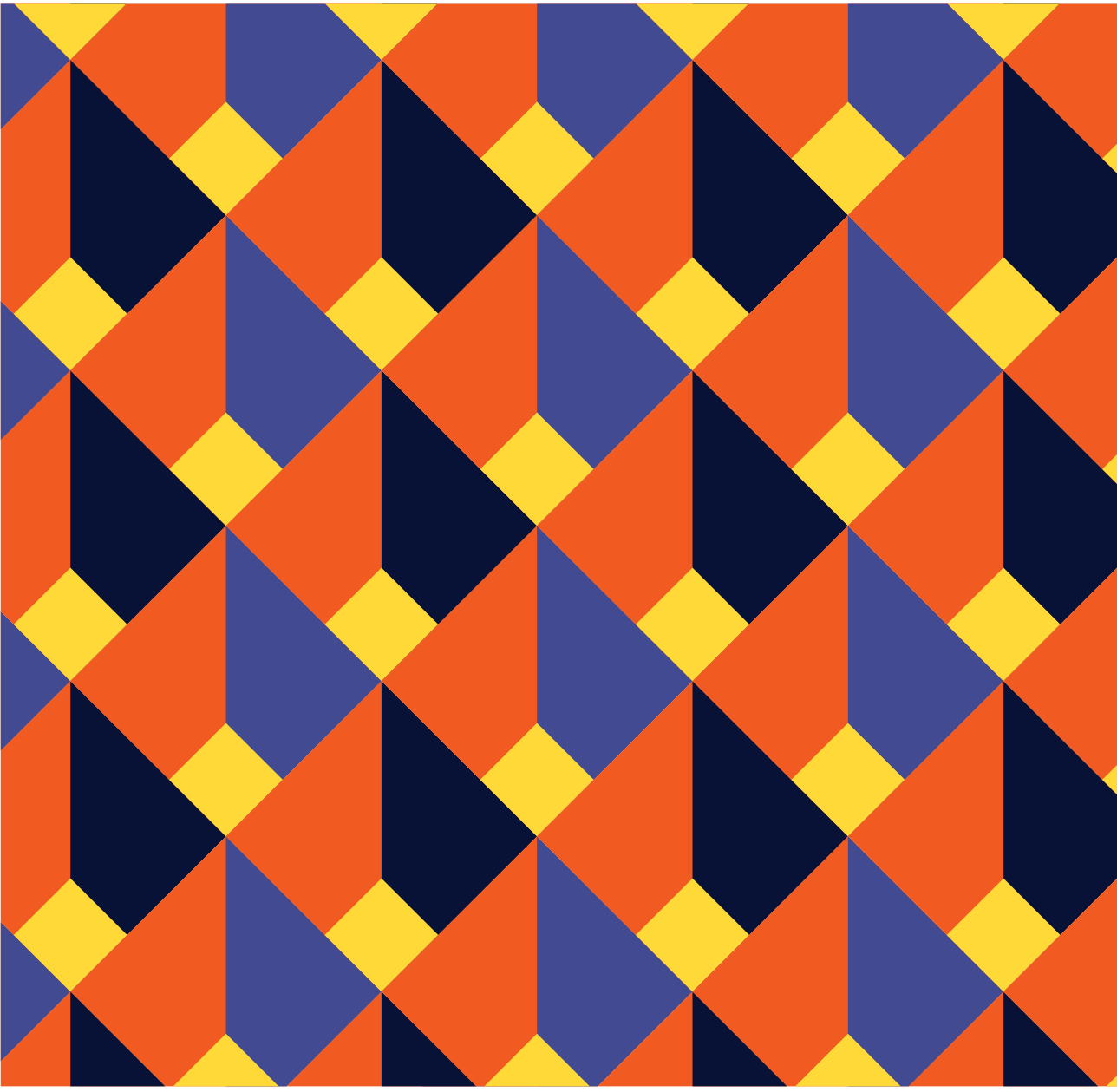
volume two / number two / twenty twenty

ROMA TRE LAW REVIEW



RomaTrE-Press
2021

ROMA TRE LAW REVIEW

volume two / number two / twenty twenty

Roma TrE-Press
2020

ROMA TRE LAW REVIEW
volume two / number two / twenty twenty

Coordinamento editoriale
Editorial Staff Roma Tre Law Review
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Rivista pubblicata nel rispetto del Codice etico adottato dal Dipartimento di Giurisprudenza dell'Università degli Studi Roma Tre, in data 22 aprile 2020.

Cura editoriale e impaginazione
teseo editore Roma teseoeditore.it

Elaborazione grafica della copertina
MOSQUITO mosquitoroma.it

Caratteri grafici utilizzati
Bodoni 72 Smallcaps Book; Didot; MinionPro-Regular (copertina e frontespizio); Adobe Garamond Pro (testo).

Edizioni Roma TrE-Press ©
Roma, marzo 2021
ISSN 2704-9043

http://romatrepress.uniroma3.it

L'attività della *Roma TrE-Press* è svolta nell'ambito della
Fondazione Roma Tre-Education, piazza della Repubblica 10, 00185 Roma.

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GIUSEPPE PALMISANO*

THE RIGHT TO A HEALTHY OR DECENT ENVIRONMENT AS A SOCIAL RIGHT: *ACQUIS* AND FUTURE PROSPECTS OF THE EUROPEAN SOCIAL CHARTER SYSTEM

ABSTRACT. *As emerges from recent trends in international and European human rights law, environmental protection and protection of human rights are complementary and mutually linked. A significant example of the interaction between human rights and protection of environment comes from the European system for the protection of social rights, namely the European Social Charter (ESC) and the practice of the European Committee of Social Rights (ECSR). The present article dwells precisely on the emergence in such system of the right to a healthy environment as an integral part of the right to protection of health, under Article 11 of the ESC, as interpreted and applied by the ECSR. The article then continues to explore further potential and prospects for the protection of environment through the system of the ESC, particularly in the framework of the Charter monitoring procedures (reporting procedure and collective complaints). Lastly, the article proposes some tentative reflections on the possible adoption of a new protocol to the ESC to explicitly incorporate environmental issues into human rights protection. According to the author's view, this would indeed be a positive response to the challenge that environmental issues pose to human rights, and would constitute a step forward to strengthen the legal protection of both environment and social rights.*

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* Full Professor in International Law, Department of Law, Roma Tre University.

5. Incorporating environmental issues into human rights protection by means of an additional Protocol to the ESC – 6. The ESC, and not the European Convention of Human Rights, as the most appropriate European normative framework to protect the human right to a sustainable environment – 7. Possible structure and contents of new environmental provisions to be incorporated into the ESC system

1. The interaction between social rights and legal protection of environment

Although at the international legal level the areas of environmental protection, on the one hand, and protection of human rights (and particularly social rights), on the other hand, originated and developed separately, their interdependence and interaction has become more and more evident through the decades.

A pivotal role in such relationship is clearly the link between human dignity and the existence of a decent environment. As the first Principle of the 1972 Stockholm Declaration puts it, "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations».[1] Similarly, in its 1997 Gabčíkovo-Nagymaros judgment, the International Court of Justice (ICJ) recognised that «the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."[2]

Based on these considerations, it is relatively simple to understand that – from a social rights perspective, that is from a "human rights in everyday life" perspective – environmental protection and protection of social rights are indeed complementary, and closely – mutually – linked.

Complementarity and mutual relationship emerge clearly when considering, first, that the deterioration of the environment has an undeniable impact on the

[1] See Principle 1 of the Declaration of the United Nations Conference on the Human Environment (or Stockholm Declaration), 16 June 1972.

[2] ICJ, Case concerning the Gabčíkovo-Nagymaros Project, Judgment of 25 September 1997, § 53 and § 112 where the ICJ refers to its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, pp. 241-242, § 29.

enjoyment of many social rights, such as – for example – the right to health and the right to safe and healthy working conditions, or the right to adequate housing, the right to work, and the right to protection against poverty and social exclusion. Neglecting environmental issues therefore means that States do not comply with their obligation to fulfil such rights; and not taking measures to avoid or reduce deterioration of the environment may even amount, in itself, to infringing in some cases specific social rights. Second, and in a reciprocal way, adequately respecting many social rights obligations may indeed contribute to improving environmental protection by States.

2. Article 11 of the European Social Charter (ESC), and the right to a healthy environment as a part of the right to protection of health, according to the jurisprudence of the European Committee of Social Rights

In spite of the importance of environmental protection for the object and purpose of a human rights treaty covering the area of social and economic rights, the European Social Charter, unfortunately, does not contain – not even in its "revised" version of 1996 – any provisions expressly referring to environmental issues or any specific provision on the right to a healthy or decent environment.[3]

[3] The European Social Charter (ESC) is a legally binding treaty for the protection of social rights, which is embedded in the institutional framework of the Council of Europe. It has been signed in Turin in 1961, but it has progressively changed by virtue of a process of institutional reform started in the late Eighties and continued during the Nineties of the last century. This process took the form of three Protocols, adopted in 1988, 1991 and 1995, and the Revised Social Charter, in 1996. In 1988 the first additional Protocol added new rights. In 1991, the Amending Protocol was adopted, improving the supervisory mechanism; and in 1995 another additional Protocol, providing for a system of collective complaints, was adopted. The culmination of this reform process came in 1996 with the adoption of the Revised Charter, which added a number of new rights, while at the same time incorporating the basic content of the 1961 Charter and its Protocols. To date, 43 out of the 47 member States of the Council of Europe have ratified either the 1961 Charter or the Revised Charter.
On the European Social Charter, see *inter alia*: Jean-François Akandji-Kombé and Stéphane Leclerc (eds.), *La Charte Sociale Européenne* (Bruylant 2001); David John Harris and John Darcy, *The European Social Charter* (2nd edition, Hotei Publishing 2001); Andrzej Marian Świątkowski, *The Charter of Social Rights of the Council of Europe* (Kluwer Law International 2007); Olivier De Schutter (ed.), *The European Social Charter: a Social Constitution for Europe* (Bruylant 2010); Matti Mikkola, *Social Human Rights of Europe* (Karelactio 2010), Oliver Dörr, 'European Social Charter', in Stefanie Schmahl and Marten Breuer (eds), *The Council of Europe: Its Laws and Policies* (OUP 2017), pp. 507-541. The official documentation of the ESC, as well as the documents of the ECSR (Conclusions, Decisions of Collective Complaints and more) are available on the Council of Europe's website for the Social Charter: available at <https://www.coe.int/en/web/european-social-charter>.

However, the European Committee of Social Rights (ECSR) in its activity of monitoring and interpreting the European Social Charter has been nonetheless able to make an important contribution to clarifying and putting into practice the complementarity and mutual relationship between environmental protection and social rights, to the benefit of both social rights and environmental protection.

This has been possible, in particular, with regard to the application and interpretation of the right to protection of health, which is enshrined in Article 11 of the European Social Charter.[4]

In fact, under Article 11 of the Charter, States are obliged to take appropriate measures to remove as far as possible the causes of ill health, and to prevent epidemic, endemic and other diseases.[5] This means that health systems must respond appropriately to avoidable health risks, i.e. risks that can be controlled by human action.[6]

Since the beginning of this Century, the ECSR has repeatedly pointed out that avoidable risks include those which result from environmental threats, and that the right to protection of health does therefore include the right to a healthy environment.[7] Following such an approach, the Committee has clarified that measures should be designed to remove the causes of ill health resulting from environmental threats such as pollution.[8]

For example, the ECSR found a violation of State's obligations with respect to the right to protection of health under the Charter in a situation where the State had

[4] See ECSR, Conclusions XXI-2 (2017) and Conclusions 2017 on Article 11.

[5] According to Article 11 of the Charter: "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia: 1. to remove as far as possible the causes of ill-health; 2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents." On the right to protection of health under Article 11 of the ESC, see G. Palmisano, "Il diritto alla protezione della salute nella Carta sociale europea," in L. Pineschi (ed.), *La tutela della salute nel diritto internazionale ed europeo tra interessi globali e interessi particolari integrata* (XXI Convegno SIDI - 2016), Napoli, Editoriale Scientifica, 2017, pp. 189-204.

[6] Conclusions XV-2 (2001), Denmark.

[7] Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §§ 194-196.

[8] Conclusions XV-2 (2001), Poland, Article 11§1; and Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, § 202.

not managed "to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest,"[9] or when the authorities had failed to take appropriate measures to remove, as much as possible, the causes of ill-health and to prevent, as far as possible, diseases in view of pollution of a river due to discharge of industrial waste.[10] Other cases concerned the failure of the authorities to take appropriate measures to address the environmental hazards and unhealthy living conditions faced by Roma communities,[11] or the lack of protective measures to guarantee clean water in Romani neighbourhoods, as well as inadequacy of measures to ensure public health standards in housing in such neighbourhoods.[12]

Further, according to the Committee's conclusions concerning Article 11, States are under an obligation to protect their population against nuclear hazards and against the consequences of nuclear accidents[13] as well as against health risks related to asbestos.[14] And a situation where availability of drinking water represents a problem for a significant proportion of the population is considered to be in breach of Article 11 of the Charter.[15]

As regards States' obligations related to tackling pollution or the protection of the environment more generally, which are clearly obligations of progressive realisation, the Committee also clarified that States must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal.[16] More specifically, according to the ECSR, in order to

[9] Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, § 221.

[10] International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint No. 72/2011, decision on the merits of 23 January 2013, §§ 153-154 and §§ 159-160.

[11] European Roma Rights Center (ERRC) v. Bulgaria, Complaint No. 46/2007, decision on the merits of 3 December 2008, §§ 49-51, violation of Article 11.

[12] European Roma and Travellers Forum (ERTF) v. Czech Republic, Complaint No. 104/2014, decision on the merits of 17 May 2016, §§ 124 and 127, violation of Article 11 and 16.

[13] Conclusions XV-2 (2001), France.

[14] Conclusions XVII-2 (2005), Portugal; Conclusions XVII (2005), Latvia.

[15] Conclusions 2017, Georgia, Article 11 § 3: "The Committee concludes that the situation in Georgia is not in conformity with Article 11 § 3 of the Charter on the ground that the measures taken to ensure access to safe drinking water in rural areas have been insufficient."

[16] Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the

combat air pollution States are required to implement an appropriate strategy which should include the following measures: develop and regularly update sufficiently comprehensive environmental legislation and regulations;[17] take specific steps to prevent air pollution at local level, such as modifying equipment, introducing threshold values for emissions and measuring air quality,[18] and, on a global scale, help or contribute to efforts towards reducing pollution;[19] ensure that environmental standards and rules are properly applied through appropriate supervisory machinery;[20] inform and educate the public, including pupils and students at school, about both general and local environmental problems.[21]

The European Committee of Social Rights has also stressed that when a preliminary scientific evaluation indicates that there are reasonable grounds for concern regarding potentially dangerous effects on human health, the State must take precautionary measures consistent with the high level of protection provided for in Article 11 aimed at preventing those potentially dangerous effects.[22] In doing so, the ECSR has applied, in the social rights field, one of the most typical principles of environmental protection, namely the precautionary principle.

3. Protecting the environment using the substantial provisions and monitoring procedures of the ESC system: desirable prospects

In light of the above, it is clear that something positive has indeed been done by the European Committee of Social Rights with a view to reinforcing environmental protection through the protection of social rights, and vice versa. And it is worth noting that recently the Committee has explicitly expressed its awareness of the fact that issues

merits of 6 December 2006, § 204.

[17] Conclusions XV-2 (2001), Addendum, Slovak Republic.

[18] Conclusions 2005, Republic of Moldova, Article 11 § 3.

[19] Conclusions XV-2 (2001), Italy, Article 11 § 3.

[20] Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §§ 203, 209, 210 and 215.

[21] Conclusions 2005, Republic of Moldova, Article 11 § 2.

[22] International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint No. 72/2011, decision on the merits of 23 January 2013, §§ 150-152.

such as the creation and protection of a healthy environment are central to the Charter's system of guarantees.[23]

But, of course, much could still be done by the ECSR in this direction, especially when considering the increasingly worrying environmental situation.

In fact, as our natural habitat is depleted and climate change advances as a result of poor governance, neglect and inaction, many other human rights protected by the European Social Charter will be – and already are – inevitably affected: the right to work and to earn a decent living (Article 1 of the Charter), the right to safe and healthy working conditions (Article 3), the rights of children and women, the protection of the family and older persons (Articles 7, 8, 16, 17, 23 of the Charter). The right to housing may also be compromised: we are already witnessing the dramatic consequences of natural disasters partly caused by climate change on the right to adequate housing, which is protected by Article 31 of the Charter.

And the same can happen in respect of the right to protection against poverty and social exclusion (Article 30 of the Charter). Climate change and deterioration of the environment can be expected to have alarming effects on the labour markets and on employment levels. Global warming related to migration and "climate refugees" will raise a host of additional social rights issues in pace with accelerated demographic change. Many experts and authorities, including Philip Alston, the former UN Special Rapporteur on extreme poverty and human rights, forecasted that climate change would drive, in the best-case scenario, tens of millions of people into poverty.[24]

Against this worrying background, further exploring and developing the potential for better protection of environment through the mechanism of the European Social Charter is really necessary and urgent, particularly in the framework of the Charter monitoring procedures.

In this regard, the reporting system under the Charter is very important and must be firstly taken into consideration. This system is currently evolving from a general

[23] ATTAC ry, Globaali sosiaalityö ry and Maan ystävät ry v. Finland, decision on admissibility and on immediate measures, Complaint No. 163/2018, 22 January 2019, para. 12.

[24] Report of former UN Special Rapporteur on extreme poverty and human rights, Philip Alston, 'Climate change and poverty', 17 July 2019, A/HRC/41/39.

and rather formal reporting by States on each Charter provision (that they have respectively accepted) to a targeted and strategic choice of issues that States are called upon to report on, and that the European Committee of Social Rights will examine. Such a positive swift represents indeed an opportunity to include issues related to the environment and social rights in the procedure.[25]

This has indeed already started happening with regard to Article 11 of the Charter (the right to protection of health). In fact, within the framework of the Questions to States concerning Article 11, the ECSR proceeds now from the assumption that "insalubrious work or living environments also affect health adversely as does air, water or other forms of environmental pollution, including proximity to active or decommissioned (but not properly isolated or decontaminated) industrial sites with contaminant or toxic emissions, leakages or outflows, including slow releases or transfers to the neighbouring environment." Based on such assumption, the Committee consequently asks the States parties to "provide information on measures taken to prevent exposure to air, water or other forms of environmental pollution, including proximity to active or decommissioned (but not properly isolated or decontaminated) industrial sites with contaminant or toxic emissions, leakages or outflows, including slow releases or transfers to the neighbouring environment, nuclear sites, mines, as well as measures taken to address health problems of the populations affected;" and to "provide also information about measures taken to inform the public, including pupils and students, about general and local environmental problems."[26]

In the nearest future, something similar could – and hopefully will – be done, *mutatis mutandis*, with regard to other environmental issues (like, for example, reduction of CO_2 emissions, green energy production, the production, use and disposal of plastics, deforestation, global warming and climate change) and the impact of mismanagement

[25] See, for example, the specific and targeted questions transmitted to the States Parties to the Charter relating to the provisions belonging to the thematic group 2 on health, social security and social protection under the reporting procedure (in view of Conclusions 2021), available at: <https://rm.coe.int/questions-to-states-parties-of-the-resc-conclusions-2021/16809f05c1>.

[26] See, for example, the targeted questions on Article 11 (the right to protection of health) transmitted to the States Parties to the Charter in view of Conclusions 2021, pp. 4-8, available at: <https://rm.coe.int/questions-to-states-parties-of-the-resc-conclusions-2021/16809f05c1>.

of such issues on a number of social rights: not only the right to protection of health, under Article 11, but also – for example, and obviously in different ways – the right to safe and healthy working conditions (Article 3), the right of children and young persons to protection (Article 7, in particular paragraphs 2 and 10, as well as Article 17), the right to housing (Article 31, in particular paragraphs 1 and 2), and the right to protection against poverty and social exclusion (Article 30).

In addition, considering that deterioration of the environment (due also to the mismanagement by States of the abovementioned issues) can undeniably pose significant risks to a number of rights set out under the Charter, the ECSR could strengthen its approach to a targeted and strategic choice of issues that States are called upon to report on, by adopting one or more "statements of interpretation" specifically dedicated to some of the environmental issues mentioned before. The pattern for this could usefully be, *mutatis mutandis*, the "Statement of interpretation on the right to protection of health in times of pandemic" that the Committee timely and appropriately adopted on 21 April 2020.[27]

4. Collective complaints as a legal instrument to urge States to enact measures of environmental protection

Clarifying and developing the complementarity and mutual relationship between environmental protection and social rights, by way of "statements of interpretation" and targeted questions to States concerning a number of Charter provisions, would also lead to positive developments with regard to the other monitoring arrangement under the Charter system, namely the collective complaints procedure, a mechanism that allows social partners – trade unions and employers organisations – as well as civil society organisations to directly apply to the European Committee of Social Rights for rulings on possible violations of the Charter in the country concerned.[28]

To date, only two complaints have been lodged with the Committee regarding the right to a healthy environment under Article 11 of the Charter, both concerning

[27] See "Statement of interpretation on the right to protection of health in times of pandemic" adopted by the ECSR on 21 of April 2020, available at: <https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640>.

[28] For more details on the collective complaints procedure, see information available at: <https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure>.

Greece: *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, No. 30/2005, and *International Federation for Human Rights (FIDH) v. Greece*, No. 72/2011. The former case challenged the Greek Government's failure to take steps to protect workers and local residents from pollution caused by lignite mines,[29] while in the latter the complainants alleged that pollution of the water of the river Asopos was having harmful effects on local residents.[30]

Should the ECSR develop in the next future the relationship between environmental protection and social rights within the framework of the reporting procedure and statements of interpretation, this would most likely determine a significant increase in collective complaints seeking to articulate and plead issues related to the environment and social human rights. And this, in turn, will cause the ECSR to build up an important body of case law, further clarifying the meaning, implications and actual effects of the complementarity and mutual relationship between social rights and environmental protection, with respect to many different subject matters.

However, it has to be recalled that, as regards the collective complaints procedure, only 15 countries have accepted this mechanism, up to now.[31] Therefore, enlarging States participation to the Additional Protocol of 1995 providing for a system of collective complaints would be really a step forward in the direction of strengthening not only, in general, the European Social Charter and the protection of social rights throughout Europe, but also – more specifically – environmental protection through the European Social Charter system. In this respect, any initiatives to facilitate the achievement of such goal would be very welcomed, and it is worth mentioning the fact that the 15 countries having accepted the collective complaints procedure have recently encouraged others to enrol themselves in the collective complaints system.[32]

[29] Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006.

[30] International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint No. 72/2011, decision on the merits of 23 January 2013.

[31] To date, the 15 States Parties to the Charter which have ratified the Additional Protocol of 1995 providing for a system of collective complaints are: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia, Sweden.

[32] Call to ratify the Additional Protocol providing for a system of collective complaints made by the 15 States which

5. Incorporating environmental issues into human rights protection by means of an additional Protocol to the ESC

But apart from any possible and desirable developments concerning the existing system of substantial provisions and monitoring procedures provided for by the European Social Charter, another crucial step the Council of Europe and the Member States of the Organisation could take in order to respond to the challenge that environmental issues pose to human rights, is to make soon arrangements for drafting a new protocol to the Charter to explicitly incorporate environmental issues into human rights protection.

Adding to the European Social Charter one or more specific provisions recognising the right to a healthy or decent environment as a social right, and regulating the State obligations to respect, protect and fulfil such right, would have the merit not only of updating and upgrading the range of rights and social areas covered by the Charter, but also of strengthening the legal protection of the environment by solidly linking such protection to the most appropriate European human rights instrument.

As regards the first positive aspect (that is updating the range of rights and social areas covered by the ESC), it is hardly necessary to recall that many other regional human rights instruments, dealing with individual and collective rights and societal issues, have already recognised the human right to a healthy environment. This is particularly the case for Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol) of 17 November 1988, which recognises that "everyone shall have the right to live in a healthy environment."[33] Likewise, Article 38 of the Arab Charter on Human Rights, which entered into force on 15 March 2008, recognises the right to a "healthy" environment.[34] Elsewhere, Article 24 of the African Charter on

have ratified it during the Expert seminar "Reinforcing social rights protection in Europe: to achieve greater unity and equality," 19 September 2019 (organised under the aegis of the French Presidency of the Committee of Ministers of the CoE).

[33] See Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") entered into force on 16 November 1999.

[34] See Article 38 of the Arab Charter of Human Rights, League of Arab States, entered into force on 15 March 2008.

Human and Peoples' Rights of 28 June 1981 states that "all peoples shall have the right to a general satisfactory environment favourable to their development,"[35] making this a group right. For its part, Article 28(f) of the ASEAN Human Rights Declaration signed on 18 November 2012 proclaims the right to a "safe, clean and sustainable environment" as part of the right to an adequate standard of living.[36]

Adding a new "environmental article" to the Social Charter would therefore make the European human rights system more in line with other regional human rights instruments dealing with collective rights and societal issues, as well as more current and thorough, as it would be more suited to the contemporary environmental reality. Furthermore, this would also represent an almost natural development of the ESC system, since it would incorporate at the normative "legislative" level of the system the result of an evolutive jurisprudence that has already been consolidated in the last two decades within the framework and practice of the same system (in particular within the scope of application and interpretation of Article 11 of the Charter).

With respect to the other positive aspect (namely strengthening the legal protection of the environment by linking it to a human rights instrument), the fact of adding to the ESC one or more provisions on the right to a healthy (or decent) environment would clearly give environmental protection what cannot be found in the large majority of sectoral conventions on the protection of the environment and in "purely environmental" treaties. In fact, in such treaties (including those which have been adopted within the institutional framework of the Council of Europe)[37] there is usually no recognition of rights conferred on individuals, or groups of individuals, or associations, and there are no effective independent compliance or monitoring mechanisms. As a result, civil society and individuals, both of which play a key role in environmental protection in the international and national arena, very often cannot avail themselves of the provisions included in such treaties, and for this reason their

[35] See Article 24 of the African Charter on Human and Peoples' Rights, entered into force on 21 October 1986.

[36] See Article 28(f) of the ASEAN Human Rights Declaration, adopted on 18 November 2012.

[37] Reference is made, for example, to the Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 1979; the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano, 1993; or the European Landscape Convention, Florence, 2000.

implementation has proved to be extremely limited, both at the international and domestic legal level.

Conversely, including one or more provisions on the right to a healthy (or decent) environment in a human rights treaty, namely the European Social Charter, would mean providing environmental protection with a binding legal instrument which gives a role to civil society and grants the organised civil society and the world of workers the right to take legal action to make sure that European States comply with their duty to protect the environment more effectively.

6. The ESC, and not the European Convention of Human Rights, as the most appropriate European normative framework to protect the human right to a sustainable environment

Moreover, both from the technical-legal and political perspective, the drafting and adoption of a new Protocol aimed at incorporating into the Charter a right to a healthy (or decent) environment would presumably pose less problems than a "brand new" human rights treaty on the right to environmental protection; in other words a treaty situating itself out of the context of any existing conventional human rights system. From the political standpoint, considering that existing environmental treaties within the framework of the Council of Europe have been ratified by far too few States, it can be assumed that an "environmental Protocol" to the ESC would get more support and ratifications than a "brand new" environmental treaty.

Not least, it is worth highlighting that the Social Charter would be the most suited Council of Europe human rights treaty system where to insert one or more provisions on the right to a healthy (or decent) environment: more suited, in particular, than the European Convention on Human Rights.

This is so for many reasons.

First of all, it is a fact that all the attempts to supplement the European Convention on Human Rights with an additional "environmental protocol" have completely failed,[38] and that the European Court of Human Rights has repeatedly

[38] As it has been pointed out by Elisabeth Lambert, in her "Introductory Report to the High-Level Conference Environmental Protection and Human Rights," Strasbourg, 27 February 2020, prepared at the request of the Steering

refused to recognise the right to a healthy environment as an individual right implicitly enshrined in the Convention.[39]

Second, the Convention – which focuses essentially on civil and political rights – is characterised by an individualistic conception of human rights that does not fit well with collective and so-called solidarity rights, as a large number of rights concerning societal issues and the right to protection of a healthy (or decent) environment undoubtedly are. The European Social Charter (especially in its "revised" version) is, on the contrary, perfectly suited to deal with collective and solidarity rights, as well as with environmental protection (as evidenced, *inter alia*, by the way in which Article 11 of the Charter has been interpreted and applied by the European Committee of Social Rights).[40]

Committee for Human Rights (CDDH), pp. 10-11: "In Recommendation 1431 (1999), for instance, the Assembly asked the Committee of Ministers to: "11.2 instruct the appropriate bodies within the Council of Europe to examine the feasibility of: […] b. drafting an amendment or an additional protocol to the European Convention on Human Rights concerning the right of individuals to a healthy and viable environment." In response, the Committee of Ministers stated that "the recognition of the individual and legally enforceable nature of the human right to a healthy and viable environment meets at present certain difficulties, legal and conceptual" (Committee of Ministers, Doc. 8892, Reply to Recommendation 1431 (1999) – Future action to be taken by the Council of Europe in the field of environment protection, 20 November 2000). […] In its comments on Parliamentary Assembly Recommendation 1614 (2003), the Bureau of the Committee for the Activities of the Council of Europe in the field of Biological and Landscape Diversity (CO-DBP) noted: "the Convention on Human Rights does not make any specific reference to the protection of the environment, an international concern that emerged at a stage ulterior to the coming into force of the Convention. Therefore, the European Court of Human Rights cannot deal effectively with a number of 'new generation' human rights, including the right to a sound environment." The initiative was repeated in 2009 with Recommendation 1885 (2009) entitled "Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment," with the same reply from the Committee of Ministers (Committee of Ministers, Reply to Recommendation 1883, Doc. 12298, "The challenges posed by climate change," 19 June 2010).

[39] Although the European Court of Human Rights held that severe environmental degradation may give rise to violations of the right to life (Article 2 of the ECHR), the right to respect for private and family life (Article 8 of the ECHR) and the right to protection of property (Article 1 of Protocol 1 to the ECHR), it has noted on various occasions that the Convention does not expressly recognise the right to a healthy environment (Apanasewicz v. Poland, No. 6854/07, 3 May 2011, para. 94; Flamenbaum and Others v. France, Nos. 3675/04 and 23264/04, 13 December 2012, para. 133; Lars and Astrid Fägerskiöld v. Sweden, decision as to admissibility, No. 37664/04, 26 February 2008; Chiş v. Romania, decision as to admissibility, No. 55396/07, 9 September 2014, para. 29; Frankowski and Others v. Poland, decision as to admissibility, No. 25002/09, 20 September 2011; Aydin and Others v. Turkey, decision, No. 40806/07, 15 May 2012, para. 24; Otgon v. the Republic of Moldova, judgment, No. 22743/07, 25 October 2016, para. 15; Fieroiu and Others v. Romania, decision, No. 65175/10, 23 May 2017, para. 18.63), which has not therefore become an autonomous right in the case-law of the Court.

[40] See ECSR, Conclusions XXI-2 (2017) and Conclusions 2017 on Article 11.

In this respect it has also to be noted that the large majority of the ESC provisions are drawn up in terms of positive legal obligations of States to take measures or elaborate and implement policies,[41] rather than in terms of subjective rights of individuals, which is particularly suitable for possible human rights provisions concerning environmental protection.

Third, unlike the ECHR system – which is distinguished by a judicial mechanism devised and well-organised to handle individual cases of human rights violation, as well as to restore the rights and situation, and satisfy individual interests of victims of specific violations (most of the time by means of a pecuniary compensation) –, the ESC system provides two mechanisms: the reporting procedure and the collective complaints procedure. Such mechanisms are much better suited to monitoring State compliance with obligations concerning areas relating to collective human interests and shared damage, like social rights and, even more, environmental protection. This is particularly true for the collective complaints mechanism: in fact, the purpose of such procedure is precisely to obtain the legal assessment not of an individual case, but rather of alleged violations characterized by elements of "collective importance" for many subjects. For this reason, it allows NGOs (including "environmental" NGOs) and social partners to bring claims[42] without requiring neither standing as victims nor previous exhaustion of domestic remedies.

7. Possible structure and contents of new environmental provisions to be incorporated into the ESC system

Incorporating into the ESC system, by means of an additional Protocol, one or more provisions specifically concerning environmental protection obviously requires identifying the object and contents of such provisions, as well as harmonising them with the typical features of the other substantial provisions of the Charter.

With a view to meeting both such requirements, it is necessary to consider not only the right to a healthy environment as it has been spelled out by the ECSR in its

[41] See for example the content of Charter's provisions such as Articles 3, 11, 16, 17, 30 and 31.

[42] See information on who is entitled to lodge complaints and requirements to be fulfilled by NGOs and social partners, available at: <https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure1>.

interpretation and application of Article 11 of the Charter, but also a number of other elements. Such elements include *inter alia*: the definition and regulation of the right to a healthy (or decent) environment in other human rights treaties (in particular treaties covering the area of social and economic rights); the recognition of such right as a fundamental right in national constitutions; the jurisprudence of international courts, monitoring bodies and constitutional courts concerning such right; the recognition and regulation of the human right to a healthy (or decent) environment in sectoral conventional systems (and other international legal instruments) on the environment; the most authoritative studies of the last twenty years concerning cases involving the intersection between human rights and the environment.

It is hardly possible to make here an in-depth analysis, or even an overview, of all such elements. However, some preliminary ideas may perhaps be tentatively drawn from them.

First, as regards the name of the right and title of the provision(s) to be incorporated into the Charter, even though the ECSR understandably referred to the "right to a healthy environment» in considering this as a part of the right to protection of health under Article 11 of the Charter, it would be probably more appropriate to use a wider and more "ecological" expression, such as – for example – the "right to a decent environment," or the "right to live in a healthy, sustainable and decent environment."[43] Such expressions would indeed make clear that the purpose of the provision is not only protecting against any environmental damage which is likely to affect human health, but also legally ensuring that protection against any environmental degradation is essential to the preservation of human well-being and dignity, also for future generations.

[43] As it has been noted by E. LAMBERT, in the "Introductory Report to the High-Level Conference Environmental Protection and Human Rights," cit. *supra* footnote 37, p. 16: "The right to a 'decent' environment adopted by the Committee of Ministers in 2004 [Committee of Ministers, Doc. 10041, 'Environment and human rights,' 24 January 2004] was a formulation already used by the OECD since 1984. A 'decent' environment means understanding the link between fundamental rights, our environment and sustainable development, and it also covers protection of the natural environment in line with today's ecological outlook. In its celebrated advisory opinion of 2017, the Inter-American Court of Human Rights held that this right protected the components of the natural environment, such as forests, rivers and other natural elements [Inter-American Court of Human Rights, Advisory opinion, OC-23/17, 15 November 2017, para. 62]."

Therefore, along the lines of all substantive articles of the ESC, the opening narrative of a new "environmental provision" could be the following: "With a view to ensuring the [effective] exercise of the right to live in a healthy, sustainable and decent environment [or, the right to a decent environment], the Parties undertake: […]."

Moving to the potential object of the various legal engagements to be undertaken by the States Parties, under a new "environmental article," some basic elements could be the following:

– Recognising in national domestic legal orders the right to live in a healthy, decent and sustainable environment.

– Taking measures, within the framework of an overall and coordinated approach, aimed at preserving the quality and integrity of the environment, and ensuring that future generations are not exposed to pollution or environmental conditions which may endanger their health or their existence itself.

– Such measures should relate to a number of fields, such as living in a pollution-free environment, access to clean water and adequate sanitation, healthy biodiversity and ecosystems, safe climate, ecological productive activities, energy production; and they should include: monitoring air and water quality and impacts on human health, assessing sources of air and water pollution, establishing environment quality legislation, regulations, standards and policies; developing action plans at the national and local levels; implementing such action plans and enforcing the standards; evaluating progress and, if necessary, strengthening the plans to ensure that the standards are met.

– Ensuring that enterprises and business activities introduce a system of environmental management covering environmental impacts, and ensuring the effective enforcement of the environmental standards against private actors (including redressing violations of the standards by private actors, as well as compensating the victims of environmental damage caused by national and multinational enterprises).

– Ensuring that information concerning environmental issues that is held by public authorities is widely and effectively available.

– Promoting and facilitating environmental education.

– Promoting and developing international cooperation on environmental protection, by the conclusions of appropriate bilateral or multilateral agreements or by other means, as well as through exchanges and dissemination of scientific knowledge and technologies respectful of the environment.

Lastly, as regards the supervision mechanism, with a view to facilitating the achievement of the most effective monitoring of the States' environmental obligations under the Charter, the new Protocol could provide the possibility for States parties to accept the collective complaints procedure, limited to the substantial environmental provisions enshrined in the Protocol itself (and not with respect to all the accepted provisions of the Charter, as established by the 1995 Additional Protocol providing for a system of collective complaints). And, in such a case, it could also "automatically" extend the right to lodge complaints against the State party having accepted the procedure to representative national non-governmental organisations which have particular competence in the matters governed by the "environmental" Protocol (without requiring to this effect an *ad hoc* declaration, as provided for by Article 2 of the 1995 Additional Protocol).

This would indeed open the door of the Social Charter system to the civil society and environmental activists. This would really mean opening the European system for the protection of the right to a decent and sustainable environment to the best guardians – so to say – of such right, that is to those who are, more than States and governments, genuinely and strongly interested in its implementation and enjoyment.

In conclusion, making arrangements for incorporating into the European Social Charter system, by means of an additional Protocol, a right to a healthy or decent environment would be the natural response to the challenge that environmental issues pose to human rights. It would also constitute a step forward in order to strengthen the protection of the environment, on the one hand, and the protection of social rights, on the other hand, which are closely interlinked. As shown above, the European Social Charter would be the best suited human rights treaty of the Council of Europe to do that and the monitoring system of the Charter is perfectly equipped for that purpose.

REBECCA SPITZMILLER*

KINDREDSHIP, SUBSIDIARITY AND GRASSROOTS MOVEMENTS: CATALYSTS FOR EFFECTIVE LEGAL CHANGE

ABSTRACT. *The article introduces and analyzes "kindredship" – a more inclusive term to identify what has been called "fraternity" throughout modern history – as a necessary ingredient, along with subsidiarity and grassroots movements, to address a range of emergencies, injustices and challenges that threaten democracy, the rule of law, and our very survival as a species. Increasingly, active citizens bring a broad array of problems to the attention of legal institutions at the local, national and global levels. Through multi-stranded synergies, our human-to-human links congeal into mass movements that spur environmental, social justice and human-rights activists to appeal to governments to make institutional changes. In Italy, the constitutional principle of subsidiarity, mirroring that of European law, requires the government to support citizens' efforts when they promote general interests. Such interests thus gain legitimacy and citizens' efforts foster reciprocal trust among themselves and with institutional allies, fortifying the democratic values that are essential to our social contract. Without this strengthened interdependence among all stakeholders, the plethora of existing legal norms at every level will remain unable to provide remedies for a vast range of inequities and brewing crises. The article explores comparative-law aspects of how the combined effects of kindredship, subsidiarity and grassroots movements fortify the rule of law. Civic engagement, based on our common humanity and built in the spirit of kindredship, is a key to overcoming the challenges that legal institutions face to defend and bolster democracy, whose inherent fragility requires constant diligence.*

* Researcher in Comparative Law and Professor (*aggregato*) of International Business Contracts, Roma Tre University.

1. Introduction

Faced with a myriad of emergencies, social injustices and other legal challenges across the globe, active-citizen groups are increasingly organizing themselves, forming grassroots movements rooted in solidarity and based on our shared humanity to seek solutions. In Italy, citizens rely on the principle of subsidiarity, residing in Article 118, 4th paragraph, of the Italian Constitution, which mandates that the public administration support their efforts when they relate to the general interest.[1] Such principle lends legitimacy to citizens' actions, forming synergies – both among individuals and between them and the government – that can foster reciprocal trust and purposeful communication, thereby strengthening the democratic values underlying our social contract. Despite the wide range of legal norms that seek to address and regulate an increasingly complex panorama of inequities and neglected problems, this fortified interdependence among all stakeholders is necessary because "today's challenges intertwine stories of individuals and populations, with which the law seems to be affected by a profound crisis and by a lack of effectiveness."[2] Legislative, executive, judicial and administrative institutions are unable to provide successful governance on their own through top-down approaches: civic engagement must fill the gap to spread democratic values and create mechanisms that make them workable and further the rule of law.[3]

[1] "The State, regions, metropolitan cities, provinces and municipalities 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."

[2] A. Cosseddu, "Introduction," in *Journeying along the Path of Fraternity: A Comparative Law Approach*, ed. A. Cosseddu, publication pending, pp. XV-XXV, at p. XVI. Formerly published in Italian as "Introduzione," in *I sentieri del giurista sulle tracce della fraternità: Ordinamenti a confronto*, ed. A. Cosseddu, G. Giappichelli Editore 2016 Torino, pp. XV-XXV, at p. XVI.

[3] Civic participation is included as one of four key indicators – or sub-factors – comprising the Rule of Law, specifically those constituting the World Justice Project's Factor 3, "Open Government," as shown in its "*Rule of Law Index® 2020*." The *Index®* "measures the effectiveness of civic participation mechanisms, including the protection of the freedoms of opinion and expression, assembly and association, and the right to petition the government. It also measures whether people can voice concerns to various government officers, and whether government officials provide sufficient information and notice about decisions affecting the community." Id. at p. 15. The other indicators comprising "Open Government" are: "Publicized laws and government data," "Right to information" and "Complaint mechanisms." Ibid.

People around the world are taking action to draw attention to and reverse trends of persistent injustices, corruption, a weakened rule of law and declining livability in our cities. They solicit governmental policies and actions to address the damage inflicted over many decades to our planet's ecosystems and other threats to society and humanity as a whole. Social and economic disruption caused by the Covid 19 epidemic has heightened awareness of our global connectedness, uniting the entire human species in a common cause for the first time in its history. Simultaneously, worldwide uprisings demanding social justice in the wake of George Floyd's murder in the US have reinforced the conviction that citizens and institutions must work together in new and innovative ways to reinvent the social contract, one in which mutual respect and responsibility are reciprocated not only among individuals but also by the legal institutions governing us.

This article will focus on these three elements: fraternity (or kindredship), subsidiarity and grassroots movements, and the ways they can combine to effect positive change by harnessing public opinion and revitalizing democratic processes through a renovated legal paradigm. It will explore the positive synergies created through this triad to stimulate all three branches of government – legislative, executive and judicial – and increased citizen engagement. It will analyze the relevant legal bases and theoretical frameworks, in a comparative perspective, and provide concrete examples of how the interaction among these three features have played out and continue to do so in Italy and elsewhere.

2. Kindredship (Fraternity in the 21st Century)

The concept of "fraternity" has seen increasing interest from legal scholars, historians, sociologists and even the Catholic Church[4] in recent years, identifying this

[4] Pope Frances, head of the Catholic Church, and Sheikh Ahmed el-Tayeb, Grand Imam of Al-Azharin Abu Dhabi, United Arab Emirates, made a joint statement entitled "Document on Human Fraternity for World Peace and Living Together" on 4 February 2019. In it, they "declare the adoption of a culture of dialogue as the path; mutual cooperation as the code of conduct; reciprocal understanding as the method and standard." They urge world leaders "to work strenuously to spread the culture of tolerance and of living together in peace; to intervene at the earliest opportunity to stop the shedding of innocent blood and bring an end to wars, conflicts, environmental decay and the moral and cultural decline that the world is presently experiencing" and "to rediscover the values of peace, justice,

"forgotten principle" as a possible solution to the challenges that have been heightened and made more evident by globalization, and as a potential tool to help deliver justice, legality and the rule of law.[5] Pope Francis's recent Encyclical Letter traces the history of the law of fraternity in biblical terms, from the Old Testament where "the imperative to love and care for others appears to have been limited to relationships of the same nation[6]" to its expansion to foreigners in the New Testament, with a call for "embracing everyone on the basis of our shared humanity.[7] The encyclical letter recalls the story of the good Samaritan, in which a lawyer asks Jesus, "What is written in the law?" and "Who is my neighbor?" Christian teachings are founded on the Samaritan's merciful actions towards the dying man in the story, and leave "no room for an appeal to determinism or fatalism as a justification for our own indifference."[8] Rather, Christian doctrine encourages the faithful to "create a different culture, in which we resolve our conflicts and care for one another."[9] These teachings contrast starkly with the restrictions placed on them in English tort law when Lord Atkin poses the same question: "Who is my neighbor?" In the landmark case that determined the limits on the duty of care, Lord Atkin defines the scope of such duty to those "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[10] Clearly, fraternity can be broadly or narrowly defined, depending on the underlying context and the purposes the writer aims to achieve.

Legal philosopher Eligio Resta has described fraternity as "awareness of the duty to have to take distance from the logic of hostility and to share common spaces with

goodness, beauty, human fraternity and coexistence in order to confirm the importance of these values as anchors of salvation for all, and to promote them everywhere." See <https://bit.ly/2BsZmr2>, accessed 20/6/2020.

[5] Cosseddu, "Introduction," XXII and XXIII, cited *supra*, note 2.

[6] The Holy See, Encyclical Letter *Fratelli tutti* of the Holy Father Francis on Fraternity and Social Relationship. 3.10.2020, paragraph 59, <http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.pdf>.

[7] Id., paragraphs 60, 61.

[8] Id., paragraphs 56, 57.

[9] Ibid.

[10] Donoghue v Stevenson, 1932 SC (HL) 31 (UKHL 26 May 1932).

every other individual, with his or her life, story and dignity."[11] In a recent book, Cosseddu *et al* focus on the principle of fraternity and its potential to contribute to solving a vast range of legal problems, including issues in criminal, tort, comparative, international and environmental law, and factoring in the legal systems of Italy, France, Spain, Portugal, Brazil, Canada, the US, the UK and other countries.[12] The broad stroke that the principle of fraternity brushes across this vast panorama reflects its historic presence in the legal-rights triad established in the French Revolution – alongside liberty and equality.[13] More recently, the inclusion of fraternity in Article 1 of the Universal Declaration of Human Rights underlines its relevance through modern times: "All human beings are born free and equal in dignity and rights […] and should act towards one another in a spirit of brotherhood." Critical moments in history have often evoked a legal principle based on "brotherly" relationships and mutual respect.

Before proceeding, however, any contemporary discussion on the principle of fraternity must involve an *a priori* inquiry as to how we might express and include within that term the idea of its true universality, i.e., that it necessarily also includes "sisterhood" and relationships with those identifying with non-binary genders.[14] We can observe that even though the Universal Declaration of Human Rights refers explicitly to "all human beings," it still uses the term "brotherhood" to express the duty to treat everyone equally, reflecting those familial-type ties that ultimately link all of humanity. If we consider different terms that might successfully encompasses this inclusivity, the term "siblinghood" might seem a plausible candidate on the semantic level, but in legal literature it generally connotes relationships within the ambit of family law, specifically relating to questions of adoption, parental responsibility, and so on.[15]

[11] *See* E. Resta, *Il diritto fraterno*, (new ed.), Laterza, Roma-Bari, 2005, p. VII; for a comprehensive view of the author's conception, *see* p. 131 et seq.

[12] Cosseddu, *Journeying along the Path of Fraternity,* cited *supra*, note 2.

[13] A.M. Baggio (editor), *Il principio dimenticato. La fraternità nella riflessione politologica contemporanea*, Città Nuova, Roma, 2007; Id. (editor), *Caino e i suoi fratelli. Il fondamento relazionale nella politica e nel diritto*, Città Nuova, Roma, 2012.

[14] *See* R. Morgan, *Sisterhood is Global*, NY, 2016, Digital edition.

[15] D. Monk and J. Macvarish, (2018) *Siblings, Contact and the Law: An Overlooked Relationship*, London: Birkbeck.

These considerations could render use the term "siblinghood" as a substitute for "fraternity" confusing, as related to the general topic but far from our intended meaning in the context of this article and in legal writings generally. Another word, "kindredship," bears no such competing legal connotations, as far as this author has been able to detect. Defined generally as "the quality or state of being of the same kindred or family,"[16] or "the state or quality of being related,"[17] the term "kindredship" expresses the concept of belonging to the human family but is unburdened by any ambiguity or misleading meanings within legal contexts. Thus, "kindredship" constitutes a plausible alternative for "fraternity" when referring to the links that tie all of humanity together in a familial bond, thus imposing a requirement of mutual respect and equality in furtherance of personal dignity and human rights. Of course, the word "fraternity," as used in this article, does denote a concept deeply rooted in history, where gender issues – including countless inequitable and exclusionary aspects – played significant roles, albeit largely unexpressed at the time the relevant historic events were occurring. We shall therefore proceed by using the term "fraternity" where the historic context or citations in the literature demand its use, but we will also employ "kindredship" to denote more accurately the relevant meaning intended herein, i.e., the principle that links our common humanity and the consequent appropriateness for solidarity among all human beings.

The concept of fraternity, as traditionally used to express our common humanity, is readily linked to reciprocity, which is the essence of legal relations, where rights and duties are placed in correlative terms.[18] Norberto Bobbio summarized the most important obligations of citizens as follows: "The duty to respect others. Overcoming personal egoism. Accepting the other."[19] Reciprocal respect and acceptance

[16] <Lexico.com/definition/kindredship>.

[17] <Merriam-webster.com/dictionary/kindredship>.

[18] A. Cosseddu, "Rethinking Legality in Contemporary Legal 'Space': A 'Bridge' between Theory and Practice," pp. 21-98, at pp. 32-33 in *Journeying along the Path of Fraternity: A Comparative Law Approach*, ed. A. Cosseddu, publication pending. Formerly published in Italian as "Ripensare la legalità nello 'spazio' giuridico contemporaneo: Un 'ponte' fra teoria e prassi," pp. 21-94 at pp. 31-32 in *I sentieri del giurista sulle tracce della fraternità: Ordinamenti a confronto*, ed. A. Cosseddu, G. Giappichelli Editore 2016 Torino.

[19] N. Bobbio-M. Viroli, *Dialogo intorno alla repubblica*, Laterza, Roma-Bari, 2001, pp. 41.

among individuals are inherent to fraternity – or kindredship, to use our proposed nomenclature – and extend horizontally among the citizenry to create a field (hence the term grassroots) across which to communicate, engaging and empowering them. It has been argued that fraternity is also rooted in Italian constitutional law, comprised within the "principle of horizontal solidarity,"[20] originating in Articles 2 and 3,[21] and that it therefore includes the concept of "equal social dignity."

Italian legal scholars debate the issue of fraternity's constitutional relevance, intended as a way to integrate social pluralism into policy and invoked as a principle that reciprocally unites humankind by requiring collaboration manifested as benevolent behavior aimed at setting limits on majority rule.[22] Its relation to liberty and equality as proclaimed in the French Revolution has morphed, according to Massa Pinto, into the oxymoron "conflictual fraternity," to describe what she deems to be its limiting function, or its mandate to behave "as if we were brothers," as the only possible way to install liberty and equality – which derive from fraternity – into reality.[23] She conceives "conflictual fraternity" as a limiting concept because it indicates the "continuous necessity of the external imposition of a duty to approach the Other, as irreducibly different, an enemy, in the awareness that this will be the only way to allow a co-existence in the present epoch."[24] She also submits that the legal principle of fraternity

[20] F. Pizzolato, *Appunti sul principio di fraternità nell'ordinamento giuridico italiano*, in *Riv. int. dir. uomo*, 2001, pp. 753 et seq. and 799 et seq.

[21] Article 2: "The Republic shall recognise and protect 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."
Article 3: "All citizens shall have equal social dignity and shall be equal before the law, without distinction of gender, race, language, religion, political opinion, personal and social conditions. It shall be the duty of the Republic to remove those obstacles of an economic or social nature which 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 organisation of the country."

[22] I. Massa Pinto, *Costituzione e fraternità. Una teoría della fraternità conflittuale: "come se" fossimo fratelli*, Jovene, Napoli, 2011.

[23] Id. Emphasis in original.

[24] Id. at p. 194 et seq. She considers subsidiarity and fraternity from a viewpoint that is critical of formalism, arguing that neither of them prescribes material content: "they are both indeterminate, to interpret, develop and implement. Subsidiarity and fraternity could be considered, in extreme synthesis, as meta-principles that expect to create order

is used by courts when they balance rights – through a "judgment of reasonableness" – adapting Rawls's Difference Principle.[25]

More recently, Adriana Cosseddu has asserted that fraternity should be considered in a perspective where law comprises co-responsibility within a net that constitutes a relational foundation, including "the family, the community and with it, its worlds (business, school, and so on)."[26] Thus considered, fraternity is "able to grant an 'equal dignity' with respect to diversities, and the opening to every other, no longer perceived as an antagonist, for the common humanity. This is a 'path' to make true prevention of conflict possible."[27]

In analyzing the Italian constitution's provisions regarding relational autonomy and responsibility found in Article 5,[28] Gregorio Arena notes several aspects that are also relevant to kindredship, as it relates to the network of subjects and institutions

in the legal system, but according to modalities that are *different* with respect to those that are considered as belonging to traditional legal science, i.e., those deemed formalistic." Ilenia Massa Pinto, "*Sussidiarietà e fraternità alla prova: due declinazioni sintomatiche della critica antiformalistica,"* Associazione Italiana dei costituzionalisti, Rivista n. 4/2011, p. 4.

[25] I. Massa Pinto, *Sussidiarietà e fraternità alla prova*, p. 9. Rawls stated that "[t]he difference principle … provides an interpretation of the principle of fraternity. In comparison with liberty and equality, the idea of fraternity has had a lesser place in democratic theory." John Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, revised edition of the 1971 original, 6th printing, 2003, p. 90. For Rawls, "fraternity does imply […] a sense of civic friendship and social solidarity, but so understood, it expresses no definite requirement. We have yet to find a principle of justice that matches the underlying idea. The difference principle, however, does seem to correspond to a natural meaning of fraternity: namely, to the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well off." Ibid. He concludes that "other aspects of fraternity should not be forgotten, but the difference principle expresses its fundamental meaning from the stand point of social justice." Id. at 91.

[26] A. Cosseddu, "Rethinking Legality in Contemporary Legal 'Space': A Bridge between Theory and Practice," pp. 21-98, at p. 92 in *Journeying along the Path of Fraternity: A Comparative Law Approach*, ed. A. Cosseddu, pending publication. Formerly published in Italian as "Ripensare la legalità nello 'spazio' giuridico contemporaneo: Un 'ponte' fra teoria e prassi," 21-94, at p. 88 in *I sentieri del giurista sulle tracce della fraternità: Ordinamenti a confronto*, ed. A. Cosseddu, G. Giappichelli Editore 2016 Torino.

[27] Ibid.

[28] Italian Constitution, Article 5. "The Republic is one and indivisible. It recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation."

involved in Italy's decentralized administration. "Being dynamic and multidirectional, the relationships that are established on the basis of the relational concept of autonomy bring advantage to all the subjects that participate in them, because even if in a quantitatively and qualitatively different measure, all the subjects that form the nodes of the network of relationships are to be considered as bearers of resources, each according to its own capacities and possibilities; and since the relationships within the model of shared administration are founded on relational autonomy, this explains how it is possible that within this model general interest and individual interest tend to coincide: In fact, it is thanks to relational autonomy that each person receives and gives something to others, in an exchange that allows you to meet your own needs by being open to others."[29] Thus, fraternity, or kindredship, works as a building block to create symbiotic relationships within the governing structure at every level of the public administration.

From a historic point of view, both grassroots movements and fraternity – manifested as kindredship, or solidarity among citizens – were present in both the American and French Revolutions, whose common goals were rooted in the aspiration to develop fundamental rights through democracy.[30] In effect, such Revolutions are the ultimate expression of subsidiarity, since citizens triggered them as the result of activities carried out in their daily lives, which initiated a wider process of change that reestablished the very governance of these citizens' countries, creating democratic constitutional models based on popular sovereignty.[31]

[29] G. Arena, "Introduzione all'amministrazione condivisa" in *Studi parlamentari e di política costituzionale,* 1997, 117-118. 29-65 p. 47.

[30] *See* F. Bruno, "The Principle of *Fraternité:* From the French Constitutions of the Revolutionary Period to the Constitution of the Fifth Republic," pp. 1-21 in *Journeying along the Path of Fraternity: A Comparative Law Approach*, ed. A. Cosseddu, publication pending. Formerly published in Italian, as Il principio di *fraternitè*: dale costituzioni francesi del period rivoluzionario alla costituzione della V Repubblica in *I sentieri del giurista sulle tracce della fraternità: Ordinamenti a confronto*, ed. A. Cosseddu, G. Giappichelli Editore 2016 Torino, pp. 1-20. "The *fraternité* present in the French constitutional texts – from those of the revolution to that of the Fifth Republic – is found in other constitutions, above all in the countries of the francophone area, from Haiti to Equatorial Guinea, from Algeria to Benin, to Cameroon." Id. at p. 2 in both editions.

[31] For the ties between the American and French Revolutions, *see* R. Spitzmiller, "*I modelli esteri e lo stato delle relazioni internazionali*," in *Studi per il Bicentenario della Rivoluzione Francese,* Vol. I, "*Gli Stati Generali di Francia:*

Even where fraternity is not recognized as an enforceable legal principle, it works as an aspirational building block to sustain and promotes the development of self-determination and democratic ideals while strengthening the social contract and the rule of law. The failure to respect the basic tenets of kindredship whereby all members of society retain their human rights and dignity has led to a breakdown of social norms, increased violence and the destruction of our environment. It has been observed: "When a society – whether local, national or global – is willing to leave a part of itself on the fringes, no political programmes or resources spent on law enforcement or surveillance systems can indefinitely guarantee tranquility."[32] Recent social unrest in the US and the insurrection at the Capitol highlight democracy's inherent vulnerability, exacerbated by the most blatant refutation of kindredship: slavery, inequality embedded in the US Constitution itself in the Three-fifths Compromise and perpetuated by centuries of social injustice.

3. Subsidiarity

The term "subsidiarity" expresses one of the key principles of European law, as established in 1992 in the Treaty of Maastricht and currently formulated under the Treaty on European Union, which entered into force in 2009. In both the European Union and in Italy, this principle distributes and allocates administrative resources and functions within and between hierarchical governmental frameworks. At the European level, it regulates and limits EU authorities from acting when national or even local

L'iniziativa Legislativa," Presidenza del Consiglio dei Ministri, Scuola Superiore della Pubblica Amministrazione, 1989, Rome, at pages 34-35. The connections between the French and US revolutions are personified by the participation in both by Thomas Paine, author of *Common Sense*, (1775-1776) – the book that sparked the American Revolution – and a sort of 18th Century grassroots blogger. More than two decades later, he wrote to President Washington, "A share in two revolutions is living to some purpose." T. Paine, *Rights of Man*, ed. Henry Collins, Middlesex, 1979, p. 9. In a gesture that exemplifies the tangible passage from words – aimed in a "common sense" way to common people for the common good – to widespread civic action and then to sweeping and lasting international legal change, he subsequently delivered George Washington with the keys to the Bastille, writing him: "That the principles of America opened the Bastille is not to be doubted, and therefore the Key comes to the right place." To George Washington from Thomas Paine, 1 May 1790," Founders Online, National Archives, <https://founders.archives.gov /documents/Washington/05-05-02-0238>.

[32] Apostolic Exhortation *Evangelii Guadium* (24 November 2013), 59: AAS 105 (2013), 1044.

governments could do so more effectively, requiring that decisions be taken as closely as possible to the citizens.[33] At the EU level, subsidiarity thus regulates concurrent powers, through a flexible mechanism that evaluates and compares national interests against local ones, through a weighing process similar to those employed through the Supremacy Clause in the United States and *konkurrierende Gesetzgebung* in Germany.[34]

In Italy, as noted above, active citizens who organize themselves through associations or grassroots movements rely on the constitutional principle of horizontal subsidiarity[35] to gain the public administration's support to carry out initiatives aimed at the collective good. Subsidiarity was established fairly recently in Italy, in 2001, when the Italian Parliament approved and a referendum confirmed revisions to Title V, Italian Constitution, inserting the principle of subsidiarity in paragraph 4 of Article 118.

The activities generated in connection with horizontal subsidiarity aim toward a broad range of objectives, but often seek to defend a public – or common – good.[36]

[33] See "The Principle of Subsidiarity, European Parliament," available at: <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>. Accessed 4 April 2020. In some instances, instead, action at the EU level is indeed warranted. The Court of Justice of the European Union so held, e.g., in case C-547/14, where Philip Morris et al challenged the EU's authority as exercised by Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014, regulating the manufacture, presentation and sale of tobacco. The CJEU upheld the EU's Tobacco Products Directive, holding that "the Commission's proposal for a directive and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level. Case C-547/14, paragraph 226.

[34] *See* R. Spitzmiller, "A Comparative-Law perspective on Street Law in Italy: Drawing best practices from Common-Law traditions to boost Civic Engagement in a Civil-Law Context" in *Street Law and Public Legal Education: A collection of best practices from around the world in honour of Ed O'Brien*, D. McQuoid-Mason (ed.) pp. 221-236, Juta, Cape Town, (2019). *See* also T. Groppi and N. Scattone, *Italy: The Subsidiarity Principle* (2006) 4(1) Int J Const L 131-137, available at <https://doi.org/10.1093/icon/moi056> (accessed on 5 September 2020).

[35] Article 118, paragraph 4, Italian Constitution. See note 1, *supra.*

[36] In Italy, legal scholars such as Gregorio Arena have defined common goods as those for which a community has assumed responsibility by providing for their care, reuse and regeneration. "The process that leads to the creation of a community for a public good begins when a group of inhabitants of a neighborhood or village propose to the municipal administration to make a pact for the care of a public good, material or immaterial. This process of community creation obviously develops even when there is no pact and a group of citizens spontaneously begin to take care of a public good, but this does not produce the transformation of the good into a common good." G. Arena, *I custodi della bellezza: Prendersi cura dei beni comuni. Un patto fra cittadini e istitutzioni per far ripartire l'Italia.* Rome (2020) p. 101. In this way, public goods become common goods, and their enrichment can enrich everyone, not just their owner. *See* G. Arena, *I beni comuni* (ed.) *Nota allegata al Bando per progetti emblematici*

For example, individual citizens and groups of them (active citizens), by spontaneous initiative and often acting based on a sense of kindredship[37] can propose interventions of care or regeneration of public spaces. These might include green areas, squares, streets, sidewalks and other public spaces, public property or subject to public use that might be in partial disuse or dilapidation.[38]

Under the Italian constitutional principle of horizontal subsidiarity, increased interaction and productive synergies are developing between institutions and grassroots movements such as Retake Roma, to be discussed further,[39] below. Horizontal subsidiarity allows decisions and actions "relating to the public interest" to be taken directly by citizens, on their own and in varying degrees of collaboration with public bodies. Heightened citizen engagement is occurring especially in the field of urban security, where residents are directly affected at the most personal and familial levels by the governance of their local surroundings. An example of this collaboration is Italy's Chamber of Deputies' invitation to Retake Roma representatives to present observations[40] relevant to the drafting of the Legislative Decree on Security.[41] The national lawmakers drew upon Retake's suggestions to incorporate them into the

provinciali, 2018.

[37] As noted above, defined as "the quality or state of being of the same kindred or family," or "the state or quality of being related."

[38] P. Biondini, "*Beni pubblici e beni comuni: città, spazi pubblici e beni urbani a fruizione collettiva*," Labsus, Laboratorio per la sussidiarietà, 18 December 2017. Available at: <https://www.labsus.org/2017/12/i-beni-pubblici-urbani-nella-prospettiva-dei-beni-comuni/>. Accessed 20.3.2020.

[39] <https://www.retakeroma.org>. Retake is a volunteer association that empowers citizens to take care of common goods all across the Italian peninsula. Retake Roma is a non-profit, non-governmental, non-partisan organization founded in 2010 and currently comprised of some 80 self-organizing neighborhood groups in Rome alone. Aimed at bolstering civic pride, personal responsibility and empowerment, it organizes educational and hands-on clean-up events that engage citizens in the democratic process of caring for and defending common goods from degradation. The volunteers seek to raise awareness about the need to increase and improve normal maintenance operations by city administrations; they educate citizens about their duty to respect the public places by influencing public opinion through first-hand engagement, social media amplification, endorsements and testimonials from key opinion leaders; they gain support and action from public authorities and the private sector.

[40]<http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/74/audiz2/audizione/2017/10/03/stenografico.0023.html>.

[41] <https://www.retakeroma.org/2017/03/07/dl-sicurezza-le-proposte-di-retake-a-montecitorio/>.

Security Decree of 2017.[42] Thanks to Retake Roma's proposals, school and university grounds – on a national level – now fall within the areas eligible for pacts for urban security and all the touristic and cultural points of interest, regardless of the number of tourists that visit them, and will also be protected in this law.[43] The Italian Security Decree addresses, *inter alia*, the types of measures that could allow abandoned urban areas to be converted into vibrant common goods. To reach the objectives set out in the decree, the legislature has provided for the possibility of pacts for urban security between territorial networks of volunteers – a characteristic manifestation of civic engagement, and of grassroots movements.

Retake has been contributing its philosophy and methodology of active citizenship through Italian educational institutions through its *Retake Schools* program since its founding, often partnering with other civic and legal organizations. One such organization is Labsus, or the *Laboratorio per la sussidiarietà*,[44] a think-tank of legal scholars supporting the implementation of the principle of subsidiarity, where volunteers – active citizens – elaborate ideas, collect a vast array of experiences and materials and report on relevant initiatives throughout Italy, including Retake Roma.[45]

As noted above, and as provided for in the Italian Security Decree, such initiatives may involve the implementation of "collaborative pacts" between governmental bodies and active citizens for the shared administration of public – or common – goods. Italy's first collaborative pact was formed with Labsus, in Bologna, in 2014.[46] Labsus defines a collaborative pact as the "technical-legal instrument that allows living the constitutional principle of subsidiarity in everyday life, [by] exercising

[42] <http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0049720.pdf>.

[43] <https://www.andreamazziotti.eu/decreto-sicurezza-migliorato-grazie-alle-proposte-dei-retakers-retake/>.

[44] <https://www.labsus.org/>. Accessed 4 April 2020.

[45] "*Retake Roma… dal degrado: Il movimento è riuscito nell'intento di riqualificare importanti spazi urbani*" L. Zonfrilli, 13 October 2013, *Laboratorio per la sussidiarietà.* See: <http://www.labsus.org/2013/10/retake-roma-dal-degrado/>. Accessed 4 April 2020.

[46] *See* "*Il 22 febbraio a Bologna presentato il primo regolamento sull'amministrazione condivisa,*" at: <www.labsus.org/2014/02/segna-agenda-il-22-febbraio-bologna-sara-presentato-il-primo-regolamento-amministrazione-condivisa/>. Accessed 27.6.2020.

a new form of responsible and solidary liberty [that renders citizens] sovereign."[47] Collaborative pacts are sources of public law that establish the rules to govern the collaboration between citizens and governmental entities in the pursuit of the general interests.[48] In Italy, as of 30 June 2019, over 1000 collaborative pacts had been signed in 199 cities in 14 regions.[49] In Rome, the first collaborative pact ever concluded was signed between Retake Roma and the Appia Antica Regional Park Entity on Saturday, June 6, 2020 at the Aqueduct Park, for the shared administration of the park's care and for the promotion of the cultural heritage it contains throughout the territory. The development of democratic processes inherent to these collaborative pacts represents an enormous shift in the paradigm that has characterized the governance of public goods, by converting them to common goods. Such shift reallocates the focus of the democratic process, placing it within the grasp of individual citizens and small clusters of them, who can then consolidate and form grassroots movements to increase their effectiveness to positively influence governance, thanks also to the synergies made possible by kindredship and subsidiarity.

Recent Italian jurisprudence confirms the virtual cycle created by these three principles. In June 2020, the Italian Constitutional Court, in judgment no. 131 of 2020, decided a landmark case in which it upheld co-planning between the public administration and third sector entities. The controversy involved a challenge of a law of the Umbria region that seemed to expand the number of subjects to be qualified as entities operating within the third sector (hereinafter ETS), claiming such expansion encroached on the exclusive competence of the state to determine rules of the civil order.[50] The Constitutional Court rejected this claim, and the judgment included broader reflections with considerable significance. The Court held that Art. 55, which opens Title VII of the ETS Code, regulating the relationship between ETS and public administrations, is one of the most significant implementations of the principle of

[47] *Labsus Rapporto 2019 sull'Amministrazione condivisa dei beni comuni*, G. Arena, p. 7.

[48] Ibid.

[49] Id. Pp. 9-10

[50] Judgment 26 June 2020 no. 131, paragraph 1.1.

horizontal subsidiarity, enhanced by art. 118, paragraph 4, Italian Constitution.[51] The Court underlined that horizontal subsidiarity was meant to displace "the idea that only the actions of the public system is intrinsically suitable for carrying out activities of general interest", recognizing the "autonomous initiatives of citizens" as "expressions of solidaristic society." The Court noted that ETSs are particularly suitable to perform collaborative functions because, according to the ETS Code, they pursue the common good, perform activities of general interest without lucrative purposes and are subject to strict controls. ETSs are also repositories of valuable information, organizational and logistical capacity that are very useful to public administrations, both because they permit cost savings and because they are able to increase the quality of services rendered.[52] This judgment by the Italian Constitutional Court confirms the importance of the principle of subsidiarity in defining active citizens' essential role vis-à-vis governance.

4. Grassroots Movements

As noted above, grassroots movements are direct manifestations of kindredship: they begin spontaneously, from the simple relationships that exist among a few persons. Citizens carrying out small clusters of activities solicit collaboration from other people who can eventually become strong enough and empowered to demand legal action from the government, by expressing both proposals and protests in numbers that the public administration cannot ignore. These active citizens are thus united through a common goal, as a result of their recognition of their kindredship. They support each other in kindred-like rapports and guide themselves upward from the ground up – from their broad-based "grassroots level" – ascending along what is often a difficult, zigzag climb through hierarchical governmental systems. They encounter and must overcome cultural and bureaucratic barricades along the way, and break through jealously held territories. They aim to achieve tangible results and legal actions that translate into social improvement for the collective good. To do so, grassroots movements rely on the

[51] Id., paragraph 4.

[52] Ibid.

principle of subsidiarity to build on the necessarily horizontal foundation of kindredship, enlarging and buttressing it with verticality as they proceed. Then, ideally, they fortify citizens' empowerment by gaining support and authority from the top, the public administration, as mandated by the rule of law.

Returning to the topic of the increasing relevance of women and non-binary individuals in the formation of grassroots movements – and hence the need to use the word "kindredship" instead of "fraternity" – we can indicate a few examples that have achieved important milestones in legal reform. The women's – rights and LGBTQ – rights movements are exemplary. In *Sisterhood is Global* – a book with a range of views from around the world addressing issues facing women, including legal questions such as marriage; divorce; polygamy; contraception; abortion; maternity leave; child raising; physical abuse, including assault, battery and rape; sexual harassment, etc. – the author boldly asserts, "Although evangelical Christians, Islamists, the Vatican, and the ultra-Orthodox regularly unite in a misogynistic brotherhood to prevent women from gaining and keeping the basic human right of reproductive freedom, *they are losing.* […] *This is directly traceable to the influence of the global women's movement."*[53] Similarly, the #MeToo movement exemplifies the growing importance of legal issues relating to gender in recent years, delivering more emphasis to the critical need for civil remedies and criminal penalties for harm caused through sexual assault. This movment has "shaken the foundations of some of the dominant structures that for so long have been keeping a stronghold over the way that powerful institutions and individuals have been dealing with instances of sexual abuse."[54]

A wide spectrum of other legal issues involving threatened or violated civil rights – including LGBTQ rights, reproductive rights, immigration, criminal justice, prisoners' rights, disability rights, racial justice and many more – have been identified by individuals who have then formed grassroots movements to seek redress for damages or reform through the courts and legislatures. The Civil Rights Movement itself was

[53] R. Morgan, *Sisterhood is Global*, Preface, NY, 2016, Digital edition. Emphasis in original.

[54] F. Ghadery, "#Metoo – has the 'sisterhood' finally become global or just another product of neoliberal feminism?," Transnational Legal Theory, 10:2, 252-274, DOI: 10.1080/20414005.2019.1630169, (2019).

spurred on by many individuals along the way, who contributed to the growth of the movement, and which has recently culminated in the Black Lives Matter movement, still protesting and bringing legal actions to achieve and equal opportunity. In the United States, the American Civil Liberties Union, a non-profit and non-partisan "public interest law firm with a 50-state network of staffed, autonomous affiliate offices"[55] has been waging legal battles for individuals and civic movements for 100 years.[56] It is one of the primary legal arms available to aggrieved persons or groups in the US, working through "the courts, legislatures and communities to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States.[57] Such initiatives are often pursued thanks to activities that were sparked by kindredship, and their success in courts ultimately further advances such principle. As the operative legal body that solicits the government for remedies and reform, the ACLU relies on a wide range of principles

[55] <https://www.aclu.org/guardians-freedom>. Accessed 29.6.2020.

[56] A complete analysis of relevant cases where the ACLU has fought to defend the causes initiated by citizens and supported by grassroots movements is far beyond the scope of this article, but a few historic cases can be noted here, to show the long standing influence this organization has had in expanding civil rights. These cases were also instrumental in swaying public opinion and drawing attention to wrongs being committed against individuals or groups by the government. See also <https://www.aclu.org/guardians-freedom>.

Gitlow v. New York, 268 U.S. 652 (1925). This landmark US constitutional law case held that the 14th Amendment "incorporates" the First Amendment's free speech clause and thus applies to the states as well as to the federal government.

Powell v. Alabama, 287 U.S. 45 (1932) The Courte held for the first time that constitutional standards applied to state criminal proceedings. Convictions of eight African Americans wrongfully accused of raping two white women were reversed due to the poor performance of their lawyers, which deprived them of their 6th Amendment right to effective counsel.

Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939). The Court found the repressive actions of an anti-union mayor to be a violation of freedom of assembly, holding that such right applies to public forums, such as streets and parks.

Smith v. Allwright, 321 U.S. 649 (1944). The Court overturned a Texas law that authorized parties to establish white primaries, holding that it abridged the Fifteenth Amendment right to vote, as well as the Fourteenth Amendment right to equal protection under the law.

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). This case forbade state laws establishing racial segregation in public schools, even if the segregated schools are equal in quality, partially overruling *Plessy v. Ferguson*.

Romer v. Evans, 517 U.S. 620 (1996), This case held that a Colorado state constitutional amendment preventing protected status based upon homosexuality or bisexuality violated the Equal Protection Clause.

[57] <https://www.aclu.org/faqs#1_1>. Accessed 29.6.2020.

related to subsidiarity, though not specifically identified as such, present in US law. As noted above, such principles and laws create a regime similar in function to those premised on subsidiarity in the EU: they regulate concurrent powers by weighing and distinguishing national and local interests with the aim to distribute power in the most appropriate and effective way.

The US Constitution provides in the Supremacy Clause that it and other federal laws and treaties made pursuant to them are the "supreme law of the land."[58] It thus establishes a hierarchy whereby any state laws that contravene these federal laws are preempted.[59] In turn, however, the 10th Amendment provides for "Reserved Powers," and was "intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people."[60] Powers that are shared by both the state and federal governments are called "concurrent powers." This presentation of the disbursement of powers in the US federal system is necessarily very simplified, but serves to underline the roughly pyramid structure within which legal actions flow, and within which citizens, grassroots movements and organizations such as the ACLU operate.

At the legal system's base, a broad field expands across all 50 states, each endowed with its own pyramid structure, beginning with a myriad of local governments and ascending up through larger, county or otherwise denominated regional bodies, to a summit at the statewide level. The federal legal apparatus operates across this same entire territory, superimposed over this expansive plain. Both state and federal governmental bodies therefore interact directly with citizens, and varying levels, depending on the nature of the matter being addressed. And though several limiting doctrines such as "standing to sue" and "exhaustion of remedies" serve to restrict direct access to remedies through the courts, the system does provide a modicum of success to persistent – and perhaps lucky – plaintiffs.

[58] US Constitution, Article VI, Clause 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every State to the Contrary notwithstanding."

[59] *Altria Group v. Good*, 555 U.S. 70 (2008).

[60] *United States v. Darby*, 312 U.S. 100, 124 (1941).

The very Preamble of the US Constitution speaks most clearly and certainly most eloquently to spur Americans on in their quest of empowerment: "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 to our Posterity, do ordain and establish this Constitution of the United States of America." The principle of subsidiarity had been conceived in the citizens' demands that led to the American Revolution in 1776. It was instilled in the social contract and thus became an inherent part of American legal culture through the Supreme Law of the Land in 1787. American democracy has evolved over the last 233 years, and the power of subsidiarity and the strength of the social contract it sustains have certainly ebbed and flowed. Especially in these current turbulent times, the need for kindredship to spark grassroots movements and urge effective management and change in the public administration to foster improvements for the common good seems to be at a peak.

In today's democracies, citizen participation often evolves from an individual level into a focused association or a grassroots movement that can lead to significant legal changes. A common vision seems to emerge: "a world in which a universal commitment to the health and well-being of the earth and all its peoples, fueled by successful global movements for economic and climate justice, has transformed production practices, consumption patterns, and economic and social relations to ones based on sustainability, equity, and the rights to land, food, and water."[61] Faced with the need for a shift in societal responsibility and organization, citizens form groups that often develop into grassroots movements, enabling them to have a larger voice and contribute to the care of common goods. As discussed above, one such movement is Retake Roma,[62] which reinterprets the role of citizens from passive by-standers and converts them into active protagonists by allowing them to "retake" their cities, collaborating with and stimulating the institutions to do their work better. This process

[61] <https://grassrootsonline.org/who-we-are/>. Grassroots International was founded in 1983 and has "expanded over the years and decades to support movements for political independence and human rights in South Africa, the Philippines, Palestine, Haiti and elsewhere with material aid and grants [using a] model of long-term partnership and direct advocacy [that] poses a powerful alternative based on movement building for systems change."

[62] <https://www.retakeroma.org>.

is the essence of subsidiarity. As active citizens, Retakers pursue self-interest and a sense of kindredship to fulfill the needs of their communities by taking care of common goods, creating scenarios where everyone benefits. Moreover, Retake's "approach, aimed at qualifying itself as a relevant subject in the public-private-non-profit partnerships, (PPPNPs) – which has become one of the main forms of organized interventions in local politics – seems to supersede the vision through which every issue of urban politics is resolved exclusively with institutional relationships where the city administration is [merely] called upon to carry out its own functions."[63] Retake is emblematic of those grassroots movements born of kindredship and nourished by empowerment attained through active citizenship that lies at the heart of subsidiarity.

5. Conclusion

We have seen how the principles of kindredship and subsidiarity can enable grassroots movements to bring about effective legal change. Fueled by the force of active citizenship that democratic society encourages through the social contract and fully supporting the rule of law, these three elements serve as catalysts to one another to engender important virtuous cycles. Such cycles are interdependent, each of them reinforcing the other; none of them could be as effective in accomplishing sweeping legal reform without the presence of the other two. They are essential in fostering democratic activity aimed at improving the quality of life for the common good and achieving social justice in the Rawlsian sense. In Italy, across Europe and in the United States, these virtuous cycles are working to improve our legal systems, furnishing them with more equitable, functional and sustainable mechanisms to support democratic values and the authority and influence of legal rules.

[63] M.C. Antonucci & A. Fiorenza, *Democrazia dal basso: Cittadini organizzati a Roma e nel Lazio*, (2016) 87.

ANTONIA SALVATO*

JOINT SECTIONS OF ITALIAN COURT OF CASSATION, JUDGMENT NO. 8236/2020: A CHANGE IN THE DEFINITION OF LEGITIMATE INTEREST?

ABSTRACT. *TIn Judgment No. 8236/2020 of the Joint Sections of the Italian Court of Cassation, the judges affirmed the jurisdiction of the ordinary judge over the damage caused by misbehaviour of the public administration. It is indeed stated that this incorrect behaviour generates an infringement of the private individual's general subjective right to the respect of good faith by public authorities. This judgement, if on the one hand qualifies the relationship between public administration and private individual as a "qualified social contact" – following the previous majority case-law –, on the other hand, declaring the jurisdiction of the ordinary judge, implicitly rejects the current notion of legitimate interest. Today, in fact, the subjective legal situation of legitimate interest can no longer be summarized in the mere interest of the private individual in the legitimacy of the administrative act. The notion of legitimate interest has a relational dimension: legitimate interest of the private individual includes the general claim that public power behaves according to correctness and good faith. After this judgement, it is correct to ask whether there is change in the definition of legitimate interest.*

* Law Graduate, Roma Tre University.

1. Introduction

In the Italian legal system, there are two different judges: the ordinary and the administrative judge. The ordinary judge is normally competent for all situations in which a "subjective right" is violated, whilst the competence of the administrative judge concerns the injury of the so-called "legitimate interests", except in cases expressly provided for by law,[1] caused by the public power.

As for subjective rights, the private individual is entitled to compensation for damage deriving from the violation of legitimate interests.[2] A specific unfair damage that the public administration can cause to the private individual is the damage which derives from the failure to respect the time constraints within which the administrative power must respect: it is called "delay damage". The public administration has the obligation to compensate the unjust damage caused by the non-observance, intentional or negligent, of the procedural deadline. The public administration, in fact, has the obligation to observe the duties of correctness and good faith, provided by Italian civil law, in the context of its relationship with the private individual. For this damage, Art. 133, para. 1, lett. a), n. 1, Italian Administrative Procedural Code provides for the exclusive jurisdiction of the administrative judge.

In a context of prevailing uncertainty[3] about whether the private individual is entitled to compensation for damage caused by misbehaviour of the public administration, in the absence of the attribution of the subtended essential value, the Joint Sections of Italian Court of Cassation judged on it[4] and affirmed the compensation of the damage caused by the misbehaviour of the public administration, declaring the competence of the ordinary judge.

[1] For the definition of "legitimate interest", see *infra*, para. 2.

[2] See *infra* para. 3.

[3] See *infra* para. 3. The majority of the previous case-law excludes compensation in the case of the absence of the attribution of the subtended essential value.

[4] Joint Sections of Cassation, 28 April 2020, n. 8236.

2. Legitimate interest: an Italian category of active legal subject situation

The Italian legal system is characterised by an autonomous subjective legal situation in the context of the administrative relations, different from the "subjective right" shared with other legal systems,[5] namely, the "legitimate interest".[6]

The bipartition between subjective right and legitimate interest stems directly from the Italian Constitution, in particular from Arts. 24, 103 and 113,[7] which confirm the existence of this category. Nevertheless, a specific definition of legitimate interest is not present in the current legal framework.[8]

At first, legitimate interests were considered only as instrumental subjective legal situations to administrative power legitimacy, without any link to a specific essential value.

With the passing of time, several theories on the definition of "legitimate interest" have been formulated.[9] First, the theory of the so-called "occasionally protected

[5] In foreign legal systems, the category of "legitimate interest" does not formally exist (except for the Spanish system, as enshrined in Art. 24 of the Constitution). Nevertheless, in all legal systems, the private citizen can enjoy a subjective legal position towards the public administration; for example, the German system considers "public subjective rights", which have a different denomination but the similar substance to the Italian legitimate interests. For further details, in particular on the English and French systems, see S. Cassese, *Le basi del diritto amministrativo*, Torino, Garzanti, 1995, p. 66.

[6] The legal institution of the legitimate interest has been part of the Italian system since 1889, with the so-called "Crispi Reform" (Law no. 5992 of 31 March 1889). The protection of the legitimate interest could not be entrusted to the ordinary judge, which was competent only for subjective rights. The jurisdiction of the ordinary judge, in fact, would have entailed a violation of the principle of separation of powers, since the judicial power would have replaced the executive power of the public administration. Therefore, protection was delegated to the Council of State, which at the time was not a judicial body, but an advisory body of the government.

[7] Art. 24, para. 1, Italian Constitution: "*Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi*"; in this article, legitimate interest is equated with subjective right and its judicial protection is guaranteed.
Art. 103, para. 1, Italian Constitution: "*Il Consiglio di Stato e gli altri organi di giustizia amministrativa hanno giurisdizione per la tutela nei confronti della pubblica amministrazione degli interessi legittimi e, in particolari materie indicate dalla legge, anche dei diritti soggettivi*". This Article provides that legitimate interest is the administrative jurisdiction's principal object.
Art. 113, para. 1, Italian Constitution: "*Contro gli atti della pubblica amministrazione è sempre ammessa la tutela giurisdizionale dei diritti e degli interessi legittimi dinanzi agli organi di giurisdizione ordinaria o amministrativa*", the protection of legitimate interest is always admitted against administrative acts.

[8] G. Napolitano, *La logica del diritto amministrativo*, Il Mulino, Bologna, 2020, p. 279; E. Casetta, *Manuale di diritto amministrativo*, Milano, Giuffrè, 2018, p. 330.

[9] For further considerations, see F.G. Scocca, *Interesse legittimo, Storia e teoria*, in *Diritto pubblico*, n. 3, 2017, pp.

interest": the legitimate interest consists in a favourable position of the subject not protected directly but only occasionally, i.e. when the position corresponds with a prejudice to a public interest, resulting instrumental in maximizing the public interest. Second, the procedural theory: the legitimate interest coincides with the interest to appeal of the recipient of the unfavourable provision. Third, the theory of legitimate interest being instrumental in ensuring the legitimacy of administrative acts: the former substantiates itself in the private claim to the legitimate exercise of administrative power. Lastly, the normative theory: the legitimate interest is a substantial legal situation – not procedural –, directly protected by the legal system, and it attributes to its owner multiple powers and faculties aimed at achieving or protecting an essential value potentially damaged by the administrative provision.[10]

Following the important judgment of the Court of Cassation of 1999,[11] which recognized the direct enforceability of the legitimate interest, including compensation when a violation of an essential value occurs, the aforementioned regulatory theory has been incorporated into the Administrative Procedural Code (CPA).[12] In particular, Art. 34, para. 1, lett. c), CPA[13] provides that the administrative judge has the power to issue a judgment ordering the public administration to adopt a binding measure; the previous failure to adopt these measures, in fact, denied the private individual the due favourable effects. With this provision, which consequently admits a judgment reversing the adoption of an act entirely attributable to the public administration, Italy aligns with other European systems.[14]

945-984.

[10] This theory finds its foundation in Art. 24, Italian Constitution, which, for the purposes of judicial protection, has equated the notions of legitimate interests with subjective rights. The private interest would be differentiated from the interest of the *quisque de populo*, and thus qualified, as it consists of an advantageous position in relation to a specific essential value.

[11] Joint Sections of Court of Cassation 22 July 1999, n. 500.

[12] Legislative decree No. 104 of 2 July 2010.

[13] Art. 34, para. 1, lett. c), CPA: «L'azione di condanna al rilascio di un provvedimento richiesto è esercitata, nei limiti di cui all'art. 31, comma 3, contestualmente all'azione di annullamento del provvedimento di diniego o all'azione avverso il silenzio».

[14] The action introduced in the Italian code conforms to the German paradigm of *Verpflichtungsklage* and to the

A situation of "subjective right" is undoubtedly present when, in order to satisfy an active legal situation, there is no need for intermediate intervention by the public administration, whilst a "legitimate interest" exists when a private subject aspires to a result for which the intermediation of administrative power is necessary. This latter subjective legal situation is indispensable in a legal system, as it legitimizes the private subject to require compliance for correctness (understood as good faith already in the moment prior to the issuance of a provision) by the public administration.

From the point of view of the protection of the legitimate interest, it is entrusted to a different judge from the ordinary one, who, however, is not completely excluded from the dispute with the public administration:[15] in fact, the ordinary judge is still competent for all remaining disputes with the public administration concerning subjective rights. Article 103 of the Italian Constitution, entrusts jurisdiction in the matter of legitimate interests to the administrative judge and, in particular areas provided for by law, also of subjective rights.[16]

3. Delay damage and mere delay damage: what compensation?

As already considered, following Judgment No. 500/1999 of the Court of Cassation,[17] the private individual is entitled to compensation for damage deriving from

English one of mandatory order. In Germany, paras. 42 e 113 of *Verwaltungsgerichtsordnung* (German administrative process code) allow the adoption of a sentence condemning an act previously refused or omitted if the plaintiff claims that their own subjective public right has been violated by the illegitimate behaviour of the public administration. In the United Kingdom, similarly, the mandatory order is the order commanding a public authority to perform a public duty.

[15] G. Napolitano, *La logica del diritto amministrativo*, Il Mulino, Bologna, 2020, p. 278.

[16] In the latter case we can talk about "exclusive jurisdiction", whilst the administrative judge can be considered the "natural judge" of legitimate interests.

[17] Before this judgement, the only protection recognized and granted to the injured party for unjust damage to legitimate interests, was the indirect one within an action for annulment, through which the private individual could only obtain the elimination of a specific damaging illegal measure issued by the public administration. Indeed, prior to the CPA, the protection of legitimate interests was focused not on the administrative relation – which arises between the proceeding administration and the citizen – but only on the administrative provision. Thus, the public administration was requested to compensate only damages to fundamental rights. This was because Art. 2043 of the Italian Civil Code (CC) was interpreted in reference only to subjective rights (Art. 2043 CC: «Qualunque fatto doloso o colposo, che cagiona a altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno»).

infringement of legitimate interests. In particular, for the compensation of the so-called legitimate "pretensive interests"[18] – aimed at achieving the adoption of a specific administrative measure expanding their legal sphere – the administrative judge must make a prognosis of the specific essential value underlying the legitimate interest: the basis of the private claim must be verified.[19] The decision of the Cassation was transposed in Art. 30 CPA; this provision explicitly confers compensatory protection, which can be exercised before the administrative judge, against unjust pecuniary damage deriving from the unlawful exercise of administrative activity or from failure to exercise mandatory administrative activity.[20] In this way, public administration is responsible for the so-called "pre-contractual liability": when an administrative procedure is initiated, a "qualified relational situation" arises between the private individual and the public administration, so responsibility derives from "qualified social contact".[21] Public administration abuses its power by violating the duties of fairness and good faith.

A specific unfair damage that the public administration can cause to the private individual is the damage which derives from the failure to respect the time constraints within which the administrative power must act.[22] This damage is called "delay damage": it is stated that the public administration has the obligation to compensate the unjust

The judgment n. 500/1999 was precisely the expression of a change in the function of compensation protection which had already taken place in civil law, no longer aimed at punishing unlawful behaviour, but at restoring the assets of the injured party. P. Fiorentino, *La tutela risarcitoria dell'interesse legittimo*, in *Salvis Juribus*, 26 June 2018, available at <http://www.salvisjuribus.it/la-tutela-risarcitoria-dellinteresse-legittimo/>.

[18] M. Nigro, *Giustizia amministrativa,* Bologna, Il Mulino, 1983.

[19] Part of the Italian doctrine disputes this need for the judgment of attribution for the purposes of compensation for damage. It is indeed argued, that following such judgment there can no longer exist a legitimate interest, but, directly, a subjective right, for which a full protection is always required.

[20] Art. 30, para. 2, CPA: «Può essere chiesta la condanna al risarcimento del danno ingiusto derivante dall'illegittimo esercizio dell'attività amministrativa o dal mancato esercizio di quella obbligatoria».

[21] Qualified social contact is a situation suitable to create reasonable and well-founded expectations for the private individual, who has a procedure opened with the public administration (a "negotiation" started). Court of Cassation, section I, 20 December 2011, n. 27648.

[22] Art. 2, Law n. 241/1990 (Law of Administrative Procedure), establishes the fundamental principle of certainty of the time in which the public administration must provide. In this way, Art. 41 of the Charter of Nice (Charter of Fundamental Rights of the European Union) is implemented. The citizen has the right to "good administration": matters concerning him must be dealt with within a reasonable time.

damage caused by the non-observance, whether intentional or negligent, of the procedural deadline. For this damage, Art. 133, para. 1, lett. a), n. 1, CPA provides for the exclusive jurisdiction of the administrative judge.

The fundamental problem concerning the delay damage is whether it can be compensated regardless of the attribution of the subtended essential value.

There are two possible cases of delay damage.[23] In the first one, the damage derives from the delay with which the public administration issued the favourable act requested; in this case, the private individual is the owner of the subtended essential value. Therefore, compensatory protection is certainly admitted. The injustice of the damage, in fact, derives from the belated achievement of the essential value by the private individual.

In the second case, the administration does not issue any act, or it does issue a negative – even if legitimate – act beyond the final term. In this case, damage is caused by the so-called "mere delay", as the private individual asks for the related compensation regardless of the attribution of the subtended essential value.

The case-law on the subject is divided on whether or not the compensation for damage caused by mere delay can be deemed as admissible. Part of the jurisprudence, in fact, starting from the affirmation of the exclusive jurisdiction in matter of delay of the administrative judge, affirms that time is an effective subjective right; the delay damage, therefore, must be compensated regardless of the demonstration of attribution of the subtended essential value.[24] However, in opposite pronunciations, majoritarian jurisprudence affirms that compensation for delay damage cannot disregard the pertaining of the essential value. The compensation is therefore subject to the demonstration that the provision of the public administration would have been favourable for the private individual as, lacking such proof, there can be no unfair damage.[25]

[23] L. Facondini, *Danno da ritardo: la tutela risarcitoria degli interessi procedimentali*, 26 July 2019, available at <https://www.diritto.it/danno-da-ritardo-la-tutela-risarcitoria-degli-interessi-procedimentali/>.

[24] Italian Council of State, section V, 10 February 2015, n. 675; Council of State, section V, 21 June 2013, n. 3407; Council of State, section V, 28 February 2011, n. 1271.

[25] Italian Council of State, section V, 18 March 2019, n. 1740; Council of State, section IV, 12 July 2018, n. 4260; Council of State, section IV, 8 February 2018, n. 825; Council of State, section IV, 17 January 2018, n. 240; Council

4. Principles affirmed by the Joint Sections of the Italian Court of Cassation in Judgment No. 8236/2020

In this jurisprudential and regulatory context, the recent Judgment No. 8236 of the Joint Sections of the Court of Cassation of 28 April 2020 has profoundly innovated the system just described concerning the compensation of delay damage. It is necessary to analyse the case to better understand the decision of the Court of Cassation.

A company wanted to realize a big hotel complex in a particular area in the Italian Region Friuli-Venezia Giulia and, to that purpose, presented a construction project to the relevant municipal administration in June 2012. Following this, the municipal administration gave to the company a positive opinion on the project. Nevertheless, after a change in the building regulations on the urban area at issue, the municipal administration denied the permission to build the hotel complex in September 2016.

Therefore, the company complained that the administration had behaved in a non-univocal way[26] and thus started a trial against the administration to obtain compensation for the damage.

The company took legal actions before the ordinary judge, as it complained

of State, section IV, 23 June 2017, n. 3068.
With the 2009 legislative reform, Art. 2 *bis* was introduced into Law n. 241/1990. Art. 2 *bis*, para. 1, («Le pubbliche amministrazioni e i soggetti di cui all'articolo 1, comma 1-ter, sono tenuti al risarcimento del danno ingiusto cagionato in conseguenza dell'inosservanza dolosa o colposa del termine di conclusione del procedimento») expressly establishes the compensation for damages deriving from non-compliance with the procedural deadlines, thus providing a new argument in support of those who claimed the compensation of the mere time factor, independently considered. The dominant jurisprudence has, however, continued to support the need for a positive verification of the attribution of the subtended essential value for the purpose of compensation. The administrative judges, in fact, reaffirm the definition of legitimate interest given in the sentence of the Plenary Assembly of the Italian Council of State n. 3/2011: it is an advantageous position linked to a specific essential value. See F. Nerli, *Il danno da omessa o ritardata emanazione del provvedimento amministrativo*, 5 March 2020, available at <https://www.diritto.it/il-danno-da-omessa-o-ritardata-emanazione-del-provvedimento-amministrativo/>; M. Benedetti, *Danno da ritardo*, 23 May 2019, available at <https://www.diritto24.ilsole24ore.com/art/dirittoCivile/responsabilita/2019-05-23/danno-ritardo-151054.php>.

[26] Joint Sections of Cassation, 28 April 2020, n. 8236, para. 2, which refers to para. 55 of the introductory summons of the company to judgment.

that the administration had denied the building permission even though its previous conduct suggested that the construction of the hotel complex would have been allowed. This positive behaviour produced in the company a legitimate expectation on the possibility of a permission concerning the construction of the building. In support of its claim, the company recalled the ordinance of the Joint Sections of the Court of Cassation No. 6594/2011, for which the damage has to be "causally" connected to the matter indicated by the law to be the exclusive competence of the administrative judge, connection which is absent in the present case.

The municipal administration, on the contrary, raised an exception funded on the lack of jurisdiction, stating that the jurisdiction pertained to the administrative judge. In fact, in the administration's opinion, there was no positive formal action suitable to justify the birth of a legitimate expectation, but there was only a mere violation of the procedural terms: the damage to be compensated was a delay damage. Moreover, the administration supported that the construction subject belonged to the exclusive jurisdiction of the administrative judge.[27] Finally, the municipal administration argued that what was stated in the ordinance was not applicable to the specific case. In fact, ordinance No. 6594/2011 concerned a case in which the administration had issued an act extending the legal sphere of the private individual; in this case, instead, there is not any favourable act.

The Joint Sections of the Court of Cassation note firstly how the issue undoubtedly falls within the construction field, as stated by the municipal administration. Nevertheless, the company's claim for compensation concerns damage not caused by acts or provisions of the administration, but by its conduct, in the relations between its offices and the company: it is therefore a damage from conduct; the legitimacy of administrative acts is not discussed.[28] In this case, the injury derives

[27] As it is stated in Art. 133, para. 1, lett. f), CPA: «Sono devolute alla giurisdizione esclusiva del giudice amministrativo, salvo ulteriori previsioni di legge […] le controversie aventi ad oggetto gli atti e i provvedimenti delle pubbliche amministrazioni in materia urbanistica e edilizia, concernente tutti gli aspetti dell'uso del territorio, e ferme restando le giurisdizioni del Tribunale superiore delle acque pubbliche e del Commissario liquidatore per gli usi civici, nonché del giudice ordinario per le controversie riguardanti la determinazione e la corresponsione delle indennità in conseguenza dell'adozione di atti di natura espropriativa o ablativa».

[28] The Joint Sections of the Court of Cassation analyse their previous ordinances, especially n. 6594, 6595 and

from the violation of the rules of correctness and good faith of private law, to which the behaviour of the public administration must conform. The violation of these rules gives rise to a responsibility of qualified social contact, for the overall behaviour held.[29] The qualification derives from the status of the public administration as a subject required to comply with the law as a source of legitimacy for its acts.

Moreover, the Court affirms the applicability of the principles expressed in ordinances No. 6594, 6595 and 6596/2011 to the present case. These principles are valid not only when there is an infringement of the reliance deriving from the issuing and subsequent cancellation of an administrative act, but also when no provision has

6596/2011, in which the judges determined the existence of the ordinary judge's jurisdiction. In all cases, private individuals complained the damage of their expectations on the legitimacy of favourable acts later annulled; they also asked for compensation for their negotiating decisions made in the meantime, trusting in the legitimacy of the acts. In the opinion of the Court of Cassation, the jurisdiction belongs to the ordinary judge as there is no infringement of a legitimate interest but of a subjective right: the "right to the preservation of the integrity of assets", harmed by the choices made trusting in the legitimacy of administrative acts. The three mentioned ordinances overcame the previous jurisprudential orientation, for which a mere connection of the dispute with a matter indicated by the law was enough to establish the exclusive jurisdiction of the administrative judge: the damage has to be "causally" connected to the matter indicated by the law to be the exclusive competence of the administrative judge.
Neither Art. 7, para. 1, CPA, nor Art. 30, para. 2, CPA affect the provisions of the ordinances. Article 7, para. 1, CPA devolves disputes concerning legitimate interests and, in the particular matters indicated by law, subjective rights, about the exercise or non-exercise of the administrative action to the administrative jurisdiction. In fact, this article, mentioning the exercise or non-exercise of the administrative action, implicitly requires that there must be a link, even mediated, to the exercise of administrative power. Article 30, para. 2, CPA establishes that, in cases of exclusive jurisdiction, the administrative judge may also be required to establish compensation for damage from injury to subjective rights. Administrative jurisdiction over subjective rights presupposes that they are involved in the performance of the public function; therefore, also in matters of exclusive jurisdiction it is necessary that the dispute is inherent in a situation of power of the administration. This inherence does not exist when the cause of the damage, for which compensation is requested, is not the bad exercise of administrative power but an illicit behaviour, which is independent of the exercise of power. It is necessary for the administration to act as an authority to entrench administrative jurisdiction, i. e. the administration must exercise its powers or adopt conduct relating to the exercise of the public function.

[29] Joint Sections of Cassation, 28 April 2020, n. 8236, para. 32: «Il dovere di comportarsi secondo correttezza e buona fede rappresenta, infatti, una manifestazione del più generale dovere di solidarietà sociale, che trova il suo principale fondamento nell'articolo 2 della Costituzione e grava reciprocamente su tutti i membri della collettività. Tale dovere si intensifica e si rafforza, trasformandosi in dovere di correttezza e di protezione, quando tra i consociati si instaurano momenti relazionali socialmente o giuridicamente qualificati, tali da generare, unilateralmente o, talvolta, anche reciprocamente, ragionevoli affidamenti sull'altrui condotta corretta e protettiva […]».

been issued.[30]

Lastly, the Court, affirming that in the present case administrative behaviour is not linked, not even mediately, to the exercise of administrative power, declares the jurisdiction of the ordinary judge.

5. Emerging problems and final considerations

In their 2020 judgement, the Joint Sections underline the behavioural duties of the public administration, which has not only to respect publicistic rules, but it has a general duty of fairness in its action. Therefore, the Joint Sections states what has already been found in the previous case-law. The responsibility of the public administration in its relationship with the private individual is of a "qualified social contact" nature. What is protected is not the so-called "legitimate expectation" – which implies only the verification of the legitimacy of the acts of the public administration –, but an autonomous situation, protected in itself, and not in its connection with the public interest.[31]

Moreover, the judges of the Court of Cassation, underlining that the behaviour of the public administration considered harmful is not related to any institutional purpose, implicitly claim that two relationships are established with the initiating of the administrative procedure. The first one is a publicistic relationship, subjected to the jurisdiction of the administrative judge. The second one is a private relationship, which is not functionally related to public power but only occasioned by it; thus, this relationship is subjected to the jurisdiction of the ordinary judge.

The Court's conclusions contain several critical profiles.[32]

Firstly, the provision of a different jurisdiction, depending on which aspect is harmed in the relationship between the administration and the private individual, leads

[30] Joint Sections of Cassation, 28 April 2020, n. 8236, para. 34.

[31] Joint Sections of Cassation, 28 April 2020, n. 8236, para. 28.2: «si tratta, in sostanza, di un'aspettativa di coerenza e non contraddittorietà del comportamento dell'amministrazione fondata sulla buona fede».

[32] See also G. Tulumello, *Le Sezioni Unite e il danno da affidamento procedimentale*, available at <https://www.giustizia-amministrativa.it/documents/20142/1717313/LE_SEZIONI_UNITE_E_IL_DANNO_DA_AFFIDAMENTO_PROCEDIMENTALE_Tulumello.pdf/3d6e52a7-c529-4a49-d979-feb15f10a18c>.

to a greater difficulty for the subject to reach full protection. In fact, in the context of the same relationship, the private individual must act before two different judges.[33] The Court of Cassation changes the concept of legitimate interest, degrading it to mere compliance with publicistic rules. As mentioned above,[34] legitimate interest is not just an interest in compliance with the law by the public administration, but it is a complex substantive position: the demand that the public administration performs its functions correctly. There is no autonomous subjective right to respect the rules of conduct because misbehaviour is not an independent element of evaluation. The judges create a *tertium genus* with respect, on the one hand, to administrative behaviours – in the strict sense – and, on the other, to behaviours that are direct or indirect exercise of power: the Joint Sections mention "behaviours occasioned by the exercise of power".[35]

Secondly, the Joint Sections affirm the duplication of the relationship between public administration and private individual. However, public administration cannot be, at the same time, both a public and private entity: public administration acts only as an authority in the administrative procedure. This unitary relationship is also confirmed by Art. 6 of the European Convention of Human Rights (ECHR) – "right to a fair trial" –, which states that the public administration must respect the correct procedure, understood as the only system of rules.[36] Evolution of the concept of legitimate interest implies that the administrative judge evaluates the entire administrative relationship and not just the administrative act. Otherwise, it would be

[33] This same criticism was also raised in the past against the mentioned judgement of the Joint Sections of the Court of Cassation n. 500/1999.

[34] See *supra*, para. 1.

[35] G. Tropea, A. Giannelli, *Comportamento procedimentale, lesione dell'affidamento e giurisdizione del g.o. Note critiche (Nota a Cass., Sez. un., 28 aprile 2020, n. 8236)*, 2020, available at <https://www.giustiziainsieme.it/it/il-magistrato-3/1087-la-cassazione-afferma-la-giurisdizione-ordinaria-da-lesione-dell-affidamento-oltre-il-caso-dell-annullamento-di-provvedimento-favorevole-alcune-note-critiche-nota-a-cass-sez-un-28-aprile-2020-n-8236>.

[36] Art. 6, para. 1, ECHR: «[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice».

admitted that a singular behavioural misconduct of the public administration can produce both illegitimacy of the act and damage caused by incorrect behaviour.

Lastly, Art. 133, paras. 1, lett. e) and f), CPA establishes the jurisdiction of the administrative judge in building subject. Contrary to what is stated by the Joint Sections, the fundamental reason for this provision is that there can be no misconduct of the administration disconnected from the public function. The behaviour occurs precisely because an administrative procedure is initiated. In the Italian legal system, the administrative judge is competent for the entire administrative relationship, not only for the act.

Finally, Judgement No. 8236/2020, on the one hand recognizes the nature of the administrative relationship as a "qualified social contact", on the other hand, it does not consider the legal provisions. Perhaps, it would have been preferable for the Court to consider the misconduct as part of the public relationship, declaring the jurisdiction of the administrative judge.

LUCA MARAFIOTI[*]

DIMENSIONES PROCESALES ANTIGARANTISTAS EN LA RESPONSABILIDAD DE LA PERSONA JURIDICA EN ITALIA[**]

ABSTRACT. *Este artículo se ocupa de analizar – a veinte años de la aprobación de la Ley 231 del 2001 que establece la disciplina de la responsabilidad de las personas jurídicas por los ilícitos administrativos que dependen del delito – el grado de efectividad de las garantías procesales reconocidas al ente imputado. El Autor, en particular, se centra sobre los aspectos críticos en cuanto a la formulación de la imputación, sobre el alcance de la carga de la prueba, sobre la vocación especial-preventiva del mecanismo procesal y, finalmente, sobre las principales distorsiones provocadas por el sistema cautelar.*

SUMARIO. 1. El alcance del tema – 2. El hecho de la entidad y la carga de la prueba – 3. Vocación especial-preventiva del proceso 231 y estímulo a la colaboración de la ente-imputado – 4. Sistema cautelar y distorsiones de las garantías

[*] Full professor in Criminal Procedure, Department of Law, Roma Tre University.

[**] Ponencia brindada al Seminario Europeo sobre "Responsabilidad de la Persona Jurìdica por Delito. Aspectos Penales y Procesales", Huelva, 4/5 octobre 2019.

1. El alcance del tema

El tema de las dimensiones antigarantistas que tiende asumir el proceso penal sobre la responsabilidad de las personas jurídicas en Italia[1] puede ser vislumbrado según ángulos de perspectivas muy distintas.

Por un lado, es posible colocarse en una perspectiva que tome en cuenta no solo exclusivamente sino principalmente el plano normativo del tema, aunque, resulte imposible no considerar la concreta dinámica en que se ha encontrado durante los últimos casi veinte años la aplicación del mismo decreto ley n. 231 del 2001. Por otro lado, el análisis puede ocupar diferentes ámbitos en el proceso penal, en lo cual el trato de la persona jurídica imputada se desarrolla de una forma antigarantista.

De todos modos, hay que ser conscientes de una premisa: a pesar de los diferentes ángulos visuales según los cuales el tema puede ser abordado, dicho antigarantismo puede ser encontrado ya sea en el tejido de las normas ya sea en la realidad del proceso.

Aquí, sin embargo, parece posible fijar algunas coordenadas esenciales del tema, es decir, referirse a aquellas macro-áreas en las cuales dicha fenomenología se pone de manifiesto en una manera más significativa.

Los temas en particular se refieren: a las deficiencias de imputación del hecho a la entidad jurídica y en la articulación de las medidas de prueba, a la flexibilidad del principio general de no-colaboración en el proceso penal, a las distorsiones que dependen de las peculiaridades en el trato de la persona jurídica en materia de las medidas cautelares.

Dichos temas constituyen "medios de cultivos" para un enfoque procesal de tipo antigarantista sobre el tema de responsabilidad de las personas jurídicas.

[1] En general, a cargo de G. Canzio-L.D. Cerqua-L. Lupária, *Diritto penale delle società. Accertamento delle responsabilità individuali e processo alla persona giuridica*, Padova, 2016; M. Ceresa-Gastaldo, *Procedura penale delle società*, Torino, 2019; G. Paolozzi, Vademecum *per gli enti sotto processo*, Torino, 2006; G. Varraso, *Il procedimento per gli illeciti amministrativi dipendenti da reato*, Milano, 2012. Para una comparación Italia-España, a cargo de L. Luparia-L. Marafioti-G. Paolozzi, *Diritti fondamentali e processo all'ente. L'accertamento della responsabilità d'impresa nella giustizia penale italiana e spagnola*, Torino, 2018.

2. El hecho de la entidad y la carga de la prueba

El art. 59 inc. 2 del decreto ley n. 231 del 2001 fija las coordenadas esenciales del hecho histórico-jurídico del reproche realizado a la entidad. Es necesario «la enunciación en forma clara y precisa del hecho que puede ser pasible de sanciones administrativas, con la indicación del delito del cual el ilícito depende, de los artículos correspondiente de las leyes y de las fuentes probatorias».

El hecho que genera la responsabilidad en cabeza de la entidad, tiene, por lo tanto, las raíces en el mismo hecho atribuible a la persona física, pero mientras que para esta última el "hecho", en todos sus aspectos objetivos y subjetivos, resuelve y concluye la atribución de responsabilidad penal, para la entidad es sólo el punto de partida de una sucesiva calificación.[2]

Según la jurisprudencia dominante de la Corte de Casación,[3] el hecho del delito realizado por los cargos jerárquicos de la entidad o sus subordinados es sólo uno de los elementos que constituye el ilícito atribuible a la persona jurídica.

A eso hay que agregarle otros que sirven para definir los criterios de imputación subjetiva y objetiva del "hecho de los otros" y necesarios a los fines de la aplicación de las sanciones administrativas a la entidad imputada.

De la exacta individualización de estos elementos pueden depender significativas consecuencias a nivel de tutela procesal y sustancial. Elementalmente, el fiscal tiene la carga de describir en modo claro y preciso, para evitar que el juicio contra la personas jurídica represente una fotocopia de aquello existente contra la persona física imputada.

La dificultad de evitar similar restricción en términos de garantías y de juicio se origina ya del tenor literal de las disposiciones contenidas en los art. 5, 6 e 7 del decreto ley 231 del 2001. Se trata, de hecho, de obtener de las normas un comportamiento que pueda depender explícitamente de la violación de un precepto de la disciplina en examen que sea y parezca diferente y autónomo respecto a la pura y simple descripción del tipo

[2] Así, A. ALESSANDRI, *Note penalistiche sulla nuova responsabilità delle persone giuridiche*, en *Riv. trim. dir. pen. econ.*, 2002, 48.

[3] Cfr. *ex pluribus*, Cass., Sez. VI, 5 octubre 2010, n. 2251, en *Cass. pen.*, 2011, 2539, con nota de G. VARRASO, para el cual «el ilícito administrativo atribuible al ente no coincide con el delito, pero constituye alguna cosa diferente, que lo comprende».

penal del delito cometido.

Es necesario considerar, en particular, la previsión que, a los fines de la responsabilidad, exige que el hecho del delito ha sido cometido en interés o para beneficio de la entidad, es decir el art. 5 del decreto ley 231 del 2011. Se refiere, de hecho, a un parámetro en virtud del cual es difícil describir las circunstancias históricas-fácticas del hecho ilícito de la persona jurídica. En efecto, hablar de interés o ventaja puede significar exclusivamente considerar una proyección finalística de la conducta delictiva de la persona física, proyección difícil de traducir en descripción histórica.

La incertidumbre sobre la real extensión del contenido del hecho atribuible a la entidad puede convertirse aún mayor, aún así, cuando se refiere al "defecto de organización" del cual habla el art. 6 del decreto ley 231 del 2001 para los ilícitos administrativos dependientes de los delitos cometidos por las personas físicas que conforman el directorio de la *societas*.

El legislador individualizó una pluralidad de cumplimientos que la entidad debe seguir a fin de no incurrir en una responsabilidad administrativa del delito.

En particular, el órgano directivo debe haber adoptado y eficazmente actuado, antes de la comisión del hecho, modelos de organización y de gestión idóneos para prevenir delitos del tipo que se haya verificado.

Después, la tarea de vigilar sobre el funcionamiento y la observancia de los modelos, de llevar a cabo su actualización que debe haber sido confiado a un organismo de la entidad dotado de poderes autónomos de iniciativa y control.

A esto debe agregarse, entonces, la demostración de una elusión fraudulenta de los modelos de organización o de gestión por parte de las personas que han cometido el delito o de la omisión o de la insuficiencia de vigilancia por parte del organismo al cual se refiere el inciso b).

Se trata de comportamientos sintomáticos de una «diligencia organizativa» de la entidad colectiva, que han constituido la base jurídica para construir negativamente el paradigma de la responsabilidad penal de la entidad, en términos de reproche, por la falta de adopción (o actuación) de los mencionados *standard* adecuados.

De tal manera, el tipo penal descripto en el art. 6 es considerado así de un hecho que impide la responsabilidad y reconduce a la órbita de las excusas absolutorias o de las causas de no punibilidad, con obvias repercusiones en términos de la carga

probatoria: la colocación de la adopción o de la eficacia de predisposiciones de los modelos de organización entre los hechos que impiden (y no ya los hechos constitutivos) la responsabilidad de la entidad concluye por determinar su ajenidad respecto de la estructura del ilícito.

No se puede, en este punto, descartar que la cuestión procesal relativa a la imputación se articula a lo largo de itinerarios escasamente garantistas.

De hecho, la ajenidad al hecho vinculado a la estructura del ilícito facilita la acusación fiscal, que está exonerada del deber de enunciar en forma clara y precisa el hecho atribuido y, en particular, el déficit de organización permite la realización de la conducta criminal.

Y la jurisprudencia a veces considera como «*ultroneo* o en cualquier caso no es necesario la referencia en la cabeza de la imputación de la culpa concretamente atribuible a la entidad, al modelo de gestión y de organización adoptado, a la idoneidad (o no) del mismo para prevenir delitos del tipo de los cuales (se cree que existieron) establecidos, ni tanto menos al comportamiento alternativo lícito exigible sobre la vigencia de una regla cautelar precisamente identificada y disputada».[4]

Corre el riesgo de ser, en tal modo, legítimo atribuir en la imputación únicamente un solo hecho constitutivo: es decir, la comisión del delito "en interés o a beneficio" de la entidad. Se crea, así, el efecto perjudicial de anclar la responsabilidad exclusivamente a la subsistencia de una relación de inmediación orgánica.

El resultado, en buena sustancia, es la imputación "implícita" en cuanto "muta" bajo el punto de vista de las lagunas organizativas concretamente atribuibles a la entidad y simplificada sobre únicamente a la referencia de la imputación penal.[5]

La intromisión del *déficit de organización* del hecho ilícito representa una respuesta a nivel legislativo a estrategias procesales seguidas por el fiscal en los proceso de delitos económicos y a la lógica probatoria consolidada en la práctica, es decir la necesidad de simplificar, sobre el terreno de la prueba, la valoración procesal.

[4] Así, Trib. Milano, G.u.p., 3 gennaio 2011 (ud. 3 novembre 2010), en *Soc.*, 2012, 65.

[5] Sobre el tema, G. Fiorelli, *La incomprensible atribución de responsabilidad del delito "administrativo", entre instancias de simplificación probatoria y formas de responsabilidad "sin acción"*, en *Revista de derecho penal y procesal penal*, 2019-11, 2131.

Se empobrece el tipo penal "de la mano" del legislador,[6] siendo justamente esto último, en el ámbito de la redacción de la norma, para empobrecer la estructura del ilícito con el fin de compensar la dificultad probatoria derivada del proceso.

Similar empobrecimiento encuentra ulterior confirmación en las acusaciones y en los procesos y genera así que la defensa del ente-imputado sea ardua.

El ente-imputado, para evitar una condena, es obligado a proporcionar una prueba de descargo y demostrar la falta de un específico "*déficit de organización".* La consecuencia de esto es que la carga probatoria sobre el plano probatorio se intervienen: no es la parte acusadora la que debe proporcionar la prueba positiva del "*déficit de organización"* de la entidad, pero espera que esta última demuestre lo contrario eso es la ausencia de responsabilidad de gestión y la adopción de una modelo preventivo eficaz.

De modo tal, la entidad parece convocada a afrontar un «desafío probatorio»[7] demasiado exigente.

Al mismo tiempo, se admite al fiscal de sustraerse por completo del cumplimiento de la carga probatoria del tipo penal. De modo tal que se termina por vehicular comprobaciones judiciales meramente presuntivas.

Sobre un terreno más amplio, facilitar al fiscal sobre el terreno de las pruebas se arriesga de negar la idea-cardinal de los sistemas acusatorios más evolucionados según los cuales el titular de la acción penal estatal debería resultar mayormente responsable respecto del imputado.

[6] V.N. D'Ascola, *Impoverimento della fattispecie e responsabilità penale "senza prova". Strutture in trasformazione del diritto e del processo penale*, Reggio Calabria, 2008. Se trata del fenómeno de la "procesalización de las categorías sustanciales", en el sentido de interacción entre la lógica probatoria y las definiciones conceptuales de los requisitos del hecho punible. Sobre el tema, A. Gargani, *Processualizzazione del fatto e strumenti di garanzia: la prova della tipicità "oltre ogni ragionevole dubbio"*, en *Legisl. pen*., 2013, 839; E. Marazaduri, *Il processo penale e le scelte di politica criminale*, en: a cargo de F. Danovi, *Diritto e processo: rapporti e interferenze*, Torino, 2015, 173; L. Marafioti, *Funzioni della pena e processo penale*, en: a cargo de G. De Francesco-E. Marzaduri, *Il reato lungo gli impervi sentieri del processo*, Torino, 2016, 213.

[7] P. Ferrua, *Procedimento di accertamento e applicazione delle sanzioni. La disciplina della responsabilità amministrativa delle persone giuridiche e delle associazioni*, en *Dir. pen. proc.* 2001, 1482.

3. Vocación especial-preventiva del proceso 231 y estímulo a la colaboración del ente-imputado

Así como sobre el terreno de la acusación y de la prueba, la impronta antigarantista que evidencia la comprobación de la responsabilidad administrativa de los entes es captado, más en general, en la vocación especial preventiva del mecanismo procesal.

En el sistema del decreto ley 231, de hecho, el propósito de la comprobación de la responsabilidad no es solo y no tanto la verificación de los presupuestos para una eventual condena del ente inculpado, sino más bien la prevención del riesgo de comisión de delitos así como la necesaria, previa, eliminación de las consecuencias dañosas del ilícito.[8]

Se trata de finalidades que parecen inevitablemente destinadas a orientar los institutos procesales hacia la función especial-preventiva, rehabilitación y enmiendas contra la persona jurídica contra la cual se procede.

Al prescindir de la bondad de los objetivos que se intentan perseguir, es decir el retorno de la empresa a una política comercial en línea con los cánones de la legalidad,[9] queda la sensación que se termina por utilizar el proceso para objetivos de intimidación y prevención propios de la pena.

Así resulta en evidente fricción con el canon de la presunción de inocencia entendida como una regla fundamental de tratamiento. Es decir, que tal canon prohíbe de asimilar al imputado a culpable y tratarlo como tal previo a una comprobación oficial e irrevocable de responsabilidad.

En este perspectiva, pueden ser leerse críticamente las numerosas oportunidades concedidas a la entidad bajo proceso de proponer acciones reparadores y colaborativas al resarcimiento del daño ocasionado o, así también, a eliminar la carencia organizativa que determinó el delito (art. 17 decreto legislativo 231/2001).

Tales instituciones parecen estar destinadas a promover y realizar una verdadera y propia colaboración activa del imputado en el proceso a su propia carga. El que induce a dudar sobre la vigencia de las garantías fundamentales que deberían regir aún también para la entidad, según está establecido por el art. 35 decreto ley 231. Tales disposiciones explícitamente equipara, de hecho, al imputado-persona jurídica al imputado-persona

[8] Para todo, PAOLOZZI, Vademecum *per gli enti sotto processo*, cit., 242.

[9] Así, L. LUPÁRIA, *Contrasto alla criminalità economica e ruolo del processo penale*, en *Proc. pen. giust.,* 5/2015, 5 s.

física respecto a los derechos y a las facultades que puede ejercer.

La atención, en efecto, está puesta sobre todo en las repercusiones negativas que se perfilan para la entidad la cual decide de no utilizar los institutos de colaboración procesal que el sistema 231 le ofrece.

Se trata de una verdadera y propia pérdida de *chances* que consiste en la imposibilidad de utilizar la reducción de las sanciones administrativas, para la entidad misma pueden constituir una forma de pena capital como es, por ejemplo, en el caso de la inhabilitación para funcionar.

La facultad de elección aparentemente reconocida a la persona jurídica de disponer en ser colaborativa *post factum* no debe, por eso, engañar.

Se termina, de hecho, por invertir el sentido más auténtico de la garantía fundamental que rige para el imputado en el proceso en su contra, es decir aquella que prohíbe cualquier interferencia negativa sobre el plano sea procesal o sancionatorio por un eventual comportamiento de no colaboración asumido por la persona bajo proceso.[10] Lo impone el respeto al sacrosanto derecho a guardar silencio que debería regir, por definición, así también para la persona jurídica.[11]

Por otra parte, resulta claro que, si la finalidad última a lo que apunta el proceso 231 es, como se mencionó, el de una re-educación de la entidad para el respeto de la legalidad, una garantía procesal como aquella del derecho a guardar silencio está destinada a sufrir una evitable distorsión funcional hasta casi traducirse en su negación.

Esto no es paradójico si se observa que, en el proceso contra las personas jurídicas, parece, si no es necesario, al menos útil y oportuno mantener un comportamiento de colaboración activa. Aunque el sistema prevé el ejercicio de actividades similares reparatorias y colaborativas en términos de libre elección relativo a la voluntad de la persona jurídica, parece innegable que la decisión de realizar un acto con el fin de evitar un perjuicio mayor, como aquel que representa la imposición de sanciones de tipo cautelar, resulta sustancialmente privar a aquel del carácter de libertad y voluntad que deberían distinguir el ejercicio de las opciones defensivas del imputado.

[10] Cfr., L. Marafioti, *Scelte autodifensive dell'indagato e alternative al silenzio*, Torino, 2000.

[11] En tema, H. Belluta, *L'ente incolpato. Diritti fondamentali e "processo 231"*, Torino, 2018.

Parece ilógico, de hecho, que alguien realice un acto completamente deliberado perjudicial sino sobre la base de una más o menos presión explicita vinculada a la amenaza de un perjuicio o en vista de una posible ventaja.

Y el ambiente procesal en el cual madura una "elección" similar parece caracterizado por una impronta fuertemente antigarantista.

4. Sistema cautelar y distorsiones de las garantías

Así también respecto de las cautelares se registran profundas huellas del orientación del sistema en sentido de un verdadero y proprio estatuto procesal antigarantista contra el ente-imputado. En tal ámbito, por otra parte, la distorsión de las garantías se manifiesta en un modo más implícito y por lo tanto en formas más sutiles.

Aquí, de hecho, se registra en apariencia un excedente de garantías sobre el nivel del contradictorio cautelar que oculta la trampa de una verdadera y propia instrumentalización de la entidad misma en contraste con la presunción de inocencia.

Contrariamente las medidas cautelares para las persona físicas, el proceso italiano 231 prevé una audiencia ad hoc, previo a las decisiones para la aplicación de las medidas cautelares, en la que está asegurado una confrontación dialéctica con la entidad acusada.

El punto, sin embargo, es que aún en tal sede, el contradictorio anticipado actúa de antecámara para el acceso, por una parte de la entidad, a las ya mencionadas actividades de colaboración y reparatorias utilizadas en óptica premiada, con el fin de suspender y, luego, revocar la medida cautelar en curso de ejecución.[12]

La intervención cautelar en la entidad se convierte, así, en un instrumento de presión para inducir a la entidad hacia un camino reeducativo mucho antes que se determine el mérito mediante una sentencia condenatoria.

Una vez más, en resumen, y aún así, más marcado termina por prevalecer la vocación especial-preventiva del proceso 231, que, distorsionando la función propia de la cautela y la pena, desnaturaliza el sentido más auténtico de las garantías fundamentales del imputado cuando viste la ropa de persona jurídica.[13]

[12] En tema, S. Renzetti, *Il diritto di difesa dell'ente in fase cautelare*, Torino, 2017, 160 s.

[13] Cfr. L. Marafioti, *Ambiguità concettuali e divenire applicativo nel processo agli Enti*, en: a cargo de Luparia-Marafioti-Paolozzi, *Diritti fondamentali e processo all'Ente*, cit., 299.

A tener en cuenta, después de todo, que en la experiencia italiana la fase cautelar representa un significativo un primer puesto y un punto de observación ideal para percibir completamente las dinámicas antigarantistas según la cual se articula el proceso en materia de responsabilidad de las personas jurídicas.

De hecho, en esa etapa, desafortunadamente, se consuma, siempre anticipadamente y a veces definitivamente, el destino de las personas jurídicas bajo proceso.

Y, sobre todo: eventuales elecciones colaborativas de la entidad resultan el fruto de instrumentalizaciones de las posiciones jurídicas para fines de política criminal,[14] en lugar de que – como, en cambio, debería ser – expresiones de la inaplicabilidad del derecho de defensa de la entidad.

[14] R. Del Coco, *Misure cautelari interdittive e diritti fondamentali dell'ente*, en: a cargo de L. Luparia-L. Marafioti-G. Paolozzi, *Diritti fondamentali e processo all'Ente*, cit., 186.

SILVIA NICO[*], ANDREA RENZI[**]

MODERN CHINESE LEGAL SYSTEM: IS THERE ANY REFERENCE TO THE IMPERIAL THOUGHT?[***] CONFUCIANISM, LEGALISM AND RULE OF LAW WITH CHINESE CHARACTERISTICS

ABSTRACT. *The evolution of Chinese society has had a strong impact on the construction of the modern Chinese State. What is not evident, however, is what kind of relationship exists between the main philosophical theories of classical China and the transition from a pure Socialist state to a legal system infused with the rule of law. The paper will primarily reconstruct the main points of the philosophical theorizations that have had the greatest influence on the development of the Chinese legal system. After reconstructing the historical framework, the constitutional evolution of the rule of law and its reflection on administrative justice will be examined. The paper, without completeness claims, tries to expose to a non-sinologist public the complexity of Chinese legal system and the relations with the historic evolution.*

[*] PhD Candidate in Civilizations of Asia and Africa, Sapienza-University of Rome.

[**] PhD Candidate in Administrative Law, Roma Tre University.

[***] Although the paper is the result of common reflections, paragraphs 2, 3, 4 and 5 are written by Silvia Nico, paragraphs 6 and 7 are written by Andrea Renzi. Introduction and conclusion have been commonly developed.

1. Introduction

In the comparative study between legal systems in recent times, People's Republic of China (PRC) has aroused great interest. China's opening to globalization and international trade has made it necessary to deepen knowledge about Chinese legal issues. The set of rules of the PRC is based on the Marxist-Leninist theory, Mao Zedong's thought, Deng Xiaoping theory, the important thought of Three Represents theorized by Jiang Zemin, the Scientific Outlook on Development and the Harmonious Society theorized by Hu Jintao and, finally, the Four Comprehensives, which is Xi Jinping's contribution to CCP's general theory.[1]

Nonetheless, it appears undeniable how the evolution of Chinese society has had a strong impact on the construction of the modern Chinese State. What is not evident, however, is what kind of relationship exists between the main philosophical theories of classical China and the transition from a pure Socialist state to a legal system infused with the rule of law.[2]

Traditionally, the state of legality has always been considered a concept imported from the Western liberal States, as proof of this, the strengthening of this principle was required for China's participation in main international organizations. But is it possible to find some historical precursors in the regulation of relations between the legal system and the citizens? Was the state of legality really imported from the West or is it possible to find some roots of this concept in Ancient Chinese philosophical thinking?

To answer these questions, the paper will primarily reconstruct the main points of the philosophical theorizations that have had the greatest influence on the development of the Chinese legal system.[3] To this end, Confucianism will be analysed in its fundamental points concerning on how it related to the law and the management of public power. Subsequently, the main theorizations of the Legalism thought and

[1] S. Hashmi, *The Four Comprehensives*, in *Leadership and Management in China: Philosophies, Theories and Practices*, New York, Cambridge University Press, 2015.

[2] In fact, the interest that the PRC has in the development of the rule of law appears evident. Just think of the role played by the Chinese Supreme Court in the theoretical analysis of this principle.

[3] L.T. Lee, W.W. Lai., *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, in *Hastings Law Journal*, 29, 1978, p. 1307 at 1308.

practices for an efficient and punctual management of the State will be examined. Finally, it will be exposed how Confucianism was able to propose a paradigm which, although anchored to its own philosophical thought, has been able to acquire elements belonging to other philosophical schools. After reconstructing the historical framework, it will be examined the constitutional evolution of the rule of law and how it has in some ways partly acquired theoretical elements from Imperial Age's philosophies. Finally, administrative justice will be analysed as a method of applying the principle of legality and how it can qualify as a syncretic model between the Legalist thought and the Confucian thought.

2. An ancient system

The Chinese legal system boasts a very ancient tradition, but in the opinion of part of the Chinese juridical science, it has remained consistent over the centuries.[4]

Even during times when Imperial power was held by ethnically non-Chinese dynasties, it did not experience drastic or significant changes.[5] The Chinese conception of law is particularly indebted to Confucian thought and since this philosophy is based on moral and ethical theorizing, the Chinese legal system has often been compared to natural law,[6] although not unanimously.[7] In addition to being probably a methodologically complex comparison, the Chinese conception of law is not entirely ascribable to Confucian thought, as other philosophical thoughts, both endogenous and exogenous to Chinese culture, have had some influence in its formation and in its development over the centuries.

[4] "Moreover, it is extremely rare in the world for its integrity, systematicness, and the vast amount of legal works, law codes, imperial regulations and the archival materials of the past dynasties left over in history," J. Zhang, *The Tradition and Modern Transition of Chinese Law*, Berlin, Springer, 2014, p. V.

[5] W. Chang, *Classical Chinese Jurisprudence and the Development of the Chinese Legal System*, in *Tsinghua China Law Review*, 2, 2010, p. 208.

[6] E. Consiglio, *Early Confucian Legal Thought: A Theory of Natural Law?*, in *Rivista di Filosofia del diritto*, 2, 2015, p. 359.

[7] Consiglio, *Early Confucian Legal Thought: A Theory of Natural Law?*, cit., 2015.

3. The Confucian concept

"The Master said,
'If the people are led by laws, and uniformity sought to be given them by punishments,
they will try to avoid the punishment, but have no sense of shame.
If they are led by virtue, and uniformity sought to be given them by the rules of propriety,
they will have the sense of shame, and moreover will become good'."[8]

As it is known, Confucianism represents the most important reference point of classical Chinese thought, its doctrine has permeated Chinese culture until it almost identified with it,[9] and even today Confucianism continues to have significant influences on numerous aspects of Chinese public and institutional life.[10]

According to the theory of Confucianism, *li* 理 is the cardinal principle that governs the cosmos. This term is difficult to translate in a univocal sense, having assumed many connotations in its long history, but in this context, it is to be understood as *principle*, an element that permeates all living beings, relationships and human values. This ethical principle must move all men in their actions and in their connections with others. It is related to the Five Constant Virtues, that are benevolence *ren* 仁, justice *yi* 义, rituals *li* 礼, wisdom *zhi* 智 and trustworthiness *xin* 信. Among these virtues, certainly *li* (rite) is the most important for the topic discussed here. This concept existed well before the formulation of Confucian theory; its birth is lost in the mists of time. Its origin can be found in ancestral religious practices, which evolved into social practices, until they were codified and standardized around 1000 B.C. by the Duke of Gong during the Western Zhou dynasty 西周朝 (1046-771 B.C.). Basically, rites were the institutionalization of social practices with strong moral implications that had to be respected from the population. Their codification was also an attempt to build a strong social hierarchy and to mark the different degrees of social ranks, such as the high and the low, the noble and the humble. The rites are therefore what comes closest

[8] Confucius, *Anaclets*, 2.7.

[9] G. Bertuccioli, F. Casalin (ed.), *La letteratura cinese*, Roma, L'asino d'oro, 2013, p. 47.

[10] M. Miranda, *I valori confuciani e il contributo ideologico di Xi Jinping*, in *Wenxin*文心. *L'essenza della scrittura. Contributi in onore di Alessandra Cristina Lavagnino*, Milano. Franco Angeli, 2018.

to the concept of law, of moral norms to be faithfully respected.[11] Confucianism has a deeply paternalistic connotation, and the ultimate goal of the human being is to elevate oneself to become a virtuous man, *junzi* 君子. There is no recognition of equality and equal dignity among men, as the leading position is reserved to virtuous men. Everyone can aspire to become such a man, and to achieve this goal, therefore, they must adhere to the *li* (principle) and to the Five Constant Virtues.

For the above-mentioned reasons, it would not make sense for Confucians to manage public life and relations between men through the severity of the laws and severe punishments if they are not respected. The central power should be an example of morality and virtue, so as to be imitated by the population. Therefore, the law has a very wide degree of discretion for the virtuous man because, as it was claimed by two eminent Confucian thinkers Mengzi 孟子 (370-289 B.C.) and Xunzi 荀子 (313-238 B.C.): "whatever law should be taken into consideration, cannot be enough on its own and must have as its foundation an ethics of humanity and benevolence."[12] Consequently, the virtuous man does not make particular efforts in respecting the laws because these are nothing else but the internalization of the ritual norms. To this, it must be added the fact that the *li* (principle) cannot be considered as a static, immutable concept, but it modifies itself on the basis of historical contingencies[13] and hence following it does not involve moral and social issues in any case.

[11] J. Zhang, *The Tradition and Modern Transition of Chinese Law*, 2014, p. 6.

[12] A. Cheng, *Storia del pensiero cinese*, Torino, Einaudi, 2000.

[13] L.T. Lee, W.W. Lai., *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, in *Hastings Law Journal*, 29, 1978, p. 1326.

4. The Legalist alternative

"Laws are the means of prohibiting error and ruling out selfish motives;
strict penalties are the means of enforcing orders and disciplining inferiors.
Authority should never reside in two places;
the power of decree should never be open to joint use.
If authority and power are shared with others, then all manner of abuse will become rife.
If law does not command respect, then all the ruler's actions will be endangered.
If penalties are not enforced, then evil will never be surmounted."[14]

Confucianism and its values represented Chinese intelligentsia's main reference point for the entire Imperial period, ended in 1911 with the fall of the Qing dynasty 清朝 (1644-1911). This does not mean that this philosophy has never been questioned. On this point, its major crisis was during the reign of Qin Shi Huangdi 秦始皇 帝 (260-210 B.C., r. From 221 B.C.), the first emperor to reign over a united China and promoter of the Legalist philosophy. The Legalist school developed its theories starting from the 4th century B.C. and its most eminent thinkers were Han Feizi 韩非 子 (? - 233 B.C.) and Li Si 李斯 (280-208 B.C.). The Legalists did not propose a philosophical reflection, but a political theory, deriving from a set of practices.[15] The practices, or techniques, were intended as practices that the state had to implement to ensure compliance with the laws. The Legalists believed that morality was split from the detention of power, the sovereigns were not necessarily virtuous, honest men, it was therefore necessary to create a system that could guarantee the functioning of the State regardless of the sovereign's abilities.

The ideal State for these philosophers and their scholars was therefore autocratic, highly bureaucratized, governed by the imposition of techniques, laws and severe punishments in case that these were not respected. The State was intended as a strong central power that governed through the establishment of special ministries. The central principle of the school is *fa* 法. This word has taken on the meaning of law intended as positive law in modern Chinese, but it is an ancient term, which at that time denoted

[14] Han Feizi, B. Watson (tr.), *Han Feizi: Basic Writings*, New York, Columbia University Press, p. 57.

[15] A. Cheng, *Storia del pensiero cinese*, 2000, p. 231 at 232.

a "norm to refer to or a model to conform to."[16] Since the birth of their school of thought, Legalists dealt with the objectification of the law, registering the laws on bronze supports and publishing them.[17] In fact, if laws were public, they could not be ignored or interpreted differently by anyone, in addition, Legalists also stressed on the concept that criminal liability had to be personal.

The Legalist school stood out for its intransigence and absolute intolerance towards any other philosophical theorizing, in fact, in the moment of its greatest power, Li Si, the school's most important exponent at the time, convinced the Emperor to implement in 213 B.C. the burning of books, during which treaties relating to all the non-Legalist philosophical schools were burnt and the persecution of Confucian academics began.

The supremacy of the Legalist philosophy however did not last long. The Qin dynasty founded by Qin Shi Huangdi did not survive long after his death and in 206 B.C. the Han Dynasty 汉朝 (206 B.C.-220 A.D.) came to power and restored Confucianism as a State ideology.

5. Confucian syncretism

Despite the brevity of the Legalist supremacy, its influences permeated the conception of law in China. Even if Confucianism had returned to vogue, some elements of the Legalist philosophy were destined to remain over time. To quote Cavalieri: "The precepts of the social practice of rituals condensed into the norms of the *li* were introduced into the imperial codes, thus effecting a fusion or synthesis between, on the one hand, the structure of empire and of the legal system as shaped by the Legalists, and, on the other, the content of the common morality that had converged in the *li*."[18]

One of the Legalists theory's most obvious legacies was the absolute pre-eminence of central power and a strong bureaucratism associated with it, which

[16] L.T. Lee, W.W. Lai., *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, 1978.

[17] A. Cheng, *Storia del pensiero cinese*, 2000.

[18] R. Cavalieri, *La legge e il rito, Lineamenti di storia del diritto cinese*, Milano, Franco Angeli, 1999.

characterized the Chinese Empire.

A feature that allowed Confucianism to survive until modern times has been its ability to assimilate and integrate concepts and theorizations belonging to different thoughts. In later times than those examined in this paper, in fact, it managed to withstand the impact force of Buddhism, an egalitarian thought that could have put the Confucian value system in serious crisis.

Buddhism counterposed two types of law: *fofa* 佛法, the law of Buddha (or Buddha Dharma, of which it is the Chinese translation) and *wangfa* 王法, the law issued by the temporal institutions represented by the King or the Emperor.[19] Buddhists considered the former as being the most important, therefore mass adherence to these principles could have put the Confucian establishment at serious risk. In the same way, this new religion imported from India put pressure on personal liability in the legal field and considered ethics of motivation being superior to the ethics of consequence. Despite its wide diffusion among the population, however, Buddhism did not affect Confucian power and its centrality in the administration of the State, but made important theoretical contributions that Confucianism included in its idea of law and justice,[20] without however being distorted.

6. The constitutional framework

Given the abovementioned historical-philosophical framework, in order to carry out an effective, albeit brief, analysis of the influence of these philosophies on the legal system of contemporary China, it is necessary to analyse at least the constitutional framework, as well as the evolution of the rule of law.

Considering the positive law's point of view, the country has undergone a jagged and complex development. Focusing only on the evolution of the People's Republic of China, it is possible to highlight how the current Constitution of 1982, for part of Western legal science, is the result of a progressive convergence of the Chinese system

[19] L.T. Lee, W.W. Lai., *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, 1978, p. 1322.

[20] R.P. Peerenboom, *Confucian Jurisprudence: Beyond Natural Law*, in *Asian Culture Quarterly,* 36, 1990.

to Western legal traditions.[21] In fact, the first Constitution of 1954 was inspired by a purely socialist model, a «Stalinist» matrix,[22] because the country had a great need of industrialization, socialisation and collectivization of productive and commercial means. The second Constitution of 1975, respecting the guidelines of the Cultural Revolution, praised anti-legality as a typically revolutionary sentiment.[23] In other words, it is possible to affirm that the Constitution of 1954 had a strong positivist imprint[24], with great value allocated to law written and codified in the "fundamental law," in contrast to that of 1975, that considered the protection of the "revolutionary spirit" and the pursuit of the war against all forms of bourgeoisie and bureaucratism to be a priority.

From these first elements it is possible to observe how in the evolution of the Chinese constitutional structure the two orientations – Legalist and Confucian – were confronted in a sort of "meeting – clash" also in the context of socialist law. In fact, even if no reference to these thoughts was formulated in explicit terms,[25] it seems difficult to think that these philosophies which had such a fundamental role in defining Chinese culture and its institutions, had no influence – albeit involuntary – on the contemporary legislator.[26]

In support of this thesis, it is interesting to observe the evolution undergone by the principle of equality of citizens before the law. This, as noted above (§ 2 and § 3), stood as a fundamental difference amid the Legalist and the Confucian doctrine. In the dialectic between the Constitutions identified above, the Constitution of 1954 explicitly

[21] This is a typical Eurocentric vision which has not always been welcomed by the international legal science. For a panoramic about China's sovereignty, with a particular regard to its role on international law's formation, see M.A. Carrai, *Sovereignty in China: A Genealogy of a Concept since 1840*, Cambridge, Cambridge University Press, 2019.

[22] Precisely, despite the differences in the form of State, the Soviet Constitution of 1936.

[23] See M. Mazza, *Lineamenti di diritto costituzionale cinese*, Milano, Giuffrè, 2006, pp. 6-10.

[24] Legal positivism is the theory that supports the exclusivity of positive law, in the sense that this is the only law that can be considered right in the strict and proper sense of the term, see N. Bobbio, *Il Positivismo giuridico*, Torino, Giappichelli, 1961, p. 15.

[25] On the contrary, during the maoist period, Chinese classical philosophy and culture have been harshly opposed. Further to this point, see M.C. Bergère, *La Chine de 1949 à nos jours*, Paris, Armand Colin, 2000.

[26] J. Zhang, *The Tradition and Modern Transition of Chinese Law*, 2014.

recognized this right,[27] in contrast to the 1975 reform that suppressed it.[28]

Instead, the progressive process of "demaoization,"[29] introduced by Deng Xiaoping's policies, led to a revival of ideas that were harmonious with the "Legalist" vision. In fact, with the adoption of the 1978 Constitution, the provisions on the State organization of the 1954 Constitution were resumed.

However, what is most relevant for this discussion is the progressive evolution of the rule of law.[30] The strengthening of the judiciary apparatus, as well as the declared possibility of petitioning the authority against illegitimate measures, and against acts or conduct of public officials, resulted in a significant emergence of a form of legal State, even if embryonic.[31]

The gradual new inspiration from Legalism, however, has not reached its peak with the aforementioned Constitution, that was, in fact, short-lived and had been replaced with a new version in 1982.

The new Constitution has undergone numerous constitutional revisions, including those of 1988, 1993, 1999 and, above all, 2004 and 2019.[32]

The constitutional model outlined by this latest document, despite its evident desire to get closer to the liberal state structures typical of the West, reveals many inconsistencies among the same provisions. If, on the one hand, the construction of the "socialist state of law" is proclaimed (Art. 5) – with guarantee rules for citizenship, including Art. 41 relating to the protection against administrative illegitimacy[33] – on

[27] See E. Rech, *La Costituzione cinese del 1954*, *Cina*, 1, 1956, p 177.

[28] The complete text is available at: <https://bit.ly/2X2lqSe>.

[29] Substantial but not formal process. The Constitution of 1978, in fact, while setting the objective of attributing legal value to the constitutional text again, contains several mentions of Mao.

[30] Rule of law is intended here as "the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government, and more generally prevents the arbitrary use of power," N. Choi, *Rule of law*, Chicago, Encyclopædia Britannica, inc., 2019, on <https://www.britannica.com/topic/rule-of-law>.

[31] See J. Luther, *Percezioni europee della storia costituzionale cinese*, *Polis working paper*, 78, 2006.

[32] For a general overview on Chinese Constitutional Law, see E. Toti, *Lineamenti di diritto cinese*, Roma, Aracne, 2010, pp. 25-44.

[33] Specifically, it is affirmed that: "Citizens of the People's Republic of China have the right to criticize and make

the other hand, it is recognized the illegality of any fact in contrast with the elements of socialist's theory, even if it comes from the organs of sovereignty.

Beyond what has been more or less explicitly stated by the Constitution itself, in order to clarify the hierarchical relationships between sources, the law on legislation (*Lifa fa*) of 15 March 2000 recognized some particular sources to be superordinate to the law, until part of legal science defined it as semi-constitutional[34] – or even constitutional if this enucleation is considered to be directly descended from the Preamble of the Constitution of 1982 –. Article 3 of the *Lifa* law therefore determined that: "Laws shall be made in compliance with the basic principles laid down in the Constitution, principles of taking economic development as the central task, adhering to the socialist road and the people's democratic dictatorship, upholding leadership by the Communist Party of China, upholding Marxism-Leninism, Mao Zetong Thought and Deng Xiaoping theory and persevering in reform and in opening to the outside world."[35]

The principle of legality with Chinese characteristics, therefore, only partially overlaps with what is imported from western systems,[36] configuring itself as a strange combination that, if on one hand distorts the traditional view of the rule of law, on the other hand stands as an unavoidable limit to the activity of the authority.[37]

suggestions to any state organ or functionary. Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty; but fabrication or distortion of facts for the purpose of libel or frame-up is prohibited. The state organ concerned must deal with complaints, charges or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposure, or retaliate against the citizens making them. Citizens who have suffered losses through infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law."

[34] F.R. Antonelli, *La "legge sulla legislazione" ed il problema delle fonti nel diritto cinese*, *Mondo Cinese*, 119, 2004, pp. 23-36.

[35] Legislation Law of the People's Republic of China (Order of the President No.31), Article 3.

[36] It must be considered that the rule of law seems to have reached China only after the wars against Western States, during the Nineteenth century, see J. Zhang, *The Tradition and Modern Transition of Chinese law*, 2014, p. 511 et seq.

[37] Specifically, about the Chinese rule of law, it can be seen what was affirmed from President Xi Jinping on the occasion of the 30th anniversary of the Chinese Constitution: "No organization or individual has the privilege to overstep the Constitution and the law therefore, in theory, not even the President of the Republic or the Chinese

Lifa law's predictions, in fact, are traceable to political, ideological and theoretical principles, which are not always homogeneous and not always harmonizable. The legal and regulatory framework that emerges, therefore, appears to be a mixture of principles of juridical positivism – which, as mentioned, we could trace back to the legalist matrix – and principles of a political nature, assimilable to an ethical vision of society – consequently attributable to Confucian doctrines.

If, in fact, among the various semi-constitutional principles, the leadership of the Communist Party is also recognized, it appears complex not to remember what was affirmed about the Confucian "virtuous man," capable of placing himself beyond the law, being the ethics – and in some ways good faith – the only acceptable guide for society.

However, it is now necessary to compare the rule of law with Chinese characteristics to these philosophical ideas. Despite the differences identified above, in fact, the implementation – at least theoretical – of the rule of law, followed the consolidated western legal tradition, providing as its corollaries the principle of supremacy of the law, the impartiality of the public administration and the independence of the courts.

For reasons of brevity, the rest of the discussion will focus on aspects relating to administrative justice.

This is because this is considered one of the tools meant to safeguard all three corollaries identified above. The actual ability to obtain protection from any illegal activities of the administration, in fact, is able to make the impartiality of the administration effective, and it allows the evidence of a real impartiality of the judge through the application of the law and the Constitution as supremacy sources.

Furthermore, the litigation's sector is the one in which a clear philosophical fracture – or a definitive union – between contemporary law and Confucianism can be most evident.[38]

Communist Party can overstep the Constitution. The latter, however, at the same time, is also the unquestionable leader of the Republic, as part of the constitutional system itself. It clearly seems to be a risk of dystonia. See K. Blasek, *Rule of law in China, a comparative overview*, Berlin, Springer, 2015, pp. 4-6.

[38] About the "no litigation" in Confucian philosophy, see Zhang, *The Tradition and Modern Transition of Chinese*

7. A focus on the use of power: administrative justice

In analysing the administrative justice system, it is necessary to qualify the judicial structure.[39] As already highlighted, the judicial protection against the acts of the public administration has been codified in the various constitutions that followed one another in the second half of the twentieth century,[40] up to the formulation contained in Art. 41 of the 1982 Constitution.

Specifically, it should be noted that the People's Republic of China, according to the model adopted with the "Civil Procedure Law of the People's Republic of China,"[41] currently in force, has assumed a monist model with regard to the jurisdiction. From this reason, it follows that the administrative litigation remained in the ordinary courts, with the creation of special administrative sections when needed.[42]

The real turning point for administrative justice, however, came in 1990 with the adoption of an organic law on the administrative trial – called the "Administrative procedure law of the People's Republic of China."[43]

Although this law marked a fundamental turning point for the relation between the citizen and the public administration – representing an indispensable rapprochement towards the rule of law – the significant limitations to the judicial union of legitimacy would seem more aimed at improving administrative efficiency, without effectively protecting citizens' rights. The reform, however, can still represents an historic turning point. In detail, it is possible to highlight how the Chinese model guarantees an appeal

Law, 2014, cit., p. 522 et seq.

[39] For a more specific overview on the civil trial in RPC, see E. Toti, *Lineamenti di diritto cinese*, 2010, pp. 155 ss.

[40] Specifically, it is mentioned in Art. 19 of the Common Program of 1949, in Art. 97 of the Constitution of 1954, in Art. 37 of the 1975 Constitution, in Art. 55 of the third Constitution of 1978 and in Art. 41 of the current Constitution.

[41] Adopted by the Fourth Session of the Seventh National People's Congress on 9 April 1991, promulgated by Order No 44 of the President of the People's Republic of China, and effective on the date of its promulgation

[42] This is one of the two typical paradigms of administrative litigation: there are dualistic systems, inspired to the French *Conseil d'États* with the creation of specialized judicial bodies only for the judgment on the administrative activity. There also exist monistic structures, with single jurisdiction over ordinary justice.

[43] Adopted at the Second Session of the Seventh National People's Congress on 4 April 1989, promulgated by Order No. 16 of the President of the People's Republic of China on 4 April 1989, and effective as of 1 October 1990.

only for acts provided by Art. 11 of the law,[44] typically endowed with a relevant concrete nature.[45] Measures adopted by the armed forces, the judicial and legislative system, as well as those issued by the Chinese Communist Party and affecting some further and large areas of the system are also excluded from the judgment.[46]

As far as vertical jurisdiction is concerned, the first instance decision is entrusted

[44] Specifically, Art. 11 states that "The people's courts shall accept suits brought by citizens, legal persons or other organizations against any of the following specific administrative acts:
(1) an administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation of property, which one refuses to accept;
(2) a compulsory administrative measure, such as restricting freedom of the person or the sealing up, seizing or freezing of property, which one refuses to accept;
(3) infringement upon one's managerial decision-making powers, which is considered to have been perpetrated by an administrative organ;
(4) refusal by an administrative organ to issue a permit or license, which one considers oneself legally qualified to apply for, or its failure to respond to the application;
(5) refusal by an administrative organ to perform its statutory duty of protecting one's rights of the person and of property, as one has applied for, or its failure to respond to the application;
(6) cases where an administrative organ is considered to have failed to issue a pension according to law;
(7) cases where an administrative organ is considered to have illegally demanded the performance of duties; and
(8) cases where an administrative organ is considered to have infringed upon other rights of the person and of property.
Apart from the provisions set forth in the preceding paragraphs, the people's courts shall accept other administrative suits which may be brought in accordance with the provisions of relevant laws and regulations." The translation can be found at <https://bit.ly/3e3z2Tw>.

[45] "Concrete administrative actions are defined as acts which concern the rights and duties of citizens, legal persons and other organizations and are carried out by governmental agencies and their officers, organizations receiving delegated powers via laws or regulations, or organizations or individuals entrusted by administrative organizations with the power to carry out administrative functions. Abstract administrative actions refer to the rules and decisions issued by various administrative organs with a general legally binding nature. They can be administrative regulations of the State Council, rules of ministries or rules and normative documents from all levels of local governments." See Y. Li, *The Judicial System and Reform in Post-Mao China,* London, Routledge 2014, p. 170 et seq.

[46] Specifically, Art. 12 establishes that "The people's courts shall not accept suits brought by citizens, legal persons or other organizations against any of the following matters:
(1) acts of the state in areas like national defense and foreign affairs;
(2) administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs;
(3) decisions of an administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel; and
(4) specific administrative acts that shall, as provided for by law, be finally decided by an administrative organ." The translation can be found at <https://bit.ly/3e3z2Tw>.

to the People's Courts at a basic level, unless the dispute does not present any characteristics of significant peculiarity and difficulty, or is produced by an act adopted by higher administrative authorities, such as those at provincial level, regions or autonomous municipalities. In the latter cases, the appeal must be addressed exclusively to the higher courts.[47]

The choice to attribute general jurisdiction to the local courts, closest to citizenship, if on the one hand favours access to justice, on the other, it brings significant critical issues regarding the mixture of administration and jurisdiction.

In fact, according to the ideal of union of the powers, belonging to a typical socialist environment, the courts identified above are subject to the supervision of the executive committees of the local popular assemblies, which are the main bodies competent to issue a significant number of administrative acts, potentially subject to appeal.[48] With regard to the substantive and procedural requirements for access to justice, the provision is configured as a particularly close regulatory network, requiring an explicit and exhaustive set of requirements, which leave very little decisional margin to the courts.[49]

The regulation also guarantees compensation for damages both for acts and for illegitimate behaviour of public administrations.[50] Despite having some restrictions on

[47] In accordance with the provisions of Articles 13-23 of the law on administrative disputes.

[48] See M. Mazza, *Lineamenti di diritto costituzionale cinese*, 2006, p. 103.

[49] Consider, for example, the requirements required by Art. 41 in order to access to the judge: "The following requirements shall be met when a suit is brought:
(1) the plaintiff must be a citizen, a legal person or any other organization that considers a specific administrative act to have infringed upon his or its lawful rights and interests;
(2) there must be a specific defendant or defendants;
(3) there must be a specific claim and a corresponding factual basis for the suit; and
(4) the suit must fall within the scope of cases acceptable to the people's courts and the specific jurisdiction of the people's court where it is filed." The translation can be found at <https://bit.ly/3e3z2Tw>.

[50] The first comma of Art. 47 affirms that "A citizen, a legal person or any other organization who suffers damage because of the infringement upon his or its lawful rights and interests by a specific administrative act of an administrative organ or the personnel of an administrative organ, shall have the right to claim compensation." The translation can be found at <https://bit.ly/3e3z2Tw>.

access - for example, the necessary preventive experimentation of out-of-court remedies[51] - if we look at protection tools and their structure, it would actually seem a system that tends towards the pursuit of the rule of law.

The main critical issues, however, regard the interference of the administrative bodies. Although, in fact, both the civil litigation law[52] and the administrative litigation law[53] explicitly prohibit any form of pressure or manipulation by public subjects towards jurisdictional activities, the relevant proximity – as well as the effective supervisory relationship – that there exists between executive committees and local popular courts, raise a few doubts about judges' effectiveness and impartiality.[54]

It is precisely on this point that, perhaps, even today the Confucian and the Legalist legacy find the main battleground among the new legal categories, such as those traditionally linked to socialist systems, and those connected with a Western positive matrix.[55]

The problems related to the interference of administrative and political bodies in the processes also emerged in the national political debate. This is an issue that involves the Chinese judicial system as a whole, but which is even more evident in the administrative dispute.

[51] Second comma of Art. 67: "If a citizen, a legal person or any other organization makes an independent claim for damages, the case shall first be dealt with by an administrative organ. Anyone who refuses to accept the disposition by the administrative organ may file a suit in a people's court. Conciliation may be applied in handling a suit for damages." The translation can be found at <https://bit.ly/3e3z2Tw>.

[52] Article 6 of Civil Procedure Law of the People's Republic of China: "The people's courts shall exercise the judicial authority with respect to civil cases. The people's courts shall try civil cases independently in accordance with the law and shall not be subject to interference by any administrative organ, social group or individual." The translation can be found at <https://bit.ly/2x1jcYM>.

[53] Article 3 of Administrative procedure law of the People's Republic of China "The people's courts shall, in accordance with the law, exercise judicial power independently with respect to administrative cases, and shall not be subject to interference by any administrative organ, public organization or individual. The people's courts shall set up administrative divisions for the handling of administrative cases." The translation can be found at <https://bit.ly/3e3z2Tw>.

[54] To understand the evolution of Chinese court system and the mechanisms of the Chinese judicial system, specifically about the relations between administrative and judicial power, see N.H. Ng, X. He, *Embedded Courts: Judicial Decision-Making in China*, Cambridge, Cambridge University Press, 2017.

[55] On this point, it should be mentioned the very high number of legislative interventions about civil matters from the 1990s until today, first of all the General Provisions of Civil Law, adopted in China in 2017.

The critical issues in the protection led leading Chinese legal science officials to define the judiciary as "de facto enactment of local bureaucracy and local party committees."[56] In fact, it can only be seen how the local popular assemblies themselves appoint the judges, as well as dispose of local funding; therefore, top level interference emerges.[57]

Recent times have seen the strengthening of Western pushes towards a progressive implementation of the traditional rule of law protections, especially in connection with the pressures of the World Bank (WB) and the World Trade Organization (WTO).[58] In fact, precisely in order to reduce these critical issues, the 2014 reform, launched by the fourth plenum of the 18th central committee of the CCP, intervened with the establishment of the district sections of the Supreme People's Court.[59] These detached sections are emanations and direct representations of the Supreme Court and, as such, they have the same powers, and their pronouncements have the same validity.[60]

The relevance of detached sections is given by the attribution of competence in administrative lawsuits with national relevance, in first instance rulings; in the appeals lawsuits against the administrative decision of the Higher People's Court of first instance; requests for a new trial against administrative sentences pronounced by the Higher People's Court and which have already become *res judicata*. In addition, the Supreme Court can assign to the district sections any other lawsuits that it considers relevant.[61]

[56] As affirmed by Bi Yuqian, Director of the Institute of Civil Procedure at Chinese University of Political Science and Law. A. Mavelli, *Riforma della giustizia, la Corte suprema del Popolo si "delocalizza"*, at <https://bit.ly/34kT3k5>.

[57] Further to this point, see Ng, He, *Embedded Courts. Judicial Decision-Making in China*, 2017, cit., p. 83 et seq.

[58] See K. Blasek, *Rule of law in China, a comparative overview*, 2015, pp. 11-12.

[59] For a panoramic on the evolution of the Supreme Court activity, see Supreme Court, *Court Reform in China*, on the official site <https://shortly.cc/ax28D>.

[60] For the Supreme Court's functions, see R. C. Keith, Z. Lin, S. Hou, *China's Supreme Court*, Londra and New York, Routledge, 2016, p. 100 set seq.

[61] Articles 2 and 3 of the provision "*Issues relating to cases that can be tried by the district courts of the Supreme People's Court*", issued by The People's Supreme Court after receiving mandate from the 3rd Plenum of CCP18th Central Committee, available only in Chinese at www.court.gov.cn. For a translation in Italian see A. Mavelli, *Riforma della giustizia, la Corte suprema del Popolo si "delocalizza"*, at <https://bit.ly/34kT3k5>.

The establishment of the detached sections is aimed at extending the scope of the Court and better coordinate the exercise of judicial power in the most important cases.[62] The willingness to reduce local influences also led party officials to order local government authorities not to interfere with ongoing judicial proceedings, as well as judges were ordered to record any pressure attempts.[63]

The desire, therefore, is to reach an effective unity and impartiality of the administrative litigation, through the leading role long assumed by the Chinese Supreme Court.[64]

In summary, it is possible to observe how, at a renewed value of the law – which, in some ways we could recognize as deriving from the Legalist thought – follows a renewed enhancement of the role of ethical guide of the Central Party and the organs it promotes – in a modern Confucianism which now seems to permeate modern Chinese politics –.[65]

8. Conclusions

From the reconstruction highlighted above it would seem that a syncretic framework emerges between traditional philosophies, socialist theory and the state of legality of a liberal origin.

The constitutional evolution of China, despite the historical changes, would seem directed towards an exercise of the public power under the rule of law. All this, however, does not cause the loss of local or national leadership's leading role. If on the one hand, in fact, an ever greater codification of legal relationships is pursued to guarantee the equality of citizens through the law, on the other hand it is maintained the degree of flexibility in the exercise of public power capable of ensuring the supremacy

[62] This is also based on the pressures made by legal science, aimed at reducing the mix between local government and lower courts. Further to this point, see: Y. Li, *The Judicial System and Reform in Post-Mao China*, 2014, p. 180.

[63] C. Minzner, *Legal Reform in the Xi Jinping Era*, *Asia Policy*, 20, 2015, pp. 4-9.

[64] See R.P. Peerenboom, *Judicial Independence in China. Lesson for Global Rule of Law Promotion*, Cambridge, Cambridge University Press, 2009, p. 23 et seq.

[65] G. Cuscito, *Il maestro Kong lavora per Xi: l'importanza di Confucio nella Cina di oggi*, in *Il Bollettino imperiale*, *Limesonline*, 2019, at <https://shortly.cc/IlHD0>.

of "ethics" over positive law.

Beyond the many shadows still present in the construction of the rule of law, especially with regard to the effectiveness of the judicial system as a third party, it is evident how significant progress has been made in this direction. Undeniably, a new declination of the rule of law seems to have emerged. If it is true that "the law never changes the society, but the society ever changes the law"[66] this new state of legality could only be nourished by the imperial philosophical thought.[67]

Therefore, if it is true, as a Confucian thought teaches, that an enlightened guide must not be bound by the strict limits of positive law, it is equally true that social peace cannot be guaranteed without the imposition of clear constraints valid for the whole citizenship, as theorized by legalists.

It is widely acknowledged that it is impossible to reduce such complex philosophies and their vast impact on Chinese culture to static concepts. It is also impossible to identify with accurateness their influence on modern written law, if not clearly reported from the legislator. Nevertheless, as already mentioned, it seems possible to identify that some of the ideas developed from the Imperial schools still seem to affect the evolution of law in the PRC.

In conclusion, it would seem to be possible to affirm that some aspects of the rule of law with Chinese characteristics are somehow the results of an influence of Legalist and Confucian elements in a modern key, aimed at balancing the socialist unitary theories with the inevitable changes in the protection of citizenship.

[66] The reference is to A. GENTILI, *Senso e consenso*, Vol. II, Torino, Giappichelli, 2015, p. 344 that quotes J. CRUET, *La vie de droit en l'impussancé des lois*, Paris, Ernest Flammaro, 1908.

[67] In reference to the past, is possible to say that "It goes without saying that the ancient Chinese law has always been developed with the development of the Chinese society," ZHANG, *The Tradition and Modern Transition of Chinese Law*, 2014, cit., p. V.

CLAUDIA GIUSTOLISI[*], ADRIANO MAGGIOLI[**]

WEBINAR
EXTRAORDINARY MEASURES TO COPE WITH THE COVID-19 CRISIS

The impact on corporate and financial market law: a comparative analysis

(Research Centre for the study of EU banking and financial law
'Paolo Ferro-Luzzi', Grandangolo, University Roma Tre, 19 June 2020)

CONTENT. 1. The Objectives of the Webinar – 2. The European Perspective – 3. The Italian Case – 3.1. The French Case – 3.2. Pandemic-Resistant Corporate Law: The example of the UK – 3.3. The German and Austrian Cases – 3.4. The Spanish Case

[*] Researcher in Economic Law - Centro Ferro-Luzzi - Roma Tre University.

[**] Law School Graduate, Università degli Studi Roma Tre.

1. The Objectives of the Webinar

On 19 June 2020 the Research Centre for the study of EU Banking and Financial Law 'Paolo Ferro-Luzzi', Grandangolo, University of Roma Tre, held a webinar on "EXTRAORDINARY MEASURES TO COPE WITH THE COVID-19 CRISIS. The impact on corporate and financial market law: A comparative analysis."

The webinar was organized, chaired and moderated by Professor Concetta Brescia Morra**,** Director of Research Center Grandangolo and Professor of Economic Law - University of Roma Tre, together with Giulio Napolitano, Professor of Administrative Law - University of Roma Tre, and Andrea Zoppini, Professor of Private Law - University of Roma Tre, both deputy directors of the Center.

Opening the webinar, Professor Concetta Brescia Morra, as chair of the event, recalled that the webinar aims to investigate the impact of Covid-19 on corporate and financial markets in Europe and in the main Member States.

The economic slowdown caused by the outbreak of Covid-19 has and will greatly affect the corporate and financial market.

The Covid-19 pandemic, besides causing a social isolation within countries, borders' closure, loss of business and employment, industry-wide shutdowns, also involved many adverse economic effects on the corporate and financial market.

The Covid crisis has forced all Member States to impose wide-ranging restrictions that have curtailed the production and sale of goods and services, which led to a downfall in spending and investment by households and companies, income and job prospects concerns, worsening of financial conditions and to a pervasive uncertainty about the future and possible new crises.

Although, from a health point of view, the peak seems to be behind us, probably the worse in terms of economic consequences is yet to come.

To overcome this, Governments across the globe introduced fiscal and monetary stimulus programs to combat the damaging economic effects caused by the virus.

Volatility in the financial markets spiked in the aftermath of the crisis, most likely due to difficulty in estimating the extent of the economic damage caused by this global event, which is still unfolding. Consequently, some legislative interventions by the EU institutions and the major EU countries were necessary in order to strengthen the stability of the financial system and the good functioning of capital markets. In this

context, Professor Concetta Brescia Morra still recalls the webinar was an opportunity to discuss the regulatory responses of the European institutions and the Member States to the Covid-19 crisis.

In conclusion, Professor Brescia Morra recalled that all the academics and experts who were invited thus have the task to explain the new rules adopted in their countries, with a punctual focus on the measures about Corporate and Financial Law approved in Italy, France, Germany, Austria, Spain and UK, specifying also how important it is to know the position of the European Union to understand the recovery strategy and the actions adopted in the area of financial services and financial markets. Once Professor Brescia Morra clarified the objectives of the webinar, she thanked the speakers and opened the webinar's works.

2. The European Perspective

The first guest to take the floor was Ugo Bassi, DG FISMA, European Commission.

He firstly acknowledged the effects of the Covid-19 crisis and underlined that, in order to make it out of it, we need a common and coordinated effort in the European Union.

Doctor Ugo Bassi briefly illustrated the new European Commission recovery tool named "Next Generation EU" focusing on its ability to address the damages caused by the crisis and relaunch the economy unlocking beneficial effects.

The core of Doctor Ugo Bassi's intervention regarded the measures taken in the financial services area. Starting with banking measures, he gave practical evidence of how the cooperative effort was put in place: EC, EBA, ECB, ESMA, and partners at the Basel Committee collaborated in order to spot regulatory flexibility for banks to exploit. The examples don't stop there: some bank prudential framework aspects were changed in order to make sure that liquidity provided by central banks could effectively be channeled to the real economy; or deferrals were provided. The Council and the European Parliament's proactivity widely eased the task.

As Doctor Ugo Bassi recalled, not only banks were lent a hand: round tables were organized with representatives of all the segments of the financial market. In this case the EC was there to listen: a platform was provided to participants to flag the

identified problems. The result was an act of soft law: the compiling of a list of best practices to be communicated which will help to spot the remaining issues and enhance coordination in their solution.

The presentation followed illustrating the ongoing discussion concerning an intervention on the securities markets based on three pillars: prospects, Mifid and securitization.

As far as the first pillar is concerned, the intervention would be addressed to secondary markets issuers and the key word would be *simplification*.

Mifid intervention would focus on the coverage research increasing, in order to provide SMEs with good investment research an adequate visibility. Both these goals' pursuance will take in consideration investor protection.

The last field of intervention again took into account the useful recommendations of EBA and aimed at alleviating the crisis' impact on banks while financing economic recovery.

Concluding, Doctor Ugo Bassi gave an example of the importance of the rainchecks put in place: several Level 2 legislation measures regarding securitization and market infrastructures in order not to burden on financial entities.

Cooperation permitted also DG FISMA and CONSOB to generate a European debate on short-selling measures, a topic which is not yet subject to a common European approach.

Doctor Ugo Bassi reminded that the path in front of all of us is still long and it includes completing Banking Union, Capital Markets Union, digitalization, and cannot avoid the greening of the financial agenda.

This crisis, like every crisis, should entail *per se* an opportunity. The presenter underlined that institutions should do everything in their power in order to top the benefits of digitalization by performing the usually difficult exercise of striking a balance between what is good and what is advantageous for the market, the market participants and for the investors but at the same time protecting the investors as much as they can. Therefore, it is all about finding the right balance and *putting the cursor where it is necessary*.

3. The Italian Case

As previously mentioned, the recent Covid-19 crisis has impacted all corporate and financial markets worldwide. In particular, in the first months of 2020, during the early stage of the pandemic crisis, the Italian, French, German, Austrian, UK and Spanish markets were among the corporate and financial markets that more experienced this situation.

The powerful impact of the Covid-19 on these financial markets has led these countries to take different – not always easy – choices to protect the different trading directions in order to reduce the impact on the world economy.

For this reason, during the webinar, after having analyzed the European perspective, the most relevant legislative news adopted in these countries were submitted.

The first country, whose legislative measures were examined, was Italy. The academics provided a regulatory framework in the perspective of public and private law. Giulio Napolitano, Professor of Administrative Law - University of Roma Tre, took the floor and made some remarks from a Public Law perspective. In particular, he explained the Italian extraordinary measures to cope with the Covid crisis from the Public Law point of view and the possible new extraordinary role of the State. He questioned whether this is a completely new role of the State or if it is simply managing conventional tools under temporary framework.

According to his experience it is very difficult to provide now, in the beginning of the post crisis management, a reply without enough experience and without enough implementation of the new measures.

However, his personal opinion is that the tools are conventional but what is unknown is the magnitude of all of them together, operating at the same time, and this could change the trend of State intervention in the economy for the next years.

With particular reference to the extraordinary measures adopted in Italy in this moment, the fundamental tools we are experimenting and implementing are four: the first one is the State guarantee provided by Italian State-owned companies which traditionally provided insurance and credit for export. In this system the company is required to provide a guarantee supported by the State as lender of last resort in order to cover the lending activity provided in the first place by banking and other financial institutions to enterprises.

The second fundamental tool is the new economic recovery asset that was established within *Cassa Depositi e Prestiti* with the purpose of strengthening the capital of enterprises.

The third tool is public ownership which, however, is supposed to be activated only in very exceptional circumstances. This is the case of the public ownership within the context of strengthening capital intervention by *Cassa Depositi e Prestiti* and the regulation provides for this kind of direct intervention in equity only as a last resource solution, and public ownership is also possible in the context of very specific cases.

This is a very exceptional measure in this direction, for example the case of Alitalia, but probably this is not a new trend to a State intrapreneur as it existed in the past.

In this respect, although some commentators and even some consultants of the Government argued that a new time has come for the return of the State as a direct economic operator, this is not the solution currently envisaged by the Government.

The fourth tool is the tightening of the foreign direct investment screening which is taking place with the extension of the screening to new sectors including banking and insurance operators. This was made in the light of the European Union Regulation on foreign direct investment screening and following a specific communication from the European Commission that pushed all Members States to apply the screening mechanism in a very strict and rigorous way.

Professor Napolitano, after having listed the Italian extraordinary measures, specified that all these four instruments – State guarantee, economics recovery asset, public ownership and foreign direct investment screening - are not completely new.

For example, Public ownership and State guarantee are of course very old tools, while the foreign direct investment screening has already been in place since 2012 and the expanded role of *Cassa Depositi e Prestiti* is an already tested instrument.

For this reason, he asked himself what is the main regulatory difference compared to the past.

His answer was that all these instruments have been implemented at the same time. They are acting in the same context. There is, to some extent, a potential overlapping between some of these instruments and, as a consequence, the overall dimension of this new potential role of the State.

This leads to some fundamental questions.

First of all, there is a relevant issue of governmental or administrative capacity, which is even different from financial capacity. Of course, the issue of financial capacity in a country as Italy, with such a huge level of public debt, is a relevant one, but we also have problems of administrative and bureaucratic capacity in managing effectively all these very powerful tools of intervention.

The problem of capacity is strictly related to the problem of promoting a sound cooperation with private actors. First, for banks: we experience in the first weeks of implementation how difficult it is, for instance, for banks to perform preliminary assessments and take decisions in the loan activity.

Secondly, there is a problem of discretion. So, what is the relationship between automatic measures that to some extent are provided in the law with the relevant area of administrative discretion in deciding where, when and how to auto-intervene and support the economic private sector.

The issue of discretion becomes extremely relevant when we think about regulatory conditions that can be introduced in relation to some of these measures.

Lastly, there is a problem about the real strength of procedural and judicial safeguards that in principle should be applied to every area of public authority, every area of State intervention and that however can to some extent be threatened when there is high discretion as it is in the field of some of this State support measures or even in the case of foreign direct investment screen.

In conclusion, Professor Napolitano affirmed that, in his view, the tools are to some extent conventional. About these tools there is the complete unknowledge of the overall magnitude of these interventions and Professor Napolitano thus believes that a new equilibrium between the role of the government, of the State, and the role of private operators must still be found.

Regarding the measures adopted in Italy, the second speech focused on the Private Law perspective. This subject has been addressed by Andrea Zoppini, Professor of Private Law - University of Roma Tre.

In particular, Professor Zoppini opened his speech with a metaphor, reporting that "*We are, basically, in the position of the pilot who tries to restart the engine*," then he recalled that there is a remarkable need for equity in all Europe and in particular in

Italian enterprises.

Firstly, Professor Zoppini clarified that there are important problems from the private law perspective about State intervention.

First of all, the State Aid regulation, and, then, Competition Law.

With regard to the State Aid regulation, he suggested to read a brilliant expression on "The Economist:" the "zombie companies." Basically, there are corporations living after death because of State Aid and State support. A good example in our experience could be Alitalia.

From a Private Law point of view another relevant point regarding guaranteed loans is whether the Covid is a material adverse change. Professor Zoppini considers it not to be a material adverse change: the Covid is thought to be as something transitory in Italian forecast.

Clarified that aspect, he introduced the economic scenario and in particular the COVID-19 impact on the Italian economy. The contraction in GDP in Italy is estimated between 8% and 10%. Regarding the market capitalization, the FTSE-MIB index reduced by 25% since January 2020 vs -7% of the European index whereas the Italian "Top line" company revenues face an estimated reduction between 7% and 18%, worth 220 to 470 billion euros. In this economic scenario, the Italian Government acted promptly by introducing measures aimed at strengthening corporate equity. In particular, as far as enterprises with revenues above 50 million euros are concerned, the Italian Government created the «Equity Recovery» initiative (*Patrimonio Rilancio*), 44 billion euros of Special-Purpose Assets dedicated to equity and quasi-equity interventions.

About the principal aspects of *Patrimonio Rilancio*, Professor Zoppini briefly summarized its characteristics.

It is a side company within *Cassa Depositi e Prestiti* (CDP), but it is separated and autonomous from CDP's own assets.

The main point to take into consideration is *Patrimonio Rilancio*, an organizational and operational system designed to ensure maximum efficiency and speed, also on the basis of self-declarations made by the beneficiaries (i.e., investee enterprises).

Patrimonio Rilancio is funded with contributions by MEF and the issuance of bonds or other financial instruments.

It has been estimated that something like 5,000 enterprises are potentially interested subjects. *Patrimonio Rilancio* will basically operate with two (or three) operating models: Temporary Framework and Market Operator Framework.

About the Temporary Framework, the entry condition for the enterprises are that the beneficiary was not already in difficulty as of 31 December 2019 and lacking the State intervention the beneficiary would go out of business; there is in the common interest to intervene (e.g., to avoid social hardship); the beneficiary is unable to find financing on the markets.

With regard to the Market Operator Framework, the second operating mode, it provides the regulation for two tools: capital increase and subordinated convertible bond, with different conditions for listed companies and not listed companies.

The third possible operating way of intervention of *Patrimonio Rilancio* is corporate restructuring, which is an intervention in enterprises that are or could go in a bankruptcy proceeding. It is not clear by now how it will be set up.

After outlining the new regulatory framework, Professor Zoppini looked at the open problems.

One is the relationship with failure discipline and insolvency procedure, an open point because of the lack of a special norm that clarifies this possible relationship.

Another is the potential litigation.

In the end, Professor Zoppini concluded that the program *Patrimonio Rilancio* is thought to be a temporary measure, but, he warned, there is nothing as steady in Italy as something which is thought to be temporary. So, it is well possible that we'll keep on with those measures for a long time.

3.1. The French case

Continuing in the exam of the different rules adopted in EU countries, the measures applied in France were examined.

The following guest to take the floor was Antonino Cusimano, Group General Counsel and Secretary General at Nexans. He told himself impressed with the French State reaction to the sudden crisis and agreed with the measures taken by the French government. In particular, with the Decree of 26 March, the French government eased the access to Partial Unemployment measures and has reduced the amount of charges

on employers.

The conditions to obtain it are (i) qualifying as impacted by exceptional circumstances as per Labour Code definition; (ii) partial or total business interruption due to Covid.

Also, he enjoyed the readiness of Parliament in passing the Emergency Law. An official declaration by the French government recognized Covid as a *force majeure* event when contracting with public authorities: a useful tool to claim Covid-19 is material adverse change, also in private litigation.

The intervention followed illustrating the Corporate Law measures closely affecting corporate life. The two Orders n° 2020-318 and 2020-321, both retroactive, extended by three months the deadlines imposed by law or articles of association for the approval of the accounts, attached documents, and the convening of the general meeting in charge of this approval.

Furthermore, corporations were allowed to broadcast meetings as a replacement of physical meetings – hard to set up in these difficult circumstances – preempting corporations' bylaws prohibitions, a measure widely used by French corporations. The remote attendance by members of governance bodies was guaranteed and the general meeting were allowed to be held 'behind closed doors'.

Doctor Cusimano noted that, while it is usually permitted to cancel general meetings if it is impossible to convene shareholders by mail, this possibility was temporary waived. On the contrary, remote shareholders attendance, such as by postal vote or proxies, was favored. These provisions implied the prevention of casting votes in real time, shareholders' questions and interventions. This caused a hostile climate toward this kind of meetings which eventually evolved in a higher rate of opposing votes, especially on corporate governance resolutions. Critics, according to Doctor Cusimano, do not take into account the difficulty of properly identifying people intervening in an online meeting, open to questions and interventions. Nonetheless, the measure's success is confirmed by data: 75 of the SBF 120 issuers held shareholders meetings 'behind closed doors'.

The second tool enthusiastically quoted and described by the speaker was the *Prêt Garanti par l'État* (PGE): the measure allows corporations to borrow money from commercial banks guaranteed by the State, typically for up to 90% of the loan. The

guarantee can be provided between mid-March and the end of 2020 while the reimbursement is not required for the first year, plus the borrower has the chance to amortise the loan over a further one to five years; it shall not exceed 25% of the borrower's 2019 turnover and it does not require any other security or guaranty; only property companies, credit institutions, financing companies and businesses in the midst of collective proceedings were excluded. The loan comes with two requirements: no dividends shall be payed and, following the signing of a *déclaration sur l'honneur*, suppliers shall be payed according to terms.

Doctor Cusimano concluded by recalling the corporate crisis management skills applied during this difficult time: board meetings drastically increased, liquidity issues arose and forced issuers to come up with ideas to increase it. Also, governance' remuneration took a hit and decreased, whereas, conversely, the circumstances implied increasing risk management skills and reporting on the crisis management.

Lastly, he highlighted the help of the *Autorité des marchés financiers* (AMF) recommending advices and handling the simplification of corporations' life. The Covid crisis appeared after the publication of the 2020 guidance, the annual report and the first quarterly results. As the emergency constantly increased, some issuers faced liquidity problems which led them to suspend their 2020 guidance and impacted quarterly results. The French regulator encouraged those with available reliable data to regularly disclose their information on periodic reassessments of their activities, financial situation and prospect, which led to a reassessment of the announced risk factors and outlooks.

After Doctor Cusimano, Pierre-Henri Conac, Professor of Commercial and Company Law at the University of Luxembourg, took the floor. First of all, he reflected on the previously discussed ability of the French State to provide loans quickly and readily. According to Professor Conac, the mechanism lacked fluency and smoothness when SMEs needed it, whereas it proved itself useful when large companies did. Professor Conac followed addressing the Foreign Direct Investment screening' regulation change. He underlined how previously, as a foreign investor crossed the threshold of the 25% in the participation in a company capital, the operation required an authorization; nowadays, once it crosses the 10% threshold, the investor has to inform the Ministry of Finance.

Subsequently, Professor Conac illustrated the electronic turn the company meetings and compliance have taken. He mentioned the disclosure required to the

companies by the AMF and then he pointed out how many French companies largely referred to the bond market rather than to the loan one, as the former is less regulated than the latter.

Once he settled these matters, Professor Conac intervention focused on the AMF action and the development of its relationship with companies during the crisis. Companies asked AMF for advices regarding a matter of social interest. The issue arose for some companies with real estate assets: whether they should forgive rent in order to help the borrowers. The AMF reply was of the non- official kind, as its powers are limited in the Company Law field. Professor Conac argued the opportunity to help customers to survive and not go into insolvency but he warned that shareholders might have a different point of view as this behavior implies losses.

Professor Conac objected the difficulty to comply with AMF requests to companies to involve shareholders during meetings and discussions, on the basis of practical reasons: identification and the right to first intervene.

Following, he told himself surprised that companies were required from many quarters to reduce the amount of dividends as a sign of solidarity with workers; even in the case the company had not received any funds by the State.

Lastly, the speaker addressed the nationalization topic. Professor Conac highlighted how a State purchase of a company whose shares price dropped because of the stop of the activities is something that sounds weird to him.

In conclusion, Professor Conac believes that the last two points revealed that the French approach is "*not liberal at all.*"

3.2. Pandemic-Resistant Corporate Law: The example of the UK

Luca Enriques, Professor of Corporate Law at the University of Oxford, then took the floor. Professor Enriques specified that his report was based on a forthcoming essay which will be published in the *European Company and Financial Law Review*.

The speech took the UK as an example of what measures can be taken in the area of Corporate Law. The purpose is to identify what tweaks should be introduced in these exceptional times in order to make sure that European businesses can get through the crisis more easily.

The way to do it is by using new special rules as little as possible but, rather,

provide for the suspension of existing rules wherever possible.

The reason for that is that these are times in which a public debate and consultation procedures are unlikely to take place with the same degree of reflection and ponderation, as in normal times: it is not the best time to test new solutions. Furthermore, these measures, if they are suspensions, by definition, will have a sunset built-in: a date on which they will elapse, and old rules will be back in place. Of course, at a later point, we may ask whether the suspensions of the rules may have proven that the old rules were not the right ones. We may do so, also, in the light of how the world has changed due to the crisis, if any permanent change will be observed.

The rationales for suspending corporate law rules are two-fold. First, since March 2020 many companies are in "survival mode": *primum vivere* may mean sacrificing some protections that have been built into corporate law but increased the time and costs of engaging in some transactions that may now be crucial for survival. Second, in usual times the degree of uncertainty is lower than today and therefore some choices can be made with less risk of getting it wrong, and markets can be trusted in providing rational signals about the value of companies.

In terms of what to do, then, "survival first" may mean to suspend rules on capital increases and on related-party transactions for capital increases and shareholders loans whenever the normal-time rules are burdensome and/or especially time-consuming. The Italian government has moved in this direction by amending the rules on capital increases.

Traditionally, there is in the UK a sort of agreement among institutional shareholders to vote against proposals to waive pre-emption rights. Exceptionally, earlier this year, this group of institutional investors declared that they would be open to the idea of waiving pre-emption rights on a case by case basis. This would be pure self-regulation, but at the same time an important signal because everyone knows that in the UK you don't just issue new shares without pre-emption rights since the general meeting would never allow you to do it.

With regard to the area of related-party transactions, the Financial Conduct Authority also adopted measures about large related-party transactions aimed at recapitalizing companies: they have provided for a suspension of the rule that requires the shareholders meeting to approve the transaction with the favourable vote of a

majority of the minority. They have done this very cautiously, because still an informal vote is needed. The company has to call, basically, all the shareholders or a majority of the shareholders and make sure that they agree with the transaction. One way to get an equity capital infusion may also be by having someone to contribute to the company in exchange of shares; that may lead an existing shareholder or a third party to cross the threshold for the mandatory bid rule. In exceptional times one could think of tweaking the mandatory bid rule provisions in order to allow these transactions to go through without the need for a mandatory bid. It would be a sort of recognition that all companies are currently *in crisis mode*. In the UK, however, there is no need for such an intervention because the Panel has broad discretion: it has a general exemption power which may be used in this situation.

Next, Professor Enriques addressed the issue of director liability. In the UK, the Parliament is passing the suspension of wrongful trading rules for just three months. Wrongful trading rules are those that apply to companies in the vicinity of insolvency when directors are aware, or should have known that the company could not survive. However, this kind of intervention is partial: not only because it does not cover situations in which companies are not close to insolvency but also because, even for companies in the vicinity of insolvency there is a doctrine named after the case "West Mercia", which may lead to liability for directors. The idea is that when the residual claimants of the company are now the creditors because the equity is worth zero, then the fiduciary duties are ought to creditors and not to directors, and the new legislation is not doing anything in this regard. Broader exemptions for duty of care violations could be rolled out to avoid risk aversion on the part of decision-makers at companies managed in crisis mode.

Lastly, Professor Enriques focused on hostile take-overs and shareholders activism.

In his own opinion, the envisaged solutions are quite extreme. In fact, he suggested that the best solution in these circumstances would be to provide for a (temporary) default rule allowing directors to veto the purchases of share above 20%, of course in the interests of the company.

Nothing of this kind is going on in the UK where they are very proud of their takeover-friendly regime.

At the end of his speech, Professor Enriques made a final general comment

stating that if the times are exceptional, extraordinary measures are maybe needed, but they should not be permanent. In his opinion there is no reason to permanently change the rules now. Perhaps, the only permanent change that could be introduced are rules that allow for a quicker switch from normal times to exceptional times in the event of another crisis in the future. That would also reduce the pressure of making the possibly temporary changes permanent.

3.3. The German and Austrian cases

The webinar following guest was Chris Thomale, Professor at the University of Vienna and Roma Tre. He presented both the German and Austrian Commercial Law solutions.

The crisis was a chance to re-assess some parts of Corporate Law: the topical issue which arose from the circumstances was the *rebus sic stantibus* general clause problem. Professor Thomale explained: the German legislator action's overarching goal was to provide time to corporations, in order to allow them to deal with the new circumstances. Since many tried to apply for a special restructuring procedure the German Code provides – which requires the applicant has reasons to demand the restructuring but has not fallen in over-indebtedness – the legislator suspended the obligations to file for insolvency. Professor Thomale underlined that the suspension was not generalized but rather surgical: only the insolvencies linked to the Covid-19 crisis shall not be filed. Professor Thomale reasoned the issues arising from this approach in terms of burden of proof. Altogether with this provision the civil liability for unduly delaying filing for insolvency was suspended.

A second step taken by the German legislator and illustrated by the speaker was the suspension of a peculiar German rule suspending the validity of corporations' payments when close to insolvency. Professor Thomale drew the participants' attention to a German Corporate Law specificity: the recharacterization of shareholder's loans to be equity rather than debt. The rule will be suspended for three and a half years and aims to incentivize shareholders to take care of their own company: shareholders will be now more likely to give debts to their company rather than further equity.

Professor Thomale found that suspension played a key role in the German legislator approach, but he also found this crisis highlighted the unworkability of certain rules.

As far as general meetings rules were concerned, Professor Thomale believes the German legislator confirmed its unique approach: since normally virtual meetings are not allowed, management and directors still have to meet in person whereas shareholders' presence can be virtual. The issue arose because corporate management decides discretionary whether to allow or not questions, turning general meetings in "*corporate management's private parties.*" The provisions regarding general meetings specifically affected smaller shareholders and exacerbated their relevance issue: big institution investors and asset managers will be allowed to the meetings whereas smaller investors are somehow expropriated of their control rights.

Moving to the Austrian solutions instead, the speaker observed that they trace the German ones. Professor Thomale underlined how the Austrian legislator has reacted not earlier than two months after the German one did. One of the differences he emphasized regards the recharacterization of shareholders loans: the Austrian provision was suspended for only three months, with poor efficacy.

Concluding, Professor Thomale deemed that when it comes to capital structure and recapitalization of companies, we could learn a lot from the crisis. Especially in the grey area between corporate law and insolvency law, the promises made by our laws are to be "*crisis solid.*" Professor Thomale underlinedalso the need to reevaluate those rules because they are not designed for times when everything's fine.

3.4. The Spanish Case

With regard to the Covid measures applied in Spain, Ignacio Tirado, Professor of Commercial, Corporate and Insolvency Law at the Universidad Autónoma of Madrid and Secretary-General UNIDROIT, showed that Spain, as Italy, did not change the law at once. It did it in different times and not in a very coordinated manner.

In particular, Professor Tirado recalled three far-reaching relevant Royal Decrees that took care of many aspects in addition to those in the webinar at hand (Labour Law issues, Tax Law issues, insolvency and restructuring).

Concerning the amendments to the Spanish Corporate Law, they are very similar to those applied in Italy, France and the UK.

In particular, with regard to financial accounts, the duty to file financial accounts has been postponed, the terms to do it have been deferred, the shareholders meetings

and the board directors' meetings have been made more flexible: they can be done remotely, in videoconference or teleconference. Some amendments of corporate law are of particular importance: specifically, the possibility to suspend a decision previously adopted to deliver dividends and to suspend also the possibility of shareholders, when they have it, to separate from the company because dividends have not been distributed.

Also, the Spanish government, fearing the lowering of the value of the shares especially in open markets and their possible purchase during fire sales by foreign investors, suspended for a while the possibility to acquire a certain percentage of the shares of capital of companies and then it moved further, simply requiring a pre-authorization to be able to invest in the shares capital of certain companies.

Professor Tirado specified also that in Spain, like in many other countries, following ESMA's approach, the short selling is not allowed.

But the most interesting part of the extraordinary measures lays with two items: one is the banking side and the other is the contractual side. About the banking side, the core is obviously the European Union and the European Central Bank, especially with this Pandemic Emergency Long Term Restructuring Operation which was and still is key to ensure that money continues to flow into the banking systems of the different European states.

Also, Professor Tirado represented the real situation of the Spanish banking sector, specifying that Spanish banks are getting out of liquidity, in part to lend to the real economy, in part, more importantly, to buy sovereign bonds. In February, Spain had for the first time a higher percentage of foreign investors as holders of national bonds than national ones.

At this point, he asked himself several questions: how is it possible that countries issue bonds and are able to place the bonds in the markets at a better price than before the crisis? How can it be possible that Brazil, one of the most battered countries in the world and with no prospect of good recover at least for a few years, has just placed 3.5 billion at the lowest interest rate in its history?

His explanation is that there is so much liquidity already available that investors just invest somewhere.

Professor Tirado underlined that the huge amount of liquidity is making the market unable to work properly. And if the market is not pricing instruments properly,

that means the monetary policy is at risk of not working in the future, and that is going to be a very big problem.

The other issue which he believes is very important in the banking area is that all this money being channeled on to the real economy by the banking system is very difficult to place in a reasonable manner.

In Spain, like in Italy, it is very difficult to really make sure that money goes only to those companies that are in trouble because of the Covid situation and not to every company. This is a very difficult task for the Spanish institutions.

The other issue that Professor Tirado represented in his speech as very important for the banking sector is that in Spain every contract is pretty much in a situation of breach with particular reference to the material adverse change (MAC) clauses that are present in the vast majority of banking contracts. In this respect Professor Tirado called for a clear-cut rule that is reasonable and that allows for a streamlined application of the rules of *force majeure* and hardship. This is something that many governments will have to implement to try to make sure that their judicial systems are not completely clogged in the coming months.

In conclusion, Professor Tirado hopes that many governments comply with the UNIDROIT principles in international commercial contracts providing the most flexible option for the clause of *hardship* and *force majeure*.

Professor Tirado brought to the attention of the participants that UNIDROIT is about to issue a note on: "*Covid and the principles of hardship and force majeure.*"

BENEDETTA MAURO[*], MICHELE BASILE[**], GABRIELE MISCIA[***]

CERTIFICATE IN INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION – 7TH EDITION[****]

CONTENT. 1. The Certificate in International Commercial and Investment Arbitration: an overview – 2. The Certificate's 7th edition – 3. The 7th University of Roma Tre-UNIDROIT Annual International Arbitration Lecture

[*] Junior Associate, D|R Arbitration & Litigation; Tutor, Certificate in International Commercial and Investment Arbitration.

[**] Law School Graduate, Roma Tre University.

[***] Trainee Lawyer, Borgna Studio Legale.

[****] Michele Basile and Gabriele Miscia authored paragraphs 1 and 2; Benedetta Mauro authored paragraph 3.

1. The Certificate in International Commercial and Investment Arbitration: an overview

From the 21st to the 25th of September 2020, the Roma Tre University School of Law hosted the seventh edition of the Certificate in International Commercial and Investment Arbitration, organized by the University of Roma Tre together with the Italian Association for Arbitration ("AIA"), in partnership with the Milan Chamber of Arbitration ("CAM") and the International Chamber of Commerce ("ICC").

The Certificate started in 2014 and has been directed since its foundation by Prof. Maria Beatrice Deli, Domenico Di Pietro and Prof. Giacomo Rojas Elgueta. Since then, it has become a standing event for anyone wishing to gain theoretical and practical insights on international commercial and investment arbitration. A truly international program, over the past seven editions it has welcomed 63 Faculty members among leading academics, in-house counsel and practitioners, and over 190 Alumni coming from more than 40 countries in all five continents.

This year's edition was confronted with a number of logistical and practical challenges. Clearly, due to the Covid-19 pandemic, the possibility of having an in-class presence was far from certain. Nonetheless, the Directors achieved delivering a hybrid edition, with 11 participants physically present at Roma Tre's premises and 15 attending classes online.

Some of the speakers delivered their lectures remotely – especially since travelling to Rome was not an option in most cases – being nonetheless able to interact with the entire class, listening and answering to each question. The classic breaks and lunches that used to take place in between classes followed the same path, and so did the annual *aperitivo*, that was turned into a virtual networking event.

The Certificate is well structured into one week of classes, covering all crucial aspects of international commercial and investment arbitration. The first day is dedicated to the foundations of international arbitration, while the following days focus on the arbitration agreement, the arbitral proceedings, the peculiarities of investment treaty arbitration, and the arbitral award. Further, the 7th edition included for the first time a session on emergency procedures and a mock cross examination, as well as a roundtable on the most current issues presented by the Covid-19 pandemic. Finally, like every past edition, the program was closed by the prestigious University of Roma

Tre-UNIDROIT Annual International Arbitration Lecture.

2. The Certificate's 7th edition

The opening lecture was delivered by Prof. Manuel A. Gómez, Associate Dean for Graduate Studies and Global Engagement at the Florida International University. Joining from the other side of the globe, he introduced the 2020 Class to international arbitration with practical examples and fascinating insights driven by his professional experience. During his class, Prof. Gómez defined the three stages of the rise of a dispute: the *naming*, i.e., the identification of a perceived injury; the *blaming*, i.e., the classification of another subject as the responsible one; the *claiming*, i.e., the confrontation and request for remedy and rejection by the allegedly responsible party. He also explained what makes a controversy actually international and the role of arbitrators, as well as the contractual nature of this dispute resolution method and the legal framework around it.

After the opening lecture, Prof. Stefan Kröll also joined the Certificate virtually. Prof. Kröll is particularly well-known in the international arbitration community, being not only the Director of the Centre for International Dispute Resolution at Bucerius Law School, but also the Director of the Willem C. Vis Arbitration Moot. The *Vis*, as it is known, is one of the most important student competitions in the fields of international commercial law and arbitration with more than 350 participating universities every year – Roma Tre being one of them –. His lecture, concerning the core elements of international arbitration, gave the participants an in-depth comprehension of some fundamental principles, such as the doctrine of separability and *Kompetenz-Kompetenz*. Prof. Kröll also offered very interesting insights on the evolution that these principles are undergoing in the worldwide arbitration field, always with a dash of his classic German humor.

After the lunch break, the traditional roundtable hosted by Certificate's sponsor ArbIt (the Italian forum for Arbitration and ADR) was held with Andrea Carlevaris (President of AIA and partner at BonelliErede) and Michelangelo Cicogna (partner at De Berti Jacchia Franchini Forlani), who focused on the determination of the place of arbitration and the applicable law. The speakers gave the audience a comprehensive understanding of these topics, as well as more in-depth considerations based on their

combined experiences. Notably, they listed the ten aspects that must always be considered when choosing the place of arbitration, which included the law, the Judiciary, the right of representation, the professional ethics, the enforceability of the award and the arbitrators' immunity from civil liability. Then, they also detailed the many different applicable laws relevant for arbitral proceedings.

To conclude the first day of seminars, Prof. Maria Beatrice Deli moderated a panel with representatives of three major arbitral institutions. The speakers were Benedetta Coppo, Head of the Rome branch office of CAM, Natalia Petrik, Legal Counsel at the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), and Gabriele Ruscalla, Counsel of the Italian-Swiss Team at the Secretariat of the ICC Court of Arbitration. The panel explained the peculiarities of institutional arbitration, as well as its convenience (in many instances) over *ad hoc* arbitration. Then, they presented some specific provisions of their respective institutions' arbitration rules. Moreover, the costs of institutional arbitration were addressed by stressing the countervailing advantages that each institution offers, such as emergency arbitrators and a revision of the final award before its communication. Naturally, remote hearings and online procedures were especially pondered by this panel, as arbitral institutions have quickly adopted these measures in response to the current pandemic – which has rendered physical proceedings very challenging, if not impossible in most cases.

The second day of classes was opened by the lecture of Dr. Sabine Konrad, partner at Morgan Lewis, who, together with associate Katrine Tvede, dealt with the arbitration agreement and its formal and substantive validity. Dr. Konrad explained in which cases an arbitral agreement is not binding for the parties, e.g., in cases of fraud, especially under the New York Convention. She interestingly made reference to the *Fiona trust v. Privalov* case decided by the House of Lords, in which the invalidity of the main contract – caused, in fact, by the allegation of a fraud – did not cause the arbitral agreement to be set aside, given the separability principle.

The following session was held by Niccolò Landi, founder of Studio Legale Landi in association with Beechey Arbitration, and Valentine Chessa, partner at CastaldiPartners, who connected from her office in Paris. Their class consisted of an in-depth analysis of arbitration agreements, and more specifically of how to analyze, select and draft them. Many aspects were considered, from the application of

institutional rules without the involvement of the issuing institution, to multi-tier, multi-party and even multi-contract arbitration clauses. Mr. Landi and Ms. Chessa also suggested a process for the drafting of a clause, starting with a basic core structure, to which further elements may be added in case of necessity (for example, regarding interim measures, document production, allocation of costs, legal privilege and confidentiality). To conclude, the speakers brought a series of pathological clauses to the attention of the participants, who were asked to point out the possible concerns and solutions.

In the afternoon, James Hosking, founding partner at Chaffetz Lindsey, addressed the intriguing issue of complex privity and non-signatory parties. He explained how in multi-party transactions the arbitral proceedings can in some instances be extended to third parties. He also drew the participants' attention to the very recent opinion of the Supreme Court of the United States, *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA*, that dealt with such complex issues. In that case the Court was asked to clarify whether the New York Convention conflicts with the domestic equitable estoppel doctrine permitting the enforcement of arbitration agreements against non-signatories.

To conclude the second day, Prof. Rojas Elgueta moderated a panel of in-house counsel from four leading multinational companies: Alma Forgò of Airbus, Rosanna Grosso of Siemens, Beatriz Saiz Marti of Enel and Marcello Viglino of WeBuild (the new group brand of Salini Impregilo). The discussion offered an alternative point of view on international arbitration and more in general on ADR: that of the users. Not surprisingly, all of the panelists agreed that multinational companies prefer avoiding national courts as much as possible. Indeed, all of them expressed their preference for multi-tier clauses that also include mediation and assisted negotiation, in order to avoid major costs especially when the value of the dispute is not high enough. On the contrary, there was not a shared view on the matter of the remote versus physical conduct of the arbitration proceedings, as some expressed a preference for remote hearings and others did not, probably due to the different nature of the disputes that usually involve their companies.

The following morning, Baiju Vasani, partner at Ivanyan & Partners in Moscow, held a lecture on the selection, appointment and powers of arbitrators. He stressed, in the first place, the utmost importance that the selection of arbitrators has

in the proceedings. A number of aspects concerning the arbitration and the award depend directly on the arbitrators, from the enforceability of the decision to the efficiency of the proceedings. The cornerstone of an informed selection is the research on any possible fact related to the future arbitrator, in order to identify someone with the expertise necessary to understand profoundly the issue and possibly the appointing party's point of view. Even though impartiality is a requirement for arbitrators, he mentioned that attorneys and arbitrators may know each other without breaching impartiality provisions. Furthermore, Mr. Vasani also made reference to the need for greater diversity in arbitrators' ranks, and then concluded by explaining the powers of arbitrators in general.

Afterwards, Prof. Marco Torsello of the University of Verona, also partner at ArbLit, gave a lecture about the arbitrators' independence and impartiality. Prof. Torsello explained how independence and impartiality differ, the former being the absence of a close personal, financial or professional relationship between the arbitrator and any of the parties of the arbitration or its counsel, while the latter being the lack of bias towards the parties. He also drew the participants' attention to the IBA Guidelines on Conflicts of Interest in International Arbitration, that provide a series of waivable and non-waivable circumstances, which can be used to understand in what instances there may be a greater risk of lack of impartiality and independence. He went on to describe in detail the arbitrators' duty to disclose and what it entails, as well as how to challenge an allegedly biased arbitrator. In conclusion, he also mentioned the possibility that an award be set aside in case of the arbitrators' bias.

Wednesday afternoon session opened with the class held by Andrew G. Paton, partner at De Berti Jacchia Franchini Forlani. Mr. Paton introduced the participants to the core of the arbitration proceedings, its procedural structure and organization. Underlining the relevance of flexibility in international arbitration and the broad discretion given to the arbitral tribunal, Mr. Paton compared Article 19 of the UNCITRAL Model Law on International Commercial Arbitration with Article 816-*bis* of the Italian Code of Civil Procedure, highlighting the analogous deference given to the parties' choice of the procedures to be followed, and, if missing, to the arbitrators' power to organize the arbitration as they consider appropriate. Starting with recommendations for an efficient case management conference, and finishing with

suggestions on how to plan in advance the evidentiary hearings, throughout his presentation Mr. Paton stressed what should be the ultimate goal of the proceedings: to allow the parties to fully present their case, considering their fair and reasonable expectations, in a timely and cost-efficient manner.

The last presentation of the day shifted the focus on evidence. Ferdinando Emanuele, partner at Cleary Gottlieb Steen & Hamilton LLP, joined the session online from his office. His presentation began with an introduction to the IBA Rules on the Taking of Evidence in International Arbitration, a codification of best practices regarding the gathering of evidence both from civil law and common law traditions. Mr. Emanuele continued his presentation by analyzing three of the most important evidentiary tools under the IBA Rules: document production, fact witnesses, and expert witnesses. Along with theoretic illustrations of the IBA Rules governing the various types of evidence, Mr. Emanuele gave the participants flashes of real-life experiences, such as a practical example of a "Redfern Schedule".

Following the end of Wednesday sessions, the classic annual *aperitivo* was held, though in an innovative way, due to the social distancing imposed by Covid-19. The Directors, together with the sponsor of the event Cleary Gottlieb Steen & Hamilton LLP, decided to transform the *aperitivo* into a virtual networking event. Both in-class and online participants had the opportunity to introduce themselves and chat with Carlo Santoro, partner at Cleary Gottlieb, as well as asking him for career-oriented advice.

Both presentations of Thursday morning focused on investment treaty arbitration. Co-Directors Maria Beatrice Deli and Giacomo Rojas Elgueta delivered the first lecture on the international protection enjoyed by individuals and companies investing in a foreign State. After a historical *excursus* from the Second International Peace Conference of the Hague of 1907, which established a horizontal inter-State procedure for foreign investment protection, to the subsequent birth of bilateral treaties for the promotion and protection of investment ("BIT"s) and the Convention on the Settlement of Investment Disputes between States and Nationals and Other States of 1965 ("ICSID Convention"), Prof. Deli proceeded to cover the notions of investor and investment that are found in investment treaties and, in particular, as provided by Article 25 of the ICSID Convention. On the other hand, Prof. Rojas Elgueta's presentation focused on the substantive standards of protection that are granted to

foreign investors. In particular, he illustrated the inconsistent fashion in which they have been applied by arbitral tribunals through a case study of the so-called "Italian Renewable Energy Saga," in which both the umbrella clause and the fair and equitable treatment standard were involved.

The procedure and various stages of an investment treaty dispute were covered by Sylvia Tonova, partner at Jones Day in London. Ms. Tonova began her presentation by analyzing the 2019 data indicating the percentages of arbitration proceedings brought by investors from developed countries and of those initiated against the European Union as an economic group. Then, she described the three typical stages of a dispute: *pre-arbitration*, *arbitration*, and *post-arbitration*. Focusing on the arbitration stage, Ms. Tonova provided a detailed outline of an ICSID arbitration proceeding, starting with the Request for Arbitration addressed to the ICSID Secretary General, and finishing with the issuance of the arbitral award within 120 days after the closure of the proceedings. Ms. Tonova concluded her presentation with a discussion of selected procedural issues, such as a comparison between ICSID and UNCITRAL Arbitration Rules regarding the arbitral tribunal's power to grant provisional measures and the requirements for such an order.

Thursday afternoon session was entirely dedicated to what is ultimately sought when an international arbitration proceeding is started: the award. The first to take the floor was Paolo Marzolini, name partner at Patocchi & Marzolini, who delivered a lecture on the deliberation of arbitral awards and on drafting techniques. After explaining the different categories of awards that may be issued – such as *consent* awards, *default* awards, *additional* awards, and awards rendered *ex aequo et bono* – Mr. Marzolini outlined the several components of a typical one: the introductory part, a summary of the proceedings and of the dispute, the operative part of the award, etc. He emphasized how important it is to have a *clear*, *accurate*, and *comprehensive* award, both in view of its correct enforceability and of possible challenges. Talking about challenges, Mr. Marzolini concluded his presentation with an examination of the most common grounds on which arbitral awards can be challenged.

Thursday last session was held by Dr. Kabir Duggal, senior associate at Arnold & Porter Kaye Scholer LLP and a Lecturer in Law at the Columbia School of Law, who managed to bring his irresistible humor into his lecture on the enforcement of awards

made in an international arbitration. He began by reconnecting with the previous session, firstly listing the specific features of ICSID awards and introducing the few specific grounds of annulment under Article 52 of the ICSID Convention. Further, Dr. Duggal continued with an illustration of the requirements needed to enforce an award under the ICSID Convention, as compared to the ones generally required by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Lastly, Dr. Duggal concluded with a discussion on how courts of most countries offer different interpretations of the exceptions under the New York Convention and of other relevant provisions.

The last day of the Certificate opened with the newly introduced lecture on emergency arbitration held by Gustav Flecke-Giammarco, partner at Seven Summits Arbitration. Mr. Flecke-Giammarco addressed the new trends in emergency arbitration, focusing on the ICC's rationale for introducing a new emergency procedure in 2012, in addition to the Pre-Arbitral Referee already established in 1990. Emergency arbitration is meant to constitute a "safe harbor" for those parties that may need urgent interim or conservatory measures and cannot await the constitution of a typical arbitral tribunal; according to the new ICC procedure, an order – which will be replaced by a subsequent final award – will usually be issued within 20 days of the filing of the application for an emergency arbitration. The rapidity of this procedure has already begun to be appealing to an always increasing number of practitioners, as demonstrated by the constantly growing volume of applications submitted to the Secretariat of the ICC.

Friday morning session continued with another novelty of this 7th edition: a mock simulation of a witness' cross examination. Aimed at offering the participants a realistic experience of one of the most fascinating parts of an arbitration hearing, the simulation was conducted by Martin Gusy (partner and head of the U.S. International Arbitration practice at K&L Gates) as counsel, Cecilia Carrara (partner at Legance) as arbitrator, and Irene Petrelli (partner at Curtis, Mallet-Prevost, Colt & Mosle) as witness. Before performing the simulation, the panelists illustrated several useful techniques to reach the counsel's main goal of undermining the credibility of the witness, and the do's and don'ts that should be respected when cross-examining a witness. In particular, the latter included avoiding being too aggressive or too mild, asking long and discussive questions, or not listening to the actual witness' responses and thus missing targets of

opportunity. The mock trial simulation succeeded in providing the Certificate's participants with a closer look at the atmosphere surrounding a real-life cross examination – especially in pandemic times, with counsel (Mr. Gusy) being connected remotely and the arbitrator and witness (Dr. Carrara and Ms. Petrelli) being in the same location – and an understanding of the dynamics and the tactics underlying the formulation of each question.

In the afternoon, the Certificate opened to external attendees for two special sessions. The first was a roundtable focusing on Covid-19's impact on international arbitration, moderated by Co-Director Domenico Di Pietro, who connected from Miami. The first to take the floor was Laura Bergamini, Legal Counsel at ICSID, who started by illustrating the impact that the Covid-19 pandemic has had on ICSID arbitrations, and then explained how ICSID proceedings have adjusted to the "new normal." Through an increased use of IT tools – as an example, ICSID has eliminated the need for any paper filings by adopting the electronic filing as its exclusive procedure, and has introduced a virtual dispatch of its rulings – ICSID has been able to provide fully remote sessions and hearings.

The second panelist to speak was William W. Burke-White, Inaugural Director and Richard Perry Professor at the Perry World House and Law Professor at the University of Pennsylvania. Prof. Burke-White analyzed the topic of State liability under investment treaties during the Covid-19 era, especially focusing on whether States may be held liable for the measures adopted in response to the pandemic and on what defenses and options they may have to avoid liability. Prof. Burke-White anticipated that, due to the introduction of governmental orders imposing citizens to stay home and closing commercial activities and transportation links, there may be the possibility for States to face – among others – fair and equitable treatment claims, full protection and security claims, national treatment claims, and indirect expropriation claims.

The roundtable was closed by Roma Tre University's Professor Vincenzo Zeno-Zencovich, who expressed his considerations on the issue of inconsistency of arbitral decisions. Prof. Zeno-Zencovich presented Article 50 of the ICSID Convention, which provides for a very limited review of awards, contrasting it to the prospect of having arbitral tribunals taking different views and finding different solutions to similar fact patterns. By contrast, he introduced the European Union Commission's

recommendation for a Council decision authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, and Article 8.28 of the Comprehensive Economic and Trade Agreement between Canada and the European Union, which establishes an Appelate Tribunal to review arbitral awards rendered under the dispute resolution Section of the Agreement. Notably, the grounds upon which the Appellate Tribunal may uphold, modify, or reverse an award are, first, errors in the application or interpretation of the applicable law and, second, manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law. In conclusion, according to Prof. Zeno-Zencovich, the issue of inconsistency may be resolved by the introduction of a stable permanent tribunal in lieu of the several *ad hoc* tribunals.

3. The 7th University of Roma Tre-Unidroit Annual International Arbitration Lecture

Like every year, the University of Roma Tre-UNIDROIT Annual International Arbitration Lecture was the Certificate's *grand finale*. Year after year, the Annual Lecture has been an occasion to listen to the most prominent experts in the world discussing crucial topics in international arbitration, ranging from substantive standards of protection in international investment law, to the finality of arbitral awards, to the use of the UNIDROIT Principles of International Commercial Contracts and the role of mandatory rules in international arbitration. This year, world-famous arbitrator and President of the Governing Board of the International Council for Commercial Arbitration ("ICCA") Lucy Reed delivered a lecture titled "Flying Solo: From *Arthur Andersen*, to Codes of Conduct, to Covid-19 Virtual Hearings."[1]

While the current situation made it impossible to hold the Annual Lecture at the UNIDROIT's splendid headquarters (and take the traditional Class portrait in their garden overlooking the Roman roofs), Prof. Maria Chiara Malaguti – the newly

[1] Lucy Reed's lecture "as delivered" and the link to the video recording of the 7th University of Roma Tre-UNIDROIT Annual International Arbitration Lecture are available at the following website: <www.arbitrationcertificate.com/wp-content/uploads/2020/08/Roma-Tre-Publication-Version-1.pdf>.

appointed President of the UNIDROIT – and Prof. Andrea Zoppini of Roma Tre University joined the Certificate's in-class participants and Co-Directors at Roma Tre School of Law's *Sala del Consiglio*. Further, over 100 external participants connected remotely.

Prof. Malaguti delivered the welcoming remarks on behalf of the UNIDROIT, stressing how this was one of the first occasions for her to appear in her capacity of President of this institution. Conversely, she pointed out, this was not the first Annual Lecture she had attended, given the relevance of this event over the years. Prof. Malaguti thus renewed the UNIDROIT's commitment in continuing its profitable cooperation with Roma Tre University, underlining the relevance of international arbitration as a tool for the use of soft law and, specifically, of the UNIDROIT Principles of International Commercial Contracts. Prof. Malaguti concluded her remarks hinting at the future of soft law and, in particular, at whether the room for its application will broaden as a result of the changing interplay between public and private law, and what will be the role of arbitrators in its use.

On behalf of the University of Roma Tre, Prof. Zoppini then introduced this year's speaker, Ms. Lucy Reed, reminding the most noteworthy accomplishments in her highly varied and distinguished career in the fields of international arbitration and international law. Prof. Zoppini then commented on Ms. Reed's selected topic, drawing from his personal experience to stress the different nature of the experience of sitting in a virtual hearing rather than in a physical hearing, before leaving the floor to the speaker.

Ms. Reed first congratulated the recipients of the Certificate in International Commercial and Investment Arbitration and offered a virtual toast to the program's Directors, complimenting their vision and flexibility in bringing the Certificate's seventh edition to life amidst global uncertainty. She also expressed her regret for not being able to deliver the lecture in Rome and for the isolation we are all forced to in the new Covid-19 world, which gave her the chance to introduce the *fil rouge* of her lecture – the arbitrators' isolation and the challenges that they are faced with as individuals – which unfolded through three different topics.

The starting point of Ms. Reed's lecture was a twist on the seminal *Arthur Andersen* arbitration, which this year turned 20 years old, with an emphasis on the perspective of the sole arbitrator. The famous case concerned two business units of the then largest accounting firm in the world and involved the 140 member firms around

the world, as well as the umbrella entity based in Geneva. Ms. Reed stressed the magnitude of the case – with claimants seeking to terminate the inter-firm agreements that tied the global organization together and billions of dollars at stake – to give a sense of the responsibility that, pursuant to the applicable arbitration agreement, was attributed to a sole arbitrator, Dr. Guillermo Gamba Posada.

The attendees' attention was drawn in particular to the arbitrator's analysis of the applicable law, based on a choice-of-law clause which provided that disputes related to the inter-firm agreements were not to be decided pursuant to the substantive law of any jurisdiction, but rather taking into account "general principles of equity." Out of many possible approaches he could take in order to define the content of those principles, Dr. Gamba Posada decided to turn to the UNIDROIT Principles of International Commercial Contracts. Among others, he applied Article 5.4 of the Principles, finding that the umbrella entity had a duty to exercise its best efforts to ensure cooperation, coordination and compatibility among the member firms' practices, and Article 7.3.1(2), setting out the criteria to determine whether the umbrella entity's breach of the latter duty amounted to a "fundamental breach of contract." Dr. Gamba Posada found that it did, and that claimants were thereby legitimated to terminate the inter-firm agreements – which meant breaking up one of the biggest business in the world –.

Ms. Reed remarked the courage that it must have taken for Dr. Gamba Posada to apply the UNIDROIT Principles, which had then been in place for only three years (having the Principles been first released in 1994, and the *Arthur Andersen* arbitration begun in 1997), in one of the most significant commercial disputes ever brought. The speaker pointed out that this brave decision may not have been possible, and a compromise solution may rather have been sought, had the tribunal been composed of three arbitrators rather than one arbitrator "flying solo". However, she pointed out that, by using the UNIDROIT Principles, the sole arbitrator in the *Arthur Andersen* case was not entirely on his own, rather reaching out to a "ground crew below him" comprising the international practitioners and scholars who had spent more than a decade researching, negotiating and drafting the Principles.

The second topic covered by Ms. Reed was the surging demand for codes of conduct for international arbitrators, largely as a result of controversy around investment treaty arbitration. While agreeing with the late Johnny Veeder – according to whom

unless arbitration practitioners regulated themselves, others, who do not know international arbitration, would do so – the speaker expressed her discomfort with those codes of conduct that include bright-line rules, such as the Draft Code of Conduct or Adjudicators in Investor-State Dispute Settlement released earlier this year by the Secretariats of ICSID and UNCITRAL.

In particular, Ms. Reed focused on the rules regulating arbitrator capacity, firmly opposing the establishment of a fixed number of cases that an arbitrator should accept in order to ensure her availability. In this regard, she referred to what she called the "David Caron Rule of X," that is, David Caron's proposal that each arbitrator should set a number – X – as the upper limit of cases that she deems to be capable of responsibly sitting on at the same time, based on a number of variables depending on individual circumstances. Ms. Reed supported this idea, particularly because it places within the individual arbitrator – again, "flying solo" – the responsibility of fixing her own X.

Finally, Lucy Reed turned to her last topic – the personal isolation in which even arbitrators on three-member tribunals find themselves in virtual hearings. Ms. Reed introduced the topic by mentioning a project that ICCA is currently collaborating with – co-edited by Roma Tre University's Professor (and Certificate's Co-Director) Giacomo Rojas Elgueta, together with Faculty members James Hosking and Yasmine Lahlou – that aims at investigating whether a right to a physical hearing exists in international arbitration through a comparative approach.

Like Prof. Zoppini in his introductory remarks, Ms. Reed emphasized the profoundly different experiences that physical and virtual hearings are. In particular, virtual hearings cannot reproduce the personal dynamic by which, in physical hearings, the arbitrators get to know and trust each other, exchange views and possibly influence each other. While this may not have an impact on the dispositive outcome of an arbitration – as the arbitrators will still be capable of carrying out robust deliberations – the professional and personal camaraderie that forms an essential part of the arbitrator's role is inevitably lost. Ms. Reed concluded with an invitation to arbitrators to remember that they are nonetheless "flying" in three-member formation, with all the cooperation and coordination skills that that requires, and – by analogy – to recipients of the Certificate to nurture the bonds created over the past week.

Prof. Zoppini took the floor again to thank the speaker and share his experience,

having noted that online meetings tend to exaggerate hierarchy by making the directive powers of chairmen even deeper, and prompting a debate on whether any correctives should be put in place. Finally, the floor was opened for questions, with former Secretary General of the ICC Court of Arbitration (and Faculty member) Andrea Carlevaris sharing an anecdote related to the *Arthur Andersen* case – being at the time a legal counsel at the ICC Secretariat, he remembered notifying it to the parties *brevi manu* on a Friday night after the stock markets closed, press awaiting outside the ICC headquarters in Paris – and commenting on Dr. Gamba Posada's use of the UNIDROIT Principles as a tool of equity rather than as a governing law.

ADRIANA MACCHIA*

A CONFERENCE ON THE EXTERNALIZATION OF BORDERS AND THE ROLE OF IOM

(Roma Tre International Protection of Human Rights Legal Clinic; ASGI – Rome, 5 December 2019)[1]

* Law Graduate, University of Roma Tre.

[1] The acts and complete recording of the conference are available on ASGI's website <sciabacaoruka.asgi.it/atti-del-convegno-esternalizzazione-delle-frontiere-e-ruolo-di-oim/>, last accessed April 30, 2020.

The Roma Tre Legal Clinic on International Protection of Human Rights, in collaboration with the Association for Legal Studies on Immigration (ASGI), acting within the framework of its *Sciabaca* and *Oruka* projects, and with the support of Haiku Lugano Foundation, Charlemagne Foundation, FAI and Fuocoammare Fund, organized the conference "Externalization of borders and the role of IOM" which was held at the Roma Tre Law Department on 5 December 2019.

The conference benefitted from the participation of Italian and international scholars and focused on the engagement of the International Organization for Migration (IOM) in projects regarding border control, especially return policies, and IOM's activities in Africa. The goal was to establish a dialogue regarding IOM's legal nature, its role in border externalization policies and the use of voluntary return to the country of origin or transit as a migration management instrument.

Professor Alice Riccardi (Roma Tre), Director of the Legal Clinic, opened the conference alongside with Cristina Laura Cecchini and Diletta Agresta, representing ASGI. Professor Riccardi underlined that the conference was set within the framework of various human rights' protection activities and projects carried out at the Roma Tre Law Department. She also laid out the conference's main questions regarding the role and obligations of international organizations in border management, their relationships with member states and other international actors, as well as the victim's access to remedy. Laura Cecchini and Diletta Agresta of ASGI illustrated the association's efforts in the study of the phenomenon of border externalization and its risks, focusing on ASGI's projects *Sciabaca* and *Oruka*, carried out with the support of the Charlemagne Foundation and FAI. The projects' aim is to contest the compression and violation of migrants' rights stemming from national, European and international migration policies mainly through strategic litigation and the promotion of an international network of European and African actors. The speakers also noted that the IOM, by leading many projects regarding border management, voluntary return, assistance, reintegration and stabilization of migrants, is one of the key implementers of the European Union migration policies and as such benefits from extensive funding both at the Union and national level.

The first presentation was held by Professor Mirko Sossai (Roma Tre), who offered an overview of the IOM's role in the externalization of borders. Professor Sossai

noted how, despite its large development and expansion, the organization has remained under-researched by scholars mainly due to its complex history, its informality and lack of transparency and the general impression that IOM is merely a service-provider to States. He then analyzed the IOM's structure and nature, underlying that, as an international organization with legal personality, it is potentially responsible for international law violations. He also remarked certain peculiarities of the organization, regarding its mandate, the lack of a human rights dimension and the relationship with member States, which clash with the role that IOM aspires to have within the United Nations' system. Indeed, Professor Sossai noted that the IOM may not be found to aim at the realization of the general interests pursued by the United Nations. Moreover, the IOM is a donor-driven organization, whose lack of transparency and decentralized structure raise questions as to the donors' power to stipulate terms and conditions.

The floor was then left to Professor Cathryn Costello, from the University of Oxford, who focused her presentation on avoiding human rights violations by international organizations. To begin with, Professor Costello underlined how, on one hand, international organizations are subject to international law but, on the other, they enjoy certain privileges and immunities which hinder their accountability. Therefore, new approaches are required to assess and respond to violations, such as the institution of human rights' mechanisms within the organizations. Turning to the IOM, she noted the difficulty to determine the organization's obligations, due to its service-based approach, and the ambiguity of its mandate which is further evidenced by the agreement with the United Nations. She also noted how, also based on the IOM's operational framework, invoking the responsibility of member States remains a viable and easier solution.

The next speaker was Professor Andrea Spagnolo (University of Turin), who explored the possibility of the responsibility of international organizations involved in the management of detention camps in Libya. Citing Article 14 of the 2011 Draft articles on the responsibility of international organizations, Professor Spagnolo noted that such responsibility could indeed be invoked, and that the true difficulty lies in finding a *forum* due to the immunities enjoyed by international organizations. However, he also noted that the acts at stake represent a violation of the *jus cogens* rule which prohibits torture and inhuman and degrading treatment and he evidenced the existence

of an emerging trend which disregards international immunities *vis-à-vis* violations of *jus cogens*.

Subsequently, dr. Jean-Pierre Gauci, senior research fellow at the British Institute of International and Comparative Law, delivered a presentation regarding the cooperation between the European Union and the IOM. Firstly, he offered an overview of the relationship between IOM and the EU: all EU Member States are also members of IOM, however, due to some gaps in the regulatory framework and to the plurality of exchanges, the role of IOM within the Union policies is often unclear. Dr. Gauci evidenced, also noting the risks and opportunities, that the EU both provides extensive project funding to IOM, as showed by the EU Trust Fund for Africa, and uses IOM's services for the implementation of EU migration programs. He also explored the EU's potential responsibility for wrongdoings stemming from these programs, mentioning in particular the possibility of using the concept of due diligence as a way to evade the difficulties of proving a relationship entailing responsibility.

The last presentation was given by Dr. Pascaline Chappart, research fellow at the Institut de Recherche pour le Développement, URMIS Paris, who addressed the issue of voluntary return. She offered an overview of the increasing use of this measure worldwide, denouncing the absence of an adequate legal framework. In particular, dr. Chappart evidenced the contrast between the description offered by the IOM, which defines the voluntary return programs "human-rights based" and "migrant-friendly," and the concerns that were raised as to the context and voluntary nature of the displacements. In this sense, she criticized the ideological framework underlying the very concept of voluntary return. Finally, she described IOM's voluntary return programs implemented in Niger since 2016, as an example of the negative impacts of such practices.

MARCO RUOTOLO[*]**, MARTA CAREDDA**[**]

LA COSTITUZIONE… APERTA A TUTTI. A ROMA TRE UNIVERSITY PROJECT

ABSTRACT. *The paper illustrates the Project "La Costituzione... aperta a tutti," wich was launched in 2018 by Roma Tre Law Department to spreading knowledge of cosnstitutional values among high school students.*

[*] Full Professor, Constitutional Law, Department of Law, Roma Tre University.

[**] Post-doctoral Research Fellow in Constitutional Law, Department of Law, Roma Tre University.

In few lines, we illustrate the new relevant activities carried out by the Law Department within the scope of the University "Third Mission." These initiatives witness the interrelation between the University and the civil society: they go along with the University's traditional activities such as research and teaching.

The University of Roma Tre is indeed committed to several projects with which it establishes relationships with schools, associations, theatres, prisons and other entities within either the society and the territory, where the University is located and delivers its main educational purpose.

La Costituzione… aperta a tutti (*The Constitution… open to everybody*) represents University's commitment to spreading knowledge of constitutional values among high school students. The Law Department is carrying out the aforementioned Project for the third consecutive year, always improving it, because it has been very successful: several schools have applied to join, being able to use university teachers for directing young students in the fundamental bases of Italian constitutional culture, which is important to acquire at school, both for those who will then attend university courses and for those who will not.

The Project was launched in 2018 by prof. Marco Ruotolo, full professor of Constitutional Law of the Department of Law. Later, due to the Project's growth, Marta Caredda was named as coordinator and the Law Department Administrative Office also provided support.

We decided to start by listening to lessons from great and well-known professors of Constitutional Law: they addressed the meaning of the fundamental Charter's keywords and they explained their importance to the school students. Bearing in mind that the hope for greater diffusion of constitutional culture is aimed specifically at targeting students of the last years of high school, we continued with in-depth analyses and debates on the relevance of the Constitution with younger Constitutional Law teachers. Such a double track approach has a clear scope. On the one hand, we think it is important that the reflection on constitutional principles takes place both through lectures – valuable and authoritative – and through comparisons, debates, work to be done in class on the issues addressed. On the other hand, the involvement of younger law scholars undoubtedly allows to reduce the generational gap between teachers and students, with a formula that fosters the active participation of boys and girls,

encouraging the assimilation of particularly complex legal concepts. In the meetings with younger researchers, in fact, students' questions are generally more frequent and the interventions characterized by greater spontaneity.

In October 2018, we arranged the first three lectures held by Law Masters in the Roma Tre Aula Magna, inviting the schools of Rome that were interested in participating: Prof. Luigi Ferrajoli held a lecture about the keyword "Legality;" Prof. Giovanni Maria Flick addressed the keyword "Memory" and Prof. Marta Cartabia dealt with the keyword "Respect." More than three hundred students from middle schools were present.

Later, we invited high school students to participate in seminars held by young constitutional scholars, in order to encourage debates. In fact, these seminars are not only about the meaning of key concepts of the Constitution, but also reflect on the current value of those concepts and how they can be part of everyone's daily life. Andrea Giubilei addressed the concepts of "Freedom and Responsibility;" Marta Caredda dealt with the theme "Solidarity and Health;" Caterina Tomba gave a talk about the relationship between "Freedom and Equality."

The University of Roma Tre continued with a greater commitment and openness to society: our senior university students, along with young teachers, conducted study meetings on the Constitution by visiting high schools' classrooms. In this way, a direct confrontation with the new generations was further encouraged, also through the narration of personal experiences of social participation and defence of legality (for example: being elected as a representative of university politics; doing activities with no profit associations).

The success of the first edition of the Project gave the enthusiasm to go ahead with the second cycle of lessons dedicated to high school students.[1] In December 2019, we invited two established professors of Constitutional Law and over five hundred

[1] The schools involved in the first Project's edition – also thanks to the collaboration, in the initial stages, with the Assessor for person, school and solidarity community of the city of Rome – were Liceo classico Anco Marzio, I.M.S. Margherita di Savoia, I.I.S. Einaudi, Istituto cinematografico R. Rossellini, Liceo Keplero e Plinio Seniore, Istituto W.A. Mozart, I.C. Nino Rota, I.C. Via P. Semeria, I.C. Giovanni Falcone, I.C. Angelica Balabanoff and I.C. Via Casal Bianco.

children from Roman schools to the University: Prof. Lorenza Carlassare held a lecture on the word "Culture" and Prof. Valerio Onida on the word "Representation." Shortly after these two lectures from the "Masters," the Covid-19 epidemic led to an interruption of our activities. However, through the distance learning mode, we were able to carry out a seminar on "Right of asylum and legal status of the foreigners" held by Simone Barbareschi.

We are ready for the third cycle of lessons. In the last month several schools applied to participate: we have planned many new lectures and seminars, adapting the Project to the needs of the current situation. We will provide the equipment for distance learning, thanks to the collaboration of the Einaudi Institute of Rome, a high school involved in the Project from the very beginning. Lectures will be followed in streaming and also recorded on a specific digital platform, so as to be seen even on a deferred basis by the largest possible number of interested students.[2]

At the end of January 2021, three lectures are scheduled to start the third edition: we want the students to reflect on "Justice," with Prof. Giorgio Costantino; on the meaning of "Freedom," with Justice Giacomo Ebner; on "Honesty," with Prof. Bernardo Mattarella. Each Monday of next February, March and April, we will do classes, along with young constitutional law researchers from the Department of Law of Roma Tre University, to look into a word or a concept of the Constitution. Among the insights that will be carried out, there will be "Europe," "Environmental Protection," "Labour" and "Democracy."

The lectures and seminars held on the occasion of the first cycle of lessons on the Constitution were collected in the book *La Costituzione… aperta a tutti* published by Roma Tre-Press in 2019. This contribution can be freely downloaded by anyone, as a study material for students and teaching aid for school teachers.

In Italy, Civic Education was no longer taught in schools; it has been only recently decided to reinsert it in the high school curricula. Therefore, the Law Department of the University of Roma Tre wants to offer help and contribute with

[2] For the third edition, 30 schools and over five hundred students are involved in the Project *La Costituzione… aperta a tutti*.

school teachers to the spreading of the constitutional tradition of the Republic. The lessons collection is preceded by an essay by Prof. Marco Ruotolo, which introduces the other writings explaining why the Constitution is a limit to Power and how the idea of Constitutionalism was born. Last October the second edition of the Volume was published: it was enriched by the lectures held between the end of 2019 and 2020. It should be mentioned that we were capable to develop such a significant project also thanks to the great support shown by the Ministry of Education from the very beginning.

With *La Costituzione… aperta a tutti*, the University of Roma Tre – in this specific case, the Department of Law – makes available to school students a wealth of fundamental knowledge on the meaning of the most important words of the Italian Constitution. We think that this activity is very important, as it represents the role that the University can and wants to play in the society, for the civic education of young citizens, before and regardless of their enrolment in our degree courses.[3]

The University is a community where the exchange of experiences and knowledge takes place. It can be and we want it to be a place of dialogue between generations: between established and young professors, university students and school students, for the harmonious growth of the constitutional culture in our country.

[3] Since several hours of lessons are scheduled, students can apply for credits, which can be useful in case they will begin a University Curriculum. It is an additional chance that is offered; it being understood that participation is free and in no way connected with subsequent enrollment at the University.

SILVIA TALINI*, DARIO DI CECCA**

THE ROLE OF THE UNIVERSITY AND LEGAL INFORMATION IN GUARANTEEING THE RIGHTS OF PRISONERS: THE FUNDAMENTAL RELATIONSHIP BETWEEN TRAINING AND PRACTICE

ABSTRACT. *The paper describes the activities of The Department of Law of the University of "Roma Tre" in the field of guaranteeing the rights of prisoners. All different activities have common objectives: reflecting on the problems of criminal execution paying particular attention to the compatibility between prison legislation and constitutional principles, participating concretely in guaranteeing prisoners' rights and, more widely, to promote a different culture of punishment. These are complex objectives that can only be achieved through a constant comparison between theory and practice.*

CONTENT. 1. The guarantee of the prisoners' rights: the role of university teaching in the constitutional context – 2. "Learning by studying" and "learning by doing:" the constant relationship between theory and practice – 3. The Legal Information Desks in the prisons of Roma Regina Coeli and Rebibbia Femminile – 4. The activity of the desks during the lockdown in collaboration with the Ombudsman of Associazione Antigone – 5. The Agreement with the Guarantor of persons deprived of liberty of the Lazio Region and the new "Sportelli per i diritti" (Legal Desks for rights)

* Researcher in Constitutional Law and professor of "Prisoners' Rights and Constitution – Legal clinic in prison," Department of Law, University of Rome "Roma Tre."

** PhD in European Law from a historical-comparative point of view, Department of Law, University of Rome "Roma Tre" and Coordinator of the Legal Information Desks, Rebibbia prisons.

Part 1*
CONSTITUTIONAL LAW, PROTECTION OF PRISONERS AND SPREAD OF A CONSTITUTIONAL CULTURE OF PUNISHMENT

1. The guarantee of the prisoners' rights: the role of university teaching in the constitutional context

The Department of Law of the University of "Roma Tre" promotes various activities in the field of guaranteeing the rights of prisoners; they arise from the awareness that a reading of penitentiary law in the light of the Constitution is not a choice but a necessity. This brief presentation concerns the activities carried out at the Department of Law in the area of Constitutional Law (IUS/08); they are based on a double will: to spread a constitutional culture of criminal execution and to participate concretely in the guarantee of the rights of prisoners.

In fact, all the institutions, including universities, are called to participate in the realization of the constitutional law, which in matters of criminal execution establishes that "Punishment cannot consist in inhuman treatment and shall aim at the rehabilitation of the convicted person" (Article 27, third paragraph). Furthermore, the Italian Constitution gives strong emphasis to the principles of *solidarity* and respect for the *dignity* of every individual for whom the Republic recognises these inviolable rights that must be guaranteed regardless of the behaviour and choices made by an individual (including criminal ones).

In particular, Article 2 of the Constitution represented a decisive change in the conception of the individual in relation to the public authority. By using the adjective "inviolable,"[1] the Constitution affirmed the *pre-existence of rights* with respect to the public powers, and reversed the individual/State relationship scheme that had characterised the previous decades.[2] State institutions, therefore, have the constitutional

* By Silvia Talini.

[1] Inviolable, inalienable (translation note).

[2] The previous Prison Regulation (no. 787/1931), approved under the Fascist dictatorship, was based on an afflictive vision of the criminal punishment; next to the death penalty the only sanction was prison confinement, an isolated place where the detainees were not entitled to any rights.

duty to guarantee human rights at every moment of social life – even when the breach of criminal law may have occurred –. The Republic is also given an incisive duty: to remove the economic and social obstacles that reduce the freedom and equality of citizens and prevent the full development of the person (Article 3, second paragraph). Therefore, public authorities have a specific, constitutional obligation to ensure that social dignity is effectively recognised for all human beings, without any distinction (not even between free and imprisoned ones).

This is necessarily reflected in the criminal system and in the principles of humanity and rehabilitation through punishment. The Italian Constitution requires that public authorities ensure full respect of the inviolable rights and dignity of each prisoner, making any re-educational plan aimed at the prisoner's social rehabilitation effective.

Rehabilitation is a goal – here a central point – that is not identified with the compulsory repentance or with the moral indoctrination of the prisoner. The rehabilitation purpose shall only aim at *re-inserting the person into society*, identifying this process with the term "resocialization."

The same principle is provided by Art. 1 of the Prison Act (Law no. 354/1975, hereafter P.A.), specifying that "prison treatment shall *conform to humanity* and ensure *respect for people's dignity.*" Also rehabilitation treatment "is carried out mainly using education, vocational training, work, participation in projects of community work, religion, cultural, recreational and sports activities, as well as facilitating proper contacts with the outside world and relations with the family" (Art. 15, first paragraph, P.A.).

Therefore, it is evident that the resocialization of every convicted person is accomplished through the guarantee of his/her constitutional rights.

The rationale of this new perspective is to be found in the awareness that a lack of contact with the world outside the prison involves serious psychophysical and behavioural discomforts that inevitably fall on the pathway to social reintegration, the ultimate goal of every punishment.

The Department of Law, through its activities in the field of Constitutional Law, aims to participate in this path of resocialization and, at the same time, to spread a constitutional culture of the criminal execution among its students and, more generally, in society.

2. "Learning by studying" and "learning by doing": the constant relationship between theory and practice

With regard to teaching in the IUS/08 sector, in the a.y. 2012/2013, the course "Prisoners' rights and Constitution"[3] was activated. In six years, almost 1,000 students have enrolled and participated not only in theoretical lessons, but also, and not secondarily, in the visits organized at the prisons of Rebibbia Nuovo Complesso and Regina Coeli.

From the 2014/2015 academic year, a Prison law clinic was activated at the Regina Coeli prison, linked to the training activities, through the collaboration of the Antigone Association. Thirty selected students participated in the "law clinic" (Legal Desks for rights) flanking the tutors (Antigone's lawyers) in the activity carried out in the Regina Coeli prison.[4]

Since a.y. 2015/2016 both activities ("Prisoners' rights and Constitution" and "Prison law clinic") have been merged into a single 7 CFU teaching course, called "Prisoners' rights and Constitution – Prison law clinic". Besides the theoretical lessons, a legal clinic was also organized in collaboration with the Antigone Association at the Regina Coeli prison and, from the academic year 2016/2017, also at the women's prison of Rebibbia.[5]

More in detail, the course aims to offer a study of Italian prison legislation in relation to constitutional law, with a theoretical-practical approach focused on the study of legislation, case law trends and administrative practice. In this way, marked by the "constitutionalist approach," the course offers a knowledge growth to the students, integrating the notions already acquired with the basic teachings (constitutional law, philosophy of law, criminal procedural law, international law, etc.). Moreover, in order to encourage a concrete contact between students and prison reality, visits to penitentiary institutions and meetings with professionals working in the field of criminal execution (lawyers, directors, judges, etc.) are also organized as part of the course.

[3] Taught by Prof. Marco Ruotolo.

[4] Taught by the author.

[5] The second part of this paper, written by Dario Di Cecca, is dedicated to the Prison law clinic activities.

With the aim of "learning by doing" and "learning by watching", on 3 October 2019 forty students from the courses "Prisoners' rights and Constitution" and "Sociology of Law" took part in a study visit organized by the Department of Law at Santo Stefano Prison (Ventotene Island), where many Italian intellectuals and politicians, such as Altiero Spinelli and Ernesto Rossi, were imprisoned during the fascist regime.[6]

The growing interest in the study of criminal execution in the wider context of constitutional law is at the basis of the decision to establish in 2013 a 2nd level Master in "Penitentiary law and Constitution," directed by Prof. Marco Ruotolo and coordinated by the author. In seven editions the course has had more than 270 participants, has promoted more than twenty conferences (also in collaboration with the Superior School of the Magistracy) and has organized, with the Institute of Penitentiary Studies and the National Guarantor of prisoners, international *internship* activities in various countries (France, Belgium, Armenia, Austria, etc.).

In order to promote the constitutional study on the criminal execution, the website *www.dirittopenitenziarioecostituzione.it* was created and the editorial series "Penitentiary law and Constitution" was founded. The series, published by Editoriale Scientifica (Naples, Italy), contains papers written by various experts, is now in its tenth volume and, in some cases, has been published with the economic contribution of the Department of Law.

The described activities are part of a general attention that the Department has towards the rights of convicted persons. For examples the activities carried out for several years by the Department's senior students in favor of prisoners enrolled in law degree courses. This has been an important activity, capable of creating an extraordinary synergy in university education between free students and students in prison. There is also a support activity to the study of students in prison (a.y. 2020/2021); the Department of Law's tutor supports prisoners in their university life, provides them with useful information and helps them prepare for exams.[7]

[6] The visit was organized by Professors Patrizio Gonnella, Dario Ippolito, Marco Ruotolo and Silvia Talini.

[7] Responsible for the activity is Prof. Patrizio Gonnella.

All these different activities have nonetheless common objectives: reflecting on the problems of criminal execution paying particular attention to the compatibility between prison legislation and constitutional principles, participating concretely in guaranteeing prisoners' rights and, more widely, to promote a different culture of punishment.

These are complex objectives that can only be achieved through a constant comparison between theory and practice.

Part 2*.
THE ACTIVITY OF LEGAL INFORMATION IN PRISON

3. The Legal Information Desks in the prisons of Roma Regina Coeli and Rebibbia Femminile

In the context of these initiatives, as mentioned above, since the beginning of 2015 the Department of Law has activated several legal information desks in prison, also in collaboration with Associazione Antigone, which has a long-standing experience in the field of guarantees in the penal system and prisoners' rights. The activity has involved dozens of students who, under the supervision of tutors (experts in criminal, penitentiary and immigration law) have provided their assistance to hundreds of inmates detained in the main Roman prisons.

The legal information desks are part of a larger university project of a legal clinic, therefore, this activity consists of two closely related phases. The operators of the Legal Desks enter the prison to collect the prisoners' requests (front office) and, once a week, they meet in the university Department to address the issues raised and discuss good practices that can be adopted (back office). During these meetings, tasks and duties are divided among the team; these include legal and jurisprudential researches, drafting petitions or the mediation with prison staff and other administrations to solicit the

* By Dario Di Cecca.

adoption of the necessary measures. Internal training activities are also periodically carried out with the participation of lawyers, magistrates and law professors. Before the authorization to enter the prison and the start of the front office activities, the selected students participate for some time in back-office activities and internal training, to familiarize themselves with the main legal instruments.

The first legal information desk was set up at the Regina Coeli prison in February 2015. In this prison, visits of the Legal Information Desk take place weekly: about 30 volunteers divided into groups enter the different sections of the institute, including the Diagnostic and Therapeutic Center. Until February 2020, the volunteers have carried out between 20 and 25 weekly consultations. Considering that the solution of a single case often requires several consultations with the person concerned, in its five and a half years of activity the Desk has met about 400 inmates per year. On average, 25% of the cases concern issues related to immigration law, such as the issuance or renewal of a residence permit, the request for international protection, the opposition to expulsion as a security measure. The remaining 75% of the requests concern issues related to prison life, such as requests for visits with family members, reward leaves, transfers to other institutes, access to alternative measures to detention or benefits provided by law, and the right to health.

Based on this experience, in April 2017 a new desk was also opened at the prison of Rebibbia Femminile. The team is composed of six operators, selected among those who took part in a training period at the Regina Coeli desk, coordinated by a lawyer with the role of an expert tutor.

Originally focusing exclusively on foreign inmates, later the desk has extended its activities to Italian inmates, collecting requests made by the staff and the prison population. Therefore, besides the specific issues of immigration law (renewal of residence permits, asylum applications, expulsions, transfers abroad, international letters rogatory, European arrest warrants, problems with identity documents, relations with embassies and consulates), the activity of the desk, since September 2019, covers all the broader issues concerning the execution of the sentence and prison law.

In particular, the main issues addressed concern: alternative measures to detention, early release, telephone calls and in-person visits with family members and third parties, external penal execution, request for benefits, special detention regime for

detainees who committed crimes so-called "ostativi" (particularly grave crimes for which access to benefits is very limited).

Desk operators enter the prison twice per month. Every time they meet an average of 10 inmates. From May 2017 to the end of February 2020, the desk has entered 60 times, carrying out a total of about 600 consultations with dozens of Italian and foreign inmates.

4. The activity of the desks during the lockdown in collaboration with the Ombudsman of Associazione Antigone

Since the end of February, due to the Covid-19 health emergency, the authorization for volunteers to enter the prison has been suspended. This limitation was adopted by almost all Italian prisons to narrow the risk that people from the free society could infect prisoners and remained in force until the end of June. Therefore, until that moment, it was not possible to carry out in-presence activities with detainees.

Because of this situation, during the entire lockdown of the prison institutes, Legal Desk operators continued to provide legal information and assistance to prisoners through the new telematic methods that we have thanks to current technology. Together with the volunteers of the Ombudsman of Associazione Antigone, a group of penitentiary experts who meet weekly to remotely carry out legal information activities for inmates and their families, the volunteers of the Legal Desks have created a task force capable of responding to the numerous requests received.

From mid-March to the end of April alone, 160 different cases were documented, corresponding to about 500 notifications. The work was carried out in coordination and interfacing with the Guarantors of the rights of detainees, Directors of the prison Institutes, the Health Managements, the Department of the Penitentiary Administration and the various regional or inter-regional offices of the Penitentiary Administration/*Provveditorati* (regions in which Italy is divided for the administration of justice; they sometimes coincide with regions while other times they include more than one region).

5. The Agreement with the Guarantor of persons deprived of liberty of the Lazio Region and the new "Sportelli per i diritti" (Legal Desks for rights)

At the beginning of 2020, the Guarantor of persons deprived of their liberty of the Lazio Region launched a project of integration with universities and qualified associations to strengthen the instruments aimed at protecting the rights of prisoners, to be realized through the establishment of new Legal Desks for the rights of prisoners in eleven of the fourteen prisons in the region.

The project was implemented through the activation of a network of information and orientation Desks for prisoners on their rights, with a particular focus on issues within the competence of the Guarantor, such as living conditions in prison, health care, school and university education, vocational training, orientation and job placement, access to benefits and alternative measures to detention, and support for social reintegration at the end of the sentence. As part of this project, the Department of Law of the University of Roma Tre has been entrusted with the activation of the Desks at the Prison Institutes of Rome Regina Coeli, Rebibbia Femminile, Casa di Reclusione, and Terza Casa Circondariale.

Thanks also to the previous experience gained in recent years, the Desks have been in operation since September 2020 carrying out support activities for the resolution of inmates' individual problems, through actions of information and assistance in the drafting of petitions that they can sign by themselves. The new desks act in synergy with the staff of the Guarantor's Office, communicating the cases in which it is necessary to speak with the heads of public administrations or competent authorities to resolve the problem expressed by the detainee, and periodically reporting to the Guarantor all problems of a general nature related to the Institute that emerged during the activities, also to monitor the state of the fulfilment of the rights of persons detained in the prison.

LAURA DI GIANFRANCESCO*

GIULIO BARTOLINI (ED.), *A HISTORY OF INTERNATIONAL LAW IN ITALY*, OXFORD, OXFORD UNIVERSITY PRESS, 2020

Following decades in which the progressive specialization of international law had directed scholarly attention away from history, in recent years a renewed interest for historical approaches to international law has emerged in scholarly works, marking what has been described as a "turn to history in international law."[1] Such interest has been accompanied by the tendency to perform historical analyses through national or local perspectives, overcoming previous scepticism over the possibility of identifying national conceptions of international law.[2] The traditional resistance to the development of studies focusing on national perspectives can be explained by taking into account international law's inherent aspiration to universality. However, international scholarship nowadays appears to recognize that, while international lawyers may indeed be considered part of an "invisible college dedicated to a common intellectual enterprise,"[3] still such community is not uniform, each national scholarship providing a different contribution to, and offering a different outlook on, international law.[4] In this respect,

* PhD in International Law, Roma Tre University.

[1] M. CRAVEN, *Theorising the Turn to History in International Law*, in A. ORFORD & F. HOFFMANN, *The Oxford Handbook of the Theory of International Law*, Oxford, Oxford University Press, 2016; M. KOSKENNIEMI, *Why History of International Law Today?*, *Rechtsgeschichte*, 4, 2004.

[2] H. LAUTERPACHT, *Règles générales du droit de la paix*, *Collected Courses of the Hague Academy of International Law*, 62, 1937, p 106.

[3] O. SCHACHTER, *The Invisible College of International Lawyers*, *Northwestern University Law Review*, 72, 1977-78, p. 217.

[4] A. ROBERTS, *Is International Law International?*, Oxford, Oxford University Press, 2017, p. 1 ff, re-framing the no-

far from enhancing particularism, inquiries into national histories and perspectives may contribute to a broader understanding of the multi-faceted nature of international law and to the critical evaluation of its developments and challenges.

Against this background, it appears relevant nowadays to devote attention to the multiple connections and mutual interactions between the global and the local. However, as far as European States are concerned, whereas significant research has been conducted over the local approaches of France, Germany and the United Kingdom, a modern comprehensive account of the role of Italian legal scholarship of international law was surprisingly absent. As Giulio Bartolini observes, most scholarly works offering a comprehensive account of the Italian perspective date back to the first half of the 20th century, while recent studies have usually dealt with more limited aspects.[5]

The declared purpose of the volume "A History of International Law in Italy", edited by Giulio Bartolini and published in 2020 by Oxford University Press, is to fill this gap by retracing the development of international law studies in Italy and analysing the contribution of the Italian scholarship and experiences to the development of international law. Without the ambition to portray "the" history of international law in Italy, the volume explicitly seeks to offer "a" history, welcoming other approaches that may foster further reflections.

The book purports to develop its history by re-assessing, on the one hand, the mutual relationship and influence between the Italian scholarship and international law, and, on the other hand, by analysing the impact of the main historical and political events in the development of this relationship. To this end, the book is divided into two main sections, the first dedicated to "The Development of International Law Scholarship in Italy" and the second focusing on "Key Historical and Political Events and their Impact on the Italian Scholarship of International Law."

The first section assesses the birth and development of the Italian scholarship of international law by analysing its main theoretical trends, as well as the works of its

tion of "invisible college" in terms of a "divisible college."

[5] G. Bartolini, *What is a History of International Law in Italy for? International Law through the Prism of National Perspectives*, in G. Bartolini, *A History of International Law in Italy*, Oxford, Oxford University Press, 2020, pp. 8-9.

protagonists and their participation to a multiplicity of networks, at both the internal and the international level.

The contributions often do so by offering insightful counter-narratives to historical and doctrinal assumptions. Claudia Storti, for instance, challenges the common indication of the Treaty of Westphalia of 1648 as the birth of modern international law, analysing the experience of Italian communes in the Middle Ages as an early laboratory for statehood. On his part, Walter Rech challenges the qualification of the period between the 17th and the early 19th century as an era of decline for international law in Italy, demonstrating, instead, that the political decline of the peninsula did not prevent Italian scholars of the time from participating in the shaping of international legal rules.

The chapters further examine the development of the Italian scholarship of international law, analysing the origins and developments of the "Italian school of international law" (see Edoardo Greppi's recollection of the role of Pasquale Stanislao Mancini and his elaboration of the nationality principle as the basis for international subjectivity, and Eloisa Mura's overview of the dialectic relationship between the Mancinian and the Positive schools), up the turning point of the 20th century, which marked a shift from pure positivism to a multitude of theoretical approaches (chapters by Giulio Bartolini on the early 20th century and Antonello Tancredi on the immediate aftermath of World War II). Ivan Ingravallo then surveys the evolution of Italian scientific journals on international law, their influence on the development of the different legal schools as well as their relationship with the political power.

The chapters by Mirko Sossai and Lorenzo Gradoni further challenge the idea that the traditional positivist approach rendered the Italian scholarship impermeable to the influence of Catholicism and Marxism. Particularly, Sossai shows that, notwithstanding the characterization of the Italian doctrine of international law as an essentially secular enterprise, the Catholic tradition was indeed a source of inspiration for international law scholars. Gradoni, instead, attempts to rescue the Italian Marxist scholarship from oblivion by showing its doctrinal significance despite a short duration in time.

Attention is also dedicated to analyse how the tradition of the Italian scholarship continues to shape the Italian approach to the study of international law. In this regard, Pietro Franzina examines the peculiar integrated approach to the study of public and

private international law in Italy, a distinctive Italian feature that finds its roots in Mancini's theory of nationality.

The second section focuses, as mentioned, on an assessment of the interconnections between key historical and political events and the development of international law in Italy and by Italy.

In this respect, the contributions comprehensively cover major events in Italian history: from the Unification of Italy in 1861 and the Roman Question (respectively analysed by Sergio Marchisio and Tommaso di Ruzza), to the Colonial experience of Italy in Eritrea and Somalia (Tullio Scovazzi), the impact of the two World Wars (Giulio Bartolini), the elaboration of the 1948 Constitution (Roberto Virzo) and, finally, the aftermath of World War II, up to the development of the European integration (Enrico Milano). The contributions illustrate that international law pervades key moments of Italian history and how it has helped shape the very essence of the country – the use of legal categories of international law as functional to Italy's unification process and the internationalist spirit of the Constitution being paradigmatic examples –.

Finally, the concluding section of the volume focuses on the current role of the Italian legal scholarship of international law. Giovanni Distefano and Robert Kolb examine the Hague Academy courses and the law of State responsibility as two key examples of the prominent influence that Italian scholars continue to exercise on the development and teaching of international law. By contrast, Paolo Palchetti offers a contemporary view on the Italian scholarship, appreciating its continued vitality and its ability to allow other approaches and methodologies permeate its work, while remaining faithful to the traditional positivistic conception of international law.

Conclusively, the volume shall be welcomed as an important contribution to the historical and comparative studies on international law. Moreover, besides being commendable for its outstanding scientific quality, the book may also be considered an important tool for young international law scholars, who inherit the tradition of a "fortress" – to use a metaphor by Luigi Condorelli,[6] which Palchetti borrows in his

[6] L. Condorelli, *Scholie sur l'idiome scellien des manuels francophones de droit international public*, *European Journal of International Law*, 1, 1990, p. 233.

concluding lines – that "has not yet capitulated" in the face of globalization.[7] For those approaching international law today, it is more than significant to acknowledge this tradition. "A History of International Law in Italy" is also an invitation to re-read the classics, stimulating a renewed interest for "one of the great legal schools of international law."[8]

[7] P. PALCHETTI, *The Italian Doctrine over Final Decades*, in G. BARTOLINI, *A History of International Law in Italy*, Oxford, Oxford University Press, 2020, p. 481.

[8] G. DISTEFANO-R. KOLB, *Some Contributions from and Influence of the Italian Doctrine of International Law*, in G. BARTOLINI, *A History of International Law in Italy*, Oxford, Oxford University Press, 2020, p. 466.

ROMA TRE
UNIVERSITÀ DEGLI STUDI
DIPARTIMENTO DI GIURISPRUDENZA