanism. But the problem is, intentionality to what end? Are we talking about an intention to motivate people to ask for receipts or an intention to get them to flock to their local café for breakfast, or both?

The problem of vagueness here is in the first place epistemic: Under this reading, it would not be clear by what method we should identify real power circuits as distinguished from mere collateral effects. Brigaglia draws a distinction between analysis and genealogy in Foucault's methodology, arguing that the genealogical method plays the more important role in his work. Hence, identifying a power circuit means reconstructing it historically and formulating hypotheses – these will of course be liable to falsification – that can also play a

[20] M. Brigaglia, n 1 above, 114. My translation.
[21] ibid, 113. My translation.
[22] ibid, 116.

role in placing contemporary social mechanisms under critical scrutiny.[23] It seems to me that the genealogical method is particularly prone to intentionalistic fallacies, because the interpreter is always arguing *ex post* and much later in time: On a genealogical approach, it becomes even more difficult to distinguish the kind of nomotropic behavior that is useful for power structures but unintended from deliberately devised strategies.

However, para-institutional governmental power can also entail a vagueness that is not just epistemic but also ontological. Jurists are very much aware of the problem of identifying the intentionality that drives the lawmaking process, so much so that some legal theorists altogether deny the concept of legislative intent.[24] Moreover, given Foucault's focus on administrative processes – a field that Brigaglia rightly identifies as being particularly neglected by legal theorists, but whose deliberative processes are much more obscure – the problem of assessing intentionality can become even more difficult to solve. And in any case, even if it were possible to identify all of the intentions that went into drafting provisions and regulations, the very content of those intentions could prove to be vague. It could be argued that the most fundamental intention behind receipt lotteries is that of reducing public debt, and that this objective is pursued by both reducing tax evasion and increasing taxes on coffee shops, such that the increased income can be seen as an intentional effect, even if it forms part of a larger strategy. I intend to lower the public debt by reducing tax evasion on income from morning breakfasting; I therefore intentionally motivate people to ask for receipts when paying for their breakfast; in so doing, I am motivating the same people to have breakfast out and hence to bring more business to coffee shops, such that the latter will bring in more income. Did I intend to raise the income of coffee shops owners? Perhaps this was not part of the original strategy, but it is certainly coherent with the general intention of reducing public debt, and it is an outcome of the strategy that I, the legislator, intentionally devised.

Of course this example is for the most part fictitious, but it should be sufficient to show what the problem is with Foucauldian *ex post* reconstructions of power circuits. Para-institutional governmental power gives rise to a problem of ontological vagueness to the extent that the idea of the legislator's intention does. My point is that when intention is worked into a Foucauldian notion of power, the slippery nature of intention can become a dangerous slippery slope for any kind of social theory, which in seeking a genuine explanation may in this way end up finding it in a conspiracy theory. Now, jurists and legal theorists are very familiar with the risk of hypostatizing intentions, and so it seems that legal theory in the end has something to teach Foucault (and social theory in general). I am quite confident that Brigaglia would agree with me on this point, given that

[23] ibid, 147–148.

[24] For example, thinkers as diverse as Ronald Dworkin and Jeremy Waldron: see on this R. Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), chapter 2.

in his book he has shown how the methodological attitude of a rigorous and insightful analytic jurisprudence can illuminate the pages of a great thinker.

VII. Conclusion

We started out with the distinction between normative and causal power, and with the traditional, legal-positivistic, and normativistic conception of jurists as masters of the former but not of the latter. In this paper, I have tried to show that this distinction, though conceptually useful, may hide the fact that in the real life of institutions normative powers have causal effects, and hence that the two kinds of power are inherently intertwined. The conclusion of my argument is that Foucault's conception of power – as analysed by Brigaglia – finds significant support from institutional ontology in showing that legal theory and legal science should broaden their focus when selecting relevant instances of power. When broadening this focus, however, jurists can teach social scientists to put up some boundaries by reflecting on the concept of intention and on the risk of hypostatizing it; otherwise the concept of power risks becoming too vague and opening the door for all manner of conspiracy theories and intentionalistic fallacies.

Essays

Legal Challenges of AI Supported Legal Services: Bridging Principles and Markets

Giulia Schneider*

Abstract

In light of the persisting regulatory gaps in the field of artificial intelligence-driven legal services, this study questions which are the legal tools that are relevant to govern the current expansion of the correspondent market in a way that is consistent with ethical declarations.

We move from the acknowledgment that machine learning models are being increasingly applied to textual data contained in legal materials for the prediction of outcomes regarding the legal position of citizens, in terms, for example, of discovery review, contract analytics and legal research. In this respect, the analysis gives account of ongoing transformations in the market of Artificial Intellinge (AI)-supported legal services, with the aim of rooting in the market reality the relevant regulatory framework. In our understanding, the analysis related to the risks connected to the employment of AI-driven legal decision-making tools delivered by the market triggers the question whether the applicable ethical-legal framework provides sufficient tools for addressing the current developments in the market of AI-assisted legal services or whether additional sector-specific solutions need to be introduced.

The analysis identifies a gap it intends to fill between the blooming market reality and the ethical and legal perspectives.

The uncertainties stemming from a vague ethical and legal framework must be overcome so as to better operationalise and protect fundamental ethical values and fundamental rights in the market of artificial intelligence-driven legal services. Against this backdrop, the study demonstrates how possible solutions against ethics/market mismatches are provided by the legal system, which can work as a bridge vehiculating into the market practice of AI-based legal decision-making tools declared ethical principles, while preventing eventual chilling effects on the market. It thus shows how these need to be adequately matched and integrated with legal design requirements to maximise the resulting positive synergies within the market and thus avoid risks of ethical dilution. In this respect, a layered regulatory regime is proposed for artificial intelligence-driven legal services, of both public and private destination. This framework is meant to operationalise general ethical values and fundamental legal liberties within the more specific regulatory framework given by the European data protection, the Open Data, the European competition framework and the European Commission's newly proposed rules for artificial intelligence.

I. Introduction

The penetration of artificial intelligence-based tools in the legal sector is

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moving forward, further accelerated by the exceptional needs brought about by the pandemic.[1] As a result of the occurring digitisation patterns, some strand of the literature has declared the end of the law, as we know it.[2] Although this statement may sound a drastic conclusion, it is certainly a provocation to be taken seriously.

Promoters[3] of these technologies support these developments, expecting far better access to justice, previously constrained by the prohibitive cost of legal advice[4] and highlighting inclusion effects on those strands of the population that would be ordinarily left outside the privilege of legal consultancy.[5] The major advantages that are identified are related to the lowering of operating expenses for legal research, time savings, and, as a result of these, the creation of greater opportunities of meeting and supporting citizens' and clients' needs. Moreover, the probabilistic computation of litigation success could determine a reduction in the cases that go to court.[6]

It is worth noting from the outset that the European Commisson for the Efficiency of Justice (CEPEJ)[7] has expressed concerns on these tools and France has already outlawed some of them, for instance, banning and punishing the use of predictive litigation Artificial Intelligence (AI) for the purpose or effect of assessing, analysing, comparing or predicting judges' real or supposed professional practices.[8] Similarly, the proposed AI Act[9] adopts a deeply asymmetric approach,

[1] For an overview see A.F. Mainini, 'Il futuro immediato della Giustizia dopo il 12 maggio 2020 - Gli effetti della crisi sanitaria determinata dalla pandemia Covid-19' (12 May 2020), available at https://tinyurl.com/3jupb7e7 (last visited 30 June 2022). See even before the Covid-19 outbreak, the considerations by B. Monarch, 'The Promise and Perils of Legal Technology in a Period of Economic Uncertainty' (8 May 2015), available at https://tinyurl.com/5n82jwxz (last visited 30 June 2022).

[2] X. Labbée, 'Robot. La fin du monde, la fin du droit ou la transition juridique' 2 *Recueil Dalloz*, 78 (2019).

[3] M. Juetten, 'The Future of Legal Technology: It's Not as Scary as Lawyers Think' *Forbes*, available at https://tinyurl.com/3d2py9xv (19 February 2015) (last visited 30 June 2022).

[4] K.N. Kotsogolou, 'Subsumtionsautomat 2.)- Über die (Un-)Möglichkeit einer Algorithmisierung der Rechtserzeugung' *Juristenzeitung*, 451 (2014); M. Engel, 'Erwiderung: Algorithmisierte Rechtsfindung als Juristische Arbeitshilfe' *Juristenzeitung*, 1096 (2014).

[5] M. Fries, 'Man Versus Machine: Using Legal Tech to Optimize the Rule of Law', available at https://tinyurl.com/bdh4mwcx, 8 (2016) (last visited 30 June 2022).

[6] This could thus counterbalance that what some strand of the literature has observed as an excessive optimism regarding litigation outcomes. O. Bar-Gill, 'The Evolution and Persistence of Optimism in Litigation' 22 *Journal of Economics & Organisation*, 490 (2006).

[7] Council of Europe-European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment' 64, 65 (2018).

[8] See Art 33, Loi no 2019- 222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (so-called Justice Reform Act), available at https://tinyurl.com/bdjdf4kw (last visited 30 June 2022). In particular: 'Les données d'identité des magistrats et des membres du greffe ne peuvent faire l'objet d'une réutilisation ayant pour objet ou pour effet d'évaluer, d'analyser, de comparer ou de prédire leurs pratiques professionnelles réelles ou supposées. La violation de cette interdiction est punie des peines prévues aux articles 226-18, 226-24 et 226-31 du code pénal, sans préjudice des mesures et sanctions prévues par la loi no 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés'.

displaying some concerns about the use of AI systems by the judiciary while remaining silent on their use by attorneys or, more generally, other legal decision makers:[10] Annex III of the Proposal for an European Artificial Intelligence Act indeed lists under the high risk tools referred to in Art 6, para 2, systems that are employed in 'administration of justice and democratic processes' defined as 'AI systems that are intended to assist a *judicial authority* in researching and interpreting facts and the law and in applying the law to a concrete set of facts', along with several 'AI systems intended to be used by law enforcement authorities'.[11] While attracting to a stricter regulatory regime those artificial intelligence tools directly used by the judiciary, the Proposal for a Regulation on AI leaves some severe regulatory uncertainties regarding those AI-based legal services that are addressed to the wider array of other private stakeholders active in the processes of legal decision-making, first of all law firms and legal consultant businesses but also independent administrative authorities.

In this way, the Act casts a shadow of suspects only onto the use of AI by public actors as judges and law enforcement authorities.[12] Strangely as it might sound, the same AI systems not used to assist a judicial authority 'in researching and interpreting facts and the law and in applying the law to a concrete set of facts' would not be considered as high risk. In other words, the same tools used by attorneys or a private arbitration centres would not be considered as high risk. The qualification evoked by ref. 40 that

> 'such qualification [as high risk] should not extend, however, to AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation or pseudonymisation of judicial decisions, documents or data, communication between personnel, administrative tasks or allocation of resources'

does not reduce the actual sharp limits only to judicial use of AI. Actually, such a

[9] European Commission, '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 (21 April 2021).

[10] European Commission, 'Annexes to the 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 (21 April 2021).

[11] ibid, Annex III, no 6 and 8, emphasis added.

[12] This is not surprising, since the overall framework of the proposed Artificial Intelligence Act, at least until the recent Council's amendments, judges the use of artificial intelligence tools by public authorities as riskier than that of private players. This is evident in respect to the case of social scoring that has been at first banned by the European Commission only in the hands of public authorities under Art 5, para 1, lett. *c)*, and then banned also in the case of private social scoring under Art Art 5, para 1, lett. *c)* of the Council's version of the proposal. See Council of the European Union, '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 - Presidency compromise text', 2021/0106(COD) (29 November 2021).

limitation in itself creates a number of concerns because it unbalances the tools available to the judiciary versus legal practitioners and potentially creates, within the realm of the private sphere, a significant market unbalance between those professionals that can afford the use of AI systems and those that cannot do it.

In light of the persisting regulatory gaps in the field of artificial intelligence-driven legal services, this study questions which are the legal tools that are relevant to govern the current expansion of the correspondent market in a way that is consistent with ethical declarations. To these ends, it generally intends legal services run by artificial intelligence as every application based on machine learning techniques, which are destined to directly provide or more broadly support the delivery of legal assistance. As known, machine learning enables to predict results based on the identification of statistical patterns within a given datasets.

The analysis moves from the acknowledgment that machine learning models are being increasingly applied to textual data contained in legal materials for the prediction of outcomes regarding the legal position of citizens, in terms, for example, of discovery review, contract analytics and legal research. In this respect, the study gives account of ongoing transformations in the market of AI-supported legal services, with the aim of rooting the relevant regulatory framework in the market reality. In our understanding, the analysis related to the risks connected to the employment of AI-driven legal decision-making tools delivered by the market triggers the question whether the applicable ethical-legal framework provides sufficient tools for addressing the current developments in the market of AI-assisted legal services or whether additional sector-specific solutions need to be introduced.

In this respect, a gap is found between the blooming market reality and the ethical and legal perspectives.

To date, the debate has been harping mostly the tune of ethical constrains. This can be easily derived from documents that have been issued at EU and international level, as the Guidelines on a Trustworthy AI by the European Commission's High Level Expert Group on Artificial Intelligence[13] and, with specific regard to the legal sector, the Council of Europe's European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment.[14]

Also, more general documents, as the recent European Commission's European Strategy for Data (hereafter 'EU strategy for data')[15] and the White Paper on AI,[16]

[13] European Commission-High Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' (8 April 2019), available at https://tinyurl.com/2p8z5dkb (last visited 30 June 2022).

[14] Council of Europe-European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter on the Use of Artificial Intelligence' n 7 above.

[15] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, A European Strategy for Data', COM/2020/66 final, (19 February 2020).

[16] European Commission, 'White Paper on Artificial Intelligence - A European Approach to Excellence and Trust', COM(2020) 65 final (19 February 2020).

place a particular emphasis on the need to consolidate an ethical framework for the employment of artificial intelligence. At national level, the experience of the German Datenethikkommission is a good example to recall.[17] In this landscape, the European Ethical Charter Charter on the Use of Artificial Intelligence in Judicial Systems and their environment is meant to provide a comprehensive guidance to justice professionals in the process of assimilation of artificial intelligence applications within the judicial system.[18]

In order to sharpen the normative strength of ethical declarations, these mentioned documents often rely on the concept of fundamental rights. Yet, most of the concerns expressed within the Charter do not seem to be addressed by the spontaneous drive of market forces nor by the European Union (EU) legislator.

In our opinion, the overemphasis on the ethical concerns while leveraging fundamental rights to define the ethics boundaries of AI in justice administration risks to mix up different levels of normativity, that is the ethical and the legal dimension, where only the latter provides enforceable rules.[19] On the legislative side, since the proposed Regulation on artificial intelligence addresses only the use by the judiciary, there is a high risk of undermining the regulatory needs for the private use of AI system in legal services especially if ethical considerations do not go along with an accurate knowledge of the reality of the developing markets in the legal services domain. At a third level, it seems that from the market side, producers of these AI-driven legal decision-making tools, in their race for reaching the competitive edge, do not take into adequate consideration ethical standards.

It thus appears that the emerging economic and technical reality of new technologies for legal decision making and the theoretical policy debates regarding the legitimacy of such applications are silently developing at parallel but non-communicating levels.

As here argued, the emerging gap between the three realities, that is the politico-ethical, the legislative and the market one, is destined to result in what has been defined in the literature as the phenomenon of 'ethical dilution'[20] or ethical 'washout'.[21] The concrete result of this is the lack of regulatory certainties

[17] See the Ethical Guidelines recently issued by the German Data Ethics Committee, Datenethikkommission, 'Gutachten der Datenethikkommission', available at https://tinyurl.com/y5ra7x3f (last visited 30 June 2022).

[18] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above.

[19] G. Comandé, 'Unfolding the Ethical Component of Trustworthy AI: a Must to Avoid Ethical Dilution' *Annuario di diritto comparato e di studi legislativi*, 39, 62 (2020).

[20] ibid

[21] E. Bietti, 'From Ethics Washing to Ethics Bashing - A View on Tech Ethics From Within Moral Philosophy' *Journal of Social Computing*, 2 (2021). K. Hao, 'In 2020, Let's Stop Ethics Washing and Actually Do Something', available at https://tinyurl.com/5cz9b5bz (last visited 30 June 2022). See also K. Yeung et al, 'AI Governance by Human Rights-Centred Design, Deliberation and Oversight: An End to Ethics Washing', in M. Dubber and F. Pasquale eds, *The Oxford Handbook of AI Ethics* (Oxford: Oxford University Press, 2019), available at https://tinyurl.com/2s4x333b (last visited 30 June 2022). See also B. Wagner, 'Ethics as an Escape From Regulation: From Ethics Washing to Ethics

for stakeholders, which either remain inactive or turn to abuses, directly given by the exploitation of regulatory gaps.[22]

By placing emphasis on the ethical dimension, businesses may be left free to conceal themselves behind compliance with a vague ethical framework, reassuring users, while perpetrating their abuses. At the same time, they expose themselves to the risk of fines and liability actions,[23] causing a spill-over harm to society, as an end effect.[24]

Although these considerations may apply to every AI-driven market sector, the particular area of AI-based legal services is, overall, at risk of a doubled-edged ethical washing outcome, given on the one hand by the fact that ethical declarations do not accurately identify the legal provisions that shall substantiate relevant ethical principles in this specific context, and on the other hand by the fact that current legal provisions applicable to our case – first of all the Proposal for a European Regulation on Artificial Intelligence – are shaped in a way that do not adequately address ethical concerns.

The sensitiveness of the market for legal services requires a prompt realignment between a clear legal and ethical framework and the market practice in the field of AI-driven legal services. Such a realignment is urgently needed to avoid substantial risks for both citizens that are the addressees of AI-driven legal services and legal operators who come to interact with these tools in their legal practice. An unbalanced development of the market for these services might results not only in competitive hurdles and market abuses but also to undermine the basic tenets of the administration of and access to justice.

For these reasons, the uncertainties stemming from a vague ethical and legal framework must be overcome so as to better operationalise and protect fundamental ethical values and fundamental rights in the market of artificial intelligence-driven legal services. Against this backdrop, the analysis demonstrates how possible solutions against ethics/market mismatches are provided by the legal system regulating evolving digital markets in the legal sector. If properly implemented, the rules that govern internal market developments in the field of digital technologies can work as a bridge vehiculating into the market practice of AI-based legal decision-making tools declared ethical principles, while preventing eventual chilling effects on the market.

The perspective of the general framework that is consolidating for the

Shopping?', in E. Bayamlioglu et al eds, *Being Profiled: Cogitas Ergo Sum* (Amsterdam: Amsterdam University Press, 2018), 84, 88.

[22] G. Comandé, n 19 above, 39.

[23] For example, under data protection law. See Arts 82-83 of the General Data Protection Regulation. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 (4 May 2016), hereafter GDPR.

[24] G. Comandè, n 19 above.

regulation of digital markets offers a starting standpoint so as to adequately match and integrate ethical principles with legal design requirements, maximise the resulting positive synergies within the market and thus to avoid risks of ethical dilution. In this respect, the enquiry proposes a layered regulatory regime for artificial intelligence-driven legal services, of both public and private destination. This framework is meant to operationalise general ethical values and fundamental legal liberties within the more specific regulatory framework given by the European data protection, the Open Data, the European competition framework and the European Commission's newly proposed rules for artificial intelligence.[25]

From a methodological standpoint, the proposed integrated approach between ethics and law aims to preserve their respective intrinsic roles without collapsing into a functional overlap. Nonetheless, it spots functional synergies between the high level of ethical and fundamental legal principles and existing market specific rules, so as to objectify general precepts into concretely actionable legal rights.

Under these premises, the study is structured as follows: a first section illustrates the more recent trends in the market of AI-related legal services and recalls applicable ethical principles that have been issued so far at European policy level; the second section detects the risks originating from the misalignment between the two levels; ultimately, the third section identifies the relevant provisions in the legal system for an ethically-sound development of AI-supported legal decision-making tools.

Overall, the study sets the analytical framework for future enquiries: open issues related to the difficult match between the market, legal, and ethical dimensions are ultimately highlighted, unveiling the challenges of further research in this field.

II. Mapping the Policy Landscape and the Market of AI-Assisted Legal Decision-Making Tools

The development of a market of products and applications designed for the legal sector has been set as a goal by the European Commission in its recent Action Plan for e-Justice,[26] where a list of projects for implementation in the time frame 2019-2023 is considered. These projects concern, *inter alia*, the consolidation of a criminal court database,[27] the improvement of the EUR-lex search-engine,[28] the advancement of court decisions' accessibility[29] and the interconnection and

[25] European Commission, 'Proposal', n 9 above.

[26] European Commission, '2019-2023 Action Plan European e-Justice, 2019/C 96/05', available at https://tinyurl.com/3536uxhm (last visited 30 June 2022).

[27] ibid 12.

[28] ibid 13. For the literature see M. Ovádek, 'Facilitating Access to Data on European Union Laws' 3 *Political Research Exchange*, 1 (2021).

[29] European Commission, '2019-2023 Action Plan' n 26 above, 15.

interoperability of legal information published in EU websites.[30] In this perspective, also the Legivoc system is worth to be mentioned: it is a database of terms that should help Member States understand European Union laws and intended to 'promote the semantic alignment of the vocabularies of EU Member States along with third States'.[31] As announced, the database constitutes a lexicon of legal terms that are readily usable for legal informatics projects developed for the purposes of improving accessibility to Member States laws and of advancing exchanges of legal information in the context of judicial and legal cooperation.[32]

For these last purposes, technologies for automatising the anonymisation and pseudonymisation of legal documents and especially court decisions are included in the agenda.[33]

In addition to these fields of action, the Commission also considers AI-based solutions for the analysis of Court decisions,[34] and the definition of use cases for blockchain technologies in the e-justice domain.[35] The development of chatbots, assisting the user and directing her/him in legal research, and especially in the research of relevant case law, is further envisaged.[36] It is worth noticing from the outset that these last fields of intervention are considered as high risk AI system in the proposed AI act. Other areas of proposed intervention regard the development of digital means for a faster communication between citizens, judicial and practitioners[37] which, to the contrary are not considered as high risk under the proposed Regulation on artificial intelligence.

As the proposed initiatives show, the European Commission is taking into account and promoting the digital transformations of the EU legal system(s), at both European level – for example through the proposed enactment of new EU portals[38] and the improvement of existing ones[39] – and national level, for example through the proposed interconnection of national legal information systems[40] and the planned automatization of national court decisions' analysis.

Overall, the European planned lines of action aim to lay down the political foundations for a developing 'e-justice' market, which is to be fuelled by the sharing and aggregation of legally relevant data. Exactly for the purposes of enabling 'innovative 'gov-tech', 'reg-tech' and 'legal tech" tools to support practitioners and

[30] ibid 14, 22.
[31] ibid 24.
[32] See Legivoc, available at https://tinyurl.com/3rt7ufxn (last visited 30 June 2022).
[33] European Commission, '2019-2023 Action Plan' n 26 above, 15.
[34] ibid 17.
[35] ibid 19.
[36] ibid 17.
[37] ibid 21.
[38] See for example the proposed common search engine on the European e-Justice Portal, for advertisements of judicial sales published in the Member States. ibid 13.
[39] See the proposed development of new features for the e-Justice Portal, such as a central query tool. ibid 10.
[40] ibid 14.

other services of public interests, the European Strategy for Data envisages an outright 'Common European Data Spaces for Public Administration'.[41]

In the intention of the European regulators this market shall have the very core objective of increasing data literacy in the legal sector, relating to the integration of traditional legal reasoning methodologies and services with new technological tools meant to support the former.[42] In this perspective, the mentioned programs are meant to variously assist both decision-makers, as judges or arbitrators, and the parties to a dispute. This means that the subjects targeted by the set plan are not only legal practitioners but also citizens without a legal expertise, whose access to legal services and thus, more in general, to justice is intended to be improved thanks to the disintermediation of legal knowledge the proposed tools offer.[43]

Nevertheless, as anticipated, an inherent tension can be observed between these shared goals and the suspect enshrined in the proposed AI act for the use of AI tools by the judiciary itself. This is why the considered European plan is structured around three different objectives: 1) the expansion of access to legal services facilitating as well the disintermediation of legal services; 2) the improvement of legal services by way of AI systems; and 3) the use of AI systems by the judiciary.

The sustained policy comes in tension when the last aim is target of actual legislation that encumbers with regulatory burdens specific uses of artificial intelligence in the legal sector, rendering them more difficult, if not impairing them at all.

Another mismatch can be identified between the European strategic program over e-justice and its high-level institutional perspective on the one hand and the actual targets of AI-driven legal services' markets on the other hand: indeed, the market perspective provides additional insights on the deep ongoing transformations in the legal service domain, which in some cases goes beyond what is perceived at regulatory level. A whole array of new start-ups is offering technologies for the improvement or the augmentation of legal services.[44] Overall, emerging applications in the context of both private and public legal services reflect a tendency towards a legal system of 'predictive justice' using data mining methods and approaches perfectly fitting the definition of AI system in the AI Act.[45] Unlike in the movie 'Minority Report', the examples that will be provided below do not

[41] European Commission, 'Communication' n 15 above, 22-23.

[42] As well highlighted in the European Strategy for data, data literacy is closely related to a shift in the competences needed in order to correctly implement and understand the results of employed technologies. ibid, 10,11, 20,21.

[43] On the disintermediation of legal services, see P. Heudebert and C. Leveneur, 'Blockchain, Disintermediation and the Future of the Legal Professions' 4 *Cardozo International & Comparative Law Review*, 275 (2020).

[44] See J. Armour et al, 'Augmented Lawyering' *ECGI Working Paper Series in Law n. 558/2020*, available at https://tinyurl.com/a7shkvxn (last visited 30 June 2022).

[45] European Commmission, 'Proposal' n 9 above, Art 3 and annex I.

predict any outcome but only provide a 'forecast' of what could happen based on a number of analysed variables.

To date no actual legal reasoning analysis is permitted by technology. Thus, predictive justice relates to tools that anticipate what could be an outcome leveraging various forms of 'statistical' and knowledge discovery methods. Of course, this shift of emphasis does not only illustrate the vanity of the hope of replacing judges and lawyers but rather makes it clear that more than predictive justice we should speak of 'predictable' justice capable of analysing and 'imagining' possible legal solutions as the aimed goal. The result is that of a justice system that enhances the collective intelligence of actors through the tools of artificial intelligence.

However, to date no marketed technology is capable of autonomously reproducing a human decision based on a 'real' legal reasoning. Hence, the mentioned technologies can only provide a support to legal professionals or more in general to citizens that need to be integrated with solid 'traditional' domain knowledge. Moreover, without proper legal analysis the actual 'predictions' not only can be misleading, resulting in over or under litigation for instance but can actually be manipulated to drive legal actions even purposedly in the wrong direction. In this perspective, future lines of development of the considered market should perhaps move from the persisting needs to integrate automated-driven tools – as search tools or information aggregation tools –, with applications that automatise the representation of sectorial domain knowledges.

As the examples below show, AI-based applications in the context of both private and public legal services are capable of structurally innovating and changing the legal profession, overturning in many cases the competences traditionally required in the legal sector.[46] At a deeper level, these applications *de facto* force changes also at the education level and at the institutional level, since in many countries legal profession is regulated/protected, granting a certain amount of exclusivity in providing legal services. In these cases, innovations must also face these regulatory hurdles: if automated legal analysis is offered mostly with the interaction of data scientists, software engineers reserving legal advice to lawyers might appear anachronistic but needed.

Among the various applications offered on the market, a distinction needs to be made between those artificial intelligence-based tools destined to private purposes – eg for the support of law firms' activities or of citizens' legal queries – and those designed for public purposes, eg for the automatization of specific tasks in judicial decision-making. The mentioned distinction is relevant because the different private or public interests involved in the use of AI-based applications in the legal sector raise different legal and ethical issues and are treated radically differently by the proposed AI Act. Below we sketch a possible, although non exhaustive, categorization.

[46] J. Armour et al, n 44 above, 57.

III. AI-Based Tools for Private Legal Services

1. *Assistance to Law Firms and Legal Consulting Businesses Through Predictive Coding:* digital tools are transforming the law office management, through user-friendly interfaces and electronic communication means with courts or other attorneys. The particular situation of the Covid-19 pandemic and the spread of smart working solutions has accelerated these developments. Also, digital support tools for contract or asset analysis are becoming more powerful. Early support tools in this sense are search engine tools as Westlaw; LexisNexis; Beck-online, which have had a substantial influence on legal advice and on state jurisdiction.[47] Developments in this sense are related to the use of AI-driven artificial intelligence software to conduct legal research, as occurs with advanced case-law search engines and predictive analytic tools.[48] An example in this respect is given by Ross AI, which uses natural language processing to find relevant results and to provide meaningful ranking of results.[49] Dorothi AI uses natural language processing to search patent filings.[50] These softwares enable to support legal advice, both in terms of fast retrieval of guiding principles of case precedents, and of interpretation and application of all the cases.[51]

Apart from legal research, automated driven tools are also changing the way legal advice is delivered. An increasing number of startups is offering automated online legal consultations services, as Justia[52] and Avvo.[53] Other services are designed to match lawyers with clients, without the expensive intermediation of a law firm, as UpCounsel ,[54] Lawgives[55] and LegalHero.[56] The software eBrevia[57] is structured for document review, 'contract analyser' and 'diligence accelerator', specifically designed for lawyers to perform due diligence review for mergers and acquisitions. Similarly, Wevorce[58] is meant to simplify divorce processes, through personalised algorithms that seek to streamline asset division, form completion and other divorce-related work.[59] All the mentioned services fall under the category

[47] M. Fries, n 5 above, 8.

[48] These two categories of AI-based legal services are mentioned by the Council of Europe-European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 17.

[49] See Ross Intelligence, available at https://tinyurl.com/y3t8kh7m.

[50] Dorothy AI, available at https://tinyurl.com/5dejdwcw.

[51] The Portal Geblitztz, available at https://tinyurl.com/we9j8hpj, has collected a substantial amount of information about sporadic measurement errors of individual speed cameras, and can challenge any overspeed fines originating from these cameras.

[52] Justia, available at https://tinyurl.com/42pj2x9x.

[53] Avvo, available at https://tinyurl.com/3r999d85.

[54] UpCounsel, available at https://tinyurl.com/58fwzhnk.

[55] Lawgives, available at https://tinyurl.com/4y5bdtmb.

[56] LegalHero, available at https://tinyurl.com/yeywker5.

[57] eBrevia, online available at https://tinyurl.com/2pfv8bky.

[58] Wevorce, online available at https://tinyurl.com/4utud8ap.

[59] The recalled AI-driven programs are listed by A. McPeak, 'Disruptive Technology and the Ethical Lawyer' 50 *University of Toledo Law Review*, 457, 461 (2019).

of so-called 'e-discovery' or 'technology-assisted review' technologies,[60] which have the distinctive features of quickly retrieving relevant information from a vast number of documents on the basis of predetermined classifications.[61] It is worth highlighting that these technologies are not only used in the private sector by law firms and legal consulting businesses, but also by public agencies. In the United States, for example, the Antitrust Division of the DoJ is already making use of e-discovery technologies in the course of mergers and acquisitions investigations.[62]

2. *Simple Serial Litigation*: technology is also used by institutional actors, as insurance companies, which employ analytical systems to collect facts of a case before getting in touch with the policy owner and cut in this way their legal expenses. By collecting facts of a case before getting in touch with the policy owner and fund the expenses of an attorney or even the courts. There are also specialized businesses, which process information collected from understandable online questionnaires to assess cases and litigate for a low fee, as in the case of the challenging of speeding fines and of the claim of lump-sum damages for flight delays.[63] These predictive systems could also be displayed in review to the parties, allowing them to decide whether they want to stick with their claim or withdraw it without bearing the court expenses. Moreover, they are being employed by lawyers for the purposes of calculating the probabilities of success of a certain litigation; as well as for the purposes of identifying and selecting the aspects of a case upon which it is convenient to work on for a successful outcome

3. *Assessment of Cases by Non-Lawyers* are equally being facilitated by technology advancements: new softwares are directly addressed to end-customers, regardless of whether these are a legal experts, or consumers, or a small business

[60] S. Gobbato, 'Procedure di e-discovery e tutela dei dati personali: una questione di metodo' *Media Laws*, available at https://tinyurl.com/5e2xdr4z (last visited 30 June 2022).

[61] A definition of these technologies has been given by Judge A.J. Peck in the ruling *Da Silva Moore* v *Publicis Groupe et al*, no 1:2011cv01279 – Document 96 (S.D.N.Y. 2012), para 3-4 where the Judge defines 'predicting coding' technologies as 'tools (different vendors use different names) that use sophisticated algorithms to enable the computer to determine relevance, based on interaction with (ie, training by) a human reviewer. Unlike manual review, where the review is done by the most junior staff, computer-assisted coding involves a senior partner (or [small]team) who review and code a 'seed set' of documents. The computer identifies properties of those documents that it uses to code other documents. As the senior reviewer continues to code more sample documents, the computer predicts the reviewer's coding (Or, the computer codes some documents and asks the senior reviewer for feedback). When the system's predictions and the reviewer's coding sufficiently coincide, the system has learned enough to make confident predictions for the remaining documents'. See also A.J. Peck, 'Search, Forward. Will Manual Document Review and Keyword Searches Be Replaced by Computer-assisted Coding?' *Law Technology News*, available at https://tinyurl.com/yc8fhc5t (last visited 30 June 2022).

[62] T. Greer, 'Electronic Discovery at the Antitrust Division: An Update', available at https://tinyurl.com/2p8xb92t (last visited 30 June 2022).

[63] This is the case of the services offered by the firms *EUclaim,* online available at https://tinyurl.com/2z55rkjd; *flightright,* online available at https://tinyurl.com/2p8kr545; *Fairplane*, online available at https://tinyurl.com/49bnzzcm, which growingly facilitate their case assessment on the basis of the analysis of the information retrieved from flight tracking or the automatic analyses of weather reports.

without a legal department, independently helping the client to analyse and prepare legal documents, as for example offered by the start-ups Catalystsecure[64] and Leverton.[65] The services provided by these companies digitise legal documents and display online forms ready to be downloaded and used by users, as judicial demands or tenancy agreements. Furthermore, these technologies can help prepare deeds and automate parts of the legal case assessments, as offered by Lexalgo;[66] drafting contracts, wills or other legally relevant statements, as enabled by Legal/Zoom;[67] RocketLawyer[68] or Janolaw.[69]

Other softwares operate a categorisation of contracts according to different criteria, detecting divergent or incompatible contractual clauses, or providing 'chatbots' informing litigants or supporting them in their legal proceedings.[70] Startups as Legalsifter,[71] Seal Software[72] and Exigent Group[73] employ AI for the purposes of helping clients to understand and assess drafted contracts. Similarly, the Claudette system developed by the European University Institute in Florence is an automated detector of potentially unfair clauses.[74] Other AI-driven tools assess the risks of success or defeat, as well as the litigation risks for the client:[75] Robot lawyer Lisa,[76] provides legal expertise automation, and is capable of issuing basic legal advice, creating legal documents as contracts. Ultimately, some services based on blockchain technologies offer to conduct automated transactions without the presence of lawyers, in the form of smart contracts.[77]

IV. AI-Based Tools for Public Legal Services

1. *Judicial Rights Enforcement*: technology tools for judicial decision-making

[64] Catalystsecure, available at https://tinyurl.com/5ak36f23.

[65] Leverton, available at https://tinyurl.com/bdhnd6j6.

[66] Lexalgo, available at https://tinyurl.com/2p8r6v5r.

[67] LegalZoom, available at https://tinyurl.com/vucek3hj.

[68] RocketLawyer, available at https://tinyurl.com/zprv6z8n.

[69] Janolaw, available at https://tinyurl.com/2p9y8bm6.

[70] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 17.

[71] Legalsifter, available at https://tinyurl.com/4pf4afa5.

[72] Seal Software, available at https://tinyurl.com/yckjm2py.

[73] Exigent Group, available at https://tinyurl.com/2p9adtjc.

[74] Caludette, available at https://tinyurl.com/zw2j59nb. For an overview of Claudette's features see G. Sartor et al, 'Claudette Meets GDPR: Automating the Evaluation of Privacy Policies Through Artificial Intelligence' *Study Report, Funded by The European Consumer Organisation (BEUC)* (2 July 2018).

[75] The issue of the calculation of risks in the context of judicial proceedings had been anticipated and assessed by a strand of the literature well before the wave of digital transformations. See H. Eidenmüller, 'Prozeßrisikoanalyse' 113 *Zeitschrift für Zivilprozess*, 5 (2000).

[76] Robot Lawyer Lisa, available at https://tinyurl.com/27m6u33d.

[77] J. Eyre, 'Blockchain 'Smart Contracts' to Disrupt Lawyers' *Financial Review*, available at https://tinyurl.com/pr42bxe5 (last visited 30 June 2022). See more in general, K. Werbach and N. Cornell, 'Contracts *ex Machina*' 67 *Duke Law Journal*, 313 (2017).

are to be contextualised in the broader topic of developments regarding the digitization of the public administration.[78] Judicial analytics imply the analysis of docket entries, case opinions, oral argument text, or other inputs to gain insights into judicial decision-making.[79] The more sophisticated technologies in this respect provide predictions regarding judicial decisions, making it possible to predict a case outcome from a judge's standpoint and to assess faster evidence.[80] An example of judicial analytics is given by the software developed by the company Gavelytics, which detects whether a judge would be favourable for a particular litigant, using data of precedents, judicial workloads and biographical information.[81]

These kinds of platforms can be classified as tools for what is increasingly known as 'predictive justice',[82] in which data mining techniques are employed for the purposes of classifying decisions or subjects based on their specific features, targeting them through a specific variable upon which the outcome of a litigation or the behaviour of a certain individual is calculated.[83] These predictive systems are based on statistical elaborations of employed terms, revealing the frequency of the occurrence of specific groups of terms.[84]

In the criminal law sector, these tools can be employed for the prediction of crimes; the prediction of the risk of recidivism; the identification of future criminals or victims.[85] In this regard, predictive systems may help mapping the elements of an investigation, supporting human experience with an integrated

[78] See D. Freeman Engstrom and D.E. Ho, 'Algorithmic Accountability in the Administrative State' 37 *Yale Journal on Regulation*, 800 (2020); G. Schneider, 'The Algorithmic Governance of Administrative Decision-Making: Towards an Integrated European Framework for Public Accountability' *Eurojus- Special Issue Big Data and Public Law: New Challenges Beyond Data Protection*, 126 (2019); C. Benetazzo, 'Intelligenza artificiale e nuove forme di interazione tra cittadino e pubblica amministrazione', available at *federalismi.it*, 27 May 2020; G. Tuzet, 'L'algoritmo come pastore del Giudice? Diritto, tecnologie, prova scientifica' *Media Laws*, available at https://tinyurl.com/wek3uzct (last visited 30 June 2022).

[79] A. McPeak, n 59 above, 464. These technologies have been also object of European projects. See F. Romeo et al, 'CREA Project – Conflict Resolution Equitative Algorithms', available at https://tinyurl.com/4jbc3b82 (last visited 30 June 2022).

[80] We refer for instance to services such as Lex Machina, available at https://tinyurl.com/4t99j72s, which provides an analysis of parties, judges and counsel, the French Case Law Analytics, available at https://tinyurl.com/57k2mbd2.

[81] Gavelytics, available at https://tinyurl.com/ykxfes4t. For the literature on this point, see S.B. Starr, 'Evidence-based Sentencing and the Scientific Rationalization of Discrimination' 66 *Stanford Law Review*, 803 (2014) where the Author defines criminal justice predictive systems as 'evidence-based methods'.

[82] As the CEPEJ Ethical Charter explains, a predictive system is a tool that announces what will happen in advance of future events. Council of Europe-European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment', n 7 above, 29-30.

[83] F. Romano et al, 'The Challenges of Legal Analysis Between Text Mining and Machine Learning' *JADT 2020: 15es Journées internationales d'Analyse statistique des Données Textuelles,* available at https://tinyurl.com/y4zv6vua (last visited 30 June 2022).

[84] Predictice, available at https://tinyurl.com/2dcfcfcw.

[85] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 48.

analysis of collected and available data. Examples of such tools are given by the Compas algorithm,[86] and the Hart Assessment Risk Tool (Hart).[87] In the field of civil law, conversely, predictive systems could be employed to measure the separation and divorce alimony.[88]

The employment of artificial intelligence for the 'prediction of' judicial decision-making is well suited for civil law countries, where the structure of the argumentation is well defined by the law. This structure is more easily replicated by computational systems, allowing judges to quickly spot the issues and legal questions underlying the case to be decided.

Overall, these tools can provide an important analytical support for judges, offering quantitative or qualitative insights over their decision-making processes. Through these systems judges and lawyers could be facilitated in finding the cases with identical or similar arguments and in using text modules. This could give advantages in terms of uniformity in case law, especially in respect to the case law of lower jurisdictions. These last considerations clearly sustain the European Commission's policy favouring investment in these tools, although the proposed AI regulation regards with suspicion their use by the judiciary in actual cases.

2. *Alternative Dispute Resolution Systems*: the digitization of alternative dispute resolution mechanisms is becoming particularly relevant in the field of consumer services. In this case, the EU has pioneered the ODR platform, recording consumer complaints online, forwarding them to a dispute resolution body, and enabling the parties to conduct the negotiation process completely online.[89] According to a strand of the scholarship, the European consumer dispute resolution platform could be considered as a forefather of an outright online court.[90] Yet, once again there is a tension between the opening to the Online Disupute Resolution (ODR) market using AI solutions and the impossibility to use similar mechanisms by the judiciary itself. Note that, for instance, an AI system that would analyse the case at hand to advice the judge to send the case for a mediation attempt would be considered as a high risk one if used by a court[91] while it could seamlessly be fostered in contractual clauses.[92] Incidentally,

[86] Eg the Compas algorithm. J. Larson et al, 'How we Analyzed the COMPAS Recidivism Algorithm, Pro Publica', available at https://tinyurl.com/3pdrpkye (last visited 30 June 2022).

[87] See for example the Hart algorithm employed by the Durham Police and Cambridge University. For the literature see M. Oswald et al, 'Algorithmic risk assessment policing models: lessons from the Durham HART model and 'Experimental' proportionality' 27 *Information & Communications Technology Law*, 223, 250 (2018).

[88] F. Romano et al, n 83 above.

[89] European Commission, 'Online Dispute Resolution', available at https://tinyurl.com/mryuwbkf.

[90] M. Fries, 'Verbraucherrechtsdurchsetzung' (Tübingen: Mohr Siebeck, 2016), 200, assessing the broader claim regarding whether ADR systems contribute to effectively pursue consumer rights enforcement.

[91] D. Thompson, 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' *Osgoode Legal Studies Research Paper Series*, available at https://tinyurl.com/5xxftkj2 (last visited 30 June 2022).

the latter would come at odds with the concern of the CEPJ about 'possible violations of Arts 6, 8 and 13 of the European Convention on Human Rights'[93] for the risk of confusion between a court assessment and an alternative (out of court) dispute resolution mechanism. For these reasons, these particular systems are considered by the CEPEJ as 'possible uses, requiring considerable methodological precautions'.

V. Mapping the Ethical Principles for AI-Assisted Legal Services

The ethical framework applicable in the EU to AI-driven legal tools can be found at a general level in the Guidelines on a Trustworthy AI by the European Commission's High Level Expert Group on Artificial Intelligence and, with specific regard to the legal sector, in the Council of Europe's European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment. The Charter is meant to provide guidance to justice professionals in the process of assimilation of legal technologies within the legal system. Although specifically designed for guiding policy makers and justice professionals in the development of AI in national judicial processes, the ethical framework is believed to be applicable in analogy also to automated-driven technologies applied in the private sector of legal services.

An accurate analysis of the two charters shows the existence of a common set of principles, which are directly substantiated in i) the principle of quality and security of employed datasets; ii) principle of non-discrimination and equality; iii) the principle of fairness; iv) the principle of transparency; v) principle of 'under user control'.

As a general premise it can be said that the first three principles assure that the considered legal technologies structurally embed specific values, especially in terms of non-discrimination and equality. The other two principles, conversely, assure that these values are externally verifiable and supervised by human subjects.

Ultimately, all the mentioned principles point to the overarching principle of human-centrism and autonomy in the use of AI-assisted legal decision-making tools.[94] This principle has a central importance in respect to artificial intelligence systems for legal decision making. It indeed requires that legal professionals maintain an autonomous judgment in respect to what is suggested by the automated system. This means that the subjects that interact with these technologies need to keep full and effective control over the final determinations, and let technologies

[92] This is well illustrated by the Cyberjustice project in Quebec, available at https://tinyurl.com/pdp6fwza (last visited 30 June 2022)..

[93] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 46, 47.

[94] See L. Floridi et al, 'AI4People- an Ethical Framework for a Good AI Society: Opportunities, Risks, Principles and Recommendations', available at https://tinyurl.com/2s3avau3 (last visited 30 June 2022).

complement and empower their decision making without losing their autonomy. In this positive perspective, the CEPEJ Ethical Charter underlines how automated-driven systems should amplify legal professionals' decisional space, by constructively supporting the conduction of legal tasks through the provision of analytical evidence.[95] A different deployment of the same principle can be envisaged when the technologies are offered to non-experts: in this case, the principle of autonomy shall safeguard the decision-making space of subjects that are not familiar with the outputs rendered by the machine.

In order to guarantee citizens' autonomy in using AI-assisted legal decision-making tools, the considered principle also requires that results obtained are interpretable and understandable to assure control by the user over the machine. From this further perspective, the principle of autonomy requires the constant supervision of humans over the functioning of employed technologies. This relates also to the actual ability of reviewing issued decisions and in particular the data that have grounded a specific outcome by overcoming the so-called automation bias.

Interestingly, the Guidelines link the said principles to the fundamental rights of equal access to justice and to a fair trial in the changing legal system.[96] In this perspective, the High-Level Expert Group presents the mentioned principles as the ethical formants of automated legal decision-making processes in which rule of law, due process and equality before the law are cherished.[97] The assumption is indeed that the protection of fundamental rights is not only a legal but also a moral entitlement.[98]

The Guidelines do not however provide practical guidance as to how effectively secure listed ethical values and thus protect related fundamental rights in the considered artificial intelligence technologies. Thus, they set the general goal of pursuing the mentioned ethical values and connected fundamental rights, without tracing any patterns for the achievement of such objectives.[99] In the absence of more elaborated methodological instructions, crucial ethical problems related to artificial intelligence, as those related to 'trolley dilemmas',[100] the algorithmic decision-making superiority or inferiority to human decisions routines,[101] or

[95] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 12.

[96] This is highlighted by D.B. Wilkins and M.J. Esteban, 'Taking the 'Alternative' out of Alternative Legal Service Providers: Re-mapping the Corporate Legal Ecosystem in the Age of Integrated Solutions' 5 *The Practice*, available at https://tinyurl.com/2p86tp3u (last visited 30 June 2022).

[97] European Commission-High Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' n 13 above, 11.

[98] ibid

[99] M. Veale, 'A Critical Take on the Policy Recommendations of the EU High-Level Expert Group on Artificial Intelligence' 1 *European Journal of Risk Regulation*, 10 (2020).

[100] J. Cowls, 'AI and the "Trolley Problem" ', available at https://tinyurl.com/2p9ndf33 (last visited 30 June 2022).

[101] J. Zerilli et al, 'Algorithmic Decision-Making and the Control Problem' 29 *Minds and Machines*, 555, 578 (2019).

the 'hidden' social and ecological costs of AI systems[102] remain unsolved.

The establishment of these ethical principles has thus moved in disconnection with the law,[103] and without taking into account what a strand of the literature has referred to as 'the question of problem framing'.[104] This relates to the identification, at the same policy level in which ethical principles have been issued, of the 'problems' given by the unethical design and practical employment of machine learning-based technologies in specific sectors, as the ones employed in the legal sector.

In this respect, the technical assessment and understanding of those tools surely offers important insights to understand the functioning of AI-based legal decision-making tools.[105] The relevance of such an assessment has been well highlighted in the case of the Compas algorithm, in relation to which the 2016 Propublica Investigation revealed the discriminatory evaluation of African American defendants' recidivism rate.[106]

To advance the awareness over the effects on society of automated prediction models, technical tools, as the so-called 'Ethical Explorer'[107] or Facebook's 'Fairness Flow',[108] have been elaborated for guiding developers and product managers in 'building solutions that avoid the potential downsides of technology' and thus in developing 'responsible tech' solutions.[109]

Moreover, businesses themselves have started to decline general ethical principles into their own corporate realities in the form of ethical charters, as the one released by Microsoft[110] and Google,[111] or codes of conduct.[112] In other cases, *ad hoc* 'AI ethical committees' have been directly established within the internal organisation of AI producers, with monitoring and supervisory tasks over the

[102] T. Hagendorff, 'The Ethics of AI Ethics- An Evaluation of the Guidelines' 30 *Minds and Machines*, 30, 104 (2020).

[103] Talking about a first 'wave of movement' focusing on 'ethics over law', C. Kind, 'The Term 'Ethical AI' is Finally Starting to Mean Something' *Venturebeat*, available at https://tinyurl.com/2n6kr2wc (last visited 30 June 2022).

[104] M. Veale, n 99 above, 1-10.

[105] C. Kind, n 103 above, talks about a second wave of ethical AI in which data and computer scientists 'sought to promote the use of technical interventions to address ethical harms'.

[106] J. Angwin et al, 'Machine Bias' *Propublica* available at https://tinyurl.com/fvxw68rh (last visited 30 June 2022), where it was found that the Compas algorithm was rating black defendants worse than white ones.

[107] See Ethical Explorer, available at https://tinyurl.com/46p66r36.

[108] See D. Gershgorn, 'Facebook Says It Has a Tool to Detect Bias in Artificial Intelligence' *Quartz*, available at https://tinyurl.com/4ah5n3xb (last visited 30 June 2022). Similarly see IBM, 'Introducing AI Fairness 360', available at https://tinyurl.com/2p8uaxyk (last visited 30 June 2022).

[109] Ethical Explorer, n 107 above.

[110] Microsoft, 'Microsoft AI Principles', available at https://tinyurl.com/2rbxmv45 (last visited 30 June 2022).

[111] See https://tinyurl.com/yck2w5kt (last visited 30 June 2022).

[112] See on the issue, H. Hilligoss and J. Fjeld, 'Introducing the Principled Artificial Intelligence Project' *CyberLaw Clinic*, available at https://tinyurl.com/y3tdyvph (last visited 30 June 2022). It is a project conducted by Harvard Berkman Klein Center that has mapped Ethical Principles and Guidelines issued by both public and private stakeholders between 2016 and 2019.

ethical countenance of developed AI tools.[113]

Nonetheless, all the mentioned examples rely on self-regulation for the purpose of conforming market efforts to ethical principles and, as stressed for example by Google, the referred ethical principles do not have a universal value but reflect those of the self-regulated company: 'we will incorporate *our privacy principles* in the development and use of our AI technologies'.[114] However, self-regulation in the field of ethical AI is more related to concerns regarding producers' ethical reputation than to those related to an effective implementation of ethical values.[115] Indeed, those initiatives are in most of the cases not overseen by any public agency and thus lack of a fundamental feature, that of enforceability.[116] In this perspective, they could encourage, rather than mend, 'ethical washout' outcomes.

A merely apparent compliance with ethical principles entails substantial risks in all sectors in which AI-driven tools are adopted. In the field of legal decision-making, nonetheless, these risks take up a particular shape, which is worth to be enquired more in depth. The acknowledgment of the peculiar risks related to that what we have defined as the 'ethics/market mismatch' in the development of AI-assisted legal services, suggests the urge to find viable solutions for the practical implementation of ethical principles.

After having mapped the risks resulting from 'ethical dilution' threats in the market for legal technologies, we will delve into the identification of patterns relevant for bridging market and ethics. Contrary to what some strand of the literature[117] and corporations themselves[118] are lately suggesting, we will demonstrate how these bridges do not rest on a more accurate socio-technical assessment of AI's functioning, but rather on the enforceable rules provided by the European legal framework regarding emerging digital technologies, as artificial intelligence, and the data that fuels these.

[113] In this respect, it is worth to recall that Google announced the establishment of an external advisory council for the responsible development of AI in March 2019. The council was nonetheless removed just after one week. See E. Bietti, 'From Ethics Washing' n 21 above, 1.

[114] S. Pichai, 'AI at Google: Our Principles', available at https://tinyurl.com/2kmhn3p2 (last visited 30 June 2022).

[115] E. Bietti, 'From Ethics Washing to Ethics Bashing' n 21 above, 6. In respect to ethics committees, the Author highlights how these are mostly influenced by the management and also dependent on company funding. Moreover, no disclosure requirements regarding these council's decision-making processes are in place. On the issue, see A. Papazologou, 'Silicon Valley's Secret Philosphers Should Share Their Work' *Wired*, available at https://tinyurl.com/52r96a32 (last visited 30 June 2022).

[116] G. Comandè, n 19 above. Of course, the lack of enforceability holds true as long as the ethical reference is not understood by regualtors (such as the American FTC) as actual binding policies whose violation triggers its intervention.

[117] C. Kind, n 103 above.

[118] K. Johnson, 'Microsoft Researchers Create AI Ethics Checklist With ML Practitioners From a Dozen Tech Companies', available at https://tinyurl.com/hdf4ywnm (10 March 2020).

VI. Mapping Market/Ethics Mismatches and Risks in AI-Assisted Legal Services

The illustrated developments in the market and the growing employment of these technologies in the legal practice, come along with some risks, which need to be carefully considered. Before engaging in the effort of identifying these risks, it is worth recalling that the same Council of Europe's Ethical Charter appears to consider artificial intelligence technologies employed in judicial systems in accordance with a risk-based approach.[119] Following this approach, the Council welcomes the improvement of legal decision making through the employment of what are considered as low-risk technologies: this is the case of visualisation techniques displaying data in a more efficient way;[120] or of the application of machine learning techniques in the field of natural language processing that operates based on key words or by linking various sources, as constitutional and conventional sources, case law and scholarship.[121] Among low-risk applications there are also those tools, which enlarge the scope of accessibility to legal information and to legal expertise, as chatbots and all those technologies that have the effect of disintermediating legal knowledge. Furthermore, the Council promotes the developments of those tools that provide indicators in respect to the performance of judicial systems, and that are thus strategically relevant for the conduction of qualitative and quantitative evaluations, which can potentially guide systemic reforms or, even before, address justice departments' re-organisation plans.[122]

Note, however, that these very same tools lend themselves to an extensive control over the judiciary and can be easily unfold in a sort of chilling effect on judges by way of stimulating conformity to previous judgments to boost statistical outcomes. In a sense they are precursors or enablers of tools actually profiling judges (and attorneys), AI based tools which are deemed[123] 'uses to be considered following additional scientific studies'.

Other artificial intelligence-based applications, conversely, need to be approached taking methodological precautions, in terms of technical structure and legal compliance, assuring a full protection of fundamental rights to subjects involved, both on the side of litigants and of legal professionals.[124] Among these 'riskier' tools, the CEPEJ lists applications that automatise the liquidation of

[119] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 16-18 and 59-63.

[120] ibid 64. Highlighting the persuasive power of visualisation techniques, R. Ducato, '*De iurisprudentia picturata*: Brief Notes on Law and Visualisation (editorial)' 7 *Journal to Open Access to Law*, 1, available at https://tinyurl.com/y2s5ycnp (last visited 30 June 2022).

[121] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 64.

[122] ibid

[123] ibid

[124] ibid 64-65.

damages in civil proceedings; tools providing alternatives to the judicial resolutions of controversies, as online dispute resolution tools. The fully automated nature of many of those applications, as well as the frequent lack of information regarding the absence of involvement of a real court, pose substantial threats to the protection of the right to a fair trial under Art 6 ECHR and of the right to an effective remedy enshrined in Art 13 ECHR. Ultimately, as anticipated, also those tools that come to profile legal practitioners, be it judges, lawyers or consultants, are to be included in the high-risk category.[125] As already stated this categorisation well echoes what has been finally enshrined in the proposed AI Act, which includes in the high risk categories those 'systems intended to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts'.[126]

Based on these premises, the following section provides an overview of the common risks associated to the considered technologies across them and due to technical reasons.

1. Biases and Due Process Guarantees

The performance of artificial intelligence tools is primarily related to the nature of data employed for the training and the functioning of automated-driven models. In this respect, integrity and quality of the datasets represent the fundamental prerequisites for a well-functioning design of technologies for the legal domain.[127] Biases in training data and proxy discrimination are the two major biases potentially affecting datasets.[128] One common source of biased training data is given by sampling bias. This bias emerges when some strands of the population are misrepresented, because there is not a sufficient representation of the features of these strands of the population in the used datasets. Sampling bias leads to misrepresentation distorting the evidence drawn from the same training data. The bias is in turn incorporated into the statistical model that originates from the training data and propagates into the output, eventually producing misleading results.[129]

Another bias potentially affecting training data is related to what data scientists call 'historical bias', resulting from sociological and/or historical misconceptions

[125] ibid 65.

[126] European Commission, 'Annexes' n 10 above, Annex III, 8 a.

[127] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 9-10.

[128] P. Hacker, 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination under EU Law' *Common Market Law Review*, 1143, 1148 (2018); G. Comandé, 'Regulating Algorithms Regulation? First Ethico-Legal Principles, Problems and Opportunities of Algorithms', in T. Cerquitelli et al eds, *Towards glass-box data mining for Big and Small Data* (New York: Springer International, 2017), 169-207.

[129] J.A. Kroll et al, 'Accountable Algorithms' *University of Pennsylvania Law Review*, 633, 680 (2017).

that are reflected into the datasets, likewise skewing their representativeness. Nonetheless, the objective of achieving representativeness of the data, may lead itself to additional biases, for it *per se* forces the designers of the technology to enact stricter surveillance and classification methods needed exactly for the measuring of the targeted data representativeness.[130] This could in turn expose minorities to additional harms.[131] Moreover, an excessive focus of accuracy and quality of employed datasets could have the paradoxical outcome of stimulating developers' extensive – and unlawful under data protection or competition laws – data collection, under the façade of the design of an ethical artificial intelligence tool.[132]

Biases in training data are also likely to generate biases in the subsequent moment of the analytical processing. If the algorithmically calculated risk scores are distributed in an untruthful way among protected groups, then the employed dataset is affected by a bias called 'unequal ground truth'. Such bias causes a 'proxy discrimination', that is a statistical discrimination,[133] given by 'untrue' statistical associations and subsequent scientific inferences.[134]

Also, with reference to those tools assessing the inclinations to decide in a certain way (for judges) or to win and /or move in a case in a certain way (for attorneys), biases, lack of accuracy in the data, quality of the training data, and so on, might result in erroneous or biased predictions leading to both discrimination and harm to all individuals involved, namely the 'evaluated' individual and the end users (eg clients), while producing a stigmatization on the decisionmaker with consequent chilling effect and a serious harm to judicial independency.

The detection of the mentioned biases both in employed datasets and in subsequent processing patterns is impaired by two major obstacles, a technical and a legal one.

The technical impairment relates to the difficulty of designing technologies, and thus also those designed for legal decision purposes, in a manner that renders their functioning transparent, interpretable and thus explainable,[135] mainly due to their adaptive and unpredictable nature.

From the legal standpoint, technologies are often developed by private corporations that are eager to protect their newly developed technologies through intellectual property rights and mainly through trade secrets.[136] The shielding of

[130] J. Powles, 'The Seductive Diversion of 'Solving' Bias in Artificial Intelligence' *Onezero*, available athttps://tinyurl.com/bddazcm7 (last visited 30 June 2022).

[131] ibid

[132] C. Kind, n 103 above.

[133] J.A. Kroll et al, n 129 above, 680-681.

[134] Highlighting the risks of these bias in the construction of an autonomous-driven and personalised legal system, H. Eidenmüller and G. Wagner, *Law by Algorithms* (Tübingen: Mohr Siebeck, 2021), 47-79.

[135] See V. Chiao, 'Fairness, Accountability and Transparency: Notes on Algorithmic Decision-Making in Criminal Justice' 15 *International Journal of Law in Context*, 135, 138 (2019).

[136] This is well highlighted by R. Brauneis and E.P. Goodman, 'Algorithmic Transparency for the Smart City' 20 *Yale Journal of Law & Technology*, 103 (2018).

legal algorithms' internal functioning through intellectual property protection upholds businesses' competitive advantage deriving from the investments in the collection and production of information.

Intellectual property tools contribute to obscuring of AI-based technologies' functioning,[137] rendering data collection and processing activities opaque and exclusive.[138] This leads in turn to opaque and exclusive quantification and categorization practices,[139] which come to sustain legally binding decisions.

In this perspective, the growing use of privately-developed algorithms for the purposes of legal decision-making, means greater influence of private corporate power in those same decisional processes. This raises also in the legal sector, the risk of 'private capture' that the literature has generally observed in respect to administrative decision-making.[140] The direct corollary of this capture is the difficulty to externally control the actual functioning of – and thus the existence of – eventual biases within- corporations' AI legal tools. As a result, legal practitioners and citizens making use of these technologies may find it difficult to challenge and object to the decisions determined by those technologies.[141] The already mentioned *Compas* case well illustrates these shortcomings.

As apparent, the risk of biases, matched with the technical and legal hurdles to algorithms' accessibility, brings about substantial concerns regarding due process guarantees.[142] It is important to note that from a formal point of view these AI based tools might not trigger the intervention of legal safeguards, such as the right to not being subject to a solely automated decision-making process (Art 22 GDPR), since technically (as in COMPAS, eg) it is a human being responsible of the final decision with actual power to overrule the AI indication. And yet, the automation bias (the subjection of the human decisionmaker to the suggested super performance of the AI tool) can easily kick in creepingly substituting a potentially biased machine decision to the officially human one.

2. Automation Bias and Machine Dependence

[137] F. Pasquale, *The Black Box Society – The Secret Algorithms that Control Money and Information* (Cambridge: Harvard University Press, 2015), 3,11.

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

[139] ibid 10, 13.

[140] C. Coglianese and D. Lehr, 'Regulating by Robot: Administrative Decision Making in the Machine Learning Era' 105 *Georgetown Law Journal*, 1147, 1151 (2017), assessing the problem of 'cyberdelegation' by governments to private corporations developing algorithms.

[141] This is underlined by R. Yu and G. Spina Alì, 'What's Inside the Black Box? AI Challenges for Lawyers and Researchers' 19 *Legal Information Management*, 5, 6 (2019), underlining problems of unpredictability of AI-based tools. See also F. Pasquale, 'Secret Algorithms Threaten the Rule of Law' *MIT Technology Review*, available at https://tinyurl.com/3wuw7s3z (last visited 30 June 2022).

[142] Stressing this link J. Balkin, 'The Three Laws of Robotics in the Age of Big Data' 78 *Ohio State Law Journal*, 5, 1217, 1239 (2017). Assessing due process guarantees in algorithmic decision-making, D. K. Citron and F. Pasquale, n 138 above, 2; K. Crawford and J. Schultz, 'Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms' *Boston College Law Review*, 55, 93 (2014).

The last considerations lead us to a different concern raised by the increasing reliance by legal professionals on automated-driven applications for the performance of their tasks. In this respect, the risks emerge of increasing dependence on AI's evidence by decision-makers, if not of an outright capture of legal decision-making processes by employed AI tools.

In addition to the consequences of the automation bias (not questioning the automated outcome but uncritically endorsing it) on the autonomy and independence with which legal decisions are taken, in the legal domain the automation bias can have a troublesome impact on the quality of legal reasoning itself, increasingly relying on statistical computations and favouring standardization, and ultimately undermining the creative component of legal reasoning, which is the gist of every hermeneutic exercise by jurists.[143] In other words, since the legal systems evolve by differentiating dissimilar cases and by incorporating emerging legal needs and solutions, the excessive reliance on previous patterns can lead to a crystallization of law halting the evolution of legal rules and their ability to adapt to different problems and/or mutations in the social understanding of them.

Further concerns relate to the difficulties of incorporating professional standards into employed technologies. This raises an array of largely unexplored issues concerning the risks concealed in automatizing a 'human science' as the legal science, because of the replacement of legal practitioners by automated/ intelligent agents. It is not only a matter of de-humanising the way in which the law is interpreted, applied and enforced but a possible significant limit to the way in which legal systems evolve, by small judicial changes, by challenging the *status quo* with new arguments, by slowly internalizing new social needs.[144]

This concern related to what is defined in technical terms as 'automation bias', is well known in other domains experiencing AI applications, where machine-driven results are a-critically applied without an autonomous evaluation of whether the rendered solution is suitable or correct in respect to the case at stake.[145]

Even when the most sophisticated automated systems develop actual predictive capabilities, which can imagine legal outcomes beyond established legal courses, for structural reasons, they remain bound to the criteria upon which the model

[143] For a theorization of the distinction between 'human' and 'computational' law see G. Zaccaria 'Figure del giudicare: calcolabilità, precedenti, decisione robotica' *Rivista di diritto civile*, 277, 280 (2020), where it is highlighted how uncertainty, in the sense of a dynamic evolutive nature, is a core feature of a human-based legal system in which the human conscience transforms into legal constructs the underlying social developments.

[144] For some philosophical reflections on the distinction between 'human being' and 'autonomous system' see M. Ferraris, 'Anima e automa' *La ricerca*, 12 (2020) where the Author identifies the distinctive feature of the human being in its corporeality and social nature, respectively related to its being attached to a human body and to a complex social context. Change of the social context in which the human acts, stimulates a change in its way of thinking and thus in its decision-making process. For a theorization of the distinction between 'human' and 'computational' law.

[145] G. Comandé, 'Intelligenza artificiale e responsabilità tra «liability» e «accountability». Il carattere trasformativo dell'IA e il problema della responsabilità' *Analisi Giuridica dell'Economia*, 169, 188 (2019).

has been built, or that the same model has autonomously generated. This means that also the most sophisticated computational models, are affected by a certain degree of 'data' or better said 'pattern dependency', which, despite the adaptiveness of the model, risk to harness automatised legal reasoning into an analytical determinism that blurs consistent patterns with the unpredictable factor characterising the human decision making and that risks making the legal system increasingly self-referential and stagnant.

Certainly, also human reasoning suffers from a certain degree of 'path dependency', in terms of what is known as the legal interpreter's 'pre-understanding'.[146] After all, the myth of the hyper-rationality of decision makers has been disowned in various fields of study, not only theoretically[147] but also empirically.[148] However, despite being inherently influenced by external factors, the human legal reasoning is still characterised by elements of irrationality and discretion, which generates some costs and maybe also some harms to third parties or society as a whole, but which is equally contributing to the evolutive development of the legal system.

Nonetheless, the adaptive nature of the artificial intelligence-based tool may potentially mitigate the threats of excessive path dependence and thus of monolithic AI-driven legal decision-making processes. Also in this case, however, an excessive adaptiveness of employed tools could entail additional risks, first related to the difficulties of identifying above-illustrated biases. Moreover, an inscrutable path-change of the correlations on the basis of which the legal decision-making process is conducted, could impair the fundamental relation between predictability and certainty on which the human-generated legal systems rely on. A fast-changing decision-making machine could indeed render it very difficult for the addressees of the legal verdict to predict the outcome of the decision-making process.[149]

[146] See D. Canale, 'La precomprensione dell'interprete è arbitraria?' *Ethics & Politics*, 1 (2006); P.G. Monateri, 'Sub voce Interpretazione del diritto' *Digesto Discipline Privatistiche, Sezione Civile* (Torino: UTET, 1993, 4ª ed), 53.

[147] Interesting in this regard are the theories developed by Nobel prize Herbert Simon, in his work, H. Simon, *Administrative Behaviour: A Study of Decision Making Processes in Administrative Organisations* (New York: Free Press, 1997, 4th ed) where the Author distinguishes between routine decisions that are of 'structured nature', thus also subjectable to predictive and automated decision-making, and strategic and managerial decisions, where the decision maker excercises his very own 'creative' discretion and which can thus hardly be standardized into a machine-readable format. See as well D. Kahneman et al, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge: Cambridge University Press, 1982).

[148] A.J. Wistrich et al, 'Heart versus Head: Do Judges Follow The Law or Follow Their Feelings?' 93(4) *Texas Law Review*, 855 (2015). See also D. Lieberman, 'Reflective and Reflexive Judgment Processes: A Social Cognitive Neuroscience Approach', in J.P. Forgas et al eds, *Social Judgments: Implicit and Explicit Processes* (Cambridge: Cambridge University Press, 2003), 44; J.St.B.T. Evans, 'Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition' *Annual Law Review of Psychology*, 255, 278 (2008).

[149] G. Zaccaria, n 143 above, 279.

3. Translational Bias

The highlighted threat of *over-reliance* on machine-driven outputs needs to be further distinguished from that of *over-use* of the considered technologies, in turn connected to the risk of 'translational biases', given by the employment of an artificial intelligence tool outside of the context or scenarios for which it was trained for.[150] The prevention of these biases is particularly important in respect to technologies employed for legal decision-making purposes, whose application in a context that is different from that for which the system was trained could have dramatic consequences. Think, for example, about the distortive, if not harmful, effects of applying a system designed for the purposes of criminal law assessments to predict the probabilities to commit a crime, for example, to the calculation of the damages deriving from a moral distress. Think also about the simple use of analytical tools conceived to assist legal experts (able to doubt machine-driven outputs and critically assess them) and the opening of its use to lay people or less experienced ones. The consequences of the over-use of these applications also beyond their original purpose, are manyfold and directly trigger civil liability concerns, as well as the need to enact specific supervisory mechanisms related to the right combination between the specific types of applications and the professionals that come to handle them in a specific field of expertise.

From a yet further perspective, it is worth highlighting how law evolves along deviant lines of reasoning from precedent cases.[151] Such 'deviating lines' offer innovative arguments that the IA could disregard as such – since outside the detected usual pattern – or classify as errors impairing the evolving nature of the legal system. Of course, there is a positive side of the coin in letting a machine learning algorithm spotting important variables in the decision-making process. It can unveil the existence of meta-legal decisive factors – not necessarily biased or forbidden ones – thus contributing to the evolution of the rule of law. The very same tool in the hands of domain experts can actually sparkle innovation instead of hampering it.

4. Inequality, Discrimination and New Vulnerabilities

The European Commission's Ethics Guidelines on Trustworthy Artificial Intelligence highlight how equality in data-driven decision-making processes requires that 'the system's operations' do not 'generate unfairly biased outputs', this implying particular attention towards 'vulnerable persons and groups', which are 'at risk of exclusion'. As the CEPEJ Ethical Charter suggests,

[150] On automation and translational biases see G. Comandé, n 145 above, 176.

[151] G. Comandé, 'Legal Comparison and Measures: It's Logic to Go Beyond Numerical Comparative Law', in *Studi in onore di Aldo Frignani, Nuovi orizzonti del diritto comparato europeo e transnazionale* (Napoli: Jovene, 2011), 173. See also ECHR, *Greek Catholic parish Lupeni and Others* v *Romania* [GC] no 76943/11, 29/11/2016, § 116; ECHR, *Z.* v *Finland* no 22009/93, §§95.

> 'public and private stakeholders must ensure that the methods used do not reproduce or aggravate such discrimination and that they do not lead to deterministic analyses or uses'.[152]

In this respect, particular attention needs to be given to those cases in which sensitive data are processed, as data related to

> 'racial or ethnic origin, socio-economic background, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data, health-related data or data concerning sexual life or sexual orientation'.[153]

Indeed, when these data are processed by technological infrastructures that are affected by the above recalled biases, the risk of discriminatory legal decisions becomes higher.

The proposed AI regulation is even sharper. While referral 44 requests in general that

> 'training, validation and testing data sets should be sufficiently relevant, representative and free of errors and complete in view of the intended purpose of the system',

referral 40 specifies:

> 'in particular, to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts'.

Overall, the untenable aim of 'free of errors' datasets approach boils down in a specific legal rule (that is Art 10.3 AI Act) established only for high-risk AI systems.

As a wide strand of the literature has acknowledged, indeed, when data subjects are classified on the basis of particular features, as health conditions or religious beliefs, the resulting decision-making processes are likely to impact on related fundamental rights, as the right to health or the freedom of speech and religion,[154] for example when access to a specific medical treatment is impaired to a patient that has been erroneously calculated by the machine as being low risk, or when access to a banking service is denied to a citizen that has been identified as high risk. The possibility to be enclosed in pre-determined algorithmic

[152] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 9.

[153] ibid

[154] This is well highlighted last by S. Wachter, 'Affinity Profiling and Discrimination by Association in Online Behavioral Advertising' 35 *Berkeley Technology Law Journal*, 366 (2020).

patterns is destined to generate stigmatization outcomes,[155] as well as new vulnerabilities,[156] related, for example, to the emotional distress of being evaluated by non-challengeable predictions.[157]

These general shortcomings of automated-driven decision-making mirror also on the legal domain. From the perspective of citizens, the reliance on AI-driven tools in the domain of private legal services, may generate discriminations resulting for example in a biased calculation of contracts risks,[158] or, in the domain of public legal services, in a biased prediction of recidivism rates.[159]

Legal professionals, conversely, risk to be exposed to profiling activities and their legal reasoning may be 'captured' by the machine along the lines of an outright machine-dependency. These two aspects will be better explored below.

4. Profiling

A risk entailed in AI-driven tools for legal services concerns the profiling of legal decision makers. This risk is particularly relevant in respect to judges and had already been noted by the Commission in the *Green Paper on public sector information in the information society*.[160] Here, it was noted that the enlargement of judicial databases could lead to the creation of outright individual dossiers on decision-makers.[161] In the artificial intelligence era the fast aggregation of information for the detection of correlations and the drawing of inferences, could create distortions in the way legal datasets are employed, that is not for gaining legal knowledge, but to detect patterns between judgments and some accidental factors, as age, sex, civil status or birthplace of decision makers.[162] This information could possibly be used for the purposes of forum shopping and thus for the identification of the most convenient judicial venue. These risks have been highlighted also by the European Court of Human Rights with reference to the

[155] G. Comandè, n 19 above.

[156] G. Malgieri and J. Niklas, 'Vulnerable Data Subjects' *Computer Law and Security*, 4 (2020). From a gender perspective, see F. Luna, 'Elucidating the Concept of Vulnerability: Layers Not Labels' 1 *International Journal of Feminist Approaches to Bioethics*, 121, 139 (2009).

[157] D.J. Solove, and D.K. Citron, 'Risk and Anxiety: A Theory of Data Breach Harms' 96 *Texas Law Review*, 737 (2018).

[158] S. Murray, 'Algorithms Tame Ambiguities in Use of Legal Data' *Financial Times*, available at https://tinyurl.com/y3n7xn3s (last visited 30 June 2022).

[159] See M. Zhu, *An Algorithmic Jury: Using Artificial Intelligence to Predict Recidivism*, available at https://tinyurl.com/2p9ce32v (last visited 30 June 2022).

[160] Commission of the European Communities, *Green Paper on Public Sector Information in the Information Society,* COM(1998)585 final (20 January 1999).

[161] ibid 11.

[162] The relevance of accidental judgments in judicial decision making has been already highlighted by some studies well before the artificial intelligence-driven revolution. See C. Guthrie, J.J. Rachlinsky and A.J. Wistrich, 'Inside the Judicial Mind' 86 *Cornell Law Review*, 777 (2001); S. Danziger, J. Levav and L. Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*, 108, 6889 (2011).

shortcomings of publishing decisions with the identification of the judge.[163]

France has been the first European Member State addressing this concern, by establishing an exception from the general right to use court decisions to analyse future judicial decision-making in the 2019 Judicial Reform Act.[164] Art 33 of the French Act bans to use judges' identities in published court decisions for the purposes of evaluating and predicting their behaviour.[165]

Similar risks of profiling through artificial intelligence-based tools regard however not only judges, but also lawyers and counterparties. As anticipated, this kind of profiling is perceived as extremely worrisome for the rule of law, since it can create significant leverage on counterparts and judges and exposes to high risks of stigmatization.[166] These instruments produce risks for end-users as well since the 'accuracy' of the profiling and its consequent predictions are highly dependent on the quality and quantity of data[167] and shifts the attention from the quality of the arguments sustaining a legal position to non-legal issues normally and officially not affecting a legal decision. In other terms, while meta-legal elements such as policy arguments have a recurrent and acknowledged place in decisions on legal matters other factors need to be and to remain irrelevant to avoid determining justice by spurious factors undermining the rule of law.

These considerations hold true also in those legal systems, as the Italian one, that are based on collective decision-making mechanisms, where no dissenting opinion is envisaged and where there are no qualitative or quantitative indicators that reveal the actual weight of the involved judges' opinion in the shaping of the final judgment thus minimizing risks of judges' stigmatization patterns.

It must also be noted that, if we do not consider or effectively remedy the risks related to biased datasets/outcomes, the very same tools, under proper vigilance, might be highly beneficial if and when 1) they actually identify and flag the (not permitted) relevance of spurious factors, that is the suspect that a monocratic judge could be driven by unpermitted biases; or 2) they flag factual metalegal[168] patterns such as the relevance of factual situations in driving the adjudicating process (eg local costs for replacing goods; existence of services

[163] Eur. Court H.R., *Vernes* v *France*, no 30183/06; Eur. Court H.R., *Pretto* v *Italy*, no 7984/77.

[164] Loi no 2019- 222 du 23 mars 2019 n 3 above.

[165] Art 33, ibid: 'the identity data of magistrates and of members of the judiciary cannot be used with the purpose of the effect of evaluating, analysing, comparing predicting their actual or alleged professional practices'.

[166] This is one of the reasons why Art 33 of French law no 2019/222 prohibits the re-use of the identification data of judges and employees for classification, evaluation, comparison or profiling purposes and accompanies this prohibition with a criminal sanction.

[167] In particular, with reference to the dangers related to the identification of the judge in charge, see Eur. Court H.R., *Vernes* v *France*, no 30183/06. On the risks related to the publication of the decision see *Pretto* v *Italy*, no 7984/77; while with reference to the necessary impartiality of the judge and the right to a judge established by law (and not only to an alternative resolution mechanism) see *Kontalexis* v *Greece*, no 59000/08, § 38, *DMD GROUP, a.s.* v *Slovakia*, no 19334/03, § 66, *Miracle Europe KFT* v *Hungary*, no 57774/13, § 58.

[168] G. Comandé, n 151 above, 173.

available, etc).

For these reasons, flagging as high risk the use only by the judiciary of these tools results in more than a misleading understanding of the risks they entail and the potential loss of their low-risk usefulness. In this light, the Council's proposal to extend the realm of unacceptable AI systems, forbidden under the AI Act, to private social scoring models does not appear to be an efficient solution, since it would ban from the market profiling methods that could have great benefits, in terms of the speed and the quantity of decision-making, also in the legal sector.

A preferrable solution would be that of including private social scoring models – not only those models used to profile judges – within the category of high risk systems under the proposed AI Act, and modelling the applicable requirements in consistency with a risk-based approach.

5. The 'Digital Legal Divide' and Competition Concerns

The importance of a certain degree of knowledge in the field of informatics and data science by legal professionals is increasingly acknowledged.[169] This change in competences needed for handling technologies employed for the resolution of controversies, could engender risky disparities between legal practitioners and their assisted parties, and especially between more powerful parties as businesses or institutions with stronger technological means, and parties with less technological facilities and thus with less understanding of rendered results. Weaker parties and weaker law firms (meaning also less financially equipped to cope with the costs) would thus become those who are less empowered on the side of technical expertise, this making it hard to litigate 'on equal munitions' with more powerful technologically endowed experts. Implications in constitutional terms to the right to a fair trial and equality of arms are obvious in many jurisdictions.[170]

The growing relevance of artificial intelligence-based tools in the patterns of legal interpretation, implementation and reform, is thus likely to generate new 'digital' legal divides, affecting citizens' accessibility to legal expertise and services in new ways as well as legal practitioners' abilities to cope with technological advancements. From the first standpoint, these divides are soon destined to result in social imbalances deriving from inequalities in the legal protection available to citizens. From the opposite angle, that of legal services providers, the different resources available to public administrations could create technological gaps in less wealthy geographical areas.[171]

[169] K.D. Ashley, *Artificial Intelligence and Law: New Tools for Law Practice in the Digital Age* (Cambridge: Cambridge University Press, 2017) 4, 11; J. Armour, R. Parnham and M. Sako, n 44 above, 57.

[170] For instance in Italy it would trigger doubts under Art 24 of the Constitution and under Arts 6 and 13 ECFR.

[171] See the evidence in respect to 'digital government services', L. Reggi and J.R. Gil - Garcìa, 'Addressing Territorial Digital Divides Through ICT Strategies: Are Investment Decisions Consistent

Additional disparities are likely to be experienced in the private sector, where market imbalances may arise as a direct result of the different availability of the highly sophisticated datasets needed to develop and enacting artificial intelligence applications[172] or even the domain interdisciplinary knowledge to master them. In consideration of the very specificities of those datasets, the market of AI-based applications for the legal sector is at risk of being characterised by high barriers to entries as well as by foreclosure behaviours, giving rise to new competition scenarios in the legal services' sector.

VII. Mapping Solutions: The Legal Framework for AI-Assisted Decision-Making Tools

The variety of concerns described so far triggers a mixture of possible lines of intervention for both interested businesses or institutions engaging in the development of AI-driven legal technologies, and regulators. For the purposes of achieving a more comprehensive and balanced understanding of these challenging transformations, a third focus of enquiry, in addition to the ones given by the market and ethical perspectives, is given by the analysis of the legal system. This is suggested by the same High-Level Expert Group on Artificial Intelligence, which identifies among the three components of the 'Trustworthy AI', not only i) ethics and ii) technical (and thus market) robustness, but also iii) lawfulness. While the first two components have been given more attention respectively from a theoretical and practical perspective, the definition of the lawfulness component has been – strangely – lagging behind.[173]

The identification of the applicable legal framework is, first of all, relevant for circumscribing the realm of *legitimate* employment of machine learning technologies for legal decision-making purposes. In accordance with the very essence of legal rules, the legal perspective comes along with enforcement mechanisms assuring compliance by economic players. Enforceability of legal requirements assures the existence of quick reaction means regarding technologies that come to violate established legal provisions: this is what occurred in the UK where an algorithm employed by the police for facial recognition purposes, was challenged by a civil rights group and ruled unlawful.[174] A correct implementation of identified legal

with Local Needs?' *Government Information Quaterly*, 101562 (2020).

[172] D. Rubinfeld and M. Gal, 'Access Barriers to Big Data' 59 *Arizona Law Review*, 340, 381 (2017); I. Graef, 'Rethinking the Essential Facilities Doctrine in Digital Markets' 53 *Revue juridique Thémis de l'Université de Montréal,* 33, 72 (2019).

[173] This point is made by G. Comandè and D. Amram, 'Feedback for the EU Commission Inception Impact Assessment Towards a 'Proposal for a Regulation of the European Parliament and the Council Laying Down Requirements for Artificial Intelligence' ', available at https://tinyurl.com/5enbarb7 (10 September 2020) (last visited 30 June 2022).

[174] J. Rees, 'Facial Recognition Use by South Wales Police Ruled Unlawful' *BBC*, available at https://tinyurl.com/2p9demt6 (11 August 2020).

requirements, as backed-up by ready enforcement, may also contribute to guarantee the employment 'for good' of legal technologies and thus define, on the side of their theoretical justifications, the sphere of acceptable uses that legitimises them.[175] In other words, prompt enforcement reactions might trigger a sort of spill-over effect that is ultimately useful to (re)define the list of high-risk AI systems in legal services and administration of justice and to unleash their faster uptake.

To begin with, the first issue to be addressed regards what part of the legal framework is relevant for the development of 'trustworthy' legal artificial intelligence-based technologies. A strand of the literature has pointed to the human rights' framework.[176] In our reading, however, the reference to fundamental rights, although necessary, is misleading if not coupled with operational rules. Indeed, as has been highlighted in the previous paragraphs, the same *Guidelines on a Trustworthy AI* appear to consider the protection of fundamental rights as the *end-goal* of an ethically-sound AI design.[177] Moreover, the same fact that fundamental rights are considered as 'basic moral entitlements'[178] places these rights at a level of normativity, which, although already attaining to the domain of enforceability,[179] is nonetheless very close to that of ethics. In this respect, it appears that the fundamental rights' perspective offers little practical guidance to effectively bridge ethics in the market without a clear-cut link with clearly legally enforceable rules.

In light of these shortcomings, in our view, the gap needs to be filled looking at the market that has to internalise ethical precepts and thus at the legal- *per se* enforceable- rules that come to regulate the market of AI-driven applications for legal services. In other words, the applicable legal framework for AI based legal services (in any domain for what matters here) needs to be a layered one moving downwards from general principles (fundamental rights protection) to general non sectoral rules (as will be referred to in the paragraphs below), and hence to sectoral rules (as occurs with the reference to the European Union Harmonisation Legislation in Annex 2 of the AI act).

With reference to general non sectoral rules, in addition to general private law rules (including liability ones),[180] by establishing a basic set of rules to which the fast-developing market of AI tools for legal decision-making needs to comply with, regulations provided by open data laws, data protection laws as well as the proposed Regulation on artificial intelligence itself provide concrete opportunities

[175] See L. Floridi et al, n 94 above.

[176] K. Yeung, A. Howes and G. Pogrebna, n 21 above.

[177] G. Comandè and D. Amram, n 173 above, 6, where the Authors make reference to 'an overall approach grounded on fundamental right protection' of the Guidelines on a Trustworthy AI.

[178] This was already acknowledged by R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

[179] Stressing this point, K. Yeung, A. Howes and G. Pogrebna, n 21 above, 5.

[180] On the problems of defining an accurate liability framework for AI systems, see generally, M. Rabitti, 'Intelligenza artificiale e finanza. La responsabilità civile tra rischio e colpa' *Rivista trimestrale di diritto dell'economia*, 295, 319 (2021).

for bridging the market reality with the ethical declarations, with that offering to market players a more clear guidance in the uptake of relevant technologies.

Under these premises, in the effort to define the relevant legal framework, from a methodological standpoint, a complementary approach is employed: this approach moves from the assumption that ethical principles themselves can offer interpretative guidance for an effective interpretation of market-based legal precepts.[181] In this perspective, the illustrated ethical principles can act as relevant interpretative criteria for detecting those provisions of the regulatory framework that are most relevant for an ethically-sound market development. From a further perspective, these same principles could also stir the evolutive interpretation of existing legal rules and encourage, where necessary, legal reforms,[182] which come to vitalise relevant ethical principles within the applicable legal and enforceable framework[183] and directly address emerging social and market imbalances.[184]

1. Open Data Regulations

The enactment of open data is likely to minimise the risks of inadequate cross-reference and to strengthen the precision of the results of automated processing, in direct consistency with accuracy objectives.[185] Moreover, explicability of AI-driven systems, which has been considered by the High Level Expert Group on AI as a crucial element for 'building and maintaining users' trust in AI systems', is exactly given by the open communication of their design, capabilities, and purposes. Explicability also involves the accessibility of the decision making process' model, that is of its organisational structure and the degree in which artificial intelligence tools are integrated with human decision making.

In this respect, the open data policies that are being increasingly considered at EU level, within the former Digital Single Market Strategy and the current EU strategy for data, are of particular importance also for the purposes of AI-driven legal services. In the new EU strategy for data, the Commission has stated the need to inform future regulatory and policy actions regarding data, upon the principle of 'as open as possible, as closed as necessary',[186] which promotes data

[181] See already, G. Comandé, n 19 above; Id, 'Multilayered (Accountable) Liability for Artificial Intelligence' in S. Lohsse, R. Schulze and D. Staudenmayer, *Liability for Artificial Intelligence and the Internet of Things* (London: Bloomsbury Professional, 2019), 165, 187.

[182] See S. Delacroix and B. Wagner, 'Constructing A Mutually Supportive Framework Between Ethics and Regulation' 40 *Computer Law & Security Review*, 105520 (2021), calling for the 'cross-fertilisation' between ethics and law Stressing this point also G. Comandè, n 19 above.

[183] See in these regards the proposal by G. Comandè and D. Amram, n 173 above.

[184] A legislative proposal by the European Commission should be due in early 2021 with the explicit purpose of making artificial intelligence 'ethical, safe and innovative'. It has been announced by European Parliament, 'Making Artificial Intelligence Ethical, Safe and Innovative', available at https://tinyurl.com/y3szuxjk (1 October 2020) (last visited 30 June 2022).

[185] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 61.

[186] European Commission, 'A European Strategy for Data' n 15 above, 15.

re-usability and analysis across different sectors of the economy, through a constant balancing with intellectual property rights.

Direct reflections of these policy statements at European regulatory level are given in particular by the Open Data Directive,[187] the forthcoming Data Governance Act[188] as well as the recently proposed Data Act.[189] These regulatory frameworks lay down rules ensuring data transferability and re-usage of public sector information for the purpose of stimulating innovation in emerging data-driven markets.

The resulting framework is particularly relevant for the development of AI tools destined to the legal sector. Here, indeed, the design and development of such technologies is mostly fuelled by judicial or otherwise publicly held data. As a result, the emerging businesses are often in private-public partnerships with relevant institutions.[190]

Accordingly, the Open Data Directive requires Member States to enact specific access regimes regarding publicly held data,[191] including *judicial data*.[192] In particular, recital 8 highlights how

> 'documents produced by public sector bodies of the executive, legislature or judiciary constitute a vast, diverse and valuable pool that can benefit society. *Providing that information, which includes dynamic data, in a commonly used electronic format allows citizens and legal entities to find new ways to use them and create new, innovative products and services*'.[193]

The recital further recalls the full support provided by European Union funding programs for the analysis of available aggregated and combined datasets and the creation of new services and applications, ultimately stirring technological

[187] Directive EU 2019/1024 of the European Parliament and of the Council of 20 June 2019 on Open Data and the Re-use of Public Sector Information (Open Data Directive), 26 June 2019, *OJ L 172 (26 June 2019) 56, 83*.

[188] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act)', 25 November 2020, COM(2020) 767 final.

[189] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)', COM(2022) 68 final (23 February 2020).

[190] This is the case of the Hart algorithm, developed in partnership with Cambridge University, with data rendered available by Durham police. Council of Europe-European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 51. The 'Partnership for Open Government' (OGP) has been established exactly for the purposes of incentivizing the enactment of technology projects based on publicly held data. It is an organization including more than seventy Member States, representatives of civil society and digital companies. ibid 19.

[191] See Art 10 Open Data Directive.

[192] See recital 43 Open Data Directive, referring to the availability of documents regarding the 'legal and administrative process'.

[193] Emphasis added. In this perspective, the recital recalls the full support provided by European Union funding programs for the digitisation of public services through the analysis of available datasets.

evolution.[194]

In light of the above, it must be observed how there are at least two main hurdles to a fruitful enactment of the considered regime. The first one regards the need of a national implementation by Member States, which could lead to a highly fragmentated European landscape regarding access to public data, including data regarding judicial decisions. This could possibly obstruct or at least slow down the development of the technologies based on such data if national markets as such are deemed insufficient to promote innovation.

The second one concerns the burden placed onto businesses to anonymise their datasets so as to bypass the application of the stricter regulatory regime regarding personal data. The Open Data Directive indeed admittedly does not interfere with the General Data Protection Regulation.[195] In this respect, recital 52 of the Open Data Directive identifies anonymization as a means for 'reconciling the interests in making public sector information as re-usable as possible (…)'. The same recital nonetheless acknowledges the costs of anonymisation interventions, to be considered as 'part of the marginal cost of dissemination' of relevant information.

These costs could be soon cut down in case of a successful development of the above-mentioned artificial intelligence-based technologies for the anonymisation of court decisions.[196] In this respect, the Commission's *e-Justice* Action Plan, envisages the training of an automated-driven model for the anonymisation of Court decisions and, as a result, the drafting of best practices as well as of technical guidelines,[197] enabling a more secure and more widely spread use of these applications. This would enable a (possibly) greater reliance on the open data framework and, as a result, a more voluminous sharing of the legal datasets needed for the development of technologies relevant to the field.

Greater accessibility of relevant legal datasets could help creating a level playing field for firms and institutions, thus reducing emerging gaps in market power directly related to an unequal collection of valuable data by producers of AI tools for legal decision-making. To these ends, the proposed Data Governance Act is meant to provide additional rules for the sharing of publicly held data, when these are 'protected' by the 'rights of others', as data protection rights or intellectual property rights.[198] In this respect, it establishes a prohibition of exclusive arrangements regarding public data.[199]

If enacted, this provision could be extremely important to enable access to public data also to medium and smaller enterprises and thus to keep up with competition dynamics in the emerging market of AI-driven legal services. It

[194] See also recital 10 GDPR.
[195] Recital 52 GDPR.
[196] European Commission, '2019-2023 Action Plan European e-Justice' n 26 above,15.
[197] ibid
[198] See Chapter III Data Governance Act.
[199] So Art 4 Data Governance Act.

would indeed stem the creation of market imbalances given by exclusive collection of relevant data by one powerful party and by the creation of preferential channels of data retrieval by businesses from public administrations and agencies. In this light, the prohibition of exclusive arrangements regarding publicly held data would thus ultimately contribute to the creation of a pro-competitive market setting for the blossoming of research and development endeavours in the sector of AI-assisted legal decision-making tools.

From a further perspective, the proposed Data Governance Act establishes a sophisticated data sharing mechanism for 'data altruism' purposes, related to the purposes of general interest, such as scientific research purposes or the *improvement of public services*.[200] This sharing mechanism relies on the intermediation of a 'data altruistic organization', which are not-for-profit legal entities recognised in the Union[201] and which share data 'without seeking a reward'.[202] Defined in these terms, the sharing infrastructure for data altruism purposes could be particularly interesting for the collection of data for the development of AI tools for public legal services, either directly by governments or by established public-private partnerships.

2. The Data Protection Framework

The General Data Protection Regulation lays down the fundamental requirements and principles for the design of technologies processing personal data. It sets the basic framework, to which such a fast-developing market needs to adhere. In this perspective, the normative grounds laid down by the GDPR are particularly important for information retrieval and the building of cognitive computational models destined to the legal sector, which strongly rely on personal data. The GDPR sets the prerequisite for the free circulation of relevant personal datasets and thus for the achievement of relevant technologies' interoperability, both of which lie at the very core of the development of the correspondent market.[203] In this perspective, the General Data Protection Regulation operates as both a *facilitator* and *external limit* to the development of intelligent agents in the market of legal services.

By external limit, we mean a set of constraints aimed at moulding the required characteristics of these AI tools to facilitate their uptake, not merely limiting or banning legal factors. This 'modelling' function of the General Data Protection Regulation over technologies' design is directly rooted in its fundamental rights'

[200] Art 2(10) Data Governance Act. Emphasis added.

[201] See recital 36 Data Governance Act.

[202] Art 2(10) Data Governance Act.

[203] Access to information and interoperability are identified by the Commission as the two key factors to be addressed for the purposes of the development of e-justice applications. This is highlighted at the outset of the e-Justice Plan. European Commission, '2019-2023 Action Plan European e-Justice' n 26 above, 9, 10.

foundations,[204] where the fundamental right to data protection, and the apparatus of substantial and procedural rules it establishes, act as enablers for the protection of other fundamental rights. In the field of digitised legal services, the technical implementation of the data protection framework will heighten the protection of fundamental rights of equal access to justice, to a fair trial and, more in general, of equality before the law clearing out many of the concerns already raised by the recalled ethical documents.

For instance, it helps preventing unacceptable profiling of judges and legal experts without criminalizing the use of such data as occurred in France. It guarantees the possibility of sharing costs for pseudonimizing/anonymizing judicial datasets, along with the possibilities offered by the DGA, among businesses who can afterwards compete for their efficient use.

Along these lines, the GDPR takes expressly into consideration personal data sharing objectives, as declared in the recitals 2, 5, 13 GDPR and as directly substantiated in the special data protection regime granted for processing activities carried out for statistical and research purposes, regarding special categories of data, under the combined reading of Arts 9(2) lett. j); 5(1) lett. b); 6(4); and 89 GDPR.[205] An interpretation of the GDPR as a research-friendly data protection framework in accordance with the mentioned recitals,[206] sustains the facilitating role of the General Data Protection Regulation in the consolidation of a new market as the one related to artificial intelligence-based tools for the provision of legal services.

Read through the lenses of its free flow of personal information objectives, EU data protection law as framed in the GDPR appears to uphold the set European policies of open data, integrating the relevant framework. The recalled Open Data Directive directly acknowledges under recital 52 that 'the re-use of personal data is permissible only if the principle of purpose limitation as set out in point (b) of Art 5(1) and Art 6 of Regulation (EU) 2016/679 is met'. By stating this, the Directive implicitly recognizes data protection law as a fragment, specifically related to personal data, of the broader European policy regarding data sharing and accessibility, ultimately expressed in the European Strategy for Data.[207]

[204] See recital 1 GDPR. See G. Comandé, n 19 above; G. Comandè and G. Schneider, 'Differential Data Protection Regimes in Data-driven Research: Why the GDPR is More Research-friendly Than You Think' *German Law Journal* (2022); D. Amram, 'Building up the 'Accountable Ulysses' Model. The Impact of GDPR and National Implementations, Ethics, and Health-data Research: Comparative Remarks' 37 *Computer Law & Security Review*, 105413 (2020); D. Amram, 'The Role of the GDPR in Designing the European Strategy on Artificial Intelligence: Law-Making Potentialities of a Recurrent Synecdoche' *Opinio Iuris in Comparatione*, 1, 7 (2020).

[205] G. Schneider, 'Health Data Pools under European Policy and Data Protection Law: Research as a New Efficiency Defense?' *JIPITEC* 49, para 1(2020).

[206] See G. Comandè and G. Schneider, 'Can the GDPR Make Data Flow for Research Easier? Yes it Can, By Differentiating!' *Computer Law & Security Review* 41, 105539 (2021).

[207] European Commission, 'A European Strategy for Data' n 15 above, 4. Arguing for an integrated consideration of the EU open data policies and data protection law, I. Graef, R. Gellert and M. Husovec, 'Towards a Holistic Regulatory Approach for the European Data Economy: Why the Illusive Notion of

Against this backdrop, specific GDPR provisions offer further evidence of their service to these sharing goals.

a) Legal Bases Under Arts 6 and 9 GDPR

An eligible legal basis for the processing of personal data to design of AI-based legal services is offered by the legitimate interest of (private) developers enshrined in article 6(1)(f) GDPR. This basis could however be relied on only by legal professionals, as law firms, for the in-house development of technologies that directly support the conduction of their legal research regarding their clients. In these cases, indeed, a data subject could reasonably expect 'that processing for that purpose may take place', in light of the existence of a

> 'relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller'.[208]

Conversely, the ground regarding the operator's legitimate interest does not seem to be suitable for businesses developing artificial intelligence applications for legal decision-making purposes in respect to which no direct relationship between the business and the client is to be found. Moreover, the same lawful basis cannot be relied on by public authorities. These ones could find an appropriate legal ground for the development of artificial intelligence tools for legal decision-making in the 'performance of a task carried out in the public interest or in the exercise of official authority vested in the controller', in accordance with Art 6(1) lett e) GDPR. Nevertheless, their initiatives might be stiffed by the proposed AI Act as we discussed before, at least for those AI system that would directly assist in 'a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts'.

Moreover, the processing of personal data for the development of algorithmic models could be generally linked to research and statistical objectives.[209] When the processing of personal data for these objectives is adequately grounded in one of the mentioned lawful bases under Art 6 GDPR, a special data protection regime is applicable, facilitating data controllers' processing through the possibility to 'derogate' to the principle of purpose limitation under Article 5(1)(b) GDPR and storage limitation under Article 5(1)(e) GDPR and to data subjects' rights as the right to be forgotten under Art 17(3) GDPR and the right to be informed under Art 14(5) GDPR.

Non-personal Data is Counterproductive to Data Innovation' TILEC Dicussion Paper, DP 2018-028, available at https://tinyurl.com/2p9d8krm (September 2018) (last visited 30 June 2022).

[208] See recital 47 GDPR.

[209] Matching the purposes of research and statistical enquiry under the GDPR and the development of algorithmic models, S. Wachter and B. Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection in the Age of AI' 2 *Columbia Business Law Review*, 494 (2019).

However, to counterbalance these derogations, Art 89(1) GDPR requires data controllers to implement safeguards, assuring the respect of fundamental data protection principles, as the principle of data minimization, and providing 'appropriate' technical and organisational measures for the protection of data subjects' rights and freedoms. These safeguards encompass, first of all, the pseudonymisation of the data. The appropriateness of these safeguards will have to be considered in light of the specificities of the technology to be developed. The technical and organizational requirements mandatory by data protection by design and default rules under Art 24 GDPR provide a fundamental benchmark to these ends.

b) Data Segregation Under Art 11 GDPR

A positive combination of the open data approach under the framework of the GDPR might unfold around an evolutive notion of anonymity, as long as pursuant to the combined reading of the notions described under Art 4 and recital 26 GDPR. In a layered evolution of the available tools, if and when a strong automated pseudonimization can be offered on judicial data, further use of judiciary (open) data could be envisaged also with reference to the underexplored possibilities offered by Art 11 GDPR.

A careful reading of Art 11 GDPR suggests that it provides a pattern to navigate between technical needs to work with personal data and the obvious concerns to their uses/abuses in the legal services domain. In an admittedly cryptical way, Art 11 GDPR suggests a lighter regime for those data controllers whose data processing does not require or does no longer require 'the identification of a data subject by the controller'. Such data controllers should not be obliged 'to maintain, acquire or process additional information in order to identify the data subject for the sole purpose of complying with this Regulation'.[210] The provision thus admits the possibility for data controllers to segregate judicial data by way of a strong level of privacy-preserving pseudonimization, freeing them from many compliance burdens.

Yet, such a possibility might be at odds with the relative notion of data anonymity. Recital 26 clearly declares that 'to determine whether a natural person is identifiable (and his/her data *data are thus not anonymous*), account should be taken of all the means reasonably likely to be used, such as singling out, *either by the controller or by another person* to identify the natural person directly or

[210] See Art 11 GDPR: 'If the purposes for which a controller processes personal data do not or do no longer require the identification of a data subject by the controller, the controller shall not be obliged to maintain, acquire or process additional information in order to identify the data subject for the sole purpose of complying with this Regulation. 2.Where, in cases referred to in paragraph 1 of this Article, the controller is able to demonstrate that it is not in a position to identify the data subject, the controller shall inform the data subject accordingly, if possible. In such cases, Articles 15 to 20 shall not apply except where the data subject, for the purpose of exercising his or her rights under those articles, provides additional information enabling his or her identification'.

indirectly' (emphasis added). Reference is made expressly not only to the means of data controllers but also of 'another person'. Thus, the mere technical prevention of identifiability by the data controller does not amount to anonymity automatically.

Yet again,

> 'to ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments'.

While a first literal reading of the latter quoted text seems to refer to abstract availability of technologies and resources, once we concentrate on the purpose of this availability ('to ascertain whether means are reasonably likely to be used to identify the natural person') we realize that Art 11 casts a sort of relative presumption of non-identifiability on data controllers who 'do not need or no longer need' to identify the data subjects whose data they are processing.

Considering that Art 6, para 4, lett e names 'the existence of appropriate safeguards, which may include encryption or pseudonymisation' as an enabler of further processing, we can easily identify a specific case of relatively (limited to specific data processing activities and data processors) anonymous data that are under the special regime of Art 11 GDPR. This can clearly be the case of strongly pseudonymized judicial data open to further public use. Such a reading, still in need of further exploration, would create a fair data pool potentially enabling the competitive development of new AI-based services balancing their use according to the used safeguards. Appropriate safeguards would need to rely also on supervisory authorities' auditing powers. The Data Altruism Organisations under the proposed Data Governance Act, could be directly entrusted with these oversight tasks.

c) Human-Centric Technology Design Under Art 22 GDPR

Art 22 GDPR prohibits the issuing of 'decisions based solely on automated processing, including profiling, which produces legal effects concerning' the addressee of the decision.[211] The provision first addresses the issue of profiling activities, highlighted as a significant risk related to the collection and processing of judicial data.

The prohibition nonetheless appears to have broader implications for the design of technologies employed for automated legal decision-making. It seems to require the developer and the controller of related technologies to establish a

[211] For a more detailed comment on Art 22 GDPR, see S. Wachter and B. Mittelstadt, n 209 above, 494; M. Brkan, 'Do Algorithms Rule the World? Algorithmic Decision-Making in the Framework of the GDPR and Beyond' 27 *International Journal of Law and Information Technology*, 2, 91 (2019).

delimitation between the human and the automation sphere, leaving room for the conduction of self-standing human choices and requiring human oversight of employed technologies.[212]

Moreover, by requiring a human-centric approach, the provision also suggests the need of adopting a scaled approach in the allocation of the tasks between humans and artificial intelligence tools. This scaling could be determined in light of the results drawn from the data protection impact assessments, which data controllers are required to conduct under the conditions provided for by Art 35 GDPR.[213] The mapping of the risks 'to the rights and freedoms of natural persons'[214] related to the employment of developed technologies, could indeed suggest the opportunity of envisaging a more invasive 'user control' when the risks are higher, and conversely of allowing a less rigorous human control, when the risks are deemed lower. In this respect, it would be desirable to define the thresholds regarding the different degree of human supervision required in respect to differently risk-rated artificial intelligence tools for legal decision-making.

For these purposes, a valuable starting point is given by the risk-based approach offered in the proposal for a Regulation on AI, which tailors its rules to the 'intensity and scope of the risks that AI systems can generate'.[215] Accordingly, it prohibits specific types of artificial intelligence applications under Art 5 and lays down specific rules for high-risk tools identified under Art 6. For this latter category of AI systems, the proposal requires the implementation of a risk management and a data governance system[216] as well as transparency safeguards,[217] which come to support the human oversight requirement under Art 14, requiring the effective oversight 'by natural persons during the period in which the AI system is in use'. The human oversight requirement is functional to the minimisation of risks to

> 'fundamental rights that may emerge when a high-risk AI system is used in accordance with its intended purpose or under conditions of reasonably foreseeable misuse'.[218]

Overall, Art 22 GDPR, as read in combination with Art 14 of the proposed Regulation on AI, establishes a mandatory minimum autonomy requirement,

[212] Stressing this point, G. Comandé and G. Malgieri, 'Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation' 7(4) *International Data Privacy Law*, 243, 265 (2017).

[213] M. Kaminsky and G. Malgieri, 'Algorithmic Impact Assessments under the GDPR: Producing Multi-layered Explanations' *International Data Privacy Law*, 1 (2020).

[214] So Art 35 GDPR.

[215] Cf Recital 14 of the proposal for a Regulation, affirming the importance of a 'defined risk-based approach' for AI. European Commmission, 'Proposal' n 9 above.

[216] ibid Art 9 and Art 11.

[217] ibid Arts 12 and 13.

[218] ibid, Art 14, comma 2.

demanding the supervision by human subjects regarding the functioning of employed technologies: this supervision relates to the ability of reviewing issued decisions and with that the data that sustain a specific outcome.

For these purposes, legal professionals using artificial intelligence tools for their decision-making will need to be equipped with adequate competences, so as to ward off the perils of the automation bias.[219] Interestingly, in this respect, the considered provisions under the GDPR and the proposed Regulation on AI appear to provide legal grounds to the CEPEJ's principle of 'under user control', which recommends the implementation of 'computer literacy programmes' for users of technologies employed in judicial systems.[220] As some scholars have interestingly observed,[221] however, this change of competence by legal professionals, directly providing AI-driven legal services or using third parties' developed legal technologies, does not only imply a mere acquisition of basic informatics knowledge by them. It triggers instead a much more complex process of combining different skills, involving data science competences for the interpretation of machine-rendered results; traditional legal expertise for the evaluation of the implications of the same results, and ultimately client skills, needed to convey the performed analysis to the party concretely bearing the effects of the decision.

d) Supervisory Authorities' Oversight and Auditing Powers Under Arts 30; 35; 36(1) and 58(1)(b) GDPR

The relevance of supervisory authorities' oversight and auditing powers in respect to the design of automated legal services is a further aspect to be considered. The information over the nature of employed datasets and the structural features of processing technologies that data protection authorities are entitled to access under Arts 30; 35; 36(1) and 58(1)(b) GDPR could indeed be extremely precious exactly for the conduction of a sound and effective supervision over the technologies eventually employed in the sector of legal services.

In accordance with Art 36(1) GDPR, data controllers have the obligation to consult the supervisory authority prior to the processing, when the data protection impact assessment shows that the processing would result in a high risk, in the absence of measures to mitigate the risk. For the purposes of this prior consultation, the controller shall provide the supervisory authority with the data protection impact assessment performed under Art 35 GDPR, together with any other information requested by the same supervisory authority, as the one contained in businesses' records of processing activities required by Art 30 GDPR.

Moreover, Art 58(1)(e) GDPR establishes data protection authorities' power to carry out investigations in the form of data protection audits, enabling the

[219] K.D. Ashley, n 169 above, 5.

[220] See Art 5, Council of Europe-European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 12.

[221] J. Armour, R. Parnham and M. Sako, n 44 above, 27.

same data protection authorities to access 'all personal data' and 'all information necessary for the performance of its tasks'.[222] Through their investigative powers, data protection authorities can enquire which data are the objects of processing activities, and how exactly they are technically processed. Accordingly, they can access the most detailed information regarding the content and structure of employed datasets[223] (eg whether pseudonymisation techniques have been adequately applied), monitoring the actual compliance with the safeguards needed to enjoy the 'facilitated regime' under art 11 GDPR.

Also from the private side, the accountability precepts enshrined in Art 5 GDPR are leading some research institutes to develop automated-driven auditing tools for the assessment of businesses' algorithms.[224] These tools could on the one hand support businesses developing artificial intelligence tools for the legal sector in the performance of their compliance tasks,[225] and on the other assist also supervisory authorities in their auditing powers.

3. Standards and Certifications Under the Proposed Regulation on Artificial Intelligence

The CEPEJ Ethical Charter recommends the enactment of corrective measures that limit or neutralize the risk of harmful effects stemming from the existence of biases in datasets employed for AI-based applications destined to the legal sector.[226] In addition to this, it welcomes initiatives that raise awareness about the presence of biases in datasets among interested stakeholders.

These issues have been partly addressed in the European Commission's proposed Regulation on artificial intelligence,[227] that has established mandatory requirements on training data, record-keeping about datasets and algorithms, transparency and quality management for high-risk artificial intelligence tools. The proposal indeed sets 'data and data governance' requirements regarding the 'training, validation and testing data sets', and assuring that in all the mentioned phases data are 'relevant, representative, free of errors and complete',[228] with particular attention to 'the specific geographical, behavioural or functional setting'.[229] In this perspective, data governance practices need to assure that AI-developed tools are bias-free. The relevance to the specific setting in which the AI

[222] Art 58(1)(e) GDPR.

[223] A. Casey, A. Farhangi and R. Vogl, 'Rethinking Explainable Machines: The gdpr's 'Right to Explanation' Debate and the Rise of Algorithmic Audits in Enterprise' 34 *Berkeley Technology Law Journal*, 145, 188 (2019).

[224] Ada Lovelace Institute, 'Examining the Black Box: Tools for Assessing Algorithmic Systems', available at https://tinyurl.com/nhj85y8z (29 April 2020) (last visited 30 June 2022).

[225] M. Kaminsky and G. Malgieri, n 213 above, 7.

[226] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 9.

[227] See G. Comandè and D. Amram, n 173 above, 1.

[228] Art 10 especially under para 1 and 2. European Commmission, 'Proposal' n 9 above.

[229] ibid, Art 10, para 4.

tool is intended to be employed, clearly aims to avoid that what has been referred above as translational bias. Nevertheless, the reference to absence of errors might need some qualification since it is technically a difficult, even if possible, requirement to guarantee.

Although the establishment of these requirements is to be certainly welcomed, these still remain quite vague and raise concerns over when a dataset used to train an AI-driven legal tool is qualitatively satisfying. In this respect, the reference to ethical standards may be useful for a more effective concretization of the proposed rules.

As the Guidelines on a Trustworthy AI underline, integrity of the employed datasets is obtained through the identification of the system's vulnerabilities, and the enactment of appropriate safeguards for the prevention of data pollution.[230] These ones are first related to the alignment of employed systems to relevant standards, as the ISO[231] and IEEE.[232] Adherence to these standards would contribute to control the system's accuracy and the eventual presence of biases in accordance with the principle of *data sanitisation*[233] even if not guaranteeing the dataset is free of error. Accordingly, for the purposes of controlling the accuracy and integrity of employed datasets, the CEPEJ Ethical Charter recommends the 'use of certified sources and intangible data with models conceived in a multi-disciplinary manner, in a secure technological environment'.[234] This means that the datasets from judicial decisions that feed the system's algorithms should be employed only if they come from certified sources and should not be modified before they are processed by the system.[235] These examples illustrate how the ethical considerations can be employed in further operational readings of the existing and forthcoming legal rules.

The quality of employed datasets is also given by their inclusiveness, that is the ability of the same datasets to reflect different population groups, without generating any unfairly biased outputs in respect to these same different groups. In particular, designers of artificial intelligence-based tools should collect relevant datasets from the relevant justice professionals, as judges, prosecutors, attorneys, or by researchers in the field, in accordance with a multidisciplinary approach.[236] Mixed project teams for the technology design could be a first important measure

[230] European Commission-High Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' n 13 above, 27.

[231] Iso, *Standards*, available at https://tinyurl.com/3fjyzaxa (last visited 30 June 2022).

[232] IEEE, *Security & Privacy*, available at https://tinyurl.com/3dy3p5dm (last visited 30 June 2022).

[233] See B.W. Goodman, 'A Step Towards Accountable Algorithms?, Algorithmic Discrimination and the European Union General Data Protection' *29th Conference on Neural Information Processing Systems*, available at https://tinyurl.com/mr3zkbkv (2016) (last visited 30 June 2022).

[234] European Commission for the Efficiency of Justice (CEPEJ), 'European Ethical Charter' n 7 above, 10.

[235] ibid

[236] ibid

to assure interdisciplinarity.[237]

In respect to the subsequent moment of bias detection, the proposed Regulation on AI comes to support the transparency requirements envisaged under the GDPR,[238] proceduralizing the development of AI-driven tools, by imposing onto developers the obligation to develop a 'technical documentation' before the system is placed on the market[239] and to design the system in a manner that enables 'the automatic recording of events ('logs') while the high-risk AI system is operating'.[240] Ultimately, it demands that the design and development of the systems is performed 'in a way to ensure that their operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately',[241] together with the development of clear instructions that should guide the operator.[242]

To correctly address the harms potentially resulting from biased datasets in AI-tools for legal services, systems should be traceable and data subjects' ability to contest and search for an effective remedy to the unfair treatment received by the employed AI tools should be guaranteed. Transparency of applications employed in the legal sector becomes a crucial matter also for legal professionals to eventually state the reason for deviating from software's recommendation preventing at the same time their professional autonomy and eventual professional liability. Indeed, an adequate motivation for having followed or not the indications rendered by the IA, could in turn protect him/her from judicial action for professional liability.

Exactly for the purposes of a fair and equitable design of AI-based technologies, the High Level Expert Group on Artificial Intelligence encourages the involvement of the different stakeholders that will be most impacted by their employment. It is assumed that by properly addressing needs and feedbacks of a wider range of users, resulting devices would also better protect data subjects' freedom of choice.[243] In this respect, collective and diffuse auditing schemes could be a relevant means for assuring a societal oversight of the collection, processing and storage cycle.

Ultimately, the proposed Regulation establishes a general presumption of conformity to the above illustrated obligations, in case of conformity of AI tools to 'harmonised standards'[244] and when the provider has followed conformity assessment procedures.[245] It also establishes the possibility for AI tools developers to

[237] ibid

[238] See Arts 12-15 GDPR. In this respect see G. Comandè and G. Malgieri, n 212 above, 243, 265.

[239] Art. 11, para 1, European Commmission, 'Proposal' n 9 above.

[240] ibid, Art 12, para 1.

[241] ibid, Art 13, para 1.

[242] ibid, Art 13, para 2.

[243] European Commission-High Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' n 13 above, 19.

[244] Art 40 European Commmission, 'Proposal' n 9 above.

[245] ibid, Art 43.

certify their products through certificates issued by notified bodies.[246]

Relevant certification schemes are also envisaged in the Regulation UE 2019/881 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification.[247] The Cybersecurity Act also establishes a framework for the implementation of common European cybersecurity schemes for digital services and products, which could be relevant for enacting certification regimes specifically regarding artificial intelligence tools for the legal sector.

For these purposes, the Agency for Cybersecurity has an important consultancy role in technological matters. The cybersecurity schemes drafted by the ENISA and enacted by the European Commission in accordance with Arts 47-50 of the Regulation, can be relied on by businesses to issue the EU statement of conformity whereby the fulfilment of the requirements set out in the scheme is declared.[248]

The adherence to issued certifications for artificial intelligence-based products employed for legal decision making could be a further means to ensure that offered services follow requirements that assure the integrity and accurateness not only of stored and processed data, but also of given results/outputs generated by the machine.[249]

VII. Conclusions: Bridging Market Developments, Ethical Principles and the Legal Framework

The definition of the relevant ethico-legal framework in the design of the highly specialized computational models destined to AI-drive legal services is a precondition for a legally-sound expansion of the correspondent emerging market. At a policy level, it also poses fruitful grounds for the theoretical debate regarding the ethical legitimacy of the deployment of such tools in the legal practice and judicial decision-making as well as the more balanced relationship between ethical and legal boundaries of their development and use.

Our analysis shows how in front of the emerging phenomenon of machine-driven legal decision making, both businesses and regulators should take concrete actions to more efficiently combine the merits of traditional and alternative legal services delivery models.[250] The study has demonstrated that a correct implementation of the described existing legal framework into the design of employed automated driven tools can minimise the threats to some fundamental

[246] ibid, Art 44.

[247] Regulation UE 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act), OJ L 151, 7 June 2019, online available at https://eur-lex.europa.eu/eli/reg/2019/881/oj.

[248] ibid, Art 53.

[249] ibid, Recital 75.

[250] D.B. Wilkins and M.J. Esteban, n 96 above.

values of the legal system, such as the principle of equality and non-discrimination, the principle of transparency of judicial decision-making and the principle of fair treatment/process, while reducing legal constraints (e.g. by a rational use of Art 11 GDPR and the Open Data Directive) and opening legally-relevant data to further use and economic exploitation, benefiting both the aims of the legal system and the development of a suitable market. In this perspective, each of the identified lines of intervention should be considered more in depth.

The employment of artificial intelligence techniques as a tool for conducting legal assessments activities still leaves open additional concerns. Part of them directly stem from the difficulties of subsuming traditional legal notions and concepts into the standardised criteria the machine reads: general legal notions, in particular so-called general clauses, as for example the good faith clause, may be of too vague and ambiguous nature to be incorporated in machine learning processes. Questions thus arise regarding whether these can be transformed into machine-readable parameters that are adequately understood, processed and thus applied by automated-driven systems; or whether automated systems can correctly combine different normative criteria, the association of which can return different legal results on the basis of the weight to be given to each of the considered criteria relevant for the case under scrutiny. Moreover, the same normative parameters could be subject to reforms or changes in the interpretation, not only directly, but also indirectly.[251] A change in interpretation could, eventually, require an update of the criteria governing the machine, if this does not occur automatically due to the open configuration of employed datasets.

Similarly, a second, more general, problem on the background of the present analysis relates to the persisting difference between artificial intelligence-driven decision-making and human legal reasoning. The human mind is indeed capable of 'creatively' substantiating legal notions in the unpredictable and unique set of circumstances of a specific case. As Floridi has argued, it is capable of giving meaning to it, in accordance with its experience and its acquired 'semantic capital'.[252] Could the machine reproduce this creative, and to some extent 'irrational' component of legal reasoning? The problem arises especially in respect to general clauses – and in respect to standards as far as the American system is concerned –, which have traditionally opened up the leeway to transformative interpretations by the judicial.[253]

These considerations lead to the much broader and problematic issue regarding the building of a legal system that incorporates algorithm-driven legal services and where the element of the creativity of the human reasoning in legal

[251] This occurs for example in case of cross-referencing between different regulations.

[252] L. Floridi, 'Semantic Capital: Its Nature, Value and Curation' 31 *Philosophy & Technology*, 481 (2018).

[253] This is underlined by R. Pardolesi, and A. Davola, 'Algorithmic Legal Decision Making: la fine del mondo (del diritto) o il paese delle meraviglie?' *Questione Giustizia*, 1 available at https://tinyurl.com/uz9scdxy (2020) (last visited 30 June 2022).

matters is nonetheless preserved and adequately balanced with the opportunities provided by the considered innovations.

Against this backdrop, after having enquired how the market for AI-driven legal tools needs to evolve *vis à vis* the existing ethic-legal framework, the further question needs to be addressed regarding how these technologies are to be built into the legal system. This last question refers to the need to find an adequate point of balance between machine-generated and human-reasoned law. In respect to the specific issue of a digitised legal system, this means that the legal tasks that are easier to be performed – because the legal analysis is more 'proceduralized' and requires less interpretative efforts, as occurs with the calculation of family allowances – can more easily be allocated to automation – always with the supervision of the competent judge or lawyer evaluating algorithms and revising eventually the decisions – for cost saving and efficiency reasons. More complex scenarios shall be, conversely, analysed by actual judges and lawyers. On these premises, a question arises: who decides what is sufficiently simple to be fed by the machine and challenging enough to be assessed by a human?

The integration between machine-driven tools and human interpretation endeavours can however be looked at also from the very opposite perspective. The greater information processing capabilities offered by intelligent agents could be exploited for the solution of more complex legal situations, enabling in some cases to overcome the traditionally acknowledged limits of the legal system, regarding the structural incompleteness of legal rules and of the information held by legal practitioners.[254] In this perspective, the new possibilities of personalised law offered by technologies based on algorithmic processing techniques are being currently evaluated by a strand of the scholarship,[255] for their potential to deliver 'ex ante behavioural prescriptions finely tailored to every possible scenario'[256] and, in particular, to specific categories of addressees, which can be informed and thus oriented in their actions nearly in real time.[257] From this perspective, thus, an additional issue will have to be addressed in a near future, directly regarding how these prescriptive commands stemming from what has been defined as 'self-driving law',[258] are to be integrated and combined with the abstract and widely remedial call of black letter law.

[254] ibid

[255] A.J. Casey and A. Niblett, 'Self-driving Laws' 66(4) *University of Toronto Law Journal*, 429 (2016); Id, 'Framework for the New Personalization of Law' 86(2) *University of Chicago Law Review*, 333, 358 (2019). See also, G. Wagner and H. Eidenmueller, 'Down by Algorithms? Siphoning Rents, Exploiting Biases and Shaping Preferences- The Dark Side of Personalised Transactions' *University of Chicago Law Review*, 86, 581 (2019).

[256] A.J. Casey and A. Niblett, 'The Death of Rules and Standards' 92(4) *Indiana Law Journal*, 1401, 1402 (2017).

[257] Reflecting over the personalisation opportunities for the legal system given by artificial intelligence, C. Busch and A. De Franceschi, *Algorithmic Regulation and Personalized Law* (London: Bloomsbury Publishing, 2021).

[258] The expression is employed by R. Pardolesi and A. Davola, n 253 above.

All these further, challenging, issues related to the ongoing processes of automatization of our legal system can be managed with greater responsiveness by policy makers and regulators if solid patterns of interconnection between the market, the ethical and the legal spheres are established. This analysis has tried to show possible interaction channels between these three different levels. It has demonstrated how the legal framework can act as a catalyst in order to blend evolving markets of AI tools for legal decision-making with established ethical principles.

In this respect, the study has shown how contrary to the dominant view that stresses the importance of a fundamental rights-based approach, the focus should be set onto the market-based regulatory framework, which comes to directly model emerging businesses in the AI-driven legal sector. In this respect, open data regulations, data protection law under the GDPR and the announced proposal of a regulation on artificial intelligence have been assessed as a primary means to implant ethical values in the market. From an opposite perspective, it has been suggested how ethical declarations themselves can be a driving force for the design and implementation of future regulations over artificial intelligence.

As we believe, the proposed hermeneutical model is particularly important for the purposes of an ethically-sound development of the sensitive market of artificial intelligence applications for the legal sector. It could nonetheless be of paradigmatic relevance also for the regulation of other fundamental rights-invasive applications of artificial intelligence, as is the case of AI-driven health applications, or of artificial intelligence tools deployed in the financial sector.

Essays

Unilateral Repudiation or Divorce? *Ṭalāq* Betwixt and Between Diverse (Extra-)Judicial Environments

Federica Sona*

Abstract

This contribution focuses on the (in)formal implementation of a form of nuptial dissolution – which is broadly identified with the Arabic term *ṭalāq* – in Italy. The essay raises red flags to signal normally unperceived dynamics affecting the (non-)recognition of foreign *sharīʿah*-compliant matrimonial dissolution forms, as well as potential discriminatory practices enacted by state legal systems and diplomatic missions.

Adopting an interdisciplinary approach, the paper sheds light on otherwise concealed multiple family arrangements implying concurrent diverse nuptial statuses for transnational Muslim partners, including 'limping marriages' and polygamous unions. By juxtaposing Islamic and Italian legal provisions, gendered readings offered to the judiciary by disputing (ex-)spouses and contrasting perceptions on revocability are revealed. Thorough analyses of original Arabic-language documentation and their carefully tuned translations bring to light problematic *ṭalāq* recognitions, which deserve to be properly scrutinized, including unnotified man's unilateral repudiations that violate the public policy criterion and the spouse's right of defense.

I. Introduction

This article[1] examines the multiple manners in which a foreign form of nuptial dissolution – broadly identified with the Arabic term *ṭalāq* –[2] can *de facto* be civilly recognized by judicial and administrative authorities.[3] Precise attention is thus paid to both the processes of normative acknowledgement and the civil recording of foreign legal proceedings or administrative procedures identified as *ṭalāq*-s. This Islamic institution is emblematic of the interaction between different

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[2] The diverse meanings of this Arabic term are discussed below, see subsection 3. In this essay, the word *ṭalāq* is pluralized by adding the suffix '-s'.

[3] Due to space restrictions, *ṭalāq*-s performed privately between the parties and those issued in religious worship centers (eg mosques) and diplomatic missions are not investigated. The involvement of both Italian and MMCs' diplomatic missions in Italy is addressed solely with regard to the civil registration of foreign *sharīʿah*-compliant matrimonial dissolutions.

legal systems – including those of Muslim majority countries (MMCs) – and religious or cultural normative orders.

Focusing on the (in)formal implementation of *sharīʿah*-compliant[4] forms of matrimonial dissolution in the Italian legal system, this study investigates legal interactions between official state bodies and Muslim (ex-)partners. It contributes to the current academic debate by raising red flags that signal broadly unperceived dynamics affecting the (non-)recognition of foreign *ṭalāq*-s and discriminatory undercurrents enacted by, or in the folds of, European legal systems.

Although Muslims living as a minority in European environments have been increasingly studied,[5] important areas remain invisible to traditional legal perspectives. Otherwise concealed fluid courses of actions are disclosed when embracing an interdisciplinary approach. Zooming in on *ṭalāq*-related issues, this article sheds light on multiple real-life scenarios involving concurrent nuptial statuses, including "limping marriages".[6] By comparing Islamic and Italian provisions, "gendered readings" offered by disputing (ex-)partners are unveiled, while thorough analyses of field-collected documentation in Arabic reveal civil *ṭalāq* recognitions that are in violation of public policy.

This contribution comprises five main sections and five subsections under section IV. The next section outlines the adopted methodologies. More specifically, it details how three methods in particular help uncover phenomena that would otherwise remain invisible. The discussion then expands on two recent *ṭalāq* proceedings addressed by the Italian Supreme Court, which represented an unprecedented opportunity for debating the ideas of living law and public policy, after half a century of judicial silence.

Building on published and unpublished legal proceedings, document analysis, and field data, the core of the proposed analysis then identifies three main characteristics that affect the (non-)recognition of a foreign *ṭalāq*. These concern the nature of the foreign authorities issuing the relevant documents, the respect of the (ex-)spouse's right of defense, and the revocability of foreign decisions concerning matrimonial dissolution. These characteristics are deeply intertwined

[4] This expression indicates that an Islamic or Muslim norm is observed. *Sharīʿah*, literally 'the road to the watering place', refers to the canon law of *Islām* and *Allāh*'s commandments. J. Schacht, 'Sharīʿa', in M.Th. Houtsma, T.W. Arnold, R. Basset, and R. Hartmann eds, *Encyclopaedia of Islam*, I Ed (1913-1936), online at https://tinyurl.com/yc7bv53w (last visited 30 June 2022); R. Aluffi, 'Šarīʿa' *Enciclopedia del Diritto* (Milano: Giuffré, 2015), VIII, 741-754; F. Castro, 'Diritto musulmano' *Digesto italiano* (Torino: UTET, 1990), VI, 289.

[5] See, among the others, O. Scharbrodt, S. Akgönül, A. Alibašić, J.S. Nielsen and E. Racius eds, *Yearbook of Muslims in Europe* (Leiden: Brill, 2021) (Vols 1-13).

[6] 'Nuptial limping statuses' can result from voluntary choice or from non-recognition of a certain form of matrimonial dissolution, and can often hide 'chained spouse' situations. The expression "chained spouse" derives from the Hebrew word *agunah,* which means chained and refers to the wife left without a *get* (a Jewish divorce). J. Baskin, 'Agunah', in *The Cambridge Dictionary of Judaism and Jewish Culture* (Cambridge: CUP, 2011); S.B. Aranoff and R. Haut, *The Wed-Locked Aguno* (Jefferson: McFarland, 2015).

with two additional key elements; namely the socio-legal performative of a *ṭalāq*[7] and the translation of the relevant foreign terms. To different extents, the interplay of these five elements eventually determines – I argue – the (in)formal implementation of *sharīʿah*-compliant nuptial dissolutions in the Italian legal system.

Mentioned elements are examined, firstly, by focusing on the possible diverse translations of the Arabic word *ṭalāq* in the laws of MMCs and according to Islamic provisions, and by investigating the impact of these translations on the Italian judiciary. Secondly, attention is paid to the role played by the foreign wording identifying the (extra-)judicial authority documenting the parties' matrimonial dissolution forms, and to the understanding of foreign normativities by judicial and administrative bodies. Thirdly, investigating the (temporary) *ṭalāq* revocability, the proposed discussion presents cutting-edge cases disclosing complex interactions between civil registrars and diplomatic missions, which remain unobserved by legal professionals and academic scholars. Subsection 4 then addresses the (ex-) spouse's right of defense and, building upon first-hand original material in Arabic language, discloses civilly recognized unnotified unilateral repudiations while raising concerns in terms of non-discrimination and equitable treatment. The last subsection gives voice to (foreign) Muslim ex-spouses, diplomatic personnel, translators and interpreters: customized and carefully tuned translation formulae are thus unveiled as pragmatic choices or the result of power unbalances, which might, in the end, obfuscate legal and social realities.

II. Combining Methodologies. When the Invisible Becomes Visible

This essay adopts an interdisciplinary methodology. First of all, legal, Islamic, and linguistic anthropology are used to support administrative and judicial bodies in clarifying the legal categories and vocabulary relied upon by the parties when coping with *sharīʿah*-compliant divorces or unilateral repudiation cases.[8]

When one embraces a different viewpoint that goes beyond published legal proceedings, neglected underlying dynamics – which can sometimes result in *de facto* multiple nuptial statuses – become visible to legal professionals and scholars. Therefore, the essay relies upon a reality-conscious (extra-)judicial approach that transcends the sole 'public policy criterion' as commonly reported by official bodies dealing with *ṭalāq* (non-)recognition processes. Accordingly, foreign *sharīʿah*-compliant forms of matrimonial dissolution, along with their implications and pitfalls, can be handled in a way that is more efficient and respondent to the

[7] For further details on the *ṭalāq* 'formalization' according to the legal and social normativities of the relevant MMCs and Muslim community as well as the utterance by means of which Muslims Islamically dissolve their marriages, see below subsection 1.

[8] This is aimed at overcoming the underlying linguistic structures rooted in diverse disciplines, while dismissing the metalinguistic assumptions built into legal thinking. See E. Mertz, 'Within and Beyond the Anthropology of Language and Law', in M.C. Foblets, M. Goodale, M. Sapignoli and O. Zenker eds, *The Oxford Handbook of Law and Anthropology* (Oxford: OUP, 2021).

actual kinship arrangements characterizing transnational Muslim families.

Secondly, when scrutinizing the legal wording adopted in judicial and administrative proceedings, empirical data play a key-role. The analysis offered here indeed combines a meticulous examination of original documentation with informants' interviews and ethnographic observation. The data examined were collected by the author from 2005 to 2020,[9] using qualitative social-science research methods.[10]

For the first time in the empirically underexplored Italian legal scenario,[11] original legalized documents – as submitted to diplomatic missions, civil registrars, and judicial bodies – are brought into focus. Consequently, this article discloses potentially shadowy techniques. As supported by statements released by officially appointed translators, interpreters, diplomatic personnel, and divorcing foreign Muslim women, the discussion also unveils undercurrents impacting bureaucratic procedures and judicial proceedings concerning Muslim (ex-)partners settled in Italy.

By digging deeply into the legal and administrative arenas and concentrating on the role played by socio-legal actors in transnational contexts, what some informants – ie (ex-)partners, translators, interpreters, lawyers, diplomatic personnel – informally identify as 'magic words' become visible. This renders it possible to investigate the socio-legal performative impact of these words and, crucially, of their translations from Arabic into Italian language, on the actual acknowledgement of foreign *sharīʿah*-compliant marriage dissolutions at the civil or social level. This approach uncovers otherwise concealed (often gendered) negotiations and potentially stereotyped kinship realities concerning transnational

[9] The research personally conducted by the author has been partially supported by the Renato Treves scholarship, Incoming post-doctoral research fellowship (BDR 04/2015), and the Max Planck Institute for Social Anthropology. See below, subsections 1-5 for specific details.

[10] Among the others, the employed methodology relies on R. Banakar and M. Traver eds, *Theory and Method in Socio-Legal Research* (Oxford-Portland: Hart, 2005); B.L. Berg, *Qualitative Research Methods for the Social Sciences* (London: Pearson, 2004); A. Bryman, *Social Research Methods* (Oxford-New York: OUP, 2001); N.K. Denzin and Y.S. Lincoln eds, *The Handbook of Qualitative Research* (London: Sage, 2017); N.K., Denzin ed, *The Handbook of Qualitative Research* (London: Sage, 1994); R.L. Gold, 'Roles in Sociological Field Observations' 36 *Social Forces*, 217-233 (1958); W. Hollway and T. Jefferson, *Doing qualitative research differently: Free association, narrative, and the interview method* (London: Sage, 2000); J. Lofland and L.H. Lofland, *Analyzing Social Settings: A Guide to Qualitative observation and analysis* (Belmont: Wadsworth, 1995); F.K. Ringer, *Max Weber's Methodology: The Unification of the Cultural and Social Sciences* (Cambridge: HUP, 1997); S. Sarantakos, *Social research* (Basingstoke: Palgrave Macmillan, 2005); D. Weinberg ed, *Qualitative Research Methods* (Oxford: Blackwell, 2002).

[11] In Italy, scholars rarely collect ethnographic evidence; rather they focus on case law. A.A. Alqawasmi, 'Marriage and divorce practices in Islamic centers in Italy' 11(4) *Onati Socio-legal series*, 959-989 (2021), began to explore Italian mosques by interviewing five *imam-s*. Regrettably, this author reports extremely limited data, mostly relying upon researches discussed in R.C. Akhtar, R. Probert and A. Moors, 'Inform al Muslim Marriages: Regulations and Contestations' 7(3) *The Oxford Journal of Law and Religion*, 367-375 (2018); J. Jones and Y. Shanneik eds, 'Reformulating Muslim Matrimony: Islamic Marriage and Divorce in Contemporary United Kingdom & Europe' 40 *Journal of Muslim Minority Affairs*, 1 (2020). See also section III.

family members.

Thirdly, the essay investigates how *ṭalāq-s* are entwined in the Italian fabric, and how the entanglement of religious and ethno-cultural practices, as discursive traditions, affects the sensibilities of modern life. This goal is achieved by approaching *Islām* as

> 'a tradition of Muslim discourse that addresses itself to conceptions of the Islamic past and future, with reference to a particular Islamic practice in the present'.[12]

Actual kinship arrangements are thus investigated by juxtaposing legal personal statuses to social ones. When dealing with cross-cultural family members, global frameworks also become critical in understanding the role of law and mutually constituting legal orders.[13] As this paper demonstrates, administrative and judicial bodies better understand foreign documentation when a clear line can be drawn between Islamic religious provisions and Muslim normativities, the latter being norms endorsed by Muslim believers and rules enacted in MMCs.[14]

It follows that an additional comparative methodological layer of analysis is necessary. A fluid scenario surfaces when juxtaposing diverse normative orders; specifically, Italian, Islamic, and Muslim provisions regulating nuptial dissolutions and affecting Muslim (ex-)partners. On that account, attention is to be paid to judicial and administrative authorities – both those in Italy and those in MMCs – that are involved in facilitating the denial or, on the contrary, the acknowledgment of civil effects to foreign nuptial dissolutions. A comparative viewpoint supports the legal expert in deconstructing the arguments employed in the *ṭalāq* (non-) recognition processes and in verifying whether the adopted reasoning reflects the current international, transnational, European, and domestic legal frameworks along with the ideas of *ordre public*.

The alternative courses of action enacted by Islamically married partners, as well as the reasons supporting the nuptial dissolution form – as socially and/or legally validated by the (ex-)spouses and the diplomatic missions of their countries of origin – are to be interpreted by bureaucrats, jurists, and legal professionals in order for them to deal with heterogeneous kinship models. Should this not be

[12] As clarified by Asad, who further explains that 'Islam is neither a distinctive social structure nor a heterogeneous collection of beliefs, artifacts, customs, and morals. It is a tradition'. T. Asad, 'The Idea of an Anthropology of Islam' 17 *Qui Parle*, 2, *Spring-Summ*er, 1-30, 20 (1986/2009). See also A.S. Ahmed, 'Defining Islamic Anthropology' 65 *Rain*, 2-4 (1984); S.M. McLoughlin, 'Islam(s) in context: Orientalism and the anthropology of Muslim societies and cultures' 28(3) *Journal of Beliefs and Values*, 273-296 (2007).

[13] S.E. Merry 'Anthropology, Law, and Transnational Processes' 21(1) *Annual Review of Anthropology*, 357-377 (1992).

[14] The adjectives 'Muslim' and 'Islamic' are often used synonymously, but the IV form of the Arabic root SLM indicates that this is not correct. *Muslim* identifies the person professing *Islām*; *Islāmī* identifies anything related to *Islām*. Accordingly, 'Islamic' is used here when referring to Islamic sources.

case, diverse nuptial statuses proliferate at the crossroads of multiple provisions concurring in regulating the very same (ex-)couple's matrimony.

The combination of the methodologies described above supplies legal experts with unique and enhanced perspectives aimed at understanding the combination of the culturally embedded goals of (foreign) *sharīʿah*-compliant normativities with the legal viewpoints endorsed by ethno-religious groups and state authorities. Bringing to light the complex issues faced by official bodies in acknowledging foreign Islamically compliant matrimonial dissolution forms as civilly valid, notice can be taken of the arguments put forward by (ex-)partners (who were formerly married according to *sharīʿah*) when claiming the legal (non-)recognition of a *ṭalāq* betwixt and between diverse normativities.

III. The Italian Judiciary, *Ṭalāq-s*, and the Living Law

After more than fifty years of silence, the Italian Court of Cassation was required to address the recognition of foreign *ṭalāq-s* not once, but twice. Prior to 2020, the Supreme Court had dealt with a *ṭalāq* case only once, in 1969.[15] Among the courts of first and second instance, about fifteen cases have been reported in legal journals in more than seventy years.[16] In Italy, despite a consistent Muslim presence,[17] legal proceedings addressing *ṭalāq*-related issues are, therefore, scarce.

The main reasoning of the two recent proceedings deserve to be briefly summarized to elucidate two key categories employed by judicial and administrative bodies in *ṭalāq* (non-)recognition processes; namely, public policy and living law. In the decision deposited at the beginning of August 2020,[18] a Jordanian-Italian (ex-)husband – who had previously obtained the transcription in the Italian civil

[15] Corte di Cassazione 5 December 1969 no 3891, *Rivista di Diritto Internazionale Privato e Processuale*, 868 (1970).

[16] Amongst the relevant proceedings addressing *ṭalāq*-related issues in Italy, see Corte d'Appello di Roma 29 October 1948, *Foro Padano*, 348 (1949); Tribunale di Milano 21 September 1967, *Rivista di diritto internazionale privato e processuale*, 403 (1968); Corte d'Appello di Roma 9 July 1973, *Il Diritto di famiglia e delle persone*, 653 (1974); Tribunale di Cremona 27 March 1973, *Rivista di diritto internazionale privato e processuale*, 307 (1974); Corte d'Appello di Trieste 23 October 1980, *Il Foro Padano*, 62 (1981); Corte d'Appello di Milano 17 December 1991, *Rivista di diritto internazionale privato e processuale*, 109 (1993); Corte d'Appello di Torino 9 March 2006, *Il Diritto di famiglia e delle persone*, 156 (2007); Corte d'Appello di Cagliari 16 May 2008, *Rivista di diritto internazionale privato e processuale*, 647 (2009); Corte d'Appello di Venezia 9 April 2015, *La Nuova giurisprudenza civile commentata*, I, 1031 (2015); Corte d'Appello di Roma 12 December 2016, *Il Diritto di famiglia e delle persone*, 353 (2017). For an analysis of the interplay between these legal proceedings and the Italian legislation aimed at avoiding "limping nuptial statues", see F. Sona, 'Defending the family treasure chest: Navigating Muslim families and secured positivistic islands of European legal-systems', in P. Shah, M.C. Foblets and M. Rohe eds, *Family, religion and law: Cultural encounters in Europe* (Farnham: Ashgate, 2014), 115-141.

[17] In 2018, the visible Muslim population was estimated at 2.8 million. See F. Ciocca, 'Musulmani in Italia: una presenza stabile e sempre più italiana' *Lenius*, 9, II (2022).

[18] Corte di Cassazione 7 August 2020 no 16804, *Rivista di Diritto Internazionale Privato e Processuale*, 107 (2021).

status registers of an Islamically compliant nuptial dissolution issued by the Palestinian *Sharīʿah* Tribunal of Western Nablus – appealed to the Supreme Court. The (ex-)wife reacted by starting a judicial procedure before the Court of Appeal in Rome aimed at the cancellation of the parties' divorced status. The Court stated that the foreign *sharīʿah*-compliant (non-final and final) proceedings did not meet the legal requirements for their effect to be recognized in Italy, therefore the *ṭalāq* should have not been registered.[19] The man appealed this judgment before the Court of Cassation, and his (ex-)wife resisted by way of a counter-appeal. Given the complexity of the case,[20] the Supreme Court first required additional information concerning the foreign Islamic and Muslim normativities.[21] The judiciary then ruled that respect for the Italian *ordre public* impedes recognition of a foreign decision of (male) unilateral repudiation. A legal principle was thus formally stated.

In another ruling deposited in mid-August,[22] the Supreme Court adopted a different approach. In this case, the (ex-)husband disputed the former decision of the Court of Appeal of Bari ordering the competent civil registrar to cancel the transcription of the divorce pronounced by the Supreme Court of Teheran, as claimed by the man's (ex-)wife. To the Supreme Court, the argument of the Court of Appeal

> 'seems to ignore the effects of ongoing developments that have led the judiciary (…) – under pressure from the progressive opening of the internal system to supranational law – to significantly change its thinking in the direction of increasing reference to the legal values shared by the international community and to the protection of fundamental rights'.

Accordingly, the Court of Cassation underlined that the Court of Appeal's reasoning 'shows that it is making its own conviction in matters of public policy that is no longer reflected in the living law'.[23]

The relevance of the 2020 Court of Cassation proceedings is twofold. Not only did the judiciary break a long silence that had lasted half a century,[24] but it

[19] The civil registrar was ordered to cancel the transcription on the parties' marriage certificate; Judgment 7464/2016.

[20] First, the case was remanded; Interlocutory Order 6161/2019. See E.W. Di Mauro, 'Il ripudio islamico tra riconoscimento e contrarietà all'ordine pubblico' *Diritto delle Successioni e della Famiglia*, 3, 1086-1105 (2020).

[21] Concerning the foreign procedural law applicable to divorces in Palestine, as well as 'the recognition, in the national legal system, of the effects of a divorce decree, judicial or extrajudicial, obtained by one of the spouses before a foreign religious court.'

[22] Corte di Cassazione 14 August 2020 no 17170, *Rivista di Diritto Internazionale Privato e Processuale*, 352 (2021).

[23] Corte di Cassazione 14 August 2020 no 17170 n 22 above, paras 5 and 9.

[24] See among the others A. Bellelli, 'La irriconoscibilità nell'ordinamento italiano del provvedimento straniero di scioglimento del matrimonio fondato sul ripudio' *La Nuova Giurisprudenza Civile Commentata*, II, 422-426 (2021); P. Di Marzio, 'Provvedimenti di ripudio (talàq)

also outlined potentially diverging *ṭalāq* (non-)recognition paths. Whereas the first decision of the Supreme Court (no 16804 of 2020) establishes the legal principle of *ṭalāq* non-recognition with civil effects on Italian soil, the second one (no 17170 of 2020) calls for a more careful and *ad hoc* examination of the foreign proceedings documenting a *sharīʿah*-compliant form of nuptial dissolution. Paraphrasing the methodology adopted here, it can be said that the invisible must be made visible for a judge to properly issue a ruling on the recognition of *ṭalāq-s*. *Ad hoc* proceedings and in-depth investigations of certificates submitted by foreigners to administrative and judicial authorities might imply higher costs linked to the involvement of diplomatic missions and country-of-origin experts, and therefore affect access to justice by disadvantaged family members. The interests at play are therefore to be carefully balanced.

The Supreme Court also emphasizes the concept of 'living law' and the relevance of 'international and supranational law' in contemporary multicultural societies. Indirectly echoing Ehrlich's vocabulary,[25] the Court of Cassation concentrated on family members as crucial socio-legal actors in what Merry described as transnational processes shaping local legal situations.[26] Consequently, even if the Italian scholarship had been consistent in arguing that a *ṭalāq* would usually be regarded as contravening public policy,[27] and would therefore not be

e riconoscimento dell'efficacia civile in Italia (Nota a Corte di Cassazione 7 August 2020 no 16804), *Ilfamiliarista.it*, 4 gennaio 2021; G. Liberati Buccianti, 'Il ripudio islamico e l'ordine pubblico (internazionale)' *La Nuova Giurisprudenza Civile Commentata*, II, 381-390 (2021); A. Licastro, 'Scioglimento del matrimonio pronunciato all'estero e 'ordine pubblico': la Cassazione si pronuncia contro la riconoscibilità in Italia del ripudio islamico' *Quaderni di Diritto e Politica Ecclesiastica*, 3, 923-953 (2020); M.T. Magosso, 'Decisione di ripudio emanata all'estero da un'autorità religiosa' *Lo Stato Civile Italiano*, 11, 12-15 (2020); D. Milani, 'Diversità e diritto internazionale privato: il ripudio islamico e la sua rilevanza nell'ordinamento giuridico italiano alla luce di due recenti pronunce della Corte di Cassazione' *Stato, Chiese e Pluralismo Confessionale*, 14, 153-171 (2021); F. Pesce, 'La corte di cassazione ritorna sul tema del riconoscimento del ripudio islamico' C*uademos de Derecho Transnacional*, 13, I, 552-573 (2021); M.E. Ruggiano, 'Il ripudio della moglie voluto dalla Sharia e la contrarietà al diritto italiano' *Familia*, 1-15 (2021); C. Scalvini, 'Un divorzio 'unilaterale' non è automaticamente contrario all'ordine pubblico' *Giurisprudenza Italiana*, 2, 345-351 (2021); D. Scolart, 'La Cassazione e il ripudio (ṭalāq) palestinese. Considerazioni a partire dal diritto islamico' *Questione Giustizia*, 1, (2020); C.E. Tuo, 'Divorzio-ripudio islamico, riconoscimento automatico e ordine pubblico' *Corriere Giuridico*, 481 (2021); P. Virgadamo, 'Il ripudio islamico pronunciato da un Tribunale religioso è ancora contrario all'ordine pubblico: una sentenza tanto decisa nelle (giuste) conclusioni, quanto perplessa nelle (a tratti nebulose) argomentazioni' *Diritto di Famiglia e delle Persone*, 1406 (2020). On these commetaries, see also below in the text.

[25] E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge: HUP, 2002/1936). See also, R. Pound, 'Law in Books and Law in Action' 44 *American Law Review*, 12-36 (1910). In Italian, see L. Mengoni, 'Diritto vivente' *Vita e pensiero*, 1 (1988); L. Salvato ed, *Profili del «diritto vivente» nella giurisprudenza costituzionale* (Roma: Quaderni e Ricerche della Corte Costituzionale, 2015); A. Mariani Marini and D. Cerri eds, *Diritto vivente: il ruolo innovativo della giurisprudenza* (Pisa: PLUS-Pisa UP, 2007).

[26] See n 13 above.

[27] See among the others, L. Mancini 'Il matrimonio islamico in Italia', in I. Zilio-Grandi ed, *Sposare l'altro. Matrimoni e matrimoni misti nell'ordinamento italiano e nel diritto islamico* (Venezia: Marsilio, 2006), 105-118; S. La China, 'Matrimoni misti al filtro dell'esperienza giudiziaria', in I. Zilio-Grandi ed,

recognized by the judiciary, this last Supreme Court decision might have opened up a new realm of possibilities.[28]

In real terms, the legal scenario already appears to be much more variegated, as this article demonstrates. In considering the legal and bureaucratic arguments, as well as the social and legal implications of *ṭalāq* (non-)recognition, the analysis uncovers usually neglected underlying dynamics. These become manifest when paying specific attention to the documentation submitted to the competent authorities, as well as to the claims argued by the (ex-)partners before the judiciary in MMCs and in Italy, respectively.

IV. Foreign Divorces and Official State Bodies. Potential Controversial Scenarios

The above-mentioned 2020 Supreme Court proceedings share a relevant feature. In both cases, the civil recognition of foreign *ṭalāq-s* in Italy was disputed before the domestic judiciary by the (ex-)wives.[29] Recognition of the *sharīʿah*-compliant nuptial dissolutions (Palestinian and Iranian, respectively) was not opposed by the competent Italian administrative authorities, who promptly acknowledged its civil validity and recorded the *ṭalāq-s* in the parties' civil status register.

In effect, foreign judgments can be recognized when the requirements set by the law are met. The civil registrar is authorized to recognize and record a foreign ruling when seven pre-requisites are satisfied.[30] These regard the competence of the foreign body issuing the judgment,[31] both parties' essential rights of defense, the non-revocability of the foreign judgment, and the respect of the *ordre public*. The parties' declaration is required to prove that the foreign final ruling is not conflicting with an Italian final judgment, and that no prior proceeding is pending before an Italian judge for the same matter and between the same parties. The foreign divorce submitted to the civil registrar must also be properly translated and legalized.[32] Once these conditions are met, the civil registrar of the municipality where the parties' marriage had been previously registered shall

Sposare l'altro. Matrimoni e matrimoni misti nell'ordinamento italiano e nel diritto islamico (Venezia: Marsilio, 2006), 119-137; also C. Campiglio, 'Il diritto di famiglia islamico nella prassi italiana' *Rivista di Diritto Internazionale Privato e Processuale*, XLIV, 343-376 (2008).

[28] For further discussion, see F. Sona, 'Paths to (in)justice. The interplay between Sharīʿah Tribunals and public policy', in M. Maclean and R. Treloar eds, *Research Handbook on Family Justice Systems* (London: Edward Elgar, 2022).

[29] For further details, see below subsection 1.

[30] Art 64 of legge 31 May 1995 no 218, *Gazzetta Ufficiale* no 128, 3 giugno 1995, hereinafter legge no 218 of 1995.

[31] Namely, the legal authority of a tribunal, a court, or any other body authorized to deal with nuptial status related matters.

[32] Art 22, Decreto del Presidente della Repubblica, *Gazzetta Ufficiale* no 303, 30 December 2000 no 223, hereinafter DPR no 396 of 2000.

record the dissolution of the marriage or its annulment.[33] If these requisites are not satisfied, the civil registrar must refuse the transcription, providing a written explanation.[34] Anyone interested can then petition for a declaratory judgment of the foreign decision ascertaining that the necessary requirements are met.[35]

Under certain circumstances, the *ṭalāq* recognition is not denied but contested. It can happen that the civil registrar acknowledges the civil validity of a foreign *ṭalāq*, whereas one of the parties disputes the transcription into the Italian civil register and his/her change of nuptial status—as happened in the cases recently addressed by the Supreme Court. Examining the typology of contested registrations of foreign *sharīʿah*-compliant nuptial dissolutions before administrative and judicial authorities, I have identified three main potential controversial scenarios. The first two encompass cases in which the spouse(s) dispute the non-recognition of a foreign *sharīʿah*-compliant nuptial dissolution, or one of the (ex-)spouses opposes the already granted, or denied, civil validity of a foreign *ṭalāq*.[36] Additional highly contentious situations arise when both spouses appeal the non-recognition of a foreign divorce by Italian administrative or judicial authorities.

As per the motivation of recognition, or refusal, of a foreign *sharīʿah*-compliant nuptial dissolution, ethnographic observations indicate that Italian legal and administrative authorities often ground their decisions on a few keywords used on the legalized translation of the documents provided by the parties or on the certificates issued by MMCs' diplomatic missions. The active intervention of the Italian diplomatic premises appears to be infrequently required; therefore, a decisive role is played by the translated documentation provided by the (ex-) partners, which might include what some informants call 'magic words'.[37] This expression identifies some specific translation formulae that can actually facilitate or, on the contrary, impede the recognition and registration of foreign *ṭalāq*-s. These customized or carefully tuned translations, and their pitfalls, in effect remain undetected by judicial and administrative bodies, as this essay discloses.

A thorough examination of court judgments and administrative procedures – addressing the potential recording and acknowledgement at civil effects of foreign *sharīʿah*-compliant matrimonial dissolution forms – shows that disputes tend to pertain to three main issues. These concern the nature of the alien authority documenting the nuptial dissolution and/or the one issuing the document;

[33] Art 10, legge 1 December 1970 no 898, *Gazzetta Ufficiale* no 306, 3 December 1970. See also Art 63(2G) and Art 12(10), DPR no 396 of 2000.

[34] Art 19, DPR no 396 of 2000; see also Art 7.

[35] Art 67, legge 31 May 1995 no 218.

[36] This pattern was recently examined by the Cassation Court. The (ex-)spouse obtains the registration of a foreign nuptial dissolution, whereas the other partner opposes this decision before the judiciary, and, if and when obtained, the other party appeals the Italian judicial decision granting (or denying) the change of the parties' nuptial status (from 'married' to 'divorced'). See above section III.

[37] See below subsection 5.

the right of defense as exercised by the defendant or the respondent,[38] and the (potential or temporary) revocability of the foreign matrimonial dissolution. The disputed matters are all deeply intertwined with additional key elements, most notably the translation of the foreign documentation and the *ṭalāq* 'formalization' according to the legal and social normativities of the relevant MMC; namely, the socio-legal performative of a *ṭalāq*. All these five elements are specifically addressed and unpacked in the subsections below.

1. *Sharīʿah*-Compliant Forms of Marriage Dissolution and *Ṭalāq-s*

When investigating the potential (un)acknowledgement of civil effects to alien *sharīʿah*-compliant matrimonial dissolution forms, primary issues concern the translation of the word *ṭalāq*. This derives from the Arabic root TLQ, which refers to the verb 'to free or to be freed.' It is also found in the verb *ṭallaqa*, which means 'to untie.'[39] In both Arabic language and Islamic law, the expression *al-ṭalāq* is an umbrella term that can identify different typologies of Islamic and Muslim nuptial dissolutions.

The Italian judiciary and administrative authorities tend to link the expression *ṭalāq* to the unilateral repudiation of the wife that becomes effective when the husband pronounces the words *anti ṭāliq,* which mean 'I repudiate you'. And indeed, family laws in the Muslim world can use the term *ṭalāq* when referring to a man's unilateral repudiation of his wife. *Ṭalāq* in this sense is used, for instance, in the Moroccan Code of Personal Status.[40] Art 70 of the *Muddawanah al-aḥwāl al-shakhṣiyyah* differentiates amongst the Arabic words *ṭalāq* – which refers to the husband's unilateral repudiation – and *taṭlīq*, which is used in case of judicial divorce.

The (official) translations of these foreign provisions into European languages might however blur the borders among the definitions of different *sharīʿah*-compliant matrimonial dissolution forms. The case of Morocco exemplifies this. On the first anniversary of the *Muddawanah* promulgation, the French translation of the 'Practical guide to the family code' published by the Moroccan Ministry of Justice,[41] interpreted the word *ṭalāq* as marriage dissolution 'by divorce under judicial supervision' and not as 'a husband's unilateral repudiation of his wife'.[42]

[38] In cases of men's unilateral repudiations issued in MMCs, the respondent is usually the woman.

[39] For an introduction, among the others, see J. Schacht, J. and. A. Layish, 'Ṭalāḳ', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, II Ed, online at https://tinyurl.com/5n6sd3ed (last visited 30 June 2022).

[40] *Muddawanah al-aḥwāl al-shakhṣiyyah*, Law no 70-03, *Official Bulletin* no 5184, 14 *hija* 1424 (5 February 2004), 418; hereinafter Moroccan *Muddawanah*.

[41] *Official Bulletin* no 5358, 2 *ramadhan* 1426 (6 October 2005), 667.

[42] As highlighted by the translations provided by M.C. Foblets and J.Y. Carlier eds, *Le code marocain de la famille: incidences au regard du droit international privé en Europe* (Bruxelles: Bruylant, 2005), 57-58, and R. Aluffi ed, *Persone Famiglia Diritti. Riforme legislative nell'Africa Mediterranea* (Torino: Giappichelli, 2006), 184.

By replacing the word 'repudiation' with 'divorce' and adding the expression 'under judicial control', the possibility of misunderstanding – a possibility that the Arabic version foreclosed – reappeared in the French version.[43] The purpose of this choice may lie in the political interest in uniting all forms of nuptial dissolution under the all-encompassing idea of divorce.[44]

Nonetheless, this approach can lead to controversial outcomes, as court proceedings show. One (ex-)spouse might support the idea of *ṭalāq* as a broad all-encompassing form of matrimonial dissolution, whereas the other partner might favor an understanding of *ṭalāq* as a man's unilateral repudiation, depending upon their respective arguments and claims. These reasonings, as well as the documentation submitted to the competent administrative or judicial authorities, can significantly impact the decision regarding the civil acknowledgement of a foreign *ṭalāq*.

A case brought before the Court of Appeal of Torino well illustrates the point. In this dispute, while an Italian-Moroccan woman submitted a plea for separation before an Italian judge, her husband obtained a 'declaration of assessment of irrevocability of repudiation' before the Moroccan Tribunal of Khouribga. This proceeding was then transcribed in the matrimonial act register. The spouses were thus 'divorced' in both Italy and Morocco. Objecting to this, the woman petitioned the Italian judiciary. The man argued that 'repudiation' should be equated with 'divorce,' and his claim was supported by a commentary written by the Italian consulate in Casablanca, which clarified that the Arabic word *ṭalāq* can be translated into Italian 'interchangeably as repudiation or divorce'.[45] In spite of that, the Italian Court regarded the defendant's reasoning equating the documented irrevocable repudiation with divorce to be 'mere verbal ploy'. To the judiciary, the word *ṭalāq* identified the man's unilateral repudiation of his wife, and not a divorce. In addition to the vague translation provided by the Italian diplomatic mission, the legal commentary of the proceeding created an extra layer of most probably unwanted linguistic confusion: the word *ṭalāq* was indeed given a fresh meaning, that is to say 'repudiation-divorce'.[46]

[43] R. Aluffi, 'Il codice della famiglia del Marocco e la sua incidenza sulla vita familiare dei marocchini in Italia' *Aequitas sive Deus*. Torino, 1187-1192 (2011).

[44] L. Ascanio, 'Equivoci linguistici e insidie interpretative sul ripudio in Marocco' *Rivista di Diritto Internazionale Privato e Processuale*, 48, 3, 573-594, 585 (2012).

[45] Corte d'Appello di Torino 9 March 2006, *Diritto di Famiglia e delle Persone*, 156 (2007). In the proceeding, 'the declaration of irrevocable repudiation' issued by two public notaries and a tribunal was regarded as a 'definitive and irrevocable divorce proceeding'; nonetheless, its validity in Italy was denied on the grounds that this form of nuptial dissolution violated public policy. The court also differentiated between internal *ordre public* (for Italian nationals) and international *ordre public* (for aliens).

[46] A. Sinagra, 'Ripudio-divorzio islamico ed ordine pubblico italiano, nota a Corte d'Appello di Torino 9 marzo 2006 n 44 above, 156-168 (2007). As clarified below, the expression 'repudiation-divorce' is not to be confused with 'divorce-repudiation.' The former was used to identify the *ṭalāq* when the husband repudiates his wife; the second expression might also be translated as 'unilateral' or 'consensual' divorce repudiation. It usually identifies other types of *sharīʿah*-compliant forms of nuptial dissolution according to which the *ṭalāq* uttering is formalized by the legal system of a MMC or a

Accordingly, two matters become of pivotal importance. First, focusing on the translations of the original documentation; secondly, differentiating between Islamic and Muslim laws.[47] In fact, MMCs' legislations can inflect the legal meaning of an Arabic term used in Islamic law to give it diverse significances and nuances, as is the case with the 2004 Moroccan Code of Personal Status. The approach recently adopted by the Italian Supreme Court in acquiring *ad hoc* clarifications on the Jordanian family law implemented in Palestine,[48] or in recommending that the competent Court of Appeal seeks to obtain the relevant information from the country concerned in order to decide a case,[49] is therefore to be supported. This course of action might, however, affect length and cost of the proceeding. A case-by-case evaluation of every *ṭalāq* is to be highly seconded while protecting weaker family members. By contrast, the establishment of a rigid postulate impermeable to any assessment regarding the specificities of every foreign (*sharīʿah*-compliant) nuptial dissolution would lead to the crystallization of the principles to be enacted within Italian legal boundaries.[50] *Ad hoc* rather than general principles are instead to be favored.[51]

The risk is that every time the word 'repudiation' is reported on a document submitted to the competent (judicial or administrative) authority, the civil validity of a foreign *sharīʿah*-compliant matrimonial dissolution is automatically denied. A case addressed by the Court of Appeal of Rome exemplifies these dynamics.[52] The judiciary ruled that the unilateral repudiation act pronounced by the husband at the wife's request cannot be subject to exequatur.[53] Consequently, the Italian wife of an Egyptian man, who had agreed to an *al-khul'* (الخلع) procedure[54] thirteen years earlier, was still regarded as the Muslim man's wife by the Italian legal system.

Some clarifications might be necessary. An Islamically married wife may obtain her *ṭalāq* either from a judicial authority, or directly from her husband. In the first case, the grounds for judicial divorces vary according to the legislation of

religious authority; or the woman agrees to, or requires, the matrimonial dissolution. See sections II and subsections 1-4.

[47] See above section II.

[48] Corte di Cassazione no 16804/2020. See above sections III-IV.

[49] Corte di Cassazione no 17170/2020, para 4. The Supreme Court clarified that Corte d'Appello di Bari violated Arts 14-15, legge 31 May 1995 no 218. See also above sections III-IV.

[50] See F. Pesce, n 24 above.

[51] See D. Scolart, n 24 above.

[52] Corte d'Appello di Roma 9 July 1973, *Diritto di Famiglia e delle Persone*, III, 653-661 (1974). See C. Schwarzenberg, 'Ordine pubblico e riconoscimento in Italia dello scioglimento di matrimonio islamico per ripudio' *Diritto di Famiglia e delle Persone*, 653-660 (1974).

[53] If and when certain requirements are met, private international law principles provide for the automatic recognition of foreign sentences, according to legge 31 May 1995 no 218.

[54] The Arabic word *khul'* derives from the verb *khala'a*, meaning 'to undress'; the spouses are indeed appointed as mutual 'dresses' – *libāsat* or *ālbisah* – in the *Qur'ān* (2: 187). The justification of the 'divorce-repudiation' is found in the *Qur'ān* (2: 229).

the relevant MMCs[55] and the Islamic sources the partners refer to.[56] Accordingly, the wife can obtain a *ṭalāq* broadly translated as 'divorce-repudiation' pronounced by her husband or by a court (or even by a *shaykh* when referring to the so-called *Sharīʿah* Councils active on European soil). These forms of nuptial dissolution are identified with the expressions *mubāraʾah*[57] or *al-khulʿ*.[58] A third option is called *tawfid*.[59] In these situations, by renouncing the deferred part of the nuptial gift (*mahr* or *ṣadaq*) reported on the partners' nuptial contract,[60] the woman can be divorced by her husband, who either repudiates her or delegates the woman to repudiate herself as his wife.[61]

Focusing on the effects of the legal proceeding mentioned above, the woman remained 'unilaterally married' to her (ex-)husband, as the Court of Appeal in Rome refused the exequatur of the foreign (repudiation) judgment, namely, a *khulʿ*. The submitted act reported that the woman declared: 'I exempt you from paying the pending part of the nuptial gift and from paying alimony, on condition that you repudiate me.' The legal act dissolving the marriage was therefore a 'consensual divorce-repudiation' instead of a man's unilateral repudiation. The judiciary dealing with this case was probably misled by a Supreme Court judgment dating back to 1969 (the sole one prior to 2020).[62] In that 1969 Court

[55] The country the parties are nationals of, or the country where the spouses contracted their matrimony, or the countries where (at least one of) the partners are willing to dissolve their marriage.

[56] Primary sources are *al-Qurʾān* and *al-Sunnah*. See respectively, A.T. Welch, R. Paret and J.D. Pearson, 'al-Ḳurʾān', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, II Ed, online at https://tinyurl.com/5ey5p5me (last visited 30 June 2022); G.H.A Juynboll and D.W. Brown, 'Sunna', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, II Ed, online at https://tinyurl.com/553esnew (last visited 30 June 2022).

[57] *Mubāraʾah* comes from *ībrāʾ*, which concerns the remission of debts. Accordingly, the wife remits the husband's debts with her regards. The *ṭalāq ʿalā al-ībrāʾ* implies a conjugal agreement; therefore, it is sometimes defined a 'consensual divorce'. See D.S. El-Alami and D. Hinchcliffe *Islamic marriage and divorce law in the Arab world* (London: CIMEL & Kluwer, 1996), 27-28; L. Welchman, *Women and Muslim family laws in Arab states: A comparative overview of textual development and advocacy* (Amsterdam: AUP, 2007), 112-116.

[58] For a definition, see above footnote no 54.

[59] The wife can repudiate herself if she had been formerly delegated to do so by her husband in their nuptial contract, under certain circumstances (eg he contracts a new marriage). This is quite common in South Asia. See amongst the others, I.D. Pal, 'Women and Islam in Pakistan' 26 *Middle Eastern Studies*, IV, October, 449-464 (1990); M. Munir 'Stipulations in a Muslim marriage contract with special reference to Talaq Al-Tafwid provisions in Pakistan' 12 *Yearbook of Islamic and Middle Eastern Law,* 235-262 (2005/6).

[60] According to *sharīʿah*, the groom has to pay his bride a gift (*mahr* or *ṣadāq*) as reported in the nuptial contract; part is anticipated at the conclusion of the marriage ceremony, the remaining is due if the husband repudiates her. In cases of *khulʿ*, the amount of money the husband gave to the woman when concluding the nuptial contract is to be returned by her. See for instance Spies, 'Mahr', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, II Ed, online at https://tinyurl.com/5hcmfpyn (last visited 30 June 2022).

[61] The formula traditionally identified with the word *tamlīk* is described in Art 89, Moroccan *Moudawwanah*. See n 40 above.

[62] See section III.

of Cassation proceeding, civil recognition of an Iranian unilateral declaration of repudiation was denied on the grounds that it was against the *ordre public*.[63] Thus, the motivation provided by the Rome judiciary did not fit the case at hand, being based on a misunderstanding of the foreign *sharīʿah*-compliant matrimonial dissolution form, civil recognition of which was requested by the woman to end her "limping marriage".[64]

This lawsuit indicates that, in the interplay between diverse competing normativities, the discrepancy between nuptial legal status and social reality can grow into a potentially unbridgeable gap. It shall indeed be stressed that none of the women who were part of the judicial proceedings mentioned above disputed the validity of the *ṭalāq* in light of Islamic and Muslim laws. The women, who formerly entered into *sharīʿah*-compliant marriages (whose civil effects were recognized in Italy), never questioned the validity of the *ṭalāq* issued in compliance to both Islamic normativity and the laws of the relevant MMCs. And, frequently, these (ex-)wives acted accordingly in both the religious and foreign socio-legal arenas.[65]

To better understand these undercurrents, as well as the Islamic validity of the nuptial dissolution forms, legal and linguistic anthropology can assist the legal professional. First of all, the fickleness of legal language can best be grasped when one understands that the word of the jurist, or the person who is responsible for implementing a legal norm, becomes a 'signifier' in and of itself. Accordingly, a 'legal word' has a meaning, but it does not have a referent. As elucidated by Sacco, it is a 'performative,' that is to say that 'what the word means is one with the word itself.'[66] However, the context can determine diverging interpretations.

In the case of transnational Muslim families, a *ṭalāq* becomes a 'performative utterance of exercitive type'[67] with illocutionary force.[68] For an utterance to be illocutionary, the parties must be aware of the social obligations involved in their relationships,[69] as evidenced by the following conditions. A conventional procedure

[63] C. Schwarzenberg, n 52 above. The Court denied the civil validity of a 'unilateral repudiation act' received from an Iranian notary acting in his civil capacity.

[64] It can be ventured that the woman then submitted an application for marriage dissolution according to Art 3, legge 1 December 1970 no 898.

[65] By way of illustration, in one of the *ṭalāq* cases recently examined by the Italian Cassation Court (see section III), the woman withdrew from her husband's bank account an amount of money equivalent to the still due nuptial gift. For a definition see footnote no 60.

[66] R. Sacco, *Antropologia giuridica* (Bologna: il Mulino, 2007), 204 also with regard to the previous sentence. On legal 'perfomatives,' see among the others L. Fiorito, 'On Performatives in Legal Discourse' *Metalogicon*, XIX, 2, 101-112 (2006). Linguistic anthropology clarifies a very similar concept with regard to the word *ṭalāq*; as explained further in the subsection.

[67] J.L. Austin, *How to do things with words* (Oxford: OUP, 1962), 150-163.

[68] J. Searle, *Speech acts: An essay in the philosophy of language* (Cambridge: CUP, 1969), 23-24. Building upon Austin (1962: 15-15), Duranti indicates these six conditions for an illocutionary act to work. A. Duranti, *Linguistic anthropology* (Cambridge: CUP, 1997), 224-226.

[69] As elucidated by Wardhaugh building upon Austin's five categories of performative. See R. Wardhaugh, *An introduction to linguistics* (Oxford: Blackwell, 1992), 285-286; J.L. Austin, *How to do*

is to be followed; an appropriate number and types of participants and circumstances have to be met; the execution should be complete; it should involve the participation of the required parties; and the participants must have certain intentions and behave accordingly. Diverse MMCs detail various *sharīʿah*-compliant procedures for a pronounced *ṭalāq* to be formalized and, in all the examined cases, these requirements were satisfied.[70]

Religious and social obligations being met, the *ṭalāq* is then perceived by the (ex)partners as valid despite the legal arguments they may invoke before civil courts. It can thus be inferred that the social and legal performative of the same (foreign) words are molded differently depending upon the normativities the (ex-)spouses are referring to. And the ethnographic observations I conducted disclose that this is a constant pattern in legal proceedings before the Italian judiciary.

Legal professionals and bureaucrats shall thus pay attention to 'gendered readings' as offered by disputing (ex-)partners. While women might argue for *ṭalāq* non-recognition on public policy grounds, men might stress the similarities between Italian and *sharīʿah*-compliant family laws in claiming the civil validity of foreign matrimonial dissolutions. From the religious and social perspectives, however, the *ṭalāq* as a valid and effective marriage dissolution form is not challenged by the Islamically married (ex-)partners, who are particularly aware of the social obligations involved in their relationship and its dissolution.

The dynamics described above indicate that, when transplanted into diverse legal systems and social contexts, the very same *ṭalāq* becomes highly contested; the illocutionary force of this Islamic and Muslim family law institute is nonetheless accepted and enacted by the partners. As this discussion demonstrates, the socio-legal efficacy of a *ṭalāq* is therefore acknowledged by the ex-spouses, whereas its effects may be disputed in a different legal system, by one or by both partners, relying upon constitutional principles and human rights narratives.

2. Competence and Jurisdiction. Extra-Judicial Bodies and Divorce Privatization

When investigating foreign nuptial dissolution forms, it is not only the word *ṭalāq* that can cause translation problems, but also the foreign vocabulary used to identify the authority documenting the marriage dissolution and the body issuing the relevant certificate.

Both the recognition and the registration of foreign *sharīʿah*-compliant nuptial dissolutions present difficulties when the partners are transnational Islamically married (ex-)spouses.[71] In particular, refusals to civilly acknowledge a foreign matrimonial dissolution are frequently grounded in the wording of the foreign

things with words (Oxford: OUP, 1962), 150-163.

[70] For an overview, see for instance, WLUML, *Knowing our rights* (London: Women Living under Muslim laws, 2006), 243-291.

[71] See above Section II.

legal act. In cases of certificates issued in MMCs, the knowledge of foreign legal cultures is thus of pivotal importance, as well as the translation from Arabic, Persian, or Urdu into Italian language.

In *ṭalāq* cases, one key aspect regards the translation of the Arabic words *'adul* and *māzūn,* which are mostly used in the certificates produced by Moroccan and Egyptian nationals, respectively.[72] In compliance with the law, a 'divorce-repudiation' must be authorized by the *'udūl* accredited for this purpose in the judicial district of the conjugal domicile, the wife's domicile or place of residence, or the place where the marriage contract was issued.[73] According to this procedure, the husband states, before officially appointed authorities, that he wishes to pronounce *ṭalāq* to his wife, and he petitions the court for authorization to certify the repudiation by two *'udūl'*. Several years of ethnographic investigations[74] revealed that *'udūl* is often translated as 'public notary' in the Italian copy of the legal act. This translation leads to problems because the Italian legal system does not recognize a notary as competent to render a judgment in family matters. Consequently, the civil validity of these documents is usually denied by civil registrars.

Surprisingly, the transcription refusals issued by administrative authorities are rarely appealed by the parties. In these case-scenarios, Islamically married partners may follow two alternative courses of action. Some (ex-)spouses I interviewed tried to have the Arabic terms *'adul* or *māzūn* translated as '(Islamic) judge' (which in Arabic would be *qādhī*) to secure the civil acknowledgement of the foreign documentation.[75] Other (ex-)spouses opted for a certificated *res judicata* status released by MMCs' embassies and consulates, or favored the *ṭalāq* homologation by foreign courts and tribunals. The last option broadly granted the registration of alien nuptial dissolutions in Italian civil registers, and 'limping nuptial statuses' were accordingly avoided.

Over time, the non-recognition of matrimonial dissolution forms perfected by extrajudicial bodies was counterbalanced by Italian and foreign provisions alike. On one hand, the laws of MMCs increasingly require the judicial homologation of extra-juridical acts, including *ṭalāq*-s. On the other, the Italian Ministry of Interior gradually took notice of other legal systems and their specificities. The Italian reform of legal separation and divorce procedures then further facilitated the recognition of foreign non-judicial nuptial dissolutions.[76] By way of illustration,

[72] The complete Moroccan expression is *kātib al-'adul*.

[73] Arts 79-80, Moroccan *Moudawwanah;* see n 40 above.

[74] For details, see above Section II.

[75] Among my informants, two couples were successful in obtaining this 'customized translation', whereas in another case the interpreter refused to provide 'carefully tuned' translations of foreign certificates.

[76] See decreto legge 12 September 2014 no 132, *Gazzetta Ufficiale* no 212, 12 September 2014; legge 10 November 2014 no 162, *Gazzetta Ufficiale* no 261; legge 6 May 2015 no 55, *Gazzetta Ufficiale* no 107, 11 May 2015.

law no 162 of 2014 and law no 55 of 2015 introduced the possibility to have recourse to extrajudicial separation and divorce procedures when certain requisites are satisfied.[77] This echoes the extension of party autonomy and the increase of non-judicial and non-adversarial processes, also with respect to family matters, as enacted across Europe.[78] The so-called 'privatization' or dejudicialization of family disputes has impacted Muslim family members, albeit indirectly.[79]

When assessing the competence and the nature of the foreign body issuing the document submitted by the (ex-)partners asking the civil acknowledgement of a *ṭalāq*, the Italian legal system focuses on two aspects. These concern the 'legal capability' of the foreign body releasing the relevant document, and the 'jurisdiction' of another legal system in dealing with the parties' matrimonial matters. As clarified by the 2020 Supreme Court ruling on the unilateral repudiation issued by a Palestinian *Sharīʿah* Tribunal, the 'jurisdiction assessment' concerns not only the legitimacy of the authority formalizing the foreign nuptial dissolution,[80] but also the jurisdiction of the foreign legal system.

In this regard, by complementing domestic provisions, the relevant European sources (the so-called Brussels II-*bis* and Rome III Regulations)[81] assist in the process of identifying the (extra-)judicial body responsible for dealing with matrimonial matters and nuptial disputes involving more than one country, specifically when Muslim spouses, who are MMC nationals, are domiciled or resident in Europe.[82] This implies that, when settled on EU soil, the spouses can formally agree upon the national law to be applied to their divorce, or legal separation, provided some requirements are satisfied. The Ministry of Interior's instructions for the civil registrar confirm that

[77] Such as mutual agreement between the spouses, and no minor or disabled children.

[78] See amongst the others K. Boele-Woelki, N. Dethloff and W. Gephart eds, *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Cambridge: Intersentia, 2014); K. Boele-Woelki and D. Martiny eds, *Plurality and Diversity of Family Relations in Europe* (Cambridge: Intersentia, 2019); J.M. Scherpe and E. Bargelli eds, *The Interaction Between Family Law, Succession Law and Private International Law: Adapting to Change* (Cambridge: Intersentia, 2021).

[79] Whether a *ṭalāq* is to be understood as an 'act of private autonomy' between Muslim spouses has been debated before the European Court of Justice in *Soha Sahyouni* v *Raja Mamisch*, Judgment of 20 December 2017. See for instance A. Licastro, 'La questione della riconoscibilità civile del divorzio islamico al vaglio della Corte di giustizia dell'Unione europea' *Stato Chiese e Pluralismo Confessionale*, 13, 1-34 (2018).

[80] This happens by issuing or registering a *ṭalāq*. See above section III.

[81] Regulation (EC) 2201/2003, *Official Journal of the European Union* L 338, 23 December 2003; and Council Regulation (EU) 1259/2010, *Official Journal of the European Union* L 343/10, 20 December 2010. See among the others C. Campiglio 'Conflitti positivi e conflitti negativi di giurisdizione in materia matrimoniale' *Rivista di Diritto Internazionale Privato e Processuale*, 497-532 (2021). For a recent development, see also the so-called 'the Brussels II-*ter* Regulation', namely Council Regulation (EU) 2019/1111, *Official Journal of the European Union* L 178/1, 2 July 2019, which came into force on 1 August 2022.

[82] Namely, divorces, legal separations, marriage annulments and parental responsibility (including child's custody and access rights).

> 'the jurisdiction of the foreign authority exists when at least one of the following requirements is satisfied: the defendant is resident or domiciled in mentioned foreign country; the marriage was celebrated in mentioned country; or one of the spouses is a citizen of mentioned country'.

These also highlight that the jurisdiction of the foreign judge exists if this has been accepted by the parties, or in case the defendant has not pled the lack of jurisdiction in the first defensive act.[83]

The above-mentioned European and domestic provisions should have facilitated the so-called 'automatic recognition' of foreign divorces and reduced the appealed cases. Nonetheless, controversial situations arise in the actual interpretation of this normativity by local registrars, particularly for MMCs' nationals. In an emblematic case, an Italian woman and a Tunisian man married in Tunisia and lived in Italy for a number of years. When the matrimonial crisis occurred, the spouses began the divorce procedure in Tunis, where the tribunal issued a 'definitive divorce.' The woman requested the civil registration of this nuptial dissolution in an Italian municipality; however, the civil registrar denied it.[84] The written explanation was grounded on a negative opinion issued by the Public Prosecutor of the Republic highlighting the lack of jurisdiction of the Tunisian tribunal in hearing the case. However, the civil registrar consulted the wrong official body – the Public Prosecutor (it should have been the Prefecture) – which had no authority in issuing guidance on such matters. Accordingly, the woman appealed the denial,[85] and the Tunisian 'definitive divorce' was eventually acknowledged as civilly valid in Italy.[86] Procedural mistakes can in fact affect the (non-)recognition of foreign *sharīʿah*-compliant matrimonial dissolutions, and this outcome might be more problematic when the applicant is not an Italian national and is less familiar with domestic provisions.

An additional aspect deserves to be emphasized. The interactions between judiciary and administrative authorities is of pivotal importance. From a historical perspective, Italian judicial bodies have become more inclined to recognize the competence of foreign authorities in certifying *ṭalāq*-s. Accordingly, over the last two decades, legal proceedings tend to predominantly focus on the other two

[83] According to Art 4, para 1, legge no 218 of 1995. See Ministero dell'Interno, *Il Regolamento dello stato civile: guida all'applicazione. Massimario per l'ufficiale di stato civile* (Roma: Ministero dell'Interno, 2014), 137.

[84] Unpublished, Case no 42, in R. Calvigioni, Il diritto internazionale privato applicato allo stato civile. Quadro giuridico e soluzioni operative (Santarcangelo di Romagna: Maggioli, 2019), 261-264.

[85] In compliance to Art 67, legge no 28 of 1995.

[86] R. Calvigioni, *Il diritto internazionale privato* n 84 above, 261-262, notes that 'perhaps out of an excess of zeal, perhaps because being excessively fearful or insecure,' officially enquired for the opinion of the Public Prosecutor of the Republic, nonetheless this procedure was incorrect. In light of Art 9 DPR no 396 of 2000, 'indication and supervision' in matters of matrimonial status compete to the Ministry of Interior; accordingly, the Memorandum 1/50/FG/29 of the Ministry of Justice dated 7 January 1997 was superseded.

characteristics affecting *ṭalāq* (non-)recognition, namely the potential violation of the right of defense, and the (temporary or potential) revocability of the foreign proceeding.[87] Arabic/Italian translations also continue to play a key role. The next subsections investigate these matters.

3. The Issue of (Potential or Temporary) Revocability

Another primary issue affecting the rejection of a petition to record foreign *sharīʿah*-compliant forms of matrimonial dissolution regards the potential, or temporary, revocability of a *ṭalāq*.

Acts of nuptial dissolution issued in MMCs are frequently refused by the Italian legal system on grounds of revocability. The Ministry of Interior clarifies that 'a foreign judgment of 'revocable' divorce involving an Italian citizen is to be considered unrecognizable being against public policy,'[88] and this applies also to recently naturalized Italian citizens.[89] The law demands a foreign proceeding to be *res judicata* for it to be civilly recorded, particularly when this concerns (naturalized) Italian nationals.[90]

The potential, or temporary, revocability of foreign divorces, however, is not an absolute ban; a remedy does exist. This obstacle can be overcome by submitting subsequent documentation declaring the divorce 'definitive and irrevocable.'[91] Accordingly, a *ṭalāq* pronounced by the husband before a public notary,[92] another state body, or certified witnesses can be recognized as a 'definitive divorce' by the judiciary after the Islamic legal waiting period (*ʿiddah*) has expired. With regard to this aspect, two chief elements that are usually overlooked concern the opposing perspectives adopted by Islamic and Italian laws regarding this matter, and the importance of the translation of some keywords from Arabic into Italian, as elucidated in the paragraphs below.

It should be clarified that, according to the *Sunnah*,[93] a Muslim husband can pronounce two types of *ṭalāq*: the 'best one' (*aḥsan*), or the 'good one' (*ḥasan*). A *ṭalāq al-aḥsan* is always 'revocable'; the husband can revoke the marriage dissolution until the legal waiting period expires. Consequently, during the *ʿiddah* the husband can reconcile with his wife and resume cohabitation.[94] According to

[87] As identified and listed in section I.

[88] See Ministero dell'Interno, n 83 above, 113, and 142-143.

[89] The Ministry of Interior clarifies: 'in case a recently naturalised Italian citizen requests the transcription of a marriage certificate containing the wording of 'divorced on the basis of revocable divorce', the fact that the events occurred when the citizen was still a foreign national is not regarded as being relevant; on the contrary, the fact that the registered event produces effects clashing with the Italian *ordre public* impedes the legal acknowledgement and registration of the act in the civil register. See Ministero dell'Interno, n 83 above, 113, and 142-143.

[90] Art 64, legge no 218 of 1995.

[91] Ministero dell'Interno, n 83 above.

[92] See section II.

[93] For a definition, see footnote no 56.

[94] The Islamic legal waiting period consists of three monthly menstruation periods if the woman is

Islamic law, however, a *ṭalāq* can also be a *ṭalāq bā'in*, that is to say an 'irrevocable divorce.' Two types of irrevocability – minor and major – exist. If the husband pronounces an irrevocable divorce of the greater degree (*ṭalāq al-baīnūnah al-kubra*), a temporary impediment to the remarriage of the former husband and wife exists. The partners can remarry only after the wife has contracted matrimony with another man and has been divorced by him. Differently, in cases of irrevocable divorce of the lesser degree (*ṭalāq al-baīnūnah al-ṣaġra*), the spouses can remarry, provided a new nuptial contract is entered between the parties.

Adopting the perspective of Islamic law, the irrevocable *ṭalāq* is regarded as reprehensible (*makrūn*), whereas the *ṭalāq al-aḥsan* is to be favored. Conversely, as highlighted by legal proceedings and scholarly debates,[95] a 'revocable divorce' or 'revocable divorce-repudiation' is considered contrary to Italian public policy and therefore not civilly recordable. Opposite viewpoints are thus embraced by Italian and Islamic legal experts with regard to the characteristics of a *ṭalāq,* and these contrasting perspectives become visible only when comparing Islamic and Italian normativities. The fact that a reconciliation can happen between the spouses during *al-'iddah* – at the husband's wish, when some Islamically compliant divorce (repudiation) forms were chosen – represents an obstacle to the civil recognition of the *ṭalāq* in Italy. The Islamically favored revocable *ṭalāq al-aḥsan*, indeed, is not *res judicata*; therefore, it cannot be recorded by an Italian civil registrar. On the contrary, if the (magic) word 'irrevocable' is reported on the translation of the legalized act, then, the matrimonial dissolution can be civilly recognized, regardless of the type of *ṭalāq* irrevocability.

Additional highly under-investigated and otherwise invisible undercurrents are disclosed when examining empirical data. Among the ones I collected and studied, an interesting case regards an Egyptian couple living in Northern Italy. In 2011, the civil registrar of the municipality accepted as civilly valid a *ṭalāq al-baīnūnah al-ṣaġra* issued between these two Egyptian nationals. The Italian administrative authority was presented with a translated and legalized *ṭalāq,* which reported the expression 'minor irrevocable divorce,' and this *ṭalāq al-aḥsan* of inferior irrevocability appeared to satisfy the domestic legal requirements.[96]

Ethnographic investigations, however, disclose two specificities which went unnoticed by state bodies; namely, a discrepancy in the partners' nuptial statuses, and a mismatch between the legally and socially perceived scenarios. The same Egyptian couple, indeed, remarried the following year by virtue of a new, civilly unregistered, *sharīʿah*-compliant marriage contract. Being part of a polygynous

subject to menstruation (*Qur'ān*, 2: 228), or three lunar months or ninety days if the woman is not menstruating (*Qur'ān*, 65: 4), or it lasts until the delivery of the baby if the woman is pregnant (*Qur'ān,* 65: 6). See Y. Linant de Bellefonds, 'Idda', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, 2nd ed, online at https://tinyurl.com/yc4v35ey (last visited 30 June 2022).

[95] See section III, and also subsections 1 and 4.

[96] As stated in Art 64, legge no 218 of 1995.

family, the second wife of the (eventually naturalized) husband needed to be part of a civilly recognized matrimony to regularly relocate to Italy as a spouse. The first (Islamically and civilly divorced) wife agreed to undergo a *ṭalāq* procedure since she could benefit from welfare support as a single parent. Consequently, one marriage was dissolved according to foreign *sharīʿah*-compliant laws, but contracted again, by the same partners, by virtue of Islamic provisions. The polygynous man's second marriage was then disclosed to the competent state authorities. Registration issues did not arise, but these spouses' kinship arrangements do not correspond to the official data reported on the civil register.

The opposite can also happen: a *ṭalāq* can be denied recognition even when it is actually a 'foreign definitive and irrevocable divorce'. Field data again clarify some effects related to the 'compromise solution' aimed at circumnavigating the irrevocability requirement, as offered by the Ministry of Interior. As elucidated above, once the Islamic legal waiting period expires, one of the parties of a revocable *ṭalāq* can submit to the civil registrar a subsequent act declaring the 'definitive and irrevocable' nature of the 'intervened divorce'.[97] This approach implies lending an ear to transnational family members by taking into consideration the specificities of a foreign legal system – including the temporary revocability of a nuptial dissolution form – in the attempt to facilitate uniformity amid societal and legal nuptial statuses across national and social borders.

The following case illustrates these bureaucratic dynamics, which usually remain unobserved by legal professionals and scholars. An Italian municipality received a legalized document, duly translated into Italian, reporting the words 'first definitive divorce'. The legal waiting period detailed on the document had already expired, leading the civil registrar to wonder if the divorce had become 'irrevocable' and therefore civilly recordable. The Italian municipality corresponded with the Italian embassy in Cairo requesting clarifications regarding the divorce issued between these two Egyptian nationals.[98] The Italian embassy explained that the divorce judgment was a 'notary act' in the form of a

> 'first definitive revocable *ṭalāq*'. Building upon, Italian private international law and the bilateral convention between Italy and Egypt,[99] the Italian diplomatic personnel regarded this marriage dissolution as 'a non-recognizable divorce with civil effects'.

The embassy also referred the civil registrar to the Egyptian diplomatic authority for further information. At this point, however, the civil registrar denied the registration

[97] See Ministero dell'Interno, n 83 above, 113, and 142-143.

[98] As recommended by Ministero dell'Interno, n 83 above, 145-146.

[99] Respectively, Art 64, legge no 218 of 1995 and Art 10, of the Convenzione tra la Repubblica italiana e la Repubblica araba d'Egitto sul riconoscimento e l'esecuzione delle sentenze in materia civile, commerciale e di stato delle persone, firmata al Cairo il 3 dicembre 1977, *Gazzetta Ufficiale* no 235, 27 August 1981.

of the 'first definitive divorce,' which, in the meantime, had become *res judicata*; consequently, it should have been civilly acknowledged as an 'irrevocable divorce.' In this situation, the partners were actually divorced. The societal reality perfectly matched the (ex-)partners' legal nuptial statuses. Nonetheless, inaccurate translations, bureaucratic misunderstandings, and delayed procedures prevented the legal recognition of the foreign *ṭalāq*.

The three scenarios discussed above all present similar familial arrangements: Egyptian nationals settled in Italy, who had married and divorced in Egypt. Their *ṭalāq*-s, however, were evaluated rather differently by the Italian legal system. The administrative authorities are not to be held solely responsible, and the same is true for the parties. The issues at stake are complex and fluid, and neither the partners nor the civil registrars can keep pace with constantly evolving family laws. A broad understanding of some specificities of Islamic law by administrative bodies can also become a double-edged sword. If it can facilitate the communication between the (ex-)spouses and civil registrars, it may cause misrepresentation and misconceptions, such as the denial of *ṭalāq* recognition on the grounds of its revocability even if the *'iddah* has expired.

4. The Right of Defense and Official Bodies Lost in Translation

Among the important factors impacting the possible (non-)recognition of foreign *ṭalāq-s* by the Italian legal system is the right of defense as exercised by defendants or respondents, usually by the (Islamically divorced) wife.

The husband's unilateral repudiation of his wife violates the fundamental principles enshrined in the Italian Constitution. The right of defense is an inviolable, constitutionally protected right (para 2, Art 24). Moreover, according to the Constitution (para 2, Art 111),

> 'all court trials are to be conducted with adversary proceedings, and the parties are entitled to equal conditions before an impartial judge acting as a third party'.

Consequently, recognition difficulties arise in relation to the legal procedures characterizing some foreign *sharīʿah*-compliant matrimonial dissolution forms. Italian private international law principles require the defendant's essential rights of defense be respected, and that the parties appear before the court in compliance with the law of the country. Rules may nonetheless differ depending on the country of origin of the partners, as the two recent proceedings before the Supreme Court demonstrated.[100]

A thorough study of foreign unilateral marriage dissolutions obtained in MMCs reveals that these legal acts are frequently perfected and recorded when the wife is not present. Accordingly, these documents are signed by the husband,

[100] See above sections III and IV.

the witnesses, and the public notaries only. The lines on the pre-printed forms of the act of *ṭalāq* that are devoted to the wife's signature and to the notice reception are often left empty. The cases I have examined[101] indicate that, whereas the judiciary appears to take this into consideration, civil registrars tend to overlook this fact. Consequently, when the partners agree to request the civil registration of a foreign unilateral *ṭalāq*, issues might not arise even if the right of defense has been violated. In some cases, the original documents, or their translation, are inaccurate or misleading;[102] in other cases, some details simply remain unnoticed.

Following the same pattern adopted in the previous sections, my analysis here refers to empirical data to make visible the otherwise invisible undercurrents. A foreign divorce recorded in central Italy will serve as a first illustration. A certificate of a 'first revocable divorce' issued in Egypt, as translated and legalized by the Italian embassy in Cairo, was submitted to the civil registrar. The document was not signed by the woman, but the paperwork was nonetheless accepted as documentation of an 'irrevocable divorce' once the legal waiting period (*'iddah*) had expired. The missing signature of the wife on the act was not regarded as problematic.

In another case, specific attention was paid to the documentation submitted in Arabic, but some key aspects went missing. The civil registrar declared to be confused by the numerous dates reported on the translation of the legalized act documenting a Muslim husband's 'first verbal divorce' as declared before the competent *māzūn* and recorded on the foreign civil register. Accordingly, additional clarifications were requested by the Italian civil registrar to an Egyptian consulate. Nevertheless, neither the Italian nor the Egyptian authorities raised the issue of the violation of the wife's rights of defense.

No right of defense was actually granted to the wife during this *ṭalāq* procedure. The fact that the woman was not present can be easily inferred when reading the original Arabic certificate. The blank spaces on the document that indicated that the formality relating to the wife's notification had not taken place were however simply not represented in the Italian translation. Examination of the official paperwork shows that the pre-printed *ṭalāq* form was left completely blank and free of any stamps or signatures. This is perhaps why the appointed interpreter did not translate this part of the original certificate. Similarly, when summoned to legalize the document, the Italian diplomatic mission did not point out that part of the official document was missing from the Italian translation. This issue was also not raised by the foreign consulate.

While the diplomatic missions and appointed translators could have been more accurate with the foreign documentation, additional details could also have been inferred by Italian authorities, if the certificates had been carefully examined,

[101] I am referring to *ṭalāq* certificates issued in Morocco, Egypt, Tunisia, Algeria, Bangladesh and Pakistan.

[102] See section II.

or if they had otherwise been made aware of these potentially problematic aspects. Scrutinizing the Italian translation of the document, it becomes evident that the act was signed by 'the spouse (not the *spouses*), the witnesses and the notary' only. Moreover, the Italian translation distinctly reports that 'the wife is not present.' The failure to notice these details, or to raise any issues regarding the woman's right of defense, was most likely unintentional. Nonetheless, it resulted in an unnotified man's unilateral repudiation being regarded as compliant with Italian public policy, and therefore civilly registered.

Another interesting situation further illustrates similar dynamics, which usually remain in the shadows. In this case, the act was first translated into Italian and legalized by the Italian embassy in Cairo. Then, it was submitted to both the Egyptian diplomatic mission in Italy and to an Italian municipality, where the *ṭalāq* was eventually recorded as an 'irrevocable divorce.' The parties - a Muslim Egyptian man and a Christian Filipino woman - both resident in Italy, had divorced in Alexandria and wanted to be regarded as unmarried in Italy as well. The documents presented to the civil registrar attest that in May 2009 the husband pronounced the first *ṭalāq bā'in* to his wife, and the act was recorded in August 2009. The original Arabic document clearly states that the wife was absent when the *ṭalāq* was completed and indeed, in place of her signature, there is a note in brackets that the woman was absent. More specifically, the original certificate reports that 'she did not come' (*lam taḥadar*). In the part of the document where the notification is supposed to be recorded, the act is scribbled all over with official stamps and legalization signatures. The Italian translation reports that the wife was absent and that the notification form was left empty. Consequently, the wife's right of defense was not respected. Nonetheless, similar to the previous situation, this unnotified man's unilateral repudiation was recorded as a civilly valid divorce.

Comparison between original Arabic documents and their legalized versions submitted to the Italian authorities highlights the importance of careful inspection of translated acts, while also clarifying that misinterpretations and oversights can result in hindering the essential rights of defense. However, had the partners disagreed on their *ṭalāq* registration, all these cases could have been appealed before the competent Italian court, which would have, most probably, denied civil recognition to these foreign acts on the grounds of defense violation and gender discrimination. Yet in the case-studies examined here, no issues were raised. Two possible hypotheses can be advanced: either the parties agreed to register their nuptial dissolution, or the partners were not aware of the possibility of disputing the civil recognition of the foreign *ṭalāq* on grounds of a violation of the woman's right of defense. Power struggles can indeed severely impact weaker family members, particularly in transnational or migration contexts.

Carefully examining the original documentation submitted to civil registrars unveils an additional key element. The potential discrepancy between administrative

and judicial recognition of foreign *ṭalāq-s* becomes evident and creates serious concerns in terms of non-discrimination and equitable treatment. The approach followed by civil state officers is thus to be critically assessed. In effect, the Ministry of Interior's instructions state that

> 'the procedure referred to as an 'act of repudiation' represents a case that is contrary to '*ordre public*' since 'repudiation' constitutes a situation in which the loss of the marital bond is decided and imposed unilaterally by the husband, and this indication cannot be said to be mitigated by the fact that the woman may possibly have manifested some form of consent: it is the institution as such which is contrary to our (ie Italian) legal system and with mandatory principles of public policy'.[103]

Regarding the legally contentious undercurrents described above, it seems plausible that, since the Arabic word *ṭalāq* was translated as 'divorce' instead of 'act of repudiation', the civil registrars did not verify whether the (ex-)wife had actually been notified of the legal act before the foreign *ṭalāq* was civilly recorded. Thus, it becomes evident that the usage of the so-called 'magic words' in the official paperwork again facilitates the legal acknowledgement of *de facto* unilateral repudiations. Remarkably, these processes remain unnoticed by legal professionals and scholars and, consequently, these matters are unmapped and under-debated.

An additional point deserves to be stressed. This concerns the potential amendment and validation of *sharīʿah*-compliant unilateral repudiations. The Ministry of Interior's instructions impede the recognition of unilateral repudiations even if an intervening proceeding certifies the dissolution of the marriage between the parties.[104] Nevertheless, Italian judicial and administrative authorities can support the theory according to which the wife's application rectifies the husband's 'unilateral repudiation', which therefore becomes a 'divorce-repudiation.' Should this be the case, the *ṭalāq* is no longer contrary to *ordre public*. According to some scholars, when the wife petitions for recognition of a repudiation in Italy, the *ṭalāq* cannot be recorded, or acknowledged, since the act itself was formed unilaterally rather than bilaterally.[105] Conversely, others maintain that the husband's unilateral decision is rectified by the claim of recognition submitted by the wife.[106] The repudiation thus becomes a sort of 'consensual divorce'.[107] As a result, the *ṭalāq* recognition should not be refused in case the woman applies for it.[108]

[103] Ministero dell'Interno, n 83 above, 148.

[104] ibid

[105] A.M. Galoppini, 'Il ripudio e la sua rilevanza nell'ordinamento italiano' *Diritto di Famiglia e delle Persone*, 34, 3, 2, 969-989, 982 (2005).

[106] C. Campiglio, 'La famiglia islamica nel diritto internazionale privato italiano' *Rivista di Diritto Internazionale Privato e Processuale*, XXXV, 21-42, 37-38 (1999).

[107] M. D'Arienzo, 'Diritto di famiglia islamico e ordinamento italiano' *Diritto di Famiglia e delle Persone*, 1, 189, 212 (2004).

[108] See A. Licastro, 'Scioglimento del matrimonio' n 24 above.

These academic arguments can be juxtaposed to the 'consensual divorce-repudiation' *(khul')* case whose recognition was refused by the Rome Court of Appeal, as examined above.[109] with specific regard to the Italian judiciary, it should also be mentioned that a pragmatic approach may lead to the acknowledgement of civil effects to a 'unilateral divorce-repudiation' as pronounced by the husband *in absentia* of his wife. The Court of Appeal of Cagliari, in effect, recognized the validity of an Egyptian 'revocable *ṭalāq*' as requested by the Italian-Egyptian (ex-)husband, on the grounds of documentation submitted by the party, including a foreign marriage contract entered into by the applicant's (ex-)wife with another man.[110]

The discussed cases indicate that it is thus of pivotal importance preventing judicial and administrative bodies from being "lost in translation".

5. Performative 'Magic Words'. (In)accurate, (In)complete or Carefully Tuned Translations

Albeit formal declarations and official texts, the examined legal and administrative case-studies unveil highly problematic forms of nuptial dissolution – such as foreign (unnotified) men's unliteral repudiations – which can be recognized as valid divorces in the Italian legal system. A *ṭalāq* can be recorded or, at the opposite, denied civil effects, on the grounds that the relevant documentation is not correctly translated, or understood, by the competent state bodies. It can also happen that the foreign acts are skimmed through rather than being carefully scrutinized, when no *ad hoc* experts are consulted by judicial bodies and administrative authorities, or the non-legally competent authority is eventually approached.

How can this impasse be solved? An Islamisation of social sciences – according to which Muslims can only be studied by those conversant with Islamic sources – is not to be argued for.[111] Fluid dynamics otherwise overlooked by judges, legal professionals, bureaucrats and scholars can be brought to light relying upon Islamic religious provisions, Muslim social normativities and MMCs' laws, as the present work demonstrates.[112] Building upon (un)published proceedings and empirically collected data, the former sections of the paper indeed offered a thorough analysis of seldomly perceived administrative and legal phenomena, while also disclosing neglected issues related to legal transplants and linguistic translation.

[109] See above subsection 1.

[110] Corte d'Appello di Cagliari 16 May 2008 no 198, *Rivista di diritto internazionale privato e processuale*, 647 (2009). For a commentary, see A. Barbu, 'Compatibilità del ripudio-divorzio islamico e ordine pubblico italiano' *Rivista Giuridica Sarda*, 2, 311-321 (2009).

[111] It has been underlined that 'one important Muslim response since the 1960s has been the attempt to Islamize the social sciences, including anthropology, that is, to appropriate them for Islam, by insisting that Muslim societies can only be studied by Islamic anthropology or by those conversant with Islamic textual sources. See R. Tapper, 'Islamic Anthropology and the Anthropology of Islam' 68 *Anthropological Quarterly*, 68, 3, 185-193, 188 (1995).

[112] See subsections 1-4.

An additional layer needs to be added to the analysis; an ear is to be lent to the relevant socio-legal actors. As discussed above, ethnographic researchers document that, in some situations, translators and interpreters might be asked by the (ex-)spouses to facilitate the civil recognition of their foreign *sharīʿah*-compliant form of marriage dissolution; other case scenarios, however, exist. The testimonies of some Arabic-Italian translators and interpreters, as well as those of women who underwent a *ṭalāq* procedure, provide further insights on these matters.

First, attention is to be paid to translators and interpreters.[113] When enquiring clarifications about the chosen wording reported in the Italian translation of foreign documentation, reactions differed. Whereas some informants proved to be annoyed when incongruences were pointed out in the documents produced;[114] others explained that they were unaware of the mistakes. Two were the explanations provided: either the translators stressed not to have expertise in the legal field or – to their understanding – the legislation in their country of origin was different, therefore the 'carefully tuned' translation provided was the result of *bona fide* inaccuracy.[115]

The technique of reporting, on legalized documents, what are commonly labelled by (Muslim) migrants as 'magic words', nonetheless, is not uniformly supported by the community of Arabic-Italian translators and interpreters. Some informants were outraged by the usage of specific formulae purposely aimed at achieving the civil recognition of foreign men's unilateral repudiations by Italian official bodies. This approach appears also not to be seconded by the personnel of MMCs' consulates and embassies.[116] On the contrary, to other interpreters, a

[113] Arabic-Italian translators have been interviewed by the author, in different instalments, from 2006 to 2019. The conversations were held mostly in Italian; specific issues were addressed in modern classical Arabic (*al-fuṣḥā*), while examining foreign original certificates and documentations. The reported statements are verbatims which have been translated into English by the author. Informants have been granted anonymity therefore the names reported in the text are not their original ones.

[114] Mahmoud, for instance, stated: 'No, but you are Italian, you don't have to read Arabic! Instead, read what is written in Italian; forget the Arabic, otherwise you get confused… They (ie the Italian civil registrar, the lawyer and the judge) aren't reading the Arabic anyway. So… don't get confused yourself as well, stick to the Italian version. This (ie the Italian translation of the document) is what you need'.

[115] Tariq clarified: 'I know. I understand what you're saying, but my country is different. I believed - believe me! - that it was still okay like this... you know, this means that... in short, *al-ṭalāq* means that you are divorced. Full stop. And a *qādhī,* a *shaykh,* a *māzūn,* a *ʿadul*... they aren't so different anyway. You know that, don't you?'. In his statement, this informant provided a little summary of the most problematic terminology reported in foreign *sharīʿah*-compliant matrimonial dissolution forms: these specifically relate to the type of *ṭalāq* and the nature of the foreign authorities issuing the relevant documents, as identified and discussed in the previous subsections.

[116] The author interviewed the personnel of MMCs' consulate and embassies, in different instalments, from 2006 to 2020. The conversations were held in Italian and/or in modern classical Arabic. Due to word-limit, only one statement-verbatim is here reported. Salima, who is employed by a MMC's diplomatic mission in Italy, declared: 'You see what they're doing? This is illegal! This is not even Islamic, in my view… The problem is... too many people claim to be able to act as translators and, then, you see the results! Some are in good faith — you have to say so, yes — but others aren't… but, what can you do? At the end, they only read the Italian paper and so if you are lucky, or if they put the 'magic words' there, then you are done! If this is a 'divorce', or if this is 'irrevocable'... or if it doesn't say that the

translation that facilitates the civil recognition of a *ṭalāq* meets the clients' needs, and therefore becomes a priority also having financial implications.[117]

Islamically married partners can approach the issue of these carefully tuned translations from similar pragmatic viewpoints. In spite of that, some women stressed different aspects.[118] An Egyptian divorcée, for instance, agreed to claim the civil registration of her unilateral repudiation issued abroad in order to fasten the bureaucratic process.[119] A Moroccan woman was instead not aware of these 'magic words', but she conceded that the transcription of the foreign *ṭalāq* into the civil register was eventually the best solution, from financial and social perspectives.[120] Explanations of these customized or strategically adjusted translations can therefore be found in several pragmatic reasons. Furthermore, societal and legal implications of the potential (non-)recognition of a *ṭalāq*, and the consequent multiple nuptial statuses and limits to remarry, are carefully balanced by the (ex-)spouses.

Muslim women might however voice a different opinion. This is for instance the case of a Moroccan -naturalized Italian- woman who submitted a plea for non-recognition of a foreign nuptial dissolution on the ground of what she articulately defined as 'customary and religious gender discrimination rules embedded in Muslim family laws'.[121] She was adamant in stressing that women

woman wasn't actually there… then, it's fine: you're divorced! And free to marry again'.

[117] For instance, an Arabic-French-Italian-Spanish translator -who offers his services nearby the entrance of a MMC's consulate- stated: 'Well... you see that's magic! If I write that word, then we're all happy and we move on. It's a win-win situation, eventually: I work, they're divorced and they register it. Done.'. Karim, a translator working in an Italian tribunal in Northern Italy, similarly declared: 'You must understand that I have to work. I can't ... you know, if the rumour spreads... if it goes around that you write like this or like that ...and it isn't good, then they don't come to you anymore! So… better write what you need, so they're happy and you work! ...we are all on the same boat, don't you say so here?!'. The reported statements are verbatims which have been translated into English by the author. Informants have been granted anonymity therefore the names reported in the text are not their original ones.

[118] These selected interviews were conducted by the author, respectively in 2008, 2014, and 2019. The conversations were held mixing Italian, French, modern classical Arabic and Moroccan Arab (called *dārijah*) languages. The reported statements are verbatims which have been translated into English by the author. Informants have been granted anonymity therefore the names reported in the text are not their original ones.

[119] Zahra explained what follows: 'Yes, some friends told us to go to this person because his translations are better, you know what I mean (…) Look, this is simple: we need a divorce. Us, back home... we do so that it costs less and it gets faster. It's true: I don't get any money from him — I was so stupid with such a little *mahr*! — but (he) doesn't have anything anyway, so what am I asking him anyway? Believe me, it's enough for me not to have him as my husband anymore... for heaven's sake! Then, we'll see…'.

[120] In Aisha's words, 'If the municipality doesn't say anything, I don't say anything; it already costs a lot (of money) to make those documents here and there... can you imagine if we have to do more (paperwork)?! (…) And then I'm divorced for us, I can't pretend to be his wife again, here… it isn't good for me too, for my family… and what would my family think?'.

[121] When addressing the potential recognition of a *ṭalāq* in Italy, Fatima added: 'When I saw this, I say: are we joking, are we? He'll always be able to do everything he wants here, too! No, my dear! No, no… Now, I am in Italy and I no longer want the law of my country. There, I can't do anything… nothing more, but not here ...here, I want to be an Italian! Tell me: can a man repudiate you, here? No! Then, he

were not positively impacted by the 2004 Moroccan *Muddawanah*. Consequently, the prospective divorcée did not intend to rely upon *sharīʿah*-compliant laws in regulating her family matters. In 2019, this woman was thus pleading the judiciary of her settlement country to dissolve her marriage according to Italian law and on more gender-neutral terms.

It emerges that local Muslim communities living betwixt and between MMCs and Italy can develop corrective performative formulae – such as carefully adjusted translations perfected by skilled interpreters. These usually overlooked carefully tuned translations remain ambivalent. On one hand, these compensate for the denial of the civil acknowledgement of foreign *ṭalāq-s*. On the other, inaccurate, incomplete or 'adjusted' translations might be craftily used, or even abused, by the (ex-)partner who is more familiar with the provisions of different legal systems, to the detriment of weaker family members. According, an alert and scrupulous analysis of the submitted foreign material is to be enacted by both administrative bodies and judicial authorities. Strategically employed 'magic words' can in effect act as a sponge that eventually functions as epistemological obstacle in obfuscating realities,[122] even to State bodies.

V. Conclusions

Revolving around some aspects of horizontal kinship relationships in the contemporary intercultural scenario, the paper focused on a foreign nuptial dissolution form identified with the Arabic umbrella term *ṭalāq*. It explored the multiple manners in which – in the journey from MMCs to Italy – possibly competing judicial and extrajudicial *sharīʿah*-compliant nuptial dissolutions can be civilly recognized, or not recognized, by Italian judicial and administrative authorities.

The proposed analysis showed that the interplay of five elements eventually determines the (in)formal implementation of *sharīʿah*-compliant nuptial dissolutions in the Italian legal system. The paper identified three main characteristics affecting the (non-)recognition of a foreign *ṭalāq:* the nature of the foreign authorities issuing the relevant documents, the respect of the (ex-)spouse's right of defense, and the revocability of foreign decisions concerning matrimonial dissolution. As clarified in the discussion, these characteristics are deeply intertwined with two additional key elements: the translation of the relevant foreign terminology, and the socio-legal performative of a *ṭalāq*. The 'formalization' of a *ṭalāq* is indeed

(ie my husband) can't repudiate me either! Enough is enough. I'm here, so we do as you do, here! I found a lawyer, and I want an Italian judge to decide, not one back there, who does what a man wants...'.

[122] Bachelard showed how a 'sponge' provided a helpful metaphor for XVIII century scientists in explaining observed phenomena, particularly those not yet scientifically understood; G. Bachelard, *La formation de l'esprit scientifique. Contribution à une psychanalyse de la connaissance objective* (Paris: Librairie philosophique, 1967). See also B. Elevitch, 'Gaston Bachelard: The philosopher as dreamer' *Dialogue*, 7, 3, 430-448 (1968); J.P. Souque, 'The historical epistemology of Gaston Bachelard and its relevance to science education' 6 *Thinking: The Journal of Philosophy for Children*, 4, 8-13 (1986).

affected by the legal and social normativities of the relevant MMCs and Muslim community, as well as by the utterance by means of which Muslim partners Islamically dissolve their marriages.

Combining comparative analyses with social science ethnographies and anthropological investigations, otherwise invisible family arrangements were disclosed and examined, while raising flags for legal professionals and bureaucrats. The paper thus brought to light fluid dynamics and potential discriminatory undercurrents enacted by, or in the folds of, European legal systems.

Adopting a comparative angle, two phenomena were highlighted. First, by the contrasting views of Islamic and Italian laws on potential, or temporary, divorce revocability become manifest. According to Islamic provisions, an irrevocable divorce is regarded as being reprehensible, whereas a revocable *ṭalāq* is to be favored. *Res judiciata* and principle of certainty are instead the fundamental concepts enshrined in Western minds. The very same *ṭalāq* can thus be valued rather differently by a foreign Muslim (ex-)spouse and an Italian legal professional.

Secondly, social and legal normative statuses of the (ex-)partners may diverge significantly. From the proposed discussion it emerged that, independently from the official acknowledgement of multiple nuptial statuses resulting from the civil registration of a foreign *ṭalāq*, the religious and social validity of a *sharīʿah*-compliant matrimonial dissolution form is not disputed by the (ex-)spouses. And this happens even if the civil validity of the foreign act is opposed by one partner before the Italian judiciary. The social and legal performatives of the word *ṭalāq* are thus understood and enacted differently by the parties, in diverse normative systems. Building upon the anthropology of *Islām*, it can therefore be inferred that a *ṭalāq* is to be investigated as an articulation of structural relations.[123]

In exploring the manners in which transnational processes are shaping local legal situations, careful notice is to be taken of the main characteristics that surface when investigating administrative processes and judicial proceedings. The potential recognition of foreign acts is indeed highly affected by the translation of the relevant foreign terminology. And this can concern not only the (potential or temporary) revocability of a *ṭalāq,*[124] but also the parties' right of defence,[125] and the authority documenting the partners' nuptial dissolution.[126]

The diplomatic personnel's, civil registrar's and judiciary's interpretation and (partial) understanding of alien *sharīʿah*-compliant normativity equally plays a key-role in the homologation, or registration of foreign documentation. The

[123] Similarly to the word *Islām* or the idea of religion. See A.H. El-Zein, 'Beyond ideology and theology: The search for the anthropology of Islam' *Annual Review of Anthropology*, 6, 1, 227-254 (1977).

[124] See above subsection 3.

[125] See above subsection 4.

[126] The 'magic words' regard not only the translation of *ṭalāq* and its (un)revocability; but also *'adul*, *māzūn* or *qādhī*; for further details, see above subsection 2.

proposed analysis distinguished among several forms of *sharīʿah*-compliant nuptial dissolutions which are variously translated as 'divorce-repudiation', 'repudiation-divorce', 'consensual divorce-repudiation', 'divorce under judicial control', 'definitive divorce', 'minor irrevocable divorce', 'verbal divorce'. And it showed to what extent the chosen translation formulae impact on the *ṭalāq* civil (non-)recognition, independently from the public policy criterion.

Furthermore, it was releveled that diverging interpretations of the word *ṭalāq* can be fostered by European or MMCs' official bodies as well as by Islamically married partners. Different translations and supporting statements can, for instance, be submitted to state bodies by (irreconcilable) spouses. Approaching Islamic and Muslim normativities as discursive traditions, in effect, Muslim (ex)partners can manifest their socio-legal agency in (apparently) dissonant terms. Furthermore, according to the party's main argument, emphasis can be strategically placed upon the first or the second word in the expression 'divorce-repudiation'; gendered readings are thus frequently offered to the Italian judiciary. These (partially) concealed undercurrents impact on the civil recognition of a *sharīʿah*-compliant nuptial dissolution, or its denial.

Strategically selected wording – such as 'judge' (instead of 'public notary'), 'definitive judgement' (rather than 'notary act'), 'divorce' (rather than 'repudiation'), 'final' (instead of 'revocable') – can also be relied upon to facilitate the civil acknowledgement of a *ṭalāq*. If the partners are in agreement, these shadowy techniques can be used to enact family arrangements such as *de facto* polygynous unions. These households remain unperceived in the eyes of the Italian civil system despite being religiously and legally valid marriages according to the laws of MMCs and Islamic normativity.

Academic studies mostly regards published legal proceedings, which are scarcely available and frequently terminologically confused,[127] and legal commentaries tend not to engage with customized or carefully tuned translations not having access original documentations.[128] Terminological issues, as well as their pitfalls in terms of anti-discrimination rights and weaker family members' protection, cannot therefore be disclosed, debated and properly addressed. Accordingly, filling a gap in the current legal and scholarly debate, this essay shed light on unperceived courses of action and (potential) discriminations. Unexpectedly, official documents and translations issued by Italian diplomatic missions or MMCs' official bodies – which were specifically aimed at facilitating the *ṭalāq* recognition by European legal systems – can also be misleading. On the contrary, 'divorce judgements' that, in real terms, were unilateral forms of 'divorce-repudiation' can be accepted the judiciary as 'effective' in Italy.[129]

Additional otherwise invisible pitfalls also surfaced in the proposed

[127] See above section III, and subsections 1-4.
[128] See above section III.
[129] See above subsection 4.

discussion. If the transcription of irrevocable divorces can be denied, unilateral repudiations unnotified to the wife can be registered with civil effects.[130] This can happen since Muslim (ex-)partners can develop skilled techniques. Reference to various authorities, partial translation of some problematic pre-printed forms in Arabic language, or customized translations of some controversial terms might therefore be used to connect two potentially conflicting principles and rules of diverse normative orders.

As this paper revealed, a full picture of the actual socio-legal dynamics involved in *ṭalāq* acknowledgement processes can be painted only when concentrating also on the involvement of local municipalities alongside with Italian and MMCs' diplomatic missions. The interplay between Muslim (ex-)spouses and State's authorities – both administrative and judicial – is thus to be carefully monitored to grasp the actual implementation of *sharīʿah*-compliant nuptial dissolution forms. The Italian legal system is, however, constantly adjusting to a variegated socio-legal reality that is rarely reported in law books, as also recently claimed by the Supreme Court.[131]

As clarified by the examined numerous case-studies, administrative and judicial authorities scour a difficult terrain studded with reforms and adjustments aimed at attempting to accommodate family members of increasingly cross-national societies.[132] Opposite interpretations might however be advanced. On one hand, taking into consideration the specificities of foreign legal systems, or normative orders, intends to facilitate uniform transnational legal and societal matrimonial statuses and to protect weaker family members. On the other, the very same approach can be perceived as a limit posed to family members' freedom in enacting diverse kinship structures, or when being settled betwixt and between different countries.

Still, both viewpoints indicate that these scenarios usually remain concealed and, therefore, the outcome of a judicial proceeding, or an administrative procedure, can be vitiated. In point of fact, skilled techniques (sometimes grounded on unbalanced gendered power-struggles) play a crucial part in bridging the gap among diverse legal and religious normative orders; whilst also paving the way to creative courses of action. The latter might attempt to dissimilarly (un)accommodate *sharīʿah*-compliant family arrangements as apparently attuned to the public policy criterion, or occasionally disguised.[133]

[130] See above subsections 3-4.

[131] See above section III.

[132] For instance, by relying upon the principle of automatic recognition, or the implementation of Brussels II-*bis* and Rome III Regulations.

[133] By way of illustration, when a *ṭalāq* is understood as a man's unilateral repudiation that violates the *ordre public*, or as it happened in the examined case of the Egyptian *de facto* polygynous family; see above section III and subsections 1-4.

Essays

The Future of European Environmental Policy in Appreciation of German Federal Constitutional Jurisprudence

Antonio Felice Uricchio*

Abstract

The European Green Deal introduced by the European Commission represents the kick-off of a new environmental and climate protection policy. Environmental safeguards and sustainability seem be the leitmotif of European politics in the future. Ambitious goals are prompting a profound ecological transformation. Nevertheless, many of the challenges raised in recent years still persist. Above all, existing European environmental law is often insufficiently implemented by the Member State level. Environmental and climate protection is also not adequately integrated into other policy areas, such as agricultural and transport policy. The ecological turnaround seem step up to the place and further develop elements of the previous reform discussion. A CO2 border compensation system for selected sectors is going to be proposed in order to reduce the risk of relocation of economic activities and emissions abroad (carbon leaks). The commitments made both worldwide and within the European Union (EU) to reduce greenhouse gas emissions make a structural change towards a climate-neutral economic situation in Germany inevitable. In recent years, numerous political initiatives have therefore been presented the aim to accelerate this transformation. With the goal of climate neutrality in 2050, the close connection between climate policy and the competitive position of German industry has come into particular focus. With a view to the climate lawsuits pending before the BVerfG and based on the proposal for a European fundamental right to environmental protection, which the writer Ferdinand von Schirach has recently introduced into the debate, the article examines the legal opportunities, but also the limits, that German and European fundamental rights can play in the context of climate policy. As a result, the contribution pleads for a fundamental right to environmental protection, to be characterised as enforceable from a procedural point of view. Ultimately, with a view to planetary boundaries (in climate protection: 1.5-2 degree target), the contribution hints at the recognition of a fundamental right to the minimum ecological subsistence, and even a possible right on having a future.

I. Introduction

The increased importance of environment and climate protection at the European level can be examined by looking at the Communication of the European Commission on the European Green Deal, which was presented in December 2019.[1] The Plan exhibits the measures that the European Commission

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[1] European Commission Communication of 11 December 2019, *The European Green Deal*, [2019]

aims at taking in the forthcoming years and sets out a roadmap for their adoption.[2] At the heart of the Communication, the ambitious climate protection is listed as a priority. The European Commission wants to propose a climate law that sets a target for 2030 of a greenhouse gas reduction of at least 50% (if possible even 55%) and greenhouse gas neutrality by 2050.[3] In order to facilitate the decision-making process, qualified majority could be considered instead of unanimity, within the ordinary legislative procedure. For this purpose, the so-called *passerelle clause* can make it possible to adopt decisions with a qualified majority if this procedure has previously been decided unanimously.

A CO2 border compensation system is proposed for specific sectors in order to reduce the risk of relocation of economic activities and emissions in foreign countries (ie carbon leaks). The European Green Deal is seen as a growth strategy through which the EU is to become a fair and prosperous society with a modern, resource-efficient and competitive economy. The Deal underlines that such growth is necessary for the future of Europe. After setting the main focus on economic development in the long run, the 2030 Agenda for Sustainable Development, which entered into force in 2016, shifts the focus on an ambitious and global transformation program. In particular, the implementation of the 17 Sustainable Development Goals (SDGs) contained therein aims to anchor and implement these goals at European level. The European Commission has expressed that the EU intends to implement the 2030 Agenda and the SDGs together with the Member States in the respects of the subsidiarity principle.[4]

The Reflection Paper of the European Commission 'Towards a Sustainable Europe by 2030'[5] stresses the need for a stronger commitment to greater sustainability and envisages good conditions for the EU to take on a pioneering role in the implementation of the SDGs.

Moreover, the German Federal Constitutional court partially supported a right on having a future, particularly considering next generations. There are several ways to safeguard and enforce such principle, economical, scientific, and still legislative. Strengthening CO2 pricing is of enormous importance. Tax and subsidy policies urgently need to be ecologically oriented especially in the areas of electric energy, heating and transport should be consistently aligned with the CO2 content of the energy sources. In addition, environmentally harmful subsidies, such as tax advantages for diesel or air transport, must be dismantled quickly.

COM/2019/640 final.

[2] European Commission Communication, COM/2019/640.

[3] ibid 5.

[4] Commission Staff Working Document of the 22 November 2016, 'Key European action supporting the 2030 Agenda and the Sustainable Development Goals Accompanying the document Communication from the Commission to the European Pariliament, the Council, the European Economic and Social Committee and the Committee of Regions. Next Steps for a sustainable Europe future: European Union action for sustainability' [2016], SWD/2016/0390 final.

[5] European Commission, *Towars a sustainable Europe by 2030. Reflection paper*, [2019], COM/2019/22, available at https://ec.europa.eu/info/.

Making financial systems sustainable should be a priority. A central concern of politics must be to align financial systems with ecological sustainability. This includes public and private investments: In order to lead sustainable investments out of their current niche, the instruments for a broad application should be designed and the overall market should always be addressed. German State should also use its direct influence and make public procurement as well as investments and plants environmentally friendly.

Another proposal in Germany concerns the possibility to establish the Council for Intergenerational Justice. In order to give young and future generations a voice in the political system, during the election periods, as well as party democracy, it is necessary to examine how the long-term responsibility of the state can be better institutionalized, via this Council. Ideally, this Council is a constitutionally anchored legitimised institution, thus, appearing as a 'heavyweight' of the political scene but politically neutral. Its members, who are expected to compound expertise in the areas of sustainable environmental, social and economic policies, shall be independent. Half of them could be elected by the Bundestag and half by the Federal Council (on the proposal of the state parliaments) for twelve years without the possibility of re-election.[6]

II. New Initiatives at Multiple Levels

1. European Initiatives

In December 2019, the European Commission presented the European Green Deal, which identifies the EU's climate neutrality by 2050 as fundamental goal. This measure is expected to be accompanied by a change in the EU's climate targets for 2030.[7]

In October 2020, the European Parliament (EP) voted in favour of extending the emission reduction targets. By 2030, emissions are expected to fall by 60% compared to 1990, and, previously, the target was 40%. The Green Deal[8] includes proposals for measures to reduce emissions in various areas such as agriculture, mobility, building renovation, sustainable financing, energy systems or research and development.[9]

An action plan has laid out the e-work on corresponding strategies and legislative proposals by 2021.[10] The key instruments included in the proposal

[6] Sachverständigenrat für Umweltfragen (SRU), 'Demokratisch reagieren in ökologischen Grenzen- Zur Legitimation für Umweltpolitik', 14 (2019), available at: https://www.umweltrat.de/.

[7] For a better understanding concerning the EU policy framework compare: A.F. Uricchio and F.L. Giambrone, *European finance at the Emergency Test* (Bari: Cacucci Editore, 2020).

[8] Sachverständigenrat für Umweltfragen (SRU), 'Die Zukunft der Europäischen Umweltpolitik', 465 (2021), available at https://www.umweltrat.de/.

[9] European Commission Communication COM/2019/640.

[10] Sachverständigenrat – Wirtschaft, Klimaschutz als industriepolitische Chance' Corona-krise gemeinsam bewältigen, Resilienz und Wachstum stärken, Paderborn, 2020, 226.

encompass cross-sectoral CO2 pricing, a CO2 border compensation system for various sectors, research funding for climate-friendly technologies and a revision of CO2 emission standards for passenger cars.

In addition, the EU presented two further climate policy-relevant strategies in the summer of 2020. Based on the EU's hydrogen strategy, the use of hydrogen-based technologies has to be strengthened.[11] The EU Commission considers relevant the development of the hydrogen technology industry. The strategy aims to set the necessary framework conditions, to initiate global energy partnerships and to create incentives for the production of hydrogen.

At the same time, the EU Commission presented a strategy for an integrated energy system, which is primarily aimed at sector coupling. Besides, the envisaged measures also call on Member States, on the one hand, to reduce the high taxation of electricity compared to other energy sources and, on the other hand, to keep subsidies for fossil fuels. In addition, the Commission announced a proposal, which will be adopted by 2021, to extend the European Emissions Trading System (EU ETS) to sectors not yet covered.[12] In March 2018, the EU Commission published an action plan for a sustained financial system. In its core, the EU Action Plan provides for the draft of a binding framework (EU taxonomy)[13] that defines uniform criteria for sustainable investments.[14] In addition, various disclosure obligations are provided for financial market participation in connection with sustainable investments and sustainability risks. In July 2020, the Taxonomy Regulation came into force.[15]

2. National Initiatives

The political process in Germany culminated in the Climate Protection Programme 2030 in autumn 2019. This catalogue of measures bundles the key points that are intended to ensure the achievement of the Climate Protection Plan 2050.[16] This includes investment funds from the federal government up to 2023 in the amount of 54 billion euros.[17] The implementation of the programme is to be carried out step by step, through laws and funding programmes.[18] A

[11] European Commission Communication of 8 July 2020, 'A hydrogen strategy for a climate-neutral Europe', [2020], COM/2020/301 final.

[12] European Commission Communication of 8 July 2020, 'Powering a climate-neutral economy: An EU Strategy for Energy System Integration', [2020], COM/2020/299 final.

[13] European Commission Communication of 8 March 2018, 'Action Plan: Financing sustainable Growth', [2018], COM/2018/097 final.

[14] European Commission, 'Taxonomy: Final report of the Technical Expert Group on Sustainable Finance' [2020], available at https://ec.europa.eu/info/; European Commission, COM/2020/299 final.

[15] Sachverständigenrat – Wirtschaft, n 10 above, 226.

[16] Bundesministerium für Umwelt (BMU), 'Klimaschutzprogramm 2030 zur Umsetzung des Klimaschutzplans 2050', Oktober (2019), available at https://www.bundesregierung.de.

[17] BMF (2019), *Finanzierung des Klimaschutzprogramms auf dem Weg,* Bundesministerium der Finanzen, Berlin, https://tinyurl.com/5n8tx7rj (last visited 30 June 2022).

[18] E. Pöttker, *Klimahaftungsrecht. Die Haftung für die Emission von Treibhausgasen in*

cornerstone of this project is the Federal Climate Protection Act (KSG), which defines the emission reduction targets.

The KSG stipulates that Germany will reduce its greenhouse gas emissions by at least 55% by 2030 compared to 1990 (para 3.1). In the long term, the Federal Government is pursuing the goal of greenhouse gas neutrality at national level by 2050 (para 1 KSG).

The KSG also sets sector-specific targets for 2030 and focuses on a continuous review of the climate targets with clear responsibilities for the individual sectors, and mandatory adaptation measures, should the trajectory deviate from. The Fuel Emissions Trading Act (BEHG) is meant to establish a national emissions trading system in the non-EU ETS heating and transport sectors from 2021.

Within the framework of the National Emissions Trading System (NEHS), emission certificates are initially issued without a quantity limit at an annually increasing fixed price. In the Conciliation Committee, the Federal Government and the Länder agreed to set the CO2 price at an initial level of 25 euros per ton of CO2 from January 2021.

After that, the price will gradually rise to 55 euros in 2025. In 2026, the fixed-price system is to be converted into a market system within a 'corridor', a minimum and maximum price of 55 euros and 65 euros.

An *ad interim* assessment is planned for 2025. Then, it will be decided whether maximum and minimum prices for the period from 2027 will continue to be considered reasonable and necessary. From 2027, an annual quantitative limit on the available allowances is to be set.[19]

According to the Climate Protection Programme 2030, a gradual reduction of the EEG surcharge as social compensation will counter-finance parts of the revenues from the national emissions trading system Depending on the actual revenues of the Fuel Emissions Trading Act (BEGH), this redistribution is likely to vary every year.[20] In 2020, the EEG surcharge was around 6.76 cents per kWh.

Despite the use of BEHG revenues to reduce the EEG surcharge, the economic slump caused by the global pandemic would have led to a sharp increase in the EEG surcharge in 2021: due to the economic situation, electricity demand in Germany fell, so did the price of electricity on the stock exchange. This leads, quite obviously, to increased payment obligations for feed-in tariffs and thus to a higher EEG surcharge next year.[21] In order to limit the additional burden on households and companies and to create planning security for the coming years, the Economic Package of June 2020 set the amount of the EEG

Deutschland und den Vereinigten Staaten von Amerika (Tübingen: Mohr Siebeck, 2014); R. Ismer, *Klimaschutz als Rechtsproblem. Steuerung durch Preisinstrumente vor dem Hintergrund einer parallelen Evolution von Klimaschutzregimes verschiedener Staaten* (Tübingen: Mohr Siebeck, 2014).

[19] Sachverständigenrat – Wirtschaft, n 15 above, 228.

[20] Bundesministerium für Umwelt (BMU), n 16 above.

[21] European Parliament, Climate Change and Migration, Legal and Policy Challenges and Responses to Environmentally Induced Migration, 2020.

surcharge for 2021 at 6.5 cents per kWh and at 6.0 cents per kWh for 2022.[22] The necessary federal subsidy is partly covered by the revenues from the BEHG, which should be used to reduce the EEG surcharge.

In addition to national emissions trading, the Climate Protection Programme provides for further sector-specific measures. Some of these have already been implemented (increase in air traffic tax, tax incentives for the renovation of buildings, reduction of VAT on train tickets in long-distance transport). A supplement to the housing allowance from 2021, which is intended to limit the burden of national emissions trading, and the Charging Infrastructure Master Plan, which aims at the faster electrification of the transport sector (Federal Government, 2020), have also been finalized. In addition to direct financial support for public and private charging stations for electric vehicles and filling stations for vehicles with fuel cells, the concept provides for various legislative initiatives to accelerate the expansion of the charging infrastructure.

By adopting the national hydrogen strategy, which was presented in the summer of 2020, the Federal Government is strengthening its ambitions to enforce the production, import, transport and application of climate-neutral hydrogen and synthetic energy carriers based on it in Germany. On the one hand, this measure should make it possible to fully de-fossilize the heavy industry, the transport and heating sectors. On the other hand, the Federal Ministry for Economic Affairs and Energy [23] open new market perspectives and 'horizons' for German companies.

This strategy considers various instruments to accelerate the establishment of a hydrogen market. The hydrogen strategy was integrated into the economic incentive to limit the consequences of the global pandemic, as an integral part of the Future Aid Package. The financial requirements there are estimated at around 9 billion euros (Coalition Committee, 2020). The economic incentive plan adopted in the summer 2020 provides for further measures relevant to climate policy. In addition, fleet exchange programs are to be launched and investments in the automotive industry are to be stimulated.[24]

3. Constitutional Complaints Against the Climate Protection Act

The First Senate of the Constitutional Court found the incompatibility of the Climate Protection Act of 12 December 2019 to German Constitution due to the missing requirements for reducing emissions by 2031. On the one hand, the obligation imposed on the Federal State to reduce greenhouse gas emissions results from the Climate Protection Act (paras 3 sec. 1 and 4 sec. 1 sentence 3 of

[22] Bundesministerium für Wirtschaft und Energie (BMWi), 'EEG-Umlage 2021: Fakten & Hintergründe', available at https://www.bmwi.de, Oktober 2020.

[23] Bundesministerium für Wirtschaft und Energie (BMWi), 'Die Nationale Wasserstoffstrategie', available at https://www.bmwi.de/, June 2020.

[24] EU Commission, A Hydrogen Strategy for a Climate-Neutral Europe, Brussels, 8.7.2020 COM(2020) 301 final.

the Climate Protection Act in conjunction with Annex 2).

On the other hand, these restrictions come from Art 20a of the German Basic Law.[25] According to the latter, the average temperature shall be lowered to 1.5°. The reduction path of the relevant greenhouse gas emissions, which is not predetermined after 2031, is problematic. These efforts are the result of the Paris Agreement which aims to reduce the rise of the average temperature.

The plaintiff point out that: 'the State had not made sufficient provisions for the imminent reduction of greenhouse gases, in particular carbon dioxide (CO2), by paras 3.1 and 4.1 sentence 3 of the Climate Protection Act in conjunction with Annex 2, but which were necessary to halt the warming of the earth at 1.5° C or at least at well below 2° C. This is necessary because a temperature increase of more than 1.5° C would put millions of human lives at stake and the crossing of tipping points with unforeseeable consequences for the climate system. About the future burden of emission reduction obligations for periods after 2030, which the complainants describe as 'emergency braking', the complainants generally invoke civil liberties.[26] They state the fact that, based on Art 2.1 of the Basic Law in conjunction with Arts 19.3 and 20a, the State did not take any appropriate measures to limit climate change in the light of Art 37 of the European Charter of Fundamental Rights and consequently disregarded EU law requirements serving the protection of the environment. The German Constitutional Court dismissed this argument.

The protection of life and physical integrity under Art 2 sec. 2 sentence 1 GG provides and includes protection against impairments caused by environmental pollution, regardless of whom and by what circumstances could be emanated. The State's duty to protect under Art 2 sec. 2 sentence 1 GG also includes the obligation to protect life and health from the dangers of climate change, such as climate-related extreme weather events such as heat, waves, forest and wildfires, hurricanes, heavy rain, floods, avalanches, or landslides. It may also establish an obligation to protect future generations.

However, the Court did not recognise that the state had not violated the fundamental rights of the plaintiff living in Bangladesh and Nepal. Still, the Constitutional Court partially upheld the case to the extent that:

> 'fundamental rights are violated by the fact that the emission quantities permitted under paras 3 sec. 1 sentence 2 and 4 sec. 1 sentence 3 of the Climate Protection Act in conjunction with Annex 2 until 2030 significantly

[25] G. Wagner, 'Klimaschutz durch Gerichte', *Neue Juristishe Wochenschrift*, 74, 2256-2263 (2021); S. Muckel, 'Pflicht des Gesetzgebers zu effektivem Klimaschutz' *JA Juristische Arbeitsblätter*, 610 (2021); K. Rath and M. Benner, 'Ein Grundrecht auf Generationengerechtigkeit?: Die Relevanz des Klimaschutz-Beschlusses des Bundesverfassungsgerichts für andere Rechtsgebiete mit intergenerationaler Bedeutung', available at https://tinyurl.com/22wua4rm (last visited 30 June 2022).

[26] Pressemitteilung Nr. 31/2021 vom 29. April 2021 - Beschluss vom 24. März 2021 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

> reduce the emission possibilities still remaining after 2030 and thus virtually any freedom protected by fundamental rights is endangered. As an intertemporal guarantee of freedom, the fundamental rights protect the complainants from a comprehensive threat to freedom by unilaterally shifting the greenhouse gas reduction burden imposed by Art 20a of the Basic Law into the future. The legislator should have taken precautions to ensure a freedom-friendly transition to climate neutrality, which has so far been lacking'.

The BVerfG took the opportunity to make very detailed and fundamental statements on Art 20a GG. The Court of First Instance found a violation of fundamental rights looking at the principle of proportionality. The Court underlined:

> 'It follows from the requirement of proportionality that not one generation may be allowed to consume large parts of the CO2 budget under a comparatively mild reduction load, if at the same time a radical reduction burden – described by the complainants as 'emergency braking' – would be left to the following generations and their lives would be exposed to serious losses of freedom'.

In this case, it is not possible to recognise an examination based on usual criteria like constitutional objective, suitability, necessity, proportionality

The Court decided that paras 3 I 2 and 4 I of the Climate Protection Act in conjunction with Annex 2 are: 'unconstitutional insofar as they justify the currently insufficiently contained risk of future violations of fundamental rights'.[27] Above all, the following postulates, based on Art 20 a GG, were decisive:

> 'On the one hand, it is constitutionally indispensable that further reduction measures are determined in good time beyond the year 2030 and at the same time sufficiently far into the future...On the other hand, further annual emission quantities and reduction measures must be defined in a differentiated manner in such a way that a sufficiently concrete orientation is created'.[28]

In substance, the BVerfG thus underlined the inadequate certainty of the statutory regulation, also observing that the para 4 VI climate protection law does not meet the requirements of Art 80 I 2 GG due to the interference with essential areas of fundamental rights. The BVerfG probably did not resort to requirements of intergenerational.

In this respect, it is worth mentioning some key considerations of the Senate

[27] Pressemitteilung Nr. 31/2021 vom 29. April 2021 - Beschluss vom 24. März 2021 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

[28] ibid

since the constitutional complaints were partly successful.[29] At the same time, courts in Germany and the EU are increasingly dealing with so-called climate lawsuits, as the executive and legislative authorities in Germany and at the level of the EU have not progressed coherently and efficiently enough yet. At the same time, according to the findings of earth system sciences, time is pushing beyond the 'planetary borders'.[30]

In the context of climate lawsuits at the German and European level, well-known difficulties of individual lawsuits in environmental law are becoming apparent. Therefore, it is not surprising that well-known solutions are experiencing a renaissance towards a fundamental right to environmental protection.

a) Fundamental Right to Environmental Protection

The proposed fundamental right to environmental protection is going to be incorporated into the many Constitutions of EU State members and still into Charter of Fundamental Rights of the EU. Since Art 37 already contains a 'right' under the title 'environmental protection', Schirach's proposal can only be about supplementing the standard or replacing its content. There is much to be said for an understanding of the proposal in the sense of replacement, since, on closer inspection, Art 37 of the GrCh turns out to be an EU objective corresponding to the provisions of Arts11 and 191 TFEU, which cannot confer any rights on citizens of the Union.

The Convention on Fundamental Rights introduced in 1999 did not focus on a fundamental right to environmental protection, because the European Charter of Fundamental Rights to be drawn up should only contain enforceable fundamental rights that should not promise citizens more than they can also redeem in court. Against this background, it is worth taking a ('retrospective') look at the German debate on a fundamental right to environmental protection, which is then to be reflected in the context of international and European law.

b) State of the Debate in German Constitutional Law

The Basic Law does not expressly enshrine any fundamental right to environmental protection as the right to create or maintain a clean and healthy environment. In this regard, proposals and motions for a constitutional amendment were not implemented, especially considering its practicability, but also for political reasons.[31] However, in practice, despite a lively discussion in the

[29] K. Gelinsky, 'Der Klimaschutz führt ein verfassungsrechtliches Schattendasein', (2019), available at https://tinyurl.com/y7uxzjkr (last visited 30 June 2022).

[30] Sachverständigenrats für Umweltfragen (SRU), n 6 above.

[31] Vgl. etwa Sachs/Murswiek, Art. 20a Rn. 33; Vgl. Umweltprogramm der Bundesregierung von 1971, BT-Drs. 6/2710, S. 9 f.; ferner BT-Drs. 10/990, 11/604, 11/663; dazu der Überblick bei Bock, Umweltschutz im Spiegel von Verfassungsrecht und Verfassungspolitik, 1990, S. 54 ff.; Kloepfer, Zum Grundrecht auf Umweltschutz, 1978, S. 9 f.

literature,[32] there were isolated attempts to derive a fundamental right to the environment from the fundamental rights enshrined in the Constitution.

In this context, a decision of the OVG Berlin from *Wall times* is often quoted. This decision is about a (forest) clearing permit for the Oberhavel power plant:[33]

> 'Where else in the Federal Republic of Germany the green environment begins, it ends in Berlin-West, the Berlin citizen encounters walls and barbed wire. For him, the preservation of nature and recreational areas has a high socio-physical and socio-psychological significance, which also gains a certain legal value from the point of view of burden compensation'.

On this basis, the OVG Berlin justified that 'any further serious interference' in natural and recreational areas 'adversely affects the individual citizen of Berlin-West in his legal interests protected by Art 2 sec. 1 GG in conjunction with para 1 BNatSchG'. In this broad interpretation, Art 2 sec. 1 GG conveys a right of defence of every citizen against such environmental interventions that have a negative effect on the sphere of human existence and thus impair the free development of personality. Similarly, the VG München also affirmed the right of citizens to bring an action with regard to a development plan for a landscape protection area.

This decision was significantly influenced by a provision of the Bavarian Constitution. Art 141.3.1 prohibits the 'enjoyment of natural beauty and recreation in the great outdoors, in particular the entry into forests and mountain pastures ... permitted to everyone'. However, the BayVGH did not uphold this interpretation, even if it apparently considered a defensive claim against natural and landscape interventions under Art 2 sec. 1 GG to be possible under special circumstances.[34] For the BVerwG, however, an appeal to Art 2 sec. 1 GG is not possible in any of the cases. The court observed that the possibility of a broadly defined neighboring action based on Art 2.2 of the Basic Law would be subject to a variety of demarcation and application difficulties. In this context, the BVerwG expressly pointed out that 'there is no fundamental environmental right'.

Following an extensive discussion in the seventies, the majority of opinion in the literature shared this view. On the one hand, interpretative attempts have tried to derive a general 'fundamental environmental right' from existing constitutional law – namely from Arts 1 and 2 sec. 1 and sec. 2 GG as well as the principle of the welfare state.[35] On the other hand, corresponding legal and political proposals for a constitutional amendment to such an end have not been

[32] Vgl. auch Sachs/Murswiek, Art. 20a Rn. 32.

[33] OVG Berlin, Urt. v. 02.05.1977, II B 2/77, DVBl. 1977, 901 (902), die Entscheidung der Vorinstanz VG Berlin, Urt. v. 14.12.1976, XIH A 419/76 und XIII A 419/76, DVBl. 1977, 353 bestätigend; zurückhaltender BayVGH, Urt. v. 21.02.1986, Vf. 6, 7-VII/85, NVwZ 1986, 633, wonach nur der Wald als solcher, nicht die bestehenden Waldflächen als geschützt angesehen wird; BVerwG NVwZ 2006, 595 Rn. 20; MKS II/Epiney,Art. 20a Rn. 26; Dreier II/Schulze-Fielitz,Art. 20aRn. 26.

[34] Vgl. BVerfGE 127, 293 (328)–Legehennen II;118, 79 (110)–Emissionshandel.

[35] BT-Drs. 12/6000, S. 65f.; Sachs/Murswiek,Art. 20a Rn. 55, Fn. 96.

implemented.[36]

Having said that, a substantively effective fundamental right to environmental protection can be constructed as an environmentally sound, partial guarantee of an individual fundamental right (for example to life, health, property) in conjunction with the function of fundamental rights as protection obligations recognized in German constitutional law.[37]

In the foreground of environmentally-related basic legal protection is the right to life and physical integrity protected in Art 2 sec 2 1 GG.[38] In principle, impairments to the planet would trigger a state duty to protect the legal interests of life and physical integrity. Art 2 sec 2 s. GG does not only apply if a health disorder is acute or imminent. The right to physical integrity already covers the upstream area of abstract risk. A risk exists if it is not known yet whether an environmental impact will cause an adverse health impact, but if this cannot be ruled out with certainty. Furthermore, environmental changes can also threaten economic freedoms (Arts 12 and 14 GG). For example, privately owned environmental goods such as soils, forests, waters or agricultural land can be damaged by environmental changes affecting their functions.[39]

The so-called climate lawsuits, which were recently filed before various courts, are also based on fundamental economic rights. Fundamental rights traditionally establish rights of defence against interference with freedom by the state (*status negativus*). However, environmental damages are usually not caused by the state, but by private perpetrators, such as companies or private individuals. The classical defence function of fundamental rights is not applicable to constellations of this kind. However, it is widely recognized that fundamental rights have a protection capacity in addition to defence (*status positivus*).[40]

Environmentally harmful conducts of private individuals who interfere with legal interests protected by fundamental rights can therefore trigger state protection obligations. However, it is important to underline a distinction. On the one hand, not every minor risk can 'unleash' a duty to protect. on the other hand, the fundamental rights protection obligations are not, merely, about a matter of pure danger prevention. Depending on the significance of the legal interest to be created, the protection obligations arise based on a certain degree of probability. The greater is the potential risk potential and the 'weight' of the threatened legal interest (eg life or health), the lower are the requirements for the probability of

[36] Ein instruktiver Überblick der einzelnen Vorschläge findet sich bei *Bock* (Fn. 9), S. 54 ff.; vgl. ferner *Kloepfer* (Fn. 9), S. 31 f.; Soell, NuR 1985, 205 f.; ferner Karpen, *Zu einem Grundrecht auf Umweltschutz*, in, Thieme (Hrsg.), *Umweltschutz im Recht*, 1988, S. 9 (23); zuletzt *Brönneke*, ZUR 1993, 153 ff.

[37] MKS II/Epiney,Art. 20a Rn. 89.

[38] BVerwGE 54, 211 (220 f.); BVerwG, Urt. v. 29.07.1977, IV C 51/75, DVBl. 1977, 897; so schon zuvor BVerwG, Beschl. v. 25.06.1975, VII B 84/74, DÖV 1975, 605.

[39] Kloepfer, *Umweltrecht*, 4. Aufl. 2016, § 3 Rn. 72 f.

[40] ibid

harm.[41] Unlike defensive rights, which are directed against a certain conduct of the state, protective obligations cannot, as a rule, be fulfilled by a single specific act. Instead, they focus on action by the state that opens up a variety of options.

Therefore, the duty to protect leaves the state and its political bodies, in particular the law-maker,[42] a discretion as to how they materially fulfil the duty to protect. However, the aim of this discretionary power always lies on the effective fulfilment of the duty to protect, whereby in any case a constitutional minimum standard of protection of fundamental rights shall be guaranteed.[43]

Nevertheless, even if widely interpreted, these environmentally protective partial warranties only cover that part of the environment that must be protected as a human livelihood. Species and animal welfare as well as large parts of nature and landscape protection are not covered. However, adverse effects on the environment cannot be reversed in an enforceable manner if they do not directly affect individual legal interests. As a result, according to constitutional law, environmental interventions that do not endanger health or property must be accepted by individuals. As a consequence, this also applies to existing enforcement deficits in environmental law.[44]

c) Regulation of Environmental and Animal Welfare in the Basic Law

Even if environmental protection is omnipresent today, not just due to the global warming issues, it is surprising, at least at first glance, that this topic was only entered into the GG as a state goal in the context of the constitutional reform of 1994. According to the complex wording of Art 20a GG, the state protects the natural foundations of life within the framework of the constitutional order through legislation, the administration and the judiciary, and the law was subsequently expanded in 2002, as to include the protection of animals. This protection also applies to future generations.[45]

This obligation to protect is initially aimed at ensuring that the state itself refrains from interfering with the environment and does not promote private intervention. An effective duty of protection exists to the extent that the state must oppose interference by third parties (for example private) and proactively take measures to preserve and restore the natural environment.[46] The environment and animals must also be protected in a responsible way considering future generations.

The obligation to protect is an expression of the principle of sustainability, which has a decisive influence on environmental law today. This could also

[41] BVerfG, NVwZ 2010, 702 (703 f.).

[42] BVerfG-K NVwZ 2007, 808 Rn. 27ff

[43] C. Calliess, *Rechtsstaat und Umweltstaat. Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassung* (Tübingen: Mohr Siebeck, 2001), 448-583.

[44] ibid 317.

[45] Vgl. GWC/von Coelln,Art. 20a Rn. 19; JP/Jarass,Art. 20a Rn. 12.

[46] Vgl. etwa Sachs/Murswiek,Art. 20a Rn. 33.

encourage to adopt special protective measures for endangered species, and to consider the effects on flora and fauna, which only develop their harmful effect in the long term.[47]

III. Legal Effects of Art 20a GG

1. Regulatory Mandate to the Legislature

Similar to the principle of the welfare state, Art 20a GG, as a state objective, is also legally binding, but in the sense of an objective legal principle. This principle is primarily addressed as an optimization requirement[48] mandating the legislature to issue appropriate environmental and animal welfare regulations.[49]

The fact that the legislature has a wide margin of discretion in fulfilling this mandate,[50] is also evident, inter alia, from the constitutional clause of Art 20a GG, which refers to the foundations of life and animals as protected 'within the framework of the constitutional order'. The legislature must weigh up the achievement of these objectives with other legal positions and interests of constitutional rank, such as individual freedoms, for example, economic freedoms under Art 12 I GG. This balancing also concerns constitutional values, such as the overall balance pursuant to Art 109 II GG, from which competing goals such as economic growth and the creation and preservation of jobs can be derived.

Since the legislature had already enacted an increasingly dense network of environmental laws since the 1970s, Art 20a GG did not initially provide any special impetus for further legislation when it was introduced into the GG in 1994. However, the legislature – especially in the light of new threats and new scientific findings – must continuously review the existing law and, if necessary, expand and sharpen it.[51]

It is also important that important basic principles and core contents of environmental law already established in environmental legislation have been constitutionally sound since the coming into force of Art 20a GG, and can therefore no longer be abolished without further ado.[52]

2. Interpretation Maxim[53]

[47] Vgl. auch Sachs/Murswiek,Art. 20a Rn. 32.

[48] BVerwG NVwZ 2006, 595 Rn. 20; MKS II/Epiney,Art. 20a Rn. 26; Dreier II/Schulze-Fielitz, Art. 20aRn. 26

[49] Vgl. BVerfGE 128, 1 (37)–Gentechnikgesetz;118, 79 (110)–Emissionshandel;vgl. auch BVerwGNVwZ 2006, 595 Rn. 20.

[50] Vgl. BVerfGE 127, 293 (328)–Legehennen II;118, 79 (110)–Emissionshandel.

[51] C. Smekal, 'Steuerpolitik in Deutschland und Österreich. 2 Nachbarn- verschiedene Wege?', in V. Ulrich et al, *Effizienz, Qualität und Nachhaltigkeit im Gesundheitswesen* (Baden-Baden: Nomos elibrary, 2007), 93-113.

[52] Näher zum gesamtwirtschaftlichen Gleichgewicht unten§22 Rn. 52.

[53] BT-Drs. 12/6000, S. 65f.; Sachs/Murswiek,Art. 20a Rn. 55, Fn. 96

Since the protection mandate under Art 20a GG is primarily addressed to the legislature, the executive and the judiciary cannot implement it 'on their own'.[54] This also emphasizes the reservation of Art 20a GG, according to which protection by executive and judicial dishes is carried out 'in accordance with the law and the law'. This clarifies that the principles of primacy and reservation of the act under Art 20 III GG also apply to the pursuit of the environmental and animal welfare mandate pursuant to Art 20a GG.

3. Justification of Interference with Fundamental Rights[55]

Art 20a GG, insofar as it is concretized in a simple law that does justice to the reservation of the law, may also serve as a basis for interference with fundamental rights.[56] In the case of fundamental rights that are subject to an express reservation of the law, it may form the constitutional legal purpose of an interference.

In the case of unconditionally granted fundamental rights such as freedom of religion and conscience pursuant to Art 4 I, IIGG,[57] freedom of art and freedom of science pursuant to Art 5 III 1 GG[58], Art. 20a GG also considers itself as a constitutionally immanent barrier to fundamental rights. Once again, it should be observed that Art 20a GG, as a constitutional value among others, does not have per se priority over affected fundamental rights or other constitutional values. Just as Art 20a of the Basic Law may restrict fundamental rights and other constitutional values in a constitutional manner, fundamental rights and other constitutional values may, conversely, affect environmental and animal welfare in accordance with Art20a of the Basic Law.[59]

In such cases, the decisive factor is to weigh up the different constitutional values as differentiated as possible, which is best carried out in the case examination in the context of the adequacy test (proportionality in the narrower sense). In addition, the importance of the affected constitutional values, for example, also plays a role in how strongly constitutional values are affected in each case.

4. No Subjective Rights

Art 20a GG generally does not give rise to any subjective rights of the individual vis-à-vis the state.[60] This basically follows from the fact that the legislature amending the constitution has integrated environmental and animal welfare into the GG – as seen – not as a fundamental right, but as an objective state objective. In contrast to the principle of the welfare state, case law has not yet derived any

[54] MKS II/Epiney,Art. 20a Rn. 89.
[55] Zu Vorrang und Vorbehalt des Gesetzes oben§16 Rn. 38ff.
[56] MKS II/Epiney,Art. 20a Rn. 91f.; GWC/von Coelln,Art. 20a Rn. 10.
[57] BVerfG-K NVwZ 2007, 808 Rn. 27ff.
[58] BVerfGE 128, 1 (41f.)–Gentechnikgesetz.
[59] Dazu etwa GWC/von Coelln,Art. 20a Rn. 11; JP/Jarass,Art. 20a Rn. 17.
[60] BVerwG NVwZ 2007, 833 Rn. 60; BVerwG NVwZ 1998, 398 (399).

subjective, enforceable rights from Art 20a GG, even in conjunction with fundamental rights and other constitutional values.[61]

IV. Strengthening the Market-Oriented Mechanisms

The core part of this chapter can be summarized as follows: the ambitious European climate goals involve considerable investments, which have to be evaluated and kept in mind. A leading instrument in the field of climate and energy policy can be narrowed down and encompasses the cross-sectorial pricing of CO2, which embodies the tool to provide a satisfactory coordination of the transformation and the mobilization of private sector capitals with regard to a lower emission economy.

As a matter of fact this comprises additionally to the pricing of CO2, the diminution of existing distorting levies and levies on energy prices. As mentioned from the Council if the German Experts: 'Strengthening market-oriented instruments and abolishing direct and indirect subsidies for fossil fuels ensures reliable policy guidelines and reduces risks for investors. This reduces the need for small-scale climate policy support measures. Finally, suitable framework conditions can provide incentives for domestic companies to engage proactively in standardization processes and thus secure and expand their international competitiveness. A corresponding restructuring of the framework conditions is accompanied by reduced and additional revenues as well as reduced expenditure by the state. If all possibilities are consistently used to compensate for the loss of revenue from lost taxes, important reform steps are possible without negative effects on the state budget. In the medium term, German climate policy must increasingly be embedded in the European context in order to further strengthen the coordination function of markets. In addition, the Europe-wide uniform labelling of economic activities with regard to their sustainability can reduce asymmetric information on the capital markets, which can stand in the way of green investments. In addition, measures can be discussed that would be suitable to secure the competitiveness of European companies in the future in the event of rising CO2 prices.

In the future, the product-specific CO2 footprint will play a central role in the attractiveness of new technologies. If the climate-relevant properties of goods and services are recorded in a transparent, traceable and legally secure manner, companies could make the climate-relevant advantages of their production processes known'.[62]

[61] Vgl. etwa BVerfGE 128, 1 (38, 61f.)–Gentechnikgesetz;Dreier II/Schulze-Fielitz,Art. 20a Rn. 87; MKS II/Epiney,Art. 20a Rn. 91; kritisch jedenfalls bzgl. eines Mehrwertes von Art. 20a GG insoweithingegen Sachs/Murswiek,Art. 20a Rn. 72a; zum Erfordernis eines verfassungslegitimen Zwecks oben§16 Rn. 79ff.

[62] Deutscher Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung,

1. Effect of the Targeted CO2 Price Paths

The price path laid down in the national emissions trading scheme sends a credible and binding signal and provides investors and households with certainty of planning. The predictable increase in the CO2 price enables households and companies to adapt to rising costs. With the transfer to a market system with a price corridor, the risk of a sharp price increase and burden on companies and households by a maximum price is limited. A minimum price, in turn, ensures that households with long investment cycles can already plan their investments in lower-emission technologies.[63]

The planning security resulting from a fixed price path or a narrow price corridor does not exist in the EU ETS. However, companies subject to certificates can use futures market contracts to hedge their presumably required energy quantities at an early stage in terms of price. This enables stakeholders to reduce uncertainty about the price path and plan their investments accordingly. The extent to which the demand for energy sources and the associated CO2 emissions react to the price changes induced by the national emissions trading system depends on the price elasticities in the heating and transport sectors.

On this basis, based on Bach et al,[64] it is possible to calculate how the price path in the national emissions trading system could affect emissions in the transport and heating sector. The assumption is made, that companies can re-allocate the costs of the CO2 price completely to households. However, substitution and evasive reactions between different energy sources cannot be ignored.

The quantitative statements are also fraught with uncertainty. Various studies distinguish between short- and long-term own price elasticities for households as well as for trade, commerce and service providers (GHD). However, the boundaries are not clear-cut. While short-term price elasticities relate to directly implementable demand responses, long-term price elasticities may reflect investments in durable goods, such as the purchase of vehicles, heating systems or, in the case of companies, production processes. In the short term, lower demand reactions are to be expected than in the long term. This results in a range of possible emission savings.

While in the household sector large parts of the savings could already be possible without a change in equipment, in the transport sector only the long-term elasticities associated with a change in equipment lead to significant emission savings.[65] Without appropriate accompanying measures for redistribution,

Klimaschutz als Industriepolitische Chance.

[63] O. Edenhofer et al, 'Assessment of the German climate package and next steps: carbon pricing, social balance, Europe, monitoring' *Mercator Research Institute on Global Commons and Climate Change (MCC)*, October 2019, available at: https://www.mcc-berlin.net/ Scientific Advisory Board at the BMWi, 2019a; SG 2019 paras 141 et seq.

[64] S. Bach et al, 'Für eine sozialverträgliche CO2-Bepreisung', Deutsches Institut für Wirtschaftsforschung of Berlin (DIW) Politikberatung kompakt, Berlin, 2019.

[65] Sachverständigenrat – Wirtschaft, n 19 above, 232.

a CO2 price has a regressive effect.[66] A CO2 price that would ensure the achievement of targets in 2030 is therefore relevant for distribution policy.[67] Even if this were addressed by appropriate redistribution, risk and loss aversion, for example, could lead to consumers being skeptical about CO2 pricing.[68] Companies may be concerned about maintaining international competitiveness. These difficulties have to be faced.

2. Green Finance

The transformation towards a lower-emission economy will require significant private and public investment. The financial sector will play an important role in financing global investment needs in the context of international climate policy and in directing capital flows towards sustainable investments. The decisive incentive for private investment is based on the return prospects. These are influenced in different ways by the effects of climate change and climate policy decisions such as the introduction of CO2 pricing. In addition, there may be information asymmetries that act as a hurdle for the sufficient mobilization of capital in sustainable projects, as they can stand in the way of the correct pricing of risks.[69]

The supply and demand for sustainable financial assets have increased significantly in recent years. Green bonds are financial instruments, whose proceeds are earmarked for the implementation of environmental and climate protection projects. They can be placed by states or by companies. In the case of states in particular, however, it is unclear how the purpose can be ensured.[70] Although they do not necessarily generate an excess return compared to conventional forms of investment,[71] the new issues are often oversubscribed several times. Nevertheless, green bonds have so far been a niche product in the global bond market. The largest share of new issues in 2019 came from Europe. Germany's largest issuer of green bonds is KfW Group. In September 2020,

[66] M. Preuss et al, 'Verteilungswirkung einer CO2-Bepreisung in Deutschland', 2019, available at: https://www.sachverstaendigenrat-wirtschaft.de/.

[67] SG 2019 Ziffern 220 ff.

[68] J. Stiglitz, 'Addressing climate change through price and non-price interventions' *European Economic Review*, 594–612 (2019).

[69] C. Smekal and E. Theurl, 'Finanzkraft und Finanzbedarf von Gebietskörperschaften', *Analysen und Vorschläage zum Gemeindefinanzausgleich in Österreich* (Wien - Cologne: Bölhau Verlag, 1990), 34; C. Smekal, 'Operationalisierung eines intragovernamentalen Transferbegriffs für den Finanzausgleich und Quantifizierung alternativer Nettotransfersalden', in E. Matzner ed, *Öffentliche Aufgaben und Finanzausgleich* (Wien: Wirtschaftsverlag Orac, 1977), 410- 438; S. Batten et al, 'Let's talk about the weather: The impact of climate change on central banks' *Bank of England Working Paper,* no 603, available at: https://www.bankofengland.co.uk/.

[70] L. Liebich et al, 'Current developments in green finance' *Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung Working Paper,* no 5, available at https://www.sachverstaendigenrat-wirtschaft.de/.

[71] G. Ibikunle and T. Steffen, 'European green mutual fund performance: A comparative analysis with their conventional and black peers' 145 *Journal of Business Ethics*, 2, 337–355 (2017).

Germany placed a green federal bond with a total volume of EUR 6.5 billion for the first time (German Finance Agency, 2020). When it comes to the use of funds from green bonds, the energy sector dominates in Germany with a share of 62%.[72] About 28% of the funds go to the building sector. Only a small part of the funds in Germany is invested in the transport sector (6.6%).

In July 2020, the EU taxonomy[73] entered into force as a classification system for sustainable investments. The European Commission's Action Plan for a Sustainable Financial System envisages that in future standard and labels for green financial products will be based on the taxonomy. The aim is to protect the integrity of the sustainable financial market and to reduce information asymmetries, which should make it easier for investors to access these products.

The EU Taxonomy Regulation divides economic activities into three categories and in future will define in a single way throughout Europe which economic activities meet sustainability requirements. In principle, issuers should disclose the extent to which all financial products meet the requirements of the taxonomy. As a result, issuers will in future also have to indicate whether products that they have not declared as sustainable are sustainable or not in the sense of the taxonomy.

Economic activity defined as sustainable in the sense of the taxonomy should contribute significantly to at least one of the six environmental objectives defined in the taxonomy and at the same time not significantly affect any of the objectives. For the clear certification of economic activities that are directly conducive to achieving the central climate policy goal of the EU and its member states, the reduction of CO2 emissions, taxonomic in its design is therefore only conditionally suitable.

On the basis of the taxonomy, the refinancing costs for companies could potentially increase if, for example, the demand for green investments is higher due to an expectation of stricter climate protection requirements. This, in turn, could strengthen incentives for companies to make their processes or business model more sustainable.

According to García et al,[74] German companies are not yet sufficiently prepared for the response. Detailed decisions on the implementation of the EU taxonomy will only be adopted successively, so that the framework is not expected to be fully operational until 2022.[75] In addition, the Action Plan for a Sustainable Financial System provides for various disclosure requirements for financial market participants in connection with sustainable investments and sustainability risks. The relevant information is to be considered essential for the correct pricing of climate risks, in particular by rating agencies.[76]

[72] L. Liebich et al, n 70 above.
[73] European Commission, COM/2020/299 final.
[74] B. García et al, *European Sustainable Finance Survey 2020* (Berlin: Adelphi, 2020).
[75] European Commission, n 14 above.
[76] Liebich et al, n 70 above.

3. Border Adjustment

The EU ETS prices CO2 emissions from production in European industrial sites. For example, power plant operators and chemical companies must purchase certificates for the CO2 emissions that are required in their plants.[77] This production-side approach to CO2 pricing increases the costs of European industrial companies relative to foreign companies not affected by the EU ETS. Especially in emission-intensive industries whose products are traded globally, this loss of competitiveness could lead to a shift in production and thus of emissions outside the EU ETS coverage (carbon leakage).

At an aggregated level, carbon leakage can be estimated by the different development of territorial CO2 emissions and footprint. The CO2 footprint of the EU ETS contributes to the emissions that occur in the production of goods consumed within the scope of the EU ETS along the entire value chain. The territorial emissions include the CO2 emitted by production processes on the territory of the EU ETS countries. The difference between the two measures is called net CO2 import.

Overall, the states of the EU ETS have always had positive net CO2 imports.[78] While emissions within the scope of the EU ETS have steadily decreased since its introduction in 2005, net CO2 imports have not fallen. This could be used as an indication of carbon leakage. However, during the same period, the CO2 intensity of imports has fallen in line with the CO2 intensity of industry in the EU ETS. The constant NET CO2 imports are therefore mainly due to increased trade volumes. Regardless of the introduction of the EU ETS, the increase in trade volumes is likely to be linked to trade policy changes such as China's accession to the WTO in 2002.[79]

Based on an econometric analysis at the industrial level, the German Council of Economic Experts shows that CO2 imports from countries without an emissions trading system to countries with an emissions trading system are 3% higher than between countries with the same systems. The analogous analysis for value added imports shows that they are falling by 6%. The lower value-added imports could be an indication that the carbon leakage protection currently implemented in the EU ETS through the free allocation of allowances to emission-intensive and international- In the first place, it has been possible to function in the first place.

In order to prevent carbon leakage, the political process for the elaboration of a CO2 border compensation was initiated in the summer of 2020 on the initiative of the German and French governments.[80] It is also listed in the European Council agreement of July 2020 as a possible future source of revenue

[77] World Bank, 'State and trends of carbon pricing 2020' *World Bank*, Washington, DC, (2020).
[78] Sachverständigenrat – Wirtschaft, n 65 above, 251.
[79] ibid 251.
[80] European Commission, *Reflextion paper of 31 may 2017 on the deepening of the economic and monetary union*, 2017, COM/2017/291 final, available at https://ec.europa.eu/.

for the EU budget. In the case of a border adjustment, importers would have to purchase a number of certificates corresponding to the CO2 footprint of the imported goods. Exporters would receive a quantity corresponding to the CO2 footprint of the exported goods.[81] If the CO2 footprint of all goods could be accurately measured, this mechanism would represent a transition from production-side pricing to consumption-based pricing of the carbon footprint of goods consumed within the scope of the EU ETS.

Similar to VAT, such a mechanism would avoid distortions of competition between producers in the EU ETS and those outside the EU ETS. A transition to consumption-based pricing could also be achieved by taxing the CO2 footprint of all goods while expanding the free allocation of allowances. If tax rates and allocation quantities are chosen correctly, this represents a theoretically equivalent alternative to CO2 limit compensation.[82]

Yet, the transition to consumption-side pricing is fraught with problems in the case of CO2 border compensation and, in the case of taxation of the CO2 footprint, with subsidizing domestic producers. For both measures, measuring the CO2 footprint of individual goods is a major challenge, as the entire CO2 emissions generated in the value chain of the good must be taken into account. The use of benchmarks is also problematic according to the European Commission.[83] For example, the benchmarks used for the current production-side compensation mechanism of free allocation cannot be used for most of the products. These only measure the direct CO2 emissions generated during production, which can differ greatly from the CO2 footprint of the products. In addition, a full border adjustment is associated with an extensive bureaucratic effort.

Against this background, in the event that border adjustment were considered in the future, the restriction to emission-and-trade-intensive industries would be preferable.

In addition, there are further action-specific challenges. The taxation of the CO2 footprint would require the introduction of an EU-wide or a European harmonized tax. In addition, the tax would have to be adjusted regularly in order to be consistent with the reduction in the amount of allowances.[84]

The introduction and any adjustment of such a tax would require a unanimous decision by all Member States.[85] According to media, as the introduction of a general border adjustment in correlation with the Destination Based Cash Flow

[81] European Environmental Bureau (EEB), 'Re- action to the European Commission's report on the Circular Economy', 2019, available at https://eeb.org/.

[82] C. Böhringer et al, 'Robust policies to mitigate carbon leakage' 149 *Journal of Public Economics*, 35-46 (2017).

[83] European Commission, n 5 above.

[84] With regard of specific aspects concerning the developments in italian tax law was a challenge to the new european development process: A.F. Uricchio and F.L. Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses* (Bari: Cacucci Editore, 2020).

[85] Sachverständigenrat – wirtschaft, n 79 above, 251.

Tax was discussed in the USA in 2017, the EU and other trading partners had already prepared a lawsuit before the WTO,[86] according to media reports.[87] For Germany as an export-oriented country, a trade conflict, especially with the USA as an important export country, can lead to an important loss of added value.

As the German Council of Economic Experts suggests:

> 'the risk of loss of value added due to trade barriers must be weighed against the risk of loss of added value due to carbon leakage. The risk of trade conflicts can be traced back on the design of the mechanisms and on global political developments. While the risk of trade policy countermeasures is likely to be high in the event of unilateral action on the part of the EU, this could be decreased by a coordinated multilateral approach in cooperation with important trading partners. Many countries worldwide, including China, Japan, Canada, Mexico and the Republic of Korea, as well as some US states, have already established or initiated the implementation of a CO2 price, albeit at a lower level than the EU ETS.[88] Provided that the most important trading partners agree to a common approach and that emission prices already paid to each other in the country of origin are credited, the idea of a climate club could be realized with the help of coordinated border compensation systems,[89] which enables progress towards global issue pricing. The revenues generated by the CO2 border compensation could be employed as transfer payments for emerging countries to join the climate club on the one hand and to facilitate their transformation to climate neutrality on the other'.[90]

V. Conclusions

In order to enable climate-neutral business to operate in the long term in both Europe and the whole planet, the use of technologies that allow the use of renewable energy in all sectors is a necessary requirement.

This scenario certainly results in opportunities. The demand for climate-friendly products, production processes and infrastructures is likely to increase.[91]

This offers German companies a wide range of opportunities to reach out to

[86] A. Guterres, 'Remarks to the opening of the Ministerial Segment of the High-Level Political Forum on Sustainable Development', 2021, available at https://tinyurl.com/477zzmvr (last visited 30 June 2022).

[87] S. Donnan et al, 'EU and others gear up for WTO challenge to US border tax' *Financial Times*, available at https://tinyurl.com/ynahx535 (last visited 30 June 2022).

[88] World Bank, n 77 above.

[89] W. Nordhaus, 'Climate clubs: Overcoming free-riding in international climate policy' 105 *American Economic Review*, 4, 1339-1370 (2015).

[90] Sachverständigenrat – wirtschaft, n 85 above, 251.

[91] A. Papantoniou, 'Intergenerational Equity in Times of Climate Change Legal Action. Moving towards a Greater Protection of Human Health?' in S. Negri ed, *Environmental Health in International and EU Law. Current Challenges and Legal Responses* (London: Routledge, 2019), 398.

new markets and strengthen their future competitiveness.

The German government should use targeted measures to pave the way for companies to seize the opportunities. The measures should focus on the consistent pricing of CO2 while at the same time abolishing state-induced distorting levies and levies in energy pricing.

The integration of national emissions trading in all sectors into the EU ETS and the establishment of cross-sectoral emissions trading in Europe should continue to be the guiding objective of the policy.[92] Until this is fully achieved, an energy price reform can strengthen the incentives for sector coupling in Germany.

The EEG surcharge for companies and households could be completely abolished and the electricity tax reduced to the European minimum tax rate. In essence, this would reduce the financial burden on households through national emissions trading. Ultimately, new technologies would become more attractive and markets would thrive.

It is also true that, by beefing up climate-friendly technologies and products, a more attractive market of the environment can make small-scale, discretionary interventions superfluous in many areas and thus save costs.

To manage the transformation, large-scale private sector investment is required instead. Today's expectations about the future development of climate-neutral[93] products and applications can mobilize private capital and real economic investments, provided that the climate-relevant characteristics of economic activity are transparent and traceable.

Clearly, the certification of sustainable investments as well as of products and processes is an important step towards dissolving obstacles that hinder investment in new companies, innovations or technologies. The growing climate policy ambitions could lead to high CO2 prices in the future. This brings considerations for a CO2 limit compensation into focus. A CO2 border adjustment, which burdens (relieves) imports (exports) according to their respective CO2 footprint, theoretically seems to be a promising instrument.

However, there are numerous practical and commercial hurdles that should be considered before an introduction. Added to this are the considerable trade policy risks arising from the unilateral introduction of CO2 border compensation. Border compensation should therefore be carefully weighed up and – if trade policy considerations do not conflict with this – at most considered for products of energy – and export-intensive industries.

Market-oriented mechanisms can have a limited incentive effect due to the interaction of different market imperfections. Therefore, selected complementary measures make sense. In particular, public research funding can make an important contribution to the innovation landscape.

The forward-looking development of skilled workers as well as targeted

[92] Sachverständigenrat – Wirtschaft, n 90 above, 251.

[93] A. Guterres, n 86 above.

further training measures can significantly facilitate the transformation. In order to have the right specialists available in Germany in good time, the right course of action must be set now. In the transport sector, network effects can make it more difficult for households to save emissions.[94] Switching to an electric vehicle is only attractive for households if there is sufficient re-fueling and charging infrastructure.

Public support for expansion may therefore be appropriate, but it should be used to promote private investment in the first place. Hydrogen technologies are an important building block for achieving climate neutrality in 2050 and at the same time provide opportunities for German industry. In order to mobilize private investment, cross-sectoral CO2 pricing, energy price reform and progress in certification are necessary. Public funding should also be moderate and address market imperfections such as knowledge externalities, network effects or information asymmetries. A public coordination process should be initiated in order to reach an agreement between politics and business.

A roadmap can help to set goals, identify the need for adaptation to the framework conditions and strengthen investment security for companies. The taxation of the CO2 footprint would require the application of an EU-wide or a European harmonized tax.[95] Moreover, the tax should be adjusted regularly in order to be consistent with the reduction in the amount of allowances.

Additionally, environmental protection interests should be taken into account in all environmentally relevant policy areas. Although the principle of environmental integration is already applicable law in the EU as well as in the Federal Republic of Germany, political practice continues to be shaped by departmental thinking. The principle of integration should therefore be based on the Basic Law and more strongly linked to the sustainability strategy.

As already stated in the introduction, the competence related to the environmental law should be ultimately transferred at EU level, through an amendment of the Lisbon Treaty, according to the subsidiarity principle in order to provide a right on having a future with regard of the next generations. If Ferdinand von Schirach's proposal for a fundamental right to environmental protection is to be more than programmatic symbolism in the climate crisis, then the lack of determinability of the content of fundamental rights and thus its judicial enforceability remains an unresolved problem.

For these reasons, a substantively effective fundamental right to environmental protection can therefore only be constructed as an environmentally protective partial guarantee of an individual fundamental right (for example to life, health, property) in conjunction with the recognized function of fundamental rights as

[94] European Commission, n 83 above.

[95] For a better understanding of the world´s economy: M. Draghi et al, *Transparency, Risk Management and International Financial Fragility* (Geneva: CEPR, 2004).

protective obligations.[96] However, this right does not cover species and animal welfare as well as large parts of nature and landscape protection. Therefore, this issue also applies to existing enforcement deficits in environmental law.[97]

As Calliess suggests: 'a fundamental right to the ecological subsistence minimum can be derived from the Basic law', specifically Art 1 sec. 1 in conjunction with Art 2 sec 2 and Art 20a GG. The BVerfG[98] has already defined initial approaches to a link between fundamental rights and Art 20a GG by 'the constitutional evaluations of Art 20 a GG' must be considered in the context of constitutional complaints'.[99]

In order to summarize the most important key elements of the Federal Constitutional Court and to provide suggestions for a European solution the Federal Constitutional Court says that the Climate Protection Act is too short and that the significantly less than 2-degree and, if possible, 1.5-degree limit of the Paris Climate Agreement is constitutionally binding. Instead of a forward-looking plan, however, the current Climate Protection Act stipulates that a large part of the remaining budget of emissions may be consumed by 2030. There is also a lack of concrete measures on how to get emissions to zero in a timely manner. Much more ambitious targets and instruments are now needed that fit in with the Paris goal. The legislator is obliged to deal more carefully with the remaining emissions that are still possible.

> 'The proposed fundamental right to environmental protection with regard of the right on having a future for the next generations is to be embedded into the Charter of Fundamental Rights of the EU. Since AT 37 already contains a 'right' under the title 'environmental protection', Schirachs' proposal can only be about supplementing the standard or replacing its content. There is much to be said for an understanding of the proposal in the sense of replacement, since, on closer inspection, Art 37 of the GrCh turns out to be an EU objective corresponding to the provisions of Arts 11 and 191 TFEU, which cannot confer any rights on citizens of the Union. In the Convention on Fundamental Rights set up in 1999 to draw up the Charter, it was not possible to agree on a fundamental right to environmental protection,

[96] V. Jacometti, 'Climate Change Liability. Some general Remarks in a Comparative Law Perspective', in B. Pozzo e V. Jacometti eds, *Enviromental Loss and Damage in a Comparative Law Perspective* (Cambridge: Intersentia, 2021), 387.

[97] Sachverständigenrat – Wirtschaft, n 92 above, 251.

[98] Siehe etwa: BVerfGE 134, 242, Rn. 298 und BVerfG, Urt. v. 24.11.2010, Az. 1 BvF 2/05; offengelassen in BVerfG, NVwZ 2010, 114 (Rn. 31).

[99] Compare C. Callies, 'Möglichkeiten und Grenzen eines klimaschutz durch Grundrechte (Klimaklagen) Zugleich ein Beitrag zum Vorschlag von Ferdinand von Schirach für ein Grundrecht auf Umweltschutz' *Berliner Online-Beiträge zum Europarecht*, 22 (2021). Dazu ausführlich das Sondergutachten des die Bundesregierung beratenden Sachverständigenrats für Umweltfragen (SRU), Demokratisch regieren in ökologischen Grenzen – Zur Legitimation von Umweltpolitik, Juni 2019, S. 175-18; (available at https://tinyurl.com/2mw9csff (last visited 30 June 2022)).

because the European Charter of Fundamental Rights to be drawn up should only contain enforceable fundamental rights that should not promise citizens more than what they can then redeem in court'.[100]

The European Union relies on overarching target formulations, EU-wide measures and binding national climate protection targets for a climate-friendly economy. In December 2019, EU leaders committed themselves to the goal of climate neutrality by 2050. By that time, therefore, all greenhouse gas emissions in the European Union should be avoided as far as possible. The remaining residual emissions must be offset by processes that remove greenhouse gases from the atmosphere, sustainably managed forests and soils. With the European Green Deal, the European Union is showing to play an international pioneering role in climate protection. Germany is playing an active role in shaping European climate policy, this endeavor should be executed from each Member State within the European Union.

[100] Compare C. Callies, n 99 above, 22.

Corporate and Financial Markets Law

Payment Tokens and the Path Towards MiCA

Gabriella Gimigliano*

Abstract

The Regulation for Market in Crypto-assets is still underway. The European Commission submitted a proposal in September 2020 and now this proposal is going through the legislative procedure collecting the opinion of issued by the ECB on the 19 February 2021 and the Opinion of the European Economic and Social Committee of the 24 February 2021. This paper shall analyse the main aspects of MiCA regulation proposal from the standpoint of EU money and payments law. More specifically, it focuses on the scope of MiCA, policy priorities pursued, asset-referenced and electronic money tokens, and the statute for issuers and crypto-related service providers. The close link between the value of payment tokens and the business plan behind an initial coin offering (ICO) ends up deeply influencing the normative approach, raising questions about the nature of 'alternative' payment instruments.

I. Money and Payment Tokens

'Money is a legal institution',[1] argued Christine Desan, since

> 'societies engineer money rather than discovering it. Their work is constant and collective, a matter that involves both public initiative and individual decision-making. (…) Money's function as a "unit of account" sounds, at first glance, like a simple matter: we choose an abstract measure, like an inch or an ounce, one that measures value rather than length or weight. But at second glance, the challenge is evident. An inch represents, in fact, a substantive length; it can be transpose over space. An ounce represents a substantive weight; it can be transpose across matter. But what is the substantive value captured by a dollar, one that convinces people with different needs and means to understand it as a common measure? And how, if they do, can it be applied to assess goods, labour, and even time?'.[2]

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[1] C. Desan, *Making money: coin, currency, and the coming of capitalism* (Oxford: Oxford University Press, 2015), 1-34.

[2] C. Desan, 'The constitutional approach to money: monetary design and the production of the modern world', in N. Bandelj et al eds, *Money talks*, 5 *Harvard Public Law Working Paper*, 1-29

In addition, as a legal institution, money calls for policy-making choices regarding the design as a means of exchange in the process of discharging monetary obligations. This requires European lawmakers to establish, for example, the irrefutable settlement assets in the process of discharging monetary obligations, the contents of the contract relationship between users and service providers, the extent to which users' payment transaction data are protected, how risks and responsibilities are allocated between payee and payer as well as between payers' and payees' payment service providers in cases of non-execution, late or defective execution of payment transactions, the extent to which payment service providers must bear the costs of giving information to payment service users, and so on. In other words, money as a legal institution looks like a two-tier normative structure where the dialectical relationship between the two tiers of the regulatory issue may greatly influence community identity and peer community participation.

In the European Union, the construction of an internal market for payments concerns money as a means of exchange and covers all Member States; while money as a unit of account concerns those Member States joining the Eurozone. What happens with the growth of virtual currencies (or crypto-currencies or payment tokens)?[3] These are private monies that, crossing jurisdictions, provide for not only a payment infrastructure or payment system,[4] but also for a settlement asset other than the legal tender.

(2016).

[3] Virtual currencies or crypto-currencies or payment tokens are a species of crypto-assets. Crypto-assets (or tokens) may be defined as 'private digital assets that a) are recorded on some forms of a digital distributed ledger secured with cryptography, b) is neither issued nor guaranteed by a central bank or a public authority, and c) can be used as a means of exchange and/or for investment purposes and/or to access goods or services' (R. Houben and A. Snyers, 'Crypto-assets. Key elements, regulatory concerns and responses' *Study requested by the ECON Committee of the European Parliament,* 1-73 (2020). Within this broad *genus*, virtual currencies, such as Bitcoin, represent a general-purpose means of payment. However, it is worth noting that there is a great deal of literature on virtual currencies. With no claim of being exhaustive, I have found the following studies interesting and useful for legal analysis: A. Ferreira et al, 'Cryptocurrencies, DLT and Crypto Assets – the Road to Regulatory Recognition in Europe', in M. Thai et al eds, *Handbook on Blockchain* (Berlin: Springer Nature), available at SSRN; A. Walch, 'Cryptocurrencies: what are they good for?' *Testimony before U.S. Senate Committee on Banking, Housing, and Urban Affairs* (27 July 2021), 1-10; J. Lee and F. L'Heureux, 'A regulatory framework for cryptocurrency' 3 *European Business Law Review*, 423-446 (2020); C. Brummer ed, *Cryptoassets. Legal, regulatory, and monetary perspectives* (Oxford: Oxford University Press, 2019); H. Nabilou, 'Bitcoin governance as a decentralized financial market infrastructure' 4(2) *Stanford Journal of Blockchain Law and Policy* 177-202 (2020); N. Vardi, 'Bit by bit: assessing the legal nature of virtual currencies', in G. Gimigliano ed, *Bitcoin and mobile payments. Constructing a European Union framework* (London: Palgrave-Macmillan, 2016), 55-71; P. Tasca, 'Digital currencies: principles, trends, opportunities, and risks' *ECUREX Research Working Paper*, October 2015, 1-110; H.Y. Jabotinsky, 'The regulation of cryptocurrencies – Between a currency and a financial product' 31 *Fordham Intellectual Property Media & Entertainment Law Journal*, 118 (2020).

[4] Art 4(7) European Parliament and Council Directive 2015/ 2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35 (thereafter, 2015 PSD2): 'a funds transfer system with formal and standardised arrangements and common rules for the processing, clearing and/or settlement of payment transactions'.

Virtual currencies are challenging money design and the European harmonisation process for payments because they are simultaneously both settlement assets and a payment infrastructure; in other words, they are both unit of account and means of exchange. Despite the fact that payment tokens are still a niche business experience, the economic and legal literature has shown a great interest in this topic since the publication of Satoshi Nakamoto's manifesto. Legal scholars focus mainly on: i) the legal status of crypto-assets, ie, whether they are comparable to investment instruments, funds, securities, or intangible assets, with a view to identifying the rules and regulations most suitable among those in force;[5] ii) the positive and negative aspects of the decentralised system of crypto-governance;[6] iii) the financial stability as well as the reputational risks associated with the integration of the crypto-system into the traditional banking and financial system due to widespread institutional investments and venture capital fund investments in crypto-assets, as well as the crypto custody services provided by traditional financial institutions.[7]

This paper has a much narrower scope, aims to investigate payment tokens within the framework of the regulation proposal for a market in crypto-assets (known as the MiCA regulation proposal).[8] It consists of a further six sections focusing on the following aspects of the MiCA proposal from the standpoint of European money and payments law. After analysing the scope (Section II) and the legal basis (Section III), this study then offers an insight on the policy priorities (Section IV), focusing on asset-referenced and electronic money tokens (Section V) and the authorisation process for crypto-issuers and service providers (Section VI). Lastly, the paper draws a conclusion (Section VII).

II. Crypto-Assets and the Scope of the MiCA Proposal

The legal literature tends to deal with tokens (or crypto-assets) as 'digital assets that are recorded on a distributed ledger and can be transferred without an intermediary, and the structuring of the issuance, the pricing of the offer, and the distribution of these instruments do not involve the participation of any regulated entity such as, for example, an investment bank'.[9] They feature cryptography and

[5] J. Lee and F. L'Heureux, ibid 430; B. Geva, 'Cryptocurrencies and the evolution of banking, money, and payments', in C. Brummer ed, *Cryptoassets. Legal, regulatory, and monetary perspectives* (Oxford: Oxford University Press, 2019) 20-22; N. Vardi, ibid 60-66.

[6] A. Walch, 'Deconstructing "Decentralization": Exploring the core claim of crypto systems', in C. Brummer ed, *Cryptoassets. Legal, regulatory, and monetary perspectives* (Oxford: Oxford University Press, 2019), 50-55; H. Nabilou, n 3 above, 180-185.

[7] A Walch, n 3 above, 8.

[8] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937 of 24 September 2020 [COM/2020/593 final] (thereafter, MiCA).

[9] A. Gurrea-Martinez and N.R. León, 'The law and finance of Initial Coin Offering', in C. Brummer, *Cryptoassets. Legal, regulatory, and monetary perspectives* (Oxford: Oxford University

DLT.

While cryptography is a technique used to protect sensitive information, either in storage or in communication, DLT stands for distributed ledger technology – the blockchain is a type of DLT – and it works as a decentralized database or ledger, but the information is stored on multiple computers (or nodes) with no middleman performing a function of validating transfers of digital assets. It is argued that

> 'In a DLT arrangement, nodes are the devices running the DLT software that collectively maintain the database records. In this design the nodes are connected to each other in order to share and validate information. At its extreme, this structure enables any entity (…) with a node to share database management responsibilities directly with each other on a peer-to-peer basis'.[10]

Therefore, the 'distributed ledger of transactions becomes the 'single version of the truth' on which a very large sample of participants can rely but which none of whom can unilaterally control'.[11] Accordingly, the DLT platform backing the use of virtual currencies is characterised by decentralization, immutability and a trust-less system.[12]

In the construction of an internal market for payments,[13] crypto-assets look like the last step of the electronification process for payments. As economists have emphasized, there is a continuum between two extreme – public and private, permissionless and permissioned – blockchains.[14] Visa-like platforms are proprietary and private platforms, but like bitcoin-type value transfer systems, they apply

Press, 2019) 117-156.

[10] D. Mill et al, *Distributed ledger technology in payments, clearing, and settlement*, 95 (2016), available at https://tinyurl.com/5nu7rbu8 (last visited 30 June 2022). In addition, the Expert Group on Regulatory obstacles to financial innovations, 30 *Recommendations on regulation, innovations and finance. Final report to the European Commission* (December 2019), argued that the DLT entails four characteristics: 'shared record keeping, multi-party consensus, independent validation, tamper evidence and resistance'.

[11] F. Fleuret and T. Lyons, n 3 above, 15.

[12] With no middleman.

[13] Concerning the definition of internal market, see Art 26(2) of the Treaty on the Functioning of the European Union (TFEU).

[14] Pilkington draws the distinction between public and private platforms with regard to the extent to which they are decentralized or ensure anonymity. In fully private platforms, read – and write – permissions are fully managed by a central decision-making player (permissioned validator) and, with a permissioned ledger, platform access is based on *know-your-business* and *know- your-customer* rules. By contrast, fully public platforms apply non-discretionary access standards, while the validation of DLT transactions works according to a distributed consensus mechanism, either a *proof-of-work* or *proof-of-stake* validation mechanism (permissionless validators), both of which are rooted in a cooperative behavioural dimension. See: M. Pilkington, 'Blockchain technology: principles and applications', in X. Olleros and M. Zhegu eds, *Research handbook on digital transformation* (Cheltenham: Edward Elgar, 2016), 1-39.

> 'the concepts of value storage, encryption, and cryptographic public/ private key pairing, at the heart of modern crypto-currencies. The real novelty is the decentralization feature: the main difference between blockchain technology and these crude predecessors is the level of decentralization of the network'.[15]

It is worth remembering that the electronification of payment transactions is far from new in terms of the construction of an internal market for payments, since the harmonisation process for payments, operating at the Union level since the 1980s, has always aimed to facilitate the straight-through processing of funds transfers by means of direct debits, credit transfers, electronic money and card payments, in domestic and cross-border transactions.[16]

From a functional standpoint, a distinction is drawn between payment tokens, utility tokens and asset tokens, but they may sometimes perform more than one function together, ie hybrid tokens.[17] Payment tokens may serve only as a means of exchange and unit of account; utility tokens allow holders to access or to purchase services provided or products sold; and asset tokens are to some extent comparable to equities, bonds, or participatory financial instruments. However, the functional classification does not necessarily correspond to the legal construction; this depends on the legal approach taken to the concepts of security and money, which varies according to the jurisdiction.[18]

This functional definition is not fully followed by MiCA. Indeed, The MiCA proposal provides a catch-all definition of crypto-assets but without covering crypto-assets already regulated by other pieces of European legislation, such as those considered to be financial instruments according to the MiFid regulatory package. Indeed, according to Art 3(2) MiCA, the concept of crypto-assets comprises 'a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology', while DLT means, within the framework of this regulation proposal, 'a type of technology which support the distributed recording of encrypted data'.[19] This normative approach has raised critical remarks, not only from academics,[20] but also from

[15] H Dong et al, 'Virtual currencies and beyond: initial considerations' *IMF Staff Discussion Note* (2016), 1-42.

[16] In contrast, since 2007, paper-based negotiable instruments as well as coins and notes fall beyond the scope of the harmonising directives and regulations in that they are deemed to belong to the past of the social and economic system. See Art 3, 2015 Payment Services Directive.

[17] The European Union Blockchain and Observatory Forum, 'Blockchain and the future of digital assets' (2019), 3-37.

[18] A. Gurrea-Martinez and N.R. León, n 9 above, 121.

[19] Art 3 (1) MiCA.

[20] The legal literature has critically emphasized the limits of an overarching definition of crypto-assets without clear boundaries with MiFiD-based investment instruments. See G. Ferrarini and P Giudici, 'Digital offerings and a mandatory disclosure: a market-based critique of MiCA' *Law Working Paper* no 605/2021, 1-31; D.A. Zetzsche et al, 'The markets in crypto-assets regulation (MICA) and the EU digital finance strategy' *Law Working Paper Series* no 2020-018, 22, analysing the MiCA proposal

the ECB and the European Economic and Social Committee. Indeed, giving their official opinion on the legislative proposal, the two European institutions called for more detailed specifications of the various sub-categories of crypto-assets and their scope, with a view to drawing a clear distinction from MiFID-based financial instruments, and due to uncertainties raised by hybrid tokens, those crypto-assets performing different functions.[21]

To be precise,[22] Title II concerns any crypto-assets not considered to be asset-referenced or electronic money tokens. This is a broad category comprising (but not limited to) utility tokens dealt with as 'a type of crypto-asset which is intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token'.[23] In contrast, asset-referenced tokens and e-money tokens are regulated in Title III and IV of the MiCA regulation proposal. The asset-referenced tokens are crypto-assets

> 'whose main purpose is to be used as a means of exchange and that purport to maintain a stable value by referring to the value of several fiat currencies, one or several commodities or one or several crypto-assets, or a combination of such assets',[24]

while the e-money tokens are a

> 'type of crypto-assets whose main purpose is to be used as a means of exchange and that purport to maintain a stable value by being denominated in (units of) a fiat currency'.[25]

However,[26] it is worth keeping in mind that MiCA does not cover crypto-assets qualified as electronic money according to the 2009 E-Money Directive,[27] financial instruments in compliance with the MiFiD regulatory package,[28] and

from the standpoint of MIFID regulatory package; V. Ferrari, 'The regulation of crypto-assets in the EU – investment and payment tokens under the radar' 27(3) *Maastricht Journal of European and Comparative Law* (2020) 325-342.

[21] Opinion of the European Economic and Social Committee, (OJ) C 155/2021; Opinion of the European Central Bank of 19 February 2021.

[22] In addition, Title V on the authorisation of crypto-assets service providers (Arts 46-68); Title VI on market abuse involving crypto-assets (Arts 69-73); Title VII on the competent authorities, ESMA and EBA (Arts 74-108); Title VIII on delegated acts and implementing acts (Art 109); Title IX on transitional and final provisions (Arts 110-114).

[23] Art 3(5) MiCA.

[24] Art 3(3) MiCA.

[25] Art 3(4) MiCA.

[26] Art 2(2) MiCA.

[27] European Parliament and the Council Directive 2009/110/EC of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC [2009] OJ L267/7 (thereafter, 2009 EMI Directive).

[28] European Parliament and the Council Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ

deposits consistent with the meaning in the 2014 Deposit Guarantee Scheme Directive,[29] or that fall within the 2019 European Regulation on securitisation.[30]

Art 1 defines the MiCA regulated field providing that the proposed regulation comprises uniform rules on the following aspects:

- transparency disclosure requirements for issuing and admitting to trading crypto-assets;

- the authorisation, supervision, and governance of crypto-asset service providers, establishing a closed list of crypto-asset services, namely, the custody and administration of crypto-assets on behalf of third parties; the operation of a trading platform for crypto-assets; the exchange of crypto-assets either for legal currency or for other crypto-assets; the execution of orders as well as the reception and transmission of orders for crypto-assets on behalf of third parties respectively meaning entering into agreements or receiving and transmitting to a third party an order issued by a person to buy, sell, or 'subscribe' (*rectius*, underwrite) one or more crypto-assets; the placing of crypto-assets; the providing advice on crypto-assets;[31]

- the issuance of asset-referenced and electronic (or e-money) tokens as well as the operation, organization, and governance of both of them;

consumer protection for the issuance, trading, exchange, and custody of crypto-assets;

- finally, measures to prevent market abuse.

III. MiCA and the Legal Basis

MiCA sets the legal requirements for the taking-up, the pursuit and the supervision of business entities engaged in the issuance of crypto-assets and the services related to them operating in the Union.[32]

This is one of the legislative pieces of the Digital Finance Strategy launched by the European Commission.[33] In fact, MiCA is matched up with the regulation

L173/349.

[29] European Parliament and the Council Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes [2014] OJ L173/149.

[30] European Parliament and the Council Regulation 2017/2402/EU of 12 December 2017 laying down a general framework for securitization and creating a specific framework for simple, transparent and standardized securitization, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 [2017] OJ L 347/35.

[31] Art 3(9) MiCA.

[32] Art 1 MiCA.

[33] COM (2020) 591 final. In the Digital Finance Strategy, the European Commission pointed to the following policy priorities: i) tackling fragmentation along the national border; ii) facilitating digital innovation; iii) creating a European financial data space in order to promote data-driven innovation; iv) addressing new challenges and risks associated with digital transformation. Despite the fact that the Commission Communication refers to financial services in general, it gives significant attention to payment services because, quoting the Commission, 'Payment services play a key role among digital financial services, being at the cutting edge of innovation and instrumental to support the digital

for a pilot regime for market infrastructure based on distributed ledger technology,[34] or DLT infrastructure, and to the regulation proposal on digital operational resilience for the financial sector.[35] However, it is worth mentioning that MiCA is the first compulsory legal act tailor-made for crypto-assets,[36] but it is far from being the first legal act concerning virtual currencies at the EU level. Indeed, the V Anti-Money Laundering Directive[37] had already pointed to virtual currencies, dealing with them as

> 'a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status as a means of exchange and which can be transferred, stored and traded electronically'.

In other words, this Directive compelled custodian wallet providers and providers engaged in services between virtual currencies and fiat currencies to fulfil due diligence duties with a view to identifying, assessing, understanding and mitigating money laundering risks.

Since this legislative proposal concerns the construction of the internal market for payments, both the Union and Member States are entitled to take regulatory initiatives. Indeed, any regulatory proposal put forward by European institutions must comply not only with the principle of conferral but also with the principles of subsidiarity and proportionality.

According to the principle of conferral, any European legislative act is legitimate as long as it is properly based on the Treaty provision. This calls upon the reference to a proper legal basis in European treaties. With regard to MiCA,

economy. Digital payment solutions enable individuals and companies to transact safely and efficiently'. Accordingly, around the same period, the Commission issued a different communication (COM (2020) 592 final) providing for a four-year strategy on retail payments. There, the Commission considers how, despite the steps forward made in terms of digitalisation of retail payments, consumers and firms prefer traditional payment instruments, such as bank transfers and card-payments, in addition to cash, rather than innovative means of payment. Within this framework, a four-pillar strategy for payments is set forth, focusing on: i) digital and instant payment solutions enjoying a pan-European reach; ii) innovative and competitive retail payment markets; iii) efficient and interoperable payment systems and technical infrastructures; iv) efficient international payments, especially money remittance. A comparison between this Commission Communication and the ones issued in the past points to some recurring features: interoperability of and access to payment systems as well as fragmentation along national borders.

[34] European Parliament and the Council Regulation of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU [2022] OJ L151/1.

[35] COM (2020) 595 final.

[36] On 30 June 2022, the Council and the European Parliament reached a provisional agreement on MiCA regulation proposal.

[37] European Parliament and the Council Directive 2018/843/EU of 30 May 2018 amending Directive (EU) 2015/849 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 [2018] OJ L156/43.

the legal basis is Art 114 TFEU: the harmonisation process aims to establish an internal market (for goods, services, persons, and capital/payments), but a State-based approach to regulation and financial supervision may impair the proper functioning of the internal market due to the global nature of crypto-assets.[38]

Concerning the principle of subsidiarity, MiCA introductory remarks point to divergent frameworks, rules, and approaches to crypto-assets as obstacles to the cross-border business activities of crypto-asset issuers since these divergencies force them to be familiar with different national legislations and submit multiple authorizations. The proportionality principle is ensured by a risk-based approach, namely, drawing a distinction among the different types of services and activities in accordance with their risk-profiles, but imposing more stringent requirements on the issuers of stablecoins, because they are more likely to grow.[39] There is no definition of stablecoin in the MiCA proposal. However, the common understanding of stablecoins suggests that they are

> 'digital units of value that are not a form any specific currency (or basket thereof) but rely on a set of stabilisation tools which are supposed to minimise fluctuations of their price in such currency(ies)'.

Within this broad definition of stablecoins, a distinction is drawn between tokenised funds, on-chain and off-chain collateralised stablecoins, and algorithmic stablecoins,[40] while asset-referenced tokens may be considered on-chain collateralised stablecoins and e-money tokens are a form of tokenised funds. MiCA does not seem to cover off-chain collateralised and algorithmic stablecoins.

European policymakers prioritized a regulation over a directive since even full harmonisation directives leave room for Member States' legislative leeway, and this would be difficult to reconcile with the global reach of the crypto-asset business and the demand for a higher level of legal certainty for fintech businesses as well as retail users.

However, the MiCA legislative process still suffers from the drawbacks of the

[38] MiCA, n 8 above, 3.

[39] However, there is no stablecoin definition in Art 3 MiCA.

[40] D. Bullman et al, 'In search for stability in crypto-assets: are stablecoins the solution?' *ECB Occasional Paper Series* no 230, 9-16 (2019). Tokenized funds are 'units of monetary value that are stored electronically in a distributed ledger to represent a claim on the issuer and are issued, on receipt of funds, for the purpose of making payment transactions to persons other than the issuer'; in fact, they are often called fiat-backed stablecoins and are not a new type of asset. As for collateralized stablecoins, 'the price of a stablecoin in the currency of reference is supported by units of an asset (or multiple assets), against which users can redeem their holdings'. Off-chain collateralized stablecoins require the cooperation of a custodian in the process of issuance, transfer, and redemption of the tokens because collateral is made up traditional asset classes; in contrast, on-chain collateralized tokens exhibit as collateral assets in digital form and their value does not depend on the intervention of a responsibile party and may be kept in a decentralized manner. Finally, we have algorithmic stablecoins where the price of stablecoins is supported only by 'users' expectations about the future purchasing power of their holdings, which does not require the accountability of any party, nor the custody of any underlying asset'.

first e-money directive experiences, namely, the Directives nos 28 and 46 of 2000 adopted in the early stages of e-money development. While European policymakers – the ECB rather than the Commission – envisioned an imminent and widespread growth of e-money business that might impair the role of unit of account, the central bank's ability to manage monetary policy and the affordability of the payment system,[41] a review of the 2000 EMI directives revealed how some of the provisions – such as those on the business scope and the initial capital and own funds requirements – had *de facto* hindered the growth of a true market for e-money services.[42] As for crypto-assets – a new business activity –, European lawmakers were concerned with taking regulatory initiatives before a large number of Member States set their own legal framework but not too early to hamper the growth of virtual currency businesses, with a view to a trade-off between the principle of technology and business-model neutrality and the policy priorities of preserving the affordability and stability of the financial system.

IV. MiCA and the Policy Priorities

The MiCA regulation proposal tries to attain a trade-off among the regulatory issues raised in the preliminary debate, begun in 2013 with studies and reports delivered by the European Central Bank (ECB) and the European Banking Authority (EBA).

The ECB[43] studies on virtual currencies and crypto-assets focused on the risks to price and financial stability as well as to the soundness of the payment system, since the ECB is in charge of defining and implementing the European monetary policy and promoting the smooth operation of payment systems.[44] Despite these risks, the ECB refrained from suggesting any *ad hoc* regulatory initiative due to the lack of general user acceptance, the low volume in VCSs, and the limited connection to the real economy, while giving priority to monitoring

[41] ECB, 'Issues arising from the emergence of electronic money' (November) *ECB Monthly Bullettin* 49-60 (2000).

[42] Preamble (2) 2009 EMI Directive.

[43] Well before the Commission submitted the MiCA regulation proposal, the ECB published some studies and reports referring to virtual currencies as virtual currency schemes. It stated that 'a virtual currency is a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted by the member of a specific virtual community'. Only three years later, in 2015, it tried to clearly delineate the difference between electronic money and virtual currencies, addressing the latter as a 'digital representation of value' other than money and currency. In 2019, the ECB preferred to make reference to virtual currencies within the broad category of crypto-assets comprising 'any asset recorded in digital form that is not and does not represent either a financial claim on, or a financial liability of, any natural or legal person, and which does not embody a proprietary right against and entity'. See ECB, *Virtual Currency Schemes* (October) 2012, 1-55; ECB, *Virtual Currency Schemes – a further analysis* (February) 2015, 1-37; ECB, *Crypto-assets: implications for financial stability, monetary policy, and payments and market infrastructure* (May) 2019, 1-40.

[44] Art 3, Protocol no 4 on the statute of the European System of Central Banks and of the European Central Bank. 26-27.

activity. However, according to the ECB, any regulatory strategy for virtual currency schemes should consider:

- taking into account the reputational risks: loss of trust in virtual currency schemes might undermine users' confidence in payment systems;[45]

- focusing on the intersection with the regulated financial system, namely gatekeeping services, such as crypto-asset custody, trading, and exchange services: they provide an access point to the traditional financial system;[46]

- drawing the distinction between centralized and decentralised ledgers: as far as virtual currency holders and crypto-assets investors may rely on third parties service providers or gatekeepers, the traditional regulatory approach may be applied; conversely, if a fully decentralised gatekeeping activity is concerned that does not imply the involvement of an identifiable intermediary, the ECB suggested considering a principle-based approach, complemented by a formal mechanism to validate the observance of such principles.[47]

EBA[48] provided for an interesting list of regulatory drivers of risk. Some of them are common to any new business, such as the legal uncertainty regarding legal treatment and the lack of definitions and standards; some other risks are peculiar to any new financial activity, for example, the opaque process of price formation, and the lack of funds separation between the exchange's own funds and the exchange users' funds. With a view to dealing with both sets of risks, the EBA took a case-by-case approach in applying European payment and financial services legislation to crypto-assets. This is the case of the 2009 e-money directive whenever the electronically-stored token is issued on receipt of funds for the purposes of making payments, pegged to a given currency according to a one-to-one ratio, redeemable at any time, accepted by persons other than the issuer and, in the end, confers on the holder a claim on the issuer.[49] Finally, some drivers of risk are peculiar to virtual currencies, such as the possibility of creating and making changes to the protocol anonymously, and the lack of refund or payment guarantees, as well as the lack of an incorporated legal person subject to regulatory standards and governance and probity conduct rules.[50] Concerning the latter group, the EBA suggested imposing the creation of an entity accountable

[45] ECB, Virtual Currency Schemes – a further analysis n 43 above, 28-29.

[46] ECB, ibid 32; ECB, *Crypto-assets* n 43 above, 28-30.

[47] ECB, *Crypto-assets* n 43 above, 29-30.

[48] EBA, Warning to consumers on virtual currencies, 12 December 2013, 1-3; EBA, Opinion on 'virtual currencies', 4 July 2014, 1-46; EBA, Report with advice for the European Commission on crypto-assets, 9 January 2019, 1-30. In 2013 virtual currencies were addressed as 'unregulated digital money' neither issued nor guaranteed by a central bank, while in 2014 the EBA dealt with them as a 'digital representation of value' which may work as a means of exchange. In 2019, the EBA made no change to the regulatory definition of virtual currencies as a monetary token but put them into the broader category of crypto-assets which also covers investment or security tokens representing debt or equity claims on the issuer, as well as utility tokens enabling the holders to access applications or services.

[49] EBA, *Report* n 48 above, 13.

[50] EBA, *Opinion* n 48 above, 38.

for the virtual currency scheme, namely, the scheme governance authority, set up as a legal person and in charge of maintaining the integrity of central transaction governance and complying with authorisation requirements. On this point, the 2014 EBA Opinion argued that 'A governance authority may, at first, appear incompatible with the conceptual origins of VCs as a decentralised scheme that does not require the involvement of a central bank or a government. However, the mandatory creation of a scheme governance body does not imply that VC units have to be centrally issued. This function can remain decentralised and be run through, for example, a protocol and a transaction ledger. If it is true that the decentralised VC schemes are secure, it should be possible for market participants to establish themselves as scheme governance authorities'.[51] Who would be in charge of setting up and running this governance authority?

While, in the next steps, this legal analysis shows to what extent MiCA follows EBA and ECB advice, it is worth noting here the two leading policy priorities on which MiCA preambles focus: establishing a trade-off between, on the one hand, streamlining capital-raising processes and improving cross-border payments to foster users' confidence in alternative payment instruments, and consumer protection and market integrity, on the other hand.[52] This is based on the two-tier nature of crypto-currencies as both payment systems and settlement assets, but also on the double connection between the issuance of crypto-currencies and the mechanism of Initial Coin Offering (ICO), meaning a 'process in which businesses (usually start-ups) or individuals issue tokens to the public to raise funds for their projects, in exchange for fiat money or other crypto-assets'.[53] Indeed, with an ICO, issuers deliver utility, asset, or payment tokens, and may receive as monetary consideration not only legal currencies but also (and in most cases) virtual currencies, especially generally accepted ones like Bitcoin and Ether. Therefore, market or user expectations of an ICO business plan may influence not only Bitcoin-like or Ether-like value, but also any newly-issued ICO payment tokens. This connection may increase the value of crypto-currencies despite the fact that there is no certainty of the actual development of the business project or its profitability.[54]

[51] ibid 39-40.

[52] Preambles (2) and (4), MiCA. The Commission also considers the advantages of payment tokens in terms of programmable money: payment tokens may hold the key to 'programmable money' ('delivery vs. payment' or 'invoice vs. payment'), by enabling the functioning of smart contracts. A simple example of programmable money could be blocking the funds for a transaction, which are then automatically released to the recipient only when specific conditions are met (for example the confirmed delivery of goods). See: Commission Staff Working Document, Impact Assessment, SWD (2020) 380 final, of 24.9.2020, 26-30.

[53] R. Houben and A. Snyers, n 3 above, 23-24.

[54] This is what happened in the US in March 2017, where 'Ethereum cofounder Vitalik Buterin revealed that an investor in the ICO of BAT spent $2,210 as a transaction fee for one payment to receive the advantages and discounts granted to early investors'. See, A. Gurrea-Martinez and N.R. León, n 18 above, 122-126.

This context may explain why MiCA compels crypto-asset issuers to publish a white paper replicating the prospectus contents in accordance with Regulation 2017/1129, because the holders of a money-like payment instrument are first and foremost investors. Here, information concerns not only the rights and obligations of payment users and service providers with regard to payment transactions, but also the objectives and contents of the business plan underlying the ICO token. Consistently, the white paper is comparable to the prospectus. Indeed, ICO issuers must notify the national competent authority of a white paper before an ICO is issued or admitted for trading on a trading platform for crypto-assets. As for asset-referenced or e-money tokens, no offering, trading, or marketing activity can begin before the competent authority has approved the white paper.[55]

Arts 5, 17, and 46 specify the contents of the white paper for asset-referenced tokens and e-money tokens. Specifically, the white paper addresses average investors, providing them with information on (1) the main features of the crypto-asset issuer and of the major participants involved in the project's design and development; (2) the issuer's business plan for the crypto-asset offering or admission to trading, ie the 'planned use of the fiat currency or other crypto-assets collected via the offering'; (3) the terms and conditions of the offering, together with the rights and obligations of crypto-assets holders; (4) the underlying technology and standards; and finally (5) the risks concerning the issuer, the crypto-asset offering and the implementation of the plan.[56] As for asset-referenced tokens, Art 17 establishes that, in addition to the information set in Art 5, the white paper comprises a detailed description of: i) the issuer's governance arrangements; ii) reserve assets; iii) custody arrangements; iv) the enforceability rights; v) the complaint handling procedure; vi) disclosure items. As for e-money tokens, in comparison with the general requirements as established in Art 5, the white paper also covers a detailed description of the rights and obligations attached to e-money tokens with regard to the holding, storing, or transferring of said e-money tokens.

While the binding structure of white papers may help prospective token holders to compare offerings, the point is whether the structure of the white paper is adequate for rectify the information asymmetry between token issuers and prospective token holders.

European lawmakers are taking tentative steps towards a new trade-off between public and private enforcement.[57] Indeed, MiCA provides that token issuers and their management bodies are subject to the national legislation on civil liability

[55] No preliminary approval is required for the offering, trading, or marketing activity of crypto-assets other than asset-referenced and the e-money tokens.

[56] Art 5 MiCA.

[57] Some critical remarks by: G. Ferrarini and P. Giudici, 'Digital offerings and public disclosure: a market-based critique of MiCa' 605 *ECGI Law Working Paper* 20-25 (2021) argued that '(…) grandiose regulatory frameworks aimed to protect investors without offering the protected parties effective instruments of private enforcement of their rights'.

rules for information given in a white paper with regard to the offering of crypto-assets or the admission of such crypto-assets to trading on a trading platform for crypto-assets.[58] Furthermore, token issuers must publish a brief summary of the white paper on their website in non-technical language providing the public with basic information about the offering as well as about admission to trading.[59] However, this non-technical report – *de facto* extremely important for the type of prospective users it addresses – plays only a complementary role: indeed, Art 22 (3) provides that token holders are not entitled to sue the issuer for damages for information provided in the summary, except when '(a) the summary is misleading, inaccurate or inconsistent when read together with the crypto-asset white paper; (b) the summary does not provide, when read together with the other parts of the crypto-assets white paper, key information in order to aid consumers and investors when considering whether to purchase such asset-referenced tokens'. Considering the policy priorities of payment tokens, it would be advisable to draw a distinction between public enforcement based on information given in the white paper and private enforcement based on information given in the non-technical summary.

V. Asset-Referenced and E-Money Tokens

Asset-referenced and e-money tokens are respectively subsumable within the category of off-chain collateralised tokens and tokenised funds. The first case requires an issuer and a third party trusted with keeping the commodity (or other non-digital asset) safe, and delivering it when requested. In the second case, the tokenisation of units of monetary value is carried out, while the issuer itself or a custodian stores the funds received. For both forms, there is a business entity – the issuer – in charge of offering and redeeming the tokens, while their transfer is based on a typical DLT platform where the network participants may validate the token transfer.[60]

MiCA covers asset-referenced tokens and electronic (or e-money) tokens and deals with them (also) as a means of payment. Thinking of traditional commercial instruments, payment tokens are negotiable if they contain an unconditional promise or order to pay a sum of money. This means that it is important to ascertain whether asset-referenced and e-money tokens confer on their holders a claim over the issuers or a redemption right on the reserve assets backing the value of the payment tokens. Indeed, while the e-money token holders are provided with a redemption right (on the issuer) at any moment and at par value, the holders of asset-referenced tokens may or may not hold a direct claim or redemption rights on the issuer or on the reserve assets. It depends on the terms and conditions set in the asset-referenced token white paper. If the

[58] Art 11(1) MiCA.
[59] As for e-money tokens, please, see Art 47(3) MiCA.
[60] D. Bullman, J. Klemm, and A. Pinna, n 40 above 12-14.

issuers of asset-referenced tokens do not grant any redemption rights to all the holders, they must establish mechanisms to ensure the liquidity of such asset-referenced tokens, by means of written agreements with the crypto-asset service providers requiring them to 'post firm quotes at competitive prices on a regular and predictable basis'.[61] However, this policy choice to leave asset-referenced token issuers to decide whether or not to grant holders redemption rights has raised strong concerns on the part of the ECB.[62] In its opinion on the MiCA regulation proposal, the ECB underscored that e-money and asset-referenced tokens are likely to be used as money-substitutes, therefore it would be advisable that both of them entitle holders to a right to redemption on the issuer or, more appropriately, that a single payment token sub-category be created comprising both of them and applying the same set of normative requirements.[63]

The above-mentioned parallel between MiCA payment tokens and negotiable instruments leads us to the stabilisation mechanism, a second feature of payment tokens. Traditionally, commercial instruments entitle the holder to get paid a sum of money, where money is the settlement asset or, in order words, the legal currency. However, the discharging of monetary obligations follows the nominalistic principle, and this principle is based on the stability of legal currency thanks to a central bank mandate. Therefore, the point is that if asset-referenced and e-money tokens claim to be means of exchange, they need to stabilise their value, pegging it to a different asset. E-money tokens claim to maintain a stable value referring to a precise 'fiat currency that is used as legal currency', while asset-referenced tokens purport to maintain a stable value referring to 'several fiat currencies that are legal tender', to one or several commodities, one or several crypto-assets, or a basket of such assets. The stabilisation mechanism implies the constitution and maintenance of a reserve of assets backing those crypto-assets all the time owing to an adequate investment policy against the risk of a decrease in the value of the asset backing the value of the tokens.[64]

However, the value of payment tokens depends not only on the value of the reserve assets but also on the ICO business plan, whether it was brought about, and to what extent it turns out to be a successful business initiative. This is why, considering the ups and downs of the ICO business plan, holders are in any case entitled to redeem the asset-referenced tokens directly from the issuer where the market value of the asset-referenced crypto-assets varies 'significantly' from the value of reference or the reserve assets.[65]

Keeping all of this in mind, one wonders whether the definition of funds, as set out in the 2015 Payment Services Directive, should be amended to include asset-referenced and e-money tokens. This definition comprises banknotes and

[61] Art 35 (4) MiCA.
[62] See above Section IV.1.
[63] See preamble (32) MiCA.
[64] Preambles (35) and (37) MiCA.
[65] Art 35 (4) MiCA.

coins, scriptural money, and e-money as defined in the 2009 EMI Directive. While some of these confer on holders a claim on the central bank, some others confer a claim on a commercial bank, but they have in common the value of the settlement asset, ie the legal currency, which is based on the credibility of the community (state or international organization) project, as Christine Desan argued.[66] In contrast, the value of both asset-referenced and e-money tokens depends not only on the stability of the reserve asset value, but also on the credibility of the issuers' business plan. For this reason, at best, the definition of funds might be amended to include e-money tokens.

1. The Interest Clause

No interest or other benefit related to the length of time during which the holder holds asset-referenced or e-money tokens may be granted to their holders.[67] This is explained, from a policy standpoint, as necessary to ensure that such tokens are used as a means of payment rather than a reserve of value;[68] otherwise, they might run in competition with central bank monies.

From a normative standpoint, a different explanation could be suggested based on the fact that both the issuers of asset-referenced tokens and e-money tokens hold no title over reserve assets. Indeed, this builds a bridge between the MiCA provision, the 2015 Payment service Directive and the 2009 EMI directive. As for electronic money, it is established that

> 'Electronic money issuers should not, moreover, be allowed to grant interest or any other benefit unless those benefits are not related to the length of time during which the electronic money holder holds electronic money',[69]

while no clear-cut choice is made for payment accounts provided by payment institutions. Vittorio Santoro argued that payment institutions do not take title on the sum of money placed in payment accounts; for this reason, they are not entitled to use them on their own, for example for extending credit or performing different business activities, but at the same time no interest should be accrued on the account balance.[70]

2. Consolidating the Functional Theory of Money?

In the MiCA regulation proposal, the Commission seems to embrace a functional and contract-based approach, consistent with the construction elaborated

[66] See, above, Section I.

[67] Arts 36 and 45 MiCA.

[68] Preambles (41) and (46) MiCA.

[69] See preamble (13) and Art 12, 2009 EMI Directive.

[70] In fact, thinking of the Italian legal system, Vittorio Santoro compared the position of the payment institution to the custodian of a deposit agreement (Art 1782 Italian Civil Code) or the agent of a mandate contract (Art 1703 Italian Civil Code). See: V Santoro, 'I conti di pagamento degli istituti di pagamento' *Giurisprudenza Commerciale*, 855-872 (2008).

by the European Court of Justice in the Mr Hedvist case.[71] Indeed, the MiCA proposal makes reference to 'fiat currencies' as well as to 'fiat currencies that are legal tenders' as if they were on the same footing. This is the case in the preambles (12) and (15), and also in the definition of asset-referenced crypto-assets and reserve assets, respectively in Art 3(3) and Art 3(4).

However, the ECB, in the opinion delivered on the MiCA proposal, critically emphasized how it is more appropriate in a Union legal text to make reference to official currencies 'of which legal tenders are expressions', in accordance with Council regulation No 974/1998 on the introduction of the euro, and the European Parliament and Council directive 2014/62 on counterfeiting.[72] While the 2014 directive defines currency as 'notes and coins, the circulation of which is legally authorised, including euro notes and coins, pursuant to Regulation (EC) No 974/98', the 1998 Regulation provides that

> 'Banknotes and coins denominated in a national currency unit shall retain their status as legal tender within their territorial limits as of the day before the entry into force of this Regulation'.

This seems much more important because, as the *Häring & Dietrich* v *Rundfunk* case[73] demonstrated, the singleness of the legal tender depends rather on the monetary settlement than on the means of exchange, either banknotes, coins or scriptural money. While Member States may match the use of cash with the use of scriptural money, any choice regarding settlement assets is pre-empted, at least for the Eurozone.

Indeed, the European Court of Justice held that Art 128 (1) TFEU and Art 16 SEBC Statute

[71] In 2015, the European Court of Justice was asked to issue a preliminary ruling on the construction of the Value Added Tax (VAT) Directive. Specifically, the Swedish tax authority wondered whether Arts 2 and 14 of the VAT directive should be interpreted as covering business activities of exchanging traditional currency for units of bitcoin and vice-versa in return for a remuneration fee. The Court held that, in the context of Art 135 (1) (e) of the VAT Directive, the concept of currency was to be dealt with as comprising traditional and non-traditional currencies, namely currencies not issued by one or more countries, accepted by the contracting parties as an alternative to legal currency and having no purpose other than being a means of payment. Therefore, according to the ECJ analysis, the legal concept of currency should comprise any fiat currency, both traditional and non-traditional, deemed as a settlement asset by the contracting parties, apart from the centralised or decentralised payment system behind. Within the context of the case, this conclusion was based on the difficulties connected to the divergent language transposition of VAT: this prompted the Court to go beyond the wording of the provisions concerned and make a functional interpretation, consistent with its teleological approach. Indeed, Art 135 (1) (e) aimed to alleviate the difficulties connected with the taxable amount and the VAT deductible in the context of taxation of financial transactions.

[72] See, especially: Art 9, Council Regulation 974/1998/EC of 3 May 1998 on the introduction of euro [1998] OJ L139/1, and Art 2(a), European Parliament and the Council Directive 2014/62/EU of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law and replacing Council Framework Decision 2000/383/JHA [2014] OJ L151/1.

[73] Joint Cases 422/19 and 423/19 *Häring & Dietrich* v *Rundfunk*, Judgement of 26 January 2021, available at www.eur-lex.europa.eu.

> '(…) preclude the adoption of a national rule the object or effect of which is to abolish, in law or in fact, cash in euro, in particular by calling into question the possibility, as a general rule, of discharging a payment obligation in cash',[74]

but – the Court continued –

> 'the recital 19 of Regulation No 974/98 states that limitations on payments in notes and coins, established by Member States for public reasons are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available'.[75]

In other words, Member States enjoy a certain degree of leeway concerning any restrictions imposed on the use of coins and banknotes as long as these restrictions are proportionate to the public interest objective pursued, with no margin on settlement assets. This normative approach to legal tender singleness may put a distance between the Commission's approach in the MiCA proposal and the ECB's official opinion, or in other words, between virtual currencies as units of account and settlement assets on the one hand and the 'official currencies of which legal tenders are expressions' on the other.

VI. A Statute for Crypto-Asset Issuers and Service-Related Providers

No offering, admission to trading, or provision of crypto-asset services is allowed without the proper authorisation. The MiCA proposal applies a traditional normative approach to crypto-asset issuers and service providers. Indeed, both economic activities are dealt with as regulated businesses.[76] Authorisation is issued by the national competent authorities according to the principle of single license and home country control,[77] but no authorisation is needed for a crypto-asset service provider, if the services are provided to persons established in the Union by their own initiative.[78]

1. Asset-Referenced and E-Money Token Issuers

With regard to asset-referenced token issuers, MiCA provides that, apart from notifying the competent authority of the white paper, any applicant must: set up a legal entity holding a proprietary DLT-platform (at least for issuers of asset-referenced tokens) and having its legal seat in a Member State; meet

[74] EBA, *Opinion* No 48 above, 20.
[75] ibid 21.
[76] Arts 15, 43, 53, MiCA.
[77] Art 58 MiCA.
[78] See preamble (51) MiCA.

prudential stability requirements, in terms of capital ratio and own funds thresholds; set up a management body whose members are persons with good repute, appropriate knowledge and experience; act in the best interest of asset-referenced tokens preventing, identifying, managing and disclosing any conflict of interests; and maintain robust governance arrangements.[79] These arrangements range from setting sound and prudent management policy to establishing a process for identification, management, monitoring and reporting of the risk to which it might be exposed, as well as maintaining the security, integrity and confidentiality of information and establishing a business continuity policy.[80] With regard to the offering of e-money tokens, there is no-newly established type of financial intermediary: indeed, the issuer must be authorised either as a credit institution or as an electronic money institution, in accordance with the authorisation and prudential supervision requirements set in their own legal statute, unless MiCA establishes otherwise.

For both types of issuers, MiCA applies two types of exemptions: one based on the nature of crypto-asset holders and the other based on ICO size; authorisation is not required if asset-referenced and e-money tokens are addressed only to qualified investors, nor when the average outstanding amount of the tokens concerned does not exceed a certain threshold. There is no specific reference to consumer protection or market integrity. However, although there is no authorisation process, issuers must notify the national competent authority of a white paper, one paper for each type of crypto-asset issued.

For both types of issuers, the MiCA statute provides some new elements in comparison with the regulation of payment institutions in the 2015 Payment Services Directive or of electronic money institutions in the 2009 EMI Directive. The applicant must:

- submit a project in terms of business plan backing the ICO;

- enter into affordable liquidity arrangements with third parties in order to grant crypto-holders a right to exchange their token holdings, as well as provide a reserve asset policy with a view to ensuring crypto-holders the right to token redemptions;

- give information on the underlying technology and standards: as Angela Walch emphasized,

> '(…) it is relatively easy to count nodes in a network, but much harder to identify and understand how miners, nodes, and software developers interact

[79] According to the preamble (26) MiCA, issuers of asset-referenced tokens are at the centre of a network of entities which ensures the issuance of such crypto-assets, their transfer and their distribution. The question is: will this network raise the same regulatory concerns raised by two-sided/multi-sided traditional payment systems?

[80] Art 16 MiCA.

in governing a blockchain'.[81]

MiCA tries to make these governance dynamics apparent: in fact, the home state competent authority must be notified of any modification to the business model and to the white paper that might 'have a significant influence on the purchase decision of any actual or potential holder of asset-reference tokens'. According to Art 21(1) MiCA, this concerns, among other things, any material changes to

> '(d) the mechanism through which asset-referenced tokens are issued, created and destroyed; (e) the protocols for validating the transactions in asset-referenced tokens; (f) the functioning of the issuer's proprietary DLT, where the asset-reference tokens are issued, transferred and stored on such an DLT'.

In a much more general way, MiCA rules and regulations for e-money token issuers also make reference to the same point;[82] these issuers must:

- provide a legal opinion explaining why the asset-referenced tokens do not qualify as financial instruments, electronic money, deposits or structured deposits (Art 16, lett d, MiCA);

- finally, meet tougher prudential supervisory rules on higher capital thresholds, interoperability requirements, and liquidity management policy, as they are qualified as issuers of significant asset-referenced and e-money tokens. This is the case of global fintech firms and the Diem case.[83] Indeed, for significant token issuers, MiCA takes into account the potential large customer base of their promoters or shareholders, but also the potential high market capitalisation, number of transactions, cross-border use, and interconnectedness with the financial system, as well as their market capitalisation and the potential size of the reserve assets backing the value of asset-referenced and e-money tokens.[84] When significant asset-referenced and e-money tokens are concerned, the EBA is in charge of releasing authorisation as well as establishing, managing, and chairing a consultative supervisory college.[85]

The MiCA statute for payment tokens leaves some questions open. First, the distinction between issuing and offering to the public. A license is required for the second rather than for the former activity, but this distinction is material to establishing any normative asymmetry between the offering of payment tokens and the monetary function reserved for credit institutions in the process of taking up reimbursable funds from the public. According to Art 3(7) MiCA, 'offer to the public' means 'an offer to third party to acquire a crypto-asset in exchange for fiat currency or other crypto-assets'; conversely, there is no definition either of 'public' or

[81] A. Walch, n 6 above, 59.

[82] See Art 46 (10) MiCA.

[83] Preambles (41), (45), (49), and (66).

[84] See: Arts 39, 41, 50-52 MiCA. An issuer may be classified as an issuer of significant asset-referenced or e-money tokens by the competent authority or on a voluntary basis.

[85] Arts 98-99 MiCA.

of 'issuing'.[86] Second, following EBA advice, MiCA compels the issuers to set up a legal entity having their legal basis in a Member State and this entity is accountable for acting in the best interest of the crypto-token holders in the issuance, redemption, and transfer of crypto-assets, despite the validation mechanism of token transfers is based on a competitive works according to a typical DLT and involves a network of participants verifying that the transfer complies with the platform rules.[87] This means that a MiCA takes a closed-system approach, where the platform is wholly-owned by a firm or set of firms, proprietary, and controlled by a single party.[88] In the end, whether it is possible to set up asset-referenced token issuers as hybrid business entities is unclear. This is allowed for payment institutions and electronic money institutions respectively in the 2015 Payment Services Directive and in the 2009 EMI Directive. If issuers were entitled to be authorised as hybrid business entities, they might match the offering of the crypto-tokens concerned with a different business activity, either financial or non-financial, a possible business case for global e-commerce platforms, big retailers, or social networks. There is no clear-cut law-making choice on this aspect in MiCA. However, since e-money token issuers must be authorised as electronic money institutions in compliance with the 2009 EMI Directive, one might infer that they will be able to set up a hybrid financial intermediary.

2. Crypto-Asset Service Providers

The authorisation process and requirements for crypto-asset service providers is in line with the legislative statute for issuers of asset-referenced and e-money tokens. In addition, Title V of the MiCA seems to give voice to some of the institutional concerns raised. In fact, the crypto-asset service providers, that the ECB has called gatekeepers are regulated in a traditional way, in compliance with ECB advice.[89] It is established that they must make public the price, volume and time of transactions executed regarding the crypto-assets traded on their trading platforms, as well as details of all such transactions, as close to real-time as is

[86] D.A. Zetzsche et al, n 20 above, 24, put forward same critical remarks but different supporting arguments. It is worth noting that the 2017 Prospectus Regulation, which has more than one material aspect in common with MiCA, not only made a distinction between issuers and offerors, but also laid down a qualitative distinction within the concept of public.

[87] D. Bullmann, J Klemm, and A Pinna, n 40 above, 11-12.

[88] M. Zachariadis and P. Ozcan, 'The API economy and digital transformation in financial services: the case of open banking' (1) *Swift Institute Working Paper Series*, 10-11 (2016). It is worth noting that Council and Parliament Regulation 2022/858 on a pilot regime for market infrastructures based on distributed ledger technology has recently been approved, but this allows only certain types of DLT platforms for financial instruments to be exempted from the regular legal framework.

[89] It is interesting to note that, according to preamble 58 MiCA, whenever crypto-asset service providers are authorized as payment institutions, they are also entitled to operare payment transactions in connection with the services they offer. One might assume that, in such cases, they are hybrid payment institutions, offering professional provision of payment services with both financial and non-financial business.

technically possible, responding to the EBA's regulatory concern about the opaque process of price formation.[90]

Crypto-asset services mimic investment services and financial activities as set out in the MiFiD regulatory package. The main difference seems to be the object: they deal with crypto-assets assumed to perform as a means of exchange rather than as financial instruments. However, MiCA establishes that not only those business entities provided with ad hoc authorisation are allowed to operate such business, but also those firms providing financial services according to EU law, and no further authorisation is needed.[91] This sounds odd because MiFiD clearly established that payment instruments are *other than* transferable securities. One might sensibly conclude that this law-making choice depends on the fact that asset-referenced and e-money tokens are both means of exchange and tools for raising capital within the ICO framework.[92]

VII. Conclusions

In the MiCA framework, payment tokens are asset-referenced and e-money tokens. The MiCA proposal establishes a tentative comprehensive framework for issuance, admission to trading, and related services, taking a traditional regulatory approach with few new aspects. Despite the aim of levelling up legal certainty and crypto-user protection along with market integrity, the broad definition of crypto-asset does not seem to live up to expectations, leaving outside the regulated field various forms of DeFi (Decentralized Finance) applications, from on-chain and algorithm tokens to Decentralised Autonomous Organizations (or DAOs), without putting forward any other form of regulatory initiatives, like an EU-based regulatory sandbox. In addition, since asset-referenced and e-money tokens are dealt with as means of raising capital and operating payment transactions, MiCA raises delicate coordination issues, not so much with money laundering framework, but with the 2015 Payment Services Directive, as well as crowdfunding and banking rules and regulations.

[90] On ECB and EBA policy priorities and regulatory concerns, see Section IV above.
[91] Preamble (54), (55) MiCA.
[92] Above, Section IV.

Malebolge

From the Sense of Justice to Juridical Feeling

Arianna Alpini*

Abstract

During the pandemic the moral demands of human beings have been disappointed by the law because the emergency has imposed many restrictions on rights, especially on freedom of assembly and association to the point of preventing assistance to family members in hospital and during funeral rites. This situation has reproposed the question regarding the separation between law and morality which recalls the relationships between feeling and law. Italian doctrine has studied the topic assuming the juridical relevance of feeling when it conforms to social conscience. Considering some of the most important approaches on the relationships between feeling and law, this paper attempts to prove that the relevance of feelings is not based on social recognition but depends on its impact on experience. Feeling is a source of knowledge in concrete human life, and consequently, feelings are always relevant legal matters.

I. The Juridical Vocation of Awareness. 'Living Law' and Effectiveness

Many years ago, the Italian philosopher Giorgio del Vecchio wrote an essay entitled 'Il sentimento giuridico', 'Juridical Feeling', which was published in 1902.[1] Basing his theory on Aristotelian philosophy, he analyses what distinguishes human beings from animals, namely the moral sense of justice such as awareness data.[2] In reality, the law can be considered historically only insofar as the awareness has a juridical vocation. The Author underlines that Roman jurists consider the sense of justice a fundamental principle of natural law. The foundation of this principle, on the one hand, was identified in 'pure reason', on the other, it was a requirement of 'will'. However, the intuition of justice was achieved through accumulated experience which in the Author's view derives from the empirical historical conditions. Indeed, law and human personality are mutually dependent as are their empirical conditions of development.

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[1] G. Del Vecchio, *Il sentimento giuridico* (Torino: Fratelli Bocca Editori, 1902), 3-4.

[2] G. Di Martino ed, *Ristretto del "De origine juris civilis" di Gian Vincenzo Gravina* (Reggio Calabria: La Città del Sole, 2006), passim. See A. Smith, *The Theory of moral sentiments* (1759), in E. Lecaldano ed, translated by S. Di Pietro (Milano: BUR, 2019), passim. It is interesting to note that Adam Smith believes that what distinguishes the human being is the inclination to barter and exchange goods even non-economic. See also D. Hume, *Treatise of Human Nature* (London, 1739), in E. Mistretta, and E. Lecaldano eds, translated by A. Carlini (Bari: Universale Laterza, 1987), passim.

However, the idea of justice does not arise from these elements.[3]

The reflection on the juridical relevance of feeling is certainly connected to the study of human nature and social relations.[4] The early 20th century Legal Realists in the United States rebelled against the prevalent idea of law as a science, a concept steeped in the unrealistic notions of scientific objectivity that then prevailed.[5] The study of emotion in many disciplines was starved at the roots during that period, as was the recognition of emotion in law.[6]

A new concept assumed relevance for the first time in the sociological doctrine: the 'living law'.[7] According to this approach, the law takes shape within social reality assigning legal value to socially relevant facts or relationships. Norms are created by social recognition despite not being formally valid, since they are devoid of legally established sources. Against this backdrop, the regulatory effect was given by a series of facts about which the lawyers had to identify the relationship between cause and effect.

Whereas the doctrine on institutional effectiveness considers an institution valid when it is affirmed in society and its function is put into practice: its

[3] G. Del Vecchio, n 1 above.

[4] See, among many authors, W.T. Blackstone, 'Law and Morality: the Hart-Dworkin Debate and an Alternative' *Archiv für Rechts und Sozialphilosophie*, 77-95 (1979); H.L.A. Hart, *Diritto, morale e libertà*, translated by G. Gavazzi ed (Acireale: Bonanno, 1968), 97; J. Raz, 'The Problem about the Nature of Law' *University of Western Ontario Law Review*, 21, 217-218 (1983); D. Lyons, *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1984), 37; H. Kelsen, *Law and Morality, Essays* in *Legal and Moral Philosophy,* in O. Weinberger ed (Dordrecht: Reidel, 1973), 83; J. Habermas, *Fatti e norme*, in L. Ceppa ed (Milano: Laterza, 1996), 136; R. Alexy, *Teoria dell'argomentazione giuridica*, in M. La Torre ed (Milano: Giuffrè, 1998), 170; F. Ferrara, *Trattato di diritto civile italiano* (Napoli: Edizioni Scientifiche Italiane, 1987), 26; N. Bobbio, *Essere e dover essere nella scienza giuridica*, in Id, *Studi per una teoria generale del diritto* (Torino: Giappichelli, 1970), 157-158; G. Tarello, 'Sulla teoria (generale) del diritto', in Id, *Cultura giuridica e politica del diritto* (Bologna: il Mulino, 1988), 391-399; F. Viola, 'La teoria della separazione tra diritto e morale', in Id, *Il diritto come pratica sociale* (Milano: Giuffrè, 1990), 71.

[5] T.A. Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' *Law and Human Behavior*, 30, 119-142 (2006); Id, 'A Field Evolves: Introduction to the Special Section on Law and Emotion' *Emotion Review*, 8, 1, 3-7 (2016); R. West, 'Law's Sentiments', in S.A. Bandes, J.L. Madeira, K. Temple and E.K. White eds, *Research Handbook on Law and Emotion* (Cheltenham: Edward Elgar Publishing, 2021) available at https://tinyurl.com/48f7dtce (last visited 30 June 2022). See A. Smith, *The Theory of Moral Sentiments* n 2 above; B.N. Cardozo, 'The Nature of the Judicial Process' *Michigan Law Review*, 20, 6, 688-690 (1921); O.W. Holmes, 'The Path of the Law' *Harvard Law Review*, 110, 5, 991-1009 (1997); R.A. Posner, *Utilitarianism, Economics, and Social Theory, The Economics of Justice* (Cambridge: Harvard University Press, 1981), 48-87. Posner's conception is buttressed by Holmes's classic depiction of the 'bad man' who cares for nothing but himself as the subject of law's authority, and central to its definition. See also R.A. Epstein, 'Unconscionability: A Critical Reappraisal' *Journal of Law and Economics*, 18, 2, 293-316 (1975).

[6] As US Supreme Court Justice Benjamin Cardozo wrote in *The Nature of the Judicial Process*, n 5 above: 'Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge'.

[7] E. Earlich, *I fondamenti della sociologia del diritto* (Milano: Giuffrè, 1976, A. Febbrajo ed), passim.

legitimacy derives from the effectiveness of its power.[8]

Both institutional effectiveness and sociological doctrine have been criticized by normativism and natural law. Institutional effectiveness is criticized because it refers exclusively to the institution and excludes the norms[9] whereas sociological doctrine reduces the fact to a natural phenomenon governed by the law of causality irrespective of the assessment of compliance with the legal system.[10]

A critical account of this comparison brings to the fore that the meaning of the legal rule is not derived from written provisions but results from the interpretation by the jurist in a given historical moment.[11] Accordingly, the understanding and application of the norms are never neutral or creative but depend on the meaning that flows from social conscience at a given time.[12] If the interpretation of a written provision is consolidated in the jurisprudence with the written text remaining the same, the meaning of the norm will be modified.[13]

In this regard, the norm is legal if accepted by society and applied by the judge. It follows that the 'effectiveness' becomes an essential requirement of legality.[14] The law changes continuously with social changes, so the content of the norm is not given by the letter of the written provision (text) but by the 'spirit' that drives the norm.[15] The concept of 'living law' seems different from the original approach. This 'living law' or 'effective law' flows from the concrete judicial application, which represents the criterion of social acceptance.[16]

[8] S. Romano, *L'ordinamento giuridico* (Firenze: Sansoni, 1977), 49.

[9] P. Piovani, 'Effettività (principio di)' *Enciclopedia del diritto* (Milano: Giuffrè, 1965), 14, 430; C.M. Bianca, 'Ex facto oritur ius' *Rivista di diritto civile*, I, 787, (1995).

[10] In this order of phenomena the legal norm as regulatory effect dependent on a judgment has no place: E. Ehrlich, n 7 above, 106. See H. Kelsen, *Lineamenti di dottrina pura del diritto* (Torino: Einaudi, 2nd ed, 2000), 5

[11] P. Calamandrei, 'Discorso sulla Costituzione agli studenti di Milano del 26 gennaio 1955', observed: 'the Constitutionis not a machine which, once set in motion, will keep moving on its own. The Constitution is a piece of paper, if I let it fall it does not move: in order to let it move one needs to add fuel every day; one needs to add commitment, spirit, desire to keep these promises, a sense of one's own responsibility', available at https://tinyurl.com/mr44kkcb (last visited 30 June 2022). See E. Betti, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica*) (Milano: Giuffrè, 1949), 3.

[12] C.M. Bianca, 'Il principio di effettività come fondamento della norma di diritto positivo' *Estudios de Derecho Civil en honor al profesor Castan Tobeñas* (Pamplona: Edizioni Università di Navarra, 1969), II, 61; Id, *Ex facto oritur ius* n 9 above.

[13] On the juridical - not political - nature of the constitutional norm and its place within the theory of the sources of law, see P. Perlingieri, 'Constitutional Norms and Civil Law Relationships' *The Italian Law Journal*, 1, 17, (2017); P. Femia, 'La via normativa, Pietro Perlingieri e i valori costituzionali', in G. Alpa e F. Macario eds, *Diritto civile del Novecento: scuole, luoghi e giuristi* (Milano: Giuffré, 2019), 359.

[14] See recently G. Vettori, *Effettività fra legge e diritto* (Milano: Giuffè, 2021), passim.

[15] V. Frosini, *La lettera e lo spirito della legge* (Milano: Giuffrè, 1994), 3 and 137; L. Mortara, 'La lotta per l'uguaglianza (prolusione al corso di diritto costituzionale nell'anno accademico 1888-1889)' *Quaderni fiorentini*, 19, 145-160 (1990).

[16] 'Living law' consists in the 'orientation firmly consolidated in the jurisprudence', such that the norm, as interpreted by the Court of Legitimacy and the judges of merit, 'now lives in the system in such a deep-rooted way that it is difficult to envisage a change in the system without the intervention of

II. Social Conscience and the Legal System

According to the above considerations, the effective content of the norm depends on the feeling that enlivens the social conscience. Therefore, the living dimension of a norm takes into account the sense of society. Consequently, the feeling has been translated into a specific interest that the legal system deems worthy of protection and qualifies it as its aim.

However, from this point of view, the feeling is not a fact since the result does not have any juridical effects.[17] The feeling does not modify the juridical situations or the external reality, since it remains in our psyche. Whereas when the feeling is expressed because an individual externalizes it, the feeling turns into behaviour and the effect is related to a conduct, not to a sentiment.[18] Considering that human feelings satisfy the needs of every individual, doctrine believes human interest in feeling can be legally protected if it is associated with an interest worthy of protection.

The consciousness gives value to the phenomena of external reality by the emotional process of feeling, but this value is merely personal. The legal system does not consider the sentiment of love relevant because the feeling does not involve the law and the individual cannot be forced to love another.

To sum up, the emotional process has an impact on the content of the rules only if the individual feeling is a social one, thus the social conscience changes 'the effective dimension of positive law'.

From another perspective, emotion shapes law and law needs to get emotion right in order to function well. Likewise, law revolves around and sculpts emotional experience, both individual and collective. Feeling and especially love should acquire legal and political relevance to build a foundation for every legal instrument. This approach removes any separation between law and morality, consequently, the law becomes sensitive to feeling and love is subject to the law.[19]

Stefano Rodotà represented the problematic relationship between law and love. He points out that the right of love cannot be denied by legal arguments, otherwise freedom and dignity would be repudiated.[20] At the same time, the

the legislator or this Court', Corte costituzionale 21 November 1997 no 350 available at giurcost.org. See T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione' *Rivista di Diritto Processuale*, 352 (1957). On the teaching of Ascarelli see C. Crea, 'What is to be done? Tullio Ascarelli on the Theory of Legal Interpretation' *The Italian Law Journal,* 1, 2, 18 (2015). See also G.B. Vico, *De uno universi iuris principio et fine uno* (Napoli, 1720), in P. Cristofolini ed, *Opere giuridiche* (Firenze, 1974), 283, who defines the Roman praetor of ancient times as '*viva legis XII Tabularum vox*'.

[17] C.M. Bianca, 'Il diritto del minore all'amore dei nonni' *Rivista di Diritto Civile*, II, 155-156 (2006).

[18] A. Falzea, 'Fatto di sentimento' in Id, *Voci di teoria generale del diritto* (Milano: Giuffrè, 1978), 556.

[19] For a reconnaissance of the topic, D. Shavell, 'Law versus Morality as Regulators of Conduct' *American Law and Economics Review*, 4, 2, 227- 257 (2002). See also H.L.A. Hart, 'Positivism and the Separation of Law and Morals' *Harvard Law Review*, 71, 4, 593-594 (1958).

[20] See P. Femia, 'Discriminazione (divieto di)', *Enciclopedia del Diritto, I tematici*, I, in G.

duty of love should correspond to the right of love, but this implication is unacceptable. In this regard, the court argues that even as the sentiment of love is missing in the couple, the spiritual element to coexistence is still possible.[21]

With reference to dilemma, it is necessary to consider the common elements and the differences between law and love. Both law and love are connected to human dimensions of social relationships and rationality. Nevertheless, there would seem to be a need for clarification about what is meant by rationality. Love is sentiment and sentiment appears to be very far from rational, but the distance can be shortened if we replace rationality with intellect or awareness.

Love and law, however, have many different characteristic features. Love is free and spontaneous and cannot be forbidden. It is private given that it is not relevant to society and is addressed to a specific individual without the need to use formal procedures. On the other hand, the law is public and general and since it is oriented towards society, it needs coercive power and formal procedures to be effective.

Accordingly, law and love are incompatible; they cannot be merged, otherwise, both law and love would have to change identity.

III. Love in the Public Sphere. Law and Emotions

These remarks are not sufficient to argue the incompatibility between law and love. The incompatibility depends, in fact, on the meaning we attribute to love and to law.

It is a common perception that law and love are opposites. Law is exemplified by rules, regulation, predictability and heteronomy while love by emotion, unpredictability, freedom and autonomy. However, these associations are the source of much misunderstanding about the role of law in society. In Bankowski's view, a better approach is to see law and love as interdependent, unable to function without each other.[22] Love prevents the law from becoming blind to individual needs and thus facilitates justice, and it also operates to keep society

D'Amico ed (Milano: Giuffrè, 2021), 8. The Author argues that 'the choice in love is not removed from the assessment of equality, because it is free (unquestionable); on the contrary: it is free (unquestionable), because here equality does not count'.

[21] S. Rodotà, 'Diritto d'amore' *Politica del diritto*, 3, 354 (2014).

[22] Z. Bańkowski, *Living Lawfully: Love in Law and Law in Love* (London: Kluwer Academic, 2001), passim. To illustrate how law and love should operate together, Bańkowski uses the analogy of marriage and love. Like law and love, marriage and love are often seen as opposites. Marriage is depicted as heteronomous, predictable routine while love is spontaneous, creative and autonomous: Bańkowski relies on Luhmann for this point. Luhmann claims that Love is spontaneous, in the present, uncoupled from external relations, contingent and a matter of fate, not interested in the future, not bound by duty or obligation, consumes everything, thematises everything. Marriage, on the other hand, is interested in the future or the eternal, as something that reduces spontaneity, calms passion, routinises love, stabilises love. See N. Luhmann, *Love As Passion: The Codification of Passion*, translated by J. Gaines and D.L. Jones (Redwood City: Stanford University Press, 1998).

beyond and above mere rule obedience. Love is the vehicle that fulfils needs and provides welfare and justice to individual circumstances. It is linked to an internal sense of what is right. What love achieves over the discourse of rights is an ability to 'feel' the conditions that motivate the law to act.[23]

In the same perspective, Simone Weil claims that love is a means by which human beings recognise the existence of each other as 'the organ of existence'.[24] The primary function of love is to give us a sense of the other as something to value.

Scholars argue that a better conception of love for Bankowski's argument is to consider friendship love, *philia*.[25] According to Aristotle, this is a type of friendship based on the love for goodness. In this kind of love, friends love each other for what they are, not for what they can get from each other, and only morally virtuous people can enter into this type of relationship. Friendship love goes beyond a relationship between two people, it is the model of society, and is linked to civic harmony, civic duty, morality and justice.

From this point of view, Blatterer considers that friendship is embedded in all of the values of liberal democracies such as freedom of association, autonomy, equality, trust, respect and justice, and he claims that friendship embodies the public norms and ideals we associate with politically, economically and socially mature societies.[26]

The connection of friendship with the political, with ideas of decency and justice moves friendship love into the public sphere. Friendship creates a feeling of what is right, and it can create a model of goodwill for others without any reference to religion, faith and belief.

The attempt to insert love and feelings into the public discourse represents the reaction to legal positivism. This is an example of contributing to an emotional discourse in contrast to modern positivism which continues to operate inside the paradigm that law and morality are and ought to be separate from one another. Critical jurisprudence, as part of the post-modern tradition, challenges meta-narratives and subverts the dominant paradigm, in so doing it makes room for alternative ways to understand law.[27]

However, the dominant view is that law in liberal legal regimes not only has

[23] Bańkowski makes a distinction between legality that includes love, and legalism which constitutes a blind obedience to rules: see Z. Bańkowski, 'Law, Love and Legality' *International Journal for the Semiotics of Law*, 14, 2, 199 (2001).

[24] L. De Maeyer, 'Love between Two Poems: The Imagination, Love and Literature in Simone Weil', in M. De Kesel and A.H. Poirters eds, *Mysticism and/as Love Theory* (Leuven: Peeters Publishers, 2021), 167-176.

[25] R. Grossi, 'Which Love in Law? Zenon Bankowski and the Meaning of love' *Law and Love* 34, 1, 2016 available at https://tinyurl.com/mpts3u8b (last visited 30 June 2022).

[26] H. Blatterer, *Everyday Friendships: Intimacy as Freedom in a Complex World* (Londra: Palgrave, 2014), passim. See S. Chiba, 'Hannah Arendt on Love and the Political: Love, Friendship and Citizenship' *The Review of Politics*, 57, 3, 522 (1995).

[27] See R. Grossi, 'Challenges for the Study of Law and Emotion' *Emotion Review*, 13, 636 (2016).

no need for moral sentiments, but that our liberal legalism creates us, or recreates us, as basically unsentimental subjects: 'un-empathic regarding the inner lives of others and unsympathetic to their suffering'.[28]

In this respect Robin West wonders:[29]

> 'what is the relation of law, in liberal legal societies such as our own, to what Adam Smith[30] called our 'moral sentiments', by which he meant, our capacity for empathic knowledge of the subjective lives of others, and our sympathetic inclination to take on their subjective suffering as our own? Does our law, and the legal culture it fosters, depend foundationally upon the existence of those moral sentiments, or does it rest, rather, on nothing but our self-regarding instincts, intuitions, and ambitions? And relatedly, does law nullify or dullen moral sentiments, or does it protect or nurture them?'

The Author claims that law protecting individuals against the potential violence of others is as much a definitional aspect of law in liberal states as law which coerces. When law protects human beings, it creates space for the development of moral sentiments in a number of ways. Consequently, there is more room not only for equality but also for a fully moral human life, enriched by passion, attachment, intimacy, and community and 'it should not be surprising, if this is right, that the protection of law is a condition of moral sentiments'.[31]

IV. The Fact of Feeling

Feeling was taken into account in the General Theory of Law.[32]

[28] R. West, n 5 above.

[29] A. Smith, n 2 above; P. Gabel, 'A Critique of Rights: The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves' *Texas Law Review*, 62, 8, 1563-1601 (1984); P. Gabel, *The Desire for Mutual Recognition: Social Movements and the Dissolution of the False Self* (London: Routledge, 2018), passim; R.A. Posner, n 5 above; O. W. Holmes, n 5 above; R. Epstein, n 5 above; R.E. Barnett, 'Contract Is Not Promise; Contract is Consent' *Georgetown Law Faculty Publications and Other Works*, 615 (2011), available at https://tinyurl.com/2ddnmmsw (last visited 30 June 2022).

[30] A. Smith, n 2 above.

[31] R. West, n 5 above.

[32] According to Adolf Merkel, 'Elemente der allgemeinen Rechtslehre', in Id, *Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts*, (Strasburgo: Erste Hälfte, 1899), Legal Theory of Law (*allgemeine Rechtslehre*) aims to determine and systemize the fundamental legal concepts through the general principles analysis related to different branches in the legal system. This is considered the juridical cultural result of the post-Kantian jurisprudence, Pandectism and Analytical jurisprudence of John Austin: G. Fassò, *Storia della filosofia del diritto*, *Ottocento e Novecento*, C. Faralli ed, (Roma-Bari: Laterza, 2005), passim. Kelsen's theory, 'Pure Theory of Law', is premised upon the basic assumption that the law resides in legal rules which are completely autonomous from morality and others human fields. If in the continental European tradition juridical positivism is characterized by rationalism and formalism, in the Anlo-American tradition it is based on the articulation of the 'is-ought problem' posed by Davide Hume: see P.

Following the traditional subdivision, the Italian jurist Angelo Falzea inserted the facts of feeling within the facts of conscience which also include the facts of knowledge and the facts of will.[33] The Author refers to the general notion of interest that leads to a general category of value and to the relationship between right and value. From this point of view, feeling is the organ through which individual consciousness relates to values. However, the legal principle is that a feeling, even when it detects as a matter of individual consciousness, it does so to the extent that it is connected to a non-individual fact, but to a way of social feeling and to an emotional atmosphere socially diffused in more or less large environments by an entire community.

Social values emerge from certain emotional atmospheres and between the socially lived value and the individual feeling there is not only an immediate and internal relationship but also an external one. In the latter case, feeling becomes the theme of an evaluation that is carried out from the outside beyond the individuals who are experiencing the existing emotional atmosphere and from the visual angle of the values of a different group. The evaluation contained in the feelings of certain people becomes the subject of another evaluation contained in the way of feeling, or in any case, in the system of values of other people or communities. Therefore, by virtue of this 'second-degree assessment', every feeling is likely to be evaluated in relation to that system of values which is a legal order.

Falzea's considerations highlight the necessity of the law to objectify feeling through a process of abstraction that sets aside the concreteness of the assessment. Feeling belongs to the individual but behaviour is evaluated according to the common feeling.[34] Law is not only what is shared but is also promotional,[35] trying to change the existing legal order. The interpreter must be able to grasp what changes.

In this regard, the analyses developed by Adam Smith on human conduct

Sirena, *Introduction to Private Law* (2nd ed, Bologna: il Mulino, 2020), 138. The Theory of Law has found new elements of development in analytical philosophy which affected jurists, in particular Norberto Bobbio who brought to light the insufficiency of a merely structural theory of law. According to the Author, the theory of law, unlike the philosophy of law, draws from the conceptual problems that arise within the juridical experience: C. Faralli ed, *Argomenti di teoria del diritto* (Torino: Giappichelli, 2016), 12-13. See, also, P. Perlingieri, 'Scuole civilistiche e dibattito ideologico: introduzione allo studio del diritto privato in Italia' *Rivista del diritto civile*, I, 405-406 (1978); on the relationship between law and ideology for methodological purposes: F. Dal Pozzo, *L'ideologia come modo di conoscenza e di relazione* (Milano: Giuffré, 1977), 274-275.

[33] A. Falzea, n 18 above, 547.

[34] 'The good sense was there but it was hidden for fear of common sense': on the differences between 'common sense' and 'good sense', see A. Manzoni, *I promessi sposi*, in V. Jacomuzzi and A. Dughera eds (Torino: Petrini, 2010); F. Festi, *Buon senso*, in *Le parole del diritto*, Scritti in onore di Carlo Castronovo (Napoli: Jovene Editore, 2018), 139. See, G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 20.

[35] See N. Bobbio, 'Sulla funzione promozionale del diritto' *Rivista trimestrale di diritto processuale civile*, 1313 (1969); S. Cotta, *Diritto, persona, mondo umano* (Torino: Giappichelli, 1989), 187.

and in particular on the role of the imagination are paradigmatic. It is not the task of the imagination to give an account of the structure of our habitual experiences, but rather to develop, in a more creative way, to the point of finding explanations to reconstitute a new order.[36]

In Smith's view the imagination is not the ground of 'common sense' but is the source of the great innovations of philosophy and astronomy. The 'imperative spectator' is none other than human consciousness: Smith attaches importance to the 'second degree assessment' operating within rather than outside of the individual. He does not identify motivation for moral conduct with vanity for public success but distinguishes the pursuit of approval with the pursuit of being worthy of approval.[37]

The focus moves to the potential of the human being and therefore to the potential of the legal order.

V. Knowledge and Experience

Observation of reality shows that it is very difficult and hazardous to identify social consciousness. In this regard Giovanni Perlingieri[38] argues that

> 'the idea that, for purposes of interpreting and applying the law, a 'sufficiently large consensus' is needed recalls totalitarian regimes and the degeneration of 'social consensus'. Fascism and communism built their strength on common sense. To rely on social conscience means introducing evaluation elements of uncertainty and arbitrariness. This is fundamentally because of two factors. First, it is not always easy to ascertain which is, at a particular moment in time, the orientation of a given community. Second, it remains an open question to ascertain whether or not the adjudicator has to rely on prevalent interpretation or on that of a part of the community which may be considered as more observant and circumspect. Furthermore, in a multi-cultural society, it is naïve to pretend to identify, with certainty, social conscience'.

In reality, it observes, on the one hand, homologation and, on the other, disorientation. It is more correct to refer to many individual consciousnesses than to consider social consciousness. The content of the norms derives from legal interpretation not dependant on social recognition, but on the reference of values belonging to culture expressed in the Italian legal system by the fundamental principles of the Constitution. However, these principles represent

[36] A. Smith, n 2 above, 19.

[37] ibid 45.

[38] G. Perlingieri, 'Reasonableness and Balancing in Recent Interpretation by the Italian Constitutional Court' *The Italian Law Journal*, 4, 2, 441 (2018) and Id, 'Sul criterio di ragionevolezza' *Annali SISDiC*, 1, (2017), 25.

not only the yardstick of comparison for every individual expression, but also for the interpretation of the 'effective positive law', that is to say, norms with direct effect also in civil law relationships.[39] In this process, it is not social consciousness that works but rather the consciousness of an interpreter.[40]

The doctrine assumes that feeling is consciousness of value and knowledge is consciousness of truth; consequently, feeling and knowledge are two different perspectives.[41] Nevertheless, without feeling it is impossible to experience the moral values. The impulse to the continuous evolution of values is given by feelings that can change the jurisprudence. The sentiment of fatherly love modified the value of dignified life through moral principles despite the lack of a specific law.[42]

Through feeling, human beings can experience life; therefore, feeling is inserted in the cognitive process aimed at interpreting the needs and interests of the individual and to promoting new applications of constitutional principles, able to satisfy them in the most comprehensive way.

According to Giuseppe Capograssi the science of law, which falls into the concrete experience of human reality, is a process of individualization. The science of law embodies the '*individuationis* principle' and from this point of view, the legal interpretation achieves a specific meaning:

> 'to discover the whole in the single position, to grasp the single position as a determination of the whole, of unity in the face of particularity and the fragmentation of the single commands'.[43]

VI. The Contemporary Sense of Justice

Love and sentiments are connected both to justice and to knowledge. The sources of knowledge are perceptions and thinking. Human beings are not

[39] On this issue, see the effective in-depth analysis by P. Perlingieri, 'Constitutional Norms and Civil Law Relationships' *Italian Law Journal*, 1, 17 (2015).

[40] A. Alpini, 'The "Equitable Dimension" of Constitutional Legality' *Annali SISDiC*, 3, 8 (2019): 'The primacy of values allows the rigid separation between ethics and law to be removed. Indeed, it cannot be denied that moral principles are incorporated and live within the law, even if they are a part thereof, by way of interpretation and application. This implies the adoption of forms of reasoning that require not only intelligence, but also sentiment: the humanity of the legal order, which includes the enigmatic and complex dimension of the existence of the human being, attracts the attention of the lawyer, by urging his sensibility'.

[41] A. Falzea, n 18 above, 552.

[42] See, for instance, Corte di Cassazione 16 October 2007 no 21748, *Il Civilista*, 10, 23 (2010). In keeping with the personalistic principle that animates our Constitution, 'which sees in the human person an ethical value in itself, prohibits any instrumentalization of the same for no purpose and conceives solidarity and social intervention according to the person and his/her development and not vice versa and looks at the human person's limit in reference to the individual at any time of his/her life and in the entirety of his/her person, in consideration of a bundle of ethical, religious, cultural and philosophical convictions that orient his/her volitional determinations'.

[43] G. Capograssi, *Il problema della scienza del diritto* (Milano: Giuffrè, 1962), 15, 173-174; Id, *La vita etica*, in F. Mercadante ed (Milano: Bompiani, 2008), passim.

satisfied merely to refer the perceptions to the concept using thinking, but they relate them also to their particular subjectivity. The expression of this individual relationship is feeling.[44]

Feelings usually include love, but it cannot be regarded in the same way as the other sentiments. It is linked to the will and to making things good for other people. Feelings and love move acts and make decisions, but sentiments could also be negative, able to hinder the free development of the human personality.

Feeling sets law in motion focusing on one side or on another and love functions to find the balance between the opposite sentiments. Consequently, sentiments and love affect the interpretation process of facts and norms. Justice can be reviewed as a human process of knowledge of which the judgement is a synthesis, setting a balance point between opposite sentiments.[45] Law translates feelings into interests, but freedom, equality and solidarity, that express moral values, are in effect feelings and legal norms simultaneously.[46] The separation between moral and law appears unlikely.[47] The sense of justice moves from perceptions to concepts and evolves through the experience. Feeling is the means whereby concepts gain concrete life.[48] For these reasons, it may be specified that the sense of justice does not belong only to 'will' or only to 'reason', because will and reason are not separated in the human cognitive process.

> 'Were we merely thinking and perceiving human beings, our whole life would flow along in monotonous indifference. Were we simply able to know ourselves as selves, we should be indifferent to ourselves. It is only because we experience self-feeling with self-knowledge, and pleasure and pain with the perception of objects, that we live as individual beings whose existence is not limited to the conceptual relations between us and the rest of the world, but who have besides this a particular value for ourselves'.[49]

Contemporary justice is primarily an existential and anthropological question closely linked with human dignity and freedom.[50]

[44] R. Steiner, *Die Philosophie der Freiheit*, translated by I. Bavastro (Milano: Editrice Antroposofica, 2007), 64.

[45] P. Calamandrei, *Processo e democrazia. Le conferenze messicane di Piero Calamandrei*, in E. Bindi, T. Groppi, G. Milani and A. Pisaneschi eds (Pisa: Pacini Giuridica, 2019), especially 58, 61-62.

[46] P. Perlingieri, 'Legal principles and Values' *Italian Law Journal*, 3, 1, 125 (2017).

[47] J. Waldron, 'Judges as moral reasoners' *International Journal of Constitutional Law*, 7, 1, 2-24 (2009), and Id, 'Refining the question about judges' moral capacity' *International Journal of Constitutional Law*, 7, 1, 69-82 (2009); F. Viola, 'Quando il diritto diventa morale' *Ethics and Politics*, 22, 3, 437-444 (2018).

[48] R. Steiner, n 44 above.

[49] ibid, compare D. Hume, n 2 above, who famously held that reason alone can never be a motive to any action of the will, an again that reason alone can never produce any action, or give rise to volition.

[50] S. Rodotà, La rivoluzione della dignità (Napoli: Laterza, 2013), passim; P. Perlingieri, La personalità umana nell'ordinamento giuridico (Napoli: Edizioni Scientifiche Italiane, 1972), passim; Id, La persona e i suoi diritti. Problemi del diritto civile (Napoli: Edizioni Scientifiche Italiane, 2005),

Luigi Mengoni argues that the labour law represented the definitive anthropology of modern law, whereas Art 1 of the Italian Constitution founds the legal system on labour. According to this approach, work gives dignity to each individual.[51] However, the human being is worthy from birth, and he/she is worthy even if limited in working skills or differently abled, because dignity is linked to the value of the human being in itself. In this regard, Pietro Perlingieri considers that a human being and dignity cannot be separated.[52]

Although dignity is the most important value of our system, its significance is debated because of the ambiguity.[53]

When God created the individual, He said:

> 'nec certam sedem, nec propriam faciem, quae munera tute optaveris, ea, pro voto, pro tua sententia, habeas et possideas.'[54]

With these words, Giovanni Pico della Mirandola depicted the individual in the *De hominis dignitate* as a free entity and the concept of dignity is given by freedom. The human capacity to orient and drive the will toward a purpose, expresses human evolution and the need to motivate relationships between individuals and between individuals and things. Motivation is necessary for human beings because only what is evident to the consciousness can be recognised by the individual.

From this perspective there emerges a new link between dignity and labour.

VII. Paradigm of Labour in Human Evolution

Originally, the social dimension was linked to a spiritual experience that was based on obedience. This element was spontaneous and founded on devotion and veneration. Obedience to the divine will and supernatural presence in nature constituted the foundation of social life. Nature regulated human behaviour; individuals belonged to a social group through blood relations and the body belonged to the gods through the bloodline. In this way, humans

passim; P. Grossi, Il diritto civile in Italia tra moderno e postmoderno dal monismo legalistico al pluralismo giuridico (Milano: Giuffrè, 2021), 88-99.

[51] L. Mengoni, 'Fondata sul lavoro', in M. Napoli ed, *Costituzione, lavoro, pluralismo sociale* (Milano: Vita e pensiero, 1998), passim; see T. Groppi, 'Fondata sul lavoro. Origini, significato, attualità della scelta dei costituenti' *Rivista Trimestrale di Diritto Pubblico*, 3, 665-686 (2012); P. Grossi, *Il diritto civile in Italia fra moderno e postmoderno* (Milano: Giuffré Francis Lefebvre, 2021), 99.

[52] P. Perlingieri, n 46 above, 125; Id, 'La "grande dicotomia" diritto positivo-diritto naturale', in Id, *L'ordinamento vigente e i suoi valori* (Napoli: Edizioni Scientifiche Italiane, 2006), 553-562, and Id, 'Interpretazione e legalità', in P. Sirena ed, *Oltre il «positivismo giuridico» in onore di Angelo Falzea* (Napoli: Edizioni Scientifiche Italiane, 2012), 87-94.

[53] C. Mazzoni, *Quale dignità. Il lungo viaggio di una idea* (Verona: Olschki, 2019), passim.

[54] G. Pico della Mirandola, *De Hominis dignitate*, in E. Garin ed (Pisa: Edizioni della Normale, 2012), 5.

entered the supernatural order, but individual being did not have an important role. In this period, the concept of individual will, which is the foundation of labour, had not yet been developed. Gradually natural instinct became extinct and the relationship with the divinity took place through the mediation of the intellect. The form with which a human being enters into relation with the divinity is the moral law that derives from God.

The authority can be thought of in the same way as the law since a human being expresses his individuality through the intellect and the producing of utensils. The principle of authority organized society according to a hierarchical order where the role of the individual depended on his/her relationship with law. The Divine was no longer to manifest itself in nature but in the individual being through the law, so the sphere of law took effect in society. The evolution of consciousness corresponds to a departure from nature via the evolution of the utensil. In fact, making utensils projects the individual will towards a goal (*telos*) which can be considered the core definition of labour. If we look at the Bible, we notice that law is an emanation of spiritual experience. Hellenic-Roman culture switches from divine law to human law: human beings become *cives* and organize society through the law.[55] The legal sphere represents relationships both between individuals and with things, however individual evolution is also represented by the full development of utensils and by military organization. Human beings are revealed in terms of individuality in the political sphere under the law.

In the modern era, we observe the passage from the Iron Age to the age of the machine. Working relationships change completely, the individual is emancipated from the religious and political sphere and the foundation of transcendent experience is no longer the principle of obedience but the principle of freedom. While the law is dominated by the conflict between principles of authority and freedom, the economy moves away from law and begins to prevail. Labour is increasingly assimilated to goods and considered in terms of performance, not in relation to human motivation. The market power vigorously proposes a 'mercantile axiology', according to which there is no distinction between goods and values, as everything has a price. Technical development and capitalism put morality into the 'free' cultural life, which is now considered as disconnected from experience and separated from law. The

[55] J. Gordley, *The Jurists. A critical History* (Oxford: Oxford University Press, 2016), passim; R. Orestano, *Introduzione allo studio del diritto romano* (Bologna: il Mulino, 1987), passim; A. Padoa-Schioppa, *A history of law in Europe. From the Early Middle Ages to the Twentieth Century* (Cambridge: Cambridge University Press, 2017); H.P. Glenn, 'Tradition in Religion and Law, *Journal of Law and Religion* 25, 2, 503-504 (2009-2010); M. Marchesiello, 'Dignità umana e funzione antropologica del diritto nel pensiero di Stefano Rodotà (in margine a Vivere la democrazia)' *Politica del diritto*, 4, 741-766 (2018); F. Dei, 'Riconquistare Foucault. Il potere, la cultura e lo spazio dell'antropologia' *Etnografia e ricerca qualitativa*, 1, 98-110 (2021). See also M. Heidegger, *Kant e il problema della metafisica*, transleited by M.E. Reina (Bari: Laterza, 1981), 181-182; S. Cotta, n 35 above, 157.

consequence is that 'the impulses offered by morality have been replaced by those of the economy, and these are then transformed into law'.[56]

VIII. Law and a New Anthropological Question

The concepts that moved individuals and peoples are the natural history of morality. The principles which constitute the foundations of a legal order are concepts which have been defined by the will of the individual.

The sense of justice arises from feelings and comes from individual conscience through moral intuition. The feeling is the means whereby concepts gain concrete life. However, feelings move through the thought process. As soon as a person's conduct rises above the sphere of the satisfaction of purely animal desires, motives are always shaped by thoughts. Love, pity, and patriotism are motives of action which cannot be analysed away into cold concepts of the understanding. It is said that here the heart and the soul, hold sway but the heart and the soul create no motives but presuppose them.

> 'Pity enters my heart when the thought of a person who arouses pity has appeared in my consciousness. The way to the heart is through the head. Love is no exception. It depends on the thoughts we form of the loved one. And the more we idealize the loved one in our thoughts, the more blessed is our love. Here, too, thought is the father of feeling. It is said that love makes us blind to the failings of the loved one. But the opposite view can be taken, namely that it is precisely for the good points that love opens the eyes. Many pass by these good points without noticing them. One, however, perceives them, and just because he does, love awakens in his soul. What else has he done except perceive what hundreds have failed to see? Love is not theirs, because they lack the perception'.[57]

Against this background the fact of feeling would be reconsidered within the process of knowledge. If we let feelings express themselves in law, then we would have new legal concepts.[58] A jurist is called upon to know human beings and from this point of view law is a new anthropological question. The sense of justice is not a mere perception or fact without effect, but it is the impulse to research new links between concepts able to exploit the potential of the principles and the legal order.[59]

[56] A. Alpini, n 40 above, 80-81.

[57] R. Steiner, n 44 above.

[58] Accordingly, with Salvatore Pugliatti, legal certainty is not the result of mechanical repetition, but the result of trust in the virtue and knowledge of the interpreter committed to the right solution of the concrete case without prejudice and concessions.

[59] See Tribunale penale di Pisa 17 February 2022 and Giudice di Pace di Frosinone 29 July 2020 both available at www.altalex.com, which have criticized the government's practice of lockdown.

IX. Final Remarks

During the pandemic the moral demands of human beings have been disappointed by the law because the emergency has imposed many restrictions on rights, especially on the freedom of assembly and association to the point of preventing assistance to family members in hospital and during funeral rites.[60] Whereas the emergent situation seems to be incarnated in the 'new normality', the jurist feels the need to reflect again on the existential dimension of the human being and in so doing he turns to the history of human evolution.[61]

Human nature is characterized by a dual vocation: for justice and for exchanging goods.[62] Both these tendencies, developed over the centuries, are linked to the human will to act towards a purpose. Human evolution through the use of utensils demonstrates precisely this tendency by labour: the labour force lies in the motivation of the human being.[63]

The sense of justice, as commonly understood, corresponds to the cultural level acquired as a behavioural foundation of coexistence. The juridical feeling, on the other hand, is the perception felt and thought, the motivation of human action.

Consequently, juridical feeling represents a 'living impulse' of the sense of justice.[64]

In the face of the contemporary sense of justice, which presupposes the protection of the particular value of the human being, dignity, there is the

Tribunale amministrativo regionale Lazio-Roma decreto 2 February 2022 no 726 and Tribunale amministrativo regionale Lazio-Roma decreto 14 February 2022 no 919, both available at www.giustizia-amministrativa.it, which have challenged the mandatory vaccination. They have also doubted the legitimacy of the suspension from work and remuneration: on this topic, see especially, Consiglio di Giustizia amministrativa della Sicilia 22 March 2022 no 351 and Tribunale amministrativo regionale della Lombardia-Milano 14 February 2022 no 192, both available at www.altalex.com.

[60] See M. Stronati, 'Il mutuo soccorso tra storia e storiografia, ovvero ripensare il diritto di associazione' *Giornale di Storia costituzionale*, I, 285 (2020). On the change of direction in legal discourse see, also, M. Meccarelli et al, 'I diritti umani tra esigenze emancipatorie e logiche di dominio', in M. Meccarelli, P. Palchetti and C. Sotis eds, *Il lato oscuro dei Diritti umani. Esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo* (Madrid: Universidad Carlos III de Madrid, 2014), 9-10; L. Lacché, 'Il tempo e i tempi della Costituzione', in G. Brunelli and G. Cazzetta eds, *Dalla Costituzione "inattuata" alla Costituzione "inattuale"? Potere costituente e riforme costituzionali nell'Italia repubblicana,* Materiali dell'Incontro di studio, Ferrara 24-25 Gennaio 2013 (Milano: Giuffré, 2013), 381.

[61] A. Watson, 'Society and Legal change' (Edinburgh: Scottish Academic Press, 1977); L. Lacché, 'Sulla vocazione del giurista italiano. Scienza giuridica, canone eclettico e Italian style tra '800 e '900' *Rivista italiana per le scienze giuridiche*, 4, 233 (2015); P. Grossi, n 51 above, 61.

[62] A. Smith, n 2 above; R. Steiner, *I capisaldi dell'economia*, translated by I. Bavastro (Milano: Editrice Antroposofica, 1982), 26.

[63] T. Groppi, n 51 above. In this regard, see the reasoning of Tribunale amministrativo regionale Lazio-Roma decreto 2 February 2022 no 726, n 59 above.

[64] On the constant return of natural law see H. Welred, *Diritto naturale e giustizia materiale*, in G. De Stefano ed (Milano: Giuffrè, 1965), 383. However, here we intend to manifest the need for a serious anthropological reflection on law.

juridical feeling that, assigning the widest moral autonomy to the juridical vocation of human conscience calls for the right to guarantee the motivation of human action.[65]

Scholars would be well advised to follow Jemolo's invitation to rediscover the deep sense of law in order to orient themselves towards a feeling of good and evil.[66] In this regard, it would seem really beneficial for human evolution to follow the 'philosophy in law'[67] which emerges from the above considerations and which may be summarised by the following provocation: human dignity does not tolerate exceptions not even by the law.

[65] Today the personal reasons acquire legal relevance thanks to the activity of judges both in the context of the contract (see, for example, the 'concrete cause') and in the context of the communion as a criterion for the assignment of indivisible goods: see A. Alpini, 'La preferenza nell'assegnazione del bene indivisibile: il criterio dell'interesse prevalente. Il nuovo orientamento della Corte di cassazione sull'interpretazione dell'art. 720 c.c.' *Diritto delle Successioni e della Famiglia*, 2, 678-689 (2017).

[66] L. Lacché, n 60 above, 262. The Author highlights the vocation of the Italian jurist to mediate the historical approach with the comparative one.

[67] P. Perlingieri, Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti, I, Metodi e tecniche (Napoli: Edizioni Scientifiche Italiane, 2020), 9.

Hard Cases

US Employers Can't Be Required to Test or Vaccinate for Covid – Tough Road Ahead for Workplace Regulation

Alan Hyde*

Abstract

The United States Supreme Court has struck down rules of the Occupational Safety and Health Administration (OSHA) in a universally mocked decision, *National Federation of Independent Business* v *Department of Labor, Occupational Safety and Health Administration* (NFIB), that suggests that future regulation of health, safety, and the environment will face similar difficulties before a Supreme Court unwilling to grant any deference to regulatory expertise.

I. The US Occupational Safety and Health Administration

Federal responsibility for occupational safety and health was created in 1970 with passage of the Occupational Safety and Health Act of 1970.[1] Before that time, workplace safety and health was regulated, if at all, separately by each of the fifty states. Federal regulation was limited to a few ad hoc programs. Proposals for a federal approach began circulating in the 1960s during the presidential administration of Lyndon Johnson. A federal agency was finally created by Congress during the Richard Nixon administration.[2] Two factors are normally given credit for the surprising support by Republicans for a federal occupational safety and health agency. First, environmental regulation was taking place simultaneously. The Environmental Protection Agency (EPA) also was created in 1970, in this case by executive order from President Nixon. The EPA reflects simultaneous concern with cleaning up polluted air and water. Most of the United States (US) environmental policy apparatus was created during the Nixon administration. Second, Nixon believed that workers represented by labor unions could be induced to support the Republican party. His administration advanced other policies designed to appeal to organized working people, notably federal regulation of private retirement plans in the Employee Retirement Income

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[1] 29 USC paras 651-667.

[2] The history is reviewed in C. Noble, *Liberalism at Work: The Rise and Fall of OSHA* (Philadelphia: Temple University Press, 1986).

Security Act (ERISA) of 1974.[3] On Nixon's resignation in 1974, this wave of new federal agencies came to an end. Today most federal regulatory agencies date either from President Franklin D. Roosevelt's New Deal of the 1930s, or the environmental wave of the Nixon years. This is relevant because, as we shall see, the current Supreme Court lacks understanding of the process by which agencies were created and the expectations that Congress and the Executive had for them. The Court demands retroactively that Congressional delegation include magic incantations of which no one had heard.

Section 6 of the Occupational Safety and Health Act (hereafter the Act) sets out three distinct methods for creating federal occupational safety and health standards.[4] Subsection (a) permits the Secretary of Labor immediately to implement 'national consensus standards' already promulgated by nationally-recognized standards-setting organizations after consideration of diverse views.[5] Subsection (b) sets out the normal process for creating future standards. It is a cumbersome process, involving formal notice, public comment, employer applications for exemption, and judicial review.[6] As early observers noted, it creates a regulatory process slower and less responsive than some European models.[7]

Recognizing the possibilities for protracted standard setting under subsection (b), Congress also created subsection (c), Emergency temporary standards. It is this section that was severely damaged by the Supreme Court's decision in the Covid case. The statutory text authorizes such emergency temporary standards on determination by the Secretary of Labor:

> '(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.'[8]

The statutory language is broad, non-technical, and includes no limits on the Department of Labor's authority.

II. The Covid Rules

It is unnecessary here to review the history of the global Covid-19 pandemic, still ongoing as this is written. Effective vaccines were made available to

[3] 29 USC §§1001-1461.

[4] 29 USC §655.

[5] 29 USC §655 (a) (authorization for national consensus standards); 29 USC §652 (9) (definition of national consensus standards).

[6] 29 USC §655 (b).

[7] S. Kelman, Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy (Cambridge MA: MIT Press, 1981).

[8] 29 USC §655 (c)(1).

Americans in December 2020, but by the end of that year, only two point eight million people had been vaccinated.[9] Increasing vaccination distribution was a major priority of the Biden administration when it took office the following month. An initial goal of one hundred million vaccinations in the first one hundred days of the administration was achieved in fifty-eight days.[10] Vaccination was highly effective. New cases fell as half the population became vaccinated.[11] However, resistance to vaccination, even though free and readily available, slowed vaccination rates. By summer 2021, other countries had passed the US in vaccination rates.[12] Low vaccination rates directly caused high numbers of new Covid cases.

This was the situation addressed by the President on 9 September 2021, in remarks that became the basis for the Department of Labor's emergency temporary standard.[13] The President observed that eighty million people, almost a quarter of the US population, had yet to receive any vaccination. While few fully vaccinated individuals would ever contract the virus - the President estimated only one in one hundred sixty thousand per day - the large number of unvaccinated individuals had led to 'a pandemic of the unvaccinated.' The President announced plans to increase vaccinations, including the emergency rule that would reach the Supreme Court, requiring businesses employing over one hundred people to require employees either to be fully vaccinated or display weekly negative tests. The President also remarked:

> 'So here's where we stand: The path ahead, even with the Delta variant, is not nearly as bad as last winter. But what makes it incredibly more frustrating is that we have the tools to combat COVID-19, and a distinct minority of Americans - supported by a distinct minority of elected officials - are keeping us from turning the corner. These pandemic politics, as I refer to, are making people sick, causing unvaccinated people to die.
>
> We cannot allow these actions to stand in the way of protecting the large majority of Americans who have done their part and want to get back

[9] R. Spalding and C. O'Donnell, 'U.S. vaccinations in 2020 fall far short of target of 20 million people' *Reuter*s, available at https://tinyurl.com/2c2xzpry (last visited 30 June 2022); B. Lovelace Jr., 'The U.S. has vaccinated just 1 million people out of a goal of 20 million for December' *CNBC*, available at https://tinyurl.com/bdfc5uy2 (last visited 30 June 2022).

[10] B. Lovelace Jr, 'Biden will reach goal of having 100 million Covid vaccine 'shots in arms' in his first 100 days as early as Thursday' *CNBC*, available at https://tinyurl.com/46tv273a (last visited 30 June 2022).

[11] 'New HHS Report: Vaccination Linked to a Reduction of Over a Quarter Million COVID-19 Cases, 100,000 Hospitalizations, and 39,000 Deaths Among Seniors' *HHS.gov*, available at https://tinyurl.com/5ewhrppp (last visited 30 June 2022).

[12] A. Shah et al, 'How Can the U.S. Catch Up with Other Countries on COVID-19 Vaccination?' *The Commonwealth Fund*, available at https://tinyurl.com/3auta3ze (last visited 30 June 2022).

[13] 'Remarks by President Biden on Fighting the COVID-19 Pandemic' *The White House*, available at https://tinyurl.com/mr49926p (last visited 30 June 2022).

to life as normal.'

He would soon have occasion to add the unelected Supreme Court to the 'distinct minority of elected officials' standing in the way of protecting the large majority of Americans.

The Department of Labor announced the emergency temporary standard on 5 November 2021.[14] The standard contains two hundred sixty-one pages of detailed medical and economic analysis, analysis of the feasibility of the proposed standard, surveys of workers and employers, and analysis of existing regulation and its inadequacy. It is difficult to imagine that the Congress that delegated power to promulgate 'emergency temporary standards' contemplated such an extensive regulatory record. One wonders how the Department of Labor might respond to even more pressing emergencies than pandemic, even had it won this case in the Supreme Court.

III. The Decision of the Supreme Court

The Supreme Court took two pages to strike down the Department of Labor's two hundred sixty-one pages analysis.

The opinion, unusually, is not signed.[15] It is five pages long, of which three recount the procedural history of the case and summarized the standard:

> 'Covered employers must "develop, implement, and enforce a mandatory COVID-19 vaccination policy." (86 Fed Reg) at 61402. The employer must verify the vaccination status of each employee and maintain proof of it. *Id., at 61552*. The mandate does contain an "exception" for employers that require unvaccinated workers to "undergo (weekly) COVID-19 testing and wear a face covering at work in lieu of vaccination". Id, at 61402. But employers are not required to offer this option, and the emergency regulation purports to pre-empt state laws to the contrary. Id, at 61437. Unvaccinated employees who do not comply with OSHA's rule must be "removed from the workplace." Id, at 61532. And employers who commit violations face hefty fines: up to thirteen point six five three dollars for a standard violation, and up to one hundred point five three two dollars for a willful one. 29 CFR §1903.15(d) (2021).'

[14] 86 Fed Reg 61402 (5 November 2021), available at https://tinyurl.com/2p88yk47 (last visited 30 June 2022)..

[15] Brief, unsigned opinions are not as unusual as formerly, when they used to be reserved for routine matters without dissent. Increasingly, major decisions are made in unsigned opinions granting or denying stays of judicial decisions. The Committee on the Judiciary of the House of Representatives held hearings in February 2021 on the Court's increasing 'shadow docket,' which usefully review its history, but thus far has not proposed legislation, available at https://tinyurl.com/y46enhc3 (last visited 30 June 2022).

This left two pages for legal analysis staying the standard. It makes two points. First, the Court held that the Occupational Safety and Health Act authorizes only 'workplace safety standards, not broad public health measures'.[16] The standard was described as 'broad public health regulation … addressing a threat that is untethered, in any causal sense, from the workplace.'[17] Of course this is untrue, and the Court admitted as much. A contagious and unvaccinated employee is most definitely a threat in, and enabled by, the workplace, to use the Court's preferred, though unstatutory term. The Court stated in dictum:

> 'We do not doubt, for example, that OSHA could regulate researchers who work with the COVID-19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments'.[18]

Such risks are precisely the risks that the holding denies: a virus spread at work. The Court insisted that the difference was 'OSHA's indiscriminate approach.'[19] However, the statute itself permits any employer to apply for a variance from standards.[20] The Court did not mention either variance provision.

The Court thus concluded that, since the standards was a forbidden public health measure and not an occupational health matter, the businesses challenging it had demonstrated likely success if the standard were to be challenged on the merits. The second point made by the majority opinion is that the standard must therefore be stayed. Earlier Supreme Court decisions hold that four factors must be considered in issuing a stay: likelihood of success on the merits, irreparable injury to the petitioner (these are said to be the most important), effects on third parties, and the public interest.[21] The Court made no mention of

[16] National Federation of Independent Business v Department of Labor v Department of Labor, Occupational Safety and Health Administration, 142 S Ct 661, 211 L Ed 2d 448 (2022), 665 (emphasis original). The Court is not quoting from the actual statute, which does not contain the word 'workplace' or limit its reach to workplaces. See, eg, the General Duty clause: 'Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees', 29 USC §654(a)(1) (emphasis supplied). More to the point, the statutory language that the Department claimed authorized the standard, Sec 655(c)(1)(A) on emergency temporary standards, reads: 'The Secretary shall provide, without regard to the requirements of (the Administrative Procedure Act), for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines that employees are exposed to grave danger from exposure to substance or agents determined to be toxic or physically harmful for from new standards…'. The standard thus contained extensive analysis of 'grave danger', 'exposure', 'substance or agents', and 'physically harmful' since these are the statutory terms. The statute does not require any analysis of 'workplace' or 'occupational'. The Court engages in close reading of nonexistent statutory language and ignores the statute that Congress enacted.

[17] ibid

[18] ibid

[19] ibid

[20] 29 USC §655(d). The statute also provides for temporary variances in 29 USC §655(b)(6).

[21] See, eg, *Nken* v *Holder*, 556 US 418, 426 (2009), quoting *Hilton* v *Braunskill*, 481 US 770, 776 (1987).

this familiar four-factor analysis, or of any precedents on analyzing requests for a stay. Instead, the Court noted the employers' claims that implementing the standard would cost 'billions of dollars', and the Department's claim that the standard 'will save over 6,500 lives and prevent hundreds of thousands of hospitalizations'. The Court then stated: 'It is not our role to weigh such tradeoffs'.[22] This is both legally incorrect and inhumane. The Court's precedents require it to weigh such tradeoffs. OSHA weighed them, in a portion of the emergency standard to which the Court did not refer, and found employer claims of cost to be considerably exaggerated. Of course, many jurists around the world would refuse to weigh employer costs against workers' lives because it is obvious in most of the world that workers' lives are more important.

Three members of the Court joined a separate concurrence written by Justice Gorsuch that provided two additional related arguments in support of the result. First, the concurrence noted that state and local governments retain authority over public health.[23] The concurrence failed to note that control of environmental and occupational hazards became a federal responsibility in the 1970s precisely because of demonstrated inadequacy of state and local regulation. Second, the existence of concurrent state and local authority somehow suggested to the concurring justices an argument said to be based on federalism: that Congressional delegation of rule-making power to a federal administrative agency must be construed not to grant authority to regulate 'major questions.'[24] On their view, a vaccination standard would have to be expressly authorized by Congress and is not included in a general delegation to an agency to promulgate emergency temporary standards.

Three justices dissented in an opinion written by Justice Breyer. The dissent was organized around the traditional four-factor analysis of judicial stays.[25] First, the dissent objected that the employers are not ' "likely to prevail" under any proper view of the law. OSHA's rule perfectly fits the language of the applicable statutory provision'.[26] Tracking the actual statutory language, the dissent noted that the emergency temporary standard provision 'commands – not just enables, but commands' OSHA to issue a standard when, as with Covid, 'employees' are 'exposed' to a 'new hazard' or 'agent' that presents 'grave danger' that is not addressed by existing regulation.

> 'The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the

[22] National Federation of Independent Business v Department of Labor n 16 above, 666.

[23] ibid 667 (J. Gorsuch, concurring). The concurrence followed the majority in treating public health and occupational health as mutually exclusive, instead of overlapping, as is obviously the case.

[24] ibid 667-669 (J. Gorsuch, concurring).

[25] n 21 above.

[26] National Federation of Independent Business v Department of Labor n 16 above, 671 (J. Breyer, dissenting).

> majority does not contest that COVID-19 is a "new hazard" and "physically harmful agent"; that it poses a "grave danger" to employees; or that a testing and masking or vaccination policy is "necessary" to prevent those harms'.[27]

The dissent noted that nothing in the language of the statute required or suggested that public health emergencies are for that reason excluded from OSHA's mandate. 'OSHA has long regulated risks that arise both inside and outside of the workplace'[28], including emergency exits, noise, and unsafe water. OSHA specifically noted that, in the dissent's paraphrase:

> 'COVID-19 spreads more widely in workplaces than in other venues because more people spend more time together there. And critically, employees usually have little or no control in those settings'.

Second, according to the dissent, even if the merits of the argument against agency authority were strong, which they are not, the balance of equities required by precedent requires that lives be saved even if employers incur costs.

IV. Critique of the Decision

The decision has met universal derision in the first wave of online commentary.

1. Restricted Definition of Hazard

The decision rests on a supposed distinction between 'workplace' hazards and 'public health' hazards. But the decision nowhere explains the origin of this distinction, the criteria for its implementation, or the implications of what could turn out to be a major limitation on the power of OSHA and similar environmental regulatory agencies created at the same time. Certainly these uncertainties are an inducement to any regulated industry to resist regulation, not merely on the traditional grounds, but by attacking agency jurisdiction, creating a factitious distinction between agency jurisdiction and general public hazards.

Almost every hazard ever regulated by OSHA is found outside workplaces. OSHA regulates them because they affect employees, and because employees have little control over working conditions (unlike consumers who are free to select safer places of business or entertainment). But all these hazards at work are obviously a subset of public health hazards, not the antithesis in some kind of crackpot Hegelian dialectic.

If the Court is serious about confining OSHA to a set, possibly a null set, of

[27] National Federation of Independent Business v Department of Labor n 16 above, 673 (J. Breyer, dissenting).

[28] ibid

hazards found at work but not in general life activities, it will have to provide criteria for making this distinction. The distinction is not found in the statute, which, as noted, speaks of hazards, agents, and dangers, without the slightest suggestion that these are not often found outside of workplaces and regulated in parallel by other agencies. Nor is the alleged distinction between 'workplace' and 'public' hazards a part of OSHA practice during its first half-century, which, as noted by the dissent, includes extensive regulation of health and safety risks also regulated by other agencies and found in various settings. Nor does the law of the US, or any other jurisdiction, contain criteria making workplaces 'private' instead of 'public.'[29]

There are signs that the Court is not serious about its impossible quest to separate workplace hazards from public health hazards. As noted, it stated in dictum that OSHA could regulate research facilities or crowded environments. This concession does not add clarity to the distinction, which is the sole basis of the majority opinion, between workplace and public hazards. Obviously the worker exposed to Covid in a research facility or crowded workplace is also exposed to a general public hazard.[30]

The Court thus faces a major dilemma of its own making. It can assume the task of creating, out of thin air and without any guidance from the relevant statutes, highly subjective boundary lines to prevent federal agencies from carrying out the tasks that Congress assigned them. This project will be highly conducive to future litigation. Or it could retreat from the absurd and indefensible distinction between two kinds of hazards, one the subset of the other, and re-interpret its decision in NFIB as if it adopted the different, though equally absurd, rationale of the concurrence.

2. The 'Major Questions' Doctrine

Justices with an agenda of disabling regulatory agencies have long explored variations on the idea that the Constitution limits Congress's ability to 'delegate' law-making authority to expert agencies. This history cannot be explored here except to note that decades of beating the 'delegation' drum have failed to yield any principles limiting Congressional authority.[31]

The opponents of environmental, health, and safety regulation have thus retreated to doctrines of statutory interpretation, rather than Constitutional competence. A recent variant, without precedent in American law, is the 'major

[29] eg K. Klare, 'Public/Private Distinction in Labor Law' 130 *University of Pennsylvania Law Review*, 1358 (1981-1982).

[30] Indeed, on the same day as the NFIB decision, the Court upheld, as against a temporary stay, regulations by the federal Department of Health and Human Services, requiring vaccination against Covid for employees of hospitals and other health care facilities, *Biden* v *Missouri*, 142 S Ct 647 (2022) (5-4 decision).

[31] G. Metzger, 'Foreword: 1930s Redux: The Administrative State Under Siege' 131 *Harvard Law Review*, 1, 22-28 (2017)

questions' doctrine, under which a normal regulatory statute is interpreted not to delegate to the administrative agency the power to decide 'major questions.' These apparently require some kind of unspecified, more specific, delegation. In NFIB, only three justices expressly adopted the theory that Covid vaccination was a 'major question' by OSHA that falls outside its Congressional mandate.

Even if this doctrine existed, it would be inapposite to NFIB. As noted, and as the next section of this Note will show in more detail, the actual language of the Occupational Safety and Health Act enacted by Congress clearly authorizes an emergency temporary standard of the type before the Court.

However, apart from the specific statute, the entire 'major questions' doctrine is absurd. It is like saying

> 'that the bigger the emergency is, the less power OSHA has. OSHA can move fast to prevent a few bad injuries, but not if hundreds of thousands are dying'.[32] '(I)t makes little sense to say Congress must explicitly authorize the precise kind of measure OSHA took. The statutory provision concerns "emergenc(ies)," which, by definition, involve unforeseen circumstances. The appropriate response to an emergency cannot be minutely prescribed in advance'.[33]

There is no doctrine of US administrative law that states that statutes conferring authority on the executive branch must be read narrowly. A Cold War provision of the immigration laws delegates to the President:

> 'Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate'.[34]

This delegation was held to give the President largely unreviewable authority to exclude all migrants from certain Muslim-majority countries, even where the President's contemporaneous statements described a plan to exclude Muslims as such.[35] The Court was unconcerned by the absence of any executive study demonstrating any danger posed by Muslim migrants, unlike the hundreds of pages of executive study of Covid vaccination. The Court denied that the President had to produce reasons to enable judicial review. Instead, it assumed

[32] A. Koppelman, 'The Supreme Court, Vaccination, and Government by Fox News' *The Hill*, available at https://tinyurl.com/duks8pwd (last visited 30 June 2022).

[33] B. Emerson, 'Seven Reactions to NFIB V. Department of Labor' *LPE Project*, available at https://tinyurl.com/y84b38tt (last visited 30 June 2022).

[34] 8 USC §1182(f).

[35] *Trump* v *Hawaii*, 138 S Ct 2392 (2018).

arguendo that the religious freedoms of Americans seeking to sponsor relatives were infringed, but held that this could be done so long as the government produced a 'facially valid', though unsupported, security concern. There was no invocation of any doctrine calling for narrow readings of delegation and certainly no mention of any supposed doctrine that the statute did not delegate 'major questions' but only routine immigration administration.

As of this writing, the 'major questions' doctrine is just rhetoric, not a meaningful part of US administrative law.[36] Indeed, only three justices adopted it in the NFIB decision. If the Court pursues this project, it will have to develop a definition of 'major question,' criteria for distinguishing major from normal decisions, and various presumptions about how to read regulatory statutes, all enacted between fifty and ninety years ago, when neither Congress, nor anyone else, had ever heard of the supposed need for a clear statement of authority over 'major questions.' The only safe guide to these questions in any particular case, is examining the actual statute that Congress enacted. But that is what the Court did not do in NFIB.

3. The Demise of Reading Statutes for Their Plain Meaning

Various techniques for reading labor law and other regulatory statutes have been used over the decades. Between the 1940s and 1960s, it was common to argue that regulatory statutes should be read 'broadly' 'in order to achieve the Congressional purpose,' although Karl Klare showed that this was never consistent practice in the Supreme Court and co-existed with a kind of conceptualism.[37] Since the 1980s, the Court has abandoned any talk of Congressional purpose and retreated to a stultifying statutory literalism.[38]

This literalism was associated in particular with the late Justice Antonin Scalia, and it is easy to imagine how he would have written the decision striking down OSHA's vaccination rules. He would have placed heavy emphasis on the definition of 'emergency' found in whatever dictionary used the narrowest definition, and insisted without evidence that Congress must have intended this narrow 'plain meaning' of the word emergency.

The broader significance of the NFIB decision may be the demise of any

[36] While this Note was in press, a majority of the Court relied on the 'major questions' doctrine to invalidate regulation of carbon emissions by the Environmental Protection Agency, *West Virginia* v *Environmental Protection Agency*, 142 S Ct 2487 (2022).

[37] K. Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941' 62 *Minnesota Law Review*, 265 (1977-1978).

[38] eg *Nationwide Mutual Insurance Co.* v *Darden*, 503 US 318 (1992) (the term 'employee', when used in a federal labor statute, must mean 'employee' under a common law analysis looking to control of work; it is reversible error to adopt a definition of 'employee' in order to achieve statutory purpose). The US is probably alone in its absolute rejection of purposive reading of labor law statutes, G. Davidov, *A Purposive Approach to Labour Law* (Oxford: Oxford University Press, 2016).

attention to statutory texts at all.[39] As the dissent notes:

> 'The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the majority does not contest that COVID-19 is a 'new hazard' and 'physically harmful agent'; that it poses a 'grave danger' to employees; or that a testing and masking or vaccination policy is 'necessary' to prevent those harms.'[40]

The Court makes no effort to construe this language, with a dictionary or anything else. Instead it substitutes the two absurd, and universally derided, approaches we have noted: that, without regard to the actual language of a regulatory statute, it must be construed to apply only to a narrow subset of problems encompassed by its text, and, among that narrow subset, only to routine, not major questions.

It is likely that we will see this approach applied much more frequently, to any regulatory initiatives emerging from Democratic administrations such as the current administration. Congress has stopped enacting major regulation of any kind, since supermajorities are now routinely required in the Senate and Congress is usually evenly divided between Democrats and Republicans, neither with a supermajority in the Senate. President Biden, like Presidents Clinton and Obama before him, knows that regulatory legislation is unlikely, and that he will have to govern through federal agencies. In this political context, the Republican Supreme Court is the cross-punch that, following the jab of the Senate filibuster, creates the classic 'one-two punch combination' in boxing. The jab takes out legislation. The cross-punch takes out administration.

We may predict that any Biden administration regulatory initiative on global warming, climate change, carbon emissions, or any other environmental or health regulation, will be held to be a 'major decision' not expressly delegated by Congress and falling outside some limits to agency jurisdiction that the Court will pull from the air, not found in the applicable enabling statute. Health agencies will be said to have power to protect only health, not the environment. Environmental agencies will be held to narrowly defined hazards, and denied authority to regulate greenhouse gas emissions.[41]

4. Issuing a Stay Without the Required Analysis

Finally, the Court's willingness to stay the vaccination rule without any consideration of the competing equities has drawn particular scorn. As stated

[39] A. Krishnakumar, 'Some Brief Thoughts on Gorsuch's Opinion in NFIB v OSHA' *Election Law Blog*, available at https://tinyurl.com/mtff9kje (last visited 30 June 2022).

[40] National Federation of Independent Business v Department of Labor v Department of Labor n 16 above, 673 (J. Breyer, dissenting).

[41] A. Liptak 'Supreme Court Considers Limiting E.P.A.'s Ability to Address Climate Change', available at https://tinyurl.com/536xj3ms (last visited 30 June 2022).

by Mark Lemley:

> 'The question before the Court is whether to overrule the court below and grant an emergency stay of the rule preventing it from going into effect even temporarily. Under well-established Supreme Court precedent, even if the Court thinks the challenger will ultimately win, stays are granted only after balancing the hardships to each party, if the petitioner can show irreparable injury, and if the public interest requires it.
>
> None of those things is true here. Indeed, the Court doesn't even try to pretend that it satisfied the dictates of the law. And there is no way it could. There is no dispute that the Court's decision will kill tens of thousands of Americans a year and overwhelm our hospitals with half a million unnecessary new COVID cases. The Court's response is to say "It is not our role to weigh such tradeoffs." That is false. It is literally their ONLY job in deciding whether the Sixth Circuit abused its discretion in denying a stay.
>
> This is a lawless order driven by nothing other than politics. The Court should be embarrassed. And I think it will come to regret abandoning even the pretense of following the law.'[42]

Or, to quote Andrew Koppelman again:

> '(Justice) Alito demanded of Solicitor General Elizabeth Prelogar that, if the Court puts the regulation on hold, 'Are you going to say, well, they're causing people to die every day?' If you want to avoid being accused of killing people, you might try not killing people.'[43]

V. Conclusion

There is no dispute that the current Supreme Court lines up with the extreme right wing in American politics. Media coverage normally focuses on such important issues as abortion and reproductive rights, gun rights, voting rights, and ability to redress racism and segregation. Equally important, however, is the Court's agenda to give businesses the legal tools to resist any kind of regulation.[44] Future courts might retreat from some of the evident absurdities of NFIB, particularly its failure to make any kind of argument from the text of the statute and substituting factitious definitions that no court will be able to administer, or even make sense of. American law professors, including those

[42] The reference is to a Facebook post dated 13 January 2022.
[43] A. Koppelman, n 32 above.
[44] G. Metzger, n 31 above, is a good introduction.

quoted here, already invoke the case as an example of how foolish the Court looks when it deviates from its own precedents and pretends not to know what everyone knows. It is likely, however, that the decision will instead be expanded by the Court as it further impedes regulatory initiatives by elected Democratic administrations.

Digital Inheritance, Right of the Heirs to Access to the Deceased User's Account, Non-Transferability Clauses: An Overview in the Light of Two Judgments Issued by Italian Courts

Ilaria Maspes*

Abstract

The transferability of digital assets is becoming more and more important due to increasing importance of digitalization of assets. In legal terms, this issue is progressively more challenging due to the difficult coordination between inheritance law – which differs between jurisdictions – and the general terms and conditions imposed by operators providing digital services in the global market. From this perspective the article examines the issues arisen in two recent decisions issued by the Court of Milan and the Court of Bologna related to the heirs' right to access to a deceased's account.

I. Introduction

In the last twenty years, Scholars and courts around the world have been called to question the fate of digital inheritance and in particular the boundaries of private autonomy in disposing the inheritance of digital assets.

Until a few years ago, the Internet, for the majority of users, had a dual purpose: sending and receiving e-mail and consulting websites. The (r)evolution that the online world has undergone in recent years is inestimable but, as far as relevant here, this article will focus on the circumstance that the Internet allows access to digital materials, stored on remote servers (the so-called 'clouds') that have an intrinsic economic – or even moral – value.[1]

In the current 'digital age', the real world is overlaid by a virtual reality that coexists in parallel and is made up of all the data and information circulating on the web which has been named, with a neologism, the 'datasphere'.[2]

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[1] U. Bechini, 'Disposizione di beni digitali' in *Tradizione e modernità del diritto ereditario nella prassi notarile*, Atti dei Convegni Roma, 18 marzo 2016 - Genova, 27 maggio 2016 - Vicenza, 1 luglio 2016, 1 *I quaderni della Fondazione Italiana del Notariato*, 241-246 (2016)

[2] V.Z. Zencovich, 'La "datasfera". Regole giuridiche per il mondo digitale parallelo', in L. Scaffardi ed, *I 'profili' del diritto. Regole, rischi e opportunità nell'era digitale* (Torino: Giappichelli, 2018), 99-109. The importance of the virtual reality in the nowadays life is testified by the interest demonstrated by the European Union in its general regulation. On this purpose see A. Maniaci and A. D'Arminio Monforte, 'La prima decisione italiana in tema di "eredità digitale": quale tutela post mortem dei dati

The digital age registers new economic items (represented by data, which are produced and conveyed in the context of the 'digital ecosystem') that have joined the list of assets to be handled after death.[3]

Since a wider proportion of wealth in modern economies will be made up of intangible goods, a clear legal framework regulating the handling of digital assets would be essential.

As it is known, Italian inheritance law, as well as inheritance law of all modern legal systems, developed in a different socio-economic environment that did not contemplate digital assets.[4] However, in the modern economy delicate questions arise about the treatment thereof after the death of their owner: in the absence of a legislative framework, a fundamental role is played by courts.

Starting from this perspective, the two Italian Courts' decisions herein discussed[5] are particularly relevant since they represent the first Italian rulings on the heirs' right of access to the digital data of a deceased.

It is also interesting to note that the matter at stake in such decisions is not the digital inheritance itself, but rather the transfer of the right to access to the accounts containing the data saved and stored in the server of an Internet service provider.

II. Facts of the Cases and Rulings

1. Factual Background

On 9 February 2021, the Tribunal of Milan[6] ruled on a case submitted by the parents of a twenty five years old chef, died in a car accident, against Apple Italia (an Apple Group company), in order to obtain the access to their son's cloud accounts and to all the files, photos and digital data stored in his smartphone for the purpose of collecting the memories of the son and publish a collection of his culinary recipes.

personali?' *Il Corriere Giuridico*, 658, 661-670(2021). The two authors point out the 'whereas clause' no 1 of the UE Regulation no 1807/2018, that states: 'The digitisation of the economy is accelerating. Information and Communications Technology is no longer a specific sector, but the foundation of all modern innovative economic systems and societies. Electronic data are at the center of those systems and can generate great value when analyzed or combined with services and products (…)'.

[3] Y. Mandel, 'Facilitating the intent of deceased social media users' 39 *Cardozo Law Review*, 1915, 1909-1943 (2018).

[4] C. Camardi, 'L'eredità digitale. Tra reale e virtuale' *Il diritto dell'informazione e dell'informatica*, 65-93 (2018).

[5] Tribunale di Milano 9 February 2021, available at https://dirittodiinternet.it; Tribunale di Bologna 25 November 2021, available at https://tinyurl.com/2yevrczu (last visited 30 June 2022).

[6] For other contributions concerning the decision issued by the Court of Milan, see beside A. Maniaci and A. D'Arminio Monforte, n 2 above, also I. Maspes, 'Morte "digitale" e persistenza dei diritti oltre la vita della persona fisica' *Giurisprudenza Italiana*, 1601-1609 (2021) and F. Pinto, 'Sulla trasmissibilità mortis causa delle situazioni giuridiche soggettive digitali' *Rivista del notariato*, 701 (2021).

Upon Apple's refusal to provide access to their son's account,[7] the applicants took legal action pursuant to article 700 of the Italian code of civil procedure to obtain an order to provide such access against Apple.

The case decided by the Tribunal of Bologna on 25 November 2021 is very similar to the previous one. It concerns the mother of a boy who committed suicide, which sued Apple to get access to the digital accounts associated to the ID Apple of her dead child.

In this case too, Apple had rejected the mother's request, alleging that it could not authorize such requests in the absence of a judicial order.

Once Apple was admitted in the proceeding, it totally deferred to the Court's decision except for pointing out some specific items the Judge's order had to set out in order for Apple to allow access to the deceased's accounts.[8]

In both cases Apple did not oppose to the claimants' request. In the proceedings before the Tribunal of Milan, Apple did not even take part in the proceedings; in the proceedings before the Tribunal of Bologna, Apple only took part to the proceedings to sue Apple Distribution International (the Apple group company that could have complied with the plaintiff's requests) and to indicate some specific items the Judge's order had to set out in order for Apple to allow access to the accounts of the deceased.

2. Ground for the Judgments

Both decisions upheld the plaintiffs' request and ordered Apple to provide access to the digital data and accounts of the deceased relatives.

It is interesting to note that, in the absence of any reference to digital succession in Italian inheritance law, both decisions, in granting access to digital data, referred to the provisions contained in Data Protection Code (decreto legislativo 30 June 2003 no 196) as amended by decreto legislativo 10 August 2018 no 101, which implemented in Italy the discipline provided by European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016on the protection of natural persons with regard to the processing of and on the free movement of such data personal data (General Data Protection Regulation the

[7] Apple required compliance with a series of procedures that did not belong to the Italian system and that were instead typical of the US Law, as well as the fulfilment of certain requirements set out in the Electronic Communications Privacy Act; it also required that the request come from an 'administrator or legal representative of the deceased's asset'.

[8] As explained in the previous note, the requirements Apple asked for in the case decided by the Court of Milano have been considered not admissible according to the Italian legal system. In the second case, decided by the Tribunal of Bologna, Apple asked the applicants to obtain a Judge's order indicating the following information: name and Apple ID of the deceased; the name of the relative requesting access to the deceased's account; confirmation that the deceased was the user of all accounts associated with the indicated Apple ID; confirmation that the applicant is the legal trustee, representative or heir of the deceased and that the applicant's authorization constitutes legal consent; confirmation that the Court requires Apple to provide assistance in accessing the deceased's account data.

so called 'GDPR').

The Tribunal of Milan pointed out that GDPR did not apply to the case since the recital no 27 of the GDPR states, on one hand, that 'the Regulation does not apply to the personal data of deceased persons' and, on the other hand, that 'Member States may provide for rules regarding the processing of personal data of deceased persons'. In light of this last provision, decreto legislativo no 101/2018 has introduced in Data Protection Code article 2-*terdecies* specifically dedicated to the issue of *post-mortem* protection and access to the personal data of a deceased person. Pursuant to the aforementioned provision, the rights to access to the personal data of a deceased person may be exercised by those who have an interest of their own, or who act to protect the data subject, as its representative, or for family reasons, unless the deceased person had expressly prohibited it in a written statement.[9]

The Court outlined in this respect that it is not clear whether Art 2-*terdecies* concerns a matter of *mortis causa* acquisition or of a legitimation *iure proprio*. The Court, therefore, referred to what the Scholars have defined as the 'persistence' of rights beyond the lifetime and it concluded that the general rule laid down by our legal system is that the rights of the interested party survive after death and that they can be exercised, *post mortem*, by certain persons entitled to exercise such rights.

In the Court of Milan case, it was highlighted that the parents of the dead boy had the right to obtain access to the data of the smartphone precisely because of the '*family reasons deserving protection*' (ie the family relationship and, in particular, the commemorative interest) granted under the (new) Art 2-*terdecies* of Data Protection Code. As already highlighted, the only limitation to this right is a written declaration by the deceased prohibiting the exercise of such rights, which was not the case in the situation at stake.

Likewise, the Court of Bologna, which decision is based on the same grounds developed by the Court of Milan, recognized that the mother had an own interest in exercising the rights to access to digital data belonged to her son, based on 'family reasons deserving of protection', granted by the Art 2-*terdecies* of Data Protection Code.

[9] The Art 2-*terdecies* of the decreto legislativo no 101/2018 provides the following rules: 1. The rights encompassed within articles 15-22 GDPR which are related to deceased persons could be exercised by a person who acts in their own interest or acts to protect the interests of the deceased, as an agent, or for familial reasons that are worthy of protection. 2. The exercise of the aforementioned rights is not admitted in certain cases indicated by the law or, solely with respect to direct offers by information society services, where the data subject has expressly prohibited the exercise through a written statement presented or communicated to the controller. 3. The will to prohibit the exercise of the aforementioned rights must be unambiguous, specific, freely given and informed; the prohibition could affect only the exercise of some of the rights encompassed within articles 15-22 GDPR. 4. The data subject has the right to revoke or modify the prohibition at any time. 5. At any rate, the prohibition cannot be detrimental to third parties' exercise of patrimonial rights deriving from the data subject's death, nor to their right to defend their interests in court.

These two decisions clearly show the complexity of the issue relating to the transmission of digital inheritance: due to the regulatory vacuum regarding digital inheritance, both the Milan and Bologna Tribunals decided the cases from the mere perspective of the processing of personal data, leaving out aspects strictly connected to the digital inheritance.

Indeed, as will be discussed below, the issue not only involves aspects of inheritance law, but also those relating to the protection of privacy.

III. Digital Goods and Digital Asset

Before moving on to the merits of the issues raised by the two judgments, it is necessary to clarify the meaning generally attributed to the concept of 'digital heritage' (*patrimonio digitale*) and 'digital goods' (*beni digitali*).

Starting from the definition of good provided by Art 810 of Italian Civil Code, there is no doubt that digital goods can be considered assets according to the Italian legal system. In particular, the notion of digital goods can extend to a wide range of categories of 'things' with the peculiarity of being located in the virtual reality.

These goods can be classified according to their nature, either patrimonial or non-patrimonial.[10] Non-patrimonial digital goods are all those assets that can only be valued in terms of their relevance to individual, family, emotional or social interests, such as, for instance: e-mails, family photographs, intimate or personal computer writings (including online diaries, blogs, personal notes, SMS messages, messages sent and received via chat, text or voice messages sent via Whatsapp, etc), personal e-mail correspondence, personal and family photographs, personal and family audiovisual recordings (films) and, in general, all digital memories that have an emotional or sentimental value.[11]

Digital goods with a patrimonial content, on the other hand, are characterized by their intrinsic economic value and the related faculty of their owner to use them on an economic level (eg software, digital photographs taken by a professional photographer, an architect's plan drawn through Computer Aided Design programs, etc).[12]

Considering the subject of digital inheritance and the decisions of the two

[10] See also the definition provided by A. D'Arminio Monforte, *La successione nel patrimonio digitale* (Pisa: Pacini Editore, 2020), 70: digital goods are basically those that can be represented in binary format, deriving by 'binary digit', that is a sequence composed of a series of numbers, namely series of 0 and 1, which can be read by a computer. C. Camardi, n 4 above, 68, specifies that the definition of 'digital goods' includes documents stored in the cloud, accounts, emails, passwords, electronic goods purchased on the net (music, films, software), digital investments (bitcoins and cryptocurrencies), e-books, software and, more generally, data entered on the Internet and referable to an individual; alternatively, and maybe more simply, may be considered as digital assets all data existing on a computer support (PC, USB pen drive, etc).

[11] A. Maniaci and A. D'Arminio Monforte, n 2 above, 665.

[12] S. Allegrezza, 'Il problema dell'eredità digitale nella trasmissione di archivi e biblioteche personali' *Bibliothecae.it*, 355, 352-400 (2020).

Italian Courts, also the account appears to be of great importance. The account may be defined as a set of functionalities, tools and contents, attributed to a single user, who is provided with access credentials (username and password). It describes, therefore, a virtual private place, in which each user has his own space for storing his files and in which he can perform those activities related to the peculiar service offered by the Provider.[13]

Notwithstanding that the account may be part of the digital asset, usually it is not a digital good in the strict and technical sense, but rather the result of a contractual relationship between the Service Provider and the user, by virtue of which the latter can make use of a service and a specific virtual environment, usually customizable, having certain contents and specific functionalities.[14] The propriety of the account belongs to the Service Provider and its use is regulated by the contract that the user signs by registering. Since it is always protected by access credentials, the account is often equated with a safety deposit box.[15]

What is very important is to avoid confusion between 'account' and 'access credentials': accounts refer to the goods and services made available by a Provider, whereas access credentials are the mechanism needed to access those goods and services.[16] Thus, even though access credentials are not technically digital goods, they are supposed to have a fundamental role for the inheritance process, given that they allow, beside the transmission of any kind right (real or personal) over the digital asset, also the traceability of the digital assets to the deceased. The transmission of credentials is one of the most complex aspects in the context of succession of digital assets: in fact, they are generally known only to their creator, they are often composed of complex characters, they can be updated periodically and be associated with another instrument, such as a OneTime Password (OTP) produced by the authentication system and then delivered on another device (eg via SMS or e-mail).[17]

Besides, to obtain some useful hints that may be taken into consideration within the Italian debate on these subjects, it seems interesting to look to other classifications and definitions raised in other legal systems and provided, for instance, by the American doctrine, that first that had to face these matters as the majority of the Internet Service provider are precisely based in the US. It was outlined that a new kind of assets had emerged, which are different from other categories of digital and intangible assets (such as royalties, online banking and investments): the income-generating digital accounts (IGDA's). The so called 'income-generating digital account' refers to accounts which may generate an earning for their owners, such as YouTube. This provider accounts allows users

[13] V. Barba, *Contenuto del testamento e atti di ultima volontà* (Napoli: Edizioni Scientifiche Italiane, 2018), 284.

[14] S. Allegrezza, n 12 above, 356-357.

[15] A. Maniaci and A. D'Arminio Monforte, n 2 above, 665.

[16] S. Allegrezza, n 12 above, 357.

[17] n 16 above.

to upload their own digital content (ie videos), granting money earning by displaying targeted ads and with no need for further input by the user. Under inheritance law, the transfer of IGDAs to the heirs of the user may cause issues, considering that IGDAs depend on a contractual agreement and for this reason they are regulated by the general terms and conditions between the Internet service provider and the user.[18]

IV. The Concept of 'Digital Inheritance'

The notion of 'digital inheritance' usually refers to all data and digital goods, belonging to a determined subject, circulating in the virtual reality.[19]

This concept has been developed by Scholars in an attempt to frame the problem of the destination of digital asset after the death of the person they used to belong to. Moreover, it has been used to refer to different situations: the *post mortem* management of digital identity, the criteria for the *post mortem* allocation of rights to digital goods and also the inheritance of data.[20]

The interests that come to the fore with regard to digital assets – and to accounts in particular – have a twofold nature: interests in accessing digital contents (eg e-mail, attachments, images, files of various types) and interests in managing (maintaining, supplementing, deleting) such contents. These interests are not necessarily patrimonial: for example, the management of digital content may pursue lucrative goals (eg web sites run by famous bloggers or web pages that are part of a corporate organization), but also ideal and memorial goals, as it happens – and it actually happened in the two cases decided by Italian Courts – when family members feel the need to keep alive the digital identity of their relative represented on the page owned by a social network Provider.[21]

[18] L.T. Reed, 'Contractual Indescendibility: examining inheritance of income generating digital accounts' 20 *Columbia Science and Technology Law Review*, 93, 94-98 (2018). The author outlines that 'the term "income-generating digital account" refers to an account with a digital service provider, usually online, that can generate income without input from the account holder. For example, YouTube accounts allow users to upload their own video content. Once the video is uploaded, the user can earn money by displaying targeted ads. As soon as the video begins to earn money, the account requires no further input or work on the part of the user to continue generating revenue. The account holder can, of course, upload more videos to increase their earnings, but they can also simply continue to earn revenue on their existing content. Advertising revenue is the most common method of generating income from a digital account, but it is not the only one. IGDAs arise from a contractual agreement between a user and a service provider. As such, they are governed primarily by the contractual terms of service between the service provider and the end user (…)'.

[19] See C. Camardi, n 4 above, 75. According to the author, the notion of digital inheritance generally collects data and information that are not stored by the deceased on supports which are in his/her direct availability, but on the web, on specialized sites or on servers controlled and owned by third parties.

[20] J.A. Castillo Parrilla, 'The legal regulation of digital wealth: commerce, ownership and inheritance of data' *European Review of Private Law*, 826, 807-830 (2021).

[21] S. Delle Monache, 'Successione mortis causa e patrimonio digitale' *La nuova giurisprudenza*

The differentiations described above, as well as the distinction between digital assets with a patrimonial content and digital assets with a non-patrimonial content are of particular importance if referred to the Italian inheritance law, since that the doctrine posed the question whether the inheritance includes only assets with patrimonial content or also those with a mere emotional value.

Some Scholars recognize that the will may always express the deceased's wish beyond patrimonial and non-patrimonial aspects: in this perspective, any disposition with a non-patrimonial content should be valid under the Italian legal system.[22]

At the same time some Scholars point out that goods with only a personal and non-economic content could not be included in the *strictu sensu* concept of 'inheritance' and they may be at the most transferrable to relatives who bear a familiar interest.[23]

Indeed, it was highlighted[24] that the term 'inheritance', under a technical and juridical point of view, refers to a process of circulation of rights and of goods that are referred to them. Moreover, the *mortis causa* succession has always had, according to the legal tradition, the role to solve the issue of *vacatio* in the ownership of legal relationships that exists only in relation to tangible or intangible assets (eg domain names, blogs, web pages) with an economic value.[25]

This is why, according to some Authors the expression 'digital inheritance' or 'succession in the digital asset' should be used, in the majority of the cases, only in a 'descriptive' sense, considering that the real matter related to digital goods concerns the identification of those who have the right to access or manage the deceased's digital goods themselves.[26]

The difficulties involved in solving succession issues related to digital assets emerges in the two cases decided by the Court of Milan and the Court of Bologna.

civile commentata, II, 460-468 (2020).

[22] A. Magnani, 'Il patrimonio digitale e la sua devoluzione ereditaria' *Vita notarile*, 1304,1281-1307 (2019), who considers valid under the Italian legal system also wills with a non-patrimonial content in accordance to an extensive interpretation of article 587 of the Civil Code referring to non-patrimonial dispositions. On this purpose, see also V. Cuffaro, 'Il testamento in generale: caratteri e contenuto', in P. Rescigno ed, *Successioni e donazioni* (Padova: CEDAM,1994), I, 763, who outlines that testamentary dispositions represent the individual's autonomy in expressing their will and, moreover, that the inheritance law does not forbidden dispositions with a 'atypical' non-patrimonial content. The same opinion is sustained by G. Perlingieri, 'Il ruolo del giurista nella modernizzazione del diritto successorio tra autonomia ed eteronomia' *Diritto delle successioni e della famiglia*, 2, 1-12 (2018): the author states that it makes no sense to distinguish between typical dispositions (with a patrimonial content) and atypical dispositions (with a non-patrimonial content), given that the best criteria of evaluation should be based on the legitimacy of the dispositions themselves and the protection they deserve according to the legal system.

[23] L. Carraro, 'Il diritto sui ricordi di famiglia', in Studi in onore di A. Cicu (Milano: Giuffrè, 1951) I, 159; A. Zaccaria, Diritti extra-patrimoniali e successioni. Dall'unità al pluralismo nelle trasmissioni per causa di morte (Padova: CEDAM, 1988), 236-239.

[24] C. Camardi, n 4 above, 65.

[25] S. Delle Monache, n 21 above, 468.

[26] ibid 468.

In such cases, the courts, in order to avoid going into the intricate aspects of inheritance law, have based their decision on the legislation on the protection of personal data which, as explained above, the Italian legislator has also regulated for data concerning the deceased.

V. The Italian Legal Framework on Matters Related to 'Digital Inheritance'

Notwithstanding the legislative vacuum in the area of inheritance law, in Italy a first relevant legislative intervention was made with the above-mentioned Decreto legislativo no 101/2018 that has introduced a specific provision regarding the processing of personal data concerning deceased persons.[27] It may therefore be considered the first provision of the Italian legal system setting the basis for a protection of the 'digital inheritance' phenomenon.

In particular, as already noted above, Art 2-*terdecies* of Data Protection Code states that the rights provided by Arts 15 to 22 of GDPR, related to deceased persons, could be exercised by a person who acts in their own interest or acts to protect the interests of the deceased, as an agent, or for familial reasons that are worthy of protection. Under the subjective profile, among the persons that may exercise these rights we find the agent (*mandatario*), appointed in virtue of a previous disposition of the deceased, and those who act for an 'own interest' and 'familiar reasons'. This second cause is the one that was recognized by the Court of Milan and of Bologna in the two above-mentioned cases. It is interesting to note that beyond the specific 'family interests', Art 2-*terdecies* primarily refers to a broader and undefined interest of the entitled party. In this respect, the provision leaves wide margins for case law to identify the 'interests' considered relevant and it will therefore be interesting to see how Courts will apply it.

Thus, in Italy the regulation on data protection does not represent an obstacle, differently from what happens abroad, especially in the American legal system (below para VI), and instead it seems to represent, so far, the only element to cling to with the aim of regulating the transfer of personal digital data of a deceased person.

VI. General Terms and Conditions Provided by the Internet Service Provider on Digital Data Transfer

One of the main issues regarding the transmission of digital assets concerns the conflict between inheritance law and the general terms and conditions imposed by the Internet service providers, which are necessarily accepted by the user with a simple click when creating an account to use the service.

[27] For the text of art 2-terdecies, see n 9 above.

This situation is becoming much more complicated due to the contrast between the transnational nature of the market in which the network service providers operate and the territorial extent of the legal system to which the user of the service belongs.[28]

As a matter of fact, as it is well known, the main providers are based in the United States, and mainly in the Silicon Valley, and consequently the contractual conditions imposed to the users are based on US law and, in particular, on California law.

Besides, it is undoubted that for a global market player it is almost impossible to establish rules or practices that meet the requirements of the inheritance law of each possible jurisdiction.

Due to these reasons, the general terms and conditions often contain provisions aimed at limiting or excluding the transmission of digital data. The result is that each social network has a different way of dealing with the users' death:[29] the most stringent solutions bar any transfer of the account after death (and also during life);[30] in other cases, attempts have been made to regulate the post-mortem transfer of digital data: transforming the account into a 'memorialized profile', deactivating the profile with the definitive deletion of all data and content, giving the chance to identificate a person entitled to manage the account in case of death, as for instance the 'legacy contact' (*contatto erede*) regulated by Facebook[31] (and more recently also by Apple).[32] However, in most cases the account and all the digital data are deleted after a certain period of inactivity so that the possibility for heirs to obtain access is practically prevented from the outset.[33]

[28] Because of the difficulties that the heirs may encounter in obtaining access to – and dispose of – the digital data of the deceased, part of the doctrine believes that the ordinary instruments already provided by law are the best way to regulate the transmission of digital assets: M. Cinque, 'La successione nel "patrimonio digitale": prime considerazioni' *Nuova giurisprudenza civile commentata*, 654, 645-655 (2012); U. Bechini, 'Password, credenziali e successione mortis causa' *Consiglio Nazionale del Notariato Studio 6-2007/IG*, available at https://tinyurl.com/bp93jmfj (last visited 30 June 2022).

[29] L.T. Reed, n 18 above, 98-99, remarks that 'any request to change the standard contractual provisions would likely go unanswered, making this option ultimately unrealistic'.

[30] Yahoo's terms of service (clause 3a) expressly exclude the transferability of the account and provide that any rights related to them terminate upon the account holder's death.

[31] Facebook (clause 5.5) recognize the possibility to appoint a legacy contact (*contatto erede*), who may manage the memorialized account once the user is dead. The legacy contact is defined as the person chosen to manage account if it is memorialized. According to the Facebook terms of use, the legacy contact can: make a featured post of the deceased's profile (eg share a final message on his behalf or provide information about a memorial event); view posts, even if privacy was set to 'Just Me'; decide who can see and publish commemorative posts, if the memorial account has a section for such posts; delete memorial posts; edit who can see posts in which the deceased has been tagged; remove the deceased's tags published by someone else; respond to new friend requests; edit the profile; update profile and cover images; request for removal of the account itself.

[32] See Apple's terms and conditions available at https://www.apple.com/legal/internet-services/itunes/.

[33] For an accurate analysis of the terms of use of the biggest and common service providers and

The main reason that leads the Internet service providers to exclude the accounts from the succession of a deceased user appears to be related to the alleged protection of the deceased's privacy,[34] although much more likely it is related to the need to avoid costs related to the succession of users.

Undoubtedly the impossibility of obtaining the transfer of an account *post mortem* could represent a problem not only with regard to income generating digital accounts (ie YouTube), but also with regard to other kind of social network's profiles (ie Facebook or Instagram) created and managed in order to promote brands and various businesses, since that nowadays marketing has become primarily focused on these communication channels.[35]

From a legal perspective, it is necessary to verify whether the non-transferability clauses and other modalities of transfer of digital assets unilaterally imposed by service providers are valid in light of the rules on inheritance law and protection of privacy of individual legal systems and, specifically, of the Italian one.[36] In fact, as it can be easily imagined, the conflict between the general terms and conditions imposed by Internet service providers and the inheritance rights of users governed by the various national laws has generated numerous disputes worldwide.[37]

social networks (Facebook, Instagram, LinkedIn, Twitter), see Y. Mandel, n 3 above, 1922-1928.

[34] Very often the sources of law Internet service providers cling to are the Stored Communications Act (SCA) and the Computer Fraud and Abuse Act (CFAA). According to the SCA, unauthorized access to stored communications is forbidden and it represents a criminal offence, for companies providing Internet services, to disclose digital communications to third parties, unless there is a Court order or the owner's consent. On the other hand, the CFAA prohibits to access and obtain information from a service provider's computer with no authorization. It is evident that both the SCA and the CFAA have different objects and aims in comparison with inheritance Law. On this purpose, in order to have a point of view on the US legislation, see always L.T. Reed, n 18 above, 102-103: 'The SCA was enacted in 1986, before email use became common, and long before major digital services like Facebook and Google were founded. The drafters were mainly concerned with privacy protection and did not consider the Act's impact on the probate process. (…). The Stored Communications Act and the Computer Fraud and Abuse Act (CFAA) work in conjunction to make IGDAs and the income they generate effectively uninheritable (…)'.

[35] See, Y. Mandel, n 3 above, 1929-1930: '(…) Accounts with such a purpose, rather than one that is used solely as a personal account, should be able to be passed to someone else, especially where there is value or potential value in the account, and when the account holder would have wanted someone else to have such access. (…)'. See also L.T. Reed, n 18 above, 101: 'In the case of many IGDAs (…) if an account holder dies, the heirs are not automatically entitled to the current or future income that the copyrighted content generates. Even if the will devises control of the account to the copyright heir, such a transfer would violate the terms of service, which explicitly prohibit transferring the account. The copyright heirs' legal options at this point are limited (…)'.

[36] As remarked by S. Delle Monache, n 21 above, 466, the French Law (article 40-1, Loi 78-17 of the 6 January 1978) could be a model to follow: in fact it excludes that the particular dispositions of the person concerned on the post-mortem processing of his personal data may result just from the signing of general conditions of the service (*conditions généralés d'utilisation*).

[37] Lot of authors went deeply through the cases arisen in the last years from abroad jurisdiction (mainly USA and Germany) on the matter of the heirs' right to access to the accounts of a deceased person, see S. Allegrezza, n 12 above, 367-374. With particular regard to the well-known decision issued by the German Supreme Court (BGH, 12.7.2018, Case III ZR 183/17), see F.P. Patti, F.

These problems are not only due to the incompatibility of individual clauses with the inheritance legislation of the various European legal systems, but more generally to the different economic-legal model of the American system on which Internet Services Providers tend to be based.[38] In order to provide an idea of the possible different approaches, the e-mail provider Yahoo (based in the United States) prohibits in its general conditions the transfer to the heirs of the mail account of the deceased,[39] while the email provider Libero (based in Italy) allows heirs to obtain access credentials to the account of the deceased through a simple procedure requiring the filing of some documents (such as death certificate of the account holder; identity document of the deceased; identity document of the heir; self-declaration certifying the name of the account being requested and the applicant's qualification of heir).[40] In fact, according to Italian law, heirs have the right to receive the deceased's correspondence, and this rule applies also to e-mails.

In this context, we are probably witnessing the arise of a new form of transnational law, fed by a multitude of different sources, which is not implemented by uniform rules but no less able to guide the behavior of operators at global level. However, the desirable trend, especially from the Italian point of view, should move towards the regulation of the right of access of the heirs to all the elements that make up the digital asset.[41]

Bartolini, 'Digital inheritance and post mortem data protection: the Italian reform' *Bocconi legal studies research paper series*, n 3397974, 1-12 (2019), available at https://tinyurl.com/yc5wdsdn (last visited 30 June 2022). See also I. Maspes. n 6 above, 1607-1608.

[38] G. Resta, 'La successione nei rapporti digitali e la tutela post-mortale dei dati personali' *Contratto e Impresa*, I, 94, 85-105 (2019), who affirms that in the US Law the thesis according to which '*actio personalis moritur cum persona*' is still predominant, as demonstrated by the Restatement of Torts 2nd (1977) that in § 652 stated that 'except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded'.

[39] In reEllsworth, No 2005-296, 651-DE (Mich.Prob. Ct. 2005). The first case on the issue of post-mortem transmission of digital assets was decided by the Oakland County Probate Court and it concerned the general terms and conditions imposed by Yahoo. In this case the parents of a prematurely deceased boy made a request to Yahoo who managed their son's e-mail account to obtain the access passwords and the transmission of all the communications contained therein. The provider rejected the request on the basis of certain provisions contained in the general terms and conditions of the contract accepted by the deceased when he created the account and, in particular, the clause of 'no right of survivorship and no transferability', which provided for the 'non-transferability' of the account and the termination of the service upon the death of the user, and the clause prohibiting the provision to third parties of the information and data contained in the mail account, except in virtue of a Court order. After a long proceeding, the Court partially granted the parents' request by issuing an order for the provider to hand over the e-mails received by their son and saved on the account, but rejected the request to transfer the account's access keys due to the no-transferability clause in the contract.

[40] On this regard, see S. Allegrezza, n 12 above, 379-380.

[41] U. Bechini, n 1 above.

VII. General Terms and Conditions Provided by the Internet Service Provider on Post-Mortem Digital Data Transfer in Light of Italian Inheritance Law

It is clear that one of the main issues at stake is the compatibility of the conditions imposed by internet service providers on the *post mortem* transfer of digital assets and accounts' access keys with Italian inheritance law.

A clear example of the difficulties that may arise from the compatibility with Italian law of general terms and conditions designed on the American legal model is the provision of Facebook regarding the 'legacy contact'.

In order to regulate the management of accounts after the death of its users, Facebook has in fact provided the option to memorialize the deceased users'. After an account has been made commemorative, it becomes inaccessible (even through the passwords of the deceased user) and unchangeable. The account then becomes a 'wall of posts' that only user-friends can continue to visualize and on which is possible to leave messages to remember the deceased user. Furthermore, clause 4.5.5 of Facebook terms of service states that users can designate a person (the so called 'legacy contact') to manage their account once it has been made 'memorialized'.

Even though the aim of this Facebook's provision is to allow the users to guarantee a management of their account after death, it is necessary to analyze its consistency with Italian inheritance law.

On this last point, it is problematic to legally frame and define according to Italian law the figure of a 'legacy contact': it could be ascribed to the figure of an agent (*mandatario*), in relation to a *post mortem mandate ad exequandum*, or to the figure of the will executor (*esecutore testamentario*).[42]

The question is not only theoretical due to the following arguments. In the first case, the appointment mechanism of the legacy contact, that does not entail notification and subsequent acceptance by the person identified - who would acknowledge the appointment only once the succession has been opened - would lead to exclude the configuration of a mandate.[43]

In the case of the will executor, it may be justifiably doubted whether the

[42] I. Maspes, n 6 above, 1606. The Author here remarks that the Facebook legacy contact is hardly reconcilable with the general figure of the mandate as well as with the institute of the will executor pursuant to article 700 of the Civil Code.

[43] ibid 1606. The Author notes that the modalities of appointment of the legacy contact of Facebook differ from those of the contract of mandate as a bilateral *inter vivos* agreement. The legacy contact is not aware of his designation, which is only made known to him upon the user's death. Pursuant to Italian legal categories the legacy contact appointment would not be an *inter vivos* agreement, but a unilateral act with an after-death efficacy. The figure could not even qualify as a testamentary mandate (*mandato testamentario*); in fact, Italian scholars sustain the invalidity of a mandate contained in a will, because of the lack of bilateralism and the invalidity of a mandate proposal expressed by will, which would lose efficacity once the proponent is dead pursuant to article 1329, comma 2 of the Civil Code. In this terms, see E. Betti, *Teoria generale del negozio giuridico* (Napoli: Edizioni Scientifiche Italiane, 1994), 312.

appointment of an executor[44] (albeit limited to the management of the Facebook account), made not by will, but through its designation on the social network is to be considered valid under Italian law.

This provision is emblematic of the problems that characterize the cases underlying the digital inheritance matter: the contrast between the contractual regulation, drawn up by providers on the basis of US law (or other foreign law) and the rules of the legal systems in which it must be implemented.

If we then consider that, with reference to the Italian system, Art 2-*terdecies* of Data Protection Code widens the range of subjects entitled to have access to the digital data of a dead person, the framework becomes even more complicated. In fact, theoretically, we cannot exclude a possible conflict between the subject appointed as legacy contact and the subjects who, on the basis of inheritance law or the aforementioned Art 2-*terdecies*, claim rights on the digital assets of the deceased.

In this context, some Scholars have suggested that, in order to avoid inheritance issues, the best solution would be to dispose of one's digital inheritance in a will.[45]

The suggestion, which may be acceptable in principle, instead appears simplistic and inconclusive.

First of all, from a factual point of view, the tendency to make dispositions through wills is more and more rare in modern society and, above all, concerns a very restricted circle of people, generally with considerable assets.

The problem of digital inheritance, on the contrary, concerns the generality of the population, the majority of which is not in the economic and cultural conditions to dispose of a will, also considering the average age of social network users.

Secondly, from a strictly legal point of view, there would be doubts about the coordination between the provisions of the will and the general contractual conditions imposed by the providers and accepted by the user.

In light of the above, it could be moreover discussed whether one can transfer his own social account by will.

Beyond the problem of non-transferability clauses often provided for in the general terms and conditions of Internet service providers, doubts arise since, as explained, the account is not a digital good in the strict and technical sense,

[44] On this subject, see. G. Giampiccolo, *Il contenuto atipico del testamento. Contributo ad una teoria dell'atto di ultima volontà*, (Milano: Edizioni Scientifiche Italiane, 1954), 127.

[45] S. Allegrezza, n 12 above, 387. See also, more recently, V. Putortì, 'Patrimonio digitale e successione mortis causa' *Giustizia Civile*, I, 163-193 (2021) and M. Cinque, n 28 above, 654-655. This last author points out that at present the only effective means of disposing of one's own digital assets is a will. She analyzes the contractual conditions of sites offering services for the transmission of digital heritage and dealing with digital death and she expresses doubts about the validity of the operations of management and transmission of the digital patrimony offered by these sites and the legal consequences of the use of these services.

but rather a digital space made available by the provider (who owns it) in which the user can carry out a series of activities, such as publishing posts, photos, videos, etc. Digital assets of the user are the posts, photos, videos that are published online and only of these we can at least think of disposing of by will.

While it is clear that accounts cannot be transferred, there has been some debate as to whether access keys to accounts can be transferred by will.

A first problem that arises concerns the qualification of a testamentary disposition by which access keys are attributed. It is discussed whether it can be configured as a legacy (*legato*) and be subject to the relative discipline.[46] The negative thesis is to be preferred, considering that the object of the attribution are usernames and passwords, which lack of a patrimonial content, that is a necessary requirement for a legacy.[47] Credentials have no economic value and are important only as tools for the exercise of activities and rights on digital assets that the deceased intends to transfer to the beneficiaries.

Consequently, in order to be able to speak of a legacy it is necessary to configure a complex object attribution that includes not only the credentials to access the account, but also the transmission of digital goods accessible through these credentials. In fact, it is only in the presence of an act of patrimonial content, capable of granting an enrichment for the beneficiary, that the provision can be qualified as a legacy and be governed by the rules provided for it.[48]

Anyway since the will may also contain non-patrimonial provisions, according to some Scholars, the testamentary attribution of the access credentials and the relative instructions to someone, although it cannot be neither qualified as a mandate, since it lacks the requirement of bilaterality,[49] it seems to integrate the extremes of an authorizing act, unilateral, receptive and freely revocable, aimed at giving the third party the power (and not the obligation) to act for the implementation of the will expressed by the testator.[50]

[46] In favor of the configurability of the 'password legacy', see L. Di Lorenzo, Il 'legato di password' *Notariato*, 147, 144-151 (2014), who qualifies access credentials as assets in a legal and technical meaning when their communication directly attributes ownership of the assets to which they allow the access. See also S. Delle Monache, n 21 above, 466-468 and G. Bonilini, 'Dei legati, artt. 649-673' in F.D. Busnelli ed, *Il Codice civile. Commentario* (Milano: Giuffrè, 2020), 167. The authors outline that the case concerning the access to digital goods with a patrimonial value (eg access credentials to home banking) is totally different from the case of attribution of username and password which do not have by definition a patrimonial content in themselves.

[47] V. Putortì, 'Gli incarichi post mortem a contenuto non patrimoniale tra testamento e mandato' *Persona e mercato*, 137-149 (2012).

[48] ibid, who refers to other authors on this peculiar aspect: V.D. Greco, 'La disposizione mortis causa delle credenziali di accesso a risorse digitali', in M. Bianca, R. Messinetti, A.M. Gambino eds, *Libertà di manifestazione del pensiero e diritti fondamentali. Profili applicativi nei social network* (Milano: Giuffrè, 2016), 199; G.F. Basini, 'L'oggetto del legato e alcune sue specie', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2003), 165.

[49] See I. Maspes, n 6 above.

[50] V. Putortì, 'Gli incarichi post mortem' n 47 above, 139.

VIII. Final Remarks

The cases submitted to the Court of Milan and Bologna show the complexity of the issue related to the *mortis causa* transmission of digital goods. Such problems have obviously not only arisen in the Italian system, but also in other legislations. The different solutions that have been given to the same questions prove the impossibility of providing a uniform response to the problem. This is due both to differences in inheritance law and the different approaches to privacy issues in different countries.

The courts of Milan and Bologna used the data protection regulations as a legal basis for their rulings, thus avoiding dealing with the more delicate issue of succession. Some Scholars have criticized this judicial approach as a missed opportunity.[51]

Furthermore, the Italian legislation on data protection failed to provide for a coordination with inheritance law. As explained, Art 2-*terdecies* of Data Protection Code increased the number of subjects entitled to access to the digital assets of the deceased, including agent and, more generally, anyone who has a private interest. This could also give rise to conflicts between those entitled to have access to digital patrimony under Art 2-*terdecies* of Data Protection Code and the legitimate heirs of the deceased.

This legal vacuum is at the basis of the tendency of Internet service providers to regulate the succession aspects of digital data in their general terms and conditions of contract, which validity, as discussed above, is often debatable.

Often the terms and conditions of the contract include the so called non-transmissibility clauses. This is obviously due to economic reasons: if the access credentials to the account or the transfer of the digital data and all the e-mails of the deceased were automatically granted to the heirs, the providers would have to bear huge costs related to assessment of the compliance of the requests with the succession rules of the various legal systems.

Moreover, it is clear that these clauses respond to the need for Internet service providers to keep themselves out of inheritance disputes related to the transfer of digital assets.

For the reason explained above, Internet Service providers tend to prevent the problem by denying the transmissibility of such data or by requiring, as in the two cases decided by the Court of Milano and of Bologna, a judicial order establishing who is entitled to receive such assets.

The economic motivations underlying this approach emerge clearly in both the analyzed cases: in fact, Apple did not oppose the request of the plaintiffs and in the case before the Court of Milan it did not even appear in court. It seems that there are no other reasons for the Internet service providers' refusal to transfer digital assets other than those related to the need not to bear the costs

[51] A. Maniaci and A. D'Arminio Monforte, n 2 above, 665.

and risks associated with the verification of the legitimacy of the applicants.

As can be seen from these brief considerations, the issues surrounding digital inheritance are many and varied and, for the most part, lack an undisputed solution.

In the absence of a normative regulation, invoked by most of the interpreters, case law plays a fundamental role that will be destined to play an increasing importance since, according to several predictions, by the end of the century the main social networks, as Facebook, will consist more of 'memorial accounts' (belonging to died people) than of living people accounts.[52]

[52] I. Sasso, 'Privacy post mortem e successione digitale', in E. Tosi ed, *Privacy digitale, riservatezza e protezione dati personali tra GDPR e nuovo Codice Privacy* (Milano: Giuffrè, 2019), 559. See also G. Resta, n 38 above, 86, who shows some data on the basis of which 'about 10.000 Facebook users die every day; 312.000 every month; the 5% of the existing accounts belong to 'digital zombie' '.

National Federation of Independent Business v *Department of Labor, Occupational Health and Safety Administration* and Employee Covid Vaccine Mandates in the US: Federalism, Separation of Powers and a Disunified Approach

Charles F. Szymanski*

Abstract

From early 2020, the Covid-19 pandemic has spread and wrought havoc across the globe. States attempted to limit its harm by first enacting draconian lock-downs. Later, after effective vaccines became available in early 2021, many states moderated these lock-downs while at the same time taking steps to ensure their populations were adequately vaccinated. Some of these steps included vaccine mandates, particularly for employees. While employee vaccine mandates were implemented in many European states, and found to be lawful by the courts in these jurisdictions, a different result ensued in the United States. In *National Federation of Independent Business* v *Department of Labor, Occupational Health and Safety Administration,* the US Supreme Court blocked an emergency regulation by an administrative agency charged with ensuring worker health and safety from taking effect, which would have required most private sector employees to be vaccinated against Covid-19. This essay examines the rationale for that decision, and explains how specificities in American constitutional law have resulted in a divergent legal approach to determining the validity of federal, state and private sector employee vaccine mandates.

I. Introduction

Almost everyone has been affected by the Covid-19 pandemic, in one way or another. Since 2020, millions of people throughout the world have died as a result of this virus, and hundreds of millions more have been infected by it.[1] The initial responses of many states included the imposition of lock-downs, forcing people to mostly stay in their homes as a means of preventing the virus from spreading.[2] Fortunately, vaccines for Covid-19 were rapidly developed, and

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[1] World Health Organization, 'WHO Coronavirus (Covid-19) Dashboard', available at https://tinyurl.com/3rmh3uv2 (last visited 30 June 2022) (over 6 million deaths and over 513 million people infected worldwide during the Covid-19 pandemic, as of 6 May 2022).

[2] E. Ip, 'The Natural Law Ethics of Public Health Lockdowns' 36 *Notre Dame Journal of Law, Ethics & Public Policy*, 454, 455 (2022) (In response to the Covid-19 pandemic, countries around the world responded by 'imposing general lockdowns on over 4.5 billion people worldwide, that is, almost 60% of the global population.').

became generally available by early 2021.[3] While many people welcomed the opportunity to become vaccinated, others were hesitant or even downright opposed to this idea. Such opposition could be traced to some suspicion of vaccines in general, the haste in which the Covid-19 vaccine was introduced, or by other personal or even religious objections.[4]

As the effectiveness of vaccines against Covid-19 in part depended on a certain level of the population becoming vaccinated, countries took various approaches to either encourage or force their people to take the vaccine. One of these approaches involved vaccine mandates for specific categories of workers or most employees in general. Certain employees, especially health care workers and teachers, had a higher risk of both conveying Covid-19 to vulnerable populations (those who were ill or infirm; children) or contracting it themselves given the nature of their work, if they remained unvaccinated.[5] Other workplaces, such as meat packing plants, also had proved to be incubators of Covid-19 given the close quarters in which employees at these facilities worked.[6] At the broadest level, all types of employees deserved a safe workplace, where their risk of contracting the virus was minimized through vaccination, and this coincided with the state's interest in increasing the general share of the population that was vaccinated as a matter of public health.[7]

Several countries in Europe took this 'maximalist' approach, particularly

[3] J. Howard, 'All 50 states now have expanded or will expand Covid vaccine eligibility to everyone 16 and up' *CNN*, available at https://tinyurl.com/mry2r6nh (last visited 30 June 2022); J. Deutsch and C. Hirsch, 'Where the EU vaccine rollout stands at the end of Q2' *Politico*, available at https://tinyurl.com/2p8nesub (last visited 30 June 2022) (60% of adults in EU received at least one Covid vaccine does by mid-2021).

[4] J.M. Middleton, 'Employer Mandated Vaccinations: What if an Employee Refuses?' 5 *Business Entrepreneurship & Tax Law Review*, 174, 184-185 (2021); S. Guidi et al, 'Depolarizing the Covid Vaccine Passport' 131 *Yale Law Journal Forum*, 1010, 1023-1025 (2022) (noting that making Covid vaccines mandatory may contribute to vaccine hesitancy); S. Mallapaty, 'Researchers fear growing COVID vaccine hesitancy in developing nations' *Nature*, available at https://tinyurl.com/2hnsx7j8 (last visited 30 June 2022).

[5] A.A. Gates, 'Legal and Ethical Implications of Mandatory Covid-19 Vaccination Programs' 25 *Quinnipiac Health Law Journal*, 125, 145-147 (2022) (rationale for vaccinating health care workers); N.N. Wyman and S. Heavenrich, 'Vaccine Hesitancy and Legal Ethics' 35 *Georgetown Journal of Legal Ethics*, 1, 6 & fn 26 (2022) (teachers).

[6] K.K. Dineen, 'Meat Processing Workers and the Covid-19 Pandemic: The Subrogation of People, Public Health, and Ethics to Profits and a Path Forward' 14 *Saint Louis University Journal of Health Law & Policy*, 7 (2020)

[7] C.J. Voegel, 'The Syringe That Drips Money: How Title VII Affects Employer-Mandated Vaccinations in the Manufacturing Sector' 19 *Indiana Health Law Review*, 217, 229-230 (2022) ('A safe work environment may be the most important reason to implement a vaccine mandate.'); A.A. Gates, n 5 above, 147 (purpose of vaccine mandate for federal employees is to ensure a safe workplace); J. Shahdanian and V. Scirica, 'Covid-19 Vaccinations The Legal and Practical Considerations for New Jersey's Public Sector Employers' 329 *New Jersey Law*, 14 (2021) ('Public health experts predict that employers will play an important role in vaccinating enough people to reach herd immunity.'); D. Kaminer, 'Vaccines in the Time of Covid-19: How Government and Businesses Can Help Us Reach Herd Immunity' 2020 *Wisconsin Law Review Forward* 101 (2020).

Italy, and required most employees to be vaccinated or otherwise lose their jobs. While there was some resistance to these measures from employees and labor unions, their legal challenges to them generally failed. Given the danger Covid-19 posed and the deadly effects of the virus that had already taken place, the courts found that employee vaccine mandates were will within the respective governments' legal authority to protect public health.[8]

In contrast, the result in the United States was much different and much more divergent. At the national level, two federal administrative agencies - the Department of Health and Human Services (HHS) and the Department of Labor's Occupational Health and Safety Administration (OSHA) – enacted emergency measures that required health care workers and most private sector employees, respectively, to become vaccinated. The latter measure by OSHA would have impacted almost 84 million employees. These administrative actions were challenged in the courts, and ultimately the US Supreme Court arrived at a split decision: the vaccine mandates for health care workers could go into effect, while the broader OSHA regulations for all private sector employees could not.[9] President Biden also used is executive authority to order a vaccine mandate for federal executive branch employees and for employees of federal contractors. Thus far, lower courts have upheld the mandate for federal employees, but have blocked the mandate for federal contractors.

In addition to these attempts at national employee vaccine mandates, various states and local governments imposed their own vaccine requirements for their public employees (police, fire, administration) or institutions (for example, health care facilities). These were challenged under both federal and state law but these cases, in contrast, were mostly not successful.[10]

Finally, individual private employers sometimes decided on their own authority to require that all their employees be vaccinated. While the American system of at-will employment gave these employers great flexibility to implement such a requirement, in limited circumstances, involving claims of religious discrimination under federal anti-discrimination law and interference with collective bargaining rights, courts did place some restrictions on these

[8] M. Diaz Crego et al, 'Legal issues surrounding compulsory Covid-19 vaccination' *Briefing for the European Parliament*, available at https://tinyurl.com/2p94w9xn (last visited 30 June 2022) (noting that Germany, Greece, France, Italy, Latvia, Estonia and Hungary have or had mandatory vaccine requirements for all or some categories of workers, or allowed employers to impose their own vaccine mandates, and reviewing legal challenges to these requirements); J. Franklin and S. Poggioli, 'Italy Is Making COVID-19 Health Passes Mandatory For All Workers' *NPR*, available at https://tinyurl.com/ycy6rkrb (last visited 30 June 2022); 'Italian court upholds rule suspending unvaccinated workers without pay' *The Local.it*, available at https://tinyurl.com/2p99w978 (last visited 30 June 2022).

[9] *Biden* v *Missouri* 142 S Ct 647 (2022) (upholding DHHS rule); *National Federation of Independent Business* v *Department of Labor, Occupational Health and Safety Administration*, 142 S Ct 661 (2022) (putting a stay on OSHA's emergency standard).

[10] J.E. Gumina et al, 'Covid-19 Vaccination Mandates: What Now?' 95-MAR *Wisconsin Law*, 12 (2022) (collecting cases).

mandates.[11]

Focusing on the most important of these cases, *National Federation of Independent Business* v *Department of Labor, Occupational Health and Safety Administration* (dealing with the OSHA regulation covering 84 million employees),[12] this essay attempts to explain the apparent disunity of the approach to employee vaccine mandates under American law and dispel some potential misperceptions about the role of American individualism. For the most part the constitutional doctrines of separation of powers and federalism have governed the response of the US judiciary, as opposed to a fixation on individual rights.

First, analyzing the *National Federation* case, it will be shown that the Supreme Court blocked the employee vaccine mandate out of concerns that OSHA went beyond its authority to enact such a regulation. An administrative agency such as OSHA operates as part of the executive branch of government, and enforces laws enacted by Congress, the legislative branch. While OSHA may reasonably interpret the statute it is charged with enforcing, it cannot add to it or go beyond the statute's scope. According to the Court, OSHA did not have the statutory authority to promulgate a national employee vaccine mandate – this was only in the power of Congress to do so through additional legislation.[13] In contrast, in *Biden* v *Missouri,* the Court *did* permit a vaccine mandate for health care workers to go forward, but only because the applicable statute empowered the DHHS to take this action (unlike the case with OSHA).[14] Next, it will be demonstrated that principles of federalism gave the separate states primary authority over their residents health and safety, and therefore broad authority to require their public employees to be vaccinated on those grounds. Because of this wide grant of constitutional authority, the various requirements imposed by the states were not in conflict with federal law and were mostly upheld. Relatedly, since under state law private employers had almost complete discretion over what terms and conditions of employment to provide for their workers, they were free to impose a vaccine mandate (or not),

[11] D.B. Thompson et al, 'What Should Ethical and Strategic Employers do about Covid-19 Vaccines?' 56 *University of San Francisco Law Review*, 219, 229-231 (2021) (employment at will is the starting point for an employer's authority to require vaccinations; statutory anti-discrimination laws covering disability and religious discrimination may offer some protection but claims based on these laws are often unsuccessful); M.L. Miller, 'Inoculating Title VII: The "Undue Hardship" Standard and Employer-Mandated Vaccination Policies' 89 *Fordham Law Review*, 2305 (2021) (noting potential religious discrimination claim under Title VII for employees who are forced to become vaccinated against their religious beliefs, but observing that employers have only a relatively weak duty to accommodate such employees); J.M. Middleton, n 4 above, 179-184; J. Shahdanian and V. Scirica, n 7 above, 18-19 ('In a unionized setting, mandating a vaccine may be a subject for collective bargaining and such bargaining may need to be completed prior to implementing such a requirement.').

[12] *National Federation of Independent Business* v *Department of Labor* n 9 above.

[13] ibid

[14] *Biden* v *Missouri* n 9 above.

unless this conflicted with applicable federal law in certain instances. Such instances did exist in the area of religious and disability discrimination, as well as labor law, where the mandates interfered with employees' religious or collective bargaining rights.

While the American approach to employee vaccine mandates may appear to be scattershot and even surprising, it has been actually been determined by longstanding principles of separation of powers and federalism. Even so, the end result in a deadly pandemic has been less than inspiring: different vaccine rules for employees in different states, during a crisis that effects the entire nation.

II. *National Federation of Independent Business*, the Covid-19 Pandemic and Separation of Powers

1. Initial Federal Labor Law Legislation Related to the Covid-19 Pandemic

During the initial phase of the Covid-19 pandemic, there was an understanding that quick legislative action had to be taken at the federal level to soften the economic blow on employers and workers. While states had primary constitutional authority over public health and safety measures needed to fight the virus, and the federal government has a more limited role, federal help was possible in the form of legislation providing fiscal assistance.[15] Various lockdowns at the state level had forced businesses to close, particularly those in the service industry (including entertainment venues and restaurants), and this in turn could have led to mass unemployment. Congress therefore enacted legislation providing forgivable loans and grants for businesses who retained their workers. At the same time, the legislation also provided for generous unemployment supplements to workers who did lose their jobs as a result of the pandemic, on top of whatever benefits they received from their respective state's social insurance schemes. Innovatively, independent contractors were also covered by this law and were likewise provided with unemployment benefits. Since – unlike in much of the developed world – American workers are not entitled to paid sick leave, the legislation also provided for temporary paid leave in the event of becoming ill with Covid-19 or for caring for a family member with Covid-19. This law was designed to avoid situations where sick employees would come to work and potentially spread the virus, out of fear that they would not be paid if they stayed at home.[16]

[15] E. Weeks and A. Patel, 'Introduction: The Future of Global Health Governance' 49 *Georgia Journal of International & Comparative Law*, 483, 487-488 (2021) ('In public health, in particular, state and local governments hold broad and well-developed authority to compel vaccination, quarantine, isolation, social distancing, masking, and other critical interventions to control the spread of infectious disease. The federal government's authority is more limited.').

[16] E. Weeks and A. Patel, n 15 above, 491; E.A. Benfer et al, 'Health Justice Strategies to Combat

However, this federal legislation did not deal with protecting the health employees who remained at work from the dangers of Covid-19. Vaccinations offering protection against Covid-19 became available approximately a year into the pandemic, being available on a widespread basis at the beginning of 2021, but no national vaccine mandate was put into place for employers at that time and for many months thereafter.

2. The Federal Occupational Health and Safety Administration's Vaccine Mandate for Private Sector Employers

Federal inaction with respect to Covid-19 and workplace safety was heavily criticized. This was especially true of workers in the meatpacking industry, who suffered from high rates of Covid-19 infections.[17] After Democrat Joe Biden defeated Republican Donald Trump in the November 2020 presidential election, analysts expected Biden to take additional steps to promote worker safety in the face of the ongoing coronavirus pandemic. Trump was generally perceived as being protective of business during the pandemic, and Biden, who enjoyed the support of most US labor unions, in contrast was thought to be more sympathetic to the plight of employees.[18]

After Biden assumed office in January 2021, the American Covid-19 vaccine roll out gained speed. While there was a large initial uptake, vaccine skepticism among the general public caused vaccination rates to hit a ceiling of 50-60% after several months in many states.[19] This was below what was necessary from a public health standpoint to achieve general immunity from the virus. When public appeals to become vaccinated did not achieve the required

the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After Covid-19' 19 *Yale Journal of Health Policy, Law, and Ethics*, 122, 167 (2020) ('The CARES Act the largest economic relief bill in US history, has approved $2.2 trillion to help businesses and individuals affected by the pandemic and economic downturn, giving workers health coverage for COVID-19, increased unemployment benefits, and paid sick leave.'); R. Arnow-Richman, 'Integrated Learning, Integrated Faculty' 92 *Temple Law Review*, 745, 755, fn 62 (2020) ('In what might hopefully model a change for the future, Congress recently extended federal unemployment benefits to "gig" workers dislocated as a result of the COVID-19 pandemic.').

[17] R. Yearby and S. Mohapatra, 'Systemic Racism, the Government's Pandemic Response, and Racial Inequities in Covid-19' 70 *Emory Law Journal*, 1419, 1435-1436 (2021) (pointing out excessive dangers of Covid-19 in the meat packing industry, and the fact that most meat packing employees were not covered by the CARES Act, including its Covid-19 related sick leave provisions).

[18] S. Lerner, 'How Trump Gutted OSHA and Workplace Safety Rules: Trump's attack on the Occupational Safety and Health Administration has left workers vulnerable to Covid-19' *The Intercept*, available at https://tinyurl.com/32drvktu (last visited 30 June 2022); D. Shesgreen, 'How COVID-19 shaped the 2020 election, swinging some voters to Biden but bolstering Trump with his base' *USA Today*, available at https://tinyurl.com/bdhfxj93 (last visited 30 June 2022) (most voters in the presidential election felt Biden would do a better job with the Covid-19 pandemic than Trump).

[19] L. Gamio and A. Schoenfeld Walker, 'See Which States Are Falling Behind Biden's Vaccination Goal' *The New York Times* available at https://tinyurl.com/yc6unfsm (last visited 30 June 2022) (observing that Biden's goal to vaccinate at least 70% of Americans with at least one shot was lagging behind in many geographic areas).

results, President Biden considered other means to boost American vaccination rates.[20] One such method was to order the federal Occupational Health and Safety Administration (OSHA) to use its authority to enact an emergency regulation that would order private sector employers with over 100 employees to require the vaccination of their employees in most instances. President Biden directed OSHA to issue this regulation in September 2021, and OSHA completed and published the emergency health and safety standards in November 2021. These standards were expected to cover over 82 million employees.[21]

Specifically, the emergency OSHA standards required large employers to have their employees be vaccinated, or alternatively undergo weekly Covid-19 testing and wear masks at work. Employees who did not comply must be removed from the workplace. Certain exemptions existed for remote workers who spent 100% of their time away from the employer's worksites, and for employees who worked predominately outdoors. In addition, employees could also apply for a religious exemption, if their religious beliefs forbade them from becoming vaccinated, and employers could further apply for exemptions if they could prove that their existing health and safety policies adequately protected employees from the hazards posed by Covid-19.[22]

3. Legal Challenges to OSHA's Vaccine Mandate in the Lower Courts

Almost immediately, various parties, including states, numerous employers and business organizations, all filed legal challenges to OSHA's vaccine mandate in the federal courts. One case reached the US Court of Appeals for the Fifth Circuit, and that court issued an order staying the application of OSHA's emergency regulation. In granting the stay, the Fifth Circuit reasoned that OSHA likely exceeded its authority as an administrative agency in issuing the vaccine mandate; its actions raised constitutional separation of powers concerns; and in any case its regulation was not narrowly tailored to take into consideration different types of employers and work environments.[23]

Shortly thereafter, under federal judicial procedural rules, all pending cases challenging the mandate were consolidated before one federal court of appeals, that for the Sixth Circuit. The Sixth Circuit vacated the earlier stay, concluding that OSHA's actions were within the scope of its administrative and constitutional authority. The court also rejected a petition to hear the case *en banc*, by an equally divided 8-8 vote.[24] Normally, Federal Courts of Appeal decide cases

[20] P.J. Larkin and D. Badger, 'The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for Covid-19 Vaccinations' 6 *Administrative Law Review Accord*, 375, 377-378 (2022).

[21] National Federation of Independent Business, n 9 above, 663-664.

[22] ibid 663-664, 671 (Dissent).

[23] ibid 664, citing *BST Holdings*, 17 F 4th 604 (5th Cir 2021).

[24] National Federation of Independent Business, n 9 above, 664, citing In re MCP No. 165, 20 F

using a panel of three judges. When cases raise especially important legal issues that may affect the public interest, at the discretion of the Federal Court of Appeals, they may be decided *en banc*, ie, all judges in that court may hear and decide the case, rather than a smaller panel.[25]

Subsequently the parties filed an application to the United States Supreme Court, requesting that the Supreme Court reverse the Sixth Circuit's decision and impose a stay on OSHA's vaccine mandate. The Court agreed to hear two challenges, one filed by a business association and one filed by a group of states, and consolidated these actions into one case.[26]

4. The Supreme Court's Decision

The Supreme Court reversed the Sixth Circuit's decision and reimposed a stay on OSHA's emergency regulation requiring vaccine mandates. When a stay is requested – here, preventing OSHA from implementing its emergency standard – it must be shown that the parties requesting the stay have a high success of likelihood on the merits of the case and that the balancing of the equities of the situation favor the granting of a stay. In this case, the Court first found that it was highly likely that OSHA acted beyond the scope of its administrative authority.[27]

OSHA has the statutory authority to issue regulations on occupational health and safety. It also has the power to 'impose emergency temporary standards necessary to protect 'employees' from grave danger in the workplace'.[28] The Court focused on the statutory limitations on OSHA's ability only to act to regulate *occupational* issues and to protect *employees* on an emergency basis. Covid-19, on the other hand, was a universal risk to which the entire population was subject. In most situations, it did not present a unique or even increased risk to employees in their respective workplaces. By issuing emergency standards that could potentially require over 84 million employees to be vaccinated, OSHA went beyond the scope of its authority, since it was acting to regulate public health in general, rather than any specific workplace danger.[29] While OSHA does regulate hazards that occur both at work and in other settings, such as the risk of fire, mandating vaccines for tens of millions of workers is an especially broad overreach of its power, according to the Court. Unlike fire and sanitary regulations for workplaces, a vaccine requirement cannot be undone if it is later found to be illegal.[30]

The Court acknowledged that OSHA could impose Covid-19 restrictions for

4th 264 (2021) and In re MCP No. 165, 21 F 4th 357 (CA6 2021).

[25] Federal Rules of Appellate Procedure Rule 35, 28 USCA.

[26] National Federation of Independent Business, n 9 above, 664.

[27] ibid 664-665.

[28] ibid 664.

[29] ibid 664-665.

[30] National Federation of Independent Business, n 9 above, 665.

workplaces that posed special dangers for employees, such as lab employees working with the virus or particularly crowded work environments, where there was an increased risk of contracting the coronavirus. However, OSHA's emergency standards went well beyond such specific situations by essentially covering *every* private employer with over 100 employees.[31]

With respect to consideration of the balancing of the equities, the Court recognized that the parties raised the potential of serious consequences if the stay was or was not granted. Employers argued that the vaccine mandate would lead to vast financial loses and mass employee resignations if it were allowed to go into effect. OSHA, in contrast, argued that a stay of the emergency standard would lead to 6,500 deaths and hundreds of thousands of preventable illnesses. Nevertheless, these possibilities did not weigh against granting a stay, since OSHA so clearly lacked the authority to make a vaccine mandate in the first place.[32]

In a separate concurring opinion, three Justices who sided with the majority – Gorsuch, Thomas, and Alito – provided a further explanation of the important constitutional limitations on the powers of administrative agencies such as OSHA, particularly in the area of public health. The United States Constitution provides only specific enumerated powers to the federal government, with all remaining powers left to the states. Indeed, traditionally the states and their political subdivisions have exercised wide constitutional authority to regulate public health.[33]

Therefore, in order for the federal government to claim authority to mandate vaccines for most private sector employees, it must show 1) the constitutional and statutory source of such authority, and 2) that the exercise of that authority does not violate the constitutional principle of separation of powers. The constitution grants authority to each of the three branches of the federal government, the executive, legislature and the judiciary, and one branch cannot exercise the powers of another branch. In cases involving an administrative agency's powers, there are two relevant doctrines that must be examined to determine whether there has been a violation of separation of powers: the major questions doctrine, and the non-delegation doctrine. Under the major questions doctrine, where the agency is attempting to regulate a subject that has vast economic and political consequences, Congress must make it clear that it has given the agency the right to regulate in this area. This ensures that the agency, which is part of the executive branch of government, does not usurp the power of the legislative branch (Congress) by regulating an important field.[34] Pursuant to the non-delegation doctrine, Congress cannot delegate authority to

[31] ibid 665-666.
[32] ibid 666.
[33] ibid 667 (Concurring opinion).
[34] National Federation of Independent Business, n 9 above, 667 (Concurring opinion).

an administrative agency, so it may be shielded from being held responsible for unpopular decisions. Relatedly, Congress cannot avoid being held responsible by making vague statutory statements that give wide room for interpretation and implementation by an administrative agency.[35]

In this case, while the federal government does have power to regulate occupational health and safety, OSHA's vaccine mandate violated the principle of separation of powers. Forcing 84 million workers to become vaccinated was certainly a 'major question' and in order to have the authority to issue this emergency standard, Congress must have given OSHA a clear mandate to do so. However, Congress did not in this case, particularly since OSHA's actions veered mostly into the realm of public health as opposed to addressing specific workplace dangers. Moreover, Congress could not have in any case delegated such an important legislative issue of public concern to an executive administrative agency.[36]

Three other justices – Sotomayor, Breyer, and Kagan – filed a dissenting opinion. They contended that OSHA's emergency standard, mandating vaccines, was within the scope of the agency's statutory authority. Pursuant to statute, OSHA had the right to issue emergency regulations to address 'new hazards' and 'physically harmful agents' that posed grave dangers to employees. Covid-19 met this definition as it was a new hazard and the virus is considered to be a harmful agent, and its spread did cause serious dangers to workers. Consequently, the dissent stressed that OSHA had the right to issue an emergency standard to address the spread of Covid-19 in the workplace.[37] They disagreed with the majority that the vaccine mandate addressed a broader public health issue, rather than focusing on dangers specifically at work, as required by the statute. OSHA routinely regulates fire dangers and sanitation issues in workplaces, even though those problems are not unique to the workplace. According to the dissent, the subject matter of OSHA's regulations must be related to safety in the workplace, and not necessarily unique to the workplace. Here, the vaccine requirement would improve the health and safety of employees, and therefore was within the ambit of OSHA's statutory authority.[38] Finally, the dissent stressed that any balancing of the equities would weigh in favor of upholding OSHA's action, since it is apparent it would save lives.[39]

III. The Impact of *National Federation of Independent Business* on Covid-19 Vaccine Mandates for Public and Private Employees

[35] ibid 669.
[36] ibid 669-670.
[37] ibid 672 (Dissent).
[38] ibid 673-675.
[39] ibid 676-677.

1. Limitations on the Scope of the Supreme Court's Decision

On one hand, there is no minimizing the dramatic impact of the Supreme Court's decision in *National Federation of Independent Business*. The Court stayed a vaccine mandate that would have led to approximately 84 million private sector workers being vaccinated during the surge of the omicron variant of the Covid-19 virus. Had these workers been vaccinated, as OSHA required, it would have profoundly improved the health and safety of American workplaces and also would have had a positive impact on the federal government's efforts to fight the pandemic at large, by increasing by a large margin vaccination rates in the country.[40] And yet, the Court's decision can also be seen as being limited in many respects.

Procedurally, the matter came before the Court as an emergency request to put a stay on OSHA's emergency standard requiring vaccines for employees. A stay is a temporary measure, and is not a decision on the underlying merits of the case. Consequently, the case will go forward in the Federal Court of Appeal for the Sixth Circuit for a final decision on whether OSHA has the authority to issue its emergency standards in response to the Covid-19 pandemic, and that decision ultimately may be reviewed again by the Supreme Court.[41] While it is very likely that the courts will ultimately find OSHA lacked the power to take this action, given the broad language in the Supreme Court's decision, technically it is possible that a different conclusion will be reached.

Moreover, even under the language of the Court's decision, OSHA itself retained the authority to issue more narrowly tailored emergency standards designed to better protect workers specifically at risk from contracting Covid-19. The Court specifically referred to lab workers in direct contact with the virus and also employees in cramped workplaces where the virus had better opportunities to spread.[42] The decision was also limited to the question of whether *OSHA* possessed the statutory authority to require Covid-19 vaccines for certain employees, and did not address whether different administrative agencies might possess that authority under a different legislative framework.

The Court also did not rule that the federal government lacked the authority to pass a law that would have required private sector employees to be vaccinated for Covid-19. Congress had passed major legislation in response to the Covid-19 pandemic, including elements that directly affected workers. However, they did not include a broad vaccine mandate as part of this legislation. Instead, because of political difficulties inherent in adding this requirement – the Democrats lacked the votes in the Senate to pass a law that

[40] C. Shachar and I.G. Cohen, 'The Danger of the Supreme Court Undercutting Biden's Vaccination Rules' *Time*, available at https://tinyurl.com/44272uzm (last visited 30 June 2022) (Predicting that if the Court rejected OSHA's vaccine mandate, it would harm public health).

[41] National Federation of Independent Business, n 9 above, 666-667.

[42] ibid 666.

included a vaccine mandate – President Biden attempted to accomplish this goal through executive administrative action. As the concurring opinion of Justice Gorsuch pointed out, this ran afoul of constitutional separation of powers considerations. But the Court did not place a bar on Congress from passing legislation mandating vaccines if it had the political will (and votes) to do so.[43]

Nor were any limitations placed on the states and their political subdivisions (ie, local governments) from requiring that employees be vaccinated in their respective jurisdictions. States traditionally had wide discretion to regulate public health and safety in US constitutional law, and would also be free to pass appropriate legislation as they saw fit.[44] Relatedly, the Court's decision had no impact on the right of private employers themselves from requiring their employees be vaccinated against Covid-19 as a condition of employment, as opposed to taking such action pursuant to a federal or state legislative mandate.

These openings left by the Supreme Court were in fact filled to some extent by various forms of federal executive and administrative action, state and local laws, and the internal rules of private employers, as set forth below.

2. Vaccine Mandates Beyond the OSHA Emergency Standard Addressed in *National Federation of Independent Business*

a) Other Federal Administrative Agency or Executive (Presidential) Employee Vaccine Mandates

In addition to OSHA, one other federal administrative agency, the Secretary of the Department of Health and Human Services (HHS) also imposed a vaccine mandate on certain employees in November 2021, albeit a less sweeping one.[45] HHS is charged with, among other duties, administering two massive federal healthcare programs, Medicare and Medicaid. Medicare provides health benefits to elderly Americans, while Medicare provides health care to low income individuals.[46] In response to the Covid-19 pandemic, HHS issues an interim final regulation that required health care workers providing services to Medicare and Medicaid patients at home care centers, hospitals and related institutions to be vaccinated against the virus. Exceptions were provided for medical and religious reasons, and the rule was not applicable to health care providers who spent 100% of their time working remotely.[47]

Various states challenged HHS's action and obtain a stay of the regulation from a federal district court. DHHS appealed and ultimately made an application

[43] *National Federation of Independent Business* n 9 above, 670 (Concurring opinion), also noting that Congress has passed legislation requiring mandatory vaccinations in the past, ibid 678.

[44] ibid 667, 670 (Concurring opinion).

[45] *Biden* v *Missouri*, n 9 above, 650.

[46] ibid

[47] ibid 651.

to the Supreme Court to dissolve the stay.[48] In its decision in *Biden* v *Missouri,* the Court agreed with HHS and restored its vaccine mandate for certain health care workers.

The Court explained that the Secretary of HHS possessed the statutory authority to promulgate requirements for health care institutions that provided Medicare and Medicaid services, including those 'as (he) finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.' Requiring that such health care workers be vaccinated was directly related to the health and safety of such individuals, particularly since these patients were at a high risk of becoming seriously ill from Covid-19.[49] Moreover, in the absence of a vaccination requirement, patients might be fearful of seeking treatment at these facilities for fear of contracting Covid-19, further contributing to the public health crisis posed by the pandemic.[50] Finally, HHS's decision to issue its regulation in an expedited manner as an interim final rule, without the normal commenting and review process, was reasonable given the unprecedented emergency facing the country.[51]

Consequently, in contrast to the OSHA emergency standard, the HHS rule was directly within the ambit of its statutory authority. It was also tailored to protect specific populations vulnerable to the vagaries of Covid-19, namely the elderly and the poor recipients of Medicare and Medicaid.[52] While it was not mentioned in the Court's decision, another possible distinction was the much wider reach of the OSHA vaccine mandate (affecting 84 million private sector employees, rather than only health care workers providing Medicare and Medicaid services. The overbreadth of the OSHA standard suggested that OSHA's vaccine mandate was for the purposes of general public health, rather than something specifically designed to protect workers under the relevant statute.[53]

President Biden also took matters into his own hands directly by issuing executive orders essentially requiring that 1) all federal employees and 2) employees of federal contractors (private employees who worked for employers with federal government contracts) receive vaccinations against Covid-19.[54] The sources of President Biden's authority to take these actions were somewhat different. With respect to his order requiring federal employees to be vaccinated, President Biden acts effectively as the Chief Executive Officer of the federal

[48] *Biden* v *Missouri*, n 9 above, 651-652.
[49] ibid 652-653.
[50] ibid 651.
[51] ibid 654.
[52] ibid 652.
[53] National Federation of Independent Business n 9 above, 666.
[54] Executive Order 14042, 86 Fed Reg 50, 985-988 (9 September 2021) (requiring a special task force to set up requirements for federal contractors to ensure adequate Covid-19 safeguards for their workers; shortly thereafter the task force mandated the vaccination of most employees of such contractors) and Executive Order 14043, 86 Fed Reg 50, 989, 50, 990 (9 September 2021) (requiring the vaccination of all executive branch employees).

workforce, and as such as the right to make decisions on personnel and management policy, including setting safe working conditions.[55] A complex legislative scheme, the Civil Service Reform Act (CSRA), protects federal employees from unlawful personnel actions. Employees who suffer an adverse employment action (such as discipline or discharge) may appeal to an administrative board (the Merit System Protection Board (MSPB)), and from there may lodge a further appeal with a federal appeals court.[56] There is also an administrative process whereby an employee may request that an illegal policy be enjoined.[57] In *Feds for Medical Freedom* v *Biden,*[58] a federal court of appeals reversed a lower court's stay of President Biden's executive order regarding the vaccination of federal employees. The court ruled that federal employees could not directly challenge President Biden's executive order in court. Instead, they must first go through the administrative process outlined in the CSRA, which was their exclusive remedy. In most cases, this would entail federal employees refusing to be vaccinated, being disciplined as a result, and challenging the discipline administratively. The MSPB could then order a full remedy to the employee if the Board found the executive order to be unlawful.[59]

Regarding the executive order mandating vaccines for employees of federal contractors, President Biden's authority was derived from the Federal Property and Administrative Services Act. This Act gives the President the general authority to promote efficiency and economy in making sure federal contracts were awarded on the most advantageous terms to the federal government.[60] According to President Biden, by mandating that employees of federal contractors be vaccinated, the contractors would work more efficiently because their employees would lose less time off from work due to Covid-19.[61] In *Georgia* v *Biden* and *Kentucky* v *Biden,* however, a federal district court and a federal court of appeals, respectively, enjoined the application of this executive order, using a similar analysis as the Supreme Court later did in *National Federation of Independent Business*. Both courts recognized that the President did have some general authority under the Act to promote economy and efficiency in federal contracts. However, in order to make a major policy change – here, requiring

[55] 'Appeals court OKs Biden federal employee vaccine mandate' *NPR*, available at https://tinyurl.com/2p99r3mp (last visited 30 June 2022) ("The administration argued that the Constitution gives the president, as the head of the federal workforce, the same authority as the CEO of a private corporation to require that employees be vaccinated').

[56] *Feds for Medical Freedom* v *Biden*, 30 F 4th 503, 506-508 (5th Cir 2022) (outlining procedures under CSRA).

[57] ibid 510-511.

[58] ibid

[59] ibid 509-510. In its decision the court also pointed out that 12 other lower courts confronting the same issue refused to enjoin President Biden's vaccine mandate for federal employees. *Feds for Medical Freedom* v *Biden*, n 56 above, 505, n. 1 (collecting cases).

[60] *Kentucky* v *Biden*, 23 F 4th 585, 589-590 (6th Cir 2022); *Georgia* v *Biden*, --- F Supp 3d ---- ; 2021 WL 5779939, 9-10 (SD Ga 2021).

[61] *Georgia* v *Biden*, n 60 above, 10.

that millions of employees be vaccinated – it was necessary for the statute to make a more specific and clear grant of such broad authority. This was absent in this case. Instead, the executive order appeared to more directed at advancing public health in general than making federal contracts more efficient.[62]

b) State and Local Government Employee Vaccine Mandates

The Supreme Court long ago definitely established the general constitutional right of states to mandate vaccines for their respective populations on the grounds of protecting public health.[63] In *Jacobson* v *Massachusetts*,[64] Massachusetts enacted legislation that required the population of various towns and municipalities be vaccinated against smallpox, upon the recommendation of a board of public health that it was necessary in a given locality. The law was challenged in court as unconstitutional, and the matter proceeded to the United States Supreme Court. In upholding the statute, the Court explained that:

> 'The authority of the state to enact this statute is to be referred to what is commonly called the police power, – a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety'.[65]

There are only narrow exceptions to this general principle. The Court in *Jacobson* recognized that forcing vaccines upon individuals, where it was medically contraindicated because of their specific health condition, could conflict with the state's goal of promoting public health.[66] State vaccine mandates may also be illegal where they violate another federal constitutional or statutory principle, especially freedom of religion.[67] Finally, they of course may be unlawful as a matter of state law if they conflict with other state constitutional or legal

[62] *Georgia* v *Biden*, n 60 above, 10-12 (issuing a nationwide injunction against the application of the executive order); *Kentucky* v *Biden*, n 60 above, 604, 606-607.

[63] J.E. Gumina et al, n 10 above, 15-16.

[64] *Jacobson* v *Massachusetts*, 197 US 11 (1905).

[65] ibid 24-25 (emphasis added).

[66] ibid 38-39.

[67] Although one commentator argues, after reviewing applicable case law, that any federal constitutional challenge to Covid-19 vaccine mandates on freedom of religion grounds (ie, for those who claimed being vaccinated would violate their religious beliefs) would likely fail. *See* D. Kaminer, n 7 above, 112-115.

principles. With respect to state and local vaccine mandates for employees, legal challenges have mostly involved alleged conflicts with federal anti-discrimination and constitutional law connected with freedom of religion, state laws concerning the authority of the executive or legislature to order the mandate, and state labor law.

Cases brought in Massachusetts, New York and New Jersey illustrate the range of responses to such challenges. In *We The Patriots USA, Inc.* v *Hochul*,[68] New York law required that all health care facilities in the state ensure that certain health care employees become vaccinated against Covid-19. Specifically the employees covered by the law were those

> 'who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease'.[69]

A medical exception existed, whereby the requirement would not apply if the vaccine would be harmful to the health of any particular individual. However, there was no specific exemption for employees who were opposed becoming vaccinated on religious grounds.[70] Various employees alleged that the state vaccine mandate violate federal anti-discrimination law, namely Title VII of the Civil Rights Act. Title VII prohibits discrimination on the basis of religion (among other reasons), and affirmatively requires employers to offer a reasonable accommodation to employees who cannot comply with a workplace requirement due to religious reasons. Under the Supremacy Clause of the US Constitution, state law is preempted by federal law to the extent there is a conflict between the two. In this case, the employees contended that the lack of a specific religious exemption in the state's vaccine mandate violated Title VII's reasonable accommodation requirement. The federal court of appeals ultimately rejected this argument, pointing out that there was no outright prohibition on granting reasonable accommodations for religious reasons contained in the law. It was conceivable that religious objectors could be assigned telework as an accommodation, for example, instead of becoming vaccinated Consequently, there was no conflict between state and federal law that would implicate the Supremacy Clause.[71]

[68] We The Patriots USA, Inc. v Hochul, 17 F 4th 266 (2nd Cir 2021).

[69] ibid 274.

[70] ibid 275.

[71] ibid 290-293. Another federal court of appeals reached a similar conclusion. *Does 1-6* v *Mills*, 16 F 4th 20, 36 (1st Cir 2021). Both courts in the *Mills* and *We The Patriots USA* cases also rejected the employees claims that the vaccine mandate violate their federal constitutional right of the free exercise of religion, found in the free exercise clause of the First Amendment. *Mills*, 35; *We The Patriots USA*, 290. The Supreme Court declined to issue an emergency stay of both the New York and Maine laws, although Justice Gorsuch wrote a strong dissent in both cases. The dissent would have found that a vaccine mandate that contained a medical exception, but not a religious exception, unconstitutionally

In *New Jersey State Policemen's Benevolent Association* v *Murphy*,[72] the Governor of New Jersey issued an executive order requiring that corrections officers at the state's prisons become vaccinated against Covid-19.[73] The labor unions representing these prison guards filed a lawsuit challenging this order on numerous grounds, arguing that the Governor lacked the authority to issue the order under state law, and that it violated the unions' rights under their respective collective bargaining agreements.[74] The court rejected these arguments in their entirety. Analyzing the relevant New Jersey statutes, it concluded that the Governor did possess wide authority to respond to the public health emergency caused by the Covid-19 pandemic. Moreover, his action requiring prison guards to be vaccinated was specifically tailored to deal with a particularly harmful aspect of the crisis- the especially high rates of coronavirus infections in the state's prisons.[75] There also was no conflict with the unions' collective bargaining agreement. Under New Jersey labor law, certain state decisions are considered a non-negotiable government prerogative, where they implicate important state policies. Requiring prison guards to become vaccinated in the midst of a pandemic that has hit prisons particularly hard was precisely such a non-negotiable government prerogative; consequently, the terms of the unions' collective bargaining agreement could not act as a bar to the Governor's order.[76]

Finally, in *State Police Association of Massachusetts* v *Commonwealth*[77], the Governor of Massachusetts issued an order requiring all employees of the executive branch of government be vaccinated against Covid-19. A union representing 1,800 state police troopers requesting negotiations on this new policy, arguing that they were required under state labor law, since it effected the troopers' terms and conditions of employment. Some negotiations took place, centered on the union's counter-proposal to include a testing option in lieu of becoming vaccinated. Ultimately, however, the Governor went ahead and unilaterally implemented the policy without waiting for the competition of negotiations. The union filed an unfair labor practice charge with the relevant administrative body, alleging that the Governor violated his collective bargaining obligations under Massachusetts labor law. While that charge was pending, the union also filed an action in court, requesting that the vaccine mandate be enjoined pending the outcome of the unfair labor practice charge. The court rejected the union's request on the grounds that the union could not show

discriminated against the free exercise of religion. J.E. Gumina et al, n 10 above, 16-17.

[72] *New Jersey State Policemen's Benevolent Association* v *Murphy*, --- A.3d ---- (NJ Super 2022), 2022 WL 414152.

[73] ibid 1.

[74] ibid 1.

[75] ibid 7-8.

[76] ibid 9.

[77] *State Police Association of Massachusetts* v *Commonwealth*, 2021 WL 5630383 (Mass Sup 2001).

irreparable injury in the absence of the injunction. Specifically, any harm the union or its members would suffer would be economic- an employee who refused to be vaccinated could be disciplined or discharged. Such harm could be remedied in full by the Massachusetts Division of Labor Relations, which had the authority to order reinstatement and full back pay, in the event the Governor implemented the vaccine mandate in violations of his duty to collectively bargain.[78]

c) Vaccine Mandates by Private Employers

Private employers have the most flexibility to impose Covid-19 mandates upon their respective workforces. The US Constitution almost always acts to restrict government or state action, and not the action of private entities. Moreover, with the exception of federal laws relating to collective bargaining and anti-discrimination, American labor law is largely left to the states. State labor law, in turn, is based on the common law employment at will doctrine, which gives employers wide discretion on hiring, firing and how to run their workplaces. Famously, or perhaps infamously, employment at will permits employers to fire any employee for any or no reason – ie, the employment relationship is at the 'will' of the employer. Consequently, an employer could freely impose a requirement that all its employees be vaccinated, and lawfully fire any employee who refused to comply.[79]

The only potential limitations on the employer would be restrictions posed by federal collective bargaining and anti-discrimination law. Under the Labor Management Relations Act (LMRA),[80] federal courts have jurisdiction over disputes concerning the interpretation of collective bargaining agreements for most private sector employees.[81] In practice, most collective bargaining agreements contain arbitration clauses, whereby an arbitrator (agreed upon by the union and the employer) will resolve any disputes over the interpretation of the agreement in a final and binding decision. A party could ask a federal court, pursuant to the LMRA, to either vacate or confirm the resulting arbitration award, although the court could only vacate the award in very limited circumstances.[82]

[78] State Police Association of Massachusetts v Commonwealth, n 77 above, 3-4. See also Civil Service Employees Association Inc., Local 1000, AFSCME, AFL-CIO, v New York State (Unified Court System), 73 Misc 3d 874, 894 (NY Supr Ct 2021) ('The choice between accepting a vaccination that one is strongly against on the one hand and the loss of employment on the other, may appear to be no choice at all. But in reality, it is just that. Nobody under the challenged policy will be forced to accept a vaccination against his or her will. Those who willingly choose not to accept the vaccine, unquestionably face a significant harm – the potential loss of employment – that can be remedied. For that reason, there is no irreparable harm…').

[79] D.B. Thompson et al, n 11 above, 229-231.

[80] 29 USC Section 185.

[81] Textile Workers Union of America v Lincoln Mills, 353 US 448 (1957).

[82] See *United Steelworkers of Am.* v *Warrior & Gulf Navigation Co.*, 363 US 574, 581 (1960); *United Steelworkers of Am.* v *Am. Mfg. Co.*, 363 US 564, 567 (1960); *United Steelworkers of Am.* v

It is also possible for a union to request that a federal court grant an injunction against the employer, prohibiting any changes in working conditions until an arbitrator decides the dispute, if (among other factors) the union would suffer irreparable harm if the changes went into immediate effect. This circumstance might especially be present when the workers' health and safety is at stake.[83]

With respect to employer vaccine mandates, unions have argued that they violate the terms of the applicable collective bargaining agreement, and must be negotiated with the union before they may be implemented. A vaccine requirement certainly effects employee working conditions, and normally would be a mandatory subject of bargaining.[84] Many collective bargaining agreements, however, contain 'management rights' clauses, in which the union waives its right to bargain over certain changes the employer may implement with respect to running its business. A broad management rights clause could conceivably provide the employer with the right to require Covid-19 vaccinations.[85] In any case, the correct interpretation of the collective bargaining agreement would be left to an arbitrator to resolve. The courts have been reluctant to grant an injunction, blocking the implementation of the vaccine mandate until arbitration, because the unions cannot show any irreparable harm would occur if the mandate went forward.[86]

Unions have argued the irreparable harm lies in the fact than a vaccination cannot be undone. An employee would be under pressure to go ahead with the vaccination for fear of losing their job, even though some months later an arbitrator may well rule that the mandate violated the collective bargaining agreement. However, the courts have ruled that this is really only economic

Enter. Wheel & Car Corp., 363 US 593, 598 (1960). These decisions are collectively known as the Steelworkers Trilogy.

[83] R.J. Garcia, 'The Human Right to Workplace Safety in a Pandemic' 64 *Washington University Journal of Law & Policy*, 113, 133 (2021). These standards for injunctions pending arbitration are for the LMRA. Airline and railway employees are covered by a different federal labor law, the Railway Labor Act (RLA). Pursuant to the RLA, if a major dispute exists between a union and an employer, the employer may not implement a policy change until the dispute is resolved. If it is a minor dispute, however, the employer may implement the change pending the outcome of arbitration. The courts have held that an employer's vaccine mandate is a minor dispute, and may be put into place until and unless an arbitrator decides otherwise. *Northeast Illinois Regional Commuter Rail Corporation,* v *International Association of Sheet Metal, Air, Rail, And Transportation Workers – Transportation Division*, 2022 WL 60523 (ND Ill 2022).

[84] *Essentia Health*, 280 F Supp 3d 1161, 1164 (D Minn 2017).

[85] *Essentia Health*, n 84 above, 1165 (employer argued that implementation of vaccine policy was within its management rights under the collective bargaining agreement); American Law Institute 'Legal and Practical Considerations for Employers Weighing Covid-19 Vaccination as a Condition of Continued Employment' VCCE0310 ALI-CLE 333 (11-12 March 2021) ('For employers with a unionized workforce, the applicable collective bargaining agreement already may vest the employer with the management right to unilaterally develop and implement a vaccine program.').

[86] International Brotherhood of Teamsters, Local 743, Plaintiff, v Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds, 2021 WL 4745258, 1 (ND Ill 2021) (denying union's request for a preliminary injunction against the implementation of the employer's Covid-19 mandatory vaccination policy, pending arbitration.); Essentia Health, n 84 above, 1165-1167.

harm which can be subsequently remedied by an arbitrator. An employee reluctant to be vaccinated could refuse to comply with the mandate, be terminated, and later be awarded backpay and reinstatement by the arbitrator if the employer's policy is found to have violated the agreement.[87]

Federal anti-discrimination law may also place some restrictions on an employer's ability to apply a vaccine requirement. The Equal Employment Opportunity Commission (EEOC), charged with administering federal employment anti-discrimination law, has issued guidelines and technical assistance indicating that

> 'federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA'.[88]

Specifically, Title VII, as noted earlier, prohibits religious discrimination by employers. This includes a requirement that employers provide employees with reasonable accommodations where an employer's policy conflicts with an employee's religious convictions. Consequently a strict employer vaccine policy, with no exceptions, could violate Title VII. At a minimum the employer must be open to a dialogue with the employee to see if a reasonable accommodation can be found (working at home, increased testing, reassignment, etc).[89] However, an employer need not accept an accommodation that creates an undue burden, and an undue burden has been defined as anything that goes beyond a *de minimis* cost. This is a very light standard and in the context of Covid-19 vaccines, any accommodation that creates a safety risk to the public or other employees, or would create costs for the employer, would create an undue burden and likely would not be required.[90]

To the extent the employer's policy also did not contain any medical exemptions for employees with certain health conditions that made it dangerous for them to be vaccinated, this may also run afoul of the Americans with Disabilities Act (ADA), which prohibits disability discrimination. Similar to religious discrimination, an employer must offer a reasonable accommodation to employees with a disability so they may be able to continue to do their job.[91]

[87] *Essentia Health*, n 84 above, 1165. The court went on to suggest that even the receipt of an unwanted influenza vaccine would not present an unacceptable safety risk, nor would it undermine the collective bargaining agreement's arbitration procedure. ibid 1167.

[88] US Equal Employment Opportunity Commission, 'What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws', *EEOC Technical Assistance*, at K.1, available at https://tinyurl.com/bdv7n2vu (last visited 30 June 2022).

[89] US Equal Employment Opportunity Commission, n 88 above, at K.2.

[90] M.L. Miller, n 11 above, 2318-2322 ('the current undue hardship standard allows employers to almost always impose a vaccine mandate without providing any religious accommodation').

[91] US Equal Employment Opportunity Commission, n 88 above, at K.5.

Notwithstanding these limitations, some perspective is in order. If a private sector employer is non-union (as the vast majority of employers are in the US), and includes exceptions in its Covid-19 vaccine policy so that employees may refuse to be vaccinated for medical and religious reasons, it is essentially free to unilaterally impose such a policy at its discretion.

IV. Conclusions

On one level, the Supreme Court's decision in *National Federation of Independent Business* was somewhat shocking. A pandemic was raging, and an administrative agency charged with protecting employee safety and health – OSHA – decided to impose a vaccine mandate on most private sector employees in an effort to mitigate the effects of Covid-19 in the workplace. The operative statute did authorize OSHA to take emergency measures when faced with new hazards and agents that posed a grave danger to employees, and Covid-19 seemed to satisfy all of these elements. Given this context, a neutral observer might have expected the Supreme Court to give OSHA the benefit of the doubt in this case, not least because of the profound health issues at stake for employees and for society. Yet, the Court took a different approach, finding that given the high stakes involved, such a broad vaccine mandate should have been clearly authorized by the legislative branch of government under the constitution's principle of separation of powers. OSHA, as an administrative agency operating under the auspices of the executive branch of government, can only create and implement rules directly connected to its charge of workplace safety, and not go farther into the sphere of protecting the health of the general public. It was the role of Congress to take such a legislative step if it felt it was truly necessary.

Yet, as a matter of constitutional and administrative law, the Supreme Court was correct. There was a general frustration at the executive level – ie, from President Biden – that Americans had not become voluntarily vaccinated in sufficient numbers by late 2021.[92] At the same time, Congress was paralyzed from passing a legislative vaccine mandate since it did not have enough votes to do so in the Senate. OSHA's emergency steps to require the vaccination of 84 million American workers was essentially an end run around the normal legislative process. Indeed, in *Biden* v *Missouri,* the Supreme Court displayed some ideological consistency by *upholding* an administrative regulation issued by the HHS requiring vaccines for health care workers performing services for recipients of federal Medicare and Medicaid health insurance benefits, where the statute did clearly authorize HHS to take such action.[93]

Rather than blame the Supreme Court, it might be better to point to some

[92] *Kentucky* v *Biden*, n 60 above, 589 (On 9 September 2021, President Biden delivered an address in which he announced that his 'patience' with 'unvaccinated Americans...is wearing thin.')

[93] *Biden* v *Missouri*, n 9 above, 142 S Ct 647.

inherent weaknesses in the US federal constitutional structure when the country was faced with the Covid-19 pandemic. The constitution vests the states with a police power that encompasses the right to protect health and safety, and more specifically impose a vaccine mandate. However, because the issue of vaccines has become connected with a liberty interest in the right to refuse a vaccine with large numbers of people, many states with an anti-establishment or individualistic tradition refused to enact public health laws require vaccines for employees, or even masks for that matter. Other states took a different, more pro-active regulatory approach, but given the fact that the pandemic was a national problem such a patchwork approach to employee safety and public health was not necessarily the most effective one. This divided approach to Covid-19 seemingly screamed for a unified, federal response to the crisis, at least in the areas of its constitutional competence. With respect to financial matters, Congress did act, providing substantial economic relief to workers (employees and independent contractors) and employers, including enhanced sick leave benefits. But with vaccines, gridlock ensued- senators from states opposed to mandatory vaccinations were able to block any legislation in that direction, effectively leaving the only recourse to executive and administrative action. This met with mixed success, as we have seen (vaccine mandates for federal employees and for certain health care workers upheld, and OSHA's sweeping mandate for private sector employees, along with that for employees of federal contractors, both denied). Private employers had the authority to take matters into their own hands an require the vaccination of their employees, only limited in certain instances by federal labor law connected to collective bargaining, and federal laws prohibiting religious and disability discrimination. But at the same time, this further contributed to the patchwork approach outlined above, different states might have different requirements for employee vaccinations, and then within each state, different employers might have varying vaccine policies.

If such a disunified approach to employee vaccine mandates seems a bit chaotic, it is. But it is a product of a federal constitutional system, with strict divisions of power between the federal government and the states, and within the federal government, between the executive, legislative and executive branches.

The Intervention in the Light of the Provisions of Serious Breach of Jus Cogens

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Abstract

The first-reading approval by the International Law Commission of the draft conclusions on 'Peremptory Norms of General International Law' re-proposes the debate on serious breaches under Arts 40 and 41 of the draft Arts on responsibility of the States in 2001.

The aim of the analysis is a careful investigation to identify repercussions in the international legal system and, in particular, the progressive development of a norm that allows the international community to take action in order to put an end to a serious breach.

I. Introduction

The first-reading approval by the International Law Commission (hereafter, ILC) of the draft conclusions on 'Peremptory Norms of General International Law'[1] has raised the interest of the UN General Assembly which, in its recent resolution of 15 December 2020, urged States to respect the approaching deadline of 30 June 2021 for the purpose of delivering comments and observations.[2]

Received from various States, the aforementioned observations were then analyzed in the fifth report of the ILC approved in the 73rd session of 2022.[3]

Such insistent action by the United Nations provides the basis for resuming the discussion of the differentiation between particular cases prohibited by the

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[1] See the draft of conclusions on 'Peremptory norms of general international law (jus cogens)' (A/CN.4/L.936) approved in first reading in the 71st session of the International Law Commission (Geneva, 29 April - 7 June and 8 July - 9 August 2019).

[2] See Resolution 75/135 adopted by the General Assembly on 15 December 2020, Report of the International Law Commission on the work of its seventy-second session, A/RES/75/135. Due to the difficult situation arising from the ongoing pandemic, the deadline given has been respected only by the Dutch government. As evidence of the significant interest of the States in the matter, comments were received from Australia, Austria, Belgium, Colombia, Cyprus, Czech Republic, Denmark, El Salvador, France, Germany, Israel, Italy, Japan, Poland, Portugal, Russian Federation, Singapore, Slovenia, South Africa, Spain, Switzerland, United Kingdom and United States of America.

[3] See Fifth report on peremptory norms of general international law (jus cogens) by D. Tladi, 'Special Rapporteur approved by the International Law Commission in the 73rd session' (Geneva, 18 April - 3 June and 4 July - 5 August 2022), available at https://tinyurl.com/57fe2p5t (last visited 30 June 2022)

international system and the possible lawfulness of the International Community's reactions, in particular in cases where they are the consequence of a serious violation of the *ius cogens*.

This instrument, which found its first definition in Arts 40 and 41 of the draft Arts on responsibility of the States in 2001, is re-proposed in conclusion 19.

The aim of the analysis is a careful investigation to identify repercussions in the international legal system and, in particular, the progressive development of a norm that allows the international community to take action in order to put an end to a serious breach.

II. From International Crimes to Serious Breaches of Peremptory Norms

The ILC first took up the issue in the 1950s when, in undertaking the responsibility study, it focused its attention on developing a text that would provide for the institution of international crimes, constructed as a category of infraction more serious than simple *delicts*.[4] To this end, in 1976 Special Rapporteur Ago presented the text of Art 18 that regulated crimes as distinct cases of international violations.[5]

[4] Thus, Special Rapporteur Ago, in the fifth report, observed that: 'l'opération à laquelle il s'agit de procéder maintenant nous amène inévitablement à prendre en considération le contenu des obligations primaires du droit international … Il ne saurait en être autrement puisque c'est fonction du contenu desdites obligations qu'il s'agit d'établir les différentes catégories d'infractions' (Annuaires de la Commission du droit international, 1976, II, 1, 3).

[5] Pursuant to Art 18 of the draft presented by Special Rapporteur Ago (*Yearbook of the International Law Commission,* 1976, II, 1, 3):

'La violation par un État d'une obligation internationale existant à sa charge est un fait internationalement illicite quel que soit le contenu de l'obligation violée.

La violation par un Etat d'une obligation internationale étaible aux fins du maintien de la paix et de la sécurité internationales, et notamment la violation par un Etat de l'interdiction de recourir à la menace ou à l'emploi de la force contre l'intégrité territoriale ou l'indépendance politique d'un autre Etat, est un 'crime international'.

Est également un crime international la violation grave par un Etat d'une obligation internationale établie par une norme de droit international général acceptée et reconnue comme essentielle par la communauté internationale dans son ensemble et ayant pour objet:

le respect du principe de l'égalité de droit de peuples et de leur droit à disposer d'eux-mêmes ; ou

le respect des droits de l'homme et des libertés fondamentales pour tous, sans distinction de race, de sexe, de langue ou de religion; ou

la conservation et la libre jouissance pour tous d'un bien commun de l'Humanité'.

On the different positions between Anzilotti and Ago, cf G. Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' 13 *European Journal of International Law*, 1083 (2002), which explains that: 'Conceptually, Anzilotti's and Ago's positions seem to be diametrically opposed: while Anzilotti does not grade violations of international law according to their gravity, Ago differentiates between delicts and (more serious) crimes. While Anzilotti only admits violations of obligations between two or more particular states as giving rise to responsibility under international law, Ago also postulates obligations towards the international community of states as a whole'.

In fact, the definition 'crime' and the configuration of the figures in which it took concrete form immediately sparked a quite lively doctrinal debate concerning the possibility, in international law, of envisaging the criminal responsibility of States.[6] Some authors argued that international law did not differ from its domestic counterparts aside from being less developed. They furthermore claimed that, even in such a system there should be, in addition to a liability that we might define as civil, also a criminal liability.[7] The clear inclination of followers of such an orientation toward the affirmation of two different profiles of responsibility, modeled on national law systems, led some scholars to identify the commission of a crime as a violation of the international order, rather than against one or more parties.

Despite the opinions to which we have just alluded, the ILC adopted a collection of measures (Art 18 of the 1976 draft) regarding the institution of international crimes. With such an institution, a classification of international violations was established for the first time, distinguishing serious crimes from simple delicts. The latter notion would take concrete form in the breach of obligations established to protect the fundamental interests of the international community as a whole. More precisely, para 1 established the general principle according to which a state's breach of an effective international obligation is an international offense, regardless of the content of the obligation violated. Para 2 dealt with defining the archetype of the crime consisting in a state's breach of an international obligation aimed at maintaining peace and international security

[6] See M. Mohr, 'The ILC's Distinction between International Crime and International Delicts and its Applications', in M. Spinedi and B. Simma eds, *United Nations Codification of State Responsibility* (New York: Oceana Publications Inc, 1987) 115; M. Spinedi, 'International Crimes of States: The Legislative History, in J.H.Weiler, A. Cassese, M. Spinedi ed (Berlin-New York: De Gruyter, 1989), 7; G. Gilbert, 'The Criminal Responsibility of States 39 *The International and Comparative Law Quarterly*, 345 (1990); K. Kawasaki, 'Crimes of State in International Law' *Shudo Law Review*, 27 (1993); G. Palmisano, 'Les causes d'aggravation de la responsabilité des Etats et la distinction entre 'crimes' et 'délits' internationaux' 98 *Revue générale de droit international public*, 629 (1994); O. Triffterer, 'Prosecution of States for Crimes of State' 67 *Review of Penal Law Volume*, 341 (1996); N. Jørgensen, 'A Reappraisal of Punitive Damages in International Law' 68 *British Year Book of International Law*, 247 (1997); D.W. Bowett, 'Crimes of State and the 1996 Report of the International Law Commission on State Responsibility', 9 *European Journal of International Law*, 163 (1998); S. Rosenne, 'State Responsibility and International Crimes: Further Reflection on Art 19 of the Draft Articles on State Responsibility' 30 *New York University Journal of International Law and Politics*, 145 (1998); G. Abi-Saab, 'The Uses of Article 19' 10 *European Journal of International Law*, 339 (1999); G. Gaja, 'Should All References to International Crimes Disappear from the International Law Commission Draft Articles on State Responsibility?', 10 *European Journal of International Law*, 365 (1999).

[7] For the exponents of this doctrine the international legal system does not include a criminal jurisdiction merely due to its relative youth and it is therefore the responsibility of legal scholarship to work in that direction. It appears obvious in light of these premises that these scholars welcomed with great satisfaction the distinction, proposed by the codification commission, between crimes and delicts. We may recall some of the principal exponents of the penal doctrine: P.N. Drost, *The Crime of the State* (Leyden: A.W. Sythoff), 1959; S. Glaser, *Droit international pénal conventionnel* (Bruxelles: E. Bruylant), 1970.

and, particularly, in the breach of the ban on the threat or use of force against another State's territorial integrity or political independence. Lastly, para 3 described other potential crimes, such as serious breaches of norms of general international law accepted and recognized as essential by the international community as a whole.[8] The norm's formulation was the subject of much debate in the Commission, as the majority of members held that the reference to the seriousness of the act as the constituent element of an international crime, ought to be eliminated.[9] Indeed, according to the reported position, the qualification of an act as an international crime would have to be based exclusively on the nature of the obligation breached, without taking into account the nature or mode of the breach itself.

This formulation was not included in the final draft of the measure, adopted by the ILC in 1980 in Art 19,[10] where the requirement of the seriousness of the conduct, removed in the general provision, reemerged in reference to the single

[8] In particular, on the basis of the measure cited, such crimes included the failure to: respect the principle of the equality of peoples and their right to self-determination; respect the rights of man and fundamental freedoms, without distinction of race, sex, language or religion; and to preserve and permit the free enjoyment of any of humanity's common possessions.

[9] Such were the positions of Vallat: 'in categorizing an act as a crime, the pertinent factor is the nature of a particular obligation'*;* Ouchakov: 'the characterization of an internationally wrongful act depends not on the seriousness of the breach, but the importance of the obligation breached, in other words, the interest protected by the obligation'; as well as Quentin-Baxter: 'in distinguishing between the regimes of responsibility and in dealing with the higher order of breaches, the imprecise word serious could be eliminated by speaking of a breach by a State of an international obligation that constituted an offence because it was a breach of an *erga omnes* obligation'. For the aforementioned opinions, see *Yearbook of the International Law Commission*, I, 69, 73, 80 (1976).

[10] Pursuant to Art 19 of the Draft on State Responsibility (text approved in first reading by the Commission in the twenty-eighth session from 3 May to 23 July 1976 in *Yearbook of the International Law Commission*, II, 2, 30 (1980)), entitled 'International Crimes and International Delicts'

1. An act of a State which constitutes a breach of international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia from:

a) a serious breach of international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

b) a serious breach of international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

d) a serious breach of international obligation of essential importance for safeguarding and preservations of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance whit paragraph 2, constitutes an international delict.

cases constituting a crime, such as 'serious breaches' of the ban on using armed force, of the right to external self-determination, of human rights and of norms implemented to protect the environment. That notwithstanding, part of the doctrine had argued that the term 'serious breach', used in the list of potential crimes, served merely to reinforce the value of the possession being safeguarded, identified in the protection of the fundamental interests of the international community as a whole and, therefore, was not a constituent, autonomous, and adjunctive element of an international crime.[11] Moreover, to clarify the definition, which, for that matter, was quite imprecise, of the legal possession violated, described as a fundamental interest of the international community, a list of example of such crimes was supplied (para 3). All other offenses, which we might term 'minor', were attributed the traditional denomination of international delicts (para 4).

While Art 19 finally clarified the specific cases constituting an international crime, it still seemed apt to specify what consequences were to result from such infractions as well. In 1982, following the positions previously expressed by Ago, Special Rapporteur Riphagen presented to the ILC the text of the second part of the draft in which, in Art 14, those consequences were finally articulated.[12]

[11] So, argues G. Carella, *La responsabilità dello Stato per i crimini internazionali* (Napoli: Jovene, 1985), 250, who explains: 'the seriousness of the breach required by art. 19, par. 3, is not to be understood in its own right, as a concept distinct from the importance of the obligation breached, but as a means of reinforcing the importance of the content'. He continues '… given a correct understanding of the *erga omnes* obligations, it must be agreed that their breach is serious in and of itself 'the introduction of the requirement of seriousness appears inopportune because it would make the notion of a crime relative and uncertain. Indeed, the breach of a single obligation would be a crime or not depending on the de facto circumstances with the consequence that, in the absence of an institutional structure competent to formulate a judgment on its seriousness according to objective criteria, the application of the regime of more serious responsibility would left to States' subjective evaluations …' and 'as there are no occurrences of the practice from which the requirement of seriousness arises, the introduction of it is not useful, nor appears opportune'.

[12] Pursuant to Art 14 of the draft of Special Rapporteur Riphagen (*Yearbook of the International Law Commission*, II, 2, 21 (1985)),

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every other State:

a) not to recognize as legal the situation created by such time; and

b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

c) to join other States in affording mutual assistance in carrying out the obligations under sub paragraphs a) and b).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligation arising under paragraph 1 and 2 of the present article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respects to the maintenance of international peace and security.

4. Subject to Art 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paras 1, 2, and 3 of the present article and its rights and obligations under

By virtue of that measure, States were required to: not recognize situations arising from the infraction; lend no assistance or aid to the offending State; cooperate to foster compliance with the cited obligations. The norm contained an implicit clause of subordination *vis-à-vis* the collective security system, as regulated by Arts 41 and 42 ff of the UN Charter,[13] establishing that consequences deriving from it were subordinated to the Charter's procedures aimed at maintaining international peace and security.

The definitive text of the measures regulating the consequences of such crimes finally appeared only in 1996, presented by Special Rapporteur Arangio Ruiz, and contained no significant modifications except the elimination of the clause subordinating the cited measures to the UN security system.[14]

Nevertheless, roughly twenty years after its first appearance, Art 19 was removed from the most recent version of the Draft on State Responsibility, prepared by Special Rapporteur Crawford and approved by the ILC in its 53rd session in 2001.

In this normative text the definition of 'international crime' disappeared,

any other rule of international law, the obligations under the present article shall prevail.

[13] Pursuant to Art 41 of the UN Charter,

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Pursuant to Art 42 of the UN Charter,

Should the Security Council consider that measures provided for in Art 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

[14] In the draft approved in first reading in 1996, the numeration was modified as well. Consequences of crimes, in fact, were discussed in Arts 51, 52 and 53, Ch. V of part II.

Pursuant to Art 51 of the Draft on State Responsibility (*Yearbook of the International Law Commission*, II, 2, 64 (1996)), entitled 'Consequences of an International Crime'

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in Arts 52 and 53.

Pursuant to Art 52 of the Draft on State Responsibility, entitled 'Specific Consequences'

Where an internationally wrongful act of a State is an international crime:

a) An injured State's entitlement to obtain restitution in kind is not subject to the limitation set out in subparagraphs c) and d) of Art 43;

b) An injured State's entitlement to obtain satisfaction is not subject to the restriction in para 3 of Art 45.

Pursuant to Art 53 of the Draft on State Responsibility (1996), entitled 'Obligations for all States'.

An international crime committed by a State entails an obligation for every other State:

a) Not to recognize as lawful the situation created by the crime;

b) Not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

c) To cooperate with the other States in carrying out the obligations under subparagraphs a) and b); and

d) To cooperate with the other States in the application of measures designed to eliminate the consequences of crime.

definitively making way for 'serious breaches' of the peremptory norms regulated by Arts 40 and 41.

Given, however, that the responsibility regime linked to their breach substantially overlapped with the one already laid down in Arts 51-53 of the 1996 version, it appeared evident that Crawford had merely aimed to overcome the 'static' description of cases that would permit a collective reaction, identifying them, rather, *per relationem,* in reference to peremptory international norms.

This also provides an explanation for the ILC's choice to insert 'serious breaches' in part II of the Draft, in relation to the consequences resulting from the commission of an internationally wrongful act, unlike Art 19 which, on the other hand, had been positioned in the first part concerning the origins of international responsibility. The extreme difficulty the ILC encountered in convincing the generality of States to accept the principle of the existence of a fundamental norm of international law that established a hierarchy of international obligations seems to have led it to avoid taking an express position on the existence of the same. The extreme delicacy of the question had thus induced Special Rapporteur Crawford to focus his attention not on affirming a general principle for differentiating the types of conduct from which international responsibility derives, but on the creation of a *regime of aggravated responsibility* as a consequence of the commission of a serious breach[15] of international peremptory norms.[16]

Such a solution was clearly preferrable, due in part to the meager 'success' that the institution of crimes had had within the international community, since it did not presume to provide for the specific types of conduct that were supposed to elicit States' reaction, but instead connected them to the breach of norms generally accepted by actors on the international stage as bearers of the system's foundational and irrevocable values.

To conclude this brief digression, the innovative character of the recent draft of conclusions on *jus cogens* is plain to see, providing as it does, even if in an apparently non-programmatic manner, a completion of the regulation of serious breaches when in conclusion 23 it specifies:

[15] J. Crawford, J. Peel and S. Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' 12 *European Journal of International Law*, 977 (2001): 'In 2000, the Special Rapporteur proposed and the Commission accepted a compromise whereby the concept of international crimes of States would be deleted, and with it article [19], but that certain special consequences would be specified as applicable to a serious breach of an obligation owed to the international community as a whole'.

[16] Pursuant to Art 40 of the Draft on State Responsibility, 2001 (*International Law Commission Report* on 53rd Session, UN. Doc. A/56/10), entitled: 'Application of this Chapter'

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

> 'Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions'.

It seems, therefore, that through the combination of Arts 40 and 41 of the draft and the list enclosed with the conclusions, the Commission backtracked in order to identify, even if *ratione temporis*, the types of criminal conduct to which the international system attributes particular relevance, distinguishing them from simple breaches of international law.

Such an intent is visible in the words of Special Rapporteur Tladi himself who, in his report to the G.A., was forced to admit that, owing to the unique nature of the matter, the Commission, in identifying norms to insert in the list, had begun from those considered to be of a binding nature in the commentaries on Art 50 of the draft of Arts on treaty law and in Art 26 and 40 of that on State responsibility.[17]

III. The Importance of Identifying Peremptory Norms in Order to Give Concreteness to the Regime of Aggravated Responsibility

Completing the regulations on serious breaches appears even more relevant when we consider that doctrine, ever since the first version of the draft on State responsibility, has already broadly explored the question of the relationship between crimes and peremptory norms. Even if it seemed logical, for the purpose of giving it a more precise consistency, to construct a regime of aggravated responsibility linked to breaches of peremptory norms, a perfect identification of the crimes that breached peremptory norms was impeded at the time precisely by the abovementioned list of examples of the same included in Art 19. Letter d) of para 2, in fact, included the hypothesis of injury by pollution, while a generalized ban on polluting, provided it existed, certainly could not, then, or now, be configured as the object of a norm of *jus cogens* and consequently *a priori* excluded the existence of a univocal connection between the two notions.

The new formulation of Art 40, on the other hand, made it possible to overcome this dualism, attaching the regime of aggravated responsibility exclusively to breaches of peremptory norms and avoiding useless examples of the particular cases constituting a particular category of wrongful acts, which would expand gradually and, in a manner, directly proportional to the

[17] See the 'Fourth report on peremptory norms of general international law (*jus cogens*)' by D. Tladi, Special Rapporteur doc. A/CN.4/727, available at https://tinyurl.com/yjvpz2je (last visited 30 June 2022).

development of new peremptory norms.[18]

It must nevertheless be pointed out how the extreme difficulty both doctrine and practice have encountered in establishing which norms truly are peremptory in nature has always made it impossible to apply the regime of aggravated responsibility, with the lone exception of the breach of the ban on the use of force.

It might also be worth our while to recall in passing that the concept of *jus cogens* only began to develop in the international system at the beginning of the last century.[19]

[18] For a detailed bibliography see: A. Verdross, 'Jus Dispositivum and Jus Cogens in International Law' 60 *The American Journal of International Law*, 55 (1966); M. Virally, Réflexions sur le 'jus cogens' 12 *Annuaire Français de droit international*, 5 (1966); A. Morelli, 'A proposito di norme internazionali cogenti' *Rivista di diritto internazionale*, 108 (1968); L. Alexidze, 'Legal Nature of Jus Cogens in Contemporary International Law' 172 *Contemporary International Law*, 219 (1981); A. Gomez Robledo, 'Le jus cogens international: sa genèse, sa nature, ses fonctions' *Recueil des cours*, 9 (1981); L. Hannikainen, *Peremptory Norm (Jus Cogens) in International Law* (Helsinki: Finnish Lawyers' Pub. Co., 1988); U. Villani, 'In tema di 'jus cogens,' norme consuetudinarie e diritto all'informazione' (paper at the III seminar on the topic: 'Libertà di informazione e tutela della vita privata', Università Cattolica di Milano, 17-18 November 1989) *Rivista Internazionale dell'uomo*, 302 (1990); R. Casado Raigón, *Notas sobre el Ius Cogens Internacional* (Córdoba: Servicio de Publicaciones de la UCO), 1991; J. Kasto, *Jus Cogens and Humanitarian Law* (Houslow: Kingston Kall Kwik, 1994); R. Magnani, *Nuove prospettive sui principi generali nel sistema delle fonti del diritto internazionale* (Roma: Pontificia Università Lateranense, 1996), 135; J.A. Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' 8 *European Journal of International Law*, 583 (1997); S. Forlati, 'Azioni dinanzi alla Corte internazionale di giustizia rispetto a violazioni di obblighi erga omnes' *Rivista di diritto internazionale*, 69 (2001); S. Schiedermair, 'Die Menschenrechte als ius cogens', in *Rahmen des Seminars Aktuelle Fragen des Völkerrechts* (Cologne: De Gruyter, 2001); A.C. Romero, 'Los conceptos de obligación erga omnes, ius cogens y la violación grave a la luz del nuevo proyecto de la CDI sobre responsabilidad de los Estados por hechos ilícitos' 4 *Revista electrónica de estudios internacionales*, 1 (2002); K. Bartsch and B. Elberling, 'Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al v. Greece and Germany Decision' 4 *German Law Journal*, 5 (2003); P. Picone, 'Il ruolo dello Stato leso nelle reazioni collettive alle violazioni di obblighi "erga omnes" ' *Rivista di diritto internazionale*, 957-987 (2012); P. Picone, 'Gli obblighi 'erga omnes' tra passato e futuro (Obligations 'erga omnes' between present and future)' - Relazione al Convegno Interesse collettivo e obblighi erga omnes nel diritto internazionale contemporaneo, Ravenna, 7-8 May 2015 *Rivista di diritto internazionale*, 1081-1108 (2015); E. Cannizzaro, *The Present and Future of Jus Cogens* (Roma: Sapienza Università Editrice, 2015); R. Kolb, *Peremptory International Law-Jus Cogens: A General Inventor* (Oxford: Bloomsbury, 2015); T. Kleinlein, 'Jus Cogens Re-Examined: Value Formalism in International Law' 28 *European Journal of International Law*, 295 (2017); I. Di Bernardini, 'Indagini sui crimini di guerra in Afghanistan e mancata autorizzazione della Corte Penale Internazionale' *Diritti dell'uomo*, 7-26 (2019); P. De Pasquale, 'Rapporti tra le fonti di diritto dell'Unione europea (The Relationship Between the Sources of EU Law)' *Diritto pubblico comparato ed europeo*, 191-213 (2019); F. Polacchini, 'Costituzione e 'ius cogens' (Constitution and jus cogens)' *Diritto pubblico comparato ed europeo*, 501-549 (2020); P. Fois, 'Sui caratteri dello 'jus cogens' regionale nel diritto dell'Unione Europea (The Elements of Regional 'Jus Cogens' in the Law of the European Union)' *Rivista di diritto internazionale*, 635-656 (2020); F.M. Palombino, *Introduzione al Diritto Internazionale* (Bari: Laterza, 2021), 207.

[19] As far back as the 1910 case of the North Atlantic fisheries between the United States and Great Britain, the North American thesis was based on the affirmation that a peremptory norm forbade States to eliminate through a convention a right of their own citizens, as was in the specific case the

In any event, until the approval of the oft-cited draft of conclusions, international doctrine and jurisprudence did not dispose of a sure and clear guide for identifying the norms that possess a peremptory nature. In such a context it's worth remarking that the international community has often been unable to apply sanctions even against a breach of norms held to be peremptory, and that this failure to react has created further difficulties. On the one hand, it has made the identification of peremptory norms even more burdensome, since the lack of a reaction to their breach has prevented the confirmation of their existence; on the other, it has authorized those with contrary interests to consider these reiterated, unpunished breaches as the expression of a contrary practice with abrogative effects on the preceding norm of general international law.

In this complex institutional framework, in which the effectiveness of the norms on serious breaches is linked to the certain identification of *jus cogens* norms, there were also proposals of a norm that would grant a jurisdictional body the authority to decide whether or not a particular system's rules were peremptory,[20] along the lines of Art 66 letter a) of the 1969 Vienna Convention on treaty law.[21]

right of fishing on the high seas. A further step in this direction was certainly the drafting of the UN Charter at the San Francisco Conference in 1945. Art 2 para 4, indeed, codified the principle of the ban on the use of force in international relations, which is certainly one of the most important and undisputed norms of peremptory law.

There is no doubt, however, that the first formal recognition in international law of the existence of a group of norms that have a peremptory nature occurred in the Vienna Convention on treaty law in 1969. Art 53, today unimaginatively reproposed by conclusion no 2, has the virtue of having given the first definition of peremptory norms as the collection of rules accepted and recognized by the international community as a whole as norms which are binding and that can be modified only by subsequent norms of the same character. Art 64, on the other hand, which sanctions the nullity and consequently the resolution of treaties not compatible with new peremptory norms, provided the implicit recognition of the relative nature of the rules of *jus cogens* which, therefore, can undergo modifications over time. Part of the doctrine, however, has argued that Art 103 of the UN Charter, by imposing the prevalence of the obligations continued within it over all other obligations contracts by the Member States, implicitly identifies peremptory law with the obligations deriving from the Charter, including the ban on the use of force, the ban on compromising the economy of other Nations, the ban on committing 'gross violations' of human rights and the ban on impeding the self-determination of peoples.

[20] See F. Maiello, 'Le violazioni gravi dello jus cogens come distinte fattispecie di illecito internazionale' *Rivista della cooperazione giuridica internazionale*, 29, 114-135 (2008): 'It would certainly have been opportune, for purposes of the certainty of law, that the Draft on State Responsibility courageously take a position in that sense, providing for the authority of the ICJ to ascertain whether a State's wrongful act, in consideration of the obligation breached, qualified as a serious breach of *jus cogens,* with all the consequences that pursuant to Art 41 arise from it'.

[21] As is well known, each State that is a party in a dispute related to the incompatibility of a treaty with a norm held to be binding is granted the faculty to refer the question unilaterally to the ICJ so that it may resolve the dispute concerning the nullity of the treaty, subsequent to, naturally, the identification of the general norm with which the treaty conflicts as peremptory.

In fact, pursuant to Art 66 off the 1969 Vienna Convention on treaty law, entitled 'Procedures for judicial settlement, arbitration and conciliation'.

Even this solution, immediately abandoned in the drafting of the various projects presented, was partially adopted in the recent draft of conclusions on international peremptory law which, after listing the relevant international acts, in conclusion 9.1, for the purpose of proving the peremptory nature acquired by a norm, identifies the decision of international courts and, particularly, of the International Court of Justice as the first subsidiary tool.

Such a provision demonstrates the aim of entrusting a genuinely impartial body with the task of establishing the existence of the binding nature of a specific norm of general international law, in itself certainly variable over time.[22]

In such a context we would be remiss not to mention the significant scope of conclusion 14, which, by excluding any customs in contrast with peremptory norms from going into force unless the former are to be considered binding as well, makes it extremely difficult to abrogate norms already inserted in the category of *jus cogens*. Undoubtedly, in fact, the characteristic of peremptoriness has often been attributed to pre-existing norms of general international law, and the limit imposed by the reported norm could be surpassed only in the unlikely hypothesis of the formation of a customary norm that, in the international community's view, immediately appears as peremptory.[23]

IV. Collective Intervention Between Serious Breaches of *Jus Cogens* and *Erga Omnes* Obligations

If the ILC's recent intervention, despite the difficulties previously highlighted, has the merit of completing the regulation of serious breaches, the same cannot be said concerning the precise identification of States' rights and responsibilities in preventing their perpetration and particularly the powers granted for blocking their commission.

Conclusion 19 is substantially a restatement of Art 41 of the Draft that dealt with defining the specific consequences arising from the commission of serious

If, under para 3 of Art 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed: a) any one of the parties to a dispute concerning the application or the interpretation of Arts 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

[22] Submitting a dispute to the IJC is normally subject to the acceptance of its jurisdiction on the part of the State convened, an acceptance, furthermore, that can be given in a moment prior to or following the submission to the same. From this point of view the ICJ's function of settling international disputes has the nature of mere arbitration with the exception of the function under Art 66 lett a).

[23] In other words, to abrogate a norm of *jus cogens* a later one must be formed, incompatible with the first, without passing through the state of customary norm. Only through the formation of a sort of instantaneous *jus cogens* could States overcome the ban in question, maintaining a form of conduct immediately legitimate on the international level.

breaches,[24] in the sense specified by Art 40.[25] Concerns regarding the formulation of the measure had already been expressed, as it contained no specific references to the obligations of the Responsible State, such as, for example, implementing particular forms of reparations, but merely obligations regarding other States, whether or not these have been injured by the wrongful act committed.

Only in the concluding norm in para 3, indeed, was it specified that the particular consequences, under Art 41, do not prejudice the application of all consequences generally envisaged with regard to international wrongful acts[26] (but different than those in question). Nevertheless, para 4 of conclusion 19 is

[24] Art 41 of the 2001 Draft on State Responsibility:

'Particular consequences of a serious breach of an obligation under this chapter.'

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Art 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Art 40, nor render aid or assistance in maintaining that situation.

3. This Art is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

[25] On the particular consequences, see C.J. Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' 13 *European Journal of International Law*, 1161 (2002); A.C. Romero, n 18 above.

[26] The notion of *restitutio in integrum* is not univocal in doctrine. According to part of this, it consists in re-establishing the *status quo ante*, while in others' view it permits the re-establishment of the situation that would have existed if the wrongful act had never been committed. The first orientation seems preferrable because it grants the institution a more restricted extension, conforming to the meaning evoked in the Draft. The second definition, in fact, contemplates not only the restoration the pre-existing situation but also the compensation of any damages occurring due to the wrongful act, subject of an autonomous measure *ex* Art 36. The faculty of the injured State to request and obtain such form of reparation cannot be used only in two hypotheses: the case in which restitution is impossible; and if said restitution gives the injured State a disproportionate advantage compared to the burden undertaken by that which committed the wrongful act. With regard to the first we might quickly note that impossibility must be understood as impossibility *in rerum natura*, being of no value the simple difficulty, whether legal or material, to perform the restitution. Should the *restitutio* be possible, it must be carried out, unless it harms the rights of third parties. In the case *Forests of Central Rhodope*, indeed, the court of arbitration, though not finding the material impossibility of *restitutio in integrum*, considered it unfeasible since in the meantime several private citizens had acquired rights to the forests themselves (see *Forests of Central Rhodope* case, *United Nations Reports of International Arbitral Awards*, III, 1405-1432 (1933)).

Deriving from this is that reparation is applied whenever restitution is impossible either entirely or partly. It consists in the payment of a monetary sum equal to the value of the damage suffered by the injured State. The same Permanent Court of Justice in the sentence concerning the matter of the *Factory of Chorzòv* specified that the compensation of the damages must cover '*the losses suffered in the measure in which such losses are not already covered by the restitution in kind*' (*Factory at Chorzów case*, *Merits,* 1928, *Permanent Court of International Justice*, Series A, n 17, 48).

The last form of reparation, this, too, alternative or concurrent to restitution and compensation, is satisfaction. This last differs from the previous ones in that it tends not to repair the material damage caused by the wrongful act, but rather its moral counterpart. According to international practice, satisfaction can consist in a formal apology, a salute to flag, the payment of a symbolic sum or other corresponding forms. Such a form of reparation, at least in recent times, is not particularly relevant from the legal standpoint. But there is much to be said about the theory according to which satisfaction has 'the function of reaffirming the rule of international law that was breached … and constituting a precedent for future breaches'.

even less clear when it specifies that an exception is made for other consequences of the breach of peremptory norms. In other words, the regulation cited, albeit vaguely (the other consequences of the commission of international wrongful acts are not referrable only to peremptory norms, but to all those in force in the international community), guarantees the application of 'general' norms regarding wrongful acts. On this basis, the State that commits a serious breach of peremptory law is required, as in the event of the commission of any other international wrongful act, to cease doing so as well as to offer reparation[27] in feasible forms.[28]

In any event it seems indisputable that both conclusion 19 and Art 41 impose both a positive and negative obligation on all States belonging to the community.

The positive obligation consists in cooperating for the purpose of bringing about the cessation of the wrongful conduct (conclusion 19 para 1 and Art 41, para 1) and creates no shortage of uncertainties.[29]

The measures cited, in fact, do not specify which tools States ought to use to bring an end to the wrongful act perpetrated by the Responsible State[30] and, above all, whether recourse to force, at least in the presence of specific situations, is possible or even obligatory. If international law recognizes the principle of a customary nature according to which the reaction must be proportionate to the attack,[31] it is then necessary to distinguish between the possible reactions with

[27] Art 31 of the Draft on State Responsibility, 2001, n 16 above:
'Reparation'
1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

[28] Appearing particularly interesting on this point is that opinion of a part of the doctrine that admits, for the sole purposes of reparation, the possibility of renunciation by the injured State even in the case of the breach of a peremptory norm (see E. Cannizzaro, 'On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law', in *The Present and Future of Jus Cogens*, n 18 above, 140).

[29] The Draft's measure establishes a genuine obligation for all States to act to impose the cessation of the wrongful act. While such a solution is desirable, it seems difficult to envisage, at least currently, that States cease to conform their conduct to free foreign policy choices. To this end suffice it to recall that the measures of the UN Charter, relating to the collective use of force for the maintenance of peace under the direction of the Security Council (Arts 42 ff), have not received, from 1945 to today, a correct application, as highlighted by the recourse to the proxy procedure.

[30] In this sense see also P. Klein, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law' 13 *European Journal of International Law*, 13, 1241 (2002).

[31] For the affirmation of this principle see *Military and Paramilitary Activities (Nicaragua/ United States of America) Merits. J. 27.6.1986 ICJ Reports* 1986, 94*:* 'there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law' *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion of 8 July 1996 ICJ Reports* 1996, 24 -245: 'The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law'.

reference to breaches of the various norms of peremptory law.

There is no doubt that, in the case of the breach of norms of peremptory law other than the ban on the use of armed force, States can react via the most important form of self-defense provided for by international law: non-violent countermeasures. It proves more difficult, on the other hand, to acknowledge that States can react to such breaches via the use of armed force. Even if some openness[32] in that direction has been proposed, to justify armed interventions in defense of one's own citizens abroad or against States that violate the human rights of their own citizens.[33]

It seems preferable to argue, however, particularly in light of Art 40 and its exact reproduction in the most recent draft, that the international legal system is evolving towards allowing a collective reaction to breaches against peremptory norms – such as egregious human rights' violations carried out (though not exclusively) via the use of force.

Resolution 1973 (2011), adopted by the Security Council at its 6498th meeting on March 17, appears an expression of this type of reaction, in which member States have been authorized to protect the civilian population from the ongoing internal conflict, to create a no-fly zone and to set an arms embargo.[34]

Similarly, with Resolution 2401 (2018), the Security Council, after imposing a temporary ceasefire for humanitarian purposes, called on member States to use their influence on the parties to ensure its implementation and to coordinate efforts to monitor the suspension of hostilities.[35]

[32] N. Ronzitti, *Rescuing National Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Dordrecht: M. Nijhoff Publisher, 1985), 26. *Contra* B. Conforti and M. Iovane, *Diritto internazionale* (Napoli: Editoriale Scientifica, 2021), 376.

[33] For humanitarian interventions see U. Leanza, 'Diritto internazionale ed interventi Umanitari' *Rivista della cooperazione giuridica internazionale*, 6 (2000). For an evolution of international law thereby so argues P. Picone, 'Le Nazioni Unite nel nuovo scenario internazionale. Nazioni Unite ed obblighi 'erga omnes" *Comunità Internazionale*, 714 (1993): ' … it may occur that traditional international law, based on the ban on States' interference in the internal affairs of other States, and on the ban (rather legendary, furthermore) on the use of force, has recently transformed into an international law that, in practice, considers the collective interventions of States in defense of the more general interests of the community a cornerstone of its functioning and mode of operating'.

For an evolution of international law in this sense, see also M. Condinanzi, '*L'uso della forza e il sistema di sicurezza collettiva*', in S.M. Carbone, R. Luzzatto, A. Santa Maria eds, *Istituzioni di diritto internazionale* (Torino: Giappichelli, 2002). The author argues that the practice of humanitarian interventions can bring about the evolution of international law, in the sense that a new cause of justification for breaches of the ban on the use of force is developing. Arguing against this is B. Conforti and M. Iovane, n 32 above, 449, for whom in the face of a praxis essentially contrary to the ban on the use of force, we ought to admit that 'international law … has exhausted its function'. According to the author, moreover, starting a war 'cannot be evaluated legally but only politically and morally' and therefore is 'neither licit nor illicit' but 'indifferent'.

[34] See the Resolution 1973 (2011), adopted by the Security Council at its 6498th meeting, on 17 March 2011, S/RES/1973 (2011), available at https://tinyurl.com/yckzmzxa (last visited 30 June 2022).

[35] See the Resolution 2401 (2018), adopted by the Security Council at its 8188th meeting, on 24 February 2018, S/RES/2401 (2018), available at https://tinyurl.com/2s4f7m8b (last visited 30 June

When, on the other hand, the breach of peremptory law occurs through the use of force, the international community's response certainly can take the form of peaceful countermeasures,[36] but *quid iuris* concerning an armed reaction? From this perspective one wonders whether among the ILC's aims was the creation of a new regime of collective self-defense or the fostering of its development,[37] or rather to refer implicitly to the collective security system of the United Nations. It is certain, however, that the majority doctrine[38] inclines toward the non-existence of a general regime of collective self-defense that goes beyond the cases of legitimate defense in response to an armed attack provided in Art 51 of the UN Charter, despite admitting that conventional norms can institute specific regimes attributing each contracting State the right to intervene even when not directly injured.

It seems preferable to argue that the hypothesis of a collective reaction of the international community to a violation of peremptory law perpetrated through the use of international force, can easily be included in the case of which in Art 51 of the UN Charter. Indeed, the use of international force in itself already implies an armed attack, condition necessary for the application of Art 51.

In any case, it seems clear that in the most recent norms, developed principally at the impetus of the ILC, a concept of solidarity is beginning to take shape, along with the existence of obligations, that the failure of which to respect calls for a 'collective' reaction. This concept of solidarity represents the first nucleus of the notion of 'public' interest, but the latter obligations appear to develop more along the lines of national administrative law than its criminal counterpart.

This public interest, then, defined on multiple occasions in the 2001 and 2019 Drafts as a fundamental interest of the international community as a whole, is undoubtedly tied to the violation of *erga omnes* obligations springing from breaches (*rectius*: serious breaches) of peremptory law, and could allow a collective reaction whether or not the aforementioned breaches were perpetrated via the use of international force.

Today this thesis finds express confirmation in conclusion 17 which, just

2022).

[36] In this sense, the sanctions put in place by many states in relation to the crisis in Ukraine must certainly be seen, given that at the meeting of the Security Council of 25 February 2022 a resolution condemning the use of force was not adopted, due to the veto placed by the Russian Federation.

[37] See J. Crawford, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts* (Cambridge: Cambridge University Press, 2002), 114, where we read: 'Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breach in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation'.

[38] B. Conforti and M. Iovane, n 32 above, 458-459.

short of twenty years later, clarifies that breaches of *jus cogens* produce *erga omnes* obligations, thus binding the two institutions indissolubly.[39]

Furthermore, the third part of the Draft on State Responsibility[40] already allowed the invocation of a state's responsibility even by those not directly injured, pursuant to Art 48,[41] when the obligation breached is contracted toward a group of States or the international community (*rectius*: *erga omnes* obligations).[42]

Nevertheless, missing in the 2001 Draft was a specific connection between a serious breach of *jus cogens* and the reaction of third-party States, which the Commission has now definitively clarified.

This connection has also given rise to what appears to be an attempt to codify a system of collective self-defense related to *erga omnes* breaches and, therefore, of *jus cogens* rules.

This solution would permit the reaffirmation of the theory of intervention[43]

[39] On this point also see F.M. Palombino, n 18 above, 247.

[40] The third part of the Draft, entitled 'The Implementation of the International Responsibility of a State', regulates the invocation of international responsibility by establishing a series of rules concerning the identification of the injured party, the admissibility of appeals, and of the loss of the right to invoke responsibility. This is the first attempt to shape a procedural system aimed at defining the forms through which States have the right to invoke others' responsibility.

According to Special Rapporteur Crawford, the invocation of international responsibility, as regulated by these articles, does not refer to simple protests expressed by one State for the non-fulfillment, on the part of another State, of norms of international law. The latter, indeed, have the nature of mere diplomatic exchanges, while the invocation of responsibility pertains to acts of a formal nature such as, for example, a recourse presented to the International Court of Justice or a court of arbitration and even the implementation of countermeasures. For this purpose, it is necessary that the State have a right to act conferred upon it by a treaty or can regard itself as an *injured party*. Unfortunately, we must admit that, while this attempt is admirable, this body of norms loses much of its meaning in the absence of a jurisdictional authority automatically competent to judge international matters. Despite the high level of prestige achieved by the ICJ, in fact, its jurisdiction is nevertheless still bound to its acceptance by the parties in a given dispute.

[41] Art 48 of the Draft on State Responsibility (2001) n 16 above:

'Invocation of responsibility by a State other than an injured State'

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (*a*) The obligation breached is owed to a group of States including that State and is established for the protection of a collective interest of the group; or (*b*) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (*b*) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

[42] On the topic, see J. Crawford, n 37 above, 318 and I. Scobbie, 'Invocation of Responsibility for the Breach of `Obligations under Peremptory Norms of General International Law' 5 *European Journal of International Law*, 1201 (2002).

[43] Intervention is defined as 'the authoritarian interference of one or more States in the internal or international life of another State'; 'If such pressure remains within the limits of a threat, we speak of a diplomatic intervention; if, on the other hand, it takes the form of the use of military force, whether

only in the case of serious breaches of peremptory law. Such a limitation would have the advantage of overcoming the most persuasive objection raised against intervention, consisting in the possibility that the latter be used as a pretext and for the purpose of justifying illegitimate interference in the juridical sphere of sovereign States. Clearly, the chances of betraying the *ratio* of the institution are notably – if not entirely – reduced if the breaches, *which allow for the authoritative interference of one or more States in the internal or international life of another*,[44] are such by characteristics and content that they can be added to the cases delineated by the attachment to the recent draft of conclusions.

Moreover, it cannot be denied that a practice in this sense has recently been initiated even in cases that are not exactly classifiable in the general regime of collective self-defense. This can be seen in the 2014 intervention against the Islamic State in various sites on the border between north-eastern Syria and western Iraq in which participated over twenty states belonging to both the western bloc and to the eastern one.[45]

peaceful or aggressive, then we speak of an armed intervention', see R. Quadri, *Diritto internazionale pubblico* (Napoli: Liguori Editore, 1989), 275.

[44] See R. Quadri, n 43 above, 275.

[45] On this point, it should be remembered that Resolution 2249 (2015) on the Islamic State, adopted by the Security Council on 20 November 2015, while stigmatizing its objectives, did not identify a concrete role of the Council in international action aimed at weakening it and above all intervenes subsequently at the beginning of the intentional mission. On the topic, see R. Cadin, 'Considerazioni generali: nella risoluzione 2249 (2015) contro l'Isil il Consiglio di Sicurezza descrive ma non spiega' *Ordine internazionale e diritti umani*, 1241-1245 (2015).

Non-Pecuniary Damages: A New Decalogue

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Abstract

In the perspective of a personalisation of personal damage and a downsizing of the rigidity of pre-established tabular criteria, we analyse what has been achieved by the Third Section of the Italian Court of Cassation (*Corte di Cassazione*), a little more than a five-year period after the Italian Court of Cassation-Joint Sections of November 2008, for which the protection of the human person and the integrity of the compensation of this value are central.

I. «Abstract Classificatory Taxonomies» and 'Revirement' of the Italian Court of Cassation (*Corte di Cassazione*)

An unhoped-for development was achieved by the Third Section of the Italian Court of Cassation (*Corte di Cassazione*) with a view to the personalisation of personal injury and an appropriate reduction in the rigidity of the pre-established tabular criteria. This was just over five years following the pronouncement of the Joint Sections (of the Italian Court of Cassation) of 11 November 2008,[1] for whom the protection of the human person and his full compensation are central.

Consequently, after these pronouncements of 2008 (so-called 'pronuncements of San Martino'), aimed at affirming a statute of non-pecuniary damage suffered by the person for the new millennium according to a unitary meaning, a jurisprudential orientation was adopted which aims at configuring further additional compensation items, such as damage due to the loss of a relationship and damage to psychological health, when the victim or the next of kin are injured due to the catastrophic death of the former[2] or in the case of a macro-

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[1] Corte di Cassazione-Sezioni unite 11 November 2008 no 26972 [and no 26973, 26974, 26975], *Rassegna di diritto civile*, 499 (2009). On this subject, see: P. Perlingieri, 'L'onnipresente art. 2059 c.c. e la "tipicità" del danno alla persona' *Rassegna di diritto civile*, 520 (2009); also refer to A. Malomo, 'Responsabilità civile: unitarietà della tutela della persona umana e atipicità delle situazioni da tutelare' *Corti salernitane*, 127 (2011).

[2] Corte di Cassazione 8 May 2015 no 9320, *Massimario Giustizia civile*, 2015; in a different sense, Corte di Cassazione 27 August 2015 no 17210, *Guida al diritto*, 57 (2015); Corte di Cassazione 20 August 2015 no 16992, *Danno e responsabilità*, 1127 (2015), with an unfavourable commentary by G. Ponzanelli, 'La III Sezione: tabelle, risarcimento integrale, voci di danno'; see Corte di Cassazione 23 January 2014 no 1361, *Danno e responsabilità*, 363 (2014); differently Corte di Cassazione-Sezioni

injury suffered by the latter.[3]

These injuries, 'various and others', must be quantified in a personalised manner regardless of the tabular settlement. Where there is moral suffering, which takes the form of the violation of a fundamental right, it is argued that it should be recognised autonomously from any biological damage as well as any damage inherent to dynamic-relational aspects pursuant to Art 138 of the Italian Private Insurance Code. This is due to it representing a compensation item in its own right and does not entail the risk of duplicate compensation. It is important that it is adequately proved and included in the case so as to make it possible for the judge to correctly assess it and, consequently, appropriately compensate the damage caused.[4] Not only. In the assessment, the judge may also take into account «presumptions and notoriety, if necessary, exclusively».[5] All the more so, if the tort has strongly deteriorated the personal relationships in the affective context, since the victim's next of kin has to provide for any needs of the latter (in the case in point, the son) with relative corrosion of the parental relationship, the damage to the interest of a non-pecuniary nature – defined by the majority in doctrine and jurisprudence as non-pecuniary damage, equal to the disruption of the daily habits of the family member who has become the carer, forced into heavy and unthinkable rhythms of life due to the imperishable commitment of having to take care of every aspect of the daily life of his son, who has survived, but is severely disabled – requires to be repaired according to the protection provided by Art 2059 of the Italian Civil Code –, for the author according to Art 2043 of the Italian Civil Code –[6] since it is the injury of a constitutionally protected personal interest.[7]

unite 22 July 2015 no 15350, *Foro Italiano*, I, 2682 (2015).

[3] Cf Corte di Cassazione 14 January 2014 no 531, *Diritto di famiglia e delle persone*, I, 1067 (2014); Corte di Cassazione 3 October 2013 no 22585, *Foro italiano*, I, 3433 (2013); Corte di Cassazione 20 November 2012 no 20292, *Danno e responsabilità*, 129 (2013).

[4] See Corte di Cassazione 9 June 2015 no 11851, *Foro italiano*, I, 2737 (2015), with critical remarks by G. Ponzanelli, 'Incertezze sul risarcimento del danno alla persona: sofferenza e qualità della vita in r.c. auto'.

[5] Corte di Cassazione 20 April 2016 no 7766, *Danno e responsabilità*, 720 (2016) with a favourable commentary by P.G. Monateri, 'La fenomenologia del danno non patrimoniale', 725, and another unfavourable commentary by G. Ponzanelli, 'Postfazione a Monateri', 727-728. See Corte di Cassazione 17 September 2019 no 23146, available at www.dejure.it, according to which 'the legal paradigms governing presumptions must be applied, and the necessary consequence in terms of suffering must be deduced from the known fact indicated'.

[6] See A. Malomo, *Responsabilità civile e funzione punitiva* (Napoli: Edizioni Scientifiche Italiane, 2017), 140, footnote no 312. This is a general clause of extended scope in accordance with the principle of solidarity. (Art 2 Italian Constitution): P. Perlingieri, 'I princípi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali Sisdic*, 1, 13 (2017); see also G. Perlingieri, 'Sul giurista che come «il vento non sa leggere»' *Rassegna di diritto civile*, 399 (2010); Id, 'Sul criterio di ragionevolezza' *Annali Sisdic*, 39, footnote no 40 (2017). See S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffré, 1967), 92, 105.

[7] Cf Corte di Cassazione 14 January 2014 no 531 n 3 above, 1067; Corte di Cassazione 3 October 2013 no 22585 n 3 above, 3433; Corte di Cassazione 20 November 2012 no 20292 n 3 above, 129.

II. Dynamic-Relational Damages

In the light of the orientation that emerged from the Third Section–[8] and supported for some time by the most attentive doctrine,[9] but according to others in divergence with respect to the above-mentioned 'pronouncements of San Martino' of 2008–[10] the new 'statute of non-pecuniary damage' allows for an existential lesion to be qualified when not only the health of a person is affected, but also when the dynamic-relational sphere is.[11]

The «all-encompassing nature» to be considered in the quantification of damage means that «in the liquidation of any non-pecuniary damage, the judge must take into account all the consequences that have derived from the damaging event, without exception, with the concomitant limitation of avoiding duplicate compensation, attributing different names to identical damage, and not exceeding a minimum threshold of appreciation, in order to avoid so-called 'small-claims' compensation».[12] The careful assessment to be carried out regarding the inner aspect of the loss (moral suffering) and its capacity to modify a person's daily life for the worse (so as to evoke so-called existential

[8] See Corte di Cassazione 31 January 2019 no 2788, *Nuova giurisprudenza civile commentata*, I, 279 (2019); Corte di Cassazione 27 March 2019 no 8442, available at www.utetgiuridica.it; Corte di Cassazione ordinanza 29 March 2019 no 8755, available at www.ilcaso.it; Corte di Cassazione 20 October 2020 no 22858, available at www.dejure.it.

[9] See G. Ponzanelli, 'Le sezioni unite di San Martino abbandonate progressivamente dalla Terza Sezione e dal legislatore' *Nuova giurisprudenza civile commentata*, II, 1349 (2018); firstly, G. Ponzanelli, 'Il decalogo sul risarcimento del danno non patrimoniale' *Nuova giurisprudenza civile commentata*, I, 836 (2018); G. Ponzanelli, *Postfazione* n 5 above, 727; Id, 'Il nuovo statuto del danno alla persona è stato fissato, ma quali sono le tabelle giuste?' *Nuova giurisprudenza civile commentata*, I, 277 (2019); C. Castronovo, 'Il danno non patrimoniale dal codice civile al codice delle assicurazioni' *Danno e responsabilità*, 15 (2019) reiterates that he has already been critical of the unified sections of the Italian Court of Cassation [C. Castronovo, 'Danno esistenziale: il lungo addio' *Danno e responsabilità*, 1 (2009)], insofar as they made the disorder possible, as demonstrated by the jurisprudential orientation of the Third Section (of the Italian Court of Cassation) aimed at overturning the assumption of equilibrium, which, according to the author, was never achieved; G. Alpa, 'Osservazioni sull'ordinanza n. 7513 del 2018 della Corte di cassazione in materia di danno biologico, relazionale, morale' *Nuova giurisprudenza civile commentata*, II, 1330 (2018); M. Franzoni, 'Danno evento, ultimo atto?' *Nuova giurisprudenza civile commentata*, II, 1337 (2018); R. Pardolesi, 'Danno non patrimoniale, uno e bino, nell'ottica della Cassazione, una e Terza' *Nuova giurisprudenza civile commentata*, II, 1344 (2018); secondo C. Salvi, 'Diritto postmoderno o regressione postmoderna' *Europa e diritto privato*, 871 (2018), there has been a disconnection with the nomothetic function of the Joint Sections (of the Italian Court of Cassation). Similarly G. Comandé, 'Dal sistema bipolare al sistema biforcuto: le linee guida della Cassazione sul danno non patrimoniale a dieci anni dalle sentenze dell'Estate di San Martino' *Danno e responsabilità*, 157 (2019). On the topic, see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, IV, *Attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 372-374.

[10] Cf P.G. Monateri, 'Danno biologico e danni da lesione di altri interessi costituzionalmente protetti' *Nuova giurisprudenza civile commentata*, II, 1341 (2018); as well as P. Cendon, '*Gemütlichkeit*: dieci fragranze esistenziali in Cass. n. 7513/2018' *Nuova giurisprudenza civile commentata*, II, 1333 (2018).

[11] Corte di Cassazione 20 April 2016 no 7766, n 5 above, 721.

[12] ibid; firstly, Corte di Cassazione 7 March 2016 no 4379, *Foro italiano online*.

damage) – «without any compensatory automatism being predictable», since such consequences 'are [...] never catalogued according to universal automatisms' –[13], together with the examination of the 'peculiarities and [...] exceptionality of the concrete case', is prodromic, as well as unavoidable, in order to allow for 'an adequate personalisation of the damage'.[14]

The negation expressed as 'abstract classificatory taxonomies' leads to a pondered evaluation of the

> 'real phenomenology of personal injury, denying which the judge risks incurring in an even more serious error, namely that of substituting a legal meta-reality for a phenomenal reality'.[15]

The issue that comes before the court always regards human suffering inflicted to which an adequate remedy must be provided if the judge is to ascertain injuries caused to the person and their fundamental rights. According to the majority of jurisprudence and doctrine, this would be done according to Art 2059 of the Italian Civil Code;[16] but, for another part of the doctrine, reasonably in accordance with Art 2 of the Italian Constitution and Art 2043 of the Italian Civil Code.[17]

Therefore, the opinion of the Court of Cassation appears to be acceptable, ie, that it is necessary to carry out a

> 'reading of the 2008 pronouncements [...] not according to a formal-deductive interpretative logic, but through an inductive hermeneutics which, after having identified the indispensable subjective situation protected at a constitutional level [...], then allows the judge to decide on the merits of the case. After identifying the essential subjective situation protected at a constitutional level [...], it then allows the judge to carry out a rigorous analysis and consequently a rigorous assessment, in terms of proof, of both the internal aspect of the damage (moral suffering) and its modifying impact *in pejus* with regard to daily life (so-called existential damage, in this sense correctly understood, or, if preferred a less disturbing lexicon,

[13] Corte di Cassazione 20 April 2016 no 7766, n 5 above, 721.

[14] ibid

[15] ibid 720. The importance of this 'approach' is highlighted by P.G. Monateri, *La fenomenologia* n 5 above, 725.

[16] Corte di Cassazione 20 April 2016 no 7766, n 5 above, 720.

[17] As discussed by P. Perlingieri, *Il diritto civile* n 9 above, 358. In particular, the Art 2 of the Italian Constitution provides: 'La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale'; the Art 2043 of the Italian Civil Code provides: 'Qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno'; the Art 2059 of the Italian Civil Code provides: 'Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge'.

damage to the life of relationships)'.[18]

This way of reasoning outlines a 'construction of categories that do not erase the phenomenology of personal damage through sterile unifying formalisms', although it would have been desirable to argue in terms of the need to always identify 'upstream' the damaged interests, so as to be able to consider, 'downstream' of this careful examination, both the 'inner suffering' as well as the 'relational dynamics of a life' that have been fatally changed.[19]

The parallelism between the need for full reparation of the injury caused to the duality of subjective situations (not coincident) such as the 'inner pain' and/or the 'significant alteration of daily life', and the provisions of Art 612 *bis* of the Italian Penal Code, which, in terms of persecutory acts, outlines both situations to the realisation of which must follow the sanction (in particular, imprisonment) for 'whoever', precisely,

> 'with repeated conduct, threatens or harasses someone in such a way as *to cause a persistent and serious state of anxiety or fear* (or to give rise to a well-founded fear for one's own safety or that of a close relative or of a person associated to them through a relationship of affection), or *to force them to alter their daily habits*'.[20]

Moreover, the findings of the Third Section, namely that 'the category of 'existential' damage is 'undefined and atypical', since it is «the same dimension of human suffering, in turn, 'undefined and atypical' »,[21] implies overcoming the erroneous assumption – from 2003 onwards upheld –[22] of the so-called 'typicality' of non-pecuniary damage relegated to the restrictive reading of Art 2059 of the Italian Civil Code, according to which only that damage expressly provided for by a written rule (implementing a constitutional norm) would be compensable. It is necessary to ensure that the reparation of any interest, both of a pecuniary and non-pecuniary nature, once injured, can be traced back to Art 2043 of the Italian Civil Code, the only general clause capable of ensuring broad, indefinite and atypical protection.

Similarly, it is also worth mentioning the Italian Constitutional Court (*Corte Costituzionale*) ruling no 235 of 2014. In confirming the constitutional

[18] Corte di Cassazione 20 April 2016 no 7766, n 5 above, 721.

[19] ibid

[20] ibid. The italics have been added by the author.

[21] ibid. See P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1972), 175 and 185, with a view to a corresponding 'elasticity' of personality protection, so as to be able to protect 'the value of the personality without limits'. Cf also A. Flamini, 'Il danno alla persona: danno patrimoniale, danno non patrimoniale, danno morale' *Corti marchigiane*, 317 (2005) and Id, *Il danno alla persona. Saggi di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2009), 118 and 121.

[22] See what is stated in para 4 and footnote no 51.

legitimacy of Art 139 of the Italian Private Insurance Code, the court emphasises that 'he provision denounced is not closed [...] to the possibility of compensating moral damage', since when this 'is proven', it must be taken into account by the court with an increase in the 'amount of biological damage (now non-pecuniary damage) by 20%', thus 'definitively' removing the justification for 'the thesis of the 'uniqueness of biological damage', as a sort of immobile prime mover of the entire compensation system'.[23] Such a limitation is justified in a system of compulsory insurance for motor vehicles (third-party liability insurance) in which

> 'the particular compensation interest of the injured party must be measured against the general and social interest of the insured to have an acceptable and sustainable level of insurance premiums',[24]

with it being in line with what we intend to support in these pages, namely the need for full reparation of the injury caused, which must always be considered pre-eminent.[25] Basically, the Italian Constitutional Court (*Corte Costituzionale*) correctly states that the 'standard mechanism for quantifying damages' only has reason to exist for the 'specific and limited sector of minor injuries', where, in any case, the judge must be allowed 'space' to personalise the *amount* due, so as to be able to 'possibly increase it by up to one fifth in consideration of the subjective conditions of the injured party'.[26]

However, focussing on macro-injuries and the relative margin of operation, it is symptomatic that the wording of Art 138 of the Italian Private Insurance Code, which coincides

> 'in its morphological aspect (a medically ascertainable injury) with Article 139 of the same code, differs in its functional aspect by dealing with an 'injury' which has a negative impact on the daily activities and on the dynamic relational aspects of the injured party. A [...] dynamic dimension of the injury, a projection entirely (and only) external to the subject, an injury to everything that is 'other than itself' with respect to the inner essence of the person'.[27]

In light of these arguments of the Court of Cassation, a further element of distinction from moral damage can be seen in Art 138 of the Italian Private Insurance Code, 'even more crystal clear', where it is stated that

[23] Corte di Cassazione 20 September 2016 no 7766, n 5 above, 722, in rejection of the relevant Pisan doctrinal thesis: P.G. Monateri, *La fenomenologia* n 5 above, 725.

[24] Corte di Cassazione 20 September 2016 no 7766, n 5 above, 722.

[25] See P.G. Monateri, *La fenomenologia* n 5 above, 726.

[26] Corte Costituzionale 16 October 2014 no 235, *Corriere giuridico*, 1483, recalled by the Corte di Cassazione 20 September 2016 no 7766, n 5 above, 722.

[27] Corte di Cassazione 20 September 2016 no 7766, n 5 above, 722.

> 'if the ascertained impairment has a significant effect on specific dynamic personal-relational aspects, [...] the amount of the damages can be increased by the judge up to thirty percent with a fair and motivated assessment of the subjective conditions of the injured party'.[28]

Since all this does not constitute 'any 'duplication of compensation' ', the assessment of the possible increase of up to 30 per cent, now up to 40 per cent,[29] becomes functional to the 'demonstrated peculiarity of the concrete case' which requires 'in relation to the damage caused to the relational life' of the person an adequate compensation.[30] 'Another and different investigation' – it is further underlined – 'will be carried out in relation to the suffered inner suffering'.[31]

By reasoning in this way, an attempt is being made to dismiss, albeit indicated in many voices in the doctrine, 'automatic compensation' as it is unthinkable to have 'a universal table of human suffering'.[32] Consequently, it will be up to the judge to determine the economic liquidation of the damage in an adequate, reasonable and proportionate manner, so as to ensure full compensation for the damage caused to interests of this nature.[33] It is fully understood how the judge, 'can never be the judge of mathematical automatisms' or 'of juridical super-categories when the juridical dimension ends up openly betraying the phenomenology of suffering'.[34]

III. Full Reparation: Inadequacy of Pre-Established Criteria

Some pronouncements of 2018[35] are paradigmatic, in the full affirmation of the jurisprudential orientation undertaken by the Third Section; and, in particular, it is important to note what emerges from an order of the Court of Cassation in 2018,[36] regarding a dispute involving a person who, as a result of an accident, suffered a serious physical impairment to the point of being forced

[28] As recalled verbatim by the Corte di Cassazione 20 September 2016 no 7766 n 5 above, 722.

[29] This is confirmed, according to the Corte di Cassazione 20 September 2016 no 7766, n 5 above, 723, in the projected reform of Art 138 of the Italian Private Insurances Code, which has been implemented in the 'competition' decree, where para 3 «distinguishes, without any possibility of equivocation, the dynamic relational aspect of the damage from psychophysical suffering of particular intensity, foreseeing in such cases an increase in compensation, compared to that foreseen in the single national table, of up to 40%».

[30] Corte di Cassazione 20 September 2016 no 7766 n 5 above, 722.

[31] ibid 723.

[32] ibid; similarly, P.G. Monateri, *La fenomenologia* n 5 above, 727; G. Ponzanelli, *Postfazione* n 5 above, 728.

[33] As criticised by G. Ponzanelli, *Postfazione* n 5 above, 728.

[34] Corte di Cassazione 20 September 2016 no 7766, n 5 above, 723.

[35] Corte di Cassazione 17 January 2016 no 901, *Foro italiano*, I, 923 (2018); Corte di Cassazione 31 May 2018 no 1370, *Danno e responsabilità*, 465 (2018).

[36] Corte di Cassazione 27 March 2018 no 7513, *Nuova giurisprudenza civile commentata*, 836 (2018).

to opt for early retirement supplemented by the payment of an INAIL (this stands for *Istituto Nazionale Assicurazione contro gli Infortuni sul Lavoro*) pension, albeit minimal compared to the salary enjoyed up to that time, together with a sudden change in the quality of his life, caused by the abrupt interruption of his relations with others[37] and the definitive renunciation of all those 'activities of care of the vineyard and the garden', which strongly affected his previous *modus vivendi*.

All this resulted in dynamic-relational damage, liquidated by the Court with the *standard* tabular measure according to the victim's age and degree of permanent invalidity, increased by 25 per cent, according to 'a personalised parameterization',[38] which, however, the Court of Appeal, subsequently called upon, did not confirm, since the loss of the possibility of devoting oneself to recreational activities represented 'an already compensated injury' with the settlement of the *standard* tabular value, ie already 'included in the biological damage', in order to avoid double compensation of the 'same injury, calling it by two different names'.

This event is a good opportunity for the Third Section to confirm and better clarify its reasoning (reiterated below in the same terms)[39] and, downstream, for that part of the doctrine most attentive to the evolution of the system of civil responsibility, to comment – some in favour, others critically–[40] on the 'new statute of personal damages'[41] as established by the First Section, by way of clarification of everything that should be considered in force regarding non-pecuniary damage.

First of all, the Italian Court of Cassation considers a singular assumption, namely that, with regard to so-called non-pecuniary damage,

> 'the law contains very few and non-exhaustive definitions; those coined by case law and practice are often used in a polysemic manner; those proposed by academia often obey the intentions of the doctrine that advocates them'.

The risk, therefore, is that «identical lemmas are used by litigants to express different concepts, and conversely that different expressions are used to express the same meaning».[42] This is the 'state of affairs' capable of 'generating a great deal of confusion' and 'preventing any serious dialectic, since any scientific discussion' would be 'impossible in the absence of a shared lexicon'.

[37] Now being confined to the house.

[38] See P. Perlingieri, *Il diritto civile* n 9 above, 379.

[39] As defined by G. Ponzanelli, 'Il nuovo statuto del danno alla persona' n 9 above, 277, in the commentary to Corte di Cassazione 31 January 2019 no 2788, n 8 above, 279.

[40] See n 9 and n 10 above.

[41] This can be understood by the title of the commentary by G. Ponzanelli, 'Il nuovo statuto della danno alla persona' n 9 above, 277.

[42] Corte di Cassazione 27 March 2018 no 7513 n 36 above, 842.

Moreover, it is argued, emphatically, that 'the need for linguistic rigour as an indispensable method in the reconstruction of institutions has already been pointed out by the Joint Sections [of the Italian Court of Cassation]' by indicating, 'as a necessary precondition for the interpretation of the law, the need to

> 'clear the field of analysis from [...] elusive and abused expressions that have ended up becoming "mantras" repeated ad infinitum without a prior recognition and sharing of meaning [...], [which] remains obscure and serves only to increase confusion and encourage conceptual ambiguity as well as exegetic laziness' '.[43]

According to the Third Section (of the Italian Court of Cassation),

> 'it is necessary to establish what must [...] be meant by 'dynamic-relational damage'; and, first of all, whether there exists *in rerum natura* an injury that can be so defined'.

IV. Decalogue of the So-Called Non-Pecuniary Damages

The Supreme Court of Cassation draws three conclusions.

The first is that the 'dynamic-relational damage', proclaimed 'with a more archaic but more noble formula, [such as] 'damage to the life of relationships' ', due to an injury to health represents the 'impairment' of every possible ordinary activity for the injured person ('from doing, to being, to appearing'). This implies that the so-called damage to health, rather than including dynamic-relational damage, constitutes in itself ' 'dynamic-relational' damage'.[44]

Secondly, that the occurrence of a permanent impairment of the victim's daily 'dynamic-relational' activities is certainly not a different type of damage from biological damage. Any injury to health is capable of generating the most damaging and diverse consequences but can be 'classified' into two groups: a) consequences necessarily common to all persons suffering that particular type of disability; b) consequences particular to the specific case, which have made the damage suffered by the victim different and greater than in similar cases. All constitute non-pecuniary damage; but while those falling within group A presuppose «the mere demonstration of the existence of the invalidity» and will be settled as biological damage as the ' 'normal' consequence of the damage' which is determined for any person suffering an «identical» impairment; those

[43] ibid, recalling Corte di Cassazione-Sezioni unite 15 June 2015 no 12310, *Foro italiano,* I, 3174 (2015).

[44] Corte di Cassazione 27 March 2018 no 7513 n 36 above, 844 continues: 'If it did not have 'dynamic-relational' consequences, the injury to health would not even be a medical-legally appreciable and legally compensable damage'.

falling within group B require 'concrete proof of the actual (and greater) damage suffered' and must therefore be compensated in an appropriate manner by increasing the estimate of the biological damage itself (ie through personalisation).[45]

However, for the purposes of personalising the compensation, it is not important which aspect of the victim's life has been compromised, but rather that the consequence or consequences are so extraordinary that they cannot be included in the damage already expressed by the percentage of permanent invalidity, 'allowing the judge to proceed with the relevant personalisation at the time of settlement'.[46]

Finally, the third is that 'the factual circumstances justifying the personalisation of compensation for non-pecuniary damage integrate a 'constitutive fact' of the claim'; and, consequently, they must be attached in a detailed manner and proved by any means and, therefore, even with the attachment of notoriety, the maxims of common experience and simple presumptions,[47] 'without being able, however, to be resolved in mere generic, abstract or hypothetical statements'.[48]

Reasoning in these terms, therefore, the Third Section arrives at the establishment of a sort of 'decalogue'–[49] claiming for itself, in some ways, a task already carried out, and in an exhaustive manner according to many in doctrine,[50] by the Joint Sections (of the Italian Court of Cassation) in 2008 – which, to complete what has been outlined so far, will be discussed in detail.

1) 'The legal system provides for and regulates only two categories of damage: pecuniary damage and non-pecuniary damage'.[51]

[45] In this sense, Corte di Cassazione 29 July 2014 no 17219, available at www.foroplus.it. Therefore, 'the consequences of the impairment which are not general and inevitable for all those who have suffered that type of injury, but were suffered only by the individual injured person in the specific case, due to the peculiarities of the concrete case, justify an increase in the basic compensation for biological damage' (Corte di Cassazione 27 March 2018 no 7513 n 36 above, 844).

[46] See Corte di Cassazione 21 September 2017 no 21939, available at www.foroplus.it; Corte di Cassazione 7 November 2014 no 23778, *Nuova giurisprudenza civile commentata*, I, 331 (2015); Corte di Cassazione 18 November 2014 no 24471, *Repertorio Foro italiano*, 208 (2014).

[47] Corte di Cassazione 27 March 2018 no 7513, n 36 above, 84, evokes Corte di Cassazione-Sezioni unite 11 November 2008 no 26972 n 1 above, 499.

[48] Corte di Cassazione 18 November 2014 no 24471 n 46 above.

[49] See G. Ponzanelli, 'Il decalogo' n 9 above, 836.

[50] See G. Ponzanelli, n 9 above, 836; Id, n 4 above, 2737; Id, 'Novità per i danni esemplari?' *Contratto e impresa*, 1202 (2015) and Id, 'Alcune considerazioni sul livello italiano del risarcimento del danno alla persona' *Nuova giurisprudenza civile commentata*, II, 558 (2019).

[51] The Italian Court of Cassation is therefore in line with the majority of doctrine and case-law which, from 2003 onwards, have accredited a bipolar system of civil liability. On the topic, see A. Procida Mirabelli di Lauro, *La riparazione dei danni alla persona*, (Napoli: Edizioni Scientifiche Italiane, 1993), 272; Id, 'I danni alla persona tra responsabilità civile e sicurezza sociale' *Rivista critica di diritto privato*, 773 (1998); Id, 'Il danno ingiusto (Dall'ermeneutica "bipolare" alla teoria generale e "monocentrica" della responsabilità civile)' *Rivista critica di diritto privato*, 13 (2003). However, this division is questionable: A. Malomo, 'Sub art. 2043 c.c.', in G. Perlingieri ed, *Codice civile annotato con la dottrina e la giurisprudenza*, IV, 2, (Napoli: Edizioni Scientifiche Italiane, 2010), 2607; P.

2) 'The [so-called] non-pecuniary damage (like pecuniary damage) constitutes a legally (although not logically) unitary category'.

3) 'Unitary category' means that any non-pecuniary damage will be subject to the same rules and criteria for compensation [Arts 1223, 1226, 2056, 2059 of the Italian Civil Code].

4) In settling non-pecuniary damage, the judge must, on the one hand, examine all the harmful consequences of the tort; and on the other, avoid giving different names to identical damage.

5) During the preliminary investigation, the court must make a detailed and in-depth assessment, in concrete and not in abstract, of the actual existence of the damage claimed (or denied) by the parties, to this end using all the necessary means of proof, appropriately ascertaining in particular whether, how and how much the victim's condition has changed compared to the life led before the unlawful act; using also, but without *a priori* taking refuge in it, known facts, the maxims of experience and presumptions, and without proceeding to any automatic compensation.

6) In the presence of permanent damage to health, the joint awarding of a sum of money as compensation for biological damage and the awarding of a further sum as compensation for damage which is already expressed by the percentage degree of permanent invalidity (such as damage to daily, personal and relational activities, which is indefectibly dependent on the anatomical or functional loss: that is to say, dynamic-relational damage) constitute a duplication of compensation.

7) In the presence of permanent damage to health, the standard measure of compensation laid down by the law or by the uniform equitable criterion adopted by the courts of merit (nowadays according to the [so-called] variable point system) can be increased only in the presence of completely abnormal

Perlingieri, n 21 above, 17; Id , 'L'art. 2059 c.c. uno e bino: una interpretazione che non convince', (2003), in Id, *La persona e i suoi diritti* (Napoli: Edizioni Scientifiche Italiane, 2006), 574; Id, 'La responsabilità civile tra indennizzo e risarcimento' *Rassegna di diritto civile*, 1063 (2004). Similarly, critical of the case-law and doctrine delimiting the applicability of Art 2043 of the Italian Civil Code for only pecuniary damage V. Scalisi, 'Diritto e ingiustizia' *Rivista di diritto civile*, 32 (2004). See Id, 'Danno alla persona e ingiustizia', (2007), in Aa.Vv., *I rapporti civilistici nell'interpretazione della Corte costituzionale. La Corte costituzionale nella costruzione dell'ordinamento attuale. Princípi fondamentali*, I, (Napoli: Edizioni Scientifiche Italiane, 2007), 56, who, with regard to the unreasonable restriction on the typical nature of damages to the person pursuant to Art 2059 of the Italian Civil Code, underlines that the 'legal reserve of the indemnifiability of non-pecuniary damage' established in the codicil provision in question 'has continued to represent in the system of the protection of third parties an authentic *vulnus* to the personalist principle, determining in the system a situation clearly unbearable for the person, all the more serious if one considers the profile of the strident contrast with the Constitutional Charter, which [...] thanks fundamentally to cardinal provisions such as those in Articles 2 and 3 has marked a profound break with certain strategic choices of the codicil, not only sanctioning in a definitive and irreversible manner the full recovery in the norm of the historical-real subject, the human person, but above all consecrating the ascendancy of the same as an apex value of the entire system'.

and quite unusual harmful consequences. The harmful consequences to be considered normal and unquestionable according to *id quod plerumque accidit* (those that any person with the same disability could not fail to suffer) do not justify any personalisation increasing the compensation.

8) In the presence of damage to health, the joint awarding of a sum of money by way of compensation for biological damage and a further sum by way of compensation for damage which has no medico-legal basis, because it has no organic basis and is not part of the medical-legal determination of the percentage of permanent invalidity, represented by inner suffering (such as, for example, pain of the soul, shame, self-loathing, fear and despair) does not constitute a duplication of compensation.

9) If the existence of one of these non-medical-legal damages is correctly deduced and adequately proved, they must be subject to separate assessment and settlement (as confirmed by the text of [Arts 138 and 139 of the Italian Private Insurance Code, as amended by legge 4 August 2017 no 124, Art 1(17)], in the part where, under the unitary definition of 'non-pecuniary damage', they distinguish the dynamic relational damage caused by injuries from 'moral' damage).

10) Non-pecuniary damage not resulting from an injury to health, but consequent to the injury of other interests protected by the constitution, is to be settled, not differently from biological damage, taking into account both the damage suffered by the victim in relation to himself (inner suffering and the feeling of distress in all its possible forms, ie the inner moral damage), and that relating to the dynamic-relational dimension of the life of the injured party. In both cases, without any automatic compensation and after careful and in-depth investigation.

In a ruling filed a year after this one and mentioned earlier,[52] the need for separate compensation (autonomously) for non-pecuniary damage is reiterated once again, with a historical reference to the closest decades of jurisprudential pronouncements on the issue in question, which originates in the pronouncement of the Italian Constitutional Court of 1986 aimed at rejecting the question of the constitutionality of Art 2059 of the Italian Civil Code and then arriving at the decisions of 2014 by the same court together with the Court of Justice of the European Union, aimed at legitimising the conformity of Art 139 of the Italian Private Insurance Code with constitutional and European principles.

Therefore, it is reiterated 'in clear letters' that so-called moral damage must be indemnified in an autonomous manner, without making any distinction according to whether it falls under ordinary civil liability or respectively under civil liability for motor vehicle traffic or civil liability for healthcare (initially only for micro-permanent injuries with the provision of indemnity limitations), precisely because it is detrimental to Art 3 of the Italian Constitution and

[52] Corte di Cassazione 31 January 2019 no 2788 n 8 above, 279.

European principles. In addition, the legislator endorsed the autonomy of the compensation post, in the formulation of Art 138 of the Italian Private Insurances Code for macro-permanent injuries as set out in legge no 124 of 2017, due to the specific nature of the damage. If there is evidence (attached) of injury to the dynamic-relational sphere of the victim, with a strongly negative impact on the (quality of) a person's life, such injury must also be compensated in a personalised manner, taking into account the 'wholly anomalous, exceptional and [...] peculiar' harmful consequences that have occurred, with a necessary increase compared to the *range* established for each point of disability in the tables.[53] There, therefore, seem to be the re-emergence of so-called existential damage,[54] which was rejected in 2008.[55]

V. Possible Implementation of a Punitive Function

However, it does not seem possible to share the jurisprudential orientation according to which, in quantifying the damage due to such an injury, it is necessary to consider the seriousness of the consequences of the harmful event, and certainly not the seriousness of the

> 'culpably causal conduct of their author, given that civil liability, beyond its functional consequences and express legislative exceptions, [would] have a general compensatory and not punitive structure'.[56]

[53] Corte di Cassazione 31 January 2019 no 2788, n 8 above, 284.

[54] This category, which at first fell within the scope of biological damage [Corte di Cassazione 30 January 1990 no 645, *Archivio giuridico della circolazione e dei sinistri stradali*, 382 (1990)], then as a non-pecuniary injury under the general clause of the injustice of damage [Corte di Cassazione 21 May 1996 no 4671, *Archivio giuridico della circolazione e dei sinistri stradali*, 730 (1996); Corte di Cassazione 3 July 2001 no 9009, *Lavoro e previdenza oggi*, 1396 (2001)], see M. Barcellona, *Il danno non patrimoniale* (Milano: Giuffré, 2008), 41; cf also M. Bussani, 'L'illecito civile', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2020), 304-305. For a reconstruction, with reference to the Corte Costituzionale 27 October 1994 no 372, *Foro italiano*, I, 3297 (1994), which makes it possible to reconfigure the non-pecuniary damage in light of Art 2059 of the Italian Civil Code, see E. Capobianco, 'Lesione di interessi esistenziali della persona e loro risarcibilità: il c.d. danno esistenziale. Il contributo della «Rassegna di diritto civile»', in P. Perlingieri ed, *Temi e problemi della civilistica contemporanea. Venticinque anni della Rassegna di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), 445.

[55] Corte di Cassazione-Sezioni unite 11 November 2008 no 26972, n 1 above, 512, highlights not that 'existential' damages cannot be included in the compensation, but that if they exist and are proven, they are among the possible items of so-called non-pecuniary damage, which must be fully compensated: S. Delle Monache, 'Alla ricerca del danno esistenziale' *Nuova giurisprudenza civile commentata*, II, 315 (2009). See G. Ponzanelli, 'Il danno non patrimoniale: una possibile agenda per il nuovo decennio (2010-2020)' *Nuova giurisprudenza civile commentate*, II, 248 (2011), who underlines: 'This is thus confirmed the unity of the category of non-pecuniary damage and the inappropriateness of dividing it into sub-categories, in the general perspective of achieving the principle of full reparation of damage'.

[56] Corte di Cassazione 31 January 2019 no 2788 n 8 above, 284.

Rather, it is the very seriousness of the injury caused to the victim concerning one or more of the inviolable rights of the person that makes the implementation of the punitive function reasonably justified.[57]

In view of the maximum protection that must be provided to safeguard fundamental European, international and constitutional principles, it is necessary that, where these are infringed, full and adequate reparation is made, which may also have a punitive (deterrent) connotation if it is useful to prevent the repetition of similar conduct or omissions (due to inexperience, carelessness or negligence) in the future.[58]

From this point of view, it is worth supporting the orientation of the Third Section (of the Italian Court of Cassation), according to which, since Art 138 of the Italian Private Insurance Code makes no reference to moral suffering when it occurs, the judge is 'free [...] to quantify it in the *an*', that is, if it is due, together with the '*quantum* [its economic quantification] with further, fair assessment'.[59] An 'endorsement' of this way of proceeding can also be found where there is an orientation towards

> 'overcoming the configurability of *compensatio lucri cum damno* [ie in overcoming the risk of assessing, in the settlement of damages, the advantageous consequences for the injured party caused directly by the harmful event] in situations in which the indemnity, although due (for example: survivor's pension; life insurance) and therefore received by the injured party following the death of a relative, does not achieve the aims which instead preserve the compensation for damages which is also due and must therefore be commensurate with the injury suffered'.[60]

[57] See M. Grondona, 'L'auspicabile "via libera" ai danni punitivi, il dubbio limite dell'ordine pubblico e la politica del diritto di matrice giurisprudenziale (a proposito del dialogo tra ordinamenti e giurisdizioni)' *Diritto civile contemporaneo*, 17 (31 luglio 2016); Id , *La responsabilità civile tra libertà individuale e responsabilità sociale. Contributo al dibattito sui «risarcimenti punitivi»* (Napoli: Edizioni Scientifiche Italiane, 2017), 105.

[58] Even with the implementation of the punitive function (A. Malomo, n 6 above, 29, 62).

[59] Corte di Cassazione 20 April 2016 no 7766 n 5 above, 723. Conversely G. Ponzanelli, n 5 above, 728: on the point, n 32 above.

[60] See P. Perlingieri, n 9 above, 386. So that, in the face of the loss of parental relationship, Corte di Cassazione 17 January 2018 no 901, n 35 above, 923, considers compensable, without risk of duplication, the so-called biological damage and the so-called moral damage *iure proprio* (non-pecuniary damage); in accordance with Corte di Cassazione 13 April 2018 no 9196, *Foro italiano*, I, 2038 (2018). In order to ensure full reparation also Corte di Cassazione-Sezioni unite 22 May 2018 no 12564, *Foro italiano* I, 1901 (2018), disapplies the so-called non-accumulation principle [Corte di Cassazione 31 May 2003, no 8827 and 8828, *Foro italiano*, 2003, I, 2272, and Corte di Cassazione 11 February 2009 no 3357, *Giustizia civile*, I, 2653 (2010); conversely Corte di Cassazione 13 June 2014 no 13537, *Foro italiano*, I, 2470 (2014)]. Cf also P. Perlingieri, L. Corsaro, G. Carapezza Figlia and A. Malomo, in P. Perlingieri et al, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2018), 925; E. Bellisario, *Il problema della* compensatio lucri cum damno (Padova: CEDAM, 2018), 1; M. Bussani, n 54 above, 802. Perplexity expressed by G. Mattarella, '*Compensatio lucri cum damno* e tipicità dei danni punitivi: una prospettiva critica' *Nuova giurisprudenza civile commentata*, II, 583,

Once again, there is explicit and clear confirmation that the peculiarities of the concrete case make it necessary (or better: fair) to determine a settlement of damages that corresponds to the interests affected – especially if they involve fundamental personal rights – beyond any labelling of individual possible items of damage and far from any restriction of tabular criteria that would otherwise mortify them.[61]

592 (2019).

[61] Cf P. Perlingieri, n 1 above, 520; as well as A. Malomo, n 1 above, 127; Ead, 'Perdita della vita e riparazione integrale' *Diritto delle successioni e della famiglia*, 403 (2015).

Insights & Analyses

Cryptocurrencies as 'Fungible Digital Assets' Within the Italian Legal System: Regulatory and Private Law Issues

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Abstract

The essay provides a comprehensive overview of cryptocurrencies within the Italian legal framework and, taking its cue from the current regulatory landscape, deepens their most salient regulatory and private law aspects.

More specifically, the first part offers a description of the evolution of AML regulation relating to cryptocurrencies, in which the notion of 'digital currency' first appeared in Italian law.

Additionally, the essay considers issues related to cryptocurrencies' legal qualification – among financial instruments, products or means of payments – also in the light of the roles and functions of providers of custody and exchange services.

Having analyzed those topics, the core of this paper deals with the main private law problems and questions, involving cryptocurrencies as digital assets originated through distributed ledger technologies (DLTs). The main areas of focus are: the acquisition and transfer (*inter vivos* and *mortis causa*) of cryptocurrencies, liens over cryptocurrencies and liabilities of cryptocurrency-related service providers.

I. Definition and Legal Qualification

Until the forthcoming entry into force of a Regulation setting licensing and compliance requirements for platforms providing custody and/or trading services relating to cryptocurrencies, which was issued in February 2022 by the Ministry of Finance (decreto 17 January 2022, on which, see below, para III), individuals based in Italy can freely access virtually all on-line exchange platforms operating transaction on cryptocurrencies, provided that no specific shut-down injunctions have been issued against a specific platform by competent administrative or judicial bodies. In the last few years, quite a number of those orders were issued by the Italian market authority (Commissione Nazionale per le Società e la Borsa: from now on, Consob) *vis-à-vis* platforms that, without

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being licensed as investment firms under MiFID, would offer, alongside cryptocurrencies, actual investment services (as defined under MiFID and decreto legislativo 24 February 1998 no 58, Testo Unico della Finanza from now on), including derivatives, certificates or contracts for difference having cryptocurrencies as their underpinning. This depends on the Consob's view of cryptocurrencies not qualifying as financial instruments (see below, para II).

Provided that this general capacity of Italian-based users to trade in cryptocurrencies, the Italian market for cryptocurrencies (on the demand side) appears to be in line with the European average, both in terms of transaction volume per capita and its distribution among different kinds of cryptocurrencies (Bitcoin and Ethereum covering approximately sixty percent of the market), including so-called stablecoins, ie cryptocurrencies whose exchange value is – or at least aims at being – correlated to one or more fiat currencies. Apparently, also Italian-based users resort to actual cryptocurrencies moved into them for speculative reasons (in fact, cryptos have increased their market value over time), whereas investment in stablecoins is driven by a less speculative investment objective, being those transactions to which the functional subrogate of the purchase of the fiat currency the stablecoin is referenced. Use of cryptocurrencies and stablecoins as a means of payment seems to be, presently, not significantly developed among consumers; however, no official or accurate data are available in this respect.

In the Italian regulatory landscape, the first legal notion that would include – but is not necessarily limited to –[1] cryptocurrencies, can be traced back to 2017, when decreto legislativo 21 November 2007 no 231, implementing EU-level legislation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AML/CFT), was amended by decreto legislativo 25 May 2017 no 90. *Inter alia*, decreto legislativo no 90/2017, amended Art 1 of decreto legislativo no 231/2007 by adding – under para 2, letter qq – a definition of *virtual currency*. According to this provision, a virtual currency is 'the digital representation of value, not issued from a central bank or other public authority, not necessarily linked to a currency which is

[1] Merely referring to a 'digital representation of value … that can be transferred , stored and traded electronically', the legal definition does not take a specific stance on the nature of the underlying technology. Therefore, from a theoretical standpoint, also electronic digital values not based on a distributed ledger technology (DLT) and/or a blockchain would fall into this definition.

In this regard, it is useful to point out that the Italian legal system also has a definition of 'distributed ledger technology' as the IT infrastructure for so-called 'smart contracts'. Legge 11 February 2019 no 12, converting into law decreto legislativo 14 December 2018 no 135, at Art 8-*ter*, para 1, defines 'technologies based on distributed ledgers' as those 'technologies and informatic protocols which use a shared, distributed, replicable and simultaneously accessible ledger, which is architecturally decentralized on cryptographic basis and allows to record, validate, update and store data both readable and protected by cryptography and verifiable by each participant, nor changeable neither modifiable'. The subsequent paragraph, indeed, defines a smart contract as a 'processor program which operates thanks to technologies based on distributed ledger and whose execution binds two or more parties on the basis of effects previously defined by their self'.

legal tender, used as a means of exchange in order to purchase goods and services and which can be electronically transferred, recorded and traded'. This notion is instrumental in subjecting to AML duties, as set out by decreto legislativo no 231/2007,[2] any provider of services relating to the utilization of virtual currency (that is,

> 'every natural or legal person who provides to third parties, on a professional basis, and also online, services functional to use, exchange and store virtual currencies and to their converting from or in currencies which are legal tender or digital representation of value, included those convertible in other virtual currencies, as well as services relating to issuing, offering, transfer and compensation services and any others aimed at acquisition, trading and intermediation in the case of exchange of the same currencies').

This stated, it also must be pointed out that the extension of the AML framework to transactions in cryptocurrencies originated spontaneously by the Italian legislator, and later included, in the same terms, in the European Parliament and Council Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for purposes of money laundering or terrorist financing, which introduced a common definition of 'virtual currency' at the European level.[3] In parallel, European Parliament and Council Directive (EU) 2018/843 expanded the subjective scope of AML duties relating to activity in cryptocurrencies, also including a

[2] Consisting of so-called 'customer due diligence', comprising: (a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source; (b) identifying the beneficial owner and taking reasonable measures to verify that person's identity, so that the obliged entity is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts, companies, foundations and similar legal arrangements, taking reasonable measures to understand the ownership and control structure of the customer; (c) assessing and, as appropriate, obtaining information on the purpose and intended nature of the business relationship; (d) conducting ongoing monitoring of the business relationship, including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the obliged entity's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds, and ensuring that the documents, data or information held are kept up-to-date (Art 18 of decreto legislativo no 231/2007), and reporting of suspicious transactions (Art 35 para 1 of decreto legislativo no 231/2007). Breach of those duties triggers sanctions, depending on the type of infringement. Art 55 para 1, of decreto legislativo no 231/2007 punishes, with imprisonment from six months to three years and a fine from 10.000 to 30.000 Euros, the lack of adequate due diligence or the communication of false information from the obliged entity.

[3] In Art 1, para (2), letter (d), point 18, Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 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 [2018] OJ L56/43, virtual currencies are defined as '[…] means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be electronically transferred, stored and traded'.

further category of service providers, namely *custodian wallet providers*, ie, entities 'that provide services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies'. This provision has been transposed into Italian legislation (Art 2, para 5, letter I, decreto legislativo no 231/2007) through decreto legislativo 4 October 2019 no 125.

Based on the argument of *sedes materiae*, it might be asserted that such a legal definition was not enacted with a general view of how comprehensively to regulate cryptocurrencies; instead, the only relevant regulatory angle is AML/CFT. However, this definition is now also embedded in Art 1, para 2, letter *f)*[4] of the above-mentioned decreto del Ministero dell'economia e delle finanze 17 January 2022, which, instead, sets a supervision framework regarding the provision of services relating to cryptocurrencies, focusing on custody and/or trading service providers relating to cryptocurrencies (see below, para III).

Against this backdrop, it is suggested that the Italian legislator's attention does not focus on defining and regulating the whole cryptocurrency value chain, including its infrastructural aspects and the mutual relationships between participants to a blockchain; no specific provisions are dedicated to the regulation of so-called mining activity (ie, processes that would lead to the issuance of further cryptocurrencies), and to a lesser extent. any requirement is laid with reference to the actual content of consensus protocols based on which cryptocurrency ledgers work and are maintained.

Rather, that regulation only insists on the relationships between final users (purchasers and holders of cryptocurrencies) and providers of custody and/or exchange services, the former referring to the keeping of cryptocurrencies deposit accounts, the latter referring to the performing of transactions relating to cryptocurrencies on behalf of clients. In this respect, relevant provisions of decreto del Ministero dell'economia e delle finanze 17 January 2022, will be described below, para III.

II. Regulation

Approaching the issue of cryptocurrency regulation under the Italian legal system, one preliminary distinction has to be drawn. From a regulatory perspective, it is, in fact, necessary to distinguish between financial instruments (as defined under MiFID) involving cryptocurrencies as underlying assets, from actual purchase of cryptocurrencies (either as legal or beneficial owners).

The former category encompasses derivatives, contracts for difference,

[4] For the sake of completeness, Art 1, para 2, letter *f)* states that virtual currencies consist of 'the digital representation of value nor issued neither guaranteed by a central bank or a public authority, not necessarily linked to a currency which is legal tender, used as a means of exchange in order to purchase goods and services or for investment aims and electronically transferred, stored and negotiated'.

units of collective investment undertakings, ETFs and ETPs, provided that their underlying is cryptocurrency.[5] Qualifying as transactions relating to financial instruments, those investment products undoubtedly fall within the objective scope of MiFID and can be offered to the public, provided that compliance with the regulatory framework for investment services in ensured. Thus far, no product intervention or other supervisory powers were exercised by Consob with respect to those instruments.

The latter category appears to be less straightforward. In fact, the question arises about whether or not cryptocurrencies qualify *per se* as financial instruments, namely, as 'transferable securities' under Art 4, para 1, no 44 (bearing the definition: 'those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as: (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares; (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities; (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures').

It would be accurate to claim that, among Italian scholars,[6] the prevailing opinion denies that cryptocurrencies would qualify as financial instruments. This seems to be Consob's stance, too; in fact, so far, no sanctions have been imposed against providers of services relating to cryptocurrency under Art 166 of Testo Unico della Finanza (that is, abusive provision of investment services due to the lack of licensing as a bank or investment firm), when online platforms *would only receive and execute orders* relating to the purchase or sale of crypto. On the contrary, Supreme Court caselaw offers one diverging decision,[7] dismissing an appeal against a preventive seizure adopted within a criminal investigation, where the offer of cryptocurrencies was part of a more articulated fraud. In this decision, the Italian Supreme Court (Corte di

[5] On the topic see ESMA, Statement on preparatory work of the European Securities and Markets Authority in relation to CFDs and binary options offered to retail clients, ESMA71-99-910, 15 December 2017.

[6] See, among others, N. Vardi, ' "Criptovalute" e dintorni: alcune considerazioni sulla natura giuridica dei bitcoin' *Il diritto dell'informazione e dell'informatica*, III, 448-449 (2015); F. Carrière, 'Le "criptovalute" sotto la luce delle nostrane categorie giuridiche di "strumenti finanziari", "valori mobiliari" e "prodotti finanziari": tra tradizione e innovazione' *Rivista di diritto bancario*, I, 135-136, (2019); M. Mancini, 'Valute virtuali e Bitcoin' *Analisi giuridica dell'economia*, 125 (2015); A. Caloni, '"Bitcoin": profili civilistici e tutela dell'investitore' *Rivista di diritto civile*, 169 (2019); M. Cian, 'La criptovaluta – alle radici dell'idea giuridica di denaro attraverso la tecnologia: spunti preliminari' *Banca, borsa e titoli di credito*, I, 331-332 (2019); E. Girino, 'Criptovalute: un problema di legalità funzionale' *Rivista di diritto bancario*, I, 760, (2019).

[7] Corte di Cassazione 25 September 2020 no 26807, *Cassazione penale*, 638 (2021); Corte di Cassazione 30 November 2021 no 44337, available at *www.dejure.it*.

Cassazione) stated – but did not sufficiently argue –[8] that all activities carried out by the owner of the website within which the offer was carried out would constitute abusive/illegal financial activity, provided that the offeror was not licensed as a bank or an investment firm.

Indeed, it would be correct to claim that cryptocurrencies would not qualify under Italian law (and perhaps under any other jurisdiction subject to MiFID), as financial instruments. More than one argument supports such a conclusion.

First, the only existing legal definition of cryptocurrency (see above, para I) explicitly makes reference to their payment/settlement nature ('used as a means of exchange in order to purchase goods and services'), which arguably excludes its qualification in terms of transferable security; Art 1, para 2, of Testo Unico della Finanza expressly states that 'means of payment do not qualify as financial instruments'.

Second, the origination of transferable securities implies the reception of funds by an issuer, thus entailing some form of liability (even if conditional, contingent and/or residual, as in equity or quasi-equity stakes) of the recipient towards the subscriber, whereas cryptocurrencies lack an identifiable issuer.

Finally, proceeds received by issuers of transferable securities are normally financing and undertaking/entrepreneurial activity, on whose outcomes the fair value of the instrument would depend; besides, the entrepreneur's assets (all or part of them) are the guarantee of the underlying liability. However, neither cryptocurrencies refer to any underlying assets, nor do they express or reflect an intrinsic value.

In the spectrum of virtual currencies' tentative legal qualification, it has been suggested[9] that cryptocurrencies could be led back to 'financial products', as per in Art 1, para 1, letter u) of Testo Unico della Finanza, whose definition includes 'financial instruments and any other investment form of financial nature'. In the Italian legal system, the existence of such a legal notion, that is

[8] In stating grounds for its decision, the Court underlined that 'suitable information was provided in order to make investors capable to evaluate whether adhere or not to the investment'; this was mainly based on the following sentence being on the website of the offeror: 'who has betted on bitcoin within two years has earned more than 97%'.

[9] A. Caloni, '"Bitcoin": profili civilistici e tutela dell'investitore' *Rivista di diritto civile*, 169 (2019). On this topic, see also Tribunale di Verona, 24 January 2017, unpublished. Ruling on a contract between an online platform and a client whose object was an exchange between legal tender and cryptocurrencies (namely, Bitcoin), the Tribunale di Verona has qualified bitcoins as financial instruments and the exchange's activity as a provision of financial services to consumers. Such qualification led to the application of consumer protection regulations (Consumer Code, decreto legislativo 6 September 2005 no 206), which entitles the consumer of a good or service with the right to be informed in a clear and understandable way of the identity of the provider, the main features of the service offered, the risks associated with the characteristics of the product purchased and that do not depend on the professional, as well as remedies provided to the consumer by the law. All information must be provided in written form, the lack of which gives rise to the nullity of the contract with relative legitimation in favor of the consumer. Since the contract was not complying with those provisions, it was declared null and void.

not in the MiFID framework, aims at enlarging – beyond activities relating to financial instruments – the perimeter of 'financial activities', which Italian law reserves for licensed banks and investment firms. At the same time, under Italian law (Art 96-*bis* of Testo Unico della Finanza), the offering of a financial product to the public is subject to the duty to publish a prospectus, as well as to all other obligations set out in the European Parliament and Council Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing Directive 2003/17/EC. Finally, distance marketing and promotion of financial products are subject to conduct rules for the provision of investment services, set out by MiFID (Art 32 of Testo Unico della Finanza; Art 125-127 of risoluzione Consob 15 February 2018 no 20307, so-called 'Regolamento Intermediari').

Due to the generic nature of this principle, Corte di Cassazione[10] and Consob[11] tried to draw some more accurate criteria that would guide legal operators in assessing if a certain transaction would fall into the category of financial products. Specifically, a financial product requires three elements to be met: a) a capital contribution from one party to another; b) the expectation of a financial performance; c) the taking of a risk which is directly linked to the capital outlay.

In this regard, however, it is submitted that, if one should not rule out that articulated/complex transactions involving the offering cryptocurrencies can be qualified as financial products when all three of the above requirements concur,[12] it should now be taken into account that the newly-adopted decreto of Ministero dell'economia e della finanza (below, para III) tips the 'qualification' scale in favor of cryptocurrencies not being regulated and supervised as financial products, but rather as currencies.[13] This implies that exchanges which would only receive and execute orders relating to the purchase or sale of crypto, as well

[10] Corte di Cassazione 5 February 2013 no 2736, available at *www.dejure.it*.

[11] Consob deliberations on this matter are several; see, particularly, comunicazioni Consob 30 November 1995 no DAL/RM/95010201; 10 July 1997 no DAL97006082; 22 October 1998 no DIS/98082979; 28 January 1999 no DIS/99006197; 12 May 2000 no DIS/36167; 1 June 2001 no DEM/1043775; 4 October 2012 no DIN/12079227; 6 May 2013 no DTC/13038246. All available at *www.consob.it*. In the same terms have expressed the last communications by Consob that had as object such operations in cryptocurrencies and these are deliberation no 19866/2017 and no 20660/2018.

[12] In fact, Consob has stepped in and exercised its supervisory and sanctioning powers when structured products or investment plans involving – but not limited to – cryptocurrencies were being offered (for instance, so-called 'mining packages'), and also when the offeror of cryptocurrencies would also commit to purchase them back over a period of time. In those cases, Consob has qualified the whole product or service as a 'financial product' (other than a financial instrument), and issued orders of temporary suspension of the offer due to the lack of a prospectus (Art 99, para 1, letter *b)* of Testo Unico della Finanza: deliberations 20901/2019 and 20878/2019, available at www.consob.it), or definitively shut the offering down (Art 99, para 1, letter c of Testo Unico della Finanza: deliberations 20845/2019; 20858/2019, available at www.consob.it).

[13] Despite that, *in practice,* they are purchased and traded due to a speculative intent, much more than they are purchased in order for them to be used as means of payment.

as other intermediaries receiving those orders and transmitting them to exchanges, would neither qualify as offerors of financial products, nor as subjects carrying out the activities of distance marketing and promotion of financial products.[14] This being so, one may wonder if activities relating to cryptocurrencies storage and transfer should then be considered, and to what extent, as provision of payment services under PSD2 (European Parliament and Council Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) no 1093/2010 and repealing Directive 2007/64/EC). This begs the question as to whether or not cryptocurrencies, when conceived as means of payments, fall into the category of 'funds', for purposes of qualifying cryptocurrency-related service providers as providers of payment services under no 2 of Annex I of PSD2 ('execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider', wherein 'payment account' means – according to Art 4(12) of PSD2 – 'an account held in the name of one or more payment service users which is used for the execution of payment transactions').[15]

III. Supervision

As anticipated, the bulk of the Italian supervision framework on cryptocurrencies is currently provided by decreto of Ministero dell'economia e delle finanze 13 January 2022. This Regulation inscribes supervision on exchanges and e-wallet (custody) service providers within the existing framework on professional currency-exchangers, whose activity is reserved for registered firms, provided that abusive currency-exchanger activity carries a pecuniary fine. In particular, according to Art 17-*bis*, para 1, of decreto legislativo 13 August 2010 no 141, 'professional currency-exchange activity, consisting of the negotiation of currency means of payments with immediate settlement, is reserved for subjects registered in a specific book held by the Body referred to in Art 128-*undecies* of the Italian Banking Act (ie, the Institution of Financial Agents and Credit Brokers, Organismo degli agenti in attività finanziaria e dei mediatori creditizi: from now on, OAM)'. Registration is subject to requirements set out in para 3 of the same article and triggers the obligation to report all transactions to the OAM which, in turn, is subject to supervision by the Ministry of Finance.

Implementing provisions of Art 17-*bis*, paras 8-*bis* and 8-*ter* of decreto legislativo no 141/2010, decreto of Ministero dell'economia e delle finanze 13

[14] It is indeed controversial whether or not a contract according to which an intermediary would purchase crpytos on behalf of clients but maintain legal ownership over those assets would qualify as a derivative contract having cryptos as its underlying asset (ie, a financial instrument).

[15] It is noted that Recital 10 to European Parliament and Council Directive (EU) 2018/843 rules out that hypotesis.

January 2022 establishes a further section of the above-cited book, dedicated to 'providers of services relating to the utilization of virtual currency' ('every natural or legal person who provides to third parties, on a professional basis, online or not, services functional to use, exchange and store virtual currencies and to their conversion from or in currencies which are legal tender or digital representations of value, including those convertible in other virtual currencies, as well as services relating to issuing, offering, transferring and offsetting and any other service aiming at acquiring, trading and intermediating of exchanges of the same currencies') and 'digital portfolio service providers' ('every natural or legal person provides to third parties, on a professional basis, online or not, services consisting of the safeguard of private cryptographic keys on behalf of its customers, in order to hold, store and transfer virtual currencies').

Registration enables firms to provide services relating to the utilization of virtual currency and digital portfolio services in favor of Italian-based users (whereas provision of those services without being registered constitutes an administrative offense) and is conditional upon particular requirements which also include the location of both the legal and real seat in Italy or, in the sole case of service providers incorporated in the UE, a stable organization in Italy. Registration requests must also carry the information about which services are provided, as well as about how those services are provided (Arts 3 and 4).

Reporting obligations imposed on cryptocurrency-related service providers must be complied with through standards which include (a) identity of clients using services and (b) aggregate data – to be transmitted to OAM on a quarterly basis – relating to the overall activity of each service provider *vis-à-vis* each client (Art 5).

Finally, the decree expressly entrusts the Tax Inspectorate with inquiry and control powers (Art 6).

IV. Private Law Issues

1. Cryptocurrencies as 'Goods' Under Art 810 of the Italian Civil Code

The issue as to whether holders of cryptocurrencies are entitled to real (ie, proprietary) rights or, rather, credit/obligation rights *vis-à-vis* specific subjects (namely, transferor and transferees, custodians and other service providers) naturally raises the question on the nature of cryptocurrencies, under a strict private-law perspective.

The current state of the debate among Italian scholars shows that it is commonly considered that cryptocurrencies would fall into the notion of 'good' under Art 810 of the Italian Civil Code, according to which 'goods are all those things that can be the subject of rights'. In fact, the qualification of cryptocurrencies as goods is the *necessary and sufficient* prerequisite in order

to qualify them as ownership.

The main obstacle to such conclusion would lie in their incorporeal nature. According to traditional doctrines, in fact, the concept of 'thing' would, *per se,* imply the asset's physical existence, save specific exceptions provided for by the law (ie, energy, according to Art 814 of Civil Code), which would form an exhaustive list.[16]

However, a counter argument has put forward,[17] based on the observation that technological and social evolution has made such principle obsolete, provided that it would leave without *erga omnes* enforcement all those immaterial entitlements which – according to the characteristics of its subject – would require such protection.[18]

Such a guiding principle supports the qualification of cryptocurrencies in terms of goods. It goes without saying that the *spending power* which is inherent to cryptocurrencies needs to be protected through enforcement means, characterized by 'exclusivity' and 'absoluteness' (*ius alios excludendi*).

In light of the above, it seems fair to agree that cryptocurrencies are to be qualified as digital ownership – namely, immaterial and fungible goods protected by a proprietary right.[19]

2. Ownership of Cryptocurrencies Stored in a 'Cold Wallet' or in a 'Hot Wallet'

Having regard to the above, the question arises as to who is the actual *legal owner* of cryptocurrencies, when token keys are stored in electronic wallets,[20] as happens in the vast majority of cases.

In this regard, some opinions[21] suggest that a distinction should be drawn

[16] M. Comporti, 'Diritti reali in generale', in A. Cicu et al eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2011), 125; V. Zeno Zencovich, '*Cosa*', in R. Sacco ed, *Digesto delle discipline privatistiche/Sezione civile* (Torino: UTET giuridica, 1988), IV, 438.

[17] C. Camardi, 'Cose, beni e nuovi beni, tra diritto europeo e diritto interno' *Europa e diritto privato*, 955 (2018); M. Giuliano, 'Le risorse digitali nel paradigma dell'art. 810 cod. civ. ai tempi della blockchain' *Nuova giurisprudenza civile commentata*, II, 1214 (2021).

[18] O.T. Scozzafava, 'Dei beni', in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 1999), 28; see also Id, *Goods and legal forms of property* (Milan, 1982), 39.

[19] D. Masi, 'Le criptoattività: proposte di qualificazione giuridica e primi approcci regolatori' *Banca, impresa, società*, 247 (2021); G.M. Nori, 'Bitcoin, tra moneta e investimento' *Banca, impresa, società*, 173 (2021); E. Calzolaio, 'La qualificazione del bitcoin: appunti di comparazione giuridica' *Danno e responsabilità*, 188 (2021); D. Fauceglia, 'La moneta privata, le situazioni giuridiche di appartenenza e i fenomeni contrattuali' *Contratto e impresa*, 1253 (2020).

[20] Indeed, it seems clear that no such doubts can arise when private keys are kept in a physical hardware device or printed on paper.

[21] See the decision by Tribunale di Firenze 21 January 2019 no 18, *Giurisprudenza commerciale*, 1073 (2020), and, among academics, the opinion of V. De Stasio, 'Prestazione di servizi di portafoglio digitale relativi alla valuta virtuale "Nanocoin" e qualificazione del rapporto tra prestatore e utente' *Banca, borsa e titoli di credito*, II, 399 (2021). In the above-cited decision, the Court of Florence has opined on how depositors of cryptocurrencies (in that case, Nanocoin) should be treated within the bankruptcy procedure of a defaulted wallet service provider, which was performing custodian activity

between software-based wallets which are *not connected to the web* (so-called 'cold wallets'), and wallets where private keys are stored in the custodian's servers so that crypto holders, in order to spend their tokens, need to access an account via an internet connection (so-called 'hot wallets').

With reference to the first case, it is argued that cryptocurrency holders maintain ownership over cryptos, insofar as the custodian does not apprehend or control private keys, so that it would be technically impossible for the custodian to spend a token without the owner's consent, which maintains exclusive control over private keys.

The case of 'hot wallets' is more complex. Since in this case, private keys are actually controlled by the custody service provider, owners of cryptocurrencies stored in a 'hot wallet' can only spend their tokens by accessing their wallet through the internet and instructing the custodian to perform a certain transaction. Thus, an agency relationship is in place between crypto-holders and custodians.

In this context, the question arises as to whether or not transmission of private keys to the custodian automatically triggers the transfer of cryptocurrencies' ownership to the depositary, so that the depositor's entitlement would change into a mere restitution credit of the same quantity and quality of cryptocurrencies (*tantundem eiusdem generis*) *vis-à-vis* the depositary; assuming this perspective, such contractual structure would fall into the notion of 'irregular deposit contract' on the basis of Art 1782 of the Civil Code, according to which

> 'when the object of the deposit contract is money or other fungible assets, and the depositary is entitled to freely use them, then the depositary becomes owner of those goods and is obliged to restitute to the depositor the same quantity and quality of those goods'.

It is apparent that this qualification issue is crucial in determining the legal treatment of several aspects, including those relating to regulation of insolvency and seizure/foreclosure of those assets.

In this regard, it is submitted that a further distinction should be made, when assessing whether or not custodians (through a 'hot wallet') become the owners of deposited cryptocurrencies. Indeed, according to the Italian legal system, the mere *traditio* of a fungible thing to the custodian does not itself convey ownership over the asset, provided that such an effect depends exclusively on the fact that the parties have agreed to entitle the depositary with the right to use and dispose of the assets (Art 1782 of the Civil Code). If the

through a 'hot wallet'. Particularly, provided that the custodian was systematically transferring deposited cryptos to its own blockchain address, the Court stated that it had become the owner of all deposited cryptos, so that the depositor would not be able to recover them as owners (through a reivindicatio). Instead, they were to be treated as creditors and subject to *par condicio creditorum*, meaning that the judicial liquidator was required to sell all remaining cryptocurrencies and distribute the proceeds among all creditors pari passu.

existence of such a provision is not *per se* impossible, this should arguably *not be the case* with most common e-wallet contracts. Conversely, if – as it should ordinarily happen – the parties have agreed that the depositor shall not dispose of cryptos if not in execution of the depositor's instructions, no transfer of ownership rights will have occurred and, consequently, the depositor is obliged to *separate (in accounting terms)* those assets from its own assets and from assets received by other depositors. At the same time, it might be argued that if the custodian's activity is limited to storing depositors' private keys without transferring deposited cryptos to its own blockchain address, *as far at the deposit contract is concerned*, cryptocurrencies should be treated as non-fungible assets, provided that it is always possible to trace to which client any act of disposal relates (so-called de-fungibilization, 'defungibilizzazione').

Given this situation, the type of contract that best reflects the parties' underlying interests is the 'regular deposit' contract (Art 1766 of the Civil Code), whereby delivery of private keys to the depositor neither implies the transfer of ownership over cryptocurrencies, which remain the depositor's,[22] nor transfers possession of cryptocurrencies from the owner to the custodian; in fact, when a 'regular deposit' contract is in place, the depositary only has 'custody' or 'detention' ('*detenzione*') of the contract's object, while possession is still the depositor's (so-called 'indirect' possession, meaning that it is exercised *through another subject*, ie, the custodian: Art 1140, para 2, of the Civil Code).

3. Purchase, Acquisition and Transfer of Cryptocurrencies

Before considering how cryptocurrencies are transferred through *inter vivo*s deeds, as well as *mortis causa*, a few words are required about how events occurring on the blockchain would affect proprietary entitlements of holders of private keys.

In this regard, should be stressed that the existence of a ledger, keeping track of transactions relating to tokens, does not imply that cryptocurrencies qualify, under Italian law, as 'movable property entered into public registers' according to Art 815 of the Civil Code (which states that 'movable goods entered into public registers are subject to special provisions established for them or, in

[22] In the case examined by the Tribunale di Firenze 21 January 2019 no 18, it was found that the owner of the platform had full availability of the cryptocurrencies (nanocoin) contained in his wallet, provided that all deposited cryptos were immediately transferred to the wallet service provider's address. Therefore, according to the Court of Florence, the relationship had to be qualified in terms of irregular deposit (Art 1782 of the Civil Code), implying the conveyance of property in favor of the recipient.

On this topic, see also, D. Fauceglia, 'Il deposito e la restituzione delle criptovalute' *Contratti*, 669 (2019). The opinion of A. Caloni 'Deposito di criptoattività presso una piattaforma exchange: disciplina e attività riservate' *Giurisprudenza commerciale*, I, 1073 (2020), according to which, the trading function underlying the relationship would result in the lack of the power of disposal of the platform manager and the qualification of the deposit as regular pursuant to Art 1766 of the Italian Civil Code.

the absence of such provisions, to provisions relating to movable property'). In fact, it would not be possible to claim that distributed ledgers (including permissionless ones) can *ipso facto* – that is, without a domestic or foreign dedicated legal provision – qualify as 'public registers', also considering the absence of a national authority in charge of regulating and overseeing the register.

It follows from this assumption that the loss of the 'spending power' associated with the possession of certain private keys, due to events occurring on the blockchain (for instance, a hard fork which would invalidate the blocks through which a certain token was acquired) needs to be conceived as destruction or loss of movable property (*amissio vel interitus rei*), implying the extinction of the related proprietary entitlement. Conversely, the acquisition of a new 'spending power', as a result of an airdrop of cryptocurrencies or a hard fork that would make what were previously invalid blocks valid, should be considered – from a legal standpoint – as an *ex lege* purchase of a chattel without owner ('*occupazione*' according to Art 923 of Civil Code), which would stem from the mere possession (direct or indirect, ie, through a 'hot wallet') of private keys, enabling a newly-originated 'spending power'.

As to the analysis of *inter vivos* transfer of cryptocurrencies, provided that cryptocurrencies qualify as digital fungible property, it follows that owners of cryptos can dispose of them for consideration[23] (including exchanges from a cryptocurrency to another cryptocurrency) or without consideration (ie, donation, on which see below), according to Italian general rules on contracts,[24] when

[23] It is argued that legal qualification as a sale contract, rather than a barter/trade-in contract, of any contract by which cryptocurrencies are transferred as a consideration for a counterperformance, does not depend on the issue of cryptos qualifying, or not, as actual (foreign) currencies. On the issue of cryptocurrencies being, or not, 'money' from a private-law perspective, see M. Passaretta, 'Virtual currencies in a private law perspective: between payment instruments, alternative forms of investment and improper securities, in S. Cerrato, R. Morone and P. Dal Checco eds, *Cryptoactivity, currencies and bitcoin* (Milan: Giuffrè, 2021), 101; see also N. Vardi, ' "Criptovalute" e dintorni: alcune considerazioni sulla natura giuridica dei Bitcoin' *Diritto dell'informazione e dell'informatica*, 445 (2015); G.L. Greco, 'Monete complementari e valute virtuali', in M.T. Paracampo ed, *Fintech* (Torino: Giappichelli, 2017), 210; R. Bocchini, 'The development of virtual currency: first attempts at framing and discipline between economic and legal perspectives' *Diritto dell'informazione e dell'informatica*, 27 (2017); G. Lemme and S. Peluso, 'Cryptocurrency and detachment from legal money: the bitcoin case' *Rivista di diritto bancario*, I, 407 (2016); V. De Stasio, 'Verso un concetto europeo di moneta legale: valute virtuali, monete complementari e regole di adempimento' *Banca, borsa e titoli di credito,* I, 747 (2018); M. Krogh, 'Transazioni in valute virtuali e rischi riciclaggio. Ruolo e responsabilità del Notaio' *Notaries*, 157 (2018); M. Cian, 'La criptovaluta – Alle radici dell'idea giuridica di denaro attraverso la tecnologia spunti preliminari' *Banca, borsa e titoli di credito,* I, 315 (2019). In fact, when parties agree that an asset (namely, cryptocurrencies) would be accepted as a means of payment (so-called conventional money), this is sufficient to treat that contract as a sale rather than a barter. Of course, this would not imply that those assets would qualify as legal tender (either domestic or foreign). On this topic, see M. Semeraro, 'Moneta legale, moneta virtuale e rilevanza dei conflitti' *Rivista di diritto bancario*, II, 137 (2019).

[24] Including contracts relating to the subscription of corporation shares. In this respect, see Corte d'Appello di Brescia, 30 October 2018, which dealt with the issue of whether or not cryptocurrencies

Italian *lex contractus* applies according to European Parliament and Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations, the so-called Rome I Regulation (which is also applicable to donations, except so far as aspects relating to family and succession law are concerned, when legge 31 May 1995 no 218 applies: see below). According to Art 1378 of the Civil Code, property over generic/fungible assets is transferred from one party to another when those assets are made 'specific' (so-called '*individuazione*'), typically by way of their delivery to the recipient.[25] Such provision is applicable to all kind of contracts involving the conveyance of property over generic goods, including donations.

With reference to cryptocurrencies, delivery consists of the purchaser being put in control of the 'spending power' associated with a certain token. This can occur via both with respect to an *on-chain* and an *off-chain* transfer. The former case implies a valid transaction taking place on the chain, through which one or more tokens are sent from the seller's address (ie, a hash identifying the public key associated with the seller's private keys) to the purchaser's address. In the latter case, actual possession over *private keys* is handed over to the purchaser, while nothing happens *on-chain* and tokens remain registered under the same *public keys*. Such a handover can occur in several forms, according to how private keys are stored. In a case in which private keys are kept in a hardware device or printed on paper, physical delivery is required (and sufficient), whereas in a case in which tokens are stored in a software-based wallet, a distinction has to be drawn between software-based 'cold wallets' and 'hot wallets'; in the case of a software-based 'cold wallet', it is required that private keys be extracted from the wallet and delivered to the recepient, or that off-line wallets' credentials are delivered to the recipient; in the case of 'hot wallets', delivery is executed when the seller's custodian transfers private keys to the recipient's custodian (when this is the same as the seller's, it is sufficient that the seller's account is charged and the recipient's account is credited).

From an Italian international private law perspective, it should be made clear that Italian courts will apply Art 1378 of the Italian Civil Code, insofar as the relevant movable property is located in Italy (*lex rei sitae*). In fact, according to Art 51 of the Italian private international law (legge no 218/1995), rules regarding the actual transfer of ownership (*modus adquirendi*) are not governed

(in that case, OneCoin) are apt to form the object of contribution for purposes of increasing the legal capital of a limited liability company. The Court denied that, based on the assumption that OneCoin does not have a liquid secondary market enabling the formation of that crypto's market valuesee: see M. Natale, 'Dal "cripto-conferimento" al "cripto-capitale" ' Banca, borsa e titoli di credito, II, 741 (2019); C. Flaim, 'Nuove frontiere del conferimento in società a responsabilità limitata: il caso delle criptovalute' Giurisprudenza commerciale, II, 900 (2020).; R. Battaglini, 'Conferimento di criptovalute in sede di aumento del capitale sociale' Giurisprudenza commerciale, II, 913 (2020).

[25] This is also the moment at which the risk of accidental loss shifts to the recipient (*res perit domino*).

by the *lex contractus*, which only governs the contract as a precondition of the property conveyance (*titulus adquirendi*). Besides, Art 52 states that 'as far as goods in transit are involved, the applicable law is the place of destination'.

One might then wonder as to when a cryptocurrency token can be deemed to be located in Italy. On this point, it is argued that the criterion of *rex lei sitae* fits the case of physical property better than 'virtual' property. However, it is submitted that the case of cryptocurrency needs to be approached commencing with the assumption that tokens cannot be 'enjoyed', as a thing, but just disposed of; therefore, tokens are nothing more than a 'spending power'. Consequently, tokens should be deemed to be located where private keys associated with a certain token (that is, private keys enabling the token's 'spending power') are stored. Of course, in case of an on-chain transfer, the relevant private keys are the recipient ones.

Based on the principle of freedom of contract, there is no reason to rule out that cryptocurrencies can be donated. According to Art 782 of the Civil Code, the solemn form of the notarial public deed is prescribed, including the presence of two witnesses at the moment at which the deed is signed before the notary (Art 48 of the notarial law, regio decreto 16 February 1913 no 89), under penalty of nullity of the deed.

If the donation concerns movable things, in addition to the formal requirements cited above, the deed of donation (or a separate note signed by the donor, the recipient and the notary) must specifically include details of the things donated, and their value (Art 782, para 1, of the Civil Code). However, if the donated property is of 'modest value', the form of the public deed is not required *ad substantiam actus* (ie, under penalty of nullity), so long as there is actual delivery of the donation's object (Art 783 of the Civil Code).

As regards applicable law, the Rome I Regulation and Italian private international law must be applied in a coordinated manner. In fact, the deed's existence and validity, as well as the content of obligations arising from donations, fall within the scope of application of Rome I, with the exception of obligations arising from family and succession law (Art 1, para 2, letter b and letter c, European Parliament and Council Regulation (EC) 593/2008). When this is the case, Art 56 of legge no 218/1995) applies, establishing that donations are governed by the national law of the donor at the time of the donation. However, the donor can opt-in (through a declaration called *professio iuris*) for the law of the State of his/her residence at the time of the donation to be applicable. Eventually, the third paragraph of Art 56 specifically deals with formal validity, establishing that the donation is valid in this respect when it complies with the relevant provisions of *either* the law applicable to the donation *or* the law of the State in which the deed of donation is made.

Having regard to inheritance law issues, it should first be noted that the Italian system is based on the principle of the general transferability *successionis*

causa of all assets, rights and relationships which belonged to the deceased person (*de cuius*). This is stated in law in order to ensure the continuity of relationships with creditors and counterparties.

Over the last few years, Italian scholars focused on the *mortis causa* succession of so-called digital assets, that is, the heterogeneous set of assets having computer-based origin, including accounts and files, which can be contained both in off-line devices and in online storage systems.[26] Cryptocurrencies certainly fall into this category.

With reference to *mortis causa* transfer of digital assets, the question arises regarding testators as to what meaning should be attributed to testamentary provisions assigning certain credentials (in case of cryptocurrencies, private keys associated to public keys which enable cryptocurrencies to be spent) to specific persons.

In this regard, learned Italian academics[27] make it clear that a difference exists between situations in which the testator aims to assign to the beneficiary the ownership of the digital asset which credentials protect (in such a case, the assignment of passwords means the assignment of the digital asset) and those in which the assignment of a password to someone is instrumental in the execution of a certain task in favour of another subject, for whose performance the assignee is appointed (in such case, a *post mortem exequendum* mandate occurs).

If the deceased person has not disposed of his/her estate through the act of making a valid will (succession *ab intestato*), so-called legitimate succession (successione legittima) will take place (Art 457 of the Civil Code), meaning that the entire inheritance will be devolved to legitimate heirs (member of the deceased subject's family, according to specific law provisions based on a proximity criterion: see Arts 565 ff of the Civil Code). Legitimate succession concerns the entire assets of the deceased (so-called *universum ius defuncti*), therefore including any cryptocurrencies possibly owned by the *de cuius*. In this

[26] C. Camardi, 'L'eredità digitale. Tra reale e virtuale' *Diritto dell'informazione e dell'informatica*, I, 65 (2018); M. Palazzo, 'La successione nei rapporti digitali' *Vita notarile*, 1309 (2019); M. Cinque, 'L'eredità digitale alla prova delle riforme' *Rivista di diritto civile*, 72 (2020); S. Delle Monache, '*Successione* mortis causa *e patrimonio digitale*' *Nuova giurisprudenza civile commentata*, II, 460 (2020).

[27] U. Bechini, 'Password, credenziali e successione mortis causa' *Studio CNN* n. 6-2007/IG, available at https://tinyurl.com/v7erejcm (last visited 30 June 2022); V.D. Greco, 'Il diritto alla trasmissione dei dati digitali post mortem: il problema della disposizione mortis causa delle credenziali di accesso a risorse digitali', in M. Bianca, A. Gambino and R. Messinetti eds, *Libertà di manifestazione del pensiero e diritti fondamentali* (Milano: Giuffrè, 2016), 195; F. Mastroberardino, *Il patrimonio digitale* (Napoli: Edizioni Scientifiche Italiane, 2019), 204; M. Palazzo, 'La successione nei rapporti digitali' *Vita notarile*, 1321, 1329 (2019); A. D'Arminio Monforte, *La successione nel patrimonio digitale* (Pisa: Pacini giuridica, 2019), 135; A. Magnani, *Il trasferimento* mortis causa *del patrimonio digitale*, *Atti e* quaestiones *notarili nell'era contemporanea e digitale* (Bari: Cacucci editore, 2020) 100; V. Putortì, 'Patrimonio digitale e successione mortis causa' *Giustizia civile,* 173 (2021); L. Di Lorenzo, 'L'eredità digitale' *Notariato*, 146 (2021).

case, heirs will become joint owners of all assets of the estate.

Finally, it should be stressed that the answer to the issue of *mortis causa* transferability of cryptocurrencies does not change depending on how private keys are stored. However, when they are stored in 'hot wallets', it is also necessary to deal with the succession in the contractual relationship between the *de cuius* and the intermediary. In principle, according to the aforementioned standard of general transmissibility of relations upon death, the contractual relationship with the intermediary should also be included in the estate.

As regards the relevant private international law issues, European Parliament and Council Regulation (EU) 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on creation of European Certificate of Succession, states that the succession will be subject to Italian law if the deceased subject had his habitual residence in the territory of the Italian Republic at the time of his death (Art 21) or if the testator, despite having his habitual residence in another State, possesses Italian citizenship, and opt-in the application of Italian law through a declaration (*professio iuris*) contained in the act of will.

4. Insolvency-Related Matters

Assuming, based on the arguments set out above, that cryptocurrencies can form the object of ownership (qualifying as 'goods' under Art to 810 of the Civil Code), it follows that creditors are able to seize their debtors' cryptocurrencies in cases of non-performance of an obligation (according to Art 2740, para 1, of the Civil Code, 'the debtor is liable towards its creditors with all its present and future property'). Procedural aspects of the foreclosure procedure change slightly, according to whether private keys can be recovered directly from the debtor, in which case rules on garnishment of movable goods apply ('pignoramento mobiliare', Arts 513 ff of the Code of Civil Procedure), or their recovery requires some form of cooperation from a third party currently keeping the debtor's property, in which case rules on third-party garnishment apply ('*pignoramento presso terzi*', Arts 543 ff of the Code of Civil Procedure).

Limited to situations in which the debtor is an entrepreneur, their insolvency can trigger bankruptcy, as a procedurally consolidated foreclosure of all the debtor assets, in order to satisfy creditors who have lodged their claims. Bankruptcy procedures are regulated by decreto legislativo 12 January 2019 no 14.

When private keys are digitally stored with a third party through a 'hot wallet', the question arises as to how token-holders' claims may be treated, should the custodian go bankrupt. The answer to this question very much depends on the issue, as discussed above, as to whether or not depositing cryptocurrencies in a e-wallet implies conveyance of the deposited assets' property in favor of the custodian.

As has already been argued, it is submitted that, according to Italian law (see Art 1782 of the Civil Code), delivery of fungible movables to a custodian does not, *per se,* make the recipient the owner of those assets, to the extent that the recipient is contractually bound not to dispose of cryptos if not in the execution of the depositor's instructions. Further, it may be useful to repeat (see above) that if the custodian's activity is limited to storing depositors' private keys without transferring deposited cryptos to its own blockchain address, it is argued that, *as far as the deposit contract is concerned*, cryptocurrencies should be treated as non-fungible assets, provided that it is always possible to trace to which client any act of disposal relates.

From the position of the custodian's insolvency procedure, this means that depositors will maintain a proprietary entitlement over deposited assets, which remain separated from the bankrupt's assets and cannot be seized by the custodian's general creditors, *insofar as they can be traced*. Thus, the procedure's receiver/liquidator is not entitled to liquidate those assets in order to satisfy creditors, but must restitute those assets to depositors, provided that they have lodged their proprietary claim (*rei vindicatio*) according to Art 210 of the Insolvency Code (decreto legislativo no 14/2019).

5. Liens on Cryptocurrencies (Including Trust)

According to Art 2786 of the Civil Code, a pledge is a security entitlement, originating from an agreement between the creditor and the pledged property's owner, which is effective only on condition that the owner of the pledged property is dispossessed of it. Furthermore, the law also requires a written deed with a 'certain date' under Art 2704 of the civil code, in which the pledged subject, the claim protected by the lien and its amount are specified (Art 2787, no 3 of the Civil Code).

With respect to cryptocurrencies, dispossession implies delivery of private keys to the creditor or to a custodian jointly appointed by the parties, so that the owner of the lien's subject cannot dispose of the pledged property without the consent of the creditor or the third-party custodian.

Having regard to the creation of trusts over cryptocurrencies, it should be noted that the Italian legal system does not have a legal tool featuring the same characters as a common-law trust. However, in its legal framework, Italy subscribed to and implemented the Hague Convention on the Law Applicable to Trusts and on their Recognition, of 1 July 1985 (legge 16 October 1989 no 364).

Based on this instrument, foreign trusts' effects must be recognized by Italian courts. Of course, the actual effects of a foreign-law trust will depend on the applicable law.

Traditionally, a debate had been conducted, among Italian legal academics and courts, about the recognizability of a trust in which all connecting factors

would point to Italy, and whose only international element would be the choice of a regulating foreign law (so-called 'domestic trust'). Caselaw has settled ruling in favor of it,[28] while this hypothesis is a matter around which academics remain skeptical.[29]

6. Loan of Cryptocurrencies

Pursuant to Art 1813 of the Italian Civil Code, the loan is the contract by which one party (lender) delivers to another (borrower) a certain amount of money or other fungible things and the other commits to return, at a particular future date (in one or more instalments, as the case may be), as many things of the same kind and quality (*tantuntem eiusdem generis*). Thereafter, in consequence of delivery, ownership of the borrowed things passes into the property of the borrower (Art 1813 of the Civil Code). Normally, the loan is an onerous contract; the lender's attribution is compensated by accruing interest, whose rate must necessarily be agreed in writing, otherwise the legal rate applies (Arts 1815, para 1, and 1284, para 3, of the Civil Code). As a general rule, accrued interest are paid in Euros, as legal tender (Art 1277 of the Civil Code), but parties can agree that the debtor can either perform its obligation in legal tender or with other goods. In this case, a so-called 'alternative obligation' would arise (Art 1285 of the Civil Code).

Having already pointed out that cryptocurrencies qualify as fungible movables, it is argued that a loan agreement might also have them as its object. Based on the principle of private autonomy (Art 1322, para 1, of the Civil Code), any private individual can lend or borrow cryptocurrencies. One might wonder what would happen, should a hard fork occur on the blockchain. In this case, in fact, two different types of cryptocurrencies might co-exist with reference to the same blockchain (the one based on the 'amended' version of the protocol, which would not recognize as valid any transaction based on the original version of the protocol, and the others based on the original version of the protocol, which would not recognize as valid any transaction based on the new version of the protocol). In this regard, it is submitted that the fungible nature of those assets requires an inquiry to be carried out as to whether or not there is fungibility between them (ie, whether or not it might be argued that they belong to the same *genus*, and differ only in terms of their respective quality; in this regard, Art 1178 of the Civil Code states that 'when the obligation's object is a fungible asset, the debtor has to provide things whose quality is not below average'). Moreover, it should also be ascertained as to whether or not the ante-fork cryptocurrencies still exist and are exchangeable on the market. Should it not be the case, then an alternative scenario arises. Either post-fork cryptocurrencies

[28] See, among others, Corte di Cassazione 9 May 2014 no 10105, *Banca, borsa e titoli di credito*, II, 251 (2016)

[29] P. Spolaore, *Garanzia patrimoniale e trust nella crisi d'impresa* (Milano: Giuffrè, 2018).

are deemed to belong to the same *genus* as the pre-fork cryptocurrencies, so that the debtor can perform its obligation delivering them, or they are not, in which case Art 1818 of the Civil Code would apply, according to which, if restitution of the borrowed assets becomes impossible or grossly burdensome due to a supervening cause that is not attributable to the borrower, then the debtor has to perform its obligation in domestic legal tender, based on its market value at the moment when the obligation is due. It should be stressed that this provision would only apply in a case of supervening impossibility, by which the original impossibility would make the contract invalid.

With reference to the lending party, it should be noted that entering in such contracts must not give rise to an economic activity carried out on a professional basis. In fact, moving from the assumption that, *from a regulatory and supervisory perspective*, cryptocurrencies are treated by the Italian legal system as foreign currencies (see above, paras II and III); it might be argued that the undertaking of granting cryptocurrency loans constitutes a financing activity. Consequently, such activity is subject to licensing (in Italy or in any other EU Member States), according to Arts 14 and 106 of decreto legislativo 1 September 1993 no 385, the consolidated act on banking regulations. Furthermore, authorization is required if the lender has a non-EU banking license.

Accordingly, *de facto* exercise of a professional activity of granting cryptocurrency loans gives rise to the phenomenon of 'abusive banking', which triggers both private law and criminal law consequences. With reference to the former, caselaw has consistently ruled that each single loan agreement entered into by an unauthorized credit undertaking is null and void. In some cases, general rules on nullity (Arts 1418 ff of the Civil Code) were applied. In other cases – and, it is argued, more correctly – it was ruled that so-called 'protective nullity' (Art 127, para 2, of the decreto legislativo no 385/1993) would apply, meaning that only the borrower is granted the legal standing to promote the nullity claim, and *ex officio* declaration by the judge is only possible insofar as the borrower has an actual benefit from the nullity been declared.[30] With reference to the latter, Art 132 of the consolidated act on banking regulations, decreto legislativo no 385/1993, prescribes the punishment of imprisonment for between six months to four years, as well as a fine of between € 2,065 and € 10,329.

7. Liability Due to Loss of Cryptocurrencies

As regards the consequences of the loss (eg, through hacking or fraud) of cryptocurrencies, this issue seems especially relevant where private keys are stored in a 'hot wallet'.[31]

[30] In the first sense, Corte di Cassazione 28 February 2018 no 4760, available at www.dejure.it; in the second, Corte di Cassazione 23 September 2019 no 23611, *Banca, borsa e titoli di credito*, II, 123 (2021).

[31] And perhaps also in a software-based cold wallet enabling crypto-holders to recover wallet's

Generally speaking, a custodian's liability under a deposit contract is set out by Arts 1218 and 1768 of the Civil Code, according to which the custodian is liable for loss of deposited assets if it did not diligently perform its custody activity. Provided that the custodian carries out its activity on a professional basis, the assessment as to whether or not it complied with the due standard of diligence must be based on 'the nature of the undertaking' (Art 1176, para 2, of the Civil Code, so-called professional diligence).

However, Italian caselaw has often ruled that when custody refers to money or securities received by clients, which can be disposed of through the internet (namely, in the case of an online bank account), then a stricter standard of liability would apply, by reason of the inherently hazardous nature of such activity. From a positive standpoint, this would call for an application, by analogy, of Art 2050 of the Civil Code (referring to tort liability), according to which

> 'whoever causes a damage to other when carrying out a hazardous activity, due to its nature or to the nature of the means it is carried out with, is liable unless it shows proof that it adopted all appropriate measures to avert the damage'.[32]

Moreover, to be taken into account is that the hacking of a 'hot wallet' by a fraudulent third party also implies an occurrence of a data breach; from this standpoint, it is noted that failure of the data controller (in this case, the wallet service provider) to ensure integrity and confidentiality of data makes it liable for consequential damage, other than 'if it proves that it is not in any way responsible for the event giving rise to the damage' (Art 82, para 3, of the European Parliament and Council Regulation (EU) 2016/679 on the protection of natural persons with the regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, also known as GDPR).

Of course, should the hacker be identified, the owner of stolen cryptocurrencies would be able recover its property, provided that this can be traced to the hacker hands (which would generally be possible also if stolen property has already been mixed with other goods belonging to the same *genus*: Art 939 of the Civil Code). With reference to third parties purchasing stolen cryptos from the hacker, their purchase is protected by the law according to Art 1153 of the Civil Code, that is if: (*i*) it is a *bona fide* purchaser of a movable good; (*ii*) the sale's object has been delivered to it; (*iii*) the sale contract is valid if not for its object not being the seller's.

Eventually, one may want to consider the hypothesis of the holder of the

credentials.

[32] Other authors believed that, under Italian law, a strict liability regime applies whenever breach of contract stems from the materialization of a risk which normally connected to the nature of the business activity exercised by the debtor. References in U. Malvagna, *Clausola di 'riaddebito' e servizi di pagamento. Una ricerca sul rischio d'impresa* (Milano: Giuffrè, 2018).

cryptocurrencies making the transfer in favor of a counterparty, as a consequence of being misled by the recipient. Apparently, provisions on contract annulment for fraud and deceit are going to be applied. In order for annulment of the contract to be granted by a court, it is necessary to show proof that deceptions perpetrated by the counterparty were such that, without them, the deceived subject would not have entered into that contract (Art 1439 of the Civil Code). Annulment implies that all that was given in performing the contract can be recovered from the recipient through a restitution claim (*condictio indebiti*). Conversely, if the deceptions were not so serious for it to be essential to have the deceived subject's consent, the contract remains valid, but the deceiver must pay compensatory damages (Art 1440 of the Civil Code).

V. Conclusions

In conclusion, the analysis carried out above shows the actual peculiarity of cryptocurrencies to be the impossibility of referring that asset class to traditional concepts and categories underpinning financial regulation.

At the same time, cryptocurrencies constitute the paradigm of '*tokens*', as a form of fully-digitally originated goods, whose underlying technologies (blockchain-DLT) enable the enforceability *erga omnes* of the digital asset's inherent entitlements.

One final remark should be made with reference to the issue of decentralization. As is known, the main promise of blockchain is to enable platforms, where assets can be originated and traded on a 'peer-to-peer' basis (meaning without any intermediation of institutional actors such as commercial banks, central security depositories, central banks). However, earlier analysis was able to highlight that multiple forms of intermediaries are present in this field, especially with reference to wallet-related and exchange-related services. This being so, it is submitted that we are experiencing an era of *new and more complex intermediation*, rather than of disintermediation. So, the question arises as to whether or not those new service providers can guarantee customers an adequate level of protection, and of how regulation would foster widespread trust in these new digital markets.

* The articles in the section 'Insights and Analyses' are accepted by the Editors-in-Chief without peer-review.