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Toward Transformative Private Law: Research Strategies

Marija Bartl*

Abstract

In this paper, I propose a way to study private law for change by showing a variety of legal alternatives to the neoliberal dogmas, through history, comparative research and the 'diverse economies' frameworks. Using these three scholarly approaches can help decentre the overwhelming necessity of neoliberal capitalism in private law thinking and renew private legal imagination. Such an opening will be crucial for our capacity to even begin imagining credible economic alternatives: realistic utopias that provide for a less insatiable prosperity.

I. Introduction

Private law has entered centre stage in both (legal) scholarship and policy. The primary reason is a growing realisation that private law, one of the central legal institutions underpinning the contemporary economy,[1] is clearly complicit in the poly-crisis we are facing. At a time when the climate emergency[2] meets growing inequality,[3] the erosion of democracy[4] and large technological transformations,[5]

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[1] The World Bank considers as the basic elements of its 'rule of law' framework mainly private law (property; contract; company; bankruptcy; and competition) as well as norm-making institutions including courts, legislative bodies, property registries, ombudsmen, law schools and judicial training centres, bar associations, and enforcement agencies. Cited in G. Barron, 'The World Bank and Rule of Law Reforms' *Development Studies Institute*, 19 (2005). Barron references as the World Bank source the following: https://tinyurl.com/yveur44c (last visited 10 February 2024).

[2] The UN Secretary General warns of 'collective suicide' over climate crisis. See *The Guardian*, available at http://tinyurl.com/mu4p6wt6 (last visited 10 February 2024). The main knowledge base on the issues of climate and biodiversity are the Intergovernmental Panel on Climate Change (IPCC) reports. See for instance IPCC Report of 2022, *Impacts, Adaptation, Vulnerability*, available at http://tinyurl.com/zscm7m6s (last visited 10 February 2024).

[3] B. Milanovic, *Global Inequality* (Cambridge: Harvard University Press, 2016); T. Piketty, *Capital and Ideology* (Cambridge: Harvard University Press, 2020); D. Markovits, *The Meritocracy Trap: How America's Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite* (London: Penguin Books, 2020); M.J. Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (London: Allen Lane, 2020).

[4] S. Haggard and R. Kaufman, 'The Anatomy of Democratic Backsliding' 32 *Journal of Democracy*, 27 (2021).

[5] S. Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power: Barack Obama's Books of 2019 (London: Profile books, 2019).

the confluence of all these challenges makes it extremely difficult to react to any one of them. Yet, it is intervention targeted at the deep infrastructure of the economy, at the level of private law, that may be exactly what is needed to reorient the economy and society toward a more sustainable future.

But first to the problems. Several important scholarly interventions have exposed to a wider audience the constitutive role of private law in the poly-crisis we are facing. Thus Katharina Pistor, in her ground-breaking contribution the Code of Capital, has shown how private law drives inequality. The top law firms use modules contract, corporate, property, insolvency and financial law to produce capital for those who can afford it — without much control of the public.[6] Furthermore, corporate law and finance scholars vehemently argue that we urgently need to transform the unsustainable and extractivist logic underpinning the corporation,[7] whilst contract law scholars challenge the regressive distribution of power, value and costs in (global) value chains.[8] At the same time, property law scholars contend that we need to change the institution of the property itself – if we truly aim to change our (extractive) relation to the Earth and its systems.[9] These critics not only argue that we need to move away from the particular neoliberal institutionalisation of private law, but also that we need to question the foundational myopias of private law, such as privity of contracts, property as dominion, or limited liability.

Multiplying crises, as well as ever-consolidating body of knowledge advocating for the change of private legal institutions, have led to policy action in the EU as well as its member states. The most visible interventions at the EU level have been to propose a set of legal measures to green the financial sector,[10] to ensure better sustainability reporting,[11] the imposition of a material obligation on large companies to engage in human rights and environmental due diligence,[12] or the expansion of ecodesign framework to include potentially all environmentally

[6] K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press 2019), 13.

[7] B. Sjåfjell, 'Redefining the Corporation for a Sustainable New Economy' 45 *Journal of Law and Society*, 29 (2018); J.P. Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Bristol: Policy Press, 2020).

[8] D. Danielsen, 'Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law Is Needed to Address Global Inequality and Economic Development' in U. Mattei and J.D. Haskell eds, *Research Handbook on Political Economy and Law* (Cheltenham: Edwad Elgar, 2017), 195; F. Cafaggi and P. Iamiceli, 'Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive' 27 *European Review of Private Law*, 1075 (2019).

[9] F. Capra and U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland: Berrett-Koehler Publishers, 2015); U. Mattei and A. Quarta, *The Turning Point in Private Law* (Cheltenham: Edward Elgar, 2018).

[10] See EU's Sustainable Finance initiatives, available at http://tinyurl.com/36vpkwjh (last visited 10 February 2024).

[11] See EU, 'Sustainable Corporate Reporting Directive', available at https://tinyurl.com/ys47hc52 (last visited 10 February 2024).

[12] See EU, 'Corporate Sustainability Due Diligence Proposal', available at https://tinyurl.com/4kp8n3u7 (last visited 10 February 2024).

damaging product groups.[13]

Despite their laudable efforts, these legislative measures hardly respond to the degree of change currently called for. The EU's interventions still build on the conviction that markets are *mostly* rational and transparency *mostly* works, despite considerable evidence to the contrary.[14] Most importantly, however, these measures fall prey to what we can describe as neoliberal naturalism, the conviction that ultimately only one version of the economy, one version of 'high-profit' capitalism, can bring us to prosperity. In this economic imaginary, innovation is a matter of private enterprise and profit margins, rather than public good or collective effort. People then, as profit-seeking creatures, become only more creative the more money they can make. In turn, if ever we limit the possibility profit, the implication is economic and social regression. But nothing can be further from the truth.

At different points in history, across different regions, and even in today's economy, people have achieved many important things based on motivations and values distinct from those cherished by seeking extraordinary profits and rents. Such practices remain (even today) both fundamental, if not-recognised, pre-requisites of the neoliberal economy (consider the production of cared for humans for the 'labour market')[15] and have brought about large innovations and impulses for prosperity (consider scientists such as Einstein or the centrality of public institutions for innovation).[16]

In this paper then, I will explore a number of research strategies that can help uncover past and current alternatives to the neoliberal sociality and legality, through historical research, comparative research and the 'diverse economies' frameworks.[17] Using these three scholarly approaches can help decentre the overwhelming necessity of neoliberal capitalism in private law thinking, and thus renew private legal imagination. Such an opening will be crucial for our capacity to even begin imagining credible alternatives to the contemporary extractive economic system: realistic utopias that provide for less insatiable prosperity.

II. Three Ways of Challenging the Mainstream Narratives

1. Historical Variance

[13] See EU, 'Proposal for Ecodesign for Sustainable Products Regulation', available at https://tinyurl.com/muhc3f5m (last visited 10 February 2024).

[14] D. Ariely, 'The End of Rational Economics' 87 *Harvard Business Review*, 78 (2009).

[15] N. Folbre, 'Measuring Care: Gender, Empowerment, and the Care Economy' 7 *Journal of Human Development*, 183 (2006).

[16] M. Mazzucato, The Entrepreneurial State: Debunking Private vs. Public Sector Myths (London: Anthem Press, 2011).

[17] J.K. Gibson-Graham, 'Diverse Economies: Performative Practices for Other Worlds' 32 *Progress in Human Geography*, 613 (2008); Id and K. Dombroski eds, *The Handbook of Diverse Economies* (Cheltenham: Edward Elgar, 2020).

History has always been an important instrument of critical scholarship.[18] Showing the diversity in ways of being, legal-institutional arrangements or political projects, has been one of the major ways in which history helped to denaturalise the present.[19] The 'historical turn' in law means that history has arrived in other departments adjacent to legal history. Thus far, it has been most visible in the sphere of international law.[20] However, it has also been important in the study of private law.[21]

So, what is the central task of history when it comes to studying private law for change? It is showing that the 'privatisation' of power[22] is neither unavoidable nor definitionally good. Rather, the scope of 'private' as opposed to 'public' or 'collective' has been a matter of political boundary work, with significant distributive and societal implications. In turn, if we can show that neoliberal arrangements are not only avoidable, but also not necessarily drivers of broad prosperity, we open the space for legal and political imagination.[23]

There are several 'typical' ways of denaturalising neoliberal capitalism via historical analysis.

The first has been to historicise the *private* in 'private law'. How 'private' has private law been, *really*? If we look, for instance, to property law scholarship, scholars often highlight that it took publicly facilitated (and violent) interventions to transform the commons into private property.[24] Corporate law scholarship has shown that the corporation emerged as the instrument of public rather than private power, as states used them to expand the remit of their extractive economies (with the use of military power)[25] far beyond their own borders.[26]

Another way of historicising the private in private law has been to problematise

[18] Marx's 'historical materialism' has been foremost a challenge to the idealism of Kant and Hegel.

[19] K. Tuori, Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe (Cambridge: Cambridge University press, 2020); R. Lesaffer, European legal history: a cultural and political perspective (Cambridge: Cambridge University Press, 2009); F.A. Wieacker, History of Private Law in Europe, translated by T. Weir (Oxford: Clarendon Press Oxford, 1995).

[20] For reflections on the 'historical turn' in international law see: I. Venzke and K.J. Heller, *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford: Oxford University Press, 2021).

[21] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979); P. Ireland, 'Corporate Schizophrenia: The Corporation as a Separate Legal Person and an Object of Property' (2016), available at https://tinyurl.com/yc8hcasz (last visited 10 February 2024); L. Moncrieff, 'A Different Kind of 'End of History' for Corporate Law', in E. Christodoulidis et al eds, *Research Handbook on Critical Legal Theory* (Cheltenham: Edward Elgar, 2019); J.P. Robé, n 7 above.

[22] See also J.P. Robé, n 7 above, for an insightful analysis of the privatisation of power via private property.

[23] R. Mangabeira Unger, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy (Cambridge: Cambridge University Press, 1987).

[24] K. Pistor, n 6 above.

[25] This is the case as it concerns both British or Dutch East Indian Corporations.

[26] G. Baars, The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy' (Leiden: Brill, 2019).

the boundaries of 'private autonomy'. Thus, in corporate law, scholars have shown that there is nothing natural in the right to 'incorporate' (by registration). For most of history, the corporation could emerge only if it had a public purpose and was granted a concession by the state.[27] In contract law, there is no natural scope for 'freedom of contract'. Rather, this has been the outcome of major struggles.[28]

The third way of historicising private law for change has been to discuss the transformations of particular legal institutions. In corporate law, it has been shown that what is today considered inherently 'normal', namely 'limited liability', was a development strongly fought against, insofar as it went against deeply held moral principles spanning the political spectrum.[29] In contract law, the shifting importance attributed to 'bargaining power' and 'just price' is the outcome of political struggle rather than the nature of the contract. [30]

Last but not least, one crucial way to historicise private law for change has been to historicise some of the discourses underpinning or neighbouring the field. In corporate law scholarship, scholars have shown how the confluence of social developments (most notably financialisation) has ushered in the ideologies of 'shareholder primacy' or 'shareholder value' that have changed how corporate law norms are read.[31] Equally, historicising neighbouring discourses, such as that of 'innovation' or 'value creation' are fundamental in questioning the deep norms of neoliberal capitalism, that place the private sector in the driver's seat of progress. Quite contrary to the story of private progress, scholars have shown that saw greater rates of growth, equality, and innovation in the period preceding neoliberalism,[32] with a more socially responsible corporation and the 'entrepreneurial state', which delivered the most fundamental innovations of our times.[33]

2. Comparative Research and the Varieties of Capitalisms

Historically, comparative research has been one of the most visible vehicles for denaturalising the 'normal' ways of doing things in private law scholarship, [34] adopted by those who were interested in expanding the legal imagination in some way.[35] The recognition that other countries and peoples organised their legal systems

[27] P. Ireland, n 21 above.

[28] H. Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (Durham: Duke University Press, 1993).

[29] S.P. Hamill, 'The Origins behind the Limited Liability Company' 59 *Ohio State Law Journal*, 1459 (1998).

[30] J. Gordley, 'Equality in Exchange' 69 *California Law Review*, 1587 (1981).

[31] B. Sjåfjell et al, 'Shareholder Primacy: The Main Barrier to Sustainable Companies', in B. Sjåfjell and B.J. Richardson eds, *Company Law and Sustainability* (Cambridge: Cambridge University Press, 2015), 79.

[32] T. Piketty, n 3 above.

[33] M. Mazzucato, The Value of Everything: Making and Taking in the Global Economy (London: Hachette UK, 2018).

[34] M. Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2022).

[35] G. Frankenberg, *Comparative Law as Critique* (Cheltenham: Edward Elgar, 2016).

and rules differently, connected to different institutions, cultures, or normative appreciations, brought home the very positivist point that the law is a political and social product of actual institutions – rather than a fully neutral and rational enterprise. Unsurprisingly, it was also in comparative law scholarship (which attempted to be more scientific in its knowledge production) that the question of method became an issue early on,[36] and more consistently than in the rest of legal scholarship, where such reflections and discussions are rare and periodic at best.[37]

Even if usually aspiring for a higher degree of 'scientific' credentials than doctrinal scholarship, more often than not comparative law scholarship came with a rather obvious political programme in mind.[38] Thus one of the most important legal projects in European private law is the (still ongoing) 'Common Core Project', which seeks to elucidate the similarities between European legal systems. While the project's founding fathers may have insisted that the project is descriptive only, those who have engaged in it have mostly been sympathetic to European legal approximation and eventually integration.[39] Comparative research has also served, more or less explicitly, as advocacy for the best (eg most efficient) ways of doing law.[40] Finally, comparative law research has provided a toolkit for creating all kinds of 'rankings' and 'indexes' that appear rather popular among international organisations, such as the World Bank's infamous 'doing business' index.[41]

An ever more important line of comparative law scholarship served to problematise simplistic universalism, eurocentrism and the dominance of Western legal thought, all of which have made us blind not only to the history of domination but also to the lessons that can be learned from different approaches to law.[42] Several recent critiques bring these questions to bear also on European and comparative private law, including for instance the theorisation of various types of hierarchies and injustices in European private law [43] or the proposal to take

[36] W. Hug, 'The History of Comparative Law' 45 *Harvard Law Review*, 1027 (1931); J.C. Reitz, 'How to Do Comparative Law' 46 *American Journal of Comparative Law*, 617 (1998); R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 339; E.J. Eberle, 'The Method and Role of Comparative Law' 8 *Washington University Global Studies Law Review*, 451 (2009); G. Frankenberg, n 34 above.

[37] M. Bartl and J.C. Lawrence, *The Politics of European Legal Research: Behind the Method* (Cheltenham: Edward Elgar, 2022).

[38] G. Frankenberg, n 34 above.

[39] For more information see the publications of the project, available at https://tinyurl.com/2kns5z32 (last visited 10 February 2024).

[40] R. Kraakman, The Anatomy of Corporate Law: A Comparative and Functional Approach (Oxford: Oxford University Press, 2017).

[41] See https://archive.doingbusiness.org/en/rankings.

[42] I.D. Edge, Comparative Law in Global Perspective (Leiden: Brill Nijhoff, 2001); W. Twining, Comparative Law and Legal Theory: The Country and Western Tradition (Leiden: Brill Nijhoff, 2001); W.F Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa (Cambridge: Cambridge University Press, 2006); S. Munshi, 'Comparative Law and Decolonizing Critique' 65 The American Journal of Comparative Law, 207 (2017).

[43] M.W. Hesselink, 'EU Private Law Injustices' 41 *Yearbook of European Law*, 83 (2022).

seriously the damages caused by racist and sexist hate speech online within tort law in Europe.[44]

Finally, important comparative insights in private law also came from reliance on non-legal scholarships, such as that of political economy. Thus, the broadly influential literature on 'varieties of capitalism'[45] showed that there are in fact different varieties of capitalism around the world, and hence (unavoidably) different legal regimes underpinning them. In private law, the 'varieties of capitalism' provide a solid ground to challenge arguments such as that we have reached the 'end of history' in corporate law, with the Anglo-American shareholder primacy model being the literal apex of development in this segment of human action.[46] Instead, there is a variety of capitalisms - even within the European Union - and thus also Europe (and any other region for that matter) that could take a different path to that of neoliberal capitalism.[47]

3. Diverse Economies and the Alternatives in the Heart of Existing Economy

The most powerful way of showing diversity in the study of private law for change is, I contend, showing that these alternative economies already exist in the very economy we inhabit.[48] Alternative economies – with different values, motivations, relations and practices – not only exist but even thrive in many contexts (although we simply may not be paying sufficient attention).[49] The task of legal scholarship is then to bring into view and facilitate, such alternatives by providing institutional forms that make it easier and more normal to engage in alternative practices, on the basis of non-profit-seeking motivations, with a view of multiplying such humanly and socially regenerative types of action.[50]

From the 70s, feminist scholarship has been particularly vocal in problematising the mainstream ideas of economy – what is value, what is productive as opposed to unproductive.[51] Under the (still) prevailing understanding, only commodified exchange (in a formal economy) counts as *productive*, as *economically valuable*. This leaves much of the feminised care labour outside of what is considered *economic production*. And yet, how can we even start thinking of 'economic growth' without a cared for, nourished, and educated 'labour force'? People are (for the

[44] See L.K.L. Soei Len and A. de Ruijter, 'Conceptualizing the Tortuous Harms of Sexist and Racist Hate Speech' 2 *European Law Open*, 8 (2023).

[45] S. Munshi, n 43 above.

[46] H. Hansmann and R. Kraakman, 'The End of History for Corporate Law' 89 *Georgetown Law Journal*, 439 (2001).

[47] L. Moncrieff, n 21 above.

[48] J.K. Gibson-Graham and K. Dombroski, n 17 above.

[49] See the project website available at https://www.nonextractivefuture.eu/ (last visited 10 February 2024).

[50] ibid

[51] N. Folbre, 'The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought' 16 *Signs: Journal of Women in Culture and Society*, 463 (1991).

most part) not produced by the market or for the market. Instead, the market depends on a large set of social institutions, and caring practices, which are made invisible, and undervalued, in current representations of the economy. What economics call the 'productive economy' is only the tip of the iceberg of all value produced.

Now, private law has been particularly powerful in normalising the mainstream understanding of not only of 'productive economy', but of a specific historical variation of it. For example, when we think, teach, and make policy in the field of company law, the centre place of imagination is the publicly owned company, alongside 'investors', 'shareholders', 'boards' and 'directors'. This is despite 50% of the EU's Gross Domestic Product (GDP) coming from Small and Medium-sized Enterprises (SMEs).[52] Not to mention that 'not-for-profit' undertakings such as social enterprises, cooperatives, care cooperatives, eco-villages, sustainability-driven businesses, fair trade initiatives are considered only marginally if considered at all.[53]

But this is clearly not only a problem of company law. When we think, teach, and make policy in the field of contract law, we adhere to unrealistic assumptions of formal equality and freedom of contract. Whenever there is a clear social demand to account for inequalities and exploitation, we exclude those issues and relegate them to abnormal, 'special' private law fields, such as labour law, consumer law, tenancy law etc. The same goes for property law, where we make sure that students learn about the exclusionary quality of property via law, scholarship, case law, and even human rights (the human right to property) – and pay only little service to commons, public ownership, most forms of shared property etc.[54]

This lack of visibility of not-so-capitalist economic practices, motivations, and values through the prism of private law has major ideological consequences. Such non-diverse private law elevates, or at least normalises, the practices, motivations, and values that stand behind mainstream neoliberal capitalism. At the same time, such private law does not recognise or support the economic activity that is built around different values and motivations – such as care, solidarity, sanctity, or generosity – and embedded in practices that are less extractive of the resources that underpin them (social, environmental, or financial). These are not seen as properly economic and legally relevant.

Paradoxically, however, this 'other' economy is by no means marginal in the European Union. In some countries (such as Italy) it counts for *circa* 10% GDP.[55] Moreover, as it has been demonstrated in the wake of the 2008 financial crisis, such activity created a level of economic resilience that helped countries weather

[52] See http://tinyurl.com/2zhkydb7 (last visited 10 February 2024).

[53] See M. Bartl, 'Teaching law in Times of overlapping Crises' *Verfassungsblog*, available at http://tinyurl.com/y5yazj9f (last visited 10 February 2024).

[54] ibid

[55] Communication from the European Commission, 'Building an economy that works for people: an action plan for the social economy', 2021, available at https://tinyurl.com/66h97zyz (last visited 10 February 2024).

the storm, especially in heavily impacted Southern Europe.[56] Even the European Commission recognised this effect, and took an increasing interest in the so-called 'social economy', putting forth several plans for social economy.[57]

Under the tagline of 'Social Economy', the European Commission bundles all kinds of not-so-capitalist economic practices that share the following main principles and features:

> 'the primacy of people as well as social and/or environmental purpose over profit, the reinvestment of most of the profits and surpluses to carry out activities in the interest of members/users ("collective interest") or society at large ("general interest") and democratic and/or participatory governance.'[58]

Clearly, the European Commission, as well as many member states for that matter, recognise that there are a range of alternative economic motivations, values, relations, and practices – even if most of the legislative activity in the EU is still directed toward a 'mainstream economy'.[59] Yet, there remains much value in what typifies this type of 'social' economic action. First, social economy enterprises place social responsibility at the heart of business. Enterprises, cooperatives, short value chains and other entities and practices of social economy are not here to advance the private interests of their members or 'investors', but to achieve (collective or general) common good. The profits thus made are not privatised to shareholders and managers but are instead (mostly) reinvested to further the common good pursued. Such social economy entities are organised in a more horizontal and non-hierarchical manner at the level of their fundamentals.[60] They are also the pioneers of social innovation, inasmuch they explore new ways of social organisation (production), innovating in the ways we practice economy and deliver the common good.[61]

Yet, while this economy is recognised as both valuable and real, why is it so little discussed in our research, law curricula, legislation, media, or public sphere? Why doesn't the EU go any further than promoting it via communications and action plans? Why is there no 'industrial policy for social economy', as we see today for clean technologies?[62] And why don't we teach about these 'legal devices' to our

[56] ibid

[57] The Commission launched 'The Social Business Initiative' in 2011 and a 'Start-up and Scale-up Initiative' in 2016. See the focus on Social enterprises available at https://tinyurl.com/ycxusftx (last visited 10 February 2024).

[58] European Commission, n 56 above, 5.

[59] At least judging on the basis of the fact that no legislative proposals have been put forth in the more than ten years by the European Commission.

[60] F. Laloux, Reinventing Organizations: A Guide to Creating Organizations Inspired by the next Stage in Human Consciousness (Brussels: Nelson Parker, 2014).

[61] See the EU's action on social innovation, available at http://tinyurl.com/mwabj753 (last visited 10 February 2024).

[62] See EU Commission Proposal for a Regulation on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry

students and colleagues? My sense is that our legal and economic imagination has been so deeply colonised by the ideas of neoliberal capitalism that we do not see, and value, what is directly 'under our nose'. It's high time to change that.

III. Conclusion

In this paper, I articulate three main research strategies that can denaturalise the still prevailing neoliberal dogmas about human nature (people as money-seekers) and the nature of the economy (extraction as efficiency).[63] I have suggested that if we had only tried to look a bit harder, we would have found that there were and are many existing alternatives to neoliberal extractivism, with people engaging productively in economic activity on the basis of different motivations and values, while building more respectful relations with others and with nature. The task of private law scholarship is then to make visible those alternatives, via the study of history, comparative perspectives as well as diverse economies.

Such approach to private law can not be challenged as naive. It does not draw on a promise of worlds not seen, or utopias not lived. Rather, it aims to show the *diversity of (once) existing economic arrangements* (motivations, values, relations, and practices) and thus offers an existing utopia in response to reified ideas behind neoliberal capitalism. Private legal scholarship, in turn, should orient itself toward the development of private law rules and institutions which foster such alternative economies, relations and motivations, while the legislative changes to private law should at least start with a commitment to support such diversity. Only by fostering non-extractive motivations, values, relations, and practices, do I see us arriving at a genuinely sustainable economy, society, and future.

For those pursuing a sustainability agenda in private law, such a decentring exercise is a fundamental requirement for creating the space necessary to unfold the legal imagination that socio-ecological transformation requires. To change how we produce, distribute, and consume, we need to change how we think about humans and the economy, what we are and how we live. This requires a private law that does more than just tinker at the edges. For instance, the introduction of the 'right to repair' means little if people (are led to) think that new is always better, the introduction of due diligence obligations will bring little change shall the remuneration of company directors remain bound to financial performance only, while the 'socialisation of costs' will continue if the financial markets reward foremost short-term financial profits. But all these compromises are currently made in the EU legislation because it remains difficult to rid ourselves of the

Act), 16 March 2023, COM(2023) 161 final.

[63] I use the term 'extraction' in a broader sense than just mining and extractive industries. I refer to it to the legal-institutional framework that incentivizes the privatization of the profits (to shareholders) and socialization of costs, via all types of 'cost-cutting' on labour, tax, the excessive use of natural resources, excessive pollution or the exploitation via the value chains.

naturalised images of both people and economy. Yet, as I have tried to show in this piece, that set of images and assumptions are not only reductionist and not borne by reality but also stand in the way of socio-ecological transformation.

Even for those who are less interested in sustainability, the approach to scholarship proposed here is not without merit. Understanding the contingency of private law institutions – by studying their historical, comparative, and practical alternatives – will enable the practice of private legal scholarship with increased awareness and ultimately additional rigour. This implies that scholarship not only presupposes contingency but also openly acknowledges it, and considers a broader range of alternatives to any legal solution, including a broader range of actors in every legal narrative, especially in relation to arguments based on private law ever-greens such as 'legal certainty', 'legitimate expectations' or 'public-private' divide. Certainty of what grounds? Whose expectations? And what remains naturalised, depoliticised, unseen and unacknowledged?

The Historical Background to Unjust Enrichment in Italy and in Europe

Antonio Albanese*

Abstract

In Europe, restitution rules are the result of a circulation of models. Historical-comparative investigation can help to trace the order lines of restitution and examine contamination and influences around the three great juridical models of the contemporary age: the Roman-French one, the Roman-German one and the English one.

I. A European Problem

The difficulties in harmonizing the national rules of the Member States of the European Union are particularly evident when discussing a future 'European' basis of the restorative principles.

In Italy, the enrichment action was the subject of three important monographic studies around the 1960s,[1] but subsequent legal literature, with rare and brilliant exceptions,[2] has not always fully understood the potential of the principle.[3]

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[1] R. Sacco, *L'arricchimento ottenuto mediante fatto ingiusto* (Torino: UTET, 1959); P. Trimarchi, *L'arricchimento senza causa* (Milano: Giuffrè, 1962); L. Barbiera, *L'ingiustificato arricchimento* (Napoli: Jovene, 1964).

[2] P. Gallo, L'arricchimento senza causa (Padova: CEDAM, 1990); Id, Arricchimento senza causa e quasi contratti (i rimedi restitutori) (Torino: UTET, 2nd ed, 2008).

[3] However, in more recent times the topic has been at the center of renewed interest, as demonstrated by the monographs of D. Carusi, *Le obbligazioni nascenti dalla legge* (Napoli: Edizioni Scientifiche Italiane, 2004); A. Nicolussi, *La lesione del potere di disposizione e l'arricchimento* (Milano: Giuffrè, 1998); P. Pardolesi, *Profitto illecito e risarcimento del danno* (Trento: Università degli Studi di Trento, 2005). Furthermore, the authors have delved into the study of the relationship between unjust enrichment and damages action: D. Carusi, 'Il concorso dei rimedi restitutori con quello risarcitorio (e il problema dell'arricchimento ottenuto mediante fatto ingiusto)' *Rivista critica del diritto privato*, 67 (2008); P. Pardolesi, 'Arricchimento da fatto illecito: dalle sortite giurisprudenziali ai tormentati slanci del legislatore' *Rivista critica del diritto privato*, 523 (2006); P. Sirena, 'Il risarcimento dei c.d. danni punitivi e la restituzione dell'arricchimento senza causa' *Rivista di diritto civile*, 531 (2006); A. Albanese, 'Il rapporto tra restituzioni e arricchimento ingiustificato dall'esperienza italiana a quella europea' *Contratto e impresa/Europa*, 922 (2006); Id, 'Arricchimento senza causa: azione e principio' *Studium Iuris*, 1114 (2006). For contributions in the field of industrial law: C. Castronovo, 'La violazione della proprietà come lesione del potere di disposizione. Dal danno all'arricchimento' *Il diritto industriale*, 7 (2003); A. Plaia, *Proprietà intellettuale e risarcimento del danno* (Torino: Giappichelli, 2003), 103; P. Sirena, 'La restituzione del profitto ingiustificato (nel diritto industriale italiano)' *Rivista di diritto civile*, 305 (2006); P.

Going through centuries-old normative and doctrinal construction, historical-comparative investigation can lead to tracing the order lines of such a complex matter, and to examining, albeit for subtle hints, relations, contamination and influences existing in the three great juridical models of the contemporary age, the Roman-French one, the Roman-German one and the English one.

In Europe, restitution laws are the result of the circulation of models. They, perhaps, represent the most uncertain product of the long historical evolution of legal thought; they played a fundamental role among the Romans; in modern times, they have long felt the pre-eminence of contract and tort; they awakened a growing interest in common law jurists and in German doctrine in the final decades of the last century. Finally, they have become an important part of the study of French-derived systems.

This phenomenon of 'homogenization' is not new in the modern era. The Soviet restitution system was inspired, for example, by the BGB model; the Russian system was then imitated by the Polish code and by the Hungarian one. The influence of the BGB is also evident in the Japanese and Chinese codes and in the 2003 Brazilian code. The influence of the common law is clear in the Indian system. Again, the Italian-French draft of the code of obligations of 1927, which, in Art 73, outlined how action brought on grounds of unjust enrichment was an important basis for the Albanian codification of 1927, for the Romanian one of 1934 and for the Greek one of 1940.

Some systems of French origin have instead deviated from their model and have expressly regulated the action of unjust enrichment; cf Arts 6 ff. of the Moroccan code of 1913; Arts 71 and 72 of the Tunisian code of obligations and contracts of 1906; Arts 140-142 of the Lebanese code of 1932.

The vitality of the principle of unjust enrichment is, therefore, confirmed by its validity in positive law (or, as in France, in caselaw application), both in Western and Eastern legal systems.[4]

In the context of systems of Roman origin, the Roman-French model is characterized by the lack of codification of the action of unjust enrichment; the French code, the Spanish code and the Italian code of 1865 exclusively regulate the two traditional legal concepts of almost-contract ('quasi contratti'), ie the payment of the undue payment and the *negotiorum gestio*. The Roman-Germanic model, on the contrary, is characterized by the absence of the quasi-contract category and by the strong presence of a general enrichment clause; for the German code of 1900, in § 812, para 1, BGB; for the Swiss code of obligations of 1911, in Art 61, para 1, OR. This confirms the incompatibility of unjust enrichment with the category of quasi-contracts. This is supported by Italian law, wherein the advent of the 1942 code led to the suppression of the quasi-contract and, concurrently,

Pardolesi, 'Un'innovazione in cerca d'identità: il nuovo art. 125 CPI' *Corriere giuridico*, 1605 (2006).

[4] For Muslim law, see P. Arminjon et al, *Traite de droit comparé* (Paris: Paris L.G.D.J., 1952), III, 364; for the South American one, see J. Fabrega Ponce, *El enriquecimiento sin causa* (Santafe de Bogotà: Plaza y Janés, 1996). See also, D. Johnston and R. Zimmermann, *Unjustified Enrichment. Key Issues in Comparative Perspective* (Cambridge: Cambridge University Press, 2002).

the introduction of the general enrichment clause (Art 2041).

The principle prohibiting unjust enrichment at the expense of others spread first in Prussian law and in the Austrian civil code and later in the German civil code (§ 812), and in the Swiss law of obligations (Art 62). More recently, it was introduced in the Italian civil code of 1942 (Arts 2041, 2042) and in the Portuguese civil code of 1966 (Arts 473-482). The most recent codification of the enrichment action can be found in Arts 884-886 of the new Brazilian civil code.

The current Spanish code and French code still offer no remedy as an autonomous figure, but both in Spain and in France unjust enrichment is elevated, thanks to doctrine and jurisprudence,[5] to a general principle which operates as an autonomous source of obligation.

As for Italy, the very codification of a general principle of enrichment was strongly opposed by some and, in the years immediately following its advent, was harshly criticized; when the code of 1865 was in force, the action of enrichment lived an (uncertain) existence only in doctrine and jurisprudence. In accordance with a tradition dating back to Justinian's Roman law, the frequent recourse to reasons of a meta-legal nature and, in particular, to the principles of equity and justice, had aroused strong fears regarding the generalization of rules such as those pertaining to undue payments, accessions, expenses on other people's property and others that embodied specific hypotheses of unjust enrichment.

The same concerns could be found among French jurists. In France, the action of enrichment does not find approval in the texts of the law but, in 1892, a judgement of the Chamber of Appeals of the Court of Cassation gave definitive access to the remedy, as a general institution of French law (see § 2).

Unlike the French code, the current Italian civil code gives an affirmative answer to the question of whether or not it is appropriate to establish a general principle of enrichment. However, the real issue of restitutive remedies still remains to be resolved, notably, what to include within the codified general principle or, in other words, what is the benefit of such a generalization, in the face of individual rules which are not only more minutely dictated, but which often differ substantially from the regulation of general action.

This is a doubt which unites continental law jurists and common law jurists; even in countries such as Germany and England, where the enrichment action has greater scope than in Italy, scholars wonder

[5] Spanish jurisprudence openly proclaims that it has the merit of elaborating the figure in Spanish law: 'el enriquecimiento injusto es institución no mencionada expresamente entre los cuasi contratos que regula el Código civil, de principal elaboración de este Tribunal Supremo, con cierto arraigo en la legislación anterior' (S. 17 May 1957).

It should be noted that the principle of unjust enrichment, in Spanish law, has subsequently received approval also in legislative texts: the expression '*acción de enriquecimiento sin causa*' is used by Art 10.0 of the reformed Spanish code (see *Título Preliminar, De las normas juridicas, su aplicación y fuentes*, introduced by law no 3 of 1973, which, in Chapter IV, regulates the rules of private international law) and by Art 65 of the Cambiaria law. As to jurisprudential introduction of the enrichment action in French law, see § 2.

> 'whether the reaction against enrichment without cause constitutes a truly unitary institution or if it is not rather a question of a series of individually differentiated means of protection'.[6]

As a first approximation, the separation between the legal systems that refer to a double system (ie, comprising two distinct restitution claims) and those that have accepted a unitary system, could be outlined as follows: among the first, the French, the Italian, the Dutch and the Austrian; among others, the German, Swiss and, partially, Greek.[7] Furthermore, in the English system, one might wonder if it is truly appropriate to speak, technically, of a general principle that prohibits unjust enrichment, when the House of Lords itself, as a rule, prefers to base restitution on a plurality of typical remedies. But if we were to study, in depth, the evolution that the restorative remedies have had in these systems, all certainty vanishes. This is because the German doctrine, for example,

> 'strives to identify a typology of case of enrichment, which concretizes the too abstract legislative formulation, in the Common Law the opposite occurs, to the extent that an effort is made to enucleate from the minute cases a principle or criterion of orientation ... which acts as a guide for the interpreter'.[8]

The study of the different European legal systems presents a surprise and a confirmation. The surprise is to discover that, on the classic tripartition just exposed, it is possible to superimpose, in matters of restitution, a bipartition; on the one hand, the French system, on the other, the Anglo-German system. The confirmation is that even for refunds, it is possible to comprehend, at an embryonic level, a gradual process of approximation between the different models.

The theme is that of the relationship between individual means of restitution and the theory of unjustified enrichment. However, it is clear that some of the most profound profiles of the restitution system and the entire subject of obligations intersect in it. Think of the Italian influences, even on the French and German systems, with regard to the irrelevance of the error, and of the contribution offered by the *Saldotheorie* of German doctrinal matrix. Consider the different reflection of the French consensual principle and of the Germanic principle of abstraction of the cause. On the contractual side we have the theories of the efficient breach and the problem of the justice of the contract. Finally, consider the problem, highlighted to us once again by the comparative experience, of the allocation of the wealth produced in the absence of damage. A problem that could be reduced roughly to the following question: is there a liability without damage? More specifically, if it

[6] E. Moscati, 'Fonti legali e fonti *«private»* delle obbligazioni', in C. Angelici et al eds, *Quaderni romani di diritto privato* (Padova: CEDAM, 2000), 254.

[7] B. Kupisch, 'Ripetizione dell'indebito e azione generale di arricchimento. Riflessioni in tema di armonizzazione delle legislazioni' *Europa e diritto privato*, 858 (2003), where also a historical explanation of this separation.

[8] A. Di Majo, *La tutela civile dei diritti* (Milano: Giuffrè, 4th ed, 2003), 345.

exists, is it a compensatory or restitutive liability? More questions may arise; can we really speak of a 'responsible' subject, with regard to accipiens or enriched subject? If there is a 'restitutive responsibility', can it disregard guilt? Again, if a sort of objective liability could also be established in the matter in question, would it be fair to consider the defendant obligated to indemnify the plaintiff to an extent that is independent of the subjective state of the former? Finally, from these elementary questions, a more refined spectrum of problems related to the economic analysis of law unravels (assuming that such a liability is fair, is it also economically convenient?), from which a surprisingly elegant theme arises.

Here, however, it is appropriate to highlight the asymmetries of our system with respect to the other national laws of the Old Continent and, above all, with respect to what appears to be a general European trend.

II. The Influence of the French System

The results achieved by authors in the phase immediately preceding the new civil code and clearly incorporated by the codifier of 1942, were strongly influenced, when not translated, by the conclusions reached from the French experience. Indeed, after long-ignoring the problem, or, at most, after deciding to resolve it in the light of an adaptation of the traditional remedies, *condictio*, *actio de in rem verso* and *negotiorum gestio*, the transalpine courts were forced to address the question more seriously.[9]

The breaking point is represented by the famous judgement of the Chamber of Appeals of the Court of Cassation,[10] known as *arrêt Boudier* or *affaire des engrais*, which, despite the absence of an explicit rule, established the action of enrichment as general institution founded directly on equity, definitively freeing it from *negotiorum gestio*.[11]

The dispute concerned the sale of a load of fertilizer, by a merchant, to the lessee of an estate. At the end of the lease, the seller of the fertilizer, which, in the meantime, had been spread on the land, had not yet received payment from the

[9] P. Gallo, n 2 above, 121.

[10] Chanbre de Requetes, June 15, 1892 (in Dalloz, 1892, I, 596, in Sirey, 1893, I, 381, with note by Labbé). Moreover, the Court adopted the conclusions already announced in the doctrine by C. Aubry and C. Rau, *Cours de droit civil francais* (Paris: Marchal et Godde, 1920), IX, 354, who were the first to accept a configuration of the reform as an autonomous figure. The ideas of the same authors also had an evident influence on the maxims mentioned below in the text, which limited the boundaries of action. The two authors cited had, in turn, followed the conclusions formulated for the first time in French law by a German jurist: Zachariae, *Lehrbuch des franzosischen Zivilrechts*, 1808 (French edition under the title: *Droit civil théorique francais* (Bruxelles: Imprimeurs èditeurs, 1842) 337), who was the first to conceive an independent action from *negotiorum gestio*, calling it *actio de in rem verso*.

[11] Verbatim: 'attendu que cette action derivant du principe d'equité qui defend de s'enrichir au detrissement d'autrui et n'ayant été réglementée pas aucun texte de nos lois, son exercice n'est soumis a aucune condition déterminée'.

tenant, who later proved to be insolvent. The seller then took action against the owner of the land, since the latter, having finally benefitted from the supply of fertilizers, had, according to him, received an unjustified enrichment; the Court agreed with him. Moreover, the decision, with a motivation whose emphasis and abstractness went well beyond the modest case submitted to its attention, pushing itself to the formulation of a principle which, since it is based on natural equity, could only be understood in the broadest and most flexible sense. In its disruptive innovative ardor, it failed to define the conditions for the operation of such an action. On the contrary, it solemnly sanctioned that the principle on the basis of which whoever is enriched to the detriment of others is required to return the stolen goods, is not subject to any predetermined condition. It is sufficient for purposes of accepting the request, that the plaintiff demonstrates that he has procured an enrichment with his own sacrifice or that done to the person against whom he acts.

The judgement, rather than closing the debate, rekindled it. It was now necessary to fill a potentially unlimited principle with content, to reconstruct the conditions for the effectiveness of a remedy which was received with concern among scholars, so much so, that it was compared to a Trojan horse introduced into the citadel of law written as '*une sorte de brulot susceptible de faire sauter tout l'edifice juridique*'.[12] Within this debate, still open and partially influenced by that original fear that the reform was capable of undermining the law, two judgements should be noted, one from 1914,[13] the other from the year following,[14] which completed the reconstruction of the institution started by the *arrêt Boudier*, adding to enrichment, damage and correlation between damage and enrichment, the other two presuppositions forming the modern action of enrichment, lack of just cause and subsidiarity of the remedy.[15]

The events beyond the Alps had an evident echo in the Italian legal reality, in which the enrichment action was recognized, although not mentioned by the 1865 code. From the examination of various provisions scattered in the codes (Arts 445, 449, 450, 468, 470, 490, 1018, 1148, 1150, 1237, 1243, 1307, 1528, 1728, 1842, 1010 of the civil code; Arts 56 and 326 of the commercial code), the existence of a general principle was deduced, which forbade unjustly enriching oneself to the detriment of others.[16] The obligation to repay was, therefore, already enshrined

[12] P. Drakidis, 'La subsidiarité, caractère spécifique et international de l'action d'enrichissement sans cause' *Revue trimestrielle de droit civil*, 580 (1961). The fear induced by the appeal to fairness, which has long infected Italian jurists as well, characterized French scientific production throughout the twentieth century. In 1956, for example, it was written that '*on a tenté de préciser le domaine de l'action de in rem verso en disant que l'enrichissement doit etre injuste. Mais l'expression est dangereuse: elle est susceptible de faire naitre l'idée que l'action est donnée lorsque l'enrichissement est contraire a l'équité*' (H. J. and L. Mazeaud, *Leçons de droit civil*, Paris: Montchrestien, 1956, II, 640).

[13] Cour de Cassation 12 May 1914, *Sirey*, I, 41 (1918).

[14] Cour de Cassation 2 March 1915, *Dalloz*, I, 102 (1920).

[15] P. Gallo, n 2 above, 128.

[16] In this regard, critically: A. Ascoli, 'Arricchimento (azione di)' *Nuovo Digesto Italiano*, I, 755-759 (1937). For the idea that the Arts 445 and 490 of the civil code 1865 find an explanation in

in the old code, albeit by means of individual provisions of law (the aforementioned Art 326 of the commercial code, as well as Arts 67 and 94 of the royal decree of 14 December 1933, no 1669).[17]

However, unlike what happened in France, in Italy the disputes around the convenience and usefulness of codifying the principle that prohibits unjustified enrichment, ended with an affirmative solution, on the basis of other European bodies of legislation, as the Swiss and the German one. On the other hand, the prohibition of unjustified enrichment had already been enshrined as an institution of a general nature in the Italian-French Project for a code of obligations and contracts[18] (Art 73), whose Explanatory Report reiterated the opportunity of enunciating a general principle.

The voices in favor of that formulation arose more and more and when, after being reaffirmed in the Preliminary Project (Arts 820-821) and in the Final Project (Arts 766-767), it found definitive confirmation in the civil code of 1942, and the Report to the Code did not hesitate to underline how the solution enjoyed the support of 'a very broad current of doctrine and jurisprudence'.[19]

Since then, however, an ancient and current question has been handed down to the interpreter; what is the relationship between enrichment, on the one hand and undue payment, negotiorum gestio and individual restitution actions on the other? For the moment, it is possible to ascertain that in the legal system on which the Italian legislator has drawn the most, ie the French one, the regulation of undue payments is not conceived as a remedy against unjust enrichment. This is demonstrated by the elaboration of a non-codified institution, the action of enrichment, to solve problems to which it would otherwise have been possible to apply the rules of the unlawful act.[20]

III. The Influence of the Germanic System

Following the codification of the enrichment action and the new arrangement of undue payment in the Italian code of 1942, the opinion, prevailing under the rule of the repealed code, which wants the second included in the first, is denied by imposition of the two reforms that would evidently be irreconcilable with that vision. If this were the case, in fact, the legislator, emulating the models of the Germanic

concepts extraneous to the idea of unjustified enrichment, C. Burzio, 'Il campo d'applicazione dell'*actio de in rem verso*' *Giurusprudenza italiana*, 129 (1897). For a similar consideration regarding Art 1728 of the civil code 1865, F. Leone, *L'azione di arricchimento in diritto moderno* (Napoli: Jovene, 1915), 145, where also the attempt to reconstruct a general theory of unjust locupletation through the examination of the individual provisions of the old code.

[17] Cf G. Castellano, La responsabilità cambiaria nei limiti dell'arricchimento (Padova: CEDAM, 1970).

[18] Progetto di codice delle obbligazioni e dei contratti, Roma, 1928, § 14, LXXXVIII.

[19] Relazione al Codice. Libro delle Obbligazioni, Roma, 1941, no 262.

[20] A. Di Majo, *La tutela civile dei diritti* (Milano: Giuffrè, 1987), 255.

area, would first have had to sanction the general prohibition of unjustified enrichment, and only after its individual applications, such as undue payment and, perhaps, *negotiorum gestio*. On the contrary, our legal system clearly detaches itself from the German, Austrian and Swiss models, by relegating unjust enrichment only at the end (Title VIII), to underline the autonomy of the two concepts.

In the opposite sense, it was decided to draw upon the choices adopted by the legislators of the German area, who literally constructed the payment of the undue amount as one of the most important concepts in which the general prohibition of unjust enrichment is articulated.

The BGB (§ 812) stipulates that

> 'anyone who obtains something through the performance of others or in any other way without a legal cause at the expense of another, is obligated towards him to restitution. This obligation also exists if the legal cause subsequently ceases to exist or if the intended result of the performance does not occur, according to the content of the legal transaction'.

Traditionally, two distinct cases are found in the law. The first is characterized by the fact that someone has obtained goods or a benefit 'through the performance of another' and this is not justified in their relationship (so-called *Leistungskondiktion*). The second is characterized by the fact that the advantage or enrichment does not follow from the service performed by the impoverished subject, but is a result that occurred 'in another way' (so-called *Nichtleistungs kondiktionen*).

The *Nichtleistungs kondiktionen* include the *Eingriffskondiktion*, the *Verwendungskondiktion* and the *Rückgriffskondiktion*. The *Verwendungskondiktion* relates to expenses made for the benefit of others; the *Rückgriffskondiktion* has as its object the payment of the debt of others. But the case of *Bereicherung in sonstiger Weise* (ie enrichment obtained 'in another way') which is, by far, of greater importance is the *Eingriffskondiktion*, pertaining to hypotheses of alienation, enjoyment or unauthorized consumption of another person's property or right. We will return extensively to this in § 6.

Going back to the Italian perspective, the *Leistungskondiktion* can be traced back, with precaution imposed by the different circulation laws operating in the two systems, to our repetition of undue payment, the *Eingriffskondiktion* to unjust enrichment. All the cases, as we have seen, however, are unified by the subsumption within a single principle expressed in § 812. The fundamental teaching of Savigny),[21] which had begun from the reunification of the various Roman *condictiones* then to come to a general principle, and once the principle had been outlined, it had examined the individual *condictiones*, was therefore embedded in the BGB. The BGB first enunciates the general principle that informs the whole matter (§ 812)

[21] F.K. Savigny, *System del heutigen römischen Rechts*, V, italian translation by V. Scialoja (Torino: UTET, 1986-1989), 507.

and then defines in detail the individual traditional *condictiones*, such as the *condictio indebiti* (§ 813-814), the *condictio causa data, causa non secuta* and *ob causam finalizam* (§ 815), the *condictio ob turpem vel injiustam causam* (§ 817). ((Para 816, in turn, expressly provides that if a person disposes of another person's property without authorization, he is required to return to the owner the consideration received. If it is a free transfer, on the other hand, it is the third-party purchaser who is required to make restitution, but within the limits of his own enrichment. This last rule is characterized, within the system of §§ 812-818 BGB (which normally imposes the restitution within the limits of the value of the enrichment), because it obliges the enriched person to return the entire profit obtained from the alienation of another person's property, even if the said profit is higher than its market value)).

However, even in Italy, the subsequent evolution of the matter does not favor the thesis that would seek to bring the repetition of unlawful enrichments within the prohibition of unjust enrichment. In reality, surviving German law immediately departed from the line of the code. It was precisely the search for the constituent elements of the general case that gave rise to the need to isolate some individual hypotheses (such as that of the undue invasion of the other's patrimonial sphere) being not entirely attributable to the provision of § 812, I, BGB.

In fact,

> 'the «unitary» concept was definitively thrown into crisis, when the emphasis (W. Wilburg, E. von Caemmerer) was placed on the diversity of the functions performed, respectively, by the action to repeat the undue performance (*Leistungkondiktion*) and from other forms of restitution not attributable to an obligatory relationship to be invalid, already extinguished or simply presumed to be so (*Nichtleistungs kondiktionen*), with respect to the action against the entry into another's sphere (*Eingriffskondition*)'.[22]

By the work of numerous scholars,[23] and, in particular, thanks to the classification traced by von Caemmerer, the German legal school, therefore, formulated a system based on the distinction between undue payment and unjust enrichment, and on the ramification of these categories into various sub-species. This ensured that from the general principle that Savigny had drawn from the synthesis of the various *condictiones* and accepted then from the codex, we return to the enunciation of the single typical concepts.

The same argument adduced by the supporters of the attribution of the undue amount to the prohibition of unjust enrichment, therefore, ends up turning against

[22] P. Schlechtriem, 'Osservazioni sulla disciplina dell'arricchimento senza causa nel diritto tedesco' *Rivista critica del diritto privato*, 357 (1984).

[23] Cf F. Schultz, 'System der Rechte auf dem Eingriffserwerb' 105 *AcP*, 1 (1909); W. Wilburg, *Die Lehre von der ungerechtfertigten Bereicherubg nach österreicischen und deutschen Recht* (Graz: Leuschner & Lubensky, 1934); H. Kötter, 'Zur Rechtsnatur der Leistungkondiktion' 152 *AcP*, 193 (1954); E. Von Caemmerer, 'Bereicherung und unerlaubte Handlung' *FS Rabel*, 333 (1954).

them. Even in systems in which the textual datum endorses that interpretation, the need has been felt for a clear distinction between embezzlement and enrichment.

IV. The Influence of the Common Law

It is known that our legal system generally favors restitution in kind, while restitution by monetary equivalent, again in general, is permitted only on a residual basis. In Common law systems, on the contrary, the rule is of restitution by equivalence even when it comes to services to give (quantum valebat). However, we must consider that, in some hypotheses, the plaintiff may have a prevailing interest in the recovery of the thing; the restitution by equivalence takes place, in fact, in the case of unique goods or of particular value or artistic value.[24]

Despite this basic difference, even with regard to the restitution, however, it is possible to discover significant elements of contamination.

The organization and simplification of restitutive remedies have also been particularly complex in the juridical systems that have wanted to take charge of them. In fact, in England and the United States, where restitution is now considered an area neither smaller nor more limited than contracts, torts or trusts, for a long time, restitution cases, still immature, had been dispersed and dissolved within other subjects, or cataloged under ambiguous guises that did not capture their real essence; quasi-contract, money had and received, subrogation, constructive trusts, etc.

At first, in order to protect the impoverished and suppress the phenomenon of unjust enrichment, common contractual actions were used, such as the action in debt, which, in addition to achieving payment of sums of money, also aims at achieving repayment if there has been a failure of consideration in the contract.

Subsequently, the action of assumpsit was used, as a general action based on the fiction that there had been a promise to pay the debt (indebitatus assumpsit, a term which implied that 'as a debtor, I confirm that I owe a sum of money'). This action gradually began to be preferred, thanks to the diminution of the burden of proof that it entailed,[25] to that of debt, starting from Slade's Case, of 1602, in which it was established for the first time that the assumpsit, ie the confirmation of the debt, could simply be presumed in all cases of debt arising from a sale.[26]

The best-known formula of assumpsit was the one aimed at returning 'money had and received'. The money had and received action can be considered the equivalent of our recovery action, although it only allows the recovery of

[24] P. Gallo, 'Ripetizione dell'indebito. L'arricchimento che deriva da una prestazione altrui' *Digesto delle Discipline privatistiche. Sezione civile* (Torino: UTET, 1998), XVIII, § 3).

[25] In fact, it was sufficient for the plaintiff to demonstrate the existence of the debt. This evidence carried a legal presumption that the defendant had promised to pay off that debt (even if, in fact, the defendant had promised nothing).

[26] *Slade's Case* (1602) 4 Co. Rep. 91°, 67 E.R. 1072.

undue payments involving sums of money (for the recovery of which, prior to the introduction of this remedy, there was no possibility). The expression 'money had and received' is nothing more than the current abbreviation of the original name of the action 'money had and received for the use of the owner'. In fact, it was assumed that the defendant, once he had received the money due to an error by the solvens, had tacitly undertaken to return to the latter what was unduly received, or rather to allocate that money exclusively in the interest of the plaintiff (for the use of the owner).

Instead, for the recovery of any other performance, it was necessary to refer to the remedies, quantum valebat (performance of giving) and quantum meruit (performance of doing).

Only in 1760, thanks to the dictum with which Lord Mansfield decided the case *Moses* v *Macferlan*,[27] it was finally possible to overcome the improbable explanation based on tacit commitments, for the first time reducing the obligation of restitution to natural justice,

> 'If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract'.

However, this principle, today referred to as 'the passage which formalized the connection between indebitatus assumpsit and enrichment',[28] remained isolated until almost the mid-1900s, when it was resurrected, in 1943, by Lord Wright in the case of *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour Ltd.*, in which, for the first time, the prohibition of being enriched without cause at the expense of others was clearly expressed, and thus the first seeds were sown, from which the unitary tendencies of reconstruction of the restitution hypotheses would germinate.[29]

The effort aimed at bringing all restitutions back to the prohibition of unjustified enrichment has obviously placed the common law interpreter before a new and no less onerous task, essentially consisting of perfecting the circumstances which make profit unjust, in finding of the typology of 'unjust factors'.[30]

[27] *Moses* v *Macferlan* (1760) 2 Burr., 1005; 97 *English Reports*, 676. Mr. Moses had paid a sum of money in execution of a judgement, which became final, but was later found to be incorrect on the basis of elements of fact that had arisen. Giving reparation to the plaintiff, at that time, would have been abstractly possible only with the action *money had and received*; but how could, in this particular case, appeal to the fictitious promise and argue that whoever had received the money had done so with the implicit intention of returning it?

[28] F. Giglio, 'Esiste un «Law of unjust enrichment» nel diritto inglese?' *Contratto e impresa*, 153 (2000).

[29] *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour Ltd*, in *Appeal Cases*, 1943, 32. The prohibition of unjustified enrichment was then expressed again by the House of Lords, with much greater clarity, in 1991, in *Lipkin Gorman* v *Karpnale*, in *Appeal Cases*, 1991, 548: see F. Giglio, n 28 above, 159.

[30] One of the leading experts on the subject has identified eleven assumptions of factors that can be defined as unfair: *mistake*, *ignorance*, *duress*, *exploitation*, *legal compulsion*, *necessity*, *failure of*

The evolution of the English jurisprudence goes hand-in-hand with that of the doctrine; the legal literature of the common law had always studied the restitutive remedies by fragmenting them into a vast case study that cannot be traced back to a single principle. In the second half of the last century, however, a fundamental work in English law introduced a unitary reconstruction of restitutive remedies, which would reconsolidate around the principle whereby 'every advantage, obtained at the expense of others, must be returned'. This is equivalent to saying, in fact, that the individual actions would all refer to unjust enrichment.[31]

Even more explicit in this direction is US law, which in § 1 of the Restatement of the law of restitution of 1937 (by Professors Seavey and Scott) expressly states the basic principle that 'a person, who has been unjustly enriched at the expense of another, is required to make restitution'.

However, these unitary tendencies do not seem to have serious concrete implications. To understand fully the phenomenon, it is necessary to reflect on the fact that in the years in which the thesis took hold and developed (the 1960s and 1970s), the main objective of scholars of restitution was to establish the very existence of the prohibition of unjustified enrichment and to legitimize it as an autonomous legal concept, so that it began to be considered seriously. It was essential to give refunds a structure based on solid and simple foundations.

After this first goal was achieved, in the 1980s and 1990s, attempts were made to reduce the level of abstraction through the formulation of the elements that form the case.[32]

In these two phases, the conceptual reunification of all restorative remedies and all possible situations around the single principle of unjust enrichment was of great use and seemed to be the easiest way to go, in order to organize and explain the restorative phenomenon.

In recent years, having overcome those original difficulties, and setting aside the need to achieve recognition of the law of restitution, many have highlighted that the correlation between restitution and unjustified enrichment is not it what was initially supposed to be.[33] Thus, there is a tendency to underline the multi-

consideration, incapacity, illegality, ultra vires and retention of property belonging to another (A.S. Burrows, *The Law of Restitution* (London, Dublin, Edinburgh: Butterworths, 1993), passim. See also P. Birks and R.N. Chambers, *The Restitution Research Resource* (Oxford: Mansfield Press, 1997, 3)).

[31] R. Goff and G. Jones, *The Law of Restitution (*London: Sweet and Maxwell, 1966) (one of the two authors, Lord Goff of Chieveley, was also one of the judges of the House of Lords, who decided on the Lipkin Gorman case). Another fundamental contribution to the foundation of a theory of unjust enrichment is that of P. Birks, *An introduction to the Law of Restitution* (Oxford: Oxford University Press, 1985). See also J. Dawson, *Unjust enrichment* (Boston: Little, Brown & Co, 1951); G.B. Klippert, *Unjust enrichment* (Toronto: Butterworths, 1983).

[32] They are: a) an enrichment of the defendant; b) which is at the expense of the plaintiff; c) which enrichment is unjust.

[33] See for example G. Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 1999), preface and 6 (at 7, in which the author openly states that the traditional interpretation is too simplistic and does not accurately reflect the reality of the restorative phenomenon); S. Hedley, 'Unjust Enrichment' *Cambridge Law Journal*, 578 (1995); Id, 'Unjust Erichment as the Basis of

causality of the restitution obligation, of which unjust enrichment can be an important, but not the only, causative event.

Unjust enrichment and restitution are therefore not synonymous. On balance, the principle of unjust enrichment failed to clarify the boundaries of restitution obligations.[34]

Finally, it should be noted that a characteristic of common law systems is the separation between the enrichment due to the initiative of the impoverished person (from or by the act of the plaintiff) and those obtained as a result of the same activity of the enriched person (by his own wrongful conduct). But, on closer inspection, the formulation of 'historical' codes already implied a similar bipartition. Consider the principle codified in the Prussian code (Allgemeines Landrecht, § 13) (and in the Austrian one: § 1041 A BGB): 'Anyone who has used or put to use utilities owed to others, is required to indemnify the impoverished subject'. Furthermore, we have already cited § 812 BGB and the separation between *Leistungskondiktion* and *Eingriffskondiktion* of German law.

Here, then, is a truly remarkable example of the circulation of models and of the primordial globalization of European law, a solution that started with the Germanic system, crossed over to the English one and ended its journey in the Italian one, where it is by now common knowledge among our most recent scholars.

In any case, it is, therefore, to the Anglo-German system that we are tributaries of the observation of the distinction of unjustified enrichment in two types of cases depending on whether the subject to whose activity the asset transfer is attributed is the enriched, or the impoverished himself.[35]

V. The Italian System: Mixture and Complementarity of Restitution Obligations

The peculiarities of the Italian system all argue against a unitary concept. Apart from the element already cited, of the placement of Art 2041 in the Civil Code, the law dictates two different regulations for *condictio indebiti* and enrichment, therefore objecting to their unitary reconstruction.

Restitution – An Overworked Concept' *Legal studies,* V, 56 (1985); J. Dietrich, *Restitution: A New Perspective* (Sydney: Federation Press, 1998); I.M. Jackman, *Varieties of Restitution* (Sydney: Federation Press, 1998). P. Birks, n 31 above, 18, who had initially proclaimed that between restitution and unjust enrichment there is a '*perfect quadration*' (see also M. McInnes, 'Restitution, Unjust Enrichment and the Perfect Quadration Thesis' *Restitution Law Review*, 118 (1999), had to acknowledge the erroneousness of that setting: P. Birks, 'Property and Unjust Enrichment: Categorical Truths' *New Zealand Law Review,* 623 (1997); Id, 'The Law of Unjust Enrichment: A Millennial Resolution' *Singapore Journal of Legal Studies,* 318 (1999).

[34] See R. Grantham and C. Rickett, *Enrichment and Restitutions in New Zealand* (Oxford - Portland Oregon: Bloomsbury Academic, 2000), passim: the authors propose the substitution of the concept of unjust enrichment with that of 'restorable enrichment', as well as per the preface by Goff.

[35] L. Ennecerus and H. Lehmann, *Recht der Schuldverhaltnisse* (Tübingen: J.C.B. Mohr, 15th ed, 1958), II, 2, § 222.

First, only the enrichment action is of a subsidiary nature. Furthermore, the object of the restitution obligation pursuant to Art 2041 of the civil code is the payment of an indemnity, which coincides with what was unduly received, only in the hypothesis of the return of a specific thing (Art 2041, para 2, of the civil code). Conversely, the undue payment favors the restitution in kind of the *eadem res* or *tantundem*, and only when this is not possible does it refer to the value of the service rendered.

Again, and above all, the regulation of the recovery action disregards, in principle, any assessment of the defendant's achieved enrichment and therefore it does not seek to operate that concrete mix between mutual prejudices and patrimonial advantages, which instead characterizes the matter of enrichment. The increase of the assets of the *accipiens* is considered only when he is incompetent (Art 2039 of the civil code).

Finally, in the enrichment action, the subjective state of the enriched person is not given prominence; on the contrary, in the undue payment, the good and bad faith of the *accipiens*, although irrelevant for purposes of the restitution obligation, are, however, decisive for purposes of its quantification.

The case of restitution of a specific thing can lead to the temptation of unitary reconstructions. Indeed, it is possible for the object of the restitution obligation to be the same. Although the undue payment tends to recover 'the thing' while the *actio de in rem verso* tends to pay compensation, if the defendant has enriched himself by acquiring a specific asset to his patrimony, the *petitum* will be always the return of that single asset (since the 2nd para of Art 2041 of the Italian Civil Code provides for the return of the thing when the enrichment has as its object a specific thing). However, the circumstance is purely coincidental, and can be explained by the fact that, in this hypothesis, there is a coincidence between enrichment and impoverishment, on the one hand, and the thing on the other.

The object of the two remedies is different even in the case of restitution of a determined thing. It clearly emerges from decisions of the Supreme Court in the matter of unjust enrichment, which clarified that in the hypothesis governed by para 2 of Art 2041 of the civil code

> 'if the restitution of the thing itself does not exhaust the enrichment and the correlative patrimonial decrease envisaged by the rule contained in para 1º, the indemnity envisaged by this last rule is due, for the residual part'.[36]

Once the distinction between the various restitution actions has been recognised, it is necessary to acknowledge that if, on the one hand, it is useful to bring them together around a single common denominator, on the other, this must be recognised in something broader than the general prohibition of unjust enrichment. What is certain is that a basic rationale resides in Art 1173 of the Civil Code;

[36] Corte di Cassazione 30 May 2000 no 7194, *Foro italiano*, I, 570 (2001).

obligations must be kept under control by law; the system of sources is atypical but, within it, the law also controls everything that does not arise from contract or tort. The reference to the general prohibition, on the other hand, can be accepted in purely descriptive terms and, provided that it is addressed, at most, to the principle and never to the action of enrichment.

Essential to the understanding of the reform is, in fact, the study of the relationship between action and principle, which is, however, characterized by an ambivalence; Art 2041 of the civil code presents itself as an open case, thus suggesting itself as a general clause and as an analytical case, to which single restitution concepts present broadly in the legal system, are commonly traced. The value as an open case represents the essence of the institution; the scope of the analytical case, on the other hand, imposes on verification pertaining to the reconciliation of typical restitutive remedies with the general clause and risks transforming Art 2041 of the civil code into a mere summary rule of hypotheses already envisaged, eliminating its character as a general clause and reducing the practical scope of the action to a minimum.

It is of little use to invoke a mere phenomenological affinity in an attempt to elevate Art 2041 of the civil code as an interpretative criterion for all the individual hypotheses of restitution obligations; on the contrary, having to bring to light an authentic identity of ratio which, on closer inspection, is lacking both with respect to individual restitutional actions widely available in the system, and with regard to the *condictio* and *negotiorum gestio*:

a) as regards the first point, the single rules[37] dictated on the matter of expenses disbursed for the benefit of the good of others (improvements, additions, repairs, etc) cannot be brought together within the principle of unjustified enrichment, which seems to touch only on a subject regulated on the assumption of other assessments, mainly of an economic nature. The relief granted to those who carry out the expenses is always filtered through the legislative assessment of the single activity in relation to the single asset. Social utility is first assessed, so that the subject who enjoys the property of others is stimulated to carry out the activity, and the intensity of the protection of his individual interest is graduated, so as not to suffer the full cost. Hence, individual actions are not intended solely for the protection of interested parties but have their own specific purpose of functional orientation, *viz*, the protection of activities suitable to increase the efficiency of productive goods. Also, the analysis of typical restitutional actions in matters of accession, union, admixture, specification and avulsion leads to similar results. Modern studies, precisely with reference to Art 936 of the Civil Code, which had been made a key provision of the general principle, allow the connection with Art 2041 of the Civil Code as follows: it is a reference

> 'correct but generic, both for the subsidiary nature explicitly attributed

[37] Cf A. Albanese, 'I miglioramenti nel codice civile' *Contratto e impresa,* 910 (2003).

> to this action, and because it does not in any case exclude a specific rule on individual points'.[38]

b) As for the second aspect, the emerging of two truly distinct fundamental 'models' within the law of restitution is clear. While the basic idea of unjust enrichment is that it is necessary to prevent someone from enriching himself unjustifiably at the expense of others (so that the restitution obligation meets the limit of enrichment), the inspiring principle of the undue payment consists in the requirement that every transfer of assets, regardless of any impoverishment/ enrichment it produces, has its own cause worthy of protection.

Even more convincing is the discrepancy between the prohibition of enrichment and the *negotiorum gestio*; a judge seized with a request for compensation for unjust enrichment cannot accept the request as *negotiorum gestio*, since the unjust enrichment action differs from the latter

> 'both for the *petitum* – consisting of the indemnity for the loss of assets suffered – and for the *causa petendi*, ie for the juridical facts placed at its foundation'.[39]

Italian doctrine concludes that the *negotiorum gestio*

> '*si distacca dall' azione generale di arricchimento senza causa e si accosta invece, conformemente alle sue origini storiche, al diritto del mandatario a essere rimborsato delle anticipazioni fatte per lo svolgimento dell' incarico conferitogli dal mandante*'.[40]

However, there is an undeniable fact; Italian refunds are characterized by their complementarity. The confirmation of this complementarity is found in the disciplinary mingling among the various reforms; think of the relationship between a 'real' and 'patrimonial' concept; undue payments[41] is undoubtedly inspired by the first. However, in the current system of the *condictio,* the exceptions are so important as to suggest a reversal of trend in favor of the second; consider Art 2037, para 3, of the Italian Civil Code; Art 2038, first para of the Italian Civil Code; Art 2039 of the civil code. These are all hypotheses in which restitution does not have, as its object, the objective economic value of the service but the patrimonial increase actually produced for the benefit of the recipient. But, on closer inspection, this happens not because the *condictio* betrays its own nature and function but because

[38] M. Paradiso, 'L'accessione al suolo. Artt. 934-938', in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 1994), 223.

[39] Corte di Cassazione 6 October 1994 no 8184, *Giustizia civile - Massimario annotato della Cassazione*, 1197 (1994).

[40] P. Sirena, La gestione di affari altrui. Ingerenze altruistiche, ingerenze egoistiche e restituzione del profitto (Torino: Giappichelli, 1999), 33.

[41] E. Moscati, 'Concezione «reale» e concezione «patrimoniale» dell'arricchimento nel sistema degli artt. 2037- 2038 del c.c.', in *Studi in memoria di D. Pettiti* (Milano: Giuffrè, 1973), II, 991.

circumstances arise which, from a systematic point of view, are external to the undue payment and make the overlapping of restitutive remedies useful from a legislative point of view which, considered individually, would have another nature and function.

Take, for example, Art 2037 of the Civil Code, relating to the destruction of the undue *res*. Repetition of the undue payment requires, in principle, the restoration between the parties of the relationship of the original patrimonial situation; if the thing has perished, this is not possible. Return is possible only for the equivalent of the value. But the criterion of *aestimatio rei* and that of *in rem verso* are applied by the legislator in a dynamic way; if the restitution of the thing has become impossible, the principles of undue or enrichment will be valid, depending on whether the *accipiens* is, respectively, in bad faith or in good faith. The result is the overlapping of the two fundamental restorative models, since Art 2037 of the civil code proportions the restitution obligation to the objective value of the thing in the case of bad faith of the *accipiens* but imposes the limit of enrichment in the case of good faith.

Art 2038 of the civil code, then, in the case of alienation of the undue *res* to third parties, contemplates the faculty of the *solvens*, lacking other protective instruments, to act with a real action of unjust enrichment against the sub-purchaser. The third party, held towards the *solvens* within the limits of his own enrichment, does not occur in the passive side of the obligatory relationship, as demonstrated by the fact that he does not take over the same debt position as the *accipiens indebiti*.

In other cases, the mixture of restitutive remedies is between undue and special restitution actions; consider Art 2040 of the civil code, which refers to the regulation of possession with regard to undue expenses and improvements made by the *accipiens* and therefore, among other things, to the third para of Art 1150 of the Civil Code. In this provision, the extent of the reimbursement of expenses varies according to the subjective states of the *accipiens* and is, therefore, graduated according to a principle which is unrelated to that of unjust enrichment.

The complementarity, emerging from concrete experience, is an inevitable consequence of the same conceptual differences between the individual remedies; to recover the undue payment, not only it is necessary to provide proof of either the enrichment[42] or the impoverishment[43] but, above all, the juridical system prepares a reaction against the unjust enrichment, even if a valid *causa solvendi* is the background to it, or, more generally, a formal justification, which if it is suitable to give a cause for the transfer of assets, does not make an enrichment just. Likewise, a reaction is set up against transfers without suitable formal justification, even if the economic consequences are perfectly just and desired by the parties, as is the case of a contract that is void due to a procedural defect.

Enrichment probably exists in most cases of undue payment but the dogmatic

[42] Cf Corte di Cassazione 9 February 1987 no 1334, Giustizia civile - Massimario annotato della Cassazione (1987).

[43] Cf Corte di Cassazione 23 January 1987 no 634, *Giustizia civile - Massimario annotato della Cassazione* (1987).

coincidence between the perception of debt and the achievement of profit cannot be deduced from a mere statistical survey. Surely, however, there is never enrichment in a kind of undue payment, one provided for by Art 2036 of the Civil Code, of undue subjective *ex latere solventis*. In fact, here the *accipiens* does not enrich himself (unjustly) with anything, since he limits himself to receiving what is due to him. Nor can he subsequently be 'enriched' since the extinguishing effect of the payment made by the *solvens indebiti* precludes him from obtaining the same payment from the actual debtor.

Finally, complementarity does not result only from the law but also from the effective application of the right of restitution by the judges. Consider the example of the *de facto* lease, when, following the execution of the relationship, the lease contract is declared void. The Supreme Court denies anyone who has used the property the right to a refund of the amount paid as consideration.[44] The undue payment would here impose full restitution of sums collected by the lessor and restitution of 'the enjoyment' of the counterparty; but the second restitution is obviously impossible, so that only the first would be due by law. Yet, if the lessee could recover the sums paid, an unjust enrichment in his favor would undoubtedly result. Here, the overlapping of the two remedies, and therefore the complementarity of the principle of enrichment with respect to that of the repeatability of the undue services, allows the judges to deny the handler a restitution.

VI. Subsidiarity

Finally, complementarity does not result only from the law but also from the effective application of the right of restitution by the judges. Consider the example of the *de facto* lease, when, following the execution of the relationship, the lease contract is declared void. The Supreme Court denies anyone who has used the property the right to a refund of the amount paid as consideration.[45] The undue payment would here impose full restitution of sums collected by the lessor and restitution of 'the enjoyment' of the counterparty; but the second restitution is obviously impossible, so that only the first would be due by law. Yet, if the lessee could recover the sums paid, an unjust enrichment in his favor would undoubtedly result. Here, the overlapping of the two remedies, and therefore the complementarity of the principle of enrichment with respect to that of the repeatability of the undue services, allows the judges to deny the handler a restitution.

The theme cannot be fully addressed here,[46] but the complementarity between

[44] Corte di Cassazione 3 May 1991 no 4849, Archivio delle locazioni e del condominio, 504 (1991), Giurisprudenza italiana, I, 1314 (1991); Corte di Cassazione 6 May 1966 no 1168, Massimario del Foro italiano - Raccolta delle massime delle sentenze della cassazione civile, 408 (1966); Corte di Cassazione 30 January 1990 no 368, Giurisprudenza agraria italiana, I, 550 (1990); Corte di Cassazione 23 May 1987 no 4681, Foro italiano, 2372 (1987).

[45] ibid

[46] Cf A. Albanese, Ingiustizia del profitto e arricchimento senza causa (Padova: CEDAM, 2005),

the different restitution remedies could provide the effective explanation of the subsidiary nature of the enrichment action. Subsidiarity, in this context, should be read precisely with regard to repetition and other restitution actions, so that the remedy pursuant to Art 2041 of the civil code comes into play (or rather, by way of aid) not only in the very rare cases in which there is no other remedy abstractly, but also in those in which the exercise of the aforementioned remedial remedies has not proved suitable for indemnifying the plaintiff for the damage suffered (according to the formula of Art 2042 of the civil code) and still remaining, for the defendant, a portion of the profit unjustly achieved. The institution of the *condictio indebiti*, precisely because it does not target the recovery of an unjust enrichment, can, in concrete terms, be unsuitable for the return of the profit.

The application of Art 2042 of the Civil Code, therefore, should be limited to enrichments due to the initiative of the impoverished person, and instead excluded for enrichments obtained through an unjust deed. In fact, the assumption of incompatibility between liability for compensation and restitutive responsibility is erroneous, which, in addition to having different content, are placed on two different levels, so that it makes no sense to speak of subsidiarity of the latter in relation to the former. The protection offered to the impoverished by tort law action has a different nature than what he seeks, with the enrichment action, in the case of illegitimate interference in his own juridical sphere. While, in this case, he demands that the profit built on the exploitation of his wealth, acting with the criminal action, would seek reparation for the damage suffered; this action is unsuitable for the plaintiff to obtain what he claimed with the *actio de in rem* verso, the return of the profit unrelated to the extent of the damage. It follows that there is no reason to deny the combination of the two remedies; what is not covered by the repair of the damage will be covered by the return of the profit.

In these terms, precisely, Art 2042 of the civil code makes sense only if applied with reference to actions aimed at obtaining the same indemnity[47] to which the enrichment action applied to a specific category of enrichments gives rise, viz, those that occurred in the absence of abusive interference.

In Italy, however, the general propensity of Italian legal science for a restrictive interpretation of the requirements of the enrichment action, finds its most fertile ground, on the one hand, in the 'patrimonial decrease' required by Art 2041 of the Civil Code and on the other, precisely in the subsidiarity required by Art 2042. The concept of 'abstract subsidiarity' prevails; recourse to the enrichment action is possible only in the presence of 'damage' and only when there is no other remedy,

178.

[47] This solution had been indicated by the Supreme Court in a decision that remained isolated (Corte di Cassazione 13 December 1969 no 3941): 'Art 2042 of the civil code when it establishes that the action for enrichment is not feasible when the injured party can take another action to obtain compensation for the damage suffered, he refers to another action that has such compensation directly as its object (e.g. in the cases of art. 1185, para. cc)'.

even if only abstractly available for the purpose of obtaining compensation.[48] The direct consequence is the clearly superior practical relevance that the principle of enrichment has assumed in the legal systems of the countries cited, compared to the Italian one, which risks being marginalized by increasingly topical discussion in the international arena. Especially since, in Italy, the prevailing concept of subsidiarity is in some ways even more restrictive than the French one, transalpine jurisprudence has in fact adopted the distinction between legal obstacle (such as limitation or forfeiture) and factual obstacle (such as bankruptcy of the defendant); only if the main action could not be exercised due to a legal obstacle, the practicability of the actio de in rem verso is precluded.[49]

In any case, the rigorous exegesis carried out in Italy regarding the subsidiary nature, and through it the substantial elimination of the action of enrichment from the legal system, is once again confirmed only in the French system. But in France, where distrust of the institute has been such as to even avoid an express standardization of it, the jurisprudence that applies to it has to deal with a less flexible system than the one placed before Italian interpreters. Moreover, even French scholars are beginning to speak of the subsidiarité as a useless and embarrassing principle.[50]

The potential of the general enrichment clause should be developed, above all, in cases of illegitimate interference by third parties in interests worthy of protection. To extend the effectiveness of the remedy to all these cases, it would be sufficient to recognize that the expression 'to damage' contained in the Art 2041 of the Civil Code, in reality, is not dissimilar to that 'at the expense' of the Anglo-German system, and accepts in an interpretative way, in other respects, a concept of subsidiarity free from the prejudices that atavistically characterize the institution. Neither the requirement of capital reduction nor that of subsidiarity constitute insurmountable obstacles.[51]

[48] Only some authors prefer the opposite concept of 'subsidiarity in concrete', according to which Art 2042 Civil Code has the meaning of excluding the exercise of the action of enrichment only for the time in which the offer of other defenses exists: see eg P. Sirena, n 40 above; A. Albanese, n 46 above.

[49] Furthermore, the French Court of Cassation is also beginning to indicate an erosion of subsidiarity, starting from a sentence that caused astonishment in doctrine: Cour de Cassation 3 June 1997, *Juris-Classeur périodique*, 1157 (1998).

[50] P. Remy, 'Le principe de subsidiarité de l'action de in rem verso en droit francais' *L'arricchimento senza causa* (Torino: V. Mannino, 2005), 71.

[51] This is a supplementary competition; if the impoverished person has already obtained the restitution of the enrichment, he will only be able to obtain additional compensation for any further damage, after having provided proof pursuant to Art 1223 Civil Code. P. Sirena, n 40 above, 149, observes that 'dal punto di vista economico, il soggetto tutelato, nel caso in cui sussistano contemporaneamente i presupposti dei rimedi considerati, potrà ottenere la somma più elevata fra il valore del danno risarcibile, l'ammontare del profitto netto lucrato dal soggetto agente e l'astratto valore del bene ovvero del servizio che questi ha utilizzato senza giusta causa'. Moderate openness to more flexible solutions seems closer today: see Corte di Cassazione 15 May 2023 no 13203; Corte di Cassazione-Sezioni unite 5 December 2023 no 33954.

VII. The Requirements of the Enrichment Action in the Anglo-German Model

With regard to the structure of the general enrichment action, the model that is increasingly gaining ground at an international level is that of common law systems[52] and of Germany, which, unlike the Franco-Italian model, which requires the simultaneous presence of five requisites for acting in enrichment (enrichment, damage, correlation between enrichment and damage, lack of just cause, subsidiarity), does not claim proof of the damage and the correlation link, nor does it attribute a subsidiary nature to the remedy; it is based, simply, on the evidence of enrichment unjustly achieved at the expense of others.

This opens, in those countries, prospects for restorative remedies which are instead denied by our interpreters, who see an insurmountable obstacle in the letter of our law.

In Germany, for example, the problem of damage perpetrated in the absence of a transfer of assets, such as in cases of simple use of another person's property or the exploitation of intangible assets, is solved thanks to the concept of *Zuweisungsgehalt*, that everyone has an exclusive right on the utilization and exploitation of utilities falling within its protected situation. The German doctrine[53] attributes to the return of the profit the function of reinstating the property right (*Fortbildung*), thus implementing the complete protection of this right from the interference of third parties.

In the Anglo-German system, the illegitimate interference with the rights held by another person is, in itself, an 'unjust factor',[54] as the common lawyers would say, regardless of proof of a diminution of assets.

The future of restitution seems to go, then, in the opposite direction to that of our legal tradition, which has fallen into a fundamental contradiction, that of believing that 'the action is given, rather than against unjust enrichment, to avoid enrichment to the detriment of others',[55] thus shifting the center of gravity of the remedy from the person of the enriched to that of the 'damaged', and ending up betraying the spirit of unjust enrichment in compliance with that of *neminem laedere*.

But the enduring value of this approach is denied by foreign legal systems:

a) the reference to damage does not appear in the BGB, where the concept of '*auf dessen Kosten*' applies. During the codification, the expression was preferred to that of '*aus dessen Vermögen*' precisely so that it was clear that the presence

[52] On the remedy of disgorgement, see the monograph by P. Pardolesi, *Profitto illecito e risarcimento del danno* (Trento: Università degli Studi di Trento, 2005), 83, where also the invitation 'to consider with renewed attention the solution adopted in common law systems'.

[53] W. Wilburg, n 23 above, 27.

[54] Cf A.S. Burrows, n 30 above, passim (and in particular chapter 13 with respect to interference with the plaintiff's property rights).

[55] A. Trabucchi, 'Arricchimento (Azione di) (Diritto Civile)' *Enciclopedia del diritto* (Milano: Giuffrè, 1959), III, 68.

of damage or of transfer of assets was unnecessary, and to highlight, instead, the mere presence of a profit realized through the abusive exploitation of other resources. The solution had its definitive approval in the decision of the Supreme Court of 1971 (*Flugreiseentscheidung*): BGHZ 55, 128. Precisely on the assumption that the proof of damage and correlation is not co-essential to the birth of restitution obligations, the judges sentenced a minor, who had traveled without a ticket by plane from Hamburg to New York, to pay the price for the flight; in this case, neither contractual liability came into play (the passenger had not concluded any contract with the airline), nor the Aquilian one, since no damage was found. However, the minor had saved an expense, and therefore the remedy of unjust enrichment was configurable.

The pivot on which the *Eingriffskondiktion* is based is not given by the illegality of the behavior of the enriched person (as in the now outdated elaboration of the *Rechtswidrigkeitstheorie*), but by a rule which is autonomous from the illegal and instead typical of enrichment (in accordance with the *Zuweisungstheorie*); the profit attributable to the abusive exploitation of the benefit of others must be returned, because the related benefits, even if only potential, belong exclusively to the owner.

The Swiss Federal Code of 1911, in Art 62 (70), follows the expression of the BGB. Even today in Switzerland, despite the traditional doctrine, such as the Italian one, adopting the criterion of the 'smaller sum', the currently prevailing trend is in the sense that restitution should not be limited by the value of the capital decrease suffered by the impoverished; the remedy does not seek to repair the damage, but to obtain the return of the profits achieved at the expense of the plaintiff. Art 64 limits the restitution to the enrichment still existing in the hands of the defendant at the time of the filing of the action; moreover, the expenses incurred by the enriched person must be taken into account (all expenses if he acted good faith, only those useful if in bad faith).[56]

b) The Portuguese code (Art 473, no 1) uses the expression 'custa de outrem', which identifies the need for the profit to have occurred thanks to goods or utilities belonging to another person.[57] The Brazilian civil code, like the Portuguese one, and following the approach of the BGB, does not mention the requirement of damage and is satisfied with the existence of a profit obtained by invading the legal sphere of others.[58] In the same vein, is the Japanese code of 1898, which in

[56] Cf Chappins, *La restitution des profits illegittimes* (Helbig, Liechtenstein: Faculté de Droit de Geneve, 1991), 8.

[57] Cf M.J. De Almeida Costa, *Noções de direito civil* (Coimbra: Almedina, 1991), 76; L. Cunha Goncalves, 'Tratado de direito civil', in *Comentário ao Código civil português* (Coimbra: Coimbra editora, 1931), IV, concerning the old Portuguese civil code of 1867 (which, like the French code, did not embed the principle, but recognized it both in doctrine and in jurisprudence); D. Leite de Campos, *A subsidiariedade da obrigação de restituir o enriquecimento* (Coimbra: Almedina, 1974); Id, 'Enriquecimento sem causa, responsabilidade civil e nulidade' *Revistas dos Tribunais*, no 560, 262 (1982).

[58] See Arts 884-886. For the previous situation, see Negreiros, 'Enriquecimento sem causa –

Art 704, prefers the concept of enrichment obtained at the expense of others, to the expression 'correlative patrimonial decrease'.[59]

c) Recent Spanish doctrine, contrasting the more traditional convictions of the Courts, has admitted the return of enrichment even beyond the limit of impoverishment, holding that the center of gravity of the action must be located exclusively in the enrichment. It is therefore noted[60] that the indemnity is not due for the use, in itself, of the thing or utility of others; the value of the use is not returned, but the gain deriving from the possession of the property of others. In the event of bad faith by the enriched person, he would have to return all profits made, and even those that could have been made. When speaking of the requisites of the action, it is necessary to abandon the perspective of depleted assets, and reference must be made solely to the existence of unjust enrichment, acknowledging that, in some cases, the restitution of the enrichment is independent of the existence of a correlative equity decrease.

d) The 1937 American Restatement of Restitution does not mention damage but uses the expression 'at the expense of'; also in Scotland, the 'draft rules on unjustified enrichment' have adopted the expression 'at the expense of another person';[61] in all common law systems, in general, this is the accepted and unanimously meaning recognized among practitioners and theorists.

In summary, in all systems that do not refer to the French model (but also in others that have simply distanced themselves on the point), proof of actual damage and of a correlation between benefit and loss of assets is not necessary. What we call 'damage', is elsewhere identified in the use of property, in the enjoyment of the right, in interference with alien patrimonial positions, in interference, ultimately, in the juridical sphere of another subject and in the exploitation of its resources.[62]

aspectos de sua aplicaçao no Brasil como un princípio geral de direito' *Revista da Ordem dos Advogados*, 55-III, 798 (1995).

[59] Cf *Civil code of Japan*, English translation by Becker (London: Butterworth & Co., 1909).

[60] Cf J.A. Alvarez Caperochipi, 'El enriquecimiento sin causa en la jurisprudencia del Tribunal Supremo' *RDP*, 872 (1977); Id, 'El enriquecimiento sin causa en el derecho civil español' *Revista General de Legislación y Jurisprudencia*, t. 236, 415, 495 (1974); Id, *El enriquecimiento sin causa* (Granada: Comares, 1989), 126. The necessity of pecuniary injury as a requirement of enrichment action has also been denied with force and depth of investigation by X. Basozabal Arrue, *Enriquecimiento injustificado por intromision en derecho ajeno* (Madrid: Editorial Cívitas, 1998), 38. Other fundamental studies are: L. Díez Picazo and M. De La Cámara, *Dos estudios sobre el enriquecimiento sin causa* (Madrid: Editorial Civitas, 1988); L. Díez Picazo, *La doctrina del enriquecimiento injustificado* (*discurso de ingreso en la Real Academia de Jurisprudencia y Legislación contestado por De la Cámara*) (Madrid: Editorial Cívitas, 1987); J.L. Lacruz Berdejo, 'Notas sobre el enriquecimiento sin causa' *RCDI*, 569 (1969); R. Nuñez Lagos, *El enriquecimiento sin causa en el Derecho español* (Madrid: Reus, 1934).

[61] Scot. Law Com. D.P. No. 99, *Appendix,* in F.D. Rose, *Blackstone's Statutes on Contract, Tort & Restitution*, 2000/2001 (London: Blackstone Press, 2000), IX, 523. N. 1 states the general principle: '*a person who has been enriched at the expense of another person is bound, if the enrichment is unjustified, to redress the enrichment*'.

[62] G. Palmer, *The Law of Restitution* (Boston-Toronto: Little, Brown and Company, 1978), 133, about the expression 'at the plaintiff's expense' writes: 'the general requirement … does not mean that

Another decisive difference between the German-Anglo-American model and the French-Italian one is that the restitution remedy, in the former, has no subsidiary character.

In common law systems, the principle of unjustified enrichment is based on only three assumptions: a) an enrichment of the defendant; b) which is at the expense of the plaintiff; c) the injustice of enrichment. The American Restatement of Restitution (1937), in its 215 paras, makes no mention of the requirement of subsidiarity. In the United States and in England, the plaintiff has the possibility of choosing, between the two remedies, the more suitable for the protection of his interest, and will prefer to act in enrichment, for example, if the action for damages has expired, or if he deems it convenient to obtain, rather than compensation for the damage suffered, the entire devolution of the profits earned by the defendant (so-called accounting of profits).[63]

In the German system, § 812 BGB, after enunciating the well-known rule according to which a person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so, is under a duty to make restitution to him; it continues by specifying that this duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur

> ('*Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalt des Rechtsgeschäfts bezweckte Erfolg nicht eintritt*').

§ 852 BGB states that if, by commission of a tort, the person liable to pay compensation obtains something at the cost of the injured person, then even after the claim to compensation for the damage arising from a tort is statute-barred, he is obliged to make restitution under the provisions on the return of unjust enrichment

> ('*Hat der Ersatzpflichtige durch eine unerlaubte Handlung auf Kosten des Verletzten etwas erlangt, so ist er auch nach Eintritt der Verjährung des Anspruchs auf Ersatz des aus einer unerlaubten Handlung entstandenen*

the gain to the defendant need to be equated to the loss to the plaintiff, nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded'.

In his two-volume study on the validity of the remedy in both civil law and common law systems, J. Fabrega Ponce, n 4 above, 284, 288, acknowledges that the new doctrinal trends on a global scale converge towards the abandonment of the idea of the indispensability of impoverishment, in favor of the sufficiency of an intrusion or invasion into the rights of others. This is the solution that the author himself considers the fairest and most suitable for the protection of juridical positions.

[63] D. Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' 80 *Columbia Law Review*, 504 (1980); S. Hedley, 'The Myth of Waiver of Tort' 100 *Law Quarterly Review*, 653 (1984).

> *Schadens zur Herausgabe nach den Vorschriften über die Herausgabe einer ungerechtfertigten Bereicherung verpflichtet*').

The usefulness of this provision is provided by the fact that, while the action for compensation for damages is statute-barred according to the ordinary term, and therefore in three years (§ 195 BGB), the restitution claim for unjustified enrichment is statute-barred ten years after it arises, or, notwithstanding the date on which it arises, thirty years after the date on which the act causing the injury was committed or after the other event that triggered the loss

> (§ 852 BGB: '*Dieser Anspruch verjährt in zehn Jahren von seiner Entstehung an, ohne Rücksicht auf die Entstehung in 30 Jahren von der Begehung der Verletzungshandlung oder dem sonstigen, den Schaden auslösenden Ereignis an*').

Therefore, the German code lacks any reference to subsidiarity. The concurrence of remedies exists not only with the tort action, but also with proprietary claims. The doctrine was initially divided, in the absence of a specific norm, between an extreme thesis that claimed an absolute subsidiarity and a more elastic thesis about a relative subsidiarity (ie, such as to prevent competition only with regard to some of the typical exercisable actions). At the end, it was agreed that the element of the lack of legal foundation' ('*ohne rechtlichen Grund*') is already a sufficient one to delimit the field of action of the remedy. Furthermore, in cases where there is a special regulation, it is clear that it must prevail over the general regulation referred to in § 812, without having to resort to the concept in question.

It is no coincidence that the Principles of European Unjustified Enrichment Law, which are intended to constitute a synthesis of the prevailing solutions in national legal systems, do not refer to 'subsidiarity', but to 'justification' (Art 2: 101). This means that the operational ambit of unjust enrichment must be delimited, but that for this purpose an adequate check on the presence or absence of a just cause is sufficient. Art 7:102 of the Principles, entitled Concurrent Obligations, in admitting the possibility of accumulation between civil liability and unjust enrichment, states that when the impoverished person also has 'a claim for reparation for disadvantage', then 'the satisfaction of one of the claims reduces the other claim by the same amount'. The keystone of the acceptance of a unitary concept at the European level, then, presents its fulcrum in the absence of just cause.

Gender and Comparative Forms of Government. A Possible Crypto-Type?

Domenico di Micco*

Abstract

Even today, even in the most modern Western democracies, female Heads of State are very rare. Many of these democracies, such as Germany, Portugal, Italy, and France, have indeed never had a woman in such an institutional role. How can this be explained? And why do European monarchies seem to be more successful than Republics in achieving gender equality in this apex role? Cultural machismo is a perhaps too easy way of dismissing these questions. This paper will argue that the gender inequality that we see today in the role of the Head of State in European Republics actually depends on an implicit and submerged legal element – a legal crypto-type – that our modern Republics have silently inherited from their monarchical past; as such, it is not part of the official constitutional order, but it still implicitly affects the gender life of this apex institution. Only the unveiling of such a silent legal element will make gender equality effective in this apex institution.

«*De terra vero nulla in muliere*
hereditas non pertinebit,
sed ad virilem sexum qui fratres
fuerint tota terra pertineat»
Lex Salica, 59.5

I. Introduction

Today's world is undoubtedly changing very rapidly. The beginning of the 21st century is indeed a far cry from previous centuries, both in terms of technology and rights. We are witnessing the dematerialisation of markets, we are seeing new opportunities arising from artificial intelligence and, more generally, from such undeniable scientific breakthroughs. At the same time, new challenges such as the recognition of gender identity independent of biological data, surrogacy and assisted dying are rapidly reshaping the legal framework. Despite these changes, however, some struggles seem to have yet to find their final vindication. The

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achievement of gender equality in the highest institutional role is one such battle that has yet to be won.

In its thousand years of history, France has never had a woman as Head of State. The same goes for the centuries-long histories of Germany, Italy, Portugal, Bulgaria, Romania, Poland, Hungary, Montenegro, Macedonia, and the Czech Republic. With the notable exceptions of Catherine, Isabella, and Maria Theresa – where these 'exceptions' were paid for dearly – Russia, Spain and Austria have also never had a woman as Head of State. Not far behind are Latvia, Estonia, Lithuania, Finland, Slovakia, Greece, and the Republics that emerged from the break-up of Yugoslavia, where few women have been Heads of State until almost the last decade.

The two main exceptions to this European picture are the United Kingdom – enough to think of the long reigns of Elizabeth I, Queen Victoria and, more recently, Elizabeth II – and the Netherlands, where no king reigned for the entire 20th century, while three women succeeded each other as Head of State: first Queen Wilhelmina, then Juliana and finally Beatrice. How can we explain such a big difference between European countries? Why have some European countries achieved gender parity in this role while others have not?

In order to answer these questions, this research will work on the basis of distinguishing two different ways of understanding the form of government within the group of European states: Monarchies and Republics. Comparison is, in fact, always an exercise in measuring diversity, whatever it may be. It measures 'what changes in what looks the same' or 'what remains the same in what looks different'.[1]

In our case, although both institutional formulas represent valid ways of structuring the public life of a national community, they embody two different and opposing logics. In monarchies, hereditary transmission is indeed central, and for this reason the gender of the successor is an unavoidable focus; in Republics, on the other hand, descent is irrelevant, to the point where it is possible to say that Republics are precisely the negation of any dynastic logic.

Comparing these two forms of government in the history of some major European countries will allow us to show how, in moving from one form to the other, certain elements have shifted from an explicit and formalised legal level to a subliminal and invisible one, which is nevertheless capable of producing effects.[2]

Of the existing monarchies in Europe today, only Liechtenstein formally

[1] H. Rosenthal and E. Voeten, 'Measuring legal systems' 35 *Journal of Comparative Economics*, 711-728 (2007); A. Gambaro, 'Misurare il diritto?' *Annuario di diritto comparato e di studi legislativi*, 17-48 (2012); D. di Micco, 'La comparazione alla prova del mondo che cambia' *Diritto pubblico comparato ed europeo*, 3-25 (2020).

[2] R. Sacco, 'Legal formants: a dynamic approach to comparative law (Installment I of II)' 39 *American Journal of Comparative Law*, 1-34 (1991); Id, 'Legal formants: a dynamic approach to comparative law (Installment II of II)' 39 *American Journal of Comparative Law*, 343-401 (1991); A. Watson, 'From legal transplants to legal formants' 43 *American Journal of Comparative Law*, 469 (1995); A. Gambaro and M. Graziadei, 'Legal Formants', in J Smits et al eds, *Elgar Encyclopedia of Comparative Law* (Cheltenham: Elgar publishing, 2nd ed, 2023).

reserves the succession to the throne exclusively for the male line. The Netherlands and the United Kingdom, which historically had no such express reservation for the male sex, have now adopted the rule of absolute primogeniture: the firstborn will be king or queen, regardless of sex. All the others have, more or less recently, changed the traditionally male reservation. Women are now eligible to succeed to the throne, although in many cases only in the absence of a male heir.

Unlike monarchies, European Republics formally proclaim the equality of all citizens, including gender equality, but in practice reserve the position of Head of State for men. France, Italy, Germany, Austria, and Portugal are probably the most visible examples of how Republics seem to be more reluctant than monarchies to close this gender gap.

How is it possible that monarchies, supposedly conservative by nature, have overcome the male reserve in the role of Head of State, while Republics, on the contrary, supposedly affirming the principle of equality of all citizens, elect only men to the office of Head of State? Is it perhaps a coincidence that all these 'reluctant Republics', when they were monarchies, reserved the office of monarch for men?

II. Two Opposing Logics for Being the Head of State

The Head of State may be a monarch or a president. Thus, in Europe today, the United Kingdom, the Netherlands, Belgium, Denmark, Norway, Spain, Sweden, Andorra, Lichtenstein, Monaco, and Luxembourg are monarchies, while all the other European states are currently Republics, born from the collapse of a previous monarchical structure.

It must be said at once that these two constitutional formulas – monarchy and republic – can today be equally effective in guaranteeing the highest values of our modern democracies. Nevertheless, the difference in their sources of legitimacy is far from irrelevant. To simplify as much as possible, a king is such because 'he is different from us', while a president is such because 'he is one of us'. In other words, the legitimacy of a king lies in his 'otherness' from his people, whereas the legitimacy of a president lies in his being one of the people. They are therefore the expression of two opposing logics.

This fundamental difference has repercussions on the rules governing the succession of the Head of State, depending on whether he is a monarch or a president. It is precisely because of the specific nature of the monarchy that the new Head of State is usually the blood relative of the previous one, so that monarchs succeed each other in the same family with reasonable and timely foresight.[3] At

[3] A. Kokkonen et al, *The Politics of Succession: Forging Stable Monarchies in Europe, AD 1000-1800* (Oxford: Oxford University Press, 2022); J. Gerring et al, 'Why monarchy? The rise and demise of a regime type' *Comparative Political Studies*, 585-622 (2021); M. Tunick, 'Hegel's justification of hereditary monarchy' 12 *History of Political Thought*, 481-496 (1991); J.H. Elliott, 'A Europe of composite monarchies' 137 *Past & present*, 48-71 (1992); A. Lawrence, 'Why Monarchies

the other extreme are Republics, where the Head of State is elected by the people according to more or less similar rules and criteria, in open rejection of any dynastic privilege or criteria.

Monarchies and Republics thus follow very different and even opposite logics when it comes to the succession of the Head of State: monarchies proclaim the continuity, predictability, and stability of the succession to the point of making it a genuine constitutional element, whereas Republics profess variance as a direct consequence of the general principle of equality, without which they would have no reason to exist.[4]

From this point of view at least, we are thus faced with two opposing visions of how and what makes the role of the Head of State effective. The Head of State – guardian of the supreme values on which the State is founded and of the constitutional balance between the various powers – can thus be imagined from two opposing perspectives: continuity and predictability, on the one hand, and change and unpredictability, on the other. In the first case, lineage is relevant; in the second, it is not. From this point of view, no other institutional office can be as contradictory as that of Head of State.

In the name of diversity and civic equality, the above would seem to favour Republics in their efforts to achieve equal representation of men and women at the Head of State, and to put monarchies at a disadvantage. So why is this not happening? Why is the opposite happening?

In order to answer these questions, it is necessary to look at how and why, throughout European history, monarchies have always had a preference for male line succession to the throne.

III. Three Reasons why Ancient Monarchies Preferred 'Blue' to 'Pink'

Throughout human history, kings have become such in at least four ways: by appointment, by acclamation, by election or by descent. Throughout human history, these forms have often alternated and succeeded each other.

Kings by appointment are perhaps the rarest and oldest. The Bible, for example, tells us how the prophet Samuel himself, at the instigation of the elders of Israel, appointed Saul king of Israel.[5]

A king can also be made by acclamation of the army. This happened to Odoacer, who was proclaimed king of Italy by the troops in 476 AD.[6]

Still Reign' 34 *Journal of Democracy*, 47-61 (2023).

[4] N. Cox and R. Miller, 'Monarchy or Republic' *New Zealand government and politics*, 130-144 (2010); F. Burt, 'Monarchy or Republic-It's All in the Mind' 24 *University of Western Australia Law Review* (1994).

[5] Samuel, II, 1-7.

[6] A. Jones and M. Hugh, 'The constitutional position of Odoacer and Theoderic' 52 *The Journal of Roman Studies*, 126-130 (1962); R. Reynolds and R.S. Lopez, 'Odoacer: German or Hun?' 52 *The American Historical Review*, 36-53 (1946).

It can also happen that the king is elected. This is what happened to George I of Greece, son of King Christian IX of Denmark, who was elected King by the Greek Constituent Assembly in 1863; to Amadeus of Aosta, elected King of Spain;[7] and even Popes, however sovereign, are elected in a circle of equals.[8]

Of all these forms, however, that of descent predominates: a king is such because he is the son of a deceased king. On closer inspection, however, this last formula, which is certainly the most familiar to us, has not always been so obvious, even in European history. At the time of the fall of the Roman Empire, the Frankish and Germanic peoples tended to elect their kings by an assembly of peers belonging to the military aristocracy.[9] It was only with Charlemagne that the legitimacy of the sovereign changed from being based on the consensus of the military class to being based on the sacred character of the king. It is precisely the bond that Charlemagne strengthens with the Church that will lead to a new sacredness of the sovereign, who from that moment on is so by the will of God.[10]

In this perspective, the sovereign's legitimacy was based on his difference from the people and even from the nobility. And it is in this perspective that his lineage begins to assume the importance that we are used to seeing in all European dynasties.[11]

The sovereign's descendants, blessed by God, thus become the key element in the king's succession. And it is from this perspective that the question of gender becomes crucial.[12]

What has worked against women on the throne throughout European history?

I would argue that the explanation we seek is a mixture of almost three different causes, which have influenced each other in different ways throughout history.

It must be said that the history of Europe has long been the history of its kings and queens. Even if today's historiography tends to downplay their role in order to emphasise other aspects, such as social, economic and gender – and this essay

[7] E. Higueras Castañeda and S. Sánchez Collantes, 'Amedeo I. The Republican King?', in D. San Narciso et al eds, *Monarchy and Liberalism in Spain: The Building of the Nation-State, 1780-1931* (Abingdon: Routledge, 2020); W.A. Smith, 'Napoleon III and the Spanish Revolution of 1868' 25 *The Journal of Modern History*, 211-233 (1953).

[8] F. Baumgartner, *Behind locked doors: a history of the papal elections* (London: Palgrave Macmillan, 2003).

[9] S. Painter, *The Germanic Kingdoms. A History of the Middle Ages 284-1500* (London: Palgrave, 1979); D.N. Dumville, 'The ætheling: a study in Anglo-Saxon constitutional history' 8 *Anglo-Saxon England*, 1-33 (1979); R. Bendix, *Kings or people: Power and the mandate to rule* (Oakland: CA, University of California Press, 1978).

[10] R. Schiefer, 'Charlemagne and Rome', in J.M.H. Smith ed, *Early Medieval Rome and the Christian West* (Leiden, Brill, 2000); J.M. Wallace-Hadrill, *The Frankish Church* (Oxford: Oxford University Press, 1983).

[11] E.M. Hallam, *Capetian France 987-1328* (Abingdon: Routledge, 2014).

[12] C.B. Bouchard, 'The Carolingian Creation of a Model of Patrilineage', in C. Chazelle and F. Lifshitz eds, *Paradigms and Methods in Early Medieval Studies* (New York: Palgrave Macmillan US, 2007), 135-151; Id, *Those of my blood: creating Noble families in Medieval Francia* (Philadelphia: University of Pennsylvania Press, 2001).

is no exception – the fact remains that kings and queens have long determined the fate of Europe and the world, for better or for worse, by starting wars, signing peace treaties, forming dynastic and political alliances that coincided with the fortunes of their kingdoms.

Today, there is no king or queen who rules directly in Europe; on the contrary, almost everywhere a sovereign is almost entirely disengaged from domestic and foreign policy decisions, confined to the role of representing the nation and providing constitutional guarantees.[13] In this contemporary logic, the continuation of the dynasty and the succession to the throne indeed lose much of their centrality in the political life of the country.

It should be noted, however, that the current constitutional prerogatives of European monarchs are the result of the more or less traumatic compression of the absolute royal prerogatives of past centuries.[14] And it is in this historical perspective, rather than in the present one, that the importance of the preservation of the dynastic line and the consequent certainty of the line of succession to the throne becomes clear, since in the sovereign resided the power of government and national sovereignty itself.[15] It was therefore a question of power, and it was for this reason that one sex imposed itself on the other.

The first element was certainly the attitude, still prevalent in European cultures, of establishing descent in the paternal line at the expense of the maternal one.[16] Since antiquity, the peoples of the European continent and the Mediterranean basin have always made a clear choice in this regard: to fix the mark of descent in the continuity of the paternal line, and the Roman idea of the *gens* is perhaps the best-known example of this.[17]

Because of this widespread patriarchal conception of descent, some might argue that this is evidence of an obvious underlying cultural machismo, sufficient in itself to obviate any need for further investigation. Personally, I think this is a valid argument, but not a sufficient one.

[13] D.M. Craig, 'The crowned republic? Monarchy and anti-monarchy in Britain, 1760–1901' 46 *The Historical Journal*, 167-185 (2003); W. Kuhn, *Democratic royalism: The transformation of the British monarchy, 1861-1914* (Abingdon: Springer-Palgrave Macmillan, 1996).

[14] S. Gordon, Controlling the state: Constitutionalism from ancient Athens to today (Boston: Harvard University Press, 2009).

[15] R. Brown and A. Michael, 'Sovereignty in the Modern Age' 20 *Canada-United States Law Journal*, 273 (1994); J. Bartelson, *A genealogy of sovereignty* (Cambridge: Cambridge University Press, 1995); J.P. Trachtman, 'Reflections on the Nature of the State: Sovereignty, Power and Responsibility' 20 *Canada-United States Law Journal*, 399 (1994); E.L. Santner, *The royal remains: The people's two bodies and the endgames of sovereignty* (Chicago: University of Chicago Press, 2012).

[16] F. Boas, 'The origin of totemism'18 *American Anthropologist*, 319-326 (1916).

[17] P. Carus, 'Hammurabi and the Salic Law' 10 *The Open Court* (1912); C.J. Smith, *The Roman clan: the gens from ancient ideology to modern anthropology* (Cambridge: Cambridge University Press, 2006); M. Radin, 'Gens, familia, stirps' 9 *Classical Philology*, 235-247 (1914); H.W. Goetz et al eds, *Regna and gentes: the relationship between late antique and early medieval peoples and kingdoms in the transformation of the Roman world* (Leiden: Brill, 2003).

On closer examination, the affirmation of this principle does not automatically lead to the exclusion of women from the succession to the throne, just as it does not lead to the exclusion of women from inheriting property in private law. Even in ancient Rome, where descent was through the male line, women inherited property on an equal footing with their male brothers, at least since the laws of the Twelve Tables.[18]

Similarly, we see that the United Kingdom and the Netherlands, which, like all other European peoples, mark the male line, have had several queens as Heads of State. In itself, therefore, this cannot be the justification we seek.

Nevertheless, there is no doubt that if we look only to the patrilineal lines for proof of descent, we automatically deny the same relevance to the matrilineal lines, which do not have the same public importance and must be virtually 'disappeared' in order to give maximum importance to the patrilineal lines. In other words, one line must be favoured at the expense of the other, in the name of certainty.

And this is the point: if we choose one line of descent to the detriment of the other, the one we choose will take on almost sacred characteristics, because it wants to be certain, unbroken, and possibly infinite. And it is here that women have suffered the indirect consequences of marking their descent in the male line, in terms of the possibility of ascending the throne.

In fact, the monarch usually marries someone of his own rank. This is, of course, both to maintain the prestige that distinguishes him from all others, and because marriage policy is one of the best tools in the game of domestic and international alliances. Political and military alliances can be forged, and, above all, peace can be hoped for. The monarch's marriage is therefore always a matter of State. The proof of this is that every monarchy has always strictly regulated the consent to the marriage of the heir to the throne by means of a rule of public law.

From this point of view, it does not matter whether the monarch is male or female because, as we have seen, the line of descent is patrilineal.

If the monarch is male, for the reasons given above, he will marry a foreign princess. Their children will then take their father's surname. In this way, the succession to the throne takes place within the same royal line. If, on the other hand, the monarch is a woman, she will marry a foreign prince and her children will take their father's surname and thus that of a foreign line. Within a generation, the throne will pass to a foreign royal family. This is the first element on which the male preference is built.

It must be said that this detail was not always given the same weight, but it was certainly never without importance. Especially with the birth of the nation and the spirit of identity and belonging it created, it ended up being quite central.

Queen Victoria married a German prince, Albert of Saxe-Coburg-Gotha, with

[18] J. Gerkens and R. Vigneron, 'The emancipation of women in ancient Rome' 47 *Revue international des droits de l'Antiquité* (2000); S. Dixon, 'Polybius on Roman women and property' 106 *The American Journal of Philology*, 147-170 (1985).

whom she had nine children.[19] The children took their father's surname. When Victoria died, her second son Edward succeeded to the throne. The new king was Edward VII of Saxe-Coburg and Gotha, who was to be succeeded by his son George V in 1910.

Although the change of dynasty did not mean a loss of national sovereignty for England, an obvious problem of expediency and national identity would soon arise. In 1917, during the First World War, London was bombed by the German Luftwaffe using Gotha bombers. In fact, the same surname as that of the British King. The embarrassment for the royal family was considerable and George V quickly changed his surname to the much more British Windsor. This seemed to solve the problem once and for all.[20]

As is well known, George V was succeeded in 1936 by Edward VIII, who abdicated for the love of Wallis Simpson in favour of his brother Albert, who ascended the throne as George VI. George VI had two daughters, Elizabeth, and Margaret, so it was clear that England would have a Queen again on his death. Elizabeth would have to marry someone of her own rank, and therefore most likely a foreign prince, with all the problems of changing royal blood on the English throne that we already know about. The foreign prince did not take long to arrive, and it was Philip of Schleswig-Holstein-Sonderburg-Glucksburg-Greece, who would thus restore a German surname to the English throne within a generation.

George VI and the British government took certain precautions against this risk.[21] Philip was forced to renounce all his titles before marriage and to change his surname, taking that of his maternal uncle Mountbatten (itself an Anglicisation of the German Battenberg). It was also stipulated that descendants in the direct line of succession would continue to bear the surname Windsor, while only those not in the direct line would bear the surname Mountbatten-Windsor. The royal house is therefore still Windsor.

Although it is true that this has not always been the case throughout history, another fact has been working against women since ancient times and in a much more specific way: pregnancy.

Throughout the long history of mankind, pregnancy has undoubtedly been one of the main risks of death for women, due to the lack of medical knowledge, pregnancy practices and, of course, poor hygiene and the almost total absence of medicines in case of need.

It is true that this applied to all pregnancies, but it is also true that in the case of a queen, the consequences of death were certainly more serious: the death of the ruler, the opening of a dynastic succession (perhaps a war), political instability, not to mention the dilemma of whether to save the mother (the ruler) or the

[19] C.V. Reed, 'Albert of Saxe-Coburg and Gotha: Prince Consort of the World', in A. Norrie et al eds, *Hanoverian to Windsor Consorts: Power, Influence, and Dynasty* (Leiden: Springer International Publishing, 2023), 111-131.

[20] The London Gazette. Official Public Record, Tuesday, 17 July 1917.

[21] V. Bogdanor, *The Monarchy and the Constitution* (Oxford: Oxford University Press, 1995).

unborn child (the future of the dynasty) in the event of difficulties in childbirth. I therefore believe that this second element also played heavily against women's chances of ascending the throne.

Then there is a third element, which I mention last, certainly not to diminish it, but rather to enhance it. There is no doubt that men have always resented the idea of having to submit to a woman, partly because of a widespread religious and social model that, from antiquity to recent times, has subordinated women to men. This last factor has certainly worked to the disadvantage of women on the throne.

All rulers, male or female, faced the risk of poisoning, assassination, or death in battle. But only queens ran the additional risk of allowing a foreigner and a new dynasty to take the throne, or of dying in childbirth. And, in any case, only queens overturned the theological and social order of the ancient world, which required women to be subservient to men. So, all this weighed heavily against women.

To sum up, in the history of European monarchies it was a mixture of these factors that made 'blue better than pink' for the throne. And this explains why most European monarchies have explicitly reserved the throne for the male sex; while those that have not, have admitted women to this role only in the absence of male candidates.

IV. The Salic Law: A Legal Screen for Specious Purposes

On the basis and because of the mix of the evidence mentioned in the previous paragraph, all ancient European monarchies favoured male succession. This was considered so much a given that no doubt arose that the throne was meant to be inherited from one man to another.

The Capetians knew this well. Hugh Capet became king of France in 987 AD, and with him began the Capetian dynasty, which, together with the Valois and Bourbon cadet branches, held the French throne until the 19th century, by a very long succession in the male line only.[22]

Since the death of Hugh Capet, and for many centuries, no king of France has died without at least one male child, and consequently no one has ever raised the question of who among the king's sons and daughters should ascend the throne.

Succession was *de facto* in the male line, thanks to its constant application and to the general perception of its 'obviousness'. Thus, we see here how a rule can be such because it is perceived as such and thus legitimised by its use, even though it lacks a positive normative element. For more than three hundred years, the rule of succession in the male line functioned without any formal, verbalised rule.

The problem first arose in 1316, when Louis X became the first French king to die without a male heir. He had a daughter by his first wife, Joanna II of

[22] J. Bradbury, The Capetians: Kings of France 987-1328, (London: Bloomsbury Publishing, 2007); S. Hanley, The lit de justice of the kings of France: constitutional ideology in legend, ritual, and discourse, 680 (Princeton: Princeton University Press, 2014).

Navarre, and died when his second wife was expecting a son, who died in the first days of his life. Joanna of Navarre was therefore the only direct heir to the throne.

It is only the absence of a male heir that opens up other possible scenarios. And it was precisely this uncertainty that allowed the implicit rule to be discussed. It was in fact in this context that Philip, the king's brother, convened the States General in 1317, which decided that the succession to the throne could only be in the male line and thus approved his coronation as Philip V of France. At that moment, for the first time, a political-legal act explicitly stated the exclusion of female succession to the throne.

Philip V also died without male heirs, and in 1322 his younger brother Charles IV succeeded to the throne, bypassing the king's daughters. Again, the succession was through the male line to prevent a foreigner marrying the widowed queen and ruling the country.

However, Charles IV also died without a male heir, and it was during this period that the Valois and Plantagenets clashed over the application of the Salic Law.[23] On one side was the future Philip VI of Valois, son of Philip the Fair's brother Charles of Valois, and on the other was King Edward III of England, son of Isabella of France and therefore a direct female descendant of Philip the Fair himself.

Philip VI based his claims precisely on the application of Salic law, thus denying the right of succession to Edward III of England, who was indeed the grandson of Philip IV, but through his mother – a woman – and as such ineligible to inherit the throne by virtue of Salic law. Eventually, thanks to the support of the great feudal lords of France, the Salic law was enforced, and Philip of Valois succeeded to the throne by application of the Salic law. The precedent was now established and operated as a formal rule. The English ruler responded by declaring war on Philip and starting the Hundred Years' War.

Thus, the problem of whether, or not, there should be an explicit rule of law to legitimise the de facto male succession arose only to legitimise the exclusion of women from the succession. In other words, the formal rule only came to create the restriction. In doing so, it did not create a new practice, it simply protected the existing one.

However, in order to legitimise a ban, a formal rule has to be found somewhere. For this purpose, since ancient times, jurists have been well aware of the power of recourse to an ancient law. Indeed, the past – the rule that comes from the past – always carries with it a great deal of authority, because it is a bit like saying: 'we have always done it this way'.

Thus, in order to justify the exclusion of women from the succession to the throne, the reasons given in the previous paragraph were not formally invoked, but a legal screen – legitimised by the psychological power of precedent – was found to justify this exclusion.

[23] R. Knecht, *The Valois: Kings of France 1328-1589* (London: A&C Black, 2007); C. Taylor, 'The Salic Law and the Valois succession to the French crown' 15 *French History*, 358-377 (2001).

This screen – or pretext – was found in an ancient law of the Frankish people,[24] and it certainly found solid approval in the theological and religious framework that pervaded the Middle Ages and modernity up to the Enlightenment.

This legislation is commonly referred to as Salic law. It is, actually, a set of laws of the Salian Franks, written down at the behest of Clovis I, King of the Franks, around 503 AD. They were, actually, pre-existing rules, passed down orally, designed to prevent the use of feud and revenge as a means of settling disputes. If we wanted to place them in a family of ancient law or in a model, we would have to note that they bear neither the visible sign of ancient Roman law nor the more recent sign of Christianisation, so in any case we would have to place them in the group of laws of the so-called Latin-Germanic kingdoms.

However, the real reason why we still remember Salic law today is that almost all the royal families of Europe excluded women from the succession to the throne, justifying it under the name of Salic law. This was made possible, in particular, by the specious reference to Title 59.5 of the Salic Laws, which reads: '*De terra vero nulla in muliere hereditas non pertinebit, sed ad virilem sexum qui fratres fuerint tota terra pertineat*'.

This ancient text was considered sufficient to legitimise the exclusion of women from the succession to the throne almost everywhere in Europe. This ancient text acted as an external legitimising factor for the rule we were looking for, and it did so on the basis of the authority that people usually recognised in the past.

On closer inspection, however, this provision does not speak at all of the succession to the throne. It simply establishes the principle that the land – the Salish land – can only be inherited by the male descendants of the deceased. In that sense, it is more like a rule of private law than a rule of public law in today's terms.

Moreover, while it is true that it reserves the inheritance of Salic lands to male descendants, it is equally true that it in no way excludes women from inheriting other types of property, including non-Salic lands. So only Salic lands are subject to such a reservation of inheritance to the male sex. How can this be explained?

Personally, I believe that the reservation of Salic lands to the male sex appears only as a form of defence of the integrity of the kingdom, which is what we came to call national sovereignty many centuries later. The extension of this exclusion of women to the mechanism of succession to the throne is therefore obviously an extension by analogy, which takes shape through a semantic forcing of the idea of land.

It should also be noted that this was done in a rather flimsy way, in other words, without any real continuity between the world of the Salian Franks and the numerous monarchies that attributed the legitimacy of the rule of hereditary succession to

[24] J.M. Potter, 'The development and significance of the Salic Law of the French' 52 *The English Historical Review*, 235-253 (1937); D. Whaley, 'From a Salic law to the Salic law: The creation and re-creation of the royal succession system of France' *The Routledge History of Monarchy*, I, 443-464 (2019).

this principle. In short, it was a complete and spurious legal resignification.

In this perspective, the Salic law worked as a legal pretext to prevent women from ascending the throne. To this end, the original Salic law was pretextually re-signified in order to confirm – through the authority of such a legal precedent – a pre-existing rule and social sentiment: better blue than pink.[25]

Here we can see the true function of this new 'Salic law': it was not to confirm the male line succession to the throne, which was already the case, but rather to exclude women, their husbands, and their descendants from it, from dynasty, land, and power, which were obviously very closely linked. So, the purpose of the Salic law was not so much to confirm the primacy of men as to eliminate the possibility of women succeeding to the throne, with all the 'problems' that this would entail. From this perspective, this re-signification of Salic law functioned as an instrument of dynastic control over the throne, and thus as an anticipatory instrument of national sovereignty.

It was Salic law – or at least its content – that was inherited by the French royal dynasties. In fact, the application of Salic law was also responsible for the last change of dynasties on the French throne, with the accession of Henry IV of Bourbon, who belonged to the last remaining Capetian branch after the extinction of the Valois branch.[26]

We can therefore say that all the French royal dynasties, both within and between them, have always followed the Salic law. As long as France was a monarchy, the Salic law governed the succession to the throne. Since it became a Republic, only men have held the office of president, as if the Salic law had implicitly continued to operate in republican times.

V. No Male Heir Determines Salic Law Softer Versions

We have seen, then, that the real reasons which led monarchies over time to favour male succession to the throne, that is, to deny it to women, lived as common sense for a long time before being formalised behind the flimsy precedent of Salic law in its innovative and creative reinterpretation.

It is now worth noting that the rule known as Salic law took various forms and degrees of rigidity in reserving the succession to the throne to male heirs, such as the possibility of admitting women in the absence of male siblings, or that women did not inherit but passed the right to the throne to their sons.

However, even these 'softer' versions of Salic law do not deny the clear preference for the male line that we have just described. On the contrary, they represent the adaptations that such a clear rule has required throughout history, the arrangements adopted by the various European crowns in the absence of

[25] J.M. Potter, ibid

[26] R. Knecht, *The Valois* n 23 above; C. Taylor, 'The Salic Law' n 23 above.

male heirs. When a king has no male heirs, considerations may indeed change: 'blue is better than pink, but pink would be better than nothing'.

In other words, these softer versions of Salic law are the result of very specific and very contingent needs. The most striking case is probably that of the Habsburg crown, which until 1713 had always been governed by a purely Salic law.[27]

In 1703, however, Emperor Leopold I issued the *Pactum mutae successonis*, which regulated the succession to the throne after his death. Specifically, the pact stipulated that on Leopold's death the throne would pass to his son Joseph I and, if he had no sons, to his brother Charles VI. This is what happened.

This first part of Leopold's provision did not change the meaning of the previous Salic law: one man would succeed another on the throne. But on closer inspection, the second part of the provision went on to say that even if Charles hadn't had children, the throne would have passed to Joseph I's daughters. Here was the new rule: in the absence of men, women would be allowed to ascend to the throne so as not to lose it. In fact, the throne would revert to the daughters of the penultimate emperor. We can see, then, that the admission of women to the throne is decidedly residual, dictated here by the absence of any other male heir. It's like saying: 'Better a woman than no heir at all'.

Charles VI, who became emperor on the death of his brother, did not like this rule, which favoured his brother's daughters over his own. So, in 1713 he issued an imperial decree, the Pragmatic Sanction,[28] which modified the *Pactum Mutuae Successionis* by stipulating that in the absence of male heirs to the throne, the succession would go to the daughters of the last reigning emperor in order of birth. In this way, Charles VI ensured that his daughter Maria Theresa would inherit the Habsburg lands on his death, rather than his brother's daughters.

Of course, even Charles VI could not be sure that this arrangement would be recognised as valid by all the Habsburg states, let alone the other European powers. He therefore had to negotiate this recognition at great length and made certain political arrangements. Austria had to enter into an alliance with the King of Poland and Russia, which led to two wars: the War of the Polish Succession (1733-1738) against France and Spain, which cost the Habsburgs Naples and Sicily in exchange for the Duchy of Parma and Piacenza, and a war against the Turks (1735-1739) on the side of Russia, which cost Austria Wallachia and Serbia. France accepted in exchange for the cession of the Duchy of Lorraine under the terms of the Treaty of Vienna of 1738. Spain accepted on the above terms in relation to the War of the Polish Succession. Great Britain obtained the cessation of the activities of the Ostend Company, whose business was highly competitive with that of the English East India Company.

[27] C.W. Ingrao, *The Habsburg Monarchy, 1618-1815* (Cambridge: Cambridge University Press, 2019).

[28] K.A. Roider, 'The Pragmatic Sanction' 8 *Austrian History Yearbook*, 153-158 (1972); R. Lesaffer, *The pragmatic sanction of 1713 and the Austro-Hispanic treaties of 1725* (Oxford: Oxford University Press, 2021).

But despite these generous concessions, after the death of Charles VI, many ignored the Pragmatic Sanction. The first to do so were the two husbands of Joseph I's daughters, Charles Albert of Bavaria and Frederick Augustus of Saxony, who challenged the validity of the law, which effectively penalised their wives in the succession.

As a result, Maria Theresa ascended the throne only thanks to the absence of a male heir and a very high price paid first by her father and later by herself. The War of the Austrian Succession broke out, which would only end after eight years and with major compromises for Austria.[29]

It should be noted, however, that although Maria Theresa succeeded in becoming Archduchess of Austria and Queen of Hungary, she was prevented from becoming Emperor of the Holy Roman Empire, where the Salic law remained unchanged. It would therefore be her husband, Francis of Lorraine, who would be formally crowned Emperor of the Holy Roman Empire. And so, after centuries of substantial Habsburg inheritance, the imperial crown passed to the House of Lorraine, which became Habsburg-Lorraine.[30]

The Maria Teresa affair therefore tells us at least three things. The question of changing the Salic law only arose because of the lack of male heirs, otherwise it would not have arisen.

There was a price to be paid for such an 'exception to the rule' to take place and become a reality, and that price is a heavy one. There was also a change in the royal dynasty that became the Habsburgs-Lorraine.

In the House of Austria, this episode would remain an exception. After Maria Theresa, until 1918, only men succeeded each other at the head of the House of Austria, even bypassing some women. Like France, Austria has had only male presidents since it became a Republic.

The Pragmatic Sanction was also responsible for another major exception to Salic law, this time in Spain. It was precisely because of the Pragmatic Sanction that in 1830 Isabella was chosen as heir to the throne by her father, Ferdinand VII. This provoked a revolt by Isabella's uncle, the Infante Carlo Maria Isidoro, who, with the support of absolutist groups, the so-call Carlists, had already tried to proclaim himself king during the agony of his brother Ferdinand VII. The Carlist attempt failed, and Isabella reigned from 1833, the year of her parents' death, until 1868, when she was exiled.[31]

Once again, the exception to the rule came at a high price.

The present Constitution establishes that the Crown is hereditary among the successors of Juan Carlos.[32] This succession follows – by virtue of the Pragmatic

[29] M.S. Anderson, *The War of Austrian Succession 1740-1748* (Abingdon: Routledge, 2014).

[30] E. Crankshaw, *Maria Theresa* (London: A&C Black, 2011).

[31] I. Burdiel, 'The queen, the woman and the middle class. The symbolic failure of Isabel II of Spain' 29 *Social History*, 301-319 (2004); M. Lawrence, *Spain's First Carlist War, 1833-40* (Basingstoke: Springer-Palgrave Macmillan, 2014).

[32] Constitución Española, Art 57.1.

Sanction – a semi-Salic order of primogeniture, that means with precedence of males over females in the same degree of descent, even if the male is younger than the female.

The problem of a constitutional amendment to avoid this gender discrimination will not arise in the near future, as Felipe VI has two daughters.

In conclusion, having seen in the previous paragraph how the Salic law – in its flimsy reinterpretation – was used as a formalised rule of law solely to exclude women, since the succession to the throne was already de facto in the male line, we have now seen how the less rigid versions of Salic law have come down through history solely to avoid the absence of male descendants, and how they have always come at a high price. The War of the Austrian Succession and Carlism are two good examples.

VI. Reformist Monarchies and Conservative Republics? Verbalized vs Unspoken Rules

So far, we have reconstructed the requirements that have led to the male line being favoured throughout history. We have also seen how this rule was for a long time experienced as common sense, before it was formally recognised under the pretext of ancient Salic law to exclude women from the throne, and then became an element of positive constitutional law. As a result, we have seen how corrections and exceptions to Salic law were made nor because a gender equality issue but solely for dynastic needs and often paid dearly in history. In other words, the ancient European monarchies always preferred blue to pink, except in the case of dynastic extinction.

For while it is true that many of these monarchies still sit on their thrones, it is also true that in many other cases the monarchy has given way to a Republic. This is certainly the case in Italy, France, Portugal, and Germany.

We thus see in Europe the coexistence of monarchies inherited from the past and Republics forged by a clean break with the past. In the first case, we therefore expect a continuity of rules; in the second, a discontinuity of rules, that means a change so clear with respect to the monarchical paradigm as to constitute a new model, untethered to the past.

How much truth is there in this view? Or rather, how much continuity is there where we think there will be a drastic cut?

In this respect, however, a distinction must be made between rules that are formally laid down and rules that are silent and latent. The latter exist and operate not because they are explicitly laid down in the legal system, but because they are ingrained in the mindset of the legal practitioner or directly in the mindset of a nation.[33]

[33] R. Sacco, n 2 above.

The theory of legal formants and cryptotypes comes to our rescue in this dutiful distinction. Indeed, every legal system is made up of legal formants acting and interfering with each other. However, comparative law scholars also know that not all formants are expressed verbally and consciously. Among those that are expressed, we certainly find the work of the legislator, who makes the rule, the work of the judge, who interprets and applies it, often redefining it, and finally the work of doctrine, which seeks to reflect on the work of the first two. However, in addition to these expressed formants, there are many other formants that work in law not because they're verbalised, which is, actually, lacking, but because they live unspoken in legal culture and common sense.

This is, in fact, the necessary premise that we have been in search of. In fact, I believe that the clear cut made in the institutional transition from monarchy to republic is valid only at the level of verbalised rules, and not at all, or much less so, at the level of tacit rules. Moreover, I believe that some of the verbalised rules of the monarchical era somehow survived into the republican era by being submerged under official law, just as karst rivers are submerged and seem to disappear but still flow. Where monarchies exist, the succession rule is still formal law, a formal constitutional norm. To intervene in this rule is therefore only a matter of political will.

In fact, a quick survey shows how many European monarchies have reformed their succession rule in recent decades. Norway, Sweden, Denmark, Belgium, the Netherlands, the United Kingdom, and Luxembourg have moved from the traditional male reserve to the current rule of equal primogeniture, whereby the eldest son of the king, male or female, ascends the throne.

For example, the Dutch Constitution states:

> 'On the death of the King, the title to the Throne shall pass by hereditary succession to the King's legitimate descendants in order of seniority, the same rule governing succession by the issue of descendants who predecease the King'.[34]

In other words, the sovereign's eldest son, male or female, succeeds, provided he is a legitimate child.

There are also more cautious openings, along the lines of what we have already seen in the Pragmatic Sanction affair. In fact, the Constitution of the Principality of Monaco states:

> '*La succession au Trône, ouverte par suite de décès ou d'abdication, s'opère dans la descendance directe et légitime du Prince régnant, par ordre de primogéniture avec priorité masculine au même degré de parenté*'.[35]

[34] Dutch Constitution 2018, Art 25, Official English Version.

[35] Constitution de la Principauté de Monaco, 17 December, Art 10 (*modifiée par la loi n° 1.249*

In other words, the throne can be inherited by women, but the male child, if there is one, takes precedence, even if he is younger. In fact, Albert II, the current reigning prince, bypassed his sister Caroline, who was the eldest.

In essence, many monarchies are adapting to changing sensibilities and making formal corrections to a rule, that of male-only succession, that they have rigidly applied for so long.

It is not known how much of this change is due to a genuine desire to be open to change, and how much is dictated instead – much more pragmatically – by the fact, or fear, of having no male heirs in the current or next generation. Just think of Spain, for instance, where the current king, Philip VI, has two daughters.

Alongside this process of innovation in the European monarchies, however, we find the dismal reality of many European Republics that have never had a female Head of State. We have already mentioned the cases of France, Germany, Portugal and Italy.

The fact is, however, that these republics have no real reason to pass on the functions of President of the Republic exclusively in the male line, since they proclaim variance rather than continuity. The formal rule does not discipline gender. In the absence of an explicit rule to this effect, what does this actually mean?

All this confirms that a formalized rule is much easier to change than an implicit, silent one.

I believe, therefore, that the answer should be sought by observing those countries that have passed from a monarchy governed by Salic law to a Republic. Indeed, I believe that it is precisely this diachronic comparison that will allow us to identify what remains the same in change.

VII. Crypto-Type Emersion: How to Reveal Submerged Legal Elements

If a crypto-type is, by definition, unwritten and therefore not formalised, how can we find it? Two different forms of government, such as monarchy and Republic, should have two different official rules for the succession of the head of State. However, if we find that they practice the same rule – the reservation of the office to the male sex – that's proof that a cryptotype lives and acts in one of the two forms, changing the official rule.[36] The so-called 'Salic Law', formally practised over the centuries as a rule of succession in the monarchical age, seems to have survived into the republican age.

To stay within the history of the great European monarchies, let us briefly recall here that even the House of Hohenzollern, which ruled first Brandenburg, then Prussia and finally all of Germany, followed the Salic law of succession to the throne. Since Germany became a republic, it has never had a female president.

du 2 avril 2002).

[36] R. Sacco, n 2 above.

Similarly, the House of Braganza in Portugal has always followed the Salic Law of Succession, albeit with a degree of openness dictated by circumstances, and since Portugal became a Republic, it has only had male Presidents.

The same applies to Italy. The House of Savoy has always been a strict follower of the Salic law. In fact, this dynasty, with its various branches, succeeded one another for more than a thousand years. Throughout this period, Salic law was the undisputed rule of succession.

In 1870 Rome was incorporated into the Kingdom of Italy. The kings of Italy had their official residence in the *Palazzo del Quirinale*, until then a papal palace. It could be said that this palace, the symbol of political power par excellence, has always been a 'palace of men': first popes, then kings. Italy became a republic in 1946. The President of the Italian Republic has his official residence in the Quirinale Palace, in continuity with the Popes and the King in his role as Head of State.

Since 1946, all the Presidents of the Italian Republic have been men.[37]

The same argument can be made for many other European states that have, sooner or later, moved from a monarchical to the current republican form of government.

In Poland, for example, only men succeeded to the throne in the monarchical era, and today, in the republican era, all presidents have been men. The same is true in Romania. The royal family provided for male succession to the throne and today, in the republican era, all the presidents of the republic have been men. Hungary is no exception. What was true in the monarchical era is still true in the republican era. It also applies to Bulgaria. It is also true of Montenegro, where the office of President of the Republic is held by men. It is also true of Macedonia and the Czech Republic, albeit with more complicated and less linear histories of independence and sovereignty. Old habits die hard.

How is this possible? I think the question should be rephrased as: what happens when a president succeeds a king? What happens when the monarchical institution of the Head of State is replaced by the republican institution in that apex role?

We usually think of a constitutional change as obvious as the transition from a monarchy to a Republic as a clean break. In this case, however, there seems to be some continuity in the change. Where royal houses have practised a male line of succession, the throne takes on – in the collective mind – masculine connotations. In other words, in countries such as Italy, France, Germany and

[37] A. Baldassarre and C. Mezzanotte, Gli uomini del Quirinale (Bari: Laterza, 1985); S. Cassese et al eds, I Presidenti della Repubblica. Il Capo dello Stato e il Quirinale nella storia della democrazia italiana (Bologna: il Mulino, 2018); C. Fusaro, Il Presidente della repubblica (Bologna: il Mulino, 2003); G. Ansaldo, Don Enrico (Firenze: Le lettere, 2013); C. Ghisalberti, Storia costituzionale d'Italia 1848-1994 (Bari: Laterza, 2002); L. Sabino, La scelta del Presidente. Cronache e retroscena dell'elezione del Capo dello Stato da De Nicola a Napolitano (Roma: Stampa Alternativa, 2024); G. Oliva, Gli ultimi giorni della monarchia. Giugno 1946: quando l'Italia si scoprì repubblicana (Milano: Mondadori, 2016); G. Giovannetti and M. Pacelli, Il Colle più alto. Ministero della Real casa, Segretariato generale, Presidenti della Repubblica (Torino: Giappichelli, 2023).

Portugal, where the throne has always been blue, the Head of State is perceived 'as blue', even in the republican era. The explicit constitutional rule that reserved the throne in the male line in the monarchical age is submerged in the institutional transition to the republican form and becomes a cryptotype and, as such, conditions the gender of the Head of State.

The Italian case is certainly a good example of this.[38] In the ashes of the Second World War, Italy held an institutional referendum on 2 June 1946, asking Italians whether they wished to retain the monarchical form and the House of Savoy, or whether they wished to make Italy a Republic. Italy became a Republic.

The House of Savoy, after some hesitation, left the country and went into exile. Italy then had to embark on a republican constitutional project, redesigning many of the institutions that had until then characterised the institutional life of the country, including the figure of the Head of State, which is what interests us most in this essay.

What prerogatives and tasks should the President of the Republic have? Where should his institutional seat be located? No one had ever seen a President of the Republic in Italy, and so it seemed natural to give him the same powers as the King. Thus, the President of the Italian Republic inherited from the Savoy the institutional seats such as the *Quirinale* Palace, *Castel Porziano*, and other state properties of the Savoy Crown. He inherited the role of representative of national unity, and therefore the supreme control of the armed forces, the power to appoint senators for life, the power to grant pardons or commutations of sentences following convictions pronounced by the judiciary, the power to promulgate laws and make them effective in the legal system, the power to give the task of forming the government and appointing ministers, the power to preside over the supreme body of self-government of the judiciary, immunity for what he does in the exercise of his role. Does that not sound like a king?

In other words, in the absence of any alternative model to which reference could be made, the shadow of royal prerogatives stretched over the nascent figure of the President of the Republic and ended up giving the President what belonged to the King. Change was fed by continuity: the President set on the king's blue throne.

The past continued in the present as far as institutional prerogatives were concerned, with the sole exception of the mechanism of election: the King is such by dynastic right, the President is such because he is elected.

It is therefore this – the mechanism of succession – that is the only characteristic of the sovereign that did not pass to the president. Consequently, the Salic law, which until then had been an official element of Italian public law - 'the throne is hereditary according to the Salic law'[39] – no longer had any legitimacy in the official law and thus was therefore abolished along with the entire previous

[38] A. Mastropaolo, L'enigma presidenziale. Rappresentanza politica e capo dello Stato dalla monarchia alla repubblica (Torino: Giappichelli, 2017).

[39] Statuto Albertino, Art 2.2.

monarchical order. Anyway, its male logic has silently survived within the Head of State office.

In more than seventy years of republican life, the Presidents of the Italian Republic – heirs of the Kings of Italy – have all been men.

A royal dynasty that for more than a thousand years regulated the succession to the throne in an exclusively male way has associated the throne in the collective imagination with the colour blue. When Italians think of a throne, they think of a king, not a queen. And so, at least until today, they have always thought of a male president, not a woman. The formal and positive rule of the monarchical age has been submerged in the republican age. The crypto-type lives on behind the paradigm of formal rule.

VIII. Conclusions

There is thus a great continuity in institutional change.

Indeed, as we have seen, institutions, even those that appear to have been created ex novo in a break with the past, carry with them a kind of inheritance that very often embodies certain features of what preceded them.

The Ptolemaic dynasty, which ruled Egypt after the death of Alexander the Great, did not hesitate to invent a continuity with the pharaohs of ancient Egypt and to use their title. Caesar, the man who founded the empire, became the very idea of emperor in the collective imagination – across peoples and time – so much so that even today we say *Kaiser* in German and *Tsar* in Russian, and even the Arabic word *Alcazar* clearly refers to him. Similarly, popes still have among their various attributes the word '*pontifex*', once the title of some other Roman magistracies.

A similar and perhaps even more obvious phenomenon can be seen in religious cults. It is well known that the pagan cult of Mithras was replaced by that of Christ: both are said to have been born of a virgin in a cave on 25 December. There is also a clear line of continuity between the Egyptian cult of Isis, the Roman cult of Demeter and the Marian cult. Similarly, the adoption of the cult of Saint Michael by the Lombards was apparently facilitated by the fact that they recognised in him many of the attributes of Wodan. Christianity was thus able to merge the legal and institutional framework of the Roman Empire and the popular religiosity of the Hellenistic-Roman period: where one would expect a clean break, there are in fact numerous points of 'continuity in change'. Similarly, the presidents of our modern Republics have many points of contact with the kings who preceded them at the Head of State.

Indeed, if it is true that it is easy to see a clear legislative discontinuity in the transition from monarchy to Republic – at least in terms of the constitutional framework expressed – it is equally true that many new institutions, such as that of the President of the Republic, which had no alternative models to draw inspiration

from, in reality traced the constitutional prerogatives of the sovereign.

These prerogatives, especially in the Italian case, were officially incorporated into the Constitution and are the current prerogatives of the President of the Republic.

At the same time, however, at the level of tacit law and unspoken rules, the idea that there was still a man on the throne, albeit a republican one, was also transferred from the king to the president.

In this way, a rule that had been formalised in the monarchical age survived in a silent and tacit form in the republican age and continues, at least to this day, to determine the sex of the Head of State. In this way, a rule that was formalised in the monarchical age survived in a silent and tacit form in the republican age and continues to determine, at least to this day, the gender of the Head of State. Hence, legal cryptotypes are unspoken, silent, and unofficial rules, nevertheless they still apply and condition the official legal framework.

The survival of legal cryptotypes is therefore not guaranteed by the force of the law, it is guaranteed by the force of their entrenchment in a people's culture and by the implicit in their minds. Therefore, at least one last question must be asked: how long does a crypto-type live?

ChatGPT: Challenges and Legal Issues in Advanced Conversational AI

Amalia Diurni* and Giovanni Riccio**

Abstract

This paper analyzes ChatGPT, the first mass-deployed chatbot using Generative Pre-trained Transformer (GPT) technology. While there is unprecedented potential for application of this technology, many concerns with multidimensional value have arisen, all of which are inherent in pre-trained AI, generative AI, and communicative AI profiles. Investigation by the Italian Data Protection Authority and political debates have revealed the inadequacy of existing regulations, and call for more flexible regulation focusing on transparency, risk assessment and explainability. This article underscores the ontological vulnerability of individuals in their interaction with AI, drawing attention to a new legal category—digital vulnerability. As communicative AI transforms society, this paper, starting from the data protection regulations, emphasizes the need for an adaptive and comprehensive regulatory framework to safeguard against emerging challenges.

I. Introduction

ChatGPT is a chatbot, a '(ro)bot capable of simulating a conversation with a human being'.[1] The acronym GPT, which stands for 'Generative Pre-trained Transformer', is particularly auspicious: a 'transformer' (an algorithm), which allows the neural network to focus only on relevant data (not in terms of significance, but in terms of the number of hits), thus achieving more accurate results; a 'pre-trained' transformer (one fed with data sets selected by the programmer, or self-learned through information drawn from the web); functioning thanks to a complex 'generative' neural network which, as such, is able to autonomously generate original content in its interaction with the user.

Each of these features deserves to be explored in depth for the multiple possibilities that the use of this technology can offer. Practical applications, such

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[1] This definition is from the Grande dizionario italiano dell'uso (GRADIT), which dates the use of the expression to 2004. For further details see Lucia Francalanci of the Accademia della Crusca, *Una risposta col bot*, 16 November 2021, available at urly.it/3zwax (last visited 10 February 2024).

as enabling the deaf to hear and the blind to see,[2] can be as miraculous as they can be threatening to the rights of the parties involved and to the ordinary running of social, political and economic interactions. The potential for use is unprecedented and increases significantly with Socratic models (modular frameworks in which multiple pretrained models can be trained to exchange information among each other and capture new multimodal capabilities without requiring fine-tuning)[3] or with cross-technology models.[4] In cross-technology models, bots can mimic human intelligence and create textual content as well as audio, video, images and computer codes. They could be used as personal assistants to restore or improve the capabilities of people with disabilities or to increase the performing quantity, speed and quality of personal or work activities; they could be a valuable professional tool to support research, education and security in any field.

However, just as it is impossible to predict the many uses and applications of bots, it is impossible to predict the dangers associated with them. It is therefore all the more important to look closely at how a chatbot works in order to focus the analysis on the profiles of human vulnerability that might exist when interacting with such a form of artificial intelligence. Digital vulnerability appears to be a universally intrinsic feature of individuals interacting with AI and a situationally extrinsic feature of individuals interacting between themselves by means of AI. Thus defined, digital vulnerability may amount to a new macro-category of private law, from which all regulatory instruments to protect individuals and guarantee the role of the law and that of public and private institutions may be derived.

ChatGPT was developed and launched by OpenAI, but other chatbots are currently competing to improve their performance and diversify and broaden their applications.[5] In general, with respect to any currently available chatbot, there seem to be three main factors from which threats may arise: (i) training, (ii) text generation, and (iii) communicative power. This article analyzes these three aspects before turning to the ChatGPT case and to the measures taken by the Italian Data Protection Authority.

II. The Pretrained AI

[2] On the future frontiers of AI applications and the ethical issues involved, see F. Jotterand and M. Ienca, *The Routledge Handbook of the Ethics of Human Enhancement* (New York: Routledge, 2023), in particular Part IV on cognitive enhancement 187-250 and Part VI on human enhancement and medicine, 307-356.

[3] A. Zeng et al, 'Socratic Models: Composing Zero-Shot Multimodal Reasoning with Language' *arXiv:2204.00598* (2022).

[4] On 25 September 2023, OpenAI announced new ChatGPT applications with voice and image capabilities, allowing users to use ChatGPT as an assistant, ready to be engaged in back-and-forth conversation in daily life: http://tinyurl.com/zsr4bjmz.

[5] Along with OpenAI's GPT-3 and 4, popular LLMs include open models such as Google's LaMDA and PaLM (the basis for Bard), Hugging Face's BLOOM and XLM-RoBERTa, Nvidia's NeMO, XLNet, Co:here, and GLM-130B.

Chatbots are an evolution of Large Language Models (LLMs) – algorithmic models capable of processing natural language inputs and predicting the next word, or completing an entire sentence, according to what probabilistically best fits the input (Natural Language Processing (NLP)). But chatbots go beyond this; not only are they able to process natural language, they are also able to generate it (Natural Language Generation (NLG)). To do this, NLGs are controlled by parameters that help the model choose between several possible responses: the higher the number of parameters, the better the performance. OpenAI's ChatGPT-4 has allegedly reached a trillion parameters, whilst GPT-3, only a few months earlier, had 175 billion parameters. These bots consist of neural networks that are 'educated' with data input/output sets. They are transformers that have been pretrained by means of machine learning. Machine learning can be self-supervised, semi-supervised or unsupervised, or even 'reinforced' by the environment in which it operates. Bots, therefore, learn to produce text by ingesting information.[6]

This new AI frontier is the outcome of an increase in computational power, requiring huge server farms[7] and ever-increasing amounts of data.[8] And it is precisely in relation to such data that problems arise. Pre-training of chatbots is achieved through enormous quantities of web content, regardless of either its quality or source. The quality of chatbot outputs is therefore affected by both the quality and quantity of its inputs (data sets and prompts).[9] The first threat, therefore, specifically concerns the unreliability of chatbot responses. Such unreliability may range from slight (ie responses that merely contain inaccurate or incomplete information) to serious (ie responses that are entirely wrong, if not utterly absurd – as in cases identified by data analysts as 'hallucinations').[10] The

[6] The conditions for chatbot technology are machine learning in the unsupervised and deep version together with the indispensable availability of big data, which is linked to the spread of the participatory web. Each web user produces data in a voluntary or automated way, through participation in social media or web browsing or by means of GPS tracking or Internet of Things: R. Kitchin, 'Big Data, New Epistemologies and Paradigm Shifts' *Big Data & Society*, 1-12 (2014); I. Goodfellow et al, *Deep Learning (Adaptive Computation and Machine Learning)* (Cambridge, *The MIT Press*, 2016).

[7] This is accompanied by all the questions regarding the economic and environmental sustainability of theuse of such server farms, as emerges from the Report 'The Digital Revolution and Sustainable Development: Opportunities and Challenges', prepared by The World in 2050 initiative and published by the IIASA, Laxenburg, Austria, 2019, available at urly.it/3zx0r (last visited 10 February 2024). In 2022 the UN Office of the Secretary-General's Envoy on Technology launched an Action Plan for a Sustainable Planet in the Digital Age: urly.it/3zx0s. See also P. Sacco et al, 'Sustainable Digitalization: A Systematic Literature Review to Identify How to Make Digitalization More Sustainable', in Y. Borgianni at al eds, *Creative Solutions for a Sustainable Development* (IFIP: Springer 2021), 14-30.

[8] One of the limits in the capacity and quality of chatbot responses to prompts is precisely the extent and accuracy of the data sets with which they are educated, so much so that a new chatbot market tailored to the needs of customers, professionals and businesses has already emerged.

[9] In addition to the market for 'professional' chatbots, a market for prompt engineering has also developed.

[10] L. Arnaudo and R. Pardolesi, 'Ecce robot. Sulla responsabilità dei sistemi adulti di intelligenza artificiale' *Danno e responsabilità*, IV, 409-417 (2023).

risk is that of an exponential increase in dis- and misinformation, whether voluntary or involuntary. Moreover, the application does not provide for a human expert in the loop, capable of assessing the correctness, genuineness and truthfulness of responses or of correcting or eliminating erroneous answers. Nor is it possible to prevent dissemination of such responses across the web, or their disguised or fraudulent use.[11] The risk is further increased by the fact that chatbots answer user prompts in such an affable and linguistically precise manner that the average user can be misled as to the reliability of responses.[12]

Addressing the propagation of fake news is one of the most urgent issues on the political agendas of most countries in the world.[13] The uncontrollability of the content of user prompts and of chatbot responses has led China, Russia, North Korea, Cuba, Syria and Iran to block access to ChatGPT within their national borders.[14] In these countries, the reason for the ban is the protection of public order[15] (and not the protection of users, which – as shall soon be shown – was the primary concern of the Italian Data Protection Authority). Chinese companies have created and launched their own chatbots as an alternative to commercial Western ones,[16] likely having programmed them to flag and report 'politically

[11] In the OpenAI terms of use, it is made clear that the responsibility for the use of the chatbot and the results obtained from it lie with its users. OpenAI Terms of Use are available at http://tinyurl.com/mrxezyp7 (last visited 10 February 2024).

[12] M. Heikkilä, 'Here's how Microsoft could use ChatGPT' *MIT Tech Review*, 17 January 2023: 'Models like ChatGPT have a notorious tendency to spew biased, harmful, and factually incorrect content. They are great at generating slick language that reads as if a human wrote it. But they have no real understanding of what they are generating, and they state both facts and falsehoods with the same high level of confidence'.

[13] For an overview of literature, notions and theories on fake news see E. Aïmeur et al, 'Fake news, disinformation and misinformation in social media: a review' 13(1):30 *Social Network Analysis and Mining*, 1-36 (2023), available at urly.it/3zx0w (last visited 10 February 2024). For a deep analysis of the issues raised see L. G. Jacobs, 'Freedom of Speech and Regulation of Fake News' *The American Journal of Comparative Law*, 70, 1278-1311 (2022). A map of the different actions against misinformation may be found in the work of D. Funke and D. Famini, 'A guide to anti-misinformation actions around the world' Poynter.org, first edition 2018, last update 2019: http://tinyurl.com/bdfxwvpr (last visited 10 February 2024). In 2022 the UN Human Rights Council adopted a plan of action against fake news and the European Commission presented a revised version of the Code of Practice on Disinformation which, in its first version dated 2018, was the first-of-its kind tool with which major industry players agreed on self-regulatory standards to fight disinformation. The 2022 Code is part of a broader regulatory framework, consisting of legislation on Transparency and Targeting of Political Advertising and the Digital Services Act.

[14] NikkeiAsia in February 2023 stated that 'Tencent Holdings and Ant Group, the fintech affiliate of Alibaba Group Holding, have been instructed not to offer access to ChatGPT services on their platforms, either directly or via third parties': the article is available at urly.it/3zx0y (last visited 10 February 2024).

[15] It should be noted that the UK has also banned the use of ChatGPT for work purposes by civil servants on public order grounds: S. Trendall, 'Government guidance bans civil servants from using ChatGPT to write policy papers', 3 July 2023, available at urly.it/3zx0- (last visited 10 February 2024).

[16] After Ernie Bot (created by Baidu as the Chinese answer to ChatGPT and made publicly available in August 2023) and SenseChat, created by SenseTime, the creation of AndesGPT by Oppo is the latest news. Its integration in the new version of the ColorOS 14 operating system, currently

sensitive' or 'potentially dangerous' questions and to act as a disseminator of state 'truths'.[17]

III. The Generative AI

We have so far looked at vulnerability profiles posed by this type of AI and associated with algorithmic pre-training and the consequences of deep learning. However, chatbots are neural systems that continue their training autonomously, either by scraping the Internet directly or by prompting a response. Consequently, the algorithm constantly acquires and uses new data to generate information and improve its performance. The issues raised by this constant training, learning and generating mechanism are multifold, but some are of particular interest for the purposes of our analysis, namely: privacy violations that take place with the processing – for training purposes – of personal data entered into the web by third parties[18] or fed into the chatbot by users themselves with their prompts (an issue addressed in the second part of this paper and directly connected with the provisions of the Italian Data Protection Authority); issues of output authenticity and authorship; process opacity; and reflexive conditioning.

Starting with the last of these issues, the information produced by chatbots is generated with the intention of being used for other inquiries as well as by users themselves for their own purposes. A high percentage of the information and text thus produced goes towards enriching the web and generating public resonance.[19] The reflexive conditioning thus created is twofold: on the one hand data produced by bots – and which feed other bots – trigger a slow but relentless substitution mechanism whereby information and text of human origin is replaced with information and text of robotic or mixed origin,[20] and on the other hand, these hits consolidate the processed and disseminated content regardless of its quality, correctness or truthfulness. In addition to a concrete risk of spreading dis- and misinformation, there is a serious and real danger of perpetuating and reinforcing

only active in China, allows better dialogue with users via the Breeno virtual assistant: urly.it/3zx0_.

[17] Through its party newspaper, the China Daily, the Chinese government published a video accusing the United States of instrumentalizing ChatGPT for propaganda purposes by spreading disinformation. The video can be seen at http://tinyurl.com/hxppa4nz (last visited 10 February 2024).

[18] Privacy issues arise with respect to both Large Language Models and Image Diffusion Models, as shown by studies carried out by a group of Google researchers: N. Carlini et al, 'Extracting training data from large language models' *USENIX Security Symposium*, 2021, available at urly.it/3zx11 (last visited 10 February 2024), and N. Carlini et al, 'Extracting Training Data from Diffusion Models' *USENIX Security Symposium*, 2023, available at urly.it/3zx12 (last visited 10 February 2024).

[19] S. Fürst, 'Öffentlichkeitsresonanz als Nachrichtenfaktor-Zum Wandel der Nachrichtenselektion' 37(2) *MedienJournal*, 4-15 (2017).

[20] A very interesting study with questions raised by M. Lana, 'L'agency dei sistemi di intelligenza artificiale. Un punto di vista bibliografico' *DigitCult - Scientific Journal on Digital Cultures*, 1, 67-78 (2022), on the book Lithium-ion batteries, a machine-generated summary of current research, by Beta Writer.

prejudice and discrimination, and of generating mass manipulation.[21] This is because AI works in a binary fashion (action/reaction, input/output), arranging data according to a probabilistic assessment, with a tendency to simplify (and thus to reduce), the number of variables. Evidence of this is found in the widespread political polarization and the alteration of democratic dynamics that the public opinion in Western countries has slowly undergone since the launch of social media.[22] Therefore, beyond disinformation, a significant aspect of human vulnerability posed by AI interaction is the progressive reduction of pluralism and dissent.

It would be easier to curtail these threats if the process that takes AI from certain inputs to certain outputs were transparent. Originally, the lack of transparency was a direct consequence of the IP protection of the algorithmic codes used by different platforms to process user data. Nowadays, however, as a result of self-training and deep learning mechanisms, programmers are able to explain the functioning of AI agents but are not able to reconstruct, *a posteriori*, the logical-mathematical processes that take place in the black boxes of AI functioning nor are they able to predict the outputs produced by them.[23] The opacity of the processes and the unpredictability of the results increase human vulnerability in direct proportion to the increase in AI agency. This vulnerability persists even after the actions taken by OpenAI on ChatGPT to comply with the request of the Italian Data Protection Authority to set up tools capable of amending incorrect personal data or of deleting them at the request of the concerned party. ChatGPT training is automatic and continuous, so the exercise of the right to withdraw consent for personal data processing by the user cannot operate retroactively, and data ingested by the bot remain in its black box.[24]

In addition to being autonomous in their continuous learning, chatbots are, by definition, 'generative', which is to say they process the enormous amount of data they feed on to answer questions or carry out text composition tasks. In answering questions and composing text the whole original connection with the data (the processing of which has generated such answers and text) is lost. Chatbots do not quote their sources and the generation process remains obscure. Just as it is not possible to correct chatbots – other than through new training – it is likewise not possible to credit the authors of the data from which answers

[21] E. Falletti, *Algorithmic Discrimination: A Comparative Perspective*, (Torino: Giappichelli, 2022) passim; N. Gross, 'What ChatGPT Tells Us about Gender: A Cautionary Tale about Performativity and Gender Biases in AI' 435 (12) *Social Sciences*, 1-15 (2023).

[22] A. Tedeschi Toschi and G. Berni Ferretti, 'Il contrasto legislativo ai socialbot. Alcuni spunti per una riforma in Italia' *Rivista italiana di Informatica e Diritto*, 155-175 (2023).

[23] J. Burrell, 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' *Big Data & Society*, 1-12 (2016).

[24] For more details on the mechanism introduced by OpenAI following the processing measures of the Italian Data Protection Authority, see L. Megale, 'Il Garante della privacy contro ChatGPT: quale ruolo per le autorità pubbliche nel bilanciare sostegno all'innovazione e tutela dei diritti?' *Giornale di diritto amministrativo*, 3, 409-410 (2023).

and text have been generated. This poses the problem of authorship, since each output (eg a scientific article, a poem, a play or film script) may well be the result of serial infringement of publishers 'copyright[25] and/or authors' intellectual property.[26] Moreover, the question of authorship also arises in relation to intellectual property and the right to exploit the text thus generated. The users – whose chatbot prompts have caused the generative act – may now use the result of this act at will, even attributing it to themselves.[27] This, however, raises the further question of authenticity.[28] At the time of writing, there is no technology able to ascertain what percentage of 'artificial assistance' is present in any written text. The issue of so-called 'paper mills' is particularly emblematic in terms of production in the scientific field.[29] The solution proposed in various fora is that of a watermark (ie an indelible imprint on the electronic format of a text) capable of identifying and separating artificial products from human ones. That said, bypassing any prohibition of use would be easy, as demonstrated by the interdiction order case involving the Italian Data Protection Authority.[30]

[25] The New York Times has questioned the future of publishing and journalism on a number of occasions in recent years (S. Podolny, 'If an Algorithm Wrote This, How Would You Even Know?' 7 March 2015; J. Peiser, 'The Rise of the Robot Reporter', 5 February 2019) and in August news came out on NPR that NYT's lawyers were exploring whether to sue OpenAI to protect the intellectual property rights associated with its reporting: urly.it/3zx19.

[26] In July 2023, Sarah Silverman sued artificial intelligence producers OpenAI and Meta Platforms for not having her permission to use her copyrighted works. Other authors joined Silverman in these suits to seek a class-action status. It is doubtful, however, whether the lawsuit will succeed, especially in consideration of the landmark case involving Google Books in 2016. In this case, the Second Circuit Court of Appeals in the United States ruled that Google Books practice of summarising texts did not violate copyright law and that Google's use of copyright protected works is a case of non-infringing fair use: *Authors Guild of America* v *Google* 721 F.3d 132 (2nd Cir. 2015). The United States Supreme Court subsequently rejected the Authors Guild's petition for appeal from the US Court of Appeals decision. Among the most recent comments on the topic of transformative and non-transformative use of copyright protected works is the article by C. Sandalow, 'I Did You a Favor By Taking Your Work: Reconsidering the Harm-Based Approach To the Fourth Fair Use Factor' 46 *Columbia Journal of Law & Arts*, 457-485 (2023).

[27] The OpenAI's Terms of Use of ChatGPT states that you (the user) '(a) retain your ownership rights in Input and (b) own the Output. We hereby assign to you all our right, title, and interest, if any, in and to Output'.

[28] For an examination of the issues related to the concept of author in the digital world, see R. Morriello, 'OpenAI e ChatGPT: funzionalità, evoluzione e questioni aperte' [S.l.] 8 (1) *DigitCult - Scientific Journal on Digital Cultures*, 59-76 (2023).

[29] N. Lucchi, 'ChatGPT: A Case Study on Copyright Challenges for Generative Artificial Intelligence Systems' *European Journal of Risk Regulation*, 1-23 (2023); R. Morriello, *Dalla pirateria dei libri all'editoria predatoria. Un percorso tra storia della stampa ed etica della comunicazione scientifica* (Milano: Ledizioni, 2022) 116-121, therein extensive literature. The alarm mainly concerns biomedical science: most recently, cf B.A. Sabel et al, 'Fake Publications in Biomedical Science: Red-flagging Method Indicates Mass Production' preprint 18 October 2023 doi: http://tinyurl.com/46ua3h2b.

[30] Instructions of how to circumvent the Italian Data Protection Authority's ban by means of VPN were easily found on the web, as were instructions on how to circumvent ChatGPT's Ethics Safeguards: Jon Christian, Amazing 'Jailbreak' Bypasses ChatGPT's Ethics Safeguards, in Futurism, 4 February 2023, available at http://tinyurl.com/3tpmmj2x (last visited 10 February 2024).

IV. The Communicative AI

Apart from the critical issues that have emerged in our observation of the technical functioning of chatbots, another major concern is the polished ability of these robots to mimic human conversation. Indeed, in their exchanges, chatbots are able to affect empathy and impressive erudition, mixed with arrogant assertiveness and variability of tone (friendly, excited, stable, serious) and style (professional, informative, educational, storytelling, benefit-focused or solution-oriented). The constant performance improvement occurs through complex attention mechanisms that enable the bots to focus on specific parts of the input text to generate more relevant and accurate outputs with respect to context, recipients' personalities and their wishes. Furthermore, the ability to store input information from the same user in memory modules makes questioning and answering exchanges more coherent and similar to those between humans. But whilst chatbot answers may seem 'sensible', they actually make 'no sense' to the machines whatsoever. And this is where the most insidious threat lies, because chatbots are modelled to imitate human conversation, thus making it hard to recognize responses as 'artificial'. It is for this very reason the chatbots must, by default, warn users of their nature. In addition to the problems of authorship, authenticity and reliability that have been addressed, the risk in the medium to long terms is the unpredictable consequences of human-machine interaction itself, at least in two respects: epistemological and sociological.

Let us start with the epistemological profile. Whilst the ability of chatbots to assimilate syntactic rules endows their responses with impressive linguistic consistency, the modest writing ability of the average user puts the latter in a position of inferiority *vis-à-vis* the machine. This condition of perceived or actual inferiority constitutes a prerequisite for vulnerability. Beyond any form of 'amusement',[31] 'intellectual' challenge[32] or professional use of chatbots (by experts capable of appraising the reliability of responses), most users who question a chatbot are technically inexperienced and not competent in the subject matter. For such users chatbots are neither entertainment nor work, but tools for understanding reality. So, in addition to the danger of spreading misinformation that has been addressed, the inferior subject's proneness to rely on those who are perceived to be more experienced, capable and educated alters the normal course of the interaction. Whilst this is common in interactions between humans – so much so that experts take responsibility for what they say – in interactions with chatbots users are warned of the nature and limits of the bot and, in accordance with the terms of use, are held solely responsible for their prompts, the ChatGPT

[31] H. Holden Thorp, 'ChatGPT is fun, but not an author' 379:6630 *Science*, 313 (2023).

[32] See the experiment on mathematical, semantic and ethical questions and the conclusions on the 'significant consequences of the industrialisation of automatic and cheap production of good, semantic artefacts' by L. Floridi and M. Chiriatti, 'GPT-3: Its Nature, Scope, Limits, and Consequences' *Minds and Machines*, 681-694 (2020).

responses that ensue, and the use that is made of such responses.[33] The manner in which warnings are given and terms of use are accepted does not prevent users from consciously or unconsciously perceiving epistemological value in the chatbot's responses. The syntactic accuracy of bot answers and the adjustment of tone and style to match those of the questions are not, of course, the result any consciousness and sensitivity of the bot, but interlocutors are, nonetheless, led to perceive the bot as being endowed with both. Scientists' warnings[34] about NLG's lack of empathy, semantic cognition or attribution of meaning have been to no avail. The mirror with which AI reflects their image back onto humans is both deceiving and beguiling.[35] Thus, the danger is to witness a human preference, at the micro level, for perpetually available, educated, accommodating and benevolent artificial conversation.[36] At the macro level, the threat lies in the deliberate or accidental manipulation of reality[37] and human knowledge as generated by 'meaningless' AI narratives.[38]

The analysis of the communicative potential of chatbots under an epistemological profile allows us to imagine their impact on the dynamics of social interaction under a sociological profile. Indeed, in its digital interactions, human vulnerability undoubtedly emerges as a characteristic of the individual. Since the individual is 'interdependent people in the singular', vulnerability also pertains to the whole of society, as it is composed of 'interdependent people in the plural'.[39] The ability

[33] In regard to content, it is said that you (the user) 'may provide input to the Services (Input) and receive output from the Services based on the Input (Output). Input and Output are collectively Content. You are responsible for Content, including ensuring that it does not violate any applicable law or these Terms. You represent and warrant that you have all rights, licenses, and permissions needed to provide Input to our Services'. See A. Malaschini, 'ChatGPT e simili: questioni giuridiche ed implicazioni sociali' *Consulta online*, II, 583-606, 597 (2023).

[34] D. McQuillan, 'Manifesto on algorithmic humanitarianism' *openDemocracy*, 4 April 2018; E.M. Bender and T. Gebru, 'On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?' *Conference on Fairness, Accountability, and Transparency* (FAccT 21), 610-623 (2021); K. Arkoudas, 'ChatGPT is no stochastic parrot. But it also claims that 1 is greater than 1' 36 *Philosophy & Technology*, 54 (2023).

[35] Well described by R.W. Gehl and M. Bakardjieva, *Socialbots and Their Friends. Digital Media and the Automation of sociality* (New York: Routledge, 2016), 2: Social bots are 'intended to present a self, to pose as an alter-ego, as a subject with personal biography, stock of knowledge, emotions and body, as a social counterpart, as someone like me, the user, with whom I could build a social relationship'.

[36] R.W. Gehl and M. Bakardjieva, n 35 above, 2.

[37] Actually, transformations arising from deep mediatisation ensue as a sort of re-figuration, namely a fundamental, structural shift of human relationships and practices: A. Hepp, *Deep Mediatisation* (New York: Rutledge, 2020), 106-112.

[38] L. Floridi, 'AI as Agency Without Intelligence: on ChatGPT, Large Language Models, and Other Generative Models' 36:15 *Philosophy & Technology*, 1-7 (2023); J.M. Bishop, 'Artificial Intelligence Is Stupid and Causal Reasoning Will Not Fix It' 11 *Frontiers in Psychology*, 1-18 (2021); S. Amato, 'Tra silicio e carbonio: le macchine saranno sempre stupide?' *BioLaw Journal - Rivista di BioDiritto*, I, 295-302 (2023).

[39] N. Elias, The Civilizing Process. The Development of Manners (New York: Urizen Books, 1978), 125.

of chatbots to imitate human communication directly threatens the individuals with whom they interact and indirectly threatens the entire society.[40] The communication is not authentic but appears so. The answers to questions, which appear original and full of new content, are, in fact, merely syntactically ordered and stylistically elegant reformulations of existing content. The process of retrieving archived content takes place automatically according to the law of the most probable.[41] Chatbots do nothing more than perpetuate the most quantitively prevalent data (and not the most qualitatively or ethically superior data)42 through an iteration of logical models, with no critical capability or semantic awareness whatsoever. If communication is a form of symbolic construction of reality, then the massive proliferation of communicative AI chatbots cannot but affect the construction mechanism of the representation that individuals have of themselves, of the society they belong to, and of the environment they live in.[43] It is impossible to predict whether the entry of AI as a new individual and social interlocutor will disrupt or be beneficial to psychological and sociological dynamics. However, given this uncertainty, it would be advisable not to take risks, and to avoid exposing users to such risks it is necessary to regulate the phenomenon and exercise control over it vis-à-vis constitutional principles, fundamental human rights, and general public interest. But what rules? What control?

V. Agile Regulation and Prior Public Scrutiny

The free ChatGPT application launch in November 2022 may be likened to a mass experiment. The purpose of the launch was not 'to ensure that artificial general intelligence benefits all of humanity' (as claimed on the OpenAI website), but rather to fine-tune the product by exploiting the prompt training provided by users; a freemium-type marketing strategy[44] for the purpose of subsequent

[40] On October 2022, after a year-long process led by the US Office of Science and Technology Policy, the White House released the Blueprint for an AI Bill of Rights to inform policy decisions. The concept of community is integral to the scope of this Blueprint and affirms that, while AI and other data-driven automated systems most directly collect data, make inferences, and may cause harm to individuals, the overall magnitude of their impacts is most readily visible at the community level: urly.it/3zx1h.

[41] M. Bertolaso and A. Marcos, Umanesimo tecnologico. Una riflessione filosofica sull'intelligenza artificiale (Roma: Carocci editore, 2023), 49-52.

[42] L. Floridi, Etica dell'intelligenza artificiale. Sviluppi, opportunità, sfide (Milan: Raffaello Cortina Editore, 2022), passim.

[43] A. Hepp et al, 'ChatGPT, LaMDA, and the Hype Around Communicative AI: The Automation of Communication as a Field of Research in Media and Communication Studies' 6 *Human-Machine Communication*, 41-53 (2023).

[44] Freemium is a business model that consists in offering a basic version of a product free-of-charge. The marketing strategy aims to attract a large volume of potential customers (customer acquisition) and at the same time to test the product in order to simultaneously or later offer an updated or improved version of it for a fee. A business model already used since the 1980s, it was christened by J. Lukin in 2006 when commenting on an article by Fred Wilson entitled 'My Favourite

commercial exploitation. Fine-tuning of the product was left to the massive training by users, who were warned (in the terms of use), that their prompts would go towards improving the service[45] and training the algorithms.[46] The analysis of how the algorithm works has revealed several critical concerns. Moreover, in recent months, operators, academics and legislators have all been compelled to consider the instruments already in place and the ones still needed to prevent risks and curb threats. This consideration is taking place on two levels: a specific one, with reference to chatbots, and a general one, with reference to any future AI product that might be launched without prior public scrutiny.

With regard to ChatGPT, we shall shortly look at the *a posteriori* actions taken by the Italian Data Protection Authority to demonstrate the uselessness of the ban instrument and the inadequacy of the GDPR (General Data Protection Regulation) to deal with threats posed by this new technology. In regard to both the enforcement action taken by the Italian Data Protection Authority and the inadequacy of GDPR, on 13 April 2023 European Data Protection Board (EDPB) members decided to launch a dedicated task force to foster cooperation on the matter. In general, the Fall of 2023 witnessed multiple political reactions to ChatGPT: the UK White Paper on AI (29 March 2023),[47] the Chinese Cyberspace Administration Draft Measures for managing generative AI (11 April 2023) and the EU Parliament amendments to the Commission's AI Act Proposal (11 May

Business Model'. The Freemium model was then studied and structured around four models by Chris Anderson (*Free: The Future of a Radical Price*, New York: Random House Business, 2009) and dissected by Eric Seufert's lucid analysis of its application to software products (*Freemium Economics: Leveraging Analytics and User Segmentation to Drive Revenue*, Waltam MA: Morgan Kaufmann, 2014). Seufert provides insight into how freemium products generate revenue, keep users engaged, and grow. Of particular relevance to the identification of vulnerability profiles following the free launch of ChatGPT are the reflections on some of the most important concepts in freemium design, namely lifetime customer value (Chapter 5) and virality (Chapter 7).

For an analysis of how the freemium model operates from an application point of view and with respect to empirical findings, see the Spotify case examined by C. Becagli et al, 'Il modello di business "Freemium" nel settore musicale e i fattori incentivanti del passaggio da utente free a premium: Evidenze empiriche dal caso Spotify' in F. Culasso and M. Pizzo eds, *Identità, innovazione e impatto dell'aziendalismo italiano. Dentro l'economia digitale* (Torino: Collane UniTo, 2019), 526-527, available at http://tinyurl.com/3r9e726j (last visited 10 February 2024).

45 The ChatGPT's Terms of Use make explicit that OpenAI may use Content to provide, maintain, develop, and improve our Services, comply with applicable law, enforce our terms and policies, and keep our Services safe.

46 Following the Italian Data Protection Authority's intervention, an opt-out option has been included in the terms of use, which, however, is not quick to implement, as it requires a form to be filled in, and could affect the efficiency of the service: 'If you do not want us to use your Content to train our models, you can opt out by following the instructions in this Help Centre article. Please note that in some cases this may limit the ability of our Services to better address your specific use case'.

47 The UK Government launched an AI White Paper to guide the use of artificial intelligence and to drive responsible innovation. AI use will be guided by five principles: safety, transparency, fairness, accountability and contestability: Office for Artificial Intelligence, Department for Science, Innovation and Technology, 'Policy paper "A pro-innovation approach to AI regulation" ', Command Paper no 815, 2023 (updated 3 August 2023).

and 14 June 2023).[48]

The debate on ChatGPT so ignited the German Bundestag on 29 March 2023[49] that it led to the publication, in November, of an AI Action Plan by the Federal Ministry of Education and Research.[50] On 21 March 2023, the French Assemblée Nationale debated and rejected an amendment drafted by ChatGPT[51] and on 19 September Premier Élisabeth Borne set up a special *Comité de l'intelligence artificielle generative*.[52] Concerns about the spread of chatbots and the possible threats associated with them have also emerged at the international level, triggering a number of initiatives already underway and several others that are in the pipeline. UNESCO has published several papers dealing with ChatGPT, ranging from a Guidance for generative AI in education and research to a policy paper[53] containing analyses of new AI technologies through the lens of UNESCO's Recommendation on AI Ethics. At the annual Group of Seven (G7) Summit hosted by Japan and held in May 2023, the leaders of the G7 countries expressed concern over the

[48] On 11 May 2023 the Internal Market Committee and the Civil Liberties Committee adopted a draft negotiating mandate on the AI Act proposal (with many amendments thereto), stating that generative foundation models such as GPT would have to comply with additional transparency requirements. Such additional requirements include the requirement of disclosing that content was generated by AI, designing the model to prevent it from generating illegal content, and publishing summaries of copyrighted data used for training. The European Parliament adopted the amendments on 14 June, introducing Recital 60 g (Generative foundation models should ensure transparency about the fact that the content is generated by an AI system, not by humans. These specific requirements and obligations do not amount to considering foundation models as high-risk AI systems, but should guarantee that the objectives of this Regulation to ensure a high level of protection of fundamental rights, health and safety, environment, democracy and rule of law are achieved. Pre-trained models developed for a narrower, less general, more limited set of applications that cannot be adapted for a wide range of tasks such as simple multi-purpose AI systems should not be considered foundation models for the purposes of this Regulation, because of their greater interpretability which makes their behaviour less unpredictable), 60 h (As foundation models are a new and fast-evolving development in the field of artificial intelligence, it is appropriate for the Commission and the AI Office to monitor and periodically asses the legislative and governance framework of such models and in particular of generative AI systems based on such models, which raise significant questions related to the generation of content in breach of Union law, copyright rules, and potential misuse), Art 28b (4. Providers of foundation models used in AI systems specifically intended to generate, with varying levels of autonomy, content such as complex text, images, audio, or video ('generative AI') and providers who specialise a foundation model into a generative AI system, shall in addition a) comply with the transparency obligations outlined in Art 52 (1), b) train, and where applicable, design and develop the foundation model in such a way as to ensure adequate safeguards against the generation of content in breach of Union law in line with the generally-acknowledged state of the art, and without prejudice to fundamental rights, including the freedom of expression, c) without prejudice to Union or national or Union legislation on copyright, document and make publicly available a sufficiently detailed summary of the use of training data protected under copyright law).

[49] On 29 March 2023, the Bundestag's Digital Committee debated the status of negotiations on the legal regulation of generative artificial intelligence (AI) at EU level: urly.it/3zx2b.

[50] Available for download at urly.it/3zx2m.

[51] The amendment is available for download at urly.it/3zx2p.

[52] For more information: urly.it/3zx2q.

[53] The policy paper deals with 'Foundation models such as ChatGPT through the prism of the UNESCO Recommendation on the Ethics of Artificial Intelligence': urly.it/3zx2t.

disruptive potential of rapidly expanding generative AI and agreed on the need for governance to ensure a human-centric and trustworthy development. The agreement triggered the so called 'Hiroshima Process' which – as recently as October 2023 – gave birth to the G7 Leaders' Statement, the International Guiding Principles, and the International Code of Conduct for Organizations Developing Advanced AI Systems. The concerns of world leaders have significantly escalated, leading – most recently, in November 2023 – to the twenty-eight signatures on the Bletchley Declaration[54] that closed the AI Safety Summit hosted in the UK by Premier Rishi Sunak.

An analysis of government strategies on the topic of artificial intelligence reveals a number of different positions on the matter, some preferring mild guidelines and others strict regulatory laws.[55] That said, recent debates and actions at national, regional and global levels all seem to converge towards the use of new regulatory forms.[56] The difficulties experienced with introducing rules into a hard law proposal such as the AI Act (now being debated by the European trilogue) amidst the hype surrounding ChatGPT and, conversely, the speed with which the Bletchley Declaration was signed, have taught us that the best strategy is that of a legal process with variable geometry and force; one that falls between intersectoral guidelines and hard laws, between sectoral codes of conduct and public authority controls, between business lobbying and democratic empowerment. The OECD has put together a regulatory policy with agile and innovative approaches, which describes tools to address digital era challenges such as regulatory sandboxes, behavioral insights, and risk-based and outcome-based regulations.[57]

There seem to be two directions along which political action is moving to try to regain control over fast-emerging technology. These are, on the one hand, to require that AI producers establish, implement, document and maintain a risk management system with third-party verification and comply with duties of

[54] Among the 28 signatories of the Bletchley Declaration are the UK, the US, the EU, China and Australia. Surprisingly, it was signed on the first day of the summit, even though the content is very daring and the goals are very challenging: from the assertion that 'there is potential for serious, even catastrophic, harm' to recognition that 'the protection of human rights, transparency and explainability, fairness, accountability, regulation, safety, appropriate human oversight, ethics, bias mitigation, privacy and data protection all need to be addressed'.

[55] In France, *La stratégie nationale pour l'intelligence artificielle* was launched in 2018 and is now in its second phase (urly.it/3zx2-). In Germany, the Bundesregierung adopted its *Strategie Künstliche Intelligenz* in 2018, now in its new version 2020: urly.it/3zx32. The Italian *Programma Strategico per l'Intelligenza Artificiale* was approved by the Council of Ministers on 24 November 2021 and has a scope for the two-year period 2022-2024: urly.it/3zx36.

US, UK, Australia and Japan tend to prefer overseeing AI with mild guidelines, while the EU and its member states have opted for strict regulatory laws.

[56] O. Pollicino, 'I codici di condotta tra self-regulation and hard law: esiste davvero una terza via per la regolazione digitale? Il caso della strategia europea contro la disinformazione online' *Rivista trimestrale di diritto pubblico*, 4, 1051-1068 (2022).

[57] See OECD, *Regulatory Policy Outlook*, 2021, in particular 'Regulatory policy 2.0, available at urly.it/3zx38 (last visited 10 February 2024).

transparency, explanation and provision of information to users,[58] and on the other hand to introduce procedures and authorities to control new technologies before their mass distribution. The latter solution has been adopted by the AI regulatory sandboxes of the European AI Act Proposal, the UK White Paper, and President Biden's Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence.[59]

As for obligations of transparency, risk assessment and explainability,[60] the problem lies in the difficulty of predicting risks. This is because the more the AI is advanced, the more unpredictable its logical-mathematical processes, decisions and outputs are. To require that only inherently controllable algorithmic models (ie ones that are predictable *ex-ante* or re-constructible *ex post*)[61] be used is unreasonable. Trying to get inside the prompt-response process of ChatGPT is tantamount to trying to access a human mind to understand its decision-making processes. There is a specific branch of science on explainable AI. Initially, it focused on developing procedures to explain the operations of self-learning algorithms,[62] but the processes of complex algorithmic models are incomprehensible and will remain so. Research has therefore shifted to a different approach: one that specifically exploits the interactive ability of bots. In short, it is a matter of inducing the AI, through prompt/response interlocution, to give, itself, an explanation of its logic-deductive and logic-generative processes and to provide a record of the data used for this in a human-friendly post-hoc fashion.[63] This would allow for *a posteriori* control over the AI and a way to correct biases and eliminate discrimination. The solution implies deep and continuous human-bot interaction, with all the unknowns that go with the radical paradigm shift induced by this new communicative AI and unprecedented in human history.[64] In the nineties, Lawrence B. Solum concluded his essay on legal personhood for artificial

[58] See Art 9 and Art 13 AI Act Proposal of the EU Commission and No 47 UK White Paper.

[59] The public body involved for the development of standards and the provision of testing environment is the National Institute of Standards and Technology (NIST): urly.it/3zx3b.

[60] In the UK White Paper 'explainability refers to the extent to which it is possible for relevant parties to access, interpret and understand the decision-making processes of an AI system'. Prior to this, the GDPR's 'right to explanation' has been the tool for promoting fairness, accountability, and transparency and for granting investigatory powers to data authorities: for literature and comments see B. Casey et al, 'Rethinking Explainable Machines: The GDPR's "Right to Explanation" Debate and the Rise of Algorithmic Audits in Enterprise' 34 *Berkley Technology Law Journal*, 143-188 (2019).

[61] S. Robbins, 'A Misdirected Principle with a Catch: Explicability for AI' 29 *Minds and Machines*, 495-514 (2019); C. Rudin, 'Stop Explaining Black Box Machine Learning Models for High Stakes Decisions and Use Interpretable Models Instead' *Nature Machine Intelligence*, 1, 206-215 (2019).

[62] L. H. Gilpin et al, 'Explaining Explanation: An Approach to Evaluating Interpretability of Machine Learning' *ArXiv* (Cornell University), arXiv:1806.00069 (2018); T. Miller, 'Explanation in Artificial Intelligence: Insights from the Social Sciences' 267 *Artificial Intelligence*, 1-38 (2019).

[63] E. Esposito, 'Dall'Intelligenza artificiale alla comunicazione artificiale' 392 *Aut Aut*, 20-35 (2021).

[64] A catalogue of issues concerning the relationship between the concepts of personhood and humanity may be found in the interesting essay by L. Solum, 'Legal Personhood for Artificial Intelligences' 70 *North Carolina Law Review*, 1231-1287 (1992), in particular 1284-1285.

intelligences by stating that,

> 'an answer to the question whether artificial intelligences should be granted some form of legal personhood cannot be given until our form of life gives the question urgency'.[65]

The time has come!

VI. Data Protection Issues. Territorial Scope and Application of the GDPR

The most urgent issues, apart from those already highlighted in the first part of the paper, are probably those related to data protection, as many data protection authorities (DPAs) of the single Member States of the European Union have been concerned with these aspects.[66]

How do data protection rules apply to ChatGPT and, in general, to chatbots and other generative artificial intelligence models? The first question to be considered is which rules apply to ChatGPT, and specifically, whether the GDPR is applicable and in which cases.

As already mentioned, ChatGPT is an AI tool, developed by OpenAI, a US company, and accessible worldwide, via any electronic device. The OpenAI privacy policy available on the landing page, relating to registration for the ChatGPT service, also specifies that the service can be used by 'international users', informing readers that the users' personal data will be transferred in the United States or where the servers of the company are located. So, if a user located in the European territory uses ChatGPT, their data are processed by the platform and transferred to servers located outside the European territory.

Art 3 of the GDPR regulates this case, holding the territorial scope of application of the Regulation based on two criteria. The first criterion, established in Art 3, para 1 of the GDPR, decrees that the Regulation applies to the processing of personal data carried out in the context of the activities of an establishment by the data controller or processor in the European Union (EU), regardless of whether the processing is carried out in the EU. This criterion is also called 'establishment' since what is important for the application of European legislation is that the carrying out of the activities takes place within the framework of a stable

[65] L. Solum, n 64 above, 1287.

[66] For further details see J. Meszaros et al, 'ChatGPT: how many data protection principles do you comply with?', available at SSRN: https://ssrn.com/abstract=4647569, 7-9. Investigations have been opened by the Spanish Data Protection Authority, on 13 April 2023, as well as several German regional authorities, by sending a questionnaire to OpenAI, asking if a data protection impact assessment was made by the company and requesting further information on data subjects' rights. Also CNIL (the French DPA) launched an action plan, scheduling investigations on several generative AI providers.

organization, including through a branch or an affiliate, within the EU.[67]

Taking into account the circumstances that characterize the service provided by OpenAI, according to the establishment criterion, the regulation referred to in the GDPR would not be applicable. The data controller, identified as Open AI, has its main office in the United States and there are no other units, companies or entities within European territory, nor entities operating on behalf of Open AI, which may be considered 'data controllers'.

However, according to Art 3, para 2 of the GDPR, the Regulation provides a second criterion according to which, if neither the owner nor the data processor is established within EU territory, the GDPR still applies. In fact, one of the purposes of the Regulation is to protect natural persons living in the EU, when the processing of their data is carried out by owners and managers established outside its borders.

In this case, reference is made to the so-called 'targeting' criterion according to which the GDPR applies when the processing is carried out by subjects established outside the EU, but offer of goods and services is addressed to European citizens, regardless of the existence of a payment of a monetary amount or (in the case of monitoring) of the behavior of the interested parties.

It should be noted that Art 3, para 2 of the GDPR refers to the 'processing of personal data of data subjects who are in the Union'. Therefore, the application of this measure is not limited by citizenship, residence or other elements of the legal condition of the interested party whose personal data are being processed, but to all subjects who are located within the EU borders.[68]

However, it is not sufficient for an interested party to be within the EU for the GDPR to apply; it is also necessary that certain characteristics connected to the processing are met. Of the two cases listed above by Art 3, para 2 of the GDPR, the one relating to the 'offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union' is the one that finds recognition in relation with the activity carried out by OpenAI. The latter offers chatbot service, ChatGPT, available upon registration of the user, who has the right – but not the obligation – to purchase a paid package to obtain greater functionality compared to the service standard. Furthermore, since this service is accessible online, it is intended to be provided without distinction to anyone in the EU who has an electronic device. This would support the application of the GDPR to the instant case, bearing in mind what is supported

[67] See Recital 22 GDPR. For the notion of 'establishment', see also A. Spangaro, 'L'ambito di applicazione materiale della disciplina del regolamento europeo 679/2016', in G. Finocchiaro ed, *La protezione dei dati personali in Italia. Regolamento UE n. 2016/679 e D. Lgs. 10 agosto 2018, n. 101* (Bologna-Roma: Zanichelli, 2019), 422, as well as the examples provided by the European Data Protection Board, Guidelines 3/2018 on the territorial scope of Art 3 GDPR, available at urly.it/3zx44 (last visited 10 February 2024).

[68] See the Guidelines 3/2018, completing what is already provided for in Recital 14 of the GDPR.

by Recital 23 of the GDPR.[69]

VII. The Investigation of the Italian Data Protection Authority

Data Protection Authorities (DPAs) of several member States have investigated the data processing made by OpenAI through ChatGPT. The first intervention was that of the Italian DPA when a provisional ban measure was adopted against ChatGPT in March 2023, requiring interruption of the service in Italian territory.[70] In particular, the Italian Authority issued an urgent and interim provision, based on three main issues:[71] the lack of a privacy policy; the presence of improper personal data in the texts provided by the chatbot;[72] and, finally, the lack of age verification of users.[73]

However, chronologically speaking, the measure related to ChatGPT is the second provision of the Italian DPA concerning an artificial intelligence system. In fact, on February 2, 2023, a decision held according to Art 58 para 2 (f) of the GDPR was issued ordering a temporary limitation

> 'on the processing of personal data relating to users in the Italian territory as performed by Luka Inc., the US-based developer and operator of Replika, in its capacity as controller of the processing of personal data that is carried out via the said app'.

Replika is a chatbot which creates virtual replicants with a text and voice interface, that can be configured by the user to be a friend, a mentor or a partner. The peculiarity of this technology is to be designed to replicate human behaviors, learning from interactions with humans to provide interlocutors with psychological support, empathetic engagement, and relief from anxiety. Thus, unlike ChatGPT, which provides answers to user questions, Replika supplies a virtual assistant programmed according to user-defined metrics, replicating a human being with

[69] See, for instance, CJEU, C-352/85, *Bond van Adverteerders and others* v *Dutch State*, 26th April 1988, § 16, available at urly.it/3zx47 (last visited 10 February 2024).

[70] Garante per la protezione dei dati personali, 30th March 2023, (doc. web n. 9870832), available here: urly.it/3zx49.

[71] L. Scudiero and S. Di Benedetto, 'Artificial Intelligence (AI) and Data Protection: Lessons Learned from the ChatGPT case (Italy)' *Practical Law Global*, 2 (15th December 2023).

[72] M. Santana Fernandes and J.R. Goldim, 'Artificial Intelligence and Decision Making in Health: Risks and Opportunities', in H. Sousa Antunes et al eds, *Multidisciplinary Perspectives on Artificial Intelligence and the Law* (New York: Springer, 2024), 192: 'These new systems not only label or classify pre-existing data, but generate new content, by aggregation and combination, from the available elements'.

[73] According to Art 8 GDPR, in the case of minors, the consent given is valid if the child is at least 16 years old. The GDPR allows member States to reduce the age limit to 13 years, even if this is not the case of the Italian regulation. See C. Yakışır, 'An Evaluation of the ChatGPT Decision, Which Italy Blocked Access on the Grounds of Violation of the GDPR' (19 April 2023). available at SSRN: https://ssrn.com/abstract=4423779.

whom to engage in human-like interactions.

During the inspection of the DPA it was proven that the privacy policy provided by Luka Inc to its users stated

> 'that personal data relating to below-13 children are not collected knowingly, whereas parents and legal guardians are encouraged to monitor use of the Internet by their children, comply with the privacy policy by instructing children to never provide personal data on the service without their authorisation, and contact the platform in case they have reason to believe that a below-13 child has provided personal data so that such data be removed from databases'.

Furthermore, in the app stores, Replika was listed as devoted to individuals aged above 17 and the terms and conditions released by the platform advised that below-13 children are banned from using the app and below-18 users must be authorized beforehand by their parents or legal guardians.

Despite these measures, the Italian DPA found that no technical limitations were put in place if the user declared to be a minor, considering that, during the subscription, the only information required were names, email addresses, and gender. Furthermore, as reported by several newspapers, the responses provided by Replika to minors or other vulnerable subjects were not suitable for the condition of such individuals, especially concerning sexually inappropriate content. Furthermore, the Italian DPA argued that the legal basis for the processing of personal data could not be found in the contractual performance, as no age verification was set up by the system and, according to Italian law, minors do not have the legal capacity to enter into contracts for the supply of implying the processing of a substantial amount of one's personal data.[74]

During its investigation into OpenAI, the Italian DPA ascertained that the company did not provide users with a privacy policy, thus not explaining the identity of the data subjects, from whom the data are collected, the data that were collected and processed, or the purposes of these processing activities. In fact, users were allowed to use the chatbot merely by logging in through a subscription to the platform or by using their e-mail credentials. Therefore, the platform was able to recognize the identity of the user, also in connection to the queries posed by the user itself to the platform.

Accordingly, the first critical issue was related to the collection of these data (those used for the subscription to the platform and the e-mail addresses used for accessing the services), which were processed without a prior privacy notice. Lacking this informative obligation, users were not in the condition to know, for instance, the identity and the contact details of the controller (or of its representative

[74] The Italian Data Protection Authority had already issued a temporary blocking measure against TikTok, as the social network platform did not provide proper methods for verifying the age of platform users, see Italian Data Protection Authority, 22 January 2021, doc. web [9524194].

in the EU territory, as in the instant case), the potential transfer of personal data outside the EU territory, the storage period of these data and the legitimation for this storage, the rights granted to the users and how to exercise these rights.

The privacy policy is the legal instrument through which information asymmetries are rebalanced between those who collect the data and the subjects to whom the data refers, who, as in the instance, may not know the uses that will be made of their data, nor the methods through which these data will be processed. One of the most controversial aspects of the use of artificial intelligence technologies is represented indeed by the opacity of the functioning of these tools, as well as the use that may be made of the data collected by the data controller after the first processing.[75]

After the first intervention of the DPA regulating its service, ChatGPT implemented the requested modifications to its landing page by including a privacy policy from the sign-up page before registration and allowing users, both located in Europe or in other territories, to opt-out from processing of their own personal data. Additionally, even if pointing out the impossibility of a full rectification of the inaccurate information provided by the answer of the machine, ChatGPT adopted a mechanism in order to authorize users to erase the incorrect information. However, at least at the time of writing, measures for age verification have not been implemented, nor has there been aninformation campaign aimed at empowering users with further information on the functioning of the artificial intelligence system.

VIII. Legal Basis and Right of Rectification

The second violation, according to the Italian DPA, concerned the absence of a legal basis for training the machine. Generative models are trained by scraping freely accessible contents on the internet, collecting and selecting among these contents, and allowing the machine to learn, similar to what a human brain would do.[76] As a part of this process, machine training can generate – as defined in technical jargon – machine hallucinations, where the machine, responding to a prompt from the user, can provide wrong answers, and may provide an incorrect

[75] It is also worth underlining that artificial intelligence systems learn, continuously and incessantly, like the human mind, from the information that is gradually provided. This aspect is clarified by OpenAI itself which, however, grants the user the possibility of setting the system in such a way as to disable learning at the time of its use; cf. urly.it/3zx4j.

[76] As already outlined, ChatGPT is trained using a method called unsupervised learning, where it learns from a diverse range of internet text. The training process involves exposing the model to a vast dataset containing parts of the internet, including websites, articles, and forums. The model learns to generate human-like text by predicting the next word in a sentence, given the context of the preceding words. This process is known as language modeling. According to the information provided by ChatGPT, Open AI uses a combination of human reviewers and automated filtering to curate and fine-tune the training data, aiming to create a model that is useful, unbiased, and safe.

reconstruction of the person's profile. These stem in part from the fact that ChatGPT is trained on information that is only periodically updated and all the information or contents created after this date are unknown to the machine: it means that ChatGPT may answer exclusively on facts that happened before 2022 and that the answers on specific persons (mainly public figures) could be imprecise, not taking into account events that happened in the last two years.

From a legal and data protection perspective, this can constitute a problem, since it could affect personal identity, providing users with partial or incorrect reconstructions of a specific person or context. For example, if we ask ChatGPT who the members of the current body of the Italian Personal Data Protection Authority are, the answer is correct, but the machine inserts, in addition to the existing ones, a fifth member, who in reality does not exist. Similarly, if ChatGPT is questioned about the identity of the members of the Authority, it states, for example, that Agostino Ghiglia, one of the four, is a former lawyer, when before being appointed to the DPA, he practiced as a journalist and was a politician, even though he also holds a law degree.

In addition to issues related to personal identity, the fact that AI machines are able to create texts that appear precise but in fact lack grounding in the real world could encourage misinformation. Frequently, users may not understand the difference between a search engine, which searches the information on the web and refers to a source of information, and a natural language processing tool (chatbot) like ChatGPT, which processes information scraped on the web, with the risk, already highlighted, of providing inaccurate data. This is the reason why, after the investigation of the DPA, ChatGPT (in its basic version) provides a warning to users, explaining that its training stops at 2022 and inviting them to consult other sources of information.

In addition to the issues described above, in the current operation of ChatGPT there could be a potential infringement of the principle of minimization, referred to in Art 5, para 1 (c) GDPR, which holds that it is necessary to process the least amount of personal data possible and these data must be 'adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed'.[77] However, compliance with the minimization principle could lead to a paradox. The possibility that ChatGPT returns complete results on an individual depends on the data used during the machine-learning process: the more data, the greater the precision in the biographical reconstruction of a person.

Furthermore, different issues arise if considered from different perspectives, and notably those of the users (data subjects) and of providers of the AI systems.

The first case perhaps is a non-issue, in the sense that, from a legal perspective,

[77] As explained by the UK Information Commissioner's Office, personal data processing must be: 'adequate – sufficient to properly fulfil your stated purpose; relevant – has a rational link to that purpose; and limited to what is necessary – you do not hold more than you need for that purpose'. On this principle see C. de Terwagne, in C. Kuner et al eds, *The EU General Data Protection Regulation (GDPR), A Commentary* (Oxford: Oxford University Press, 2020), 317.

the problem of the correct reconstruction of the identity of an individual may find a solution in the information requirements provided by the machine to the user. In other words, the DPA's provision does not require the result of the query to be exact, but that, on the one hand, the user is warned (as ChatGPT now does) that the information provided may not be complete, accurate, or, up to date; and that on the other hand, the data subject has the right to request the rectification of the personal information which is incorrect, pursuant to Art 16 GDPR.

Today, ChatGPT, when questioned about a person's identity, simply replies that their information is updated as of January 2022, inviting the user to check other and more recent sources of information. Probably, it would be appropriate for the system to add that some of the information provided may not be correct, in order to warn the user of the unreliability of the contents provided.

The second requirement, that data subjects be given the opportunity to request rectification of incorrect information, could mean that the system manager could be overwhelmed by millions of requests and be forced to correct the outputs of the machine. Rectification is a first-generation data protection right, included in Directive 46/95/EC, which allows data subjects to obtain 'without undue delay the rectification of inaccurate personal data concerning him or her'.[78] The boundaries of the right to rectification and of the right of erasure, contained in Art 17 GDPR, are unclear, in the sense that in the latter case the data controller is expected not to modify the information, but to delete it, while, in the case of the rectification, the information should be modified or updated following the request of the data subject.[79]

In the case of ChatGPT which is the right that the data subject may exercise? May I have the right of not being mentioned by an AI machine in its answers or may I only ask for the rectification of the incorrect information? If limited to ChatGPT, the answer is partially contained in the system itself, in the sense that the chatbot does not provide answers related to non-public figures.[80] In contrast, in cases of public figures, as already mentioned, the sentence starts with a warning 'As of my last knowledge update in January 2022'.

The exercise of the right to rectification, after the intervention of the Italian DPA, which required ChatGPT to inform users about its potential mistakes, seems to be a minor concern at the moment. In particular, as argued by some technology scholars, the exact deletion of personal data, especially in real-time, is hard to

[78] V. Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2009).

[79] J. Ausloos, The Right to Erasure in EU Data Protection Law. From Individuals Rights to Effective Protection (Oxford: Oxford University Press), 97.

[80] Generally, ChatGPT answers as follows: 'If John Doe is a private individual or someone not widely covered in publicly available sources, it might be challenging to provide detailed information. If there are specific details or context you can provide, it might help in giving more accurate information. Alternatively, you can check the latest online sources or databases for any recent developments related to John Doe'.

achieve and the suggested solution is that of the approximate data deletion from machine learning models,[81] which should be less time-consuming even if not totally complying with the provisions of Arts 16 and 17 GDPR.[82]

Furthermore, it is necessary to consider the profile of the falsity of the information provided and the possible liability of the platform operator.

In other words, it is necessary to separate two levels, that of the administrative sanction for unlawful processing of personal data from that of liability for false information. As noted above, an individual could ask ChatGPT to rectify information concerning him or her, pursuant to Art 16 GDPR and, according to the requirements of the Italian DPA, ChatGPT or another chatbot operator would be obliged to rectify the information provided as the output of a user's query. If, for example, I ask ChatGPT about who a public figure is, the latter may request rectification, in case of inaccurate information, or integration, in case of incomplete information. If ChatGPT does not comply with the data subject's request to rectify or erase some data, then the data protection authorities could sanction it with administrative fines.

In the latter case, the chatbot operator cannot be held responsible if the information is defamatory. In a scenario where ChatGPT claims that a public figure has committed a certain act, and that act represents a circumstance injurious to the honor or reputation of the public figure, intent on the part of the chatbot operator would be required. In the past, courts have dealt with cases involving suggestions from search engines. Despite some uncertainties, in most cases, the defamatory nature of the association between a person's name and certain criminal offenses has been excluded when facilitated by artificial intelligence, given the lack of an intention to harm the honor and reputation of that person. The same reasoning might be applied in the case of ChatGPT, where, not considering the cases of machine hallucination, information is provided to users automatically, without any human selection, such that it is impossible to attribute direct and malicious liability to the software programmers or to the managers of the chatbot.

IX. Age Verification and ChatGPT

The last aspect considered by the Italian DPA concerned age verification and the possibility for ChatGPT to limit its usage to individuals older than the age of sixteen years. As mentioned above, the Italian DPA had already taken action in this regard with respect to TikTok, by imposing more severe measures aimed at

[81] Z. Izzo et al, Approximate Data Deletion from Machine Learning Models, in Proceedings of the 24 the International Conference on Artificial Intelligence andS tatistics (AISTATS) 20210, San Diego, PMLR:Volume130.

[82] It is questionable whether AI based on machine learning is capable of erasing personal data (moreover, the data used for training is not recorded by the machine), see on this aspect 'We Forgot To Give Neural Networks The Ability To Forget', Forbes, 25 January 2023.

checking the age of the users.

Currently, Italian regulations do not explicitly require service providers to conduct specific age verification investigations, and generally websites rely on disclaimers through which users declare themselves to be of legal age.

In a comparative perspective, the English experience could show the difficulties in regulating these aspects. In UK, recently a controversial legislative provision has been adopted, named the Online Safety Bill,[83] which has introduced new obligations for tech platforms to prevent minors from accessing pornographic contents. The English law has garnered significant criticism, which can be summarized into three distinct strands: freedom of speech; privacy; and punitive measures.

Regarding the first aspect, critics have highlighted the fact that the Secretary of State and Ofcom[84] will have unprecedented powers to define and limit speech, without scrutiny by legislative bodies, potentially leading to a chilling effect on the quality of content transmitted online.

Additionally, the law imposes byzantine requirements, especially in the light of the guidance approved by Ofcom for the implementation of the specific measures to be adopted.[85] These costly measures, coupled with very high (including criminal) sanctions, could particularly deter startups, creating a competitive advantage for big tech firms, which are the only ones in a position to bear the transactional costs related to the implementation of these measures.[86]

Finally, the most challenging aspect concerning user privacy revolves around the potential obligation for platforms and internet service providers to monitor content exchanged among individuals. In fact, the Online Safety Bill undermines the core principle of the e-commerce directive (specifically, Art 15, Directive 2000/31/EC), stating that internet service providers are not liable if they have a merely neutral and technical role. For instance, according to some scholars, instant messaging services like WhatsApp or Telegram might be required to monitor user conversations to ensure there are no violations concerning minors.[87]

Similarly, following Ofcom's guidelines, it seems that a user might be compelled to prove their legal age by registering their identification document (eg driver's license, ID card, passport) to access an online service. This choice raises several questions about data collection, especially when it pertains to sensitive information such as sexual preferences (as in the case of adult websites), potentially leading

[83] On the long and widely discussed legislative process of the draft bill see V. Nash and L. Felton, 'Treating the Symptoms or the Disease? Analysing the UK Online Safety Bill's Approach to Digital Regulation', 2023, available at SSRN: https://ssrn.com/abstract=4467382

[84] Ofcom is the UK's communications regulator, with competences on TV, radio and video on demand sectors, fixed line telecoms, mobiles, postal services, online services.

[85] See Ofcom, Implementing the Online Safety Act: Protecting children from online pornography, 5 December 2023.

[86] See M. Lesh and V. Hewson, 'An Unsafe Bill: How the Online Safety Bill Threatens Free Speech, Innovation and Privacy, Institute of Economic Affairs Monographs' *IEA Briefing Paper*, 22 (2022) available at SSRN: https://ssrn.com/abstract=4172955.

[87] M. Lesh and V. Hewson, n 86 above, 10.

to discrimination, extortion, or other illicit behaviors. Similarly, the recourse to payment tools like credit cards does not seem more convincing either, as other documents would still be supplemented to provide age verification.

These major criticisms, however, seem less relevant in the context of chatbots. Firstly, at the moment, there is a limited number of operators like ChatGPT, and they have significant financial resources. Obligations could be tailored to the size of the provider, as held in the DSA with VLOPs (very large online platforms), imposing identification requirements only on the largest ones and preventing barriers to entry for smaller operators. Secondly, biometric authentication systems that do not store user data could be used: there are operators in the market who identify the user's age using artificial intelligence systems without storing the facial points used for biometric identification on servers.[88]

X. Final Remarks

In conclusion, aspects related to data protection seem ancillary in the debate concerning the development of generative communicative artificial intelligence. However, when ChatGPT was launched, GDPR was the only common legal source applicable to it. Currently, as also evidenced by the provisional text of the Artificial Intelligence Act, the focus is on issues involving social control over citizens through mass surveillance systems, behavioral manipulation or emotion recognition, leveraging AI and biometric technologies. While the EU's AI Act is still in the works and its latest version is not yet available to the public, it seems generative models such as chatbots are considered of limited risk. Thus, they would be subject to very light transparency obligations, such as the duty to advise users about any content generated by AI, as is already done by ChatGPT.

On the contrary, the threats arising from this new technology are multifold for individuals and societies, related to AI's pre- and self-training, text generation, and communicative power. The main concerns arise from the increasing agency demonstrated by AI and the interaction ability with humans. Regrettably, the AI Act considers artificial intelligence systems just as products and not as agents, stressing the risk-based approach.[89]

Moreover, analyzing the latest agreed version of the AI ACT, only non-European companies are obliged to monitor the development of their AI models and their impact on fundamental rights. The legislation thus sounds as a kind of protectionist policy promoted by European institutions, disguised as protection of fundamental rights. The renowned Brussels effect has raised a wall of protection of the values

[88] T. Sica, 'Dati biometrici, tutela del singolo e opportunità di mercato' *Diritti comparati*, 965 (2022).

[89] A. Mantelero and F. Fanucci, 'Great Ambitions. The International Debate on AI Regulation and Human Rights in the Prism of the Council of Europe's Cahai', in P. Czech et al eds, *European Yearbook on Human Rights* (Cambridge: Intersentia, 2022) 225.

enshrined in the Charter of Nice,[90] including data protection, by creating a safer digital place for all EU citizens who are users of digital services. However, in this sector, there seems to be a general feeling is that Europe, instead of fostering innovation and competitiveness, is confronting its lagging behind US and Asian countries (especially China and Korea) by preventing the invasion of technologies produced (and controlled) by third countries.[91]

However, it is necessary to be careful not to fall into the competing narrative. The interventions of the DPAs have raised many criticisms, as it has been argued that these provisions would hamper innovation and amplify disadvantages faced by European companies, who will be unable to use these artificial intelligence systems for further development. Theoretically speaking, law is aimed at selecting the interests that a given society is willing to protect. Europe has chosen to prioritize the protection of personal data over the uncontrolled development of technologies based on the liberal dogma that the market sets the rules. In the European constitutional tradition, human dignity takes precedence over liberty, consumers are protected from aggressive business practices, and finally, while the AI industry has so far built the datasets for AI models by indiscriminately scraping the web, it will now be forced to limit the use of personal data and process it by filtering the information on which the machines are trained.[92]

It is time to try to find a way to educate people so that they are aware of the risk involved not only in using AI, but also in interacting with it. The law should be given credit for this educational function. Like the consumer-professional imbalance recognized in consumer law, there is an imbalance of power and capabilities between humans and machines. Therefore, declaring the ontological vulnerability of humans in any interaction with AI, making the concept of digital vulnerability a new macro-category in private law, and interpreting existing norms or drafting future ones on its basis could be the right legal tool to lay the foundation for a global digital law.[93]

[90] A. Bradford, The Brussels Effect: How the European Union Rules the World (Oxford: Oxford University Press, 2020).

[91] On this aspect, see G. Greenleaf, 'The Brussels Effect of the EU's AI Act on Data Privacy Outside Europe' 171 *Privacy Laws & Business International Report* 1, 3-7 (2021).

[92] O. Pollicino, Judicial Protection of Fundamental Rights on the Internet. A Road Towards Digital Constitutionalism? (Hart Publishing, 2021).

[93] On the relationship between data protection and vulnerability see G. Malgieri, *Vulnerability and Data Protection Law* (Oxford: Oxford University Press, 2023).

Essays

Law's Evolution and a 'Claim to Progress' - for a Philosophy of the History of Law

Massimo La Torre*

Abstract

The article aims at providing an attempt to reconsider the notion of evolution of law from a normative point of view and not from a functional or functionalist perspective. Evolution of law thus is disconnected from its possible roots in a Darwinian cosmology or in a functionalist or system theory of society. In such a perspective, evolution is rather interpreted as a punctual change (an improvement?) between two temporal sites. No grand '*Weltanschauung*' should here be presupposed. On the other side, law is considered as a historical practice and a normative concept that is projected towards a better state of affairs than the present one. In a legal decision there is embedded an intrinsic claim to progress: after the decision the world should be a better one that before it. In a sense, one might speak of an utopian projection of law. This however is not based on any thick philosophy of history, or on any history that could as such offer us a philosophy or a sense to itself. History is hardly a '*magistra vitae*', though it could perhaps be thematised as the case-law of morality, its 'jurisprudence'. The progress-inherent force of law could indeed be traced back to its performative character. Law - as Robert Alexy claims - has an intrinsic claim of correctness and justice. Now, the paper tries to show that such claim drives the law into a likewise pragmatically founded claim to progress. Evolution comes to light in the claim to progress. The phenomenology of law might thus be viewed as a practice aiming at what appears normatively better than a past situation, from which legal practice progresses and must come to terms with.

I. Preliminaries

The aim of this essay is to reconsider the notion of the evolution of law from

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I wish to dedicate this essay to Professor Günther Teubner, my *Doktorvater*, with gratitude.

a normative point of view and not from a functional or functionalist perspective. The discourse on the evolution of law is thus made independent from a finalistic, or teleological, *Weltanschauung*, from an intrinsic design of history, or a Darwinian cosmology, or from system theories, or else from long-time functionalist learning processes. In the following pages, the evolution of law is on the other hand interpreted and investigated as a timely *molecular* change, that is, as a progression and improvement, between two specific temporal coordinates. To this end, no Grand Theory as such is employed; no teleology inherent to human nature or to the history of society is placed under discussion. There is no 'immanence in becoming' no Heideggerian *Geschick*, no 'destiny of the Being', and certainly no 'Providence', in the events of history other than those brought about by the actors therein involved.

Nor is there any form of rationality inherent to human action that cannot be fathomed by discursive reason and that can thus be termed as being entirely unintentional, *à la* Hayek.[1] After all, law is assumed as a historical practice and normative concept that from such practice can be inferred. The phenomenology of law might thus be viewed as a practice aiming at what appears normatively better than a past situation, from which legal practice progresses and must come to terms with.

Intrinsically embedded in a legal decision - and therein lies the key thesis of this research - there is, as a performative condition of 'felicity'[2] the claim that that decision produces an 'improved' normative state. Following that legal decision, or legal act, the world of law has presumably 'progressed' with respect to what it was prior to the making of that legal decision, or legal act. Implicit in the legal decision is - I would argue - a 'claim to progress'. What we have here is a sort of utopian projection of a juridical phenomenon. This temporal progression is what makes sense, and allows, the conditional relation we find in a legal rule that is commonsensically structured in a previous 'fact' and in a following 'effect'. Whereby the relation is constituted by the rule, but nonetheless is required by the demand that is emerging in a fact asking for a specific legal consequence. This is to meet those interests that are revealed through that specific fact. There must be a basic congruence between that fact and that following consequence, a congruence that cannot be just arbitrarily construed and decided through the legal rule.[3] Otherwise, the rule would be unreasonable, and more often than not,

[1] On this topic and more broadly on the paradigm of legal evolution, I turn your attention to the research by M. Barberis, *L'evoluzione del diritto* (Torino: Giappichelli, 1998). The study on this same topic by N. Luhmann, 'Evolution des Rechts', in Id, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (Suhrkamp, Frankfurt am Main, 1981), continues to be authoritative.

[2] J.L. Austin, *How to Do Things with Words* (Oxford: OUP, 2nd ed, 1976). Cf. also E.D. Elliott, 'The Evolutionary Tradition in Jurisprudence' 85 *Columbia Law Review*, 38-94 (1985).

[3] See A. Falzea, 'Efficacia giuridica' *Enciclopedia del Diritto*, (Milano: Giuffrè, 1965), XIV, 19-25. Now also in Id, *Efficacia giuridica. Con uno scritto di Rodolfo De Stefano*, edited by P. Falzea and M. La Torre (Soveria Mannelli: Rubbettino, 2024), 74 (*forthcoming*).

invalid and ineffective.

This thesis, though, is not grounded in any way on a compact or solid philosophy of history, or on a certain conception of history, that as such offers a view or understanding that is sufficiently and globally meaningful to those intelligent enough to perceive it. History can hardly ever emerge as *magistra vitae*, although such an ambition could possibly, and more modestly, be formulated as a sort of 'jurisprudence' of morals. Historical events can be interpreted and used as precedents, whenever we have to face a new event that forces us to take a moral stance and decide about a distinct course of action. However, the history of 'precedents' can never be really binding.

The 'progressive' force of law could be outlined as one of the traits of its performative context - herein lies the gist of the essay. While Jürgen Habermas and Robert Alexy teach us that law contains an intrinsic claim to correctness, or rightness, which then can be held and made more explicit, once universalized, into a claim to justice, the aim here is to argue that the claim to justice of which the law is thus the bearer might be developed and articulated on a further claim - a claim itself pragmatically founded, which is the 'claim to progress'. Doesn't it become possible to postulate a teleology, an 'end of history', for law not only in terms of the material progression of events, facts, and actions, but also in terms of normative progression? In this light, by the way, law might be permanently thematised as 'modern';[4] a possible 'post-modernity' would but be a further step of 'modernity'.

II. Evolution in Law and Morality

It may be conjectured that the evolution of law is a notion in many ways inherent to the perception and conceptualisation itself of the phenomenon of law, indeed as a feature that could represent an additional distinctive trait of law with respect to morality. It could be stated that the registration or, better still, the claim that something is law, that a certain situation is legal and therefore linked to a certain claim to correctness and justice, implies that the qualification of something as legal marks a 'progress' with respect to a previous stage which is not law and not legal, or not yet fully law and legal. Thus, viewing an event as law may indeed be perceived or considered as 'better' than when that qualification is absent or controversial. That there is the right to this right is a progress with respect to the past when that right did not exist or was still not definitively acknowledged as such. Law is marked and defined by a specific localisation and even more so by distinctive temporal coordinates. *Tempus regit actum*: law is traditionally seen as the outcome of a deed or a series or sequence of deeds as occurring and above

[4] On the issue of 'modernity' and its incompatibility with 'the end of history', see C. Castoriadis, 'L'epoque du conformisme généralisé', in Id, *Le monde morcelé. Les carrefours du labyrinthe* (Seuil: Paris, 1990), III, 13.

all changing in time and bringing about a series of legal consequences.[5] Law is indeed exposed to transformation in time.

The same, though, could not be said of morality. If an action or a situation is declared moral or aligned to morality according to a performative register, it would certainly be implicit in such an affirmation that it is better than the action or situation that is in contrast with morality. What cannot similarly be said is that it is a 'progress' with respect to an 'immoral' situation or action. At least not a progress in a temporal sense. And, because the situation or action was moral in the first place, from the beginning, in the sense that the source of the moral qualification is not something new. If it were new, thus changing, doubt would be cast on its universal and permanent validity. If torturing an innocent - and someone guilty, for that matter - is immoral today, it was just as immoral yesterday. It is immoral at Guantanamo and in the case of Marcus Gäfgen, and similarly immoral in the case of Henri Alleg, tortured in the prisons of the French paratroopers in the Algeria in the 1950s.[6] 'Rien ne permet de croire que la morale ait jamais changé' - Simone Weil says.[7] The moral, or immoral, act escapes time; it shies away from time. Universalisation, which is the engine of ethical judgement, shatters temporality, overcomes it. Or takes no heed of it. On the contrary, law is fully placed and makes only sense within time and space. Its universalizability is temporally and spatially circumscribed.

It thus becomes difficult to talk about the progress of morality, its movement in time, unless we are not talking about 'positive morality', the morality of a dominating social group which is placed and effective within a given space and time. If morality is and must be a sum of regulative, not constitutive rules, the latter being only meaningful in time and space, and at the same time it endows itself with counterfactuality (a quality present in its characteristic attempt to become universal), morality does not represent a progress with respect to a previous state. Simply because a previous state of morality is not here normatively meaningful. There is neither ontic nor deontic novelty here, as Kurt Baier points out, outlining then morality's distance from positive law: 'It is nonsense to say, 'Yesterday God decreed that killing shall no longer be morally wrong' or 'The moral law against lying was promulgated on 1 May. Morality therefore cannot be any sort of law'.[8]

This is clearly different with law. Law requires factuality. Although it aspires and claims to be normative and, in some instances - at least according to a few doctrines - to be justice, law makes sense exclusively within the domain of facticity. Although

[5] See M. Bretone, *Diritto e tempo nella tradizione europea* (Roma-Bari: Laterza, 1999).

[6] See H. Alleg, *La question* (Paris: Éditions de Minuit, 1958). On the issue of torture and the feasibility of its morality and legality, cf M. La Torre and M. Lalatta Costerbosa, *Legalizzare la tortura? Ascesa e declino dello Stato di diritto* (Bologna: il Mulino, 2013).

[7] S. Weil, 'Refléxions sur l'hitlérisme', in Id, *Écrits historiques et politiques* (Paris: Gallimard, 1960), 41.

[8] K. Baier, The Moral Point of View. A Rational Basis of Ethics (New York: Random House, 1965), 88.

it may have a strong normative purport, law does always have a beginning and an end; it is 'promulgated', or originated, has a 'source' that is a social given, and exists in time. It is then derogated, abrogated or disused after time. Likewise, contracts and the rights they imply or produce, a specific practice of law, are constituted, modified, and terminated in time. Moral obligations, and rights, are not subject to the same ruling of time.

And law, of course, is a construct of norms or rules. And these, unlike 'habit' - as Herbert Hart reminds us - are forward-looking, they look ahead to the future.[9] Lon Fuller tells us laws are, or must be, 'prospective', for a legal system exclusively based on retroactive norms would evidently be absurd.[10] Legislation - Hart insists - would be best understood by casting aside the coercive command model, comparing it instead to a promise,[11] or to commitment.[12] Promise and commitment clearly contain within them a temporal dimension pointing to what will be; both generate strong expectations for a future event. The time component is very significant in the sphere of public life. If there is no progress, there must at least be *durée*, projection in time, which alone can offer that degree of stability in terms of expectations that can make an institutional practice possible.[13]

We might conceive progress in the moral sphere, in so far as we deal with the learning of moral rules by people and possibly by societies too. But it the access to those rules that is posed to time transformation, not the rule themselves, which is instead the case of law. In the law the progress is inherent to its rules and acts; this is not allowed to a morality that is permanently subject to a requirement of universality.

III. Law as a Progress

Law is the product of a rift that is overcome with a forward leap. Law is progress. Or, at least, that is how it is theorised by the classics of political and legal philosophy. According to an initial model (corresponding roughly to Aristotelian but which is recurrent in Greek and Latin political thought as well), law is the outcome of a society fulfilled, accomplished. It is achieved through the formation of a group of families and their amalgamation into a more complete and self-sufficient organic unit. It is the outcome of the agora and its public nature, not of

[9] Cf H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 2nd ed, 1997), 58.

[10] Cf L.L. Fuller, *The Morality of Law*, revised edition (New Heaven: Yale University Press, 1969), 53. The opening up to the future of legal norms is therefore interpreted by Lon Fuller as one of the eight requirements of law's 'inner morals'.

[11] 'This is the operation of a 'promise' which in many ways is a far better model than that of coercive orders for understanding many, if not all, features of law' (H.L.A. Hart, n 9 above, 43 in italics).

[12] 'An element of commitment by the lawgiver is implicit in the concept of law'. L.L. Fuller, n 10 above, 216.

[13] See H. Arendt, *Vita activa oder Vom tätigen Leben* (München: Piper, 18th ed, 2016), 68.

the home and its private nature. Law is had 'among private individuals' but not in 'private'. This is pointed out by Hannah Arendt when she recalls that *lex* has its etymological root in *re-ligare*, in the idea of reconnecting, of putting in relation.[14] You can oblige only those who can be obliged, and you oblige yourself only if you have a relation with those you are obliging yourself to. The occurrence of a relationship between private individuals thus postulates a venue that is shared by the private individuals who are related to each other and is, at the same time, removed from the proprietary and patriarchal disposition existing in the private sphere.

'Themis' would appear to have the same root as 'domus': justice is a house; justice requires a house and can be had (only) within it. It is a space, an ambit of action, an intra moenia. But the 'house' in turn, refers to justice, to the 'city', where everyone has his due unlike the patriarchal family where everything is due to the One who is the *pater familias*.

The grouping of families in the city allows one to exit the family and to build an independent space, a space higher than the family itself. And it is in this space that law is generated. Just as the politician is not a father or a shepherd, nor will the lawmaker be either. In such a way that, by proclaiming that there is no such parenthood or consanguinity with the families that make up the city, he is often a stranger. Law is the gift of the stranger - of his alienness - to the natural dimension where the family continues to be grounded, that very family that continues to be the centre for the reproduction of the vital cycle of human beings. Economy continues to dwell in the house; politics, through law, distances itself from it. The law of the human beings who are citizens is essentially conventional, not natural. Law is possible and viable in the progress from the house to the agora. Law lies in just this progression. Its development lies in its becoming, in its being enforceable as a value.

Natural law, it would appear, has put this crucial progression under scrutiny. And this may well have been if we were to go by Thrasymachus who shouts out to Socrates that justice is merely what is most useful to the strongest, or if the cruel sentence passed down by the Athenians to the citizens of Milos had emerged as a principle of international law, according to which the weaker must succumb because that is how it has always been in nature. But the sentence that ultimately decrees the demise of the Melians indicates that there is no law between cities and peoples to enforce but merely force to wield. There are no walls that protect friends or foes within, that protect cities at war, armies in battle. Yet, the analogy between war - generally an all-out war - and politics cannot be upheld. For natural law, which is the law of the strongest, applies not only in the former but also in the latter.

As thus far presented, one could object, natural law looks very much like a

[14] See H. Arendt, 'What is Authority', in Id, *Between Past and Future. Eight Exercises in Political Thought* (New York: The Viking Press, 1968), 121.

gross deformation or a caricature of authentic and genuine law of nature. On the contrary, it is of an altogether different nature: natural law serves to defend the weak, not the strong. It foresees or preconizes compassion or mercy, not cruelty. It is a limitation; it is restraint, not complacency. It is the law bestowed upon us by a master or by a source higher than that of a lawmaker or judge. It is no longer a human and contingent product. It is *lex aeterna*, *lex divina*, that needs no written codes; it belongs specifically to human reason, to *natural lumen*. It manifests itself to all by means of the intellect and the nature of things.

Yet this kind of law still requires an additional pro. There is no medieval natural law philosopher who could discard determinatio. The rule of natural law continues to be cognitively underdetermined; it is vague and ambiguous and much too vulnerable (because it lacks positive sanction and secular power). In this light, although not imperfect, it is still incomplete. It will be 'complete', only when *ius positivum* comes into play. Most certainly, the latter is not a normative progression with respect to the *ius naturale;* rather, it is its necessary aid, an institutional development that if missing would represent a serious pragmatic as well as moral flaw. In such a way, earthly authority, the sovereignty of the prince, would arise by natural law and be legitimised - as pointed out by John Finnis, a present-day Thomist law philosopher - solely because (scandalously, he seems to imply) it can impose its precepts by sheer force.[15]

This rift in the notion of progression - and the development that will ultimately complete and overcome it - comes back with even more potency in modern natural law, which breaks away from Thomist scholasticism. It returns and explicitly affirms itself at the time when history conceptualises itself as a process viewed as one which qualifies and gives meaning to the event.[16] This is exactly what Norberto Bobbio meant by the 'natural law model'.[17] In this light, what distinguishes the doctrine of law would not be law intended as a body situated above the prince, a law of nature, but a situation preceding that which is produced by law. Law impacts, drastically changing it, a condition where law is still absent: the natural state. Vico's 'ferine state' was not that different.

For Rousseau, too, the progress that comes with law is a fact, albeit still morally fragile. No matter how idyllically he may present the natural state, and no matter how much he may insist that progressive civilisation, that the development of arts and crafts, are but a corruptive element of the original condition of innocence of man, the evolutionary leap of law is not really cast in doubt, not even by him. In fact, for Rousseau corruption and decadence occur in a process still underway within the framework of the natural, non-juridical, state, a process triggered by the division of labour and the specialisation of social functions. From this point

[15] Cf J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), 250.

[16] Cf H. Arendt, 'What is Authority' n 14 above, 63.

[17] See N. Bobbio, 'Il modello giusnaturalistico', in Id and M. Bovero eds, *Società e Stato nella filosofia politica moderna* (Milano: il Saggiatore, 1979), 17.

of view, the natural state has a primitive stage featuring the innocence of the *bon sauvage*, followed by a successive stage branded by the vice of egoism and the clash between subjects who have become hoarders of egocentric interests. '*Alors les choses en étoient déjà venues au point de ne pouvoir plus durer comme elles étoient*'.[18] It is only at this point, during this second stage, that there arises the need for a change, for an institutional exit from the domain of force - into which the state of nature had descended - to enter the domain of law.

In their fallen state of nature, human beings '*avaient trop d'affaires a démeler entre eux pour pouvoir se passer d'arbitres*'.[19] But this proto-legal situation, characterised by the presence of an arbiter or judge - in itself a progression - occurs *de facto*; it is a *fait accompli*, a further stage in the specialisation and development of the functions of arts and crafts. It is a situation that produces a primitive law, a law that under many aspects continues to be unjust, requiring a leap, a further progression. This, however, will not be irreflective or organic, driven by functional dictates, but ushered in an explicit or reflective manner, by means of a public deliberation. It is the social contract and the law as a general will.

In any case, it is only when one exits the natural state - a condition where there is no law, dominated by insecurity and force - that one can effectively speak about law. The sequence is nevertheless temporal, even when the natural state is but an instance in a mental experiment. And because law is, in this case, progress with respect to the natural state, it continues to be exposed to the risk of being pushed back because progress, evolution, may not be definitive. In any case, it is not necessarily the sign and the result of a teleological and evolutionary process, of a sort of temporal normative arrow. Evolution here occurs between two directly and comparable conditions where the unsustainability of the one paves the way to the sustainability of the other. Once within the civil state, progress drains, and it is difficult to see how it can reproduce itself. If anything, it could expand, for example, by transforming the relations between states into fully legal relations with the implementation in the international space of a civic condition.

In reality, the way legal history developed as envisaged by Vico does not differ significantly. From the 'ferine state' to the 'age of Gods', in which law is identified with the power of the strongest, and to that of the 'heroes' and the 'humans', it is a progression that besides reproducing the development of the human spirit - as manifesting itself initially as 'sense', successively as 'imagination' and finally as 'reason' - has been an accumulation of normative. In the 'ferine state', 'in the purported state of nature (that of the family), there being no empires of civic laws, the *pater familias* would appeal to the gods for the wrongs done unto them'. [20]

[18] J.J. Rousseau, 'Sur l'origine de l'inégalité parmi les hommes', in Id, *Du contrat social, Discours sur les science et les arts* (Paris: Union génerale d'éditions, 1973), 345.

[19] ibid 366.

[20] G.B. Vico, 'Princìpi di scienza nuova (1744)', in Id, *Opere filosofiche* (Firenze: Sansoni, 1971), 650-651.

In other words, as Guido Fassò pointed out, 'there still were no rules of conduct'.[21] In the 'heroic' age, legal experience was obedience to command and its strictest formulation, while justice intended as fairness would occur only in the 'age of men'. Progression occurs only between a stage where there is no law but only an appeal to the forces above (divine judgement) and a situation where there is law with a claim to justice (human judgement), 'where the truth of the facts is paramount'.[22] In between, there is an intermediate stage where normative is exclusively based on a claim to fairness (ordinary judgement) and the juridical order grounded on the rigorous management of the formal rule, on the 'maximum scrupulousness of the word'.[23]

Natural law, intended as a practice that is structured by way of the conceptual connection between positive and moral law, is the destination of this journey. That is what Jules Michelet, the great French historian and admirer of Vico, says: '*Jusque-là, il n'y a qu'un droit civil: avec l'age humain commence le droit naturel*'.[24]

IV. Law as Regress

But what if law, even while underlining a progression, proved to be, in any case, a defective or even perverse mechanism? What if the cost it imposed for the soundness and objectivity of the rules were too high and became unsustainable? And what if progress contained within itself the germ of its own ineluctable decadence? This appears to be what we are told by that philosophy which is least affected by the advantages and allures of modernity emerging from the rejection of the natural state. A law that is too conventional and contract-based now seems to be replicating very closely the relational dynamics and reciprocal dependence that were features of the natural state. Is law, then, too close, too dangerously close, to the condition that denied it and from which it had wanted to distance itself? To the extent that law, if it were to be real progress, must be in the condition to overcome and even deny itself.

Broadly speaking, what is being outlined here is the Hegelian-Marxist model. In this model, law is but a temporary progress that ultimately leads to its superseding and even extinction. We are aware that for Hegel law is the starting point of a path that must be objectified in morals before developing into an ulterior stage, ie, into the ethical dimension of the state. The state, according to this model, overcomes and reassembles law. And for Marx, as is well known, law lies ambiguously between the space of ideology and the factuality of political violence. It is a progress that should soon lead to something else - something that can highlight its shortcomings

[21] G. Fassò, Storia della filosofia del diritto, II, L'età moderna (Bologna: il Mulino,1968), 283.
[22] G.B. Vico, n 20 above, 656.
[23] ibid 654.
[24] J. Michelet, 'Discours sur le système et la vie de Vico', in M. Gauchet ed, *Philosophie des sciences historiques. Le moment romantique* (Paris: Seuil, 2002), 217.

and sanction its absence.

Alexander Kojève affirms on the basis of Hegel's *Phenomenology of the Spirit* that law is generated in the Master and Servant dialectics, *Herr* and *Knecht*. Human evolution is grounded on the struggle for acknowledgement. In this struggle, someone wins, and someone loses. The winner becomes the Master and the loser the Servant. But the Servant has stripped himself of humanity by accepting the absolute domination of the other in exchange for his life. For the Master, the mere acknowledgement of the Servant is not enough, having stripped the Servant of his autonomy and dignity. Acknowledgement is meaningful only if it comes from a source of dignity. And a slave is no such source of dignity. Law arises in this struggle and in dialectics. However, law in the beginning is the privilege of the Master; it is law only in power and not in act, for the Servant is not in a position to recognise and realise as being valid and legitimate. That law must be contested and overcome if it must be realised and meet its claim to legitimacy. '*L'histoire du Droit est donc le passage du Droit de la puissance à l'acte*'.[25] For Kojève, the process leads to the figure of the Master and the Servant to that of the Citizen, and law will occur only at the end of history intended as Universal Imperium.

It should therefore not be taken for granted that modern philosophic tradition would lay its hopes on positive law. The evolution it traces often boils down to an absence that needs to be filled. The critical attitude is often turned into a thrust towards the plurality and variableness of legal positivity, in turn countered by a specific theoretical move which is that of reinterpreting, more or less optimistically, law as a general form, finally conceptualising it as a structure from whence individual rights originate. If law wants to avoid exposing the risks that are inherent in its nature to mercantile corruption and authoritarian meddling, it must rise once again as an aggregate of rights, or as a 'form' implying subjective rights. The development of law will thus be the progress of rights.

Nevertheless, the passage from right in the singular to rights in the plural, from objective to subjective law, is somewhat problematic at least when considered within the very modern paradigm of legal positivism. It is for this reason that law is essentially command and prescription. Law is here conceived imperiously, in such a way that it becomes conceptually and practically extremely difficult to derive from it spheres of liberty and autonomy for the recipients of these commands and prescriptions. As a result, starting from Bentham, including John Austin and Georg Jellinek, all the way to Hans Kelsen or Alf Ross, positivist theories have focused on attempting to marshal the notion of subjective right and to reduce it - as programmatically affirmed by Hans Kelsen - to objective law.[26] Rights are not, in this case, a progress but probably only an illusion or a mutation that can have a dangerous impact on the legal system as a whole and its claim to be in charge and

[25] A. Kojève, *Esquisse d'une phénomenologie du droit* (Paris: Gallimard, 1981), 133.

[26] On this topic, see M. La Torre, *Disavventure del diritto soggettivo. Una vicenda teorica* (Milano: Giuffrè, 1996).

in control. While rights multiply the normativity of the system, they reduce the ability to exercise control at a central level inasmuch as they refer to the autonomy and self-certification of the rights holder. However, *auctoritas, non libertas facit legem*, besides *non veritas* (for the legal positivist).[27] Truth and liberty are obstacles to the smooth running of the modern machinery of positive law, and rights must refer to both to be exercised.

Law is only authority and sovereignty as a factual power from a somewhat external point of view, that is, from the point of view of subjects who are not involved as the participants of a common practice. If we analyse law as a series of material acts or positive orders, the subject who stands out as the key figure is the author of those material acts, ie, the lawmaker. It is on this figure that legal positivism focuses its conceptualisation of the legal practice, which is in this case essentially a sequence of decisions. Those who do not decide but are nevertheless involved in the legal practice (lawyers) disappear from the theoretical radar of law. Yet the law is their concern, too. Clearly, it is the judge's concern, although in classical legal positivism the judge is essentially but a relayer of the lawmaker's precepts and that consequently - it may be affirmed - legal propositions are merely 'reiterated precepts'.[28] A 'reformed' legal positivism could in any case give a broader scope and stronger role to the judge, which is what Kelsen posits when he affirms that the judge is not simply 'the law's mouthpiece'. As we well know, for the Austrian jurist the judge is himself a producer of norms albeit covering a narrower spectrum. The judge, according to this view, produces 'individual' and not general norms, the latter being the laws.[29]

For Herbert Hart, the judge is the subject who is in some ways the paramount and 'creative'[30] figure, from an internal point of view, among those taking part in the legal system, among those who have legal title to the norms. Curiously, though, Hart reserves to the judge exclusively an internal point of view, affirming even contradictorily that parties in court and citizens (who are those who have legal title to the norms) are seen from an external point of view.[31] In other words, the judge sees law as a practice focusing in giving and demanding motives, while the common man - the citizen and, with him, the lawyer, who is in some ways his 'double' - actually adopts before the law a prudential approach. For both lawyer

[27] See U. Scarpelli, 'Auctoritas, non veritas facit legem' 75 *Rivista di filosofia*, 29-43 (1984).

[28] Cf U. Scarpelli, 'Le "proposizioni giuridiche" come precetti reiterati' 44 *Rivista internazionale di filosofia del diritto*, 465-482 (1967).

[29] See H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, re-edition edited by M. Jestaedt (Tübingen: Mohr Siebeck, 1st ed, 2008), 89-90.

[30] See H.L.A. Hart, n 9 above, 135-136.

[31] ibid 115-116. Hart is aware that a reduction of this kind in the ambit of the internal point of view means turning law into a radically authoritarian practice, or into a 'slaughterhouse' where citizens are sacrificed as animals: 'In this more complex system [in a system of primary and secondary rules], only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughterhouse. But there is little reason for thinking that it could not exist or for denying it the title of a legal system' (ibid 117).

and the citizen alike, the law does not speak with the language of obligation and even less so with the language of rights.

This way of portraying legal practice does not render it justice. Substantially speaking, legal practice is 'controversy', conflict between opposing parties, each one standing up for their grievances. Each party - and the lawyer representing them - demands that the law be applied, but they do so by invoking their rights. Law is thus applied by the mobilisation of subjective rights. The parties claim their own rights. Law in action thus appears as the 'right of rights'. And that is not all, for by demanding that their subjective right be acknowledged, the parties pretend to be in the right, to be right. It is what Ronald Dworkin[32] calls the 'rights thesis', which brings to mind the inescapable internal aspect of law characterised by the claim to rights and - even more significantly - by the *claim to be correct*, the claim to be within one's right, to be in the right, which inasmuch as requiring to be universal, gives rise to the *claim to justice*.[33]

The right of rights is thus anything but self-sufficient or exhaustively contained in itself; it is, on the other hand, consigned to a dimension of morality: the claim to be in the right, the claim to fairness and justice. The right of rights exits the formal and systemic enclosure within which legal positivism wished to circumscribe it, repositioning itself in the area of solid normativity - that very same area some believed had been left behind once the road to the legal state had been paved. Once, that is, the state of nature had been abandoned and the situation had come to be governed by positive law. For that is indeed how this evolutionary passage has been conceptualised, as an overcoming of counter-facticity and strong normativity and as the upholding of facticity and positivity. But in the right of rights (that which best reflects the phenomenology of the legal practice intended as controversy), the very essence of law is its moral projection, the required and not contingent overture to moral thought.

The evolution to positivity does not exempt us from making considerations on the criteria of justice and morality, so that a further passage is required which, nevertheless, cannot be the denial of the deliberative and institutional practice and the mere reliance, once again, on the counterfactual situation. The overture to the moral dimension occurs and remains within the institutional framework. There is no return to the 'state of nature'. The fundamental norm of law - especially in a constitutional state - is eminently constitutional, not regulatory; its aim is the generation of a new reality, not the regulation of a pre-existing reality. It is the 'constitutional moment' Bruce Ackermann speaks about.[34] Normative law has an ontic layout and impact that moral law does not have. There is in law a novelty that is missing in morality.

[32] See R. Dworkin, 'The Model of Rules I', in Id, *Taking Rights Seriously* (London: Duckworth, 1978), second chapter.

[33] See R. Alexy, *Begriff und Geltung des Rechts* (Stuttgart: Alber, 1992).

[34] See B. Ackerman, *We the People, Foundations* (Cambridge: Belknap Press, 1993), I.

The novelty in the evolution of law lies also in its progressing without too many breaks and disruptions, like a series of cases and decisions that follow the narrative flow almost as if they were the chapters of the same, unfinished, novel - a novel that is continued whenever a new controversy arises and is solved. The decision must present itself as the ring of a chain, like the continuation of a story, that hinges on an issue of justice where it is the story as a whole - the story intended as the process and progress of events - that gives meaning to every legal decision. In a nutshell this is what Ronald Dworkin says in his hermeneutical and coherentist reconstruction of legal practice.[35]

In jurisprudence, the projection is once again evolutional. It is a proceeding towards the ideal sense of juridical practice. It is, as Dworkin puts it, 'the pressure of law beyond law'.[36] The norm is intended, explained, and applied in consideration of its contribution to the ideal form of life, of legal cohabitation and condition; that very same ideal that justified and motivated the exit for the 'state of nature'. The norm is its *sense*; and its sense must be set against the background of the driving idea and the 'utopia' of the corresponding form of life.

V. Evolution and Legal Theory

The evolutionary model is also at the base of some key influential law theories. The notion that law must be explained as a progress from a previous situation of normative incompleteness occurs not only in modern natural law but also in some of the most influential doctrines of legal positivism. Law is the outcome of an evolutionary leap, claims John Austin, the founder of 'analytical jurisprudence'. Hans Kelsen says it in his own way as does Herbert Hart even more explicitly. In Austin's theory, law is outlined and conceptualised against the backdrop of a situation defined as 'positive morality', where the presence and functioning of a centre of autonomous power is yet to be crystallised and where there are yet no differentiations in terms of specific functions (as in the case of deliberation and enforcement of sanctions).

Considering his cultural background, Kelsen would appear to be reasonably immune to all evolutionary temptations. Yet even for him, positive law is the result of an evolution, where progression starts from an underdetermined normative system, heading to a more developed one. It is the shift from what he calls a 'static' to a 'dynamic system'. In a dynamic system, normative production - as is well known - concerns but specific organs to which the corresponding competencies are attributed. The system is dynamic because it is the outcome of a development, of a progression from previous norms. And it is a creative progression because it is not envisaged in the previous and higher norms. The norm signals a 'leap' with

[35] See R. Dworkin, *Law's Empire* (London: Fontana, 1986), 228.
[36] ibid 407-408.

respect to the norm from which it derives. In the 'static' system this leap does not occur; here there is no progress, because the norms already exist in the initial, previous, or higher norms. The successive and individual or concrete norm is only the logical consequence of the general norm. The temporary status here heralds no specific gap or progress.

Once a dynamic system is in place, Kelsen believes that system may be more or less advanced. Such a system is constituted when there is an organ that decides on the application of the norms. The judge is the primary organ that allows for the technical emergence of the 'dynamic system', therefore, of positive law. The latter will perfect itself successively when, following the rise of the figure of the judge, there successively develops a legislation of sorts as well as a centralised sovereignty or at least one that can be conceptualised as such. Thus, if for Austin international law is still merely a form of positive morality, failing, therefore, to achieve the full dignity of law,[37] for Kelsen it is to all effects positive law albeit still 'young' and developing and notwithstanding the various forms of judiciary or jurisdiction involved. International law, Kelsen says, is true law. Once a form of jurisdiction is in place, Kelsen is confident there will be a further evolutionary leap that will develop and institutionalise the normative structure that had been established in the first place through a legal procedure.[38]

Kelsen is here once again indebted to natural law and, more specifically, to Kant's interpretation of it. For the philosopher from Konigsberg, it is the demand to take recourse to a judge that drives the shift from the natural to the civil state. Subjects need their rights to be publicly and impartially acknowledged: '*Da sie sich einander nahe sind, so kommt jedes Recht dem des anderen in Weg. Sie bedürfen Richter*'.[39] It is therefore the activation of the legal function that sets in motion the evolutionary stage of law.

With respect to Kelsen, Hart is by far more sceptical about the legal value and qualification to be ascribed to international law.[40] For Hart, there is still no such thing as a rule of acknowledgement, that is, a practice or series of practices, from which it would be possible to assume the rule establishing its belonging to the legal system and, therefore, the validity of the norm in question. Yet, Hart shares with Kelsen the view concerning the centrality of the role played by the judge - the judge intended as the institution that crystallises a law that is no longer primitive. For Hart, as is well-known, there is a primitive law consisting exclusively of primary norms - norms of conduct - and a fully-developed law, an advanced law, where

[37] See J. Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicholson, 1954), 142.

[38] See for example H. Kelsen, *Peace Through Law* (Chapel Hill: University of Carolina Press, 1944).

[39] I. Kant, 'Ausgewählte Reflexionen aus dem Nachlass', in Id, *Schriften zur Geschichtsphilosophie* (Stuttgart: Reclam, 1980), 236.

[40] Scepticism that is expressed, as is well known, in the tenth chapter of *The Concept of Law*.

the primary come with the secondary norms.[41] The latter include the so-called norms of 'judgement', that is, the norms that establish jurisdiction, the procedure that ensures if the primary norms of conduct have been observed or violated.

The rise of jurisdiction is, also in this case, the decisive moment in the formation of an advanced legal system. Although it would appear that for Hart, jurisdiction is not possible without two other secondary norms, the norm of acknowledgement (functionally not dissimilar to Kelsen's *Grundnorm*) and the norm of change (the norm that introduces legislative power in the legal system). The latter is a kind of norm that reconnects in a significant way positive law as an advanced system to its changeability, which is in a way something equivalent to the 'dynamicity' Kelsen has spoken about in his *Stufenbau* doctrine. According to Hart, law is positive and not primitive if endowed with norms that allow it to change, ascribing the related competences to a specific organ.

According to Hart, 'secondary norms' - those that attribute power, meta-norms, norms that generate norms - are those that make a legal system modern and not primitive. Their appearance is therefore an evolutionary acquisition. Their introduction as the constituent norms of legislation and jurisdiction, besides those 'acknowledging' law as a coherent legal system, 'is a *step forward* as important to society as the invention of the wheel'.[42]

The evolution of law, it could be said, is connected to the system's ability to reflect on itself. A normative system is juridical if it acquires a meta-normative ability; in other words, the evolution of law is a law that explicitly assumes as its task its own evolution. This reflective ability may be sharper, more radical, to the extent that the meta-norms could become the principles of norms. That is, the dynamicity or progressivity of law may refer to what the Austrian civil law scholar Walter Willburg said about the need to concretise legal measures through underlying principles when he indicated law as a 'bewegliches System', a 'mobile system',[43] introducing a position that Ronald Dworkin would successively develop more systematically.

But there is an exception: legal realism, at least that of the American kind. There is no claim to progression here, for two main reasons. In the first place, law is considered by the realist from an external point of view, the point of view of Oliver Wendell Holmes's 'bad man':

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside it, in the vaguer sanctions of conscience.[44]

[41] Refer to *The Concept of Law* n 9 above, 91.

[42] ibid 41, italics mine. See J.M. Finnis, 'H.L.A. Hart: A Twentieth-Century Oxford Political Philosopher' 54 *The American Journal of Jurisprudence*, 166, 161-185 (2009).

[43] W. Willburg, Entwicklung eines beweglichen Systems im bürgerlichen Recht (Graz: Kienreich, 1951).

[44] O.W. Holmes, 'The Path of the Law' 10 *Harvard Law Review*, 459, 457-478 (1897).

What prevails here is the point of view of the immoral or amoral subject who does not find reason for his action in his conscience but in the observation or, better, in the prediction of the consequences of his conduct and, therefore, in the negative consequences that law may cause him. Therefore, law is essentially the harbinger of negative material consequences, the giver of sanctions, pain, and sacrifice. Law is thus unable to make the situation which called for its application less miserable than what it was before it was enforced. From this point of view, the consequences produced by law, far from being a progress, is most certainly a regress, a cost, a loss.

VI. A Philosophy of the History of Law

It is not easy to find legal theory experts or philosophers who have specifically dealt with the philosophy of the history of law. I am aware of only two scholars who have tackled this issue explicitly in recent times: Gustav Radbruch and Gerhard Dulckeit, two German jurists. Since Radbruch is certainly more interesting, we will not deal in this paragraph with Dulckeit, a neo-Hegelian who trained under Julius Binder in the 1920s and 1930s.

Radbruch, is the one who interests us more in this venue. All but neo-Hegelian, he is considered as a jurist and legal philosopher who belonged to the German neo-Kantian school of thought that developed between the 19th and 20th centuries. Radbruch focused, *expressis verbis*, on the 'philosophy of the history of law' in both his principal philosophy of law studies, namely *Rechtsphilosophie*, the last edition of which was significantly published in 1932, and *Vorschule der Rechtsphilosophie*, the lectures he gave when universities reopened in post-Hitler Germany, which were published in 1946. In both these publications, a chapter is dedicated to the *Philosophie der Rechtsgeschichte*. As well-known, these two books are quite different: the former, *Rechtsphilosophie*, is wider in scope, more systematic and developed, while the latter reflects the pace and tone of lectures and is more apodeictical and concise. But there is a further difference between the two works.

Rechtsphilosophie upholds a neo-Kantian point of view. It is in many ways its paradigmatic application. And considering the type of neo-Kantian approach Radbruch adopts - the neo-Kantian thought that developed in the south-west, in Windelband - it boils down to the implementation of what is tendentially a non-cognitive metaethics. In this work, Radbruch is a metaethical relativist who draws ethical and political theses and legal theories from relativism. The second work, *Vorschule*, brings to light a kind of 'conversion' in which we observe the earliest formulation of the so-called 'Radbruch formula', according to which in the conflict between legal certainty, between positive law, and the demand for justice, certainty and law must prevail (in consideration of the prominent value of certainty). Except when the injustice generated by the application of the law is

so excessive as to be intolerable. It is a formula that, overcoming pre-war legal positivism, paves the way to a new normative perspective, the post-positivist perspective of a conceptual link - and therefore also pragmatic - between law and morality.

The tragic experience of the Hitlerian State was an eye-opener for the professor from Heidelberg, whom the regime had forced to retire. An ethical thesis, no matter how perverse, cannot be countered by a meta-ethical thesis if not at the risk of being argumentatively and existentially prevailed upon. Inapplicable is the argument - similarly upheld by Kelsen who was also a relativist - according to which, there being no certain truth in matters of values, all values must be respected, thereby justifying democracy. Thus, if a value cannot be justified and is, therefore, arbitrary, entirely relative, it is difficult to understand how it can be considered worth protecting. You protect something that has value, yet if that value cannot be proved, protecting it makes no sense. Indeed, we could insist that that is 'our' value, that it is a value 'we want', but there is no reason to respect it if it is absurd, evil, or perverse. Thus, in the absence of any justification or reason, what remains is persuasion with facts, regardless if they arise from rhetoric, from the manipulation of sentiments, or from force outright. If you cannot convince, you can still win. But you will have to rely on force so that, at the end, the strongest will prevail, although force may not always be right. Unless you rely on some Hegelian 'cunning of the reason' or some romantic 'normative force of the fact'. Which are not, however, the options taken by Kelsen or Radbruch.

Reiterating in 1932 what he had already said in a previous essay entitled 'The essence and value of democracy', Kelsen sustains that only he who believes to be invested by the Absolute, to be the new 'Son of God', can claim to be endowed with moral certitude, implying consequently that only a fool could pretend to have such divine or moral status. Unfortunately, as he was outlining these thoughts, the 'serpent's eggs' hatched, and the world found itself breathing air that had changed, and dealing with a new kind of people, led by a leader, the *Führer,* who believed he had been anointed by that certitude. Who believed was the very incarnation of that certitude. And against those abominable and aberrant moral theses, it was perfectly futile to affirm that those theses were unfounded. Against the Absolute, even when invoked in folly, there was little cognitivism and relativism could do. What can be affirmed instead was that those who stood against evil must have arguments that were unequivocal and universal, sounder, and stronger than those upheld by the great *Leader*. If you are unable to do so, your moral position is in danger.

In such a situation, I must be in the position to affirm plausibly the following: in defending democracy, I'm right, while you, in demanding dictatorship, are wrong. And, indeed, this *is true*. In wanting liberty, I am in the right, and you, in upholding slavery, are *in the wrong*. And this was something Radbruch realised during the tragic years under Hitler. Indeed, by 1945 his relativistic beliefs had

been deeply shaken. The Nazi regime had shown there was no truth in normative enunciations, now that they were rooted in absolutism. This led Radbruch to also abandon legal positivism - which was a derivation of relativism - and to opt for a relatively moderate and reflective form of natural law. This change was first outlined in the lectures he held at Heidelberg in the autumn of 1945 and in his *Vorschule*, the new 'Propaedeutic to the philosophy of law'. Now, what interests us here is to understand to what degree this change impacted Radbruch's position with respect to the philosophy of the history of law.

In *Rechtsphilosophie*, Radbruch starts his discussion on the philosophy of the history of law by pitting two doctrines against each other: *Allmacht der Rechtsform* ('omnipotence of the legal form') vs *Ohnmacht der Rechtsform* ('impotence of the legal form'). According to the first doctrine, the legal form finds little or no resistance in the *Rechtstoff*, in the stuff of law, in the legal matter, while in the other, *Rechtstoff* comes across resistance, a limit, to its 'form'. But let us clarify matters further.

By 'legal form', Radbruch intended the substantial content of the value of law, while 'the stuff of law' was the situation on which normative value applied, it was a kind of conduct by example. A paradigmatic version of the theory of 'omnipotence' was natural law, according to which the normative content would, in any case, emerge and shape positive law-making and *de facto* situations and chance. A characteristic doctrine of 'impotence' is, on the other hand, the German Historical School of Jurisprudence as set down by the likes of Friedrich Carl von Savigny.

According to this line of thinking, normative content is the outcome of historical contingency, of a *de facto* situation. Now, regarding the approach to the history of law, to its progress in time, it would appear that the 'omnipotence' doctrine tends to underestimate, to mitigate, change and transformation. According to this doctrine, 'legal form' is unaffected by and overcomes time. The opposite, on the other hand, occurs in the historicism as advocated by Savigny: law is subject to the constant flux of time and no immobility is possible considering that legal forms as well as regulations are determined by the contingency and mutability of events.

But a third option is viable, Radbruch tells us. This option in reality had already been outlined in Hegel's critique to Savigny:

Barbarians are ruled throught instincts, customs, feelings, but they do not have any awareness of it. Once the law is posited and know about, all that is casual is driven out from sentiments, opinions, from the forms of vengeance, compassion, and egoism, and in this way only the law gets its true determinacy and is acknowledged dignity [*Barbaren werden durch Triebe, Sitten, Gefühle regiert, aber sie haben kein Bewusstsein davon. Dadurch, dass das Recht gesetzt und gewusst ist, fällt alles Zufällige der Empfindung, des Meinen, die Form der Rache, des Mitleids, der Eigensucht fort, und so erlangt das Recht erst seine wahrhafte Bestimmtheit und kommt zu seiner Ehre*].[45]

[45] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (1820) (Frankfurt am Main: Ullstein,

Customary law does not have a basic feature of positive law in the shape of legislative acts; it misses reflexivity. When legal experience, intended as a primitive and unwitting vehicle of tradition and visceral sentiment, organises itself, especially when exercising the controversial struggle for law as outlined by Jhering, must be able to put on the line the 'legal form', the reflective normative regime, in such a way that it cannot be dragged solely by the contingency of the situation. It may even be observed that for Savigny progress occurs by accumulation, by the multiplication of time strata, without producing an evolutionary or normative leap. On the other hand, Hegel, albeit within a historicist but nevertheless rationalistic system, believes law can occur as both disruption and improvement, therefore, allowing it to stake a claim to progress. Although this may be part of a 'List der Vernunft', it does not exclude or put out of contention the performativity of the legal experience, which is the result of self-awareness. And that's why Hegel is so much closer to legal Enlightenment than Savigny could ever be.

But it was the issue concerning legal validity that for Radbruch had a value as philosophy of history. Here we have, once again, the clash between the two opposing theses. The rationalistic, on the one hand, which claims that law stakes its validity on a previously valid law. There is continuity here, for the issue of validity is grounded exclusively on a previously valid title. Or, there is the romantic position where, as Fichte said, all that had become law had done so against law: '*Alles, was in der gegenwärtigen Menschheit an Recht ist, ist auf die erst Weise zustande gekommen, gegen die Form des Rechts*'.[46] Radbruch defines this latter doctrine 'Volcanism', a sort of catastrophe theory, while the theory of continuity is called 'Neptunism'.

While 'Volcanism' foresees a permanent breach in history, Radbruch points out that this is possible due to a perspective that also envisaged continuity. In fact, to sustain itself, such a perspective would require a broad thesis on the events of human and legal history, namely the principle 'according to which those who were called to produce law are those who are able to produce law'.[47] It is worth mentioning at this point the striking coincidence between this proposition of philosophy of history and the concept of law recently presented by two Oxonian natural law philosophers, Joseph Raz and John Finnis. For the latter, law is founded on *de facto* authority, on 'the extraordinarily crude principle' according to which normativity is the outcome of *de facto* power.[48] Joseph Raz, too, says something similar when discussing the nature of law; he offers an 'exclusive' legal positivist interpretation of it, one that always excludes all conceptual links between law and morals. Law - Raz affirms - is the product of an authority, ie, an entity capable of

1972), § 211, Zusatz, 171.

[46] F.H. Fichte, Wissenschaftslehre und das System der Rechtslehre: Vorgetragen an der Universität zu Berlin in dem Jahre (Bonn: Adophus Marcus, 1834), 514.

[47] G. Radbruch, *Rechtsphilosophie*, Studienausgabe, R. Dreier and S. Paulson eds (Heidelberg: C.F. Müller, 1999), 91.

[48] J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), 250.

imposing its instructions to others, capable, that is, to be an authority. Herein lies its 'true essence'.[49]

In *Vorschule,* Radbruch's treatment of the philosophy of law is more concise. While no mention is made here of 'Volcanism' or 'Neptunism', focus is once again on the alternative between the doctrines of 'omnipotence' and that of the 'impotence' of law, producing an *impasse* that can nevertheless be broken. Radbruch bases this conviction by developing the idea of the struggle of law first outlined by Jhering in *Kampf ums Recht*. Anticipating the 'rights thesis' of Ronald Dworkin, Radbruch underlines the fact that the nature of law can be fully grasped only by starting with the controversy of controversy. Law cannot be explained by looking at the decision, the command, or the bureaucratic application of the rule. It is the clash between conflicting motives and the decisions taken as a consequence that really explain what law really is: '*Nur wenn man den Rechtssatz als Konfliktlösung betrachtet, kann man ihn von einer blossen Beamteninstruktion unterscheiden*'.[50]

A legal system - Radbruch says - is more resistant to history the more it is abstract and broad; the more it is *lebensferner*, 'far from life'. A system based on casuistry, one that is more adherent to the peculiarities and minutiae of the realities of society, *lebensnäher*, 'closer to life', is, on the other hand, more exposed to and less protected from the attrition of passing time.[51] The omnipotence of the legal form is bound externally by the coexistence of various centres of sovereignty, and internally by the impossibility to derive a new constitution from the older one.[52]

VII. Modern Law as Progress

Whatever the case may be, we could say that progress is the myth or tale that shakes and nourishes the experience of law. And this is something that is clearly evident in modern law. Modernity radicalises the notion of improvement and novelty, conceiving progress as a torsion in time's arrow - a conviction that continues to be predominant today. Progress no longer requires a *tertium comparationis* but is presented in the garb of history of philosophy as secularised theodicy. What manifests itself here is providence ('*Die Vorsehung leitete den Faden der Entwicklung weiter*'[53]) - a providence that manifests itself not so much to single individuals as to humankind. A providence that manifests itself as history of society. Indeed, society *is* the agent of providence, becoming, as such, ontologically more compact, distancing itself further and becoming more independent with

[49] See J. Raz, 'Authority, Law and Morality' 68 *The Monist*, 295-324 (1985).

[50] G. Radbruch, 'Der Zweck des Rechts', in Id, *Der Mensch im Recht* (Göttingen: Vandenhoeck & Ruprecht, 1957), 94. See G. Radbruch, *Vorschule der Rechtsphilosophie*, A. Kaufmann ed (Vandenhoeck & Ruprecht, Göttingen, 3rd ed, 1965), 85.

[51] ibid 85.

[52] ibid 83.

[53] J.G. Herder, Auch eine Philosophie der Geschichte zur Bildung der Menschheit (Stuttgart: Reclam, 1990), 14.

respect to single individuals. It is thus no longer conceivable as being the outcome of a 'pact', or agreement, a deliberation or a reflection.

What now emerges is therefore a dimension that is distinct from the strictly public or state spheres, and sufficiently also removed from the private sphere of subjects: it is the 'civil society' that secularises what had previously been conceived as a religious dimension. Similarly, the providential tone of human events in time occurs along a path that is at the same time unintentional but also strictly human. History becomes a narrative told by those who can already read the course of events. History and society thus become concepts characteristic of modernity that are strengthened by the notion of progress and by the temporal propinquity to an ideal state which is also a finality. The evolution of law is thus a sequence of stages having an ultimate end, driven by the same engine. We thus find ourselves deep in the broad sweep of the philosophy of history and in the evolutionistic sociological theory.

Modernity is somewhat akin to the Baron of Munchhausen who wants to prop up his collar. Modernity is insatiable because it can generate new desires and projects and, therefore, perennially unsatisfied of what it possesses, see and experience. Law is therefore subjected to a constant dynamism and to an accelerated consumption of its own resources. Good law is no longer the venerable and consolidated one, but the latest available one – the newest that quashes the previous. Law has been motorised and become the outcome of continuous revision and destruction. When Voltaire in his Dictionnaire philosophique under the entry Lois asks what is intended as a good law, he answers by pointing to the tabula rasa: '*Voulez-vous avoir de bonnes lois? Brulez les vôtres et faites-en de nouvelles*'. The 'rule of change', to use a formula by Herbert Hart, is its basic norm.

But where is all this change leading? What direction is it taking? Will a time come when the law-making machine will be switched-off? Is there an ultimate end to all this? Will it ever end? While some cannot see where all this is going, others see a direction.

Growing social complexity, increasing specialisation of functions and widening globalization of economic processes, in addition to ever more sophisticated information technologies and game changing technological progress, have all contributed to making change and evolution a feature of daily life. But where is all this heading to? What is the target of the arrow of time that shores up the legal system?

The category of change is partly hostile or impregnable to jurisprudential decisionism. This makes it very attractive for an approach that ceases to be shaped by the rationality of sovereignty and command. If law is governed by change, it cannot be the authoritarian and contingent outcome of a decision. The course is set and norms pile up on each other without having to rely on the force of decision. Norms are strung like beads on a thread tied in space and time. Law can thus configure itself as not bound to convention, force, and punishment. It is believed

that evolutionary law can do without coercion and force. It accumulates and proceeds by layers and genetic mutation without having to constrict but only rely on the strength of time. Sovereign power thus lies with those who hold and govern time with no exception. The regularity of time remains unfaltering even in the face of catastrophe and emergency. The beholder of time, in terms of orthogenesis and phylogenesis, is time itself. In this kind of setting, the sovereignty of constituent power dissolves.

Law expands in layers, by accumulation and necessity. A fitting metaphor is not the clock - not the mechanical device that is the product of matter fused, shaped, and reshaped and then turned and hammered and assembled - but the tree. The clock is an act of force, the tree far from it. Or one may resort to a notion of history featuring cycles that have already been arranged within a given framework. A cyclical history does not present junctions where the players involved must assess and evaluate alternative routes; its understanding and fruition is exclusively cognitive.

Evolution as assessment is an observer's privileged category from an external point of view. If shifted internally, the self-observer's point of view would collapse as a mode of participation, such as one that could be able to provide an answer to the need for pragmatic action. To have participation it does not make sense that a participant does just observe himself, and that participation would assume the meaning of the description of a distinct fact, for in such case the self-observation could only certify the participant's taking distance from participation, his lack of commitment in the practice of participation, his inability to lay down a standard of conduct, and the assuming of a different performative register. The internal point of view would break down if it did not perceive the alternatives that action was confronted with, if, that is, the normative intuition of choice was not confirmed by and justified in the cognitive experience of empiric reality, and if, finally, it was not capable of affirming or claiming what must be pursued.

> *Da hier* - in Kant's own words - *ein Vorhersagen des künftigen die Aufgabe ist, dieses aber nicht geschehen kann, wenn man nicht a priori urteilen kann, was geschehen werde, mithin dass das Bessere notwendig aus der Verkettung der schon gegenwärtigen Ursachen mit ihren Wirkungen erfolgen müsse, die Notwendigkeit des beständigen Fortschritts zum Besseren […] in Betrachtung komme.*[54]

The alternative for action arises in the gap between the previous and successive condition, between cause and effect in a specific given context. If the effect of this action is also the cause of a successive effect and so on, this an assessment that is not covered by the performative mode needed by a course of action to deliberate about.

[54] I. Kant, n 39 above, 213.

Clearly, in the practical reasoning you could, and probably should, take into account the successive mid-term consequences of the proposed action. But this continues to be a cognitive consideration that is all the more hypothetical the more its consequences are mediated and require the activation of an efficient cause. The internal point of view requires almost exclusively a specific causal chain. As for the lengthy sequence of causes where the junction to be engaged must be placed, it cannot be ignored by those who consider the same situation *sub specie evolutionis*. It should not likewise be neglected that that specific action leading to that specific effect can be improved and repeated at each deliberative turning point.

The claim to progress is stronger and more conspicuous where, as in law, there is a claim to correctness and justice. In law, the claim to correctness and justice reach out to an ideal where requirement is met and perfection achieved. Of course, an ulterior conceptual consequence of this claim is that progress cannot define or consider itself merely temporary or accidental. Progress cannot be followed by a regress, that the claim to justice must necessarily remain unrequited because it is vain and unfounded. I can stake a claim to correctness and justice, I have the founded hope that both can be attained. The claim to justice assumes that an analogous claim can once again in a remerging or new legal controversy. Progress is presumably followed by more progress, and that there cannot be conceptual space is a landscape of this kind for regress and decline. In the demand for justice, the arrow of time always goes straight.

What will then be the ultimate end of this progressive movement? How can it be conceptualised? I believe there are three options. One could rely on the notion of the end of history, or to that of the eternal return. Or even point to a meeting point in an infinite, *Treffpunkt in Unendlichem*. But where is law going? What is its destination?

For law, the end of history is not really an option, because without history law would not be able to consider itself as progress, albeit temporary. There would not be any progress if history ended or were accomplished. If the 'mobility' of process were only temporary, so would the legal system be, which would ultimately coil itself up. Principles would become rules. But when would that occur? And why? Under which circumstance or case would it be possible to affirm that the process has come to a definite end? Why shouldn't the principle be expressed and compounded beforehand as a rule and the hermeneutical and applicative activity of the norm as merely a deductive operation?

The experience of law as progress is also not encouraged by the eternal return, by cyclical 'corsi e ricorsi'. Here, as Herder critically points out, all conceptual tension would be absent and lead to confusion and scepticism. '*Kein Plan! kein Fortgang! ewige Revolution – Weben und Aufreissen! – Penelopische Arbeit!*'.[55] Jurisprudence would then be akin to Penelope's shroud, to be done and undone and unable to achieve narrative sense. Where law is cyclically destined to retrace its footstep

[55] J.G. Herder, n 53 above, 37.

back and to start judgement afresh, where there is no longer any *res judicata*, its ability to set a direction is seriously put in doubt.

When the hourglass of deliberation is turned and the judge is doomed to decide on the same object and controversy, nothing whatsoever has been decided. Nor will anything be resolved. Injustice - that very same specific injustice - would forever re-emerge, and law would be like Sisyphus who addresses wrongdoing only to see it come crashing down as a heavy boulder that must be heaved up again *in saecula saeculorum*. Injustice would forever return and law merely be the negative impression of the event or merely a futile aesthetic revolt against it. Unless, when the eternal return is given an entirely normative reading and transformed into a Kantian imperative or mental experiment of sorts, do not create a line of conduct, and do not pass a judgement that you cannot recapitulate every time the circumstance arises again and again, forever.

Or it may lay its hopes on a meeting point in the infinite. In which case, progress would be permanent, ceaseless. There would be no coming back and there would be no end. All would forever be unaccomplished, but at a point that is ever higher and further. But how will law, whose aim is to offer stability and security, correctness, and universal outreach, be able to sustain this continuous shifting of the normative coordinates? And, above all else, who will govern a law, so mobile and changeable? Will its users – those who apply and resort to it - be able to deliberate a way to slow it down, to stop its relentlessness, to change its direction?

To a degree, law is conceptually linked to evolution intended as progress. Law is legitimate and valid where it presents and justifies itself as a condition that has improved with respect to a previous and divergent one. But law is nevertheless placed under duress and ultimately blunted if its prescriptions, now entirely under the influence of time, are conceptualised and succeed each other, becoming an unstoppable and unwieldy movement that breaks up in vast sequence of normative contents. The solution may ultimately reside in the practical device law, intended as the action it wishes to manage, assigns itself in the gap between two conditions. The causal chain that concerns it is not *sub specie eternitatis*, nor consequently *sub specie evolutionis*, which belong exclusively to the 'no place', or to the observer or moralist. Its gaze is addressed to the present, on which it will however decide tomorrow. And to this end, it must be able to operate to the very best or better. It must therefore be conceivable and dependable (esigibile). The tomorrow of law can therefore be claimed only as 'progress'.

VIII. Involutionary Models: Law Without Progress

In a minor work, *Das Ende aller Dinge,*[56] ie, 'The end (but also the goal) of

[56] I. Kant, 'Das Ende aller Dinge', in Id, *Schriften* n 39 above, 166. On this work, see H. Simony, *Kants Schrift "Das Ende aller Dinge"* (Zürich: EVZ-Verlag, 1962).

all things' Kant outlines in a long footnote four possible models of human society. These four pessimistic and involutionary models are the 'caravanserai', the 'correctional centre', the 'mental asylum', and, finally, the 'cloaca'.[57] The caravanserai features overcrowding, congestion, and confusion, where people are squeezed tight, push, and shove each other minding their own business and rush by unconcerned. In the second model, the correctional home, life is conceived as a permanent penal retribution, an endless punishment, where rules are but punishment. Secondary norms or sanctions are the only ones that apply here. These are, in fact, so pervasive that the norms of conduct – the primary norms – are no longer of any consequence.

As for the madhouse, nothing really makes any sense there, as all kinds of suffering and humiliation are inflicted for no reason at all. There really are no fully-fledged norms, whose contents must first be understood before they can be applied. The inmates are not at fault and the suffering inflicted upon them is without justification.

And then there is the cloaca, which is nothing more than a 'dump', where filth, grime and all manners of putrescence are dumped. This is where we stand at this moment, where we bear witness to our age. This is what we deserve because we produce ordure, because we corrupt and are corrupted. The cloaca is the society where everything and everyone are examples of debasement and meanness where purity, good intention, virtue cannot emerge.

That is why man was chased out of the terrestrial paradise, Kant tells us citing a Persian legend. In the terrestrial paradise, all edible plants could be digested without producing waste, with the sole exception of sweat. Only one plant, if eaten, led to defecation. And that was just the plant Adam and Eve ate, soiling that divine and untarnished corner of the world. It was for this reason and no other that the two were chased out of the terrestrial paradise and dumped in the world, where their descendants survive. Their original sin was that of having created the need for a dumping ground, so that a sewer, a land filled with waste, was assigned to them.

Now, what shape will law take, what meaning, in each of these scenarios? In the caravanserai, law will probably look like a traffic code governing the orderly interaction on the public ways. What matters here is that a regulation can be applied, but as to what type is less relevant. The normative is regulatory and is not constituent. It does not require, produce nor refer to a form of life.

In the correctional facility (*Zuchthaus*), law is, on the other hand, a set of sanctions, a series of rules designed exclusively to apply punishment, to inflict pain. In the mental asylum (*Tollhaus*), rules are not merely measures of containment, a means of mechanical control, a set of restraining orders, because those to whom the measure is applied do not understand it and are not capable to reflect on it. As for the cloaca, what role will law have in a society that is a dump where human

[57] I. Kant, 'Das Ende' n 56 above, 171.

experience can manifest itself only in the form of corruption and degradation? In such a scenario law, too, is waste, something that is without quality and virtue, the token of baseness. Law is thus corrupt, like everything else around it.

Kant's four pessimistic and involutionary models of society, show us on the contrary four essential qualities of law. Law points to the existence of a community where there is none in a caravanserai made up of people who meet by chance and soon part ways. A caravanserai is little more than a crossroads where people stay for a short time without bothering to take notice of who comes and goes.

Law is a set of rules that implies the freedom of those it addresses. But in a correctional facility, where an exclusively disciplinary regime prevails, there is no longer any functional freedom left. The recipients of the regulation are no longer those to whom the sanction is applied. There is no longer any conduct that can avoid the application of the sanction. Retribution loses its bearings the moment the detention facility is separated from the rest of society. This is all the more paradoxical because the purpose of detention is paradigmatically that of giving retribution.

Law continues to be essentially a system of rules that calls upon reason. It is reason and through reason that law is realised. Law, in other words, is a reflection of law. But in a mental asylum, reason is a missing commodity. Here, rules are not meant to govern conduct but somewhat irrationally to repress it. In a madhouse, it is no longer possible to speak about sanctions; what prevails here are security measures and means of repression, because the subjects placed under restrictive measures cannot be held accountable. No redemption or correction can be expected. Nor can the principle of retribution be applied.

And what about the cloaca? In a society overrun by the wholesale corruption of mores, law no longer has any quality or virtue, nor a public morality it can appeal to or mobilise. Law no longer has any stake to claim. Law is without virtue and is hogwash like everything around it. Law could be, on the other hand, a cleansing tool that can clear up a reality - a reality grounded on power and interests - that is intrinsically corrupt. Law could provide a veil that can cloak the filth, that can conceal what is not pleasant to behold.

In the four negative and involutionary settings envisaged by Kant, law appears to have lost all meaning because community, liberty, reason, and virtue have been taken out of the picture - because Kant has removed his fundamental 'transcendental categories'. And this occurs because in such involutionary societies the idea and experience of progress have gone amiss. In the caravanserai, time is substantially circular, a perpetual merry-go-round, that defines the structure of social relations. In the correctional facility, punishment is mere retribution and there are no prospects of rehabilitation for the inmate. In the mental asylum, time has stopped alongside all movement. The ideal here is the straightjacket that immobilises. And communication is voided. The patients' improvement is intermittent and, in good substance, only apparent. In the cloaca, in corrupt society, there is no ideal criterion or subject which can be indicated as an example. With the good also the

beauty has gone missing. And when good is wanting, the just and equitable will be unable to anchor its project. In none of these regressive models does the notion of progress find its place.

Also, because in such models, a critique of the rules that hold up the corresponding systems would not only be impossible but also meaningless. In the caravanserai, the critique would be fairly straightforward, because the *Witz* would simply lie in the traffic rule. It's either the right- or alternatively left-hand drive. And there really is not much to comment upon. There is no singularity of meaning or relevance that distinguishes the one alternative to the other. One could fortuitously decide which one to adopt, entrusting oneself to chance. There is little deliberation to be done here.

In the correctional facility, there is no room for a critique of punishment because this is the place where only authoritarian punishment is handed out. Nor can a critique be developed on the specific punishment applied to the subject because the sentence has been passed; it is *res judicata*, the judgement is final. The correction is the execution of a judgement that has been passed. It is not a forthcoming judgement against which an appeal may be lodged.

In the mental asylum, critique clashes with the irrationality of the subjects who live and operate therein; those who develop a criticism must heed a principle of reason. Indeed, they must hope in the possibility that their arguments can be accepted exquisitely on their merit. But in a mental asylum, there is no one who can follow the arguments of a line of reasoning. There is no claim to correctness, because a discourse of this kind is addressed to no one who can understand it.

And finally, in the cloaca, the critique would not be grounded on an anthropological base; those who criticise must be able to show some sort of respect for the subject of the criticism, for criticism is meaningful only if it can be received and, in turn, shared. It can be received and shared, that is, by those who are in good faith. But in this festering and corrupt place no one deserves respect because no one is and can be in good faith.

Law is therefore meaningless when set against a backdrop where progress cannot be conceived, where there is no aspiration for progress. And this occurs when law can no longer count on one of its basic phenomenological tenets: that it comes into play when there is an aspiration to correctness and justice and is therefore criticisable inasmuch as perfectible, and therefore experienced as but a stage in the progress towards moral betterment.

IX. Claim to Progress

Law is not content with the present; it looks ahead to the future, to something that is not there yet. A key mode of being is lying in wait. By waiting, law dilutes the present, takes away value from it. To be or having to be, law prefers the latter. But this takes our focus away from life 'here and now'. It fills us with hope and

demands. Normativity is arrogant. Laws are insatiable because there is nothing that can meet their expectations. In hoping to be endowed with law, to be in the right, may therefore be turned against itself to the extent that law may receive the stigma of frustration and desperation. For, we are well aware, or the legal practice tells us, that that enormous amount of hope and ambition of justice cannot be fully met. The bag of Miss Flite, the delusional old woman in Charles Dickens' *Bleak House*, fills up with old papers, writ of summons, memorandums, burdening her soul with a demand for justice that the time of the law forever dilates.[58] The 'here and now' is replaced by the 'not yet' of the trial, of the claim to correctness.

But after all is said and done, law continues to be configured in terms of progress and evolution. An evolutionary theory of law is that which identifies law fully and exclusively with the law of modernity, with the law, that is, of the *Rechtsstaat*, with the rule of law, where a certain substance of the law, its 'generality' and 'abstractness', is shaped as a form of law. An evolution of this kind is intended also as an argument that would exempt us from investing legal practice with moral contents. This would be founded on its own substantially autochthonous normativity, which would be ensured by its very same action. This latter legal action would consist in an articulation of general rules and laws, additionally sustained by adversarial procedures, or something similar as sustained, for example, by Lon Fuller who, as we well know, believes there is an intrinsic morality in law by virtue of its *modus operandi* and not contents. A different version of this theory is provided by Niklas Luhmann, according to whom it is the functional and rational procedure that separates law from other social practices, religion in the first place.[59]

'Secularization' constitutes a decisive evolutionary leap for law intended as an independent social phenomenon. The independence of modern legal concepts from all political theologies is radicalised as an expression of an accomplished normative autarchy. Law and sovereignty are separated the one from the other. This is basically, with some further variations, the thesis of Franz Neumann, according to whom law produces its own normativity, which resides above all in the general and abstract law, which is equal to all and applicable notwithstanding the specificity of cases. 'Law as a phenomenon distinct from the political command of the sovereign is possible only if it manifests itself as general law'.[60]

Habermas' theory of law, too, can be pinned to a legalist approach if we bear in mind his position on the inner functional link between the law and laws, between objective law and subjective laws he outlines in the third chapter of *Faktizität und Geltung*.[61] The law as 'form', specifically as *Gesetz*, would necessarily imply

[58] Refer to the first encounter with this character, C. Dickens, *Bleak House* (London: J.M. Dent, 1994), 30-32. For a deeper analysis refer to B. Cavallone, *La borsa di Miss Flite* (Milano: Adelphi, 2016).

[59] See N. Luhmann, *Legitimation als Verfahren* (Neuwied am Rhein: Luchterhand, 1969).

[60] F. Neumann, 'The Change in the Function of Law in Modern Society', in Id, *The Democratic and Authoritarian State*, edited by H. Marcuse (New York: The Free Press, 1957), 66.

[61] See J. Habermas, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des

coherence through subjective rights: '*In diesem Sinne sind die subjektiven Rechte mit dem objektiven Recht gleichurprünglich*'.[62] Subjective law would play a key role within the normative articulation and validity of positive law and wouldn't produce, as such, any tension or discrepancy between the authority of the supreme decision and the autonomy of the administration and the vindication of individual rights.

From these perspectives, as well as for Neumann, Luhmann, and Habermas, law stakes a claim on justice that, however, does not go beyond a somewhat tautological claim on legality. It could therefore be objected that legal practice would not stake any further claim on progress, for justice is not in any way intended as a 'bridge' or link between law and morals. Progress and what it claims can be had only if this link can be established. Otherwise, law can indeed evolve and differentiate itself functionally, separating itself even further from the 'world of life', from the functional machinery of society, which for Habermas at least before the turnaround in *Faktizität und Geltung)* was represented by the media ecosystem, which included the law, considered on a par with the currency, market and technical administration,[63] and sustained not by communicative but by an exquisitely *strategic ratio*.[64] Evolution will occur here, not progress, for that is a moral category.

It should nevertheless be said that for Habermas the law, too, has a moral legitimisation deriving from the cognitive and normative shortcomings of the moral discourse. For the latter to become effective, both in terms of the motivations and determination of conduct, it requires the establishment of positive law. Against this backdrop, the moral discourse is sustained by the communication dimension which in the community is 'perceived' within the democratic deliberation. Positive law and democracy can therefore be understood as a progressive instance with respect not only to merely the moral discourse, which lacks sanctions and legal specificity, but also to the mere articulation of a public domain set up as a political community expressing its own idea of good life. After having operatively activated the moral discourse, positive law separates itself from it, akin to democracy, whose

demokratischen Rechtsstaates (Frankfurt am Main: Suhrkamp, 1992), 109.

[62] ibid 117.

[63] J. Habermas, Theorie des kommunikativen Handelns, II, Zur Kritik der funktionalistischen Vernunft (Frankfurt am Main: Suhrkamp, 1980), 536.

[64] Refer to J. Habermas, 'Überlegungen zum evolutionären Stellenwert des modernen Rechts', in Id, *Zur Rekonstruktion des Historischen Materialismus* (Frankfurt am Main: Suhrkamp, 1976), 260. In Habermas' reflection on the concept of law three phases can be singled out. In the first phase, law focuses exclusively focused on the strategic rationality of players who are essentially concerned about meeting their economic needs. Luhmann's theory on the systemic rationality of law is therefore rejected in this first phase. In the second phase, which was initially outlined following the publication of *Theorie des kommunikativen Handelns*, law is thematised as having a two-pronged nature – as an 'institution' (making it 'discursive', endowed with communicative and systematic rationality) and as a 'medium' (and, therefore, endowed with strategic and functional-systemic drive). The third phase is introduced by *Faktizität und Geltung*, and here law is conceived as having a fully discursive scope, unlike the economy and administration that continue to be 'media', areas of strategic action that are hardly open to communicative rationality.

aim is to protect the good life, which isolates itself from the universally aspiring normative discourse. Law (and democracy) thus achieve an autonomous normative dimension, which no longer requires to be verified with respect to universalising morality, which is the stronger normativity. For Habermas, who is here in line with Klaus Günther,[65] the discourse of justification driven by the universalising principle is no longer that which orientates the application of the positive norm or case put before the judge. What applies here is the 'coherence' with the positive legal system, for the application of positive laws is clearly separate and independent from justification. At hand in the first instance is the establishment of the validity of the norm, while in the second the key issue is the suitability of the situation in which the rule is applied.[66]

The progress law establishes with respect to morality paradoxically leads to a situation where law cannot stake a claim to progress. For positive law, once set down, would no longer operate purporting justice, but rather according to a self-referential claim for coherence and integrity. In this instance, integrity acquires contours of functionality that are significantly different from normative and moral contours, from 'Dworkin's integrity'. For Dworkin, the legal discourse reproduces or simulates the moral discourse, by activating it in all cases especially the 'difficult'.[67] For Habermas, 'integrity' implies the coherence of the *ratio decidendi* with the remaining and previous cases, besides the adequacy of the decision to the specific case.[68] For Dworkin, integrity means the robust universalizability of the criterion adopted and its interpretation, where legal interpretation is based on the interpretation, for example, of a musical score, which in pragmatic terms is – or claims to be – the best possible interpretation of that specific piece of music.[69] Progress can indeed be claimed because for Dworkin the legal decision claims to be not only correct or just but presents itself as the best possible in law.

By burdening the 'form' of law with a cumbersome core, while surreptitiously attaching a strong normative content - as Luhmann and Habermas have done - law ends up justifying itself. It becomes self-sufficient. Its legitimacy and justice are autopoietic, and moral reasoning must give way to legal dogmatism: *Sileat ethica in munere alieno*. The secularization process moves along a path that is further away than that followed not only by religion but also by morality, thereby restoring to law its full normative autonomy. Law, in other terms, no longer must justify itself with respect to the criteria or principles it cannot establish on its own.[70]

[65] Günther's theory is not outlined with utmost clarity in his *Der Sinn für Angemessenheit. Anwendungsdiskurse in Moral und Recht* (Frankfurt am Main: Suhrkamp,1988). His position is outlined more clearly in the debate with Alexy at the European University Institute in March 1992, which was published 6 *Ratio Juris*, 143 (1993).

[66] See J. Habermas, *Faktizität* n 61 above, 266-267.

[67] See R. Dworkin, 'Is There Really No Right Answer in Hard Cases?', in Id, *A Matter of Principle* (Cambridge-Massachusetts: Harvard University Press, 1985), 119-145.

[68] See J. Habermas, *Faktizität* n 61 above, 276.

[69] See R. Dworkin, *Law's Empire* (Oxford: Hart, 2nd ed, 1999), chapter three.

[70] This would make the anti-poietic paradigm - on this subject refer to G. Teubner, *Rechts als*

Yet, the recurrent aspiration for justice that comes with legal practice in its various stages cannot be avoided. Nor can the aspiration for progress that is necessarily connected to it, as has been pointed out. Similarly, the hope for justice and progress too cannot be avoided - that hope that can turn into the grief of frustration and become a time forever extendable that will bring forgetfulness of the present and ultimately lead to desperation.[71]

X. External and Internal Point of View

One could, however, still object that the claim to progress does not apply to those theories where law features a static, non-dynamic vision, and is conservative. According to such theories, law is the embodiment of an age-old status quo, where change is viewed as betrayal and failure of that self-same law, whose task is to maintain order as it is, as it was established. Medieval law looks not ahead, but behind. The best law endorses; it is the oldest, not the newest. It is the previous title, the oldest, that prevails. It is related to private law, for possession is tantamount title. Antiquity establishes law. The supreme values of law lie in certainty and stability, principles that abhor change and transformation. In this light, the legal act is declaratory, the assertion of a normative evidence that is produced over time confirming a normative core that has been established once and for all and is, therefore, inalterable. As the great Georges Ripert puts it:

> *'Il ne faut pas oublier que toute loi nouvelle est en elle même un mal, puisqu'elle detruise des situations acquises et par là crée un désordre au moins momentané'*.[72]

Yet, here too the legal decision - which claims to perform and give justice - cannot be but progress despite any momentous or general crisis of the law,[73] being able as it is to improve the situation that has been affected by controversy and transgression. The *status quo ante* is thus re-established, restored, ensuring

autopoietisches System (Frankfurt am Main: Suhrkamp,1989) - very attractive to those who wish to keep the law's operativity independent from functional imperatives that are alien to it. This is at least what is sustained by A. M. Hespanha, *Cultura jurídica europeia. Síntese de um Milenio* (Mem Martins: Publicações Europa-America, 2003), 362.

[71] Law as a generalising structure can indeed become mere legal fiction and become a none too subtle form of injustice, as has been pointed out: 'There are many pleasant fictions of law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets'. C. Dickens, *Nicholas Nickelby* (London: Penguin, 2000), 596.

[72] G. Ripert, 'Evolution et progrès du droit', in G. Balladore Pallieri et al, *La crisi del diritto* (Padova: CEDAM, 1953), 9. See G. Tarello, *Sul problema della crisi del diritto* (Torino: Giappichelli, 1957), 16.

[73] See G. Ripert, *Le déclin du droit. Etudes sur la legislation contemporaine* (Paris: Librairie générale de droit et de jurisprudence, 1949).

the resolution of the disturbances that the legal decision was called to tackle. The decision resolves the question, which is reintegrated in the legal order so that we now have an 'improved' situation with respect to that which had been affected by uncertainty and conflict. Legal certainty is thus re-established. The old law is returned, which is 'better' than the previous situation, better than when the age-old established order had been challenged. There is improvement, there is 'progress'. But it is a 'timely' progress that does not necessarily entail a broader perspective – the perspective of the history of law. This kind of progress is modest and does not require a philosophy of the history of law to justify or drive it.

Even where law is not considered as a change to an end - a change with a direction or a destination - it is operatively in its aspiration to justice marked by two temporal landmarks that indicate a progression. The 'dynamism' of law, even when considered age-old and unchanging, emerges every time a decision has to be made on a case, which is nevertheless new, unlike any previous one. As Lord MacMillan said in a well-known speech on the lawyer's ethics:

> 'The law formulated in the light of past experience becomes dynamic when it has to be applied to the events of the present. In the Law Courts history never repeats itself. No two cases are ever the same'.[74]

In other words, if from an 'external point of view', from the detached viewpoint of an 'observer', law may appear static and considered as making no progress, the dynamism of the legal experience and the claim to progress that accompanies it are clear to those who see it from the inside. Law is dynamic from the point of view of the persons who are involved in and contribute to making a legal decision.

XI. Man as Novelty

There is history because there is man. To this end, Hannah Arendt recalls Franz Kafka's parable. The story is told of *Er,*[75] 'he' (the human being) who is stuck between the two forces of time - one force is dragging him back to the past and the other pushing him forward into the future. 'He' must resist both forces to survive, to stay where he is, in that empty place between past and future, which is represented by the *present*. 'He' is strongly tempted to quit the fight, to remove himself from his space and place himself in an external dimension. He could do it if he were in a position to act as the arbiter or mediator between the two forces, which, if it hadn't been for his resistance, would most likely offset each other. History would thus collapse if it had not been for 'him' or for the 'gulf' his existence opens up, or for the 'leap' it makes along that time sequence that would otherwise be

[74] Lord MacMillan, 'The Ethics of Advocacy', in Id, *Law and Other Things* (Cambridge: Cambridge University Press, 1937), 174.

[75] Refer to F. Kafka, *Er*, in M. Walser ed (Frankfurt am Main: Suhrkamp, 1984).

uniform and continuous. Human history is the outcome of 'man's' resistance to the past and future. History occurs when the past does not repeat in the future. Between the past and future, a rift emerges, a hiatus, a fracture, which is the *present*. The *present* in this scenario is a break from the past as well as a suspension with respect to the future. Thus, not continuity with what was, but not even the immediate advent of what will be. What matters is the here and now, *nunc stans*.

But what really happens to 'Er', who is capable of opening a rift in time between what was and what will be? His birth - Hannah Arendt says - marks a radical beginning. 'He' has no past before his birth. He just was not there prior to his being born. The existence of the human being rolls out for those who experience it, who live it, as an *ex-nihilo* dimension, as 'the beginning of a beginning'.[76] Now, this is a circumstance that occurs collectively, going beyond the single human subject, and affects all individuals in their relationship and cohabitation. Human relationships, too, not unlike the life of the single individual, are braced between past and future in a temporal flux that appears to be endless. Where then can we lay our feet, where can we find a spot where we can, even briefly, be ourselves? Where can we rest and regain ourselves? Where can we learn to know who we really are away from the flux of time? Or even better how can we protect ourselves from time that consumes us and corrodes all things material and natural? That place, Arendt tells us, is the 'home': '*Boden gerade kann ich nur in der Gegenwart haben. Die Dimension der Heimat ist der Gegenwart*'.[77] This is where human beings build their dwelling.

Nevertheless, the home, 'man's home', highlights once again the beginning, which is the nature of the new-born, of birth. Here, the home is the community, society as the public sphere. In this regard, Simone Weil speaks of positive laws as 'walls' echoing a fragment of Heraclitus.[78] The home is the legal system where the principal feature is not violence but is 'constitutivity', contrary to the opinion expressed by jurists and their postmodern critics.

Indeed, there is something new in the system of institutions generated by the constitutive norms of the legal system. This constitutivity reproduces at a social level the individual given of birth, of the radical beginning of the self ('him', 'I'). What occurs here involves collective performance. A performative act - a promise, for example - takes place between clearly distinguishable subjects who entertain a clearly identifiable single intersubjective relationship, which, nevertheless, presupposes the validity and efficacy of social rules, as well a set of practices and a common language and way of life. In this setting, the performative act occurs within the framework of a normative system, whose specific strengths are its

[76] H. Arendt, *Between Past and Future* n 14 above, 10.

[77] H. Arendt, *Denktagebuch 1950 bis 1973*, I, in U. Luds and I. Nordmann eds (München: Piper, 2002), 301.

[78] S. Weil, *La source grecque* (Gallimard, Paris, 2nd ed, 1953), 37.

constitutivity and ability to establish new practices in the world. Now, if the performativity of the single legal act contains the aspiration to correctness, followed by the universal nature of the demand for justice and, as pointed out previously, its existential translation into a claim for progress, the sequence that is thus outlined similarly occurs in the constitutivity of the legal system as a whole. A constitution that closes with an article affirming that 'this constitution in unjust' would be as contradictory in terms of performance as would be the enunciation where it is said that 'the cat is on the carpet, but I don't believe it'.[79] From the aspiration for justice inherent in the constitutional system, like what occurs in the single legal act, there may derive the claim to progress. In the sense of a legal order that manifests itself in its constitutivity, there also is its implicit aspiration for progress. This constitution is better than the previous one - this is the statement that the constitutive norm of the legal system cannot deny.

[79] See. R. Alexy, 'Law and Correctness' 51 *Current Legal Problems*, 210, 205-221 (1998).

Equal and Not. A Feminist Perspective on Italian Family Law

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Abstract

In countries of the so-called global north, family law is currently based on the principle of gender equality. However, despite this foundation, both formal and substantive discrimination persists. In this context, it is imperative to apply a feminist perspective to identify where the law and the courts uphold or challenge traditional gender roles and power dynamics.

Beginning with a chronological analysis of the introduction of formal gender equality in Italian family law, the article examines two areas of significant social importance where women often encounter *de facto* discrimination: post-marital property decisions and domestic violence. It concludes by considering the role of Italian family law scholarship in promoting both formal and substantive equality.

I. The Need for a Feminist Approach to Family Law

In countries of the so-called global north, family law is now based on the principle of formal equality between men and women, resulting in a predominantly gender-neutral attitude.[1]

However, the shift towards equal treatment is relatively recent. Conventionally, it can be traced back to the British Married Women's Property Act of 1870, which recognised the rights of married women to keep their earnings and investments independent of their husbands, to inherit modest sums and to own rented or inherited property from close relatives. While this was a step forward for women's rights, married women still did not achieve full financial independence, as the majority of their financial assets and property were still legally controlled by their husbands.[2] In recent decades, one of the most notable achievements in the UK

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[1] As is well known, the term 'gender' has been borrowed from the medical field to denote characteristics (attitudes, behaviors, clothing, language, etc.) believed in a given society and culture to be fitting and appropriate for men and women. In this perspective, it may or may not align with sex, which, in contrast, pertains to biological characteristics (such as genitalia, chromosomes, and reproductive organs). A classic reference on this topic is A. Oakley, *Sex, Gender, and Society* (London: Temple Smith, 1972). On the origin of the equality principle and its development in Family Law see W. Müller-Freienfels, 'Equality of Husband and Wife in Family Law' 8 *The International and Comparative Law Quarterly*, 249 (1959) and on the road from negative equality to positive equality between men and women J. Richards, 'Feminism and Equality' 9 *Journal of Contemporary Legal Issues*, 225 (1998).

[2] B. Griffin, 'Class, Gender, and Liberalism in Parliament, 1868-1882: The Case of the Married

has been the passing of the Equality Act 2010. Indeed, this comprehensive piece of legislation takes a holistic approach to promoting gender equality across different facets and stages of life. Among its key provisions, the Act abolishes the remaining vestiges of marital power entrenched in common law and previous legislation, thereby furthering the cause of gender equality.[3]

Moreover, full formal equality has not been achieved in all countries, and discriminatory laws against women persist. One of the best-known examples is family names. For centuries, it has been a social and legal convention that children take their father's surname. However, according to the European Court of Human Rights (ECtHR), the automatic precedence of the father's surname over that of the mother's violates the prohibition of discrimination and the right to respect for private and family life guaranteed by Arts 8 and 14 of the European Convention on Human Rights (ECHR). For example, in *Cusan and Fazzo* v *Italy* (7 January 2014), the ECtHR found a violation in the inability of married couples to agree to give their child the wife's surname. More recently, in *León Madrid* v *Spain* (26 October 2021), the Court condemned the rigidity of the rule that the paternal surname should come first in cases of parental disagreement. Moreover, in many countries, the law allows women to add or even replace their maiden surname with their husband's surname when they marry, but men do not have the same option. The ECtHR has repeatedly challenged this discrimination. In *Burghartz* v *Switzerland* (22 February 1994), the European judges addressed the inequality resulting from the fact that wives, but not husbands, are allowed to add their spouse's surname to their own after marriage. In the case of *Ünal Tekeli* v *Turkey* (16 November 2004), the European Court criticised a national provision which required married women to take their husband's surname upon marriage, thereby preventing them from retaining their own surname. In *Losonci Rose and Rose* v *Switzerland* (9 November 2010), the Court considered the prohibition for the husband to retain his own surname after marriage as discriminatory, given that the same right would have been granted to his wife if the roles were reversed.

However, most of the discrimination that women face today stems from violations of the principle of substantive equality. The phenomenon is widespread also in the systems of the so-called global north, which often perceive themselves as fully committed to formal equality and well-positioned in rankings assessing substantive discrimination within family households. Indeed, traditional gender

Women's Property Acts' 46 *The Historical Journal*, 59 (2003). However, according to Chused (R.H. Chused, 'Married Women's Property Law: 1800-1850' 71 *Georgetown Law Journal*, 1359-1426 (1982)), the enactment of married women's property laws reflected an increase in women's family responsibilities, more than a new role for them in the commercial and political world.

[3] See Section 198, which abolishes the husband's common law duty to maintain his wife and the common law presumption of advancement (stating that a man transferring property to his wife, child, or fiancée is making a gift of that property to the recipient, unless there is evidence to the contrary). This section also establishes the presumption of equal shares when one spouse pays the other a housekeeping allowance.

roles dictate that women bear a disproportionate burden of care responsibilities for children, dependent relatives and domestic work. Despite a shift towards a dual-earner household model, this work remains largely invisible, undervalued in terms of its importance and lacking in economic recognition. Since the 1960s, legislators and courts have actively sought to promote *de facto* equality. For example, several European countries, including Italy, introduced the community property (*comunione legale* in Italy, régime de la *communauté réduite aux acquêts* in France, *régimen de gananciales* in Spain) as the default matrimonial regime to recognise the value of domestic work within the family. The aim is to provide greater financial protection for the spouse without an independent income. However, in most countries the result has fallen short of expectations due to a number of factors, including the complexities involved in managing and dividing joint property. In addition, the ease of choosing separate property, which is now preferred by the majority of couples entering into marriage regardless of their income level, has contributed to this outcome.

An exceptional event such as the Covid-19 pandemic has highlighted how formal and, above all, substantive inequalities experienced by women within families are exacerbated in emergency situations. Indeed, these situations place a disproportionate burden of social and economic consequences on this part of the population.[4]

Under this light, a feminist perspective is crucial as it helps to identify and address gender injustices, promote gender equality, and challenge traditional norms and stereotypes.[5] Indeed, it analyses how family law legislation and practice affect gender equality within the family and society, seeking to understand whether they reinforce or challenge traditional gender roles and power dynamics. For example, as I will discuss later in this article, divorce legislation that prioritises the autonomy and independence of each spouse and gender-neutral custody arrangements may work well in a social context where both partners share family responsibilities and are dual earners. However, it may exacerbate the economic and social challenges faced by divorced wives and mothers in a country where gender inequalities in household management are still significant. In addition, an intersectional approach, which considers the interplay of multiple intersecting identities and factors when addressing legal issues related to family and domestic matters, recognises that women's experiences and rights may differ based on factors such as race and class. For example, intersectionality is critical in child custody and child support cases because it shows that the best interests of the child must be considered in the context of various intersecting factors (such as income, employment opportunities and caregiving responsibilities) that may affect the child's well-being and the parents' ability to provide care and support. Indeed, the best interests of the child

[4] World Economic Forum, *Global Gender Gap Report 2021* (Geneva: WEF, 2021), 43.

[5] As is well known, there is a plurality of feminisms inspired by different methodological approaches and political options. The common feature among them is the questioning of male dominance, both in society and in law. A classical reference is K.T. Bartelett, 'Feminism and Family Law' 33 *Family Law Quarterly*, 475 (1999).

require that custody arrangements are made on the basis of the quality of the child's relationship with each parent and not on the basis of their standard of living after divorce, which may be influenced by disparities in wealth, often based on gender discrimination against women in the acquisition of property.[6]

In this respect, Italy is an interesting case because of the existing tension in family law between modernity and tradition.[7] In particular, progressive legislation has facilitated faster divorces (legge 6 May 2015 no 55) and introduced the possibility of divorce without judicial proceedings by private agreement (decreto legge 12 September 2014 no 132). Furthermore, civil mechanisms to combat gender-based violence were strengthened with the enactment of the *Cartabia Reform* of civil procedure (decreto legislativo 10 October 2022 no 149). Nevertheless, Italy still faces a scenario in which family structures continue to place a disproportionate burden on women, who are assigned the primary responsibility for caring for children and managing the household.[8]

In the following paragraphs, I will first provide a diachronic analysis of the incorporation of the principle of formal equality without gender distinction into Italian law. I will then consider two areas of considerable social importance in which women often encounter *de facto* discrimination: a) post-marital property decisions following the breakdown of marriage; b) domestic violence, a phenomenon that disproportionately affects women and is rooted in historically unequal power relations between women and men, which amounts to discrimination against women. I will conclude with reflections on the potential role of Italian family law scholars in promoting both formal and substantive equality in family law.

II. Formal Equality in Family Law

As previously stated, the establishment of formal equality between men and women in family law is a relatively recent occurrence.

In Roman law, full legal capacity was granted exclusively to the *pater familias*, with the simultaneous presence of the *status libertatis*, *status civitatis* and *status familiae* in the same person. Women could only acquire such capacity under

[6] The issue appears more complex than just the gender wage gap. For an interesting socio-psychological reconstruction of the dynamics that can lead to a greater concentration of property in the hands of men, see C.M. Rose, 'Women and Property: Gaining and Losing Ground' 78(2) *Virginia Law Review,* 421 (1992).

[7] With a specific focus on the Italian regulation of the property effects of divorce and marriage on spouses, M.R. Marella, 'Il futuro del divorzio (e del matrimonio) fra autonomia e solidarietà', in C. Camardi ed, *Divorzio e famiglie. Mezzo secolo di storia del diritto italiano* (Padova: CEDAM, 2021), 320, draws on Duncan Kennedy's considerations regarding the clash in the United States between pro-sex reformers and neo-Puritan reformers.

[8] See the data collected by ISTAT, Distribuzione carico di lavoro nelle coppie, available at http://tinyurl.com/2p9z262a (last visited 10 February 2024), regarding the 'asymmetry index', which measures the percentage of family workload carried out by women aged 25-44 out of the total family work time carried out by couples in which both partners are employed.

certain circumstances (if they were released from the *patria potestas* of the *pater* and emancipated from the *manus* of the husband) and with certain restrictions (eg, they were never granted *potestas* over other individuals). In addition, women, even those *sui iuris*, were restricted in their capacity to act, as they were subject to the *tutela mulierum* throughout their lives: that is to say, they could administer their property alone, but for extraordinary administration acts the *auctoritas* of the guardian was required.[9] As scholars have pointed out, the rationale for the institution of *tutela mulierum* is not to be found tout court in an *infirmitas sexus* stemming from a genuine belief in the existence of a weak state of women. [10] On the contrary, it was a cultural construction used to justify the real social reason, namely the protection of the agnates' expectations of succession, in the overriding interest of preserving the family as the key organism of society, capable of ensuring the maintenance of social peace and the protection of all its members. The same reasoning inspired the fact that only female adultery was relevant and sanctioned: the intention was to prevent the offspring of a person other than the husband from benefiting from his wealth.[11] Under this light, if until Augustus adultery by women was prosecuted and punished within the family, with the *lex Julia de adulteriis*, the state took over the powers previously held by the *pater familias* and made adultery a public offense.[12]

Throughout the pre-modern period, the family maintained a marked asymmetry of gender roles, particularly in the relationship between spouses. In particular, marriage remained the basic instrument for ensuring the orderly transmission of property from one generation to the next.[13] In order to maintain the coherence of the family patrimony over generations, institutions such as *maggiorascati* and *primogenitura* were established, guaranteeing a preferential distribution of inheritance in favour of older sons. Conversely, daughters received a reserved portion of the inheritance, known as a dowry, which facilitated their marriages and served as advance compensation for the loss of their parents' inheritance upon separation from the family of origin.[14] With marriage, the woman passed from the power of the paternal family to that of the husband, who not only had the administration and availability of the dowry (formally, the dominium of these goods remained in the hands of the wife), but also the power to authorise or not to

[9] The primary reference is to B. Albanese, *Le persone nel diritto privato romano* (Palermo: Università di Palermo, 1979).

[10] Hence P. Zannini, *Sulla tutela mulierum* (Torino: Giappichelli, 1976), 8.

[11] As is known, in fact, pater vero is est quem nuptiae demonstrant (Digest, 2, 54).

[12] V. Arangio-Ruiz, *Storia del diritto romano* (Napoli: Jovene, 1942), 254.

[13] M. Morello, 'Humanitas e diritto: la condizione giuridica della donna nella famiglia dell'età pre-moderna' *Studi urbinati di scienze giuridiche politiche ed economiche. New Series A - 2016*, nos 3 and 4, 378 (2016).

[14] P. Ungari, *Storia del diritto di famiglia in Italia* (Bologna: il Mulino, 2002), 68; G.S. Pene Vidari, 'Dote, famiglia e patrimonio fra dottrina e pratica in Piemonte' *La famiglia e la vita quotidiana in Europa dal '400 al '600. Fonti e problemi, Atti del Convegno internazionale*, Milano 1-4 dicembre 1983 (Roma: Ministero per i Beni culturali e ambientali, 1986), 111.

authorise the wife to dispose of her personal property (the so-called parafernals).[15] The Italian statutes of the 13th century were generally silent on the subject of adultery, as if to express a precise desire to leave the problem to individual family strategies. But already at the beginning of the 14th century, in the statutes of several Italian communes, the punishment for the man was only a fine, but for the woman it was more severe, even death.[16] A common element in all the legislation was the need for action by the husband, father-in-law, father or brother.[17] The rationale was clear: to ensure the certainty of male descent, while allowing male household members to condone adultery if they found it functional to their needs (eg, a sterile husband seeking progeny).

The French Revolution opened a breach in the patriarchal system. In fact, the key principle of equality (*égalité*) reverberated, at least at the height of the revolutionary ferment, as a recognition of the need to overcome the social and legal discrimination suffered by women, but also as a personalist principle that gradually transformed marriage, no longer as a mere political and patrimonial instrument, but as a place for the realisation of free and equal individuals.[18] The *Déclaration des droits de la femme et de la citoyenne* written by Olympe de Gouges in 1791 states that 'ignorance, forgetfulness or contempt of women's rights are the sole causes of public disasters and the corruption of governments' (preamble) and that

> 'the exercise of women's natural rights is limited only by the constant tyranny of men who oppose them; these limits must be reformed according to the laws of nature and reason' (Art 4).

A law of 20 September 1792 allows spouses to jointly apply for divorce, either by mutual consent or at the request of one of the parties, on grounds of incompatibility, ill-treatment or desertion of the matrimonial home. With regard to succession by death, following the abolition of primogeniture in 1790, the National Assembly decided in April 1791 that succession without a will should be divided equally between all the children, regardless of sex or age, and in 1793 and 1794 the principle of equality was extended to all forms of succession.[19]

The Napoleonic era, on the other hand, as is well known, marked a drastic strengthening of the leading position of the husband-father in the family. In fact, with the notable exception of divorce, Napoleon himself promoted the inclusion in the Civil Code of family legislation of a reactionary nature, aimed at ensuring 'the strong family in the strong state'.[20] Parental authority is termed '*paternelle*' as it is exclusively attributed to the father, conceptualized as a '*magistrat domestique*',

[15] ibid 65.
[16] M. Morello, n 13 above, 387-388.
[17] ibid
[18] P. Ungari, n 14 above.
[19] S. Desan, 'Pétitions de femmes en faveur d'une réforme révolutionnaire de la famille' *Annales historiques de la Révolution française* (2006).
[20] P. Ungari, n 14 above 104.

almost akin to a public office.[21] Furthermore, married women required authorization from their husbands to perform acts of a patrimonial nature: this authorization was, in fact, unfamiliar in countries following the *droit écrit* but acknowledged in countries following the *droit coutumier*.[22] The provision was later reiterated in the first Civil Code of the Kingdom of Italy (1865), albeit with a milder formulation. It no longer mandated such authorization for acquisitions but limited it to donations and sales of immovable property, mortgages, assignments, recoveries of capital, as well as related transactions and legal actions (Art 134 of the Civil Code of 1865).[23] From the outset, this provision and the overall deeply autarchic and misogynistic framework of the Civil Code faced strong criticism from intellectuals and political figures, both male and female.[24]

However, it was not until legge 17 July 1919 no 1176 (commonly referred to as the Sacchi Law, named after the deputy who introduced it) that the requirement for the husband's authorisation was abolished in Italy.[25] The law was passed not only because of social evolution, but also because of the

> 'need to improve the legal status of women, and also to give praise and honour to what Italian women have done and will do for their country'[26] (the reference is to the essential social and economic contribution of women during the First World War).

Despite the progressive emancipation of women in public law (eg, the right to vote in 1946 and the right of access to public offices and all positions in the public administration, including the judiciary, in 1963), the road to full equality between

[21] A. Desrayaud, 'Le père dans le Code civil, un magistrat domestique' 14(2) *Napoleonica. La Revue*, 3 (2012).

[22] As P. Ungari notes, the legal provision marks a step backwards for the women of Lombardy and Veneto in whose pre-unification territories the Austrian code, which did not know marital authorisation, applied.

[23] For additional study, refer to P. Ungari, n 14 above, 162 and F. D'Alto, *La capacità negata. Il soggetto giuridico femminile nella giurisprudenza postunitaria* (Torino: Giappichelli, 2020).

[24] Among the women, there was the journalist Anna Maria Mozzoni, author of, among other works, the remarkable *La donna in faccia al progetto del nuovo Codice civile italiano* (Milano: Tipografia sociale, 1865). Others included the educationalist Valeria Benetti Brunelli, known for her work *La donna nella legislazione italiana* (Roma: Forzani e C., 1908), and the doctor and socialist politician Anna Kuliscioff, who argued that without social conquests, civil rights would be limited to the few who could afford them.

Among the politicians, one could mention, for example, the Brindisi lawyer Salvatore Morelli. He was the author of *La donna e la scienza o la soluzione del problema sociale* (Napoli: Società Tipografico-Editrice, 1869) and, although unsuccessful, lobbied parliament for a bill on the legal reintegration of women and two bills on divorce.

[25] The evolution of women's status, as comprehended through shifts in family roles stemming from the industrial revolution and its detachment from the exclusive domestic sphere, stands as one of the central themes in P. Passaniti, *Diritto di famiglia e ordine sociale* (Milan: Giuffrè, 2011).

[26] Thus, the Hon. Sacchi spoke in Parliament during the presentation of the project. For a detailed reconstruction, refer to M. Severini, *In favore delle italiane. La legge sulla capacità giuridica della donna (1919)* (Venezia: Marsilio, 2019).

men and women in the family is long and tortuous, especially with regard to the personal relationship between spouses. The Italian Constitution of 1948 proclaims the 'moral and legal equality of the spouses', although it allows the law to set limits 'in order to guarantee the unity of the family' (Art 29, para 2). This reference to the 'family unit' allowed the original text of the 1942 Civil Code to maintain a patriarchal view of the family for decades (for example, Art 144 stated that the husband was the 'head of the family'), thus avoiding possible constitutional objections.

Towards the end of the 1960s, there was a significant shift, largely attributed to key interventions by the Italian Constitutional Court. A notable case illustrating this change pertains to the differential treatment of adultery. Despite the provisions in the Civil Code of 1865 and the original text of the Civil Code of 1942 emphasizing the reciprocal nature of the duty of fidelity (Art 121 of the Civil Code of 1865 and Art 143 of the Civil Code of 1942), a teleological and systematic interpretation had, until the 1960s, construed this duty to imply sexual exclusivity for the wife alone. This interpretation influenced the rules on legal separation, which excluded the possibility of separation 'on the grounds of adultery on the part of the husband, unless there are circumstances such that this fact constitutes a grave insult to the wife' (Art 151, para 2, of the Civil Code of 1865 and Art 151, para 2, of the 1942 Civil Code, original text). The 1930 Penal Code also distinguished between two forms of adultery: that committed by the wife (Art 559) and that committed by the husband (referred to as 'concubinage' in Art 560). The former was constituted by sexual intercourse by the woman outside of marriage, while the latter required the additional condition of a genuinely stable relationship leading to 'concubinage'. In its judgments no 126 of 16 December 1968 and no 147 of 27 November 1969, the Constitutional Court declared the two criminal provisions on adultery unconstitutional because they violated the principle of equality by treating adultery differently based on the sex of the person violating fidelity.

During the 1970s, the legislator played a prominent role by enacting law no 151/1975 under the so-called 'reform of family law'. Men ceased to be the 'head' of the family and husbands and wives have equal rights and duties (Art 143, para 1, of the Civil Code) and are expected to 'cooperate in the interests of the family' (Art 143, para 2, of the Civil Code). The institution of dowry was abolished (Art 166 *bis* of the Civil Code) and the term 'paternal authority' was replaced by 'parental authority', which emphasises the joint exercise of both parents, irrespective of their gender (Art 316 of the Civil Code).

Other parliamentary interventions followed over the years, gradually eliminating the vestiges of marital and paternal power from the legal system. Finally, in 2013, the rule - admittedly without practical relevance, but of undoubted symbolic value - that still existed in the Civil Code, according to which the paternal will prevails over the maternal in the event of disagreement between the parents on an urgent and unavoidable intervention for the child (Art 316, para 3, of the Civil Code), was abolished.

However, one glaring example of discrimination remains: the family name.

A particular aspect concerns marriage. The wording of the Italian Civil Code of 1865 and the original text of the Civil Code of 1942 established, as an expression of the attribution of marital authority by the husband to his wife, the automatic attribution of his surname to her by law.[27] Nevertheless, the interpretation gradually evolved, emphasising that the marital surname is a sign of family membership but does not change the woman's identity. The rule was therefore reinterpreted as a mere right and not an obligation for the wife to use the husband's surname (Corte di Cassazione 13 July 1961 no 1692). As a result, identity documents now show the maiden name and, only with the wife's consent, the husband's surname. Despite this interpretation, there is no doubt that the fact that only the wife can add her husband's surname to her own (without the possibility for him, in agreement with his wife, to add her surname to his own) is not justified by sufficient reasons and must be considered as discriminatory.[28]

Even more significant in terms of its social and cultural impact is the practice of taking the paternal surname, which became widespread in Western Europe around the 11th century.[29] The reason is clear: the need to establish and make visible paternity, since maternity is already proven by birth. As the Honourable Marisa Nicchi put it during a general debate in Parliament on a bill (never adopted) to reform family names,

> 'The imposition of the father's surname stems from men's desire to establish their centrality in the generation of life and lineage from which they feel excluded. Consequently, by concealing the mother's name, the primary mother-child relationship is erased'.[30]

The practice was so deeply rooted in culture and society that the drafters of the Civil Code didn't feel the need to codify it in a written text, although they did refer to it indirectly on several occasions.[31] The fact that the paternal transmission rule was tacit has long prevented its constitutionality from being reviewed, since the Constitutional Court can only challenge the constitutionality of 'laws'.

Only recently, the Constitutional Court has intervened in the matter,

[27] In 1927, Scaduto refers to the wife's 'right and, at the same time, obligation to carry out the acts of her legal life under her husband's surname' (G. Scaduto, 'Sul cognome della donna maritata' *Annali della Università di Messina*, 215 (1927).

[28] As already pointed out by F. Prosperi, 'Eguaglianza morale e giuridica dei coniugi e la trasmissione del cognome ai figli' *Rassegna di Diritto Civile,* 842 (1996). In case law, a relevant reference is the European Court of Human Rights, *Ünal Tekeli* v *Turkey*, cit.

[29] M. Bourin and P. Chareille, 'Désignation et anthroponymie des femmes. Méthodes statistiques pour l'anthroponymie'. Tome II-2 (Tours: Presses universitaires François-Rabelais, 1992).

[30] Camera dei Deputati, 'Discussione del testo unificato dei progetti di legge: Disposizioni in materia di attribuzione del cognome ai figli' (A.C. 360 ed abbinate-A), 14 July 2014.

[31] For example, Art 262 of the Civil Code stipulates that in the case of children born out of wedlock, 'the child shall take the surname of the father if both parents have given their consent at the same time'. The aim is to establish a rule similar to that which exists for legitimate children.

progressively recognizing the unconstitutionality of the automatic transmission of the paternal surname. In 1988, the Court merely reiterated the traditional view that had led the Constitution to allow 'limits' to the equality of spouses 'in order to guarantee family unity' (Corte costituzionale 11 February 1988 no 176). However, in 2006, it began reversing its position, stating that the patronymic rule was 'the legacy of a patriarchal concept of the family, ... and of an outdated marital power ...', but concluded that the question of legitimacy was inadmissible due to the discretionary power that should be granted to the legislator in the matter (Corte costituzionale 16 February 2006 no 61). In 2016, the Constitutional judges recognised the right of parental couples to choose, by agreement, the attribution of the double surname of both mother and father, declaring the patronymic rule unconstitutional because it violated both the principle of equality without distinction of sex and the right of the child 'to be identified ... by taking the surname of both parents' (Corte costituzionale 21 December 2016 no 286). Ultimately, in May 2022, the Court decisively overturned the longstanding discriminatory practice requiring children to bear only their father's surname. This reversal was prompted by the Court's recognition that the exclusive inheritance of the father's surname violated Art 2 (the right of children to identify with both parents), Art 3 (prohibition of discrimination based on sex), and Art 117 (infringement of Arts 8 and 14 of the ECHR as interpreted by the European Court) of the Italian Constitution (Corte costituzionale 31 May 2022 no 131).[32] Consequently, all Italian children born after June 2022 will carry both their mother's and father's surnames, in an order determined by the parents; in cases where parental consensus is absent, the decision will be entrusted to the judiciary.

III. Substantive Equity

1. Marriage and Divorce Laws

As noted above, the violation of substantive equality today has a more tangible and serious impact than the remaining remnants of formal equality violations.

A relevant example is the neglect, in the event of separation and divorce, of the significant contribution made by the spouse, often the woman, who is primarily responsible for caring for the family, raising the children and managing the household. In fact, the Italian legislator has intervened on several occasions to value domestic and family work.

A key instrument is the introduction of the *comunione dei beni* (community property) as statutory regime by the Family Law Reform of 1975. Indeed, according to Art 159 of the Civil Code, this regime applies to all couples, unless the spouses

[32] The judgement is annotated in this journal by A. Diurni, 'In the Name of the Child: Remedies to Adultcentrism in Naming Law' 8 *The Italian Law Journal*, 857 (2022) and G. Terlizzi, 'In the Name of Equality. The Italian Constitutional Court Rewrites the Rule on Surname Attribution' 8 *The Italian Law Journal*, 873 (2022).

expressly state otherwise at the time of their marriage or in a subsequent agreement. According to its rules, the property acquired by the spouses during the marriage, either individually or jointly, becomes part of their joint property, with the exception of personal property (Art 179). In the absence of proof to the contrary, movable property is deemed to form part of the community property (Art 195 of the Civil Code). The fruits of a spouse's personal property, such as the rent received for a house owned solely by that spouse, and his or her personal activities (eg salary or pension), provided they still exist at the time of the dissolution of the community, are also considered part of the community property (so-called 'deferred community property'). Joint property may be administered individually by the spouses (Art 180 of the Civil Code). However, acts of extraordinary administration and the conclusion of contracts granting or acquiring personal rights of use require the joint action of both spouses. In the event of the dissolution of the community regime (Art 191 of the Civil Code, including change of regime, separation, divorce or death), the property is divided equally.

The choice of community property as the legal regime reinforces the concept of marriage as a partnership in which both spouses share equally in the responsibilities and benefits. It recognises the equal value of the contributions of husbands and wives, whether one is the main breadwinner or both work. In particular, it promotes the equal sharing of assets acquired during the marriage. In the event of divorce or the death of one spouse, it facilitates the division of property to ensure that both share in the assets and financial security, even where there is a significant income disparity.

However, a critic that could be addressed to community property system is that it can lead to gendered economic inequality, as assets acquired during the marriage are divided equally between the spouses, regardless of each spouse's financial contribution. This can be unfair if one spouse has a significantly higher income or has accumulated more assets prior to marriage. Another limit of the statutory community property regime is that it is easy to deviate from it without having to justify the choice. Spouses are indeed free to choose the separate property regime either at the time of marriage or later. Current statistics show that in Italy the separate property regime has become the norm in new marriages, regardless of the economic conditions or lifestyle choices of the spouses.[33]

A second instrument used by the legislator to value women's family work is the discipline of the so-called *impresa familiare* (literally 'family business') provided for in Art 230 *bis* of the Italian Civil Code. The purpose of this provision, which was introduced in 1975, is to give legal recognition to work carried out informally (eg without an employment contract) by family members (spouses, third- and second-degree relatives) in a single enterprise owned by one of them. Specifically, family

[33] According to ISTAT (the National Institute of Statistics), 74.7% of new marriages chose the matrimonial regime of legal separation of property: ISTAT, Marriages, civil unions and divorces 2020, available at http://tinyurl.com/nvbxestx (last visited 10 February 2024).

members of the entrepreneur are legally entitled to participate in the management of the business and are granted the right to maintenance, participation in profits, distribution of business increases and liquidation of shares.

The *impresa familiare* provision promotes equality between spouses within the family business by emphasising that both spouses can have legitimate interests in the management and success of the business. In particular, it recognises that women often make a significant but unpaid contribution to the family business and ensures that they have access to a fair share of the business assets or matrimonial family property.

The disadvantages of regulating family businesses under Art 230 *bis* of the Italian Civil Code, according to some critics, can include complexity in the division of assets, especially when the business has multiple activities or divisions. It can also create financial constraints that make it difficult to manage the business or to distribute profits fairly between the spouses. Finally, it can lead to family conflict, especially if family members disagree about management or distribution.

A third instrument to ensure recognition of women's unpaid work in the family is the spousal support and maintenance order in the context of marital breakdown.[34] The situation varies when it comes to legal separation and divorce. Indeed, maintenance payments are subject to different rules depending on the nature of the breakdown. Art 156 of the Civil Code governs legal separation, specifying the criteria for maintenance eligibility, which include the requirement of 'inadequate income' and the absence of fault on the part of the potential beneficiary.[35] Art 5, para 6, of legge 898/1970 provides for divorce maintenance when 'adequate means' are lacking and cannot be acquired due to objective reasons. The article further mandates a thorough assessment of the personal circumstances of the spouses and includes an evaluation of the reasons for the decision, the individual and economic contributions made by each spouse to the family and the formation of their respective or joint property, their individual incomes, and the duration of the marriage.

In the context of legal separation, the criterion for assessing the 'adequacy' of resources is commonly interpreted by the courts as the standard of living maintained during the marriage. The rationale behind this is clear: separation may loosen the marital bond, but it does not completely sever it. Consequently, the economically disadvantaged spouse is expected to maintain a standard of

[34] In Italy, both legal separation and divorce continue to exist. The former is by far the most common cause of divorce. However, there are situations in which legally separated spouses do not seek a divorce (in accordance with the principle of canon law of the indissolubility of the catholic marriage they contracted or for practical reasons, such as the intention not to lose the survivor's pension in case of the other spouse's death).

[35] The spouse who has caused the breakdown of the marriage by violating the rights and obligations of marriage is indeed penalised with the loss of the right to maintenance if he or she is the economically weaker spouse.

living comparable to that of the more financially secure separated partner.[36] This principle seems crucial not only in cases where one spouse, by and large the wife, does not work outside the home, but especially in cases where she receives a lower income. In such situations, the reference to the standard of living experienced during the marriage allows for the recognition that the husband's higher income also reflects the contribution of the wife's domestic efforts. In essence, it serves as a means of recognising women's unpaid domestic work.

However, the reference to the standard of living is open to criticism. The first is that the expectation of maintaining the same standard of living is no longer worth protecting because of the separation, which demonstrates the intention to end the community of life.[37] Moreover, the criterion of the standard of living, and in particular the reference to the 'potential' standard of living, rebalances the property situation of the spouses to the detriment of the freedom of the spouses to reject the community property regime.[38] The challenge of measuring living standards could also be emphasised; it is a parameter fraught with difficulty in objective measurement and open to various interpretations. Particularly, the pervasive tendencies towards tax evasion and fictitious deprivation can pose challenges for the courts in gauging the capacity of the economically stronger spouse to contribute. Another critique centers on the potential disincentive effect of the alimony, as recipients might be dissuaded from pursuing economic independence, believing the received allowance sufficiently covers their financial needs. This scenario could be detrimental to both the recipient and the paying spouse, who may find themselves obligated to disburse a substantial amount over an extended period.

The situation appears different in the case of divorce. Until 2017, the courts employed the standard of living during the marriage as a benchmark for assessing financial sufficiency after divorce, but interpretations have since evolved. A significant shift then occurred with Judgement no 12196 of 16 May 2017 (commonly known as the Grilli judgement after the name of one of the parties involved, Mr Grilli, a former Italian minister). In this ruling, the Supreme Court declared that post-divorce alimony payments should no longer be tied to the standard of living experienced during the marriage. Consequently, a financially independent woman, regardless of her contribution to family formation and the husband's assets, is not entitled to alimony. The ruling emphasized the need to move beyond the patrimonialist concept of marriage as a permanent arrangement. The Court recognized marriage as an act of freedom and self-responsibility, an arena of affection, and an effective community

[36] Several scholars note that post-separation maintenance amounts to nothing more than a transformation of marital rights to material assistance and contribution. C.M. Bianca, *Diritto civile* (Milano: Giuffrè, 2005), 197; E. Quadri, 'La portata dell'art.143 cod. civ. nel matrimonio e oltre il matrimonio' *Nuova giurisprudenza civile commentata*, 510 (2000); P. Morozzo della Rocca, 'Separazione personale (dir. priv.)' *Enciclopedia del Diritto* (Milano: Giuffrè, 1989), 1397.

[37] L. Barbiera, I diritti patrimoniali dei separati e dei divorziati (Bologna: Zanichelli,1998), 14.

[38] L. Olivero, 'Sub art. 156', in G. Ferrando ed, *Matrimonio* (Bologna: Zanichelli, 2017), 917, considers the reference to the potential standard of living to be an 'accounting alchemy'.

of life, now commonly acknowledged in social customs as dissolvable. Therefore, the Court asserted that there is no legally relevant or protected interest for the former spouse in preserving the marital standard of living. Furthermore, the divorce decree extinguishes the matrimonial relationship not only at the personal but also at the economic-patrimonial level. Any reference to that relationship is deemed illegitimate, as it would unjustifiably reinstate it, albeit limited to the economic dimension of the matrimonial standard of living, in an unwarranted perspective of overextending the matrimonial bond. In essence, the nature of the interest safeguarded by the divorce allowance is not the re-equilibration of the economic conditions of the former spouses. Rather, it is the achievement of economic independence. Thus, the divorce allowance's function is exclusively welfare-oriented, and it is in this context that it must be understood. Indeed, at the heart of the Grilli ruling is the Anglo-American idea of divorce as a clean break: after divorce, each spouse is free to manage their own assets in order to rebuild their lives independently.[39] The allowance is recognised as having only a minimal welfare function, and any compensatory value for the greater efforts made during the marriage is denied.

However, for many women, even in situations of violence or irreconcilable conflict, there is a risk that they will be compelled to remain in the marriage for fear of losing their alimony and being unable to sustain themselves independently. Additionally, for women who have always worked within and for the family, there arises the necessity to seek employment outside the home after raising children. In essence, while the 'clean break' principle may be endorsed in the abstract, its application in practice can result in injustices, particularly when, as in Italy, formal equality is not paralleled by substantive equality between men and women within the family household and in the realm of employment.[40]

In this context, the Joint Section of the Italian Court of Cassation intervened in 2018 with judgment Corte di Cassazione-Sezioni unite 11 July 2018 no 18287. The Court, in its ruling, began by reasserting the multifaceted nature of the divorce alimony, emphasizing not only its supportive aspect but also its character as an equalizing-compensation measure. The supportive nature, as widely recognized, seeks to ensure the autonomy and economic independence of the former spouse lacking adequate means of support.[41] On the other hand, the compensatory character acknowledges

[39] It should be noted, however, that in Anglo-American systems, post-marital solidarity is essentially expressed in the equitable distribution of assets after divorce. This explains why alimony (ie the allowance) has a subsidiary and limited role.

[40] This is the rationale behind the criticism of the Grilli ruling, as voiced by feminists such as C. Saraceno (quoted by E. Pagani, 'Donne e uomini restano su fronti opposti "Noi siamo deboli"; Mai più sul lastrico' *La Repubblica*, 19 May 2017) and L. Sabbadini 'Divorzio, la Cassazione certifica una parità che non c'è' *La Stampa*, 11 May 2017).

[41] If the applicant spouse has no income, the allowance will therefore be due regardless of the duration of the marriage and regardless of the personal contribution made in the marriage by the applicant spouse.

> 'the contribution made to the realization of family life, particularly by considering the professional and economic prospects that may have been foregone, while also taking into account the duration of the marriage and the age of the applicant'.

Specifically, the Court of Cassation asserts that to grant the divorce allowance, it is crucial to assess whether there exists an imbalance in the financial resources of the two spouses, stemming from an unequal arrangement of the family household. This evaluation should encompass a unified consideration of the contributing spouse's role in family management, the creation of matrimonial as well as personal assets, and the duration of the marriage.[42]

However, looking at the case law following this 2018 judgment, there is a discernible trend towards reducing the compensatory and equalisation aspects of divorce settlements. In particular, a concrete demonstration of the 'sacrifices' made to contribute to the family's financial needs has become imperative. Indeed, there must be concrete evidence of the concrete losses made in order to contribute to the family's needs. In this respect, the courts go so far as to exclude the possibility of relying on indirect evidence by means of presumptions (Art 2727 of the Civil Code). Moreover, they tend to consider that donations and contributions made by the economically stronger spouse to the weaker one exclude the 'sacrifice' and, consequently, maintenance.

In this way, the Court of Cassation appears to impose a challenging burden of proof on women, demanding a retrospective reconstruction of the family's economic setup, specifying the particular choices that resulted in financial imbalance. However, such a task seems practical only in certain specific scenarios, such as family relocations due to the spouse's work or the decision to opt for part-time employment following the birth of a child.[43] For instance, the Court of Cassation reversed a second-instance judgment that had granted a €300 alimony to the ex-wife of a wealthy construction and tourism entrepreneur. The Court stated that, despite the marriage lasting for twenty years, the presumption of an equal contribution from the wife to her husband's assets could not be justified.[44] According to the Court, the causal link between the established economic inequality between the spouses and the applicant's contribution to the management of family life must be examined in detail, taking account of the fact that the couple had not had any children and that the wife had continued her professional career as a teacher.

Truly, as mentioned above, the prevailing view in case law tends to be that

[42] ibid

[43] The impact is almost a devil's proof for the potential beneficiary, as it necessitates reconstructing the family household retrospectively. There are few straightforward cases (eg, transfers driven by the work obligations of one spouse, opting for part-time employment following the birth of a child.

[44] Corte di Cassazione 20 April 2023 no 26252.

the purpose of maintenance is only fulfilled if, at the time of the divorce, the situation of the spouse claiming maintenance is worse than it would have been if the sacrifice for the family's needs had not been made.

An emblematic illustration is a ruling by the Court of Pavia in July 2018, shortly after the Joint Sections decision of the Supreme Court.[45] The case involved a couple who divorced after thirty-nine years of marriage (having separated after twenty-seven years), raising three children and relocating multiple times due to the husband's job. At the time of the divorce, the wife, over fifty years old, possessed 'no professional income or pension' as she had forsaken her career to dedicate herself to the family. However, she owned three properties, transferred to her name by her husband during the marriage, and inherited assets totaling approximately €660,000.00 at the initiation of the proceedings. The Court asserted that, considering the presented facts, there was no economic disparity justifying the requested alimony, despite the absence of pension income for the wife. The judgment emphasises the fulfillment of the 'post-marital solidarity' requirements. The Court noted that, based on common experience, pursuing a career as a journalist (the wife's profession) would not have placed her in a better financial situation than her current standing at the end of her working life. The ruling is particularly noteworthy as it states that the compensatory function of alimony should not address rectifying labor market and economic recognition inequalities concerning women's non-domestic work. Instead, these inequalities should be considered solely to assess whether an ex-wife, who dedicated herself exclusively to the family by mutual agreement during the marriage, can find employment after divorce.

Lastly, it is noteworthy that Italian courts reduce or diminish the divorce allowance in cases where a stable de facto cohabitation arises for the woman receiving the allowance. While this is arguably reasonable for alimony with a supportive nature, it raises concerns when applied to alimony with a compensatory function. If the wife is granted the allowance for dedicating herself primarily or exclusively to the children and the household during the marriage, why should she forfeit this compensation in the event of a new romantic relationship?[46]

It is indeed true that both men and women experience economic challenges as a result of separation and divorce, contributing to what sociologists describe as a new form of poverty stemming from family crises. Men, especially separated fathers, often encounter financial difficulties, frequently bearing the financial burden of relocating to a new residence and facing the inherent instability prevalent in today's job market.[47] However, women typically find themselves in more vulnerable

[45] Tribunale Pavia 23 July 2018, *Nuova Giurisprudenza Civile Commentata*, 126 (2019) with a note by C. Rimini.

[46] In this sense also C. Rimini, 'Una visione sbagliata che penalizza le donne' *La Stampa*, 8 November 2020.

[47] According to a report by Caritas (pastoral organisation of the Italian Bishop's Conference), approximately 80,000 divorced men with children find themselves on the brink of poverty. See Caritas, False restarts, 2014 Report on Poverty and Social Exclusion in Italy, available at

positions, often being recipients of alimony and struggling to fulfill financial obligations for various reasons. Primarily, the pervasive issues of tax evasion and precarious employment complicate the Italian court's assessment of the working parent's ability to make payments. Additionally, even if the court establishes the maintenance amount and the ex-husband fails to pay, enforcement often pose challenges: conventional legal mechanisms, such as Art 473 *bis*70 of the Code of Civil Procedure, include asset seizure as an option, but if the debtor lacks assets or has transferred them, recovering the maintenance allowance becomes almost impossible. Furthermore, the procedures for debt recovery are frequently protracted and intricate, demanding time, financial resources, and legal expertise. These factors may dissuade many women from pursuing the recovery of the maintenance they are rightfully entitled to.

In addressing the highlighted inefficiencies related to both the regulation of matrimonial property effects and the financial repercussions of separation and divorce, it is imperative to adopt comprehensive measures on various fronts. From a legislative perspective, exploring alternative solutions, such as the equitable distribution of property upon the separation of a married couple, akin to the equitable distribution system in Anglo-American law, is essential. Additionally, courts should place greater emphasis on considering the economic and social implications of their decisions. Lastly, at the administrative level, there should be a dedicated focus on implementing policies that strengthen women's economic autonomy.

2. Domestic Violence Against Women

Another example of *de facto* discrimination against women within the family is male domestic violence. According to the Istanbul Convention, this phenomenon refers to 'acts of physical, sexual, psychological or economic violence' perpetrated against a woman as such (ie because of her gender) and

> 'occurring within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim' (Art 3(a), (b)).[48]

This is in fact the most common form of violence against women: statistics clearly show that gender-based violence is usually perpetrated by a woman's partner or former partner.[49]

http://tinyurl.com/mvya55v6 (last visited 10 February 2024).

[48] I will refrain from using the term 'victim' in alignment with professionals who believe it may risk relegating women to a passive position of weakness. Terms such as 'survivor' appear to more effectively convey women's empowerment.

[49] World Health Organization (WHO), *Violence against women* (New York, WHO, 2021). In Italy, according to data from the Italian National Institute of Statistics (ISTAT), the most severe forms of violence are often inflicted by partners, relatives, or friends. Specifically, 62.7% of reported rapes

In 2001, the Italian legislator (Law 154) introduced protection orders against family abuse for the first time in the Civil Code (Art 342 *bis* and 343 *ter*). These orders served as a civil instrument to safeguard family members facing abuse. However, a minority of courts had long undermined this instrument by deeming the orders inapplicable if, at the time of the application, there was no ongoing cohabitation between the abuser and the person affected – despite the latter leaving the family home due to violence and later seeking the protection order. The recent Cartabia reform of civil procedure has addressed this issue by legally establishing that these orders can be sought even if cohabitation has ceased (Art 473 *bis*.69 of the Code of Civil Procedure).

In April 2022, the *Commissione parlamentare di inchiesta sul femminicidio, nonché su ogni forma di violenza di genere* (parliamentary investigation Committee on femicide and gender violence) published a report highlighting the phenomenon of 'secondary victimization' experienced by women and their children during family court proceedings. This form of victimization stems not directly from the violence but rather from the response of institutions, including the police, courts, health, and social services. A first example of revictimization is the resort to conciliation and mediation in cases of domestic violence – an approach explicitly discouraged by the Istanbul Convention due to the inherent power imbalance in situations of violence, which impedes the ability of the more vulnerable person to negotiate a fair agreement.[50] A second instance involves the neglect to consider partner violence against women when determining custody and visitation arrangements for their minor children in the event of the separation of the parental couple.[51] Paradigmatic cases include judicial decisions of shared custody in the context of domestic

were committed by partners, 3.6% by relatives, and 9.4% by friends. Even instances of physical violence, including actions like slapping, kicking, punching, and biting, are predominantly carried out by partners or ex-partners. See ISTAT, *Il numero delle vittime e le forme della violenza* (Roma: Istat, 2014). In the first half of 2021, a report from the State Police revealed that 89% of women killed within the family context fell victim to emotional violence perpetrated by their partner or ex-partner. See Dipartimento della Pubblica Sicurezza - Direzione Centrale della Polizia Criminale - Servizio Analisi Criminale, *Vite Violate - Analisi Dati I semestre 2020/2021* (Rome: Dipartimento Pubblica Sicurezza, 2021).

[50] The undue recourse to mediation and conciliation is also noted by the Council of Europe, *Implementation of the in Italy: Report of Women's NGOs (so called shadow report)* (Strasbourgh: Council of Europe, 2018), 1, 42, 48.

[51] According to Art 31 of the Istanbul Convention, 'Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account'. However, according to the shadow report (48) fathers accused of violence have the same probability as other fathers of obtaining custody of their children. In the same sense Grevio (Group of Experts on Action against Violence against Women and Domestic Violence), *Baseline Evaluation Report. Italy* (Strasbourg: Council of Europe, 2020) 60, which expresses 'extreme concern' about this 'widespread practice' noting that the group 'is concerned that the difficulties in fulfilling the requirements of Art 31 might be the consequence of the introduction of a legal reform on shared custody which failed to carefully assess the enduring inequalities between women and men and the high rates of exposure of women and child witnesses to violence, as well as the risks of post-separation violence' (paras 185 and 187).

violence, despite the presence of personal precautionary measures decided in criminal proceedings or juvenile court orders limiting parental responsibility.[52] Another noteworthy aspect is the abundant case law from tribunals, which, despite decisions for exclusive custody, allows unrestricted contacts between the perpetrator and the child.[53] Also, there are standardised decisions to strip abused mothers of their parental authority and entrust children to social services.[54] Indeed, mothers are at times subjected to a judicial assessment of their suitability as parents, based on the belief that they may not be capable of caring for their children due to their tolerance, at least for a certain period, of the abuse. Additionally, they are often labeled as 'alienating parents' (referring to the so-called Parental Alienation Syndrome) because they allegedly hinder the relationship between the child and the abusive father.[55]

The European Court of Human Rights has also identified dysfunctions in Italian law when dealing with cases of domestic violence. The case of *I.M.* v *Italy* (10 November 2022) is a compelling example. The case concerned a mother who fled home with her two children, aged 4 and 1, to escape the violence of their father. The juvenile court urgently suspended parental responsibility and mandated weekly meetings between the father and the children under 'highly protective' conditions, supervised by a psychologist (para 10). However, logistical challenges within the social services, such as a shortage of staff and inadequate space, led to meetings taking place in unsuitable locations (including a library, a room in the municipality, and the town square). These encounters lacked the presence of a psychologist, and on one occasion, the social services even left the children alone with the father, who displayed anger and frightened them (para 50). Mother's complaints and social service reports highlighted the father's seriously disparaging behavior towards his ex-partner during meetings and aggression towards the children (paras 17, 18, 47) and threats towards the professionals overseeing the meetings (para 23). However, despite the mother's repeated requests to halt the meetings, citing their danger to the children, and her subsequent refusal to accompany them, the Juvenile Court suspended the mother's parental responsibility for three years. The Court deemed her behavior harmful to the children, arguing

[52] The source is authoritative: Consiglio superiore della magistratura (Italian High Council of the Judiciary), Linee guida in tema di organizzazione e buone prassi per la trattazione dei procedimenti relativi a reati di violenza di genere e domestica (Rome: CSM, 2018), para 7.6.

[53] See eg Tribunale di Napoli, 28 June 2006, www.dejure.it; Tribunale di Roma, 11 October 2018, www.dejure.it; Corte d'Appello Palermo 12 June 2013 *Le leggi d'Italia professionale* (2023).

[54] As pointed out in the Shadow Report of women's association, all too often the custody of children is resorted to the Social Service (in 70.4% of cases for the ordinary Court and 90.7% for the Juvenile Court (above, 49-50).

[55] n 50 above 40, 48-51. The report highlights how courts and social services frequently adopt standardized approaches, prioritizing the preservation of the child's relationship with both parents without critically assessing the impact of violence against the partner on parenting skills. In essence, as noted in the introduction to this work, there appears to be a mindset of 'beat the wife, but do not touch the children'.

that she had not made sufficient efforts to protect the right of the children to joint responsibility of parents (paras 34, 38). It was only after three years that the visits ceased, coinciding with the father's imprisonment for drug trafficking. Subsequently, he was divested of his parental responsibility, and the mother regained full parental responsibility (para 61). The ECtHR found a violation of the children's and the mother's right to respect for family life. The children were indeed compelled to meet their father for years in conditions detrimental to them (para 125), and the mother was suspended from parental responsibility without a proper assessment of the allegations of domestic violence and the lack of adequate security conditions for protected meetings (para 136).

Many of the above-mentioned dysfunctions in family law legislation and practice in dealing with gender-based domestic violence have been addressed by the recent Cartabia reform of civil procedure. First of all the reform explicitly designates the new Section I of Chapter III of Title IV *bis* of the Civil Procedure Code as 'gender or domestic violence', thus introducing for the first time in this Code an explicit reference to 'gender' as a qualifying element of violence.[56] Indeed, while it is certainly true that rules must be general and abstract in order to apply to an indefinite range of situations, it is also true that they must respond to the specific needs of the persons involved. Specifically, the Cartabia includes several provisions aimed at addressing the secondary victimization of children. These regulations were incorporated during the review of the text in the Senate Justice Commission, following the recommendation of Senator Valente, the then President of the parliamentary Investigative Committee on Femicide, who was actively involved in the investigation that later, in 2022, resulted in the aforementioned report. Primarily, in cases involving allegations of 'domestic or gender violence', the law prohibits judicial conciliation (Art 473 *bis*.42 para 6) and family mediation (Art 473 *bis*.42 paras 3 and 6; art. 473 *bis*.43).[57] Furthermore, it is stipulated that the judge shall avoid the joint appearance of the parties (Art 4737.42, paras 2 and 6) and may order to keep secret to the perpetrator the place where the woman and the children are accommodated (Art 473 *bis*.13, para 2 and Art 473 *bis*.42, para 4). It is then forbidden, as far as possible, to repeatedly listen to women and children (Art 473 *bis*.13, par. 2 and Art 473 *bis*.45, para 2): it is indeed well known that repeated retelling of the violence suffered leads the person recounting it to relive it, at least in part. It is also stated that the hearing must take place in an appropriate setting (Art 473 *bis*.45 para 1). Finally, it is stipulated that any visiting rights granted to the abusive parent must not jeopardise the safety of the victims (Art 473 *bis*.46).[58]

[56] On the flip side, the phrase has drawn criticism for the use of the adversative conjunction 'or', which might imply an alternative between 'gender' and 'domestic' violence. However, it is evident that the intention is to encompass cases of both domestic and gender-based violence.

[57] M.C. Feresin et al, 'La mediazione familiare nei casi di affido dei figli/e e violenza domestica: contesto legale, pratiche dei servizi ed esperienze delle donne in Italia' *Rivista Criminologia Vittimologia e Sicurezza*, 13 (2017).

[58] C. Angiolini, 'Note critiche sulla (ir)rilevanza delle violenza di genere nelle decisioni in merito

IV. The Necessity of Incorporating a Gender Perspective into Family Law and the Role of Academia

Throughout this article it has been demonstrated that the achievement of equality remains a significant challenge. The existence of both formal and substantive equality is essential to the promotion of fairness, equality and justice, particularly in family law. Indeed, this area is of particular importance as discrimination within the family is one of the most pervasive and universal forms of societal prejudice.[59] Under the Agenda 2030 sustainable development goals, it is crucial to eliminate all forms of violence against women and girls in the private sphere too (target 5.2). This encompasses addressing harmful practices such as child early and forced marriage, as well as female genital mutilation (5.3) and gender based domestic violence. Notably, family law serves as the primary and most effective defense against violence, enabling its interception and counteraction before it escalates. As emphasized by the Italian parliamentary investigation Committee on femicide and gender violence,

> 'a family lawyer is the initial point of contact for a woman experiencing violence in a couple because her primary objective is the definitive termination of the violent relationship (i.e., divorce)'.[60]

In this context, academics, irrespective of gender,[61] should play a crucial role in advocating for both formal and substantive justice in family law. Indeed, it is essential to recognise that traditional assumptions of private law, such as the neutrality of law and the principle of private autonomy, cannot be universally applied. While civil and family law rules may seem gender-neutral, feminist literature has consistently argued that this neutrality is merely superficial. The application of these rules can, in reality, lead to substantial discrimination against women.[62] A notable example is the situation discussed earlier regarding divorce maintenance. The mention in the Grilli judgment of economic self-sufficiency as a prerequisite for receiving alimony could be reasonable in an ideal system where men and women earned the same salary for similar work and shared family responsibilities equally. However, in the reality of the majority of Italian families, where domestic responsibilities

all'affidamento e alla gestione dei figli nella prospettiva del diritto privato' *Ragion pratica*, 389 (2019).

[59] Social Institutions and Gender Index, 2019 Global Report. Transforming Challenges into Opportunities, Chapter 3.

[60] Commissione parlamentare di inchiesta sul femminicidio, nonché su ogni forma di violenza di genere, *La risposta giudiziaria ai femminicidi in Italia* (Roma: Camera dei Deputati, 2021), 85-86.

[61] It is not a coincidence that, nowadays, the majority of family law professors, especially in the lower ranks of academia, are women. It's as if the family, including in the field of law, is predominantly associated with femininity.

[62] Take, for example, the temporary prohibition of remarriage for the woman (Art 89 of the Civil Code) or the proof by childbirth of maternity (Art 269 para 3 of the Civil Code).

predominantly burden the mother-wife, this criterion becomes discriminatory.

It is therefore important to teach future legal professionals at university level that in family law it is not possible to adopt a 'neutral' perspective when assessing facts and conducts.[63] Indeed, judges will have to consider the gender perspective when interpreting events and behaviors. Thus, 'the concept of gender is extremely important in guiding a judicial process, assessing evidence and ultimately deciding a case'.[64] A negative example is provided by a judgment of an Italian court which refused to attribute fault for the legal separation to a husband who had been the perpetrator of violence against his wife (Tribunale di Biella, 7 December 2021, unpublished). The decision was based on the fact that the violence had continued for decades and that the wife had reconciled with her husband after each incident. The panel of judges was apparently unaware of the specificities that distinguish gender-based violence from other violations of marital obligations, including the so-called cycle of violence, in which episodes of violence typically alternate with periods of reconciliation.[65]

Family law professors are being urged to include discussions on gender equality, combat sexist stereotypes and eliminate discriminatory language in university lectures and textbooks. Currently, family law textbooks lack references to a feminist perspective. To address this, a family law lecturer can identify areas in the current curriculum for seamless integration of a feminist perspective, such as marital obligations, economic consequences of separation and divorce, child custody and support, and domestic violence. The lecturer could explore the historical development of family law in the context of the women's rights movement, invite guest speakers with insights from gender studies (eg lawyers from anti-violence centres), analyse case law through a feminist lens, include readings by feminist legal scholars, and assign papers and dissertations that explore family law issues from a feminist perspective. It is also necessary to condemn the use of discriminatory vocabulary, such as the term 'patria potestà' (paternal authority). This term is no longer used in law, but it is still widely used in everyday language and, more importantly, in administrative forms (eg school and health).

In addition, there seems to be a need to work at the level of academic research to gather evidence and data to identify biases and inequalities and to make recommendations for legal reform. In particular, it might be interesting to work with sociologists, social psychologists, economists and linguists to explore how family law affects gender dynamics, power structures and the well-being of individuals within families. Classical legal analysis of legal texts, judicial measures and doctrine could beneficially be complemented by 'field' analysis of court files and interviews with legal professionals. Evidence of the usefulness of such analysis can be found in

[63] G. Medina, 'Juzgar con perspectiva de género' *Justitia familiae*, 19 (2016).

[64] ibid

[65] It is worth noticing that the Italian Court of Cassation ruled out any relevance of reconciliation in cases of violence and admitted the separation charge even in the presence of a single episode of violence. In this regard, refer to the Corte di Cassazione 21 April 2015 no 8094, www.dejure.it.

the report on secondary victimisation prepared by the abovementioned Committee on femicide and gender violence.[66] The research methodology included a survey of court files related to separation proceedings with minor children registered in Italy in March, April, and May 2017.[67] In addition, interviews were conducted with legal professionals who routinely handle domestic violence cases. The study also involved a comprehensive examination of emblematic cases to understand the legal trajectories of women who claimed to have experienced secondary victimization due to the non-recognition of domestic violence in their court cases.

Finally, initiatives that promote policy advocacy and activism under the umbrella of public engagement and the so-called 'third mission' of universities should be welcomed. The opportunity for family law academics to participate in public debates and conferences, give interviews and use social media are all effective ways of informing and engaging the wider public about the need for reform. Working closely with lawyers, judges and legal practitioners helps to bridge the gap between academic research and practical application. Engaging with gender equality organisations and activists is crucial to influencing policy change. It is also important to raise public awareness of gender inequality in family law through various platforms, such as writing op-eds and using other means of communication. For example, the Faculty of Law at the University of Turin has been hosting classes from primary and secondary schools in the city of Turin for several years, providing a 'lesson' on legal issues.[68] One of the most well-received lessons is 'Bambine e Bambini a Scuola di Parità' ('Children in the School of Equality'), a didactic activity that initiates discussions on emblematic cases of discrimination against women closely linked to everyone's everyday life. For instance, the lesson addresses the issue of surnames, considering that the majority of Italians still carry only their father's surname. Subsequently, the session delves into exploring the prohibition of discrimination and underscores the actions that each individual, regardless of age and particularly within the family, can take to promote equality between men and women.

[66] Commissione parlamentare di inchiesta sul femminicidio, nonché su ogni forma di violenza di genere, 'Relazione. La vittimizzazione secondaria delle donne che subiscono violenza e dei loro figli nei procedimenti che disciplinano l'affidamento e la responsabilità genitoriale' (Roma: Camera dei deputati, 2022).

[67] Specifically, a two-stage probability sampling was implemented. The first-stage units were the Ordinary Courts, stratified by geographic regions (North, Centre, South). The second-stage units were the case files related to judicial separations with applications for custody of children recorded in the register during the three months considered in the year 2017. See n 66 above, 20.

[68] The activity is part of the programme *Un giorno all'Università* (A day at university), promoted by the City of Turin and ITER - Istituzione Torinese per una Educazione Responsabile (Turin Institution for Responsible Education) within the project *Crescere in città* (Growing up in the city) with the University of Turin, the Polytechnic, the 'Giuseppe Verdi' State Conservatory, IAAD - Institute of Applied Art and Design and the Albertina Academy of Fine Arts. For further information see Comune di Torino, available at http://tinyurl.com/eejntypt (last visited 10 February 2024).

Essays

The Contribution of Artificial Intelligence and Computer Algorithms to the Investigation Activities of the Financial Administration and to the *Jus Dicere* Function of the Tax Judge: What Prospects for the Suppression of Tax Evasion?

Salvatore Antonello Parente*

Abstract

Artificial intelligence, big data and computer algorithms, in addition to being used in administrative action, can play an important role in judicial proceedings, in the application of tax provisions, in the context of assessment procedures and in suppression of tax evasion.

One of the advantages of the technology lies in the possibility of filing a large amount of information relating to taxpayers, which can then be shared between tax authorities of different States. This system maximizes the ability of the financial administration to carry out cross-checks, also through the use of telematic tools, in order to identify any inconsistencies worthy of further study.

In the jurisdictional field, 'predictive justice' software, based on the indexing of data and the use of metadata and sophisticated algorithms, while fully complying with common law systems, in which the principle of the binding precedent applies, can be important also in civil law systems, including tax matters.

The essay aims to examine the extent to which public entities can base their institutional action on the results of algorithmic processing.

I. The Jurisdictional and Tax Assessment Functions in the Era of the Data Economy and Cloud Computing Systems: The Contribution of Artificial Intelligence and Computer Algorithms

In the era of the data economy[1] and crypto-assets,[2] artificial intelligence and

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[1] A.F. Uricchio and S.A. Parente, 'Data driven e digital taxation: prime sperimentazioni e nuovi modelli di prelievo' *Diritto e pratica tributaria internazionale*, 606 (2021); A.F. Uricchio, 'L'imposizione della data economy tra proposte di nuove forme di prelievo, web tax italiana e global minimum tax', in F. Gallo and A.F. Uricchio eds, *La tassazione dell'economia digitale. Tra imposta sui servizi digitali, global minimum tax e nuovi modelli di prelievo* (Bari: Cacucci, 2022), 31-120; A. Fedele, 'Intervento sulla rilevanza dei dati nella determinazione degli imponibili nell'era digitale' *Rivista di diritto tributario – supplemento online*, 19 September 2023, 1-12.

[2] F. Alcaro, 'Intelligenza artificiale e attività giuridica', in P. Perlingieri et al eds, *Rapporti civilistici e intelligenze artificiali: attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 2020), 3; M.R. Nuccio, 'Intelligenza Artificiale e gestione dei rischi: prospettive di tutela' *Rassegna di diritto civile*, 1466-1470 (2022); S. Capaccioli, 'Cripto-attività, cripto-valute ed Iva', in G. Ragucci ed, *Fisco*

computer algorithms,[3] phenomena largely resulting from the development of technological knowledge and innovation,[4] can be used in administrative procedures, giving rise to an automated action,[5] and can also play an important role in judicial proceedings[6] and in the application of tax provisions.[7]

Of no less importance can be the function carried out in the context of formal and substantive assessment procedures[8] - in order to facilitate and guide controls

digitale. Cripto-attività, protezione dei dati, controlli algoritmici (Torino: Giappichelli, 2023), 33; D. Conte, 'Imposizione reale e ricchezza di origine virtuale: quale tassazione per le criptoattività?' *Rivista di diritto tributario*, 483-540 (2023); A. Fuccio and M. Tarantino, 'Cripto-attività e stabile organizzazione' *Rivista di diritto tributario – supplemento online*, 2 February 2023, 1-7; M. Pierro, 'Le cripto-attività e l'imposizione diretta dopo la legge di bilancio 2023', in G. Ragucci ed, *Fisco digitale* above 11; E. Fazio, *Intelligenza artificiale e diritti della persona* (Napoli: Edizioni Scientifiche Italiane, 2023), 2; A. Marano, 'La rivoluzione degli algoritmi verdi nella fiscalità ambientale: dall'esperienza spagnola alle novità italiane' *Rivista di diritto tributario*, 687-707 (2023); A. Perrone, 'Sull'esistenza di un nuovo "valore digitale" e la sua rilevanza fiscale: il caso dei crypto-asset' *Rassegna tributaria*, 268-308 (2023); M. Pierro, 'Il TUIR alla prova delle cripto-attività: indicazioni europee e il discutibile intervento della prassi' *Rassegna tributaria*, 855-875 (2023).

[3] On the new taxation models deriving from the spread of artificial intelligences and computer algorithms, see S. Dorigo, 'La tassa sui robot tra mito (tanto) e realtà (poca)' *Corriere tributario*, 2364-2370 (2018); A.F. Uricchio, 'Robot tax: modelli di prelievo e prospettive di riforma' *Giurisprudenza italiana*, 1749-1761 (2019); S.A. Parente, 'Artificial Intelligence and Taxation: Assessment and Critical Issues of Tax-Levy Models' 26(3) *Białystok Legal Studies*, 135-151 (2021); A.F. Uricchio, 'Prospettive di ulteriori interventi in materia fiscale tra tassazione dell'intelligenza artificiale e ulteriori nuove forme di prelievo', in F. Gallo and A.F. Uricchio eds, n 1 above, 485-534; M.G. Ortoleva, 'Artificial Intelligence and Robots: Taxing or Incentivising?' *Rivista di diritto tributario – supplemento online,* 31 December 2022, 1-10.

[4] A. Uricchio, 'Evoluzione tecnologica e imposizione: la cosiddetta «bit tax». Prospettive di riforma della fiscalità di internet' *Il diritto dell'informazione e dell'informatica*, 753, 753-754; A. Uricchio and W. Spinapolice, 'La corsa ad ostacoli della web taxation' *Rassegna tributaria*, 451-493 (2018); C. Sacchetto, 'Introduzione', in F. Montalcini, R. Nemni, C. Sacchetto, *Diritto tributario telematico. Nuovi confini* (Torino: Giappichelli, 2021), XXVII.

[5] A.G. Orofino and G. Gallone, 'L'intelligenza artificiale al servizio delle funzioni amministrative: profili problematici e spunti di riflessione' *Giurisprudenza italiana*, 1738, 1738-1748 (2020); F. Farri, 'Digitalizzazione dell'amministrazione finanziaria e diritti dei contribuenti' *Rivista di diritto tributario*, 115, 129-139 (2020); C. Francioso, 'Automated decision making by tax authorities and the protection of taxpayers' rights in a comparative perspective' *Rivista trimestrale di diritto tributario*, 541-558 (2023).

[6] For the application of artificial intelligences in accounting judgment, see A. Giordano, 'Intelligenza artificiale, giusto processo e giudizio contabile' *Rivista della Corte dei conti*, 27-35 (2022).

[7] S. Dorigo, 'Intelligenza artificiale e norme antiabuso: il ruolo dei sistemi "intelligenti" tra funzione amministrativa e attività giurisdizionale' *Rassegna tributaria*, 728-751 (2019); T. Rosembuj, *Inteligencia artificial e impuesto* (Barcelona: el Fisco, 2018).

[8] M.G. Ortoleva, 'The employment of AI by the Italian tax administration to fight tax relief abuse: the difficult balance between public interest and taxpayer rights' *Diritto e processo tributario*, 351-376 (2022); F. Paparella, 'L'ausilio delle tecnologie digitali nella fase di attuazione dei tributi' *Rivista di diritto tributario*, 617-652 (2022); A. Contrino, 'Digitalizzazione dell'amministrazione finanziaria e attuazione del rapporto tributario: questioni aperte e ipotesi di lavoro nella prospettiva dei princìpi generali' *Rivista di diritto tributario*, 105-120 (2023); C. Francioso, 'Intelligenza artificiale nell'istruttoria tributaria e nuove esigenze di tutela' *Rassegna tributaria*, 47-60 (2023); A. Guidara, 'Accertamento dei tributi e intelligenza artificiale: prime riflessioni per una visione di sistema' *Diritto e pratica tributaria*, 384-400 (2023); F. Paparella, 'L'ausilio delle tecnologie digitali nell'applicazione

and to make the choice of taxpayers more neutral - and in the prosecution of tax fraud.[9]

Since these are functions characterized by public interest, in which a conflict emerges between the power exercised by the administrative authority and the protection of the administered,[10] it is necessary to examine the limits, including those of an ethical nature,[11] that should be placed on the ability of public agencies to rely upon the results of processing based on artificial-intelligence systems as the foundation of their institutional action.[12]

One of the advantages of technology lies in the ability to store a large amount of data relating to taxpayers[13] (also using the aid of sophisticated cloud computing systems) and to effectively process the stored data.

The subsequent sharing of this information between the authorities of the different States maximizes the ability of the financial administration to carry out cross-checks, also through the use of telematic tools,[14] in order to identify any inconsistencies worthy of further study.[15]

dei tributi', in L. del Federico and F. Paparella eds, *Diritto tributario digitale* (Pisa: Pacini Giuridica, 2023), 155.

[9] R. Cordeiro Guerra, 'L'intelligenza artificiale nel prisma del diritto tributario', in S. Dorigo ed, *Il ragionamento giuridico nell'era dell'intelligenza artificiale* (Pisa: Pacini Giuridica, 2020), 87-88, according to which 'the issue of transparency in the selection of subjects to be controlled, net of the appreciable positions of the doctrine in this regard, is in fact lacking in effective justice, in the sense that the circumstance that a taxpayer is controlled outside the guiding criteria internally issued by the competent offices or an excessive or redundant number of times, does not constitute grounds for the invalidity of the deed of assessment resulting from such control' (translated from the original). On topic, see G. Melis, *Manuale di diritto tributario* (Torino: Giappichelli, 2019), 298; S. Dorigo, 'Opportunità e limiti nell'impiego dell'intelligenza artificiale da parte del Fisco' *Corriere tributario*, 965-973 (2022); E.M. Bartolazzi Menchetti, 'Le sanzioni tributarie nell'economia digitale', in L. del Federico and F. Paparella eds, *Diritto tributario digitale* n 8 above, 261; S. Dorigo, 'L'intelligenza artificiale e il possibile "rinascimento" del sistema sanzionatorio tributario' *Rivista di diritto tributario*, 407-433 (2023).

[10] D.U. Galetta, 'Public Administration in the Era of Database and Information Exchange Networks: Empowering Administrative Power or Just Better Serving the Citizens?' 25(2) *European Public Law*, 171-181 (2019).

[11] A. Maceratini, 'New Technologies between Law and Ethics: Some Reflections' 26(3) *Białystok Legal Studies*, 9-24 (2021).

[12] S. Dorigo, 'L'intelligenza artificiale e i suoi usi pratici nel diritto tributario: Amministrazione finanziaria e giudici', in R. Cordeiro Guerra and S. Dorigo eds, *Fiscalità dell'economia digitale* (Pisa: Pacini Giuridica, 2022), 204.

[13] G. Palumbo, 'Alcuni argomenti a favore dell'utilizzo dei dati personali da parte del Fisco', in Id, *Fisco e privacy. Il difficile equilibrio tra lotta all'evasione e tutela dei dati personali* (Pisa: Pacini Giuridica, 2021), 99.

[14] M. Carrozzino et al, 'I controlli tributari telematici', in L. Del Federico and C. Ricci eds, *Le nuove forme di tassazione della Digital Economy. Analisi, proposte e materiali per il dibattito politico e istituzionale* (Canterano: Aracne, 2018), 171.

[15] F. Farri, 'Digitalizzazione' n 5 above, 129.

II. The Use of Digital and Algorithmic Tools to Make Tax Prevention, Assessment and Prosecution More Efficient

Even without achieving a real 'algorithmic revolution',[16] this system – already envisaged and, in part, implemented in the French legal system[17] and in that of the United States of America, whose financial administrations have long been entitled to make use of algorithms and big data to scan the social media used by taxpayers and additional open sources (for example, press articles, websites and information made public by the data subject) in search of potential tax evaders[18] – has been the subject of attention by the Italian tax authority.

That agency – through SOGEI, a company in charge of managing and organizing IT systems on behalf of the Ministry of Economy and Finance and the Court of Auditors – has long made use of information obtained from electronic invoicing,[19] as well as telematics databases for intelligence and tax verification activities and for economic policy decisions.[20] These cognitive elements rise to a sort of 'fiscal oracle'.[21]

Recently, a new algorithm has been developed, called 'Ve.R.A.' (acronym for 'verification of financial reports'),[22] capable of processing and cross-referencing millions of pieces of data simultaneously in order to identify lists of taxpayers at risk of tax evasion. The legal basis for the adoption of the 'Ve.R.A.' algorithm is represented by Art 1, para 682, legge 27 December 2019 no 160, where the interconnection of different tax datasets and databases with the national tax

[16] S. Dorigo, 'Il tramonto delle regole fiscali tradizionali nell'economia del XXI secolo: rivoluzione algoritmica e tutela dei diritti', in R. Cordeiro Guerra and S. Dorigo eds, n 12 above, 29.

[17] Art 154, legge 28 December 2019, no 2019-1479 (Loi de finances pour 2020).

[18] C. Dell'Oste and G. Parente, 'Ecco come il Fisco incastra gli evasori con le prove raccolte sul web' *Il Sole 24 Ore*, 28 January 2020; L. Quarta, 'Impiego di sistemi AI da parte di Amministrazioni finanziarie ed agenzie fiscali. Interesse erariale versus privacy, trasparenza, proporzionalità e diritto di difesa', in A.F. Uricchio et al eds, *Intelligenza Artificiale tra etica e diritti. Prime riflessioni a seguito del libro bianco dell'Unione europea* (Bari: Cacucci, 2020), 199; F. Montalcini, 'Piattaforme Digitali, Social Network e Fisco: Evoluzione o Rivoluzione?', in Id et al, *Diritto tributario telematico. Nuovi confini* (Torino: Giappichelli, 2021), 49; G. Palumbo, 'L'utilizzo dei dati da parte del fisco e delle multinazionali: punti di contatto e differenze', in Id, *Fisco e privacy* n 13 above, 60; O. Signorile, 'La ricerca di dati su fonti aperte come nuovo strumento delle indagini fiscali', in G. Ragucci ed, n 2 above 113.

[19] M. Conigliaro, 'Big data e fatturazione elettronica: nuovi strumenti di contrasto all'evasione' *Il fisco*, 3907-3912 (2019); M. Peirolo, *Fatturazione elettronica* (Milano: Wolters Kluwer, 2019), 7; A. Amodeo, 'Memorizzazione ed utilizzazione dei dati tratti dalle fatture elettroniche', in G. Palumbo, *Fisco e privacy* n 13 above, 89; M. Conigliaro and S. De Benedictis, 'Tenuta e conservazione digitale a norma di libri e registri: un percorso a ostacoli nonostante i tentativi di semplificazione' *Il fisco*, 3407-3412 (2022); F. Farri, 'Gli obblighi strumentali ai fini dell'attuazione del tributo', in L. del Federico and F. Paparella eds, *Diritto tributario digitale* n 8 above, 192.

[20] A. Contrino, 'Banche dati tributarie, scambio di informazioni fra autorità fiscali e "protezione dei dati personali": quali diritti e tutele per i contribuenti?' *Rivista di diritto tributario – supplemento online*, 29 May 2019, 1-8; F. Tarini, 'L'utilizzo delle banche dati nei controlli in dogana' *Tax News*, 81, 81-92 (2022).

[21] G. Palumbo, 'E domani?', in Id, *Fisco e privacy* n 13 above, 115-116.

[22] C. Francioso, 'Intelligenza' n 8 above, 63-76.

registry[23] governed by decreto del Presidente della Repubblica 29 September 1973 no 605 is allowed.

Equally important is the use of big data[24] (tax registry, archive of relationships with financial operators and tax information system) for the collection and exchange of information relating to balances and movements in current accounts and other types of relationships entertained by taxpayers through financial intermediaries.[25]

Therefore, big data, such as massive collection of data and information of a strictly individual nature, despite the critical issues regarding the protection of the privacy of the subjects involved,[26] has become an important tool that allows the financial administration to enrich its information compendium in order to make it broad and varied.[27]

In this way, in addition to implementing and making tax monitoring, prevention and assessment activities better and more efficient, the use of big data allows agencies to limit illegal conduct and prosecute violations with greater immediacy and effectiveness.[28]

III. Big Data and Predictive Capacity of the Financial Administration

From this perspective, as also reiterated at the Organization for Economic

[23] C. Califano, 'Anagrafe tributaria' *Diritto online (2014)*, available at http://tinyurl.com/4pfmvdyu (last visited 10 February 2024).

[24] The term indicates the ability to extrapolate, analyze and relate multiple heterogeneous data, even diversified according to the source (human generated, machine generated, and business generated), in order to identify the links between the different phenomena and predict future ones. On the use of big data by the financial administration, see K. Malaszczyk and B.M. Purcell, 'Big data analytics in tax fraud detection' 23 *Journal of Finance and Accountancy*, 1-10 (2018); P. Mehta et al, 'Big Data Analytics for Tax Administration', in A. Kő et al eds, *Electronic Government and the Information Systems Perspective* (Cham: Springer, 2019), 47; G. Palumbo, 'L'utilizzo' n 18 above, 63; A. Purpura, 'La frontiera dei Big data', in G. Palumbo, *Fisco e privacy* n 13 above, 71; G. Pitruzzella, 'Dati fiscali e diritti fondamentali' *Diritto e pratica tributaria internazionale*, 666, 666-677 (2022).

[25] A.F. Uricchio, 'La fiscalità dell'intelligenza artificiale tra nuovi tributi e ulteriori incentivi', in U. Ruffolo ed, *Intelligenza artificiale. Il diritto, i diritti, l'etica* (Milano: Giuffrè, 2020), 528; A.F. Uricchio, 'Prospettive per l'introduzione di nuovi modelli di prelievo in materia di intelligenza artificiale anche alla luce del recovery plan', in U. Ruffolo ed, *XXVI lezioni di Diritto dell'Intelligenza Artificiale* (Torino: Giappichelli, 2021), 447-448.

[26] M. Bogni and A. Defant, 'Big data: diritti IP e problemi della privacy' *Il Diritto industriale*, 117-126 (2022); A. Contrino, 'Banche dati' n 20 above, 1; A. Carinci, 'Fisco e privacy: storia infinita di un apparente ossimoro' *Il fisco*, 4407, 4407-4412 (2019); A. Contrino and S. Ronco, 'Prime riflessioni e spunti in tema di protezione dei dati personali in materia tributaria, alla luce della giurisprudenza della Corte di Giustizia e della Corte EDU' *Diritto e pratica tributaria internazionale*, 599-625 (2019); S. Capolupo, 'Analisi del rischio: disposizioni a tutela della privacy' *Il fisco*, 307-311 (2020); G. De Petris, 'La digitalizzazione del fisco e la difficile parità delle armi tra amministrazione e contribuente' *Corriere tributario*, 588-594 (2020); F. Montalcini, 'Privacy e Fisco nell'ambiente fiscale virtuale', in Id et al, *Diritto tributario telematico. Nuovi confini* (Torino: Giappichelli, 2021), 23.

[27] A. Purpura, 'La frontiera' n 25 above, 79-80.

[28] ibid 73.

Cooperation and Development (OECD),[29] the tax authority benefits from big data, which can reveal, with greater ease and immediacy, each taxpayer's effective ability to pay.[30]

Nevertheless, a balance of the interests involved prevents the financial administration, in the exercise of its action, from exceeding what is necessary to ensure the regular functioning of the services essential for the life of the community.[31]

The use of big data, together with the ability to realize economic benefits in terms of optimization of the costs of the administrative apparatus, with consequent saving of resources to be allocated to other purposes, contributes to perfecting a predictive capacity for the financial administration, also acting as an indirect parameter for evaluating both the effectiveness of internal activities and external initiatives that impact (positively or negatively) on the taxpayer's legal and patrimonial sphere.[32]

The predictive attitude[33] takes the form of the possibility of formulating advances and forecasts about the trend of future taxpayers' conduct, a result that traditional monitoring and prevention tools would be able to ensure only with extreme difficulty.[34]

The use of big data in the tax field, making it clear which tax obligations have appeared to be more complex and poorly understood by taxpayers, also contributes to achieving a 'relational' benefit, favoring a rapprochement between tax authorities

[29] OECD, Advanced Analytics for Better Tax Administration: Putting Data to Work (Paris: OECD, 2016), 15.

[30] A. Purpura, 'La frontiera' n 25 above, 83. On the systematic relevance of the principle of ability to pay, see K. Vogel, 'Il diritto tributario internazionale', in A. Amatucci ed, *Trattato di diritto tributario* (Padova: CEDAM, 1990), I, II, 365-390; M. Basilavecchia, 'Funzione impositiva e situazioni soggettive', in L. Perrone and C. Berliri eds, *Diritto tributario e Corte costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 185-200; E. De Mita, *Interesse fiscale e tutela del contribuente. Le garanzie costituzionali* (Milano: Giuffrè, 2006), 41-56; P.J. Wattel, 'Fiscal Cohesion, Fiscal Territoriality and Preservation of the (Balanced) Allocation of Taxing Power; What is the Difference?', in D. Weber ed, *The Influence of European Law on Direct Taxation. Recent and Future Developments* (Alphen aan den Rijn: Kluwer Law International, 2007), 156-165; J. Goldsmith and D. Levinson, 'Law for States: International Law, Constitutional Law, Public Law' 122(7) *Harvard Law Review*, 1822-1830 (2009); G. Falsitta, *Il principio di capacità contributiva nel suo svolgimento storico prima e dopo la Costituzione repubblicana. Schermaglie dialettiche su "scuole" e "maestri" del passato* (Milano: Giuffrè, 2014), 189-199; M.C. Fregni, 'Legitimacy in Decision-Making in Tax Law: Some Remarks on Taxation, Representation and Consent to Imposition' *Rivista di diritto finanziario e scienza delle finanze*, 410-435 (2017); C.J. Jacobs, 'In Defense of Territorial Jurisdiction' 85(7) *The University of Chicago Law Review*, 1623-1647 (2018); J. Kokott, 'Brevi riflessioni sui rapporti tra principi costituzionali e principi del diritto internazionale in materia tributaria' *Diritto e pratica tributaria internazionale*, 588-598 (2022).

[31] A. Purpura, 'La frontiera' n 25 above, 87-88.

[32] ibid 80-81.

[33] A. Di Pietro, 'Leva fiscale e divisione sociale del lavoro', in U. Ruffolo ed, *XXVI lezioni di Diritto dell'Intelligenza Artificiale* (Torino: Giappichelli, 2021), 451.

[34] A. Purpura, 'La frontiera' n 25 above, 76.

and taxpayers.[35]

IV. Blockchain Technologies and Control and Monitoring Activities of the Tax Authority

From a *de iure condendo* prospect, especially for combating VAT carousel fraud,[36] blockchain technology could also be a useful support to the control and monitoring activities carried out by the tax authority,[37] as, within the system of blocks, each operation is subject to distribution within an open access digital register, in which it is then filed and encrypted, thus becoming no longer manipulable.[38]

In fact, blockchain technology makes it possible to verify in real time the transactions carried out between economic operators, the exact time of execution of the operation, the identity of the parties involved and the possible existence of tax credits or debts.[39]

In particular, the blockchain uses public key cryptography, consisting of an asymmetric cryptographic algorithm that uses two mathematically generated keys: a 'private key', used to encrypt, and a 'public key', used to de-encrypt the message or to verify its signature. As a result of a mathematical link between the two keys, the public key works only if the corresponding private key exists.[40]

In relation to the activities carried out by the financial administration, blockchain technology would play a disincentive role with respect to those who intend to carry out fraudulent transactions, while at the same time encouraging tax compliance.[41]

[35] ibid 77.

[36] G.D. Toma, 'La frode carosello nell'Iva. Parte prima: risvolti penali' *Diritto e pratica tributaria*, 715-766 (2010); Id, 'La frode carosello nell'Iva. Parte seconda: risvolti tributari (I)' *Diritto e pratica tributaria*, 1381-1433 (2010); A. Giovanardi, *Le frodi IVA. Profili ricostruttivi* (Torino: Giappichelli, 2013), 10; P. Bertini, *Le frodi carosello* (Santarcangelo di Romagna: Maggioli, 2016), 109; M. Greggi, 'Frodi fiscali e neutralità del tributo nella disciplina dell'Iva' *Diritto e pratica tributaria*, 115-138 (2016); R. de la Feria and A. Schoeman, 'Addressing VAT Fraud in Developing Countries: The Tax Policy-Administration Symbiosis' 47(11) *Intertax*, 950-967 (2019).

[37] A. Maniatis, 'Blockchain with emphasis on tax law', in D. Vrontis et al eds, *Business Management Theories and Practices in a Dynamic Competitive Environment* (Thessaloniki: EuroMed Press, 2019), 680; T. Calculli, 'Proporzionalità del prelievo e sostituzione tributaria ai tempi della blockchain "aterritoriale" ' *Rivista di diritto tributario – supplemento online*, 1 November 2022, 1-10; A. Quattrocchi, 'Le potenzialità applicative della blockchain e dei database condivisi nell'attuazione della norma tributaria' *Rivista di diritto tributario – supplemento online*, 22 November 2022, 1-9; F. Tumbiolo, 'Profili fiscali della formazione del consenso all'interno della blockchain: la tassazione del mining e del fork di bitcoin' *Diritto e processo tributario*, 475-509 (2022).

[38] A. Purpura, 'Digitalizzazione, tecnologizzazione e diritto tributario. Prospettive di una difficile (ma possibile) sinergia?' *Rivista di diritto tributario – supplemento online*, 22 July 2020, 3-4.

[39] M. d'Agostino Panebianco, 'A Blockchain to reinforce Tax-Compliance' *Rivista di diritto tributario – supplemento online*, 1 May 2020, 1-5; ibid 5.

[40] A. Purpura, 'Digitalizzazione' n 38 above, 7.

[41] M. d'Agostino Panebianco, n 39 above, 1; ibid 4. On tax compliance, see G. Ragucci, *Gli istituti*

Along this line, the rewarding nature of the blockchain would seem to emerge, a mechanism structurally oriented to select the economic transactions carried out in a lawful manner, in the face of the automatic rejection of any fraudulent conduct.[42]

Also in this area, SOGEI, albeit on an experimental basis, has implemented specific analysis methodologies designed to prevent and combat tax evasion more effectively and to improve, also on a qualitative level, investigation by indicating the elements to be detected and the documentation (including digital documents)[43] to be acquired and integrating the available tools.[44]

V. 'Transaction Network Analysis' and Self-Compliance Tools: The Pilot Project 'A Data Driven Approach to Tax Evasion Risk Analysis in Italy'

In a *de iure condito* view, another aid to the investigation activities of the financial administration,[45] harmonized at European Union (EU) level, is the 'Transaction Network Analysis', a plan drawn up in 2019 by the European Commission to improve the efficiency of the exchange of information[46] between the tax authorities of the Member States for the purpose of combating VAT fraud,[47] through the preparation of an electronic archive formed with the data provided by users through self-compliance tools.[48]

della collaborazione fiscale. Dai comandi e controlli alla Tax Compliance (Torino: Giappichelli, 2018), 59.

[42] A. Purpura, 'Digitalizzazione' n 38 above, 7.

[43] G. Palumbo, 'La legittimità degli accertamenti basati su documentazione digitale', in Id, *Fisco e privacy* n 13 above, 51. In case law, see Corte di Cassazione 12 February 2010 no 3388, *CED Cassazione*; Corte di Cassazione 30 March 2012 no 5226, *CED Cassazione*; Corte di Cassazione 13 May 2016 no 9870, *CED Cassazione*.

[44] A.F. Uricchio, 'La fiscalità' n 26 above, 528; A. Uricchio, 'Prospettive' n 26 above, 448.

[45] A. Viotto, I poteri di indagine dell'amministrazione finanziaria. Nel quadro dei diritti inviolabili di libertà sanciti dalla Costituzione (Milano: Giuffrè, 2002); G. Fransoni, Le indagini tributarie. Attività e poteri conoscitivi nel diritto tributario (Torino: Giappichelli, 2020), 49.

[46] P. Adonnino, 'Cooperazione amministrativa e modalità di scambio di informazioni tra amministrazioni fiscali nazionali' *Tributi*, 826-829 (1995); S. Dorigo, 'La cooperazione fiscale internazionale', in C. Sacchetto ed, *Principi di diritto tributario europeo e internazionale* (Torino: Giappichelli, 2011), 206; C. Garbarino, 'Scambio di informazioni (dir. trib.)' *Digesto delle discipline privatistiche, sezione commerciale, Aggiornamento* (Milanofiori Assago: UTET Giuridica, 2012), VI, 661; P. Mastellone, 'La cooperazione fiscale internazionale nello scambio di informazioni', in R. Cordeiro Guerra ed, *Diritto tributario internazionale. Istituzioni* (Padova: CEDAM, 2012), 213; S. Dorigo, 'Scambio di informazioni nel diritto tributario internazionale' *Digesto delle discipline privatistiche, sezione commerciale, Aggiornamento* (Milanofiori Assago: UTET Giuridica, 2015), VII, 480; L. Salvini, 'I regimi fiscali e la concorrenza tra imprese' *Giurisprudenza commerciale*, 130-145 (2016); L. Starola, 'Lo scambio automatico di informazioni nel settore fiscale' *Corriere tributario*, 2280-2285 (2018); A. Valente, 'Scambio automatico di informazioni fiscali esteso anche alle piattaforme digitali' *Ipsoa Quotidiano*, 27 July 2020; C. Setti della Volta et al, 'Scambio di informazioni ed esigenza di coordinamento per le cripto-attività' *Il fisco*, 3465-3469 (2022).

[47] A. Purpura, 'Potenziali benefici, rischi e limiti del "Transaction Network Analysis" quale strumento di prevenzione e contrasto alle frodi IVA infra-UE' *Rivista di diritto tributario – supplemento online*, 2 August 2019, 1-10.

[48] F. Farri, 'Digitalizzazione' n 5 above, 129.

The use of a complex algorithm makes it possible to connect such data, reporting any anomalies to the financial administration, through special 'alerts', in order to allow it to activate substantial controls.[49]

From this perspective, the access by the financial administration to computer archives processed with distributed ledger technology could be a useful tool for discovering evasion.[50]

In any case, the use of presumptive methods for determining the taxable amount and the results of predictive analyzes of possible evasive behaviors cannot constitute a presumption of evasion, being rather a source of triggering of the checks on the merits suitable for bringing out the positions of the individual taxpayers.[51]

Even in the Italian legal system, over the years, the use of artificial intelligence to support the assessment activities carried out by the financial administration has been increasingly intense: an implicit confirmation can be found in Art 1, para 682, legge no 160/2019, which allows the Revenue Agency to make use of

> 'the technologies, processing and interconnections with the other databases at its disposal, in order to identify risk criteria useful for bringing out positions to be subject to control and incentivizing spontaneous compliance'.[52]

Therefore, while waiting to arrive at a real 'algorithmic' assessment,[53] one could think of combining the data processing activity by intelligent systems with forms of preventive cooperation between tax authorities and taxpayers, in order to select the situations of potential risk.[54]

An initial screening carried out with the help of artificial intelligence systems would allow the selection of taxpayers worthy of further study. Subsequently, a preliminary cross-examination phase would allow the tax office to inform the taxpayer of the results of the automated procedure, opening the way to cooperation between the parties involved; such cooperation would promote a disclosure of the data not in the possession of the financial administration. With more data,

[49] ibid 130, according to which to avoid VAT fraud, an algorithm could be used which, combining the data (VAT number) of the invoice issuer, uploaded by a user to make use of the VAT deduction, with the data of the VAT payments made from the issuer, brings out an inconsistency. Furthermore, on this point, see R.T. Ainsworth and A. Shact, 'Blockchain Technology Might Solve VAT Fraud' 13(83) *Tax Notes International*, 1174-1175 (2016).

[50] F. Farri, 'Digitalizzazione' n 5 above, 131.

[51] ibid 133.

[52] G. Palumbo, 'Contrasto all'evasione fiscale e impatto sulla privacy dei contribuenti', in Id, *Fisco e privacy* n 13 above, 13; A. Zuccarello, 'Algoritmi e automatismi nei controlli della dichiarazione: profili problematici' *Rivista di diritto tributario – supplemento online*, 2 June 2022, 1, 8.

[53] On topic, see G. Ragucci, 'L'analisi del rischio di evasione in base ai dati dell'archivio dei rapporti con gli intermediari finanziari: prove generali dell'accertamento "algoritmico"?' *Rivista di diritto tributario – supplemento online*, 4 September 2019, 1-6; M. Fasola, 'Le analisi del rischio di evasione tra selezione dei contribuenti da sottoporre a controllo e accertamento "algoritmico" ', in G. Ragucci ed, n 2 above, 79.

[54] S. Dorigo, 'Intelligenza' n 7 above, 746; L. Quarta, n 18 above, 245.

the administration could integrate the cognitive elements at their disposal and, if necessary, repeat the algorithmic processing.[55]

Also important, in this context, is the pilot project called 'A data driven approach to tax evasion risk analysis in Italy' which was funded by the EU in 2021 with the primary purpose of innovating the tax risk assessment processes of taxpayers through use of network science tools, visual analysis of information and artificial intelligence.[56] In fact, the representation of data in the form of networks makes it easier to bring out indirect and non-evident relationships between subjects that may be related to tax evasion and avoidance schemes that are difficult to identify using traditional analysis techniques.[57]

VI. Intelligent Systems and Machine Learning Techniques: The Enhancement of the Financial Administration's Investigative Capabilities and the New Conformation of the Tax Legal Relationship

The adoption of innovative 'man-machine' interfaces, then, makes it possible to enhance the investigative capabilities of the financial administration, accelerating and making the process of acquiring and processing relevant information more intuitive and natural.[58]

In Italy, the Ministry of Economy and Finance, in the guideline for the achievement of the fiscal policy objectives relating to the three-year period 2021-2023, in line with the transition to e-government of the entire public administration, recognized the need to strengthen the databases, methodologies and technological tools to support the fight against tax evasion, to promote tax compliance, and to acquire relevant information. With the additional information, the Ministry would perform targeted checks on taxpayers who have particular tax risk indices, also through the use of machine learning and artificial intelligence techniques.[59]

It is, therefore, evident that nowadays tax agencies cannot ignore the use of sophisticated artificial intelligence systems capable of collecting, elaborating and processing a large amount of data and information relating to taxpayers, despite the potential to disclose personal data.[60]

[55] S. Dorigo, 'L'intelligenza' n 12 above, 209-210.
[56] ibid 204.
[57] ibid 204, fn 17.
[58] ibid 204, fn 18.
[59] ibid 204-205.
[60] ibid 205, according to which 'several times the Privacy Guarantor has intervened against the Revenue Agency to impose the adoption of suitable forms of guarantee on the use of such data, invoking the intervention of qualified human operators for the interpretation of the results of the automated processing for the protection of the taxpayer'. Furthermore, on this point, see G. Palumbo, 'Contrasto' n 53 above, 11; A. Tomo, 'La "forza centripeta" del diritto alla protezione dei dati personali: la Corte di giustizia sulla rilevanza in ambito tributario dei principi di proporzionalità, accountability e minimizzazione' Diritto e pratica tributaria internazionale, 908-918 (2022); C. Contrino, 'Spinte

Such intelligent systems could help the administration to verify, on the basis of the evidence acquired elsewhere, whether or not a given behavior should be considered elusive or evasive.[61]

From a *de iure condendo* point of view, when drafting the Charter of taxpayers' IT rights, which is contained in action 24 of the 'EU eGovernment Action Plan 2016-2020', it should be reiterated that predictive calculations can be used for the fight against tax infringements only as a prerequisite for the initiation of investigation, not being able to assume a legal presumption of evasion.[62]

Furthermore, with the evolution of the investigative tools available to the financial administration, the need to codify some rights and obligations of the taxpayer, in order to adapt them to the modern conformation of the tax legal relationship, emerges strongly, even at the European level.[63] It concerns, in particular, the right to access one's personal data and to obtain its blocking and cancellation, the right to be heard before undergoing a measure potentially damaging to one's individual sphere, and the right to compensation for the damage deriving from the incorrect management of information.[64]

VII. The Application of Artificial Intelligence to Automated Settlement and Formal Control of Tax Returns. Further Uses of Intelligent Systems in Tax Matters

On the one hand, the continuous updating required by a jumble of primary and secondary rules, often antinomic, the administrative practice that is not always linear and coherent and the orientations of case law in continuous and frenetic evolution and, on the other, the apparent automatism application of many

evolutive (sul piano sovranazionale) e involutive (a livello interno) in tema di bilanciamento fra diritto alla protezione dei dati dei contribuenti ed esigenze di contrasto all'evasione fiscale' *Rivista di diritto tributario – supplemento online*, 3 October 2023, 1-10; C. Francioso, 'Pubblicazione di dati fiscali e diritto al rispetto della vita privata' *Rivista di diritto finanziario e scienza delle finanze*, 82-129 (2023); G. Ragucci, 'Introduzione e note ordinate sul fisco digitale', in G. Ragucci ed, n 2 above, 4; G. Ziccardi, 'Protezione dei dati, lotta all'evasione e tutela dei contribuenti: l'approccio del Garante per la protezione dei dati italiano tra trasparenza, big data e misure di sicurezza', in G. Ragucci ed, n 2 above, 61. In case law, see Judgment of Corte di Cassazione 11 June 2018 no 15075, *CED Cassazione*; Corte di Cassazione 4 July 2018 no 17485, *CED Cassazione*.

[61] S. Dorigo, 'L'intelligenza' n 12 above, 205.

[62] F. Farri, 'Digitalizzazione' n 5 above, 139.

[63] For the interrelation between these new tools, the existing set of procedural safeguards recognised by the EU Charter of Fundamental rights to taxpayers (eg Effective Remedy – Art 47; Habeas Data – Art 42; Right to a Good Administration – Art 41) and the prospects highlighted by the recent update contained in the Charter of taxpayers' IT rights, see K. Perrou, *Taxpayer Participation in Tax Treaty Dispute Resolution* (Amsterdam: IBFD, 2014), 109; J. Kokott and P. Pistone, *Taxpayers in International Law. International Minimum Standards for the Protection of Taxpayers' Rights* (New York: Bloomsbury Publishing, 2022), 207; C. Califano, *L'arbitrato e gli strumenti di risoluzione delle controversie nel diritto tributario* (Milano: Giuffrè, 2023), 50.

[64] G. Ragucci, 'L'analisi' n 54 above, 2-3.

tax provisions[65] (such as, for example, those relating to tax deductions), together with some typical factors of intelligent systems – such as the tendential completeness of the reference database and the speed of data processing - which allow to reduce (if not eliminate) the margin of error, lead us to think that taxation is certainly one of the sectors of the legal system in which the use of artificial intelligence - in the near future - will be particularly intense, with the likelihood that AI's use will only expand.[66]

With reference to the activities carried out by the financial administration, artificial intelligence could find easy application in the hypothesis of automated liquidation and formal control of declarations,[67] governed in the Italian system by Arts 36 *bis* and 36 *ter*, decreto del Presidente della Repubblica 29 September 1973 no 600, as regards income taxes, and by Art 54 *bis*, decreto del Presidente della Repubblica 26 October 1972 no 633, for VAT: these are checks of an ascertainable nature[68] performed by an electronic brain programmed on the basis of specific algorithms, with which the *an* and *quantum debeatur* are recalculated with respect to the amounts declared by the taxpayer.[69]

This investigative activity, aimed at correcting the errors that emerge *ictu oculi* from the declaration, leads directly to registration in the tax role, preceded by a communication of irregularity (so-called 'amicable notice'),[70] which invites the taxpayer to assert his reasons or to regularize his position and access a facilitated assessment of tax penalties.[71]

[65] E.L. Rissland, 'Artificial Intelligence and Legal Reasoning: A Discussion of the Field and Gardner's Book' 9(3) *AI Magazine*, 45-47 (1988).

[66] R. Cordeiro Guerra, n 9 above, 94.

[67] R. Schiavolin, 'Limiti di applicabilità dell'art. 36-bis D.P.R. 600/1973' *GT – Rivista di giurisprudenza tributaria*, 1165-1168 (1994); P. Russo, 'Il problema dei termini per la liquidazione delle imposte dovute in base alla liquidazione ai sensi dell'art. 36-bis' *Rassegna tributaria*, 1014-1018 (1995); P. Coppola, 'La liquidazione dell'imposta dovuta ed il controllo formale delle dichiarazioni' *Rassegna tributaria*, 1475-1483 (1997); F. Pedrotti, 'Riflessioni sull'ambito oggettivo di applicazione dell'art. 36 ter comma 2 D.P.R. 29 settembre 1972 n. 600' *Rivista di diritto tributario*, 479-485 (2019); M. Fasola, 'Dai controlli automatici ex art. 36-bis alla amministrazione "algoritmica" dei tributi: quali garanzie per il contribuente?' *Diritto e processo tributario*, 377-406 (2022); A. Zuccarello, 'Specificità del controllo formale della dichiarazione dei redditi' *Rivista di diritto tributario*, 347-354 (2022).

[68] G. Gaffuri, 'Considerazioni sull'accertamento tributario' *Rivista di diritto finanziario e scienza delle finanze*, 534-536 (1981); G. Fransoni, 'Considerazioni su accertamenti "generali", accertamenti parziali, controlli formali e liquidazione della dichiarazione alla luce della L. n. 311/ 2004' *Rivista di diritto tributario*, 600-602 (2005); S. Zagà, 'Le discipline del contraddittorio nei procedimenti di «controllo cartolare» delle dichiarazioni' *Diritto e pratica tributaria*, 857-864 (2015); S. La Rosa, *Principi di diritto tributario* (Torino: Giappichelli, 2020), 339.

[69] A. Zuccarello, 'Algoritmi' n 53 above, 2; P.L. Cardella et al, 'I controlli e la fase di accertamento', in L. del Federico and F. Paparella eds, *Diritto tributario digitale* n 8 above, 233.

[70] M. Pierro, *Il dovere di informazione dell'amministrazione finanziaria* (Torino: Giappichelli, 2013), 147; A.M. Gaffuri, 'Il punto su… la natura dei termini nei controlli formali e le conseguenze del mancato invio della preventiva comunicazione di irregolarità' *Rivista di diritto tributario – supplemento online*, 3 October 2022, 1-5.

[71] A. Zuccarello, 'Algoritmi' n 53 above, 2.

Although this is a paperless process, a certain lack of transparency must be noted, as the algorithms on the basis of which the computer system is programmed is not known, with consequent uncertainty of the outcomes of the settlements.[72]

Further uses of intelligent systems in tax matters could concern, in the context of the synthetic assessment of income,[73] the institutions of the income meter[74] and the expenditure meter, as well as sector studies[75] (now replaced by synthetic reliability indices),[76] the comparability analysis in the transfer pricing regulations and the 'savings meter'.

The latter expression designates a predictive tool which, through a specific algorithm, verifies, on the basis of the data provided by the archive of relations with financial operators, the consistency of the savings accumulated by the taxpayer in a given tax period with the income declared in the same period of time, in order to bring out any anomalies suitable for further checks by the tax authority.[77]

This could happen if the taxpayer makes an important investment that is not justified by the declared income or, even in the presence of a fixed monthly salary, has lavish expenses potentially revealing the existence of other undeclared income.[78]

These are events in which the ability of the living operator to compare and connect apparently autonomous situations and data plays an important role, with respect to which the algorithm would significantly increase both the number of elements being analyzed and the speed of elaboration, without substantially altering the substantive tax law, thereby protecting the values that govern tax matters.[79]

VIII. The Need to Know the Support Mechanisms of the Computer Algorithm and the Indispensability of Human Intervention in Verifying the Results of Automated Data Processing: The Position of Administrative Case Law

Even the administrative case law,[80] while recognizing that the use of robotic procedures is instrumental in guaranteeing greater efficiency and cost-effectiveness

[72] ibid 4.

[73] G. Selicato, *Il nuovo accertamento sintetico dei redditi* (Bari: Cacucci, 2014), 105; F. Amatucci, 'Introduzione. L'accertamento sintetico e il nuovo redditometro', in F. Amatucci ed, *L'accertamento sintetico e il nuovo redditometro* (Torino: Giappichelli, 2015), XI; G. Tinelli, 'Accertamento sintetico e tutela del contribuente', in F. Amatucci ed, *L'accertamento sintetico e il nuovo redditometro* (Torino: Giappichelli, 2015), 3.

[74] M. Logozzo, 'Redditometro e diritto alla privacy', in F. Amatucci ed, *L'accertamento sintetico e il nuovo redditometro* (Torino: Giappichelli, 2015), 49.

[75] M. Versiglioni, *Prova e studi di settore* (Milano: Giuffrè, 2007), 149.

[76] F. Amatucci, 'Dalla Tax compliance agli Indici sintetici di affidabilità' *Tax News*, 161, 161-168 (2019).

[77] G. Palumbo, 'L'utilizzo' n 18 above, 61.

[78] ibid 61.

[79] S. Dorigo, 'L'intelligenza' n 12 above, 202-214.

[80] Consiglio di Stato 8 April 2019 no 2270, available at www.dejure.it; Consiglio di Stato 13 December 2019 no 8472, available at www.dejure.it.

of the administrative activity, for reasons of transparency has considered essential the requirement of the algorithm's knowability,[81] since it is a set of mathematical calculations through which an electronic brain is supplied with a series of instructions expressed in a language other than the legal one.[82]

This is also relevant for the purposes of the motivation of the assessment notice, which allows the taxpayer to be put in a position to understand the basis of what is being contested and the logical procedure through which the office reached its decision.[83]

Therefore, the 'technical formula' represented by the algorithm must be accompanied by clarifications that translate it into the 'legal rule' underlying it, so as to make it legible and understandable both for taxpayers, who can thus exercise their right of defense, and for the judicial body, put in a position to review how the power was actually exercised by the administrative authority.[84]

In fact, the opacity and non-knowability of the mechanisms underlying the algorithm[85] can also negatively affect the activity carried out by the judging body, which could assess the reliability of the reconstruction put in place by the tax office, only at the cost of making use of complex technical consultancy *ex officio*, which would significantly increase the costs of justice.[86]

It is, therefore, necessary to understand the path underlying the comparison between the concrete characteristics of the case and those that, on the basis of the data known by the computer system, should have existed in order to be able to judge correct the operation carried out by the taxpayer.[87]

The requirement of the algorithm's knowability also assumes relevance on the merit level as the impossibility of understanding its functioning involves the subordination of the administrative activity to the choices, even of value, made independently, uncontrolled and discretionary by those who have elaborated the algorithm.[88]

In any case, as confirmed by administrative case law,[89] albeit in relation to a non-tax case, human intervention cannot be ignored in the verification of the results of algorithmic processing, since the latter cannot be used without first taking

[81] P.S. Maglione, 'La Pubblica Amministrazione "al varco" dell'Industria 4.0: decisioni automatizzate e garanzie procedimentali in una prospettiva human oriented' *Amministrazione in cammino*, 26 May 2020, 35; G. Palumbo, 'Conclusioni', in Id, *Fisco e privacy* n 13 above, 112; M. Pontillo, 'Algoritmi fiscali tra efficienza e discriminazione' *Rivista trimestrale di diritto tributario*, 649-678 (2023).

[82] A. Zuccarello, 'Algoritmi' n 53 above, 4.

[83] S. Dorigo, 'L'intelligenza' n 12 above, 205-206.

[84] G. Ragucci, 'L'analisi' n 54 above, 1; A. Zuccarello, 'Algoritmi' n 53 above, 4.

[85] F. Pasquale, The Black Box Society: The Secret Algorithms That Control Money and Information (Cambridge, London: Harvard University Press, 2015).

[86] S. Dorigo, 'L'intelligenza' n 12 above, 207.

[87] ibid 206.

[88] ibid 206.

[89] Tribunale amministrativo regionale Lazio 10 September 2018 no 9224, available at www.dejure.it; Consiglio di Stato 4 February 2020 no 881, available at www.dejure.it.

steps to prevent a tool conceived as a predictive model of the risk of evasion from becoming a method of assessment, especially where it is based on presumptions.[90]

From this perspective, the activity carried out with the use of artificial intelligence systems does not automatically result in the issuance of a tax penalty: this phase, rather, becomes an internal investigation, purely instrumental and auxiliary, which is followed by an administrative procedure based on respect of the principles of cross-examination,[91] collaboration[92] and good faith between the financial administration and the taxpayer, in which the official who is a natural person assumes external responsibility for the agency's activity after having put in place a cognitive, acquisitive and judgment activity.[93]

IX. The Role of Artificial Intelligence and Computer Algorithms in Tax Consultancy for the Taxpayer

In particular, the more stable and ordered a body of legislation is, the less need there is to resort to artificial intelligence will be felt to facilitate times and methods of application. By contrast, a chaotic and emergency tax legislation, not consistent with the principles but characterized by a simple list of cases, as happens in the Italian legal system,[94] requires a mechanistic and meticulous interpreter. Artificial intelligence could well support (and even replace) the human figure of the jurist or practitioner in applying such legislation.[95]

Not surprisingly, the Institute for Employment and Research (IAB) of Nuremberg - as part of the 'Futuromat' program - has identified the tax consultant as one of the professions with the highest risk of replacement due to the advent of robotics,[96] especially with reference to the basic application activities, including the drafting of the tax return, which are characterized by almost mechanistic aspects.

There is also no shortage of intelligent machines equipped with greater functionality, capable of simulating human skills of a higher level. The experimental

[90] G. Ragucci, 'L'analisi' n 54 above, 1-2.

[91] S. Muleo, 'Il contraddittorio procedimentale e l'affidamento come principi immanenti', in A. Bodrito et al eds, *Consenso, equità e imparzialità nello Statuto del contribuente. Studi in onore del prof. Gianni Marongiu* (Torino: Giappichelli, 2012), 406; G. Ragucci, *Il contraddittorio nei procedimenti tributari* (Torino: Giappichelli, 2013), 5; S. Sammartino, 'Il diritto al contraddittorio endoprocedimentale' *Rassegna tributaria*, 986-989 (2016); A. Giovannini, 'Il contraddittorio endoprocedimentale' *Rassegna tributaria*, 13-18 (2017).

[92] S. Cannizzaro, 'Il principio di reciproca collaborazione tra amministrazione finanziaria e contribuente nel procedimento e nel processo', in A. Fantozzi and A. Fedele eds, *Statuto dei diritti del contribuente* (Milano: Giuffrè, 2005), 242.

[93] S. Dorigo, 'L'intelligenza' n 12 above, 207-208.

[94] M. Logozzo, 'Codificazione, Statuto dei diritti del contribuente e federalismo fiscale', in Id, *Temi di diritto tributario* (Pisa: Pacini Giuridica, 2019), 3.

[95] R. Cordeiro Guerra, n 9 above, 96-97.

[96] McKinsey Global Institute, *Jobs lost, jobs gained: workforce transitions in a time of automation* (New York: McKinsey & Company, December 2017).

project 'Taxman'[97] was elaborated and developed in the United States of America since the mid-1970s with the main purpose of providing information to taxpayers regarding the tax treatment to which certain corporate reorganization operations would be subject. Another example is 'predictive' software, such as the 'Blue J Legal'[98] system, which, through a specific algorithm, using a program called 'Tax Foresight', compares and crosses the jurisprudential precedents on which the common law systems are based, providing the success/failure percentages in relation to the disputes to be undertaken in tax matters, in order to express the possible expected result of a certain interpretation or application of tax legislation.[100]

The role assumed by artificial intelligence systems and computer algorithms is therefore evident. These tools could also constitute a useful support for the taxpayer and his tax consultants, providing valuable information suitable for evaluating the conduct to be followed in relation to the tax treatment of a specific case or to set up an effective defensive strategy or to identify *ex ante* the probabilities of a positive outcome of a possible litigation action, in order to enhance the predictive function and guide the procedural choices, avoiding clogging the tax courts with disputes with an uncertain outcome or desisting from pursuing judgments that are already pending.[99]

The financial administration could then make use of sophisticated 'predictive' software, such as those already in use in various sectors of the legal system, to 'prevent' situations of fraud and to identify taxpayers at high risk of evasive or elusive conduct.[100]

X. 'Predictive Justice' Software as *Ad Adjuvandum* Tools for Orienting the Activity of the Tax Judge

In the judicial field, 'predictive justice' software,[101] based on the indexing of data and the use of metadata and sophisticated algorithms, such as syntactic analysis tools and machine learning systems, which, by crossing a large amount

[97] L.T. McCarty, 'Reflections on "Taxman": An Experiment in Artificial Intelligence and Legal Reasoning' 90(5) *Harvard Law Review*, 837-840 (1977); S. Dorigo, 'Intelligenza' n 7 above, 729; Id, 'L'intelligenza' n 12 above, 199, fn 2.

[98] On topic, see B. Alarie et al, 'Using Machine Learning to Predict Outcomes in Tax Law', available at http://tinyurl.com/4j2ta2df (last visited 10 February 2024); S. Dorigo, 'Intelligenza' n 7 above, 742; Id, 'L'intelligenza' n 12 above, 199-203.

[100] S. Dorigo, 'Intelligenza' n 7 above, 741-742; R. Cordeiro Guerra, n 9 above, 94.

[99] S. Dorigo, 'L'intelligenza' n 12 above, 203; F. Farri, 'L'attività d'indirizzo', in L. del Federico and F. Paparella eds, *Diritto tributario digitale* n 8 above, 175.

[100] F. Farri, 'Digitalizzazione' n 5 above, 131.

[101] V. Morignat, 'L'IA, dalle predizioni alle decisioni', in A.F. Uricchio et al eds, *Intelligenza Artificiale* n 18 above, 63; C. Sacchetto, 'Intelligenza Artificiale, Giustizia Predittiva e nuovi confini del Processo Tributario', in F. Montalcini et al, *Diritto tributario telematico. Nuovi confini* (Torino: Giappichelli, 2021), 259; G. Pasceri, *La predittività delle decisioni. La funzione giurisprudenziale e la responsabilità delle parti nell'utilizzo dell'intelligenza artificiale* (Milano: Giuffrè, 2022), 126.

of data input (decision-making contents), seeks a correlation between them and deduces an application model (probability of decision-making orientation). Such software fully conforms to common law systems, in which the principle of binding precedent applies (so-called '*stare decisis*'), and is useful also in civil law systems, including tax matters,[102] while retaining an autonomous significance.

In fact, in continental legal systems, characterized by the *ius scriptum*, the jurisprudential precedent – although it has no binding effect, as it is not included among the sources of law - could guide the judge's reasoning, providing him with useful arguments to justify his decision.[103]

In this context, even if the human judge can make use of artificial intelligence systems as an auxiliary function in support of the *jus dicere* activity[104] to identify and elaborate the principles of law, the jurisprudential precedents and the arguments suitable for orienting his reasoning and motivating the decision,[105] the possibility of imagining a 'robot' tax judge seems completely strange and remote. Intelligent machines are not yet able to fully replace the human decisionmaker, since the latter - far from being based on mere mechanism - often requires a *quid pluris* of sensitivity, which, at present, the cold algorithm does not seem able to provide.[106] Furthermore, it would be difficult to guarantee that a final robotic decision would be regarded as fully justifiable in law and fact on appeal.[107]

By contrast, in applying tax rules that require an economic evaluation of the

[102] In the tax field, often characterized by serial disputes, on 'predictive justice', understood as the possibility of predicting the outcome of a judgment through the aid of special algorithms capable of extracting the meaning of previous decisions to find the solution of new cases, see S. Carunchio, 'Giustizia predittiva e processi telematici: sfide pratiche ed etico giuridiche' *Fiscal focus*, 2 March 2019, 1-3; A. Vozza, 'Intelligenza artificiale, giustizia predittiva e processo tributario' *Il fisco*, 3154-3158 (2019); L. Tremolada, 'Giustizia predittiva, l'intelligenza artificiale migliore amica dell'avvocato' *Il Sole 24 Ore*, 10 March 2020, available at http://tinyurl.com/4nb433nu (last visited 10 February 2024); F. Farri, 'La giustizia predittiva in materia tributaria' *Rivista di diritto tributario – supplemento online*, 12 October 2022, 1-5; A. Marcheselli, 'Intelligenza artificiale e giustizia predittiva: il bivio tra Giustiniano e il Leviatano e il pericolo coca cola' *Rivista di diritto tributario – supplemento online*, 20 October 2022, 1-5; E. Marello, 'Il punto su… Popper, "Prodigit" e giustizia predittiva' *Rivista di diritto tributario – supplemento online*, 24 October 2022, 1-4; F. Farri, 'Il punto su… intelligenza artificiale e processo tributario nel prisma della riforma fiscale' *Rivista di diritto tributario – supplemento online*, 26 November 2023, 1-5; P. Giacalone, 'Intelligenza artificiale, giustizia predittiva e processo tributario: problemi e prospettive' *Rivista di diritto tributario*, 299-338 (2023); E. Marello, 'Prodigit: alcune domande di metodo e qualche semplice proposta' *Rivista di diritto tributario – supplemento online*, 1 February 2023, 1-3; V. Mastroiacovo, 'Prevedibilità, predittività e umanità del giudicare in materia tributaria' *Rivista di diritto tributario – supplemento online*, 14 February 2023, 1-5; F. Odoardi, 'Il processo tributario nell'era dell'economia digitale', in L. del Federico and F. Paparella eds, n 8 above, 281.

[103] On topic, see M. De Felice, 'Su probabilità, precedente e calcolabilità giuridica', in A. Carleo ed, *Il vincolo giudiziale del passato. I precedenti* (Bologna: il Mulino, 2018), 37.

[104] F. Patroni Griffi, 'La decisione robotica e il giudice amministrativo', 28 August 2018, available at http://tinyurl.com/yc868yh5 (last visited 10 February 2024).

[105] S. Dorigo, 'L'intelligenza' n 12 above, 212.

[106] S. Dorigo, 'Intelligenza' n 7 above, 748-749.

[107] C. Sacchetto, 'Intelligenza' n 103 above, 261; S. Dorigo, 'L'intelligenza' n 12 above, 211.

case, artificial intelligence could have important room to maneuver for the purpose of processing economic and mathematical data suitable for allowing the judge to weigh the rationality of the operation with respect to normal parameters of conduct of the taxpayer, in order to enhance, in an *ad adiuvandum* perspective, the predictive function with respect to the activity carried out by the natural person judge, avoiding any form of mechanism.[108]

Artificial intelligence would thus have a residual value within the tax jurisdiction, allowing the judging body to find the argumentative supports of its decision and preserving the function of the judge (human being) called to adapt the abstract rule to the peculiar characteristics of the concrete case.[109]

XI. The Auxiliary Function of Intelligent Systems in International Tax Planning: The Multilateral Instrument Matching Database

Even in the context of international tax planning,[110] intelligent systems could perform a subsidiary function, through programs which, using complex algorithms, indicate the optimal structure of a corporate group and the best allocation of the income of the participating companies (holding and subholding) so that they can operate in certain jurisdictions.[111]

To counter and stem the practices of aggressive tax planning,[112] the OECD recognized the need to update and coordinate some provisions of the pre-existing international conventions against double taxation, by resorting to the use of intelligent databases, such as, for example, the Multilateral Instrument Matching Database,[113] a sort of algorithm, characterized by complexity of operation and management, which, by combining the provisions of the Multilateral Convention (MLI)[114] - adopted to modify those that already exist - and the rules of individual

[108] S. Dorigo, 'L'intelligenza' n 12 above, 212.

[109] ibid 212-213.

[110] C. Garbarino, 'Pianificazione fiscale internazionale' *Digesto delle discipline privatistiche, sezione commerciale, Aggiornamento* (Milanofiori Assago: UTET Giuridica, 2008), IV, 670-683.

[111] R. Cordeiro Guerra, n 9 above, 94.

[112] F. Amatucci, 'L'adeguamento dell'ordinamento tributario nazionale alle linee guida OCSE e dell'UE in materia di lotta alla pianificazione fiscale aggressiva' *Rivista trimestrale di diritto tributario*, 3-15 (2015); P. Pistone, 'La pianificazione fiscale aggressiva e le categorie concettuali del diritto tributario globale' *Rivista trimestrale di diritto tributario*, 395-404 (2016); L.V. Caramia, 'Pianificazione fiscale aggressiva e nuovi obblighi informativi: le mandatory disclosures rules', in A.F. Uricchio and G. Selicato eds, *Summer School in Selected Issues of EU Tax Law as EU Law* (Molfetta: Duepuntozero, 2018), 249; P. Pistone, *Diritto tributario internazionale* (Torino: Giappichelli, 2019), 71.

[113] Available at http://tinyurl.com/2hftyx5x (last visited 10 February 2024). On topic, see D. Canè, 'Intelligenza artificiale e sanzioni amministrative tributarie', in S. Dorigo ed, *Il ragionamento giuridico* n 9 above, 319-320.

[114] N. Bravo, 'The Multilateral Tax Instrument and Its Relationship with Tax Treaties' 8(3) *World Tax Journal*, 279-282 (2016); M. Lang et al eds, *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* (Alphen aan den Rijn: Wolters Kluwer, 2018); A. Della Carità and L.

bilateral treaties, it identifies, within the latter, the current text, indicating the changes that have occurred.[115]

XII. Artificial Intelligence and Potential Evasion: The Intelligent Customs Control Based on Machine Learning and the Interpretation of the General Anti-Abuse Clauses

Artificial intelligence, in tax matters, if used with coherence and awareness, could also make it possible to select and contrast situations of potential evasion,[116] as has already happened in other foreign legal systems. This is the case of Brazil, which has recently introduced an intelligent customs control system - based on machine learning and called SISAM[117] - with which the probability of fiscal irregularity of an import operation is weighted and the appropriateness of a physical customs control by the competent authorities is assessed, through an estimate in terms of cost-benefits, all in order to guide decision-making processes (for example, do not carry out an inspection as the values involved in the operation are not such as to justify human intervention).[118]

However, a clarification is appropriate: in the phase of selecting the taxpayers to be audited, with a view to administrative simplification, it is possible to rely solely on the assessment of technologically advanced systems, since this is consistent with the objective of cross-referencing large quantities of data to identify anomalies

Bonfanti, 'Riserve, opzioni e algebra booleana nella Convezione multilaterale BEPS' *Corriere tributario*, 2661-2670 (2017); D. Canè, 'In vigore dal 1° luglio la convenzione multilaterale BEPS. Funzione, struttura ed effetti', 23 July 2018, available at www.dirittobancario.it; S. Dorigo, 'L'impatto della Convenzione multilaterale BEPS sul sistema dei trattati contro le doppie imposizioni: verso un diritto tributario internazionale dell'incertezza?' *Rivista trimestrale di diritto tributario*, 559, 559-565 (2018); D. Kleist, 'The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS. Some Thoughts on Complexity and Uncertainty' 1 *Nordic Tax Journal*, 31-35 (2018); S. Dorigo, 'Il Multilateral instrument e le sue contraddizioni: il mito del multilateralismo tra conferme e ridimensionamenti' *Novità fiscali*, 88-90 (2019); C. Califano, *L'arbitrato* n 65 above, 93; S.A. Rocha, 'Risk Society and International Tax Multilateralism', in Id and A. Christians eds, *A Multilateral Convention for Tax. From Theory to Implementation* (Alpheen aan den Rijn; Kluwer Law International, 2021), 140-145.

[115] S. Dorigo, 'Intelligenza' n 7 above, 735; R. Cordeiro Guerra, n 9 above, 94.

[116] V. Visco, 'Cosa insegna la e-fattura: la tecnologia dimezza l'evasione' *Diritto e pratica tributaria*, 1671-1673 (2019).

[117] R. Köche, 'L'intelligenza artificiale a servizio della fiscalità: il sistema brasiliano di selezione doganale attraverso l'apprendimento automatico (SISAM)', in S. Dorigo ed, *Il ragionamento giuridico* n 9 above, 333; H. De Brito Machado Segundo and L.N. Hernández Rivera, 'Artificial intelligence and tax administration: uses and challenges in Brazil', in S. Dorigo ed, *Il ragionamento giuridico* n 9 above, 355.

[118] R. Cordeiro Guerra, n 9 above, 97-98, which focuses attention on the criticalities that would ensue to a system programmed in an absolute utilitarian key, that is, according to a cost-benefit criterion: in this case, the 'taxpayer whose control could result in greater recovery would be subjected to verification, so omitting control over the tax evader almost certainly but for modest amounts in absolute terms'; S. Armella, 'Rettifica del valore doganale sulla base di banche dati' *Diritto e pratica tributaria*, 2471-2489 (2023).

that still have to be investigated in depth. In the ascertainment phase, on the other hand, it is necessary to limit the probative weight of the findings deriving from the aid of intelligent machines, since these can only be used as a starting point to be corroborated, even in cross-examination, with other elements that emerged during the preliminary investigation.[119]

With reference to the interpretation of the general anti-abuse clauses, widespread in international tax law – since it is not a purely mechanical or reconnaissance operation, as an activity that starts from the literal data and, through a process based on multiple factors, judges whether or not the concrete case can be traced back to the abstract regulatory paradigm – the use of artificial intelligence systems must be excluded until it is possible to recognize in them some form of consciousness and sensitivity, capable of supplanting the hermeneutic activity carried out by the human being.[120]

As things stand, therefore, also because of the seven 'capital vices' from which AI is affected (imperfection, opacity, insufficiency, inhumanity, convenience, inaccuracy, and incompleteness),[121] an 'exclusively' robotic administrative decision supported by parallel 'robotic' reasoning is inconceivable, since this is a situation in which the duty to state reasons is not adequately fulfilled. In fact, in the most advanced algorithmic applications, it is not always possible to reconstruct in an easy and linear manner the logical-legal path that has led to a given decision. A motivation based on algorithmic results that are hardly comprehensible would not place the taxpayer in a position to easily exercise his right of defence, making it necessary to resort to technical consultants in order to try to understand its content.[122]

The technical formula expressed by the algorithm, while simulating human reasoning, must be accompanied by explanations that translate it into the underlying legal rule, so as to make it readable and comprehensible.[123] An algorithm based on a formula that is not knowable, at least in its essential instructions, does not make it possible to verify the conformity of the formula used with the legislative dictate.[124]

At a legal level, developing, implementing and operating algorithms constitutes, in fact, an important means of regulating and exercising power in a context characterized by the digital revolution.[125]

It is therefore necessary for the result of algorithmic processing to be part of

[119] C. Francioso, 'Intelligenza' n 8 above, 65-93.

[120] B. Kuźniacki, 'The Marriage of Artificial Intelligence and Tax Law: Past, Present and Future', available at http://tinyurl.com/2uyw2dmh (last visited 10 February 2024).

[121] A. Gambino, 'I sette vizi capitali dei giudici-robot (tra blockchain e AI)' *Diritto Mercato Tecnologia*, 13 December 2018, 1-4.

[122] C. Francioso, 'Intelligenza' n 8 above, 52-53, 85.

[123] Consiglio di Stato 8 April 2019 no 2270, n 80 above.

[124] C. Francioso, 'Intelligenza' n 8 above, 89.

[125] V. Mastroiacovo, n 104 above, 7.

the reasoning and to be legally comprehensible, without the need for technicians, who, in some cases (eg, that of neural networks), would not even be able to fully reconstruct the logical path of the automated decision.[126]

On the other hand, it is also true that the claim of full comprehensibility of the entire decision-making process at the basis of the algorithm would render the most advanced artificial intelligence systems unusable, since AI could be expected to produce a transparent result, ie one based on unambiguous reasoning that can be interpreted without misunderstandings, rather than the full comprehensibility of the logical-descriptive process.[127]

The proposal for a European regulation on artificial intelligence COM (2021) 206 final of 21 April 2021 also seems to point in this direction. It calls for intelligent systems to be designed and developed in such a way as to guarantee a sufficient margin of transparency to enable users to interpret the reasoning that led to the algorithmic decision and to use it appropriately.[128]

From this perspective, the interpretation of general anti-abuse clauses requires a capacity for adaptation and mediation on the part of human intelligence, which is difficult to replace by an algorithm or any other automated tool because the subjective aspect predominates, linked not only to preparation and experience of the jurist but also to the ability to balance interests to reach a truly fair decision.[129]

If, on the other hand, intelligent machines perform a supplementary and instrumental function, acting as a mere technical aid capable of supporting the legal reasoning of the human person without taking over, there are no impediments to their possible use.[130]

In the case of activities that are not merely preparatory, it is necessary to guarantee the right to human intervention in the decision-making process and to provide for strict standards of justification.[131]

The compromise solution - in compliance with constitutional and European principles governing tax matters - makes it possible to attribute a non-marginal role to intelligent systems in directing the choices of the financial administration, while at the same time supporting the implementation of forms of preventive dialogue between the fiscal authority and the taxpayer,[132] to configure a post-

[126] C. Francioso, 'Intelligenza' n 8 above, 86, fn 147; N. Sartori, *I limiti probatori nel processo tributario* (Torino: Giappichelli, 2023), 73.

[127] G. Fioriglio, 'La Società algoritmica tra opacità e spiegabilità: profili informatico-giuridici' *Ars Interpretandi*, 53, 60-61 (2021); C. Francioso, 'Intelligenza' n 8 above, 63.

[128] C. Francioso, 'Intelligenza' n 8 above, 63.

[129] S. Dorigo, 'L'intelligenza' n 12 above, 213.

[130] id, *Intelligenza* n 7 above, 740-741.

[131] C. Francioso, 'Intelligenza' n 8 above, 92.

[132] M. Basilavecchia, 'Il contraddittorio endoprocedimentale tra norme e principi alla luce dell'art. 5-ter d.lgs. n. 218/97', in A. Cuva and A. Damascelli eds, *L'accertamento tributario alla prova del contraddittorio endoprocedimentale obbligatorio* (Bari: Cacucci, 2021), 11-27; R. Cordeiro Guerra, 'Luci ed ombre nel nuovo contradditorio preventivo obbligatorio', in A. Cuva and A. Damascelli eds, *L'accertamento tributario alla prova del contraddittorio endoprocedimentale obbligatorio* (Bari: Cacucci, 2021), 29-40; L. Salvini, 'Il nuovo contraddittorio tra contribuente e

modern conception of the tax relationship based on compliance[133] and, as such, to relegate conflict situations to an *extrema ratio*.[134]

Amministrazione Finanziaria', in A. Cuva and A. Damascelli eds, *L'accertamento tributario alla prova del contraddittorio endoprocedimentale obbligatorio* (Bari: Cacucci, 2021), 63-73; S.R. Gianoncelli, *La definizione dell'accertamento* (Pisa: Pacini Giuridica, 2023), 1-31; A. Viotto, 'Il contraddittorio endoprocedimentale nella legge delega per la riforma fiscale' *Rivista di diritto tributario – supplemento* online, 9 September 2023, 1-10.

[133] V. Ficari, 'Gli "interessi" pretensivi del contribuente: dagli "strumenti" di collaborazione e partecipazione alle "definizioni consensuali" ' *Rivista trimestrale di diritto tributario*, 59-67 (2022).

[134] S. Dorigo, 'L'intelligenza' n 12 above, 213.

Essays

The Italian Regime of Legal Communion Within Matrimony Viewed Through the Prism of Constitutional Principles

Dario Scarpa*

Abstract

The concept of 'legal community' within the Italian property regime is derived from the normative treatment of the property of spouses as community of property, whether immediate or residual, as well as the maintenance of the personal character of the purchase of property. The legal community concept, along with Arts 177-179 of the Italian Civil Code 1942, have created a wide-ranging debate, with supposed links to constitutional principles, to expand or narrow the scope and attractiveness of purchases as being treated as legal community between spouses. Despite doctrinal criticism, the methodological canon supporting the normative interpretation of the Civil Code with reference to constitutional principles has absolute relevance, and does not assume infallibility of the indivisible ability of princes to penetrate the positive discipline in matters of legal communion.

I. Legal Communion as a System of Values in the Evolution of Matrimonial Discipline: Relationship Between Rule and Exception in the Determination of the Nature of Legal Communion

Legal thought over time on the regime of legal communion between spouses has been the subject of wide-ranging doctrinal and jurisprudential debate in the search for principles underlying the concept. Opposing lines of interpretation based on different references to different constitutional principles have been the basis for the introduction of a capital regime.[1]

The concept of legal community within the Italian regime for distribution of property upon dissolution of marriage is derived from the normative provisions of property of spouses being generally being as community property, whether immediate or residual, as well as maintaining the personal character of the

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[1] See: P. Perlingieri, 'Sui rapporti personali nella famiglia' *Il diritto di famiglia*, 1262 (1979); F. Grassetti, *sub* Art 156 Civil Code, in G. Carraro, G. Oppo and A. Trabucchi eds, *Commentario alla riforma del diritto di famiglia,* (Padova: CEDAM, 1996), 303; M. Dogliotti, 'Separazione, addebito, affidamenti: criteri interpretativi e valutazioni di merito' *Giurisprudenza italiana,* I, 686 (1982); furthermore, F. Santoro-Passarelli, *sub* Art 143 Civil Code, in G. Carraro, G. Oppo and A. Trabucchi eds, *Commentario alla riforma del diritto di famiglia* (Padova: CEDAM, 1977), II, 223; A. and M. Finocchiaro, *Diritto di famiglia*, I (Milano: Giuffrè, 1984), 245; S. Alagna, *Famiglia e rapporti tra coniugi nel nuovo diritto* (Milano: Giuffrè, 1979), 339.

purchase. The leal community concept, along with Arts 177-179 of the Italian Civil Code 1942, have created a wide-ranging debate, with supposed links to constitutional principles, to expand or narrow the scope and attractiveness of purchases as being treated as legal community between spouses.[2]

The requisite systematic reflection on the discipline of legal communion requires correctly framing the institution within the various and distinct principles of constitutional rank that govern the fundamental rights of the person. After all, the system of extensive capacities of the matrimonial property regime of the legal community does not originate from the[3] alleged existence of an uncontested *communionis* in the categorization of goods and purchases which, in the absence of explicit prescription, must be included in the legal community.[4]

Research suggests that there is an inclination to extend the attractiveness of the community regime, but care must be exercised to correctly identify the principles (including constitutional ones) that should underpin it. Favoring community property, better expressed in the concept of *favor personae coniugis,* must be reconsidered with respect to the outcome of the orderly arrangement of the legal regime of community property as a dispositive and autopoietic structure for the regulation of property relations between spouses, who, as an expression of their private autonomy, can not only opt for other regulatory regimes, but can also flex the rules of communion to serve their own needs and those of their family.[5]

[2] On the concept of joint ownership, see: Corte costituzionale 17 March 1988 no 311, *Nuova giurisprudenza civile commentate*, I, 561 (1988); Corte di Cassazione 4 August 1998 no 7640, *Giurisprudenza italiana*, 741 (1988); Corte di Cassazione-Sezioni unite 24 August 2007 no 17952, *Famiglia e diritto*, 12 (2008); Corte di Cassazione-Sezioni unite 22 April 2010 no 9523, *Redazione Giuffrè* (2010). See more, Corte di Cassazione 19 March 2003 no 4033, *Foro italiano* I, 2745 (2003), with commentary by De Marzo; Corte di Cassazione 7 March 2006 no 4890, *Giustizia civile* I, 1485 (2007); Corte di Cassazione, 11 June 2010 no 14093, *Notariato*, 607 (2010); Corte di Cassazione, 21 December 2001 no 16677, *Giustizia civile,* I, 2820 (2002); Corte di Cassazione 14 January 1997 no 284, *Il diritto di famiglia e delle persone*, 26 (1998).

[3] To grasp the requisite research on the role of legal interpretation, see P. Perlingieri, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile*, 318 (2010); Id, 'Produzione scientifica e realtà pratica: una frattura da evitare' *Rivista di diritto commerciale*, I, 455 (1969), Id, *Scuole tendenze e metodi. Problemi del diritto civile*, (Napoli: Edizioni Scientifiche Italiane, 1989), 15; G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli, 2015), 10. Inoltre, G. Capograssi, *Studi Sull'esperienza Giuridica* (Roma: 1932), 9; E. Paresce, 'Interpretazione (filosofia del diritto e teoria generale)' *Enciclopedia del diritto* (Milano: Giuffrè, 1972), XXII, 203; E. Betti, *Interpretazione della legge e degli atti giuridici* (Milano: Giuffrè, 2nd G. Crifò ed, 1971), 287. The latter denies the arithmetic nature of the interpretative operation, inspired not only by the ideal objectivity of values, but also by the real objectivity of the sensible world; see Id, *Teoria generale dell'interpretazione* (Milano: Giuffrè, 1955), 33.

[4] See A. Trabucchi, 'Il ritorno all'anno zero: il matrimonio come fonte di disparità' *Rivista di diritto civile*, II, 488 (1975); G. Ferrando, 'In tema di famiglia di fatto' *Giurisprudenza di merito*, II, 133 (1977); M. Dogliotti, 'Famiglia legittima, famiglia di fatto e princìpi costituzionali' *Giustizia civile*, III, 192 (1978); M. Bessone, 'Convivenza 'more uxorio' e tutela della famiglia di fatto in una giurisprudenza non conformista' *Giurisprudenza di merito*, I, 717 (1979).

[5] See N. Punzi, 'L'intervento del giudice nei rapporti familiari' *Rivista di diritto civile*, I, 166 (1978); V. Roppo, 'Ipotesi vecchie e nuove di intervento del giudice nella famiglia' *Il diritto di famiglia*, 311 (1979); P. Zatti, 'I diritti e i doveri che nascono dal matrimonio e la separazione dei coniugi', in P.

The above perspective for investigating the regime of legal communion *manifestly* leads to a rethinking of the relationships between codicistic prescriptions and oft-invoked constitutional principles that represent, as a whole, a prism that allows for an updated interpretation of legal safeguards in favor of the community and individual spouses.[6]

Without prejudice to[7] considering the legislative deficiency in the list of purchases[8] that do or do not fall under the ambit of legal communion between the spouses, and given the rejection of any form of dogmatism in the resolution of hermeneutic perplexity, the research is grounded in the flexibility of the categories of purchases as chosen by the legislators of the 1975 reform of Family Law. It is the duty of the judge deciding on the division of property to balance the interests underlying various empirical hypotheses that, must be studied through the application of the principles of reasonableness and proportionality in the choice of the resolving regulatory criterion, although this is not based on any express legislative determination.

Despite doctrinal criticism, the methodological canon that supports the normative interpretation of the Civil Code with reference to constitutional principles is relevant, and does not assume infallibility of the indivisible ability of princes to penetrate the positive discipline in matters of legal communion. On reflection, equality and solidarity between spouses in the expression of legal community must be the hermeneutical sources of the application of the matrimonial property regime, especially in cases of contested resolution. Furthermore, the codicistic indications of the equality of spouses in the management of common property and their family obligations appear to respect the maximum amount of solidarity being recognized

Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1982), 90.

[6] On this interpretative tendency, see A. Falzea, 'La prassi nella realtà del diritto', in Id. et al, *Studi in onore di Pietro Rescigno*, I, *Teoria generale e storia del diritto* (Milano: Giuffrè, 1998), 409, and P. Perlingieri, 'Norme costituzionali e rapporti di diritto civile' *Rassegna di diritto civile*, 95 (1980).

[7] Cf U. Scarpelli, 'Gli orizzonti della giustificazione' *Etica e diritto*, 5 (1986); H. Kelsen, *Reine Rechtslehere* (Wien: F. Deuticke Verlag, 1934), Italian translation by R. Treves, *La dottrina pura del diritto* (Torino: Einaudi, 1956), 73; V. Cotta, *Giustificazione e obbligatorietà delle norme* (Milano: Giuffrè, 1981), 10; furthermore, A. Falzea, 'Efficacia giuridica', in *Enciclopedia del diritto* (Milano: Giuffrè, 1965), XIV, 4; Id, *Voci di teoria generale del diritto* (Milano: Giuffrè, 1970), 266. Finally, for a complete view of the role of the legal norm, see also: N. Bobbio, *Teoria della norma giuridica* (Torino: UTET, 1958), 23; Id, 'Norme primarie e norme secondarie', in Id et al, *Studi per una teoria generale del diritto* (Torino: Giappichelli, 1975), 195.

[8] For a clearer understanding of the roles that reasonableness and the balancing of interests play in the work of the person/body applying the law, see: G. Perlingieri, *Profili applicativi* n 3 above, 10; also see: G. Cosco, 'Convivenze fuori dal matrimonio: profili di disciplina nel diritto europeo' *Diritto di famiglia*, 349 (2006); F. Romeo, 'Famiglia legittima e unioni non coniugali', in Id ed, *Le relazioni affettive non matrimoniali* (Torino: UTET, 2014), 18; R. Amagliani, 'Autonomos e contratti di convivenza', in A. Busacca ed, *La Famiglia all'imperfetto?* (Napoli: Edizioni Scientifiche Italiane, 2016), 305; L. Balestra, 'La convivenza di fatto. Nozione, presupposti, costituzione e cessazione' *Famiglia e diritto*, 919 (2016), M. Dogliotti, 'Dal concubinato alle unioni civili e alle convivenze (o famiglie?) di fatto' *Famiglia e diritto*, 868 (2016).

between them.[9]

We now reflect on the subject with a brief systematic analysis of the norms. It is indisputable that the regime of legal community between spouses must be read in light of a relation of equality and solidarity between them.[10] This is because the relevant normative expression (Art 160 of the Civil Code) prescribes the spouses cannot derogate from either the rights or the duties of marriage as prescribed by the law. Moreover, the period of limitation for the performance of actions by spouses in excess of ordinary administration of duties, as well as the conclusion of contracts guaranteeing the personal rights of enjoyment and representation for these actions, are granted in court or acquired together by both spouses.

However, the lack of conceptualization by the legislator in the definition of the goods that are treated as legal communion, and the derivative listing technique, must not lead to dogmatic categories as a set of pre-emptive rules aimed to resolve the difficulties of subsumption of concrete facts into the rule of law. In hermeneutic terms, whether distinct classes of purchases fall under the ambit of legal communion (as in Arts 177-179 of the Civil Code) are defined by categories of the reconstructed patrimonial events of the spouses' married life according to the regulation of the economic relations between them.[11]

The categorization of facts must not result in dogmatism but, on the contrary,[12] in the exaltation of an interpretative canon that is based on constitutional principles that may be used to determine the inclusion of a given fact or event in the rule of law from time to time. We use this line of argument to approach the best solution of each concrete case, following balancing the interests of the parties (the spouses) involved based on reasonableness and proportionality.[13]

However, if the canon of the correct interpretation is as described above, we first need to identify the degree of connection and the capacity of intervention of the constitutional principles, in their many spectra, with respect to the regime of

[9] P. Schlesinger, 'La legge sulle unioni civili e la disciplina delle convivenze' *Famiglia e diritto*, 846 (2016); A. Torrente and P. Schlesinger, *Manuale di Diritto Privato* (Milano: Giuffrè, 22th ed, 2019), 9; G. Ferrando, *Diritto di famiglia* (Torino: UTET, 2016), 22; G. Alpa, 'La legge sulle unioni civili e sulle convivenze. Qualche interrogativo di ordine esegetico' *Nuova giurisprudenza civile commentata*, 1718 (2016).

[10] See F.D. Busnelli, 'Il principio di solidarietà e «l'attesa della povera gente», oggi' *Rivista trimestrale di diritto e procedura civile*, 413 (2013).

[11] See: E. Russo, 'L'oggetto della comunione legale e i beni personali', in P. Schlesinger ed, *Commentario. Codice Civile* (Milano: Giuffrè, 1999), 48-49.

[12] See once again: P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti' *Rassegna di diritto civile*, 334 (2001); P. Perlingieri, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 441.

[13] N. Lipari, 'Spirito di liberalità» e «spirito di solidarietà' *Rivista trimestale di diritto e procedura civile*, 17-18 (1997); F.D. Busnelli, 'Solidarietà: aspetti di diritto privato' *Iustitia*, 435 (1999); M. Delmas-Marty, *Pour un droit commun* (Paris: Seuil, 1994), 273, 283; C. Mancina-Ricciardi, *Famiglia italiana: vecchi miti e nuove realtà* (Roma: Donzelli editore, 2012), 23. See also F.D. Busnelli, 'Prefazione', in D. Amram and D'Angelo eds, *La famiglia e il diritto fra diversità nazionali ed iniziative dell'Unione Europea* (Padova-Milano: CEDAM, 2011), IX.

legal communion.

II. Search for the Correct Classification of the Matrimonial Property Regime in Constitutional Principles in the Context of the Tension Between Protecting the Individual and Balancing Familial Interests

The dispositive nature of the legal community leads to a limitation of the application of constitutional principles to the choices made by the spouses and, consequently, to regulation of the scope of implementation of the matrimonial property regime adopted. Therefore, the ontological dyscrasia invoked between the legal communion,[14] with the related *favor comunionis,* and the principles of equality[15] and constitutional solidarity, inferred as absent in different property regimes (ie separation), loses persuasive and methodological force. This is because, once the will of the spouses (operative effect) has been expressed within the legal community (or, in the absence of a contrary indication, the regime in question has been indicated as legal), this implies that the principles of the equality of spouses and the solidarity between them must be applied within the framework of the individual property regime adopted.

It is appropriate to speak of a microsystem of the legal community of property between spouses within the discipline of family law. However, this does not lead to the isolation of the regime from the necessary forms of interpretative support provided by constitutional principles and values.[16]

If the mechanism of interaction between constitutional values and the application of the regime of legal communion is well understood, it is possible to derive the correct framework of individual principles in the internal dynamics of the management of legal communion.[17]

Solidarity between spouses, as an orderly value, is widely applied in the property regime in the legal community when community property is liable for all the burdens on it at the time of purchase-the burdens of administration, the

[14] See S. Cassese, 'L'eguaglianza sostanziale nella Costituzione: genesi di una norma rivoluzionaria' *Le Carte e la Storia*, 5-13 (2017); M.S. Giannini, 'Profili costituzionali della protezione sociale delle categorie lavoratrici' *Rivista giuridica del lavoro*, no 6 (1952).

[15] Cf. A. Falzea, 'Le couple non marié', in Id. et al, Scritti d'occasione, Ricerche di teoria generale del diritto e di dogmatica giuridica (Milano: Giuffrè, 2010), 101.

[16] Cf E. Russo, L'oggetto della comunione legale e i beni personali, n 11 above, 20-21. Also see: A. Donati, La concezione della giustizia nella vigente Costituzione (Napoli: Edizioni Scientifiche Italiane, 1998), 343-344; F. Gauthier, Triomphe et mort du droit naturel en Révolution (Paris: 1992), 19; J.E.S. Hayward, 'Solidarity» and the Reformist Sociology of Alfred Fouillée' American Journal of Economics and Sociology, XXII, 216 (1963). 'Finally, in the course of rightly destroying privileges and monopolies, the Revolution in France, like the Reformation in England, allowed itself to by carried away to the extent of destroying the very principle of association.'

[17] Cf M. Gorgoni, 'Le convivenze di fatto meritevoli di tutela e gli effetti legali tra imperdonabili ritardi e persistenti perplessità', in *Le unioni civili e convivenze di fatto L. 20 maggio 2016, n 76*, (Sant'Arcangelo Romagna: Maggioli, 2016) 191, and F. Tassinari, 'Il contratto di convivenza nella L. 20.5.2016 n 76' *La nuova giurisprudenza civile commentata*, 1738 (2016).

costs of maintaining the family, the education and upbringing of children, any obligations undertaken by the spouses separately in the interests of the family, and any obligations undertaken jointly by them.[18]It is therefore evident that the drive for solidarity is present in the management of the estate in legal communion to protect the interests of the[19] (unusual placement of footnote after 'the' you could put both footnotes at the end of the sentence) family[20] and the spouses.

[18] Read C. Grassetti, 'I princìpi costituzionali relativi al diritto di famiglia', in P. Calamandrei and A. Levi eds, *Commentario sistematico alla Costituzione italiana* (Firenze: Barbera, 1950), 285; G. Azzariti, *Problemi attuali di diritto costituzionale* (Milano: Giuffrè, 1951), 106; G.B. Funaioli, *L'evoluzione giuridica della famiglia e il suo avvenire al lume della Costituzione* (Firenze: 1951), 44.

[19] This calls for a brief historical and philosophical remark on the family. 'The family is the natural society, whose members are united by love, trust and natural obedience, It is a natural society because everyone belongs as a member to a family not by their own will but by nature and because the relationships and mutual behavior of family members are not based on reflection, but on feeling. The family is an organic whole. The trust that family members have in each other consists in the fact that everyone has no interest in themselves, but in general for the whole [...]. The first natural relationship in which the individual enters with others is the family relationship. It has, indeed, also a legal side, but this is subordinated to the side of feeling, love, trust [...]. Every member of the family does not have its essence in his own person, but only the whole of the family constitutes his personality [...]. The union of people of the two sexes, which is marriage, is essentially neither a merely natural union, nor a pure civil contract, but a moral union of feeling, in the mutual love that makes her a single person [...]. The duty of the parents towards the children is to provide for their maintenance and education, that of the children is to obey them, until they become independent, and honor them for life' (G.W.F. Hegel, *Philosophische Propädeutik, Herausgegeben von Karl Rosenkranz* (Berlin: Duncker & Humblot, 1840). Hegel's philosophical reflection is aimed at establishing the unconditionality of the ethical instance. In this theoretical context, it becomes problematic to harmonize the moral value with the dynamism of the affective life. We thus reflect on what the French philosopher Jean Francois Lyotard claimed on the question of human rights: 'What makes human beings similar to each other is the fact that each person carries within him the figure of the other' (J.F. Lyotard, 'The Rights of the Other', in S. Shute and S. Hurley eds, *Human Rights*, (Milano: Garzanti, 1994). One cannot say 'I' without contemplating a 'you,' another in which one recognizes oneself. Knowledge and understanding must be the basis of civil co-existence. The Western family with regard to law and principles respects the equal dignity of its members, in particular women and minors. In an axiological vision, it is necessary for a communion of life to overcome every attitude of division and incompatibility. The family is a constitutive element of a creative design, an expression of conjugal love. Family life has the chance to grow day by day on the condition that the persevering commitment of the spouses never fails.' 'Spouses,' the Second Vatican Council warns, 'will fulfill their duty with human and Christian responsibility, with reflection and common commitment a right judgment will be formed, taking into account both the personal good and that of the children [...] [while] evaluating the living conditions of their time and safeguarding the scale of the values of the good of the family community, and of temporal society.' Finally, we focus on Kierkegaard's perspective, which requires redefining the very categories by which existence can be thought of: the individual and possibility. These categories can be applied only to one's life from within. Kierkegaard can be thus placed in the Augustinian perspective of inner reflection. The individual, is faced with alternatives attributable to two existential models of an aesthetic or an ethical life. To them is added a third: religious life. These three models of life can be considered to be states of existence. The ethical stage is characterized by choice.

[20] See M. Bin, *Rapporti patrimoniali tra coniugi e principio di eguaglianza* (Torino: UTET, 1972), 113, and Esposito, 'Famiglia e figli nella Costituzione italiana', in *Scritti in onore di A. Cicu* (Milano: Giuffrè, 1951), 560. P. Rescigno, 'L'eguaglianza dei coniugi nell'ordinamento della Comunità Europea', in Id et al, *Eguaglianza giuridica e morale dei coniugi* (Napoli: Jovene, 1974), 20; P. Barile, 'L'eguaglianza morale e giuridica dei coniugi nella giurisprudenza costituzionale', in Id. et al,

In this context, the application of the interpretative canon to balance the interests between spouses to identify the legal limits to the solidarity between them in the exercise of their personal and economic activities comes into play. The classes of facts that determine the maintenance of the personal ownership of a good, with the impediment of entry into communion, are an expression of the constitutional value of the freedom of the economic initiative of individual subsidiaries. It is evident that the axiologically oriented reading of the discipline of the legal communion between spouses leads to a natural emphasis on a continuous weighting of the degree of application of ordinal values by striking the necessary balance between the interests (patrimonial and personal) of the subjects involved.[21]

The degree of flexibility and extension in the categories of goods and purchases that may or may not enter into the legal communion between spouses will be examined by men in future studies. Here, I examine the limits of the interaction between the principle of solidarity between spouses and the principle of freedom of economic initiative to understand how, from a legal perspective, there is no real conflict in the determination of property rights within the regime of legal community.

Consider that solidarity is applied to the management of property in legal community, with the related effect of prompting the participation of the spouse, creditors, and debtors relating to the needs of the family. On the contrary, a spouse's freedom of economic and entrepreneurial initiative concerns the stage prior to the management of the common property, before determination of the class into which any purchase is categorized.

The balancing of interests between spouses necessarily envisages an axiological interaction between the constitutional values described above without any limitation on the fields of their application to the positive discipline of legal community. Within the stages and development of the matrimonial property regime distinct constitutional and legal values have been progressively identified that find their correct translation into the property relations of the spouses.

If solidarity during the management of community property leads to the expression of a mutuality in the pursuit of family interest, with the participation of both spouses in support of the superior aim of protecting the needs of the family unit, self-determination by either spouse in different expressions of their economic initiative in the genetic phase of the purchase is one apt instance of the need to protect the autonomy of the individual in the transformation and

Eguaglianza giuridica e morale dei coniugi (Napoli: Jovene, 1974), 42.

[21] Cf L. Mengoni, 'Fondata sul lavoro: la Repubblica tra diritti inviolabili dell'uomo e doveri inderogabili di solidarietà', in C. Castronovo, A. Albanese and A. Nicolussi eds, *Mengoni, Scritti I. Metodo e teoria giuridica* (Milano: Giuffrè, 2011), 143; E. Rossi, 'La fraternità fra 'obbligo' e 'libertà'. Alcune riflessioni sul principio di solidarietà nell'ordinamento costituzionale', in A. Marzanati and A. Mattioni eds, *La fraternità come principio di diritto pubblico* (Roma: 2007), 86-87; F. Pizzolato, 'Appunti sul principio di fraternità nell'ordinamento giuridico italiano' *Rivista internazionale dei diritti dell'uomo*, 762 (2001).

progression of their assets.

The interpretative path continues in the observation of important data in circumscribing the perimeter of the actions of a single spouse in legal community. Accompanied by the affirmation of the principle *nemo invitus locupletari potest* (a maxim meaning that a claimant seeking relief may not be awarded damages greater than their loss), the exceptional nature of the effectiveness of the legal community of property between spouses lies in the automatic transfer of property to a non-German spouse, of communion without quotas in the face of the mere presence of status.

If, naturally, the acquisition of property (of any economically valuable asset) derives from the teleologically oriented personal activity of the spouse, the special characterization of the microsystem of legal community consists in partial derogation from this etiological model in order to exalt the marital status. This, in compliance with the system of the automatic acquisition of communion, creates a situation of co-ownership that is in open contrast to the legal value of the right to property, and manifests the tension in the transience of legal scenarios of co-ownership (through the exercise of division).

However, the exceptional nature of the regulation of legal community between spouses must be subjected to a deeper axiological analysis from the perspective of the relevant protections, including constitutional ones, of individual spouses. Precisely, it is the affirmation of the character of the exceptional, pursuant to and for the effects of preliminary provisions of Art 14, and must be concretely assessed in the various classes of facts supporting the inclusion of the property in community, or allowing the maintenance of full ownership of the property in favor of the individual spouse who purchases the property.

I will now examine the final details of the initial hermeneutic approach to the regime. This is done in light of the fact that recognition of the normativity of legal communion and the relative incompleteness of the relevant categories of facts, which modify the patrimony of the community property and the individual spouse, obligate the person/body applying the law to trace the order of values beyond those expressed in the regime's microsystem to finalise a systematic and orderly concept.

It is useful to undertake a historical excursus of the constitutional dynamics involved regarding the interactive relationship between spouses. The plurality of interventions of the Constitutional Court in the field of family law is a clear expression of the balance between the protection of individual rights and the safeguarding of family unity, in compliance with Arts 29 and 30 of the Constitution. The apparent persistence of the aforementioned equilibrium is confirmed in the traditional reading of the Constitution in the sense of the pre-eminence of the family based on marriage and the rights of the parties to it. This suggests a concept of the family in an extensive and axiological sense for the configuration of competing institutions, such as civil unions.

The constitutional principles express and support men and women being treated equally. However, participation of a married woman in a marriage, as a bearer and producer of income for the family, in the historical sense has tended to be recognized as integrative and marginal. At the same time, the contribution of assets and economic resources by the male spouse has taken clear primacy. This tendency is the result of a static and inconclusive reflection that cannot lead to any valid systematic or normative data. On the contrary, the reflection on legal communion between spouses and the emergence of new criteria of interpretation for individual cases manifests a natural tension toward the evolution of the hermeneutic technique, and should be able to grasp the changed needs and ways of life of people in compliance with the principle of equality (Art 3 of the Constitution).[22]

From a constitutional point of view, the starting point based on the initial discussion of this subject can now progress with respect to the correct application of the principles of constitutional rank within the regime of legal communion. If the legal regime constitutes a penalty default rule for which communion determines a dispositive rule that is, however, systematically derogated (as practice clearly indicates), it can be inferred that the regulatory and interpretation-related tension must progress toward the maximum flexibility of the regulatory mechanism along with the sought-after willingness of spouses to meet their personal and familial needs of life.

There are no family interests that transcend the individual interests of the various components of it. It follows that the family can be classified as an institution in an organic sense, in which all the family aims pursued by the spouses in the constancy of *affectio familiaris* (family affection), are not subject to legal protection.[23]

In the system of the constitutional pluralism of social formations, the Constitutional Charter offers a graduation of values in identification of the relationship of 'gender to species' that runs between Art 2 of the Constitution - that protects every social formation for its realizing function - and Art 29 of the Constitution, which identifies the family as deserving of protection in the realization of a social function.

In light of this observation, we can derive the concept, axiological or purely

[22] S. Patti, 'Il diritto al mantenimento e prestazione di lavoro nella riforma del diritto di famiglia' *Il diritto diritto di famiglia*, 1368 (1977); P. Vecchi, 'Obbligazioni nell'interesse della famiglia e responsabilità solidale dei coniugi' *Rivista di diritto civile*, II, 623 (1991).

[23] F. Corsi, 'Il regime patrimoniale della famiglia', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1979), 110. Furthermore, see A. Palazzo, 'Tipologie e diversità degli acquisti personali dei coniugi in comunione dei beni' *Rivista del notariato*, 1127 (2006). See also P. Schlesinger, 'Commento all'art. 179 c.c.', in G. Carraro, G. Oppo and A. Trabucchi eds, *Commentario* n 1 above, 159; E. Del Prato, 'L'esclusione dell'acquisto dalla comunione *ex* art. 179, comma 2, codice civile' *Rivista di diritto civile*, I, 460 (2002). It is worth remembering the idea in G. Beccara, 'I beni personali', in P. Zatti ed, *Trattato di diritto di famiglia*, III, *Regime patrimoniale della famiglia* (Milano: Giuffrè, 2002), 199.

orderly, whereby participation by spouses in the family may not constitute a reason for limiting or denying the ownership of inviolable rights. Instead, it may result in the compression of certain capital rights which, in a reasonable sense and on the basis of the correct balance of interests, can be limited in the best interests of the family.

The recognized teleology of the family presupposes the unavailability of only certain subjective family situations of a personal nature, and provides a *de facto* autonomous importance to marriage as a contract. In ontological terms, the Constitutional Charter assumes a notion of contentiously and axiologically oriented marriage in which each individual spouse must have room for patrimonial action in the pursuit of their own interests and those of the family.

Of course, the choice and application of the above principles and reasoning is the matrimonial property regime of legal community as a system that allows spouses to divide their property-related choices in relation to the family.

A reconstruction that aims to establish the category of family interest according to an organic and individual conception of the family by virtue of its location as a community is appropriate and still timely. In this sense, the interest of the family coincides with that in the community of life, rightly given that the interest in the development of family life (in the case of a legal community regime) represents the fulcrum of the action of individual spouses. Then the interpreterbody/person applying the law too can consider the superiority of family interest in the solution to hermeneutic contradiction.

If we reflect on the role of the family within the Italian legal system, we can argue according to a naturalistic view related to happiness that every social formation of a couple (in this case, the family) is characterized on the basis of the phenomenological evolution of its subjective composition. While family formation in the absence of offspring is, in the axiology of the discipline, at the center of the patrimonial and existential interests of only the spouses, the social formation of the couple with children provides an 'other' for the interaction of interests in the relations between spouses and their children. This gives rise to the related need to re-read the concept of legal communion in a close way with the rules to protect behavioral and patrimonial obligations to protect children.[24]

In the application of norms, the law must follow the principle of reasonableness in its expression of the criteria and reasoning aimed at solving cases and events that are constantly changing from both a scientific and a sociological point of view. Legal science is confronted by other sciences, and follows them by proposing reasonable legal structures that can balance the social, existential, and patrimonial interests of the persons involved.

[24] For the German doctrine, see: J. Prutting and P. Schirrmacher, 'Die Auslegung von familiengesellschaftsbezogenen Rechtsgeschaften' *Zeitschrift fur Unternehmens - und Gesellschaftrecht* bd. 46, 833 (2017); see also, A. Koeberle, Schmidt, H. Witt, and P. Fahrion, *Family Business Governance*, 2. Aufl. (Berlin: 2012), 41.

III. Expansive Capacity of the Discipline of Spouses' Legal Communion: Interest Compression in the Community Property Regime and Expression of the Constitutional Principle of the Economic Initiative of the Individual Spouse

As indicated above, the interpretative evolution of the regime of legal community between spouses must abandon any fixation on mere dogmatism in absolute terms to crystallize a categorization of community property and personal property. The regime of communion requires an axiological reading of the provisions in a combined sense to enhance the interests and safeguards of the family.[25]

The phenomenology of family practice shows that changes in the subjective and patrimonial situations of spouses can occur during marriage. As an examination of the hypotheses of entry into legal community, the fundamental normative provision (Art 177 of the Civil Code) indicates that purchases made by the spouses together or separately during marriage are treated as coming under the community regime, with the exception of those relating to personal property: ie the fruits of the property of each spouse received and not consumed at the dissolution of community property; the proceeds of the separate businesses of the spouses if they have not been consumed on dissolution of the community property; and the holdings managed by both spouses and established after marriage.[26]

The expansive capacity of legal community is appreciated in the activity of the spouses during marriage in the automatic acquisition of co-ownership of the property purchased regardless of the actual participation of the spouse, despite the natural principle of *pacta sunt servanda* (agreements must be kept) and the relativity of the effects of negotiations between the contracting parties.

The statutory provision of a legal clause determining co-ownership requires close interaction between legal values, and it is essential to respect the principle of balancing interests with proportionality.

[25] On the subject, see: P. Stanzione, 'Diritti fondamentali dei minori e potestà dei genitori', in P. Perlingieri ed, *Rapporti personali nella famiglia* (Napoli: Edizioni Scientifiche Italiane, 1979), 92; Id, *Capacità e minore età nella problematica della persona umana* (Napoli: Edizioni Scientifiche Italiane, 1975), 332. Read F.D. Busnelli, 'Capacità e incapacità di agire del minore', *Rivista di diritto civile*, 54 (1982); F. Ruscello, 'La potestà dei genitori. Rapporti personali', in P. Schlesinger ed, *Codice civile. Commentario* (Milano: Giuffrè, 1996), 38; M. Giorgianni, 'In tema di capacità del minore di età' *Rassegna di diritto civile*, 103 (1987).

[26] Read: T. Auletta, 'Modelli familiari, disciplina applicabile e prospettive di riforma' *Nuove leggi civili commentate*, 615 (2015); G. Iorio, 'Il disegno di legge sulle 'unioni civili' e sulle 'convivenze di fatto': appunti e proposte sui lavori in corso' *Nuove leggi civili commentate*, 1014 (2015); F. Romeo and M.C. Venuti, 'Relazioni affettive non matrimoniali: riflessioni a margine del d.d.l. in materia di regolamentazione delle unioni civili e disciplina delle convivenze' *Nuove leggi civili commentate*, 971 (2015); see G. Casaburi, 'Il disegno di legge sulle unioni civili tra persone dello stesso sesso: verso il difficile, ma obbligato riconoscimento giuridico dei legami familiari' *Il Foro italiano*, IV, 10 (2016); G. Oberto, 'I contratti di convivenza nei progetti di legge (ovvero sull'imprescindibilità di un raffronto tra contratti di convivenza e contratti prematrimoniali)' *Famiglia e diritto*, 165 (2015); M. Trimarchi, 'Il disegno di legge sulle unioni civili e sulle convivenze: luci e ombre' *Juscivile*, 1 (2016), and G. Ferrando, 'Le unioni civili. La situazione in Italia alla vigilia della riforma' *Juscivile*, 38 (2016).

However, let us reflect further. From the perspective of a hermeneutically correct distinction between the legal clauses of the regime of communion and constitutional principles, the co-ownership clause incorporates the principles of equality (in terms of the contributions of the spouses) and solidarity (of family needs). These are generally recognized in various legal systems, and further attenuate the principle *pacta sunt servanda* by way of derogation from the general rule in them.[27]

It follows that the rules governing legal community of the property regime regard as a cause for the attribution of joint ownership not just any form of increase in the property of the individual spouse, but purchases or proceeds that do not have the character of the close organizational personality related to the legal–patrimonial sphere of the individual. This is determined through a valuation that is not abstract, but is made in light of the judgment that, *ex ante*, the division and weighting of the interests involved are formulated.

If we consider the evolution of the principle of relativity, overcoming any form of dogmatism is derived from recognition of the generated legal effects that are directed toward third parties not participating in the formulation of the agreement. It is precisely the matrimonial property regime of the legal community that allows such an extensive effect on an entity (ie the spouse) that does not participate in the transaction for the purchase of the property and, nevertheless, is the beneficiary of the translational effect, *pro rata*, of the object of the purchase.[28]

[27] On the doctrine, see: F. Macario, 'Nuove norme sui contratti di convivenza: una disciplina parziale e deludente' *giustiziacivile.com*, 9 (2016); U. Perfetti, 'Autonomia privata e famiglia di fatto. Il nuovo contratto di convivenza' *Nuova giurisprudenza civile commentata*, 1761 (2016); F.D. Busnelli, 'Il diritto della famiglia di fronte al problema della difficile integrazione delle fonti' *Rivista di diritto civile*, 1476 (2016); Id, 'Il diritto della famiglia di fronte al problema della difficile integrazione delle fonti' *Juscivile*, 183 (2017); F.P. Luiso, 'La convivenza di fatto dopo la L. 76/2016' *Diritto di famiglia*, 1085 (2016); E. Quadri, 'Convivenze e contratto di convivenza' *Juscivile* 108-109 (2017); G. Alpa, 'La legge sulle unioni civili e sulle convivenze. Qualche interrogativo di ordine esegetico' *Nuova giurisprudenza civile commentata*, 1179 (2016); P. Zatti, 'Introduzione al Convegno' *Nuova giurisprudenza civile commentata*, 1663 (2016); L. Lenti, 'Convivenze di fatto. Gli effetti: diritti e doveri' *Famiglia e diritto*, 933 (2016); P. Schlesinger, 'La legge sulle unioni civili n 9 above, 845; A. Arceri, 'Unioni civili, convivenze, filiazione' *Famiglia e diritto*, 958 (2016); G. Buffone et al, *Unione civile e convivenza. Commento alla l. 20 maggio 2016, n 76 aggiornato ai dd.lgs. 19 gennaio 2017, nn 5, 6, 7 e al d.m. 27 febbraio 2017* (Milano: Giuffrè, 2017); V. Carbone, 'Riconosciute le unioni civili tra persone dello stesso sesso e le convivenze di fatto' *Famiglia e diritto*, 848 (2016); L. Balestra, 'Unioni civili, convivenze di fatto e 'modello' matrimoniale: prime riflessioni' *Giurisprudenza italiana*, 1779 (2016); Id, 'Evoluzione e approdi della convivenza more uxorio: dialogo con Alberto Trabucchi' *Giustizia civile*, 59 (2017).

[28] See: A. Fusaro, 'Profili di diritto comparato sui regimi patrimoniali' *Giurisprudenza italiana*, 1789 (2016); M. Dogliotti, 'Dal concubinato alle unioni civili e alle convivenze (o famiglie?) di fatto' *Famiglia e diritto*, 868 (2016); R. Pacia, 'Unioni civili e convivenze' *Juscivile*, 195 (2016); G. Bonilini, 'La successione mortis causa della persona 'unita civilmente' e del convivente di fatto' *Famiglia e diritto*, 980 (2016); G. Iorio, 'Il disegno di legge sulle 'unioni civili' e sulle 'convivenze di fatto': appunti e proposte sui lavori in corso' *Le nuove leggi civile commentate*, 1022 (2015); M. Sesta, 'Unione civile e convivenze: dall'unicità alla pluralità dei legami di coppia' *Giurisprudenza italiana*, 1792 (2016); Id, 'L'unione civile: una speciale formazione sociale d'istituzione legislativa?' *Lo Stato*, 6, 261 (2016); A. Ruggeri, 'Unioni civili e convivenze di fatto: 'famiglie' mascherate? (nota minima su una questione controversa e sulla sua discutibile risoluzione da parte della legge n. 76 del 2016)' *Consulta Online*,

The source of the binding effect of the act of autonomy must be found in the volitional element of the subject. Given this, the granting (according to a canon of legal exception) of the translation extension in favor of a third party, beyond the limit of the legal order in the intangibility of the legal sphere of others, wants the presence of the asset advantage in favor of the subject who (stops the faculty of refusal) receives the transference attribution.

The above-mentioned order of values has absolute importance for the resolution of questions concerning the exact delimitation of the mechanism of acquisition of the legal community of spouses. The Italian Court of First Instance held, *inter alia*, claims and contractual positions in which a spouse takes over while maintaining the regime of community property. As noted below, the principle of relativity and the operational limit on the certainty of an increase in property in favor of the person (spouse) not participating in the contract for its purchase are the indices used to determine the operation (or lack of it) of the regime of legal communion.

The 'constitutional' comparison of interests in the regime of communion leads us to trace how the principle of substantial equality between subjects of the legal system can influence the patrimonial dynamics of legal community (Art 2 of the Constitution).

IV. Necessary Balancing of Underlying Interests as a Moment of Synthesis Between the Systematization of the Legal Regime and the Exception of the Same

The mere appearance of an infringement of the principle indicated by the extension of the application of the community of property between spouses must be reassessed against the principle of reasonableness that seeks a natural coordination of the principle of substantive equality with that of marital equality, referred to in Art 29, para 2 of the Constitution.

The express reference in Art 29 to marriage as a synthesis of the moral and legal equality of the spouses prompts us to assess how the substance of equality between spouses is related to the governance of family property as a guarantee of

251 (2016); G. Oberto, 'I regimi patrimoniali delle unioni civili' *Giurisprudenza italiana*, 1797 (2016); F. Padovini, 'Il regime successorio delle unioni civili e delle convivenze' *Giurisprudenza italiana*, 1817 (2016); G. Casaburi and E. Grimaldi, *Unioni civili e convivenze* (Pisa: 2016), 1; P. Morozzo della Rocca, 'Il diritto alla coesione familiare prima e dopo la legge n. 76 del 2016' *Giurisprudenza italiana*, 584 (2017); M. Blasi et al, *La nuova regolamentazione delle unioni civili e delle convivenze* (Torino: UTET, 2016), 43; C. Romano, 'Unioni civili e convivenze di fatto. Una prima lettura del testo normativo' *Notariato*, 333 (2016); E. Giusti and F. Vettori, 'Famiglia di fatto ed unioni civili: verso un nuovo modello di famiglia?' *giustiziacivile.com*, 1 (2016); G. Dosi, *La nuova disciplina delle unioni civili e delle convivenze* (Milano: Giuffrè, 2016); M. Sesta, *Codice dell'unione civile e delle convivenze* (Milano: Giuffrè, 2017), 1; L. Dell'Osta and G. Spadaro, *Unioni civili e convivenze: tutte le novità* (Milano: Giuffrè, 2016), 34.

the family unit. In such a case of orderly coordination, the regime of community property properly fits with constitutional values only if the temporal progression of the explication of the principles is evaluated including an examination of the following: the (substantial) equality of spouses, such as natural persons; the phase preceding the choice of the regime; and the exercise of free private initiative. Meanwhile, the equality (moral and legal) of the spouses within the matrimonial context is exalted in the governance of legal community and the effectiveness of the co-ownership regime for purchases subject to entry into legal communion.[29]

The validity of the perspectival framing of constitutional values in the legal community regime is also supported by the further interpretation of the principle of equality in the context of the professions of the spouses. The principle that identifies the maintenance of the personal character of the goods acquired for their profession confirms the correctness of the hermeneutic path along which the regime of legal community must manifest the maximum amount of flexibility and adaptability to the professional and personal initiatives of the spouse with respect to the value of constitutional rank. In this way, equality in this case substantiates the freedom of initiative of each spouse in the self-determination of their life choices. The moment of instrumentality of the activity and the consequent purchases constitute the discriminating factor in determining the entry of property into common property, or the maintenance of the personal ownership of the acquiring spouse.[30]

The acquisition of the axiological imprint leads us to consider the canon of reasonableness as a concept of absolute relevance in the correct application of the limits of the exclusive ownership of the spouse who performs professional activity. A professional activity (manual and/or intellectual) is that which the spouse carries out mainly with an economic intent.

Note that it is precisely in this passage of assessing the concrete case that reasonableness assumes a decisive weight in the resolution of the matter. This is

[29] See, in Italian jurisprudence: Corte di Cassazione 6 May 1957 no 1529, *Giustizia civile*, 244 (1958); Corte di Cassazione 18 May 1953 no 1047, *Giustizia civile*, 1632 (1953); Tribunale di Trani 26 November 1957, *Corti Bari, Lecce e Potenza*, 102 (1958); Pretura di Roma 23 February 1959, *Temi romana*, 499 (1959); Pretura di Manfredonia 29 December 1959, *Daunia giudiziaria*, 52 (1961); Corte d'Appello di Trieste 13 July 1957, *Giustizia civile Massimario*, 35 (1957); Corte d'Appello di Torino 1 February 1957, *Giustizia civile Massimario*, 17 (1957).

[30] Cf A. Davì and A. Zanobetti, 'Le obbligazioni alimentari tra parti di un'unione civile e tra conviventi nel diritto internazionale privato' *Rivista trimestrale di diritto e procedurale civile*, 197 (2017); V. Carbone, 'Riconosciute le unioni n 27 above, 854. On the difference between the right to maintenance and the right to alimony, cf C. Majorca, 'Degli alimenti' *Commentario D'Amelio-Finzi* (Firenze: 1940), I, 772; G. Tedeschi, 'Alimenti (dir. civ.)' *Novissimo digesto italiano*, I, 490 (Torino: UTET, 1957); G. Tamburrino, 'Alimenti' *Enciclopedia del diritto*, (Milano: Giuffrè, 1958), II, 33; D.V. Amato, *Gli alimenti* (Milano: Giuffrè, 1973), 28; Id, 'Gli alimenti', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1997), III, 929; L.C. Pisu, 'Prestazioni alimentari del terzo e strumenti di regresso' *Il Foro italiano*, I, 713 (1971); A. Di Majo, 'Doveri di contribuzione e regime dei beni nei rapporti patrimoniali tra coniugi' *Diritto di famiglia. Scritti in onore di Nicolò* (Milano: Giuffrè, 1982), 313; A. Falzea, 'Il dovere di contribuzione nel regime patrimoniale della famiglia' *Rivista di diritto civile*, 609 (1977); A. Trabucchi, 'Alimenti (dir. civ.)', in *Novissimo digesto italiano*, Appendice (Torino: UTET, 1980), I, 227.

because the decision maker will have to make a clear distinction between activities that can be attributed to the profession (or professions) of the spouse, according to the natural instrumentality between the acquired property and the profession, and other activities that do not have this character. Such activities fall within legal community in terms of the translational effectiveness of property.[31]

As a corollary of interpretation, labor protection, as an expression of the principle of private economic initiative, limits: the participation of the spouse in the product of the work initiative through the restriction of certain purchases or to the remaining not consumed gain. The nature of the deferred legal community on the earnings of the spouse not consumed during the period of the regime provides evidence of respect for the principle of self-determination of the individual spouse who maintains the full use of the asset and rightly of the gains deriving from the working activity with the limit of the fall in communion of the residual.

The balancing of interests between the activation of legal community and the affirmation of the ownership of the individual spouse provokes reflection on the principle of property protection to deny automatic expropriation of it under the legal community regime without compensation from the acquiring spouse. Following an axiological line, the restriction on the principle of property derives from the alteration of ownership in favor of the non-participating spouse to a subjective acquisitive situation by virtue of the automatism of the phenomenon of legal community. However, the principle of reasonableness, when applied to legal community, warrants the correct weighting of the property rights of the spouse against the solidarity and egalitarian values of the community property regime as a regulatory model freely chosen by the spouses.[32]

The harmony of constitutional and legal values is confirmed by the finding that the compression (*pro quota – proportional share*) of ownership in subjective and patrimonial situations is the normative result of a dispositive option desired by the same spouse who, therefore, does not see their protection of constitutional rank altered or denied in any way.

The rule of law provides that assets intended for the operation of an enterprise

[31] Read T. Auletta, *Alimenti e solidarietà familiare*, (Milano: Giuffrè, 1984), 43; Id, 'Alimenti (dir. civ.)' *Enciclopedia giuridica* (Roma: Treccani, 1988), I, 1; R. Pacia, 'Decorrenza degli alimenti legali e natura costitutiva del provvedimento giudiziale' *Rivista di diritto civile*, I, 53 (2011); M. Dogliotti, 'Gli alimenti', in M. Bessone ed, *Trattato di diritto privato - Il diritto di famiglia*, III (Torino: UTET, 1999), 502; Id, 'Doveri familiari e obbligazione alimentare', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1994), 147; C.G. Terranova, *Contributo ad una teoria unitaria delle prestazioni alimentari* (Napoli: Edizioni Scientifiche Italiane, 2004), 51; G. Ferrando, 'Alimenti' *Digesto discipline privatistiche. Aggiornamento* (Torino: UTET, 2000), I, 487; C. Rolando, *Alimenti e mantenimento nel diritto di famiglia* (Milano: Giuffrè, 2006), 21-22.

[32] Cf G.F. Palermo, 'Obbligazioni solidali nell'interesse della famiglia?' *Rivista del notariato*, 488 (1979); A. Finocchiaro, *Diritto di famiglia* (Milano: Giuffrè, 1984), I, 292. See also, E. Perego, 'Se in regime di separazione dei beni un coniuge risponda delle obbligazioni contratte dall'altro nell'interesse della famiglia' *Rassegna di diritto civile*, 351 (1987); P. Stanzione, 'Comunione legale tra coniugi e responsabilità per le obbligazioni assunte' *Il diritto di famiglia*, 1101 (1984).

of one of the spouses established after the marriage, and their expansion will be considered the object of community property only if it exists at the time of its dissolution. The classes and categories of assets to be considered in terms of the maintenance of the subjective situations of the spouse include those: pertaining to strictly personal goods of each spouse and their accessories; assets used for the pursuit of the profession of the spouse other than those intended for the operation of a holding forming part of the community property; property obtained as compensation for damage (and any pension relating to the partial or total loss of working capacity); and assets acquired by payment of the price for the transfer of personal assets listed above or by their exchange, provided that this is expressly stated at the time of purchase.

In purely private terms, the above means that spouses voluntarily accept the legal clause of alteration in the ownership of the goods and subjective situations of which they are bearers, through the transposition of the matrimonial property regime of legal community. This is evident from the flexibility of the regime of matrimonial property for immediate and deferred legal community. It is founded on the volition of both spouses, and involves the coexistence of the values of common property law with the principles of constitutional rank where it is not possible to attribute to the community characteristics and protections contrary to those in the Constitution.[33]

Starting from evidence of the volition of the subjects in determining the effects of the regime, the flexibility of legal community of property between spouses allows us to consider how the structure of family values within the relationship between them sits perfectly well with constitutional principles. Systematic reflection is the consequence of the finding that the mechanism of legal community arises from the will of the spouses who, in compliance with the rules of redistribution of wealth, decline the application of constitutional principles without any possibility of deviation from their related safeguards.

Based on the above, it is necessary to abandon any hypothesis of a dogmatic reconstruction of the phenomenon of legal communion. Above all, we need to shun the drift of the formation of categorizations based on acquired facts that would determine an excessively expansive capacity of legal community of the spouses (to the detriment of constitutional protections for the position of the individual). On the contrary, we also need to discourage a maximum dispositive self-determination of the individual spouse (in defiance of the principle of solidarity that permeates family life).

Importantly, the error that generates such an approach is the failure to investigate

[33] See: C.D.B. Maioli, 'Dovere di contribuzione e solidarietà tra coniugi' *Rassegna di diritto civile*, 481 (1984). Read F. Santoro-Passarelli, *Commentario al diritto italiano della famiglia* (Padova: CEDAM, 1992), I, 497; F. Santosuosso, *Il matrimonio* (Torino: UTET, 1989), 250; R. Perchinunno, *Le obbligazioni nell'interesse familiare* (Napoli: Jovene, 1982), 94; A. Falzea, 'Il dovere di contribuzione' n 30 above, 623; S. Alagna, 'Il principio patrimoniale primario della famiglia' *Vita notarile*, I, 862 (1977).

all of the consequences of protected interests, protection of subjective positions, and potential legal effects. If we think about the place of the microsystem of legal communion in the overall system of legal values, we can deduce the necessity of applying the criterion of balancing the interests underlying the individual case as a moment of synthesis between the systematic and dispositive nature of the legal regime, and the protection of subjective rights.[34]

The flexible (legal and conventional) nature of legal community allows us to evaluate individual cases and facts of acquisitions of goods with due attention and thoughtfulness. It then becomes possible to grasp how, and to what extent, it is flexible with respect to individual prescriptions, and the interests of the family and spouses. This characterization of communion must be understood by the interpreter when resolving various subjective situations in a reasonable manner and according to the balance of interests.

The attempt to categorize the classes of facts or purchases that may or may not enter into legal communion is incorrect by virtue of the clear difficulty of reconstructing the legal system in this context. This is to say, it is capable of framing a varied and, above all, complete range of acts and facts (in the present case, of purchases) as included in it and, of as it turns out, under the validity of the statute of limitations. But this reconstructive hypothesis is not feasible in the microsystem of the legal community involving spouses in cases where, in the case of limited normative data, the classes of facts and purchases envisaged at the regulatory level are incomplete in the determination of the perimeter of application, and are too fragmentary for effective empirical reconstruction.[35]

Moreover, the objection that the categorization may be the result of interpreting activities incorrectly is based on an indisputable contradiction in terms. If categorizing is an activity carried out by the body/person applying the law, it is not clear how they can avoid balancing of interests in individual cases. This is because determination of

[34] See: R. Calvo, 'I diritti successori del coniuge', in Id and G. Perlingieri eds, *Diritto delle successioni e delle donazioni* (Napoli: Edizioni Scientifiche Italiane, 2013), I, 633. See Corte di Cassazione 27 January 2016 no 1588, *Giurisprudenza italiana*, 1328 (2016), with comment by I. Riva, 'Diritto di abitazione del coniuge superstite – Il possesso della casa familiare da parte del coniuge superstite ai fini dell'acquisto della qualità di erede'; see also L. Carraro, *La vocazione legittima alla successione* (Padova: CEDAM, 1979), 114; E. Perego, 'I presupposti della nascita dei diritti d'abitazione e d'uso a favore del coniuge superstite' *Rassegna di diritto civile*, 714 (1980); G. Frezza, 'Appunti e spunti sull'art. 540, comma 2, c.c.' *Diritto di famiglia*, 966 (2008); G. Tedesco, 'Successione legittima e diritti del coniuge superstite sulla casa familiare fra legato con dispensa dall'imputazione, prelegato e legato in conto' *Rivista del notariato*, 425 (2013); A. Tullio, 'I diritti successori del coniuge superstite' *Famiglia persone e successioni*, 290 (2012); V.E. Cantelmo, 'La situazione del coniuge superstite' *Rassegna di diritto civile*, 51 (1980); A. Mirone, *I diritti successori del coniuge* (Napoli: Jovene, 1984), 143.

[35] Cf A. Mirone, *I diritti successori* n 34 above, 110; C. Trinchillo, 'Il trattamento successorio del coniuge superstite nella disciplina dettata dal nuovo diritto di famiglia', in *Studi in onore di Guido Capozzi* (Milano: Giuffrè, 1992), I, 2, 1214; G. Vicari, 'I diritti di abitazione e di uso riservati al coniuge superstite' *Diritto di famiglia*, 1314 (1978); A. Ravazzoni, 'I diritti di abitazione e di uso a favore del coniuge superstite' *Diritto di famiglia*, 222 (1978); L. Mezzanotte, *La successione anomala del coniuge* (Napoli: Edizioni Scientifiche Italiane, 1989), 43.

a single category of facts which to apply an identified discipline means, in axiological terms, to search for the protections and interests underlying the category in comparison (balancing) with other categories of facts that are close to it in an empirical and legal sense.

Essays

New Solutions and Critical Remarks from Squaring the Circle of Dieselgate: Towards a Fruitful Coordination Between Automotive and Consumer Law?*

Emanuele Tuccari**

Abstract

Dieselgate – first revealed about ten years ago – is a complex affair that has raised numerous legal, environmental and economic issues in the context of (national and supranational) systems with very different characteristics. It has therefore become a 'neverending case', harbinger of multiple reflections, in a constantly cha(lle)nging global context.

The reflections presented here – moving therefore from the emblematic event of the 'Dieselgate' – begin to develop critical considerations with reference also to the identification of a complex balance between different socio-economic instances, traceable to competition and sustainability, in the current European Union legal landscape. This EU system – destined to be echoed, albeit sometimes differently, in the national legal system of the individual member states – has so far developed mainly thanks to the constant dialogue between wide-ranging and structured automotive and consumer law, on the one hand, and numerous rulings of the Court of Justice of the European Union, on the other hand. The result is a detailed reconstruction – characterised by positives and negatives – outlined herein, starting from the specific perspective of individual remedies in consumer law.

I. A 'Neverending Case' in a Cha(lle)nging World

Dieselgate – at least as regards its fundamental characteristics – is already known not only to experts and scholars in the automotive sector[1], to independent administrative and judicial authorities (national and supranational), but also to the general public (also due to the significant attention given to the affair by

* The complexity of the reflection on the remedial system ascribable to 'Dieselgate' – and, more generally, to the abuse of sustainability claims in the automotive sector – required the present considerations to be structured in two parts (which, although independent, are physiologically interconnected): the first part is hosted here in Volume No 2 of 2023, but it will therefore be followed by a second part ('New solutions and critical remarks from squaring the circle of Dieselgate: a 'neverending case' between private and public enforcement'), destined for Volume No 1 of 2024.

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[1] For an initial overview, please refer to the contributions (aimed at deepening, from different perspectives, the different national solutions) contained in M. Frigessi di Rattalma ed, *The Dieselgate. A Legal Perspective* (Berlin: Springer, 2017) and in B. Gsell and T.M.J. Möllers eds, *Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal* (Cambridge: Intersentia, 2020).

various media).[2]

In 2014, during an analysis to assess the emissions and fuel consumption of diesel engines on the road, US scientists from the Center for Alternative Fuels Engines and Emissions (CAFEE) at West Virginia University, supported by the California Air Resource Board (CARB), noted that some diesel-powered Volkswagen cars were producing more polluting exhaust gases than the company had certified and could reasonably be expected from the company's statements during test drives.[3]

The environmental performance of the vehicles thus proved to be worse not only than the results of the type-approval tests, but also than the permissible nitrogen oxide threshold values for road traffic. It was soon discovered that an add-on component had been installed on numerous diesel vehicles with the aim of circumventing the pollutant emission control system. This software was capable of recognising that a type-approval check had been carried out so that the levels of harmful gases produced (and a number of other parameters) complied with the legal requirements, only to be deactivated under on-road driving conditions

[2] As is well known, Dieselgate was a scandal on a global scale. Here, it seems only right to recall, without claiming to be exhaustive, at least some national decisions of the independent administrative authorities and case law (criminal, civil and administrative). If, on the one hand, the disputes have mostly been settled out of court in the United States of America (with the signing of three settlement agreements approved by the US District Court for the Northern District of California between 2016 and 2017), on the other hand, in Europe, there has been no lack of judicial measures and rulings. In Italy, see Autorità Garante della Concorrenza e del Mercato (AGCM) 4 August 2016 no 26137; Tribunale amministrativo regionale Lazio, Roma, Sez. I, ord, 7 December 2016, no 7872; Id, 31 May 2019, no 6920; Consiglio di Stato, Sez. VI, 7 January 2022, n. 68; Corte d'Appello di Venezia 16 November 2023 no 2260, *ForoNews*, 1 December 2023; Tribunale di Venezia, 7 July 2021, *Il Foro italiano*, I, c. 4023 (2021); *Nuove leggi civili commentate*, 1335 (2021); *Danno e responsabilità*, 243 (2022); Tribunale di Avellino, 10 December 2020, *Il Foro italiano*, I, 1482 (2021); Trib. Genova, 5 ottobre 2021; Trib. Monza, 28 January 2021, n. 135; Corte d'Appello di Bari, 4 February 2021, n. 222; Tribunale di Trieste, 7 October 2022, n. 490 (all available at www.onelegale.wolterskluwer.it/); Corte di Cassazione 14 October 2021 no 28037 (available at www.dejure.it). In Germany, in addition to a number of pronouncements (in the form of injunctions) imposing large fines on Volkswagen (such as that of the Braunschweig Public Prosecutor's Office referred to in the context of several judgments before our administrative courts), see Bundesgerichtshof, 26 June 2023, Vla ZR 335/21, *Neue Juristische Wochenschrift*, 1099 (2023); Bundesgerichtshof, 25 May 2020, n. VI ZR 252/19, *Neue Juristische Wochenschrift*, 1962 (2020), *Zeitschrift für Wirtschaftsrecht*, 1179 (2020). In Spain, see Juzgado de lo Mercantil n. 1 de Madrid, n. 36/2021, available at http://tinyurl.com/2vh85xp2 (last visited 10 February 2024); Tribunal de Valladolid, n. 291/2016, available at http://tinyurl.com/mrxsunk2 (last visited 10 February 2024).

For an overview of 'Dieselgate' facts the national case law, see, for all, F. Bertelli, *Profili civilistici del "Dieselgate". Questioni risolte e tensioni irrisolte tra mercato e sostenibilità* (Napoli: Edizioni Scientifiche Italiane, 2021), 5-90.

[3] Further information concerning the composition, organisation, publications, projects and activities of the Center for Alternative Fuels Engines and Emissions (CAFEE) can be found at: https://www.cafee.wvu.edu/. The California Air Resource Board (CARB) is a government agency operating under the umbrella of the California Environmental Protection Agency (CalEPA). The latter organisation reports directly to the Governor's Office in the Executive Branch of the California State Government (for more information on the organisation, functions and activities of the California Air Resource Board see https://ww2.arb.ca.gov/).

(when the levels became much higher).

The scandal quickly spread from the United States of America to Europe: new questions of fact emerged – arising both from the discovery of further manipulation software and from the problems relating to repairs and replacements carried out by Volkswagen (which often turned out to be, at least in part, ineffective) – without, however, distorting the fundamental coordinates of the original case. In fact, Volkswagen was authorised by the Kraftfahrt-Bundesamt (KBA) – the German Federal Motor Transport Authority (responsible for the type-approval procedure) – to carry out a recall and update of the recirculation system for polluting gas emissions from vehicles (without the type-approval ever being revoked). However, the recirculation system was only fully effective at outside temperatures between 15 and 33 degrees Celsius (and at an altitude of less than 1,000 metres; the so-called 'temperature window'), becoming progressively less effective as temperatures fell (to zero at temperatures of less than 9 degrees below zero). The purchasers of the various Volkswagen vehicles – equipped with the manipulation system, which, following the recall and updating, reduced polluting gas emissions only in the 'temperature window' – therefore took further recourse to the courts in order to obtain effective remedies against the repeated installation of devices considered to be prohibited.

As a result, legal and economic (as well as environmental) issues have emerged that have led to endless litigation – at national and EU level – which today makes Dieselgate a sort of 'neverending case'.

This 'never-ending case' is part of the more general issue of the problems arising from the use of statements concerning the environmental sustainability of goods bought and sold (usually documented as part of the vehicle's 'certificate of conformity').[4] If, on the one hand, it is now amply demonstrated that each consumer is conditioned in their final negotiating decision by the degree of social and environmental responsibility of the professional operator with whom they interact, on the other hand, it is equally clear that there is a wide information gap between operators on the real characteristics of the vehicle and the recourse, often merely instrumental, to statements on sustainability.[5] It is therefore a

[4] In the past, the 'car conformity certificate' attested that a vehicle purchased in the European Union complied with the provisions of the vehicle type-approval directive 2007/46/EC ('establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles'). The aim was thus to ensure that the same environmental, technical and safety rules were observed throughout the European Union. Today, Directive 2007/46/EC is no longer in force, repealed, as of 31 August 2020, by Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 (on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) no 715/2007 and (EC) no 595/2009 and repealing Directive 2007/46/EC).

[5] See F. Bertelli, '«Dichiarazioni pubbliche fatte dal o per conto del venditore», conformità oggettiva e ed economia circolare', in G. De Cristofaro ed, *La nuova disciplina della vendita mobiliare nel codice del consumo* (Torino: Giappichelli, 2022), 226. For contributions demonstrating consumer perception of the degree of social and environmental responsibility of the professional operator, see,

question of ensuring that these statements are used correctly, so as to stimulate, albeit indirectly, competitiveness among companies on the sustainability front as well. Otherwise, the dissemination of false statements – perhaps by exploiting the information asymmetry between professionals and consumers – could end up provoking, firstly, a generalised distrust in the reliability of the statements themselves and, secondly, a significant decrease in the propensity to purchase eco-friendly vehicles.[6] The risk is that these 'greenwashing' practices (which, by presenting products and activities as environmentally sustainable, seek to conceal their negative environmental impact) – in addition to undermining any aspiration to sustainable development – will end up, at the macroeconomic level, also altering the proper functioning of competitive dynamics.[7]

So, this study therefore aims to critically outline – also thanks to the analysis of CJEU case law – the regulation of the various possible remedies to Dieselgate in the more general systemic context of a cha(lle)nging world.[8]

II. From the Regulation of Unfair Commercial Practices...

among others, M. Tavella ed, *Comunicazione, marketing e sostenibilità ambientale* (Torino: Giappichelli, 2022); Z. Sethna and J. Blythe, *Consumer behaviour* (SAGE Publications: London, 4th ed, 2019), 516; and the *Behavioural Study on Consumers' Engagement in the Circular Economy* (drafted on behalf of the European Commission by LE Europe, VVA Europe, Ipsos, ConPolicy andTrinomics, 2018 and now easily available at https://tinyurl.com/ype6yynw (last visited 10 February 2024)).

These are expanding perspectives of investigation (enhancing the current relationships between psychology, sociology, behavioural economics and consumer law). See R. Caterina, 'Modelli di razionalità e incompletezza del regolamento contrattuale', in G. Rojas Elgueta and N. Vardi eds, *Oltre il soggetto razionale. Fallimenti cognitivi e razionalità limitata nel diritto privato* (Roma: RomaTre-Press, 2014), 47 ss; N. Guéguen, *Psicologia del consumatore* (Bologna: il Mulino, 2016); A.P. Seminara, 'Libertà del consumatore e psicologia della pubblicità' *Contratto e impresa*, 493 (2020).

[6] For an overview of the risks of 'greenwashing', see F. Bertelli, n 5 above, 219, 226; T. Rumi, 'La tutela del consumatore dalle asserzioni ambientali ingannevoli' 1410 *Jus civile*, (2022).

[7] For some fascinating reflections on the relations between production, consumption and sustainability from the perspective of European private law (and not only), see H.M. Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy' 8 *Journal of European Consumer and Market Law*, 229-237 (2019); M.W. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' 15 *European Review of Private Law*, 323-348 (2007). For a comprehensive overview of the characteristics and problems of green claims and statements concerning environmental sustainability, see F. Bertelli, *Le dichiarazioni di sostenibilità nella fornitura di beni di consumo* (Torino: Giappichelli, 2022); A. Benedetti, 'Le certificazioni ambientali', in G. Rossi ed, *Diritto dell'ambiente* (Torino: Giappichelli, 5th ed, 2021), 207.

[8] It is this ambitious mission that has dictated the analytical approach of, firstly, critically reflecting on the individual remedies deriving from the consumerist evolution of the European Union matrix (E. Tuccari, 'New solutions and critical remarks from squaring the circle of Dieselgate: towards a fruitful coordination between automotive and consumer law?' *The Italian Law Journal*, II (2023)), and, then, considering the dialogue between compensatory remedies and collective redress in the broader context aimed at assessing the role of and relations between public and private law (E. Tuccari, 'New solutions and critical remarks from squaring the circle of Dieselgate: a 'neverending case' between private and public enforcement' *The Italian Law Journal*, I (2024)).

In analysing the remedial solutions to 'Dieselgate', we aim to develop reflections that will allow us to grasp, in the context of the constant *dialogue between legislation and case law*, the evolution of the issues *underlying the main contractual, compensation and procedural aspects of the affair and the abuse of sustainability claims*. Indeed, this abuse is even encouraged precisely by the prospect of easy and immediate gains through false statements. The possible dissemination of untrue statements, perhaps taking advantage of consumers' limited access to the real meaning of the information provided by professionals, risks provoking not only a generalised lack of confidence in the reliability of the statements themselves, but above all a significant decrease in the propensity to purchase eco-sustainable vehicles.[9] Such cases of 'greenwashing' seem to fall – even on a first reading (also by administrative and jurisdictional authorities) –[10] within the scope of the discipline of unfair commercial practices.

A glance at the EU legislation on unfair commercial practices – contained, as is well known, predominantly within the framework of Directive 2005/29/EC (moreover, recently amended by Directive 2019/2161/EU) – immediately reveals the breadth of the definition of '(business-to-consumer) commercial practice' ('any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'; Art 2, sub d), directive 2005/29/CE).

The general prohibition refers to all conduct contrary to professional diligence and liable to 'materially distort the economic behaviour', in relation to the product, of the average consumer they reach or to whom they are directed (Art 5). Then – if the provision of the above-mentioned general prohibition were not already considered decisive – commercial practices specifically considered 'unfair' (and, therefore, prohibited) are those held to be 'misleading' (Arts 6 and 7) and 'aggressive' (Arts 8 and 9), such as to include all those behaviours of the professional capable of determining different purchase choices from those that would have been made freely in their absence.[11]

[9] M. D'Onofrio (*Il difetto di durabilità del bene* (Napoli: Edizioni Scientifiche Italiane, 2023), 23-30) rightly dwells on the systematic role of information obligations in the perspective of a more sustainable consumer law.

[10] In Italy, for example, the decisions of the Autorità Garante della Concorrenza e del Mercato (AGCM) of 4 August 2016, no 2613 n 2 above, of the Tribunale amministrativo regionale Lazio, Rome, 7 December 2016 no 7872 n 2 above, and of the same Tribunale amministrativo regionale Lazio, Roma, 31 May 2019 no 6920 n 2 above, as well as of the Corte d'Appello di Venezia 16 November 2023 no 2260 n 2 above; Tribunsl Venezia 7 July 2021 n 2 above; Tribunale di Avellino 10 December 2020 n 2 above; Tribunale di Genova 5 October 2021 n 2 above, substantially subsume the 'Dieselgate' cases under the regulation of unfair commercial practices.

[11] Moreover, Directive 2019/2161/EU has supplemented the list of 'misleading actions' in Art 6 (thus, 'any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors' is 'misleading' within the meaning of the new para 2, lett c)), and enriched the list of pre-contractual information to be considered 'relevant' when formulating

The 'Dieselgate' scandal – arising from the misuse of sustainability claims (contained, in turn, in the 'certificates of conformity' of Volkswagen vehicles) – therefore seems to fall directly, without particular difficulty, within the scope of application of the directive on unfair commercial practices – as then transposed in the various Member States.

Although the potentially 'all-encompassing' formulation of the notion of unfair commercial practice (and of the consequent prohibition) does not pose particular reconstructive problems, the 'remedy question' (in the structured perspective of a necessary intermingling of public and private enforcement) is decidedly more complex. In this regard, the recent enhancement of public protection (through a general tightening of pecuniary sanctions) must be welcomed (thanks, above all, to the issuance of Directive 2019/2161/EU), while private innovations deserve much less praise. As is well known, in fact, Directive 2019/2161/EU also introduced a new Art 11a into the original text of Directive 2005/29/EC:

> '(1). Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances. (2). Those remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law'.

This broad formulation, however, leaves significant margins of discretion (to be exercised at the time of transposition) to individual national legislators, leaving little hope, also as a result of the significant differences in the *modus operandi* of the various Member States, of the application of uniform rules to possible future cases.

In Italy, the perplexities seem to be confirmed not only by recent decisions of national courts on the uncertain determination of compensation,[12] but also by the recent approval of Legislative Decree no 26 of 7 March 2023 and, more generally, by the 'minimalist' approach in transposing EU legislation, at least in terms of individual private remedies, carried out by the national legislator.[13] The

an 'invitation to purchase' for the purposes of assessing a commercial practice as a 'misleading omission' within the meaning of Art 7 (see, in particular, the current paras 4, 4a, 6). Annex I to Directive 2005/29/EC – which contains the list of commercial practices considered unfair in all cases – has also recently been supplemented by Directive 2019/2161/EU (see n. 11a, n. 23a, n. 23b, n. 24c). On this point, see, for all, G. De Cristofaro, 'Legislazione italiana e contratti dei consumatori nel 2022: l'anno della svolta. Verso un diritto "pubblico" dei (contratti dei) consumatori?' *Nuove leggi civili commentate*, 40-41 (2022).

[12] We will came back specifically to this topic later, with an analysis also covering additional recent (national and European) case law decisions, see E. Tuccari, 'New solutions' n 8 above.

[13] On the Italian 'legislative minimalism', which has recently emerged in the transposition of EU

latter, by inserting a new para 15-*bis* into current Art 27 of the Italian Consumer Code (titled 'administrative and judicial protection'), has, in fact, limited itself mostly to literally referring to the problematic wording of Art 11-bis of Directive 2005/29/EC, thus leaving to the national interpreter the arduous task of finding a solution, in application, to the aforementioned critical regulatory aspects.[14]

It is thus that the most recent interpretations provided by the Court of Justice – perhaps also aware of certain critical issues, especially in relation to enforcement of the unfair commercial practice rules (still, as we have seen, not entirely resolved, since they are substantially remanded to the application that the national courts make of them) – go well beyond the simple (re)affirmation of the prohibition of the installation of manipulation software in the perspective of sectoral legislation and unfair commercial practice rules, advancing an structured point of view (compatible with the prohibition of unfair commercial practices, but somewhat different).[15]

directives, see, among others, S. Pagliantini, 'L'attuazione minimalista della dir. 2019/770/UE: riflessioni sugli artt. 135 *octies* – 135 *vicies ter* c. cons. La nuova disciplina dei contratti *b-to-c* per la fornitura di contenuti e servizi digitali' *Nuove leggi civili commentate*, 1499-1560 (2022); P. Coppini, 'Armonizzazione massima e minimalismo legislativo nel "nuovo" difetto di conformità dei beni di consumo' *Actualidad Jurídica Iberoamericana*, 468-501 (2023).

[14] According to the new Art 27 of the Italian Consumer Code (titled 'administrative and judicial protection'), para 15-*bis*, consumers who have been harmed by unfair commercial practices may also generally submit a claim for proportionate and effective remedies, including compensation for the harm suffered and, where applicable, price reduction or termination of the contract, taking into account, where appropriate, the gravity and nature of the unfair commercial practice, the harm suffered and other relevant circumstances (this is without prejudice to other remedies available to consumers). The topic of unfair commercial practices has attracted the attention of Italian literature, especially in the last ten years (also with specific reference to the controversies arising from 'Dieselgate'). See, among others, the monographic studies by A. Fachechi, *Pratiche commerciali scorrette e rimedi negoziali* (Napoli: Edizioni Scientifiche Italiane, 2012), 11, 31; M. Bertani, *Pratiche commerciali scorrette e consumatore medio* (Milano: Giuffrè, 2016), 79-90; E. Labella, *Pratiche commerciali scorrette e autonomia privata* (Torino: Giappichelli, 2018), 21-45, 93-150; T. Febbrajo, *Il* private enforcement *del divieto di pratiche commerciali scorrette* (Napoli: Edizioni Scientifiche Italiane, 2018), 95; F. Leonardi, *Comportamento omissivo dell'impresa e pratiche commerciali scorrette* (Milano: Wolters Kluwer, 2019), 47-95; L. Guffanti Pesenti, *Scorrettezza delle pratiche commerciali e rapporto di consumo* (Napoli: Jovene, 2020), 191-290; as well as the even more recent contributions of M. D'Onofrio, n 9 above, 113-150; C. Granelli, 'Pratiche commerciali scorrette: le tutele' *Enciclopedia del diritto* (Milano: Giuffrè, 2021), 825-873; Id, 'L'art. 11-*bis* della direttiva 2005/29/CE: *ratio*, problemi interpretativi e margini di discrezionalità concessi agli Stati membri ai fini del recepimento' *Jus civile*, 256-268 (2022); G. De Cristofaro, 'Rimedi privatistici "individuali" dei consumatori e pratiche commerciali scorrette: l'art. 11-*bis* dir. 2005/29/UE e la perdurante (e aggravata) frammentazione dei diritti nazionali dei Paesi UE' *Jus civile*, 269-303 (2022); S. Pagliantini, 'I rimedi non risarcitori: esatto adempimento, riduzione del prezzo e risoluzione del contratto' *Jus civile*, 304-315 (2022); M. Maugeri, 'Invalidità del contratto stipulato a seguito di pratica commerciale sleale?' *Jus civile*, 316-320 (2022).

[15] As is well known, the Court of Justice of the European Union (CJEU) plays a decisive role in the general interpretation of the European Union framework (and, in particular, there are indeed numerous pronouncements dealing with individual provisions of the legislation on unfair commercial practices and lack of conformity in the supply of consumer goods). Recently, on the 'ideological-political' character of the reference for a preliminary ruling to the Court of Justice of the European Union, see S. Pagliantini, 'Trent'anni di direttiva 93/13, postvessatorietà restitutorio ed il

III. …to That of Lack of Conformity

In the summer of 2022, the Court of Justice of the European Union – through a trilogy of judgments (issued following a reference for a preliminary ruling on certain questions raised by the Austrian Supreme Court, the Eisenstadt Regional Court and the Klagenfurt Regional Court) (C-128/20, GSMB Invest; C-134/20, Volkswagen; and C-145/20, Porsche Inter Auto and Volkswagen) – proposed, in particular, an interesting reinterpretation of the regulation of the automotive sector and the sale of consumer goods.[16]

First of all, the CJEU stated that *a device that ensures compliance with nitrogen oxide emission limit values only in the 'temperature window' constitutes*, insofar as it reduces the effectiveness of the emission control system under normal conditions of use, *a defeat device prohibited under Art 5, para 2, of Regulation no 715/2007* on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.

A different conclusion might perhaps be reached if it were shown that the installation of the defeat device meets the 'need to protect the engine against damage or breakdown and for safe operation of vehicles' (Art 5, para 2, lett a) of Regulation No 715/2007).

Nevertheless, according to the Court,

> 'a defeat device such as that at issue in the main proceedings can be justified under that exception only where it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of a component of the exhaust gas recirculation system, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven'.[17]

vuoto di una interpretazione conforme a tutto tondo' *Accademia*, 11 (2023); Id, *Rinvio pregiudiziale ed interpretazione adeguatrice (la narrazione del civilista)* (Milano: Wolters-Kluwer, CEDAM, 2023) 23; P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, II, *Fonti e interpretazione* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 150.

[16] For an analysis of these CJEU rulings, see S. Vanini, 'Violazione di norme pubblicistiche di tutela ambientale da parte del produttore e difetto di conformità al contratto del bene consegnato al consumatore: La Corte di giustizia UE e il caso «*Dieselgate*» (C. Giust. UE 14 luglio 2022, in causa C-145/20, Porsche Inter Auto e Volkswagen)' *Rivista di diritto civile*, 166-192 (2023); E. Tuccari, 'La CGUE ritorna sul "Dieselgate" e disegna una disciplina sempre più "sostenibile" del settore *automotive*' *Giurisprudenza italiana*, 5, 1010-1026 (2023); and, in the foreign literature, see M.-E. Arbour, 'The Volkswagen Scandal at the CJEU: Defeat Devices between the Conformity Guarantee and Environment Law' 13 *European Journal of Risk Regulation*, 670-681 (2022); V. Bassani-Winckler, 'Environnement - Émissions des véhicules' *Europe*, 10, 344 (2022); A.M. Rodríguez Guitián, 'El Dieselgate y el Tribunal de Justicia de la Unión Europea (Reflexiones a propósito de tres pronunciamientos de 14 de julio de 2022)' *Anuario de Derecho Civil*, 727-792 (2023).

[17] C-128/20 *GSMB Invest*, Judgment of 14 July 2022, available at www.eur-lex.europa.eu, para 62; C-134/20 *Volkswagen*, Judgment of 14 July 2022, available at www.eur-lex.europa.eu, para 74; C-145/20 *Porsche Inter Auto and Volkswagen*, Judgment of 14 July 2022, available at www.eur-

Such a requirement exists only where, at the time of EC type-approval of that device or of the vehicle fitted with it, no other technical solution makes it possible to avoid risks. It is clearly for the referring courts to ascertain whether that is the case with the manipulation device with which the vehicles are equipped in each individual case, but, according to the Court,

> 'while it is true that Article 5(2)(a) of Regulation No 715/2007 does not formally impose any further conditions for the application of the exception laid down in that provision, the fact remains that a defeat device which, under normal driving conditions, operated during most of the year in order to protect the engine from damage or accident and ensure the safe operation of the vehicle, would clearly run counter to the objective pursued by that regulation, from which that provision allows derogation only in very specific circumstances, and would result in a disproportionate infringement of the principle of limiting NOx emissions from vehicles'.[18]

It would therefore be the same overall *ratio* of the legislation – aimed at limiting as far as possible the emission of noxious gases by vehicles –[19] that would guide the interpreter in the direction of a markedly (and rightly) restrictive interpretation of the exception in Art 5, para 2, lett a) of Regulation no 715/2007.

Moreover, the consumer – when he buys a vehicle belonging to the series of an approved type and, therefore, accompanied by a certificate of conformity – may reasonably expect that such a vehicle complies, even in the absence of specific contractual clauses, with all the provisions (including Art 5) of Regulation no 715/2007. Art 2 of Directive 1999/44/EC contributes to outlining a structured system of presumptions to facilitate the assessment of the conformity of the commodity with the contract. In particular, the wording of Art 2, para 2, lett d) must be interpreted, according to the CJEU, as meaning that a motor vehicle, falling within the scope of Regulation No 715/2007, does not have the usual quality of goods of the same type that the consumer may reasonably expect if, although it has EC type-approval in force (and may therefore be used), it is equipped with a manipulated software.

Finally, the circumstance that, after having purchased a vehicle, a consumer admits that they would have purchased it even if they had been aware of such a lack of conformity is not in itself relevant, according to the CJEU, for the purpose of determining whether a lack of conformity is to be classified as 'minor'. Therefore, despite the absence of any legislative definition of the notion of 'minor

lex.europa.eu, para 73.

[18] C-128/20 *GSMB Invest*, Judgment of 14 July 2022 n 17 above, para 63; C-134/20 *Volkswagen* n 17 above, para 75; C-145/20 *Porsche Inter Auto and Volkswagen* n 17 above, para 74.

[19] This *ratio* seems to emerge already from a simple reading of several Recitals of Reg. no 715/2007 (see, in particular, Recitals 1, 4, 5, 6, 10, 11, 12). On this point, see M.-E. Arbour, n 16 above, 672-674.

lack of conformity',[20] the CJEU reaches this conclusion by developing a systematic analysis (and enhancing the purpose) of Directive 1999/44/EC and Regulation No 715/2007. These regulatory texts – if read in a coordinated manner – aim, on the one hand, to establish a fair balance between the interests of the consumer and those of the seller and, on the other hand, to protect the environment and considerably reduce harmful gas emissions from diesel-powered vehicles in order to improve air quality in compliance with pollution limit values. Having regard to the dual purpose of the system of protection, as outlined by the Court of Justice, the presence of a defeat device in a vehicle, the use of which is prohibited under Art 5, para 2, of Regulation no 715/2007, cannot be regarded as a minor lack of conformity within the meaning of Art 3, para 6, of Directive 1999/44/EC. The latter provision must therefore be interpreted – according to the CJEU – as meaning that a lack of conformity of a vehicle consisting in the installation of a manipulation device (prohibited under Art 5, para 2, of Regulation No 715/2007) cannot be classified as 'minor' even where the consumer, had they been aware of the existence and functioning of that device, would in any event have purchased that vehicle. It follows that it is impossible to exclude *ex ante* any possible recourse to the remedy of rescinding the contract of sale of a vehicle where there is a manipulation device prohibited under Art 5, para 2, of Regulation no 715/2007.[21]

So, the trilogy of CJEU judgments – in addition to clarifying the interpretation to be given to the specific provisions of EU law (applicable at the time of the facts) – seems to contribute to a peculiar 'sustainable' view of consumer law in the automotive sector.

The reconstructive hypothesis essentially ends up including environmental attestations among the integrative elements of the conformity of the motor vehicle to the contract of sale. This reconstruction requires the interpreter to carefully scrutinise the fundamental characteristics of the regulation of the sale (or, *rectius*, of the supply)[22] of consumer goods through the prism of sustainability

[20] For a reflection of the Italian literature, already in the context of Dir. 1999/44/EC, see, among others, G. De Cristofaro, Difetto di conformità al contratto e diritti del consumatore. L'ordinamento italiano e la direttiva 99/44/CE sulla vendita e le garanzie dei beni di consumo (Padova: CEDAM, 2000); R. Pardolesi, 'La direttiva sulle garanzie della vendita: ovvero di buone intenzioni e di risultati opachi' Rivista critica di diritto privato, 442 (2001); A. Luminoso, 'Chiose in chiaroscuro in margine al d. legisl. N. 24 del 2002, Problemi e dilemmi', in M. Bin and A. Luminoso eds, Le garanzie nella vendita dei beni di consumo, in F. Galgano ed, Trattato di diritto commerciale e di diritto pubblico dell'economia (Padova: CEDAM, 2003), XXXI, 10; R. Fadda, La riparazione e la sostituzione del bene difettoso nella vendita (dal codice civile al codice del consumo) (Napoli: Jovene, 2007), 176.

[21] See, critically, S. Pagliantini, *Rinvio pregiudiziale* n 15 above, 3-5. In the foreign literature, see, among others, R. Simon, 'Manipulated Software as a Minor Lack of Conformity?' 12 *Journal of European Consumer and Market Law*, 2, 71-75 (2023).

[22] Thus – with regard to Art 1, para 4, Dir. 1999/44/EC as well as today's art 3, Dir. 771/2019/EU – see F. Addis 'Spunti esegetici sugli aspetti dei contratti di vendita di beni regolati nella nuova direttiva (UE) 2019/771' *Nuovo diritto civile*, 5-27, 12 (2020). Moreover, the shift from sales to supply corresponds to an increasing focus on so-called 'servitization' (especially within the automotive sector). On the phenomenon of 'servitization', see Y.M. Atamer and S. Grundmann, 'Sales Law in

not only to appreciate its positive aspects, but also to unveil its negative aspects through a critical analysis of the evolution of the dialogue between European Union legislation and case law in the automotive sector.

1. The Evolution of European Union Legislation

If, on the one hand, European Union legislation in the automotive sector is characterised by a great deal of complexity resulting above all from the incessant succession of numerous interventions (as specific as they are often partial), on the other hand, it is distinguished by a dual perspective – the protection of competition and sustainable development – which, for years now, seems to have inspired the main legislative innovations.

Indeed, there is no lack (nor has there been a lack in the past) of legislation in the automotive sector that is specifically oriented towards the protection of competition, as evidenced, purely by way of example and without any claim to exhaustiveness, by the specific provisions of EU Regulation no 461/2010 on the application of Art 101, para 3, of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (which, as of 1 June 2010, replaced EU Regulation no 1400/2002 and will remain in force, after being amended by Commission Regulation (EU) 2023/822 of 17 April 2023, until 31 May 2028), or by the rules on distribution contracts, also applicable in the automotive sector, of EU Regulation 2022/720 on the application of Art 101, para 3, of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (which, as of 1 June 2022, replaced EU Regulation 2010/330).[23] Nor can we overlook the numerous regulatory interventions in the automotive sector inspired, more or less directly, by protection (in addition to competition) of the environment in the perspective of sustainable development. In addition to the aforementioned Regulation no 715/2007 (on the type-approval of motor vehicles with respect to emissions from passenger and light commercial vehicles, Euro 5 and Euro 6, and on obtaining vehicle repair and maintenance information), there is also Directive 2007/46/EC (the so-called 'framework directive' for the type-approval of motor vehicles and their trailers), later repealed by Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the type-approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles),

Transformation: Sustainability, Digitalisation, Servitisation', in Ead eds, *European Sales Law. Challenges in the 21st Century* (Cambridge: Intersentia, 2023) 1-46; H. Beale, 'From Sales to Servitisation', in S. Grundmann and Y.M. Atamer eds, *European Sales Law. Challenges in the 21st Century* (Cambridge: Intersentia, 2023) 47-76, 49.

[23] On this point, for a recent overview of contract law in the automotive sector (including transposition, and significant related issues, into Italian national law), see F. Ricci, 'I contratti di distribuzione automobilistica integrata nel D.L. n. 68/2022 (dalla l. n.108/2022 alla l. n. 6/2023)' *Accademia*, 231-251 (2023).

to Regulation (EC) no 692/2008 (implementing and amending Regulation no 715/2007), later amended by Regulation (EU) no 566/2011 and repealed by Regulation (EU) 2017/1151 (which, in turn, supplements Regulation no 715/2007, amends Directive 2007/46/EC and Regulation (EU) no 1230/2012), and Regulation (EU) 2019/631 (setting CO2 emission performance standards for new passenger cars and new light commercial vehicles and repealing Regulations (EC) no 443/2009 and (EU) no 510/2011). In the same sense, reference can also be made to the numerous resolutions of the European Parliament (such as, most recently, that of 14 February 2023, which amends Regulation (EU) 2019/631 with regard to the strengthening of performance levels for CO2 emissions from new cars and new light commercial vehicles, in line with the Union's greater ambition on climate change).[24]

And it is precisely with the specific regulatory context of the automotive sector that the analysis of the legislation on the sale of consumer goods – also of a European Union matrix and, according to the proposed reinterpretation, on protection of competition and, at least in part, on sustainable development – must be coordinated.[25]

In order to develop a summary analysis of the evolution, in a (more or less) sustainable key, of the legislation on the sale of consumer goods, it seems appropriate to first consider the original Directive 1999/44/EC (in force at the time of the facts brought to the attention of the Austrian courts) and, then, the subsequent directive – declared to be of 'maximum harmonisation' –[26] 771/2019/EU

[24] See n 42 below.

[25] Traditionally, the regulation of the sale of consumer goods moves from an ideal protection of competition from a 'capitalist' perspective. It is very clear in Art 1 of Dir. 2019/771/EU itself: 'The purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection, by laying down common rules on certain requirements concerning sales contracts concluded between sellers and consumers, in particular rules on the conformity of goods with the contract, remedies in the event of a lack of such conformity, the modalities for the exercise of those remedies, and on commercial guarantees [...]'. For all, see L. Nivarra, *Diritto privato e capitalismo. Regole giuridiche e paradigmi di mercato* (Napoli: Jovene, 2010), 15, 97-108. The regulation of the sale of consumer goods therefore aims to ensure the promotion and development of the market, also through the protection of competition. In the context of consumer discipline, especially when reread in conjunction with the specific regulation of the automotive sector, it seems possible, however, to glimpse, alongside the ideal of competition protection, an additional *ratio* of environmental protection for the development of a sustainable single market. In the foreign literature, see H.W. Micklitz, n 7 above, 229-237; Y.M. Atamer and S. Grundmann, n 22 above, 1-46. In the Italian literature, interesting insights can be found, for example, in D. Imbruglia, 'Mercato unico sostenibile e diritto dei consumatori' *Persona e mercato*, 495-510 (2021); F. Modugno, 'I diritti del consumatore: una nuova "generazione" di diritti?', in *Scritti in onore di Michele Scudiero*, III, (Napoli: Jovene, 2008), 1363-1464, 1412; S. Pagliantini, 'Contratti del consumatore (diritto europeo)' *Enciclopedia del diritto* (Milano: Giuffrè, 2021), 68-69, 101-102.

[26] Dir 771/2019/EU – once past the principle of 'greater protection' of the consumer – is declared to be of 'maximum harmonisation'. According to Art 4 ('Level of harmonisation'), 'Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive'. For a critical analysis, see,

(which repeals the previous directive and has now been transposed, albeit sometimes with significant differences, by practically all the Member States) with reference to at least two distinct profiles.

The first relates to the very notion of 'conformity'. As we have seen, Art 2 (titled 'Conformity with the contract') of Directive 1999/44/EC provides for a system of presumptions to facilitate comparative assessment between the actual qualities of the goods delivered and their expected qualities. Despite the fact that there has been no lack of problems in interpreting the complex overall wording of the legislation, it must be noted how, especially in the automotive sector, any comparative assessment is decidedly facilitated by the aforementioned provision according to which

> 'consumer goods are presumed to be in conformity with the contract if they […]: show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling' (Art 2, para 2, lett d)).

Indeed, this presumption seems to be able to operate, especially in the automotive sector, with reference to products that do not comply with the environmental parameters specifically agreed upon in the sector regulations as well as expected at the end of homologation processes and certifications issued by third parties. It is difficult, therefore, to doubt the applicability in the case of motor vehicles equipped with an emissions manipulation system, already in light of the original regulations of the European Union matrix – as then transposed into the legislation of the various Member States – on the nonconformity in the sale of consumer goods. It seems even more difficult, however, to escape the application of the new European Union discipline resulting from the transposition in the various Member States of Directive 771/2019/EC. The latter reformulates, in fact, the very notion of 'conformity' (of the goods to the contract of sale), outlining precise subjective (Art 6) and objective requirements (Article 7) in place of the structured system of presumptions set forth in Art 2 of Directive 1999/44/EC. Moreover, precisely in the context of the objective requirements, it states that the goods shall

among others, A. Barenghi, Osservazioni sulla nuova disciplina delle garanzie nella vendita di beni di consumo' *Contratto e impresa*, 806-822, 808 (2020). Thus, according to the majority of Italian doctrine, there is either 'armonizzazione massima parziale e temperata' (S. Pagliantini, 'Contratti di vendita di beni: armonizzazione massima, parziale e temperata della Dir. UE 2019/ 771' *Giurisprudenza italiana*, 217-238 (2020) or 'armonizzazione massima selettiva' (F. Addis, n 22 above, 7). On this point, for an articulate position (starting from the wording of Dir. 771/ 2019/EU), see S. Pagliantini, 'A partire dalla dir. 2019/771 (UE): riflessioni sul concetto di armonizzazione massima' *Nuovo diritto civile*, 1, 11-22 (2020); F. Bertelli, 'L'armonizzazione massima della direttiva 2019/771 UE e le sorti del principio di maggior tutela del consumatore' *Europa e diritto privato*, 953-993, 957, 971 (2019).

> 'be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling' (Art 7, para 1, lett d)).

This further and express regulatory recognition of the systematic centrality of public statements (and, therefore, of sustainability statements) – *a fortiori* considering the contextual overcoming of any equivocal reference to the previous system of presumptions – makes it possible to appreciate, even more easily and directly, the possible gap between the actual sustainability of the goods purchased and the public sustainability declarations made prior to the purchase. It follows that the individual cases of 'greenwashing', including those implemented in the automotive sector, may now entail a breach not only of the prohibition of unfair commercial practices (pursuant to Art 5 of Directive 2005/29/EC), but also of the separate obligation to supply the consumer with compliant goods (pursuant to Art 5 of Directive 2019/771/EU). Such a reinterpretation of the very notion of 'conformity' is, moreover, reflected on the level of protection, since it allows the use of individual remedies provided for the delivery of non-compliant goods and, in so doing, makes it possible to obviate the limits of protection underlying the (national) discipline of unfair commercial practices (moving, however, in the same direction as the new Article 11-bis of Directive 2005/29/EC).

The second profile – which allows us to critically evaluate the evolution of the legislation on the sale of consumer goods through the prism of sustainability – is represented precisely by the 'remedies'. This is, as is well known, a system that provides for a sort of 'hierarchy of remedies' (originally provided for in Art 3 of Directive 1999/44/EC and substantially replicated in Art 13 of the subsequent Directive 771/2019/EC):[27] in the event of a lack of conformity of the goods, the

[27] In the Italian literature, on the nature of the regulation of the sale of consumer goods, see Addis, n 22 above, 5-27, 15. Here, without any pretension of taking a position on such a doctrinal dispute (since, though fascinating and harbinger of undoubted concrete consequences, it does not appear strictly relevant to the elaboration of this paper), we only wish to recall the heated debate between those who trace the discipline of the sale of consumer goods back to the system of sales guarantees (see A. Nicolussi, 'Diritto europeo della vendita di beni di consumo e categorie dogmatiche' *Europa e diritto privato*, 525-580 (2003); C. Castronovo, 'Il diritto di regresso del venditore finale nella tutela del consumatore' *Europa e diritto privato*, 957-988 (2004); L. Nivarra, 'I rimedi specifici' *Europa e diritto privato*, 157-201 (2011)) and those who, on the other hand, resort to the concept of obligation to explain the seller's liability in the case of lack of conformity of consumer goods (G. Amadio, 'La "conformità al contratto" tra garanzia e responsabilità' *Contratto e impresa/Europa*, 2, 10 (2001); P. Schlesinger, 'Le garanzie nella vendita di beni di consumo' *Corriere giuridico*, 561 (2002); R. Fadda, 'Il contenuto della Direttiva 1999/44/CE: una panoramica' *Contratto e impresa/Europa*, 410, 418 (2000)). This contrast was substantially reproposed, albeit with some differences in argumentation (arising from the new regulatory wording), in the analysis of

consumer has the right, firstly, to repair or replacement of the goods and, secondly (where restoring conformity is impossible or imposes disproportionate costs on the seller), to a reduction of the price or termination of the contract.[28] If, on the one hand, the remedial solution – 'sustainable' par excellence – of repairing the goods continues to have a central role in the 'hierarchy' of remedies in cases of lack of conformity, on the other hand, a whole series of interpretative questions remain unresolved today, precisely in the perspective of an enhancement of the legislation through the prism of sustainability. First of all, the non-hierarchical nature of the remedies aimed at restoring the conformity of the goods is confirmed: it is up to the individual consumer to freely choose between repair and replacement without any marked preference, if not on the basis of predominantly material and economic reasons,[29] for the (clearly more 'sustainable') remedy of repairing the goods.[30] Moreover, the margins of application of the same right to the

Dir 771/2019/EU (in particular, for the thesis of the so-called 'pure guarantee' ['garanzia pura'], see F. Piraino, 'La violazione della vendita di beni al consumatore per difetto di conformità: presupposti della c.d. responsabilità del venditore e la distribuzione degli oneri probatori', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 125-174, 136-143; Id, 'La garanzia nella vendita: durata e fatti costitutivi delle azioni edilizie' *Rivista trimestrale di diritto e procedura civile*, 1117-1144 (2020); Id, 'Garanzia per vizi nella vendita e tempo: il nodo della durata e della prescrizione', in G. Passagnoli et al eds, *Liber amicorum per Giuseppe Vettori* (Firenze, 2022), 3291-3368; for the obligation argument, see R. Fadda, 'Il diritto al ripristino della conformita` negli artt. 135-*bis* e 135-*ter* cod. cons.: tendenze conservatrici e profili innovativi', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 281-311, 286-292. Among others, A. Iuliani ('Note minime in tema di garanzia per i vizi nella vendita' *Europa e diritto privato*, 671-692, 682 (2020); Id, *La promessa del fatto del terzo. Contributo allo studio della prestazione di garanzia* (Napoli: Edizioni Scientifiche Italiane, 2023), 109-113) has recently returned to reasoning on the nature of defects in sales between warranty and non-performance (with a critical approach to the 'pure guarantee' thesis); on this point, recently, see also L. Regazzoni, *La garanzia nel diritto dei contratti. Logiche economiche, scelte legislative e autonomia privata* (Milano: Giuffrè, 2022), 78.

[28] There are doubts as to whether the 'primary remedies' in particular belong to the remedial phase proper (as protection against non-performance): see, among others, R. Fadda, n 27 above, 292-299; F. Oliviero, 'La nuova disciplina dei c.d. "rimedi secondari": riduzione del prezzo e risoluzione del contratto', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 313-355, 313-318; and, more recently, L. Nivarra, 'I rimedi contrattuali', in C. Granelli and N. Rizzo eds, *L'Europa dei codici o un codice per l'Europa?* (Torino: Giappichelli, 2023), 109-123, 120-121.

[29] This perspective seems to emerge from the current wording of Art 13, paras 2 and 3, Dir 2019/771/: '(2). In order to have the goods brought into conformity, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including: (a) the value the goods would have if there were no lack of conformity; (b) the significance of the lack of conformity; and (c) whether the alternative remedy could be provided without significant inconvenience to the consumer. (3). The seller may refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate, taking into account all circumstances including those mentioned in points (a) and (b) of paragraph 2'.

[30] This element has been critically emphasised in the literature. See, among others, E. Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' 27 *European Review of Private Law*, 4, 851-873, 857 (2019); T.M.J. Möllers, 'The Weaknesses of the Sale of Goods Directive – Dealing with Legislative Deficits' *Jus civile*, 1165-1188, 1186 (2020); V. Mak, E. Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment

restoration of conformity (and, therefore, of the remedy of repair of the goods) are reduced, albeit indirectly, whereas the new Directive 771/2019/EC provides for new and further specific circumstances that, in the case of a lack of conformity, give rise to the consumer's right to directly request the proportional reduction of the price or the termination of the contract of sale (see Art 13, para 4).

These are, once again, perspectives and criticalities present in the text of the directive that have been reflected – also as a result of the usual 'minimalist' transposition activity – in the current text of the Italian consumer code (Arts 128-135-*septies*).[31]

Through Consumer Law' 43 *Journal of Consumer Policy*, 227-248, 234 (2020); A. Michel and E. Van Gool, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption' 10 *Journal of European Consumer and Market Law*, 4, 136-147, 144 (2021); and, in the Italian literature, see D. Imbruglia, n 25 above, 505.

[31] In Italy, the decreto legislativo 2 February 2002 no 24 had originally introduced the provisions into the civil code, outlining, however, a 'sub-type' of sale (that, precisely, of the sale of consumer goods; see A. Zaccaria and G. De Cristofaro, *La vendita di beni di consumo. Commento agli artt. 1519-bis – 1519-nonies del codice civile* (Padova: CEDAM, 2002); and, more recently, A. Luminoso, *La compravendita* (Torino: Giappichelli, 10th ed, 2021), 380). Those rules were repealed by Art 143, lett s) of decreto legislativo 6 September 2005 no 206 (the Consumer Code) and their contents were merged into Chapter I of Title III of Part IV of the Consumer Code (Arts 128-135). Then, following the enactment of the subsequent Dir 771/2019/ EU, decreto legislativo 4 November 2021 no 170 transposed the new provisions into Italian law by replacing the previous Chapter I of Title III of Part IV of the Consumer Code (Arts 128-135-septies). This regulatory evolution, at a European Union level, was clearly reflected in our consumer code discipline as well. However, the 'hierarchisation of remedies', according to De Cristofaro ('Legislazione italiana e contratti dei consumatori nel 2022: l'anno della svolta. Verso un diritto "pubblico" dei (contratti dei) consumatori?' *Nuove leggi civili commentate*, 29 (2022); Id, 'Verso la riforma della disciplina delle vendite mobiliari *B-To-C*: l'attuazione della dir. UE 2019/771' *Rivista di diritto civile*, 229, fn 49 (2021), is somewhat weakened, since the consumer can nowadays access – with greater ease than in the past – to the 'secondary' remedies of price reduction or contract termination. In the same sense, see R. Fadda, n 27 above, 301-302; Oliviero, n 28 above, 320-330 (and, for a comparison also with the legislation previously in force, see also Id, *La riduzione del prezzo nel contratto di compravendita* (Napoli: Jovene, 2015), 46-50). For an analysis of the remedy of the out-of-court settlement as a direct consumer remedy, see C. Sartoris, 'La risoluzione della vendita di beni di consumo nella dir. n. 771/2019 UE' *Nuova giurisprudenza civile commentata*, 702-713 (2020); and, with reference to its enhancement in the (more specific) Italian legal system, T. dalla Massara, 'Art. 135 *septies* cod. cons.: il coordinamento tra codice del consumo e codice civile in tempi di armonizzazione massima', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 485-498, 496-498. On the 'minimalist' approach in transposing the directive on the sale of consumer goods into Italian law, see P. Coppini, n 13 above, 468-501.

Different choices have been made in the legal systems of other Member States. And this, in the first place, with reference to the scope of application and influence of European Union legislation. Here, for example, are the cases of the German and French legal systems, which have traditionally had an important influence on our legal system. Indeed, as is well known, Germany proceeded, also as a result of the need to transpose Directive (EU) 771/2019, to reform the Civil Code. France, although having initially chosen (like Italy) to transpose Directive (EU) 771/2019 within the framework of the *Code de la consommation*, has then greatly enhanced the directive on the sale of consumer goods (and in particular the rules on lack of conformity) within the recent project of reform on contracts, where the influence (also remedial) of the aforementioned directive is rather significant well beyond the scope of the sale of consumer goods (see, among others, A. Fournier, 'Les contrats portant sur une chose', in V. Monteillet and G. Cerqueira eds, *L'avant-projet de réforme du droit des*

2. The Evolution of European Union Case Law

In order to also appreciate the development of EU case law on 'Dieselgate', with reference to both the specific legislation of the automotive sector and that of the sale of consumer goods, it is necessary to start from the ruling of 17 December 2020, C-693/18, of the Court of Justice of the European Union.

The judgment – rendered after the request of the examining magistrates in the context of criminal proceedings (against Volkswagen for the offence of aggravated fraud concerning the placing on the French market of vehicles equipped with an alleged manipulation system) before the *Tribunal de grande instance de Paris* – concerns

> 'the interpretation of Article 3(10) and Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information'.[32]

This is, in other words, the first time that the Court of Justice of the European Union has been called upon to deal with specific legislation relating to the type-approval of motor vehicles with regard to emissions from passenger and light commercial vehicles (Euro 5 and Euro 6) and the obtaining of information on vehicle repair and maintenance. The Court holds that software integrated into the control unit, if it acts on the functioning of the emission control system and reduces its effectiveness, falls within the concept of 'defeat device' (as laid down in Art 3, para 10, of Regulation (EC) no 715/2007).

The broad interpretation, thus outlined, of the concept of 'defeat device' must then be followed, according to the same ruling of the Court of Justice, by a restrictive interpretation of Art 5, para 2, lett a) of Regulation (EC) no 715/2007. The latter provision, as is now well known, provides for an exemption from the

contrats spéciaux (Paris: Société de législation comparée, 2023), 89-101; X. Godin, 'Introduction', in Ch.-E. Bucher and M.-A. Daillant eds, *La réforme du droit des contrats spéciaux* (Paris: Dalloz, 2023), 28; A.S. Lebret, 'La vente', in Ch.-E. Bucher and M.-A. Daillant eds, ibid 107-116; F.C. Dutilleul, 'Observations provisoirement conclusives sur l'avant-projet de réforme du droit des contrats spéciaux', in Ch.-E. Bucher and M.-A. Daillant eds, ibid 194-195).

[32] Case 693/18, *CLCV and Others*, Judgment of 17 December 2020, available at www.eur-lex.europa.eu, para 1. For a first comment, in the Italian literature, see G. F. Simonini, 'La Corte di giustizia analizza i dispositivi sul controllo delle emissioni degli autoveicoli alla luce di una interpretazione molto restrittiva, offrendo nuove prospettive di lettura del c.d. scandalo *dieselgate*' *Diritto comunitario e degli scambi internazionali*, 3-4, 567 (2020). In the foreign literature, see, in France, A. Rigaux and D. Simon 'Environnement - Émissions des véhicules' *Europe*, 2, 72 (2021); P. Thieffry, 'Le Dieselgate, rare rencontre du droit international privé et de l'environnement en aval des mines de potasse d'Alsace' *Revue trimestrielle de droit européen*, 1, 220-222 (2021); and, in Germany, M. Schröder, 'Urteil v. 17. 12. 2020 – C-693/18: Anmerkung' *Juristenzeitung*, 782-784 (2021); M. Will, 'Unionsrechtswidrigkeit von Diesel-Abschalteinrichtungen' *Neue Juristische Wochenschrift*, 1199-1202 (2021).

general prohibition on the use of defeat devices that reduce the effectiveness of emission control systems where there is a need to protect the engine against damage or breakdown and to ensure the safe operation of vehicles: however, according to the CJEU, this provision is not applicable if the device systematically improves the performance of the vehicle emission control system only during type-approval procedures with the sole aim of complying with the threshold values set by the legislation and thus obtaining vehicle type-approval. The Court of Justice outlines a broad interpretation of the concept of 'defeat device' – and, consequently, the application of the general prohibition of the use of such devices that reduce the effectiveness of emission control systems – and then suggests a restrictive interpretation of the provision – and thus excludes its application – considered to be decidedly exceptional, which justifies the possible installation on the grounds of the need to protect the engine against damage or breakdown and to ensure the safe operation of vehicles.

These are clear indications of the position of CJEU that certainly aim, in interpreting the automotive sector legislation, to emphasise protection of the environment from the outset, in the perspective of sustainable development.

When 'Dieselgate' – albeit in the light of a slightly different (but substantially comparable) case – returns to the Court of Justice in the summer of 2022, the outcome, at least for questions concerning the lawfulness or otherwise of the 'incriminated' software, is fairly predictable: the Court limits itself to essentially retracing the same argumentative process as in the previous case. Once again, the broad interpretation of the notion of 'defeat device' (pursuant to Art 3, para 10, of Regulation (EC) no 715/2007) and the consequent application of the general prohibition on the use of software that modifies the effectiveness of emission control systems (pursuant to Art 5, para 2, of Regulation (EC) no 715/2007), this time ensuring environmental performance only within a certain 'temperature window', and then reiterating the restrictive interpretation of the provision – and therefore precluding its application – considered exceptional, which justifies the possible installation for the need to protect the engine from damage or breakdown and to ensure the safe operation of vehicles (Art 5, para 2, lett a) of Regulation (EC) no 715/2007).

It is certainly not the increasing emphasis placed by the Court of Justice on the 'sustainable' approach of the entire Regulation no 715/2007 that is, however, the main novelty. Instead, in the trilogy of rulings from the summer of 2022 (and, indeed, above all in the decisions stemming from C-134/20 and C-145/20), the previously entirely neglected reference to the law on the sale of consumer goods now becomes central.

The fruitful interaction of the interpretation of the sectoral legislation with that of Art 2, para 2, lett d) of Directive 1999/44/EC constitutes the real novelty of the aforementioned rulings. To the now familiar interpretation of Art 3, para 10, and Art 5, paras 1 and 2, of Regulation no 715/2007 is added, as we have seen,

the coordination with an interpretation of the legislation on the sale of consumer goods aimed at making the regulation on the lack of conformity applicable to the 'Dieselgate' cases (because, as has already been pointed out,

> 'when both the protection of the environment and a high level of consumer protection are taken seriously, a true commitment towards the reduction of NOx emissions seems tangible').[33]

It follows that a motor vehicle equipped with a system to manipulate its environmental performance, against the issuance of public sustainability statements, could be considered as a non-compliant product within the meaning of Directive 1999/44/EC. Moreover, we see no reason why this conclusion should change following the entry into force of the new concept of 'nonconformity' – even broader and, as we have seen, specifically aimed at enhancing the role of, *inter alia*, public sustainability statements – introduced by Directive 771/2019/EC.

However, there is more: the applicability of the rules on lack of conformity of the goods with the contract raises – subject, of course, to the ascertainment, on a case-by-case basis, of the fact by the national courts – the question of 'remedies'.[34] An interesting consideration has thus developed concerning the

[33] M.-E. Arbour, n 16 above, 678-679.

[34] In the past, the Court of Justice of the European Union had already intervened several times to interpret the characteristics of the 'hierarchy of remedies' (of course, especially at the time of Dir 1999/44/EC). See Case 404/06 *Quelle AG* v *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, [2008] ECR I-2685; Joined Cases C-65 and 87/09 *Gebr. Weber GmbH* v *Jürgen Wittmer and Ingrid Putz* v *Medianess Electronics GmbH* [2011] ECR I-5257. For comments, in the Italian literature, see L. Mangiaracina, 'La gratuità della sostituzione del prodotto difettoso nella direttiva 1999/44/CE: la normativa tedesca al vaglio della Corte di giustizia' *Europa e diritto privato*, 191-202 (2009); G. Magri, 'La vendita di beni di consumo torna alla Corte di giustizia: eccessiva onerosità del rimedio, differenze linguistiche e influsso della Dir. 99/44/CE sul diritto tedesco e italiano' *Giurisprudenza italiana*, 534-539 (2011); M. Francisetti Brolin, 'Garanzie nell vendita di consumo ed esatto adempimento sostitutivo: nuove questioni al vaglio della Corte di giustizia' *Contratto e impresa/Europa*, 775-797 (2011); De Hippolytis, 'Su chi gravano le spese occorrenti per la rimozione di un bene di consumo difettoso e l'installazione di un bene sostitutivo?' *Il Foro italiano*, IV, 567-570 (2011); A. De Franceschi, 'La sostituzione del bene "non conforme" al contratto di vendita' *Rivista di diritto civile*, 559-596 (2009); A. Genovese, 'Ripristino della conformità del bene di consumo difettoso' *Giurisprudenza italiana*, 1502-1504 (2011). And, in the foreign literature, see S. Herrler, 'Rückforderung von Nutzungsersatz beim Verbrauchsgüterkauf: Verzögerter Beginn der Verjährungsfrist wegen unübersichtlicher Rechtslage' *Neue Juristische Wochenschrift*, 1845-1847 (2009); C. Herresthal, 'Die teleologische Auslegung der Verbrauchsgüterkaufrichtlinie - Der EuGH auf dem Weg zu einer eigenständigen Methode der Rechtsgewinnung' *Zeitschrift für europäisches Privatrecht*, 598-612 (2009); S. Stijns and S. Jansen, 'Consumer Sales – Remedies', in E. Terryn et al eds, *Landmark cases of EU consumer law: in honour of Jules Stuyck* (Cambridge: Intersentia, 2013) 704-724; Grundmann, Stefan: 'Consumer Sales – The Weber-Putz Case-Law: From Traditional to Modern Contract Law', in E. Terryn et al eds, *Landmark cases*, ibid, 731-742; M. Dupont, 'Le consommateur n'est pas tenu d'indemniser le vendeur d'un bien de consommation défectueux pour l'usage qu'il en a fait jusqu'à son remplacement' *Droit de la consommation*, 77-81 (2008); K. Lilleholt, 'Case: CJEU – Quelle' 6 *European Review of Contract Law* 2, 192-196 (2010); G. Pignarre and L. F. Pignarre, 'A propos de la gratuité du remplacement d'un bien non conforme' *Recueil Le Dalloz*, 2631-2635 (2008); P. Rott, 'The Quelle Case and the Potential of and Limitations to

abstract admissibility, in cases attributable to 'Dieselgate', even of the termination of the original contract of sale, since a conformity defect of this kind cannot be considered 'minor' within the meaning of Art 3, para 6, of Directive 1999/44/EC. Moreover, the circumstance that, after having purchased a commodity, the consumer themself admits that they would have purchased it even if they had been aware of such a lack of conformity is not in itself relevant, according to the CJEU, for the purpose of determining whether a lack of conformity can be objectively characterised as 'minor'.[35] This means that – in the light of both Art 3 of Directive 1999/44/EC (and, as we have seen, Art 13 of Directive 771/2019/EC) – the termination of the contract is a remedy which, once the conformity defect has been established, cannot be abstractly excluded in cases attributable to 'Dieselgate'.[36]

Interpretation in the Light of the Relevant Directive' *European Review of Private Law*, 1119-1130 (2008); T.M.J. Möllers and A. Möhring, 'Recht und Pflicht zur richtlinienkonformen Rechtsfortbildung bei generellem Umsetzungswillen des Gesetzgebers' *Juristenzeitung*, 919-924 (2008); C. Schneider and F. Amtenbrink, ' "Quelle": The possibility, for the seller, to ask for compensation for the use of goods in replacement of products not in conformity with the contract' *Revue européenne de droit de la consommation*, 301-309 (2007-08); C. Aubert de Vincelles, 'Charge des frais liés au remplacement d'un bien vendu non conforme' *Revue des contrats*, 1233-1242 (2011); J.A. Tamayo Carmona, 'Gastos y costes de la acción de sustitución de bienes no conformes - Directiva 1999/44/CE, sobre venta y garantías de bienes de consumo - Comentario de la STJ de 16 junio 2011, C-65/09 y C-87/09' *Revista de Derecho Patrimonial* 31, 401-425 (2013); J. Luzak, 'Who should bear the risk of the removal of the non-conforming goods?' 1 *Journal of European Consumer and Market Law* 2, 35-40 (2012); Ead, 'A Storm in a Teacup? On Consumers' Remedies for Nonconforming Goods after Weber and Putz' 23 *European Review of Private Law*, 689-704 (2015); A. Fromont, 'Verdure, Christophe: Arrêt Weber et Putz: la prise en charge des frais de remplacement en application de la garantie des biens de consommation' *Revue européenne de droit de la consommation*, 141-150 (2012); K. Sein, 'Kalamees, Piia: Recoverability of Removal and Installation Costs in Case of Defective Consumer Goods: How Would the Weber and Putz Case Be Solved under Common European Sales Law?' *Zeitschrift für Gemeinschaftsprivatrecht*, 289-293 (2011); J. Hoffmann and S. Horn, 'Grundfragen des kaufrechtlichen Aufwendungsersatzes für Ein- und Ausbaukosten' 218 *Archiv für die civilistische Praxis*, 865-904 (2018); E. Poillot, 'Droit contractuel de la consommation. Inexécution du contrat' *Recueil Le Dalloz*, 845-846 (2012); G. Paisant, 'Quelles obligations pour le vendeur qui délivre un bien défectueux?' *La Semaine Juridique - édition générale* 40, 1759 (2011).

[35] The Court of Justice of the European Union thus essentially agrees with the Opinion of Advocate General Athanasios Rantos (delivered on 23 September 2021 before the Court of Justice). On this point, see, for all, G. F. Simonini, 'Verso una concezione oggettiva (e tecnica) del difetto di conformità dei beni di consumo' *Danno e responsabilità*, 64-76, 68 (2022).

[36] According to M.-E. Arbour, n 16 above, 678-680: 'Handed down in the aftermath of the diesel scandal, the CJEU trilogy left plaintiffs with three certainties: the car industry regulatory framework impacts upon almost every condition of the conformity guarantee; the lack of conformity is not 'minor' (conversely, we may qualify it 'major'); and, as a result, consumers from twenty-seven Member States may seek the termination of sale contracts with the seller, as the CJEU basically acknowledged that greenwashing is not tolerable contractual practice: '[t]he beauty evoked by commercial marketing may induce consumers to act to their later regret on sober reflection, but more is at stake when these aesthetic charms camouflage environmental injury' […] 'the CJEU sent three powerful messages to diesel car manufacturers and national regulators: firstly, the state of the art cannot supersede supranational regulation; secondly, regulation costs must be internalised by the industry; and thirdly, technical means must be devised in order to comply with Euro thresholds (Euro

Here, although probably animated by the best of intentions, the Court of Justice proposes a reading that runs the risk of not taking sufficient account of the current evolution of the body of laws (both in the wording of Directive 1999/44/EC and the subsequent Directive 771/2019/EC and in that of Regulation 715/2007). The impression is that we are dealing with a 'political pre-understanding' of the matter:[37] if, on the one hand, the first step of the Court's argumentation is convincing where it finds an 'objective' lack of conformity of the motor vehicle (in the absence of the usual qualities and characteristics of goods of the same type) because it was equipped with software prohibited by Regulation 715/2007, on the other hand, the next step of the same argumentation is decidedly less convincing – in case of a conformity defect (and not of a material defect and even less of an *aliud pro alio*) – when it objectively and almost automatically deduces (irrespective, moreover, of whether the consumer states that, had they been aware both of the existence and of the operation of the prohibited device, they would in any event have purchased the said vehicle) the potential (but general) seriousness of the defect from the very wording of Art 5, para 2, of Regulation 715/2007 ('the use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited').[38] However, this last step of the argumentation, relating to the *potential (but general) seriousness of the lack of conformity*, seems to be based simply (not on the prohibition laid down by the text of the regulation but) on the teleological context and, above all, on the circumstance that a vehicle circulating in disregard of the emission limit values laid down in Annex I to Regulation no 715/2007 (despite valid EC type-approval) generally violates the principle of sustainable development (Art 1, para 3, of the EU Treaty) and the value of 'the importance of environmental protection'.[39]

IV. Future Perspectives: From Emphasis on Product Durability to Mandatory Repair?

Already at the outcome of *this incessant dialogue referred to so far between European Union legislation and case law* – inspired by a coordinated rereading of the regulation of the automotive sector and the sale of consumer goods through the prism of sustainability – there is no lack of reasons to reflect on possible future prospects.

In particular, the same Directive 771/2019/EU – notwithstanding the lack of hierarchisation within the scope of the remedies aimed at restoring the conformity of the goods (and the persistent perplexities, *inter alia*, on the discipline of the

5, Euro 6, etc), *no matter what*'.

[37] S. Pagliantini, *Rinvio pregiudiziale* n 15 above, 3-5, 20.

[38] See C-145/20 *Porsche Inter Auto and Volkswagen*, n 17 above, paras 94-95.

[39] ibid para 95.

terms within which such remedies can be asserted) –[40] allows one to glimpse references with a view to a (even more) sustainable reinterpretation of the regulations on the sale of consumer goods.

Leaving aside for the moment the need to identify (at national and European Union level) new and more incisive 'information obligations' for the seller, so that he is required to disclose to consumers the characteristics that affect the environmental impact of the commodity (such as, for example, its durability, its reparability, and the availability of spare parts),[41] it should be noted the emphasis already placed by Directive 771/2019/EU – particularly under Arts 5 and 7, para 1, lett d) and Recital 48 (but also present in some previous and subsequent resolutions of the European Parliament) –[42] on the *durability of the commodity* as an objective requirement of conformity and on repair as a means of encouraging sustainable consumption.[43]

There has been no lack of 'courageous' ideas – aimed at legitimising even the

[40] On the perplexities about the regulation of the terms, see M. Faccioli, 'La nuova disciplina europea della vendita di beni ai consumatori (dir. (UE) 2019/771): prospettive di attuazione delle disposizioni sui termini' *Nuove leggi civivili commentate*, 250-279 (2020); Id, '*La durata della responsabilità del venditore e la prescrizione dei diritti del consumatore*', in G. De Cristofaro ed, *La nuova disciplina* n 5 above, 383-415.

[41] There are – as M. D'Onofrio has already correctly pointed out (see, n 9 above, 24) – national regulations that are decidedly more advanced than the Italian one (such as, for example, the French one).

[42] Several resolutions emanating from the institutions of the European Union propose the imposition of stringent information obligations on professionals regarding these aspects. In its resolution of 10 February 2021 on the New Circular Economy Action Plan, the European Parliament insisted on consumer information on the durability of goods and their reparability (no 26; and overall preference for the ecological theme and repair: nos 23 and 31 and nos 54 to 132). Also in the resolution of 25 November 2020, entitled 'Towards a more sustainable single market for business and consumers', the Parliament had considered the aspect of pre-contractual information (no 6 (b); no 21), calling for the development of a strategy to increase the durability and reparability of goods (no 6 (b); no 21). Even earlier, the resolution of 4 July 2017, on a longer lifetime for products: benefits for consumers and companies, devoted a paragraph to the need to ensure better consumer information (from nos 27 to 29; but nos 1 to 8; nos 9 to 15 are also very important).

[43] This point of view seems to be confirmed by reading the text of Arts 5 and 7, para 1, lett d), as well as Recital 48 of Directive 771/2019: 'Article 5 [Conformity of goods] 'The seller shall deliver goods to the consumer that meet the requirements set out in Articles 6, 7 and 8, where applicable, without prejudice to Article 9'; 'Article 7 [Objective requirements for conformity] (1). In addition to complying with any subjective requirement for conformity, the goods shall: […] be of the quantity and possess the qualities and other features, *including in relation to durability*, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling'; 'Recital 48: As regards bringing goods into conformity, consumers should enjoy a choice between repair or replacement. Enabling consumers to require repair should encourage sustainable consumption and could contribute to greater durability of products. The consumer's choice between repair and replacement should only be limited where the option chosen would be legally or factually impossible or would impose costs on the seller that would be disproportionate, compared to the other option available. For instance, it might be disproportionate to request the replacement of goods because of a minor scratch, where such replacement would create significant costs and the scratch could easily be repaired'.

professional's refusal to proceed to replacement when the most convenient solution is repair (parameterising the choice in the light of the 'environmental', and not merely 'economic', cost of one solution compared to the other) –[44] but the current legal situation does not seem to allow 'leaps forward' due to legislative choices that have so far been decidedly less 'courageous'. The risk, in fact, is that of confusing 'being' (ie a European Union regulation set up mainly to protect consumers and competition, only partly re-readable today, through the prism of sustainability) with 'wanting to be' (ie, in the perspective of some interpreters, a regulation capable of protecting, at the same time and in equal measure, consumers, competition and environment)![45]

It is not certain, however, that the above-mentioned European regulatory indications (especially, but not only, on the durability of products) – still mainly of a programmatic nature –[46] will not lead to more binding forecasts in the near future.

For example, the recent 'Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828' seems to give greater value to the repair remedy, also through specific information duties placed on the producer (see Art 6).[47] According to the framework of the Proposal

[44] See, in this sense, for instance D.M. Matera, 'Difetto di conformità, gerarchia dei rimedi e sostenibilità ambientale nel nuovo art. 135-bis cod. cons. e nella Dir. 771/2019' *Rivista di diritto privato*, 453-472, 458-470 (2022).

[45] See n 25 above. In more general terms, on the relationship between 'competitiveness' and 'sustainability', see E. Caterini, 'Sustainability and Civil Law' 4 *The Italian Law Journal* 2, 289-314, 295-297, 305-306 (2018).

[46] This is already (well) noted by M. D'Onofrio, n 9 above, 143.

[47] This different perspective (information, first, repair, second) is evident – as well as from numerous passages in the explanatory memorandum – from several provisions. This is the current text of Arts 4 and 6: 'Article 4 [European Repair Information Form] (1) Member States shall ensure that, before a consumer is bound by a contract for the provision of repair services, the repairer shall provide the consumer, upon request, with the European Repair Information Form set out in Annex I on a durable medium within the meaning of Article 2 (11) of Directive 2019/771/EU. (2) Repairers other than those obliged to repair by virtue of Article 5 shall not be obliged to provide the European Repair Information Form where they do not intend to provide the repair service. (3) The repairer may request the consumer to pay the necessary costs the repairer incurs for providing the information included in the European Repair Information Form. Without prejudice to Directive 2011/83/EU, the repairer shall inform the consumer about the costs referred to in the first subparagraph before the consumer requests the provision of the European Repair Information Form. (4) The European Repair Information Form shall specify the following conditions of repair in a clear and comprehensible manner: (a) the identity of the repairer; (b) the geographical address at which the repairer is established as well as the repairer's telephone number and email address and, if available, other means of online communication which enable the consumer to contact, and communicate with, the repairer quickly and efficiently; (c) the good to be repaired; (d) the nature of the defect and the type of repair suggested; (e) the price or, if the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated and the maximum price for the repair; (f) the estimated time needed to complete the repair; (g) the availability of temporary replacement goods during the time of repair and the costs of temporary replacement, if any, for the consumer; (h) the place where the consumer hands over the goods for repair, (i) where applicable, the availability of

for a Directive – which, albeit only implicitly, thus demonstrates *the need for a further Euro-Union legislative step* – 'Member States shall ensure that upon the consumer's request, the producer shall repair, for free or against a price or another kind of consideration, goods' (Art 5).[48] From the lack of conformity of the goods to the contract – found, as we have seen, in the hypothesis of the misuse of environmental sustainability statements included in the 'certificate of conformity' of the vehicle – *will thus derive primarily an obligation to repair at the expense of the producer*?

Without prejudice to the interpreter's need to try to critically coordinate the regulation (of the automotive sector and) of consumer law at least with further compensation and procedural profiles, as well as with equally relevant problematic

ancillary services, such as removal, installation and transportation, offered by the repairer and the costs of those services, if any, for the consumer; (5).The repairer shall not alter the conditions of repair specified in the European Repair Information Form for a period of 30 calendar days as from the date on which that form was provided to the consumer, unless the repairer and the consumer have agreed otherwise. If a contract for the provision of repair services is concluded within the 30 day period, the conditions of repair specified in the European Repair Information Form shall constitute an integral part of that contract. (6).Where the repairer has supplied a complete and accurate European Repair Information Form to the consumer, it shall be deemed to have complied with the following requirements: (a) information requirements regarding the main features of the repair service laid down in Article 5(1) point (a), and Article 6(1), point a of Directive 2011/83/EU and Article 22(1), point (j), of Directive 2006/ 123/EC; (b) information requirements regarding the repairer's identity and contact information laid down in Article 5(1), point (b), and Article (6)(1), points (b) and (c), of Directive 2011/83/EU, Article 22(1), point (a), of Directive 2006/123/EC and Article 5(1), points (a), (b) and (c), of Directive 2000/31/EC; (c) information requirements regarding the price laid down in Articles 5(1), point (c), and Article 6(1), point (e), of Directive 2011/83/EU and Article 22(1), point (i) and (3), point (a), of Directive 2006/123/EC; (d) information requirements regarding the arrangements for the performance and the time to perform the repair service laid down in Articles 5(1), point (d), and Article 6(1), point (g), of Directive 2011/83/EU'; 'Article 6 [Information on obligation to repair] Member States shall ensure that producers inform consumers of their obligation to repair pursuant to Article 5 and provide information on the repair services in an easily accessible, clear and comprehensible manner, for example through the online platform referred to in Article 7'.

[48] This is the current wording of Art 5 of the Proposal (published on 23 March 2023): '[Obligation to repair] (1). Member States shall ensure that upon the consumer's request, the producer shall repair, for free or against a price or another kind of consideration, goods for which and to the extent that reparability requirements are provided for by Union legal acts as listed in Annex II. The producer shall not be obliged to repair such goods where repair is impossible. The producer may sub-contract repair in order to fulfil its obligation to repair. (2). Where the producer obliged to repair pursuant to paragraph 1 is established outside the Union, its authorised representative in the Union shall perform the obligation of the producer. Where the producer has no authorised representative in the Union, the importer of the good concerned shall perform the obligation of the producer. Where there is no importer, the distributor of the good concerned shall perform the obligation of the producer. (3). Producers shall ensure that independent repairers have access to spare parts and repair-related information and tools in accordance with the Union legal acts listed in Annex II. (4). The Commission is empowered to adopt delegated acts in accordance with Article 15 to amend Annex II by updating the list of Union legal acts laying down reparability requirements in the light of legislative developments'. On this topic, see, among others, C. Dalhammar et al, 'What is Right to Repair (R2r) and How Can it be Realised through Legal Interventions?', in S. Grundmann and Y.M. Atamer eds, n 22 above, 165-196.

aspects concerning the relationship between private and public enforcement,[49] the possible provision (and punctual formulation) of a repair obligation placed on the manufacturer – also supported by precise duties of information – is already an interesting prospect to start assessing the actual possibility of 'squaring the circle' of future cases similar to Dieselgate.[50]

[49] On the need for further critical coordination work – in light of the usual debate between national and EU law and case law – including of the various compensatory and procedural profiles as well as interference between public and private enforcement measures in the Dieselgate affair, see E. Tuccari, 'New solutions' n 8 above.

[50] The idea of 'squaring the circle' of these cases is clearly taken up by H.W. Micklitz, n 7 above.

Transparency and Comprehensibility of Working Conditions and Automated Decisions: Is It Possible to Open the Black Box?

Loredana Zappalà*

Abstract

The paper proposes a reflection on the possibility for workers and trade unions to know and understand the logics of the functioning of new forms of algorithmic management. In particular, the essay analyses the evolution of the principle of transparency and comprehensibility of automated decision-making systems in labour matters, focusing on the recent discipline with which the Italian legislator has transposed the Directive 2019/1152 on predictable and transparent working conditions. The analysis also looks at the recent judgments of some Italian Courts which, at the request of trade union, have clarified the scope and breadth of information obligations in relation to automated decision-making systems. In the light of the Italian experience, collective bargaining can be considered as the most appropriate regulatory instrument to respond to the new challenges related to the use of technology in the workplace.

I. Algorithmic Boss, Computational Power and Information Asymmetries

The digital revolution brings about many changes in the workplace, presenting law with a complex technological, organizational, relational, and cultural landscape in the production of goods and services.[1] In an era dominated by digitisation and abundant data, a significant shift is occurring where algorithmic automation is replacing human decision-making in the governance of labour relations. Digital technologies can interact with management decision-making processes in various ways. Companies have the option to employ workforce analytics tools, which

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[1] See S. Borelli et al, *Dizionario del diritto del lavoro che cambia* (Torino: Giappichelli, 2022). The literature on labour law regarding technology is now extensive. For essential further references in the Italian debate, refer to M. Novella and P. Tullini eds, *Lavoro digitale* (Torino: Giappichelli, 2022); A. Lo Faro eds, *New Technology and Labour Law* (Torino: Giappichelli, 2023); P. Tullini eds, *Web e lavoro. Profili evolutivi e di tutela* (Torino: Giappichelli, 2017); C. Alessi et al eds, *Impresa, lavoro e non lavoro nell'economia digitale* (Bari: Cacucci, 2019); R. Del Punta, 'Un diritto per il lavoro 4.0', in A. Cipriani et al eds, *Il lavoro 4.0. La quarta rivoluzione industriale e le trasformazioni delle attività lavorative* (Firenze: Firenze University Press, 2018); A. Aloisi and V. De Stefano, *Il tuo capo è un algoritmo. Contro il lavoro disumano* (Bari: Laterza, 2020); E. Dagnino, *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoristica* (Modena: Adapt University Press, 2019); M. Faioli, *Mansioni e macchina intelligente* (Torino: Giappichelli, 2018).

consist of a broad range of advanced instruments and methods for scrutinising data. These tools allow for the measurement and enhancement of workforce performance, as well as the management of company personnel. Alternatively, those workforce analysis tools could be incorporated into decision-making systems that replace human management, leading to concrete instances of algorithmic management.[2]

In the first scenario, technology holds the potential to produce an augmented human manager, who possesses exceptional computational, analytical, and decision-making abilities. Conversely, in the second scenario, software operates as the manager, exhibiting a considerable degree of autonomy, owning responsibility for human resource management based on a predetermined set of variables.

The ways in which businesses hire employees, structure work and schedules, arrange orders, promote and sell products, distribute goods, and handle invoicing and accounting have seen an evident growth in innovative organizational processes. Decision-making tasks are now fully digitisable, reproducible, and programmable following standardised protocols. They possess the capability to manage and integrate with non-human capabilities, handling vast amounts of information within physical and temporal realms without limitations or boundaries. Automated decision-making processes can be easily globalised, modified or replaced on a large scale, bypassing entire chains of middle management. These chains are decreasing in numbers and are increasingly becoming only executors and controllers of a digitalised management system. This system is completely autonomous and possesses a computational and predictive ability that exceeds that of a human. It confers undeniable advantages to employers by facilitating contextualized management of multiple job positions, expediting the identification of the most appropriate candidates during selection procedures, and eliminating irrational biases that humans may exhibit in management, thereby rendering the process more universally applicable.

Algorithmic management fundamentally alters the contractual arrangements stipulated in traditional employment contracts. This is achieved through two means; firstly, by disproportionately enhancing conventional employer powers, and secondly, by establishing new and profound technological-informational subordination of the employee. Through algorithms, management gains a new power over the workforce – computational power. This power derives from enabling technologies that process data, transform input into output, identify statistical patterns, extract

[2] M.K. Lee et al, 'Working with Machines: The Impact of Algorithmic and Data-Driven Management on Human Workers' *Proceedings of CHI*, 1 (2015); K.C. Kellogg et al, 'Algorithms at Work: The New Contested Terrain of Control' 14 *Academy of Management Annals*, 366 (2020); A. Mateescu and A. Nguyen, 'Algorithmic Management in the Workplace' 1 *Data & Society*, 1 (2019); J. Wood, 'Algorithmic management consequences for work organisation and working conditions' *JRC Working Papers Series on Labour, Education and Technology*, WP no 7, 1 (2021); J. Adams-Prassl, 'What if Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work' 41 *Comparative Labor Law & Policy Journal*, 123, 131-132 (2019); M.H. Jarrahi et al, 'Algorithmic Management in a Work Context' 8 *Big Data & Society*, 1, 2 (2021).

correlations, produce inferences, generate forecasts, build profiles, and compare and evaluate through an indirect experience that can be traced back to the 'proxy culture'.

In the context of employment, algorithmic management possesses various new capacities for utilising the workforce. By reducing workers to operational data and machine-processable inputs, their evaluations result from data processing that remains beyond the worker's control. Such data may stem from practices of digital hyper-control and gamification that integrate the worker into the corporate context.

Algorithmic management techniques used in managing human labour can generate new personal data from non-personal data due to the use of big data and the computational power it offers. This results in a digital reflection of workers, which they may not be aware of. In work environments where algorithmic management is used to profile and make decisions on individuals, it makes use of both personal and big data to generate new information about them. It is the outputs produced by big data analytics and algo-created data that can impact the evaluation of worker performance and could result in disciplinary action or negative treatment. This underscores the negative image that algorithmic management creates of the worker. Through the mediation of data analysis, the employer utilises computational power to project their own representation of reality onto the company and, consequently, the workers. This is achieved through an algorithmic procedure that reconstructs a digital identity of the employee, including their productive capacity, competence, reliability, responsibility, and personal opinions. Causal connections between workplace and external data inform this digital identity. It is an analysis that management makes many decisions regarding the employment relationship, which cannot be controlled or known by the service provider.

Computational power has a multiplier effect on 'traditional' employer powers, increasing the power of direction and control, as well as restriction, recommendation, registration, rating, replacement and reward. Organisational literature has demonstrated that chatbot alerts and algorithmic management nudges can restrict workers' thinking capability, leading to significant frustration, as they are often not fully understandable.

The most prevalent application of algorithmic management can be observed in digital work platforms, where algorithms manage resources, direct and shape the performance, working and non-working time of workers through nudges, such as advising Uber drivers to increase their speed. It should be noted that these algorithms are entirely opaque and not comprehensible to the workers. Even if it means risking dangerous situations or accepting rides that prove to be uneconomical for the worker, employers not only create a perception of unfair recommendations among workers but also assign scores based on internal performance evaluations, such as the number of services and efficiency. All aspects of the worker's reliability should be considered, such as punctuality, adherence to shifts, order completion rates, staying within the designated service area during available hours, and order reassignment rates. Additionally, external

parameters, including the number of working hours, efficiency, and user feedback, should be taken into account.

In such situations, the ability of workers to comprehend the information renders their role in communicating their working conditions and managing their relationship with their employer ineffective. This is due to the speed and complexity of the information, which surpasses their legal and/or technological capacity to comprehend the management decisions. As a result, they lack the necessary perspective to understand the implications of these decisions and the strength to request clarifications or oppose choices that directly affect them. In this context, the employee becomes the focus of the employer's communication, which can be too rapid and unpredictable at times. They receive technical and legal jargon that they may not comprehend or even notice. Essentially, the worker is voiceless in a conversation that never takes place. They exist in an informational setting without occupying its core. The technological transformations in social organization create power imbalances and result in a social divide between increasingly open individuals and increasingly obscure and uncontrollable powers.

II. Transparency and Explainability of Contractual Terms and Conditions and the Enabling Dimension of Information: Limits and Potential of the GDPR

The use of automated decision-making has become a critical concern for labour law and beyond. These technological implementations have the potential to significantly impact the lives, dignity of workers and employment relationships of workers. The principle being studied extensively is how ideal algorithmic rationality, which is neutral, objective and therefore always abstractly preferable to the limited cognitive or intentionally corrupt human intervention, can produce nonetheless irrational and sometimes discriminatory decisions. Discrimination is created by irrational, blind, mirror, deterministic, non-deterministic, and machine learning algorithms, undermining therefore both general law and labour law specifically.

Recent years have seen a flurry of academic work addressing explainability as a means to achieve accountability in algorithmic decision-making systems.[3]

However, it is apparent that organisations are unlikely to provide comprehensive explanations regarding the process, rationale and precision of algorithmic decision-making voluntarily, unless they are legally required to do so. These systems are frequently intricate, encompass confidential personal data, and employ techniques and models treated as trade secrets. Therefore, expounding on them would generate

[3] F. Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Cambridge, MA: Harvard University Press, 2015); J.A. Kroll et al, 'Accountable Algorithms' 165 *University of Pennsylvania Law Review*, 633 (2017); S. Wachter and B. Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' 2 *Columbia Business Law Review*, 1 (2019).

supplementary expenses and jeopardize the organisation's security.

In this context, it is clear that assuming unforced cooperation from organisations that use automated decision-making systems is unrealistic. Implementing mandatory regulations is the only plausible solution to partially reveal the operational methodology of algorithmic systems.

In the framework outlined above, the issue of transparency of algorithmic decision-making has been at the centre of the debate in the European institutions for some time. Transparency that concerns not only the processing of the data itself, but also the way in which the data is processed by automated systems that return a specific identity or characteristics of the person created by artificial intelligence systems. In fact, through an evolutionary interpretation of the European Union's General Data Protection Regulation[4] (GDPR), the perspective of legal protection of the person, the owner of the data, and therefore also of the worker, is guaranteed by the principle of transparency, understood as a fundamental principle that allows one to control the processes of construction and use of personal identity. The power to control one's own identity is at the heart of the protection of the human person in the information society; a necessary tool to preserve one's freedoms (first and foremost self-determination) in the age of so-called global surveillance and of a life increasingly lived in the infosphere.[5] The GDPR provides a single legal framework for the protection of personal data, directly applicable in all Member States of the European Union (EU). In labour matters, the GDPR is obviously applicable to the collection and processing of workers' data, including in the more specific case of automated decision-making by algorithmic management tools.

Under Arts 5, para 2, and 24, para 1, GDPR, the employer, as the data controller, must be able to demonstrate that it has complied with a number of substantive and organisational requirements when processing employee data. It must demonstrate that the data processing complied with all the principles set out in Art 5, para 1, GDPR, namely lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality. Pursuant to Art 15 GDPR, the data subject has the right to obtain from the controller the confirmation of whether personal data relating to him/her is being processed and, if so, access to such personal data, except for information on the existence of automated decisions, including profiling, referred to in Art 22, paras 1 and 4, and, at least in these instances, relevant information on the logic applied and on the significance and envisaged consequences of such processing for the data subject. In any event, Art 22, para 1, gives the data subject the right not to be subject to a decision based solely on automated processing, including profiling,

[4] European Parliament and Council Regulation (EU) 2016/679 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 [2016] OJ L119/1.

[5] L. Floridi, The Fourth Revolution: How the Infosphere is Reshaping Human Reality (Oxford: Oxford University Press, 2014).

which produces legal effects concerning him or her or similarly significantly affects him or her. However, there are exceptions to this general prohibition. For example, automated decision-making is allowed when it is necessary for the conclusion or performance of a contract, as may be the case in relation to an employment contract (Art 22, para 2(a), GDPR). However, even if it falls under this exception, an employer must take appropriate measures to safeguard the rights and freedoms and legitimate interests of the data subject, at least the right to obtain human intervention from the controller, to express his or her point of view and to contest the decision (under Art 22, para 3, GDPR), and to provide the employee, upon specific request, with confirmation of the existence of automated decision-making and, if so, with meaningful information about the logic involved in the decision-making process, including an explanation of the envisaged consequences of such processing for the employee (Arts 13 and 15 GDPR).

This is certainly an important regulation, but its impact depends very much on the interpretation of the notion of fully automated processing: the GDPR's right to an explanation, even if legally binding, would be limited to decisions based solely on automated processing with legal or similarly significant effects. These conditions significantly limit its potential applicability.

In recent years, it has therefore become clear, including in the debate launched by the European institutions, that the use of automated decision-making systems entails many risks that will inevitably affect people's lives and fundamental rights. In this context, the EU has proposed the development of artificial intelligence based on 'trustworthy', transparent, knowledgeable, relevant, human-controlled and accountable technology in order to create an 'ecosystem of trust'. Automated decisions, in order to remain anthropocentric, should be inspired by the Human-in-the-Loop (HITL) approach; ie, a technological and organisational approach that places human knowledge and experience at the centre of decision-making processes governed by algorithms, while ensuring precise human oversight of the functioning of automated decision-making processes. This is to avoid the distorting effects of automation, to interpret outputs correctly and with human criteria and values, and to preserve the possibility for the supervising human to decide, in any given situation, not to use the output itself, to ignore it, to cancel it or to reverse it.

For this reason, the doctrine dealing with the GDPR has long doubted the potential effectiveness of the aforementioned regulation. The same Working Party was set up under Art 29 of Directive 95/46/EC[6] and Art 15 of Directive 2002/58/EC,[7] which issued specific guidance on automated processing, stating that the prohibition of fully automated processing requires a restrictive interpretation,

[6] 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 [1994] OJ L281/31.

[7] 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) [2022] OJ L201/37.

according to which the controller cannot avoid the provisions of Art 22 by fabricating human involvement. To qualify as human involvement, the controller must ensure that any control over the decision is meaningful and not merely a token gesture; it should be exercised by someone who has the authority and competence to change the decision.[8]

Consistent with this broad interpretation, the guidance cited above also emphasizes that the growth and complexity of machine learning may make it difficult to understand how an automated decision-making process or profiling works. Therefore, the controller must find simple ways to explain to the data subject what the underlying logic is, or what criteria were used to make the decision. The GDPR requires the controller to provide useful information about the underlying logic, not necessarily a complicated explanation of the algorithms used or an explanation of the entire algorithm. However, the information provided must be sufficiently complete to enable the data subject to understand the reasons for the decision. The intelligibility of the automated decision-making process is therefore a concept that needs to be defined in relation to the cognitive abilities and skills of the recipient, as well as the purpose of the access to the explanation.[9]

Finally, and very briefly, it is worth recalling the very broad interpretation of Art 22 GDPR given by Advocate General Priit Pikamäe in his Opinion of 16 March 2023 before the Court of Justice in a case concerning the profiling of natural persons by a credit and rating agency.[10] The Advocate General pointed out that Art 22, para 1, of the GDPR has a distinct feature compared with the other restrictions on the processing of data contained in that regulation in that it establishes a 'right' for the data subject not to be subject to a decision based solely on automated processing, including profiling. Despite the terminology used, the application of Art 22, para 1, of the GDPR does not require the data subject to actively invoke the right. An interpretation in the light of recital 71 of that Regulation, taking account of the scheme of that provision, particularly its para 2, which specifies the cases in which such automated processing is exceptionally permitted, suggests instead that provision establishes a general prohibition on decisions of the kind described above. At the same time, Advocate General Priit Pikamäe gives an extensive interpretation of decision that produces 'legal effects' concerning the data subject or 'similarly significantly affects him or her', holding that the notion of legal effect on the person includes the possibility of not benefiting from a contractual

[8] See Art 29 Data Prot. Working Party, Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679, http://tinyurl.com/48dfbcx4 (on file with the *Columbia Business Law Review*).

[9] M. Peruzzi, 'Intelligenza artificiale e tecniche di tutela' *Lavoro e diritto*, 541-559 (2022). On the difficulties of filling the right to explanation with content in the technological habitat, see P. Tullini, 'La questione del potere nell'impresa. Una retrospettiva lunga mezzo secolo' *Lavoro e diritto*, 429-450 (2021).

[10] See Opinion of Advocate General Pikamäe, delivered on 16 March 2023, Case C-634/21, *OQ v Land Hesse, Joined party: SCHUFA Holding AG*, available at www.eur-lex.europa.eu.

relationship with a credit institution, that may certainly affect the economic life of the data subject. This situation justifies the right to obtain meaningful information about the logic involved, even where this may entail a partial sacrifice for the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software.

III. Application of Art 22 GDPR in Employment Context: In Search of a Trustworthy Ecosystem

Although the scope of the GDPR for labour law may not seem obvious at first glance, case law in recent years dealing with the transparency of automated systems has reached important conclusions that are worth mentioning. To give just a few examples of the relevance of the cited provisions of the GDPR, even in very different contexts, it is possible to cite the fundamental 'lesson' of Italian administrative jurisprudence on the subject of the allocation of seats and transfers of public school teachers. The Council of State, section VI, with judgment no 8472 of 13 December 2019,[11] has in fact highlighted what are the 'minimum guarantee elements' of the use of algorithms in the management of labour relations in the public administration; namely a) the full upstream knowability of the module used and the criteria applied; b) the imputability of the decision to the body holding the power, which must be able to carry out the necessary verification of the logic and legitimacy of the choice and the outcomes entrusted to the algorithm. Knowability, therefore, and verifiability from a logical point of view. Where 'knowability' disregards the 'multidisciplinary characterisation' of the algorithm, which requires not only legal expertise, but also technical, computer and statistical, administrative expertise. As the Council of State has made clear, this does not mean that the 'technical formula' which is in fact the algorithm should not be accompanied by explanations which translate it into the underlying 'legal rule' and make it readable and comprehensible. Therefore, also in the case of the transfer of teachers in Italian state schools, the aforementioned jurisprudential orientation has established the applicability of the provisions of the GDPR to the present case: ie, the cognitive guarantees ensured by the information notice and the right of access, as well as the express limitation to fully automated decision-making processes. The right to knowledge of the existence of decisions taken by algorithms and, correlatively, the duty on the part of those who process data in an automated manner, to make the data subject aware of them, must therefore – according to the Council of State cited above – be accompanied by mechanisms capable of deciphering their logic. In this perspective, the principle of knowability is completed with the principle of comprehensibility, ie, the possibility, to borrow the expression of the GDPR, of receiving 'meaningful information on the logic used'.

[11] Consiglio di Stato 13 December 2019 no 8472, *Foro Italiano*, 340 (2020).

Similarly, the principle of non-exclusivity of the algorithmic decision requires, according to the judgment under consideration, that the automated decision-making process must include a human contribution capable of verifying, validating or refuting the automated decision. In the field of mathematics and information technology, the model referred to is precisely the one defined as HITL (human in the loop), in which the machine must interact with the human in order to produce its result.

On the basis of these premises, in the present case, the algorithm used by the Italian public employer did not comply with the above-mentioned principles. Also in view of the fact that it was not clear why the legitimate expectations of some teachers who had been placed in a certain position on the ranking list had been disappointed to the detriment of others. Therefore, according to the Italian Council of State, the fundamental need for protection raised by the use of the algorithmic computer tool is the denial of transparency as an obligation to make the decision comprehensible, in compliance with the principle of reasoning and/or justification of the decision.

The provisions of the GDPR have also found significant application in the area of automated processing through platform work. The Italian Data Protection Authority (DPA), for example, has carried out extensive checks on a number of digital working platforms involved in food delivery, finding numerous breaches of data protection law arising from the extensive use of algorithmic management.[12] With regard to the information to be provided to data subjects, for example, the Italian DPA considered insufficient the information provided in a document entitled 'Privacy policy of the rider for Italy', which is available via a link, included in the standard contract that Deliveroo signs with riders and published on the company's website. It was found that the company had failed to provide 'meaningful information on the logic applied, as well as on the significance and expected consequences of such processing for the data subject'. As such, the company – which carries out automated processing, including profiling, that falls under Art 22 of the GDPR – had breached the 'enhanced' information obligations that the regulation explicitly requires in such cases (see Art 13, para 2 (f), GDPR).

In the same case, the Italian DPA found that the company – which monitored riders with GPS every 12 seconds – also carried out automated processing, including profiling, to assess 'reliability' and 'availability' to accept shifts on peak days, to determine riders' priority in the choice of shifts; and to allocate orders within booked shifts, through an algorithmic system called Frank (also active after 2020).[13] According to the Italian DPA, the company was not able to explain or

[12] Garante per la protezione dei dati personali 22 July 2021 no 285, Injunction Order against Deliveroo Italy srl, available at www.garanteprivacy.it.

[13] This is the algorithm that is used to profile individual drivers, determine their reliability and, consequently, the possibility of granting (or refusing) access to job opportunities at certain pre-established times, thus offering (or refusing) an employment opportunity, on which the Tribunale di Bologna 31 December 2020, *Rivista Italiana di Diritto del Lavoro* 175 (2021) issued against

provide adequate information to workers on the functioning of the Frank algorithm, the FAQs made available on the website not being sufficient in this respect.

Therefore, as the Italian DPA itself noted, the data processing discipline of the GDPR is functional to guarantee platform workers, not only in terms of privacy, but also from a substantive point of view. As provided for in Art 47-*quinques* of decreto legislativo 15 June 2015 no 81 (in the wording introduced by the Italian legislature in 2019), workers on digital platforms 'who carry out activities of delivery of goods on behalf of others, in urban areas and with the help of velocipedes or motor vehicles' are subject to the anti-discrimination rules and the rules protecting the freedom and dignity of workers, including access to the platform. Since, according to the aforementioned provision, the exclusion from the platform and 'the reduction of work opportunities due to the non-acceptance of the service are prohibited', the knowledge of how the Frank algorithm works – for the worker excluded or penalised by the platform – is functional to activate and claim a substantial protection against the loss of work opportunities or the deactivation of the account.[14]

Outside the Italian context, the recent Dutch case law on the automated processing of data of Uber and Ola Cabs drivers is of particular importance: in no less than three decisions, the Amsterdam Court of Appeal has largely ruled in favour of the drivers, finding that Uber and Ola have violated the rights of taxi drivers under the GDPR.[15]

The drivers, in fact, appealed the Amsterdam District Court's decisions to receive further access to their personal data and receive information about the way in which Uber and Ola take automated decisions about their drivers.

In particular, the Amsterdam Court of Appeal, providing a very broad interpretation of the provisions of the GDPR and the notion of personal data,[16] affirmed – with regard to some drivers dismissed by Uber or other employees of Ola Cabs – the right of taxi drivers to know how and why the automated system had 'profiled' them as potential fraudsters, this decision having significant legal effects on the data subjects.

The Amsterdam Court of Appeal, therefore, sanctioned the right to know and understand the rationale behind the decision made on the basis of 'tags', 'reports', 'individual passenger ratings', as well as on the 'batched matching system' (ie the automated system by which Uber connects drivers to passengers, which first groups

Deliveroo Italy srl also expressed its opinion, confirming its discriminatory nature. On this decision, see A. Aloisi and V. De Stefano, 'Frankly, My Rider, I Don't Give a Damn' *Rivista il Mulino*, available at http://tinyurl.com/4jtr66p3 (last visited 10 February 2024).

[14] See also Garante per la protezione dei dati personali 10 June 2021 no 234, Injunction Order against Foodinho srl, available at www.garanteprivacy.it; an abstract in English of this decision is http://tinyurl.com/3t79vnab (last visited 10 February 2024).

[15] See Gerechtshof Amsterdam 4 April 2023 no 200.295.747/01, no 200.295.742/01 and no 200.295.806/01.

[16] In line with ECJ jurisprudence, Case C-434/16 *Peter Nowak* v *Data Protection Commissioner*, Judgment of 20 December 2017 available at www.eur-lex.europa.eu.

the closest Uber drivers and passengers into a batch and then determines the optimal match within this group) or the so-called 'upfront pricing system' (ie the automated system by which Uber calculates the price of a ride in advance on the basis of objective factors such as the length and expected duration of the ride, of the trip requested, the relationship between supply and demand at the time, expected traffic patterns and the date) or, again, on the 'rating history' of Ola Cabs, which had also helped to create a profile of drivers potentially engaged in fraud.

Therefore, when we are dealing with automated processing that significantly affects the individual, preventing workers from knowing how their reliability profile has been constructed by the algorithm, and therefore when we are dealing with a decision that has legal consequences that significantly affect the individual, the individual has the right to access the data and to have useful information about the 'underlying logic', even if there is a commercial interest of the company to maintain business secrecy for competitive purposes.

As clarified by the Amsterdam Court of Appeal, moreover, of relevance here is that the information should be 'useful information', ie such information that enables the data subject to make an informed decision as to whether or not he or she wishes to exercise his or her rights guaranteed by the GDPR, such as the right to rectification or inspection or the right to seek judicial remedy.

According to the Court – citing the European Guidelines on Automated Processing – Art 15, para 1, of the GDPR requires the controller to provide the data subject with general information that is useful for challenging the decision, in particular information on the factors taken into account in the decision-making process and their respective 'weighting' at an aggregate level. The information provided should be sufficiently complete to enable the data subject to understand the reasons for the decision. However, it also follows from this guidance that it does not necessarily have to be a complex explanation of the algorithms used or an exposition of the full algorithm. The explanation cannot even be a simple reference to the company's website, as Uber attempted to do, but rather the platform must explain the factors and the weighting of those factors that it uses to arrive at the ride-sharing decisions, the fare decisions and the average ratings, as well as provide other information necessary to understand the reasons for those decisions.

In short, as one seems to read between the lines of the Dutch Court of Appeal's decision, it is not the technical/commercial explanation of how the algorithm works that is important, but the explanation of the logic of the weighting of the data obtained, because it is precisely on this weighting – or on the error or lack thereof – that the employee will ultimately be able to assert his rights. From this point of view, the provisions and application of the GDPR in the field of employment can be seen as playing the role of a pioneer: of a 'window' on the automated management models that, until now, have acted as a veritable curtain concealing the real working conditions.

A role as an information trailblazer, therefore, which beyond the world of

digital work platforms mentioned above, can also be played in more traditional spheres of the world of production and services, such as in the logistics sector, as shown by the recent trade union initiatives launched at Amazon, where – recently – in a cooperation between the worker's union 'UNI Global' and privacy NGO 'noyb.eu', Amazon warehouse workers from Germany, UK, Italy, Poland and Slovakia filed access requests under Art 15 GDPR. The goal is to find out how Amazon treats workers' personal data under the EU's GDPR, since workers are so far left in the dark about the use of their data, despite Amazon using sophisticated systems to monitor workflows and workers.[17]

IV. EU Labour Law: From Transparency and Predictability of Working Conditions to Comprehensibility and Beyond

Given the profound changes in production contexts, the European Pillar of Social Rights, proclaimed in Gothenburg on 17 November 2017,[18] has focused labour attention on the importance of transparency. It established that workers have the right to be informed in writing, at the beginning of the employment relationship, of the rights and obligations arising from the employment relationship and of the conditions of the probationary period; furthermore before any dismissal, they have the right to be informed of the reasons and to be given a reasonable period of notice; and they also have the right of access to effective and impartial dispute resolution and, in the event of unfair dismissal, the right to a remedy, including adequate compensation.

Therefore, in the wake of the aforementioned social pillar, Directive 2019/1152[19] on transparency and predictability of working conditions was adopted, establishing a general principle of transparency applicable to a wide range of workers, who should be guaranteed the right to obtain correct information on the working conditions applicable to them. Recognising the 'inadequacy' of the previous Directive 91/533/EEC[20] to regulate the profound changes in labour markets as a result of digitalisation processes, and knowing that some new forms of work are far removed from traditional employment relationships in terms of predictability, creating uncertainty for the workers concerned in terms of social protection and

[17] NOYB, Amazon Workers Demand Data-Transparency, noyb.eu (14 March 2022), available at http://tinyurl.com/45c2n88z (last visited 10 February 2024).

[18] F. Hendrickx, 'European Labour Law and the Millennium Shift: From Post to (Social) Pillar', in F. Hendrickx and V. De Stefano eds, *Game Changers in Labour Law*, *Bulletin of Comparative Labour Relations*, 49 (2018); K. Kilpatrick, 'Social Europe via EMU: Sovereign Debt, the European Semester and the European Pillar of Social Rights' *Diritto del Lavoro e Relazioni Industriali*, 737 (2018).

[19] European Parliament and Council Directive (EU) 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L186/105.

[20] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L288/32.

applicable rights, the EU has indeed seen the need for a new regulation.

This was done in order to guarantee workers, including platform workers and 'false self-employed', the right to full and prompt written information on working conditions. A genuine transversal principle of transparency and predictability of working conditions has thus been introduced (planning and organisation of work, time slots, pay, but also the right to parallel employment with other employers, the right to a minimum of predictability of work and the right to refuse work if this is lacking, the obligation to provide training, etc), which should be widely applied in both traditional and digitalised workplaces.

If, from the perspective of Directive 91/533/EEC, information had the task of ensuring a full understanding of the rights and obligations to which the employee is entitled by virtue of the conclusion of the contract, the information rights contained in the new Directive 2019/1152 are 'third-generation' information rights, as they focus on the dynamic aspect of the information itself. In fact, the principle of transparency and predictability of contractual conditions is based on a right to information that is not just a 'snapshot' of what exists, but rather a dynamic one that must guarantee not only knowledge and understanding of the contractual conditions applied, but also the predictability of possible changes that, in a 'high-speed' world of work, run the risk of making the worker's life unprogrammable, with an obvious increase in the porosity of working time that potentially prevents any capacity for self-determination of the person and his or her living spaces.

The above-mentioned new Directive, with its hard law content, is a candidate as a source of not only procedural but also substantive rights that can be asserted before the courts by workers who are insufficiently informed about the aspects provided for by the Directive. On the one hand, the transparency and predictability of the contractual conditions and the detailed written information on all the elements mentioned in the Directive recall the tendency to increase legal formalism and the proceduralisation of conduct and management acts as a counterbalance to the increasing liberalisation and proliferation of flexible employment models. On the other hand, they take on the connotation of new enabling tools for the capacities of the workers concerned, the planning and predictability of their living and working space and time, of remuneration and its elements, of the possibility of accepting other jobs. In short, information as an enabling tool for the planning and predictability of one's own living conditions, even before that of work, as the last generational right that increases the possibility of workers acquiring a greater space of substantial freedom in the employment relationship and in professional trajectories. On the other hand, they are configured as potentially enabling instruments of investigation (if not also of spaces of unquestionability) of the methods of exercising the employer's powers, especially those managed by automated decision-making mechanisms.

The same perspective of increasing transparency also inspires the proposal

for a directive COM (2021) 762 of 9 December 2021,[21] which aims to improve the working conditions and increase the level of protection of platform workers.

In particular, the latter directive aims to: ensure that persons working through digital platforms have or can obtain correct information on the employment situation in the light of their actual relationship with the digital work platform and have access to applicable labour and social protection rights; ensure fairness, transparency and accountability in algorithmic management in the context of work through digital platforms; and increase transparency, traceability and awareness of developments in work through digital platforms and improve the application of relevant rules for all persons working through digital platforms, including those operating across borders. In the European Commission's logic, therefore, the proposed Directive aims to achieve the specific objective of ensuring fairness, transparency and accountability in algorithmic management by introducing new substantive rights for persons who work through digital platforms.

This includes the right to transparency about the use and functioning of automated decision-making[22] and monitoring systems, which specifies and complements existing rights in relation to the protection of personal data.

Transparency and traceability of work through digital platforms is also – according to the Commission's approach – an important tool to support competent authorities in enforcing existing rights and obligations in terms of working conditions and social protection.

In particular, the European Commission's proposal on work through digital platforms considers the 'opacity' of the algorithms that govern the employment relationship in platforms as the real new element of weakness that could and should act as a watershed between autonomy and subordination. This is based on the assumption that the lack of transparency and clear information on how the algorithm works in the platform actually prevents workers (even those who would like to work autonomously) from making informed and responsible decisions that affect them. It is therefore precisely in platforms, which are the most emblematic example of management by algorithmic management, that the Commission has envisaged the introduction of a so-called rebuttable presumption of an employment relationship, with a reversal of the burden of proof of the autonomous nature of the relationship. The rebuttable presumption of the subordination of the relationship, therefore, as a bulwark against the computational power of the platforms, which would oblige – once again – the algorithmic management to prove the 'algorithmic counterfactuals'; that is, to prove how and why the relationship of the platform worker should be considered truly autonomous, despite the 'technological-informational subordination' that characterises the relationship itself.

[21] COM(2021) 762 final of 9 December 2021, Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work.

[22] A. Aloisi and N. Potocka-Sionek, 'De-gigging the labour market? An analysis of the 'algorithmic management' provisions in the proposed Platform Work Directive' 15 *Italian Labour Law E-Journal*, 29 (2022).

Thus, in order to address the risks of opacity and inscrutability of algorithmic management, the above-mentioned proposal of directive provides for a number of information/explanatory obligations for digital work platforms (see Arts 6, 7 and 8), which go beyond the simple and general right to be 'fully and promptly informed in writing' about working conditions already provided for in Directive 2019/1152 and already applicable to platform workers; such as the obligation to inform workers about automated monitoring systems that are used to monitor, supervise or evaluate the performance of digital platform workers by electronic means; as well as the obligation to inform these workers about automated decision-making systems that are used to make or support decisions that significantly affect their working conditions, such as access to tasks, earnings, health and safety at work, working hours, promotions, possible suspension or termination of their account, etc.

The above-mentioned proposal of directive, if adopted, will therefore impose a real obligation on workplaces to provide the required information to workers quickly, in a concise, transparent, comprehensible and easily accessible form, using simple and clear language. The subject matter of the information partly overlaps with that of the GDPR rules, which are already widely applied thanks to a broad jurisprudential interpretation (such as that of the Amsterdam Court of Appeal) of the information to be provided on fully automated processing: the information concerns both the introduction and the use of automated decision-making and monitoring systems, the categories of actions monitored, supervised or evaluated, including by means of rating procedures, the categories of decisions and the main parameters used by the systems to take them. At the same time, the above-mentioned proposal of directive provides for an obligation of human supervision of the automated systems, as well as an obligation to provide a written explanation of the decision and a reasoned review of the decision, which could be followed by an obligation to immediately rectify the decision taken by the algorithmic management or, if this is not possible, an obligation to pay appropriate compensation, if the automated decision is found to violate the worker's rights.

Unlike Art 22 of the GDPR, the proposal for a directive on work through platforms therefore enriches the content of the obligation of human supervision of the automated process on a stable basis: whereas Art 22 of the GDPR provides that, where fully automated processing is allowed for the performance of a contract, the data subject has the right to obtain human intervention by the data controller, to express his or her opinion and to contest the decision; in other words, an on-demand human intervention by the data subject. The proposal for a Directive on work through platforms, on the other hand, provides for a stable obligation of human supervision of automated systems: an obligation that Member States will be able to impose on platforms also by verifying that the platforms themselves employ sufficient human resources (with the necessary competence and authority) to supervise decisions. A monitoring obligation to which is then added the right of the data subject to obtain explanations of the decisions taken, to request a review, etc.

The proposed directive on platform work represents a particularly significant 'curvature' of Art 22 GDPR, as it opens up spaces for control over the algorithmic decision that go far beyond the purpose of transparency. Indeed, human monitoring and human review of significant decisions (Arts 7 and 8 of the proposal) seem to open up spaces for control over the rationality and reasonableness of the algorithmic decision (which must not 'put undue pressure on workers' or endanger their physical and mental health), as well as its non-discriminatory nature. In short, a form of control that is no longer limited – as in the GDPR – to the use of data and processing that affects the construction of the person's identity (or his or her potential to access services, as is the case in the area of creditworthiness processing), but extends to the protection of the worker's material positions in the online or onlife workplace. A labour declination of the obligations of information and human control that, of course, will have to be built and filled with content in the near future.

This is a perspective that also seems to be reflected in the proposed Artificial Intelligence Regulation (also known as the AI Act proposal),[23] especially in the version approved by the European Parliament,[24] which introduced several amendments to the Commission's draft, inspired by a more anthropocentric vision of AI. Of particular importance is the provision in the new Art 29, para 1-*bis*, which also imposes an obligation on the operator to establish human supervision of the system, ensuring that the persons in charge of such supervision are competent, suitably qualified and trained, and have the necessary resources to ensure effective supervision of the system. Another important innovation concerns the strengthening of the collective dimension of information obligations: the new para 5-*bis* of Art 29 introduces specific obligations for the operator/employer with regard to (a) consultation of workers' representatives and (b) information of workers *uti singuli*. According to the wording of the new paragraph, prior to the operation or use of a high-risk IA system in the workplace, the operator shall consult the workers' representatives with a view to reaching an agreement in accordance with Directive 2002/14/EC and shall inform the workers concerned that they will be subject to the system. This wording expresses a precise regulatory choice that should lead Member States to face up to the need not only to inform, but also to promote real negotiation with trade unions, thus stimulating, at least in this area, the development of participatory practices and institutions that allow us to look at the world of artificial intelligence with a greater dose of optimism.

[23] COM (2021) 206 of 21 March 2021, 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.

[24] Following the approval of the position of the European Parliament in plenary session on 14 June 2023 (with 499 votes in favour, 28 against and 93 abstentions), inter-institutional negotiations began in July 2023 under the Spanish Presidency of the Council. On this last version see the extensive considerations of A. Alaimo, 'Il Regolamento sull'Intelligenza Artificiale: dalla proposta della Commissione al testo approvato dal Parlamento. Ha ancora senso il pensiero pessimistico?' *federalismi.it*, 18 October 2023, 25.

V. The Transposition of Directive 2019/1152 into the Italian System: The So-Called 'Transparency Decree' Between Stop-and-Go

Last year, the Italian legislature adopted decreto legislativo 27 June 2022 no 104, the so-called 'Transparency Decree'[25], which transposed Directive 2019/1152 on transparent and predictable working conditions. This is a very complex regulation that rewrites decreto legislativo 26 May 1997 no 152, and with it the right to information on the essential elements of the employment relationship and working conditions, and the related protection of personnel working in private companies and public administrations. Various types of information must be communicated by the employer to each employee in a clear and transparent manner, in paper or electronic form, and must be kept and made accessible to the employee, with proof of transmission or receipt being kept for a period of five years from the end of the employment relationship.

Of particular interest in relation to the subject matter of this paper is the provision (Art 4, para 8) that introduces into the aforementioned decreto legislativo 26 May 1997 no 152 a new Art 1-*bis* entitled 'Further information obligations in the case of the use of automated decision-making or monitoring systems'. It provides – extending the wording of Directive 2019/1152 and partly anticipating the content of the proposed directive on platform work – that the public and private employer is obliged to inform the employee of the use of automated decision-making or monitoring systems designed to provide information relevant to the recruitment or assignment, management or termination of the employment relationship, the assignment of tasks or duties, as well as information relating to the monitoring, evaluation, performance and fulfilment of the contractual obligations of employees.

Unlike the proposal for a directive on platform work itself, however, the scope of the 'Transparency Decree' is much broader from the point of view of scope, as it concerns not only platform workers, but also all forms of smart working, collaboration, as well as 'traditional' subordinate work directed or monitored by computer systems.

It has been rightly pointed out that the notion of 'automated decision-making or control system' is so broad as to cover both systems based on a 'traditional'

[25] M.T. Carinci et al, 'Obblighi di informazione e sistemi decisionali e di monitoraggio automatizzati (Art 1-*bis* "Decreto Trasparenza"): quali forme di controllo per i poteri datoriali algoritmici?' *Labor*, 7 (2023); G.A. Recchia, 'Condizioni di lavoro trasparenti, prevedibili e giustiziabili: quando il diritto di informazione sui sistemi automatizzati diventa uno strumento di tutela collettiva' 9 *Labour & Law Issues*, 1 (2023); A. Tursi, 'Decreto trasparenza: prime riflessioni – 'Trasparenza' e 'diritti minimi' dei lavoratori nel decreto trasparenza' *Diritto delle Relazioni Industriali*, 1 (2023); A. Viscomi, 'Noto analogico e ignoto digitale. Brevi note su alcuni aspetti del 'Decreto Trasparenza' *ilforovibonese.it*, 7 December 2022; F. D'Aversa and M. Marazza, 'Dialoghi sulla fattispecie dei «sistemi decisionali o di monitoraggio automatizzati» nel rapporto di lavoro (a partire dal decreto trasparenza)' *giustiziacivile.com*, 11 (2022); A. Allamprese and S. Borelli, 'L'obbligo di trasparenza senza la prevedibilità del lavoro. Osservazioni sul decreto legislativo n. 104/2022' *Rivista giuridica del lavoro*, 671 (2022); G. Proia, 'Trasparenza, prevedibilità e poteri dell'impresa' *Labor*, 641 (2022).

algorithm – understood as a finite sequence of instructions defined in such a way as to be executed mechanically and to produce a given result – and artificial intelligence systems that operate through an automatic learning process; this is because the aforementioned Art 1-*bis* expressly refers not only to 'categories of data and the main parameters used for programming', but also to 'training' the automated system.

In addition to the general clarification of the areas covered by the information, para 2 of the new Art 1-*bis* provides that, in order to comply with the above-mentioned obligations, the employer must provide the employee, before the start of the employment relationship, with the following additional information (b) the purposes and objectives of such systems; (c) the logic and operation of such systems; (d) the categories of data and the main parameters used to program or train them, including performance assessment mechanisms; (e) the control measures adopted for automated decisions, any correction processes and the quality management system manager; (f) the level of accuracy, robustness and cybersecurity and the metrics used to measure these parameters, as well as the potentially discriminatory impact of these metrics. In addition to these information obligations, para 3 of the aforementioned Art 1-*bis* also provides for a broad right of access to such information: in fact, it is provided that the employee, directly or through the company or territorial trade union representatives, has the right to access the data and to request further information on the aforementioned information obligations at any time. Decreto legislativo 27 June 2022 no 104, in turn, provides in its commentary that the employer or the client is obliged to provide the requested data and to reply in writing within thirty days of the request.

The subsequent paras of the new Art 1-*bis* then provide for coordination measures with the GDPR,[26] as well as a very strict timeframe for the communication of changes in contractual conditions, providing for the right of workers to be informed in writing, at least 24 hours in advance, of any change affecting the information previously provided and entailing a change in the conditions of performance of the work. Finally, para 6 of the aforementioned Art 1-*bis* reiterates the 'linguistic' and structural requirements of the information, stipulating that this information must be provided by the employer or client to the workers in a transparent manner, in a structured, commonly used and machine-readable format. This is, as we have said, a 'third generation' right to information, based on the obligation of the employer to transform and convert the language and logic of the machines into a language that can be understood by human beings, rationally explained and, consequently, verifiable in terms of its potential impact on all the rights established by labour legislation for the protection of the person

[26] On coordination with the provisions of the GDPR, see also the explanatory note provided by the Garante per la protezione dei dati personali, 'Questioni interpretative e applicative in materia di protezione dei dati connesse all'entrata in vigore del d. lgs. 27 giugno 2022, n. 104 in materia di condizioni di lavoro trasparenti e prevedibili (c.d. "Decreto trasparenza")', 24 January 2023, available at https://tinyurl.com/5f9h8phm (last visited 10 February 2024).

involved in the employment relationship.

The same information and data must also be sent to the trade union representatives in the company or to the single trade union representation and, in the absence of such representatives, to the territorial branches of the trade union confederations that are relatively more representative at national level. The Ministry of Labour and Social Policy and the National Labour Inspectorate may request the communication of and access to the same information and data.

It is clear that the above-mentioned provisions represents a real race forwards by the Italian legislator, which has tried to define an information obligation that goes as far as requiring an explanation of the logic and operation of automated systems, the control measures adopted for automated decisions, the possible correction processes and the 'human' manager of the quality management system, the metrics and impact assessments of possible discriminatory effects.

The right of access, information and clarification of the logic and operation of automated systems is granted to the individual, but also to the company or local trade union representatives, who can then play an active role in verifying the comprehensibility of the information provided. In order to provide workers with the necessary information, the employer must analyse in detail the automated systems in use, describing, for example, their logic and operation, data and programming parameters, potential discriminatory effects, etc. The employer must therefore take the necessary steps to ensure that the information provided is comprehensible to the individual. The employer must furthermore draw up a list of the automated decision-making or automated monitoring tools used and, for each tool, make legible and explain the purpose of use, the personal data processed, the profiles of the employment relationship concerned and the measures envisaged to ensure the security and reliability of the system. In the case of particularly invasive tools, the employer must also define the logic of the system, the data and parameters used to program it, the evaluation mechanisms and control measures, the parameters for evaluating the system and its potentially discriminatory effects: all these elements must therefore be made explicit in a preventive logic. Once the relevant information has been identified, it must be 'linguistically translated' into a structured and commonly used format and made usable by automated tools. As mentioned above, the information burden is further proceduralised, as the decree also provides for the obligation to share information with third parties (company trade union representatives and, upon request, the Ministry of Labour and the National Labour Inspectorate, which has control and sanctioning powers).

These are new and undoubtedly disruptive provisions, which perhaps should have been drafted more precisely, especially as their application could be a precursor to litigation, due in particular to certain terminological uncertainties contained in the provision itself. In fact, the reporting obligations referred to concern – by express legislative provision – the decision-making or monitoring systems, which are not precisely defined, which may provide, on the one hand, 'relevant'

information for cases of recruitment, assignment, management or termination of employment contracts, assignment of tasks or duties, and, on the other hand, information 'affecting' the monitoring, assessment, performance and fulfilment of the contractual obligations of workers. This is therefore a much broader scope than that of the proposal for a directive on platform work: in this case, the disclosure obligation also concerns highly digitalised 'traditional' companies that in fact use real forms of algorithmic management to manage their workforce.

In an attempt to avoid possible problems of interpretation, the Ministry of Labour itself tried to clarify the scope of application of the aforementioned Art 1-*bis* by issuing circolare 20 September 2022 no 19, in which it states that, on the basis of the knowledge and experience currently available, it can be considered that automated decision-making or monitoring systems are those instruments which, through the activity of collecting and processing data, carried out by means of an algorithm, artificial intelligence, etc, are capable of generating automated decisions. In the hypothesis described, according to the Circular, the obligation to provide information would also exist in the case of merely incidental human intervention. For example, according to the Circular, the obligation to provide information would exist in the following cases: recruitment or assignment through the use of chatbots during the interview, automated profiling of candidates, screening of curricula, use of software for emotional recognition and psycho-aptitude tests, etc; management or termination of the employment relationship. Management or termination of the employment relationship with automated assignment or cancellation of tasks, duties or shifts, definition of working hours, productivity analysis, determination of remuneration, promotions, etc., through statistical analysis, data analysis or machine learning tools, neural networks, deep learning, etc; use of tablets, digital devices and wearables, GPS geolocalisation, facial recognition systems, rating and ranking systems, etc.

The Italian legislator's rush forward has provoked some very harsh criticism from Italian doctrine, which has not failed to point out how this legislation, precisely because of its broad wording, is structurally open to the risk of being translated into practices of mere 'informational mannerism',[27] that is to say, forms of bureaucratisation of information developed by consultants, which will do little to help workers or their representatives understand how automated decisions were made, ie to forms of bureaucratisation of information developed by consultants, which will be of little or no help to workers or their representatives in understanding how automated decisions are made. But above all, it is unreasonable, and as such to be repealed, as it is considered that the legislator has attempted to solve complex phenomena with a simple (even too simple, so much so as to be incomprehensible and unworkable), but mistaken rule, and with an excessive sanctioning approach,

[27] M. Faioli, 'Giustizia contrattuale, tecnologia avanzata e reticenza informativa del datore di lavoro. Sull'imbarazzante 'truismo' del decreto trasparenza' *Diritto delle Relazioni Industriali*, 45 (2023).

without taking into account the changing European framework of regulation of artificial intelligence, data governance, digital platforms and digital markets/services.

The excessively ungenerous criticism levelled against Art 1-*bis* of the 'Transparency Decree' was such, evidently, that it led to a partial about-face a few months after the decree's approval: the so-called 'Labour Decree' (decreto legge 4 May 2023 no 48, converted into legge 3 July 2023 no 85), with a view to easing the burden on companies, has in fact also intervened on the 'Transparency Decree' by limiting the employer's obligation to provide information to cases where the systems in question are 'fully' automated. With the addition of this adverb, which limits the disclosure obligations to 'fully' automated systems, the intention was therefore to intervene in an attempt to lighten the burden on companies.

Although the legislator's intention to take a step back on this point is clear, it does not appear that the transparency machine can be completely rewound.[28] In the face of an obligation to provide information, and therefore a right of the employee or trade union to know the logic of the operation of automated systems, it does not seem that the employer can escape the obligation to provide information simply by claiming that it is not a fully automated system, but rather must endeavour to prove (to the individual or trade union organisation) where and how the element of human control or decision-making intervenes.

In effect, therefore, the employer's duty to provide information may result in a partial reversal of the burden of proof on the employer, who will have to show, in the event of litigation, where the human element intervenes and how it is able to influence the automated decision-making process. In part, this means that the employer will also have to demonstrate and make clear to the judge in any dispute how the automated decision-making or monitoring process actually works.

In other words, either the employer proves the human intervention (to those who request it: the employee concerned, the trade union or the supervisory bodies), of course also explaining its effects and thus partially revealing the logic of its operation, thus evading both the information obligations of Art 1-*bis* of the 'Transparency Decree' and the obligations of Art 22 of the GDPR. Or where the employer fails to provide such evidence – the verification of which is drawn under the jurisdiction of the Employment Tribunal – the door is opened to a finding of a violation of the 'Transparency Decree', but also to a possible violation of Art 22 GDPR.

Moreover, in the Italian system, the labour judge's control could also extend to the possible violation of Art 4 of the Workers' Statute,[29] which allows the use of information collected through tools used by the worker to perform work and

[28] It also underestimates the scope of the attempted downsizing of obligations implemented with the 'Decreto lavoro' also E. Dagnino, 'Modifiche agli obblighi informativi nel caso di utilizzo di sistemi decisionali o di monitoraggio automatizzati (art. 26, comma 2, d.l. n. 48/2003)', in Id et al eds, *Commentario al d.l. 4 maggio 2023, n. 48 c.d. "decreto lavoro"* (Modena: Adapt University Press, 2023).

[29] Legge 20 May 1970 no 300.

tools for recording access and attendance for all purposes related to the employment relationship, provided that the worker is given adequate information on how to use the tools and carry out the checks and in compliance with the provisions of the GDPR.

If the employer could not prove that a particular automated processing was not fully automated (because it was integrated with human supervision), it could not even use the information obtained against the employee for disciplinary purposes.

Thus, far from being an unnecessary or unreasonable provision, the provision of the 'Transparency Decree', even in the wording corrected by the so-called 'Labour Decree' (which, as mentioned above, limits the obligation to provide information to fully automated systems), opens the door to a new form of potential control over the exercise of employer powers managed by and with the help of intelligent machines; but, above all, it may lead to a partial reversal of the burden of proof of the not fully automated nature of the decision-making process or, in any case, of the not merely 'fictitious' nature of human control.

As a result, in the event of a dispute, the failure to provide the information referred to in Art 1-*bis* of the 'Transparency Decree' will have to be expressly proven by the employer, who, in the event of a request by the employee or the trade unions, will not be able to limit itself to invoking the inapplicability of the aforementioned article, but will have to prove the real and effective existence and occurrence of human intervention.

These are provisions that undoubtedly confirm how, in the near future, the prospects for the control of automated employer powers will also and above all pass through transparency, information and explanation, in short, through a procedural-explanatory logic that will oblige employers to equip themselves with real figures of explainers, transparency analysts, explainability strategists. Figures who can explain the functioning of automated decision-making processes, machine learning, the underlying logic and the management implications will therefore be increasingly necessary. All of this through a re-humanisation of language that makes it possible to understand the generative process of the decision and that will inevitably open up spaces of control over what the algorithms decide and the repercussions in terms of compression of the 'traditional' rights of the working person. The right to information – and the transparency that goes with it – will thus increasingly take on the role of a precondition (necessary, but obviously not sufficient) for the effectiveness of the rules laid down by the system to protect workers. It goes without saying that this unravelling process could also be very complicated: for example, in the case where the supplier is actually the reseller of a solution produced by others, so it may not be in possession of the details necessary to fulfil the information obligation required by law. The disclosure process could also be very complicated in the case where the employer is a small company, where the value of the contract and the bargaining power of the company would not allow it to easily obtain the information necessary to reduce the information

asymmetries between employer and employee, thus making the employer's disclosure obligations an impossible obligation to comply with, if not at an unacceptable cost.

VI. The Italian 'Transparency Decree' 'Taken Seriously': The Driving Role of Trade Unions and the First Jurisprudential Applications

Despite of the harsh criticism of the 'Transparency Decree' one thing is certain: trade unions have 'taken it seriously' and have therefore launched a series of legal initiatives aimed at obtaining the effectiveness of the information that employers must provide on fully automated decision-making systems.

In addition to recourse to the judicial remedy aimed at the recognition of the employment status of platform workers, or the ascertainment of actual discriminatory practices implemented by automated decision-making systems, trade unions have in fact initiated a litigation strategy aimed at countering the opacity of the algorithm.

This represents a partial novelty in the Italian system, on which a brief introduction should be made. Art 80 GDPR provides for two forms of representation of data subjects: the first according to which the data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Arts 77, 78 and 79 GDPR on his or her behalf, and to exercise the right to receive compensation; the second provides the possibility that Member States may provide that anybody, organisation or association, independently of a data subject's mandate, has the right to lodge a complaint with the supervisory authority and to exercise the rights referred to in Arts 78 and 79 if it considers that the rights of a data subject under the GDPR have been infringed as a result of the processing.

Unlike other countries, however, the Italian legislature has only transposed the hypothesis sub a) provided for in the GDPR, admitting that collective subjects can act as representatives of the victims of the regulatory violation. However, the same legislator has not transposed the hypothesis sub b) provided for in the GDPR, which would have allowed collective subjects to act in court even in the absence of a specific mandate from the victims of the violation. The national legislation,[30] moreover, with an implementation regulation that is perhaps too restrictive compared to the broad provision of the GDPR, admits the legitimacy to act only of 'third sector entities' among which, by express legal provision, trade unions are

[30] See decreto legislativo 1 September 2011 no 150, art 10, para 5.

not included. Although, therefore, the GDPR could have offered Italian trade unions the possibility of intervention to protect workers' data, the Italian regulation has, from this point of view, mortified this expectation.[31]

The adoption of the 'Transparency Decree', which, as mentioned above, in a decisive 'labour' shift on the issue of transparency (in Art 1-*bis*), explicitly grants Italian trade unions the right to access data and request information on the functioning of fully automated decision-making systems. It is therefore a broader provision than that foreseen in the Italian provisions implementing the GDPR, but also much broader than that foreseen in the proposed Directive on platforms, since it applies precisely to all employers. By 'duplicating' the information channels, such discipline places in the hands of the trade union organisation a conspicuous dowry of information that can be used, for the benefit of the individual worker, to verify the legitimacy of a subsequent act of management of the employment relationship, but also to protect the collective interest of the entire group of workers concerned, as a basis for negotiation. This provision therefore opened the way for the union to take direct legal action to enforce its right to information. This is a path that the Italian trade unions have taken with great determination and which, in the course of a year since the new rules came into force, has produced a first jurisprudential orientation that seems to have 'taken seriously' the obligations of transparency and the rights of trade unions to understand how automated decision-making systems work.

The three cases[32] so far have been brought under Art 28 of the Workers' Statute, which provides special protection for trade unions complaining about anti-union conduct by the employer. In the three cases dealt with, therefore, the dispute arose from specific requests by the union to obtain information from some digital work platforms operating in the food delivery sector about the operation of the automated systems used by the employer, which remained unanswered.

The cases cited arise as 'occasions' within a broader litigation strategy aimed at obtaining a ruling, first and foremost, on the contractual status of Italian riders; unlike other litigation initiatives already undertaken, on these occasions the 'gateway' to protections is the violation of the 'Transparency Decree' and thus the failure to inform the union on how the automated systems used by the platforms operate.

In particular, according to the first judgment of the Court of Palermo of 31 March 2023, Uber Eats had in fact refused to provide the information requested by Filcams-CGIL, considering that the latter trade union organisation did not have the right to request the information provided for in Art 1-*bis* of the 'Transparency Decree'. The labour judge confined himself to verifying, on the one hand, the

[31] G. Gaudio, 'Algorithmic management, sindacato e tutela giurisdizionale' *Diritto delle Relazioni Industriali*, 30 (2022).

[32] Tribunale di Palermo 31 March 2023; Tribunale di Palermo 20 June 2023; Tribunale di Torino 5 August 2023, all available at https://www.wikilabour.it/segnalazioni/sindacale/.

applicability of the aforementioned discipline to platform workers who enjoy certain protections 'typical' of subordinate employment; on the other hand, the representativeness of the trade union requesting the information; and, on the other hand, the existence of anti-union behaviour on the part of the platform that had refused to provide the information. In this case, therefore, Art 1-*bis* served as a 'picklock' to confirm the discipline applicable to riders and, consequently, the role of the union subject to it in protecting the demands of the workers concerned.

On the contrary, the case dealt with by the Court of Palermo, which ended with the judgment of 20 June 2023, was more explicit, coming after the amendment of the 'Work Decree', which, as mentioned above, limited the information obligations under Art 1-*bis* only to cases of 'fully' automated systems. In this case, the platform Foodinho Srl, a company that manages the home delivery services of the international brand Glovo in Italy, although it also contested the legitimacy of the requesting trade union, had in any case fulfilled its information obligations, in compliance with commercial secrecy. However, the information provided was not considered exhaustive by the trade union, which asked for much more detailed information 'on the algorithmic impact assessment', including the implementation plans for the various elements and parameters used, their interaction and weighting, etc.

This was information that, according to the platform, could not be provided because it was covered by business secrecy; at most, the information that the platform was willing to provide consisted of 'further clarifications on the cases in which the behaviour would lead to the presumption of a lack of interest in the platform' and therefore to the disconnection of the employee; the development of a criterion that would be 'subsidiary' to those already used by the system in use to match orders with employees; and further general clarifications on the security of the system, without however compromising 'the security of the entire IT architecture'. In the above-mentioned judgment, the Court of Palermo was confronted with a number of delicate issues, also in relation to the new text of the Regulation as amended in 2023. In this respect, the Court of Palermo first raised the problem of clarifying what is meant by 'fully automated systems', specifying that they

> 'must be understood as systems that do not provide for human intervention in the final stage of decision or control, regardless of any human intervention in the preceding stages, such as mere data entry, however processed'.

In the present case, the platform had not demonstrated human intervention (it had only alleged it, but had not proved it) and, in any case, it had not demonstrated that human intervention was involved in the final phase of the decision, with human intervention being limited to the mere input of data and the activation of the system, which was then entirely managed by 'algorithmic or computerised automatisms'. In particular, the platform had limited itself to depositing a document

entitled 'Transparency Disclosure Pursuant to Legislative Decree no 104/2022', which did not reveal the weights, scores, parameters and priority criteria used to profile the worker and subsequently allocate the slots. All of this should have been disclosed, with the sole exception of the 'source codes and mathematical formulae used', which are covered by industrial and commercial secrecy. In the absence of effective information, the judge found that the platform's behaviour was anti-union.

The same condemnation was finally pronounced by the Court of Turin on 5 August 2023, again against Foodinho Srl: in this case, too, the Court of Turin dealt with the concept of 'fully automated system' as a decision-making system that operates without human intervention. Human intervention which, in this case, according to the judge, was not only not proven, but – as can be read in the folds of the reasoning – not even demonstrable, given that these are often very complex operations (the allocation of orders) that the system carries out every ten seconds, in other words in a 'time lapse that objectively excludes any possibility of human intervention in the decision'.

The fully automated nature of the decision-making mechanism is also established – with the same logic – for the attribution of the excellence score, for facial recognition, for the cancellation of the work shift upon the occurrence of certain events, etc. Of particular interest in the above-mentioned judgment is the passage in which the labour judge questions the accuracy of the information provided to the workers, which, for the purposes of assigning the score of excellence, assigns relevance to the actual willingness of the couriers to use the platform, recognising priority access to the calendar for those with the best score; in fact, according to the judge, this system is 'presented' to the workers as if the platform played the role of a mere intermediary between demand and supply of services between the three users of the platform: customers, companies and couriers.

This is an incorrect reconstruction and presentation of the information, since in reality the platform is an employer that carries out the profiling of personal data in order to analyse, evaluate and predict the performance of the riders and their reliability, and therefore, on the basis of the profiling, activates a fully automated decision-making process. Despite the fact that the platform had explained how the scores worked, the Court of Turin considered that the information notice itself was not exhaustive with regard to a number of profiles (the specific measure of the increase/decrease of the score following negative or positive feedback, the absence of measures to parameterise the criteria for the score of excellence, excluding possible discrimination, etc).

VII. Is It Possible to Open the Black Box? Probably Not, but It Is Useful to Take a Look Inside and Possibly Bargain for Its Contents

The European regulation and the Italian case of the transposition of the directive on predictable and transparent conditions, with the extension of the

transparency rules to automated systems, allow some reflections.

In labour law, however, transparency, and with it language and communication, play an enabling role, allowing the worker not only to check how his or her work identity is constructed (whether he or she is an unproductive worker, potentially negligent, etc), but also to open up spaces for a subjective and subjective assessment of the work identity. It also opens up spaces for a conscious regulatory subjectivation that moves in spaces of determination of contractual conditions that can be foreseen; and, not least, such as to act as a gateway to a potential control of the employer's powers and the legitimacy of acts of management of the labour relationship that are 'dehumanised', but above all based on logics that are not always comprehensible to human beings.

As can be seen from a reading of the decisions of the Italian courts analysed above (of Palermo and Turin), transparency in the exercise of employer powers is not an end in itself. It has the function of 'revealing' the real nature of the relationship (whether subordinate or not), as well as the potential discriminatory effects in the exercise of employer powers. This is a need that goes beyond the complex world of platforms: understanding how an automated decision-making system works is, in fact, functional to ensuring the effectiveness of a range of 'typical' labour regulations. Just think how important it can be for the worker to understand how he is being monitored by the machine or instrument he is using, ie by the tools needed to perform the work: just to give a brief example, it may be useful to recall that in Italy, Art 4 of the Workers' Statute provides that the data obtained by the employer through the tools used to perform the work may be used for all the effects of the employment relationship (promotions, disciplinary sanctions, etc), provided that the worker is given the opportunity to understand how the data is being used; provided that the employee is duly informed about the use of the tools and the controls to be carried out, and in compliance with the provisions of the GDPR. An information notice which, in the light of article 1-*bis* of the 'Transparency Decree', must be very detailed at this point, on pain of jeopardising the legitimacy of any disciplinary power exercised and/or dismissal ordered against the worker for facts revealed as a result of the fully automated monitoring.

Although the regulation on the transparency obligations of automated systems seems to have a limited impact on the rights of the individual workers involved, it is possible to consider that the real effect of transparency is to reinforce a whole series of already existing labour regulations, especially since, as mentioned above, the Italian legislator (unlike the proposal for a directive currently being approved at European level) has dictated a regulation that applies not only to work platforms but to all private and public employers.

To take another example, it is also possible to recall how the issue of automated decisions has recently been used to identify the 'real' employer in labour contracts:

according to a recent strand of Italian jurisprudence,[33] where management power is entirely entrusted to automated systems that tell the worker what to move, where to move it and where to take it, the 'real' employer is presumed to be the client. Even in these cases, therefore, transparency and the 'unveiling' of the automated decision-making process can serve to protect workers employed under a fictitious service contract, which in all likelihood conceals a real agency relationship. In addition to this function of 'unveiling' the real dynamics of the employment relationship, the issue of transparency opens up a space for reflection on the potential scope for reviewing the employer's powers in terms of rationality, reasonableness, non-arbitrariness and non-discrimination.

The more complex the digitalised work contexts become, the more transparency, communication, information and language become tools for creating an 'environment of trust', for reducing opportunistic behaviour, based on the awareness of the worker's difficulties in getting to know the management data concerning him and its rapid processing, for facilitating predictable work management, but also tools for enabling potential forms of control over the employer's actions and their intrinsic rationality, obscured by the black box. A black box that perhaps cannot really be opened, but which at least – even at the cost of forcing it – one can try to glimpse, in a glimmer of light, the content to be scrutinised in terms of rationality, the reasonableness of the exercise of power, the mystification of reality, and so on.

From this point of view, the information obligations on fully automated systems would perhaps have deserved to be included in a specific and more organic regulation on the use of such systems. A regulation that goes beyond mere transparency to become a real 'system' regulation, of at least the same dignity as that contained in Art 4 of the Workers' Statute, which originally provided for audiovisual controls in the workplace.

On the other hand, as the Italian DPA itself points out in the note 'First indications on Legislative Decree no 104 of 27 June 2022, the so-called "Transparency Decree" ' of 24 January 2023, the links between the use of automated systems and the limits already provided for in the Workers' Statute are obvious: even in the case of automated systems, the existence of the conditions of lawfulness established by Art 4 of the Workers' Statute must always be verified. In fact, even in the case of automated systems, the existence of the conditions of legality set out in Art 4 of the Workers' Statute must always be verified, as well as compliance with the provisions of Art 8 of the same statute, which prohibits the employer from acquiring and, in any case, processing information and facts that are not relevant to the assessment of the employee's professional aptitude or, in any case, that relate to the employee's private sphere. Given the already significant points of contact between the new information obligations and Art 4 of the Workers' Statute,

[33] See Tribunale di Padova 16 July 2019 no 550 and Tribunale di Bologna 3 marzo 2023 no 126 available at www.dejure.it.

precisely in order to avoid the difficulties of translating the language of machines into a language understandable by humans, it would be desirable for employers to proceed to very detailed information of the trade unions, if not to real forms of prior negotiation of the algorithmic system with the trade unions themselves (for example, precisely through the authorisation agreements referred to in Art 4 of the Workers' Statute). In other words, the negotiation of the algorithm, far from remaining a mere hypothesis, can serve as a real instrument capable of guaranteeing the same employer party against any future litigation on the matter.

In fact, we can only briefly recall the positive experience of negotiations between the trade unions and Afiniti LTD, an American multinational data and software company founded in 2005 that focuses on the development of artificial intelligence for use in call centres. This company has developed an algorithm that, by combining artificial intelligence and big data, predicts in real time the behaviour of the person calling a company's call centre. The system searches for the most appropriate agent to interact with that call. Not the first available operator, as is the case with more traditional inbound queue management systems, but the person who is most 'likeable', closest to the caller's expectations and who expects a comprehensive response. In other words, the software manages the operator by directing him to answer the call, 'selecting' him on the basis of personal characteristics that make him 'preferable' to other operators. It is well known that in Italy the dissemination of such software by companies such as Enel, Tim and Wind was preceded by an agreement between some of these companies and the trade unions, in accordance with Art 4 of the Workers' Statute. The main aim of this agreement was to ensure that the information 'captured' by the algorithm would remain anonymous in any case, and therefore not usable for all purposes of the employment relationship.

Collective bargaining and trade union initiatives can be the most effective means of implementing legal safeguards against the risks associated with algorithmic management.[34] Collective agreements can offer solutions for particular challenges in this regard, also at the sectoral and company level. They can cope with these challenges fairly flexibly by taking into account the interests of workers and employers. Collective agreements can also tailor the general principles laid down in legislation and apply them in specific contexts. Prior negotiation of automated systems, their logic and operation, could therefore contribute to a prior disclosure, in accordance with the principle of good faith, of the problems of opacity of the algorithm. Upstream bargaining, which could therefore have the effect of reducing downstream information obligations prior to use, since the operating logic could be considered to have already been partly explained, negotiated and therefore made comprehensible by the 'words' and explanation of the union agreement itself.

[34] See V. De Stefano and S. Taes, 'Algorithmic management and collective bargaining' 29 *Transfer: European Review of Labour and Research*, 1, 21-36 (2023).

Malebolge

On the High Open Sea
Computational Empiricism and the Naturalization of Law

Nicola Lettieri*

But I put forth on the high open sea
With one sole ship, and that small company
By which I never had deserted been.
Ulysses in Dante Alighieri's '*Divine Comedy*',
Inferno XXVI, trans. by H.W. Longfellow

At first, I was deeply alarmed.
I had the feeling that,
beneath the surface of atomic phenomena,
I was looking at a more internal level
of mysterious beauty.
W. Heisenberg, *Physics and beyond*
(London: Allen & Unwin, 1971), 129

Abstract

The paper projects into the legal universe a topic, the overcoming of the divisions between natural and social sciences, long central in philosophical debate. Fed by a longstanding research trajectory intersecting law, complexity theory, and computational social sciences, it advocates for a vision where law is conceptualized and studied in empirical terms as a natural phenomenon, a part of natural's world complexity in all its relations with the many levels of reality – from individual cognitive mechanisms to social macro dynamics – playing a role in its emergence and evolution. Cornerstone of the proposal is the ability of computational heuristics and methods to foster new ways to empirically understand reality; what Paul Humphreys, the philosopher of science, terms 'computational empiricism'. Laden with profound epistemological and methodological implications, this approach lays the groundwork for a research agenda convincingly non-disciplinary, open to radical questions and, to a large extent, yet to be built.

* Nicola Lettieri is researcher at the National Institute for Public Policy Analysis (Rome), associate researcher at the Institute of Cognitive Sciences and Technologies of the Italian National Research Council and adjunct professor of Legal informatics at the University of Sannio (Benevento). This paper represents an ideal continuation of a reflection begun long ago and developed within several papers. The ideas contained in these pages echo insights I first articulated in 2014 in the Research Topic call 'Law as a Natural Phenomenon: The Empirical Investigation of the Legal Universe between Complexity, Biology, and Computation' hosted by the journals *Frontiers in Interdisciplinary Physics*, *Frontiers in Evolutionary Sociology,* and *Frontiers in Social and Evolutionary Neuroscience* ((http://tinyurl.com/4ydx4rck) last visited 10 February 2024). The author is truly grateful to Ilaria Pica for the precious and insightful comments given during the draft of this paper.

I. On the High Open Sea

I will not mince words. I think that anyone who agrees to write for a section named 'Malebolge' must be resolute like Dante's Ulysses: fully committed to the 'mad flight', ready to 'put forth on the high open sea' without hesitation, made brave by the burning desire to open new frontiers.

This article resonates with such a spirit. In the following, I will provide some statements that are free from the fear of radical or unorthodox considerations, reflections born venturing far beyond the shores of traditional legal research. To this purpose, I will repeatedly and explicitly evoke a researcher who, to remain in a Dantean universe, embodied for me the figure of Virgil, a guide and source of inspiration. I refer to Domenico Parisi, philosopher of science, psychologist and cognitive scientist, a pioneer in fields ranging from psycholinguistics, to artificial life, artificial intelligence and evolutionary robotics, who has also devoted much of his thinking to the future of social sciences and their computational and non-disciplinary development.

Inspirer, quite literally, of generations of researchers from any field, Parisi has played a decisive role in the evolution of my research path and in convincing me of the need to look at the world of law 'from the outside', beyond disciplinary boundaries, in search of new ways to interpret and, therefore, understand reality.

I have always admired and shared this attitude for a number of reasons, but above all for the scientific results it leads to. Upon closer inspection, the story of the progress of science, is the story of the ability of human beings to move away from consolidated visions and conceptual structures to build deeper forms of understanding the world. If, for example, Boltzmann had not dared to search *out* from physics[1] solutions to interpret the behavior of systems composed of billions of particles, statistical mechanics would not have seen the light.

Fed by an experimental research path at the boundaries between law, complexity theory, and computational social science, this contribution tries to bring the '*ethos* of the external observer'[2] into the legal context through a reflection on the future

[1] We refer here to social statistics and Quetelet's probability theory. On this point, see T. M. Porter, 'From Quetelet to Maxwell: Social statistics and the origins of statistical physics', in R. Cohen ed, *The Natural Sciences and the Social Sciences* (Dordrecht: Springer, 1994), 345-362.

[2] Such an approach led me to engage with the most diverse research areas from computational legal studies to cognitive science via complexity theory. Among the works done in between these fields: N. Lettieri, 'Fuori da uno splendido isolamento. Le scienze cognitive negli orizzonti della scienza giuridica' *Sistemi Intelligenti*, 22, 323-336 (2010); Id and D. Parisi, 'Neminem laedere. An evolutionary agent-based model of the interplay between punishment and damaging behaviours' 21(4) *Artificial Intelligence and Law,* 425-453 (2013); N. Lettieri, *Ius in silico. Simulazione, computazione, diritto* (Napoli: Edizioni Scientifiche Italiane, 2013); Id, 'Computational Social Science, the Evolution of Policy Design and Rule Making in Smart Societies' 8(2) *Future Internet*, 19 (2016); Id et al, 'The legal macroscope: Experimenting with visual legal analytics' 16(4) *Information Visualization*, 332-345 (2017); Ead, 'Platform economy and techno-regulation. Experimenting with reputation and nudge' 11(7) *Future Internet*, 163, (2019); N. Lettieri, 'Law In The Turing's Cathedral. Notes on the Algorithmic Future of the Legal Research', in W. Barfield ed, *Cambridge Handbook on The Law Of Algorithms* (Cambridge: Cambridge University Press, 2020), 32-95; N. Lettieri et al,

of law and the science that studies it. The topic chosen is the naturalization of law, the tracing of legal phenomena back to natural ones. The process can be well connoted using Parisi's words: to naturalize implies adopting

> 'a vocabulary of concepts, a theoretical framework, an "ontology" of entities, research methodologies, which do not assume a difference, a lack of homogeneity, a separation between the study of nature and the study of the phenomenon itself, between phenomena that can be "explained" and phenomena that can only be "understood" '.[3]

In other words, naturalizing the legal phenomenon[4] means: i. studying it using 'the same concepts used by the natural sciences or concepts defined in terms of concepts used by the natural sciences';[5] ii. thinking of it as 'consisting of mechanisms and processes that are quantitative in nature and in which physical causes produce physical effects'; iii. reconstructing its 'emergence over time from a previous state of the world in which it did not exist'.[6]

Today, the social sciences exhibit a pronounced tendency to dichotomize nature and society, employing conceptual and methodological tools vastly different from those of the natural sciences. Yet, bridging these two realms seems to be commendable for several reasons. Firstly, from an ontological perspective, the man-nature divide is at odds with the reality of an interconnected ensemble of phenomena, which are fully understandable only in their interrelations. Secondly, from an epistemological standpoint, this separation hinders our ability to comprehend humans, their behaviors, and societies.

The above also applies to law, where the bifurcation between nature and society not only obstruct a deeper empirical grasp of the real-world processes underpinning legal phenomena, but also hamper the formulation of legal solutions

'Knowledge mining and social dangerousness assessment in criminal justice: metaheuristic integration of machine learning and graph-based inference' 31(4) *Artificial Intelligence and Law*, 653-702 (2023); Ead, 'Keeping judges in the loop: a human-machine collaboration strategy against the blind spots of AI in criminal justice' 27(16) *Soft Computing*, 1-19 (2023).

[3] See D. Parisi, 'Naturalizzazione della cultura' *Montag*, 4, 19-35 (1998). Parisi puts forth a reflection in line with the growing attention paid, also on a philosophical level, to Naturalism. On this point see, among others, E. Agazzi and N. Vassallo eds, *Introduzione al naturalismo filosofico contemporaneo* (Milano: Franco Angeli, 1998); F. Laudisa, *Naturalismo* (Roma-Bari: Laterza, 2014); H. Price, *Naturalism without mirrors* (Oxford: Oxford University Press, 2010).

[4] The expression is here used in an extremely broad sense to allude to a complex social fact in all its components and manifestations, encompassing everything from written norms to the cognitive processes underlying the emergence and diffusion of social norms.

[5] In the anti-naturalistic perspective that permeates much of the human sciences, in fact, the separation between man and nature is used to legitimize the distinction between what can be studied scientifically (physical, chemical and biological phenomena) and realities (consciousness, moral values, laws etc) basically deemed incompatible with the empirical method based on direct observation, the formulation of hypotheses, experimental verification and mathematical demonstration.

[6] D. Parisi, Le sette nane. Una critica delle scienze dell'uomo e una proposta per un loro futuro migliore (Napoli: Liguori, 2008).

grounded in a robust scientific comprehension of reality.

A cornerstone of our reflection, as hinted at in the title, is the role of computation in shaping the scientific understanding of the world we live in. We will argue that advancements in information science, technology, and computational methods open new avenues for approaching social (and, therefore legal) phenomena, enabling the integration of knowledge and the linking of various reality aspects which, as we have seen, are an essential precondition for reasoning in naturalistic terms. The project is ambitious, it is time to venture into the high open sea.

II. Computational Empiricism: On the Epistemic Role of Computation

The last decades have witnessed the spread of computation-based approaches in almost any area of science. Virtually every discipline, from physics to social psychology, has today a 'computational counterpart', a corresponding sub-sector extensively using algorithms to shed light on the phenomena it is interested in. As a matter of fact, along with the streams of data flooding our lives, computation - here understood not just as numerical calculation or algorithm implementation, but as any kind of automated information processing including symbolic reasoning or pattern recognition[7] - is opening new frontiers to scientific investigation.

In such a scenario, one should question how computational and data-driven heuristics challenge established epistemologies. The relationship between science and computing has been a subject of discussion since the middle of the last century, when, during the Manhattan Project, the first digital computer saw the light. In that very moment, to use the words of John von Neumann's chief engineer Julian Bigelow, 'a tidal wave of computational power was about to break and inundate everything in science, and things would never have been the same'.[8]

Over the decades, contributions on this point have been countless with a sharp increase since the 2000s, after the explosion of Big Data and the spread of the computational science paradigm.[9] On the other hand, issues to be addressed are numerous spanning from the reproducibility of experiments made with

[7] P. Michelucci ed, *Handbook of Human Computation* (New York: Springer, 2016).

[8] G. Dyson, Turing's Cathedral: The Origins of the Digital Universe (New York: Pantheon, 2012).

[9] See, within an ever expanding literature, P. Thagard, Computational Philosophy of Science (Cambridge: MIT Press, 1988); T. Tibor, Computer Epistemology: A Treatise on the Feasibility of the Unfeasible or Old Ideas Brewed New (Singapore: World Scientific, 1991); P. Humphreys, Extending Ourselves: Computational Science, Empiricism, and Scientific Method (Oxford: Oxford University Press, 2004); J.V. Segura, 'Computational Epistemology and e-Science: A New Way of Thinking' 19(4) Minds and Machines, 557 (2009); E. Winsberg, Science in the Age of Computer Simulation (Chicago: University of Chicago Press, 2010); R. Kitchin, 'Big Data, New Epistemologies and Paradigm Shifts' 1(1) Big Data & Society, (2014).

computational instruments[10] or the limits of e-discovery[11] and the scientific value of the results produced by AI working with petabytes of high-dimensional data. Most of these problems are related to complex topics on the borders between the philosophy of science and technical - sometimes strictly mathematical - issues[12] that go far beyond the scope of this work. There are, however, some general epistemological questions it is worth dwelling on when pondering the perspective of any form of evolution in a naturalistic sense of legal science.

The question we wish to consider here is framed by Paul Humphreys in a volume offering a systematic philosophical account of computational research,[13] and of how the latter is producing different approaches to the scientific method. Starting from research practices like agent-based simulations,[14] Humphreys draws a parallel between the ways in which computational methods have enhanced our abilities to mathematically model reality and the more familiar ways in which scientific instruments have expanded our access to the empirical world. This enhancement is effectively qualified as 'empirical extension': similar to technologies that extend our perceptual abilities (think to the electronic microscope), and together with the data deluge, computation moves the boundaries between what is observable and what is unobservable.

If the word fact denotes real-world phenomena that can be somehow measured and linked in causal terms, then, in extending the 'observational realm', computation extends the realm of facts, thus paving the way to new forms of empirical investigation qualified by Humphreys as 'computational empiricism'. Examples can be found in the possibility of detecting and analyzing previously inaccessible

[10] R.D. Peng, 'Reproducible research in computational science' 334(6060) *Science*, 1226-1227 (2011).

[11] P. Langley, 'The computational support of scientific discovery' 53(3) *International Journal of Human–Computer Studies*, 393-410 (2000).

[12] D.H. Bailey et al, 'Reproducibility in computational science: a case study: Randomness of the digits of Pi' 26(3) *Experimental Mathematics*, 298-305 (2017).

[13] P. Humphreys, n 9 above.

[14] Agent-based social simulation models (ABSS) are a type of computational modeling used to understand and analyze social phenomena. This approach involves creating simulations in which individual entities, known as 'agents', interact within a defined environment according to a set of rules. Each agent in an ABSS model represents an individual or a collective entity (like a group, organization, or even a nation), and is typically characterized by a set of attributes, decision-making capabilities, and behaviors (among the others see, on this topic, J.M. Epstein, *Generative Social Science: Studies in Agent-Based Computational Modeling* (Princeton: Princeton University Press, 2006). ABSS models are led by the theoretical assumption that the macro-level social phenomena (eg, the emergence of social norms or the spread of racial segregation) are the result deriving from the interactions occurring, at the micro-level, between individuals and between individuals and the environment. ABSS models typically include several key components. First, a set of heterogeneous artificial agents simulates real-world actors and their behaviors. Second, there are rules of interaction that govern these agents. Finally, an environment is defined, encompassing dynamic, organizational, and spatial characteristics. Today social simulation provides policy-makers with the ability to run a what-if analysis allowing to observe the effects potentially deriving from different choices by means of well-developed models of a given 'target system' (see, for example, the effects of social stressors on patterns of political instability).

dimensions of reality from internal states of individuals (think sentiment analysis or computational analysis of neuroscientific data) to the dynamics occurring on social networks (think about the study of opinion dynamics on network models by means of simulation models).

The computational extension of the boundaries of 'facts', broadens the limits of what we can consider empirical research (and, therefore, natural science), increasing the variety of topics a given area of science can tackle. In light of this evolution, it becomes essential to decide where to steer our efforts. This is also true for legal scholarship, at least for that part of it that considers empirical investigation a challenge worthy of engagement.

However, despite the technical and practical advances, achievements in the research areas that have been most directly concerned with the intersections of law and information technology - from the early *Jurimetrics*[15] to today's *Computational legal studies*[16] - have not brought substantial changes in the questions that scholars of the legal phenomenon ask themselves, in the way the goals and boundaries of legal science are conceived.

III. The 'Empirical Shyness' of Legal Scholarship

Legal science is, arguably, one of the areas of knowledge furthest from the natural science paradigm. Although with some exceptions, which we will discuss below, it can reasonably be argued that, overall, legal studies have always maintained a considerable distance from the methods, the questions and, above all, from the vision of reality that characterizes the natural sciences.

The statement largely stems from how the concept of law[17] - and, consequently, of the science that studies it - has evolved over time. As a matter of fact, the history of Western legal thought reveals a trajectory where the interpretations of the legal phenomenon that have prevailed leave little room for empirical analyses and the

[15] L. Loevinger, 'Jurimetrics-The Next Step Forward' 33 *Minnesota Law Review*, 455 (1948).

[16] R. Whalen ed, Computational Legal Studies: The Promise and Challenge of Data-Driven Research (Cheltenham: Edward Elgar Publishing, 2020).

[17] The problem of the concept of law, that is, of the determination of the elements that allow legal rules to be distinguished from other types of rules, is, to use Bobbio's words, one of the 'capital problems of the philosophy of law' whose difficulty depends 'by the breadth, multiplicity and complexity of the field of experience to which the jurist or legal philosopher turns his attention'. For this reason, the concept of law has taken on a different meaning over time depending on the observer's point of view (scholar of private, public or international law, legal philosopher, sociologist, historian) and the historical moment. On this point, the scheme proposed by Bobbio is still current, cataloging the positions taken by jurists in this regard, highlighting how the typification effort has historically concentrated on a few fundamental characteristics of the legal norm: i) structure, ii) content, iii) purpose, iv) subject who establishes the rule, v) subject to whom the rule is addressed, vi) sanction (see N. Bobbio, 'Diritto', in A. Azara and E. Eula eds, *Novissimo Digesto Italiano* (Torino: UTET, 3rd ed, 1960), V, 769-776). Still on this point, for a more up-to-date overview, see, within an extensive literature, G. Fassò, *Storia della filosofia del diritto. III. Ottocento e Novecento* (Roma-Bari: Laterza, 2020).

model of a science built around the 'sensible experiences' and the 'certain demonstrations' Galileo put at the core of the scientific endeavour. Even with a thousand nuances, the answer to the question 'what is law?' has always gravitated around the idea of a system of written rules of conduct (the so-called *ius positum*) before which the *scientist* is called to perform work of interpretation and, at most, of systematization.[18]

Law, on the other hand, has an eminently practical function. Overall, it aims at building the conditions for an orderly conduct of collective life by defining canons of justice, prescribing behaviour, organizing cooperation, and administering sanctions for actions deemed harmful to the common good.

In the face of this, it is not surprising that legal science has assumed the prevailing character of a 'practical'[19] science, an area of study separate from other fields of knowledge that, using its own criteria and methods, aims more at 'describing' the system of norms for the use of scholars and practitioners by guaranteeing its interpretation based on verifiable logical procedures,[20] than at scientifically 'explaining' the characteristics and dynamics of legal phenomenon seen as fact and read in terms of processes occurring on levels of reality outside the normative one. Such a circumstance is confirmed in the debate on the scientific nature of legal studies that began when jurists began to seriously engage with the natural sciences and the achievements resulting from the practice of the scientific method.

Symbolically started around the middle of the 19th century by the legal

[18] One of the most compendious definitions of law is probably the one offered more than a century ago by François Gèny: 'a set of rules to which man's external conduct in his relations with his fellow men is subject, which, under the inspiration of the natural idea of justice [...] and, appearing susceptible of social and perhaps coercive sanction, are or tend to be provided with such sanction and from this time forward are placed in the form of categorical commands dominating the particular wills to secure order in society', F. Gény, *Science et technique en droit privé positif: nouvelle contribution à la critique de la méthode juridique*, I (Paris: Receuil Sirey, 1912), 51.

[19] The connection with practical interests and objectives is also highlighted, with reference to the social and human sciences in general, by Parisi: 'in the human sciences, the connection between knowledge and practical interests is stronger and has a deeper impact on the nature of the disciplines and theories.[...] the human sciences are immediately focused on the practical problems of human beings, so much so that in them sometimes there seems to be no disinterested space for knowledge before one even thinks about using it for practical purposes', see D. Parisi, *Simulazioni: la realtà rifatta nel computer* (Bologna: Il Mulino, 2010), 130.

[20] In the last century there has been no shortage of anti-formalist positions fighting the idea of a legal science essentially oriented towards exegesis and systematization of sources. One of the more recent and authoritative expressions of this interpretation of law and the role of the jurist can be found in the work of Paolo Grossi, who strongly opposes the 'prison of exegesis' in which the jurist is often forced by assigning the latter an active role in understanding the reality to be regulated. According to Grossi, jurists also have the fundamental task of 'reading the signs of the times, flexibly following the very rapid movement and change, noting the gaps that evolution has generated', a reading which in some way underlies needs similar to those that animate the proposal of naturalization presented in these pages. On this point see P. Grossi, *Società, diritto, stato: un recupero per il diritto* (Milano: Giuffrè, 2006). Along the same lines, see Id, *Mitologie giuridiche della modernità* (Milano: Giuffrè, 2007).

philosopher Von Kirchmann with the *pamphlet* 'The lack of value of jurisprudence as a science',[21] the reflection raises issues still relevant today, yet far from being satisfactorily resolved.

Despite the quantity and variety of contributions accumulated over time, to paraphrase what Parisi said about the relationships between philosophy and complexity science, legal research uses 'outdated reference frames and does not take into account theoretical and methodological developments in science that would be of great importance'.[22]

Upon closer inspection, the point is not - for many aspects - the abstract transferability of natural science methods into the legal domain. The point is, similarly to what happens in other areas of the social sciences, to reflect adequately on the meaning and possible configuration of the relationship that can be established between the natural sciences, the legal regulation of social life, the study of *ius positum*, and the perspective of an empirical science of the legal phenomenon in line with the knowledge and vision of the world that the progress of science offers us today.

IV. The Troubled Relationship Between Law and the Natural Sciences

The projection towards the natural sciences is not, in an absolute sense, a new phenomenon in the history of legal thought. Ever since the scientific method revealed its revolutionary ability to illuminate the fundamental laws of the universe, more than one jurist has recognized Galileo's science as a model from which to draw on a scientific or methodological level. This deserves a brief mention at least to offer at my arguments a dialectical reference term.

The first manifestations of this interest date back to the 17th century, when the methods of the new 'natural philosophy' began to be perceived by the exponents of the 'natural law' as possible allies in the opera of discovering 'Natural law', the set of transcendent principles of justice and rationality that natural law scholars believed they had to scientifically investigate in order then to transpose them into the discipline of real life.

Hugo Grotius, the father of 'modern natural law', is probably the first and most significant representative of this line of thought. Having put aside the idea of a system of rules resulting from the will of a God-person, the 'Natural law' becomes for him a fact of nature knowable, as such, through the exercise of reason and the language of science. It is no coincidence that in *Prolegomena* of the *De iure belli*

[21] The statement is well known: 'Insofar as the science of law takes the contingent as its object, it becomes contingent itself: three words of rectification from the legislator, and entire libraries become waste paper' (see J.H. Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, Italian translation: *La mancanza di valore della giurisprudenza come scienza* (Berlin: Julius von Springer, 1848).

[22] See D. Parisi, 'Ritardi della filosofia' *Rivista di filosofia*, 413-454 (2000).

ac pacis,[23] the treaty of international law to which his fame is mainly due to, he declares to have used the methods of mathematical physics to root the identification of the principles of natural law presented in his work in a rigorous logical path.

Thomas Hobbes, another exponent of the 'Natural law' school,[24] goes somewhat further. Indeed, his doctrine of the State is rooted not only in the Galilean theory of motion and mechanics, but also in another natural science, modern physiology emerging in those years,[25] which becomes an additional source of metaphors for conceptualizing the dynamics of law and imagining new forms of regulation of human societies.

The assumption for which natural sciences constitute the founding model for a new legal science continued throughout the eighteenth century. Accompanied by the suggestions of a Newtonian physics that quickly became a reference for all social sciences,[26] the 'naturalist' perspective continued to be a source of inspiration for several jurists. The Scottish Enlightenment thinkers David Hume and Adam Smith, to mention two significant names, also went as far, albeit with different motivations, as to vague a science of human nature that applied Newton's view of reality and experimental method to law (as well as morality and politics).[27]

[23] Grotius speaks of 'demonstrations' founded on 'notions so evident that no one can deny them without doing violence to himself'. The method is described in more detail by Grotius in *De jure predae*: 'as mathematicians usually preface every concrete demonstration with a preliminary formulation of certain broad axioms (*some common... ideas*) on which all people easily agree, in order to have some fixed point from which to proceed in the following proof, so we will also indicate certain rules (*regulations*) and read (*laws*) of the most general kind, presenting them as preliminary assumptions that must be recalled, rather than learned for the first time, in order to lay a foundation on which our other conclusions can confidently rest'. See H. Grotius, *De jure belli ac pacis*, translation by F.W. Kelsey (Oxford: Clarendon Press, 1925), 29-30.

[24] The use of mathematical language and metaphors coming from the natural sciences is a characteristic feature of the entire modern natural law theory. Thomasius, philosopher and jurist who authored, in 1707, a German translation of the *De iure belli ac pacis*, argued that the natural law scholars Hugo Grotius, Thomas Hobbes and Samuel Pufendorf had distinguished themselves precisely for having applied mathematical reasoning to natural law, even going so far as to state that 'a non-mathematician could never hope to understand the science of natural law'. The works of other fundamental authors can be traced back, with all the needed differences, to the same cultural background: the *Ethica more geometrico demonstrata* from Baruch *Spinoz* and the *Specimen demonstrationum politicarum* by Leibniz, two works in which logic and probability calculation become an integral part of the analyis. On this point see the very interesting work carried out in I.B. Cohen, *Scienze della natura e scienze sociali* (Bari: Laterza, 1993), 129.

[25] We refer here to the work of William Harvey, an English doctor known for being the first scholar to accurately describe the human circulatory system and the properties of blood. Hobbes also drew heavily on Harvey's discoveries, which must have had a special importance for him as they were based on mathematics, ie, on quantitative considerations.

[26] The summary proposed by the political scientist and historian is indicative J.S. McClelland: 'in the Enlightenment, everybody wanted to be the Newton of the social sciences. Find the axioms of human nature, deduce from them in the approved Newtonian manner, and a complete science of man became a possibility'. J.S. McClelland, *A history of western political thought* (London: Routledge, 2005), 280.

[27] M.G. Barberis, Giuristi e filosofi. Una storia della filosofia del diritto (Bologna: il Mulino, 2011), 93.

However, the dialogue between legal and natural sciences softened at the end of the Enlightenment, shifting towards objectives that appear less radical when compared with the ambitions of natural law scholars in the face of the achievements of Galilean science. At the turn of the nineteenth and twentieth centuries, the influence of natural science on the legal science takes on new connotations: pushing towards the study of factual aspects of the legal phenomenon, encouraging openness to empirical and quantitative methods of inquiry, and fostering dialogue with other disciplines, but no longer touching, in explicitly naturalistic terms, on the conception of law and the science that is to study it. The currents of *Realism*[28] and of *Empirical Legal Studies*[29] or, again, the Sociology of law,[30] are representative examples of this change of pace.

Overall, the sketched picture leaves no room for doubt: the idea that law is a part of the natural world that can be explored by drawing on the vision of reality, the acquisitions and methods of the natural sciences have had limited follow-up. The naturalistic impetus of Grotius and his successors has basically exhausted itself in the adoption of the deductive axiomatic method, while the more empirically oriented declinations of legal studies have never gone so far as to consider as a possible starting point of their inquiry an explicit location of law within nature.

To date, while there is no shortage of areas of study investigating law-relevant phenomena from the perspective of the natural sciences - think of the strand of

[28] The expression refers to two connected currents of thought: the *Scandinavian realism,* aimed at exploring the impact exerted by individual psychological attitudes and the social context on the mechanisms of application of the rules and the *American legal realism,* movement born in American law faculties with the idea of extending the rigor of the scientific method to the study of the fundamental concepts of law. Among the most significant works of the Scandinavian realism see, A.A.T. Hägerström and M.F.S. Fries, *Socialfilosofiska uppsatser. Med inledning av Martin Fries* (Stockholm: Albert Bonniers Förlag, 1939); A. Ross, *On Law and Justice* (London: Stevens & Sons, 1958); K. Olivecrona and C.D. Broad, 'Inquiries into the Nature of Law and Morals' 30(115) *Philosophy*, 369-373 (1955). On the *American legal realism* see, O.W. Holmes Jr., 'The path of the law' 10(8) *Harvard Law Review*, 457-478 (1897); K. Llewellyn, 'A realistic jurisprudence – the next step' 30(4) *Columbia Law Review*, 431-465 (1930); J. Frank, *Law and the Modern Mind* (New York: Routledge, 1930).

[29] Relatively new approach to the study of law which explicitly lists among its objectives the experimental and empirical investigation of legal questions. Developing in the United States over the last ten years, the movement of *Empirical Legal Studies* is characterized by a highly interdisciplinary research perspective. It is no coincidence that, among the objectives of the Society for Empirical Legal Studies, there is the promotion of 'conversations among scholars in law, psychology, sociology, economics, political science, criminology, finance, health care, and other disciplines'. For an interesting overview of the topics covered in the area of Empirical legal studies, see P. Cane and H. Kritzer eds, *The Oxford handbook of empirical legal research* (Oxford: Oxford University Press, 2012).

[30] Area of legal studies which, to use the Renato Treves words, aims to investigate 'on the one hand the problem of society in law, that is, social behavior that conforms or differs from the norms, of the so-called "effective" legal reality, which can act as an indicator of a free, latent, living or developing right; on the other hand, the problem of law in society, that is, that of the position, function and purpose of law in society seen as a whole', see R. Treves, *Sociologia del diritto: origini, ricerche, problemi* (Torino: Einaudi, 1987), 5.

research on the borders between neuroscience and law[31] - no front in the modern 'naturalistic' sense of the science of legal phenomenon has yet been opened. The time, as we will show, is now to move in this direction and, in this paper, the time has come to fill this proposal with content and reasons.

V. Thinking of Law as a Natural Phenomenon

The hypothesis of a naturalization of legal science is not a trivial one. Without using hyperbole or adhering to a specific philosophy of science perspective, it can be argued that the adoption of a modernly naturalistic approach to the legal phenomenon is a choice that affect constituent elements of the primary identity of legal science, those same aspects that, in Kuhn's (2009) vision, define the concept of a scientific paradigm:[32] the reference ontology; the research questions; the techniques and tools of inquiry as well as the solutions deemed valid.

It will not seem nonsensical, therefore, if, before delving into the merits of such a radical hypothesis, we spend some time delineating the boundaries of the proposed idea, particularly in clarifying the relationship it should have with what legal science already encompasses as a whole today. From this perspective, it is important to specify that the proposal outlined in these pages does not intend to deny the validity of the legal science model currently followed by the majority of scholars and practitioners of law, regardless of the legal system under consideration. Law is a *social technology* which, as we have seen, has the eminently practical function of enabling the orderly conduct of social life and directing the latter toward shared and socially desirable ends.

In the light of this, the persistence of a legal science-*scientia legum*, an area of study primarily focused on exegesis, the systematization of legal sources (rules, case law etc) and the reflection around the formal criteria of production of the latter makes and will continue to make sense.[33]

The real issue lies elsewhere. Beneath the *surface* of positive law, its sources

[31] The literature on the subject is now very extensive. Among the first works on the topic see M.D. Freeman and O.R. Goodenough eds, *Law, Mind and Brain* (Farnham: Ashgate Publishing, 2009); O.R. Goodenough and M. Tucker, 'Law and cognitive neuroscience' 6 *Annual Review of Law and Social Science*, 61-92 (2010). For an updated overview of the subject matter, see among others, in Italian, G. Bombelli and A. Lavazza eds, *Law and Neuroscience. New Perspectives* (Sesto San Giovanni: Mimesis, 2021).

[32] Identifiable, to use Kuhn's own words, with a 'model of problems and solutions acceptable to those who practice a certain field of research', see T.S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 2012), 10.

[33] It is worth recalling here the consideration made by Carlo Rovelli on the possible coexistence of the naturalistic approach with other forms of study of reality: 'Law, aesthetics, morality, logic, psychology... are autonomous sciences. But the assumptions of these disciplines and the realities they deal with do not contradict naturalism, because they can be traced back to the general coherence of the natural world, just as chemistry is compatible with physics: our thinking and our inner life are real phenomena, generated from us, natural creatures in a natural world, C. Rovelli, 'Siamo creature naturali in un mondo naturale' *Domenica del Sole 24 Ore*, 14 December 2014.

and mechanisms of action, phenomena belonging to different levels of reality[34] (from that of individual cognition to that of institutions) are stirred and interact with each other, all phenomena that, although traditionally brought back to the domain of the natural sciences, play a decisive role in the genesis, manifestation and evolution of what happens on the legal level. It is therefore essential to recontextualize and study them within a coherent theoretical and research framework.

On the other hand, one of the hallmarks of natural science, is the attempt to explain phenomena that take place on one level of reality in terms of processes that take place on other levels. So does physics, so have chemistry and biology.[35]

The legal phenomenon is not exempt from this multi-layered interpretation of reality: it too unfolds across various levels of reality, and understanding it requires identifying and studying these layers. From this perspective - this is our main claim - , it is not unreasonable to regard law as an integral part of the natural world, inclusive of all phenomena that shape its characteristics.[36] This holds true despite the fact that law primarily presents itself as an artifact, a deliberately crafted tool designed to achieve a specific purpose.

The challenge, essentially, is to reconnect law with nature, to address what Huw Price – author of one of the most recent and insightful epistemological contributions on the subject of naturalism – defines as the 'problem of placement',[37] the issue of where to *position* in relation to the natural sciences entities such as law, moral values, or conscience, which seem alien to the world described by physics and other sciences studying nature.

Upon reflection, the decision to place law within the category of natural phenomena (with all that entails in terms of methodology and the willingness to discover other levels of reality within it),[38] has more than one rationale. A turn in

[34] Think, among others, of the biological and cognitive mechanisms underlying legally relevant individual choices currently studied by cognitive sciences, neurosciences and behavioral sciences or, again, the collective dynamics investigated by computational social sciences and sociophysics and capable of influence the operation of legal rules.

[35] A quintessential example of this approach in the natural sciences is provided by Erwin Schrödinger's seminal essay, where he first explores the concept of explaining life - specifically the genetic transmission of hereditary traits - through quantum phenomena. This work essentially paved the way for the emergence of molecular biology (see E. Schrödinger, *What is Life? The Physical Aspect of the Living Cell* (Cambridge: Cambridge University Press, 1944).

[36] Words used by Daniel Dennett in his attempt to build a naturalistic approach to religion apply here: 'I might mean that religion is natural in the sense that it is not supernatural, a human phenomenon made up of events, organisms, objects, structures, forms and the like, which obey the laws of physics or biology [...] religion, as a complex set of phenomena, is a completely natural phenomenon[...] But smoking, war and death are also natural. In this sense of natural, everything artificial is natural! The Aswan Dam is no less natural than a beaver dam[...] natural sciences take as their object every aspect of nature, and that means jungles and cities, birds and airplanes', see D.C. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon*, (London: Penguin, 2006).

[37] H. Price, *Naturalism without Mirrors* (Oxford: Oxford University Press, 2010), 6.

[38] The drive to 'dig', to seek new levels *inside of* observed reality, is a distinctive feature of natural science well exemplified by the search for the ultimate components of matter which has driven physics from the atomism of Democritus to quantum theory. The investigation of the fundamental

this direction is not justified only, in ontological terms, by a stance regarding an intrinsic quality – being natural - of the object of study. The possibility of tracing back a phenomenon to the category of 'natural' things is also a function of the concrete possibility of observing, measuring,[39] empirically investigating, and experimentally exploring it.

In a similar perspective, any phenomenon that can be measured, modelled, experimented and, in a broad sense, explored with the methods of natural sciences becomes 'natural'. Today, the perimeter of what can be studied 'naturalistically' has greatly expanded and included many of the phenomena that are at play beneath the surface of law evoked earlier. The factors behind this expansion are diverse and lie as much on a scientific and methodological level as on the broadly instrumental-technological one.

From the scientific point of view, a first driving factor for the hypothesis of naturalizing law here proposed is represented by the enormous strides made in understanding 'non-legal' levels of reality on which law-relevant phenomena occur. A good example in this sense is the insights gained by cognitive sciences regarding individual and collective mental processes underlying legal phenomena or involved in the formation of the law itself such as the so-called *opinio iuris ac necessitatis* in the case of custom. A similar argument can be made for the results achieved in other research areas, from behavioral sciences to the emerging field of computational social sciences.[40]

The availability of a growing body of sectoral scientific knowledge is not the most relevant factor for the construction of the approach to law that we are hypothesizing. A much more significant factor is represented by complexity theory,[41]

structure of things translates, to use Heisenberg's words, into looking 'beyond the surface of atomic phenomena, [in search of] an innermost level of mysterious beauty' (see W. Heisenberg, *Physics and beyond. Encounters and Conversations*, (New York: Harper & Row, 1971), 81). In some way, this is the thesis proposed here, the same thing can be done with law: broaden the notion that defines it by discovering the levels of reality, the phenomena of which it is literally 'made'; things that today, unlike in the past, we can understand and connect based on the image of the world provided by modern science.

[39] Without stretching the bounds, we can quote what Max Planck claimed about the role of the progress of observation and measurement systems with respect to the development of science: 'if we cast a retrospective glance at the road along which physics has proceeded so far, we must admit that further progress will depend essentially on the development and wider application of our methods of measurement', see M. Planck, *The Image of Science, Essays on Modern Physics* (Castelvecchi: Roma, 2018), 44.

[40] C. Cioffi-Revilla, 'Scienza sociale computazionale e scienza giuridica', in S. Faro et al eds, *Diritto e scienze sociali computazionali* (Napoli: Edizioni Scientifiche Italiane, 2011); E. Fabiani et al eds, *Diritto, neuroscienze, scienze della cognizione* (Napoli: Edizioni Scientifiche Italiane, 2014); L. Cominelli, *Cognizione del diritto: per una sociologia cognitiva dell'agire giuridico* (Milano: Franco Angeli, 2016).

[41] Over the past two decades, the conceptual vocabulary of complexity theory has seeped into an increasingly broader part of social science. The spread of concepts such as 'emergence', 'non-linearity', 'non-equilibrium dynamics' or 'phase transitions' has triggered not only important theoretical revisions, but also reformulations on a methodological level. For an overview of the ongoing process, see D. Byrne and G. Callaghan, *Complexity theory and the social sciences: The state*

a frontier area of science that is uncovering the laws that surprisingly unite the behavior of processes that take place, at vastly different scales, wherever systems made up of sets consisting of a tendentially large number of interacting elements materialize. Because of their inherent characteristics - non-linearity, unpredictability, self-organization, emergence[42] - complex systems have long remained outside the tractability boundaries of Newtonian and deterministic science.

Today, complexity science is refining a valuable toolkit for understanding the structure, behaviour and dynamics of change in complex systems: a theoretical framework and methodological apparatus capable of profoundly transforming the understanding of the world at different ontological levels, from the fundamental mechanics of the human brain to the innumerable manifestations of social complexity of which law is a part.

For legal science, engaging with complexity theory can have a revolutionary effect. Some experiences of this kind of engagement have already taken place. However, the outlook on the 'legal complexity', has so far resulted in the adoption of concepts and methods from physics for the study of *legal document corpora*.[43]

Still almost entirely absent is a research perspective geared toward embracing the conceptual and methodological vocabulary of *complexity science* to interpret (first) and investigate (then) the processes underlying the 'law-norm'. The adoption of a *complexity-inspired* perspective[44] should lead to broadening the 'static' conception of law seen as a one-dimensional object, with that of a phenomenon that develops on different levels (cognition, behavior, society) connected by action and feedback cycles to be explored in new ways.[45]

On the other hand - and this is the third and final argument - the naturalization of law finds support from ideal conditions on the methodological and instrumental level.[46] Computational social science - an area of study that brings together the

of the art (London: Routledge, 2013).

[42] For an introduction to the properties of complex systems and, more generally, to complexity theory see, in Italian, A. Pluchino, *La firma della complessità: una passeggiata al margine del caos* (Catania: Malcor D', 2015).

[43] J.B. Ruhl et al, 'Harnessing legal complexity' 355(6332) *Science*, 1377-1378 (2017).

[44] M. Xenitidou and B. Edmonds eds, *The Complexity of Social Norms* (Cham: Springer, 2014).

[45] The interaction between different ontological levels is one of the characteristic features of complex systems and this obviously also applies to the social systems of which law is an expression: 'complex social systems are characterised by multiple ontological levels with multidirectional connections, proceeding not only from the micro to the macroscopic levels but also back from the macro to the micro-levels', see R. Conte et al, 'Manifesto of computational social science' 214(1) *The European Physical Journal Special Topics*, 325-346 (2012); D. Helbing et al, 'Social Systems and Complexity' 11(4) *Advances in Complex Systems*, 485 (2008).

[46] The availability of adequate investigation methods and tools (here referring to mathematical tools in the strict sense) is an important conditioning factor in the dialogue between social sciences and natural sciences. *Political Arithmetics*, an economic-social discipline born at the beginning of the 17th century at the hands of William Petty and aimed at extending to the social sciences the new ideas and the conception of the world that were establishing in the natural sciences, failed essentially because the mathematical methods used by physics in the seventeenth century were not suited to the study of social phenomena. Arithmetic and algebra were not enough, probability calculation and

complexity theory *framework*, social sciences questions and the computational science paradigm - now provides an apparatus of research methods and practices that can open up entirely new horizons for scientific understanding of the social world. Computer simulation, complexity models and *network analysis*[47] are only one part of an ever-evolving toolkit fueled by the growth of available computing power, the datafication process of an ever-larger part of our lives[48] and, not least, advances in artificial intelligence.

In conclusion - we have somewhat already highlighted it above - computers and data, *data-driven* heuristics and computational models extend the boundary of phenomena that can be detected, measured, simulated and causally connected; the boundary, ultimately, between what can be treated as nature and what it cannot.

VI. Making Wings for the 'Mad Flight'

The endeavor to align legal science with the model of natural sciences is a project worthy of significant intellectual and scientific effort. This belief is supported by several reasons.

The first is purely scientific. The broadening of the phenomenological horizon of legal studies and the adoption of methods belonging to natural science understood in its broadest sense, from neuroscience to complexity theory, open new scenarios that go beyond the scientific understanding of the legal organization of human societies. The research topics of a naturalized legal science (eg the individual and collective cognitive dynamics underlying the interplay between legal and social norms)[49] are relevant only to the legal domain,[50] but to all social sciences.

infinitesimal calculus which were only just emerging then would have been needed. On this point see I.B. Cohen, n 24 above, 136.

47 C. Cioffi-Revilla, *Introduction to computational social science* (London-Heidelberg: Springer, 2014).

48 Most of computational social science is based today on the use of techniques *data mining* in line with the paradigm described, in 2009, in D. Lazer et al, 'Computational social science' 323(5915) *Science*, 721-723 (2009). There is still however much to explore in the potential integration between the *data-driven* approach and the *model-driven* one, a vision of a social science oriented towards using computation to develop new theoretical models (mainly agent-based generative simulation models in the perspective outlined by Joshua Epstein) of the processes underlying social complexity. A very interesting proposal on this point is presented in R. Conte et al, n 45 above. For an introduction to the paradigm of *generative social science* you are in J.M. Epstein, n 14 above.

49 Other topics of potential interest are the processes underlying the emergence of legal norms, the interactions between regulatory policy choices and social dynamics or, again, the unwanted social effects potentially deriving from the introduction of a legal norm.

50 The world of law has already shown sensitivity to the broad category of topics just mentioned. There would be many names to mention. By way of example only, see here R. Ellickson, *Order without law: How neighbors settle disputes* (Harvard: Harvard University Press, 1991); E.A. Posner, *Law and Social Norms* (Harvard: Harvard University Press, 2009); R. Sacco, *Il diritto muto. Neuroscienze, conoscenza tacita, valori condivisi* (Bologna: il Mulino, 2015); M. Svensson, 'Norms in law and society: towards a definition of the socio-legal concept of norms', in *Social and Legal Norms* (London: Routledge, 2016), 39-52). None of these reflections, however, takes into

For legal scientists, naturalization could represent a new response to the need for 'recovery of the factual and social dimension'[51] of the legal phenomenon repeatedly invoked but always overwhelmed by the formalist reading of law still dominant today. For social scientists, the availability of gradually more refined models of how law emerges, evolves, and operates could turn into the possibility of enriching[52] their theories and models with an explicit representation of a level of reality, the legal one, which significantly impacts social dynamics.

Naturalisation, in any case, does not only represent an opportunity to transcend the paradigm that, at present, rules the legal and social worldview. In perspective, it opens up to legal systems, to *policy* and *rule-making*, the possibility of rooting their choices in an gradually deeper knowledge of the phenomena being regulated.

Taking it to the extreme, seen as an artifact through which societies devise responses to the problems they face at all levels, from that of a state's fiscal policies to the global level of climate change, law is 'technology without science'.[53] Legal culture lacks a projection towards a scientific study (in the sense alluded above) of what law is and how it interacts with the social reality from which it comes and on which it is intended to operate. Without such an understanding, everything becomes more difficult: pronouncing empirically grounded value judgments about the goodness of regulatory choices and, above all, working out regulatory solutions not as something that happens *off-line* outside the social and factual context of intervention, but as a constitutive process that interacts with the self-organized behavior of the context itself.[54]

A legal norm, on the other hand, can be seen as a single system together with the social reality that is object to intervention. In such a view, the outcome of a regulatory intervention (whether it comes from laws, administrative acts or even judicial decisions) is a function not only of the abstract, separately defined

consideration, as a basic epistemological option, the projection towards the natural science paradigm.

[51] P. Grossi, n 20 above.

[52] The idea is well summarized in a recent work by Cristiano Castelfranchi who theorizes a 'science of layered mechanisms', a scientific model described in these terms: 'we need several different layers of "theory," in particular for understanding human behavior. These layers should concern: the cognitive (mental) representations and mechanisms; the neural underlying processes; the evolutionary history and adaptive functions of our cognition and behaviors; the emergent and complex social structures and dynamics, their relation and feedbacks on individual minds and behaviors, and the relationship between internal regulating goals and the external functions/roles of our conduct; the historical and cultural mechanisms shaping our minds and behaviors; the developmental paths'. See C. Castelfranchi, 'For a science of layered mechanisms: Beyond laws, statistics, and correlations' 5 *Frontiers in Psychology*, 536 (2014).

[53] What has been said does not overlook the value-based and political choice component inherent in legal regulation, namely the decision expressed by a given community regarding what may be considered just and desirable at a particular historical moment. The idea is simply to highlight the profound connection that this political and value-based evaluation maintains with the empirical understanding of the factual context from which it originates and on which the regulation is intended to operate.

[54] F. Squazzoni, 'A social science-inspired complexity policy: Beyond the mantra of incentivization' 19(6) *Complexity*, 5-13 (2014).

characteristics of the regulatory instrument and the factual context. The evolution of the system (the outcome of regulatory choices) is the result of the often complex and counterintuitive way, in which regulation and context interact.[55] Because of this, it can be much better understood, and evaluated in terms of its compliance with legally defined values and principles, with the support of a genuinely scientific investigation.[56]

The stakes are high. A scientific understanding of the complexity to which law gives rise together with the phenomena itself tries to order is an important condition for freeing public discourse and policy choice from fallacious representations of reality and coping more consciously with the challenges looming over the globalized, technological, and interconnected society we live in.[57]

It remains clear, in any case, that the naturalization of legal science is an ambitious project of not immediate realization. It presupposes a series of changes that involve the cultural-scientific identity of the legal scholar to an extent that goes far beyond the willingness to rethink the legal phenomenon as part of nature. The list of what is required of the 'jurist-naturalist' of the future is long: to familiarize with the worldview and the complexity theory conceptual vocabulary by opening himself to all the areas of scientific knowledge (from social psychology to the theory of evolution) with which the latter prompts dialogue; to adopt a methodologically eclectic, issue-oriented research style, oriented toward a creative use of theoretical constructs from other disciplines; project himself towards an empirical and quantitative reading of legal phenomena; to rethink the problems under study and his research questions in computational terms; and to prepare himself to design and experiment, together with other categories of scholars, new research tools and methods.

Added to all this is the need for careful reflection with an epistemological slant, a prerequisite for giving awareness to a project which, in essence, moves asymptotically toward the construction of what Niels Bohr called 'unity of knowledge'

[55] The *Tragedy of the Commons*, the social dilemma theorized by Hardin (G. Hardin, 'The tragedy of the commons: the population problem has no technical solution; it requires a fundamental extension in morality' 162(3859) *Science*, 1243-1248 (1968)) and which became the focus of Elinor Ostrom's research (E. Ostrom, *Governing the commons: The evolution of institutions for collective action* (Cambridge: Cambridge University Press, 1990)), is a significant example of the type of scenario just mentioned. The evolution of the dilemma, which law also aims to govern, is indeed influenced by dynamics - such as the interaction between the mechanisms of intertemporal choice and selfish rationality - that science is increasingly shedding light on. On this point see, by way of example, J. Jacquet et al, 'Intra-and intergenerational discounting in the climate game' 3(12) *Nature Climate Change*, 1025-1028 (2013).

[56] N. Lettieri, The legal macroscope n 2 above; Id, Law In The Turing's Cathedral n 2 above.

[57] From this perspective, it is suggestive to think of the law produced by a naturalized legal science as an instrument capable of better contributing to the construction of what has recently been defined as 'planetary-scale intelligence' (see A. Frank et al, 'Intelligence as a planetary scale process' 21(2) *International Journal of Astrobiology*, 47-61 (2022)): the ability to build a coordinated global response to potential existential threats through the acquisition and application of collective knowledge on a planetary scale.

understood as the 'harmonious understanding of increasingly vast aspects of our condition'[58] to be sought as an almost inevitable consequence of the 'unity of nature'.

To do all this, what we need is a research agenda, a program devoted, with the necessary degree of openness and radicality, to the exploration of foundational, basic research issues which would today be difficult to find a satisfactory placement in the current disciplinary organization of research and academy, especially in Italy. In this perspective, a structure similar in spirit to the *Foundational Questions Institute (FQxI)* (the institute founded in 2005 by Max Tegmark to support basic research in the foundations of physics and cosmology with regard to 'visionary and pioneering' frontier topics) would be needed.

Creating such an entity clearly constitutes a daunting task, a challenge reminiscent of the 'mad flight' Ulysses talks about in the XXVI *Canto*. On the other hand, it foreseeably requires multiple and significant efforts: thinking radically; forging networks of ideas and people across disciplines, and, above all, constantly striving to extend the vision further, asymptotically ahead. For all the reasons above, it seems to be a worthy commitment, an endeavour any inspired researcher would persists in doing until the very end.

[58] N. Bohr, I quanti e la vita: Unità della natura. Unità della conoscenza (Torino: Bollati Boringhieri, 2016).

Malebolge

Divine Allegories and Earthly Realities: Exploring Symbolism in Dante's 'the Divine Comedy' for Insights into International Environmental Law

Shabnam Mahlawat* and Abhishek Siroha**

Abstract

This research paper delves into uncovering the metaphorical and allegorical layers within Dante Alighieri's 'The Divine Comedy' and their potential applicability to modern environmental law and ethics. Analysing Dante's odyssey through Hell, Purgatory, and Heaven as a figurative portrayal of human behavior and ethical repercussions, this paper investigates how his masterpiece provides valuable perspectives for environmental jurisprudence and ethics. By connecting Dante's work to contemporary concerns, it explores the convergence of law and morality within the sphere of environmental conservation. The aim is to demonstrate how the allegorical elements in 'The Divine Comedy' shed light on the ethical dimensions of environmental protection and offer insights into the interplay between law and moral principles in today's environmental context.

I. Introduction

Dante Alighieri's 'Divine Comedy' is a masterpiece of Italian and World literature, composed in the fourteenth century. This epic poem is renowned for its intricate allegorical narrative, rich symbolism, and profound exploration of themes that resonate through the ages. Dante's journey through Hell, Purgatory, and Heaven, guided by the poet Virgil and his beloved Beatrice, is a profound exploration of human nature, morality, and the divine.[1] It delves into complex issues such as sin, redemption, divine justice, and the human condition. The work's significance extends far beyond its historical context, offering timeless insights into the human experience and the quest for spiritual truth. In recent decades, the concept of international environmental law has gained increasing prominence in our interconnected and environmentally conscious world. This body of law comprises a complex web of agreements, conventions, treaties, and principles that collectively aim to address the global environmental challenges that transcend national borders. These challenges include climate change, biodiversity loss, habitat destruction, pollution, and resource depletion. International environmental law

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[1] A. Pagano and M. Dalena, 'Dante's 'Inferno' is a journey to hell and back' *National Geographic*, available at http://tinyurl.com/yc8nt497, 2022 (last visited 10 February 2024).

recognizes the need for concerted global efforts to safeguard our planet and its ecosystems for current and future generations. The growing importance of international environmental law is underscored by the urgent need to tackle worldwide environmental crises. Climate change, in particular, poses an existential threat, demanding coordinated and equitable action from nations across the globe. International agreements such as the Paris Agreement and the Convention on Biological Diversity exemplify the collective resolve to mitigate these challenges. Environmental justice, sustainable development, and the equitable distribution of environmental resources are key tenets of this evolving legal framework. This research paper explores the intriguing parallels between Dante's 'Divine Comedy' and international environmental law. By connecting a timeless work of literature with contemporary global concerns, we aim to shed fresh light on both subjects and inspire a holistic approach to addressing environmental challenges. In doing so, we hope to emphasize the enduring relevance of Dante's literary masterpiece and the pressing need to tackle environmental issues through international cooperation and legal frameworks. This manuscript is an attempt to explore and elucidate the intriguing parallels that exist between Dante Alighieri's 'Divine Comedy' and the realm of international environmental law. By examining these parallels, we aim to illuminate unique insights into both subjects and showcase their shared relevance, despite belonging to different realms - literary and legal.

This comparative approach seeks to establish connections between the moral, ethical, and legal principles outlined in 'Divine Comedy' and the contemporary principles and challenges of international environmental law. To highlight the practical application of international environmental law, we will illustrate how the principles of environmental justice, sustainability, and accountability are upheld or tested in real-world situations. A distinctive aspect of our analysis is the fusion of literary analysis and legal scholarship. We aim to present Dante's work as a source of inspiration for addressing contemporary environmental challenges and emphasize its relevance within the legal and ethical framework of international environmental law. Moreover, we will consider the ethical and moral dimensions inherent in both Dante's work and international environmental law. This approach will offer a comprehensive understanding of the interconnectedness of these fields and inspire a holistic perspective on environmental issues, including the moral imperative and ethical considerations in environmental justice and sustainability.

II. Dante's 'Divine Comedy' and Environmental Themes

Dante Alighieri's 'Divine Comedy' is a timeless epic poem that comprises of three interconnected parts: '*Inferno*', '*Purgatorio*', and '*Paradiso*', each of which forms a distinct stage in Dante's (the protagonist and poet of this epic) spiritual journey.

***Inferno*:** In the first part, '*Inferno*', Dante embarks on a descent into Hell,

guided by the Roman poet Virgil. He explores the nine concentric circles of Hell, each dedicated to different sins. As he ventures deeper, the severity of punishments intensifies. Notable sinners include historical figures and contemporary political foes. The journey ultimately leads to the frozen lake at the core of Hell, where Satan resides as a three-faced monster.[2]

***Purgatorio*:** In the second part, '*Purgatorio*', Dante ascends a mountain representing a place for souls to undergo purification before ascending to Heaven. Souls in Purgatory are genuinely remorseful and seek redemption. Dante encounters souls striving to ascend, and his journey serves as a symbol of spiritual growth and redemption.[3]

***Paradiso*:** The final part, '*Paradiso*', witnesses Dante ascending through celestial spheres representing different virtues. In each sphere, he meets saints, angels, and blessed souls who reside there, radiating divine knowledge and love. Dante's journey through Paradise results in a profound spiritual awakening, deepening his understanding of God's love and the divine order of the universe. The culmination of the poem takes place in the Empyrean, where Dante experiences the Beatific Vision - a direct encounter with God.[4]

Dante's 'Divine Comedy' is a treasure trove of environmental and ethical themes, even though it predates modern environmental discourse. Several key themes stand out:

Sin and Environmental Harm: The concept of sin in '*Inferno*' can be likened to environmental harm. Just as different sins in Hell warrant different punishments, environmental injustices often lead to varying consequences.[5] The severity of punishment in Hell corresponds to the gravity of the sin, mirroring the disproportionate impacts of environmental harm on marginalized communities.

Redemption and Justice: In '*Purgatorio*', the souls' quest for redemption mirrors the objectives of international environmental law in rectifying environmental wrongs and achieving environmental justice. The parallel between the Purgatorial journey and the aspiration to cleanse oneself of environmental burdens underscores the pursuit of justice in both contexts.

***Paradiso* and Environmental Ideals**: Dante's vision of Paradise in '*Paradiso*' represents an ideal state of environmental justice. It envisions a world where individuals, regardless of their backgrounds, have equitable access to a clean and healthy environment.[6] This resonates with the ultimate goal of environmental

[2] D. Manganiello, 'Dante according to Eliot', in Id ed, *T.S. Eliot and Dante* (Palgrave Macmillan UK, London, 1989), 1-16.

[3] D. Alighieri, 'The Divine Comedy of Dante Alighieri, Volume 2: Purgatorio' available at http://tinyurl.com/cxayyxr4 (last visited 10 February 2024). The Divine Comedy of Dante Alighieri Volume 2 (last visited October 29, 2023).

[4] 'The Divine Comedy, vol. 3 (Paradiso) (English trans.)|Online Library of Liberty' available at http://tinyurl.com/mr2dskj9 (last visited 10 February 2024).

[5] 'The Effects of Sin On Humanity's Moral Disposition In Dante's Inferno - Free Essay Example' Edubirdie available at http://tinyurl.com/yc8vefsu (last visited 10 February 2024).

[6] P. Gagliardi et al eds, *Protecting Nature, Saving Creation* (Palgrave Macmillan US, New York,

justice: to create a society where all enjoy equal access to environmental resources and benefits.

Moral Responsibility: Throughout the entire journey, Dante grapples with questions of morality and ethics. His encounters with various souls and divine beings prompt reflections on individual and collective moral responsibility.[7] These ethical considerations are directly relevant to discussions about environmental policies and resource allocation in international environmental law.

Dante's 'Divine Comedy', while a work of literary fiction, transcends its narrative to offer profound insights into human nature, morality, and spirituality. It provides an allegorical framework that resonates with contemporary concepts of environmental justice and ethics, underlining the enduring relevance of this classic work in addressing modern global environmental challenges.

III. Parallels with Environmental Concepts

Dante Alighieri's 'Divine Comedy' resonates with contemporary environmental concepts, forging striking parallels that transcend the centuries. His exploration of themes such as moral responsibility for environmental degradation, the consequences of environmental harm, and the quest for redemption and justice aligns with modern environmental concerns. Here, we delve into these parallels, supported by examples and specific passages from the poem. Dante's delves into the concept of moral responsibility for one's actions, mirroring today's ethical discussions surrounding environmental degradation. In Dante's vision of Hell, sinners face punishments befitting their transgressions. These punishments are reflective of their moral responsibility, akin to how contemporary environmental ethics emphasize individual and collective responsibility for environmental harm.

For instance, in the seventh circle of Hell, Dante encounters the 'Violent against Nature'. These sinners abused their natural environment and are now subjected to torment in a burning desert. The vivid imagery of this punishment underscores the consequences of violating the natural order. This parallel can be seen in today's world, where individuals, industries, and nations face growing scrutiny for their contributions to environmental degradation, such as deforestation or pollution. Dante's portrayal of Hell and its varying degrees of punishment finds a contemporary echo in the consequences of environmental harm. Just as different sins in Hell warrant different torments, environmental injustices disproportionately impact marginalized communities. In both cases, there is an inherent imbalance in the consequences of wrongdoings.

Consider Dante's depiction of the ninth circle of Hell, where the sinners guilty of treachery suffer in the frozen lake, likened to the punishing realities faced by

2013).

[7] 'Moral Responsibility In Dante's Canto V, The Inferno|123 Help Me', available at http://tinyurl.com/yaeek3fz (last visited 10 February 2024).

communities afflicted by climate change.[8] Marginalized populations, often the least responsible for environmental harm, bear the brunt of environmental consequences, aligning with Dante' representation of unequal punishments in Hell. Dante's '*Purgatorio*' presents a metaphorical journey of souls seeking redemption and cleansing, a quest that parallels the aspirations of individuals and communities affected by environmental injustices. These communities aspire to cleanse themselves of the burdens imposed by pollution, resource exploitation, and other environmental harms, much like the souls seeking purification in Purgatory.

In the poem, the theme of redemption and justice is vividly exemplified through Dante's encounter with the penitent souls, who diligently work toward their purification.[9] This mirrors the efforts of environmental activists and communities worldwide who strive for environmental justice, seeking to right past wrongs and create a more equitable and sustainable future.

In summary, Dante's 'Divine Comedy' beautifully parallels contemporary environmental concepts. His exploration of moral responsibility for environmental degradation, the consequences of environmental harm, and the quest for redemption and justice mirrors the ethical and environmental challenges we face today. Dante's timeless insights serve as a poignant reminder of the significance of addressing environmental issues with ethics, justice, and responsibility, transcending the boundaries of time and literature.

1. Analysing Dante's '*Inferno*' and Its Parallels with Environmental Harm

Dante's vivid depiction of sin and its consequences in '*Inferno*' serves as a powerful allegory that resonates with the concepts of environmental harm, responsibility, and liability in international environmental law. In Dante's Hell, each sin corresponds to a specific punishment, mirroring the idea that environmental degradation results in real-world consequences.

For instance, the sinners in Dante's 'Violent against Nature' face the torment of a burning desert. Their punishment reflects the consequences of harming the natural environment, underscoring the concept of moral and legal responsibility. This parallel extends to contemporary environmental sins, where individuals, industries, and nations engage in actions that damage the environment, such as deforestation, pollution, or habitat destruction.

In international environmental law, the principle of environmental responsibility is a critical aspect. It establishes that those who cause environmental harm should bear the responsibility for their actions. An example of this is the case of the Deepwater Horizon oil spill in 2010. BP, the company responsible for the spill,

[8] 'Dante's Inferno Canto 32: Summary & Quotes', available at http://tinyurl.com/6ajtd4ht (last visited 10 February 2024).

[9] G. Corbett ed, 'Penance and Dante's Purgatory', in *Dante's Christian Ethics: Purgatory and Its Moral Contexts* (Cambridge: Cambridge University Press, 2020),105-203.

faced extensive legal liabilities and cleanup costs, showcasing how international environmental law holds polluters accountable for their actions. This aligns with Dante's portrayal of Hell, where sinners face proportional consequences for their transgressions.

2. Aligning Dante's Purgatorial Journey with Environmental Redemption

Dante's Purgatorial journey, as depicted in '*Purgatorio*' is a metaphor for the quest for redemption, which closely aligns with the objectives of international environmental law in rectifying environmental wrongs and achieving environmental justice. The souls in Purgatory are genuinely remorseful and actively seek purification, much like the collective aspiration for environmental redemption.

In the modern context, this pursuit of redemption is evident in international efforts to address environmental wrongs. For instance, initiatives to restore degraded ecosystems, such as reforestation programs or habitat restoration projects, exemplify society's commitment to making amends for past environmental transgressions. In international environmental law, reparations and compensation mechanisms are established to rectify environmental harm, emphasizing the pursuit of environmental justice and the need for accountability.

Legal cases, such as those involving indigenous communities seeking restitution for land and resource exploitation, reflect this alignment. These communities strive to restore environmental and social balance, echoing the theme of redemption within Dante's work. The pursuit of environmental justice is deeply embedded in international environmental law, aiming to right past wrongs and achieve equity in the distribution of environmental benefits.

3. *Paradiso* and Environmental Ideals

Dante's *Paradiso* envisions an ideal state of being, which closely parallels the aspirations of international environmental law. The ideals within Dante's vision include equitable access to a clean and healthy environment, the pursuit of global sustainability, and the alignment of this vision with the goals of environmental justice and global environmental protection.

International environmental law shares these ideals. It envisions a world where all individuals, regardless of their backgrounds, have equal access to a clean and healthy environment. The principle of environmental justice within international law emphasizes the importance of ensuring that marginalized communities are not disproportionately burdened by environmental degradation. Legal frameworks seek to promote equitable access to environmental resources and benefits. Real-world examples of international initiatives and legal frameworks that strive to achieve these environmental ideals include the Sustainable Development Goals (SDGs) adopted by the United Nations. These goals emphasize the importance of sustainable environmental practices, access to clean water and sanitation, and

the eradication of poverty and inequality. The Paris Agreement, with its focus on limiting global warming and promoting climate resilience, also reflects the ideals presented in Dante's '*Paradiso*'.

Dante underscores the significance of addressing environmental harm, pursuing redemption and justice, and striving for a world where equitable access to a clean and healthy environment is achieved. These parallels highlight the enduring relevance of Dante's literary masterpiece and its insights into addressing modern global environmental challenges.

IV. Contemporary Relevance and Challenges

Contemporary environmental challenges, including climate change, biodiversity loss, and pollution, pose significant threats to our planet and have profound implications for international environmental law. These challenges transcend borders, making it imperative for nations to collaborate effectively in addressing them. Dante's timeless themes offer valuable insights and guidance for tackling these pressing issues. Dante's concept of moral responsibility and consequences in '*Inferno'* is particularly pertinent to climate change. Just as the sinners in Hell face consequences commensurate with their sins, nations that disproportionately contribute to climate change bear greater moral and legal responsibility. Dante's work underscores the need for a fair distribution of the burden of addressing climate change, aligning with the principle of common but differentiated responsibilities in international environmental law. Dante's themes of redemption and justice in '*Purgatorio*' mirror efforts to rectify biodiversity loss. International initiatives, like the Convention on Biological Diversity, aim to restore ecological balance and achieve environmental justice. This reflects Dante's call for redemption, as society seeks to make amends for its environmental transgressions and protect Earth's biodiversity. The consequences of environmental harm portrayed in '*Inferno*' draw parallels with modern pollution issues. As Dante's sinners face proportional punishments, industries, and nations must bear liability for the pollution they cause. Lessons from Dante's work emphasize the importance of holding polluters accountable in international environmental law.

While international environmental law has made significant strides, there are persistent gaps and challenges that hinder the achievement of environmental justice and sustainability. Dante's work offers inspiration for potential legal reforms and policy recommendations to address these issues. Dante's exploration of sin and consequence parallels the disproportionate impacts of environmental harm on marginalized communities. In international environmental law, achieving equity in the distribution of environmental benefits and burdens remains a challenge. Legal reforms inspired by Dante's call for fairness could include stronger mechanisms for ensuring that the environmental consequences of actions do not unfairly fall on vulnerable populations. In Dante's journey, sinners face their consequences,

highlighting the importance of accountability. International environmental law often lacks robust enforcement mechanisms. Drawing from Dante's themes, legal reforms might involve stronger international bodies and monitoring systems to ensure compliance with environmental agreements and regulations.

Dante's '*Inferno*' embodies the precautionary principle, which advocates taking preventive action when faced with potential harm. International environmental law could adopt a more proactive approach by enhancing the role of this principle. Policymakers can strengthen international agreements and treaties to encourage nations to take preventive measures to avoid environmental harm. His vision of an ideal state in '*Paradiso'* emphasizes equitable access to a clean and healthy environment. International environmental law must prioritize inclusivity and equity in decision-making processes. Legal reforms can promote the involvement of marginalized communities in environmental policymaking and ensure their interests are represented. In summary, Dante's themes provide valuable insights and guidance for addressing contemporary environmental challenges. By drawing parallels and learning from the moral and ethical lessons embedded in his work, international environmental law can take steps to rectify its gaps and challenges. These potential legal reforms and policy recommendations inspired by Dante's literary masterpiece can contribute to a more just and sustainable global environmental future.

V. Conclusion

The parallels between Dante's 'Divine Comedy' and international environmental law are both striking and profound. In Dante's work, we find echoes of modern environmental concepts, such as moral responsibility for environmental degradation, the consequences of environmental harm, the quest for redemption and justice, and the pursuit of environmental ideals. These parallels highlight the enduring relevance of a 14th century literary masterpiece to the contemporary challenges of global environmental protection. The significance of these parallels extends to both the study of literature and the practice of international environmental law. In literature, it demonstrates the timelessness of Dante's themes and their ability to shed light on pressing contemporary issues. It underscores the capacity of literary works to inform and inspire discussions on ethics, morality, and environmental justice. In the realm of international environmental law, these parallels offer a fresh perspective on addressing global environmental challenges. By drawing inspiration from Dante's allegorical journey, legal scholars and policymakers can explore novel approaches to promote equity, sustainability, and accountability. Dante's work encourages us to recognize that environmental protection transcends mere legal frameworks; it is inherently a moral and ethical imperative that should inform the decisions and actions of nations and individuals. These parallels have broader implications for advancing environmental justice and sustainability on a global

scale. They underscore the importance of fairness, accountability, and collective responsibility in addressing environmental issues. By aligning with the principles and objectives of international environmental law, we can strive for a world where all individuals, regardless of their backgrounds, have equal access to a clean and healthy environment. In conclusion, recognizing and leveraging these parallels is of paramount importance. The ethical and moral lessons from Dante's work can guide us in addressing contemporary environmental challenges. By adopting a holistic perspective that encompasses ethics, justice, and accountability, we can pave the way for a more sustainable and just world.

We must heed the call to action by acknowledging the intertwined relationship between literature, ethics, and international environmental law. This recognition can serve as a powerful tool in shaping policies, initiatives, and practices that better protect our environment and ensure a sustainable future for generations to come. The relationship between literature, ethics, and international environmental law remains a rich area for further research and exploration. Future research directions may delve deeper into the nuanced intersections of these fields, investigating how other literary works can inform and inspire environmental ethics and legal practices. Additionally, the efficacy of ethical principles derived from literature in shaping environmental policy and promoting justice could be a focal point of inquiry. Ultimately, the exploration of this interdisciplinary relationship offers a wealth of opportunities for advancing the global environmental agenda and ensuring a harmonious coexistence with our planet.

Malebolge

Belonging, Things and Time(s). Elements for a Spatio-Temporal Perspective on Law

Veronica Pecile*

Abstract

This article presents two proposals to enable the legal recognition of a not-one, collective, assembled subject: property conceived as belonging and legal time as made up of multiple temporal layers. First, it provides a genealogical reconstruction of how the category of belonging has percolated through modern legal thought since Roman jurists identified it as a much broader and richer relation to things than that denoted by owning. Linked to belonging as a potential model for the relationship between individuals and things is a conception of things as not ontologically pre-given, but rather constructed through legal technique. Secondly, the paper argues that one of the effects of the ongoing ecological and climate crisis on the machine of abstraction of Western modern law is the questioning of legal time as the institution through which a linear, historical and chronological conception of time has been legitimised and reinstated. What is emerging is a set of seemingly contradictory, diverse, non-human temporalities that have been marginalised by modern legal thought and are increasingly demanding legal recognition. The article concludes by stating that property as belonging and legal time as multiple are fundamental elements for a legal technique that aims at instituting the collective.

I. Introduction: Personhood, Property and Legal Time

Among the constitutive tensions at the heart of Western modern law, an important one is that between persons and property. Both of these legal abstractions have been constructed as 'empty slots' into which different kinds of rights can be fitted: in both cases, isolating a central concept at their core is difficult and how to do so is the subject of endless theoretical disputes.[1] Originally, the term *persona* was used to refer to the mask worn by actors in ancient theatre; the legal person works in a similar, fictional way, as it was used in Roman law to define a party in a case and designate what was merely a center of imputation of rights and duties.[2] As for property, a widespread view – first elaborated by legal realism and then readapted in critical legal studies – conceives it as a 'bundle of sticks'. This means thinking of property as devoid of any specific essence but rather as consisting of powers and rights conceived as discrete sticks – for example, one stick might

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[1] M. Davies, 'Persons, Property and Community' 2 *Feminists@law* (2012).

[2] P. Napoli, 'Variazioni sull'adagio: la natura può fare a meno dell'uomo' *Filosofia Politica*, III, 447-464 (2023).

be a right of access and another might be a right to sell or to destroy.[3] The emergence of a specific notion of property as hegemonic in modern legal thought – exclusive, absolute, based on an almost limitless control over the thing – has meant that possessive individualism has been the ideology defining the relation between persons-as-owners and what is not them, deemed available to be appropriated as an object. The rise of the movement for the commons in the post-2008 conjuncture has implied a questioning from the grassroots level of the hegemonic idea of property in favour of one in which the interests of the community are pivotal.

As Ngaire Naffine has argued, the construction of a legal person – that is, the transformation of an entity into one who can legally act – as well as that of a non-person – which cannot legally act and is generally conceived of as property – can be interpreted as the greatest political act of law.[4] The ongoing extension of legal personhood to include entities of the natural world can be read as yet another instance of this process. The 'juridification of nature' is a term used to define the set of legal discourses and mechanisms through which natural entities have been given legal personhood in recent years.[5] After centuries in which nature has been constructed by law primarily as something to be used, controlled and exploited – in one word, as property – we are now witnessing its transformation into a legal subject recognised in constitutional texts, national laws, court rulings and policies.[6] These developments seem to put into effect the proposal famously made by Christopher Stone back in 1972:

> 'I am quite seriously proposing', he wrote then, 'that we give legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment – indeed, to the natural environment as a whole'.[7]

The spread of this rights-based approach orienting the legal protection of the environment has been met with much enthusiasm, but also with some criticism. It has been pointed out, for instance, that the rights of nature discourse could be deployed as another universalising rhetoric that could legitimise the continuation of

[3] D. Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Durham and London: Duke University Press, 2014), 161.

[4] N. Naffine, 'Who Are Law's Persons? From Cheshire Cats to Responsible Subjects' 66 *The Modern Law Review*, 346-67 (2003).

[5] The expression 'juridification of nature' is taken from the essay by M. Spanò, '« Perché non rendi poi quel che prometti allor?» Tecniche e ideologie della giuridificazione della natura', in Id ed, *L'istituzione della natura* (Macerata: Quodlibet, 2020), 103-124.

[6] Examples of the process of juridification of nature include the enshrinement of the rights of nature in the Ecuadorean Constitution in 2008; the adoption of the Bolivian Law of the Rights of Mother Earth in 2010; the discussion around the recognition of ecocide as an international crime; and the recognition of the Whanganui River in New Zealand as a legal person in 2017 and of the Atrato River in Colombia in 2016.

[7] C. Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' 45 *Southern California Law Review*, 450-501, 456 (1972).

extractivist policies and ultimately reproduce the existing structures of domination in a global capitalist system.[8] The rights of nature, the critics argue, could as well be used as a radical tool to rebalance unjust power dynamics, but this can only happen if Western legal scholars make greater efforts in developing legal techniques to this end, which incorporate Indigenous approaches to the use of and relation with the environment.[9] Other critics point to another problematic aspect of the juridification of nature, namely that it is a process involving 'much ideology and little technique'.[10] Rights of nature would reinforce a moralising idea of nature as Other, an object which can – very anthropocentrically – only be the target of either exploitation or protection.[11] What these discourses would fail to understand is that in Western modern law 'nature' does not exist 'out there' as some ontological pre-given that precedes law. If there is an ontological precedence, it is in the opposite sense: what is called nature has been relentlessly constructed as such through legal procedure, as Yan Thomas' genealogical study on the status of things for Roman jurists has shown. According to this radically constructivist approach to law and nature, the latter is 'the event that occurs whenever the law decides to repair it'.[12] In Roman law, nature was the 'sparring partner' of legal forms: not a counterforce to law but rather a material limit to its application. This representation of the natural world was a remnant of a pagan culture still influencing the Roman jurists and from which modern thought is very detached.[13] And yet, the forms that those jurists elaborated have survived until today, entering into modern law through the great work of mediation carried out by the Pandectists in the 19th century. In sum, concepts of nature are a social and legal construction, and an analysis of how societies have historically conceptualised nature shows that there are no immutable characteristics that can be isolated from what in different conjunctures is called 'nature'.[14] Law has the power to produce nature as such through its specific instituting capacity, and thereby to construct the appearance of its immutability.

In this article, I draw on this debate about the limits of the juridification of nature to propose two points that shift the focus of the discussion away from the

[8] M. Tănăsescu, Understanding the Rights of Nature: A Critical Introduction (Bielefeld: Transcript Verlag, 2022).

[9] J. Gilbert et al, 'The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's "Greening" Agenda', in D. Dam-de Jong and F. Amtenbrink eds, *Netherlands Yearbook of International Law 2021: A Greener International Law—International Legal Responses to the Global Environmental Crisis* (The Hague: T.M.C. Asser Press, 2023), 47-74; M. RiverOfLife et al, 'Yoongoorrookoo' 30 *Griffith Law Review*, 505-529 (2021).

[10] M. Spanò, '«Perché non rendi poi quel che prometti allor?»' n 5 above, 105.

[11] On this point see, among others, A. Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"' 26 *Law and Critique*, 225-249 (2015).

[12] M. Spanò, '«Perché non rendi poi quel che prometti allor?»' n 5 above, 124.

[13] P. Napoli, 'Variazioni', n 2 above, 451.

[14] On the links between social change and changing constructions of nature, as well as on the parallelisms in the social construction of women and nature, see C. Merchant, *The Death of Nature: Women, Ecology, and the Scientific Revolution* (San Francisco: Harper & Row Publishers, 1990).

idea of nature as a subject of rights and point instead to the possibility of legally recognising a subject that is not one, assembled, collective. While recognising natural entities as legal subjects risks reproducing the anthropocentric structure of modern law with moralising and ideological effects, I argue that a rethinking of what we mean by legal subject is possible if we adopt a pragmatic approach to two elements: property rethought as belonging and legal time conceived as multiple. I begin with property and argue for reformulating it according to two intertwined tenets: belonging meant as a broader category than owning (in Part II), and things considered as the outcome of legal procedure (in Part III). Then, I focus on another institution that has played a crucial role in ensuring the functioning of the modern individual subject, namely legal time. In Part IV I reconstruct how modern law has been tightly imbricated with a linear, historical and chronological idea of time, both reproducing it and contributing to its fabrication. Then, in Part V, I highlight how the climate breakdown is posing challenges to law that are also and importantly of a temporal nature, as diverse temporalities reemerge and demand law's recognition. I conclude by stating that rethinking property and legal time along the suggested lines is a precondition for finding legal tools through which the collective is recognised and instituted.

II. Belonging, or, Broader than Property

In the 2nd century, jurist Sextius Pomponius wrote a long comment to the three books of civil law by the jurist Masurius Sabinus. A fragment of this work deals with the topic of belonging and is collected in the Digest, the compendium of legal writings on Roman law compiled four centuries later for the will of the Emperor Justinian I. In the fragment D.50.16.181, included in the book *De significatione verborum* ('On the meaning of words'), Pomponius wrote:

> '*Verbum illud "pertinere" latissime patet: nam et eis rebus petendis aptum est, quae dominii nostri sint, et eis, quas iure aliquo possideamus, quamvis non sint nostri dominii*'.
>
> 'The verb to belong has a very wide range of meanings: it applies to things that are our property, but also to things over which we have certain rights, even if they are not our property.'[15]

In the sense that is conventionally adopted in modern legal thought, belonging works as a synonym for owning. It designates the same appropriative relationship between a subject and a thing, but from the point of view of the latter instead of the former: a thing belongs to a subject because the subject owns it, in a perfectly

[15] A. Watson, *The Digest of Justinian, Vol. 4 [Books 1-40]* (Philadelphia: University of Pennsylvania Press, 1998). Pomponius' fragment is included in Book 50.

circular relation. Pomponius' fragment allows us to take a step back from this reductionism. It opens up the possibility of considering *pertinere* as something decoupled from *possidere* – as detached from property meant as an exclusive mode of ownership based on the owner's control over the thing.

In other words, a thing can belong to me even though I am not its owner. If I am the usufructuary, or a simple user of a thing, then I can claim that it belongs to me, even though the owner is someone else. Belonging and owning reveal themselves as not symmetrical, as they express very different kinds of relationships to things; the former is much broader, richer and accommodating for different political contents than the latter. This point has some subtle implications that go beyond the mere subject-object relation. Belonging alters not only one's relationship with things but also one's whole life as an individual in society. For example, it changes what it means to claim to be a formal citizen and thus to belong to a political community. Belonging will no longer mean being part of a pre-constituted community determined by some essence: rather, the community will be ephemeral, open and mostly determined by the practices through which its members relate to things – by the use they make of them.

The legal category of belonging proves to be more useful than the narrower conception of property to describe a range of grassroots practices that have developed over the past decades in Western societies and through which a collective use and access to spaces and resources has been affirmed. When looking at mobilisations such as the one for the commons in Italy during the 2010s, we may ask what impact these practices have exerted on the forms providing the structure of modern law; we may want to assess, in other terms, the meaning of these political experiences as far as legal abstraction is concerned. With Davina Cooper, we may ask: 'what kind of belonging is this?'.[16] In her work on what she defines as 'everyday utopias' – a diverse set of spaces in which everyday life is organised in radically diverging ways from conventional social and political structures in the Global North – Cooper shows how property is being reimagined and re-practiced through experiences of communal living. In these cases, focusing solely on those property relations that are recognised by the state would mean missing much of what is going on: it would imply, for instance, not noticing how in these places property and governance are intertwined in attempts at self-government and direct democracy; or how it is not just the case that the users create the space through the use they make of it, but it is also vice versa – a community is constituted as such by the relation it maintains to a thing.[17] Cooper explains how belonging can be deployed as a more suitable legal category than

[16] D. Cooper, n 3 above, 161.

[17] On the idea of the community relating to the commons not as a gated group but as 'a quality of relations, a principle of cooperation, and responsibility to each other and to the earth, the forests, the seas, the animals', see S. Federici, 'Feminism and the Politics of the Commons', in Team Colors Collective ed, *Uses of a Whirlwind: Movement, Movements, and Contemporary Radical Currents in the United States* (Oakland: AK Press, 2010), 283-94.

property conventionally intended if we want to explore the layers of relations, between individuals but also between individuals and things, that are at stake in communal experiences. In particular, she points to three variants of belonging that seem useful for illuminating the complexity of such relations: conventional property, constitutive belonging and proper attachment.[18] The first form is the one that in modern legal thought is associated with property. This kind of belonging is the one often explained in legal theory through the metaphor of the bundle of sticks. According to this image, property is not a monolithic entity, but is made up of a set of elements – the sticks – corresponding to various powers and rights held by different actors, who have different property interests towards the thing. This idea of property as a bundle of rights was famously introduced by Hohfeld and then elaborated by the legal realists. One of its implications is a dimension of malleability: sticks can be added, removed and redistributed among individuals, thus changing the distribution of power and resources among them.[19] We may see this as an arithmetical view of property, as it were; a kind of 'level zero' of belonging. It is what we observe at work, for instance, in the case of cultural spaces that were reclaimed as commons in the Italian struggle for *beni comuni*. The spaces in question belonged to an owner, such as the public actor, who held the property title, but for a certain time granted a right of access to the users. This concession was made in a more or less peaceful way, as shown by the eviction attempts made by public authorities in these spaces, which can be read as moments in which the sticks that make up property were being reshuffled and reassigned.

A second, more sophisticated form that belonging can assume, defined by Cooper as 'less obviously agentic' than the one just described, is constitutive belonging. This refers to a kind of relation between persons and things that is not merely instrumental or based on an opportunistic use of the resource, but is instead dynamic and 'mutually formative', in the sense that each part involved 'takes shape in and through the other'.[20] It is the kind of relationship that has bound together occupied cultural spaces and the communities reclaiming them as commons, and which literature has referred to as 'commoning' – implying that the commons are the result of a process by which a thing or space is produced, an activity rather than an object, a verb instead of a noun. Adopting this view means that spaces reclaimed as commons belong more to those who make use of them than to the owners.[21] Property law, from this perspective, ceases to be mainly

[18] See again D. Cooper, n 3 above, 161-163.

[19] A. di Robilant, 'Property: A Bundle of Sticks or a Tree?' 66 *Vanderbilt Law Review*, 869-932 (2013).

[20] D. Cooper, n 3 above, 162.

[21] On the idea of commoning see, among others, P. Linebaugh, *The Magna Carta Manifesto: Liberty and Commons for All* (Berkeley: University of California Press, 2008); P. Bresnihan and M. Byrne, 'Escape into the City: Everyday Practices of Commoning and the Production of Urban Space in Dublin' 47 *Antipode*, 36-54 (2015); D. Bollier, *Commoning as a Transformative Social Paradigm* (London: Routledge, 2020).

about owners and holders of rights and is about the property interests of the have-nots whose lives are shaped by others' property holdings.[22]

A third and final variant of belonging identified by Cooper is proper attachment, which is related to, but not identical with, constitutive belonging. This consists of a bond of connection and proximity between individuals and things that can also be made counter-hegemonically, that is, through political projects in which new forms of belonging are forged.[23] This third layer brings us close to a crucial moment: that of instituting, in which the relations between individuals and things get formalised by means of legal technique. In the case of the Italian movement for the commons, this third form of belonging was particularly relevant. Because activists deployed legal tactics to make the use prevail over the property title and to experiment with direct democracy and self-government, scholars have argued that the movement for *beni comuni* acted as a constituent power – as a collective subject engaged in a bottom-up process of institution-making.[24] For instance, the occupants of the Valle Theatre in Rome resorted to a private legal form, the foundation, as a tactical mechanism allowing them to formalise their use of the space – to provide this use with temporal continuity. It can be said that this was a professional use: the thing reclaimed as commons – the theatre – was one in which a community of occupants, made of artists, actors and cultural workers, could carry out their work. The recourse to the private legal form was thus a way of securing and protecting this direct relationship between the community and the thing – the theatre – also in the future, and to provide a long-term legal and political significance to the occupation conducted until then.

The identification of this third level of belonging adds a crucial third dimension to the previous two: it is through this stage that property as a bundle of sticks and property as a constitutive relationship can 'stand' and endure in space and time. It is in this third moment that the political dimension of law, and of private law in particular, is revealed. Private legal rules play out as the infrastructure of social life and different configurations of rules imply different distributive effects.[25] In instances such as the one of the commons, property can take up a legally pluralist shape that reflects the existence of a web of relations, not all of which are recognised by the state, between individuals and things.[26]

[22] A. J. van der Walt, *Property in the Margins* (Oxford, Portland: Hart Publishing, 2009).

[23] D. Cooper, n 3 above, 163.

[24] S. Bailey and U. Mattei, 'Social Movements As Constituent Power: The Italian Struggle for The Commons' 20 *Indiana Journal of Global Legal Studies*, 965-1013 (2013).

[25] For a critical and genealogical exploration of the relationship between private law and the collective, see M. Spanò, *Fare il molteplice: il diritto privato alla prova del comune* (Turin: Rosenberg & Sellier, 2022).

[26] On this point see J. Griffiths, 'What Is Legal Pluralism?' 24 *Legal Pluralism and Unofficial Law*, 1-56 (1986).

III. The Legal Construction of Things: Beyond Ontological Objectivism

In his essay *La Valeur des choses*, published in 2002, Yan Thomas attempted to dismantle one of the main traits of modern legal thought: the metaphysics of the subject-owner, to whom the total availability of the world belongs. He did so by reversing the perspective and placing himself at the level of things: to downsize the infinite power of the subject owner over the world, Thomas meticulously reconstructed the status of things in Roman law. This quest may be partly reminiscent of Heidegger's work in the 1930s, namely an analysis of things and of the conditions that make it possible for a thing to be such a thing. However, that was a metaphysical kind of inquiry, concerned with the being 'thing' of the thing.[27] Yan Thomas carried out a similar operation, except that he used the legal categories in order to figure out what makes a thing a thing. The distance between Heidegger and Thomas is staggering, but we can imagine how the arguments of philosophical ontology can be tested by the tools of legal technique. If one wants to know how to find things in Rome, this essay by Yan Thomas provides some important answers.[28] It is a philosophical treatise developed with the tools of the jurist, without yielding to metaphysical temptations.

The subtitle of Thomas's text is 'Roman law outside religion' (*le droit romain hors la religion*). The French legal historian adopted a materialist and structuralist approach to examine how Roman jurists constructed things. He showed that if we take the perspective of the latter, then we find on their side an element of permanence – a duration built normatively. Such a construction of things sets aside not only the metaphysical explanations of things, but also those of cultural anthropology, in which there can be a subjectivist twist on the things themselves. Except that in Thomas's reconstruction, things do not exist in themselves: they are established by legal artifice – normatively made. If there is an ontology of things at work, it is not given but constructed. Things are the objects resulting from a technical construction that takes place through procedure. This, in turn, is a decision qualified by an authority and derived from legal dispute.[29]

Thomas's approach is materialist in the sense that the level of abstraction it reaches is not based on pre-constituted concepts but on the study of legal cases, which in his analysis are the equivalent of fieldwork for the social sciences. This approach opens up significant possibilities for dialogue between legal theory and the social sciences: for example, the debate on the mobilisations for the commons

[27] See M. Heidegger, Die Frage nach dem Ding: Zu Kants Lehre von den transzendentalen Grundsätzen (Tübingen: De Gruyter, 1962); Id, Kant und das Problem der Metaphysik (Frankfurt am Main: Klostermann, 1973); Id, Phänomenologische Interpretation von Kants Kritik Der Reinen Vernunft (Frankfurt am Main: Klostermann, 1977).

[28] I owe much of this reflection on the status of things in Roman law, and on the analysis of them conducted by Yan Thomas, to the seminar 'L'inappropriable' given by Paolo Napoli at the École des Hautes Études en Sciences Sociales in 2022/2023.

[29] On the legal status of things in Roman law, see Y. Thomas, 'La valeur des choses. Le droit romain hors la religion' 6 *Annales. Histoire, Sciences Sociales*, 1431-1462 (2002).

becomes one also, and significantly, concerned with the right to property and its limits. But Thomas's approach is also a structuralist one. Subjects do not exist as a pre-constituted essence but are delocalisations, reflections, secondary effects of a way of thinking like the one informing Roman law, which gives immediate normative power to the non-human world – to things. We are not talking here about the animal or vegetal world, because the important opposition for Roman jurists was that between things and persons. The subject, then, does not exist in itself: it emerges in relation to things and does not pre-exist them. Contrary to sociological approaches arguing that norms spontaneously emerge from the level of actors, in Thomas's reconstruction the relations between subjects and things are entirely caught up in a web of institutional relations. The result is no longer a praise of the sovereign individual over the world, but an invitation to find on the side of things an element of permanence and duration that is normatively constructed (Thomas 2002).[30] This is what can be called a legal ontology of things – an ontology that is not natural but institutionally constructed. All things, even those that seem most pre-given, such as nature itself, are produced by the concrete acts of institutions. Even if the latter were to limit themselves to acknowledging the existence of a thing, by this gesture they would have already transformed its supposed naturalness.[31]

On this materialist and structuralist basis, Thomas developed his own theory of institutions. To institute is first of all to give things a name, which has great consequences for the social order. It is to carry out an operation after which the world will no longer be the same. This operation is verbal and practical at the same time, as the specific capacity of law is artificial and consists of mixing words and gestures. Law is not only knowledge, it is also a technique that creates social reality through the invention of forms – this is what instituting means. Instituting does not mean creating from scratch: rather, as Paolo Napoli explains, it means

> 'to isolate the sequence of frames that make up the shape of reality in such a way that, once the process is complete, it is no longer possible to go back because, in the eyes of the jurist, the recodification of people, things, actions and functions that follows that shaping has produced a concrete abstraction that instantly supplants the empirical datum.'[32]

The outcome of this process is the production of the institute – a noun disciplining a relationship while qualifying it. Indeed, as Yan Thomas insisted, law is the only discourse that produces the world it designates.[33] It is in this

[30] See Y. Thomas, n 29 above.

[31] See Id, 'Imago naturae. Note sur l'institutionnalité de la nature à Rome' 147 *Publications de l'École Française de Rome*, 201-27 (1991).

[32] P. Napoli, 'Variazioni' n 2 above, 450. Author's translation.

[33] Y. Thomas, 'Le droit entre les mots et les choses. Rhétorique et jurisprudence à Rome' 23 *Archives de Philosophie du Droit*, 94 (1978).

abstract and formal quality of the institutes that lies the origin of their longevity and adaptability right up to modernity.[34]

IV. Law Fabricating Time

Of all the institutions of Western modern law, one has played a crucial role in providing the conditions for the smooth functioning of its forms: time, or rather legal time. The relationship between law and time has been a very close one in the shaping of modern societies. The peculiar concept of time of modernity has not only been recognised but also constructed by law: in other words, law has instituted time.

It is first worth clarifying what we mean when we talk about the modern idea of time. Commonly represented through the image of a linear arrow indefinitely pointing forward – in the direction of what is alternatively labelled as progress, development or growth – the time of the moderns *passes*, meaning that it abolishes all the past behind it.[35] It is this peculiarity of modern time – the fact that it literally consumes all the events it passes through – that led E.P. Thompson, in his study of the dissemination of clocks in industrial England, to observe that 'time is now currency: it is not passed but spent'.[36]

It would not be enough to say that in modern societies time has a linear shape. Modern time is also historical, namely tied to the deeds of concretely acting individuals and institutions; and it is chronological, that is, constructed as a succession of events like discrete points making up a unitary flow.[37] The dominance of this idea of time has implied a marginalisation of other temporal conceptions informing human and social practices, such as cyclical ones, which nevertheless did not disappear. These persisting and counter-hegemonic ideas of time in modernity have been identified by Carol Greenhouse as instances of resistance to historical time:

> 'if linear time dominates our public lives it is because its primary efficacy is in the construction and management of dominant social institutions, not

[34] In Roman law, the *res incorporales* were legally recognised entities deprived of substance, 'things without body', at once concepts and instruments. On this point see M. Spanò, 'Cose senza corpo. Forma e materia degli istituti giuridici', in A. Montebugnoli ed, *Sulla soglia delle forme. Genealogia, estetica e politica della materia* (Milan: Meltemi, 2022), 149-163.

[35] On the image of the irreversible and linear passing of time as a modern technique separating nature (whose forces are temporally built as ahistorical) from society (whose human actors are constructed as acting in history), see B. Latour, *We Have Never Been Modern* (Cambridge: Harvard University Press, 1993).

[36] E.P. Thompson, 'Time, Work-Discipline, and Industrial Capitalism' 38 *Past & Present*, 56-97 (1967).

[37] On the historical character of time in modernity, see R. Koselleck, *Futures Past: On the Semantics of Historical Time* (Cambridge, MIT Press, 1985); on the concept of chronological time, see S. Kracauer, 'Time and History' 6 *History and Theory*, 65-78 (1966).

because it is the only 'kind' of time that is culturally available.'[38]

The social sciences have guarded and reproduced the hegemony of the modern concept of time, whether considering it as a collective representation of social experiences or as a progression of changing social forms – as respectively in Durkheimian and Marxist theory.[39] Law does more than this: because its peculiar force is that of instituting – of naming and disciplining social reality in one gesture – not only has it contributed to strengthening the naturalisation of the modern idea of time, it has also produced it. Among the techniques that have contributed to the shaping of modern societies, law is the one specifically devoted to solving the incongruencies arising from the coexistence of multiple forms of time. Time is massively manipulated by legal technique, which institutes it by relentlessly stretching its arrow forwards and backwards.[40]

Two examples can illustrate this quality of law, its special ability to manipulate time through its operations. The first one is the statute of limitations (*termine di prescrizione*), which consists in the extinction of a right if the holder does not exercise it within the time limit set by law. In criminal law, the extinction affects the right to punish before a final conviction or the right to apply a certain punishment to a person as a result of the passage of time. Here, law constructs a time line within which a certain conduct is qualified as an offence, fixing its beginning and end and excluding what comes before and after from the possibility of being qualified as such. The technical construction of the time arrow is in this case an almost literal process. A second example is less immediate and is brought up by Mariana Valverde in her important work on the temporal analysis of law. Valverde's thesis is that different legal facts are shaped and given meaning by specific space-time configurations.[41] For example, local police regulations, especially in common law systems, consist of 'time- and space-specific rules' regulating a whole range of activities, such as parking or littering. Sleeping in parks is made illegal, but only at night; and the park space is divided internally according to the different activities that can be carried out there. The operation of differentiating space is also a core logic of land use law, which however builds a fiction of atemporality by proceeding through the spatial tool of the map.[42]

Far from being abstract, then, the manipulation of time through legal technique is a very material process.[43] People, things, technologies, laws: all these elements,

[38] On the social and cultural making of time in modernity, and law's role in instantiating it, see C.J. Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' 98 *The Yale Law Journal*, 1637 (1989).

[39] Id, *A Moment's Notice: Time Politics Across Cultures* (Ithaca: Cornell University Press, 1996).

[40] See again C. Greenhouse, 'Just in Time' n 38 above, 1642.

[41] M. Valverde, Chronotopes of Law: Jurisdiction, Scale and Governance (London: Routledge, 2020).

[42] ibid 12.

[43] A genealogical study of modern legal forms brings to light the roots of law's ability to craft

and the interaction among them, contribute to the creation of legal temporalities as devices constructed to govern ideas of time. Recent critical studies on the relationship between time and things from a legal perspective have shown that objects and legal artifacts are crucial in the making of legal temporalities, dismissing the reductionist view of time as simply imposing itself on law.[44]

This tight bond between legal facts and time implies that modern law itself has a temporal character, one that makes its functioning closer to myth than to other modern cultural formations. Because law advances by building time, it acquires a timeless quality. This mythical aspect of law is confirmed by another element, especially visible in common law systems: the relation of reversibility that binds together past and present decisions – with the former influencing the latter, and the latter being able to reverse the former.[45] Through its techniques, law fabricates the discontinuities that separate past, present and future and instantiates them as such.[46]

Crucial to this timeless quality of modern law, and to the fact that from a temporal viewpoint it functions like myth, is the character of 'eternal objects', as Peter Fitzpatrick called them, that modern legal forms bear. Their function is also the one of mediating between the general and the particular, of providing models of what the social reality is and also should be. As Fitzpatrick wrote,

> 'Let us take property as an instance. As the 'external', reified object, it is suffused with the palpable and the specific. Yet it is also elevated in terms no less extensive than those attributed to the transcendence of myth. It is, to summarise various formulations of Enlightenment, the foundation of civilisation, the very motor-force of the origin and development of society, the provocation to self-consciousness and the modality of appropriating nature.'[47]

Property works as the quintessential eternal object of modern law. Its absolute, individualistic, exclusive conception, which is hegemonic in modern legal systems, has a temporal nature: it mirrors in its structure a transcendent myth, that of an appropriative relationship between the individual and the natural world.

fictional devices manipulating time. Yan Thomas examined the case of a monastery emptied of all its monks, to which jurists in the 12th and 13th century managed to grant personhood to prevent the monks' goods from being taken over even after the death of the last of them. See Y. Thomas, 'L'extrême et l'ordinaire. Remarques sur le cas médiéval de la communauté disparue', in J.C. Passeron and J. Revel eds, *Penser par cas* (Paris: École des Hautes Études en Sciences Sociales, 2005), 45-73.

44 E. Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (Toronto, Buffalo, London: University of Toronto Press, 2016).

45 See again C. Greenhouse, 'Just in Time' n 38 above, 1642-1643.

46 On how racial designations are also temporal divisions in colonial contexts, see R. Mawani, 'Law As Temporality: Colonial Politics and Indian Settlers' 4 *UC Irvine Law Review*, 65-96 (2015).

47 See P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 50.

V. The Resurgence of Marginalised Temporalities

Over the past years, the complex relationship between law and time has increasingly become the object of critical inquiry in socio-legal studies. After decades dominated by what has been called a 'spatial turn' in the study of legal phenomena – that is, an emphasis on the co-constitutive relation between law and space –, critical legal scholarship has been turning to law's temporal aspects.[48] This has meant the refusal to limit the analysis to the exploration of the spatial dimension of legal facts, while restricting the temporal one to a simplistic vision of time as history.[49] Drawing on critical approaches to time developed in feminist, queer and postcolonial studies, the spatial perspective on law has been integrated with a temporal one, thereby exploring legal phenomena through a spatio-temporal lens.[50] In this way, each legal form – for example, property – is studied in its power to shape and reproduce a specific space-time configuration, and the co-production of legal and temporal norms is at the centre of the inquiry.[51]

The issue of time and temporality is at the heart of one of the most pressing debates in legal studies, namely the one on how to conceive legal tools to deal with ecological and climate breakdown. The dilemmas that have confronted legal scholars and practitioners in recent years are often of a temporal character: they range from how to hold industrialised states accountable for past harm caused by ongoing greenhouse gas emissions,[52] to how to secure the future generations' fundamental rights and thus to enforce a principle of intergenerational equity in

[48] For the spatial turn in legal theory see, among others: Y. Blank and R. Zvi, 'The spatial turn in legal theory' 10 *HAGAR Studies in Culture, Polity and Identities*, 27-60 (2010); E. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989); N. Blomley, *Law, Space, and the Geographies of Power* (New York, London: Guilford Press, 1994).

[49] For an introduction to the temporal turn in socio-legal studies, see, among others: M. Valverde, *Chronotopes of Law* n 41 above, 11; Id, ' "Time Thickens, Takes on Flesh": Spatiotemporal Dynamics in Law', in I. Braverman et al eds, *The Expanding Spaces of Law* (Redwood City: Stanford University Press, 2020), 53-76; D. Massey, *For Space* (London: Sage, 2005).

[50] For a postcolonial perspective on modern time as not-one, see, among others: D. Chakrabarty. *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000); S. Hall, 'When Was "The Post-Colonial"? Thinking at the Limit', in I. Chambers and L. Curti eds, *The Post-Colonial Question: Common Skies, Divided Horizons* (London and New York: Routledge, 1996), 242-273. For perspectives on future and utopia in feminist and queer theory, see L. Edelman, *No Future: Queer Theory and the Death Drive* (Durham: Duke University Press, 2004); J. Halberstam, *In a Queer Time and Place: Transgender Bodies, Subcultural Lives / Sexual Cutlures* (New York: New York University Press, 2005); E. Grabham, 'Legal Form and Temporal Rationalities in UK Work-Life Balance Law' 29 *Australian Feminist Studies*, 67-84 (2014).

[51] For empirical studies of the co-production of legal and temporal norms, see, among others: E. Grabham and S. M. Beynon-Jones, 'Introduction', in Ead eds, *Law and Time* (London: Routledge, 2018), 1-28; M. Travis, 'Justice, Temporality and Science Fiction' 2 *Law and Literature*, 241-261 (2022).

[52] S. Mason-Case and J. Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present', in B. Mayer and A. Zahar eds, *Debating Climate Law* (Cambridge: Cambridge University Press, 2021), 170-189.

the distribution of the adverse effects of climate change.[53] In all these cases, a number of temporalities other than the one enshrined in and reproduced by legal time demand recognition before the law. One of the ways in which to read the current is to interpret it as a moment in which the misalignment between the modern concept of time and the timescales of the Earth is dramatically revealed.[54] Law itself exacerbates such a misalignment whenever it overlooks the environmental harms that are temporally dispersed in the past or the future.[55]

Temporalities transcending modern time have appeared in the transformation that has affected a fundamental institution of private law such as property. This brings us back to the example of the commons, namely a counter-hegemonic idea of property that has re-emerged in Western legal thought and practice after the 2008 economic crisis. The commons have implied a resizing of the subject owner's power and a reshaping of the property form in two directions: on the one hand, the dominium – the owner's right to dispose of the thing fully – has been reduced; on the other hand, what has become central is the thing, and the resulting legal regime is one in which it is the thing itself that dictates its own legal status.[56] By recognising the eccentric articulation of individuals, rights and things that has been labelled as commons, law has registered the relation that constitutes them, the link of co-production that binds the resource or space to the community taking care of it. What is thus recognised is a temporal layer that extends beyond the present in which the subject owner is conventionally squeezed and embraces the existence of both future generations – to whom access to the thing must be guaranteed – and of the things, the resources, the ecosystems whose common character is being reclaimed.

VI. Concluding Thoughts

The relationship of law – and private law in particular – to the collective, the more than one, has often been described in terms of impossibility.[57] An individualistic model of the relationship between persons and things has prevailed, which not

[53] L. Collins, 'Judging the Anthropocene: Transformative Adjudication in the Anthropocene Epoch', in L.J. Kotzé ed, *Environmental Law and Governance for the Anthropocene* (Oxford and Portland: Hart Publishing, 2017), 309-27.

[54] For the text that first introduced the term, see P. Crutzen and E. Stoermer,' The Anthropocene' 41 *Global Change Newsletter*, 17-18 (2000).

[55] B.J. Richardson, 'Doing Time-The Temporalities of Environmental Law', in L.J. Kotzé ed, *Environmental Law* n 53 above, 55-74.

[56] For an overview of the commons as a legal concept, see M. Marella,'The Commons as a Legal Concept' 28 *Law and Critique*, 61-86 (2017); P. Napoli, 'Indisponibilité, service public, usage. Trois concepts fondamentaux pour le «commun» et les «biens communs»' 27 *Tracés. Revue de Sciences humaines*, 211-233 (2014); S. Foster and C. Iaione, 'The City as a Commons' 34 *Yale Law & Policy Review*, 281-349 (2015); C. Crea, ' "Spigolando" tra *biens communaux*, usi civici e beni comuni urbani' 3 *Politica del diritto*, 448-464 (2020).

[57] See again M. Spanò, *Fare il molteplice* n 25 above, 9.

only describes how these two legal abstractions are bound together but also strictly demarcates the private from the public sphere and dictates the organisation of society as a whole.[58]

This article departed from the ongoing discussion about the limits of the juridification of nature to advance a twofold proposal that could make this relationship less possible. Property as belonging and legal time as multiple are the potential tenets for a legal theory and technique that can recognise a not-one, hybrid subject. What private law technique has recently developed are tools for accommodating property as belonging and multiple temporalities within the great machine of abstraction of social reality that is Western modern law. As a result, the 'here-and-now' proprietary logic underpinning a conventional use of its forms has been radically challenged. Jurists have been learning to work with a relational and social conception of property and have been doing so within the framework of not one but at least two temporalities: the present, namely the shared historical moment in its political, economic and social contingencies; and an intergenerational time, which concerns the life of a society in a given space over different generations. Perhaps a third step is needed to complete the transformation of the legal subject and to institute the collective: the recognition of another temporal framework which, after having been used in the Earth sciences, is making its way into the social sciences through the mediation of postcolonial studies. Alternatively called 'deep time' or 'planetary time', it denotes the temporality of a river, a forest, and the Earth's timescales more broadly.[59] For modern law, capturing this more-than-human temporality would entail making room in its forms for the collective, the hybrid, the mutable; it would amount to taking the conflict over forms – the rethinking of the concepts through which jurists do the work of abstracting reality – to its most radical consequences. It would mean reaffirming the pragmatic vocation of private law, its capacity to mediate everything we do and to lend its forms to political projects that institute use and social cooperation.

[58] See again M. Davies, 'Persons, Property and Community' n 1 above.

[59] D. Chakrabarty, *The Climate of History in a Planetary Age* (Chicago: University of Chicago Press, 2021).

Hard Cases

Italian Citizenship by Marriage: Some Remarks on the Constitutional Court's Ruling no 195 of 2022

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Abstract

In July 2022, the Italian Constitutional Court handed down Judgment no 195 on the issue of citizenship by marriage. The Court held that foreign or stateless persons married to an Italian citizen cannot be denied Italian citizenship due to the death of their spouse pending the proceedings, provided that they fulfil the conditions to obtain Italian citizenship at the time of the application. Thus, the Court declared that Art 5 of the Italian Citizenship Act violated Art 3 of the Italian Constitution in so far as it included the death of the Italian spouse during the proceedings among the circumstances precluding the acquisition of citizenship. Against this backdrop, the present contribution investigates whether the pertinent rule violated international human rights law as well, an issue that the Constitutional Court left unaddressed. To this end, particular attention will be paid to the principle of non-discrimination under Protocol 12 to the European Convention on Human Rights.

I. Introduction

In July 2022, the Italian Constitutional Court handed down Judgment no 195 on the issue of citizenship by marriage.[1] The Court concluded that foreign or stateless persons married to an Italian citizen cannot be denied Italian citizenship due to the death of their spouse pending the proceedings for the recognition of their right, provided that they fulfil the conditions to obtain Italian citizenship at the time of the application. Thus, the Court declared that Art 5 of the Italian Citizenship Act[2] was in violation of Art 3 of the Italian Constitution in so far as it included the death of the Italian spouse during the proceedings among the circumstances precluding the acquisition of citizenship. The Court addressed the issue solely from the standpoint of the domestic legal system, without taking into account any international law instrument. Still, it is worth assessing whether the conclusion of the Court is consistent with the international human rights law obligations binding upon Italy.

Following a short overview of the legal regime governing the procedure for obtaining Italian citizenship by marriage (Section II), this paper summarises the facts of the case and the reasoning underpinning the ruling of the Constitutional

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[1] Corte costituzionale 26 July 2022 no 195, *Federalismi* (2022).

[2] Legge 5 febbraio 1992 no 91 (as amended) (hereinafter 'Italian Citizenship Act').

Court, and it provides some general considerations on the Court's judgment (Section III). It later explores if (and to what extent) the contested rule was also in contradiction with international law, notably with the principle of non-discrimination under Protocol 12 to the European Convention on Human Rights (Section IV). Section V draws some concluding remarks.

II. Italian Citizenship by Marriage

According to national law, there are five ways to obtain Italian Citizenship,[3] notably *jure sanguinis* (or nationality by descent), marriage or other family relationship, *jus soli* (as regards particular categories of foreign and stateless persons), naturalization,[4] and by decree of the President of the Republic 'when there is an exceptional interest of the State'.

To obtain citizenship by marriage with an Italian national, the foreign or stateless person must fulfil a set of requirements and must not fall under any of the circumstances precluding the granting of Italian citizenship.[5] In particular, Art 5 of the Italian Citizenship Act prescribes a qualifying period: the foreign or stateless person may acquire citizenship if he or she has resided in Italy for at least two years after the marriage, or after three years from the marriage if he or she has resided abroad. This qualifying period is reduced by half if the married couple has natural or adopted children.[6]

Circumstances precluding the granting of Italian citizenship by marriage include, on the one hand, events that affect the marriage bond and, on the other, the final conviction by a court of law for one of the crimes listed in Art 6(1)(a) and (b) of the Italian Citizenship Act.[7] Also, citizenship is denied if there are well-founded

[3] For an overview of the means to obtain nationality, see eg, O. Dörr, 'Nationality' *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2019), paras 12-23; C. Focarelli, *International Law* (Cheltenham: Edward Elgar, 2019), 42. On the means to be granted Italian citizenship, see eg, R. Bin and G. Pitruzzella, *Diritto costituzionale* (Torino: Giappichelli, 21st ed, 2020), 25; P. Pustorino, *Lezioni di tutela internazionale dei diritti umani* (Bari: Cacucci, 1st ed, 2019), 180-184; G. Minervini, 'Italian Citizenship Attribution to Patrick Zaki An International Law Perspective' *The Italian Review of International and Comparative Law*, 443, 445 (2021).

[4] Dörr defines naturalization as 'the conferment of nationality onto an alien by a formal individual act with the consent of (…) the person concerned' (O. Dörr, 'Nationality' n 3 above, para 12).

[5] Scholars also define these conditions as 'positive requirements' and 'negative requirements', respectively. See A. Rauti, 'Acquisto della cittadinanza italiana per matrimonio e morte del "coniuge" nella sent. cost. n. 195 del 2022' *Osservatorio Costituzionale*, 433 (2022).

[6] According to a recent amendment, in certain cases foreign or stateless persons must also prove their knowledge of the Italian language. See legge 1 dicembre 2018 no 132, Art 9(1) and decreto legislativo 25 luglio 1998 no 286 (as amended), Art 9(1).

[7] Notably, lett *a*) recall the offences provided for in Volume II, Title 1, Chapters I, II and III of the Criminal Code. These Chapters respectively govern offences against the international legal personality of the State, against the domestic legal personality of the State and against the political rights of citizenships. Lett *b*) mentions the case of convictions for an offence committed with criminal intent for which the law prescribes a statutory penalty of a maximum of at least three years

reasons to consider the person concerned as a serious threat to national security.[8]

For the purpose of the present paper, the first set of circumstances is particularly relevant. Before the ruling of the Italian Constitutional Court, Art 5 of the Italian Citizenship Act prescribed that, at the time of issue of the decree by the Minister of Internal Affairs, the marriage must not have been dissolved or annulled, or the civil effects of the marriage must not have been terminated, and the spouses must not have legally separated.

On a procedural stance, the application for citizenship must be submitted to the *Prefettura*, one of the bodies of the Minister of Internal Affairs, which has up to thirty-six months to inform the applicant of the result of the procedure.[9]

Lastly, it must be pointed out that, according to Italian Supreme Court, the foreign or stateless person who submits the application for citizenship by marriage is entitled to a full-blown individual right (*diritto soggettivo*) to obtain Italian citizenship, as confirmed by the fact that the competence on dispute resolution lies on ordinary courts – and not on administrative ones, as it would have been the case if the applicant was only bestowed with a 'legitimate interest' (*interesse legittimo*).[10]

III. The Constitutional Court's Ruling no 195 of 2022

The case under comment was referred to the Constitutional Court by the Tribunal of Trieste, which was called to decide on the rejection by the administrative authorities of the application for citizenship submitted by a Ukrainian national.

The woman has resided in Italy since 6 September 2007, married an Italian citizen on 14 March 2009, and submitted the application for citizenship on 9 June 2011. On 27 July 2012, she became a widow pending the proceedings of citizenship. On 22 April 2013, the *Prefettura* notified her that her application was inadmissible: according to the administrative authorities, the death of the spouse dissolved the marriage and, thus, fell within one of the circumstances precluding the granting citizenship under Art 5 of the pertinent act. The woman filed a complaint before the Tribunal of Trieste, which identified three possible grounds of unconstitutionality. Notably, the Tribunal argued that the provision was in violation of Art 3 of the Italian Constitution (principle of equality and reasonableness), alone and together with Art 24 (right to judicial action) and Art 97 (principle of sound administration).[11]

According to the Tribunal of Trieste, the relevant norm led to an unjustified

imprisonment, or convictions by a foreign judicial authority for a non-political offence for which the law prescribes a custodial penalty of more than one year when the foreign sentence has been recognized in Italy. Rehabilitation of the offender ceases the preclusive effect of the conviction. See Italian Citizenship Act, Art 6(3).

[8] Italian Citizenship Act, Art 6(1)(c).

[9] ibid Art 9-*ter*.

[10] Corte di Cassazione-Sezioni Unite 21 ottobre 2021, para 4, available at www.questionegiustizia.it; legge 17 febbraio 2017 no 46, Art 3(2).

[11] Corte costituzionale 26 July 2022 no 195, para 5-5.3.

unequal treatment between, on the one hand, the foreign or stateless person applying for citizenship before administrative authorities, who is entitled to an 'individual right' of obtaining the Italian nationality, and, on the other hand, other situations where persons may directly enforce their individual rights before the courts of law. In this latter scenario, the judicial rulings have retroactive effects. Conversely, in the case of the application for citizenship, the requirements must be met at the moment of the issuance of the decree, a circumstance that divests of any relevance the existence of the mandatory conditions upon submission of the application. Thus, according to the Tribunal, the administrative procedure constituted a limit to the assessment of the pertinent right before civil courts, in violation of Art 24 of the Italian Constitution. The referring Tribunal also contested that the length of the proceedings could negatively affect the applicant, in violation of the principle of sound administration under Art 97 of the Italian Constitution.

The third and last ground concerns the principle of reasonableness. The Tribunal pointed out the difference between the death of the Italian spouse and the other events precluding granting citizenship (annulment of marriage, cessation of its civil effects, legal separation, and other grounds for dissolution of marriage): whilst the former is an unforeseeable event, the latter are the consequences of voluntary decisions attributable to the applicant. The Tribunal also argued that the rationale of the relevant rules lies on the need to avoid fraudulent marriage to obtain Italian citizenship. In light of these observations, there was an intrinsic contradiction between the purpose of the norm and the means to pursue such an aim. Thus, the provision violated the principle of reasonableness under Art 3 of the Italian Constitution.

Both the Attorney General and the Italian Constitutional Court focused on this last ground. The Attorney General contested the rationale proposed by the Tribunal of Trieste on two main grounds. First, the regime governing citizenship by marriage is meant to protect the family unit stemming from the marriage between an Italian citizen and a foreign or stateless person. Second, Art 5 does not aim at granting an individual right to citizenship, rather its purpose is to ensure special protection to the foreign or stateless person with regard to the possibility of residing in Italy and to the right to enter and leave the country. Given these considerations, the Attorney General concluded in favour of the reasonableness of Art 5: citizenship by marriage aims at reinforcing the stability of the family unit, provided that this unit exists at the time of the issuance of the decree. Therefore, the disappearance of the family unit (due to the death of the spouse pending the proceedings) justifies the inadmissibility decision and, ultimately, constitutes a legitimate circumstance precluding the granting of citizenship.[12]

The Constitutional Court affirmed that the main rationale of the regime governing citizenship by marriage consists in offering a simplified means to obtain Italian citizenship to foreign or stateless persons due to their membership of a

[12] Corte costituzionale 26 July 2022 no 195, para 6 - *in fatto*.

family unit grounded on the marriage bond with an Italian citizen.[13] Subsequently, the Court did not clarify which of the two proposed rationales was the one underpinning circumstances precluding the granting of citizenship, but it analysed both alternatives and declared that the contested provision was unreasonable in relation to each of them.[14]

The Court, first, affirmed that the death of the spouse is a natural and random event, outside the control of the foreign or stateless person, which does not pertain to the grounds of the right to citizenship. This right is based on having been part of a family unit constituted through marriage, for the duration of the qualifying period prescribed by law and, following the submission of the application, until the death of the spouse. Against this backdrop, the denial of citizenship is unreasonable in so far as the person concerned meets all the required conditions upon submission of the application and the event occurs pending the procedure. According to the Court, this regime is even less reasonable in cases where a family unit exists between the widow and the couple's children, whether natural or adopted.[15]

Moving on to the second rationale, the Court highlighted the lack of a provision that specifically governs the consequences of fraudulent marriages in relation to the proceedings for granting citizenship.[16] Even assuming that the legislator tried to fight such phenomenon by requiring the absence of indicators pointing at fraudulent marriages (such as the legal separation or cessation of the civil effects) until the issuance of the decree conferring citizenship, the inclusion of the death of the spouse pending the proceedings among the circumstances listed in Art 5 is still unreasonable. In fact, fraudulent marriage requires a degree of intent and foreseeability on the part of the person who is willing to wed with the sole purpose of obtaining citizenship. According to the Constitutional Court, this is not the case of the death of the spouse pending the proceedings.[17]

The Court therefore recalled that a violation of the principle of reasonableness under Art 3 of the Italian Constitution occurs in cases of *intra legem* unreasonableness, *viz.* where there is an intrinsic contradiction between the overall purpose pursued by the legislator and the provision meant to achieve such goal. The assessment of reasonableness, thus, requires evaluating the consistency between a norm and its *ratio legis*.[18]

In conclusion, Art 5 of the Italian Citizenship Act is in violation of Art 3 of the Italian Constitution since it postpones the assessment of the dissolution of marriage, as a consequence of the death of the spouse, to the moment of the issuance of the decree. The provision is thus partly unconstitutional in so far as it does not exclude

[13] Corte costituzionale 26 July 2022 no 195, para 6 - *in diritto*.

[14] ibid para 7.

[15] ibid para 7.1.

[16] The Court noted that provisions on fraudulent marriage exist in relation to family reunification under decreto legislativo 25 luglio 1998 no 286 (as amended), Arts 29(9) and 30(1-*bis*).

[17] Corte costituzionale 26 July 2022 no 195, para 7.2.

[18] ibid para 8.

the death of the spouse, pending the proceedings to obtain citizenship, from the circumstances precluding the recognition of the right to citizenship.[19]

For reasons of judicial economy, the Court did not address the other grounds of unconstitutionality referred by the Tribunal of Trieste.

1. The Death of the Spouse and the Automatic Application of Circumstances Precluding Citizenship by Marriage

The ruling of the Constitutional Court should be welcomed, because it erased an unreasonable provision from the Italian legal system. Moreover, to some extent, it highlighted several critical aspects of the regime on citizenship by marriage – such as the excessive length of the administrative proceedings underlined by the Tribunal of Trieste. However, the line of reasoning of the judgment in itself and the legal regime governing the enforcement of the circumstances precluding the granting of citizenship by marriage are still controversial.

First, Rauti pointed out that the judges seemed to consider the death of the spouse (pending the proceedings for citizenship) as always being a natural and random event, completely devoid of any degree of intent or foreseeability on the part of the widow. This assumption is at least doubtful when it comes to marriage with elderly or terminally ill patients, because in these cases the death of the spouse in the near future hardly falls within the definition of a 'random event'.[20]

Secondly, Art 5 of the Italian Citizenship Act establishes an automatic mechanism under which the application for citizenship is declared inadmissible as soon as one of the precluding circumstances occurs. According to the same author,[21] the Constitutional Court lost the chance to criticise the automatic nature of this mechanism, which relies on the erroneous assumption that the other circumstances precluding the granting of citizenship (such as the legal separation or cessation of the civil effects) are always the consequence of voluntary decisions attributable to the applicants or their spouses. As a corollary of the automatic application of the circumstances under Art 5, foreign or stateless persons are required to remain wed even if the Italian spouses cheat on them, or in case of desertion – ie, in cases of blatant breaches of the obligation of fidelity and cohabitation under Art 143(1) of the Italian Civil Code.[22] This is highly questionable as it runs contrary to each of the proposed rationales underpinning Art 5: on the one hand, the occurrence of one of the precluding circumstances does not exclude, in and for itself, the persistent existence of a family unit (eg, between the former spouse and the children of the couple); on the other hand, forcing individuals to remain wed to

[19] Corte costituzionale 26 July 2022 no 195, para 9.

[20] A. Rauti, 'Acquisto della cittadinanza italiana' n 5 above, 446.

[21] ibid 446-447.

[22] Italian Civil Code, Art 143 (Reciprocal Rights and Duties of the Husband and Wife): '(1) Upon marrying, the husband and wife acquire the same rights and assume the same duties. The state of matrimony requires a reciprocal obligation to fidelity, to moral and material assistance, to collaboration in the interest of the family and to cohabitation. (…)'.

faulty spouse does not seem an adequate measure to fight against fraudulent marriages – it rather appears to encourage them, at least after the occurrence of the event pending the proceedings for citizenship.

We agree with Rauti that the legal regime on citizenship by marriage should require the applicant to meet the relevant conditions upon the submission of the request, whilst the occurrence of one of the precluding events that affect the marriage bond should be assessed on a case-by-case basis, by taking into account the continual existence of the family unit notwithstanding the dissolution of the marriage bond, the best interests of the child (if any) and the degree of intention on the part of the spouses. Such an approach may also avoid possible tensions with the principle of non-discrimination under Protocol 12 of the European Convention on Human Rights (ECHR). [23]

IV. The Right to Citizenship and International Law

It is generally accepted that questions of nationality fall within the reserved domain of States: these enjoy a general discretion in determining the criteria for the acquisition and loss of nationality, a matter which falls within domestic jurisdiction. Still, international law somehow limits this discretion, including through the obligations stemming from international human rights law.[24]

Even if a comprehensive body of rules relating to citizenship is still missing, some specific international rules govern both *horizontal* and *vertical* aspects linked to citizenship – ie, those related to inter-State relations and to individual-State relations, respectively. In fact, citizenship assumes significance in several scenarios governed by general rules of international law or treaty norms.

In greater detail, States have a general freedom to regulate the conferral and revocation of their nationality on the domestic level, whilst the few norms of

[23] Council of Europe, Protocol no 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 2000, entry into force 1 April 2005).

[24] O. Dörr, 'Nationality' n 3 above, para 4; J. Crawford, *Brownlie's Principles of International Law* (Oxford: Oxford University Press, 9th ed, 2019), 495-497. See also PCIJ, *Nationality Decrees Issued in Tunis and Morocco,* Advisory Opinion of the 7 February 1923, 23-24; ILC, 'Nationality, Including Statelessness. Report by Mr. Manley O. Hudson, Special Rapporteur', in *Yearbook of the International Law Commission*, 1952, II, 8. The relationship between citizenship and international law has been addressed by a wealth of literature, including eg, H.F. Van Panhuys, *The Role of Nationality in International Law. An Outline* (Leiden: A.W. Sijthoff, 1959); I. Brownlie, 'The Relations of Nationality in Public International Law' *British Yearbook of International Law*, 284 (1963); M.S. McDouglas et al, 'Nationality and Human rights: The Protection of the Individual in External Arenas' *The Yale Law Journal*, 900 (1974); A.F. Panzera, *Limiti internazionali in materia di cittadinanza* (Napoli: Jovene, 1984); R. Donner, *The Regulation of Nationality in International Law* (Leiden: Brill, 2nd ed, 1994); Y. Zilbershats, *The Human Right to Citizenship* (Leiden: Brill, 2002); L. Panella, *La cittadinanza e le cittadinanze nel diritto internazionale* (Napoli: Editoriale Scientifica, 2008); A. Annoni and S. Forlati eds, *The Changing Role of Nationality in International Law* (London: Routledge, 2013); K. Krūma, *EU Citizenship, Nationality and Migrant Status. An ongoing challenge* (Leiden: Brill, 2014).

general international law pertaining to this matter govern the consequences of a State's policy choices in this field *vis-à-vis* other States - eg, whether the latter may refuse to recognize the consequences of the attribution of nationality by the former. The International Court of Justice (ICJ) has affirmed this principle in the famous *Nottembohm* case on diplomatic protection. In its judgment, the Court clarified that 'international law leaves it to each State to lay down the rules governing the grant of its own nationality'[25] and that 'the wider concept of nationality is within the domestic jurisdiction' of each sovereign State.[26] In fact, the conferral of nationality determines who enjoys the rights and is bound by the duties that each State recognizes to and imposes on its citizens. However, it is for international law 'to determine whether a State is entitled to exercise protection' to the benefit of specific individuals, on the ground of nationality, in its horizontal relation with other sovereign States.[27] The ICJ concluded that a 'genuine connection' must exist between the State and its nationals for the attribution of citizenship to have consequences on the international level.[28] Subsequently, the International Law Commission (ILC) smoothed the ICJ's conclusion. The 2006 Articles on Diplomatic Protection do not mention the 'genuine link' for the purposes of diplomatic protection, as the ILC's work simply requires that the attribution of nationality is 'not inconsistent with international law'.[29] This more relaxed rule stems from the assumption that, according to the ILC, in the *Nottebohm* case 'the Court did not intend to expound a general rule applicable to all States, but only a relative rule' for the specific case at hand.[30] The most recent developments on diplomatic protection point out a shift from a mere *horizontal* dimension to a (at least partly) *vertical one*, according to which individuals have a legitimate interest (yet, not a right).

The development of the regime governing diplomatic protection at both the national and international level has led scholars to argue that individuals have at least a legitimate expectation to benefit from the protection of their country of nationality, which thus limits this latter discretion.[31] This shift from a *horizontal* perspective to a *vertical* one characterized also other fields of international law where nationality assumes significance. These fields include, for example, those

[25] *Nottebohm Case (second phase)*, Judgment of April 6th, 1955, ICJ Reports 1955, 4, 23.

[26] ibid 20.

[27] ibid 21.

[28] ibid 23.

[29] Art 4 'State of nationality of a natural person', in *Yearbook of the International Law Commission*. Report of the Commission to the General Assembly on the work of its fifty-eight session, II, Part two (Geneva: United Nations Publication, 2006): 'For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law'.

[30] ibid para 5.

[31] See eg, A.M.H. Vermeer-Künzli, *The protection of individuals by means of diplomatic protection: diplomatic protection as a human rights instrument* (Leiden: Universiteit Leiden 2007), 176-205; E. Denza, 'Nationality and Diplomatic Protection' *Netherlands International Law Review*, 463 (2018).

concerning expulsions of aliens, where only the State of nationality has the obligation to re-admit them. The original rationale of this rule, which is currently enshrined in human rights treaties as well, pursued the objective of allowing States to remove third-country citizens from their territory.[32]

From the standpoint of States' discretion in the matter of nationality, if general international law limits the consequences of acquisition or revocation of citizenship in the *horizontal* relationships between States, international human rights law limits States' discretion to confer or revoke nationality in its *vertical* relationships with individuals claiming citizenship (or victim of a withdrawal decision). Such limitations are also imposed by other special regimes, such as the one on stateless persons, which seeks to prevent statelessness at birth or later in life by also requiring States to adopt specific criteria for the conferral of nationality.[33]

As for international human rights law, Art 15 of the Universal Declaration of Human Rights (UDHR) establishes the right of everyone to a nationality and to change nationality, alongside the prohibition of arbitrary deprivation of citizenship.[34] This provision has not been transposed in subsequent treaties of universal and regional scope, with only a few exceptions. In particular, the American Convention on Human Rights and the Arab Charter on Human Rights mirror Art 15 UDHR. Moreover, the former enshrines the right to acquire citizenship according to the *ius soli* criterion, to be applied if the person has no right to any other nationality;[35] the latter, on its part, affirms the *ius sanguinis* criterion based on the mother's citizenship and enshrines the right to have more than one nationality.[36]

[32] S. Marinai, *Perdita della cittadinanza e diritti fondamentali: profili internazionali ed europei* (Milano: Giuffrè, 2017), 2. For other fields in which such shift took place, see *id*, 4-7.

[33] eg, Art 1 of the Convention on the Reduction of Statelessness (28 September 1954, entry into force 6 June 1960) prescribes the *ius soli* criterion. On revocation of nationality, see S. Marinai, n 32 above.

[34] Universal Declaration of Human Rights (10 December 1948) Art 15: '1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.' On this provision, see eg, M. Adjami, J. Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' 27 *Refugee Survey Quarterly*, 93 (2008). Other non-binding provisions enshrining the right to nationality are provided under regional systems of human rights: see eg, Organization of American States (OAS), American Declaration of Rights and Duties of Men (2 May 1948), Art 19; Association of Southeast Asian Nations (ASEAN), Human Rights Declaration (18 November 2012), Art 18.

[35] American Convention on Human Rights (22 November 1969, 18 July 1978), Art 20: '1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.' See also Inter-American Court of Human Rights, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion of the 19 January 1984, available at https://www.refworld.org/cases, in which the judges affirmed that: 'nationality is an inherent right of all human beings' (para 32).

[36] Arab Charter on Human Rights (15 September 2004, entry into force 15 March 2008), Art 29: '1. Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality. 2. States parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child. 3. Non one shall be denied the right to acquire

Other provisions recognize the right of children to nationality.[37] Against this backdrop, it is doubtful that the right of everyone to a nationality stems from a norm of general international law.

Whilst only a few international human rights treaties prescribe the right to a nationality, a remarkable number of conventions restrict States' discretion in grating or withdrawing their citizenship. Notably, human rights law requires States to comply with the principle of non-discrimination in settling the rules governing the questions of nationality.[38] In this regard, Protocol 12 to the ECHR may provide a useful tool in assessing the compatibility of the (former) Art 5 of the Italian Citizenship Act with international human rights law.

Before addressing this specific topic, a few remarks on EU citizenship are due. As is well known, EU citizenship is granted automatically to anyone who holds the nationality of an EU Member State.[39] Besides the rights and duties under domestic law, EU citizens enjoy the rights and bear the duties provided for in EU law, including, eg, the right to move and reside freely within the EU and the right to vote and to stand as candidates in elections to the European Parliament.[40] In the same vein as under international law, the initial wide discretion on questions of citizenship under the EU has gradually reduced: in fact, although it still is for each EU Member State to lay down the conditions for the acquisition and loss of their citizenship, 'the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law'.[41]

another nationality, having due regard for the domestic legal procedures in his country.'

[37] See eg, International Covenant on Civil and Political Rights (16 December 1966, 23 March 1976), Art 24(3); Convention on the Rights of the Child (20 November 1989, 2 September 1990), Art 7(1).

[38] O. Dörr, n 3 above, para 6; L. Henenbel and H. Tigroudja, *Traitè de Droit International des Droits de l'Homme* (Paris: Pedone, 12th ed, 2018), 1192-1193. See also International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, entry into force 4 January 1969), Art 5 (d) (iii); Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, entry into force 3 September 1981) Art 9 (1); Convention on the Rights of Persons with Disabilities (13 December 2006, entry into force 3 May 2008), Art 18 (1); European Convention on Nationality (6 November 1997, entry into force 1 March 2000), Art 5 (1).

[39] Treaty on the Functioning of the European Union (TFEU), Consolidated Version 2016, Art 20 (1).

[40] TFEU, Art 20 (2), lett a) and lett b).

[41] See eg, Case C-369/90, *Micheletti and Others* v *Delegación del Gobierno en Cantabria*, Judgment of 7 July 1992, para 10; Case C-179/98 *Belgian State* v *Fatna Mesbah,* Judgment of 11 November 1999, para 29; Case C-135/08, *Janko Rottmann* v *Freistaat Bayern*, Judgment of 2 March 2010, para 45. All the judgments are available at: www. curia.europa.eu. According to the case law of the Cout of Justice of the European Union (ECJ), for example, the legislation of an EU Member State cannot restrict the effects of the grant of the nationality of another EU Member State by imposing an additional condition (such as, eg, habitual residence of the person concerned in the territory of this latter Member State) for recognition of that nationality with a view to the exercise of the EU fundamental freedoms, such as freedom of establishment (see eg, Case C-369/90, *Micheletti and others*, *ibid*). The ECJ also clarified that Member States may revoke their citizenship by naturalization when that citizenship was obtained by deception, 'on condition that the decision to withdraw observes the principle of proportionality' (see eg, Case C-135/08, *Janko Rottmann,* ibid).

1. The Principle of Non-Discrimination under Protocol 12 of the ECHR and the Right to Citizenship by Marriage under (former) Art 5 of the Italian Citizenship Act

Art 1 of Protocol 12 to the ECHR establishes that the 'enjoyment of any right set forth by law shall be secured without discrimination on any ground (…) or (…) status'. The additional protocol was adopted to plug the gap in the scope of the prohibition of discrimination under Art 14 ECHR, whose application is limited to the enjoyment of the rights and freedoms enshrined in the Convention. Even if the European Court of Human Rights (ECtHR) recognized since its early case-law that Art 14 has an autonomous field of application,[42] it has been reluctant to address a claim under this provision in the absence of an alleged breach of ECHR right.[43] In an attempt to verify the relevance of this prohibition with regard to nationality by marriage under (former) Art 5 of the Italian Citizenship Act, the following lines sketch the scope and content of Art 1, Protocol 12 to the ECHR by taking into account the ECtHR's case-law on Art 14 of the Convention due to the strict connection between the two provisions.

As it has just been noted, Art 1, Protocol 12, covers the enjoyment of 'any right set forth by law'. As clarified in the Explanatory Report to the Protocol, this expression refers to – among other situations – 'any right specifically granted to an individual under national law'.[44] According to the ECtHR's well-established case law, the ECHR concepts have an autonomous meaning, so that the interpretation under the domestic law of Contracting Parties has a relative value and, at best, only constitutes a starting point.[45] The ECtHR has constantly interpreted the term 'law'

For other considerations on this topic, see eg, A. Del Vecchio ed, *La cittadinanza europea. Atti del Convegno - Roma, 26 marzo 1998* (Milano: Giuffrè, 1999); M. Condinanzi et al, *Citizenship of the Union and free movement of persons* (Leiden Boston: Martinus Nijhoff Publishers, 2008); A. Tizzano, 'Alle origini della cittadinanza europea' *Diritto dell'Unione europea*, 1031 (2010); B. Nascimbene and F. Rossi Dal Pozzo, *Diritti di cittadinanza e libertà di circolazione nell'Unione europea* (Padova: CEDAM, 2012); U. Villani, 'Riflessioni su cittadinanza europea e diritti fondamentali', in G. Caggiano ed, *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano* (Torino: Giappichelli, 2014); S. Marinai, n 33 above, 9-13, and the literature reported thereby.

[42] Eur. Court H.R., *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' (Merits)*, Judgment of 23 July 1968 (available at www.hudoc.echr.coe.it), in which the Court recalls that: 'In its opinion of 24th June 1965, the Commission expressed the view that although Article 14 (Article 14) is not at all applicable to rights and freedoms not guaranteed by the Convention and Protocol, its applicability "is not limited to cases in which there is an accompanying violation of another Article" '.

[43] D.J. Harris et al, *Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 4th ed, 2018), 764-765.

[44] Explanatory Report to the Protocol no 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, para 22.

[45] E. Bjorge, Domestic Application of the ECHR: Courts as Faithful Trustees (Oxford: Oxford University Press, 2015), 202-222; J. McBride, The Doctrines and Methodology of Interpretation of the European Convention on Human Rights by The European Court of Human Rights, 2021, available at www. rm.coe.int.

so as to encompass both legislation and case law: notably, the Court has accepted that 'law' is the (statute or lower rank) enactment in force as interpreted by the competent courts.[46]

Neither Art 14 of the Convention nor Art 1, Protocol 12 define 'discrimination'. According to the Court, direct discrimination identifies the 'difference in treatment of persons in analogous, or relevantly similar situations'[47] and 'based on an identifiable characteristic, or 'status'[48] protected by these two provisions. On the other hand, *indirect* discrimination occurs when a general policy or neutral rule has a disproportionately prejudicial effect on a particular group, even when the policy or rule has no discriminatory intent and is not specifically aimed or directed at that group.[49] The Court also developed a two-phase discrimination test in order to assess whether differences in treatment constitute discrimination. The first step of the test is meant to establish whether there has been a difference in the treatment of persons in analogous or similar situations. Should this be the case, the second step aims at assessing whether the difference has an objective and reasonable justification, notably whether the difference pursues a legitimate aim and is proportionate to the purpose pursued.[50]

Last but not least, States parties to the ECHR have both negative and positive obligations under the prohibition of discrimination: States are obliged not to discriminate (directly or indirectly) in their official acts and to adopt affirmative actions to prevent, stop, or punish discrimination in horizontal relationships, eg, those perpetrated by private actors against other private actors.[51]

Turning to the application of these general principles to the case at hand, as recalled in the introductory notes, the Italian Supreme Court has interpreted the Italian legal regime governing citizenship by marriage as conferring an *individual right* to obtain Italian citizenship upon the foreign or stateless person who submits the pertinent application.[52] Therefore, Art 5 of the Italian Citizenship Act falls within the *ratione materiae* scope of Art 1, Protocol 12 to the ECHR. Moreover,

[46] G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford: Oxford University Press, 2013), 84. See ibid 70 for references to the ECtHR's case-law.

[47] See eg, Eur. Court H.R., *Biao* v *Denmark*, Judgment of 24 May 2016, para 89; *D.H. and Others* v *The Czech Republic*, Judgment of 13 November 2007, para 175. Both judgments are available at www.hudoc.echr.coe.it.

[48] Eur. Court H.R., *Varnas* v *Lithuania*, Judgment of 9 July 2013, para 106 available at www.hudoc.echr.coe.it. On the definition of direct discrimination, see also D.J. Harris et al, n 43 above, 766.

[49] See eg, Eur. Court H.R., *Hugh Jordan* v *The United Kingdom*, Judgment of 4 May 2001, para 154; *D.H. and Others* v *The Czech Republic*, Judgment of 13 November 2007, para 183; *Sampanis and Others* v *Greece*, Judgment of 5 June 2008, para 67; *Biao* v *Denmark*, Judgment of 24 May 2016, para 103. All these judgments are available at www.hudoc.echr.coe.it. See also D.J. Harris et al, n 43 above, 766-767.

[50] See D.J. Harris et al, n 43 above, 772-776.

[51] ibid 799-801.

[52] Corte di Cassazione-Sezioni Unite 21 ottobre 2021 no 29297 n 10 above; legge 17 febbraio 2017 no 46, Art 3(2).

the former national provision constituted direct discrimination on the grounds of status, notably the marital status pending the application for citizenship. Former Art 5 required the marital status to exist upon the submission of the application and at the end of the procedure, which can take up to thirty-six months. This constituted a different treatment between foreign nationals who are still wed at the issuance of the decree conferring citizenship, and those who are not due to the death of their spouse. This different treatment has no objective and reasonable justification. In this regard, it is possible to recall the reasoning underpinning the judgment of the Italian Constitutional Court: the denial of citizenship due to the death of the spouse pending the proceedings does not pursue a legitimate aim (be it connecting the conferral of citizenship to the protection of a family unit or fighting fraudulent marriages). Therefore, former Art 5 constituted an unjustified form of direct discrimination by law and, thus, a violation of the negative obligation under Art 1, Protocol 12 ECHR.

V. Concluding Remarks

With Judgment no 195 of July 2022, the Italian Constitutional Court marked a step towards a more reasonable and less discriminatory regime on citizenship by marriage. Even if the Court only addressed the legitimacy of former Art 5 of the Italian Citizenship Act from the standpoint of intrinsic reasonableness under Art 3 of the Italian Constitution, this judgment has also contributed to eliminating an unjustified differential treatment in violation of the prohibition of discrimination under Art 1, Protocol 12 of the European Convention on Human Rights.

Still, the reasoning of the judgment is not without flaws. The main shortcoming is the lack of general disapproval of the automatic mechanism governing the application of precluding events that affect the marriage bond. Although the Court was bound to decide solely on the question referred by the Tribunal of Trieste, it could still have elaborated more on this issue (eg, in an *obiter dictum*). In our view, the lack of a case-by-case assessment of the specific situation of the applicant following the occurrence of one of these events may be contested on the grounds of reasonableness and the prohibition of discrimination, under both the Italian constitution and the ECHR. Indeed, even if States enjoy a general discretion in setting up the criteria for the conferral and loss of nationality, their sovereignty on this matter finds limits in their own legal regime (according to the hierarchy of sources) and in their international human rights obligations. It will not be a surprise, thus, if other applicants decide to litigate their right to obtain Italian nationality by marriage in front of judges up to the Italian Constitutional Court.

Hard Cases

Something New on the Eastern Front. The Application of the 1996 Hague Child Protection Convention in Italy to Children Fleeing the Russian-Ukrainian War

Ester di Napoli*

Abstract

This article offers a critical assessment of a judgment by the Italian Supreme Court in 2023 (judgment no 17603 of 13 June 2023), concerning the recognition of a measure by which the Ukrainian Consulate in Italy appointed a woman as guardian of several Ukrainian children who had fled the war. The judgment is interesting for two reasons. First, it deals with the Hague Convention on the Protection of Children of 19 October 1996, with which Italian courts appear to have little familiarity with, despite the fact that Italy has been a party to the Convention since 1 January 2016. Secondly, the judgment addresses an issue that is rarely examined by courts and scholars, namely the role of consular authorities in the application of the Convention. Both the Supreme Court's reasoning in the judgment and its conclusions are unconvincing. The judgment refers to several legal texts, but fails to provide adequate guidance on their interaction and coordination. In addition, the Court relies on various Private International Law mechanisms in its reasoning, but does not seem to be fully aware of the specificities of each technique and of the issues raised by their combined operation. The Supreme Court's approach, it is argued, hardly contributes to ensure the proper interpretation of the Hague Convention on the Protection of Children.

I. Introduction

On 13 June 2023, the Italian Supreme Court issued its first decision on the 1996 Hague Child Protection Convention[1] to a case falling within the national migrant children's protection system and in particular, concerning several Ukrainian children fleeing the war (judgment no 17603 of 2023).

This judgment arrives just two weeks before another one issued by the Joint Divisions of the Supreme Court, which applied the 1996 Hague Convention to the recognition of a Russian judgment concerning the exercise of parental

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[1] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. The Convention entered into force, at the international level, on 1 January 2002. To date, fifty-four States are bound by the Convention. More details on the status of ratifications and accessions available at http://tinyurl.com/srsxefjb (last visited 10 February 2024).

responsibility over a child,[2] and one month after the Joint Divisions applied the Convention to a case concerning children residing in the United States, in order to exclude the jurisdiction of Italian courts.[3] In less than two months, the Corte di Cassazione has had the opportunity to highlight a number of critical issues concerning the application of an international convention, which entered into force in Italy on 1 January 2016,[4] replacing the 1961 Hague Convention (according to Art 51),[5] and which has, since then, been rarely applied.[6]

In judgment no 17603 of 2023, the Supreme Court spends more than thirty pages reviewing the main provisions of the 1996 Hague Convention, concluding for the recognition of the appointment of a guardian carried out by the Ukrainian Consulate in Naples, based on a series of previous administrative measures issued in Ukraine.

The detail devoted to the 1996 Hague Child Protection Convention in the judgment shows the need perceived by the Italian judges to understand the application of an international instrument that establishes uniform rules on Private International Law on children's protection, and that comes into play here with renewed force, in a landscape – the cross-border movement of internationally displaced children – that requires a meaningful effort of coordination. The starting point is that the instruments of Private International Law must be intertwined with those of Immigration Law, with the unique aim of protecting the best interests of the children.

[2] Corte di Cassazione 26 June 2023 no 18199, available at www.cortedicassazione.it.

[3] Corte di Cassazione-Sezioni unite 16 May 2023 no 13438, available at www.cortedicassazione.it. The United States of America signed the Convention in 2010, but have not ratified it yet.

[4] The 1996 Hague Convention was implemented by legge 18 June 2015 no 101. On the application of the Convention in Italy, see C. Honorati, 'Norme di applicazione necessaria e responsabilità parentale del padre non sposato' *Rivista di diritto internazionale privato e processuale*, 793-812 (2015); M.C. Baruffi, 'La Convenzione dell'Aja del 1996 sulla tutela dei minori nell'ordinamento italiano' *Rivista di diritto internazionale privato e processuale*, 977-1019 (2016). See also F. Albano ed, *La Convenzione dell'Aja del 1996. Prontuario per l'operatore giuridico* (Roma: Marchesi Grafiche Editoriali SpA, 2018), which provided the first translation into Italian of the Convention's Explanatory Report authored by Paul Lagarde. The volume is freely available at http://tinyurl.com/36w4hdju (last visited 10 February 2024). See in general: M.C. Baruffi, 'The 1996 Hague Convention on the Protection of Children', in I. Viarengo and F. Villata eds, *Planning the Future of Cross Border Families* (Oxford: Hart, 2020), 259-271; N. Lowe and M. Nicholls QC, *The 1996 Hague Convention on the Protection of Children* (Bristol: Jordan Publishing, 2012).

[5] Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. More information available at http://tinyurl.com/bd2592c8 (last visited 10 February 2024).

[6] In addition, see the following judgments: Corte di Cassazione-Sezioni unite 13 December 2018 no 32359 (termination of parental responsibility); Corte di Cassazione 29 December 2021 no 41930 (notion of unaccompanied child); Corte di Cassazione 24 March 2022 no 9648 (notion of unaccompanied child); Corte di Cassazione-Sezioni unite 19 October 2022 no 30903 (child's maintenance). All judgments are available awww.cortedicassazione.it.

II. The Facts and the Judgment of the Italian Supreme Court no 17603 of 2023

A woman, Yuliya Dynnichenko, applied to the Juvenile Court of Catania (Sicily) to be recognised as the 'international guardian' ('tutore internazionale')[7] of seventeen temporarily displaced children who had run away from an orphanage in Ukraine. The woman's application was based on Art 4 of legge no 64 of 15 January 1994 (the law implementing four international conventions in Italy)[8] on the recognition and enforcement of foreign measures for the protection of children in accordance with the 1961 Hague Convention.[9]

The Juvenile Court rejected the application, considered that the children did not have a legal representative in Italy and were therefore considered 'unaccompanied' (UAMs), and accordingly confirmed the appointment of a voluntary guardian pursuant to Art 11 of Law of 7 April 2017, no 47 on the protection of unaccompanied children.[10] The Juvenile Court's decision recognised that the applicant – the President of a Ukrainian-Italian association based in Catania – had only been granted custody of the children after their arrival in Italy, declaring to the competent police headquarters that she had been 'delegated' to receive them by the Ukrainian Consul General in Naples. The Juvenile Court held that Art 4 of legge no 64 of 1994 was not applicable, but rather the legge no 101 of 18 June 2015, which transposed the 1996 Hague Convention in Italy. Considering that the

[7] The notion of 'international guardian' does not appear in any legal instrument dealing with children in migration, adopted at the European, international and national level, which simply deal with 'guardian'. Among all, see European Union Agency for Fundamental Rights (FRA), *Guardianship for unaccompanied children. A manual fort trainers of guardians* (2023), available at http://tinyurl.com/25tz8my2 (last visited 10 February 2024).

[8] The European Convention on the Recognition and Enforcement of Decisions on Custody of Minors and on the Restoration of Custody (Luxembourg, 20 May 1980), the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980), the Convention on the Protection of Minors (The Hague, 5 October 1961), and the Convention on the Repatriation of Minors (The Hague, 28 May 1970).

[9] Art 4 of legge 15 January 1994 no 64 provides for an *exequatur* procedure for the recognition of measures taken under the 1961 Hague Convention, stating that: '1. Recognition and enforcement in the territory of the State of the measures for children's protection adopted by foreign authorities, in accordance with Article 7 of the Hague Convention of 5 October 1961, are ordered by the juvenile court of the place where such measures must be enforced. 2. The court decides by decree in chambers, having heard the public prosecutor and, where appropriate, the child and the persons where he/she is located, upon appeal by the interested parties (…)'.

[10] Legge 7 April 2017 no 47 on Provisions on Protective Measures for Unaccompanied Foreign Minors. The English translation is available at http://tinyurl.com/ycxzcv9z (last visited 10 February 2024). Art 11 establishes a national system on 'voluntary guardianship', made of private citizens selected and trained by regional ombudspersons to be appointed by juvenile courts as guardians of UAMs. The Italian Authority for Children and Adolescents monitors the recruitment, training and supervision of voluntary guardians at regional level: the monitoring reports and any useful documentation on voluntary guardianship are available at https://tutelavolontaria.garanteinfanzia.org/homepage. On voluntary guardians, see also E. di Napoli, 'La tutela volontaria dopo la legge n. 47/2017', in A. Annoni ed, *La protezione dei minori non accompagnati al centro del dibattito europeo ed italiano. Atti del workshop Ferrara 16 novembre 2017* (Napoli: Jovene, 2018), 73.

woman's appointment did not originate from a jurisdictional authority (namely the court of the children's habitual residence in Ukraine), it did not recognise it. In particular, the Court examines the activity of the Consulate General of Ukraine in Naples, attesting the authenticity of several notarial deeds and a decree of the Ukrainian Ministry of Education, Science, Childhood and Sport designating the orphanage's educator as the person responsible for the children's travel and for their registration in Italy, and 'recognised and delegated' the applicant as guardian. According to the Juvenile Court, the measure taken by the Consulate General was to be considered as a delegation of parental responsibility by means of purely private (ie notarial) acts, and was therefore prohibited by the jurisprudence of the Italian Supreme Court.

The woman therefore challenged the decision before the Corte di Cassazione, on two grounds: incorrect or misapplication of the law under Art 4 of legge no 64 of 1994, and incorrect or misapplication of the rules for qualifying children as UAMs. In particular, she claimed that the Juvenile Court should have considered the concept of 'unaccompanied children' as defined in Directive 2001/55/EC on minimum standards for giving temporary protection,[11] and that she had not been granted *de facto* custody (as referred to in the aforementioned Supreme Court case law), but had been correctly and legally appointed guardian by the Consulate General in accordance with the Ukrainian-Italian consular treaty of 2003.

The Supreme Court examines the main Arts of the 1996 Hague Convention and concludes that the Italian jurisdiction to decide the case is well established according to Art 6 of the Convention, which sets forth a rule of jurisdiction applicable to refugee and internationally displaced children. After reviewing the existing Italian laws and soft laws on the protection of UAMs, it finally excludes Ukrainian children from this category. It reached this conclusion by referring to Arts 23 and 24 on recognition and enforcement of the 1996 Hague Convention, recognising that the applicant's appointment as guardian, carried out by the Consul General of Ukraine in Naples pursuant to Art 50 of the 2003 bilateral consular treaty, was of a constitutive nature (and not a notarial one, ie merely the receipt of a declaration by a person delegating another person): the application was therefore upheld and the decision of the Juvenile Court of Catania overturned.

[11] Art 2, lett. f): 'unaccompanied minors' means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States'; Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

III. Critical Assessment: The Application of the 1996 Hague Convention in the Italian Migrant Children's Protection System

The 1996 Hague Convention lays down uniform Private International Law rules, applicable to its Contracting States in the field of parental responsibility and children's protection. They aim to *i)* identify the competent authorities (rules on jurisdiction: Arts 5-14), *ii)* determine the applicable law (conflict-of-laws rules: Arts 15-22), *iii)* establish the conditions for the cross-border circulation of measures (rules on recognition and enforcement: Arts 23-28), and *iv)* regulate the administrative 'dialogue' between central authorities (rules on cooperation: Arts 29-39).

The material and personal scope of application of the Convention is set out in Arts 1 to 4, which define the concept of 'child' for the purposes of the Convention,[12] and the measures to be included and excluded from the concepts of 'parental responsibility' and 'children's protection'. Such measures 'may concern', *inter alia*: the attribution, exercise, termination or restriction of parental responsibility; guardianship, curatorship and similar institutions; the designation and functions of any person or body having charge of the person or property of the child, representing or assisting the child; the placement of the child in a foster family or in an institutional care, or the provision of care by *kafala* or an analogous institution; the supervision by a public authority of the care of a child by any person having charge of the child (Art 3). The Convention exhaustively excludes a number of measures as the establishment or contesting of a parent-child relationship, emancipation, and decisions on the right of asylum and on immigration (Art 4).

At first sight, therefore, the Convention does not seem to apply to situations involving migrant children. However, the Explanatory Report to the Convention clarifies that this exclusion shall be limited only to decisions, ie only to the *granting* of the right of asylum or residence permit, as these fall within the States' sovereign powers. This means that the protection and representation of children applying for asylum or a residence permit falls within the scope of the Convention. Art 6 of the Convention, as already mentioned, establishes a *forum necessitatis* for 'refugee children and children who, due to disturbances occurring in their country, are internationally displaced', establishing that the authorities of the Contracting State holding jurisdiction are those on the territory of which such children are present as a result of their displacement. The Explanatory Report further explains that the children concerned are those who abandoned their countries because of the conditions existing there, who are often unaccompanied and, in any case, temporarily or permanently deprived of their family environment.

[12] Art 2: 'The Convention applies to children from the moment of their birth until they reach the age of 18 years'. The Convention thus embraces the general definition of 'child' as contained in Article 1 of the UN Convention on the Rights of the Child of 20 November 1989. It is worth mentioning that not all Hague Conventions have made the same choice: it is the case of the Convention of 25 October 1980 on the civil aspects of international child abduction, which ceases to apply when the child attains the age of 16 years (Art 4).

The Convention clearly declares to come into play in contexts relating to 'children on the move', and thus applying to be an instrument for the governance of child migration: it does not aim to replace other instruments applicable to these situations – namely the tools pertaining to the realm of Immigration Law – but rather requires a coordination effort, in order to effectively ensure the best interests of the child, as enshrined in Art 3 of the 1989 UN Convention on the Rights of the Child (CRC).[13] Discussions on the relationship between the 1996 Hague Convention and the European instruments adopted in the field of judicial cooperation in civil matters have taken place within the European Parliament,[14] the Hague Conference on Private International Law,[15] and among scholars,[16] but have never taken root.[17]

The 'integrated protection' of children – through a coordinated reading of Private International Law and Immigration Law measures – was advocated by the UN CRC Committee in its statement of 24 March 2022, where it urged States to provide 'core and integrated support to traumatised Ukrainian children, especially those who are unaccompanied.'[18] To this end, the UN Committee

[13] On the instrumentality of the 'law of the Hague' to the protection of children's rights contained in the CRC, see H. van Loon, 'Protecting Children Across Borders: The Interaction Between the CRC and the Hague Children's Conventions', in Id ed, *The United Nations Convention on the Rights of the Child. Taking Stock After 25 Years and Looking Ahead* (Leiden: Brill Nijhoff, 2017), 31, 41; C. Bernasconi and P. Lortie, 'La CRC e i lavori della Conferenza dell'Aja di diritto internazionale privato nel settore della protezione delle persone di minore età', in Autorità Garante per l'infanzia e l'Adolescenza ed, *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza Conquiste e prospettive a 30 anni dall'adozione* (2019), available at http://tinyurl.com/3huxxs8u (last visited 10 February 2024).

[14] See S. Corneloup et al, Private International Law in a Context of Increasing International Mobility: Challenges and Potential, Study for the JURI Committee, European Parliament (2017); S. Corneloup et al, Children on the Move: A Private International Law Perspective, Study for the JURI Committee, European Parliament (2017); M. Erb Klünemann, Potential and Challenges of Private International Law in the Current Migratory Context. Experiences from the Field, Briefing, European Parliament (2017).

[15] See The Hague Conference on Private International Law – HCCH, Permanent Bureau, *The Application of the 1996 Child Protection Convention to Unaccompanied and Separated Children* (2023), available at http://tinyurl.com/mpbyvrda (last visited 10 February 2024).

[16] See, among others, C. Honorati, 'La tutela dei minori migranti e il diritto internazionale privato: quali rapporti tra Dublino III e Bruxelles II-bis?' *Rivista di diritto internazionale privato e processuale*, 691-713 (2019); F. Ippolito and G. Biagioni eds, *Migrant children: challenges for public and private international law* (Napoli: Editoriale Scientifica, 2016); V. Van Den Eeckhout, 'The Instrumentalisation of Private International Law: quo vadis? Rethinking the "Neutrality" of Private International Law in an Era of Globalisation and Europeanisation of Private International Law' *Social Science Research Network* (2014).

[17] It would not be wrong to say that the discussion provoked political agitation among Member States of the Hague Conference on Private International Law. This is witnessed, for instance, by the fact that the document entitled 'The Application of the 1996 Hague Child Protection Convention to Unaccompanied and Separated Children', was published on 7 July 2017 on the website of the Hague Conference and soon after removed. It re-appeared, substantially unchanged, authored by P. Lortie and C. Armstrong Hall, 'Tools in International Law for the Protection of Unaccompanied and Separated Children' *International Family Law, Policy and Practice*, 5 (2017).

[18] 'Ukraine: Urgent and extra support needed for separated and unaccompanied children, says UN child rights committee', 24 March 2022, available at http://tinyurl.com/bddzefwc (last visited 10

encouraged States to develop national strategies for the non-discriminatory inclusion of unaccompanied, asylum seeking and refugee children in national child protection systems and urged them to

> 'take measures to protect all unaccompanied and separated children who, due to their vulnerability, are inevitably at risk of trafficking, exploitation and abuse'.

Such measures, in particular,

> 'should include international and regional cooperation and coordination across borders for identification, registration and tracing of children with the aim of ensuring that no child is unaccounted for, and to enable and support family reunification, having the best interests of the child taken as a primary consideration.'

In order to assist legal practitioners and national policy makers in using all possible instruments to protect the best interests of children on the move's wellbeing, the European e-Justice Portal has published a factsheet providing for guidance on the application and coordination between the EU Regulation 2019/1111 ('Brussels IIb')[19] and the 1996 Hague Child Protection Convention.[20]

From an Italian perspective, the 'need' to apply the 1996 Hague Child Protection Convention was not seriously perceived[21] until the war between Russia and Ukraine broke out.[22] One need only look at the communication of the Italian

February 2024).

[19] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1. It replaced Regulation (EC) no 2201/ 2003 ('Brussels IIa' or 'Brussels IIbis') as from 1 August 2022. See C. González et al eds, *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters. A Commentary on Regulation 2019/1111 (Brussels IIb)* (London: Edward Elgar Publishing, 2023).

[20] *Children from Ukraine – civil judicial cooperation*, available at http://tinyurl.com/ysfr64v (last visited 10 February 2024).

[21] This was not the case, for instance, of France. See Ministère de l'éducation nationale, de l'enseignement supérieur et de la recherche; ministère de la justice; ministère des affaires sociales, de la santé et des droits des femmes; ministère de l'intérieur; secrétariat d'Etat chargée de la famille, de l'enfance des personnes âgées et de l'autonomie, *Circulaire interministérielle relative à la mobilisation de services de l'Etat auprès des conseils départementaux concernant les mineurs privés temporairement ou définitivement de la protection de leur famille et les personnes se présentant comme tels*, 25 janvier 2016, 3. The document is available at http://tinyurl.com/aw2v4d3x (last visited 10 February 2024).

[22] The Fifth Report on the Monitoring of the Voluntary Guardianship System, published in November 2023 by the Italian Authority for Children and Adolescents, contains a focus on Ukrainian children. It shows that between January and December 2022, 3.427 voluntary guardians were appointed for children arriving with adults. In 50% of such cases they had shown documents issued in Ukraine appointing their accompanying adult as a guardian. The Report does not contain any reference to the 1996 Hague Child Protection Convention. The Report is available at http://tinyurl.com/vbmz4ddf (last visited 10 February 2024).

Central Authority's details to the Permanent Bureau of the Hague Conference – an obligation laid down in Arts 29 and 45 – which was made in April 2022,[23] more than six years after the entry into force of the Convention in Italy. The massive influx of children from Ukraine meant that the transmission of such information could no longer be delayed:[24] cooperation between the Ukrainian and the Italian Central Authority was certainly considered essential to facilitate the communication, offer assistance, and arrange for the placement of children fleeing the conflict.

The Russian-Ukrainian war has boosted the application of the 1996 Hague Convention in Italy, highlighting old and new problems related to it.

Among the 'old' ones, some of which have already been reported to the UN Committee on the Rights of the Child (as they are considered to undermine the effectiveness of children's human rights enshrined in the UN CRC),[25] there is the critical issue of the designation of the Italian Central Authority. Unlike all other Hague Conventions and EU instruments adopted in the field of judicial cooperation in family matters, for which the Ministry of Justice has been designated,[26] under the 1996 Hague Convention the Italian Presidency of the Council of Ministers was appointed Central Authority. This choice, presumably made in line with the 1993 Hague Adoption Convention,[27] is a 'natural consequence' of legge no 101 of

[23] See Italy - Central Authority (Art 29) at http://tinyurl.com/yf7muh35 (last visited 10 February 2024).

[24] According to the data provided by the Italian Ministry of Labour and Social Policies, immediately after the war started – to 28 February 2022 – the total number of unaccompanied children was 11.201, with no Ukrainian children counted. Soon after, to 31 March 2022, the number of UAMs increased to eleven thousand nine hundred thirty-seven, and Ukrainian children were one thousand four hundred and nineteen, ie the third nationality after UAMs from Egypt and Bangladesh. Since April 2022, and throughout the year, Ukrainian UAMs became the first largest group in Italy, with three thousand nine hundred and six out of a total of fourteen thousand twenty-five and progressively increased until they touched and exceeded the highest rate ever reached, in 2016 (they were five thousand one hundred twenty-two out of fourteen thousand five hundred and twenty-eight in May; five thousand three hundred and ninety-two out of fifteen thousand five hundred and ninety-five in June; five thousand five hundred and seventy-seven out of sixteen thousand four hundred seventy in July; five thousand four hundred and twenty out of seventy thousand six hundred and sixty-eight in August; five thousand two hundred and eighty out of eighteen thousand eight hundred one in September; five thousand one hundred and fifty-three out of eighteen thousand eight hundred and seventy-six in October; five thousand seventy-three out of twenty thousand thirty-two in November; five thousand forty-two out of twenty thousand eighty-nine in December). In 2023, Ukrainian UAMs are still among the first groups counted in Italy: numbers are decreasing but still very significant (to 31 July 2023, they were the twenty point forty percent of the total, equal to twenty-one thousand seven hundred and ten). More information at http://tinyurl.com/47n5nbs6 (last visited 30 September 2023).

[25] See the Opinion of the Italian Authority for Children and Adolescents on the Fifth and Sixth Government Report to the UN Committee on the Rights of the Child, pursuant to Art 3, para 1, lett i), of legge 12 July 2011 no 112, instituting the Italian Authority for Children and Adolescents (April 2017): see https://www.garanteinfanzia.org/.

[26] Office IV of the Department of Juvenile and Community Justice (Ministry of Justice): https://www.giustizia.it/giustizia/it/mg_12_4_4_4.page.

[27] The Italian Central Authority appointed under the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption is the Commission for

2015, which simply ordered the Convention to be 'fully and entirely' implemented in Italy, without any legal intervention aimed at integrating it into the Italian legal system ('*piena ed intera esecuzione è data alla Convenzione*'; so-called '*ratifica secca*'), which would have been necessary for its effective functioning. The implementation of the Convention in Italy is therefore flawed from the outset.

In addition to the lack of a systematic vision in the designation of the Italian Central Authority, an issue that has only recently been resolved by the Italian civil law reform concerns the so-called exequatur procedure under Art 26. Art 15, para 3 of the decreto legislativo no 149 of 2022 amended the decreto legislativo no 150 of 2011, introducing Art 30-*bis*, which specified the procedures applicable to the effectiveness of foreign judgments under EU law and international conventions. Art 30-*bis*, para 5, in particular, extends the proceedings for interim relief – in accordance with Art 281-*decies* of the Italian Code of Civil Procedure – to proceedings for the declaration of enforceability (*exequatur*) of foreign judgments or, more specifically, for the verification of the existence of the conditions for recognition, or for the refusal of recognition, when the effectiveness of the judgments is based on an international convention. Although not clearly specified, the protective measures adopted under the 1996 Hague Convention fall within its scope of application. Art 30- *bis* applies to proceedings initiated after 30 June 2023: there is no evidence yet of its application.

The optional certificate provided under Art 40 of the 1996 Hague Convention has not yet been implemented.[28] It should be issued by the authorities of the Contracting State of the child's habitual residence or of the Contracting State where a measure of protection has been taken, and would indicate the capacity in which the person is entitled to act and the powers conferred on him or her: this would greatly facilitate the cross-border movement of migrant children.

The 'new' critical issues surrounding the Convention are closely linked to its application and could be addressed with from two different perspectives. The first reflects the recent trend – developed after the outbreak of the war – to refer to the 1996 Hague Child Protection Convention in policy documents on the reception of migrant children. This is the case of the Unaccompanied Children's Plan ('*Piano minori stranieri non accompagnati*') adopted by the *ad hoc* Commissioner of the Italian Ministry of Interior, appointed after the war to coordinate the measures

International Adoptions (www.commissioneadozioni.it), whose President is the Minister for Family, Birth and Equal Opportunities (Minister without portfolio, thus directly relying on the Presidency of the Council of Ministers).

[28] In particular, Art 40, para 3, states that 'Each Contracting State shall designate the authorities competent to draw up the certificate'. See E. di Napoli, 'Sinergie tra diritto dell'immigrazione e diritto internazionale privato: il caso dei minori stranieri non accompagnati', in Autorità Garante per l'infanzia e l'Adolescenza ed, *La Convenzione delle Nazioni Unite sui diritti dell'infanzia* n 13 above, 431. In particular, on the implementation of Art 40 of the Convention, see Id, 'Guardians of unaccompanied children at the intersection of immigration law and private international law' *Thematic Issue Papers,* Defence for Children Italy, (2022).

and procedures for assisting UAMs from Ukraine.[29] The section on the definition of unaccompanied children includes a reference to the 1996 Hague Convention (4): the document first outlines the concept of UAMs, and then states that such definition does not prejudice the provisions set forth in the legge no 101 of 2015 implementing the Convention in Italy.[30] However, the reference appears to be a mere declaration of the intent to apply the Convention, an opening signal towards it: as the same Supreme Court shows, there is in fact no awareness of the *ways* in which such application should be carried out in practice.[31]

The second perspective is a purely legal one, and in particular, the incorrect application of the 1996 Hague Convention by Italian judges. Due to their unfamiliarity with the Convention, coupled with a lack of understanding of the rules and mechanisms of Private International Law,[32] Italian courts have *always* applied the Convention on the basis of Art 42 of the Law of 31 May 1995, no 218 on the reform of the Italian system of Private International Law. Judgment no 17603 of 2023 is no exception. The provision, used indiscriminately as an 'entrance door', in fact extends the application of the 1961 Hague Convention (and now of the 1996 Hague Convention) to those cases to which the Convention would not apply *per se*. Conversely, the Convention applies when the conditions for its application are met. A further proof of the lack of awareness towards the 1996 Hague Convention and its legal paradigm is the tendency of the Supreme Court to make an a-critical reference to all the articles contained therein, instead of limiting itself to those that are strictly necessary. The Supreme Court has followed the same approach in the present judgment: even though the case concerned the recognition in Italy of a measure adopted under the Convention, the Court has referred not only to the

[29] The 'Commissario delegato per il coordinamento delle misure e delle procedure finalizzate alle attività di assistenza nei confronti dei minori non accompagnati provenienti dall'Ucraina – Ministero dell'interno', Francesca Ferrandino, adopted the Plan on 13 April 2022, and updated it on 5 May 2022: https://www.interno.gov.it/it/notizie/aggiornato-piano-minori-stranieri-non-accompagnati.

[30] It reads as follows: 'Restano ferme le disposizioni della legge 18 giugno 2015, n. 101 di ratifica ed esecuzione della Convenzione sulla competenza, la legge applicabile, il riconoscimento, l'esecuzione e la cooperazione in materia di responsabilità genitoriale e di misure di protezione dei minori, fatta all'Aja il 19 ottobre 1996'.

[31] See para IV.

[32] Strengthening the Italian dimension of the European Judicial Network (EJN) also through the organization of training sessions for judges is among the reasons underlying the co-funded European Project, now in its second edition (2023-2025), entitled '*EJNita 2.0: Building Bridges and New Roadmaps*' (https://aldricus.giustizia.it/). The Consortium is led by the Ministry of Justice and composed of the main Italian stakeholders (practitioners and academics) daily applying instruments of civil judicial cooperation: the Superior School of the Judiciary ('*Scuola Superiore della Magistratura*' - SSM), the National Council of Notaries ('*Consiglio Nazionale del Notariato*' - CNN), the National Lawyers' Council ('*Consiglio Nazionale Forense*' - CNF), the National Association of Civil Registrars ('*Associazione Nazionale Ufficiali di Stato Civile e d'Anagrafe*' - ANUSCA), the Catholic University of the Sacred Heart of Milan, the Universities of Ferrara and Turin and, as associate partners, the National Association of Bailiffs in Europe ('*Associazione Ufficiali Giudiziari in Europa*' - AUGE) and the Italian Authority for Children and Adolescents ('*Autorità garante per l'infanzia e l'adolescenza*' - AGIA).

articles on recognition and enforcement of judgments (23, 24, 25 together with 43), but also to the rules on jurisdiction (5, 6, 7, 11, 13, 14), the conflict-of-laws rules (15, 16), the rules on co-operation (33, 34) and even the general provisions of Art 40.

IV. In Particular: The Concept of Unaccompanied Children Was Not the Core Issue

The overall reasoning of the Supreme Court reveals the main concern underlying the entire decision: the lack of a combined reading between the instruments of Immigration Law and Private International Law. In fact, the Court develops its understanding of the case in two distinct and self-contained compartments, which it ultimately attempts to merge in order to draw its conclusions: judgment no 17603 of 2023 represents a dangerous judicial interpretation, which mirrors the same 'pointillist approach' adopted by Italian policy and law makers.

This is all the more evident when one considers the Court's approach to the qualification of migrant children as unaccompanied: it proceeds along blind alleys, missing the opportunity to 'build bridges' between the two fields of law.

The Court moves from the definition of 'unaccompanied children' in Italian Immigration Law, and then focuses on the activity of the Consulate General of Ukraine in Naples in appointing the applicant as their guardian. However, by applying a coordinated reading and an 'integrated protection' approach to children, Immigration Law considerations should have given way to Private International Law considerations.

The case involved three levels: *i)* a chain of foreign acts appointing different guardians over the children (first the director of the orphanage and then another woman who brought the children to Italy); *ii)* the adoption of a guardianship measure by a foreign authority on Italian soil (the Ukrainian Consulate), under the 1996 Hague Children Protection Convention, appointing Mrs Dynnichencko; *iii)* its recognition in Italy. The proceedings before the Supreme Court concerned only the third level, which in turn was based on the first two.

It thus seems quite clear that the qualification of children as UAMs under Italian Immigration Law instruments – the main issue to deal with, according to the Court, which was also inevitably bound by the applicant's request – was anything but a *consequence* of the recognition of the Ukrainian guardianship measure.

In any case, a coordinated reading could also have been successfully carried out on the other way round: the Court could have moved from Immigration Law considerations, as it did, to connections with Private International Law. The Supreme Court examines the definitions of unaccompanied children contained in several Italian legal instruments.[33] In particular, it refers to legge no 47 of 2017, the main

[33] In addition to legge no 47 of 2017, the Court refers to the decreto del Presidente del Consiglio

instrument for the protection of UAMs in Italy, whose Art 2, para 1, states that

> '(f)or the purposes of this Law, an unaccompanied foreign child present in the territory of the State is a child who has neither Italian nor EU citizenship, who is, for any reason, in the territory of the State or who is otherwise subject to the Italian jurisdiction, without any assistance and representation by his parents or other adults legally responsible for him *according to the laws in force within the Italian legal systems*' (italics are added).

The Supreme Court clearly understands the reference to 'laws in force' as limited to the rules adopted in the field of Immigration Law: it shall be given a broader meaning instead, including applicable Private International Law rules, namely those provided for in the 1996 Hague Convention. This strong need for a coordinated interpretation is even evident in the wording of the aforementioned national Plan on UAMs,[34] which the same Supreme Court recalls in its review: the document indeed includes the identical concept under legge no 47 of 2017, adding that it is applied into play 'without prejudice' to the application of legge no 101 of 2015, which implements the 1996 Hague Convention.

V. The 1996 Hague Convention and the Measure Adopted by the Ukrainian Consulate in Italy

The case presented an additional element of complexity in that the measure appointing Mrs Dynnichenko as the children's guardian was issued by a Ukrainian consular authority in Italy. The Tribunale per i Minorenni di Catania had already (and wrongly) refused to recognise it on the grounds that it was not issued by a Ukrainian judicial authority, which it considered to be the only competent to decide on the appointment of a guardian, given that the children at the time still had their habitual residence in Ukraine.

The Supreme Court dealt with this matter by examining the powers exercised by the Consul in adopting such a measure and, consequently, its legal nature. In doing so, it adopts the same fragmented approach, referring to the instruments regulating the exercise of the powers of foreign consuls in Italy (the 1963 Vienna Convention on Consular Relations,[35] the 2003 Consular Treaty between Italy

dei Ministri 9 December 1999 no 535 regulating the functions of the Committee for foreign children and to the decreto legislativo 18 August 2015 no 142 implementing the European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60, and the European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

[34] See fn 29.

[35] The Vienna Convention on Consular Relations of 24 April 1963 was implemented in Italy through Law of 9 August 1967, no 804.

and Ukraine),[36] but without explaining how they interact, in the present case, with the 1996 Hague Convention. In addition, the Supreme Court wrongly refers to the decreto legislativo no 71 of 2011, which applies to Italian consular offices abroad, ie offices that are depended on the Italian Ministry of foreign affairs (Art 1).[37]

Again, it would have been sufficient to start from the 1996 Hague Convention rules on recognition. Art 23 provides that 'measures' taken by the 'authorities' of a Contracting State shall be recognised by operation of law in all other Contracting States. On the one hand, according to the Convention, the 'measures' are those referred to in its Arts 3 and 4. On the other hand, the Convention says nothing about the characteristics of the authority, neither about its nature nor about the nature of the powers it is to exercise. This implies that it need not necessarily be a court, but might also be an administrative authority. However, it is evident that in order to issue a 'measure' relating to parental responsibility, guardianship or the placement of a child in a foster family, there must be a 'constitutive control of effectiveness' by a public authority: in other words, the measure should not be the mere result of a (joint) declaration of individuals.[38] It is the law applicable to the proceedings[39] that confers the relevant powers on the authority: for example, under Italian law, measures relating to parental responsibility can be adopted by the courts, as well as by parties assisted by their lawyers, following authorisation by the public prosecutor ('*negoziazione assistita*').[40]

The Consulate General of Ukraine in Naples is to be considered an 'authority' within the meaning of Art 23 of the 1996 Hague Convention: it is, by its very nature, a public authority of the sending State and, pursuant to Art 50, para 2, of the 2003 Consular Treaty between Italy and Ukraine, 'in accordance with the legislation of the State of residence and international agreements in force between the Parties', to take measures to appoint guardians of children and to monitor the exercise of their mandate.

The Explanatory Report further clarifies that the expression 'recognition by operation of law' in Art 23 of the 1996 Hague Convention means that it is not

[36] Consular Convention between Italy and Ukraine of 23 December 2003. The Supreme Court wrongly refers to an instrument dated 2016.

[37] Decreto legislativo 3 February 2011 no 71 on the organization and functions of consular offices ('Ordinamento e funzioni degli uffici consolari, ai sensi dell'articolo 14, comma 18, della legge 28 novembre 2005, n. 246').

[38] E. D'Alessandro, 'Divorzio davanti all'ufficiale di stato civile' *Diritto Processuale Civile e ADR*, 321-324 (2023).

[39] The judgment mentions at least one significant decision, concerning a child arrived in Italy for study purposes, on the basis of an Albanian notarial act through which his parents had delegated the sister, already living in Italy, to take care of him (Supreme Court's order no 41930 of 2021). The Court ascertained that under Albanian law the delegation of parental responsibility is not possible: the child had *de facto* – not legally – been entrusted to his sister, had consequently to be qualified as unaccompanied, and a voluntary guardian according to Art 11 of legge no 47 of 2017 had thus to be appointed.

[40] Art 6 of the decreto legislativo 12 September 2014 no 132, as converted and amended into legge 10 November 2014 no 162.

necessary to have recourse to any proceedings in order to obtain recognition as long as the person invoking the measure does not take any steps to enforce it; it is for the party against whom the measure is invoked, who must allege one or more grounds for non-recognition, among those exhaustively enumerated in the following para 2. Letter *a)* in particular, provides that the measure shall not be recognised if it 'was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II'. Art 5, para 1, of the Convention – the general rule on jurisdiction set out in Chapter II – entrusts to the authorities of the Contracting State of the habitual residence of the child the principal jurisdiction to take measures for the protection of his or her person and property. In this case, it was undisputed that the children's habitual residence,[41] ie the place where they had 'some degree of integration in a social and family environment',[42] was in Transcarpathia (Ukraine) at the time of the appointment. The Ukrainian Consulate General in Naples held jurisdiction under the 1996 Hague Convention: there were no impeding reasons for recognition.

VI. Concluding Remarks: Taking Stock and Moving Forward

The Supreme Court's judgment no 17603 of 2023 is the first 'attempt' by the Court to shed light on the functioning of the 1996 Hague Child Protection Convention in the context of the migration of Ukrainian children to Italy after the outbreak of the war. Even if it did not quite work, it could be seen as a first tentative step towards a coordinated reading of Immigration Law and Private

[41] The connecting factor of the child's habitual residence is commonly used within EU legal acts in the field of family law with cross-border implications, and it is borrowed from the 'Law of The Hague' (namely from all Conventions adopted within the Hague Conference on Private International Law in the field of family matters). It embodies the principle of proximity, which in turn translates the principle of the best interests of the child, a substantial right, a procedural rule, and an interpretive principle, which shall be a primary consideration in 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' (UN Committee on the Rights of the Child, *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. Art 3, para 1*).

[42] Case C-523/07 *A*, Judgment of 2 April 2009, available at www.eurlex.europa.eu, para 38. There is no definition of habitual residence, neither within EU Law nor in the Hague Conventions. However, since 2009, the Court of Justice of the European Union has been interpreting the child's habitual residence a number of times, giving the legal interpreter uniform (objective and subjective) elements to look at, on a case-by-case approach, in order to identifying it. A useful list of the decisions issued by the Court of Justice of the European Union interpreting the child's habitual residence may be found athttps://tinyurl.com/37vaszkv (last visited 10 february 2024). On the child's habitual residence see, among others: E. di Napoli, 'A place called home: il principio di territorialità e la localizzazione dei rapporti familiari nel diritto internazionale privato post-moderno' *Rivista di diritto internazionale privato e processuale*, 899-922 (2013); C. Fossati, 'La residenza abituale nei regolamenti europei di diritto internazionale privato della famiglia alla luce della giurisprudenza della Corte di giustizia' *Rivista di diritto internazionale privato e processuale*, 283-314 (2022); M. Mellone, 'La nozione di residenza abituale e la sua interpretazione nelle norme di conflitto comunitarie' *Rivista di diritto internazionale privato e processuale*, 685-716 (2010).

International Law instruments.

The judgment reflects the gaps, which the 1996 Hague Child Protection Convention's implementation currently faces in Italy[43] and, in a broader perspective (as it comes after a series of judgments focusing on issues related to judicial cooperation in civil matters), the increasing attention that the Italian Supreme Court is devoting to issues of Private International Law.[44] There is also a growing interest in scenarios such as the cross-border movement of children, especially those coming from third countries, which has traditionally been the prerogative of other branches of law, better known and applied by legal practitioners as Immigration Law.[45]

The approach of Italian judges is thus changing, and Private International Law instruments are gaining attention. The openness to the use of 'new' instruments and mechanisms must, however, be guided by a strong training on corresponding 'languages' and rationales. Moreover, when children are involved, the 'integrated approach' of the legal practitioner (looking at the range of possible legal tools applicable) requires a further overture: it implies a case-by-case analysis, but it must be based on a strong foundation, ie a solid knowledge of the legal instruments that come into play.

As shown in the case of the Ukrainian children, judgment no 17603 of 2023, the lack of implementation of the 1996 Hague Convention and the lack of coordination not only jeopardise the best interests of the child, but also multiply the judicial efforts. If Ukrainian children had been issued with a certificate under Art 40 of the Convention, indicating the capacity and powers of the guardian(s) appointed in Ukraine and by the Consulate General in Italy, the case would probably not have reached the Supreme Court and the children would not have been subjected to additional stress and frustration.[46] Furthermore, the lack of an

[43] See the decision of the Tribunale per i Minorenni di Bolzano 6 April 2022 no 37, in the framework of the request to appoint a voluntary guardian for children fleeing the Russian-Ukrainian war with a woman deemed to be their guardian under Ukrainian law, duly certified by the General Consul of Ukraine in Milan. The Juvenile Judge in particular ascertained that the woman in question was the director of the children's orphanage and that, under the Ukrainian Family Code, she was their guardian. The decision may be downloaded from the section 'Case Law' available at https://famimove.unimib.it/case-law/.

[44] See Corte di Cassazione-Sezioni unite 5 December 2023 no 34032, available at www.cortedicassazione.it interpreting Art 3, para 2 of legge no 218 of 1995.

[45] The smooth and correct application of the 1996 Hague Child Protection Convention, in a broader scenario, fits in the UN 2030 Agenda, whose Sustainable Development Goal (SDGs) no 10.7 aims at facilitating an 'orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'. See widely, R. Michaels et al eds, *The Private Side of Transforming our World. UN Sustainable Development Goals 2030 and the Role of Private International Law* (Cambridge: Intersentia, 2021).

[46] See the *Conclusions & Recommendations* adopted on 19 October 2023 by the Special Commission (SC) on the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, available at http://tinyurl.com/2p9buczr (last visited 10 February 2024). The SC noted that 'the use of a certificate under Article 40 would facilitate the recognition of measures by operation of law under Article 23(1)' (para 73).

integrated interpretation prevents the Supreme Court from fulfilling its main function, which is to ensure that the law is strictly observed and interpreted in a uniform manner (‘*funzione nomofilattica*’).

Insights & Analyses

Space Colonization: Which Regulations and in Whose Interests?*

Valentina Barela**

Abstract

This work aims to analyse the emerging and urgent issue of the lack of regulation on the exploitation of resources extracted from celestial bodies. It highlights the leading role of private investors, which inevitably disrupts the traditional legal frameworks of private and public law. It outlines the incomplete interpretations that international regulations are subject to. They have prompted the intervention of national legislation on this theoretically international law-bound subject. Attention then focuses on two national laws, the US and Japanese, as examples of a non-dogmatic, but functional approach to this subject. The traditional tools offered by public and private law cannot be underpinned in their original context, therefore it is necessary to go beyond the ontological problem of property rights as national laws have been established. Finally, the intention is to propose a working towards bilateral agreements that, in line with national laws, testify to a different significance of the parties involved, such as private and public entities, space agencies, among others.

I. Private Actors and the Blurred Distinction Between Public Law and Private Law in the Context of the Exploitation of Space Resources

The concept of utilizing space resources has been discussed for decades and today, without a doubt, we can confirm that it could lead to new economic opportunities and technological advancements, from both the perspective of space exploration and that of Earth, and, specifically, it carries significant implications for the widespread commercialization of space activities and scientific purposes.[1]

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[1] We cannot ignore the benefit of exploration and exploitation of Space-Based Solar Power (especially for Sustainable Energy), or the space manufacturing promoted by Varda Space Industries, in the pharmaceuticals field. Although the United States of America, China, and Russia have been the principal actors on this stage so far, things are changing, and many other countries are realizing the importance of taking part in this endeavour. Europe, well known for its successes in innovative technologies, exploratory missions in geo-observation, meteorology as well as telecommunications, recently has invested a lot to be part of this economic race; the European Space Agency is activating a new form of cooperation and funding to erase competition and efficiency in new commercial space activities, through the new net of Business Incubation Centres (BIC) and the Cassini Space Entrepreneurship Initiative addressed to increase the private initiatives. However, it is important to bear in mind that special law is a matter of concurrent competence with that of the States (Art 4, para 3, TFUE). See A. Conzutti, 'La New Space Economy: profili costituzionali dell'integrazione europea

Prominent examples of resources are water[2] and minerals on celestial bodies such as the Moon and asteroids. From an economic perspective, the extraction and use of space resources are greatly hyped, but extremely interesting as space resources can be considered vast and have enormous economic potential for humanity. Furthermore, space activities have the potential to deliver measurable efficiency improvements, and innovation to foster better prospects for living across the globe, encompassing health benefits, technology, artificial intelligence, remote operations, and cybersecurity, among others. In this scenario, the emerging potential in space mining is ultimately expanding without excluding speculative purposes. This is one of the reasons for the need to find stable regulation that goes beyond the traditional dualism of private law and public law. All the economically influential countries are equipping themselves for these forms of exploitation, with 'domestic' laws, in a very weak international legal framework.

Outer space law has been born out of international law. However, the core of the debate has shifted from the latter, narrowly understood, due to the rapid growth of global economic competition in the New Space Economy.[3] Therefore, this

in materia spaziale' 4 *DPCE online*, 3362 (2021). In April 2021 the European Parliament and the Council established the Union Space Programme and European Union Agency for the Space Programme and Repealing Regulations (EU), no 912/201, (EU) no 1285/2013 and (EU) no 377/2014, and Decision no 541/2014/EU. R. Zubrin, 'The economic viability of mars colonization', in T. James ed, *Deep space commodities* (London: Palgrave Pacmiliam, 2018), 159; E. Beauvois and G. Thirion, 'Partial Ownership for Outer Space Resources' *Advances Astronautics Science and Technology*, 3, 29, (2020). M. Byers and A. Boley, *Who Owns Outer Space?* (Cambridge: Cambridge University Press, 2023); S. Zolea, 'Esplorazione spaziale e nuove forme di appartenenza: spunti comparativi' 26 (1) *The Cardozo Electronic Law Bulletin* (2020).

[2] Many asteroids contain an abundance of water that is a particularly valuable resource because it serves as rocket fuel and, therefore, would facilitate space operations that could benefit from services provided directly in space.

[3] The Space Economy term is not well defined. One can find varying definition attempts throughout the space community. A useful starting point for anyone new to the topic is a publication by the Organisation for Economic Co-operation and Development (OECD). The latter provides one of the most extensive and widely considered definition attempts in the first edition of its Handbook on Measuring the Space Economy, published in 2012. More specifically, the OECD determined here as a working definition that 'The Space Economy is the full range of activities and the use of resources that create and provide value and benefits to human beings in the course of exploring, understanding, managing and utilising space. Hence, it includes all public and private actors involved in developing, providing, and using space-related products and services, ranging from research and development, the manufacture and use of space infrastructure (ground stations, launch vehicles, and satellites) to space-enabled applications (navigation equipment, satellite phones, meteorological services, etc) and the scientific knowledge generated by such activities. It follows that the Space Economy goes well beyond the space sector itself since it also comprises the increasingly pervasive and continually changing impacts (both quantitative and qualitative) of space-derived products, services, and knowledge on economy and society'. See *OECD Handbook on Measuring the Space Economy* (OECD Publishing, 2012), 20, available at http://tinyurl.com/4atznvu9 (last visited 10 February 2024). In the second edition of this Handbook, published in 2022, the OECD also makes positive reference to the definition of the Bureau of Economic Analysis, Department of Commerce of the United States of America (USA) from 2020 reading: 'The space economy consists of space-related goods and services, both public and private. This includes goods and services that: are used in space, or directly support those used in space; require direct input from space to function, or directly support

extensive topic necessitates the consideration of hybrid resources as an expression of the new pluralism of sources.

Undoubtedly, the lack of international legislation, particularly, on the exploitation of outer space resources,[4] allowed nation-states to take a leading step in addressing some issues that have remained unclear due to vague international legislature.

National laws remain limited to mere statements of principle that do not effectively regulate commercial relations; they also do not outline the peculiarities and characteristics of the mentioned rights or positions. Mostly, they affirm the responsibility of the states for any mission led by private entities, combined with a state authorization system, as a premise for any form of mission. They assert entitlements to outer space resources that are extracted without designing a clear legal framework. Ultimately, but of primary importance, these national laws prove to be of primary support for the national economic strategies of space-faring nations.[5]

Any matter testifies to the new relations between national and international law, in which this field is characterized by a simultaneous movement of privatization and nationalization that can be easily noticeable.[6] The hierarchy system has been weakened. The vast number of economic interests involved, induced private companies to become the main actors in the *iure condendo* governance.[7] Besides the essential requirement of national identification for any outer space mission, the rules in this vast sector represent an evolution and a new balance among concealed forces that often supersede the traditional public authority (or so-called public power) and disrupt the conventional hierarchy of regulatory sources.[8] Public power, identified as a government, has been replaced by a widespread involvement of

those that do; are associated with studying space'. See *OECD Handbook on Measuring the Space Economy* (OECD Publishing, 2nd ed, 2022), 28–29, available at http://tinyurl.com/42yr9fde (last visited 10 February 2024). The OECD then further conceptualises the Space Economy as consisting of three segments, with additional information regarding each of the three segments (upstream segment, downstream segment, and space-derived activities in other sectors).

[4] The request for a developing international law has been requested for a long time. See B. Cheng, 'The Commercial Development of Space: The Need for New Treaties' 19 (1) *Journal Space Law,* 17 (1991); F. Francioni and F. Pocar, *Il regime di internazionalizzazione dello spazio* (Milano: Giuffrè, 1993), 15; S. Hobe, 'Adequacy of the Current Legal and regulatory Framework Relating to the Extraction and Appropriation of Natural Resources in Outer Space' 32 *Annals of Air and Space Law*, 115, (2007); E.R. Finch, 'Commercial Space Development in Millenium 2000' 27 *Journal of Space Law*, 161 (1999).

[5] L. Rass-Masson, 'Stratégies étatiques et lois nationales dans le droit international de l'espace', in C. Bories and L. Rapp eds, *L'espace extra-atmosphérique et le droit international* (Paris: Pedone, 2021).

[6] See A. Guyomarc'h, 'Property on Space Resources: The Search for a Terminology' 2 (2) *Market & Innovation*, 73 (2023).

[7] See M. De Bellis, 'Public law, and private regulators in the global legal space' *I-Con9*, 428-429 (2011). The Author gives some examples of how public authorities have incorporated rules already long established by private bodies or often delegated to private actors' challenges that require more expertise due to technical innovation, such as what happened for the National Board of Fire Underwriters, in Kansas, or for the *Consiglio Nazionale delle Ricerche* (CNR), committed to carrying out and promoting research activities.

[8] See M.R. Ferrarese, *Nuovi Poteri* (Bologna: il Mulino, 2022).

private individuals in decision-making and regulatory processes to matters of public importance, all encapsulated within the term 'governance'.[9] The political, social, and economic stakes are extremely high, consequently, it is necessary to face them osmotically, thus emphasizing a 'global legal pluralism'.[10] In this scenario, the strength of international law which rests on the undoubted sovereignty of individual nations, primarily representing public interests and innervated by public law, is shown to be particularly weak.

Therefore, it is crucial to highlight the urgency to provide firm, uniform Regulations of commercial activities in space law, making up for the inertia and impotence of international law and modulating the activism of domestic law that appears with an allegedly dominant bias towards public interests.

This data must be considered with another factor, namely 'the domain of private investors'. The space sector, which for a long time was predominantly supported by the institutions, is witnessing an ambitious intervention by private investors.[11] It's a real cultural revolution, which forces us to redefine relations between private and public law and reveals a different dynamic among sources of laws. Very pressing legal issues are emerging since there are currently no international rules governing the exploitation of space resources, which could lead to conflicts between Nations.

Therefore, some national laws have been enacted on exploration and use for the benefit of all mankind, sometimes soliciting private intervention, with a specific focus on efforts to exploit natural resources available there, whether for private or public purposes.

In reality, the economic power and efficiency of private investors have rocketed and have altered and blurred the boundaries between public and private law.

The bargaining leverage has been transferred from the Government to nongovernmental commercial operators. In truth, the phenomenon of global private governance has been regarded not only as economic and financial regulation but also as environmental protection. 'Private' operators are the most advanced in developing technology to carry out spatial missions. For instance, the National Aeronautics and Space Administration (NASA) asked Elon Musk's Company, Space X, to build a lander to go back to the moon. It is up to Space X to provide transportation to the international space station after the space shuttle is accomplished. Consequently, private entities appear and grow even faster than government ones and with much more consistency because of the independence

[9] ibid 27, Ferrarese's metaphor, in which governance is likened to a vast cloak designed to conceal various manifestations of 'uncovered' power in a post-democratic context, is highly illustrative of the transformation of power (where private individuals/companies become the main actors in decision-making processes).

[10] It is the definition given by J.S. Bergé, *L'application du Droit National, International et Européen* (Paris: Dalloz, 2013) or the one given by R. Michaels, 'Global Legal Pluralism and Conflict of Laws', in P. Schiff Berman ed, *The Oxford Handbook of Global Legal Pluralism* (Oxford: Oxford University Press, 2020).

[11] See M. Weinzierl, 'Space, the Final Economic Frontier' 32 (2) *Journal of Economic Prospectives*, 173 (2018).

of programs from state administration and thus from ever-changing domestic politics. Economic circumstances and opportunities are the fulcrum of their investment and lead the programs on. The lack of certainty of legal protection, on the other hand, is the permanent risk of their actions[12] and at the same time a great challenge for governments.

Moreover, considering that these kinds of investments are extremely expensive, it is easy to imagine that they need to receive some form of return. In addition, therefore, it is important to mention the phenomenon of ridesharing in the space sector which means generally the launch of secondary payload as part of someone else's mission, usually involving a reduced-price tag and less control over some other missions' elements like schedule on the part of the secondary payload client.[13] From an economic perspective, ridesharing benefits nations, and others not only by generating additional income but also by providing the additional benefit of making satellite launches more affordable to smaller actors with less funds, potentially contributing to economic development at large. Naturally, there are many legal aspects to consider when engaging in ridesharing as contracts may involve multiple entities and jurisdictions.

II. The International Scenario that Prompted the Enactment of National Laws

Being acknowledged that the outer space law is indeed an emerging field, with many challenges in various aspects of law, including intellectual property, property rights, liability for damages caused by debris,[14] cybersecurity,[15] space

[12] I. Christensen, 'Building confidence and reducing risk in space resources policy' 1 (7) *ROOM The Space Journal*, 38-39, (2016). See also, R. Jakhu et al, 'Space policy, Law and Security', in J.N. Pelton and A.P. Bukley eds, *The Farthest Shore: A 21st Century Guide to Space* (Burlington: Collector's Guide Publishing, 2010), 208.

[13] For example, Space Exploration Technologies Corp (Space X), which develops launch vehicles for various purposes as well as the Starlink communications satellite mega constellation, has established a dedicated 'Smallsat Rideshare Program' in the context of its launch activities available at http://tinyurl.com/mtv4ee5j (last visited 12 February 2024). Furthermore, in 2022 NASA 'has selected 13 companies to provide launch services for the agency's Venture-Class Acquisition of Dedicated and Rideshare (...) missions, providing new opportunities for science and technology payloads and fostering a growing U.S. commercial launch market': see 'Companies to Provide Venture Class Launch Services for NASA' (26 January 2022), available at http://tinyurl.com/6aaadycb (last visited 12 February 2024). The European Space Agency (ESA) also sees value in partaking in satellite ridesharing: 'Vega returns to flight proves new rideshare service' (3 September 2020), available at http://tinyurl.com/5d42p9v6 (last visited 12 February 2024).

[14] See among others, S. Hobe et al eds, Cologne Commentary on Space Law Volume II Rescue Agreement Liability Convention Registration Convention Moon Agreement (Cologne: Carl Heymanns Verlag, 2013). P. Stubbe, State accountability for space debris: a legal study of responsibility for polluting the space environment and liability for damage caused by space debris (Leiden: Brill Nijhoff, 2018); S. Zolea, 'Errore e responsabilità nel diritto dello spazio in Europa: un sistema multilivello' La cittadinanza europea, 61 (2002).

[15] A. Fröhlich ed, Outer Space and Cyber Space. Similarities, Interrelations and Legal

tourism.[16] and telecommunications, among others, this work aims to pinpoint some experiences of national legislation regarding the exploitation of resources, while paying attention to what was conceived in the international forum and disposed by international rules.

Thus, focusing on the exploitation of resources, it is appropriate to refer to the US experience, in particular to the Commercial Space Launch Competitiveness Act 2015[17] (CSLCA) because it was the first law enacted on this theme and draw a parallel with the Japan experience that led to the Space resource mining Japan Act of 2021. This was the last law provided on the same theme all over the world, both of which were put in place to pave the way for maximizing exploration and use of space resources.

The US Act goes beyond the encouragement of private companies to invest in the development of technologies for asteroid mining and other space resource utilization activities. The CSLCA also contains provisions related to remote sensing reform, launch licensing, international obligations, and space traffic management. It streamlined the regulatory process for licensing commercial remote sensing operations and clarified the roles of various government agencies in the approval process. The law sets out certain requirements and regulations for commercial space launch licenses, to provide a clear framework for companies seeking to conduct space launches. It also promotes coordination among federal agencies in the authorization process and state environmental rules. As a corollary to all the provisions, the commitment to international treaties and agreements concerning space activities emerges. Nevertheless, as for the present work, it is necessary to emphasize that the US law reopens the long debate on the legitimacy of the exploitation of precious resources present on the Moon and other celestial bodies. This is because it promotes the exploration and collection of materials extracted from space or asteroids for commercial purposes by US citizens, granting them the right to detain, possess, transport, and sell what they obtained 'in accordance with applicable laws, including international obligations of the United States'.

Perspectives (Gewerbestrasse: Springer, 2021).

[16] P. Brinkmann, 'British billionaire Richard Branson plans to soar into space Sunday' (9 July 2021), available at http://tinyurl.com/ycktcpce (last visited 12 February 2024). Nicholas Schmidle, *Virgin Galactic and the Making of a Modern Astronaut* (New York: Henry Holt & Co, 2021). National Aeronautics and Space Administration (NASA), news release, 20-007, 'NASA selects first commercial destination module for International Space Station' (27 January 2020), available at http://tinyurl.com/yb3e3dnd (last visited 12 February 2024). The addition of a new module always entails safety risks, as exemplified in August 2021 when the thrusters on the newly added Russian module Nauka unexpectedly fired after docking, endangering the entire International Space Station. You can read more about this incident in Joey Roulette's article, 'Uncontrolled Firing from Russian Module Leads to Brief "Tug of War" on the International Space Station', available at https://tinyurl.com/ew8fzzwu yb3e3dnd (last visited 12 February 2024).

Other nations, Japan,[18] the United Arab Emirates,[19] Luxemburg,[20] subsequently adopted national laws with similar contents.[21] Japan was the last country to enact national law on this topic with some not inconsiderable differences.

Before trying to outline the main feature of these municipal laws, it is pivotal to consider the international scenario and the historical political circumstances in which the first outer space treaty was drafted. Thus, it is advisable to remember that space activities were born out of military and geopolitical competition when Sputnik, the first artificial satellite, was launched by the Soviet Union in 1957. The aim was to ensure that space wouldn't serve as a stage for nuclear conflicts. For this reason, most international treaties acted, mainly for 'peaceful purposes'[22] for the so-called 'Common Heritage of mankind',[23] mainly addressed to developing

[18] See 'Japan: Space Resources Act Enacted', available at http://tinyurl.com/256d3kyw (last visited 10 February 2024). S. Kozuka, 'National Space Law and Licensing of Commercial Space Activities in Japan', in L.J. Smith et al eds, *Routledge Handbook of Commercial Space Law* (London: Routledge, 2024).

[19] See Federal Law no 12 on the Regulation of the Space Sector, Art 4 (December 19, 2019) (UAE), available at http://tinyurl.com/yvwtyadt (last visited 10 February 2024). This law further regulates the Emirates Space Agency. The law concerns the consideration of various activities in space, from the launch of vehicles into space to the extraction and transportation of resources.

[20] See Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace (Law of 20 July 2017 on the Exploration and Use of Space Resources). Luxemburg is the first European Country to develop a clear regulation of ownership rights of minerals, water and other resources extracted from outer space-atmospheric, especially those present on asteroid, approving a law relating to their exploration and use which ensures private entities a series of rights. According to the provision of Art 1 the space resources in question are susceptible to appropriation in compliance with the principles which inspire the entire corpus spatialis, provided that the authorized operator carries out the activities referred to in the same Art 1 'in accordance with the conditions of the authorization and the international obligations of Luxembourg' (Art 2). Additionally, it creates Luxembourg Space Agency. Luxembourg seeks to channel the interests of as many major companies as possible, both due to the favourable tax plan and by offering all companies that have their headquarters in Luxembourg the opportunity to obtain the license, with the condition that the applicant represents at least ten percent of the capital. Very important is the fact that the law expressly establishes that resources can be subject to appropriation, and no explicit or implicit reference is made to Art 2 of the Outer Space Treaty (OST). In contrast to the United States, where it is mentioned that activities cannot be subject to claims of ownership or sovereignty, but not mention the word 'appropriation'. The United Arab Emirates and Japan, on the other hand, remain generic, stating their interest in complying with international law.

[21] See M. De Pagter, 'Who Dares, Wins: How Property Rights in Space Could be Dictated by the Countries Willing to Make the First Move' 1 (2) *CJIL Online*, 116, (2022).

[22] See Arts III and IV of Outer Space Treaty. The Art IV (para 1) of the Outer Space Treaty, that establishes 'States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner'. The superpowers agreed not to place in orbit around the Earth any weapons of mass destruction, but they left open the legal possibility of using outer space to launch intercontinental missiles through suborbital flight. Their first decision coincided with international public interest, while the second didn't. Permission to launch missiles with nuclear warheads in suborbital flight was the open door to the subsequent intensification of the nuclear arms race, which, as we already know, almost reached calamity levels.

[23] The term was originally introduced in the Antarctic Treaty of 1959 and then reaffirmed GA-Resolution of December 13, 1963. Specifically, the preamble of the Antarctic Treaty recognizes that 'it

countries to generate a legal framework for the main purpose of preventing a monopoly in this area. The principle of the 'Common Heritage of Mankind' is a concept that can certainly play a central role in discussions about the commercialization of space resources as it promotes the idea that space and its resources should be regarded as a common asset of humanity. This principle was originally formulated for international maritime law, particularly for deep seabed mining activities, but it has been extended to outer space. In essence, the principle of the Common Heritage of Mankind asserts that space resources, such as minerals on the Moon or other celestial bodies, should be managed in a way that benefits all of humanity and should not be subject to unilateral appropriation or exploitation by individual countries or commercial entities. Consequently, this principle encourages international cooperation and the involvement of many nations in the management of space resources to ensure they are used fairly and sustainably. It leads to the concept of 'moral internationalization' which is closely linked to this principle as it emphasizes the importance of acting ethically and responsibly in the exploitation of space resources. The commercialization of space resources could lead to ethical challenges such as preserving the environment in space, protecting potential space ecosystems, and avoiding over-exploitation. Adhering to the Common Heritage of Mankind principle can help mitigate such challenges by encouraging the international community to establish rules and norms to ensure that the exploitation of space resources respects shared moral values and the common interest of humanity.

The main law about exploration activities is the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, universally known as the Outer Space Treaty (OST). It is the Treaty on the topic that has been recognized by the greatest number of States. It has been negotiated and drafted under the auspices of the United Nations and has been signed by 27 States and in the following years has been signed and ratified by many other nations, up to 105.

It is appropriate to mention also the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, better known as the Moon Treaty

is in the interest of mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene of object of international discords'. G. Oduntan, 'Imagine There are No Possessions: Legal and Moral Basis of the Common Heritage Principle' 2 (1) *Space Law*, 30 (2005). The Author explores the evolution of the common spaces concept in international law and utilizes parallels from similar frameworks governing shared ownership in other global regions like the deep seabed and Antarctica; as a premise the Author denies any sort of property right in outer space. Among others, see S. Mirzaee, 'Outer Space and Common Heritage of Mankind: Challenges and solutions' 1 *RUDN Journal of Law*, 101-105 (2017); S. Ervin, 'Law in a Vacuum: The Common Heritage Doctrine in Outer Space' 7 (2) *Law, Boston college International and Comparative Law review*, 403-431 (1984). P. Taylor, 'The Concept of the common heritage of mankind', in D. Fisher ed, *Research Handbook on Fundamental Concepts of Environmental Law Cheltenham* (UK: Edward Elgar Publishing, 2016), 306-334. The Outer Space Treaty, as an incipit, at Art 1 states that the exploration and use of Outer Space 'shall be the province of all mankind'.

or the Moon Agreement, signed in 1979 (coming into force in 1984) that reaffirms the principles of the OST as the peaceful purposes of outer space activities (as the moon and its natural resources are the common heritage of mankind),[24] and praises the freedom of scientific investigation.[25]

The Moon agreement and National laws emphasise the principles of outer space international law that can be summarized in five points. In particular, it is feasible to trace the principle of free access and free use of space by all the actors of the international community, the principle of non-appropriation of space and celestial bodies, the principle of the peaceful use of space, the principle of international cooperation, the principle of state liability for damage caused by space activities regardless of whether these activities are attributable to the state or private individuals operating on national territory. However, the principle of non-appropriation is the most important for this investigation, as it has led to the failure of the Moon Agreement due to its non-acceptance by a significant number of non-signatory States. Art 11 specifically establishes that

> 'the Moon and its natural resources are the common heritage of mankind (…) neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person'.

Additionally, it points out that

> 'the placement of personnel, space vehicles, equipment, facilities stations, and installations on or below the surface of the moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the surface of the moon or any areas thereof'.

The pivotal aspect of the Moon Agreement, which would have represented added value but at the same time was its failure as well, is its endeavour to make the common heritage principle effective through establishing an international management regime. The latter would ensure equitable sharing among all States Parties of the benefits derived from lunar resources, taking into consideration the interests and needs of developing countries. As a counterpart, it inevitably would have required measures of control over the exploitation. Establishing an international

[24] See Art IV: 'The exploration and use of the moon shall be the province of mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development' (…) 2. States Parties shall be guided by the principle of cooperation and mutual assistance in all their activities concerning the exploration and use of the moon. International cooperation in pursuance of this Agreement should be as wide as possible and may take place a multilateral basis, on a bilateral basis or through international intergovernmental organizations'.

[25] In truth, outer space is currently governed by five main treaties: thus, in addition to the Outer Space Treaty and the Moon Agreement, it must be considered the Rescue Agreement, the Liability Convention, and the Registration Convention.

regime implements appropriate procedures to govern the exploitation but also to control the activities of the states, is the core of the realization of the Common Heritage of mankind in Outer Space. The restrictions that would have involved private initiatives, if the Moon Agreement had been accepted by more States, are indeed the reason for its failure, and thus have led to unsuccessful attempts by the international system so far. Nevertheless, it has the merit of having tried to go beyond the reinforcement and reiteration of these principles. Those affirmations are however controversial, considering that the States Parties have drafted a Joint Statement intending to encourage more States to sign the Moon Agreement. The Joint Statement points out that the Moon Agreement does not preclude any modality of exploitation, by public or private entities, or prohibit the commercialization of such resources, provided that such exploitation is compatible with the principle of a common heritage of mankind.[26]

Therefore, the OST remains the main Treaty to which we must refer when discussing international law concerning the exploitation of resources and the main international principles associated with it;[27] the main point is to consider the exploitation of resources that they are aptly the principle of free access and free use of space, the principle of non-appropriation of space and celestial bodies and the principle of the common heritage of mankind.[28] These principles are all interconnected. The principle of the common heritage of mankind serves as (the) foundation and (the) basis of the international principle of non-appropriation, which is established in Art 2 of the OST declaring:

> 'Outer space, including the moon and the other celestial bodies, is not subject to national appropriation by claim of sovereignty,[29] through employing use or occupation, or by any other means'.[30]

[26] Joint Statement on the Benefits of Adherence to the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979 by States Parties to that Agreement, U.N. Doc. A/AC.105/C.2/2008/CRP.11, at 3 (Apr. 2, 2008). See R. Lefeber, 'Relaunching the Moon Agreement' 41 *Air & Space Law* 1, 42 (2016).

[27] See T. Cheney, 'There's No Rush: Developing a Legal Framework for Space Resource Activities' 43 *Journal of Space Law*, 106, 110 (2019).

[28] For a positive interpretation of the flexibility and generality of this article *see* A. Guyomarc'h, n 6 above, 80. *Contra*, A. Kerrest, 'L'appropriation des resources minérales des corps célestes', in P. Clerc et al eds, *Le droit entre ciels et terres: mélanges en l'honneur du professeur Laurence Raillonì* (Paris: Edition A Pedone, 2022).

[29] The Peace of Westfalia in 1648 recognised states as equal sovereigns in the domain of international law and established that non-interference within a state's territory by other states is the expression of its sovereignty. D. Croxton, 'The Peace of Westphalia del 1648 and the Origins of Sovereignty' 21 (3) *The Int'l History Review*, 569 (1999). B. Fassbender and A. Peters, *Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 229-240. H.R. Hertzfeld and F. Von Der Dunk, 'Bringing Space Law into the Commercial Word: Property Rights without Sovereignty' 6 (1) *Chicago Journal of International Law*, 81 (2005), available at http://tinyurl.com/mr3pycyc (last visited 10 February 2024).

[30] 'The Art II only lays down new rules when applied to the moon and other celestial bodies

Is it possible to conceive property rights without sovereignty, and the coexistence of property rights with the application of the principle of a common frame of reference? Can we acknowledge the existence of these rights without infringing upon the principle of non-appropriation as stipulated in the Outer Space Treaty?

There is a wide range of contentious interpretations of this article, depending on whether the aim is to prioritize a shared international consensus or to justify, and thus allow, autonomous regulation stemming from 'municipal law'. Initially, in support of the power of the international 'conclave', it excludes any form of property on the moon and other celestial bodies.[31] Notwithstanding, it needs to be read in relation with Art 1 of OST which proclaims the freedom of exploration and use of resources.

Given the knowledge of a significant number and strength of private investors, a question arises: does the prohibition of sovereignty, clearly directed at States, also extend to private entities, potentially denying them property rights?[32] This does not seem to be the case due to the fact personal appropriations are not mentioned and, thus, do not appear to be explicitly excluded. This provision does not address whether mining activities are permitted. Art II supports space resource exploitation and appairs to pertain solely to claims of sovereignty and occupation. Thus, Art II favours space resource exploitation specifically pertaining only to claims of sovereignty and occupation. In support of this statement, the distinction between appropriation and use is pivotal.

It is appropriate to accept the orientation it supports that sovereignty is a means of moderating the relationship between the state and the community governed by the State. Thus, sovereignty needs to be traced back to the authority of the political community.[33] However, it has different forms of manifestation, and the principle of non-appropriation is only one of those that can be circumscribed to the territory understood as land. For this reason, it is relevant to also mention Art VIII of OST

which before the OST were res nullius and, therefore, claims of sovereignty would have been legitimate under to the traditional rules of the international law governing occupation and claims of Sovereignty on Earth'. M. Williams, 'The Controversial rules of International Law Governing Natural Resources of the Moon and the Other Celestial Bodies' 58 *Proceedings of the International Institute of Space Law*, 529 (2015).

[31] B. Cheng, 'The 1967 Space Treaty' 95 *Journal de droit international*, 538 (1968).

[32] See eg T. Cheney, 'Managing the Resource Revolution: Space Law in the New Space Age', in R.J. Wilman and C.J. Newman eds, *Frontiers of Space risk: Natural Cosmic Hazards & Societal Challenges* (Boca Raton: CRC Press, 2018), 245-268. This concept of no sovereignty in outer space is repeated in Art 11 of the Moon Treaty (Agreement Governing the Activities of States on the Moon and Outer Celestial Bodies, 18 Dec 1979, 1363 UNITS 3). See eg among those assert limitation to only States and not private entities, bearing in mind the State's international responsibility for its all national activities space (art VI), F. Tronchetti, 'The Non- Appropriation Principle Under Attack: Using Article II of the Outer Space Treaty in its defence' 50 *Procedure Law Outer Space*, 526, 530 (2007); Id, 'Legal Aspects of Space Resource Utilization', in *Handbook of Space Law* (Cheltenam: Edward Elgar Publishing, 2015), 769-813; S. Freeland and R. S. Jakhu, 'The Intersection Between Space Law and International Human Rights Law', in R.S. Jakhu and P.S. Dempsey eds, *The Routledge Handbook of Space Law* (London: Routledge, 2017), 234.

[33] F.H. Hinsley, *'Sovereignty'* (Cambridge: Cambridge University Press, 2nd ed, 1986).

which states that countries retain jurisdiction and control over objects appearing on their space registers, representing those as a sort of 'functional property right'.[34] On the other hand, the property right is linked to powerful States only to prevent individuals from protecting themselves through self-protection.

In addition, the Moon and other celestial bodies are included in 'res extra commercium' category, but only in the sense that the States are the parties involved and only if these celestial bodies are considered in their entirety. Is not the case of synecdoche that requires a radical refusal of the metaphysical unity of Law, for which the relation between perception, reality, and thought is mainly rhetorical, as Pier Giuseppe Monateri taught us with his insights a long time ago.[35]

A demonstration of this blurred and 'flexible' interpretation can be traced to Art 1 of the Treaty which appears as a justification, and at the same time, as a limited application of this aforementioned prohibition. Exploitation is a necessary consequence and *prèmise* at the same time as use and exploration and necessarily leads to the commercialization of resources where all these activities are possible thanks to private investors and operators. The prohibition of appropriation is therefore intended to ensure that the use of these celestial bodies is permitted to all States, thereby preventing exclusive exploitation of their resources.

This is one of the reasons why it is advisable to consider utilizing and tapping into outer space resources through a lease agreement and granting licenses, thus obviating the ontological problem of property rights. It is certain that, through this space activity, an asset or an individual prerogative recognised by law is acquired.

In addition, it is worth mentioning the relevant comparison with the enacted regulations for deep-sea mining activities, where a 'property regime' has developed under similar constraints, such as the non-appropriation principle. A comparison has been made with the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[36] well known as a landmark convention setting out rules relating to the world's oceans and seas, covering issues including territorial limits, resources, and protection of the marine environment. Although, the operational perimeter is very different and divergently defined, the license granting regime established for seabed mineral resources is a good draft on which to establish a regulation for

[34] See Art VIII: 'A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personal thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth'. A. Gupta, 'Property Rights and Sovereignty Within the Framework of the Common Heritage of Mankind Principle' *Proceedings of the international institute of Space law*, 127 (2020); W.N. White, 'Real Property rights in Outer Space' *40th Colloquium on the Law of Outer Space*, 370 (1998), available at http://tinyurl.com/3y5d72rs (last visited 10 February 2024).

[35] P.G. Monateri, La Sineddoche. Formule e regole nel diritto delle obbligazioni e dei contratti (Milano: Giuffré, 1984).

[36] J.G. Wrench, 'Non- appropriation, no problem: the Outer Space Treaty is ready for Asteroid Mining' 51 *Case Western Reserve Journal of International Law*, 437 (2019).

licensing for the exploitation of outer space resources.

III. Reflections on Some Divergences Between Japanese and American Law Regarding Resource Exploitation

The debate surrounding resource exploitation prompted the US in 2015 to enact the Space Resources Exploration and Utilization Act that states a few but clear principles about the exploitation of any abiotic resource in situ outer space, inclusive of water and minerals. The law refers specifically to a-biotic elements; consequently, every new right does not extend to extra-terrestrial life, so anything alive may not be exploited commercially.

There is no explicit reference to the right of ownership, but all the entitlements mentioned are the ones that entail the property right: possess, own, transport, use, and sell. Para § 51303, titled 'Asteroid resource and space resource rights', states:

> 'A United States Citizen, engaged in commercial recovery of an asteroid resource or a space resource, under this chapter, shall be entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space resource, obtained by applicable law, including the international obligations of the United States'.

The aim is to boost the right of United States citizens to engage in commercial exploration for and commercial recovery of space resources free from harmful interference, in accordance with the international obligations of the United States and subject it to authorization and continuing supervision by the Federal Government.

The issue has been simplified to eliminate any doubts regarding the favourability of privatizing the exploitation of outer space resources, as long as it remains under the control of federal agencies. The rules governing the use of resources in space, however, remain uncertain.[37] The US Act of 2015 was undoubtedly influenced and championed by lobbying efforts from Planetary Resources, a private company based in Washington, focused on the future commercialization of asteroid mining.[38] It

[37] The international Treaties, by the way, established the Extension of Terrestrial Law into Outer Space about their liability to each other for damages that their spacecraft might cause either private or public entities to own or operate the mission.

[38] Planetary Resource Inc is a US company, established in 2009 with the aim to mine asteroids identifying them as the most commercially viable near the Earth to extract water that can lead to the development of multiple transformative technologies that are applicable to the global market.

Another private US Company, involved in space mining established in 2013, is Deep Space Industries which has the goal to produce water, propellant, and building materials to favour growing space markets. Both Companies have received massive economic support from the Government of Luxemburg, both have legal headquarters in Luxembourg. The tax benefits for companies in Luxembourg, as well as favourable corporate laws and access to the European market, are well-known. This makes the country particularly attractive for financial companies, investment firms,

comes as no surprise that the US Act 2015 encourages the commercial exploration and recovery of space resources by United States citizens while actively discouraging government barriers to the development of economically viable, safe, and stable industries for commercial exploration within the United States. The strength of this law has been demonstrated and validated by subsequent legislative initiatives from other economic and political entities. These initiatives have successfully overcome the interpretative constraints related to the principle of sovereignty,[39] piquing the interest of economically powerful states eager not to miss out on potential opportunities.

Japan, as a State that has dedicated substantial efforts to space development since its initial involvement as an original signatory of the Outer Space Treaty,[40] has followed the lead of the United States by enacting the Space Resources Mining Act on June 15, 2021. This legislation explicitly permits individuals to engage in commercial space resource mining and outlines the automatic acquisition of space resources that are exploited.

In truth, the Japanese Act seems to adopt an even more colonizing approach, encompassing a wider array of resources as objects of exploration, exploitation, and commercialization. It does not specify that they must be a-biotic resources, which consequentially includes the possibility to commercialise flora and fauna and any living organism useful for humans in the future. It could be quite alarming from an ethical perspective but nowadays it doesn't seem we are living in a preference stage where putting limitations instead of creating the most opening and comprehensive perspective can be favoured.

The Act defines them as 'water, minerals and other natural resources that exist in outer space, including the Moon and other celestial bodies'. Space resources encompass elements such as water, minerals, and other materials found in the outer space realm, including the moon and other celestial bodies. Notably, the legal framework does not explicitly outline the specific scope of 'natural resources', leaving

wealth management companies, and multinational corporations.

The commercial opportunities related to national space exploration started to be an important governmental aim since the administration of George W. Bush that provided incentives for investments in space, created monetary prizes for the accomplishment of space missions, and secured property rights of private industry involved in outer space explorations and exploitations.

[39] On April 6, 2020, was issued an Executive order linking participation in the National Aeronautics and Space Administration's (NASA) Artemis Program to international acceptance and legitimization of the United States view on space resource appropriation. The Signatories affirm that the extraction of space resources does not inherently constitute national appropriation under Art 2 of the OST and that contracts and other legal instruments relating to space resources should be consistent with that Treaty. See, S. Mostershar, 'Commentary, Artemis: The Discordant Accords' 44 (2) *Journal of Space Law*, 591 (2020).

[40] Japan adhered to all Treaties in the following years unless the Moon Agreement. Therefore, it is party to the Agreement on the Rescue of Astronaut, the Return of Astronauts, and the Return of Objects Launched into Outer Space (1968), The Convention on International Liability for Damage Caused by Space Objects (1972), and the Convention on Registration of Objects Launched into Outer space (1975).

room, as just mentioned, for interpretation as to whether this includes inanimate or abiotic resources. Furthermore, the law does not make a clear distinction between resources located on or within a celestial body and the celestial body itself. However, it does acknowledge the necessity of adhering to international laws, hinting at a potential limitation on asserting exclusive rights over an entire celestial body. No reference is mentioned about the term appropriation, as it is possible to note in the US law.

Certainly, it is interlay appropriate to emphasize the economic approach of common law tradition linked to the mainstream view of property as a bundle of interconnecting rights,[41] that entitles estate, status, and immaterial situation, rather than to embrace the approach of civil law tradition where the pivotal role is led by the domain *in rem*. The freehold must be preserved for all mankind (common heritage), and the use, under the guise of leases and licenses and easements may allow the State and private individuals, having previously obtained national authorization, to carry out the best exploitation.

International and national laws dedicate many rules to authorization procedures. Any private and public entities need to obtain the authorization of the State which must have control (mostly through the national aerospace agency) of all programs and missions undertaken, either by public or private entities. Countries have distinct prerequisites for securing a license, which typically involves demonstrating the capacity to carry out their proposed plans. A prevalent limitation placed on these licenses is that they cannot be easily transferred to external parties. Japan permits transfers, but subject to the condition that the concerned party secures explicit government consent.[42]

IV. Some Thoughts in Conclusion

Certainly, this process of national regulation which sees these 'colonizing' missions by private protagonists can no longer be stopped, in the same way as the operative action of international law, beyond the declaration of intents cannot.

[41] See, eg, B.A. Ackerman, *Private property and the Constitution* (New Haven, CT: Yale University Press, 1977), 26-29, reporting that the bundle-of-rights conception of property is so pervasive that 'even the dimmest law student can be counted upon to parrot the ritual phrases on command'. *Contra*, see, eg, T.W. Merrill and H.E. Smith, 'What Happened to Property in Law and Economics?' 111 *Yale Law Journal*, 357 (2001); J.E. Penner, 'The "Bundle of Rights" Picture of Property' 43 *Ucla Law Review,* 711 (1996); A. Gambaro, 'La proprietà nel common law angloamericano', in A. Candian et al eds, *Property- propriètè – Eigentum: Corso di diritto privato comparato* (Padova: CEDAM, 2002), 93; L. Moccia, 'Il modello inglese di proprietà', in *Diritto private comparato: istituti e problemi* (Roma-Bari: Laterza, 2012), 47; A. Wasser and D. Jobes, 'Space Settlements, Property Rights, and International Law: Could a Lunar Settlement Claim the Lunar Real Estate It Needs to Survive' 73 (1) *Journal of Air Law and Commerce*, 48 (2008).

[42] Luxembourg unconditionally bans any form of transfer. Conversely, the United Arab Emirates, like Japan, permits transfers, but is subject to the condition that the concerned party secures explicit government consent.

It shall be deemed that the traditional tools offered by public and private law cannot be underpinned in their original context, therefore we need to go beyond the ontological problem of property rights as national laws have been established; however, a need for rules for preventing harm, interference among space-resource operations and dealing with resolutions of conflicts on this topic remains urgent[43].

The sovereignty of international law cannot be guaranteed because even though hierarchical state law is subject to international law, its incidence is down to each nation-state, because. After all, they ultimately decide whether to implement international obligations and authorize and constrain the activities of international entities through domestic law. Consequently, the range of what is possible under international law is defined by domestic law. In addition, the property issue can become a problem of private international law, as a form of allocation of regulatory authority,[44] more than public international law due to the 'domestic sources' that are occurring in this scenario. Space law is an expression of highly composite different resources and new forms of interaction between the several levels of normativity.[45] The latter aspect, or rather this new global regulatory order constitutes a bold challenge.

The tool of proper contractual terms, reminiscent of those utilized in deep sea mining should not be underestimated. Rather than depending on conventional property rights, asteroid mining is expected to embrace contractual agreements that will likely incorporate standard clauses commonly found in existing mining contracts. For example, the Mining Code established by the International Seabed Authority could serve as a blueprint for a similar organization operating under

[43] An international path aimed at greater cooperation has, in any case, been pursued by the United Nations. It is offered by the 'Building blocks for the development of an international framework on space resource activities' created by the Hague International Space Resources Governance Working Group, to promote international cooperation and multi-stakeholder dialogue. Specifically, is the result of the committee on the Peaceful Uses of Outer Space whose main task is to review and foster international cooperation in the peaceful uses of outer space, as well as consider legal issues arising from the exploitation of outer space. See Fengna Xu et al, 'A re-examination of fundamental principles of international place. Law at the dawn of Space mining' 44 (1) *Journal of Space Law*, 1-43 (2020).

The latter suggests the possibility of granting a temporary right to exploit space resources. This entails assigning 'priority' rights to an operator who wishes to explore or extract space resources, allowing him to do so for a specified maximum duration and within a designated area registered in an international database while ensuring international recognition of these priority rights. The duration and scope of the priority right should be determined on a case-by-case basis, considering the specific circumstances of the proposed space resource activity. Additionally, the legal acquisition of resource rights over raw minerals and volatile materials extracted from space resources, as well as any derived products, can be accomplished through domestic legislation, bilateral agreements, and/or multilateral agreements. See http://tinyurl.com/yc74hr6r (last visited 10 February 2024).

[44] See A. Milles, 'Towards a Public International Perspective on Private International Law: Variable Geometry and Peer Governance' (2012), available at http://tinyurl.com/4hv8ztr4 (last visited 10 February 2024).

[45] See, *infra*, M. Couston, 'Défis et perspectives pour le droit spatial du XXI siècle' 3 *Revue Francaise de droit aérien et spatial*, 256 (2002); R. Michaels, 'State Law as Transnational Legal Order' *UC Irvine Journal of International, Transnational and Comparative LA*, 141 (2016).

the Outer Space Treaty to develop its own set of regulations governing companies engaged in asteroid mining.

In addition, it cannot be denied that 'domestic' laws, on purpose, have paved the way for a journey that goes beyond national implications. An example is provided by the Artemis Accords, drafted by the USA in collaboration primarily with the few nations that have legislated on the exploitation of space resources. In those Accords the need and desire to give these municipal laws a kind of international validation is evident. The Artemis Accords,[46] a set of nonbinding multilateral and bilateral agreements, consist of thirteen provisions established by the United States in 2020 in collaboration with Australia, Canada, Italy, Japan, Luxembourg, the United Arab Emirates, and the United Kingdom. Although they are not legally binding, their goal is to form a solid political and legal consensus on the subject. Furthermore, as of today, 36 other nations have already joined. Through ten principles on space exploration and property rights, the Accords outline the goals and beliefs of these countries regarding the current state of international space law in relation to space exploitation and exploration, going beyond the requirements of OST or even being seen in contrast with them. One of the goals outlined in the Accords is the establishment of a permanent human colony on the Moon. Could it be considered an act of appropriation under the Outer Space Treaty?[47]

Equivalent attention must be paid to another bilateral agreement, finalized by Russia and China,[48] through which they have announced plans to establish a permanent inhabitant base on the Moon, inviting other states to be part of the International Lunar Research Station with the aim to focus on projects such as extracting mineral and water, utilising in-situ resources. It is conceivable that the coveted new regulation must consider these positions established through bilateral agreements that effectively reinforce the stance taken by the states through municipal laws.

Ultimately, in this scenario, it is advisable to give an operative role concerning new governance offered by space Agencies that have increased enormously, such as that of the European Space Agencies,[49] Japan Aerospace Exploration Agency, and Luxembourg Space Agency, in addition to NASA.

[46] See E.A. Taichman, 'The Artemis Accords: Employing Space Diplomacy to De-Escalate a National Security Threat and Promote Space Commercialization' 11 *National Security Law Brief* 112, 113 (2021).

[47] One noteworthy aspect of the Artemis Accords is the requirement for signatories to share scientific information 'derived from their space activities with the public and the scientific community in good faith and 'in accordance with Article XI of the Outer Space Treaty', and in this regard, the agreements seem to reinforce the principle that all activities undertaken must be for the benefit and in the interest of all nations, as stated in Art I of the Outer Space Treaty.

[48] It is a consequence of the China exclusion under the Walf amendment which prohibits NASA from collaborating with any Chinese entity that uses governmental funding without specific congressional permission.

[49] ESA Space Resources Strategy (2019), available at http://tinyurl.com/yvs34xuu (last visited 10 February 2024).

Insights & Analyses

The Function of Mediation in Transnational Family and Inheritance Law Litigation: The Role of the Department of Legal Sciences (DSG) - Unifi in European Field Research

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Abstract

This paper describes the participation of DSG, Unifi, in two European Union-funded research projects, GoInEU Plus and InMEDIATE, and presents the results, which highlight the need to resolve cross-border issues through solutions agreed by the parties with the intervention of professional dispute resolution facilitators. The projects have focused particularly on two areas where, for essentially cultural reasons, it is more difficult to find a framework of shared European principles: family law and succession law. The latest InMEDIATE project, therefore, has a more general dimension, covering all areas of dispute resolution, and is part of the ECVET system for training European professionals with the aim of designing the curriculum of an International Mediator.

I. Transnational Relationships: In Particular, the GoInEu Plus Project on Succession Statutes After the Entry into Force of EU Succession Regulations

In two projects coordinated by the Unifi Department of Legal Sciences (DSG), transnational litigation issues emerged.

GoInEu Plus[1] proposes to enlarge, with an innovative perspective, the scope of the first GoInEu project on succession law (which began on October 1, 2017, and ran for two years) to include problems regarding the recognition and enforcement of decisions in matters of matrimonial property regimes and registered partnerships property regimes. It therefore focuses on the legal management of different inheritance statutes for transnational families, with a new special focus on the increasing problems of integration of different cultures in Europe.

In this day and age, in times of ever-increasing migratory flows,[2] the problems

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For the purpose of the publication of this essay, para 1 is to be referred to Sara Landini, paras 2 through 4 to Simona Viciani.

[1] www.goineu.eu.

[2] According to the last available statistics, in 2015 migrants to EU Member States were 4.7 million, while at least two point eight million migrants have left an EU Member State; see https://tinyurl.com/s5c3ybc4 (last visited 10 February 2024).

caused by transnational family relationships, and issues surrounding inheritance law, provide a wealth of examples to facilitate the understanding of how crucial it is to find new ways to foster the coexistence between different cultures and legal statuses, through the use of cultural mediation tools, for example. The aim is to overcome some of the social conflicts that may cause forms of religious and political radicalization that end up inciting terrorist behaviors.

This topic is therefore closely related to many of the problems that migrant families in Europe face today. It also applies to the issue of real integration that is currently a clear strategy for efficiently contributing to the European Agenda on Security in terms of providing effective judicial responses to terrorism.

Integration is one of the most important challenges in Europe. The European Commission recently adopted an Action Plan on the integration of third-country nationals (June 7, 2016). The Action Plan provides a comprehensive framework to support Member States' efforts in developing and strengthening their integration policies. It also describes concrete measures that the Commission will adopt.

The Plan includes actions across all policy areas that are crucial for integration:

- Pre-departure and pre-arrival measures, including actions to prepare migrants and local communities for the integration process;
- Education, such as actions to promote language training, Early Childhood Education and Care for migrant children, teacher training, and civic education;
- Employment and vocational training, including actions to promote early integration of migrants into the labor market and migrants' entrepreneurship;
- Access to basic services such as housing and healthcare;
- Active participation and social inclusion, including actions to support exchanges with the host society, migrants' participation to cultural life, and fighting discrimination.

In light of the current migratory challenges, and as announced in the Communication on April 6, 2016, the moment has now come to revisit and strengthen the common approach across policy areas and involve all relevant actors – including the EU, Member States, regional and local authorities, as well as social partners and civil society organizations. This is also supported by the European Parliament in its Resolution of 12 April 2016, which calls, among other matters, for full participation and early integration of all third country nationals, including refugees.

GoInEu Plus aims to reduce social conflicts by analyzing the impact of migration to EU Family & Successions Law, having particular regard to the application of European Regulations 1103 and 1104 enacted in 2016 coordinated with Regulation (EU) 2012/650.

It is well-known that the ways in which a person distributes their assets could have social implications, either after death or during their life. Additionally, the social values regarding family support, as well as government taxation policies and

succession laws, have real implications for the way that assets are transferred.[3]

Social values are strictly related to culture, which are mainly of a national dimension, and to national law.

Thus, in the case of international families, the identification of national law should account for the need for social cohesion.

Regulations 1103 and 1104, along with Regulation 650, try to find a solution to facilitate the principle of freedom of movement of European Citizens.[4]

European Parliament and Council Regulation (EU) 2016/1103 of 24 June 2016 aims to implement enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes.

All the rules applicable to matrimonial property regimes should be covered in a single instrument to provide married couples with legal certainty regarding their property and to offer them a degree of predictability. In order to allow spouses in another Member State to enjoy their rights, which have been created or transferred to them as a result of the matrimonial property regime, this Regulation must be applied.

On this topic, it is important to consider the role of private autonomy in regulating the situations of power and duty related to *jus in rem* even in legal systems, such as Italy, ordered on the principle of typicality of jus *in rem*. The parties could therefore regulate, in agreement of the choice of the applicable law, within the spaces left to their private autonomy, the adaptation of an unknown right *in rem* to the closest equivalent right under the law of that other Member State.

It is also necessary to consider the changes within the concept of wealth, currently leaning towards financial instruments that represent real systems for allocating family wealth.

Regulation 1103 only deals with matrimonial property regimes and it should not apply to other preliminary questions such as the existence, validity or recognition of a marriage. These preliminary questions are covered by the national law of

[3] See K. Bulcroft, 'A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics' 2 *Journal of Law and Family Studies*, 1 (2000).

[4] See P. Franzina and I. Viarengo, The EU Regulations on the Property Regimes of International Couples (Elgar: Cheltenham, 2020), 1-13; C. Marrese, Successioni transfrontaliere tra diritto interno e diritto internazionale (Milano: Giuffrè, 2019), 9-11. With particular regard to Regulation 650 see A. Damascelli, Diritto internazionale privato delle successioni a causa di morte (dalla l. n.218/1995 al reg. UE n. 650/2012) (Milano: Giuffrè, 2013), 157; A. Davì and A. Zanobetti, Il nuovo diritto internazionale privato europeo delle successioni (Torino: Giappichelli, 2014), 308; C. Baldus, 'Erede e legatario secondo il regolamento europeo in materia di successioni' Vita notarile, 561-570 (2015); T. Ballarini, 'Il nuovo regolamento europeo sulle successioni' Rivista di diritto internazionale, 1116 (2013); R. Battiloro, 'Le successioni transfrontaliere ai sensi del reg. UE n. 650/2012 tra residenza abituale e certificato successorio europeo' Diritto di famiglia e delle persone, 658 (2015); A. Bonomi and P. Wautelet, Il regolamento europeo delle successioni commentario al reg. UE 650/2012 applicabile dal 17 agosto 2015 (Milano: Giuffrè, 2015); E. Calò, 'La pianificazione successoria dei cittadini spagnoli e dei residenti in Spagna alla luce della disciplina europea delle successioni' Rivista del notariato, 691 (2018).

Member States, including their rules of private international law.

Private autonomy plays a relevant role in the choice of the law governing the matrimonial property regime.[5]

According to Art 22, the spouses or future spouses may agree to designate, or change, the law applicable to their matrimonial property regime, if the law is one of the following:

(a) The law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or

(b) The law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

Regulation (EU) 2016/1104 similarly provides for implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions relating to matters of the property consequences of registered partnerships.

According to Art 22 of Regulation 1104, partners or future partners may agree to designate, or change, the law applicable to the property consequences of their registered partnership, if that law attaches property consequences to the institution of the registered partnership and if the law is one of the following:

(a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded;

(b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded; or

(c) the law of the State under whose law the registered partnership was created.

Only where there is an absence of a choice-of-law agreement pursuant to Art 22, the law applicable to the matrimonial property regime shall be determined according to secondary criteria. For instance, the spouses' first common habitual residence after the conclusion of the marriage, and, in case of partnership, the law of the State under whose law the registered partnership was created.

Regarding both marriage and partnership, this Regulation specifies that the application of a provision of the law of any State may be refused only if such application is manifestly incompatible with the public policy (order public) of the forum.

Both of these regulations are connected to Regulation 650 as some succession rights arise from the property regime of the marriage or of the partnership.

These regulations make up a unified framework which, when read in conjunction with national law, can penetrate national systems. They address a specific EU goal and they need to be read in unison even if they seem to cover different areas. The Union has given itself the objective of maintaining and developing an area of freedom, security and justice to ensure the free movement of people. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial

[5] O. Feraci, 'L'autonomia della volontà nel diritto internazionale privato dell'Unione Europea' *Rivista di diritto internazionale*, 424 (2013).

cooperation in civil matters that have cross-border implications, particularly when necessary for the proper functioning of the internal market.

Regulation 650 shall apply to the succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.

Some matters shall be excluded from the scope of this Regulation. Particularly questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage. Regulation 1103 shall apply to matrimonial property regimes. 'Matrimonial property regime' is defined as a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution. By the way, it shall not apply to the succession to the estate of a deceased spouse.

Regulation 1104 shall apply to matters of the property consequences of registered partnerships.

'Registered partnership' is defined as the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfills the legal formalities required by that law for its creation. It shall not apply, incidentally, to the succession to the estate of a deceased partner.

In reality, it is difficult to distinguish family property matters from inheritance matters. One way to think about it is to consider the difficulty that lies with agreements relating to the family balance sheet that may have effects mortis causa or agreements made about inheritance that affect the ownership of assets in family relationships. These regulations must be considered in line with the ultimate objective of allowing the free movement of European citizens by avoiding constraints that may derive from the problems of applicable law with respect to two fundamental aspects of being a person: family relationships and succession affairs.[6]

During the implementation of the project's training objectives, difficulties emerged regarding its application. The results from the GoInEu and GoInEu Plus projects, which aimed to contribute to developing and disseminating an innovative cross-professional EU law training program, focusing specifically on Migration and Cultural Mediation. The results highlighted some weaknesses such as a lack of knowledge of the EU Regulation among professionals, a requirement to communicate and disseminate their content to citizens, challenges in specific cases to determine the scope of application of different EU regulations in inheritance, patrimonial families' regime (650, 1103, 1104), the possible cross-application of Regulations (EU) 2012/650 and 2016/679 for digital goods (see web profiles on social network), and the use of EU certificates (EU Succession Certificate) to exercise rights in front of banks, insurers, and investments funds. With regard to the certificates, it is

[6] See P. Biavati, 'La realizzazione dello spazio giudiziario europeo di giustizia, libertà e sicurezza: stato attuale e tendenza evolutive alla luce del programma di Stoccolma' *Rivista Trimestrale di diritto e procedura civile*, 185 (2013); A. Bucher, 'La famille en droit international privé' 283 *RCADI*, 39 (2000).

important to remember the recent entry into force of Regulation (EU) 2016/1191 promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 2012/1024 which sets out a system for the further simplification of administrative formalities for the circulation of certain public documents and their certified copies where those public documents and the certified copies thereof are issued by a Member State authority for presentation in another Member State.

The results that have been achieved so far have opened up new trends that we are committed to exploring whilst the research team is active.

As Samuel Baumgartner stated in his paper published in 2004 'Is Transnational Litigation Different?', courts, legislators and lawyers still approach transnational cases in the same fashion as purely domestic ones, adjusting the concepts of domestic law where they believe it necessary. This approach was significant for the transnational issues setting. The same problem emerges with mediation applied to transnational cases. What are the issues and what is the adequate approach to transnational litigation?

Mediation is the most effective way to solve cross-border disputes for many reasons: i) time and cost saving; ii) small constraints and formalities; iii) inclusive and cross-cultural approach; and iv) flexible procedure preserving personal relationships.

II. Conflict Mediation as a Tool for Managing the Private Autonomy of the Parties

The contemporary trend toward introducing and enhancing alternative modes of dispute resolution is linked to both regulatory efficiency and private-subject protection objectives. It is geared toward reducing litigation and overcoming the high costs and complications of litigation and reducing lengthy litigation. It is also geared toward improving access to justice by broadening and diversifying the possibilities for protection and, at the very least, toward greater adequacy and specificity of judicial response.

To achieve these results, however, it requires a change in the legal culture of traditional systems of social regulation, moving away from that culture of conflict based on the clear dichotomy, typical of the procedural sphere, between winners and losers. Rather, it requires moving closer to mechanisms that provide for the return to the parties involved, through the strengthening of the mechanism of self-regulation, not only of the power but also of the 'responsibility' to make decisions about the conflict they are involved in.

Mediation refers to the procedure that aims to reach an agreement to settle a dispute (conciliation); it constitutes a conflict management tool that is part, along with other procedures, of the so-called ADR (*alternative dispute resolution*) systems, whose main feature is that they present themselves as alternatives to state

jurisdiction[7] and are based on the ability to ensure both the impartiality and the completeness of the conciliatory system.

The European Union has taken a decisive role in recent years,[8] producing a series of normative documents aimed at encouraging and regulating the use of ADR methods in member countries.[9]

Until decreto legislativo 4 March 2010 no 28 came into force, Italy had not adopted a legislative policy that addressed the issue of incorporating ADR practices into the legal system in an organic way, but only a series of provisions in the civil, commercial, and criminal fields. The law provides for three types of mediation as long as the rights are available: compulsory, delegated, and optional.

The recent reform of the commercial and civil mediation process[10] expands the areas for which mediation is mandatory. The new Art 5 of decreto legislativo 28/2010 adds disputes concerning joint ventures, consortia, franchises, labor

[7] ADR, which originated in the United States in the 1970s, soon spread to Europe as well thanks to various European Union interventions, including the March 30, 1998 recommendation and subsequent ones of 4 April 2001 and 19 April 2001.

[8] European Parliament and Council Directive (CE) 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters represented the point of arrival of a long and complex process, which started, as recalled in point 2 of the 'recital' by the Tampere European Council of October 1999, then developing over the years, in the framework of Community initiatives on access to justice - an area in which the subject of mediation, and more generally of ADR, must therefore be framed from the point of view of Community legislation -, initiatives that have been articulated in numerous interventions by the Commission and Parliament, starting in 1998.

[9] In France, alternative dispute resolution tools are called MARC (*Modes Alternatifs de Règlement des Conflits*) it is possible to state that the remedy embraces the most varied forms: arbitration, mediation and conciliation which are divided into judicial and extrajudicial. Representing, therefore, an alternative to the judicial solution, they can still develop before the judge who must in that case ensure the validity of the agreements in relation to the procedural rules but respond to a public policy aimed at offering ever more and fitting answers to the growing demand for justice requested by the affiliates. Also in Germany, the methods of conciliatory justice are widely used thanks also to the active role played by lawyers and notaries. The latter often find themselves playing the role of neutral consultants of the parties when drafting the transaction and, moreover, in some regions of Germany, they are authorized to conduct real mediations. The judge has various tools suitable for bringing the parties closer together: he can order the parties face-to-face or provide assessments of fact or law himself with the power to organize the proceedings and in some cases the judge is educated in mediation.

In Austria, where alternative dispute resolution systems offer the parties a more adequate solution than civil proceedings for those conflicts that have specific characteristics, a special federal law has even been enacted (law 'on mediation in civil matters' issued in 2003 and entered into force on 1 May 2004).

Outside of Europe, in England and Wales in addition to arbitration used widely for international disputes, between large companies, in employment law and consumer disputes, other ADR tools are also used such as mediation, impartial assessment, of the regulatory authorities (bodies established by law of the Parliament independent of the government), judicial conciliation, determination through technical consultants, impartial inquiry and the 'medarb'.

[10] Legge 26 novembre 2021 no 206 (Delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata) and decreto legislativo 10 ottobre 2022 no 149 (Attuazione della legge no 206 del 26 novembre 2021).

contracts, network contracts, supply contracts, partnerships and subcontracts.

The norm on compulsory mediation, as it has been regulated,[11] has provided a scope of application identified by subject matter.

When choosing which matters should be subject to an obligatory attempt at conciliation, the law follows two criteria: first, it examines whether the substantive relationships between the parties, if intended to last beyond the settlement of the specific dispute, are deemed suitable for mandatory mediation; second, it considers disputes relating to certain types of contracts that, although they do not assume lasting relationships between the parties and see a massive dissemination, are the basis of a significant part of the dispute.

It is critical in mediation, more than in any other practice, to lay the foundations for the development of a relationship between the parties.

This is an extremely complex confrontation, because of the technical and emotional aspects involved and the difficulty of getting the parties to negotiate. However, if a mediation is carried out properly by the mediator[12] and the lawyer,[13] it can, in our opinion, effectively and adequately resolve confrontation.

Therefore, for mediation to be successful, the mediators ability to negotiate carries great importance,[14] taking into account their ability to convey the will of the parties, but we also agree with those who believe[15] that, even when the mediator formulates the proposal, it is always the parties involved who actually perform the act of disposition, the expression of their will.

This last observation, while referring specifically to the role of mediation with respect to the reaffirmation of the principle of the negotiating autonomy of the parties in their disputes, nonetheless allows us to argue for the validity of this principle in all forms of crisis management, particularly with regard to the priorities that arise in relation to the purposes of alternative dispute resolution remedies.[16]

[11] Decreto legge 29 dicembre 2010, no 225, coordinated with the conversion law, legge 26 febbraio 2011 no 10, 'Proroga di termini previsti da disposizioni legislative e di interventi urgenti in materia tributaria e di sostegno alle imprese e alle famiglie'.

[12] Regarding specifically the function of the mediator, see the interesting reflections of M. Martello, *La formazione del mediatore. Comprendere le ragioni dei conflitti per trovare le soluzioni* (Torino: Giappichelli, 2013).

[13] On the lawyer's role in mediating, see P. Lucarelli, 'Mediazione, la "Chiave d'oro" per la risoluzione dei conflitti' *Guida al diritto*, 46 (2013).

[14] For a study on the figure of the mediator, A. Tonarelli, 'Sociogenesi di una professione al confine tra le professioni: il caso del mediatore civile e commerciale', in A. Tonarelli and S. Viciani eds, *Le professioni intellettuali tra diritto e innovazione* (Pisa: Pacini, 2015), 91.

[15] For reflections, including critical ones, on the role of the mediator, I. Pagni, 'La mediazione dinanzi alla Corte Costituzionale dopo l'ordinanza del Tar Lazio n. 3202/2011' *Corriere giuridico*, 995 (2011); Id, 'Gli spazi e i ruoli della mediazione dopo la sentenza della Corte Costituzionale 6 dicembre 2012, n. 272' *Corriere giuridico*, 262 (2013).

[16] We highlight the importance of this text on mediation as a conflict resolution technique, A. Robert et al, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994). 'Forse il primo passo da fare è proprio quello di allontanarsi da una visione della mediazione che sia quella esclusiva di tecnica di risoluzione dei conflitti alternativa a quella giudiziale e di abbracciare definitivamente la spiegazione in termini di

Transformative mediation, in its real meaning, defines its autonomy not so much as supporting the jurisdictional act's mode of conflict regulation, but as an autonomous mode of conflict regulation itself. In other words, the purpose of transformative mediation is to return the power and responsibility for resolving the dispute to the protagonists of the conflict. This practice, in a way, abandons the classic problem-solving approach to mediation and instead works on the abilities and possibilities of the parties involved to find a solution to their dispute on their own. Thus, increasing the empowerment of each in mutual recognition, so as to transform their interaction from conflictual to constructive and collaborative.[17]

In this framework, it is clear how the focus is on the construction of the private sphere as a formal guarantee of interests and prerogatives referring not only to the individual person but also to the problems related to the representation of private spheres that come into constant interrelation with each other.[18]

The latter observation, while referring specifically to the role of mediation with respect to the reaffirmation of the principle of the parties negotiating autonomy in crisis management, nevertheless allows us to argue for the validity of this principle in all its forms, especially with respect to the priorities that arise in the field with respect to the purposes of alternative dispute resolution remedies.

The same is also true for assisted negotiation,[19] which is an important tool in the field of out-of-court dispute resolution and can complement, rather than replace, mandatory mediation.

III. The Role of Transnational Mediation in Cross-Border Civil Disputes. The InMEDIATE European Project

Mediation is undoubtedly a very useful tool for handling disputes between parties of different nationalities.

Differences in language, tradition, and culture are often a reason for

negoziazione assistita, che si valorizzi cioè la dimensione volontaria e privata del fenomeno', so, P. Lucarelli, 'La mediazione nelle controversie commerciali', in C. Besso ed, *La mediazione civile e commerciale* (Torino: Giappichelli, 2010), 229.

[17] Private autonomy consists of the power of individuals to freely regulate their own interests and make decisions within the limits and obligations established by law. On the basis of the relationship between the private individual and the legal system, private autonomy is defined from time to time either as a power granted to individuals or as an original freedom, a social phenomenon that pre-exists any kind of legal recognition. The Constitution does not expressly mention it but indirectly protects it in Arts 2 and 3 (as a necessary tool for the full development of the human person) and in Art 41 (as a private economic initiative).

[18] P. Perlingieri, Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti (Napoli: Edizioni Scientifiche Italiane, 2020).

[19] For an in-depth study of assisted negotiation, see S. Delle Monache, 'Profili civilistici della negoziazione assistita' *Giustizia civile*, 105-127 (2015). In this contribution, the Author focuses on the centrality in assisted negotiation of good faith in the obvious difficulty of combining it with the defensive strategies of lawyers, taking into account the peculiar role played by the latter in the procedure in question.

misunderstanding, but it can also be a starting point for building a new dialogue, a new mutual understanding.

The difficult management of conflict dynamics and cross-cultural issues in cross-border civil disputes has made transnational mediation today the main tool for alternative dispute resolution between parties of different nationalities. These disputes may arise due to the heterogeneity of domestic legal systems and respective procedural rules, whose application at trial would lengthen the time of dispute resolution.

For the purposes of Art 2 of Directive (EC) 2008/53,[20] a cross-border dispute is defined as a dispute in which at least one of the parties is domiciled or ordinarily a resident in a member state other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute arises; (b) recourse to mediation is ordered by a court; (c) the obligation to resort to mediation arises under national law; or (d) for the purposes of Art 5, an invitation is issued to the parties (by judge)

A cross-border dispute shall also mean a dispute in which a judicial or arbitration proceeding resulting from mediation between the parties is initiated in a member state other than that in which the parties were domiciled or resided habitually at the date referred to in paragraph (1) (a), (b) or (c).

In this framework, one of the key challenges is the diversity of training standards and mediation qualifications in the EU. This makes it difficult for mediators to manage conflict dynamics and cross-cultural issues in cross-border civil disputes.

As the second para of Art 1 of the Directive clarifies, the directive applies to cross-border disputes, a limitation set out in Art 67 of the Treaty,[21] with reference to Arts 65 and 61, which expressly refer to 'judicial cooperation measures in civil matters having cross-border implications'.

However, this limitation has not been an obstacle, in almost all member states, to the extension of national legislation to internal mediation on the basis of the principles of the directive (as the directive itself advocates, in point eight of the recitals preceding the text, stating that 'nothing should prevent member states from applying these provisions to internal mediation proceedings as well').

The issues of mediation, and ADRs more generally, are now topics that can be discussed anywhere in Europe with the certainty of being understood. In fact, it can be said that the basic issues that are discussed are always the same, even in different national contexts, ranging from the mandatory-optional alternative to the court-ordered case-mediation, or from the issue of defensive assistance to that of the training requirements of mediators.[22]

In short, mediation represents an activity that relies on a common tongue where the words used have the same meaning for everyone, avoiding the need

[20] Directive (EC) 2008/52 n 9 above.
[21] https://tinyurl.com/2y5zw83x (last visited 10 February 2024).
[22] M. Marinari, 'La mediazione nella prospettiva europea' *Questione giustizia*, 1 (2015).

for translation, at least in most cases, meaning that anyone can understand and be understood even when engaging with international interlocutors that operate in the mediation environment. This is a very important achievement, which should also be analyzed from a sociology of law perspective.

In practice, the procedure covers the following stages: dispute, litigation, communication, negotiation, and closure.

Communication is the most important stage in this circle. In fact, in ADR, and particularly in mediation, we are dealing with the concept of negotiability. This, therefore, does not require confrontation, and can create a 'common' law of mediation, at least in relation to some basic elements, although individual national realities have their own unique elements.[23]

Ideally, we would be able to look at the individual and have the ability to see them in their social context to understand how their decision-making process works, their priorities, and how their decisions will be evaluated in his or her home country. In this way, cultural differences become elements of communication and negotiation, and one can benefit from knowing a certain culture while keeping individual interests at the forefront all the time.[24]

Civil mediations in international disputes are not yet widespread, despite numerous past initiatives at the European level. One of the main challenges is the differences in training standards and qualifications in this field in the EU, making it difficult for mediators to manage conflict dynamics and cross-cultural issues in cross-border civil disputes.

In this context, InMEDIATE, a project funded by the European Commission under the ERASMUS+ program (October 2020-June 2023).[25] InMEDIATE focused on establishing pan-European standards for mediator skills.

The mission and goals of the project were: promoting cross-border mediation, improving cooperation and networking in the field, fostering high quality standards in the mediation training system, designing, implementing, and delivering and validating a learning outcomes-oriented training curriculum.

Some goals of the project include the assimilation of online education resources on a single platform and making those resources available for free public use. An additional goal is the dissemination of knowledge and learning materials, and the creation of tools to replicate the InMEDIATE certification system and InMEDIATE training curriculum for international civil mediators with an InMEDIATE e-Platform. It is expected that the outcome will consist of a toolkit that replicates the InMEDIATE training course and its related certification system that provides: i) guidance for national and international organizations willing to adopt the training course model and methodology; ii) quality standards and procedures adopted to

[23] n 23 above.

[24] G. De Bertiand A. Marsaglia, *Gestire negoziazione e mediazione. Guida per l'avvocato* (Milano: Altalex, 2022).

[25] https://www.inmediateproject.eu/.

assess the final qualifications in terms of enhanced knowledge, competencies and skills gained by the participants on completion of the course; iii) methodological framework and practical tools for continuous professional development of VET teachers, trainers and mentors in the mediation field. Unifi's Department of Legal Sciences participated in the project to assess and verify whether the qualifications necessary for the creation of the professional figure of the transnational mediator are acquired during the training. In addition, the project must obtain certification from the Italian Ministry of Justice in order to obtain formal acknowledgement of Italian participation. We can consider this to be a concrete achievement in line with the creation of a certification that other member states within the European credit system can recognize for vocational education and training (ECVET) system.[26]

To achieve this, the objectives of the Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European credit system aimed at facilitating the assessment of learning outcomes of individuals and enabling the recognition of credits acquired in courses established in different Member States by individuals interested in having a qualification, in a European area of lifelong learning without borders, have been analyzed by the research team.

This study became necessary because the objectives of the Recommendation (to support and supplement the activities of Member States, to facilitate cooperation between them, to increase transparency, and to promote mobility and lifelong learning) cannot be adequately achieved by Member States, but rather, due to scale or effects, would be better achieved at the Community level. The Community may adopt measures in accordance with the principle of subsidiarity as set out in Art 5 of the Treaty.[27]

In accordance with point eight of the Recommendation, ECVET is applicable to all learning outcomes that, in principle, should be attainable through a variety of education and learning pathways at all levels of the European Qualifications Framework for Lifelong Learning (EQF) and subsequently transferred and recognized.

The Recommendation thus contributes to the broader goals of promoting lifelong learning and increasing the employability, openness to mobility, and social inclusion of workers and learners. In particular, it facilitates the development of flexible and individualized pathways, as well as the recognition of learning outcomes acquired through non-formal and informal learning.

In addition, Section ten explains that the document should facilitate the compatibility, comparability and complementarity of credit systems used in VET and the European Credit Transfer and Accumulation System (ECTS), used in higher education. Thus, it should contribute to greater permeability between levels of

[26] It is one of the common EU tools. It is intended to aid the transfer, recognition and accumulation of assessed learning outcomes of individuals aiming to achieve a qualification and to promote lifelong learning through flexible and individualized learning pathways.

[27] https://tinyurl.com/2y5zw83x.

education and training, in accordance with national legislation and practices.

Based on these thematic insights, with the understanding that more training, transparent information, and freely available educational content would help to increase mediation services at the local, regional, national, and cross-border levels, the DSG, Unifi, produced an Evaluation Report[28] based on objectives. The report focused on:

- Assessment of the learning results achieved by the trainees in terms of capacity and expertise;

- Assessment of the training program in terms of impact, efficiency and effectiveness;

- As a final assessment, based on the ECVET recognition methodology, it was suggested that an appropriate number of credits be assigned to each part of the training and learning outcomes, based on a table prepared for this purpose.[29]

[28] Evaluation Report, UNIFI Training Evaluation and Certification (M26-28) LP: Uni Florence.

[29] Please, refer to viewing the following table contained within the Report.

Module-Knowledge-Ability-Expertise-Credits

Module 1: Alternative Dispute Resolution: Legal Framework & Mediator's Responsibility

Knowledge: EU regulatory system – EU legal initiatives

Credits: 1

Module 2: Mediation Styles and Code of Conduct

Knowledge: Standards of mediation practice as stated in the European Code of Conduct for Mediators

Credits: 2

Module 3: Culture and Communication

Ability: Deepening awareness of our values, beliefs and perceptions

Credits: 2

Module 4: Conflict Analysis

Ability: Asking questions

Credits: 2

Module 5: Negotiation

Ability: Conduct a negotiation

Credits: 2

Module 6: Mediation Stages

Ability: Ability to demonstrate competence, to differentiate various mediation stages and to understand the importance of the preparatory phase in cross-border commercial disputes

Credits: 4

Module 7 Mediation techniques.

Expertise: Reflexivity in mediation, taking into account assumptions and cultural lenses. Preparation and varying expectations as well as ways of communicating and working with culturally diverse parties. Specific techniques useful throughout the mediation process, including clarification, identifying vicious circles and working with the value square model

Credits: 3

Module 8: Co-mediation

Expertise: Creative cooperation between co-mediators

Credits: 3

Module 9: Online Dispute Resolution

Expertise: Overview of online dispute resolution, specifically e-negotiation, online arbitration, and online mediation. The advantages and disadvantages of using video-conferencing platforms

Credits: 2

Total credits: 21

IV. The Resolution of Transnational Family and Inheritance Issues Through the Challenges of GoInEU Plus and InMEDIATE Projects

Transnational mediation aims to resolve family disputes involving at least two countries.

Sometimes, these types of litigation develop in a context characterized by the different cultural and religious practices of the people involved, or when the customary practices of one country contradict the laws of the country to which the member has moved. In these cases, international mediation can help people in conflict overcome these differences to reach an agreement.

Specifically, in the first part of this study, mediation in family relationships is a structured process during which an impartial mediator allows members of a family to talk constructively about their conflict. The goal is to facilitate communication and dialogue to find satisfactory solutions for all family members involved in the conflict.

As previously noted, the EU council has adopted regulations implementing two forms of enhanced cooperation on matrimonial property relations and property effects of registered partnerships, respectively Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of decisions regarding matrimonial property regimes and Regulation (EU) 2016/1104, for registered partnerships.[30] These instruments, which are effective as of 29 January 2019, dictate uniform rules on jurisdiction, applicable law and recognition, and enforcement of foreign decisions.

In order to make it easier for spouses or partners to manage their assets, the Regulations authorize them to choose the law applicable to their property regime, regardless of the nature or location of the assets, from among the laws that have a close connection with them by reason of their habitual residence or citizenship. It is possible to make this choice at any point during the relationship.[31]

The new instruments in this framework aim to eliminate obstacles to the free movement of persons in the European judicial area. It aids in particular with overcoming the difficulties experienced by couples, whether same-sex or heterosexual, in the management or distribution of their property, either between themselves or with third parties, and either during their relationship or at the time of liquidation of the property regime. It also ensures legal certainty and greater predictability of solutions.

But the difficulties arising from obtaining a shared form of integration among all member states means that these regulations operate within a whole set of both domestic and EU regulations with which they interact very closely.

This clearly causes a whole set of conflicts relating to the prevalence of one set of rules over another when applied to a particular situation concerning the delimitation of the scope of application of the rules of succession and property rules.

[30] https://tinyurl.com/2w98np5h.

[31] Respectively, recitals 44 and 45 of Regulations above in the text.

Significantly, the occurrence of family conflicts in matters of inheritance is far from uncommon and can cause rifts among family members that are difficult to heal.

Especially in cross-border successions, uncertain situations can be created for all parties involved, although with the introduction with a single regulation (Regulation (EU) 2012/650), which governs all *mortis causa* successions opened on the territory of a member state as of 17 August 2015, even if it is a non-EU citizen, a process of harmonization has begun through the application of the principles of uniqueness and universality of the applicable law of the complex situation preceding.

The Regulation ensures that a cross-border succession is handled consistently, under one law, and by one authority. In principle, the courts of the member state where a citizen was last habitually a resident of will have jurisdiction to decide the succession and the law of that state will apply.

However, citizens may choose the law of their country of citizenship to be the law applicable to their inheritance. The application of a single law by a single authority to a cross-border succession avoids parallel proceedings with possible conflicting court decisions. It also ensures that decisions made in one member state are recognized throughout the Union without the need for a special procedure.[32]

A European Certificate of Succession (ECS) has been introduced: this document, issued by the probate authority, can be used by heirs, legatees, executors and administrators of the estate to prove their status and exercise their rights or powers in other member states. Once issued, the ECS will be recognized in all member states without the need for any special procedure.[33]

Nevertheless, these principles cannot be general in scope.[34]

[32] According to which, Art 21, the law applicable to the entire succession is that of the state in which the *de cuius* had his or her residence at the time of death and if, by way of exception, it is found that the deceased had closer connections with a state other than that established under paragraph 1, the law of succession of that state will apply.

To the subsequent Art 22 according to which a person may choose as the law he governs his entire succession that of the state in which he has citizenship at the time of his choice or death.

[33] On 9 December 2014, the Commission adopted an Implementing Regulation establishing the forms to be used under the Succession Regulation, cf Commission Implementing Regulation (EU) 2014/1329 of 9 December 2014 establishing the Forms referred to in Regulation (EU) 2012/650 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, available at https://tinyurl.com/3mhpdtf7 (last visited 10 February 2024).

[34] On the topic, L. Fumagalli, 'Rinvio e unità della successione nel nuovo diritto internazionale privato' *Rivista di diritto internazionale privato e processuale*, 835 (1997); E. Calò *Le successioni nel diritto internazionale privato* (Padova: CEDAM, 2007), 33; D. Solomon, 'Die Renaissance des Renvoi im europäischen Internationalen Privatrecht', in *Liber amicorum Klaus Schurig* (München: De Gruyter, 2012), 237-253; H. Schack, 'Was bleibt vom Renvoi?' *IPRax*, 315-319 (2013); A. Bonomi, 'Il regolamento europeo sulle successioni' *Rivista di diritto internazionale privato e processuale*, 293–307 (2013); R. Ambrosino, 'La scissione delle successioni transnazionali: osservazioni sulla sorte delle liberalità del de cuius' (2022), available at https://tinyurl.com/yxmweent (last visited 10 February 2024).

The principles therefore create a crisis in the unity of the inheritance system, which has brought back into play the principle of fractioning this system, the latter of which has also been brought back to relevance in the Italian legal system by an important ruling of the Supreme Court.[35]

The recurrence of a dualistic system in the regulation of transnational succession implies the opening of at least two (or more, if the deceased's real estate is present in more than one state) successions. It also implies the formation of two distinct masses, each subject to different rules of vocation and publicity. For example, the various laws that are necessary to verify the validity and effectiveness of the succession title, to identify heirs, and to determine the size of shares and methods of acceptance and publicity.[36]

The scope of the *lex successionis*, in particular, identified for estate and movable successions, encompasses all three stages in which the succession procedure unfolds: devolution, inheritance transmission of assets, and division.

With regard to the rights of the beneficiaries, the partitioning of the inheritance could lead to some rather dubious solutions because the possible non-communication of the two inheritance masses would lead to an undermining of the internal order, for the reason that the exclusion of the assets that are part of the foreign succession would result in a questionable compression of the *de cuius* disposable share, significantly undermining the freedom of testamentary self-determination.

In all these cases, mediation proves to be a very effective tool for preventing and resolving conflicts within families about inheritance.

For a significant survey of the concept of public policy, see G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), where it is noted that the distinction between domestic and international public policy is often overstated, since more appropriate seems to be that between fundamental principles and legislative provisions expressing the same that cannot be derogated from by any domestic or external legislation and mandatory norms that are not expressive of fundamental rights and therefore not only derogable by foreign legislation but also applicable to foreign nationals under conditions of reciprocity (Art 16 preleggi).

[35] Corte di Cassazione-Sezioni unite 5 February 2021 no 2867, annotated by M. Rizzuti, 'Successioni transnazionali e revocazioni testamentarie' *Corriere giuridico* 1325-1329 (2021); even by R. Barone, 'Le Sezioni Unite della Cassazione intervengono su una successione transfrontaliera italo-inglese: una decisione ricca di spunti interessanti' *Vita notarile*, 1-28 (2022); D. Damascelli, 'La Cassazione si esprime su qualificazione e rinvio in materia successoria: un'occasione persa per la messa a fuoco di due questioni generali del diritto internazionale privato' *Famiglia e diritto*, 11-24 (2021); F. Marongiu Bonaiuti, 'Il diritto internazionale privato delle successioni in casi collegati al Regno Unito: riflessioni sulla sentenza Pescatore' *Trust e attività fiduciarie*, 696-709 (2022). The Court in its reasoning dwells on the obligation of the judge to consider the two successions independent of each other, each subject to different rules of vocation and deletion, verification of the title of the estate, the respective shares of the co-heirs, the manner of acceptance and the rights of the legitimates.

[36] See, F. Morongiu Buonaiuti, 'The Low Applicable to Succession, Between Unit and Splitting of the Relevant Legal Regime, the Role of Renvoi' *The Italian Review of International and Comparative law*, 405-419 (2021); H. Lewald, 'Questions de droit international des successions' *Recueil des Courts*, 19-20 (1925); A.E. Von Overbeck, 'Divers aspects de l'unification du droit international privé spécialement en matière de successions' *Recueil des Courts*, 561 (1961); A. Grahl Madsen, 'Conflict between the Principles of Unitary Successions and the System of Scission' *ICLQ*, 598-643 (1979).

It is particularly effective in transnational mediation (where it is important to establish where proceedings are held and which language is used) because the proceedings can adapt to each party's need, while also maintaining their choice on whether they wish to continue or abandon the mediation to reach a settlement of interests that represents the real desires of each party.

In this way, the GoInEU and GoInEU Plus projects, by following the InMEDIATE training program to provide professionals with a comprehensive set of specialized knowledge, technical and cross-cultural skills, can resolve certain issues. The issues that can be resolved are as follows: ensure a uniform application of European law, which is in turn strengthened through action; EU citizens and migrants are better informed about the current state of implementation of European law, and are confident that their successions will be recognized in member states; discrimination against different family structures is addressed and solutions are proposed; and input is offered to study the impact of migration and emerging technologies on succession law.

Insights & Analyses

Public Corruption in the Italian Legal System: Between Early Deflagration Offenses, a Low Determinacy Coefficient and Remaining Application Tensions

Alessandro Milone*

Abstract

This paper takes as its starting point the analysis of a recent judgment of the Sixth Section of the Supreme Court on the subject of bribery and provides a reconstruction of the microsystem of the cases provided by the Italian legal system on the subject. It proposes a solution to overcome the application difficulties that have emerged in practice in delineating the boundary between functional bribery and corruption proper, configuring the outlines of a new framework more in line with the guarantees and principles of criminal law.

I. Introduction

A little more than thirty years after Tangentopoli, the issue of public corruption still remains in Italy as well as in Europe, of great topicality both from a political point of view (see, for example, the recent Belgian investigation into corruption in European institutions called in the media as *Qatargate,* which involved some Italian politicians) and from a purely legal point of view, which is the subject here.

Moreover, even though the sporadic interest in the subject has prompted the Italian legislature to intervene, within a few years, at least three times (2012, 2015, 2019) in a direct way on corruption offenses, even distorting the original structure of the Rocco Code, today there remain certain regulatory gaps to be filled. Many scholars have substantial doubts about the application of jurisprudence in the various cases that our current Penal Code provides in the field of public corruption.

Currently, the two articles of the Criminal Code dealing with bribery (Arts 318 and 319), following the Severino reform of 2012, are characterized in a relationship of 'speciality by specification', in the sense that Art 318 of the Criminal Code provides for a crime of danger that punishes the generic conduct of selling the public function, while conversely Art 319 of the Criminal Code provides for a crime of damage and requires a specific act contrary to the duties of office.

The rewriting of the provision is in line with the qualitative and criminological changes that has affected the corrupt phenomenon, thus aiming at the repression of the new and more serious forms of so-called systemic and 'subservient corruption'. In systemic corruption, in fact, there is a corruptive agreement which, far from

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relating to the trading of a single specific or identifiable office act, aims rather at creating a permanent commitment on the part of the public official, who makes available to the corruptor the generality of the acts proper to his function. The corruptive relationship is projected into a long-term perspective and is transformed into the commodification of public function or power.

The legislator thus represses the placing on the public official's payroll or the subservience of the public function, which until now was assumed in the case provided for in Art 319 of the Criminal Code, in the amended Art 318 of the Criminal Code, provided that the payments made are not related to the performance of one or more acts contrary to official duties. Thus, after the 2012 reform, there was a break in the synallagmatic relationship between the act of office and the acceptance of a promise and receipt of benefits by the public agent, which always characterised the two traditional forms of corruption in the Criminal Code: bribery for an act in conformity with the act and bribery for an act contrary to official duties.

This setting has not been peacefully accepted in recent years by the jurisprudence, which has operated, at least in an initial phase, a sort of counter-reform in its application, contrary to the *littera legis*.

The proposed analysis below first attempts to verify the state of the art in the field of public corruption and, then to propose a new arrangement of corruption offences within our legal system that may help to overcome the interpretative difficulties still emerging.

II. Supreme Court Returns to the Issue of Corruption for the Exercise of Function

The Sixth Section of the Supreme Court, for the reason mentioned above, recently returned to the issue of delimiting the scope of application between the two main corruption offenses provided for by the Italian legal system in Arts 318 and 319 of the Criminal Code: bribery for the exercise of function and so-called proper bribery for an act contrary to the duties of office.

It has ruled both on the correct interpretation of the notion of the 'official act' that the public official must undertake to perform, as consideration for the agreement with the private corrupting party, for the purposes of the configurability of bribery proper, and on the correct application of bribery cases in cases of stable subservience of the public official to private interests.

The subject has been several times the object of the attention of both doctrine and jurisprudence, which from the 1990s have tried to give an answer on the interpretative level to the relevant phenomenological changes[1] that have influenced

[1] The classical phenomenology of corruption has always been rooted in the individual pact (*pactum sceleris*) that was established between two subjects, an *extraneus* and an *intraneus* of the Public Administration, with an exchange - a real 'contract' - between act and utility as its object. On the 'phenomenological revolution' of corruption, which emerged particularly from the 1980s and

public corruption, to the repercussions of these on the normative datum and to the answers that the legislature has provided on the political-criminal level.

It is worthwhile, briefly, to recall the facts covered by this judgment.

The case brought to the Court's attention a corrupt affair involving a contractor and a mayor in the province of Potenza, which is part of the more famous media-judicial case known as '*Tempa* Rossa'.[2] This affair, as is well takes its name from the oil site at the center of the investigation by the Potenza Public Prosecutor's Office, which, starting in 2006, dealt with a system of corrupt facts concerning mainly the contracts necessary for the construction and upgrading of oil extraction facilities in the area.

The case under review, against the ruling of the Potenza Court of Appeals, was brought by the entrepreneur found guilty of the crime of bribery proper *under* Art 319 of the Criminal Code. and sentenced to a term of three years' imprisonment, in addition to accessory penalties and statutes in favor of the civil plaintiff, for having bribed the local politician with the aim of obtaining - through certain forms of undue pressure exerted by the first citizen on the managers of major oil companies operating in the municipal territory - subcontracts from multinational companies awarded the contract for the exploitation of the Tempa Rossa oil field.

From the judicial investigation, which concerns one of the 'strands' into which the investigation was divided, it emerged that this activity would have been the result of an agreement between the two individuals - one public and the other private citizen - concerning certain economic benefits, consisting in the employment in the corrupting entrepreneur's company of a number of people liked by the mayor, specifically identified, and in the giving of a monthly sum of money through the signing of a fictitious lease of a property owned by the public official's children (which in reality always remained at the owner's disposal).

According to the judgments of merit (on the basis of findings also coming

1990s of the last century, with the spread of so-called systemic corruption and with new forms of manifestation of the crime, leading to the most recent reforms on the subject, *ex plurimis*, see the work of G. Forti, 'Il volto di Medusa: la tangente come prezzo della paura', in Id ed, *Il prezzo della tangente. La corruzione come sistema a dieci anni da "mani pulite"* (Milano: Vita e Pensiero, 2003); G. Fiandaca, 'Esigenze e prospettive di riforma dei reati di corruzione e concussione' *Rivista italiana diritto e procedura penale*, 885 (2000); P. Davigo and G. Mannozzi, *La corruzione in Italia. Percezione sociale e controllo penale* (Bari: Laterza, 2008), 7; F. Cingari, 'La corruzione pubblica: trasformazioni fenomenologiche ed esigenze di riforma' *Diritto penale contemporaneo Rivista Trimestrale*, 79 (2012); M. Gambardella, 'Dall'atto alla funzione pubblica: la metamorfosi legislativa della corruzione "impropria" ' *Archivio penale*, 15 (2012). For a sociopolitical perspective, see the contributions of D. Della Porta, *Lo scambio occulto. Casi di corruzione in Italia* (Bologna: il Mulino, 1992); Id and A. Vannucci, *Corruzione politica e amministrazione pubblica. Risorse, meccanismi, attori* (Bologna: Il Mulino, 1994); A. Vannucci, *La corruzione nel sistema politico italiano a dieci anni da mani pulite*, in G. Forti, ed, *Il prezzo della tangente* above, 23.

[2] On the events related to the prosecutions of the 'Tempa Rossa' case refer to M. Gambardella, 'Corruzione, millantato credito e traffico di influenze nel caso "Tempa Rossa": una debole tutela legislative' *Cassazione penale*, 3597 (2016); M.C. Ubiali, 'I rapporti tra corruzione ex art. 319 c.p., traffico d'influenze illecite e millantato credito nella prima pronuncia della Cassazione sulla vicenda "Tempa Rossa" ' *Diritto penale contemporaneo*, 20 June 2016.

from telephone intercepts) the public official, as a quid pro quo for the corrupt agreement - especially through implicit threats – would have carried out conduct materialized, subsequently, in activities of illicit conditioning and influence towards the entrepreneurs of the 'Tempa Rossa' Oil Center, already the subject of separate trial for the crime of extortion.

On closer inspection, the main issues before the Supreme Court in this case related to the need to correctly qualify the crime in addition to the need identify both the consummation moment of the crime and the public act being commodified.

In relation to the consummation of the crime, the Court reiterated regarding of antecedent bribery, that

> 'the performance of the act by the public official is not part of the structure of the crime and does not even play a role in determining the moment of consummation'.

In fact, it is irrelevant - for the purpose of the integration of the case - that the act is actually performed, since bribery

> 'is a two-pronged crime in the sense that it is perfected alternately with the acceptance of the promise or with the giving of the utility in exchange for the mercy or a specific act to the contrary'.

The Supreme Court, therefore, had to intervene to ascertain whether the conduct engaged in by the subjects integrated, as established in the first two levels of the trial court, the more serious crime of bribery proper under Art 319 of the Criminal Code or whether, instead, it was necessary to requalify the act and bring it back into the sphere of functional bribery, which is punished less severely by Art 318 of the Criminal Code.

The judges of legitimacy rejecting part of the grievances put forward by the defense that aimed to exclude *in toto* the nexus of correspondence between the private party's promises and donations and the public official's activity. Instead, on the basis of a temporal *hiatus* defined as extremely relevant between the two conducts, the judges departed from the approach of other previous jurisprudence, and established the need to bring the fact, as requested by the appellant, back into the more suitable framework of the case of corruption for the exercise of function.

The judges justify this derubrication by agreeing with the reinterpretation of bribery 'for subservience' according to which they now consider outdated

> 'the approach that, starting from the assumption that the contrary act of office, the object of commodification, can include any behavior detrimental to the duties of loyalty impartiality and honesty that must be observed by anyone exercising a public function, has arrived at the affirmation that configures the crime of bribery for an act contrary to the duties of office - and not the milder crime of bribery for the exercise of the function referred to in Art 318 of the

> Criminal Code - the stable subservience of the public official to the personal interests of third parties, which results in acts, which, although formally legitimate, insofar as they are discretionary and not strictly predetermined in an, when or *quomodo*, conform to the objective of realizing the interest of the private party in the context of a logic globally oriented to the realization of interests other than institutional ones'.

In the case at hand, on closer inspection, the judges found the agreement between the corrupt and the corruptor did not have as its object the performance of a specific administrative act falling within the competence of the mayor, but only a generic placing at the disposal or on the payroll of the public agent, which-as reconstructed by the court proceedings on the merits-had not translated into the performance of concrete acts of the office.

The Court, following up on an already established jurisprudential orientation, reiterated how stable subservience to the function, in cases where it does not result in acts contrary to the duties of the office, should be brought under the provision of Art 318 of the Criminal Code as amended by legge no 190 of 2012.

The ruling, therefore, makes it possible to review the differences between the offenses in question and, considering the interpretative difficulties still prevalent in enforcement practice today, to propose a reformulation of the entire system of corruption offenses that could overcome the jurisprudential contrasts and define, with greater clarity, the boundaries between the different types of public corruption.

III. A Step Back: The Microsystem of Public Corruption Offenses After the Reform Season (Brief Overview)

The microsystem of public corruption offenses,[3] provided for by the system within Title II of the Second Book of the Penal Code, has been reformed on several occasions in recent years, both (1) to address needs of a phenomenological nature, relating to the new ways of manifesting corrupt conduct that have emerged mainly since the Tangentopoli investigation and 'refined' in subsequent years, as well as to meet Italy's covenant commitments at the international level,[4] and (2) to

[3] For a historical-normative reconstruction of the system of corruption offenses in Italy, may we refer to A. Milone, *Corruzione pubblica e diritto penale. La crisi dei principi tra Italia e Stati Uniti* (Napoli: Edizioni Scientifiche Italiane, 2023). See also, recently, G. Furciniti, *Il sistema penale anticorruzione* (Napoli: Edizioni Scientifiche Italiane, 2022); G. Stampanoni Bassi ed, *La corruzione, le corruzioni* (Milano: Wolters Kluwer, 2022).

[4] On the international legislation on corruption, *ex plurimis*, see L. Salazar, 'Recenti sviluppi internazionali nella lotta alla corruzione (… e conseguenti obblighi di recepimento da parte italiana)' *Cassazione penale*, 1529 (1998); Id, 'Strumenti più efficaci per reprimere la corruzione e le frodi comunitarie' *Diritto e giustizia*, 10 (2000); S. Manacorda, *La corruzione internazionale del pubblico agente* (Napoli: Jovene, 1999); C.R. Calderone, 'La lotta alla corruzione in campo comunitario ed internazionale' *Rivista trimestrale diritto penale dell'economia*, 607 (2001); F. Palazzo, 'Kriminologische und Juristiche Aspekte der offentlichen Korruption', in *Festschrift fur Klaus Volk*

provide the institutions in charge of combating the phenomenon with an anti-corruption armamentarium that could guarantee greater effectiveness both in terms of prevention and repression.

It is useful to check the regulatory 'state of the art' in the field of public corruption following the three main reforming interventions in recent years, legge no 190 of 2012, legge no 69 of 2015 and legge no 3 of 2019 (the so-called 'Spazzacorrotti' law), dwelling here only on the aspects related to the cases under observation.

The legislature, as anticipated, intervened in 2012, with the so-called Severino reform,[5] partially abandoning the model of typification of bribery offenses, defined as 'mercantile', adopted by the Rocco Code, which - based on the illicit buying and selling of a public act - provided for the differentiation between improper bribery (an act of office in accordance with official duties: Art 318 of the Criminal Code) and proper bribery (an act contrary to official duties: Art 319 of the Criminal Code). The most obvious result of the novelty was, within the scope of bribery offenses, the inclusion of bribery for the exercise of a function in Art 318 of the Criminal Code in the *corpus of* corrupt offenses.[6]

Until the reformatory intervention under consideration, bribery, in all its forms, required not only the necessary concurrence of two parties, but also the identification of a specific act, conforming to or contrary to the duties of office, as the object of the corruptor's giving or promising. The figures of corruption described by the Rocco Code were centered on the so-called 'mercantile model' within which the act of bribery represented the core of the cases.

With the transformation of corruption from an episodic to a systemic phenomenon,[7] the rigid notion of 'act of office',[8] however, over time, has

(Munchen: C.H. Beck, 2009), 535; V. Mongillo, *La corruzione tra sfera interna e dimensione internazionale* (Napoli: Edizioni Scientifiche Italiane, 2012).

[5] On the anti-corruption reform desired in 2012, during the technical government headed by Mario Monti, by former Justice Minister Paola Severino, see eg the contributions by E. Dolcini and F. Viganò, 'Sulla riforma in cantiere dei delitti di corruzione' *Diritto penale contemporaneo Rivista trimestrale*, 232 (2012); F. Palazzo, 'Gli effetti "preterintenzionali" delle nuove norme penali contro la corruzione', in B.G. Mattarella and M. Pelissero eds, *La legge anticorruzione. Prevenzione e repressione della corruzione* (Torino: Giappichelli, 2013), 1; D. Brunelli, 'La riforma dei reati di corruzione nell'epoca della precarietà' *Archivio penale*, 59 (2013).

[6] The following is the text of Art 318 of the Criminal Code currently in force: 'A public official, who, in the exercise of his functions or powers, unduly receives, for himself or a third party, money or other benefits, or accepts the promise thereof, shall be punished by imprisonment from three to eight years'.

[7] On the transformation of corruption from the 'bureaucratic' type, in which the administrative act is the object of commodification, to 'business corruption', in which stable relationships that act on the entire administrative function predominate, see F. Palazzo, 'Le norme penali contro la corruzione tra presupposti criminologici e finalità etico-sociali' *Cassazione penale*, 3389 (2015); A. Spena, *Il «turpe mercato». Teoria e riforma dei delitti di corruzione pubblica* (Milano: Giuffré, 2003).

[8] On the criminalistic notion of 'act of office' see the contributions of M. Romano, 'Fatto di corruzione e atto discrezionale del pubblico ufficiale' *Rivista italiana diritto e procedura penale*, 1314 (1967); G. Vassalli, 'Corruzione propria e corruzione impropria' *Giustizia penale*, 305 (1979); C.F. Grosso, 'Corruzione' *Digesto delle Discipline Penalistiche* (Torino: UTET, 1989); M. Pelissero, 'La nozione di atto d'ufficio nel delitto di corruzione tra prassi e teoria' *Diritto penale e processo*, 1011

undergone a long process of erosion or dilation of its content by the jurisprudence[9] which, with the aim of responding to the need to effectively repress the phenomenon, has gradually reduced its centrality.[10]

It should be preliminarily noted that the criminal concept of an official act is broader than that used in administrative law, in that the criminal legislature refers not only to the act understood in the strict sense but to the overall administrative activity carried out by a Public Administration entrusted with powers to manage public interests. Over time, therefore, two alternative approaches to the interpretation of the reference (to the act) contained in legal provisions have been consolidated and stratified in case law.

The first orientation[11] held that the act of office that was the object of remuneration should be identified in its content or kind, even in cases where there was a plurality of acts. However, such a view ended up considerably restricting the possibilities of incriminating certain conduct, bringing it back into the sphere of corrupt acts. As a result, there was a strong push to overcome this approach - the result of the so-called mercantile model - in order to allow for evidentiary simplification at trial.

Thus, as early as the 1990s, a second - more flexible - direction[12] developed,

(2000); V. Manes, 'L'atto di ufficio nelle fattispecie di corruzione' *Rivista italiana diritto procedura penale*, 924 (2000); E. Amati, 'Sulla necessità di individuare un atto specifico e determinato nei delitti di corruzione' *Foro ambrosiano*, 1 (2001).

[9] The so-called criminal jurisprudential law is not a novelty circumscribed only to the subject of corruption and in particular of corruption by subservience, the result of an elaboration built in the courts, but rather it is a constant, with respect to the evolution of Italian criminal law, which has touched numerous fields of criminal protection (for example, from external complicity in mafia association to the so-called environmental concussion), especially the so-called emergency one, where - in the absence of effective legislation or repressive norms - the supplance of the judicial power has intervened. See *ex plurimis*, M. Donini, 'Il diritto giurisprudenziale penale. Collisioni vere e apparenti con la legalità e sanzioni dell'illecito interpretativo' *Diritto penale contemporaneo Rivista trimestrale*, 22 (2016); F. Palazzo, 'Legalità fra law in the books e law in action' *Diritto penale contemporaneo Rivista trimestrale*, 4 (2016).

[10] The tendency of the practice to valorize proper corruption is recalled by G. Fidelbo, 'La corruzione "funzionale" e il contrastato rapporto con la corruzione propria' *Giustizia insieme*, 14 May 2020, according to whom 'the path of jurisprudence in this matter is well known and can be summarized in what has been effectively defined as a progressive 'dematerialization of the element of the act of office', a path that determined the 2012 legislature to intervene on art. 318 c.p.' See also P. Severino, 'La nuova legge anticorruzione' *Diritto penale e processo*, 7 (2013).

[11] See, eg, Corte di Cassazione 16 October 1997, *Giurisprudenza italiana*, 212 (1998), with a note by Ronco; Corte di Cassazione 2 September 1996, *Rivista penale*, 336 (1997); Corte di Cassazione 17 February 1996 no 204440; expressly in the sense of denying the configurability of the crime where it is not possible to ascertain the nature and content of the act that the public official should have performed.

[12] See, eg, Corte di Cassazione 7 March 1997, *Rivista penale*, 576 (1997); Corte di Cassazione 5 March 1996 no 205076. In doctrine, see the critical considerations of V. Manes, n 8 above, 924; Id, 'La "frontiera scomparsa": logica della prova e distinzione tra corruzione propria e impropria', in G. Fornasari and N.D. Luisi eds, *La corruzione: profili storici, attuali, europei e sovranazionale* (Padova: CEDAM, 2003), who already wrote: 'in the typical domain of case elements, on the other hand, in our opinion, the typicality heritage proper to corruption cases, marked, in the discipline of the Italian

which, taking its cue from the so-called clientelistic model of typification, ended up affirming that the failure to concretely identify an act does not affect the incrimination for bribery, in cases where the service was agreed upon by reason of the functions held by the public agent.

In essence, well before Severino's reforming intervention, the notion of an act of office had undergone - in enforcement practice - a "progressive rarefaction"[13] because, according to the Court, for the existence of the crime of bribery proper, the act did not necessarily have to be identified in concrete terms.

This was a new vision that, denouncing the inadequacy of the Rocco Code model with respect to the strong changes that had emerged in the criminological reality, starting precisely with Mani Pulite, had tried to affect corrupt offenses with the introduction of the concept of subservience to the function,[14] redrawing the acceptable application of the rules in force through a forcing of the literal datum, thus creating a clear break between the norm and jurisprudential application.

After a long process of interpretation and applicative extension of the norms, jurisprudential doctrine, however, had brought this new hypothesis of enslavement under the umbrella of bribery proper *under* Art 319 of the Criminal Code. For the Supreme Court, therefore, the identification of the act was no longer necessary, as it was only necessary to ascertain the finalistic link and the connection between the utility granted or promised and the public function completely enslaved to the illicit purposes of the private individual.[15] This broadening of the notion of an

code, by two fundamental junctures, must be preserved with every care: - the necessary linking of the case in question to an official act, falling within the competence of the agent; - the distinction between proper and improper corruption, with the necessarily autonomous consideration of corruption in discretionary acts, referable, as the case may be, to one or the other hypothesis'.

[13] Thus, M. Pelissero, 'I delitti di corruzione', in C.F. Grosso and M. Pelissero eds, *I reati contro la pubblica amministrazione* (Milano: Giuffrè, 2015), 287.

[14] The current formulation of bribery for the exercise of the function of Art 318 of the Criminal Code finds, therefore, its own 'predecessor' in the jurisprudential creation of the so-called bribery by subservience or payroll entry, which was determined in the hypotheses in which the public agent was systematically paid by the private party for the future realization of acts or for the influence that - *one-off* - served within the administration for the management of the illicit activities of the private 'employer'. Specifically, in the so-called payroll entry, the public entity periodically receives undue consideration regardless of the realization of an official act, granting the private party its willingness to act - in the most heterogeneous ways - where the need arises. This is behavior - on closer inspection - that is particularly serious, but which can hardly be traced under the typical scheme of corrupt *quid pro quo* and which has been included in it only by a decidedly extensive interpretation operation of jurisprudence. See on the subject H.J. Woodcock, 'La corruzione per asservimento', in P. Davigo et al eds, *Corruzione e illegalità nella pubblica amministrazione*, (Roma: Aracne, 2012); S. Massi, 'Atto vincolato, atto discrezionale e "asservimento" del pubblico agente nella struttura della corruzione propria' *Diritto penale dell'economia*, 271 (2003).

[15] 'On the subject of bribery proper, it is not necessary to identify the specific act contrary to the duties of office when, as in the present case, the public official, in exchange for money or other benefits, subjugates the function to the interests of the private individual, since in this way the dutiful function of control that the public official is entrusted with is thwarted, thereby integrating the violation of the duties of loyalty, impartiality and exclusive pursuit of public interests that are incumbent on the same (...) That it is corruption proper is derived from symptomatic indices of the

act had meant that the crime of bribery proper was also applied to conduct directed at giving money or utilities to public officials with a view to influencing future and eventual acts (and suitable for realizing, in the first instance, a fiduciary link between the two parties involved in the pact). In this way, it was jurisprudential law, through these new forms of corruption in 'future memory',' that brought about the painful shift from the centrality of the act to the function.

Despite the internal fibrillations within the jurisprudential formant, the regulatory framework on the subject, still strongly anchored to the mercantile model of corruption, remained substantially unchanged until 2012, when the Severino law, posing the issue of adapting domestic legislation to international requirements, carried out a more comprehensive reform of crimes against P.A, consecrating the effective crisis of the 'act-centric' corrupt model both through the reformulation of Art 318 of the Criminal Code and through the introduction of the case of corruption for the exercise of function.

Art 1, para 75, letter *f* of legge 190 of 1012, in reformulating Art 318 of the Criminal Code, merged the so-called improper bribery in compliance with official duties into the new, broader case of 'bribery for the exercise of the function',' punished in a more serious way than bribery for a contrary act, which remained structurally unchanged in Art 319 of the Criminal Code with limited changes that affected only in terms of tightening of sanctions.

With this choice, the 2012 legislature, by reaffirming the prevalence of the principle of legality, tried to heal that rift that had matured in jurisprudential practice, which had created the figure of bribery in future memory or 'on the payroll' of the private individual, and attempted to overcome the inadequacy of the Italian repressive system, which until then had been incapable of effectively curbing the corruptive phenomenon that, on the phenomenological level, as mentioned above, had changed its *modus operandi*.

The purpose of the novelty was to give relevance to a phenomenon - that of public officials being paid in view of their generic availability - which is widespread, serious for the democratic system and still not referable to any incriminating case, except through the work of 'creative' interpretation of jurisprudence in the courtroom. The rule, in effect, no longer reports the link to a specific act, overcomes the distinction between antecedent and subsequent bribery and, eliminating the reference to the private party's performance as remuneration, refers to the more generic phrase 'money or other utility'.

On the criminal policy level, this new criminal type seems to have met the needs of recomposing the discord between 'living law' and normative data, meeting the need to respond to social changes. Although the new norm has given legislative coverage to serious conduct that takes the form of subjugating the

existence of the corrupt pact given by the payment of private benefits of various kinds', thus the Supreme Court of Cassation explains the theory of subservience of the function in Corte di Cassazione 26 February 2007 no 21192, *Cassazione penale*, 1408 (2008).

public function to private interests, it should be noted that, on the level of compliance with the principle of legality, its wording raises some concerns, which we will account for in the following section.

The crime, transformed, according to some, into a 'crime of danger', by virtue of a marked anticipation of the criminal protection of the legal asset, is difficult to contain in its expansive force, having been constructed with the aim of having to 'hit' agglomerations of corrupt interests that resort to sophisticated and innovative techniques.

The choice, made by the Severino reform, to partially abandon the traditional link of the case to the presence of the official act and to replace it with the functions or powers of the public official, has marked, undoubtedly, not only a fundamental step in the evolution of this crime but also - on the level of the criminal matter - an important innovation on the side of the protected legal good, which has seen the rarefying of the strict connection of the crime to the classical model of protection relating to the good performance and impartiality of the PA[16]

Only three years later, legge 27 May 2015 no 69, made a further intervention in the area of crimes against the Public Administration. Although this intervention did not produce significant changes on the substantive level, it both toughened, for the second time in a few years, the prison sentences for corruption offenses, and for the introduction in Art 322-quater of the Criminal Code of a hypothesis of pecuniary reparation owed to the PA by the corrupt public official, and it included Art 323-*bis* of the Criminal Code, para 2, which provides for a decrease in punishment from one-third to two-thirds for the offender who decides, under certain conditions and after the commission of the crime, to cooperate with the judicial authority.

The latest relevant intervention on public corruption is the Bonafede Reform Law[17] (legge 9 January 2019 no 3 named after the proposing Minister of Justice

[16] F. Cingari, 'La corruzione per l'esercizio della funzione', in B.G. Mattarella and M. Pelissero eds, n 5 above, 406, according to which 'the choice to decouple the corrupt pact from the act of office radically breaks with tradition by affecting the characters of the current model of criminal protection, contributing (...) to shift the center of gravity of the protection increasingly from the 'act' to the 'pact' and from the more solid good of the good performance of public administration to the less graspable good of trust in the loyalty and dignity of the public apparatus'.

[17] On the reform, *ex plurimis*, R. Cantone, 'Ddl Bonafede: rischi ed opportunità per la lotta alla corruzione' *Giurisprudenza penale web*, 1 (2018); A. De Vita, 'La nuova legge anticorruzione e la suggestione salvifica del Grande Inquisitore. Profili sostanziali della l. 9 gennaio 2019, n. 3' *Processo penale e giustizia*, 947 (2019); in a critical sense see also the considerations of A. Gaito and A. Manna, 'L'estate sta finendo ...' *Archivio penale*, 3, (2018); G. Flora, 'La nuova riforma dei delitti di corruzione: verso la corruzione del sistema penale?', in Id and A. Marandola eds, *La nuova disciplina dei delitti di corruzione. Profili penali e processuali*, (Firenze: Pacini Giuridica, 2019), 3; M. Gambardella, 'Il grande assente nella nuova "legge spazzacorrotti": il microsistema delle fattispecie di corruzione' *Cassazione penale*, 44 (2019); M. Mantovani, 'Il rafforzamento del contrasto alla corruzione' *Diritto penale e processo*, 608 (2019); N. Pisani, 'Il disegno di legge "spazzacorrotti": solo ombre' *Cassazione penale*, 3589-3592 (2018); T. Padovani, 'La spazzacorrotti. Riforma delle illusioni e illusioni della riforma' *Archivio penale web*, 577 (2018); A. Camon, 'Disegno di legge spazzacorrotti e processo penale. Osservazioni a prima lettura' *Archivio penale web*, 799 (2018); D. Pulitanò, 'Tempeste sul penale. Spazzacorrotti ed altro' *Diritto penale contemporaneo Rivista trimestrale*, 235 (2019).

in office during the Conte I government), which - in the wake of a social perception particularly sensitive to the issue of corruption and by virtue of a changed political-criminal approach to the phenomenon - radically reversed the course of the 2012 legislature, which was also concerned with preventing risk of corruption, thus increasingly pushing anti-corruption law towards the shores of emergency criminal law.[18] This fully realized the tendency to unite anti-corruption legislation with legislation on mafia-type organized crime and counterterrorism.[19]

The Bonafede measure,[20] in short, inspired by a vision of criminal law as a fighting tool,[21] responded to social demand by creating even tougher regulatory schemes than those already used for the repression of ordinary crime. It, on closer inspection, does not affect the structure of corruption offenses and mostly focuses its attention toward the institutes of the cause of non-punishability, undercover operations, the statute of limitations and finally on the subject of accessory penalties, without forgetting the investigative novelties introduced on the subject of the use of computer capturers, the so-called *trojan* viruses, and on the penitentiary level, the inclusion of certain offenses in the so-called anti-mafia double track.

Regarding bribery offenses, the only major substantive change was the upward adjustment of the prison sentence for the crime of bribery for the exercise of function, which had already been amended only four years earlier by the aforementioned legge no 69 of 2015, motivated by the need to be able to allow the use of pre-trial detention for this crime as well.[22] To this day, the crime of so-called functional

[18] On the relationship between criminal policies, emergency legislation and fundamental rights, with particular reference to antiterrorism and antimafia disciplines see, G. Riccio, *Politica penale dell'emergenza e Costituzione* (Napoli: Edizioni Scientifiche Italiane, 1982); S. Moccia, *La perenne emergenza. Tendenze autoritaria nel sistema penale*, (Napoli: Edizioni Scientifiche Italiane, 2000); G. Fiandaca, 'Criminalità organizzata e controllo penale' *Indice penale*, 19 (1991); A. Cavaliere, 'I reati associativi tra teoria, prassi e prospettive di riforma', in G. Fiandaca and C. Visconti eds, *Scenari di mafia,* (Torino: Giappichelli, 2010).

[19] See, for example, G. Spangher, 'L'anticorruzione "imita" il modello crimine organizzato' *Guida al diritto*, 7, 6 (2010). Similarly, on the tendency to assimilate mafia-type organized crime and administrative crime see, more recently, also G. Di Vetta, 'L'assimilazione tra corruzione e criminalità organizzata nel declino della categoria del white-collar crime' *Studi sulla questione criminale*, 31 (2020); A. Mattarella, 'Il contrasto alla corruzione nelle fonti internazionali ed il rapporto tra mafia e metodo corruttivo nell'ordinamento italiano' *Sistema penale*, 5(2022).

[20] For a concise review of the measure's contents, see F. Rippa, 'Misure per il contrasto dei reati contro la pubblica amministrazione, nonché in materia di prescrizione del reato e in materia trasparenza dei partiti e movimenti politici' *Processo penale e giustizia*, 292 (2019). On the extra-criminal measures of the Bonafede reform, see M.C. Ubiali, 'Le disposizioni extra-penali della legge cd. spazza-corrotti: trasparenza e finanziamento dei partiti politici e norme sulla regolamentazione delle fondazioni' *Diritto penale contemporaneo*, 21 January 2019.

[21] On the political use of criminal law E. Dolcini, 'La pena ai tempi del diritto penale illiberale' *Diritto penale contemporaneo*, 1 (2019). While on the relationship between criminal policy and law, it remains a point of reference C. Roxin, *Politica criminale e sistema penale. Saggi di teoria del reato* (Napoli: Edizioni Scientifiche Italiane, 1991).

[22] On the issue of the instrumentalization of substantive norms for procedural purposes, ie, the tendency whereby incriminating cases are constantly enslaved to evidentiary needs or configured directly by the legislature on the basis of such needs, see the still relevant reflections of T. Padovani,

bribery is punishable by imprisonment of three to eight years.

The penalty aggravation for the crime *under* Art 318 of the Criminal Code responds to the need - left unmet by legge no 190 of 2012 - to harmonize (in this case upward) the overall penalty levels among the various corruption crimes. The Bonafede reform, in this sense, responds to the demand that has emerged from the jurisprudence of wanting to equip functional corruption with a system of penalties appropriate to the seriousness of the behavior it describes, namely the overall commodification of public function. In a sense, it was intended to provide a response to the orientation of legitimacy which, as we shall see below - not caring about the legislative intervention of 2012 - had continued to bring back into the area of Art 319 of the Criminal Code so much conduct that, according to the new *littera legis,* should have been framed under Art 318 of the Criminal Code.

IV. The Internal Boundary Between Functional Corruption and Proper Corruption in the Jurisprudence of Legitimacy

Coming, now, to the central theme of our analysis, the Supreme Court has returned to the need to mark an exact line between functional corruption and proper corruption, especially in cases where the corrupt dynamic lacks specific reference to the act of office, in order to once again provide clarity.

The 2012 legislature's choice to read the disvalue of the *pactum sceleris* by centering it on the functional profile of public activity would seem to suggest that - in all cases in which there is no explicit reference to specific acts contrary to official

'La disintegzione del sistema sanzionatorio e le prospettive di riforma: il problema della comminatoria edittale' *Rivista italiana diritto e procedura penale*, 419 (1992), who points out that when 'the stage of the dumb servant was succeeded by that of the talkative servant (...) the criminal process began to constitute a problem for criminal law and its punitive instances' (ibid 431). When the trial became an 'equal partner (...) the cycle of legal production (settled) permanently within the trial' (ibid 433): '(...) the conceptual moment from which criminal law expresses itself as law is the historical moment in which the process activates its mechanisms; and in their dynamics it is criminal law that presents itself as the 'instrument' of the criminal process, within the scope of which the object of the investigation is identified and specified and the sanctioning consequences are determined' (ibid 434). Finally, when special judgments are established ('plea bargaining, abbreviated proceedings, proceedings by decree'), which in themselves 'have a very strong substantive repercussion (...)', the trial, 'directly intervening on the substantive institutions' from 'equal partner' becomes 'tyrant partner' (ibid 435-436). As well, T. Padovani, 'Il crepuscolo della legalità nel processo penale. Riflessioni antistoriche sulle dimensioni processuali della legalità penale' *Indice pen*ale, 527 (1999); G. Lunghini, 'Problemi probatori e diritto penale sostanziale. Un'introduzione', in E. Dolcini and C.E. Paliero eds, *Studi in onore di G. Marinucci* (Milano: Giuffrè, 2006), 409, who at the beginning of his work speaks of the 'shaping function of substantive criminal law performed by evidence problems'. Recently, on the subject of the 'processualization' of criminal law, see, V. Garofoli, 'Il servo muto e il socio tiranno: evoluzione ed involuzione nei rapporti tra diritto penale e processo' *Diritto penale e processo*, 1457 (2004); F. Ruggieri, 'Processo e sistema sanzionatorio: alla ricerca di una "nuova" relazione' *Diritto penale contemporaneo Rivista trimestrale*, 89 (2017), who recalls how 'jurisprudence when the facts (...) do not meet the needs of ascertainment, allows itself exegesis to the uncertain boundaries of the prohibition of analogy, in defiance of the principle of legality'.

duties - bribery should always be framed in the new Art 318 of the Criminal Code: both in cases of bribery for the exercise of the function and in those in which the conduct integrates an act that would have fallen under the old improper bribery for an act in accordance with official duties. It would be decidedly reductive to read the new Art 318 of the Criminal Code as a corruption limited only to cases of trading in functions in accordance with official duties. This approach would betray the turning point made by the Severino Law, ending up relegating Art 318 of the Criminal Code to entirely marginal cases of corruption, in some cases even irrelevant in terms of offensiveness.[23]

Therefore, while initially the two rules on bribery stood on a level of absolute bilaterality and distinguished themselves in relation to the seriousness of the behavior, with the 2012 amendment we could say that Art 318 of the Criminal Code takes on the role of a general rule with respect to Artt 319 and 319-*ter* of the Criminal Code.[24]

The judges breaking of the symmetry and their binary reference to the legitimate or illegitimate act of office on which the balance between the various corruption offenses had always been based, is important because of the consequences for the regulation of the succession of criminal laws over time and the correct *actio finium regundorum* between the new criminal cases: the absence of the reference to the act only in bribery for the exercise of the function, and its simultaneous presence in bribery proper, generated - as we shall see below - the question regarding the correct use of the two norms in application with respect to the concrete conduct taken into consideration from time to time.

According to a strict reading of the new literal normative datum, the novel change regarding the disappearance of the element of the act of office in the general provision would make it absolutely necessary to identify the act in cases of corruption proper.

Nonetheless, to a large part of the jurisprudence following the Severino reform, the overall punitive treatment provided by the new law (from 1 to 5 years), on which - as we have seen - the Bonafede reform also intervened later (raising the sentencing range from 3 to 8 years' imprisonment), did not seem suitable. Because - while it is true that the new Art 318 of the Criminal Code can also include the old conduct of improper bribery for acts in accordance with official duties - the disvalue of the sale of the entire public function, repeated over time, on closer inspection, cannot be placed on a very different treatment level from the sale of a single act contrary to official duties (Art 319 of the Criminal Code provides for imprisonment from 6 to 10 years). Moreover, the punishability of functional bribery was precisely the main reason that prompted the 2012 legislature to intervene in

[23] On this point see G. Amato, 'Corruzione: si punisce il mercimonio della funzione' *Guida al diritto*, 48 (2012); A. Gargani, 'La riformulazione dell'art. 318 c.p.: la corruzione per l'esercizio della funzione' *Legislazione penale*, 611 (2013).

[24] See M. Gambardella, 'Profili di diritto intertemporale della nuova corruzione per l'esercizio della funzione' *Cassazione penale*, 3857 (2013).

the area of criminal bribery.

For this reason, with respect to this new, wholly *sui generis* sanction structure, in the years following the law's enactment, a prevailing orientation of the Supreme Court[25] - now decisively superseded by more cautious jurisprudence - has not fully accepted and internalized the scheme of allocation of conduct between Arts 318 and 319 of the Criminal Code, as outlined earlier.

In fact, the Supreme Court on several occasions,[26] - disregarding the *voluntas legis*, ie, the obvious choice of the legislature that had tried to mend the rift created in the matter between positive datum and jurisprudential formant - showing itself unwilling to repudiate its initial approach, has shown itself to be opposed to the reconduction of all cases of functional corruption within the new case, by virtue of the consolidated orientation that already framed in the case of corruption proper *under* Art 319 of the Criminal Code the subjugation of public functions aimed at the performance of acts contrary to official duties.

According to this interpretative guideline, the stable subservience of the public official must be brought under the umbrella of corruption proper if systematic recourse to acts contrary to official duties, even if not predefined or identifiable *ex post facto*, or omissions or delays in due acts, is found.[27]

For post-reform jurisprudence, therefore, the new Art 318 of the Criminal Code would retain a subsidiary and general character with respect to all conduct that would otherwise not fall under the umbrella of bribery proper: subjugation of the function, for the Court, is an exceptionally serious act not to be included in Art 319 of the Criminal Code.

[25] On the jurisprudential evolution after the Severino reform, see A. Gargani, 'Le fattispecie di corruzione tra riforma legislativa e diritto vivente: il sentiero interrotto della tipicità del fatto' *Diritto penale e processo*, 1029 (2014) who points out how the jurisprudence following legge no 190 of 2012 sterilized the reform itself while maintaining the orientation that brought corruption for the exercise of function under the paradigm of Art 319 of the Criminal Code; cf F. Rippa, 'La corruzione per l'esercizio della funzione tra rilievi sistematici e primi assestamenti della prassi' *Nel Diritto*, 299 (2015) who expresses his criticism of the counter-reform work of the post-Severino jurisprudential formant.

[26] 'The stable subservience of the public official to the personal interests of third parties through the systematic use of acts contrary to the duties of office that are neither predefined nor specifically identifiable *ex post facto* configures the crime under Art 319 of the Criminal Code, and not the milder crime of bribery for the exercise of function under Art 318 of the Criminal Code. Cf Corte di Cassazione 15 October 2013 no 9883, *Cassazione penale*, 2442 (2014), with note by G. Stampanoni Bassi, 2447. See also, the note to Corte di Cassazione 20 October 2016 no 3606, with note by G. Marra, 'Lo stabile asservimento del pubblico ufficiale agli interessi dei privati integra la fattispecie della corruzione cd. Propria' *ilpenalista.it*, 17 February 2017, which recalls how 'the Supreme Court has (...) concluded that the crime of bribery for an act contrary to the duties of office is committed when the stable subservience of the public official has also resulted in the performance, for the benefit of the private party, of one or more acts that are formally legitimate, but not strictly predetermined in the *an*, *when* or in the *quomodo*'. For the author, 'the Supreme Court with this ruling has (...) reiterated a now well-established line of jurisprudence, according to which the revised Art 318 of the Criminal Code, rubricated with the title bribery for the exercise of the function, would find application only for those residual situations in which the sale of the function has as its object with certainty one or more acts of the office, or the finalism of the public official's mercy is not known'.

[27] See Corte di Cassazione 28 February 2014 no 9883, in www.dejure.it.

We could see - according to the logic espoused by this orientation - cases in which the conduct of a public official who commits a single act contrary to the duties of office is punished with a rather hefty penalty, while the conduct of a public servant who stably sells his function and powers in the service of private interests for a prolonged period of time is punished with a much milder treatment.[28] The risk of unequal treatment between those who commit a single act contrary to their official duties and those who stably serve on the *payroll* seems obvious, yet the solution put forward by this line of jurisprudence does not seem fully satisfactory. On this point, an attempt will be made in the proposal to provide an alternative *de jure condendo* solution.

In this view, on the basis of a purely jurisprudential approach - oriented primarily toward repressive and evidentiary needs and contested by a large part of the doctrine - whenever, in the context of bribery by stable servitude, the act is identifiable even only by *genus* at the time of the agreement and both parties to the agreement are aware of the contrary to official duties of future activities, the conduct must be configured within the perimeter of bribery proper.

The possibility that bribery by subservience - in cases where the contrary act is identified - may fall within the scope of bribery proper *under* Art 319 of the Criminal Code, does not pose relevant problems, although the identification of the act is not always easy, since in Art 318 of the Criminal Code the stable remuneration of a public subject represents a mode of realization of the typical case, while more complex are the cases in which, even in the presence of the stable enslavement of the public agent, it is not possible to determine with certainty the specific act that is the object of commodification.

The approach that intends to bring this hypothesis, too, within the scope of proper bribery would end up defeating the reform intended by the legislature, relegating to the margins the scope of application of Art 318 of the Criminal Code, which, instead, assigned the functional element of bribery a key and central role in the new system, albeit punished (erroneously) less severely than in Art 319 of the Criminal Code.

While, in principle, the remarks made by the aforementioned case law on the subject of sanction dosimetry seem sharable, since bribery by subservience is indeed much more detrimental to the proper functioning of the PA than the commodification of the individual contrary act, the 'counter-reform' made by this orientation of the Court does not appear to be in line with the principle of taxativity of criminal law.

What is more, today, as a result of the 2019 legislative intervention, the penalty levels of the two corruption offenses are almost homogeneous, and equally serious, so that it may no longer be justifiable to bring many functional corruption behaviors

[28] L. Furno, 'Riflessioni a margine di Sez. VI, n. 4486/2018, nel prisma della recente legge c.d. spazza-corrotti e delle tre metamorfosi dello spirito' *Cassazione penale*, 3501 (2019); A. Bassi, 'La Corruzione', in Id et al eds, *I nuovi reati contro la P.A.* (Milano: Giuffré, 2019), 123.

back into the area of corruption proper in the post-Severino enforcement practice.

It is precisely on this aspect that the judgment under comment intervened, which, by distancing itself from the post-Severino orientation of the Court less in line with the normative dictate, and embracing a different and more recent orientation[29] of the Supreme Court itself, constitutes a new and final jurisprudential *step* on the subject, recognizing a space of more pronounced autonomy for Art 318 of the Criminal Code.

According to the judges of legitimacy, the approach

> 'that reduces to the minimum the scope of application of the crime of bribery for the exercise of the function punished by Art 318 of the Italian Penal Code (...) does not consider that even the mere acceptance of the giving of money or other utility always constitutes in itself a conduct detrimental to the public official's duties of probity and impartiality, while for the purposes of the configurability of the crime of corruption proper, referred to in Art 319 of the Italian Penal Code, it is necessary that the unlawful agreement between public official and private corruptor provides for the performance by the former of an act specifically identified or identifiable as contrary to the duties of office, with the consequence that where the content of the corrupt pact is not ascertained, and even in the presence of systematic payments by the private party in favor of the public agent, the conduct must be brought back within the scope of corruption for the exercise of the function pursuant to Art 318 of the Criminal Code'.

For the Court - having emphasized the nature of the crime of functional corruption as a crime of danger, which is substantiated by the public official's taking charge of a private third-party interest, regardless of the identification of the performance of a specific act - the public official's stable subservience to third-party interests should be brought within the scope of the provision of Art 318 of the Criminal Code 'unless the making available of the function has concretely produced the performance of acts contrary to the duties of office'.

Ultimately, according to the Supreme Court, the stable subservience of the public official, carried out through an indistinct series of acts that can be linked

[29] This is a guideline, initially a minority one, which in recent years is becoming more firmly established. See, for example, Corte di Cassazione 11 December 2018, no 4486 and Corte di Cassazione 19 September 2019 no 45184. Similarly, more recently, Corte di Cassazione 22 October 2019, no 18125, in www.dejure.it, returned to the topic, for which functional corruption, given its nature as a crime of danger, sanctions 'the violation of the principle addressed to the public official not to receive money or other benefits by reason of the public function exercised and, specularly, to the private individual not to pay them'. On the ruling, see the comment by M.C. Ubiali, 'Sul confine tra corruzione propria e corruzione funzionale: note a margine della sentenza della Corte di cassazione sul caso "mafia capitale" ' *Rivista italiana diritto e procedura penale*, 662 (2020), who recalls how 'this norm incriminates the programmatic understanding between the public official and the private party, an understanding that can also be 'mute' from the evidentiary point of view'.

to the function, integrates the crime referred to in Art 318 of the Criminal Code, since with this provision the legislator wanted to include all forms of buying and selling of the function that are not connected to the performance of acts contrary to the duties of office. From this perspective, the crime of bribery proper fits into a kind of criminal progression in which there is a shift from a situation of danger (under Art 318) to a case of damage (under Art 319) that expresses the maximum offensiveness of the crime, by virtue of the exact determination of the content of the commitments made by the public official.

According to the now-majority approach of the Supreme Court, the undue gift, by conditioning the loyalty and impartiality of the public agent who broadly puts himself at the disposal of the private individual, puts the proper performance of the public function at risk; and, on the other hand, the gift-being synallagmatically connected with the performance of a specific act contrary to the duties of office, realizes a concrete injury to the protected legal asset, meriting a more severe punishment. In conclusion, according to the Court's approach, the mercimony of the function is, as a rule, referable to the case provided for in Art 318 of the Criminal Code, and this is not because such conduct is not serious, but rather because of a problem of typicality in the absence of the identification of an act contrary to the duties of the office, evokes either a mere danger or, if anything, the injury of an instrumental good, which is that of the fairness and impartiality of the public agent, without yet determining an injury to the good performance of the Public Administration.

However, as we shall see later, the order of severity that motivates the current penalty treatment of bribery cases is not convincing, just as both the internal boundaries of functional bribery and the literal tenor of the case (Art 318) remain unclear.

V. The Problematic Points of the Bribery Under Art 318 of the Criminal Code

In light of t the relationship between functional corruption and proper corruption, it is necessary to sketch the a few essential aspects of this system, fueled by the Bonafede reform, considering the progressive trend toward combination of the elements of anti-corruption criminal law and emergency criminal law.

First, the new corruption for the exercise of function is taking on the characteristics of generic corruption (a true *catch-all provision*), which raises doubts about the compatibility of the norm with the principles governing criminal intervention: it is, in the wake of the criminal policy direction that is increasingly equating mafia crime with corrupt crime, gradually turning into a kind of environmental corruption without typicality.

The lack of a reference to the act of office in Art 318 of the Criminal Code, along with the broader and more discretionary reference to the powers and

functions of the public official as the object of the bargaining, determine, in detriment to the principle of typicality and fragmentary nature, a pan-penalization of *lato sensu* corruptive conduct progressively eroding the boundaries between the different types of corruption, with the ultimate effect of reducing physiological gaps in protection and subsuming under the area of the criminally relevant any behavior that could endanger the Public Administration.

The criminalization, by means of a single case, of such heterogeneous conducts makes a large part of the doctrine[30] fear expansion of the margins of discretion in the judicial identification of what is or is not lawful, especially in relation to the so-called *munuscula* or donatives of use of modest amounts, which would be - on closer inspection - inevitably not only drawn into the area of the criminally relevant but, moreover, would end up being punished through the (very serious) form of systematic and lasting corruption *ex* Art 318 of the Criminal Code[31]: punishing conduct characterized by a nonexistent or tenuous disvalue of the fact would not only render irrelevant or disproportionate the sanctioning character of the rule under consideration, but would also disproportionately broaden the sphere of punishability, causing excesses of criminalization in violation of the principle of offensiveness.

On closer inspection, the circumstance that the material conduct is unrelated to the performance of an official act - with the shift toward the relevance of the corrupt pact and the centrality of the functional qualification - could induce the interpreter to bring within the area of application of the case hypotheses in which the donation provided by the private party is bestowed because of the functional qualification held by the public subject. This is in contrast to the prior condition that the donation is bestowed in relation to concrete exercise of powers and functions. The concrete identification of the exercise of powers is not always entirely easy, and in any case would end up narrowing the scope of the rule intended by the 2012 legislature, which has consciously decided to exclude, in relation to Art 318 of the Criminal Code, the need for a clear and direct identification of the act being commodified. Here the boundary between inoffensive and offensive conduct of the protected good, in the case of functional bribery, does not appear easy to find.

[30] Thus, V. Manes, 'Corruzione senza tipicità' *Rivista italiana di diritto e procedura penale*, 1126 (2018), for whom 'after the laborious cultural emancipation from the obsession with the prestige of the P.A. and after years of troubled reconversion of the interests protected in a constitutionally oriented key in the framework of the principles of good performance and impartiality (...) the current preference seems to go a rebours, towards immaterial and spiritualized objectivities, where the image of incorruptibility of the p.a. (...) according to a precise design of "moralization" and pedagogy of society, pursued through the law and in parallel through the criminal process'; Cf M. Donini, 'Il corr(eo) indotto tra passato e futuro. Note critiche a SS.UU., 24 ottobre 2013-14 marzo 2014, n. 29180, Cifarelli, Maldera e a., e alla l. n. 190 del 2012' *Cassazione penale*, 1482 (2014), according to whom 'it is increasingly clear that the legislature believes that only by strengthening the protection of values is the protection of goods possible. Not knowing how to do this society, one resorts to the criminal. If it is not criminal, there is no real obligation'.

[31] See also F. Palazzo, 'Gli effetti "preterintenzionali" delle nuove norme penali' n 5 above, 19.

The so-called generic corruption would, on closer inspection, fit into that normative trend-crystallized by the '*spazzapacorrotti*', that relies on 'early deflagration' offenses, characterized by authorial logic and a low coefficient of determinacy, to respond to emergency criminal phenomena. This is hinged on the basis of elastic and poorly descriptive concepts.

The excessive criminalization of conduct that is only potentially offensive with respect to the goods of impartiality and good performance of the PA but concretely unsuitable to intervene in the deviation of administrative activity, caused an anachronistic return to the protection of goods such as loyalty, prestige of the PA or trust itself in the PA, which are more suitable to justify the punishability of certain conduct that is only abstractly dangerous.

In this way, the criminal law undergoes a major expansion through the typification of crimes as danger hypotheses and sees its function as an *extreme ratio* distorted, becoming increasingly a weapon of control[32], pacification of social problems and issues, and an instrument of 'political and social pedagogy'[33].

VI. The Cernobbio Project and the Macro-Corruption Case

Before presenting a hypothetical alternative regulatory proposal, it is necessary to check what further solutions have already been put forward by the doctrine to overcome the critical relationship between the two main corruption offenses in the system.

On prominent solution is the so-called Cernobbio Proposal or Statale Proposal[34]

[32] T. Padovani, 'Il confine conteso. Metamorfosi dei rapporti tra concussione e corruzione ed esigenze "improcrastinabili" di riforma' *Rivista italiana di diritto e procedura penale*, 1302-1318 (1999), according to whom: 'only in the pathology of an omnipotence delirium can the criminal law be attributed the function of a priority instrument of social control: it must essentially be recognized above all as a function of limitation against the potentially infinite needs of criminal policy'.

[33] The expression is from C.E. Paliero, 'L'autunno del patriarca. Rinnovamento o trasformazione del diritto penale dei codici?' *Rivista italiana di diritto e procedura penale*, 1232 (1994). It is worth mentioning here the thought of T. Padovani, n 32 above, 1315, according to whom the criminal law is 'the crudest, the most painful, the most costly and the least effective of the tools that a civilized community can deploy to guide conduct; precisely because of this, its use conforms (or should conform) to the canon of the *extrema ratio*, namely the recognition of inevitability with no reasonable alternatives'; cf instead, S. Moccia, n 18 above, 54, for whom, 'the symbolic function of the criminal law (...) discourages an extra-criminal solution, less 'representative' than the criminal one, which, on the other hand, for most cases is the most suitable to solve the problem at the root'; even harsher is the judgment on this tendency by L. Eusebi, 'L'insostenibile leggerezza del testo: la responsabilità perduta della progettazione politico-criminale' *Rivista italiana di diritto e procedura penale*, 1668-1688 (2016): 'a society that affirms values only with criminal law-which does not take steps to ensure that those values conform every aspect of the regulatory apparatus and that the avenues, or preconditions, for access to crime are minimized-results, paradoxically, in a criminogenic society, since it attests precisely in this way to citizens that such an affirmation of values is in essence declamatory in nature'.

[34] Elaborated as *Proposals on the Prevention of Corruption and Illicit Party Funding*, they were presented on 14 September 1994 by G. Colombo, P. Davigo, A. Di Pietro, F. Greco, O. Dominioni,

which, although launched in the years immediately following the *Clean Hands* scandal of 1992 - with the investigations and related prosecutions resulting from *Tangentopoli* still in full swing across the country - still finds strong support today, albeit with some significant variations.

The proposal was not only the fruit of those very intense years, in which the diffuseness of the phenomenon emerged, and of the work of a *pool* of magistrates, lawyers and professors who had closely followed the judicial events, but originated heaviness and rigidity of the anti-corruption instruments that the legislature, even after the reform operated by Legge no 86 of 1990, had left as a legacy to counter the phenomenon of corruption on a repressive level. It is from this context, and from the limits of the fourfold division of improper bribery and corruption proper (antecedent and subsequent), that the Cernobbio Project arose, which cultivated the goal of achieving a new, simpler and possibly more effective discipline on the subject.

As part of the package of regulations aimed at strengthening the strategy to crack down on corruption, the Proposal defined an alternative path for corruption that could overcome the mercantile model, a paradigm that was still unshakable, legislatively speaking, throughout the 1990s.

The Cernobbio reformers, in the wake of the inadequacy of the 'act-centric' structure of the current case, launched, in Art 1 of the Proposal, the idea of the so-called single macro-case, which provided for the unification of all cases in a single rule.[35]

D. Pulitanò, F. Stella, and M. Dinoia. They are also known with reference to the city of Cernobbio because a few days before their official presentation during the Milan conference, magistrate Di Pietro anticipated their realization at the annual seminar organized by Studio Ambrosetti in Cernobbio. For more extensive references, see 'Proposals on the Prevention of Corruption and Illicit Party Financing' *Cassazione penale*, 2348 (1994); 'Note illustrative di proposte in materia di corruzione e illecito finanziamento di partiti' *Rivista trimestrale di diritto penale dell'economia*, 920 (1994). On this point, see also the intense debate that has ensued in the doctrine, with essays by F. Stella, 'La filosofia della proposta anticorruzione' *Rivista trimestrale di diritto penale dell'economia*, 935 (1994); D. Pulitanò, 'Alcune risposte alle critiche verso la proposta' *Rivista trimestrale di diritto penale dell'economia*, 948 (1994); Id, 'La giustizia penale alla prova del fuoco' *Rivista italiana di diritto e procedura penale*, 3-42 (1997); T. Padovani, 'Il problema Tangentopoli tra normalità dell'emergenza ed emergenza della normalità' *Rivista italiana di diritto e procedura penale*, 448-462 (1996); G.M. Flick, Come uscire da Tangentopoli: ritorno al futuro o cronicizzazione dell'emergenza? *Rivista trimestrale di diritto penale dell'economia*, 945-947 (1994); F. Sgubbi, 'Considerazioni critiche sulla proposta anticorruzione' *Rivista trimestrale di diritto penale dell'economia*, 941 (1994); G. Zagrebelsky, 'Dopo Mani Pulite tanti interrogativi' *Cassazione penale*, 508 (1994); C.F. Grosso, 'L'iniziativa Di Pietro su Tangentopoli. Il progetto anticorruzione di Mani Pulite fra utopia punitiva e suggestione premiale' *Cassazione penale*, 2341 (1994); G. Insolera, 'Le proposte per uscire da Tangentopoli' *Critica al diritto*, 17 (1995); S. Moccia, 'Il ritorno alla legalità come condizione per uscire a capo alta da Tangentopoli' *Rivista italiana di diritto e procedura penale*, 463 (1996).

[35] It is stated in Art 1 of the Proposal, 'It shall be punishable by imprisonment from four to 12 years for a public official or a person in charge of a public service to unduly receive for himself or a third party money or other benefits or accept a promise thereof in connection with the performance, omission or delay of an act of his office, or the performance of an act contrary to the duties of his office, or otherwise in connection with his position, duties or activity. Conviction shall entail perpetual

The 'Cernobbio' idea therefore, espousing the evolution that was already taking place in practice, fell within the logic of overcoming the mercantile model, but not of completely setting it aside: by eliminating all reference to the distinction between the four modes of corruption, in fact, it tried to impose a rigid logic according to which public agents would be prohibited from receiving any form - however minimal - of utility by reason of their subjective position, regardless of the act adopted.

Thus, a macro-case was delineated within which to bring together not only all existing forms of bribery but also additional *side* manifestations of corruption, such as trafficking in unlawful influence and extortion by inducement.

The doctrine most attentive to the constitutional guarantees of criminal law[36] stigmatized the replacement of the overall subsystem of bribery offenses with a single macro-fact, considering such a solution to be seriously detrimental to the principle of typicality and the essential guarantee it plays in the system. So much so that, by punishing in the same way any type of corrupt agreement, heterogeneous facts with diametrically different disvalue would suffer the same punitive treatment, to the detriment also of the principle of proportionality of punishment.

Moreover, the offensive content of such an incriminating case would be particularly 'rarefied', meaning that it would rest on the official's duty of nonvenality and, specifically, on the duty not to accept any benefit in connection with the office held. In such a normative scenario the simple fact of disvalue of the unjustified gift would have been sufficient not only to bring back *tout court* into the typical fact of bribery every borderline contact between public official and private individual, but also to demand an almost homogeneous punishment.

The Proposal still retains its validity today and gains space in scholarly debate in light of the difficulties still present in its application. On the subject, recently, more prudent doctrine,[37] has attempted to revive the idea of the macro-fact,

disqualification from public office'.

[36] On this point, we highlight the critical remarks that have been made toward the constitution of a single incriminating provision for bribery that come from, among others, E. Musco, 'Le attuali proposte individuate in tema di corruzione e concussione', in *Revisione e riformulazione delle norme in tema di corruzione e concussione. Atti del Convegno di studi di diritto penale* (Bari: Cacucci, 1996), 43; F. Sgubbi, 'La semplificazione ed unificazione delle norme sulla concussione e corruzione nel progetto di riforma', ibid 60; G. Contento, 'Altre soluzioni di previsioni normative della corruzione e concussione', ibid 68; E. Gallo, 'La proposta del pool' *La Repubblica*, 30 September 1994, 10; A. Pagliaro, 'Per una modifica delle norme in tema di corruzione e concussione' *Rivista trimestrale di diritto penale dell'economia*, 55 (1995). *Ex plurimis*, for A. Manna, 'Corruzione e finanziamento illegale ai partiti' *Rivista italiana di diritto e procedura penale*, 116, 136 (1999), 'the construction of an all-encompassing and indefinite incriminating case would also end up making the borderline between licit and illicit truly uncertain'. Similarly, critical of the unitary solution A. Spena, ' "Chi lascia la strada vecchia per la nuova" Perché una riforma dei delitti di corruzione non dovrebbe abbandonare il modello mercantile', in A. Castaldo et al eds, *Scritti in onore di Alfonso M. Stile* (Napoli: Editoriale Scientifica, 2013), 1081. On different positions, R. Borsari, *La corruzione pubblica. Ragioni per un cambiamento della prospettiva penale* (Torino: Giappichelli, 2020), 379.

[37] See, for example, M. Gambardella, 'Il nodo della "stabile messa a libro dell'agente pubblico" in tema di corruzione' *Penale. Diritto e procedura*, 1-21 (2020), for whom 'it would be advisable in

trying to calm the criticism that had been advanced in previous years and proposing the solution of including different sentencing frames within the single case, so that the different conducts and their penalties can be differentiated.

It should be noted, however, the risk that such a solution, if not well implemented, while helping to reduce the evidentiary burden during the trial application of the norms, could constitute a further injury to the principles of typicality and offensiveness, standardizing decidedly heterogeneous behaviors and disvalues and 'flattening' the injurious content of the norm.

In the case of an ill-considered calibration of the various conducts included within the single macro-corruption offence, the disvalue of the latter would ultimately be based on the acceptance of an undue utility, falling into the category of crimes against state security and thus becoming a true 'crime of disloyalty',[38] where the core of the disvalue would reside in the disloyal behavior of the public official.

Finally, Cernobbio's proposal-inevitably including the crime of influence peddling within the scope of unlawful conduct-would, pending a desired legislation on lobbying activity, end up making the boundary between such 'generic bribery', trafficking in unlawful influence (should it not be permanently abolished) and any other lawful lobbying activity extremely vague.

VII. A *De Jure Condendo* Proposal for a New Systematization of Public Corruption Offenses

In light of the reasons stated so far, it cannot but be noted that the current arrangement of public corruption offenses in our criminal system does not fully satisfy.

For this reason, from a reform perspective, we consider it useful to share some *de jure condendo* considerations we hope would lead to a reformulation of the cases currently in force, keeping well in mind the twofold objective of providing operators with a clearer and more effective regulatory framework of ensuring the

the near future to try to construct a general hypothesis of incrimination of corruption, inclusive of the figures of corruption for the exercise of the function, for an act contrary to the duties of office and the hypotheses of undue induction. (...) This is a simplification that is indispensable to practice and that could contribute to guaranteeing citizens greater certainty and equality in the judicial application of the law (...) The use of Occam's razor (...) would, moreover, make it possible to avoid abolitionist profiles (...) The different criminalistic disvalue of the types of facts, could be designated through different edictal frames; with punishments sometimes diversified for the corrupters'. See again M. Gambardella, n 17 above, 44, who - rightly pointing out the paradox according to which systemic corruption is punished through the milder figure of bribery - proposes to 'concentrate rather than fragment'. *Contra*, V. Manes, n 30 above, 1129, who reminds of the risk of penalization, with no room for fragmentation, directed at hitting every suspicion or symptom of illegal conduct.

[38] Thus, R. Rampioni, 'I delitti di corruzione e il requisito costitutivo dell'atto d'ufficio: tra interpretazioni abroganti e suggestioni riformatrici' *Cassazione penale*, 3406 (1999), who - commenting on the hypothesis of the container case of corruption - already alluded to the transformation of the criminal law of the fact into the criminal law of authorship by virtue of the loss of typicity of the fact.

safeguarding of the fundamental principles that govern criminal matters.

The current set-up, which is mainly the result of the 2012 intervention designed to give legislative cover to the jurisprudential creation of bribery by subservience, has failed to contain the interpretive contrasts on the boundaries between the two cases of corruption. On the contrary, despite an overall structure of the reform that is very attentive to the administrative prevention side of the phenomenon, it has given the impetus on the criminal law front, to a slide of anti-corruption towards emergency shores, providing legal practitioners with a new case of functional corruption that is far too generic.

One of the objectives of the new arrangement to be proposed is to redraw the internal and external boundaries of corruption norms, which, however, is not limited only to the subsystem under consideration here.

The hoped-for intervention cannot but also set itself the goal of harmonizing and simplifying the entire system of crimes against the Public Administration, starting with the repeal of the case of undue induction, which is inevitably drawn into the sphere of corruption, and a new legislative intervention in the area of trafficking in illicit influence, which also suffers from critical profiles from the point of view of criminal typicity.

On the other hand, as far as corruption offenses are concerned, the current wording does not make it possible to meet either the needs of repressive action or those of ensuring compliance with the principle of legality and its corollaries.

From this balancing perspective (and for the reasons already analysed above) it is necessary to rewrite the rules to create - within the code - a kind of ascending *climax* of seriousness among the different 'variants' of corruption.

For the purpose of further clarification, it is useful to briefly anticipate the content and the 'final' solutions and then proceed to explain in detail the various forms of corruption that are proposed.

The proposed new Art 318 should contain a new offence under the heading 'bribery by an act of office', within which various forms of manifestation of corrupt behaviour should find a place, linked to an appropriate penalty treatment.

The proposed new Art 319 should be entitled 'bribery by subservience' and contain two new forms of corruption structured in the form of a habitual offence.

On the lowest rung of this new arrangement would be the crime of bribery by an act of office, reformulated with the dual provision of punishability with respect to an act that complies with or is contrary to the duties of office. Note, however, the new norm, on the subject of bribery by a conforming act, should provide for punishment, albeit mild, only for the hypothesis of improper antecedent bribery. We argue that such conduct, testifies to far more than a 'wake-up call' with respect to the possibility of more serious future misconduct or venality that harms the prestige of the PA, eroding citizens' trust in the fairness of the administration and placing itself to some extent in opposition to the proper conduct of the Public Administration. In these marginal cases, the act strictly, insofar as it complies, is not

vitiated, yet the fairness of the administrative activity - *fueled* by undue compensation or benefit to the public official - appears to be called into question. On the other hand, the genesis of bribery offenses is to be found in the need to 'protect the public interest that the acts of public officials do not constitute the object of private trading or buying and selling'.[39]

Doing so to the proposed rule would create a threefold level of sanctioning disvalue, that could also dispel doubts about the non-punishability of subsequent bribery by a compliant act[40] which should find no place in the code. With the exception, however, of a sanction of temporary disqualification against the public official, since it is incapable of generating a significant offense to the protected good. Possibly, the preferred solution of an administrative sanction could be considered.

Such a reform hypothesis to replace the current Art 319 of the Criminal Code would, on closer inspection, allow for the construction of a basic case of bribery endowed with a greater grip on the concrete reality of administrative activity, (re)anchoring bribery to the act requirement, central to the mercantile typification model, and rooting the mini-corruption system in the realm of the criminal law of the act. This was always the case from the Rocco Code to the Severino Law.

The idea of including on the first step of the *climax* only improper antecedent bribery or by a conforming act, makes it possible to rebalance the sanction framework of the current Art 318, which - paradoxically - then encompasses all the old improper bribery hypotheses, punishing them with a punishment that has now become extremely severe after the Bonafede reform.

The current sanction paradox is not limited exclusively to corruption for the exercise of function. In fact, as pointed out earlier here, it is completely unreasonable-in the all-internal relationship between the two hypotheses of corruption, to deem corruption proper more serious and damaging to the system and to punish it with a higher sentence range than the systemic one.[41]

To prevent such a situation from continuing, and to avoid the task of legislative substitution being carried out by the judiciary, it is appropriate to provide for a

[39] See C.F. Grosso, n 8 above, 154.

[40] This solution was advanced by a large part of criminalist doctrine, including F. Bricola, 'Tutela penale della pubblica amministrazione e principi costituzionali' *Temi*, 578 (1968); R. Rampioni, *Bene giuridico e delitti dei pubblici ufficiali contro la pubblica amministrazione* (Milano: Giuffrè, 1984), 313; S. Seminara, 'Gli interessi tutelati nei reati di corruzione' *Rivista italiana di diritto e procedura penale*, 3, 951 (1993).

[41] As also pointed out by M. Gambardella, 'Considerazioni sull'inasprimento della pena per il delitto di corruzione per l'esercizio della funzione (Art 318 c.p.) e sulla riformulazione del delitto di traffico influenze illecite (Art 346-bis c.p.) nel disegno di legge Bonafede' *Cassazione penale* 11, 577 (2018), 'systemic corruption (...) has an immense disvalue: it is lethal for economic growth, it affects the cost of public works and the morale of ordinary people. Systemic corruption should then not be brought under the milder figure of bribery, as provided for in Legge no 190 of 2012. (...) And in the reformulation of the corrupt subsystem, the hypotheses of stable putting on the payroll and lasting subjugation of public functions to private interests - even if no specific illegitimate act bought and sold is identified - must be assigned their rightful place as hypotheses of greater disvalue of corruption: undermining, the latter criminally illegal conduct, the foundations of public ethics'.

new crime of 'bribery by subservience' that would stand on the top rung of the new mini system, replacing the current bribery for the exercise of function with a new case that takes into account the new phenomenology of corruption. Such a hypothesis, in addition to providing the system with more reasonableness, would make it possible to overcome the resistance of certain jurisprudence (now in the minority) to bring the conduct of stable subservience back into the sphere of corruption proper, avoiding friction between the powers of the State in such a delicate matter as crimes against the Public Administration.

In conclusion, the two norms currently in force should be inverted, placing corruption for acts of office on the lower rung and corruption for stable servitude on the higher level, to limit the applicative scope of the current arrangement, which risks, inclusion of functional corruption criminal facts of lesser intensity and to underestimate instead the seriousness of systemic corruption, sanctioning it as a minor form of corruption. Such a solution, moreover, would make it possible to keep out of the area of the criminally relevant so-called *munuscula*, ie, gifts of modest value, gratuities, which also could be attracted, with the current arrangement, into functional corruption, which, as a crime of danger, runs the risk of opening up even to facts of particular tenuousness if not completely irrelevant to the system.

Such a solution would, finally, make it possible to overcome the *tension in application* that also emerged from the Supreme Court ruling under comment and strike a balance between the cases, committing legal practitioners and jurisprudence to identify, in cases of bribery by an act of office in the version proposed here, the public act (albeit understood in the broadest sense of activity) ascribable to the conduct of the public official who is the subject of the illicit purchase.

VIII. (*Follow*) Corruption by 'Subservience' as a Habitual Crime

By virtue of the highlighted shortcomings of the current wording of Art 318 of the criminal code and the interpretative contrast that still creeps into jurisprudence, the new bribery by subservience should be given a greater grip on factual reality through the identification of suitable elements to delineate the stability and continuity of the relationship between the private party and the public party.

The *ratio of the* proposal is twofold: there is a need to respond adequately to the demands coming from reality, where systemic corruption is of particular alarm, but also to prevent the current functional corruption, due to an inherent indeterminacy of the case, from allowing harmless behavior to enter the area of criminally relevant.[42]

[42] This was also mentioned recently by G. Fidelbo, 'La corruzione "funzionale" e il contrastato rapporto con la corruzione propria', in Id ed, *Il contrasto ai fenomeni corruttivi. Dalla spazzacorrotti alla riforma dell'abuso d'ufficio*, (Torino: Giappichelli, 2020), 48, according to which 'the crime of bribery for the exercise of the function encloses within it conducts endowed with profoundly different degrees of offensiveness, ranging from corruptions of an almost bagatelle nature (...) to much more

The new rule should expressly provide that the agent's placement on the payroll is accomplished through the giving-receiving of money or other utilities in exchange, alternately, for the generic availability or for the performance of multiple acts of office included within a criminal reiteration.

The proposed new normative construction would, on closer inspection, fall within that category of doctrinal creation known as habitual offenses,[43] ascribable among the so-called crimes of duration, which requires the existence of the 'interspersed repetition of several identical and homogeneous conducts'[44] objectively linked to each other.

Specifically, this new corruption by subservience could be articulated into two offenses of different severity.

The former would fall under the umbrella of the so-called habitual proper offenses and would consist of the repetition of conduct which, if taken individually, would not constitute a different offense but, possibly, conduct punishable by a measure of a disciplinary or administrative nature, the systematic repetition of which would alone give rise to a figure of crime. Only such a unitary offense, such a 'system of offensive conduct', outside of which there is no serious prejudice to the system, can give criminal relevance to the habitual proper offense. It would, therefore, integrate the new crime in question simply the stable and generic subservience of the public official to interests unrelated to the administration, achieved through a permanent commitment to perform or omit an indistinct and unidentifiable series of acts and activities on the part of the corrupt public official.

In the second case, on the other hand, the so-called improper enslavement - equivalent to a complex crime *pursuant to* Art 84 of the Criminal Code[45] - would be expressed through several criminal conducts, having the same nature and

serious conducts, falling within the figure of corruption for subservience to the function'.

[43] As is well known, no provision of the Penal Code expressly mentions the category of habitual offense. For a dommatic analysis, *ex plurimis*, refer to G. Leone, *Del reato abituale, continuato e permanente* (Napoli: Jovene, 1933); G. Fornasari, 'Reato abituale' *Enciclopedia giuridica* (Roma: Treccani, 1991), XXVI; M. Petrone, *Reato abituale* (Padova: CEDAM, 1999); P. Siracusano, 'I reati a condotta reiterata. Spunti per una rivisitazione', in *Studi in onore di Mario Romano* (Napoli: Jovene, 2011), 1239; see, also recently, the study by A. Aimi, *Le fattispecie di durata. Contributo alla Teoria dell'unità o pluralità di reato*, (Torino: Giappichelli, 2020). Lastly, a critical reinterpretation of the category of habitual crime has been advanced by F. Bellagamba, *Il reato abituale. Prospettive per una possible lettura rifondativa* (Torino: Giappichelli, 2023).

[44] The definition in these terms is reported by F. Mantovani, *Diritto penale. Parte Generale* (Milano: CEDAM, 10th ed, 2017). Similarly, G. Cocco, 'Unità e pluralità di reati', in Id and E.M. Ambrosetti eds, *Manuale di diritto penale. Parte generale, I/2, Il reato* (Padova: CEDAM, 2012), 53, which identifies the conducts of the habitual crime 'not as a sum of isolated and sporadic episodes but as an event in which each individual occurrence constitutes a moment of development of a broader reality and accesses the previous one with characteristics of persistent frequency', although they 'may not have the same morphological structure'. See also V. Manzini, *Trattato di diritto penale italiano* (Torino: UTET, 1986), 573, who qualifies habitual crime precisely because of the 'habitual or professional repetition of facts, which, taken individually, would not be crimes'.

[45] Cf F. Ramacci, *Corso di diritto penale* (Torino: Giappichelli, 2017), 478, who characterizes the improper habitual offense as a complex crime.

constituting as many crimes, carried out in a given time frame and indicative of an subordination of the public function to private interests. It is precisely such subjugation that would constitute - from a normative point of view - the figure of the disvalue of the conducts unitedly considered.[46] Alternatively, on closer inspection, it is the very concept of 'subservience' that requires at least a relationship between the two parties to the corrupt pact that is temporally appreciable, since instantaneous enslavement cannot be conceivable. It appears, therefore, evident that in the customary case proper a single isolated act would not integrate a hypothesis of enslavement of the public function to private interests, since it lacks the minimum character of offensiveness necessary to assume criminal relevance. Eventually, it would have to be verified that that single act was not commodified, thus integrating the different and autonomous case of corruption by an act of office.

In terms of sanctions, improper or complex subservience in which the performance of multiple acts in accordance with or contrary to official duties is part of a generic willingness to instrumentalize the public function to favor private interests would assume a greater disvalue than the new proper subservience, hinged only on the 'making available' of one's function by the public servant, which would not result in conduct that, outside the context of servitude, would not constitute a crime but possibly mere administrative or disciplinary offenses.

In relation to the identification of the *tempus commissi delicti*, which is fundamental for the determination of the law applicable to the concrete case in hypotheses of succession of laws, the crime of '*necessarily* habitual bribery' could be said to be perfected with the performance of the act that - when added to the previous ones - is capable of exceeding the 'threshold of intensity of disvalor of

[46] Thus, F. Bellagamba, 'L'eclettica struttura del reato abituale nel labirintico contesto delle fattispecie di durata' *Legislazione penale*, 1 (2020), who also recalls, on the subject, the heated doctrinal debate in relation to the issue of the *dies a quo* and the statute of limitations of the crime: 'with regard to habitual offenses, the prevailing doctrine and the entire jurisprudence are oriented in the sense of considering that the statute of limitations begins to run from the day of the last anti-juridical act, which closes the (*post*) consummative period that began with the one that, combined with the previous ones, determines the minimum series of relevance (c.d. cessation of habituality), because it is only at that time that the injury or the danger of injury to the legal goods protected by the incriminating norm taken into consideration from time to time ceases'. *Contra*, see, most recently, M.G. Rutigliano, 'La prescrizione dei reati abituali con particolare riferimento allo ius superveniens sfavorevole' *DisCrimen*, 1-13 (2022), for whom 'it would seem reasonable to identify the *tempus commissi delicti* at the moment in which the actions put in place assume relevance for the first time for the criminal system. Indeed, it is at this instant that the conduct (or the minimum series of relevant conducts) becomes tainted with anti-juridicality causing for the first time a crack to the legal good protected by the norm'. Cf also R. Catena, 'Reati a consumazione prolungata e profili problematici nella contestazione cd. "aperta". Equivoco interpretativo in una recente sentenza della Cassazione' *Giurisprudenza penale web*, 13-14 (2020), for which 'the habitual crime is marked, in fact, by the repetition of conduct interspersed over time, even in a different form, directed against the same legal good; the qualifying element of the said constitutive plot, is identified, in the normative narrative, by the unidirectionality of this reiterative sequence whose components do not constitute isolated and sporadic episodes, but rather dowels of a broader affair, in which each one accesses the previous one with characteristics of persistent frequency, that is, of habituality, which is accompanied, on the subjective level, by a single criminal intention'.

action and event',[47] integrating that *minimum* necessary for the concretization of the offense to the protected good. From that moment on, the consummation would begin, which would end with the cessation of the repetition of the enslaving conduct, that is, wi th the breaking of the link of habituality.

This threshold of disvalour [see above], in any case, in order not to run the risk of remaining an assertion lacking substance and concreteness, must be easily identifiable through factual elements characterising the new regulatory construction. These elements must be identified by the legislature, leaving a residual space for interpretation to the jurisprudence.

Thus, as with the necessarily habitual offences, the new habitual bribery cannot consist of a single criminal manifestation, which, if anything, may be taken into account as another less serious form of bribery.

On close inspection, the temporal element turns out to be essential in order to realize the greatest possible offense to the system and to the protected goods of impartiality and good performance, as well as to underscore the characters of the necessary temporal continuity of the corrupt pact and the persistence of the offending conduct.

In conclusion, reversing the order of severity of the two offenses proposed here - bribery by act of office and bribery by subservience - should commit the legislature, to both rewrite the norms with a high degree of determinacy, and to review and harmonize the penalty system of all the provisions included in Chapter I of crimes against the PA, which in recent years have experienced a decidedly substantial aggravation that, when tested in practice, has not brought significant benefits even in terms of deterrence.

[47] See M. Romano, *Commentario sistematico del codice penale* (Milano: Giuffrè, 2004), 347.

* The articles in the section 'Insights and Analyses' are accepted by the Editors-in-Chief without peer-review