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LEONARDO CINOTTI*

JHERING Y SU "ESPÍRITU DEL DERECHO ROMANO": LECTURA DE UN JOVEN ESTUDIOSO

RESUMO. *Este artículo se pone el objetivo de ofrecer a los estudiosos e interesados de la Historia del Derecho Romano, así como de la Historia del Derecho en general, una interpretación y una lectura renovada de una de las obras 'clásicas' más importantes en esta materia, o sea «El espíritu del Derecho Romano en las diversas fases de su desarrollo» de Rudolf Von Jhering.*
Este trabajo – que es enorme porque consta de cuatro volúmenes y casi dos mil páginas – marca, sin duda, un punto de inflexión sin precedentes en el enfoque al Derecho Romano y en la elaboración de un nuevo método de estudio de la historia de los fenómenos jurídicos.
En efecto, a través de una inmersión en todos los ámbitos de la historia del pueblo romano, desde el religioso, hasta el económico, social, cultural, antropológico y filológico, Jhering intentó descubrir el alma y la verdadera esencia del origen del Derecho Romano y del desarrollo de uno de los sistemas jurídicos que ha tenido más éxito en la historia.

ABSTRACT. *This article aims to offer scholars and those interested in the History of Roman Law, as well as in the History of Law in general, an interpretation and a renewed reading of one of the most important 'classic' works on this subject, that is «The spirit of Roman Law at the various stages of its development» by Rudolf Von Jhering.*
This work – which is enormous because it consists of four volumes and almost two thousand pages – marks, without any doubt, an unprecedented turning point in the approach to Roman Law and in the elaboration of a new method of studying the history of legal phenomena.
Indeed, through an immersion in all areas of the history of the Roman people, from the religious, to the economic, social, cultural, anthropological and philological, Jhering tried to discover the soul and the true essence of the origin of Roman Law and the development of one of the most successful legal systems in history.

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1. Introducción

Leer y estudiar los grandes 'clásicos' de la literatura jurídica, especialmente los que fueron escritos y elaborados por los más importantes teóricos y académicos puros, tiene algunas ventajas relevantes, ya que, así como ofrece una visión general de los fenómenos jurídicos, al mismo tiempo permite observar la evolución de un pensamiento y del cambio de su perspectiva.

«*El espíritu del derecho romano en las diversas fases de su desarrollo*» – cuyo título original en alemán es «*Der Geist des Romischen Recht auf den verschiedenen Stufen seiner Entwickelung*» – junto a su Autor, Rudolf Von Jhering, pueden ser reconducidos en estas categorías: de hecho, no sólo una obra de este tipo permite a quien le se acerca de sumergirse en una amplia reflexión del fenómeno jurídico de un pueblo – en el caso específico el pueblo romano – indagando en las razones más ocultas y las características más ancestrales, sino también permite saborear, a través de una lectura íntegra de la obra, las más profundas contradicciones que caracterizan un autor – como solo puede pasar a un verdadero erudito devoto.

En este sentido, recorriendo los distintos volúmenes de «*El espíritu del derecho romano*», se va percibiendo poco a poco que la intención inicial del Autor de profundizar y esbozar todo el desarrollo histórico del derecho del pueblo romano, no sólo no se concreta por la cantidad infinita de estudio y trabajo necesarios, sino cambia su sustancia en el progreso.

De hecho, durante los muchos años en los que trabajó intensamente en la construcción de esta obra, Jhering cambió natural y fisiológicamente su opinión, así que en los últimos capítulos del cuarto volumen – que, por cierto, es el último – tomó con-

ciencia de que su reflexión era tan compleja que iba mucho «más allá del romanismo» y decidió interrumpir la obra para «intentar una síntesis más amplia»[1].

Como ya se señaló, la obra, que consta de cuatro volúmenes y que se quedó inconclusa, es el resultado de 13 años de trabajo, que van desde el 1852 hasta el 1865. Para realizar este trabajo – que no pretende analizar en detalle todo el texto original de Jhering, sino ofrecer una interpretación renovada que permita aproximarse al estudio de uno de los grandes clásicos de la historia del derecho romano –, se utilizó por el primer volumen la traducción italiana de Luigi Bellavite del año 1855, mientras que para los otros tres se utilizó la versión española de Enrique Principe Satorres de 1900.

La pregunta que, hoy, podría surgir espontáneamente a un estudiante o a un profesional del derecho es sin duda esta: ¿por qué traducir, estudiar y conocer una obra que tiene más de 170 años? La respuesta ya se encuentra en los prefacios del traductor italiano Luigi Bellavite y francés, O. De Meulenaere – cuya nota esta traducida en la versión española – que argumentaron que un monumento jurídico como el que nos ocupa era necesario «para llenar una profunda lacona» en el estudio del derecho romano, ya que «¿cómo podrían los glosadores, separados durante tanto tiempo per la época de Justiniano, extraer un conocimiento adecuado del derecho romano solo a través de las fuentes justinianeas?»[2]. Además, el valor de una obra como esta consiste precisamente en que cualquier persona que la lea «hasta el final conocerá el derecho romano que si hubiese estudiado muchos manuales de instituciones y cursos de Las Pandectas» y en que «la mayor parte de los tratados de derecho romano son compilaciones de textos que nos demuestran cómo la osamenta de ese derecho influye todavía sobre la civilización actual, aunque no ha podido encontrarse el alma. Jhering ha trasfusionado sangre en las venas del cadáver, le ha vuelto a la vida y le ha infundido esa alma»[3].

[1] F. Battaglia, *Rudolf Von Jhering*, 1933, Enciclopedia Treccani Online <https://www.treccani.it/enciclopedia/rudolf-von-jhering_%28Enciclopedia-Italiana%29/>.

[2] Prefacio a la traducción italiana de Luigi Bellavite, en R. V. Jhering, *Lo spirito del diritto romano nei diversi gradi del suo sviluppo*, traducción de Luigi Bellavite, Tipografia e Libreria Pirotta E.C., Milano, 1854, Vol. I, pp. VII, XVIII.

[3] Prefacio a la traducción francés de O. De Meulenaere, en Jhering, *El espiritu del derecho romano en las diversas fases de su desarrollo*, traducción de Enrique Principe Satorres, Casa Editorial Bailly-Bailliere, Madrid, 1900, Vol. I, 1877, pp. 3, 4.

Por lo tanto, la razón para estudiar y leer *«El espíritu del derecho romano»* es investigar y descubrir cuál es el alma verdadera, cuál es el secreto del derecho que ha influido, de manera más o menos penetrante, en el desarrollo de casi todos los sistemas jurídicos del mundo.

Por otra parte, también es necesario considerar el gran alcance innovador de la obra en cuestión, ya que marca un enorme punto de inflexión en el planteamiento del estudio de la historia no sólo del fenómeno jurídico romano, sino del derecho en general.

En este sentido, puede decirse que el Autor rompió totalmente con el enfoque entonces predominante, propugnado por la Escuela Histórica: en efecto, a través de un examen minucioso de los elementos sociales, familiares, culturales y espirituales que caracterizaron la evolución del pueblo romano, al menos en la fase más arcaica – ya que la obra se limita a esta – el pretendía demostrar que el derecho no es algo inconsciente, que se forma de manera espontánea y natural, sino un verdadero medio técnico que es pensado y aplicado conscientemente por los seres humanos para progresar.

Será interesante observar cómo el derecho romano ha sido efectivamente utilizado como «terreno experimental»[4] con la intención de demostrar que el derecho ha sido siempre un reflejo y una formación consciente del espíritu de un pueblo y no, como pretende la Escuela Histórica, sobre todo Savigny, un mero desarrollo instintivo.

Además, F. Schulz también calificó la obra en cuestión como «grandiosa», ya que «abrió un nuevo camino: muchas cosas esenciales se vieron por primera vez con exactitud y se enfatizaron con fuerza»[5].

En este sentido, como se verá más adelante, Jhering logró captar la verdadera esencia de muchas instituciones del derecho romano arcaico, ya que no se limitó a un estudio puramente jurídico, sino que profundizó en otros aspectos culturales, en particular los etimológicos, centrando su atención y su reconstrucción histórica en la búsqueda de una base común para todas las esferas de la sociedad, desde la religiosa hasta la familiar, desde la social hasta la jurídica.

Sin embargo, no se pueden ignorar los diversos defectos que caracterizan a *«El*

[4] Battaglia, cit.: <https://www.treccani.it/enciclopedia/rudolf-von-jhering_%28Enciclopedia-Italiana%29/>.

[5] F. Schulz, *I principii del diritto romano*, edición de Vincenzo Arangio Ruiz, Firenze, 1949, p. 2.

espíritu del derecho romano», tanto desde el punto de vista de su estructura formal como de su contenido.

En cuanto al aspecto formal, parece fisiológico, para quien se acerque a una primera lectura, que la obra resulte, como también señalaba Schulz, «muy caótica», precisamente porque se tiene la ambición de tratar todo el desarrollo del fenómeno jurídico romano en todos sus particulares y detalles. Por lo tanto, la consecuencia, desde el punto de vista del contenido, fue «que la obra no superó el siglo VI a.C., de modo que todo el periodo clásico y postclásico sólo se tocaron»[6].

Por otro lado, Capogrossi Colognesi también señaló que el trabajo de Jhering, aunque sea basado sobre el material jurídico exclusivamente romano, parece impulsarse hacia generalizaciones que van mucho más allá de los límites del sistema jurídico romano[7].

El nivel de abstracción, en efecto, es muy alto, como lo es la evidente tendencia a querer trazar, en mi opinión, una línea de desarrollo de la historia jurídica de las civilizaciones en general, tomando, en este sentido, la experiencia romana como emblema absoluto.

2. Premisa metodológica

Desde el principio del primer volumen, Jhering señala que el objetivo de su obra es permitir que aquellos que no son expertos en derecho puedan informarse y comprender realmente el fenómeno jurídico romano, que, por la extraordinaria importancia que sigue teniendo hoy en el mundo moderno, «debe ser considerado como una de las apariciones históricas más destacadas»[8].

Sin embargo, para comprender las razones de la gran superioridad del derecho romano, según el Autor, es necesario asumir puntos de vista absolutamente generales que

[6] *Ivi*, p. 3.

[7] L. Capogrossi Colognesi, *Jhering e 'Lo spirito del diritto romano'*, en «Quaderni Fiorentini per la Storia del pensiero giuridico moderno», 1992-01-01, Vol. 21, p. 186.

[8] Jhering, *Lo spirito del diritto romano nei diversi gradi del suo sviluppo*, cit., Vol. I, p. 4.

nos permitan observar todo «desde lejos»[9]: por lo tanto, hay que volver a los principios.

Desde este punto de vista, lo que plantea el Autor es una cuestión puramente de método. De hecho, sostiene que desde el principio se ha cometido un gran error en el estudio del derecho romano, de modo que nunca se consiguió captar realmente en su verdadera esencia: no es casualidad que muchos trabajos modernos sobre la historia del derecho romano hayan sido reducidos a ser simples «almacenes», donde toda la información, desde la más relevante hasta la más insignificante, se guarda y reporta indistintamente[10].

En definitiva, cree que este derecho siempre ha sido estudiado sólo a través de dogmas, de forma sustancialmente «escolástica», olvidando no sólo su vínculo concreto con la vida de las personas que lo produjeron, sino incurriendo en el error de identificarlo completamente con preceptos jurídicos específicos e individuales.

En efecto, las disposiciones legislativas, sean positivas o consuetudinarias, no son más que «las extremidades prácticas del derecho […] pero éste las supera tanto en extensión como en intensidad»[11]: es simplemente la punta del 'iceberg' del verdadero derecho de un pueblo, que, por supuesto, es un fenómeno mucho más articulado, profundo y complejo.

Y es precisamente la peculiaridad del tipo de estudio que se necesita para conocer la historia de un fenómeno jurídico lo que empuja el autor a desarrollar reflexiones sobre el método que debe seguir un estudioso para comprender realmente su esencia.

En primer lugar, partimos del supuesto – para nada banal – de que estudiar la historia del derecho no es la misma cosa que estudiar la historia en general. La primera, por cierto, presenta parámetros objetivamente diferentes, en particular el de la medida del tiempo, que, en este contexto, asume ciertamente menos importancia que, por ejemplo, la que desempeña en la historia política.

En este sentido, no sólo define el desarrollo histórico del derecho como un movimiento interno, muy lento y completamente inobservable – hasta el punto de que

[9] *Ivi*, p. 8.

[10] *Ivi,* nt 1 p. 42.

[11] *Ivi*, p. 17.

captar con precisión y precisión sus límites y fases puede ser una tarea difícil –, sino que sobre todo afirma que el historiador del derecho debe modificar sus instrumentos para medir el factor tiempo, puesto que es necesario utilizar un metro más ancho y elástico[12].

En el caso concreto, en efecto, surge claramente que la historia del derecho en Roma se caracteriza por instituciones y entidades verdaderamente duraderas, con la consecuencia de que es difícil identificar, en detalle y en orden cronológico, todos los diferentes pasajes evolutivos del ordenamiento jurídico romano.

Por lo tanto, no parece posible proceder o razonar sobre la base de una mera escala temporal construida en función del número de años, utilizando el tiempo como un mero «*fundamentum dividendi*», ya que, de este modo, mediante un enfoque puramente cronológico y lineal, se perdería la real naturaleza del fenómeno histórico del derecho romano, compuesto de muchas capas diferentes[13].

Por el contrario, para tener una visión de conjunto, se debe adoptar una lectura sistemática, que no se limite al estudio de las instituciones jurídicas individuales durante las distintas etapas históricas, sino que indague en las razones profundas que hay detrás de la formación de cada una de ellas, poniendo en relación con otros ámbitos de la sociedad romana, desde la religión, pasando por la política, hasta el aspecto militar o familiar.

En segundo lugar, siempre con el objetivo de captar la real naturaleza del derecho romano, Jhering evidencia lo necesario que es liberar el campo de algunos prejuicios, que han sido tan engorrosos que han influido irremediablemente en la forma en que se ha estudiado este complejo fenómeno histórico, en cuanto han centrado la atención en la «historia de los dogmas, es decir de la legislación y la doctrina»[14], y no en el derecho tal como operaba en la práctica cotidiana de ese pueblo.

Desde este punto de vista, hay que abandonar un enfoque que podría definirse como mitológico: la idea, en efecto, de que Roma no tomó nada de fuera, no es más que el fruto de un relato legendario. La formación del derecho y del Estado romano no se produce en absoluto ex abrupto: ambos no son de derivación primaria, sino secun-

[12] *Ivi*, p. 53.

[13] *Ivi*, p. 61.

[14] *Ivi*, pp. 38-39.

daria, ya que surgen sobre la base y por medio de formaciones preexistentes, llevando desde fuera una composición histórica que no es para nada irrelevante[15].

En este sentido, es necesario desarrollar una verdadera conciencia histórica, ya que, como sostiene el Autor, lo que nos parece natural y razonable no es más que el resultado de un proceso muy largo y laborioso: hay siempre que tener en consideración que ciertas ideas jurídicas, que hoy son comunes a todos los pueblos y que parecen ser el fruto natural del desarrollo de la razón humana, en realidad no son más que el producto de la historia.

La acusación de Jhering contra la doctrina científica de su tiempo parte precisamente de estas premisas: ella quiere que tanto el Estado como el derecho romano sean aceptados como hechos consumados[16]; pero estos «no nacieron en el mundo misteriosamente»[17].

Sólo con estas bases, abandonando toda una serie de creencias que hasta entonces fueron dadas demasiado por supuestas, es posible empezar y afrontar un viaje por la historia del derecho romano.

3. El origen del derecho no está en el Estado, sino en el individuo

La primera de estas convicciones es, sin duda, que el derecho es un producto del poder estatal: nada más lejos de la *forma mentis* romana. Por el contrario, el Autor sostiene que el origen del derecho romano hay que buscarlo exclusivamente en la fuerza individual.

Este tipo de planteamiento, a los ojos de un lector contemporáneo, es objetivamente difícil de comprender, ya que todo el mundo está acostumbrado a poner cualquier cosa en manos del Estado, a definir todo el derecho vigente sobre la base de la voluntad emanada por sus órganos y a dejar en sus manos también la aplicación práctica.

Hoy no solo la fuerza personal ya casi no se reconoce en el derecho, sino que

[15] *Ivi*, p. 79.

[16] *Ivi*, p. 80 ss.

[17] *Ivi*, p. 83.

además se ve como un elemento de perturbación del orden jurídico: pero no era así en el sistema jurídico romano, especialmente en las fases más arcaicas. Por tanto, es necesario entrar en el fondo de la cuestión para desmentir este tipo de preconceptos[18].

De hecho, la fuerza del individuo juega un papel fundamental en la construcción de la sociedad romana: no es casualidad que Jhering utilice una de las instituciones más importantes de todo el derecho privado, es decir la propiedad, para explicar el origen individual y privado del fenómeno jurídico en su conjunto.

Él argumenta, intentando demostrar su tesis sobre la derivación del derecho de la fuerza personal y material, que la propiedad, en las fases más arcaicas del ordenamiento jurídico, es un fenómeno de tipo originario, no derivado. Esta se toma y se obtiene exclusivamente donde se encuentra la *res*. La adquisición por parte del *civis romanus* sólo puede consistir en el gesto de *capere*: sólo puede ser propietario de lo que toma directamente con la mano (*manu captum, mancipium*).

De esta forma, el concepto de propiedad parece excluir *a priori* su transmisibilidad a través, por ejemplo, de la *traditio*; en caso contrario, esa sólo se adquiere mediante un acto unilateral de apropiación[19].

Para confirmar esta concepción originaria del derecho, caracterizada por rasgos bélicos y violentos, es suficiente leer el texto de Gayo en IV, 16[20], donde se afirma expresamente que el mejor modo de adquirir la propiedad, «maxime», es precisamente la apropiación violenta del botín de guerra.

Además, también a nivel etimológico, parece que existan indicios en este sentido, como por ejemplo el término *praedium*, que significa suelo: la relación de éste con el término *praeda*, que significa botín de guerra, es evidente[21].

Lo mismo parece ocurrir a nivel simbólico, ya que, ante el Tribunal de los Cen-

[18] *Ivi*, p. 85.

[19] *Ivi*, p. 87.

[20] Gai IV, 16: «[…] *festuca autem utebantur quasi hastae loco, signo quodam iusti dominii, quando iusto dominio ea maxime sua esse credebant, quae ex hostibus cepissent*».

[21] Respecto a ese tema, Jhering subraya la connotación bélica del término latino vir: en efecto, mientras que el termino sanscrito para indicar el hombre es *nri-nara*, que el idioma griego expresó con *aner*, el latino lo rechazó y utilizó *vir*, de *wira*, que en sanscrito singifica guerrieto. *Ivi*, p. cit., 91.

tumviros, cuando se trataba de propiedad – pero también en el caso de *manumissio* de los esclavos ante el pretor, así como en el matrimonio – el símbolo de la lanza siempre fue presente.

Fundamentalmente, no sólo los términos y usos de la guerra influyen en entidades jurídicas específicas como el *mancipium*, sino que, en general, se puede decir que la adquisición de un bien gracias a la fuerza material es el punto desde que trae su origen el concepto mismo de propiedad[22].

La conclusión del razonamiento es que la fuerza material es la madre del derecho: este aspecto se capta perfectamente en el caso específico de la propiedad, puesto que ésta originariamente no es más que el derecho sobre la cosa depredada, por lo tanto, sólo surge del botín. El Autor sostiene, en efecto, que la única forma para transferir la propiedad de una *res*, en ese contexto, es realizar un acto que simule, de hecho, una expropiación violenta[23].

Este tipo de reconstrucción sirve, en la práctica, para demostrar que todo tipo de derecho surge de la defensa y venganza privada, y por tanto de dinámicas puramente individuales, que nada tienen que ver con las modernas estructuras sociales y estatales.

El derecho, por tanto, no surge porque sea reconocido por un órgano superior y soberano, como es el Estado; por el contrario, surge porque un individuo tiene la fuerza material para crearlo e imponerlo. La concepción fundamental del derecho romano arcaico es que «la fuente del derecho no está en el Estado, sino en el individuo»[24].

En el plano procesal, además, es posible encontrar una prueba ulterior de la conclusión a la que llega Jhering: en este sentido, las funciones del antiguo *iudex* romano parecen ser las de cualquier árbitro, ya que no deriva su poder de ninguna manera del Estado, sino directamente de las partes[25].

Bajo este perfil, conviene subrayar las enormes diferencias estructurales existentes entre los ordenamientos jurídicos modernos y el romano: el hecho de que el antiguo estado romano tuviera un rey, una autoridad legislativa y una judicial no significa en la

[22] *Ivi*, p. 88 ss.

[23] *Ivi*, p. 93.

[24] *Ivi*, p. 95.

[25] *Ivi*, p. 124 ss.

manera más absoluta que sea igual o comparable a un sistema moderno, ni tampoco que se pueda hablar de división de poderes.

Como escribe el Autor, las formas suelen engañar, al igual que las etiquetas: emblemático es precisamente el papel del *iudex*, que nunca obtuvo su legitimidad de una concesión estatal, sino del principio de la voluntad subjetiva de las partes[26].

Eso es, pues, el primer elemento esencial del espíritu del derecho romano, su primera tendencia, o sea que toda forma jurídica procede de la fuerza personal y de la voluntad subjetiva del individuo.

4. La gens: el lugar donde la familia y el Estado se encuentran

El otro aspecto fundamental evidenciado en la obra – que, por supuesto, es síntoma de un fuerte cambio de paradigma respecto al método con el que se había estudiado hasta ese momento la historia del derecho romano – es que el origen de un sistema jurídico más articulado respecto a las fases primitivas debe buscarse no en la entidad del Estado, sino en la formación de las *gentes*.

En particular, la *gens* representa, según la interpretación del Autor, la primera realidad social y jurídica real con la que tuvo que enfrentarse el *civis romanus*. El Estado arcaico estaba, en general, compuesto por linajes familiares: él destaca, a este respecto, que la complejidad de la organización jurídica de la familia es inversamente proporcional al desarrollo de un Estado. Cuanto más imperfecto y embrionario es este último, más elaborada y estratificada es la organización familiar.

Cuando un Estado, tal como se entiende en el sentido moderno, está todavía en un proceso de desarrollo, todas las necesidades primordiales – en primer lugar, las de garantizar la seguridad o regular las relaciones interpersonales – son inevitablemente satisfechas por la comunidad de individuos más natural que existe, es decir por la familia. Ella viene en subrogación del estado[27].

[26] *Ivi*, p. 131.

[27] *Ivi*, p. 132.

«La gens representa la identidad del Estado y de la familia»[28]: esto quiere decir que los elementos político y familiar se entrecruzan, creando una entidad jurídica híbrida, desconocida para nuestra forma de entender el derecho, pero que ha representado una pieza esencial en lo que podría ser definido como el proceso de aumento gradual en la complejidad de un ordenamiento jurídico.

El vínculo que se establece en el seno de la *gens* abarca, según el Autor, toda la existencia de un individuo y todos los intereses de su vida: desde el culto de los dioses, al servicio militar, hasta la actividad política[29].

Por otra parte, partiendo del supuesto de que el origen del derecho se encuentra, en general, en la voluntad y fuerza subjetivas de un solo individuo, con mayor razón la institución de la *gens* juega un papel esencial en el desarrollo de ese ordenamiento jurídico, puesto que representa la primera forma de limitación precisamente a esta libertad ilimitada e innata del individuo. En efecto, formar parte de una gens significaba, para un sujeto, entrar en una relación de «coordinación fraternal», de comunidad: esto conllevaba naturalmente límites intrínsecos a su libertad de acción.

Esta última, abstractamente ilimitada, sólo se comprimía mediante un medio negativo indirecto de castigo, es decir, mediante la amenaza de exclusión de la misma comunidad, ya que la *gens* no tenía poder punitivo directo[30].

Esta es esencialmente la idea del Autor: el derecho privado estaba originalmente completamente separado del estado. Todo parte de la voluntad subjetiva y del individuo: desde el momento que el Estado mismo no ha conceso ningún tipo de derecho, no forman parte de sus competencias las de restringirlo o comprimirlo[31].

Capogrossi Colognesi, por ejemplo, dice que esta reconstrucción de la evolución del concepto de Estado es interesante precisamente porque no se banaliza en los dos simples pasajes «*potestas* del *pater familias*»-«Estado»[32].

[28] *Ivi*, p. 136.

[29] *Ibid.*

[30] En particular, es interesante observar el paralelismo hecho por Jhering entre este mecanismo de exclusión de las gentes y el aplicado, en la época republicana, a través de la magistratura de la Censura (*Ivi*, p. 143).

[31] *Ivi*, p. 166.

[32] Capogrossi Colognesi, *Jhering,* cit.*,* p. 190 ss.

Diferentemente, Jhering también inserta la gens como un paso, casi como si fuera un «diafragma, un elemento singularmente contradictorio de fractura, así como de continuidad, en el proceso de crecimiento de las formas políticas estatales en comparación con las formas sociales preexistentes». De esta manera, se desarrolla lo que se denomina «parentesco civil»[33], que abre a la comunidad política propia de un Estado.

La primera forma de compresión de los 'derechos' se realiza, pues, en el seno de las *gentes*.

5. La fuerza de espíritu y el derecho

La característica más importante que Jhering atribuye al pueblo romano es, sin duda, su gran fuerza de espíritu.

Este aspecto está íntimamente conectado con las constataciones anteriores sobre el papel esencial de la voluntad subjetiva en el nacimiento y afirmación del derecho y representa también la razón más importante de fricción con el pensamiento de la Escuela Histórica.

La gran fuerza de espíritu, de hecho, según el Autor, es la connotación que permite comprender la razón por la que el fenómeno jurídico romano tuvo este gran éxito histórico, así como su verdadera esencia.

En el fondo, sostiene que la historia del derecho romano es una historia de voluntad, primero individual, luego colectiva. El pueblo romano y su producto jurídico, por tanto, nunca han sido víctimas de la historia, ni han sufrido pasivamente ningún proceso de cambio. Por el contrario, la participación humana en el desarrollo del derecho siempre ha sido activa y se inició desde el período más arcaico.

Los exponentes de la Escuela Histórica, como bien se sabe, no estaban de acuerdo con esta posición, ya que creían que el derecho no fue creado intencionalmente, sino que surgió y se formó a través de una costumbre casi inconsciente entre el pueblo[34].

[33] *Ivi*, p. 192.

[34] JHERING, *El espiritu del derecho romano en las diversas fases de su desarrollo*, cit., Vol. IV, p. 6. Sobre este punto, él

El derecho romano, en cambio, según la reconstrucción del Autor, debe su formación, desde su origen, al cálculo ya la intención. Nada fue accidental. El *ars* jurídico romano es la representación plástica de una sociedad organizada que sabe imponerse y sabe elegir lo que más le conviene: es el lugar donde el sentimiento y el intelecto se muestran en toda su luz[35]. Por eso habla expresamente del egoísmo colectivo organizado[36].

Pero todo parte, como ya se ha dicho, de la fuerza material, de la voluntad de un solo individuo.

Al respecto, escribe que «*La ley es la religión del egoísmo*»[37]: esto quiere decir que los romanos lograron desde un principio transformar el mismo derecho en mero instrumento de cálculo para perseguir los mayores beneficios y intereses objetivos, de manera casi completamente independiente de la influencia de la moral subjetiva[38].

La utilizaron, desde el principio, como un medio para perseguir sus fines: por eso escribe que «*la historia dio a los romanos la tarea de cultivar el derecho*»[39], ya que tenían una verdadera vocación histórica, un empuje, una gran fuerza para poder afirmarlo.

En efecto, si el derecho romano supera a cualquier otro en su lógica, el mérito no debe atribuirse exclusivamente a un determinado grado de inteligencia, sino sobre todo a la combinación con el elemento de la voluntad, que permitió transformar esta lógica en un acto concreto[40].

En este sentido, es interesante que Jhering ponga el énfasis no sólo en la fuerza moral y espiritual en sí misma, sino también en su relación con el instrumento del intelecto.

Esta influencia recíproca entre el intelecto y la voluntad se hace evidente al observar cómo se comportaban los romanos frente a las innovaciones. O, mejor dicho,

escribe con razón que, en el campo de las ciencias jurídicas, la Escuela Histórica representa el mismo fenómeno que el romanticismo en la literatura.

[35] Id., *Lo spirito,* Vol. I, p. 245.

[36] *Ivi*, p. 243.

[37] *Ivi*, p. 246.

[38] *Ibid.*

[39] *Ivi*, p. 236.

[40] *Ivi*, p. 250.

cómo se comportaron ante la urgencia de conciliar la necesidad práctica de innovar o cambiar algo, con su lógica rígida. Su aversión moral a cualquier tipo de transgresión y de desplazamiento de los principios, su *firmitas*, estimulaba directamente al intelecto a desarrollar todos los caminos posibles de innovación, manteniéndose siempre fiel a sus principios ya sus cánones[41].

Todo esto para hacer una afirmación que parece mucho más revolucionaria de lo que se podría creer: la excelencia del derecho, para Jhering, no depende sólo del intelecto, sino también y sobre todo de una voluntad enérgica, de una gran fuerza moral, de lo que èl define egoísmo ilustrado y disciplinado del pueblo romano[42].

El autor insiste mucho en este punto, por lo menos en los volúmenes primero y cuarto. Sin embargo, es particularmente útil observar que estos elementos de fuerte voluntad, individual y colectiva, se manifestaron, especialmente en las fases más arcaicas y clásicas, a través de un rígido formalismo.

La forma, en este sentido, como se verá más adelante, era la exteriorización, la expresión de la fuerza moral y manifestaba el sentimiento y la voluntad jurídica más íntima de un pueblo.

6. La igualdad formal: summu jus, summa injuria

Otro elemento cuya importancia se intenta destacar en todos los volúmenes de la obra es el papel de la ley en el desarrollo del sistema jurídico romano.

En este sentido, Jhering considera que la ley ha representado un hito, un punto de inflexión en el proceso evolutivo de la organización jurídica, puesto que representa no sólo el acto colectivo a través del cual el derecho, tomando oficialmente conciencia de sí mismo, «se despoja de su túnica de inocencia»[43], sino también la primera forma de expresión y cristalización de la voluntad del pueblo romano.

[41] *Ivi*, p. 251.

[42] *Ivi*, p. 255.

[43] Id., *El espiritu del derecho romano en las diversas fases de su desarrollo*, traducción de Enrique Principe Satorres, Madrid, 1900, Vol. II, p. 40.

El progreso del derecho, en efecto, consiste precisamente en una separación, ya que sólo se convierte en un «adulto» cuando se separa del sentimiento jurídico que lo originó. Y es precisamente la ley la que crea esta separación: al hacerse escrita, la ley, quizás por primera vez, expresa «el tránsito de la intimidad subjetiva a la exterioridad objetiva»[44].

Sustancialmente, esto significa que el derecho sólo progresa cuando adquiere una forma. Sin embargo, si, por un lado, con este tipo de progreso, el derecho pierde su fluidez o elasticidad, por el otro, compensa esta pérdida con las ventajas de «fijeza, precisión, uniformidad»[45].

Dicho esto, es evidente la razón por la que el propio Autor reconoce tanta importancia a la codificación de las XII Tablas: la considera como el primer momento real de crecimiento del derecho, ya que el pueblo romano, tras un período de incertidumbre debido a la caída en desuso de las *leges regiae* y a la vuelta a lo que comúnmente se define como derecho consuetudinario, decidió poner por escrito las reglas en las que se basaba su convivencia civil, cristalizándolas y otorgándoles un expreso reconocimiento formal. En este sentido, él habla explícitamente de la tendencia del derecho romano arcaico hacia el sistema de derecho escrito[46].

El papel jugado por el derecho consuetudinario, por otra parte, constituye un motivo más de fricción con los juristas de la 'Escuela Histórica': en este sentido, el Autor no sólo cree que sus idea de que «el derecho ha venido al mundo como el idioma, sin esfuerzo ni fatigas, fruto de la acción invisible, inconsciente y pacífica del talento del pueblo»[47] es profundamente errónea; sino también sostiene que éstos mismos han atribuido «una importancia exagerada a la formación natural del derecho consuetudinario, cerrando los ojos ante el enorme progreso que el derecho recibe al pasar del estado de costumbre al de la ley»[48].

[44] *Ivi*, pp. 42-43.

[45] *Ivi*, p. 42.

[46] *Ivi*, p. 32 ss.

[47] *Ivi*, p. 34, nt. 22.

[48] *Ivi*, p. 35. Además, al Autor escribe que «el derecho consuetudinario ha sido, realmente, el niño mimado de la escuela que se intitula Histórica, como si creyera deber indemnizarle con su afecto del olvido y abandono en que

La única consecuencia real que la historia ha confirmado que se deriva del ideal del derecho consuetudinario es la incertidumbre y la confusión del derecho[49].

El formalismo emerge así, desde el principio, como uno de los rasgos fundamentales del derecho antiguo[50]: de hecho, se desarrolla una tendencia evidente hacia la extrema y rigurosa precisión formal externa, ya que era impensable reconocer a la voluntad subjetiva individual – totalmente desprovista de formas – cualquier tipo de efecto jurídico[51].

La forma, entonces, se convierte en el medio a través del cual se intenta de dar concreción y fortalecer la voluntad del individuo, que, de lo contrario, permanecería siendo una pura abstracción: por lo tanto, se define como «la fijación, la encarnación de la sustancia fluida del derecho en un cuerpo sólido, y esto mismo limitado»[52].

Sin embargo, como es normal, fijar significa necesariamente limitar: y es precisamente esta limitación intrínseca la que marca el punto de inflexión en la creación y perfeccionamiento de la técnica jurídica típicamente romana de la *interpretatio*.

Por otra parte, esta técnica, además de ser el emblema de la grandeza del pensamiento lógico-jurídico del pueblo romano, representa un punto de vista excepcional desde el que identificar algunos rasgos esenciales del espíritu del mismo pueblo, a saber, el conservadurismo y la firmeza de su voluntad subjetiva.

Por lo que se refiere a la *interpretatio*, Jhering parte de un supuesto que no es obvio: la ley es estacionaria, la vida siempre progresa. De hecho, a pesar de una armonía inicial entre la ley y la vida social que esta regla, siempre llega fisiológicamente un momento en que cesa el acuerdo y la ley se vuelve total o parcialmente inapropiada.

El pueblo romano, pues, actuaba en este sentido: se reinventaba para preservarla. ¿Y qué técnica usó? Precisamente la *interpretatio*, que no era una simple explicación de la ley, sino la conciliación de la ley escrita con las necesidades de la vida. El Autor sostiene

antes había estado» (*Ivi*, p. 33).

[49] *Ivi*, p. 34 nt. 22.

[50] *Ivi*, p. 51.

[51] *Ivi*, p. 50.

[52] *Ivi*, p. 26.

que un pueblo para el cual el derecho, en lugar de ser impuesto por una fuerza externa, representó una elección libre y consciente, sólo podía tratar de salvarlo y mantenerlo constantemente[53].

Esto significaba, a mi juicio, que la enérgica voluntad comentada anteriormente y ese fuerte espíritu moral que caracterizaba al pueblo romano, en esa particular fase arcaica del desarrollo del derecho, se materializó por un lado en un rígido formalismo, por otro en una técnica interpretativa tan sofisticada que permitió al llamado *ius strictum* conservarse sustancialmente inalterado.

El derecho antiguo, en efecto, limitaba lo más posible la influencia de una apreciación u opinión individual, a la que, en cambio, el derecho posterior daba tanta importancia: lo que equivalía a un intento de limitar la arbitrariedad[54].

Posteriormente, pero, con estas premisas, el mismo Autor se pregunta: ¿es todavía posible reconocer el principio de igualdad como principio? La respuesta, en este contexto, parecería ser negativa. De hecho, según él, la igualdad romana debe combinarse con la verdadera libertad y, en consecuencia, con todas las desigualdades que la historia conlleva[55].

En este sentido, existe un abismo entre la igualdad en el concepto de derecho nuevo o moderno y el del derecho antiguo, que era pura y exclusivamente formal. Siempre se aplicaba el *ius strictum*: *summum jus summa injuria*[56].

A este propósito, en la obra se argumenta que la excesiva igualdad, en algunos casos, puede conducir a desigualdades efectivas. O más bien, que casos concretos sustancialmente diferentes no pueden ser tratados de manera homogénea. Este es el principio que en los ordenamientos jurídicos contemporáneos se define como igualdad sustancial, equivalente, además, a lo que el propio autor llama una tendencia a la (necesaria) individualización[57].

[53] *Ivi*, pp. 70; 73.

[54] *Ivi*, p. 87.

[55] *Ivi*, p. 101.

[56] *Ivi*, p. 103.

[57] *Ivi*, pp. 105-106.

En el derecho privado de Roma, sin embargo, esta tendencia a la individualización se manifiesta por primera vez en una edad avanzada y en total contradicción con el espíritu del derecho arcaico, que, por el contrario, le bloqueaba el paso en todos los ámbitos y circunstancias.

El legislador no puede, para un solo caso particular, hacer excepciones a la ley, ni el juez o pretor para un solo caso debe colocarse fuera de esa. El derecho antiguo prefiere sacrificar toda la equidad para aplicar una estricta igualdad formal. El individuo que ha sufrido un daño podría consolarse de la injusticia de la decisión con la convicción de que la justicia así lo exigía[58].

El objetivo era, por lo tanto, la exclusión total de cualquier tipo de parcialidad y arbitrariedad: esta es la razón por la cual se toleraron también las desventajas objetivas de un formalismo rígido.

En definitiva, se quiere expresar que, en el derecho arcaico, igualdad significa formalismo, y formalismo significa aplicación igualitaria e indistinta.

Desde este punto de vista, el arcaico proceso de las *legis actiones*, en sí mismo, es bastante significativo: esas *actiones* contenían la fijación de las disposiciones de la ley, lo que en realidad sólo permitía aplicarlas mecánicamente, impidiendo al juez examinar lo que era puramente individual en el caso que le fue sometido[59].

Un ámbito específico, en el que se manifiesta claramente la diferencia entre el derecho arcaico y sus posteriores desarrollos en términos de igualdad formal y sustancial, puede identificarse, según Jhering, en la *litis aestimatio* judicial.

En este sentido, las dos ideas opuestas, la de igualdad formal y la de tendencia a la individualización, se traducen respectivamente en *aestimatio* objetiva y *aestimatio* subjetiva.

Según la primera, una deuda o un daño pueden calcularse simple y puramente en base a su valor pecuniario objetivo; alternativamente, para la segunda, este cálculo debe realizarse tomando en consideración otros factores y elementos que sean relevantes para la relación obligatoria única o para las personas directamente implicadas.

[58] *Ivi*, pp. 106-107.

[59] *Ivi*, p. 122.

Esta distinción está reconocida en el derecho romano y pertenece a dos fases bien distintas. Una se resuelve en un *certum*, la otra en un *incertum*. El derecho arcaico, como resultado de una concepción formal de aplicación e interpretación del derecho, sólo conocía la estimación objetiva[60].

7. Los juristas: los oráculos de la ciudad

En este punto, parecería completamente normal preguntarse: ¿cómo una sociedad compleja y en constante evolución como la romana podía tolerar esta extrema rigidez formal tanto en la producción como en la aplicación del derecho?

El Autor identifica la respuesta en la omnipresencia y en el papel protagonista de los juristas. Este elemento, además, está fuertemente relacionado con el aspecto, del cual se discutió anteriormente, de la codificación de las XII tablas, identificable como el punto de inflexión en la historia del derecho: de hecho, solo a partir de ese momento, que para el pueblo romano representa una «ruptura», comenzó a desarrollarse una verdadera técnica y reflexión jurisprudencial[61].

Es útil recordar, bajo este perfil, que, en las fases más arcaicas del ordenamiento jurídico en cuestión, quienes tenían el monopolio de la creación e interpretación del derecho eran exclusivamente los pontífices.

Había una profunda mezcla entre la religión –que, como es lógico, el autor considera uno de los principios fundamentales del espíritu romano – y todas las demás esferas de la sociedad, incluida, por supuesto, la del derecho.

En efecto, si comparamos los métodos y ritos del derecho arcaico con los de la religión, podemos observar, por ejemplo, la misma precisión, el mismo rigor en la redacción de las fórmulas: la menor discrepancia en la enunciación de la fórmula conducía a la invalidez. Siempre se ha conservado la fe en el poder místico de ciertas palabras y frases[62].

[60] *Ivi*, p. 125.

[61] Id, *El espiritu del derecho romano en las diversas fases de su desarrollo*, traducción de di Enrique Principe Satorres, Madrid, 1900, Vol. III, pp. 92-93.

[62] *Ivi*, p. 99.

Este método rígido, profundamente influido por connotaciones religiosas, caracterizó a la jurisprudencia pontificia durante todo el período de su actividad, especialmente por lo que concierne al formalismo[63].

Así pues, es interesante notar que Jhering identifica, además de la codificación de las XII tablas antes mencionada, otro importante nodo en la historia del fenómeno jurídico romano, tan importante que contribuyó a la transformación progresiva del derecho, tanto negociador como procesal, en un sentido cada vez más libre y liberado de formas específicas y precisas, dando importancia a otros y diferentes elementos.

Este momento está representado no sólo por el paso formal del monopolio de la ley y de la jurisprudencia de los pontífices al pretor[64], sino sobre todo por ese fenómeno que una parte importante de la doctrina ha siempre identificado con la laicización de la jurisprudencia.

En este sentido, el Autor subraya la importancia de la revolución que se produjo tanto en la jurisprudencia como en la administración de justicia, ya que, a un colegio permanente, al que siempre fue difícil separarse de sus prácticas previamente establecidas, le sucedieron los magistrados *praetores*, elegidos únicamente durante un año, que pronto sustituyeron la forma severa de los procedimientos de las *legis actiones* por el procedimiento *per formulas*, es decir, un medio infinitamente más elástico y libre[65].

Además, es necesario destacar el hecho de que los Pretores, casi siempre, no eran juristas desde el punto de vista técnico-profesional: por esto, en las fases posteriores – que, sin embrago, en la obra en cuestión no llegan a ser tratadas – se formó una clase de *prudentes*, o *iuris periti*, con la tarea de coadyuvar y asistir al pretor en el ejercicio de su actividad de *iurisdictio*.

Aunque, el aspecto más relevante que se aprecia en la reconstrucción de Jhering es que la jurisprudencia, primero en la forma de los pontífices, luego en la puramente técnico-profesional de los prudentes, siempre ha sido omnipresente y siempre ha desempeñado un papel esencial tanto para la organización y regulación de las relaciones sociales en general, tanto por el aspecto del comercio jurídico.

[63] *Ivi*, pp. 104-105.

[64] *Ivi*, p. 108 ss.

[65] *Ivi*, p. 109.

Sólo un altísimo nivel de preparación y tecnicidad podía justificar el formalismo de la voluntad férrea que caracterizó a la sociedad arcaica, al menos hasta la gran expansión comercial de Roma que se remonta hacia el siglo III a.C.: los juristas, en sentido amplio y omnicomprensivo, eran, de hecho, los únicos que conocían a la perfección las herramientas procesales y de negociación para regular o resolver cualquier tipo de situación, puesto que ellos mismos las elaboraban y reinterpretaban, al punto que llegaron a asumir, dentro de la misma comunidad citadina, un papel que Cicerón definió de «*oraculum totius civitatis*»[66] de la ciudad.

Sólo una corporación, un colegio religioso y exclusivo como el de los Pontífices, primeros poseedores del *ars iuris*, podría dotar a la jurisprudencia de una autoridad tan fuerte que llegó a ejercer un poder único sobre la formación y posterior desarrollo del derecho[67].

Básicamente, un formalismo tan rígido solo puede ir de la mano de un alto tecnicismo.

En términos concretos, es suficiente imaginar que la validez de un testamento, por ejemplo, dependiera de una sola palabra utilizada en lugar de otra (por ejemplo, *heres ne esto* en lugar de *exheres esto*) y que solo un incidente o una omisión costaran muy caro al legatario o heredero. Por ingenioso que haya sido el derecho romano, el rigor de usar estas palabras sólo puede justificarse por una práctica profundamente técnica como la de los juristas.

El autor escribe, en efecto, que «En manos del jurista que redactaba los testamentos u otros títulos, éstos perdían su carácter peligroso»[68].

Todo esto, que fue lo que permitió tolerar las formas incómodas y estrechas de los actos jurídicos y el rigorismo extremo[69], pone claramente de manifiesto la extrema importancia de los juristas en general en la estructura social: cumplieron una función inédita en los sistemas jurídicos contemporáneos, especialmente en los de civil law, que

[66] *Ivi*, p. 118; nt. 103, p. 118.

[67] *Ivi*, p. 105.

[68] *Ivi*, p. 119.

[69] *Ivi*, p. 122.

no puede superponerse de manera absoluta a las funciones que desempeñan hoy ni los abogados ni los órganos judiciales.

8. La predilección del Derecho Romano hàcia el elemento exterior

Hay también un dato – probablemente el más significativo en toda la historia del fenómeno jurídico romano, limitado, por supuesto, a los períodos tratados – que Jhering en su obra logra meritoriamente captar, o sea la tendencia de la época más antigua hacia la exterioridad, lo que él mismo define como un «elemento sensible del derecho»[70].

En esencia, esto significa que cada pensamiento complejo o abstracto elaborado por los individuos o, más generalmente, por los pueblos, para llegar a ser tal, debe necesariamente partir de un dato material, concreto[71].

Con mayor razón, esta observación parece válida para el pensamiento jurídico, dado que el derecho, en sus diversas formas, antes de ser objeto de especulaciones ideológicas o filosóficas, nació con el objetivo muy pragmático de regular, evitar o resolver situaciones de conflicto, de incertidumbre o inestabilidad.

Escribe que «el espíritu no se liberta de la influencia del mundo exterior sino después que ha permanecido sometido a él durante un cierto (…) período de prueba necesario para que pueda elevarse a la comprensión del pensamiento abstracto»[72].

Esta tendencia a la exterioridad del derecho romano más arcaico parece aún más interesante si la leemos desde el punto de vista de los juristas contemporáneos, especialmente los de los sistemas de *civil law*, que hoy parten de presupuestos muy diferentes.

En este sentido, la elaboración del pensamiento jurídico siempre se imagina como un proceso de abstracción, que encuentra su esencia precisamente en separarse de un fenómeno externo y concreto, puesto que las normas contienen todas, sin distin-

[70] *Ivi*, p. 125.

[71] *Ibid.*

[72] *Ibid.*

ción, una abstracción, una generalización, que – por lo menos en teoría – nunca debería preocuparse por el caso particular.

Por eso, muchas veces se olvida el dato concreto, materiales, específicos, reales, a partir del cual se desarrolla este proceso y al que necesariamente debe volver durante su aplicación.

Diferentemente, el Autor individua las nociones del derecho antiguo en términos como «Palpables, exteriores, sensibles, tangibles y visibles»[73], ya que la forma externa siempre predomina sobre la idea.

Una tendencia similar a la exterioridad puede expresarse en tres conceptos diferentes, que no se limitan a representar las principales características del derecho romano en los primeros siglos de su desarrollo, sino que también pueden servir para resumir algunos pasajes necesarios al que todo tipo de sistema social jurídicamente organizados necesariamente debe hacer frente para alcanzar un cierto grado de complejidad.

Tales conceptos son, según Jhering, la materialidad, la palabra y el formalismo.

9. La materialidad y la palabra

En cuanto a la materialidad, el Autor identifica ejemplos observando, por un lado, la formulación y sustancia de la célebre *Lex Aquilia*, ya que ésta se aplicaba, al menos en época arcaica, sólo a los daños visibles; por otro lado, el propio concepto de dolo y el *crimen expilatae hereditatis*.

Desde el primer punto de vista, llega a hablar no de *damnum iniuria datum*, sino de *damnum corpore corpori datum*[74], puesto que se pensaba que sólo el daño «realizado en un objeto por consecuencia de una acción exterior positiva ejercida sobre él»[75] podía en realidad considerarse como tal.

Asimismo, ni el dolo ni la usurpación de cosas hereditarias eran considerados delitos en la época arcaica, porque no tenían relevancia externa, perceptible en el ámbito

[73] *Ivi*, p. 128.

[74] *Ivi*, p. 129 ss.

[75] *Ivi*, p. 130.

jurídico de un tercero: en concreto, el *crimen expilatae hereditatis*, no se consideraba injusto porque la relación de los bienes con el heredero era puramente ideal[76].

Lo mismo, sin embargo, también se aplica en el derecho civil, ya que, en el contexto contractual, inicialmente, solo se protegía el *error in corpore*, no el *error in substancia*. Posteriormente, en vez, la jurisprudencia comenzó a desarrollar una concepción más íntima y voluntaria del error, reconociendo una importancia cada vez mayor a todas las que eran las voluntades, necesidades y expectativas de un comprador respecto al bien adquirido[77].

Una concepción tan materialista sólo puede ser la consecuencia evidente de ideas económicas no muy avanzadas, que se refieren únicamente a objetos visibles y tangibles[78].

«La historia […] del Derecho Romano presenta así las fases y los progresos del movimiento económico» [79]: si se pregunta, en efecto, cuáles eran los factores económicos del comercio jurídico antiguo, la respuesta es, sin duda, la res y los hombres considerados como tal.

Esta es la razón por la cual el ordenamiento jurídico romano ha pasado progresivamente de un enfoque completamente materialista a uno fuertemente espiritualista, tanto que el elemento subjetivo – que hoy se considera esencial para la realización de cualquier tipo de negocio jurídico – ha adquirido un peso cada vez mayor.

Para constatar la tendencia hacia el espiritualismo, es suficiente, por otro lado, observar cómo han evolucionado las instituciones de la *possessio* y la *usucapio*[80]: el *usucapiens*, en lo que el autor define como derecho «nuevo», podría servirse, para la finalización de esta misma *usucapio*, de una posesión ejercida por otra persona, por ejemplo, su antecesor.

Pero la institución más representativa de la tendencia del derecho hacia materialismo es sin duda la propiedad: para los romanos, en efecto, la transmisión de la propiedad no era la del derecho de propiedad, sino simplemente la transmisión de la res. En la

[76] *Ibid*.

[77] *Ivi*, p. 132.

[78] *Ivi*, p. 140.

[79] *Ivi*, pp. 136-137.

[80] *Ivi*, p. 133 ss.

mancipatio, en la *in iure cessio*, en la *traditio* este mecanismo es emblemático. Esto creó una peculiaridad extremadamente significativa del derecho arcaico según Jhering: todos los derechos, a excepción de la propiedad, no eran transferibles; sucederle a alguien en un 'derecho' sólo era posible en la propiedad, donde el derecho y la cosa se confundían[81].

Así que, donde no había una *res* materialmente transferible, la sucesión no era posible. Esto significa que, a diferencia de los ordenamientos jurídicos contemporáneos, un concepto elaborado y categorizador como el de 'derecho subjetivo' o 'derecho relativo' era completamente desconocido para el sistema romano.

A nivel jurídico, en ese período, solo existía lo que era perceptible, o sea la *res* y el sujeto a ella conectado. Por tanto, en tal contexto, caracterizado por un formalismo rígido y una gran atención al aspecto material, también el elemento de la palabra adquirió una importancia que no es en modo alguno marginal.

El Autor señala acertadamente que el recurso a la palabra es uno de los fenómenos que caracterizan la falta de madurez y desarrollo intelectual del derecho, y que el epígrafe de la historia de todo el derecho podría ser «*In principio erat verbum*»[82].

Escribe que «La emancipación de la palabra comienza cuando el espíritu ha adquirido bastante vigor para poder operar con seguridad sin el concurso de ella»[83].

Es evidente, sin embargo, que un enfoque esencialmente formalista también se refleja en el tipo de interpretación que se hacía de los negocios, hechos y fórmulas: una interpretación puramente literal.

Así volvemos a la cuestión, que se mencionó anteriormente, de la igualdad formal y de los riesgos intrínsecos que conlleva.

La *malitiosa juris interpretatio*, como la llama Cicerón, fue una consecuencia inevitable de la antigua *interpretatio*; el *dolus* y el *fraus* fueron, de hecho, legalizados, y «no era raro que el *summum jus*, es decir, el extremo rigor en la observancia de las palabras viniese a convertirse en una *summa injuria*»[84].

[81] *Ivi*, pp. 141-142.

[82] *Ivi*, p. 147.

[83] *Ivi*, p. 155.

[84] *Ivi*, p. 161. A este respecto, por ejemplo, mientras el derecho antiguo carecía de cualquier remedio, «en las convenciones del derecho estricto […] el derecho nuevo, permitía a los estipulantes garantirse contra esos daños por

No obstante, Jhering señala que la interpretación literal contribuyó a la formación de un lenguaje científico, cuya fijeza y riqueza influyeron mucho en el Derecho Romano. Esto «es lo que nos revela la riqueza filológica tan acentuada en los trabajos de los juristas romanos, y nos descubre el motivo de sus explicaciones de verborum significatione, de verbis priscis, etc., tendencia que es desconocida de nuestros juristas modernos»[85].

10. El formalismo

El formalismo merece sin duda un análisis más profundo, ya que no sólo el mismo Jhering le dedica una abundante parte del volumen III de la obra en cuestión, sino sobre todo porque representa realmente el mínimo común denominador entre todos los elementos de los que ha discutido hasta ahora: el formalismo, a pesar de que los manuales tradicionales de derecho romano conservan al respecto «un silencio absoluto»[86], es por cierto el rasgo característico esencial del derecho arcaico[87].

En particular, no debe entenderse como un fenómeno jurídico específico, sino como un hecho general de la historia de la civilización, ya que «indica una fase necesaria en la historia del desarrollo del espíritu humano»[88]: esto significa que, según la reconstrucción del Autor, todos los pueblos deben atravesarla necesariamente.

La función de la forma, en efecto, es hacer visible lo invisible: gracias a ella, las ideas, las organizaciones y las instituciones se modelan sobre la vida y el mundo sensible, haciéndose así palpables, concretas, reales[89].

Jhering sostiene, en este sentido, que las ideas que carecen de una forma específica pierden su fuerza moral sobre las almas; de lo contrario, las que tienen formas

medio de la *clausola doli* […], y en cuanto al *promettant*, se ponían a cubierto con la *exceptio doli* que les concedía el Pretor» (*Ibid.*).

[85] *Ivi*, p. 162.

[86] *Ivi*, p. 238.

[87] *Ivi*, p. 178.

[88] *Ivi*, pp. 216-217.

[89] *Ivi*, pp. 228-229.

fijas y externas están destinadas a permanecer, a sobrevivir. Este es el gran servicio que la forma presta a la historia humana: asegura la continuidad de las ideas[90].

Por otro lado, «la forma es el contenido desde el punto de vista de la visibilidad (…) porque no existe forma sin contenido ni contenido sin forma»[91], ya que cualquier acto de voluntad o intención, para tener significación jurídica, debe ser reconocible.

Dicho esto, el Autor se propone inmediatamente el objetivo de desmentir un mito que se ha mantenido durante demasiado tiempo, es decir, aquel según el cual la forma es sinónimo de falta de libertad.

En cambio, cree que es exactamente lo contrario, y que existe una relación particular entre forma y libertad, dos ideas fundamentales del derecho romano, que, a pesar de su aparente contradicción, están profundamente conectadas y relacionadas[92].

De hecho, cree que el desarrollo más completo de la era de la libertad coincide también con el reinado del rigorismo formal más tiránico. No es casualidad que cuando la libertad se desvanece poco a poco, bajo la presión constante del régimen de César, precisamente en ese momento también desaparecen el formalismo y las fórmulas del derecho arcaico[93].

«Enemiga jurada de la arbitrariedad, la forma es la hermana gemela de la libertad»[94]: este es el significado. Ella es el freno que la contiene y la protege, ya que el concepto mismo de libertad presupone intrínsecamente el de límite. Las personas que profesan el verdadero culto a la libertad comprenden instintivamente el valor de la forma, y sienten que ésta no es un mero decoro exterior, sino su verdadero guardián.

Por lo tanto, es natural preguntarse: ¿en qué consiste realmente el formalismo? ¿Cómo se ajusta en la dinámica de un sistema jurídico?

Al respecto, el Autor define el acto formal como «el acto por el cual la inobservancia de la forma jurídicamente prescrita para la manifestación de la voluntad encuen-

[90] *Ivi*, pp. 229-230.

[91] *Ivi*, p. 181.

[92] *Ivi*, p. 179.

[93] *Ibid.*

[94] *Ivi*, p. 180.

tra su sanción en el acto mismo»[95], o, mejor dicho, en su invalidez. En esencia, un sistema formalista parece estar caracterizado por la necesaria observancia de formas o formularios muy precisos y predefinidos: sin el cumplimiento de estos criterios, ningún acto puede ser válido, vinculante o relevante.

Con el fenómeno histórico y jurídico del formalismo, sin embargo, sucede siempre lo que sucede en todos casos: todo el mundo señala sus defectos o desventajas, ninguno sus méritos. De este modo, un solo caso inconveniente, como el de un testamento declarado nulo por defecto de forma, se advierte mucho más que miles de casos en los que la forma ha cumplido una función positiva, tal vez de protección. Por tanto, el juicio de un ignorante es siempre hostil al formalismo[96].

A pesar de ello, las desventajas existen y también sería contraproducente no dar adecuadamente cuenta de ellas. Jhering identifica esencialmente dos de ellas: el peligro y la incomodidad.

El peligro proviene de la altísima probabilidad de encontrar defectos de forma. Esta forma, de hecho, hay que conocerla perfectamente para hacer cualquier cosa que tenga un efecto jurídico: por eso «en una legislación formalista, el ignorante y el imprudente salen perjudicados en muchas ocasiones»[97].

Hay, sin embargo, diferentes grados de dificultad y peligrosidad para el formalismo, según los negocios que se pretende llevar a cabo: basta comparar la forma del testamento romano con la de la *stipulatio*. La primera es mucho más complicada: puesto que requería la citación de testigos, la *familiae emptio*, la *nuncupatio*, etc., si hubiera habido un solo testigo incapaz entre los siete o un error en la fórmula para establecer el heredero, todo el testamento habría sido cancelado. Diferentemente, en la *stipulatio*, cualquier palabra estaba bien: bastaba que tuviera una forma interrogativa (*spondeo*, *fidejubeo*, *fidepromitto*)[98].

La otra desventaja es la incomodidad: no es suficiente la sola voluntad, sino que siempre se debe satisfacer la forma a través de «un acto deliberado cumplido de propósito

[95] *Ivi*, p. 182.

[96] *Ivi*, p. 189.

[97] *Ivi*, pp. 189-190.

[98] *Ivi*, pp. 191-192.

y que la refleje»[99].

De hecho, Jhering sostiene que, en casos de urgencia, cuando no se respeta la forma impuesta y se celebra un acto que no la tiene, éste no puede tener ningún tipo de efecto jurídico. Por tanto, en esa circunstancia, su efecto, o, mejor dicho, su eficacia, dependerá únicamente de la voluntad y de la buena fe del obligado[100].

Esta inobservancia, sin embargo, como señala el propio Autor, luego se convirtió en la regla: en Roma se desarrolló gradualmente un sistema de convenciones (contratos) basado en la buena fe, que, siendo un sistema de comercio legal basado en la lealtad y la fidelidad, no es más que un «producto y complemento del formalismo»[101].

Es interesante notar, en este punto, que los definidos por el autor como casos de urgencia, me atrevería a decir patológicos, se han convertido, por toda una serie de factores – principalmente cambios económicos –, en completamente fisiológicos. Así que la realización de los efectos jurídicos de un negocio se basaba, a partir de cierto momento, sólo en la buena fe, y ya no en el cumplimiento de las formas y formularios.

Sin embargo, también hay algunas ventajas muy relevantes que deben tenerse en cuenta.

En el sistema del formalismo, en efecto, expresar la intención de querer no presenta absolutamente el riesgo de ser confundido con la libre expresión de la voluntad. En el sistema donde falta la forma, por el contrario, cuando no hay forma prescrita, siempre se puede confundir la intención con la voluntad, y ésta con la intención. «La forma es el sello de la voluntad jurídica»[102].

Además, el uso de formas solemnes ayuda a las partes a razonar y reflexionar sobre la importancia del acto jurídico que están a punto de realizar: el Autor, por ejemplo, sostiene que el término *spondesne*, al ser pronunciado, tenía la función de despertar la conciencia jurídica[103], casi como si fuera, me atrevo a decir, una campana de alarma.

[99] *Ivi*, p. 196.

[100] *Ivi*, p. 198.

[101] *Ivi*, p. 199.

[102] *Ivi*, p. 206.

[103] *Ivi*, pp. 208-209.

Por otra parte, Jhering, precisamente en lo que se refiere a los posibles pros y contras del formalismo más extremo, plantea una cuestión que, en mi opinión, parece profundamente actual, a veces esclarecedora, ya que podría abrir innumerables discusiones, especialmente en consideración del estado actual del sistema de comercio jurídico y del enorme desarrollo de la negociación asimétrica: «si el formalismo presenta el peligro de que quien tenía realmente la intención de comprometerse queda por su compromiso, gracias a un vicio de forma, el sistema de la carencia de formas encierra el peligro contrario, o sea que quien no tenía ninguna intención de obligarse se verá contra su voluntad cargado de una responsabilidad que non contrajo. ¿Cuál es el inconveniente más serio? Creo que no cabe duda»[104].

El Autor, por lo tanto, ciertamente proporciona algo sobre lo que reflexionar.

11. Las diferentes expresiones del formalismo en el Derecho Romano antiguo

Una vez formuladas estas premisas generales respecto al papel del formalismo en los ordenamientos jurídicos, Jhering intenta trazar una línea de desarrollo dentro del sistema romano, en lo que se refiere específicamente a las formas negóciales, tratando también de realizar clasificaciones, aunque sean aproximadas.

A este respecto, él, componiendo un esquema[105] para dividir los negocios y los procedimientos sobre la base de su sujeción o no a las formas, llega a la conclusión de que todos los actos que pertenecen indudablemente al derecho arcaico están sujetos a reglas y formas fijas, mientras que los que se refieren con certeza a la «nueva» época no tienen forma. En otras palabras, «la era arcaica tiene una tendencia tan decidida para imponer la forma como la época posterior para evitarla»[106].

Posteriormente, también identifica un método de clasificación de los actos formales en el derecho antiguo[107]: este método consiste en ordenar tales negocios y proce-

[104] *Ivi,* p. 209.

[105] *Ivi*, p. 235.

[106] *Ivi*, p. 237.

[107] *Ivi*, p. 239 ss.

dimientos según el tipo y la clase de personas que deben tomar parte en ellos.

Por ejemplo, un primer grupo contiene los actos que se realizan con la ayuda del pueblo, como el *testamentum calatis comitiis*, la *adrogatio*. Otro, los que requieren la asistencia de las autoridades civiles: ante el censor, *manumissio censu*; ante el pretor, todas las *legis actiones* (excepto la *pignoris capio*) y los actos de jurisdicción voluntaria, como la *in iure cessio, la manumissio vendicta, la in adoptionem datio, la emancipatio*, así como la transmisión de tutela y la herencia legítima.

Luego están los actos realizados ante las autoridades religiosas, a menudo junto con el pueblo, es decir, *testamentum, adrogatio, conferreatio*; y aquellos para los que, en general, se requería la presencia de testigos: *conferreatio, nexum, mancipatio, coemptio, testamentum per aes et libram, cretio*. Por último, estaban los actos que se realizaban sin la participación de otras personas salvo las propias partes, como el contrato verbal (*stipulatio*) y el contrato literal.

En cualquier caso, el número de formas propias del derecho arcaico no era muy grande: la *mancipatio*, la *in iure cessio* y la *stipulatio* ocupaban un lugar totalmente privilegiado y preferente. En efecto, mientras las otras formas se limitaban a ciertos actos específicos, estas últimas eran abstractas, susceptibles de las más diversas aplicaciones[108]: en este sentido, se puede afirmar tranquilamente que la *mancipatio* y la *in iure cessio* se referían a lo que hoy se define como derechos absolutos, mientras que *stipulatio* los llamados derechos u obligaciones relativas[109].

Pero cuando se habla de formas, es un error hacer referirse únicamente a las literales: en particular, el formalismo gestual es muy importante en el Derecho Romano.

Desde este punto de vista, es interesante mostrar las razones por las que el Autor cree que la mano, simbólicamente hablando, juega un papel fundamental en la historia del derecho: no sólo porque es la parte más importante del cuerpo junto con la lengua, sino porque representa – en su opinión – el verdadero órgano de la voluntad. En efecto, no hay «movimientos del alma que la mano no pueda traducir de manera expresiva, y […] no hay un acto solemne en el periodo de la infancia de los pueblos en el cual no

[108] *Ivi*, p. 241.

[109] *Ivi*, p. 275.

juegue un gran papel»[110].

Por ejemplo, la aprehensión de la res en la *mancipatio* o del deudor en la ejecución personal son gestos de mano altamente simbólicos y significativos del poder que se pretende establecer sobre esa cosa o persona[111].

Este aspecto recuerda mucho a las cuestiones abordadas anteriormente tanto sobre la materialidad del derecho como sobre su derivación de la fuerza del individuo: la mano, en efecto, se configura como «el instrumento, el símbolo y la expresión técnica (*manus*) de la fuerza jurídica»[112], convirtiéndose, a mi juicio, en el símbolo del cruzamiento conceptual, en el Derecho Romano, entre la tan apreciada «fuerza moral» de la que habla el Autor y el formalismo como fenómeno en general.

También es interesante indagar otro aspecto especialmente representativo de las tendencias de la época: el del uso de los formularios.

En este sentido, hoy en día, el derecho vigente completa de mil formas diferentes la voluntad expresada por las partes, especialmente en los contratos, tanto que a veces es la misma ley la que completa o integra o configura la voluntad negociadora. Pero en la fase arcaica del desarrollo del derecho romano no era así en absoluto: los formularios eran necesarios porque faltaba el cumplimiento de la voluntad y las partes debían tener cuidado de prever y regular cada aspecto de la futura dinámica contractual. Por tanto, la utilidad y la esencialidad de los formularios se combinó también con el rigor formalista del derecho y del procedimiento arcaico[113].

Estos, por otra parte, precisamente por la función de seguridad jurídica, de los comercios y de los negocios que realizaban, hicieron de sus compiladores verdaderas celebridades desde un punto de vista literario[114].

Jhering señala, precisamente en lo que se refiere a los formularios, que el rigor formalista también puede expresarse con distintos grados de especificidad y complejidad.

[110] *Ivi*, p. 286.

[111] *Ivi*, p. 287.

[112] *Ivi*, p. 290.

[113] *Ivi*, p. 296 ss.

[114] *Ivi*, p. 299.

En este sentido, en cuanto a la determinación de los términos que deben ser pronunciados y empleados, ésta no es igualmente rigurosa y articulada en todos los actos jurídicos.

De hecho, si algunas veces la fórmula es larga y forma una especie de letanía, otras veces simplemente consiste en una simple y única palabra. Un ejemplo de formalismo rígido y absolutamente prolijo se identifica en el procedimiento testamentario: sujeto a formas fijas, incluso para todas las disposiciones particulares individuales, no deja libertad de movimiento a quienes lo realizan. La institución del heredero, la desheredación, los legados, el nombramiento de tutores, todo tiene una forma prescrita. Por el contrario, la *stipulatio* sólo tiene como fórmula fija la palabra *spondes*, como ocurre en todos los actos formados por las que él define como palabras sacramentales, tales como *fidepromitto, fidejubeo, heres esto, acceptum habep, praes sum*[115].

Luego existen diferentes vías intermedias: por un lado, las fórmulas elásticas, es decir, frases que, aunque fijadas en sus puntos esenciales, pueden sufrir modificaciones, como la constitución del usufructo por la *in iure cessio*.

Por otro lado, las fórmulas esquemáticas fijas que deben ser rellenadas en algunos puntos por las partes individuales, pero que para el resto son inmutables: como la indicación de la suma en la *manus iniectio* y en la *nexi solutio*[116].

Tal diferencia sólo puede explicarse tomando nota de las diferencias estructurales entre los actos mismos, pero también y sobre todo de una importancia diferente que tenían.

En actos menos solemnes, obviamente, se concedía a las partes una iniciativa más amplia. Esto, sin embargo, no debe inducir al error de pensar que precisamente porque las fórmulas eran más cortas o menos exigentes, el formalismo en ese caso era menos rígido. Este no fue así, ya que el rigor era igual[117].

Hay un último aspecto que debe ser considerado, en el que Jhering se centra con tanto cuidado que parece casi un filólogo, y es el uso de los diferentes tiempos verbales en los distintos actos negóciales.

[115] *Ivi*, pp. 304-305.

[116] *Ivi*, pp. 306-308. El Autor se refiere a los textos de Gayo: Gai. IV, 21 y III, 174.

[117] *Ivi*, p. 309.

Partiendo del supuesto de que, en aquella época, como se ha afirmado reiteradamente, la expresión oral era la esencia misma del derecho, parece aún más útil tratar de reconstruir, en detalle, el porqué de la elección de cada tiempo verbal para un determinado tipo de acto o negocio jurídico. Cada tiempo tiene, en efecto, su propia razón de ser y su función específica.

El imperativo, por ejemplo, expresa por sí mismo el concepto de orden categórico, hasta el punto de que se usaba tanto en las leges y plebiscitos, como en el ámbito testamentario: *heres, exheres, liber, damnas, esto, entendido, sinito*[118].

El subjuntivo, en cambio, era utilizado sobre todo por el Senado, que no tenía facultad de mandar, pero podía invitar, interceder, recomendar. También se encuentra en el *Edictum* del pretor. Jhering, bajo este perfil, sostiene que la relación que existe entre «el subjuntivo del pretor y el imperativo del pueblo puede compararse a la que existe entre la *bonorum posesio y la hereditas*: en cierto modo, el pretor obra como el pueblo, pero en apariencia»[119].

El indicativo, por su parte, expresa afirmaciones, declaraciones, seguridad: esto ocurre cuando la declaración del hablante es suficiente para producir objetivamente el efecto querido: *praes sum, spondeo, manum injicio*[120].

Por último, el futuro constituye la forma de las promesas, como las del pretor: *actionem, judicium, interdictum, bonorumpositionem dabo; pacta conventa servabo*[121].

12. El proceso

Otro elemento que se desprende de *«El espíritu del derecho romano»* y del que conviene dar cuenta, es el de la estrecha, indisoluble, irreversible conexión que existía entre el derecho y el proceso.

[118] *Ivi*, pp. 325-327.

[119] *Ivi*, pp. 329-330.

[120] *Ivi*, pp. 331-332.

[121] Las formas solemnes del derecho civil arcaico no conocen el futuro y siempre están conjugadas en el presente. (*Ivi*, p. 334).

«Lo que el cuerpo es para el espíritu, lo fue también la estructura analítica del procedimiento para el análisis de las ideas»: Jhering en el trascurso de la obra no se limita a reconocer la existencia de esa relación de correspondencia, sino que llega a conceder al antiguo proceso romano el papel de una real *condicio sine qua non* del mismo derecho[122].

Señala, en efecto, que si bien hoy nos encontramos en un período que podría definirse como «abstracto» del derecho, en el que los principios más profundos se tratan desde un punto de vista esencialmente teórico, tanto que ocurre con frecuencia que el proceso y el derecho parecen dos extraños; de lo contrario, en la fase primitiva del derecho, no era así: estaban tan estrechamente ligados y conectados que «la mayor parte de los principios del fondo del derecho existen solo como principios del procedimiento: el crédito como *actio in personam*; el *nexum* como *manus injiectio*»[123].

Esta característica del fenómeno jurídico como fenómeno procesal confirma nuevamente las tendencias básicas del derecho romano que Jhering ha intentado identificar: la materialidad, el ritualismo, el alto grado de tecnicismo, el papel central de los juristas que sabían manejar, producir e interpretar el derecho en el proceso.

Al respecto, es interesante reiterar lo que el Autor señala en la obra en cuestión: hoy, en los ordenamientos contemporáneos, parece que los que se llaman comúnmente 'principios del derecho' son productos de la naturaleza, o más bien de los hechos adquiridos en la vida jurídica.

Sin embargo, él considera esta concepción un profundo error: los principios del derecho arcaico o antiguo no se limitaban a ser la expresión pura y simple de las relaciones que existen en la realidad de la vida; por el contrario, eran el producto de una ciencia que le ha dado cierta forma[124].

Un razonamiento similar parece ser, en mi opinión, aún más válido hoy, unos 170 años después de la composición de la obra. En este sentido, no sólo, muchas veces se cae en el equívoco de considerar los principios generales del derecho, especialmente los constitucionales – que Jhering aún no conocía por evidentes razones cronológicas – como productos naturales de la historia, como algo dado por supuesto e inamovible,

[122] Id., *El espiritu*, Vol. IV, cit., pp. 145-149.

[123] *Ivi*, p. 195.

[124] *Ivi*, pp. 196-197.

que es fijo y no se puede tendencialmente modificar; pero incluso se llega a creer que ciertas instituciones del derecho, incluidas algunas muy específicas o técnicas, son desarrollos ontológicos y consecuencias naturales y lógicas de la historia, cuando, en realidad, no son más que el fruto de opciones elegidas a lo largo de los siglos y confirmadas repetidamente.

El Autor argumenta, en efecto, que la historia del derecho tiene un recorrido temporal mucho más extenso que la historia política: «el historiador del derecho tiene que medir el tiempo con un instrumento más amplio y elástico que habitualmente no se utiliza»[125].

Precisamente por eso, es necesario tomar conciencia de que el tiempo también cambia los principios fundamentales, así como cambia las reglas del derecho: éstas necesariamente deben evolucionar y modificarse, ya que «no constituyen de modo alguno categorías lógicas, sino que son la concentración de reglas materiales y las reglas cambian con las relaciones»[126].

La profunda interconexión entre derecho y proceso en el sistema romano arcaico, por tanto, pone de manifiesto no sólo que ya en un principio «reinaba una laboriosa actividad y se producía una creación circunspecta y judicial», sino sobre todo que los fundamentos más profundos del derecho no son en modo alguno «obra de una fuerza natural y ciega, sino el hecho libremente querido y la gloria alcanzada por el pensamiento de los hombres»[127].

Este fue el proceso: una construcción técnica ingeniosamente desarrollada por los hombres para resolver prácticamente situaciones de incertidumbre o controversia. Y este era el derecho.

[125] Id., *Lo spirito,* Vol. I, 53.

[126] Id., *El espiritu*, Vol. IV, pp. 340-341.

[127] *Ivi*, p. 342.

13. Observaciones conclusivas

Al final, lo que hace que la obra de Jhering sea extremadamente valiosa es, sin duda, su visión general. A través de ella se trata, como ya se dijo inicialmente, de reconstruir la verdadera esencia del fenómeno jurídico romano, captando sus características más íntimas, sus tendencias más profundas.

La primera sensación que se percibe leyendo todos estos volúmenes y estos miles de páginas es ciertamente la de tener que ver con una obra que intenta la hazaña imposible de adentrarse en las profundidades de los mecanismos de la historia, o más bien de interpretar y poner por escrito lo que es el espíritu del derecho de un pueblo.

El resultado – muy lejos de ser obvio o banal – es que es posible observar sólo algunas de las características más generales: por ejemplo, se percibe inmediatamente la derivación del derecho de la fuerza física; su interconexión, casi interdependencia, con los rituales religiosos y con la estructura militar de un pueblo; además se nota, a lo largo de la obra, el fuerte materialismo, la fuerte sensorialidad del derecho romano también.

Pero, sobre todo, en mi opinión, emerge un rasgo por encima de todos, un fenómeno particular y transversal que, al conectar y representar a todos los demás, puede servir de prisma a través del cual leer la verdadera naturaleza del derecho romano, que es el formalismo.

En efecto, el formalismo no es uno de esos hechos realizados que hay que aceptar como tales y cuya explicación no ofrece ningún interés, sino que, por el contrario, es una creación jurídica consciente y calculada, un lenguaje de signos profundo y perfectamente meditado, en pocas palabras, un producto artístico del espíritu jurídico[128].

En definitiva, como demostración de lo que se dijo anteriormente, esta característica no hace más que confirmar la tesis de que el derecho es una elección consciente, voluntaria y deliberada del pueblo romano; es la demostración de la fuerza moral de su espíritu y de su voluntad profunda.

Por tanto, desde una lectura global de la obra, aunque sea incompleta y concentrada en la época arcaica, uno de los rasgos esenciales del verdadero espíritu del de-

[128] Id., *El espiritu*, Vol. III, p. 278.

recho romano es precisamente el formalismo, que es todo menos falta de voluntad, o carencia. de contenido, o falta de personalidad o carácter: por el contrario, es un signo distintivo, una posición que se ha solidificado a lo largo de los siglos.

En conclusión, se puede aprender mucho sobre la historia de Roma y de su Derecho leyendo Jhering. «*El espíritu del derecho romano en los diversos grados de su desarrollo*» es una inmersión en la complejidad de la historia del derecho del pueblo romano y del derecho en general.

Pero también es un viaje al interior de la mente de un jurista completo, tan preparado y culto que es capaz de tratar no sólo el derecho romano en sus formas más técnicas, sino todo el fenómeno jurídico histórico, pasando de la historia a la filología, a la filosofía, al derecho comparado.

GIUSEPPE COLANGELO* **- FRANCESCO MEZZANOTTE****

THE EVOLVING (?) NOTION OF 'AGREEMENT' IN THE AGE OF ALGORITHMS. INTERACTIONS BETWEEN ANTITRUST AND CONTRACT LAW

ABSTRACT. *By affecting business strategies and consumers' behavior, the wide-scale use of algorithms, prediction machines and blockchain technology is currently challenging the suitability of several legal rules and notions which have been designed to deal with human intervention. In the specific sector of antitrust law, the question is arising on the adequacy of the traditional doctrines sanctioning anticompetitive cartels to tackle coordinated practices which, in the absence of an explicit "meeting of the minds" of their participants, may be facilitated by algorithmic processes adopted, and eventually shared, by market actors. The main concern in these cases, discussed both at regulatory and academic level, derives from the general observation that while the traditional concept of collusive agreement requires some form of mutual understanding among parties, nowadays decision-making of firms is increasingly transferred to digitalized tools. Moving on from these premises, the paper investigates the impact that the rules applicable to the conclusion of (smart) contracts may have, from an antitrust law perspective, in the detection and regulation of anticompetitive practices.*

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1. Introduction

There's a red thread linking together the foundational elements of contracts, as comparatively detectable in modern systems of law, and the more specific notion of cartels or concerted practices, that is of interest for antitrust experts: both of these disciplines have as their basis some form of mutual understanding between parties aimed at coordinating the behavior of two or more subjects according to a certain "common meeting of the mind"[1].

In dealing with juridical rules depending on the existence and on the nature of the psychic states of the agents, a modern approach to the juridical phenomenon starts from the recognized impossibility of actually scrutinizing the inner forum of single individuals and (even more clearly) legal entities, and therefore of grounding certain technical notions – such as that of agreement – on purely subjective and intellectual elements[2].

In this regard, the abandonment of the nineteenth-century theories inspired by the dogma of the will goes hand in hand with the progressive emergence of an array of external indices on the basis of which legal systems have been prompt to consider the presence and the substantive content of a promise exchanged among the parties[3]. As a significant example, the standard rules on the formation of the contract offer a very effective representation of the close interdependence that exists between the legally binding manifestations of the will and the techniques available to legal subjects to mutually exchange information and communications[4].

In this context, the most recent diffusion of digital technologies and

[1] On the different possible ways interrelation between contracts (as a primary manifestation of private autonomy) and regulatory tools (as those provided for by antitrust law), it appears still useful the analysis of C.R. Sunstein, *Paradoxes of the Regulatory State*, in «University of Chicago Law Review», 57, n. 2, 1997, pp. 407-441.

[2] E. Peel, *Treitel on the Law of Contract*, Thomson-Sweet & Maxwell, London, 2015[14], para. 1-002.

[3] For an overview of the history of concepts, P. Sirena, *Introduction to Private Law*, il Mulino, Bologna, 2020[3], p. 315; P. Ziegler, *Der subjektive Parteiwille. Ein Vergleich des deutschen und englischen Vertragsrechts*, Mohr Siebeck, Tübingen, 2018, pp. 25-30.

[4] R.B. Schlesinger (ed.), *Formation of Contracts. A Study for the Common Core of Legal Systems*, Dobbs Ferry, New York-London, 1968.

automatized processes represents only the latest form of manifestation of an evolutionary path that has always called the interpreter to adapt the operational consequences of a pre-juridical notion, such as that of agreement, to the particular forms and tools available to the parties which mutually express their positions and, ultimately, their consent[5]. At the same time, the development of transactions based on the operation of algorithms, such as those that characterize smart contracts (especially when powered by blockchain technology), may appear so disconnected from human activity as to question the very premise of the discourse, namely that at the basis of a given legal effect there is an agreement between two or more subjects, inspired (at least indirectly) by their individual determination[6].

In this framework, the intensive application of algorithmic technologies in entrepreneurial transactions is more recently raising peculiar issues from the point of view of antitrust law, where some form of conscious coordination between undertakings is considered necessary in order to trigger the enforcement mechanisms meant to sanction anticompetitive practices. It then becomes crucial for legal theorists and public bodies to examine the relationship between the meeting of the mind and the meeting of algorithms, in order to clarify whether the latter is (or should be treated as) a modern substitute for the former, or whether there is still room to ground on the free determination of market-actors the results of an entrepreneurial activity based on the automation granted by digital processes.

The article proceeds as follows. Section (2) sets the scene of the analysis by describing how digital technologies are currently challenging legal remedies commonly applied by antitrust authorities against anticompetitive cartels; Section (3) looks at the issue through the more traditional lens of contract theories, which allow to widen the

[5] R. Weber, 'Smart Contracts: Do we need New Legal Rules?', in A. De Franceschi and R. Schulze (eds), *Digital Revolution - New Challenges for Law*, C.H. Beck-Nomos, München-Baden-Baden, 2019, pp. 299, 307; D. Defossez, *Acceptance sent through email; is the postal rule applicable?* in «Law, State and Telecommunications Review», n. 23, 2019, p. 11.

[6] See R. Janal, 'Fishing for an Agreement: Data Access and the Notion of Contract', in S. Lohsse, Schulze and D. Staudenmayer (eds), *Trading Data in the Digital Economy: Legal Concepts and Tools*, Hart-Nomos, Baden-Baden, 2017, p. 271; but with a different approach, A.U. Janssen, 'Demystifying smart contracts', in C.J.H. Jansen, B.A. Schuijling and I.V. Aronstein (eds), *Onderneming en Digitalisering*, Wolters Kluwer, Deventer, 2019, p. 15.

investigation with a parallelism taken from the constitutive elements of agreement, commonly understood as an essential condition for a valid transaction. Section (4) concludes the analysis with a preliminary assessment of the main policy options that are currently animating, both at regulatory and academic level, the debate on a need to reform some of the foundational doctrines of antitrust law.

2. New challenges to antitrust law

Because antitrust rules have been designed to deal with human facilitation of coordination, they require some form of mutual understanding among firms looking at the means of communication used by players in order to coordinate, while mere interdependent conduct or collusion without communication (conscious parallelism) is lawful.

In particular, the caselaw has clarified that, irrespective of the form, the existence of an agreement requires 'a concurrence of wills' on the implementation of a policy, "the pursuit of an objective, or the adoption of a given line of conduct on the market", the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention[7], or a "meeting of minds", "a unity of purpose or a common design and understanding," as well as "a conscious commitment to a common scheme"[8].

Further, in the EU it has been introduced the concept of concerted practices, defined as any direct or indirect contacts intended to influence the conduct of other firms, with the aim of filling potential gaps by precluding coordination between firms which, «without having reached the stage where an agreement, properly called, has been concluded, knowingly substitutes practical co-operation between them for the risks of

[7] Case T-41/96, *Bayer AG v. Commission* [2000] ECR II-3383, paras. 69 and 173. See also Case T-208/01, *Volkswagen AG v. Commission* [2003] ECR II-5141.

[8] *Interstate Circuit Inc. v. U.S.*, 306 US 208, 810 (1939); *American Tobacco Co. v. U.S.*, 328 U.S. 781, 809-810 (1946); *Monsanto Co. v. Spray- Rite Service Corp.*, 465 U.S. 752, 768 (1984).

competition»[9]. Moreover, in order to tackle forms of coordination which are intermediate between agreements and conscious parallelism, courts have intervened in case of plus factors and facilitating practices (such as price announcements and information exchanges).

Nonetheless, given that under certain conditions oligopolists can coordinate their business behaviors without entering into an arrangement, antitrust authorities have traditionally struggled with tacit collusion. Therefore, the very notion of agreement has been questioned because deemed to be too formalistic, hard to make operational, and unconnected with the modern theory of oligopoly. Notably, it has been suggested to reform the agreement requirement by interpreting it as applicable to all interdependent behavior that is successful in producing oligopoly prices[10].

In this framework, the wide-scale use of algorithms and the emergence of blockchain technology are currently posing even growing challenges to antitrust practitioners and experts.

2.1 Collusion by algorithms

Pricing algorithms, i.e. algorithms that use price as an input and/or use a computational procedure to determine price as an output[11], may make explicit collusive agreements more stable, by making it easier to monitor prices, thereby limiting the incentives to deviate or helping to detect deviations, and they may promote new forms of tacit collusion by triggering automatized coordination independently of any human intervention and even autonomously learning to play collusive strategies (so-called algorithmic collusion).

The main concern posed to regulatory bodies is that algorithms (in particular,

[9] Cases C-48, 49, 51-57/69, *ICI v. Commission (Dyestuff)* [1972] ECR 619.

[10] L. Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, in «California Law Review», 99, 2011, p. 683.

[11] UK Competition and Markets Authority, *Pricing Algorithms* (2018) 9 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf>.

self-learning algorithms) may amplify the oligopoly problem expanding the grey area between unlawful explicit collusion and lawful tacit collusion by coordinating independently of human intervention and even autonomously learning to collude without communicating with one another[12].

Two approaches have emerged within the law and economics literature. According to a first strand, algorithmic collusion represents a realistic scenario and may eventually disrupt antitrust law[13]. In contrast, other scholars highlight the lack of evidence downplaying algorithmic collusion as merely speculative and further arguing that the expanding use of algorithms raises familiar issues to antitrust enforcers that are well within the existing canon[14].

Policy makers and competition authorities have endorsed a wait-and-see approach so far. According to the UK Competition and Markets Authority (CMA),

[12] OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* (2017) 25 and 34-36 <www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm>.

[13] See, e.g., S. Assad, R. Clark, D. Ershov, and L. Xu, *Algorithmic Pricing and Competition: Empirical Evidence from the German Retail Gasoline Market* (2020) CESifo Working Paper No. 8521 <www.cesifo.org/en/publikationen/2020/working-paper/algorithmic-pricing-and-competition-empirical-evidence-german>; Z.Y. Brown and A. MacKay, *Competition in Pricing Algorithms* (2020) Harvard Business School Working Paper No. 67, <https://hbswk.hbs.edu/ item/competition-in-pricing-algorithms>; E. Calvano, G. Calzolari, V. Denicolò, and S. Pastorello, *Artificial Intelligence, Algorithmic Pricing and Collusion* (2020), 110 *American Economic Review* 3267; E. Calvano, G. Calzolari, V. Denicolò, and S. Pastorello, *Algorithmic Pricing: What Implications for Competition Policy?* (2019) 55 *Review of Industrial Organization* 1; A. Ezrachi and M. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Cambridge-London: Harvard University Press, 2016); J.E. Harrington, *Developing Competition Law for Collusion by Autonomous Price-Setting Agents* (2018) 14 *Journal of Competition Law and Economics* 331; S.K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, (2016) 100 *Minnesota Law Review* 1323.

[14] See, e.g., L. Bernhardt and R. Dewenter, 'Collusion by code or algorithmic collusion? When pricing algorithms take over' (2020) 16 *European Competition Journal* 312; A. Gautier, A. Ittoo, and P. Van Cleynenbreugel, 'AI algorithms, price discrimination and collusion: a technological, economic and legal perspective' (2020) 50 *European Journal of Law and Economics* 405; A. Ittoo and N. Petit, 'Algorithmic Pricing Agents and Tacit Collusion: A Technological Perspective', in H. Jacquemin and A. De Streel (eds), *L'intelligence artificielle et le droit* (Bruxelles: Larcier, 2017), 241; J. Johnson and D. Sokol, 'Understanding AI Collusion and Compliance', forthcoming in D. Sokol and B. van Rooij (eds), *Cambridge Handbook of Compliance* (Cambridge: Cambridge University Press, 2021); M.K. Ohlhausen, 'Should We Fear The Things That Go Beep in the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing' (2017) 11 <www.ftc.gov/public-statements/2017/05/should-we-fear-things-go-beep-night-some-initial-thoughts-intersection>; U. Schwalbe, 'Algorithms, Machine Learning, and Collusion' (2019) 14 *Journal of Competition Law & Economics* 568.

algorithmic pricing is more likely to exacerbate 'traditional' risk factors facilitating collusion in markets which are already susceptible to human coordination[15]. In a similar vein, the French and German antitrust authorities, as well as the UK Digital Competition Expert Panel, have concluded that, in the situations considered so far, the current legal framework is sufficient to tackle possible competitive concerns[16].

The European Commission, instead, appeared ready to endorse a proactive approach. Indeed, it published an open public consultation on the need for a new competition tool that allows intervention when a structural lack of competition prevents the market from functioning properly, such as oligopolistic market structures with an increased risk for tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions[17]. However, in the proposal presented in December 2020, the planned new competition tool has been folded into the Digital Markets Act and apparently watered down into market investigations that will allow the Commission to update the obligations for gatekeepers and design remedies to tackle systematic infringements of the Digital Markets Act rules[18].

Therefore, at this stage a complete reshape of the current antitrust has been considered exaggerated. After all, antitrust authorities have been already able to tackle the algorithmic-facilitated coordination in some scenarios. Indeed, antitrust authorities have detected cartels implemented thanks to the use of dynamic pricing algorithms, i.e. software designed to monitor market changes and automatically react adjusting conspirators' prices in order to avoid eventual undercuts[19]. Admittedly, in this scenario,

[15] UK Competition and Markets Authority, 'Pricing Algorithms', 48.

[16] Autorité de la Concurrence and Bundeskartellamt, 'Algorithms and Competition', (2019) <www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/06_11_2019_Algorithms_and_Competition.html>; UK Digital Competition Expert Panel, 'Unlocking digital competition', (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>.

[17] European Commission, 'New Competition Tool', Inception impact assessment (2020) <ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool>.

[18] European Commission, 'Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)', COM(2020) 842 final.

[19] See European Commission, 24 July 2018, Case AT.40465 (*Asus*), AT.40469 (*Denon & Marantz*), AT.40181 (*Philips*), AT.40182 (*Pioneer*); UK Competition and Markets Authority, 12 August 2016, Case 50223, *Online sales*

the algorithms play a secondary role serving as a mere tool to facilitate and enforce an explicit coordination already established between humans, hence it is not problematic to evaluate these conducts within the standard definition of agreement and concerted practice.

However, as previously mentioned, pricing algorithms may also lead to tacit coordination and may extend tacit collusion beyond the boundary of oligopoly. In particular, the collusive outcome may be reached via third party algorithms, companies could unilaterally use algorithms to facilitate conscious parallelism, and finally self-learning algorithms may even autonomously collude.

Under the first hypothesis, competitors adopt the same algorithmic pricing model and third-party providers of algorithm services act as a hub in a so-called hub-and-spoke scenario, allowing a coordination without the need of direct communication or contact between the companies. And the CMA has considered this hypothesis of conspiracy as the most immediate risk[20]. Nonetheless, it poses competition issues that could be addressed under existing antitrust rules. Indeed, according to the caselaw, because it is the rim that connects the spokes, proof of a hub-and-spoke cartel requires evidence of a horizontal agreement among the spokes (the so-called rim requirement), being discussed the level of knowledge required to the spokes, i.e. awareness or just foreseeability[21].

Nonetheless, two additional hypotheses appear more troublesome from the perspective of the antitrust enforcement. Notably, companies may unilaterally design pricing algorithms to react to rivals' pricing or may rely on algorithms which, learning by themselves, may arrive at tacit coordination, without the need for any human intervention and without communicating with one another. In the former case, because algorithms have been designed to respond intelligently to the conduct of competitors, the mere interaction of algorithms increases the likelihood of reaching a conscious

of posters and frames; U.S. Department of Justice, 6 April 2015, *U.S. v. David Topkin*.

[20] UK Competition and Markets Authority, 'Pricing Algorithms', 31.

[21] See, e.g., Case C-74/14, *Eturas UAB and others v. Lietuvos Respublikos konkurencijos taryba* [2016] 4 CMLR 19; *United States v. Apple, Inc.* (*The eBook* Case), 791 F.3d 290 (2nd Cir. 2015).

parallelism, without requiring companies to engage in any communication[22]. Hence, the question for antitrust enforcers is whether this algorithmic interaction may constitute a form of coordination (algorithmic communication), facilitated for instance by signalling practices. In the latter case, because there is no human intervention and no communication between algorithms, it may be even questioned the possibility to attribute their conduct to a firm.

Against this backdrop, it comes as no surprise that the growing use of algorithms in business decision-making has reinvigorated the debate about the need to revisit the antitrust notion of agreement.

2.2 Collusion by blockchain

Rather than debating on algorithmic collusion, a recent strand of literature urges to investigate the potential anticompetitive use of blockchain technology[23]. Indeed, the antitrust enforcement is designed to tackle issues where market power is centralized, consequently it appears at odds with decentralization[24].

As the argument goes, while algorithmic collusion remains old wine in new bottles, i.e. a new way of implementing well-known practices, blockchain-based collusion, especially when it involves the use of smart contracts, changes the nature of collusion creating an almost infinite number of possibilities for antitrust infringement[25].

[22] M. Vestager, 'Algorithms and Competition' (2017) Remarks at the Bundeskartellamt 18th Conference on Competition <https://ec.europa.eu/competition/speeches/index_theme_17.html>.

[23] See J. Abadi and M. Brunnermeier, 'Blockchain Economics' (2018) NBER Working Paper No. 25407 <www.nber.org/papers/w25407>; C. Catalini and C. Tucker, 'Antitrust and Costless Verification: An Optimistic and a Pessimistic View of Blockchain Technology' (2019) 82 *Antitrust Law Journal* 861; L.W. Cong and Z. He, 'Blockchain Disruption and Smart Contacts' (2018) NBER Working Paper No. 24399 <www.nber.org/papers/w24399>; A. Deng, 'Smart Contracts and Blockchains: Steroid for Collusion?' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187010>; T. Schrepel, 'Collusion by Blockchain and Smart Contracts' (2019) 33 *Harvard Journal of Law & Technology* 117.

[24] Catalini and Tucker, 'Antitrust and Costless Verification: An Optimistic and a Pessimistic View of Blockchain Technology'.

[25] Schrepel, 'Collusion by Blockchain and Smart Contracts'.

Further, by allowing the implementation of agreements whose constraint stems from cryptographic rules, blockchain and smart contracts transform collusion into a cooperative game strengthening trust and stability among colluders. Therefore, blockchain solutions may create fundamental issues for antitrust facilitating both the sharing of sensitive information and the implementation of anticompetitive agreements.

This perspective has caught the attention of the U.S. antitrust enforcers. As recently acknowledged by Makan Delrahim, former Chief of the Antitrust Division at the U.S. Department of Justice, even though blockchain technology offers tremendous potential value, there is potential for misuse of well-crafted blockchain solutions[26].

In contrast, some scholars call for a cautionary approach pointing out that, although the blockchain may create additional possibilities to reach and protect collusive outcomes, the underlying theories are not new and this is not the case that the technology itself is illegal but rather the use that the parties make of it[27].

In order to assess the potential anticompetitive risks brought by the blockchain technology, it is useful to distinguish the case in which a collusive outcome is reached or facilitated due to the participation to a blockchain consortium from the case in which users of the blockchain codify their collusive agreement in a smart contract.

The former scenario reflects the traditional concerns about horizontal cooperation agreements which may lead to the sharing of sensitive information, hence it should be tackled by antitrust authorities pursuant to the general principles for the assessment of the exchange of information[28]. In this regard, it has been noted that private/permissioned blockchains require more attention than public/permission-less

[26] M. Delrahim, 'Never Break the Chain: Pursuing Antifragility in Antitrust Enforcement' (2020) Remarks at the Thirteenth Annual Conference on Innovation Economics <www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-thirteenth-annual-conference>.

[27] R. Nazzini, 'The Blockchain (R)evolution and the Role of Antitrust' (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256728>. See also OECD, 'Blockchain Technology and Competition Policy' (2018) <https://one.oecd.org/document/DAF/COMP/WD(2018)47/en/pdf>.

[28] See European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance', (2011) OJ C 11/1; Federal Trade Commission and U.S. Department of Justice, 'Antitrust Guidelines for Collaboration among Competitors' (2000) <www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf>.

blockchains[29]. Although a public blockchain offers an enhanced data visibility, at the same time it is opened to everyone's participation which lowers the risk of collusion. A private blockchain, instead, allows, participants to get exclusive and secure access to potentially relevant information. Nonetheless, in both the hypothesis a blockchain consortium would merely represent a new technological means to facilitate collusion by exchanging information. Against this backdrop, the added value of the blockchain technology is represented by the possibility to ensure the authenticity of the information, hence reinforcing the confidence among colluding parties, and to allow a better monitoring of the collusive agreement thanks to the real-time recording of transactions.

More problematic from the antitrust enforcement perspective appears the use of blockchain coupled with smart contracts. Indeed, this combination may sustain the collusive outcome and improve its stability by making the terms of the agreement immutable without the consent of all the users and by automating the execution of the collusion, i.e. automatically activating side payments when certain conditions are met and punishments upon deviations.

However, the combination of blockchain and smart contracts is not only able to sustain an explicit collusion by efficiently enforcing an agreement, but it may also facilitate tacit collusion[30]. Notably, in order to execute the smart contract under certain conditions, the parties need to feed it with external data which allow to trigger the provisions of the contract and which are provided by "oracles", i.e. programs retrieving and verifying external data through methods such as web APIs or market data feeds. The members of a blockchain consortium may choose to rely on each other as record keepers for the oracle service, hence improving the monitoring of participants' behavior. Therefore, it has been argued that, by generating decentralized consensus, blockchain inevitably leads to greater knowledge of aggregate business condition on the blockchain, which can foster tacit collusion among sellers[31].

[29] I. Lianos, 'Blockchain Competition – Gaining Competitive Advantage in the Digital Economy: Competition Law Implications', in P. Hacker, I. Lianos, G. Dimitropoulos, and S. Eich (eds), *Regulating Blockchain: Political and Legal Challenges* (Oxford: Oxford University Press, 2019), 329; C. Pike and A. Capobianco, 'Antitrust and the trust machine', (2020) OECD Blockchain Policy Series <www.oecd.org/daf/competition/antitrust-and-the-trust-machine-2020.pdf>.

[30] Deng, 'Smart Contracts and Blockchains: Steroid for Collusion?'.

[31] Cong and He, 'Blockchain Disruption and Smart Contacts'.

3. Looking for a legally relevant agreement. Sketches from contract law

Reduced to the bone, the vivid debate recently evolved in the antitrust sector can be traced back to a fundamental question: under what conditions can a tacit or factual understanding among two or more market actors be said to exist and to be legally relevant? After all, the positions advocating for a necessary revision of traditional antitrust remedies all seem to take the move from the perceived difficulty of framing into the concept of agreement – traditionally understood as meeting of the minds – more sophisticated forms of inter-individual coordination facilitated by an automatized, and thus depersonalized, meeting of algorithms[32].

Read in this light, general private law theories may offer a contribution to the discussion, considering in particular that the element represented by the parties' common intention stems as a standard requirement for the validity and efficacy of any bi- or multi-lateral legal transaction, to the point of being frequently presented as inherently connected to the very definition of what a 'contract', in juridical terms, is[33].

Though a detailed comparative scrutiny of single national laws on such foundational aspects would go far beyond the scope of this article[34], it appears nonetheless useful for our analysis to resort to the general indications coming from major pieces of model law, here considerable as expression of the shared roots and approaches detectable, at least from an academic perspective, throughout the jurisdictions of the Western legal tradition[35].

Starting from the common core of European systems, Art. 2:101, para. 1, of the Principles of European Contract Law (PECL) is particularly clear in stating that

[32] OECD, 'Algorithms and Collusion: Competition Policy in the Digital Age', 39.

[33] H. Kötz, 'Comparative Contract Law', in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd ed., Oxford: Oxford University Press, 2019), 902. See also Peel, *Treitel on the Law of Contract*, 1, describing the contract as an agreement giving rise to obligations which are enforced or recognized by the law.

[34] See as a general reference for basic comparative materials, H. Beale, B. Fauvarque-Cosson, J. Rutgers, and S. Vogenauer, *Cases, Materials and Texts on Contract Law* (3rd ed., Oxford: Hart Publishing, 2019), Pt. 2.

[35] For methodological remarks on the value of uniform law models, N. Jansen and R. Zimmermann, 'European Contract Laws: Foundations, Commentaries, Synthesis', in Idd. (eds), *Commentaries on European contract laws* (Oxford: Oxford University Press, 2018), 1; P. Sirena, 'Die Rolle wissenschaftlicher Entwürfe im europäischen Privatrecht' (2018) *Zeitschrift für Europäisches Privatrecht* 838.

«[a] contract is concluded if: (*a*) the parties intend to be legally bound, and (*b*) they reach a sufficient agreement», with this latter element identified in presence of terms that "have been sufficiently defined by the parties so that the contract can be enforced, or can be [otherwise] determined" (Art. 2:103)[36]. The substantial identification of the notion of contract with the requirement of agreement is even more explicit in the text of the Draft Common Frame of Reference (DCFR), according to which "[a] contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect" (Art. II. – 1:101)[37]. On the other side of the Atlantic Ocean, the Restatement (Second) of the Law of Contracts issued by the American Law Institute[38], though clarifying that the notion of agreement (i.e. a "manifestation of mutual assent on the part of two or more persons") «has in some respects a wider meaning than contract» (§ 3)[39], defines this latter concept as «a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty» (§ 1), in this way giving relevance to the «manifestation of intention to act or refrain from acting in a specified way» as expressed by the promisor and addressed to the promisee (§§ 2.1-3)[40]. On a same tune, the Uniform Commercial Code (UCC) defines the "Contract", as «the total legal obligation that results from the parties' agreement» (§§ 1-201(12)), considering this latter element as «the bargain of the parties in fact, as found in their language or inferred from other circumstances, in-

[36] O. Lando and H. Beale (eds), *Principles of European Contract Law* (PECL), Parts I and II (Le Hague-London-Boston: Kluwer Law International, 2000).

[37] C. von Bar, E. Clive and H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (Outline edition, Munich: Sellier, 2009).

[38] American Law Institute, Restatement of The Law Second, Contracts (1981).

[39] American Law Institute, Restatement of The Law Second, Contracts (1981), §3 and Comment (a), where it is explicated that «[t]he word 'agreement' contains no implication that legal consequences are or are not produced».

[40] American Law Institute, Restatement of The Law Second, Contracts (1981), §2 and Comment (a), where it is explicated that «[i]f by virtue of other operative facts there is a legal duty to perform, the promise is a contract; but the word "promise" is not limited to acts having legal effect. Like 'contract,' however, the word 'promise' is commonly and quite properly also used to refer to the complex of human relations which results from the promisor's words or acts of assurance, including the justified expectations of the promisee and any moral or legal duty which arises to make good the assurance by performance».

cluding course of performance, course of dealing, or usage of trade» (§§ 1-201(3))[41].

While these introductory notes confirm that the legal validity of a contract ubiquitously mandates a series declarations (or expressions) of will communicated, and eventually shared, by the contractors, it must nonetheless be stressed that the approach taken by legal systems in the application of these agreement-related requirements operates without any considerations of their concrete understanding and of the actual intentions the parties[42]. Indeed, irrespectively of the way by which each single jurisdiction formalizes this point in its blackletter rules, the test adopted by courts and contractual interpreters to ascertain the presence of a binding juridical act, and to identify its relevant terms, rests on a merely external standard, based on the indications ascribable to materialized expressions, or other conducts, of the would-be parties, and without the need (and even the abstract possibility) of giving weight to their subjective states of mind[43].

As put by Lord Clarke in a relevant precedent of English contract law, "[w]hether there is a binding contract depends not upon [the parties'] subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations"[44]. In more general terms, this is the core idea detectable at the bottom of the guiding principle of the "objective theory of contract": «[T]he intentions of the parties to a contract or alleged contract are to be ascertained from their words and conduct rather than their unexpressed intentions»[45]. Transposed to the notion of agreement, this approach «necessarily dictates that there is no absolute requirement of a subjective meeting of the minds»[46], being it only possible for a third party judge to

[41] Uniform Commercial Code, Art. 1. General Provisions, Part II.

[42] See G. Christandl, 'Formation of Contracts', in N. Jansen and R. Zimmermann (eds), *Commentaries on European contract laws* (Oxford: Oxford University Press, 2018), 231.

[43] Peel, *Treitel on The Law of Contract*, para. 1-002, explicitly defines a purely subjective approach as simply "unworkable."

[44] *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG4*, [2010] UKSC 14, 45.

[45] J.M. Perillo, 'The Origins of the Objective Theory of Contract Formation and Interpretation' (2000) 69 *Fordham Law Review* 427.

[46] In these exact terms, M. Furmston and G. Tolhurst, *Contract Formation: Law and Practice* (2nd ed., Oxford:

rely on how a reasonable individual would understand and interpret the evidence of what the parties said and did[47].

These general points have concrete impacts on several operational aspects of contract regulation, starting from the fundamental issue of its conclusion: at what condition is it possible to treat a mutual understanding of two or more individuals as a valid and binding contract?

3.1 The objective approach to contractual agreement: Applications in contract formation

The more traditional way through which the juridical analysis materializes the requirement of the consent applies a conventional procedure which links together the exchange of an offer (with which the offeror univocally indicates its intention to be bound to definite contractual conditions), with the correlative acceptance by the offeree[48].

Though a number of scholars stresses that this method of discovering the existence and content of an agreement is not always consistent with modern commercial dynamics, and may result in an inappropriate tool when it comes to unveil the real will of the contractors[49], it must be noted that its application still appears effective in caselaw, where it operates as a flexible and reliable model[50], that has also proven capable of being adapted to the technological changes of the twentieth century (telex, fax, the advent of the Internet and email)[51].

Oxford University Press, 2016), 6.

[47] *Norwich Union Fire Insurance Society Ltd v WM H Price Ltd* [1934] AC 455, 463.

[48] See as a relevant formalization of these rules, DCFR, Artt. II-4:201 - II-4:211.

[49] S.J. Bayern, 'The Nature and Timing of Contract Formation', in L.A. Di Matteo and M. Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford: Oxford University Press, 2015) 77; M. Siems, 'Unevenly Formed Contracts: Ignoring the Mirror of Offer and Acceptance' (2004) *European Review of Private Law* 771.

[50] Furmston and Tolhurst, *Contract Formation*, 7.

[51] D. Nolan, 'Offer and Acceptance in the Electronic Age', in A. Burrows and E. Peel (eds), *Contract Formation and Parties* (Oxford: Oxford University Press, 2010), 61; and on the ground of an in-depth comparative analysis, A.M. Benedetti and F.P. Patti, 'La revoca della proposta: atto finale? La regola migliore, tra storia e comparazione' (2017) *Rivista di diritto civile* 1293, 1334.

A closer look at the operational rules which inspire the concrete application of this procedural test shows that while its historical origins were inextricably connected with the ambition to identify an actual meeting of the minds of the contracting parties, modern system of laws assigns greater importance to practical and equitable considerations[52]. It is only on these latter grounds that is possible to understand, just to list a couple of relevant examples: (*a*) the so-called "postal rule", according to which English law considers the acceptance valid and binding already from the moment of its shipment, and thus treats the contract as validly concluded even in the absence of an actual knowledge by the offeror of the positive response by the offeree[53]; (*b*) the stricter limits posed by modern legal systems to the power of revocation of the offer, inspired by the rational of safeguarding to the reliance of the offeree, and less justifiable from a purely subjective perspective, rooted on the intention of the offeror[54].

Consistently with this line of reasoning, it is today widely accepted that the presence of a consent among two or more individuals may be identified and evidenced not only through the formal exchange of explicit statements, but, among other means, by any form of conduct that is capable of showing agreement[55]. The rule has been traditionally applied in commercial contexts, as in cases of a prompt acceptance implied in the immediate performance rendered by the offeree, or in scenarios of prolonged negotiations resulting in mutual performance, even in the absence of an identifiable formal meeting of offer and acceptance[56].

[52] A.T. von Mehren, 'The Formation of Contracts', in *International Encyclopedia of Comparative Law*, vol. VII, *Contracts in General* (Tübingen-Leiden-Boston: Mohr Siebeck, 2008), 82: "In the early 19th century this issue – along with many others that arise in connection with the formation of contracts – was approached not in terms of practical and equitable considerations but of 'meeting of the minds'".

[53] *Adams v. Lindsell* [1818] 1 B&Ald 681; *Dunlop v. Higgins* [1848] 1 HLX 381. See E. McKendrick, *Contract law. Text, Cases, and Materials* (7th ed., Oxford: Oxford University Press, 2016), 106.

[54] S. Gardner, 'Trashing with Trollope: A Deconstruction of the Postal Rules in Contract' (1992) 12 *Oxford Journal of Legal Studies* 170.

[55] See Art. 2:204 PECL and Art. II-4:204 DCFR, which identically state that «[a]ny form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer». On a same tune, see Unidroit Principles on International Commercial Contracts (2016), Art. 2.1.1; American Law Institute, Restatement of The Law Second, Contracts (1981), § 19; UCC, § 2-204 («A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract»).

[56] See Unidroit Principles on International Commercial Contracts (2016), Art. 2.1.1, Comment 2.

As it will be discussed in the following paragraph, when transposed to modern negotiation settings, the application of this latter rule appears potentially apt to coordinate the traditional juridical approach to contract formation with more problematic issues recently discussed in the light of the growing diffusion of computerized transaction protocols capable of automatically executing the terms of a contract[57].

3.2 The objective approach to the agreement-requirement and the smart contract

Confronted with the always increasing number of digitally automatized transactions concluded on daily bases in a heterogeneous series of market contexts, legal scholars have started questioning the compatibility of these innovative forms of 'contracts' with the traditional private law doctrines[58].

As for what it is here at stake, the idea of a contract whose terms are encoded in algorithmic language and that is capable of being 'smartly' (i.e. automatically) executed at the mere objective detection of a pre-defined triggering factor (operating as a kind of "digital condition precedent")[59], might at first sight seem to deprive of its traditional value a standard requirement such as that of a meeting of the minds, that would be no longer effectively shared by the interested individuals[60]. Specifying this argument through an exemplary remark, one may wonder whether the programming code through which the smart contract is designed may actually represent an "understandable language" supporting, in credible terms, a mutual understanding

[57] According to the well-known definition of 'smart contract' elaborated by Nick Szabo with specific reference to the case of the vending machine (see N. Szabo, 'Smart contracts' (1994) <www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html>).

[58] See J. Lingwall and R. Mogallapu, 'Should Code Be Law: Smart Contracts, Blockchain, and Boilerplate' (2019) 88 *University of Missouri-Kansas City Law Review* 285; P. De Filippi and A. Wright, *Blockchain and the Law. The Rule of Code* (Cambridge MA-London: Harvard University Press, 2018), 74.

[59] P. Paech, 'The Governance of Blockchain Financial Networks' (2017) 80 *Modern Law Review* 1073, 1082.

[60] R. O'Shields, 'Smart Contracts: Legal Agreements for the Blockchain' (2017) 21 *North Carolina Banking Institute* 177.

between the contracting parties[61].

At closer look, notwithstanding the undoubtful fascination that may be generated by the idea of contracts concluded and performed without the need of any human intervention, at the present stage of development these digital tools do not seem to greatly differ from old-fashioned analogical contracts, at least as for what concerns the legally relevant elements mandated for their valid formation (e.g. "offer and acceptance procedures, consideration, intention to create legal relations, and capacity")[62].

Indeed, although the academic debate is more recently focusing on a possible future development of systems capable to autonomously conclude negotiations, drafting contractual clauses on the basis of available (big) data and constantly adapting their content through machine learning technologies[63], the current praxis of smart contract is not associated with (nor requires the interventions of) artificial intelligence[64], but rather operates in a strictly deterministic way, with the automatic fulfilment of the specific obligations correlated to the set of conditions encoded in the software[65]. In

[61] Weber, 'Smart Contracts', 304-305, who, though observing that "[i]n real life, parties do indeed not often fully understand the programming language of a smart contract (and thereby its contents)", is nonetheless willing to conclude that "[p]ersons who enter into a smart contract accept the binding force of the technical conditions even if they do not really understand all details of the technology."

[62] In explicit terms, referring to English contract law, M. Durovic and A.U. Janssen, 'The Formation of Blockchain-based Smart Contracts in the Light of Contract Law' (2018) 26 *European Review of Private Law* 753; but with a look extended to continental legal systems, P. Sirena and F.P. Patti, 'Smart Contracts and Automation of Private Relationships' (2020) Bocconi Legal Studies Research Paper Series <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3662402>.

[63] L.H. Scholz, 'Algorithmic contracts' (2017) 20 *Stanford Technology Law Review* 128, 164; S. Williams, 'Predictive Contracting' (2019) 1 *Columbia Business Law Review* 621.

[64] J.M. Lipshaw, 'The Persistence of "Dumb" Contracts' (2019) 2 *Stanford Journal of Blockchain Law & Policy* 1; S.A. McKinney, R. Landy and R. Wilka, 'Smart Contracts, Blockchain, and the Next Frontier of Transactional Law' (2018) 13 *Washington Journal of Law, Technology & Arts* 313, 322; and for a more specific overview of the technological aspects of the smart contract, V. Gatteschi. F. Lamberti and C. Demartini, 'Technology of Smart Contracts', in L.A. Di Matteo, M. Cannarsa and C. Poncibò (eds), *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms* (Cambridge: Cambridge University Press, 2019), 37.

[65] See M. Cannarsa, 'Interpretation of Contracts and Smart Contracts: Smart Interpretation or Interpretation of Smart Contracts?' (2018) 26 *European Review of Private Law* 773. This latter aspect is at the bottom of the often cited statement that challenges the "smartness" of a smart contract, focusing on its rigid operation according to the IF-THEN parameter, incapable of adapting the programmed performance to relevant contextual circumstances (see on this aspect E. Mik, 'Smart Contracts: Terminology, Technical Limitations and Real World Complexity' (2017) 9

more explicit terms, this implies that the automatized process through which the operating system executes a digital performance ("smart contract code") does not affect the juridical characters of the underlying agreement that binds the legal subjects ("smart legal contract")[66].

On these very grounds, it is today a consideration shared by a large strand of legal scholars that the peculiarities (and benefits) of smart contracts can be appreciated mainly in the light of their possible "self-execution" and "self-enforcement"[67]. Other founding doctrines of the law of contract – and in particular those concerning the element of the agreement, and of the process of detection a binding "meeting of the minds" among its parties – appear to be largely less affected by the impact of digital technologies[68].

A perfect exemplification of this line of reasoning may be identified in the model rules on contract formation provided for in the latest version of the Unidroit Principles on International Commercial Contracts, updated in 2016. In line with the general approach detectable in modern legal systems, this soft law instrument not only considers it possible to ascertain the presence of a mutual consent «by conduct of the parties that is sufficient to show agreement» (Art. 2.1.1), but then explicitly refers to the notion of "parties' conduct" to cases "where the parties agree to use a system capable of setting in motion self-executing electronic actions leading to the conclusion of a contract without the intervention of a natural person"[69].

Law Innovation & Technology 269).

[66] On this distinction, J. Stark, 'Making Sense of Blockchain Smart Contracts' (2016) <www.coindesk.com/making-sense-smart-contracts/>; B. Carron and V. Botteron, 'How smart can a contract be?', in D. Kraus, T. Obrist and O. Hari (eds), *Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law* (Cheltenham-Northampton: Edward Elgar, 2019), 101, 111-114; M. Durovic and F. Lech, 'The Enforceability of Smart Contracts' (2019) 5 *Italian Law Journal* 493, 499.

[67] K. Werbach and N. Cornell, 'Contracts Ex Machina' (2017) 67 *Duke Law Journal* 313, 318.

[68] See in general terms E. Mik, 'The Resilience of Contract Law in Light of Technological Change', in M. Furmston (ed.), *The Future of the Law of Contract* (Oxon-New York: Routledge, 2020), 112; and for the explicit observation that in the praxis of smart contracts it is still frequently possible to detect the standard sequence of exchange of offer and acceptance among the parties, G. Gitti, 'Robotic Transactional Decisions' (2018) *Osservatorio del diritto civile e commerciale* 619, 622.

[69] Unidroit Principles on International Commercial Contracts (2016), Art. 2.1.1, Comment 3 and Illustration:

With these considerations in mind, it is possible to turn back to the implications of digital contracts and, more in general, algorithmic based transactions, in the sector of antitrust law.

4. Instead of a conclusion: So what in antitrust law?

From an antitrust law perspective, the main concern posed by the growing application of smart technologies regards the possibility to increase the achievement of tacit collusion. Indeed, even if smart technologies were able to better support explicit collusive outcomes, these scenarios can be still scrutinized under current antitrust provisions. In those cases, algorithms and blockchains merely represent new tools that allow undertakings to efficiently reach and protect a coordination which however is established between humans and belongs to them. Hence, the challenge for the authorities is to detect and prove elements showing a coordination among firms, but relevant theories and notions are not threatened by the emergence of new technologies as such. Vice versa, whether these technologies were fit for fostering tacit collusion or even generating new forms of conscious parallelism, they would critically expand the blind spot of antitrust enforcement. Indeed, as illustrated, competition law challenges the means used by market players to reach a collusive outcome, rather than prohibiting collusion as such.

Against this backdrop, the debate in antitrust circles crucially depends on the reliability of the evolutions of algorithmic collusion as a realistic scenario and the eventual remedies to deploy.

As far as the technological substance of smart contracts and blockchains will continue to operate according to the deterministic logic that inspires it today (under the

«Automobile manufacturer A and components supplier B set up an electronic data interchange system which, as soon as A's stocks of components fall below a certain level, automatically generates orders for the components and executes such orders. The fact that A and B have agreed on the operation of such a system makes the orders and performances binding on A and B, even though they have been generated without the personal intervention of A and B».

IF-THEN parameter of execution, stimultated by a digitalized triggering factor), settled hermeneutical tools nowadays available to the interpreter, analyzed in this article also from a purely contract-law perspective, do not seem to be qualitatively altered. Rather, standard factors commonly applied for the detection of a binding agreement appear still suited to identify cases where the collusive intention of the parties may be ascertained, even in the absence of an explicit intention, as an objective evidence implicitly derivable by their conducts (e.g. the deliberate reliance of two or more market actors on a certain common software or program, applied as a shared pricing-strategy tool).

On these grounds, the wait-and-see approach that has been up to now assumed by national antitrust authorities (and ultimately also by the EU Commission) in the evaluation of possible amendments to existing competition rules and doctrines stands as a logic corollary of the observation that algorithmic pricing, as we currently know it, is more likely to exacerbate traditional risk factors, than to have a disruptive impact on competition law[70].

As lucidly suggested by Margrethe Vestager already in 2017[71], all the previous considerations shall not be understood as an invitation to disregard possible future technological developments, underestimating the importance of being ready to tackle innovative issues raised by algorithms that, rather than working as mere tools in the hands of humans, will be instead capable of autonomously coordinating among themselves, and learning over time to collude.

At the same time, even assuming that science fiction scenario as a credible future reality, it appears highly questionable that the main focus of a perspective reform of antitrust law should then be put on the legal notions of agreement, and on a necessary extension of its scope capable of encompassing not just "meeting of the minds" but also "meeting of algorithms". As our analysis has shown, such a radical revision would appear not only inconsistent with the current operational aspects of the agreement-related requirements (which, even in a traditional approach to contract law, cannot be intended

[70] UK Competition and Markets Authority, 'Pricing Algorithms', p. 48.

[71] M. Vestager, 'Algorithms and Competition' (2017) *Bundeskartellamt 18th Conference on Competition* <https://ec.europa.eu/competition/speeches/index_theme_17.html>.

in a strictly subjective way), but it would probably also prove unhelpful to keep the practice at stake within the traditional antitrust boundaries, since it should be first and foremost investigated whether, and at what conditions, the conduct of a deep learning system could be ascribed to firms or natural persons[72].

If algorithmic collusion emerges as a real concern, then tacit collusion would become. Therefore, rather than wrestling on the notion of agreement, the debate should be focused on the appropriateness of a regulatory intervention aimed at forbidding collusive outcomes as such, regardless of the means used and of a finding of mutual under-standing.

However, the age of digital smart collusion is not arrived yet and is even not foreseeable for the next future. In the meantime, collusive attempts through smart technologies appropriately belong to the regular business-as-usual antitrust enforcement, hence they do not require any reshape of current rules and theories.

[72] This point raises a series of foundational issues that clearly go beyond the scope of the present research, up to the question of the true legal nature of artificial intelligence, and of the forms and conditions of its possible subjectivization. See, G. Teubner, 'Digital Personhood? The Status of Autonomous Software Agents in Private Law' (2018), https://ssrn.com/abstract=3177096; G. Wagner, 'Robot Liability', in S. Lohsse, R. Schulze and D. Staudenmayer (eds), *Liability for Artificial Intelligence and the Internet of Things* (Baden-Baden: Hart-Nomos, 2019), p. 27.

LUCA LUPÁRIA DONATI - GIULIA FIORELLI*

LA PARTICIPATION DU PEUPLE À L'ADMINISTRATION DE LA JUSTICE PÉNALE EN ITALIE : PHYSIONOMIE STRUCTURELLE ET FONCTIONNELLE DE LA *CORTE D'ASSISE*

RESUMÉ. *L'article fournit une illustration critique des règles régissant la* Corte d'assise *italienne : un organe juridictionnel, composé à la fois de juges professionnels et de juges populaires, mettant en œuvre le principe constitutionnel énoncé au troisième alinéa de l'article 102 de la Constitution italienne, qui reconnaît expressément « la participation directe du peuple à l'administration de la justice ». Après avoir retracé les origines et l'évolution historique de l'institution, cet examen met notamment en évidence les points forts et les faiblesses inhérentes au rôle joué par la composante populaire dans l'expérience du procès pénal italien.*

ABSTRACT. *The paper provides a synthetic overview of the Corte d'Assise: a collegial judicial organ, formed by two professional judges (giudici togati) along with six lay judges (giudici popolari), implementing the constitutional principle set forth by the third paragraph of Article 102 of the Constitution, which expressly recognises the 'direct participation of the people in the administration of justice'. After retracing the origins and historical evolution of the Corte d'Assise, this paper highlights strengths and weaknesses of the role played by the lay judge in the Italian criminal trial.*

* Tout en étant le fruit d'une réflexion commune de la part des auteurs, Luca Lupària Donati (professeur à l'Università de Milan) a rédigé les paragraphes 1, 2 e 5 et Giulia Fiorelli (chercheur à l'Università Rome III) les paragraphes 3 e 4. Cet article a été écrit dans le contexte de la recherche « Juridictions criminelles de jugement » (Université de Rennes, IODE, 2021-2023) et est destiné au volume final de celle-ci.

1. La participation populaire à l'administration de la justice en Italie : origine et évolution historique de la **Corte d'assise**

La participation des citoyens à l'administration de la justice a vu le jour, en Italie, à l'époque de la domination napoléonienne, pour revêtir par la suite un rôle central dans les revendications libérales qui apparurent dès les premiers mouvements d'insurrection de 1820[1]. L'entrée de juges non professionnels dans les dynamiques judiciaires – expression du principe issu de la philosophie des Lumières selon lequel la décision doit être fondée sur l'intime conviction de l'individu – avait été proposée, en effet, pour instituer un instrument de « défiance politique »[2] à l'égard d'un pouvoir judiciaire encore fortement lié à la monarchie.

Il s'agissait, à l'origine, d'une forme de participation populaire qui prévoyait – conformément au modèle procédural des systèmes de la *common law* – que les jurés auraient constitué un collège indépendant[3], destiné à trancher sur les questions de fait, en rendant un verdict dénué de toute motivation, en vertu duquel les magistrats professionnels étaient appelés à trancher en ce qui concerne les questions de droit[4].

[1] Pour une reconstruction historique de la participation populaire à l'administration de la justice, voir E. Amodio, *Giustizia popolare, garantismo e partecipazione*, dans E. Amodio (ed.), *I giudici senza toga*. *Esperienze e prospettive della partecipazione popolare ai giudizi penali*, Giuffré, Milan, 1979, p. 11 et sqq.; A. Avanzini, rubrique *Corte di assise (ordinamento italiano)*, dans *Dig. disc. pen.*, vol. III, Utet, Turin, 1989, p. 180 et sqq. ; G.V. Bocchino, rubrique *Corte d'Assise*, dans *Dig. disc. pen.*, Agg. 2005, Utet, Turin, 2005, p. 255 et sqq. ; G. Grasso, *Giuria e Corte d'Assise: pigrizia, incapacità, malafede del legislatore*, Giappichelli, Turin, 1974, p. 89 et sqq. ; A. Marongiu, rubrique *Corte d'assise (premessa storica)*, dans *Enc. dir.*, vol. X, Giuffré, Milan, 1962, p. 778 ; K. Natali, *La partecipazione del popolo all'amministrazione della giustizia*, dans « Questione giustizia », 2020, 6 novembre 2020; L. Pepino, *La Corte di Assise alla prova dei fatti*, dans « Questione giustizia », 1982, p. 119 et sqq. ; S. Riccio, rubrique *Corte Assise*, dans *Noviss. dig.*, vol. IV, Utet, Turin, 1959, p. 920 et sqq. ; P. Vico, rubrique *Giurati*, dans *Dig. it.*, XII, Utet, Turin, 1900, p. 561 et sqq.

[2] Dans le même sens, Amodio, *Giustizia popolare, garantismo e partecipazione*, cit., p. 15. D'un avis différent, A. Gabelli, *I giurati nel nuovo regno italiano*, Tip. Bernardoni, Milan, 1861, p. 9, qui déconseille d'attribuer une valeur politique exclusive à l'institution : le jury devait avant toute chose représenter une institution juridique visant à créer un « tribunal de juges choisis par le peuple, indépendants, remplaçables et jouissant par conséquent de la confiance commune ».

[3] Pour une analyse approfondie de la structure et des fonctions de la *Corte d'assise* dans l'État libéral, voir A. Gabelli, *I giurati nel nuovo regno italiano*, cit., *passim*; P. Lanza, *La giuria e il giudizio penale davanti la Corte d'assise*, Vannucchi, Pisa, 1886, p. 411 et sqq. G. Pisanelli, *Dell'istituzione de' giurati*, Stabilimento Ghio, Napoli, 1868.

Pour voir apparaître une participation de juges non professionnels dans les activités de la *Corte d'assise*, sous la forme que nous connaissons aujourd'hui, il faut attendre le *Decreto Regio* [décret royal italien] n° 249 du 23 mars 1931[5], qui supprime le jury et redéfinit la composition des cours d'assises, en introduisant une structure mixte de l'organe rendant la justice, selon le modèle du *scabinato*, l'échevinat, ayant été mis en place en Allemagne[6].

Au cours du régime fasciste, la *Corte d'assise* était composée de deux magistrats professionnels et de cinq juges non professionnels (appelés « *assessori* » - assesseurs)[7], réunis au sein d'un seul collège[8], avec des compétences leur permettant, par un jugement motivé, de décider des problèmes de fait aussi bien que des questions de droit.

Structuré de cette manière, le *scabinato* représentait une diminution marquée du rôle joué par les juges non professionnels, ceux-ci étant définitivement privés du monopole juridictionnel du jugement sur le fait.

Mais il y a plus. La méfiance du régime fasciste à l'égard du jury populaire avait également fini par conditionner la procédure de recrutement des juges non

[4] Sur ce point, voir M. Meccarelli, *«Due lati di una stessa figura». Questione di fatto e di diritto tra Corte d'assise e Cassazione nel dibattito dottrinale verso il codice di procedura penale del 1913*, dans F. Colao-L. Lacchè-C. Storti (par les soins de), *Processo penale e opinione pubblica in Italia tra Otto e Novecento*, Il Mulino, Bologna, 2008, p. 163 et sqq.

[5] À titre de commentaire sur la *Corte d'assise* telle que celle-ci a été réformée par le législateur de 1931, voir U. Aloisi, *Le nostre Corti d'assise*, dans « Riv. it. dir. pen. », 1937, p. 13 ; E. Altavilla, *La sentenza della Corte d'assise*, dans «Rivista penale», 1938, p. 654 et sqq. ; Avanzini, rubrique *Corte di assise (ordinamento italiano)*, cit., p. 180 ; Bocchino, rubrique *Corte d'Assise*, cit., p. 255 et sqq. ; R. Orlandi, *La riforma fascista delle corti d'assise*, dans L. Garlati (ed.), *L'inconscio inquisitorio*, Giuffrè, Milan, 2010, p. 225 et sqq. ; C. Passarella, *Una disarmonica fusione di competenze : magistrati togati e giudici popolari in Corte d'assise negli anni del fascismo*, Historia et ius, Roma 2020 ; C. Perris, rubrique *Giurati e giuria*, dans *Nuovo dig. it.* vol. VI, Utet, Turin,1938, pp. 381-383 ; M. Pisani, *La corte d'Assise negli anni '30*, dans « Rivista di diritto processuale », 2011, p. 1424 et sqq.

[6] Sur ce point, on renvoie à L. Garlati, *L'inconscio inquisitorio. L'eredità del Codice Rocco nella cultura processualpenalistica italiana*, Giuffré, Milan, 2010, p. 226, en relation avec l'abolition du jury en Allemagne en 1924, et à l'introduction ultérieure, de la part du législateur allemand, du modèle du *scabinato*.

[7] Contrairement à ce qui s'observe dans d'autres pays, le vocabulaire législatif a changé avec les le changement des institutions : l'abandon du jury classique est devenu évident par un changement du nom des juges populaires, dénommés « assesseurs » et non plus « jurés ».

[8] Concernant la composition des Cours d'assises sous le régime fasciste, voir A. Parpagliolo, *Codice di procedura penale. le disposizioni di attuazione e regolamentari, l'ordinamento delle Corti di assise e le norme sui Tribunali per minorenni*, Barbera, Florence, 1936, p. 649 et sqq.

professionnels : en plus de devoir être des citoyens italiens, d'être âgés de trente à soixante-cinq ans et d'avoir fait preuve d'une « conduite morale et politique irréprochable », ils devaient, par ailleurs, être membres du Parti national fasciste et appartenir à certaines catégories de représentation politique ainsi qu'aux classes les plus élevées de la société[9]. Et ceci dans le but de mieux gouverner la composante populaire du collège[10].

Après la chute du régime fasciste, la participation populaire à l'administration de la justice représentait un des problèmes les plus controversés au sein de l'*Assemblea costituente*, laquelle, chargée de rédiger la Constitution, se présentait divisée entre ceux qui entendaient maintenir l'institution du *scabinato* et ceux qui, au contraire, tendaient pour la réintroduction du jury[11].

Au vu toutefois des incertitudes et des critiques qui furent soulevées contre un éventuel retour au jury[12], l'*Assemblea costituente* décida d'opter pour le maintien d'une

[9] En particulier, la lettre d de l'article 4, alinéa 1, du *Decreto Regio* nº 249 de 1931, établissait comme susceptibles de pouvoir jouer le rôle d'assesseur de la Cour : 1) les membres du *Gran Consiglio*, du *Senato*, de la *Camera dei deputati* et du *Consiglio nazionale delle corporazioni* ; 2) les membres de l'Accademia d'Italia et les membres ordinaires des Académies ou Instituts dont la liste figure dans une section spéciale du décret royal du 22 décembre 1930, nº 1757 ; (3) les «*presidi* et *rettori* des provinces » ; (4) les *podestà* ou *vice-podestà* (lettre modifiée par l'article 3 du *decreto regio*º 1162 de 1934) ; (5) les « auteurs d'œuvres scientifiques ou littéraires ou d'autres œuvres intellectuelles de grand prestige » ; 6) les diplômés ou licenciés d'une université ou d'un institut d'enseignement supérieur ; 7) les diplômés des instituts d'enseignement supérieur (mais uniquement s'ils ont versé à l'État une contribution fiscale annuelle minimum de mille lires) ; 8) les employés et retraités ayant exercé certaines fonctions au service de l'État ou des collectivités locales (à condition d'être titulaires d'un diplôme de fin d'études secondaires), ou les officiers de l'armée en congé ou retraités avec un grade non inférieur à celui de capitaine ; 9) les présidents et secrétaires des confédérations et des fédérations nationales des associations syndicales légalement reconnues, ainsi que des syndicats nationaux légalement reconnus, secrétaires fédéraux du Parti national fasciste et secrétaires politiques des Faisceaux (lettre modifiée par l'article 3 du *decreto regio* nº 1162 de 1934). En plus des conditions « morales » et « de carrière », il fallait « être citoyen italien et jouir de ses droits civils et politiques » (lettre a de l'article 4, alinéa 1) et « être âgé de trente ans au moins et de soixante-cinq ans au plus » (lettre b). Pour une analyse des conditions requises pour devenir « assesseurs », voir A. Alberti-A. Rossi Merighi (par les soins de), *La Legislazione Fascista*, Tipografia della Camera Dei Deputati, Rome, 1929, p. 258 et sqq.

[10] On trouve le même avis, entre autres, chez Orlandi, *La riforma fascista delle corti d'assise*, cit., p. 231.

[11] Pour un examen plus approfondi, v. F. Cò, *Sovranità popolare e partecipazione dei laici ai giudizi penale nella costituzione italiana*, dans Amodio (par les soins de), *I giudici senza toga*, cit., p. 75 et sqq.

[12] Pour les critiques soulevées à l'encontre du jury, voir les propos des députés Scalfaro, Turco e Romano, cités par F. Calzaretti, *La nascita della Costituzione*, *La nascita della Costituzione. Le discussioni in Assemblea Costituente a commento degli articoli della Costituzione*, dans <www.nascitacostituzione.it>, séances du 7 et du 12 novembre 1947.

composition mixte du collège de la *Corte d'assise*.

À cette fin, en plus de la disposition qui prévoyait la « participation directe du peuple à l'administration de la justice »[13], visée au troisième alinéa de l'article 102 de la Constitution, le législateur constituant, par le sixième alinéa de l'article 111 de la Constitution, prévoyait – tout comme encore de nos jours – l'obligation de motiver toutes les mesures judiciaires adoptées ; cela a eu pour résultat d'exclure toute possibilité de retour au jury classique et à son verdict rendu en un seul mot[14].

Par application de ces principes constitutionnels, la loi n° 287 du 10 avril 1951[15] a consacré l'adoption définitive, au sein du système juridique italien du système du *scabinato*, considéré comme représentant le seul modèle en mesure de garantir la participation directe du peuple à l'administration de la justice et, en même temps, de respecter l'obligation de motivation.

À la suite de cela, les juges professionnels et les juges populaires constituent désormais un « collège unique à tous les effets »[16], non seulement dans les cours d'assises, mais aussi dans les cours d'assises d'appel. L'abolition du verdict exprimé en un seul mot et la suppression de l'ancienne dichotomie entre les questions de droit et les questions de fait avaient imposé l'introduction d'un instrument de contrôle des décisions, portant sur le fond, ce qui a incité le législateur à créer les *Corti d'assise d'appello*.

[13] À ce sujet, voir P. SCAPARONE, La *disciplina costituzionale dell'intervento di "laici non tecnici" nella amministrazione della giustizia*, dans « Giurisprudenza costituzionale », 1968, p. 2363 et sqq.

[14] AMODIO, *L'obbligo costituzionale di motivazione e l'istituto della giuria*, dans « Rivista italiana di diritto e procedura penale », 1970, III, p. 444 et sqq., souligne l'incompatibilité d'un verdict dénué de toute motivation avec l'obligation de détailler les évaluations probatoires réalisées sur les faits.

[15] Pour un commentaire sur la *Corte d'assise* dans le système judiciaire actuel, voir AVANZINI, rubrique *Corte di assise (ordinamento italiano)*, cit., p. 180 ; BOCCHINO, rubrique *Corte d'Assise*, cit., p. 255 et sqq.; A. CASALINUOVO, rubrique *Corte d'assise (diritto vigente)*, dans *Enc. dir.*, vol. X, Giuffrè, Milan, 1962, p. 774 et sqq. ; ID, *La Corte di Assise*, Milan, Giuffré, 1964 ; F. CIAPPARONI, rubrique *Scabinato e scabini*, dans *Noviss. dig. it*, vol. XVI, Utet, Turin, 1957, p. 667 ; G. GUADAGNO, rubrique *Corte di assise*, dans *Enc. forense*, Giuffré, Milan, 1958, p. 769 et sqq. ; A.. JANNITI PIROMALLO, *Il nuovo ordinamento delle corti di assise*, Giuffrè, Milan, 1952 ; G. LATTANZI, *La legge sulle corti d'assise*, Giuffrè, Milan, 1952 ; RICCIO, rubrique *Corte d'Assise*, cit., p. 917, selon lequel la chambre mixte représente une conséquence inévitable de la fusion des principes consacrés par les articles 102 alinéa 3 et 111 alinéa 6 de la Constitution italienne.

[16] Le caractère unitaire du collège des juges est explicité par l'article 5 de la loi n° 287 du 10 avril 1951, qui dispose que « les magistrats et les juges populaires constituent à tous les effets un collège unique ».

En ce qui concerne la composition du collège des juges, l'article 3 de la loi nº 287 de 1951, modifiée par le décret-loi nº 18 du 6 février 1986, prévoit que la *Corte d'assise* est composée d'un président, choisi parmi les magistrats ayant au moins le rang de magistrat d'appel, d'un magistrat ordinaire, choisi parmi les magistrats ayant le rang de magistrat du tribunal[17], et de six juges populaires. L'article 4 de cette même loi, en revanche, établit de quelle manière est composée la *Corte d'assise d'appello* : celle-ci est présidée par un magistrat exerçant le rôle de président de la chambre de la Cour d'appel ou, en l'absence d'un tel magistrat ou en raison de son indisponibilité, par un magistrat ayant une qualification non inférieure à celle d'un magistrat d'appel déclaré apte à subir une évaluation ultérieure en vue d'une nomination en qualité de magistrat de la Cour de cassation, et est composée d'un magistrat de la Cour d'appel et de six juges populaires.

En ce qui concerne, plus particulièrement, les membres non professionnels de la Cour, la loi nº 287 de 1951 établit que sont susceptibles de remplir la fonction de juge populaire – sans distinction de sexe[18] – les citoyens italiens qui jouissent des droits civils et politiques et font preuve d'une bonne conduite morale et présentent un âge compris entre 30 et 65 ans À ces conditions, le législateur ajoute, pour les juges populaires de la *Corte d'assise*, l'exigence de la possession d'un « diplôme de fin d'études du collège, quel qu'en soit le type »[19] et, pour les juges populaires de la *Corte d'assise d'appello*, la possession d'un « diplôme de fin d'études du lycée, quel qu'en soit le type[20].

Il s'agit de conditions d'éligibilité minimales, introduites dans le but d'élargir autant que possible le réservoir des juges populaires[21].

[17] La nomination des magistrats professionnels de la *Corte d'assise* et de la *Corte d'assise d'appello* se fait, conformément à l'article 8 de la loi nº 287 du 10 avril 1951, telle qu'elle a été modifiée par le décret-loi nº 18 du 6 février 1986, par un décret du Président de la République, par lequel sont également nommés les magistrats suppléants de chaque *Corte d'assise* et de chaque *Corte d'assise d'appello*.

[18] Il faut souligner que ce ne fut qu'avec la loi nº 1447 du 27 décembre 1956 que la fonction de juge populaire a été officiellement attribuée aux femmes. Cf. Grasso, *Giuria e Corte d'assise*, cit., p. 213 et sqq., concernant les opinions, inacceptables, de divers parlementaires visant à exclure les femmes de la fonction de juge populaire.

[19] Dans le même sens, l'article 9 lettre d) de la loi nº 287 du 10 avril 1951.

[20] Dans le même sens, l'article 10 de la loi nº 287 du 10 avril 1951.

[21] A ce sujet, V. Patanè, *Requisiti per la nomina a giudice popolare ed incompatibilità: concetti da non confondere*, dans « Giustizia penale », 1993, III, c. 168 et sqq. Pour une critique, en particulier, de l'exigence du titre d'études, voir Amodio, *Giustizia popolare, garantismo e partecipazione*, cit., p. 69, selon lequel cela n'aurait aucun sens « de faire

En plus des normes qui régissent les conditions indispensables pour exercer la fonction de juge populaire, le législateur a prévu une procédure de recrutement complexe, qui comporte cinq phases fondamentales : 1) formation des listes des juges populaires domiciliés dans chaque commune ; 2) formation des listes des juges populaires domiciliés dans chaque Tribunal ; 3) formation des listes définitives pour les Cours d'assises de premier et de deuxième degré ; 4) formation par tirage au sort des listes générales des juges populaires ordinaires et suppléants ; 5) tirage au sort des juges populaires par session et formation du collège des juges[22].

En particulier, les citoyens qui répondent aux conditions décrites plus haut peuvent s'inscrire sur les listes municipales prévues à cet effet[23], à partir desquelles le président du tribunal du lieu où se trouve la *Corte d'assise* procède à la formation et à la publication des listes définitives des juges populaires. Les tableaux définitifs servent de base à la formation des listes générales de juges populaires, titulaires et suppléants, destinées à couvrir les besoins de chaque C*orte d'assise* pour un laps de temps de deux ans.

Lors d'une audience publique, en présence du Procureur général et du *Presidente* [Bâtonnier] de l'ordre des avocats, on procède à un tirage au sort, à partir des tableaux définitifs, d'un nombre de noms prédéterminés pour chaque *Corte d'assise*, qui seront inscrits sur les listes générales en respectant un critère de parité entre hommes et femmes[24]. Une fois que les listes générales auront été formées, les fiches qui mentionnent tous les noms ayant été tirés au sort sont scellées et placées dans l'urne des juges populaires ordinaires.

Ensuite, quinze jours avant la date fixée pour la convocation de la session de la *Corte d'assise* ou de la *Corte d'assise d'appello*, le Président procède, dans le cadre d'une

une distinction entre les conditions pour être juge populaire du premier ou du second degré ».

[22] En ce qui concerne cette organisation, voir BOCCHINO, rubrique *Corte d'Assise*, cit., p. 255 et sqq. Pour un commentaire de cette procédure, voir également G. DI GIOVINE, *Il procedimento per la formazione degli elenchi dei giudici popolari*, Milan, Giuffrè, 1965.

[23] Cependant, étant donné que la loi prévoit que la fonction de juge populaire est obligatoire, la phase d'inscription volontaire est suivie de l'intégration des listes par les soins d'une commission municipale, avec l'inclusion automatique de tous les noms des personne domiciliées dans la commune qui répondent aux exigences requises.

[24] Pour une analyse critique de la procédure de nomination des juges populaires, voir AMODIO, *Giustizia popolare, garantismo e partecipazione*, cit., p. 49 et sqq.

audience publique, à l'extraction du nom des juges populaires à partir de l'urne[25] et vérifie s'il existe des motifs empêchant l'acceptation du mandat.

Le jour fixé pour l'examen de la première cause, le Président – toujours dans le cadre d'une séance publique – procède à la composition du collège des juges, en appelant les juges qui sont présents dans l'ordre d'extraction en vue d'accomplir leur mandat. En cas d'absence ou d'empêchement éventuel, le Président procède à l'extraction des noms des juges suppléants et procède à leur convocation immédiate. Après les éventuelles déclarations d'abstention ou de récusation des juges populaires, à propos desquelles c'est le Président de la Cour qui tranche, les six juges non professionnels prêtent serment, en prononçant la formule prévue par le législateur[26].

2. La compétence de la Corte d'assise

Nonobstant le grand nombre de formes que cette institution a revêtues au cours du temps, on peut dégager, comme formant une constante dans l'évolution de l'organe judiciaire à composition non professionnelle, la tendance à rendre le droit plus « humain » et à faire en sorte que le jugement soit plus sensible à l'évolution de la conscience juridique du peuple. Le manque de professionnalisme et les lacunes techniques dans le domaine juridique qui caractérisent les juges non professionnels sont raisonnablement compensés par les avantages « de la participation de personnes qui sont le plus possible proches des valeurs socioculturelles qui ont été lésées par des infractions criminelles qui ont gravement nui aux principes de la coexistence civile ».

[25] Pour tenter de faire face à la « fuite des juges populaires », qui se manifesta lors des premiers procès contre les *Brigate rosse*, la loi nº 74 du 24 mars 1978 a amené le nombre de bulletins devant être extraits de l'urne de dix jusqu'à la moitié du nombre de noms qui sont contenus dans celle-ci, avec une limite maximum de cinquante.

[26] Le serment, conformément à l'article 30 de la loi nº 287 de 1951, est prêté selon la formule suivante : « Mû par la ferme volonté de remplir mon devoir en tant que personne d'honneur, conscient de la suprême importance morale et civile de la fonction qui m'a été confiée par la loi, je jure d'écouter avec diligence et d'examiner avec sérénité les preuves et les raisons de l'accusation et de la défense, de former mon intime conviction en jugeant avec droiture et impartialité, et d'éloigner de mon âme tout sentiment d'aversion et de faveur, afin que la sentence soit rendue ainsi que la société est en droit de l'attendre : l'affirmation de la vérité et de la justice. Je jure en outre de maintenir le secret ».

C'est dans ce sens qu'on peut expliquer le choix qui fut celui du législateur de réserver les infractions pénales les plus graves et les plus odieuses prévues par le Code pénal à la compétence de la *Corte d'assise*.

En effet, la compétence *ratione materiae*, conçue par le législateur en fonction de la gravité des infractions pénales, est identifiée par le recours à un critère quantitatif, c'est-à-dire en fonction du *quantum* de la peine prévue par l'infraction pénale prétendument commise.

Toutefois, le législateur prévoit un certain nombre d'exceptions à ce critère quantitatif et attribue également à la compétence de la *Corte d'assise* la compétence pour connaître de certaines infractions identifiées au moyen d'un critère qualitatif, soit en relation avec la nature de certaines infractions pénales. Par rapport à ces infractions, bien que la peine prévue soit moindre, le législateur a estimé qu'il était important de confier l'affaire à un juge plus sensible dans l'interprétation du sentiment de la communauté dont il fait partie à un moment historique donné[27].

Le premier des deux critères établit, en vertu de l'article 5 lettre a) du Code de procédure pénale italien, la compétence de la *Corte d'assise* pour les infractions punies par la réclusion criminelle à perpétuité ou par un emprisonnement dont le maximum ne peut être inférieur à vingt-quatre ans. Aux lumières de ce critère, de la compétence de la *Corte d'assise* ressorts, tout d'abord, le délit de meurtre, puni par l'article 575 du code pénal d'une peine minimale d'emprisonnement de vingt et un ans et d'une peine maximale (qui n'est pas explicitement indiquée par le législateur) d'emprisonnement d'au moins vingt-quatre ans conformément à la règle générale énoncée à l'article 23 du code pénal italien[28].

Le législateur montre de cette manière qu'il est peu enclin à soumettre à la

[27] À ce sujet, voir G.M. Baccari, *La cognizione e la competenza del giudice*, dans G. Ubertis-G.P. Voena (ed.), *Trattato di procedura penale*, Giuffrè, Milan, 2011, p. 154 et sqq.

[28] L'article 5, lettre (a) du Code de procédure pénale italien, tel qu'il a été amendé par la loi nº 5 du 26 avril 2010, prévoit, en effet, la compétence de la *Corte d'assise* « pour les infractions pour lesquelles la loi prévoit une peine de réclusion criminelle à perpétuité ou un emprisonnement maximum qui ne peut être inférieur à vingt-quatre ans, à l'exclusion des infractions, même aggravés, de tentative de meurtre, de vol à main armée, d'extorsion et d'associations de type mafieux, y compris étrangères, et les infractions, même aggravées, qui sont régies par le décret présidentiel italien nº 309 du 9 octobre 1990 ».

compétence de la composante non professionnelle de la Cour certains crimes graves « pour lesquels on estime qu'une préparation technique et juridique spécifique est nécessaire ou, en tout cas, pour lesquels – par exemple, les délits liés à la criminalité organisée – on est en droit de craindre que le juge populaire puisse être exposé à un conditionnement extérieur indu »[29]. Plus en particulier, le fait de soustraire à la compétence de la Corte d'assise les infractions d'association de malfaiteurs de type mafieux (article 416-bis du Code pénal italien) se justifie pas le besoin d'éviter qu'un juge populaire ne puisse manquer à son devoir d'impartialité, en raison des pressions extrajudiciaires auxquelles il pourrait être soumis lors du jugement d'infractions de ce genre.

Selon le critère qualitatif, le législateur, en vertu de l'article 5 lettres (b), (c), (d), (d-bis) du Code de procédure pénale italien, établit la compétence de la Cour sur la base de l'intitulé de l'infraction faisant l'objet de la cause.

Le juge dans le cadre d'une composition mixte est, avant toute chose, compétent pour juger l'homicide consenti (article 579 du Code pénal italien), l'instigation ou la complicité dans le suicide (article 580 du Code pénal italien) et l'homicide involontaire (article 584 du Code pénal italien). Parmi les infractions pour lesquelles la Corte d'assise est « qualitativement » compétente, l'article 5 du Code de procédure pénale italien inclut également toute infraction intentionnelle si la mort d'une ou plusieurs personnes résulte de l'acte, à l'exclusion de la mort ou des blessures résultant involontairement d'une autre infraction (article 586 du Code pénal italien), de la rixe (article 588 du Code pénal italien) et du défaut d'assistance à personne en danger (article 593 du Code pénal italien)[30].

La loi attribue en outre une compétence à la *Corte d'assise* pour le crime de réorganisation du parti fasciste, prévu par application de la XII[e] disposition finale de la Constitution, pour le crime de génocide, régi par la loi n[o] 962 du 20 juin 1967, et pour

[29] Voir dans ce sens, O. Mazza, *I protagonisti del processo*, dans O. Dominioni-P. Corso-A. Gaito-G. Spangher-G. Dean-G. Garuti-O. Mazza (par les soins), *Procedura penale*, Giappichelli, Turin, 2021, p. 81. Ce point de vue est également partagé par Baccari, *La cognizione e la competenza del giudice*, cit. p. 161, qui souligne à quel point le niveau élevé de technicité de certaines infractions, telles que les infractions liées aux stupéfiants, sont difficilement sujet à une évaluation correcte par les membres non professionnels de la Cour.

[30] Pour une définition précise de tous les cas s'inscrivant dans le champ d'application de l'alinéa c) de l'article 5 du Code de procédure pénale, voir Baccari, *La cognizione e la competenza del giudice*, cit., pp. 163-164.

les crimes contre la personnalité de l'État, punis d'un emprisonnement d'au moins dix ans, tel que prévu par le titre I du livre II du Code pénal italien. Le motif de ce choix réside dans « la plus grande sensibilité à l'égard des problèmes politiques »[31] dont fait preuve le juge populaire par rapport au juge professionnel, grâce à laquelle une interprétation plus proche du sentiment de la collectivité est garantie.

Pour finir, le juge en composition mixte est compétent pour juger les infractions commises dans le cadre de l'association de malfaiteurs tendant, du point de vue de ses fins, à perpétrer les infractions prévues par l'article 416, alinéa 6 du Code pénal italien, les infractions de réduction en esclavage (article 600 du Code pénal italien), de traite des personnes (article 601 du Code pénal italien), d'achat ou de vente d'esclaves (article 602 du Code pénal italien), de même que les infractions à des fins de terrorisme, pour lesquelles la peine maximum ne peut être inférieure à dix ans.

En définitive, il faut remarquer que, récemment, le domaine des compétences qui sont attribuées à la *Corte d'assise* a été élargi en vertu de la loi n° 33 du 12 avril 2019, par laquelle le législateur, en modifiant l'article 438 alinéa 1-*bis* du Code de procédure pénale italien, a exclu du champ d'application du procès avec procédure abrégée les crimes punis par une réclusion criminelle à perpétuité[32].

En effet, jusqu'à ce que cette loi entre en vigueur, la possibilité que l'on reconnaissait au prévenu de demander un jugement avec procédure abrégée (également) pour les crimes qui étaient sanctionnés par une réclusion à perpétuité lui permettait, de fait, d'échapper aux règles de compétence, prévues par l'article 5 du Code de procédure pénale italien, et de se soustraire de cette manière au jugement de première instance avec composition populaire, en donnant la préférence à un jugement rendu par un juge professionnel unique.

[31] À ce sujet, voir à nouveau BACCARI, *La cognizione e la competenza del giudice*, cit., p. 165.

[32] En ce qui concerne les principales nouveautés ayant été introduite par la loi n° 33 du 12 avril 2019, voir A. DE CARO, *Le ambigue linee di politica penale dell'attuale legislatore : giudizio abbreviato e reati puniti con la pena dell'ergastolo*, dans « Diritto penale e processo », 2018, p. 1627 et sqq. ; F. GIUNCHEDI, *De profundis per i procedimenti speciali. Considerazioni a margine alla legge di inapplicabilità del giudizio abbreviato ai delitti puniti con la pena dell'ergastolo*, dans « Archivio penale », 2019, p. 1 ss.; F. ZACCHÈ, *Inammissibile l'abbreviato per i reati puniti con l'ergastolo: osservazioni a margine della l. 12 aprile 2019, n° 33*, dans « Processo penale e giustizia », 2009, p. 1202 et sqq.

De cette manière, dans le but de soumettre à nouveau l'instruction des infractions particulièrement graves à un procès public et, surtout, à la compétence réservée à la *Corte d'assise*, cela allant de pair avec l'exigence d'assurer un caractère exemplaire à la peine et d'éviter que le prévenu ne puisse bénéficier des effets avantageux du jugement avec procédure abrégée, le législateur a prévu l'interdiction de ce type de jugement pour les infractions punies par la réclusion criminelle à perpétuité.

Et ce faisant, il a de fait, étendu les compétences attribuées à la *Corte d'assise*, ce qui a entraîné des répercussions inévitables sur l'entité des tâches qui pèsent sur la Cour et, plus généralement, sur les délais du procès[33].

3. La procédure par-devant la Corte d'assise

La *Corte d'assise*, qui est, d'un point de vue fonctionnel, compétente pour la phase des débats dans les procédures de première instance, trouve son expression la plus significative dans le principe de la procédure contradictoire en ce qui concerne la formation de la preuve. Ce principe, élevé au rang de « statut épistémologique » de la juridiction pénale, revêt, dans le procès devant la *Corte d'assise*, une charge plus incisive car il assure en pratique une participation populaire effective au procès pénal en permettant l'examen direct et oral des preuves.

De fait, par le biais du débat contradictoire dans la formation de la preuve, le juge populaire – que l'on considère comme une « sorte de Saint-Thomas du droit »[34] – appuie ses capacités d'évaluation sur ce qu'il entend, ce qu'il voit et ce qu'il perçoit au cours de l'instruction du procès. Seul « le recours au discours direct »[35], dans le cadre de

[33] Les répercussions de ce choix sur la charge de travail des Cours d'assises et sur les délais de jugement sont mises en relief dans A. Cisterna, *I consistenti impatti di una novella sulle corti di assise*, dans « Guida al diritto », 21, 2019, p. 22 et sqq.

[34] C'est ce que l'on trouve décrit de manière efficace dans C. Barbieri, *Ancora sulla giuria : una proposta normativa per la Corte d'Assise*, dans « Giustizia penale », 1996, c. 319.

[35] De la même manière, Garuti, *Il giudizio ordinario*, dans Dominioni-Corso-Gaito-Spangher-Dean-Garuti-Mazza (par les soins de), *Procedura Penale*, cit., p. 592.

l'obtention de preuves déclaratives, garantit une compréhension facile et correcte des faits par les juges populaires et leur participation effective au moment du délibéré.

Le passage à un procès de nature accusatoire, s'appuyant sur le principe du caractère verbal de l'instruction, a par conséquent contribué à impliquer davantage les juges populaires dans la formation de la preuve, en leur donnant la possibilité de saisir toutes les connotations expressives, y compris celles de nature non verbale, produites par la méthode dialectique de l'interrogatoire et du contre-interrogatoire. C'est, en particulier, le mécanisme du *contre-interrogatoire* qui garantit, « par la confrontation dialectique des parties et de leurs thèses opposées »[36], un haut degré d'attention des juges populaires quant au déroulement de l'instruction.

La pertinence du principe du contradictoire dans les procès devant la *Corte d'assise*, visant à ce que les juges non professionnels soient mieux en mesure de peser le poids démonstratif des preuves, se fait surtout sentir lorsque des constatations probatoires hautement spécialisées doivent faire l'objet d'une évaluation[37].

Comme on le sait, le recours de plus en plus fréquent aux connaissances techniques et scientifiques modernes lorsqu'il s'agit de constituer des preuves a progressivement déplacé le centre de gravité du procès de la phase des débats vers les enquêtes préliminaires, au cours desquelles il arrive souvent que les données objectives soient obtenues par la police judiciaire, pour être ensuite analysées par des experts[38].

[36] Voir dans ce sens, F.L. Willman, *L'arte della cross examination*, Giuffrè, Milan, 2009, p. 31, lequel qualifie les jurés en ces termes.

[37] En ce qui concerne les difficultés que les juges populaires connaissent lorsqu'il s'agit de comprendre des informations hautement spécialisées à la suite de la réduction des espaces dialogiques de formation de la preuve dans l'instruction du procès, nous renvoyons à G. Fiorelli, *La Corte d'assise di fronte al sapere scientifico*, dans L. Lupária-L. Marafioti-G. Paolozzi (par les soins de), *Dimensione tecnologica e prova penale,* Giappichelli, Turin, 2019. Pour un examen plus général de l'évaluation de la preuve scientifique de la part du juge populaire, voir N. Fusaro, *I giudici popolari di fronte alla prova scientifica tra effetto csi e contro-effetto csi*, dans « La Corte d'assise », 2013, p. 345 et sqq. ; A. Gaito, *Valutazione della prova scientifica e prevalenza del principio dell'oltre ogni ragionevole dubbio. Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, dans « Archivio penale », 2012, p. 22 et sqq. ; M. Montagna, *Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, dans Ead., *L'assassinio di Meredith Kercher. Anatomia del processo di Perugia*, Aracne, Roma, 2012, p. 260 et sqq.

[38] Le déplacement progressif du centre de gravité procédural de la phase des débats du procès vers la phase des enquêtes préliminaires est mis en évidence par L. Marafioti, Digital evidence *e processo penale*, dans « Cassazione penale », 2011, p. 4509 ; C. Conti, *L'inutilizzabilità*, dans A. Marandola (ed.), *Le invalidità processuali. Profili statici*

Dans de tels cas, les résultats scientifiques ayant été obtenus pendant la phase de l'enquête se manifestent au sein du procès sous la forme d'un « document », ce qui réduit la procédure contradictoire à un jugement « posthume » sur des éléments qui ne sont pas faciles à interpréter et qui ont déjà été « pré-conditionnés » au cours des enquêtes préliminaires proprement dites »[39].

Cela finit par avoir des répercussions inévitables justement sur les capacités d'évaluation dont font preuve les juges populaires.

De fait, la diminution progressive du principe de l'oralité des preuves ayant été décrite plus haut finit par priver les juges populaires d'occasions importantes de discussion et de clarification des questions les plus complexes apparaissant dans le procès. Et cette impossibilité de pouvoir prendre connaissance de manière directe des données probatoires ne peut que rendre plus difficile – voire pratiquement impossible – la formation, chez le juge populaire, d'une conviction autonome, en mesure de garantir une participation adéquate au délibéré final et de limiter le risque d'une acceptation dénuée de toute critique des connaissances scientifiques manifestées par l'expert[40].

Parmi les solutions envisagées pour pallier le manque de connaissances spécialisées au sein de la *Corte d'assise*, il convient de rappeler la proposition, ayant été avancée par la doctrine, d'introduire un « jury technique »[41], c'est-à-dire un collège de juges composé de juges professionnels et complété par la participation de juges experts non professionnels, afin qu'ils puissent offrir leurs connaissances techniques au cours de la recherche de la vérité dans le procès.

e dinamici, Wolters Kluwer, Milan, 2015, p. 128.

[39] Voir, Lupária, *La disciplina processuale e le garanzie difensive*, dans Lupária-G. Ziccardi (ed.), *Investigazione penale e tecnologia informatica*, Giuffrè, Milan, 2007, p. 128.

[40] Sur ce risque et, plus généralement, sur la relation entre juge et expert, on renvoie à O. Dominioni, *La prova penale scientifica. Gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, Giuffrè, Milan, 2005 et Lupária, *Mythe et réalité dans la représentation de la preuve génétique*, Cahiers Droit, Sciences & Technologies, 2019, 9, p. 71.

[41] Pour cette proposition, voir, entre autres, P. Curatolo, *Sistema attuale e proposte di modificazione (composizione del collegio e giudizio),* dans Aa.Vv*., Problemi della Corte d'Assise. Convegno di studio Enrico De Nicola*, Giuffrè, Milan, 1964, p. 121 ss.; Guadagno, rubrique *Corte di assise*, cit., pp. 773-774; G. Benassi, *Giudici esperti o esperti giudici?*, dans « Critica penale », 1948, p. 1 ss., et, en dernier lieu, aussi, Fiorelli, *La Corte d'assise di fronte al sapere scientifico*, cit., p. 180.

Une option de ce genre est sans aucun doute intéressante, encore qu'elle présente certains aspects critiques. En particulier, le fait d'ajouter, dans le collège des juges, un jury d'experts spécialisés ferait courir le risque de dénaturer la fonction du juge professionnel, qui, comme on le sait, peut se faire aider par des experts mais, en vertu du principe de la libre conviction, n'est pas obligé d'accepter leurs conclusions[42].

Confronté aux difficultés épistémiques qui naissent d'une telle disparité de connaissances, la seule solution qui puisse être envisagée d'un point de vue pratique pour harmoniser les composants non professionnels, juridiques et techniques se trouvant au sein du Collège, pourrait être envisagée sous la forme d'une plus grande spécialisation exigée de la part du juge professionnel[43]. En d'autres termes, il s'avère indispensable de renforcer le rôle « d'intermédiaire » joué par le juge professionnel, en favorisant une préparation spécialisée de celui-ci par la mise en place de cours de formation et de perfectionnement appropriés, afin qu'il puisse progressivement acquérir les connaissances techniques nécessaires, notamment, pour mieux maîtriser le patrimoine linguistique et conceptuel de la science.

4. La délibération collégiale de l'arrêt

Immédiatement après la clôture des débats, commence la phase de délibération du jugement, à laquelle participent les mêmes juges qui ont participé à la formation de

[42] On trouve de cet avis, FIORELLI, *La Corte d'assise di fronte al sapere scientifico*, cit., p. 180, pour qui « [...] l'introduction, au sein de la composition collégiale de la *Corte d'assise*, « d'experts » ayant des fonctions décisionnelles finirait par contraindre le juge professionnel à s'en remettre entièrement aux connaissances spécialisées de ces derniers [...] ».

[43] Sur l'importance de la spécialisation du juge professionnel quant aux matières scientifiques, voir les considérations de CAPRIOLI, *La scienza "cattiva maestra" : le insidie della prova scientifica nel processo penale*, cit. p. 3526 ; G. CIVINNI, *La specializzazione del giudice*, dans « Questione giustizia », 2000, p. 605 ss. ; CARLIZZI-TUZET, *La valutazione del sapere specialistico tra requisiti di affidabilità e oneri probatori*, cit., p. 121 ; FIORELLI, *La Corte d'assise di fronte al sapere scientifico*, cit., p. 181 ; LUPÁRIA, *Trial by probabilities - Qualche annotazione "eretica"*, dans « La Corte d'assise », 2, 2012, p. 155 et G. GENNARI, *Nuove e vecchie scienze forensi alla prova delle corte. Un confronto internazionale e una proposta per il futuro*, Maggioli, Santarcangelo di Romagna, 2016, p. 137 et sqq., selon lequel la formation du juge lui permet d'acquérir ce patrimoine linguistique et conceptuel qui est indispensable pour une évaluation faite en toute indépendance des données scientifiques introduites dans le procès.

la preuve dans les débats contradictoires entre les parties.

Les principes de l'immédiateté des délibérations et de l'interdiction de changer le juge, tels qu'ils sont régis par l'article 525 du Code de procédure pénale italien, revêtent une importance plus importante encore dans le cadre de la procédure par-devant la *Corte d'assise*.

Tout particulièrement en ce qui concerne le principe de l'immédiateté du délibéré, la continuité entre le moment de la formation de la preuve et le moment du délibéré permet, en effet, de ne pas disperser le patrimoine cognitif constitué de souvenirs, d'impressions et de perceptions acquis par les juges non professionnels lors de l'examen du procès et sur la base duquel ils sont appelés à former leurs convictions[44].

Qui plus est, le renvoi du délibéré du jugement après un laps de temps considérable à compter de l'instruction par débats risque d'augmenter le danger que la conviction des juges populaires soit influencée par les opinions des médias et ceci dans le contexte du phénomène toujours plus répandu qui tend à accentuer le côté spectaculaire de la chronique judiciaire[45].

En ce qui concerne après le principe selon lequel il est défendu de changer de juge, la nécessité de garantir une identité physique entre l'organe de prise de décision et l'organe devant lequel le débat a eu lieu se présente sous une forme particulière dans le cadre de la procédure par-devant la *Corte d'assise*.

La crainte que les fréquents prétextes qui sont invoqués par les juges populaires au cours du jugement soient susceptibles de rendre vaines les activités ayant été menées à bien jusqu'à ce moment-là a conduit le législateur à introduire l'institution du « juge suppléant »[46]. Il s'agit d'un « type spécial de juge »[47] qui, conformément à la deuxième

[44] Sinon, au cas où un laps de temps prolongé s'écoulerait entre la collecte des preuves et la délibération du jugement, les juges populaires se verraient forcés de faire un effort de mémoire considérable et d'évoquer à nouveau les sensations perçues pendant l'instruction de la preuve par le simple mécanisme des lectures.

[45] En ce qui concerne les influences exercées par les médias sur la sérénité du jugement de la composante non professionnelle, cf. G. Spangher, "*Processo mediatico" e giudici popolari nei giudizi delle corti d'assise*, dans « La Corte d'assise », 2011, p. 117 et sqq. ; M. Petrini, *Guidare la giuria verso la decisione giusta*, dans Montagna (par les soins de), *L'assassinio di Meredith Kercher*, cit., p. 420 et sqq.

[46] Du point de vue terminologique, il convient de souligner que, bien que l'article 525, alinéa 2, du Code de procédure pénale italien utilise l'expression « juges suppléants », l'article 26 de la loi nº 287 du 10 avril 1951, pour faire

partie de l'article 525, alinéa 2, du Code de procédure pénale italien, est appelé à assister au déroulement des débats, afin de pouvoir remplacer, si nécessaire, un membre du collège, au cas où celui-ci serait dans l'impossibilité de poursuivre ses fonctions, sans qu'il soit nécessaire de renouveler toute l'instruction par débats[48].

La possibilité d'ajouter les juges « suppléants »[49] au collège, sous un nombre ne dépassant pas dix, est remise à la discrétion du Président de la *Corte d'assise*, qui, conformément à l'article 26 de la loi n° 287 du 10 avril 1951, peut procéder à la désignation dans les cas où la durée du débat menace de se prolonger[50], c'est-à-dire chaque fois que cela apparaît « dans tous les cas opportun ».

Une fois qu'ils sont entrés dans la chambre du conseil, les juges – qu'ils soient titulaires ou suppléants – procèdent à la délibération du jugement par le biais d'une procédure de vote qui est régie par l'article 527, alinéa 2, du Code de procédure pénale italien, selon lequel « dans le cadre des jugements devant la *Corte d'assise*, les juges populaires votent en premier lieu, en commençant par celui d'entre eux qui est le moins âgé »[51].

référence aux juges qui assistent aux débats qui sont appelés à compléter l'organe de jugement uniquement au cas où un membre serait empêché de poursuivre ses fonctions, a recours à l'expression « juges supplémentaires ».

[47] L'expression a été forgée à partir de P. Renon, *Mutamento del giudice penale e rinnovazione del dibattimento*, Giappichelli, Turin, 2008, p. 211, auquel il convient de se référer pour un examen plus approfondi.

[48] L'article 525, alinéa 2, du Code de procédure pénale italien prévoit en effet que « si les juges suppléants doivent participer à la décision à la place des juges titulaires qui sont empêchés d'assister à la procédure, les mesures déjà adoptées ne conservent leurs effets que si elles n'ont pas été expressément révoquées ».

[49] Il faut toutefois ajouter que la figure du juge suppléant a soulevé de nombreuses incertitudes étant donné que celui-ci – avant de prendre la place du juge titulaire – assiste dans un rôle qui est celui d'un « spectateur » du débat, mais n'exerce pas les fonctions réelles d'un « juge », ce qui fait courir le risque d'ignorer le principe de l'impossibilité de changer de juge.

[50] La durée de la procédure peut être évaluée par le Président de la *Corte d'assise* sur la base de certains facteurs indicatifs, pour la détermination desquels il convient de consulter P. Dorigo, *Commento al D.L. 6/2/1986 n. 18 – L.24/3/1986 n. 79 (corti d'assise)*, dans « Legislazione penale », 1986, pp. 411-413.

[51] L'article 527 du Code de procédure pénale italien détermine quelles sont les différentes phases selon lesquelles doit s'organiser le délibéré du collège : le collège, sous la direction du président est appelé, avant toute chose, à se prononcer sur les questions préliminaires qui ne sont pas encore résolues. Au cas où la résolution de ces questions n'empêche pas l'examen de la substance, le collège devra délibérer aussi bien sur les questions de fait que sur les questions de droit. La norme prescrit de manière expresse que tous les juges doivent exprimer un avis motivé sur chaque question, indépendamment du vote ayant été donné sur les autres questions précédemment traitées. Pour finir, le lé-

De cette manière, le législateur entend préserver le caractère naturel de la délibération de la composante non professionnelle, en évitant que l'autorité du magistrat professionnel, au début du vote, puisse influencer la conviction des juges populaires, en conditionnant leur décision. Dans le même ordre d'idées, le législateur a prévu que, parmi les juges populaires, ce soit le juge le moins âgé qui doive voter le premier, en partant de l'idée que ce dernier est également celui qui est le moins en mesure d'influencer la décision des autres juges non professionnels.

Cependant, s'il est vrai que les modalités de délibération du jugement de la part de l'organe collégial qui sont décrites plus haut visent à garantir la formation de la libre conviction des juges populaires, il est également vrai que la présence des deux magistrats professionnels, ainsi que les activités de direction qui sont menées à bien par le Président font courir le risque, même dans le contexte du secret de la chambre du conseil[52], d'une pression indue s'exerçant sur la délibération des membres non professionnels, lesquels finissent par « ratifier » le travail effectué par le magistrat professionnel[53].

Et même dans le cas où la majorité des juges populaires entendrait s'écarter de l'opinion des magistrats professionnels, ceux-ci seraient dans tous les cas encore en mesure de porter préjudice à la volonté collégiale, en donnant lieu au phénomène aussi grave que peu fréquent des « motivations suicidaires »[54].

gislateur fait de la majorité le critère délibératif de référence et prévoit également que, dans le cas d'une égalité des voix, c'est la solution la plus favorable pour le prévenu qui prévaudra.

[52] Le secret de la délibération représente, de l'avis de MONTAGNA, *Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, cit., p. 269, « le principal obstacle pour une analyse scientifique » du parcours de délibération.

[53] On trouve du même avis, MONTAGNA, *Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, cit., p. 271, qui oppose aux normes fixées par la législation en vue de garantir l'indépendance de jugement des juges populaires une « coutume pratique » qui permet d'entrevoir une réalité tout à fait différente. Sur ce point, voir également GRASSO, *Giuria e Corte d'assise*, cit., p. 308, lequel, en procédant par « suppositions », souligne l'influence inévitable que les magistrats professionnels exercent sur les juges non professionnels.

[54] L'éventualité des motivations suicidaires est approfondie par différents auteurs, parmi lesquels, E. ALTAVILLA, *La sentenza della Corte d'assise*, dans « Rivista penale », 1938, p. 654 et sqq. ; G. ESCOBEDO, *Le sentenze suicide*, Fratelli Bocca editori, Milan, 1943; P. GIUDICE, *Le cosiddette sentenze "suicide" in Corte di Cassazione*, dans « Rivista penale », 1942, pp. 389-395; G. BELLAVISTA, *Studi sul processo penale*, Giuffrè, Milan, 1976; P. CALAMANDREI, *Giustizia suicida*, dans *Il ponte*, 1950, pp. 187-195; et, pour finir, GARLATI, *L'inconscio inquisitorio. L'eredità del codice rocco nella cultura processualpenalistica italiana*, cit., pp. 234-236.

Il s'agit d'un véritable « défaut du collège hétérogène »[55], qui contribue à mettre en évidence la difficile coexistence entre les magistrats professionnels et les juges populaires. Cela se produit chaque fois que le juge professionnel[56] ne partage pas l'avis exprimée par les membres non professionnels. Chargé de rédiger l'exposé des motifs, il doit donc introduire dans celui-ci « les arguments soutenant une conviction qu'il […] n'a pas »[57]. Toutefois, il a pu advenir qu'il le fasse en se servant, sciemment, d'une manière déplorable de ses capacités techniques, ce « pour élaborer une motivation imparfaite et pour préparer ainsi son annulation, afin de voir triompher sa thèse de manière définitive »[58]. En d'autres termes, le Président ou le juge adjoint, plutôt que de voir entérinée la décision ayant été prise par la majorité des juges populaires[59], rédige l'exposé des motifs d'une manière qui est ouvertement contraire au dispositif, dans le but d'en favoriser le rejet en cas de recours contre celui-ci.

Par la motivation « suicidaire » – également connue sous le nom de « anti-motivation »[60] – le juge rédacteur, par conséquent, finit par remplacer la volonté du collège par la sienne propre. De telles circonstances vont évidemment à l'encontre des principes fondamentaux régissant les délibérations collégiales[61], selon lesquelles les

[55] C'est en ces termes que s'exprime Cavalla, *I giudizi di corte d'assise*, dans *Problemi della Corte d'Assise. Convegno di studio Enrico De Nicola*, cit., p. 137, à propos des motivations suicidaires.

[56] La loi n'exclut pas cependant l'hypothèse que le jugement puisse être motivé par un juge populaire : l'article 40 de la loi n° 287 du 10 avril 1951 prescrit, en effet, que le jugement doit être rédigé « d'habitude » par le président ou par un autre magistrat, sans cependant exclure la possibilité qu'il le soit par un juge populaire. Toutefois, comme cela a été mis en évidence par U. Aloisi, *Le nostre Corti d'assise*, dans « Rivista italiana di diritto penale », 1937, p. 13, la pratique des faits laisse entendre qu'il s'agit là d'un événement très rare, perçu comme étant une anomalie, étant donné que le juge populaire est d'habitude dans l'incapacité de remplir une tâche de ce genre, vu qu'il n'a aucune maîtrise des concepts juridiques. Pour une reconstruction sur ce point, voire R. Orlandi *L'anti-motivazione (o delle sentenze suicide). In ricordo di una coraggiosa battaglia di Gennaro Escobedo*, dans « Giustizia penale », III, 2021, c. 116.

[57] Dans le même sens, Cavalla, *I giudizi di Corte d'assise*, cit., p. 137.

[58] Dans le même sens, G. Musillami, *Ancora sulla sentenza della Corte di assise*, dans « Rivista penale », 1938, p. 660.

[59] Cavalla, *I giudizi di Corte d'assise*, cit., p. 137, voit dans les motivations suicidaires le « dernier recours » dont les juges professionnels disposent pour dominer la conviction des juges populaires.

[60] Voir dans ce sens, Escobedo, *Le sentenze suicide*, cit., p. 1 et sqq.

[61] Les préoccupations du législateur concernant le grave phénomène des motifs suicidaires apparaissent dans l'article

décisions des différentes personnes doivent être ramenées à une unité non fractionnable, qui puisse refléter la conviction de la majorité sans faire transparaître les opinions personnelles des juges.

5. Le contrôle exercé par la Corte d'assise d'appello *sur la décision*

Le rapport de « subordination » qui – comme on vient de le mettre en évidence – peut apparaître au moment de la décision entre les juges professionnels et les juges populaires risque d'être encore plus net au sein de la *Corte d'assise d'appello*, organe statuant au deuxième degré, qui tranche sur un appel ayant été interjeté contre l'arrêt rendu par la *Corte d'assise*[62].

Les principales difficultés que connaissent les juges populaires lorsqu'il s'agit d'apporter une participation active au jugement en appel résident dans la structure même de cette procédure au second degré[63].

Le jugement au deuxième degré se caractérise, en effet, par ce qu'il doit être principalement « cartulaire », c'est-à-dire rendu sur la base d'une simple relecture des

2 alinéa 1 lettre cc) du décret législatif du 23 février 2006, en vertu duquel constitue une infraction disciplinaire de la part du magistrat, « l'adoption délibérée de mesures affectées par une incompatibilité évidente entre le dispositif et la motivation, en mesure de révéler une contradiction pré-constituée et sans équivoque sur le plan logique des contenus ou de l'argumentation ». Sur ce sujet en renvoie largement à P. Fimiani-M. Fresa, *Gli illeciti disciplinari dei magistrati ordinari*, Giappichelli, Turin, 2013, pp. 151-153.

[62] Pour un examen de la procédure devant la *Corte d'assise d'appello*, voir A. Dall'Ora, *L'impugnazione nel giudizio di assise*, dans Aa.Vv., *Problemi della Corte d'Assise. Convegno di studio Enrico De Nicola*, cit., p. 238 et sqq. ; U. Guarnera, *Sul funzionamento delle Corti d'assise d'appello*, dans « Giustizia penale », 1952, III, c. 124; M. Pisani, *La corte d'assise e il giudizio di appello,* dans « Rivista italiana di diritto e procedura penale », 2010, p. 3 et sqq. ; Petrini, *Guidare la giuria verso una decisione giusta*, cit., p. 422 et sqq. ; G. Vismara, *L'appello contro le sentenze della Corte d'assise*, dans « Rivista di diritto processuale », 1981, p. 121 et sqq.

[63] De nombreux auteurs, en traitant de la participation populaire à l'administration de la justice, s'arrêtent sur les difficultés que rencontrent les juges populaires dans le jugement basé sur les actes du procès au deuxième degré. Parmi ceux-ci, voir Altavilla, *La Corte d'assise*, cit., pp. 42-43; A. Casalinuovo, *La Corte di Assise*, Giuffrè, Milan, 1964, p. 70 ; Fiorelli, *La Corte d'assise di fronte al sapere scientifico*, cit., pp. 176-177; Grasso, *Giuria e Corte d'assise*, cit., pp. 326-327; Montagna, *Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, cit., p. 271 et sqq. ; Petrini, *Guidare la giuria verso la decisione giusta*, cit., p. 422 et sqq. ; Pisani, *La Corte d'assise e il giudizio di appello*, cit., p. 3 et sqq. ; Dall'Ora, *L'impugnazione nel giudizio di assise*, cit., p. 238 et sqq.

éléments apparus pendant l'instruction par débat au premier degré. Le législateur a choisi de priver le juge d'appel de la faculté de prendre directement connaissance des sources de la preuve, en limitant au domaine de l'« exceptionnel » les hypothèses de renouvellement du débat, ce qui fait qu'il n'est possible de procéder à une reprise des preuves ayant déjà été obtenues en première instance ou à l'acquisition de nouvelles preuves que dans certains cas, qui sont strictement indiqués par l'article 603 du Code de procédure pénale italien[64].

Et la nature exceptionnelle des cas dans lesquels il est possible d'examiner les sources de preuve de manière directe a pour résultat final d'affecter, de manière significative, le « bon sens » des juges populaires, qui, en n'assistant pas à la formation de la preuve dans le débat contradictoire des parties, sont privés de la seule garantie qui soit « nécessaire pour élaborer un état d'âme qui puisse ensuite se traduire par un apport autonome à la décision »[65].

De fait, la simple relecture des procès-verbaux du jugement de première instance empêche le juge populaire d'éprouver cet ensemble de sensations et d'impressions, dont la perception, allant au-delà de la simple composante verbale, n'est garantie que par l'oralité du débat contradictoire.

Dans un tel contexte, les juges populaires ne sont guère en mesure de former de manière indépendante leurs propres convictions sur la base d'un « dossier fait de papiers inexpressifs »[66], sans avoir la possibilité « d'écouter le prévenu et de se rapprocher par conséquent de l'homme qu'ils doivent juger »[67].

Les difficultés susmentionnées ont amené une partie de la doctrine à soutenir qu'il est nécessaire de rendre obligatoire le renouvellement de l'instruction par débat dans le cadre des jugements devant la *Corte d'assise d'appello*[68], dans le but de surmonter les

[64] Et cela parce que les juges du deuxième degré (professionnels ou populaires) ne sont pas tant appelés à juger les faits que le jugement au premier degré lui-même.

[65] Dans ce sens, FIORELLI, *La Corte d'assise di fronte al sapere scientifico*, cit., p. 177.

[66] Dans ce sens, CASALINUOVO, *La Corte di Assise*, cit., p. 91.

[67] Toujours dans ce sens, CASALINUOVO, *La Corte di Assise*, cit., p. 91. On trouve du même avis, GRASSO, *Giuria e Corte d'assise*, cit., p. 327, qui exclut que les juges populaires puissent contribuer utilement à la décision, si ceux-ci ne peuvent pas se rapprocher « de l'homme qu'il faut juger ».

[68] À cet égard, PISANI, *La Corte d'assise e il giudizio di appello*, cit., p. 3 et sqq, fait référence à la proposition faite au

hésitations dont font preuve les juges populaires lorsqu'il s'agit de contribuer à l'évaluation en l'absence de la « réévocation orale des faits de la cause »[69]. En d'autres termes, on a proposé de sauvegarder la participation populaire dans les jugements en appel, par le biais de l'obligation de répéter la preuve du jugement de première instance, comme si la clause de la « nécessité absolue », telle qu'elle est prévue par l'article 603, alinéa 3, du Code de procédure pénale italien, devait toujours faire partie des jugements en appel dont le juge est saisi dans le cadre d'une composition « mixte ».

Une telle proposition, nonobstant les avantages indiscutables que les juges populaires pourraient obtenir d'une perception directe des preuves, n'a jamais été réellement mise en vigueur, étant donné que l'obligation de renouveler le débat risquerait de « dénaturer » la structure globale actuelle du jugement d'appel, en entraînant, qui plus est, un alourdissement de la charge judiciaire qui pèse sur les cours d'assises d'appel[70].

Mais les difficultés que rencontrent les juges populaires lorsqu'il s'agit de participer activement au jugement « cartulaire » (sur les pièces écrites de la cause) au deuxième degré proviennent non seulement de l'absence de perception directe des preuves, mais aussi du manque de connaissance des actes provenant du premier degré.

En effet, les juges professionnels « ont une possibilité d'accéder et de contrôler les actes du procès qui est bien différente par rapport à celle que possèdent, dans la pratique, les six autres juges populaires »[71]. À cela vient s'ajouter la situation

parlement de permettre le renouvellement du système probatoire utilisé au premier degré, éventuellement sur demande de la part du juge populaire. On trouve, pour appuyer cette possibilité de renouveler le débat du premier degré, DALL'ORA, *L'impugnazione nel giudizio di assise*, cit., pp. 241-242, selon lequel, dans les limites des chapitres ou points de l'arrêt attaqué, il faut rendre obligatoire l'évaluation directe, par les juges populaires, de toutes les preuves concernant la matière devant être traitée. Tout ceci sans préjuger du fait, précise l'auteur, que, dans les cas où le recours de l'appelant s'appuie sur des motifs de droit, plutôt que de fait, le renouvellement n'aura pas lieu. Une telle possibilité est sévèrement critiquée par CAVALLA, *I giudizi di corte d'assise*, cit., p. 141, selon qui « le juge populaire ne peut évaluer l'opportunité ou la nécessité de renouveler le débat, en tout ou en partie ». On trouve du même avis également, GUARNERA, *Sul funzionamento delle Corti d'assise d'appello*, cit., c. 123.

[69] Et encore, FIORELLI, *La Corte d'assise di fronte al sapere scientifico*, cit., p. 178.

[70] Pour une critique de la proposition figurant ci-dessus, étant donné qu'elle nuit à l'économie de la procédure, voir VISMARA, *L'appello contro le sentenze della Corte d'assise*, cit., p. 121 et sqq.; PETRINI, *Guidare la giuria verso la decisione giusta*, cit., p. 424.

[71] Voir dans ce sens, MONTAGNA, *Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, cit., p. 273,

physiologiquement dominante occupée par l'un des deux juges professionnels (le « giudice relatore »), qui, étant chargé de la reconstruction et de l'illustration des faits aux autres membres du collège des juges demeure le seul à pouvoir prendre bien à l'avance entièrement connaissance des actes.

Afin de rééquilibrer le fossé « cognitif » existant entre la composante non professionnelle et la composante professionnelle, une circulaire ministérielle de 1963, nº 4/2240/14, avait tenté de remédier à l'insuffisance des informations que possédaient les juges populaires quant aux actes du procès de première instance, en prévoyant que « des copies de l'arrêt attaqué, des motifs de l'appel et des autres actes du procès que le Président de la Cour estime [rait], suivant son jugement éclairé, particulièrement importantes soient rapidement remises à chaque juge populaire »[72].

Toutefois, le Code de procédure de 1988 n'a pas accueilli les suggestions qui figuraient dans la circulaire en question : l'article 164 des dispositions de mise en application du Code de procédure pénale stipule, en effet, que les parties, si elles font appel de l'arrêt, doivent présenter au greffe deux copies de l'acte d'appel, probablement « destinées aux deux magistrats professionnels »[73]. De cette manière, on a totalement négligé la présence des six juges populaires, pour lesquels le législateur ne semble pas avoir prévu le dépôt de copies de l'acte d'appel, avec des répercussions évidentes sur la formation de leur conviction indépendante.

En bref, le risque que l'on court est que « des voies différenciées d'accès à l'information »[74], entre les juges populaires et les juges professionnels, puissent finir par amoindrir de manière inévitable l'indépendance de jugement de la composante non

à laquelle on renvoie en ce qui concerne les distorsions du système lorsqu'il s'agit de garantir un accès homogène à tous les composants de la *Corte d'assise d'appello* aux informations du jugement de premier degré.

[72] Pour un commentaire concernant cette circulaire, on renvoie une fois encore à Bocchi, *La partecipazione popolare in assise nella relazione dei presidenti delle Corti (1958-1974)*, cit., p. 122.

[73] Voir, encore une fois, Montagna, *Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, cit., p. 274.

[74] C'est dans ces termes que s'exprime L. Lanza, *Emozioni e libero convincimento nella decisione del giudice penale*, dans *Criminalia*, 2011, p. 370, selon lequel les juges professionnels disposent, dans tous les cas, d'une « une vitesse d'accès et de contrôle sur les résultats de la procédure qui, dans la pratique, n'est pas et ne veut pas être la même que celle des six autres juges populaires ».

professionnelle. Seule, en effet, une connaissance homogène des procès-verbaux du premier jugement et la possibilité d'accéder de manière identique aux informations de la part des différents membres du collège est en mesure de garantir que « la participation et surtout la délibération finale des juges populaires soient, autant que possible, autonomes et réalisées en pleine connaissance de cause »[75].

Or, de telles considérations générales suffisent pour deviner que le déficit d'autonomie décisionnelle des juges populaires, qui est déjà évident dans le jugement au premier degré, est encore davantage exacerbé dans la *Corte d'assise d'appello*[76], dans laquelle la fonction purement subalterne de la composante non professionnelle finit par atteindre son apogée.

La seule solution, par conséquent, pour revitaliser le rôle du juge populaire, de telle sorte qu'il ne soit pas définitivement relégué au rôle d'« antiquité incapable de survivre dans une société, comme la société moderne »[77], demeure celle qui consiste à mettre en valeur la dialectique du procès afin de préserver cette « fraîcheur émotionnelle »[78] dont la composante non professionnelle apporte à la délibération finale et de rendre de cette manière efficace sa contribution au jugement.

[75] Dans le même sens, PETRINI, *Guidare la giuria verso la decisione giusta*, cit., p. 422. Du même avis, BOCCHI, *La partecipazione popolare in Assise nelle relazioni dei presidenti delle corti*, cit., p. 123, selon qui, si l'on veut garantir une certaine collégialité dans le prononcé, on ne peut se passer d'un organe qui soit homogène lorsqu'il s'agit de garantir « l'égalité d'information de ses membres ».

[76] De la même opinion GRASSO, *Giuria e Corte d'assise*, cit., p. 326, selon lequel « dans le jugement en appel, les défauts du jugement au premier degré sont encore exacerbés ». Dans le même sens, FIORELLI, *La Corte d'assise di fronte al sapere scientifico*, cit., p. 176, selon lequel dans le cadre du procès d'appel est encore exacerbé le « *déficit* cognitif » dont souffrent déjà les juges populaires au cours du premier jugement. Voir enfin, CAVALLA, *I giudizi di corte d'assise*, cit., p. 140, pour lequel la fonction « chorégraphique » des juges populaires atteint un niveau maximum dans les jugements en appel.

[77] Dans ce sens, AMODIO, *Giustizia popolare, garantismo e partecipazione*, cit., p. 1.

[78] L'expression est tirée de ALTAVILLA, *La Corte d'assise*, cit., p. 39.

TOMMASO SICA[*]

THE ROLE OF CREDITORS IN CORPORATE AND CONTRACT GOVERNANCE

ABSTRACT. *The essay deals with the impact on corporate and contract governance of creditor's intervention in the management of the financed company. In fact, the conventional notion according to which the creditor was not endowed with sufficient incentives to manage the company has gradually been overcome since the development of new contractual types that grant the lender conformative rights in the debtor company. By contrast, the contribution from the creditor might enforce both the entity's commercial operations and, in general, the market structures in which the debtor company participates.*

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1. The evolution of corporate governance rules

The expression 'corporate governance' refers to the set of rules that make it possible to balance the different interests and power relations involved in the management of a company, in order to allocate control efficiently[1]. In both Anglo-Saxon and Japanese-Rhine models these dictates are conceived on the contraposition between the company's shareholders, its owners in their various forms, and the directors, while other stakeholders are not traditionally recognised as having any effective management role[2].

[1] *Ex multis*: A. Gambino, *Governo societario e mercati mobiliari*, in *Giur. comm.,* 1997, I, p. 788 ss.; U. Tombari, *La nuova struttura finanziaria della società per azioni (*Corporate governance *e categorie rappresentative del fenomeno societario)*, in *Riv. soc.*, 2004, p. 1084 ss.; L. Enriques-P. Volpin, *Corporate Governance Reforms in Continental Europe*, in 21 *Journal of Economic Perspectives* 117 (2007); P. Montalenti, Società per azioni, *corporate governance* e mercati finanziari, Giuffrè, Milano, 2011; E. Ferran-L. Chan Ho, *Principles of corporate finance law*, II ed., Oxford University Press, Oxford, 2014; L. Gullifer-J. Payne, *Corporate Finance Law. Principles and Policy*, III ed., Bloomsbury, London, 2020. See also the essays in *Governo dell'impresa e mercato delle regole. Scritti giuridici per Guido Rossi*, I, Giuffrè, Milano, 2002.

[2] F. Barca, *Imprese in cerca di padrone. Proprietà e controllo nel capitalismo italiano*, Laterza, Roma-Bari, 1994, stylises the corporate governance rules of the various jurisdictions along certain common lines: (i) balance between ownership and control; (ii) provision of instruments that can take the place of ownership in the exercise of control; (iii) the presence of financial institutions within ownership structure and of guarantee instruments in favour of non-controlling owners. In recent years, despite traditionally incorporating the specificities of their legal systems of origin, corporate governance rules have become increasingly more harmonised on a global level. The Anglo-Saxon model of corporate law is essentially conceived on the distribution of capital among a multitude of shareholders, with the consequent need for a financial market structure capable of ensuring the contestability of control. Hence the central role played by large banking institutions. In the German model, banks also play a key role, centralising within their own structures the transactions associated with the exercise and transfer of control. Similarly, in the Japanese model, the role of the *keiretsu* stands out, a network set up between financial and insurance intermediaries and companies in which a bank holds a majority stake in the group. Lastly, in Italy, following the various reforms of company law, there has been a gradual shift away from a 'family' capitalist model to a system that is closer to the Japanese-Rhine model, with the possibility of choosing between a dualistic scheme, with a management board and supervisory board, and a monistic scheme, based on the presence of the board of directors and an internal management control committee. For a more in-depth analysis, see A. Nicita-V. Scoppa, *Economia dei contratti*, Carocci, Roma, 2005, p. 315 ss., in addition to J. Armour-Enriques-H. Hansmann-R. Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class*, in *The Anatomy of Corporate Law: A Comparative and Functional Approach*, III ed., Oxford University Press, Oxford, 2017, p. 50 ss. e R. La Porta-F. Lopez-de-Silanes-A. Shleifer, *Corporate Ownership Around The World,* National Bureau of Economic Research (NBER) Working paper n. 6625, available at the following link: <http://www.nber.org/papers/w6625>.

It is also worth recalling how these rules, which outline the procedures and principles governing the decision-making process, have developed, especially in recent decades, as a synthesis of the various theories of the firm that have been elaborated by the American scholars. It is therefore appropriate at this point to provide a brief overview of the main theories.

The earliest models of the "firm" in North American literature followed an approach aimed at valorising their function as mere production entities, without investigating their organisational characteristics. However, as early as the 1930s, Coase emphasised the ontological distinction between the firm and the individual, identifying the firm as an institution capable of ordering relations between a plurality of subjects[3]. The firm thus replaces the market, in that the traditional exchange relationship is replaced by a structure in which the entrepreneur directs production, placing himself at the centre of an 'internal' network of transactions[4].

In the wake of Coasian thought, Simon proposed the idea of the firm as a complex organisation aimed at managing the interests of a plurality of subjects and minimising transaction costs, given, however, not so much by the peculiarities of the market as by the limited rationality of the acting subjects[5].

Williamson, on the other hand, turning back to the two theoretical approaches outlined above, associated the concept of 'governance' with the firm, considering the latter as a private system endowed with its own rules. More specifically, the firm is attributed the role of governing exchanges capable of producing transactional costs, identifiable in limited rationality, in the scarcity of resources, and in opportunistic behaviours[6].

The Grossmann-Hart-Moore (GHM) model, however, elaborated a theory of the efficient allocation of property rights in the context of incomplete contracts. In

[3] R.H. Coase, *The Nature of The Firm,* in 4 *Economica* 386 (1937). See also Id., *The problem of social cost*, in 3 *Journal of Law & Economics* 1 (1960).

[4] G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, in 117 *Harvard Law Review* 1102 (2004).

[5] H.A. Simon, *New developments in the theory of the firm*, in 52 *American Economic Review* 1 (1962).

[6] O.E. Williamson, *The economic institution of capitalism,* The Free Press, New York, 1986.

particular, property rights are identified as a residual right to control, i.e., the right to decide on the use of the asset in all cases that are not foreseen, or not foreseeable, in a contract[7]. The firm, from this perspective, catalyses property rights over the various assets which it is made up of, attributing control to whoever holds the indispensable asset.

The theory of the 'nexus of contracts', which identifies the company as the common denominator behind a series of contractual relationships both within the company (between shareholders and managers, and between minority and majority shareholders), and outside the company (with the company's creditors, employees, suppliers, and customers)[8], has also obtained considerable success. According to this concept, the shareholders, having injected risk capital, then bear higher costs and have higher gains and thus become those with the highest incentives to exercise decision-making powers[9].

This reconstruction, however, has long since been revised, due to a number of corrections that have been made – such as the theory of the firm not as a network *of* contracts but as a "nexus *for* contracts" – in order to distinguish it from the other networks of contractual relationships, but also due to profound criticism, since this theory does not take into account the role that other subjects, such as the creditors, can take on in the governance of the enterprise, and above all, since it takes as its starting point the idea of the completeness of contracts, that regulate every aspect of the relationship between the parties from the very moment they are signed[10].

Whilst the first theories of the firm use as their reference model an entity in

[7] J. Grossman-O.D. Hart, *An Analysis of the Principal – Agent Problem*, in 51 *Econometrica* 7 (1982); Idd., *The costs and benefits of ownership: A theory of vertical and lateral integration*, in 94 *Journal of Political Economy* 691 (1982); Hart-J. Moore*, Property Rights and The Nature of The Firm,* in 98 *Journal of Political Economy* 1119 (1990); Idd., *Foundations of incomplete contracts,* 66 *Review of Economic studies* 115 (1999).

[8] A. Alchian-H. Demsetz, *Production, Information Costs and Economic Organization,* in 62 *American Economic Review* 777 (1972); Hansmann, *The Ownership of Enterprise*, Harvard University Press, Cambridge - London, 1996 (It. transl. *La proprietà dell'impresa*, edited by A. Zoppini, Il Mulino, Bologna, 2005); L. Zingales, *In search of new foundations*, in 55 *Journal of Finance* 1623 (2000); C. Marchetti, *La* 'nexus of contracts' theory: *teorie e visioni del diritto societario*, Giuffrè, Milano, 2000; K. Ayotte-Hansmann, *A nexus of contracts theory of legal entities*, in 42 *International Review of Law and Economics* 1 (2015).

[9] M. Mozzarelli, *Business covenants e governo della società finanziata*, Giuffrè, Milano, 2013, p. 79 ss.

[10] W. Bratton, *The "Nexus of Contracts" Corporation: A Critical Appraisal*, in 74 *Cornell Law Review* 407 (1989). See also G. Teubner, *Networks as Connected Contracts*, Bloomsbury, Oxford-Portland, 2011.

which ownership and control are bound together in the same subject, the phenomenon gradually emerges of the separation of ownership and control, in which the shareholders are attributed the role of residual claimants while the directors have control over the management of the company[11]. Hence the origin of managerial theories of the firm, above all that of Jensen and Meckling, which analyse the problems of agency between the firm's lenders and its management, in order to identify forms of governance that are most suitable for reducing such gaps[12].

The brief introduction above is a preface to the understanding of the models and requirements of a strictly economic nature analysed below, that have favoured the proliferation of clauses designed to give creditors ever-increasing power to intervene in the decisions of financed companies. As Posner stated: "*efficient company law should not favour corporate freedom or creditor protection, but endeavors to find a balance between these two objectives in a way that minimizes the cost of investment*"[13].

2. Creditors and the shareholder primacy theory

The assumption of shareholder primacy found in the theories of American doctrine in the past, according to which the objective of management is to increase the wellbeing of shareholders, has gradually been replaced by a wider vision in which the management of a company must be exercised by taking into account the interests of all

[11] According to Barca, *Le politiche del governo societario*, in A. Ninni-F. Silva (eds), *La politica industriale: teorie ed esperienze*, Laterza, Roma-Bari, 1997, p. 220, "*the essence of corporate governance lies precisely in freeing control from ownership, through the balancing of two opposing interests: the interest of the entrepreneur in exercising control over the company without interference and the interest of investors (creditors or shareholders) in protecting themselves against the risk of inefficient management of the financing received by the entrepreneur".* On the separation between ownership and control, see E. Fama-M. Jensen, *Separation of Ownership and Control*, in 26 *Journal of Law and Economics* 301 (1983), and F.H. Easterbrook-D.R. Fischel, *The Economic Structure of Corporate Law*, Harvard University Press, Cambridge-London, 1991.

[12] M.C. Jensen-W.H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, in 3 *Journal of Financial Economics* 305 (1976).

[13] R.A. Posner, *The Rights of Creditors of Affiliated Corporation,* in 43 *University of Chicago Law Review* 499, 509 (1976).

the actors involved, from shareholders to creditors, and from customers to suppliers[14]. Despite this, the influence of the creditor on the debtor company was initially ignored and relegated to the rank of an episodic phenomenon, only of any importance when a company crisis was approaching[15]. The challenge of corporate governance, which focusses on achieving a balance between ownership and control, with the aim of leading the directors' discretionary power towards the interests of the shareholders, thus did not benefit from the potentially crucial role of creditors[16].

The lender is commonly associated with a position of passivity, merely waiting to receive payment, which is occasionally counterbalanced by the activation of contractual remedies in the case of default or the approaching of a company crisis[17]. It was, therefore, the shareholders who were also recognised as having the function of monitoring the performance of the entity's economic activity, since creditors were not considered to have adequate incentives.

However, it should be noted that commercial practice, which more and more frequently provides for the inclusion of ancillary clauses in financing contracts, giving the creditor powers to intervene in the management of the financed company, has made the need to determine whether a contribution to the management of the company could come from creditors – especially bank creditors –[18].

Law and economics literature focuses on the relationship between the management and the shareholders of the firm as a fiduciary duty – and thus one of loyalty – of the former towards the latter. It is also often pointed out that directors and shareholders do not always have any unmediated interaction, as both have a contract

[14] M.E. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts and the Dual Nature of the Firm,* in 24 *Journal of Corporate Law* 834 (1999).

[15] F. Tung, *Leverage in the Boardroom: The unsung influence of private lenders in corporate governance,* in 57 *UCLA Law Review* 115, 118 (2009).

[16] H.G. Manne, *Mergers and the Market for Corporate Control,* in 73 *Journal of Political Economy* 110, 112-14 (1965).

[17] Tung, *Leverage in the Boardroom: The unsung influence of private lenders in corporate governance*, cit., p. 119 concerning the role of creditors in traditional corporate governance states succinctly that "*They are simply not a part of the classic corporate governance story".*

[18] L. Picardi, *Il ruolo dei creditori fra monitoraggio e orientamento della gestione nella società per azioni,* Giuffrè, Milano, 2013, p. 112.

directly with the company. The directors perform their duties vis-à-vis the company and thus only indirectly vis-à-vis the shareholders. The latter, however, turn out to be the ultimate beneficiaries of the managers' actions, since they are the ones who own the company's shares. Hence the origin of a model in which a duty is placed on the directors to protect the company's shareholdings.

Such a scenario is not traditionally present in the relationship with the company's creditors. The difference between the latter and the shareholders is identified by scholars in the shareholders' position as residual claimants. The shareholders' contract with the company is more fragile than that of the other stakeholders, since, as bearers of residual risk, the shareholders are the last to receive the cash flows generated by the economic activity and effectively hand over control of the company to the directors[19].

In modern capitalist economies, the broad autonomy accorded to directors is in fact justified by the need for them to constantly make complex decisions, which require weighing up the aspects of specific concrete cases, which are difficult to foresee *ex ante* on a contractual basis. The result is a framework in which the management of the company is left to the evaluations and discretion of those vested with decision-making power. Hence the idea of the greater vulnerability of shareholders, who are at risk of the danger of directors pursuing their own personal interests.

3. The issue of incomplete contracts

Having clarified the marginal role of creditors in 'traditional' corporate governance, a further consideration must be made in order to understand the motivations behind the lender governance phenomenon. Reference here is made to the dogma of incomplete contracts, according to which in the real world it is not possible, on the basis of the information provided by the parties at the time of its conclusion, to draw up a contract capable of regulating all aspects of the relationship between the contracting parties, and between the latter and interested third parties[20]. Conversely,

[19] Easterbrook-Fischel, *The Economic Structure of Corporate Law*, cit., p. 30.

[20] O. Hart-B. Holstrom, *The theory of contracts* in *Advances in Economic Theory*, edited by T. Bewley, Cambridge

one must be aware of the ontological inability of the contract to ensure maximum functionality at all stages of the relationship and between all parties involved.

The reasons for this assertion are to be found in the considerations of behavioural law and economics, which take as their starting point the impossibility for the human mind to collect, process and comprehend an unlimited amount of information. This is due both to the cognitive limitation of contracting parties and to the existence of information asymmetries between them[21].

The incompleteness of contracts therefore imposes a change in the concept of the contract[22]. The so-called 'sanctity of contract', given the *ex-ante* impracticability of drawing up a contract that takes into account all possible unforeseen events or variation in terms, is replaced by a more flexible idea of the contract that is anchored to factual reality[23]. In this way, the agreement becomes a mere summary of the regulation desired by the parties, and contains only the essential guidelines, leaving open the possibility of renegotiation, or a mere modification of certain clauses, in the event of changes to the structure of interests originally agreed upon. The impracticability of a complete and exhaustive set of clauses, capable of providing for all contingencies and protecting all actors from the moment it is signed, confers dynamism on the contractual instrument,

University Press, Cambridge, 1987, p. 71 ss.; HART-MOORE, *Foundations of incomplete contracts,* cit., p. 115 ss.; J. TIROLE, *Incomplete Contracts. Where Do We Stand?,* in 67 *Econometrica* 741 (1999); W. MACLEOD, *Complexity and Contract,* in E. Brousseau-J.M. Glachant (eds), *The Economics of Contracts. Theories and Application*, Cambridge, 2002; A. KEAY-H. ZHANG, *Incomplete Contracts, Contingent Fiduciaries and A Director's Duty to Creditors*, in 32 *Melbourne University Law Review* 141, 156 (2008).

[21] KEAY-ZHANG, *Incomplete Contracts, Contingent Fiduciaries and A Director's Duty to Creditors*, cit., p. 154 state that "*In other words, the contracting parties are not able to foresee the future perfectly, although some may know more about something than others".* See also *Oltre il soggetto razionale. Fallimenti cognitivi e razionalità limitata nel diritto privato*, edited by G. ROJAS ELGUETA-N. VARDI, Roma, 2014, *passim.*

[22] For a thoughtful survey of contract theories, issues and cases in order to reassess the field's present vision of contract law, see the essays in *Comparative Contract Law*, edited by P.G. Monateri, Edward Elgar Publishing, Cheltenham-Northampton, 2018. The relationship between contract and economic theory is analyzed by R. COOTER-U. MATTEI-MONATERI-R. PARDOLESI-T. ULEN, *Il mercato delle regole. Analisi economica del diritto civile*, I, Il Mulino, Bologna, 2006, ch. 3.

[23] F. MACARIO, *Regole e prassi della rinegoziazione al tempo della crisi*, in *Crisi finanziaria e categorie civilistiche,* edited by G. Alpa-E. Navarretta, Giuffrè, Milano, 2015, p. 61 ss.

which ultimately can adapt to changing circumstances[24].

Incompleteness also manifests itself with regard to the opportunistic behaviour of the parties aimed at maximising self-interest. Due to information asymmetry, contractors are not always able to recognise such conduct at the negotiation stage and find themselves facing disputes during the execution stage[25]. Here again, one of the reasons for incomplete contracts is related to the cost and time involved in defining an agreement that is as complete as possible. This circumstance often makes it preferable to include a mere mapping of the main elements of the agreement in the contract, leaving the concrete implementation of the arrangement of interests to a later date. Reference must then be made to the costs of negotiation and those necessary to obtain a judicial enforcement of the agreement, with the risk, moreover, that an external authority may be unable to verify and analyse the relevant information[26].

Hence contractual incompleteness can be a source of inefficiency, since the difficulty of ascertaining all the terms of the agreement undermines the character of absolute binding force attributed to reciprocal promises, leading the parties to disregard the agreement in its entirety. The contract becomes, in this context, a set of declarations that can always be renegotiated, not fulfilling a pareto-efficient function from the moment it is signed[27].

Moreover, assuming the incomplete nature of the contract implies overcoming the idea, typical of the nexus of contract theory, according to which the efficient attribution of decisional rights can only take place in favour of the category that bears the highest costs but also obtains the highest revenue, i.e., the shareholders[28]. In fact,

[24] See the monographs of G. Bellantuono, *I contratti incompleti nel diritto e nell'economia*, Cedam, Padova, 2000 and A. Fici, *Il contratto incompleto*, Giappichelli, Torino, 2005.

[25] Added to this there is the difficulty for the courts to verify beyond doubt the opportunistic behaviour. See T. Muris, *Opportunistic Behaviour and the Law of Contracts,* in 65 *Minnesota Law Review* 521 (1981).

[26] Hence the identification of the incomplete contract as a contract that cannot be verified *ex post facto* by the party obliged to settle the dispute and therefore not fully enforceable. Nicita-Scoppa, *Economia dei contratti*, cit., p. 195 ss.

[27] Thus, the risk of post-contractual opportunism ("hold-up") arises for the party making a specific investment in the presence of an incomplete contract. This risk is embodied in the possibility that at any time the counterparty may renegotiate or terminate the contractual relationship. Nicita-Scoppa, *Economia dei contratti*, cit., p. 197.

[28] Mozzarelli, Business covenants *e governo della società finanziata*, cit., p. 81 underlines how the *nexus of contract*

the relationship that is established between the company and the financing parties, like any other long-term relationship, must necessarily be conceived as dynamic, with the awareness that time and originally unforeseeable events are capable of altering the scenario outlined at the time the agreement is signed. The contract, therefore, while it may aspire to completeness, is not ontologically capable of containing all the variables that may manifest themselves in a relationship[29].

It follows that, with specific regard to the contract between the company and creditors, the agreement cannot *ab origine* regulate every single factual change capable of affecting the terms agreed upon, but it can certainly regulate the decision-making process[30]. The change in the reference paradigm is evident, considering that in a model that assumes the contract to be complete, the need to include the lender among the actors involved in the governance of the debtor enterprise does not arise. In this hypothesis, the contractual protection is considered to be full and is unaffected by the decisions of the shareholders. On the other hand, the attribution of an incomplete nature to the contract implies the insufficiency of the transaction to guarantee creditors full protection. The decisions of the partners are potentially capable of generating negative consequences on the rights of the lenders, thus raising the question whether it could be useful to allow creditors to enter into the governance of the debtor company.

Ultimately, the path outlined above, which has led to the emergence of the phenomenon of lender governance – which is covered in the following section – denotes the idea that, far from attributing decision-making power to a single category of subjects, it may be beneficial to allocate decision rights in the financed enterprise by reasoning in terms of greater efficiency.

theory bases this assumption on the different incentives that influence stakeholders and creditors. The latter, in view of their pre-established claim, would be indifferent to any greater gains obtained by the financed company.

[29] A diametrically opposite dynamic is referred to in the so-called 'merger clauses', an expression used to indicate clauses placed at the foot of international contracts in which the parties state that the signed document represents the 'entire agreement', and anything not included therein does not assume any binding value between the parties. On this subject, see the monograph of M. Foglia, *Il contratto autoregolato: le* merger clauses, Torino, 2015.

[30] Mozzarelli, Business covenants *e governo della società finanziata*, cit., p. 86.

4. Creditors' involvement in the governance of debtor company

That being said, the following considerations must be made with regard to the position of the company creditors[31]. The marginal role reserved for them by studies on corporate governance is based, as demonstrated above, on the idea that shareholders bear a greater risk than other stakeholders. The company's financiers are the bearers of claims that can be defended in courts of law with a predefined amount, and not potentially unlimited, as is the case with residual claimants[32]. Moreover, they tend to benefit from more comprehensive contractual schemes that provide a certain amount of protection, which is not always the case in the relationship between directors and shareholders. It is clear, however, that even if one wishes to adhere to such a reconstruction, the need to protect the position of creditors, whether or not it is more or less 'inconvenient' than that of the shareholders, remains. On the contrary, it is worth asking whether the risk to which the creditors are subject might not justify the inclusion of a legally binding obligation on the debtor company to take account of creditors' expectations.

This risk can be seen when a debtor company engages in opportunistic behaviour, a phenomenon that can be broken down into two elements: the opportunism of shareholders and that of the managers[33]. With regards to the shareholders, the ontological structural difference between their claims and the creditor's claims has already been emphasised, with a consequent divergence also in terms of incentives. Faced with a fixed claim by the creditor, the shareholder is induced to undertake more risky actions, given that any increase in income would not entail a change in the magnitude of the creditor's claim considering that, on the contrary, they would in any case bear the risk of the debtor company's eventual bankruptcy[34]. At the same time,

[31] *The Law and Economics of creditor protection*, edited by H. Eidenmüller-W. Schön, Asser Press, The Hague, 2008.

[32] V. Acharya-Y. Ahimud-L.P. Litov, *Creditor Rights and Corporate Risk-Taking*, in 102 *Journal of Financial Economics* 150 (2011).

[33] Armour-Hertig-Kanda, *Transactions with creditors*, in *The anatomy of corporate law. A comparative and functional approach,* cit., p. 115.

[34] L. Enriques-A. Romano, *Rewiring Corporate Law for an Interconnected World*, in 64 *Arizona Law Review* 51 (2022).

however, since the creditor's claim would have to be satisfied before that of the shareholders, the latter might be disincentivised from engaging in transactions capable of ensuring an immediate positive net value, since they would only produce benefits for the lenders.

With regard to the opportunism of the decision-making body, the problem that arises is primarily related to the risk of directors pursuing their own self-interest. Moreover, even where this is not the case, it must always be remembered that the directors are bound by a fiduciary relationship with the shareholders, which requires them to defend this category of investors[35]. The creditor can resolve the problems outlined above *ex ante* by implementing a contractual scheme that can raise his level of protection. However, it is unlikely for cognitive and informational limitations to allow for the stipulation of a contract that is so complete that it takes into consideration all forms of opportunistic conduct. On the other hand, the control of the company and full knowledge of its performance still remains with the directors, who could use this circumstance to their own advantage in pursuit of their own personal interest as well as that of the shareholders.

In such a scenario, it is easy to understand the usefulness of clauses, such as covenants, aimed at limiting the *ex-post* discretion of the decision-making body on investment choices and requiring the disclosure of information relevant to the repayment of the loan[36]. By means of such covenants, the creditor tends to gradually secure portions of the financed company's management in order to avoid waiting passively for its fulfilment, with the risk that the debtor may become insolvent. The objective is thus to ensure that the company's strategic decisions are implemented in a prudent manner and taking into account the interests of all parties involved[37].

When creditor involvement is not episodic, but has a constant influence on decision-making processes, it is known as 'lender governance', i.e., the more or less

[35] G. Nini-D. Smith-A. Sufi, *Creditor Control Rights and Firm Investment Policy*, in 36 *Journal of Financial Economics* 92 (2009).

[36] C. Zimmermann, *An Approach to Writing Loan Agreement Covenants*, in 58 *Journal of Commercial Bank Lending* 2 (1975).

[37] In this way the creditor aims to prevent a business crisis by bringing forward the monitoring phase.

direct management of the company by its creditors[38]. This phenomenon arises when covenants are breached. The breach of the obligations contained in the covenants betrays the debtor's inability to meet the commitments related to the financing, as this would lead to the default of the company[39]. On the other hand, the creditor, aware of the debtor's objective inability to meet the payment obligation, rather than implementing the forfeiture of the benefit of the term, enters into new negotiations, renegotiating the terms of the loan. The gradual mechanism triggered by the breach of covenants and the subsequent renegotiation gives the creditor progressively more involvement in the management of the company. This is, in any case, a physiological outcome, given how easy it is to breach covenants and the consequent need for directors to provide explanations to lenders[40].

The lender at this point prefers to keep the relationship with the financed company alive, assuming partial or even total control of it. Such a solution may in fact prove to be more fruitful than the abrupt termination of the financing, where the risk of the debtor's incapacity becomes even more apparent. Conversely, through lender governance, the financed enterprise is guided towards more prudent management.

It is therefore necessary to investigate the actual impact of creditors on the company's choices, on the assumption that the phenomenon is widespread not only in the crisis phase but also in the contractual practice correlated to the normal course of business[41]. It is also essential to consider a possible convergence between the interests of the shareholders and those of the creditors, with the aim of identifying an efficient allocation of decision-making powers in view of increasing the value of the company[42].

[38] A.D. Scano, *Debt covenants e governo delle società per azioni solventi: il problema della* lender governance, in *Nuovo dir. soc.,* 2011. p. 14 ss.

[39] Tung, *Leverage in the Boardroom: The Unsung Influence of Private Lenders in Corporate Governance,* cit., p. 135.

[40] Scano, *Debt covenants e governo delle società per azioni solventi: il problema della* lender governance, cit., p. 22; M. Roberts-Sufi, *Control Rights and Capital Structure: An Empirical Investigation*, in 64 *Journal of Finance* 1657, 1666 (2009).

[41] Undoubtedly, the worsening of the company's economic-financial conditions increases the prevalence of the phenomenon, although forms of intervention, including some that are fairly invasive, can occur even if the company does not go bankrupt.

[42] L. Miotto, *Il controllo creditorio difensivo*, Giappichelli, Torino, 2017, p. 151 ss.

This rapprochement could also be brought about by the objective of monitoring the actions of the directors, which are characterised by a greater propensity to risk. In this perspective, the exchange of information, obtained by each actor through different channels, together with the reaction instruments attributed to them by law or by contract, may prove useful for the creation of a more efficient model of corporate governance[43].

Lender governance therefore leads to a rethinking of corporate governance, which is thus conceived in a dynamic and 'interactive' perspective where the set of management rules is produced by the interaction between the various actors[44]. If all parties involved in the management of the enterprise adhere to the goal of limiting managerial slack, the action of the creditor bank, structurally able to devote adequate resources to monitoring the debtor, can benefit all other stakeholders unable to exert sufficient influence on the debtor. The sharing of signals and information among the various creditors is also reflected in the activation of remedies, which vary according to the type of relationship. Thus, a system is generated in which each actor reveals the information he obtains about the debtor's activity to the others, delegating the monitoring and reaction to the subject that, by structure and capacity, is able to act more efficiently.

This results in a broader conception of governance, aimed at maximising the value of the company and also including the perspective of the stakeholders. In structural terms, it is divided into a supervisory phase, in which data on the company's management is acquired and processed, and a reaction phase, which is only implemented when the supervisory phase has identified an unfavourable scenario.

However, it must be borne in mind that there remains a risk to other creditors that the bank will take actions to consolidate its position to the detriment of other stakeholders. American scholars generally identify four types of conflicts: (i) those

[43] In fact, directors may be induced to adopt a more responsible conduct as a result of the activation or prospect of sanctions and remedies, such as the forfeiture of the operation of the acceleration clause, the implementation of voice powers, the revocation of one or more managers. In addition, any action taken by one actor may also benefit the other categories involved, especially those who, in relation to the specific event, have greater incentives to intervene in a reactive manner. See M.J. Roe-F. Cenzi Venezze, *A capital market, corporate law approach to creditor conduct*, in 112 *Michigan Law Review* 59 (2013).

[44] Triantis-Daniels, *The role of debt in interactive corporate governance*, cit., p. 1079.

generated by the bank's premature exit from the lending relationship, for reasons other than the correction of managerial slack; (ii) those generated by the bank's negligence, which takes action too late due to the limitation of management opportunism iii) those related to the deterioration of the economic conditions of the debtor company and the consequent exploitation by the bank to renegotiate the terms of the agreement to its own advantage; iv) those connected to the bank's implementation of remedies aimed at correcting the management's action but orienting the management of the company to its own exclusive liking[45]. In fact, it is evident that debt can lead to the bankruptcy of the financed company, where the latter is unable to satisfy the creditor's claims, or to the decrease in the value of shareholdings, increasing the risk of acquisition[46].

The objective of this article is in fact not to recommend one model over another, but rather to prompt reflection on the advisability and consequences of the entry of creditors into the governance of the debtor company. In this sense, it cannot be denied that the recourse to debt and the entry of creditors into management pushes directors to maximise profitability and avoid bankruptcy – also to avoid reputational repercussions in the reference market –. Debt also influences investment policies, since the limitation imposed by covenants on the company's financial management, if accompanied by shrewd decisions of the directors, can result in an increase in company performance[47]. Hence, greater debt exposure offers managers with more honed management skills the opportunity to show their qualities, distinguishing themselves from their counterparts who expose themselves to a greater risk of bankruptcy[48]. Conversely, however, managers with established experience are more likely to operate with lower leverage or spread over longer terms in order to escape from the constant influence of creditors over their actions[49].

[45] Triantis-Daniels, *The role of debt in interactive corporate governance*, cit., p. 1090.

[46] On this point, see C.K. Whitehead, *The Evolution of Debt: Covenants, the Credit Market, and Corporate Governance*, in 34 *Journal of Corporation Law* 641 (2009).

[47] Consider also that, by increasing the debt, the contractual obligation to make future payments reduces agency costs related to cash flow, as there is less liquidity available to the directors for discretionary use. On this point, see R.M. Stulz, *Managerial Discretion and Optimal Financing Policies*, in 26 *Journal of Financial Economics* 3 (1990).

[48] Grossman-Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, cit., p. 691.

[49] G.T. Garvey-G. Hanka, *Capital Structure and Corporate Control: The Effect of Antitakeover Statutes on Firm*

Debt governance thus represents a fundamental piece of corporate governance. If properly managed, debt can boost corporate productivity by disciplining managers and containing agency costs produced by conflicts between the various actors involved in the company's affairs. It is no coincidence that lender governance has also been discussed in doctrine as a 'missing lever' of corporate governance, i.e., as an innovative and efficient tool capable of revolutionising traditional corporate governance[50].

However, the acquisition of control by the lender also exposes the company to opportunistic conduct by the latter. While it is true that banks are endowed with incentives and structural requirements that prevent the formation of typical director biases, it is also evident that the lender, unlike managers, is not subject to a fiduciary duty towards the company. Therefore, the maximisation of the lender's welfare does not necessarily lead to the maximisation of the financed company's wellbeing. It is useful to emphasise that, notwithstanding the lender liability that can be incurred by the creditor/manager for engaging in abusive conduct to the detriment of the debtor, there are at least two factors that severely limit the possibility of the lender engaging in opportunistic conduct.

First, if the creditor's action consists of a breach of contract, they are without doubt liable for damages for non-performance, having to bear additional costs over and above those associated with monitoring the debtor.

Another key factor is that of reputation. As a rule, the bank lender is larger than the financed company and does not limit its relations to the latter or to companies in the same sector. Engaging in misconduct could then result in damage to the good name of the institution, which, in light of the fierce competition in the credit market, could potentially prove very risky[51].

However, the resilience of the model outlined so far is closely related to the

Leverage, in 54 *Journal of Finance* 519 (1999); L.L. Lundstrum, *Entrenched Management, Capital Structure Changes and Firm Value*, in 33 *Journal of Economics and Finance* 161 (2009).

[50] This expression is taken from D.G. Baird-R.K. Rasmussen, *Private Debt and The Missing Lever of Corporate Governance,* in 154 *University of Pennsylvania Law Review* 1209 (2006).

[51] D. Fischel, *The Economics of Lender Liability*, in 99 *Yale Law Journal* 131, 138 (1989). This is further corroborated by the growing phenomenon of reputational algorithms, on which see for e.g., Trib. Roma, 4 April 2018, with a note by G. Giannone Codiglione, *Algoritmi reputazionali e confini dell'autonomia dei privati*, in *Dir. inf.*, 2019, p. 520 ss.

flexibility it can show with respect to changes in the credit market. From the traditional lack of liquidity linked to the existence of debt, the last few years have seen an increase in free cash flow and greater competition at a qualitative and quantitative level between the various intermediaries[52]. The possibility of resorting more easily to various credit risk reduction instruments, above all factoring, is resulting in a reduced interest on the part of banks to exercise the prerogatives attached to credit until maturity[53]. The same consequence leads to competition among the sector's operators, who are incentivised to turn to the secondary market on which to relocate credits - all the more so when they have high risk profiles[54]. These solutions are certainly more economical than the establishment of a system of monitoring and control over the financed company, although at present there is no certainty as to the definitive abandonment of lender governance schemes following the development of credit derivatives and the secondary credit market.

5. The rise of contract governance

The preceding paragraphs have demonstrated the need to take into account the effects on the reference market of the choices related to debt management and the hetero direction taken by the creditor. Cost-effectiveness must therefore be assessed not only

[52] Picardi, *Il ruolo dei creditori*, cit., p. 119; C.K. Whitehead, *Creditors and Debt Governance*, Cornell Law School Research Paper No. 011-04, February 12, 2011, available on the <website http://ssrn.com/abstract=1760488>.

[53] This scenario has led to the emergence of a true market for impaired loans, within which the most widespread operation is certainly the securitisation of loans under Law 130/1999. On this point, see for example, U. Violante, *La circolazione del credito «distressed»*, Giuffrè, Milano, 2013.

[54] P. Schlesinger, *Il primato del credito*, in *Riv. dir. civ.,* 1990, I, p. 825, argues for the centrality of the credit industry as vital to the development of other economic sectors, highlighting the shift from a system based on the static enjoyment of goods to one based on contractualisation and business activity, in which a crucial role is played by financial and service-producing activities, and in which obtaining credit is essential to be able to operate in the market. This subject has recently been taken up by V. Confortini, *Primato del credito. Responsabilità patrimoniale ed espropriazione privata nell'economia del debito*, Jovene, Napoli, 2020, which emphasises how the primacy of credit has led to a progressive commodification of credit and the financialisation of the economy, characterised by companies making recourse to tradable securities rather than bank financing and the consequent expansion of intermediaries' activities in the trading of securities rather than in the granting of credit. In essence, what is being traded is not so much the asset or money itself as the access to these assets.

with regard to the mere creditor-debtor relationship, but also in view of the systemic repercussions. In this perspective, then, it seems appropriate to read the issue from the perspective of contract governance, which serves as a link between the theory of governance and the general theory of the contract[55]. Whilst governance is defined as the institutional matrix within which transactions are negotiated and executed, its rules are necessary where risks of opportunism arise, or third-party interests are involved[56]. From a contractual perspective, the use of governance structures becomes crucial where the agreement does not consist of a one-off exchange, but rather of long-term or network relationships, where the risk of opportunistic behaviour is particularly high[57].

However, the focus on contract governance is fairly recent, as, traditionally, scholars have studied governance only with regard to the organisation of the corporate structure. Undoubtedly, corporate governance has played (and still plays) a crucial role since it is able to address familiar themes from a new, sometimes much broader, research perspective. It is not simply limited to ordering the architecture of the internal structures of a company, but also takes into account their market-oriented nature. Moreover, in an increasingly financial and global economy, corporate governance provides a common language that transcends borders and makes it easier to compare legal rules and facts.

That said, the financial crises have made clear the need to pursue not only the stability of individual players but that of the market as a whole. And, in this sense, contract governance plays a much broader role than corporate governance. It provides a research approach that deals with the institutional framework within which contractual relationships are put in place and which verifies what consequences the economic, legal,

[55] The most complete contribution on this subject is that of *Contract Governance. Dimensions in Law & Interdisciplinary Research*, edited by S. Grundmann-F. Möslein-K. Riesenhuber, Oxford University Press, Oxford, 2015. See also the review by F. Mezzanotte in *Annuario Del Contratto 2015*, directed by A. D'Angelo-V. Roppo, Giappichelli, Torino, 2016, p. 246 ss.

[56] Cfr. O.E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, in 22 *Journal of Law and Economics* 233 (1979).

[57] Möslein, *Contract Governance within Corporate Governance – A Lesson from the Global Financial Crisis*, in *The Organizational Contract. From Exchange to Long-Term Network Cooperation in European Contract Law*, edited by Grundmann-F. Cafaggi-G. Vettori, Routledge, London-New York, 2013, p. 293 ss.

social and cultural effects of the agreement may generate in the relevant market[58]. This approach is consistent with the idea of contract law as an auxiliary infrastructure, intended both to give market participants as much contractual freedom as possible, but also to support the long-term stability of markets[59]. Ultimately, the contract is not regarded as having effects only between the parties, but its impact on third parties is assessed in a systematic manner[60].

Hence, contract governance can be understood in a twofold sense: on the one hand, governance by contract[61], which emphasises the regulatory function pursued through the contract, and on the other hand, governance through contract[62], understood as the sum total of the negotiating instruments adopted to manage a relationship between two subjects[63].

[58] S. Patti, *Contractual Autonomy and European Private Law*, in *Rules and Principles in European Contract Law,* edited by J. Rutgers-P. Sirena, Intersentia, Cambridge-Antwerp-Portland, 2015 p. 123 ss.; Mezzanotte, *Regulation of Business-Clients Relationships through 'Organisational Law'*, in *European Review of Contract Law*, 2017, p. 123 ss., esp. p. 126.

[59] H. Collins, *Regulating Contracts,* Oxford University Press, Oxford, 2002, spec. p. 225 ss.

[60] A. Zoppini, *Autonomia contrattuale, regolazione del mercato, diritto della concorrenza* in *Contratto e Antitrust,* edited by G. Olivieri-Zoppini, Laterza, Roma-Bari, 2008, p. 3 ss.; Id., *Funzioni del diritto privato e tecniche di regolazione del mercato*, in *Funzioni del diritto privato e tecniche di regolazione del mercato*, edited by Zoppini-M. Maugeri, Il Mulino, Bologna, 2009, p. 15; V. Ricciuto, *Regolazione del mercato e "funzionalizzazione" del contratto* in *Studi in onore di Giuseppe Benedetti,* Napoli, 2008, p. 1615 ss.

[61] J.E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, in 106 *California Law Review* 373 (2018); Riesenhuber, '*Schatten des Rechts – Contract Governance und Governance der Vertragsverhandlungen bei der SE-Mitbestimmung*' in *Festschrift for Klaus Hopt*, Berlin, 2010, p. 1225 ss.

[62] P. Zumbansen, *The Law of Society: Governance Through Contract*, in 14 *Indiana Journal of Global Legal Studies* 191 (2007) underlines also that: "*Contracts, in this view, reflect society's differentiation into many, highly specialized areas of social activity. This approach sees contracts as constituting a radicalized form of an endless self-reproduction of differences, which reflects and is intimately linked to the eternal destruction of societal unity into fragmented, functional societal discourses*". See also Id., *Law, Economics, and More: The Genius of Contract Governance*, in *Contract governance*, edited by Grundmann-Möslein-Riesenhuber, cit., p. 80 ss.

[63] The central role of contract governance emerges especially in view of the progressive European integration at economic level. From this perspective, the contract, as regulated *ab externo*, contributes to the smooth functioning of the European Union's single market by removing obstacles to the protection of competition and the free choice of consumers, investors, and customers. This is discussed at length by Zoppini, *Il contratto asimmetrico tra parte generale, contratti di impresa e disciplina della concorrenza*, in *Riv. dir. civ.,* 2008, p. 515 ss. and Mezzanotte, *Regulation of Business-Clients Relationships through 'Organisational Law'*, cit., p. 123 ss. Concerning the same function performed by all private law rules, see R. Weigmann, *L'interpretazione del diritto societario armonizzato nell'Unione*

The first definition thus allows for purposes beyond those envisaged by the parties to enter into the contract[64]. This view was generated with the advent of regulation which implied a functionalisation of the relationship between private parties that was quite evident, as opposed to the objectives that the legislature intended to achieve with the civil code, which was essentially aimed at dictating the conditions of recognisability and validity of the individual contractual act[65]. From this new perspective, the contract becomes the most suitable instrument for resolving failures: regulation extends its assessment to the market impact of the individual transaction, verifying its advantageousness within the system[66]. Such a function is absent in the logic of the Italian civil code, where the focus is placed solely on the correct procedure for the formation of the will of the individual, without the consideration, on a broader scale, of the congruity between the interest pursued by the parties and the impact, on the market in which the transaction is placed, of the benefits obtained[67].

Concerning the second notion, this emphasises the capacity of the contract to regulate a transaction that is more complex than the contractual case typified by the Italian civil code. The contract is no longer the object of mere interpretation and qualification but becomes the ideal means of channelling the changing needs of the

europea in *Contr. impr. Eur.,* 1996 p. 487 ss.; G. Comparato-H.W. Micklitz, *Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU*, in *General Principles of EU Law and European Private Law*, edited by U. Bernitz-X. Groussot-F. Schulyok, Wolters Kluwer, Alphen aan den Rijn, 2013, p. 121 ss. See also M. Libertini, voce *Concorrenza*, in *Enc. dir., Annali*, Milano, 2011, p. 191 ss. e D. Corapi, voce *Impresa (diritto comunitario)*, in *Enc. dir., Annali*, Milano, 2007, p. 734 ss.

[64] This is the perspective of the so-called "libertarian paternalism", respect to which, see R.H. Thaler-C.R. Sunstein, *Libertarian Paternalism,* in 93 *American Economic Review* 175 (2003); Thaler-Sunstein, *Nudge. Improving Decisions About Health, Wealth, and Happiness,* Penguin Publishing, New York, 2008; Sunstein, *Deciding by Default*, in 162 *University of Pennsylvania Law Review* 1 (2013).

[65] Zoppini, *Autonomia contrattuale, regolazione del mercato, diritto della concorrenza*, cit., p. 3 ss.

[66] Zoppini, *Funzioni del diritto privato e tecniche di regolazione del mercato,* cit., p. 15 ss.

[67] D. Simeoli, voce *Contratto e potere regolatorio (rapporti tra)*, in *Dig. disc. priv., sez. civ.*, agg., Torino, 2014, p. 94 ss.; F. Venosta, *Contratti regolati e rimedi civilistici*, in *Oss. dir. civ. comm.*, 2016, 98 e segg.; C. Ferrari, *I contratti dei mercati regolati,* Giappichelli, Torino, 2018, p. 156 ss.; A. Nervi, *Il contratto come strumento di conformazione dell'assetto di mercato* in *I poteri privati e il diritto della regolazione*, edited by P. Sirena-Zoppini, Roma Tre University Press, Roma, 2018, p. 507 ss.; C. Solinas, *Il contratto amministrato*, ESI, Napoli, 2018, p. 193 ss.

parties into a long-term relationship[68].

Moreover, one of the most innovative aspects introduced by governance theory is related to the focus on human behaviour, and thus on the incentives and ways in which actors make decisions[69]. The revolutionary scope of this approach made it possible to overcome the rigid dichotomy between the State and private actors, which had characterised the phase of 'dirigisme' in the 1970s and had nevertheless led to a crisis of law, summarised by the term *'steuerungskrise des rechts'*[70]. The advent of governance, on the other hand, broadened the view to include the interactions between the public and private elements, in order to verify the impact on the system of both the rules and the actions of citizens[71]. This is based on a precise conviction in policy terms: that lesser rigidity in the rule is accompanied by a greater range of reactions on the part of the private actor. This is exactly what happens in the contractual sphere where the parties' conduct is guided by mutual consent in the presence of flexible and non-hierarchical rules[72]. If, therefore, the parties are able to negotiate even if they may be in conflict with

[68] F. Bartolini, *Strutture contrattuali complesse. Problemi della trilateralità nei contratti di finanziamento*, ESI, Napoli, 2019, p. 13 warns, however, that the perspective of contract governance and in particular that of governance through contract, while sharing the function of constructing contractual regulation outside the mere dynamics of the exchange of goods or services, should not be confused with the concept of normative contracts. The latter, according to the author, "*is a category that – even though their effects and notion are debated, and despite the fact that their boundaries are very fluid – finds indirect typifications in the civil code and in specific legislation, in a framework that, albeit original, remains within the traditional framework of the contract identified in the traditional way by the codified model of general and special parts*". For a more in-depth look at normative contracts, see, amongst others, G. Guglielmetti, *I contratti normativi,* Padova, 1969; A. Gentili, *Sull'interpretazione dei contratti normativi*, in *Contr. impr*., 1999, p. 1162 ss.; A. Orestano, *Accordo normativo e autonomia negoziale*, Cedam, Padova, 2000; G. Gitti, *Appunti sull'accordo normativo*, in *Riv. dir. priv*., 2002, p. 249 ss.

[69] On *behavioral law and economics* as an approach that can anticipate the responses of individuals to legal norms, see the essays contained in *Oltre il soggetto razionale*, edited by Rojas Elgueta-Vardi, cit.

[70] E. Schmidt-Assmann, *Gefährdungen der Rechts- und Gesetzesbindung der Exekutive*' in *Festschrift for Klaus Stern*, C.H. Beck, München, 1997, p. 745 ss.; *Contract Governance*, edited by Grundmann-Möslein-Riesenhuber, cit., p. 42.

[71] Zoppini, *Il diritto privato e i suoi confini*, Il Mulino, Bologna, 2019, p. 171 ss., esp. p. 177 s. (See also the review by A.M. Benedetti, in *Riv. dir. civ*., 2021 p. 608 ss.)

[72] Riesenhuber, *A Need for Contract Governance?,* in *Financial Services, Financial Crisis and General European Contract Law. Failure and Challenges of Contracting,* edited by Grundmann-Atamer, Wolters Kluwer, Alphen aan den Rijn, 2011, p. 61 ss.

the predefined rules of contract law, legislators cannot fail to anticipate such contractual behaviour when drafting the rules. In essence, the contract governance perspective admits that the regulator's awareness of the reactions of private parties, engendered by a given provision, can lead to it becoming more effective[73].

From the perspective of contract governance, the interpretation of the phenomenon of creditor intervention in the management of the financed company points therefore, first of all, to the need to verify the repercussions of the relationship between the lender and the financed entity at systemic level. Specifically, it is necessary to identify the usefulness of the clauses that give rise to the phenomenon in maintaining the stability of market structures. From this point of view, the choice of remedy is crucial, given that, in light of the role played by a given company in its production sector, any abrupt cut in financing could lead to the insolvency of the company itself and, as a knock-on effect, to the onset of economic difficulties for the companies doing business with it. The function played by agreements that, by means of renegotiation, attribute powers of involvement to the creditor, must certainly be analysed not only for their legitimacy, but also from the perspective of the proper functioning of the market[74]. In this view, the restriction of the debtor's private autonomy could be justified in the light of the greater efficiency achieved from keeping open the relationship with the lender compared to interrupting it. This is because the positive trend of the reference sector also produces favourable consequences for the financed company itself, which, otherwise, would place itself and the other subjects with which it interacts at risk of insolvency.

However, placing this phenomenon within the prism of contract governance

[73] V. Roppo, *Il contratto*, in *Tratt. Iudica-Zatti*, II ed., Giuffrè, Milano, 2011, p. 974 states that the more complex a phenomenon becomes, the greater the need for instruments that allow it to be 'governed' appropriately, emphasising also how contract governance implies above all the preparation and activation – at times by law, at times by private autonomy – of the most suitable mechanisms for managing the critical issues that arise in the development of the relationship between the parties: in short, contractual remedies. In this sense too, the subject of remedies thus proves to be the true heart of contract law and contract theory above all others.

[74] Finally, the *Guidelines on loan origination and monitoring,* issued by the *European Banking Authority* on the 29 May 2020 (that can be consulted freely on the website of the Authority), in paragraph 8.4, entitled "*Monitoring of covenants*", underline the crucial role played by *covenants* in the timely detection of a company crisis. The aim of the European regulator is to strengthen the predictivity of early warning models in order to identify positions whose credit quality is at risk of deterioration, thereby preventing disruptions in the market structure.

involves considering the clauses that give rise to it as instruments of contractual architecture themselves. Within the complex relationship that is established between creditor and debtor, where the debtor's interest in keeping the contract alive and the creditor's interest in the return of the investment can be discerned, the provision of covenants that regulate power relations can play a role in the simplification and regulation of the entire structure at stake. In essence, the intention is to affirm that the complexity of the relationship and the plurality of the interests involved, including the public interests tied to market stability, may justify the inclusion in the contract of a series of stipulations that more adequately reflect the needs of the parties[75].

[75] This view can be traced back to the idea of *Private Ordnung* (on which see G. BACHMANN, *Private Ordnung. Grundlagen ziviler Regelsetzung*, Mohr Siebeck, Tübingen, 2006 and S. MEDER, Ius non scriptum. *Tradizioni della produzione privata del diritto*, trad. it., Editoriale Scientifica, Napoli, 2011), according to which forms of self-regulation of economic and social activities are increasingly being sought out, to the point of arriving at scenarios in which public regulation is relegated to a marginal role. See also M. GRONDONA, *Poteri dei privati, fonti e trasformazioni del diritto: alla ricerca di un nuovo ordine concettuale*, in *I poteri privati e il diritto della regolazione*, edited by Zoppini-Sirena, cit., p. 5 ss.

LUCA MARAFIOTI[*]

REVERSAL OF ACQUITTAL ON APPEAL: FACT FINDING AND THE RIGHT TO BE HEARD[**]

ABSTRACT. *The recent pronouncement of the European Court of Human Rights in the case Maestri v. Italy elevated the examination of the defendant on appeal to an indispensable step before overturning an acquittal into a conviction. It was ruled, in fact, that a mere chance to be heard is not enough, but a specific summons to appear before the Court of Appeal to make the examination is necessary; otherwise, the decision is unjust. One must ask oneself, then, what significance this rule assumes in the perspective of a legal conception of evidence of European matrix. If, that is, the defendant's right to be heard takes on the value of a procedural defence guarantee as enshrined in Article 6 ECHR, or if, rather, it becomes something more: an epistemological rule addressed to the judge to ensure the reliability of the judgement. When reconstructed as an epistemological rule, the right of the accused to be heard by the appellate Court escapes the balancing game with the other guarantees, also established by the European Court in its holistic view of a fair criminal trial. However, due account must be taken of the risk that such a cognitive function of this right may lead to negative inferences being drawn from the silence of any defendant who does not wish to undergo the examination. This feeling of unease, which is confirmed by the jurisprudence of the European Court, should, however, be allayed by the recent directive on the presumption of innocence, which expressly prohibits drawing evidential indications from the silence of the defendant.*

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1. New developments in European case law on the renewal of the trial evidentiary hearing on appeal

In the eyes of the Italian procedural-criminalist, reflecting about criminal evidence from the perspective of the European Court of Human Rights implies reserving privileged attention to the renewal of the trial evidentiary hearing on appeal.

The importance of such a focus of investigation is immediately explained in the light of the considerable jurisprudential and regulatory repercussions which, in Italy, have been witnessed, in recent times, with reference to the institute of the renewal of the evidence on appeal, in the event of overturning the first instance judgement which acquitted the accused.

In compliance with the well-known European ruling on the case Dan v. Moldova of 2011, according to which «those who have the responsibility for deciding the guilt or innocence of an accused ought, in principle, to be able to hear witnesses in person and assess their trustworthiness»[1], first the Italian Court of Cassation[2] and then the legislator[3] have, in fact, established that the appellate judge can only reform the acquittal after a renewal of the testimony, if the appeal concerns the evaluation of that oral evidence.

The basic idea is to prevent that a defendant acquitted at first instance at the outcome of a full cross-examination trial, based on the oral hearing of the evidence, can be convicted for the first time on appeal by merely re-reading the papers contained in

[1] ECHR, 5 july 2011, *Dan v. Republic of Moldavia*, in *www.echr.coe.int*; similarly see, ECHR, 28 February 2017, *Manoli v. Republic of Moldavia*, *ivi*, p. 5; Id., Sez. I, 29 june 2017, *Lorefice v. Italy*, in «Cass. pen.», 2017, p. 4556. Among the scholars, see H. Belluta, Overturning the acquittal *in appello e giusto processo: la Corte europea esige la rinnovazione della prova*, in «Riv. it. dir. proc. pen.», 2017, p. 886 ss.; A. Capone, *Dopo Dan c. Moldavia. Per un processo di parti nell'appello penale*, in «Riv. dir. proc.», 2015, p. 1007 ss.; A. Gaito, *Verso una crisi evolutiva per il giudizio di appello. L'Europa impone la riassunzione delle prove dichiarative quando il p.m. impugna l'assoluzione*, in «Arch. pen.», 2012, 2, p. 1 ss.

[2] See, Cass., Sez. Un., 28 april 2016, Dasgupta, in «Cass. pen.», 2016, p. 3203; Id., Sez. Un., 19 january 2017, Patalano, in «Cass. pen.», 2017, p. 2666; Cass., Sez. Un., 4 april 2019, Pavan, in «CED Cass.», rv. 255112.

[3] Reference is made to Law No. 103 of 2017, which inserted into the Italian Code of Criminal Procedure paragraph 3-bis of the Code of Criminal Procedure in Article 603, pursuant to which: «in the event of an appeal by the public prosecutor against a judgment of acquittal on grounds relating to the assessment of declaratory evidence, the judge shall order the renewal of the trial investigation».

the trial file. To borrow the words of the European Court, in fact, such a conviction, without direct hearing of witnesses, would be unjust 'as a matter of fair trial'. Furthermore, because of the structure of the appellate remedies in the Italian criminal system, the convicted person on appeal would find himself deprived of the possibility of submitting his conviction to a new examination of the merits[4]. The latter could only be challenged on grounds of legitimacy before the Court of Cassation, which cannot review the facts and the evaluation of evidence carried out by the lower court.

The adherence shown by the Italian system to the cornerstones of European case law on the subject of the orality of evidence on appeal was not, however, sufficient to spare Italy from further reproaches by the Strasbourg judges.

With the Maestri judgment of 8 July 2021, the European Court of Human Rights condemned the Italian State for violating Article 6 § 1 of the Convention, as the domestic Court of Appeal failed to renew the examination of the defendants acquitted at first instance and then convicted at second instance.

More specifically, the complaint made by the Strasbourg Court relates to the alleged insufficiency of the summons of the defendants to appear at the appeal hearing, as a means of enabling the defendants to be heard before the Court of appeal.

In the interpretation of the European Court, in fact, if the defendants do not appear at the trial, this does not amount to a tacit waiver on their part of the right to be heard before the appellate court. On the contrary, in the words of the Court, «the fact that a defendant had waived the right to attend the hearing did not in itself release an appellate court that conducted a full assessment of guilt or innocence from its duty to carry out a direct assessment of the evidence given in person by the defendant where the latter wished to maintain his or her innocence and had not explicitly waived the right to address»[5]. To this end, it becomes incumbent on the judicial authorities to adopt «all positive measures needed to guarantee the examination of the defendant»; first and foremost, the setting of a hearing, with a summons to the defendant, to hear the

[4] On this point, see Belluta-L. Lupária, *La parabola ascendente dell'istruttoria in appello nell'esegesi "formante" delle Sezioni Unite,* in «Dir. pen. contemp. - Riv. Trim.», 3/2017, p. 159.

[5] See ECHR 16 july 2019, *Júlíus Þór Sigurþórsson* v. Island.

defendant even if he did not appear at the first hearing, did not ask to speak and did not oppose – through his defence counsel – that the Court of Appeal should decide on the merits of the case.

This is the only way, according to the European Courts, to fully guarantee the right of defence. For the effective protection of the latter, in adherence with the guarantees of a fair trial laid down in Article 6 ECHR, the mere opportunity offered to the defendant to speak last and make, if he wills, spontaneous statements is not sufficient. Such an institution, being left to the free initiative of the defendant, would not be even remotely comparable to the examination of the defendant by the trial court. The mere possibility for the defendant to make spontaneous statements does not, in fact, satisfy the court's obligation to hear the person concerned in person on facts and issues decisive for the ascertainment of his possible guilt.

2. The right to be heard as an epistemological rule in second instance proceedings

Such an obligation placed on appellate judges makes it interesting to ask, then, what is the meaning to be attributed to the defendant's hearing in the legal conception of evidence at the European level.

It seems clear, in fact, that the supranational court has here gone far beyond the limits of a reconfirmation of its own case law on the procedural fairness guarantees of the trial, in the broad sense connected with the physical presence of the defendant at his trial.

It is true that, in Maestri v. Italy, it is emphasized that the defendant's choice of not being examined must not be equivocal. This choice, like any determination by the defendant concerning his participation in the hearing, must also be, according to the Court, conscious and explicit. This refers back to that conception of the European fair trial as a subjective guarantee of the defendant[6], the basis of which is precisely the

[6] See S. Quattrocolo, *Partecipazione al processo e contraddittorio*, in <www.lalegislazionepenale.eu>, 19.10.2020,

defendant's right to participate physically in the trial and to be heard by the judge[7].

It is equally undeniable, however, in the perspective favoured by the ruling under consideration, that the hearing of the defendant also takes on a new and unprecedented value, which places it in direct relation with the judicial decision; therefore, becoming an indefectible step for the appeal judge called upon to overturn the acquittal into a conviction. Even before being a right of the accused, the hearing of the latter during the appeal proceedings represents an epistemological rule for the exercise of second instance jurisdiction. It is valid, that is, «as a rule imposing on the fact finder a certain cognitive attitude»[8].

The proof is the link established by the European Court between the judge's obligation to proceed to summon the defendant for examination and the reliability of the ascertainment of the subjective elements of the crime charged. In this regard, it is pointed out that to correctly reconstruct the *suitas* of the criminal conduct, as an element of the allegation of guilt, it is necessary to verify the defendant's intention with respect to the facts charged against him[9]. This implies directly examining the accused person, so as to allow him to express his views on circumstances that are decisive for the correct formation of the judge's free convincement on the issue of liability[10].

The change of step is of no small moment: the cognitive function attributed to the right to be heard opens, in fact, new horizons in the perspective of the European judgement of procedural fairness, on which our panel today is called upon to discuss.

We are well aware that, in recent years[11], the holistic approach to the assessment

p. 109.

[7] Above all, see ECHR 12th february 1985, *Colozza* v. Italy and ECHR 1st march 2006, *Sejdovic* v. Italy. For a case-law overview, see A. Procaccino, *Informazione e consapevolezza dell'imputato per la presenza al suo processo. Suggestioni europee e problemi nazionali*, in <www.lalegislazionepenale.eu> 16.2.2020.

[8] In these terms, F. Picinali, *The Presumption of Innocence: a Deflationary Account*, in «Modern Law Review», 84, n. 4, 2021, p. 738.

[9] The link here is to the judgement ECHR, 22th November 2011, *Lacadena Calero* v. Spain, § 47.

[10] M. Caianiello-S. Tesoriero, *Diritto di difesa e appello penale: vecchie e nuove coordinate dalla giurisprudenza della Corte Edu (a proposito di Maestri e altri contro Italia),* in «Cass. pen.», 2021, p. 4091

[11] ECHR 15th december 2011, *Al-Khawaja e Tahery v. UK*, with notes by I. Dennis, *Al Khawaja and Tahery v. United Kingdom, Commentary*, in «Criminal Law Rev», 2012, p. 376 ss.; in the same perspective see also ECHR 15th

of the individual case submitted to the Strasbourg Court has changed dangerously[12]. From being a criterion used to assess the presence of a violation of fairness in the light of the specific characteristics of the case, the 'as a whole' test operated by the Court has turned into a technique aimed at remedying an already established violation of the rights enshrined in Article 6 ECHR[13]. This is possible whenever, precisely in the light of the holistic assessment of fairness, the individual right violated is adequately compensated for by other conventional guarantees.

From this perspective, the rights recognised to the accused by Article 6 ECHR enter a balancing game: even in the face of a breach of fairness in the procedure, the existence of other guarantees for the defendant provided for by domestic law succeeds in saving the overall fairness of the case.

This approach is hardly reassuring in terms of the effective protection of procedural rights. Without mincing words, we run the risk of tolerating the loss of a fundamental guarantee merely because the defendant has been able to exercise a different one[14]. A risk that becomes even more severe if one goes so far – and the European Court has already done that[15] – as to balance the rights of the defence against requirements of a different nature, such as those protecting the interests of justice in the repression of criminal phenomena. To pose these latter requirements as compensatory factors for the infringement of a defense guarantee means, in fact, to legitimate a complete annihilation of the individual's guarantees before the exercise of public powers. This, according to a logic distorting the very function historically exercised by the judges of the European Court, namely that of guardians of the individual against undue pressure and arbitrariness on the part of the State[16].

december 2015, *Schatschaschwili, v. Germania*; ECHR, 10th november 2020, *Dan v. Repubblic of Moldova n. 2*, with comment by A. Mangiaracina, Dan v. Moldavia *2: la rinnovazione in appello tra itinerari sperimentati e cedimenti silenziosi*, in «Arch. pen.», 2020, p. 711 ss.

[12] See Caianiello, *You Can't Counterbalance What You Want,* in «European Journal of Crime, Criminal Law and Criminal Justice», vol. 25, 2017, p. 285.

[13] See R. Kostoris, *Per una "grammatica" minima dell'equità processuale*, in «Riv. it. dir. proc. pen.», 2020, p. 1677.

[14] See, again, Kostoris, *ibid.*

[15] ECHR 15th december 2011, *Al-Khawaja e Tahery v. UK*, cit.; ECHR, 15th december 2015, *Schatschaschwili v. Germany*, cit.; ECHR 13th september 2016, *Ibrahim et others v. UK.*

Within such a scenario, then, one can well understand the innovative scope of a conception of the right to be heard as an epistemological rule, rather than as a guarantee understood in a subjective sense: consequently, it is removed from the game of balancing the guarantees pertaining to the European fair trial. Any breach of it, far from being justified by compensatory factors relevant to the holistic assessment of the fairness of the procedure, would sanction its injustice once and for all.

3. The right to silence: a double-edged sword

The transformation of the right to be heard from an individual guarantee to an epistemological rule calls for mistrust on the part of the Italian jurist.

Perhaps because of our habit of coming to terms with an 'omnivorous' vision of the judge's role[17], typical of the mixed system founded on the myth of the search for material truth[18], we are inclined to view with suspicion any attempt to make the individual's guarantees objective.

It is difficult, in fact, to shake off the heavy tradition of those doctrines which, at the time of the 1930 Code of Criminal Procedure, affirmed that the right to remain silent does not entail a limitation on the principle of the judge's *intime conviction*. And, indeed, they went so far as to recognise the silence of the accused as having real probative value, whenever the latter, being able to provide information useful to his defence, refused to cooperate[19].

On closer inspection, this is a concern that remains current, even in the aftermath of the transition from a mixed-inquisitorial system to a system that tends to

[16] See A. Boldrin, *Approccio compensativo e* overall fairness *nella giurisprudenza della Corte edu, tra relativismo delle garanzie e altre derive,* in <www.lalegislazionepenale.eu>, 26.10.2021.

[17] F. Cordero, *Diatribe sul processo accusatorio*, in *Ideologie del processo penale*, 1966, p. 201.

[18] See M. Nobili, *Il principio del libero convincimento del giudice*, 1974 and G. De Luca, *La cultura della prova e il nuovo codice di procedura penale*, in *Studi in onore di Giuliano Vassalli. Evoluzione e riforma del diritto e della procedura penale*, vol. II, edited by M.C. Bassouni, A.R. Latagliata, A.M. Stile, Giuffrè, Milan, 1991, p. 201.

[19] L. Marafioti, *Scelte autodifensive dell'indagato e alternative al silenzio*, Giappichelli, Turin, 2000, p. 317 ss.

be an adversarial one. Proof of this can be seen in the parabola that has affected, in the new code, the rules of cross-examination: born as a right of the parties, it has gradually transformed into an essential component of judicial activity, to the point of representing a veritable method of ascertaining the facts in the trial. A transformation that has, however, risked – and still risks – to crush the suspect's right to silence, transforming it, in turn, from an individual's instrument of guarantee into an «odious and mocking privilege»[20], which hinders the demands of truth.

Bear in mind that it is rare for a ruling to go so far as to openly deny the procedural value of *nemo tenetur se detegere*. Nor does jurisprudence ever openly affirm the existence of a burden of cooperation on the part of the suspect with respect to the reconstruction of the fact. As a matter of principle, in fact, it is reiterated that the defendant has the right to remain silent and to lie, and that the exercise of the right to silence can never take on negative value. However, sometimes emphasising the agonistic component of cross-examination and the active role reserved for the parties in the new code, it is then stated that it is in the interest of the suspect to contribute to the presentation of alternative hypotheses to that formulated by the prosecution and that, therefore, the judge's conviction may be based on evidence in respect of which silence may serve as corroborating element or take on circumstantial value.

Here in the background it seems possible to glimpse the *trait d'union* that links the inquisitorial tradition (which saw silence as an implicit admission of guilt), with the mixed trial and the 'Italian-style' adversarial model: a tradition that never manages to free itself entirely from the 'double-edged' value of silence (or, as the Germans say, from its *zweischneidig* nature).

In other words, our tradition has difficulty departing from the common-sense maxim – whose fortune is due to the influence of the doctrine of civil procedure[21] –

[20] MARAFIOTI, *Scelte autodifensive dell'indagato e alternative al silenzio*, p. 369.

[21] See, in particular, A. CARRATTA, *Il principio della non contestazione nel processo civile*, Giuffrè, Milan, 1995. On the influence of such procedural theories in our system, especially in the summary trial, E. AMODIO, *Il modello "accusatorio" statunitense e il nuovo processo penale italiano,* in *Il processo penale negli Stati Uniti d'America*, edited by Amodio and Bassiouni, Giuffrè, Milan, 1988, XLII; G. PAOLOZZI, *Il giudizio abbreviato*, Cedam, Padua, 1991, p. 79; D. SIRACUSANO, *La decisione allo stato degli atti: un pesante limite del giudizio abbreviato*, in *Introduzione allo studio del nuovo processo penale*, Giuffrè, Milan, 1989, p. 220; E. SOMMA, *Il giudizio abbreviato*, in *I riti differenziati nel nuovo*

according to which «he who does not contest the accusation implicitly recognises the truth of the adversary's assertions', as well as from the empirical datum according to which 'as a rule, the fact that is not contested is true».

One must be very careful on this point: to assign appreciable meanings from a legal point of view to negative or neutral elements, such as the lack of reaction to the allegations of others, is to transform the 'non-contestation' into an instrument influencing the judge's decision and the silence of the accused into an instrument of proof. This makes, in some ways, current the historical path of the *ficta confessio*[22], which from being an essential basis for the Enlightenment reaction against torture, ended up, over time, replacing its probative scope without recourse to any physical torment. In short, even in this case, a theoretical approach that originated as an obvious guarantee for the defendant has, in the end, turned into its opposite. And the negative effects of this tendency have persisted even in the current reality of criminal proceedings and well beyond national borders.

4. The necessary examination of the defendant: a new 'appetite for confession'?

When I say that this problem transcends national borders, I am not only referring to the possibility that attitudes similar to those denounced in our system might occur in other more markedly adversarial systems. Already 30 years ago, John H. Langbein reminded us how the early adversary system was little respectful of the right to silence and favoured the «accused speaks trial' model, in which the accused, to be acquitted, necessarily had to face the jury[23]. Things have obviously changed, and that model has been replaced by what Langbein calls 'testing the Prosecution theory»; a model that has now become commonplace in European countries. The example given

processo penale (Atti del Convegno), edited by Dalia, Jovene, Naples, 1989, p. 122. See also MARAFIOTI, *La giustizia penale negoziata*, Giuffrè, Milan, 1992, p. 359 ff.

[22] See P. MARCHETTI, Testis contra se. *L'imputato come fonte di prova nel processo penale dell'età moderna*, Giuffrè, Milan, 1994, p. 202 ff.

[23] See J.H. LANGBEIN, *The Origins of Adversary Criminal Trial*, Oxford University Press, Oxford, 2003.

by the great American scholar sounds, however, as a warning to pay the utmost attention to erosions – overt and covert – of the right to silence, regardless of the legal traditions and trial models adopted in a given country.

If we then raise our eyes to the European Court of Human Rights, we have no difficulty in realising that the scepticism of the Italian jurist becomes the scepticism of the European jurist.

Attention goes, more appropriately, to the Court's ambiguous orientations on the issue of the protection of the right to silence and, more generally, on the *nemo tenetur se detegere* guarantee. It is true that, on a number of occasions, the Strasbourg judges have followed guarantee principles, denying that probative indications or punitive consequences can be drawn from the silence or non-cooperation of the defendant[24]. But it is equally true that on numerous occasions the Court has tolerated limitations on the right to silence, especially when the facts and circumstances brought before the court required – one might say imposed – a response from the defence.

Emblematic in this perspective is *Murray v. United Kingdom*[25], where the Court stated: «It [...] obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution»[26].

Statements such as the one enunciated in the Murray case bring to mind those old positions of German doctrine of the last century, which recognised in the head of the parties a burden of "taking a position"[27], sometimes seen as an expression of the

[24] ECHR, 25 February 1993, Funke v. France, § 44; ECHR, 3 May 2001, J.B. v. Switzerland, § 63-71; ECHR, 5 April 2012, Chambaz v. Switzerland, §§ 50-58.

[25] ECHR, 8 February 1996, John Murray v. United Kingdom, § 49. On the same line, ECHR, 17 December 1996, Saunders v. United Kingdom, § 68; ECHR, 13 September 2016, Ibrahim v. United Kingdom, cit., § 274; ECHR, 29 June 2007, O'Halloran e Francis v. United Kingdom, §§ 53-55; ECHR, 21 December 2000, Heaney e McGuinness v. Ireland, §§ 54-55; ECHR, 10 March 2009, Bykov v. Russia, § 92.

[26] On this topic see A. Ashworth, *Self-incrimination in European Human Rights Law – A Pregnant Pragmatism*, in «30 Cardozo L. Rev.» (2008-2009), p. 751.

[27] It is the well-known *Einlassungslast* theory, which is due to J. Goldschmidt, *Der prozess als Rechtslage: eine Kritik des prozessualen denkens*, Springer, Berlin-Heidelberg, 1925, p. 99.

dispositive power connected to the substantial situation brought before the court[28]. Positions – it must be clearly stated – that are now obsolete even in the field of civil proceedings and that certainly cannot find their way into the field of criminal proceedings[29].

The reference to situations requiring a response from the defence, however, opens up a wide scenario of hypotheses in which the defendant is in a privileged position regarding the knowledge of certain circumstances. One thinks of the contribution of the defendant to the reconstruction of the fact, when the issue to be ascertained is the subjective element of the crime – as in the Maestri case – or a cause of justification; or one thinks, again, of the delicate issue of alibi proof. All situations in which the defendant's cognitive contribution may be valuable or decisive, because of his 'closeness to the evidence'. And it is difficult to imagine that such elements could emerge at trial outside the defendant's allegation or declarative contribution.

However, one should never confuse the defendant's burden of attaching exculpatory evidence with the legal burden of proof on the prosecution. In fact, it is one thing to recognise that the defendant has an interest in alleging circumstances useful to his defence or to the reconstruction of the fact (burden of production)[30]; it is quite another to shift onto him the burden of proving the truth of the fact alleged (burden of persuasion) or, indeed, his innocence.

Such reversals of the burden of proof fatally clash with the presumption of innocence, which places the entire burden of proving the constituent elements of guilt 'beyond any reasonable doubt' on the prosecution. The sharing of burdens in the criminal trial, according to the cornerstones of the presumption of innocence, therefore responds to obvious political reasons, demanding the highest possible standard for the assertion of guilt in order to avoid the risk of an innocent person being convicted[31].

[28] For useful references, see CARRATTA, cit., p. 109.

[29] For an in-depth study of the topic, MARAFIOTI, *Scelte autodifensive*, cit., p. 324 ss.

[30] See E.M. CATALANO, *La prova d'alibi*, Giuffrè, Milan, 1998, p. 67 ss. On the allocation of evidential burdens as a risk allocation technique, see A.A.S. ZUCKERMAN, *The Principles of Criminal Evidence*, Clarendon, Oxford, 1989, p. 105 ff.

[31] See F. CAPRIOLI, *L'accertamento della responsabilità penale "oltre ogni ragionevole dubbio"*, in «Riv. it. dir. e proc.

This is, on closer inspection, an apportionment that is not insensitive to the difficulties that the prosecution may encounter in proving what we in Italy call 'impeding facts' (such as, for example, a cause of justification). With a view to demanding a proactive demeanour from the subject who is generally in the best position to prove the existence of a given fact, the activation of the person concerned is required. This is a form of empowerment of the subject considered closest to the evidence, which would, however, violate the presumption of innocence if the standard required for this type of fact were equated with the standard concerning guilt[32].

What, then, are the ways out?

The fears aroused by the examination of the case law of the European Court of Human Rights, which resurfaced following the Maestri case, could be mitigated, within the Union, by the rules contained in Directive 2016/343/EU on the presumption of innocence, the final stage of a reform path that, in our country, has been hailed as a new deal of the criminal trial guarantee[33].

It reassures, in fact, the clear statement expressed in Article 7(5), according to which: «The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned».

However, further criticism can be made. Although the preambles of a EU act do not have binding legal force, as they cannot derogate from the provisions of the act itself, one cannot remain indifferent to the statements contained in preamble 28, which, after re-proposing the exact same wording as Article 7(5), specifies, however: «This should be without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected».

It is clear, in fact, that such a clause runs the risk of reviving, in derogation of

pen.», 2009, vol. I, p. 75; CATALANO, *Ragionevole dubbio e logica della decisione*, Giuffrè, Milan, 2016, p. 204 ff.; O. MAZZA, *Il ragionevole dubbio nella teoria della decisione*, in «Criminalia», 2012, p. 359 ff.; G. PIERRO, *Accertamento del fatto e colpevolezza al di là di ogni ragionevole dubbio*, Aracne, Rome, 2011, p. 30 ff.

[32] See G. GAROFALO, *La diversificazione degli standard di prova nel processo penale e nel rapporto fra giurisdizioni*, in «Cass. pen.», 10/2020, p. 3897.

[33] In these terms, O. MAZZA, *Presunzione d'innocenza e diritto di difesa*, in «Dir. pen. proc.», 12/2014, p. 1401.

what is provided for in the text of the Directive, those same rules that allow evidentiary inferences – direct or indirect – to be drawn from the silence of the defendant, whenever a response from him is to be expected. Or, again, those worrying distinctions between 'proper' and 'improper' coercion[34], which risk legitimising a sort of 'appetite' for cooperation on the part of the accused, which bring to mind Michel Foucault's fine reflections on the appetite for confession that pervades modern justice systems and which join inquisitorial and adversarial tradition and the adversarial model[35].

Indeed, the great French philosopher reminds us of the existence of three fundamental reasons why the need for the accused's contribution never loses its relevance and transcends geographical boundaries. The confession represents, in fact, an act of recognition of the sovereignty of the institution called upon to judge; a 'contract of truth' that allows the judge to know by virtue of indubitable knowledge; a punitive commitment, through which the accused accepts the punishment inflicted. Reflections that lead us – thanks to the chance given by this conference and the European Court of Human Rights – to reflect once again on the relevance of that Aristotelian paradox, which has been the subject of much discussion by American scholars[36], which casts doubt on the real voluntariness of an action performed «out of fear of greater evils or in view of some good»[37].

[34] See G. Lasagni, *Prendendo sul serio il diritto al silenzio: commento a Corte cost., ord. 10 maggio 2019, n. 117*, in «Dir. pen. cont.», 2/2020, p. 141.

[35] M. Foucault, *Mal fare, dir vero. Funzione della confessione nella giustizia. Corso di Lovanio (1981)*, ed. F. Brion-B.E. Harcourt, transl. Zini, Einaudi, Turin, 2013. For extensive reflections on the French philosopher's text, see Luparia-Marafioti (eds), *Confessione, liturgie della verità e macchine sanzionatorie. Scritti in occasione del Seminario di studio sulle 'Lezioni di Lovanio' di Michel Foucault*, Giappichelli, Turin, 2015. On the reasons for the enduring relevance of the confessional phenomenon, see Luparia, *La confessione dell'imputato nel sistema processuale penale*, Giuffrè, Milan, 2006, p. 1 ff.

[36] See. Thomas III-Bilder, *Aristotle's Paradox and Self-Incrimination Puzzle*, «Journ. Crim. L. & Crimin.», 82, 1991, p. 243.

[37] Aristotele, *Etica nicomachea*, in *Opere*, vol. VII, Laterza, Bari, 1993, III, 49, 1, 1110a.

GIUSEPPE PALMISANO*

QUELQUES REMARQUES SUR LE DROIT AU LOGEMENT EN TANT QU'OBJET D'OBLIGATIONS FAITES AUX ETATS DANS LE SYSTÈME DE LA CHARTE SOCIALE EUROPÉENNE**

ABSTRACT. [Title: *Some remarks on the right to housing as an object of State international obligations, under the legal system of the European Social Charter*]
At the European regional level, the right to housing, intended as a human right, is recognised and guaranteed by the Revised European Social Charter (RESC, 1996). Art. 31 of the RESC places a number of positive obligations on European States having accepted it, concerning the adoption of measures aimed at promoting access to housing of an adequate standard, preventing and reducing homelessness, and making the price of housing accessible to those without adequate resources. The present article draws the attention to the implementing practice of the RESC as an instrument for the protection and realization of the right to housing in Europe, particularly focusing on the case law of the European Committee of Social Rights (ECSR, the Charter supervisory body), as it emerges from the so-called collective complaints procedure, which enables social partners and non-governmental organisations to apply to the ECSR directly for it to rule on possible violations of the Charter in the country concerned.

RÉSUMÉ. *Au niveau régional européen, le droit au logement, considéré comme un droit de l'homme, est reconnu et garanti par la Charte sociale européenne révisée, du 1996. L'article 31 de la Charte révisée impose un certain nombre d'obligations positives aux États européens qui l'ont acceptée, en ce qui concerne notamment l'adoption de mesures visant à favoriser l'accès au logement d'un niveau suffisant, à prévenir et à réduire l'état de sans-abri, et à rendre le coût du logement accessible aux personnes qui ne disposent pas de ressources suffisantes. Cet article met en exergue la pratique de mise en œuvre de la Charte révisée en tant qu'instrument de protection et de réalisation du droit au logement en Europe, en se concentrant en particulier sur la jurisprudence du Comité européen des*

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droits sociaux (CEDS, l'organe de contrôle de la Charte sociale), telle qu'elle ressort de la procédure dite des réclamations collectives, qui donne aux partenaires sociaux internationaux et nationaux, ainsi qu'aux organisations internationales non gouvernementales, la possibilité de s'adresser directement au CEDS afin qu'il statue sur l'éventuelle violation de la Charte dans les pays concernés.

1. La considération du droit au logement en tant que droit de l'homme au niveau régional européen

Comme l'a révélé le rapport intitulé *Cinquième Regard sur le Mal-Logement en Europe*, présenté en juillet 2020 par la Fédération Européenne des Associations Nationales Travaillant avec les Sans-Abri (FEANTSA) et la Fondation Abbé Pierre[1], la crise du logement sévit partout en Europe : en effet, on estimait que dans la seule Union Européenne plus de 700 000 personnes vivaient, à cette époque, dans la rue ou dans des abris d'urgence.

Dans ce contexte, la pandémie et la crise sanitaire de 2020/2021 ont donc agi comme des révélateurs d'une crise du logement qui était évidemment préexistante. Mais elles ont aussi contribué à faire ressortir et rappeler que l'accès à des logements adéquats

[1] *Cinquième Regard sur le Mal-Logement en Europe*, FEANTSA et Fondation Abbe Pierre, Juillet 2020 : <https://www.feantsa.org/public/user/Resources/resources/Rapport_Europe_2020_FR.pdf>.

et abordables pour tous, ainsi que la garantie pour tous de n'être pas privés de la possibilité de vivre dans des logements adéquats, constituent non seulement un défis politique important et un véritable test de pérennité économique, sociale et environnementale des Etats européens et de l'Union Européenne, mais aussi des droits essentiels pour la dignité humaine, desquels dépendent de nombreux autres droits, comme les droits à la santé, à la sécurité, à la vie privée et à la vie familiale. Des droits que les Etats européens sont tenus de respecter, protéger et réaliser en vertu d'engagements qu'ils ont eux-mêmes pris aux termes de plusieurs instruments de droit international et européen en matière de droits de l'homme.

Au niveau international mondial (ou onusien, si l'on préfère), le droit au logement fait partie intégrante du droit à un niveau de vie adéquat, qui est reconnu par l'article 1, paragraphe 1, du Pacte international relatif aux droits économiques, sociaux et culturels (PIDESC)[2], et son contenu a été précisé dans les Observations générales n. 4 et n. 7 du Comité des droits économiques, sociaux et culturels de l'ONU, qui fournissent les détails spécifiques des différentes dimensions du droit au logement[3].

Au niveau régional européen, c'est la Charte sociale européenne, et notamment la Charte révisée de 1996, le seul instrument normatif qui garantit et règle d'une manière étendue, à l'art. 31, le droit au logement en tant que droit de l'homme, et – plus précisément – en tant que droit social fondamental[4].

[2] Article 1, paragraphe 1, du PIDESC : « Les Etats parties au présent Pacte reconnaissent le droit de toute personne à un niveau de vie suffisant pour elle-même et sa famille, y compris une nourriture, un vêtement et un logement suffisants, ainsi qu'à une amélioration constante de ses conditions d'existence. Les Etats parties prendront des mesures appropriées pour assurer la réalisation de ce droit et ils reconnaissent à cet effet l'importance essentielle d'une coopération internationale librement consentie ».

[3] Voir <https://www.ohchr.org/fr/documents/committee-economic-social-and-cultural-rights-general-comment-no-4>, et <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=fr&TreatyID=9&DocTypeID=11>.

[4] Il n'est presque pas nécessaire de rappeler que la Charte sociale européenne est un traité du Conseil de l'Europe qui garantit les droits sociaux et économiques fondamentaux, et qui est le pendant de la Convention européenne des droits de l'homme (qui se réfère aux droits civils et politiques). Elle garantit un large éventail de droits de l'homme « de tous les jours », liés à l'emploi, au logement, à la santé, à l'éducation, à la protection sociale et aux services sociaux. La Charte sociale a été initialement adopté à Turin, le 18 octobre 1961. En 1996, à la conclusion d'un processus de relance et des réformes, a été adoptée la Charte sociale révisée, à laquelle sont aujourd'hui parties 35 Etats européens membres du Conseil de l'Europe. Sept Etats membres du Conseil sont encore parties à la Charte de

En effet, aucune mentionne n'est faite du droit au logement ni dans la Convention européenne des droits de l'homme (CEDH), qui s'occupe – comme on le sait – des droits civils et politiques, ainsi que des libertés fondamentales[5], ni dans la Charte des droits fondamentaux de l'Union européenne, qui fait seulement une référence timide au droit à une aide au logement, dans la même disposition, l'art. 34, paragraphe 3, qui s'occupe de l'aide social afin d'assurer une existence digne à ceux qui ne disposent pas de ressources suffisantes[6].

Il nous paraît donc intéressant, dans les quelques pages qui suivent, d'accorder une certaine attention à la Charte sociale européenne, pour mieux comprendre en quoi consistent les obligations qui incombent aux Etats européens en matière de droit au logement ; et de le faire sur la base surtout de l'application de la Charte par l'organe com-

1961.

[5] Bien que le droit au logement ne figure pas dans la CEDH, plusieurs articles de la Convention demeurent importants, et ont été effectivement utilisés par la Cour européen des droits de l'homme, pour la lutte contre le sans-abrisme et l'exclusion liée au logement, tels que l'article 8 (le droit à la vie privée et familiale et la protection du domicile), l'article 6 (le droit à un procès équitable qui peut être invoqué en cas d'expulsion), l'article 3 (le droit à la protection contre les traitements inhumains et dégradants), l'article 2 (le droit à la vie), et l'article 14 (le droit à la protection contre la discrimination). Parfois, le droit à la protection du logement a aussi été déduit par la Cour du droit de propriété (article 1, Protocole 1 à la Convention).

[6] Pour ce qui concerne le droit de l'UE, il faut toutefois noter positivement que la question du logement et la situation des sans-abris est maintenant prise en compte dans le cadre de ce qu'on appelle le « Socle européen des droits sociaux » (SEDS), c'est-à-dire le plan d'action lancé par le Président Juncker dans son discours sur l'état de l'Union le 13 septembre 2017, et approuvé par le Parlement européen, le Conseil et la Commission lors du sommet social pour des emplois et une croissance équitables, le 17 novembre 2017 à Göteborg. Comme on le sait, il s'agit d'un plan d'action visant à encourager le passage progressif à une Union plus socialement équitable et à faire de sorte que la convergence s'étende à trois grands secteurs : égalité des chances et accès au marché du travail ; conditions de travail équitables ; protection sociale et inclusion sociale. L'objectif est notamment de renforcer l'action des institutions de l'Union pour renforcer la jouissance de leurs droits sociaux par les citoyens européens, sur la base de 20 principes clés.
Parmi ces principes, le principe n. 19 est consacré précisément à « Logement et aide aux sans-abri ». Ce principe, qui repose évidemment sur l'article 34 de la Charte des droits fondamentaux, va en fait beaucoup plus loin que celui-ci, s'inspirant plutôt de l'article 31 de la Charte sociale révisée, puisqu'il inclut le logement social, la protection contre les expulsions, les aides pour les ménages à bas et moyens revenus, et le droit à l'hébergement et aux services sociaux pour les personnes sans abri. On peut espérer que, dans un avenir proche, la mise en œuvre et le développement du SEDS, qui implique la nécessité de trouver un équilibre entre les impératifs économiques et sociaux des systèmes de logement, pourra donc faire avancer les contenus du droit dérivé de l'Union européenne en matière de droit au logement, et que l'établissement d'une approche davantage basée sur les droits sociaux pourrait renforcer, dans les politiques de l'UE, la priorité accordée par le Socle à la question du logement.

pétent à s'occuper des réclamations effectivement introduites dans ces deux décennies concernant le respect par les Etats européens des lesdites obligations : c'est-à-dire, le Comité européen des droits sociaux (CEDS).

2. L'article 31 de la Charte sociale révisée

D'après le texte de l'art. 31 de la Charte sociale révisée, les Etats européens parties à la Charte, en vue d'assurer l'exercice effectif du droit au logement, se sont notamment engagés : « 1. à favoriser l'accès au logement d'un niveau suffisant; 2. à prévenir et à réduire l'état de sans-abri en vue de son élimination progressive; et 3. à rendre le coût du logement accessible aux personnes qui ne disposent pas de ressources suffisantes ».

Avant de proposer quelques observations sur le contenu et les caractéristiques des obligations imposées aux Etats européens par la Charte sociale en matière de logement, il faut préciser que le droit au logement, tel que protégé par l'art. 31 de la Charte révisé, n'a pas encore été largement accepté au niveau européen.

En fait, il s'agit d'un droit au respect duquel, en premier lieu, ne sont pas obligés les 7 Etats qui sont encore partie à la Charte sociale de 1961, qui ne contient pas une disposition correspondante à l'art. 31 de la Charte révisée. Ces Etats sont la Croatie, la République tchèque, la Danemark, l'Islande, le Luxembourg, la Pologne, et le Royaume Uni.

En outre, même la majorité des 35 Etats qui sont parties à la Charte révisée, qui est réglée (comme la Charte de 1961) par un mécanisme de « menu à la carte » pour ce qui concerne l'acceptation de ses dispositions par les Etats, a opté jusqu'à aujourd'hui de ne pas accepter les trois paragraphes de l'art. 31[7].

[7] En raison du large éventail de droits et de domaines d'intérêts sociaux et économiques couverts par ce traité, la Charte sociale est fondée sur un système d'acceptation qui permet aux Etats de choisir, dans une certaine mesure, les dispositions qu'ils souhaitent accepter comme obligations en vertu du droit international. Par conséquent, tout en les encourageant à accepter progressivement l'ensemble des dispositions, la Charte permet aux Etats, au moment de la ratification, d'adapter leurs engagements au niveau de la protection de droits sociaux acquis dans leur pays, dans la loi et/ou en pratique. Ce système « à la carte » a cependant ses limites. Comme prévu dans la Partie III de la Charte révisée (article A, paragraphe 1), les Parties contractantes s'engagent à se considérer liés juridiquement par un nombre

Bref, les Etats européens qui sont obligé au respect des obligations imposées par cet article, aujourd'hui, ne sont guère plus qu'une douzaine, notamment : Finlande, France, Grèce, Italie, Pays-Bas, Norvège, Portugal, Slovénie, Espagne, Suède et Turquie (qui ont accepté tous les trois paragraphes de l'art. 31), Andorre et Ukraine (qui ont accepté deux paragraphes de cet article), et Lettonie et Lituanie (qui ont accepté seulement le premier paragraphe de l'article).

Il faut quand même ajouter que cela ne signifie pas que les Etats parties à la Charte qui ne sont pas liés au respect de l'art. 31 n'ont pas du tout d'obligation concernant le logement, aux termes de la Charte sociale. En fait, comme nous le préciserons plus loin, on doit aussi tenir compte de l'art. 16, sur le droit de la famille à une protection sociale, juridique et économique, d'après lequel les Etats parties sont engagés à favoriser la construction de logements adaptés aux besoins des familles[8].

Mais ayant dit ça, et pour venir au contenu du droit au logement protégé par la Charte sociale, on ne doit pas penser que l'art. 31 garantit le droit au logement en tant que droit subjectif individuel de chaque personne à jouir d'un logement d'un niveau suffisant, pour lui-même (ou elle-même), ou pour sa famille.

Dans ce sens, la plupart des dispositions de la Charte concernant le logement ne posent pas à la charge de l'Etat d'obligations de résultat, ou à réalisation immédiate d'un droit subjectif individuel (telles que, par exemple, dans le champ des droits politiques, les obligations concernant le droit de voter, ou, dans le champ de droit sociaux, les obligations concernant le droit à l'assistance médicale en cas d'urgence et de besoin).

La Charte sociale pose plutôt à la charge des Etats des obligations de moyens, consistant en l'adoption de mesures positives aptes à réaliser les conditions juridiques, économiques, administratives, et aussi concrètes-opérationnelles, qui sont nécessaires

minimum de dispositions. Parmi ces dispositions il doit y avoir, au minimum, six des neuf articles du « noyau dur » de la Charte, ainsi qu'un nombre supplémentaire d'articles ou de paragraphes numérotés de la Charte, choisis par l'Etat, pourvu que le total d'articles ou de paragraphes numérotés ne soit pas inférieur à 16 articles (sur 31) ou à 63 paragraphes numérotés de la Charte révisée.

[8]Article 16 (Droit de la famille à une protection sociale, juridique et économique) : « En vue de réaliser les conditions de vie indispensables au plein épanouissement de la famille, cellule fondamentale de la société, les Parties s'engagent à promouvoir la protection économique, juridique et sociale de la vie de famille, notamment par le moyen de prestations sociales et familiales, de dispositions fiscales, *d'encouragement à la construction de logements adaptés aux besoins des familles*, d'aide aux jeunes foyers, ou de toutes autres mesures appropriées ».

en vue d'assurer que les personnes et les groups couverts par la Charte puissent effectivement avoir accès à des logements d'un niveau suffisant, conduire leur vie dans un tel logement, et n'être pas privés illégitimement d'une telle possibilité.

En outre, dans la plupart des cas, il s'agit d'obligations « à réalisation progressive », dans le sens que les Etats se sont engagés à agir pour réaliser progressivement les conditions nécessaires à assurer une jouissance effective du droit au logement par les personnes concernées.

Bien entendu : en disant que dans le domaine du droit au logement, les Etats parties à la Charte n'ont pas, dans la plupart des cas, d'obligations de résultat et d'assurer immédiatement la réalisation de certaines conditions, mais ils ont des obligations de moyens et à réalisation progressive, on ne veut pas signifier que les Etats peuvent se permettre de ne s'efforcer pas d'assurer l'exercice du droit au logement et de ne prendre pas au sérieux les obligations juridiques qui découlent de la Charte à cet égard.

Tout au contraire, les Etats sont tenus de s'efforcer avec continuité pour avancer dans la réalisation de toutes les conditions requises et l'adoption des mesures nécessaires. Et on peut bien exiger, sur la base de la Charte, qu'ils s'efforcent d'avancer dans cette réalisation – pour utiliser les mots du Comité européen des droits sociaux – « à une échéance raisonnable, au prix de progrès mesurables, en utilisant au mieux les ressources qu'ils peuvent mobiliser »[9]. Et si les Etats ne le font pas, ceci s'avère être un non-respect de la Charte sociale et une violation de l'obligation international d'assurer l'exercice effectif du droit au logement, établie par l'art. 31 de la Charte sociale révisée.

3. Le droit au logement dans le cadre de la procédure des réclamations collectives et la contribution du CEDS à la clarification du contenu du droit

C'est précisément dans cette perspective que le Comité européen des droits sociaux (CEDS), l'organe de contrôle de la Charte sociale, a interprété et appliqué les dispositions de la Charte qui s'occupent du droit au logement, et surtout qu'il a pu – à

[9] CEDS, *Autisme-Europe c. France*, réclamation n° 13/2002, décision sur le bien-fondé du 4 novembre 2003, par. 53.

travers les procédures de contrôle de la Charte – tant clarifier et développer le contenu des obligations étatiques en matière de logement, que donner une contribution concrète à la réalisation du droit au logement de certains groups de personnes dans des situations spécifiques concernant, tour à tour, plusieurs Etats européens.

Nous nous référons notamment à la procédure d'évaluation des rapports étatiques, mais surtout à la procédure des réclamations collectives.

Il convient de rappeler que cette dernière procédure – qui à ce jour a été acceptée par 16 Etats parties à la Charte – donne aux partenaires sociaux internationaux et nationaux, ainsi qu'aux organisations internationales non gouvernementales (OING) dotées du statut consultatif auprès du Conseil de l'Europe, la possibilité de s'adresser directement au CEDS afin qu'il statue sur l'éventuelle violation de la Charte dans les pays concernés[10].

Il convient aussi de rappeler que la procédure des réclamations collectives, à la différence des requêtes introduites à la Cour européenne des droits de l'homme, n'est pas ouverte aux requêtes individuelles. Elle ne peut pas être utilisée pour soumettre au Comité des cas individuels de violation des droits sociaux, ou pour lui faire établir la violation des droits des particuliers, ainsi que l'obligation de l'Etat de remédier à la violation subie par des victimes individuellement identifiées. Sa finalité consiste à obtenir une évaluation juridique non pas d'un cas individuel, mais plutôt d'une situation spécifique caractérisée par des éléments « d'importance collective » pour une généralité de sujets ; évaluation à réaliser sous l'angle exclusif de l'intérêt objectif à une application satisfaisante, par l'Etat concerné, des dispositions de la Charte sociale.

Et en cas de décision de violation, adopté par le CEDS, les Etats concernés par une réclamation sont obligés de donner suite à cette décision en soumettant au contrôle du CEDS et au Comité des Ministres du Conseil de l'Europe les mesures qui ont été

[10] Il s'agit d'une procédure quasi-juridictionnel, caractérisée par le principe du contradictoire entre organisation réclamante et Etat concerné, qui se déroule la plupart du temps uniquement par écrit, et au cours de laquelle plusieurs formes d'intervention par des entités qui ne sont pas parties à la réclamation sont aussi possibles. Il s'agit notamment de ceux partenaires sociaux internationaux qui ont aussi droit de présenter une réclamation, des autres Etats parties de la Charte qui ont accepté le Protocole prévoyant le système des réclamations collectives, et aussi de toute organisation, institution ou personne qui soit appelée par le CEDS à soumettre des communications pertinentes sur l'affaire à décider.

prises à cet effet, pour réaliser le droit protégé dans la Charte dans la situation spécifique faisant l'objet de la réclamation.

C'est donc dans le contexte de cette procédure que le CEDS a pu donner – comme on le disait – une contribution particulièrement utile à la clarification ainsi qu'à la réalisation du droit au logement en Europe.

Cela ressort bien, entre autres, par le récent rapport intitulé « Obligations faites aux Etats en matière de droit au logement à travers la jurisprudence européenne » (Juin 2020), préparé et publié par Housing Rights Watch avec FEANTSA (la Fédération Européenne des Associations Nationales Travaillant avec les Sans-Abri)[11]. Dans ce rapport, la très large majorité de la jurisprudence européenne mentionnée consiste précisément en des conclusions et surtout des décisions adoptées par le CEDS dans le cadre de la procédure des réclamations collectives.

Et il ressort aussi bien, de ce rapport, l'apport et la contribution originale que le CEDS a donné à la reconstruction des contenus et des implications du droit au logement en tant que droit de l'homme (ou droit social fondamental).

En fait, dans la jurisprudence du CEDS en matière de droit au logement on ne pas trouver beaucoup de références ou des renvois à des décisions ou jugements d'autres instances juridictionnelles européennes.

Le Comité est, bien sûr, très attentif à la jurisprudence de la Cour européenne des droits de l'homme, et il utilise assez fréquemment les *dicta* de la Cour qui peuvent avoir une incidence sur l'interprétation et l'application du droit au logement dans la décision d'un cas concret.

Cela vaut par exemple pour le concept de « distinction discriminatoire »[12] ou de « discrimination raciale » appliqué au droit au logement[13]. Ou pour la prise en

[11] Voir <https://www.housingrightswatch.org/sites/default/files/FEA%20005-20%20Update%20housing%20obligations_FR_v7.pdf>.

[12] Voir par exemple CEDS, *Centre européen des Droits des Roms (CEDR) c. France*, réclamation n° 51/2008, décision sur le bien-fondé du 19 octobre 2009, par. 82.

[13] Voir CEDS, *Centre sur les droits au logement et les explusions (COHRE) c. Italie*, réclamation n° 58/2009, décision sur le bien-fondé du 25 juin 2010, *passim*, surout paragraphes 37-40 ; 106 ; 117 ; 120-121 ; 129 ; 131 ; 138 ; 155-156.

compte de la vulnérabilité des Roms en droit comme en fait, et pour la protection des populations roms (ou des Sinti) afin de préserver leur diversité culturelle[14]. Ou pour le respect des garanties procédurales en matière d'expulsion forcée[15]. Et, en général, le CEDS a aussi souligné plusieurs fois que les interprétations qu'il développe de l'article 31 de la Charte sociale doivent être en phase avec l'interprétation que la Cour donne des dispositions pertinentes de la Convention. Approche que le Comité a concrètement appliqué, par exemple, dans la décision de la réclamation n. 53/2008, *FEANTSA c. Slovénie*, pour ce qui concerne l'interprétation développée par la Cour du droit de propriété, en considérant comme légitimes certaines restrictions au droit des propriétaires immobiliers privés[16].

Toutefois, pour ce qui concerne spécifiquement le contenu et la portée des obligations de l'Etat en matière de logement, il est aisément compréhensible que le CEDS fasse plus utilement référence à la jurisprudence internationale *non-européenne*, mais plutôt onusienne, et surtout à l'interprétation at aux décisions du Comité des Nations unies sur les droits économiques, sociaux et culturels concernant le droit au logement en tant qu'élément du droit à un niveau de vie suffisant, aux termes de l'art. 11 du Pacte sur les droits économiques, sociaux et culturels[17].

Ceci vaut, par exemple, pour le concept et les éléments de « logement suffisant ou convenable », pour lequel le CEDS a fait référence à la jurisprudence du Comité onusien dans la décision de la réclamation n. 33/2006 *Mouvement International ATD Quart Monde c. France*, ou plus récemment dans la décision de la réclamation n. 110/2014, *Fédération Internationale des Ligues des Droits de l'Homme (FIDH) c. Irlande*[18].

[14] *Ibid.*, spécialement paragraphes 37 à 40, 106, 117, 120-121, 129, 131, 138, 155-156.

[15] Voir CEDS, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) c. Grèce*, réclamation n° 49/2008, décision sur le bien-fondé du 11 décembre 2009, paragraphes 37 et 38.

[16] CEDS, *FEANTSA c. Slovénie*, réclamation n° 53/2008, décision sur le bien fondé du 8 septembre 2009, par. 33.

[17] En fait, on a dit (*supra*, para. 1, notes 3 et 4) que, au niveau juridique international, c'est précisément le système du PIDESC à prendre en considération explicite le droit au logement en tant que droit de l'homme (ou droit social fondamental).

[18] A ce propos voir *infra* le paragraphe suivant et spécialement la note 23.

4. Les obligations positives faites aux Etats en matière de logement : quelques exemples concernant l'obligation d'assurer un logement d'un niveau convenable

D'ailleurs, l'originalité de l'apport et de la contribution du CEDS en matière de droit au logement s'explique en partie par le fait qu'il est appelé à interpréter et appliquer des dispositions – celles de l'art. 31 de la Charte révisée – qui constituent, comme on l'a dit, une sorte d'*unicum* dans le panorama du droit international et européen des droits de l'homme, et qui s'inscrivent à leur tour dans un système normatif – la Charte révisée – caractérisé par une approche très avancée à la protection et à la réalisation des droits sociaux par le Etats. Mais cette originalité s'explique aussi, en partie, par l'originalité de la procédure des réclamations collective, et donc par le genre de problèmes – d'importance collective –, et la spécificité des situations de violation, que les organisations réclamantes soumettent à l'attention du Comité.

La jurisprudence du CEDS est en effet débitrice, en grande partie, à l'activisme, aux capacités juridiques et au rôle crucial joué par certaines organisations internationales non gouvernementales (OING), qui ont soumis au Comité des réclamations bien circonstanciées concernant la situation et les problèmes liés au logement en plusieurs Etats européens.

Nous nous référons surtouts à des OING telles que FEANTSA, Mouvement International ATD Quart Monde, le Centre on Housing Rights and Evictions, la Fédération internationale des Ligues des Droits de l'Homme, le Centre européen des droits des Roms, et aussi la Conférence des Eglises européennes.

On peut donc bien profiter de la jurisprudence du CEDS dans la procédure de réclamations collectives[19] pour proposer quelques exemples du contenu possible des obligations positives des Etats européens en matière de droit au logement.

D'abord, et d'une manière générale, le Comité a souligné que ce droit, tel qu'énoncé par la Charte, doit « revêtir une forme concrète et effective, et non pas théorique ». Il en résulte que les Etats Parties ont les obligations (positives) suivantes : « a)

[19] Cette jurisprudence est constituée notamment par une douzaine de décisions sur le bien-fondé adopté par le CEDS dans les vingt dernières années. On peut les consulter sur le web à <https://www.coe.int/fr/web/european-social-charter/processed-complaints>.

de mettre en œuvre des moyens (normatifs, financiers, opérationnels), propres à permettre de progresser réellement vers la réalisation des objectifs assignés par la Charte ; b) de tenir des statistiques dignes de ce nom permettant de confronter besoins, moyens et résultats ; c) de procéder à une vérification régulière de l'effectivité des stratégies arrêtées ; d) de définir des étapes, et de ne pas reporter indéfiniment le terme des performances qu'ils se sont assignées ; e) d'être particulièrement attentifs à l'impact des choix opérés par eux sur l'ensemble des catégories de personnes concernées et singulièrement celles dont la vulnérabilité est la plus grande ».

Ceci a été dit, la première fois, par le Comité dans la décision de la réclamation n. 33/2006, *Mouvement International ATD Quart Monde c. France*[20].

Il faut souligner que la réclamation portait soit sur l'insuffisance en France de l'offre de logements d'un coût accessible et les modalités d'attribution des logements sociaux aux personnes les plus pauvres (aux termes du paragraphe 3 de l'art. 31), soit – aux termes du paragraphe 2 de l'article – sur la procédure suivie en cas d'expulsions d'occupants sans titre, qui aurait effectivement mené à l'errance des personnes concernées, car – entre autres – aucune autorité n'était chargée de rechercher une négociation au préalable, pour savoir où les familles allaient pouvoir habiter.

Cette approche générale au contenu opératif des obligations de l'Etat en matière de logement a été suivi et précisé maintes fois par le Comité.

On doit toutefois s'entendre sur la valeur juridique des différentes activités indiquées par le Comité en tant qu'obligatoires dans le passage qu'on vient de mentionner.

Dans une décision plus récente, du juin 2017, concernant la réclamation n. 110/2014, le CEDS a précisé à cet égard que « le non-respect de l'une ou de l'ensemble de ces obligations ne constitue pas en soi nécessairement une violation du droit au logement. De même, le fait qu'un Etat respecte plusieurs ou l'ensemble desdites obligations n'exclut pas nécessairement qu'il ne satisfasse pas, dans une situation donnée, à son devoir de garantir le droit au logement ». Donc, chaque situation doit être examinée « au cas par cas en fonction de son bien-fondé et de ses particularités, en tenant compte

[20] CEDS, *Mouvement International ATD Quart Monde c. France*, réclamation n° 33/2006, décision sur le bien-fondé du 5 décembre 2007, par. 60.

de tous les facteurs pertinents aux circonstances de l'espèce »[21].

Il s'agit notamment de la décision dans la réclamation *Fédération Internationale des Ligues des Droits de l'Homme (FIDH) c. Irlande*, qui est en effet très intéressante pour plusieurs raisons.

Dans cette affaire, la FIDH alléguait que l'Irlande n'aurait pas respecté le droit au logement des familles, aux motifs surtout que certains logements sociaux étaient inadaptés en termes d'adéquation aux besoins, d'habitabilité et de caractère approprié, et que différents aspects des programmes de réhabilitation de l'Etat dans les principaux parcs de logements sociaux n'étaient pas conformes aux obligations énoncées dans la Charte.

La question concernait donc essentiellement le contenu des obligations étatiques d'assurer un logement d'un niveau suffisant (ou convenable).

A cet égard, le Comité, en confirmant sa position précédente, a d'abord clarifié que « le droit au logement pour les familles englobe la mise à disposition d'un logement d'un niveau convenable et donnant accès aux services essentiels. Il se réfère ici à l'observation générale n° 4 du Comité des droits économiques, sociaux et culturels des Nations Unies, qui dispose que '[un] logement convenable doit être habitable, en ce sens qu'il doit offrir l'espace convenable et la protection contre le froid, l'humidité, la chaleur, la pluie, le vent ou d'autres dangers pour la santé, les risques dus à des défauts structurels et les vecteurs de maladies. La sécurité physique des occupants doit également être garantie'. En outre, '[u]n logement convenable doit comprendre certains équipements essentiels à la santé, à la sécurité, au confort et à la nutrition. Tous les bénéficiaires du droit à un logement convenable doivent avoir un accès permanent à des ressources naturelles et communes : de l'eau potable, de l'énergie pour cuisiner, le chauffage et l'éclairage, des installations sanitaires et de lavage, des moyens de conservation des denrées alimentaires, d'un système d'évacuation des déchets, de drainage, et des services d'urgence' »[22].

Il a donc considéré la situation existante dans des nombreux ensembles de lo-

[21] CEDS, *Fédération Internationale des Ligues des Droits de l'Homme (FIDH) c. Irlande*, réclamation n° 110/2014, décision sur le bien-fondé du 12 mai 2017, par. 110.

[22] *Ibid.*, par. 118.

gements sociaux en Irlande, en observant que « les remontées d'eaux usées, les analyses démontrant la pollution de l'eau, les problèmes d'humidité, les moisissures persistantes, etc. touchent au cœur même de ce qui fait qu'un logement est ou non convenable et soulèvent en l'espèce de graves inquiétudes quant à l'habitabilité et à l'accès aux services »[23].

Et il a aussi noté « que les autorités irlandaises n'ont pas compilé de données statistiques complètes concernant l'état des logements sociaux depuis 2002 et qu'il n'existe pas de calendrier national pour leur rénovation. Beaucoup de programmes de réhabilitation adoptés par le Gouvernement ces dix dernières années n'ont pas été menés à leur terme, de sorte qu'un certain nombre de locataires continuent de vivre dans des conditions de logement non conformes aux normes d'habitabilité »[24].

Pour ces motifs, le CEDS a conclu que « le Gouvernement irlandais a omis de prendre en temps voulu des mesures suffisantes pour garantir le droit à un assurer un logement d'un niveau suffisant à un nombre non négligeable de familles vivant dans des logements sociaux », et il a donc violé la Charte sociale[25].

Cette décision est aussi intéressante parce qu'elle montre que la protection du droit à un logement d'un niveau suffisant, dans le système de la Charte sociale, s'étend au-delà de l'application de l'art. 31.

En fait, la réclamation portait sur l'art. 16 (le droit de la famille à un protection sociale, juridique et économique), et non pas sur l'art. 31 (droit au logement), au motif que l'Irlande n'a pas accepté ce dernier article. Et le Gouvernement a soulevé une exception préliminaire selon laquelle la réclamation aurait été irrecevable parce qu'elle portait justement sur des questions qui auraient relevé en substance de l'article 31, lequel n'a pas été accepté par l'Irlande.

Or, le CEDS a rejeté cette objection, en rappelant qu'en vertu de l'article 16, les parties sont tenues de promouvoir la protection de la famille par le biais de la construction de logements adaptés aux besoins des familles. Et, il a répété encore une

[23] *Ibid.*, par. 119.

[24] *Ibid.*, par. 120.

[25] *Ibid.*, par. 121.

fois : « Le fait que le droit au logement soit énoncé à l'article 31 de la Charte n'exclut pas que des questions pertinentes relatives au logement soient examinées dans le cadre de l'article 16, qui traite du logement en tant qu'élément du droit des familles à une protection sociale, juridique et économique (Centre européen des droits des Roms (CEDR) c. Bulgarie, réclamation n° 31/2005, décision sur la recevabilité du 10 octobre 2005, par. 9, Forum européen des Roms et des Gens du voyage (FERV) c. République tchèque, réclamation n° 104/2014, décision sur le bien-fondé du 27 mai 2016, paragraphes 67 et 68) »[26].

Et pour ce qui concerne en particulier l'obligation de l'Etat de garantir un logement d'un niveau suffisant aux familles, le Comité a réitéré que « les articles 16 et 31 de la Charte se chevauchent partiellement, en ce sens que la notion de logement adéquat est identique aux articles 16 et 31 (voir Centre sur les droits au logement et les expulsions (COHRE) c. Italie, réclamation n ° 58/2009, décision sur le bien-fondé du 25 juin 2010, par.158) »[27].

Ceci signifie que les Etats qui n'ont pas accepté l'art. 31, mais seulement l'art. 16, sont également tenus, selon le Comité, « de fournir un logement d'un niveau suffisant pour les familles ; de tenir compte des besoins des familles dans les politiques de logement ; et de veiller à ce que les logements existants soient d'une qualité satisfaisante, soient dotés de tous les éléments de confort essentiels (tels que le chauffage et l'électricité), et qu'ils soient aussi d'une taille adaptée à la composition du ménage qui y réside »[28].

[26] *Ibid*., par. 25.

[27] *Ibid*., par. 107.

[28] *Ibid*., par. 106.

5. Les obligations étatiques positives concernant la prévention et la réduction de l'état de sans-abri, et celles finalisées à rendre le coût du logement accessible aux personnes qui ne disposent pas de ressources suffisantes

Un autre aspect pour lequel les décisions du CEDS ont mis bien en exergue le caractère et le contenu des obligations positives de l'Etat en matière de droit au logement concerne la prévention et la réduction de l'état de sans-abri, aux termes du paragraphe 2 de l'art. 31 de la Charte révisée.

A cet égard, plusieurs décisions du Comité ont clarifié que, bien que la privation du logement dont on était occupant pour des motifs tenant tant à l'insolvabilité qu'à une occupation fautive soit légitime, et bien que les autorités de l'Etat disposent évidemment d'une large marge d'appréciation pour ce qui est de la mise en place de mesures en matière d'aménagement urbain, l'obligation de prévenir et réduire l'état de sans-abri exige que les Etats adoptent quand même les mesures nécessaires pour d'éviter que les personnes visées par une menace ou une procédure d'expulsion ne deviennent des sans-abri.

Ceci signifie d'une part que, en cas d'expulsion, les autorités étatiques doivent néanmoins s'efforcer préalablement de rechercher de solutions alternatives à l'éviction, fixer un délai de préavis raisonnable avant la date de l'expulsion, et exécuter l'expulsion dans des conditions respectant la dignité des personnes concernées, comme le CEDS l'a dit dans une série de décisions concernant la violation du droit des Roms ou des familles roms au logement[29].

Mais cela signifie aussi, d'autre part, que, lorsque l'intérêt général ou l'application de la loi justifient l'expulsion, les autorités publiques doivent faire en sorte de reloger ou d'aider financièrement les personnes concernées, afin qu'ils puissent trouver une solution alternative d'hébergement, car – autrement – l'obligation de réduire l'état de sans-abris ne serait pas respectée. Ce qui a été affirmé très clairement par le Comité

[29] *Centre européen des Droits des Roms (CEDR) c. Grèce*, réclamation n° 15/2003, décision sur le bien-fondé du 8 décembre 2004 ; *Centre européen des Droits des Roms (CEDR) c. Bulgarie*, réclamation n° 31/2005, décision sur le bien-fondé du 18 octobre 2006 ; *Centre européen des Droits des Roms (CEDR) c. France*, réclamation n° 51/2008, décision sur le bien-fondé du 19 octobre 2009 ; *Centre on Housing Rights and Evictions (COHRE) c. Italie*, réclamation n° 58/2009, décision sur le bien-fondé du 25 juin 2010.

dans une décision qui ne concernait pas le Roms, mais la situation générale en France des expulsions pour insolvabilité ou pour occupation fautive[30].

Et à propos du droit de ne se retrouver sans abri et logement adéquat, protégé par l'art. 31, par. 2 (ainsi que par l'art. 16, pour ce qui concerne la protection de la famille), on doit souligner que le CEDS l'estime tellement fondamental et inhérent au respect de la vie et la dignité humaine, qu'il considère que les Etats parties soient tenus à l'assurer exceptionnellement aussi aux personnes qui ne rentrent pas dans le champ d'application personnel indiqué dans l'Annexe à la Charte, qui se réfère – comme on le sait, et malheureusement, on pourrait ajouter – aux « étrangers que dans la mesure où ils sont des ressortissants des autres parties résidant légalement ou travaillant régulièrement sur le territoire de la partie intéressée ».

On peut en effet trouver plusieurs décisions concernant la violation du droit à un abri et à un logement adéquat de mineurs étrangers non accompagnés et aussi d'autres ressortissants étrangers en situation irrégulière sur le territoire de l'Etat[31].

Enfin, le CEDS a eu l'occasion de s'exprimer aussi sur les mesures qui sont nécessaire pour réaliser les obligations positives prévues par le paragraphe 3 de l'art. 31, finalisées à rendre le coût du logement accessible aux personnes qui ne disposent pas de ressources suffisantes.

On peut ici se référer surtout à deux décisions, l'une dans *Mouvement International ATD Quart Monde c. France* (2007) et l'autre dans *FEANTSA c. Slovénie* (2009). De ces décisions il ressort, entre autres, que les Etats sont tenus de favoriser la construction de logements sociaux à destiner prioritairement aux plus défavorisés ; de réduire les délais trop longs d'attribution des logements sociaux ; et de prévoir des aides au logement pour les personnes aux revenus modestes et les catégories défavorisées de la population[32].

[30] Nous nous référons notamment à CEDS, *FEANTSA c. France*, réclamation n. 39/2006, décision sur le bien-fondé du 5 décembre 2007, paragraphes 85-91.

[31] *Défense des Enfants International c. Pays-Bas*, réclamation n° 47/2008, décision sur le bien-fondé du 20 octobre 2009 ; *Conférence des Eglises européennes (CEC) c. Pays-Bas*, réclamation n° 90/2013, décision sur le bien-fondé du 1 juillet 2014 ; *Commission internationale de Juristes (CIJ) et Conseil européen sur les Réfugiés et Exilés (ECRE) c. Grèce*, réclamation n°173/2018, décision sur le bien-fondé du 26 janvier 2021.

[32] Voir CEDS, *Mouvement International ATD Quart Monde c. France*, réclamation n. 33/2006, décision sur le bien-

6. Quelques mots de conclusion

Ceux-ci étaient donc seulement des exemples pour montrer en quel sens la réalisation du droit au logement, aux termes de la Charte sociale, nécessite le respect et l'exécution d'obligations positives par les Etats et les autorités publiques, ainsi que l'utilité qu'un système normatif européen (tel que la Charte sociale) et une procédure de contrôle quasi-juridictionnelle (telle que la procédure des réclamations collectives) peuvent avoir pour traiter et résoudre les problèmes sérieux qui affligent la jouissance de ce droit dans les Pays européens.

Mais, pour conclure, on dirait encore une fois que tout ça peut produire des résultats utiles et importants seulement si, et dans la mesure où, la société civile organisée et engagée, c'est à dire les OING actives dans le domaine du droit au logement, se révèlent capables de faire vivre et faire fonctionner effectivement le système européen de protection des droit sociaux, en appelant les Etats européens à leurs responsabilités en matière de logement.

fondé du 5 décembre 2007, paragraphes 98-100 et 131, et *FEANTSA c. Slovénie*, réclamation n. 53/2008, décision sur le bien-fondé du 8 septembre 2009, par. 72.

VIVIANA SACHETTI*

A NEW CHAPTER IN THE NEVER-ENDING RULE OF LAW SAGA IN THE EU: THE JUDGMENT ON THE ANNULMENT OF THE CONDITIONALITY MECHANISM

ABSTRACT. *The present contribution intends to provide a brief analysis of the recent judgments in the annulment proceedings brought before the European Court of Justice by Poland and Hungary concerning the alleged non-compliance with the Treaties of the conditionality mechanism (Regulation (EU) 2020/2092). The judgments may be deemed as a further step in defining the rule of law within the European Union legal order, as they shed new light on this instrument, adopted in order to tackle violations of that Union's fundamental value that bear negative consequences for the EU's budget.*

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The European Court of Justice (hereinafter: ECJ) has recently adopted two 'twin' rulings, in its full composition and by means of an accelerated procedure, on two actions for annulment brought before the Court by Hungary and Poland[1]. Both actions concerned the request for the Court to adjudge on the compliance with the Treaties of the so-called 'conditionality mechanism', introduced in the European Union (hereinafter: EU) legal order through Regulation (EU) 2020/2092[2] with the aim of protecting the EU's budget from infringements of the rule of law.

In brief, the conditionality mechanism was established in December 2020 on the basis of Art. 322 of the Treaty on the Functioning of the European Union (hereinafter: TFEU)[3], in order to contain and sanction those conducts of Member States – e.g., the threats to the independence of the judiciary or the limitation of available and effective remedies against arbitrary or unlawful decision of public authorities – capable

[1] Judgment of 16 February 2022, case C-156/21, *Hungary* v. *Parliament and Council*, ECLI:EU:C:2022:97; judgment of 16 February 2022, case C-157/21, *Poland* v. *Parliament and Council*, ECLI:EU:C:2022:98. For some early comments on the present judgments, see M. Fisicaro, *Protection of the Rule of Law and 'Competence Creep' Via the Budget: The Court of Justice on the Legality of the Conditionality Regulation*, in «European Constitutional Law Review», 2022, pp. 1 *et seq*.; R. Mavrouli, *The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation*, in «European Papers», 2022, vol. 7, n. 1, pp. 275 *et seq*.; L. Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, in «Hague Journal on the Rule of Law«, 28 June 2022, available online; S. Progin-Theuerkauf, M. Berger, *ECJ Confirms Validity of the Rule of Law Conditionality Regulation*, in «European Law Blog», 11 March 2022, available online; A. Zemskova, *Rule of Law Conditionality: a Long-Desired Victory or a Modest Step Forward?*: Hungary v. Parliament and Council *(C-156/21)* and Poland v. Parliament and Council *(C-157/21)*, in «EU Law Live», 18 February 2022, available online.

[2] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. For an analysis of the conditionality mechanism, see *ex multis* B. Nascimbene, *Il rispetto della* rule of law *e lo strumento finanziario. La "condizionalità"*, in «Eurojus.it», 2021, n. 3, pp. 172 *et seq*.; P. Mori, *Gli strumenti di tutela del rispetto dello Stato di diritto: verso una condizionalità finanziaria*, in Av.Vv., *Temi e questioni di diritto dell'Unione europea. Scritti offerti a Claudia Morviducci*, Cacucci, Bari, 2019, pp. 187 *et seq*.; N. Kirst, *Rule of Law Conditionality: The Long-Awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?*, in «European Papers», 2021, vol. 6, n. 1, pp. 101 *et seq*. The present Author also wishes to refer to her own previous work for a wider perspective on the subject, in V. Sachetti, *Il nuovo meccanismo di condizionalità per la protezione del bilancio dell'Unione europea*, in «Studi sull'integrazione europea», 2021, n. 2, pp. 431 *et seq*.

[3] Art. 322, para. 1, 1, TFEU, provides as follows: «[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations: (a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts […]».

of undermining the sound management of the Union's budget. The sanctions thereby adopted range from the suspension of the disbursement of certain funds, particularly those derived from the Next Generation EU, to the early repayment of loans guaranteed by the Union budget or termination of legal commitments[4].

However, the Conclusions reached by the European Council in December 2020[5] have led to a *de facto* delay of the applicability of the conditionality mechanism, as they required the Commission to adopt guidelines concerning the concrete conditions of implementation, in light of the potential action for annulment of the Regulation «so as to incorporate any relevant elements stemming from such judgment»[6]. Unsurprisingly, such conclusion found its way through those adopted by the European Council as the result of a compromise with Poland and Hungary, that had already anticipated their intention of bringing an action under Art. 263 TFEU before the ECJ[7].

Preliminarily, the Court is requested to evaluate the admissibility for evidentiary purposes of an Opinion of the Council's Legal Service[8], that the institution itself claimed to be an internal document, as such covered by professional secrecy, the publication and disclosure as evidence of which had not been authorised. In the Council's view, if

[4] Art. 5, Regulation 2020/2092. On the use of similar mechanisms in the EU context, see G. Gioia, *La condizionalità nell'esperienza dell'Unione europea. Protezione del bilancio e valori costituzionali*, in «Diritti comparati«, 2021, n. 3, pp. 153 *et seq.*; A. Baraggia, M. Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, in «German Law Journal», 2022, vol. 23, n. 2, pp. 131 *et seq*.

[5] Conclusions of the European Council of 10-11 December 2020.

[6] *Ibidem*, n. 2, lit. c).

[7] A. Alemanno, M. Chamon, *To Save the Rule of Law You Must Apparently Break It*, in «Verfassungsblog», 11 December 2020, available online. The Commission indeed adopted its guidelines (Communication of the European Commission, Guidelines on the application of the Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget, 18 March 2022), recalling repeatedly the clarifications provided by the Court of Justice in the cases at hand; for an early comment, see G. Gioia, *Le linee guida della Commissione europea sul meccanismo di condizionalità a protezione del bilancio UE: effettività della tutela dello Stato di diritto e valorizzazione dello spazio pubblico europeo*, in «Blog Diritti Comparati», 24 March 2022, available online.

[8] Opinion of the Council's Legal Service n. 13593/18, not published. For a comment on the adoption of such opinion, see K.L. Scheppele, L. Pech, R.D. Kelemen, *Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-Related Rule of Law Mechanism*, in «Verfassungsblog», 12 November 2018, available online.

the Court were to recognise the possibility for the applicants to rely on that Opinion during the proceedings, it would entail a violation of the principles of fair trial and of equality of arms among the parties.

While conceding that the use of the Opinion in the absence of an authorisation may constitute an infringement of Regulation (EC) 1049/2001[9], the Court considered the existence of overriding reasons stemming from the principle of transparency. In particular, the Council had not sufficiently demonstrated the presence of sensitive content, as the effects of the Opinion appear to be limited to those concerning the legislative process of Regulation 2020/2092, the legitimacy of which is precisely the object of the requests of the applicants. It is also interesting to note that the Court, in acknowledging that the principle of transparency «guarantees, inter alia, that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system»[10], refers to a previous order, adopted by the Court itself, which has never been published[11].

The grounds for the action brought forward by Hungary and Poland deal primarily with the following six motives: (i) the lack of competence on the part of the Union to adopt the Regulation; (ii) the infringement of the principles of subsidiarity and proportionality; (iii) the failure to illustrate the motivation for the adoption of the Regulation; (iv) the violation of the principle of conferral; (v) the infringement of the States' national identities as set forth in Art. 4, para. 2, Treaty on the European Union (hereinafter: TEU); (vi) the breach of the principle of legal certainty. For the sake of brevity, only the main issues decided by the Court will be analysed, as follows.

As for the first ground, the two Member States claimed that the legal basis of Art. 322 TFEU allows for the creation of mechanisms for the protection of the Union's budget, provided that they aim at safeguarding its sound management, as opposed to

[9] Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. According to Art. 4, para. 2, of the Regulation: «[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] court proceedings and legal advice […] unless there is an overriding public interest in disclosure».

[10] *Hungary* v *Parliament and Council*, cit., para. 55; *Poland* v. *Parliament and Council*, cit., para. 52.

[11] Order of 14 May 2019, case C-650/18, *Hungary* v. *Parliament*, not published, ECLI:EU:C:2019:438.

the objective of protecting the rule of law, which appears to be the case with the Regulation at hand. Furthermore, the legislator should not introduce instruments that could circumvent the procedure established under Art. 7 TEU in order to protect the Union's fundamental values as set forth in Art. 2 TEU, including the rule of law. Nor could the Regulation sidestep – and this is a significant concession on the part of the applicants – the judicial remedy of the infringement procedure (Arts. 258 *et seq*. TFEU) in those cases in which the effective judicial protection set forth in Art. 19, para. 1, TFEU is allegedly undermined. Undoubtedly, this constitutes the key issue of the action, brought forward by two Member States that – as known – have for some time been at the at the centre of political and judicial proceedings[12] as a consequence of several measures adopted at the domestic level, which have repeatedly been deemed a violation of the fundamental value of the rule of law.

Relying on the arguments raised by the applicants themselves, the Court clarified that the conditionality mechanism cannot be considered as an instrument elusive of the essentially political procedure under Art. 7 TEU. Indeed, the arsenal at the disposal of the Union in order to tackle any violation of its fundamental principles includes, as Hungary and Poland have observed, the recourse, for instance, to judicial means. Thus, it follows that other mechanisms may well be introduced to protect the rule of law, albeit through mediated means, as the Regulation requires an actual or potential impact on the sound financial management of the Union's budget[13], which in any case remains the ultimate subject of protection under the conditionality mechanism.

Therefore, the Court, requested to evaluate whether Art. 322 TFEU is an adequate legal basis[14], affirmed that the purpose of Regulation 2020/2092 is entirely related to the protection of the Union's budget, in light of the types, aims and

[12] A complete overview of which can be found in L. Pech, D. Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgements since the* Portuguese Judges *Case*, in *Swedish Institute for European Policy Studies*, 20 May 2021, available online.

[13] Art. 5, para. 3, Regulation 2020/2092.

[14] A question on which see Kelemen, Scheppele, *How to Stop Funding Autocracy in the EU*, in *Verfassungsblog*, 10 September 2018, available online.

requirements for the application and the termination of the sanctioning measures therein provided, as well as of the general objective of safeguarding the legitimate interests of the final recipients and beneficiaries of the Union's funds thus guaranteed. In this context, the respect for the rule of law constitutes «an essential precondition for compliance with the principles of sound financial management»[15]. To this end, the ECJ recalled that sharing the fundamental values set forth in Art. 2 TEU is one of the «specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law» and, as such, «implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected»[16]. It follows that the respect of the rule of law constitutes the precondition for the enjoyment of the rights stemming from the Treaties, and, as a consequence, the mechanism that safeguards the Union's budget is lawful as the latter constitutes the main instrument that gives concrete expression to the EU policies.

The assessment of the compliance with the principle of legal certainty appears instead to be more problematic. The applicant States had indeed raised concerns on the consistency with said principle of Art. 3 of Regulation 2020/2092, that provides a number of cases «indicative of breaches of the principles of the rule of law»[17]. As a response, the Court affirmed that «the EU legislature cannot be required to specify, under such a conditionality mechanism, all situations of breach of the constituent principles of the rule of law, such breach being characterised by disregard for requirements known to Member States in a sufficiently specific and precise manner»[18]. While this pronouncement is *per se* agreeable, at the same time it fuels doubt over the

[15] *Hungary* v *Parliament and Council*, cit., para. 116; *Poland* v *Parliament and Council*, cit., para. 130.

[16] *Hungary* v *Parliament and Council*, cit., para. 125; *Poland* v *Parliament and Council*, cit., para. 143.

[17] The three situations therein listed draw clear inspiration from the cases that have already been at the centre of attention of the European institutions, namely: (i) threats to the independence of the judiciary; (ii) the failure to prevent and remedy unlawful or arbitrary decisions adopted by public authorities; (iii) the failure to guarantee available and effective remedies.

[18] *Poland* v *Parliament and Council*, cit., para. 171.

function held by said Art. 3, even if it were to be read in conjunction with Art. 2 of the Regulation, which provides a definition – again, expressly non exhaustive – of the elements that form the rule of law. Nor more persuasive appears the claim that, notwithstanding the lack of a detailed definition, the «extensive case-law of the Court» would suffice to clarify the meaning of each element[19].

Among the 'minor' grounds of the action of annulment, the one concerning the potential violation of the principle of the respect of national identities[20] deserves a closer look, not least as the reliance on it constitutes a beloved argument for Hungary and Poland, as both States have repeatedly raised it in the infringement proceedings brought against them by the Commission in the context of the rule of law. The ECJ had thus the chance to clarify that the compliance with such principle, enshrined in Art. 4, para. 2, TEU, implies a margin of appreciation for the Member States in implementing the value of the rule of law, provided that its safeguard is an obligation of result bearing on all parties to the Union, so that no divergences as to that objective can be tolerated[21].

Lastly, it is worth underlining a reminder by the Court, the echo of which will certainly resonate in its future decisions. In an almost secondary passage of its reasonings, the EU judges recall that «Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which […] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States»[22].

A loud warning for the Member States, in particular the applicants themselves whose reactions will predictably not be long in coming, including through the decisions of their constitutional courts, by reminding them that the respect of the founding principles constitutes a persistent and long-lasting condition that is not exhausted the

[19] *Ibid.*, para. 201.

[20] On which see L.S. Rossi, *2, 4, 6 (TUE)… L'interpretazione dell'"identity clause" alla luce dei valori fondamentali dell'UE*, in Liber Amicorum *Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Giappichelli, Torino, 2018, pp. 859 *et seq*.

[21] *Hungary* v *Parliament and Council*, cit., para. 233; *Poland* v *Parliament and Council*, cit., para. 265.

[22] *Hungary* v *Parliament and Council*, cit., para. 232; *Poland* v *Parliament and Council*, cit., para. 264.

moment that they become members of the Union. An exhortation for the institutions, beginning with the Commission, already prompted by the European Parliament[23] to launch the conditionality mechanism without further ado[24], along one more additional road. And once more, on the basis of the decisions of an indefatigable Court that, along the lines of the judgments at hand, appears to urge the institutions to act in order to resolutely protect the Union's fundamental values.

[23] See, most recently, European Parliament resolution of 9 June 2022 on the rule of law and the potential approval of the Polish national recovery plan (RRF), 2022/2703(RSP); see also European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092, 2021/2711(RSP).

[24] Pech, *No More Excuses. The Court of Justice Greenlights the Rule of Law Conditionality Mechanism*, in *Verfassungsblog*, 16 February 2022, available online.

MIRKO SOSSAI*

SANCTIONING RUSSIA: QUESTIONS ON THE LEGALITY AND THE LEGITIMACY OF THE MEASURES IMPOSED AGAINST THE INVASION OF UKRAINE

ABSTRACT. *Since the invasion of Ukraine in February 2022, an unprecedented level of cooperation has been achieved among a group of like-minded States – encompassing G7 members as well as Australia, Switzerland, and South Korea – in imposing sanctions against the Russian Federation. In particular, the European Union has taken various rounds of restrictive measures against Russia: a combination of targeted sanctions against government élites and a more comprehensive package of measures of commercial and financial character. A key issue is that of their legality under international law. In the view of the EU, its restrictive measures are fully compliant with international obligations. They are in any event justified as a response to the Russia's aggression, one of the most serious breaches of the fundamental rules of the international community. But other States disagree: they claim that the only legitimate sanctions are those adopted by the UN Security Council and unilateral measures are always an unlawful intervention in the internal affairs of the targeted State.*

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1. Introduction

The armed aggression perpetrated against Ukraine since 24 February 2022 has led both the USA and the European Union (hereinafter EU) to impose various rounds of sanctions against the Russian Federation. This type of response is not at all new; rather, it is built upon a solid framework of measures that have been already adopted in connection with the annexation of Crimea of March 2014[1]. However, the current complex framework of measures has been described as unexpectedly robust and severe, being capable of permanently reshaping the global economy: a combination of 'targeted sanctions' against government élites and a more comprehensive package of measures of commercial and financial character, affecting Russia as a whole, as well as its principal ally, Belarus[2]. Although the EU and the USA have certainly sought to coordinate their reaction with respect to the design and the content of their 'sanctions', along with other countries – Australia, Canada, Japan, South Korea, Switzerland and the United Kingdom – it is important to note that they have adopted such measures in an individual and unilateral manner. Still, they are putting considerable pressure on other States to adopt similar actions against Russia, although there is widespread skepticism concerning their legality and legitimacy.

2. The EU Restrictive Measures against Russia: Some Distinctive Features

The analysis of the sanctioning activity of both the EU and the USA has so far sought to determine the impact of these measures, essentially with respect to the

[1] See A. Bultrini, *EU "Sanctions" and Russian Manoeuvring: Why Brussels Needs to Stay its Course while Shifting Gears*, in »IAI Commentaries 20/46«, June 2020, <https://www.iai.it/en/pubblicazioni/eu-sanctions-andrussian-manoeuvring-why-brussels-needs-stay-its-course-whileshifting>.

[2] An overview of the packages of restrictive measures so far adopted by the EU is available at <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/>, 2022. See C. Portela. *Sanctions, Conflict and Democratic Backsliding: A User's Manual*, EUISS, May 2022, <https://www.iss.europa.eu/content/sanctions-conflict-and-democratic-backsliding>.

contribution to foreign policy objectives[3]. Other issues have been left in the background, including elements that remain crucial in the debate among diplomats and legal experts. For instance, questions concerning the legality and legitimacy of the imposed measures have been mostly neglected.

In international law, the term 'sanction' usually identifies measures taken in accordance with the constituent instrument of an international organization, in particular those taken by the United Nations Security Council (hereinafter UNSC) under article 41 of the United Nations (UN) Charter[4]. Contrariwise, decentralized reactions to the commission of an internationally wrongful act are justified either as retorsions or as countermeasures, depending on their characteristics. It follows that the reason why some States have a skeptical reaction to the adoption of 'sanctions' against the Russian Federation is not only political but also legal: they doubt or even sometimes openly contest the legality of the autonomous adoption of coercive measures (i.e., outside of the UN collective security framework) thus violating the sovereignty of the targeted States, even if such measures are adopted to preserve the peace and to protect general interests of the international community as a whole. During the last years, however, both the USA and the EU have largely resorted to this method of 'coercive diplomacy'[5], by applying their own measures when UN collective action was blocked or even in parallel with UN sanctions[6].

[3] See Portela *European Union Sanctions and Foreign Policy: When and Why do They Work?*, Milton Park, Routledge, 2010; F. Giumelli, F. Hoffmann, & A. Książczaková. *The When, What, Where and Why of European Union Sanctions*, in «European Security», 2021, 30:1, 1-23.

[4] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, in *Yearbook of the International Law Commission 2001*, vol. II, 2001, p. 75; see ILA, *Study Group on UN Sanctions and International Law. The Design and Interpretation of UN Security Council Sanction Resolutions*, Final Report, 2019; J.M. Farrell, *United Nations Sanction and the Rule of Law*, Cambridge University Press, Cambridge, 2007; L. van den Herik, *The Individualization and Formalization of UN Sanctions*, in L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing, Cheltenham, 2017, pp. 1-16.

[5] See N. Ronzitti, *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law*, Brill, Leiden, 2016, pp. 1-32.

[6] On the US practice, see R. Nephew, *The Art of Sanctions: A View from the Field*, Columbia University Press, New York, 2017; M. Rathbone, P. Jeydel & A. Lentz, *Sanctions, Sanctions Everywhere: Forging Path through Complex Transnational Sanctions Laws* in *Georgetown Journal of International Law*, 44(3), 2013, pp. 1055-1126; on EU autonomous meausres, see S. Poli, *Le misure restrittive autonome dell'Unione europea*, Editoriale Scientifica, Napoli,

From a legal perspective, restrictive measures adopted by the EU share some distinctive features. For instance, they require a unanimous decision by its members within the Council of the EU, as they fall within the framework of the Common Foreign and Security Policy (CFSP): the unanimity requirement could result in tensions, delays and even stalemates, as shown by the difficulties in reaching a compromise towards the approval of the sixth package of measures against the Russian Federation[7]. Yet, the defining feature of the EU action is the existence of a full and effective judicial review: indeed, since 2014, a significant number of targeted persons have challenged the validity of the restrictive measures before the Court of Justice of the EU, mostly in the framework of actions for annulment. It follows that the Court has already developed a conspicuous case-law on 'sanctions' against the Russian Federation, that has contributed to elucidate the principles underpinning the exercise of this power by the EU, including the nature of the measures, the motivation and the criteria for designation of targeted persons[8].

At the time of writing, the list of targeted persons, that has been constantly updated since 2014, includes more than 1,000 physical and legal persons, including members of the Russian government, members of the State Duma and of the National Security Council, high-ranking State officials, but also prominent businesspeople: therefore, it is to be expected that several of them will challenge the restrictive measures before the Court of Justice of the EU[9]. One must recall that the listed persons and entities are targeted by 'individual' measures, i.e. measures that cause the freezing of their assets and impose a travel ban, preventing them from travel to and to transit through the territory of the EU, as they are deemed to be responsible for actions that directly or indirectly affected the territorial integrity, the sovereignty and the

2019.

[7] EU agrees Russia oil embargo, gives Hungary exemptions; Zelenskiy vows more sanctions, <https://www.reuters.com/world/europe/best-we-could-get-eu-bows-hungarian-demands-agree-russian-oil-ban-2022-05-31/>.

[8] See C. Beaucillon, *Opening Up the Horizon: The ECJ's New Take on Country Sanctions*, in «*Common Market Law Review*», 55:2, 2018, pp. 387-415.

[9] See, for instance, *Usmanov v. Council of the European Union*, Case T-237/22, Order of the President of the General Court of 27 June 2022, in which the General Court dismissed an application from sanctioned Russian billionaire Alisher Usmanov for interim measures.

independence of Ukraine. As to the asset freeze in particular, it is noteworthy that the Court of Justice of the EU made it clear that «those measures are by nature temporary and reversible and do not therefore infringe the 'essential content' of the right to property»[10]. 'Sanctions' do not entail, in other terms, the seizure of property, although it remains debated whether it would be possible to use financial resources owned by sanctioned oligarchs to rebuild Ukraine[11].

3. The Challenge of the Full Implementation at the Domestic Level

The full implementation of the EU restrictive measures against the Russian Federation at the domestic level is fundamental for the purpose of their effectiveness. EU Member States are bound to take all necessary measures to correctly implement them, not only by designating the competent national authorities that are engaged with 'sanctions' issues, but also by laying down rules on penalties applicable to infringements of the restrictive measures under their administrative and/or criminal law. Significantly, the EU Commission recently proposed to add the violation of restrictive measures to the list of EU crimes, with the purpose of setting a common basic standard on criminal offences and penalties across the Union[12].

Given the multi-sectoral nature of restrictive measures, various Italian authorities are involved in the implementation process, including the Financial Security Committee at the Ministry of Economy and Finance and Ministry of Foreign Affairs and International Cooperation. Moreover, Italy has entrusted the National Public Property Agency (the *Agenzia del demanio*) with the task of ensuring the storage, administration and management of frozen economic assets[13]. The Agency reportedly

[10] *Mykola Yanovych Azarov v Council of the European Union*, Case T-215/15, Judgement of 7 July 2017, para. 85

[11] EU should seize Russian reserves to rebuild Ukraine, Borrell tells Financial Times. *Reuters* (9 May 2022).

[12] Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, COM/2022/247 final (25 May 2022).

[13] See Decreto legislativo 25 maggio 2017, n. 90, Art. 12.

expressed concern over the enforcement of the targeted measures against oligarchs and other businesspeople, in consideration of the volume of frozen assets and their nature: for instance, they have included luxury yachts, which do not ordinarily fall into the Agency's mandate[14].

As above mentioned, the new rounds expand the existing measures that have been applied since 2014, following the annexation of Crimea and the non-implementation of the Minsk agreements. The packages adopted since March 2022 include a significant element of novelty: i.e. the imposition of financial restrictions, whose design was inspired by the measures that both the EU and the USA had previously approved against Iran with respect to its nuclear program. Indeed, the Council of the EU decided to disconnect several Russian and Belarusian banks from the SWIFT messaging services, which facilitate information exchange between financial institutions, and constitute nowadays an essential tool in ensuring international payments. Moreover, the Union introduced a ban on «transactions related to the management of reserves as well as of assets of the Central Bank of Russia, including transactions with any legal person, entity or body acting on behalf of, at the direction of, the Central Bank of Russia»[15]. Due to the ban on transactions from the EU and other countries, the central bank can no longer access the assets: it is estimated that more than half of Russian reserves are frozen. These measures complement other typical trade sanctions, like import and export restrictions of certain goods and technology. As for the energy sector, the sixth package of EU measures introduced a gradual restriction in the import of crude oil and refined petroleum products, with temporary exception for those member States that suffered from a specific dependence on Russian supplies and have no viable alternative options[16].

[14] Ucraina, Agenzia Demanio: "Yacht congelati oligarchi? Sono tre, siamo molto preoccupati", <https://www.adnkronos.com/ucraina-agenzia-demanio-yacht-congelati-oligarchi-sono-tre-siamo-molto-preoccupati_Fec2Osm6JOQBWvP0NUXM0>.

[15] Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 57 (28 February 2022) 1-3.

[16] Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 153 (3 June 2022) 53-74.

4. Are EU Measures in Accordance with International Law?

The EU has consistently maintained that «the introduction and implementation of restrictive measures must always be in accordance with international law»[17]. As for the effects on third countries, the EU commits itself to abstain from adopting legislative instruments having extra-territorial application, on the consideration that they would be in breach of international law. Indeed, the EU understands its restrictive measures to be applicable only in situations in which a link exists: the standard clause setting out to what extent an EU regulation concerning restrictive measures should apply covers the territory of the EU, including its airspace; aircrafts or vessels of Member States; nationals of Member States, inside or outside the territory of the EU; companies and other entities incorporated or constituted under Member States' law; or any business done in whole or in part within the EU. Contrarywise, the USA applies 'secondary sanctions', having an extraterritorial application, against Iran and North Korea: a practice that the EU has strongly condemned[18]. Significantly, the USA has so far refrained from attributing 'secondary' effects to the sanctions against the Russian Federation and Belarus, as their enforcement in relation to the ban on crude oil purchase would be considered very controversial.

As for the Russian Federation, in the view of the EU, its restrictive measures do not amount to a wrongful act against that country. Indeed, some of them are to be qualified as retorsions, i.e. reactions that do not interfere with the target State's rights under international law but merely amount to unfriendly acts. Yet, it is significant that Moscow reiterated that some 'sanctions' are against the rules of the World Trade Organization (WTO): in this respect, the EU affirmed that its measures would be allowed as exceptions under article XXI(b) GATT, whereby member States may adopt

[17] Council of the European Union, *Sanctions Guidelines – update*, Doc. 5664/18, 2018, para. 9.

[18] See generally T. Ruys, T. & C. Ryngaert, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, in *British Yearbook of International Law*, 2020; Z. Goldman & A. Lindblom, *The US Position and Practice with regards to Unilateral and Extraterritorial Sanctions: Reimagining the US Sanctions Regime in a World of Advanced Technology*, in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions*. Edward Elgar Publishing, Cheltenham, pp. 130-147.

actions which it considers necessary for the protection of its essential security interests, in particular in time of armed conflict or in the event of serious international crises.

Moreover, the Russian Federation has condemned US and EU 'sanctions' as infringements of the customary principle of State sovereignty. However, the main justification that has been advanced is that the EU restrictive measures are to be qualified as countermeasures in reaction to serious breach of *erga omnes* obligations, i.e. obligations owned to the international community as a whole, including the prohibition of aggression[19]. The distinction between sanctions *stricto sensu*, a category including only measures decided by the UNSC, and countermeasures, a category referring to decentralized reactions by individual States or regional organizations with the purpose of protecting general interests of the international community, has gained acceptance in the 'Western' literature. In order to be legal, countermeasures must respect the principle of proportionality and shall not entail the use of armed force. It shall be underlined that the aim underlying the adoption of countermeasures is not that of inflicting a punishment; rather, to put pressure on the targeted State, with the aim of inducing it to take responsibility, and hence to re-establish a situation of adherence to international law.

5. Legitimate Sanctions or Unilateral Coercive Measures?

After the Russian invasion of Ukraine, an unprecedented level of sanctions cooperation was achieved among a group of 'like-minded' States, encompassing G7 members as well as Australia, Switzerland, and South Korea. It has been argued that the EU, by forging a link between its economic strength and its foreign policy through the adoption of restrictive measures, has also sought to establish itself as a regional and even as a global leader in 'sanctions'[20]. As part of this leadership at the European level, the

[19] See M. Gestri (2016), Sanctions Imposed by the European Union: Legal and Institutional Aspects. In Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law*, Brill, Leiden, The Netherlands, pp. 70-102.

[20] P. J. Cardwell, & E. Moret (2022). The EU, Sanctions and Regional Leadership. *European Security*. See e.g. European Council (2022). Conclusions on the Russian military aggression against Ukraine (24 March 2022): «The

EU has invited selected third countries in the EU neighborhood to align with its measures[21]: whereas the Union was successful in gaining that result in relation to other 'sanctions' regimes (i.e. those against African countries), fewer decided to align themselves with respect to the measures taken against the Russian Federation, irrespective of the strong political pressure[22].

What emerges from a wider perspective is that a large number of States, including China, South-East Asia States and the member States of the African Union[23], disagree with the abovementioned concerning the legality of EU and US measures against the Russian Federation. These States support the position whereby the only legitimate sanctions are those adopted by the UNSC and unilateral coercive measures are always in violation of the principle of sovereign equality of States and an unlawful intervention in the internal affairs of the targeted State.

On various occasions China manifested its opposition *vis-à-vis* unilateral sanctions, as «a concrete manifestation of hegemonism and power politics», that «created and aggravating humanitarian crises, violated the basic rights of civilians, including women and children, and caused great damage to the harmony and stability of international relations»[24] . As for the measures taken against Russia for the invasion of Ukraine, the Chinese Foreign Ministry Spokesperson stressed that «[w]e oppose unilateral sanctions and long-arm jurisdiction without basis in international law and UN Security Council mandate as well as undue prohibition or restriction on normal economic and trade activities between Chinese and foreign companies»[25].

European Council calls on all countries to align with those sanctions. Any attempts to circumvent sanctions or to aid Russia by other means must be stopped».

[21] See C. Eckes, *The Law and Practice of EU Sanctions*, in S. Blockmans & P. Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, Edward Elgar Publishing, Cheltenham, 2018, pp. 206-229.

[22] See e.g. German, Serbian Leaders Clash over Kosovo, Russia Sanctions. *Politico* (11 June 2022), <https://www.politico.eu/article/olaf-scholz-aleksandar-vucic-germany-serbia-kosovo-russia/>.

[23] African Union (2022). Resolution on the Impact of Sanctions and Unilateral Coercive Measures on African Union Member States, AU Doc. Assembly/AU/Res. 1(XXXV).

[24] UN Security Council (2022). *General issues relating to sanctions*, UN Doc. S/PV.8962 (7 February 2022), 11.

[25] Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference (21 April 2022), <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202204/t20220421_10671466.html>.

This is not only a political stance: indeed, the Chinese Ministry of Foreign Affairs also expresses a different vision of the international legal order, which puts at the center the principles of coexistence and sovereign equality. Undoubtedly, sovereignty occupies the conceptual heart of the Chinese Communist Party's vision of international relations, and it is not by chance that China has become one of the world's strongest supporters of the principle of non-intervention in the internal affairs of other countries[26]: so it comes as no surprise that unilateral sanctions have been seen as a violation of this principle, as they are «are exactly intended to stigmatize other States under the pretext of democracy and human rights in a bid to incite color revolutions and regime change, hence a blatant violation of basic norms governing international relations»[27].

For their part, in June 2022, G7 leaders referred to the principle of sovereignty too, although with a completely different emphasis, when they reaffirmed the condemnation of «Russia's illegal and unjustifiable war of aggression against Ukraine», and their readiness to provide «the needed financial, humanitarian, military, and diplomatic support» to Kiev «in its courageous defence of its sovereignty and territorial integrity»[28]. Moreover, the G7 countries stressed their commitment to «unprecedented coordination on sanctions for as long as necessary, acting in unison at every stage»[29], also through the establishment of a multilateral task force known as REPO (Russian Elites, Proxies, and Oligarchs) to facilitate the sharing of information and reciprocal assistance in the freezing of assets[30].

[26] See M.A. Carrai, *Sovereignty in China: A Genealogy of a Concept since 1840*, Cambridge University Press, Cambridge, 2019.

[27] Say No to Unilateral Sanctions and Jointly Uphold the International Rule of Law: Keynote Speech by H.E. Mr. Xie Feng, Commissioner of the Ministry of Foreign Affairs of China in the Hong Kong Special Administrative Region at the Opening Ceremony of 2020 Colloquium on International Law (3 December 2020), <https://www.mfa.gov.cn/ce/cohk/eng/qwsy/t1838003.htm>.

[28] G7 Leaders' Communiqué - Executive summary (29 June 2022).

[29] *Ibid.*

[30] G7, Russian Elites, Proxies, and Oligarchs Task Force Ministerial Joint Statement (29 June 2022).

MARGHERITA FELEPPA*

EUROPEAN SALES LAW IN THE 21ST CENTURY
(UNIVERSITY OF ZURICH, JUNE 17TH-18TH, 2022)

In an era where 74% of European internet users shop online[1], sales law faces many new challenges. The SECOLA Conference on European Sales Law in the 21st Century has provided its audience with an all-encompassing view of the subject: from discussions on the shift from ownership to servitizations, goods with digital elements, sustainability and right to repair issues to perspectives on direct producer's liability, liability of online platforms and even the rise of a new lex mercatoria in the AI scene.

The first session of the conference, chaired by Pascal Pichonaz (University of Fribourg/European Law Institute, President), was dedicated to «Setting the Long-Term Scene» and hosted the key-note introductive speech of Hugh Beale (Warwick University) «Sales Law in the 21st Century – from Ownership to Servitization?». Servitization has been thoroughly studied by the Organization & Management literature, which traditionally presents it according to a 3-step evolution: (i) a first stage, based on the transfer of goods with 'product oriented' services (such as integrated, tailor made business packages); (ii) a second one, characterized by the retention of ownership and its provision to the customer limited to use-oriented functions; (iii) a final one, focused on 'result-oriented' services which completely disregard the material availability of goods. From a legal perspective, servitization represents a turning point in a number of sectors where digitization currently extends its relevance in the realm of the law: from the agreements evolved in the market sectors of the sharing economy to the provisions of contracts for smart products and for the settling of IoT environments. In all these

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[1] Eurostat 2021, *E-commerce statistics for individuals*, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals#General_overview>.

fields, servitization offers considerable advantages, both for suppliers (for instance, extra-sources of revenues, longer term relationships with customers) and for customers (for example, one-stop shops and tailored services). At the same time, it certainly raises new legal issues, highlighted by Beale through a comparison with the traditional model of the contract for the sale of goods, and the related set of remedies available in the western legal systems. Beale focused on the different standards which define the expected quality of goods, on the one hand, and of digital contents, on the other, and, as a corollary, on the heterogeneous sets of obligations pending upon the seller and the supplier. In terms of responsibility, the evolution of market-offers based on an inextricable interpenetration of goods and services, potentially provided by different professionals, leads to question to what extent the end-user is able to identify the liable subject: to Beale, pre-contractual information is a crucial element in addressing the point. Another focal element in the regulation of servitization is the promotion of a legal environment that fosters competition among providers, reducing the number of cases in which customers may find difficulties or relevant transaction costs in passing from one supplier to another. Among others, a formal barrier is the set of data available to the old provider, and that the new one might need in order to offer a qualitatively comparable service. Looking ahead, attention should be given to the debate surrounding the most recent proposals concerning a European Data Act, which could certainly represent an effective tool to regulate the matter.

The second session of the Conference, concerning «Goods with Digital Elements», was chaired by Jacobien Rutgers (VU Amsterdam), and opened by the intervention of Mirjam Eggen (University of Bern), dedicated to the topic «Sale of Goods vs. Supply of Digital Content». The analysis emphasized the pressing need to identify the exact boundary line between the concept of good and that of service. The traditional answer, already in the elaboration of Adam Smith, finds its roots in the prevalence of tangible components in the former notion, and of immaterial ones in the latter. Eggen's investigation departed from the relevant blackletter rules traceable in the EU sources (both of primary and secondary level) and applied their interpretation to solve the practical problems connected to the question of whether, and in which circumstances, the end-user may be entitled to a contractual claim towards the provider of digital contents. The analysis was centered on three major classes of cases: (i) the

purchase of connected devices; (ii) the purchase of digital content; (iii) the temporary supply of digital contents. In each of them a relevant hermeneutic criterion is to be found in a classification of contracts based on their primary function: the "transfer of assets" vs. the "provision of services".

Christian Heinze (Heidelberg University) illustrated the topic «Conformity Requirements of Goods with Digital Content». Building off the definitions provided by EU secondary sources, Heinze addressed two fundamental questions: (i) what characterizes goods with digital elements, and why their definition is of relevance; (ii) what is the rationale of having special rules for goods with digital elements in sales law. As to the first issue, he stressed the relevant divergences between the provisions of Directive 2019/770 (on certain aspects concerning contracts for the supply of digital content and digital services) and of Directive 2019/771 (on certain aspects concerning contracts for the sale of goods, also the Sale of Goods Directive or the Directive). These were considered as particularly relevant especially in the light of the possible joint application of both legal tools, and of the correlative set of remedies (in this regard, special attention was dedicated to the lack of harmonization in the rules concerning the case of termination of contract). As for the second issue, Heinze suggested the need of special rules for digital elements in consideration of their inner peculiarities, which cannot be coherently addressed by the traditional set of rules dictated by sales law. Indeed, digital elements cannot be used in isolation; they need constant updates; they are often provided by a third party, different from the seller of the goods; their fitness for purpose and correlative conformity-test represent an open-ended and highly problematic issue because of the developing context in which they operate.

The conclusive report of the session was presented by Katarzyna Kryla-Cudna (University of Bristol), and it was aimed at investigating the challenges posed by goods with digital elements from the point of view of the commercial seller. Two main issues were examined: (i) the advance payment (connected to the fact that the average sale price covers also digital services and content provided after the contract is concluded); (ii) the division of liability (inherent to the frequent involvement of different market actors, each providing tangibles and/or intangibles components of the complex digital-good architecture). These topics were analyzed by taking into account the interrelation between the contents of the EU Directives and the rules of the CISG (as in particular

to the issue of the right of redress and the passing of risk).

The third session, chaired by Pietro Sirena (Bocconi University) focused on sustainability. Yeşim Atamer (University of Zurich) opened the session with a presentation titled «Durability as a new requirement of conformity» where she sought to answer the question of whether sales law can contribute to green growth, in line with the EU Green Deal and UN Sustainable Development Goal n. 12. The starting point for the discussion was the concept of durability, defined by article 2(13) of Directive 2019/771 as «the ability of the goods to maintain their required functions and performance through normal use». Under this Directive, the non-durable nature of goods constitutes non-conformity, as it can fall under the subjective or objective requirements of conformity (articles 6 and 7). In addition, Atamer explored the connection between durability and the 2-year liability period, arguing in favor of the extension of the latter which might also benefit other related issues such as that of planned obsolescence (which, she argues, differs from the durability issue per se as it implies fraudulent intent on behalf of the producer). She concluded by suggesting the introduction of a broader definition of durability so as to include repairability and the availability of spare parts as well as the introduction of a rule allowing statements on durability to be interpreted, to the extent possible, as guarantees.

The second panelist of the session, Marco B.M. Loos (University of Amsterdam), delivered a presentation on the exceptions to the application of the Sale of Goods Directive, namely the one provided under article 3(5)(a) for second-hand goods sold at public auction (that Member States may exclude from the scope of the Directive) and the one envisaged by article 10(6) for second-hand goods (whereby Member States may provide that the seller and the consumer can agree to contractual terms or agreements with a shorter liability or limitation period), with the aim of understanding whether these exceptions are aligned with the sustainability imperative. To answer this question, he studied the laws of the Member States that have made use of the exceptions under articles 3(5)(a) and 10(6), as well as those of the Member States that have decided not to resort to them, finding that national legislators failed to expressly state a reason behind their choice. Having established that neither of the two exceptions in the Directive helps achieve sustainability goals, Loos concluded by pointing out the need to stimulate sustainable consumption.

Following the two presentations, the discussion with the audience showcased various perspectives on second-hand goods and unfair terms and on consumers' understanding of durability.

Carl Dalhammer (Lund University) opened the second part of the third session with a presentation on the right to repair. He explained that product repairability is a key aspect of the circular economy – along with other 'R' activities such as re-using, refurbishing, repurposing, remanufacturing, recycling and recovering. He then expanded on the policy perspective, arguing in favor of more «choice editing» from legislators (i.e. providing that all products comply with high environmental and quality standards); more policies aimed at educating consumers on lifetime, warranties, repairability and the need for legal coordination between the policies of the European Union and those of the Member States. After having explained the role of consumers and the importance of their understanding of durability as one of the top three factors influencing purchasing decisions, Dalhammer moved on to the contents of the right to repair. In his view, the right to repair should encompass: (i) the rights of individuals to repair their goods autonomously or by resorting to independent repairers; (ii) the right for consumers/independent repairers to access manuals, spare parts, and tools; (iii) the right to have a product that can be repaired with common tools; (iv) the right to reasonably priced spare parts; (v) the 'right to know' more about product lifetime and repairability and (vi) the right to legal guarantee on the repair work (and/or commercial warranty). The right to repair in the EU was also compared to repairability in the United States, where there seems to be a similar issue on the lack of harmonization between state and federal law. The presentation was concluded with a reference to the upcoming legal interventions on the right to repair in the European Union.

Next, Ofer Tur-Sinai (Ono Academic College) analyzed intellectual property as a barrier to repairability[2]. He introduced the right to repair by highlighting its global and interdisciplinary nature, as the subject gains momentum in many jurisdictions and brings up environmental, competition and property law considerations. A comparison

[2] See L.C. Grinvald, O. Tur-Sinai, *Intellectual Property Law and the Right to Repair*, in «Fordham Law Review», 88, 2019, p. 63 and Id., *The Right to Repair: Perspectives from the United States*, in «Australian Intellectual Property Journal», 31, 2020, p. 98.

was then made between the right to repair in the US and in the EU: while repairability pertains to the property rationale in the United States, the EU seems to address the matter from an environmental perspective. Moving on to the interplay between IP and repairability, Tur-Sinai showed that IP rights are often used by producers as an argument against repairability claims. For instance by claiming that repair information qualifies as trade secrets and they use design and logos to secure exclusivity. Looking at IP theory, he contended that the very rationale for IP law, namely that of incentivizing innovation, may justify the establishment of the right to repair because users can drive innovation and progress. He concluded that developing the right to repair requires acting on four circles. The first one pertains to the right to engage in repair that must be granted to individuals. The second one concerns repair shops which should be allowed advertising their repair activities and benefit from the diffusion of repair information. The third one has to do with replacement parts: competition in the market for spare parts must be enabled. The last one is addressed to manufacturers placing affirmative duties on original manufacturers to supply parts and repair information in order to ensure the implementation of an effective right to repair.

Overall, the panel contributed ideas toward enhanced models for the circular economy. The panelists engaged in a discussion with the audience concerning additional factors influencing consumers' decisions to resort to repair, such as the price and value perception of the good as well as consumers' distrust of non-authorized repair shops.

The first day was concluded with a session on «Disclosure Duties and Withdrawal Rights», chaired by Fernando Gomez (Pompeu Fabra University). Here, Antonio Davola (LUISS Guido Carli University/University of Amsterdam) presented on «Relational Disclosure as a Tool to Mitigate the Threats of Profiling Techniques in Online Sales». The Majority of B2C interaction is based on consumer profiling, a technique that gives rise to both opportunities – like reducing transaction costs through matching – and risks – such as discrimination and behavioral manipulation – and hence needs regulation. Under Directive 2019/2161, price personalization is subject to disclosure: a pre-contractual obligation, applying to every trader, to inform consumers in case of price personalization. Nevertheless, while such disclosure obligation is designed for non-relational decision makers, Davola maintained that consumers are relational entities, and their decisions are affected by the relationship with others. He

concluded by sharing the results of his empirical study on consumers and streaming services, which showed that consumers have a better understanding of profiling when information is presented in a relational format[3].

The next speaker, Nikola Ilic (University of Belgrade) talked about a different aspect of online sales: the right of withdrawal. The basis for his presentation was Antonios Karampatzos' proposal that the right of withdrawal pursuant to Directive 2011/83 (which Karampatzos classifies as «mandatory law protection») should allow for waivers thus taking the form of a mandated-choice model whereby the law obligatorily provides the consumer with the possibility to choose between a contract without a withdrawal right and a contract with a withdrawal right and a higher price[4]. Ilic raised the question of whether it is possible to alter the right of withdrawal right to increase sellers' and consumers' efficiency. His analysis was built upon extensive literature review, constructing and testing the hypothesis and deriving conclusions while relying on different methods such as historical-legal, dogmatic or normative, comparative-legal, law and economics. He concluded that the allocation of risk in distance sales contracts should be taken into account when (re)defining the right of withdrawal and special attention should be given to fairness and economic efficiency (i.e. information asymmetry and transaction costs). In addition, a new, and waivable, right of withdrawal should be observed in a broader context because, as he noted it, «it is a powerful tool and a sharp sword, but only when properly managed and used with care».

The day ended with a discussion on the platforms that employ multiple option schemes offering different prices which vary based on the inclusion or exclusion of cancellation options. The audience also talked about the harmful environmental consequences of the frequent exercise of the right of withdrawal.

On June 18th 2022, it was time for the last session of the conference: «Network Perspectives Beyond Sales Contracts», which was divided into two sub sessions.

[3] A. Davola, I. Querci, S. Romani, *No Consumer is an Island - Relational Disclosure as a Regulatory Strategy to Advance Consumers Protection Against Microtargeting* (February 8, 2022). SSRN: <https://ssrn.com/abstract=4068548> or <http://dx.doi.org/10.2139/ssrn.4068548>.

[4] A. Karampatzos, *The withdrawal right pursuant to Directive 2011/83/EU and the application of the mandated-choice model*, in *Private Law, Nudging and Behavioural Economic Analysis*, Routledge, London, 2020.

The first one, chaired by Lucinda Miller (University College London), was opened by Jean-Sébastian Borghetti (Paris 2 Panthéon-Assas University) who gave a speech titled «Is There a Need for Direct Producer Liability in case of non-Conformity?». Borghetti began by illustrating French law on direct producer liability which provides for *action directe* allowing end-buyers to bring a direct contractual claim for any breach of a warranty attached to the contract of sale against any seller up the chain of sales, including the producer[5]. He also shared critical remarks on direct producer liability, asserting that producers are often located outside of the European Union and that they have no possibility of knowing whether the end-buyer is a consumer or a company as they stand at the very beginning of the sales chain. Therefore, he advocated for the introduction of direct producer liability as a voluntary guarantee.

Cristina Poncibò (University of Turin) approached the AI scene with her presentation on «*Lex Mercatoria Ex Machina*», devoted to exploring the law of merchants in the age of blockchain. Underlying this presentation was the idea that much like the growth of international trade gave rise to the lex mercatoria, the unprecedented technological evolution may give rise to a 'lex cryptographia'[6]. In this context, Poncibò showed that technology driven contracts evidence a different understanding of core principles like customs and communities, the principle of justice, the relationship with the law and with the state as well as the process of codification of technical rules. She added that, in essence, the blockchain community denies the importance of the role of the state and relies heavily on arbitration as the preferred dispute resolution method. She also pointed to the difficulty in regulating this phenomenon: technology experts should be included in the legal discussions and reforms while fragmentation should be avoided. She concluded by noting the centrality of this new development in the everlasting concept of *lex mercatoria*, where technology will become the architecture of sale contracts.

[5] For an overview of direct producer's liability in Europe see M. Ebers, O. Meyer, A. Janssen, *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, Munich, 2009.

[6] See P. De Filippi, A. Wright, *Decentralized Blockchain Technology and the Rise of Lex Cryptographia* (March 10, 2015). SSRN: <https://ssrn.com/abstract=2580664> or <http://dx.doi.org/10.2139/ssrn.2580664>.

Following the first part of the session, the audience asked questions about the nature of the *action directe* as a contractual claim, consensus in technology driven contracts and the role of the state in blockchain technology.

The last part of the session was chaired by Ulrich Schroeter (University of Basel) and it was opened by Carlotta De Menech's discussion on «Online Platform Economy and Product Liability Law: A Review of the Theory of Enterprise Liability» (University of Pavia). Online platforms can have different legal qualifications (such as hosting service provider pursuant to art. 14 e-commerce Directive or art. 5 Digital Services Act; or producer, quasi-producer, importer, supplier under art. 3 of the Product Liability Directive) as well as different degrees of involvement in the supply chain (pure or hybrid online marketplaces). Legal and policy reasons support holding online marketplaces liable for losses caused to the consumers by dangerous products purchased from their websites, for example the fact that providers have the possibility to perform precautionary tasks, like detection software notice and takedown systems, to ensure product safety[7]. According to De Menech, it would be difficult to apply the strict liability approach to this scenario as online marketplaces might be seen as pure intermediaries hence the Directive on Liability for Defective Products might not apply. Instead, she suggested resorting to a negligence-based system where the standard of care should not be completely defined by the judges, as a case-by-case approach would involve very high administrative costs, and the liability regime should be complemented with an *ex-ante* and co-regulation of diligence duties that digital providers should comply with. She concluded by referring to the amendments adopted by the EU Parliament to the DSA, such as article 43(a), which pave the way for such a regime.

The last presentation of the SECOLA Conference 2022 was that of Ricardo Pazos (The Autonomous University of Madrid) concerning conformity in the Artificial Intelligence world. Pazos began by asserting that the notion of conformity can be used to solve or mitigate some of the issues in the AI world. To this end, he put forward three suggestions: (i) generalizing the principle of conformity; (ii) reconsidering the

[7] For a study on the matter see European Parliamentary Research Service, *Liability of online platforms*, Brussels, 2021, <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_ EN.pdf >.

interaction between subjective and objective requirements for non-conformity and (iii) drawing a parallel between data protection rights by default and by design (article 25 of the GDPR) and conformity, which could also be classified as conformity by default and by design under the Sale of Goods Directive. To conclude, he emphasized the significance of flexibility in the AI scene and the need to rethink the ultimate goal of consumer protection as one of a high – and not of the highest – standard.

The SECOLA leading scholars and practitioners showcased various perspectives on the present of sales law while encouraging thought-provoking discussions on its future. By combining presentations on the challenges faced by modern consumers with those of sellers, producers and online marketplaces, this conference has captured the evolution of sales law, shedding light on the most relevant issues posed by technology.

RENZO FILICE - ANTONIO PERSICO*

ADMINSTRATIVE LAW SEMINARS AT ROMA TRE LAW SCHOOL
(29-30 MARCH, 23-24 MAY, 2022)

CONTENT. 1. The activities of Professors Chevalier and Eliantonio visiting the Department of Law – 2. The seminars given by Professor Chevalier: the seminar on «Transnational administrative law» – 2.1. The seminar on «The Administrative Judge and Strategic Litigation» – The seminars given by Professor Eliantonio: the seminar on «Judicial review of administrative action: the case of soft law» – 3.1. The seminar on «Comparative approach on judicial review of administrative action: Method»

1. The activities of Professors Chevalier and Eliantonio visiting the Department of Law

This Report will focus on the seminars given by Professors Emilie Chevalier and Maiolina Eliantonio for Roma Tre Ph.D. students.

Emilie Chevalier, Professor of Public Law at the University of Limoges, France, visited the Department of Law of Roma Tre University from Monday 21st March to Thursday 31st March 2022. During her visit, Professor Chevalier took part in the activities of the Department of Law contribuiting to its cultural and scientific development with her deep knowledge of Public, Admnistrative and Comparative Law.

In particular, Professor Chevalier gave two lectures for the students of the courses on Administrative Justice and on Health Law, taught by Professor M.A. Sandulli and Professor F. Aperio Bella, respectively. The lecture titled «The French administrative judge and the health crisis (focus on interim measures)» focused on the management of the COVID-19 emergency in France and the use of precautionary measures made by French Administrative Courts. This lecture dealt with multiple problems inherent

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to Administrative Justice and Health Law. The students and the scholars who attended the lecture had the opportunity to reflect on the effectiveness of the French Administrative Justice during the pandemic crisis, noticing the similarities and the differences between the French and the Italian systems. The other lecture, titled «The access to administrative Courts in France (focus on legal standing)», dedicated to the the students attending the Administrative Justice class, concerned the most recent developments in the matter of legal standing and interest before French Administrative Courts, and was dedicated to the students of the course of Administrative Justice. Both lectures were given in English, in order to allow a broader participation of the public and to overcome language barriers.

Professor Chevalier also gave two seminars in English for Ph.D. candidates in Legal Disciplines, with the participiation and coordination of Professor Sandulli and Professor Aperio Bella. The topics of the seminars were «Transnational Administrative Law» and «Strategic Litigation». In fact, Professor Chevalier is a profound connoisseur of these themes, upon which she has a privileged look as a member of the steering committee of the Transnational Administrative Law Network and as the co-editor of the book «Contentieux Stratégiques: Approches sectorielles», published in 2021.

Mariolina Eliantonio, Professor of Comparative Administrative Law and Procedure at the University of Maastricht visited Roma Tre Law Department from Monday 16th May to Thursday 26th May 2022. Professor Eliantonio, in this visiting period, took part in the Course of Administrative Justice taught by Professor M.A. Sandulli, gave two seminars for Ph.D. students in Legal Disciplines and participated in the activities of the Department of Law.

In particular, Professor Eliantonio on May 17th gave a lesson, in the Course of Administrative Justice, titled «Il rapporto tra Corte di Giustizia e giudici amministrativi». She gave also on May 18th the final lesson of the Course of Administrative Justice with Professor Sandulli and Professor L. De Lucia from the University of Salerno. The lesson titled «L'Europeizzazione della giustizia amministrativa» focused on the European integration process of the administrative justice among Member States. In this lesson Professor Eliantonio analyzed different issues: the role of European jurisprudence on the setting of minimum requirements for integration; the role of national judges in the application of these requirements; the

relationship between national procedural law and the respect of minimum standards; the importance of principles of effectiveness and judicial effectiveness in the uniform application of the European law.

During her visit, Professor Eliantonio also gave two seminars for the Roma Tre Ph.D. School in Legal Disciplines with participation and coordination of Professor Sandulli and Professor Aperio Bella. The topics of the seminars were «Judicial review of administrative action: the case of soft law» and «Comparative approach on judicial review of administrative action: Method». Professor Eliantonio is a great expert of these themes. In fact, she is, inter alia, co-editor of the book «Case, Materials and Text on Judicial Review of Administrative action», published in 2019.

2. The seminars given by Professor Chevalier: the seminar on «Transnational administrative law»

The seminar focused on the research carried out by Professor Chevalier on transnational administrative acts and their effects. Professor Chevalier has long studied this topic indeed, with particular regard to the influence of EU law. Moreover, as part of the Transnational Administrative Law Network, she is currently working on a project aimed at the publication of a «Traité de droit administratif international» by the end of 2022.

Professor Sandulli introduced the event, highlighting that the topic of the seminar, even though already known in the past, has taken on new relevance nowadays: transnational effects of administrative acts such green pass or driving licenses are evidently of widespread interest at the present.

The presentation was divided into two parts: the first part concerned the identification of transnational administrative acts, while the second part revolved around the judicial review of this type of acts.

Starting off by the identification of trasnational administrative acts, Professor Chevalier stressed the importance of distinguishing them from composite administrative acts. The two cathegories may overlap, but they do not coincide. Transnational administrative acts imply an horizontal relationship between legal orders, while composite administrative acts are the results of a vertical interaction of a national legal

order with a superordinate legal system (e.g. GMO authorisations issued in the EU as the outcome of a composite procedure with the participation of European and national authorities).

A second preliminary observation was that transnational effects can be produced within the terriotry of a single State. For instance, in composite States like Germany or the U.S.A., or even in Spain, the administrative acts of a Land, Federated State or Comunidad Autónoma may well produce effects elsewhere in the territories under the State sovereignty.

Finally, transnational administrative acts differ form international administrative acts. The latter are adopted by international organisations o institutions, while the former derive from a State or infrastatual authority.

As for the criteria of identification of trasnational administrative acts, Professor Chevalier observed that it would not be possible to refer only to the notions adopted by a national legal order, as they may not be the same in different legal orders. Anyways, Professor Chevalier proposed to utilize the organic criteria, according to which the act in question must be adopted by an administrative authority (or even better, as suggested by Professor Sandulli, by a subject entitled to the use of public powers), together with the formal criteria, according to which regulatory acts, point-like decisions and public contracts can be considered trasnational administrative acts. However, it is fundamental to ascertain the transnational dimension of the act. This dimension exists in the presence of a 'foreign' element, depending on the origin of the act, on its effects, or on both. The foreign element may be the reason/ground of the act. It is the case of acts of trasnational imputation, whose adoption depends on facts or legal situations existing outside the territory of the authority that enact them. An administrative act may be considered to have transnational effects also if it has consequences in the territory of other States, different frome the State of the authority that enacted it. The foreign element is thus the consequence of the enforcement of the act.

According to EU law, the recognition of the efficacy of an administrative act adopted by a Member State's adminsitrative authority is often automantic, on the basis of the mutual recognition principle. On this regard, Professor Chevalier mentioned the famous «Cassis de Dijon» case, whose decision was based on the application of the mutual recognition principle. Other examples of acts automatically recognised in the

EU are diplomas and Erasmus exams. In addition, Professor Chevalier recalled how secondary EU law usually provides for cases of administrative cooperation between authorities of different Member States, obliging the proceeding authority to take into consideration the information produced by the other authorities. Outside the EU, the production of the effects of an act in a legal order different from the one in which the act was adopted depends either on the unilateral will of the State or on the adoption of an international convention. In response to an observation of Professor Aperio Bella, Professor Chevalier clarified that the rest of her speech would not revolve around the so called «authorisations in sequence», that is authorisations subject to an expressed subsequent recognition.

The focus on the the judicial review upon trasnational administrative acts was introduced with an emblematic example: the review of the transboundary consultation procedure leading to an environmental impact assessment. In this case, we have an act of transnational imputation (the EIA), adopted in State A, which is gounded on the results of the consultations that took place in State B. What about the judicial review in this case? Can the judge of State A review the process of consultation and its results? According to the sovereignty principle, the answer should be no. In general, the judge of a certain State is never allowed to annul an act adopted in a different State, as a consequence of the aforementioned principle. However, even if the judge could review that process, which law should be applied (national law of State A or B)? Anyways, the judge of State B may well decline its jurisdiction on the consultations process, as it is merely preparatory. A possible solution *de iure* condendo, suggested by Professor Chevalier, would be the provision for a preliminary horizonatal ruling, which means that the judge of State B takes part in the process before the judge of State A.

At the EU level, such a gap in the judicial protection is not consistent with the right to an effective judicial protection and with the non-discrimination principle. Therefore, a solution must be found in Professor Chevalier's opinion. On this regard, Professor Chevalier explained that the Court of Justice and, to a certain extent, the French Council of State, opted fot the solution that the national judge of the State of adoption of an act can review the transnational part of a trasnational administrative act under the EU law.

In particular, the French Council of State, in the Forabosco ruling (9 june 1999,

n. 19034), concerning the functioning of the Schengen information system and the validity of a denial issued by the French authority to non EU-citizens that submitted an application for residence permits, stated that the French administrative judge is competent (has jurisdiction) to evaluate whether the alert sent by another Member State authority is justified or not according to the Schengen information system (SIS) rules. Therefore, French administrative courts have jurisdicition to review the grounds of the decision according to secondary EU law. On the contrary, in the Catrina ruling (23 May 2003, n. 237934), the Council of State held that the French administrative courts can not review the lawfulness of the procedure conducted in another Member State which led to the registration of the applicant in the SIS. In this case, in fact, the EU rules are not applicable and the French administrative Judge could not apply the procedural law of a different State.

As for the EU jurisprudence, Professor Chevalier mentioned two cases as well. The first one is the Berlioz case (Case C-682/15), in which the ECJ held that art. 47 of the Charter of Fundamental Rights grants the right to challenge the legalty of a decision which imposed a pecuniary penalty for failure to comply with an administrative decision to provide information ('information order') in the context of an exchange between national tax administrations pursuant to Directive 2011/16 on Administrative Cooperation in the Field of Taxation. The Court stated that national courts have jurisdiction to review the request of information adopted by the administrative authoritiy of another Member State, thus ensuring the correct enforcement of EU law. More in detail, the Luxembourg court was held empowered to verify the «forseeable relevance» of the information requested by French authorities, in order to assess whether the request was legitimate under Directive 2011/16.

In the R.N.N.S. and K.A. ruling (Case C- 225/19 and C-226/19), the Court of Justice held that the obligation for Member States to guarantee a right to an effective remedy, within the meaning of Article 47 of the Charterof Fundamental Right, against a decision refusing a visa means that the judicial review of that decision must cover the legality of the denial, taking into account all of the elements in the file, both factual and legal, on which the competent national authority based that decision, in accordance with Article 32 of the Visa Code. Nevertheless, the review of the merits of the objection to the issuing of a visa raised by another Member State in the context of the prior

consultation procedure provided for in Article 22 of that code, is reserved to the national courts of that other Member State or Member States. Despite the invocation of art. 47 of the Charter, Professor Chevalier observed that the Court of Justice provided for a solution which is not consistent with the right to an effective judicial protection, because its application would impose migrants to go before at least two different courts in two different States.

In conclusion, Professor Chevalier stressed that even the Court of Justice follows a case-by-case approach, as the mutual recognition principle has different implications according to the subject/matter concerned. It would be useful, concluded Professor Chevalier, to identify some procedural standards, to grant the effectiveness of the judicial protection at least in the EU Member States against transnational administrative acts.

2.1. The seminar on «The Administrative Judge and Strategic Litigation»

The second seminar given by Professor Chevalier revolved around the phenomenon of strategic litigation. Professor Sandulli introduced and coordinated the event, Professor Aperio Bella intervened and other participants contributed to the debate.

First of all, Professor Chevalier explained that the French expression «*Contetieux stratégique*» (strategic litigation) refers to the attribution of political relevance to certain cases. In this sense, the appelants may decide to bring their cases before any court, included the administrative courts, in order to give them a wider relevance in the eyes of the public and of the institutions, regardless the chances of victory. By doing so, the process is exploited for the pursuit of different purposes, (e.g. to stimulate a legislative reform).

«*Contetieux stratégique*» means something different from «*stratégie contentieuse*» (strategy of litigation), even though the two expressions may sound alike. The latter, indeed, refers to the reiteration of an action by an individual before a judge, leading to a form of 'justice harassment'.

Professor Chevalier indentified in the «judiciarisation» of modern societies one of the main factors favouring the expansion of strategic litigation. In particular, the

administrative judge, in France like in Italy (as Professor Aperio Bella confirmed), has strongly contributed to the promotion of fundamental rights and to the development of new remedies, becoming the voice of social changes, and not only of the law.

Professor Chevalier then observed that grey areas exist, in which it is complex to assess whether we are in the presence of strategic litigation. For instance, what is the difference between strategic litigation and judiciary activism? Shall any action brought by a NGO be considered as strategic litigation? In order to answer these questions, and to better circumscribe the studied phenomenon, Professor Chevalier suggested to use three different criteria.

According to the organic criteria, strategic litigation occurs only before a judge. In this sense, strategic litigation implies the authority and legitimacy of a judge. On the contrary, as a rule, no strategic litigation occurs before an arbitrator or in case of alternative dispute settlement mechanisms.

The substantial criteria concerns the content of the action. In most cases, the action aims at finding the failure to act by public authorities, ensuring the effectiveness of the law. Usually the action in question is a transformative action, which is an action whose aim is the transformation of the law, in general by the annulment of a norm. The strategic action may also be a protective action, aimed at the effective application of rights to vulnerable citizens or even a defensive action, ensuring the status quo of the law through the judicial interpretation.

Finally, the subjective criteria gives relevance to the intention of the party/appelant, who brought the action as a result of a conscious process of mobilisation of the judge in order to 'desingularise' the dispute. In other words, the intent of the party is the promotion of an *erga omnes* scope of the action, transforming an individual case in a strategic litigation a posteriori. The Case of Vincent Lambert, decided by the French Council of State on June 24, 2012, on the matter of euthanasia, is emblematic. The association «Union Nationale des Associations de Familles de Traumatisés crâniens et de Cérébro-lésés» decided to intervene in the process concerning the decision of the medical team to stop the treatment, starting a question *prioritaire* de constitutionnalité with the purpose of obtaining a certain interpretation of the law by the judge, which would put patiens such as Mr. Lamberti outside the scope of the law invoked before the court.

Migration law is an exemplary field for strategic litigation. As Professor Chevalier explained, the law usually does not take sufficiently into account the vulnerability of migrants, thus failing to grant the access to justice and the effective protection of fundamental right in this sector. In response to such critical issues, there is a relevant recourse to strategic litigation by associtations for the protection of migrants. Such associations act as organised or 'collectivised' applicants, with a pro-active approach and specific knowledge of the internal functioning and acts of the administration, as they can usually count on an experienced team of lawyers. Professor Chevalier reported some cases concerning the activity carried out by the french association GISTI (*Groupe d'information et de soutien des immigrés*), which testify how sometimes associations intervene in the process to give visibility to an injust gap of legal protection concerning migrants' fundamental rights, while in some cases, they are in not even visible, as they only back the action of a natural persons, granting them technical and juridical assistence.

Professor Chevalier clarified that no judge (e.g. administrative, civil, constitutional) is a priori excluded from strategic litigation. In case of more than one judge having jurisdiction for the same case, finding the right judge at the right time is a matter of processual strategy to find the right judge at the right moment.

At this point, Professor Chevalier presented some emblematic cases of strategic litigation in climate law. She mentioned the Urgenda rulings in Netherlands, resulting from the coordinated action of civil society. The Duch courts have affirmed that the State has failed to comply with its duty of care by not taking all possible measures to combat climate change, therefore ordering the Dutch State to intensify its efforts and to take additional measures. In Germany, strategic litigation led the Constitutional Court, on March 24, 2021, to declare the Federal Climate Change Act incompatible with fundamental rights insofar as they lack provisions on the updating of reduction targets for periods from 2031, ordering the legislator to enact provisions by no later than 31 December 2022 on the updating of reduction targets for periods from 2031 as set forth in the reasons of the decision.

Professor Aperio Bella noted that the Italian Council of State, within the decisions no. 17 and 18/2021 of the Plenary Assembly, denied the intervention in the process of different associations of beach concessionaires, thus impeding the

desingularisation of a dispute which surely had political implications.

Professor Chevalier mentioned some other climate cases resulting from strategic litigation, including the «Notre Affaire à tous» ruling given by the *Tribunal Administratif de Paris* on February 3rd, 2022. Some environmental associations brought different actions before the mentioned Court, holding the French Government responsible for the damage resulting in the modification of the atmosphere and its ecological functions. In particular, the associations claimed the French Government had failed to act in respect to climate change. The administrative court of Paris ascertained the existence of ecological damage linked to climate change, yet stating that the French Governement responsibility is limited to the non-compliance with obligations assumed at the international level in terms of greenhouse gas emissions reduction. As for the reparation measures, the Court specified that their content is reserved to the free discretion of the Governemnt. Professor Chevalier highlited that even though the decision did not fully grant the requests of the associations, it had a wide political and social relevance.

In conclusion, Professor Chevalier observed that it is a matter of subjective interpretation to assess whether strategic litigation led to failure of success, considering tha the most relevant cases may well not have ended with a (totally) favourable judicial decision in legal terms.

3. The seminars given by Professor Eliantonio. The seminar on «Judicial review of administrative action: the case of soft law»

This seminar took place on May 23rd, 2022, in Roma Tre Law Department and focused on two important issues: EU soft law in the Member States and the judicial review of EU soft law.

Regarding the first topic, Professor Eliantonio analyzed the positive and the negative aspects of the soft law use in the legal system of the Member States. In fact, on the one hand, the advantages of soft law help Member States to implement law and the flexibility on Member States diversity. Soft law also allows to increase information flow both MS-MS and MS-COM and reduce the need to initiate infringement proceedings. Finally soft law plays an important role in the guidance for authorities/judges

(application stage). At the same time, on the other hand, the use of soft law presents several disadvantages like the unclear determination of effects or questionable publicity and accessibility. Soft law also permits the Commission to bypass democratic control and meanwhile the use by EU courts can broaden democratic deficit.

Then Professor Eliantonio showed three different typologies of soft law: a) post-law = interpretative soft law; b) pre-law = prepare legislation; c) para-law = substitute for legislation.

The seminars focused also on the results of the research conducted by Professor Eliantonio in the book «EU Soft Law in the Member States. Theoretical findings and empirical evidence». Professor Eliantonio underlined that, despite the important legal and practical effects, the role of soft law in the MS has not been studied and the lack of attention is problematic as it could create potential dangers for principles of legal certainty, equality and legality and for effective and uniform implementation and enforcement of EU law. At the same time, the potential benefits of soft law to contribute to better implementation of EU law remain underexploited.

The aims fixed in the research were presented by Professor Eliantonio. First, the research shed light on the use of EU soft law at national level by national administrations when implementing EU policies and by national courts when ruling in cases falling within the scope of application of EU law. Secondly, the book aimed at stimulating a debate between academics and practitioners regarding the national role of soft law and with a view to formulating policy guidance intended to support national actors.

What could be the methodology in the opinion of Professor Eliantonio?

Wonder about how (Interviews with national civil servants and national judges, Case law research), what (Policy areas: environment, competition and State aid, financial regulation, social policy) and where (UK, IT, FR, DE, FI, SL, NL + later CY, HU, ES).

Then Professor Eliantonio focused on the second topic of the seminars: the Judicial review of EU soft law.

She analyzed the problems related to the interpretation of Article 263 TFEU and to the role of IBM ruling according to which legal effects are deemed to exist where the measure is «binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position». Concretely: when soft law is

construed as introducing a new obligation, where soft law determines the way in which an EU institution intends to exercise its discretion, or where soft law has been produced in cooperation with the Member States.

Professor Eliantonio, after these general considerations, examined an emblematic case: C-911/19, Fédération bancaire française (FBF). It is a claim against the act through which the French Prudential Control and Resolution Authority (*Autorité de contrôle prudentiel et de resolution*) declared to comply with the European Banking Authority's guidelines. In light of recent jurisprudential developments, the opinion of the French authority could be subject to judicial review. Professor Eliantonio raised two questions:

Can guidelines issued by the European Banking Authority be subject to an annulment action? Why does the French court care?

The Textilwerke Deggendorf ruling said that an act which can 'without any doubt' be challenged directly in a direct action cannot subsequently be challenged indirectly through a preliminary question of validity.

Professor Eliantonio reported the opinion of Advocate General Bobek. According to him, Textilwerke Deggendorf should not apply in the case law of soft law because it is impossible to establish whether 'without any doubt' an action for annulment would have been open. Bobek argued that Foto-Frost ruling should not apply either: how can something not be challengeable directly but must be indirectly submitted to the Court through a preliminary question of validity? Infact, in the opinion of the Advocate General, the unavailability of action for annulment and the obligation to send a preliminary question of validity are incompatible.

Finally, the ruling of the Court of Justice established that the guidelines at stake have no «binding legal effects», so no action for annulment is available; only the preliminary question of validity is available (without the need to prove individual and direct concern).

Then Professor Eliantonio made a comparison between Italian, English, German and French legal systems in relation to different kind of soft law adopted in each of these States. The comparison also analyzed the admissibility of a judicial review of soft law measures in mentioned States.

The conclusions of the comparison were that all legal systems, to various extents,

admit the judicial review of soft law measures when these measures have relevance outside the administration. At the same time, the CJEU stubbornly sticks to a very restrictive notion of 'legal effects' and relies on preliminary question of validity.

Professor Eliantonio ended the seminar with a question: are the mentioned findings of CJEU in compliance with art. 47 of EU Charter of Fundamental rights?

After the precious explanation of Professor Eliantonio, there was a debate with interesting questions asked by Professor Aperio Bella and Ph.D. students.

3.1. The seminar on «Comparative approach on judicial review of administrative action: Method»

The second seminar took place on May 24th, 2022, in the Law Department of Roma Tre University.

Professor Eliantonio spoke about comparative administrative law in action, focusing on the genesis and the production of the mentioned Casebook «Judicial review of Administrative action» published in 2019.

The aims of the Casebook were:

1) Examining similarities and differences between administrative justice systems of France, Germany, Netherlands, UK and EU.

2) Examining the influence of European Union and ECHR law and jurisprudence on the administrative justice systems.

3) Assessing the possibility of a *ius commune* in the administrative justice.

Then Professor Eliantonio explained the features of the Casebook founded first on a case-based and therefore bottom-up approach to the study of the law to uncover common general principles which are already present in the living law, rather than a top-down approach which endeavors to formulate rules and model principles. Another important feature is the functional comparative approach searching for similarities in dealing with comparable situations in the examined legal systems. Professor Eliantonio also underlined the importance of a focus on concepts, principles and the functioning of the law in practice as opposed to mere 'rules' (thus seeing the various national laws and their application in practice as alternative options rather than stand-alone systems).

The last relevant characteristics regard an emphasis on the impact of European law (both EU and ECHR law) and on the question of whether European law is a driving force towards the emergence of a new *ius commune*. At the same time, also a strategic vision of the role of comparative law as a tool to bring forward the common European legal heritage while respecting cultural diversity.

The seminar focused also on the production methodology of the Casebook. Professor Eliantonio showed the most important steps related to cooperation among legal scholars from all over Europe who are each responsible for their 'own' legal system. Moreover, the starting point is extracts from legislation, literature and case law and excerpts from the European level which a) explain the standard or traditional way in which a legal system approaches a certain issue of judicial review; or b) explain patterns of deviations from the standard or traditional approach; or c) explain how the standard or traditional approach has been modified under the influence of the ECHR or the EU legal system. Therefore, different from many 'traditional' comparative works, chapters do not consist of national reports with a comparative analysis by one of the scholars, but on a joint effort. They are mutually discussed and framed.

Professor Eliantonio ended the seminar with the perspective of an 2nd edition of the Casebook «Judicial review of Administrative action» based on updates, addition of other legal system and do's & don'ts (logical terminology, comparative law team, reasonable planning of work).

Throughout the lesson, Professor Sandulli and Professor Aperio Bella intervened with interesting questions and remarks.

CLAUDIO MINUTILLO TURTUR*

BLOCKCHAIN BETWEEN LAW AND REGULATION: WHERE DO WE STAND?

CONTENT. 1. Introduction – 2. Zero knowledge proofs and data protection Law – 3. Regulatory competition in the digital age: a race to the blockchain? – 4. The Upcoming MiCAR-DLT-DORA Regulations: Opportunities and Shortcomings – 5. Market power in the blockchain – 6. The *Lex Mercatoria* in the age of blockchain – 7. Nft amid property and financial law challenges – 8. Conclusive Remarks

1. Introduction

On 12 May 2022 the seminar «Blockchain between law and regulation: where do we stand?» took place at Roma Tre's Law Department, where renowned experts in fields stemming from commercial to competition and data protection law discussed the impacts and challenges that EU and national legal frameworks will face as blockchain technologies and cryptocurrencies become more and more ubiquitous and widespread.

The event began by the introductory remarks by the Vice Dean of the Law Department, Professor Giorgio Resta, who briefly underlined how much blockchain technology will inevitably affect, and has already affected, Italian and European law on many fronts, and how timely the discussion that was going to take place afterwards appeared to be.

Professor Margherita Colangelo, who together with Professors Noah Vardi and Claudia Morgana Cascione organized the seminar, stressed how the potential use cases and business models powered by blockchain technology not only are almost infinite, but they will inevitably create some clashes with national laws, as soon as those use cases

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will become embedded in real businesses. That is why, for instance, some States have already started, or are on their way, to regulate and shed a light on the rather complex and articulated world of cryptocurrencies and their exchange, be it at national or European level.

2. Zero knowledge proofs and data protection Law

The first panelist was Professor Michèle Finck from the University of Tübingen, who discussed her upcoming research dealing with the implications of zero knowledge proofs (ZKPs) for European data protection law. These could be defined, in general terms, as cryptographic techniques used mainly, but not solely (as they could also be used for example to enhance the security of trade secrets), in blockchains, and whose aim is to minimize the amount of data shared to convey information.

More specifically, borrowing a definition provided S. Micali *et al*. in 1985, a zero knowledge proof could be deemed as «a cryptographic technique whereby one party (the "prover") proves to another (the "verifier") that a statement is true without conveying any additional information apart from the fact that the statement is true»[1]. Given the above-mentioned characteristics, it could be said that a ZKP is clearly helpful in distributed contexts (e.g blockchains like Ethereum) where there are many additional parties, since, thanks to a ZKP, not only there would be no 'data spillover', since the data required to verify the information would be limited to the bare minimum; but also because using ZKPs would entail a much more rapid and efficient process than using a combination of emails and passwords in order to access your digital profile and exchange information.

One of the findings of professor Finck's forthcoming paper is therefore that using ZKPs could arguably be regarded as a data minimisation technique. Looking at Article 5 GDPR, which clearly states that «personal data has to be adequate relevant

[1] S. Micali, S. Goldwasser and C. Rackoff, *The Knowledge Complexity of Interactive Proof Systems*, in «SIAM Journal on Computing«, Volume 18, Issue 1, 1985, p. 186.

and limited to what is necessary in relation to their processing purposes»[2], it could reasonably be inferred that a ZKP might be considered as a compliance tool to be used in order to fulfill the provisions and principles contained not only in the above-mentioned Article, but also in Article 25 GDPR, which instead deals with data protection by design and by default, and according to which: «the controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed»[3].

One more argument that could back up the claim that ZKPs shall be considered as adequate data minimization technique according to the GDPR is that, since in its Article 78 there is also a reference to the «state of the art»[4] mechanisms that must be used in order to minimize the amount of data shared and to protect their flow, this could also mean that ZKPs solutions, in a not-so-distant future, could be preferred to other, more outdated, compliance mechanisms, and considered the correct state-of-the-art technique in order to act in accordance to the GDPR.

Nonetheless, Professor Finck was also adamant in saying that not only there is a consistent number of people arguing that it is paradoxical to even talk about something resembling a data anonymization technique in a data economy like the one we are currently living in, and also that it would be *naïf* to believe that ZKPs are holistic solutions fit to thoroughly comply with the GDPR. In fact, even if they undoubtedly minimize the data shared, those data still remains personal data, and, as a consequence, every other obligation under the GDPR still applies, creating some rather high hurdles to overcome and undeniable trade-offs between equally important principles. To give an example, since one of the key principles addressed and fully protected by the GDPR is the transparency[5] in how personal data are collected and treated, then ZKPs, which

[2] EUROPEAN PARLIAMENT and EUROPEAN COUNCIL, Regulation (EU) 2016/679, *On the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR)*, art. 5.

[3] *Ivi*, art. 25.

[4] *Ivi*, art. 78.

[5] *Ivi*, art. 13-14.

are secured and powered through very complicated cryptographic methods, would then be unfit to meet the transparency obligations contained in the Regulation.

Therefore, Professor Finck concludes that, as good and convenient ZKPs could be as a data minimisation technique, however they shall not be regarded as a panacea to comply with the whole GDPR.

3. Regulatory competition in the digital age: a race to the blockchain?

The following panelist was Professor Florian Möslein from the University of Marburg, whose speech was centered on the rather complex and fascinating topic of how much regulatory power should the law actually possess in regards to digital transformation; and at the same time whether there is a tangible risk of a so called «race to the bottom», should such power be more than what is perceived to be necessary by businesses that operate through blockchain technologies.

The starting point of his argument is in fact that platforms mostly self-regulate their digital ecosystems, and blockchain networks are no exception, as they operate according to coding rules: therefore, the question is which role the law should play in this new environment, and also whether digital regulatory regimes should compete with state laws (bipolar regulatory competition), or be embedded in the latter (two-tier regulatory supply).

There is no question that the digital transformation we have been witnessing in the last twenty years has also raised many legal questions, and this unavoidable circumstance has convinced politicians and administrations around the globe to proceed with a radical update of their respective laws. This, however, is far from being something radically new, that has been solely the consequence of the development of blockchain technologies: one could in fact just look at how much the advent of the internet has compelled states all over the world to adapt their legislations accordingly, to understand how this process has been unfolding.

Nonetheless, what differentiates the case of blockchains and digital assets is that they are arguably emerging at an incredibly fast pace, and smaller states such as Malta, Gibraltar or Wyoming in the US are already on track to be considered pioneers regarding

crypto and blockchain regulation, aiming to become, specially thanks to particularly favouring tax benefits, safe havens for crypto entrepreneurs and a sort of Delaware for digital assets law[6].

The reference to Delaware is not casual: as such state still today prizes itself with very a liberal and advantageous corporate law, which during the years has proven to be a magnet for many corporations within and outside the US that wanted to either start a business or move from a country where the tax burden was considered to be too high; states around the world seem to be trying to replicate Delaware's approach, albeit in the field of digital assets. This situation then seems to bring up the idea of a competition between legal systems, a «race of laxity»[7] that ultimately favourites smaller states whose tax benefits would be unmatchable for bigger ones.

In more specific terms, the above-mentioned race could be defined as 'theory of institutional competition', which, although controversial – since still today is one of the most debated topics in the field of law and economics –, states that there are some prerequisites that should be met in order to talk about a possible regulatory competition between legal systems:

– Material differences;
– Choice of law;
– Incentives for legislators.

However, even if these conditions are met, regulatory competition does not necessarily lead to a race to the bottom, but it could very well result in a race to the top: as it can serve to satisfy consumers' preferences, prevent mistakes and provoke legal innovations across the globe.

Unlike corporate law though, crypto assets' law is far from being clearly defined yet: but, notwithstanding the heterogeneity and confusion surrounding crypto-

[6] See for example: M. Byhoff and B. Ford, *This State is Becoming America's Crypto Capital*, Bloomberg, 2022, <https://www.bloomberg.com/news/articles/2022-02-02/wyoming-is-trying-to-become-america-s-blockchain-capital>; D. Steinbeck, *Malta: Blockchain's Island Haven*, 2018, Crypto Law Insider, <https://cryptolawinsider.com/malta-blockchains-island-haven/>; K. Makortoff, *Blockchain Rock': Gibraltar moves to become world's first cryptocurrency hub*, in «The Guardian», 2021, <https://www.theguardian.com/technology/2021/dec/27/blockchain-rock-gibraltar-moves-to-become-worlds-first-cryptocurrency-hub>.

[7] This expression comes from justice's Brandeis dissenting opinion in the case Louis K. Liggett Co. *v.* Lee (1933).

currencies, there is nonetheless one specific characteristic that could be found in all of them: they depend on digital systems (blockchains) that can enforce legal rules, therefore acting in a way akin to that of 'private legislator'. Given that, it would not be excessive to state that 'code is law', as the obligations and contracts that take place on every blockchain are automatically regulated through strings of code written in different programming languages.

Because of this functional equivalence to law, some fear the end of classic contract law is looming. The fact that digital systems can enforce rules, and that agreements can be implemented on the blockchain thanks to smart contracts, creates in fact an understandable sense that these digital systems are regulated through different digital jurisdictions that vary from blockchain to blockchain, and even offer an alternative dispute resolution mechanism should any controversy on property rights emerge.

However, if we were to assume that there is such competition between a digital and an ordinary jurisdiction, we should then ask which one we should be preferred: and in order to do that, it is necessary to dig into the pros and cons of both systems.

As far as the advantages of digital jurisdictions, the following seem to be the most straightforward and appropriate ones to list: i) they are more cost effective; ii) they provide an high degree of freedom; iii) they have an inherently global reach; iv) they provide an effective self-execution of contracts and rules.

While the elements listed above are definitely tempting and may lead us to prefer a digital jurisdictions, there are nonetheless very good reasons to prefer the state offer, since the latter: is based on experience and traditions; has the potential to differentiate; comes with the possibility of fair enforcement; bears no restriction to the digital sphere, as opposed to the digital jurisdiction which is limited to the digital world.

Having a look at where things stand nowadays, according to Professor Moslein, it is possible to observe that there are constant interactions and a coexistence between the two systems, but no such things as a 'race to the code' yet, and will probably never happen in the near future, since the statutory law is still to be largely preferred for the reasons listed above, hence making it impossible to have the best of both worlds condensed either in the digital or in the ordinary jurisdiction. Given the interplay between the two jurisdictions, the state could then choose among a variety of regulatory strategies, which often overlap with one another, that could inform its approach towards

the digital sphere: an hegemonic strategy (which is mainly used in non democratic countries such as China), self-regulation and a more specific enabling of the platforms[8].

4. The Upcoming MiCAR-DLT-DORA Regulations: Opportunities and Shortcomings

The next speaker was Professor Filippo Annunziata from Bocconi University, who focused his presentation on his forthcoming paper, which critically assesses the upcoming MiCAR-DLT-DORA Regulations, underlining their strengths and weaknesses. In his speech Professor Annunziata focused on the first Regulation, which specifically deals with cryptocurrencies.

Generally speaking, Professor Annunziata believes that, thanks to MiCAR[9], the EU could truly become a single market where crypto assets are uniformly regulated: a unique feature and a rather positive one to celebrate appropriately, as it will undoubtedly make the European Union not only a first-mover in regulating crypto, but also the only true global market for crypto assets in the world. At the same time, nonetheless, it must be noted that there are some critical shortcomings and problems that could arise from the Regulation that must be addressed, in order for MiCAR to unleash its full potential.

The first problem is the taxonomy contained in MiCAR and the relationship between MICA and EU Capital Markets Law, especially the MiFID Regulation. The former adopts a negative definition[10] when it comes describing its scope of action, meaning that instead of defining in a positive way the areas and practices that it will cover – except for the specific definition of asset-backed and e-money tokens it expressly contains – it simply declares that it will regulate the rest of the tokens that do not already

[8] I. Chiu, *Decrypting the Trends of International Regulatory Competition in Cryptoassets,* in «European Journal of Comparative Law and Governance», Volume 7, Issue 3, 2020, p. 297.

[9] EUROPEAN PARLIAMENT and EUROPEAN COUNCIL, *Proposal for a regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937*, COM/2020/593 final.

[10] *Ivi*, art. 2 par. 2, according to which it «shall apply to tokens that do not fall within the scope of existing EU Financial Legislation».

fall in the current financial legislation, hence thwarting the very reason MiCAR was created: namely providing legal certainty when it comes to regulating crypto assets.

This approach is then rather troubling, and an example could clarify why it would be wise to review this strategy. Since one of the core elements of the definition of a financial element under EU Capital Markets Law is in fact the concept of negotiability, we then shall ask ourselves what would happen if a token could fall within the meaning of «financial element» according to MiFID Regulation, but it is not negotiable. Would it fall under MiCAR? The answer is not yet self-evident, especially considering the fact that 'negotiability' is still a very much unclear concept to date; therefore one would have to look at national company laws to try to find a satisfactory answer, which however, by definition, are different from one another and therefore ultimately provide little help in finding an appropriate answer to the above-mentioned question; and equally insufficient and extremely cumbersome solution would be to simply rely on *ex post* intervention in order to clarify whether a crypto asset falls under the provisions of MiCAR or not.

A second problem that arises when looking at MiCAR's wording is its approach towards DeFi (decentralized finance), which seems to be already outdated by now, especially when considering the part dealing with stablecoins: it appears to be too biased and to solely reflect the need to provide response to bad past experiences, rather than addressing how the market actually works and would evolve in the future. Moreover, it seems unclear whether MiCAR truly follows a decentralized approach in regards to DeFi, as it actually appears rather centralized, given that it does not cover truly decentralized tokens and assets such as bitcoin, to name the most important one of all.

Should the MiCAR remain in the current form and the taxonomy as well as relationship between MiCAR and DeFi would not be sufficiently clarified, a consequence that would inevitably follow is that national legislations could find themselves in contrast with MiCAR. As a result, since in Italy we currently have national legislation according to which we are bound to apply national rules also to crypto, but not to all of them, it would be foreseeable to end up having a token issued in another member state classified as not falling into MiCAR according to its national provisions; differently, if it were to be issued in Italy, it would then be subject to such provisions, even more so since in 2021 the Italian Supreme Court classified bitcoin as a financial product, hence outside the

scope of the current MiCAR. This, clearly, is a situation that must be avoided and that would completely nullify the scope and aim of MiCAR regulation.

The third aspect that deserves to be addressed according to Professor Annunziata is whether the provision of MiCAR should also apply to 'pure' utility tokens such as NFTs (non-fungible tokens), which do not perform any financial function, or that start performing it only after some time. In order not to impair a genuine competition in the field of NFT in fact, it might be reasonable for the Commission to act in a more nuanced and proportionate way, and to come up with special provisions aimed at addressing NFTs specifically, thereby making it possible for start-ups and entrepreneurs operating in that field to flourish within the EU and attract talents from all over the world.

5. Market power in the blockchain

The seminar then turned to a completely different topic: namely the concept of market power in the blockchain. The speaker that offered his contribution on the matter was Professor Konstantinos Stylianou, University of Leeds.

In order to fully grasp the topic, it is essential to begin by stressing how much the concept of market power is central for competition law: as it is a fundamental parameter taken into account by competition agencies all over the world not only to solve cases of potential abuse of dominance, albeit they represent the most common hypothesis, but also whenever anticompetitive agreements, cartels or a merger whose result could impair genuine competition in a given market are concerned.

More specifically, market power could be deemed to be present whenever a firm has the ability to:

– Raise prices;
– Exclude competitors;
– Act without regard to competitors and consumers[11].

Moreover, in order to determine whether a firm actually holds market power,

[11] EUROPEAN COMMISSION, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, (2009/C 45/02), par. 10-11.

the European Commission uses an array of various legal and economic tests, that could briefly be summarized in: the SSNIP test (also known as the hypothetical monopolist test); a large market share; the presence economies of scale and scope; the absence of countervailing buyer power[12].

With this in mind, then the question to be asked, and to which the speaker tried to give an answer, is whether in the market of blockchains there are already firms that could be considered dominant, or possess substantial market power.

As of today, it could be said that blockchain markets are much more competitive than most 'traditional' markets, and not entirely dominated by Bitcoin as many commentators wrongly argue. For instance, since blockchain technologies have appeared, it has been possible to register a situation similar to an oligopoly only for a couple of years, but that was lost in a relatively short period of time due to vast and ever-growing competition.

Furthermore, it is also worth remembering that when Facebook planned to launch its currency *Libra*, financial authorities closely monitored it and the European Commission opened an investigation[13] for leveraging of market power in social networks in the crypto assets market or crypto assets transaction market, and that ultimately forced the Big Tech to roll back its plan.

Nonetheless, even if we arguably find ourselves in a relatively new market that seems to be working perfectly, we shall not forget that this situation is greatly resemblant to what the internet market looked back in the day, something that twenty years later did not prove to be the case. Therefore, since we should be aware that it could only be a matter of time until dominant firms will emerge and try to monopolize also blockchain markets[14], competition agencies should be ready to fend off such attempts using

[12] *Ivi*, par. 13-18.

[13] REUTERS STAFF, *Facebook's Libra faces EU antitrust probe: Bloomberg*, 2019, Reuters, <https://www.reuters.com/article/us-facebook-libra-idUSKCN1VA1Z3>; E. Dwoskin and G. De Vynck, *Facebook's cryptocurrency failure came after internal conflict and regulatory pushback*, in «The Washington Post», 2022, <https://www.washingtonpost.com/technology/2022/01/28/facebook-cryptocurrency-diem/>.

[14] See, on the matter, for example: G. Huberman, J. Leshno and C.C. Moallemi, *Monopoly without a Monopolist: An Economic Analysis of the Bitcoin Payment System*, in «The Review of Economic Studies», Volume 88, Issue 6, 2021, p. 3011; W. Gottsegen, *The first NFT monopoly*, Coindesk, 2022, <https://www.coindesk.com/layer2/2022/03/14/the-first-nft-monopoly/>.

appropriate, and possibly new, regulatory tools.

In order for the European Commission to pre-emptively figure out whether there is an attempt to monopolize a blockchain market, Professor Stylianou has so far been able to identify a behaviour that could lead to an increase of market power, namely an «installed base». To have a glimpse of what that means in practice, it is worth mentioning how Cardano's blockchain has been operating lately. The latter is in fact not only a blockchain whereby its users have an incentive to stick with it since they are rewarded a certain number of digital assets for every transaction they validate; but at the same time Cardano has also a smart contract embedded in it that allows it to become a multi-purpose application suited to build DAPP (decentralized applications) on it, one of them being for example Pavia, which is focused on the metaverse.

Therefore, according to Professor Stylianou, if there are no incentives to abandon Cardano, the platform will keep attracting people, and as a consequence its market share will not be transeunt. In fact, it could be said that the more a blockchain is able to retain people, the more unshakable it becomes, while its market power becomes more solid.

Professor Stylianou then concluded by mentioning, on the other hand, some elements that according to his opinion may hint to a decrease in market power, and therefore must be taken in due consideration by the European Commission when trying to the determine the effective degree of market power held by a firm operating in blockchain markets. Namely: a change in design choices; forking; bridgecoins; token effects; L2.

6. The Lex Mercatoria in the age of blockchain

The following topic that was addressed, this time thanks to the contribution of Professor Cristina Poncibò (University of Turin), was the relationship between *Lex Mercatoria*[15] and blockchain, and more specifically whether the former could serve as

[15] Which according to professor F. GALGANO could be defined as «a national body of legal rules and principles, which are developed primarily by the international business community itself based on custom, industry practice, and general principles of law that are applied in commercial arbitrations in order to govern transactions between private

an ideal framework in order to evaluate whether blockchain technologies can be regarded as the foundation of a truly bottom-up system, as envisioned by many blockchain professionals and scholars. In order to do so, Professor Poncibò elaborated on some aspects that could be deemed as essential for the success and development of the *Lex Mercatoria* during time: spontaneity, universality and autonomy from national law or justice.

In regards to the first point, the *Lex Mercatoria* can in fact be considered as a law beyond the state, as it has always been freely combining elements from national and non national laws, merging them together. If we then turn to blockchain technologies, we could observe a similar pattern, since coding – exactly like the *Lex Mercatoria*, which has been subject to a process of legitimation without recognition from the state, thanks to the community of merchants that in itself had decided to regulate its activities according to it – has been undergoing a very similar transformation, and it could be said that the role that merchants played back in the day for the *Lex Mercatoria*, is now held by developers all over the world, that progressively shape blockchain technologies. The same holds true if we look to the universal reach of *Lex Mercatoria*, which seems to be present also as far as coding is concerned, especially thanks to the ubiquitous nature of the internet.

One difference that would nonetheless be possible to enumerate between the Lex Mercatoria and blockchain is the fact that, while the former was essentially developed thanks to a rather homogenous group of people such as merchants, in the case of blockchain not only there are, albeit in a much smaller number, private blockchains that do not allow any external participants to be part of it and modify it, but also so called 'core developers', who play a preponderant role in shaping current and future blockchains.

Finally, as far as the last point is concerned, it could be said that while it was true that at the beginning, thanks to its radical novelty, blockchain technologies were very much independent from regulation, as of today, inevitably, there is a much more institutionalized community.

parties in transborder trade, commerce and finance».

The final question Professor Poncibò then posed is how we can understand the customs that govern blockchain, especially since, as opposed to the process that led to the creation of the *Lex Mercatoria*, there are no social norms traditionally speaking derived from technology itself, but simply some rules that are created through the various smart contracts that are run on blockchains. Therefore, in blockchain communities it could be said that while there is digital trust, the same is not true for social trust: hence it is worth asking whether, absent that crucial feature, one could possibly envision a blockchain community in itself, given the fundamental role that social trust played in shaping the *Lex Mercatoria*.

7. Nft amid property and financial law challenges

The final speaker of the conference was Professor Giulio Sandrelli (University of Roma Tre), who has provided an overview of the possible legal challenges that NFTs, whose entire market capitalization now exceeds approximately 15 billions euros and are becoming more and widespread across the globe, could entail.

To give a bit of context, the Professor remembered that the ancestors of NFTs were the so called *colorcoins* of 2013, which indeed were an evolution of bitcoin. Then, five years later, in 2018, *cryptokitties* followed suit and finally, in 2021, the tokenization and sale of the first tweet started the 'new-wave' of NFTs we currently live in.

NFTs areas of growth have constantly expanded over the years, the most relevant and lucrative ones being: art, collectibles, videogame, fashion, real estate and smart properties, and in order to properly understand how NFTs actually work, it is necessary to describe their structure.

The latter is in fact composed of a token, which could be defined as a digital information registered on a blockchain via a smart contract, attesting that a certain user has a right to either deliver an object or perform some activities; then we have the metadata, which is unique to the token and sometimes incorporated directly in the smart contract (so called on-chain metadata) or stored somewhere else (off-chain metadata). Finally, it is necessary to distinguish two set of possibilities: either there is no 'minting' service on the blockchain and in this case the platform produces the NFT,

or a minting service is present, therefore we will have an author that asks the platform to tokenize the NFT produced by him, and then users might buy it.

Turning to NFTs' functional characteristics, they could be summarized in the following: non-fungibility, as they are unique samples; rivalry; transferability; interoperability, as they may be used or traded outside their native platform.

After this necessary introductory part, Professor Sandrelli approached the central topic of its presentation, namely the legal issues that NFTs pose and will inevitably pose, especially as far as IP law, AML (anti money laundering) and private law are concerned.

The first legal question to address is whether the owner of an NFT is for real or not. While for instance, according to the NBA Top Shop terms and conditions «because each Moment is an NFT, when you purchase a Moment in accordance with these Terms… you own the underlying NFT completely» and therefore it would be possible to use an NFT as an owner, Professor Sandrelli disagrees, and believes that the actual state of things is different and more complicated, and that we ought to split the above-mentioned question in two parts, asking ourselves whether we would be able to assert property on the token or on the underlying asset.

In order to understand what the implications would be in the former case, it is worth starting by saying that there seems to be a functional analogy between the token and the property, and they have been treated as such so far. Nonetheless, there is an objection according to which, by following this approach, the result might the violation of the *numerus clausus* principle: however, Professor Sandrelli believes that it would not ultimately be concerning, since NFTs have their own autonomy, non fungibility and more importantly a technological and not a legal nature, hence making them inevitably fall outside a *numerus clausus*. If we were to believe in the other option, on the other hand, according to Professor Sandrelli, this would practically mean that, for example, in bankruptcy situation the receiver could include also an NFT, and that it would also be possible to start an *in rem* claim of NFTs if they are deposited in a third party wallet, as well as *in rem* remedies such as proprietary injunctions or a worldwide asset freezing in case of theft of keys or fraud. Moreover, even if it could be possible to consider the underlying asset as a form of property as far as on-chain NFTs are concerned, for many more of them such as *cryptokitties* this possibility does not seem to exist, since rather than owning those form of tokens, one may simply win a contractual relation, and the

same goes for tokenized real world assets, as they follow the law governing those real world assets.

The next question to which Professor Sandrelli attempts to answer is then whether the transfer of an NFT also implies the transfer of the underlying asset. A first way to look at the issue is by relying on the so called 'theory of the incorporation'. However it does not seem convincing in the case at hand, because NFTs' primary function and NFTs' rules of transfer are in accordance to DLT (Distributed Ledger Technology) standards, hence not compatible with securities rules.

It is nonetheless correct to say that a reduced form of incorporation still exists in the fact that the owner of the NFT is entitled, depending on the single case, to either obtain access to data, the delivery of an asset or some performance of activities.

Another topic that Professor Sandrelli briefly discussed was how NFTs could cope with Rome I regulation[16] of contractual obligations, as while it excludes negotiable documents from its scope, it would still be applicable to NFTs-related agreements such as parties' choice of law.

More specifically, whenever there is an owner claiming delivery of an NFT, so far it is possible to register a tendency according to which it would be preferable to apply the *lex rei sitae* principle (especially UK courts are making this point), relating the token to a physical territory either based on the location of the off-chain assets or where private keys are located. However, as Professor Sandrelli promptly pointed out, these are rather partial criteria and not only could possibly exacerbate conflicts, but more importantly they would be almost impossible to apply for public blockchains.

Finally, Professor Sandrelli concluded stating that there are also many financial implications that derive from NFTs, especially since they are undoubtedly sliding into the investment area. Considering in fact that investment funds are starting to invest in NFTs, and NFTs creators have also begun to gather resources through crowdfunding initiatives, it seems likely that those kind of NFTs will be considered either akin to financial instruments in the latter case, therefore possibly triggering MiFID regulation;

[16] EUROPEAN PARLIAMENT and EUROPEAN COUNCIL, *Regulation (EC) No 593/2008 (Rome I) applicable to contractual obligations*.

or similar to an investment product in the former, thereby triggering domestic regulation.

8. Conclusive Remarks

Finally, Professor Claudia Morgana Cascione from the University of Bari concluded the seminar by thanking all the participants for their insightful contributions, and hoping to replicate the event very soon, as she is sure the topics addressed will only grow bigger and more complex over time.

ARTICLES

NOTES

MEETINGS & READINGS

ROMA TRE
UNIVERSITÀ DEGLI STUDI
DIPARTIMENTO DI GIURISPRUDENZA