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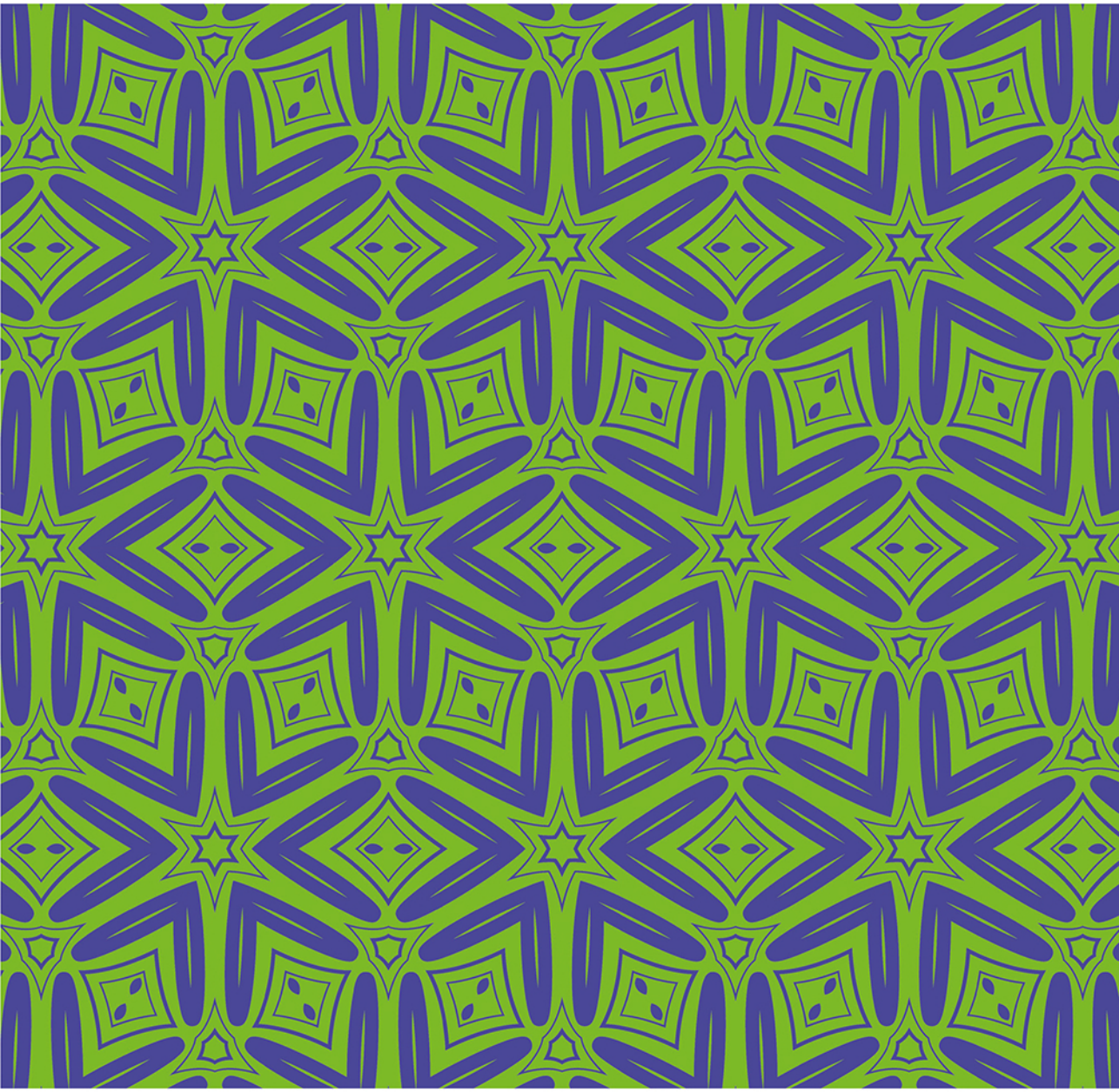

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EMANUELE CONTE*

THE ORDER AND THE *VOLK*. ROMANTIC ROOTS AND ENDURING FASCINATION OF GERMAN CONSTITUTIONAL HISTORY**

ABSTRACT. *For the German legal historians of the 19th Century, Germany existed as a nation well before the establishment of a unitarian State. Based of shared values and a common spirit, this nation was described as having a constitution (*German Verfassung*) not enacted by any constitutional power but based on the concrete order of the German communities. After 1920, German social historians took up the torch of this vision of institutional history from the hands of legal historians. Being the most important representative of the German constitutional historiography during the Nazi time, Otto Brunner published a series of essays that largely spread this identitarian view of national laws also outside the borders of Germany. They presented the medieval law as an immanent "order" rather than as a set of State norms. Despite being clearly driven by political and cultural debates of the 19th-20th Century Germany, the key concepts of this historiographical stream (called* Vefassungsgeschichte*) are still used by French and Italian legal historical research.*

* Full Professor in History of Medioeval and Modern Law, Faculty of Law, Roma Tre University.

** This text is a revised version of a talk to the Law Faculty held at Chicago University in April 2016, and appeared in a slightly different version in *De rebus divinis et humanis Essays in honour of Jan Hallebeek*, ed. Harry Dondorp / Martin Schermaier / Boudewijn Sirks, Göttingen 2019, pp. 37-53. I wish to thank William Sullivan for his substantial help in improving my English.

1. History and Law after the First World War

When he gave the last academic talk of his life in Berlin on 4 May 1919,[1] Otto von Gierke was, at age seventy-eight, an old and highly respected professor of law in Germany. He had published thousands and thousands of pages: four big volumes of his celebrated *Das deutsche Genossenschaftsrecht*, three books on *Deutsches Privatrecht* (1895, 1905, 1917), one book on the corporation in German jurisprudence, a six-hundred-page volume of critical essays from 1888 on the draft of the German Civil Code project, and a number of individual essays.[2]

Nineteen nineteen was a hard year for Germany. It was also a sad one for Gierke himself, who had been a witness to the unification of his country at the beginning of his academic career on the eve of the Franco-Prussian War and who remained an enthusiastic German nationalist. The opening words of his talk offer a vivid portrayal of his mood at the end of the First World War:

> "We the survivors, who stand in deep shock over the grave of our hopes, do not want to allow the tragedy of a crushing fate rob us of our faith in the irreplaceable value of what our fathers created."[3]

These words express a disappointment that is about much more than a military defeat. Gierke had insisted for more than fifty years on the peculiarity of the German institutions, in public as well as in private law. Now, after the defeat and the burdensome conditions of the Treaty of Versailles, he encourages Germans to look ahead to the future. At the same time, Gierke argues, he who thinks *historically* must also look backwards. German *identity*, the only hope for a safe and fruitful new beginning, is to be

1 O. von Gierke, *Der germanische Staatsgedanke*. Vortrag gehalten am 4. Mai 1919, Berlin 1919, now reprinted in: O. von Gierke, *Aufsätze und kleinere Monographien*, W. Pöggeler (ed.), Hildesheim/Zurich/New-York 2001, p. 1066 *et seq*. I give the original pagination.

2 For general biographic information, see the entry *Otto von Gierke* in: G. Kleinheyer/J. Schröder (eds.), *Deutsche und Europäische Juristen aus neun Jahrhunderten. Eine biographische Einführung in die Geschichte der Rechtswissenschaft*, 5th ed., Heidelberg 2008, pp. 152-158.

3 "*Wir Überlebenden, die wir tief erschüttert am Grabe unserer Hoffnungen stehen, wollen uns durch die Tragik des zermalmenden Schicksals den Glauben an den unersetzlichen Wert der Schöpfung unserer Väter nicht rauben lassen.*" O. von Gierke (note 1) 4.

found in the historical background of the German nation:

> "We are a people, with thousands of years of history, who have fulfilled our calling in world culture in part by enriching political and legal life with our own ideas. Before we let foreign cultural attitudes become our masters, we should ask ourselves whether the German idea of the state can still offer us something of higher value for the future. Germanness (*Germanentum*) is what created, after the downfall of the ancient world, the medieval and modern world in which we now live. We Germans are the core Germanic people, the *Urvolk*."[4]

In this lecture, given right at the outset of the controversial Weimar Republic period, just after the First World War, Gierke points the way forward for his country by turning to the past. As a great legal historian, Gierke relies on the Romantic-era notion of the guiding role of history in shaping national identity and character.[5]

In fact, Gierke had already used the same Romantic notion in a different context some forty-six years earlier, in a lecture given at Breslau in 1873. That earlier lecture starts with the image of Kaiser Wilhelm I being crowned in January 1871 at Versailles, on the throne of the Bourbons. For many Germans, this historic event at the gates of Paris signaled a national revival, the triumph of a wise return to medieval values over the dangerous innovations imposed on European civilization by the French culture. For some, Gierke observed, the new German Empire represented a *return* to the *ancien régime*. For others, the Second Reich was an absolute novelty, a new experiment in politics, public law, and diplomacy. Yet in Gierke's vision, Germany was neither reactionary nor

4 The new Germany should found its new State on the solid base of its history, says O. VON GIERKE (note 1) 5: "*Heute müssen wir alle vorwärts blicken … Aber wer geschichtlich denkt, wird nunmehr … den Blick auch rückwärts … wenden. Sollen wir denn wirklich bei dem Neubau unseres Staates wieder, wie schon oft, uns von fremden Gedanken überfluten lassen? … Wir sind doch ein Volk mit mehrtausendjähriger Geschichte, das in Erfüllung seines weltumspannenden Kulturberufs auch das Staats- und Rechtsleben mit eigenen Gedanken befruchtet hat. Bevor wir fremde Volksgeister zu unseren Herren machen, sollten wir uns doch besinnen, ob nicht der germanische Staatsgedanke uns auch für die Zukunft höhere Werte zu bieten vermag. – Das Germanentum ist es nun einmal gewesen, das nach dem Untergange der antiken Welt die mittelalterliche und moderne Welt, in der wir bis heute leben, geschaffen hat. Wir Deutschen aber sind das germanische Kernvolk, das Urvolk*."

5 The particular importance of history for German national self consciousness is stressed by E.-W. BÖCKENFÖRDE, *Die Einheit von nationaler und konstitutioneller politischer Bewegung im deutschen Frühliberalismus*, in: E. W. BÖCKENFÖRDE (ed.), *Moderne deutsche Verfassungsgeschichte* (1815-1918), Köln 1972, pp. 27-39.

revolutionary: it was just true to its national identity.

In victorious 1873 as in tragic 1919, Gierke developed the same basic argument: that the German idea of law was different in its essence from the Roman one, and that this difference should be enhanced and exploited to unleash the extraordinary potential of the German people.

At the end of his 1919 lecture, Gierke sums up the main points of his vision, and we cannot help but think that the old professor was dictating the terms of his intellectual legacy for the new twentieth century:

"*Unser Staat soll nationaler Staat sein und bleiben*!": "Our state should be based on our national identity!" – meaning also that a common national spirit joins Germany and Austria together.

"*Unser Staat soll geschichtlich fundamentiert bleiben*." "Our state should stand on a historical foundation": history does not represent, for Gierke, the historical reconstruction of doctrines and social contexts of public law through time, but the ancient, unchangeable foundations of a distinctly German legal identity.

"*Unser Staat soll ein organisch aufgebautes Gemeinwesen germanischer Prägung bleiben*." Gierke asserts that municipalities and local government entities are autonomous in Germany; they do not derive their legal existence or authority from the state.

"*Unser Staat soll sozialer Staat sein. Sozial, aber nicht sozialistisch*!" Our state should remain a *community*, conceived by Gierke as an *organism*. "It should be then a *social state*. Social but not socialist!"

"*Unser Staat soll Kulturstaat sein und bleiben*." "Our state should be and remain a cultural state." The English translation of *Kulturstaat* does not do justice to the meaning of the German concept, which has deep roots in German constitutional thought.[6]

"*Unser Staat soll Rechtsstaat sein*." *Rechtsstaat* is often translated as "rule of law." In Gierke's vision, the concept means more, both public authority and private initiative are never completely free from their legal framework. Embedded in popular feelings, legal rules oblige each person to respect his or her legal *duties* while enjoying his or her legal *rights*.

6 See, among many other studies: G. Mettele/A. Schulz (eds.), *Preußen als Kulturstaat im 19. Jahrhundert*, Paderborn 2015.

Gierke's last lecture is thus a real roadmap for the construction of the new Germany. It is, in my view, both a cornerstone for the democratic constitution of the Weimar Republic and one of the legal justifications for the Nazi state, the frightening outcome of a large part of the interwar constitutional German thought.

2. Verfassung and History

Gierke was a lawyer but, in the tradition of the German historical school of law, he was also a very important and respected German social historian. As a legal historian, he clearly connected legal history to a sort of legal anthropology, a description of the popular customs that formed a shared heritage for the whole national community. In the Romantic culture of the nineteenth century, the deep grounding of a legal system in the spirit of the nation was the only true pledge of the real lawfulness of the legal order. This tendency to explain the historical development of law as emanating from the spirit of the people was present in scholarship on both private and public law. In private law, Pandectists built their extraordinary successful school on the assertion that Roman law, the basis for modern German private law, had been "taken over" by the Germanic peoples when they invaded the Roman Empire. The same connection between history, identity and legality was drawn for public law: in public law, historians of German law since the eighteenth century had posited the existence of an ancient German constitution that long predated the creation of a unified German state.[7] Georg Waitz's 1844 *Deutsche Verfassungsgeschichte*, one of the earliest classic texts on German constitutional history, is very much in this vein. For Waitz, "constitution" means something very different from what we (Western Europeans) usually understand under this definition. The German *Verfassung*, for Waitz, could not be reduced to a collection of fundamental constitutional rules on which the state is based. It is much more: it is some-

7 The public law of Germany was nothing but its history, wrote Justus H. Böhmer already at the beginning of the 18th century: *Ius publicum regiminis Germanici nulla olim lege comprehensum non ab alio fere principio accersitur, quam a longaeva consuetudine: quae quid <aliud> est, quam antiquitatis Germanicae historia?*. J. H. Böhmer, *Ius ecclesiasticum protestantium. Usum hodiernum iuris canonici iuxta seriem Decretalium ostendens et ipsis rerum argumentis illustrans*, I (quinta editio), Halle, 1756 (first ed. 1714-37) 214-215 § 21. On Böhmer's book, see E. Conte, *Ius ecclesiasticum protestantium… in The Formation and Transmission of Western Legal Culture*, in: S. Dauchy et al, *150 Books that Made the Law in the Age of Printing*, Springer 2016 (Studies in the History of Law and Justice, 7).

thing that can and must stand also *without* a state, because after all, in 1844, Germany was not a state. It is, rather, the legal identity of a nation: Waitz describes the customs of the Germans as based on the history of the nation, with a kind of anthropological flavor. Rules governing inheritance, popular games, folk music, peculiar ideas of contract and marriage law: all of it was part of the German constitution for Waitz.[8]

Of course, after 1871 a real German state did exist. But, as Gierke had clearly said, it was a peculiar State. Its constitution was not given from above, from the ruler to the people, because the ruler simply gave written form to the feelings of the people.

On this point both strands of the German historical school – *i.e.*, scholars who focused on Germanic law on the one hand and Roman law on the other – shared the same opinion: a legal norm is binding not because of the power conferred by the ruler but because the rule reflects the spirit of the whole people. But the two groups of scholars put different glosses on the concept. For Roman-law scholars, this "spirit" had a more active and subjective character: it was identified with the will of the people. In his famous book on customary law, the Romanist Georg Friedrich Puchta developed his theory of *Volksüberzeugung* ("popular conviction")[9] and his basic argument was that the strength of customary law lay in the "common conviction" that a particular behavior was legal. This means that it was not the pure *fact* that people had been doing something for a long period of time that gave rise to a customary rule. Rather, it was the public's being persuaded to believe that certain behavior is lawful that made the behavior into a binding legal rule.

Scholars who focused on Germanic legal sources, on the other hand, tended to follow the position of Georg Beseler, who stressed much more the *fact* of an ancient be-

8 See F. Graus, *Verfassungsgeschichte des Mittelalters*, *Historische Zeitschrift* 243 (1986), pp. 539-540: "*Nicht mehr in geschriebenen Konstitutionen, die durch Grundgesetze (lois fondamentales-constitutionelles des 18. Jahrhunderts) bemüht waren, die Willkür der Herrscher einzugrenzen, sah man die Lösung. Man interpretierte die Verfassung als gewachsenes Ergebnis des freien Spiels historischer Kräfte–der Begriff wurde dementsprechend erweitert und zugleich auf das 'staatliche Leben' begrenzt, gegenüber anderen entscheidenden Gebieten des wirtschaftlichen und sozialen Lebens abgegrenzt. Man sucht die Kontinuität in Gesetzgebung und Herrschaftsformen und hob sie lobend hervor. Die Betonung der Kontinuität zeichnet die deutsche Verfassungsgeschichte des Mittelalters von allem Anfang an aus*."

9 P. Landau, *Die Theorie des Gewohnheitsrechts im katholischen und evangelischen Kirchenrecht des 19. und 20. Jahrhunderts*, ZRG KA 108 (1991), pp. 156-196.

havior, deemphasizing the importance of the subjective will of the sovereign people.[10] In his *Volksrecht und Juristenrecht*, the Germanists' 1843 intellectual manifesto, Georg Beseler wrote:

> "Law, in its initial formation, is not the product of chance or human discretion, deliberation, or wisdom; it is created neither by legislation nor by philosophical abstraction. Rather, it develops directly in the life of the people, like morals and language, on the broad basis of general human relations; it lives in the common consciousness of the people, from whose individual constitution it also receives its special character."[11]

For both Romanists and Germanists, however, the nation was a large community of people, with its legal system deeply rooted in its history. Knowledge of national law could be obtained only through the study of the national history, which revealed the basic principles of a shared legal inheritance.[12]

Influenced by these accepted theories, legislation promulgated under the Second Reich was mainly thought as the writing down of self-imposed rules whose force and effect derived from their acceptance by the German people.

3. Verfassungsgeschichte as the history of an "order"

We can understand now how important this self-consciousness of a German national legal tradition was after the defeat of 1918, far beyond any political and military achievements of the German state, and how important the work of historians, i.e., their search for the ancient shared roots of Germany's national legal tradition, was for this self-consciousness.

10 E. Conte, *Consuetudine, Coutume, Gewohnheit and Ius Commune. An Introduction, Rechtsgeschichte*, 24 (2016), pp. 234-243.

11 G. Beseler, *Volksrecht und Juristenrecht*, Leipzig 1843, 59: "*Das Recht ist in seiner ersten Entstehung nicht das Produkt des Zufalls oder der menschlichen Willkür, Ueberlegung und Weisheit; weder die Gesetzgebung, noch die philosophische Abstraktion hat es geschaffen. Auf der breiten Basis allgemein menschlicher Verhältnisse entwickelt es sich unmittelbar im Volksleben, wie die Sitte und die Sprache; es ist lebendig in dem gemeinsamen Bewusstseyn des Volkes, von dessen individuellen Beschaffenheit es auch seinen besonderen Charakter erhält*."

12 G. Dilcher, *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization, Rechtsgeschichte* 24 (2016) 20-72.

It was thus no accident that, starting in the 1920s, German historians concentrated increasingly on what they called *Verfassungsgeschichte*, the study of the German society as it evolved during the Middle Ages, developing the main legal institutions that would ultimately constitute Germany's national legal *order*. An "order" more than a state, because the relationship between the German nation and the German state had already been difficult before the unification. Even after the First World War and under the Weimar Republic, the dominant German theories of constitutional law refused to accept the idea of a state that imposed legal norms on the people.

During the interwar period, a number of medieval historians increasingly focused attention on the "unifying characteristics" of the German nation. Social historians largely took the place of Germanic legal historians, as if they were moving the focus of nineteenth-century historiography in German law into the broader field of German social history.[13]

The Middle Ages were, of course, the core of this new historiography, because the medieval period was seen as the age of the triumph of the German *Volk* over the Romans and of the establishment of the German identity both within German territory and all across Europe.

One of the basic features of the German popular constitution described by *Verfassungsgeschichte* historians was that it called into question the concept of the state. As we have seen, for the politics and law of the nineteenth century a German nation could perfectly exist in the absence of a German state. A German constitution existed before the state, and it continued to exist with a degree of independence from the state. This peculiar vision was at the core of the historical research into the original characteristics of the German nation, the characteristics that historians could date back to the time of the "entrance of the Germans into history."[14]

13 See the classical book by E. W. Böckenförde, *Die deutsche verfassungsgeschichtliche Forschung im 19. Jahrhundert*, 1st ed. 1961, 2nd ed., Berlin 1995. Italian translation by P. Schiera, *La storia costituzionale tedesca nel secolo decimonono*, Milano 1970.

14 The German expression "*Eintritt der Germanen in die Geschichte*", or "*in das römische Culturleben*" was pretty diffused since the middle of the 19th century. An example in F. Dahn, *Die Könige der Germanen*, vol. 4, Teil 7.1 und 7.2, Leipzig 1894, p. 274.

The state that did not exist for historians of the Middle Ages was the state described by Gierke as a fictional person created to rule the people, as had been the case for the Roman Empire. In his monumental *Das deutsche Genossenschaftsrecht* and in a number of minor works, Gierke had insisted on denying the existence of a German state during the Middle Ages, at least in the sense given to the word by the doctrine of natural law. Instead, in the artificial figure of a sovereign state, Gierke saw a superstructure imposed on the German people through the evil influence of Roman law. By contrast, the German form of a political corporation was not based on a fiction: it was founded, according to Gierke, on the concrete order of German *Verbände* and was never transformed into the abstract unity of an all-powerful state.

German social historians in the 1920s took up the torch of a history of real, practiced institutions from the legal historians, merging the modern vision of law as a function of society with the old ideas of the legal creativity of the German *Volk*.[15] The result was a historiography quite in tune with the ideas that were affirmed by the totalitarian dictatorship in 1933.[16]

In that very year, Theodor Mayer, one of the most important representatives of the new *Verfassungsgeschichte*, stressed a peculiarity of the German state of the Middle Ages, one that marked it as substantially different from the modern state. Whereas the modern state is built as an *institutioneller Flächenstaat*, a political organism in which all power is derived from the centre, the German medieval state was a *Personenverbandstaat*, in which many independent powers were federated in a complex structure.[17] Every part

15 This is clearly said by T. Mayer, *Die Ausbildung der Grundlagen des modernen deutschen Staates im hohen Mittelalter* (a paper given on August 30, 1938 in Zurich), HZ (1939) 457-487, 457: "*Die deutsche Geschichtswissenschaft hat seit etwa einer Generation die Interesse in steigendem Masse den Fragen nach dem Werden von Volk und Staat der Deutschen zugewandt …. Die neue Aufgabe fand eine neue wissenschaftliche Methode zu ihrer Lösung und beide haben sich gegenseitig angeregt und befruchtet, so dass das Bild der mittelalterlichen Geschichte sich grundlegend verändert und erweitert hat. Die statische, dogmatisch-institutionelle Betrachtungsweise der Historiker, die auf der Urkundenforschung aufgebaut ist, ist umgestaltet und ergänzt worden*."

16 An extremely useful account of the development of the German historiography after 1930 is H. Lehmann-J. Van Horn Melton, *Paths of Continuity. Central European Historiography from the 1930s to the 1950s*, Cambridge 1994, pp. 263-292.

17 Cfr. R. Heinzel, Theodor Mayer. *Ein Mittelalterhistoriker im Banne des „Volkstums," 1920-1960*, Paderborn 2016, p. 94.

of this complex organism had its own legal autonomy, so that the idea of a German state cannot stand solely on obedience; it must be based on a principle of voluntary collaboration. This feature created an important difference, said Mayer, between the Roman and the German notions of state. Whereas the Roman state was a despotic, centralized entity removed from the feelings of the people, the German state was the union of many free and independent corporate bodies, gathered together by the common desire to participate in the larger national community.[18]

Many of the main points of the old legal-historical theories of the Germanists of the nineteenth century were also reworked to form the basis of a new historiography whose results fitted nicely with the ideas of the new Nazi government. As a consequence of this new way of seeing the relationship between the state, the rule of law, and the people, a new term was increasingly used to avoid any confusion between the two competing models of state. Instead of being called "state", the German political organism was called "order", *Ordnung*.[19] *Ordnung* quickly became an extremely successful substitute for *Staat*. The domestic and international successes of the Third Reich encouraged both historians and political scientists in Germany to think of the Germans as propagators of a new order. In 1942, Karl Richard Ganzer sold more than 850,000 copies of his book *Das Reich als europäische Ordnungsmacht*, testifying to the wide success of the idea of a legal order that could impose itself without the enforcement mechanisms of a modern state.[20]

18 The same ideas, probably mediated by the French legal historians of the 20th Century, are still present in the works of B. Kriegel (Barret-Kriegel). See further, text at note. 35.

19 On the very use of the word *Ordnung* in the Nazi time, see L. Raphael, *'Ordnung' zwischen Geist und Rasse: Kulturwissenschaftliche Ordnungssemantik im Nationalsozialismus*, in: H. Lehmann-O. G. Oexle (eds.), *Nationalsozialismus in den Kulturwissenschaften 2.*, Göttingen 2004, 115-137.

20 T. Vordemayer, *Bildungsbürgertum und völkische Ideologie*, Berlin / Boston 2016, 309-310; E. Wadle, *Visionen vom Reich. Streiflichter zur Deutschen Rechtsgeschichte zwischen 1933 und 1945*, in: J. Rückert-D. Willoweit (eds.), *Die deutsche Rechtsgeschichte in der NS-Zeit. Ihre Vorgeschichte und ihre Nachwirkungen*, Tübingen 1995, 241-300, 254 ff.

4. Otto Brunner: From German Law to Verfassung and Society

A power that guarantees a social *order*: that is what the Third Reich wanted to be. This was considered a very "German" ambition, rooted in the spirit of the medieval (and hence German) society studied by historians of the national "constitution." This is particularly evident for Otto Brunner, whose book *Land and Lordship*[21] was published in 1939 and remained a great scholarly success up through the end of the century.

As recent research has shown, Brunner was an "extremely active and deeply convinced supporter of National Socialism."[22] Besides reading newly discovered archival material concerning his attempts to enter the *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP),[23] Hans-Henning Kortüm has also been able to see the unpublished book that Brunner had written for a larger audience, which lay in proof in 1944 under the title *Der Schicksalsweg des deutsches Volkes* but never came out. It is an astonishing piece of militant historiography, which uses the "*völkisch*" view of medieval history to strengthen the determination of the German people in the hour of their final struggle.

Brunner presents himself as a soldier:

> "The soldier knows his opponent; he is determined to fight him until the destruction. He brings to his opponent the respect he deserves. This soldierly attitude is also valid with respect to the past, that is, the object that deeply concerns the historian."[24]

This extreme vision was in fact the natural development of the historical view of Brunner. Medieval German society, for Brunner, was made up of a diverse assortment of powers that, while politically autonomous, all observed a general rule that unified

21 O. Brunner, *Land and Lordship: Structures of Governance in Medieval Austria*, trans. H. Kaminsky/J. Van Horn, Philadelphia 1992.

22 H. Kortüm, *„Gut durch die Zeiten gekommen." Otto Brunner und der Nationalsozialismus, Vierteljahrschrift für Zeitgeschichte* 66 (2018), pp. 117-160, p. 119: "*Die hier präsentierten Quellen zeigen Brunner eindeutiger und stärker als bislang bekannt als äusserst aktiven und zutiefst überzeugten Anhänger des Nationalsozialismus*."

23 Also mentioned by J. Van Horn Melton, *From Folk History to Structural History: O. Brunner (1898-1982) and the Radical-Conservative Roots of German Social History*, in: *Paths of Continuity* (note 16), p. 267. J. Van Horn Melton has also gathered some evidence of a less convinced support of Brunner to Nazism: he also helped a Jewish colleague of his wife to escape arrest in 1942 (270). On the other hand, Van Horn maintains that "his support for National socialism went well beyond the bounds of political opportunism" (p. 271).

24 H. Kortüm (note 22), p. 145, quoting p. 11 of the print draft.

the whole nation. This general rule is called *Ordnung* and is not imposed from above, but it was perceived as right and just by the entire nation.

Gadi Algazi stressed that Brunner's idea of *Ordnung* comes through particularly clearly in one important passage of *Land and Lordship*.[25] In that passage, Brunner writes:[26]

> "[L]aw and justice, Right and law were in the end the same. This reflected a mentality in which all laws, orders, decrees, commands, were considered valid only in the context of 'Right'—the sense of the community, for which ideal and positive law were inseparable because law was community law, the community's conviction about what is right and legitimate, the conviction that dominates the heart of every individual with elemental power.' The convictions of the men of that time about the right and the legitimate seemed to them unchangeable and eternal, *êwa*, and they felt all 'positive' law to be a part of this enduring order. Hence there could be no contradiction between law and justice. That is why Heinrich Mitteis has called medieval legality a 'conviction of Right'." [footnotes omitted]

A quick analysis of the sources of this passage reveals that the medieval society described by Brunner was largely seen through the studies of the old Germanistic legal historiography: the assumption that "law was community law" (*Recht war Volksrecht*) harkens back to Beseler (1843) and more recently to the work of the historian Fritz Kern, whose article *Recht und Verfassung im Mittelalter* came out in 1919,[27] to be translated into English in 1939,[28] reprinted in German as a book in 1952 and in subsequent editions up through the twenty-first century. The reference to "the community's con-

25 See G. Algazi, *Otto Brunner „Konkrete Ordnung" und Sprache der Zeit*, in: P. Schöttler (eds.), *Geschichte als Legitimationswissenschaft*, 1918-1949, 2nd ed., Frankfurt am Main 1998, pp. 166-203.

26 O. Brunner, *Land and Lordship*, p. 119; O. Brunner, *Land und Herrschaft* (5 1965), s. pp. 139-140; *Land und Herrschaft* (1 1939), pp. 165-166, und K. G. Hugelmann, *„Das Deutsche Recht,"* in: O. Brunner u. a. (ed.), *Das Mittelalter*, Leipzig 1930, p. 217. The passage is also quoted *in extenso* in J. Rückert, *Der Rechtsbegriff der Deutschen Rechtsgeschichte in der NS-Zeit: der Sieg des „Lebens" und des konkreten Ordnungsdenkens, seine Vorgeschichte und seine Nachwirkungen, Die deutsche Rechtsgeschichte in der NS Zeit* (note. 20), p. 207.

27 F. Kern, HZ 120 (1919), pp. 1-79.

28 F. Kern, *Kingship and Law in the Middle Ages*, transl. with an introduction by S. B. Chimes, Oxford 1939. Especially useful for the understanding of the intellectual world of Kern is J. Liebrecht, *Fritz Kern und das gute alte Recht. Geistesgeschichte als neuer Zugang für die Mediävistik*, Frankfurt am Main 2016 (*St. zur eur. Rechtsgeschichte*, p. 302). For the connections with 19th Century legal history and the Germanists, see pp. 85-92.

viction about what is right and legitimate, the conviction that dominates the heart of every individual with elemental power," is taken from Claudius von Schwerin, the author of the then most widely read handbook on German legal history; similar remarks can be found in many German legal history handbooks from the nineteenth and early twentieth centuries. Brunner also refers explicitly to Heinrich Mitteis, who in 1926 was still applying Puchta's theory of custom to the study of German law.[29] The reference to the German word *êwa* also has a long history. The word is attested solely in a few Carolingian manuscripts that use the term as a definition of popular law.[30] Noticed by German legal historians in the nineteenth century, the word became more important in the twentieth, because its linguistic root[31] seemed appropriate to underline the eternal and unchangeable feature of the German concept of popular law.[32]

The perfect coherence between Brunner's *Land and Lordship* and the theories of the historical school of law, both of which shared the same strong rejection of positive law, was emphasized in an enthusisatic 1941 review of Brunner's book by the great legal historian Heinrich Mitteis. The conception as a "sacral order" (*sakrale Ordnung*) that the *Urgermanen* had of law, wrote Mitteis, has always been the dominant concept of law among the Germanist legal historians, for whom law cannot be altered by state power because it springs directly from the consciousness of the *Volk*.[33] To impose this

29 H. Mitteis, *„Rechtsgeschichte und Machtgeschichte,"* in: G. P. Bognetti *et al* (eds.), *Wirtschaft und Kultur. Festschrift zum 70. Geburtstag von Alfons Dopsch,* Baden bei Wien/Leipzig 1938, pp. 547-580: pp. 565-566.

30 Cfr. G. Schmitz (ed.), *Die Kapitulariensammlung des Ansegis, Monumenta Germaniae Historica*, Hannover 1996, pp. 35-36, pp. 49-50.

31 See R. Schmidt-Wiegand, *„Ewa"* in: H. Jankuhn-H. Beck (eds.) *Reallexikon der Germanischen Altertumskunde*, 2.Aufl., Berlin 1994, pp. 35-37.

32 The meaning of the term *êwa* had been described in different ways in the different editions of the same book, R. Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, Leipzig 1894. I have seen the second edition, where it is defined on page 13 as *ewige Ordnung* ("eternal order"), whereas in the sixth edition, produced with co-author E. Freiherr von Künssberg (Berlin 1922), it is presented on page 19 as a variant of the word *Ehe*, meaning in German *Billigkeit* or in Latin *aequum* (English "equity").

33 H. Brunner, *Land und Herrschaft. Bemerkungen zu dem gleichnamigen Buch Otto Brunners, Historische Zeitschrift*, 163 (1941), pp. 255-281, pp. 270-271: "*Das Recht ist in Gott gegründet und mit Gerechtigkeit und Billigkeit identisch …. Diese Auffassung ist aber nicht etwa erst durch das Christentum vermittelt worden, sie ist schon dem Urgermanentum eigen, für die das Recht eine sakrale Ordnung war …. Damit ist die germanische Konzeption des unwandelbaren und unverbrüchlichen, aus der Volksüberzeugung unmittelbar fließenden guten alten Rechts aufgehoben*."

Germanic variety of the rule of law, Germany did not need a state, at least not in the abstract sense defined by the learned lawyers, because the legal order was engraved in the hearts of all Germans. At the same time, the pluralism of political entities in Germany could not endanger the essential unity of the German nation because the common legal order could not be altered by any person or power. As we have already seen, this is the image of the German state that Gierke presented in 1919: a peculiarly German state does not impose its laws, but rules a pluralist community that acknowledges the existence of a common *order* arising from the spirit of the people.

5. Some examples of the enduring persistence of the idea of a medieval ordo in European historiography

Now it might seem odd that these old, nationalist, even racist ideas, rooted in the nineteenth century and proudly exalted in the Nazi period, still have some currency among historians and lawyers in the twenty-first century. But to our surprise, we can easily recognise in more than one national scholarly tradition this vision of the old school of the Germanist legal historians, mediated by the work of the *Verfassungsgeschichte* historians.

I offer below a few signs of the persistence of this historiographical construct even in current scholarship.

(a) Germany. After the war, Germany took seriously enough the task of getting its universities rid of fascist doctrines. But the German professors who had been loyal to the Nazi government were so numerous that it was not possible to stop every former Nazi from teaching. After being expelled from the Vienna University, Otto Brunner found a chair in Hamburg, and continued to work and publish. His *Land and Lordship* reappeared in multiple editions (reprints in 1939, 1942, and 1943; then new editions in 1959 and 1965, and further reprints in 1973, 1981, 1984, 1990; an Italian translation in 1983; and an English translation in 1992), and he also published some short syntheses such as his *Sozialgeschichte Europas im Mittelalter* (in 1978 and 1984, an Italian translation in 1980, Spanish in 1991, Finnish in 1992) where the concepts he had expressed in his main books were summarized for a broader readership.

It is worth noting that a large part of the tradition of German legal history fed

into what we now think of as "social history."[34] This happened because historians of medieval German law refused to study the abstract constructions of the learned scholastic law, considering them to be mere superstructures imposed by state powers in opposition to the spirit of the people. Instead, they devoted themselves to describing a truly popular law, imposed by custom and formed basically by social behavior, attitudes, and practices. They used the same kind of material on which the German *Verfassungsgeschichte* constructed their vision of a popular law as opposed to a learned and artificial law imposed on the people by judges, professors, and finally also kings and emperors, with their officials trained in the study of Justinian's laws.

The very idea of a popular law, which could resist the imposed Roman-law superstructures over a period of centuries, led historians to disconnect the idea of law from the power of the state. Instead of being the source of law, the state becomes its enemy, committed to choke off the rules naturally produced by the *Volksgeist* with the ruthless abstractions of Roman law.

After the tragic failure of the Third Reich, the German historians were particularly keen on painting a portrait of the German Middle Ages that stressed social structures much more than any construction of a central authority. The *Verfassungsgeschichte* that had been the premise of a peculiar German *Ordnung* became the description of a popular order based on anthropological features and on ancient traditions. Brunner's and Fritz Kern's books had second lives, and the old image of a stateless order was happily revived.

(b) France. The influence of Germanist scholarship arrived relatively early in France, beginning with the work of the early nineteenth-century historian Henri Klimrath, and it became dominant in French legal history with the extraordinary success of François Olivier-Martin, whose *Histoire du droit français*, first published in 1948, had an extremely large use in French universities, being reprinted until 2010. Born in 1879, Olivier-Martin was a legal historian educated in the spirit of German legal history: in 1938 he published a book on the corporatist structure of the Kingdom of France during the Middle Ages, following Gierke's interpretation. In his book of 1947, *Les lois du roi*,

34 See Lehmann-Van Horn Melton, *Paths of Continuity* (note 16).

he proposed a distinction between the *lois du royaume* and the *lois du roi*, meaning that there are two kinds of legislation in the French tradition: the king made the law, yet he lacked the power to alter the old preexisting legal traditions of the kingdom. According to Olivier-Martin a core set of fundamental rules, which the monarchy was bound to respect, existed. This is merely a French version of the German idea of a popular *Verfassung* that lies beyond the power of the central authorities to change.

French legal historians tended to reproduce the German division between "Romanists" and "Germanists" by emphasizing the traditional distinction between the *pays de droit écrit* and the *pays de droit coutumier*. Olivier-Martin insisted on his interpretive key, namely that the king had no power to change the private law and that his *ordonnances* would have been effective only in the areas of public administration, the law of privileges, civil and criminal procedure, and substantive criminal law.

The distinction is a French transfiguration of the German distinction between the concepts of *Verfassung* and *Konstitution*. As the core set of rules of social intercourse, deep-rooted in the self-consciousness of the people, the *Verfassung* represented the identity of a nation, whereas the *Konstitution* was an act empowering the king and government. Given this distinction, even the king could not change the identitarian rules. It is the same position that we have seen in Brunner and his predecessors. Law is an *Ordnung*, an "order," which escapes the power of the state and therefore exists without the state.

During the late 1980s and the 1990s, an influential historian of political thought gave yet again a new impulse to these old nineteenth – and early twentieth – century ideas in France. In 1988 Blandine Kriegel wrote the second book of her tetralogy on the relationship between the French state and historiography, under the title *La défaite de l'érudition*.[35] Recruited to the *Collège de France* by Michel Foucault, Blandine Kriegel was fascinated by the constructs of the legal historians in general and of Olivier-Martin in particular. She insisted on the despotic character of Roman law, connecting the development of modern civil liberties to the process of "relegation" of Roman law. Instrument of every despotic power, Roman law was the main

35 B. Kriegel, *L'histoire à l'âge classique, 1, Jean Mabillion; 2, La défaite de l'érudition; 3, Les académies de l'histoire; 4, La république incertaine*, Paris 1988. Reprint Paris 1996.

obstacle to remove so as to attain a degree of real liberty and predominance of the law over state power.

The vision of Kriegel had been sharply criticized by some great French legal historians: Yan Thomas[36] and Jacques Krynen have taken quite a clear stance against this simplistic identification of Roman law with an oppressive system. A vision resulting from a mixture between the old fashioned vision of a French Germanist like Olivier-Martin and a simplified idea of law in history that Barret-Kriegel had taken from some old classics like Jules Michelet's *Histoire de France*.[37]

Yet again, now only a few years ago, a new controversy arose in the pages of the French journal *Droits*: André Castaldo published two articles[38] in 2008 criticizing Jacques Krynen and Gérard Giordanengo for having stressed the importance of late medieval jurists' abstract legal constructs for the early modern construction of a national system of private law.[39] The nineteenth-century idea that Roman law was an imposition of the central power over the "spirit" of a national rule of law could not accept this new way of describing the history of French law as a mixture of local practices and a legal culture that, over time, diffused abstract legal rules that the doctrine had built on the authoritative base of the Roman law sources.

Castaldo's articles have received two detailed responses, one from Yves Mausen, the other from Gérard Giordanengo. Yves Mausen's 2009 article[40] showed the "practical value" of the Roman-law doctrines that the Parlement of Paris used to settle the everyday disputes it had to deal with. Mausen agrees with Yan Thomas, Jacques Krynen, and Gérard Giordanengo that the old interpretive model based on the opposition between people and lawyers, or Roman law against German law, or concreteness against abstrac-

36 Y. Thomas, *L'institution civile de la cité*, Le Débat 74 (1993), pp. 21-40, note 8.

37 J. Krynen, *L'encombrante figure du légiste: Remarques sur la fonction du droit romain dans la genèse de l'État, Le Débat* 74 (1993), p. 44.

38 A. Castaldo, *Pouvoir royal, droit savant et droit commun coutumier dans la France du Moyen Age: À propos de vues nouvelles, Droits* 46 (2007), pp. 117-158; and 47 (2008), pp. 173-247.

39 J. Krynen, *Jus commune et 'droit commun' en France, du XIIIe au XVe siècle, Études d'histoire du droit et des idées politiques* 3 (1999), pp. 219-247; G. Giordanengo, *Le droit romain, droit commun de la France, Droits* 38 (2003), pp. 21-35.

40 Y. Mausen, *A demonio merediano? Le droit savant au parlement de Paris, Droits* 48 (2009), pp. 159-177.

tion, must be abandoned. Law is a very complex phenomenon, whose high degree of abstraction is impossible to eliminate. This does not mean that law has nothing to do with reality: on the contrary, legal abstractions are a powerful tool for settling disputes to change the balance of power in real life.

Gérard Giordanengo's response, published in a 2010 article,[41] is extremely informative. After a long and detailed demonstration of the persistence of learned law in the theory and practice of French law from the twelfth century onward, Giordanengo concludes that "the nationalism of the legal historians of the ninteenth century, which let them see in the customs the real law of France, can no longer be accepted."[42]

(c) Italy. The lively discussions in French scholarship have no parallel in Italy. More than fifteen years ago I tried to offer a critical point of view[43] about a very successful Italian monograph on medieval legal ordering,[44] but neither the author of the monograph nor anyone else took up the opportunity to enter into a scholarly debate.

My critical position is shared and backed up with further analysis by Peter von Moos. In his 2008 work on the concepts of "public" and "private" in medieval history and historiography,[45] von Moos remarks that a number of *braune Relikte* of nineteenth- and twentieth-century historiography continue to structure our understanding of medieval society. In particular, von Moos remarks that the exercise of translating some Ita-

41 G. Giordanengo, *Roma nobilis, orbis et domina: Réponse à un contradicteur*, Révue Historique de Droit Français et étranger, 88 (2010), pp. 91-150.

42 G. Giordanengo (note 41), p. 150.

43 E. Conte, *Droit Médiéval. Un débat historiographique italien, in Annales. Economie, Sciences Sociales*, 57 (2002), pp. 1593-1613 (tr. it. *Storicità del diritto. Nuovo e vecchio nella storiografia giuridica attuale*, in Storica 22, 2002, pp. 135-162). More on the topics in: E. Conte, *L'état au Moyen Âge*, in: P. Bonin - P. Brunet - S. Kerneis (eds.), *Formes et doctrines de l'État. Dialogue entre histoire du droit et théorie du droit*, Paris 2018, pp. 123-136.

44 P. Grossi, *L'ordine giuridico medievale,* Roma-Bari 1995, many reimpressions. In 2006 Grossi signed two pages of introduction to the new issue of his book, reprinted without any change after 10 years from its first issue. Just to say that the discussions that followed the first edition had not changed his ideas, and particularly that (1) the Medieval law, better defined as an "order" to stress its immanence in the European people and the small impact of legislation on it, is basically different from the modern idea of law; and (2) this basic character of Medieval law does not change for eight centuries, from the 6th to the 14th century. In particular, the birth of legal science within the scholasticism does not change the features of the medieval legal order.

45 P. von Moos, *Öffentlich und Privat, Gemeinsames und Eigenes*, in: G. Melville (ed.), *Gesammelte Studien zum Mittelalter*, vol. 3, 3. ed., Berlin 2007, pp. 131-132.

lian historiographical constructs into German evokes frightening slogans of the 1930s.[46]

The lack of discussion among the specialized legal-historians has allowed, in Italy, a rather simplistic use of historical arguments in some pretty lively legal debates.[47]

6. Conclusions

We could easily go on with other examples of the enduring fortune of a historiographical model that arose in a particular historical situation as a reaction to the liberal state, to the triumph of rational legislation, and to the distinctions between private rights and public legislation and between private and public law. The exponents of the conservative wing of the German historical school have lined up against the exaggerated individualism of capitalist society, clamoring for more social sensitivity in the legal system. Their target was the dichotomy between the state and the individual; their desired reform was a more scattered distribution of public power among many corporate bodies, whose autonomy could provide a legal order that would answer the real needs of the society instead of affirming an abstract project of private, individualist rights. It is the conservative answer to the same tensions that gave birth to socialism and communism. But whereas Marxist social doctrines proposed an evolution through capitalism toward the rising sun of a socialist state and a socialist international network, the conservative social doctrines of Gierke were strongly tied to a nationalist feeling. It was an essential precedent for the Nazi theories,[48] as it was certainly for the historiographical stream of *Verfassungsgeschichte*.

The model of the popular origin of medieval law erases much of the complexity of medieval law. The model's defenders treat the doctrinal literature of medieval Roman

46 P. VON MOOS (note 45) 198 and note 194, quotes the expression "*sangue, terra, durata*" used by Grossi, whose German translation evokes the expression *Blut und Boden*.

47 Some remarks on the discussion on the commons in: E. CONTE, *L'État au Moyen Âge* (note 43).

48 See M. STOLLEIS, *Die Rechtsgeschichte im Nationalsozialismus: Umrisse eines wissenschaftsgeschichtlichen Themas, in Recht im Unrecht: Studien zur Rechtsgeschichte des Nationalsozialismus*, Frankfurt am Main 1994, p. 64, note 28. Gierke was very much appreciated by Nazi legal theorists after 1933. See, *e.g.*, R. HÖHN, *Otto von Gierkes Staatslehre und unsere Zeit: Zugleich eine Auseinandersetzung mit dem Rechtssystem des 19. Jahrhunderts*, Hamburg: Hanseatische Verlagsanstalt 1936, which evokes a byword current among scholars immediately after the Nazi rise to power: "*Zurück an Gierke!*".

and Canon law as a mere superstructure, useful only for validating legal forms already created by the people. On the contrary, doctrinal abstractions created from the twelfth century onwards have been extremely creative, effective, and in some cases revolutionary. Academic lawyers forced customs to change,[49] seriously endangered the feudal system, and substantially contributed to the creation of a new model of sovereignty. They made possible a public, rational legal procedure, introduced a right of resistance, constructed a new system of jurisdiction, and defined the powers of public officials. We now understand that considering all this as a mere superstructure served the political views of German academia in the nineteenth and twentieth centuries. We should be careful, however, not to adhere to the old historiographical interpretations just for the sake of keeping alive the feelings of the last century.

49 E. Conte, *Roman law vs. customs in a changing society* (Italy, 12th-13th centuries), in: P. Andersen - Mia Münster-Swendsen (eds.), *Custom. The Development and Use of a Legal Concept in the High Middle Ages*, Copenhagen 2009, pp. 33-49.

ALESSANDRO CUOMO*

USING COMPETITION LAW AND DESIGNING NEW ACCESS REGIMES TO FORCE INDUSTRIAL DATA CIRCULATION BETWEEN COMPANIES IN THE EU DIGITAL SINGLE MARKET

ABSTRACT. *The present paper aims at shedding light on two of the many regulatory approaches recently proposed by the EU Commission to adapt the existing EU legal framework to the changes brought about by the digital economy. Today digital data have become a fundamental resource for any kind of business, but while personal data already have a complex regime under EU data protection law regulating their circulation, there is much legal uncertainty about the circulation of non-personal, or industrial, data. According to the Commission, one thing is however certain: new rules should be put in place to enhance the circulation of industrial data between private actors, so that more companies can benefit from the improved opportunities of data analytics.*

The first approach proposed by the Commission is looking at the industrial data circulation from an antitrust perspective. The main question will be whether non-consensual access to dominant undertakings' industrial datasets can be granted to their competitors through Article 102 of the Treaty on the Functioning of the European Union (TFEU).

The second approach proposed by the Commission is taking legislative action to design new access regimes to create, under given conditions, obligations forcing companies to open their industrial datasets to other firms. The main question will be which main guidelines EU lawmakers should follow to properly design such regimes.

* Law School Graduate, Roma Tre University.

1. Introduction. Enhancing Industrial Data Circulation Between Companies

The relationship between technology and law is notably an utterly complex one. This is due to the typical disruptiveness brought about by the former in human societies: the application of new technologies has the capacity to bypass outdated legal regimes and to open up previously unexpected scenarios where new economic activities can rapidly flourish, altering the structures of existing markets or even creating brand new marketplaces. Even though the digital revolution might today be reshaping the way economic value is produced, the role of regulators will anyway stay unchanged: correcting market failures such as monopoly power, negative externalities, incomplete information and any inefficiency in the allocation of goods and services in order to maximize social welfare.[1]

Digital data are infinite and machine-readable pieces of information representing aspects of this world. From an economic perspective, these huge volumes of information disclosed by individuals or gathered by connected devices, – referred to as "Big Data" – have become a fundamental resource for any kind of business, as it can lead to new knowledge, drive value creation, and foster new products, processes, and markets.

In 2015 the EU Commission launched the EU Digital Single Market Strategy, with the purpose of enabling the best possible access to the online world for both individuals and businesses.[2] Since digital data, as an information good, is in many respects similar to a public good, it is fundamental to ask what legal rules are necessary in Europe to enable the digital economy to fully realize the social benefits of this technological, economic, and social revolution. First, digital data are "not-rivalrous" in use, since the marginal costs of an additional use of data is zero.[3] This means that, after data are collected, one company using them does not exhaust their value at once, such data being

1 G. Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance, Journal of Public Policy*, 17, 1997, p. 139 at 141.

2 EU Commission, *A Digital Single Market Strategy for Europe*, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192, p. 3.

3 W. Kerber, *Rights on Data: The EU Communication 'Building a European Data Economy' from an Economic Perspective* in S. Lohsse, R. Schulze and D. Staudenmayer *Trading Data in the Digital Economy: Legal Concepts and Tools,* Nomos Verlagsges, 2017, p. 109 at 116.

still potentially useful for further processing by other firms. Second, data are excludable goods, meaning that it is possible for firms holding them to prevent others from having access to them without authorization.[4] It is exactly this characteristic that allows data holders to make data object of transactions, by shielding them from third parties and determining the terms and conditions under which access can be granted.[5]

This analysis will only focus on the circulation of one species of the genus "digital data": non-personal data, also referred to as industrial data. Notoriously, personal data already have a very complex legal regime in the EU legal framework, mostly contained in the General Data Protection Regulation (the GDPR), which substantially establishes limitations to companies' freedom to collect, use and sell such information.[6] The expression "industrial data" refers to data created and used in industrial and commercial scenarios, but excludes any personal information covered by GDPR.[7]

In the EU market economy, based on the principle of freedom of contract, the main source of industrial data sharing is through contracts. Industrial data are traded by private actors as immaterial goods or commodities through contracts that are typically drafted under the consensual licensing agreement model. In such manner, the data holder unilaterally imposes conditions and requirements, which the licensee is obliged to comply with. The licensor maintains his strong competitive advantage by not transferring data to the licensee, but agreeing to give him access for a certain scope and for a certain time.

4 S. Lohsse, R. Schulze and D. Staudenmayer, *Trading Data in the Digital Economy: Legal Concepts and Tools* in S. Lohsse, R. Schulze and D. Staudenmayer *Trading Data in the Digital Economy: Legal Concepts and Tools*, Nomos Verlagsges, 2017, p. 13 at 15.

5 J. Drexl, R. M. Hilty, L. Desaunettes, F. Greiner, D. Kim, H. Richter, G. Surblyte & K. Wiedemann, *On the Current Debate on Exclusive Rights and Access Rights to Data at the European Level*, 2016, https://pure.mpg.de/rest/items/item_2339820_16/component/file_2339821/content, p. 3.

6 Regulation (EU) 2016/679 of the European Parliament and of the Council on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, 2016, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016R0679. The GDPR can be defined as a data governance framework applicable to undertakings' processing of "any information relating to an identified or identifiable natural person." See Article 4(1) of the GDPR.

7 B2B transactions, manufacturing, production, transport, mining, shipping, aeronautical traffic, financial services, securities markets and many Internet of Things contexts are sources of industrial data. Anonymized personal data are qualified as industrial data, to the extent that, not carrying personally identifiable information, they fall outside of the GDPR's scope. See GDPR, Recital 26.

Most importantly, the licensor often embodies certain limitations of the use of the data in the contract, preventing the licensee from fully exploiting the potential of data sharing.

After an in-depth analysis of industrial data marketplaces,[8] the Commission identified one main problem arising from the structural features of such markets: consensual data transfers through contracts enable an overall level of data circulation between companies, which is deemed suboptimal from a macroeconomic point of view. Being data non-rivalrous goods, their value is maximized when all the actors who can extract value from them have the possibility to do so.[9] But contract law, as the source of control over industrial data, can work efficiently only when the holder of data has an economic interest in sharing them with others and when the bargaining power of the parties is equally strong.[10]

This is why it has been argued that, at least for certain types of data, granting non-consensual access to third parties could bring welfare-enhancing effects without impinging on the economic interests of the data holder, who invested into his data collecting capabilities.[11] One of the objectives of the Digital Single Market Strategy is therefore enhancing forced industrial data circulation to allow economically weak players reaping the benefits of Big Data analytics, ultimately improving service innovation and digital markets competition.

Among the many regulatory solutions proposed by the Commission as the pos-

8 EU Commission, *Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy*, 2017, https://ec.europa.eu/digital-single-market/en/news/staff-working-document-free-flow-data-and-emerging-issues-european-data-economy.

9 OECD, *Data-Driven Innovation: Big Data for Growth and Well Being,* 2015, https://read.oecd-ilibrary.org/science-and-technology/data-driven-innovation_9789264229358-en#page1, p. 180.

10 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data,* 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862975, p. 41. The author emphasized that, in industrial data markets, scale and scope effects in the collection and analysis of digital data and direct and indirect network effects typical of these markets are arguably conducive to market concentration and vendor lock-in effects, especially in the field of the manufacturing of connected devices. All the economic value and benefits of industrial data analytics seem to be captured by few companies, notwithstanding the fact that many operators often collaborate to the production of such data. On the top of this, legal uncertainty regarding how to draft data licensing agreements appears to hinder industrial data circulation between companies, especially to the detriment of small and medium-sized enterprises.

11 OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being,* 2015, p. 186.

sible "ways-forward" to achieve a higher level of industrial data circulation in the single market,[12] this analysis will focus on two specific proposals:

(i) using EU competition law to force dominant firms to open their industrial datasets to their competitors;

(ii) designing new access regimes at the EU law level to impose on some undertakings, under given conditions, obligations to grant third parties access to their datasets.

2. Enhancing Access to Industrial Data Sets through Article 102 TFEU

At its fundamental level, antitrust law protects the process of competition, ultimately scrutinizing whether the growing market power of undertakings could harm consumer welfare, for instance rising product prices, or reducing output, product quality or innovation.[13] Therefore, it is no surprise that the exclusive control over massive industrial data sets by single firms has recently attracted the attention of antitrust authorities.[14]

The control of massive quantities of data, especially by those that are referred to as "Big Tech companies," raises multiple concerns under the three typical anticompetitive figures embodied in EU law, restrictive agreements,[15] abuse of dominant positions[16] and mergers and acquisitions significantly reducing competition.[17] Increasing attention is being paid by antitrust authorities from all over the world, when assessing a firm's market power and dominance, to the role played by its Big Data practices.[18]

12 EU Commission, *Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy*, 2017, p. 30.

13 R. Wish, *Competition Law,* Oxford University Press, 2008, p. 1.

14 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data,* 2016, p. 42.

15 EU, Consolidated Version of the Treaty on the Functioning of the European Union, 2008, OJ C326/47, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT, Article 101.

16 Consolidated Version of the Treaty on the Functioning of the European Union, Article 102.

17 Council Regulation (EC) 139/2004 on the Control of Concentrations between Undertakings, 2004, OJ L24/1, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0139.

18 I. Graef, *Market Definition and Market Power in Data: the Case of Online Platforms, World Competition: Law and Economics Review*, *38,* 2015, p. 473 at 474; see also Joaquín Almunia, *Competition and Personal Data Pro-*

IT markets in general – and especially the entities which are referred to as "online platforms"[19] – have special characteristics, such as often being multi-sided markets, benefitting from economies of scale and scope and networks effects, that are arguably conducive to market concentration and dominance by very few players.[20] Control over industrial data is considered as a potential competition problem, and the EU Commission as well as EU Member States' national competition authorities are currently inquiring into the relation between control over massive digital datasets and market power.[21] However, this part of the analysis will only try to answer to the question whether EU competition law is an appropriate instrument to protect the free market economy by granting some players access to dominant firms' industrial datasets. Indeed, a general right to access third parties' data could theoretically be adopted from an antitrust perspective.[22]

The relationship between information circulation and market competition is an old one: already in 1945 the US Supreme Court, using a sharp procompetitive reasoning, ruled that unilaterally denying access to news agency reports to competing media companies resulted in substantial harm to competition.[23] Since information, especially in a data-driven economy, corresponds to value, "access to information has a competitive impact."[24]

tection (Speech of 2012) http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm, where the Commissioner stated, with respect to personal data: "DG Competition has yet to handle a case in which personal data were used to breach EU competition law. In time, personal data may well become a competition issue."

19 Search engines, media portals, trading platforms and social networks share the similarity of gathering different categories of users and exploit special competitive effects. Data is notably a fundamental resource for this kind of business models. See EU Commission, 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' (Communication) COM(2016) 288 final, p. 2.

20 M. Maggiolino, *I Big Data e il Diritto Antitrust,* Egea, 2018, p. 132.

21 *Autorité de la Concurrence* and *Bundeskarellamt*, Competition Law and Big Data, 2016, http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf, p. 11.

22 S. Louven, *Shaping Competition Policy in the Era of Digitization – Access to Data*, 2018, http://ec.europa.eu/competition/information/digitisation_2018/contributions/sebastian_louven_oldenburg_centre_for_law_of_the_information_society.pdf, p. 2.

23 US Supreme Court, *Associated Press v. US*, 1945, 326 US 1, https://supreme.justia.com/cases/federal/us/326/1/.

24 R. H. Weber, *Data Portability and Big Data Analytics. New Competition Policy Challenges, Concorrenza e*

On the positive side, competition law is applicable indistinctly to any sector of the digital economy. Against the backdrop of the necessity to enhance industrial data circulation in the private sector, competition law could potentially work as a "platform on which legislatures can build to formulate more targeted and sector-specific rules," among which access solutions could be enforced.[25] As the Commission itself stated, "competition law is applicable in the context of data-driven business models and therefore it may be invoked to claim a wider access to data held by one economic operator."[26] And anyway, "competition law thinking as a market-compliant approach will […] prove important for devising additional pro-competitive regimes that promote access to data."[27]

On the negative side though, competition law can notably counteract only to a specific type of market failure, being antitrust intervention only justified when harm to competition is identified. Since digital data became a fundamental input comparable to a raw material for many kind of business, a firm's refusal to grant competitors access to its datasets, under certain conditions, could possibly result in a restriction to competition.[28]

Two questions can be raised on the interrelation between competition law and access to industrial datasets:[29]

(i) whether there can be any right of access to data from an antitrust point of view;

(ii) if access can be granted, how to design such access relationship.

An example of an antitrust dispute over access to digital datasets is the 2012

Mercato, 23, 2016, p. 59 at 60.

25 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data*, 2016, p. 43.

26 EU Commission, *Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy*, 2017, p. 21.

27 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data*, 2016, p. 44.

28 S. Louven, *Shaping Competition Policy in the Era of Digitization – Access to Data*, 2018, p. 4.

29 S. Louven, *Shaping Competition Policy in the Era of Digitization – Access to Data*, 2018, p. 4.

PeopleBrowsr v. Twitter case, in California.[30] Since 2008, PeopleBrowsr was in a contractual relationship with Twitter to have access to its datasets and receive data generated by the latter. PeopleBroswr used such precious data to assess its own products and to design improved marketing campaigns.[31] When Twitter suddenly excluded PeopleBrowsr from its market analysis, the latter brought forward an antitrust action seeking an injunction to prevent Twitter from destroying its business and restraining competition in markets relying on data generated on the social network. The parties ended up settling the dispute in California Federal Court, agreeing to let PeopleBrwsr to continue to have access to Twitter's datasets until 2013. Thereafter, PeopleBrwsr would switch to access to an authorized Twitter data reseller.[32]

No specific dispute on access to digital data has come up in EU competition case-law, yet. However, some considerations on potential data-related antitrust cases can be drawn from existing jurisprudence on refusals to deal since, according to the Magill case,[33] under exceptional circumstances a refusal to grant access to its resources by a dominant undertaking can be captured as an abusive refusal under Article 102 TFEU.[34]

Once dominance in a relevant market is established, a special responsibility is notably conferred to the dominant undertaking, whose scope is determined on a case-by-case basis.[35] An obligation to grant access to its datasets could derive from this antitrust responsibility.[36]

30 US District Court of the Northern District of California, *People Browsr Inc. et al. v. Twitter Inc.*, 2012, Case No 3:12-cv-06120.

31 PeopleBrowsr paid annually around US$ 1 million for Twitter's service.

32 V. Bagnoli, *The Big Data Relevant Market, Concorrenza e Mercato,* 23, 2016, p. 73 at 75.

33 ECJ 6 April 1995, Joined Cases C-241 and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities,* https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A61991CJ0241 (*Magill* case), para 49.

34 M. Maggiolino, *I Big Data e il Diritto Antitrust,* 2018, p. 321; C. Osti, *L'obbligo a Contrarre: il Diritto Concorrenziale tra Comunicazione Privata e Comunicazione Pubblica* in A. Zoppini-C. Olivieri, *Contratto e Antitrust,* Editori Laterza 2008, p. 26 at 32.

35 EC Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009, https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN, para 1.

36 S. Louven, *Shaping Competition Policy in the Era of Digitization – Access to Data*, 2018, p. 4.

For a refusal to grant access to data to amount to an abuse of dominant position under Article 102 TFEU, logically (i) the data holder must be dominant in the relevant market,[37] (ii) the refusal to grant access should constitute an abuse of such dominant position and (iii) no pro-competitive defense must exist to justify the conduct.[38]

The notion of dominance under EU case-law revolves around the factual power of the undertaking to "behave to an appreciable extent independently of its competitors, its customers and ultimately its consumers."[39] However, as any other qualification relevant to competition law, dominance is a concept that must be examined in light of all the concrete circumstances of the individual case. Recently, data-driven business models have been analyzed in depth by German scholars with the intent of adapting competition law to the challenges of digitization: exclusive control over data was considered such a relevant factor that the German Competition Act was amended in 2017 to include the specific criterion of a firm's "access to data relevant for competition" in the assessment of its market power.[40] A dominant position based on data power could be deemed to exist where access to such data is essential for competitors to the extent that data is considered a market entry barrier, that the dominant firm can exploit to exclude

37 The issue related to the definition of a "Big Data relevant market," in both the product and geographic dimension, will not be addressed in this analysis, since it is entirely dependent upon the factual circumstances of the case at hand, for instance which specific kind of digital data are relevant for competitors, which players are in the market, the total market size and the possibility of market dominance. Indeed, the concept of relevant market under competition law is notably "an analytical tool that assists in determining the competitive constraints upon undertakings: market definition provides a framework within which to assess the critical question of whether a firm or firms possess market power." See WISH, *Competition Law,* 2008, p. 26. However, for a proposal of a structured method to identify data relevant markets, see BAGNOLI, *The Big Data Relevant Market,* 2016, p. 93.

38 R. H. WEBER, *Data Portability and Big Data Analytics. New Competition Policy Challenges,* 2016, p. 68.

39 ECJ 13 February 1979, Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0085, para 38. Dominance entails that competitive restraints physiologically existing in any competitive market are not sufficiently effective, thus letting the undertaking enjoy substantial market power over a period of time. Typically, in the assessment of market dominance, different factors are taken into account by the Commission: the position on the market of actual competitors, entry of potential competitors, countervailing buyer power – either referred to other firms or consumers –, market structure and market shares. See EC Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009, para 10.

40 German Act against Restraints of Competition Section 18(3a) no. 4, Federal Law Gazette I 2017, p. 1416.

new entrants.[41]

Looking at existing case-law, some guidance is already established for assessing whether, in general, a refusal to deal constitutes an abuse of dominance under Article 102 TFEU. Two different scenarios can be considered: the dominant undertaking refuses to grant access and terminates an existing contractual relationship with the counterparty or the dominant undertaking refuses to grant access to a third party with whom no previous contract was concluded.[42] In the first case, the refusal must be considered unlawful if (i) considering all the circumstances, it could result in a restraint to competition and (ii) it is not objectively justified in economic terms.[43] In the second case, under the Bronner case,[44] the Court of Justice of the European Union (CJEU) added the requirement that the resource the dominant firm refused to deal be essential, as no other substitute exists for the economic activity of the entity seeking such resource.

These requirements clearly echo the principles of the essential facility doctrine, devised by US courts as a specification of the refusal to deal.[45] In the EU legal framework, even if the right to choose the trading partners is firmly recognized as a cornerstone of the economic freedom, when a dominant firm controls a facility that is somehow essential for its competitors, it seems reasonable that, under certain circumstances, it can be forced to grant access to its facility.[46]

41 S. Louven, *Shaping Competition Policy in the Era of Digitization – Access to Data*, 2018, p. 4.

42 M. Maggiolino, *I Big Data e il Diritto Antitrust,* 2018, p. 322.

43 See ECJ 6 March 1974, Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities,* https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A61973CJ0006; ECJ 3 October 1985, Case C 311/4 *Centre Belge d'Etudes de Marché - Télémarketing (CBEM) v SA Compagnie Lluxembourgeoise de Télédiffusion (CLT) and Information Publicité Benelux (IPB)* http://curia.europa.eu/juris/liste.jsf?language =en&num=C-311/84.

44 ECJ, Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* http://curia.europa.eu/juris/liste.jsf?language=en&num=C-7/97, para 41.

45 R. Pitofsky, D. Patterson & J. Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law,* Antitrust Law Journal, 7, 2002, p. 444.

46 See EC Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009, where at para 78 it is stated that "[t]he concept of refusal to supply covers […] refusal to grant access to an essential facility."

Going back to the requirements necessary for a refusal to be qualified as an abuse of dominance, the CJEU, in the case abovementioned Magill case and in IMS Health case[47] designed a first test for this purpose. These cases demonstrated that "it is easiest to show dominance in data-related cases where the petitioner seeks access to concrete semantic information that is indispensable for doing business in a market."[48] Lastly, the Microsoft[49] case, the CJEU formulated a four bullets test listing cumulative conditions that need to be fulfilled for a refusal to deal to amount to a violation of Article 102 TFEU:

(i) "in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighboring market;

(ii) in the second place, the refusal is of such a kind as to exclude any effective competition on that neighboring market;

(iii) in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand."[50]

(iv) The refusal is not economically justified.[51]

Firms exerting de facto control over industrial datasets are arguably highly incentivized to act in a manner that allow them to maintain their competitive "data-advantages," for instance limiting competitors' access to data and anyway preventing other forms of data circulation.[52] The question at hand therefore becomes whether industrial data sets can be qualified as an essential facility, to which access must be granted in

47 ECJ 29 April 2004, Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001CJ0418, para 38.

48 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data*, 2016, p. 46.

49 CJEU, Case T-201/04 *Microsoft Corp v. Commission of the European Communities* [2007] ECLI:EU:T:2007:289 para 332. It is relevant to note that Microsoft's market dominance did not arise from IP rights, but "from the fact that Windows had emerged as a *de facto* standard in the market for operating system, which made the interoperability information an indispensable input for offering interoperable programs that would run on Windows," see Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data*, 2016, p. 46.

50 *Microsoft* case, para 332.

51 *Microsoft* case, para 333.

52 D. Rubinfeld & M. Gal, *Access Barriers to Big Data*, *Arizona Law Review*, 59, 2017, http://arizonalawreview.org/pdf/59-2/59arizlrev339.pdf, p. 339 at 352.

order to maintain competition to a functioning level in a given market.[53]

In the Bronner case, a network of interlocked contractual agreements to deliver newspapers to subscribers was considered as an essential facility. This could support the argument that digital data can be qualified as an essential facility, since the dominant firm did not have any form of traditional or intellectual property rights over its facility, but merely enjoyed a contractual form of control over the network, very similar to the control data holders enjoy over their datasets.[54]

The first requirement set by the ECJ in Microsoft, the indispensability requisite, is certainly the most difficult to fulfill in a data scenario. Indeed, "assessing the dominance in a world of big datasets by using the concept of substitutability remains a most difficult task."[55]

"[A]n input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter […] the negative consequences of the refusal."[56] The very non-rivalrous nature of data, even in their collection, raises delicate issues with respect to non-substitutability: whether data are substitutable will depend on the actual circumstances of the case. In most cases, for publicly available information, such as data on the weather or on the quality of certain streets, different sources are available, and any data collector could arguably duplicate the datasets. Regarding user online generated content, even if some online service providers may have exclusive control over massive datasets, other websites are theoretically free to collect the same kind of data from the same user and for the same types of activity.[57]

53 B. Lundqvist, *Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet of Things World*, 2016, https://ssrn.com/abstract=2891484, p. 18.

54 I. Eagles & L. Longdin, *Gambling on Essential Facilities: Withholding Data as an Abuse of Market Power in European Competition Law,* New Zealand Business Law Quarterly, 12, 2006, p. 395 at 409.

55 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data*, 2016, p. 46.

56 EC Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009, para 83.

57 A. V. Lerner, *The Role of "Big Data" in Online Platform Competition*, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780, p. 20.

In the Bronner case, the CJEU clearly stated that a resource in the control of a competitor cannot be considered indispensable if there are no "technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult" for competitors to duplicate the resource.[58] The Court emphasized that the argument showing that duplication of the resource would not be economically viable for the petitioner' scope of business would not be enough to justify access to the facility.[59] Specifically, for access to be regarded as indispensable, it would be necessary that it is not economically viable to create a second facility with the same characteristics as the dominant firm's one.[60] This means that the petitioner, regardless of the size of its business, should make the same economic investment as the dominant firm in its technologies and services to collect data before claiming that the resource is indispensable.[61]

The question thus is not whether the petitioner can develop its own facility, but whether an undertaking operating on the same scale as the dominant firm could. Unless the petitioner proves to have invested similar amounts of resources in data collection, the dominant firm's datasets will not be considered indispensable. This reasoning seems to run against the possibility of data being considered an essential facility, since it excludes the possibility of competition law to assist companies requesting access to data simply because they are small or not as efficient as the dominant firm.[62] Plainly, the competitive advantage that the dominant firm enjoys due to its control over the facility cannot be a sufficient ground to qualify the resource as indispensable,[63] since under competition law "there is no duty to aid competitors."[64]

58 *Bronner* para 44.

59 *Bronner* para 45.

60 *Bronner* para 46.

61 M. Maggiolino, *I Big Data e il Diritto Antitrust,* 2018, p. 326.

62 I. Eagles & L. Longdin, *Gambling on Essential Facilities: Withholding Data as an Abuse of Market Power in European Competition Law*, 2006, p. 409.

63 Opinion of Advocate General Jacobs delivered on 28 May 1998 in *Bronner* case, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CC0007, para 65.

64 US Supreme Court, *Verizon v. Law Offices of Curtis Trinko*, 2004, 540 US 398, https://supreme.justia.com/cases/federal/us/540/02-682/.

Regarding the second requirement, foreclosing competition in a secondary market, its rationale rests on a leveraging and exclusion antitrust theory.[65] Its assumption is that the dominant undertaking is active in the same market as the petitioner and refuses access to the facility specifically to drive its competitors out of such market. In data cases, this is very unlikely to happen, since a typical feature of digital data is being inherently multi-purposed, often being useful for some applications that were not even imagined by the original collector.[66] Furthermore, with respect to the elimination of effective competition, "the closer the substitutability between the dominant undertaking's output and that of its competitors in the downstream market, the greater the proportion of competitors in the downstream market that are affected, and the more likely it is that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking."[67] Speaking of digital data, identifying the level of substitutability of datasets and the likelihood that the demand could be diverted from foreclosed competitors to the dominant firm would be incredibly hard. Arguably, this requirement would never be met in a data scenario.

Regarding the third requirement, the "new product rule," this requisite only applies to cases involving refuses to license IP rights.[68] As we saw earlier, under the current EU legal framework, digital data can be covered by IP protection in very limited cases. This would seem to weigh in favor of considering digital data as an essential facility. Anyway, to the extent that trade secrets protection applies to digital data – or in the case that the data producer's right was implemented – this additional requirement could become more relevant.

Regarding the fourth requirement, *i.e.*, the presence of potentially reasonable justifications to refuse access to the facility, many uncertainties remain on which efficiency defenses and procompetitive effects could be brought forward to justify a refusal

65 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data*, 2016, p. 49.

66 M. Maggiolino, *I Big Data e il Diritto Antitrust,* 2018, p. 327.

67 EC Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009, para 85.

68 *Microsoft* case para 334.

to access data.[69] Arguably, a claim that the refusal to share datasets is necessary for the dominant firm to allow it to make an economic return on the investments required to develop its data collection capabilities would make much economic sense and could therefore be accepted as an efficiency by the Commission and the CJEU, since it generates a strong incentive to continue to invest in data technologies and services in the future.[70] Even this last requirement seems to run against the qualification of datasets as essential facility.In sum, qualifying a refusal to grant access to data as an abuse of dominant position under Article 102 TFEU might be a problematic task, at least under the current CJEU case-law.[71]

First of all, if the policy objective is to enhance digital data circulation "private competition-law enforcement […] will often be too burdensome given the need to show market dominance in each and every case, while the problem will very much become one of mass cases."[72]

Furthermore, the digital sector seems to be an industry where disruption has been caused many times by new entrants, who certainly did not enjoy the data competitive advantages of the incumbents, but nevertheless drove them out of the market by offering new innovative services.[73] It has been argued that even if control over large amounts of data were necessary for an entrant to compete successfully in a market, that would not differ from any high start-up fixed costs existing in many industries, certainly not constituting an unfair competitive advantage.[74]

69 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data*, 2016, p. 52.

70 EC Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009, para 89.

71 Maggiolino, *I Big Data e il Diritto Antitrust,* 2018, p. 325.

72 J. Drexl, *On the Future EU Legal Framework for the Digital Economy: A Competition-based Response to the 'Ownership and Access' Debate* in S. Lohsse, R. Schulze and D. Staudenmayer, *Trading Data in the Digital Economy: Legal Concepts and Tools,* Nomos, Verlagsges, 2017, p. 223 at 238.

73 A. Lambrecht-C. Tucker, *Can Big Data Protect a Firm from Competition?*, 2015, https://www.competitio policyinternational.com/wp-content/uploads/2017/01/CPI-Lambrecht-Tucker.pdf, p. 6.

74 J. Kennedy, *The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown*, 2017, http://www2.itif.org/2017-data-competition.pdf, p. 8.

It is true that few firms may have de facto exclusive control over huge datasets, but from an antitrust perspective, this does not necessarily mean that they have exclusive control over and can exclude competitors from the new collection of such data. Especially from an antitrust perspective, "what one should be concerned with are not data per se, but rather services which require data for their functioning."[75] Regarding user generated content, in 2014 the Commission, authorizing the merger between Facebook and WhatsApp, stated that "the use of one consumer communication app […] does not exclude the use of competing consumer communications apps by the same user."[76] The Commission clarified that, even if the merged entity's datasets would be massive, there would still remain an equally massive amount of Internet user data that it did not have control over.[77] This way of reasoning seems far from considering industrial datasets as essential facilities.

Lastly, even assuming that a dominant firm's refusal to grant access to its datasets amounted to a violation of Article 102 TFEU, many problems remain on how the remedy of forced sharing could be devised, implemented and monitored under competition law. Typically, compulsory licenses are the traditional remedy for abusive refusals

75 V. Zeno-Zencovich, *Do 'Data Markets' Exist?*, 2019, http://www.medialaws.eu/wp-content/uploads/2019/ 03/2_2019_Zeno-Zencovich.pdf, p. 5.

76 EU Commission*, Case M.7217 – Facebook/Whatsapp*, 2014, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf, para 133. The same kind of reasoning, running that the amount of accessible data usable for analytics purposes would remain sufficient for competitors to match the advantage of the merging parties, was used by the Commission in EU Commission, *Case M.6314 – Telefonica UK/ Vodafone UK/ Everything Everywhere/ JV*, 2012, http://ec.europa.eu/competition/mergers/cases/decisions/m6314_20120904_20682_2898627_EN.pdf and EU Commission, *Case M.7023 – Publicis/Omnicom*, 2014, http://ec.europa.eu/competition/mergers/ cases/decisions/m7023_20140109_20310_3566669_EN.pdf. Similarly, the US Federal Trade Commission, when it cleared the Google's acquisition of DoubleClick in 2007, stated that "[t]he evidence indicates that neither the data available to Google […] constitutes an essential input to a successful online advertising product. A number of Google's competitors have at their disposal valuable stores of data not available to Google. For instance, Google's most significant competitors in the ad intermediation market, Microsoft, Yahoo!, and Time Warner have access to their own unique data stores. These firms own popular search engines, and will have access to consumer information from their internal ad servers, ad intermediation services, other web properties, and software." See https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc commstmt.pdf, p. 12.

77 EU Commission, *Facebook/WhatsApp* case, 2014, para 189.

to deal.[78] But many aspects of the administrative management of the compulsory license to access would need to be decided upon by some authority.

The intervention by the courts, in the form of an order to share data following the judgement, would require the same courts to maintain supervision for some time to ensure that access is effectively granted.[79] The order could embody a general binding obligation on the dominant firm to grant access in a non-discriminatory manner to its competitors, without specifying the exact terms of access.[80] But such general measure would arguably result in many small competitors acting as free riders to exploit the dominant firm's resources, with the inevitable consequence of decreasing ex ante investment incentives and ultimately losing dynamic efficiency.[81]

Alternatively, drafting specific terms of access of the compulsory license could be the task of competition authorities, better equipped than courts in this regard. But this would result in the EU Commission functioning as a pure ex ante central legislative authority, a role it could not be perfectly fit for.[82]

To conclude, even in the very unlikely scenario in which a refusal to grant access to datasets were considered an abuse of dominant position under the essential facility doctrine, the problematic issues of establishing a fair price for access, identifying the entities entitled to access and designing access terms and conditions would arise. Plainly, these tasks would be better performed by legislative bodies, rather than by competition authorities.

The policy objective of promoting access to privately held digital datasets in order to foster competition in the Digital Single Market ultimately boils down to correcting digital markets features and structure, that seem to naturally lead to data lock-in effects and market concentration. Notably, competition law is not an instrument

78 M. Maggiolino, *I Big Data e il Diritto Antitrust,* 2018, p. 328.

79 J. P. Choi, *Compulsory Licensing as an Antitrust Remedy, WIPO Journal*, 2, 2010, p. 74 at 77.

80 T. A. Piraino, *Identifying Monopolists' Illegal Conduct Under the Sherman Act, New York University Law Review*, 75, 2000, p. 809 at 883.

81 J. P. Choi, *Compulsory Licensing as an Antitrust Remedy,* 2010, p. 77.

82 M. Maggiolino, *I Big Data e il Diritto Antitrust,* 2018, p. 328.

appropriate to intervene on market structure.[83] Legislative action, in the form of competition-oriented digital datasets access regimes, should be taken outside of the realm of competition law.[84]

3. Enhancing Access to Industrial Data through Non-consensual Data Sharing Mechanisms

If the main objective of the Commission is enabling enhanced industrial data circulation, effective forms of legislative actions may be adopted at the EU law level. Typically, any market for "Internet of Things device"[85] could cause a lock-in effect: the user of the device has an economic interest in using the data generated, but the manufacturer, whose superior bargaining power allows him to take control of the data by unilaterally imposing conditions in the contract for the sale of the device, has an incentive to deny such access. This is why regulating access to data held by others can be an alternative to use EU competition law to achieve the same results.[86]

If, as we stated before, consensual transfer through contracts is the ordinary way of industrial data circulation, "the policy goal of promoting data sharing and exchange […] to foster market competition shall be based on regulatory regimes which, at given conditions, force non-consensual access to data."[87] A strong consideration supporting data access regulatory measures is that many times the economic value intrinsic to the data is minimal, being the ability of an actor to make innovative use of such data the

83 G. Colangelo-M. Maggiolino, *Big Data, Data Protection and Antitrust in the Wake of the Bunderskartellamt Case Against Facebook, Italian Antitrust Review*, 1, 2017, p. 104 at 108.

84 J. Drexl, *Data Access and Control in the Era of Connected Devices,* 2018, https://www.ip. mpg.de/fileadmin/ipmpg/content/aktuelles/aus_der_forschung/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf, p. 37.

85 IoT devices, also referred to as smart or connected devices, are technological tools that are engineered to collect and store data from the environment they are used in. Typically, the device manufacturer will engineer the device so that it constantly transfers the collected data back to him, even though the actual user of the device could be another company.

86 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data*, 2016, p. 41.

87 F. Mezzanotte, *Access to Data: The Role of Consent and the Licensing Scheme*, 2017, p. 176.

key element.[88] On this assumption, access solutions could foster competition and research in marketing data science, ultimately awarding companies that exploit data in the most efficient and unexpected way. "Data commons" is a term created to describe non-discriminatory access to certain data for a certain group of actors, who could use the data by paying the holder.[89]

A first example of already existing legislation aimed at ensuring access to information goods is the Copyright Protection Directive:[90] Article 3 introduced a legal exception to copyright protection in cases where text and data mining is carried out on a copyrighted work for the purpose of scientific research. Shifted in a data market scenario, access could be designed to counteract, when deemed necessary, the de facto exclusivity that data holders have over industrial data with the objective of enhancing data circulation. Of course, the data holder's refusal to grant access to third parties cannot be by itself the only justification for regulatory intervention: such legitimate capacity of erecting technical barriers around data and contractually authorizing third parties to use them is exactly data holders' economic incentive to invest in data technologies. And the simple fact that data can be shared without losing quality does not mean that they will not lose value, at least from the data holder perspective: his exclusivity over datasets can be a strong competitive advantage vis-à-vis competitors.

The optimal solution would therefore be to strike a balance between access to and legitimate control of industrial data.[91] Keeping out of this analysis the access regimes based on public interests purposes, by which public authorities could obtain access to datasets generated by private actors, the main approach suggested by the Commission to force circulation of industrial data would be to design "access regimes based on re-

88 EU Commission, *Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy*, 2017, p. 36.

89 OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being*, 2015, p. 187.

90 Directive (EU) 2019/790 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019, https://eurlex.europa.eu/eli/dir/2019/790/oj.

91 J. Drexl, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access to Data*, 2016, p. 41.

muneration" to enhance data markets competition and data services innovation.[92] Such measures should remedy market failures scenarios in which the industrial data holders' practices are deemed exclusionary or, at least, leading to a level of industrial data circulation regarded as too limited.[93] Designing data access rights can be considered as "an expression of fully competition-oriented regulation that aims at opening up new data-based markets for competition."[94]

Taking inspiration from the rules developed by standard setting organizations with respect to essential patents – *i.e.*, FRAND licenses –[95], the law could design an obligation to license data usage, binding on data holders and in favor of identifiable third parties, at certain conditions and according to principles of reasonableness and non-discrimination.

The recognition of non-waivable data access rights could specifically target the market failures caused by data locks-in and balance the unequal bargaining positions of the parties engaged in industrial data markets.

Some instances of sector-specific non-consensual data transfer mechanisms can be already found in the EU legal framework.

With the objective of ensuring effective competition in the market for vehicle repair and maintenance information services, Regulation 715/2007,[96] as amended, en-

92 EU Commission, *Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy*, 2017, p. 30.

93 R. H. Weber, *Improvement of Data Economy Through Compulsory Licences*? in S. Lohsse, R. Schulze and D. Staudenmayer *Trading Data in the Digital Economy: Legal Concepts and Tools,* Nomos Verlagsges, 2017, p. 137 at 145.

94 J. Drexl, *Data Access and Control in the Era of Connected Devices,* 2018, p. 18.

95 Technical standards, which enable connected devices produced by different firms to interoperate, are often developed by private firms collaborating in standards-development organizations (SDOs). Firms may obtain patents (standards-essential patents, SEPs) covering their contribution to the development of a standard. SDOs typically require that their participants mandatorily license SEPs to manufacturers of standardized products, either royalty-free or subject to fair, reasonable and non-discriminatory royalties. See J. L. Contreras, F. Gaessler, C. Helmers & B. J. Love, *Litigation of Standars-Essential Patents in Europe: a Comparative Analysis, Berkeley Technology Law Journal*, 32, 2017, p. 1459.

96 Article 7 of Regulation (EC) 715/2007 of the European Parliament and Council on Type Approval of Motor Vehicles with Respect to Emissions from Light Passenger and Commercial Vehicles (Euro 5 and Euro 6) and

shrines an obligation for vehicle manufactures to provide standardized access to vehicle repair and maintenance information, without discriminating between authorized dealers and repairers and independent operators.

Directive 2015/2366[97] similarly established an obligation to grant to new payment services – also referred to as "FinTech" companies – access to certain information held by credit institutions on a non-discriminatory basis, with the aim of lowering market entry barriers for such services and ultimately cutting costs for payments to the benefit of both consumers and merchants. In such manner, the credit institutions' monopolistic position in holding consumers' bank account information is undermined: by unlocking such information for FinTech companies, overall competition in the market of electronic payments is strongly enhanced.[98]

At the EU Members' national law level, France has recently put in place legislation to oblige companies to open up their datasets for certain re-uses.[99] In particular, certain electricity and gas production and consumption data controlled by distribution systems private operators can be re-used by any other private actor (Article 23).

Obviously, designing new obligations to license access to industrial data would require different economic considerations than the ones underpinning the abovementioned examples. And the issue of access should always be studied in close connection with the topics of interoperability and technology standardization.[100] But the main ra-

on Access to Vehicle Repair and Maintenance Information, https://eur-lex.europa.eu/legal-content/en/ALL/juri =CELEX:32007R0715.

97 Articles 35 and 36 of Directive (EU) 2015/2366 of the European Parliament and of the Council on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) no. 1093/2010, and Repealing Directive 2007/64/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2366. Specifically, after consent is given by the credit institution's customer on such sharing mechanism, credit institutions are obliged to share such customer's bank account information with Payment Initiation Service Providers and Account Information Service Providers.

98 M. Maggiolino, *I Big Data e il Diritto Antitrust,* 2018, p. 350.

99 *Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, JO République Française n° 0235* of 7 October 2016, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT0000 33202746&categorie Lien=id.

100 W. Kerber, *A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis,* 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858171, p. 22.

tionale should be recognizing access to entities which have a legitimate interest in using a companies' industrial data.[101] The subjects entitled to access would therefore be "anyone who is directly concerned with the data collection and is in need of access to that data."[102]

Designing the circumstantial conditions that legitimize subjects having a legitimate interest to access would certainly be a complex task for EU lawmakers. Especially, an element that should be carefully taken into consideration is the degree of competition existing between the data holder and the entity entitled to access, to avoid excessive aid given to competitors of the data holder.[103]

First of all, two alternative policy choices can be taken: on the one hand, establishing a general access regime applicable to machine-generated data covering different sectors of the market regardless of the peculiarities of the single case, and on the other hand, opting for sector-specific regimes, each tailoring the characteristics of an identified area of the market.[104]

Regarding general access regimes, the model of legal exceptions to IP rights typically pursues the same objective of guaranteeing information circulation, under determined circumstances.[105] For instance, Article 5 of the InfoSoc Directive[106] lists a number of legitimate uses of a copyrighted work, independent from any market sector, in which the right of the copyright holder downgrades *vis-à-vis* the social interest in the legitimate use by third parties, and the copyright protection is not enforceable.

Second, the definition of the scope of the right to access could be general or detailed.[107] The former would allow third parties to further use of data for any purpose.

101 J. Drexl, *Data Access and Control in the Era of Connected Devices,* 2018, p. 157.

102 J. Drexl, *On the Future EU Legal Framework for the Digital Economy: A Competition-based Response to the 'Ownership and Access' Debate*, 2017, p. 237.

103 EU Commission, *Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy*, 2017, p. 37.

104 EU Commission, *Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy*, 2017, p. 37.

105 F. Mezzanotte, *Access to Data: The Role of Consent and the Licensing Scheme*, 2017, p. 182.

106 Directive (EC) 2001/29 of the European Parliament and Council on the Harmonization of Certain Aspects of Copyrighted and Related Rights in the Information Society [2001] OJ L167/10.

107 F. Mezzanotte, *Access to Data: The Role of Consent and the Licensing Scheme*, 2017, p. 177.

The latter would establish limitations to the applications for which data are made available. This second solution seems preferred by the doctrine: access should be limited to the purpose of data analysis in the sole interest of the entitled entity, that could outsource the analysis to a third service provider.[108] The purpose of further commercializing the accessed data should therefore be firmly excluded, such possibility remaining an exclusive power of the original data holder.

Third, for the definition of the level of remuneration, inspiration could be taken from the REACH Regulation.[109] In order to safeguard the general interest in reducing the level of chemicals tested on animals, the access system established by such Regulation in Articles 27 and 30 forces the circulation of data animal tests in the private sector. The costs of sharing the information are the result of a negotiated procedure among the data holder and the interested parties. In case of failure of the negotiation, Articles 27 (2) and 77(2) REACH makes sure that a fair and non-discriminatory price is struck by imposing mandatory normative guidance on general assessment principles, adopted by the European Chemicals Agency.

Another source of inspiration for establishing levels of remuneration to obtain access could be FRAND principles, both as an initial point to start drafting both fair and reasonable pricing criteria and procedural steps imposed to the parties interested in access.[110] The fulfilment of a set of compulsory negotiation steps would constitute an initial burden on the data holder, as part of his obligation to license. In particular, the series of steps elaborated by the EU Court of Justice in the Huawei case[111] could

108 J. Drexl, *On the Future EU Legal Framework for the Digital Economy: A Competition-based Response to the 'Ownership and Access' Debate*, 2017, p. 237.

109 Regulation (EC) 1907/2006 of the European Parliament and Council Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Establishing a European Chemicals Agency, Amending Directive 1999/45/EC and Repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1907-20140410.

110 Mezzanotte, *Access to Data: The Role of Consent and the Licensing Scheme*, 2017, p. 178.

111 ECJ, Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, http://curia.europa.eu/juris/liste.jsf?num=C-170/13. In particular, (*i*) para 63: "after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, it is for the proprietor of the SEP to present to that

offer reliable guidance, always bearing in mind that industrial data transfer practices are well different from SEPs litigation. Difficulties may arise from the fact that industrial data arguably do not have an intrinsic value to use as an initial benchmark.[112] The quantification should therefore have as a starting point the specific data usage envisioned by the entity who claims access and the overall context in which data is exchanged.[113]

Some concerns have been voiced on the inevitable difficulties that the implementation of a general or sector-specific access regime model would bring about.[114] The general model has the flaw of being necessarily too vague, therefore a high level of uncertainties would be expected, that would result in a high level of litigation. The sector-specific model bears the risk of requiring much more costs, time and research effort to lawmakers, in order to properly address the heterogeneous fields of the digital economy.

Trying to draw some conclusions, some scholars argue that the best approach to design access regimes to industrial data would be acknowledging the "complementarity between general and stand-alone systems of access."[115]

Going back to the data lock-in loophole between the connected device manufacturer and user, the issue could be address with the adoption of a general legislation on an access right in favor of the economic user of the device.[116] As the Commission

alleged infringer a specific, written offer for a license on FRAND terms [...] specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated;" (*ii*) para 65: "it is for the alleged infringer diligently to respond to that offer, in accordance with recognized commercial practices in the field and in good faith, a point which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics;" (*iii*) para 66: "should the alleged infringer not accept the offer made to it', it must submit 'to the proprietor of the SEP in question, promptly and in writing, a specific counter-offer that corresponds to FRAND terms;" (*iv*) para 67: "where the alleged infringer is using the teachings of the SEP before a licensing agreement has been concluded, it is for that alleged infringer, from the point at which its counter-offer is rejected, to provide appropriate security, in accordance with recognized commercial practices in the field;" (*v*) para 68: "where no agreement is reached on the details of the FRAND terms following the counter-offer by the alleged infringer, the parties may, by common agreement, request that the amount of the royalty be determined by an independent third party, by decision without delay."

112 OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being*, 2015, p. 197.

113 H. R. Weber, *Improvement of Data Economy Through Compulsory Licences*?, 2017, p. 155.

114 F. Mezzanotte, *Access to Data: The Role of Consent and the Licensing Scheme*, 2017, p. 184.

115 F. Mezzanotte, *Access to Data: The Role of Consent and the Licensing Scheme*, 2017, p. 184.

116 Drexl, Hilty, Desaunettes, Greiner, Kim, Richter, Surblyte & Wiedemann, *On the Current Debate on Exclusive Rights and Access Rights to Data at the European Level*, 2016, p. 6.

suggests, fair and reasonable remuneration levels should be established to make sure that competition is enhanced and the manufacturer is not excessively impinged upon.[117] In such manner, the manufacturer's superior bargaining power could be successfully overcome, and the user could analyze data he/she has a legitimate interest in.[118]

Without prejudice to this general and first-to-implement access regime, further sectorial legislation bears the unquestionable benefits of addressing peculiarities of specific contexts of industrial data exploitation.[119] And even "if a general rule would be introduced, [sectorial] concretizations for the concerned environment might be unavoidable," especially because only solutions finely tuned to the specific business context could overcome the typical concerns of compulsory licenses regimes, mainly the compliance with the data holder's right of free economic activities.[120] Therefore, the list of the sectorial access regimes already in force at the EU level will hopefully be extended to correct detectable market-sector failures.

4. Conclusions

In B2B industrial data markets, datasets in the exclusive factual control of some companies must be unlocked to allow wider data circulation to the benefit of other market players and, ultimately, social welfare itself. We analyzed two regulatory approaches proposed by the EU Commission to force such circulation.

Regarding the possible role of EU competition law in enhancing industrial data circulation, many uncertainties arise on how to grant smaller competitors wider access to dominant firms' datasets. Notably, a refusal to grant access to information relevant to competition by a dominant firm could theoretically amount to a violation of Article

117 EU Commission, *Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy*, 2017, p. 39.

118 For instance, "a data-access right can empower a farmer to connect the data collected by the diverse farming machines of different brands to run the farm without in any way restricting the ability of the manufacturers of these machines to commercialize the aggregated data collected from all the farmers on whose land their farming machines are used", see J. Drexl, *On the Future EU Legal Framework for the Digital Economy: A Competition-based Response to the 'Ownership and Access' Debate*, 2017, p. 236.

119 F. Mezzanotte, *Access to Data: The Role of Consent and the Licensing Scheme*, 2017, p. 185.

120 Weber, *Improvement of Data Economy Through Compulsory Licences*?, 2017, p. 154.

102 TFEU. But the current test for assessing the abusiveness of refusal to deals under the case-law of the CJEU seems to weigh against this possibility. Indeed, considering digital data as essential facilities that all competitors should have the right to access appears today a very remote possibility, especially because industrial data could hardly be considered not substitutable resources in the light of the CJEU Bronner case and of the Commission Facebook/WhatsApp merger case. In any case, even if digital data were considered essential facilities for competitors, the Commission would not be in the best position to regulate how access should be granted.

Regarding the legislative implementation of access regimes, compulsory licensing mechanisms could, under certain conditions drafted by EU lawmakers, oblige data holders to grant access to their datasets to other private players against remuneration. Some examples of such access regimes already exist in the EU legal framework. In such manner, lock-in effects in the field of the manufacturing of IoT devices could be solved: manufacturers, who usually maintain control over data generated by the devices, could be obliged to share the data produced with users of the devices. And sector-specific regimes could be designed to fix specific market failures and imbalances in other areas of industrial data markets. Obviously, the difficult task for EU lawmakers would be to design appropriate conditions upon which granting access becomes mandatory for data holders. Also, the mechanisms to determine a fair price to be granted access would be a very delicate issue. But new access regimes would certainly succeed in enhancing industrial data circulation in the EU.

GIULIA FIORELLI*

SENTIDO COMÚN Y SABER CIENTÍFICO: ¿OXÍMORON O BINOMIO POSIBLE?

RESUMO. *Este articulo se ocupa de analizar el impacto sistemático que la utilización creciente de las informaciones tecnico-científicas en el proceso penal moderno provoca en la tradicional capacidad valorativa de los jueces populares, que pueden apelarse solamente al "sentido común" ordinario.*

1. Consideración preliminar

La utilización creciente de las informaciones tecnico-científicas en el proceso penal moderno requiere de interrogarse sobre las posibles interacciones entre progreso tecnológico y participación popular para la comprobación de la responsabilidad penal del imputado.

El punto de observación privilegiado se refiere al impacto sistemático que el saber científico provoca en la tradicional capacidad valorativa de los jueces populares – escabinos – de las *Corte di Assise*,[1] que pueden apelarse solamente al "sentido común" ordinario.

Las incertidumbres que tradicionalmente tienen origen en el paso de las informaciones tecnico-científicas de la "cultura de los expertos" a la "cultura media del

* Research Fellow in Criminal Procedure Law, Faculty of Law, Roma Tre University.

1 Me permito señalar sobre la cuestiòn, G. Fiorelli, *La Corte d'Assise di fronte al potere scientifico*, a cargo de L. Luparia - L. Marafioti - G. Paolozzi, *Dimensione tecnologica e prova penale*, Torino 2019, p. 169 ss.

juez",[2] se vuelven aún más evidentes cuando la valoración de la prueba tecnológica se confía al sentimiento y a las emociones del juez lego.

Resulta evidente que la valoración emotiva de los resultados técnico-científicos aparece como un verdadero "oxímoron" que, en el proceso penal moderno cada vez más devoto de la especialización del saber, provoca el riesgo de favorece el escepticismo sobre la valoración del juez laico y poner en discusión la participación misma del pueblo en la justicia.

En este sentido, ya *Mirjan R. Damaška* – hace más de veinte años – formulaba un interrogante que, a la luz del proceso penal contemporáneo, resulta significativamente actual: ¿pueden las carencias cognitivas del lego justificar que se sustraigan del juicio ciertos tipos de información estadística o científica?[3]

Para responder a esta pregunta resulta imprescindible establecer de qué manera el saber científico puede ser manejado por los jueces populares; en otras palabras, de qué modo se asegura la comprensión, por parte de estos últimos, de los resultados técnico-científicos adquiridos durante el proceso.

La respuesta a este interrogante impone, a su vez, encuadrar el rol asumido por los jueces profesionales respecto a eventuales déficits cognitivos de los que pueden sufrir los jueces legos, y comprender si la formación técnico-jurídica de los primeros termina por influenciar y contaminar el juicio de los segundos. Ello permitirá individualizar el grado efectivo de autonomía de la contribución del juez lego, respecto de aquella que proviene del juez profesional, en la valoración de las informaciones altamente especializadas que ofrecen los expertos en el juicio.

2 Para una profunda reflexión sobre las posibles interacciones entre sentido común y saber científico en el razonamiento del juez, V. Denti, *Scientificità della prova e libera valutazione del giudice*, *Riv. dir. proc*., 1972, p. 414; M. Taruffo, *Senso comune, esperienza e scienza nel ragionamento del giudice*, *Riv. trim. dir. proc. civ*., 2001, p. 687; Id., *Conoscenza scientifica e decisione giudiziaria: profili generali*, Aa.Vv., *Decisione giudiziaria e verità scientifica*, Milano, 2005, p. 5; Id., *La prova scientifica nel processo civile*, *Riv. trim. dir. proc. civ*., 2005, p. 1079 ss.; O. Dominioni, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, Milano, 2005, p. 45 ss. En particular, según M. Taruffo, *Conocimiento científico y estándares de prueba judicial*, *Boletín Mexicano de Derecho Comparado*, nueva serie, 38(114), 2005, pp. 1286-1287, «la extensión de la ciencia en campos del saber que en el pasado eran dejados al sentido común ha provocado un relevante movimiento de las fronteras que separan la ciencia de la cultura media no-científica»

3 Así, M. R. Damaska, *Il diritto delle prove alla deriva*, Bologna, 2003, p. 52.

2. El sentido común en la valoración de la prueba científica

Partiendo del primer interrogante – ¿cómo el saber científico es gestionado por jueces populares? – la preocupación principal se refiere al modo en el cual los sujetos privados de cualquier formación técnico-jurídica pueden valorar una prueba científica.

A tal fin, es necessario, ante todo, establecer qué rasgos caracterizan la capacidad valorativa del juez popular.

Aun considerando la diversidad de formas que la participación popular en la administración de justicia ha asumido en el tiempo,[4] se reconoce que un dato constante es el de la tendencia a "humanizar" el juicio penal, volcando en éste la sensibilidad del pueblo.[5]

Esta mayor sensibilidad en valorar un episodio criminal pasa, necesariamente, por el carácter no profesional de quien se encuentra investido de la función juzgadora de manera ocasional y que no hace del juicio un trabajo de rutina.[6]

El juez lego funciona, por lo tanto, como un elemento integrador del juez profesional,[7] a fin de que la conciencia jurídica (ofuscada por un excesivo tecnicismo) pueda adherirse en mayor medida a los valores socio-culturales del ambiente en el cual se ha cometido el delito.

De este modo, la participación popular en la administración de justicia encuentra su legitimación para aquella categoría de delitos que golpea mayormente la conciencia del pueblo (originariamente, los delitos pasionales y los delitos políticos), cuya comprobación prescinde de la solución de cuestiones procesales consideradas

4 Sin ánimo de exhaustividad, se mencionan sobre las formas de la participación popular en la justicia en el ordenamiento jurídico italiano, A. Avanzini, voce *Corte di assise (ordinamento italiano)*, *Dig. disc. pen.*, III, Torino, 1989, p. 180 ss; A. Casalinuovo, voce *Corte d'assise (diritto vigente)*, *Enc. dir.*, X, Milano, 1962, p. 774 ss.; G. Guadagno, voce *Corte di assise*, *Enc. forense*, Milano, 1958, p. 769 ss; A. Janniti Piromallo, *Il nuovo ordinamento delle corti di assise*, Milano, 1952; G. Lattanzi, *La legge sulle corti d'assise*, Milano, 1952; S. Riccio, voce *Corte Assise*, *Noviss. dig.*, IV, Torino, 1959, p. 920.

5 Sobre el fundamento etico-social de la participación popular en la administración de justicia, como "jurisdicción de equidad", F. Carnelutti, *L'equità nel giudizio penale*, *Giust. pen.*, 1945, III, c. 1.

6 Ampliamente, L. Corso, *Giustizia senza toga. Giuria, democrazia e senso comune*, *Criminalia*, 2008, p. 375.

7 En este sentido, F. P. Gabrielli, *Il giudice dei grandi delitti nel pensiero scientifico e nel movimento legislativo contemporaneo*, *Riv. dir. penit.*, 1931, p. 1401.

particularmente complejas.[8]

Sin embargo, el problema es que hoy ya no existen delitos para cuya comprobación no sea necesario algún conocimiento técnico.

Si bien en el pasado los jueces populares podían valorar fácilmente las pruebas producidas en el juicio, recurriendo simplemente al "sentido común", en razón del escaso desarrollo tecnológico al cual el proceso penal podía acudir para demostrar los hechos relevantes, lo cierto es que hoy los jueces populares se encuentran constreñidos a desarrollar una tarea más ardua que una mera valoración emotiva del suceso. Deben vérselas con el empleo procesal del ADN obtenido del cuerpo de la víctima, con el grado de confiabilidad de una prueba dactiloscópica, con los métodos de reconocimiento de voz humana o, incluso, con técnicas de seguimiento satelital.

A los jurados se les exige confrontarse con informaciones técnico-científicas incluso muy complejas, que solo personas con conocimientos altamente especializados y con capacidades particulares están en condiciones de comprender sin problemas.

En la reconstrucción del hecho criminal, la capacidad valorativa basada sustancialmente en el "sentido común" entra entonces en colisión con las informaciones científicas que se presentan en el proceso, pues los jueces populares no pueden valerse, por ejemplo, de los parámetros usuales empleados para la valoración de la credibilidad de un testimonio, para valorar las informaciones ofrecidas por expertos en balística con las que se intenta reconstruir la trayectoria de un disparo.

Se trata, aquí, de determinar la credibilidad de las informaciones científicas adquiridas en el proceso, credibilidad que se halla ínsita en la garantía de imparcialidad y de competencia del experto y que está conectada, en general, a la conformidad con los protocolos elaborados por la comunidad científica, respecto de los cuales los jueces populares no poseen ninguna preparación.

A los problemas que presenta la posibilidad de confiarse únicamente al "sentido común", se debe añadir que la consagración del empleo de prueba científica – y aún más de prueba digital – provoca un progresivo debilitamiento del principio de la oralidad

8 Es el parecer de G. V. Bocchino, voce *Corte d'Assise*, *Dig. disc. pen.*, Agg., Torino, 2005, p. 255 ss.

de la prueba, del cual el juez popular es una suerte de tutor natural.[9] El juez popular, como ha definido la doctrina más reciente, es una especie de «*San Tommaso del diritto, che crede praticamente solo a ciò avviene davanti ai propri occhi*».[10]

La apelación, cada vez más frecuente, a instrumentos técnico-científicos, corriendo el baricentro del proceso y llevándolo del debate a las investigaciones preliminares,[11] termina por sustraer de los ojos del juez popular importantes momentos de confronte y de clarificación de las cuestiones más complejas. Y la falta de percepción directa del dato probatorio por parte del juez popular no hace más que tornar más difícil – sino prácticamente imposible – la formación de una convicción autónoma que esté en condiciones de garantizar un adecuado aporte participativo en la deliberación final.

En ausencia de la obtencion directa de la prueba, falta esa inmediatez que resulta necesaria para la formación de un estado de ánimo que se traduzca, luego, en una contribución autónoma a la decisión.

3. El "mito" de la mayor capacidad cognitiva del juez profesional

Una vez reconocidas las evidentes dificultades que enfrenta el juez popular para la valoración de las informaciones técnico-científicas que brindan los expertos en el juicio, es importante comprender, entonces, cuál es el rol que asume el juez profesional para asegurar a los jueces populares la comprensión del saber especializado.

A tal fin, puede resultar útil analizar la contraposición entre sistemas de "Corte bifurcada" y sistemas de "Corte unitaria",[12] para establecer si algunas soluciones ideadas para mejorar la relación entre expertos, juez profesional y jurados, pueden proveer

9 Cfr. nuevamente A. Avanzini, voce *Corte di assise (Ordinamento italiano*), 1989.

10 Así, C. Barbieri, *Ancora sulla giuria: una proposta normativa per la Corte d'Assise*, *Giust. pen*., I, 1996, c. 319.

11 En este sentido, L. Marafioti, *Prueba digital y proceso penal*, *Derecho penal y procesal penal*, 2012, p. 1906, según el cual «el baricentro de un proceso basado en la prueba cientifica está cada vez más en la etapa de investigatión preliminar».

12 Sobre el carácter bifurcado o unitario de la Corte, M.R. Damaska, *Il diritto delle prove alla deriva*, 2003, p. 71. En la primera forma, el juez que admite o rechaza las pruebas es distinto de aquel que emite la decisión final; en la segunda forma, el juez lego integra una Corte junto con juez professional. Para una visión completa sobre el tema, M. Montagna, *Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, a cargo de M. Montagna, *L'assassinio di Meredith Kercher. Anatomia del processo di Perugia*, Roma, 2012, p. 259 ss.

indicaciones útiles para la relación que se instaura entre peritos, juez profesional y juez lego en la experiencia italiana.

En un proceso celebrado ante la "Corte bifurcada", como el juicio por jurado estadounidense,[13] el rol del juez profesional respecto al juez lego aparece bien definido: al primero se le pide, como se sabe, una valoración preliminar sobre la admisibilidad del testimonio experto,[14] a fin de sustraer al jurado de cualquier eventual información pseudo-científica. La bifurcación presenta al juez lego la evidencia de forma ya "purificada", permaneciendo este ignorante de la información que no logró pasar el filtro de reglas de exclusión.

En particular, el juez profesional realiza un juicio sobre la fiabilidad de la prueba científica, según los parámetros de la refutabilidad, de la revisión por parte de la comunidad científica, del conocimiento de la tasa de error y de la aceptación general en la comunidad de expertos.[15]

A este filtro preventivo de admisibilidad le sigue, luego, la predisposición de instrucciones *ad hoc*, no solo sobre la ley aplicable, sino también sobre los conceptos esenciales necesarios para el jurado para comprender y valorar las informaciones técnico-científicas.

13 Para una análisis del proceso penal estadounidense, R. N. Jonakait, *The American Jury System*, Yale University Press, 2003, p. 185 ss.; N. Vidmar-S. Diamond, *Juries and expert evidence*, in *Brooklyn Law Review*, 66(4), 2001, p. 1121 ss.; S. L. Albertson, *Effect of Jurors' Race on Their Response to Scientific Evidence*, LFB Scholarly Publishing LLC, 2012, p. 53 ss.

14 Se pregunta, en particular, de qué manera el saber científico puede ser manejado por los jueces populares, V. P. Hans, *Judges, Juries, and Scientific Evidence*, *Journal of Law and Policy*, 2007, Vol.16(1), p. 19 ss.: «How well do laypersons understand complex scientific and technical testi-mony presented in this adversarial context? If they need help, how can jury assistance be integrated into the unique setting of the jury trial?». Del mismo modo, Sharis S. Diamond, *How Jurors Deal With Expert Testimony and How Judges Can Help*, *Journal of Law and Policy*, 2007, Vol.16(1), p. 47 ss.: «What may happen if jurors indeed cannot competently evaluate expert testimony?».

15 Tales criterios, que en su conjunto conforman el denominado "estándar Daubert" (desde el caso *Daubert, et al. c. Merrell Dow Pharmaceuticals* en 1993), resultan ser: i) la corroborabilidad empírica y falseabilidad de la teoría científica en que se sustenta su producción; ii) la posibilidad de determinar el porcentaje de error relativo a la técnica empleada; iii) la existencia de un control ejercido por otros expertos; peer review sobre la disciplina en cuestión; iv) la existencia de consenso general de la comunidad científica acerca de la validez de los planteamientos sobre los que se asienta; v) la necesidad de que exista una conexión directa entre la prueba y los hechos de los que trata el caso concreto.

El juez profesional, con respecto al colegio de los jurados, asume, de hecho, un rol fundamental de mediador entre el experto y el jurado, a fin de "traducir" en un lenguaje común todas aquellas informaciones no directamente comprensibles para el hombre medio. Se instaura, de este modo, un diálogo entre el perito y el juez, para que este último comprenda plenamente las reglas científicas que se refieren al caso, con el objeto de poder dar luego al jurado instrucciones probatorias eficaces.

Análogos defectos comunicativos entre los expertos y los jueces populares se presentan en el interior de la "Corte unitaria", como es la *Corte di Assise*.

La elección de fundir el elemento técnico con el elemento lego, al interior de una "Corte unitaria", hizo menos nítido el rol del juez profesional y más arduo comprender cuánta autonomía de juicio podría llegar a tener, de manera efectiva, el juez lego en la decisión en el recinto del Tribunal, de frente a las opiniones expresadas por los magistrados.

La investigación sobre este punto se presenta particularmente compleja, considerando el hecho de que las dinámicas decisionales, al interior del sistema de escabinos, están cubiertas por el secreto de el recinto del Tribunal.[16] No obstante el secreto de est recinto, no es difícil pensar, de todos modos, que son los jueces profesionales los que "guían" correctamente la actividad valorativa de los jueces populares, según una relación que copia aquella que se da entre "docente y discente".[17]

Sin embargo, si bien por un lado aparece innegable el rol "docente" del juez profesional, al menos en aquello que se refiere a las cuestiones técnico-jurídicas, por el otro lado es también innegable que, frente a las cuestiones técnico-científicas, el mito de la mayor capacidad cognitiva del juez profesional termina por vacilar.

Nuevamente resultan útiles las palabras de *Mirjan R. Damaška*: «¿acaso el juez medio no está igualmente confundido frente a complejos problemas matemáticos, o perplejo ante arcanas intuiciones científicas?».[18] En efecto, es innegable que la ciencia

16 Sobre esta dificultad, M. Montagna, *Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, 2012, p. 269; M. Pisani, *Il segreto della camera di consiglio: profili penalistici*, *Riv. it. dir. proc. pen*., 2006, p. 402.

17 La sugerente expresión para esta relación es de L. Pepino, *La Corte di Assise alla prova dei fatti*, *Quest. giust.*, 1982, p. 119.

18 Así, se pregunta M. R. Damaska, *Il diritto delle prove alla deriva*, 2003, p. 52.

moderna coloca, frente a todos los jueces "generalistas", informaciones que solo los expertos pueden comprender sin dificultad.

Por lo tanto, frente a las informaciones técnico-científicas, «tanto los jueces profesionales como los legos son profanos, con iguales dificultades, en búsqueda de explicaciones,[19] o bien, recurriendo a la relación académica, ambos son "discentes" ante el experto que es el "docente".

El único elemento diferencial, incluso en clave evolutiva, puede hallarse en la cada vez mayor especialización y formación científica que se requiere del juez profesional respecto del juez lego.

De hecho, es importante potenciar el rol de "intermediario" del juez profesional, favoreciendo su especialización mediante la institución de oportunos cursos de formación y perfeccionamiento, obligatorios, para que puedan acumular gradualmente el conocimiento técnico necesario para neutralizar el riesgo de que los jueces populares sean llevados a engaño por informaciones pseudo-científicas.

Por lo tanto, se impone un recorrido de crecimiento cultural que deberá desarrollarse, principalmente, a través del estudio y la actualización profesional.[20] De todas maneras, la cultura que debe ser adquirida no es – y no debe ser – una cultura científica "de mérito" sino, antes bien, una «*cultura dei criteri*»:[21] el juez no debe transformarse en un científico sino que debe saber valorar la validez de los métodos científicos utilizados.

A estos fines, la jurisprudencia que arriba del otro lado del océano puede brindar preciosas indicaciones de método para nuestro operador que, hallándose en presencia de una prueba científica, debe analizar su fiabilidad y su idoneidad probatoria con relación al hecho específico.

19 Nuevamente, M. R. Damaska, *Il diritto delle prove alla deriva*, 2003, p. 52.

20 En este sentido, F. Caprioli, *La scienza "cattiva maestra": le insidie della prova scientifica nel processo penale*, *Cass. pen.*, 2008, pp. 3526-3527.

21 Para un análisis sobre este concepto, O. Dominioni, *La prova penale scientifica*, Milano, 2005, p. 69 ss.

4. El Colegio técnico de expertos y el riesgo de desnaturalizar la función del juez profesional

En respuesta a las exigencias de especialización del órgano juzgador penal, es interesante traer a colación la propuesta de introducir un "colegio técnico",[22] que se remite a la doctrina alemana del "*Sachverstandige laienrichter*". Vale decir, un colegio juzgador compuesto por jueces profesionales e integrado con la participación de jueces-peritos legos, que, en función decisoria, participan en la deliberación de la sentencia – en colaboración y con paridad de votos – con los jueces profesionales.

A través de la institución de colegios técnicos se armonizarían las exigencias jurídicas con las científicas, conciliando la necesidad de especialización del juez profesional con el principio constitucional de la participación del pueblo en la administración de justicia: los expertos, aun revistiendo cualidades esencialmente técnicas, responderían, en fin, a los requisitos de laicidad y de ajenidad respecto de la magistratura profesional ordinaria.[23]

Aun cuando pueda parecer sugestiva, esta propuesta plantea dos cuestiones críticas.

La elección de integrar el colegio juzgador con jueces-peritos legos produciría, sobre todo, el efecto de desnaturalizar la función del juez profesional.

Como es sabido, en el sistema italiano el juez puede valerse de la ayuda de un experto, pero, en virtud del principio de la libre convicción y de la prohibición de delegar su función en el conocimiento científico externo, no está obligado a aceptar sus conclusiones. Diversamente, la inserción de los peritos en el interior del colegio juzgador empujaría al juez a confiarse completamente a las conclusiones ofrecidas por el juez-perito lego, acentuándose así el riesgo de que se produzca una suerte de acomodamiento al *ipse dixit* del experto, que terminaría por ser el verdadero juez.

Pero las perplejidades mayores que genera esa propuesta se hallan en el plano

22 Entre los autores que hacen referencia a esta antigua propuesta, G. Guadagno, voce *Corte di assise*, *Enc. forense*, 1958, pp. 773-774; S. Riccio, voce *Corte Assise*, *Noviss. Dig.*, 1959, p. 920; P. Curatolo, *Sistema attuale e proposte di modificazione (composizione del collegio e giudizio)*, Aa. Vv., *Problemi della Corte d'assise. Convegni di studio "Enrico De Nicola". Problemi attuali di diritto e procedura penale*, Milano, 1964, p. 122; G. Grasso, *Giuria e corte d'assise: pigrizia, incapacità, malafede del legislatore*, Torino, 1974, p. 318.

23 En este sentido, A. Foschini, *Osservazioni sulla riforma della Corte di Assise*, Aa.Vv., *Problemi della Corte d'assise. Convegni di studio "Enrico De Nicola". Problemi attuali di diritto e procedura penale*, Milano, 1964, pp. 58-59.

de las garantías de la defensa: si el experto entrase a formar parte del colegio como juez y, por lo tanto, se le confiase a aquél no una función consultiva sino más bien una decisoria, su valoración técnica en el recinto del Tribunal, al momento de la decisión, resultaría sustraída de cualquier forma de contradictorio. En el secreto de el recinto del Tribunal, el experto terminaría por guiar y condicionar al juez profesional hacia una nueva valoración técnica de la prueba, sin que la defensa ni la acusación tengan posibilidad de replicar siquiera mínimamente.[24]

5. Conclusión

Pues bien, frente a las evidentes dificultades que el juez popular encuentra en la valoración de una prueba técnico-científica, el único modo de mejorar su comprensión del conocimiento altamente especializado y de facilitarle el manejo del mismo es aumentando al máximo las dosis de contradictorio.[25]

Al respecto, es importante precisar que también el rol del contradictorio debe ser repensado en esta materia, pues, en la mayoría de los casos, se traducirá en un debate sobre las opiniones de los expertos o, más aún, en un juicio "póstumo" de idoneidad del *modus operandi*, tratándose quizás de un reflujo en sede de debate de los resultados de una comprobación técnica irrepetible.[26]

Afirmada la exigencia de adaptar la tutela del derecho al contradictorio a la peculiaridad de la prueba científica, es sólo a través de aquél que los jueces populares podrán adquirir mayores espacios de valoración, funcionales para cubrir lagunas cognitivas especializadas, impidiendo así que las informaciones pseudo-científicas se

24 Sobre todas estas cuestiones, P. Curatolo, *Sistema attuale e proposte di modificazione (composizione del collegio e giudizio)*, 1964, p. 122.

25 En este sentido, F. Caprioli, *La scienza "cattiva maestra": le insidie della prova scientifica nel processo penale*, 2008, p. 3530; P. Moscarini, *Lo statuto della "prova scientifica" nel processo penale*, *Dir. pen. proc*., 6/2015, p. 653; P. Tonini, *Prova scientifica e contraddittorio*, *Dir. pen. proc*., 2003, p. 1459; J. Vuille-L. Luparia-F. Taroni, *Scientific evidence and the right to a fair trial under Article 6 ECHR*, *Law, Probability and Risk (2017) 16*, pp. 55-68; L. Marafioti, *Prueba digital y proceso penal*, 2012, p. 1906, según el cual «el mejor mètodo experimentado hasta ahora en el proceso es el contradictorio, que asume el rol de defensa clave contra posibles distorsiones».

26 Sobre la "metamorfosis" del contradictorio, nuevamente L. Marafioti, *Prueba digital y proceso penal*, 2012, p. 1906.

infiltren a escondidas en el proceso.

Ello le permite al juez popular, de manera más fácil, la formación de una convicción autónoma que pueda traducirse en un aporte emotivo adecuado a la deliberación final de la sentencia, lo cual resultará ser el último baluarte contra el riesgo de un proceso cada vez más allanado a la ciencia.

LUCA LOSCHIAVO*

LOOKING AT THE EDICT OF ROTHARI

Between German Ancestral Customs and Roman Legal Traditions

ABSTRACT. *The essay takes up the debate on the nature of the most ancient Lombard legislation (whether it is really 'Germanic' or influenced by the Roman legal tradition). After more than two hundred years of discussion, a satisfactory solution is still waiting to be found. The research of the last decades on the early medieval Europe has deeply changed the perspective from which to look at the ancient norms. Legal historiography can no longer ignore the contribution of the studies of ethnogenesis and not even how much we know about the complex phenomenon of vulgar Roman law. Through some examples especially related to criminal law and the trial, these pages intend to show how useful it is to address the subject according to a different approach. Particurarly strong seems to be the imprint of the late Roman military law on the Longobard legislature.*

1. Framing Lombard law

How far do Lombard laws – and especially the Edict of Rothari – reflect the ancestral customs of that Germanic people and how far do they reveal, on the contrary, the influence of Roman legal traditions? This question is a 'classic' theme of debate for legal historians (in Germany and Italy in particular). Other questions are traditionally connected to it: did an earlier Lombard law book exist prior to the initiative of King Rothari in 643? What did writing down the ancient customs in Latin really mean? Was

* Full Professor of History of Medieval and Modern Law, Faculty of Law, Roma Tre University.

the Edict of Rothari a 'personal' law code (*i.e.*, for Lombards only) or was it thought of as a 'territorial' one? After more than two hundred years of discussion a satisfactory solution is still waiting to be found. This is certainly not the place to go over the whole series of contributions of scholars who have taken part in this long debate. It is however necessary briefly to remind ourselves of the principal efforts in the past to answer such questions.

First, there were the German scholars who – during the nineteenth century – began to study the Lombard heritage. It was precisely at this time, at the end of a long process, that the modern German state was being formed: these scholars were seeking the original roots of the common juridical culture of that state. They felt it was their duty to provide a historical foundation for the construction of a new, national, German law. In their opinion, such common roots could be found in the Middle Ages. In particular, they thought that they would be able to recognize what they called an *urgermanisches Gemeinrecht* in Salian law (the *Pactus legis Salicae*) and in Lombard legislation.[1] So German scholars looked at Lombard law with the idea that it reflected (perhaps better than the Salian *Pactus* itself) the *incunabula* of ancestral German law (immediately arguing amongst themselves whether or not the Lombards belonged to the east or west group).[2] With as much erudition as imagination, they involved themselves in studying Lombard norms. It is no surprise that they were not at all interested in words or concepts taken from Roman law. Such an approach was reinforced by the flattering judgment of

1 See G. Gaudian, 'Gemeindeuthsches Recht im Mittelalter?', *Ius Commune* 2 (1969), pp. 33-42, and now the volume of L. F. Shäfer, *Juristische Germanistik. Eine Geschichte der Wissenschaft vom einheimischen Privatrechts* (Frankfurt a. M., 2008).

2 It will be sufficient to remember here scholars like M. A. v. Bethmann-Hollweg, in *Der Civilprozeß des gemeinen Rechts in geschichtlicher Entwicklung* IV.1 (Bonn 1868 [= Aalen, 1959]), pp. 293-294, especially p. 296: "*Die Langobarden mehr von ihrer ursprünglichen Verfassung und Sitte als die genannten Völker* [Vandals, Burgundians, Goths] *in die neue Wohnsitze mitbrachten*;" J. Ficker, 'Das langobardische Recht und die skandinavischen Rechte', *Mitteilungen des Instituts für österreichische Geschichtsforschung* 22 (1901), pp. 1-50); and above all H. Brunner, in *Deutsche Rechtsgeschichte* I (Leipzig 1906[2]), pp. 529-538. Earlier literature can be found in A. Solmi, 'Diritto longobardo e diritto nordico', *Archivio Giuridico* 61 (1898), pp. 509-510. More recently, the prevailingly Nordic character (be it Scandinavian or Saxon) of Lombard law has been defended by M. Scovazzi, *Le origini del diritto germanico* (1957, now in Id., *Scritti di storia del diritto germanico* I, Milan 1975), pp. 57-60; F. Bayerle, *Leges langobardorum. Einleitung*, (Germanenrechte, N. F., Witzenhausen 1962), pp. 11-12 and H. Conrad, *Deutsche Rechtsgeschichte. I. Frühzeit und Mittelalter* (Karlsruhe 1962[2]), p. 65.

an 'authority' like that of Heinrich Brunner who recognized in the Edict of Rothari the implementation of a clearly designed project with remarkable juridical consciousness.[3] This way, ideas about the authentic 'German' substance of the Edict became embedded in the historiography of the subject. They appear for example in text-books of the period 1950-1970, such as those of Conrad in Germany and Calasso or Astuti in Italy.[4]

The nineteenth century was not yet over when Italian scholars too began debating the question about how closely or not Lombard laws followed 'German' models.[5] However the approach to the problem was a quite different one. Italian scholars were also not free from a certain spirit of nationalism, but – as opposed to their German colleagues – they had as main goal the identification of the so-called 'sources' of the Lombard Edicts. Apart from a noteworthy exception about which more will be said later, most of them concentrated on recognizing what in Lombard laws was taken from the Roman juridical tradition. In practice, they assumed that it was their duty to demonstrate how the barbarians – although the winners – at the moment of giving themselves a legal system (albeit primitive) had to accept models of the 'beaten but superior' Latin civilization. We may take as an example an essay by Nino Tamassia, who in 1889, with infinite patience and every sort of textual comparison, tried to show how most of the chapters of the Edict of Rothari were composed by selecting terms, phrases and concepts from at least three great juridical traditions: Roman (both from pre-Justinianic law and from the *Corpus Iuris Civilis*); Gothic (that is both the Visigoths and the Ostrogoths) and finally ecclesiastical.[6]

Tamassia's essay developed ideas previously raised by Nani (1877) and Del Giu-

3 Brunner, *Deutsche Rechtsgeschichte* (n. 2), p. 531.

4 Conrad (n. 2) p. 65; F. Calasso, *Medio Evo del diritto* (Milan 1954), for example p. 108; G. Astuti, *Lezioni di storia del diritto italiano. Le fonti* (Padova 1953 [repr. with *addenda*1968], pp. 86-103; 'Spirito del diritto longobardo: il processo ordalico' (1973), now in Id., *Tradizione romanistica e civiltà giuridica europea* I (Roma 1984), pp. 83-104.

5 Note C. Nani, *Studi del diritto longobardo. I. Le fonti del diritto longobardo* (Turin 1877); and P. Del Giudice, 'Le tracce di diritto romano nelle leggi longobarde' (1885-7), in Id., *Studi di storia e diritto* (Milan 1889), pp. 362-470.

6 N. Tamassia, 'Le fonti dell'Editto di Rotari' (1889), in Id., *Scritti di storia giuridica* II (Padua 1967), pp. 181-260, especially p. 185.

dice (1886-7),[7] and in the years to come, it was followed by a series of successors up to the end of the 1960s: von Halban, Giardina, Besta, Vismara, Cavanna, Paradisi.[8]

Different and quite exceptional, even unique, was the approach to Rothari's legislation by Gian Piero Bognetti. For more than thirty years (1931-1963) he investigated the world of the Lombard people, deeply convinced of the need to study the Lombard question as a whole. His work is today collected in four thick volumes devoted to the Lombard period.[9] In his opinion, normative items – such as the *Edicta* – can be understood only by considering Lombard history and civilization in all their complexity. Bognetti underlined the importance of their settlement in the Pannonian region at the beginning of the sixth century in the foundation and development of Lombard civilization. During those decades, the Lombards came repeatedly into contact with Byzantium, by becoming *milites foederati*. Lombard institutions – to start with one of the most typical of them, the *fara* – would thus be adapted on a Byzantine military model. Over and above purely formal similarities, however, the most significant loan from Roman law was the adoption of Roman military models, which influenced many areas or aspects of Lombard public law. Rules regulating relations between private citizens, on the contrary, reflected rather traditional Germanic customs.

2. Re-starting the debate

Apart from Bognetti (to whom we shall return), both the 'Germanistic' and the 'Romanistic' approaches leave us unsatisfied. In fact, looking at the first, it cannot be

7 See n. 5 above.

8 A. von Halban, *Das römische Recht in den germanischen Volksstaaten* II (Breslau 1901), pp. 74-80; C. Giardina, 'L'Editto di Rotari e la codificazione di Giustiniano' (1937), now in Id., *Storia del diritto* I (Palermo 1963) pp. 9-61; E. Besta, 'Le fonti dell'Editto di Rotari', in *Atti del I Congresso internazionale di studi longobardi* (1951) (Spoleto 1953), pp. 51-59; G. Vismara, 'Cristianesimo e legislazioni germaniche. Leggi longobarde, alamanne e bavare' (1967), now in Id., *Scritti di storia giuridica* I (Milan 1987) pp. 451-511; A. Cavanna, 'Nuovi problemi intorno alle fonti dell'Editto di Rotari' (1968), now in Id., *Scritti (1968-2002)* I (Napoli 2007), pp. 3-110; B. Paradisi, 'Il prologo e l'epilogo dell'Editto di Rotari' (1968), now in Id., *Studi sul medioevo giuridico* I (Roma 1987), pp. 189-220.

9 G. P. Bognetti, *L'età longobarda* I-IV (Milan 1966-8); for a thoughtful recent reconsideration of the figure and the work of Bognetti, see P. Delogu, "Giampiero Bognetti, storico della civiltà", in Id., *Le origini del medioevo. Studi sul settimo secolo* (Roma 2010), pp. 365-381.

denied that the development of modern fields of research (archaeology, anthropology, ethnography, etc.) has in recent decades demolished a large part of the basis on which those scholars depended. Today, we know that the supposed original unity of the Germanic tribes never existed. We know that the migration processes of barbarian peoples almost always consisted of the transfer of tribal groups held together by a temporary common interest, but not necessarily with any shared ethnicity. We also know that the relationship between barbarian peoples and the Roman world into which they moved into was not normally a conflictual one. On the contrary, there was a very fluid situation with continuous opportunities for experiencing new and different forms of coexistence.[10] Consequently, many earlier certainties are now disputed.

On the other hand, if we consider the studies which concentrated on searching for the sources of each of the Edict's chapters, they leave us dissatisfied too. Although based on the solid ground of textual criticism, such works only tell us about 'formal' or 'external' aspects of the Edict. They lack, in other words, any effort to reach the core of the problem, which remains the understanding of the formation of a new civilization.

Anyway, earlier German and Italian historiography present the same fallacious starting point: Lombard law was studied in the misleading framework of a 'collapse of civilization.' Such a perspective conditioned the whole debate, quite apart from the ideological influences which created an intellectual barrier between the two groups of scholars. It is probably not by chance that interest in our theme has diminished since the end of the Second World War, even though no generally accepted conclusion has been reached.[11] In Italy, at least, questions about German or Roman prevalence in Lombard legislation seem today to have been abandoned by legal historians and become in practice a field for 'pure' historians.

But in recent years, quite unexpectedly, the debate has been re-opened, the 'det-

10 See, especially, W. Pohl (ed.), *Kingdoms of the Empire. The Integration of Barbarians in Late Antiquity*; and 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*, both in the series 'The Transformation of the Roman World', nos. 1 and 13 (Leiden & Boston 1997 and 2003); and the essays now collected in W. Pohl, *Le origini etniche dell'Europa* (Rome 2000) (especially on Lombards, essays 6 and 8).

11 So Cavanna (n. 8), p. 16.

onator' being the publishing, during the 90s of the last century, of important works by Ennio Cortese and by Maurizio Lupoi. Both these scholars have tried to put the whole question in new terms, transferring their attention from the mere textual datum to the problem of juridical relationships.

In a number of recent works,[12] Cortese, picking up an earlier, detailed and still important study,[13] has repeated his criticism of a too simple opposition between a Romanistic and a Germanistic vision, as also of research which concentrates exclusively on recognizing normative (or purely linguistic) loans in chapters of the Edict of Rothari. Much more interesting to him are the wide perspectives opened up by discovering – through the primitive formulations contained in the Edict – Vulgar Roman practices widespread in both the eastern and the western empire. Such practices must have provided the context in which the Lombards came to terms with the Roman empire and with its inhabitants. Cortese has reached that opinion by studying a number of legal forms generally believed to be genuinely Germanic. In contrast to Bognetti, he has paid particular attention to private law.

Lupoi, in his volume entitled *The Origins of the European Legal Order*,[14] paints a picture of the whole of the legal society of early medieval Europe. Drawing on his comparatist training and accepting the now well established research perspective of *The Transformation of the Roman world*, Lupoi has tried to identify the outlines of 'a common European legal system' over and above obvious regional or national specificities. Created after the collapse of late imperial Roman institutions, such a system would have served both old and new inhabitants of the Roman world.

In this context and despite the existence of other peoples who founded kingdoms, the Lombard experience, in the overall view of Lupoi, shows some peculiarities: the Lombard people imposed themselves in Italy outside the system of *hospitalitas* and

12 'Thinx, gairethinx, thingatio, thingare cum gaida et gisil. Divagazioni longobardistiche in tema di legislazione, manumissione dei servi, successioni volontarie' (1988); 'In margine alla ristampa di G. G. Archi, L'"Epitome Gai"' (1991); 'Il processo longobardo tra romanità e germanesimo' (1994), now all in Id., *Scritti* I (Spoleto 1999), and, above all, *Il diritto nella storia medievale* I (Rome 1995), pp. 125-172.

13 E. Cortese, 'Per la storia del mundio in Italia' (1955-6), now in Id., *Scritti* I (n. 12), pp. 3-154.

14 English translation (Cambridge 2000), of the original *Alle radici del mondo giuridico europeo* (Rome 1994).

maintained a position of outright rejection of Roman imperial models and the institutions of the Church. This rejection – as Lupoi nevertheless emphasizes – was however of Roman 'socio-political' models. On the other hand, the Lombard people had an open mind *vis-à-vis* the 'rules regulating Roman society' and some of the principles of Roman legal culture. In conclusion, there should be valid for the Lombard people also Lupoi's general idea that "'Germanic' law did not exist, but Roman law no longer existed either. What did exist was an oral culture which was moving towards writing, and a written culture that was moving towards orality" (p. 25).

As already mentioned, the interventions of Cortese and Lupoi have re-opened the debate. In particular, an answer as rapid as it is polemic has been given by some contemporary scholars of German law; with the declared intention of reacting against what he considered a radical, but not always justified, questioning of traditional views about the ancient Germanic world, Gerhard Dilcher has asked the following, provocative question:[15] "did Germanic peoples have a law?," organizing a meeting among many of the most important scholars of the *leges barbarorum*.[16] Tracing the conclusions of that meeting, Dilcher clearly appreciates in general the scale of Lupoi's enterprise, and in particular the attention paid to the return to an oral culture, but does not accept the absolute denial of the existence of a German law. On the contrary, he rejects the thesis of Cortese on the role played by Vulgar Roman legal practice.

3. The mystery of the gairethinx

It is clearly not a coincidence that Dilcher chose the Lombard figure of the *gairethinx* as the theme for his paper at that meeting. It is indeed to the *gairethinx* that Cortese pays particular attention in his analysis of the Edict of Rothari.

15 G. Dilcher, 'Leges – Gentes – Regna. Zur Rolle normativer Traditionen germanischer Völkerschaften bei der Ausbildung der mittelalterlichen Rechtskultur: Fragen und Problemen', in G. Dilcher & E.-M. Distler (edd.), *Leges – Gentes – Regna. Zur Rolle von Germanischen Rechtsgewohnheiten und lateinischer Schrifttradition bei der Ausbildung der frühmittelalterlichen Rechtskultur* (Berlin 2006), pp. 15-42, at p. 22. Note also the other contributions by Dilcher, and those by Jürgen Weitzel and Karol Modzelewski.

16 The proceedings are now collected in the last mentioned volume. It is possible to recognize similar approaches in some of the papers of the earlier volume edited by J. Weitzel, *Hoheitliches Strafen in der Spätantike und im frühen Mittelalter* (Cologne etc. 2002).

The term occurs more than once. On the traditional view, it refers to the army as assembly, in the form described by Tacitus, as the location for decisions. According to Cortese, it means rather a 'formal act' used to ratify and confirm certain disposition acts.[17] It is also, according to Cortese, noteworthy that some Lombard procedures are similar to typical schemas of the ancient Roman *ius ciuile*. Thus in Roth. ch. 224 we read that an owner who wished definitively to discharge a freedman had to do so three times, after as many (fictitious) sales, in the presence of *gaidos* (probably witnesses) and *gisil* (a guarantor).[18] The procedure seemed to him too similar to the three *mancipationes* in the presence of five witnesses and one *libripens*, prescribed by Gaius in emancipating a *filiusfamilias* (*Institutiones* I.132 and *Liber Gai* I.6.3-4), to be a simple coincidence. For Cortese, we obtain the same impression of the *gairethinx* as a Germanic mask of the Roman *mancipatio*, if we look at other chapters of the Edict where the *gairethinx* is mentioned.[19] Once the same legislator proposes the equation *gairethinx id est donatio* (ch. 171).[20] The problem is that a reference to the Roman *donatio* runs the risk of being misleading, since the classical *donatio* changed out of all recognition in the late Roman world. Rather, for Cortese, the passage is useful in directing our attention to the common elements that occur in every mention of the *gairethix* by Rothari. The involvement of a *gairethinx* was thus necessary in disposing of an inheritance in the absence of a son (Roth. chs. 171-4). It is, for Cortese, once more possible to recognize the *mancipatio* requested for a *testamentum per aes et libram* (and is it also possible to compare the Lombard *gisel* with the Roman *familiae emptor* of Gaius, *Inst.* II.103).

When, in a quite different contest, the king talks of having used a *gairethinx* to

17 See, in particular, *Il diritto* (n. 12), pp. 137-142.

18 De manumissionibus. *Si quis servum suum proprium aut ancillam suam liberos dimittere voluerit, sit licentia, qualiter ei placuerit. Nam qui fulcfree et a se extraneum, id est amund, facere voluerit, sic debit facere. Tradat eum prius in manu alteri homines liberi et per gairethinx ipsum confirmit; et ille secundus tradat in tertium in eodem modo, et tertius tradat in quartum. Et ipse quartus ducat in quadrubium et thingit in gadia et gisil, et sic dicat: de quattuor vias, ubi volueris ambulare, liberam habeas potestatem. Si sic factum fuerit, tunc erit amund, et ei manit certa libertas: postea nullam repetitionem patronus adversus ipsum aut filius eius habeat potestatem requirendi. …*

19 So also Cavanna (n. 8), pp. 100-103 on Roth. ch. 222.

20 *Si quis se disperaverit … filius non possit habere, et res sua alii thingaverit, posteaque eum contegerit filius legitimus procreare: omne thinx, quod est donatio, quod prius fecerat rumpatur … .*

confirm the promulgation of his Edict (Roth. ch. 386), it will be sufficient – says Cortese – to consider the meaning of such a promulgation to recognize that, even in this case, we have to do with something like a very important disposition deed. The king 'gives' to his people the legislation, visibly embodied in a book. Here – as in all the other cases – a *gairethinx* is necessary in order to confirm a particular disposition deed. Just like other acts of unreciprocated liberality, in a contest dominated by family relationships, these unilateral acts needed particular accompanying rituals.[21] Etymology is invoked in support of such interpretation: Cortese asks us to consider the root which connects the Lombard *thinx* to the modern German *Ding* or English *thing*.[22]

According to Dilcher, however, such a reconstruction would be meticulous in terms of individual 'legal-philological arguments,' but in fact far removed from any comprehension of German-Lombard reality.[23] In particular – continues Dilcher – Cortese's analysis fails to consider the specificity of a popular culture rooted in orality. On his part, Dilcher minimizes the 'authoritative' role of Rothari as King and stresses the pact-like nature of the Edict of AD 643. He insists on the active role played by the army in the legislative process and tries to demonstrate that the *gairethinx* mentioned in the so-called Epilogue (Roth. ch. 386) is nothing other than an ancestral rite, which had to be enacted in the context of the Germanic army as assembly. In other words, the meaning of *gairethinx* is tied to what other Germanic peoples call a *Ding*: an assembly which combines judicial and legislative functions and where not only decisions are taken, but also ethnic and religious identity takes shape.[24]

Even Dilcher has to admit other and different meanings for the same word *gairethinx* in the other cases in which it is employed in the Edict. In one such case – as

21 Cortese, *Il diritto* (n. 12), pp. 161-166, finds a similar logic, *i.e.*, to ensure *firmitas*, and the same affinity with Roman procedures in other typical Lombard forms, such as the *launegild* (similar to the *donatio nummo uno*) or the *wadia* (with the name and function of the *vadimonium*).

22 See again Cortese (n. 12), p. 137.

23 "*per gairethinx secundum ritus gentis nostrae confirmantes.*" *Zu Recht und Ritual im Langobardenrecht*, in *Leges – Gentes – Regna* (n. 15), pp. 419-448, esp. p. 423.

24 Dilcher, (n. 15), pp. 22-23, here refers to the vast study of J. Weitzel of the Frankish *Ding*: *Dinggenossenschaft und Recht. Untersuchungen zum Rechtsverständnis im fränkisch-deutschen Mittelalter* I-II (Cologne 1985).

we have seen – the legislator himself proposes the (not altogether satisfactory) gloss *donatio*.[25] Anyway, neither in the chapters about inheritance nor in those about emancipation do we find any mention of the army gathered together. Moreover, it remains only a hypothesis that the obligatory presence of witnesses and *gisel*, prescribed by Rothari, takes the place of the ancient army assembly (for Dilcher the Lombard *Ding* = *Gairethinx* is represented in a famous – but disputed – image of Agilulf's majesty, used for the last time precisely for the promulgation of the Edict in Pavia in AD 643).[26]

Apparently, however, in terms of legal meaning, the conclusions reached by Dilcher are not that distant from those of Cortese: both recognize in the *gairethinx* a ritual available for a variety of transactions: it pursues the juridical goal of giving legal validity by means of public recognition. Where they differ is in defining the context in which these norms were formed and where they operated. For Cortese, the *gairethinx/mancipatio* is once more a case of the emergence of very ancient practices that had remained long in use in the post-Roman world. These practices had spread along with the military and economic expansion of Rome. The Lombard people could have got to know of them even before their arrival in Italy. And the use of such ancient legal forms was perhaps for them the easiest and most efficient way to move into the (for them) new world characterized by landed property, a developed agricultural economy, extra-familial labour, individual or extra-gentilicial relationships. For Dilcher, on the other hand, Rothari's norms presuppose a deep fracture between the late Roman world

25 According to Dilcher, (n. 23) p. 426, where the Edict claims the publicity of the *gairethinx* (*non absconse*: Roth. c. 172) it would be outside of the schema of the Roman *donatio* and nearer to Germanic forms of publicity. One could nonetheless note here perhaps also the echo of the Constantinian constitution of the year 323 (*CTh* 8.12.1.1-2 = *CJ* 8.53.25), present in the Visigothic and Burgundian traditions (in Lex Rom.Burg. 22.4 we find for example *neque id occulte* which corresponds very well to Rothari's expression *non absconse*).

26 In an Appendix to his article, Dilcher dedicates a specific *excursus* to the meanings of the Plate of Agilulf: *Die Agilulf Platte als Zeugnis des langobardischen Gairethinx*, (n. 15), pp. 449-458. On the other hand, Dilcher's interpretation of Roth. ch. 386 is followed by K. Modzelewski, *L'Europa dei barbari* (Turin 2008), p. 55. The scene imprinted on the famous plate actually lends itself to conflicting interpretations (see, for example, K. Wessel, 'Ikonographische Bemerkungen zur Agilulfplatte', in *Festschrift J. Jahn* (Leipzig1958), pp. 61-67 and P. Delogu, 'Il Regno longobardo', in P. Delogu et al. (eds), *Longobardi e Bizantini* (Turin 1980), pp. 43-44). More recently, C. La Rocca and S. Gasparri ('Forging an early medieval royal couple: Agilulf, Theodelinda and the 'Lombard Treasure' (1888-1932)', in W. Pohl - M. Mehofer, (eds), *The Archaeology of Identity* (Wien, 2010), pp. 269-287) tend to exclude that the plate can be authentic.

and the newly created Germanic kingdoms. Such norms represent a new product of the encounter between an archaic, oral legal structure with a developed late antique legal culture, dominated by abstraction and writing. Roman models would thus have given no more than technical support: conceptual schemas and legal terms useful for a transfer of rules belonging to an oral tradition into a writing-oriented cultural world.

4. New (and old) risks

The firm position taken by Dilcher has to be understood in the context of a larger project which expands well beyond the limited theme of Lombard law.[27] Along with other legal historians, Dilcher is opposed to what he sees as an attempt to minimize the contribution of the ancient German peoples in the construction of a modern European legal culture. Whether such an attempt has really been made is very difficult to say. Such a point of departure, however, appears to me to run the risk of taking research on Lombard law down a blind alley. The debate – it is true – appears today to be free from the ideological pressures typical of the period before the end of the Second World War and takes much more sophisticated forms than in the past. Wider awareness of other fields of research is also apparent, and nobody now holds ideas such as that, for instance, of the derivation of the different *Stammesrechte* (tribal laws) from a single *urgermanisches Gemeinrecht* (common ancestral Germanic law). We are all conscious of having to consider separately the laws of the different barbarian peoples.[28]

Sometimes, nevertheless, some of the arguments used are reminiscent of past discussions of an ancestral German legal system. Every rule, every form that cannot readily be traced to Roman law (or canon law) traditions tends to be linked to this *portmanteau* concept. Here and there, there even re-appear echos of the old vision of the arrival of the Germanic peoples inside the Roman empire in terms of a 'clash of civilizations.'

Especially striking is the almost total refusal to allow any role to the vulgarization of Roman law. The concept of 'vulgar law' is certainly among the most problematic

27 G. Dilcher, *Zur Entstehungs- und Wirkungsgeschichte der mittelalterlichen Rechtskultur* (n. 15), pp. 603-637.

28 After the pioneering study of Reinhardt Wenskus, *Stammesbildung und Verfassung. Das Werden der frühmittelalterlichen Gentes* (2nd ed., Cologne & Graz 1977) see the introduction to Pohl, *Le origini etniche* (n. 10), pp. 1-38.

in modern historiography.[29] Nevertheless, it appears that such a refusal by some contemporary 'Germanists' derives from a not completely dispassionate view of the phenomenon.[30] Their aim appears, in fact, to be to explain the emergence in the post-Roman world of practices contrasting with official normative texts, as first and foremost the consequences of Germanic legal influence on the Roman legal system. In doing so, however, they forget that every living legal system – whether under external influence or not – is under continuous pressure to renew itself. Sometimes it may undergo very deep modifications (*praeter* or even *contra legem*) as a consequence of a dialectic that – even if particularly prominent in the late Roman world – is anyway inevitable. Rather, however, than spending too much time on what may be no more than impressions, I shall now try to introduce some new elements into the debate.

5. Ancient customs and complex ethnogenesis.

Scholars generally agree that the norms of the Edict of Rothari shall be divided into two separate large masses. The first contains ancient customs (*cawarfide*), until then handed down orally and then collected together by the king in collaboration with the *antiqui homines*. The second consists of more recent measures, that express the growth and autocratic development of the monarchy.[31] While for this second mass there is little doubt about the models which Rothari and his counsellors followed (*i.e.*, the Visigothic, Frankish and Bavarian legislations on the one hand and Roman-Byzantine traditions on the other), the debate remains open for the first one.

Some scholars think that the core of these ancient customs can only reflect Lombard ancestral law. In other words these would be the rules that the 'long bearded men' were accustomed to when they left the North to begin their peregrination through cen-

29 On this, see P. Wormald, 'The 'Leges barbarorum': law and ethnicity in the post-Roman West', in H. W. Goetz *et al.* (n. 10), pp. 21-53.

30 This is not naturally valid for all German scholars: see for instance the approaches to the problem of Hermann Nehlsen or Harald Siems.

31 So already E. Besta, *Fonti: legislazione e scienza giuridica dalla caduta dell'impero romano al secolo decimo quinto*, I-II, in *Storia del diritto italiano pubblicata sotto la direzione di Pasquale Del Giudice* (Milan 1923 = Frankfurt/Main & Firenze 1969) I, pp. 134-137. For Paradisi, (n. 8), pp. 189-190 and 218-219, the two masses correspond to two successive versions of the Edict.

tral and eastern Europe. The Lombards would thus have jealously maintained these customs by a process of oral transmission from generation to generation even after their arrival in Italy.[32]

However, we may ask ourselves how old and how large such a core might have been. We should not forget how long and how complicated the process of Lombard ethno-genesis was. During the eighty years before their arrival in Italy, a large number of Lombard tribes migrated from Noricum to Pannonia. Their numbers increased with the integration of groups of (defeated) Gepids, Huns, Sarmatians and also some Romans, already living in that province.[33] The process is not unparalleled. Modern historians describe such an ethnic structure (capable of integrating various heterogeneous groups) as having an 'open identity.' The catalyst for such a process must be considered to be the sharing of a certain number of common traditions (religious, cultural, juridical), as well as, of course, the presence of a charismatic warrior chief, foreshadowing a later monarch, but still prevalently characterized by military leadership functions.[34] In order for the integration process to be successful, however, such a common core needs to be neither too diffuse nor too particularistic. As far as sacral and religious aspects are concerned, for instance, we can observe the long co-existence, among the Lombard people, of pagan practices, along with Arianism (and later also Catholicism), even long after their arrival in Italy. As then suggested – in particular by Walter Pohl – it is also probable that the patterns of such traditions were much more 'Roman' and much less 'barbarian' than sometimes believed.[35]

When the Lombard people crossed the Alps in 568, the different tribes did not yet form an ethnic unity. Their tendency towards hetero-integration remained very ,strong even after the conquest of Italy.[36] Only after the tragic death of Alboin – which

32 See Dilcher (n. 23), pp. 437-438 and above all Modzelewski (n. 26), pp. 54-56 and 65-70.

33 Delogu (n. 26), pp. 3-12; see in particular p. 9: archeological escavations testify to "a cultural environment very different from that attested later in Pannonia."

34 See J. Jarnut, *Storia dei Longobardi* (Italian trans., Turin 1995), pp. 23-26; and Id., 'Gens, Rex and Regnum of the Lombards', in H. W. Goetz *et al.* (n. 10), pp. 409-427.

35 Pohl, *Le origini* (n. 28), pp. 8-9.

36 According to Delogu (n. 26) p. 13, at the moment of the invasion under the command of Alboin there

signals also the failure of his efforts to impose his personal supremacy on a conglomerate of heterogeneous peoples – was such a tendency replaced by a plan to unify the tribes in a single people with a clear ethnic identity.[37] The larger part of their customs surely cannot be very old, and their development surely has to be placed during the Lombard stay in the former Roman provinces of Noricum and Pannonia. Nor we can exclude the possibility that any initial core continued to expand after the Lombard settlement in Italy.

6. Institutions and criminal law

One must ask at this point what were the nature and origin of the customs which Lombards brought with them to Italy. Light is thrown by the afore-mentioned studies by Bognetti. The Lombard arrival in Noricum marks the arrival of the Lombards in the complex world of the new Romano-barbaric *regna*. These *regna* – as we know – were continuously in contact with Byzantium. As soon as they entered this political context, the Lombards began to collaborate with the Byzantines. They had of course their own interests: first they wished to throw off the Herulian yoke, later they aspired to subdue the Gepids. Collaboration with the emperors followed the usual bilateral pattern: military service in return for money and imperial land. Such a relationship was so deeply rooted, that groups of Lombard warriors (with their families, in the characteristic form of the *fara*) continued to act as mercenary soldiers for the Byzantines, even long after the establishment of Lombard rule in Italy.

Bognetti showed how, during their Pannonian period, Lombard institutions took forms imitating Roman military structures. Obviously, the model could not be the 'classical' Roman legion. Rather, we have to think in terms of organizational forms which barbarian bands assumed in joining together with a Roman army (either like the 'national' corps sent by German kings to act as *σύμμαχοι* or in the form of *farae* acting as *militiae foederatae*). The necessities of war, and overall the process of living in common

was "a turbulent and composite mass seeking in the migration not only space and wealth but also a new unity." See also POHL (n. 28), pp. 154-156.

37 So, among others, DELOGU, *Il Regno* (n. 26), pp. 14-28 and 34-39 and POHL (n. 28), pp. 162-165, esp. p. 164.

with other units of the imperial armies, enforced the acceptance of a number of rules.[38]

Roman military regulations certainly marked the first contact of the Lombards with written law. As Bognetti showed, a number of Rothari's chapters come without any doubt from these regulations.[39] Bognetti's examples concern in particular the institutional framework and the criminal law. It cannot be denied that the structure of military units (*ducati* or, with a germanic term, *farae*), even the titles of the highest ranks of the *populus/exercitus* (*dux, comes, centenarius, decanus*) derive from Roman patterns. It would be possible to add here the supplementary example of the *sculca*. This is a military group with specific scouting, vanguard, and espionage functions in support of the rest of the army. It is mentioned by Rothari (ch. 21) and later by Rachi (ch. 13), but sources from the East testify to its existence (and actually its name) in the Byzantine army already in the sixth century AD.[40]

It is in military regulations also that we can find the origins of a number of criminal law norms.[41] They concern, in particular, military offences: treason, desertion, espionage for the enemies, disobedience to a commander's orders, sedition.[42] To the

38 Following Bognetti, Jarnut, 'Gens' (n. 34) p. 425, writes: "we may conclude that the Lombards … were influenced by late antique cultural forms even before their entrance into Italy." Along the same lines, N. Everett, 'Literacy and the law in Lombard government', *Early Medieval Europe* 9 (2000) pp. 93-107.

39 G. P. Bognetti, 'L'influsso delle istituzioni militari romane sulle istituzioni longobarde del secolo VI e la natura della "fara"', (1953) and 'Frammenti di uno studio sulla composizione dell'Editto di Rotari', now both in Id., *L'età longobarda* (n. 9) III, pp. 1-46 (esp. pp. 43-45), and IV, pp. 583-609 (esp. pp. 593-594).

40 O. Bertolini ('Ordinamenti militari e strutture sociali dei Longobardi in Italia', in *Ordinamenti militari in Occidente nell'alto Medioevo* [XV Sett. di studio del CISAM, Spoleto 1967) I, pp. 429-580, esp. pp. 494-496) thinks that the origin of the term was rather a German (Gothic) one and that the Byzantines later adopted it. But it seems more plausible that the borrowing was the other way round if we consider that the same institution (*scolca*) appears in medieval Sardinian: the island, as we know, remained substantially immune to German influence: see L. Loschiavo, 'Ordinamento giudiziario e sistemi di giustizia nella Sardegna medievale', in I. Birocchi & A. Mattone (edd.), *La Carta de Logu nella storia del diritto italiano* (Roma & Bari 2004), pp. 125-128.

41 E. Osenbrüggen, *Das Strafrecht der Longobarden* (Schaffhausen 1863 = Aalen 1968).

42 For some decades the criminal law of Germanic people has been a matter of debate for legal historians. The interest has developed from the publication of Hermann Nehlsen's essay, 'Entstehung des öffentliches Strafrecht bei den germanischen Stämmen', in K. Kroeschell (ed.), *Gerichtslauben-Vorträge. Freiburger Festkolloquium zum 75. Geburtstag von H. Thieme* (Sigmaringen 1983, pp. 3-16), stimulating many further works. Among the most recent must be mentioned G. Dilcher, 'Fehde, Unrechtsausgleich und Strafe im älteren langobardischen Recht. Eine Skizze', in J. Weitzel (ed.), *Hoheitliches Strafen in der Spätantike und in frühen Mittelalter* (Cologne etc. 2002), pp.

cases mentioned by Bognetti, one may add the interesting case of Roth. ch. 260:

> If someone finds in the street gold, clothes or anything else and he lift it up above the knee and does not report it or declare it to the authority, he will have to re-pay it nine-fold.[43]

The strongly German flavour of this norm is more apparent than real, since even in this case it is easier to believe in the application of a Roman military rule. It's not difficult to note similitudes within ch. 10 of the so-called *Lex militaris ex Ruffo*.[44] We have also to remember that – since the earliest times – as soon as the camp had been built, each soldier had to swear not to steal inside the camp and also to give within three days to his commander every object of value that he had found near the camp.[45]

The case can be compared with Roth. ch.16. The matter at issue here is the appropriation of clothes or other objects from an abandoned corpse.[46] This norm has not

27-45. See also – albeit regarding a later period – Ch. MEYER, 'Auf der Suche nach dem lombardischen Strafrecht. Beobachtungen zu den Quellen des 11. Jahrhunderts', in H. SCHLOSSER & D. WILLOWEIT (eds), *Neue Wege strafrechtlicher Forschung* (Cologne etc. 1999), pp. 341-388.

43 *Si quis aurum aut vestis seu qualibet rem in via invenerit et super genuculum levaverit et non manefestaverit aut ad iudicem non adduxerit, sibi nonum reddat.*

44 With this title – or, more frequently, as *Nómos stratiotikós* – it is usually named a greek collection of criminal-disciplinary rules, inserted in the appendix of the Ecloga of Leo III the Isaurian (AD 726); see G. FAMIGLIETTI, *"Ex Ruffo leges militares"* (Milan 1980), pp. 1-16 (edition and translation at pp. 18-29; Ch. 10 is at pp. 20-21): "If a soldier, having found an animal or anything else, no matter how small or large, does not show them and give them to his commander, he will punished as for theft. And along with him will be punished whoever else knew of the matter but chose to remain silent."

45 Our sources are Polibius (*Hist.* 6.33.1) and Aulus Gellius (*Noct.Att.* 16.4.2), with the words of the oath: *... in exercitu decemque milia passuum furtum non facies dolo malo solus neque cum pluribus pluris nummi argentei in dies singulos; extraque hastam, hastile, ligna, poma, … si quid ibi inveneris sustulerisve, quod tuum non erit, quod pluris nummi argentei erit, ... tu ad ... consulem ... proferes* …. For similar norms in other barbarian legislations, see F. BAYERLE, *Das Entwicklungsproblem im germanischen Rechtsgang*, (Heidelberg 1915), pp. 401-403; and L. LOSCHIAVO, *Figure di testimoni e modelli processuali tra antichità e primo medioevo* (Milan 2004), pp. 197-199. It could be objected that all organized armies must have rules along these lines. Actually, if we belive to Procopius, when Lombards got in touch with Romans and began to serve in the Roman army as *foederati* (AD 548 or before), they were not yet an organized army. Rather, they looked like bands of bandits pratically without any rules at all.

46 "If someone finds a dead man in a river or in the countryside, and takes his clothes and hides the body, he shall repay 80 pounds to the relatives. If he finds and strips it and immediately reveals it to his neighbours and it is known that he acted for a reward and not to steal, he shall he give back the goods he has taken and he shall suffer no further ac-

remained unnoticed by historians.[47] Someone thought of a possible derivation from the Bible (*Deut.* 22.3).[48] Much more evident and significant, however, appears the analogy with a couple of passages of Ulpian in the Digest.[49] Beyond words, what really strikes in this last Rothari's Chapter – in respect to each other German/Barbarian law – is the attention for the mental element (*animus furandi vel non*).

7. Excursus: Roman military justice and 'German' judges

The Roman Empire forced *foederati* to observe Roman military discipline in any military operation. As regards other aspects of social living, on the other hand, barbarian soldiers were left free to rule themselves according to their own customs (*ius speciale*).

According to a pattern which corresponds more to military logic than to any possible Roman or Germanic inspiration, commanders were expected to act as judges between their own soldiers. It is easy to hold, with Bognetti, that such officials (or more probably their assistants) provided themselves for that function with handbooks generally similar in kind. The characteristic *forma siquata* (from the recurrent *incipit Si quis* … = "If someone")[50] also – typical of Romano-barbarian legislation and in particular of the Salic and Lombard codes – could in fact descend from such handbooks.[51] And

cusation," (*De rairaub. Si quis hominem mortuum in flumine aut foris invenerit aut expoliaverit et celaverit, componat parentibus mortui solidos octoginta. Et si eum invenerit et expolivarit et mox vicinibus patefecerit et cognoscitur quod pro mercedis causa fecit, nam non furandi animo, reddat spolia quae super eum invenit et amplius ei calumnia non generetur*).

47 See F. Calasso, *Il negozio giuridico*, (2nd ed., Milan 1967), pp. 117-120; also I. Birocchi & U. Petronio, 'Responsabilità contrattuale (diritto intermedio)', in *Enciclopedia del diritto* 39 (Milan 1988), p. 1061.

48 *Similiter facies de asino et de vestimento et de omni re fratris tui, quae perierit. Si inveneris eam, ne negligas quasi alienam*: so Tamassia, *Le fonti dell'Editto* (n. 6), pp. 243-244.

49 *Dig.* 47.2.43.4-9: *Qui alienum quid iacens lucri faciendi causa sustulit, furti obstringitur, sive scit cuius sit sive ignoravit … si neque fuit neque putavit [derelictum esse], iacens tamen tulit, non ut lucretur, sed redditurus ei cuius fuit, non tenetur furti. Proinde videamus, si nescit cuius esse, sic tamen tulit quasi redditurus ei qui desiderasset vel qui ostendisset rem suam, an furti obligetur – et non puto obligari eum – solent plerique etiam hoc facere, ut libellum proponant continentem invenisse se et redditurum ei qui desideravit: hi enim ostendunt non furandi animo se fecisse.*

50 The expression seems to be used for the first time by the medieval jurist Odofredus (so Besta, *Fonti* [n. 31] pp. 135-136); see F. Bayerle, 'Über Normtypen und Erweiterungen der Lex Salica', in *ZSSt. GA* 44 (1924), pp. 394-419 and D. Daube, *Forms of Roman Legislation* (Oxford 1956), pp. 43-46.

51 Bognetti, *L'influsso* (n. 39), pp. 42-43. Perhaps too confidently, J. Durliat in his recent large-scale synthesis of early medieval Europe, *De l'Antiquité au Moyen Âge: l'Occident de 313 à 800* (Paris 2002) wrote: "*Les lois*

this could explain better than other theories a general correspondence between different Romano-barbarian codes, notably when individual legislators come from different ethnic groups:[52] a good example might be the *lex data* which Aetius, around 445, gave to the Britons of Armorica, traces of which have been recently recognised by Soazick Kerneis in the so-called *Canones Wallici* (an ethnic and military law at the same time).[53]

When then the late antique empire was still alive and functioning, during peaceful periods, the *militiae foederatae* were certainly in contact with the local populations (*i.e.*, the *provinciales*). As was to be expected, from these contacts there developed both commercial relationships and the inevitable related disputes. Beginning with Constantius, Roman emperors – usually inclined to favour their troops – began to allow military judges to resolve disputes in which soldiers and civilians were involved and the subject-matter was not military at all.[54] In the provinces in particular – where military and civil rank often coincided – it became usual to delegate judicial functions to local commanders. Dukes, counts but also – especially in the countryside – simple *centenarii* often assumed the role of *iudices dati*.

This had important repercussions, for instance, in procedure. In tribunals composed of such judges it seemed certainly reasonable to admit a simpler and more relaxed procedure in comparison with what was in force in normal courts. It is easy to suppose, for example, that in front of military judges the procedure should be more oral, and that it was this model of justice that barbarian peoples discovered as they came into contact with Rome, and to which they progressively became accustomed.[55]

germaniques sont donc des codes militaires pour juger les fautes commises par des militaires." For a recent and updated contribute on the influence of the Roman military models on the Law of the Roman-barbarian kingdoms, see now S. Esders, 'Late Roman Military Law in the Bavarian Code', in *La forge du droit. Naissance des identités juridiques en Europe (IVe-XIIIe siècles)*, Clio@Themis 10 (2016), http://www.cliothemis.com.

52 See von Halban, *Das römische Recht* (n. 8), pp. 94-95.

54 S. Kerneis, 'L'ancienne loi des Bretons d'Armorique. Contribution a l'étude du droit vulgaire', *RHDFE* 73 (1995) pp. 175-199 and Ead., '"Morte moriatur". La peine capitale chez les Bretons d'Armorique á la fin de l'Antiquité', *RHDFE* 79 (2001), pp. 331-345.

54 See *CTh* 2.1.2 (AD 355) and *CJ* 3.13.6 (AD 413).

55 See *Nov.Th.* 4 (AD 438) and *CJ* 3.1.17 (AD 531), with W. E. Voß, 'Vom römischen Provinzialrecht der Spätantike zum Rechtsgang des frühen Mittelalters', in H. Siems et al. (eds), *Recht im frümittelalterlichen Gallien.*

When then, in the West, the Empire came to an end and new political structures (the Romano-barbaric *regna*) grew up and the barbarian kings assumed governmental responsibilities, they did not aim to impose new and different patterns. On the contrary, they perpetuated – insofar as they were able – the administrative techniques to which they had become accustomed since their first contacts with the Roman world. So they were in general barbarian commanders who assumed jurisdiction in the mixed disputes (barbarian *vs.* Roman, and, in the majority of cases, soldiers *vs.* civilians).[56]

8. 'Germanic' procedures: a new approach

The excursus has given us the opportunity to pay attention to a further important aspect of Lombard law, *i.e.*, the settlement of disputes and procedure. In considering legal historiography (in particular Continental), we observe with some surprise how far discussion of this theme continues to be influenced by ancient theories about the specific nature of ancient 'common' Germanic law. Legal history handbooks reflect still today a vision of a 'Germanic' trial in opposition to Roman models. Frankish-German and Lombard legal procedure was thus dominated by communally-based oral procedures, by rituality and formalism, by the centrality of the litigants in comparison with the judge, and, finally, by the habit of considering each dispute – no matter the question actually at issue – in the conceptual framework of personal injury.

In particular, Germanic and Lombard procedure was characterized both by the single aim not of revealing which party was right or wrong, but of ending the dispute without resorting to feud, and by a very distinctive approach to evidence. The approach – precisely in order to settle somehow the dispute – was substantially irrational. The personal right of the accused 'to purge himself' is supposed to have made impossible any discussion based on a rational approach to evidence, such as documents and witnesses. The mentality (*Geist*) of the Germans will have imposed, on the contrary, irrational approaches such as ordeals, duels and (multiple) oaths. Such kinds of proof will

Spätantike tradition und germanische Wervorstellungen (Cologne 1995), pp. 73-108, esp. pp. 79-80 and 90-97; also Loschiavo (n. 45), pp. 83-88.

56 The best example remains that of the Ostrogothic king Theodoric: see P. Wormald, (n. 29), pp. 25 and 35.

have been able to show unequivocally the moral or physical superiority of the accused and of his clan. An unconditional faith in divine intervention (leading to the outcome of the 'proof') will have been placed above a rational search for the truth. The judge will be left with the simple task of deciding on the 'proof' designed to reveal such superiority, and of checking on the regularity of its delivery.[57]

Although very widespread, such a view is in fact very weakly based: it suffices to recall how, using the same sources, Jakob Grimm was able to affirm – in complete disagreement with the later prevalent opinion – that the original Germanic trial knew not one procedure, but two: one for civil actions and one for criminal cases. The principal difference between the two was inherent in the approach to evidence: witnesses and charters for the first, oaths and duels for the second.[58]

Moreover, historians – especially Anglo-American – have shown in the last three decades how the picture of the systems of dispute-settlement in use in the new *Regna* is really much more varied and complex than previously supposed. Great importance is to be attributed to two collective volumes published during the 1980s, inspired by earlier essays by Rebecca Colman and Simon Roberts.[59] The first, edited by John Bossy, underlined how important in the western legal tradition were alternative procedures such as arbitration, mediation, compromise and transaction.[60] The second, coordinated by Wendy Davies and Paul Fouracre, moving from a critique of the standard view of

57 The 'classical' outline is that of Karl August Rogge in 1820 (*Über das Gerichtswesen der Germanen – ein germanistischer Versuch* [Halle 1820]). The explanation of the way in which during the Middle Ages the Germanic element modified Roman procedure was later taken for granted by M. A. von Bethmann-Hollweg (*Der Civilprozeß des gemeinen Rechts in geschichtliche Entwicklung*, I-VI [Bonn 1864-1874 = Aalen 1959]). On the ideological basis of Rogge's work and on its impact on German legal science in the nineteenth century, see K. Nehlsen-von Stryk, 'Zum «Justizbegriff» der rechtshistorischen Germanistik', in *Ius Commune* 17 (1990), pp. 189-222, esp. p. 194, and J. M. Moeglin, 'Le "droit de vengeance" chez les historiens du droit au Moyen Âge (XIX^{e}-XX^{e} siecle)', in D. Barthélemy *et al.* (eds.), *La vengeance 400-1200* (*Bibliothèque des Écoles Françaises d'Athènes et de Rome* 357, Rome 2006), pp. 101-148.

58 J. Grimm, *Deutsche Rechtsalterthümer*, II (Leipzig 1899^{4}), pp. 491-500. See F. Patetta, *Le ordalie. Studio di storia del diritto e scienza del diritto comparato* (Turin 1890=1972), p. 232.

59 R. V. Colman, 'Reason and Unreason in Early Medieval Law', *Journal of Interdisciplinary History* 4 (1974), pp. 577-603; S. Roberts, *Order and Dispute. An Introduction to Legal Anthropology* (Oxford 1979).

60 *Disputes and Settlements. Law and Human Relations in the West*, J. Bossy ed. (Cambridge 1983).

medieval justice, aimed to trace a better one.[61]

The most important change is the new approach, both interdisciplinary and comparative. Just such an approach makes it possible to go beyond the old idea of a collapse of civilization and move towards a serene consideration of the mutual influences between peoples with different ethnical and cultural identities, but ready to experiment with possible forms of effective common existence. Thanks also to a new attention to practical evidence (instead of the old perspective concentrated on the normative sources), it now emerges better than how the procedures in use in the centuries at issue correlate with contemporary social and political relationships. The principal results so far obtained are: a) the study of procedures for dispute settlements in the new *Regna* cannot avoid considering and comparing other situations, including those from outside western Europe, and, in particular, systems adopted in the late Roman empire and overall in the Roman provinces; b) new elements which is it possible to recognize in the social and juridical relationships of the barbarian kingdoms are not the product of the replacement of Roman models with those brought from their homeland, but the development of new and original solutions, generally characterized by pragmatism and for that reason accepted by both the Germanic and Roman population;[62] c) the role played by the Church in this context was a central one from the first moment, long before the Carolingian 'renaissance;' d) finally, the traditional dichotomy rational/irrational is better substituted by an analysis of the greater or lesser functionality of the procedure adopted with regard to the goal to be reached. The final goal was a peaceful resolution of a dispute, but also – and often – the formalization of an agreement reached outside the court.

9. Lombard legal procedure

Without doubt, these results can be applied to the Lombard world. In the traditional vision, the Lombard trial would reflect the same logic as the 'Germanic' one

61 *The Settlement of Disputes in Early Medieval Europe*, W. Davies & P. Fouracre (eds) (Cambridge 1986).

62 Recently W. Davies, in 'Local participation and legal ritual in early Medieval law courts', in *The Moral World of the Law* (Cambridge 2000), pp. 48-61, has underlined anew how 'perhaps surprisingly, given the range of cultures, the surviving records of court cases suggest that there were considerable similarities of procedure across time, space and language group' (p. 50).

and would still express clearly the original function of ending a feud between clans: the only variant would be the use of duels and oaths, but no forms of evidence from ordeal. There would thus be no role for enquiry into the facts: in the 388 chapters of the Edict of Rothari, there never appear terms like *testis* or *testimonium*, and only once is there a mention of written documents (Roth. ch. 243).

It would be wrong, however, to conclude therefrom that the Lombards did not know how to use witnesses or documents as evidence. In contrast to the chapter just cited, surviving evidence of slightly later legal practice shows that already in the seventh century *chartae* circulated in the Lombard kingdom: it was presumably possible to produce them to a judge.[63] And at the time of Rothari, even recourse to witnesses is attested between Lombards. It is in fact not difficult to recognize in the Edict figures similar to those of witnesses.[64]

We now have to ask ourselves what meaning there could have been to the intervention of persons with the function of witnesses in a judicial procedure where, maybe more than in the other Germanic systems, supreme importance is supposed to have been given to the eventual decision (determined by the formal procedures discussed above) and no attention at all paid to enquiry as to the facts.

Maybe, the indifference of Lombard judges to evidence has been over-emphasised in the past by legal historians.[65] There is rather evidence to suggest that things

63 The first example is a *notitia iudicati* of the year 674 in the reign of Pertarit, with edition and commentary by G. P. Bognetti, 'Il gastaldato longobardo e i giudicati di Adaloaldo, Arioaldo e Pertarido nella lite fra Parma e Piacenza' (1940), now in Id., *L'età longobarda* (n. 9) I, pp. 234-239.

64 We must first consider Roth. chs. 16 and 260. Anyway, there are many other cases in which the presence of persons witnessing facts, in order to refer to them later before a judge, is implicit (Roth. chs. 9, 32, 42, 146, 172, 212, 227, 252, 253). That Lombards used *testes negotiales* in early times is also attested under Liutprand (*e.g.*, Liut. ch. 133, AD 733): see Loschiavo, *Figure* (n. 45), pp. 195-204.

65 See for instance Astuti, *Spirito* (n. 4), p. 88: "*La funzione giurisdizionale si esaurisce nel giudizio ordalico, che è diretto non già all'accertamento della verità dei fatti … bensì unicamente ad un regolamento formale ….*" Other scholars, however, have noticed how, alongside formal loyalty to a pure Germanic procedure, there nonetheless emerges in Lombard trials an interest in the establishment of the facts, an interest which is however explained in terms of a progressive contamination of the Lombard institutions under the pressure of the Italian environment: see G. P. Bognetti, 'Un contributo alla storia del diritto penale longobardo in una comunicazione di Achille Ratti (Pio XI) all'Istituto Lombardo' (1939), now in Id., *L'età longobarda* (n. 9) I, pp. 275-339, esp. pp. 322-328; A. Padoa Schioppa, *Ricerche sull'appello nel diritto intermedio* I (Milan 1966), pp. 153-157; F. Sinatti d'Amico, *Le prove giu-*

might have been different, such as the punishment for involuntary homicide described in Roth. ch. 387.[66] Such a legal rule perhaps does not fit the 'pure' schema of a Germanic trial, in which the person accused of murder can only confess his guilt or deny the accusation as a whole, without the possibility of demonstrating that he acted without any intention of killing. On the contrary, if one considers a Lombard judge able to declare a homicide to be involuntary, it should follow that he possessed the capacity to develop a judicial enquiry based on a rational and informal examination of the facts, presumably based on the testimony of witnesses.

10. Traditional proofs and evidence of witnesses in the Edict of Rothari

To confirm that at the time of Rothari it was possible to reach a judgment equally capable to avoid a feud, even without recourse to the traditional 'proofs,' we may now consider the figure, only apparently an innovation, of the *proditor*.[67] He looks very much like our informer: he makes possible the indisputable identification of the guilty person (*per certum*) and above all – what is here of interest – without recourse to the formal 'proofs.'[68] No matter if such person is a eyewitness or (more probably) an

diziarie nel diritto longobardo. Legislazione e prassi da Rotari ad Astolfo (Milan 1968), pp. 51-54, and, more recently, E. Cortese, 'Il processo longobardo tra romanità e germanesimo' (1995), now in Id., *Scritti* (n. 12) II, pp. 1139-1165, esp. pp. 1153-1154 e 1156.

66 "If somebody kills a freeman accidentally and involuntarily, he will pay for composition as much as that man has been valued at and the feud will not requested because he acted involuntarily" (*Si quis hominem liberum casum facientem nolendo occiderit, conponat eum, sicut adpretiatus fuerit, et faida non requiratur, eo quod nolendo fecit*).

67 We can find a pregnant roman precedent in *C.Th. 7.18.3* (AD 380): the *temoniarius* who denounces (*prodiderit*) the deserter will receive a reward. Once again we have to do with a military norm (which should have been familiar to *milites foederati* like Lombards have been). The term comes back again in *Interpretatio* to *C.Th. 10.10.2* (= *BA* 10.5.1) where is used as synonymous of *delator*.

68 Roth. Ch. 255: "If someone through a *proditor*, that is through a reliable informant, discovers a theft, to him the thief shall return nine times what was stolen" (*Si quis per proditorem, id est per certum indicatorem, furtum invenerit, sibi nonum, qui furtum fecit, ei restituat*). The same figure of the *proditor* appears also in Roth. ch. 335: "Concerning an animal that has been flayed. If a wolf kills someone's animal and someone unknown to the owner flays it and hides it, and it is discovered by means of a proditor, he is to compensate ..." (*De animale excoriato. Si lupus animale cuiuscumque occiderit et aliqui eum nesciente domino excortecaverit et celaverit et per proditorem inventum fuerit, componat …*). In the Roman sources the term *proditor* appears only in *CTh* 14.18.1 = *CJ* 11.26[25].1 (*… ut eorum quidem, quos tenet condicio servillis, proditor studiosus et diligens dominium consequatur …*). Similar rules to that of Rothari also occur in the Theodosian Code (*CTh* 7.18.3 e 4), significantly in a military context. Another

accomplice forced to denounce the theft. What is important is that the intervention of the *proditor* creates a situation similar to that created by being caught in the act or by confession.[69] In all these cases, in fact, the judge first enquires about the facts without any formalities, then inflicts the punishment directly, without awaiting the outcome of the traditional 'proof.'

It was Franca Sinatti d'Amico's intuition that the judge's role in a Lombard trial could have been much more important than usually assumed.[70] The activity of a judge, in particular, must have involved two levels: that of the *certum* and that of the *probatum*. "*Certum* is what is certain and legitimate in itself, *probatum* is what is put definitively out of any discussion by evidence."[71] Real evidence of facts on the one hand, an absolute and undisputable solution (determinated by a formal 'proof') on the other: the Edict is silent, but is clear that if it is a judge's duty to check the outcome of the 'proof,' it can be only the same judge who has to recognize the 'objective' certainty of facts and circumstances that are presented to him. Nevertheless, unable to abandon the traditional 'dogma' of the inherent indifference of Lombard trials to facts, Sinatti did not take to its logical conclusion her initial intuition. Witness evidence, according to her opinion, remained substantially extraneous to the Lombard legal system.[72]

The interest of a Lombard judge in facts and the 'automatic' decision of a case by means of the outcome of the traditional 'proofs' are in fact not incompatible. If it is true that the sentence whereby the judge assigns the 'proof' to one of the parties repre-

possible source for the word is Isidore, *Etym*., X.221: '*Proditor, pro eo quod detegit …*' If not the term, the function is present in Frankish law: see *Childeberti II decretio*, ch. 8 (AD 596), in *MGH*, *Capitularia regum Francorum* I (Hannover 1883) 1.7, p. 17, where the *centenarius* (*iudex*) captures the thief thanks to evidence: it is easy to recognize here an informer (*… ut audierit*).

69 It is clearly not an accident that Roth. ch. 255 follows immediately upon two other chapters which deal with cases of *flagrante delicto* (*fegangit*) in relation to a freeman (Roth. ch. 253) or a slave (Roth. ch. 254); for confession, see Roth. ch. 364: once a confession has been made, it cannot be retracted and the choice of traditional *purgatio* by oath is forever excluded.

70 *Le prove* (n. 65), pp. 38-56.

71 *Le prove* (n. 65), p. 49.

72 *Le prove* (n. 65), p. 176.

sents 'the most important act of the whole procedure,'[73] it is not true that the judge does not come to this decision *ex abrupto*, *i.e.*, passively, or automatically, after the indictment and subsequent reply.[74] On the contrary, contemporary reports of judgments show that a Lombard judge comes to his decision at the end of a cognitive process in which, without doubt, a rational evaluation of the elements produced by the parties to the proceedings played its part.[75]

Especially when the arguments advanced by the plaintiff appeared in themselves conclusive, reaching thus the objective level of what was *certum*, the judge did not reach a formal decision, but precisely in cases in which the informer made it possible to discover the thief and, more generally, in *flagrante delicto* or confession, but also in civil cases, when a dissatisfied creditor acted on a claim strengthened by a warranty (*wadia*). Nor, in such cases, was it allowed to the accused to purge himself of the charge. The judge proceeded instead directly with the imposition of the penalty or with the seizure of property (*pigneratio*).[76] Even Lombard judges were not insensitive or indifferent to the availability of evidence that was rationally convincing, when it appeared safe beyond all doubt. Like the Goths and Franks, so also the subjects of Rothari appreciated the value of a *certa probatio*, *i.e.*, of the evidence capable of appearing in the eyes of the court – but also to the surrounding community – absolutely 'clear' and 'indisputable.'

When, on the contrary, none of the conflicting claims of the parties appeared supported by real evidence and therefore the case remained shrouded in the mists of uncertainty and doubt, did it fall to the judge to break the impasse in the proceedings caused by an opposition between parties formally in a condition of equality. The judge then opened a preliminary investigatory stage, consisting in the informal hearing of

73 *Le prove* (n. 65), p. 146.

74 For the opposite (and widespread) view, see G. Salvioli, *Storia della procedura civile e criminale* I (Milan 1925) (= Frankfurt a. M. & Florence 1969), p. 216: "*In qualunque atto giudiziario il tribunale assiste passivo e segue da spettatore ciò che fanno i contendenti*."

75 Sinatti d'Amico (n. 65), pp. 44-50, 149 and 157-159; and Loschiavo, *Figure* (n. 45), pp. 209-217. An enquiry into the facts, carried out by the *sculdascius* responsible for ascertaining the discharge of his responsibilities by a duke in respect of his *exercitales*, appears in Roth. ch. 23.

76 Only when the guarantor himself (*fideiussor*) was associated with the defendant in contesting the legality of a claim (as in Roth. ch. 366), was the alleged debtor allowed to refute the charge by swearing an oath.

witnesses, in the reading of *chartae*, and also in the direct or indirect inspection of the places involved in the case. In this way, he could have formed a detailed and 'subjective' opinion about the disputed facts and about the substance of the respective claims of the parties.[77] By demanding a traditional 'proof,' the judge of course broke with the initial equilibrium between the parties. But by choosing the party from whom to demand the 'proof,' he indicated the party he considered most credible, and in fact gave to it the advantage in the case.

It remains true, however, that a trial system as essentially archaic as the Lombard one did not allow the judge to give formal and explicit expression to the logical-deductive process by which he had formed his opinion.[78] We have to remember that at the time it was absolutely necessary that the decision was accepted by both parties. Only in this way would it be possible to eliminate the temptation to return to the path of private justice once embarked in a public trial. It was therefore necessary that any decision was socially recognised and so became unassailable. Such characteristics were in fact the necessary prerequisites for the enforceability of the decision: an enforceability that the authority of the court was not sufficient by itself to impose.

For this to occur, it was necessary for the 'subjective' opinion of the judge about the case to become, in some way, an 'objective' one. It was necessary, in other words, for his decision to appear in itself 'indisputable' and 'unobjectionable' through the addition of the seal that only the outcome of a solemn and public 'proof' entailed. Archaic formalism thus overlapped with the rational examination of the facts. This, however, did not in any way imply that the Lombards were indifferent to the conclusions which the court had reached in consequence of the facts themselves.[79]

Even a Lombard trial was perhaps less 'Germanic' than has long been thought.

77 Good examples of enquiries of this type can be found in the *inquisitio* ordained by Pertarit in AD 674: Bognetti, *Il gastaldato* (n. 63), pp. 224-242; also in the *iudicatum* pronounced in 742 by Gotescalc, Duke of Benevento: P. Bertolini *"Actum Beneventi". Documentazione e notariato nell'Italia meridionale langobarda (secoli VIII-IX)* (Milan 2002) no. 48, pp. 394-412). In this last case, the duke suspends the proceedings and orders two of his officers to conduct an *inquisitio* motivated in these terms: '*Vnde et iterum pro ampliorem agnoscendum certam ueritatem*'.

78 See Sinatti d'Amico, *Le prove* (n. 65), p. 149.

79 For opposite opinions see Salvioli, *Storia* (n. 74), p. 249, and Sinatti d'Amico, *Le prove* (n. 65), pp. 25-50, esp. p. 47.

GIACINTO PARISI*

TRIAL AS AN INVESTMENT: IS LITIGATION FUNDING COMPATIBLE WITH THE ITALIAN CIVIL PROCEDURAL LAW SYSTEM?

ABSTRACT. *The present paper aims at examining the main aspects of litigation funding through the analysis of its evolution in the legal systems where it first emerged. In the second part, the author reviews the compatibility of such contract with the Italian civil procedural law system, assessing the main relevant issues.*

1. Legal expenses as an obstacle to the access to justice

It is common experience that trial-related expenses can be an obstacle for individuals seeking justice, and by such means they can limit the exploitation of a right which, pursuing Article 24 of the Italian Constitution, is bestowed upon all.

The Italian legal system has developed several remedies, both public and private, with the main purpose of avoiding such issue and ensuring an effective access to justice for all citizens.

First, it is worth mentioning on this subject the so-called *patrocinio a spese dello*

* PhD in Civil Procedural Law, Roma Tre University. I would like to thank Rosaria Giambersio for her precious comments and suggestions on an early draft of this paper.

Stato (legal assistance paid by the State), set forth by Articles 74 *et seq.* of the d.p.r. 115/2002, which consists in an advancement of the trial-related legal expenses in favor of individuals whose taxable income as per the last filed tax return (to be intended as the one declared for the purposes of the so-called IRPEF, the tax imposed on individuals) does not exceed 9,926.22 euros.[1] However, individuals with an income higher than such amount, which is updated every year on the basis of the data collected by the *Istituto Nazionale di Statistica* (ISTAT), cannot have access to such assistance. Such remedy is then quite limited in its application.

Among private law remedies, on the other hand, it is worth mentioning insurance policies[2] that have the (either partial or exclusive) aim to cover the legal expenses required by law to defendants in the case of legal proceedings initiated against them.[3]

The same goal can also be achieved by a factoring contract, according to which one sells without recourse (*pro soluto*) credits to another individual, who will subsequently try and retrieve, also by means of a trial, the credits he/she acquired.[4]

Lastly, legal assistance services offered by various kinds of labor organizations in favor of their members also serve the purpose of allowing the access to justice for all individuals, regardless of their financial resources.

2. Litigation funding. Main concepts

Litigation funding is today to be included among private law remedies aimed at supporting access to trial.[5] Although it has been employed for centuries in foreign

1 As a result of the granting of this benefit, some expenses that the law puts upon the party are paid by the latter only in case of conviction, whereas others are paid by the State only (Article 131). The State then proceeds to retrieve such expenses pursuing Articles 133 and 134, *i.e.*, by requesting them to the convicted counterparty or, if not possible, to the party that received the benefit, in case it obtained a financial compensation from the proceedings.

2 A. Tina, *Il rimborso delle spese legali nel contratto di assicurazione*, *Giur. comm.*, 2015, 685 *et seq.*

3 For example, it is common for individuals holding executive positions within a company to sign these policies in order to protect their finances in case a liability case is filed against them.

4 On this regard, it is worth mentioning that Article 1261 of the Italian civil code prohibits selling credits to judges, court office clerks, attorneys and notaries in relation to rights that are litigated before the judicial authority they belong to or within the judicial district they operate in.

5 For the qualification of this contract from a civil law standpoint, see I. Gambioli, *Prozessfinanzierungsver-*

legal systems, especially the common-law based ones, only recently has it been implemented by individuals in Italy and it is currently being studied by Italian scholars mainly for the aspects not related to litigation.[6]

In general terms, the litigation funding framework requires a subject who is not part of the litigation (a sponsor) to be willing to pay the legal expenses of one of the parties of the trial and also of the counterparty in case the financed subject is eventually convicted to reimburse such amount.

In case the financed subject wins at trial or if the parties reach an agreement, the subject has the obligation to transfer to the sponsor a percentage of what he/she is entitled to by the judgment or by the transaction. For this reason, the contract can also contain clauses that obligate the party to sell his/her future credit, thus granting the sponsor with the legal power to request the payment from the debtor.

That said, it is worth mentioning that litigation funding can take different legal shapes.

In fact, it can consist in a mortgage where the capital (plus the interests) is to be returned to the sponsor at the end of the litigation; or it can also be a contract whereby the sponsor has to pay the trial expenses, with the benefit of receiving a percentage of the outcome in case of victory of the financed subject; it can also be an insurance policy against the risk of conviction, with the legal consequence of an obligation on the sponsor to pay the legal expenses of the counterparty whenever required by the

träge. I contratti di finanziamento della lite nei paesi di lingua tedesca, http://fundit.unito.it/ITA/risultati/pubblicazioni.html, 23 *et seq*.

6 Among the first scholars in Italy to review such issue in general terms, see E. D'Alessandro, *«Contratto di finanziamento della lite»: mera operazione finanziaria finalizzata a trarre profitto dal processo civile ovvero strumento che agevola l'accesso alla tutela giurisdizionale?*, *Int'l Lis*, 2016/2017, 142 et seq.; G. M. Solas, *Finanziare il contenzioso: esperienze a confronto*, *Contratto e impresa*, 2016, 184 *et seq*.; L. Coppo, *Il contratto di finanziamento della lite da parte di terzi: profili sostanziali*, http://fundit.unito.it/ITA/risultati/pubblicazioni.html, 2 *et seq.* It is also worth mentioning that Turin University Law School, together with Compagnia San Paolo, Turin Bar Association and Aida (International Association of Insurance Law, district of Piemonte and Valle d'Aosta) has started a research project on the issue, and, with a specific agreement, also Cassa Forense (the entity that handles the attorneys' pension funds in Italy) joined the initiative. On this, see C. Martinetti, *Finanziamento delle liti in Italia*, *Giur. arb.*, 2018, 150 *et seq.* and also the website *fundit.unito.it*.

Court in its judgment; it can cover all or part of the total amount of the trial expenses.[7]

From a subjective point of view, the funding can be dispensed by an individual (who can also be the attorney of the financed subject), a third legal subject, an insurance company, a bank, a governmental or non-governmental organization and even by a nation; on the other hand, the financed subject can also be an individual, a company or a public entity.

Depending on the different combinations of the subjects and the interests involved, and on the different shapes the agreement can take (being particularly crucial the case where the controversial right is sold to the sponsor), the sponsor's involvement in the trial can have different impacts. In fact, he/she can have a mere advisory role (so-called *passive funding*) or, on the opposite, he/she can hold the right to take litigation-related decisions instead of the party (*active funding*) or can play a role (although less decisive) in such decision process: for example, he/she can have the prerogative to give his/her opinion on some (or all) processual choices and can reserve the right to terminate the contract in case the financed subject undertakes a litigation path he/she does not agree on.

Such contract is usually employed in high financial value litigations proceedings to ensure a profit margin for the sponsor, and in particular in trials aimed at convicting the counterparty, but also, in some cases, at establishing or assessing a right,[8] if such litigation can result in a financial profit for the plaintiff (and thus for the sponsor).[9]

Once specified that an economic analysis of law reveals very interesting issues on litigation funding and on the interests pushing a subject to sponsor a litigation,[10] it

7 L. Coppo, *Il contratto di finanziamento della lite*, 4.

8 For example, the judicial action whereby one requires to be recognized as an heir to one's estate.

9 With reference to the processual role held by the financed subject, it must be noted that litigation funding, in light of the fact that the sponsor would only finance litigation proceedings that can ensure a profit margin, is mostly entered into by plaintiffs rather than defendants. Therefore, at least in principle, litigation funding in favor of a defendant is feasible only if the latter is also filing a conviction request against the plaintiff, or if the defendant is the one asserting a controversial right, *e.g.*, in case he/she files an opposition to an injunction or if he/she initiates a judicial action to request the release of any seized assets.

10 E. D'Alessandro, *«Contratto di finanziamento della lite»*, 146 *et seq.*; D. S. Abrams-D. L. Chen, *A market for justice: a first empirical look at third party litigation funding*, *University of Pennsylvania journal of business law*, 2013,

is worth mentioning that the present paper will however only consider the issues that such agreement presents from a civil procedural point of view, which have so far been reviewed by Italian scholars only with regards to international arbitration.[11]

Thus, the present work aims at verifying the compatibility of the institute in question with the Italian procedural law system, by taking into consideration the main issues that might arise from its currently quite scarce application in Italy.

To do so, it may be convenient to start the analysis with some short considerations on the origins of the said contract and then by further exploring how this is employed in foreign legal systems, before focusing our attention on the domestic system.

3. A historical background

One of the most ancient forms of third party litigation funding can be found in the Attican law of the IV-V century b.C., where the so-called sycophants (*συκοφάντης*) were professionals in the trade of litigations.[12]

The success of sycophants was due to the difficulty for the average citizen to bear the costs of a trial, ranging from the expenses strictly connected to the litigation to the fees of several subjects who had to be employed by the individual. In fact, as the system did not provide for a legal representation, the individual had to employ a "ghost writer" for trying to win its case, *i.e.*, a professional in charge of drafting the speeches to pronounce before the Court (*λογογράφος*) and of teaching the parties rhetoric tricks (*σοφιστής*). It was also customary for the parties to pay bribes to witnesses and jurors: an additional cost for the trial.

1088 *et seq.* claim that subjects who operate in the litigation funding market are more inclined to sponsor litigation proceedings in the fields of commercial law, with written evidence, a value which is not lower than some hundred thousand dollars and a high percentage of successful results.

11 On this, see P. Bernardini, *Third party funding in international arbitration*, *Riv. arb.*, 2017, 1 *et seq.*; S. Forni, *Il "Third Party Funding" nell'arbitrato internazionale*, *Contratti*, 2013, 965 *et seq.* For further considerations, see also F. Arossa, E. Marcenaro, *Awarding costs in international arbitration: rules, impact of legal traditions, party and counsel perspective*, *Dir. comm. int.*, 2016, 665 *et seq.*

12 For the relevant literature, see L. Coppo, *Il contratto di finanziamento della lite*, 11 *et seq.* Among sycophants there were at least three different roles, only one of which was played by those subjects who financed a litigation undertaken by another subject in order to obtain a percentage of its positive outcome.

Roman law also knew litigation funding, as it set forth legal provisions related to the so-called *calumniatores*, individuals who initiated litigation procedures as plaintiffs in exchange for money or other benefits.[13] Usually, their employment contract consisted in an early sale of the *res litigiosa*, as the financed subject agreed to give back to the sponsor a percentage of what he/she would have achieved at the end of the litigation. The goal of the financed subject was dual: on the one hand, obtaining the necessary resources to initiate the trial and, on the other hand, being replaced during the trial by subjects of a higher social rank who were better perceived by the Court.

Roman law prohibited individuals from selling the *res litigiosa* while the litigation was ongoing: if such provision was not respected, the contract was considered void. The reason behind was possibly, on the one hand, the need to avoid that a third subject could interfere in a trial he/she had no interests in and, on the other, to dissuade slanders.

However, such provisions were very restrictive as their application was limited to contracts concluded after the beginning of the dispute and thus did not regard the agreements that were reached before then. For such reason, starting from 506 b.C., the scope was broadened in order to comprehend also sales concluded before the beginning of the trial and it was also specified that the sponsor who "acquired" the litigation could sue the financed subject only in relation to the amounts that were deposited before the beginning of the trial.[14]

We can identify some similarities between the rise of third party litigation funding in England and the Attican and Roman systems.[15]

In fact, in England, at the beginning of the Middle Ages, both the trial by ordeal and the trial by battle or by combat were potentially dangerous for the physical safety of the parties. Thus, to avoid such risk, it was very common for the parties to engage

13 *Iustiniani Augusti Digesta seu Pandectae*, 3.6.1.

14 The reference is to the Constitution of the Emperor Anastasio, referred to in the *Iustiniani Codex* (4.35.22), which prohibited the sale *ante litem* as a response to the several litigation proceedings initiated by individuals who were considered as men trying to "devour" others' property or fortunes. The ban would have then be confirmed by the following Constitution proclaimed by Iustinianus in 531 b.C. (*Iustiniani Codex* 4.35.23).

15 For further analysis of such issues, see M. Radin, *Maintenance by Champerty*, *California Law Review*, 24, 1935, 57 *et seq.*

"champions", who were paid to take part in the trial.[16]

Such tradition continued even after such processual forms ceased to exist: the champion became a subject who bought a percentage of the potential outcome of the litigation and in exchange provided payment in relation to the trial-related expenses. Considering that the large majority of proceedings at the time concerned property rights, the sponsor was usually granted a portion of the contentious land.

That is the reason why the litigation funding contract was called *champerty*, from the Latin word *campi pars* or *campi partus*, related to the expression *tenancy by champart* that described the right to dispose of somebody else's property. It could be similar to the Italian right to property called *enfiteusi*, *i.e.*, that institution allowing a subject to dispose of an estate belonging to someone else as if he/she were the owner, in exchange for money.

The sponsor, in case of a positive outcome, became the owner of the portion of the land in question, whereas the financed subject kept a right to cultivate and dispose of such.

Right at the end of the Middle Ages, it was common for feudal lords to finance their vassals in order to enable them to claim their property rights on lands belonging to other lords, asking a portion of the disputed land as a reward for the positive outcome of the trial. Thus, vassals went to Court with their noble sponsor and entourage, who exerted a persuasive and sometimes intimidatory power on the judge: feudal lords could thus weaken their enemies by enabling individuals to file an actual property claim against them and diminish the length of their lands.

In order to ward off such practice, English sovereigns drew up, starting from 1275, a range of laws that banned the parties from prompting others to start a trial (*maintenance*) in exchange for money or other benefits (*champerty*). The violation of such prohibitions was not only a civil tort but it also entailed a criminal liability, considering that *champerty* and *maintenance* were crimes.

After that, both legislation and case law focused more on the fact that third party litigation funding resulted in an increment in litigation. Thus, the contract in

16 It is the so-called *campio conductivus*. For a review of such phenomenon, see P. H. Winfield, *The History of Conspiracy and Abuse of Legal Procedure*, Cambridge, 1921, 106 *et seq.*

question was considered legitimate only if the third sponsor had an interest in the trial that was not deemed emulative or speculative, like, for example, in case the sponsor was a close relative of the party or the loan was in any case granted for philanthropic purposes.

4. Some notes on comparative law

Coming to the modern days, each state of the United States has a different approach to the third party litigation funding agreements. Some states oppose the application of the bans against *champerty* and *maintenance* discussed above; others (and they are the majority) allow such contracts.[17]

The American Legal Finance Association (ALFA) was founded in 2004, adopting an ethical code for its members.[18] Moreover, the ethical committee of the New York Bar Association drafted a report on some issues related to the institute.[19]

In Canada, such phenomenon is particularly common in relation to class actions.[20]

17 For a detailed reconstruction of the different positions in the American states, see J. Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, *UCLA Law Review*, 2010, 571 et seq., also for the case law of reference (especially 584 et seq.). In case law, please see the opinion released on 9 March 2016 by the Superior Court of the State of Delaware in the case *Charge Injection Technologies Inc. v. Du Pont de Nemours*, https://courts.delaware.gov/opinions/download.aspx?ID=238000, which claimed that the litigation funding contract was valid and effective.

18 It is an association comprising the most important sponsor companies operating in the USA and has the aim to guarantee some minimal standards, in terms of correctness, ethics and transparency in the litigation funding agreements. The activities of the association, which are directed solely at consumers, are listed in more detail on the website *https://americanlegalfin.com*, where a deontological code can also be found.

19 Aba Commission on ethics 20/20, *White Paper on Alternative Litigation Finance*, 2011, available on the website of the American Bar Association at: https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf. Such report is the result of the activities of a research group aimed at reviewing the impact of the alternative means of financing a litigation proceeding on the attorney-client relationship and on the professional and disciplinary liability of the first. Considering this, the report mainly focuses on the attorney's duties towards the financed subject and on the potential conflict of interests between the parties, but it deliberately does not analyze the opportunity of such means and their potential repercussions on civil law and litigation proceedings.

20 The leading case is the one decided by the Ontario Supreme Court on 21 March 2011, *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, www.canlii.org/en/on/onsc/doc/2011/2011onsc1785/2011onsc1785.

England is definitely the country where the third party litigation funding is most developed. The most common model includes a third subject paying for the litigation costs in exchange for a percentage of the pecuniary fine inflicted upon the defeated party by the Court in case of a positive outcome of the trial for the sponsored individual. In case of failure, on the other hand, the sponsor loses his/her investment and he/she is usually obligated to pay for the legal expenses of the counterparty. Moreover, the Lord Chief Justice, Mr. Rupert Jackson, in his report *Review of Civil Litigation Costs* has recently expressed positive remarks on the various models of litigation funding, by stating that they are an effective way of implementing access to justice.[21] It is also worth mentioning that, considering that *champerty* and *maintenance* are no longer crimes under the Criminal Law Act of 1967 (although they are still suitable to originate tort liability), the possibility to sell one's judicial right to a third subject has become legitimate if the latter has a genuine commercial interest in the trial.

As previously stated, although litigation funding contracts have a specific tradition in common law systems, they are now applied also in some civil law systems and,

html. The case regarded an individual who decided to file a class action to obtain a certification declaring the admissibility of the class action itself so as to demonstrate he had the financial resources to support the judicial action. To do so, he asked the Court to validate a litigation funding agreement signed by an Irish Company, CFI, which committed itself to pay for the expenses of a trial in exchange "of 7 per cent of amount of settlement or judgment, subject to cap of $ 5 million prior to pre-trial and $ 10 million thereafter». The contents of the funding agreement were also reviewed by the potential class members and by the defendant. The Ontario Court had to sentence on the validity of such agreement and on its compatibility with the prohibition of *champerty* and *maintenance* aimed at protecting the justice administration «from abuse by the exploitation of vulnerable litigants" (§ 18 of the judgment). The Canadian Court firstly drew a parallel with the *contingency fee agreements* and then quoted the decision *McIntyre Estate v. Ontario* of the local Court of Appeal (Attorney General) (2002), 2002 CanLII 45046 (ON CA), 61 O. R. (3d) 257, [2002] O. J. no. 3417 (C. A.), stating that a contingency fee agreement is not *per se* prohibited by the *Champerty Act*, but the percentage attributed to the attorney needs to be evaluated, on a case by case basis, in terms of reasonableness and fairness. Thus, the Supreme Court approved the funding agreement brought to its attention because a) it concluded that the funding agreement was suitable to reach the purposes of class actions, as it enabled access to justice; b) the agreement left the control of the litigation to the representative plaintiff; c) the percentage agreed in favor of the sponsor (seven per cent) seemed reasonable, also in light of the risk undertaken by the latter, and even more of the existing coverage cap (five million Canadian dollars in case of a transaction during the pre-trial phase and ten million Canadian dollars in case the transaction took place after that).

21 Lord Jackson, *Review of Civil Litigation Costs: Final Report*, 2009, Ministry of Justice (https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf), 335, § 4.4.

in particular, in the German one.[22]

In fact, German case law provided that the *Prozessfinanzierungsverträge* are not contrary to public policy pursuing § 138 *Bürgerliches Gesetzbuch* (BGB); on the contrary, case law has claimed that said agreements, as commendably aimed at enabling the access to trial (*der Zugang zum Recht*), are valid and legitimate, and are not deemed to cause a misbalance between the parties, as they are mainly addressed to the plaintiff and not the defendant, in full coherence with their function of allowing individuals to file for a trial regardless of their financial condition.[23]

The Austrian[24] and Swiss[25] case law have reached similar conclusions and have then considered litigation funding agreements as legitimate.

In France, such phenomenon is more limited, although in the past few years there have been some judgments that have incidentally stated that the "*contrat de financement de procès est sui generis et inconnu des Etats membres de l'Union Européenne à l'exception des pays de culture juridique germanique.*"[26]

22 For an interesting analysis on this, see I. Gambioli, *Prozessfinanzierungsverträge*, 2 *et seq.*

23 *Oberlandesgericht* (OLG) *München*, *Urteil* 31 March 2015, 15 U 2227/14, which considered as valid and effective a litigation funding agreement whereby the sponsor would have obtained 50 per cent of the amount liquidated by the Court to the financed subject, in consideration of the complexity of the litigation in question and, consequently, the uncertain nature of the results. The German judges thought that such agreement did not meet neither the requirements of § 138 *Bürgerliches Gesetzbuch* (BGB) – thus it was not immoral – nor the ones of § 49 *Bundesrechtsanwaltsordnung* (BRAO), in its version valid before 30 June 2008 (on the prohibition of the contingency fee) as they both refer only to the attorney's fees and cannot then be applied on the *Prozessfinanzierer*. Finally, § 34 of the decision, states that if the *Prozessfinanzierungsvertrag* was declared void, this would be to the detriment of the financed subject (who would have to pay, unexpectedly, the trial expenses) and not only of the sponsor.

24 *Der Oberste Gerichtshof* (OGH), 27 March 2013, 6 Ob 224712b, https://www.ris.bka.gv.at/Jus/, which expressly states that § 879, Abs. 2, n. 2 does not make the litigation funding agreement void, as such provision only refers to attorneys, notaries, tax consultants and auditors.

25 Federal Court, 10 December 2004, 131/223, http://www.servat.unibe.ch/dfr/c1131223.html, and also Federal Court, 22 January 2015, 2C_814/04, *ibid.*

26 It is the judgment of 17 June 2006, RG no. 05/01038, released by *Cour d'appel* of Versailles, *www.legifrance.gouv.fr*, which reviewed a matter originating from a litigation funding agreement concluded by the Australian company *Jancom* and the German company *Foris* in relation to an arbitration procedure initiated against the French company *Onix*. *Jancom* had lost the case and wanted *Foris* to pay for the expenses: *Foris*, on the other hand, claimed that it was supposed to pay only within the limits of the agreed cap coverage agreed. As *Onix* did not receive what it was entitled to within the arbitration procedure by neither *Jancom* nor *Foris*, it went before the Nanterre Court.

In 2014, the *Club des Juristes* published a report on litigation funding and, after some discussion, the *Conseil National des Barraux* adopted in 2017 some deontological guidelines on the matter.[27]

In Spain, the issue has been analyzed by some scholars,[28] but it is not practiced in Court.

On the other hand, European law increased attention on such agreements. In particular, Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in EU countries and its accompanying communication explicitly refer to litigation funding in case of class actions, setting out a series of principles to respect: transparency on the origins of the funds; the power of the judge to suspend the trial in case of a conflict of interests or a lack of resources of one party whether it has been asked to pay the expenses to the counterparty; the surveillance by (a not better specified) public authority on the agreements.

Similar provisions are embodied in Article 16 of the Proposal of Recommendation of the European Parliament of 6 June 2017, which provides some advice to the Commission concerning the adoption of minimal common standards of civil procedure in the European Union.

5. The compatibility with the Italian civil procedural law system. An introduction

Based on the outcomes of the historical and comparative review undertaken above, we can now proceed to verify the compatibility of the litigation funding agreements with the main principles regulating the domestic processual system.

As we stated above, such contract is not currently governed by the Italian law

The French judge, in both the first and second instance, claimed a lack of jurisdiction, stating that France had no jurisdiction over the case neither in application of Article 2 of the EU Regulation 44/2001 (the defendant did not have a domicile in France), nor in application of Article 5 of the same Regulation (the litigation funding could not be considered a service contract, as the provision states that in such cases the jurisdiction is attributed to the judge of the place where the service is provided).

27 The integral work is available on the website www.avocatparis.org/mon-metier-davocat/publications-du-conseil/rapport-sur-lefinancement-de-larbitrage-par-les-tiers.

28 For example, see O. Cojo Manuel, *Third- Party Litigation Funding: Current State of Affairs and Prospects for its Further Development in Spain*, *European Review of Private Law*, 2014, 439 *et seq.*

system. In the absence of applicable provisions, it is up to scholars to verify whether and to what extent it can be practically and legitimately applied. Before starting such analysis, it is also worth mentioning that the following thoughts can be applied also if the sponsor is a foreign subject, considering that, pursuing Article 12 of Law 218/1995, the civil trial taking place in Italy is regulated by Italian law.

The analysis of the civil procedural law aspects of litigation funding must be carried out from different perspectives, *i.e.*, the legal standing of the parties to the agreement within the trial, their potential impact on the impartiality and independence of the judge, the obligation to declare the existence of the funding and finally the interaction between the agreement and the provisions regulating trial expenses.

It is also important to consider that, despite the commendable aim of the contract at hand, it can be used in malicious ways and it is then important for the system to take appropriate remedies so as to avoid its erroneous interpretation and application.

Further considerations can be outlined, finally, also on the deontological aspects related to the position of the legal counsel representing his/her client within a judgment financed by a third party.

6. The legal standing of the parties

The first aspect to be taken into consideration is obviously the issue of legal standing.

On this aspect, it is firstly worth considering that within a litigation funding agreement, the sponsor usually acquires a portion of the litigated credit as a warranty before the litigation begins.[29]

Thus, in the case where the existence of the agreement emerges within the trial, we should conclude that if it is ascertained that the financed subject started the proceedings only in the interests of the sponsor, his/her filing should be rejected – if that is the case *pro quota*, so in relation to the portion of the credit that had been sold –

29 In this case, there would be the sale of a future credit, which case law considers admissible and immediately valid. See, among others, Court of Cassation, 10 December 2018, no. 31896, www.iusexplorer.it.

given the lack of ownership of the litigated right on the plaintiff.[30]

As a consequence, clauses providing a sale of the credit before the beginning of the trial are difficult to apply in the Italian legal system, unless the sponsor acts as plaintiff, jointly with the financed subject whether the latter retained a part of the credit.

Obviously, as stated by Art. 111 of the Italian civil procedural code (c.p.c.), if the sale takes place after the trial started, the trial will continue between the original parties, although the sponsor will have the opportunity to intervene in the proceedings and ask for the ousting of the financed subject.

In this case, the major challenge is to identify a judicial remedy that protects the sponsor before the trial starts and insures that the financed subject complies with the agreement.

One way of achieving this would be to have a separate agreement that the parties are required to sign (pursuing the original contract) only after the trial started, whereunder the sponsor acquires the credit: in this case the sponsor would have legal standing to require the payment to the financed subject, also pursuing Article 2932 of the Italian civil code (c.c.).

Obviously, regardless of whether such clause is present or not, the sponsor has his/her own interests in the proceedings thanks to the litigation funding agreement and thus should be able to intervene in the trial initiated by the financed subject, pursuing Article 105, § 2, c.p.c.[31]

Furthermore, should the defendant be acquainted with the litigation funding agreement, he/she could ask the judge to summon the sponsor, pursuing Articles 106 and 269 c.p.c., in order to ask for the conviction of the latter; it could also be the judge to summon the sponsor on his/her own initiative, pursuing Article 107 c.p.c.[32]

30 The Court, on its own initiative, shall acknowledge it in any stage and instance of the trial. See Court of Cassation, joint sessions, 16 February 2016, no. 2951, *Resp. civ. prev.*, 2017, 2, 517.

31 In case the sponsor has a legal interest to support the reasons of the financed subject: on this, among others, see Court of Cassation, 30 December 2016, no. 27528, *www.iusexplorer.it*.

32 On the application of such provision, see Court of Cassation, 9 January 2013, no. 315, www.iusexplorer.it.

7. The impartiality of the judge

Shifting the focus from the parties to the subject called to decide on the trial, either a state-appointed judge or an arbitrator,[33] one of the most interesting issues is what happens if there is a conflict of interests between the latter and the sponsor: such issue is even more problematic is case the sponsor does not intervene in the proceedings.[34]

As well known, Article 51, § 1, c.p.c. lists the cases in which the judge must withdraw from a given litigation: for the same reasons, he/she can be rejected by the parties. Moreover, § 2 of the same provision states that the judge can request authorization to withdraw from the engagement where deemed necessary. Similarly, Article 815 c.p.c. lists the cases in which the arbitrator can be rejected by the parties, which are the same laid down in Article 51, § 1, c.p.c.; obviously, with regard to a single proceeding, the parties of an arbitration can agree upon other cases in which the arbitrator cannot accept the engagement or can be rejected by the parties.

Besides the obvious differences, it is worth noting that both provisions mentioned above list cases in which the lack of impartiality of the judge origins from a given relationship with the parties or their appointed counsels.

Therefore, currently, the relationship with the sponsor cannot be taken into consideration, unless he/she intervenes in the judgment.

However, such conclusions do not seem satisfying, also in case the sponsor has not acquired the credit as a warranty for his/her investment. In fact, for example, in case of arbitrations and, even more so, in case of arbitrations administered by third organizations, it is not unusual for private judges or for the institute controlling the arbitration to have financial relations with the sponsors: in this case, assuming that what said above is correct, such relationship would be irrelevant unless the sponsor is a part of the judgment or an appointed counsel of the party.

Obviously, it is desirable for these cases to be regulated by the legislature in order to take into account the relationship between the sponsor and the judge. To do

33 This problem was already considered in international arbitration, where it is commonly thought that there is a duty of disclosure on the private judges concerning their relationships with the parties and the sponsors.

34 F. Arossa, E. Marcenaro, *Awarding costs in international arbitration*, 665 *et seq.*

so, it would also be necessary to establish an obligation on the parties to declare in the trial the existence of a litigation funding agreement: this issue will be further analyzed in the paragraph below.[35]

8. The obligation to declare the existence of the funding

The considerations outlined above lead to wonder whether the Italian legal system requires the parties to declare before the judge if they have a litigation funding agreement and in what terms.

On this aspect, it is worth considering that, in international arbitrations, such declaration is considered as a best practice and some institutes have explicitly stated so in their regulations.[36] Following this example, also domestic arbitration institutes could proceed this way. On the contrary, within traditional trials (and arbitrations, in lack of the clauses referred to above), at the moment there does not seem to be an obligation on the parties in such sense. However, when possible, the judge could request the parties to exhibit the litigation funding contract, with the exception of confidential parts[37] if necessary, although such order could conflict with the confidentiality clauses in the contract,[38] which however could be considered recessive before an order issued by a jurisdictional authority.[39] Such solution has one limit: Italian law does not provide for any remedies to force a party to comply with an exhibition order issued by a judge.

However, if during the trial a specific evidence on the existence and contents of

35 On this regard, it is worth mentioning that, similarly to other arbitration organizations, Article 20 of the Regulation of the Milan Chamber of Arbitration of 2019 states that "the arbitrators shall submit their statement of independence to the Secretariat within the time limit it sets" and "in the statement of independence the arbitrator shall disclose, specifying the time and duration (…) any relationship with the parties, their counsel and any other person or entity involved in the arbitration, even on a financial relationship basis." However, in case the parties have not previously communicated the existence of a litigation funding agreement, the arbitrators have no knowledge of the existence of a third subject involved in the arbitration.

36 F. Arossa, E. Marcenaro, *Awarding costs in international arbitration*, 665 *et seq.*

37 For an example on this, see *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case no. ARB/12/6), Procedural Order no. 3, 12 June 2015.

38 P. Bernardini, *Third party funding*, 1 *et seq.*

39 See Arezzo Court, 31 January 2017, no. 123, www.iusexplorer.it.

the agreement emerged, the lack of compliance could be considered as a proof that confirms said existence and contents.[40]

De iure condendo, one potential solution would be to introduce in the civil trial an obligation on the party to declare such agreement when he/she initiates the trial or after the trial, if the agreement is concluded later.[41] Such declaration could only regard the main contents of the agreement, *i.e.*, the parties involved, either directly or not, in the funding and whether the credit was sold before the trial started, and it would serve as a solution to those independence-related issues referred to above.

Some claimed that such obligation would have negative consequences, as it could influence the judge on the merits of the case[42] or, at least, his/her final decision on the allocation of the trial expenses.[43]

Such argument, however, does not seem conclusive, as the existence of a litigation funding agreement does not seem *per se* suitable to influence the outcome of the trial, considering that the evaluation carried out by the sponsor is based on elements which, at least partially, are different from the ones taken into account by the judge. Thus, the litigation funding agreement could be considered as a mere statement from the party, like, for example, a legal opinion lodged within the trial in order to support the plaintiff.[44]

9. The provisions regulating the legal expenses

A further issue to consider is whether, at the end of the trial, the judge can liquidate the trial expenses in favor of the sponsor or, in case of a negative outcome for the financed subject, can convict the sponsor to pay the amount: obviously only in case

40 Among others, see Court of Cassation, 27 January 2017, no. 2148; Court of Cassation, 22 December 2014, no. 27231; Court of Cassation, 27 August 2004, no. 17076, all in *www.iusexplorer.it*.

41 F. Arossa, E. Marcenaro, *Awarding costs in international arbitration*, 665 *et seq.*

42 Considering that the decision to sponsor a litigation proceeding depends on the likelihood of a positive outcome, judges might consider such agreement as an element pointing towards the validity of the plaintiff claim.

43 F. Arossa, E. Marcenaro, *Awarding costs in international arbitration*, 665 *et seq.*

44 In this sense, see among the most recent judgments, Court of Cassation, 28 June 2018, no. 17063; Court of Cassation, 2 August 2012, no. 13914, both at www.iusexplorer.it.

the latter is a party of the proceedings.

At present, such scenario does not seem possible, considering that, pursuing Article 91 *et seq.* c.p.c., the trial expenses can be liquidated only in favor of the party or of the legal counsel, the latter in case he/she declared to have anticipated such expenses and his/her fees have not been paid. At the same time, the order to pay the expenses of the counterparty can be issued against the party and, besides that, only against its representatives and subjects holding a power of attorney, pursuing Article 94 c.p.c.

However, in abstract it is possible for the financed subject to ask the Court to be exonerated from liability and to file a request for the sponsor to sustain the costs of the trial.

Similarly, under the ligation funding agreement and in cases where he/she has not acquired the credit, the sponsor can intervene in the trial and request that the financed subject be ordered to transfer him/her a portion of the award recognized by the Court, besides the expenses paid by the counterparty.

It must be said that such solutions, although in principle viable, require the sponsor to be highly involved in the trial, whereas in the other legal systems he/she does not formally become a party of the litigation.

Another very common issue is whether the financed subject can ask the counterparty to compensate him/her for the payments he/she made in relation to the agreement.

To address such issue, it is necessary to first clarify the nature of the percentage of the *res litigiosa* that is recognized to the sponsor in case of a positive outcome for the financed subject.[45]

In other terms, if that payment is considered as a cost, it cannot be sustained by the counterparty, as it is not technically a trial expense, considering that such expenses are limited to the fees of the counsels and the taxes paid in the context of the trial.

On the contrary, if the percentage of the *res litigiosa* is considered a detriment that the financed subject had to pay so as to have access to justice, this could be considered as a cost of the trial, which the losing defendant could then be convicted to pay pursuing Article 1224, § 2, c.c. The obligation referred to above shall obviously apply

45 P. Bernardini, *Third party funding*, 1 *et seq.*

only if the plaintiff proves within the trial that he/she paid such amount and that, in lack of other economic resources to sustain the trial expenses, the agreement was the only way he/she had to initiate a judicial proceeding.[46]

10. The risk of malicious litigation

Another issue which was already outlined in the historical background is the potential malicious employment of litigation by the sponsor.

The claim of the plaintiff could in fact be specious and financed only to damage another subject, for business-related or even political reasons.[47]

Such issues have all been faced, also recently, by foreign legal systems and have contributed to create some serious doubts on the admissibility of the litigation funding, which could be seen in this light as instrumental in increasing ligation[48] by using trials for unlawful purposes.

In fact, the first European law provisions on the matter already mentioned above represent an attempt to avoid such negative consequences.

For example, Article 16, § 1, letter b), of the proposal of Resolution of the European Parliament of 6 June 2017 on the adoption of common minimal standards of civil procedure in the European Union sets out the prohibition for a competitor or an employee of the defendant to sponsor a class action against the latter.

Such approach must be considered positive, as it does not prohibit litigation funding in itself, which, as already mentioned, has in principle a commendable aim, but avoids a malicious employment of the instrument.

46 On this, it can be mentioned the principle of law stated by Milan Court, 21 July 2016, no. 9205, www.eclegal.it, 27 September 2016, with a note of G. Parisi, which recognized to the winning party in trial, as damages pursuing Article 1224 c.c., the reimbursement of the expenses paid to initiate the optional mediation proceedings.

47 On this, the example of Paula Jones is extremely famous. She sued her employer, who was at the time the Arkansas Governor and future President of the United States, Bill Clinton, only thanks to the financial sponsorship from a powerful political opponent of the latter: the case is *Clinton v. Jones*, 520 US 681 (1997); *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996).

48 Actually, one of the most frequent criticism within foreign systems on the litigation funding is that such can lead to an increment of litigation, with a consequent prolongation of the length of the trial. On this, among others, see D. S. Abrams, D. L. Chen, *A market for justice*, 1075 *et seq.*, on a study on the Australian law system.

In Italy such consequences can be avoided by a strict application of the remedies already present in our legal system, *e.g.*, the conviction of the party acting with malicious intent or serious negligence within the trial, pursuing Article 96 c.p.c.[49] Such remedy, however, could be used directly against the sponsor only if he/she is a party of the trial: otherwise, the defendant can separately sue him/her to have him/her declared liable for enabling the financed subject to maliciously initiate a trial against himself/herself.

11. The deontological duties of the counsel

The issue of the compatibility of the litigation funding with the Italian processual system involves also some aspects related to the legal provisions, also of deontological nature, regulating the legal counsels' activities.

One of the first matters that arise on this aspect is related to the duty of confidentiality of the attorney. As set out in Article 28 of the deontological code approved by the *Consiglio nazionale forense* (National Bar Association) on 31 January 2014, regardless of the subject who actually appoints the attorney as a legal counsel for the party, the counsel cannot disclose to third subjects information and documentation he/she acquires during his/her professional engagement. Such circumstance could be considered problematic for the sponsor, as the attorney could not disclose information to him/her and he/she could then not take part in the strategic choices related to the trial (obviously, in lack of an authorization to do so from the client).

Such issue could actually be overcome if the retainer of the counsel was signed directly by the sponsor in relation to the activities to perform in favor of the financed subject.

The deontological code grants this possibility and expressly distinguishes the "client", who is the one that appoints (and pays) the counsel, from the "assisted party," which is the subject represented in the trial. In such case, Article 28 does not underline any differences between the two subjects and the counsel could thus freely share with the sponsor every piece of information and documentation related to the proceedings.

49 For some first evaluations about the so-called *responsabilità processuale aggravata* and on its relations with non-contractual liability, see L. P. Comoglio, *sub art. 96*, *Commentario del codice di procedura civile*, edited by L. P. Comoglio et al., I. Padova, 2012, 1256 *et seq.*

However, the issue could rise again in case of a conflict of interests between the client (here the sponsor) and the assisted party, for example in the event that the financed subject wishes to settle the case, whereas the sponsor prefers to reach a judgment.

Here, if the conflict cannot be resolved, the counsel would be obligated to renounce his/her engagement, pursuing all the necessary activities to assist the parties before the appointment of a new counsel, according to Article 24 of the deontological code.

12. Conclusions

All the considerations outlined above make evident that litigation funding is a very effective instrument that enables subjects who lack the necessary resources to have access to justice.

Moreover, it is worth mentioning that such contract is in principle compatible with the Italian prosecution system, although it could present some potential issues that however could be solved thanks to the relevant general principles.

In any case, the same issues lead to believe that, if such phenomenon became increasingly widespread in Italy in the years to come, detailed rules will be necessary because it cannot be put solely in the hands of scholars and case law.

NOAH VARDI*

PRIVATE LAW AS RESTORATIVE JUSTICE: NOTES ON ITS USE FROM HISTORICAL WRONGS TO HUMAN RIGHTS LITIGATION

ABSTRACT. *Within the wider phenomenon of so-called 'juridification' of historical wrongs, the paper examines the role of private law as a tool for restorative justice. Whereas the use of private law and its remedies (such as contract, tort, unjust enrichment) as instruments for "reparation" may appear to be at odds with the functions of restorative justice, the paper assesses extensive litigation that was brought forth in different legal systems especially as of the end of the XXth Century, and which though based on claims in private law, poses a series of specific problems that deserve attention.*

1. Introduction

The phenomenon of the so-called "juridification" of historical injustices, centred on the use of law and legal instruments as a means to try and offer reparation for historical (and often mass) torts is neither new nor unprecedented.[1] Whereas public law, international

* Associate Professor of Comparative Law, Faculty of Law, Roma Tre.

1 Literature on this point is extremely vast and impossible to quote. With reference to the specific issues examined in this paper see for an overview *ex multiis* A. Garapon, *Peut-on réparer l'Histoire? Colonisation, Esclavage, Shoah*, (Paris: Odile Jacob, 2008); H. Muir Watt "*Privatisation du contentieux des droits de l'homme et vocation universelle du juge américain: réflexions à partir des actions en justice des victimes de l'Holocauste devant les tribunaux des États-Unis*", 4 *Revue Internationale de Droit Comparé* 2003, p. 883; E. Barkan, *The Guilt of Nations. Restitutions and Negotiating Historical Injustices*, (New York: The Johns Hopkins University Press, 2000); M. J. Bazyler, *Holocaust Justice. The Battle for Restitution in America's Courts*, (New York and London: New York University Press, 2005); J.

law and criminal law have traditionally been the elective instruments for the prosecution of these violations of human rights, the growth of private law as a tool to offer reparations is somewhat more recent. The latter has developed around the notion of "historical wrongs" as private law infringements, giving rise to extensive litigation in several legal systems, beginning especially in the United States in the last decade of the XXth century.[2]

The very idea of reverting to private law as an instrument for "reparation" (and as an independent cause of action, disjointed from criminal procedures) may appear to be at odds with the functions of restorative justice, given the reconciliatory and reparative nature of the latter and the adversary nature of the former;[3] the practical experience of the litigation that will be briefly discussed here however seems to indicate that

THOMPSON, *Taking Responsibility for the Past. Reparation and Historical Injustice*, (Cambridge: Polity Press, 2002); J. WALDRON, *Redressing Historic Injustice*, 52 *U. Toronto L. J.* (*University of Toronto Law* Journal*)* 2002, p. 135; G. RESTA, V. ZENO-ZENCOVICH (Eds.), *Riparare Risarcire Ricordare. Un dialogo tra storici e giuristi*, (Napoli: Editoriale Scientifica, 2012) and Id., *La storia «giuridificata»*, *ibidem*, p. 11.

2 The United States' vocation, typical of the tradition of adversarial legalism, of attracting litigation based on torts of various nature often committed outside the American territory within its *fora*, was long anchored on the provisions of the Alien Tort Claims Act and on the acceptance of an extraterritorial jurisdiction within US courts for violations of international *ius cogens.* This tendency suffered however an abrupt stop after the *revirement* brought by the US Supreme Court in 2013 with the *Kiobel v. Royal Dutch Petroleum Co.* decision (133 S. Ct. 1659, 2013). The Alien Tort Claims Act (28 U.S.C. § 1350), was originally promulgated as part of the Judiciary Act of 1789, and it provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. The role of the Alien Tort Claims Act in human rights litigation became relevant after the *Filartiga v. Pena-Irala* case (630 F2d 876 (2d Cir. 1980)) which recognized torture practiced by a foreign state as a tort committed in violation of international law. The practice of the lower Federal courts of recognizing US jurisdiction for a wide panoply of cases (suffice it to recall not only the so-called Holocaust Litigation on which this paper further dwells, but also war prisoners litigation, Japanese forced labor litigation, Armenian genocide litigation, American slavery litigation, and a wide array of cases for violation of human rights, labour rights, child labour) was never explicitly affirmed by the Supreme Court until the Kiobel case, in which reverting the interpretation of the lower courts, the Supreme Court denied that the Alien Tort Act confers jurisdiction for violations of the law of nations occurring within the territory of a sovereign other than the United States (presumption against extraterritorial application of US law). A previous attempt to circumvent the reach of the Alien Tort Statute had already been made by the Court in *Sosa v. Alvarez-Machain* (542 US 692 (2004)).

3 For an outline of the terms of the discussion, see G. RESTA, *Le ferite della storia e il diritto privato riparatore* in G. CONTE, A. FUSARO, A. SOMMA, V. ZENO-ZENCOVICH, *Dialoghi con Guido Alpa. Un volume offerto in occasione del suo LXXI compleanno*, (Roma: Roma TrE-Press, 2018), p. 417. On the implications of the different instruments of reparation including "compensation" (for both material and non-material injuries) see G. MANNOZZI, G. A. LODIGIANI, *La giustizia riparativa. Formanti, parole, metodi*, (Torino: Giappichelli 2017), at 37-39 and pp. 222-228; A. GARAPON*, Peut-on réparer l'Histoire?*, at 153 *et seq*.

private law remedies – tort but not only – have the potential of pursuing restorative justice. It should be kept in mind however, that when these legal devices are invoked as instruments for the pursuit of reparations, very often their discipline is somewhat adjusted so as to overcome procedural difficulties.

Indeed, whereas victims of historical wrongs (often as a class) dispose of a wide array of legal instruments through which to try and pursue "historical justice," including instruments which aim at ascertaining "historical truth",[4] and whereas these instruments often cross interdisciplinary borders between different areas of the law, the use of private law remedies in both historical and "human rights" litigation, poses a series of specific problems on which this paper would like to focus.

One of the most illustrative cases at point is the so-called "Holocaust-Era Litigation," whose importance is due notably to its antecedence in time and scale. This litigation refers to those civil actions brought forth starting from the end of the 1990's mainly in US courts under the form of class actions (*ex* Rule 23 of the Federal Rules of Civil Procedure) by American and foreign plaintiffs who were survivors of the Holocaust. Claims against both American and foreign defendants requested compensation for torts, breach of contract and unjust enrichment deriving from events which took place during the Second World War and are related to the Holocaust.

This civil litigation later served as a model for other cases of violation of human rights including *inter alia* other World War cases (Japanese-American claims, other insurance cases), colonial and post-colonial claims, American-slavery reparations, and corporate liability cases for aiding and abetting in the commission of human rights violations. Whether this may be considered a practicable model however remains an open issue. It should be noted indeed that all of the Holocaust-Era cases were settled out of court with strong political interventions, entailing questions on whether the model could be successfully proposed again. This proved to be especially problematic after the *revirement* of the US Supreme Court in 2013 regarding the interpretation of the Alien Tort Claims Act, which had served thus far as the basis for jurisdiction in

4 See S. Rodotà, *Il diritto alla verità*, in G. Resta, V. Zeno-Zencovich (Eds.), *Riparare Risarcire Ricordare. Un dialogo tra storici e giuristi*, at 497.

American Courts.[5] In the aftermath of the *Kiobel v. Royal Dutch Petroleum Co*.[6] decision, pending litigation in other areas of human rights litigation was dismissed for want of jurisdiction.[7]

The common feature of these cases is that the civil claims based on either alleged tort, breach of contract and/or unjust enrichment also constitute a violation of human rights to the detriment of the plaintiffs, and thus offer an interesting intersection of at least three different branches of law (other than private law which becomes central for the correct assessment of the claims only once justiciability issues are solved).

International human rights law, while not necessarily ensuring the enforceability or guaranteeing a cause of action in foreign courts, provides however the substantive rule of law for certain claims.[8] Private international law is central for the determination of jurisdiction issues where private law claims are involved (such as the contractual or

5 See *supra* note n. 2.

6 133 S. Ct. 1659, 2013.

7 See for example *In Re South African Apartheid Litigation*, 56 F. Supp. 3d 331 (S.D.N.Y. 2014); *Balintulo v. Daimler AG,* 727 F.3d 174 (US Court of Appeals, 2d Cir., 2013). Interestingly, some scholars have highlighted that it will be precisely the reference to tort law (both national and foreign) that will allow, notwithstanding the impracticability of the Alien Tort Act, to continue this course of litigation for human right violations, given that every human right violation is also an intentional tort under private law. See R. P. Alford, "The Future of Human Rights Litigation After Kiobel", in 89 *Notre Dame Law Review* 2013-2014, 1749.

8 In one of the first – unsuccessful – Holocaust Litigation cases, *Handel v. Artukovic* (601 F. Supp. 1421 (1985) the Federal District Court of California explained that the international law claims of the plantiffs must arise under the laws of the United States for jurisdiction to exist (thus excluding that plaintiffs may infer a cause of action from the law of nations) and the while international law may provide the substantive rule of law in a given situation, the enforcement of international law is left to individual nation states, unless the claims are based on self-executing Treaties and Conventions (an argument that the Court rejected in the *Handel* case with reference to the Geneva Convention of 1929 and the Hague Convention of 1907 (see *Handel v. Artukovic*, 1425-1426)).

labor claims at the basis of some of the principal Holocaust litigation cases). Public international law is determinant for assessing enforceability of claims where issues of State sovereignty and immunity arise.[9]

2. Private law claims in the Holocaust-Era Litigation

While certainly not the only case of international human rights litigation, the so-called Holocaust-Era cases offer an interesting example of claims in private law for the reparation of human rights violations. The litigation (which after several unsuccessful attempts[10] in the years following the Second World War and up to the 1980's were pro-

9 The recognition or refusal of jurisdiction for international law crimes in national courts (admissibility of actions against a person accused of committing a crime, especially if the crime was committed extraterritorially) may depend on different principles of jurisdiction. These include the territoriality principle (jurisdiction is recognized when an offence occurs within the territory of the prosecuting state); the nationality principle (jurisdiction is recognized when the offender is a national or resident of the prosecuting state); the protective or security principle (jurisdiction is recognized where an extraterritorial act threatens interests that are vital to the integrity of the prosecuting state); the passive personality principle (recognizing jurisdiction where the victim is a national of the prosecuting state); and the universality principle (jurisdiction is recognized for the prosecution of perpetrators of certain violations of international law regardless of the nationality of the perpetrator, the nationality of the victim or the place of commission). See I. Brownlie, *Principles of Public International Law*, 5th ed., (Oxford: Oxford University Press, 1998), at 303-308. See generally Restatement Third of Foreign Relations Law of the United States, Pt. IV Introductory Note 1987.
See also, precisely on the problem of jurisdictional immunities of States and civil actions for compensation related to events of the Second World War, the judgement of the International Court of Justice of February 3rd 2012 (ICJ, 3/2/2012 n. 143, *Germany v. Italy* (Greece intervening)), quashing, as contrary to international law, convictions of Germany executed by Italian courts. The Italian Constitutional Court however, with a ground-breaking and much discussed judgment in 2014 (Corte Cost., 22nd Oct. 2014, n. 238), confirmed the judicial trend initiated by the Italian Supreme Court in 2004 (with the famous Ferrini case, relating to a claim against Germany for the damages suffered by the plaintiff who was deported to Germany and subject to forced labour during World War II), in which the Supreme Court had affirmed that Germany was not entitled to sovereign immunity for the violations of human rights committed during World War II (Corte di Cassazione, Sezioni Unite, 11th Mar. 2004, n. 5044). On the Ferrini case, see, *ex multiis*, P. De Sena, F. De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case", 16 The European Journal of International Law 2005, p. 89.
Following these judgements, a new wave of civil litigation connected to the Second World War was initiated in front of Italian courts, with claims for damages related inter alia to deportation in concentration camps, forced labour, massacres committed by military forces, killings, injuries and other crimes against civilians (conduct qualified as relevant not only for criminal law, but also under tort law). See for an overview of these cases, G. Resta, 'Le ferite della storia e il diritto privato riparatore', at 441- 442.

10 See *i.e.*, *Kelberine v. Sociète Internationale*, 363 F. 2d. 989 (D.C. Cir. 1966); *Handel v. Artukovic*, 60F. Supp. 42 (C.D. Cal. 1985); *Princz v. Federal Republic of Germany*, 26 F 3d 66 (D.C. Cir. 1994).

posed again at the end of the 1990's), can be roughly grouped into the so-called Swiss Bank litigation;[11] the German and Austrian Bank Litigation;[12] the Slave-labour Litigation;[13] and the Insurance Litigation.[14]

11 The so-called Swiss Bank litigation (starting in 1996, later consolidated in 1998, with the *In Re Holocaust Assets Litigation* class action in front of the Federal District Court of NY (1998 US Dist. LEXIS 18014 E.D.N.Y. Oct. 7th, 1998), was brought forth by survivors or heirs of victims of the Holocaust against defendant Swiss banks alleging three distinct sets of accusations. Under the first, the so-called 'dormant account claims', plaintiffs alleged that the Swiss banks failed to return money deposited with them by Jews seeking a safe haven for their assets; according to the so-called 'looted assets claims' plaintiffs alleged that the banks traded in assets looted from the Jews by the Nazis; and according to the so-called 'slave labour claim' the banks were alleged to have traded in assets made by slave labour which were then sold, and to have received in deposit the proceeds of sale. The case settled out of court (with a $ 1.25 billion settlement) with the identification of five different categories of entitled recipients to compensation from the fund: the class of deposited assets; the class of looted assets; the class of slave labour I; the class of slave labour class II; the refugee class.

12 The German and Austrian bank litigation (consolidated claim of 1999 in front of the US District Court for the Southern District of New York *In Re Austrian and German Bank Holocaust Litigation* (80 F. Supp. 2d 164; 2000 US Dist. LEXIS 119; 46 Fed. R. Serv. 3d (Callaghan) 30) made similar accusations as the Swiss Bank litigation against German and Austrian banks. This litigation too settled out of court with a $ 40 million settlement.
Later actions were brought against French, British and US branches of banks in front of the California State Court in San Francisco (*i.e.*, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *Mayer v. Banque Paribas*, no. BC 302226 (Cal. Super. Ct. filed Mar. 24, 1999)) for claims arising from the so-called "Arianization" of bank accounts and deposited assets. Whilst some defendants agreed to settling immediately (*i.e.*, Britain's Barclays Bank, with a $ 3.6 million settlement) others were induced to do so after claims of dismissal for non-justiciability were denied by the Courts (but before any judgment was passed).

13 The slave-labour litigation (starting from the famous case *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248 (D.N.J. 1999) and followed by *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 1999), brought forth by former deported slave-workers, claimed compensation for the profits derived to corporations and undertakings from the use in their plants of slave-labour provided by the Nazi-regime and performed by the plaintiffs. In one of the few cases in which a decision was reached at first instance, the case was dismissed on the basis of issues of justiciability. The appeal lodged subsequently became moot when the parties reached an out-of-court settlement. This litigation is nonetheless relevant for the issues of substantive law that were considered (*see infra*).

14 The insurance claims (see *Winters* v. *Assicurazioni Generali S.p.A.*, no. 98 Civ. 9186 (S.D.N.Y. filed Dec. 30, 1998); *Cornell v. Assicurazioni Generali S.p.A.*, no. 97 Civ. 2262 (S.D.N.Y. filed Mar. 31, 1997) alleged the breach of life insurance contracts signed prior to World War II events whose premiums were never paid by (several) defendant insurance companies to plaintiffs who were either direct beneficiaries or heirs of insured victims of the Holocaust. The *ad hoc* International Commission on Holocaust Era Insurance Claims was charged with the distribution of the awards following out-of-court settlements.
There are several other cases filing claims both against individuals (*i.e.*, the cases concerning looted art), corporations and industries, and some of these make inter alia express claims for unjust enrichment (*i.e.*, the litigation against pharmaceutical firms for the unjust enrichment allegedly derived from the medical experiments conducted on interns of concentration camps: *see Kor v. Bayer AG* (S.D. Ind. Filed Feb. 17th 1999). For the scope of this paper however it

The facts of these cases are notorious, as are the outcomes which almost invariably led to out-of-court settlements accompanied by political intervention on both sides and often by ad hoc legislation for the creation of Funds for the payment of compensation. This has left many of the procedural and justiciability issues unanswered.

Indeed the central issues of the standing of both plaintiffs (recognized where the plaintiffs were direct survivors of the Holocaust, controversial in case of heirs) and defendants (more problematic because of State Immunity and corporate liability issues); the problem of political question; the one of subject matter exclusion (since claims were allegedly barred by War Reparations and Peace Treaties); and the one of time limitation (with the prescription of contractual and tort based claims and the problems concerning the applicability of so-called equitable tolling), were only decided incidentally, if it all, in the preliminary phases (and with different opinions on admissibility given by the relevant courts).

What however was not thoroughly considered in the litigation and calls for closer attention from a comparative lawyer's point of view is the substantive law underlying the claims.

The Swiss Bank Litigation made three different claims for restitution: the deposited assets claim, the constructive trust claim and the slave labour/looted assets claim.[15] Plaintiffs alleged that defendants "breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves unjustly; were negligent; violated customary international law, Swiss banking law and the Swiss commercial code of obligations; engaged in fraud and conspiracy; and concealed relevant facts from the named plaintiffs and the plaintiff class members in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory and punitive damages, and declaratory and other appropriate relief."[16] Plaintiffs also de-

will suffice to analyse some of the recurring elements in the cases cited above in the text. For a thorough and detailed reconstruction of the history, antecedents, claims and facts of the Holocaust Era Litigation see *ex multiis* especially M. J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. Rich. L. Rev. (University of Richmond Law Review) 2000-2001, p. 1.

15 Memorandum of Law submitted by Burt Neuborne, *In re* Holocaust Victim Assets CV-96-4849 (ERK) (MDG) [hereinafter Neuborne Memorandum] and B. Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 *NYU Annual Survey of American Law* 2003, p. 618.

16 See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139; 2000 US Dist. LEXIS 1072, (Fairness

manded "disgorgement of any profits unjustly earned by defendant banks by knowingly assisting Nazis in the consummation of crimes against humanity, together with the return of any assets (or the value thereof) for which the banks acted as knowing receivers of stolen property."[17]

The order and variety of claims made in the Swiss bank litigation gives a meaningful insight into the problems related to the use of a restitutionary remedy. From a purely private-law point of view, there are three distinct situations which give rise to claims under different branches of the law. In general where the victims of the Nazi persecution had voluntarily deposited their assets with the Swiss banks, hoping for a safe haven, claims can be founded in contract or tort (while the continued retention and refusal to return the assets can also lead to a restitutionary claim); whereas when the Banks had knowingly received stolen or looted assets, claims can be based solely on unjust enrichment (and violation of customary international law, such as aiding and abetting in the commitment of war crimes). Hence the resort to the typical remedial device of the constructive trust, which is also justified by the circumstance that under US case law (and New York law more specifically) it is not a requirement for a constructive trust that there be any special fiduciary relationship between the parties (as is instead required under the English law).[18]

In its relation to other claims (*i.e.*, bailment), the case for an equitable remedy such as a constructive trust becomes residual to the extent that a claim under the former cannot be made (*i.e.* when the deposit of money in a fund entails the loss of an identifiable and particularized proprietary interest).[19]

Hearing), 4.

17 Neuborne Memorandum, at 3.

18 See § 160 Restatement on Restitution (1938): "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." See also J. P. Dawson, *Unjust Enrichment. A comparative Analysis*, (Boston: Little Brown Co. 1951), at 28 ff.; and generally, A. W. Scott, *Constructive Trusts*, 71 *Law Quarterly Review* 1955, p. 39. On the "purely remedial" nature of the constructive trust see J. P. Dawson, *Unjust Enrichment*, at 32.

19 See *Bertoni v. Catucci*, (117 A.D.2d 892, 498 N.Y.S.2d 902, 905 (N.Y. App. Div. 1986)): "as an equitable remedy a constructive trust should not be imposed unless it is demonstrated that a legal remedy is inadequate."; see also for example the claim filed in *United States v. Pokerstars et al.* (2011), 11 Civ. 2564 (LBS), US District Court

The Litigation against German, Austrian, and other banks (based on the so-called "Aryanization claims") draws more extensively on the notion of unjust enrichment. The claimants argued that banks converted the assets of those persecuted by the Nazis and profited from their forced and slave labour.[20]

While the insurance cases were classic claims for breach of contractual obligations,[21] the litigation which sets out the most complex issues concerning unjust enrichment is the slave labour one (although the case was dismissed). The complaint of the Iwanowa case set out causes of action for restitution and unjust enrichment and quantum meruit/quasi contract under US State law (Michigan and Delaware) and for restitution and unjust enrichment under German law. It also claimed violation of the law of nations and sought disgorgement of all economic benefits accrued to the defendants as a result of the plaintiff's forced labour and compensation for the reasonable value of her services and damage for the inhuman conditions the defendant inflicted upon her.[22]

3. Meaning and use of restitutionary claims in human rights litigation. Emergence of a new notion?

From the point of view of the pattern of facts and of the claims, the common element in the different categories of litigation consists in the unjust enrichment deriving to non-governmental entities (corporations, banks, insurance companies) by the transfer of assets and by other forms of exploitation of the condition of victims of the Nazi persecutions.[23]

Notwithstanding the constant reference to the need to prevent "unjust enrichment" and to this principle as being common to the different legal systems whose

Southern District of NY.

20 Consolidated Complaint *passim*; see *In Re* Austrian and German Bank Holocaust Litigation, Master File no. 98 Civ. 3938 (SWK), 80 F. Supp. 2d 164; 2000 US Dist. LEXIS 119, 46 Fed. R. Serv. 3d (Callaghan) 30, 5.

21 The amended complaint also sets out other causes of action including breach of insurance policies; breach of fiduciary duties; breach of duty to disclose; conversion; bad faith; unjust enrichment; and accounting.

22 See *Iwanowa v. Ford Motor Co.*, US District Court for the District of New Jersey, 67 F. Supp. 2d 424, 1999, 432.

23 B. Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 *NYU Annual Survey of American Law* 2003, p. 615.

laws could have hypothetically been applicable if the litigation had not been settled out of court, at first sight it may be difficult to identify a correspondence with a single unitary notion of this institute (if one excludes the common ethical, moral and equitable idea which derives from Pomponius's maxim in the Digest and the following doctrinal elaborations on it)[24].

The fact that different national laws are recalled entails significant difficulties in the articulation of the claims. This is particularly clear in the slave labour cases where reference was made both to the common law – equitable – notions of unjust enrichment and quantum meruit and to the German general clause for unjust enrichment (§ 812 *BGB*); and in the Swiss banks litigation where New York law and jurisprudential precedents and the Swiss code of obligations (§ 62-68 *OR*) are referred to.[25]

These difficulties concern first of all (setting momentarily aside the doctrinal issues on the classification of the action and on its relation to contract or tort) the possible foundation and actionability of the claims. Suffice it to consider for example the issue of burden of proof in an action for unjust enrichment. The requirement that there is proof of a loss or an injury suffered by the plaintiff as a consequence of the enrichment of the defendant is not universally construed, especially as far as the type of loss is concerned. It is for example traditionally required in the romanistic systems such as the French or Italian one, whereas under the American system, given that the defendant was enriched at the plaintiff's expense, it is sufficient the plaintiff lost an expected benefit or that the plaintiff has a superior "moral" claim to the enrichment that the defendant obtained.[26] By its very nature, even where mention to a loss is made, actionability of disgorgement of profits focuses and depends on the unjustified enrichment derived to

24 D. 50, 17, 206 '*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*'.

25 As instances of alternative applicable law, both of which inspired by the common principle of "preventing unjust enrichment as a principle function of justice, along with the enforcement of contract and tort remedies" see Neuborne Memorandum, 14.

26 Restatement of Restitution § 1 (1937); E. Sherwin, *Reparations and Unjust Enrichment*, 84 *Boston University Law Review* 2004, p. 1448. The construction of the German and Swiss systems distinguishes between enrichment at the plaintiff's expense deriving from voluntary transfers (*Leistungskonditionen*) whose legal basis subsequently cease to exist and unconvenanted benefits arising "otherwise" (mainly benefits arising from unauthorized use of the plaintiff's rights or property). See § 812 par.1 *BGB* and art. 62 Swiss *OR*.

the defendant, whereas, on the contrary a profit derived as a consequence of a tortious act will not be relevant if no injury has occurred.

Another significant issue is the concurrence with other actions (tort and contract) and the possibility of cumulating claims.[27] There is no clear position concerning the possibility of basing claims on concurring actions. On the contrary, these actions all denote an intersection of at least two types of remedies.

Indeed, most of the claims are based on both tort and unjust enrichment (the basis of tort is also necessary given the foundation for jurisdiction in US courts lies with the Alien Tort Claims Act[x])[28]. Torts also serve as a direct connection to international law claims.[29] Concurrence with contract seems to be excluded (if one for example reads the requisites for actions for quantum meruit under US law quoted in one of the cases at issue)[30].

These cases often also intersect with typical proprietary remedies (*i.e.*, conver-

27 The difference becomes relevant as for the type and entity of compensation that can be recognized; as for the articulation of the burden of proof; and as far as limitation periods are concerned: see *i.e.*, the (often quoted but also contested) decision of the German Supreme Court *Bartl v. Heinkel*, BGHZ 48, 125 (1967) (F.R.G.) considering the two-year limitation period for wages (§ 196(1)(9) *BGB*) as applicable to claims for compensation for rendered slave labour (and not the longer limitation periods for tort or for unjust enrichment under § 195 *BGB* and § 852 *BGB*).

28 D. 50, 17, 206 '*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*'.

29 Torts provide the substantive law basis of crimes committed according to the scheme of inclusion of most international human right violation instances within a corresponding tort at common law (i.e., genocide, torture, rape, correspond to species within torts of battery, assault, intentional infliction of emotional distress, wrongful death; forced labour comes within the tort of false imprisonment and so forth). See Neuborne Memorandum, 59 ff.; see also A. J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 *Brooklyn J. Int'l L. (Brooklyn Journal of International Law)* 2008, p. 886; and see the argument by Judge Greenaway in dismissing the claim in the *Iwanowa* case where the court found that the Alien Tort Claims Act in addition to establishing subject matter jurisdiction, also creates a private right of action for violations of customary international law torts (*Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d, 441-443).

30 "A *quantum meruit* recovery is available under principles of restitution where recovery under contract is not possible." "A plaintiff seeking to recover the reasonable value of her services on a *quantum meruit* theory under Delaware law [invoked in the *Iwanowa* case] must establish that (1) she performed such services with an expectation that the recipient of the benefit would pay for them and (2) absent defendant's promise to pay, the plaintiff performed the services under circumstances which should have put the recipient of the benefit on notice that she (plaintiff) expected to be paid for her services.)." "Similarly, Michigan courts have held that a plaintiff may recover under a quantum meruit theory where the defendant accepts beneficial services from the plaintiff for which compensation is customarily made and naturally anticipated." See *Iwanowa v. Ford Motor Co.*, at 471-472

sion), especially in the common law. Even the use of the constructive trust (to describe a proprietary claim which operates to disgorge a profit wrongfully made in some instances as a fiction for the custody of money as a result of an illegal activity) does not always clarify the boundary between restitution law and proprietary law, as it often remains unclear whether the liability to account in the manner of a constructive trustee is a proprietary or personal response of liability.[31] This difficulty is not only found in the common law; may it suffice to consider some of the issues in German law regarding the relation between restitution under the law of enrichment and the liability of the unjustified possessor.[32]

Furthermore and closely related: given that several of the claims proposed base the action on more than one institute of substantive law, an open issue remains whether this concurrence or cumul of actions may contrast for example with the element of subsidiarity which characterizes actions for unjust enrichment in some legal systems (such as France and Italy for example) or with the notion of waiver of tort (typical once again of the common law traditions) which would seem to exclude a cumul of claims in tort and restitution for the same case in which unjust enrichment derived to the defendant by his own wrongful conduct.

A closer examination of the references to "unjust enrichment" in the human rights litigation thus seems to suggest that what is being recalled is not the technical notion of unjust enrichment disciplined by national laws, but rather a trans-national and general action, which is closer to tort than it is to contract (given the tie with instances of international law and war crimes). Only under such a perspective, can the difficulties in reconciling differences in national rules on restitutionary claims be at least in part surmounted.

The issue thus becomes, where and how is the reference to "unjust enrichment"

31 See J. J. Edelman, *Restitutionary and Disgorging Proprietary Awards for Wrongs*, in Eltjo J. H. Schrage (Ed.), *Unjust Enrichment and the Law of Contract*, (The Hague, London, New York: Kluwer Law International, 2001), p. 205.

32 With consequences as far as "severeness" of liability and effects on defendants in good faith are concerned. See M. J. Schermaier, *Current Questions in the German Law of Enrichment*, in Eltjo J. H. Schrage (Ed.), *Unjust Enrichment and the Law of Contract*, p. 118 ff.

relevant and what is its significance? One of the most meaningful aspects of basing claims on unjust enrichment lies in the attempt to justify civil claims for redress deriving from international (criminal) law violations. It serves as the medium of connection between these two areas of law. If restitution and unjust enrichment have traditionally been classified in some systems as "*quasi* contracts," one could consider them here as "*quasi*-torts" or better still as "*quasi* crimes."

Indeed, the claims in the different categories of Holocaust litigation also made a further case: the alleged violation of customary international law by private entities as a result of the knowing cooperation with governments in carrying out certain state policies. The consequent claim under civil law was for the disgorgement of the unjustly earned profits made by those private entities (once again construed as constructive trustees of the victims' assets).[33]

The last type of claim becomes particularly relevant as to whether the Holocaust litigation possibly set a "model" for human rights litigation. In the immediate aftermath of (or still pending) the Holocaust litigation, different class actions were initiated claiming restitution for unjust profits derived from the commission of war crimes (such as the American Prisoners of War in Japan litigation)[34]; from unpaid insurance claims to heirs of victims of the Armenian genocide;[35] from issues related to American slavery reparations;[36] or in cases against corporations for aiding and abetting in the commission of human rights violations.[37] Most of these cases have either been settled out of court

33 See Neuborne Memorandum, 30 ff.

34 See *Levenberg v. Nippon Sharyo Ltd.* no. C-99-1554 (N.D. filed March 16, 1999) and *Jackfert v. Kawasaki Heavy Industries Ltd.*, no. CIV 99 1019 (D.N.M. filed Sept. 13, 1999) later consolidated *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000).

35 *Marootinan v. New York Life Ins. Co.* C.D. Cal. Filed Jan. 17, 2000. The claim was settled out of court.

36 *Cato v. United States* (70 F. 3d 1103 (9th Cir. 1995); In *re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027 (N.D. III. 2004). The latter action was dismissed on the basis of limitation and lack of standing of the plaintiffs. Under the political question doctrine however, the Court referred the issue to Congress (given the lack of a sufficient legal basis for judicial redress) and several legislative proposals ensued (see "The Commission to Study Reparations Proposals for African Americans Act" H.R. 40, 105th Cong., 1997).

37 See *i.e.*, two cases against oil companies (both settled out of court): *Doe v. Unocal*, 248 F.3d 915, (9th Cir. 2001) and *Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386 (S.D.N.Y.) 226 F. 3d 88 (2d Cir. 2000); see also *Beanal* v. *Freeport-McMoran, Inc.*, 197 F 3d 161 (5th Cir. 1999) and *Hereros ex re. Riruako v. Deutsche Afrika-Linien Gmblt.*

or dismissed on different grounds.[38] While this therefore leaves the issue of the practicability of the model of this type of litigation partly unanswered, it further confirms however that undoubtedly the role played by political intervention in the Holocaust litigation should not be underestimated as one of the determining factors for its outcome. Indeed most of the settlement agreements also contained provisions barring all future similar claims against national classes of defendants, with the direct obligation of intervention in favour of defendants assumed by plaintiffs' Governments. It may also be questioned whether these cases represent a truly "legal civil remedy" model for the violation of human rights.

4. The quiet appeal of private law remedies

An issue which several observers have raised concerns the question whether the choice of basing claims for reparation of historical wrongs and human rights violation on tort or on restitution is an appropriate one. Doubts have been expressed for example on the suitability of the instrument in relation to the objectives of the plaintiffs; on the moral and ethical implications surrounding cash payments; on the "efficiency" of these tools for the scope of obtaining reparation.[39]

It has been highlighted for example that cash payments under tort or other compensation schemes for historical wrongs are hardly in line with the typical functions

& Co., 232 Fed Appx. 90 (3d Cir. 2007) (dismissed insufficient foundation of the action). This litigation too was brought under the Alien Tort Claims Act.

38 It has been noted that success of future similar claims for disgorgement of profits (for example the claims on behalf of descendants of American slaves for the unjust enrichment derived to slave-owners and corporations from centuries of exploitation) requires specific conditions such as "1. identification of massive wealth transfers to identifiable recipients that unjustly enriched the recipients; 2. a demonstration that the wealth transfers were unlawful; 3. the ability to reverse the transfers by requiring restitution of unjustly acquired profits to identifiable victims." B. Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, at 619. This however may not be enough, especially given the difficulties deriving from justiciability issues.

39 See *ex multiis* for example D. Satz, 'Countering the Wrongs of the Past: the Role of Compensation' in M. S. Williams, R. Nagy, J. Elster (Eds.), *Transitional Justice*, *Nomos*, Vol. LI, 2012, p. 129; A. Vermeule, *Reparations as Rough Justice*, in M. S. Williams, R. Nagy, J. Elster (Eds.), *Transitional Justice*, *Nomos*, Vol. LI, 2012, p. 151; E. Posner, A. Vermeule, *Reparations for Slavery and Other Historical Injustices*, in 103 *Columbia Law Review* 2003, p. 689.

of disincentive, redistribution and sanction of tort law; that they are problematic from the welfarist approach of compensation; that there is an incommensurability between the monetary liquidation and the entity of the wrongs suffered as a result of the injustice; that there is a mismatch between the perpetrators of the wrongs and the defendants (often representatives of the former, sometimes even third parties) and between the plaintiffs and the injured parties.

As attempts to achieve what has been defined as "rough justice," these schemes of compensation would find a justification as second-best, only insofar as they are better than no justice at all;[40] a critique that could be extended *mutatis mutandis* to other instances of compensation under tort law.

Strictly speaking, from the point of view of the plaintiffs and the *quantum* that is recoverable, actions based on tort could probably lead to better results as far as compensation is concerned when compared to actions based on unjust enrichment (restitution aims at disgorging a profit, compensation also covers damages arising from an injury). However reference to the "unjustified" profit is germane to the type of litigation at issue: claims for the reparation of historical wrongs (the Holocaust litigation but also the American-slavery litigation) are characterized by a strong "moral" (and political) component, in which on the one hand the concrete difficulties posed by issues of limitation, indirect liability and justiciability, make a case in contract or tort quite problematic; but on the other hand, the urge to "seek justice for wrongs" (also felt by the public opinion who is no less an actor in this litigation than politics), suggests basing claims on the more or less commonly accepted notion of a restitutionary action.

The legal device of restitution is by definition and historically "residual." It is also relatively broad (whether or not it was born as a single specific action or whether it later developed into a general remedy) and thus particularly appropriate for claims that cannot be classified according to definite legal parameters.

Under this perspective, a claim in tort or in contract has sharper boundaries, and the legal problems which arise with the notion of repairing historical injustices (a significant portion of so-called human rights litigation deals with historical wrongs) can

40 A. Vermuele, *Reparations as Rough Justice*, at 151-152.

be circumnavigated by recurring to the general notion of restitution of what was unjustly gained. The inherently moral dimension of this type of remedy seems appropriate for "punishing of recognized wrongdoings."

Furthermore the use of unjust enrichment in modern claims against corporations may find its justification in the looser (or more flexible) boundaries offered by restitution as compared to claims for compensation in contract or tort, especially since the claims based on aiding and abetting do not necessarily imply the commission of an (intentional) injury – one of the elements of tort –, it being sufficient that the defendant has somehow benefited from the enrichment derived to it to the detriment of the plaintiff. Restitution thus allows a wider range of instances to be accommodated within the framework of the claims.

The relatively residual and comparatively new (in the US legal system) entry of the institute of restitution within the array of tools that claimants can dispose of has also another competitive advantage over the use of contract and tort: there has been minor doctrinal (and jurisprudential) elaboration around the notion and its use.[41]

However, these relative advantages in framing a claim in restitution suffer from the inherent element of vagueness and the difficulty in determining the exact *quantum* of the disgorgement, especially in view of the fact that more often than not human rights litigation involve class actions (with numerous plaintiffs whose "detriment" may not always be easily and uniformly classified); refer to facts that are distant in time (thus posing issues of justiciability in relation to direct standing of plaintiffs but also liability of current shareholders for facts alleged to behaviour of longstanding corporations,[42] and issues of limitation); and finally suffer the danger that if restitution is the "last action" available, defendants can somewhat more easily make the argument that there is a need for a moral reparation (preferably out of court) and not for a judgment (with

41 See E. Sherwin, *Reparations and Unjust Enrichment*, at 1448.

42 In case of successful unjust enrichment claims against corporations, shareholders would be the ones to sustain the financial burden of the award, even though it may be both logically and procedurally difficult to demonstrate that current shareholders have "unjustly" benefited or profited from a historical wrong. (See E. A. Posner, A. Vermeule, *Reparations for slavery and other historical injustices*, at 704-705; E. Sherwin, *Reparations and Unjust Enrichment*, at 1453.

the clear implication that the former is more discretionary and of minor entity).

Thus, given that often the notion of "unjust enrichment" invoked in these cases is supra-national and sui generis; given that it serves as a medium for the recognition of new forms of international wrongs, setting itself at a crossroad between torts and crimes; and finally given that the use of this notion can be a double-edged sword, it remains to be ascertained whether the referral to this notion is the most appropriate – and especially – the most viable for this type of litigation. This will be possible only if and when a significant amount of decided cases will allow meaningful observations.

5. A few conclusive remarks

The use of private law as an instrument of restorative justice, as highlighted above, is neither a new nor an unprecedented phenomenon. Notwithstanding a meaningful development of litigation in front of courts worldwide, giving rise to some important judgements (but significantly more numerous extra-judicial outcomes), there are both theoretical underpinnings left unanswered and substantive and procedural issues still unresolved.

The former concern the role and appropriateness, both from ethical, moral, and systemic points of view, of private law remedies as instruments of reparation for historical wrongs. The latter concern the difficulties in "fitting" private law institutes to human right infringements without distorting neither the substantive rules nor the procedural ones. Private law remedies tend to have a "quiet appeal" in this type of litigation; it should however be kept in mind that by its very nature, restorative justice transcends not only the boundaries between different branches of the law, but also between law and other forms of reparation. As a consequence, any reflection on the most appropriate or effective approach towards reparation of historical wrongs and human rights violations needs to take into account both this interaction, and the varying attitude that politics, courts and the public opinion may have towards them in any given moment.

SIRIO ZOLEA*

DROIT, POPULISME ET SENS COMMUN: LA THÉORIE DÉMOCRATIQUE FACE À L'ÈRE DES POPULISMES[1]

ABSTRACT. *La contribution présente développe dans le domaine du droit la notion de populisme élaborée par les études de théorie politique de Laclau et de Mouffe, en tant qu'une forme particulière d'articulation conflictuelle d'un discours politique dans une société liquide, fondée sur un partage dichotomique de la société en deux camps réciproquement antagonistes: le peuple (la base) et le pouvoir (les élites), identifiés selon des critères variables. C'est une stratégie discursive qui poursuit une mobilisation visant à la rupture politique, plutôt qu'à sa gestion dans la continuité institutionnelle, mais neutre en ce qui concerne les contenus potentiels dont elle peut être remplie: tantôt progressistes, tantôt conservateurs; tantôt démocratiques, tantôt autoritaires. Le monde du droit n'est pas étranger à l'avènement de l'ère des populismes. L'offensive visant à la colonisation du sens commun, qui est propre à tout discours populiste, se concentre souvent sur des sujets plus ou moins strictement juridiques.*

* Postdoctoral Researcher in Private Comparative Law, lecturer in Transport and Tourism Law – University of Macerata.

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1. Populisme: qu'est-ce-que c'est? L'histoire, les historiens, les commentateurs, la politique d'aujourd'hui

On parle de plus en plus de "populisme" et ce mot est souvent violemment évoqué dans le débat politique comme un synonyme tantôt de "démagogie", tantôt de "subversivisme", tantôt même de "néofascisme", selon le contexte et selon la cible de l'accusateur. Ce signifiant flou s'est en effet rempli au fil du temps de signifiés différents, qui compliquent tout essai d'y faire correspondre une notion précise. On peut quand même essayer de mettre un peu d'ordre dans cette confusion, avant d'analyser les implications de ce phénomène dans le monde du droit.

On parlait de populisme déjà au XIX[e] siècle, notamment en Russie avec le *narodničestvo* et aux Etats-Unis (EU) avec le *People's Party*. Le *narodničestvo*, plus ou moins familier aux lecteurs du monde entier à travers les romans de Dostoîevski et de Turgenev, fut à vrai dire un ensemble de tendances et idéologies assez bigarrées, à partir de certaines desquelles se développa le premier noyau du mouvement socialiste russe; répandu parmi les intellectuels russes de la deuxième moitié du siècle, le populisme voyait dans la communauté rurale traditionnelle et dans l'esprit des masses paysannes – avec lesquelles les populistes cherchaient un rapport direct – les bases d'un modèle de développement solidaire alternatif à la perspective d'une modernisation capitaliste.[2] Le *People's Party* américain se rapproche probablement déjà plus des emplois de nos jours du mot "populisme". Ce mouvement, surtout formé par de petits propriétaires ruraux ruinés par les changements du commerce global et du mode de production interne, mais essayant d'adresser son message à toutes les classes productives, y compris les ouvriers des premières grandes usines, représentait principalement une forme de résistance contre la formation du capitalisme des grandes *corporations*. Son idéologie se fondait sur le mythe américain d'une société constituée en tant que communauté de petits propriétaires, libres travailleurs de leurs propres terres; en se servant d'une rhétorique radicale, les populistes attaquaient la centralisation des moyens de production et des richesses dans les mains d'un petit nombre de grandes entreprises et banques et défendaient une démocratisation des institutions et un rôle économiquement actif de l'Etat, qui devrait

2 V. F. Venturi, *Il populismo russo*, voll. 1-3, II éd., Einaudi, Turin, 1972.

financer les agriculteurs à des conditions plus favorables que celles des banques et réglementer les nouveaux réseaux de communication (chemins de fer, télégraphes, etc.) et le marché dans l'intérêt général.[3] L'Etat devait donc, dans leur conception, défendre activement les opportunités économiques de tout citoyen, en contrastant la formation d'élites économiques et politiques, incompatibles avec une liberté effective, et non seulement formelle, du peuple.

Le populisme est devenu l'un des sujets brûlants de l'historiographie nord-américaine, surtout depuis la moitié du XX^{e} siècle: c'est exactement de ce débat que des glissements sémantiques découlent, en rendant ce mot assez ambigu et polysémique. L'école du "consensus", répandue aux années 1950 et 1960, tendait, dans son analyse, à minimiser l'importance des conflits, et notamment de la lutte des classes, dans l'histoire nationale et à exalter le rôle de valeurs partagées dans la société, comme le compétitivisme, l'individualisme économique et la propriété, au-delà des différences des factions. Le populisme étant la manifestation la plus flagrante et la plus répandue dans l'histoire récente des EU d'une autre tradition idéologique, plutôt visant à la rupture et à l'antagonisme sociale qu'à la conciliation, aussi bien dans les formes que dans les contenus, ces historiens[4] en ont fait la cible principale de leurs attaques, jusqu'au dénigrement de ce mouvement.[5] En tant qu'emblème d'un radicalisme politique américain, le populisme

3 E. Foner, *Give Me Liberty! An American History*, vol. 2, V éd. (Seagull), W. W. Norton & Company, New York, 2017, pp. 649-659; N. Pollack, *The Populist Response to Industrial America*, Harvard University Press, Cambridge (Massachusetts) et Londres, 1962.

4 Le travail de loin le plus important à ce propos est celui de R. Hofstadter, *The Age of Reform: from Bryan to F.D.R.*, Knopf, New York, 1955.

5 A. Jäger, *The Semantic Drift: images of populism in post-war American historiography and their relevance for (European) political science (working papers, n. 3)*, dans *Populismus: populist discourse and democracy*, Thessalonique, Juillet 2016, p. 5: "With the imaginative wit of the new urbanite, Hofstadter contrasted the Populist 'Agrarian Myth' with the 'Commercial Realities' of the late-nineteenth-century, accusing the Populist farmers of posing as an endangered yeomanry for the sake of winning over American public opinion, while being in reality mere crypto-capitalists, utterly enmeshed in the 'business society' which they themselves claimed to criticise so vocally. Their hatred of processes of financialisation and corporate capitalism could, in Hofstadter's purview, better be explained out of a fear of losing status, rather than a steep decline in living standards. With the irony so characteristic of the post-war New York Intellectual, Hofstadter delivered a psychological portrait of the nineteenth-century 'farmer-entrepreneur' as divided between economic modernism and cultural traditionalism, perpetually schizophrenic in his defence of the market economy coupled with a plea for pastoral virtues, oscillating between two political poles which could only

était alors violemment assailli non seulement comme un certain mouvement historiquement circonscrit, mais plutôt comme l'archétype idéologique de toute déviation de l'axe du libéralisme capitaliste – déviations conçues par cette école, sous l'influence des dangers vécus par leur génération, comme essentiellement ultraréactionnaires – en y attribuant des tendances comme un nationalisme et un isolationnisme poussés, un racisme de fond et un anti-intellectualisme extrême, ainsi qu'en y voyant les racines profondes d'expériences politiques successives néfastes très diversifiées,[6] comme les mouvements profascistes américains[7] et le maccartisme.[8] C'est ainsi qu'aux EU la parole "populisme" a progressivement perdu l'ancrage avec le phénomène réel du People's Party et avec son idéologie spécifique, pour définir génériquement les idéologies de tendances politiques disparates accusées de plébiscitarisme et de démagogie, qui n'ont en commun rien d'autre que l'appel direct aux masses populaires et le refus radical de l'ordre politique du pluralisme libéral, de ses formalités, de ses médiations et de son système d'équilibres délicats entre institutions différentes, surtout quand elles le contestent "de droite", mais aussi quand elles le contestent "de gauche".[9] Dans ce sens, le mot s'est transmis dans le

achieve institutional reconciliation in the 'experimental pragmatism' of the American New Deal".

6 V. R. Hofstadter, *The Age of Reform: from Bryan to F.D.R.*, Knopf, New York, 1955; cfr. N. Pollack, *Hofstadter on Populism: A Critique of "The Age of Reform"*, dans *The Journal of Southern History*, vol. 26, n. 4, nov. 1960, pp. 499-500: "In presenting this critique it was necessary to confine the remarks to Hofstadter's own evidence and in that way raise questions concerning the validity of his scholarship. It is suggested, however, that a re-searching of Populist manuscripts and newspapers shows even more effectively the weaknesses of his interpretation, for the evidence on each of his themes points to an entirely different conclusion. For example, the Populists were far from adopting a retrogressively utopian view towards society; many of them accepted the fact of industrialism and sought to democratize its impact through highly specific measures. They did not hold to outdated producers' values but reasoned that farmers and workers were being placed in precisely the same economic position vis-à-vis the total society; hence, actual attempts at coalition between the two groups were made. Tens of thousands of Populist statements show that anti-Semitism was so infrequently mentioned that it might be contended that there was less, not more, anti-Semitism in the movement than in the rest of society".

7 V. Ferkiss, *Populist Influences on American Fascism*, dans *The Western Political Quarterly*, vol. 10, no. 2, juin 1957, p. 350 ss.

8 E. Shils, *The Torment of Secrecy: The Background and Consequence of American Security Policies*, The Free Press, Glencoe, 1956; R. Hofstadter, *The Paranoid Style in American Politics*, dans R. Hofstadter, *The Paranoid Style in American Politics and Other Essays*, Knopf, New York, 1965, p. 3 ss.

9 V. A. Jäger, *The Semantic Drift: images of populism in post-war American historiography and their relevance for (European) political science (working papers, n. 3)*, dans *Populismus: populist discourse and democracy*, Thessalonique,

langage de la science politique et, surtout, du débat politique américain, comme une sorte d'épithète utilisé par les défenseurs du *status quo* pour attaquer toute forme de radicalisme politique.

Toujours dans la même acception, le mot a été reçu aussi en Europe, d'abord en France[10] (mais aussi en Italie)[11], en correspondance avec la montée du Front National,[12] où son usage s'est bientôt répandu à partir des analystes politiques, aux commentateurs politiques, jusqu'aux journalistes et aux politiciens, avec le résultat d'être enfin même revendiqué par le Front National, pour détourner l'attention des accusations de racisme et de fascisme et renouveler l'image du parti, en profitant de moments d'insé-

juillet 2016, pp. 9-10: "While previously only reserved for specific debates within American social and political history, and therefore pertaining to some rather strict temporal demarcations, the newly conjured tool of 'populism' proved to be a concept of high analytic elasticity, with a multitude of semantic dimensions now to be taken in account. Overseeing these multidimensional understandings of the word, five new distinct meanings can be highlighted:

• populism as a political style, comprising a rhetorical, rather than substantive conception of 'paranoid politics'. In its invocation of the 'people' as the sole source of political legitimacy, it is akin to 'anti-elitism', although more ideologically articulated than merely contrarian politics. Equivocally synonymous with 'demagoguery' (Hofstadter, Ferkiss, Bell).

• populism as plebiscitarianism, signifying a demand for direct democracy and anti-constitutionalist rule, hostile to representative liberal democracy and pluralist interest-group politics. A variant of Rousseauian 'monism' in the Berlinian sense, meaning 'democracy without the rule of law' (Shils, Lipset).

• populism as status politics or cultural politics, representing a political ideology in which status-concerns and non-class based, subjective motivations for social action were seen as prevailing over rational decision-making (Shils, Lipset, Parsons).

• populism as a mass political movement, exemplifying a pathology of unconsummated processes of political modernization, pointing to an 'asynchronism' between economic, social, political and cultural trends in developing societies (Kornhauser, Shils, Lipset).

• populism as a political tradition, characterised by rural romanticism and anti-intellectualism, exemplified by the 'yeoman myth' and other nostalgic forms of politics. Hostile to cosmopolitanism and wary of financial and intellectual elites (Hofstadter, Bell)"; sur le changement de la perception générale du populisme, v. aussi M. Kazin, *The Populist Persuasion: an American History*, Cornell University Press, Ithaca et Londres, 1995.

10 Cfr. B.-H. Lévy, *La pureté dangereuse*, Grasset, Paris, 1994.

11 En s'inspirant aux événements du mouvement de contestation radicale du système qui s'était formé en 1968 en Italie (aussi), v. N. Matteucci, *Il liberalismo in un mondo in trasformazione*, Bologne, Il Mulino, 1972; v. aussi N. Matteucci, *Dal populismo al compromesso storico*, Rome, Edizioni della Voce, 1976, ainsi que l'étude *Populismo* dans son *Dizionario di politica*, réalisé avec N. Bobbio et G. Pasquino (Turin, UTET, 1976).

12 V. P.-A. Taguieff, *La Rhétorique du national-populisme: les règles élémentaires de la propagande xénophobe*, dans *Mots. Les langages du politique*, vol. 9, 1984, p. 113 ss., ainsi que les travaux successifs du même auteur.

curité sociale et de crise politique;[13] les accusations de populisme n'ont épargné non plus, dans le débat politique français, des expériences de radicalisme politique de gauche.[14] Depuis les années 1990, dans toute l'Europe on recourait au concept de populisme, le plus souvent sans dédier beaucoup d'attention à ses origines, pour définir surtout, mais non pas exclusivement,[15] les nouvelles stratégies de mouvements et d'idéologies néofascistes et d'extrême droite:[16] un concept dont ces mouvements ont su à leur tour se servir habilement afin de se camoufler et de se rendre acceptables dans le débat politique aux yeux d'électeurs moins extrémistes, en développant leur discours théorique, existant de longue date, sur la possibilité d'une troisième voie possible au-delà des clivages droite-gauche, capitalisme-socialisme.[17]

Le débat juridique n'a donc appréhendé l'idée de populisme qu'à la suite de ce long parcours. C'est ainsi que le populisme a été même qualifié comme l'ennemi le plus sournois et le plus létal de la démocratie constitutionnelle, une forme de pathologie et de corruption du processus démocratique, se servant de techniques éversives de manipulation du consentement: dans cette vision, des auteurs arrivent à repousser la notion

13 A. Jäger, *The Semantic Drift: images of populism in post-war American historiography and their relevance for (European) political science (working papers, n. 3)*, dans *Populismus: populist discourse and democracy*, Thessalonique, juillet 2016, p. 14 ss.; v. aussi p. 17: "In 1994, the word 'populism' established itself as the solid synonym for political irrealism, demagoguery, antielitism and chauvinism, constituting a political passepartout unlike any other term in the French political vocabulary. The features which the American pluralists had first ascribed to the term – plebiscitarianism, irrationalism, romanticism – were now recycled into the jargon of postmodern media analyses. Simultaneously, a militant 'anti-populism' was on the rise on behalf of politicians purportedly still adhering to a 'reasonable' form of politics not based on denunciation and rhetorical absolutism".

14 Pour une généralisation transversale de la notion de populisme à une multiplicité de mouvements politiques radicaux, v. les études du numéro dédié à *Les populismes* de *Vingtième siècle: revue d'histoire*, n. 56, 1997.

15 G. Hermet, *Les populismes dans le monde: une histoire sociologique. XIXe-XXe siècle*, Fayard, Paris, 2001; T. S. Pappas, *Populist Democracies: Post-Authoritarian Greece and Post-Communist Hungary*, dans *Government and Opposition: an International Journal of Comparative Politics*, 2014, vol. 49, n. 1, p. 1 ss.; M. Tarchi, *Italia populista: dal qualunquismo a Beppe Grillo*, Il Mulino, Bologna, 2015.

16 V., *ex ceteris*, H.-G. Betz, *Radical Right-Wing Populism in Western Europe*, Basingstoke, Palgrave Macmillan, Londres, 1994; P. Ignazi, *Extreme Right Parties in Western Europe*, Oxford University Press, Oxford, 2003; cfr. A. Martinelli, *Mal di nazione: contro la deriva populista*, Università Bocconi Editore, Milan, 2013, p. 76, qui affirme l'existence d'un lien profond entre le nationalisme et le populisme contemporaine, considéré comme une idéologie.

17 Pour le débat sur le populisme dans les milieux de la "nouvelle droite", v. A. de Benoist, *Le moment populiste: droite-gauche, c'est fini!*, éditions Pierre-Guillaume de Roux, Paris, 2017.

de souveraineté populaire, en y voyant le germe d'un populisme d'aujourd'hui menaçant mortellement le constitutionnalisme.[18]

2. La théorie populiste de Laclau

Cette prémisse a été nécessaire pour jeter un premier regard à l'évolution du concept de populisme au fil du temps. Peut-on arrêter ici notre enquête sur cette notion, en la considérant une base suffisante et en nous bornant désormais à la recherche de ses implications dans le monde du droit? On a de bonnes raisons d'en douter. La plupart des réflexions citées sur le populisme semblent plus disposées au dénigrement et à la ridiculisation du concept – et à travers de ceci, éventuellement, des idées mêmes du rôle des masses dans la vie publique et de la volonté et de la souveraineté populaires, qui y sont en général associées[19] – qu'à une compréhension approfondie du phénomène et de ses mécanismes. Pour remettre en cause la pensée *mainstream* sur le populisme, il suffit d'observer la difficulté de plusieurs œuvres de théorie politique à le définir: ou en le déterminant dans les détails, pour se rendre compte ensuite que, en effet, les expériences historiques se détachaient foncièrement du modèle édifié,[20] ou en l'identifiant seulement négativement avec son attitude rhétorique masquant un vide idéologique,[21] ou en se bornant à reconnaître le caractère

18 V. A. Spadaro, *Costituzionalismo versus populismo (Sulla c.d. deriva populistico-plebiscitaria delle democrazie costituzionali contemporanee)*, dans G. Brunelli, A. Pugiotto, P. Veronesi, *Studi in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere*, Jovene, Naples, 2009, p. 2007 ss.; *contra*, A. Somma, *Sovranismi. Stato, popolo e conflitto sociale*, DeriveApprodi, Rome, 2018; C. Galli, *Sovranità*, Il Mulino, Bologne, 2019; sur la relation tendue entre le constitutionnalisme et le populisme, v. aussi Y. Mény, Y. Surel, *Par le peuple, pour le peuple. Le populisme et les démocraties*, Fayard, Paris, 2000, p. 36 ss.; P. Pombeni, *Il populismo nel contesto del costituzionalismo europeo*, dans *Ricerche di storia e politica*, 2004, n. 3, p. 367 ss.

19 V. à ce propos W. H. Riker, *Liberalism Against Populism. A Confrontation between the Theory of Democracy ant the Theory of Social Choice*, Waveland Press, Prospect Heights, 1982.

20 V. par ex. les essais de D. MacRae, *Populism as an Ideology*, pp. 153-165, et de P. Wiles, *A Syndrome, Not a Doctrine: Some Elementary Theses on Populism*, pp. 166-179, les deux dans G. Ionescu, E. Gellner (sous la direction de), *Populism: Its Meaning and National Characteristics*, Weidenfeld and Nicolson, Londres, 1969.

21 Cfr. K. Minogue, *Populism as a Political Mouvement*, dans G. Ionescu, E. Gellner (sous la direction de), *Populism: Its Meaning and National Characteristics*, Weidenfeld and Nicolson, Londres, 1969, pp. 197-211; encore, pour une interprétation du populisme comme une idéologie faible, v., avec des nuances différentes, C. Mudde, *The Populist Zeitgeist*, dans *Government and Opposition: an International Journal of Comparative Politics*, 2004, vol.

indéterminé de ses contenus, en se concentrant alors sur l'analyse de ses différentes manifestations,[22] Encore, des juristes qui ont écrit à ce propos[23] semblent tendre à faire du populisme le trou noir au-delà de l'horizon des événements duquel enfermer l'ensemble des menaces pour la démocratie constitutionnelle qu'ils aperçoivent. On pourrait se demander si vraiment il y a une matrice partagée de ces menaces et si leur plus petit dénominateur commun éventuel ne peut pas être utilement repéré ailleurs. Loin d'être assouvie, notre recherche n'est qu'au début.

On peut trouver des éléments d'analyse alternative du populisme chez certains auteurs, par exemple dans l'intuition que le populisme est plutôt une approche, un style ou une dimension de la culture politique en général qu'un type d'idéologie ou d'organisation spécifiques,[24] ou dans la réflexion qui fait du populisme quelque chose qui accompagne toujours la démocratie,[25] dont la composante de système pragmatique ne peut se passer d'une composante de système de rédemption, dans une tension pérenne

39, n. 4, pp. 543-544: "I define populism as *an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the volonté générale (general will) of the people. Populism, so defined, has two opposites: elitism and pluralism.* [...] Though populism is a distinct ideology, it does not possess 'the same level of intellectual refinement and consistency' as, for example, socialism or liberalism. Populism is only a 'thin-centred ideology', exhibiting 'a restricted core attached to a narrower range of political concepts'"; P. A. Taggart, *Populism*, Open University Press, Buckingham, 2000; Y. Mény, Y. Surel, *Par le peuple, pour le peuple. Le populisme et les démocraties*, Fayard, Paris, 2000, p. 177 ss.; L. Zanatta, *Il populismo. Sul nucleo forte di un'ideologia debole*, dans *Polis: ricerche e studi su società e politica in Italia*, 2002, n. 2, p. 263 ss.

22 V. M. Canovan, *Populism*, Harcourt Brace Jovanovich, New York, 1981.

23 V. par ex. A. Spadaro, *Costituzionalismo versus populismo (Sulla c.d. deriva populistico-plebiscitaria delle democrazie costituzionali contemporanee)*, dans G. Brunelli, A. Pugiotto, P. Veronesi, *Studi in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere*, Jovene, Naples, 2009, p. 2007 ss.; C. Pinelli, *Populismo, diritto e società. Uno sguardo costituzionale*, dans *Questione Giustizia*, 2009, n. 1, p. 29 ss.

24 P. Worsley, *The Concept of Populism*, dans G. Ionescu, E. Gellner (sous la direction de), *Populism: Its Meaning and National Characteristics*, Weidenfeld and Nicolson, Londres, 1969, p. 245; A. Knight, *Populism and Neo-Populism in Latin America, Especially Mexico*, dans *Journal of Latin American Studies*, 1998, vol. 30, n. 2, p. 223 ss.; E. Capozzi, *Democrazia incompiuta, partitocrazia, antipolitica: una prospettiva interpretativa della storia italiana*, dans E. Capozzi, M. Griffo (sous la direction de) *Cercare la democrazia. Un itinerario tra politica e storia*, Alfredo Guida Editore, Naples, 2010, p. 115; v. aussi J.-W. Müller, *What Is Populism*, University of Pennsylvania Press, Philadelphia, 2016.

25 Y. Mény, Y. Surel, *Par le peuple, pour le peuple. Le populisme et les démocraties*, Fayard, Paris, 2000, pp. 32-35.

entre ces deux pôles,[26] ou encore dans l'interprétation de l'idée de peuple comme un phénomène ayant une nature relationnelle.[27] Le moment est finalement venu d'introduire dans cette exposition la théorie populiste de Laclau, qui, en partant précisément de la sensation d'insatisfaction pour l'état de l'art en la matière, en a su offrir une vision organique et cohérente; un regard à cette théorie semble indispensable pour pouvoir ensuite revenir en toute connaissance de cause à l'influence du populisme dans la sphère juridique. Laclau, directement influencé par les expériences de populisme sud-américaines, notamment par celle de Perón en Argentine,[28] où l'auteur avait fait de la militance politique dans la gauche péroniste, demeure au fil de toutes ses études un intellectuel révolutionnaire: postmarxiste, il conjugue son effort d'analyse de la réalité avec un effort de fournir aux militants politiques de son temps des instruments conceptuels nécessaires pour transformer la réalité. Il faut bien tenir compte de cela pour mieux comprendre la signification et l'esprit lato sensu militants de toute son œuvre, qui fondent son point de vue original sur le populisme: en effet, aujourd'hui, des mouvements politiques comme Podemos en Espagne et la France Insoumise s'inspirent manifestement, dans la détermination concrète de leur stratégies politiques, à ses théories.[29]

Les œuvres les plus connues de Laclau sont Hegemony and Socialist Strategy, écrite avec Chantal Mouffe, et On Populist Reason. Dans la première, se détachant d'une lecture marxiste classique, Laclau et Mouffe remettent en cause la relation struc-

26 M. Canovan, *Trust the People! Populism and the Two Faces of Democracy*, dans *Political Studies*, XLVII, 1999, pp. 15-16: "some democratic theorists explicitly seek to strip democracy of all redemptive features and to emphasize its non-messianic side. This is democracy without foundations, democracy as open-ended political practice, democracy of which we should not expect too much. But the implication of the analysis presented above is that any attempt to banish the redemptive aspect of democracy is likely to be self-defeating. As a way of interpreting democracy it is rather like trying to keep a church going without faith. In politics as in religion, loss of faith tends to lead to corruption and surrenders the ground to revivalism [...]. [A]ttempts to escape into a purely pragmatic interpretation of democracy are illusory, for the power and legitimacy of democracy as a pragmatic system continues to depend at least partly on its redemptive elements. That always leaves room for the populism that accompanies democracy like a shadow".

27 M. Saward, *The Representative Claim*, dans *Contemporary Political Theory*, 2006, vol. 5, n. 3, p. 297 ss.

28 Sur laquelle v., *ex ceteris*, S. Sigal, E. Verón, Perón o muerte: los fundamentos discursivos del fenómeno peronista, Editorial Legasa, Buenos Aires, 1986.

29 V. notamment P. Iglesias Turrión (sous la direction de), *Ganar o morir. Lecciones políticas de Juego de Tronos*, Akal, Madrid, 2014; J.-L. Mélenchon, *L'ère du peuple*, Fayard, Paris, 2014.

ture/superstructure et la notion économiciste de classe, en développant la conception gramscienne[30] d'hégémonie culturelle jusqu'à affirmer la non fixité (d'autant plus dans une phase de crise organique) de l'identité sociale (et, notamment, du sujet social révolutionnaire), se formant dans un système ouvert de relations. Cette identité n'aurait donc pas un prius objectif dans les rapports de production et trouverait son sens seulement dans un réseau flou de relations mouvantes: c'est un point de vue exaltant la dimension discursive de la sphère politique – qui vit toujours dans un équilibre délicat entre les dimensions antagonistes du pragmatisme positiviste du probable et de l'espoir rédempteur du possible – au sein de laquelle (et non ailleurs) un nouveau bloc historique se dessine, dans un processus continu de formation et de dissolution des agents.[31]

Dans la deuxième œuvre citée,[32] développant plusieurs réflexions de la première, la théorie populiste laclausienne est exhaustivement exposée. En partant de la constatation du dénigrement du populisme, de l'aptitude, que l'on a observée, à le circonscrire, en ne le définissant que négativement, dans les milieux de la marginalité, de l'indétermination, de la rhétorique, de la manipulation, de l'irrationalité, toujours en l'opposant au monde de la politique "normale", légitime, derrière tout cela Laclau a essayé de démasquer l'expression d'un plus profond dénigrement des masses, ou, mieux, de toute mobilisation populaire non pas canalisée dans le lit des structures et des institutions sociales existantes.[33] Au contraire, il voit dans l'indétermination dans la sphère politique

30 A. Gramsci (1891-1937) a été l'intellectuel le plus connu du mouvement ouvrier italien du XX^{e} siècle.

31 E. Laclau, C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, II éd., Verso, Londres, New York, 2001; v. notamment p. 193, identifiant en conclusion leur vision de démocratie radicale "in a form of politics which is founded not upon dogmatic postulation of any 'essence of the social', but, on the contrary, on affirmation of the contingency and ambiguity of every 'essence', and on the constitutive character of social division and antagonism. Affirmation of a 'ground' which lives only by negating his fundamental character; of an 'order' which exists only as a partial limiting of disorder; of a 'meaning' which is constructed only as excess and paradox in the face of meaningless – in other words, the field of the political as the space for a game which is never 'zero-sum,' because the rules and the players are never fully explicit. This game, which eludes the concept, does at least have a name: hegemony".

32 E. Laclau, *On Populist Reason*, Verso, Londres, New York, 2005.

33 E. Laclau, *On Populist Reason*, Verso, Londres, New York, 2005, pp. 3-64, se sert de plusieurs auteurs, de Taine, à Le Bon, à Tarde, à McDougall, pour reprendre le débat sur la psychologie des masses, en soulignant l'influence de la vision positiviste de la mobilisation des masses anonymes comme une aberration pathologique de la vie sociale; une attention particulière est dédiée à l'approche plus nuancée de Freud, que Laclau prend comme

rien d'autre que le miroir de l'indétermination d'une réalité sociale fluctuante et dans la rhétorique (en tant que substitution d'un mot littéral avec un mot figuré, subsumant son signifié sous le propre) un fondement de la structure conceptuelle qui caractérise la politique, et non pas un élément ultérieur et extérieur par rapport à un quid donné; les éléments du discours (et, notamment, les identités) n'acquièrent de signification que dans leurs relations de différences et d'équivalences réciproques. Le (sentiment d'appartenance à un) peuple aussi, dans cette perspective, n'est pas préconstitué, n'est même pas tout simplement le produit d'une idéologie, mais c'est un rapport concret entre les agents sociaux, l'une des articulations possibles d'une multiplicité de demandes sociales, la relation systématique desquelles peut donner lieu à un sentiment d'identité. L'insatisfaction découlant de l'incapacité du système existant d'absorber d'une façon différentielle (c'est-à-dire séparées les unes des autres) ces demandes et leur accumulation au fil du temps, tandis qu'un système institutionnel, quel qu'il soit, s'éloigne de plus en plus de sa base populaire, permettent qu'entre ces demandes différentes une relation d'équivalence – et non différentielle – s'instaure,[34] en les liant dans celle que Laclau appelle une "chaîne d'équivalence", sur la base de laquelle un sujet social, un "peuple", un acteur potentiel de l'histoire, se forme, dans un rapport d'antagonisme avec le pouvoir. Une véritable configuration populiste se constitue alors de l'articulation d'équivalence des demandes, de la formation sur cette base d'une frontière d'antagonisme qui sépare

le point de départ pour son élaboration.

34 E. Laclau, *On Populist Reason*, Verso, Londres, New York, 2005, p. 73: "Think of a large mass of agrarian migrants who settle in the shantytowns on the outskirts of a developing industrial city. Problems of housing arise, and the group of people affected by them request some kind of solution from the local authorities. Here we have a demand which initially is perhaps only a request. If the demand is satisfied, that is the end of the matter; but if it is not, people can start to perceive that their neighbours have other, equally unsatisfied demands – problems with water, health, schooling, and so on. If the situation remains unchanged for some time, there is an accumulation of unfulfilled demands and an increasing inability of the institutional system to absorb them in a differential way (each in isolation from the others), and an equivalential relation is established between them"; p. 86: "The meaning of such demands is determined largely by their differential positions within the symbolic framework of society, and it is only their frustration that presents them in a new light. But if there is a very extensive series of social demands which are not met, it is that very symbolic framework which starts to disintegrate. In that case, however, the popular demands are less and less sustained by a pre-existing differential framework: they have, to a large extent, to construct a new one. And for the same reason, the identity of the enemy also depends increasingly on a process of political construction".

le "peuple" du pouvoir et, à un certain niveau de mobilisation, de l'unification des demandes dans un système stable de signification. Le populisme, non pas une idéologie, mais une logique politique qui peut se remplir des contenus politiques et sociaux les plus divers, est alors dans la dimension politique l'opposé de l'institutionnalisme: si ce dernier se caractérise pour la prévalence de la logique différentielle au sein de la communauté, le premier fait prévaloir la logique de l'équivalence, partageant la société en deux camps antagonistes, un "nous" contre un "eux",[35] ces derniers individués comme l'oligarchie du pouvoir à bouleverser, les fronts respectivement déterminés selon les critères de sa propre chaîne d'équivalence.[36]

Dans ce système de relations, la question se pose alors de savoir comment des demandes hétérogènes peuvent s'associer dans une seule demande globale, capable d'établir sa frontière d'antagonisme entre "peuple" et "oligarchie" et visant à soustraire le pouvoir à la dernière pour le "restituer" au premier. A ce propos, il est nécessaire que l'une des demandes puisse représenter et unifier dans la logique du système populiste la totalité des éléments de la chaîne, en déterminant leur frontière et en les différentiant de toute autre chose, de sorte que toute identité puisse trouver une collocation dans le système, en deçà ou au-delà de la limite dichotomique: cette demande, qui exerce la fonction hégémonique d'unification d'un camp, se charge dans le discours aussi d'une signification universelle qui se superpose à son signifié particulier,[37] en incarnant non pas la réalisation, mais l'aspiration à la plénitude et à la totalité.[38]

35 "S'aimer, c'est haïr le même ennemi": J.-P. Sarte, *Le Diable et le bon Dieu*, Gallimard, Paris, 1951, p. 245.

36 E. Laclau, *On Populist Reason*, Verso, Londres, New York, 2005, pp. 67-124.

37 Ladite demande se fait de plus en plus un signifiant vide, détaché de son signifié particulier initial, à mesure que des demandes de plus en plus diversifiées entrent dans la chaîne d'équivalence.

38 E. Laclau, *On Populist Reason*, Verso, Londres, New York, 2005, pp. 70-71: "there is the possibility that one difference, without ceasing to be a particular difference, assumes the representation of an incommensurable totality. In that way, its body is split between the particularity which it still is and the more universal signification of which it is the bearer. This operation of taking up, by a particularity, of an incommensurable universal signification is what I have called hegemony. And, given that this embodied totality or universality is, as we have seen, an impossible object, the hegemonic identity becomes something of the order of an empty signifier, its own particularity embodying an unachievable fullness. With this it should be clear that the category of totality cannot be eradicated but that, as a failed totality, it is a horizon and not a ground"; p. 163: "For populism, as we have seen, is the terrain of a primary undecidability between the hegemonic function of the empty signifier and the equivalence of particularistic

3. Avantages de l'approche de Laclau

Un autre élément important de la théorie de Laclau est la mobilité des frontières partageant l'articulation politique, les signifiants hégémoniques étant dans ce domaine toujours fluctuants. Des chaînes d'équivalence alternatives et rivales – chacune constituant une dimension discursive totale, universelle – reliant selon des logiques différentes des demandes populaires s'affrontent et se superposent, l'une essayant de briser l'autre, en absorbant certaines de ses demandes dans le réseau de liens d'un autre projet hégémonique construit autour d'une autre demande fondamentale, qui essaye de représenter les autres demandes, et en proposant une autre identité de peuple et une autre frontière dichotomique entre le "nous" et le "eux". Le succès d'un projet ou de l'autre ne dépend que de l'issue de la lutte hégémonique entre ces visions, c'est-à-dire de la capacité de l'un ou de l'autre, moyennant la multitude d'instruments de la politique, de recueillir derrière son drapeau le consentement des majorités sociales; aucune demande n'est à priori insérée dans une chaine où dans une autre, avant l'exercice de la fonction d'homogénéisation des "signifiants vides" rivaux, ouverts à se remplir de signifiés différents.[39] Pendant des périodes de crise organique, d'ensemble, quand tout le système existant de symboles et de signifiés craque, cette lutte pour l'hégémonie se fait plus intense et dramatique, tandis que pendant des phases de plus grande stabilité elle devient plus discrète et submergée, sans une mise en discussion généralisée du cadre politique et social, quand le pouvoir est en mesure de satisfaire la plupart des demandes au moyen d'une logique différentielle en empêchant leur enchaînement dans un discours alternatif capable de saper les bases du système. Se fondant aussi sur les études de Mouffe,[40] Laclau voit un

demands. There is a tension between the two, but this tension is none other than the space of constitution of a 'people'"; v. aussi E. Laclau, *Why Do Empty Signifiers Matter to Politics?*, dans E. Laclau, *Emancipation(s)*, Verso, Londres, New York, 1996, pp. 36-46.

39 E. Laclau, *On Populist Reason*, Verso, Londres, New York, 2005, p. 129 ss.; v. aussi E. Laclau, *La guerre des identités. Grammaire de l'émancipation*, La Découverte/MAUSS, Paris, 2000.

40 V. C. Mouffe, *The Democratic Paradox*, Verso, Londres, New York, 2000, pp. 2-3: "On one side we have the liberal tradition constituted by the rule of law, the defence of human rights and the respect of individual liberty; on the other the democratic tradition whose main ideas are those of equality, identity between governing and governed and popular sovereignty. There is no necessary relation between those two distinct traditions but only a contingent historical articulation", pp. 95-96: "By privileging rationality, both the deliberative and aggregative perspectives leave aside a central element which is the crucial role played by passions and affects in securing allegiance to democratic

lien profond, et non pas une contradiction nécessaire, entre théorie populiste et théorie démocratique: il observe que la démocratie se fonde sur l'existence d'un sujet – d'un "peuple" – démocratique, qui ne peut émerger que de certaines articulations hégémoniques de demandes dans des chaînes d'équivalence, dont le signifiant vide soit capable de recueillir des revendication de démocratie, par exemple, dans certaines configurations, en les coordonnant à des revendication de liberté, si ces dernières ne font pas partie du cadre de règles déjà partagées dans le système politique, comme il est arrivé pour plusieurs expériences en Amérique Latine.[41] Ainsi, par exemple, en 2013 en Turquie la revendication particulière, de nature écologiste, d'empêcher la destruction du parc Gezi à Istanbul s'est faite le signifiant vide, et ainsi l'élément unificateur et totalisant, d'une multitude de revendications de démocratie et de liberté partagées par de larges tranches[42] de la société turque, en devenant le catalyseur d'une révolte populaire.

Après cet aperçu rapide de la théorie de Laclau, le moment est venu d'en évaluer l'utilité gnoséologique, aussi bien en général qu'en particulier par rapport à notre né-

values. [...] The failure of current democratic theory to tackle the question of citizenship is the consequence of their operating with a conception of the subject which sees individuals as prior to society, bearers of natural rights, and either utility-maximizing agents or rational subjects. In all cases they are abstracted from social and power relations, language, culture and the whole set of practices that make agency possible. What is precluded in these rationalistic approaches is the very question of what are the conditions of existence of a democratic subject".

41 V. E. Laclau, *On Populist Reason*, Verso, Londres, New York, 2005, p. 171: "if there is to be an articulation/combination between democracy and liberalism, demands of two different types have to be combined. Combination, however, can take place in two different ways: either one type of demands – liberalism, for instance, with its defence of human rights, civil liberties, and so on – belongs to the symbolic framework of a regime, in the sense that they are part of a system of rules accepted by all participants in the political game, or they are contested values, in which case they are part of the equivalential chain, and so part of the 'people'. In Latin America during the 1970s and 1980s, for instance, the defence of human rights was part of the popular demands and so part of the popular identity. It is a mistake to think that the democratic tradition, with its defence of the sovereignty of the 'people', excludes liberal claims as a matter of principle. That could only mean that the 'people"s identity is fixed once and for all. If, on the contrary, the identity of the 'people' is established only through changing equivalential chains, there is no reason to think that a populism which includes human rights as one of its components is a priori excluded. At some points in time – as happens today quite frequently in the international scene – defence of human rights and civil liberties can become the most pressing popular demands".

42 Mais non majoritaires, ce qui, face à la répression étatique, a enfin déterminé l'insuccès du mouvement, tandis que la chaîne d'équivalence créée par le parti islamique au pouvoir s'est démontrée plus large, stable et solide, capable de mobiliser des majorités sociales aussi bien pour contenir la révolte de Gezi parc de 2013 que pour arrêter la tentative de coup d'Etat de 2016.

cessité d'une approche juridique au phénomène du populisme. En termes d'analyse des mécanismes réglementant à un niveau profond la société contemporaine, on peut à bon droit se demander[43] si son abandon substantiel de la distinction infrastructure-superstructure et de la centralité du conflit capital-travail correspond ou non aux dynamiques réelles du monde de la production. Mais c'est probablement une question qui dépasse l'horizon de Laclau, dont le point d'observation est centré dans la sphère de la théorie politique. De son élaboration on peut tirer des outils précieux précisément en cette perspective. Sa théorie semble en effet bien s'adapter au fonctionnement et à l'ossature de la politique des société liquides[44] occidentales du XXI^e^ siècle, où les sentiments d'appartenance de classe – naguère facilités par les grandes concentrations de travailleurs de l'époque de l'ouvrier-masse, désormais au contraire entravés par la dimension du travail flexible, précaire, discontinu, décentré, etc. – et les corps intermédiaires se sont beaucoup affaiblis, par rapport à l'ascension de la dimension du rapport individuel de consommation, et où les identités collectives en générale se sont faites fluides, incertaines et évanescentes. La dimension d'isolation individuelle de la logique de la consommation ne se traduit en effet pas du tout par un déclin de la masse et, notamment, par une prévalence de rapports différentiels aussi dans la sphère politique, mais y transmet sa vocation à l'immersion de l'individu dans une réalité inconnue, épouvantable et menaçante, avec la conséquence que l'attitude d'une maîtrise rationnelle de la réalité est dépassée par l'ancien besoin collectif de la suggestion pré-rationnelle et symbolique passant par les archétypes de masse.[45] Le rôle des masses et de leurs structures latentes – contrairement aux prévisions des positivistes du XIX^e^ siècle, animés par une terreur sacrée de la foule – tend (et semble destiné à tendre encore) à l'accroissement plutôt qu'à la disparition, au moyen de social networks et d'autres réseaux de communication de masse,

43 V. notamment les critiques de S. G. AZZARÀ, *Nonostante Laclau: populismo ed egemonia nella crisi della democrazia moderna*, Mimesis, Milan, 2017.

44 Pour la notion de société liquide, v. Z. BAUMAN, *Liquid Modernity*, Polity Press, Cambridge, 2000.

45 Pour une analyse de quelque chose que l'on peut appeler des archétypes de masse dans l'histoire de l'humanité, la référence centrale demeure E. CANETTI, *Masse und Macht*, Claassen, Hambourg, 1960; v. notamment, dans cette œuvre, la notion de "masse double", anticipant quelque peu la conception laclausienne de frontière dichotomique qui caractérise le populisme.

qui posent en tout moment l'individu au centre de foules virtuelles omniprésentes, souvent dépassant les frontières nationales, le soumettant à une multitude obsédante de suggestions sans précédents dans l'histoire.

Dans la lutte politique on ne voit alors plus – et cela surtout de la part des classes subordonnées, exclues non plus seulement de la maîtrise des moyens de production, mais aussi, au-delà de l'apparence, de la maîtrise consciente des moyens de communication, dans un double assujettissement d'aliénation – des acteurs préconstitués dans le monde des rapports économiques qui se disputent le pouvoir, mais des fronts improvisés autant que mouvants, réunis autour de revendications symboliques variables, qui concourent en premier lieu pour la détermination d'un horizon de réponses en vue duquel enchaîner les demandes sociales. Même si la ligne de conduite de dénoncer et de démasquer les rapports inégaux, toujours existant dans la sphère économique et structurant selon leur paradigme la société entière, n'a pas probablement perdu complètement son rôle, cela ne prélude plus d'une manière directe à la formation d'un sujet populaire historique visant à la rupture sociale, tandis que l'idée d'une sorte de "guerre de position", se déroulant sur le terrain de la société civile comme déjà Gramsci le théorisait, pour l'exercice d'une hégémonie culturelle pour obtenir le consensus des majorités, devient la prémisse nécessaire de toute tentative réaliste d'arriver à se servir de la machine sophistiquée de l'Etat contemporain pour réaliser des buts de changement social.

Il faut bien remarquer que ces mécanismes semblent bien connus par les oligarchies dominantes, qui à leur tour s'en servent volontiers pour réaliser leurs buts à travers des stratégies discursives populistes. A la différence du groupe politique dominant contre lequel la Révolution française de 1789 s'est dirigée, ceux d'aujourd'hui – ou, mieux, leurs composantes les plus clairvoyantes et dynamiques – ne se caractérisent pas comme tout simplement défensifs, en limitant, dans une logique institutionnaliste, leur action à l'absorption séparée des demandes par une logique différentielle, mais, dans une sorte de "révolution permanente", remettent sans arrêt en cause les visages publics, les hiérarchies, les équilibres, les valeurs et les formes institutionnelles du système de pouvoir, en les soumettant à un renouvellement continu qui assure en définitive la survivance stratégique de la structure économique et des rapports de domination sociale. Des secteurs de l'establishment se servent alors de stratégies populistes, forment leurs propres chaînes d'équivalence, créent leur propre conception de la fracture peuple/élite,

font appel à leur propre peuple (par exemple, on peut penser à la suggestion du slogan Make America Great Again) et, en utilisant toutes les opportunités de mobilisation que le monde de la communication instantanée permet, s'en servent pour dépasser d'autres secteurs dans la lutte pour le pouvoir. D'autre part, aussi des mouvements essayant de représenter les intérêts des classes subalternes ont appris la leçon et, en acceptant le cadre mobile de la communication et de la politique de la (post)modernité liquide, y ont construit à leur tour leurs propres chaînes d'équivalence et leurs propres suggestions/identités populaires (par exemple, on peut penser au slogan de la France Insoumise aux dernières élections présidentielles françaises: "la force du peuple"), pour pouvoir recueillir des majorités sociales et aspirer au pouvoir.

A ces raisons d'actualité et de validité de la théorie populiste de Laclau, d'autres s'en ajoutent, concernant spécifiquement la perspective du juriste sur le populisme. Les approches interprétant le populisme comme une idéologie courent souvent le risque de témoigner à leur tour une approche idéologique institutionnaliste, qui s'oppose politiquement à ce qui devrait faire l'objet de l'analyse plutôt qu'en fournir des clés d'interprétation. De plus, faire du populisme une idéologie conduit le discours sur le "populisme juridique" à essayer de déchiffrer la vision du droit propre à cette idéologie... sauf que, conformément à ce que l'on a observé à propos des expériences populistes en général, identifier une vision du droit partagée par des mouvements politiques complètement différents serait une chimère irréalisable. Au contraire, si l'on considère le populisme en tant qu'une logique politique, en tant qu'une forme de stratégie politique, s'adaptant à une multiplicité de contenus idéologiques, mais ayant des caractéristiques spécifiques,[46] indentifiables et distinguables par rapport à d'autres variétés de logique politique, on peut introduire le droit comme une variable de ce système, en reconnaissant, tout simplement, que le droit, en tant que phénomène social occupant une place importante et délicate dans des sociétés complexes, est un élément constitutif des chaînes d'équivalence, des revendications juridiques concourant, en même temps que des revendications, par exemple, économiques ou étiques, à la formation de discours hégé-

46 Cfr. à ce propos les réflexions de J.-W. Müller, *What Is Populism*, University of Pennsylvania Press, Philadelphia, 2016.

moniques. En effet, le droit concourt d'une manière vitale à régir la vie collective, avec d'autres systèmes normatifs non juridiques (moraux, religieux, de bon ton, de diplomatie...), et les société contemporaines tendent à réglementer par des dispositions de droit détaillées des secteurs de plus en plus larges des rapports sociaux: on ne doit pas alors s'étonner de la place de protagoniste que des demandes de nature (exclusivement ou d'une façon concurrente) juridique peuvent occuper dans une chaîne d'équivalence, voire, potentiellement, la place de signifiant vide universel, c'est-à-dire d'un élément hégémonique enchaînant dans un rapport d'équivalence tous les autres éléments formant l'un des fronts d'une dichotomie populiste.

4. Hégémonie et sens commun

Avant de procéder avec quelques exemples de ce que l'on baptisera "populisme juridique", un autre concept mérite d'être introduit, pour mieux comprendre l'idée d'hégémonie inspirant cet essai: c'est le concept de "sens commun". Beaucoup de philosophes, depuis l'antiquité, se sont confrontés avec cette notion, jusqu'à caractériser même le nom de l'Ecole écossaise fondée par Thomas Reid (1710-1796), basant son système sur l'existence de principes intuitifs et pré-rationnels qui fondent le rapport des personnes avec la réalité.[47] Une conception partiellement différente du sens commun est développée par l'intellectuel italien Giambattista Vico (1668-1744), qui, dans sa "Scienza nuova", y donnant notamment une valeur éthique en tant que système de croyances partagées au sein d'une communauté, le définit comme un "jugement sans réflexion qui est généralement porté et senti par toute une classe, par tout un peuple, par toute une nation ou par le genre humain tout entier".[48] Selon l'auteur, le "droit na-

47 T. Reid, *Essays on the Intellectual Powers of Man*, 1785, J. Bell, Edimbourg, G. G. J. et J. Robinson, Londres, p. 555, "there are [...] propositions which are no sooner understood than they are believed. The judgment follows the apprehension of them necessarily, and both are equally the work of nature, and the result of our original powers. There is no searching for evidence, no weighing of arguments; the proposition is not deduced or inferred from another; it has the light of truth in itself, and has no occasion to borrow it from another", p. 573: "The universality of these opinions, and of many such that might be named, is sufficiently evident, from the whole tenor of human conduct, as far as our acquaintance reaches, and from the history of all ages and nations of which we have any records".

48 G. Vico, *La science nouvelle* (trad. française), Renouard et Compagnie, Charpentier, Paris, 1844, p. 42, XII.

turel des gens est né en même temps que les mœurs et les coutumes des nations, lesquelles sont conformes entre elles dans un même sens commun et humain; et cela sans aucune réflexion, et sans prendre exemple les unes des autres".[49]

Gramsci part aussi d'une conception de sens commun assez semblable, dont on ne peut pas faire abstraction pour comprendre de façon adéquate sa théorie de l'hégémonie, qui à son tour se démontre vitale pour déchiffrer les rapports entre droit et populisme. La "société civile" consiste pour cet intellectuel italien en l'ensemble des organismes ayant une nature "privée" du groupe social dominant, institutions éducatives ou autres apparats qui exercent autrement une fonction de propagation idéologique, c'est-à-dire d'hégémonie sociale, par la diffusion capillaire du consentement pour un certain ordre social, tandis que la "société politique", en tant que pouvoir juridique, c'est-à-dire l'Etat stricto sensu, exerce plutôt la fonction de domination directe, de commandement par la coercition et la force.[50] L'auteur se sert aussi d'une notion d'Etat lato sensu, absorbant des éléments autrement associés à la notion de société civile, dans un seul système d'"hégémonie cuirassée de coercition"[51] les deux niveaux de la coercition-domination et du consentement-hégémonie peuvent bien s'entrelacer donc dans un seul mécanisme complexe, comme il se passe en effet dans le système sophistiqué de pouvoir des sociétés contemporaines. Le sens commun est chez Gramsci la conception de la vie de telle ou de telle autre couche sociale, non pas immeuble et raide comme le

49 G. Vico, *La science nouvelle* (trad. française), Renouard et Compagnie, Charpentier, Paris, 1844, pp. 74-75, CV.

50 V. A. Gramsci, *Quaderni del carcere*, vol. III, Einaudi, Turin, 1975, pp. 1518-1519: "Si possono, per ora, fissare due grandi «piani superstrutturali», quello che si può chiamare della «società civile», cioè dell'insieme di organismi volgarmente detti «privati», e quello della «società politica o Stato», e che corrispondono alla funzione di «egemonia» che il gruppo dominante esercita in tutta la società e a quello di «dominio diretto» o di comando che si esprime nello Stato o nel governo «giuridico». Queste funzioni sono precisamente organizzative e connettive"; vol. II, p. 800: "in una determinata società nessuno è disorganizzato e senza partito, purché si intendano organizzazione e partito in senso largo e non formale. In questa molteplicità di società particolari, di carattere duplice, naturale e contrattuale o volontario, una o più prevalgono relativamente o assolutamente, costituendo l'apparato egemonico di un gruppo sociale sul resto della popolazione (o società civile), base dello Stato inteso strettamente come apparato governativo-coercitivo"; v. aussi L. Althusser, *Idéologie et appareils idéologiques d'Etat. (Notes pour une recherche)*, dans L. Althusser, *Positions, 1964-1975*, Les éditions sociales, Paris, 1976, p. 67 ss.

51 A. Gramsci, *Quaderni del carcere*, vol. II, Einaudi, Turin, 1975, pp. 763-764.

folklore, mais toujours se transformant, s'enrichissant de notions scientifiques et d'opinions philosophiques entrées dans l'usage;[52] dans cette perspective dynamique, il y voit un lien bien étroit avec son idée d'hégémonie culturelle:[53] la lutte hégémonique est précisément une lutte pour la définition et la redéfinition du sens commun, jusqu'à sa transformation dans un nouveau sens commun, c'est-à dire dans une nouvelle vision du monde et dans un nouveau système de valeurs, qui se substituent à ceux préexistant et justifient et créent le consentement social à un nouveau ordre et à un nouveau pouvoir.[54] Ce n'est que du conflit qu'un sens commun, fondant un système de rapports de pouvoir, se forme et s'effondre et l'objet stratégique de la lutte hégémonique consiste exactement en cela. Une nouvelle chaîne d'équivalence, pour revenir au lexique laclausien, est alors l'embryon potentiel d'un nouveau sens commun, l'affirmation duquel dépend enfin du sort de la lutte hégémonique.

Dans une reconstruction interprétative de la réalité sociale de nos jours, réduire le rôle du droit au niveau de la société politique ne tient compte du caractère complexe des mécanismes du pouvoir étatique des sociétés libérales du XXI[e] siècle, qui, conformément à l'intuition gramscienne, hybride les niveaux de la société civile et de la société politique, de la domination et du consentement, de la participation populaire et de la reproduction des mécanismes en coulisse qui fondent la suprématie de l'oligarchie dominante. Des sujets de droit font l'objet de débats d'opinion dans la presse, à la télévision, sur internet, au café, chez le coiffeur, débats auxquels tout citoyen participe activement ou passivement avec des possibilités nouvelles d'être à tout moment à jour des choix des représentants politiques... peut-être, avec quelques difficultés d'orientation dans ce déluge d'informations. Encore, le droit régit une quantité de domaines de la vie quotidienne inimaginable il y a quelques temps, ce qui lie de plus en plus des éléments juridiques à la vie de la société civile et de ses apparats; donc, la fonction de création, de transmission et de reproduction du consentement a souvent pour objet l'ordre juridique. La lutte hégémonique ne se borne pas à la sphère de la domination politique

52 A. Gramsci, *Quaderni del carcere*, vol. III, Einaudi, Turin, 1975, p. 2271.

53 A. Gramsci, *Quaderni del carcere*, vol. II, Einaudi, Turin, 1975, p. 1045.

54 A. Gramsci, *Quaderni del carcere*, vol. II, Einaudi, Turin, 1975, p. 1047.

directe, mais, de plus en plus avec la croissance de la complexité sociale, peut avoir comme des acteurs protagonistes des chaînes d'équivalence liant de plusieurs manières possibles des demandes bigarrées, par exemple d'égalité, de démocratie, de liberté, de sécurité, de transparence, d'honnêteté, de solidarité, ou encore de fermeture des frontières, de réforme morale ou religieuse, de suprématie géopolitique, d'individualisme économique etc., formant dans leur ensemble un ordre, qui se manifeste aussi bien sur le plan économique, que sur le plan éthique, que sur le plan juridique, etc., ou transversalement parmi ces plans. Un sens commun, en tant que conception de la vie et du monde, est donc une combinaison articulée d'éléments étiques, esthétiques, philosophiques, scientifiques, économiques, juridiques, etc., réciproquement liés dans la vision développée par un groupe social et notamment par celui qui cimente hégémoniquement autour de soi la société entière dans un bloc historique. On va maintenant se concentrer sur quelques exemples du rôle que des demandes essentiellement appartenant au monde du droit peuvent acquérir au sein d'une chaîne hégémonique et, par son intermédiaire, dans la lutte hégémonique pour la colonisation du sens commun.

5. Le droit dans des chaînes d'équivalence populistes: quelques exemples

Plusieurs exemples de ce que l'on vient d'exposer peuvent être empruntés à l'actualité; on se bornera a quelques cas récents et très connus, ayant déjà attiré l'attention des médias et des commentateurs internationaux.

a) Le Brexit

L'affaire récente du Brexit démontre bien que des questions juridiques peuvent être au centre d'un discours populiste. En effet, le choix auquel le peuple du Royaume-Uni à été appelé en 2016 par un référendum, l'appartenance ou la sortie de l'Union Européenne (UE), va avoir des implications plus ou moins importantes un peu dans tous les domaines de la vie sociale du Royaume... mais, avant tout, il faut se rappeler que la demande principale du front des Brexiters était précisément de se retirer des Traités Européens, c'est-à-dire des actes de droit international, en activant la procédure réglementée par la clause de retrait de l'article 50 du Traité sur l'Union Européenne. Ainsi, une revendication juridique est devenue le signifiant vide enchaînant une pluralité d'autres demandes sociales – plusieurs desquelles aussi ne sont pas du tout étrangères au monde juridique – dans un rapport d'équivalence, même des demandes qui, par elles-mêmes,

étaient réciproquement très éloignées dans le spectre politique précédent: par exemple, limiter l'accès au pays aux immigrés des autres pays de l'UE faisant concurrence aux travailleurs autochtones; décider de manière autonome les politiques en matière d'immigration et de réfugiés provenant de pays extra-UE, en les liant aussi à des craintes de sécurité et d'ordre publique; recouvrer une pleine souveraineté économique et des politiques sociales (malgré le fait que le Royaume avait déjà gardé sa propre monnaie): cela, après que la crise grecque a attiré l'attention des opinions publiques sur les effets sociaux tragiques des politiques d'austérité européennes; privilégier les rapports politiques et économiques avec les Etats du Commonwealth of Nations et avec les Etats-Unis, qui partagent une langue commune et des éléments culturels et juridiques importants, au lieu des rapports avec le continent. Encore, d'autres demandes formant la chaîne d'équivalence du front du Leave étaient plus spécifiquement juridiques: en effet, l'idée de la suprématie du droit européen, mal s'adaptant à la conception de la souveraineté parlementaire caractérisant le Royaume dans son évolution historique, ainsi que le style et la substance des normes européennes, parfois difficilement adaptables au fonctionnement des ordres juridiques nationaux, ont été souvent utilisés dans les discours des brexiters pour soutenir leur position politique.[55] Au contraire, la faction du Remain a adopté plutôt une stratégie différentielle et défensive, diffusant la terreur de conséquences économiques et politiques catastrophiques d'un saut dans l'inconnu et essayant d'absorber séparément les demandes d'insatisfaction populaire dans la perspective de la réalisation possible, au moins partiellement, de réformes à l'intérieur de l'UE, en contractant des conditions meilleures pour le Royaume.

Tout le monde sait quel front a gagné la bataille. On voit bien que le front populiste du Leave s'est construit en liant des demandes si hétérogènes en vue de conduire

55 V. la position de Nigel Farage, leader du pro-Brexit *UK Independence Party*, favorable à "a proud, patriotic country that has control of its borders, represents itself on the world stage and makes its own laws in our own sovereign Parliament. I believe in a new British deal once we leave the EU, one that suits the needs of our own country", dans son article publié par *The Telegraph* du 29 octobre 2015: http://www.telegraph.co.uk/news/politics/ukip/11961604/Britain-will-be-flattened-if-it-stays-in-the-EU.html; selon Boris Johnson, un autre membre très important du front du *Leave*, cité par M. Elliott, *"Vote leave, take control"? Sovereignty and the Brexit debate*, dans *Public Law for Everyone*, article du 23 juillet 2016: "you cannot express the sovereignty of Parliament and accept the 1972 European Communities Act".

le Royaume hors de l'Unione Européenne: en ayant conquis hégémoniquement le consentement de la majorité des électeurs, en ayant colonisé et rendu anti-européen le sens commun du Royaume, en ayant réalisé enfin son but, ce front ne pouvait en tant que tel aspirer à garder le pouvoir, puisque les défis de la nouvelle phase politique posaient immédiatement de nouveaux problèmes, faisant émerger d'autres fronts de division dichotomique de la société. C'est ainsi qu'aujourd'hui, sous la direction de Jeremy Corbyn, le Labour Party, qui semblait l'un des perdants de la bataille sur le Brexit, est depuis les élections générales de 2017 au centre de l'attention des commentateurs en tant que capable d'articuler une stratégie populiste hégémonique,[56] dans une nouvelle chaîne d'équivalence, orientée a lier les demandes de travailleurs, de chômeurs, d'étudiants, de minorités ethniques, de jeunes gens en général et de la classe moyenne paupérisée, pour construire une majorité sociale autour d'un dessin déclaré de retour au Welfare State, d'intervention de l'Etat dans l'économie, de démocratisation et de solidarisation de la société et de dégagement militaire dans le monde. L'acceptation par le peuple du Royaume de la stratégie populiste des brexiters a probablement créé une attitude partagée plus favorable au populisme, qu'un renouvelé Labour Party a su ensuite intercepter.

b) Trump et l'Obamacare

On peut faire découler un deuxième exemple de populisme juridique de l'actualité récente des Etats-Unis d'Amérique, en rapport avec l'un des personnalités le plus souvent associées, à bon droit, au populisme contemporain: Donald Trump. Sa stratégie politique, qui lui a permis de gagner les élections présidentielles de 2016, s'est assez explicitement caractérisée comme populiste: son slogan, Make America Great Again, a créé une fracture dichotomique au sein de la population, mobilisant surtout la couche sociale moyenne blanche appauvrie par les conséquences (délocalisation, tertiarisation, informatisation, concurrence commerciale internationale des pays en voie de développement, produisant des marchandises à des coûts plus bas) de la mondialisation, isolationniste en politique étrangère, voyant l'immigration comme une menace pour l'emploi et pour la sécurité et contraire à l'intégration des minorités ethniques. Paradoxalement

56 Le slogan des travaillistes aux élections générales de 2017, bien témoignant une perspective de partition dichotomique de la société entre "un peuple" et "une oligarchie", a été: "For the many, not the few".

peut-être, vue la carrière personnelle de Trump, mais moins paradoxalement, en réfléchissant sur la fluidité des mécanismes populistes de mobilisation, il a su construire son peuple autour de ces ressentiments et identifier l'ennemi dans les establishments de la politique institutionnelle, de la presse, de la bureaucratie et du deep state, accusés de favoriser en même temps l'oligarchie financière de Wall Street, les intellectuels (notamment de New York) et les minorités ethniques et sociales, contre les intérêts de la multitude des "vrais" américains. La stratégie différentielle et défensive de son opposante aux élections, Hillary Clinton,[57] n'a pu rien faire contre la suggestion de rupture et de revanche de Donald Trump, enfin élu Président des Etats-Unis.

Ce qu'il est plus intéressant de souligner ici c'est l'importance de la dimension juridique dans le populisme de Donald Trump, faisant par exemple d'une demande avant tout juridique, l'abrogation du Patient Protection and Affordable Care Act de 2010, communément dit Obamacare, l'une des revendications de sa campagne. Cette réforme du système de santé, fortement voulue par l'administration de Barack Obama, sans remettre en cause sa structure essentiellement fondée sur des assurances privées, avait élargi à des millions d'américains l'accès aux cures médicales, aussi au moyen de l'utilisation de subsides publics et en les obligeant à s'assurer, et avait imposé aux assurances de couvrir des personnes déjà dans un mauvais état de santé. L'augmentation des coûts du système, qui demeurait quand même un marché privé, a alors investi, au moins partiellement, les américains qui étaient déjà assurés, ainsi que les finances publiques, en rendant assez impopulaire la réforme. Trump a donc décidé dans sa campagne pour les présidentielles – probablement, pour obtenir un plus fort soutien du Parti Républicain, mais aussi pour se servir du mécontentement de la population envers cette loi – de l'attaquer frontalement, en promettant "to repeal and replace Obamacare". Si d'autres revendications de Trump, comme la construction d'un mur à la frontière avec le

57 Déjà aux élections primaires du *Democratic Party*, Hillary Clinton, malgré le soutien de l'entier *establishment* du parti, avait seulement avec beaucoup de difficultés dépassé son adversaire Bernie Sanders, qui se caractérisait aussi par une stratégie populiste, bien que différente de celle de Donald Trump en tant que progressiste, fille de la vague du mouvement *Occupy Wall Street*, en essayant d'enchaîner les demandes de la classe moyenne appauvrie avec celles des plus pauvres et des minorités, contre l'oligarchie financière, le complexe militaro-industriel et les plus riches, ainsi qu'en suscitant la suggestion d'un nouveau *New Deal*, de la publicisation du système de santé et d'un système universitaire gratuit.

Mexique ou une politique économique assez protectionniste, sont généralement plus connues et plus commentées que l'abrogation de l'Obamacare, cette dernière s'adapte plus à être analysée dans cet essai, puisqu'elle témoigne mieux la conception de l'ordre juridique caractérisant le populisme de Donald Trump.

Comment une telle revendication a pu entrer avec succès dans une chaîne hégémonique populiste, dans le contexte politique des Etats-Unis? Cela a été consenti par une évolution historique, suite à laquelle les acteurs de la politique des EU adoptant une stratégie populiste ont changé radicalement: si le prototype du populisme américain a été le People's Party – dont on a observé comment l'étiquette de conservateur et de réactionnaire a été attribuée ex-post, de façon controversée, avec un regard attentif à la réalité présente des auteurs plutôt qu'à celle historique – et si une telle stratégie d'enchaînement de demandes dans un rapport d'équivalence a aussi caractérisé le progressisme du New Deal de Franklin Delano Roosevelt, après la guerre, avec le maccartisme, puis avec les campagnes présidentielles de George Wallace, avec Richard Nixon, Ronald Reagan, etc., des stratégies populistes ont été adoptées surtout par les secteurs les plus conservateurs du monde politique nord-américain, en leur permettant avec succès de démanteler le système de welfare state du New Deal.[58] Au fur et à mesure que la situation économique et le cadre international étaient changés, la chaîne d'équivalence réalisée autour du programme de Roosevelt s'était donc graduellement affaiblie, tandis que des demandes sociales auxquelles ce système, désormais institutionnalisé depuis longtemps, n'arrivait plus à répondre d'une manière adéquate passaient dans le camp de ses adversaires. Le mythe de la liberté américaine comme liberté en premier lieu contre toute intromission de l'Etat – visant par exemple à réglementer et à limiter le marché intérieur et à garantir par les dépenses publiques le bien-être de tout membre de la communauté – un mite jadis surpassé par la stratégie populiste de Roosevelt, pouvait ainsi surpasser enfin à son tour le New Deal par une stratégie populiste, identifiant la bureaucratie étatique avec une nouvelle caste parasitaire, avec une oligarchie à abattre par le peuple, et critiquant son lourd système de taxation et son attention pour les minorités ethniques,

58 E. Laclau, *On Populist Reason*, Verso, Londres, New York, 2005, pp. 133-137; v. aussi M. Kazin, *The Populist Persuasion: an American History*, Cornell University Press, Ithaca et Londres, 1995.

plutôt que pour les "vrais" américains (essentiellement, les couches sociales moyennes blanches). Le populisme de Trump s'inscrit donc dans cette évolution historique. On peut mieux comprendre maintenant la signification des revendications juridiques de son discours populiste, incluant aussi bien l'élimination (ou modification radicale) de l'Obamacare qu'une réforme, visant à une réduction générale (mais notamment, en pratique, pour les plus riches) des taxes sur les revenus des personnes physiques et des entreprises.[59] La vision juridique du populisme conservateur américain se traduit donc,[60] en ce qui concerne la législation réglementant le rôle économique et social de l'Etat, par une lecture non évolutive de la Constitution, exaltant les droits négatifs de première génération et notamment la liberté économique des individus, auxquels, dans le marché intérieur, l'Etat doit imposer le moins possible de limitations et d'obligations de contribution pour des raisons de solidarité sociale, en limitant au maximum son rôle,[61] en dehors des nécessités de défense et de sécurité: ce qui n'empêche pas au discours politique de Trump de faire, paradoxalement, souvent appel à l'idée d'une unité et d'une homogénéité de la communauté (des "vrais" américains), contre les menaces intérieures et extérieures.

c) Le référendum constitutionnel italien de 2016

On peut envisager en tant que dernier exemple le débat qui a précédé le référendum constitutionnel italien de décembre 2016, qui peut encore éclairer les particularités du populisme du XXIe siècle, notamment en ce qui concerne son rapport avec la sphère juridique.

59 Ce n'est pas par hasard que, suite à la victoire de Donald Trump et à ses énormes difficultés à obtenir l'abrogation de l'*Obamacare* (puisque la majorité républicaine au Sénat était très faible et des divisions internes subsistaient), il n'a réussi à vider substantiellement le contenu de la réforme de la santé de l'administration précédente (en éliminant l'obligation d'assurance) que par la loi qui a approuvé la réforme fiscale, en témoignant le lien profond entre ces deux revendications dans son discours.

60 Ces observations sont très générales et indiquent une tendance d'ensemble du discours politique de Donald Trump (et de ses prédécesseurs sur la voie d'un populisme conservateur aux EU), mais il faut aussi tenir bien compte de l'extrême fluidité de sa rhétorique, qui, voire après son élection en tant que Président des EU, demeure assez oscillante et contradictoire: par exemple, pour rester en la matière de l'abrogation de l'*Obamacare*, en déclarant parfois de vouloir quand même garantir une couverture sanitaire pour tout le monde, mais sans provoquer une augmentation de la dépense publique et des prix des assurances.

61 Pour l'analyse d'un processus de privatisation même de la production du droit dans la politique du droit des EU, v. U. Mattei, *Il modello di common law*, IV éd., Giappichelli, Turin, 2014, pp. 276-278.

On associe généralement le populisme à des idéologies politiques extrêmes; s'il est vrai que des positions politiques d'orientation modérée, d'autant plus si déjà intégrées dans la sphère du pouvoir, adoptent le plus souvent des stratégies institutionnalistes, d'absorption différentielle des demandes sociales et de défense des grandes lignes du système politique existant comme capable d'y répondre adéquatement, d'ailleurs les phases historiques de crise organique, concernant non seulement le domaine de l'économie, mais toute la sphère de la vie publique et des valeurs sociales, dissolvent le cadre institutionnel et renforcent et généralisent la dimension fluide de la politique, de sorte que même des populismes "de centre" deviennent à leur tour concevables. Tel est le cas de la stratégie discursive adoptée par le Partito Democratico italien[62] quand son leadership a été conquis par Matteo Renzi, qui, sans mettre en discussion la collocation politique centriste du parti, en a changé profondément la rhétorique, en se faisant l'un des interprètes en Italie de l'avènement de l'ère des populismes. C'est ainsi que Renzi a dans un premier moment construit son discours autour de l'idée de la "mise à la caisse" de la vieille politique, en concentrant son attaque sur la nécessité à la fois de se débarrasser d'un groupe de direction (du parti et, en général, du pays) incapable et habitué à un monde dépassé, et, par des réformes, d'un renouvellement et d'une modernisation du pays: plus intégré dans l'Union Européenne, finalement capable de regarder à l'avenir avec enthousiasme. Dans sa rhétorique postmoderne, qui convient à une société liquide ayant perdu des sentiments solides d'identités, son peuple était surtout composé par "les plus méritants", les jeunes ambitieux, les nouveaux entrepreneurs créatifs et désireux d'investir sur l'informatique et sur les nouvelles technologies; un peuple de nouveaux consommateurs et de self-made men, se confrontant avec une oligarchie de privilégiés et d'épaves d'une époque de garanties sociales que l'Etat ne peut plus assurer dans un monde globalisé et informatisé: bureaucratie politique, bureaucratie administrative, syndicats, travailleurs déjà entrés dans le monde de la production et garantis par un système de droits non plus soutenables. Dans cette perspective, l'Etat devait réduire le plus possible son rôle de garant des droits économiques et sociaux, de deuxième génération, et d'interventionnisme visant à "éliminer les obstacles d'ordre économique et social qui, en limitant de fait la liberté et l'égalité des citoyens, entravent le plein épanouissement de la personne humaine

62 On pourrait faire des remarques similaires sur la stratégie discursive d'Emmanuel Macron en France.

et la participation effective de tous les travailleurs à l'organisation politique, économique et sociale du Pays" (art. 3 de la Constitution italienne, entrée en vigueur en 1948), pour mieux se conformer au libéralisme encore inspirant majoritairement la construction européenne, en concentrant son activité au soutien des jeunes méritants et ambitieux recherchant un succès individuel.

Mais ce n'est qu'avec le temps, après une série de succès politiques de Renzi et son ascension au rôle de Président du Conseil des Ministres, que l'affirmation de la nécessité d'une réforme constitutionnelle, demande juridique par excellence, encore plus dans un pays ayant une Constitution rigide, est devenue même le chaînon le plus important, le signifiant vide hégémonique de la chaîne populiste du chef du Gouvernement, capable, en cas de succès, de consolider pour longtemps son pouvoir. Le Renzi "metteur à la caisse" de la vieille garde s'était alors transformé en un Renzi réformateur, qui, après des interventions de compression de la législation sociale et travailliste, demandait de lever le plus résistant des obstacles posés par le vieille monde, qui s'était formé après la fin de la guerre mondiale par un compromis entre les chrétien-démocrates, les socialo-communistes et les libéraux, qu'il voyait comme désormais périmé depuis la fin de la guerre froide, pour pouvoir passer vraiment à la pars construens et réaliser complètement son dessin d'ordonnancement juridique et d'ordre social postmodernes. La réforme constitutionnelle, approuvée par le Parlement italien avant d'être soumise à la consultation populaire par référendum, ne touchait pas directement les parties économiques et sociales de la Constitution, mais se bornait à modifier les équilibres institutionnels entre des pouvoirs publiques, notamment en renforçant l'influence du pouvoir exécutif sur la procédure législative, en éliminant le bicamérisme parfait et l'élection populaire directe du Sénat (rendu représentatif des collectivités territoriales et associé à la procédure législative seulement en quelques cas), en supprimant dans le texte constitutionnel les départements et en renforçant les compétences étatiques par rapport aux compétences des régions (qui à leur tour avaient au contraire été élargies par une réforme constitutionnelle en 2001). Tout cela se liait à la loi électorale qui venait d'être approuvée,[63] fortement majoritaire, qui garantissait au parti le plus voté une très large

63 Loi n. 52 du 6 mai 2015, enfin abrogée avant qu'elle pût être effectivement appliquée à l'occasion d'une

majorité parlementaire à la Chambre des députés: la combinaison de la réforme constitutionnelle et de la loi électorale donnerait au parti gagnant et à son leader une suprématie politique inhabituelle dans l'histoire politique italienne récente, dont la structure institutionnelle, réalisée au lendemain de la chute du régime fasciste, prévoyait un partage délicat du pouvoir entre plusieurs institutions différenciées. On ne peut pas ici approfondir les contenus de la proposition de réforme constitutionnelle; ce qui semble plus important est de mettre en évidence sa valeur de signifiant vide hégémonique dans une chaîne d'équivalence, en faisant de la réforme le seul moyen possible de "débloquer le pays" et en demandant ainsi de faire confiance à la figure charismatique de Renzi en tant que capable de réaliser tout cela. Les conséquences souhaitées d'épargne économique et d'accélération de la procédure législative découlant de la simplification institutionnelle étaient exaltées par les supporteurs de la réforme, promettant des résultats importants de moralisation de la vie publique, après de longues phases de scandales de corruption et de coûts exagérés de la politique, et assurant aussi des conséquences de stabilisation politique du pays, capable d'engendrer à son tour, par l'établissement pendant longtemps d'une majorité parlementaire solide et en syntonie avec le gouvernement, une stabilisation économique et sociale, par l'approbation de réformes stratégiques dans la direction souhaitée par le parti gagnant, ainsi qu'un plus grand prestige du pays sur la scène européenne et internationale.

Les adversaires de la réforme constitutionnelle ne partageaient pas une vue politique générale, éparpillés dans tout le spectre politique, avec des perspectives souvent incompatibles. Malgré cela, en réponse à la stratégie populiste de "réformer la Constitution pour débloquer le pays", un autre bloc populiste, opposé au premier, s'est formé, ce qui rend cet exemple très intéressant: non pas donc une logique d'équivalence se confrontant avec une logique différentielle, mais deux logiques d'équivalence se confrontant pour l'hégémonie sur les demandes sociales. La défense de la Constitution est ainsi devenue le signifiant vide hégémonique de cette autre chaîne d'équivalence, en se structurant en négatif pour repousser la réforme. Malgré l'hétérogénéité du front, un cadre

élection, après le refus populaire de la réforme constitutionnelle par référendum et après avoir été déclarée partiellement anticonstitutionnelle par la *Corte Costituzionale*.

de discours populiste hégémonique partagé s'est formé, rempli ensuite par chaque force d'opposition de ses contenus spécifiques mobilisant ses activistes, sympathisants et électeurs; cela, en laissant assez de côté, dans le débat courant, les aspects techniques de la réforme, sur lesquels discutaient, très partagés entre eux, les constitutionnalistes, les uns favorables à une gouvernabilité plus facile, les autres craignant des dérives autoritaires et une concentration excessive de pouvoir. Au contraire, le discours commun des adversaires de la réforme portait d'une part sur l'attaque à l'expérience de gouvernement de Renzi, en acceptant le défi de la personnalisation de l'affrontement – chacun avec ses critiques: avoir accueilli trop d'immigrés et de réfugiés, avoir compromis les droits des travailleurs et favorisé la précarité des jeunes, avoir soutenu des banques impliquées en des scandales financiers, avoir utilisé trop souvent la force publique contre les contestateurs, etc. –, d'autre part sur la critique aux influences des pouvoirs financiers internationaux et des puissances étrangères dans la réalisation du projet de réforme constitutionnelle. A vrai dire, le rôle étatique dans l'économie et son interventionnisme à des fins de solidarité sociale avaient été déjà amplement démantelés au cours des années précédentes, mais les institutions européennes et des groupes d'intérêts économiques internationaux avaient souvent souhaité des réformes plus poussées en ce sens et l'esprit social, solidaire et travailliste des constitutions d'après la deuxième guerre mondiale était vu, dans cette perspective, comme un obstacle périlleux à la suprématie de la logique du marché, en liant dans plusieurs documents la proposition d'une centralisation politique à celle d'un affaiblissement des droits sociaux et tout cela avec la perspective de réformes constitutionnelles.[64] Déjà en 2012, à la suite de la stipulation du traité du

64 V. J. P. Morgan, *The Euro area adjustment: about halfway there*, disponible en-ligne, p. 2: "The constitutions and political settlements in the southern periphery, put in place in the aftermath of the fall of fascism, have a number of features which appear to be unsuited to further integration in the region"; p. 12: "At the start of the crisis, it was generally assumed that the national legacy problems were economic in nature. But, as the crisis has evolved, it has become apparent that there are deep seated political problems in the periphery, which, in our view, need to change if EMU is going to function properly in the long run. The political systems in the periphery were established in the aftermath of dictatorship, and were defined by that experience. Constitutions tend to show a strong socialist influence, reflecting the political strength that left wing parties gained after the defeat of fascism. Political systems around the periphery typically display several of the following features: weak executives; weak central states relative to regions; constitutional protection of labor rights; consensus building systems which foster political clientelism; and the right to protest if unwelcome changes are made to the political status quo. The shortcomings of this political

Fiscal Compact,[65] la loi constitutionnelle 1/2012 avait introduit dans la Constitution italienne le principe d'équilibre du budget et renforcé la subordination des sujets publics aux règles financières européennes. La revendication d'une pleine souveraineté politique, sociale et économique a donc été un élément d'unification du front anti-réforme, chaque mouvement politique mettant l'accent sur l'un ou sur l'autre aspect (contrôle des frontières, possibilité de faire des politiques budgétaires expansives, etc.) de ce souhait partagé de récupération de souveraineté. Pendant les derniers jours de campagne référendaire, la prise de position de représentants de pays alliés dans l'UE ou dans l'OTAN, comme l'Allemagne et les Etats-Unis, n'a que renforcé cette rhétorique fondée sur le danger d'une limitation radicale de la souveraineté nationale démocratique par l'approbation d'une réforme que le sens commun percevait désormais comme dictée par des puissances et des pouvoirs étrangers. C'est ainsi que le référendum populaire a largement repoussé la proposition de réforme constitutionnelle, en causant la crise politique du Gouvernement Renzi. Un bloc populiste a ainsi gagné sur l'autre, en enchaînant un plus grand numéro de demandes sociales insatisfaites dans un lien plus solide; la suggestion de débloquer le pays a été dépassée par la suggestion de sauvegarder la souveraineté nationale et de se débarrasser d'un gouvernement assez contesté.

6. Conclusions: vers un populisme juridique

De tout ce que l'on vient d'observer, le moment est arrivé de faire découler quelques observations. On a contesté les interprétations du populisme comme une idéo-

legacy have been revealed by the crisis"; v. aussi la lettre de Jean-Claude Trichet (alors président de la Banque Centrale Européenne) et de Mario Draghi (président actuel de la BCE) au Gouvernement italien du 5 août 2011, suivant la réunion du Conseil directif de la BCE du 4 août: "A comprehensive, far-reaching and credible reform strategy, including the full liberalisation of local public services and of professional services is needed. This should apply particularly to the provision of local services through large scale privatizations. [...] A thorough review of the rules regulating the hiring and dismissal of employees should be adopted in conjunction with the establishment of an unemployment insurance system and a set of active labour market policies capable of easing the reallocation of resources towards the more competitive firms and sectors. [...] In view of the severity of the current financial market situation, we regard as crucial that all actions listed in section 1 and 2 above be taken as soon as possible with decree-laws, followed by Parliamentary ratification by end September 2011. A constitutional reform tightening fiscal rules would also be appropriate".

65 Un traité international convenu entre 25 des pays de l'UE.

logie, puisqu'elles se traduisent le plus souvent par une critique idéologique au populisme qui n'aide pas du tout à comprendre le phénomène. En se servant des études de Laclau et de Mouffe, on a ensuite interprété le populisme comme une logique politique particulière, privilégiant une stratégie d'enchaînement dans un rapport d'équivalence des demandes sociales, réunies par une revendication exerçant la fonction de signifiant vide hégémonique, plutôt qu'une stratégie institutionnaliste d'absorption différentielle des demandes, une fois isolées les unes des autres. Pour mieux comprendre le fonctionnement d'une telle stratégie hégémonique, on a jeté un coup d'œil aux écrits de Vico et de Gramsci et on a abordé la notion de sens commun, vu non pas comme quelque chose de donné, fixe et immuable, mais comme le champ de bataille stratégique de la lutte hégémonique. L'adoption d'une stratégie populiste plutôt qu'institutionnaliste comporte de plus grandes chances de succès dans un moment de crise organique, quand le système social n'est pas capable de donner des réponses adéquates a une multiplicité de demandes sociales, disponibles alors à être liées dans un nouveau cadre de significations aspirant à substituer celui qui oscille et qui se désagrège. La phase historique actuelle peut bien être définie comme un moment de crise organique; c'est la raison la plus évidente de la multiplication de phénomènes populistes, non nécessairement véhiculant des idéologies radicales: même des modérés peuvent se comporter comme des populistes, si les stigmates de l'époque sont la crise, la fluidité et l'incertitude sociale.

On a vu que des revendications juridiques se prêtent bien à l'enchaînement dans des associations d'équivalence avec d'autres revendications et peuvent même y exercer le rôle de signifiant hégémonique vide. Le droit, comme l'économie, la morale, le bon ton, l'esthétique et tout ce qui concourt à la formation du sens commun, n'est pas du tout étranger à l'avènement d'une ère des populismes. D'autant plus dans des sociétés démocratiques, où le droit est conçu comme un produit de la souveraineté populaire, des questions juridiques font l'objet du débat et peuvent facilement partager dichotomiquement l'opinion publique. On revient alors sur l'opposition, affirmée par quelques auteurs, entre le populisme, conçu comme une pathologie du processus démocratique, et le constitutionnalisme:[66] c'est une interprétation qui semble considérer le droit consti-

66 V. A. Spadaro, *Costituzionalismo versus populismo (Sulla c.d. deriva populistico-plebiscitaria delle democrazie*

tutionnel comme quelque chose de statique, de donné, tandis que, dans une phase de crise organique, la constitution n'est que l'un des terrains de confrontation, où plusieurs logiques institutionnalistes et plusieurs logiques populistes s'affrontent avec des géométries variables. On a vu le cas italien, où deux populismes se disputaient précisément sur l'opportunité de réformer la Constitution: une stratégie populiste visait à sa modification; une autre stratégie populiste a réussi à l'empêcher; comment pourrait-on interpréter cette situation au moyen du modèle "constitutionnalisme versus populisme"? Encore, des expériences récentes de populisme en Amérique du Sud montrent que des constitutions, même très avancées et ouvertes à la participation populaire, peuvent découler de formes d'hégémonie populistes; et on pourrait trouver le même esprit dans plusieurs des constitutions européennes les plus louées.[67]

La logique populiste, par son évocation de forces externes au système, peut se traduire par un élément de dynamisme et de souplesse des démocraties constitutionnelles, en servant à chaque instant à balancer les risques de tout excès d'institutionnalisme menaçant de claustrer le système politique dans un formalisme autoréférentiel et renfermé, isolé des masses populaires et de leurs demandes, géré par des professionnels de la politique. C'est de ces situations de décalage, d'accumulation d'une distance rageuse et suspicieuse entre gouvernants et gouvernés, que les réactions les plus graves et funestes découlent: par conséquent, une dose de populisme, reportant au centre du débat le sujet de la souveraineté populaire, peut se révéler un médicament vital. Encore, essayer d'attribuer au constitutionnalisme et à ses mécanismes une sorte de valeur mystique résolutive d'une façon autonome des problèmes sociaux pourrait représenter une

costituzionali contemporanee), dans G. Brunelli, A. Pugiotto, P. Veronesi, *Studi in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere*, Jovene, Naples, 2009, p. 2007 ss.; P. Ciarlo, *Democrazia, partecipazione popolare e populismo al tempo della rete*, dans *Rivista AIC*, 2018, n. 3, p. 1 ss.; A. Vosskuhle, *Demokratie und Populismus*, dans *Der Staat*, 2018, n. 1, p. 119 ss.; E. Scoditti, *Populismo e diritto. Un'introduzione*, dans *Questione Giustizia*, 2019, n. 1, p. 10 ss.; L. Ferrajoli, *L'alleanza perversa tra sovranismi e liberismo*, dans *Costituzionalismo.it*, 2019, n. 1, p. 1 ss.; en critiquant une telle opposition conceptuelle, cfr. C. R. Kaltwasser, *Populism vs. Constitutionalism? Comparative Perspectives on Contemporary Western Europe, Latin America, and the United States*, dans *The Foundation for Law, Justice and Society: Policy Brief*, 2013, http://www.fljs.org/files/publications/Kaltwasser.pdf; J.-W. Müller, *What Is Populism*, University of Pennsylvania Press, Philadelphia, 2016.

67 V. par ex. la Constitution portugaise de 1976.

tentative de cacher derrière les formes constitutionnelles la nature réelle du pouvoir, conflictuelle et en soi (quel qu'en soit le vêtement, même constitutionnel) violente, oppressive et menaçante;[68] faire oublier cette nature, comme il s'ensuit de toute logique politique institutionnaliste, c'est très dangereux: c'est pourquoi il est bon qu'une dose de populisme puisse toujours l'équilibrer. Le rôle du populisme se fait encore plus essentiel pendant des phases de crise organique, dont l'issue la plus saine passe par une mobilisation démocratique directe du peuple, dernier dépositaire de la souveraineté, visant à élaborer collectivement, à décider et à imprimer une nouvelle direction au cadre social et politique et au système institutionnel. Sans oublier les marges amples d'élasticité et d'adaptation au changement social que l'on peut repérer dans les systèmes des constitutions, voire rigides,[69] chercher à l'intérieur de l'ordre constitutionnel la solution à la crise de l'ordre constitutionnel n'est pas toujours et nécessairement l'issue la plus rationnelle, efficace et équitable. Par exemple, les constitutions européennes d'après-guerre se caractérisaient par la garantie plus ou moins renforcée des droits sociaux de deuxième génération (travail, instruction effectivement accessible, couverture sanitaire universelle et de qualité, habitation décente, un salaire et une retraite convenables, etc.): aujourd'hui, à peu près à 60 ans de distance, non seulement ces droits ne sont pas complètement réalisés, mais la tendance est aussi à un leur affaiblissement, face à la restauration du cadre politique libéral précédent, des contradictions duquel les horreurs du XX^{e} siècle se sont engendrés. Souvent, il a suffi de ne pas appliquer les dispositions constitutionnelles, jusqu'à essayer de faire pénétrer dans le sens commun populaire l'idée que ces dispositions, dépassées, peuvent même être abrogées. La subordination fréquente des

68 Selon E. Canetti, *Masse und Macht*, Claassen, Hambourg, 1960, l'exécution de tout ordre laisse dans la personne obéissante une épine douloureuse, un corps étranger dans sa chair, dont l'individu perçoit la nécessité de se libérer, tôt ou tard: individuellement, en le transmettant par l'action de faire exécuter des ordres à celui qui lui est subordonné; collectivement, par la formation d'une "masse de renversement", visant à la libération de l'ensemble des épines d'un ensemble d'individus, qui ne peuvent pas s'échapper des ordres individuellement.

69 V. à ce propos les réflexions de la doctrine italienne, dont notamment F. Lanchester, *La Costituzione tra elasticità e rottura*, Giuffrè, Milan, 2011; G. Amato, *L'elasticità delle costituzioni rigide*, dans *Nomos. Le attualità nel diritto*, 2016, n. 1, http://www.nomos-leattualitaneldiritto.it/nomos/giuliano-amato-lelasticita-delle-costituzioni-rigide; cfr. déjà C. Mortati, *La Costituzione in senso materiale*, réimpression inchangée avec une introduction de G. Zagrebelsky, Giuffrè, Milan, 1998.

politiques économiques des gouvernements à la volonté inflexible des institutions du marché international[70] et la croissance de normes et de décisions politiques fondamentales élaborées au niveau européen (plongé dans l'idéologie du marché) sans la présence d'un système véritablement démocratique les rendant l'expression d'une volonté populaire, à leur tour contournent et neutralisent de plus en plus les garanties de démocratie et de participation populaire inspirant ces constitutions, en plus de leurs contenus sociaux.[71] L'histoire récente démontre alors comment une stratégie d'absorption différentielle de ces demandes sociales, dans un système qui graduellement puisse en assurer la satisfaction, peut facilement échouer, quand un activisme direct des masses, visant à la supporter de l'extérieur du système institutionnel, fait défaut. Au contraire, dans l'élasticité dynamique du rapport entre forme et substance constitutionnelle, c'est précisément la présence d'un tel activisme, en plus de la capacité de prévoyance et de l'esprit d'ouverture des responsables politiques, qui pourrait déterminer la réception d'un besoin diffus de transformation démocratique et sociale dans le cadre des textes constitutionnels existants, en valorisant par une approche évolutive – comme cela pourrait par exemple être possible en Italie[72] – leur esprit démocratique, populaire et social, lorsque celui-ci est capable d'absorber et de symboliser une volonté de rupture répandue dans la société.

Y a-t-il des risques dans les populismes? Oui, bien sûr, il y en a: mais non plus que dans l'institutionnalisme, en effet. Dans un cas comme dans l'autre, le bien-être ou le mal-être d'une société et de ses classes réside enfin non pas dans l'adoption de la part des acteurs politiques d'une stratégie ou de l'autre, mais dans l'adoption, finalement, d'un ordre constitutionnel et d'une forme de société ou de l'autre, ce qui concrètement peut recommander aux acteurs, selon le cas, l'usage de stratégies différentes. Le monde politique de nos jours est un terrain fécond pour le populisme: mais la réponse la plus

70 Cfr. les réflexions de M. Manetti, *Costituzione, partecipazione democratica, populismo*, dans *Rivista AIC*, 2018, n. 3, p. 375 ss.; L. Ferrajoli, *Democrazia e populismo*, dans *Rivista AIC*, 2018, n. 3, p. 521; A. Somma, *Verso il postdiritto? Fine della storia e spoliticizzazione dell'ordine economico*, dans *Politica del diritto*, 2018, n. 1, p. 79 ss.

71 Cfr. A. Somma, *I limiti del cosmopolitismo: la sovranità nazionale nel conflitto tra democrazia e capitalismo*, dans *Costituzionalismo.it*, 2019, n. 1, p. 17 ss.

72 Cfr. G. Dossetti, *Costituzione e riforme*, dans G. Dossetti, *I valori della Costituzione*, Edizioni San Lorenzo, Reggio Emilia, 1995, p. 97 ss.; A. Barbera, *Costituzione della Repubblica italiana*, dans *Enciclopedia del diritto: annali*, VII, Giuffrè, Milan, 2015, p. 265 ss.

raisonnable à cela ne pourrait pas être, plutôt que la négation de légitimité de cette stratégie, sa réception? En politique, une stratégie doit avant tout fonctionner. La logique populiste n'a ni plus, ni moins de dignité qu'une autre logique politique: tout simplement, en certains cas, elle fonctionne. Aujourd'hui, elle fonctionne souvent. La politique, concrètement, c'est choisir un côté. Encore une fois, le populisme ne fait que dénuer cette simple réalité. Le droit, voire le droit constitutionnel, n'est que l'un des champs de bataille pour la création du nouveau sens commun, de plus en plus enchaîné comme un élément de logiques politiques populistes. Collègues juristes, soyons les bienvenus à l'époque du populisme juridique!

ANDREA ZOPPINI*

LES SYSTÈMES-EXPERTS ET LA RESPONSABILITÉ CIVILE
EXPERT-SYSTEMS AND LIABILITY**

RÉSUMÉ. *Les systèmes-experts ne se limitent pas à traiter une donnée ou restituer une information. Ils élaborent une réponse adéquate à une question posée. Ce faisant, ils ont vocation à remplacer l'intervention d'un expert humain. Les hypothèses de responsabilité s'en trouvent accrues car, au vice de fonctionnement toujours possible du système, s'ajoute le risque de la fourniture d'une information erronée, se substituant à une "prestation" mais se présentant comme un "produit"; on peut donc s'interroger sur le cadre juridique à retenir. Le droit américain semble écarter la responsabilité du fait des produits, quoique toute controverse ne soit pas éteinte; il retient, en revanche, que la responsabilité peut, dans certains cas, être recherchée pour n'avoir pas eu recours à un système-expert plus faible qu'un cerveau humain.*

ABSTRACT. *Expert-systems do not only treat or retrieve data: they elaborate an adequate reply to questions. Their purpose is to replace human experts. The risk of liability is increased because not only can the system be defective but there is an additional risk arising from the supply of erroneous information, conceived as a service but perceived as a product. What is the appropriate legal framework? Although the debate is not closed, US law appears exclude strict product liability but seems to admit, in certain cases, liability for failure to have recourse to expert-systems which are more performing than the human brain.*

* Full Professor of Private Law Institutions, Faculty of Law, Roma Tre University.

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CONTENT. 1. Introduction – 2. Différence entre les logiciels traditionnels et les systèmes-experts – 3. Commercialisation des systèmes-experts – 4. Défauts dans les systèmes-experts – 5. Responsabilité pour le mauvais fonctionnement d'un système expert: responsabilité pour la diffusion commerciale d'informations erronées – 6. Responsabilité pour l'usage impropre d'un système expert – 7. Responsabilité pour la non-utilisation d'un système expert – 8. Recours à l'action prohibitive dans le droit italien

1. Introduction

L'une des applications les plus importantes dans le domaine de l'intelligence artificielle est constitué par les systèmes-experts (S.E.). Le système d'intelligence artificielle unit deux caractères apparemment inconciliables: l'un typiquement humain, l'intelligence, voire la capacité de maîtriser les situations nouvelles et de résoudre les problèmes; l'autre typiquement mécanique puisque il est fait ou obtenu par des moyens techniques.

L'intelligence artificielle évoque la fable de l'apprenti sorcier, qui fait vivre ce qui est par nature inanimé, et, après, en perd le contrôle. Elle évoque aussi le pessimisme – qui a un précédent littéraire dans le livre de Orwell «1984» – de ceux qui prévoient que les ordinateurs pourront provoquer toutes sortes de désastres, et même altérer un jour les structures de la pensée humaine.[1]

L'utilisation de l'intelligence artificielle est marquée par le passage de systèmes à caractère informatif/descriptif, typiques des logiciels traditionnels, à des systèmes à caractère interprétatif/inférentiel, typiques par contre des S.E.

Le premier S.E. a été réalisé à l'université de Stanford en Californie il y a vingt ans. Aujourd'hui on est au début de leur commercialisation et de leur utilisation hors des centres de recherche et d'expérimentation: on estime que leur marché (évalué en 1985 à vingt millions de dollars) atteindra deux milliards et demi de dollars en 1993.[2] Le trait saillant du S.E. consiste à aider et, du moins théoriquement, à remplacer l'expert humain dans les domaines d'importance stratégique pour une société indus-

1 On fait référence à B. F. SKINNER, *Beyond Freedom and Dignity*, New York, Bantam-Vintage, 1972; pour un compte rendu des accidents causés par le mauvais fonctionnement d'un ordinateur, voir M. GEMIGNANI, *Product Liability and Software*, *Rutgers Computers & Technology Law Journal*, 8, 1981, p. 173.

2 Artificial Intelligence Answers SOS Calls, Mcdonnel Douglas, Mis Week, Jan. 9, 85, vol. 6, n. 2, p. 48.

trielle avancée: ainsi, les S.E. appliqués à la géologie et destinés aux recherches pétrolières. Ajoutons également l'application des S.E. à la médecine, qui engendrent des craintes, et nécessitent des mesures de prudence vu l'importance des conséquences qui entrent en jeu.

2. Différence entre les logiciels traditionnels et les systèmes-experts

Il faut distinguer les logiciels traditionnels et les S.E., tout en tenant compte de ce que, si les solutions technologiques varient selon les progrès accomplis, la philosophie qui est à la base d'un S.E. reste identique: il s'agit de systèmes qui, en utilisant la "connaissance", donnent des solutions valables pour l'usager.

Le S.E., donc, "joue un rôle analogue à celui d'un expert humain, en égalant son processus de décision, puisqu'il est capable de gérer un corps organisé de connaissance dans un domaine défini".[3]

En ce qui concerne sa structure, un S.E. se compose de:

a) une base de connaissances (long term memory) élaborée sous forme de règles spécifiques du domaine d'application;

b) un moteur d'inférence (inference engine), un logiciel qui organise le raisonnement à partir des connaissances précédentes;

c) une base de faits (short term memory) qui est un ensemble de connaissances constitué par les données du cas en examen.

En ce qui concerne ses fonctions, un S.E. est à même de:

a) dialoguer en langage naturel avec l'usager à travers l'interface homme-machine, qui lui permet d'interroger la machine et inversement;

b) déduire des conclusions;

c) expliquer comment le système est arrivé à inférer une solution et pourquoi il requiert certaines informations;

d) agrandir ou corriger la base de connaissances, par le biais de nouvelles règles.

La différence avec les anciens logiciels traditionnels est évidente et en particulier,

3 T. M. Lazzari-F. L. Ricci, *I sistemi esperti. Ricerca scientifica ed applicazioni*, Roma, La Nuova Italia Scientifica, 1985.

avec les logiciels dits d'aide à la décision, constitué par:

a) un programme qui élabore un algorithme, même très complexe;

b) des données, qui ne font pas partie du logiciel.

Ces logiciels d'aide à la décision sont capables de fournir un résultat optimal sur la base d'un nombre fixe de questions, posées, en général, dans un ordre établi; contrairement aux S.E. ces logiciels ne fournissent pas un résultat optimal en cas de réponses manquantes. Il s'agit, donc, d'élaborations algorithmiques de données, qui laissent à l'usager-expert la tâche de les interpréter, puisqu'ils sont compréhensibles par l'auteur seulement et non par la plupart des gens.

Les S.E. sont les livres, les documents de tout genre et les films, parmi les instruments qui aident à prendre des décisions. Avec les S.E., c'est le système lui-même qui recherche les informations relatives à la solution d'un problème, pourvu que l'interrogeant réponde correctement aux questions posées; au contraire, les instruments obligent l'interrogateur à rechercher activement dans les documents toutes les données dont il a besoin.

3. Commercialisation des systèmes-experts

Le logiciel a été comparé à un vêtement, qui peut être fait sur mesure, peut être acheté en version standardisée, ou peut être acheté déjà confectionné, et ensuite "personnalisé" grâce à des modifications opportunes. D'une manière analogue la commercialisation des logiciels traditionnels est faite de façon différente selon que le logiciel comporte des caractéristiques standardisées ou résulte d'un rapport particulier à l'inverse entre l'informaticien et celui qui l'a commandé. Cette différence, en particulier selon l'expérience américaine, entraîne des conséquences remarquables en ce qui concerne la responsabilité du producteur, et la possibilité que le logiciel soit considéré comme un produit ou comme une prestation de service.

On peut donc distinguer: a) un logiciel, dit progiciel, produit en série et destiné à un public de consommateurs non déterminés ("canned software"); b) un logiciel, produit en série, et par la suite, adapté par l'informaticien aux besoins spécifiques du client; c) un logiciel résultant d'un projet et d'une réalisation *ad hoc* de la part de l'informaticien ("custom made software").

Pour les S.E. aussi on peut adopter la distinction entre un progiciel ("canned

software") et un S.E. fait sur mesure pour le client et apte à satisfaire ses besoins. Dans cette seconde catégorie, les exemples les plus significatifs sont les S.E. ayant pour utilisateurs et co-réalisateurs les grands hôpitaux, qui se servent de leurs spécialistes pour déterminer les règles de la base de connaissances.

Deux autres hypothèses de commercialisation des S.E. sont: a) le "shell"; b) le "professional adviser".

a) Le *shell*, conçu comme un S.E. privé de sa connaissance, facilite la réalisation d'un autre S.E. destiné à résoudre un problème précis appartenant à la même classe. Le *shell* est constitué par les mécanismes linguistiques aptes à représenter la connaissance et par les procédures du moteur d'inférence. Il est important de souligner qu'un usager non-informaticien sera difficilement à même d'en faire usage.

b) Il est possible, enfin, d'utiliser le S.E. comme un expert, en achetant l'information à celui qui possède le système.

4. Défauts dans les systèmes-experts

Un S.E. est défectueux lorsqu'il ne donne pas une consultation exacte; un logiciel est, par contre, défectueux lorsque il n'élabore pas les données de la façon prévue. Il faut, à ce propos, considérer la nature composite des S.E., qui dévient toujours d'un travail d'équipe entre un informaticien et un expert humain, et leur caractère encore largement expérimental, au moins jusqu'à maintenant.

Les défauts des S.E. peuvent être identifiés: a) dans le *shell*; b) dans la connaissance; c) dans la "présentation".

a) En ce qui concerne le *shell*, il s'agit d'un cas où la connaissance est exacte, mais le moteur d'inférence ne combine pas exactement les règles entre elles.

b) Les règles que le S.E. est destiné à utiliser dérivent des connaissances d'un expert humain, et donc, le système dérive ses règles d'une source faillible. Prenons en exemple un spécialiste qui a coopéré à la détermination des règles pour un S.E. destiné au diagnostic d'une certaine maladie. Il peut avoir introduit une règle erronée, avoir omis une règle critique, avoir, enfin fait référence à une connaissance dépassée. Un généraliste consulte le S.E. et, à cause d'un diagnostic erroné, le patient meurt. Il est évident que sans le S.E., les connaissances erronées ou insuffisantes du spécialiste auraient des conséquences négatives seulement sur les patients s'étant adressées à lui pour une consultation.

A cause du S.E., ses connaissances erronées ont, potentiellement des conséquences négatives sur un grand nombre de patients qui n'ont pas de contacts directs avec lui.
Ici le problème surgit de l'imputabilité au producteur du S.E. de la prestation de l'expert, qui se pose dans les termes d'une responsabilité du fait de l'activité de ses employés. Même si les experts ne sont pas aux ordres du producteur, le producteur peut être toutefois jugé responsable car la prestation des experts n'est pas isolable d'un processus productif; est cela sur la base du principe selon lequel celui qui se sert du travail d'autrui ne doit pas seulement tirer profit des avantages de la coopération, mais aussi assumer le risque des désavantages qui pourraient en dériver.[4]

c) Faute dans la "présentation", c'est-à-dire: 1. le système donne des réponses susceptibles de plusieurs interprétations; 2. le S.E. ne réalise pas que le cas ne fait pas partie de son domaine de connaissance.

5. Responsabilité pour le mauvais fonctionnement d'un système expert: responsabilité pour la diffusion commerciale d'informations erronées

A l'heure actuelle il n'y a pas de statistiques significatives concernant la responsabilité pour le mauvais fonctionnement des S.E., et les études à ce sujet exposent des situations théoriques. Seule la diffusion commerciale peut conduire à donner des solutions plus précises aux nombreux problèmes que l'utilisation des S.E. implique.[5]

Pourtant les thèmes émergeant dans la littérature américaine ont une valeur paradigmatique pour les problèmes posés et pour les solutions proposées.

La doctrine américaine s'est posée le problème d'établir si les S.E.: doivent être

4 Cf. G. Alpa - M. Bessone, *La responsabilità del produttore*, Milano, Giuffrè, 1976.

5 L'utilisation des systèmes informatiques et, en particulier, de l'intelligence artificielle implique aussi des questions importantes de caractère éthique. J. H. Moor, *Are There Decisions Computer Should Never Make?*, in D. G. Johnson - J. W. Snapper, *Ethical Issues in the Use of Computers*, Belmont, Wadsworth Publishing, 1985, p. 120, se pose le problème d'établir s'il y a des taches décisionnelles qui ne doivent jamais être assignées à un ordinateur, et il aboutit à la conclusion que personne ne peut en réalité savoir si les ordinateurs pourront, dans le future, égaler ou même dépasser la capacité de décision des êtres humains. A ce sujet, voir aussi M. Gemignani, *Laying Down The Law To Robots*, *San Diego Law Review*, 21, 1984, p. 1045. Dans la littérature italienne, voir R. Borruso, *La vera natura del computer (i limiti di sostituibilità con l'uomo)*, in *Informatica ed evoluzione giuridica nell'attività economica*, Firenze, Nardini, 1985, pp. 175-195.

considérés comme "good" ou "service". Cette distinction est très importante puisque, selon la section 402A du *Second Restatement of Torts*,[6] c'est seulement dans la première hypothèse que le producteur est soumis à la responsabilité objective ("product liability", *i.e.* "liability without fault")[7] pour les dommages provoqués par les produits commercialisés, le consommateur étant dispensé de la preuve de la "négligence" du producteur.

Les critères dont s'inspire le *Second Restatement of Torts* pour imposer cette responsabilité au producteur sont les suivants: a) le fait que le produit sur le marché soit utilisé par le consommateur sans contrôles ultérieurs, et par conséquent que le consommateur se fie de la sécurité intrinsèque du produit même ("stream of commerce policy"); b) la considération que le producteur se trouve dans la position la meilleure pour contrôler et prévenir les défauts éventuels du produit ("risk control rationale"); c) le producteur est, enfin, dans la position la meilleure pour supporter, en termes économiques, le risque provoqué par des produits défectueux, parce qu'il peut en partager le coût entre tous les consommateurs, tout en y ajoutant les frais pour une éventuelle assurance coût ("cost spreading rationale").

En ce qui concerne les logiciels traditionnels, leur mode de commercialisation a une valeur décisive. Seulement dans l'hypothèse des progiciels ("canned software") on trouve les éléments nécessaires pour imposer au producteur la responsabilité objective. Dans les cas des logiciels standardisés modifiés pour le consommateur, la prestation professionnelle est considérée comme prépondérante, et la "product liability" par conséquent est exclue.[8]

6 1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject for physical harm thereby caused to the ultimate user or consumer, or to his property, if: a) the seller is engaged in the business of selling such a product, and b) it is expected and does reach the consumer without substantial change in the condition in which it is sold.

2. The rule stated in susbsection 1. Applies although: a) the seller has exercised all possible care in the preparation and sale of his product, and b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

7 The term "product liability" normally contemplates injury or damage caused by a defective product, W. KIMBLE-R. O. LESCHER, *Products Liability*, St. Paul Minn., West Publishing Co., 1979.

8 Voir, en particulier, S. LANOUE, *Computer Software and Strict Products Liability*, *San Diego Law Review*, 20, 1983, p. 439; S. NYCUM, *Liability for Malfunction of a Computer Program*, *Rutgers Computers & Technology Law Journal*, 7, 1979, p. 1; J. PRINCE, *Negligence: Liability for Defective Software*, *Oklahoma Law Review*, 33, 1980, p. 848.

En ce qui concerne les S.E., indépendamment de leur mode de commercialisation, la doctrine américaine a considéré que le régime de la "product liability" ne devrait pas trouver d'application.

Avant tout, la section 420 A du *Second Restatement of Torts* est appliquée seulement en cas de dommage matériel aux personnes ou à leurs propriétés. Par conséquent, l'hypothèse où le dommage est seulement économique reste exclue: cela, par exemple, dans le cas d'un avocat qui perd une cause à la suite d'une information erronée obtenue grâce au S.E.

En outre, les principes de la "product liability" ne s'appliquent pas au professionnel qui fournit une prestation de service de caractère libéral, et celui qui a subi un dommage peut agir seulement sur la base de la "professional malpractice".

Le vice peut être un "manufacturing defect", dû au mauvais fonctionnement des machines ou aux méprises du personnel, ce qui rend un produit accidentellement différent des autres. Ou il peut s'agir d'un "design defect", c'est-à-dire d'un défaut dans la conception du produit, et qui donc se répète pour tous les produits de cette série. Dans ce cas, l'acheteur doit prouver qu'il était "raisonnablement" possible d'obtenir une conception sans défaut. A ce sujet, on a constaté que, au cas de vices de "design", la "strict liability" s'oriente dans le sens de la négligence, puisque l'on demande l'évaluation de ce qu'un "reasonable designer" aurait dû faire.[9]

Prenons le cas, par exemple, d'un patient qui subit un dommage, physique et économique, à la suite d'une thérapie que son médecin lui a prescrite d'après les informations reçues du S.E. Ce patient n'a pas la possibilité de s'adresser directement à celui qui a commercialisé le système, car on considère la prestation de service comme prépondérante: c'est-à-dire que le contact entre le S.E. et le patient se réalise à travers la présence et le jugement du médecin, et que donc le S.E. n'atteint pas le consommateur dans le sens prévu par la définition de la "product liability". Voilà pourquoi les juges

9 En ce qui concerne la possibilité d'appliquer la "product liability doctrine" aux "design defects", voir, O. B. Mason, *Strict Liability in Tort: Is It Applicable to Design Defects?*, *Washburn Law Journal*, 20, 1981, p. 600 at 601; pour les "design defects" dans le logiciel voir V. M. Brannigan-R. E. Dayhoff, *Liability for Personal Injuries Caused by Defective Medical Computer Programs*, *American Journal of Law & Medicine*, 7, 1981, p. 123.

n'ont pas appliqué la règle de strict liability dans l'affaire "Barbee v. Rogers",[10] dans une hypothèse où un opticien avait fourni des lentilles de contact défectueuses. Dans ce cas, la cour a considéré comme un produit les lentilles en soi, et comme prestation l'activité professionnelle visant à adapter les lentilles à chaque patient, et, en reconnaissant le vice dans la prestation professionnelle, a exclu l'application de la "product liability".

Mais, le médecin dans notre exemple, lui aussi ne pourra pas obtenir les dommages-intérêts du producteur sur la base de la "strict liability", parce que ce principe est applicable seulement lorsque la partie lésée est un consommateur, et non entre "businesses".

Les S.E., de même que tous les autres instruments de transmission de la connaissance, et avant tout les livres, ne seraient donc pas soumis au régime de la "product liability". Cette thèse trouve son application dans le cas "Cardozo v. True",[11] la cour ayant estimé qu'il faut exclure le principe de la "strict liability" lorsque il s'agit d'"idées publiées". Dans cette espèce, un livre de recettes avait omis de signaler que l'un des ingrédients était toxique s'il était ingéré tout seul et cru; la cour n'a pas considéré le livre comme un produit, et par conséquent elle a exclu la "strict liability," en considérant que l'usage prévu pour un livre est la lecture, et que lire un livre n'est pas dangereux. Si l'on applique la "ratio decidendi" de ce cas à l'hypothèse d'un S.E. qui fournit une information erronée, on devrait conclure que le "intended use" d'un S.E. est la consultation, qui n'est pas dangereuse en elle-même, et que, donc, la "strict liability" ne devait pas trouver d'application.

Un argument supplémentaire est fourni pour soutenir la thèse selon laquelle tous les S.E.: commercialisés sont des "services", pour cela soustraits à la "product liability"; il tient à ce que le régime de la responsabilité objective est jugé inadéquat s'agissant de produits qui comportent une possibilité d'erreurs et d'imperfections et que ce régime ne pourrait que nuire au développement technologique de ces produits. Des considérations analogues ont été faites en ce qui concerne l'opportunité de soumettre le producteur de médicaments à une responsabilité objective. Et, ce à plus forte raison, si l'on considère le développement ultérieur des S.E. constitué par des systèmes aptes à

10 *Barbee v. Rogers*, 425 S. W. 2d 342, Tex. 1968.

11 *Cardozo v. True*, cet. Denied, 353 So. 2d 674, Fla. 1977.

apprendre sur la base de faits.[12]

Pourtant, certains auteurs indiquent des solutions différentes.[13] Significatif, à ce propos, est le cas "Brocklesby v. United States".[14] Il s'agit d'une hypothèse où des dommages-intérêts ont été obtenus par les familles des victimes et les propriétaires de l'avion à la suite d'un désastre aérien causé par des cartes aériennes erronées : ces cartes étaient publiées par une maison d'édition privée, mais utilisaient des données fournies par la *Federal Aviation Agency.* La cour a estimé que les cartes ne sont pas faites pour être lues, mais pour guider la navigation aérienne ; elle les a, donc, considérées comme un produit et, vu qu'il est "unreasonably dangerous for its intended use", la "product liability" devait être appliquée. En outre, la cour a considéré la maison d'édition des cartes comme responsable de négligence puisqu'elle aurait dû savoir que les carte étaient erronées.

Si l'on suit l'enseignement de cette espèce, la "product liability doctrine" pourrait être parfois appliquée aux producteurs des S.E. puisque l'on peut considérer le S.E. comme un produit, et que les informations qu'il fournit sont destinées à un usage spécifique et à une application pratique.

6. Responsabilité pour l'usage impropre d'un système expert

En ce qui concerne l'usager du système il faut distinguer deux hypothèses: a) l'usager qui n'a pas de connaissances spécifiques dans le domaine du S.E.: et qui l'utilise à la place d'un expert humain; b) l'usager qui a une compétence spécifique dans le domaine du S.E. Dans le premier cas, il est évident que l'usager est totalement dépendant des informations que le S.E. est à même de lui fournir tandis que, dans le deuxième cas, on s'attend de la part du professionnel un contrôle des données que le système fournit alors: le professionnel ne peut pas compter exclusivement sur la garantie du vendeur.

12 Dans ce sens, voir D. W. WARD, *Issues of Liability in Expert System Software*, *ISA Transactions*, 26, 1987, p. 57. En ce qui concerne la responsabilité des producteurs de médicaments voir G. SCIACCHERO, *Sulla responsabilità dei produttori di farmaci*, in *La responsabilità in materia sanitaria. Atti del convegno nazionale tenuto a Bologna e Ravenna il 16 e 17 Dicembre 1983*, Milano, Giuffrè, 1984, p. 151.

13 Voir en particulier R. M. LUCASH, *Legal Liability for Malfunction and Misuse of Expert Systems*, *SIGCHI Bulletin*, 18, 1986, p. 35.

14 *Brocklesby v. United States*, 735 F. 2d 794, 800 n. 9, 9th Cir. 1985.

Du point de vue de la responsabilité de l'usager, il faut distinguer rentre: a) usage impropre; b) sélection impropre.

a) On parle d'usage impropre là où l'usager ne suit pas les instructions concernant le fonctionnement du programme, ou ne répond pas aux questions correctement, ou encore fournit des données erronées ("garbage in, garbage out").

b) L'usager s'en remet à un système qui n'est pas à même de fournir, dès le début, les solutions demandées; ou bien, il s'en remet à un system obsolète. Par exemple, dans l'affaire "Swiss air Transport v. Benn",[15] impliquant un ordinateur, mais non un S.E., et où une compagnie aérienne a été jugée coupable parce qu'elle utilisait un système qui n'avait pas la capacité de reconnaître les billets altérés.

Il y a aussi le risque que des usagers équipés d'un S.E. pratiquent une profession pour laquelle des aptitudes professionnelles sont exigées.

7. Responsabilité pour la non-utilisation d'un système expert

Il a déjà été souligné que les S.E. sont des instruments de diffusion des connaissances qui, généralement, aident le professionnel. Celui-ci doit contrôler les informations provenant du système: le fait d'utiliser un S.E. n'exclut pas la responsabilité de celui qui s'en sert fournissant une prestation professionnelle.

Cependant, le professionnel est également responsable envers son client lorsqu'il ne dispose pas, ou lorsqu'i n'est pas à même de disposer en cas de besoin, des moyens technologiques et scientifiques les plus actualisés et fiables. Il est hors de doute que les S.E. permettent au professionnel d'élever remarquablement le standard de sa prestation, soit en permettant la crédibilité de ce qui est préconisé, soit en fournissant d'autres indications. Sur la base de ces considérations, peut être considéré comme coupable de négligence le professionnel que n'utilise pas les instruments technologiques disponibles et s'en remet uniquement à son propre "cerveau". A ce sujet on a considéré (Gemignani) que "for certain sensitive, delicate or hazardous tasks (such as aircraft requiring fast and accurate response beyond human capability), it may be unreasonable not to rely upon an expert-system". D'ores et déjà il existe des S.E. de pointe utilisés quotidiennement,

15 *Swiss Air Transport v. Benn,* 467 N.Y.S. 2d 341, N.Y. Civ. Ct. 1983.

(comme par exemple Dendral (utilisé en chimie), Micyn (en Médecine), Prospector (dans les recherches minières), Ace (pour l'entretien des câbles téléphoniques), RI/xcon (pour la configuration des ordinateurs). Ces systèmes ont parfois démontré leur meilleure précision par rapport aux experts humains, d'autant plus qu'ils peuvent garder ou transmettre une plus grande quantité de données.

Sur la base des instruments de transmission des connaissances de plus en plus modernes et performants, on demande au professionnel d'élever le standard de sa prestation professionnelle. Les cours américaines ont tendance à abandonner la "locality rule" par rapport à la prestation du professionnel, et en particulier du médecin qui est tenu à une prestation analogue à celle de ses collègues dans la même catégorie. Cette règle était née du fait qu'un médecin de ville – ayant accès à des écoles médicales, des bibliothèques et à des collègues spécialisés – devait fournir une prestation nécessairement supérieure à celle du médecin de campagne qui, bien évidemment, ne dispose pas de ces sources d'information.[16]

8. Recours à l'action prohibitive dans le droit italien

Il n'est pas nécessaire d'ajouter d'autres éléments pour souligner le danger qui se cache derrière le S.E. surtout s'ils sont utilisés par des usages qui n'ont pas une connaissance dans le domaine du système. Il se pose donc le problème d'identifier l'instrument apte à prévenir les dommages, qui, s'étant produits à la suite de l'application dans un cas particulier, peuvent potentiellement se répéter si l'on travaille avec des systèmes de la même série.

Dans le système juridique italien, cet instrument a été identifié avec l'action prohibitive – une demande en référé[17] – qui devrait devenir un remède général dans ce

16 Pour ces problèmes, voir J. S. Zeide- J. Liebowitz, *Using Expert Systems*: *The Legal Perspective*, *IEEE Expert*, 2, 1987, p. 19. En ce qui concerne la responsabilité des dommages provoqués par des logiciels défectueux appliqués en médecine voir V. M. Brannigan-R. E. Dayhoff, *Liability for Personal Injuries Caused by Defective Medical Computer Programs*, 1981. La doctrine italienne a constaté que, quand certains traitements, thérapeutiques et diagnostiques, sont acquis à la science médicale et son considéré, par conséquent, comme suffisamment fiables, le médecin doit faire en sorte d'en être adéquatement informé, voir M. Zana, *La colpa per omesso aggiornamento tecnico professionale del medico*, in *La responsabilità medica*, Milano, Giuffrè, 1982, p. 101.

17 Voir G. Arieta, *I provvedimenti d'urgenza ex art. 700 c.p.c.*, Padova, Cedam, 1985, p. 18.

domaine, ou à côté de mesures atypiques qui sont du ressort de l'appréciation du juge.

Si l'on admet la possibilité d'avoir recours à l'action prohibitive, il faut aussi identifier le sujet qui a intérêt à intenter une action légale.

Il n'est pas du tout facile de démontrer l'intérêt à agir d'un consommateur *ut singulus*, soit qu'il s'agisse de la partie déjà lésée, soit qu'il s'agisse de quelqu'un sachant que le produit est défectueux, et voulant se prémunir contre un éventuel "dommage futur". Il est plus facile d'admettre l'intérêt de la part des groupes et des associations de consommateurs et, en considération du contenu technologique des S.E., aussi des associations professionnelles.

L'action prohibitive pourrait être particulièrement apte à prévenir l'impact nuisible des S.E. qui présentent des défauts, et qui ne sont donc pas à même de fournir une consultation exacte. Cet instrument a été déjà appliqué avec succès dans d'autres systèmes juridiques: par exemple dans le cas de produits ne répondant pas aux standards légalement exigés.[18]

18 En ce qui concerne l'application de l'action prohibitive comme forme de sauvegarde contre les produits qui ont des vices de conceptions voir G. ALPA, *Diritto privato dei consumi*, Bologna, il Mulino, 1986. Sur l'action prohibitive: A. FRIGNANI, *L'injunction nella common law e l'inibitoria nel diritto italiano*, Milano, Giuffrè, 1975.

MATTIA BROZZI*

THE NEW BUSINESS CRISIS AND INSOLVENCY CODE
Innovations in Company Law

ABSTRACT. *The paper examines the impact of the enactment of the new Code of "Business Crisis and Insolvency" (CCI), Legislative Decree no. 14/2019, on existing Italian company law. The CCI, indeed, brings significant changes to the entrepreneurial and corporate organizational structures, both with regard to the supervisory bodies and the liability actions against directors. While the wide majority of the CCI provisions will enter into force not earlier than 18 months after their enactment, the company law rules, Articles 375, 377, 378 and 379, are already enforced.*
The aim of this paper is to provide a first summary and commentary of those rules that, under several respects, amend the Italian Civil Code.

1. Introduction to Legislative Decree no. 14/2019

Implementing Law no. 155 of 19 October 2017,[1] Legislative Decree no. 14 was enacted on 12 January 2019.[2]

* Law School Graduate; Assistant in the course of Commercial Law II, Roma Tre University.

1 With the aforementioned law, the Italian government was delegated to reform the law governing business crisis and insolvency. For an accurate analysis, see V. De Sensi, *Adeguati assetti organizzativi e continuità aziendale: profili di responsabilità gestoria*, in *Soc*., 2017, p. 311.

2 The new Code was published in the Italian Official Gazette on 14 February 2019. For the complete code, see Official Gazette, General series, 14 February 2019, no. 38, Ordinary Supplement no. 6, in www.gazzettaufficiale.it/eli/id/2019/02/14/19G00007/sg. For a detailed overview of the previous stages of the provision, see F. Lamanna,

The Legislative Decree, entitled "*Code of Business Crisis and Insolvency*" (hereinafter, CCI, from the Italian name "*Codice della Crisi di Impresa e dell'Insolvenza*"), is composed of 391 articles[3] and will completely replace Royal Decree no. 267 of 16 March 1942, *i.e.*, the Bankruptcy Law, currently in force. Over a decade after the previous intervention,[4] the Italian legislature overcame the old model of the Bankruptcy Law of 1942.

The massive size of the new Code is the result of the clear legislative intent to overcome the regulatory framework of the Bankruptcy Law[5] and reorganize the number of different laws regulating the subject (*e.g.*, the discipline of non-commercial over-indebtedness)[6] into a single text.

The entry into force of the CCI is not uniform for all its provisions (see Article 389 CCI). While most of the new provisions on business crisis and insolvency will be effective from 15 August 2020, after 18 months of "*vacatio legis*",[7] some provisions have

Il Codice concorsuale in dirittura d'arrivo con le ultime modifiche ministeriali al testo della Commissione Rordorf (I), in *ilFallimentarista.it*, 17 October 2018; Id., *Il testo in itinere del Codice della crisi e dell'insolvenza approda in Parlamento*, in *ilFallimentarista.it*, 15 November 2018. Cfr. F. PASQUARIELLO, *Italian bankruptcy code moving towards a reform era*, in *Dir. Fall.*, II, 2016, p. 347 to 368.

3 The Legislative Decree is divided into four parts: Part I – *Code of business crisis and insolvency* [Arts. 1 to 374], which contains and constitutes the actual new Code (so called, CCI.); Part II – *Amendments to the Civil Code* [Arts. 375 to 384], which makes changes to various provisions of Book V, Titles II and V and provides for the repeal of certain provisions (e.g., Art. 2221 of the Italian Civil Code); Part III – *Guarantees in favor of buyers of buildings to be built* [Arts. 385 to 388]; Part IV – *Final and transitional provisions* [Arts. 389, 390 and 391].

4 The latest amendments in bankruptcy law occurred with Legislative Decree no. 5 of 9 January 2006. However, in many scholars' view, the previous reform did not fully respect the intent of an organic reform of the subject. Indeed, the structure of Royal Decree no. 267 of 16 March 1942 has remained unchanged, above all maintaining the basic inspiration, which is historically linked (according to the thought of M. GABOARDI, *Spunti sulla legge delega per la riforma organica delle procedure concorsuali: profitti processuali*, in *Riv. Soc.*, 2018, p. 137) to the paradigmatic (but now declining) notion of the individual entrepreneur to the detriment of the prevailing corporate entrepreneurial phenomenon and, on the other hand, to the logic of subordination of negotiated solutions of business crisis with respect to bankruptcy, as a liquidation-based solution.

5 It should be noted that the new Code presents 125 additional articles compared to the previous Bankruptcy Law of 1942.

6 Some bankruptcy-style procedures were however left outside the reform, such as the regulation of the extraordinary administration of large companies.

7 As some scholars have pointed out (R. RORDORF, *Prime osservazioni sul Codice della crisi e dell'insolvenza,* in *I Contratti,* 2019, II, 129 ss.), the unusually long period is fully justified by the need to prepare adequate organizational structures and by the need of players to have adequate time to study and assimilate all the regulatory changes.

already become effective on 16 March 2019,[8] essentially covering the organizational structure of collective businesses, especially when they are run by companies, while specific organizational requirements are established for limited liability companies (LLC), including new rules on directors' liability.

2. Entrepreneurial and corporate organizational structures

As anticipated, the first relevant changes affect the organizational structure of collective businesses. Considering that collective businesses are predominantly companies, it is easy to predict that those provisions will translate into regulatory changes in the organization and management of companies.

Article 375 CCI amends Article 2086 of the Italian Civil Code in two ways:

1) firstly, it changes the title of the heading from the old, fascist-era, "*Direction and hierarchy in the business*" to a new, more functional and neutral "*Business management*", thus eliminating any reference to "*hierarchy*" (Article 375, para. 1, CCI);

2) secondly, it introduces a new paragraph providing the collective business's duty to detect the emergence of the crisis at an early stage[9] (Article 375, para. 2, CCI).

Moreover, the Government has reserved the possibility to intervene with corrective measures, before the decree becomes operational in its entirety. The need for further adjustments, furthermore, could impose itself if, in a fairly short time, the process of issuing the European insolvency directive was completed. In November 2016, a first proposal was drafted. Indeed, "This directive aims at providing access to sustainable enterprises in financial difficulties to preventive restructuring frameworks to enable them to restructure at an early stage, and so prevent insolvency. It also gives reputable bankrupt entrepreneurs a second chance, and introduces measures to increase the efficiency of restructuring, insolvency and discharge procedures." See *Directive on business insolvency: Council agrees its position,* in www.consilium.europa.eu/en/ 11 October 2018.

8 In particular, Article 27, para. 1, and Articles 350, 356, 357, 359, 363, 364, 366, 375, 377, 378, 379, 385, 386, 387 and 388 CCI. The latter are part of Part I, Title X, entitled "*Provisions for the implementation of the crisis and insolvency code, coordination rules and transitional regulations*" and of the second and third parts, respectively "*Changes to the civil code*" and "*Guarantees in favor of buyers of buildings to be built.*" Furthermore, other individual specific rules provide for a further deferred entry into force. Regarding the main discipline of the new Code, Article 390 provides some specific rules for the transitory discipline: notwithstanding the general term of 18 months, all the proceedings pending on 15 August 2020 will continue to be governed by the current Bankruptcy Law. Lastly, the second paragraph of the same Article provides applicability of the "old" discipline to all the procedures opened before the CCI came into effect.

9 Article 2, lett. a) CCI defines the state of crisis as a state of economic-financial difficulty that makes insolvency likely, *i.e.*, for going concerns it consists in the inadequacy of expected cash flows to regularly meet scheduled obligations.

In particular, any collective business (mainly companies, but also, possibly, associations or public entities conducting businesses) shall now "set up an organizational, administrative and accounting structure appropriate to the nature and size of the company,[10] also in view of the timely detection of the company crisis and the loss of business continuity, as well as to take action without delay for the adoption and implementation of one of the instruments envisaged by the regulation for overcoming the crisis and recovering business continuity."[11]

Therefore, that provision[12] becomes a reference standard of general scope for all (company and non-company) collective enterprises to assess the correct and functional organization of the business[13] and to detect a company crisis at the earliest possible stage. The new obligations stated in the second paragraph of Article 2086 of the Italian Civil Code are expressly extended – under Article 377 CCI – to all forms of companies, through the amendment of the relevant provisions regulating partnerships, both general and limited, as well as dictated in the matter of simple companies (Article 2257 of the Italian Civil Code), joint stock companies (Articles 2380-*bis* and 2409-*novies* of the Italian Civil Code), limited liability companies (Article 2475 of the Italian Civil Code).[14]

10 As some authors pointed out (N. Abriani, *Commento al Codice della crisi di impresa e dell'insolvenza*, in *Quaderni in eXecutivis*, III, 2019, p. 39), it is a relative parameter that will change considering the type of business conducted, the size of the company and the organizational structure.

11 This novelty seems to be compatible with the changes made to Article 2381, para. 5, of the Italian Civil Code: the delegated bodies ensure that the organizational, administrative and accounting structure is adequate to the nature and size of the company and report to the Board of Directors and the Board of Statutory Auditors […] on the general operating performance and on its foreseeable evolution as well as on the most significant transactions, due to their size or characteristics, carried out by the company and its subsidiaries.

12 Provision that first sanctioned only the power of the entrepreneur to direct and control his/her collaborators. A. Pilati, *Sub Art. 2086 Italian Civil Code*, in G. Cian-A. Trabucchi, *Commentario breve al codice civile,* Torino, Cedam, 2014, p. 2343. The Code is limited to recognizing a generically hierarchical power of the employer towards the worker and the mentioned Article "constitutes the normative transcription of a material reality of a sociological order, which is that of the organization of industrial work," as stated by E. Ghera, *Diritto del lavoro*, Torino, Giappichelli, p. 122.

13 Unlike Article 2381 of the Italian Civil Code, which establishes an obligation solely for joint-stock companies. See footnote 9, *supra.*

14 The text of the Article is shown below: *«1. All'articolo 2257 del Codice civile, il primo comma è sostituito dal seguente: "La gestione dell'impresa si svolge nel rispetto della disposizione di cui all'articolo 2086, secondo comma, e spetta esclusivamente agli amministratori, i quali compiono le operazioni necessarie per l'attuazione dell'oggetto sociale.*

It is interesting to note that this amendment creates a link between company law and bankruptcy law, which was previously unknown.

Legal scholars have pointed out that organizational structures and corporate control systems must be adequate to the "*going concern*" and to the purpose of a timely detection of the crisis.[15] Moreover, the new Code introduces a principle of correct entrepreneurial management for every collective business, which is likely to produce its most relevant effects to spot the emergence of crisis.[16]

3. Liability actions against directors for breach of duties and how to establish damages

Article 2476 of the Italian Civil Code, as amended by Article 378, para. 1 CCI, now expands the duties owed by directors of LLCs to include the "obligation of preserving the corporate assets," similarly to what is provided for joint stock companies by Article 2394 of the Italian Civil Code.

Under Article 2476, LLC directors are now liable with respect to the obligation to preserve the company's assets, as it is expressly provided that they are liable to creditors when the company's assets are insufficient to satisfy their claims.[17]

Salvo diversa pattuizione, l'amministrazione della società spetta a ciascuno dei soci disgiuntamente dagli altri". 2. All'articolo 2380-bis del Codice civile, il primo comma è sostituito dal seguente: "La gestione dell'impresa si svolge nel rispetto della disposizione di cui all'articolo 2086, secondo comma, e spetta esclusivamente agli amministratori, i quali compiono le operazioni necessarie per l'attuazione dell'oggetto sociale". 3. All'articolo 2409-novies, primo comma, del Codice civile, il primo periodo è sostituito dal seguente: "La gestione dell'impresa si svolge nel rispetto della disposizione di cui all'articolo 2086, secondo comma, e spetta esclusivamente al consiglio di gestione, il quale compie le operazioni necessarie per l'attuazione dell'oggetto sociale". 4. All'articolo 2475 del Codice civile, il primo comma è sostituito dal seguente: "La gestione dell'impresa si svolge nel rispetto della disposizione di cui all'articolo 2086, secondo comma, e spetta esclusivamente agli amministratori, i quali compiono le operazioni necessarie per l'attuazione dell'oggetto sociale. Salvo diversa disposizione dell'atto costitutivo, l'amministrazione della società è affidata a uno o più soci nominati con decisione dei soci presa ai sensi dell'articolo 2479". 5. All'articolo 2475 del Codice civile, dopo il quinto comma è aggiunto il seguente: "Si applica, in quanto compatibile, l'articolo 2381"».

15 As remarked by P. Montalenti, *La gestione dell'impresa di fronte alla crisi tra diritto societario e diritto concorsuale*, in *Riv. Soc*., 2011, p. 820: Id, *Diritto dell'impresa in crisi, diritto societario concorsuale, diritto societario della crisi: appunti*, in *Giur. comm*., I, 2018, 62.

16 On this point, see N. Abriani, *Commento al Codice della crisi di impresa e dell'insolvenza*, 2019, p. 39.

17 See G. D. Mosco, *Doveri e responsabilità di amministratori e sindaci nelle società di capitali*, in Società, I, 2019, p 117. Cfr. N. Abriani, *Le azioni di responsabilità alla luce del codice della crisi*, in Aa.Vv., *Il codice della crisi d'impresa*, *Italia Oggi,* 2019, p. 56.

The new Code lays down a criterion for determining the amount of damages due by directors for acts or omissions in breach of Article 2476, para. 1, Italian Civil Code.[18]

Indeed, Article 378, para. 2, CCI introduces a presumption on the "*quantum*", adopting the criterion of the so called "*Netto patrimoniale*" (net assets).[19] This criterion is definable as the difference between the net worth of the company on the date when the director has left his/her office[20] and the net worth of the company on the date in which a cause for dissolution occurred pursuant to Article 2484 of the Italian Civil Code.[21]

However, in the event of unreliability or absence of accounting records, damages may be quantified by calculating the difference between the value of assets and liabilities as calculated in the insolvency procedure – the so-called "*Criterio differenziale.*"[22]

In so doing, the law resolves the existing contrast among different courts[23] in the matter and the objective difficulty of liquidating damages in all those (frequent)[24] cases in which the accounting records are missing or have been irregularly kept during the life of the then declared insolvent business.

The rule concerns all liability actions, even if they have been promoted without an initiated bankruptcy proceeding.

18 It will be used to calculate the amount of indemnifiable damage in liability actions, exercised when a dissolution case has occurred.

19 New paragraph 2, Art. 2486 of the Italian Civil Code. For more details on this criterion, see L. Jeantet-P. Vallino, *La responsabilità degli amministratori: guardare al passato, pensare al futuro e interpretare il presente*, in *il-Fallimentarista.it*, 2 May 2019.

20 Or, in the event of the commencement of an insolvency procedure, on the date of its opening.

21 Minus the costs already sustained (and to be sustained) after the occurrence of the cause of dissolution and until the closing of the liquidation.

22 On this topic, see N. Abriani, *Nuova disciplina della crisi d'impresa e modificazioni del Codice civile: prime letture*, in *Società*, IV, 2019, p. 411.

23 For a reconstruction of the conflict between Courts, see A. Jorio, *La determinazione del danno risarcibile nelle azioni di responsabilità*, in *Giur. comm.*, 2011, I, p. 149. Cfr. M. Spiotta, *L'atteso chiarimento delle Sezioni Unite sull'utilizzabilità del criterio del deficit*, in *Giur. it.*, 2015, p. 1417.

24 As stated by A. Bartalena, *Le azioni di responsabilità nel codice della crisi d'impresa e dell'insolvenza*, in *Fall.*, III, 2019, p. 298, the liability actions against directors and auditors of failed companies have become much more frequent and involve higher amounts.

4. Obligation to appoint the supervisory body and auditor for limited liability companies. Applicability of Article 2409 of the Italian Civil Code

Among the most interesting regulatory changes introduced by the Code, Article 379 CCI amended Article 2477 of the Italian Civil Code (paragraphs 3 and 4), extending the number of companies, in particular limited liability companies, obliged to appoint the statutory auditors, as an internal body, or an external auditor.

Indeed, at first,[25] Article 379, para. 1(c), CCI has significantly reduced the threshold, the time limit within which LLEs are required to appoint the supervisory body. It is thus required to exceed, for two consecutive years, at least one of the following limits:

1) total assets in the balance sheet: 2 million euros;

2) revenues from sales and services: 2 million euros;

3) average number of employees during the financial year: 10 units.

That obligation ceases if the company has not exceeded, for three consecutive financial years, any of the limits indicated above.

It is clear that the increase in the number of companies subject to the appointment of statutory auditors or external auditors is functional to the better functioning of the so-called "alert measures"[26] – one of the main innovations of the CCI.[27]

Indeed, supervisory bodies play a fundamental role in preventing the insolvency of a company. Both statutory auditors and internal auditors have the duty, pursuant to Article 14, para. 1 CCI, "to verify that the management body constantly evaluates, assuming the consequent appropriate initiatives, if the organizational structure of the company is adequate, if there is an economic and financial balance and what is the

25 Please see paragraph 4.1 below.

26 See S. Bastianon, *Early warning, allerta e probability of default nel nuovo Codice della crisi d'impresa*, in *il-Fallimentarista.it*, 14 May 2019.

27 The main objective of the Reformation is to "anticipate" by facilitating the emergence of the corporate crisis – before it results in the most serious and overt insolvency – through specific indicator instruments, offering the companies in difficulty the assistance of the so-called "OCRI". The acronym refers to independent bodies that make up the business crisis. Indeed, as claimed by authoritative legal scholars, one of the basic objectives of the CCI is "*safeguarding the residual value of the company, rather than dispersing it in a liquidation perspective,*" providing the entrepreneur with the possibility of "*getting back into the game,*" as stated by R. Rordorf, *Prime osservazioni sul Codice della crisi e dell'insolvenza*, 2019.

foreseeable trend of the management, as well as to immediately report to the same management body the existence of well-founded indications of the crisis."

The provision mentioned above is likely to have a strong impact on many SMEs that would thus be required to appoint a body, with all the difficulties and, above all, the costs involved, which they considered so far unnecessary.

The legislature – aware of the difficulties that such provision may entail – has decided to grant a "transition period" of nine months[28] since the entry into force of Article 379 CCI.

Hence, a longer period has been granted to limited liability companies to appoint the supervisory body or the auditor, amending – if necessary – the memorandum and articles of association.

Lastly, Article 379, para. 2, CCI provides the applicability of the procedure envisaged by Article 2409 of the Italian Civil Code to limited liability companies. Before the reform, most scholars and courts excluded the applicability of Article 2409 of the Italian Civil Code to LLCs.[29] Now, by filing a claim to the Court, it is possible to report the suspicion of serious irregularities committed by directors.[30] The assumption is the "well-founded suspicion that directors, in violation of their duties, have performed serious irregularities in the management that can prejudice the company or one or more of its subsidiaries."

In the most serious cases the Court can remove the directors (and, if necessary, also the auditors) and appoint a judiciary administrator.[31] The powers and duration of the judiciary administrator's office are established by the Court.

28 If the articles of association provide for a mere reference to the Italian Civil Code (instead of inserting *ad hoc* clauses in the statute), the amendments are directly applicable and the requirement to appoint such body is imposed from the entry into force of Article 379 CCI (*i.e.*, 16 March 2019), with no transitional period.

29 See D. Fico, *Denunzia al tribunale e controllo giudiziario sulla gestione*, in *ilSocietario.it,* 21 November 2018. See Corte di Cassazione, 13 January 2010, no. 403, in *Società,* 2010, p. 665. Cfr. A. Bertolotti, *Denunzia al tribunale*, in *Giur. it.,* IV, 2018, p. 900.

30 The investigation which must be carried out by the Court concerns the whole management activity. In this regard, see V. Salafia, *La società r.l. e l'art. 2409 c.c.*, in *Società*, IV, 2019, p. 458.

31 Authoritative legal scholars remark that there is a very strong interference by the judge in the course of corporate life. See R. Rordorf, *Brevi note in tema di controllo giudiziario della gestione delle società previsto dall'Art. 2409* c.c., in *Società,* 2015, p. 1212.
Moreover, the decree ordering the removal of directors and the appointment of a judiciary administrator can be appealed to the Court of Appeal within twenty days of the notification.

4.1. The Italian legislature retraced its steps

Pending this paper, the so-called "*Sbloccacantieri*"[32] decree was approved and made some other changes to Article 2477 of the Italian Civil Code.

No later than three months after Article 379 CCI was enforced, the Italian legislature has retraced its steps, increasing the time limit within which limited liability companies must appoint the supervisory body or the external auditor.

Article 2-*bis*, para. 2, of Legislative Decree no. 32 of 18 April 2019, converted with amendments into Law no. 55 of 14 June 2019, rewrote the letter c) of the second paragraph of Article 2477 of the Italian Civil Code, doubling the limits set, at first, by Article 379 CCI. Now, it is required to exceed, for two consecutive years, one of the following limits:

1) total assets in the balance sheet: 4 million euros;

2) revenues from sales and services: 4 million euros;

3) average number of employees during the financial year: 20 units.

The rationale of the change is the overcoming of critical issues (for small-sized companies) connected to the increase in costs and to the organizational difficulty to appoint the supervisory body.

SMEs must comply with the legal obligation within nine months of the entry into force of Article 379 CCI, *i.e.*, by 16 December 2019.

Further problems still exist for companies that have already appointed the supervisory body, based on the previous text of the new "*Business crisis and insolvency*" Code.

Although the law has not provided anything in this regard, it should be possible to proceed with a dismissal for cause, since the raising of the limits has made the appointment no longer mandatory.[33]

32 Literally, "unlocks construction sites". Law no. 55, 14 June 2019 published in the Italian Official Gazette on 17 June 2019.

33 Indeed, the solution is not that simple. As some authors pointed out, (see G. Nigro, *Sbloccacantieri: raddoppiate le soglie per la nomina dell'organo di controllo nelle s.r.l.,* in *Quotidiano giuridico Pluris*, 21 June 2019), there are different solutions. Following Article 4, lett. i) of Italian Ministerial Decree no. 261, 28 December 2012, "the supervening absence of the obligation of legal audit due to the lack of law requirements" is one of dismissal cause. The same cannot be said if a supervisory body has been appointed. In fact, Article 2400 of the Italian Civil Code provides that the dismissal must be approved by the Court, after hearing the interested party.

FEDERICA CENTORAME*

TOWARDS A TWO-PHASE SYSTEM IN THE ITALIAN CRIMINAL PROCEDURE?

ABSTRACT. *Despite the traditional unitary decision-making system of Italian criminal procedure, the most recent case-law seems to give increasing importance to the Italian Enforcement Judge in amending the original sanction imposed at the end of the trial phase. From this perspective, the present paper will be focused on verifying if such brand-new tendency to bifurcate the decision between guilt and sentencing in the Italian criminal process represents another legal transplant from the Common-law model or, rather, a peculiar effect of its inner inquisitorial soul.*

1. Introduction

It is the claim of many legal scholars[1] that, during the last few years, Italian criminal proceedings – where the finding of guilt and sentencing take traditionally place at one single session – seem to have converged towards a sort of "*segmentalization*"[2] of these triable issues, just as in the Anglo-American bifurcated criminal process, whereby

* Research Fellow in Criminal Procedure Law, Faculty of Law, Roma Tre University.

1 On this opinion, among the Italian scholars, see A. Gaito, *Poteri di integrare il merito* post rem iudicatam, in *Diritto penale e processo*, 1995, p. 1322; S. Lorusso, *Giudice, pubblico ministero e difesa nella fase esecutiva*, Milano, 2002, p. 91; L. Marafioti, *Funzioni della pena e processo penale,* in G. De Francesco-E. Marzaduri, *Il reato lungo gli impervi sentieri del processo*, Torino, 2016, p. 209; G. Ubertis, *Sul progetto preliminare del Codice di procedura penale*, in *Rivista italiana di diritto e procedura penale,* 1988, p. 1309.

2 See G. O. W. Mueller-D. J. Basharov, *Bifurcation: the Two Phase System of Criminal Procedure in the United States*, in *Waine Law Review*, 1968, p. 616.

there are two phases of the trial, one concerned with *guilt fact finding* and the other with *sentencing*.

In particular, what has emerged as a central feature of this phenomenon of change is the increasing power that Italian jurisprudence has entrusted to the Enforcement court to restructure the sentence imposed by the trial judge at the end of the fact-finding process.

Based on these premises, it is argued that the penalty is actually established within the Enforcement phase of the proceeding due to the fact that the severity of the original sanction applied might well be reviewed by the Enforcement Judge. It follows that the trial phase is conversely intended to determine only whether the defendant is guilty or innocent of the crime he/she is charged with.[3] And this would appear to be another attempt to incorporate typical Common-law institutions into the Italian criminal justice system, following on its long-standing shift from an inquisitorial model to an accusatorial one.[4]

Moving from such theoretical assumptions, this paper aims to assess the true extent of this legal transplant[5] of the Common-law concept of bifurcation into the Italian criminal process in order to answer the question whether it is a further fruit of the accusatorial ambitions of the Italian justice system, or, by way of contrast, it represents a reshaped projection of its inquisitorial legacy.

2. The Italian Sentence Supervision Judiciary and its power-duty to amend the sanction

For the Italian reader – as well as for those coming from other civil-law systems – the bifurcation of the criminal process, which stands out as one of the most striking hallmarks of the Anglo-American justice system, is extremely common. In essence, it

3 D. Thomas QC, *The Sentencing Process*, in M. McConville-G. Wilson, *The Handbook of the Criminal Justice Process*, Oxford, 2002, p. 478.

4 For a recent overview of this process of transition, see J. T. Ogg, *Adversary and Adversity: Converging Adversarial and Inquisitorial Systems of Justice - A Case Study of the Italian Criminal Trial Reforms*, in *International Journal of Comparative and Applied Criminal Justice,* 37, 2013, p. 31; L. Lupária-M. Gialuz, *Italian Criminal Procedure: Thirty Years After the Great Reform*, in *Roma Tre Law Review*, 1, 2019, p. 24.

5 In the words of A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edimburgh, 1974.

consists in separating "the issue of criminal liability from that of an appropriate sentence,"[6] which is the ultimate expression of the Common-law jury system where a defendant who contests his/her guilt is tried by the jurors and the judgement falls entirely within the authority of the judge. Nevertheless, such a binary decision-making system does not change even in cases heard by a judge sitting alone.[7] Here again, although the sentence is determined by the same magistrates who had decided whether the defendant is guilty or innocent, the Anglo-American process falls then into two distinct stages.[8] And to be fair, this latter aspect could be used as an argument in favour of the abovementioned doctrinal approach whereby also the Italian criminal process is moving forward a bifurcated style system of judgement. That is because, in the light of the Common-law experience, the bifurcation between conviction and sentencing does not seem to be strictly linked to the existence of a bifurcated adjudicating body as well: namely, the jury on the one hand, and the professional judge, on the other. It follows that it might well be transplanted even within the Italian justice system where notoriously there is no jury and the adjudicating body has thereby a unitary structure.

In this perspective, it is thus worth highlighting that the Italian process of implementing the judgment of conviction is under the jurisdiction of two different courts. On the one hand, the Enforcement Judge as such, who is entrusted with the control over the legitimate implementation of the enforceable decision; on the other hand, the Sentence Supervision Judge and the Sentence Supervision Tribunal, whose task is to assess the adequacy of the penitentiary treatment compared to the rehabilitation of the condemned person.[9] Both of them have an expanding role within the Italian criminal trial since they are empowered to change the sentence imposed at the end of the former stage of the proceeding, either in part or completely. On the argument presented in this

6 Literally, G. O. W. Mueller-D. J. Basharov, *Bifurcation: The Two Phase System of Criminal Procedure in the United States*, 1968, p. 613.

7 See J. Jackson, *The Adversary Trial and Trial by Judge Alone*, in M. McConville-G. Wilson, *The Handbook of the Criminal Justice Process*, 2002, p. 335.

8 D. Thomas QC, *The Sentencing Process*, 2002, p. 478.

9 See M. Gialuz, *The Italian Code of Criminal Procedure: a Reading Guide,* in M. Gialuz-L. Lupária-F. Scarpa, *The Italian Code of Criminal Procedure: Critical Essays and English Translation,* Padova, 2017, p. 54.

paper, however, the key point is to understand the rationale behind such increasing duties to amend the penalty so as to compare it with the one underlying the pure Anglo-American bifurcated model.

To this end, let us examine first the cases where the Sentence Supervision Judge and the Sentence Supervision Tribunal are entitled to amend the original sentence. To some extent, the fact of undertaking certain active sentencing responsibilities is implicit in the own function of these professional judges. In fact, to ensure the coherence of the penitentiary treatment with respect to both the personality of the subjects and the progress made by them in terms of rehabilitation, the sanction itself has to be modified so that the Sentence Supervision Tribunal can apply one of the alternative measures to detention provided by law, instead of mantaining the penalty initially imposed with the enforcing judgement.

A good example of this deviation from the original sanction imposed at the end of the trial is the brand-new proactive role that the recent Legislative Decree no. 123 of 2 October 2018 amending the Italian penitentiary system has given to the Sentence Supervision Judge. In cases of lower sanctions – prison sentence of up to eighteen months – and after the suspension of the enforcement has been ordered by the Public Prosecutor in accordance to Art. 656, par. 5 CCP, the Sentence Supervision Judge has thus been empowered to provisionally grant the convicted person one of the alternative measures referred to in Articles 47, 47-*ter* and 50, par. 1, of Law no. 354 of 26 July 1975, also on the basis of the results of the scientific observation of the personality carried out by the External Criminal Enforcement Office. In practice, this means that the Sentence Supervision Judge himself is able to commute the original sanction imposed by the trial judge into an alternative measure (*i.e.*, probation) without the need to hold a hearing nor without the obligation to wait until the case is tried before the Sentence Supervision Tribunal. In fact, if no objection is raised by the condemned person against the reassessment of the sanction, the provisional order imposing the "new" sentence becomes enforceable. It is easy to see that this is reflected in a considerable simplification of the procedure for amending the sanction imposed at the end of the trial phase which seems to follow very closely the pure Anglo-American two-phase system of criminal proceedings, because it basically achieves a bifurcated decision-making process with a bifurcated "adjudicating body": the trial judge, on the one hand; the Sentence Super-

vision judge, on the other. Therefore, it can be reasonable stated that from the perspective of the Sentence Supervision Judge's power of restructuring the sanction, the two models in comparison seem to have converged even on their rationale side. The Common-law bifurcation as such is based on the pivotal assumption that "the punishment should fit the offender as well as the crime,"[10] likewise the Italian Supervision Sentence jurisdictional body is entrusted with the task of ensuring the re-education of the accused person, set forth in Article 27, par. 3 of the Italian Constitution.

3. The new role of the Italian Enforcement Judge: comparative impressions and traditional goals

The other aspect to be considered to ascertain the true nature of the Italian reception of the Common-law style bifurcated system is the increasing importance given to the role of the Enforcement Court in managing the sentence resulting from the final decision whose enforcement the Court is responsible for.

In this regard, it may be convenient to take a brief look at the relevant case-law. One need only mention the power of the Court to amend the sanction in case of convictions which turned out to be illegal following a decision of the Constitutional Court declaring the constitutional illegitimacy of specific provisions concerning the penalty[11] (*e.g.*, those providing for mitigating or aggravating circumstances), or as a result of a final judgement of the European Court of Human Rights (ECHR) establishing a violation of a fundamental right safeguarded by the European Convention (e.g., the right to no punishment without law laid down in Article 7 ECHR).[12] Again, it is worth mentioning the Enforcement Judge's competence to amend the sentence resulting from a

10 E. Zenoff, *Sentencing Alternatives*, in R. J. Janosik, *Encyclopedia of American Judicial System. Studies of the Principal Institutions and Processes of Law*, New York, 1987, p. 917.

11 *Corte di Cassazione, Sezioni Unite*, 29 May 2014, *Gatto,* in *Rivista italiana di diritto e procedura penale*, 2015, p. 1006, which follows *Corte Costituzionale*, 15 november 2012, no. 251, in *Giurisprudenza costituzionale*, 2012, p. 4043.

12 *Corte di Cassazione, Sezioni Unite*, 24 October 2013, *Ercolano*, in *Giurisprudenza italiana,* 2014, p. 1752, to be read in connection with ECHR, 17 September 2009, *Scoppola* v. *Italy*; *Corte di Cassazione*, 6 July 2017, in *Rivista penale,* 2018, 4, p. 379**,** linked to ECHR, 14 April 2015, *Contrada* v. *Italy.*

mistake of law in the application of the relevant rules at the adjudication phase.[13]

It is easy to see that, in terms of practical results, these decisions achieve something similar to what is reached in the Anglo-American bifurcated judgement system, since the issue of the enforceable sentence ends up being actually postponed from that of the guilt fact-finding. On the other hand, however, the two types of bifurcation are remarkably different in their intimate essence.

As mentioned before, within the "original" Common-law bifurcated trial, the sentencing phase of the procedure is intended to achieve the individualization of the sanction to be imposed to the defendant.[14]

To this extent, the Anglo-American model envisages a strict distinction between the factual basis on which to pass, respectively, the verdict and the sentence.[15] It follows that, although the sentencer must base the sanction on a version of the facts which is consistent with the verdict,[16] any issues related to both mitigating and aggravating circumstances, as well as the evidence concerning the accused person's character and his own background and criminal records[17] are assembled by the probation officer in the pre-sentence reports, and restricted to that portion of the proceeding in which the sentence is determined.

The same can be said about the use of psychiatric evaluations of the defendant's history and his personal characteristics at the dispositional stage of the action. With a

13 *Corte di Cassazione, Sezioni Unite*, 27 November 2014, *Basile*, in *Cassazione penale*, 2015, p. 2578, according to which the Enforcement Judge has the power to amend the sanction if the trial judge imposed an additional sentence due to a mistake in perception of the law applicable in the case in point; *Corte di Cassazione, Sezioni Unite*, 29 October 2015, Mraidi, in *Cassazione penale*, 2016, p. 4009, whereby the Enforcement Judge is legitimated to revoke the final conviction – and consequently the relative sanction – if the relevant rules applied were already been repealed before the conviction, but the proceeding judge did not declare it due to a mistake of perception.

14 D. A. Thomas, *Principles of Sentencing*, London, 1979, p. 8.

15 See A. Ashworth, *Sentencing and Criminal Justice*, Cambridge, 2015, p. 424; J. Shapland, *Between Conviction and Sentence. The Process of Mitigation*, London-Boston and Henley, 1981, p. 1.

16 D. A. Thomas, *Principles of Sentencing*, 1979, p. 368.

17 Regarding the English system, however, pursuant to the *Criminal Justice Act 2003*, evidence of the defendant's bad character is now admissible at trial under the sole conditions provided for by the law, such as if all parties to the proceedings agree to the evidence being admissible or when the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it.

view to determining the most suitable and proper sanction for the condemned person, a psychiatric study of the case can thus help the sentencing judge to answer any questions that require a more definitive inquiry into the offender's personality – his motives, his inner conflicts, his capacity for self-control, or his latent character assets – and also the question of his need for psychiatric treatment,[18] that are all assessments serving the goal of the sentencing stage.[19] By way of contrast, none of the above evidence can be adduced to the jury (or to the trial judge) at the earlier stage of the Anglo-American proceeding for the purpose of deciding on the guilt or innocence of the accused.[20] The result of such bifurcated approach, it is argued, is that "the verdict itself may not imply any determination on a matter which is relevant to sentence."[21] This explains why, according to the English case-law,[22] if any issue relevant to sentence (*i.e.*, where the defence contends provocation) is left unclear as a result of the jury verdict, the judge should hold a so-called *Newton hearing* before passing a sentence. In sum, this means that the sentencing judge is required to come to his own view of the factual issues having potentially significant impact on the level of sentence by means of a proof stage other than that of the trial.[23]

Nevertheless, there is none of that within the bifurcated sentence decision-making process *à l'italienne.* Unlike the Common-law model, it thus draws no distinction at all between the evidentiary basis upon which the Enforcement Judge amends the sen-

18 See R. B. Campbell Jr, *Sentencing: The Use of Psychiatric Information and Presentence Reports*, in *Kentucky Law Journal*, 60, 1972, p. 293.

19 A. R. Felthous, *The Use of Psychiatric Evaluations in the Determination of Sentencing,* in R. Rosner-R. Harmon, *Criminal Court Consultations*, New York, 1989, p. 190; A. Dershowitz, *The role of Psichiatry in the Sentencing Process*, in *International Journal of Law and Psychiatry*, 1978, p. 63-77.

20 See R. McPeake, *Criminal Litigation and Sentencing*, Oxford, 2015, p. 225; W. T. Pizzi, *Sentencing in the US: An Inquisitorial Soul in an Adversarial Body?,* in J. Jackson-M. Langer-P. Tillers, *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, Oxford and Portland, 2008, p. 70; M. Wasik, *Rules of Evidence in the Sentencing Process*, in *The Sentencing Process*, Dartmouth, 1997, p. 187.

21 D. A. Thomas, *Establishing a Factual Basis for Sentencing*, in *Criminal Law Review*, 1970, p. 81.

22 *R v Newton* (1982) 4 Cr App R (S) 388; *R v Costley* (1989) 11 Cr App R (S) 357; *R v Broderick* (1993) 15 Cr App R (S) 476.

23 See again D. A. Thomas, *Establishing a Factual Basis for Sentencing*, 1970, p. 84.

tence and that underlying the former two-fold decision on the issues of guilt and sentencing delivered by the trial judge. One need only think that, pursuant to the Italian justice system, any information about the defendant's antecedents, his "bad" character, criminal records or even current charges are heard by the trial judge together with all the evidence relevant to fact-finding. Thus, it becomes clear that there cannot be any effective separation between the evidentiary material that is used in the Italian two-phases system of criminal procedure: the finding of guilt and sentencing which take place at one single session at the end of the trial stage, on the one hand, and the reassessment of the sentence carried out during the Enforcement stage of the proceeding, on the other. This is due also to the fact that, contrary to what happens in the Common-law system once the legal proceedings are closed, the Italian court shall always justify its decision in an opinion that evaluates the evidence gathered and explains in detail all the grounds for the deliberation.[24] Hence, the Enforcement court amending the sentence cannot but refer to all the same items and issues that the reasoning behind the decision dealt with. Accordingly, Italian case law[25] has ruled that the entire file of the trial process must be at the disposal of the Enforcement Judge himself, who may have unrestricted access to it.

It follows that the Italian Enforcement Judge's power to amend the sanction consists of nothing but a substantial review of the previous judgement and its cognitive framework.[26] Yet, this makes a sharp severance between the Italian phenomenon which has given increasing importance to the Enforcement phase in amending the sentence and its Anglo-American reference model of bifurcated trial.

Rather than being seen as another attempt to spread the Common-law institutions into the Italian legal traditions, the transfer of such Italian-style bifurcation of the proceedings has resulted instead in its opposite, that is the fortification of both the basic

24 On this point, L. Marafioti, *Italian Criminal Procedure: A System Caught between Two Traditions*, in J. Jackson-M. Langer-P. Tillers, *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, 2008, p. 87.

25 *Corte di Cassazione, Sezione I*, 30 November 2005, Fiorella, in *CED Cassazione*, no. 233102. Similarly, *Corte di Cassazione, Sezioni Unite*, 29 May 2014, Gatto.

26 On this point, please refer to F. Centorame, *La cognizione penale in fase esecutiva*, Torino, 2018, p. 73.

continental tenets of the Italian criminal justice system and its peculiar attachment towards seeking as closely as possible the objective truth in adjudicating criminal liability.[27] A significant corollary to this is that "continental justice implies the need for direct reconsideration of the trial adjudication by a higher court."[28] In this perspective, where there have been mistakes of fact or of law undermining the reliability of the final sentencing decision delivered at the end of the trial,[29] even the Italian Enforcement Judge is required to reassess the decision, and, as a result of this reconsideration, accordingly amend the imposed sentence. The point is, however, that since it is the fruit of a reassessment of the former decision, such an amendment of the sentence must be seen as a further appellate remedy within the Italian "vertical" and "unitary" criminal justice system,[30] not as a clear-cut bifurcated procedural phase in which sentencing is actually determined.

27 On this opinion, E. Grande, *Legal Transplants and the Inoculation Effect. How American Criminal Procedure Has Affected Continental Europe*, in *The American Journal of Comparative Law*, 64, 2016, p. 589, who underlines the dichotomy between the *objective* truth as conceived by the Continental systems and the *interpretive* truth as the goal of justice in the pure adversary models.

28 Literally E. Grande, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure*, in *Global Jurist*, 9, 2009, p. 16.

29 A recent overview of the concept of juridical truth is provided by G. Ubertis, *Profiles of Judicial Epistemology*, Turin, 2018.

30 See L. Lupária-M. Gialuz, *Italian Criminal Procedure: Thirty Years After the Great Reform*, 2019, pp. 66-67.

CLAUDIA GIUSTOLISI*

NO-DEAL BREXIT
DECREE LAW NO. 22 OF 25 MARCH 2019

ABSTRACT. *The risks of a non-negotiated detachment of the United Kingdom (UK) from the European Union (EU) has prompted the Italian legislature to take actions aiming at protecting the markets, mitigating the perceived risks, and providing a clear roadmap of what lies ahead for banking, financial and insurance undertakings affected by Brexit.*
Consequently, the Italian Government recently issued Decree Law no. 22/2019 addressing the scenario of a no-deal Brexit (the Decree), which was published in the Official Gazette *on 25 March 2019; the Decree entered into force on 26 March 2019 and provides for a transition period of 18 months. The provisions of the Decree will apply both to UK entities providing regulated activities in Italy under the EU freedom of establishment or the freedom to provide services as well as to Italian entities operating in the UK.*

1. Introduction

Decree Law no. 22 of 25 March 2019 was published in the Italian Official Gazette no. 71 of 25 March 2019, was converted into Law no. 41 of 20 May 2019, and contains urgent measures to ensure the stability and integrity of financial markets, as well as the protection of Italian and UK investors in the event of the UK withdrawal from the European Union.

In particular, the Decree is intended to determine the legal framework applicable to banks, investment firms and other financial operators in the event that the United

* Post Doctoral Researcher, Università degli Studi di Siena.

Kingdom leaves the European Union without an agreement ("no-deal Brexit").

The risks of a non-negotiated detachment of the UK from the European Union has prompted the Italian legislature to take actions aiming at protecting the markets, mitigating the perceived risks, and providing a clear roadmap of what lies ahead for banking, financial and insurance undertakings affected by Brexit.

The Decree, indeed, sets forth a transition period of 18 months (the "Transition Period"), which is the period of application of the provisions contained in the Decree.

In fact, in case of a no-deal Brexit, as of the leave date, domestic intermediaries will have to stop providing investment services and activities in the United Kingdom, given that they will no longer benefit from the European passport. Similarly, British intermediaries will no longer be able to provide their services in Italy using pre-existing authorizations.

Moreover, it establishes a number of transitional measures generally differentiated depending on the nature of the business exercised in Italy, on the relevant regime – whether under the freedom to provide services or the freedom of establishment – at the date of effectiveness of Hard Brexit, as well as, in certain cases, on the type of clients *vis-à-vis* whom the activity is carried out.

In particular, the regulatory measures prepared are intended to ensure continuity in the provision of investment services and activities by both Italian entities operating in the United Kingdom and British entities operating in Italy, as well as to regulate the orderly exit from the domestic market of British operators obliged to discontinue activities in Italy by the leave date.

The application of said transitional measures requires in certain cases a prior notice to be served to the competent Italian supervisory Authority (Bank of Italy for the banks – Consob for the investment firms), no later than three days before Hard Brexit becomes effective.

The Bank of Italy and Consob published the instructions to follow for UK financial institutions and for Italian investors under Decree Law no. 22 of 25 March 2019.

2. The measures laid down in Decree Law no. 22/2019

The Decree structures the relevant applicable provision depending on:
– the type of entity (*e.g.*, banks, insurance undertakings, investment firms);
– the way the entity provides services in Italy (*i.e.*, under the freedom to provide services or the freedom of establishment);
– the categories of clients the reserved activities are provided to (this aspect is taken into account with respect to investment services);
– the services provided (for banks, a distinction with regard to financing and collection of savings is set forth).

Intermediaries that intend to avail themselves of the transitional regime shall make a notification to the relevant Italian competent Authority no later than three business days before the Date of withdrawal, in accordance with the procedures established by the competent authorities (the Notification).

In particular, the Decree Law sets out different transitional provisions for:
– UK banks and branching electronic money institutions that intend to cease operations, and UK payment institutions, non-branching electronic money institutions and asset management companies that are required to cease operations.
In this case, no later than 15 days from its entry into force, UK banks and branching electronic money institutions that intend to cease operations in Italy after the date of withdrawal shall notify the Bank of Italy of the way they plan to ensure the orderly termination of their activities. The intention to cease operations must also be communicated to the relevant UK supervisory authorities. The orderly termination of activities in Italy shall also be disclosed to the Italian customers and to the relevant business counterparties of the financial institution (Article 4 of Decree Law 22/2019).
– UK banks and branching electronic money institutions that intend to continue to operate in Italy.
In this case, the subjects that intend to continue to operate in Italy after the date of withdrawal, in relation to all or part of the activities previously carried out, shall notify the Bank of Italy at least three business days prior to the date of withdrawal. Moreover, the intention to continue to operate shall also be communicated to the relevant UK supervisory authority (Article 3(6) of Decree Law 22/2019). No later than six months after the start of the transition period, the subjects that have notified their intention to

continue to operate in Italy may apply for a license to operate as third-country institutions if they intend to operate beyond the transition period of 18 months. Failure to submit such application shall trigger a run-off period of six months, by the end of which the financial institution will have ceased to operate in Italy.

– *UK investment firms that, at the date of withdrawal, provide investment services and activities in Italy.*

a) In the exercise of the right of establishment through branches, they may continue, during the transition period, to perform the same activities (Art. 3, paragraph 4 of the Decree).

b) Under the freedom to provide services:

b1) they may continue to perform the same activities only with regard to eligible counterparties and professional clients (until the adoption of a decision of the European Commission in accordance with Article 47, paragraph 1 of the EU Regulation 600/2014, and in any case not beyond the transition period (Art. 3(3) of the Decree).

The subjects referred to in points a) and b) may benefit from the transition period subject to forwarding a notification to Consob within 3 working days prior to the date of withdrawal.

The same firms, where they intend to operate in Italy beyond the transition period, shall submit to Consob – within a final deadline of six months from the date of the start of the said period – the application for authorization to practice their activities.

b2) In favor of retail clients and opt-up professional clients, they shall terminate activity by the date of withdrawal.

This institution shall inform clients, other entities with whom they have relations in the provision of services and CONSOB on the initiatives taken to ensure the orderly termination of activity (within fifteen days).

– *UK insurance companies operating in Italy.*

These subjects will be removed from the EU list of insurance companies held by IVASS. In order to guarantee the continuity of services for policyholders, insured persons and persons entitled to insurance benefits, the UK insurance companies shall continue to operate during the Transition Period with respect to the management of existing contracts and coverages in force at the date of withdrawal, without entering into new con-

tracts or renewing existing contracts. Furthermore, UK insurance companies are required to submit to IVASS a plan illustrating the relevant measures to be adopted in order to ensure the regular and proper execution of existing contracts and coverages within 90 (ninety) days from the date of entry into force of the Decree. In turn, policyholders may withdraw from existing contracts having a duration exceeding one year without any additional cost, by giving written notice to the company or by exercising other forms of termination of the contract (tacit renewal clauses lose their effect). The policyholder's withdrawal shall take effect from the expiry of the first policy year following the date of withdrawal from the relevant contract. UK insurance companies shall inform policyholders, insured persons and other persons entitled to insurance benefits with respect to the operating regime applicable, within 15 days from the date of entry into force of the Decree.

– *UK insurance and reinsurance intermediaries operating in Italy.*

These subjects will be removed from the relevant register held by IVASS. In order to avoid any detrimental impact for any contractual party, insured persons and persons entitled to insurance benefits, UK intermediaries will be allowed to carry out any activities required to orderly terminate existing relationships (and in any event within maximum 6 (six) months from Hard Brexit), without entering into new contracts or renewing existing contracts. UK intermediaries shall inform any contractual party, insured persons and persons entitled to insurance benefits regarding the operating regime applicable, within 15 (fifteen) days from the date of entry into force of the Decree.

3. The protection of Italian depositors and investors

Moreover, pursuant Article 8(1)(3) of Decree Law no. 22/2019, the banks referred to in Article 3(1) of the Decree (branches), after the date of withdrawal shall adhere by law to the Italian deposit guarantee (DGS) systems. Also on that date, UK banks that operate under the freedom to provide services shall adhere by law to the DGS unless they submit to it a statement from the UK DGS certifying that their depositors shall continue to be protected by the latter.

In the same way, after the date of withdrawal the branches of UK banks and investment firms operating in Italy shall adhere by law to the Italian investor compensation scheme (ICS). Also on that date, UK banks and investment firms that operate

under the freedom to provide services shall adhere by law to the ICS unless they submit to it a statement from the UK ICS certifying that their investors shall continue to be protected by the latter.

Within thirty days (three months for DGS) of the date of withdrawal both categories of UK intermediaries shall contact the Italian DGS and ICS to carry out the required operational and administrative formalities (including the obligation to pay contributions) shall complete the formalities required for adherence to the DGS or ICS.

As soon as possible and in any case within forty days, both categories of UK intermediaries shall inform their depositors and investors of the DGS and ICS in charge.

These provisions arise from the need to strengthen and protect Italian depositors and investors who have placed their trust in UK banks and investment firms.

For these reasons, the Italian Government has decided to implement a transitional regulation that extends the compensation and protection of these depositors and investors, providing for a coverage for claims arising from banks or investment firms' inability from Italian DGS (the coverage is € 100,000 for depositants) and from Italian ICS (the coverage is € 20,000 for investors), even after the United Kingdom's exit from the European Union.

MARIA ALESSANDRA SANDULLI*

THE RISK OF THE UNCERTAINTY OF THE RULES AND THE CONSEQUENCES OF THEIR INFRINGEMENT

ABSTRACT. *The essay reproduces the report presented by the author at the IIAS (International Institute of Administrative Sciences) Conference held on 25-29 June 2018 in Tunis.*
Since then, the topical importance of the legal certainty issue has become increasingly clear in the Italian scientific debate. The writings collected in the volume edited by F. Francario and M. A. Sandulli on "Principle of reasonableness of jurisdictional decisions and right to legal certainty" (Naples, 2018) offer a vivid proof of this. In the last year the problems highlighted in this essay have found further evidence in the Italian case-law as well as in the regulatory national framework. The umpteenth amendment to the Public Procurement Code (together with a draft law announcing the complete reform of the Code), which has, inter alia, provided for the abolition of some of the new controversial Italian National Anti-Corruption Authority regulatory powers, is emblematic. This last choice, although it constitutes a first step to overcome one of the weaknesses represented in the essay, in turn inevitably creates further uncertainties due to its still partial extent.

1. Introduction

One of the main risk factors for a country's economy is, in my opinion, the lack of security about the rules governing the correct exercise of public powers (administrative and judicial), which operators and investors have to deal with.

Whoever invests in a given territory or sector needs to trust in the system he/she has to deal with, without bearing the risk that public authorities might suddenly change

* Full Professor of Administrative Law, Administrative Court procedure and Health Law at the University of "Roma Tre."

the given conditions for exercising his/her economic activities or for obtaining (or, if already awarded, for keeping on obtaining) economic benefits. In the same way, if public authorities, after many years, state unpredictably that the same operators do not have the right titles to exercise their activities (because of the delay in the administrative controls or because of the adoption of a narrow interpretation of legislative provisions which are objectively ambiguous), after having attracted them with a fake *openness* and *simplification* of the rules, clearly trick investors.

In the enterprise perspective, always looking for profitable investments, stability on the qualifying titles and criteria to exercise a professional or economic activity or on the conditions that have to be met in order to enjoy the results of economic investment is a fundamental aspect. So, this topic is inevitably closely related to the uncertainty of the rules governing the correct exercise of public powers that very often offer, to those who have to face them, an illusionary *expectation* of impartiality and *predictability*.

In a very complex and unclear context, public administrations are more likely to make mistakes, and by doing so, to unfairly deny operators the necessary qualifications for exercising their activities or for the acquisition of goods and benefits, or, just as badly, to wrongfully choose their contracting parties, to find unfounded breach of rules, or to impose unfair and disproportionate sanctions. In the same way, because of the complexity of the framework, public authorities might also challenge or put into question qualifications and titles obtained years before, depriving operators of the source of income they have invested in and/or of the work they have already started.

If this last harmful issue inescapably brings operators and investors to turn away, it's even more worrying having regard to the titles (the so-called "consent by silence") that are considered implicitly formed due to the inertia kept by the public administrations on the requests (inertia encouraged by the public officials' concern to take responsibility for complex interpretative choices).

But, in this already alarming context, what is even more worrying is the ever-increasing number of activities that the Italian law allows to start on the basis of a start-up activity notification (in the past it was the so-called self-declaration: "*Dichiarazione*" or "*Denuncia di inizio di attività*," today replaced by "*Segnalazione di inizio di attività*"). As already mentioned, this notification risks to be considered unlawful after a long time, when administrations, with proper controls, find out that the (already started) activity

did not satisfy all the requirements provided by the various and complex rules or because operators made involuntary mistakes or omissions when producing the notification.

Even if in the Italian legislature several rules were adopted, through continuous reforms, aiming at reducing the uncertainty of these titles allowing to struck them down only if strict conditions are met, unfortunately the same rules have been (and continue to be) subjected to conflicting interpretations, giving space to further uncertainties. The rules that should simplify and liberalize the exercise of economic activities turn out to be detrimental to operators, depriving them of an *ex ante* control over the lawfulness of the activity that they are about to start and making them unable to guarantee the validity and stability of their titles when contracting with banks or sponsors.

So, even though the Italian Administrative Procedure Act doesn't allow the public administrations to withdraw given authorizations or quash their own decisions when conferring economic benefits, eighteen months after the granting of such benefits, administrations and judges misuse the exception to this general rule (I'm referring to Article 21-*nonies*, paragraph 2-*bis,* of the Italian Law on Administrative Procedure, Law no. 241/1990, as amended by Law no. 124/2015) that allows public administrations to quash their own decisions if delivered on the basis of misrepresentations of the truth or false declarations as established by a final criminal judicial decision. According to their strict interpretation, the time limit to exercise powers provided by Article 21-*nonies* Law 241, cit. does not apply if there is a final conviction only in cases of false declarations, thus excluding the necessity of a conviction for the cases of misrepresentations of the truth or erroneous indication of the circumstances or of the legal status. As already noted, it is unfortunately and just inevitably due to the complexity and uncertainty of the legal and jurisprudential framework.

The issue is even more complicated for the self-declarations of conformity because, despite the explicit reference to the strict conditions of self-annulment (mentioned in Article 19, Law 241, cit.), interpreters always propose new reading keys, which can be both dangerous and helpful for operators. Since the mentioned provision was not amended or repealed by the last reform, some believe that the administrations could exercise an *ex post* control without any temporal limitation, in order to identify any erroneous indications of mandatory conditions to start the activity. So, Article 21, paragraph 1, of the same Law still provides that: "With the declaration or with the

request referred to in Articles 19 and 20 the interested party must declare that he meets the conditions and the requisites required by law. In the event of false declarations or false certifications, the compliance of the activity and its effects to the law or the amnesty provided for in the articles themselves is not permitted and the declarant is subject to the sanction provided for in Article 483 of the Criminal Code, unless the fact constitutes more serious crime." Others consider that Art. 21-*nonies* does not extend its scope of application to the exceptions referred to in the aforementioned par. 2-*bis*, because it makes reference only to the conditions for the 'self-annulment.'

If we really believe (as I do) that the use of simplification tools and of mechanisms of "para-liberalization" of the economic activities (*e.g.*, the self-declaration) are fundamental steps for the development of the country as well as for ensuring compliance with the EU principles of free movement and free establishment set out in the Bolkestein Directive of 2006, this system then cannot expose operators trusting in these instruments to higher risks more than others who obtained explicit authorization or any other explicit administrative act.[1]

As already mentioned, the uncertainty of the regulatory framework is particularly serious when it involves interdictions or prohibitions and the consequences of their violation.

The risk of incurring in heavy administrative sanctions (pecuniary or interdictory) is nowadays even higher (due to the conditions of their application) than the risk of incurring in criminal sanctions. One need only think of the devastating effects of an interdiction to receive the already granted economic advantage or to contract with the public administrations due to (infringements of) rules with unspecific and unclear

1 On this topic, see, M. A. Sandulli, *Controlli sull'attività edilizia, sanzioni e poteri di autotutela,* at *www.giustizia-amministrativa.it*; Id., *Poteri di autotutela della pubblica amministrazione e illeciti edilizi*, at *federalismi.it*, 2015, 14 and *Autotutela,* in *Treccani. Il Libro dell'anno del diritto*, Istituto dell'Enciclopedia Italiana Roma, 2016; R. Chieppa, *La (possibile) rilevanza costituzionale della semplificazione dell'azione amministrativa*, in *Giorn. dir. amm*., 2009, p. 265; G. Corso, *Perché la complicazione?*, in *Nuove autonomie*, n. 3-4, 2008, p. 325; F. Merusi, *La semplificazione: problema legislativo o amministrativo?*, ivi, p. 335; P. Lazzara, *La semplificazione dell'azione amministrativa ed il procedimento tra diritto interno e diritto comunitario*, *ivi*, 475; N. Longobardi, *Attività economiche e semplificazione amministrativa. La Direttiva Bolkestein modello di semplificazione*, available at www.amministrazioneincammino.it; A. Natalini, *Le semplificazioni amministrative*, Il Mulino, Bologna, 2002.

objectives or which are difficult to interpret (to the extent that they cause contrasts in the case-law). Likewise, think of the upsetting effects deriving from higher pecuniary sanctions imposed by the Competition Authority.

In a more general perspective, the lack of clarity of the regulatory framework and the extreme confusion of the legal formulas used (which no longer correspond to traditional categories and institutions, so that for example we often speak inappropriately of "void" or "revocation" to describe an "annulment" or of "exclusion from a tender" to describe an "expulsion" due to the impossibility of awarding the contract, etc.) do not allow to predict with a sufficient degree of reliability if an operator can actually be admitted to a public selection procedure or will actually be able to obtain the necessary qualifications in order to exercise an economic activity.

At the same time, this unpredictability reflects its effects on the "case-law," which wrongly plays a "creative" role that is not its own. So, even if the administrative courts try to achieve clear interpretative orientations, unfortunately they offer extremely heterogeneous solutions, also because of the (inevitable) difficulty faced by the same courts to create "their own" principles resolving disputes certainly related to a specific case.

From another point of view, the uncertainty of the legal and judicial framework increases the number of actions before the Courts, since operators are interested in having a positive judgment or a verdict which, regardless of the outcome, makes the parties (the plaintiff or the defendant) non-responsible because of the decisions adopted.

The resources of the judicial system are however limited and the increase in litigation determines uncertainty and, therefore, general dissatisfaction. In fact, in order 'to do justice,' not only the dispute has to be resolved, but the parties and the general community must also understand the reasons underlying that decision and, possibly, accept them. Still, it is a result difficult to obtain if the decisions build upon brief and often inadequate reasons as well as on contradictory precedents.

We often read that the rule of law has been in crisis for a quite a long time and it must be considered outdated, but I believe that it is a value we absolutely cannot afford to lose. In the same way, the legislative "service" is crucial to a society, especially nowadays since it is absolutely necessary to restart the economy and to give predictability and certainty to those who, despite the difficulties, are investing time and resources in studies, work and goods.

2. National Factors of Uncertainty

This is the reason why, for years (and I can say, sadly, for several decades),[2] I have reserved great attention, both with my writings and by organizing conferences and meetings,[3] to the legal certainty issue bearing in mind the following fundamental principle: only stable rules can guarantee the stability of the institutional and economic system.

Without legal certainty, as it is constantly stressed also at the European level, there can be no certainty of relationships, be they social, private, or public ones.[4]

I have already mentioned that in Italy this demand has, unfortunately, not yet been met.

This is mainly due to the political crisis and, at the same time, to the lacks and excesses of our legislative system that adopts too many poor quality rules that are even contradictory in several cases.

We are overloaded with reforms, which are repeatedly corrected and revised (with the technique of the delegated decrees for the "correction" of the original ones) and which, in turn, refer to secondary sources of administrative law (regulations) or to

2 Among others, M. A. Sandulli, *Brevi riflessioni su alcune recenti tendenze all'incertezza del diritto*, in *Rass. parlamentare*, 2003, p. 128; *La s.c.i.a. e le nuove regole sulle tariffe incentivanti per gli impianti di energia rinnovabile: due esempi di 'non sincerità' legislativa. Spunti per un forum,* in *federalismi.it*, 2011, p. 6; On this topic see also, F. Francario, *Il diritto alla sicurezza giuridica: note in tema di certezza giuridica e giusto processo*, in *Garanzie degli interessi protetti e della legalità dell'azione amministrativa*, ES, Napoli, 2019, 3; M. Trimarchi, *Stabilità del provvedimento e certezze dei mercati*, in *Dir. amm.*, 2016, 321.

3 Reference is made here to all the conferences organized by our *Associazione dei professori di diritto amministrativo* (AIPDA), under my Presidency, and, in particular, the annual Conference of 2014 on *L'incertezza delle regole*, ES, Napoli, 2015; of 2015 on *Le Fonti del diritto amministrativo*, and of 2016 on *Antidoti alla cattiva amministrazione: una sfida per le riforme*. The presentations are available on the website of the Association: *www.dirittoamministrativo.org* and the several meetings organized on the topic, such as: *Le misure di prevenzione della cattiva amministrazione: le garanzie procedimentali* (Scuola Universitaria Superiore of Pisa, 19 February 2016); *La riforma della Pubblica Amministrazione e i decreti di attuazione della Legge 124/2015 (Legge Madia*) (University of Milan, 26 February 2016); *Principi e regole dell'azione amministrativa: il principio di buona amministrazione e la riforma Madia* (Administrative Court of First Instance of the Lazio Region, 1 February 2016, Rome); *Cattiva amministrazione e responsabilità amministrativa* (University of Bergamo, 7 June 2016).

4 M. A. Sandulli-F. Aperio Bella, *Certezza delle regole e rapporto tra le Corti: il caso dei c.d. costi di sicurezza aziendali*, in S. Toschei, *L'attività nomofilattica del Consiglio di Stato*, Roma, 2017; M. A. Sandulli, *Profili soggettivi e oggettivi della giustizia amministrativa: il confronto*, at *federalismi.it*, 2017, 3; Id., *Principi e regole dell'azione amministrativa: riflessioni sul rapporto tra diritto scritto e realtà giurisprudenziale*, in *federalismi.it*, 2017, p. 23; L. Torchia, *Lontano dal giuspositivismo: incertezza, insicurezza, fiducia*, in *Giorn. dir. amm.*, 2017, p. 171 *et seq.*

acts of regulation/interpretation which are difficult to classify (here I make reference to the "Guidelines" of the Italian National Anti-Corruption Authority). Lastly, the case-law gradually and sometimes deliberately refers to them not only for the interpretation, but also for the "creation" of rules that the proper sources are unable to provide.

The Council of State, exercising its advisory role on the legislative reforms, tried, but sadly without great success, to point out critical issues and asked for an amendment to the provisions considered unclear, unconstitutional or contrary to EU law.

As highlighted in the introduction, ambiguous and contradictory provisions are an evident risk especially in administrative law: if a public power directly affects one's rights, it has to be bound by a clear and certain regulatory framework (i.e., the principle of legal certainty and the rule of law), or rather by legal rules of a substantive and procedural nature aimed at ensuring the impartiality of public action and the best balance between the different public and private interests at stake, allowing an effective and adequate control over their compliance.[5]

The rush to adopt quick reforms, being fully aware of their shortcomings and of the fact that they will be amended and corrected along the way, is a phenomenon which should be fought and discouraged.[6]

The problem is so evident that we are increasingly invited to acknowledge – and to accept – the inadequacy of the legislature and the (consequent) need to renounce the rules issued by the representative bodies in favor of flexible rules adopted by economic powers and independent Authorities.[7]

However, it is clear that legislative procedures offer more guarantees. Hence, their replacement with, for example, the so-called soft-law rules increases the risk of

5 M. A. Sandulli, *Il codice dell'azione amministrativa: il valore dei suoi principi e l'evoluzione delle sue regole*, in M. A. Sandulli, *Codice dell'azione amministrativa*, Milano, 2017, 3-4,hereis field we assistprocedure.

6 M. A. Sandulli, *Semplificazione, certezza del diritto e braccia legate*, in *giustamm.it*, 2005; Id., *La s.c.i.a., le nuove regole sulle tariffe incentivanti per gli impianti di energia rinnovabile: due esempi di "non sincerità" legislativa. Spunti per un forum*, in *federalismi.it*; Id., *Introduction* to the AIPDA annual Conference 2014 on "*L'incertezza delle regole*", Naples, 3-4 October 2014, in *Annuario* AIPDA, 2014, Napoli, ES, 2015.

7 M. A. Sandulli, "*Principi e regole dell'azione amministrativa: riflessioni sul rapporto tra diritto scritto e realtà giurisprudenziale*", *supra*, note 5.

uncertainty[8] (as it is repeatedly indicated in the reports and interventions presented at the 2015 AIPDA (Italian Association of Administrative Law Professors) annual Conference and in *Le Fonti del diritto amministrativo*).

It is clear that this is even more problematic if we consider its impact on sanctions. The gradual increase of the administrative sanctions requires even greater attention to the adoption of those rules whose infringement can be sanctioned by the competent authority.

The rule of law principle applied to sanctions, without distinction between the criminal and the administrative ones, and the application of the principle *nullum crimen, nulla poena sine* a (prior, clear and certain) *lege*, that European law (ECHR and EU) wants to extend also to the latter, precludes sanctions based on a technical rule or on a precedent, as well as on interpretative "guidelines" (that are sometimes also adopted afterwards).

Before I mentioned the ANAC guidelines. Our legislature, with the new 2016 Italian Public procurement Code, designed a system based on rules which are sometimes difficult to understand and apply, interpreted by "flexible" tools with a very much unclear nature.[9]

This an utterly serious problem, which contradicts the slogan that flexible rules

8 Exempted from prior legitimacy checks, the 'light' regulations are more easily exposed to the risk of annulment, causing therefore new disputes and instability. Not to mention the risks related to their probable continuous review and the consequent problems in identifying the rules applicable to the procedures in progress, linked, *inter alia*, to the innovative or interpretative nature that the various parties will try to give to the new rules according to the respective interests and to the uncertainties due to the fact that their application can be subject to justified derogation. On the topic, *amplius*, M. A. Sandulli, *Poteri dei giudici e poteri delle parti nei processi sull'attività amministrativa. Dall'unificazione al codice*, in *federalismi.it*, 2015, p. 18.

9 G. A. Giuffrè, *Le 'nuove' dimensioni del regolamento. Il caso delle Linee guida ANAC*, at *federalismi.it*, 2017, p. 2; C. Deodato, *Le linee guida dell'ANAC: una nuova fonte del diritto?*, at Giustamm.it, 2016, 4; F. Cintioli, *Il sindacato del giudice amministrativo sulle linee guida, sui pareri del c.d. precontenzioso e sulle raccomandazioni di Anac*, in *Dir. Proc. Amm*., 2017, 2, p. 381 *et seq*.; G. Morbidelli, *Linee guida ANAC: comandi o consigli?*, in Dir. Amm., 2016, 3, p. 273 *et seq*.; I. A. Nicotra (edited by), *L'Autorità Nazionale Anticorruzione. Tra prevenzione e attività regolatori*a, Torino, Giappichelli, 2016. The extreme uncertainty on the rules comes also from the pending list of references for preliminary rulings referred to the European Court of Justice by the Italian Administrative Courts (four are linked to the new Contract Code: one is related to the 2006 Code and two concern public contracts' review procedures) whose judgments could dramatically change the rules operators have already started to be familiar with.

support the economic upturn: the reckless launch of and the participation in new tendering procedures are certainly not encouraged by such an unclear framework.[10]

The result is, as mentioned, that citizens or undertakings in this context are forced to seek rulings from the Courts, the same rulings that the legislator did not know how or did not want to adopt *ex ante*, with all the uncertainties deriving from an *ex post* measure adopted for a specific case.

The problems deriving from a contradictory, ambiguous and often incomplete regulatory framework are often tackled by strengthening the role of judicial interpretation.[11] This solution however, as already mentioned, inevitably creates further uncertainties and contradictions, because inherently linked to the fact that the rule regards a specific case that, without the proper limits, is at risk of arbitrariness or at least lacks "predictability."

First of all, we find judicial interpretations which, although connected to the same subject and to the same rules, are very different and often contradictory. Hence, the system is destabilized, the administration and the operators cannot find the "security" they would need.

It is increasingly common that the Courts not only interpret, but also end up replacing the legislator, by directly creating "new laws" and/or by even rewriting the rules in those cases (though rare) in which the legislator expressed a seemingly clear *voluntas legis*.[12]

As noted on several occasions, examples of 'creative' jurisprudence are unfortunately frequently found in the field of public contracts,[13] as well as in those

10 The problem of uncertainty of the regulatory framework on the subject of public contracts already characterised the old Code, as the author had pointed out in M. A. SANDULLI, *L'eterna incertezza della disciplina dei contratti pubblici: quale diritto per le stazioni appaltanti e quali prospettive per la competitività del Paese?*, at *federalismi.it*, 2008, p. 5; Id., *Contratti pubblici e (in)certezza del diritto fra ordinamento interno e novità comunitarie*, in *federalismi.it*, 2008, p. 7.

11 On the topic, see the already cited works at note 3.

12 On this issue see, M. A. SANDULLI, *Poteri dei giudici e poteri delle parti nei processi sull'attività amministrativa. Dall'unificazione al codice*, *supra*, note 9.

13 On this issue, see the case-law of the administrative Courts, stating: "Professional offenses taken into consideration in the list provided by Art. 80 paragraph 5 letter c) Legislative Decree 50/2016, for the purpose of ex-

decisions of the competent administration ordering the annulment of the measures issued before the entry into force of Law no. 124 of 2015 (the so-called "Madia Law"). From 28 August 2015, the 18-month period – set by Art. 21-*nonies* of Law no. 241 of 1990 – starts, within which stability of the legal position has to be achieved.[14]

The issue becomes even more complicated if we consider that in this 'creative' context, from the perspective of the so-called "administration of results", the Courts grant public administrations a dangerous "freedom" to act, on the assumption that the breach of rules aimed at protecting citizens and the general public interest is not to be considered so serious as to undermine the lawfulness of the final act.

Indeed, in a democratic constitutional framework that guarantees fundamental rights, it is possible and coherent to refer to an administration of results, if the aim is to achieve a clear framework of rules allowing a logic and not strictly formalistic interpretation. But it must not allow the administration to act beyond the rules which can easily lead to the exercise of "super-powers."[15]

Evidently, a State based on the rule of law and on a Constitution that draws on the separation of powers and on the primacy of the rules adopted by institutions representing the people, cannot allow the Courts to play a fundamental regulatory role.[16]

Even though the Courts have surely been playing an important role in developing fundamental principles coherent with the constitutional framework and in

cluding an economic operator from a tender, are purely exemplary and such as to entail exclusion based on presumption. However, the exclusion can also take place in all cases where the contracting authority is able to demonstrate with solid reasons that the economic operator has been guilty of serious professional offences, such as to make his integrity and reliability doubtful, even in case of a termination for non-compliance contested by the party by the judicially excluded." C.g.a. 30 April 2018, n. 252; Cons. St., section V, 2 March 2018, n. 1299.

14 M. A. Sandulli, *Principi e regole dell'azione amministrativa: riflessioni sul rapporto tra diritto scritto e realtà giurisprudenziale*, *supra*, note 5.

15 M. A. Sandulli, *Semplificazione amministrativa e amministrazione di risultati*, in M. Immordino - A. Police, *Principio di legalità e amministrazione di risultati*, Torino, 2004, 230; Id., Introduction to the conference on *Codificazione, semplificazione e qualità delle regole*, University of Roma Tre, 17-18 March 2005**,** at *www.giustamm.it***,** 2005, p. 3.

16 M. A. Sandulli, *Il ruolo del giudice amministrativo e i limiti al potere giurisprudenziale di interpretazione*, Presentation at the annual AIPDA Conference, Trento, 5-6 October 2012, in *Annuario AIPDA 2012*, Naples, ES, 2013; Id., *Effettività delle norme giuridiche nell'interpretazione giurisprudenziale e tutela del cittadino*. Presentation at the Conference on *L'attività nomofilattica delle Magistrature Superiori*, Rome, 21 June 2012, Palazzo Spada.

compliance with the EU rules,[17] it is necessary to stress that the direct implementation by the Courts of the constitutional principles (general and indeterminate), inevitably leads to the uncertainty of the rules of social life and to the unpredictability of the consequences (positive and negative) of one's behavior.[18]

As already highlighted on previous occasions,[19] it is necessary to clearly distinguish the two roles of the legislator and of the judge. The first must set the rules for implementing constitutional principles; the latter must apply them by giving a correct, broad and constructive interpretation. However, the second one must never be confused with the creation of a "new law," which, although more technically correct and in general more reasonable, remains unrelated to the democratic principle and therefore unsuitable to guarantee security and social peace.

The judge must apply (and interpret) the law, but must not "construct" it. The risk of entrusting to the discretion of "few experts" a regulatory and innovative power that the Constitution reserves, in a general and abstract way, to the organs representing the "sovereign people" is too high to be accepted.[20]

If the lawmaker abdicates his own role, the judicial power is likely to result in the arbitrariness of individual judicial bodies, whose *regula iuris* is not subject to a control of constitutional legitimacy, reserved in our legal system to the sources of legislative status. Moreover, the case-law is not as public as the law, hence, economic and non-

17 M. A. Sandulli, *Il ruolo del giudice: le magistrature supreme*, at *federalismi.it*, 2007, p. 16.

18 On the role of the judge as one who 'makes order' in relation to the rules and does not 'create' them, see, A. Pajino, *Nomofilachia e giustizia amministrativ*a, in *Rass. For.*, 2014; G. Severini, *La sicurezza giuridica e le nuove implicazioni della nomofilachia,* at www.giustizia-amministrativa.it, 2018; F. Patroni griffi, *Valore del precedente e nomofilachia*, at www.giustizia-amministrativa.it, 2017; Id., *La giustizia amministrativa tra presente e futuro*, ivi, 2019. On the limits of the judge to interpret the rules, see, M. A. Sandulli, *Il ruolo del giudice amministrativo e i limiti al potere giurisprudenziale di interpretazione*, *supra*, note 17; Id., *Effettività delle norme giuridiche nell'interpretazione giurisprudenziale e tutela del cittadino*, *supra*, note 17.

19 M. A. Sandulli, *Principi e regole dell'azione amministrativa*, *supra*, note 5.

20 A. Travi, *Eccesso di potere giurisdizionale e diniego di giurisdizione dei giudici speciali al vaglio delle Sezioni Unite della Cassazione* (Presentation at the seminar organized by the *Struttura di formazione decentrata della Corte di cassazione*, Rome, 21 September 2017), at *giustamm.it*, 2017, p. 11; F. Francario, *Il sindacato della Cassazione sul rifiuto di giurisdizione*, in *Libro dell'anno del diritto*, Roma, Treccani, 2017; M. A. Sandulli, *A proposito del sindacato della Corte di cassazione sulle decisioni dei giudici amministrativi*, at www.giustizia-amministrativa.it, 2017.

economic operators cannot be considered liable if they are not aware of the most recent developments.[21]

Unfortunately, it is sufficient to have a brief look at the latest case-law reports or at the website of the administrative institution to perceive the extreme confusion that reigns over the procedural rules, affecting the right of defense, already significantly affected by the high costs, the strict time limits and the complexity of the drafting, notification and filing of the documents (in paper or electronic form). Since the adoption eight years ago of the Code of Administrative Process (Legislative Decree no. 104 of 2010), the Council of State in plenary session has adopted 50 decisions (out of a total of 137) on matters related to the procedure. Nineteen of which were adopted in the last three years and three just in 2018 (three other decisions are to be published).

3. Towards Possible Solutions?

The above-mentioned and discussed issues confirm the validity of the concerns expressed at the beginning.

Operators and investors are evidently discouraged by the new limits on the guarantees of the fundamental values that are imposed in the name of the needs of the economy. It should be sufficient to recall the recent "spread subsidies" provisions which, by failing to comply with the legislative and contractual commitments undertaken with international economic operators, drastically reduce the subsidies that the State had legally and contractually recognized to producers of renewable energy with the purpose of attracting and encouraging them to invest in our Country. As a consequence, operators and investors are reluctant to trust a system which is ambiguous, uncertain, which affects the explicit, implicit or "self-certified" titles necessary to start activities and to invest resources, and which offers less and less judicial guarantees. Therefore, they inevitably move away from Italy, looking for different outlets for their entrepreneurial investments and their financial resources.[22]

21 M. A. Sandulli, *Principio di legalità e effettività della tutela: spunti di riflessione alla luce del magistero scientifico di Aldo M. Sandulli*, in *Diritto e società*, 2015, 4, p. 649.

22 The trust of the investors, necessary to promote growth in the Country, needs a system which is predictable, trustworthy and provides effective protection. On this issue, see, M. A. Sandulli, *Poteri dei giudici e poteri delle*

In conclusion, the general public interest in the stability of the rules and the trust of citizens and economic operators in the loyalty of the institutions, on which legal certainty and in more general terms legal *security* draw, are nowadays of the utmost importance. The trust of those who, at different levels, internal and international, central and local (political, professional, bureaucratic, etc.) work for the Public Administration and manage public services is indeed a necessary element of democracy and an essential condition for carrying out any kind of activity or intervention. The sacrifice of the values of security and democracy is however all the more serious if we consider that the values of correctness and reasonableness when regulating legal relations (in whose name some part of the case-law justifies a "creative" interpretation of the law, beyond the text and the *rationale* behind it) are nowadays repeatedly and declaredly sacrificed to the primary needs of the economy, in the name of the need to promote growth in the country.

It is neither sensible nor fair that, on the one hand, the legislator (generally endorsed by the Constitutional Court) imposes new limits on the protection of fundamental rights (health, environment, justice, good administration) in the name of the needs of the economy; and, on the other hand, that judges allow public authorities to extend *ad libitum* the scope and time limits of public controls, prohibitions and sanctions. In this way they deny the very few guarantees that, because of the serious insecurity created in the economic sector by the uncertainty of the regulatory framework and the inefficiencies of the Administration, the legislator sometimes tries to offer citizens and operators who are increasingly held responsible for the assessments and evaluations that public authorities should carry out and for which the pay very high taxes.

Contrary to what some recent case-law seems to suggest, it is therefore necessary to foster a coherent system, based on the rule of law and on constitutional values.

To this purpose, it must be borne in mind, on the one hand, that legal certainty is strictly linked to the effectiveness of the rules, which requires an adequate protection (either administrative and judicial). This is consistent with a principle provided by Di-

parti nei processi sull'attività amministrativa, supra, note 9; G. Napolitano, *Diritto amministrativo e processo economico*, in *Dir. amm.*, 2014, p. 695 *et seq.* and M. Di Benedetto, *Diritto amministrativo e crescita economica*, in *Il diritto dell'economia*, 2014, p. 189 *et seq.*; S. Rose Ackerman, *Economics of Administrative Law*, Cheltenham, Edward Elgar, 2007.

rective 2007/66/CE stating that, in order to guarantee effective compliance, acts and behaviors in breach of the rules must not produce their effects. On the other hand, in order to promote trust in the system between investors, it is also necessary to foster a more efficient and healthier administration[23] whereas it is clear that by limiting *ex ante* controls and by raising obstacles to the access to judicial protection, corruption and maladministration are bound to increase despite the numerous adopted provisions aimed at fighting them (which are however *ex post* remedies and not *ex ante* measures).

Evidently, these considerations are linked to values that are or should be a common heritage and which are independent from any ideological and political beliefs, and so, under this perspective, they are presented at this international conference.

23 M. A. Sandulli, *Poteri dei giudici e poteri delle parti nei processi sull'attività amministrativa*, *supra*, note 9.

REBECCA SPITZMILLER*

THE INFLUENCE OF COMPARATIVE LAW IN TEACHING "STREET LAW" IN ITALY

ABSTRACT. *This paper analyzes various comparative-law features inherent to teaching "Street Law" in Italy, a legal clinic now offered at Roma Tre's Law Department. The clinic examines basic legal notions such as the rule of law, democracy and justice, framed around active-citizenship initiatives enabled by the principle of horizontal subsidiarity. Street Law presents these concepts using learner-based, interactive methodology – typical of all legal clinics – in a "train-the-trainer" format. As part of the clinic, the law students in turn teach these concepts to high school students in several theoretical and hands-on lessons at a local high school, resulting in "peer-to-peer" teaching. Not surprisingly, Street Law, initiated by student-activists in Washington DC in the early 1970s, is deeply infused with common-law legal-education methodology and principles. Traditional lecture-based methods typical of civil-law legal education give way to the Socratic method, guided discussions, guest speakers, onsite visits to local government offices, role-play, games and other hands-on activities designed to engage students in a challenging, new experience aimed at both increasing their practical skills and mastering legal principles. This paper will analyze the methodological aspects of the course, and the policy guidelines embedded in soft-law provisions emanating from various sources that offer sound rationales for including Street Law in legal education. It will also review the comparative-law notions inherent to the clinic that extend also to substantive legal concepts such as subsidiarity, a largely European notion,*[1] *seeking parallels to it in the American legal system, as well as several of the fundamental rights and duties of democracy.*

* Researcher in Comparative Law and Professor (*aggregato*) of International Business Contracts, Roma Tre University.

1 The US Constitution does not mention subsidiarity explicitly, and federal courts rarely review cases presenting challenges based on the principle it entails, i.e., that whenever possible, measures should be taken at the lowest level of government that can effectively achieve them. See G. BERMANN, *Subsidiarity as a Principle of US Constitutional Law*, 42 *Am. J. Comp. L. Supp.* 555, 1994, at 560.

CONTENT. 1. What is Street Law? History and Methodology – 2. National, European and International Legal Foundations Supporting Street Law in the Law School Curriculum – 2.1. In Italy – 2.2. In Europe – 2.3. In the United States – 2.4. In the International Sphere – 2.5 Conclusions regarding Legal Foundations for Street Law in the Law School Curriculum – 3. Comparative-Law Notions Inherent to Street Law – 4. Subsidiarity – 4.1. A Brief Historic Overview – 4.2. The European and Italian Perspectives – 4.3. The US Perspective – 5. Concluding Observations

1. What is Street Law? History and Methodology

In the spring semester of academic year 2018-2019, the Law Department of Roma Tre University introduced a new "didactic activity"[2] called "Street Law." Now a staple in the increasing range of clinical-legal-education offerings taught in law schools worldwide,[3] this clinic marks Street Law's debut in Italy. First introduced at Georgetown Law School in 1972, and taught today across the USA and in some 40 nations around the world, Street Law uses innovative, interactive teaching techniques[4] as it pushes law students beyond their comfort zones, stimulating them to become promoters of social action.

Every Street Law program shares certain elements or characteristics:

1. teaching practical content (law, democracy, and government);

2. using interactive teaching strategies to develop important civic skills (civic engagement, problem solving, critical analysis, and communication); and

3. involving the community in the educational process (resource experts from law and law enforcement visiting classrooms and students working beyond classroom

2 *I.e.*, "a set of classes or a plan of study on a particular subject, usually leading to an exam or qualification" (Definition of "course," at https://dictionary.cambridge.org/it/dizionario/inglese/ course) in law that carries less than five *CFUs* (*Crediti formativi universitari*, or University Education Credits) rather than a full "course," which carries five or more such credits, according to the terminology used at Roma Tre University. For the purposes of succinctness, this "didactic activity" will be referred to as a "course," or as a "clinic," hereinafter.

3 L. Arbetman, *Street Law Inc.: Context history and future,* 1 *Int J Pub Legal Educ*, 2018, 3.

4 *Id.* Lee P. Arbetman, Executive Director at Street Law, Inc., characterizes Street Law as a way to "teach the public about law and public policy using learner-centered, interactive teaching methods. Today, Street Law programs can be found in every state in the US and in more than 40 countries around the world [… in] more than 120 law schools."

walls in the community).[5]

This Roma Tre edition of Street Law inserts students in the context of teaching civic education and legality in high schools. It calls upon their knowledge of substantive law and their powers of persuasive communication, while instilling them with didactic skills. The unique quality of the course is that it gives Italian law students the opportunity to hone all these skills by actually teaching Italian high school students – *liceali* – about the basic principles they have already been studying for years. Their lesson plans include discussions and activities based on the rule of law, the foundations of democracy, the reasons we strive for justice, and the tools the Italian Constitution provides to pursue these ideals. They analyze fundamental legal concepts ranging from basic tenets of criminal norms that guarantee security in a democratic society to concepts regarding common goods, subsidiarity and other constitutional principles. In addition to the theoretical knowledge they will impart in the *liceo* classroom on these topics, the law students will also lead hands-on lessons with the *liceali* on a street near their school, taking concrete action together to care for common goods in need of refurbishing. Their efforts constitute a collective effort to restore dignity and functionality to this common space, while putting into practice the concepts they've discussed inside the traditional classroom, first as learners, then as instructors.

In particular, during the five-week course, the law students acquire "specific knowledge and competences regarding themes relative to the rule of law, subsidiarity and the protection of common goods," deeply analyzing the legal aspects that constitute them in a comparative and international perspective. The clinic's learning objectives provide that "at the end of the course, the students will be able to:
– describe the main theoretical and normative frameworks that constitute the principles of the rule of law and of subsidiarity, in a comparative and international perspective, with particular reference to the Italian and US contexts;
– plan and organize training initiatives aimed at transmitting this knowledge to high school students;

5 R. Grimes, *Part one: Introduction, Ed O'Brien Conference*, in *Ed O'Brien Book, Street Law and public legal education: A collection of best practices from around the world in honour of Ed O'Brien* in press by Juta & Co. Ltd.

– promote, through the application of the acquired knowledge and skills, the implementation of events aimed at taking care of common goods;
– interact with the public administration in order to manage and improve the territory (or common goods);
– diffuse the principles of actions of horizontal subsidiarity."[6]

2. National, European and International Legal Foundations Supporting Street Law in the Law School Curriculum

Policy guidelines embedded in soft-law provisions emanating from various sources offer sound rationales for including Street Law in legal education. Here we will focus on several such examples: one from the Italian legal system – and by extension the EU –, one from the US and a third from an international body, the UN.

2.1. In Italy

The importance of the Street Law objectives can be inferred from the content of the Decree of the Italian *Ministero dell'Istruzione, dell'Università e della Ricerca* (*MIUR*)[7] of 25 October 1993, n. 302, whose subject was "Educating towards Legality." In defining this key phrase, the Ministry specified that "educating towards legality" means elaborating and spreading an authentic culture of civic values. It defined this culture as one that:
– considers law as an expression of a social pact, indispensable for building informed relationships between citizens themselves, and between citizens and institutions;
– allows for the acquisition of a deeper and more extensive notion of the rights of citizenship, starting from the awareness of the reciprocity among subjects possessing the same dignity;
– facilitates the understanding of how the organization of personal and social life founds itself on a system of legal relationships;

6 Course objectives, Roma Tre Law Department website: http://uniroma3-public.gomp.it/Insegnamenti/Render.aspx?CUIN=xx1822445 (Accessed 30 May 2019).

7 Italian Ministry of Education, University and Research.

– develops the awareness that conditions such as dignity, liberty, solidarity and security cannot be considered as having been permanently acquired, but must be pursued, coveted and – once secured – protected.

This decree identifies and defines the same objectives as those pursued in Street Law. It encourages, later in the document, the "realization of a series of initiatives" as "possible means of promoting the delineated process." However, the *MIUR* decree does not indicate any specific methodology that converts the theories inherent in "legality" into concrete practices. In the decree, "educating towards legality" remains a theoretical, academic pursuit. Thus, it does not prescribe techniques or methodologies, or envision the idea of linking law students to high school students, in a synergetic, peer-to-peer, learning relationship, as identified and implemented in Street Law.

2.2. In Europe

Examining the general development of clinical legal education in Europe, it is noteworthy that a wave of experiential learning intensified when the Bologna process began in 1999.[8] "It was only following the adoption of the Bologna Declaration (aimed at the creation of a common European area for higher education), the European integration process and the growing competition between public and private universities that clinical legal education began to take hold in Western Europe."[9] To gather force, clinical legal education has had to overcome several obstacles, many tied to fitting into the prevalent civil-law educational practices mentioned above. It was difficult to diverge from "the formalism of legal studies and their separateness from objectives of social justice and commitment to public goods."[10] This formalism and the separateness from the achievement of social ends, which

8 See M. Romano, *The history of legal clinics in the US, Europe and around the world* in C. Bartoli, *Legal Clinics in Europe: For a commitment of higher education in social justice* in *Diritto & Questioni Pubbliche*, *Special Issue,* Palermo: Diritto & Questioni pubbliche, 2016. "With the Bologna Declaration, a system of credits and easily comparable titles was introduced, allowing greater mobility of students and teachers, and aiming at facilitating the process of European integration and a greater exchange between the positive experiences of the different universities." *Id.* at 33.

9 *Ibid.*

10 M. Barbera, *The Emergence of an Italian Clinical Legal Education Movement* in A. Alemanno-L. Khadar (eds) *Reinventing Legal Education: How Clinical Education Is Reforming the Teaching and Practice of Law in Europe,* Cambridge: Cambridge University Press, 2018, 62.

have been embedded in the civil-law legal-education system for some 1000 years, do not readily embrace "law in action, where the goals include rethink[ing] and reconceptualiz[ing] norms, institutions, law-making processes, and the role of the different actors involved in these mechanisms. [… It means] reintroduc[ing] in legal education the idea of law as an instrument of social change […] as a social weapon."[11]

The arsenal that Street Law brings to bear is well defined among the learning objectives written and adopted by the Roma Tre law students themselves in the modules they taught at the local high school. These included: "to foster the development of the high school students' public spirit; to understand concepts of democracy, law and justice; to comprehend the differences between common goods, public goods and private goods; to understand the principle of subsidiarity, shared administration, care and respect for common goods."[12] These learning objectives recall the Ministerial decree that called upon educators to "elaborate and spread an authentic culture of civic values."[13] They correspond to the other specific points of the decree in the consideration of "law as an expression of a social pact, indispensable for building informed relationships between citizens themselves, and between citizens and institutions; […] understand[ing] how the organization of personal and social life founds itself on a system of legal relationships; develop[ing] the awareness that conditions such as dignity, liberty, solidarity and security cannot be considered as having been permanently acquired, but must be pursued, coveted and – once secured – protected."[14]

By not only learning these principles but also teaching them to their (slightly

11 *Ibid.*

12 Taken from a lesson plan designed by Street Law students, edition 1, Roma Tre University Law Department 2019. In it, they delineated specific methodology and detailed timetable to follow: "The discussions will take place based on the Socratic Method. The students will be stimulated to express their opinions in a guided discussion, as follows: Initial plenary discussion – 15 min. - What is a common good? – 10 min. - What is the difference between a private good and a public good? – 10 min. - Reflection. Who takes care of the common goods? Why? – 10 min. - Introduction to the concepts of subsidiarity and shared management of public spaces. Collaborative Pacts – 10 min. - Conclusions: comprehend the benefits, not only to the environment but also to society and to personal development that derive from the activity of Retake (compare with sports) – 10 min. - Final plenary discussion. – 20 min."

13 Decree of the Italian *Ministero dell'Istruzione, dell'Università e della Ricerca (MIUR)* of 25 October 1993, n. 302.

14 *Id.*

younger) peers, the law students are imparting notions and using methodology intended to effect change, using skills they obtained through a sense of empowerment that the course aimed to heighten. These skills are transferrable to situations students will encounter in future endeavors – as lawyers, public officials, corporate strategists, engaged citizens – or any role where leadership is required and exercised through informed, persuasive communication skills. By introducing Street Law into its curriculum, Roma Tre University maintains its prominent role in clinical legal education in Italy; it now offers four other legal clinics: the Clinic on the Law of Immigration and Citizenship, the Legal Clinic on Minors' Rights, the Banking and Financial Law Legal Clinic and the Prison Law Clinic.[15]

2.3. In the United States

In 1992, the American Bar Association (ABA), an institution closely linked to US law schools due to, *inter alia*, its accreditation of them,[16] published the *McCrate Report.* It stated, "clinical [legal] courses, both in a simulated and live-client setting, occupy an important place in the curriculum of virtually all ABA-approved law schools."[17] The *McCrate Report* also encouraged law "schools to recognize the value of live-client clinical experiences and to explore ways to expand the availability of courses that offer such experiences."[18] This Report therefore endorsed and encouraged the continued and in-

15 *Cliniche legali, Presentazione*, Roma Tre University's Law Department. http://www.giur.uniroma3.it/?q=cliniche_legali (Accessed 1 June 2019).

16 "The Role of the ABA Section of Legal Education and Admissions to the Bar. Under Title 34, Chapter VI, § 602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar are recognized by the United States Department of Education (DOE) as the accrediting agency for programs that lead to the J.D. degree. In this function, the Council and the Section are separate and independent from the ABA, as required by DOE regulations.
The Council of the Section promulgates the Standards and Rules of Procedure for Approval of Law Schools with which law schools must comply in order to be ABA-approved. The Standards establish requirements for providing a sound program of legal education. The law school approval process established by the Council is designed to provide a careful and comprehensive evaluation of a law school and its compliance with the Standards." See https://www.americanbar.org/content/dam/aba/publica tions/ misc/legal_education/2016_accreditation_brochure_final.authcheckdam.pdf, (Accessed 21 May 2019).

17 American Bar Association, *Legal Education and Professional Development – An Educational Continuum Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* (known as the *McCrate Report*) 1992, p. 6.

18 *Id.* (at 254).

creased use of courses such as Street Law, which were already being taught in law schools across the United States.

In fact, clinical legal education began in early 1900s in the United States due to the influence of the legal realist movement. Jurists who extolled legal realism argued "that legal education should expose students to the dynamic relationship between theory and practice – that good theory is practical, and that good practice is informed by theory."[19] A prominent legal realist, Jerome N. Frank, advocated that legal clinics should play a broad role in legal education in 1933: "law school clinics would not confine their activities to [those] now undertaken by the Legal Aid Society. They could take on important work for governmental agencies or other quasi-public bodies."[20] He defended an expanded scope and purpose of legal education to a concrete understanding of how the law could work to pursue social ends. "The law student should be taught to see the inter-actions of the conduct of society and the work of the courts and lawyers[21] [… and] be encouraged to consider that an important part of their future task is to press for improvements of the judicial process and for social and economic changes through legislation, and wise administration, but, at the same time, that proposals for adequate improvements should be formulated on the basis of moderately accurate information as to how the judicial, legislative and administrative processes actually function."[22] This mixture of practical knowledge and theoretical expertise is precisely what characterizes all legal clinics today, including Street Law.

2.4. In the International Sphere

Regarding relevant guidelines handed down in the sphere of international law, we can refer to the United Nations Sustainable Development Goals, which identifies 17 such Goals, each with a number of Targets to reach by the year 2030. Two of the

19 S. Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *Fordham L. Rev.* 1929, 2002, at 1932. Available at: http://ir.lawnet.fordham.edu/flr/vol70/iss5/29 (Accessed 30 May 2019).

20 J. Frank, *Why Not a Clinical Lawyer-School? Faculty Scholarship Series* 4109, 1933 at 918. https://digitalcommons.law.yale.edu/fss_papers/4109 (Accessed 30 May 2019).

21 *Id.* at 921.

22 *Id.* at 922-923.

Goals are particularly relevant to the Street Law clinic, numbers 4 on Quality Education and 11 on Sustainable Cities and Communities.

Goal 4 provides: "Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all." In establishing this goal, the international community has reiterated the importance of quality education as a means to improve the conditions of lifestyle of persons, the community and society as a whole. It has emphasized that education is thus a factor that contributes to making the world safer and more sustainable.[23] In particular, Goal 4 includes the following Target:

> By 2030, ensure that all learners acquire *the knowledge and skills* needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development.[24]

The dual focus on knowledge and skills through quality education reflect those that Street Law – and all clinical legal education – pursues.

When coupled with the objectives set forth in Goal 11, which provides, "Make cities and human settlements inclusive, safe, resilient and sustainable," Street Law's overarching themes come full circle. This Goal seeks a comprehensive, sustainable and participatory approach to make our cities safer and more inclusive, especially for women, children, the elderly and disabled.[25] The Street Law curriculum provides precisely this prescription to deliver its results. By engaging two different categories of young people – university and high school students – in interactive learn-by-doing activities and encouraging the younger group to echo the message among their families and friends,

23 See *Agenzia Italiana per la Cooperazione allo sviluppo*, at https://www.aics.gov.it/home-ita/settori/obiettivi-di-sviluppo-sostenibile-sdgs/ (Accessed 30 May 2019).

24 Emphasis added. See, *e.g.*, United Nations Department of Economic and Social Affairs: https://www.un.org/development/desa/disabilities/envision2030-goal4.html (Accessed 30 May 2019).

25 See *Agenzia Italiana per la Cooperazione allo Sviluppo*, at https://www.aics.gov.it/home-ita/settori/obiettivi-di-sviluppo-sostenibile-sdgs/ (Accessed 30 May 2019).

Street Law seeks to spread throughout the entire society its purpose of instilling respect for the common goods that comprise our cities. Looking closer at Goal 11, the following two Targets stand out as particularly relevant to Street Law's aims: "Enhance inclusive and sustainable urbanization and capacity for participatory, integrated and sustainable human settlement planning and management in all countries" and "Reduce the adverse per capita environmental impact of cities, including by paying special attention to air quality and municipal and other waste management."[26]

2.5. Conclusions regarding Legal Foundations for Street Law in the Law School Curriculum

Similar concerns emerge from the Italian, European, US and international recommendations sustaining themes relating to learning-by-doing or experiential learning regarding civic education, social cohesion and respect for the environment. In these directives, therefore, we can detect common threads that seem to be fairly non-controversial, lending support to offering Street Law in the law school curriculum. Nonetheless, Roma Tre's Street Law clinic is in effect a pilot course; its content and purpose still lie fairly far afield from mainstream offerings in Italy's law departments. Given the many pressing issues facing Italy, Europe and indeed the entire world today that require innovative thinking and quality lawyering to cobble viable solutions, a comparative-international-law approach would seem an obvious choice. A passage from a case decided by Learned Hand in 1911 is relevant: "How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance."[27] Along

26 See, *e.g.*, United Nations Department of Economic and Social Affairs: https://www.un.org/development/desa/disabilities/envision2030-goal11.html (Accessed 30 May 2019).

27 *Parke-Davis & Co. v. H. K. Mulford Co.*, Circuit Court, S.D. New York 189 F. 95; 1911 US App. LEXIS 5245 28 April 1911, Learned Hand. The quote comes from a patent case dealing with technical issues regarding the chemical composition of "crude product" Adrenalin. His analysis of the case concludes with a strong endorsement of using solutions presented through the study of comparative law:

> "I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as

these same lines but some sixty years later, Saul D. Alinsky cited Justice Hand as stating: "the mark of a free man is that ever-gnawing inner uncertainty as to whether or not he is right."[28] Alinsky claims that social organizers who aim at effecting positive change would agree with Hand's statement, and that he also believes that "if people have the power to act, in the long run they will, most of the time, reach the right decisions."[29] This sense of optimism and trust informs legal clinics such as Street Law. These values should push us towards creating opportunities that allow law students to experiment, to think on their own, to engage with others based on their own powers of reasoning, to take on responsibility, to become empowered through the study of law. Indeed, empowerment starts through civic awareness and develops into civic engagement and accomplishment. Active citizens and groups or associations of them act through "empowerment" to engage not only other citizens but public administrators as well.

3. Comparative-Law Notions Inherent to Street Law

Several areas of substantive law studied in Roma Tre's first edition of Street Law invite analysis through a comparative lens. These areas range from that known as "subsidiarity" in Italian and EU law, and its counterpart – if we can call it that – in the US, to that of basic concepts of legality itself, ranging from criminal norms and administrative sanctions in various settings. "Comparative law facilitates a better comprehension of the different social and cultural institutions of our world."[30] The comparative-law framework, with its broader, interdisciplinary and international approach contributes to a greater understanding of these issues. In fact, for purposes of Street Law, the comparative-law approach worked in precisely the ways Zweigert and Kötz describe:

> these. […] In Germany, where the national spirit eagerly seeks for all the assistance it can get from the whole range of human knowledge, they do quite differently. The court summons technical judges to whom technical questions are submitted and who can intelligently pass upon the issues without blindly groping among testimony upon matters wholly out of their ken."

28 S. Alinsky, *Rules for Radicals: A Pragmatic Primer for Realistic Radicals,* New York: Random House, 1971, Vintage Books Edition, 1989, at 11.

29 *Ibid*.

30 K. Zweigert-H. Kötz, *Introduzione al Diritto Comparato*, Milano: Giuffrè Editore, 1998, at 18 (translated from the Italian).

> The primary function of comparative law is, like that of all scientific methods, knowledge. If by the science of law we intend not only interpretive science regarding law, principles of law and national 'rules' and 'standards,' – but also the search for models to avoid and resolve social conflicts – then it is clear that comparative law provides a wider range of models and solutions than that [of] a national legal system.[31]

Using a comparative approach coupled with an interactive, learn-by-doing method, allowed students to reflect on a range of principles comprising legality, democracy and justice in ways they hadn't previously encountered thus far in their study of law. Zagrebelsky notes in his *Imparare democrazia* that one of deomcracy's foundations is the "Spirit of dialogue […] Democracy is *discussion*, *reasoning together*."[32] The next section will focus on one of the main areas of substantive law encountered and analyzed in Street Law: subsidiarity. Following Zagrebelsky's suggestion, we *discussed* this principle in almost every lesson, recognizing that "[o]ne of the most characteristic implications of subsidiarity is political participation."[33] In a clinic aimed at engaging students by directly involving them in the interplay between the public administration and individual empowerment, *reasoning together* about its potential "in facilitating citizens' participation in social and political relationships, enhancing democracy, and protecting individual liberty"[34] is key. This interactive method draws students into the law and engages them to participate in the democratic process at the most basic level,[35] in a true manifestation of the principle of subsidiarity. It is not surprising that this principle constitutes a central theme of the clinic.

31 *Id.* at 17.

32 G. Zagrebelsky, *Imparare democrazia*, Torino: Einaudi, 2007 (emphasis added).

33 M. Evans-A. Zimmermann, *Global Perspectives on Subsidiarity* (Eds.) New York: Springer 2014, Introductory chapter, at 2.

34 M. Kanetake, review of M. Evans-A. Zimmermann, *Global Perspectives on Subsidiarity* (Eds.) New York: Springer 2014, *Global Perspectives on Subsidiarity* 13 *Int'l J. Const. L.* 1085, 2015, at 1086.

35 Tocqueville wrote: "I maintain that the most powerful, and perhaps the only, means of interesting men in the welfare of their country which we still possess is to make them partakers in the Government." A. de Tocqueville *Democracy in America* (translated by H. Reeve) 2002, V 1 at 270.

4. Subsidiarity

4.1. A Brief Historic Overview

The roots of subsidiarity are traceable to the thoughts of Aristotle and Aquinas.[36] It also has ties to the Catholic Church, and featured in Pius XI's 1931 encyclical, where he wrote that subsidiarity:

> remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.[37]

Here, the encyclical expresses the complexity of the concept of subsidiarity: hierarchical powers of the Church that should recognize and support the members of its body.

Pursuing a political-philosophy point of view – including considerations relevant to virtue ethics – Dominic Burbridge examines subsidiarity in his article entitled

36 In *The Federal Constitution: Towards a Normative Theory*, 61 *Am. J. Juris.* 13, 2016, Nicholas Aroney writes: "Aristotle begins his *Politics* with an account of human beings born into households, inhabiting villages and finding their fulfilment within the *polis*. [… He] later describes the *polis* as a composition of individual citizens (*politai*) formed into a self-sufficing unity." p. 13, footnote 1 […and] "concludes that the *polis* is the essential unit of human self-governance and the location of 'supreme authority.'" p. 14. St. Thomas explained that "order is unity arising from the harmonious arrangement of many objects, a true, genuine social order demands that the various members of a society be united together by some strong bond." *Contra Gentiles*, III, 71. In these excerpts, we can perceive the seeds of what will become the basis of horizontal subsidiarity, as discussed *infra.*

37 Pius XI, *Quadragesimo anno,* § 79, 1931. The encyclical continues, at § 80 "The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of 'subsidiary function,' the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State." https://bit.ly/1A5GcL9 (Accessed 30 May, 2019). Here the encyclical articulates a more clearly defined version of what would be considered vertical subsidiarity.

"The Inherently Political Nature of Subsidiarity."[38] In it, he states, "A democratic order hosts participatory decision-making insofar as the people are sovereign in the fullness of their political nature. This requires concurrent navigation of the criteria of legitimate authority alongside deciding what should be done."[39] This consideration, placing popular sovereignty at the forefront, approaches the horizontal version of subsidiarity. In that regard, Burbridge cites Jonathan Chaplin who sustains that subsidiarity is a call for social functions to be fulfilled, not at *the lowest possible level but* rather at *the right level*[40] and that "*all* communities have a potential responsibility towards *all other* communities (and to persons) to offer them various kinds of 'help' or service. The principle [of subsidiarity] turns out to have not only a vertical but also a horizontal application."[41] Burbridge believes that "What matters is not how society is ordered as a whole, but the recognition of various inter-dependencies between otherwise autonomous groups, interdependencies that are best facilitated through a principle of a-political non-absorption."[42] These ideas emphasize participation in its broadest, macro perspective, including that of horizontal subsidiarity.

Recently the term "new governance" has been used to analyze these basic principles about decision-making and participation in the democratic process. It comprises the idea that the state alone is unable to meet all the demands expected of it, and thus "needs to engage other actors to leverage its capacities."[43] Emanuel Savas described new forms of public administration nearly two decades ago, meant to meet the challenges posed by changing dynamics in society. "Governments, now more than ever, must persuade and motivate citizens to secure their support. Because many societies, even in ad-

38 D. Burbridge, *The Inherently Political Nature of Subsidiarity*, 62 *Am. J. Juris.* 143, 2017.

39 *Id.* at 144.

40 J. Chaplin, *Subsidiarity and Social Pluralism*, (emphasis in original) New York: Springer, 2014, at 72.

41 *Id.* at 75.

42 D. Burbridge, *The Inherently Political Nature of Subsidiarity*, at 144.

43 F. Stewart, *Behind the Cloak of Corporate Social Responsibility: Safeguards for Private Participation within Institutional Design*, 25 *Ind. J. Global Legal Stud*. 233, 2018, at 246. "Under this definition, new governance encompasses a broad diversity of thought with one common thread: an agreement that today's governance demonstrates a correlation between the state's engagement with 'other actors' and the blurring of the public-private distinction, evidenced in practice by many examples of governance partnerships." *Id.*

vanced market economies, are becoming less coherent, less unified, more fragmented, and have less respect for political authority, public officials must bring together the various stakeholders and gain consensus on common action."[44]

4.2. The European and Italian Perspectives

In European law, subsidiarity is a key principle, as established in 1992 in the Treaty of Maastricht, and currently formulated under the Treaty on European Union, which entered into force in 2009.[45] In both the EU and within Italy, this principle helps distribute and allocate administrative resources and functions throughout the governmental frameworks.[46] In the EU context, it regulates and limits EU authorities from acting when national or even local governments could do so more effectively, requiring that decisions be taken as closely as possible to the citizens.[47] Subsidiarity in this context therefore regulates concurrent powers, providing a flexible mechanism that weighs the national interest against local ones. This regulation of concurrent powers provides rules in a hierarchical structure, pushing the exercise of governmental power downward to the lowest administrative level that can effectively achieve the objectives of any given proposed action, in what is generally known, as noted above, as "vertical subsidiarity."

In Italy, innovators and volunteer organizations that are engaged in active citizenship have begun to invoke "horizontal subsidiarity" under Article 118 of the Italian Constitution.[48] It provides: "The State, regions, metropolitan cities, provinces and mu-

44 E. Savas, *Privatization and the New Public Management*, 28 *Fordham Urb. L.J.* 1731 (2001) at 1736.

45 The present formulation, in the consolidated version following the Treaty of Lisbon, is contained in Article 5(3) and protocol (No. 2) on the application of the principles of subsidiarity and proportionality of the Treaty on European Union, which entered into force on 1 December 2009: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

46 It is interesting to note that during the same timeframe in which "subsidiarity" was forming across Europe, critical developments were helping spread the practices of clinical legal education worldwide.

47 See *The Principle of Subsidiarity, European Parliament*, available at: http://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity (Accessed 30 May 2019).

48 In 2001, the Italian Parliament approved, and a referendum confirmed revisions to Title V of the Italian Constitution, inserting the principle of subsidiarity in paragraph 4 of Article 118.

nicipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity"[49] Based on this provision, citizen initiatives aimed at improving the collective good are increasingly expecting and demanding governmental support. In the Italian legal context, "horizontal subsidiarity" thus garners support for citizens' actions *from the bottom up, to the* "*State, regions, metropolitan cities, provinces and municipalities*." It thus provides "individuals" or "associations" with institutional support for "activities of general interest" from every level of the Italian government, thus encouraging citizens to undertake them. In both the EU and Italy, the term subsidiarity is relevant to the distribution of governmental power. Comparing and contrasting their content and functions sheds light on the complex relationship between the two interacting legal systems and their effects on citizens and local administrations.[50]

In Italy, this recently established legal framework that institutes horizontal subsidiarity has allowed for and encouraged growth in activities undertaken by active citizens based on their newly found sense of empowerment – especially those aimed at taking care of common goods. Enrica Rocca describes the revolutionary principle of horizontal subsidiarity as follows:

In 1997, in a well-known essay on the need for a shared system of administrative governance, Professor Gregorio Arena wrote that the Italian system of public administration seemed to be evolving towards a new model based on the principle of cooperation rather than on the conflict between citizens and the public power. Synergy, not antagonism, between the public and private spheres should be the new lens through which to look at the power relationships of society. What was a mere theoretical idea in 1997, which had the backing of some case law, has today become a day-to-day phenomenon.[51]

49 Constitution of the Italian Republic, published by the Parliamentary Information, Archives and Publications Office of the Italian Senate. Available at: https://www.senato.it/documenti/repository/is tituzione/costituzione_inglese.pdf (Accessed on 30 May 2019). "*Stato, Regioni, Città metropolitane, Province e Comuni favoriscono l'autonoma iniziativa dei cittadini, singoli e associati, per lo svolgimento di attività di interesse generale, sulla base del principio di sussidiarietà*". The current text of Article 118 was introduced with the constitutional law 18.10.2001, n. 3.

50 See *e.g.*, T. Groppi and N. Scattone, *Italy: The Subsidiarity Principle,* 2006, 4(1) *Int J Const L* 131-137 https://doi.org/10.1093/icon/moi056 (Accessed on 30 May 2019).

51 E. Rocca, *The City, between Innen and Aussen: The Revolution of the Horizontal Subsidiarity Principle in*

4.3. The US Perspective

The United States Constitution contains no explicit reference to subsidiarity, but the federal structure it creates, including the Supremacy Clause,[52] arguably work toward its general goals. "From executive orders requiring that a proposed federal action be weighed against the efficacy of state action, to congressional restraint in areas of state regulatory competence, to judicial enforcement of state-federal boundaries, much of [the USA's] political and legal landscape comports fully with subsidiarity's ideal."[53] However, some commentators believe that "the US system offers few political or legal guarantees that the federal government will act only when persuaded that the states cannot or will not do so on their own."[54] George A. Bermann asserts that even if "the notion of political self-governance underl[ies] the American federal system," he recognizes that "federal preemption of state law is permitted in all areas where the two levels share powers.[55] Bermann and others tend to characterize the function of subsidiarity in the United States as more of a "guide to the legislator."[56]

Regarding in particular the existence of the principle of *horizontal* subsidiarity in the US Constitution, we might argue that the Ninth and Tenth Amendments of the Bill of Rights, both ratified in 1791, could provide valuable insights. The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It thus cautions against

Italy, 5 *Birkbeck L. Rev.* 135, 2017, at 144.

52 Article VI Clause 2 of the United States Constitution establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the "supreme law of the land." Subsidiarity is said to be similar to the principle of *Konkurreiende Gesetzbegung* in Germany. See T. Groppi and N. Scattone, *Italy: The Subsidiarity Principle*.

53 See P. Widulski, *Bakke, Grutter, and the Principle of Subsidiarity*, 32 *Hastings Const. L.Q.* 847, 2005, at 852.

54 G. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*in *Columbia Law Review*, Vol. 94, Issue 2 (March 1994), pp. 331-456, at 403.

55 See G. Bermann, *Subsidiarity as a Principle of US Constitutional Law*, at 560.

56 M. Jachtenfuchs-N. Krisch, *Subsidiarity in Global Governance*, 79 *Law & Contemp. Probs*. 1, 2016, pp. 1-26, at 11. These authors, comparing what they consider the negligible influence of the courts in upholding the principle of subsidiarity in the EU and the US, write: "Even in the EU, which, contrary to the United States, has a legally enforceable subsidiarity principle, scrutiny by the European Court of Justice has not led to many practical results." *Id.* at 12.

making any assumptions regarding the scope of people's rights based on the mere inclusion of them elsewhere in the Constitution. As such, the Amendment has been said to have been intended to vitiate the maxim: *expressio unique est exclusion alterius.*[57] The Tenth Amendment is said to create Reserved Powers. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Ninth and Tenth Amendments therefore both call to mind ideas regarding popular sovereignty, enshrining the fundamental role of the people in the founding of the United States. These amendments thus reflect a sense of empowerment residing in the people – a *grassroots* culture – and firmly embed it into the US *legal* culture already at the time of its founding. This infusion of empowerment into its legal culture strengthened and grew over time; later, in literature, Ralph Waldo Emerson called it self-reliance.[58]

Many procedural – and substantive – law mechanisms comprise the fabric of the American legal system. "The availability of class action suits and broad, liberal discovery rules have strengthened the potential of private actions in the US."[59] The private enforcement regime that characterizes, *e.g.*, US antitrust law – by providing for the remedy of treble damages and empowering individual citizens as private attorneys general to enforce the Sherman Act[60] – demonstrates the effectiveness achieved by this culture.

57 See *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991).

58 R. Emerson, *Self-Reliance* (1841).

59 R. Spitzmiller *A Primer on Competition and IP Law: A US-EU Perspective on Private Enforcement* in *Competition Law and Intellectual Property A European Perspective* in G. Caggiano, G. Muscolo and M. Tavassi, *Competition Law and Intellectual Property: A European Perspective,* Wolters Alphen aan den Rijn: 2012, pp. 293-312 at 296. "The ancestor of today's US federal class action suit, first passed in 1938 and governed by Federal Rules of Procedure Rule 23 (2010) and 28 U.S.C § 1332(d) (2010), dates back to group litigation in medieval England. It was imported through case law and rules of equity in the US (*e.g.*, Equity Rule 48, promulgated in 1833), which allowed for representative suits in cases with numerous plaintiffs. The 1938 Federal Rules of Civil Procedure also ushered in the liberal discovery rules characterizing modern litigation. *Ibid.* See S. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 *Boston College Law Review* 691, 1998, at 691. Available at: <http://lawdigitalcommons.bc.edu/bclr/vol39/iss3/6>.

60 *The Antitrust Modernization Commission, Report and Recommendation*, (2007), 243 stated: "From the outset Congress contemplated that private parties would play a central role in enforcement of the Sherman Act. Indeed, Senator Sherman believed that individuals should act as 'private attorneys general,' and that the antitrust laws should encourage such enforcement."

"This effectiveness is predicated upon an entire legal system that has supported such an approach throughout its history, […] as well as a legal tradition that has long viewed private citizens as empowered to enforce antitrust laws."[61]

The United States thus originated and expanded through a horizontal plane of development that pushed outward and upward, from the American Revolution onward. American society, including its legal institutions, derived *ab initio* from self-organization, propelled by individuals, families and groups of people who created structures on their own that served civic needs. Volunteers built infrastructures such as roads and schools and established fire departments and law enforcement; they did so out of necessity due to a void of structured power. In fact, in 1835, in *Democracy in America,* Alexis de Tocqueville described the existence of several phenomena that he found to play striking roles in the fledgling nation: subsidiarity, decentralization, active citizenship and empowerment.[62] He analyzed and delineated the deeply rooted differences between European and American legal and civic cultures that somehow still persist today.

5. Concluding Observations

We can observe that those who want to advance justice in the US may do so because they are inspired by the principle of equality and in defense of cer-

61 R. Spitzmiller *A Primer on Competition and IP Law,* at 308.

62 On decentralization: "The partisans of centralization in Europe are wont to maintain that the Government directs the affairs of each locality better than the citizens could do it for themselves; […] But I deny that such is the case when the people is as enlightened, as awake to its interests, and as accustomed to reflect on them, as the Americans are. [... O]n the contrary, in this case the collective strength of the citizens will always conduce more efficaciously to the public welfare than the authority of the Government. It is difficult to point out with certainty the means of arousing a sleeping population, and of giving it passions and knowledge which it does not possess; it is […] an arduous task to persuade men to busy themselves about their own affairs; […] to interest them in [...] the repairs of their common dwelling. But whenever a central administration affects to supersede the persons most interested […] it is either misled or desirous to mislead. However enlightened and however skilful a central power may be, it cannot of itself embrace all the details of the existence of a great nation": A. de Tocqueville, *Democracy in America* 2002, V 1 at 108.
On active citizenship and empowerment: 'I maintain that the most powerful, and perhaps the only, means of interesting men in the welfare of their country which we still possess is to make them partakers in the Government, …. everyone takes as zealous an interest in the affairs of his township, his county, and of the whole State, as if they were his own, because everyone, in his sphere, takes an active part in the government of society' (at 270); https://goo.gl/MmPVwx (accessed on 30 May 2019).

tain "inalienable rights: … Life, Liberty and the Pursuit of Happiness."[63] Such concepts are rooted in the American Declaration of Independence and were later consolidated to guarantee them in the Bill of Rights and in the XIV Amendment of the oldest constitution of the world. Corresponding principles exist in the Italian founding charter. Article 2 provides: "The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled."[64] This Article "affirms – albeit as an implicit recognition – the centrality […] of the individual and of the social groups in which the individual's personality is expressed."[65] Article 3, instead, states: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature that constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country."[66]

However, these two articles, even taken together, were not sufficient to render explicit "a responsibility of the State which, however, associates to itself all the non-profit social formations that act for the purpose of the general interest in a logic of active citizenship … [and to] implement Articles 2 and 3 of the Constitution.[67] For this reason,

63 Thomas Jefferson, Declaration of Independence, 1776.

64 Article 2, Italian Constitution: "*La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità`, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale*."

65 F. Logiudice, *Sull'art. 118 della Costituzione: la vexata quaestio della sussidiarietà*, Altalex, 29/06/2006 http://www.altalex.com/documents/news/2006/07/11/sull-art-118-della-costituzione-la-vexata-quaestio-della-sussidiarieta (Accessed on 30 May 2019).

66 Article 3, Italian Constitution: "*Tutti i cittadini hanno pari dignità sociale [XIV] e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali. E` compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l'eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese*."

67 G. Arena, *Il principio di sussidiarietà orizzontale nell'art. 118 u.c. della Costituzione, in Studi in onore di*

subsidiarity was introduced in 2001.[68] It establishes horizontal subsidiarity, *i.e.*, asserting that "in the relationships between public powers and organizations of society, it is manifested as a promotional initiative aimed at rendering effective the possibility, for individuals or associations and in general 'groups' of citizens, to carry out actions of general interest that, spontaneously, they decide to implement in parallel to the public structures, also creating, through autonomous activities, structures and interactions with the public organs."[69]

That a constitutional reform was needed in the year 2001 to effect this end demonstrates one of the differences between this aspect of the legal culture of the United States and that of Italy. In the USA, despite the absence of an explicit provision, the concept of active citizenship – and therefore of horizontal subsidiarity – is somehow inherent to the very principle of democracy, as reflected also in the very premise "We the People," immortalized in the Preamble of the US Constitution.[70] Historically, as noted above, we might say that certain aspects of American citizenship have embodied the concepts of empowerment, horizontal subsidiarity and active citizenship ever since the Declaration of Independence, which is itself a manifestation of self-determination and autonomy of the people.

In a process that parallels the founding of the United States, the origins of the Street Law clinic exemplify those differences. As noted above, in the early 1970s, a handful of law students at Georgetown University started giving practical lessons in law to high-school students, teaching them how to take on civic responsibilities. Their initiative epitomized subsidiarity, decentralization, active citizenship and empowerment. The first "Street Law" clinic was thus founded, launching a global movement "to teach the public

Giorgio Berti, Napoli, 2005, vol. I, pp. 179-221; ID, citing Honorable Rosa Jervolino Russo, in the Proceedings of Parliament, Camera dei Deputati, Discussioni, Seduta del 20 settembre 2000, 23.

68 *Id.*

69 F. Logiudice, *Sull'art. 118 della Costituzione,* Altalex, 29/06/2006.

70 "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

about law and public policy using learner-centered, interactive teaching methods."[71] As noted above, over the last decade, clinical legal education (CLE) has been expanding in Europe, including in Italy. With the new Italian Street Law course, the *bel paese* will join the "global movement to advance justice through practical education about law and democracy."[72]

71 L. Arbetman, *Street Law, Inc.: Context history and future*, 1 *Int J Pub Legal Educ* 3, 2018.

72 *Id.* at 4.

BRUNO PAOLO AMICARELLI*

REMEDIES AGAINST UNLAWFUL FOREIGN DIRECT INVESTMENTS SCREENING MEASURES UNDER THE NEW COMMON EU REGULATION

ABSTRACT. *What can foreign investors do when their investments are blocked by the government of the destination country? To what extent is it actually possible to review before an administrative judge a veto decision, given the broad discretion exercised by governments in this field? The paper tries to analyze these problems in the light of different legal orders, also taking into account the effects of the new EU Regulation 452/2019.*

The purpose of this paper is to analyze the remedies against those administrative decisions that unlawfully forbid a foreign direct investment. Two main interests must be taken into account and balanced when discussing this subject: firstly, the interest of the foreign investor as well as the one of the company receiving the investment to achieve the transaction and, secondly, the public interest protected by national States.

However, studying the protection of investments, it's easy to see that it should be ensured in two different moments: the one before the entrance into the market, in which the State may issue a screening measure, and the one after that the investment has been successfully concluded, which poses different issues about the treatment of the foreign investor. These two different phenomena are nowadays regulated in totally different ways.

While the treatment of the concluded investment is part of a supranational set of rules created after many years of development and debate, the phase of the establish-

* PhD Candidate in Administrative Law, Faculty of Law, Roma Tre University.

ment in the foreign market and its control are still subject to the opposite kind of regulation: national States still claim their sovereignty in this matter and, as a consequence, the remedies are contained in internal laws.

Why did the treatment of established investors become part of international laws?

The main reason can be found through a brief historical analysis. In the thirties, big companies, mainly the so-called Seven Sisters (oil companies), decided to stipulate the "State contracts," which contained the first examples of arbitration clauses. The purpose of this clause was, obviously, to avoid that in case of prejudices the only way to obtain protection would have been to ask the local courts to apply internal laws which in some Nations, like the middle east ones, may have been rudimental or, anyhow, too difficult to be known and studied.

State contracts evolved in the first Bilateral Investment Treaties (BIT), such as the one stipulated between Germany and Pakistan in 1959. Today there are almost 3,600 BITs. The main difference consists in the contracting parties: no more agreements between a private company and a State, but between two different States. However, these treaties may contain an anomalous arbitration clause, which creates the possibility for private investors (and not for the State) to obtain protection against harmful decisions of the State before an arbitrator. This means that while the State agrees to the clause at the moment of the stipulation of the treaty, the investor agrees to it when he starts the arbitration procedure. In this context, the Washington convention of 1965 created the International Centre for Settlement of Investment Disputes (ICSID), which operates under the World Bank and tries to centralize all the arbitration procedures. All these efforts, as mentioned, were put in place with the purpose of reducing the influence of national interests in the resolution of the many State-investor disputes.

However, a very different framework shows up when studying the relationship between arbitration and the moment in which the foreign investor enters the market. Apparently, there is no space for the use of arbitration procedures to guarantee protection against a screening measure that creates unlawful prejudices for the foreign companies. The biggest part of Bilateral Investment Treaties does not allow any kind of protection at the moment of the establishment of the investment, providing only safeguards after the establishment. This means that BITs may only allow for a dispute between two States, which may happen as a consequence of the decision of the State of

the investing subject to invoke the diplomatic protection. Anyway, a small minority of BITs and Free Trade Agreements (FTAs) contain a clause recognizing the possibility to settle the dispute before an arbitrator.

The main example is set out by the CETA: this treaty at Article 86 clearly disposes that the State must guarantee to a foreign investor the same treatment offered to domestic investors (the so-called national treatment clause). This should impair the use of any Foreign Direct Investment (FDI) screening mechanism. However, as stated by Article 89, it gives the possibility to legislate with the purpose of protecting main interests, e.g., national security, public health, environment, etc. This provision gives space to all those domestic regulations that alter the equal treatment principle. On the other hand, Article 8.18 of the treaty, when it lists the cases in which the investor can go before the permanent Tribunal, does not include the establishment phase. The CETA, in fact, renounces the arbitration system and adopts a Tribunal composed of 15 members, appointed by Canada and the EU which should ensure more coherence among the judgments and more impartiality than the arbitration system. Moreover, this system may be considered harmful for the investor, because the composition of the Tribunal may shift the protected interests from private parties to the States. Anyway, the mentioned exclusion of the establishment phase from the jurisdiction of this Tribunal means that any dispute about a harmful screening measure under the CETA may be brought before an arbitrator, but always keeping in mind that the exceptions which currently exist in Article 89 may weaken a concrete review of investors' claims.

Beyond this very particular case of arbitration, however, the Investor-State Dispute Settlement-ISDS system rarely works for the protection from unlawful FDI screening measures. The only kind of remedies that can be adopted are the ones offered by national legal systems, whether and when they are provided for. In this field, an apparently positive innovation is provided by the new EU Regulation for a common framework in FDI screening procedures, issued in March 2019. Article 3 provides that Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory, but they shall also provide for some minimum requirements, among which point n. 5 of the Article is the most interesting one: «foreign investors and the undertakings concerned shall have the possibility to seek recourse against screening decisions of the national authorities.»

This Regulation sets out a kind of protection that is not always recognized by the States. The main example against this is the one offered by the USA and the jurisprudence about the Committee on Foreign Investment in the United States (CFIUS). In the recent case *Ralls Corporation v. Committee on Foreign Investment* (United States Court of Appeals, District of Columbia Circuit, 2014), the possibility to review a presidential decisions which prohibits an FDI was radically excluded by the judge because of the political question doctrine. The main reason was, in fact, that the power exercised by the President shall be deemed to have a political content, so it does not consist in the mere administrative implementation of public goals. The measure adopted would have a purely political nature, because the State would be setting the goals to be pursued, describing in detail the concept of "national interest" underlying these decisions. It is not a mere definition of the concrete attitude of this power in the face of the specifics of the facts. Therefore, due to the separation between executive and judicial power, the excluded investor would not be given any possibility to obtain judicial review of the taken decision, which cannot be considered "unlawful", since the decision of whether an investment is lawful or not in the field of foreign investments lies solely with the CFIUS. The only protection given in that case to the Chinese company *Ralls* was the right to due process. *Ralls* in fact, did not request a judgment about the Presidential determinations concerning foreign policy and national security. Instead, it only asked to decide whether the due process clause entitled it to have notice of, and access to, the evidence on which the President relied and an opportunity to rebut that evidence before he reaches his non-justiciable and unreviewable determinations.

In Europe, on the other hand, the nature of mere administrative activity of screening measures is more peacefully accepted. In Italy both jurisprudence and doctrine agree that these powers of veto can be fully controlled by the administrative judge, being qualified as measures of high administration and not, rather, as political questions. In France, the exercise of these powers is subject to the jurisdiction of the administrative judge, even extended to issues of substance, thus enabling the judge to adopt decisions that will replace the ones of the administration. In Germany, because of the general principle contained in paragraph 40 of the *Verwaltungsgerichtsordnung* (the Code of Administrative Court Procedure), which states that «Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the

disputes are not explicitly allocated to another court by a federal statute», veto measures (as any other administration's decision) cannot be considered political questions and will always be subject to legal redress.

The EU Regulation, therefore, partially recognizes and partially extends this tendency to protection already present in some of the Member States that possessed a screening mechanism. In general, this Regulation imposes on States only some obligations, because it does not create a tool for centralized control of foreign investments and, consequently, it does not centralize judicial review. The new legislation, in fact, keeps the power to adopt (or not) a veto measure in the hands of national governments. However, on the one hand the Regulation envisages a mechanism of cooperation between the States and the Commission, entrusting to the latter a power of recommendation and to the former a duty to inform and evaluate the considerations of the Commission. On the other hand, and that is more important for the analysis conducted here, a series of interesting minimum requirements are imposed to all the States that own or will want to adopt a screening mechanism. Among these requirements, in addition to the aforementioned provision about the obligation to provide for instruments of judicial protection for foreign investors who suffered an illegitimate ban, we can mention compliance with the principle of non-discrimination based on the State of origin and compliance with the investor's transparency and privacy principles. Furthermore, Member States are obliged to report to the Commission any proposed reform of their instruments for investments' control and, even if they do not have a control mechanism, they must submit an annual report to the Commission on the flow of investments in the country.

With regard to the possibility of judicial review, the reform lets two main questions survive: legal redress to what end? Legal redress by which material standards?

To what end is judicial review useful?

On the one hand, pending review of a particular investment often suffices to scare investors to an extent that they withdraw from a takeover altogether. On the other hand, one should not forget that shareholders invested in the target company also face significant devaluation as a consequence of pending review or withheld approval.

Against this background, how sensible is it to review a screening decision of a screening mechanism, *i.e.*, the decision to initiate a review, to make a transaction con-

tingent upon certain conditions or even to prohibit an investment altogether? Mildly so. Court cases take time, and even preliminary injunctions will overstrain the patience of the market. It seems unlikely that the victory in court will completely save a deal that has (publicly) run into the prospect of review.

This impression is reaffirmed by the fact that often one lawsuit in one jurisdiction would not be enough. An example is offered by the case of the German company *Aixtron*: in May 2016 the Fujian Chinese investment fund issued a 670 million euro takeover bid for *Aixtron*, active in the chip production market. On 2 December 2016, President Obama decided to block the transaction and to reject the inclusion of *Aixtron*'s US business in the deal. Both the prohibitive decision of the US as well as the decision of the German screening mechanism may have been subject to legal action (the US one, however, only for procedural issues). In addition, there was still no decision taken by the German *Bundesministerium für Wirtschaft und Energie* (the Federal Ministry for Economic Affairs) brought before the Court, only the prospect of one in the future. What were the investors supposed to do in this case? To sue the German administration for a potential decision? Fujian, however, decided to drop its offer to purchase *Aixtron*.

This is not to say that seeking legal redress against screening decisions is not possible or irrational *per se* (there may be sound legal reasons to do so), but it seems to be of little use to actually save investments under review. In most cases, in fact, the most sensible course of action for frustrated investors (or shareholders in the target company) seems to be a claim for damages resulting from a withheld, delayed or issued screening decision.

What are the material criteria?

It is decisive to pinpoint the material standards for legal review. Investors must have clear what each screening mechanism understands by a covered transaction (with sub-questions such as what are foreign investors, critical industries and infrastructure, etc.) to ensure that the scope of review is clear and investors follow the pertinent notification and application procedures.

However, the centerpiece of any control mechanism is usually the national security standard (or a semantical equivalent). Foreign investments imperiling national security are what they aim (or purport) to prevent, at least in liberal economies. This term is never exhaustively defined, sometimes it remains enigmatic and in many cases

not revisable by the reviewing bodies. Thereby, it leads to wide, perhaps infinite administrative discretion, even in those countries that do not consider it as a form of political activity. For example, the CFIUS was defined, with a colored expression, a "church without a bible." National security has often been construed in such broadness to include even the economic security of the States. The new EU Regulation does not seem to limit these tendencies, as it refers to security and public order and provides a non-exhaustive catalogue of factors, which may be taken into account when determining whether they are affected.

In conclusion, legal redress against FDI screening measures is significantly limited from a practical point of view. Effective legal review for foreign investors is a prerequisite for legal certainty, which is held dear by the Regulation. It could also reduce suspicions of screening measures being protectionist instruments against whoever turns out to be the latest "economic enemy." In this regard, however, a radical change is not to be expected from the Regulation, whose only reference to legal redress in Article 3, number 5, leaves much room for interpretation.

MARIA STELLA BONOMI*

FOREIGN DIRECT INVESTMENTS SCREENING MEASURES IN THE EU AND DUTY TO GIVE REASONS

ABSTRACT. *Recent reforms in terms of screening measures for foreign direct investments address national security and other risks of public interest. However, they may also conceal other concerns, such as the fear of predatory acquisition of significant local businesses by foreign countries. As a consequence, the above-mentioned measures may be used to create commercial barriers in spite of the many international treaties that guarantee freedom of trade. Further analysis of the ability of national EU governments to make investments in other countries is therefore needed. The present study explores recent cases of the so-called "golden power" in Italy, which have sought to oppose foreign government-driven acquisitions.*

The mechanisms for controlling foreign direct investments (FDI) have increased exponentially in recent years, including via international reforms.

While the flow of investments can be positive for national economies, it may also conceal political and strategic objectives behind a veil of purely economic purpose, objectives such as access to confidential information, advanced technologies, and natural resources.

On closer inspection, the duty to give reasons for these measures does not seem to be explicitly defined by the European legislature. Nevertheless, the obligation to provide the reasons underlying a specific foreign direct investment screening measure, whether it be a veto or the imposition of certain conditions, is implicitly inferable from a series of provisions.

* Post-doc Research Fellow in Administrative Law, Roma Tre University, Department of Law.

One must first consider the new EU Regulation 2019/452,[1] whose objective is to create an integrated system that limits predatory acquisitions by non-EU countries for reasons of safety and public order. This falls directly within Article 207 of the Treaty on the Functioning of the European Union (TFEU), which provides that trade protection measures are part of the common commercial policy entrusted to the exclusive competence of the EU.[2]

This system, however, will not be implemented through the establishment at the EU level of control powers over foreign investments, but through the coordination of instruments of control that individual Member States have already prepared or will adopt in the future, via a complex mechanism of cooperation between States and the Commission.

First, the Regulation requires Member States to notify the European Commission of any foreign direct investment in their territory (Article 3). Subsequently, it attributes to the Commission the power to issue a non-binding opinion on the FDI in three cases: (1) where this could adversely affect sectors of relevance for internal security (i.e., infrastructure, energy, patents, the pluralism of information, protection of personal data); (2) in the event that the investment affects a project of European interest which also includes the use of European funds (*i.e., Horizon 2020*, *Galileo*, or the European industrial development program for defence); and (3) when the FDI in one Member State can affect the security or the public order of another Member State.[3]

Article 4, paragraph 2 of the Regulation also contains three potential indicators of the risks that an investment made by a State outside the EU may entail to the security

1 EU Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019, which establishes a framework for the control of foreign direct investment in the Union.

2 Article 207, paragraph 1, of the TFEU: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy, and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

3 In the latter case, however, the Member State that receives foreign investments will not only have to solicit and then take the "advisory opinion" of the Commission into "due consideration," but will also have to notify the other Member States that might be interested, in order to also collect their opinions.

and public order of the European Union. These are: (*i)* the foreign investor is directly or indirectly controlled by a foreign government; (*ii*) there is a risk that the investor is performing or otherwise connected with the performance of criminal activities; (*iii*) the investor previously participated in activities detrimental to the internal security of the European Union.

The Regulation, therefore, only imposes a certain stringent obligation on states. The new legislation establishes not only duties of communication and the obligation to acquire opinions, it also provides a series of interesting minimum requirements that all States, which already have or intend to adopt a *screening* mechanism, have to comply with for minimising the damage caused by these measures. Among these requirements, we can mention compliance with the principle of non-discrimination based on the State of origin, the obligation to provide instruments of judicial protection for foreign investors who suffer from an illegal ban, and compliance with the foreign investor's transparency and *privacy* rules.[4] Furthermore, Member States are obliged to report to the Commission any proposed reform of their scrutiny instruments and, even if they do not have a control mechanism, they must submit an annual *report* to the Commission on the flow of investments in the country.

In light of the framework outlined by the new Regulation, its clear intention is therefore to guarantee full transparency of the decision-making process on the control of foreign direct investments, in addition to ensuring full and effective jurisdictional protection.

Two questions arise spontaneously: (1) how can it ensure the transparency of foreign direct investment screening mechanisms without providing an obligation of prompt justification for these decisions? (2) How can access to jurisdictional protection be guaranteed without first knowing the reasons that led the State to intervene with a negative provision?

The possibility for investors from non-EU countries to know the reasons that led to the imposition of a veto or a condition appears to be of primary importance in

4 *See* European Commission, *Screening of foreign direct investment - an EU framework*, 2019, available at https://bit.ly/2TsrDFO.

order to protect their interests and to guarantee, in broader terms, the principle of legal certainty. Indeed, the Regulation itself is inspired by the idea of creating a positive framework for foreign investments, considered a source of well-being and economic growth for the EU (recital 1).

The reasons for a State to adopt restrictive measures against foreign direct investments are specified in the Regulation: security and public order. These are broad and undefined concepts and, therefore, require a more precise explanation precisely in the justification of specific decisions.

Article 3, paragraph 2 also states that Member States establish the circumstances that give rise to the control, the reasons for the control, and the detailed procedural rules that are applicable.

Furthermore, in imposing a cooperation mechanism between Member States for the exclusive purpose of protecting security and public order, the Regulation expressly states that all the intra-procedural acts of this mechanism should be explicitly subject to the obligation to justify decisions.[5] This principle must also apply in the cases where it is the Commission that requests information on a specific foreign direct investment or issues an opinion addressed to a Member State. Therefore, it cannot be held that the obligation to justify decisions is foreseen for intra-procedural provisions, nor even for those that have their own external effects.

Finally, the Regulation clarifies that any immediate action must be duly justified. This must be done in a clear manner, due to the exceptional nature of immediate intervention for reasons of security and public order.

It is also interesting to verify if and how the obligation to justify the screening measures of foreign investments at the national level is regulated. I will briefly discuss

5 EU Regulation 2019/452, recital 18: "The cooperation mechanism should be used exclusively for the purpose of protecting security and public order. For this reason, Member States should duly justify any request for information relating to a specific foreign investment directed to another Member State as well as any possible comments addressed to that Member State. The same requirements should also apply when the Commission requests information on a particular foreign direct investment or issues an opinion addressed to a Member State. Compliance with these requirements is also important when an investor from a Member State is in competition with third country investors for the purpose of making an investment or buying assets in another Member State."

the discipline in Italy and France.

In Italy, the guidelines for screening of foreign direct investments are contained in Law Decree no. 21 of 15 March 2012, converted into Law no. 56 of 11 May 2012, as last modified by Law Decrees no. 148 of 16 October 2017, converted into Law no. 172 of 4 December 2017, and no. 22 of 25 March 2019, converted into law no. 41 of 20 May 2019. The exercise of special powers is currently envisaged in the sectors of national defence and security, 5g networks, as well as for activities of strategic importance in the energy, transport, and communications sectors.

Article 3-*bis* of the 2012 law decree contains an important provision on justification. In fact, by 30 June each year, the President of the Council of Ministers must transmit to the Chambers a report on the activities carried out on the basis of special powers, "with particular reference to the specific cases and to the public interests that motivated the exercise of these powers." The legislature, therefore, made explicit the need to state – at least in the annual report – the reasons of public interest underlying the adoption of a screening provision.

This report, however, has not been presented every year, as required by law: to date, there have been only two reports, one relating to the period 3 October 2014/30 June 2016, and the other relating to the period 1 July 2016/31 December 2018.

It is of particular interest to examine these reports in order to understand, in concrete terms, the reasons that justified the exercise of *golden powers* in Italy.

First, one notes a series of significant applications of special powers directly following the recent legislative developments.

On 19 October 2017, via Decree of the President of the Council of Ministers, special powers were exercised on the proposal of the Minister of Defence, through the imposition of conditions, according to Article 1, law decree 21 of 2012, on the sale by the company *Piaggio Aero Industries s.p.a*. to the company *PAC Investment S.A.* (indirectly controlled by the Chinese government), of the *EVO* company branch, relating to the set of activities of research, development, design, and sale of aircraft models and maintenance, aircraft repair and overhaul services.

On 2 November 2017, on the other hand, the Italian Government was firmly resolved to oppose, according to Article 1 of law decree 21 of 2012, the acquisition by

a French group of an Italian company active in ballistics and air control engineering. Although the company involved in the transaction is small, the veto on the *Altran/Next* business marks a new level of intervention for all intents and purposes, as this is the first case ever, in Italy, of an effective ban via *golden power* on acquisition by a foreign operator.

Only in one case, therefore, has the Italian government vetoed the sale of a company: so far, the tendency has been to impose provisions aimed at guaranteeing occupational interests first and foremost, without banning a sale in its entirety.

However, we must acknowledge the beginning of a phase of unprecedented government intervention aimed at protecting national strategic interests.[6] In the recent annual report to Parliament on the exercise of special powers for the period from 1 July 2016 to 31 December 2018, the Italian Government itself recognized the existence of an upward *trend* in protecting national strategic sectors, revealing a threefold increase in the total notifications sent to the Government with respect to the period examined by the previous report (3 October 2014 to 30 June 2016).

But what are the reasons behind the exercise of these special powers referred to in the annual reports to Parliament?

In the reports, reference is always made to the principles of security and public order. As already mentioned, these are generic, broad, and poorly defined principles, which clearly imply a very wide administrative discretion.

Almost certainly, the justification for individual screening measures for foreign direct investments will be more detailed than what appears in the report. However, the individual measures and the related reasons are not published, therefore it is not possible to know their content.

One could hypothesize that, if a private citizen were to present an instance of generalized civic access, this could be rejected, precisely to protect the public interests of security and public order, within the limits set by law.

This is certainly a significant problem, given that the EU regulation, as already

6 The Italian government, for example, contemplated (albeit without concrete consequences) exercising the *golden power* in the case of the acquisition of the *Esaote* company by the Chinese giant *Alibaba*.

stated, imposes transparency obligations.

It would, therefore, be necessary to wait for the publication of jurisdictional measures that refer to the contested veto of or conditions on a foreign investment and the related justification.

In fact, it is widely accepted in Italy, both in doctrine and in jurisprudence, that the screening measures for foreign direct investments fall within the category of the so-called acts of high administration, not considered the same as political acts and, therefore, unquestionable. Acts of high administration are formally and substantially administrative acts, characterized by a strong discretion almost comparable to that of political acts, but not as free in terms of purpose. This is directly reflected in the application of the legal regime of administrative acts and, therefore, the general law on administrative procedure (Law no. 241 of 1990), particularly Article 3, paragraph 1, which establishes a general obligation to state reasons for all administrative measures.

In France, on the other hand, the regulations on screening of foreign direct investments are contained in the *Code monétaire et financier* (French Monetary and Financial Code), as last amended in 2019.

Foreign investments in a business in France are subject to prior authorisation by the Minister of Economy if that business participates, even in an occasional way, in the exercise of public authority or is involved in one of the following areas: (*a*) activities that affect public order, public safety, or national defence interests; (*b*) research, production, or marketing of weapons, munitions, powders, and explosive substances.

Unlike other EU countries, the French legislature has expressly provided an obligation to state reasons in the case of the exercise of special powers. Article R 153-10 of the Code, in fact, states that the Minister of Economy must justify the veto of a foreign investment ("The minister [...] refuses via a justified decision"). In addition, the Code also sets out a specific list of legal grounds on the basis of which the Ministry can refuse to grant authorisation, thus blocking the investment.[7] Consequently, in practice

7 Article R-153-10: "The Minister of the Economy refuses via justified decision to authorise of the planned investment if they find, following an examination of the application: 1) That a serious suspicion exists that the investor is likely to commit one of the infractions addressed by the articles 222-34 to 222-39,223-15-2,225-5,225-

the Ministry uses one of the grounds mentioned in this provision of the Code.

Although the legislature has made the obligation to provide explicit justification only in relation to the power of veto and not in relation to the power of attaching conditions to a foreign investment, it could be said that, since it is still an administrative act – subject to the jurisdiction for substantive reasons of the competent administrative court, it must still be justified in light of the provisions contained in the 2016 *Code des relations entre le public et l'administration* (Code on Relations between the Public and the Administration). In fact, Art. L 211-2 provides a general obligation to state the reasons for the (individual) unfavourable administrative measures.

Finally, it seems appropriate to clarify that in France the foreign direct investments decisions are not disclosed to the public and no annual report is in place.

Law no. 2019-486 of 22 May 2019, known as the *PACTE Law*, changed this situation and does require the Government to disclose key statistical figures about the foreign direct investments screening measures in France, but such information has not yet been published. Therefore, it is not possible to concretely analyse the justifications for screening measures.

6,225-10,324-1,421-1 to 421-2-2,433-1,433-2, 435-3, 435-4, 450-1 of the Penal Code and by the first paragraph of article 321-6 of the same code or provided under the first title of book IV of the same code; 2) Or if the implementation of the conditions mentioned in article R. 153-9 is not sufficient on its own to ensure the preservation of the national interests defined by article L. 151-3 in the event that: a) The continuity of the activities, industrial capacity, and capacity for research and development of knowledge of technology and associated know-how would not be preserved; b) Or if the integrity, security, and continuity of the supply or the integrity, security, and continuity of the business of an establishment, installation, or work of vital importance in the sense of articles L. 1332-1 and L.1332-2 of the Code of Defence or of the transport or electronic communications networks and services or the protection of public health or data protection would not be guaranteed; c) Or if the execution of contractual obligations of the company with headquarters in France as owner or subcontractor would be compromised in the context of public markets or contracts affecting public order, public security, the interests of national defence or research, the production or commerce of arms, munitions, powders, and explosive substances."

GIANLUCA BUTTARELLI*

RECENT DEVELOPMENTS ON THE ECJ'S CONTROL OVER STATE AID IN THE ENERGY SECTOR: THE LITHUANIAN CASE

ABSTRACT. *In this judgement the ECJ had the opportunity to return to the issue of State aid in the energy sector, after several rulings with partially divergent outcomes were issued in the last period. State intervention in the energy sector is still subject of controversial debate, different outcomes of the rulings are closely connected with the peculiarity of each Member State's legal system. In this respect, what seems to be the most distinctive element in the ECJ jurisprudence is the existence of a private or public intermediary body, which is charged by national legislation to collect, manage and distribute the financial resources at issue. In this regard, it is also necessary that the entity acts under public control. State resources are in fact involved only when control over a company is exercised by the State as shareholder. ECJ jurisprudence has so far used a formalistic approach in its relevant analysis, while sometimes the ECJ has shown to unduly mix its different case-law principles.*

1. Introduction

The European Court of Justice (ECJ), on 15 May 2019, ruled on a request for a preliminary ruling concerning the Lithuanian incentive mechanism for the purchase of electricity produced from renewable sources and its possible qualification as State aid.

* PhD Student Law & Social Change: The Challenges of Transnational Regulation, Faculty of Law, Roma Tre University.

The request consists of five different questions related to:

(i) whether the interpretation of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) allows to consider that the funds provided for financing a public interest service (PIS) in the electricity sector at stake constitute or not a State resource within the meaning of that provision;

(ii) whether same Article 107(1) must be interpreted as meaning that the obligation provided in the Lithuanian law imposing undertakings to purchase electricity at a fixed price from certain electricity producers, and also providing that the losses suffered by undertakings due to that obligation are offset with funds possibly attributable to state resources, is or is not to be considered as aid granted to electricity producers through resources referable to the State;

(iii) whether the legal schemes which granted support in favor of undertakings implementing projects of national strategic importance, and also in favor of undertakings aiming at ensuring the security of electricity supply, are or are not to be regarded as selective or capable of affecting trade among Member States;

(iv) whether the Lithuanian regime of public interest service in the energy sector meets the criteria established in the *Altmark*[1] judgment or not;

(v) whether the obligation related to the public interest service has to be regarded as distorting or threatening to distort competition.

With the aforementioned judgement, the ECJ had the opportunity to return to the issue of State aid in the energy sector, after several rulings with partially divergent outcomes were issued in the last period. Even after the well-known *PreussenElektra* judgement,[2] State intervention in the energy sector is still subject of controversial debate. Different outcomes of the rulings are closely connected with the peculiarity of each Member State's legal system, therefore the analysis of the relevant judgements requires further attention, especially on national backgrounds.

Despite the restrictive approach shown by the ECJ, State intervention in the energy field is essential. In terms of regulatory measures, State action is necessary to

1 ECJ, C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg.*

2 ECJ, C-379/98, *PreussenElektra.*

achieve objectives of public general interest such as energy efficiency, innovation, and environmental protection. With regards to empirical measures, State intervention is justified by the existence of market failures. Huge industrial infrastructure and projects require considerable financial investments that are not always granted in the optimum quantity requested under normal market conditions. On the other hand, the production of the socially desired level of energy produced from renewable sources may not be reached due to the additional costs of those processes where compared to the other more economically advantageous ones that exist on the market.

2. Lithuanian legislation on public interest services in the electricity sector

According to Lithuanian legislation, public interest services in the electricity sector are services provided by private undertakings that must be established by the government. Furthermore, the government also defines the providers and the procedures through which these services are guaranteed, in accordance with the general requirements provided by law. Under the general Lithuanian law on electricity, public interest services mainly concern:

(i) aid schemes and balancing measures related to the electricity obtained through renewable sources;

(ii) the generation of electricity through cogeneration through combined heat and power plants so far as this system is efficient in terms of energy savings;

(iii) several methods designed to ensure the security of electricity supply and also to safeguard the security, reliability and independence of the Lithuanian energy system, including the production of identified and specific power plants of strategic importance.

As a consequence, the entities that provide PISs are, on the one hand, the electricity producers who generate energy from renewable sources and, on the other hand, the electricity producers appointed by the government in order to perform the other PISs.

With regards to the energy generated by renewable sources, law provided that PIS funds must be administrated by an entity directly or indirectly controlled by the State. As a general rule, PIS funds are collected from end consumers by distribution and transport system operators, which had the duty to entirely transfer them to the administrator controlled by the State. The administrator in turn distributes them to all the undertakings that provide PISs. Since the administrator of the funds is not financed

from public resources, its administrative costs are covered by the same PIS funds. Rates and distribution criteria are set by a public body in relation to the energy consumption that is expected for each year. In relation to the production of energy from renewable sources, the obligation consists in paying the difference between the fixed price established for a producer and the price of the electricity sold by that producer according to the procedures established by the government. This price however, cannot be lower than the average price market calculated by public administration. PIS providers that generate electricity from renewable energy sources are selected through a tender procedure based on the lowest offer price, and are obliged to conclude contracts with electricity purchasers, namely the distribution and transport system operators. In this way, losses incurred due to the marketing of the electricity bought in the context of PISs are compensated by the administrator of the funds through monies allocated to PISs. Consequently, the undertaking's cost of balancing with renewable energy is fully supported by those funds. PIS funds cannot be used for a purpose other than restoring PIS supply and do not, in any way, constitute amounts to be included in the State budget. All electricity consumers pay the price of PISs in relation to the amount of energy actually consumed. Consumers who fail to pay PIS rates are subject to general procedures established for civil matters.

Concerning the electricity generated in cogeneration plants, undertakings can submit an application to the Minister for Energy in order to be appointed as PIS providers. In this case, the interested undertakings conclude contracts with the public electricity suppliers, establishing the quantities of electricity to be periodically purchased. For this reason, PIS providers receive a compensation which is payed through PIS funds.

3. The Court's decision

The ECJ's ruling on the first preliminary question is apparently an easy task. The Court, in this respect, recalls its own precedents, noting that in order to be qualified as State aid within the meaning of Article 107(1) TFEU, economic advantages must be granted directly or indirectly through State resources and simultaneously be attributable to the State. However, the demonstration of these elements does not seem to be fully valued, considering that the following arguments of the Court focus on other aspects. The Court's decision states that the Lithuanian legal regime constitutes an intervention

by State resources within the meaning of European law. In stating this, the relevant element of the Court's evaluation is represented by the fact that the administrator of PIS funds is under public control, although the nature and the extent of this control does not clearly emerge from the request for preliminary ruling. In recalling its jurisprudence, the Court ruled that even if the sums corresponding to the aid measures are not permanently held by the State or do not constitute a financial asset of the public sector, as long as those funds remain under public control and are thus available to the national authorities, they must be considered as State resources.

In this case, PIS funds are collected by a formal private entity, without any legal chance to derogate from PIS regime. The administrator of the funds is the sole entity in charge of this duty according to Lithuanian law. As stated by the referring court, this private body is directly or indirectly controlled by the State, without any discretion as to the determination as well as the assignment and the use of these funds.[3] Once the legal regime has been determined, the Court has no alternative but to consider PIS sums as remaining under State control.

The answers given to the second, third and fifth preliminary requests are in some way dependent on the solution adopted for the first question.

PIS funds have the purpose of compensating the additional cost that operators may sustain when obliged to purchase electricity at a fixed rate from certain electricity producers. This compulsory purchase system is neutral for distribution and transport system operators, *i.e.*, it does not give them a direct economic advantage. On the one hand, PIS funds are distributed through a mechanism that allows operators only to compensate financial losses deriving from energy purchased at a higher price than the market one. On the other hand, it is not possible for energy sellers to charge the additional costs on the costumers. PIS funds allow renewable energy producers to sell a certain amount of energy at a higher price than the market price, and, in any case, to sell a higher quantity compared to a scenario without financial incentives. As a result, energy

3 It must be noted also that PIS monies cannot be used for purposes other than payment for the provision of PIS, and do not form part of the State budget. Consumers who fail to pay PIS obligations are responsible in accordance with the general procedure laid down for civil matters, *i.e.*, they are not subject to liability under public law rules.

producers must be regarded as the indirect beneficiaries of the support measures. Therefore, there is no doubt about the selective nature of the support measures attributable to the State, whereas the aim of the Lithuanian legislation is to promote the production of renewable energies together with the pursuit of specific goals related to independence, security and reliability of the national energy network. Moreover, since the electricity market has been recently liberalized at the European level, State intervention is capable, at least potentially, to have effect on trade between Member States both in terms of competitive advantage for the entry of national producers in foreign markets, and also in the possible existence of entry barriers for foreign producers in the national energy market. Finally, the Court clarified that PIS regime must be regarded as distorting or liable to distort competition.

The fourth question is related to compliance with the conditions set by the *Altmark* ruling in relation to the existence of a service of general economic interest, which is up to the national judge to verify.

4. State aid in EU courts case law

In order for a measure to be considered State aid within the meaning of Article 107(1) TFEU, it must fulfill the following cumulative conditions: (i) the existence of a certain economic advantage; (ii) the economic advantage must be directly or indirectly granted through State resources and must be imputable to the State; (iii) the advantage must favor certain undertakings according to the selectivity criterion; (iv) the measure must distort or threaten to distort competition and affect trade between Member States. The assessment of the second condition has proved to be the most problematic in the ECJ case law and its investigation constitutes a sort of assumption: only once this condition is fulfilled, the analysis of the other conditions becomes useful in order to consider a measure as State aid. Therefore, the analysis carried out in this paper will focus on this aspect.

It must be preliminary noted that even within the second condition, the ECJ jurisprudence is now clear in claiming that a State aid measure must both be directly or indirectly granted through State resources and be imputable to the State. Those characteristics must be satisfied cumulatively, and it is therefore necessary that the two requirements are examined separately and not confused in the analysis.

When the advantage is granted by a legislative provision or by an administrative act of general application or, more in general, by any provision issued and attributable to public bodies, the imputability to the State is somehow inevitable. The analysis becomes more complex if the measure refers to an undertaking that is owned by a public body or is subject to its control. In this regard, it is necessary to question the involvement of public bodies in the adoption of the measure: it must be examined to which extent a public influence has been exercised on the decision taken by the undertaking. The circumstances and the context in which the decision is taken by public undertakings might constitute key elements for a measure to be considered as imputable to the State. In this regard, some indicators have been provided such as, for example, the degree of integration of the undertaking into the structures of the public administration, the nature of the undertaking's activities and its behavior in normal market conditions with private operators, the legal status of the undertaking, the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicators showing an involvement by the public authorities in the adoption of a measure.[4] Therefore, on the one hand, the mere fact that a public undertaking has been constituted in the form of capital company according to the civil law cannot be regarded as sufficient to exclude the existence of aid measures taken by undertakings and also imputable to the State. On the other hand, the imputability to the State cannot be declared only because an economic advantage is granted through resources of a public undertaking.

Following an extensive interpretation, the definition of aid granted by a Member State or through State resources could include all resources that are under State control and thus all resources that are available to public authorities. In this sense, the definition could cover every transfer of resources that is determined by the State, either involving public budget or not.

State aid could therefore be originated by a transfer of resources directly borne by a public budget, such as government funds or assets, even those owned and administered by public undertakings but also private entities designed by the State. Member States are in fact precluded from circumventing State aid law by assigning to other en-

4 ECJ, case C-482/99, *Stardust Marine*, par. 56

tities the transfer of State resources.

Therefore, funds financed through compulsory charges imposed by State legislation, and administered and apportioned in accordance with that legislation, may be regarded as State resources within the meaning of Article 107(1) TFEU even if they are administered by entities separated from public authorities.[5] In the landmark ruling *PreussenElektra*,[6] the ECJ examined the German incentive mechanism based on an obligation imposed on electricity distribution and transport companies to purchase certain amounts of electricity from renewable energy sources at a fixed minimum price established by public authorities. The electricity supply companies had to partially pay the difference between those prices and the market prices. In this case, the Court held that the purchase obligation did not constitute State aid because companies fulfilled the obligation by using their own financial resources. The allocation of the financial burden arising from that obligation between those electricity companies and other private undertakings, while constituting an economic advantage for some private undertakings, did not involve a direct or indirect aid granted trough State resources.[7] The interpretative outcome that one could immediately draw from this judgement is that for a measure to be considered as State aid it must entail an actual financial burden for a public body. The subsequent *Stardust Marine* case seems to confirm the general orientation expressed in the *PreussenElektra* case but has nevertheless added important indications. The Court in fact had to deal with the support measures to the electricity production granted by a French company that formally appeared to be private, but was instead mainly owned by the French government, which used it to financially intervene in the energy market with support measures. Unlike the incentive systems based on legislative measures, in this case the financing measures derived from an intervention of the State as shareholder. It was therefore necessary to update the previous jurisprudential approach in order to safeguard the effectiveness of European law on State aid. The *Stardust Marine* case clarified the cumulative nature of the State resources conditions, and also elaborated a test

5 ECJ, case C-262/12, *Association Vent De Colère! And Others*, par. 25

6 ECJ, C-379/98, *PreussenElektra*

7 Ibid, par. 58-60

for the imputability to the State connected with the role of the State as majority shareholder of a private company. The judgment also provided the aforementioned non-exhaustive list of indicators of the imputability to the State. The Court has indeed emphasized that the imputability condition requires the exercise of a dominant influence and also an effective control over a public owned or controlled company. The Court has also stated that financial resources must be at the disposal of the State.[8] Starting from the *Stardust Marine* case, it appears to be clear that the cost of the incentive systems for the production of electricity produced by renewable sources could not be borne only by private companies. The trend developed in these years was to make the financial burden of incentives increasingly "public" through withdrawals on the community of consumers or supply companies, generally linked to the energy consumption. Thus, several public or even private bodies were designed in various European legislations to ensure the efficient management of the financial flow consequent to the imposed withdrawals.

In the *Essent Netwerk*[9] case consumers were obliged to pay a surcharge to the supply companies which were subject to the obligation to purchase and resell electricity produced by renewable sources. These supply companies were compensated with the funds formed by the surcharges paid by consumers, which were collected by a public company operator, then allocated and distributed according to the law. The Court ruled that this incentive mechanism constituted an aid granted through State resources. The same outcome was achieved in the *Iride*[10] case that, from a factual point of view, can be compared to the *Essent Netwerk* case.

In the *Vent de Colère*[11] case the French law provided a legal mechanism forcing supply undertakings to purchase wind-generated electricity at a higher price that the market price of the energy, which was periodically updated by a public authority. Those additional costs for undertakings are fully transferred to and charged on final consumers and collected and managed by a public law corporation established by law, whose gen-

8 ECJ, case C-482/99, *Stardust Marine*, par. 52

9 ECJ, case C-206/06, *Essent Netwerk Noord B.V.*

10 ECJ, case T-25/07, *Iride and Iride Energia.*

11 ECJ, case C-262/12, *Vent de Colère and Others.*

eral manager and Supervisory Board are nominated by the Government and other public institutions, and therefore act under a mandate of the French State. This public body acts as an intermediary in the management of those funds, it could determine late payments or defaults in payment by final consumers and reports to the administrative regulatory authority. In addition, this public entity could also invest the funds collected from final consumers. The remuneration from those investments was to be deducted from the amount of the payable charges, which is periodically updated. All those elements allowed the Court to affirm that the sums collected and managed by the French public law investment group must be regarded as remaining under public control, therefore that mechanism for offsetting the additional cost constitutes an intervention granted trough State resources.[12] Yet, another case[13] concerns the Austrian law, which instructed a private law company to administer the entire system of compulsory contributions. In this case, the Court strengthens its principle according to which the funds that are financed through compulsory contributions imposed by the legislation of the Member State, administered and apportioned in accordance with that legislation, could be regarded as State resources even if they were administered by entities separate from the public authorities. In this regard, it must be noted that a transfer of State resources is not a necessary condition to consider the advantage granted to one or more companies as State aid pursuant to Art. 107(1) TFEU.[14]

The recent *ENEA*[15] judgment seems to have changed the orientation so far taken by the ECJ.

The Polish law on energy provided for an incentive mechanism by imposing an obligation on electricity suppliers and producers to purchase certain volumes of electricity produced by cogeneration. That obligation applied to supplier companies that sold electricity to end consumers, requiring that an established percentage of the total sales of energy must be produced by cogeneration. Companies that fail to comply with

12 *Ibid*, par. 29-37.

13 EuGC, case T-251/11, *Austria c. Commission.*

14 *Ibid*, par. 55.

15 ECJ, case C-329/15, *ENEA.*

the obligation established by law are subject to a financial penalty while the proceeds of the financial penalties applied are poured into the national fund for environmental protection and water management. The purchase price of electricity produced by cogeneration shall be freely set by mutual agreement between the parties in the transaction, i.e., the companies subject to the purchase obligation and the producer of such electricity. Anyhow, the Polish regulatory body had the power to approve the maximum price for the sale of electricity to end users. ENEA is a company that produces and sells electricity and is wholly owned by the Polish State. In this case the Court held that a national measure such as the polish one, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration, does not constitute an intervention of the State or through State resources. The Court stated that an obligation imposed on electricity suppliers and producers to purchase electricity produced by cogeneration, even when a price is set by a public authority, does not in itself involve any direct or indirect transfer of State resources within the meaning of Article 107(1) TFEU.

The Polish mechanism implied that the purchase obligation could not be systematically passed on to end users by undertakings. Moreover, those extra costs are not financed by a compulsory contribution imposed by the State or by a full offset mechanism. The electricity supplier and producer companies were not appointed by the State to manage State resources but were bounded by a purchase obligation imposed on them by means of their own financial resources.[16]

5. Conclusions

It could be said that the main element that distinguishes the *PreussenElektra* and the *ENEA* judgments from all the rest of the ECJ jurisprudence is the existence of a private or public intermediary body, which is charged by national legislation to collect, manage and distribute the financial resources at issue. In this regard, it is also necessary that the entity acts under public control. In the *PreussenElektra* and *ENEA* cases, the undertakings have to fulfill the obligations established by national law financing on their own resources, while in the other cases various entities were charged with the duty

16 *Ibid*, par. 23-30.

to administer the financial resources and an offset mechanism to compensate the burdened companies for the additional costs they have to bear. Such an offset mechanism, in the consolidated opinion of the Court, would imply that supply or producer undertakings do not spend their own financial resources but they are requested by the State to manage and redistribute State resources. In these cases the financial resources mostly take place directly between private parties, *i.e.*, energy supply/producer undertakings or end consumers. It could be stated that those financial transfers may be considered as transfers of State resources mainly due to the presence of two elements: (i) a law provision and (ii) the State control over the entities that manage those funds. The element of the law provision is generally linked to the imputability: it refers to a measure or an obligation on the State, although in some circumstances it may not be a sufficient condition.[17] However, law provisions may not always be relevant. The State can in fact act as a shareholder of a public or formally private company and then generate more distortive effects on competition. Therefore, it is necessary to separate the State-legislator from the State-shareholder. State resources are in fact involved only when control over a company is exercised by the State as shareholder. In any case, it can be said that the ECJ jurisprudence has so far used a formalistic approach in its relevant analysis, while sometimes the ECJ has shown to unduly mix its different case-law principles. As an example, on the one hand it could be impossible to say that the imputability condition has been met by solely the existence of a national law provision, while on the other hand the condition on the existence of aid measures granted through State resources is not fully satisfied just because the State has the majority shareholding in the undertaking regulated by energy legislation. Those outcomes and principles deriving from case-law refer to different situations, and therefore must be separately applied. However, a public

17 In this regard, it has been claimed that a formalistic interpretation would require that "all legislation regulating the relationship between enterprises is assessed under State aid rules", that might be a "difficult exercise with an uncertain outcome." As a matter of fact "most national legislation of that type would in any event not constitute State aid because it does not satisfy the requirement of selectivity which means that it does not favor certain undertakings or the production of certain goods within the meaning of Article 92(1)." Therefore, one must conclude that "it seems preferable that legislation regulating the relationship between private actors is as a matter of principle excluded from the scope of the State aid rules" ECJ, C-379/98, PreussenElektra, Opinion of AG Jacobs, par. 151-157. Reflecting on these arguments AG Maduro has stated that a narrow interpretation would disregard that there should be a distinction "between direct interventions in the market and general measures to regulate economic activities" ECJ, case C-237/04, Enirisorse, Opinion of AG Maduro, par. 44.

undertaking and an intermediary entity may not be present at the same time. The ECJ jurisprudence has always analyzed the State control over the public undertakings in relation to the condition of the measures directly or indirectly granted through State resources. In any case, these principles must be applied, or at least adapted, to a situation in which there is only a formally private intermediary entity entrusted with the duty of managing those funds, which is, to some extent, subject to the State control.

If one has to consider the financial transfers between private companies and end consumers as State resources, it must be necessarily proven that the State is able to exercise an effective and dominant influence over the intermediary entity. It must be also proven that the State is capable of directing the use of those financial resources managed by the intermediary entity. The mere fact that the law enables certain public authorities to exercise a generic form of control, or the mere fact that the State holds the majority of the capital in the intermediary entity does not lead to the conclusion that the State may exercise a dominant influence and therefore does not enable public authorities to direct the use of the resources. Indeed, the State ownership over public undertakings in itself or solely a national law provision are not sufficient to consider a public undertaking or an intermediary entity different from any other institution that employs its own resources to comply with a legislation or a regulatory requirement. As stated in the *Stardust Marine* case, actual exercise of that control cannot be automatically presumed. Nevertheless, the *ENEA* case has some peculiarities, it can be an example to better clarify this aspect. In this case, the State only acted as a legislator. The purchase obligation provided by law indistinctly applied to both private and public undertakings. As said before, ENEA was a fully public undertaking. It has been proved that ENEA's decision not to fulfill the purchase obligation has been taken independently of any external public influence, as a part of its autonomous business plan. This circumstance empirically proves that there is not always a coincidence between the State as legislator and the State as shareholder. Indeed, the interests at stake of the two subjects can also be divergent. If the interests were the same and the State exercised its dominant influence over ENEA, this public company would have in fact fulfilled the obligation.

The *ENEA* ruling remarks once again that the two State subjectivities remain distinct and therefore must be analyzed separately. In relation to the transfer of State resources, the *ENEA* ruling seems to establish a relationship of direct proportionality

between the degree of interference of the public control and the existence of an aid measure granted through State resources.

However, in contrast to what has been expressed by the Court, it could be noted that the existence of a State control, as well as the possibility for public authorities to influence the relevant decision taken by the intermediary entity, have little to do with the condition of the State resources. These elements could instead be used more properly to consider that a financial measure taken by the intermediary body is imputable to the State. The condition of the State resources could instead be more genuinely relevant when discussing financial aid measures through a more substantial approach: as an example, when those measures directly or indirectly entail a financial burden for the State's accounts, whatever is the form taken by the aid. Further examples could be those particular circumstances where the public authorities have total and effective control over the intermediary entities so that public instructions cannot be disregarded. In these cases, the financial resources that formally come from the private sector could be considered State resources only when the public authorities could allocate those resources by using full discretion. The Court on this aspect has instead generally adopted a superficial and formalistic approach. In the Court's opinion what seems to distinguish a measure constituting State aid from all other measures that do not fall within the scope of Article 107 (1) TFEU, is solely a full offset mechanism, according to which certain undertakings are required to transfer funds into an intermediary entity subject to the State control, even if the degree and the intensity of this public control it is not fully examined by the Court. One might wonder which is the difference between a system in which undertakings make direct payments to their competitors and a system in which there is an intermediary entity subject to a 'non-invasive' form of public control limited, for example, to the lawfulness of the acts or simply directed at verifying the correct destination of the funds previously established by a law of general application. This type of reasoning is confirmed by the fact that the two different systems could have the same practical effects on competition among energy companies. Therefore, one could hypothesize a "non-invasive" State control limited to a pure control of legitimacy, and in particular, focused on the respect of the criteria of allocation of the funds, which are already established by national law. This situation could be compared, from a substantial point of view, to the situation in which a purchase obligation, in the absence of an in-

termediation, is not considered as State aid. In this respect, it would be rather desirable the use of a pragmatic approach more focused on the effects of the aids on the undertakings and also more focused on the existence of an effective State control over the intermediary entities. The use of an effects-based approach could in fact replace the current formalistic approach used by the Court, focused instead only on the status of those intermediary entities entrusted with the task of administering the funds.

CHIARA CERSOSIMO*

SECESSION: THE STRICT LINE BETWEEN LAW AND POLITICS. A COMPARATIVE ANALYSIS OF QUEBEC, CATALONIA AND SCOTLAND

ABSTRACT. *The spread of secessionist movements over recent decades has jeopardized compliance with the constitutional order of well-established democratic legal systems. The aim of this paper is to indicate available lawful procedures which may help find a compromise between the aspirations of those who wish for secession and central Governments' prerogative to maintain their States' territorial integrity.*

1. The principle of self-determination

The notion of self-determination has its roots in the wake of the First World War, when new States emerged from the collapse of the Austro-Hungarian and Ottoman empires. In this period, some world leaders took up the idea of the right of national peoples, groups of individuals with a shared ethnicity, language, culture, and religion, to determine their own destiny, *i.e.* to decide on their affiliations and *status* on the world

* PhD Candidate in Comparative Law, University of Roma Tre.

scene.[1] Although they did not regard such a principle as a means of ensuring the decolonization process, a few decades later, the same idea was applied to colonial peoples and, by the 1960s, it had become widely accepted that oppressed colonized groups ought to have similar rights to choose their political and sovereign *status*.[2]

The UN General Assembly's *Declaration on the Granting of Independence to Colonial Countries and People*[3] was the starting point for the rise of self-determination as a principle for creating legal rights, deriving its moral force from the general statement that all people have the right to determine their own destiny.[4] Soon afterwards, this principle was embodied in two International Conventions on human rights (the *Charter of the United Nations* and the *Vienna Declaration and Programme of Action*)[5] and, consequently, its scope *ratione personae* was enlarged, without any colonial overtones, to all people.[6]

1 The Soviet leader, Vladimir Lenin, was the first in the international arena to insist that the principle of self-determination had to be established as a general criterion for the liberation of people. He conceived of such a principle as a justification for a violent secession in order to liberate people from bourgeois governments. At the same time, President Wilson also proposed his own philosophy of self-determination, which basically consisted of the right of peoples to choose their government freely. See, A. Cassese, *Self-determination of peoples. A legal reappraisal*, Cambridge, Cambridge University Press, 1995, p. 14 at 19; H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, Philadelphia, University of Pennsylvania Press, 1990, p. 27 at 29.

2 See, M. J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"? Revolutionary International Legal Theory or Return to Rule by the Great Powers*?, *Journal of International Law & Foreign Affairs*, 10, 2005, p. 389 at 390; M. Sterio, *On the Right to External Self-Determination: "Selfistans", Secession, and Great Power Rule*, *Minnesota Journal of International Law*, 19:1, 2010, p. 137.

3 G. A. Res. 1514 (XV) of 14 December 1960.

4 In this sense, C. Tomuschat, *Secession and self-determination*, in M. G. Kohen (ed.), *Secession. International Law Perspectives*, Cambridge, Cambridge University Press, 2006, p. 23.

5 Article 1 of the *Charter of the United Nations* states that one of the purposes of the UN is "to develop friendly relations among nations based on the respect of the principle of equal rights and self-determination of the people…". Art. 55 of the UN Charter further states that the UN shall promote goals such as higher standards of living, full employment, economic and social development and human rights' "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Art. 1 par. 2 of the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in 1993, equally affirms that "All peoples have the right of self-determination. By the virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development".

6 In this sense, the UN General Assembly's *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nation*s, G. A. Res. 2625 (XXV)

Even since then, it has been quite clear that not only peoples under colonial domination, but also peoples subject to other forms of foreign subjugation, domination or exploitation have the right to take legitimate actions to realize their right to self-determination.[7] According to a number of commentators,[8] such a right (in particular, entitlement in terms of unilateral secession) may also appear within a third scenario, namely when an existing State denies its people (or, more realistically, a part of it) the right to exercise civil and political rights (so-called "remedial right to secession").[9]

of 24 October 1970.

7 See, in particular, the *UN General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, G. A. Res. 50/6 of 9 November 1995.

8 See, e.g. K. Doehring, *Self-Determination*, in B. Simma (ed.), *The Charter of the United* Nations. *A Commentary*, New York, Oxford University Press, 1994, p. 56, 66; J. A. Frowein, *Self-Determination as a Limit to Obligations Under International Law,* in C. Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht, Martinus Nijhoff, 1993, p. 211; D. Murswiek, *The issue of a Right of Secession- Reconsidered*, in C. Tomuschat (ed.), op. cit., p. 21, 26 at 27; R. McCorquodale, *Self-Determination: A Human Rights Approach*, *International and Comparative Law Quarterly*, 43, 1994, p. 857, 880 at 881; J. Crawford, *State Practice and International Law in Relation to Secession*, *British Year Book of International Law*, 69, 1998, p. 87 at 117.
The legal basis of this third scenario is generally found in art. 1, par. 2, of the *Vienna Declaration, which* provides for the duty of the Government to "represent the whole people belonging to the territory without distinctions of any kind". Thus, it adds credence to the idea that a complete denial of citizens' civil and political rights may give rise to a right of secession.

9 The "remedial right" to secession has its origin in the *Aaland Island case.* The Aaland Island is a small island situated between Finland and Sweden, belonging to the former, but which sought to join the latter. In 1920, the Aalanders claimed, before the Council of the League of Nations, that they were ethnically Swedish, so they were entitled to break away from Finland and reunite with Sweden. The Commission of Rapporteurs, appointed by the League of Nations to recommend a solution to the question, suggested that the Aaland Island remain under the sovereignty of Finland, but that this country be obliged to increase the guarantees provided to the Aaland Islanders. The Aalanders held the right to cultural and ethnic autonomy, but the latter had to be exercised within Finland. Only if Finland failed to respect their cultural and ethnic autonomy, would the Aalanders have the right to secede from the mother State. See, A. Cassese, *Self-determination of people*, op. cit., p. 27 at 31.
In the same vein, a more recent judicial decision has been given by the African Commission on Human and Peoples' Rights. In 1992, the Katangese People's Congress requested, under art. 65 of the *African Charter on Human and Peoples' Right*s, that the African Commission recognized the right of the Katangese people to secede from Zaire. The Commission stated that, in the absence of concrete violations of the human and political rights of the Katangese people, it should uphold the sovereignty and the territorial integrity of Zaire. Consequently, Katanga was obliged to exercise a variant of self-determination (independence, self-government, federalism, confederalism, unitarism and so on) which was compatible with the sovereignty and territorial integrity of the mother State. See, *African Commission on Human and Peoples' Rights*, Communication 75/92, *Katangese Peoples' Congress v. Zaire*, par. 26-28. The full text is available at: http://www.achpr.org/files/sessions/16th/comunications/75.92/achpr16_75_92_eng.pdf

In all three scenarios, a common distinction is made between internal and external self-determination. Internal self-determination (potentially) applies to all peoples and implies that they should have cultural, social, political, linguistic and religious rights within the framework of an existing state. As long as those rights are respected by the State, the people are not entitled to challenge its territorial integrity or its sovereign stability.[10]

External self-determination, on the other hand, arises in the most extreme cases where an existing state does not respect the basic rights of the people or, worse still, violates their human rights. Under such exceptional circumstances, the principle of territorial integrity does not prevail and the principle of self-determination may lead to a modification of the external boundaries of the existing State.[11] The exercise of such a right can take a more or less intrusive form on State sovereignty and lead the oppressed people to self-government, some sort of autonomy, a free association or, as *extrema ratio*, to independence.[12]

There would seem to be three constitutive parameters for the international legal right to external self-determination and, as a consequence, for the right to secession. Firstly, there must be a group of people who, although in a minority in relation to the rest of the population of the parent State, represent a substantial part of the territory of that State. In order to be considered a people, such a group should also share the same

However, undoubtedly, the most important case-law on this matter is the Canadian Supreme Court's Advisory Opinion of 1998, *Reference re Secession of Quebec.* On the basis of the international law right of self-determination, the Court argued that the existence of such a right in favour of peoples who are blocked from the excising of their civil and political rights and, in particular, its entrustment to secession, does not correspond to a well-established standard of international law, see, Supreme Court of Canada, *Reference re Secession of Quebec*, *International Law Materials*, 37, 1998, 1340 ss., par. 134-138.

10 The UN General Assembly' s Declarations *on Friendly Relations* and *on the Fiftieth Anniversary of the United Nations*, as well as the *Vienna Declaration and Programme of Action* of 1993, reflect the general principle that the right to self-determination is limited by the territorial integrity and the political unity of sovereign States. Furthermore, while art. 1 of both the UN *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. See, *Supreme Court of Canada*, *Reference re Secession of Quebec*, in op. cit., par. 130.

11 J. Dugard and D. Raič, *The role of recognition in the law and practice of secession*, in M. G. Kohen (ed.), *Secession. International Law Perspectives,* op. cit., p. 106.

12 M. Sterio, *On the Right to External Self-Determination,* op. cit., p. 142.

cultural, social, linguistic, political and/or religious attitudes.[13] Secondly, the State from which the people in question wish to secede must have exposed that people to a serious violation or denial of their civil and political rights and/or to serious and recurrent violations of human rights. Thirdly, there must be no realistic and effective alternative remedy which might lead to the peaceful settlement of the conflict between the people in question and the parent State.

An act of unilateral secession that does not fulfil the above-mentioned conditions constitutes an abuse of the right to self-determination. Such an act represents a violation of international law and the international community will most likely deny recognition of any new state.[14]

In short, from the perspective of international law, the obligation to respect the right to self-determination includes the prohibition of abuse of that right, *alias* the prohibition of unlawful violation of the territorial integrity and national sover-

13 According to all the relevant texts dealing with self-determination, all "peoples" are holders of these rights, but the problem with such a construction is the definition of this concept of "people". In particular, if we equate the juridical concept of "people", contemplated by the instruments of international law, with the concept of people in the ethnic sense, then the majority of existing States would be composed of different peoples, entitled individually to a right to self-determination. Furthermore, considering that the drafters of such texts were the representatives of States, it can be presumed that they did not wish the destruction of those States. Whereas the legal position was fairly simple during the colonial period (all peoples under colonial rule were considered as a unit together with the territories which the colonial power had fixed), nowadays determining who is a "people" is extremely complex. Although many studies have been conducted in accordance with both legal and political science methods, the enigma remains unresolved.

See, A. CASSESE, *Self-Determination Revisited*, in *Liber Amicorum Eduardo Jiménez de Aréchega*, vol. 1, Montevideo: F. C. U., 1994, p. 229; M. P. SCHARF, *Earned Sovereignty: Judicial Underpinnings*, *Denver Journal of International Law and Policy*, 2003, p. 373, 379. From the political science perspective see, A. BUCHANAN, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Boulder, Colorado, Westview Press, 1991, p. 174; IDEM, *The International Institutional Dimension of Secession*, in P. B. LEHNING (ed.), *Theories of Secession*, London-New York, CRC Press, 1998, p. 227; L. BRILMAYER, *Secession and Self-Determination: A Territorial Interpretation*, in *Yale Journal of International Law*, 16, 1991, p. 177 at 202.

14 J. CRAWFORD, *The creation of States in International Law*, New York, Oxford University Press, 1979, p. 105 at 106. This is what happened when Southern Rhodesia (now Zimbabwe) decided, unilaterally, to separate from Great Britain. Most of the international community refused to recognize the new independent State, which remained isolated for a long time and was unable to conduct international relations. See, J. E. S. FAWCETT, *Security Council Resolutions on Rhodesia*, *British Yearbook of International Law*, 41, 1965-1966, p. 103, 112 at 113.

eignty of an existing State.[15]

2. A domestic "right to secession"

Having made clear under what conditions a unilateral act of secession may be considered, by international law, as a lawful exercise of the right to external self-determination, we now have to verify whether a right to secession may be allowed by domestic legal systems.

This question has acquired central importance in recent years as separatist minority groups throughout the world have begun challenging the territorial integrity of existing States. For instance, such is the case of the Canadian province of Quebec, of the Spanish Autonomous Community of Catalonia and of the Scottish part of the United Kingdom. In such areas the economic, social, political and legal differences between the regions of the different States have given rise to significant secessionist movements.

The leading case-law on this issue is that of the Advisory Opinion of the Supreme Court of Canada, *Re Secession*, of 20th August 1998.[16]

In 1995, a popular referendum on separation from Canada was organized in Quebec. It was narrowly defeated with 50.58% of the population voting to stay with the mother State, while 49.42% voted to secede.[17] As a result of the referendum, the Canadian Government engaged in a heated campaign in opposition to the separatist movement. One aspect of this strategy was the submission of a reference to the Supreme Court of Canada concerning three questions relating to a hypothetical unilateral secession by Quebec.[18]

15 See, J. DUGARD and D. RAIČ, *The role of recognition*, in M. G. KOHEN (ed.), *Secession. International Law Perspectives,* op. cit., p. 109.

16 Supreme Court of Canada, *Reference re Secession of Quebec*, op. cit.

17 The question put before voters in 1995 was "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995 (*i.e.* the "Tripartite Agreement")?".

18 The questions submitted by the Federal Governor in Council to the Supreme Court of Canada read as follow: "1. Under the Constitution of Canada, can the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or Government of Quebec the right to effect the

The first question to the Court was whether Quebec could legally secede unilaterally under the Constitution of Canada. The Canadian Constitution does not expressly authorize or prohibit the secession of a province from the Confederation,[19] nevertheless, according to the Supreme Court, such an act would alter the governance of the Canadian territory *in a manner which is undoubtedly inconsistent* with the current constitutional arrangements and would, therefore, be illegal.[20] As a consequence, a lawful secession of Quebec from Canada would require an amendment to the Canadian Constitution.[21]

secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or Government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?".

19 More generally, in no democratic legal system is there a Constitution which provides the right of secession. The only two exceptions are the Ethiopian Constitution and the Saint Christopher and Nevis Constitution Order. Art. 39 par. 1 of the Ethiopian Constitution lays down that "Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession". This article was included in the Ethiopian Constitution of 1994 in the aftermath of the bloody secession war with Eritrea. On the other hand, art. 113, par. 1, of the Saint Christopher and Nevis Constitution Order 1893 provides that "The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this Constitution shall no longer have effect in the island of Nevis". This provision is justified by the fact that Saint Christopher and Nevis has only been an independent State since 1983 and, until then, the only feature the two islands had in common was that they were parts of the British Empire.

20 *Supreme Court of Canada*, *Reference re Secession of Quebec*, op. cit., par. 84.

21 The approach of the Supreme Court of Canada is in marked contrast with the position adopted by the US Supreme Court in the famous case law *Texas v. White Case*. Dealing with the issue of the legality of Texas' desire to secede, the US Supreme Court stated that "The US Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation […] The union between Texas and the other States was as complete, perpetual, and as indissoluble as the union between the original States". See, *Texas v. White* (1869) 74 US (7 Wallace) 700, 725 (1868), at 726.

It's interesting to note how two legal systems, both of which belong to the common law legal tradition and have a written Constitution, endorse a completely different doctrine of secession. However, more recently the Supreme Court of Alaska has embraced a theory of secession closer to that of the Supreme Court of Canada. In the case of *Scott Kohlhaas v. State of Alaska, Office of the Lieutenant Governor*, Alaska's Supreme Court stated that the secession of Alaska from the United States would firstly require an amendment to Alaska's Constitution. By arguing in this way, it did not exclude the possibility of Alaska's independence. See, Alaska Supreme Court no. S-13024, January 15th 2010. See, on this point, V. Ferreres Comella, *Cataluña y el derecho a decidir*, in *Teoría y realidad constitucional*,

The Supreme Court recognized the dual nature of the act of secession, both legal and political, and linked these two dimensions by four unwritten constitutional principles: federalism; democracy; constitutionalism and rule of law; and respect for minorities.[22] These foundational principles function in symbiosis, cannot be read in isolation and no one of them prevails over the others.[23]

The main constitutional novelty, introduced by the *Secession Reference,* was the identification of the political actors' right and duty to negotiate in good faith. The Canadian federal legal system distributes public power to both the federal and the provincial governments.[24] Federalism enables the provinces to pursue policies suitable to the particular demands and interests of provincial inhabitants. At the same time, Canada, as a whole, is a democratic community and sovereignty belongs to all Canadian citizens, democratically represented by their elected representatives. The principle of democracy does not allow one majority to be conceived as being more legitimate than others in its expression of the opinion of the people. On the contrary, the principle of democracy requires a continuous process of discussion at both federal and provincial levels. The *Canadian Constitutional Act* embodies this value by conferring a right to initiate constitutional changes on each participant in the Confederation. As a consequence, it confers legitimacy on the effort of the Government of Quebec to initiate the Constitutional amendment process in order to secede lawfully. Moreover, the existence of this right corresponds to a duty of the Federal Government and the other provinces in the Confederation to engage in constitutional discussions and take Quebec's will to secede seriously.[25]

The whole process has to comply with the principle of the rule of law, which requires all government action to comply with the law, including the Constitution. For

37, 2016, pp. 470-471.

22 From a comparative law perspective, it is interesting to note that civil law legal systems, as opposed to common law legal systems (which have a written Constitution, like Canada), are used to codifying their fundamental constitutional principles in the text of the Constitution itself and not to leaving them unwritten. See, for example, arts. 1 to 12 of the Italian Constitution (*Fundamental Principles*); arts. 1 to 9 of the Spanish Constitution (*Preliminary Part*); arts. 1 to 14 of the Portuguese Constitution (*Fundamental Principles*).

23 *Supreme Court of Canada*, *Reference re Secession of Quebec*, op. cit., par. 83, 32.

24 *Ibidem*, par. 56-58.

25 *Ibidem*, par. 61-69.

this reason, the negotiation *iter* must be governed by respect for the same foundational constitutional principles (federalism; democracy; constitutionalism and rule of law; and respect for minorities).[26] Consequently, Quebec is not entitled to a right to self-determination such that it can dictate, unilaterally, the terms of its proposed secession to other parties. Negotiation implies addressing the interests of the federal government, of Quebec, of other provinces and of minorities, as well as the rights of all Canadians within and outside Quebec.[27] The outcome of the negotiations is not predictable; it is a political process whose content is not determined in the Opinion. The Canadian Court adopted a quite ambiguous position on this point. It rejected two absolutist hypotheses: there would not be a legal obligation on the other provinces and the federal government to accede to the secession of Quebec, as they were subject only to negotiation on the logistic details of secession, while much less still would a clear expression of self-determination by Quebec impose obligations upon the other provinces or the federal government.[28] It seems that the content of this obligation lies somewhere between a mere bargaining point about the details of secession and a redistribution of powers between federal government and the provinces, but it's hard to be precise about what it is exactly.

The Canadian Supreme Court also clarified that the role of a judicial court in the independence process is really marginal. It is a complex political process which implies political judgments and evaluations. The Court may just identify the broader constitutional values at stake, but it has no supervisory role over the political aspects of negotiations on constitutional amendments.[29]

A similar position was, partly, adopted by the Spanish Constitutional Court in 2014. In Judgment 42/2014,[30] the above-mentioned Court ruled on the constitutionality of the Catalan Parliament's resolution of 23rd January, 2013.[31] This resolution is

26 *Ibidem*, par. 72, 89.

27 *Ibidem*, par. 89-96.

28 *Ibidem*, par. 90-93.

29 *Ibidem*.

30 STC in *Boletín Oficial del Estado*, Jueves 10 de Abril de 2014, Núm. 87, Sec. TC, pp. 77-99.

31 *Resolució 5/X del Parlament de Catalunya, per la que s'aprova la Declaració de sobirania i del dret a decidir del poble de Catalunya*. The resolution was published in the *Butlletí Oficial del Parlament de Catalunya*, no. 13, Jan.

known for proclaiming the Catalan people sovereign and, furthermore, for conferring on Catalans the "right to decide" on their future.

3. The principle of sovereignty and the claim to independence

The Spanish Constitutional Court invalidated the part of the abovementioned Act which established the "principle of sovereignty" because of its conflict with arts. 1.2 and 2 of the Spanish Constitution,[32] but upheld the proposition of Catalans' "right to decide".

Of course, the Catalan people cannot be sovereign because their sovereignty would involve the denial of the sovereignty of the Spanish people. Two sovereignties, at the same time, cannot legally exist.[33] On the other hand, Catalans may be entitled to exercise their "right to decide". According to the Court, this right can be interpreted within the existing legal framework, as the "political aspiration" of Catalans to decide on their future.[34] Spain is not a militant democracy, there is no essential limit to constitutional amendments if they are brought about through constitutional means.[35]

24, 2013.

32 Art. 1 of the Spanish Constitution: "1. Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as the highest values of its legal system.

2. National sovereignty belongs to the Spanish people, from whom all State powers emanate.

3. The political form of the Spanish State is that of a Parliamentary Monarchy".

Art. 2 Spanish Constitution "The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all".

33 In this sense, V. Ferreres Comella, *The Spanish Constitutional Court Confronts Catalonia's "Right to Decide" (Comment on STC 42/2010)*, *European Constitutional Law Review*, 10, 2014, p. 580.

34 STC 42/2014, in op. cit., p. 97 "Estos principios, como veremos, son adecuados a la Constitución y dan cauce a la interpretación de que el «derecho a decidir de los ciudadanos de Cataluña» no aparece proclamado como una manifestación de un derecho a la autodeterminación no reconocido en la Constitución, o como una atribución de soberanía no reconocida en ella, sino como una aspiración política a la que solo puede llegarse mediante un proceso ajustado a la legalidad constitucional con respeto a los principios de «legitimidad democrática», «pluralismo», y «legalidad», expresamente proclamados en la Declaración en estrecha relación con el «derecho a decidir». Cabe, pues, una interpretación constitucional de las referencias al «derecho a decidir de los ciudadanos de Cataluña», y así debe hacerse constar en el fallo".

35 In the same sense, STC 103/2008; STC 90/2017; STC 114/2017.

In the end, the Court invited the political players to enter into discussions in order to find a solution to the constitutional crisis. During the process of negotiation, the parties should act and cooperate, following the constitutional values of democracy and the rule of law. As a consequence, if a region (Catalonia) submits a proposal to change the Constitution, the Spanish Parliament should take it into account.

These parts of Judgment 42/2014 recall the statements by the Supreme Court of Canada on the right of a province/region to promote constitutional amendments;[36] on the duty of the central government to take seriously the proposal of a constitutional reform and on the invitation to political negotiation. The Spanish Court seems to share the Canadian idea about the marginal role of the judicial authorities in political negotiations on constitutional change.[37]

Nevertheless, judgment 42/2014 was strongly criticised by scholars.[38] The *Tribunal Constitutional* reinterpreted the Declaration in question in order to save, partly, its validity and sustained that the "right to decide" was not directly tied to the declaration of Catalan sovereignty. This interpretation is not sustainable: the Declaration explicitly affirmed that the Catalan people is already sovereign. It did not express the wish of the

Conversely, the Italian and the German Constitutional Courts adopted a very different position on the same matter, see *Italian Constitutional Court* Judgment no. 118/2015, par. 7.2 according to which "[…] L'unità della Repubblica è uno di quegli elementi così essenziali dell'ordinamento costituzionale da essere sottratti persino al potere di revisione costituzionale". See also, 2 *Bundesverfassungsgericht* 349/16, according to which "In der Bundesrepublik Deutschland als auf verfassungsgebenden Gewalt des deutschen Volkes beruhendem Nationalstaat sind die Länder nicht "Herren des Grundgesetzes". Für Sezessionsbestrebungen einzelner Länder ist unter dem Grundgesetz daher kein Raum. Sie verstoßen gegen die verfassungsmäßige Ordnung". See, S. Ragone, *Los Länder no son «señores de la Constitución»: el Tribunal Constitutucional Federal Alemán sobre el referéndum separatista bávaro*, *Teoría y Realidad Constitucional*, 41, 2018, p. 407 at 416; I. Spigno, *Constitutional Judges and Secession. Lessons from Canada… twenty years later*, *Perspectives on Federalism*, 9, 2017, p. 117 at 121.

36 Art. 87.2 The Spanish Constitution empowered the Assembly of Self-Governing Communities to request the central Government to adopt a bill about constitutional changes.

37 In this sense V. Ferreres Comella, *The Spanish Constitutional Court Confronts Catalonia's "Right to Decide" (Comment on STC 42/2010*), op. cit., p. 585.

38 For a comment on STC 42/2014 see, V. Ferreres Comella, *The Spanish Constitutional Court Confronts Catalonia's "Right to Decide" (Comment on STC 42/2014*), op. cit., p. 571 at 590; Id., *Cataluña y el derecho a decidir*, *Teoría y Realidad constitucional*, 37, 2016, p. 461 at 475; E. Fossas Espalder, *Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña*, *Revista española de derecho constitucional*, 101, mayo-agosto, 2014, p. 273 at 300.

Catalan people to be sovereign in the future (after the necessary adoption of constitutional reforms). Despite this, the Court detached the "right to decide" from the principle of sovereignty, which it invalidated. In the Declaration, the idea of sovereignty and of the "right to decide" are strictly linked: the Catalan people is sovereign, so it is entitled to exercise the right to decide. If the Court has invalidated the premise, it is hard to sustain that the derivative right will survive.[39]

4. A referendum on secession

Another criticism of STC 42/2014 was expressed with regard citation of the Supreme Court of Canada Advisory Opinion *Re Secession*. The *Tribunal Constitucional*, in support of the invalidation of the Catalan people's "principle of sovereignty", made, improperly, reference to the former judgment.

The Spanish Court failed to focus on the subject-matter of the cited Opinion. The question referred to the Supreme Court of Canada's being concerned whether a province (in particular, Quebec) is entitled to secede unilaterally, not whether a province can hold a referendum on unilateral secession. Despite this, the *Tribunal Constitutional* agreed with the Canadian final statement which excluded the existence, according to the domestic legal order, of the right of a province (in the Spanish case, of the Autonomous Community of Catalonia) to secede unilaterally and, as a consequence, added that Catalonia could not hold a referendum on independence unilaterally.[40]

Actually, the Supreme Court of Canada did not question the legality of the referendum of 1998 nor of the previous referendum of 1980, both organized unilaterally

39 In this sense, V. Ferreres Comella, *The Spanish Constitutional Court Confronts Catalonia's "Right to Decide" (Comment on STC 42/2014*), op. cit., p. 581 at 582; Id., *Cataluña y el derecho a decidir*, op. cit., p. 471 at 473; E. Fossas Espalder, *Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña*, op cit., p. 285 at 286; p. 294 at 299.

40 STC 42/2014, in cit., p. 95 "Igualmente este Tribunal ha declarado que autonomía no es soberanía [STC 247/2007, FJ 4]. De esto se infiere que en el marco de la Constitución una Comunidad Autónoma no puede unilateralmente convocar un referéndum de autodeterminación para decidir sobre su integración en España. Esta conclusión es del mismo tenor que la que formuló el Tribunal Supremo de Canadá en el pronunciamiento de 20 de agosto de 1998, en el que rechazó la adecuación de un proyecto unilateral de secesión por parte de una de sus provincias tanto a su Constitución como a los postulados del Derecho".

by Quebec.

In common law legal systems, such as that of Canada, the Constitution is generally silent on the matter of referendum. A referendum does not have a legal value, but just a political one: it is simply a tool for assessing the desire of the people, whose outcome, although requiring political feedback, is not legally binding.

For these reasons, it is generally easier, in common law countries, to promote and organize (consultative) referenda at the regional/provincial level. This is what happened with the Quebec referenda of 1980 and 1998: thanks to the silence of the Constitution, the provincial Parliament was able to hold the referenda without requiring any authorization from the federal Government.[41]

By way of contrast, although the United Kingdom does not have a written Constitution, because of the fundamental principle of Parliamentary Sovereignty, Scotland does not have the power to hold a referendum unilaterally.[42] Consequently, the Scottish referendum on secession from the United Kingdom of 2014 could be held only after authorization was given by the UK Parliament.[43] So, in both the Quebecois and the Scottish referenda, the fundamental principle of the rule of law was fully complied with.

The legal system in Spain belongs to the civil law legal tradition and the Constitution expressly provides that only central government can authorize referenda (art. 149.1.32 Spanish Constitution)[44]. As in the United Kingdom, it is not possible to con-

41 In this sense, A. López Basaguren, *Demanda de secesión en Cataluña y sistema democrático. El Procés a la luz de la experiencia comparada*, *Teoría y realidad constitucional*, 37, 2016, p. 173.

42 Under Sections 28 and 29 and Schedules 4 and 5 of the *Scotland Act 1998*, the Scottish Parliament has a general legislative jurisdiction limited by certain express restrictions and reservations. The power to consult the electorate on the question of secession was conceived of as a *reversed matter*, beyond the competence of the Scottish Parliament.

43 As set out in the Scotland Act 1998, in the field of *reserved matters* (Schedule 5), the UK Parliament remains sovereign. So, to allow the Scottish Parliament to legislate for an independence referendum, Schedule 5 needed to be modified through Section 30 of the Scotland Act 1998. A Section 30 order meant that the UK government could temporarily devolve power to the Scottish Parliament. In this regard, on 15th October, 2012, the UK and Scottish Governments signed an Agreement on a Referendum on Independence for Scotland. Attached to the Agreement was an Order in Council which, under the terms of Section 30 of the Scotland Act 1998, devolved to the Scottish parliament the competence to legislate for a referendum to be held before the end of 2014 on whether Scotland should become independent of the rest of the United Kingdom.

44 Art. 149 Spanish Constitution: "1. The State shall have exclusive competence over the following matters: 32. Authorization of popular consultation through the holding of referendums".

voke a regional referendum in Spain without the *placet* of the central authorities. We would argue that the principle of Parliament Sovereignty in Great Britain, in a similar way to the Constitution in civil law systems, prohibits, as a matter of law, a regional Parliament from promoting a referendum unilaterally.

Furthermore, according to the *Tribunal Constitutional* legal doctrine on referenda, matters which affect the foundations of the constitutional order and would, thus, require a constitutional amendment are excluded from popular consultation[45]. So, even if the Spanish government authorized a secession referendum in Catalonia, it could not take place. This doctrine is justified by the fact that Spain has a written Constitution which already provides the procedures necessary to introduce constitutional amendments (arts. 167 and 168 Spanish Constitution). In particular, art. 168 establishes a special procedure for modifying the most important parts of Constitution,[46] such as

45 This doctrine was stated, for the first time, by the Spanish Constitutional Court in the STC 103/2008 judgment. On that occasion, the *Tribunal Constitucional* ruled on the law of the Basque Parliament, which fixed the date and the questions to be posed in a unilateral regional referendum on secession from Spain (*Plan Ibarretxe*). From the perspective of comparative law, it is interesting to note that Italian constitutional law allows Regions to hold regional referenda (art. 123 Italian Constitution), but the subject of such referenda may not affect the foundations of the constitutional order. In this sense, the *Corte costituzionale italiana*, judgment n. 118/2015, par. 5 "Nel merito, occorre anzitutto ribadire che non v'è dubbio che le questioni di interesse della comunità regionale, su cui la Regione può attivare la partecipazione delle popolazioni del proprio territorio tramite referendum consultivo, possono riguardare anche ambiti che superano i confini delle materie e del territorio regionale, fino a intrecciarsi con la dimensione nazionale (sentenze n. 496 del 2000, n. 470 del 1992, n. 256 del 1989). Tuttavia, l'esistenza di un tale interesse qualificato non abilita la Regione ad assumere iniziative – anche di consultazione popolare – libere nella forma o eccedenti i limiti stabili in virtù di previsioni costituzionali. […] Per questo, i referendum popolari, nazionali o regionali, anche quando di natura consultiva, sono istituti tipizzati e debbono svolgersi nelle forme e nei limiti previsti dalla Costituzione o stabiliti sulla base di essa. 6. La disciplina dei referendum regionali ha la propria sede nello statuto regionale, secondo quanto previsto dall'art. 123 Cost. Nell'esercizio dell'autonomia politica a essa accordata da tale disposizione (sentenza n. 81 del 2012), da svolgere in armonia con i precetti e con i principi tutti ricavabili dalla Costituzione (*ex multis*, sentenze n. 81 e n. 64 del 2015), ciascuna regione può stabilire forme, modi e criteri della partecipazione popolare ai processi di controllo democratico sui propri atti; può introdurre tipologie di referendum anche nuove rispetto a quelle previste nella Costituzione (sentenza n. 372 del 2004); può pure coinvolgere in tali consultazioni i soggetti che prendano parte consapevolmente e stabilmente alla vita della comunità, ancorché non titolari del diritto di voto e della cittadinanza italiana (sentenza n. 379 del 2004)".

46 Art. 168 Spanish Constitution "1. If a total revision of the Constitution is proposed, or a partial revision thereof, affecting the Preliminary Part, Chapter II, Division 1 of Part I, or Part II, the principle of the proposed reform shall be approved by a two-thirds majority of the members of each House, and the *Cortes Generales* shall immediately be dissolved.

the principle of indissoluble unity of the Spanish Nation (art. 2 Spanish Constitution). Therefore, in the case of Catalonian secession, this should be the procedure to be followed, towards a final necessary (national) referendum in order to ratify the amendment previously approved by the Spanish Parliament.

The position of the Spanish Constitutional Court could not, though, be more different:[47] its task is the preservation of the Constitution. As long as the Constitution is not amended, it cannot empower Catalonia to unilaterally organize a referendum on secession. What the Court can do, and did, is send the political actors a message, *i.e.* its upholding of the "right to decide" may suggest that a consultative (non-binding) regional referendum on Catalonia's independence should be authorized by the Spanish government.[48] In this regard, some legal authors proposed a set of feasible solutions in order to achieve, legally, a consultative referendum, without awaiting prior modifications of arts. 92[49] and 168 of the Spanish Constitution.[50] However, the position of the Spanish

2. The House elected thereupon must ratify the decision and proceed to examine the new constitutional text, which must be passed by a two-thirds majority of the members of each House.
3. once the amendment has been passed by the *Cortes Generales* it shall be submitted to ratification by referendum.".

47 The Spanish Constitutional Court's doctrine on referenda was recently confirmed in the STC 114/2017 judgment of 17th October, 2017, on the Law of the Catalan Parliament 19/2017, of 6th September, 2017, regarding the referendum on self-determination, in *Boletín Oficial del Estado*, Núm. 256, Martes 24 de octubre de 2017, Sec. TC., p. 102547: "Esta modalidad referendaria carece de previsión expresa alguna tanto en la Constitución (que solo menciona referendos consultivos nacionales en los que votan todos los ciudadanos, se entiende que españoles: art. 92.1) como en la citada Ley Orgánica 2/1980 y en el EAC. La exigencia de previsión expresa presupone que la figura referendaria tiene que estar claramente establecida o bien directamente en la norma suprema o bien en la ley orgánica que satisface la doble reserva de los artss. 81.1 (en relación con el 23.1) y 92.3 CE y solo a partir de ello podrían los Estatutos de Autonomía prever, a su vez, referendos en que participara el cuerpo electoral de la Comunidad Autónoma. El Parlamento de Cataluña, en suma, carece de competencia para regular y convocar un referéndum, citándose al respecto determinados pasajes del ATC 24/2017 y de las STC 51/2017 y 90/2017".

48 In this sense, V. Ferreres Comella, *The Spanish Constitutional Court Confronts Catalonia's "Right to Decide" (Comment on STC 42/2014*), op. cit., p. 588.

49 Art. 92 Spanish Constitution "1. Political decisions of special importance may be submitted to all the citizens in a consultative referendum.
2. The referendum shall be called by the King on the President of the Government's proposal after previous authorization by the Congress.
3. An organic act shall lay down the terms and procedures for the different kinds of referendum provided for in this Constitution".

50 *I.e.*, the approval by the Spanish Parliament of a new *Ley Orgánica* on consultative regional referenda (a

Government remained firm: it could not authorize a referendum on secession in Catalonia since the Constitution could not be amended in such a sense.

In this context, the lesson by the Canadian Supreme Court, according to which *a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy,* acquires even more importance.[51] Legitimacy is the key aspect. Firstly, Spain has to ascertain through a consultative referendum whether the majority of Catalans actually aspire to secession from Spain and if, and only if, an effective *clear* majority of Catalans expressed its *clear* preference for secession, would the negotiation on constitutional changes have to be triggered.

So, what would constitute a *clear* majority on a *clear* question?

The Supreme Court of Canada stated that only an affirmative vote by a *clear* majority of provincial inhabitants on a *clear* question about independence would precipitate the duty to negotiate, but it refused to venture into the dilemma of what a clear majority was and what question would be free of ambiguity. After all, these are political, not judicial, matters.

The question put before the Quebecois voters in 1995 was manifestly confusing:[52] the lack of the words "independence" or "secession" led to confusion among the electorate, which had always preferred, and still prefers today, a more decentralized federalism rather

kind of referendum not yet included in the existing *Ley Orgánica 2/1980 sobre las distintas modalidades de referéndum*), in this sense F. Rubio Llorente, *Un referéndum para Cataluña*, *El País*, 8 octubre 2012. On the other hand, J. Vintró, in *Legalidad y referéndum en Cataluña*, *La Vanguardia*, 2 de noviembre 2012, proposed reform to Catalan Law 4/2010, attributing to Catalonia an express power to promote a regional referendum on secession, in the light of the power of a regional Parliament to propose constitutional amendments to the *Cortes Generales.*

51 Supreme Court of Canada, *Reference re Secession of Quebec*, op. cit., par. 67.

52 The question put before voters in 1995 was "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12th, 1995 (*i.e.*. the "Tripartite Agreement")?". The question put before the Quebecois in the previous referendum of 1980 was equally confusing. It literally asked "The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad – in other words, sovereignty – and at the same time maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?".

than a divorce from Canada.[53] The people might have improperly believed that the referendum question referred to setting up an association with Canada akin to state relations within the European Union and not the achieving of independence from the mother State.[54] So, in order to prevent future misconceptions and give effect to the requirement for clarity set out by the Supreme Court, the Canadian government decided to act.

The Federal Parliament adopted the *Clarity Act* in 2000.[55] This provided a two-fold clarity test, conducted by the Federal House of Commons. It firstly had the task of determining whether a question "would result in a clear expression of the will of the population" of a province to secede from Canada.[56] The *Act* provided that a *clear* question should focus expressly on secession and not be combined with other ambiguous proposals.[57] If the House of Common found the referendum question unclear, "the Government of Canada shall not enter into negotiation on the terms on which a province might cease to be a part of Canada".[58] In the case of a positive test result, the House of Common would also check, after the referendum took place, whether "in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province to cease to be a part of Canada".[59] A negative result to this second

53 J. Gaudrealu-Desbiens, *Algunos de los desafíos legales y políticos que debe afrontar el movimento de independencia de Quebec*, *Teoría y Realidad Constitucional*, 37, 2016, p. 142 at 43.

54 C. Hébert-J. Lapierre, *Confessions post-référendaires*. *Les acteurs politiques de 1995 et le scenario d'un oui*, Montréal, Éditions de l'Homme, 2014, p. 33 at 34.

55 S. C. 2000, Chapter 26, passed by the House of Common on 15th March, 2000 and in force since 29th June, 2000. The version currently in force, as consolidated in 2018, is available at: https://laws-lois.justice.gc.ca/pdf/C-31.8.pdf

56 Section 1 (5), *Clarity Act*.

57 Section 1 (4), *Clarity Act* expressly states that a *clear* clear referendum question could not merely focus "on a mandate to negotiate" without soliciting a direct expression on secession, and it could not envisage "other possibilities in addition to secession of the province from Canada, such as economic or political arrangements with Canada".

58 Section 1 (6), *Clarity Act*.

59 Section 2, *Clarity Act*. The paragraph 2 of Section 2 establishes factors that the House of Commons will be taking into account "(a) the size of majority of valid votes cast in favour of the secessionist option; (b) the percentage of eligible voters voting in the referendum; and (c) any other matters or circumstances it considers to be relevant". According to paragraph 3, the House of Common should also take into account "the view of all political parties represented in the legislative assembly of the province whose government proposed the referendum on seces-

test would also prevent the Canadian government from entering into negotiation.

It is evident that the *clarity* test puts a great degree of discretion into the hands of the House of Commons, which, in times of institutional crisis, may block access to a referendum. The rejection by Quebec of the *Clarity Act* was obviously explosive. The National Assembly passed the *Act Respecting the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*,[60] which declares the existence of the inalienable right of the Quebec people to freely decide its political regime and its legal *status*.[61] It also establishes that in the case of a provincial referendum, the winning option is that which obtains a simple majority of valid votes cast (50%+1).[62]

The legislative clash between the federal and provincial acts continues and the Canadian dilemma over what would constitute a clear majority in a clear referendum question remains unresolved.[63] Furthermore, another controversial aspect of the "Canadian referendum model" is the uncertainty about the aftermath to the referendum. If there were, in Quebec, a referendum on a *clear* question (regarded as such by the Federal House of Common) and a *clear* majority voted "yes", what would the content be of the negotiations between the Quebec government, the other Canadian provinces and the Federal Government? The Canadian Advisory Opinion is not clear on this point,[64] and the *Clarity Act* has done very little to settle the matter.

The only reasonable way to prevent any kind of uncertainty would be through the federal and provincial governments entering into a prior agreement on both the re-

sion, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government proposed the referendum on secession, and any other views it considers to be relevant".

60 Revised Statutes of Quebec, Chapter E-20.2, passed by the National Assembly on 7 December 2000, and in force since 28 February 2001. It is available at: http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/E-20.2

61 Section 2, *Act Respecting the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State.*

62 Section 4, *Act Respecting the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State.*

63 See, J. GAUDREALU-DESBIENS, *Algunos de los desafíos legales y políticos que debe afrontar el movimento de independencia de Quebec*, op. cit., p. 145. See also P. DUMBERRY, *Lesson learned from the Quebec* Secession Reference *before the Supreme Court of Canada*, in M. KOHEN (ed.), *Secession. International Law Perspectives*, Cambridge, Cambridge University Press, 2006, p. 446 at 450.

64 Supreme Court of Canada, *Reference re Secession of Quebec*, op. cit., par. 90-93.

ferendum modalities (question and winning option) and its effects.

This was actually the strategy followed in the United Kingdom on the occasion of the Scottish referendum on independence (2014).[65] Westminster and Edinburgh reached a prior agreement on the question, the majority and the effect of the referendum.[66] This agreement ensured the clarity of the entire process.

The Parliament of the UK and Parliament of Scotland ruled that the consequence of a majority of valid votes in favour of secession would be Scottish independence. The outcome of the referendum would be politically binding and the subsequent negotiations would be about the details of Scottish secession from the United Kingdom.[67]

The "British referendum model" seems to ensure the authority of the votes more than its Canadian equivalent. A clear question, like the one put before the Scottish people in 2014 ("Should Scotland be an independent country?"), and the prior knowledge of the effects of the referendum outcome, led voters to express a more conscious preference. Vagueness of the question and obscurity regarding the referendum consequences might push the electorate to vote for independence even though it does not really want it. So, in other words, if the question does not clearly refer to independence or if the the consequence of the affirmative vote does not imply a negotiation on independence, but a more general negotiation on institutional arrangements, people might vote "yes" just to achieve a reform of federalism (and not secession). This means a separation between the referendum question and the political meaning of the vote, *i.e.* an infringement of the fundamental values of legitimacy.[68] How could a referendum outcome that does not correspond to the wishes of the electorate be legitimately upheld?

65 The United Kingdom and Scottish Parliaments agreed to promote an *Order in Council under Section 30 of the Scotland Act 1998* to allow a single-question referendum on Scottish independence. The text of the agreement is available at https://www2.gov.scot/resource/0040/00404789.pdf

66 J. Gaudrealu-Desbiens, *Algunos de los desafíos legales y políticos que debe afrontar el movimento de independencia de Quebec*, op. cit., p. 146.

67 A. López Basaguren, *Demanda de secesión en Cataluña y sistema democrático. El Procés a la luz de la experiencia comparada*, op. cit, p. 181.

68 In this sense, V. F. Comella, *Cataluña y el derecho a decidir*, op. cit., p. 469.

5. The "right to decide"

As a result of the great difficulty of achieving independence within the existing legal frameworks, both in Quebec[69] and in Catalonia,[70] secessionists have called for an alleged "right to decide". This right is something different from the basic right to vote in general elections, a right routinely exercised by both Quebecois and Catalans.[71]

This "right to decide" is conceived of as the collective right of a community of individuals, settled in the territory of an existing State, to express its wish to leave the mother State or, further, to secede unilaterally. Neither meaning of the "right to decide" has a legal basis, either in the Canadian or in the Spanish legal system.

If such a right is conceived of as the right of a community to be heard,[72] *i.e.* to express its will in a referendum, and independence were the winning option, should negotiations be opened up between the seceding province/region, the federal government and the other provincial/regional governments anyway. The same question re-emerges: what does the obligation to negotiate imply? Should the parties negotiate on the details of a province's independence or on any feasible institutional settlements?[73]

69 Nevertheless, in Quebec the calling for the "right to decide" is less vigorous than in Catalonia. See, J. Gaudrealu-Desbiens, *Algunos de los desafíos legales y políticos que debe afrontar el movimento de independencia de Quebec*, op. cit., p. 153.

70 In Spain, the origin of the "right to decide" dates back to the *Plan Ibarretxe*, named after the Basque President in Office, who wanted to promoted a regional referendum to decide on the future status of the Basque Country.

71 See, V. F. Comella, *Cataluña y el derecho a decidir*, op. cit., p. 461 at 462.

72 The configuration of a "right to be heard" in terms of a positive right is quite difficult, see, *Ibidem*, 466-469.

73 Same Spanish scholars sustain that the "right to decide" is an implicit right, different from the right to self-determination, as it has its legal basis in the democratic principle. See, M. Barceló, M. Corretja, A. González Bondia, J. López, J. M. Vilajosana, *El derecho a decider. Teoría y práctica de un nuevo derecho*, 2015, Barceloma, Barcelona, p. 24 at 28. See also, J. Ridao Martín, *La juridificación del derecho a decidir en España. La STC 42/2014 y el derecho a aspirar a un proceso de cambio político del orden constitucional*, *Revista de Derecho Político*, 91, septiembre-diciembre, 2014, p. 101 at 102, 128, who considers that "el derecho a decidir no es equivalente al derecho a la autodeterminación puesto que tiene sustantividad propia: constituye una aspiración política amparada por la libertad de expresión y el derecho de participación".
In contra, F. Espalder, *Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña*, op. cit., p. 292 "el derecho a ser consultado no forma parte del derecho fundamental de participación política de los ciudadanos garantizado por el artículo 23.1 CE, ni existe un «derecho» a las instituciones catalanas a organizar cualquier tipo de referéndum o consulta sobre la independencia de Cataluña". See also V. F. Comella, *Cataluña y el derecho a decidir*, op. cit., p. 466 at 469.

On the other hand, if the "right to decide" entitled a community of individuals to secede unilaterally,[74] it would be a "right" that does not feature in domestic law or international law. A right to secede is not generally foreseen by democratic legal systems (with very few exceptions)[75] and international law admits it only under particular circumstances. Both the *Vienna Declaration and Programme of Action* and the UN General Assembly's *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* laid down that as long as the domestic Government represents the whole people belonging to its territory, without any distinctions, people cannot impair the territorial integrity or the political unity of the State. As a consequence, only discriminated people can be allowed to secede from the parent State in the exercising of their civil and political rights. This is not the case with the Quebecois or the Catalans. The residents of Quebec and Catalonia freely make political choices and pursue their economic, social and cultural development, like all other Canadian and Spanish citizens.[76]

For these reasons, the recognition by the Spanish Constitutional Court of the Catalans' "right to decide" did not confer a "legal" right to decide upon the Catalan people, but just accepted as legitimate the "political aspiration" to secede lawfully. Such an aspiration can actually be realized only through the existing constitutional procedures

74 Three big theories were drawn up to justify this unilateral right to secede, respectively referred to as the principle of democracy; the principle of nationality and the concept of just cause. All of these are open to criticism, see V. F. Comella, *Cataluña y el derecho a decidir*, op. cit., p. 463 at 466.

75 Even where this right is covered by a national constitutional provision (*i.e.* the Constitution of Ethiopia and the Constitution of Saint Christopher and Nevis), its effective exercise is quite complex. Art. 39.4 of the Ethiopian Constitution provides that "The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect: a) when a demand for secession has been approved by a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned; b) when the Federal Government has organized a referendum which must take place within three years of the time it received the concerned council's decision to secede; c) when the demand for secession is supported by a majority vote in the referendum; d) when the Federal Government has transferred its powers to the council of the Nation, Nationality or People that has voted to secede; and e) when the division of assets is effected in a manner prescribed by law"; while Section 113.2 of the Constitution of Saint Christopher and Nevis states that "A bill for the purpose of subsection (1) shall not be regarded as being passed by the Assembly unless, on its final reading, the bill is supported by the votes of not less than two-thirds of all the elected members of the Assembly and such a bill shall not be submitted to the Governor-General for his or her assent […]".

76 Supreme Court of Canada, *Reference re Secession of Quebec*, op. cit., par. 134-138; STC 114/2017, in *Boletín Oficial del Estado*, Núm. 256, Martes 24 de octubre de 2017, Sec. TC., p. 102557-102558.

and cannot take place outside the Spanish constitutional order.[77]

It is evident that the Spanish Court's interpretation of the "right to decide" is completely different from that of the Catalan independents,[78] who consider the "right to decide" as a moral right to decide on their future and that it entrusts them with the power to use all legal frameworks to make its exercise possible. So, if the Spanish Constitution is a barrier to the right to decide, they may subvert it.

6. The principle of effectivity

The existing barriers to finding a legal basis for the aim to secede have led many secessionists to seek support from the principle of effectivity.[79] According to this principle, international law may adapt to recognize a factual reality, regardless of the legality of the steps undertaken to its realization.[80] So, in other words, the international community may recognize a *de facto* entity as a new State, albeit it emerges from an unlawful act of secession (so-called "remedial secession").

The legal grounds for a remedial secession would be the International Court of Justice's Advisory Opinion of 22nd July, 2010, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*.[81] On this occasion, the UN General Assembly requested the International Court of Justice (ICJ) to decide whether the unilateral declaration of independence on the part of Kosovo was in accordance

77 STC 42/2014, in cit., p. 97 "una aspiración política a la que solo puede llegarse mediante un proceso ajustado a la legalidad constitucional con respeto a los principios de «legitimidad democrática», «pluralismo», «legalidad»".

78 The position of Catalonia was confirmed by the Catalan Parliament's resolution 1/XI, of 9th November, 2015, which proclaimed the beginning of the process of creating an independent Catalan State; by the Catalan Parliament's resolution 306/XI, of 6th of October 2016, on the general political orientation of the Government; by the Law of the Catalan Parliament 19/2017, of 6th September, on the «referendum de autodeterminación»; by the Law of Catalan Parliament 20/2017, of 8th of September, on the «transitoriedad jurídica y fundacional de la República».

79 See, for instance, J. López, *A Right to Decide? On the Normative Basis of a Political Principle and its Application in the Catalan Case*, in K. J. Nagel & Rixen (eds.), *Catalonia in Spain and Europe. Is There a Way to Independence?*, Baden, Baden: Nomos, 2015, p. 28.

80 *Supreme Court of Canada*, *Reference re Secession of Quebec*, cit., par. 141.

81 G. A., Res. 63/3 requested the Opinion of the Court on the following question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?".

with international law. Embracing the so-called avoidance doctrine,[82] the ICJ just responded that neither general international law nor the *lex specialis* created by Security Council resolution 1244 (1999)[83] prohibited the declaration of independence in question. So, the Kosovan declaration of 2008 did not violate any applicable rule of international law.

The ICJ expressly refused to deal with the matter of whether international law provided for a right to "remedial secession" and, if so, under what circumstances.[84] It distinguished between the question put before it and that put before the Supreme Court of Canada in 1998. The Canadian Court was questioned whether international law entrusted people to a positive right to secede, while the ICJ was asked whether international law prohibited a unilateral declaration of independence.[85] It is clear that the scopes of the two assessments were different: the Canadian Court evaluated, *ex ante*, the existence of a positive right to secession, whilst the ICJ assessed, *ex post*, the compatibility of a specific unilateral declaration of independence with international law. Therefore, the mere fact that a particular act, such as the Kosovan declaration of independence, had not violated international law was not to be considered as an exercise of a right conferred by the ICJ.[86]

Ultimately, it is hard to sustain that the ICJ's Advisory Opinion on Kosovo's unilateral declaration of independence should be the basis for the recognition of a "legal" "right to decide". This Opinion deals with a very concrete factual situation which does not permit

82 The avoidance doctrine is the technique, used, in particular, by the US Supreme Court, of avoiding having to rule on a constitutional issue, resolving the case on other grounds. On the using of avoidance doctrine by international courts, see J. ODERMATT, *Patterns of avoidance: political questions before international courts*, *International Journal of Law in Context*, 14, 2018, p. 221 at 236.

83 S. C. Res. 1244 (1999) on the situation relating to Kosovo, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement

84 International Court of Justice's Advisory Opinion of 22nd July, 2010, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, par. 82-83. The full text is available at: https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf

85 *Ibidem*, par. 56.

86 *Ibidem.*

the ICJ statements to be taken out of context.[87] Of course, in some cases, international law may, *ex post facto*, draw legal conclusions from a factual situation, but it does not create *per se* a new right. If a unilateral declaration of independence is not in contrast with international law, it does not imply the right to infringe the domestic legal order.

7. European Union Membership for a new State

According to the Vienna Convention on the Succession of States in Respect of Treaties of 1978, when a part of a territory of a State separates to form a new State and the predecessor State continues to exist, the automatic application of an international treaty constituting an international organization is excluded if it would be incompatible with the object and purpose of the treaty or it would radically change the conditions of its operation (arts. 34 (2) (b) and 35 (c)).

There is no doubt that an automatic accession of an independent Scotland or Catalonia to the EU would be both incompatible with the object and purpose set out in the Treaty on European Union (TEU) and would radically change the conditions for the operation of EU treaties (*i.e.* the existence of particular Member States and their relative size of territory and population). However, it is worth noting that, although the rules of the Vienna Convention on Succession of States in Respect of Treaties apply to any treaty which is the consistent instrument of an international organization, they do not jeopardise any relevant rule of the international organization itself (first of all, those concerning the acquisition of membership).[88] Thus, the effect of a state succession on membership of an international organization depends firstly on the relevant rules of the organization at issue.[89]

87 What, in particular, should not be generalized is the affirmation contained in par. 121 of the International Court of Justice's Advisory Opinion of 22nd July, 2010, according to which "the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government", and, so, it should not be sustained that secessionists may act outside the rules of their national constitutional framework.

88 See art. 4 Vienna Convention on Succession of State in Respect of Treaties.

89 See J. Crawford SC and A. Boyle, *Annex A. Opinion: Referendum on the Independence of Scotland-International Law Aspects*, p. 92 at 94 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf

EU Law does not include any specific rule on the accession (automatic or not) to the EU of a new entity created by its obtaining independence from the territory of a pre-existing Member State. Moreover, there is no precedent for a metropolitan part of an EU Member State becoming independent and claiming automatic membership or seeking to join the EU in its own right. As a consequence, the following considerations must necessarily be somewhat speculative.

Taking into account the norms of the EU Treaties, it is most likely that an independent Scotland or Catalonia would be required to follow the ordinary procedure on joining the EU as a new Member State.[90] According to art. 49 TEU, any European State which respects the values of art. 2 TEU and is committed to promoting them may apply to become a member of the Union. The EU institutions must consider the application in accordance with the procedural requirements and the existing EU Member

90 The three last Presidents of the European Commission have spoken in favour of this assumption. Firstly, Romano Prodi, President of the Commission, on 1st March, 2004, stressed that a new independent region would become, as a result of its secession from an existing EU Member State, a third country in relation to the Union and all treaties would not apply to its territory from the first day of its independence (*Official Journal of European Union*, 3rd April, 2004). Secondly, the same answer was given by José Manuel Barroso, President of the Commission, eight years later, on the behalf of another College of Commissioners (*Official Journal of European Union*, 3rd December, 2012 and 1st February, 2004). Thirdly, exactly the same answer was given by Jean-Claude Juncker, President of the Commission, as recently as in September 2015 Van Rompuy, President of the European Council, has also taken the same position, see *Remarks by the President of the European Council on Catalonia*, 12th December, 2013, EUCO 267/13, PRESS 576 (European Council).
On the contrary, the supporters of both Scottish and Catalan independence had argued, at least at the beginning, that the new Scottish and/or Catalan States, as a result of secession, would have the right to preserve, automatically, their membership in the EU without the need to amend the EU Treaties or have negotiations with the other EU Member States. See, K. Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, *Duke Journal of Comparative and International Law*, 24, 2013, p. 51 to 105, which mentions the declarations of both Nicola Sturgeon, the Scottish Primer Minister, actually in office, and Oriol Junqueras, a Catalan nationalist. Artus Mas, the President of the Government of Catalonia from 2010 to 2015, spoke in the same terms in a speech given in Brussels on the 7th November, 2012. Given the absence of any legal basis for such argumentation, certain members of both Scottish and Catalan independence movements have supported the idea that, in order to ensure the EU Membership of the new independent States, just a modification of the EU Treaties would be necessary under art. 48 TEU, while the procedure under art. 49 TEU would be redundant. In this sense, N. Maccormick, *The European Constitutional Convention and the Stateless Nations*, *International Relations*, vol. 18, 3, 2004, p. 331; D. Edward, *EU Law and the Separation of Member States*, *Fordham International Law Journal*, 36, 2013, p. 1151; S. Douglas-Scott, *How Easily Could an Independent Scotland Join the EU?*, *University of Oxford. Legal Research Paper*, 14, 2014. For a critical analysis on this last theory, J. Piris, *La Unión Europea, Cataluña y Escocia (Cuestiones jurídicas sobre las recientes tendencias secesionistas en los Estados Miembros de la UE)*, *Teoría y Realidad Constitucional*, 37, 2016, p. 120 to 127.

States and the applicant(s) must unanimously ratify a treaty on the admission.

So, in order to achieve EU membership, a new entity must be firstly recognised as a new State by the international community and, secondly, it must respect and promote the values of art. 2 TEU.

Art. 2 TEU entails respect for the rule of law, *i.e.* compliance with the normative provisions of the national legal system, this condition can clearly not be met if Scotland and/or Catalonia declare independence unilaterally in breach of the constitutional rules of the metropolitan State to which they belong. As a consequence, other EU Member States will be forced to refuse recognition of Scotland and/or Catalonia as States which are independent of UK and Spain respectively and any application for EU membership on the part of Scotland or Catalonia could not be accepted.[91]

On the other hand, if Scotland and/or Catalonia lawfully achieved independence, the accession process could be simplified by the fact that they are already subject to EU Law as a part of a EU Member State (UK and/or Spain), although it could never lead to an automatic accession. The eventual simplification would still be an effect of negotiations between the new independent States, the EU institutions and the EU Member States. However, in any case, the ultimate result of the accession would be a necessary treaty to make amendments to all EU treaties as a consequence of this increase in membership.[92]

The issue of EU membership for Scotland was hotly debated during the 2014 campaign for the referendum on independence. The idea that an independent Scotland would be able to achieve EU membership was especially challenged by the so-called "Better Together" campaign. Membership of the EU became a debatable issue and the possibility of an independent Scotland's joining was disputed. The doubt around EU membership moulded the election as the uncertainty influenced some otherwise "yes" voters.[93] Notwithstanding this, the safe "no" vote that ensured EU membership seems

91 In this sense, J. Piris, *La Unión Europea, Cataluña y Escocia (Cuestiones jurídicas sobre las recientes tendencias secesionistas en los Estados Miembros de la UE)*, op. cit., pp. 111-112.

92 In this sense, J. Crawford SC and A. Boyle, *Annex A. Opinion: Referendum on the Independence of Scotland-International Law Aspects,* op. cit., p. 101.

93 It is worth noting that EU membership would be vital to an independent Scotland's economy, thus the

to have now been nullified by the Brexit vote.[94]

Indeed, in June, 2016, the majority of British citizens voted to leave the European Union[95] and, shortly after, Prime Minister Theresa May declared the intention to pursue a "hard" Brexit, severing most ties with EU. This resulted in the possibility of there being a fresh Scottish referendum on independence.

The Scottish anti-Brexit rhetoric is focused on a new push for secession by leveraging on the (problematic) constitutional relationship between England and Scotland. In a nutshell, Brexit would be the latest example of Westminster's policies being forced upon the Scottish people without their consent because Scotland would be subject to the unwanted consequences of leaving the EU, one of the main causes of the negative outcome of the 2014 referendum.

What is more, a 2018 poll indicates that a majority of Scots are in favour of independence once the UK leaves the EU, but, at the same time, it also shows that a majority of Scots are in favour of the union if Brexit is abandoned.[96] Under these circumstances, it is more than likely that if and when a hard Brexit takes place, the (majority of the) Scottish Parliament, in reference to the continuing political divergence between Edinburgh and Westminster, will be ready to call formally for a second referendum on secession.[97]

In short, the EU membership of an independent Scotland and/or Catalonia

doubt around membership was a powerful push for citizens to vote "no". See B. RILEY-SMITH, *Alex Salmond and William Hague clash over an independent Scotland's EU membership*, *The Telegraph*, 28 April 2014, available at https://www.telegraph.co.uk/news/uknews/scottish-independence/10795070/Alex-Salmond-and-William-Hague-clash-over-an-independent-Scotlands-EU-membership.html; I. TRAYNOR, *Alex Salmond Insists Independent Scotland Would Remain in EU*, *The Guardian*, 28th April, 2014, available at https://www.theguardian.com/politics/2014/apr/28/alex-salmond-independent-scotland-remain-european-union.

94 See M. K. THOMPSON, *Brexit, Scotland and the Continuing Divergence of Politics*, *The Midwest Quarterly*, 60, 2, 2019, pp. 141-142.

95 The Brexit referendum was actually passed by a narrow margin of 4% of the vote. Furthermore, not all of the nations in the UK favoured leaving: 53.4% voters in England supported Brexit, while Scottish voters rejected it with 62% voting to stay in.

96 Deltapoll, *Scotland Poll*, September 2018, available at www.deltapoll.co.uk/wp-content/uploads/2018/09/Scotland-website.pdf

97 See M. K. THOMPSON, *Brexit, Scotland and the Continuing Divergence of Politics*, op. cit., p. 151 to 156.

seems to be one of the focal points of the campaigns on secession. It has the power to strongly influence public opinion and even overturn election results. That said, the issue of secession of a metropolitan part of an existing EU Member State, such as the UK and Spain, is strictly related to the position that is taken by the EU institutions,[98] as well as the outcome of any possible negotiations between the EU, its Member States and the applicant(s) for membership.

8. Final Remarks

A community of individuals, established in the territory of an existing State, who enjoy the same civil and political rights as the other citizens may not claim a "positive" right to secede. The demands relating to the desire for independence of the Catalan, Quebecois and Scottish peoples can materialize solely and exclusively within the framework of their respective domestic legal systems.

Even if the difficulty of achieving secession lawfully were to lead one of these peoples to a unilateral declaration of independence, recognition by the international community of the resulting entity as a new State is not a foregone conclusion. A successful outcome to the independence process largely depends on the support of the most powerful countries in the World.[99] On the other hand, the recognition of a new State also relies on the legitimacy of the process by which the *de facto* secession is pursued. If an emergent State has disregarded legitimate obligations laid down in the legal system of the State to which it previously belonged, it can expect that disregard to hinder its being granted international recognition.[100]

Would Catalonia obtain the support of other European Union Member States

98 On the position so far adopted by European institutions, see n. 90.

99 In this sense, M. STERIO, *On the Right to External Self-Determination*, op. cit., p. 149, according to whom the classical theories of recognition under international law (the constitutive theory and the declaratory theory) remain unapplied in practice and it is often the international political reality that dictates whether an entity is treated as a state by international community. On the recognition of States, see J. CRAWFORD, *The creation of States in International Law*, New York, Oxford University Press 1979, p. 3 at 29; J. DUGARD and D. RAIČ, *The role of recognition in the law and practice of secession*, in M. G. KOHEN (ed.), *Secession. International Law Perspectives*, op. cit., p. 94 at 111.

100 In this sense, Supreme Court of Canada, *Reference re Secession of Quebec*, cit., par. 143.

against Spain?[101] It would seem improbable.[102] Would France support the independent State of Quebec and put pressure on other States in order to recognize it?[103] Probably not. A French policy of this kind could trigger the dissatisfaction of European Union Member States, such as Spain or Belgium, which are facing secessionist threats. France itself could face problems with Corsica, where there is a well-established nationalist movement looking for more autonomy, or even independence.[104]

For the above reasons, the best way to manage the disaffection of the would-be secessionists would be to find a political solution within the borders of the State. It implies cooperation in good faith between federal and provincial/regional political actors. The central Government should refrain from stubbornly adhering to a strict concept of the rule of law and the provincial/regional Government ought to comply with the domestic legal order. A collaborative effort by both parties could lawfully give voice to the different political aspirations, as shown by the case of the Scottish referendum of 2014.

101 This question arose during the mandate of *the Consell Assessor per a la Transició Nacional*, a commission of experts appointed in 2013 by the Catalan Government in order to give advice on the creation of the State of Catalonia. This commission contended that, if Spain did not allow a referendum on Catalonia's secession, it would breach the democratic principle on which European Union law is based. In such a case, the Catalan authorities should look for the support of European Union Member States in order to start a procedure against Spain, under article 7 of Treaty of the European Union, which empowers the Union to attest that there is a risk of violation of democratic values in a specific country and to suspend the rights (including the right to vote in the Council of European Union) of that Member State.

102 A practical demonstration of this was given on the 27th October, 2017 when, after the unlawful unauthorized Catalan referendum on independence of the 1st October, Catalan authorities declared the independence of Catalonia from Spain. As a consequence, the Spanish Government applied, with the approval of the Spanish Senate, the exceptional mechanism of art. 155 of the Spanish Constitution, removing the Catalan President in charge and his Cabinet and calling new elections for December 2017. In the interim, no European Union countries or United Nations Member States supported the cause of Catalan secession.

103 Because of its linguistic and cultural kinship with Quebec, France has consistently adopted a policy of non-indifference, but also of non-intervention, with regard to the former.

104 J. Gaudrealu-Desbiens, *Algunos de los desafíos legales y políticos que debe afrontar el movimiento de independencia de Quebec*, op. cit., p. 159.

CRISTINA FRATTONE*

SAME-SEX SPOUSES' RIGHTS IN THE ECJ'S *COMAN* CASE

ABSTRACT. *In its* Coman *judgment of 5 June 2018 the Grand Chamber of the Court of Justice of the European Union (ECJ or the Court) gave a positive answer to the question whether the same-sex spouse of an EU citizen has a derived right to move and reside in another Member State with the EU citizen.*

Firstly, confirming established case-law, the ECJ affirmed that Directive 2004/38/EC applies by analogy to an EU citizen who was settled in another Member State and then returned to his Member State of nationality. Therefore, the right to move and reside freely in the EU under Article 21(1) TFEU entitles the Union citizen to invoke EU free movement law even against the Member State of which he is a national.

Secondly, the ECJ gave a broad interpretation of the term 'spouse' provided for in Article 2(2)(a)of Directive 2004/38 assuming it is a gender-neutral expression, namely a person who is legally married to another. For the sole purposes of EU free movement law, the term 'spouse' entitling to the right of residence in another Member State for a period longer than three months under Article 7(2) of Directive 2004/38 comprehends the same-sex person with whom the EU citizen has contracted a marriage according to a Member State national law.

In conclusion, given the significance of freedom of movement in EU law, Member States are not allowed to deny the right to move and reside for more than three months to the same-sex spouse of an Union citizen for the only reason that the national law of the host Member State does not recognize the homosexual marriage lawfully contracted in another Member State.

* PhD Student in Private Comparative Law, Roma Tre University. The author wishes to thank Prof. Noah Vardi for her comments and suggestions to a previous draft of this paper.

The preliminary ruling delivered on 5 June 2018 in the *Coman* case by the Court of Justice[1] has been welcomed as a further step towards a full recognition of same-sex couples' rights in EU law.

In this case, the ECJ stated the principle that same-sex spouses of EU citizens have the same rights as heterosexual spouses for the purposes of EU free movement law as far as they are legally married under the law of another EU Member State.

There were great expectations regarding this judgment since it was the first time that the ECJ was asked to rule upon same-sex marriages for the purposes of EU free movement law, as pointed out by the Advocate General Wathelet in his Opinion.[2] In the Court's previous case-law, the 'spouse' of an EU citizen under Directive 2004/38/EC[3] was "*a person joined to another person by the bonds of marriage*."[4] In its *Coman* judgment the ECJ clarified that the term 'spouse' in Article 2(2)(a) of Directive 2004/38/EC must include the same-sex spouse who is lawfully married to an EU citizen in another Member State, regardless of whether domestic law of the host Member State provides same-sex marriage or not. So, "*Although the Member States have the freedom whether or not to auth-*

1 Judgment of the Court (Grand Chamber) of 5 June 2018, EU:C:2018:385, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, curia.europa.eu/juris/documents.jsf?num=C-673/16. For other comments on this judgment see also A. Coman, 'Landmark case from Romania expands possibilities for LGBT rights', 5 March 2019, available at openglobalrights.org/landmark-case-from-romania-expands-possibilities-for-lgbt-rights/; M. Fallon, 'Observations sous CJUE, 5 Juin 2018, gr. ch., Coman, C-673/16, EU:C:2018:385', *Cahiers de l'EDEM*, June 2018; L. Gyeney, 'Same sex couples' right to free movement in light of member states' national identities. The legal analysis of the Coman case', XIV. *Iustum Aequum Salutare*2018(2), pp. 149-171; S. Penasa, 'Matrimonio tra persone dello stesso sesso e libertà di circolazione dei cittadini europei e dei loro familiari: osservazioni a "cerchi concentrici" sul caso *Coman c. Romania* della Corte di Giustizia', *Diritto, Immigrazione e Cittadinanza*2018(3); F. Battaglia, 'La definizione di "coniuge" ai sensi della direttiva 38/2004: il caso *Coman e Hamilton*', *Ordine internazionale e diritti umani* 2018, pp. 301-321.

2 Opinion of Advocate General Wathelet delivered on 11 January 2018, EU:C:2018:2, curia.europa.eu/juris/document/document.jsf?text=&docid=198383&doclang=EN, point 2.

3 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0038.

4 ECJ 25 July 2008, EU:C:2008:449, *Metock and Others*, curia.europa.eu/juris/documents.jsf?num=C-127/08, para.98 and 99.

orise marriage between persons of the same sex, they may not obstruct the freedom of residence of an EU citizen by refusing to grant his same-sex spouse, a national of a country that is not an EU Member State, a derived right of residence in their territory."[5]

Such an interpretation is in line with the case-law of the European Court of Human Rights (ECtHR) that has held several times that the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' protected by Article 8 ECHR (European Convention on Human Rights)[6] in the same way as the relationship of a heterosexual couple in the same situation.[7]

The ECJ statement was anticipated by Advocate General Wathelet's Opinion on 11 January 2018 that also stood for a broad interpretation of the term 'spouse' within the meaning of EU free movement law. However, there are certain subtle differences between Wathelet's Opinion and the ECJ's reasoning.

1. The facts of the case

Mr Relu Adrian Coman, a Romanian and an American citizen, and Mr Robert Clabourn Hamilton, an American citizen, got married in Brussels in 2010, where Mr Coman lived and worked as a parliamentary assistant in the European Parliament. After living separated from each other for some years due to employment reasons, the two married men decided to move together to Romania, the EU Member State of which Mr Coman is a national. Thus, they invoked the right of Mr Hamilton to reside for

5 Court of Justice of the European Union, *The term 'spouse' within the meaning of the provisions of EU law on freedom of residence for EU citizens and their family members includes spouses of the same sex*, Press release n. 80/18, Luxembourg, 5 June 2018, Judgment in case C-673/16 Relu Adrian Coman and Others v. *Inspectoratul General pentru Imigrări* and Others, curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180080en.pdf.

6 Article 8 ECHR provides: «*Right to respect for private and family life.1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*».

7 ECtHR 7 November 2013, 29381/09 and 32684/09,*Vallianatos and Others v. Greece*, hudoc.echr.coe.int/eng?i=001-128294, CE:ECHR:2013:1107JUD002938109, § 73; ECtHR 14 December 2017, 26431/12, 26742/12, 44057/12, and 60088/12, *Orlandi and Others v. Italy*, hudoc.echr.coe.int/eng?i=001-179547,CE:ECHR:2017:1214JUD002643112, § 143.

more than three months in a Member State as a family member of an EU citizen under Article 7(2) Directive 2004/38/EC.

Nonetheless, the Romanian authorities refused to grant Mr Coman's husband the permission to reside in Romania, given the fact that Romanian law did not allow same-sex marriage. In fact, Articles 277(2) and (4) of the *Codul Civil* (the Romanian Civil Code) prohibit homosexual marriage as far as the recognition of such a marriage celebrated abroad.[8] According to Articles 259(1) and (2) of the *Codul Civil*, marriage is the union of a man and a woman with a view to founding a family.[9]

As a consequence, the national authorities refused to recognise Mr Hamilton as the legal spouse of Mr Coman. Therefore, Mr Hamilton, a non-EU citizen and not a family member of an EU citizen, was only granted a permission to stay for a period no longer than three months. Moreover, the Romanian authorities denied an extension of Mr Hamilton's right of temporary residence in Romania on grounds of family reunion.

In 2013 Coman and others seized the *Judecătoria Sectorului 5 București* (Court of First Instance, District 5, Bucharest, Romania) because of the alleged violation of their freedom of movement.

During the procedure, the *Curtea Constituțională* (the Romanian Constitutional Court) was asked whether the prohibition to celebrate and recognize same-sex marriages under Article 277(2) and (4) of the *Codul Civil* integrated a violation of the constitutional right to intimate, family and private life as far as equality where it lead to deny a permission of residence to the same-sex spouse.

Given the fact that the question involved the right to family life and freedom of movement in the EU, which is a matter of EU law under Directive 2004/38/EC, the *Curtea Constituțională* seized the ECJ[10] for a preliminary ruling.

8 Articles 277(1), (2) and (4) of the *Codul Civil* state as follows: «*1. Marriage between persons of the same sex shall be prohibited. 2. Marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania. […] 4. The legal provisions relating to freedom of movement on Romanian territory by citizens of the Member States of the European Union and the European Economic Area shall be applicable*».

9 Articles 259(1) and (2) of the *Codul Civil* state as follows: «*1. Marriage is the union freely consented to of a man and a woman, entered into in accordance with the conditions laid down by law. 2. Men and women shall have the right to marry with a view to founding a family*».

10 The questions referred to the ECJ for a preliminary ruling were: "*(1) Does the term "spouse" in Article*

2. The reasoning of the Court

2.1. The applicability of EU free movement law

In its *Coman* ruling, the Court points out some fundamental principles of EU free movement law.

First of all, the Court firmly affirms the importance of ensuring a high standard of protection to EU citizens being the citizenship of the Union "*the fundamental status of nationals of the Member States.*"[11] In the Court's view, the need to grant EU citizens free movement allows a broad interpretation of Directive 2004/38.

The Court ruled that EU free movement law does not apply directly to a Romanian citizen and his family member in Romania, since Directive 2004/38 only applies to Union citizens moving to a Member State other than the one of which they are nationals. The ECJ confirmed its case-law under which "*it follows from a literal, contextual and teleological interpretation of Directive 2004/38 that the directive governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he is a national and does not confer a derived right of residence on third-*

2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?
(2) If the answer [to the first question] is in the affirmative, do Articles 3(1) and 7([2]) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union?
(3) If the answer to [the first question] is in the negative, can the same-sex spouse, from a State which is not a Member State of the Union, of the Union citizen to whom he or she is lawfully married, in accordance with the law of a Member State other than the host State, be classified as "any other family member" within the meaning of Article 3(2)(a) of Directive 2004/38 or a "partner with whom the Union citizen has a durable relationship, duly attested", within the meaning of Article 3(2)(b) of that directive, with the corresponding obligation for the host Member State to facilitate entry and residence for that spouse, even if that State does not recognise marriages between persons of the same sex and provides no alternative form of legal recognition, such as registered partnership?
(4) If the answer to [the third question] is in the affirmative, do Articles 3(2) and 7(2) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a Union citizen?".

11 Para. 30; see also ECJ 20 September 2001, EU:C:2001:458, *Grzelczyk*, curia.europa.eu/juris/documents.jsf?num=C-184/99, para. 31; ECJ 8 March 2011, EU:C:2011:124, *Ruiz Zambrano*, curia.europa.eu/ juris/documents.jsf?num=C-34/09, para. 41; and ECJ 2 June 2016, EU:C:2016:401, *Bogendorff von Wolffersdorff*, curia.europa.eu/juris/documents.jsf?num=C-438/14, para. 29.

country nationals who are family members of a Union citizen in the Member State of which that citizen is a national."[12]

Nonetheless, the Court found a ground to apply the Directive by analogy to Mr Coman's case since he had moved to another Member State (Belgium) and then returned to his Member State of nationality (Romania).

The reasoning of the Court represents an application of the *effet utile* doctrine,[13] that leads to find whether the effectiveness of the right of any Union citizen to move and reside freely within the territory of the Member States under Article 21(1) TFEU requires that a derived right of residence must be granted to the third-country national who has a familiar bond with an Union citizen exercising his right to free movement.[14] The family life that the EU citizen has created or strengthened during his "*genuine residence*"[15] in a Member State other than that of which he is a national may continue when he returns to his Member State of origin (para. 24). Otherwise the Union citizen could

12 See, to that effect, ECJ 12 March 2014, EU:C:2014:135, *O. and B.*, curia.europa.eu/juris/documents.jsf?num=C-456/12, para. 37; ECJ 10 May 2017, EU:C:2017:354, *Chavez-Vilchez and Others*, curia.europa.eu/juris/documents.jsf?num=C-133/15, para. 53; ECJ 14 November 2017, EU:C:2017:862, *Lounes*, curia.europa.eu/juris/documents.jsf?num=C-165/16, para. 33.

13 In EU law, *effet utile* refers to the effectiveness of a rule of law (D. Chalmers, G. Davies & G. Monti, *European Union Law. Text and materials* (Cambridge: Cambridge University Press, 2nd edn 2010), p. 1015 n. 3).The principle of effectiveness has been recognized as a general principle by the Court. Its origins lie in the interpretative techniques of the Court as it is not based directly on the laws of the Member States but derives from the distinct characteristics of EU law, primacy and direct effect (T. Tridimas, *The General Principles of EU law* (Oxford: Oxford University Press, 2nd edn 2006), pp. 418-476). On the principle of *effet utile* in EU law and its declinations see K. Lenaerts-P. Van Nuffel, *Constitutional Law of the European Union* (London: Sweet & Maxwell, 2nd edn 2005), para. 5-040, 5-051, 5-054, 11-011, 14-050, 17-010; see also C. Barnard-S. Peers, *European Union Law* (Oxford: Oxford University Press, 2014), pp. 167 and 199-200. On the application of the *effet utile* principle to the third country spouse see P. Craig-G. De Búrca, *EU Law. Text, Cases and Materials* (Oxford: Oxford University Press, 2ndedn 2011), p. 539; see also D. Chalmers, G. Davies & G. Monti, *European Union Law* (Cambridge: Cambridge University Press, 3rd edn 2014), pp. 503-506; K. Lenaerts-P. Van Nuffel, *Constitutional Law of the European Union* (London: Sweet & Maxwell, 2nd edn 2005), para. 5-127.

14 See, to that effect, ECJ 12 March 2014, EU:C:2014:135, *O. and B.*, curia.europa.eu/juris/documents.jsf?num=C-456/12, para.50 and 61; ECJ 10 May 2017, EU:C:2017:354, *Chavez-Vilchez and Others*, curia.europa.eu/juris/documents.jsf?num=C-133/15, para.54-55; ECJ14 November 2017, EU:C:2017: 862, *Lounes*, curia.europa.eu/juris/documents. jsf?num=C-165/16, para.46 and 61.

15 With this expression the Court refers to a period of residence in a Member State different from that of origin led pursuant to and in conformity with the conditions set out in Directive 2004/38.

be discouraged from leaving the Member State of which he is a national in the first place, because he would be uncertain whether he will be able to continue in his Member State of origin a family life which has been created or strengthened in the host Member State. Hence, the exercise of the right to move and reside freely in the EU would be impaired.

To that effect, the Court invokes Article 21(1) TFEU and it states that Directive 2004/38 must be applied, by analogy, to an Union citizen who has moved to another Member State due to his right to free movement and then returned to his Member State of origin, as it had been previously stated in 2014 in the *O. and B.* case[16] (para. 25).

In conclusion, an EU citizen can exercise the rights provided for in Article 21(1) TFEU, such as the right to lead a normal family life, together with their family members (para. 32),[17] even against the Member State of which he is a national (para. 31).[18]

2.2. The interpretation of the term 'spouse'

In its preliminary ruling the ECJ answered the question whether Mr Coman's husband could be considered a 'spouse' under Directive 2004/38.

According to Article 7 of the above-mentioned Directive, 'family members' accompanying or rejoining an EU citizen in a Member State of the EU are granted a derived right of residence for more than three months. Article 2(2)(a) of the Directive states that the 'spouse' of an EU citizen must be considered a 'family member' for the purposes of the Directive.

Firstly, the ECJ interprets the term 'spouse' as gender-neutral identifying a person who is legally married to an EU citizen (see para. 35).

16 ECJ 12 March 2014, EU:C:2014:135, *O. and B.*, curia.europa.eu/juris/documents.jsf?num=C-456/12, para.50 and 61.

17 See, to that effect, ECJ 7 July 1992, EU:C:1992:296, *Singh*, curia.europa.eu/juris/documents. jsf?num=C-370/90, para. 21 and 23; ECJ 14 November 2017, EU:C:2017:862, *Lounes*, curia.europa.eu/ juris/documents.jsf?num=C-165/16, para. 52.

18 See, to that effect, ECJ 23 October 2007, EU:C:2007:626, *Morgan and Bucher*, curia.europa. eu/juris/documents.jsf?num=C-11/06 and C-12/06, para.22; ECJ 18 July 2013, EU:C:2013:524, *Prinz and Seeberger*, curia.europa.eu/juris/documents.jsf?num=C-523/11 and curia.europa.eu/juris/documents. jsf?num=C-165/14C-585/11, para. 23; ECJ 14 November 2017, EU:C:2017:862, *Lounes*, curia.europa. eu/juris/documents.jsf?num=C-165/16, para. 51.

Secondly, the Court finds that Directive 2004/38 does not refer to the legislation of the host Member State in order to qualify who can be considered the 'spouse' of an EU citizen. It is worthy to underline that this is a crucial point of the ECJ's reasoning. In fact, it marks a difference in the treatment of 'registered partnerships' and marriage, since the former is in the scope of the Directive only "*if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State*" according to Article 2(2)(b).

Consequently, the Court states that the recognition of a same-sex marriage lawfully celebrated in another Member State for the sole purpose of granting a derived right of residence to a third-country national family member of an EU citizen is mandatory for Member States. If not, the refusal of the host Member State to grant such a permission to the EU citizen's spouse may interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU (see para. 40). Hence, the Directive would be deprived of its effectiveness if the residence permit of the same-sex spouse of an EU citizen depended on national family law of the host Member State.

Clearly, the sensitive nature of the issue forced the ECJ to make clear that such an obligation does not imply that Member States are forced to include same-sex marriages in their national legislation, since they remain free to decide whether or not to allow them. In this respect, the restraint showed by the ECJ was understandable. In fact, it is commonly known that the regulation of family law is an exclusive competence of the Member States.

With regards to the possible justification for the restriction of EU free movement law, the ECJ excludes that Member States can invoke 'national identity' or 'public policy' reasons. In fact, according to the Court's established case-law, the concept of public policy must be interpreted strictly, hence public policy may be relied upon only in case of "*a genuine and sufficiently serious threat to a fundamental interest of society.*"[19] Threat that can-

19 See, to that effect, ECJ 13 July 2017, EU:C:2017:542, *E*, curia.europa.eu/juris/documents.jsf? num=C-193/16, para.18; ECJ 13 September 2016, EU:C:2016:675, *Rendón Marín*, curia.europa.eu/juris/documents.jsf?num=C-165/14, para. 58; ECJ 2 June 2016, EU:C:2016:401, *Bogendorff von Wolffersdorff*, curia.europa.eu/juris/documents.jsf?num=C-438/14, para.67; ECJ 29 April 2004, EU:C:2004:262 and ECLI:EU:C:2004:262, *Orfano-*

not be found in this case, since granting a derived right of residence to the same-sex spouse does not require Member States to provide for the institution of marriage between persons of the same sex in their national law, as pointed out above (para. 45).

Finally, the ECJ highlights that national measures restricting the exercise of freedom of movement for persons can be justified only in so far as they comply with EU fundamental rights law (para. 47-51).[20] On this point, the ECJ recalls the fundamental right to respect for private and family life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'),[21] which has the same meaning and the same scope as those guaranteed by Article 8 of the ECHR.

In fact, the ECtHR ruling on Article 8 ECHR has made clear that the relationship between homosexual people may fall within the notion of 'private life' and that of 'family life' in the same way as the one between heterosexual people in the same situation.[22] In the landmark decision *Schalk and Kopf v. Austria*, the ECtHR gave birth to a broad interpretation of Article 12 ECHR in light of Article 9 of the Charter and it stated that same-sex spouses were entitled to the same protection as any other married couple. Nonetheless, the ECtHR showed some restraint since it did not deny that the traditional definition of marriage involved the union of a man and a woman, therefore it reserved to the State the option between allowing same-sex marriage in their own domestic law or not. Thus, the ECtHR case-law is coherent with the one of the ECJ where it excludes that there is any breach of the non-discrimination rule on the grounds of

poulos and *Oliveri*, curia.europa.eu/juris/liste.jsf?num=C-482/01 and curia.europa.eu/juris/documents.jsf?num=C-493/01, para.65; ECJ 27 October 1977, EU:C:1977:172, *Bouchereau*, curia.europa.eu/juris/documents.jsf?num=C-30/77, para. 33; ECJ 4 December 1974, EU:C:1974:133, *van Duyn*, curia.europa.eu/juris/documents.jsf?num=C-41/74, para. 18.

20 See, by analogy, ECJ 13 September 2016, EU:C:2016:675, *Rendón Marín*, curia.europa.eu/ juris/documents.jsf?num=C-165/14, para.66.

21 Article 7 of the Charter, entitled «Respect for private and family life», provides: «*Everyone has the right to respect for his or her private and family life, home and communications*».

22 ECtHR 7 November 2013, 29381/09 and 32684/09,*Vallianatos and Others v. Greece*, hudoc.echr.coe.int/eng?i=001-128294,CE:ECHR:2013:1107JUD002938109, § 73; ECtHR 23 February 2016, 68453/13, *Pajić v. Croatia*, hudoc.echr.coe.int/eng?i=001-161061, CE:ECHR:2016:0223JUD006 845313, § 73; ECtHR 14 December 2017,26431/12; 26742/12; 44057/12 and 60088/12,*Orlandi and Others v. Italy*, hudoc.echr.coe.int/eng?i=001-179547,CE:ECHR:2017:1214JUD002643112, § 143.

sexual orientation when a State does not provide for marriage between two people of the same sex.[23]

After pointing out the meaning of the term 'spouse' in light of EU free movement law, the ECJ answers positively to the question whether the right to move and reside freely in the EU under Article 21(1) TFEU means that a third-country national of the same sex as a Union citizen whose marriage was lawfully concluded in another Member State has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months (see para. 52-56).

As for the fact that the host Member State is the same State of which the Union citizen is a national, it has already been clarified that Article 21(1) TFEU entitles the Union citizen with some rights even against his Member State of origin.

As for the derived right of residence of a third-country national, it appears from the letter of Article 7(2) of Directive 2004/38 that family members who are third-country nationals fall within the scope of the Directive and shall be granted the derived right of residence provided for when accompanying or joining an Union citizen in the host Member State.

3. Comments

After the ECJ decision, the Romanian Constitutional Court did not repeal the civil code provisions, but it clarified that these provisions need to be applied in light of the *Coman* ruling.[24] In addition, the Romanian Constitutional Court recognized that same-sex couples have the same right to private and family life as heterosexual couples in Romania, quoting decisions from the European Court of Human Rights and a deci-

23 See ECtHR 24 June 2010,30141/04, *Schalk and Kopf v. Austria*, hudoc.echr.coe.int/eng?i=001-99605, CE:ECHR:2010:0624JUD003014104; see also to that effect ECtHR 21 July 2015, 18766/11 and 36030/11,*Oliari and others v. Italy*, hudoc.echr.coe.int/eng?i=001-156265,CE:ECHR:2015: 0721JUD001876611; ECtHR 16 July 2014, 37359/09,*Hämäläinen v. Finland*, hudoc.echr.coe.int/eng?i=001-145768,CE:ECHR:2014:0716JUD0 03735909; ECtHR 11 July 2002, 25680/94 and 28957/95, *I. v. the United Kingdom* and *Christine Goodwin v. the United Kingdom*, hudoc.echr.coe.int/ eng?i=001-60595 and hudoc.echr.coe.int/eng?i=001-60596, CE:ECHR: 2002:0711JUD002568094 and CE:ECHR:2002: 0711JUD002895795.

24 A. Coman, 'Landmark case from Romania expands possibilities for LGBT rights', 5 March 2019, available at www.openglobalrights.org/landmark-case-from-romania-expands-possibilities-for-lgbt-rights/.

sion from the Italian Constitutional Court (*ordinanza* n. 4/2011).[25]

With regards to the reference to the Italian Constitutional Court made by the Romanian Constitutional Court two remarks can be done. First, it could be seen as an example of the use of the comparative law method in domestic disputes.[26] Second, it could be related to the influence that the Italian constitutional justice system played in the creation of the Romanian Constitutional Court in its actual configuration.[27]

The *Coman* ruling has a big symbolic value pushing towards a higher standard of protection of same-sex couples under EU free movement law. Among the Member States, the configuration of same-sex couples' rights is extremely varied, therefore it was not straightforward for the ECJ to give a gender-neutral definition of the term 'spouse'.

The last Member States to admit same-sex marriage were Austria, due to a decision of the Austrian Constitutional Court,[28] Malta[29] and Germany.[30]

In the previous year,[31] the Member States allowing same-sex marriage were Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Portugal and Spain. Norway provided for same-sex marriage too. Other Member States have chosen to give same-sex couples access to a registered partnership,

25 *Decizia nr. 534 din 18 iulie 2018 referitoare la excepția de neconstituționalitate a dispozițiilor art. 277 alin.(2) și (4) din Codul civil*.

26 On this point see T. Groppi & M.-C. Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (Oxford; Portland: Hart Publishing, 2013); J. M. Smits, 'Comparative Law and its influence on national legal systems', in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), pp. 513-538.

27 The Romanian Constitutional Court has been defined as "*a 'hybrid' institution, with elements grafted from the French Constitutional Council as regards the Court's structure and from the Italian Constitutional Court as regards its powers and jurisdiction*" (B. Selejan-Guțan, *The Constitution of Romania. A Contextual Analysis* (Portland: Hart Publishing, 2016), p. 166).

28 The Austrian Constitutional Court (VfGH) with its decision of 4 December 2017 (G258-259 /2017-9) repealed the law forbidding same-sex marriage with effect starting from 31 December 2018.

29 The Maltese Parliament approved the *Conversion of Civil Unions into Marriage Regulations* with a sole dissenting vote and it was published in S.L. 530.02 of 1 September 2017, *Legal notice 382 of 2017*.

30 The law authorizing same-sex marriage (*Gesetzzur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*) of 20 July 2017 was published in *BGBl.*, I, 28 July 2017, 2787.

31 ILGA - Rainbow Europe Index 2018, available at ilga-europe.org/sites/default/files/Attachments/index_2018_small.pdf.

with similar or limited rights as compared to those conferred to spouses: Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy[32] and Slovenia. In the end, there are six EU Member State who have not ruled at all on same-sex couples' rights: Bulgaria, Slovakia, Poland, Latvia, Lithuania and Romania.

Hence, it can be useful to point out some differences between the ECJ ruling and the Advocate General Wathelet Opinion.

The Advocate General gave relevance to "*the existence of a proven stable relationship*" so his approach was more focused on the facts of the case.

The ECJ linked the right to the preservation of family relationships to the high standard of protection that EU citizens are granted under Article 21 TFEU. Whereas, the Advocate General did not invoke Article 21 TFEU. In fact, he relied only on Directive 2004/38 which applied by analogy to the case. Apart from the legal technicalities, the different approach led to relevant different consequences in terms of future applications of the rule. While the ECJ stressed the fact that the marriage was contracted in a Member State of the EU where the EU citizen was living as an exercise of the freedom of movement ensured by Article 21 TFEU, the Advocate General held that "*the place where the marriage was entered into is irrelevant.*"[33] Therefore, the ECJ added a requisite to the derived right of residence of the same-sex spouse of an EU citizen.

The reason is that the Advocate General had no tribute to pay to Article 21 TFEU since he relied only on the Directive. Firstly, he recalled the *Metock* ruling, in which the Court held that Article 3(1) of Directive 2004/38 must be interpreted as meaning that the third-country national who is the spouse of a EU citizen residing in a Member State whose nationality he does not possess benefits from the provisions of that Directive, irrespective of when and where their marriage took place.[34] Secondly, he marked the difference between the provision about marriage in Article 2(2)(a) of the Directive and the one about registered partnership in Article 2(2)(b) and in particular

32 Law of 20 May 2016 n. 76 (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*), published in *GU Serie Generale*, 21 May 2016, n. 118.

33 See points from 48 to 53 of the Opinion.

34 ECJ 25 July 2008, EU:C:2008:449, *Metock and Others*, curia.europa.eu/juris/documents.jsf?num=C-127/08.

to the Union legislature's decision to make express reference to the law of the host Member State in the case of a registered partnership.

Moreover, the Advocate General clearly sustained an updating of the traditional definition of marriage: "*the solution adopted by the Court in the judgment of 31 May 2001,* D and Sweden v. Council *(C-122/99 P and C-125/99 P, EU:C:2001:304), by which 'according to the definition generally accepted by the Member States, the term marriage means a union between persons of the opposite sex', now seems to me outdated*" (point 57 of the Opinion). However, the ECJ did not follow this suggestion and stayed focused on the purposes of EU free movement law.

From this comparison it is evident that the ECJ showed a certain restraint in its judgment.

In conclusion, the solution given by the Court and its choice to limit the effects of its preliminary ruling for the sole purposes of EU free movement law seems to be fair because of the sensitive nature of the issue, which involves political choices that do not belong to the judiciary power.

The only aspect that seems problematic is the requirement of a marriage contracted in a Member State, since it leaves several doubts as to the possibility of a third-country national, who is the spouse of an EU citizen due to a marriage contracted in a State which is not a part of the EU, to be granted a derived right of residence under Article 2(2)(a) of Directive 2004/38.

MICAELA LOTTINI*

EU LAW ON ANIMAL WELFARE AND ITS CORRECT AND EFFECTIVE APPLICATION

ABSTRACT. *With the support and cooperation of the Member States, the EU institutions have been promoting animal welfare for more than forty years. The aim of the EU policy on animal welfare is to reconcile the interests of the various actors on the market with the interest of 'individual' animals to improve the quality of their lives and to avoid their pain and suffering. The first part of this article outlines, in general terms, the EU policy on animal welfare, focusing also on its 'constitutional aspects' and, in particular, on the newly introduced Article 13 of the Treaty on the Functioning of the European Union (TFEU), expressly dealing with animal welfare and on its interpretation by the Court of Justice of the European Union (CJEU). The second part of the article deals with the new initiatives of the Commission on animal welfare. Some conclusive remarks follow.*

1. Preliminary remarks

«A popular saying, unauthoritatively ascribed to Mahatma Gandhi, has it that the greatness of a nation and its moral progress can be judged by the way its animals are treated. If that is the case, then the matter under consideration warrants particular attention».

This is the *incipit* of the Opinion delivered (on 21 January 2016) by Advocate General (AG) Nils Wahl in a case (*Masterrind*)[1] on the interpretation of the EU rules

* Professor of Administrative Law and State and Market in EU Law, at the Law Department of the University of Rome 'Roma Tre'.

1 C-469/14.

on the protection of animals during transport.

The AG, with his very unusual (for a legal Opinion) opening paragraph, effectively gives a sense of the increased relevance and significance that 'animal welfare' has gained in the cultural, ethical, and legal debate[2] in Europe and worldwide. He also gives an insight into the issues raised, both at a philosophical and legal level, on whether animals should be understood as objects of human ownership, or as holders of independent interests.[3]

Notwithstanding that no specific competence is conferred upon the Union by the Treaties, a European policy (in cooperation with the Member States) has been developed to protect and improve the living conditions of animals.

This is clearly reflected in the several Regulations and Directives adopted over the years, in addition to the other Policy Papers from the different EU institutions concerned (Commission, Parliament, Council),[4] dealing with the welfare of animals.

All in all, the EU policy on animal welfare is aimed at striking a balance between the various interests at stake within the internal market and the interests of animals as 'sentient beings,' in the context of an ever-increasing awareness and concern for the way in which animals are treated and of an open debate on their legal status.

It should also be emphasised that the Commission made it clear that EU legislation on the protection of animals is also contributing to foster the proper functioning of the internal market, by harmonising the relevant standards to avoid competitive distortions (*Evaluation of the EU Policy on Animal Welfare and Possible Policy Options for the Future* – Final Report).[5]

Indeed, the EU policy on animal welfare is part of the strategy for the integration of the internal market as its objective is to strike a balance between the businesses'

2 A debate, which traces back to ancient Greek philosophy.

3 If not even legal rights.

4 See, in this respect, the website of the European Commission: https://ec.europa.eu/food/animals/welfare_en.

5 The evaluation was commissioned by the Directorate General for Health and Consumers (DG SANCO) of the European Commission under the terms of the framework contract between GHK Consulting and the same DG SANCO, December 2010, available at: http://www.eupaw.eu/, p. 1.

interest to generate a profit and other non-economic interests, such as consumer and environmental protection or public health, from this very particular point of view.

Despite the commitment of EU institutions and the fact that the Union has dedicated on average approximately 70 million euros per year[6] to support animal welfare, still much remains to be done, as outlined in the Commission Communication, *on the European Union strategy for the protection and welfare of animals* (2012-2015),[7] adopted in February 2012.

In particular, among the issues that should be dealt with to enhance animal welfare, the Commission acknowledges the lack of enforcement of EU legislation in numerous areas.[8]

This is due, *inter alia*, to the difficulty of applying the same sector specific rules to Member States having different weather conditions, land realities, farming systems; furthermore, Member States often do not take sufficiently effective measures and do not apply enough resources to give effect to the provisions aimed at fostering animal welfare.

Taking these findings into consideration, the Commission proposes a new strategy, having at its core the simplification of the legal framework and the promotion of a better compliance with the legislation in place, in particular through the launch of a new initiative, namely the setting up of the 'EU Platform on animal welfare' (the Platform).

6 The data cover the period 2000-2008. Communication from the Commission to the European Parliament, the Council and the European economic and social Committee, of 15 February 2012, *on the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, COM(2012) 6 final/2, footnote n. 14.

7 Communication from the Commission to the European Parliament, the Council and the European economic and social Committee, of 15 February 2012, *on the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, cit., *passim*.

8 «There are areas where no specific EU legislation exists or the existing general requirements are difficult to apply and are not likely to have practical effects. Moreover, many stakeholders lack sufficient knowledge about animal welfare and consumers lack appropriate information […]». Communication from the Commission to the European Parliament, the Council and the European economic and social Committee, of 15 February 2012, *on the European Union strategy for the protection and welfare of animals 2012-2015*, cit., par 2.

The Platform is an 'Expert Group'[9] whose key task is to assist and advise the Commission on issues relating to the application of EU law on animal welfare, and also to facilitate the exchange of information, experience and best practices amongst the various stakeholders (both public and private).

The Platform is then followed by a more technical initiative, namely the establishment of a network of Reference Centres; each Centre is aimed at providing support and assistance to the Member States in carrying out official controls, in relation to a specific area of animal welfare. Further, each Centre should make available its scientific and technical expertise, carry out studies and develop methods to assess the welfare level of animals, as well as to improve it.

2. EU law on animal welfare and Article 13 TFEU

Animal welfare has since long been on the political agenda of the European Union and of the previous Community. Starting from the 1970s, several international Conventions have been signed and made part of EU law, in relation to farmed animals,[10] pets,[11] wildlife,[12] etc.

Directives and Regulations[13] have been adopted over the past years to cover different aspects of animal welfare: the protection of animals kept for farming purposes,[14]

9 «Commission expert groups are consultative entities set up by the Commission or its services, comprising at least six public and/or private-sector members, which are foreseen to meet more than once. The role of expert groups is to provide advice and expertise to the Commission and its services (…)». Communication from the President to the European Commission, of 10.11.2010, *framework for Commission expert groups: horizontal rules and public register*, C(2010) 7649 final.

10 European Convention, *for the protection of animals kept for farming purposes*, of 10 March 1973, approved and made part of EU law by Council Decision 78/923/EEC, of 19 June 1978, *concerning the conclusion of the European Convention for the protection of animals kept for farming purposes*, OJ L 323, 17 November 1978. See also, the European Convention, *for the protection of animals for slaughter*, 1979.

11 European Convention, *for the protection of pet animals*, 13 November 1987.

12 Convention, *on the conservation of migratory species of wild animals*. The Convention was signed in 1979 (19 September) and entered into force in 1983.

13 For all the relevant information, see the website of the European Commission.

14 Council Directive 98/58/EC of 20 July 1998, *concerning the protection of animals kept for farming purposes* (OJ L 221, 8 August 1998).

during transport,[15] at the time of killing,[16] or used for scientific purposes,[17] but also the keeping of calves,[18] pigs,[19] laying hens[20] and broilers,[21] or the wildlife in zoos.[22] In 2007, Regulation no. 1523/2007[23] was adopted to ban the placing on the market (as well as the import to or the export from the Union) of cat and dog fur and products containing such fur; whereas, in 2009, the EU adopted Regulation no. 1223/2009[24] to prohibit the placing on the market of cosmetic products where the final formulation or the ingredients are subject to animal testing; and so on.

Unsurprisingly, a vast body of case-law was developed by the CJEU on the interpretation and application of these rules.[25]

15 Council Regulation (EC) no. 1/2005, *on the protection of animals during transport* (OJ L 3, 5 January 2005).

16 Council Regulation (EC) no. 1099/2009, *on the protection of animals at the time of killing* (OJ L 303, 18 November 2009). See, in this respect, Commission Implementing Regulation (EU) 2018/723, of 16 May 2018, *amending Annexes I and II to Council Regulation (EC) No 1099/2009 on the protection of animals at the time of killing as regards the approval of low atmospheric pressure stunning.*

17 Directive 2010/63/EU of the European Parliament and the Council, *on the protection of animals used for scientific purposes* (OJ L 276, 20 October 2010).

18 Council Directive 2008/119/EC, *laying down minimum standards for the protection of calves* (OJ L 10, 15 January 2009).

19 Council Directive 2008/120/EC, *laying down minimum standards for the protection of pigs* (OJ L 47, 18 February 2009).

20 Council Directive 1999//74/EC, *laying down minimum standards for the protection of laying hens* (OJ L 203, 3 August 1999).

21 Council Directive 2007/43/EC, *laying down minimum rules for the protection of chickens kept for meat production* (OJ L 183, 12 July 2007).

22 Council Directive 1999/22/EC, *relating to the keeping of wild animals in zoos* (OJ L 94, 9 April 1999). See in this respect also, Council Regulation (EC) n. 338/97, of 9 December 1996, *on the protection of species of wild fauna and flora by regulating trade therein*, OJ L 061, 3 March 1997.

23 Regulation (EC) n. 1523/2007 of the European Parliament and of the Council, of 11 December 2007, *banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur*, OJ L 343, 27 December 2007.

24 Regulation (EC) n. 1223/2009 of the European Parliament and of the Council, of 30 November 2009, *on cosmetic products*, OJ L 342/59, 22 December 2009.

25 Just as an example, see the decisions of the CJEU: *Masterrind*, 28 July 2016, Case C-469/14; *Rubach*, 16 July 2009, Case C-344/08; *Sofia Zoo*, 4 September 2014, Case C-532/13.

In 2009, the Treaty of Lisbon introduced a specific provision on animal welfare, Article 13 of the TFEU, drawing on Declaration no. 24 *on the protection of animals*, annexed to the Final Act of the Treaty on European Union (Maastricht Treaty) and on Protocol no. 33 *on protection and welfare of animals*, introduced with the Treaty of Amsterdam.[26] Both the Declaration and the Protocol called upon EU institutions and Member States to take into consideration the welfare of animals when drafting and implementing legislation and policies.

By recognising animals as 'sentient beings,' Article 13 TFEU offers a first legal answer to the question on whether animals should be regarded as objects of rights vested in their human owners or holders of independent interests, and therefore recognised a particular legal status and accorded an even limited legal protection.

Given that Article 13 TFEU makes it clear that animals are not 'objects,' this provision requires the Union and the Member States to pay full regard to the welfare requirements of animals in formulating and implementing some EU policies[27] (in particular, the 'internal market' policy), while respecting the legislative or administrative national rules relating to religious rites, cultural traditions and regional heritage.

As it is apparent, Article 13 TFEU does not provide a definition of 'animal welfare'[28] or of 'sentient being'; nor it specifies whether in the above-mentioned policies, animal welfare has to prevail over the other interests at stake or has to be balanced with them and under which conditions.

26 «The high contracting parties, desiring to ensure improved protection and respect for the welfare of animals as sentient beings, have agreed upon the following provision which shall be annexed to the Treaty establishing the European Community, in formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage». For a comment, see, T. Camm-D. Bowles, *Animal welfare and the treaty of Rome – legal analysis of the protocol on animal welfare and welfare standards in the European Union*, in *Journal of environmental law*, 2000, p. 197.

27 Agriculture, fisheries, transport, internal market, research and technical development and space.

28 In this respect, it is worth noting that the European Convention, *for the protection of pet animals*, of 13 November 1987, indicates (Art. 3) the basic principles for animal welfare: «1 Nobody shall cause a pet animal unnecessary pain, suffering or distress. 2 Nobody shall abandon a pet animal».

In that regard, it should be borne in mind that this provision sets a limit to animal protection, identified in respect of Member States' religious rites, cultural traditions and regional heritage.[29]

All things considered, the wording of Article 13 TFEU leaves many unanswered questions concerning the legal value of the provision and the effects that can derive from it. Arguably, replies to such questions can be found in the CJEU case-law on the interpretation of the same Article 13 TFEU and of the 'constitutional provisions' predating the amendment introduced by the Lisbon Treaty, such as the aforesaid Declaration n. 24 and Protocol no. 33 *on protection and welfare of animals*.

In that regard, it may be worth focusing on the CJEU judgment of 12 July 2001, issued in the *Jippes case*.[30] Interestingly, in this case the CJEU is called upon to decide if animal welfare can be considered as a 'general principle of EU Law.'

A Dutch Court refers to the Court for a preliminary ruling on whether the ban on vaccination (accompanied by sanitary slaughter) in case of autobrakes of the foot-and-mouth disease, imposed by the relevant European rules, can be considered unlawful because contrary to the 'principle of animal welfare.'

The applicants contend that a general principle of EU law exists to the effect that 'save in so far as may be necessary, animals are not to be exposed to pain or suffering and their health and welfare are not to be impaired.'[31]

They maintain that the principle forms part of the collective legal consciousness[32] and of the European legal order, due to the intention expressed by the Member

29 V. Zeno-Zencovich, *Law, beauty and wrinkles. Firm points and open issues after the EU cosmetics Regulation*, in V. Zeno-Zencovich (eds) *Cosmetici. Diritto, regolazione, bio-etica*, Roma Tre Press, Roma 2014, p. 9, at 16.

30 C-189/01.

31 Par. 36.

32 Legal scholars point out in this respect that: «a general principle of EU law may firstly originate from sources of written law; provisions of the Treaties or of secondary legislation which are regarded by the CJEU a manifestation of general principles. Sometimes the Court of Justice infers general principles of law from the "Treaty system" rather than from a single EU law provision […] ». Also […] «the existence of a general principle is inferred by the Court of Justice as a principle common to the laws of the member States […]. In this regard it is necessary to point out that the EU Court of Justice has never declared it to be necessary – for a general principle to be considered a general principle of EU law – that the principle concerned should be present in all, or even in most of the legal systems of the member States. It was in fact, at times, considered sufficient that the principle was present in only one of the system examined,

States and the Community (EU) in ratifying the various Conventions (on animal welfare) and in adopting specific legislation on the matter (as well as from the above-mentioned Protocol no. 33).

The conclusion reached by the CJEU is that 'animal welfare' is not to be regarded as a general principle of Community law (EU law), nor does it form part of the objectives of the EU Treaties.

Legal scholars refer to as general principle of EU law: «the yardstick against which the legality of measures adopted within the field of Community law is to be measured.»[33] Furthermore, it is also argued that: «as occurs in all national legal orders, also in EU legal order the main function of general principles of law has been, from the very beginning, to allow EU judges to fill in the gaps in EU legal order. The general principles of EU law aim at assisting judges and public administrations in the interpretation of written norms whose meaning is uncertain or unclear; this is the reason why such principles are binding on members States as primary law.»[34]

The legal consequence of considering animal welfare as a general principle would be that all the relevant regulations should be considered unlawful if they failed to achieve an effective protection of animals. Bringing this argument to the extreme, one could even argue that the mere 'use' of animals should be subject to a justification.

If animal welfare is not to be regarded as a general principle of EU law, nonetheless, the CJEU makes it clear (consistently with its previous case-law)[35] that the interests of the Community (EU) indeed include the health and protection of animals (EU), which are also amongst the requirements of public interest that the Community (EU) institutions must take into account in exercising their powers (*United Kingdom*

if it fitted well with achieving the objectives of the Treaties. [...]». D. U. Galetta, *General principles of EU law as evidence of the development of a common European legal thinking: the example of the proportionality principle (from the Italian perspective)*, in H.-J. Blanke - P. Cruz Villalón - T. Klein - J. Ziller (eds), *Common European legal thinking. Essays in honor of Albrecht Weber*, Springer, Heidelberg 2016, p. 221, at 223.

33 E. Spaventa, *Case C-189/01 H. Jippes*, in *Common market law review*, 39, 2002, p. 1159, at 1163.

34 A. Adinolfi, *I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri*, in *Rivista italiana di diritto pubblico comunitario*, 3-4, 1994, p. 521

35 *Holdijk and Others*, 21 May 1981, joined Cases C-141/81 to 143/81; *Hedley Lomas*, 23 May 1996, Case C-5/94; *Compassion in World Farming*, 19 March 1998, Case C-1/96; *Mondiet*, 24 November 1993, Case C-405/92.

v Council);[36] Protocol no. 33 seeks to reinforce this obligation, whose fulfilment can be verified, in particular, in the context of a review of the proportionality of the measure in question.

As a matter of fact, it has to be borne in mind that Article 36 TFEU[37] indicates the protection of animals as one of the general interest grounds that can be taken as justifications[38] for national measures restricting the free movement of goods between Member States. In other words, a national restrictive measure does not breach the EU single market rules if it pursues the objective of protecting animals and it is necessary and proportionate to that end.

In sum, the welfare of animals, in the view of the CJEU, is not a fundamental principle of EU law or an objective of the EU Treaties, however, it is a 'legitimate objective in the public interest'[39] that must be taken into account and balanced with the other interests at stake.

The CJEU confirms this view in the judgments issued after the introduction of Article 13 TFEU,[40] as it is clearly pointed out by Advocate General M. Bobek, in its Opinion delivered on 17 March 2016, in the case *European Federation for Cosmetic Ingredients*,[41] where he makes it clear that: «there is a manifest value statement on the part of the Union, at both primary and secondary levels of EU law, […] nonetheless, as with other values, animal welfare is not absolute» […].[42]

In other words, animal welfare is a *value* that has to be promoted and fostered, as it is expressly stated, *inter alia,* by Recital n. 2 of Directive 2010/63/EU *on the pro-*

36 *United Kingdom v Council*, 23 February 1988, Case C-131/86, par. 17.

37 «The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property». […].

38 *Viamex Agrar Handel e ZVK*, 17 January 2008, joined Cases C-37/06 and 58/06.

39 See, to that effect, *Viamex Agrar Handel and ZVK*, cit., par. 22, and *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, 19 June 2008 Case C-219/07, par. 27.

40 *Zuchtvieh-Export GmbH*, 23 April 2015, Case C-424/13, par. 35.

41 C-592/14.

42 Parr. 20 and 21.

tection of animals used for scientific purposes:[43] «Animal welfare is a value of the Union that is enshrined in Article 13 of the TFEU.»

As a matter of fact, it is interesting to note that the CJEU is willing to use Article 13 TFEU to justify an extensive interpretation of the rules which are aimed at protecting animals.[44]

Therefore, Article 13 TFEU is hardly revolutionary and legal scholars point out that despite its introduction, within the EU legal system, animals still seem to be attributed a dual status, that of 'sentient beings' and 'products' or more precisely 'goods' (which in accordance with the CJEU case-law are products 'which can be valued in money and which are capable, as such, of forming the subject of commercial transactions').[45]

Nonetheless, Article 13 TFEU is certainly an important step toward a more effective protection of animals, because it clarifies (hopefully conclusively), that they are not 'objects' and that animal welfare is a value that has to be upheld.

This clearly raises important legal and ethical issues that have to be dealt with, not only at a European level, but also at a national one. In this respect, Article 13 TFEU is substantially part of the legal 'constitutional' framework of the Member States; consequently, the protection of animals has indirectly been incorporated into the their shared legal and ethical values that must be consistently taken into account by policy makers, judges and public authorities.

3. The new strategy of the Commission and the enforcement of the existing legislation

Over the past few years, the Commission adopted several instruments[46] that grouped the various aspects of the EU policy on animal welfare and indicated a comprehensive European strategy, by proposing lines of action to reconcile animal welfare with economic interests.

More in particular, with the Communication *on the European Union Strategy*

43 OJ L 276/33.

44 *Brouwer*, 14 June 2012, Case C-355/11.

45 *Commission v Italy*, 10 December 1968, Case C-7/68.

46 Community Action Plan *on the Protection and Welfare of Animals 2006-2010.*

for the Protection and Welfare of Animals (2012-2015),[47] the Commission identifies «the main common drivers that affect the welfare status of animals in the Union»[48] and indicates the strategic actions that should be taken.

The Commission acknowledges that the Union has been adopting or adapting specific pieces of legislation to specific problems to the effect that some regulations contain provisions that are too general to have practical effects and that welfare requirements do not cover all animal species or all the emerging problems and issues.

Hence, the Commission considers the possibility of introducing a simplified EU legislative framework, setting out animal welfare principles for all animals kept in the context of an economic activity. The new framework should also promote simplification, reduction of administrative burden and the valorisation of welfare standards as a means to enhance competitiveness of the EU food industry.

According to the Commission, the establishment of general principles in a consolidated revised EU legislative framework could contribute to the simplification of the animal welfare *acquis* and ultimately *facilitate its enforcement*.

As a matter of fact, the lack of enforcement of the EU legislation by the Member States is still common in a number of areas; some of them do not take sufficient measures to inform stakeholders, to train official inspectors, to perform checks and to apply sanctions.[49]

As a result, numerous EU legislative provisions on animal welfare have not been fully applied and have not delivered the intended effects.

The Commission makes it clear that it considers the issue of compliance as a matter of priority. In this respect, among other things,[50] with the Communication *on the*

47 COM/2012/06 final.

48 P. 4.

49 Communication from the Commission to the European Parliament, the Council and the European economic and social Committee, of 15 February 2012, *on the European Union strategy for the protection and welfare of animals 2012-2015*, cit., p. 4.

50 In accordance with the Commission, consumers, stakeholders and the general public still lack appropriate information on animal welfare aspects. Hence, it is necessary to raise awareness of respect for animals, to promote responsible ownership and to inform consumers about the relevant EU legislation. In this respect, the Commission plans to launch a study to map out the current animal welfare education and information activities (both at a national

European Union Strategy for the Protection and Welfare of Animals,[51] following up on previous Policy Papers,[52] the Commission expresses its intention to set up a European network of *Reference Centres for animal welfare*, based on a central coordination institute acting in cooperation with a network of national research institutions located in the Member States.

The Centres should provide technical support for the development and implementation of animal welfare policies, and ensure that the competent authorities (especially at a national level) receive coherent and uniform technical information on the way the EU legislation has to be implemented.

By its Decision of 24 January 2017,[53] the Commission set up the EU 'Platform on animal welfare.' This 'Platform' is an 'Expert Group'[54], consisting of 75 members representatives of the competent authorities of the Member States[55] responsible for animal welfare; international intergovernmental organisations; the European Food Safety Authority; business and professional organisations carrying out activities at the EU level in the food supply chain where animals or animal products are involved as well as in the keeping of animals for other farming purposes; organisations from the civil society; and also independent experts from academic and research institutes.[56]

In accordance with Article 2 of the Decision, the 'Platform' assists the Com-

and European level); moreover, it plans to promote transnational information campaigns or educational initiatives on animal welfare.

51 Cit.

52 For example, the establishment of European Reference Centres had already been discussed by the Commission in the: Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Options for animal welfare labelling and the establishment of a European Network of Reference Centres for the protection and welfare of animals*, of 28 October 2009, COM(2009)584 final, Art. 8.

53 *Establishing the Commission Expert Group 'Platform on Animal Welfare'*, 2017/C 31/12, OJEU C 31/61, 31 January 2017.

54 See, infra, footnote n. 9.

55 States that are members of the agreement on the European Economic Area (EEA).

56 In practice, forty members have been appointed by the Director General for Health and Food Safety following a call for applications to represent business and professional organisations, organisations from civil society and independent experts from research institutes. Thirty-five members represent public institutions such as competent authorities, international organisations working on animal welfare and the European Food Safety Authority.

mission with the development of coordinated actions to foster the implementation and application of EU law on animal welfare and its correct understanding.

The Platform should also encourage dialogue between competent authorities, businesses, civil society, academia, scientists, international organisations, etc., on topics related to animal welfare. A further task of the Platform is to foster a more affective and correct application of EU law, by promoting exchange of experiences and good practices, scientific knowledge and innovations.

Article 3 provides that, in general, the Commission may consult the 'Platform' on any matter related to animal welfare relevant for the Union.

The Platform may also appoint a maximum of five observers.[57]

As for its functioning, the Platform meets twice a year, working in relation to specific areas and on specific projects; it regularly invites other fora or stakeholders to present their initiatives and activities, acting as a hub for connecting the various spheres where animal welfare is debated at an international level.

The Platform aims at assisting the Commission in its objectives which include a better implementation of the EU animal welfare legislation and the promotion of EU standards at the global level.

The Platform could also develop activities where there is no specific EU legislation or activities in order to promote good animal welfare practices. This could be done through the production of guidance documents on specific issues or on more general topics, such as animal welfare labelling.

It is worth noting that the activities and meetings of the Platform are public and available online as podcasts.

During its second meeting, the Platform launched the first Reference Centre for Animal Welfare, in accordance with its above-mentioned documents from the Commission and the Official Controls Regulation (EU) 2017/625.[58]

In particular, recital no. 73 of the Controls Regulation states that «for the per-

57 For example, Switzerland has been granted an observer status within the Platform.

58 Regulation (EU) 2017/625 of the European Parliament and of the Council, of 15 March 2017, *on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products*, OJ L 95, 7 April 2017.

formance of official controls and other official activities, which are aimed at identifying possible violations to the rules […] in the field of animal welfare, the competent authorities should have access to updated, reliable and consistent technical data, to research findings, new techniques and the necessary expertise for the correct application of Union legislation applicable in those two areas. For that purpose, the Commission should be able to designate, and rely on the expert assistance of, European Union Reference Centres for the authenticity and integrity of the agri-food chain and for animal welfare.»

Hence, Article 95 of the Official Controls Regulation (whose heading is *Designation of European Union Reference Centres for animal welfare*) spells out that: «the Commission shall, by means of implementing acts, designate European Union Reference Centres for animal welfare that shall support the activities of the Commission and of the member States in relation to the application of the rules for welfare requirements for animals» (no. 1).

The Centres have to be designated following a public selection process (Article 95, n. 2), and are responsible for the supporting task of providing scientific and technical expertise to relevant national networks and bodies in the area of animal welfare; of developing or coordinating the development of methods for the assessment of the level of welfare of animals and for the improvement of the welfare of animals; of carrying out scientific and technical studies on the welfare of animals used for commercial or scientific purposes; of conducting training courses for staff of the national scientific networks or bodies, for staff of the competent authorities and for experts from third Countries; of disseminating research findings and technical innovations and collaborating with Union research bodies (Article 96 - *Responsibilities and tasks of European Union Reference Centres for animal welfare*).

On 5 March 2018, following a public selection process,[59] a consortium formed by the Wageningen Livestock Research (the Netherlands), the Friedrich Loeffler Institute (Germany) and the Department of Animal Science at Aarhus University (Denmark) was designated by the Commission as the first European Union Reference Centre for

59 Call for selection and designation of the first European Union Reference Centre for animal welfare, 13 October 2017, available at: https://ec.europa.eu/info/news/first-eu-reference-centre-animal-welfare-call-selection-launched-2017-oct-17_en.

Animal Welfare (Commission Implementing Regulation (EU) 2018/329).[60]

This first Centre will focus on pig welfare since improving the enforcement of the legislation of pigs is one of the Commission's priorities in the area of animal welfare. Its designation will be reviewed every five years. The specific tasks of the Centre will be defined in the annual or multiannual work programs established in conformity with the objectives and priorities of the relevant work programs adopted by the Commission.

4. Conclusions

With the support and cooperation of the Member States, the EU institutions have been promoting animal welfare for more than forty years.

The aim of the EU policy on animal welfare is to reconcile the interests of the various actors on the market with the interest of 'individual' animals to improve the quality of their lives, and not to be subject to degrading treatments or exposed to pain and suffering.

The policy has a multifaceted approach, which goes from raising awareness amongst consumers and the public at large of respect of animals, to the creation of a level playing field through the harmonisation of standards and requirements, in order to avoid 'animal welfare dumping' that could (*inter alia*) adversely affect the well-functioning of the competitive market.

Evidently, this is a very ambitious goal due to the considerable economic and non-economic interests at stake, the balance of which is often in practice left to the CJEU and its discretion in the interpretation of the law.

A major step forward was made with the introduction of Article 13 TFEU, which clearly dispels any doubt about the current legal status of animals under EU law (at least in theory). What this provision states is that animals are not 'objects' but 'sentient beings,' and should be treated as such.

The interpretation of Article 13 TFEU (and of the previous 'constitutional' provisions) made by the CJEU reveals that the protection of animals' interests and the

60 Commission Implementing Regulation (EU) 2018/329, of 5 March 2018, *designating a European Union Reference Centre for Animal Welfare*, C/2018/1223, OJ L 63, 6.3.2018.

promotion of their well-being is not considered a fundamental principle of EU law. Yet, animal welfare is a 'public interest' that must be taken into consideration by the EU institutions and Member States (or in general by public authorities) when formulating or applying their policies and making their decisions.

Even though animals can still be the object of legal rights (of humans), in principle their well-being should be negatively affected only under a (strict?) legal test of necessity and proportionality; the conflicting interests of animals and individuals should be carefully weighed up.

Over the last few years, the Commission adopted a series of documents to encourage further debate on the future developments of the policy, with a particular focus on its strengths and weaknesses.

The attention of the Commission is centred, more specifically, on the correct enforcement of the already existing rules and on the promotion of new initiatives, such as the 'EU Platform on animal welfare', which in fact is aimed at fostering the correct application of EU law on animal welfare both at a national and European level; and the Reference Centres, which are expected to provide technical support.

In conclusion, much has been done at a European level to foster the protection of animals and still much remains to be done, in particular when it comes to the correct application and enforcement of the relevant EU principles and rules.

Having said that, the author of this article holds the opinion that the creation of a specific forum of discussion, such as the EU Platform (that is a means whereby experts can share information and experience) and the introduction of the EU Reference Centres that make available their technical expertise, can be viable initiatives to further the protection of animals across the EU. All in all, these mechanisms should target each and every problem in the regulatory process and in the subsequent process of application of the enacted rules. This approach should be aimed at avoiding contrasts by promoting cooperation and dialogue at all levels to achieve an ever-increasing protection of animals and a more integrated and ethical internal market.

However laudable and far-reaching the efforts made by the EU institutions to improve the well-being of animals may be, it is evident that all the moral dilemmas inherent in the protection of animal welfare still remain unresolved. However, dealing with these dilemmas is something that goes beyond the possibilities of legal scholars.

CARLO CAPRIOGLIO*

RETHINKING LEGAL EDUCATION IN TIMES OF CRISIS

Some Remarks from the Case of the Roma Tre Migration and Citizenship Law Clinic

ABSTRACT. *The article provides a critical understanding of the expansion of clinical legal education in Italy, which have occurred in the last decade, in order to investigate the meaning of the implementation of law clinics in Italian law departments and its role in rethinking legal education methods and practice. In this light, the paper will not deal with the issue of the definition of law clinic, which fuels the debate among clinical scholars. Rather, it will analyse the evolution of clinical legal education through the lens of the concept of 'crisis'. Intended as a situation in which social processes, actors and forces push for a rethinking of legal knowledge categories and teaching methods, 'crisis' will provide a critical analytical framework through which to reflect on the unconventional approach to law and legal education that law clinics foster. In the following sections, the article will build on practical examples from the experience of the Roma Tre Migration and Citizenship Law Clinic to show, on the one hand, how a law clinic can become a relevant actor in promoting access to justice for marginalized people and groups; on the other, how it can carry out activities that – by linking research and social engagement – lead students to develop a critical approach toward law and legal instruments, deepening their understanding of the relation between law and social phenomena.*

* Post-doc Researcher Philosophy Of Law, Faculty of Law, Roma Tre University.

1. Introduction

Italian law clinics are a recent phenomenon, having begun about ten years ago with the first clinical trials in the law departments of Brescia, Torino-IUC and Roma Tre.[1] What could have seemed like just an attempt to introduce a practice-oriented teaching methodology borrowed from the US tradition of legal education, it soon turned out to be a much deeper phenomenon. In her research on Italian clinical legal education, Clelia Bartoli refers to it as a 'movement' in order to grasp the meaning and implications of a process that entails a different approach to the law and raises awareness of the role played by legal scholars in the promotion of social justice.[2] Bartoli argues that the 'clinical movement' mirrors "the emergence of a new wave in academia" that is moving toward "a more realistic, critical and socially committed conception of law."[3] In other words, the spread of law clinics across Italy[4] cannot be understood simply as a successful introduction of a way of teaching distinct from the theoretical and methodological apparatus of legal formalism; instead, it reveals a more profound process of rethinking of the legal culture. The clinical approach challenges, in fact, the alleged autonomy of legal knowledge and its *subject*, as it entails a "social conception of the law" that takes seriously the role, interests and relationships of legal and social actors in what has been defined as "the social processes of legal invention."[5] Simply put, clinical methodology – at least when it promotes 'access to justice' for disadvantaged groups and subjects – brings to the fore the multiple social, economic and political factors that shape the law as a 'social

1 Further information is available at: www.clinicalegale.unibs.it; www.iuctorino.it/studies/clini cal-education; www.clinicalegale.giur.uniroma3.it.

2 C. Bartoli, *The Italian legal clinics movement: Data and prospects*, *in International Journal of Clinical Education*, 22, 2, 2015, pp. 213-229.

3 Bartoli, *The Italian legal clinics movement*, cit., p. 214.

4 In 2019 more than twenty law departments in Italy provide clinical courses, including those at the universities of Brescia, Roma Tre, Turin, International University College of Turin, Perugia, Florence, Palermo, Catania, Verona, Bergamo, Milano-Bicocca, Genoa, Bari, Teramo, Sassari, Naples, Foggia, Trieste and Udine. The main fields of interest are human rights, migration and refugees, labour, criminal and prison law. There are also clinical programs focusing on disabilities, anti-discrimination, family law, minors, privacy and environmental law. For an overview of the clinical programs in Italy, see Bartoli, *The Italian legal clinics movement*, cit.

5 A. M. Hespanha, *Legal History and Legal Education, in Rg*, 4, 2004, pp. 41-56, pp. 45-46.

product' and in its everyday application.

It is worth noting that what happened in Italy has occurred within a broader process of the expansion of clinical legal education in Europe. In the last two decades, other countries such as Spain, France and Germany have experienced either the introduction or the multiplication of clinical programs. However, law clinics are not *per se* a novelty in European legal education. Clinics appeared in British universities in the 1970s, in the wake of the first wave of modern clinical legal education in common law countries,[6] and the 1990s saw the first clinical trials in former communist countries.[7] Therefore, the recent spread of law clinics can be seen as a third step in the implementation of European clinical legal education. Yet this recent increase is more than just a further development. In fact, this new generation of law clinics has distanced itself from both the Anglo-American and the Eastern European traditions to create a "distinctly European identity", linked to the peculiarities of civil law systems but, above all, with the engagement with the wider social, political and legal space produced by the process of European integration.[8] In this light, Italian law clinics are part of a broader movement at the regional level that is challenging the traditional apparatus of the European legal teaching, which has historically been tied to legal formalism, by pushing it to reimagine itself as more "pragmatic, policy-aware, and action-oriented."[9]

This process has generated an increasing interest among legal scholars, and there is now a rich body of literature about clinical legal education and its development at both the international and national levels. The discussions tend to focus on 'technical' and 'methodological' aspects, trying to sketch a definition of law clinic and to identify its key or essential features.[10] The heterogeneity of organizational models, the broad

6 J. Giddings *et al.*, *The first wave of modern clinical legal education. The United States, Britain, Canada and Australia*, in F. Bloch (ed.), *The Global Clinical Movement: Educating Lawyers for Social Justice*, Oxford, Oxford University Press, 2011, pp. 6-7.

7 E. Winkler, *Clinical Legal Education. A report on the concept of law clinics*, 2012, available at: law.handels.gu.se/digitalAssets/1500/1500268_law-clinic-rapport.pdf.

8 A. Alemanno, L. Khadar, *Conclusion*, in Id. (eds.), *Reinventing Legal Education: How Clinical Education Is Reforming the Teaching and Practice of Law in Europe*, Cambridge, Cambridge University Press, 2018, p. 341.

9 Alemanno, Khadar, *Conclusion*, cit., p. 347.

10 For an extensive discussion of this point, see C. Bartoli, *Legal clinics in Europe: for a commitment of higher*

range of legal and paralegal activities that clinics perform and the variety of fields of intervention are all relevant matters that fuel the debate among clinical scholars, pushing them to deepen the critical issue of what a law clinic is and is not.

The problem of sketching a definition of law clinic is also at the heart of the Italian debate. This need for clarity among clinical scholars certainly comes from the variety of clinical programs, which is at least partially connected to the current 'crisis of legal studies'. Since, in fact, the drop of enrolments in Italian law departments in the last eight years,[11] they are pushed towards fierce competition in attracting students by offering a wide range of courses and practice-oriented activities, which are supposed to provide them with better job opportunities in the future. This competition leads law departments to widen their clinical programs that can be presented as innovative methodologies for developing professional skills and competences, yet running the risk of using 'law clinics' as a label for activities that don't fit either the essential methodological aspects or the social justice values that underlie the tradition of clinical legal education.

However, given the existing literature, this article will not address definitional issues or the organisation and functioning of law clinics. It is enough to recall here Emil Winkler's survey of the variety of clinical programs around the world and his claim that "there are no set definitions of what a law clinic or clinical programs should consist of."[12] According to Winkler, a definition of a legal clinic "would be something like [...] *a combination of practical legal education and legal aid*."[13] This very brief and 'open' definition seems sufficient to account for the fundamental features that a law clinic should include: student involvement in practical activities concerning real legal cases and actual clients, for both educational and social justice aims.[14]

education in social justice, *in Diritto & Questioni Pubbliche, Special issue,* 2016. See also WINKLER, *Clinical Legal Education*, cit.

11 From 27.171 in the academic year 2011/12 to 17.130 in 2017/2018. See, Anvur, *Rapporto biennale sullo stato del sistema universitario e della ricerca*, 2018, p. 28.

12 WINKLER, *Clinical Legal Education,* cit., p. 4.

13 *Ibid.*

14 While the definition advanced by the European Network for Clinical Legal Education (ENCLE) is much

In light of these considerations, this article will start by focusing on the case of Italy with the purpose of situating the introduction and growth of law clinics against the backdrop of the 'multiple crises' that involved Italian society in the last decade. Intended as a situation in which social processes of socio-legal change push for a rethinking of legal knowledge and teaching practice, 'crisis' will provide a critical analytical framework through which to reflect on the unconventional approach to law and legal education that law clinics foster. The subsequent sections will build on practical examples from the experience of the Roma Tre Migration and Citizenship Law Clinic[15] – one of the first clinical programs in Italian law departments. The third part will thus analyse the case of the Roma Tre Law Clinic's free consultancy service for migrants and asylum seekers. The fourth will instead focus on the Clinic's intervention on the topic of migrant labour exploitation in Italian agriculture. The dual aim is to show, on the one hand, how a law clinic can become a relevant actor in promoting access to justice for marginalized people and groups; on the other, how it can carry out activities that – by linking research and social engagement – lead students to develop a critical approach toward law and legal instruments, deepening their understanding of the relation between law and social phenomena.

2. Legal education in times of crisis: framing the spread of law clinics in the context of socio-legal change

The expansion of clinical legal education is often read in connection with processes of the globalisation of law and jurisdictions and of increasing internationalization of higher education.[16] This is especially true in Europe, where the integration process created a transnational legal space that enables scholars, lawyers and students to easily exchange knowledge and teaching experiences and, above all, to approach common issues

more detailed and extensive, it refers to the same essential aspects. See the ENCLE definition at: encle.org/about-encle/definition-of-a-legal-clinic. For an extensive discussion on this matter, see A. Maestroni, *Accesso alla giustizia, solidarietà e sussidiarietà nelle cliniche legali*, Torino, Giappichelli, 2018.

15 About the Roma Tre Migration and Citizenship Law Clinic, see F. Asta *et al.*, *Il ruolo delle cliniche legali come strumento di insegnamento e approccio al diritto. L'esperienza della Clinica del Diritto dell'Immigrazione e della Cittadinanza di Roma Tre*, in A. Maestroni *et al.* (eds.), *Teorie e Pratiche nelle Cliniche Legali*, Torino, Giappichelli, 2018.

16 Alemanno, Khadar, *Conclusion*, cit., pp. 323-330.

with a shared legal framework. As several scholars have pointed out, there is a line between law clinics and the so-called 'Bologna Process' that aimed to harmonize the higher education systems in EU countries in order to meet the requirements of the labour markets.[17]

The Bologna Process certainly created a favourable cultural environment for the introduction of clinical legal education as a practice-oriented teaching methodology. Marella and Rigo stress the 'ideological consistency' of the convergence of the development of clinical programs and the Bologna Process, since law clinics can easily be bent to the aims of 'professionalization' and 'commodification' of education and knowledge for which Bologna was designed.[18] In this light, since the 2012 reform of the legal profession provided for law students to carry out the first six months of the necessary eighteen-month lawyers' training pathway during university studies,[19] some law departments allow students to do it by attending a clinical program. A quick glance to the websites of law departments demonstrates the link between law clinics and 'professionalization,' since most of them group clinical programs and legal traineeships under the same page. Nevertheless, as Marella and Rigo observe, it is important to highlight how Italian law clinics seem for now to have moved instead toward a critical understanding of the law and a stronger awareness of the jurists' role in promoting social change.[20] This article suggests thus framing the 'blossoming' of law clinics in the context of the recent 'multiple crises' of Italian society and legal order in order to understand it as the result of socio-legal change that required a rethinking of both legal education and culture.

In the last decade, the word 'crisis' has been endlessly evoked: the 2008 economic collapse, the mass movements of refugees in 2011 and 2015, the fall of traditional political parties and the resurgence of nationalism, the growing opposition to the EU and the events related to climate change are just some examples of the social and political

17 The 'Bologna Process' was an intergovernmental cooperation that involved 48 European countries, the Commission and a number of other actors. About the connection between the Process and the development of clinical legal education in Europe, see Bartoli, *Legal clinics in Europe*, cit., pp. 76-78.

18 M. R. Marella, E. Rigo, *Le cliniche legali, i beni comuni e la globalizzazione dei modelli di accesso alla giustizia e di lawyering*, *in Rivista Critica del Diritto Privato*, 4, 2015, pp. 537-556, p. 546.

19 Art. 40, Law no. 247/2012, entitled 'The New Discipline of the Legislation of Legal Professions.'

20 Marella, Rigo, *Le cliniche legali*, cit., p. 547.

phenomena labelled as 'crises.' 'Crisis' does not have a clear definition in either legal theory or social and political theory. Under this perspective, Giuseppe Campesi defines it as "a catch-all word, a label […] that denotes a situation that breaks with routine and calls for immediate action:" in this sense, it is "almost a synonym for 'emergency.'"[21] Read in the traditional approach of "Securitization Theory" then, 'crisis' works as a discursive tool used by powerful social actors for purposes of government and control. Since the 'crisis narrative' often produces this kind of political effects, one can look to the several 'crises' that hit Italian society as opening up spaces for exceptional or emergency measures. Yet in this context, the term reflects something different: a period or phase of relevant social, political and legal changes that question – or rather overturn – the well-established theoretical frameworks, approaches and categories, as well as the teaching methodologies of several fields of knowledge.

In the last ten years, 'crisis' has not just been used to justify the adoption of emergency measures, rather it has served as an effective rhetorical tool that encompassed and merged very different social phenomena into a sort of 'crisis continuum,' that has profoundly shaped both people's experiences and the production of knowledge. According to Dines, Montagna and Vacchelli, "crisis has not simply become the descriptor of a succession of events, but rather a paradigmatic frame for thinking about our times."[22] They describe 'crisis' "as a powerful narrative device that, when invoked, produces a set of meanings that structure knowledge of social phenomena and, crucially, shape policy decisions, governance structures but also our own approach as academics to studying the world."[23] Since 'crisis' has become a "protracted experiential condition"[24] with epistemological implications for the scientific understanding and the critic of social phenomena, the development of clinical legal education must be understood within the

21 G. Campesi, *Crisis, migration and the consolidation of the EU border control regime*, *in Int. J. Migration and Border Studies*, 4, 3, 2018, pp. 196-221, p. 197.

22 N. Dines *et al.*, *Beyond crisis talk: interrogating migration and crises in Europe, in Sociology*, 52, 3, 2018, pp. 439-447, p. 441

23 *Ibid.*

24 *Ibid*. The authors base their analysis on Jane Roitman's reflections on the topic contained in the book *Anti-crisis*, published by Duke University Press in 2014.

epistemic effects of this context. Intended as a situation in which social processes, actors, factors and forces push for a rethinking of legal knowledge and teaching methods, 'crisis' provides thus a critical analytical framework through which to reflect on the spread of law clinics and their unconventional approach to law and legal education. After all, the history of clinical legal education has always been connected to periods of radical social change. In the United States, the spread of law clinics was fostered by the civil rights movement from the mid-50s to the late 60s, while in Latin America and Eastern Europe countries the introduction of clinical legal education occurred during phases of deep constitutional transition.[25]

In Italy, the main areas law clinics intervene in underline the relevance of processes of social and legal change in the development of clinical legal education. Migration and asylum, labour, prison, environmental law, anti-discrimination and gender-related issues are all domains characterized by structural inequalities and an unbalanced distribution of power among social actors. Furthermore, while these features largely result from the law and its concrete application by institutional actors, they have been sharpened by specific political and legislative choices made in – and justified by – the protracted experience of 'crisis.' Labour and migration are useful examples. On the one hand, the worsening of the overall economic situation brought drastic welfare cutbacks and a further boost toward the liberalization of labor markets and the precarization of working relationships. On the other, a number of legislative reforms and policies have significantly restricted the rights of migrants, asylum seekers and refugees.[26] The policies deployed in these fields have often relied upon the 'narrative of crisis' as in the cases of the financial crisis or the rhetoric of the refugee and migration 'crisis' or 'invasion': narratives often interwoven and mutually reinforcing. Thus the choice of the early Italian law clinics to focus on labour and migration is not just revealing of the general commitment to social justice and the promotion of access to justice for vulnerable

25 Bloch (ed.), *The Global Clinical Movement,* cit.

26 Since 2009 a long series of reform have affected the Italian migration and asylum law with the aim of restricting migrants' rights, their access to social services and even their arrival on the national territory. Recently the so-called "law on security" (no. 132/2018) abolished the permit for humanitarian reasons, restricted asylum seekers' rights and weakened the Italian reception system.

people and groups that steers clinical activities;[27] it also highlights the choice to deal with topical issues emerging from important processes of social and legal transformation in domains of social relationships that are inherently conflictual due to the unequal distribution of rights and – more broadly – of social power.

The close connection with social change seems to be – at least in part – a direct consequence of the clinical methodology itself. Since they provide legal assistance to real subjects and communities, law clinics open a breach in the narrow community of academia and bring to the fore everyday issues and phenomena. It is the *clients* who drive to some extent the educational experience, steering it toward some legal issues rather than others; and this is especially true for law clinics that offer legal aid services directly to the public.[28] What occurs in clinical legal education is thus a *reversal* of the traditional process of knowledge production: instead of scholars selecting and labelling specific matters as relevant for legal thought, actual common people and social groups point to what deserves – or better, *needs* – to be addressed by legal science. Law clinics make it possible for social realities to cross past academic boundaries and contaminate the approach, topics and process of legal knowledge production. Using the famous phrasing of the post-colonial scholar Dipesh Chakrabarty, Marella and Rigo argue that the global spread of law clinics can be understood in terms of a sort of 'provincialization' of "traditional legal culture."[29] In other words, as Chakrabarty's purpose was to renew the understanding of categories and assumptions of Western political tradition by "exploring how this thought – which is now everybody's heritage and which affects us all – may be renewed from and for the margins,"[30] that is, from its colonial roots and history, the 'provincialization' of legal education (and knowledge) works to shift the atten-

27 Bartoli, *The Italian legal clinics movement*, cit.. On the experience of the University of Brescia, see M. Barbera, *The making of a civil law clinic*, in M. Pedrazzoli, L. Nogler, L. Corazza (eds.), *Risistemare il diritto del lavoro*. *Liber amicorum*, FrancoAngeli, Milano, 2012, p. 323 ss.

28 At the moment, there are only two law clinics in Italy that provide a drop-in service open to the public within a Law Department: the Roma Tre Migration and Citizenship Law Clinic, established in 2010 and, since 2015, the Human Rights Law Clinic at the University of Palermo.

29 Marella, Rigo, *Le cliniche legali*, cit., p. 542.

30 D. Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, Princeton University Press, Princeton, 2000, p. 16.

tion to issues and layers of the legal order that are usually overlooked or relegated to the margins. This, in turn, promotes a critical rethinking of the categories and paradigms of legal science.

As said before, research on clinical legal education shows that the vast majority of the law clinics in Italy pursue access to justice for disadvantaged subjects and groups, minorities and vulnerable people. This commitment offers a viewpoint from the bottom and margins of the social hierarchy, meaning that layers of social order are engaged by people who are more likely to face abuse, unlawful practices and violations of their rights by public authorities and officials and more powerful private actors (i.e., employers). In these fields of society people often have disordered, unconventional and unwarranted legal experiences, far from the canonical understanding of the rule of law and its founding principles of due process, equality, non-discrimination and so on. People at the bottom of society usually face what Michel Foucault calls the 'daily life' of liberal democracies, in which the

> calm force of the State, it is known, conceals its violence; its laws, the unlawfulness; its rules, the arbitrariness. The swarming of abuses, misuses and irregularities constitutes not so much an inevitable detour, but the essential and permanent life of the "rule of law". The bad temper of the prosecutor or the indigestion of the judge, the sleepiness of the jurors are not hitches to the universality of the law, but they rather secure its *ordered course* [emphasis mine].[31]

Foucault's reflection highlights the structural role of hidden abuses and daily violations as a condition for the ordinary exercise of the law in liberal states and its role in securing and governing the hierarchies of the society.

The reversal of approach entailed in clinical methodology focuses attention on issues – the everyday unlawful practices and behaviours of public administrations, local authorities and minor courts – usually experienced by marginalized subjects and thus largely overlooked by legal culture and scholars whose approach is often influenced by

31 M. Foucault, *Préface* a M. Debard, J. L. Henning, *Les Juges kaki,* Paris, 1977, pp. 7-10, in M. Foucault, *Dits et Écrits*, vol. III, n. 191, pp. 138-140.

their belonging to higher social classes.[32] Most of all, it sheds light on how these practices and behaviours are crucial in defining what the "social conditions of the possibility"[33] are for the access to justice and the exercise of rights by specific social groups, communities and categories of people. And once again, it comes to light the connection between clinical legal education and processes of social change: marginalized groups and communities are, in fact, often both the bearers and promoters of the most powerful processes of transformation of the relationships and the rules of the society.[34]

3. Promoting access to justice for migrants and asylum seekers in times of crisis: the case of the Roma Tre Law Clinic on Migration and Citizenship

When the Roma Tre Law Clinic on Migration and Citizenship was established as an experimental seminar on immigration and asylum law in 2010, it was one of the very first clinical programs in Italy. From the very beginning, the clinic dealt with real legal cases, focusing on the situation of the Afghan asylum seekers whose asylum requests were stuck because of the provisions of the "Dublin Regulation" and who lived in a self-built tent camp – called "*la buca*" (*the hole*) – at the Ostiense train station near the University.[35] The clinic has been an optional curricular course since the academic year 2011-2012, and it is attended each year by an average of 25 students. The course provides students with both practical and theoretical knowledge on migration and refugee law, along the lines of the 'learning by doing approach' developed by the US law clinics. The Clinic has always combined theoretical knowledge with practical experience, through a teaching methodology that starts from the claims and the needs of actual rights-bearing people.

In 2012, the Clinic set up a free legal consultancy service ('Front Office'), the

32 L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Roma-Bari, Laterza, 1998, p. 800.

33 P. Bourdieu, *La distinction: critique sociale du jugement*, 1979, trad. it. *La distinzione. Critica sociale del gusto*, Bologna, il Mulino, 1983, p. 427.

34 On this point, see F. Asta *et al.*, *Il ruolo delle cliniche legali*, cit.; and C. Caprioglio, *Teaching Law, Promoting Social Justice. Notes on the Development of Clinical Legal Education in Italy*, in *German Journal Of Legal Education*, 4, 2017, pp. 225-239.

35 H. Grant, J. Domokos, *Dublin regulation leaves asylum seekers with their fingers burnt*, *in The Guardian*, 7th October 2011, available at www.theguardian.com/world/2011/oct/07/dublin-regulation-european-asylum-seekers.

first in Italy, inside the building of the Law Department, which is open to the public weekly all year long. There, students are directly involved in analysing and solving real cases from outside the University. Under the supervision of two immigration lawyers, students provide legal information, support for administrative procedures and practices, draft appeals against refusals of international protection and research asylum seekers' countries of origin.[36] Open to the public and offering free and qualified services of legal assistance, the Front Office soon became a point of reference for local immigrant communities and asylum seekers in Rome. In fact, thanks to the students' commitment and competences, the Clinic now has around 200 users annually.[37] This figure does not show just the high quality of the Clinic's services and the excellent work of the students, but mostly the actual – and growing – social need for access to legal aid and consultancy. Third-country nationals, refugees and asylum seekers are, in fact, a structural component of the contemporary Italian society, forming more than 8% of the resident population.[38]

This demand for legal assistance comes from the fact that migrants – perhaps more than other disadvantaged groups – face multiple obstacles in accessing justice, with not only social, cultural and economic barriers, but also legal hurdles keeping them from claiming their rights. Applying to the court means acting *as a citizen* in the public sphere and doing it, most of the times, on your own, as an individual: the lack of formal recognition of citizenship status thus structurally limits migrants' access to justice. Furthermore, the growing intolerance towards migrants and minorities, the precarity of their legal status, the lack of awareness of their rights and the increasing costs of proceedings and of a legal defense all discourage migrants from seeking to have their rights respected.

36 Due to the relevance of the Countries of Origin Information (COI) in the appeals against first-instance denials of asylum, a new clinical program was launched in 2017 – the Legal Clinic on Human Rights and Refugee Law – focused on producing independent "COI Reports" available as open source at protezioneinternazionale.giur.uniroma3.it. The program is carried out in collaboration with the Tribunal of Rome, which often refers to these reports in asylum cases. For further information, see giurisprudenza.uniroma3.it/didattica/cliniche-legali/legal-clinic-human-rights-and-refugee-law.

37 Further information is available at www.giurisprudenza.uniroma3.it/didattica/cliniche-legali/clinica-del-diritto-dellimmigrazione-e-della-cittadinanza.

38 According to the Italian National Institute of Statistics, there were 5,144,440 third-country nationals in Italy as of the 1st January 2018, an increase of around 100,000 people from the previous year. The data are available at www.dati.istat.it/?lang=en.

In this context, it is worth noting that the Italian system of legal aid, regulated by Decree of the President of the Republic no. 115/2002, is supposed to ensure the right to take legal action and the right to defense at all levels and states of judicial proceedings for poor people, in accordance with Article 24 of the Italian Constitution.[39] However, despite the formal provisions, the law requires very strict income limits to be eligible for legal aid and it does not cover the costs of the administrative procedures related to the exercise of fundamental rights. Furthermore, the many bureaucratic obstacles in applying for legal aid significantly reduce the access to justice for vulnerable people and socially disadvantaged groups.

The case of the recognition of international protection is a good example of the ineffectiveness of the Italian legal aid system. During the whole first part of the procedure, from the submission of the asylum request to the decision of the Territorial Commission,[40] the law does not provide asylum seekers with any form of legal assistance or administrative support. This lack of support has consequences. For instance, in 2018 the percentage of recognition of international protection (refugee status and subsidiary protection) in the first instance was only 16% of all asylum requests, while, in the same year, the Clinic lodged more than 80 appeals against the denials of international protection before the Tribunal of Rome, with 90% of the decisions resulting in the applicant receiving a form of protection. The Clinic's experience, even though of limited statistical value, nonetheless reveals how crucial it is for asylum seekers to have access to qualified, professional legal assistance.

The issue of the access to justice for migrants in Italy has been raised by several independent organizations. In the 2014 report on the conditions of undocumented migrants in Italy – which references the findings of the Roma Tre Law Clinic's research on

39 Art. 24 Constitution of the Italian Republic: "1. Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. 2. Defense is an inviolable right at every stage and instance of legal proceedings. 3. The poor are entitled by law to proper means for action or defense in all courts […]".

40 The Territorial Commissions for the international protection recognition are administrative authorities competent to process requests for international protection in first instance. Located in the main urban centres, the Territorial Commissions are part of the Ministry of Interior and operate under the coordination of the National Commission, which is based in Rome.

administrative detention[41] – the International Commission of Jurists (ICJ) states that

> […] the need for substantial reforms in both the legal framework and in policies and practice of Italian officials, both executive and judicial, charged with administering the expulsion and detention regime, is compelling, if equal access to justice is to be guaranteed to undocumented migrants. […] The ICJ mission found the present system to be seriously and unacceptably flawed and incapable of ensuring an effective remedy to migrants in situations of expulsion or detention.[42]

While the study considers only the so-called undocumented migrants, the ICJ and the European Council on Refugees and Exiles (ECRE) have raised similar concerns about asylum seekers and refugees.[43] Furthermore, the reforms adopted by the Italian Government in 2017 and 2018 seriously curtailed asylum seekers' rights and ability to apply to courts, further limiting their access to justice.[44] The 2017 reform implemented the system of administrative detention, which allows asylum seekers to be detained under specific conditions,[45] it changed the regulation of the notifications of decisions of the Territorial Commission and reduced the number of the jurisdictional levels for appealing denials of international protection from three to two. The decree also estab-

41 The Roma Tre Law Clinic coordinated the research "Lexilium – Observatory on judicial review of migrants' removal." The research was carried out by a national network of law clinics and it collected and examined case law from Justices of the Peace in Bari, Bologna, Prato, Rome and Turin during the first and last quarters of 2015. Further information is available at www.lexilium.it. For the final reports, see F. Mastromartino, E. Rigo, M. Veglio, *Lexilium. Osservatorio sulla giurisprudenza in materia di immigrazione del giudice di pace: sintesi rapporti 2015*, *in Diritto, immigrazione e cittadinanza*, 2, 2017.

42 International Commission of Jurists (ICJ), *'Undocumented' Justice for Migrants in Italy. A mission report*, Geneva, October 2014, p. 62.

43 International Commission of Jurists (ICJ), European Council on Refugees and Exiles (ECRE), *Joint Submission to the United Nations Special Rapporteur on the human rights of migrants report on access to justice for migrants*, 16th April 2018.

44 Law Decree no. 13/2017, converted with amendments into Law no. 46/2017, and the Law Decree no. 13/2018, converted with amendments into Law no. 132/2018.

45 On this point, see F. Asta-C. Caprioglio, *Per giusta decisione. Riflessioni sul controllo giurisdizionale del trattenimento degli stranieri*, in *Materiali per una storia della cultura giuridica*, 2, 2017, pp. 553-572.

lished fast-tracked procedures for the evaluation of the appeals that allow judges not to hear the applicant in person and to ground the decision on the video recording of the interview with the Territorial Commission. The 2018 reform abrogated the provision of the permit for 'humanitarian reasons,' which was the most common form of protection granted in Italy in recent years, and downsized the reception system for asylum seekers and refugees.

From this perspective, Italian law clinics – especially those dealing with migration and asylum issues – are operating in a context that recalls, to some extent, the historical circumstances in which the first wave of clinics arose. As mentioned, modern clinical legal education took shape in US law schools in the '60s with the aim of improving access to justice for poor people and vulnerable groups who could not afford the costs of justice, since the American law did not – and does not – provide a public legal aid in several domains, such as civil law cases.[46] While law clinics cannot fill the gaps in the legal protection system, the experience of the Roma Tre Law Clinic shows that they can play a vital role in promoting access to justice for migrants and asylum seekers. But there is something more. The work of the Clinic must be seen in connection with the phenomenon of the so-called 'crisis of justice' or 'crisis of jurisdiction': that is the increasing failure of courts to enforce the law and to protect rights from violations and abuses. The debate on the 'crisis of justice' – especially in the domain of civil law – dates back to the early '80s and has been understood in connection with the retreat of welfare state and the de-judicialization (*i.e.*, Alternative Dispute Resolution (ADR) procedures) prompted by neoliberal policies.[47]

Relatedly, the austerity measures adopted in Italy in the aftermath of the 2008 financial crisis led to an increase of the costs of proceedings and gave a further boost to

46 GIDDINS *et al.*, *The First Wave of Modern Clinical Legal Education*, cit. About the issue of access to justice and legal aid in the United States, see G. P. JAMES, *Access to Justice, Costs, and Legal Aid*, *in American Journal of Comparative Law*, 54, Supplement Issue, 2006, pp. 293-316.

47 V. DENTI, *Riflessioni sulla crisi della giustizia civile*, *in Il Foro Italiano*, 108, 11, 1985, pp. 341-352; L. Lanfranchi, *Costi sociali della crisi della giustizia civile e degiurisdizionalizzazione neoliberista*, in Giur. it., 1996, IV, 165 ss. For a comparative analysis of the issue, see A. Zuckerman (ed.), *Civil justice in crisis: comparative perspectives of civil procedure,* Oxford University Press, Oxford, 2000. On the relation between clinical legal education and the process of de-judicialization in Italy, MARELLA-RIGO, *Le cliniche legali*, cit., pp. 544-546.

the phenomenon of the "escape from litigation (*fuga dalla giustizia*)" that, according to Maria Rosaria Ferrarese, means "that people use the channels of civil justice less and less to settle their disputes."[48] Since in the field of migration and asylum the 'escape from litigation' often means that migrants' fundamental rights are less and less recognized, the activities of the Roma Tre Law Clinic are an interesting experiment in recovering and rehabilitating the law and litigation as effective tools for the enhancement of constitutional rights and freedoms.

4. Linking research and social engagement: the case of students in support of migrant workers in the fields of Southern Italy

In the last six years, the Roma Tre Law Clinic has developed a line of action-research focused on the issue of migrant labour and exploitation in Italy's agricultural sector. This section will not provide an extensive analysis of the topic, but instead will show how, by linking research and social engagement, these activities have enabled students to develop a critical approach to the law and its relation with social actors and processes. First, however, it is worth spending a few moments on the process that led the Clinic to focus on the topic.

In the last ten years, the media has paid increasing attention to migrant labour in the Italian agricultural areas, especially in Southern regions, where revolts and strikes for fair wages and better living conditions have shed light on the severe living and working conditions of migrant workers, for example, in Rosarno in 2010 and Nardò in 2011.[49] This raised public awareness of the role of the illegal gangmaster system (*caporalato*) and organised crime in agriculture.[50] For this reason, between 2011 and 2016 the Italian Parliament adopted two legislative reforms focusing on law enforcement and

48 M. R. Ferrarese, *Civil Justice and the Judicial Role in Italy, in The Justice System Journal, 13, 2, 1988-89,* pp. 168-185.

49 D. Perrotta, *Ben oltre lo sfruttamento: lavorare da migranti in agricoltura, in il Mulino*, n. 1/14, 2014, available at www.rivistailmulino.it/journal/articlefulltext/index/Article/Journal:RWARTICLE: 75749. For a critical reflection on media representation of migrant workers exploitation in Italy, see N. Dines, E. Rigo, *Postcolonial Citizenships and the "Refugeeization" of the Workforce: Migrant Agricultural Labor in the Italian*, in S. Ponzanesi and G. Colpani (eds), *Postcolonial Transitions in Europe: Contexts, Practices and Politics*, Lanham, Rowman and International, 2015.

50 Illegal gangmaster is the unlawful recruitment of workers on behalf of third parties, often under exploitative conditions. It is a widespread phenomenon in Italian agriculture, but also in other sectors of production (*i.e.*, construction).

the prevention and repression of crimes, as like 'gangmastering' and the most severe forms of labour exploitation.[51] A criminal law approach that brought legal scholars to mainly focus on the analysis of practical problems arising from the application of the new criminal offence provisions.[52]

However, the Clinic's interest in this matter did not come from the increasing media and political attention or the increased engagement of the law and legal scholars. Rather, the interest stemmed from the encounter with actual migrant workers during the daily activities of legal aid and consultancy. The migrants who came to the Front Office for legal advice on migration-law-related issues told students about the harsh conditions and on-going violations they suffered living and working as harvesters in Southern Italy. Students thus decided to leave the University to support Clinic users in the places where they spent considerable time facing severe problems and abuses. This shows the reversal of the knowledge production process and the continuous reshaping of the educational path that clinical legal education can entail. In fact, the development of a research interest on the topic did not come from the awareness of some more sensitive scholars of the social relevance of migrant agricultural labour exploitation. Instead, it was the social relevance of the issue that pushed the Clinic – especially the students – to face a phenomenon affecting the daily lives of thousands of migrant citizens in Italy.[53]

The first activities were carried out in the winter 2014, when a group of students moved for two weeks to Rosarno, in Calabria; there, in cooperation with a network of as-

51 Law Decree no. 138/2011, later converted with amendments into Law no. 148/2011, and Law no. 199/2016. The first reform introduced the offence of "Unlawful gangmastering and labour exploitation" in Article 603-*bis* of the Italian Criminal Code. The 2016 reform amended the provision in order to make the employer liable for the behaviour of labour exploitation. For a critical reflection on the new criminal offence provision, see S. T. Cagli, *La controversa relazione della sanzione penale con il diritto del lavoro, tra ineffettività, depenalizzazione e istanze populiste,* in *Lavoro e diritto*, 3-4, 2017, pp. 613-642.

52 D. Ferranti, *La legge n. 199/2016: disposizioni penali in materia di caporalato e sfruttamento del lavoro nell'ottica del legislatore*, in *Diritto Penale Contemporaneo (on-line)*, 2016.

53 For an introduction of the problem and a survey of the relevant legal instruments, see A. Corrado, *Migrazioni e lavoro agricolo in italia: le ragioni di una relazione problematica*, EUI, Firenze, 2018. For an extensive denouncement of the severe labour exploitation of migrants in Italian agriculture, see Amnesty International, *Exploited Labour. Migrant workers in Italy's agricultural sector*, 2012, available at www.amnesty.org/en/documents/EUR30/020/2012/en.

sociations and volunteers, they set up a legal consultancy service inside the workers' tent camp. The students provided legal information and advice to workers on migration and asylum law and took part in assemblies of workers and public initiatives to denounce the severe conditions of exploitation. The same year, the students spent part of their summer holidays in the north of Apulia on the Capitanata plain, one of the most important tomato–growing areas in Italy, where about 15,000 migrants work during the harvest season. For two weeks, students offered consultancy and legal advice to migrant workers in the self–built "Grand Ghetto," inhabited at the time by around 1,500 sub–Saharan migrants. The students also organized discussions about matters of interest to the workers, in order to better understand their views and opinions, give practical information related to the exercise of rights and help them improve their Italian language skills.[54]

The strong interest shown by students, and the legal competences acquired during the fieldwork experiences, brought the Clinic to promote, in the summer 2016, an 'experimental field trip' to Venosa, in Basilicata, an important tomato-growing area of Southern Italy, where the regional government was experimenting with new policies for the reception of temporary migrant workers, related to the broader aim of prevention and repression of gangmastering.[55] There, the students visited the Italian Red Cross reception centre for migrant workers and denounced the inadequate living conditions and problems workers faced every day in the centre: particularly, the isolation, the long distance from the harvest and the lack of basic services.[56] Students also took part in the organisation of a public event for migrant workers promoted by a network of local associations. The following year, students carried out a fieldwork research in the north of Apulia, focusing on the functioning of the supply chain and the role of large-scale retailers in creating the conditions for agricultural labour exploitation. Finally, in 2018 a

54 Some of the findings and reflections emerging from the research carried out in Apulia and Calabria appeared in E. Rigo (ed), *Leggi Migranti Caporali. Prospettive critiche e di ricerca sullo sfruttamento del lavoro in agricoltura*, Pisa, Pacini Giuridica, 2016.

55 On this, see N. Dines, *Humanitarian reason and the representation and management of migrant agricultural labour, in Revista THEOMAI*, 38, 2018, pp. 37-53.

56 About the fieldwork researches in Apulia and Basilicata of the Roma Tre Law Clinic's students, see also Asta *et al.*, *Il ruolo delle cliniche legali*, cit.

group of students went back to Basilicata to update the research carried out two years earlier and observe the changes in local reception of migrant workers.

These activities had implications for the students' legal education, since they fostered an unconventional perspective on the law that shed light on the connection between legal instruments and relationships and interests of different social actors involved in agricultural production. As in 'participatory action research,' where "researchers are not separate, neutral academics theorizing about others, but co-researchers or collaborators with people working towards social equality,"[57] students worked closely with migrant workers to support their rights and claims. In fact, as Hough and Kalsen argue, "'legal participatory action research,' or legal PAR, makes its most significant and original contribution to legal scholarship not only by 'looking to the bottom' in a theoretical sense, but by treating those 'at the bottom' as equal research partners who are presumptively best situated to identify, analyse, and solve the problems that directly affect them."[58]

Leaving aside a methodological discussion of what 'legal participatory action research' is and its strengths and limits, what is interesting here is that the close relationship with workers built during fieldwork brought the students to share, to some extent, the view of the workers. Being in close touch with the social reality of agricultural labour led students to adopt what can be defined as a "situated justice perspective:" a realistic and anti-formalist approach that highlights the various social, political, economic and cultural factors that affect the ability of vulnerable subjects to exercise their rights.[59] In other words, it enabled students to experience first-hand the multiple structural – and often hidden – factors that limit the exercise of rights by vulnerable social actors like migrant workers. Furthermore, it shed light on the role of the law in shaping the balance of forces between employers and workers. In a context structurally shaped by conflicting interests – such as labour relationships – less powerful rights-bearers do

57 B. Gatenby, M. Humphries, *Feminist Participatory Action Research: Methodological and Ethical Issues, in Women's Studies International Forum*, 23, 1, 2000, pp. 89-105, p. 90.

58 E. Houh, K. Kalsen, *It's Critical: Legal Participatory Action Research, in Michigan Journal of Race & Law*, 19, 2, 2014, pp. 287-347, p. 294.

59 E. Berrey *et al.*, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation, in Law and Society Review*, 46, 1, 2012, pp. 1-36, p. 3.

not often perceive the law as a neutral tool that provides rules and schemes to settle legal disputes among equal subjects fairly. On the contrary, a situated justice perspective led students to experience that "legal categories, frameworks, and cultural constructs are not impartial" and that "[D]espite law's ideological promise of neutrality, legal concepts communicate the worldviews of people in positions of power and facilitate those groups' interests."[60]

Migrant labour in Italian agriculture is thus a paradigmatic example of the role of the law in securing a certain set of social relationships. The issue lies, in fact, at the intersection between two different sectors of the legal order – labour and immigration law – both of which regulate domains of society that are structurally unbalanced.[61] In this light, the close observation of what occurs in the harvests of Italian agriculture, through the 'legal participatory action-research' fieldwork activities, increased the students' awareness of the real causes of the widespread violations of rights, the daily abuses and lack of policies of mediation of labour relations in agricultural production. It also enabled them to understand that the Italian labour law often fails to provide effective remedies to migrant workers and, more broadly, an actual legal protection of their rights. It unveiled the law's hidden role in weakening the position of migrant workers in their relationships with their employers. In fact, it made clear how the precariousness of the immigrant legal status and the countless restrictions in their access to social services prevent – or at least discourage – migrants form seeking justice and claiming their rights as workers.[62]

5. Conclusions

The article placed the spread of law clinics in Italy against the backdrop of the context of crisis – or rather, 'multiple crises' – that involved the Italian society in the last ten years. The evolution of clinical methodology in law departments was thus ana-

60 Berrey *et al.*, *Situated Justice*, cit., p. 8. See also, E. Berrey, *Why Diversity Became Orthodox in Higher Education, and How It Changed the Meaning of Race on Campus*, *in Critical Sociology,* 37, 2011, pp. 573-596.

61 For an extensive analysis of the interactions between labour and immigration law, see C. Costello, M. Freedland (eds), *Migrants at Work. Immigration & Vulnerability in Labour Law*, Oxford, Oxford University Press, 2014.

62 On this, see M. McBritton, *Lavoro degli immigrati e lavoro sommerso: l'inadeguatezza della normativa, in Questione Giustizia*, 3, 2014, pp. 171-180.

lysed through the lens of the concept of 'crisis,' intended as a situation in which social processes, actors, factors and forces push for a rethinking of legal knowledge categories and teaching methods. The aims was, in fact, to highlight the connections between clinical legal education and processes of socio-legal change, in order to shed light on the core meaning of the expansion of clinical programs in Italy and the consequences on traditional legal education approach and methods.

Through the analysis of practical examples from the experience of the Roma Tre Migration and Citizenship Law Clinic, the article firstly emphasized the Clinic's role in promoting access to justice for marginalized groups and vulnerable people, as well as in recovering the litigation as an essential tool for the enhancement of fundamental rights in a time of 'crisis of jurisdiction.' Furthermore, the case of migrant labour in agriculture shed light on how a clinic can provide for a "situated justice perspective," which enables students to experience first-hand the multiple structural factors that – behind formal legal provisions – define the real conditions of possibility for the exercise of rights by vulnerable subjects, as well as to understand the role of the law in shaping the balance of forces between social actors.

In light of these reflections, the article thus argued that clinical legal education is not just a matter of methodology, nor of 'simply' enhancing the values of justice and equality that, among others, underlie the Italian Constitution and the most relevant international human rights conventions. Rather, as Marzia Barbera – one of the most prominent Italian clinicians – recently pointed out, law clinics concern something more relevant: at the very core of clinical legal education is, in fact, the 'positioning' of jurists and legal knowledge amid the multiple relations of power and inequality that shape society.[63] Law clinics, in fact, entail a 'partisan' view toward the law that pushes legal scholars and students to side with the less powerful people, communities and social groups. What is at stake in clinical legal education is thus the very understanding of the function of the law and the role that jurists and lawyers play in the face of some of the fundamental challenges and socio-political issues that will shape future societies.

63 Barbera, *Il movimento delle cliniche legali e le sue ragioni*, *in* A. Maestroni *et al.* (eds.), *Teorie e Pratiche nelle Cliniche Legali*, Torino, Giappichelli, 2018, p. XXV.

CLAUDIA GIUSTOLISI[*], TOMMASO SICA[**]

A CONFERENCE ON INTERNAL CONTROLS IN LISTED COMPANIES

(Consob – Grandangolo Conference, Rome, May 21st 2019)
Presentation of the Research Center "*Centro di ricerca interdipartimentale sul diritto europeo della banca e della finanza: Paolo Ferro Luzzi*"

CONTENT. 1. The Research Center and its objectives – 2. The "*Internal Controls in Listed Companies*" Conference

1. The Research Center and its objectives

On Tuesday 21 May 2019 at the Consob auditorium in Rome a conference was held on "Internal Controls in Listed Companies," organized by Consob together with the "*Centro di ricerca interdipartimentale sul diritto europeo della banca e della finanza: Paolo Ferro Luzzi – Grandangolo*," established by Roma Tre University.

The conference was an opportunity for the Director of the "*Centro di ricerca interdipartimentale sul diritto europeo della banca e della finanza: Paolo Ferro Luzzi – Grandangolo*," Professor Concetta Brescia Morra, to present the new Research Center and its various purposes. Professor Brescia Morra recalled that the first meeting of 6 May of the Board of Directors of the newly founded "*Centro di ricerca interdipartimentale sul diritto europeo della banca e della finanza: Paolo Ferro Luzzi – Grandangolo*" took place at the Roma Tre University's Law Department.

The dedication to Professor Paolo Ferro Luzzi is particularly significant, since

[*] Post Doctoral Researcher, Università degli Studi di Siena.

[**] PhD Candidate in Private Law, Roma Tre University.

it refers not only to a "*Maestro*" who is thus honored, but also leads back to his legacy – as a pioneer in the areas of bank and finance law and corporate law – regarding the impact of regulatory innovations, especially of European law, on the economy and on the rights of individuals and enterprises.

The project of a Research Center aims precisely at the stable and coordinated investigation of the interactions between law and economics, inevitably in an interdisciplinary perspective; it is promoted by three Departments of Roma Tre University – the Law Department, the Political Sciences Department and the Business Economics Department – and it seeks to provide the Research Center with its own regulatory, organizational and management autonomy.

Promoting a dynamic synergy of knowledges seems to be one of the most important aspects in the activity of the Center, and not only at the technical level. A social-economic analysis is, in fact, crucial to the impact factor study of lawmaking, as it is also dealing with the related problems in terms of public and private governance at the Italian, but above all, European and international level.

In addition, the Research Center intends to move in the direction of policy, meaning that the research it undertakes will not merely focus on the reasoned recognition of existing material, but it can legitimately aspire to provide advice about the legislative reforms in progress. We should also consider the historical moment in which the Research Center is founded, particularly with regard to the crisis of the European Institutions, often accused of an exclusively economic-financial approach, lacking the legitimization of shared values.

The purpose of the Research Center is therefore to create a regular forum of debate between Italian and European academics involved in different thematic areas and between representatives of public institutions, authorities and relevant bodies. The Research Center also looks towards the internationalization of Roma Tre University, as a place to train young researchers.

Lastly, we are facing a path of extreme scientific, cultural but also social-political and economic importance, in conformity with the mission of Roma Tre University and the Departments involved.

2. The "Internal Controls in Listed Companies" Conference

The "Internal Controls in Listed Companies" conference aimed at taking stock of the most important legal issues revolving around the function of the internal control system in listed companies. The conference was well structured into a first morning session, followed by a round table and a second afternoon session. The opening and the presentation were entrusted to Professor Anna Genovese, a Member of Consob, who was pleased to welcome some of the most important Italian scholars participating in the event. She also highlighted the relevance of such a crucial topic in guaranteeing a uniform regulatory framework.

The first morning session began with the meaningful presentation of Professor Piergaetano Marchetti, who first wanted to remember his friend and colleague Ferro Luzzi. Professor Marchetti then reconstructed the current regulations regarding the internal control system, underlining how legislation on the topic is not completely exhausted but deals with a constant evolution due to the events. The problem, according to Professor Marchetti, is the dearth of autonomous regulations of the alternative systems. Moreover, his speech analyzed the structural and functional characteristics of the internal control system, as well as the disclosure obligations. Lastly, Professor Marchetti analyzed the regulations of the Italian traditional and alternative systems of corporate governance.

His speech was followed by the presentation of Dr. Maria Letizia Ermetes who, as a Consob delegate, provided a series of data on the activity carried out through internal controls. Dr. Ermetes examined first the development of the regulations of the Board of Auditors in the Consolidated Law on Finance. Then, she illustrated some data about both the composition and the functions of the Board of Auditors. In the end, she analyzed the dialogue between Consob and the Boards of Auditors, hoping for an even greater collaboration.

The following speaker to take the floor was Professor Mario Stella Richter, who dealt with the topic of the individual subjective requisites of the members of the internal control bodies in listed companies. In particular, Professor Stella Richter analyzed the requirements of professionalism and independence of the members of the internal control body, the peculiar position of the auditors of the group and the characteristics of the one-tier board system. His speech ended with an in-depth analysis of the self-assessment of the control body.

The last speech of the first session was delivered by Professor Andrea Zoppini, who discussed the adequacy of supervision over compliance with the principles of correct administration and the adequacy and functioning of the administrative and accounting organizational structure. He also examined the business-judgement rule and its possible effects within our system.

The second part of the morning section started with a speech of Professor Marco Maugeri, aimed at observing the role of the supervisory body in the regulation of transactions with related parties.

He called for the renewal of the Consob Regulation no. 17221 of 12 March 2010, in accordance with the new EU Directive no. 2017/828 (SHRD II), recently adopted in Italy with Legislative decree no. 49/2019.

This speech was followed by a round table, coordinated by the Consob Member Dr. Carmine Di Noia. Besides Dr. Simone Scettri, a representative of the association of auditors, some members of the supervisory body of listed companies took part: Rosalba Casiraghi (Eni), Enrico Laghi (Acea), Carolyn Adele Dittmeier (Generali), Simone Scettri (Assirevi), Rossella Locatelli (Intesa Sanpaolo) and Sergio Duca (Enel). The debate was particularly interesting, as the members of the supervisory bodies addressed the most critical issues that they concretely found in the application of the norms. The dialogue was especially focused on what should be deemed as an irregularity to communicate to Consob, according to Consolidated Law on Finance.

The afternoon session started with a speech held by Professor Carlo Angelici, who analyzed the relationships between the administrative functions and the control functions in the traditional system and in the two-tier board system, also focusing on the challenge of the resolutions of the supervisory body. He analyzed the exchange of information between the control body and the administrative body in the traditional system and in the two-tier board system. Professor Angelici also examined the challenge of the resolutions of the Board of Auditors and of the control body in the two-tier board system.

The presentation of Professor Roberto Sacchi reviewed the complaints made by minority shareholders to the Board of Auditors. He explained the requirements that auditors must respect after complaints are filed and he suggested the extension of the regulation of complaints to the directors of companies. In conclusion, he analyzed the complaints in the one- and two-tier board systems.

Professor Giovanni Strampelli focused on the relationship between the supervisory body and shareholders. He showed the difficulties originating from the contact between directors and shareholders and the problems regarding the engagement of institutional investors.

Lastly, Lawyer Salvatore Providenti, as a former Head of Legal Advice in Consob, illustrated the precedents regarding Consob sanctions on the violation of supervisory duties and failure to report irregularities to Consob, according to Article 149 of the Consolidated Law on Finance. Starting from concrete cases, he analyzed the relationship between Article 149, sections 1 and 3 of the Consolidated Law on Finance and their possible evolution following the introduction of the EU Directive SHRD II.

The last presentation was given by Professor Umberto Tombari, who dealt with the issue of the control function of non-executive directors in listed companies. In particular, he analyzed the personal and financial relationships between the auditors, the company and the other companies of the same group. Moreover, he underlined the substantial role of the guidelines of the *Consiglio Nazionale dei dottori commercialisti* concerning the estimate of payments to auditors.

CHIARA FEDERICA PEDACE*, MARTINA MILLEFIORINI**

"EGUAGLIANZA, DONNE E DIRITTI" "EQUALITY, WOMEN AND THE LAW"

Equality, Women and the Law, edited by Alessandra Facchi, Carla Faralli and Tamar Pitch, was published in 2005 (by *Il Mulino Editore*) after the premature death of the author, Letizia Gianformaggio. Never translated into English, the book constitutes a milestone for Feminist Legal Theory. The main objective of this text is the valorisation of the legal principle of equality, in contrast with the critiques raised by the Theory of Difference and by the postmodernist debates in law.

The analysis of the author is conducted with a meticulous analytical approach, and focuses on the interaction between equality and difference: these terms are useful for the debates both on the feminist legal studies and on the theories of equality.

Letizia Gianformaggio's argumentation aims at dissolving the dichotomy between equality and difference by demonstrating their compatibility. According to the author, the confusion generated by the overlap between equal treatment and the treatment of a group of individuals "as if they were equal" has to be overcome. This analysis involves a critical approach to the concept of equality in its "evaluative" meaning, which affirms that differences have to be considered in relation to a single comparative entity. Nonetheless, even acknowledging the bonds of the classic formulation of the principle of equality in these terms, Letizia Gianformaggio demonstrates how it is possible to build other meanings inside the boundaries of the legal system itself. Indeed, the author identifies the necessity of equality as a tool of valorisation of singularities, pursued through

* PhD Candidate in Philosophy of Law, Roma Tre University.

** PhD Candidate in Philosophy of Law, Roma Tre University.

the politics of difference, as a consequence of the universality of fundamental rights. This specific legal equality is considered compatible with the Theory of Difference since the reclamation of diversity basically addresses the protection of the personal dignity considered in its specificity.

In Letizia Gianformaggio's work, the theoretical survey, conducted with analytical precision, was always linked to an inquiry of the legal institutions of the social life that surrounded her.

The critique of the consideration of equality as "sameness" concretely addressed gender difference by considering a series of questions, such as the controversial issue of surrogate motherhood. On this matter, both the author's refusal of the assimilationist approach, and her consideration of the specific nature of female gestation within the rules of its negotiation are significant.

Starting from the biological diversity of female and male procreation, which determines a natural and different bond between the expectant mother and the baby, the author considers as appropriate the decision of the English Court to allow women to give up their baby only after birth, and not at any previous moment, even when the agreement is already defined. This differential treatment is not considered as discriminatory, because it is rooted into a criterion, the material one of the maternal experience, which, if not properly valorised, would lead to the denial of its specificity.

This recurring bond between equality and difference in their assessment, according to which the former is functional to the valorisation of the latter, is to be seen in the author's wider vision of the legal phenomenon as characterized by two inseparable elements: facts and values. In accordance with this vision, equality cannot be defined only in descriptive terms, but it has to be set as an orientating value within the legal system.

The remarkable work of analysis made by the author represents a rare example of passion and courage, when facing the daily practice of law as a service for civil society. Quoting her words: "Our first engagement as female jurists is for women's equality and rights" (Chapter XIV).

LETIZIA GIANFORMAGGIO was born in Spello, Perugia, in 1944. She graduated in Law at the University of Perugia with a thesis in Philosophy of Law supervised by Professor Uberto Scarpelli. She obtained an annual contract at the *Consiglio Nazionale delle Ricerche* (National Italian Council of Research) and she taught Moral Philosophy at the University of Pavia. In 1975 she started teaching Philosophy of Law at the Faculty of Law of the University of Siena and, then, at the University of Ferrara. She expired in Florence in 2004. She was one of the founders of "GIUdIT – *Giuriste d'Italia*" in 2001, an association whose members are Italian women jurists, sensible to gender difference, debating and researching law and politics. She worked on a wide range of themes such as juridical argumentation, equality as well as classical authors *i.e.*, Helvetius and Hans Kelsen. During her academic activity, she did several studies about women and the law. She can be considered one of the most prominent Italian feminist legal theorists of our times.

ALESSANDRA FACCHI is Professor of Philosophy of Law, University of Milan.

CARLA FARALLI is Professor of Philosophy of Law, University of Bologna.

TAMAR PITCH is Professor of Philosophy of Law, University of Perugia. Vice President of GIUdIT.

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