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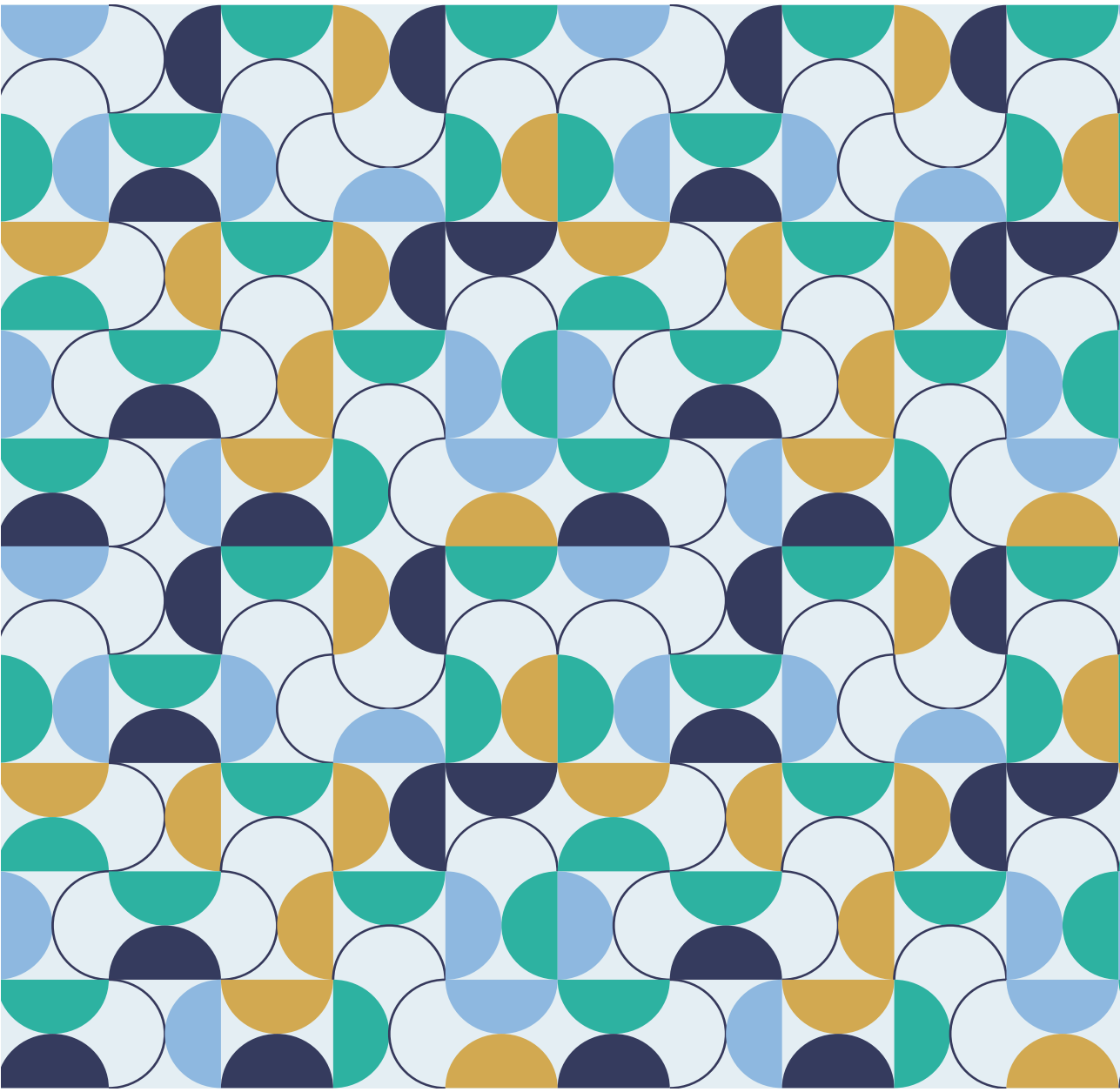

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ARTICLES

NOTES

MEETINGS & READINGS

MARTA BEGHINI[*], ISABELLA ZAMBOTTO[**]

'RES CORPORALES' AND 'RES INCORPORALES'. ROMAN FOUNDATION AND CURRENT DEVELOPMENT OF A BIPARTITION[***]

ABSTRACT. *The article aims to critically reconstruct the dichotomy res corporales-res incorporales from Gai 2.12-14. In particular, attention is focused on the historical origin of the distinction and the discretional criterion underlying it, on the comparison between this distinction and the further distinction relative to res mancipi-res nec mancipi, and, finally, on the developments that the conceptual pair finds in the main modern codifications.*

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[***] Marta Beghini is the author of §§ 3, 4, 5 and 7, Isabella Zambotto of §§ 1, 2, 6, 8 and 9. This essay is part of the project ANTARes - A New Thinking About 'Res'. Roman Taxonomies in the Future of Goods, funded by STARS @ Unipd 2019.

1. The centrality of Gai 2.12-14

It is well known that the legal studies conducted over the centuries on the distinction between *res corporales* and *res incorporales* adopted Gai 2.12-14[1] as a starting point. The fragment is also found in the Justinian compilation in Gai. 2 *inst*. D. 1.8.1.1 and I. 2.2.2[2], as well as in Ep. Gai. 2.1.2-3, Paul. Sent. 3.6.11 and Tit. Ulp. 19.11 and 15[3]. These latter cases, however, show some more marked textual variants. In addition,

[1] Gai 2.12: *Quaedam praeterea res corporales sunt, quaedam incorporales.* 13. *<Corporales> hae, quae tangi possunt, velut fundus homo vestis aurum argentum et denique aliae res innumerabiles.* 14. *Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae iure consistunt, sicut hereditas ususfructus obligationes quoquo modo contractae. nec ad rem per<tinet, quod in hereditate res corporales con>tinentur, et fructus qui ex fundo percipiuntur, corporales sunt, et quod ex aliqua obligatione nobis debetur, id plerumque corporale est, veluti fundus homo pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. eodem numero sunt iura praediorum urbanorum et rusticorum. ... ius altius tollendi aedes (?) et officiendi luminibus vicini aediumaut non extollendi, ne luminibus vicini officiatur. item fluminum et stilicidiorum idem ius ... ius aquae ducendae. haec iura praediorum (?) tam urbanorum quam rusticorum servitutes vocantur.*

[2] Gai. 2. *inst*. D. 1.8.1.1: *Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales hae sunt, quae tangi possunt, veluti fundus homo vestis aurum argentum et denique aliae res innumerabiles: incorporales sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt, sicut hereditas, usus fructus, obligationes quoquo modo contractae. Nec ad rem pertinet, quod in hereditate res corporales continentur: nam et fructus, qui ex fundo percipiuntur, corporales sunt, et id quod ex aliqua obligatione nobis debetur plerumque corporale est, veluti fundus homo pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. Eodem numero sunt et iura praediorum urbanorum et rusticorum, quae etiam servitutes vocantur*; I. 2.2.2: *Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales eae sunt quae sui natura tangi possunt: veluti fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles. Incorporales autem sunt quae tangi non possunt. qualia sunt ea quae in iure consistunt: sicut hereditas, usus fructus, obligationes quoquo modo contractae. nec ad rem pertinet quod in hereditate res corporales continentur: nam et fructus qui ex fundo percipiuntur corporales sunt, et id quod ex aliqua obligatione nobis debetur plerumque corporale est, veluti fundus, homo, pecunia: nam ipsum ius hereditatis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. Eodem numero sunt iura praediorum urbanorum et rusticorum, quae et servitutes vocantur.*

[3] Ep. Gai. 2.1.2: *Praeterea quaedam res corporales sunt, quaedam incorporales. Corporals sunt, quae mani tangi possunt: velut ager, mancipium, vestis, aurum, argentum, et his similia. Incorporales sunt quae tangi non possunt, qualia sunt ea, quae non in corpore, sed in iure consistunt, sicut hereditas et obligationes de diuresis contractibus scriptae. Et licet hereditas vel emptio aut diversi contractus res corporals in se habeant, ius tamen ipsius hereditatis vel emptionis aliorumque contractuum incorporale est.* 3. *Incorporalia etiam sunt iura praediorum urbanorum vel rusticorum. Praediorum urbanorum iura sunt stillicidia, fenestrae, cloacae, altius arigendae domus aut non erigendae, et luminum, ut ita quis fabricet, ut uicinae domui lumen non tollat. Praediorum vero rusticorum iura sun tuia, vel iter, per quod pecus aut animalia debeant ambulare vel ad aquam duci, et aquaeductus: quae similiter incorporalia sunt. Haec iura, tam rusticorum quam urbanorum praediorum, sevuitutes appellantur*; Paul. Sent. 3.6.11: *Sinendi modo tam corporales res quam quae in iure consistunt legari possunt: et ideo debitori id quod debet recte legatur*; Tit. Ulp. 19.11: *In iure cedi res etiam*

some references are scattered in the Gaian institutions (Gai. 2.17; 2.19; 2.28; 2.38; 3.83; 3.85; 4.3)[4], in the Digest (Ulp. 19 *ad ed.* D. 10.3.4 pr.; Iav. 4 *ex Plaut.* D. 12.6.46; Maec. 2 *fideicomm.* D. 32.1.95; Ven. 10 *act.* D. 34.4.32 pr.; Gai. 7 *ad ed. prov.* D. 41.1.43.1; Gai. 4 *ad ed. prov.* D. 41.3.9; Ulp. 3 *de off. cons.* D. 42.1.15.9) and in C. 7.33.12.4 (*Imp. Iustinianus A. Iohanni pp.* a. 531)[5].

incorporales possunt, velut usufructus et hereditatis et tutela legitima libertae; 19.15: *Res autem corporales, quasi singulae in iure cessae essent, transeunt ad eum, cui cessa est hereditas.*

[4] Gai 2.17: *Sed item fere omnia, quae incorporalia sunt, nec mancipi sunt, exceptis servitutibus praediorum rusticorum; nam eas mancipi esse constat, quamvis sint ex numero rerum incorporalium*; 2.19: *Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem*; 2.28: *Res incorporales traditionem non recipere manifestum est*; 2.38: *Obligationes quoquo modo contractae nihil eorum recipiunt: nam quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo, quibus res corporales ad alium transferuntur, id efficere possum; sed opus est, ut iubente me tu ab eo stipuleris; quae res efficit, ut a me liberetur et incipiat tibi teneri. quae dicitur novatio obligationis*; 3.83: *Etenim cum pater familias se in adoptionem dedit mulierve in manum convenit, omnes eius res incorporales et corporales, quaeque ei debitae sunt, patri adoptivo coemptionatorive adquiruntur exceptis his, quae per capitis deminutionem pereunt, quales sunt usufructus, operarum obligatio libertorum, quae per iusiurandum contracta est, et lites contestatae legitimo iudicio*; 3.85: *Item si legitimam hereditatem heres, antequam cernat aut pro herede gerat, alii in iure cedat, pleno iure fit ille heres, cui cessa est hereditas, proinde ac si ipse per legem ad hereditatem uocaretur; quod si postea quam heres extiterit, cesserit, adhuc heres manet et ob id creditoribus ipse tenebitur; sed res corporales transferet, proinde ac si singulas in iure cessisset, debita vero pereunt, eoque modo debitores hereditarii lucrum faciunt*; 4.3: *In rem actio est, cum aut corporalem rem intendimus nostram esse aut ius aliquod nobis conpetere, velut utendi aut utendi fruendi, eundi, agendi aquamve ducendi vel altius tollendi prospiciendive, aut cum actio ex diverso adversario est negativa.*

[5] Ulp. 19 *ad ed.* D. 10.3.4 pr.: *Per hoc iudicium corporalium rerum fit divisio, quarum rerum dominium habemus, non etiam hereditatis*; Iav. 4 *ex Plaut.* D. 12.6.46: *Qui heredis nomine legata non debita ex nummis ipsius heredis solvit, ipse quidem repetere non potest: sed si ignorante herede nummos eius tradidit, dominus, ait, eos recte vindicabit. eadem causa rerum corporalium est*; Maec. 2 *fideicomm.* D. 32.95: *'quisquis mihi heres erit, damnas esto dare fideique eius committo, uti det, quantas summas dictavero dedero'. Aristo res quoque corporales contineri ait, ut praedia mancipia vestem argentum, quia et hoc verbum 'quantas' non ad numeratam dumtaxat pecuniam referri ex dotis relegatione et stipulationibus emptae hereditatis apparet et 'summae' appellatio similiter accipi deberet, ut in his argumentis quae relata essent ostenditur. voluntatem praeterea defuncti, quae maxime in fideicommissis valeret, ei sententiae suffragari: neque enim post eam praefationem adiecturum testatorem fuisse res corporales, si dumtaxat pecuniam numeratam praestari voluisset*; Ven. 10 *act.* D. 34.4.32 pr.: *Detrahere legatis vel adicere, si nihil praeter pecuniam numeratam legatum sit, promptum est: cum vero res corporales intervenient, et scriptura difficilior fit et obscura portio*; Gai. 7 *ad ed. prov.* D. 41.1.43.1: *Incorporales res traditionem et usucapionem non recipere manifestum est*; Gai. 4 *ad ed. prov.* D. 41.3.9: *Usucapionem recipiunt maxime res corporales, exceptis rebus sacris, sanctis, publicis populi romani et civitatium, item liberis hominibus*; Ulp. 3 *de off. cons.* D. 42.1.15.9: *Sed utrum confessum nomen tantum capi possit an etiam si neget quis se debere, videamus. Et magis est, ut id dumtaxat capiatur, quod confitetur: ceterum si negetur, aequissimum erit discedi a nomine, nisi forte quis exemplum secutus corporalium pignerum ultra processerit dixeritque ipsos debere iudices de nomine cognoscere, ut cognoscunt de proprietate: sed contra rescriptum est*; C. 7.33.12.4 (*Imp. Iustinianus A. Iohanni pp.* a. 531): *Eodem observando et si res non soli sint, sed incorporales, quae in iure consistunt, veluti usus fructus et ceterae servitutes.* Moreover, the expression

This overview suggests that we should think of these multiple sources as branches of a core one, namely Gai 2.12-14. The statement concerning the significance of these passages with regards to the origin of the reflection on the 'things' in question, has to be deepened further.

To assert that the Gaian fragments ideally constitute the origin of any research on the subject is not to deny the existence of any elaboration of the distinction between *res corporales* and *res incorporales* prior to the Gaian manual, be it in a purely philosophical or even legal sense (albeit at an embryonic level), as will be seen below[6]. More simply, it is intended to highlight how the division in question is the first to soar to a juridical nature in ancient Rome, as emphasized by a large number of authors[7].

corpus is, in some cases, contrasted with *ius* (Ulp. 15 *ad ed.* D. 5.3.18.2; Ulp. 39 *ad ed.* D. 37.1.3 pr.; Ulp. 53 *ad ed.* D. 39.2.13.1; Ulp. 53 *ad ed.* D. 39.3.8; Pomp. 33 *ad Sab*. D. 39.5.9 pr.; Ulp. 71 *ad ed.* D. 43.26.2.3; Ulp. 75 *ad ed.* D. 44.2.7 pr.; Paul. 2 *inst*. D. 44.7.3 pr.), in others to money (Iav. 4 *ex Plaut*. D. 12.6.46; Maec. 2 *fideicomm*. D. 32.95).

[6] See *infra*, § 3.

[7] See entry '*Res*', in *Vocabularium Iurisprudentiae Romanae*, vol. V, Berlin, 1939, pp. 100 ff.; entry *'Res'*, in *Oxford Latin Dictonary*, edited by P.W. Glare, Oxford, rist. 2005, pp. 1625 ff.; O. Stobbe, *Handbuch des Deutschen Privatrechts*, vol. I, Berlin, 1885, p. 520; E.I. Bekker, *System des heutigen Pandektenrechts,* vol. I, Weimar, 1886 (ref. Aalen, 1979), p. 288; Id, *Allerlei von den dinglichen Rechten insbesondere von den Rechten an eigner Sache*, in «Zeitschrift für die vergleichende Rechtswissenschaft», II, 1890; p. 20; F. Regelsberger, *Pandekten*, vol. I, Leipzig, 1893, pp. 359, pp. 366 f.; B. Windscheid, *Lehrbuch des Pandektenrechts*, vol. III[9], Frankfurt am Main, 1906, § 137; C. Fadda - P.E. Bensa, *Note al secondo libro di* B. Windscheid, *Diritto delle Pandette*, vol. IV, Torino, 1926, pp. 183 ff.; V. Scialoja, *Teoria della proprietà nel diritto romano*, vol. I, Roma, 1933, pp. 21 ff.; G. Pugliese, *'Actio' e diritto subiettivo*, Milano, 1939; M. Villey, *L'idée du droit subjectif et les systèmes juridiques romains*, in «Revue historique de droit français et étranger», XXIV-XXV, 1946-1947, pp. 209 ff.; H. Pflüger, *Über körperliche und unkörperliche Sachen*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXV, 1947, pp. 339 ff.; R. Monier, *La date d'apparition du 'dominium' et de la distinction juridique des 'res' en 'corporales' et 'incorporales'*, in *Studi in onore di S. Solazzi nell'anniversario del suo insegnamento*, Napoli, 1948, pp. 357 ff.; H. Kreller, *'Res' als Zentralbegriff des Institutionensystem*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXVI, 1948, pp. 572 ff.; B. Albanese, *La successione ereditaria nell'antico diritto romano*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», XX, 1949, pp. 356 ff.; G. Pugliese, '*Res corporales', 'res incorporales' e il problema del diritto soggettivo*, in «Rivista italiana per le scienze giuridiche», V, 1951, pp. 237 ff., now in *Scritti giuridici scelti*, Napoli, 1985, pp. 225 ff.; B. Biondi, *I beni*, in *Trattato di diritto civile italiano*, a cura di F. Vassalli, vol. IV.1, Torino, 1953, pp. 21 ff.; Id., entry *Cosa corporale ed incorporale (dir. rom.)*, in *Novissimo digesto italiano*, vol. IV, Torino, 1959, pp. 1014 ff.; F. Wieacker, *Griechische Würzeln der Institutionensystems*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXX, 1953, pp. 103 ff.; G. Astuti, entry *Cosa* (*dir. rom. e interm*.), in *Enciclopedia del diritto*, vol. XI, Milano, 1962, pp. 5 ff.; G. Grosso, *La distinzione tra 'res corporales' e 'res incorporales' e il secondo capo della 'lex Aquilia'*, in *Synteleia. Vincenzo Arangio-Ruiz*, a cura di A.

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As for the scope of the bipartition in Roman law, there has been no shortage of voices claiming that it had a mere educational function. This can be presumed by the lack of evidence showing that each of the two *species* of *res* created a distinct legal regime applied in practice. In addition, it can be inferred from the reticence of Roman jurists of the advanced classical age to resort to such distinction[8].

However, this assumption is worthy of reconsideration in light of multiple arguments. The Gaian categories represent «uno strumento di architettura giuridica, per dare armonia al discorso»[9] on the subject of *res*, which is especially meaningful for the understanding of the Gaian institutional tripartition of *ius* into *personae*, *res* and *actiones.* Under the tripartition, property, limited real rights, inheritance, and obligations are notoriously considered *res incorporales*. It is then undeniable that focusing on these categories amounts to «l'operazione più lineare compiuta nell'ambito della giurisprudenza romana, per organizzare in una visione d'insieme l'intera disciplina dell'appropriazione e dello scambio»[10], «in vista della soluzione di concreti problemi di regime giuridico»[11].

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[8] See among others, Burdese, *'Res incorporalis'*, cit., p. 109; Id., *Manuale di diritto privato romano*, Torino, 1993 (rep. 2010), p. 168, in the footsteps of Orestano, *Il problema*, cit., p. 174; more generally, on the Gaian system, M. Fuhrmann, *Das systematische Lehrbuch. Ein Beitrag zur Geschichte der Wissenschaften in der Antike*, Göttingen, 1960, pp. 104 ff. and nt. 4 for further bibliographical references; W. Flume, *Die Bewertung der Institutionen des Gaius*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXXIX, 1962, pp. 22 ff.

[9] In these terms Turelli, *'Res incorporales' e beni immateriali*, cit., pp. 1 ff.

[10] In this sense, see Brutti, *Il diritto*, cit., p. 260.

[11] Thus Burdese, '*Res incorporalis',* cit., pp. 98 ff., especially p. 98.

2. The textual reconstruction and interpretation of Gai 2.12-14

In light of the above, it is time to read Gai 2.12: *Quaedam praeterea res corporales sunt, quaedam incorporales.* 13. *<Corporales> hae, quae tangi possunt, velut fundus homo vestis aurum argentum et denique aliae res innumerabiles.* 14. *Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae iure consistunt, sicut hereditas ususfructus obligationes quoquo modo contractae. nec ad rem per<tinet, quod in hereditate res corporales con>tinentur, et fructus qui ex fundo percipiuntur, corporales sunt, et quod ex aliqua obligatione nobis debetur, id plerumque corporale est, veluti fundus homo pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. eodem numero sunt iura praediorum urbanorum et rusticorum ... ius altius tollendi aedes (?) et officiendi luminibus vicini aediumaut non extollendi, ne luminibus vicini officiatur. item fluminum et stilicidiorum idem ius ... ius aquae ducendae. haec iura praediorum (?) tam urbanorum quam rusticorum servitutes vocantur*.

The first task is to identify the textual formulation of Gai 2.14[12], which wavers between two reconstructive hypotheses.

On the one hand, there is the text from the Veronese palimpsest, *quae iure consistunt*, in which, according to Studemund, there is no possibility to read the preposition *in* between *quae* and *iure*[13]. On the other hand, the integration of *in* is justified by other commentators[14] on the basis of the already mentioned Gai. 2 *inst.* D. 1.8.1.1, Ep. Gai. 2.1.2, Paul. Sent. 3.6.11 and C. 7.33.12.4 (*Imp. Iustinianus A. Iohanni*

[12] On the state of the manuscript and the additions commonly accepted by the publisher, see the in-depth outline by Nicosia, *Ea quae iure consistunt*, cit., pp. 822 ff., where an extensive bibliography is provided.

[13] G. Studemund, *Apographum,* Lipsiae, 1874 (rep. Osnabrück, 1965), p. 56, r. 20; Id, *Supplementa*, in P. Krüger, *Collectio librorum iuris anteiustiniani in usum scholarum*, vol. I[4], Berolini, 1899, p. XXVII; sharing the *lectio* Polenaar, Gneist, Dubois, Mispoulet, Kniep, Girard, De Zulueta and Reinach; for further discussion, see Nicosia, *Ea quae iure consistunt*, cit., p. 824.

[14] These are Huschke, Kübler and Bizoukides, taken from M. David, H.L.W. Nelson, *'Gai Institutionum commentarii quattuor'. Text und Kommentar*, Leiden, 1960, p. 240. In support of the integration in recent decades, see Bretone, *I fondamenti*, cit., p. 143, nt. 51; Tondo, *Appunti*, cit., p. 635, nt. 27; Falcone, *Osservazioni*, cit., pp. 129 f.; Stolfi, *Per una genealogia*, cit., p. 75.

pp. a. 531, reporting the syntagma *in iure*)[15].

What might seem to be, at a first glance, a marginal problem of *restitutio textus*, is instead far from negligible and is preliminary to any conceptual and systematic in-depth study of the subject[16].

Schematically, we can observe how opposites strands of thought have been grafted onto each *lectio*, even though there are interpretative paths that deviate from them in terms of conclusions, albeit starting from a reconstruction of the source common to the main trail from which they branched[17].

The first path, still followed by most scholars, is the one traced by Orestano in favour of the construction *quae iure consistunt*. According to this view, it cannot be excluded that the insertion of *in* was the work of the post-classics and Justinianes[18] following their interpretation of the Gaian original, according to which the *res incorporales* would identify with 'legal relations'[19] or with 'rights'[20]. By adopting an objective perspective, Orestano interprets the fragment in the sense that the *res incorporales* find their foundation in the *ius*, representing «un *quid* che ha esistenza per il diritto e nel diritto: *iure*»[21].

There is no doubt that these arguments, both in the palimpsest and in later

[15] See *supra*, ntt. 3 and 5.

[16] As Orestano, *Il problema*, cit., p. 152: «può apparire una sottigliezza ed invece vi è una differenza profondissima»; recently, Falcone, *Osservazioni,* cit., p. 129, emphasised the importance of the issue.

[17] These are Grosso, *Problemi sistematici*, cit., p. 41, nt. 3; C. Möller, *Die Servituten*, Göttingen, 2010, p. 228. Both, while starting from the reconstruction *quae in iure consistunt*, substantially recover Orestano's position in the sense that the *res incorporales* find their foundation in *ius.*

[18] Orestano, *Il problema*, cit., pp. 151 f.; taken up by Nicosia, *Ea quae in iure consistunt*, cit., pp. 831 f.; Id, *Iuris consultorum acutae ineptiae*, in *Studi in onore di R. Martini*, vol. II, Milano, 2009, p. 892 nt. 78; notes also in Id., *Quasi pretii loco*, in «Iura», LX, 2012, p. 11, nt. 20.

[19] I quote Scialoja, *Teoria*, vol. I, cit., p. 24.

[20] Thus V.-Al. Georgescu, *Études de philologie juridique et de droit romain*, vol. I, *Les rapports de la philologie classique et du droit romain*, Bucarest-Paris, 1940, p. 82 and nt. 3; Pugliese, *'Res corporales'*, cit., pp. 247 f.

[21] Orestano, *Il problema,* cit., p. 152; in an adhesive sense, among more recent authors, see Cursi, *'Res incorporales'*, cit., 181 and nt. 36; A. Guzman Brito, *El carácter dialéctico del sistema de las 'Institutiones' de Gayo*, in *Estudios de Derecho romano en homenaje al prof. Dr. d. Francisco Samper: con ocasión de su jubilación en la Pontificia Universidad Católica de Chile*, coordinado por P.-I. Carvajal Ramirez, Santiago (Chile), 2007, p. 449; Brutti, *Il diritto*, cit., p. 260; Turelli, *'Res incorporales' e 'beni immateriali'*, cit., pp. 2 ff.; Cardilli, *Fondamento,* cit., pp. 274 ff.

evidences, are articulate, thorough and elegant[22]. This is further buttressed by the recent support manifested by those who adhere to the opposite view and who herald the authenticity of the syntagma *in iure consistunt.*

However, it appears more prudent to stick to the dictate of the manuscript, also in light of the fact that, despite the apparently convincing motivations behind the aforementioned integration, one is forced to relegate them into the realm of conjecture, in the absence of any conclusive data.

Behind such a *lectio* there seems to lurk a pitfall that is anything but negligible. This is the risk of leaning towards in the identification of '*res incorporales*' with 'rights', as a reflection of the reinterpretation of the terms in a subjectivist key. Such an interpretation would flatten the terms in a way that reflects the modern Leibnizian dichotomy *subiectum-obiectum* (analogous to Hobbes' almost contemporary attestations), in which the former is the sole holder of legal situations and is able to influence the surrounding reality thanks to its own *voluntas*, no longer subject to the dictates of the *ius*[23]. Indeed, some have seen in the *res incorporales* the *tout court*

[22] He considers unlikely both the hypothesis that a plurality of subjects, operating autonomously and in different places and times, had felt the need for an amendment that reflected their post-classical and Justinian conception, and that there was a connection between the Digest sources and a single reworking of the Gaian manual, which would have been the first to accept the amendment in question Falcone, *Osservazioni*, cit., p. 133. In favour of the genuineness of the addition, according to the author, Pomp. 29 *ad Sab.* D. 43.26.15.3: *Precario habere etiam ea quae in iure consistunt possumus, ut immissa vel protecta*, a passage considered genuine and classical. In an adhesive sense, see Stolfi, *Per una genealogia*, cit., p. 75.

[23] G.W. Leibniz, *Nova methodus discendae docendaeque jurisprudentiae*, II.10, in *Variorum opuscula*, Pisis, 1799, p. 195; for bibliography, see Id., *Il nuovo metodo di apprendere ed insegnare la giurisprudenza. In base ai principi dell'arte didattica premessi nella parte generale, e alla luce dell'esperienza*, saggio introduttivo, introduzione e note di C.M. de Iuliis, Milano, 2012, pp. 64 ff. and nt. 92. There are many quotations attesting to Leibniz's knowledge of Hobbesian thought, reported by R. Palaia, *Unità metodologica e molteplicità disciplinare nella 'Nova Methodus discendae docendaeque iurisprudentiae'*, in *Unità e molteplicità del pensiero filosofico e scientifico di Leibniz. Simposio internazionale (Roma, 3-5 ottobre 1996)*, a cura di A. Lamarra e R. Palaia, Firenze, 2000, p. 150; I. Birocchi, *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*, Torino, 2002, p. 215; S. Ciurlia, *Diritto, Giustizia, Stato. Leibniz e la rifondazione etica della politica*, Lecce, 2005, pp. 38 ff. Also significant is the essay by T. Ascarelli, *Hobbes and Leibniz and legal dogmatics*, in T. Hobbes, G.W. Leibniz, *Testi per la storia del pensiero giuridico*, Milano, 1960; on which see G. Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna, 1976, p. 134, nt. 98; M. Grondona, *Storia, comparazione e studio del diritto: Tullio Ascarelli, 'Hobbes e Leibniz e la dogmatica giuridica'. Un esercizio di lettura*, in *Diritto: storia e comparazione. Nuovi propositi per un binomio antico*, a cura di M. Brutti e A. Somma, Frankfurt am Main, 2018, pp. 219 ff. About the impact of Leibnizian construction on the interpretation

equivalent of modern subjective rights[24]. Such a reconstruction is fruit of the advent of the 'Copernican revolution' brought about by natural law and clashes with the objective reading of *ius.* Such an objective reading is suggested here by the context[25], given that the Roman conception is more apt to contemplate *divisiones rerum* in which «è la cosa stessa che esprime la sua natura come tale riconosciuta e tutelata dal diritto degli uomini»[26]. At the same time, one can detect significant inconsistencies with the Roman conceptual framework, which places *personae* and *res* on the same level, as centers of legal relations[27].

A different way of overcoming both the problem of textual reconstruction and the opposition between subjective and objective perspective that result of the Pandectistic influence could leverage on the etymology of *res*, for some closely connected to *reor* (think)[28]. Thus, *ab origine*, *res* would have been *incorporalis*, or rather conceived as an intangible entity, created by the mind, and relevant for the legal thought.

Having fixed these points, we can then proceed to a translation of the passage

of Roman sources, see Stolfi, *Per una genealogia*, cit., pp. 63 ff.; Cursi, *'Res incorporales'*, cit., p. 183; R. Fiori, *La definizione della 'locatio conductio'. Giurisprudenza romana e tradizione romanistica*, Napoli, 1999, pp. 331 ff., where extensive bibliography; Id., *Il problema dell'oggetto del contratto nella tradizione civilistica*, in *Modelli teorici e metodologici del diritto privato. Obbligazioni e diritti reali*, Napoli, 2003, pp. 203 ff.

[24] Kreller, *'Res'*, cit., pp. 583 f., whose thesis has remained a *unicum* in the doctrinal landscape. For an in-depth examination of the different positions on the long-standing issue of subjective rights, see Stolfi, *Riflessioni*, cit., pp. 132 ff. and ntt. 41, 42, where extensive bibliographical references; previously, *ex multis*, see O. Robleda, *El derecho subjetivo in Gayo*, in *Studi in onore di G. Scherillo*, vol. I, Milano, 1972, pp. 7 ff.; B. Albanese, *Appunti su alcuni aspetti della storia del diritto soggettivo*, in *Scritti in onore di A.C. Jemolo*, vol. IV, Milano, 1963, pp. 1 ff.; Pugliese, *'Actio'*, cit., pp. 37 ff., pp. 71 ff.; C. Gioffredi, *Osservazioni sul problema del diritto soggettivo nel diritto romano*, in «Bullettino dell'Istituto di Diritto Romano», LX, 1957, pp. 227 ff.

[25] It should be pointed out that, in the perspective adopted here, *ius* presents two 'indistinct souls', i.e. the subjective and the objective, identifiable from time to time by the context: on the subject, cf. paradigmatically A. D'Ors, *Aspectos objectivos y subjectivos de 'ius'*, in *Studi in memoria di E. Albertario,* vol. II, Milano, 1953, pp. 277 ff.; R. Santoro, *Potere ed azione nell'antico diritto romano*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», XXX, 1967, pp. 457 ff.; B. Albanese, *Premesse allo studio del diritto privato romano*, Palermo, 1978, pp. 76 ff.; C. Pelloso, *Studi sul furto nell'antichità mediterranea*, Padova, 2008, pp. 164 ff.; Id., *Il concetto di 'actio' alla luce della struttura primitiva del vincolo obbligatorio*, in *'Actio in rem' e 'actio in personam'. In memoria di M. Talamanca*, a cura di L. Garofalo, vol. II, Padova, 2011, pp. 130 ff. and nt. 1.

[26] Thus Cardilli, *Fondamento,* cit., p. 268.

[27] In this sense, Orestano, *Il problema,* cit., pp. 105 ff.; followed by Cursi, *'Res incorporales'*, cit., p. 184.

[28] Ae. Forcellini, *Totius Latinitatis Lexicon,* vol. III, Patavii, 1805, entry *Res*, p. 730.

in the following terms: secondly, some things are corporal, others incorporeal. Corporal (things) can be touched, such as the land, the slave, the garment, gold, silver, and in short, many other innumerable objects. Incorporeal (things) are those that cannot be touched, such as those that can be found in law, such as inheritance, usufruct, obligations in any way contracted. It is not relevant that corporal things are contained in the inheritance, that the fruits which are received from the land are corporal, or that what is owed because of some obligation is in most cases a corporal thing, such as a property, a human being, money. This is because the 'right' of inheritance is incorporeal, and the 'right' of usufruct, as well as the 'right' of obligation, is incorporeal. The same class of things includes urban and rustic servitudes[29].

3. The historical origin of the classification and the discretionary criterion

As anticipated, the antithesis between *res corporales* and *res incorporales*, as well as the discretional criterion chosen in it, is not as ancient «quanto la sua applicazione»[30].

The Gaian scheme is centred, to a first approximation, on the dichotomy between corporality or tangibility and incorporeality or intangibility. More precisely, the conceptual assumptions on which it is based are influenced by conceptions that find their origins in Greek philosophical thought – in particular Aristotelian and Stoic – and, subsequently, Roman[31]. In this sense, the reference to works on grammar[32],

[29] I reproduce, subject to some minor modifications, the translation proposed by CARDILLI, *Fondamento*, cit., p. 273.

[30] Cf. V. SCIALOJA, *Teoria*, vol. I, cit., p. 21.

[31] On this point see P. BONFANTE, *Corso di diritto romano*, vol. II, *La proprietà*, Milano, 1926, pp. 8 f.; SCIALOJA, *Teoria*, vol. I, cit., pp. 22 f.; GEORGESCU, *Études*, vol. I, cit., pp. 77 ff.; W. FLUME, *Die Bewertung der Institutionen des Gaius*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXXIX, 1962, pp. 25 f.; ORESTANO, *Il problema,* cit, pp. 145 ff.; ZAMORANI, *Gaio*, cit., pp. 363 f.; GROSSO, *Problemi*, cit., pp. 47 ff.; F. BONA, *Il coordinamento*, cit., pp. 420 ff.; G. PUGLIESE, *Dalle 'res incorporales' del diritto romano ai beni immateriali di alcuni sistemi giuridici odi odieri*, in «Rivista trimestrale di diritto e procedura civile», XXXVI, 1982, p. 1138, ntt. 1 and 2; A. GUZMAN BRITO, *Las cosas incorporales en la doctrina y en el derecho positivo*, Barcelona-Buenos Aires-México D.F.-Santiago de Chile, 1995, pp. 19 ff.; BRETONE, *I fondamenti*, cit., pp. 169 ff., pp. 182 ff.; More recently, see BRUTTI, *Il diritto*, cit., p. 260; CURSI, *'Res incorporales'*, cit., p. 181, nt. 37; STOLFI, *Riflessioni,* cit., pp. 132, nt. 38 and 136 f.; CARDILLI, *Fondamento*, cit., pp. 273 f. Claims the autonomy of the elaboration of Roman jurispru-

rhetoric[33] and dialectics[34], which can be traced back to an age not very distant from Gaius, is significant. This interpretation is countered by those who believe that both the distinction in question and the distinctive criterion contained therein were adopted for the first time, in their purely technical-legal meaning, by Gaius[35].

On closer inspection, with regard to the development of the classification *res*

dential thought MONIER, *La date*, cit., pp. 360 ff. In a doubtful sense, see recently FALCONE, *La definizione*, cit., p. 94, according to whom «quanto alla bipartizione interna alle *res*, alcuni dati testuali mostrano senz'altro che, nel periodo tra fine della repubblica e primo Principato, in ambiente giurisprudenziale come nella cultura retorica e filosofica un'attenzione per il profilo dell'incorporeità di determinate entità era ben radicata: ma nessuno di tali riscontri consente conclusioni circa la preesistenza o meno a Gaio della specifica classificazione '*res corporales-res incorporales*'».

[32] Charis. *Ars gramm*., II, 193, 14 ff. V. BONA, *Il coordinamento*, cit., p. 421, nt. 31 ff. More recently FALCONE, *Osservazioni*, cit., pp. 131 ff. On the incidence of grammatical theories see J. STROUX, *Die griechischen Einflüsse auf die Entwicklung der römische Rechtswissenschaft*, in *Atti del Congresso internazionale di diritto romano (Bologna-Roma 17-27 aprile). Milano*, vol. I, Pavia, 1934, pp. 111 ff., now in *Römische Rechtswissenschaft und Rhetorik*, Potsdam, 1949, pp. 81 ff.; F. WIEACKER, *Griechische Wurzeln des Institutionensystems*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXX, 1953, pp. 106 ff.; M. KASER, *Gaius*, cit., pp. 138, 142; H.J. METTE, '*Ius civile in artem redactum*', Göttingen, 1954, p. 22, nt. 4.

[33] Cic. *top*. 5.26-27, on which see *infra* and Quint. *inst*. 5.10.116: *Tum secundo gradu, non potuisse donari a victore ius, quia id demum sit eius quod teneat: ius, quod sit incorporale, adprendi manu non posse.*

[34] Sen. *ep.* 6.6.11: *Etiamnunc est aliquid superius quam corpus. Dicimus enim quaedam corporalia esse, quaedam incorporalia. Quid ergo erit, ex quo haec deducantur? illud, cui nomen modo parum proprium inposuimus quod est'. Sic enim in species secabitur, ut dicamus: 'quod est' aut corporale est aut incorporale.* 12. *Hoc ergo est genus primum et antiquissimum et, ut ita dicam, generale … Illud genus 'quod est' generale, supra se nihil habet; initium rerum est; omnia sub illo sunt. …* 14. *'Quod est' in has species divido, ut sint corporalia aut incorporalia nihil tertium est.* It only needs to be added that the recalled testimony (as well as that of Carisio's source, cf. *supra*, nt. 26) moves on a terrain extraneous to legal experience, so that its scope should be reduced.

[35] PUGLIESE, *'Res corporales'*, cit., p. 247; ID., *Dalle 'res incorporales'*, cit., pp. 1138 f.; KASER, *Gaius und die Klassiker*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», LXX, 1953, pp. 127 ff., especially 142 ff.; ZAMORANI, *Gaio*, cit., pp. 362 ff., especially p. 364, nt. 15, where he points out that the work «presenta forti legami con la persona di Gaio». On this last aspect recently see BALDUS, *I concetti*, cit., pp. 46 ff. and previously, among others, ROBBE, *Osservazioni*, cit., pp. 111 ff. On the relationship between the Gaian systematics and the expository model of the Sabinian school recently see STOLFI, *Riflessioni*, cit., p. 138, nt. 57. Regarding methodologies in the drafting of the Gaian manual, with specific reference to the use of expository schemes only with regard to legal institutions, see F. WIEACKER, *Über das Verhältnis der römischen Fachjurisprudenz zur griechisch-hellenistischen Theorie*, in «Iura», XX, 1969, pp. 463 ff.; BONA, *Il coordinamento*, cit., p. 413, nt. 13. More generally on the autonomy of the Gaian text from the thought of others summarises the debate M. MIGLIETTA, *'Servus dolo occisu'. Contributo allo studio del concorso tra 'actio legis Aquiliae' e 'iudicium ex lege cornelia de sicariis'*, Napoli, 2001, p. 14, nt. 23, as well as, more recently, the contributions in *Le istituzioni di Gaio: avventure di un 'bestseller'. Trasmissione, uso e trasformazione del testo*, a cura di U. Babusiaux e D. Mantovani, Pavia, 2020.

corporales-res incorporales, it must be said that there was no unity of view within the Greek schools of philosophy[36], especially with regard to the index through which corporal reality could be identified. Very briefly, the concept of tangibility proper to Aristotelian philosophy is linked to a peculiar idea of *corpus*, according to which what can be perceived through the senses is only a bodily thing. Differently, things that cannot be touched but only conceived with the intellect are incorporeal[37]. On the other hand, according to the current of Stoicism, everything that produces an effect is *corpus*, «così che la voce sarebbe corporale perché produce effetto sull'apparato uditivo»[38].

The distinction in question – with regard to which the Aristotelian conception seems to have been preferred by Roman thought as opposed to the Stoic one – was first accepted by the Latin rhetorical and philosophical reflection and later adopted, with some adjustments, by Roman jurists.

Traces of categorisation can first be found in Cicero[39], albeit expressed in a different way. I refer to Cic. *top*. 5.26: *Definitionum autem due genera prima: unum earum rerum quae sunt, alterum eorum quae intelleguntur*. 27. *Esse ea dico, quae cerni tangi que possunt, ut fundum aedes, parietem stillicidium, mancipium pecudem, supellectilem penus et cetera; quo ex genere quaedam interdum vobis definienda sunt. Non esse rursus ea dico, quae tangi demonstrari ve non possunt, cerni tamen animo atque intellegi possunt, ut si usus capionem, si tutelam, si gentem, si agnationem definias, quarum rerum nullum subest [quasi] corpus, est tamen quaedam conformatio insignita et inpressa*

[36] On this point, see also H. Göppert, *Ueber einheitliche, zusammengesetzte und gesamt-Sachen nach römischen Recht*, Halle, 1871 (rep. Roma, 1970); P. Sokolowski, *Die Philosohie im Privatrecht, Sachbegriff und Körper in der klassichen Jurisprudenz und der modernen Gesetzgebung*, vol. I, Halle, 1902, pp. 43 f. With specific reference to the different approaches to the distinction in Greek and Latin philosophy see especially Scialoja, *Teoria*, vol. I, cit., pp. 22 ff. With reference to the sources, in addition to those indicated specifically for each philosophical current, see also Arist. *phys* 4.7; Agost. *civit*. *Dei* 8.6; Lact. *inst. div.* 7.12; Tert. *hermog*. 35; *anim*. 5; *carne Chr*. 2; *Marc*. 4.8.

[37] Arist. *anima* 2.11; 3.12; *Phys*. 4.

[38] Thus, the recent re-edition of Grosso, *Corso*, cit., p. 11; Dio. Laer. *phil*. 7.1.140 ff.; Sext. Emp. *corp*. 3.

[39] It is only worth pointing out that, in the past, the earliest example in Roman thought was thought to be some verses by Lucretius in *rer. nat.* 1.303-305: *quae tamen omnia corporea constare necessest / natura, quoniam sensus inpellere possunt; / tangere enim et tangi, nisi corpus, nulla potest res.* On this point, see. Georgescu, *Études*, vol. I, cit., p. 78; Monier, *La date*, cit., pp. 360 f.; G. Franciosi, *'Usucapio pro herede'. Contributo allo studio dell'antica 'hereditas'*, Napoli, 1965, p. 37, nt. 89; Orestano, *Il problema*, cit., p. 146, nt. 79.

intellegentia, quam notionem voco[40].

This is a distinction that the Arpinate also applies to law. In this sense, it can be noted that the usucapion – unlike in the legal texts where it does not appear – is identified as an example of *res incorporalis*. This is because it is a thing that cannot be perceived with the senses, but only through the intellect. As far as *res corporales* are concerned, the exemplification of the *stillicidium* is striking. The latter, according to Roman jurists, fell among the *res incorporalis* as a servitude – understood here as the material fact of the fall of water. But the distinction above is also relevant in its more general philosophical scope: according to Cicero, the *res incorporales* are the concepts of the human mind that do not have an objective existence, while *res corporales* are the things *quae cerni et tangi possunt*. In other words, those that have objective existence.

Having dealt with the contours of the relationship between the Greek and Roman philosophical conceptions, some authors believe that the concepts underlying the adoption of the distinction in question in Roman jurisprudence[41] indicate a process of dematerialization of the *res incorporales* that are traceable in the Festus' voice of

[40] On the passage see B. Albanese, *La successione ereditaria in diritto romano antico*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», XX, 1949, pp. 364 ff. More recently Zamorani, *Gaio*, cit., p. 299; Bretone, *I fondamenti*, cit., pp. 170 f.; Id., *Il diritto invisibile. Concetti e metafore nel 'Sistema' di Savigny*, in «Materiali per una storia della cultura giuridica», XXXIV, 2004, p. 23 and nt. 11; Nicosia, *Ea quae iure consistunt*, cit., pp. 828 f. On the subject, see also Cic. *top*. 5.29, as well as Boeth. *in Top. Cic.* 50.3: *Omnia enim quae definiuntur aut corporalia sunt aut incorporalia. Ea vero, quae corporalia sunt, esse dicit; quae incorporalia non esse*.

[41] Monier, *La date*, cit., pp. 357 ff.; Villey, *L'idée*, cit., pp. 209 ff.; Id. - M. Villet, *Les origines de la notion de droit subjectif*, in «Revue historique de droit français et étranger», XXIV, 1946-1947, pp. 221 ff.; Pugliese, *'Res corporales'*, cit, pp. 225 ff.; P.E. Sokolowski, *Die Philosophie im Privatrecht*, vol. I, Aalen, 1959, pp. 41 ff.; G. Segrè, *Corso di diritto romano: le cose, la proprietà e gli altri diritti reali (Anno Accademico 1926-27)*, Torino, 1927, pp. 204 ff.; Stroux, *Die griechischen Einflüsse*, cit, pp. 94 ff.; G. Grosso, *Appunti sulle distinzioni delle cose nelle Istituzioni di Gaio*, in *Studi di storia e diritto in onore di E. Besta per il XL anno del suo insegnamento*, Milano, 1939, pp. 35 ff.; Georgescu, *Études*, vol. I, cit., pp. 77 ff.; K. Kagan, *'Res corporalis' and 'res incorporalis'. A Comparison of Roman and English Law of interest for life*, in «Tulane Law Review», XX, 1945-1946, pp. 98 ff. and XXI, 1946-1947, pp. 74 ff.; Kaser, *Gaius*, cit., pp. 127 ff.; Flume, *Die Bewertung*, cit., pp. 25 f. There are those who have traced the use of the dichotomy in question, which includes the trichotomy of *ius quod ad personas, ad res, ad actiones pertinent*, to a typically Roman legal experience of pontifical origin. In this sense see O. Karlowa, *Römische Rechtgeschte*, vol. I, Leipzig, 1885, p. 725; F.X. Affolter, *Das römische Institutionen-System: sein Wesen und seine Geschichte*, Heidelberg, 1897, pp. 2 ff. They consider instead that the classification penetrated Roman jurisprudence before Gaius, already from the end of the republic or the beginning of the principate, V. Arangio-Ruiz, *Istituzioni di diritto romano*[14], Napoli, 1960, pp. 162 f.; Pugliese, *'Res corporales'*, cit., p. 247; Id., *Dalle 'res incorporales'*, cit., pp. 1138 f.; Robbe, *La 'successio'*, cit., pp. 39, 46, 85 f.; Id., *Osservazioni,* cit., p. 118; Bona, *Il coordinamento*, cit., p. 428, nt. 46.

possessio: *Possessio est, ut definit Gallus Aelius, usus quidam agri aut aedificii, non ipse fundus aut ager. Non enim possessio est <ex iis> rebus quae tangi possunt neque qui dicit se possidere <is suam rem> potest dicere* rell., contained, as known, in the work *de verborum quae ad ius civile pertinent significatione*[42]. In this context, between the end of the 2nd and the beginning of the 1st century BC, Elio Gallo, when specifying the legal meaning of *possessio*, speaks of *res quae tangi (non) possunt*, and possession, which defined in terms of the *usus* of the fund, distinguishes itself from the fund (unlike the Gaian approach, in which, as is well known, the quiritarian dominion of the fund coincides with the fund itself, i.e. the *res* is considered as one with the right of ownership over the *res* itself)[43].

Additional evidence of such discussion, albeit with suspicions of interpolation, was found in Paul. 15 *ad Sab*. D. 8.1.14 pr.: *Servitutes praediorum rusticorum etiamsi corporibus accedunt, incorporales tamen sunt et ideo usu non capiuntur: vel ideo quia etc.*[44]. With respect to this, it is possible to point out that Paulus «ben potrebbe aver derivato la nozione di incorporalità dei *iura* e la correlativa distinzione delle *res* o dallo stesso substrato culturale, per cui la nozione è trafilata in Gaio o, immediatamente, dallo stesso patrimonio di scuola che altri possono aver recepito da Gaio ed anonimamente trasmesso»[45].

Further reference to the binomy corporality-incorporeality is believed to be found in an Ulpian passage, contained in Ulp. 39 *ad ed.* D. 37.1.3.1: *Hereditatis autem bonorumve possessio, ut Labeo scribit, non uti rerum possessio accipienda est: est enim iuris*

[42] The text reproduced here is that of Lindsay, 260. Cf. Voci, *Diritto*, vol. I², cit., p. 160; Orestano, *Il problema*, cit., p. 145. More recently, see Cursi, *'Res incorporales'*, cit., p. 181 and nt. 38; on the work of Elio Gallo, G. Falcone, *Per una datazione del 'De verborum, quae ad ius pertinent, significatione' di Elio Gallo*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», XLI, 1991, pp. 242 ff.

[43] On testimony and, more generally, on the relations between *possessio* and *res incorporales* see G. Nicosia, '*Possessio e res incorporales*', in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», LVI, 2013, pp. 275 ff.

[44] Voci, *Diritto*, vol. I², cit., p. 161; Orestano, *Il problema*, cit., p. 148 and nt. 84. On the passage see F. Schulz, *Sabinus-Fragmente in Ulpians Sabinus-Commentar*, Halle, 1906, p. 95., now in «Labeo», X, 1964, p. 272.

[45] Bona, *Il coordinamento*, cit., p. 427. It is only appropriate to point out that the doctrine compares the affirmation of the conception of servitudes as *res incorporales* with the enactment of the *lex Scribonia* on which recently see G. D'Angelo, *Sulla 'lex Scribonia de usucapione servitutum'*, in «Annali del Seminario Giuridico dell'Università degli Studi di Palermo», LVI, 2013, pp. 9 ff.

magis quam corporis possessio. Denique etsi nihil corporale est in hereditate, attamen recte eius bonorum possessionem adgnitam Labeo ait. Here, while pointing out that *hereditas* (and *bonorum possessio*) is a *ius* and not a *corpus*, Ulpianus quotes Labeo, who lived between the end of the first century BC and the beginning of the first century AD.

Finally, with regards to evidence dating back to the mid-2nd century AD, in addition to the fundamental fragment of Gai 2.12-14, it is also worth mentioning Pomp. 29 *ad Sab*. D. 43.26.15.2: *Precario habere etiam ea quae in iure consistunt possumus, ut immissa vel protecta*. In this fragment, Pomponius uses the expression *ea quae in iure consistent* to specify a new scope of application of the precarious concession. The expression could, to a certain extent, be considered consolidated, i.e. «già acquisita al sapere giurisprudenziale»[46].

4. The most notorious among the absentees: property

The Gaian classification, in particular the concept of *res incorporales*, «stabilisce una connessione teorica tra nozioni»[47] [establ]. The connection is sometimes implicit – such as that of property –, other times «distanti – per esempio quelle di obbligazione e di servitù, –, oppure tra nozioni che si incrociano nell'uso pratico, così l'*hereditas* può comprendere le obbligazioni»[48]. It is a matter of taking a closer look at the scope of the distinction with reference to the broader theme of *res* as dealt with in the Gaian manual, thus the repercussions of the distinction from different points of view, i.e. in relation to property (absent from the aforementioned list), to the further fundamental partition between *res mancipi* and *res nec mancipi* and, in connection with the latter, to the treatment of the modes of transfer of *dominium* (where *traditio*, as we shall see, is excluded for any *res corporalis*).

The translation of the Gaian witness contained in Gai 2.12-14 is central to the

[46] In this sense see Falcone, *La definizione,* cit., p. 95, nt. 122.

[47] Brutti, *Il diritto*, cit., p. 261.

[48] *Ibid.*, p. 261.

study of the distinction in question and gives us an open-ended and non-exhaustive list[49] of 'things' in which the *res incorporales* are identified with patrimonial legal relations, in the sense of elements of patrimony[50].

A first peculiarity characterizing Gaius' treatment of the *res incorporales* concerns the lack of reference to property, that is «il più importante dei rapporti patrimoniali»[51]. In this regard, it seems difficult to think that Gaius set it aside out of forgetfulness[52]. According to a widespread opinion, the Antonine jurist would have preferred to structure his dissertation by identifying the *dominium* with the bodily thing that constitutes its object, thereby omitting to include the *dominium* itself in the list of incorporeal things[53]. This perspective has been considered by most as the expression of

[49] See P. Greco, entry *Beni immateriali*, in *Novissimo digesto italiano*, vol. II, Torino, 1958, p. 358; Voci, *Diritto*, vol. I[2], cit., pp. 160 f.; Bretone, *I fondamenti*, cit., pp. 144 f.; F. Gallo, *Recensione* a Bretone, *I fondamenti*, cit., p. 137 and 144, where he recalls the absence of *dominium* from *res incorporales* to conjecture that the list in question also included the *lites contestatae legitimo iudicio* and the *ius adgnationis*. To the contrary, M. Villey, *Le 'ius in re' du droit romain classique au droit moderne*, in *Conférences faites à l'Institut de Droit Romain en 1947*, Paris, 1950, pp. 187 ff. On Villey's reflections, see N. Rampazzo, *Diritto soggettivo e 'ius' nella visione di Michel Villey*, in «Revue internationale des droits de l'antiquité», LIV, 2007, pp. 379 ff., as well as M. Miceli, *L'aktionenrechtliches Denken' dei giuristi romani e le forme dell'appartenenza*, in *'Actio in rem' e 'actio in personam'. In ricordo di M. Talamanca*, a cura di L. Garofalo, vol. I, Padova, 2011, in particular pp. 116 ff.

[50] V. Grosso, *Problemi*, cit., p. 51; Burdese, *Considerazioni*, cit., pp. 23 ff. On closer inspection, there are those who consider that the notion of *res incorporalis* extends beyond patrimonial relationships, thus also to personal and procedural ones. On this point, recently see Stolfi, *Riflessioni*, cit., p. 136, ntt. 52 ff. See also G. Grosso, *Corso*, cit., p. 12, nt. 17; F. Gallo, *Recensione* a Bretone, *I fondamenti*, cit., in «Iura», XLIX, 1998 (publ. 2002), p. 137.

[51] Grosso, *Corso*, cit., p. 12.

[52] This is certainly not the context in which to address the relevance of the issue within the Roman legal experience. In general terms, see Scialoja, *Teoria*, vol. I, cit., pp. 260 ff.; L. Capogrossi Colognesi, *La struttura della proprietà e la formazione dei 'iura praediorum' nell'età repubblicana*, vol. I, Milano, 1969, pp. 349 ff.; Id., entry *Proprietà* (*dir. rom.*), in *Enciclopedia del diritto*, vol. XXXVII, Milano, 1988, pp. 160 ff. More recently, among many, T. dalla Massara, *Antichi modelli e nuove prospettive del diritto dominicale*, in «Contratto e impresa/Europa», 2010, pp. 724 ff.; Id, *Il paradigma proprietario nell'ordine frattalico delle fonti*, in *Studi in onore di M. Pedrazza Gorlero*, vol. I, *I diritti fondamentali tra concetti e tutele*, Napoli, 2014, pp. 161 ff.; P. Grossi, *La proprietà e le proprietà nell'officina dello storico*, Napoli, 2016; C.A. Cannata, S. Roncati, *Materiali per lo studio dei diritti reali*, Torino, 2021, pp. 47 ff.; M. Miceli - L. Solidoro, *In tema di proprietà: il modello romano nella tradizione giuridica*, Torino, 2021.

[53] Cf. Affolter, *Das römische Institutionen-System*, cit., pp. 374 ff.; P. Girard, *Manuel élémentaire de droit romain*[7], Paris, 1924, p. 264; Bonfante, *Corso*, vol. II, cit., p. 9; E. Betti, *Istituzioni di diritto romano*, vol. I, Padova, 1942, p. 354; Biondi, entry *Cosa corporale*, cit., p. 1014; Grosso, *Problemi*, cit., p. 43; Gioffredi, *Aspetti*, cit., p. 252; Pugliese, *Dalle 'res incorporales'*, cit., pp. 1139 ff.; Gallo, *Recensione* a Bretone, *I fondamenti*, cit., p. 138; Voci,

a typical Roman mindset, which concerns the way of conceiving the development of *dominium* in an economic-patrimonial sense. More in detail, the distinctive trait of the Roman mentality would be none other than that of understanding «la proprietà, per il suo carattere di signoria generale e assoluta sulla cosa, che investe questa nel complesso delle sue utilizzazioni»[54], therefore identifying property «colla cosa stessa nella destinazione di questa all'assoggettamento e sfruttamento da parte dell'uomo»[55].
Departing from this reading, Falcone has recently reinforced the idea that «la mancanza della proprietà dall'elenco delle *res quae in iure consistunt* e l'implicita assunzione delle *res corporales* quali cose in proprietà si spiegano partendo non da una generale rappresentazione (romana) della proprietà, bensì dalle specifiche scelte sistematiche gaiane»[56]. Systemic indications in support of such an interpretation can be found on the repeated use of the lemma *proprietas* in Gai 2.30 and Gai 2.33[57], which, alone, could refute what has been stated above. Secondly, indications can be found in the reference to the modes of transfer of *dominium* over the *res*. As we shall see, these are centred on the distinction between *res corporales* and *res incorporales*, which in turn is related to the further categorisation between *res mancipi* and *res nec mancipi*[58]. In short, the inclusion of property among *res incorporales* would have created a 'short circuit' in the system, determined by the fact that the transfer of *dominium* over *res nec mancipi* occurred by *traditio* and the latter was, however, incompatible with a *res incorporalis*[59].

Diritto, vol. I², cit., p. 162. More recently, see Brutti, *Il diritto*, cit., 262; Romeo, *L'appartenenza*, cit., pp. 72 ff.; Cursi, *'Res incorporales'*, cit., p. 182 and nt. 40; Falcone, *Osservazioni*, cit., pp. 162 ff.; Stolfi, *Per una genealogia,* cit., p. 77.

[54] Thus Grosso, *Corso*, cit., p. 12.

[55] *Ibid*. Falcone, *Osservazioni*, cit., p. 164, ntt. 99 and 100, who considers that there are some objections against the very underlying assumption of this allegedly typically Roman perception of property.

[56] Falcone, *Osservazioni*, cit., p. 164.

[57] Gai 2.30: *Ususfructus in iure cessionem tantum recepit. Nam dominus proprietatis alii usufructum in iure cedere potest, ut ille usumfructum habeat et ipse nudam proprietatem retineat. Ipse usufructuarius in iure cedendo domino proprietatis usumfructum efficit, ut a se discedat et conuertatur in proprietatem; alii uero in iure cedendo nihilo minus ius suum retinet; creditur enim ea cession nihil agi*; 2.33: *Quod autem diximus usumfructum in iure cessionem tantum recipere, non est temere dictum, quamuis etiam per mancipationem constitui possit eo, quod in mancipanda proprietate detrahi potest; non enim ipse ususfructus, apud alium proprietas sit.*

[58] On these aspects, see *infra*, § 5.

[59] In this sense see Stolfi, *Riflessioni*, cit., p. 142; Falcone, *Osservazioni*, cit., p. 165.

5. The relevance of the distinction in relation to the further partition between 'res mancipi' and 'res nec mancipi' and, in connection, to the modes of property transfer

In the second book of the *Institutiones* devoted to the *res*, Gaius proceeds with various classifications of things[60]. Within the sphere of *res privatae* and alongside the partition relating to *res corporales* and *incorporales*, he includes the further partition between *res mancipi* and *res nec mancipi*[61].

The Gaian dissertation about *res corporals - res incorporales* covers a strong systematic value and a broader scope than that which could be attributed to it at first glance. On the one hand, the *divisio* at stake is intertwined with the further partition between *res mancipi* and *res nec mancipi* (Gai 2.17)[62]. On the other hand, and in connection to what was said above, it constitutes the starting point for the treatment of the modes of property transfer. Reflecting on the effects that the qualification in comment may thus allow us to clarify not only the scope and meaning of the conceptual binomy *res corporales-res incorporales* (both notions and of the criterion on which the distinction is based, including the connections that can be traced with the modern and contemporary development of the categories[63]), but also the regime of circulation of the various *res* anchored to it.

With regard to the first aspect – i.e. the distinction between *res mancipi* and *res nec mancipi* – Gaius turns to *res mancipi* and *res nec mancipi* (Gai 2.14 ff.; I. 1.120)[64] after listing the *res incorporales* (*hereditas*, usufruct, *obligationes*, prior servitudes). In a nutshell, *res mancipi* were the land on Italic soil, slaves, draught and pack animals, and

[60] L. Lantella, E. Stolfi, M. Deganello, *Operazioni elementari di discorso e sapere giuridico*, rist. Torino, 2005, especially pp. 143 ff., where they speak of «classificazioni a due livelli».

[61] On this partition, see *infra*, § 5.

[62] Gai 2.17: *Item fere omnia quae incorporalia sunt, nec mancipi sunt, exceptis servuitutibus praediorum rusticorum; name as mancipi esse constat, quamuis sint ex numero rerum incorporalium.*

[63] On this point, see *infra*.

[64] Gai 2.14 ff.; Gai 1.120: *Eo modo serviles et liberae personae mancipantur; animalia quoque quae mancipi sunt, quo in numero habentur boves, equi, muli, asini; item praedia tam urbana quam rustica quae et ipsa mancipi sunt, quali sunt Italica, eodem modo solent mancipari.*

the servitudes on rustic land; all other *res* were *nec mancipi*.

It is apparent how, even in this categorisation of *res*, there is a mixture of things and rights, that is to say between *corpora* and *iura*. Legal doctrine that attempted to justify this questioned the possibility of adopting the same explanation offered for the similar problem regarding the distinction between *res corporales* and *incorporales*. This is, as already pointed out[65], the involvement in them of only patrimonial elements, in contrast with property, materialised in the thing[66]. In other words, the question has been raised as to whether the ownership of Italic land, slaves, draught animals and pack animals, and rustic servitudes can be considered *res mancipi*. On the contrary, whether the ownership of other corporal things, such as urban servitudes, and in general of all *res incorporales* except rustic servitudes can be considered *res nec mancipi*.

On closer inspection, this arrangement does not correspond to the thinking of the Romans and does not appear to correctly reflect the sources. It seems reasonable to believe that the mixture of things and servitude rights, found within the category of *res mancipi*, had a historical reason. This relates to the development over time of rustic servitudes, which were first understood in terms of *res corporales* and were later included in the field of application of the *mancipatio* as *res mancipi* (unlike the other servitudes considered as *iura*). In essence, Gaius would have constructed the distinction between *res mancipi* and *res nec mancipi* for reasons of 'system harmony'. According to his view, certain *res incorporales* would fall under the *res nec mancipi* while all *res corporales* would fall under the *res mancipi*. What follows is that the category of *res mancipi* would end up including not only corporal things but also *iura praediorum rusticorum.* This is also evident in the treatment of the modes of transfer of *res*, where the incidence of the distinction between *res mancipi* and *res nec mancipi* «esplica fondamentalmente nel

[65] See *supra*, § 4.

[66] On the relationship between the distinctions see Grosso, *Appunti*, cit., pp. 45 ff.; Id., *Corso*, cit., pp. 65 ff.; S. Solazzi, *Glosse a Gaio. II*, in *Per il XIV centenario delle Pandette e del Codice di Giustiniano*, Pavia, 1934, pp. 331 ff., now in *Scritti di diritto romano*, vol. VI, Napoli, 1972, pp. 299 ff.; G. Segrè, *Se i fondi provinciali fossero 'res nec mancipi'*, in «Atti della Regia Accademia delle Scienze di Torino», LXXII, 1936-1937, pp. 84 ff., now in *Dalla radice pandettistica alla maturità romanistica. Scritti di diritto romano*, a cura di N. Scapini e con una prefazione di G. Grosso, Torino, 1974, pp. 577 ff.; F. Gallo, *Studi sulla distinzione tra 'res mancipi' e 'res nec mancipi'*, Torino, 1958, pp. 150 ff., edita nuovamente, con una nota di lettura di F. Zuccotti, in «Rivista di diritto romano», IV, 2004, pp. 1 ff.

modo di trasferimento della proprietà, in cui appunto avviene quello scambio tra cosa e diritto, che dà materia al parallelo tra *res corporales* e *res incorporales*»[67].

With specific reference to the second aspect – the application of the distinction in relation to the modes of transfer of *dominium* – Gaius specifies that *res mancipi* and *nec mancipi* also differ from each other in the ways property is transferred over them (Gai 2.18)[68].

More precisely, the *traditio* was used to transfer ownership of a *res nec mancipi*. On the other hand, for the *res mancipi*, *mancipatio* or *in iure cessio* was necessary (Gai 2.19-22)[69]. The Antonine jurist then returns to the *res incorporales* to specify the type of transaction that could be used in relation to the individual category in question. He points out the inapplicability of the *traditio* to all *res incorporales*, due to the fact that the latter could not be touched and could not be the object of material delivery[70]; the applicability of *in iure cessio* to urban servitudes and of *mancipatio* to rustic ones; the applicability of *in iure cessio* to usufruct (in the case of provincial funds, also of *pactiones et stipulationes*) and *hereditas*. Lastly, with regard to *obligationes*, Gaius specifies that none of the three mentioned modes of property transfer was applicable, so that if one wanted to transfer the ownership of a claim it was necessary to sign a *stipulatio* between the debtor and the third party (*obligationis novatio*) (Gai 2.28-39)[71].

[67] Thus Grosso, *Corso*, cit., p. 66.

[68] Gai 2.18: *Magna autem differentia est inter mancipi res et nec mancipi.* On the coordination between the distinctions see Grosso, *Appunti*, cit., pp. 45 ff.; G. Scherillo, *Lezioni di diritto romano. Le cose*, Milano, 1945, pp. 11 ff.; Gallo, *Studi*, cit., pp. 235 ff.; G. Franciosi, *Studi sulle servitù prediali*, Napoli, 1967, pp. 62 ff.; Zamorani, *Gaio*, cit., pp. 364 ff. Fundamental on this point is the work of Bona, *Il coordinamento*, cit., pp. 409 ff.; Robbe, *La 'successio'*, cit., p. 47, nt. 37; Id., *Osservazioni*, cit., pp. 123 ff.; Romeo, *L'appartenenza*, cit., pp. 25 ff.

[69] Gai 2.19: *Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem. Itaque si tibi vestem vel aurum vel argentum tradidero sive ex venditionis causa sive ex donationis sive quavis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim* 2.21: *In eadem causa sunt provincialia praedia, quorum alia stipendiaria, alia tributaria vocamus: stipendiaria sunt ea, quae in his provinciis sunt, quae propriae populi Romani esse intelleguntur; tributaria sunt ea, quae in his provinciis sunt, quae propriae Caesaris esse creduntur. Mancipi vero res sunt, quae per mancipationem ad alium transferuntur; unde etiam mancipi res sunt dictae. quod autem valet mancipatio, idem valet et in iure cessio.*

[70] The problem of the relationship between *possessio* and *res corporales-incorporales* also relates to the transfer by *traditio,* on which see Nicosia, *'Possessio'*, cit., pp. 279 ff.

[71] Gai 2.28. *Res incorporales traditionem non recipere manifestum est.* 29. *Sed iura praediorum urbanorum in iure cedi*

All this being said, it is evident how the antithesis *res corporales-res incorporales* filters and harmonizes itself with the treatment of the modes of property transfer. In this regard, the «empirico e non univoco»[72] coordination between the two aspects seems to be explained in the light of the systematic structure chosen by Gaius. That is, by looking precisely at the individual things included in the *res incorporales*, as he deals with the *traditio*, *mancipatio* and *in iure cessio* – already examined in Gai 2.18-27. In other words, the Antonine jurist's attempt to bring the two main distinctions closer together can be justified in the light of the rational and «esauriente» character[73] (although, as we said, not exhaustive)[74] of the classification *res corporales-res incorporales*.

tantum possunt; rusticorum vero etiam mancipari possunt. 30. *Ususfructus in iure cessionem tantum recipit: nam dominus proprietatis alii usumfructum in iure cedere potest, ut ille usumfructum habeat et ipse nudam proprietatem retineat. ipse usufructuarius in iure cedendo domino proprietatis usumfructum efficit, ut a se discedat et convertatur in proprietatem; alii uero in iure cedendo nihilo minus ius suum retinet: creditur enim ea cessione nihil agi.* 31. *Sed haec scilicet in Italicis praediis ita sunt, quia et ipsa praedia mancipationem et in iure cessionem recipiunt. alioquin in provincialibus praediis siue quis usumfructum ius eundi agendi aquamue ducendi vel altius tollendi aedes aut non tollendi, ne luminibus vicini officiatur, ceteraque similia iura constituere velit, pactionibus et stipulationibus id efficere potest; quia ne ipsa quidem praedia mancipationem aut in iure cessionem recipiunt.* 32. *Sed cum usufructus et hominum et ceterorum animalium constitui possit, intellegere debemus horum usumfructum etiam in prouinciis per in iure cessionem constitui posse.* 33. *Quod autem diximus usumfructum in iure cessionem tantum recipere, non est temere dictum, quamuis etiam per mancipationem constitui possit eo, quod in mancipanda proprietate detrahi potest; non enim ipse usufructus mancipatur, sed cum in mancipanda proprietate deducatur, eo fit, ut apud alium usufructus, apud alium proprietas sit.* 34. *Hereditas quoque in iure cessionem tantum recipit.* 35. *Nam si is, ad quem ab intestato legitimo iure pertinet hereditas, in iure eam alii ante aditionem cedat, id est antequam heres extiterit, proinde fit heres is, cui in iure cesserit, ac si ipse per legem ad hereditatem vocatus esset: post obligationem vero si cesserit, nihilo minus ipse heres permanet et ob id creditoribus tenebitur, debita vero pereunt, eoque modo debitores hereditarii lucrum faciunt; corpora vero eius hereditatis proinde transeunt ad eum, cui cessa est hereditas, ac si ei singula in iure cessa fuissent.* 36. *Testamento autem scriptus heres ante aditam quidem hereditatem in iure cedendo eam alii nihil agit; postea vero quam adierit si cedat, ea accidunt, quae proxime diximus de eo, ad quem ab intestato legitimo iure pertinet hereditas, si post obligationem in iure cedat.* 37. *Idem et de necessariis heredibus diversae scholae auctores existimant, quod nihil videtur interesse, utrum aliquis adeundo hereditatem fiat heres an inuitus existat. quod quale sit, suo loco apparebit: sed nostri praeceptores putant nihil agere necessarium heredem, cum in iure cedat hereditatem.* 38. *Obligationes quoquo modo contractae nihil eorum recipiunt: nam quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo, quibus res corporales ad alium transferuntur, id efficere possum; sed opus est, ut iubente me tu ab eo stipuleris; quae res efficit, ut a me liberetur et incipiat tibi teneri. quae dicitur novatio obligationis.* 39. *Sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri*.

[72] Bona, *Il coordinamento*, cit., p. 435.

[73] *Ivi*, p. 450.

[74] See *supra*, § 4.

Under this distinction, it is not the legal figures that find form and substance in the world of the *ius* to be examined, but rather the means of transferring the ownership of a *ius*. Essentially, Gaius would have held that «ogni altra classificazione di cose, egualmente attinente agli 'elementi del patrimonio' potesse essere in qualche modo coordinabile»[75] with this distinction. The latter, however, would have proved unsuitable to ground the systematics of the ways of property transfer, thus leaving room for the further distinction between *res mancipi* and *nec mancipi*, which showed itself – although in progressive decline – still functional for this purpose[76].

6. 'Res incorporales' and intangible goods in the European Roman tradition: the German experience

The Gaian category of *res incorporales* was faithfully interpreted, according to its original meaning, by the medieval and modern Roman tradition. Mention should be made, in extreme summary and limited to the most significant authors, to Accursio, Azone, Donello and Hilliger[77].

More complex was the matter concerning the interpretations of the ancient model from the 18th century onwards. European legal science, especially German one, rediscovered the partition, which was seen with much interest as an element of comparison in the debate about the qualification of intellectual works.

[75] Bona, *Il coordinamento,* cit., p. 450. See also Grosso, *Corso,* cit., pp. 13 f., who, in the parallel highlights the procedural profile relating to *rei vindicatio*, *petitio usus fructus* and *vindicatio servitutis*.

[76] With reference to this aspect, more extensively discussed in the discussion devoted to *res mancipi* and *res nec mancipi*, see, among others, M. Kaser, *Eigentum und Besitz im älteren römischen Recht*[2], Köln-Graz, 1956, pp. 8 ff., and Id., *Der römische Eigentumsbegriff,* in *Deutsche Landesreferate zum VI International Kongress für Rechtsvergleichung (Hamburg, 1962),* Berlin-Tübingen, 1962, pp. 20 ff., as well as A. Guarino, *Diritto privato romano*[11], Napoli, 1997, pp. 353 ff.

[77] Cf. Accursio's explanation in Glossa *plerumque* ad Inst. 2.2.2; Azo, *Summa Codicis,* ed. Venet. 1572, III, 1, c. 206; H. Doneau, *De iure civili commentarius*, IX. 7 (*Opera omnia*, vol. II, Lucae, 1763, pp. 1193 f.); as well as XX. I (*Opera,* cit., vol. V, Lucae, 1764, pp. 759 ff.; O. Hilliger, *Notae ad Donelli de iure civ. Comment. Opera omnia*, cit., V, p. 761, n. 2. For further discussion, see Pugliese, *Dalle 'res incorporales'*, cit., pp. 1142 ff.; Guzman Brito, *Las cosas*, cit., pp. 42 ff.

The reflection was deepened later during the 19th century and at the dawn of codification, when German doctrine – having inherited (and shared by the most[78]) the materialistic conception of property, coinciding with the thing itself (*res corporales*)[79], later incorporated in § 90 BGB[80] – reasoned on the question of the protection of copyright, which was necessarily excluded from the dominical paradigm[81]. In this context, a link was effectively established between *res incorporales* and intellectual works[82], both in terms of continuity and in terms of fracture.

As for the correspondence between the legal figures, it is undeniable that the

[78] Exception made, in the German panorama, for R. von Jhering, *Rechtsschutz gegen injuriöse Rechtsverletzungen*, in «Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts», XXIII, 1885, merged in *Gesammelte Aufsätze aus den Jahrbüchern für die Dogmatik des heutigen römischen und deutschen Privatrechts*, vol. III, Jena, pp. 375 ff., which supports the idea of intellectual property, although it does not identify the *res incorporales* with intangible goods. On the contrary, the scholars of the Historical School, G. Hugo, *Lehrbuch einies civilistischen Cursus*, vol. I[6], Berlin, 1820, p. 260, p. 262; F.K. Savigny, *Das Recht des Besitzes*[4], Gießen, 1822, p. 142; G.F. Puchta, *Pandekten*[12], Leipzig, 1877, pp. 216 f.; Id, *Vorlesungen über das heutige römische Recht*, vol. I, Leipzig, 1873, p. 324; the forerunners of the Pandectist School, L.A. Warnkönig, *Commentarii juris romani privati*, vol. I, Leodii, 1825, pp. 339 f.; J.F.L. Göschen, *Vorlesungen über das gemeine Civilrecht*, vol. II, Göttingen, 1839, pp. 19 ff.; F.A. Schilling, *Lehrbuch für Institutionen und Geschichte des römiscen Privatrechts,* vol. II, Leipzig, 1837, pp. 222 ff., pp. 487 ff. (whereas, with specific regard to scientific positivism, see paradigmatically C.F. Mühlenbruch, *Doctrina Pandectarum*, vol. II, Halis Saxonum, 1831, pp. 12 ff., pp. 67 ff.; A.F.J. Thibaut, *System des Pandekten-Rechts*, vol. I, Jena, 1803, p. 168; vol. II, p. 23); as well as the components of the Pandectics themselves, E. Böcking, *Pandekten des römischen Privatrechts*, vol. I[2], Bonn, 1853, pp. 243 ff.; F.L. Keller, *Pandekten*, vol. I[2], Leipzig, 1866, pp. 249 ff.; K.A. von Vangerow, *Lehrbuch der Pandekten*, vol. I[7], Marburg, 1875, pp. 539 ff.; C.G. von Wächter, *Pandekten,* vol. I, Leipzig, 1880, p. 176, pp. 255 ff.; A. von Brinz, *Lehrbuch der Pandekten*, vol. I[2], Erlangen, 1873, pp. 468 ff.; L. Arndts, *Lehrbuch der Pandekten*[9], Stuttgart, 1877, p. 53; L. Kuhlenbeck, *Von den Pandekten zum bürgerlichen Gesetzbuch*, vol. I, Berlin, 1898, pp. 263 ff.; vol. II, Berlin, 1899, pp. 385 ff.; Bekker, *System*, vol. I, cit, p. 63; O. Wendt, *Lehrbuch der Pandekten*, Jena, 1888, p. 15; J. Baron, *Pandekten*[8], Leipzig, 1893, pp. 234 ff.; F. Regelsberger, *Pandekten*, vol. I, Leipzig, 1893, p. 359; H. Derbnburg, *Pandekten*, vol. I[7], Berlin, 1902, pp. 154 ff., pp. 443 ff. On Windscheid's thought, see what will be said in more detail *infra*. For an overview of the issue, see Cursi, *'Res incorporales'*, cit., pp. 190 f.; previously, among others, Tellegen, *'Res incorporalis'*, cit., pp. 35 ff. More generally, on the acceptance-displacement of bipartition in European codes, see Guzman Brito, *Las cosas*, cit., pp. 43 ff.

[79] See *infra*, § 4.

[80] § 90 BGB: Sache im Sinne des Gesetz sind nur körperliche Dinge. Commenting on the provision in the broader framework of the Gaian bipartition Vincenti, *'Res'*, cit., pp. 20 f.; Cursi, *'Res incorporales'*, cit., pp. 190 f.

[81] For further discussion, see Cursi, *'Res incorporales'*, cit., pp. 189 ff.

[82] On this subject, see recently Turelli, *'Res incorporales' e beni immateriali*, cit., p. 17; in the wake of Pugliese, *Dalle 'res incorporales'*, cit., pp. 1175 f.

nature of things (*corporales-incorporales*, corporal-incorporal) is a strong point of contact, useful for the definition of intellectual makings without corporeality as objects of law[83]. However, the absence of these creations – which already existed in ancient Rome – from the list of *res incorporales* should be emphasised, demonstrating their irrelevance as 'things' or 'goods' in the legal sense, as well as the exclusion of any right over them for their author[84]. It is then necessary to reflect on the naturalistic and conceptual distinction between *res* and goods: the former are intangible entities, of «mera consistenza giuridica»[85], conceivable as elements of the patrimony, «centri di imputazione di relazioni giuridiche»[86]. The latter, on the other hand, exist in the reality of facts, regardless of the legal world[87], and constitute objects of law[88].

[83] Scialoja, *Teoria*, vol. I, cit., p. 21, p. 25; Fadda, Bensa, *Note*, cit., p. 187; Biondi, *I beni*, cit., *pp.* 21 ff.

[84] To the traditional extraneousness of copyright to Roman legal experience (see, for all, A. Guarino, *Diritto privato romano*[12], Napoli, 1990, pp. 312 f., nt. 18.2; Pugliese, *Dalle 'res incorporales'*, cit., p. 1175 and nt. 56; Id., *Istituzioni di diritto romano,* Padova, 1986, p. 504; Guzman Brito, *Las cosas*, cit., pp. 56 ff.) opposes U. Bartocci, *Aspetti giuridici dell'attività letteraria in Roma antica,* Torino, 2009, pp. 36 ff., pp. 49 ff., pp. 230 ff., who does not exclude forms of protection of intellectual work or in any case regulatory solutions favourable to authors. *Contra*, G. Santucci, *Diritti dell'autore in Roma antica?*, in «Index», XXXIX, 2011, pp. 143 ff., in particular p. 149, according to whom there would be no indication, not even indirect, of a legal protection of the author. With respect to the *tabula picta* hypothesis, (Gai 2.78; Gai. 2 *rer. cott.* D. 41.1.9.2; Paul. 21 *ad ed.* D. 6.1.23.3; I. 2.1.34), for Pugliese, *Istituzioni*, cit., p. 504, it is also possible to qualify the case in terms of specification; Brutti, *Il diritto*, cit., p. 289, also observes that *pictura* is seen as a material entity, different from intellectual creations and immaterial goods. On this subject, see most recently Turelli, *'Res incorporales' e beni immateriali*, cit., pp. 9 ff.

[85] Pugliese, *Delle 'res incorporales',* cit., p. 1182.

[86] Orestano, *Il problema*, cit., pp. 111 ff.

[87] Pugliese, *Delle 'res incorporales'*, cit., p. 1182; recently, in an adhesive sense, Turelli, *'Res incorporales' e beni immateriali*, cit., p. 15; Polito, *Some Considerations,* cit., p. 39.

[88] In this view, the category of *res incorporales* would thus be expanded to include 'objects of law', as Bekker, *System*, vol. I, cit., p. 62; on the subjectivist perspective that makes 'object of law' what is not 'subject of law', see Cursi, *'Res incorporales'*, cit., p. 200. An echo of this approach, as will be discussed in more detail *infra*, § 8, can be found in the definition of goods *under* Art. 810 of the Civil Code, according to which they are «le cose che possono formare oggetto di diritti»: on this point, see Cardilli, *Fondamento*, cit., p. 265. If not all things are goods, at the same time, our code does not exclude the possibility that there may be goods other than things, whose desirability for the subject derives from a qualifying procedure that does not imply material physicality, according to N. Lipari, *Le categorie del diritto civile*, Milano, 2013. On the conceptual distinction between 'thing' and 'good' in legal terms, fundamental S. Pugliatti, entry *Beni (teoria generale)*, in *Enciclopedia del diritto*, vol. V, Milano, 1959, pp. 164 ff.; Id., entry *Cosa (teoria generale)*, in *Enciclopedia del diritto*, vol. XI, Milano, 1962, pp. 19 ff.; V. Zeno-Zencovich, entry *Cosa*, in *Digesto delle discipline privatistiche - Sezione civile*, *vol.* IV, Torino, 1989, pp. 440 ff.; for an analysis of the concept of thing in the digital era, see M. Giuliano, *Le risorse digitali nel paradigma dell'art. 810 cod. civ. ai tempi della 'block-*

Aware of this discontinuity and in the attempt of enhancing it from a terminological point of view, Stobbe suggested a change in the wording. Instead of 'things', he resorted to the term intangible 'goods'[89], thus charting a course that led to Kohler's elaboration of the theory of *Immateralgüterrechte*[90].

In this framework, Windscheid's thought is of particular interest, as it winds its way through his *Lehrbuch des Pandektensrecht* and gives us two different meanings of the expression 'incorporeal things'.

Starting from the assumption that the patrimony is made up of rights, he observes that its elements, even in the legal lexicon, are generally indicated by the things to which the rights refer. What follows is that – since property is a 'corporeal thing' – rights over the objects of others and obligations, existing only in the mind, are to be defined as incorporeal things. The reasoning, on closer inspection, distinguishes the components of property into corporal and incorporeal things, depending on the object of reference. It is no coincidence that the reference to Gaius is explicit and the use of the construction 'objects of right' is absent[91].

However, the locution is later used to classify 'things subject to law'. According to the scholar, positive law can go well beyond the correlation between the concept of thing and corporeality and treat even merely fictitious things, called 'incorporeal things', as objects of legal relations. These include, under Roman law, rights and universality of things, and within the legal experience contemporary to the author, intellectual property. The risk of a change of perspective is immediately perceived by Windscheid, who takes care to clarify the conceptual distinction between the ancient *res incorporales*, and the

chain'. Parte prima, in «La nuova giurisprudenza civile commentata», 2021, pp. 1224 ff.

[89] O. Stobbe, *Handbuch des Deutschen Privatrechts*, vol. I, Berlin, 1885, p. 520; in similar terms, Bekker, *System*, vol. I, cit., p. 288; Id., *Allerlei von den dinglichen Rechten insbesondere von den Rechten an eigner Sache*, in «Zeitschrift für die vergleichende Rechtswissenschaft», II, 1880, p. 20; Regelsberger, *Pandekten*, vol. I, cit., p. 359, pp. 366 f.

[90] By this, meaning the patrimonial rights to intellectual creations according to the conception of J. Kohler, *Zur Konstruktion des Urheberrechts*, in «Archiv für bürgherliches Recht», X, 1895, pp. 241 ff.; Id, *Die Idee des geistigen Eigenthums*, in «Archiv für die civilistische Praxis», XXXII, 1894, pp. 141 ff.); excluding the moral ones, later included in the more recent monistic theory of E. Ulmer, *Urherberund Verlagsrecht*[3], Berlin-Heidelberg-New York, 1980, *passim*, as Cursi, *'Res incorporales'*, cit., p. 192, nt. 84.

[91] Windscheid, *Diritto*, cit., pp. 118 ff., especially p. 120, nt. 5 for the reference to Gaius.

modern 'incorporeal things', objects of law[92]. This explains the meaning of the listing: the new category includes certain figures that already existed in ancient Rome[93].

One must therefore give the German scholar credit for having reaffirmed the boundaries of the category in accordance with the 'Roman law of the Romans'[94], highlighting its discontinuity with respect to 'incorporeal things', object of law', but not for this reason diminishing its value. On the contrary, the Gaian systematics continues to be a valuable element of comparison in the making of ideas at the basis of German codification.

7. Things and intangible assets in the Italian legal experience: the digital era and the new challenges of the metaverse

In current Italian law, the fundamental distinction *res corporales-res incorporales* (and the elements included therein, presented as *divisio rerum* in the Roman sources) is referred to goods and rights (Art. 812 et seq. of the Civil Code)[95].

The overturn of the Roman paradigm and the change in the conception of property, affirmed in the context of the Enlightenment but already traced by the humanists through the 'two-faced' use of the term *dominium*[96], are also recognised in

[92] *Ivi*, p. 477, nt. 3.

[93] Thus Turelli, *'Res incorporales' e beni immateriali*, cit., pp. 22 ff.

[94] I borrow the expression from R. Cardilli, *Das römische Recht der Pandektistik und das römische Recht der Römer*, in *Wie pandektistisch war die Pandektistik*?, herausgegeben von H.-P. Haferkamp und T. Repgen, Tübingen, 2017, pp. 83 ff. As we have seen, the interpretation of Gai 2.12-14 restores the opposition between the Roman law of the Romans and the bourgeois Roman law.

[95] For a comparison with experiences other than the Italian one, see recently Cursi, *'Res incorporales'*, cit., pp. 183 ff., especially p. 201, who points out that «lo schema espositivo che ricorre nella dottrina tedesca, francese, italiana riguardo le *res incorporales* prevede la conservazione del contenuto originario romano (i diritti, con l'estensione all'universalità di cose, con l'aggiunta delle produzioni intellettuali, concepite come 'cose oggetto di rapporti giuridici')».

[96] See, among many references, H. Doneau, *Commentarius de iure civile*, IX.8, § 5 ff., in *Opera omnia*, vol. II, Milano, 1828, pp. 1193 ff. See also P. Grossi, *Il dominio e le cose, percezioni medioevali e moderne dei diritti reali*, Milano, 1992, pp. 385 ff.

the French Civil Code, which hinges on a single form of individual property[97]. Overall, «una simile rimodulazione del rapporto fra soggetto e beni apre naturalmente la strada all'applicazione della nuova concezione proprietaria a tutte le cose sia materiali che immateriali»[98].

In the Italian Civil Code, the notion of goods is contained in Article 810, according to which «sono beni le cose che possono formare oggetto di diritti». On the other hand, the «pre (e quindi extra) giuridica»[99] notion of 'thing', otherwise seen as «il nome più indeterminato e più comprensivo della lingua italiana»[100], is implied and absorbed within the legally relevant notion of good[101].

Today, the interpreter called upon to reflect on the notion of 'good' and, before that, of 'thing' within the confines of our current civil code[102], does not have an easy

[97] With regard to the French experience and the different perspectives taken in doctrine see, among others, Ed. Fuzier-Hernan-A. Darras-Th. Griffaud, *Code civil annotés*, Paris, 1900, pp. 606 ff.; M. Planiol, *Traité èlémentaire de droit civil,* vol. I[5], Paris, 1908, pp. 820 ff.; against the theory of intellectual property see K.S. Zachariae von Lingenthal, *Manuale del diritto civile francese,* vol. I, a cura di C. Crome, Milano, 1907, p. 449. More recently, see G. Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna, 1976, pp. 182 ff.; P.M. Vecchi, *Possesso, possesso dei diritti e dei beni immateriali ed acquisto del diritto mediante il decorso del tempo*, in *Uso, tempo, possesso dei diritti. Una ricerca di diritto positivo*, a cura di E. Conte, V. Mannino e P.M. Vecchi, Torino, 1999, pp. 216 ff.; Cursi, *'Res incorporales'*, cit., pp. 187 ff.

[98] Cursi, *'Res incorporales',* cit., p. 187.

[99] Thus Zeno-Zencovich, entry *Cosa*, cit., p. 438.

[100] In these terms, see entry *Cosa*, in *Enc. giur. Treccani online.*

[101] The literature is endless In general terms, see B. Biondi, entry *Cosa* (*dir. civ.*), in *Novissimo digesto italiano*, vol. IV, cit., pp. 1007 ff.; Pugliatti, entry *Beni*, cit., pp. 164 ff.; Id., entry *Cosa*, cit., pp. 19 ff.; Zeno-Zencovich, entry *Cosa*, cit., pp. 438 ff. Among many, see Biondi, *I beni*, cit.; F. De Martino, R. Resta, G. Pugliese, *Della proprietà*, in *Commentario del codice civile* a cura di A. Scialoja e G. Branca, Bologna-Roma, 1976, pp. 1 ff.; D. Messinetti, entry *Oggetto dei diritti*, in *Enciclopedia del diritto*, vol. XXIX, Milano, 1979, pp. 808 ff.; Aa.Vv., *Dalle 'res' alle 'New Properties'*, a cura di G. De Nova, B. Inzitari, G. Tremonti e G. Visentini, Milano, 1991; S. Rodotà, *Tecnologie e diritti*, Bologna, 1995; A. Gambaro, *Il diritto di proprietà*, a cura di G. De Nova, B. Inzitari, G. Tremonti e G. Visentini, Milano, 1991; A. Zoppini, *Le 'nuove proprietà' nella trasmissione ereditaria della ricchezza (note a margine della teoria dei beni)*, in «Rivista di diritto civile», 2000, I, pp. 185 ff.; M. Costantino, R. Pardolesi, D. Bellantuono, *I beni in generale*, in *Trattato di diritto privato. Proprietà*, vol. I[2], Torino, 2005, pp. 3 ff.; A.T. Scozzafava, *I beni*, in *Trattato di diritto civile del Consiglio nazionale del Notariato*, diretto da P. Perlingieri, Napoli, 2007, pp. 12 ff.; A. Jannarelli, F. Macario, *Della proprietà*, in *Commentario del codice civile* a cura di E. Gabrielli, Milano, 2012, pp. 5 ff.; F. Piraino, *Sulla nozione di bene giuridico in diritto privato*, in «Rivista critica del diritto privato», 2012, pp. 470 ff.; A. Gambaro, *I beni*, Milano, 2012; C.M. Bianca, *Diritto civile*, vol. VI, *La proprietà*[2], Milano, 2017, pp. 33 ff.

[102] For a look at the subject of 'European law of things' see most recently, C. von Bar, *Questioni fondamentali per la*

task. This happens essentially for three reasons: first, as explained above, because of the very meaning of 'good' contained in the Civil Code, which comes to be identified with that of the object of rights. Second, because of the «disinvoltura polisemica»[103] with which the terms 'good' and 'thing' are used by the legislator, doctrine and jurisprudence. Third, because of the comparison with the 'new goods' (various are the terms on the point: immaterial goods, intangible goods, virtual goods) resulting from the technological development of an increasingly globalised society. Such a comparison imposes an interpretative effort on the jurist in order to include within the notion of 'good' – and therefore of 'thing' – even entities without a corporeal dimension. In other words, they must include 'goods' whose desirability for the owner derives from a qualifying procedure that does not imply a material physicality[104].

In the context of modern economics, significant examples on the subject are to be found, for example, in the usucapion and pledge of shares in Limited Liability Companies (*S.r.l.*)[105] but also, with regard to rights in rem over a company share, in the usufruct of shares[106]. Indeed, in all these hypotheses, it is a matter of reconciling the

comprensione del diritto europeo delle cose, in «Rivista di diritto civile», 2018, pp. 571 ff.

[103] Thus P. Grossi, *I beni: itinerari fra 'moderno' e 'post-moderno'*, in «Rivista trimestrale di diritto e procedura civile», 2012, pp. 1059 ff.

[104] Lipari, *Le categorie,* cit. In general terms, see M. Are, entry *Beni immateriali* (*dir. priv.*), in *Enciclopedia del diritto*, vol. V, Milano, 1959, pp. 244 ff. Among others, see S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata*, Bologna, 1990, pp. 883 ff.; G. De Nova, *I nuovi beni come categoria giuridica*, in *Dalle 'res' alle 'New Properties'*, cit., pp. 13 ff.; M. Trimarchi, *Nuovi beni e situazioni di godimento*, in *Il diritto civile oggi. Compiti scientifici e didattici del civilista (Atti del I Convegno Nazionale S.I.S.Di.C., Capri, 7-9 aprile 2005),* Napoli, 2006, pp. 575 ff.; D. La Rocca, '*New Assets and New Rights'. Sull'attualità della teoria dell'oggetto giuridico*, in *Studi in onore di D. Messinetti*, a cura di F. Ruscello, Napoli, 2008, pp. 505 ff.; Aa.Vv., *Diritti esclusivi e nuovi beni immateriali*, a cura di G. Resta, Torino, 2010, pp. 21 ff.; A.M. Gambino, *Diritto d'autore e nuovi processi di patrimonializzazione*, in «Diritto industrilae», 2011, pp. 114 ff.

[105] See recently, C. Rinaldo, *Usucapione e acquisto 'a non domino' delle quote di partecipazione in società a responsabilità limitata*, in «Rivista di diritto civile», 2017, pp. 631 ff.; E. Battelli, *Il pegno sui beni immateriali. Contributo allo studio del pegno non possessorio sugli 'intangible assets'*, Milano, 2021, in particular pp. 219 ff. and the bibliography cited therein. With regard to guarantees on intangible rights and, in particular, *Intellectual Property Rights* see, among many, C.S. Zimmerman, L.J. Dunlop, *Overview: Intellectual Property. The New Global Currency*, in *The New Role of Intellectual Property in Commercial Transactions*, edited by M. Simensky and L.G. Bryer, New York, 1994, pp. 3 ff.; F. Mezzanotte, *Garanzie del credito e proprietà industriale: riflessioni sulla 'collateralization' delle licenze esclusive*, in «Rivista di diritto civile», 2014, pp. 1168 ff.

[106] Most recently, see C. Rinaldo, *Usufrutto di azioni e diritto di recesso,* in «Rivista di diritto civile», 2022, pp. 585

traditional system of real rights with the thrust of commercial practice, since the problem concerns the application of civil law institutions (usucapion, pledge, usufruct), inherent to a *res corporales*.

In addition to this, among the numerous figures created as a result of the rise of new technologies[107], a very important role is nowadays played by information, particularly digital information[108] and the storage system connected to it, i.e. the *Blockchain*[109]. The jurist's attention to the protection of such an 'asset' concerns both the individual's interest in holding, enjoying and disposing of that specific information that is the subject of intellectual property, and the possible violation of *ius excludendi* as a subjective right[110].

The problem lies in the difficulty of reconciling the notion of 'good' with the incorporation or intangibility of digital information. More specifically, the push of technological innovation and the arrival of 'new goods' would impose a change of

ff. See also A. Asquini, *Usufrutto di quote sociali e azioni*, in «Rivista del diritto commerciale», 1947, I, pp. 25 ff.; G.C.M. Rivolta, *Azioni e quote sociali: pegno di usufrutto, pegno di nuda proprietà e diritto di voto*, in «Rivista di diritto civile», 1998, I, pp. 583 ff.; D. Poletti, *Decadenza o metamorfosi dell'usufrutto? Spunti per una riflessione*, in *Le società*, 2016, pp. 930 ff.; A. Valzer, *Usufrutto sulle partecipazioni sociali e riserve*, in *Patrimonio sociale e governo dell'impresa*, a cura di G.A. Rescio e M. Speranzin, Torino, 2020, pp. 110 ff.

[107] By way of example, think of the computer program, works of *industrial design*, *software* and its algorithm, databases, and secret information, on which see A. Blandini, entry *'Know-how'*, in *Enciclopedia del diritto*, *Aggiornamento*, vol. I, Milano, 1997, pp. 725 ff.; V. De Sanctis, entry *Autore* (*diritto di*), in *Enciclopedia del diritto*, *Aggiornamento*, vol. II, Milano, 1998, pp. 104 ff.; G. Sena, entry *Invenzioni industriali*, in *Enciclopedia del diritto*, *Aggiornamento,* vol. II, cit., pp. 456 ff.; Id., entry *'Design'* (*disegno industriale*), in *Enciclopedia del diritto*, *Aggiornamento*, vol. II, cit., pp. 287 ff.; G. Ettore, entry *Banche dati* (*tutela delle*), in *Enciclopedia del diritto*, *Aggiornamento*, vol. V, Milano, 2001, pp. 130 ff.

[108] On the notion of information, see Zeno-Zencovich, entry *Informazione* (*profili civilistici*), in *Digesto delle discipline privatistiche - Sezione civile*, vol. IX, Torino, 1993, pp. 420 ff.

[109] M. Maugeri, entry *'Smart Contracts'*, in *Enciclopedia del diritto*, *I Tematici*, vol. I, *Contratto*, a cura di G. D'Amico, Milano, 2021, pp. 1132 ff., in particular pp. 1133 f., where he expands on his bibliography, he specifies that the *Blockchain* «si può immaginare come una lavagna infinita indelebile, un *database* distribuito che vede ogni modifica soggetta all'approvazione di tutti i nodi. Una lavagna, semplificando molto, in cui si può leggere a chi appartengono alcuni valori e che consente di tracciare, in modo indelebile, tutti i passaggi fra questi valori … È un sistema che sfrutta la crittografia e permette di conservare informazioni digitali garantendo integrità e data delle registrazioni … Il modo di registrazione sommariamente descritto è quello tipico delle criptovalute. In particolare è quello di *Bitcoin*». See also Giuliano, *Le risorse,* cit., pp. 1214 ff.; Id., *Le risorse digitali nel paradigma dell'art. 810 cod. civ. ai tempi della 'blockchain'. Parte seconda,* in «La nuova giurisprudenza civile commentata», 2021, pp. 1456 ff.

[110] Zeno-Zencovich, entry *Cosa,* cit., p. 454.

paradigm. The latter would be no longer anchored to the proprietary regime, but to that of common goods or *commons*[111], i.e. the general mandatory model[112].

If one is to describe in its essential features the model of protection of information as a legal asset identified by civil law, the reference goes to intellectual property law, declined, as is known, in its different forms of industrial property law and copyright[113]. The scheme adopted is that of the Roman model of *dominium* over *res corporales*. For some decades now, this model has been the subject of criticism, and the «perplessità che denunciano l'inadeguatezza di questa concezione»[114] operate «su due versanti: dogmatico giuridico e politico-economico»[115].

On closer inspection, however, the different theoretical positions that emerge

[111] From the perspective of the commons see LIPARI, *Le categorie*, cit., pp. 133 ff. See also A. IULIANI, *Prime riflessioni in tema di beni comuni*, in «Europa e diritto privato», 2012, pp. 617 ff. More generally, on the paradigm shift, see recently ZENO-ZENCOVICH, '*Big data' e epistemologia giuridica*, in *Dati e algoritmi. Diritto e diritti nella società digitale*, a cura di S. Faro, T.E. Frosini e G. Peruginelli, Bologna, 2020, pp. 13 ff., now in *Scritti in onore di M.G. Losano. Dalla filosofia del diritto alla comparazione giuridica*, a cura di L.L. Alix e A. Somma, Torino, 2021, pp. 574 ff. The literature on the subject of *beni comuni* or *commons* (the latter is the expression used by North American scholars of *Law and Economics*, on which, for all, M. HELLER, *Commons and anticommons*, Northampton, 2009) is vast and heterogeneous. Among the many contributions see S. CASSESE, *I beni pubblici. Circolazione e tutela*, Milano, 1969; P. GROSSI, *Un altro modo di possedere: l'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Milano, 1977; ID., *La proprietà*, cit.; M. ARSÌ, *I beni pubblici*, in *Trattato di diritto amministrativo, vol.* II, a cura di S. Cassese, Milano, 2003, pp. 1705 ff.; F. CORTESE, *What are Common Goods? Pictures from the Italian Debate*, in «Polemos», XI, 2017, pp. 417 ff.; AA.VV., *I beni pubblici. Dal governo democratico dell'economia alla riforma del codice civile*, a cura di U. Mattei, E. Reviglio e S. Rodotà, Milano, 2010; U. MATTEI, A. QUARTA, *The Turning Point in Private Law Ecology, Technology and the Commons*, Cheltenham, 2019. In a historical perspective, with specific reference to the category of 'common good' in the medieval experience, see R. FERRANTE, *Per una storia giuridica dei beni comuni. Il governo del territorio nell'esperienza storico-giuridica*, a cura di P. Ferretti, M. Fiorentini e D. Rossi, Trieste, 2017, pp. 173 ff. With regards to Roman law instead, see recently D. DURSI, *'Res communes omnium'. Dalle necessità economiche alla disciplina giuridica*, Napoli, 2017; M. FALCON, *'Res communes omnium'. Vicende storiche e interesse attuale di una categoria romana*, in *I beni di interesse pubblico nell'esperienza giuridica romana*, a cura di L. Garofalo, vol. I, Padova, pp. 107 ff.

[112] P. RESCIGNO, *Disciplina dei beni e situazioni della persona*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», V-VI, 1976-1977, pp. 861 ff.

[113] G. GIACOBBE, entry *Proprietà intellettuale*, in *Enciclopedia del diritto*, vol. XXXVII, Milano, 1988, pp. 368 ff.; F. BENUSSI, entry *Proprietà industriale*, in *Digesto delle discipline civilistiche - Sezione commerciale*, vol. XI, Torino, 1995, p. 418; A. MUSSO, entry *Proprietà intellettuale*, in *Enciclopedia del diritto*, *Annali*, vol. II.2, Milano, 2008, pp. 890 ff.; ID., entry *Proprietà industriale*, in *Enciclopedia del diritto*, *Annali*, vol. II.2, cit., pp. 868 ff.

[114] CURSI, *'Res incorporales',* cit., p. 175.

[115] *Ibid.* and the extensive bibliography cited there.

regarding the use of 'proprietary logic' for the protection of intangible goods as *res incorporales* (protection of an absolute right[116]; protection of the broader category of belonging[117]; protection of a monopoly right)[118] never lead towards a total liberation from this logic. The latter continues to resist the tremors caused by the 'society of technology'[119] in the face of the unstoppable process of digitalization and, on the other hand, of the necessary protection of free competition in the market.

In the current state of affairs, the relationship between the adoption of the proprietary conception, and the legal qualification of the new intangible goods highlights a profound tension which is ineliminable, as it is due to the comparison between different cultural models (as seen, the Roman and the naturalistic legal models). The hermeneutic solicitation just outlined ultimately forces us to rethink the traditional legal categories[120], in order to adapt them to the hyper-connected new reality, material and at the same time virtual (in synthesis *onlife*)[121], always closer to finding space in the metaverse, where the relationship 'human-*res*' is projected.

[116] Pugliatti, *La proprietà nel nuovo diritto*, Milano, 1954, pp. 252 ff.

[117] Scozzafava, *I beni e le forme giuridiche di appartenenza*, Milano, 1982, pp. 556 ff.

[118] R. Franceschelli, *Monopoly structure of industrial law institutions*, in «Rivista di diritto industriale», 1956, I, pp. 137 ff.

[119] Both case law and national and European legislators continue to refer to the proprietary model of copyright. See Sena, *Giurisprudenza sulla natura giuridica del diritto di autore*, in «Rivista di diritto industriale», 1953, II, pp. 82 ff.; Vecchi, *Possesso*, cit., pp. 216 ff. At the European level see N. Boschiero, entry *Beni immateriali* (*dir. internaz. priv. e proc.*), in *Enciclopedia del diritto*, *Annali*, vol. II.2, cit., pp. 115 ff.; M. Libertini, entry *Concorrenza*, in *Enciclopedia del diritto*, *Annali*, vol. III, Milano, 2010, pp. 191 ff. Please note the recent Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, which was implemented in Italy by Legislative Decree 8 November 2021, no. 177. On this subject see Aa.Vv., *Il diritto d'autore nel mercato unico digitale*, a cura di A. Cogo, in *Giur. it.*, 2022, pp. 1253 ff.

[120] In this regard, Cursi, *'Res incorporales'*, cit., pp. 202 ff. wonders whether «sia praticabile una tutela risarcitoria per i danni patrimoniali e non patrimoniali (*ex* Art. 2059 cod civ. e Art. 2043 cod. civ.) derivanti dalla lesione di diritti sulle creazioni dell'ingegno, che soppianti il tradizionale schema reale», as happens with the model of *personal property* in the *common law* tradition.

[121] L. Floridi, *The Onlife Manifesto: Being Human in a Hyperconnected Era*, Heidelberg-New York-Dordrecht-London, 2015; Id., *La quarta rivoluzione. Come l'infosfera sta trasformando il mondo*, Milano, 2017.

8. The Gaian bipartition in the Latin American Roman tradition

The Gaian bipartition was also a fruitful model of comparison for the Latin American legal experience of the modern age[122].

As far as Argentine law is concerned, it is especially significant to retrace the stratification of the Code, in order to recover the original draft of the former *Código civil*. The latter was conceived between 1864 and 1869 by the great jurist Dalmacio Vélez Sársfield, a specialist of Roman law and the Romanesque tradition[123]. The text, albeit with some modifications, was transposed into the so-called Código civil velezano of 1871, which was reformed in 1968, with the extension of the applicability of the provisions relating to things to energy and natural forces susceptible of appropriation[124].

Specifically of interest here are Article 2311, «se llaman cosas en este Código los objetos corporales susceptibles de tener un valor», and Article 2312, «los objetos inmateriales susceptibles de valor, e igualmente las cosas, se llaman bienes. El conjunto de los bienes de una persona constituye su patrimonio». In the second provision, it is possible to notice how the *genus* 'beni' include both things such as corporeal objects and intangible objects, both of which have value and form the basis of a person's patrimony.

The provision is very stimulating as a synthesis of ancient and contemporary solutions. With regard to the innovative profile, it introduces the category of goods, a trace of which can already be found in *Las Siete Partidas*[125]. With regard to the Roman

[122] For an initial framing of the distinction in Latin American codifications, see Guzman Brito, *Las cosas*, cit., pp. 46 ff.

[123] On the figure and contribution of the Argentine scholar, see A. Cháneton, *Historia de Vélez Sársfield*, vol. II, Buenos Aires, 1938; A. Díaz Bialet, *El derecho romano en la obra de Vélez Sársfield*, Cordoba, 1949; R. Zorraquin Becú, *La formación intelectual de Vélez Sársfield*, in «Revista del Instituto de Historia del Derecho Ricardo Levene», XV, 1964, pp. 156 ff.; the essays in the volume *Dalmacio Vélez Sársfield e il diritto latinoamericano. Atti del Congresso Internazionale (Roma, 17-19 marzo 1986)*, a cura di S. Schipani, Padova, 1991; A. Levaggi, *La formación romanistica de Dalmacio Vélez Sarsfield*, in «Studi sassaresi», V, 1981, pp. 317 ff.; M. Rosti, *Il contributo di Vélez Sársfield al diritto dell'Argentina indipendente*, in «Materiali per una storia della cultura giuridica», XXXIII, 2003, pp. 465 ff.

[124] The reform only touches Article 2311, to which the following paragraph is added: «las disposiciones referentes a las cosas son aplicables a la energía y a las fuerzas naturales susceptibles de apropiación», by Ley 26 abril 1968, no. 17.771.

[125] *Part.* 2.17 pr., in the edition *Las Siete Partidas del Sabio Rey don Alfonso el nono*, nuevamente Glosadas por el

inheritance, there is an evident enhancement of the interpretation of the bipartition, so much so that *res corporales* and *incorporales* are part of the patrimony, which for the Argentine scholar is still composed of *derechos reales* and *derechos personales*[126]. Velezano's thought thus seems to be the forerunner of one of the interpretations elaborated by Windscheid in his *Lehrbuch des Pandektensrecht* around the incorporeal things as parts of the patrimony[127]. This is because the Argentinean reflection predates the construction of the theory of the *Immaterialgüterrechte.*

A further trace of the recovery of the Roman classification at the basis of the new legal architecture can be found in the terminology of Article 2311, as formulated in the *Código civil* velezano *ante* riforma. The use of the adjective *corporales*, of clear Gaian matrix, is not accidental[128], but rather an apposition that will be changed to *materiales*, probably considered more suitable to represent entities such as energy and natural forces[129].

The roots of Velezano's thought, once German influence is excluded, are then to be found in the landscape of the Latin American legal system.

Even today, Article 565 of the Chilean Code reports the distinction between *cosas corporales* and *cosas incorporales*[130] and defines the later partition through the reconstruction of Gai 2.14 proposed by David and Nelson (*in iure consistunt*): «incorporales las que consisten en meros derechos, como los créditos, y las servidumbres activas»[131].

Licenciado Gregorio López, Salamanca, 1555, respectively volumes II, p. 53; III, pp. 172 f.; for the reconstruction of the passages in the manuscripts, see Díaz Bialet, *El derecho romano*, cit., vol. III, pp. 394 f., pp. 501 f. On this point, see Turelli, *Modello*, cit., pp. 127 f.

[126] D. Vélez Sársfield, *Notas al Código civil de la República Argentina,* Buenos Aires, 1872, pp. 335 f.

[127] See *supra*, § 6.

[128] In this sense, Turelli, *'Res incorporales', 'objetos corporales'*, cit., p. 178; summarised in Id., *Modello*, cit., pp. 126 f.

[129] The legislator may have been inspired in this sense by A.G. Spota, *Tratado de Derecho Civil,* I, Buenos Aires, 1953, pp. 198 f.; as noted by M. Mariani de Vidal, *Derechos reales*, vol. I[4], Buenos Aires, 2004, pp. 11 f.; *Código civil y comercial de la Nación Comentado*, Buenos Aires, 2015, pp. 46 f.

[130] Art. 565: Los bienes consisten en cosas corporales o incorporales. Corporales son las que tienen un ser real y pueden ser percibidas por los sentidos, como una casa, un libro. Incorporales las que consisten en meros derechos, como los créditos, y las servidumbres activas. For a comment, see Guzman Brito, *Las cosas*, cit., pp. 49 ff.

[131] On this point, see Turelli, *'Res incorporales', 'objetos corporales'*, cit., p. 179.

Not far off is the wording of the Louisiana *Civil Code* of 1825 (which remains substantially similar to the current code in its layout)[132], which Vélez Sársfield had the opportunity to consult. Article 451 states «things are divided, in the second place, into corporeal and incorporeal: corporeal things are such as are made manifest to the senses – which we may touch or take, which have a body, whether animate or inanimate. Of this kind are fruits, corn, gold, silver, clothes, furniture, lands, meadows, woods and houses; incorporeal things are such as are not manifest to the senses, and which are conceived only by the understanding, such as the rights of inheritance, services and obligations». The resonance of the Gaian model is evident, especially in the illustrative list of incorporeal things, whose features endure after millennia of history[133]. It should also be noted that the classification is part of the broader tripartition *persons*, *things* and *actions*, according to Article 439 of the Civil Code, corresponding to the Gaian systematics. Also, the influence of the distinction of Cic. *top.* 5.26-27 between res *quae sunt* and *res quae intelleguntur*[134] is clearly perceivable.

To return to the *Código* Vélez Sársfield, greater attention should now be paid to the lexical discrepancy between *objetos corporales* and *objetos inmateriales* contained at Articles 2311 and 2312. The reason for this discrepancy is probably to be found in the influence exercised by the Brazilian jurist Augusto Teixeira de Freitas on Vélez Sársfield[135].

The latter, in his *Notas*, recalls the Note to Article 317 of the *Esboço de Código Civil* signed by the former[136], strongly critical of the Gaian bipartition, due to the confusion generated by the interweaving of material things and rights on things: the

[132] Art. 461 - Corporeals and incorporeals. Corporeals are things that have a body, whether animate or inanimate, and can be felt or touched. Incorporeals are things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property.

[133] On this point, see C.P. Sherman, *Roman Law in the Modern World*, Boston, 1917, p. 142.

[134] On which see *supra*, § 3.

[135] On the subject, see A. Burdese, *Il sistema del codice civile argentino e la distinzione tra diritti personali e reali (dal pensiero di Teixeira de Freitas a quello di Vélez Sársfield)*, in *Dalmacio Vélez Sarsfield e il diritto latinoamericano*, a cura di S. Schipani, Padova, 1991, pp. 157 ff.

[136] Vélez Sársfield, *Notas*, cit., p. 132, picks up A. Teixeira de Freitas, *Esboço de Código civil*, Rio de Janeiro, 1860, p. 213.

incorporeality of ancient *res* clashes with the corporeity of all things in the modern conception. Abandoning the tripartition of the Gaian systematics, Teixeira de Freitas adopts the bipartition of real rights-personal rights, redefining the notion of thing, confined «alle cose esistenti materialmente in natura e suscettibili di valutazione economica, senza pertanto considerare, oltre ai diritti reali aventi ad oggetto le medesime, i diritti su cose incorporali, quale la proprietà letteraria, scientifica e artistica»[137]. Therefore, he preferred to reason by adopting the specula of *objetos*, *materiaes* and *immateriaes*[138].

Here, the terminological difference could be explained by Vélez Sársfield's sharing of Teixeira de Freitas' position, who nevertheless does not refuse the use of the Romanesque lexicon *corporales* to define material entities, essentially corresponding to Teixeira de Freitas' 'things'. Ultimately, the partition *res corporales-res incorporales* does not turn out to be a normative solution applicable *tout court* in the 19th century Argentine codification project[139].

The abandonment of the Roman category is today confirmed by the current *Código civil y comercial de la Nación*. Article 16, dedicated to *Bienes y cosas*, provides that «los derechos referidos en el primer pàrrafo del artículo 15 pueden recaer sobre bienes susceptibles de valor económico. Los bienes materiales se llaman cosas. Las disposiciones referentes a las cosas son aplicables a la energía y a las fuerzas naturales susceptibles de ser puestas al servicio del hombre»[140]. The only *cosas* to be mentioned are *bienes materiales* (non *corporales*) for two reasons. First, materiality has become a marginal element, supplanted by 'the value' as the new guiding criterion[141]. Second, both 'non-material economic values' and transactions concerning intangible things are

[137] A. Burdese, *La distinzione tra diritti personali e reali nel pensiero di Teixeira de Freitas*, in *Augusto Teixeira de Freitas e il diritto latinoamericano. Atti del Congresso Internazionale del Centenario di Augusto Teixeira de Freitas (Roma, 12-14 dicembre 1983)*, a cura di S. Schipani, Padova, 1988, p. 306.

[138] Teixeira de Freitas, *Esboço*, cit., pp. 214 ff.; on which see Turelli, *'Res incorporales'*, *'objetos corporales'*, cit., p. 181.

[139] In this sense, Turelli, *'Res incorporales', 'objetos corporales'*, cit., p. 182.

[140] For a commentary, see Mariani de Vidal, *Derechos*, cit., pp. 9 ff.

[141] Thus the commentary in *Código*, cit., pp. 46 f.; on the notion of value, not to be reduced to mere economic value, see *Ivi*, p. 15.

regulated by Article 764, which extends the application of the rules concerning obligations to give «a los casos en que la prestación debida consiste en transmitir, o poner a disposición del acreedor, un bien que no es cosa».

Nevertheless, the central role assumed by Gai 2.12-14 on the 'data-science' level, to quote Orestano, is undeniable. The Roman structure, in other words, once again confirms itself as a tool for the foundation of reasoning of the legal architectures that follow it. Perhaps, it manifests with greater vigor its own inescapability precisely at the moment when those constructions of thought depart from the original foundations, which – although buried by new ones – remain an ineliminable portion of the ground on which the work rests.

9. Chinese codification and the Roman tradition: the Gaian bipartition in doctrinal constructions

In the new Civil Code of the People's Republic of China (PRC), which entered into force on 1 January 2021, there is no textual reference to the Gaian bipartition[142]. Instead, Title V, headed 'On Subjective Civil Rights', mentions goods, and not 'things', as is the case in most codes today.

However, this does not diminish the importance nor the vitality of the Roman paradigm, underlying the systematics of property law[143].

[142] On the path of Chinese codification, see O. Diliberto, *La lunga marcia. Il diritto romano nella Repubblica Popolare Cinese*, in *Disegnare il futuro con intelligenza antica. L'insegnamento del latino e del greco antico in Italia e nel mondo*, Bologna, 2012, pp. 53 ff.; Fei Anling, *Elaborazione e caratteristiche del Codice civile cinese*, in «Roma e America», XLI, 2020, pp. 133 ff.; M. Timoteo, *Il nuovo Codice civile cinese: prime riflessioni,* in «Roma e America», XLI, 2020, pp. 233 ff.; Diyu Xu, *Il modello cinese di codificazione civile,* in *Codice civile della Repubblica Popolare Cinese*, trad. it. di Meiling Huang, introduzione di Diyu Xu, a cura di O. Diliberto, D. Dursi e A. Masi, Pisa, 2021, vol. III ff.

[143] In general, on the relations between the Roman legal system and Chinese law, see S. Porcelli, *Diritto cinese e tradizione romanistica. Terminologia e sistema*, in «Bullettino dell'Istituto di Diritto Romano», CX, 2016, pp. 254 ff.; R. Cardilli, *Diritto cinese e tradizione romanistica alla luce del nuovo Codice della Rpc*, in *Mondo Cinese*, no. 167, year XLVII no.1, 2019, pp. 26 ff.; S. Schipani, *Vie dei Codici civili e Codice civile cinese*, in «Roma e America», XLI, 2020, p. 192; S. Porcelli, *Il Codice civile della Repubblica Popolare Cinese frutto del dialogo tra Cina e diritto romano*, in «Roma e America», XLI, 2020, pp. 265 ff.

In this regard, it is worth mentioning that legal science accepts the binomial *res corporales-res incorporales* not only in the manual[144], but also in the commentaries of the new code. Specifically, particularly significant is the mention of the bipartition in the commentary to Article 115 (already present in the general part of the Code dating back to 2017 and then accepted in the current text), dedicated to the distinction between immovable and movable goods and the admissibility of the right as the object of another right[145].

It can thus be observed how, in the Chinese legislative text, the adoption of a solution conforming to most European models established in modern times is not matched by the abandonment of the ancient Roman system, which continues to be an indispensable point of reference for interpreters.

[144] Among the most influential, see for all J. Ping, *Minfaxue,* Beijing, 2016, p. 223; W. Liming, *Minfa*, Beijing, 2015, p. 92.

[145] For the text of the provision in Italian, see *Codice civile della Repubblica Popolare Cinese*, cit., p. 26. As for commentary, see S. Hong, *Zhonghua Renmin Gongheguo Minfa Zongze tiaowen shuoming, lifa liyou ji xiangguan guiding*, Beijing, 2017, p. 272.

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THE ITALIAN WAY TOWARD E-VOTING

ABSTRACT. *Electronic voting is undoubtedly a challenge for contemporary democracies. Over the last few years, Italy has adopted a faltering approach to e-voting by fostering various and disjointed local experiments without any national strategy. Recently the Italian legislator has renewed its interest in the issue by setting up a "Fund for electronic voting" in the Ministry of the Interior Budget. The fund is aimed at encouraging e-voting experimentation addressed only to Italians residing abroad and voters who live in a different city from where they are resident. In fact, under Italian election law, the latter category of voters has to go back home to validly cast the vote. To regulate the experiments, the Ministry of the Interior adopted a decree based on the work of a commission of experts. In parallel, the Ministry of Foreign Affairs undertook its e-voting experiment for the election of the consultative body of the Committees of Italians abroad (Com.It.Es.). Starting from the above-mentioned cases, the paper aims to briefly point out some domestic constitutional issues connected to e-voting. Then, it will focus on using e-voting as a way to fill the loopholes in Italian election law according to which those voters who live far from the place of their residence are forced to go back home to validly exercise the fundamental right to vote. This factor was particularly evident during the worst phase of the Covid-19 pandemic when travel also represented a health risk for voters.*

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1. Introduction

Much has been said in recent years about e-voting. To get started on the topic, it is necessary to briefly point out that in this paper e-voting is intended as the use of electronic devices to cast or count electoral votes. From this perspective, e-voting is not generally a way to modernize the electoral process, but it significantly affects the right to vote.

E-voting is part of the most ambitious process to develop e-democracy, which is «the support and enhancement of democracy, democratic institutions and democratic processes by means of ICT, and linked to the engagement and re-engagement of citizens in democracy»[1].

Thanks to the international legal framework, it is possible to arrive at a narrow definition of e-voting. Some international documents – even if they are not legally binding – offer an accurate definition of e-voting. For instance, the 2004 Council of Europe Recommendation specified that e-voting refers to «an e-election or e-referendum that involves the use of electronic means in at least the casting of the vote»[2]. In this view, the casting of the vote is seen as the most critical moment of the entire electoral procedure[3]. In 2013 the Handbook for the observation of New Voting Technologies published by the OECD provided a wider definition of e-voting as the «use of information and communication technologies (ICT) applied to the casting and counting of votes». Therefore, in this sense, e-voting includes also the counting phase through ballot scanners. The Council of Europe returned to the definition of e-voting with the 2017 Recommendation that clarified e-voting as «to cast and/or count the vote».

[1]Council of Europe, Recommendation CM/Rec (2009)1 of the Committee of Ministers to Member States on electronic democracy (e-democracy), § 5 and 7, 2009.

[2] Council of Europe, Recommendation Rec (2004)11 of the Committee of Ministers of Member States on legal, operational and technical standards for e-voting.

[3] M. Rosini, *Il voto elettronico tra standards europei e principi costituzionali. Prime riflessioni sulle difficoltà di implementazione dell'e-voting nell'ordinamento costituzionale italiano,* in «Rivista AIC», 1/2021, 8.

2. E-voting in Italy: past attempts and the state of art

In Italy, the discussion about the electronic systems of voting seems to be again an element of interest both in politics and in law. The Italian debate on electronic voting (voto elettronico) began in the 80s. During these years, some Italian MPs presented bills concerning the electronic ballot and the introduction of automated electoral procedures[4]. As a result, constitutional scholars have also focused their interest on the topic[5]. During the last two years, the debate on e-voting has increased notably because of the Covid-19 pandemic which brought back the debate on alternative forms of voting. The pandemic has shown us how the limitations of the freedom of movement have directly affected citizens' rights, including their right to vote. In the last few years, there have been several attempts to implement e-voting, but they were conducted locally without a national strategy.

The interest in e-voting has soared meaningfully in the last fifteen years throughout the EU Member States and EU institutions. About the European Union, we have to remember that recently a Council Decision of 13th July 2018 amended the Act concerning the election of the members of the European Parliament by introducing a new article 4a which states: «Member States may provide for the possibilities of advance voting, postal voting, and electronic and internet voting, in elections to the European Parliament. Where they do so, they shall adopt measures sufficient to ensure in particular the reliability of the result, the secrecy of the vote, and the protection of personal data in accordance with applicable Union law»[6]. Thus, the EU explicitly encourages, under certain conditions, the use of alternative forms of voting, including electronic voting. As specified in the preamble, one of the reasons for issuing this Decision is ensuring a stronger turnout and encouraging participation in the European

[4] See. E. Bettinelli, *La lunga marcia del voto elettronico in Italia*, in «Quaderni dell'osservatorio elettorale», no. 46, 2002.

[5] For some of the first doctrinal works on the topic see: A. Agosta, F. Lanchester, F. Spreafico (eds), *Elezioni e automazione. Tutela della regolarità del voto e prospettive di innovazione tecnologica,* Franco Angeli, Milan, 1989.

[6] Article 1, par. 4 Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976.

elections. On this point, it should be noted that Decision no. 2018/994 leaves the regulation of the way in which the vote is expressed to the legislation of the Member States[7].

Probably, the most important foreign experience is that of Estonia. In this Baltic Country, many aspects of citizens' lives can be conducted online. Even the right to vote can be exercised through an innovative internet voting system[8].

Considering the Italian context, the most important initiative was carried out by the Lombardy Region during the 2017 referendum called to ask for greater legislative autonomy from the Government[9].

The referendum was held using tablets set up in physical polling stations[10]. It was still on-site voting, since citizens had to go personally to cast their vote. But the innovative aspect concerned the introduction for the very first time of electronic devices to collect votes. However, many cases of failure were reported. For this reason, the time spent by electoral officers counting the electronic votes increased significantly.

All the circumstances of these last few years, together with the European experience, have brought out the critical issues of the current election law. The growing awareness of the topic has led the political discussion to focus on the opportunity of introducing electronic tools on a national scale. Additionally, the Covid-19 pandemic

[7] Rosini, *Il voto elettronico tra standards europei e principi costituzionali. Prime riflessioni sulle difficoltà di implementazione dell'e-voting nell'ordinamento costituzionale italiano,* cit.

[8] M. Schirippa, *Il voto elettronico nell'esperienza europea tra pregi e criticità*, in «Federalismi.it», no. 6, 2020, 239 ff. From the same author see Schirripa, *Le nuove frontiere del diritto di voto. Uno studio di diritto comparato,* Wolters Kluwer, Milan, 2022. For more information about the Estonian experience see L.G. Sciannella, *Il Remote Internet Voting in prospettiva comparata. Il caso dell'Estonia*, in «Diritto pubblico comparato ed europeo», no. 2, 2020, pp. 451-476.

[9] It is necessary to specify that there have been some minor experiments since the 2000s but they affected only some polling stations in the municipality involved. For more information see: P. Carlotto, *Il voto elettronico nelle democrazie contemporanee*, Padua, Cleup, 2015; A. Gratteri, *Finalità e problemi del voto elettronico: le prospettive della sua attuazione in Italia*, in «Forum Quad. Cost.», 25th March 2015.

[10] The electronic voting during the regional referendum was regulated by Lombardy regional law no. 63/2015 (*Introduzione del voto elettronico per il referendum consultivo. Modifiche alla legge regionale 28 aprile 1983, n. 34. Nuove norme sul referendum abrogativo della Regione Lombardia – Abrogazione l.r. 31 luglio 1973, n. 26 e successive* modificazioni) and Regional regulation no. 3/2016 (*Regolamento per lo svolgimento del referendum consultivo mediante voto elettronico*).

caused increased interest in e-voting or alternative forms of voting to the traditional ones.

In 2019, the Budget Law set up a one-million-euro fund at the Ministry of the Interior to implement electronic voting. This was an important step in the Italian e-democratization process[11]. It not only provided for financial support but also encouraged a national level discussion on e-voting. The fund was aimed at financing experimentation directed towards a specific category of voters. Specifically, it was addressed to voters who are not living in their place of residence because of work, study or medical treatment[12]. The Italian legislator's approach to electronic voting is gradual and takes into account only limited cases.

In this context, it seems relevant to clarify why the Italian legislator has chosen to start precisely from the voters who are not in their place of residence on election day. Unlike many countries (for instance France, Germany, the United Kingdom), Italian election law does not allow absentee or early voting forms. A very limited exception is foreseen only for Italians residing abroad or temporarily abroad for work, study, or medical reasons who can vote by mail.

In 2000, a constitutional amendment modified Article 48 of the Italian Constitution by introducing a new third paragraph. According to the new provision, the law must lay down the requirements and modalities for citizens residing abroad to exercise their right to vote and it must guarantee the effectiveness of this right. Moving from the new constitutional framework, the Italian legislator changed the election law by introducing postal voting for citizens resident abroad.

To understand the legal basis of the Italian postal voting system, it is necessary to keep in mind the Italian Constitution provisions stating that «The vote is personal and equal, free and secret. The exercise thereof is a civic duty» (Article 48, § 2). We can affirm that the need to guarantee 'the effectiveness' of the right to vote for those who are abroad can be interpreted as a reason to justify postal voting.

[11] Article 1, par. 627, Law no. 160/2019 (Italian Budget Law for the year 2020).

[12] Article 1, par. 628, Law no. 160/2019 (Italian Budget Law for the year 2020).

More recently, a new amendment to Italian election law[13] has extended the right to vote by mail also to citizens who are temporarily abroad for work, study, or medical reasons even if they are not properly Italians residing abroad because they are not registered on the special registry created for them called AIRE (*Anagrafe degli Italiani residenti all'estero*).

The Italian Constitutional Court has not yet had the chance to rule against postal voting. However, on two occasions the Court issued warnings to the legislator concerning the need to correct the distortions of the postal voting system for Italians abroad[14].

However, the 20-year-experience in postal voting for citizens resident abroad and the most recent experience for citizens temporarily abroad (since 2015) have shown serious weaknesses in the management of votes expressed by mail from foreign countries[15].

The lack in the election law of any forms of absentee or early voting creates additional problems. Voters are forced to go back to the municipality where they are resident to correctly cast their vote. In this view, e-voting could be a great opportunity to fill this loophole in Italian election law.

As we have seen so far, the debate on the topic has finally begun to have an impact. Although initially disregarded, the proposals on e-voting have significantly developed during the last couple of years and were translated into a series of concrete actions.

In line with these, the Decree-law no. 77/2021 amended the provision contained in the budget law for the year 2020 to extend the e-voting experimentation to regional and administrative elections[16].

Besides this, according to the original provision, the Ministry of the Interior, in

[13] Article 2, par. 37, Law no. 52/2015 that introduced a new article 4-*bis* in the Law no. 459/2001.

[14] Italian Constitutional Court ruling no. 63/2018 and no. 195/2003.

[15] For an accurate analysis of critical issues concerning voting for Italians living abroad see: V. Desantis, *Il voto degli italiani all'estero: nuove criticità e vecchi problem nella prospettiva del superamento del voto per corrispondenza*, in «Federalismi.it», no. 32, 2022.

[16] Article 38-bis, par. 10, Decree-law no. 77/2021.

agreement with the Ministry of Technological Innovation and Digitalization (then Ministry for Digital Transition), had the task of adopting a decree to define how to use the 'Fund for electronic voting'.

The Ministry was to adopt the decree within thirty days from the entry into force of the 2020 Budget Law. However, the deadline was not respected. For this reason, the term was extended to 31 June 2021. Finally, guidelines for testing e-voting were approved by a ministerial decree issued on 9 July 2021. Of course, the decision to involve regional and administrative elections in this project made it necessary to update the guidelines. A few months later, the ministerial decree of 21 October 2021 established the terms and conditions for the experimentation in the forthcoming regional and administrative elections, in full compliance with the provisions of Decree-law no. 77/2021. However, «in consideration of the international political situation and the risks connected with cyber security» the start of the experimentation has been postponed to 2023, the year when it was presumed that there would be political elections (Art. 6, para. 3 of Decree-Law no. 41/2022). As is well-known, given the premature termination of the parliamentary term, the elections were held on 25th September 2022, so there was no time to organize the experimentation. Therefore, unless there are further derogations, it is expected to begin for the next administrative elections.

The drafting of the guidelines directly involved some institutional bodies. It seems interesting to point out that these guidelines were written up by a Commission set up by the Ministry of the Interior's Central Directorate for Electoral Services composed of the representatives of the Ministry of Foreign Affairs and International Cooperation, the Ministry of Justice, and the former Ministry for Technological Innovation and Digitization.

With the e-voting regulation, the legislator aims to stop the numerous fraudulent episodes that occurred in the votes of expatriates. Additionally, e-voting seems to be a valuable solution for voters who live in places where they are not officially resident. In the current legislative context, citizens have to go back to the city of residence to validly cast their vote, which means that people have to deal with considerable organizational and economic difficulties. These obstacles often represent real impediments to exercising the fundamental right to vote. Furthermore, current election law may also hurt turnout

as recently underlined by the White paper on abstentionism[17] published in April 2022 by the Italian Ministry for relations with Parliament. The report distinguishes between two kinds of abstentionism affecting the turnout. The first is voluntary abstentionism, which is the case if citizens spontaneously choose not to vote because they are disaffected with politics. The second is involuntary abstention, which occurs when citizens cannot cast their vote because of obstacles or objective practical reasons, even if they want to participate. Among these obstacles, there is undoubtedly the presence of no alternative form to the in-person vote on election day.

3. The forthcoming experimentation on electronic voting

As already mentioned in the previous section, the guidelines on e-voting experimentation were approved on 9 July 2021[18], with a ministerial decree issued by the Ministry of the Interior and the Ministry for Digital transition. The decree establishes the principle of gradual implementation as the core of the electronic voting experiments. In the application of this general criteria, the primary goals are, on the one hand, to verify the correct functioning of electronic voting and, on the other, to balance costs and benefits. To do so, the decree provides a two-stage approach. The first phase concerns a voting simulation. The idea is to reproduce all the stages of an electoral event and to involve a significant sample of voters in the area chosen for the simulation (municipal or consular area). The main purpose of this procedure is to test the practical and operational solutions since the outcomes will not have any legal value. To make the simulation work properly, the decree states that voters must be aware of the meaning of the simulation phase and they need to be acquainted with the lack of legal value of the related results. A targeted communication campaign is anticipated, to be launched through various channels to make the voters aware of the simulation and its effects.

[17] White paper "*Per la partecipazione dei cittadini. Come ridurre l'astensionismo e agevolare il voto, Dipartimento per i rapporti con il Parlamento*", April 2022, available at the following link: <https://www.riformeistituzionali.gov.it/media/1427/ebook-libro-bianco_02_05_22.pdf>.

[18] Ministry of the Interior decree 9th July 2021.

After the simulation, real experimentation can be held. This phase takes place during a real electoral event, so it produces binding results. According to the Ministerial decree, at this stage, electronic voting should represent a concrete alternative to traditional voting methods. Therefore, voters must be able to opt in advance, in a fixed time frame before the election day, whether to exercise the vote on-site or electronically. If no choice is made, the procedure establishes that citizens are asked to vote in person in the municipality where they are registered or by mail in case of Italians living abroad.

To participate in the experiment, voters are requested to apply at their municipality's electoral office. Once the form is received, the office carries out an initial verification to ensure that the applicant has the right to vote. Only in the case of a positive outcome, does the office certify this status by generating a 'qualified attribute' uniquely related to the applicant. Then, a digital identity is created for each applicant, and this is associated with its profile. Digital identity is an essential requirement and an enabling factor for voting electronically. Whereas, for the authentication, the voters are identified by the Italian public Identity System (so-called SPID, *Sistema pubblico di identità digitale*).

Both in the simulation phase and during the following experimentation, the Ministerial decree envisages that electronic voting can take place in two different forms. The first one consists of a web application to which citizens access to express their votes. This is certainly a way to enhance the absentee voting method, since people can express their choice from wherever they are located, simply by accessing the online platform. The second one is 'on-site' voting characterized by the use of special electronic devices situated in the polling station. In this case, the voters' physical presence is still requested, but electronic tools ensure a simplified and paperless electoral procedure.

The Ministerial decree points out the criteria for regulating the entire electronic voting process. First of all, the system needs to ensure neutrality, it must not, even indirectly, influence the voter's intention. Moreover, the system must protect the secrecy of the ballot. This means that the system has to be built in a way that votes are not referable to voters under any circumstances. To achieve this, the Ministerial decree sets some basic requirements. The electronic system must separate the voter's information from those relating to the cast vote. A voter cannot cast more than one vote in the same electoral event. Very conveniently it is also possible to express a blank ballot.

Nevertheless, the voter is not allowed to cast a null vote.

In the framework drawn up by the Ministry of the Interior, the voter should be able to verify if the choice he/she has made corresponds to his/her will. Therefore, the device used for voting should allow voters to check their vote on the screen before they submit it definitively. Once the vote is electronically cast, it is permanently acquired by the system and virtually 'sealed'. All the votes are collected in an electronic ballot box without any alteration and they are mixed up virtually. In addition, all turnout data are encrypted. Only at this point, just before the counting of electronic votes, is the virtual seal removed. After the closure of all voting operations, including those carried out with traditional methods, the counting of the votes can start. The results of electronic voting are immediately communicated to the bodies entitled to proclaim the results who read up the minutes and add up votes expressed both electronically and in the traditional way.

The Ministerial decree focuses on the need to guarantee the secrecy and personal vote principle, in line with the ministerial guidelines that recognize the rule of a secret ballot as an essential value for all phases of electronic voting.

The last section of the Ministerial decree is specifically addressed to the «system of guarantees». It primarily consists of the chance to demonstrate that each vote has been correctly included in the electronic ballot box and that the procedure ensures the protection of all personal data involved. In addition, the Ministerial decree establishes that the source code of the electronic voting system is published on the institutional website of the Ministry of the Interior, to ensure transparency and to allow independent and extensive verification of the system itself. Plus, the decree opportunely prohibits the issue of voting proofs that somehow reveal the content of the vote itself. The aim is to avoid the illegal use of such a document by third parties (for instance vote-trading).

4. The recent experimentation for the election of the "Com.It.Es"

In all the initiatives discussed so far the Ministry of the Interior has played a key role. But it is not the only player to have taken action. The Ministry for Foreign Affairs and International Cooperation (MAECI) has recently completed the first trial of electronic voting for the elections of the Committees for the Italians abroad (*Comitati*

per gli italiani all'estero – Com.It.Es)[19].

The use of electronic voting for the renewal of Com.It.Es has already been discussed in the past, even though it has brought few results. In 2012, the Mario Monti government approved a decree-law according to which the Ministry of Foreign Affairs, in agreement with other Ministries, were to adopt a ministerial regulation concerning the implementation of electronic voting for the election of Com.It.Es[20]. The ministerial regulation was to ensure the principle of secrecy of the ballot and lay down the criteria for voting data encryption. However, the ministerial regulation on the e-voting for the Com.It.Es. was not adopted because the deadline fixed by the decree-law expired. For this reason, the following 2015 Com.It.Es. elections were conducted using the already known postal vote.

More recently, another experiment was carried out on 3 December 2021 and involved, on a voluntary basis, voters residing in 11 consular districts[21]. As has already occurred in other similar cases, the experiment did not produce any legal effects. In fact, for this kind of election, only the vote by mail remained binding.

The voter who wanted to participate in the trial and vote digitally had to connect to the MAECI *IoVoto* portal. Even in this case, the above-mentioned SPID system was used for the authentication.

The Ministry of Foreign Affairs decree[22] also includes provisions relating to the trial procedure. It seems particularly significant to underline that the decree was approved by the Italian Authority for Data Protection, which only raised concerns regarding the hosting provider. As specified by Article 2 (Principles), the whole set of rules introduced by the decree is inspired by Article 48 of the Italian Constitution and in particular by the principles of the personal vote, equality, freedom and secrecy of the

[19] The Committees were established by Law no. 286/2003. Their normative framework was completed by D.P.R. no. 395/2003. Anyway, already Law no. 205/1985 had established the so-called Committees for Italian emigration (Comitati dell'Immigrazione italiana). Nowadays, the Committees are bodies that represent Italian residents abroad in the relationship with Italian embassies and consulates (Article 1, par. 2, Law no. 286/2003).

[20] L. Trucco, *Le nuove tecnologie salveranno il voto all'estero degli italiani*? in «Forum Quad. Cost.», 6 January 2013.

[21] Berlin, Munich (for the Munich and Nuremberg committees), Marseille, London (for the London and Manchester committees), The Hague, Houston, Sao Paulo, Tel Aviv and Johannesburg.

[22] Ministry for Foreign Affairs and International Cooperation decree 22 November 2021.

vote. The decree clarifies that the main objective of the experiment is to collect technical elements regarding the feasibility of electronic voting for the election of Com.It.Es. In line with the Interior Ministry decree examined above, the Ministry of Foreign Affairs decree states that it is essential to inform voters about the meaning and the functioning of the experiment. For this reason, it requests an informative campaign beforehand.

Regarding the procedural aspects, the decree provides that e-voting is hosted by a Cloud service provider previously approved by the Italian Government. The vote is to be expressed via the Internet since there are no physical polls where voters can go to cast their vote. The entire Internet voting process takes place on the Ministry of Foreign Affairs web portal called *IoVoto.* To gain access, voters should use a personal device and authenticate themselves twice through the SPID System. Following this, voters are requested to give their consent to the personal data treatment. At this point, each voter is notified with a personal code. Once all preliminary procedures have been fulfilled, the voter can choose the list and the candidates. The choice has to be confirmed to become definitive. The vote is immediately transmitted to the database and encrypted. In this phase, all the voters' data are separated from the data relating to votes. At the end of the procedure, the voter receives a confirmation attesting he/she has voted validly. But, again, no reference to the choice expressed is permitted.

The counting procedure can take place only when all the consulates selected for trial conclude the collection of votes. In this phase, a Commission composed of 5 members and chaired by a diplomat is called to perform the following operations. The Commission has to check that for each Com.It.Es there have been at least 20 e-voters. If this condition is fulfilled, votes can be counted. On the contrary, if there are fewer than 20 e-voters, the counting operation is suspended. In addition, it is up to the Commission to draw up a report of the counting of the votes.

In the light of the report of the 3 December 2021 experiment, the decree entrusts to the Ministry of Foreign Affairs the task of drawing up a report (within 9 months from the conclusion of the e-voting operations) with all the data related to the electronic consultation.

As regards the turnout, we can briefly say that there were 7756 voters registered to participate in the e-voting experiment for Com.It.Es. Among them, only 1236 were registered on the SPID System, the prerequisite for taking part in the digital vote. The

voters were 672 overall[23].

Even if it was only a one-off experiment, this experience represents the first step toward a new voting system for the election of Com.It.Es. Moreover, from a long-term perspective, it would permit the correction of some serious malfunctioning that has occurred the voting for Italians residing abroad. The conclusion of the technical analysis in the final report states that use of remote e-voting is feasible for the election of Com.It.Es., while further research would be needed for the use of this system for elections and referenda.

In the following section, we will analyze which features an e-voting system has to respect to be fully compliant with the Italian constitutional framework. Internet voting[24] raises several complex issues that would require an in-depth analysis of the relevant constitutional principles and legislation. As can be easily understood, the vote expressed through a personal device in the form of *home voting* could not sufficiently guarantee all the conditions set down by the Italian Constitution, in particular, the secrecy and personal vote principle. Finally, the decree aims to establish a connection between the two different experiments. The idea is to share the experience gained by the Ministry of Foreign Affairs with the Ministry of the Interior where the fund for electronic voting was established in 2020. All data collected during the Com.It.Es. experiment must be sent to the Ministry of the Interior.

5. Some constitutional issues related to e-voting

E-voting is most certainly an important challenge for Constitutional law. The use of electronic devices for voting purposes raises serious constitutional issues. Before analyzing the impact of e-voting on the Italian Constitutional framework, we must

[23] All the data are contained in the Final report published by MAECI and available at the following link: <https://www.esteri.it/wp-content/uploads/2022/07/MAECI___Portale_Voto_Elettronico___Relazione_Finale.pdf>.

[24] For further definition of Internet voting see: K. Goos, B. Beckert, R. Lindner, *Electronic, Internet-based voting*, in R. Lindner, G. Aichholzer, L. Hennen (eds), *Electronic Democracy in Europe. Prospects and Challenges of E-Publics, E-Participation and E-Voting*, Springer, 2016, pp. 135 ff.

remember that recently the topic of e-voting has surfaced again regarding Italians residing abroad and Italians not living in their place of residence. Therefore, the Italian legislator is about to introduce some e-voting experimentation for these categories. E-voting may offer major benefits. First, it is seen as an instrument to make the exercise of voting easier for expatriates and citizens located in a city where they do not reside. In addition, e-voting could overcome the problems identified in postal voting.

As mentioned above, Article 48 paragraph 2 of the Italian Constitution states that the vote must be free and secret, personal and equal and that the exercise thereof is a civic duty. According to Italian constitutional legal doctrine, «personal and equal» and «free and secret» are two pairs of guarantees[25] that represent the minimum voting standards as regards democracy[26].

Based on these principles, scholars have started raising questions about the compliance of e-voting with the constitutional framework.

One of the major problems concerns system security. Many informatics experts have expressed doubts about the current safety level of the most modern voting infrastructure. Two of the most important informatics associations in Italy have spoken out against e-voting as imagined by the Ministry of the Interior decree[27]. In this context, even Blockchain would not be helpful.

But security is not the only concern. Even if an e-voting infrastructure is absolutely safe, it is necessary to investigate if and to what extent electronic voting could guarantee the personal vote principle and the secrecy of the vote. The personal principle requires that the choice has to be cast directly by the voters. In some other countries, the principle of the personal vote is not constitutionalized. As a result, for instance, proxy voting can be easily introduced into the election system. Unlike in France and the United Kingdom, in Italy proxy voting is forbidden by election law, and it is ontologically incompatible with the personal principle stated by the Italian

[25] E. Battinelli, *Voto (diritto di),* in *Dig. Disc. Pubbl.*, 1990, § 8.

[26] F. Lanchester, *Voto (diritto di)*, in *Enc. Dir*., 1993, § 17.

[27] In relation to the Ministerial decree, the "Gruppo di Ingegneria Informatica" (GII) and the "Gruppo di Informatica" (GRIN), two groups of Italian Informatics experts, recently approved a motion on e-voting expressing high risks for the safety of the electoral procedures.

Constitution. Only very limited exceptions are envisaged. This is the case of voters who are unable to express their vote because of their physical or medical condition (e.g., blind people). Under this specific circumstance, voters can be helped by their relatives who are supposed to only give aid to the sick voter but who do not replace or represent him/her. This provision represents a defence against fraudulent episodes that could occur with proxy voting.

The personal vote principle leads some constitutional scholars to also doubt the compatibility of the postal vote. As anticipated in the first sections, nowadays election law only allows Italians residing abroad and Italians temporarily abroad for work, study or medical treatment to access this voting method. The legal basis of this exception can be found under Article 48, paragraph 3 of the Italian constitution, which requires the legislator to guarantee the effectiveness of the vote for Italian expatriates. Therefore, the postal vote is admitted only for this limited category of voters just to protect its effectiveness. Unfortunately, Italian postal voting is badly organized. There is a lack of transparency, especially regarding the procedure of sending individual letters and voting sheets by mail. Moreover, there is a lack of controls over shipments. All these factors contribute to considerably increasing the risk of violation of the principles of secrecy and the personal vote principle.

Therefore, we must consider that remote electronic voting could pose similar problems. First of all, remote voting cannot guarantee that the person who sends the vote from home through a personal device is the eligible voter who is supposed to cast it. Online authentication cannot completely prevent this risk which implies a potential violation of the personal vote principle. Perhaps, in this field, it could be useful to implement biometric technologies to verify voters' identities[28].

Another important aspect concerns the relationship between the principle of the secrecy of the ballot and the use of remote e-voting systems. Voting secrecy means that each vote must not be attributable to the citizen who expressed it. In other words, the vote must remain anonymous. This principle is closely connected with the principle

[28] ROSINI, *Il voto elettronico tra standards europei e principi costituzionali. Prime riflessioni sulle difficoltà di implementazione dell'e-voting nell'ordinamento costituzionale italiano,* cit., p. 24.

of equality of the vote. Moreover, it is a fundamental principle of every democracy. Secrecy is also a prior requirement for protecting freedom, as repeatedly stated by the Italian constitutional court[29]. Only if the voters can rely on the secrecy of the ballot, can they express their will with full freedom, without any pressure or suggestions. Remote e-voting, as well as postal voting, raises a fundamental difficulty in respect of the principle of secrecy[30]. To illustrate the complexity of the problem the following example may be presented: the voters could be observed by someone while expressing their votes from home. Nonetheless, to ensure the respect of the secrecy principle, the e-voting system must not allow people to memorize or print the choice made.

6. Final remarks

All the initiatives illustrated in previous paragraphs represent a remarkable step forward on the Italian way towards e-voting[31]. However, despite the progress, there is still a long way to go. The first phase of the experimentation by the Ministry of the Interior should have started in 2022, during the last administrative elections and referendum but it did not happen because the Government by decree-law postponed the deadline.

[29] Italian Constitutional Court ruling no. 98/1968.

[30] Rosini, *Il voto elettronico tra standards europei e principi costituzionali. Prime riflessioni sulle difficoltà di implementazione dell'e-voting nell'ordinamento costituzionale italiano,* cit., p. 30.

[31] Although not related to e-voting in the strict sense, it is worth briefly mentioning another important innovation that has recently been introduced in Italy. This is the electronic collection of signatures for referendums and citizens' initiatives (see Article 1, paragraphs 341-344 of Law No. 178/2020 and Article 38-quater of Decree-Law No. 77/2021). Recently, the Government completed the public platform for collecting subscriptions for referendums and citizens' initiatives (available at the following link: <https://firmereferendum.gov.it/referendum/open>). This innovation, when fully implemented, will greatly simplify the collection of signatures, including through the use of the SPID system. Doubts have been raised in the doctrine on the use of this tool and on the need to accompany this reform with other reforms, including constitutional ones. Some authors have pointed out that democratic processes sometimes need to be 'slow' in order to function properly (see R. Borrello, *Firma digitale e slow democracy*, in «Nomos. Le attualità del diritto», no. 3, 2022; P. Carnevale, *La richiesta di referendum abrogativo dinanzi alle risorse della digitalizzazione. Qualche prima considerazione sulla sottoscrizione per via telematica*, in «Nomos. Le attualità del diritto», no. 3, 2022).

Looking at the Italian constitutional framework, it is necessary to distinguish between the different infrastructures that can support e-voting. On the one hand, e-voting can be held in protected public facilities. On the other, remote e-voting can be achieved through personal devices in the form of home voting. Looking again at the essential voting requirements established by Article 48 of the Italian Constitution, it is possible to affirm that the former kind of e-voting is more compatible with our fundamental law. Of course, to fully guarantee the secrecy and the personal vote principle even the infrastructure has to ensure security and impenetrability from the outside. It is not difficult to imagine the introduction of public e-voting stations in place of or in addition to the traditional ones. Only in this way can the personal vote and secrecy principles be adequately protected.

E-voting relates to wider issues of compatibility with the Italian constitution which go to the heart of the hesitancy of scholars to embrace this innovation. Somehow, remote e-voting could be compared with the postal voting, at least as regards the respect for the provisions under Article 48 of the Italian constitution. Remote e-voting collides inevitably with the personal vote and secrecy principles. When citizens privately express their vote from their own home, the State has no power to control whether those votes are expressed in full freedom. In this view, the voting booth offers more guarantees.

As previously pointed out, the Italian legislator is about to experiment with e-voting only for two kinds of voters: Italians residing abroad and voters living in a place that is not their official residence. Nowadays Italian expatriates can vote by mail. The same opportunity is not given to voters who live in Italy, but in a city where they are not residents. It is estimated that there are approximately 4,9 million Italian citizens (10,5% of all Italian voters) who have to go back to their residences to vote validly[32]. Currently, Italian election law provides a few electoral refunds (for the journey by train or affiliated air or sea companies). However, they fail the goal of securing concrete financial aid, since they are not sufficient to cover voters' travel expenses. As a result, due to both organizational and economic reasons, many voters decide not to go and

[32] White paper, cit., p. 17. Among the 4.9 million voters who live or study outside their province of residence, 1.9 million (4% of all voters) would take at least four hours round trip to return to their place of residence.

vote and, in so doing, they sacrifice their fundamental right to vote. This is an anomaly that urgently needs a solution.

One option might be to extend postal voting to citizens who live far from where they reside, in a way similar to what already happens for Italians residing abroad (such as by introducing forms of early voting). An alternative might be to implement electronic voting by taking the necessary precautions. An on-site e-voting facility would be preferable and the IT supporting infrastructure should wholly guarantee compliance with all voting security standards.

In the light of the above, I believe we should look at e-voting as an opportunity. Of course, there are still some issues of compatibility with the personal vote and secrecy principles to solve. Nevertheless, these tools might facilitate voting by allowing citizens to vote who would otherwise be unable to do so for all the reasons outlined above. In this sense, it is worth recalling that there are other constitutional provisions relevant to the right to vote besides Article 48. In fact, Article 3 should also be considered. Its second paragraph establishes: «It is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country».

With the terms «remove those obstacles» that impede «the effective participation of all workers in political […] of the country» the difficulties connected with living far from the voter's place of residence immediately come to mind. Hence, Article 3, paragraph 2 could be balanced with Article 48, paragraph 2, in particular with the personal vote principle, in order to come to an acceptance of remote e-voting. In this sense, it is important to highlight another principle that is part of the equation, that of universal suffrage.

Finally, both the experiments conducted by the Ministry of the Interior and those conducted by the Ministry of Foreign Affairs seem to be positive enough to encourage a debate on e-voting in Italy. Last year's Com.It.Es. simulation was held using a home voting system. However, it would be better if the Ministry of the Interior's forthcoming experiment were held in controlled public polling stations in the form of on-site e-voting.

GIULIA VALENTI*

TRANSPARENCY AND DIGITAL TECHNOLOGIES IN PUBLIC PROCUREMENT DURING THE PANDEMIC

ABSTRACT. *In the fight against the pandemic, the Italian Government adopted strong simplification measures of the Public Procurement system, with the purpose of ensuring the quick delivery of essential goods and services and in the hope of avoiding the stop of many relevant economic activities. These measures simplified the procedure for Public Tenders by eliminating some controls and disclosure obligations. Yet these measures brought out a trade-off between transparency and simplification that damaged the possibility of democratic control over public action. E-procurement 2.0 could make it possible to overcome this trade-off. The article will start with the analysis of the principle of transparency and its difference with inferability, it will then analyze the Italian governance through the pandemic and touch on the new e-procurement systems as a possible solution to the lack of inferability of public action.*

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1. Introduction

The outbreak of the pandemic caught the Italian administration off guard, highlighting the weakness of the health system and of the entire universe of public procurement. The Government introduced several reforms aimed at addressing the emergency, providing a series of urgent and temporary measures. After two years of state of emergency, the constant uncertainty regarding the evolution of the pandemic has led the Government to provide several extraordinary measures, whose effectiveness has been extended over time. The Government promulgated many law decrees[1] (almost all subsequently converted into laws by the Parliament) enacting exceptions or suspensions of some of the rules set out in the Procurement Code. These had the common goal of simplifying and streamlining public procedures in order to avoid the block of the public procurement system and therefore allow the immediate supply of services and materials necessary to fight the pandemic. The Italian Government chose to achieve these objectives by relying strongly on simplification and urgent legislation which, however, occurred to the detriment of transparency and security[2].

The weakening of disclosure requirements within tender procedures and the use of emergency procedures, aimed at reducing bureaucracy and procedural delays, constitute a strong obstacle to transparency as a principle of democracy[3], not allowing full inferability of the procedures and preventing widespread control by civil society.

The emergency legislation showed a massive trade-off between transparency and simplification: while transparency, as openness and inferability, increases bureaucracy, and thus slows down public administration, simplification speeds up public action removing controls and publication disclosures. However, the relationship between these

[1] As will be explained, Italy can use decrees also for legislative purpose in case of special emergency. The decree is adopted by the Government and must be converted in a law by the Parliament within five days. Law decrees and legislative decrees are two different tools that the Constitution provides to the Government for legislative purposes. While the first can be enacted by the Government and only later approved by the Parliament, in cases of emergency, the second needs a specific law that legitimates the Government to legislate on specific matters under specific principles.

[2] Cfr. E. CARLONI, *La trasparenza come risposta all'emergenza*, April 26th 2020, in<https://www.anticorruzione.it/>.

[3] M.A. SANDULLI, *accesso alle notizie e ai documenti amministrativi*, in enciclopedia del diritto, 2000.

two principles is not necessarily one of contradiction or conflict. Transparency and simplification can be reconciled through e-procurement and new ITC technologies, which would allow access to a multitude of large-scale data (big data) already indexed, or processed, thus allowing both a transparent and effective and fast administration, since many of the bureaucratic steps in the tender procedures can be carried out directly by the software.

Moving from the pandemic experience, this article will try to stress two points: what is the relationship between simplification and transparency? If simplification is meant to clarify administrative procedure why it doesn't always lead to a better transparency? and second, how the emergency rules in public procurement had scarified transparency?

In this sense, the drive towards computerization 2.0 pushed for by the recovery plan can be seen as a decisive solution.

2. The transparency discourse

Transparency is a principle fostering impartiality and good administration[4], it is the base of the administration activity and can be defined as a «a real and proper Government fundamental value that expresses the behaviour that Public Administration has to adopt. It is a goal to reach, especially if we think of public administration as a tool to serve the community, expression of the community rather than an expression of a higher power»[5]. In other words, transparency must guarantee inferability of the activity of the Administration to all citizens[6].

At a European level, due to the lack of legitimacy of the European Institutions, openness has gradually become the 'guiding principle' of the functioning of the EU

[4] Cfr. A. Aloia, *Open Government, tra digitalizzazione e trasparenza della PA*. 2014,in <https://www.diritto.it/open-government-tra-digitalizzazione-e-trasparenza-della-pa/>.

[5] Sandulli, *Codice dell'azione amministrativa*, Giuffrè, Roma, 2010, p.89.

[6] C. Hood, *Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?*,*West European Politics*, no. 2010, pp. 989-1009.

machinery and a foundation of democracy in the Union[7]. Starting from a few decisions of the Court of Justice, the principle is now enshrined in Article 1 TEU regarding the decision-making process, which has to be taken «as closely as possible to the citizen», and in Article 15 TFEU that states that all the EU's institutions «shall conduct their work as openly as possible».

The principle was initially enshrined by European rules on fair competition, that aim at protecting equality conditions among the bidders on public tenders. These entailed publishing all information related to any stage of the administrative proceeding, demonstrating that under this meaning transparency equates to openness of the proceeding. However, the extension of the principle evolved into an instrument of good governance.

In the Italian legal system, nudged by European law, transparency originated from the principle of good performance and impartiality, thus the principle of openness must be applied not only on the administrative structures, but also on public function and on the exercise of Public Power[8]. Indeed, the two principles reflect two aspects of openness: good performance requires the Public Administration to counteract inertia in adapting to new techniques and tools that can facilitate and improve the efficiency of public action; in this sense, the principle of good performance requires the establishment of an updated and efficient administration; impartiality, on the other hand, refers as openness as inferability of public action.

In the Italian Constitution, transparency is not expressly mentioned. The only reference is in article 97, stating that public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration. The actual principle of transparency is the result of a long and important evolutionary process starting in 2005, when a law[9] set transparency as a basic principle of public

[7] A. Alemanno, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy,* European Law Review, HEC Paris Research Paper No. LAW-2013-1003, <https://ssrn.com/abstract=2303644>.

[8] G. Corso, *Manuale di diritto amministrativo,* Giappichelli, Torino, 2013.

[9] Law February 11th 2005 no. 15, entitled «Amendments and additions to the law of 7 August 1990, no. 241, concerning general rules on administrative action», explicitly introduces the principle of transparency into the law on the procedure prior to the regulatory intervention, the principle had already been abundantly recognized by

action; in 2007, a decree provided for specific publication requirements on educational offer that university has to follow[10]; in 2009, a law modifying the administrative proceeding legislation identified access as a general principle of administrative activity, «in order to encourage participation and ensure impartiality and transparency»[11]; finally, the same law[12] provided an openness requirement for every group of Public Administration to publish on the website a minimum amount of information related to the structure and functions of the public office[13].

With a more specific focus on public tenders, the legislation implementing directives 2004/17/EC and 2004/18/EC[14] establishes that public administrations must comply with the principles of «economy, effectiveness, timeliness and correctness; the assignment must also comply with the principles of free competition, equal treatment, non-discrimination, transparency, proportionality, as well as that of advertising in the manner indicated in this code», making the principle mandatory for the contracting authority. The last step in this long journey is the raise of ICT technologies and big data. New legislation adopted in 2013[15] aimed at improving transparency with the use of ICT technologies and at finally achieving a complete transparent administration. The decree led Italy into a new era foreseeing the publication of more and more information on administration web site.

Nevertheless, more information available does not necessarily mean greater

univocal jurisprudence, as there was no specific reference in the Constitution.

[10] Article 2 of the Decree of the Minister of Education, University and Scientific Research of October 31st 2007, n. 544.

[11] Article 10 of the Law June 18th 2009, n. 69, modifying art. 22 of law no. 241/1990.

[12] Article 21 of the Law June 18th 2009, n. 69.

[13] More specifically the article statue: the annual salaries, curricula vitae, e-mail addresses and telephone numbers for professional use of municipal and provincial managers and secretaries as well as to make public, with the same means, the rates of absence and greater presence of personnel, separated by managerial level offices "as well as to make public" a) an indicator of one's average payment times relating to purchases of goods, services and supplies, called "timeliness indicator payments"; b) the average times for defining the procedures and providing the services with reference to the previous financial year.

[14] Art. 2 of the legislative decree April 12th 2006, n. 163 Code of public contracts relating to works, services and supplies

[15] Legislative decree March 14th 2003 no. 33, known as «the transparency decree».

transparency[16]. The more information we have the less we are able to analyse and understand it; the more information is available the less we will easily select the information we need, the less we will able to distinguish which notion is important and which notion we need[17]. In this sense, openness is different from inferability[18]. While the first implies visibility as complete and easy identifiable info[19], the second leads to a deep comprehension of the decisional mechanism of authority power that improves the accountability of public administration and leads to good administration. In other words, openness is a mere factual state of the act, organization, or procedure, while transparency in the sense of inferability is clarity and comprehensibility of the administrative action[20] that can be used to draw accurate conclusions.

In too many cases, the legislator has improved transparency as openness, undermining the importance of inferability, which has the advantage of legitimizing public action and allowing a widespread public control of the administrative actions.

In this regard, transparency has different implications: by allowing a widespread control on the administration, it can also be an effective remedy against the crisis of legitimacy, therefore an important instrument to improve participatory democracy[21].

Hence, transparency is something different from just openness or from the right to free access, because it forces the Public Administration to behave properly notwithstanding formal publishing requirements, it imposes the awareness on that an understandable explanation of power is needed. The risk inherent in the possibility of

[16] On this topic see CARLONI, *Il paradigma della Trasparenza*, Mulino, Bologna, 2022

[17] M. FENSTER, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 2006, <http://scholarship.law.ufl.edu/facultypub/46>.

[18] G. MICHENER, and K. BERSCH, *Identifying Transparency*, Information Polity, 2013, <https://ssrn.com/abstract=3290813>.

[19] D. CURTIN, A. J. MEIJER, *Does transparency Strengthen Legitimacy?,* Information Polity, vol. 11, no. 2, pp. 109-122, 2006.

[20] Cfr. R. MARRAMA, *La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo*, in Diritto processuale amministrativo, 1989, p. 416 ss, but also C. CONTESSA and A. UBALDI, Manuale dell'Anticorruzione e della Trasparenza, in Collana Tribuna Professionisti, Tribuna, 2021.

[21] S. CASSESE, *La partecipazione dei privati alle decisioni pubbliche*. *Saggio di diritto comparato*, in «Riv. trim. dir. pubbl.», 2007, 13 ss.; U. ALLEGRETTI, *L'amministrazione dall'attuazione costituzionale alla democrazia partecipativa*, Giuffrè, Milano, 2009.

confusing such principles is that of «making transparency a fictitious principle, devoid of meaning, potentially applicable to everything and not applied to anything in practice, without its precise characterization and often fatally not very technical»[22].

According to Fenster, transparency, in terms of mere openness and publication requirements, can lead to opacity, because «[it] forces disclosure and creates a nation that is more susceptible to security breaches and less able to enforce its own laws because evildoers will have greater access to information that could be used to threaten the health and safety of the public. […] At a more quotidian level, disclosure requirements also undeniably raise the fiscal costs of Government. […] Transparency also harms Government decision-making by adversely affecting the ability of Government officials to deliberate over policy matters outside of the public eye, and by curbing or skewing the production of informational goods»[23].

It is undeniable that the digital era and the access to big data lead to increased information that we cannot comprehend and risks slowing down public administration; yet it is also undeniable that having access to public information is an essential condition to make power accountable and thus improve democracy.

What emerges is a different concept of transparency that goes beyond the respect of procedural rules and requires inferable information. In this scenario, a key role is played by ICT technologies. These not only allow access to big data, but are able to index information and therefore make the information more understandable.

3. The Italian governance during the pandemic

In the immediacy of the emergency, Italy had to implement extraordinary measures that prevented the administration from stalling and allowed the Country, as far as possible, to tackle the pandemic first and then restart. These emergency measures aimed at streamlining the administrative procedure, seriously reduced and undermined

[22] F. Manganaro, *l'Evoluzione del principio di trasparenza amministrativa*, in Astrid Rassegna, 2009, p. 8.

[23] Fenster, *the Opacity of Transparency,* cit.

the criteria of transparency[24], limiting the possibility of democratic control over public action.

During the emergency, the Government copiously used decree laws, which are the only legislative available instrument for a quick response to the emergency since they do not need prior approval by the Parliament.

According to the Constitution[25], in extraordinary cases of necessity and urgency, the Government can issue decrees having the force of law, under its own responsibility with the obligation to submit the decree to the Parliament on the same day of the publication, in order for the decree to be converted into parliamentary legislation within 60 days from its publication.

Starting from the 1980s the use of decrees increased considerably, so much that «extraordinary cases of necessity and urgency» became loose requirements. This is a true pathological behavior of Italian institutions, a symbol of the immobility of the system of perfect bicameralism, entangled in excessive constitutional guarantees and practices. In this context, the outbreak of the pandemic prompted the Government to rely heavily on decree laws, well beyond the regular practice, enough to cast doubt on its legality; nevertheless, these concerns were dismissed by the Constitutional Court which recently[26] ruled in favor of the extraordinary nature of the event, now more necessary than ever.

The first and perhaps most innovative decree is the so called «Cura Italia» (Heal Italy), which mainly introduces three exceptions: it suspends the terms relating to the

[24] More over derogation is not always simplification, see L.R. Perfetti, *Derogare non è semplificare. Riflessioni sulle norme introdotte dai decreti semplificazioni ed in ragione del PNRR nella disciplina dei contratti pubblici*, in Urbanistica e Appalti, vol. 4, July 1st 2022, p. 441.

[25] Art. 77 of the Constitution «The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of such introduction. Such a measure shall lose effect from the beginning if it is not transposed into law by Parliament within sixty days of its publication. Parliament may regulate the legal relations arisen from the rejected measure».

[26] In this regard, the Constitutional Court also expressed itself in favor of the DPCM (Decree of the President of the Council) which in Italy have materially ordered, at least for 2020, the measures to combat the pandemic, defining them as «necessary administrative acts» with a generic content, C. Cost. 27.10.2021 n. 198 rel. Petites.

activities of the offices of the tax authorities; it introduces a separate reporting transparency obligation for donations to support and fight the emergency, which must be published at the end of the state of emergency; and finally, it suspends the administrative deadlines of the expiring proceedings and administrative acts.

This decree allowed a rapid supply of the essential tools to fight pandemic, such as masks, medicines and medical material and a cloud service necessary for remote work, which will be authorized through a negotiated procedure without prior publication of the notice. These are interventions that affect both the content and the provisions of public contracts, as well as the procedural rules to ensure the streamlining and acceleration of procedures.

More specifically, the legislation provided a suspension of the ex-ante emergency state evaluation that is needed to justify the exercise of a simplified procedure[27], by excluding the prior publication of the notice, and exempted the contracting authority from having to justify this decision.

Further exceptions concern the stipulation of the contract: the contracting authority can stipulate the contract based on the self-certification relating to the possession of the general, financial, and technical requirements, and to the absence of exclusion grounds. In addition, the limit to the amount of donation to the purchase of supply that can be directly accepted and did not need a specific proceeding, was erased from a maximum of 40,000.00 euros[28] to the threshold of European relevance.

In May 2020 a second decree was published[29] with specific requirements on public procurement. The percentage of the contractor payment to be given in advance rose from 20% to 30% for public tender proceedings initiated before June 30th 2021, this deadline being afterwards postponed to December 31st. Other exceptions were then introduced to facilitate payments for the purpose of economic recovery; the payment

[27] This is the procedure referred to in art. 63, paragraph 6 of the legislative decree April 18th 2016 no. 50 (Public Procurement Code). According to this legislation, it is possible to resort to the negotiated procedure without prior publication of the notice regardless of the existence of urgent assessments, providing for the comparison of four and not five operators to be consulted, provided that one of them is an innovative start-up or a small and innovative medium-sized enterprise, registered in the appropriate special section (Art. 63 comma 2 lett. c d.l. 18/2020.).

[28] Provided for by art. 36, paragraph 2, lett. a) of the Procurement Code.

[29] Law decree May 19th 2020 no. 34, known as «decreto rilancio».

of the state of progress of works (SAL) has in fact been established, for school building works, also in derogation from the provisions of the Code of public contracts.

The exceptions provided by the third decree, the so called «Simplification decree», streamline all stages of tender procedures from the notice publication to the conclusion of the contract, up to the potential dispute phase. With regard to below-threshold contracts, for the purpose of encouraging public investments, direct assignment or negotiated procedure can be adopted after simple consultation with at least five operators existing on the market, even in aggregate form. Besides that, the simplification on anti-mafia regulation is particularly relevant; accordingly, until June 30, 2023, the state of emergency is considered persistent and, taking due account of the statutory exceptions, the public procurement proceeding can continue even in the absence of the anti-mafia information[30]. On over-threshold proceedings, the rule provided a suspension of the scheduled proceedings and a temporary discipline for the ones already started[31].

In May 2021, another decree was published[32] aiming at overcoming the exceptional price increase of certain products, such as those related to construction materials, in order to fight speculations. Therefore, it provided a list with the materials whose price grew more than 8% to be subjected to a compensation mechanism. Furthermore, notwithstanding the provisions of the procurement code[33], it provided a fund for the adjustment of prices with a budget of 100 million euros for the year 2021.

The rules adopted with the simplification decree were further modified with

[30] Cfr. artt. 1-bis and13 of the Decree Law April 8th 2020, no. 23, converted with modifications, by law June 5th, 2020, no. 40, and artt. 25, 26 e 27 del Legislative Decree May 19th, 2020, no. 34 The exception is planned for proceeding regarding economic benefits however denominated, disbursements, contributions, grants, loans, loans, concessions, and payments from public administrations, if the release of the documentation is not immediately following the consultation of the single national database for the purpose of issuing the anti-mafia documentation

[31] Artt. No. 5,6, and 8 Decree Law of July 16th 2020, no. 76, This regulation imposed a serious sacrifice of transparency and lawfulness, especially after the sentence of the Criminal Supreme Court of January 27th 2022 no. 7264 that excluded the application of bid rigging in direct award..

[32] The so called <decreto sostegni-bis> Law Decree May 25 2021 converted in Law with modifications by Law July 23rd 2021 no. 106

[33] See art. 115 of Public Procurement Code

the so-called decree simplification-bis[34] in order to comply with the goals of the Italian Recovery Plan (Piano Nazionale Ripresa e Resilienza - P.N.R.R.) especially with regard to public procurement, due to the fact that simplification and rationalization of the rules on public contracts represent the main tenets of first phase of the reforms envisaged by the PNRR until 2023.

Further simplification measures are envisaged relating to the use of resources allocated by the PNRR and the PNC (Complementary National Plan). The use of the negotiated procedure is allowed, under certain conditions, without prior publication of the call for tenders and the assignment of a reward score, if the use of innovative technologies in the design is planned. Another important innovation is the institution of the Higher Council of Public Works, envisaged exclusively on technical and economic feasibility projects (PFTE) of public works under the competence of the State, or in any case financed for at least 50% by the State, of an amount equal to or higher than 100 million euros[35].

The decree raises[36] from 40% to 50% of the total amount of the contract the maximum quota of works that can be carried out with subcontracting[37].

Among the most important aspects of the decree is the temporal extension of the state of emergency to June 30, 2023, in relation to the possibility of stipulating the contract even in the absence of anti-mafia documentation, as well as the possibility of direct assignment for works of less than 150,000 euros and for services and supplies, including engineering services architecture and design activities, for an amount of less than 139,000 euros[38]. The suspension of the obligation to inform the contracting

[34] Law decree May, 31 2021 n. 77 converted by law July 29 2021 no. 108, in application of PNRR provisions ‹*Piano Nazionale Ripresa e Resilienza*›.

[35] This prevision was subject to other modification by Decree Law of September 10th 2021 no. 121 and by Decree Law November 6th 2021 no. 152.

[36] In reform of art. 1, paragraph 18, of the Decree Law of April 18th 2019 no. 32, in application until June 30th 2023

[37] The provision was issued in response to the infringement procedure 2018/2273 opened by the European Commission which considered the affixing of a quantitative limit to the percentage of subcontracted work in contrast with EU legislation.

[38] Relating to the application of these measurement many "scandals" are emerging thank to the work of Public Prosecutors, an example is the 18 millions bidden for new hospitals in Caserta Naples and Salerno in which twenty-tree

authority about the three subcontractors is envisaged, with the consequent lack of knowledge of the identity of the subjects who will work in subcontracting. Lastly, it is stated that the purchases of IT goods and services, necessary for the realization of the PNRR, can be made through direct assignment, whereas under certain conditions it is not possible to resort to assignment with the ordinary procedure[39].

More recently, other changes to the legislation on public contracts introduced with by legislative decree (so-called «infrastructure decree»), as well as by the 2022 financial law, both focused on increasing transparency in the payment system, including the budget law that amplifies the fund for price adjustments to one hundred million euros.

Finally, the provisions introduced by the legislative decree are also noteworthy. The legislative decree of November 2021[40] entitled «urgent provisions for the implementation of the PNRR and for the prevention of mafia infiltration» provides measures to promote the greatest participation in tenders concerning PNRR funds. In particular, the procedures for assigning the design required by the aforementioned calls can be carried out even in the absence of a specific provision in the planning documents provided for by the Code.

4. E-procurement 2.0, a possible solution

A solution to the crisis of the principle of transparency triggered by the outbreak of the pandemic could lie in new technologies, and e-procurement notably. New technologies may reconcile speed, simplification, and transparency, allowing complete intelligibility of data relating to the various stages of the tender and, at the same time, facilitating the cataloguing and analysing the data. To tell the truth, e-procurement was

people are suspected for fraud and bid rigging, see <https://tg24.sky.it/napoli/2022/05/18/appalti-asl-campania> or maxi Fraud that leaded to the arrest of eleven people in Rome and Prato for 43 million euros, <https://www.lanazione.it/prato/cronaca/frodi-truffe-appalti-1.7856521>.

[39] Art. no. 53 Law decree May 31st 2021 n. 77.

[40] Law decree of November 6th, 2021, n. 152 converted with modifications by Law December 29th 2021 no. 233

an important objective already in the EU Directives of 2014[41], as a tool capable of simultaneously implementing simplification and transparency, as well as implementing the value for money of the service offered[42].

Certainly, the transition to e-procurement is still tortuous, especially due to the fact that the legislation on public procedures is constantly changing, so much so that the reform of the Procurement Code is being carried out even before the complete implementation of the already existing rules. In addition, another major element of difficulty is represented by the practical application of ICT technologies in public administration in general, especially regarding the 36,000 contracting authorities, with over 100,000 shopping centres[43], many of which are small and unable to use ICT technologies. The transition to e-procurement would have been easier if at least the contracting stations had been reduced as it was provided for in art. 38 of the CCP, the application of which has been postponed several times.

A turning point towards the complete informatization of the procurement system could come unexpectedly from the pandemic, and specifically from the PNRR. In fact, last January, perhaps following the difficult relationship with smart working, the Minister for Public Administration announced the Strategic Plan for the enhancement and development of the human capital of the Public Administration, an extraordinary training plan (the largest ever carried out) that will involve 3.2 million public employees.

Furthermore, to allow the achievement of the objectives of the PNRR, the Government has issued several legislative innovations termed e-procurement 2.0 by the doctrine.

The main changes concern the following areas. First, a Ministerial Decree[44] specified the characteristics and functions of the telematic purchasing systems. Then,

[41] see Directives 2014/24/UE, 2014/25/UE, 2014/23/UE.

[42] referring to point n. 63 of Directive 2014/24/EU.

[43] <www.anticorruzione.it>.

[44] Ministerial Decree no. 148 of 2021 called "Regulation laying down procedures for the digitization of public contract procedures", in implementation of art. 44 of the Code of public contracts.

legislative decree 77/2021[45] provided the establishment of the electronic file of the economic operator (FVOE, FOE in Italian), containing data and documents necessary for the purpose of verifying the possession of the general and special requirements, entered by the operator and usable for the various tenders, which will be kept in the national database of public contracts (BDNCP) and managed by The Italian Anti-Corruption Authority (ANAC). Finally, the new digital prototype[46], which updated the previous version of 2017, provided the individual contracting stations with a tender disciplinary scheme for the completion of an «Electronic open procedure for the award of public service and supply contracts in the ordinary sectors above Community threshold with the criterion of the most economically advantageous offer based on the best quality/price ratio».

Basically, the Government is expecting a system able to better manage the entire life cycle of public procurement, supporting contracting authorities and economic operators for the entire duration of the tender procedure.

For example, the e-procurement platforms will be able to support numerous functions, such as: drafting and publication of the announcement and tender documents; compilation and presentation of offers; carrying out the activities of the selection board, with the possibility for the commissioners to consult the offers; conducting public sessions electronically; calculation of technical and economic scores, as well as anomaly thresholds; drafting, acquisition and notification of the measures for the exclusion of competitors; verification of participation requirements through interaction with the national database of public contracts (BDNCP); formation of the final ranking, acquisition of the award provision and fulfilment of post-information obligations; drafting and acquisition of the contract.

E-procurement will therefore be able to put an end to the eternal rivalry between simplification and security, between simplification and transparency. The words of ANAC President Giuseppe Busia are significant in this regard: «The elimination of formal obligations for contracting stations and economic operators is crucial to reduce times

[45] That modify art. 81 of Legislative Decree. No. 50/2016.

[46] published in the G.U. (official Gazettes) of December 24th 2021.

and costs and to accelerate the tender procedures»[47]. He then adds: «The digital file that we are implementing will allow the contracting authorities to use the assessments already carried out by another contracting authority to admit the economic operator to the tender, speeding up the verification of the general requirements (white list)».

In conclusion, the relationship between simplification and transparency is not directly proportional; at the increase in the level of the first one does not necessarily lead to an increase in the level of transparency, in the meaning of inferability. Certainly, at an early stage, when bureaucracy level is too high the implementation of simplification does lead to better transparency, but when some procedural obligation, that are meant to ensure the lawfulness of the procedure, are eliminated the transparency of the entire proceeding fails. This is particularly evident in public procurement, in which many of the information obligation that has been removed were applied to ensure the lawfulness of the procedure and of the bidder.

Therefore, administrative simplification necessarily leads to a streamlining of the costs of the tender procedure, and therefore also of the guarantees established to protect public action. In this regard, the extension of the transparency obligation, in the sense of the publication disclosures of the documentation of the public tender, cannot be considered as a possible solution to the reduction of security checks on the participants in the tender. In fact, the increase in documentation available to citizens does not always constitute an improvement in the level of knowledge and transparency of public action. The transparency of the administration represents a form of democratic control over its action only where citizens can understand public action. In other words, if citizens are invested by a multitude of documents that they cannot understand and decipher then this cannot be a step forward towards a transparent administration. Rather, this represents a step backwards towards an obscure administration. In these terms, e-procurement can help the citizen, and the Administration itself, to find their way in the multitude of documents and procedures, effectively and quickly, and therefore to overcome the trade-off between speed, simplification, correctness and transparency.

[47] Press Release of ANAC, Al via il Fascicolo Virtuale dell'Operatore Economico, October 27th 2022, in <https://www.anticorruzione.it/-/al-via-il-fascicolo-virtuale-dell-operatore-economico-operativo-dal-25-ottobre-obbligatorio-da-met%C3%A0-novembre>.

SIRIO ZOLEA[*]

THE EUROPEAN COURTS FACED WITH THE UNKNOWNS OF PREDICTIVE JUSTICE[**]

ABSTRACT. *First of all, this paper considers the notion of predictive justice, assessing the new possibilities it opens up and, at the same time, the potential dangers associated to the application of algorithmic computer tools to the legal field: especially, upheaval of the system and hierarchy of the sources of law, algorithmic bias and the black box problem. These issues must be considered distinguishing the use of predictive justice by the judges from its use by the parties, their lawyers and legal advisors. Then, the paper focuses on the European Court of Human Rights and on the Court of Justice of the European Union, wondering how the introduction of Artificial Intelligence tools could affect the operations and the procedures of such judges, taking in account their peculiarities and, as for the EU Court, the variety of its competences.*

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[**] This working paper develops the speech given at the special workshop «Predictive Justice: an Interdisciplinary Approach between Philosophy of Law, Legal Comparison and Informatics», held within the 30th Biennial World Congress of the International Association for the Philosophy of Law and Social Philosophy: «Justice, Community and Freedom», Bucharest, 7-8 July 2022.

IN THE RIVERS north of the future
I cast the net, that you
hesitantly burden
with stone-written
shadows.
(Paul Celan, from *Breathturn*)

1. What is predictive justice?

The capability to grant a certain degree of rational predictability is paramount for the success and the effectiveness of every legal order and, particularly, as pointed out by Weber[1], for the stability of the legal orders that accompany modern (capitalist) societies, because rational calculability – through clarity and coherence both in lawmaking and in case law[2] – is the necessary ground for business. Legal doctrine is aware of it for a long time now[3], and contemporary debate about predictive justice particularly focuses on how certain cutting-edge Artificial Intelligence technologies, such as machine learning and natural language processing, analyze through complex algorithms a large number of judicial decisions, in order to make probabilistic projections on the outcome of new legal cases and help the parties and even the judge make the (allegedly) best choices. According to the most radical views, algorithmic decisions, realized through these and other AI technologies, should even replace the role of the judge, or a part of it. These are developments not only concerning the common law world, traditionally based on a case-by-case inductive approach, but also the civil law legal orders, where the real role of case law as a substantial source of law cannot anymore be denied[4]. In a few words, assuming an easy accessibility of the judicial decisions, predictive justice is an in-depth computer analysis by algorithms of a massive

[1] M. Weber, *Economy and Society: an outline of interpretive sociology*, vol. 2, University of California Press, Berkeley 1978, pp. 809 ff.

[2] N. Irti, *Un diritto incalcolabile*, Giappichelli, Torino 2016, p. 5.

[3] Cf. O.W. Holmes, *The Path of the Law*, in «Harvard Law Review», vol. 10, n. 8, 1897, pp. 457 ff.

[4] E. Calzolaio, *Il ruolo della giurisprudenza come fonte normativa tra* civil law *e* common law, in Liber amicorum *Luigi Moccia*, Roma Tre Press, Roma 2021, pp. 175 ff.

scale of legal precedents, an analysis aimed to calculate and preempt the probabilities of the outcomes of present litigation[5], reducing the uncertainty of the judgement[6] (and possibly avoiding and preventing the judgment itself).

The idea of using mathematical models and calculation methods to compute the probability of different possible outcomes of litigation was not previously unknown[7], but contemporary computer science enormously increases the opportunities of calculation at accessible costs, offering legal actors an appearance of restored certainty in the middle of a confusing time of multiplication and overlapping of the formal and of the *de facto* (national, transboundary, global, hard law, soft law, etc.) sources of law. Predictive justice poses several ethical and regulatory problems, more serious when the debate concerns tools available to use by judicial[8] and police[9] authorities (or even

[5] See also the definition of A. Garapon, J. Lassègue, *Justice digitale*, PUF, Paris 2018, p. 219: «La justice prédictive désigne *stricto sensu* la capacité prêtée aux machines de mobiliser rapidement en langage naturel le droit pertinent pour traiter une affaire, de le mettre en contexte en fonction de ses caractéristiques propres (lieu, personnalité des juges, des cabinets d'avocats, etc.) et d'anticiper la probabilité des décisions qui pourraient intervenir. L'expression est devenue générique en renvoyant à toutes les innovations numériques dans le domaine du droit»; S. Lebreton-Derrien, *La justice prédictive. Introduction à une justice «simplement» virtuelle*, in R. Sève (editor), *La justice prédictive*, in «Archives de philosophie du droit», t. 60, Dalloz, Paris 2018, pp. 4-5: «la notion de justice prédictive qui s'est imposée, mais qui reste diversement définie, est toujours consubstantielle de celle d'algorithme, tout aussi nouvellement entrée dans notre quotidien et définie comme une suite finie et non ambiguë d'instructions permettant d'aboutir à un résultat à partir de données fournies en entrée, soit par un développement humain, soit par la machine elle-même pour l'algorithme d'apprentissage. Pour fonctionner, l'algorithme doit donc être exprimé dans un langage informatique, transcrit en un programme et exécuté dans un logiciel ou compilé sous la forme d'une application. Algorithmique, cette justice prédictive semble faire appel tantôt aux statistiques, tantôt aux équations mathématiques»; cf. A. Santosuosso, G. Pinotti, *Bottleneck or Crossroad? Problems of Legal Sources Annotation and Some Theoretical Thoughts,* in «Stats», vol. 3, n. 3, 2020, pp. 376 ff.

[6] See B. Dondero, *Justice prédictive: la fin de l'aléa judiciaire?,* in «Recueil Dalloz», n. 10, 2017, pp. 532 ff.; Y. Gaudemet, *La justice à l'heure des algorithmes. À propos de justice prédictive*, in «Revue du droit public et de la science politique en France et à l'étranger», n. 3, 2018, pp. 651 ff.; see also A. Santosuosso, G. Sartor, *La giustizia predittiva: una visione realistica*, in «Giurisprudenza Italiana», n. 7, 2022, pp. 1760 ff.

[7] See for ex. L. Loevinger, *Jurimetrics: the Next Step Forward*, in «Minnesota Law Review», vol. 33, n. 5, 1949, pp. 455 ff.; E. Barbin, Y. Marec, *Les recherches sur la probabilité des jugements de Simon-Denis Poisson*, in «Histoire & Mesure», vol. 2, n. 2, 1987, pp. 39 ff.

[8] About the USA, see R. Courtland, *Bias Detectives: the researchers striving to make algorithms fair*, in «Nature», vol. 558, n. 7710, 2018, pp. 357-360; I. De Miguel Beriaìn, *Does the Use of Risk Assessments in Sentences Respect the Right to Due Process? A critical analysis of the Wisconsin v. Loomis ruling*, in «Law, Probability and Risk», vol. 17, n. 1, 2018, pp. 45 ff.; G. Resta, *Governare l'innovazione tecnologica: decisioni algoritmiche, diritti digitali e principio di uguaglianza*, in «Politica del diritto», n. 2, 2019, pp. 199 ff.; D. Abu-Elyounes, *Contextual Fairness: a legal and*

replacing them), particularly in the criminal law field, where the fundamental liberties of the individual are implied. In fact, the main worries concerning the replacement (in whole or in part) of the self-critical judgements of reason by the algorithmic rules of rationality[10] are about: the difficulties in the selection (e.g., include or not to include old and very old cases? And cases judged before the advent of the democratic regimes? And the concurring and dissenting opinions? etc.) and in the hierarchy (how to weight decisions of judges of different levels of jurisdiction?) of the relevant precedents[11]; the margin of error and the possibility of cyber-attacks[12]; the falseness of the idea that non-human AI agents are not affected by passions and ideologies, while algorithms are as biased as the people who trained them, but in a less transparent and accountable way[13]; the opacity in the functioning of the algorithms[14]: the black box problem not only arises

policy analysis of algorithmic fairness, in «Illinois Journal of Law, Technology and Policy», n. 1, 2020, pp. 1 ff.; K. Hartmann, G. Wenzelburger, *Uncertainty, Risk and the Use of Algorithms in Policy Decisions: a case study on criminal justice in the USA*, in «Policy Sciences», vol. 54, n. 2, 2021, pp. 269 ff.; F. Lagioia, R. Rovatti, G. Sartor, *Algorithmic Fairness through Group Parities? The case of COMPAS-SAPMOC*, in «AI & SOCIETY», 2022; about China, see D. Todaro, *Efficienza e controllo: l'uso della tecnologia nei tribunali cinesi*, in «Mondo cinese: rivista di studi sulla Cina contemporanea della Fondazione Italia Cina», n. 167: year XLVII, n. 1, «Codice cinese: Xi e il governo della legge», 2019, pp. 67 ff.; J. Peng, W. Xiang, *The Rise of Smart Courts in China: Opportunities and Challenges to the Judiciary in a Digital Age*, in «Nordic Journal of Law and Social Research», n. 9, 2019, pp. 345 ff.; R.E. Stern *et al.*, *Automatic Fairness? Artificial Intelligence in the Chinese Courts*, in «Columbia Journal of Transnational Law», 2021, pp. 515 ff.; about the French project DataJust, aiming to elaborate a jurisprudential database serving as point of reference for judges, lawyers and other legal professionals on the amount of compensations for bodily harm, see F. G'sell, *Les progrès à petits pas de la «justice prédictive» en France*, in «ERA Forum», 2020, pp. 299 ff.; about the legislative proposal for a new statutory procedure for certain criminal cases to be dealt with via an automated online process, in England, see G. Cowie *et al.*, *Judicial Review and Courts Bill 2021-22*, House of Commons Library 2021, pp. 33 ff.

[9] About the English legal order, see M. Oswald *et al.*, *Algorithmic Risk Assessment Policing Models: lessons from the Durham HART model and "Experimental" proportionality*, in «Information and Communications Technology Law», n. 2, 2018, pp. 223 ff.

[10] G. Noto La Diega, *Against the Dehumanisation of Decision-Making*, in «JIPITEC», n. 1, 2018, p. 4.

[11] E. Battelli, *La decisión robótica: algoritmos, interpretación y justicia predictiva*, in «Revista de derecho privado», n. 38, 2020, pp. 61-62; R. Mattera, *Decisione negoziale e giudiziale: quale spazio per la robotica?*, in «La nuova giurisprudenza civile commentata», n. 1, 2019, p. 207.

[12] É. Filiol, *Les risques concernant l'utilisation des algorithmes dits prédictifs dans le domaine sensible de la justice*, in R. Sève (editor), *La justice prédictive*, in *Archives de philosophie du droit*, t. 60, Dalloz, Paris 2018, pp. 150-151.

[13] Noto La Diega, *Against the Dehumanisation of Decision-Making*, cit., p. 33.

[14] G. Fioriglio, *La Società algoritmica fra opacità e spiegabilità: profili informatico-giuridici*, in «Ars Interpretandi»,

from the intentional lack of transparency of the designer[15], but also from the objective complexity of these mechanisms for the public of non-computer scientists[16], leading people to a 'blind deference' to the machine's decision, believing its answer as a transcendental truth, instead of a subjective one[17]; the fact that the judge, mostly in the civil law world, has to apply not only punctual norms, but also more discretionary legislative principles and general clauses[18]; the fact that algorithms tend to equate several kinds of factual inputs (legal norms, precedents, facts and other elements of the folder, temperament of the judge, etc.) obtained from the mass of jurisprudential big data, associating all these elements in mathematical correlations stranger to the legal concept of causal link and to the legal hierarchy of the sources of law[19]; the social legitimacy of the judicial decision, product of the wisdom and the experience of the judge, who must justify the reasons of it, which, at a later time, might be evaluated by a higher judge[20]; and the democratic legitimacy of the judicial decision, challenged by the threat of a solely technical legitimacy[21]; finally, how to face the existing contradictions in case-law and how to avoid to stop any possible evolution and democratic pluralism of the jurisprudence through the creation of an indissoluble bond to the previous decisions?[22]

n. 1, 2021, pp. 53-67.

[15] A.M. Carlson, *The Need for Transparency in the Age of Predictive Sentencing Algorithms*, in «Iowa Law Review», vol. 103, 2017, pp. 303 ff.

[16] Oswald *et al.*, *Algorithmic Risk Assessment Policing Models: lessons from the Durham HART model and "Experimental" proportionality*, cit., pp. 233-234; D.R. Desai, J.A. Kroll, *Trust but Verify: a guide to Algorithms and the Law*, in «Harvard Journal of Law and Technology», vol. 31, n. 1, 2018, pp. 7 ff. More in general, see H. Shah, *Algorithmic Accountability*, in «Philosophical Transactions A», 2018, 376; F. Pasquale, *The Black Box Society. The Secret Algorithms That Control Money and Information*, Harvard University Press, Cambridge (Massachusetts) and London 2015.

[17] A. Harkens, *The Ghost in the Legal Machine: Algorithmic Governmentality, Economy, and the Practice of Law*, in «Journal of Information, Communication & Ethics in Society», vol. 16, issue 1, 2018, pp. 16 ff.

[18] M. Luciani, *La decisione giudiziaria robotica*, in «Rivista AIC», n. 3, 2018, p. 890.

[19] Garapon, Lassègue, *Justice digitale*, cit., pp. 230-231.

[20] R. Bichi, *Intelligenza Artificiale tra "calcolabilità" del diritto e tutela dei diritti*, in «Giurisprudenza italiana», n. 7, 2019, pp. 1777-1778.

[21] Garapon, Lassègue, *Justice digitale*, cit., pp. 214-218; Y. Meneceur, C. Barbaro, *Artificial Intelligence and the judicial memory: the great misunderstanding*, in «AI and Ethics», vol. 2, issue 2, 2022, pp. 269-275.

[22] Dondero, *Justice prédictive: la fin de l'aléa judiciaire?*, cit., pp. 537-538; Battelli, *La decisión robótica: algoritmos, interpretación y justicia predictiva*, cit., p. 62.

And could not, through such AI proceedings, a misinterpretation (or, in any case, a disputable interpretation) of one or more judges become more authoritative than the law itself, contradicting even the fundamentals of the *État de droit*? It is important to remember that «the scientific and legal knowledge, the capacity to collect, classify and compare data, are important skills for solving the case, but they need to be accompanied by the ability of the judge to interpret law. This is a human ability, as it needs awareness of the contextual dimension of law; in other words, it needs humanity: a free will that impacts with the concrete facts of the case together with the responsibility to seek justice for that case»[23]. In any case, a fundamental innovation in the system of the sources of law should pass through the constitutional democratic mechanisms and should not be introduced in the judicial procedure as a neutral, impersonal, objective product of technological innovation. In fact, «AI algorithms cannot replace social or legal reforms that need to be made in order to cultivate a more just society, but collaboration between all actors in the field can at least ensure that we are on the right path»[24].

Utilizations of predictive algorithms by the parties (and their lawyers and other legal advisers) involve less critical issues, as calculators just make more precise and 'scientific' something that has always, empirically, been the work of experienced legal professionals. Nevertheless, in countries where such kind of services are already being offered to the public by the so-called LegalTechs (legal technology start-ups[25]), worries among authors and judicial institutions concern inequalities[26], personal data protection (requiring a more or less intense anonymization of the decisions[27] also to comply with

[23] L. Vagni, *The Role of Human Judge in Judicial Decisions: preliminary remarks on legal interpretation in the age of Artificial Intelligence*, in E. Calzolaio (editor), *La decisione nel prisma dell'intelligenza artificiale*, CEDAM, Padova 2020, p. 200.

[24] Abu-Elyounes, *Contextual Fairness: a legal and policy analysis of algorithmic fairness*, cit., p. 54.

[25] For this notion, see, more in depth, the *Charte Éthique pour un marché du droit en ligne et ses acteurs*, 2017, <https://www.charteethique.legal/charte-ethique>, accessed 22/12/2022, art. 1.

[26] Because, at least in the next future, predictive justice services are likely to be accessible and affordable only for the wealthiest legal actors on the market: Garapon, Lassègue, *Justice digitale*, cit., p. 243.

[27] O. Cachard, *Aux grands arrêts, les juristes reconnaissants… Brefs propos sur l'«anonymisation» des décisions de justice*, in «Recueil Dalloz», 2004, pp. 29 ff.; C. Bigot, *Anonymisation, données sensibles et droit à l'information: à la recherche d'un équilibre entre la protection des données personnelles et la liberté de l'information dans le domaine judiciaire*, in «Légipresse (hors série), Le cours de la justice et la liberté de l'information: comment concilier des impératifs contradic-

the European GDPR)[28], the lack of regulation and control of the reliability and of the neutrality of the AI-based algorithms offered to the legal professionals[29], and opportunistic behaviors of forum shopping based on systematically profiling the judges[30]. One may wonder how the implementation in the market of legal services of these technologies, implying both sustaining and disruptive functions for the lawyers, will defy and change the legal professions and their ethics[31]. In fact, neither the real potential advantages of predictive justice, providing legal actors, including the judges, with a more complete knowledge of the precedents and perhaps reducing the judicial litigation, should make legislators forget the hazards and the desirable limits of the utilization of such algorithms in the legal field – as their responsible utilization is paramount – nor such hazards should make the legislators forget the advantages and introduce irrational, hasty and exorbitant prohibition rules, as it currently seems to be the case of France. Indeed, in this country, the law[32] currently prohibits and punishes as a criminal offence any activity of profiling and classifying judges and chancellor's officers, through data elaborations aiming to evaluate, analyze, compare or predict their professional conduct, real or presumed. Several authors criticize such an untransparent choice[33], in contrast to the general French tendency towards the open data in the field

toires», proceedings of the forum of 9/12/2020, 2021-1, 2021, pp. 71 ff.

[28] See É. Buat-Ménard, P. Giambiasi, *La mémoire numérique des décisions judiciaires*, in «Recueil Dalloz», n. 26, 2017, p. 1485; G. Grasso, *Il trattamento dei dati di carattere personale e la riproduzione dei provvedimenti giudiziari: dal Codice della privacy all'attuale disciplina*, in «Foro italiano», V, 2018, pp. 349-353.

[29] Gaudemet, *La justice à l'heure des algorithmes. À propos de justice prédictive*, cit., pp. 651 ff.

[30] P. Deumier, *L'*open data *des magistrats: une petite histoire législative*, in «RTDciv.», 2019, pp. 72 ff.

[31] Cf. R. Susskind, *Tomorrow's Lawyers: an introduction to your future*, Oxford University Press, Oxford 2017; see also A. Santosuosso, O.R. Goodenough, M. Tomasi (editors), *The Challenge of Innovation in Law: the impact of technology and science on legal studies and practice*, Pavia University Press, Pavia 2015; K.D. Ashley, *Artificial Intelligence and Legal Analytics: new tools for law practice in the digital age*, Cambridge University Press, Cambridge 2017.

[32] Art. 33 of the law n. 2019-222 of 23 Mars 2019 reforming the justice.

[33] T. Perroud, *L'anonymisation des décisions de justice est-elle constitutionnelle? Pour la consecration d'un principe fondamental reconnu par les lois de la République de publicité de la justice*, in «Le blog de Jus Politicum», <https://blog.juspoliticum.com/2019/03/11/lanonymisation-des-decisions-de-justice-est-elle-constitutionnelle-pour-la-consecration-dun-principe-fondamental-reconnu-par-les-lois-de-la-republique-de-publicite-de-la-justice/>, 2019, accessed 22/12/2022; W. Zagorski, *Law as a Set of Decisions: on merits and dangers of legal realism through the prism of big data*, in E. Calzolaio (editor), *La decisione nel prisma dell'intelligenza artificiale*, CEDAM, Padova 2020, p. 181; L.

of justice[34], and they note that the risk of forum shopping is overestimated in relation to the existing processual rules on competence[35].

2. Prospects of employment of predictive justice before the European Court of Human Rights

In this paragraph and in the next one, it will be analyzed whether there are prospects of employment of predictive justice tools before the European Court of Human Rights and the Court of Justice of the European Union, consistently with the institutional role of these two supranational courts. First of all, it is important to report an experiment of predicting judicial decisions of the European Court of Human Rights through natural language processing, whose results were published in 2016. This Court aims to ensure the observance of the engagements undertaken by the member states of the European Convention of Human Rights and its protocols, with jurisdiction extended to all matters concerning their interpretation and application[36]. The Court may receive applications[37], for breach of its provisions, after all domestic remedies have been exhausted, by another member state, or, what is more innovative in relation to international law, from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by a member state. Applying predictive algorithms to the case law of such particular judge, the researchers aimed to predict whether a particular article of the Convention had been violated, given textual evidence extracted from a case, which comprises of specific parts pertaining to the facts, the relevant applicable law and the arguments presented by the parties involved. In this

JANICOT, *L'anonymisation du juge*, in P. Bourdon (editor), *La communication des décisions du juge administratif*, LexisNexis, Paris 2020, pp. 85-87.

[34] About this tendency, see L. CADIET (editor), Report to the Justice Department, *L'*open data *des décisions de justice. Mission d'étude et de préfiguration sur l'ouverture au public des décisions de justice*, 2017.

[35] F. ALHAMA, *Vers une plus grande accessibilité des décisions rendues par les juridictions administratives*, in «RFDA», 2019, p. 703.

[36] Art. 32 of the Convention.

[37] Artt. 33 ff.

way, they wanted to corroborate their hypothesis that the textual content and the different parts of a case are important factors that influence the outcome reached by the Court, on the assumption that there is enough similarity between certain chunks of the texts of the published judgments (in particular, the procedure; the facts: circumstances of the case and relevant law other than articles of the Convention; the law: the alleged violation of an article of the Convention, comprising parties' submissions and legal reasons that purport to justify the specific outcome reached by the Court; the outcome of the case: a decision to the effect that a violation of a Convention article either did or did not take place[38] and of the applications lodged with the Court and/or briefs submitted by parties for pending cases[39]. Predictive tasks were concretely based on the text of published judgments rather than lodged applications or briefs simply because the researchers did not have access to those documents. Their model resulted to be able to predict the decisions of the Court with an accuracy of 79% on average (75% for cases based on art. 3 of the Convention, about prohibition of torture; 84% on art. 6, about right to a fair trial; 78% on art. 8, about right to respect for private and family life): the authors also interpreted their results in the sense that «the 'facts' section of a case best predicts the actual court's decision, which is more consistent with legal realists'[40] insights about judicial decision-making. We also observe that the topical content of a case is an important indicator whether there is a violation of a given Article of the Convention or not»[41]. A more recent study showed the results

[38] See, in particular, N. Aletras *et al.*, *Predicting Judicial Decisions of the European Court of Human Rights: a natural language processing perspective*, in «PeerJ Computer Science», October 2016, p. 4: «The judgments of the Court have a distinctive structure, which makes them particularly suitable for a text-based analysis. According to Rule 74 of the Rules of the Court, a judgment contains (among other things) an account of the procedure followed on the national level, the facts of the case, a summary of the submissions of the parties, which comprise their main legal arguments, the reasons in point of law articulated by the Court and the operative provisions. Judgments are clearly divided into different sections covering these contents, which allows straightforward standardisation of the text and consequently renders possible text-based analysis».

[39] *Ivi*, p. 2, pp. 4-6.

[40] About predictive justice and legal realism theories, cf. Zagorski, *Law as a Set of Decisions: on merits and dangers of legal realism through the prism of big data*, cit., pp. 175 ff.

[41] Aletras *et al.*, *Predicting Judicial Decisions of the European Court of Human Rights: a natural language processing perspective*, cit., p. 2; see also p. 11: «The consistently more robust predictive accuracy of the "Circumstances" subsection suggests a strong correlation between the facts of a case, as these are formulated by the Court in this subsection,

of another experiment of text-based approach and language analysis of the judgments of the Court, treated as quantitative data. It was realized increasing the number of the envisaged articles of the Convention (nine instead of three) and of the cases considered per article, and submitting to machine learning parts of the case different from the first paper (in particular, excluding the 'law' section, which sometimes explicitly mentions the verdict): the final score of the predictions was similar to the other study (77% vs 79%)[42]. In addition, interestingly, in this paper, predictions were also made, about future cases, on the base of the past cases, resulting in a lower classification performance (from 58% to 68%, depending on the gap between the training and testing data), and other predictions of outcomes were made, only based on the names of the judges who decide the cases, achieving a relatively high classification performance (average accuracy of these predictions: 65%)[43].

It is the opinion of the authors of the paper of 2016 that building a more complete text-based predictive system of judicial decisions could offer lawyers and judges a useful assisting tool, in order to identify cases and extract patterns that correlate with certain outcomes and to develop prior indicators for diagnosing potential violations of specific articles in lodged applications and eventually prioritize the decision process on cases where violation seems very likely, potentially reducing the significant delays of the Court[44]. Their viewpoint should be accurately evaluated, particularly in the light of the supranational institutional function of the Court. As for the lawyers and other professionals offering legal advice to potential claimants, the support of computer predictive systems, elaborated on the base of a full database of the past decisions of the Strasbourg Court, could actually be a precious tool to calculate in advance the chances

and the decisions made by judges. The relatively lower predictive accuracy of the "Law" subsection could also be an indicator of the fact that legal reasons and arguments of a case have a weaker correlation with decisions made by the Court. However, this last remark should be seriously mitigated since, as we have already observed, many inadmissibility cases do not contain a separate "Law" subsection».

[42] M. Medvedeva, M. Vols, M. Wieling, *Using Machine Learning to Predict Decisions of the European Court of Human Rights*, in «Artificial Intelligence and Law», vol. 28, 2020, pp. 237-266.

[43] *Ivi*, pp. 257-259, 259-262.

[44] Aletras *et al.*, *Predicting Judicial Decisions of the European Court of Human Rights: a natural language processing perspective*, cit., p. 3.

of success of a claim in front of the judge and help the client decide whether or not to go ahead with a lawsuit which might cost him much time and economic effort.

With regard to the side of the judges of this Court – who, of course, come from different legal orders, of civil law and common law – the matter is probably more sensitive and must be addressed very cautiously. This is true in general, as already mentioned, but even more if we bear in mind the function of the European Court of Human Rights. In fact, it has last instance jurisdiction, originating from the Convention of 1950, but with a larger scope than an ordinary international judge only accessible by states to settle their disputes. The Strasbourg Court, though, is directly accessible to the individuals, allegedly victims of violations from a member state of the treaty, but its political legitimacy is fragile, as it does not descend from the democratic sovereignty of a state and it is not part of a system of separation of powers, at least in the traditional sense[45]. Thus, based on an international treaty, the authority of the Court is much sensitive to political events, to policy-driven arguments and to the evolution of the diplomatic relationships among the member states, and the only way it has to solidify its position is not *ratione auctoritatis*, but *auctoritate rationis*, through the quality, the fairness and the transparence of its procedures and of its decisions[46]. This is why every proposition of innovations in the procedures of the Court that aims to increase the utilization of technologies often criticized for the black box problem, for the risks of excessive deference of the judges towards the precedents, for the algorithmic bias, etc., should be very attentively assessed and tested before implementation, adopting, meanwhile, an approach of self-restraint. The current attitude of the Court in respect of its own case law is a delicate and pragmatic compromise between civil law and common law cultures[47] implying a certain doctrine of precedent[48] (strengthened by the

[45] About the independence, accountability, transparency and legitimacy issues of the ECHR, cf. B. Çali, S. Cunningham, *Judicial Self Government and the Sui Generis Case of the European Court of Human Rights*, in *German Law Journal*, vol. 19, n. 7, 2018, pp. 1977 ff.

[46] Cf. S. Dothan, *Judicial Tactics in the European Court of Human Rights*, in «Chicago Journal of International Law», vol. 12, n. 1, 2011, pp. 115-142; M. Demetriou QC, *Does the CJEU Need a New Judicial Approach for the 21st Century? A CJEU User's Perspective*, paper presented at the conference *A More Literal and Predictable Approach for the Court of Justice of the EU?*, organized by the Bingham Centre for the Rule of Law, 2 November 2015.

[47] Cf. E. Lambert, *Les effets des arrêts de la Cour européenne des droits de l'homme. Contribution à une approche pluraliste du droit européen des droits de l'homme*, Bruylant, Bruxelles 1999, pp. 304-305: «les effets des arrêts de la CourEDH

amendments of 2004 to the Convention) which is applied by carefully using the techniques of distinguishing and openly departing from earlier decisions for significantly relevant reasons[49]. On the one hand, computer algorithmic tools merely facilitating a better knowledge and classification of the case law by the judges of Strasbourg seem to be advisable to improve the speed, the quality and the coherence of their judicial activities and decisions, whose 'bureaucratic' style has been accentuated by the increase in number of cases[50]. But, on the other hand, tools more actively susceptible to influence

ne peuvent pas relever du schéma classique obligatoire/non obligatoire. Cette vision, critiquée pour sa simplicité et sa radicalité, ne correspond plus à l'analyse pluraliste des rapports entre l'ordre européen et les ordres internes. Il faut lui substituer le concept d'autorité, susceptible de gradation. Cette gradation dépend de plusieurs facteurs comme la qualité intrinsèque de la décision et l'existence d'une "jurisprudence constante"»; p. 398: «la Cour EDH […] ne s'estime pas liée par ses propres jugements et elle recourt librement aux revirements de jurisprudence. Cette affirmation doit être immédiatement nuancée; la CourEDH recourt très largement à la technique de l'auto-référence, laquelle comprend des réalités diverses qu'il faudra distinguer».

[48] E. Calzolaio, *La Giurisprudenza della Corte Europea dei Diritti dell'Uomo nella prospettiva della comparazione giuridic*a, in «Rivista critica del diritto privato», n. 4, 2015, pp. 633-634; about the precedent in the ECHR, see also, *ex ceteris*, K. Lucas-Alberni, F. Sudre, *Le revirement de jurisprudence de la Cour européenne des droits de l'homme*, Bruylant, Bruxelles 2009.

[49] For instance, reflecting societal changes: see L. Wildhaber, *Precedent in the European Court of Human Rights*, in P. Mahoney *et al.* (editors), *Protection des droits de l'homme: la perspective européenne / Protecting Human Rights: The European Perspective: mélanges à la mémoire de/studies in memory of Rolv Ryssdal*, Heymanns, Köln 2000, pp. 1530-1531; but also to surmount uncertainties of interpretation in the case law of the Court and to meet the need to satisfy the increasing litigation on a key issue: see Calzolaio, *La Giurisprudenza della Corte Europea dei Diritti dell'Uomo nella prospettiva della comparazione giuridic*a, cit., pp. 631-632; see also J. Mowbray, *An Examination of the European Court of Human Rights' Approach to Overruling its Previous Cases*, in «Human Rights Law Review», 2009, pp. 179 ff., n. 2, focusing on the Court's reluctance to expressly acknowledge that it is overruling established case law and on its failure to always provide adequate justifications of the social or scientific developments underpinning its revised jurisprudence.

[50] Calzolaio, *La Giurisprudenza della Corte Europea dei Diritti dell'Uomo nella prospettiva della comparazione giuridic*a, cit., pp. 630-631. The modification of 2004 of the procedural rules established in the Convention lets the Court focus on the most relevant and the less obvious cases, relying on single-judge formations (which may declare inadmissible or strike out of the Court's list of cases an application, where such a decision can be taken without further examination, art. 27 of the Convention) and three-judges committees to filter and to decide the rest of them. About these committees, see art. 28: «Competence of Committees. 1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote, […] (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court»; cf. *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention - Explanatory Report - [2004] COETSER 1 (13 May 2004)*: «Paragraphs 1 and 2 of the amended Article 28 extend the powers of three-judge committees. Hitherto, these committees could, unanimously, declare

the attitude of the Court, radically changing its approach towards case law or even potentially weakening the independence and the transparency of the trial, and thus risking weakening the prestige of the Court among the member states and their citizens, and consequently the compliance of the states towards its decisions, should hopefully be avoided. In any case, relevant procedural innovations, potentially affecting the substance of the rights granted by the Convention and its protocols, should be subject to the greatest debate, not only involving professionals and legal doctrine, but also the diplomacies of the member states, in order to be fully accepted by all parties involved.

3. Prospects of employment of predictive justice before the Court of Justice of the European Union

With regard to the Court of Justice of the European Union[51], the collegiality and the impersonality of its judgements tend to minimize the space devoted in the text to the detailed analysis of the facts, generally making it more difficult to fully understand the reasonings of the judges[52] and probably, in particular, also to apply predictive algorithms to the case law[53]. The variety of the most important competences of the

applications inadmissible. Under the new paragraph 1.b of Article 28, they may now also, in a joint decision, declare individual applications admissible and decide on their merits, when the questions they raise concerning the interpretation or application of the Convention are covered by well-established case-law of the Court. Well-established case-law normally means case-law which has been consistently applied by a Chamber. Exceptionally, however, it is conceivable that a single judgment on a question of principle may constitute well-established case-law, particularly when the Grand Chamber has rendered it. This applies, in particular, to repetitive cases, which account for a significant proportion of the Court's judgments (in 2003, approximately 60%). Parties may, of course, contest the well-established character of case-law before the committee».

[51] Cf. the experiment related in M. Lippi *et al.*, *Claim Detection in Judgments of the EU Court of Justice*, in U. Pagallo *et al.* (editors), *AI Approaches to the Complexity of Legal Systems, AICOL International Workshops 2015-2017*, Springer, Cham 2018, pp. 513 ff.

[52] See Calzolaio, *Il valore di precedente delle sentenze della Corte di giustizia*, in «Rivista critica del diritto privato», n. 1, 2009, pp. 41 ff.

[53] Predictive tools applied to the decisions of the CJEU should also, in any case, possibly take in account the opinions of the Advocate general, because of their importance in the decision-making process of the Court and because of their greater clarity.

CJEU should be taken in account, in order to assess how predictive technologies might be used in the framework of the activities of the Court. Some of its tasks, for instance, resemble, at the European level, the usual tasks of a national administrative court, judging about claims against the EU institutions for annulment[54] and for failure to act[55], brought by the member states, the institutions themselves or any natural or legal person if the actions relate to a measure addressed to them. Thus, the utilization of predictive tools by the potential claimants (legal services of the states and of the EU institutions) and by law firms specialized in European law could help improve their services, even though, when considered by institutional actors, the effective decision to challenge the validity of the act or ask to make take an act is fundamentally a political decision. Predictive justice could also improve the services of legal firms with experience on disputes between the Union and its servants[56]. From the side of the judges, these issues are similar to the issues already analyzed speaking of the Strasbourg Court: it is important to look for a good equilibrium point between the wish to improve the knowledge of the precedents and the risk to surreptitiously introduce bias, opacities and to stop the evolution of the case law by crystallizing it. This same reasoning applies with even more necessary prudence for infringement procedures, against a national government for failing to comply with EU law, started by the European Commission or another member state[57]: in these procedures, the reasoning about the undeniable importance of case law coherence should not make forget the eminent importance of the specificities and of the context of the case, especially in the most delicate questions, for which the role of the European judge as political and diplomatic engineer of the single situation is paramount. As for actions for damages from any person or company who has had their interests harmed as a result of the action or inaction of the EU or its staff[58], the scarce number of claims makes it difficult to envisage them under the form

[54] Artt. 263-264 TFEU.

[55] Art. 265 TFEU.

[56] Art. 270 TFEU.

[57] Artt. 258 ff. TFEU.

[58] Artt. 268, 340 TFEU.

of big data analytics, while doing statistics seems to be quite easy through more traditional methods[59]. Finally, we should consider the judgments concerning reference for preliminary rulings about the interpretation of the Treaties, and the validity and interpretation of the European acts, when the national judge before which such a question is raised considers that a decision on the question is necessary to enable him/her to give judgment, compulsorily if it is a court or tribunal of a member state against whose decisions there is no judicial remedy under national law[60]. The peculiarities of this (para-constitutional) competence of the Court, resulting in a judgment where the interests of the parties of the judgment *a quo* are only indirectly involved and envisaged, could limit the economic attractiveness for the parties of the utilization of predictive tools. Furthermore, by its very nature, the subject of the judgment is more complex than the mere prevalence of a party over another, making it difficult, at least in some cases, to approach the question through an abrupt, univocal prediction. However, more precise knowledge of the precedents might give some help to the European judges – and to the national judges in their dialogue with the CJEU – through the development and implementation of computer tools optimizing the precision of case law search engines and their standards of categorization. In fact, also for preliminary rulings the Court tends to respect its own precedents[61], aiming at a uniform interpretation of the EU law[62], and, as a consequence, a good knowledge of the precedents is paramount for all the actors involved in the procedure.

More in general, perhaps more important than the procedural distinction among the different competences of the Court, we should envisage the variable weight of the political factor from one case to another, which do not necessarily only characterize infringement procedures[63]. In fact, the Court of Justice of the European

[59] In particular, highlighting the low rate of success of such actions: R. Mańko, EPRS (European Parliamentary Research Service), *Action for damages against the EU*, <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf>, 2018, accessed 22/12/2022, p. 8.

[60] Art. 267 TFEU.

[61] Cf. art. 99 of the Rules of Procedure of the CJEU.

[62] See Calzolaio, *Il valore di precedente delle sentenze della Corte di giustizia*, cit., pp. 41 ff.

[63] See for ex., as a preliminary rule, CJEU, Joined Cases C-508/18 and C-82/19 PPU, judgment of 27 May 2019, about a European arrest warrant issued by a public prosecutor's office of a member state (Germany).

Union often applies general principles more than punctual norms, and it complicatedly justifies its decisions on the cumulative basis of purposive, systemic and literal arguments[64]. Therefore, the coherence of case law is fundamental to ensure a certain degree of legal certainty in the EU law and to foster the compliance of the states[65]. This is why the Court tends to frequently refer to its precedents and to rarely explicitly change its previous case law[66], adopting a high degree of formal standardization of its decisions[67], potentially suitable for the application of predictive technologies. However, some cases under the jurisdiction of the Court – for instance, with regard to the uncertain line between the competences of the Union and of the states, in the context of the recent tensions between the institutions of the EU and countries such as Hungary and Poland – require particularly strong considerations and mediations of policy, as, since the beginning of the European construction, the Court plays a cardinal – autonomously political – role in the establishment and evolution of the European political integration, as a pro-federalist policy-making, often beyond the limits of an explicit normative or even political mandate[68]. Furthermore, in order to render such decisions acceptable to the national level, the style of the Court is much focused on the importance of persuasion in the judicial discourse[69]. Hence, in many situations, the (political) substance tends to prevail over the standardized form, making it difficult to

[64] G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing, Oxford and Portland (Oregon), 2013.

[65] Cf. M. Cappelletti, D. Golay, *Judicial Branch in the Federal and Transnsational Union*, in M. Cappelletti, M. Seccombe, J.H. Weiler, *Integration through Law: Europe and the American federal experience*, vol. 1, book 2, De Gruyter, Berlin and New York 1986, p. 333: «unlike the American Supreme Court and the European Constitutional Courts, the Court of Justice has almost no powers that are not ultimately derived from its own prestige, intellectual and moral force of its opinions».

[66] J. Komárek, *Judicial Lawmaking and Precedent in Supreme Courts*, in «LSE Working Papers», 4/2011, 2011, p. 33.

[67] J. Komárek, *Legal Reasoning in EU Law*, in D. Chalmers, A. Arnull, *The Oxford Handbook of European Union Law*, Oxford University Press, Oxford 2015, pp. 49-50.

[68] Cf. H. Rasmussen, *On Law and Policy in the European Court of Justice: a comparative study in judicial policymaking*, Nijhoff, Dordrecht, 1986.

[69] O. Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint*, in «German Law Journal», vol. 5, n. 3, 2004, p. 317.

predict the decision through big data analytics, abstracting from the concrete political background of the case.

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In conclusion, this paper has shown, in relation to the European courts of Luxembourg and of Strasbourg, some of the potentialities and of the limits of the AI technologies: undoubtedly useful to the parties to optimize their processual decisions, useful but at the same time dangerous when used by the judges, in any case carrying the risk to burden the net of the future choices through the heavy stone-written shadows of the past[70]. This is why the modalities of utilization of predictive justice by judges must – before every implementation – be the result of a serious debate within the legal doctrine, within the whole civil society, and, with regard to the supranational courts, among the representatives of the countries involved. A debate which should not only take in account the technical computer issues, but also the ethical and the political issues implied, particularly relevant as policy arguments play an important part in the reasoning of these courts. In any case, all projects of implementation of algorithmic tools by European judges must take in account the peculiarities of the functions and of the functioning of these courts, which should avoid the mistake to weaken and delegitimize themselves through too hurried innovations, which might make them more opaque or incapable of evolution of case law.

[70] Cf. the poem of Paul Celan quoted at the beginning of this paper.

ELISABETTA FRONTONI*

THE ITALIAN CONSTITUTIONAL COURT AND THE SURNAME OF CHILDREN

ABSTRACT. *The essay analyses Constitutional Court judgment No. 131 of 2022, which finally puts an end to discrimination between mother and father in the attribution of a child's surname. Although the decision is to be welcomed, it raises problems concerning the relationship between the Constitutional Court and the legislative power. The essay examines these issues in connection with the child's personal identity and the limits of the Constitutional Court's pronouncements.*

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1. Introduction

After waiting in vain for the legislature to intervene, the Court rewrote the rule on the child's surname. Judgment No. 131 of 2022 puts an end to discrimination between parents based on the fact that in Italy the child's surname is the paternal one.

The decision is of extreme interest both for its undoubted social repercussions and for its effects on the principle of the separation of powers. The essay will attempt to analyse both these aspects of the ruling, highlighting their close interrelation.

In Italy, the rule of the paternal surname applied to all children regardless of whether they were born within marriage, outside marriage or adopted. In the case of children born in wedlock, the rule was so deeply rooted in custom that the Italian legislature had not even felt the need to write it down expressly, because it was derived from certain provisions in the legal system, since it was presupposed by them. The articles that assume the attribution of the paternal surname to the child are Articles 237, 262 and 299 of the Civile Code, Article 72(1) of Royal Decree No. 1238 of 9 July 1939 (Rules Governing Marital Status), and Articles 33 and 34 of Presidential Decree No. 396 of 3 November 2000 (Provisions Reforming and Simplifying the Rules on Marital Status, Pursuant to Article 2(12) of Law No. 127 of 15 May 1997)[1]. This patent

[1] The rules governing surname have undergone several modifications over time. Article 237 of the Civil Code, as amended by Legislative Decree no. 154 of 2013, provides that «possession of status results from a series of facts that taken together serve to prove the filial and kinship relationship between a person and the family to which he claims to belong» and specifically from the concurrence of «the following facts: – that the parent has treated the person as a child and has provided for his maintenance, education and placement in that capacity; – that the person has been constantly regarded as such in social relations; - that he has been recognised in that capacity by the family». As regards the child born out of wedlock, Article 262 of the Civil Code, again as amended by Legislative Decree No 154 of 2013, before the Court's additive intervention in 2016, provided that «the child shall take the surname of the parent who first recognised him. If the recognition was made simultaneously by both parents, the child shall take the surname of the father. If the filiation towards the father was ascertained or recognised after the mother's recognition, the child may take the father's surname by adding it to, preceding or replacing it with that of the mother. If the filiation vis-à-vis the parent has been ascertained or acknowledged after the surname has been attributed by the civil registrar, the first and second paragraphs of this article shall apply'; the child may, however, 'retain the surname previously attributed to him, if this surname has become an autonomous sign of his personal identity, by adding it to, preceding it or substituting it for the surname of the parent who first recognised him or for the surname of the parents in the case of recognition by both». Finally, with regard to the adopted child, Article 299 of the Civil Code, before the Court's additive intervention in 2016, provided that «if the adoption is made by spouses, the adopted

violation of the equality between spouses, solemnly proclaimed by Article 29 of the Italian Constitution, was justified on the basis of the limitation of the guarantee of family unity, laid down in the same article. In the legislator's view, the father's surname served to preserve that unity. On the other hand, as far as children born out of wedlock were concerned, the disparity in treatment between parents was functional to guaranteeing the recognised child the same treatment as the legitimate child (i.e. the one born within marriage) and the adoption discipline, introduced by Law No 184 of 1983, was also inspired by the same uniformitarian logic. The Italian legislature has not felt the need to change the patronymic even recently when it intervened to bring about the important unification of the status of children with Law No. 219 of 2012 and the subsequent Legislative Decree No. 154 of 2013. Evidently, the reform would have been a suitable opportunity to set hand also to a revision of the regulation of the surname[2].

2. The course of the Constitutional Court facing the legislative inertia

This is the background to the recent decision of the Italian Constitutional Court.

It comes after a long and complex journey that began almost 20 years ago with decision No. 61 of 2006 in which, though the Court had found that the child's surname regulation was in conflict with the Constitution, it had not declared the regulation

child shall take the surname of the husband». Article 72, paragraph 1, of Royal Decree No. 1238 of 9 July 1939 prohibited the imposition on the child of the name of the living father, while Articles 33 and 34 provide the limits on the attribution of a name and the provisions on the surname. In particular, for what we are interested in here, Article 33 (Provisions on the surname) provided that «The legitimised child shall have his father's surname, but if he is of age on the date of legitimation, he may choose, within a year from the day he becomes aware of it, to keep the surname he previously bore, if different, or to add to it or place before it, at his choice, that of the parent who legitimised him». Finally, Article 34, which sets limits on the attribution of a name, provides in its first paragraph that «It is forbidden to impose on the child the same name as the living father [...]».

[2] This point is emphasised by the Constitutional Court in Judgment No. 286 of 2016 and also by the scholars, see M. Trimarchi, *Il cognome dei figli: un'occasione perduta dalla riforma*, in «Famiglia e diritto», 2013, p. 243 and S. Troiano, *Cognome del minore e identità personale*, in «Jus civile», 2020, 3, p. 559 ff.

constitutionally unlawful[3]. In fact, the Court, while noting that the «system of attributing surnames is the legacy of a patriarchal conception of the family [...] no longer consistent with the principles of the legal system and with the constitutional value of equality between men and women», observed that, faced with several solutions compatible with the Constitution, it is within the legislature's discretion to choose among the various options[4]. For these reasons, the pronouncement closed with an invitation to the legislator to act as soon as possible.

Ten years later, in the absence of the hoped-for intervention of the Italian legislature, the issue of a child's surname came before the European Court of Human Rights. The European Court, in the Cusan Fazzo v. Italy judgment of 7 January 2014, condemned Italy for violation of Article 14 in conjunction with Article 8 of the ECHR[5]. According to the European Court, the provision of a paternal surname violates the equality of parents, who, by mutual agreement, cannot decide to give their child only the maternal surname.

At last in 2016, the protracted legislative inertia in remedying the discriminations noted by the Constitutional Court, and perhaps also the decision of condemnation of the European Court of Human Rights, led the Constitutional Court to go beyond its own jurisprudence and to declare the rule on the automatic attribution

[3] See G. Serges, *Famiglia e matrimonio*, in *La famiglia davanti ai suoi giudici*, a cura di F. Giuffrè, I. Nicotra, Editoriale Scientifica, Napoli, 2014, p. 587.

[4] On this decision, see E. Palici Di Suni, *Il nome di famiglia. la Corte si tira ancora una volta indietro, ma non convince*, in «Giurisprudenza costituzionale», 2006, p. 550 ff.; S. Niccolai, *Il cognome familiare tra marito e moglie. Come è difficile pensare le relazioni tra i sessi fuori dallo schema dell'uguaglianza*, in «Giurisprudenza costituzionale», 2006, p. 558 ff.; I. Nicotra, *L'attribuzione ai figli del cognome paterno è retaggio di una concezione patriarcale: le nuove Camere colgano il suggerimento della Corte per modificare la legge*, in «Consulta online», 16.2.2006.

[5] On the decision of the European Court of Human Rights, see E. Malfatti, *Dopo la sentenza europea sul cognome materno: quali possibili scenari?*, in «Consulta online», 9.3.2014; F. Buffa, *Nel nome della madre. Prime riflessioni sulla sentenza CEDU, II sez., 7 gennaio 2014, Cusan e Fazzo c. Italia*, in «Questione giustizia», 15.1.2014 and S. Niccolai, *Il diritto delle figlie a trasmettere il cognome del padre: il caso Cusan e Fazzo c. Italia*, in «Quaderni costituzionali»., 3/2014, p. 453 ff. On the decisive influence of this pronouncement on the Constitutional Court's decision, see E. Malfatti, *Illegittimità dell'automatismo, nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro*, in «Forum quaderni costituzionali», 5.1.2017, p. 1 ff. For a different perspective, see E. Frontoni, *Genitori e figli tra giudici e legislatore. La prospettiva relazionale*, Editoriale Scientifica, Napoli, 2019, p. 101 ff.

of the paternal surname unconstitutional. In detail, with judgment No. 286 of 2016, the Court declared unconstitutional the rule in the part where it does not provide that, by mutual agreement, parents may derogate from the paternal surname rule by adding the mother's surname to the paternal one[6].

However, in the event of failure to agree, the judgment leaves in place the automatism of the paternal surname, and thus the inequality between parents, not completely restoring constitutional legality. For this reason, it ends with a new invitation to the legislature to intervene to provide a regulation of the matter that eliminates the unconstitutionality at the root[7].

Also this new call for action went unanswered. Thus, the issue of the child's surname was once again before the Court, raised in the course of a case that a couple had been unable to give their son only his mother's surname[8].

It is in the course of this new judicial review that the constitutional judge is referring to itself the question of the legitimacy of the rules governing the automatic attribution of the father's surname to the child in the event of a lack of agreement between the parents[9].

The Court observes that «even if the right of the parents to choose, by mutual

[6] On this decision, see FRONTONI, *Illegittimità dell'automatismo, nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro*, cit., p. 1 ff.; S. SCAGLIARINI, *Dubbie certezze e sicure incertezze in tema di cognome dei figli*, in «Rivista AIC» 2/2017; A. FUSCO, «*Chi fuor li maggior tui?*»: *la nuova risposta del Giudice delle leggi alla questione sull'attribuzione automatica del cognome paterno. Riflessioni a margine di C. cost. sent. n. 286 del 2016*, in «Osservatorio AIC» 3/2017; C. INGENITO, *L'epilogo dell'automatica attribuzione del cognome paterno al figlio*, in «Osservatorio AIC», 2/2017.

[7] On this point of the decision, see FRONTONI, *Genitori e figli tra giudici e legislatore. La prospettiva relazionale*, cit., p. 98 ff. and p. 173 ff.

[8] With a referral order filed on 17 October 2019 and registered as No. 78 of the 2020 Register of Referral Orders, the Second Civil Division of the Ordinary Court of Bolzano raised questions as to the constitutionality of Article 262(1) of the Civil Code, in that it fails to allow parents, at the time of contemporaneously acknowledging their child, and in spite of their mutual agreement, to give the child the mother's surname only.

[9] See Constitutional Court, ord. n. 18 del 2021. On the various aspects of this ruling, see INGENITO, *Una nuova occasione per superare "l'anche" nell'attribuzione al figlio del cognome dei genitori. Riflessioni a margine dell'ordinanza n. 18/2021 della Corte costituzionale*, in «Federalismi.it», 11/2021; G. MONACO, *Una nuova ordinanza di "autorimessione" della Corte costituzionale*, «Federalismi.it», 11/2021; MALFATTI, *Ri-costruire la 'regola' del cognome: una long story a puntate (e anche un po' a sorpresa)*, in «Nomos», 1/2021 and see also FRONTONI, *Il cognome del figlio: una questione senza soluzione?,* in «Osservatorio AIC», 4/2020.

agreement, the transmission of their mother's surname alone were recognised (as the two parents requested), the rule requiring the acquisition of the paternal surname alone should be reaffirmed in all cases where such an agreement is lacking or has not been legitimately expressed; in these cases, which are likely to be more frequent, the prevalence of the paternal surname should therefore be reconfirmed, the incompatibility of which with the fundamental value of equality has long been recognised [...]»[10].

The Court also points out that «not even the consent, on which the limited possibility of derogation from the general rules of patronymic is based, could be considered an expression of real equality between the parties, since one of them does not need the agreement in order for its surname to prevail»[11].

As it has been the case on most occasions when the Court has decided to refer to itself a question of constitutionality, the issue has been declared well-founded and, as a result of the judgment, the children are having a double surname, maternal and paternal, in the order indicated by the parents. In this way the mother's name, which until now had been 'invisible', is finally recognised.

Moreover, both of them may also decide to give their children only the surname of one of them, thus derogating from the new rule introduced by the Court.

As mentioned at the beginning of this comment, the judgment is undoubtedly extremely important, because it puts an end to a now intolerable discrimination between parents, although the possibility for them to derogate from the double surname rule gives rise to some perplexity, also in the light of previous constitutional case law.

3. Parental equality and personal identity of the child

In order to clarify this aspect better, it is necessary to make some preliminary considerations. Starting from Judgment No 286 of 2016, to justify the unconstitutionality of the surname regulation, the Court relies on two profiles of violation of constitutional norms. The automatic attribution of the patronymic contrasts with both

[10] Constitutional Court, Ord. No. 18 of 2021.

[11] Constitutional Court, Ord. No. 18 of 2021.

the principle of equality (Article 3, first paragraph, of the Constitution), and the child's right to personal identity (Article 2 of the Constitution). Since Judgment No. 13 of 1994, the latter represents an essential personality trait and involves a number of aspects including the right to see represented the bond with both parental branches[12]. In the decision under comment, the Court once again refers to this profile, emphasising that «children's right to a personal identity and the equality between the parents intersect in the area of selecting surnames»[13] and observing that «a person's surname, together with their first name, forms the core of their legal and social identity: it is how they are identified for both public and private law purposes, and it becomes the abbreviated representation of the individual personality, the meaning of which grows and is enriched over time»[14].

After this premise, however, the Constitutional Court seems to 'forget' this profile that embodies the right to a child's personal identity. Letting parents choose their child's surname means disregarding the child's personal identity, which, as the Court has observed in its previous judgments, should be anchored in the recognition of both parental lines and not defined by a free choice of the parents.

Giving due weight to the right to personal identity as well, the Court should have stopped at the introduction of the new double surname rule, without also

[12] In Judgment No. 286 of 2016, the Court emphasised that «In order to achieve the full and effective realisation of the right to personal identity, which has its primary and most immediate expression in the name, along with the recognition of equal significance to both parents within the process of constructing that personal identity, the child's right to be identified from birth by the surname of both parents must be recognised. Conversely, the provision for absolute priority to the father's surname sacrifices the child's right to identity, denying him or her the ability to be identified from birth also by the mother's surname». See Constitutional Court, Judgment No. 286 of 2016, point 3.4.1 of Conclusions on Points of Law. On the right to personal identity see V. Zeno-Zencovich, *Identità personale*, in *Digesto delle Discipline Privatistiche*, UTET, Torino, vol. IX, 1993, p. 294 ff.; G. Pino, *The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights,* in *The Harmonization of Private Law in Europe,* edited by M. Van Hoecke and F. Ost, Hart Publishing, Oxford, 2000, p. 225 ff. On the relevance of the right to personal identity in contemporary family law, see D. Messinetti, *Diritti della famiglia e identità della persona*, in «Rivista di diritto civile», 2005, I, p. 137 ff.; M.R. Marella, G. Marini, *Di cosa parliamo quando parliamo di famiglia*, Laterza, Roma-Bari, 2014, p. 41 ff.; M. Di Masi, *L'interesse del minore. Il principio e la clausola generale*, Jovene, Napoli, 2020; F. Caggia, *Capire il diritto di famiglia attraverso le sue fasi*, in «Rivista di diritto di famiglia», 2017, p. 1572 ff.

[13] Constitutional Court, Judgment No.131 of 2022, point 9 of Conclusions on Points of Law.

[14] Constitutional Court, Judgment No. 131 of 2022 point 9 of Conclusions on Points of Law.

providing for the possibility of its derogation.

In order to justify the possibility of derogating from the rule of double surname, the constitutional judge introduces the new concept of 'family identity' to which the child is linked, at the moment when, through his surname, he acquires the *status filiationis*. Consequently, «the way in which a surname professes a child's family identity must reflect and show respect for the parity and equal dignity of the parents»[15]. In this changed perspective, it is not so much relevant the surname itself, but rather the manner in which this attribution arrives at, which must be equal. That is why, after having placed the parents in a position of effective equality, it can be given value to the agreement between them to derogate from the general rule.

The Court's argument does not appear convincing, because it conflicts with previous case law and because it appears to be an expression of the Court's choice in favour of a conception of the family as a social formation characterised by a wide sphere of autonomy from which the State must withdraw as far as possible. This option, however, appears to be reserved to the legislature's discretion and not to a judgment of the Constitutional Court[16].

[15] Constitutional Court, Judgment No. 131 del 2022, point 9 of Conclusions on Points of Law.

[16] The various bills presented in the previous legislature tended to give parents the choice of surname (four in the Chamber of Deputies, see Bill Nos. 106, 230, 1265 and 2129, and three in the Senate of the Republic, see Bill Nos. 170, 286 and 1025). These are very similar drafts that seek to resolve the different issues that arise when abandoning the criterion of the automatic paternal surname. Bill No. 106 (which reproduces, with some amendments and additions, the content of the bill AS No. 1628 approved by the Chamber of Deputies in the 17th legislature on 24 September 2014, the examination of which was then halted in committee at the Senate) provides, for example, for the introduction of a new Article 143-quater in the Civil Code, pursuant to which «Married parents, when declaring the birth of their child, may attribute to the child, according to their will, either the father's surname or the mother's surname or those of both in the agreed order. If there is no agreement between the parents, the child is given the surnames of both parents in alphabetical order. The children of the same married parents, born subsequently, bear the same surname attributed to the first child. A child who has been attributed the surnames of both parents may transmit to his/her child only one of them, at his/her choice».

4. The Constitutional Court's judgment and the relationship with the legislature

Whit regard to the relationship with the legislature, the decision presents further critical profiles[17]. Actually, it is part of a new trend in constitutional jurisprudence to overcome the limit of the legislature's discretion in the face of its continuous inaction to guarantee constitutional rights[18].

According to an authoritative doctrine, when the Court does not declare constitutional illegitimacy so as not to invade the legislature's sphere of discretion, on the one hand it risks offering the latter, and its inertia, a kind of over-protection and, on the other, it fails in its role as guarantor of constitutional rights[19]. In line with this position, many authors believe that the Court's new attitude is justifiable in the light of the protracted legislative inertia[20]. This type of intervention is more radical than the Court's traditional one, which, following the Crisafullian doctrine of obligatory rhymes, merely made explicit what was implicit in the legal system[21].

According to these authors, overcoming the so-called obligatory rhymes allows

[17] Two famous essays by Modugno and Zagrebelsky from the 1980s examine the complex relationship between the Constitutional Court and the legislature. Recently, the two scholars have taken up the topic. See, F. Modugno, *Corte costituzionale e potere legislativo,* in *Corte costituzionale e sviluppo della forma di governo italiana*, Bologna 1982, p.19 ff. and G. Zagrebelsky, *La Corte costituzionale e il legislatore*, *ivi*, p. 103 ff.; Modugno, *Vecchie e nuove questioni in tema di giustizia costituzionale. Il superamento dell'insensato dualismo tra (semplice) legalità e costituzionalità*, in «Diritto e Società», 4/2019, p. 791 ff. and Zagrebelsky, *Sofferenze e insofferenze della giustizia costituzionale. Un'introduzione*, in «Diritto e Società», 4/2019, p. 545 ff.

[18] On this new trend, see G. Lattanzi (President of the Constitutional Court), *Summary of the report on the work of the Constitutional Court in 2018*, M. Cartabia (President of the Constitutional Court), *Summary of the report on the work of the Constitutional Court in 2019;* G. Coraggio (President of the Constitutional Court), *Report by president on the Constitutional Court's activity in the year 2020,* on <www.cortecostituzionale.it>.

[19] V. Marcenò, G. Zagrebelsky, *Giustizia costituzionale*, il Mulino, Bologna, 2012, p. 400.

[20] See M. Ruotolo, *L'evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale. Per un inquadramento dell'ord. n. 207 del 2018 in un nuovo contesto giurisprudenziale,* in «Rivista AIC», 2/2019. Ruotolo, *Corte e legislatore,* in «Diritto e società», 1/2020, p. 53 ff. Ruotolo, *Oltre le rime obbligate?,* in «Federalismi.it», 3/2021; D. Tega, *La Corte nel contesto. Percorsi di ri-accentramento della giustizia costituzionale in Italia,* Bup, Bologna, 2020*,* p. 101 ff.

[21] See V. Crisafulli, *La Costituzione ha vent'anni*, in «Giurisprudenza costituzionale», 1976, 1707 ff. On this type of decisions, the so called additive judgments, see *Introduction to Italian Public Law*, edited by G.F. Ferrari, Giuffrè, Milano, 2008, p. 204 ff.

the Court to perform fully its task of guaranteeing the supremacy of the Constitution. This function appears even more important when, as in this case, the violation of rights, «due to the inertia of the legislature rather than to its own autonomous decision and thus protracted over time, is perceived as an 'injustice'...»[22].

On the contrary, according to other authors, when the Court chooses among several possible solutions, all compatible with the Constitution, it is exercising a function that does not belong to it, by invading the field of the legislature, even when the latter has remained inert[23].

Moreover, the Court replaces the legislature in the role of interpreter of the social conscience, without having the legitimacy and adequate tools to do so (the Court is not a representative body and does not have a complete vision of the issue). According to these authors, the search for increasing legitimacy has prompted the Court to accompany its activism with a growing and critical dialogue with society, through a new website and by visiting schools and prisons[24]. Thus, the Court no longer seems to act only with its judgments, as it should[25].

This debate on the role of the Constitutional Court takes place in the framework of a more comprehensive issue concerning the interpretative powers of the Constitutional Court. In order to simplify as much as possible, two lines of interpretation are opposed: those who believe that the Court could not go beyond the text (according to a position that can be ascribed to so-called originalism) and those who instead believe that the Constitution should be understood as a living document[26].

[22] See G. Repetto, *Recenti orientamenti della Corte costituzionale in tema di sentenze di accoglimento manipolative*, in Liber amicorum *per Pasquale Costanzo*, in «Consulta online», 3.2.2020.

[23] N. Zanon, *Corte costituzionale, evoluzione della "coscienza sociale" interpretazione della Costituzione e diritti fondamentali: questioni e interrogativi a partire da un caso paradigmatico"*, in «Rivista AIC», 4/2017.

[24] On the importance for constitutional Courts to open up to civil society, see A. Bogdandy, *Strukturwandel des öffentlichen Rechts Entstehung und Demokratisierung der europäischen Gesellschaft*, Suhrkamp, 2022.

[25] On the new activism of the Constitutional Court, see the remarks of A. Morrone, *Suprematismo giudiziario Su sconfinamenti e legittimazione politica della Corte costituzionale*, in «Quaderni costituzionali», 2/2019, p. 251 ff. For a different perspective, see R. Bin, S*ul ruolo della Corte costituzionale. Riflessioni in margine ad un recente scritto di Andrea Morrone*, in «Quaderni costituzionali», 4/2019, p. 757 ff. E. Cheli, *Corte costituzionale e potere politico. Riflessioni in margine ad un recente scritto di Andrea Morrone*, in «Quaderni costituzionali», 4/2019, p. 780 ff.

[26] On this debate, see R. Guastini, *Legalità*, in *Rule of law. L'ideale della legalità*, a cura di G. Pino, V. Villa, Il Mulino,

Reading judgment No. 131 of 2022 in the perspective of the separation of powers, while the introduction of the new rule of double surnames seems to be the choice that is most respectful of the Constitution, because it guarantees both equality between parents and the personal identity of the child, the possibility for parents to choose only one of their surnames appears to be a choice that has been made by the Court. From this point of view, the elimination of the automatism of the paternal surname in favour of the new rule of double surnames appears to be a way for the Court to affirm the supremacy of the Constitution by adopting the choice most in conformity with it, in the face of continuing legislative inertia. On the contrary, the possibility of choice granted to parents appears to be an undue invasion of the legislature's field, which lends itself to criticism as an example of excessive activism on the part of the Constitutional Court.

Furthermore, from the perspective of social effects, the choice given to parents could considerably reduce the impact of the pronouncement on relations between them. A German study shows that in Germany, where it is possible to choose the family name, only «6 per cent of couples choose the wife's name as the family name, while 75 per cent choose the husband's, which is therefore the one that is normally passed on to the children»[27].

The doctrine has long pointed out that judgments of the Constitutional Courts can have the effect of shutting down and sterilising public debate on an issue. These decisions can be perceived as something that 'falls from above' on a society that is not yet fully ripe for change.

Bologna, 2016, p. 142 ff.; ZANON, *I rapporti tra la Corte costituzionale e il legislatore alla luce di alcune recenti tendenze giurisprudenziali*, in «Federalismi.it», 3/2021. On the first interpretation of the Constitution, see, M. DOGLIANI, *Interpretazione*, in *Dizionario di diritto pubblico*, IV, a cura di S. Cassese, Milano, 2006 p. 3179 ff., on the second, see A. BARBERA, *Art. 2*, in *Commentario alla Costituzione*, a cura di G. Branca, Zanichelli, Bologna, 1975, p. 50 ff. For an intermediate position, see MODUGNO, *I "nuovi diritti" nella giurisprudenza costituzionale*, Giappichelli, Torino, 1995. The debate resembles the one following the judgment Dobbs v. Jackson Women's Health Organization. See A. PALMIERI, R. PARDOLESI, *Diritti costituzionali effimeri? L'*overruling *di «Roe v. Wade»,* in «Foro italiano», IV, 2022, p. 432 ff.; M.R. MARELLA, *«Dobbs» e la geopolitica dei diritti, ivi,* p. 442 ff.

[27] See TROIANO, *Cognome del minore e identità personale*, cit., p. 585 ff. and Nur sechs Prozent aller Paare entscheiden sich für den Namen der Frau in Suddeutsche Zeitung of 19 December 2018, on <www.suddeutsche.de>.

5. Concluding remarks

Even after this important Court judgment, the long history of the child's surname cannot be said to be over. The legislature must still intervene to provide a surname regulation that resolves the various problematic profiles on which the Court's judgment could not intervene. In order to be effective, the constitutional justice needs the cooperation of the legislature. The Court addresses the legislature on these further profiles as well.

First of all, the Court makes it clear that the declaration of constitutional illegitimacy affects the rules attributing the surname and will therefore take effect from the day after its publication in all those cases where such attribution has not yet taken place, including those in which legal proceedings for that purpose are pending. All the others will keep the paternal surname given at birth. This surname can only be changed through a special administrative procedure. In addition, the judgment provides guidance for couples who already have other children. In these cases, the Court seems to suggest the way of adopting the original surname, which after the decision would take on the value no longer of an imposed surname, but of the one freely chosen by the parents for their family.

The Constitutional Court, however, states that in the event of disagreement between the parents, the choice cannot be replaced by a court decision. In that case, the general rule of double surnames will apply.

On this issue, the Court once again invites the legislature to intervene to lay down rules that, applying to all children of the same parents, do not undermine the identifying function of the surname.

In addition, the Court called for legislative intervention to resolve the issue of the surname that will be passed on to the child in the generational transition. It is up to Parliament to provide for rules to avoid the effect of a «mechanism that multiplies the number of surnames with the passage of generations»[28] which could be prejudicial to the identity function of the surname. Even with regard to this delicate issue, however,

[28] Constitutional Court, judgment No. 131 del 2022, point 15.1 of Conclusions on Points of Law.

the judgment indicates to the legislature a possible solution, namely that it is the parent holding the double surname who chooses the one of the two that he/she wants to be representative of the parental relationship, «unless of course the parents choose to give their child one of their double surnames»[29].

These indications suggest that the Constitutional Court, fearing that the legislature will continue to remain silent, is laying the basis for a new and definitive intervention to complete the process begun in 2006.

[29] *Ibid.*

JAVIER MARTÍNEZ CALVO[*]

THE ATTRIBUTION OF SURNAMES IN ITALIAN LAW AFTER THE CONSTITUTIONAL COURT'S JUDGMENT N. 131/2022: CURRENT SITUATION, NEW CHALLENGES AND SOME PROPOSALS FOR INTEGRATION FROM SPANISH LAW[**]

ABSTRACT. *The Judgment of the Italian Constitutional Court no. 131 of 2022, to the analysis of which a large part of this paper is dedicated, has declared the unconstitutionality of Art. 262(1) of the Italian Civil Code, introducing two important modifications in the system of attribution of surnames to children: on the one hand, it establishes that, in the absence of agreement, the child will receive the surname of both parents, making it the general rule and thus putting an end to the automatic attribution of the paternal surname. And, in the event that the parents decide to attribute the child exclusively the surname of one of them, this may be the paternal or maternal surname, putting an end to the impossibility of the child receiving only the maternal surname. But this raises new challenges, such as the determination of the order of surnames in cases of double surnames, the possible multiplier effect of surnames in successive generations or the way in which the principle of family unity is to be guaranteed. These questions will be addressed by bringing up the solutions offered by the Spanish system, where the double surname has traditionally been the general rule, and which may therefore be useful for integrating the new Italian system of attribution of surnames.*

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1. The system of attribution of surnames in Italian law prior to Constitutional Court's Judgment no. 131 of 2022

Article 262(1) of the Italian Civil Code, the subject of the pronouncement of the Constitutional Court in its Judgment no. 131 of 2022 (to whose analysis these lines are dedicated), regulates the attribution of the surname to children born out of wedlock, providing that the children adopt the surname of the parent who first recognised them, and, when the recognition is made simultaneously by both parents, the children take the surname of the father.

In the case of matrimonial children, there is no rule in positive law, which made sense for many years, but not today. In this respect, until the reform carried out by Law no. 151 of 19 May 1975, Article 144 of the Civil Code stipulated that the husband is the head of the family and the wife follows his civil status, adopting his surname. In this way, the husband's surname was imposed on the wife and became the family surname, so that it was not necessary to establish rules to determine the surname of the children born in the marriage, who in any case received this family surname.

Law no. 151 of 19 May 1975 modified Article 144 of the Civil Code and introduced a new Article 143-bis, providing for the addition and no longer the substitution of the wife's surname by the husband's, a provision which from the beginning was interpreted as an option and not an obligation for the wife. This blurred the image of the husband's surname as the family name.

The problem is that the reform did not introduce any reference to the regime of transmission of the spouses' surnames to the children, so that, in practice, the rule of attribution of the father's surname was maintained[1]. The Italian legal system seems to take it for granted if we look at the provisions contained in various rules, such as Article 262(1) of the Civil Code, which we have already seen that, although referring to children born out of wedlock, provides that when recognition is made simultaneously by both parents, the child takes the father's surname.

Also Art. 299(3) of the Civil Code, concerning adopted children, provides that

[1] See M. Sesta, *Manuale di diritto di famiglia*, Cedam, Padova 2007, p. 208.

the adopted child takes the surname of the husband. And, in similar terms, Art. 27(1) of Law no. 184 of 1983 establishes that the adopted child receives and transmits the surname of the adoptive parents. This surname, in accordance with the condition of child born in the marriage of the adopting spouses, refers unequivocally to that of the husband, to the point that paragraph 2 of the same precept establishes that, only in the case that the adoption is established in favour of the separated wife, the adoptee will receive her surname.

Finally, Article 34 of Presidential Decree no. 396 of 2000 also presupposes the attribution of the father's surname, as it prohibits giving the child the same name as the father or the living brother or sister, in order to avoid homonymity.

Therefore, a patriarchal vision of the family has traditionally prevailed in Italian law (as it did in most of the legal systems around us), which, especially in recent years, has been strongly criticised by the doctrine[2] (but there were also those in favour of such a system)[3].

The fact is that when the Constitutional Court has had the opportunity, it has highlighted the inconvenience of this regime, as well as the problems of constitutionality that it may present. Already in its Order no. 176 of 1988[4], it considered that it would be possible, and probably more in line with the evolution of social conscience, to replace the rule of attribution of the father's surname to children born in marriage with a different criterion, more respectful of the autonomy of the spouses and of Article 29 of the Italian Constitution, which provides that marriage is ordered on the moral and legal equality of the spouses.

It is more categorical in its Judgement no. 61 of 2006[5], in which it states that

[2] See V. Barba, *Apellido familiar, apellido de los hijos e igualdad de género en el Derecho italiano: hacia la superación del modelo familiar patriarcal*, in «Actualidad Jurídica Iberoamericana» n. 16 bis, 2022, pp. 886-919.

[3] As Sesta notes, Italian doctrine was divided between those who considered that it did not comply with the principle of equality and those who, on the other hand, justified the continuation of this legal framework by virtue of the provision in Article 19(2), which allows limits to be placed on equality between spouses to guarantee family unity. Sesta, *Manuale di diritto di famiglia*, cit., pp. 209-210.

[4] With a note by F. Dall'Ongaro, *Il nome della famiglia e il principio della parità*, in «Il diritto di famiglia e delle persone», 17, n. 1, 1988, pp. 1576-1586.

[5] With a note by L.Gavazzi, *Sull'attribuzione del cognome materno ai figli legittimi*, in «Nuova giur. civ. Comm»,

the current system of attribution of surnames is the legacy of a patriarchal conception of the family, which has its roots in Roman family law[6], and of an antiquated marital power, which is no longer coherent with the principles of the legal system and with the constitutional value of equality between men and women (an idea that it would reiterate in its Judgement no. 145 of 2007).

A few years later, in its Judgement no. 286 of 2016[7], it went further and declared the unconstitutionality of the rules for determining surnames as being contrary to the principle of equality, insofar as they do not allow spouses to transmit to their children, by mutual agreement, also the maternal surname; extending its effects to both Art. 262(1) and Art. 299(3) of the Civil Code. Therefore, after the aforementioned ruling, the attribution of a double surname to the child began to be admitted, provided that there is agreement between the parents.

However, and despite the progress made by the aforementioned pronouncement, the truth is that, in the absence of agreement, only the paternal surname continued to be transmitted[8], and, furthermore, the possibility of attributing only the mother's surname was forbidden, even if there was agreement in this respect between the parents.

This has led the Constitutional Court to intervene again, and it has done so in its Judgement no. 131 of 2022, which I will now analyse.

2. Background to the Constitutional Court's decision

Constitutional Court Judgment no. 131 of 2022 has its origin in the presentation of three questions of unconstitutionality in relation to the content of Art. 262(1) of the Civil Code, although, as we shall see below, it only entered into the

2007 1, p. 30 ff.

[6] See too V. Carbone, *Quale futuro per il cognome?*, in «Famiglia e diritto», 2004, fasc. 5, pp. 457 ff.

[7] With a note by E. Al Mureden, *L'attribuzione del cognome tra parità dei genitori e identità del figlio*, in «Corriere giuridico», 2017, 2, pp. 165 ff.

[8] See R. Favale, *Il cognome dei figli e il lungo sonno del legislatore*, in «Giurisprudenza italiana», 2017, 4, p. 824.

substance of two of them, as the other was not admitted.

The first question of unconstitutionality was presented by the Court of Bolzano (2nd section) through its order dated 17 October 2019 (registered as no. 78 in the 2020 register of orders). The proposing court considered that Art. 262(1) of the Civil Code, by impeding that, in the case of simultaneous recognition of a child born out of wedlock, the parents may, by mutual agreement, transmit only the maternal surname, could be contrary to Articles 2, 3, 11 and 117(1) of the Constitution, the latter in conjunction with Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified by Italy and made enforceable by Law no. 848 of 4 August 1955; and with Articles 7 and 21 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000.

The facts date back to an appeal brought by the Public Prosecutor's Office to the Court of Bolzano requesting the rectification of the birth certificate of a child, to which the parents had attributed only the maternal surname at the time of the declaration of birth, carried out with the simultaneous recognition of both parents in front of the medical director. It was not, therefore, a question of attributing both surnames, which in the case of agreement between the parents was already possible following the Constitutional Court Judgment no. 286 of 2016, but only the maternal surname, an option that was not provided for in the current legislation. It should be noted that, in the course of the proceedings before the Court of Bolzano, the parents confirmed that they wished to attribute to their daughter only the mother's surname.

Some time later, the Constitutional Court itself, after analysing the order of the Bolzano Court, decided to raise a broader question of unconstitutionality on the content of Art. 262(1), by order of 11 February 2021 (registered as no. 25 in the 2021 register of orders). Like the Tribunale di Bolzano, the Constitutional Court considered that the aforementioned Article could be contrary to Articles 2, 3 and 117(1) of the Constitution, the latter in relation to Articles 8 and 14 of the ECHR, but for an additional reason: because, in the absence of agreement between the parents, it attributes the paternal surname to the children, instead of the surnames of both parents.

The third question of unconstitutionality brought against Art. 262(1) of the Civil Code has its origin in the application filed by two spouses with the aim of being

allowed to impose on their child only the surname of the mother. In this way, they sought to guarantee the child's right to identity, as well as the principle of family unity, by assigning the couple's third child the surname that, prior to their marriage, they had already had two other daughters (previously recognised only by their mother and who therefore bore only her surname). However, this request was rejected both by the officer of the Civil Status Office and by the Lagonegro Court (before which the parties appealed), which, in its Decree of 4 November 2020, considered that the alleged protection of the integrity of the family unit could well be safeguarded by attributing the surname of both parents to all the children. The aforementioned Decree was appealed before the Court of Appeal of Potenza, which decided to raise a question of unconstitutionality through its order of 12 November 2021 (registered under no. 222 in the 2021 register of orders). However, as anticipated, this last question of unconstitutionality was not admitted by the Constitutional Court, on the grounds that it lacked an adequate and independent illustration of the reasons why the censured rule would constitute a violation of constitutional norms. In any case, its subject matter was similar to that of the question of unconstitutionality submitted by the Court of Bolzano, so that, in practice, its inadmissibility has not impeded the Constitutional Court from ruling on the substance of the case.

For the rest, the Constitutional Court decided to cumulate and resolve jointly the first two questions of unconstitutionality to which I have referred, given the close connection between them. And it did so in the following manner.

3. The Constitutional Court's decision

The Constitutional Court had to judge the constitutionality of Art. 262(1) of the Civil Code from a dual perspective:

On the one hand, the Court of Bolzano, in the question of unconstitutionality raised through the order dated 17 October 2019 (registered under no. 78 in the 2020 register of orders), points out that the precept in question may suffer from a defect of unconstitutionality by not allowing the parents, by mutual agreement, to attribute to the child only the surname of the mother. It therefore calls for an additional intervention

repealing the general rule on the automatic transmission of the paternal surname and allowing the parents to attribute to their child only the maternal surname.

For its part, the Constitutional Court, by order of 11 February 2021 (registered under no. 25 in the 2021 register of orders) proposes, as a preliminary ruling, an intervention that replaces the content of Art. 262(1) of the Civil Code, eliminating the provision that, in the absence of a different agreement between the parents, the paternal surname is attributed to the child, instead of the surnames of both parents.

We have already seen in the previous section that the constitutional precepts invoked by the proposing courts coincide: Article 2, in relation to the protection of the identity of the child, and Article 3, in relation to the principle of equality in relations between parents. Reference is also made to a possible conflict with the international obligations assumed by Italy, under Article 117(1) of the Constitution, in relation to the protection of the personal identity of the child, provided for by Article 8 of the ECHR, and to the prohibition of discrimination, a matter covered by Article 14 of the ECHR.

Therefore, the proposing courts understand, in the first place, that the rules relating to the attribution of the surname may not be in conformity with Article 2 of the Constitution, from the point of view of the protection of the personal identity of the minor. In this respect, the Constitutional Court, in the Judgment, which is the subject of this commentary, shows how the surname has decisive profiles in the configuration of the personal identity of the minor. Together with the name, it represents the core of the legal and social identity of a person, conferring identifiability, both in public law relations and in private law relations. In this regard, it brings up the doctrine it has established in other previous rulings, in which it considered that the name is an autonomous distinctive sign of personal identity (Judgement no. 297 of 1996), an essential feature of personality (Judgements no. 120 of 2001, no. 268 of 2002 and no. 286 of 2016) and a fundamental right of the human person (Judgements no. 13 of 1994, no. 297 of 1966, no. 120 of 2001 and no. 268 of 2002).

The Constitutional Court also understands that, from a family point of view, the identity of the child can be broken down into three elements: (i) the parental link with the father, identified by a surname, representative of his family branch; (ii) the parental link with the mother, also identified by a surname, also representative of her

family branch; (iii) and the choice of the parents to recognise the child at the same time, welcoming him or her into a family unit. In this way, the automatic and exclusive attribution of the surname of the paternal parental line not only unilaterally obscures the parental relationship with the mother, but also sacrifices the child's right to identity, denying him or her the possibility of being identified, from birth, also with the mother's surname.

The second constitutional precept invoked by the proposing courts is Article 3 of the Constitution, which enshrines the principle of equality. In this regard, the Bolzano Court refers to the grounds of the judgment of the European Court of Human Rights of 7 January 2014 (Cusan and Fazzo v. Italy), which held that the impossibility for parents to attribute to their child, at birth, the mother's surname instead of the father's surname constituted a violation of Article 14 of the ECHR (prohibition of discrimination), in conjunction with Article 8 of the ECHR (right to respect for private and family life)[9]. In paragraph 66 of the above-mentioned decision, the European High Court stressed the importance of a development in the direction of ensuring equality of the sexes and the elimination of any discrimination in the choice of surname, pointing out that the tradition of expressing the unity of the family by attributing to all its members the surname of the husband cannot justify discrimination against women.

The Italian Constitutional Court, in the judgement we are analysing, adheres to these arguments and considers that, in the face of the rules that guarantee the attribution of the father's surname, the mother finds herself in a situation of asymmetry, antithetical to equality, which ends up causing an effect of invisibility of the woman. In fact, already in the question of unconstitutionality presented through the order of 11 February 2021, it highlighted this situation, alleging that not even consent, on which the limited possibility of non-application of the general rules providing for the attribution of the father's surname is based, could be considered an expression of real equality between the parties, given that one of them does not need the agreement to make their own surname prevail. Without equality, the logical and axiological conditions

[9] See further C. Pitea, *Trasmissione del cognome e parità di genere: sulla sentenza Cusan e Fazzo c. Italia e sulle prospettive della sua esecuzione nell'ordinamento interno*, in «Diritti umani e diritto internazionale», 2014, fasc. 1, pp. 231 ff.

for an agreement are lacking. In its Judgement no. 131 of 2022, the Constitutional Court insists on this idea and considers that the rule of automatic attribution of the paternal surname, *a priori*, invalidates the possibility of an agreement, all the more improbable insofar as its object is the attribution of the mother's surname exclusively, that is, the radical sacrifice of what corresponds to the father.

Based on the above, the Constitutional Court declares the unconstitutionality of Art. 262(1) of the Civil Code, as being contrary to arts. 2, 3 and 117(1) of the Italian Constitution, the latter in relation to Articles 8 and 14 of the ECHR, insofar as it provides, in relation to the hypothesis of recognition carried out simultaneously by both parents, that the child adopts the surname of the father, instead of providing that the child adopts the surnames of the parents, in the order agreed by them, without prejudice to the agreement, at the time of recognition, to attribute the surname of only one of them, which could be either the paternal or maternal surname.

Consequently, it also declares the unconstitutionality of other rules of the Italian legal system that regulate the attribution of surnames in the same sense as Article 262(1) of the Civil Code. In this regard, it considers that Article 299(3) of the Civil Code and Article 27(1) of Law no. 184 of 1983 are unconstitutional in so far as they provide that the adopted child shall receive the surname of the husband instead of providing that the adopted child shall receive the surnames of the adoptive parents, in the order agreed by them, without prejudice to the agreement, reached during the adoption procedure, to attribute the surname of only one of them, which may be either the paternal or the maternal surname.

Therefore, with the judgement of the Constitutional Court, two important modifications are introduced in the system of attribution of surnames to children: on the one hand, it is established that, in the absence of agreement, the child will receive the surname of both parents, making this the general rule and thus putting an end to the automatic attribution of the paternal surname. And, in the event that the parents reach an agreement different from this general rule, that is, when they decide to attribute the child exclusively the surname of one of the parents, this may be the paternal or maternal surname, putting an end to the impossibility for the child to receive only the maternal surname.

4. Unresolved issues and proposals for integration from Spanish law

a) Order of surnames

Once the double surname (paternal and maternal) has become the general rule in Italian law, the next question that arises is the order in which the newborn (or adopted) child will receive the surnames of his or her parents.

If there is agreement between the parents, it seems clear that this must always take precedence. In fact, this is also the solution adopted in other European countries that provide for the attribution of a double surname, including Spain (Art. 49(2) of Law no. 20 of 21 July 2011, on the Civil Status Register).

But in the absence of an agreement, it is necessary to determine the criteria to be followed to establish the order of surnames. And, in this regard, the Italian Constitutional Court has ruled out that the mechanical preference of the paternal or maternal surname can be used as a criterion, as it would imply reproducing the same discriminatory logic that underlies the rule that was declared unconstitutional through Judgment no. 131 of 2022[10]. In fact, the European Court of Human Rights has also expressly ruled on this issue in its Judgement of 7 January 2014 (León Madrid v. Spain), referring to a provision of Spanish law (Article 194 of the Regulation of the Civil Status Registry Law, in correlation with Article 109 of the Spanish Civil Code), which required giving the father's surname before the mother's in case of disagreement over the order.

As an alternative, in its pronouncement, the Constitutional Court proposes that, when there is no agreement on the order of attribution of the parents' surnames, in the absence of specific criteria that may be introduced by the legislator, the conflict should be resolved by judicial intervention, which is the instrument provided for in Italian law to resolve disagreements between parents on decisions of particular importance concerning their children (Art. 316, second and third paragraphs, of the Civil Code). In fact, this is the rule to which case law and doctrine have been resorting when disagreements between the parents on the attribution of the child's name are to be resolved.

[10] See Barba, *Apellido familiar, apellido de los hijos e igualdad de género en el Derecho italiano*, cit., p. 910.

However, I have doubts as to whether it is appropriate to leave this decision to the judge. It cannot be ruled out that, especially during the first years of the new system, disagreements between parents about the order of their children's surnames will be frequent, with the risk of a high number of lawsuits reaching the courts with the aim of determining the order of the surnames of the born (or adopted) child, with the consequent risk of increasing the levels of saturation they are already experiencing. Furthermore, leaving this decision in the hands of the judge would mean that during the time the legal proceedings are in progress the order of the child's surnames would not be defined, which I believe could even end up affecting the child's right to identity.

That is why it seems to me that, on this point, the solution provided by the Spanish legislator may be more appropriate. In this regard, Art. 49(2) of Law no. 20 of 21 July 2011 on the Civil Status Register provides that in the event of disagreement between the parents about the order of the surnames or when this is not stated, the Civil Registrar shall require them to communicate the order of the surnames within a period of 3 days. After this period has expired, the Civil Registrar shall decide on the order of the surnames. Obviously, the decision of the Civil Registrar is subject to appeal in the courts.

As to the criteria to be followed in determining the order of the child's surnames in the absence of agreement between the parents, Italian law remains silent. And, in the case of Spanish law, Art. 49(2) of Law no. 20 of 21 July 2011, on the Civil Status Register, limits itself to stating that, when the Civil Registrar has to decide the order of surnames, the best interests of the child must be taken into account[11]. As it can be seen, this is a very vague criterion, which does little or nothing to help the Civil Registrar when making his or her decision, which will inevitably contain large doses of discretion[12]. On most occasions, it will not serve to determine the most appropriate

[11] The best interests of the child is an indeterminate legal concept that will have to be specified in each case. See F. Rivero, *El interés del menor* (2nd ed.), Dykinson, Madrid 2007, pp. 84-85.

[12] In fact, it has been criticised by the Spanish doctrine: R. Barber, *Apellidos y Registro Civil*, in «Actualidad Jurídica Aranzadi», 2010, 809, p. 4 ff.; and M. Ordas, *Imposición al menor del apellido paterno: igualdad, derecho a la propia imagen, interés del menor*, in «Derecho Privado y Constitución», 2014, 28, p. 88. Although other authors have argued in favour of such a system: see M. Linacero de la Fuente, Tratado del Registro Civil: adaptado a la Ley 20/2011, de 21 de julio, del Registro Civil, Valencia 2013: Tirant lo blanch, pp. 203-204.

order (for example, it is not clear how it can be more beneficial for a child to have the surname López García than García López).

For this reason, it seems that it would be more appropriate to introduce objective criteria. In this respect, in the case of Spain, during the parliamentary processing of the current Civil Status Law (which abolished the preference of the paternal surname), the political parties made some proposals aimed at providing some criteria that would allow the Civil Registrar to decide the order of surnames in the absence of agreement between the parents. For example, the Socialist Party defended the use of an alphabetical criterion, so that the surname beginning with a previous letter in the alphabet would be given first[13]. The Basque Nationalist Party, for its part, proposed that the least frequent surname should be chosen first, and therefore the one most likely to disappear, consulting the Bases of the National Institute of Statistics.

In other cases, the criteria proposed had a subjective nuance, but without leaving the decision on the order of surnames in the hands of the Civil Registrar. This is the case of the proposal made by the United Left, which suggested leaving it to the democratic choice of the family, allowing for the opinion and vote of family members other than the parents (e.g. grandparents, uncles, aunts, etc.).

In my view, objective criteria are preferable, as they would avoid giving space for the discretion of the decision-maker, as well as for appeals against the decision taken. And, among the possible objective criteria, the one that is probably best suited to the principle of equality is the drawing of lots. A solution that I believe would also be useful in the case of Italian law.

b) Multiplier effect of surnames

A risk that the Italian system presents by establishing as a general rule the double surname (paternal and maternal), and which has been highlighted by the Constitutional Court in its Judgment no. 131 of 2022, is the multiplying effect of surnames in the succession of generations.

[13] This solution has been proposed by Barba for the Italian regulation: Barba, *Apellido familiar, apellido de los hijos e igualdad de género en el Derecho italiano*, cit., p. 911.

The Constitutional Court therefore calls on the Italian legislator to adopt a criterion to avoid this multiplier effect of surnames. In this respect, it proposes that each of the parents with a double surname should choose the surname they want their descendants to receive.

However, this would mean placing the burden on parents to choose which of their two surnames (one paternal and one maternal) to pass on to their children, which in many cases could lead to a conflict of loyalties.

Therefore, I believe that it would be preferable to adopt the solution provided for in Spanish law (in which the double surname has traditionally been the general rule), which consists of the transmission to the children of the first surname of each of their parents (Art. 49.2 of Law no. 20 of 21 July 2011, on the Civil Status Register). And if one of the parents had a special interest in passing on their second surname to their children, he or she could always change the order of his or her own surnames prior to birth and so pass on the surname that was initially in second place.

c) Guarantee of the principle of family unity

Finally, the Constitutional Court, in its Judgement no. 131 of 2022, makes another appeal to the legislator to protect the child's interest in not having a surname different from that of his or her siblings, with the consequent sacrifice of a profile that is also part of his or her family identity. In this respect, it proposes reserving the options relating to the attribution of the surname to the moment of simultaneous recognition of the couple's first child (or at the moment of his or her birth in marriage or adoption), in order to make them binding with regard to subsequent children recognised at the same time by the same parents (or born in marriage or adopted by the same couple)[14].

In fact, this is the provision that is included in Spanish law through Art. 109(3) of the Civil Code, which provides that children born later will have the same order of surnames as the eldest; and probably the one that best guarantees the principle of family unity.

[14] See too *Ivi*.

SONIA RAMOS GONZÁLEZ*

EL DERECHO A USAR EL APELLIDO DE LA MADRE EN PRIMER LUGAR. ESTADO DE LA CUESTIÓN EN EL DERECHO ESPAÑOL

ABSTRACT. *Based on a brief analysis of the Italian Constitutional Court decision 131/2022, of April 27, this paper aims to explain the Spanish civil law reforms that have been carried out to eliminate discrimination against women in determining the order of children's surnames. It is shown that the abandonment of the rule of precedence of the paternal surname has occurred not only because of the application of the principle of equality between parents, but also because of the consideration of the minor's best interest principle as a criterion to determine the order when parents do not agree before registration.*

SUMARIO. 1. La Sentencia del Tribunal Constitucional italiano 131/2022, de 27 de abril y su comparación con el régimen actual sobre transmisión de los apellidos en el Derecho (CC) español − 2. Las distintas reformas del Derecho civil español dirigidas a la eliminación de la discriminación por razón de sexo en la determinación del orden de los apellidos − 3. Análisis de la jurisprudencia del Tribunal Supremo y de la doctrina del Tribunal Constitucional sobre la determinación del orden de los apellidos − 4. Conclusiones

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1. La Sentencia del Tribunal Constitucional italiano 131/2022, de 27 de abril y su comparación con el régimen actual sobre transmisión de los apellidos en el Derecho español

1.1. La Sentencia del Tribunal Constitucional italiano 131/2022, de 27 de abril

La Sentencia del Tribunal Constitucional italiano (STCI) núm. 131, de 27 de abril de 2022 - 31 de mayo de 2022[1], ha declarado inconstitucional el artículo 262, párrafo 1º del Código civil, en la parte en la que atribuye al hijo no matrimonial, con filiaciones reconocidas simultáneamente por ambas líneas, el apellido del padre («*Il figlio assume il cognome del genitore che per primo lo ha riconosciuto. Se il riconoscimento è stato effettuato contemporaneamente da entrambi i genitori il figlio assume il cognome del padre*»). El Tribunal sostiene, como ya había declarado en sentencias anteriores (en particular, en la STCI núm. 286, de 8 de noviembre de 2016[2]), que la regla legal de atribución automática del apellido paterno al hijo, vestigio de un sistema patriarcal de la familia matrimonial, es contraria al principio de igualdad de trato de los progenitores (art. 2 de la Constitución italiana) y, en consecuencia, también lesiona el derecho al nombre del menor y su identidad (como derecho inviolable de la persona, art. 3 de la Constitución italiana). Además, la regla supone la infracción por el Estado de las obligaciones que derivan del Derecho comunitario y de las normas internacionales (art. 117.1 Constitución italiana) en relación con el derecho a la vida privada y familiar, que ampara el derecho a la identidad del menor, y la prohibición de discriminación por razón de sexo, previstos en los arts. 8 y 14 del Convenio para la protección de los derechos humanos y de las libertades fundamentales, hecho en Roma, de 4 de noviembre de 1950 (CEDH).

En el procedimiento de instancia seguido ante el Tribunal de Bolzano, que es quien plantea una de las cuestiones de inconstitucionalidad sobre la norma, los recurrentes tenían dos hijas nacidas fuera del matrimonio inscritas con el apellido materno y reclamaron inscribir a su tercer hijo también con el apellido materno. Alegaron que la denegación de la inscripción por parte del Encargado del Registro civil

[1] Publicada en la Gazz. Uff. de 1 de junio de 2022, n. 22.

[2] Publicada en la Gazz. Uff. de 28 de diciembre de 2016, n. 52.

vulneraba el derecho del menor a su propia identidad y a la unidad familiar, al impedir que tuviera el mismo apellido que sus hermanas[3].

La STCI 131/2022 propone al legislador cuál es la regla de transmisión y orden de los apellidos respetuosa con la Constitución: aquella que atribuye al hijo; i) los apellidos de ambos progenitores; ii) en el orden que estos acuerden; y iii) salvo que los progenitores decidan conjuntamente, en el momento del reconocimiento de la filiación, transmitir al hijo el apellido de uno solo de ellos[4]. Además, el Tribunal señala que si los progenitores no se ponen de acuerdo sobre el orden de los apellidos, deberá ser el juez quien determine el mismo, como ya ocurre en relación con otras decisiones importantes que conciernen a los hijos, incluida la elección del nombre (FJ. 11º.3).

Son especialmente importantes los razonamientos siguientes del Tribunal Constitucional italiano:

Primero, aclara, en respuesta a la cuestión planteada por el Tribunal de Bolzano, que no sería suficiente para salvar la constitucionalidad modificar la regla en el único sentido de admitir como excepción el acuerdo de los progenitores de atribuir sólo el apellido de la madre[5], porque esta alternativa haría muy difícil o improbable la posibilidad de acuerdo desde el momento en que la regla subsidiaria atribuye al hijo el apellido paterno (FJ. 11º.1). Por lo tanto, es necesario para respetar el principio de igualdad y

[3] Información extraída de M. Caldironi, *La atribución de apellidos a los hijos en la jurisprudencia de la Corte constitucional italiana*, «ReDCE», núm. 37, Enero-Junio de 2022., p. 8 <https://www.ugr.es/~redce/REDCE37/articulos/010_CALDIRONI.htm>.

[4] Como consecuencia de la declaración de inconstitucionalidad del art. 262, párrafo 1º Código civil italiano, el Tribunal Constitucional declaró igualmente inconstitucionales las normas que regulan la transmisión de los apellidos de los hijos nacidos dentro del matrimonio y de los hijos adoptados, y que atribuyen al hijo el apellido del padre o sólo pueden interpretarse en ese sentido (art. 299.3 del CC italiano, en materia de adopción de personas mayores de edad, art. 27.1 de la Ley núm. 184 de 4 de mayo de 1983, en materia de adopción, y art. 34 del Decreto presidencial núm. 396 de 3 de noviembre de 2000, relativo a los límites en la atribución del nombre, en la parte en que dispone que el hijo nacido dentro del matrimonio asume el apellido del padre). Para que estas disposiciones sean conformes con la Constitución italiana y la CEDH, según el TCI deberían disponer que el hijo asumirá los apellidos de los progenitores, en el orden que estos acuerden, y sin perjuicio del acuerdo, en el momento del nacimiento o durante el procedimiento de adopción, de atribuir el apellido de uno solo de ellos.

[5] El Tribunal recuerda que la STEDH de 7 de enero de 2014 (*Cusan and Fazzo v. Italia*) ya estableció que el vacío legal en el Derecho italiano consistente en no permitir que se atribuya al hijo el apellido de la madre cuando hay acuerdo entre los progenitores es una violación de los artículos 8 y 14 del CEDH.

atribuir la misma importancia a los dos vínculos de filiación que la ley asigne al hijo los apellidos de ambos progenitores.

Segundo, el principio de igualdad entre los progenitores exige, en cuanto al orden de los apellidos, que estos expresen, de común acuerdo, cuál es el orden que desean transmitir a su hijo. Una norma que atribuyera al hijo el apellido de la madre o del padre en primer lugar sería discriminatoria, como ha establecido el TEDH en la sentencia de 26 de octubre de 2021, León Madrid v. España, respecto al art. 194 del Reglamento del Registro civil de 1957 (FJ. 11º.3), que se analizará más adelante.

En tercer lugar, el Tribunal argumenta que la excepción basada en la atribución por los progenitores del apellido de uno solo de ellos es necesaria porque el apellido escogido puede ser el único que identifica la unión de los progenitores o porque, en interés del hijo, puede ser necesario contemplar otros factores preexistentes relacionados con el estatuto de la filiación como, por ejemplo, el vínculo con hermanos y hermanas que solo se han inscrito con el apellido de uno de los progenitores, o el vínculo con otros hijos de uno de los progenitores (FJ. 12º).

El TCI añade una consideración importante sobre el número de apellidos de cada progenitor que son objeto de transmisión a los hijos: invita al legislador a considerar medidas que eviten la transmisión de más de un apellido de cada progenitor, porque sostiene que, de lo contrario, el apellido perderá su función de ser parte esencial de la identidad del sujeto. Estas medidas podrían incluir la elección por parte de cada progenitor con doble apellido de aquél apellido que mejor representa el vínculo de filiación o la elección por parte de ambos progenitores del doble apellido de uno de ellos (FJ. 15º).

La STCI 131/2022 supone un cambio significativo en el régimen jurídico de los apellidos en comparación con la STC 286/2016, de 8 de noviembre[6]. En esta última, el TC había declarado inconstitucional el art. 262, párrafo 1º del Código civil italiano por no permitir a los progenitores, de común acuerdo, atribuir al hijo el apellido

[6] Como sostiene Matteo Caldironi, la STC 286/2016 supuso un avance importante pero no restableció la legalidad constitucional. En efecto, el TCI no basó la inconstitucionalidad en la regla de defecto que seguía dando preferencia al apellido paterno. CALDIRONI, *La atribución de apellidos a los hijos en la jurisprudencia de la Corte constitucional italiana*, cit., p. 7.

materno *además* del apellido paterno previsto en la ley[7]. Por lo tanto, los progenitores sólo podían, mediante acuerdo, transmitir al hijo los apellidos de ambos, pero en cambio no podían transmitir sólo el apellido de la madre. Además, a falta de pacto, el apellido paterno se transmitía al hijo por mandato legal. Las cosas han quedado de manera bastante distinta tras la STCI 131/2022, porque la regla propuesta por el Tribunal supone que la ley adopta un sistema de doble apellido que se aplicará en el orden que determinen, por acuerdo, los progenitores. Esta regla podrá ser excluida si estos acuerdan transmitir al hijo el apellido de uno solo de ellos.

1.2. Comparación con el régimen jurídico vigente en el Derecho civil español en materia de atribución de los apellidos

El régimen jurídico vigente básico de transmisión de los apellidos en el Derecho civil español se puede sintetizar en las siguientes reglas, previstas fundamentalmente en el art. 109 Código Civil español (CC) y en el art. 49 de la Ley 20/2011, de 21 de julio, del Registro Civil (LRC 2011)[8]:

1. «La filiación determina los apellidos con arreglo a lo dispuesto en la ley» (art. 109, párrafo 1º CC).
2. «Si la filiación está determinada por ambas líneas, el padre y la madre de común acuerdo podrán decidir el orden de transmisión de su respectivo primer apellido, antes de la inscripción registral» (art. 109, párrafo 2º, inciso 1º CC y art. 49.2 LRC 2011).
    a. «Si no se ejercita esa opción, regirá lo dispuesto en la ley» (art. 109, párrafo 2º, inciso 2º CC). El art. 109 CC remite a la LRC de 2011, cuyo art. 49.2, párrafo 3º, establece como criterio subsidiario, en caso de desacuerdo o de silencio de los progenitores, que el Encargado del Registro civil acordará el orden de los apellidos atendiendo al interés superior del menor. En concreto:
        «En caso de desacuerdo o cuando no se hayan hecho constar los apellidos en la solicitud de inscripción, el Encargado del Registro Civil requerirá a

[7] También declaró la inconstitucionalidad del art. 299, párrafo 3º Código civil italiano, en materia de adopción de personas mayores de edad.

[8] La Ley entró en vigor el 30 de abril de 2021, excepto para algunas disposiciones que entraron en vigor con anterioridad, como el art. 49.2 LRC (30 de junio de 2017).

los progenitores, o a quienes ostenten la representación legal del menor, para que en el plazo máximo de tres días comuniquen el orden de apellidos. Transcurrido dicho plazo sin comunicación expresa, el Encargado acordará el orden de los apellidos atendiendo al interés superior del menor […]».

b. No obstante, no es aplicable la opción si el nacido tiene hermanos del mismo vínculo, porque es una regla imperativa que «el orden de apellidos inscrito para el mayor de los hijos regirá en las inscripciones de nacimiento posteriores de sus hermanos del mismo vínculo» (art. 109, párrafo 3º CC)[9].

i. Sin embargo, la LRC 2011 permite a los padres, de común acuerdo, decidir la anteposición del apellido materno para todos los hermanos «si en el momento de entrar en vigor esta Ley los padres tuvieran hijos menores de edad de un mismo vínculo» (Disposición transitoria única LRC 2011). Ahora bien, señala la norma, «si éstos tuvieran suficiente juicio, la alteración del orden de los apellidos de los menores de edad requerirá aprobación en expediente registral, en el que estos habrán de ser oídos conforme al artículo 9 de la Ley Orgánica 1/1996, de 15 de enero».

3. «El hijo, al alcanzar la mayor edad, podrá solicitar que se altere el orden de los apellidos» determinados de acuerdo con las reglas anteriores (art. 109, párrafo 4º CC).

4. El régimen anterior resulta aplicable a la filiación matrimonial, no matrimonial y adoptiva, ex art. 108, párrafo 2º CC.

5. «En los supuestos de nacimiento con una sola filiación reconocida, ésta determina los apellidos. El progenitor podrá determinar el orden de los apellidos» (art. 49.2, párrafo 4º LRC 2011).

El régimen jurídico que deriva de la STCI 131/2022 difiere del sistema español, como mínimo, en los siguientes puntos:

En el Derecho español el sistema de doble apellido es, salvo en las excepciones previstas por la legislación, imperativo y de orden público. En este sentido, la excepción que prevé la STCI relativa a la transmisión, por acuerdo, del apellido de uno de los pro-

[9] También lo destaca A.I. Berrocal Lanzarot, *La identidad personal. El nombre y los apellidos. El interés superior del menor*, «Revista Crítica de Derecho Inmobiliario», N.º 760, 2017, pp. 937-975, p. 951.

genitores no sería válida. Tampoco sería válido un acuerdo por el que se transmitiera el segundo apellido de cada progenitor, porque la ley también prevé que sólo se transmite el primer apellido de cada progenitor.

El Derecho español no remite al juez sino al Encargado del Registro civil la decisión sobre el orden de los apellidos (art. 49.2 LRC 2011), si no hay acuerdo entre los progenitores y una vez oídos ambos.

El carácter de orden público de la materia está vinculado al interés del Estado «en dotar de estabilidad el estado civil mediante la fijación inicial de los apellidos y los supuestos concretos de cambio o alteración de los mismos» (STC 167/2013, de 7 de octubre)[10].

«Por una parte, [los apellidos] se configuran como un elemento constitutivo de la identidad de las personas y de su vida privada, familiar y profesional, dado que constituyen un medio de identificación personal y profesional, y reflejan el vínculo con una familia. Pero, paralelamente, tienen relevancia de orden público, dado el interés público existente en la correcta identificación de las personas, no sólo por la relevancia que tienen para las relaciones de Derecho público (p. ej., en materia tributaria, educativa, sanitaria, asistencial, etc.), sino también por la frecuencia con que las cuestiones del ámbito privado, tanto personal y familiar como profesional, trascienden al ámbito jurídico público (p. ej., relaciones laborales, Administración de Justicia, registros, etc.)» (Dictamen 70/2020, de 2 julio, del Consejo de Estado en un expediente relativo a una solicitud de cambio de apellidos del hijo de una mujer víctima de violencia de género).

El principio de duplicidad de líneas también forma parte del orden público en esta materia, por lo que, en caso de determinación de la filiación por ambas líneas, es contrario al orden público español la transmisión exclusiva de los apellidos de una sola línea, la materna o la paterna. La autonomía privada de los progenitores alcanza al orden

[10] M. Corera Izu sostiene que «es un principio de orden público que afecta directamente a la organización social y que no es susceptible de variación alguna so pena de consagrar un privilegio para determinada categoría de españoles que atentaría, al carecer de justificación objetiva suficiente, al principio constitucional de igualdad de todos los españoles ante la Ley. De ahí que no puede haber un ciudadano español que ostente un solo apellido» (*Comentario a la sentencia de 26 de octubre de 2021 del TEDH sobre la regulación de los apellidos en España*, «Revista Aranzadi Doctrinal», núm. 3/2022, BIB 2022\559, p. 6).

de los apellidos pero no a la supresión del apellido de uno de ellos, excepto en los supuestos previstos en el art. 111 CC (cuando el progenitor haya sido condenado a causa de las relaciones a que obedezca la generación, según sentencia penal firme y cuando la filiación haya sido judicialmente determinada contra su oposición).

En este contexto, es interesante la Sentencia del Tribunal Supremo (STS) 496/2018, de 14 de septiembre. El pleito se originó por una demanda de paternidad no matrimonial interpuesta seis años después del nacimiento del menor, que había sido inscrito con los apellidos de la madre, como establece la legislación. El actor solicitó en la demanda la modificación de la inscripción de nacimiento, pero no se pronunció sobre el orden de los apellidos. En la contestación a la demanda, la madre solicitó que se mantuvieran sus apellidos. El Juzgado de Primera Instancia (JPI) desestimó la reclamación por considerarla caducada. La Audiencia Provincial (AP) estimó el recurso de apelación del actor, declaró la filiación paterna, ordenó la modificación de la inscripción y que se conservara el apellido materno en primer lugar y se añadiera después el paterno, porque de esta manera se conseguía un menor impacto en la vida y entorno del menor. La madre interpuso recurso de casación y alegó que la sentencia era incongruente con las peticiones de las partes porque había conformidad entre los progenitores sobre el orden de los apellidos, en tanto que el actor no se había pronunciado ni se había opuesto a lo pedido por la madre. El Tribunal Supremo desestimó el recurso y confirmó la sentencia recurrida: «la conformidad inicial –demanda y contestación– sobre los apellidos solo puede venir referida a su orden y no a la supresión de los de un progenitor, pues ello, en principio, iría en contra de la previsión legal y del interés del menor» (FD. 2º). El TS también sostuvo que la sentencia recurrida había tenido en cuenta el interés del menor para otorgar preferencia al apellido de la madre. Recuerda, además, que de la LRC 2011, se colige: «(i) que el derecho de la personalidad del nacido exige como elemento de su identidad que aparezca inscrito con nombre y apellidos, que los apellidos vienen determinados por la filiación; ii) que en la determinación de su orden se han de ponderar y aplicar dos derechos de especial relevancia, el de igualdad por razón de sexo y el de interés superior del menor».

Los progenitores tampoco pueden modificar sus apellidos por otros distintos, excepto en los supuestos previstos legalmente (arts. 53 a 57 LRC 2011), entre los que

se encuentra la autorización por parte del Encargado del Registro de civil del cambio de apellidos de las víctimas de violencia de género o a sus descendientes que estén o hayan estado integrados en el núcleo familiar de convivencia (art. 54.5 LRC 2011).

En el expediente resuelto por el Dictamen 70/2020, de 2 de julio, del Consejo de Estado, al que resultaba aplicable la normativa anterior a la LRC 2011, el cambio lo había solicitado el hijo mayor de edad, quien había presenciado a la edad de cuatro años agresiones propinadas por su padre contra su madre.

También está contemplado que el Encargado autorice el cambio de los apellidos «[c]uando sobre la base de una filiación rectificada con posterioridad, el hijo o sus descendientes pretendieran conservar los apellidos que vinieren usando antes de la rectificación. Dicha conservación de apellidos deberá instarse dentro de los dos meses siguientes a la inscripción de la nueva filiación o, en su caso, a la mayoría de edad» (art. 53.5 LRC 2011).

Bajo la normativa anterior, el art. 58.1 LRC 1957 permitía el cambio de apellidos para evitar la desaparición de un apellido español. En el caso resuelto por la STS 629/2021, de 27 de septiembre, el TS estimó el recurso de casación de los progenitores, así como su demanda, en la que solicitaban el cambio de los apellidos de su hija consistente en agregar el segundo apellido del padre (Vacelar) al primer apellido paterno, con base en el riesgo de desaparición de aquel apellido.

2. Las distintas reformas del Derecho civil español dirigidas a la eliminación de la discriminación por razón de sexo en la determinación del orden de los apellidos

En el Derecho español el Código Civil de 1889 y la Ley del Registro Civil de 1957 partían de un sistema de doble apellido, no dispositivo para las partes, que sigue vigente, según el cual la filiación determina los apellidos, de manera que, si la filiación está determinada por ambas líneas, el hijo recibe el primer apellido de cada progenitor y si la filiación está determinada por una sola línea, los hijos tienen los dos apellidos del

progenitor que reconozca su condición.

Por tanto, la adecuación de la normativa al principio de igualdad entre los progenitores se ha concretado básicamente[11] en la cuestión de cómo esta normativa determinaba el orden de los apellidos y, en particular, en el cuestionamiento de la regla tradicional de prevalencia del apellido paterno frente al materno. Como ha advertido la jurisprudencia, «es patente la relevancia individualizadora del primero de los apellidos de una persona» (por todas, STS, 266/2018, de 9 de mayo).

El legislador español, en distintas reformas, ha modificado la normativa del CC y la normativa registral para adaptarla al principio de igualdad entre los progenitores y a la prohibición de no discriminación por razón de sexo previstos en el art. 14 de la Constitución Española de 1978 (CE).

A continuación, se analizará esta evolución con más detalle.

2.1. La regla tradicional: anteposición del apellido paterno al materno

La regla tradicional en España consistía en el uso del apellido del padre, en primer lugar, y del apellido de la madre, en segundo lugar, y, según los datos, esta regla todavía está arraigada en la actualidad[12].

La redacción originaria del art. 114 CC establecía: «[L]os hijos legítimos tienen derecho: 1º. A llevar los apellidos del padre y de la madre». En el mismo sentido, se pronunciaba el art. 53 de la primera Ley de 8 de junio de 1957 sobre el Registro civil (LRC 1957), en su redacción originaria: «las personas son designadas por su nombre y apellidos, paterno y materno, que la Ley ampara frente a todos», precepto desarrollado por

[11] La reforma del año 1999 eliminó la diferencia de trato por razón de género que existía en supuestos de filiación reconocida sólo por un progenitor. El art. 55 de la Ley del Registro civil de 1957, en su redacción originaria, permitía sólo a la madre la opción de alterar el orden de sus apellidos para evitar que socialmente se reconociera que el hijo era de padre desconocido.

[12] Según datos del Ministerio de Justicia, a pesar del cambio legislativo, la inmensa mayoría de los progenitores inscriben a su hijo siguiendo el orden tradicional de los apellidos, primero el paterno y después el materno, probablemente porque, para las parejas que están unidas, no es una cuestión importante, mientras que para una minoría la alteración de la regla tradicional es una forma de visualizar la igualdad (elDiario.es, 30 de abril de 2021, «Solo el 0,5% de los bebés nacidos en cinco años lleva el apellidos de la madre primero: "Mucha gente nos dice '¿qué necesidad?'"», <https://www.eldiario.es/sociedad/apellido-materno-no-despega-0-5-bebes-nacidos-padre-no-automatico-lleva_1_7875692.html>).

el art. 194 del Reglamento de la Ley del Registro Civil (RRC, aprobado por Decreto de 14 de noviembre de 1958) que establecía: «[a]pellido paterno es el primero del padre; materno, el primero de los personales de la madre aunque sea extranjera. En el Registro, uno y otro, se expresarán intercalando la copulativa "y"».

Aunque ninguna de estas normas estableció expresamente el orden de transmisión de los apellidos, se interpretaba que seguían el sistema tradicional de preferencia del apellido paterno («En principio, también se ha seguido, en orden a los nombres y apellidos, el sistema tradicional», señalaba la Exposición de Motivos de la LRC 1957, apt. VI)[13]. El Tribunal Constitucional, en la Sentencia 167/2013, de 7 de octubre, se refiere a este sistema como el que «ha venido siendo usual en el ordenamiento jurídico civil».

2.2. La reforma de 1981: opción del hijo de anteponer el apellido materno

Tras la aprobación de la Constitución española de 1978, el art. 109 CC, en la redacción que resultó de la Ley 11/1981, de 13 de mayo, de modificación del Código Civil en materia filiación, patria potestad y régimen económico del matrimonio, establecía: «la filiación determina los apellidos con arreglo a lo dispuesto en la Ley. El hijo, al alcanzar la mayor edad, podrá solicitar que se altere el orden de sus apellidos». Esta reforma del CC eliminó la distinción entre filiación legítima e ilegítima y reconoció al hijo mayor de edad la opción de alterar el orden de los apellidos determinados por la ley, es decir, solicitar que el apellido materno precediera al paterno. Sin embargo, la doctrina coincide en afirmar que esta norma no eliminaba la discriminación de la mujer[14],

[13] También la doctrina civil interpreta que la regla de preferencia del apellido paterno deriva de estas normas. En relación con los arts. 53 y 55 LRC 1957, M.I. DE LA IGLESIA MONJE, *El interés superior del menor y el orden de los apellidos sin acuerdo de los progenitores tras la determinación de la filiación de manera sobrevenida*, «Revista Crítica de Derecho Inmobiliario», Nº. 761, 2017, pp. 1433 a 1448, p. 1436. También considera que la regla consuetudinaria del uso en primer lugar del apellido paterno se consolidó *con matices* en el CC, en la LRC y en su Reglamento, E. TORRELLES TORREA, *La elección del orden de los apellidos por parte de los progenitores y los criterios de determinación a falta de acuerdo en la Ley de Registro civil de 2011*, «Revista Crítica de Derecho Inmobiliario», Nº. 753, 2016, pp. 185-222, pp. 192, 205. Por su parte, R. BERCOVITZ RODRÍGUEZ-CANO sostiene que el art. 53 LRC 1957 no era suficientemente claro a favor de la prioridad del apellido paterno (*El nombre y los apellidos*, «Revista Doctrinal Aranzadi Civil-Mercantil», núm. 9/2014, BIB 2014\54, p. 3).

[14] M.R. LINACERO DE LA FUENTE, *El nombre y los apellidos,* Tecnos, Madrid, 1992, pp. 158 y 159.

porque la opción se reconocía de manera personalísima al hijo y no podìa ser ejercitada en su nombre por los representantes legales (Resolución de la Dirección General de Registros y del Notariado -DGRN- de 1 de marzo de 1994) –reglas que siguen vigentes–. Además, sólo podría ejercitarla a partir de la mayoría de edad, lo que supone que la discriminación de la mujer se hacía efectiva en el momento de la inscripción del nacimiento y raramente se iba a eliminar en el futuro porque los apellidos, inscritos en el orden tradicional, ya formaban parte esencial de la identidad del sujeto construida durante su minoría de edad[15].

También lo ha reconocido la STEDH de 26 de octubre de 2021, asunto León Madrid v. España, al valorar esta medida como insuficiente para salvar la discriminación de la regla tradicional, porque no evita el enorme impacto para los derechos de la personalidad y para la identidad del menor que supone no poder alterar el orden de los apellidos con anterioridad. Además, desde el punto de vista de la madre, tampoco evita el sufrimiento diario derivado de las consecuencias de la discriminación causada por no poder alterar el orden de los apellidos de su hijo (apt. 67).

2.3. La reforma de 1999: opción de los progenitores de anteponer el apellido materno

La siguiente reforma en esta materia fue obra de Ley 40/1999, de 5 de noviembre, sobre nombre y apellidos y orden de los mismos, que modificó el art. 109 CC para introducir el principio de libertad de pacto de los progenitores en la determinación del orden de los apellidos: «Si la filiación está determinada por ambas líneas, el padre y la madre de común acuerdo podrán decidir el orden de transmisión de su respectivo primer apellido, antes de la inscripción registral. Si no se ejercita esta opción, regirá lo dispuesto en la ley» (art. 109 párrafo 2º CC). La Exposición de Motivos de la Ley justificaba el cambio de la siguiente manera:

«Baste recordar (…) que el artículo 16 de la Convención de Naciones Unidades de 18 de diciembre de1979 prevé que los Estados signatarios tomen las medidas necesarias para hacer de-

[15] Torrelles Torrea, *La elección del orden de los apellidos por parte de los progenitores y los criterios de determinación a falta de acuerdo en la Ley de Registro civil de 2011*, cit., pp. 185-222, p. 191.

saparecer toda disposición sexista en el derecho del nombre; que el Comité de Ministros del Consejo de Europa, desde 1978, establece en la Resolución 78/37 la recomendación a los Estados miembros de que hicieran desaparecer toda discriminación entre el hombre y la mujer en el régimen jurídico del nombre y que el Tribunal Europeo de Derechos Humanos ha sancionado, en la sentencia de 22 de febrero de 1994 en el caso Burghartz C. Suisse, las discriminaciones sexistas en la elección de los apellidos.
Es, por tanto, más justo y menos discriminatorio para la mujer permitir que ya inicialmente puedan los padres de común acuerdo decidir el orden de los apellidos de sus hijos, en el bien entendido de que su decisión para el primer hijo habrá de valer también para los hijos futuros de igual vínculo, lo cual no impide que, ante el no ejercicio de la opción posible, deba regir lo dispuesto en la Ley».

La Resolución de la DGRN 4/2004, de 10 de noviembre, dio respuesta a la cuestión de si en caso de determinación judicial de la filiación paterna en un momento posterior a la inscripción de nacimiento, también resultaba aplicable la opción. La resolución sostiene que no admitir la opción en este momento posterior a la inscripción de nacimiento supondría incurrir en una discriminación por razón de filiación respecto a los hijos cuya filiación haya sido establecida judicialmente, quienes podrían conservar los apellidos que vinieran usando con anterioridad a dicha determinación (art. 59.3 LRC 1957; actual art. 53.5 LRC 2011), pero no ver alterado el orden de los mismos por acuerdo mutuo de sus progenitores. Además, establece que si la sentencia que declara la filiación paterna dispone la inversión de los apellidos y dicha sentencia gana firmeza por no ser recurrida, se ha de entender que existe el mutuo consentimiento que exige la inversión del art. 109 CC. En el caso, el Encargado del Registro civil había inscrito la filiación paterna declarada judicialmente, pero había denegado la modificación judicial de los apellidos ordenada por el juez, según la cual debía mantenerse en primer lugar el apellido materno, como había solicitado la madre en la contestación a la demanda. Consta que el actor no se había pronunciado sobre el orden de los apellidos ni se había opuesto a la solicitud de la madre.

La Ley 40/1999 también modificó el art. 55 LRC 1957 para eliminar otra regla discriminatoria de la mujer en supuestos de nacimiento con una sola filiación reconocida. La nueva redacción atribuía a ambos progenitores la opción de determinar, al

tiempo de la inscripción, el orden de los apellidos: «En los supuestos de nacimiento con una sola filiación reconocida, ésta determina los apellidos, pudiendo el progenitor que reconozca su condición de tal determinar, al tiempo de la inscripción, el orden de los apellidos» (párrafo 2º). En la redacción anterior del precepto, esta posibilidad sólo se permitía a la madre, para ocultar que el hijo era de padre desconocido y así evitar el reproche social que merecía esta situación[16].

2.4. El art. 194 del Reglamento del Registro Civil y la anteposición del apellido paterno como regla de defecto

La reforma de 1999 no erradicó la discriminación de la mujer[17] porque el art. 109 CC no estableció un criterio subsidiario en caso de desacuerdo o de silencio de los progenitores sobre el orden de los apellidos, sino que seguía remitiendo a que regirá «lo dispuesto en la ley»; ley que no podía ser otra que la LRC 1957, cuyo artículo 53, como hemos señalado antes, se interpretaba en el sentido de consolidar el sistema tradicional de prevalencia del apellido paterno: «Las personas son designadas por su nombre y apellidos, paterno y materno, que la Ley ampara frente a todos». Prueba de ello es que unos meses más tarde, el Gobierno aprobó el Real Decreto 193/2000, de 11 de febrero, para adaptar el Reglamento de la Ley del Registro civil a la reforma introducida por la Ley 40/1999, y con base en esa finalidad dio una nueva redacción al art. 194 RRC, estableciendo con claridad –la que había faltado en las normas del CC y de la LRC 1957– la prioridad del apellido paterno: «Si la filiación está determinada por ambas líneas, y a salvo la opción prevista en el artículo 109 del Código Civil, primer apellido de un español es el primero del padre y segundo apellido el primero de los personales de la madre, aunque sea extrajera».

[16] M.P. Sánchez González, *El orden originario de los apellidos (con especial referencia a la ley 40/1999, de 5 de noviembre)*, «Aequalitas: Revista jurídica de igualdad de oportunidades entre mujeres y hombres», núm. 9, 2002, pp. 11-16, p. 16.

[17] Susana Quicios valora que tanto la reforma de 1981 como la de 1999 se quedaron muy cortas (pp. 255, 261). S. Quicios Molina, *Orden de los apellidos: autonomía privada, interés superior del menor y no discriminación por razón de sexo*, «Derecho Privado y Constitución», 39, pp. 249-286.

Tal y como dispone la Resolución DGRN 29/2016, de 22 de enero: «faltando en este caso el imprescindible consentimiento del padre, es de obligada aplicación la regla general y al Encargado no se le ofrecía posibilidad legal alguna de alterar el orden de apellidos fijado por la norma».

Por último, la redacción del art. 53 LRC 1957, que resultó de la Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, sustituyó la referencia al apellido paterno y materno por «los apellidos, correspondientes a ambos progenitores». Es verdad que puede interpretarse que la finalidad de la modificación era adaptar el precepto a la reforma del CC que reconocía el matrimonio entre personas del mismo sexo, pero el resultado fue que eliminó del art. 53 LRC 1957 la preferencia de un apellido sobre otro[18] y la única norma que integraba la remisión del art. 109 CC ya no tenía rango legal, sino reglamentario (el art. 194 RRC) y además era contraria al principio de igualdad. Algunos autores consideran que el único sentido posible de la modificación introducida en el art. 53 LRC 1957 es precisamente la de eliminar la preferencia a favor del apellido del padre, lo que les permite sostener que el nuevo art. 53 LRC 1957 supone una derogación tácita del art. 194 RRC 1958, reforzada por su incompatibilidad con el artículo 14 CE (principio de igualdad y prohibición de discriminación por razón de sexo)[19].

2.5. La STEDH de 26 de octubre de 2021, León Madrid v. España

La declaración del carácter discriminatorio por razón de sexo del art. 194 RRC 1958 vino de la mano de del TEDH en su sentencia de 26 de octubre de 2021 (León Madrid v. España). El Tribunal Constitucional español no ha declarado la inconstitucionalidad del precepto. De hecho inadmitió el recurso de amparo que precedió a la STEDH por falta de justificación sobre su trascendencia constitucional, a pesar de que la actora había alegado que las sentencias de instancia habían vulnerado su derecho a la igualdad y a no sufrir discriminación por razón de sexo (art. 14 CE) por haber aplicado

[18] Torrelles Torrea, *La elección del orden de los apellidos por parte de los progenitores y los criterios de determinación a falta de acuerdo en la Ley de Registro civil de 2011*, cit., p. 193.

[19] Por todos, Bercovitz Rodríguez-Cano, *El nombre y los apellidos*, cit., p. 3.

el art. 194 RRC 1958 (STC 176/2012, de 15 de octubre)[20]. Las sentencias de instancia habían determinado la filiación paterna de su hija y ordenado la inscripción de los apellidos en el Registro civil, contemplando como primero el del padre. Consta que la reclamación de paternidad se interpuso cuatro meses después del nacimiento.

La recurrente reiteró ante el TEDH el carácter discriminatorio del precepto porque atribuía al hijo automáticamente el apellido del padre en primer lugar, sin que hubiera lugar a revisión y sin tener en cuenta las circunstancias del caso, por ejemplo, la insistencia del padre de interrumpir el embarazo, que la menor había sido inscrita desde el nacimiento con los apellidos maternos, o que el padre no había reconocido su paternidad inmediatamente tras el nacimiento.

La STEDH reconoció que España había adoptado numerosas medidas dirigidas a garantizar la igualdad entre hombres y mujeres (Ley Orgánica 3/2007, de 22 de marzo de 2007, para la igualdad efectiva de hombres y mujeres –LO 3/2007– o la LRC 2011). En la actualidad, este marco legal debe completarse con la Ley 15/2022, de 12 de julio, integral para la igualdad de trato y la no discriminación (Ley 15/2022). No obstante, el Tribunal concluyó que la regla del art. 194 RRC 1958 es contraria al art. 14 (derecho a la igualdad) y 8 (derecho a la intimidad personal y familiar) CEDH. Primero, porque supone una diferencia de trato entre los progenitores al no permitir al juez tener en cuenta las circunstancias del caso alegadas por la madre (apt. 61). En segundo lugar, porque el Gobierno no ha presentado una justificación objetiva y razonable: ni la tradición o las actitudes mayoritarias en la sociedad, que pudieran existir en el momento de aprobar esa regla, son suficientes para justificar una diferencia de trato por razón de sexo (apt. 66), tampoco está justificada por razones de seguridad jurídica, porque este mismo objetivo se podría conseguir anteponiendo el apellido materno y, por último, no es suficiente la posibilidad que tiene la hija de solicitar la alteración de sus apellidos a partir de la mayoría de edad (apt. 69). Es interesante destacar que el Tribunal reconoce, no obstante, que la regla en sí misma no entra necesariamente en contradicción con el Convenio, pero que la imposibilidad de derogarla es excesivamente rígida y discriminatoria para las mujeres (apt. 68).

[20] También inadmitió el recurso de amparo por motivos procedimentales la STC 242/2015, de 30 de noviembre.

2.6. La Ley 20/2011, de 21 de junio, del Registro civil: el interés superior del menor determina el orden de los apellidos en caso de desacuerdo o de falta de declaración conjunta de los progenitores

En el año 2011, el legislador aprobó la Ley 20/2011, de 21 de julio, del Registro civil, cuyo art. 49.2 derogó tácitamente el art. 194 RRC al introducir como regla de defecto que será el Encargado del Registro civil[21] quien acordará el orden de los apellidos atendiendo al interés superior del menor.

El problema del criterio escogido por el legislador es su difícil concreción *ex ante*, porque está formulado en términos muy abiertos precisamente para que el aplicador lo precise en función de cada caso. No obstante, en relación con la materia que nos ocupa, es relevante el art. 2.2 de la Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil, que incluye, entre los criterios generales que se tendrán en cuenta para interpretar y aplicar en cada caso el interés superior del menor «la preservación de la identidad». De esta manera, si tras el nacimiento del menor sólo está determinada la filiación materna, si el menor es inscrito con los apellidos de la madre y si el menor hace uso de su nombre y apellidos en el ámbito privado y público, su interés en caso de que se reconozca judicial o extrajudicialmente la filiación paterna se concretará, en la mayor parte de los casos, en mantener como primer apellido el materno[22].

Por ese motivo, se ha sostenido, con razón, en la doctrina que el criterio del interés superior del menor es relevante en los casos de determinación judicial de la filiación posterior al nacimiento del menor, pero es discutible su utilidad si estamos ante el desacuerdo de los padres en casos de filiación determinada simultáneamente por ambas líneas al nacer[23]. Para este segundo supuesto, se ha defendido que hubiera sido preferible

[21] De acuerdo con la Disposición adicional 2ª LRC 2011, las plazas de Encargados del Registro Civil se proveerán entre Letrados de la Administración de Justicia.

[22] Véase, *infra*, el análisis de la jurisprudencia del Tribunal Supremo. En el mismo sentido se pronuncia QUICIOS MOLINA, *Orden de los apellidos: autonomía privada, interés superior del menor y no discriminación por razón de sexo*, cit., pp. 249-286, pp. 276-279.

[23] Ha defendido esta tesis TORRELLES TORREA, *La elección del orden de los apellidos por parte de los progenitores y los criterios de determinación a falta de acuerdo en la Ley de Registro civil de 2011*, cit., pp. 202-203.

el establecimiento de un sistema aleatorio, como el sorteo o el orden alfabético[24], porque difícilmente podrán identificarse razones que le permitan al Encargado del Registro civil llenar de contenido el interés del menor y decidir un orden u otro[25], y, finalmente, lo que probablemente se discutirá serán los intereses contrapuestos de los progenitores en defender la priorización de su apellido.

Véase, por ejemplo, el asunto resuelto por la Resolución DGRN 46/2021, de 24 de mayo. El hijo había sido inscrito con el nombre escogido por la madre y con sus apellidos. Con posterioridad, se produjo el reconocimiento de la filiación paterna ante el Registro civil, con el consentimiento de la madre. Los progenitores no se pusieron de acuerdo sobre el orden de los apellidos, la encargada del Registro civil consideró que no había datos objetivos que justificaran la prevalencia de un apellido sobre otro y aceptó la alegación del padre relativa a que, como el nombre del hijo lo había escogido la madre, era justo que al padre le correspondiera escoger el orden de los apellidos. La madre recurrió la decisión y la DGRN desestimó el recurso porque apreció que, ante la dificultad de determinar qué es hoy más beneficioso para el menor, era conveniente no modificar una vez más los apellidos impuestos.

En los casos de determinación judicial de la filiación posterior al nacimiento del menor, surge la pregunta de a quién debería corresponder la decisión sobre el orden de los apellidos, si al juez o al Encargado del Registro civil. La Resolución de la DGRN 4/2004, de 10 de noviembre, sostiene que la firmeza de la sentencia, conforme al art. 222 LEC y por razón de la cosa juzgada ganada, excluye toda posibilidad de revisión en el proceso de calificación registral.

[24] También hay autores que consideran que estos criterios están alejados de la más mínima seriedad y rigor. M. Corera Izu, *El nombre y los apellidos en la "nueva" ley registral*, «Revista Aranzadi Doctrinal», núm. 3/2018, BIB 2018\7559, p. 5.

[25] M. Navarro Castro, "Comentario al artículo 49 LRC" en José Antonio Cobacho Gómez, Ascensión Leciñera Ibarra (Dirs.), *Comentarios a la Ley del Registro Civil*, Aranzadi Thomson Reuters, Cizur Menor, 2012, p. 730.

3. Análisis de la jurisprudencia del Tribunal Supremo y de la doctrina del Tribunal Constitucional sobre la determinación del orden de los apellidos

La jurisprudencia del Tribunal Supremo y la doctrina del Tribunal Constitucional dictadas en el marco de procedimientos de determinación judicial de la paternidad han ayudado a interpretar el significado del interés superior del menor en materia de atribución del orden de los apellidos cuando no existe acuerdo por parte de los progenitores, aunque se trata de sentencias recaídas en asuntos a los que resultaba de aplicación la normativa anterior a la LRC 2011.

En efecto, el desacuerdo de los progenitores normalmente se presenta en un procedimiento judicial de determinación de la paternidad, que se inicia después de la inscripción del nacimiento del hijo con los apellidos de la madre, única filiación determinada en ese momento (art. 49.2 LRC 2011, art. 55, párrafo 2º LRC 1957). Entonces, uno o los dos progenitores solicitan al juez que se anteponga su apellido al del otro[26].

Como el art. 49.2 LRC 2011 no entró en vigor hasta el 30 de junio de 2017 (Disposición final 10ª LRC 2011), la regla tradicional de anteposición del apellido paterno del art. 194 RRC 1958 convivió durante unos años con la LRC 2011, que aunque no era ley aplicable al caso, su principios y reglas habían dejado ya muy claro el carácter discriminatorio de la regla tradicional. La aplicación mayoritaria por parte de las sentencias de instancia del art. 194 RRC 1958 provocó una jurisprudencia abundante del Tribunal Supremo creada a partir de la STS núm. 76/2015, de 17 de febrero, que sostuvo que es necesario llevar a cabo una interpretación correctora de la normativa registral, en concreto, del art. 194 RRC, de acuerdo con los principios constitucionales que fundamentaron la LRC 2011, basados en la igualdad de género y en el interés superior del menor[27]. En definitiva, ambos valores constituyen principios generales del derecho

[26] El ex Magistrado de la Sala Primera del Tribunal Supremo, Antonio Salas Carceller, propone que en este supuesto «sería conveniente regular mediante una norma específica la atribución de los apellidos» porque lo excepcional debería ser el cambio del orden de los apellidos. A. Salas Carceller, *El interés del menor y el orden de los apellidos. Sentencia del Tribunal Constitucional de 14 de diciembre de 2020*, in «*Revista Aranzadi Doctrinal*», núm. 2/2021, BIB 2022\559, p. 4.

[27] Susana Quicios califica como notoria la resistencia de los aplicadores del derecho a dejar de aplicar la regla del art. 194 RRC 1958 (pp. 265-266). Quicios Molina, *Orden de los apellidos: autonomía privada, interés superior del menor*

que integran el ordenamiento jurídico y que vinculan a los jueces en la aplicación e interpretación de las normas (art. 4 LO 3/2007, art. 4.3 Ley 15/2022 y 2.1. Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor[28]).

Antes de la STS núm. 76/2015, de 17 de febrero, el Tribunal Constitucional en la Sentencia 167/2013, de 7 de octubre, ya había establecido que en casos de determinación judicial de la paternidad, los jueces y tribunales han de valorar el interés del menor para decidir sobre el orden de los apellidos. Ignorar este criterio supone una lesión del derecho al nombre del menor, que integra su personalidad y también su derecho a la imagen (18 CE).

«En el caso de determinación judicial de la paternidad, la filiación se establece de forma sobrevenida, con las consecuencias inherentes a los apellidos y entra en juego el derecho del menor a su nombre, puesto que en el periodo transcurrido entre el nacimiento y el momento en que se puso fin al proceso por Sentencia firme había venido utilizando el primer apellido materno, siendo patente la relevancia individualizadora del primero de los apellidos de una persona».

La STC167/2013 concedió el amparo a la recurrente, valoró que el interés del menor en el caso consistía en mantener el apellido materno en primer lugar y para llegar a esta conclusión tuvo en cuenta las siguientes circunstancias: el menor ya estaba escolarizado, no había tenido una relación estable con su padre y este había sido condenado por sentencia como autor de un delito de violencia en el ámbito familiar.

En la última Sentencia del Tribunal Constitucional consultada, dictada en un recurso de amparo similar (STC 178/2020, de 14 de diciembre), el Tribunal deja claro que su función se debe limitar a «examinar si la motivación ofrecida por [los jueces y

y no discriminación por razón de sexo, cit., pp. 249-286, pp. 266-267.

[28] «Todo menor tiene derecho a que su interés superior sea valorado y considerado como primordial en todas las acciones y decisiones que le conciernan, tanto en el ámbito público como privado. En la aplicación de la presente ley y demás normas que le afecten, así como en las medidas concernientes a los menores que adopten las instituciones, públicas o privadas, los Tribunales, o los órganos legislativos primará el interés superior de los mismos sobre cualquier otro interés legítimo que pudiera concurrir».

tribunales ordinarios] para adoptar cuantas medidas conciernen a los menores, está sustentada en su mayor beneficio y así comprobar que no se han lesionado sus derechos fundamentales», porque <«[l]a decisión de cuál sea en cada caso el interés superior del menor corresponde tomarla a los jueces y tribunales ordinarios». La sentencia no es de excesiva utilidad porque el Tribunal Supremo no había entrado en el fondo ya que había considerado extemporánea la solicitud de la madre de mantener el apellido materno en primer lugar, realizada en la vista oral, en lugar de hacerlo en su demanda de reclamación de la filiación paterna.

La primera sentencia del Tribunal Supremo español que aplica la interpretación correctora de la normativa conforme al interés superior del menor es la núm. 76/2015, de 17 de febrero. En el caso, ambos progenitores habían solicitado en la demanda y en la contestación de la demanda respectivamente que se antepusiera su apellido. El JPI estimó íntegramente la demanda de reclamación de la paternidad del actor y, en lo que nos interesa, ordenó la inscripción del apellido paterno en primer lugar. La AP confirmó la sentencia de instancia argumentando que éste era un tema de estricta legalidad y que estaba obligada a aplicar los arts. 109 CC, 53 LRC 1957 y 194 RRC. Además, no se había acreditado el perjuicio que le ocasionaría al niño anteponer el apellido paterno al de la madre. El TS estimó el recurso de casación de la actora, pero fuera de citar la STC 167/2013 explicada más arriba y de razonar sobre la necesidad de tener en cuenta el interés del menor, no lo concretó en función de las circunstancias del caso. Se deduce de la sentencia que este interés coincidía con mantener el primer apellido indicado en la inscripción de nacimiento.

«En términos de estricta legalidad vigente no existe duda respecto de la decisión adoptada por la sentencia recurrida, conforme a lo dispuesto en el artículo 109 del Código Civil, artículo 53 y siguientes de la Ley de Registro Civil y artículo 194 del Reglamento de Registro Civil […]. La respuesta, sin embargo, no puede ser de interpretación literal de la norma cuando está en cuestión el interés superior del menor […] Es, pues, el interés superior del menor el que inspira el legislador de esta Ley [LRC 2011] para resolver el orden de los apellidos en defecto de acuerdo de los progenitores, confiando que sea el Encargado del Registro Civil el que valore tal interés y asuma la decisión. Evidentemente meritada Ley no ha entrado en vigor, pero autoriza una interpretación correctora de la vigente, porque en los aspectos sustantivos la vigencia constitucional

de los principios que la inspiran sí se encuentran en vigor […] Así ha venido interpretando la legislación vigente el Tribunal Constitucional en la [STC 167/2013] por entender comprometido el derecho fundamental a la propia imagen del menor del artículo 18.1 de la Constitución Española» (FF.DD. 3º y 4º).

Reiteran esta doctrina las SSTS 620/2015, de 11 de noviembre; 621/2015, de 12 de noviembre; Pleno 659/2016, de 10 de noviembre; 651/2017, de 29 de noviembre; 658/2017, de 1 de diciembre; 93/2018, de 20 de febrero; 130/2018, de 7 de marzo; 496/2018, de 14 de septiembre; 645/2020, de 30 de noviembre; entre otras.

De la lectura de las mismas se deducen los siguientes parámetros o circunstancias relevantes para identificar el interés del menor en cada caso:

– La conducta de los progenitores no es relevante: así porque la conducta del padre fuera «recta y noble […] en orden a hacerse cargo del menor y relacionarse» y porque «la conducta de la madre [fuera] reacia a ese reconocimiento» no está justificado el cambio del orden si el Tribunal «no atisba ningún argumento que justifique cual sea el beneficio del menor con el cambio del orden de los apellidos, si se le suprimiese el primero que viene usando desde la inscripción del nacimiento» (STS 266/2018, FD. 2º, apt. 4º).
– El interrogante que se ha de responder «no es tanto si existe perjuicio para el menor por el cambio de los apellidos como si, partiendo del que tiene como primero, le sería beneficioso el cambio, de forma que el primero fuese el paterno y el segundo el materno. Si no consta ese beneficio, no existe, pues, razón para alterar el primer apellido con el que viene identificado el menor» (STS, Pleno, 659/2016, FD. 3º; 620/2015, FD. 5º, apt. 6º). Se trata de que «la declaración de paternidad caus[e] el menor impacto en la vida y entorno que en el momento de dictar la sentencia envuelven al niño» (STS 496/2018).
– Un factor relevante a tener en cuenta es el tiempo con el que el menor venía usando el apellido de la madre antes de la reclamación de paternidad o la edad que tendrá el menor al finalizar el procedimiento judicial: «si a la fecha que se resuelve el recurso el menor tiene cerca de seis años, durante los cuales familiar, social y escolarmente se ha identificado para el primer apellido con el de la madre, con él debe permanecer» (STS 620/2015, FD. 5º, apt. 6; STS 651/2017, FD. 3º, apt. 6º). En términos parecidos: «a la finalización del proceso judicial el menor tendrá cerca de seis años y durante este período de tiempo es conocido con el nombre primigenio tanto en

el ámbito familiar como en el escolar y social» (STS 621/2015, FD. 3º, apt. 6º).
– El carácter no tardío de la reclamación no es determinante y por lo tanto el interés del menor también puede justificar que se mantenga el apellido materno como primer apellido. «[C]on ser ello [la reclamación no tardía] un elemento relevante a considerar, no puede ser tenido como único y esencial, pues, a juicio de la Sala, se ha de partir de que el menor se inscribió con una sola filiación reconocida, teniendo como primer apellido el que entonces se determinó, así como que "es patente la relevancia individualizadora del primero de los apellidos de una persona"» (STS, Pleno, 659/2016, FD. 2º, apt. 4º).

Una excepción de nota al supuesto típico de mantenimiento del primer apellido de la madre por ser el primer inscrito es la STS 439/2020, de 17 de julio, porque en este caso el interés del menor se relacionó con el mantenimiento de los mismos apellidos que sus hermanos y esta circunstancia justificó anteponer el apellido paterno al materno. El menor fue inscrito con el apellido del presunto padre y con el apellido materno por este orden. Se interpuso una acción mixta de impugnación y de reclamación de la paternidad, el JPI y la AP la estimaron y se ordenó que se inscribiera el apellido paterno en primer lugar. La madre recurrió en casación, alegando que la sentencia de instancia había fijado arbitrariamente el orden de los apellidos del menor sobre la base de la decisión del presunto padre y de la madre biológica hacía cuatro años y se había limitado a sustituir automáticamente el apellido del presunto padre por el del padre biológico. El TS desestimó el recurso de casación y confirmó no alterar el orden, es decir, mantener el apellido paterno en primero lugar, pero por motivos distintos a los que utilizaron las sentencias de instancia y relacionados con información que las partes habían introducido ante el TS: hicieron constar que la menor tenía dos hermanos en el núcleo familiar de su padre biológico y una hermana nacida de la relación entre su madre y la persona inscrita como padre en primer lugar. Según el Tribunal, «lo más beneficioso para el interés de la menor […] es que mantenga en cada núcleo familiar el orden de apellidos que constan en ellos respecto de sus progenitores biológicos, por ser el que menos problemas le acarrearán en cuanto a identificación con sus hermanos en la vida familiar, social y escolar».

4. Conclusiones

La Sentencia del Tribunal Constitucional italiano núm. 131, de 27 de abril de 2022 - 31 de mayo de 2022, ha declarado inconstitucional el artículo 262, párrafo 1º del Código civil, en la parte en la que asigna al hijo no matrimonial, con filiaciones reconocidas simultáneamente por ambas líneas, el apellido del padre.

El Tribunal propone al legislador la opción normativa respetuosa con el principio de igualdad de trato entre los progenitores y el derecho al nombre y a la identidad del menor: establecer una regla que atribuye al hijo los apellidos de ambos progenitores en el orden que estos acuerden, salvo que decidan conjuntamente, en el momento del reconocimiento de la filiación, transmitir al hijo el apellido de uno sólo de ellos.

El Tribunal Constitucional también señala que si los progenitores no se ponen de acuerdo sobre el orden de los apellidos, deberá ser el juez quien determine el mismo.

La STCI 131/2022 supone un cambio significativo en el régimen jurídico de los apellidos, en comparación con sentencias anteriores, como la STCI 286/2016, porque el Tribunal propone introducir para el derecho italiano un sistema de doble apellido.

En comparación con el Derecho civil español, se destaca que en España el sistema de doble apellido es imperativo y de orden público con carácter general, por lo que la excepción que prevé la STCI relativa a la transmisión, por acuerdo, del apellido de uno de los progenitores no sería válida. La autonomía privada de los progenitores alcanza al orden de los apellidos pero no a la supresión del apellido de uno de ellos, porque también forma parte del orden público en esta materia el principio de duplicidad de líneas.

Además, la ley, también mediante una regla imperativa, determina que sólo se transmite el primer apellido de cada progenitor.

El trabajo da razón de las distintas reformas legislativas que se han llevado a cabo en España para adaptar la regulación sobre el orden de los apellidos al principio de igualdad entre los progenitores y a la prohibición de no discriminación por razón de sexo previstos en el art. 14 de la Constitución Española de 1978 (CE).

Con la Ley del Registro Civil de 2011 (art. 43.2) se abandona la regla de anteposición del apellido paterno al materno que regía en defecto de acuerdo entre los progenitores y se sustituye por otra que atribuye al Encargado del Registro civil determinar el orden atendiendo al interés superior del menor.

El criterio del interés superior del menor es especialmente relevante en los casos de determinación judicial de la filiación posterior al nacimiento del menor inscrito con los apellidos maternos. El análisis de la jurisprudencia del Tribunal Supremo dictada en estos casos permite concluir que en la inmensa mayoría de los asuntos el interés superior del menor coincide con el mantenimiento del primer apellido materno porque es con el que se ha venido identificando.

GIULIA BAZZONI*

INSTITUTIONAL TEACHING TODAY. ON THE 50TH EDITION OF "ISTITUZIONI DI DIRITTO CIVILE" BY ALBERTO TRABUCCHI (UNIVERSITY OF ROMA TRE, NOVEMBER 18TH, 2022)

CONTENT. 1. Opening remarks – 2. The tradition of a Master – 3. Introduction to morning session – 4. Institutions – 5. Culture – 6. Market – 7. Languages – 8. Afternoon session conclusion – 9. Boundaries – 10. Current events – 11. Round Table

1. Opening remarks

On 18 November 2022 the Seminar «*Institutional teaching today. On the 50th edition of Istituzioni di diritto civile by Alberto Trabucchi*» took place at Roma Tre's Law Department, where renowned academics discussed about the meaning of institutional teaching of civil law today from different perspectives. Each speaker received a keyword to focus on.

The event began by the introductory remarks by the University Rector Massimiliano Fiorucci and the Dean of the Law Department Antonio Carratta, who both briefly underlined the importance of thinking about teaching today, especially after two years of pandemic. Considering that University was not ready for such a situation, it had to face the emergency, changing the way of proposing the classes. It is therefore appropriate to reflect on the enduring and temporary elements of the didactic. In conclusion, the conference was not only a celebration of the 50th edition of a law handbook, but also a seminar about the perspective on how to teach and not only about what to teach.

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2. The tradition of a Master

The morning session was chaired and coordinated by Professor Nicola Lipari, who immediately handed over the word to Professor Giuseppe Trabucchi, who had the task of introducing to the audience the eminent figure of his father, Professor Alberto Trabucchi and outline the relationship between the Author's thought and the handbook now in its 50th edition.

Professor Giuseppe Trabucchi firstly reminded the renowned figure of Professor Giorgio Cian, the 'first apprentice' of Professor Alberto Trabucchi.

To introduce the handbook, it was regarded as appropriate to describe the figure of Professor Alberto Trabucchi, since his personality was identified in this volume. In the opinion of the panelist, indeed, such a textbook is still current thanks to the forward thinking of his father. Since the first editions, the textbook was conceived as a series of principles and rules exposed systematically and established around the Civil code perspective. Nevertheless, the speaker explained that such principles came not only from the systematic analysis of the existing rules but also through the interpretation of the contemporary society, hence principles beyond the rules, such as the human rights.

According to Professor Alberto Trabucchi's view, indeed, rules are not only a formal construction, but they should be linked with social reality. The legal setting should be constantly modernized through legal interpretation, which should revive rules and their effectiveness towards the subjects. He strongly believed in the effectiveness of law which should try to be compliant with substantial justice.

Besides that, during the drafting of this textbook, the Author always maintained a deep focus on the existing ethical and moral values of the community; this element has also certainly contributed to its persisting relevance, allowing to associate his work with the improvements of the society. Even though the consideration of the relationships between rules and living ethical and moral values may lead to an evaluation of the law as correct or incorrect, Professor Alberto Trabucchi, however, has never fallen into this kind of judgment, by distinguishing his ethical-moral opinion from the enforceability of law.

In the Author's view, the inflexibility of the Civil code could be overcome through the application of general clauses, which should be essential to avoid the risk

of discretionary interpretation of the judges and the consequent creation of substantial differences between them. The application and interpretation of the general clauses should allow uniformity in the interpretation of the Civil code's rules.

The panelist added, in conclusion, that his father's strength was deeply connected also to his lectures. The handbook shows the spirit he put inside his lectures for his law students. His educational method was the dialogue: he used to propose a case to the students once a week for stimulating them to the interpretation of law. He aimed to demonstrate that also young students – if conducted properly – could research the sense of rules since that he strongly believed in the democracy of law. This method could be enduring if properly adjusted and, above all, new forms of teaching must be built starting from the method.

3. Introduction to morning session

Professor Nicola Lipari had the duty to properly chair and coordinate the morning session.

He briefly reminded how the lectures of Professor Alberto Trabucchi deeply stimulated his mind, during his first years of university attendance.

Professor Lipari stressed how that Law School is living today a schizophrenic situation, since there are two different and not overlapping lines: on the one hand, there are positions in which a new dimension of law is identified, and on the other, lectures that constantly repeat patterns of the past. Considering this, law is recognized today as a practical science, focused not only to the analysis of the standard placed but also to the performance of the common practice. Hence, the main question should be whether it could be possible to insert these new phenomena, through integration or injections, into the structure of such a handbook that have been constructed from a different perspective and, for this reason, it appears as radically outdated in comparison with the current events.

Professor Lipari then recalled the concept of 'post law', hence in this context it is necessary to clear what means new sources of law and categories, which both now tend to be placed not from above but from below, by the practice, through an act of

recognition. Hence, the past law hierarchy, lost its strict sense.

In conclusion, Professor Lipari underlined that the current regulation must be researched, therefore the new student's task is to acquire an active role in this search of a new system since they should not be mere spectators or passive receivers of information.

4. Institutions

The following panelist to whom Professor Lipari turned the stage over, after his brief introduction, was Professor Paolo Spada, whose speech was centered on the topic of the concept of Institutions. He firstly underlined that, even though the handbook still maintains its name, «Istituzioni», from the 48th edition it has been divided in two different volumes, one dedicated to Civil law and one to Company law.

The word institution comes from ancient Latin, specifically from the term *Institutio* that means disposition or arrangement, but also instruction and education. Therefore, the choice of this title for the Professor Trabucchi's work is meaningful about his scope: on the one hand, it binds the book development according to the first concept of the term institution, on the other hand, it aims to emphasizes the educational scope to develop a professional competence still related to the first of the two senses. Hence, the word institution is used for fully describing the teaching approach chosen by the Author and the scope of such a handbook.

Considering this, the main task of the institution consists in persuading and inspiring the readers by moving their mind and not only their memory. It should be an uninterrupted stimulus for students, which induces them to an active mind training and not only to a passive reception of information.

Professor Spada added that progression chosen in the current institutions is imposed by the need to give the subject matter of the two 'volumes' new nourishment. Although divided, the two volumes are still connected, especially due to the Authors' choice of subject division and mutual references. They do not follow therefore the systematic order of the Civil code, but they seek to provide an organic view of both subjects.

5. Culture

The following speaker was Professor Claudio Consolo whose speech was focused on cultural background of Professor Trabucchi's handbook.

He felt that to understand the foundations of the institutions, it was appropriate to step back and focus on Professor Trabucchi's training. After graduating with Professor Francesco Carnelutti, Trabucchi was entrusted to Professor Adolfo Ravà, who introduced him to a new legal method and new philosophical liberal ideals. Since then, Professor Ravà's teaching later became the solid basis of the successful approach of the Trabucchi's handbook, that it has been capable of overcoming several tensions during the years. Such a solidity came from Professor Ravà's view, which used to consider law not as subservient to the State, since the latter is not an end but a means, which is neither the only nor the most important. Hence, the study of Ravà's handbook was essential for the young Professor Trabucchi who was surely influenced by such a reading when writing his own institutions that are therefore indebted to Ravà's teaching.

In the fulfillment of this work, Professor Trabucchi was assisted by his collaborator Anteo Genovese, who was used to transcribe all his university lectures and by Professor Carnelutti himself, who reviewed edition after edition.

Considering this, the Professor Consolo underlined that the idea of Professor Trabucchi was to structure a useful handbook for students and not just for his colleagues. It was regarded as appropriate, indeed, the description of the law figures without forgetting the construction, which should be disciplined, regulated and not too modernist.

In conclusion, Professor Trabucchi's success raised from his ability to effectively address students. The textbook has become increasingly smoother from edition to edition and institutions gained strength without being heavier. That's why this textbook continues to affirm an essential core that, no matter how many forays it receives by both National and European legislator, it maintains its strength and its philosophical approach that has granted and keep alive such long-lasting foundations and thoughtful.

6. Market

The following panelist, to whom Professor Lipari gave the word, was Professor Marisaria Maugeri, whose keyword was market. She firstly highlighted how it was appropriate in Professor Trabucchi's idea to keep separate the subject of classroom teaching from that of textbooks. The lecture, indeed, is an ever-living element while the book is enduring. This is still the case today – especially regarding the subject of market regulation – while the textbook stands for to a theorical guidelines, it is the Professor's main task to provide connections with practical cases, making the scholars at the center of the issues.

With respect to this, according to the panelist opinion, what may need a review today, above all in the textbook, should be the relationship with the regulation of the European Union. Whereas in the past it was considered enough mentioning the belonging to the European community, this is no longer the case today.

While explaining market and consumers specific regulations, for example, it should be necessary to mention the E.U. law concerning such subjects and, of course, the ECJ's most recent decisions on the matter. In both cases, indeed, there are a multi-level system of legal sources, and the relationship between them should be better underlined in the textbook.

According to the speaker, the main issue, however, is not the textbook but the doctrine itself since this transition has not yet matured. This is precisely the reason why handbooks are still structured between general and sectoral part in a traditional way, since there is still a prevalence to recognize the informative function of the textbook, as well as the idea of a unique paradigm. Hence, the classical liberal model behind the textbook is challenged by the E.U., however, it must be noted that subverting the pre-established order would not be helpful for students. That is way it is necessary to handle this moment of confusion and absence of a systematic approach.

Trabucchi's handbook, for its part, shows an alert to students in the general part, since it explains that there are some areas in which there are specific regulations that one must learn about. In conclusion, the method of addition, used such a textbook, could be a good compromise in the opinion of Professor Maugeri.

7. Language

The last speaker of the morning was Professor Stefano Delle Monache whose speech was focused on the relationship between language and legal phenomena, since law is a spoken phenomenon, hence a fact of language.

Firstly, Professor Delle Monache spoke about the relationship between language and education, emphasizing that the handbook wishes to maintain the tone of the lecture in the writing as well, since it is the only way to be more effective with students. In such a model, the idea that wishes to be stressed is that the language of didactics is only partially the language of law, since it should not be assumed that the language of teaching in the same as that of science.

It is a teaching method that wants to consider a 'right told' rather than explained. That is why is not an aseptic language, purely theorical and subservient to technique, but a language imbued with realism aimed at comparison between legal subject matter and life experience.

The prose of the institutions is different, richer, and less concerned with conforming to a rigorous criterion of precision and coherence in the definition of concepts. On the contrary, the prose on the page of the institutions is at times tumultuous, in contrast to the sober eloquence of the general doctrines. The law of institutions is a 'narrated law', because the content of the book refers to a description of legal reality as a phenomenon in perpetual motion.

Despite Professor Trabucchi's classical legal approach, the dynamism of law in the changing society represents a main element in the plot of his institution's pages. This is expressed by language: a language that becomes a tale, since the institutions, while being bound to their own ordering function, know how to connect this with the flow of time and human experience.

Thus, language and content cannot but influence each other: language changes as content changes. Considering this, the speaker wondered whether today we should continue to use the technical language of law or the airier language of principles. In this perspective, Professor Delle Monache held to be true, in conclusion, that once the institutional language is untethered from a strict reference to law, there is a risk of offering students a representation that could somehow mislead them. Principles and

values are tools to be handled instead with great caution. Professor Trabucchi's institutions are also along this line.

8. Afternoon session conclusion

The afternoon session was chaired and conducted by Professor Giuseppe Zaccaria, who primarily recognized the huge memory of the Master and his immeasurable teaching function for generations of law students. According to the opinion of Professor Zaccaria, the main ability of Professor Trabucchi was to propose a comprehensive, coherent, systematic vision of civil law.

With great skill he fused together notions coming from both German and French traditions. The idea of Romanistic derivation that conceived a legal system open to reality is also very closed to the method chosen by Professor Trabucchi for his textbook. Thus, there is everything in it: Roman law, Christianity, Civil code, BGB, Constitution.

Clearly, many figures, such as the family, have radically changed to modern times; however, the structure remains firmly systematic and organic. The text is a compact and comprehensive layout which wish to guide the reader to new research. Over the course of time, the textbook has expanded with the handling of cases drawn from life and thus intended to stimulate the student's preparation. The text never showed an abstract and dogmatic law but a concrete one, greatly contributing to change the face of law in Italy, spreading the idea that law relates to real experience and living social practice, it is something that is renewed daily.

According to the opinion of Professor Zaccaria, the distinguishing feature of the text and the element of major prestige consists in its absolute clarity that is both light and incisive in style. In a context where the word is abused, this manual still values concision. Information must be given to the extent that it is education. There can be no effective specialization without a stable background knowledge.

9. Boundaries

The first afternoon panelist, to whom Professor Zaccaria handed over the floor, was Professor Mario Stella Richter, whose keyword was boundaries. Boundaries are closely linked to law. Not only because law needs 'the where', since today there is also law without borders, but because the border distinguishes what is right from what is wrong. Therefore, boundaries also deal with limits.

In the same way that law implies a boundary, teaching also imposes a limit. Boundaries are what mark each subject, which always have internal and external boundaries. On the one hand, what must be included in the treated subject and what must be left out (external boundaries), on the other hand, boundaries between one content and another, and their relationship that must be weighed (internal boundaries). Then there are the boundaries in time and space: historical boundaries and geographical boundaries of a certain institutional subject and besides that, boundaries between what must be updated and what must be maintained as the original, as a common character and value.

With reference to external boundaries, the conventional relationship is between civil and commercial within private law. The Professor Trabucchi's institutions are currently divided into two volumes: one covering civil law and one commercial law and in the choice of the current Authors, some concurrent topics have been drawn into civil law and others into commercial law. Still regarding external boundaries, the institutional treatment raises the issue of the inclusion of those subjects that are becoming increasingly specialist (e.g., banking, insurance, etc.). The issue must be asked to what extent it makes sense to include sectorial disciplines in an institutional treatment, and this question leads directly from the sphere of external boundaries to that of internal ones.

Thus, the issue of the internal boundaries of the textbook was introduced: the proportionality problem between the scope of treatment of the institutes and their relevance. This is precisely another key issue: if the overall boundaries of the work are provided, the space of each institute cannot be increased without limits. Linked to that is the matter of boundaries in time: how far a specific manual may be preserved to bear witness to the reality that existed when the manual was written and to try to ensure continuity. Besides that, how much space should be provided today for international

or supranational comparison or standardization.

Considering this, in the author's opinion, today one should show more courage to remove than to put in, to seek a systematic view. There is a duty to exclude from the treatment all those institutions that are not relevant in society or at any rate not relevant in a systematic vision. If the complexities struggle to be brought back to an ordering vision, this does not diminish the fact that it is appropriate to try to bring them back within a scheme. In conclusion, there is an urgently necessity to draw boundaries and impose limits.

10. Current events

The last speaker of the afternoon session was Professor Tommaso Dalla Massara, whose speech was focused on the topic of what should be considered as current and what as outdated in education today.

While questioning the meaning of the term current, if it tends to be associated with something that refers to the present, the Professor Dalla Massara was also interested in the other meaning of the term, which is connected to the Latin word *agere.*

Actum - agere, that which is actual insofar as it is manifested in act, in something that is tangible, that is exteriorized. This aspect of acting also characterizes the figure of Professor Trabucchi himself: a strong-willed, decisive figure, very attached to *agere* who loved dynamism.

Sticking with the theme of *agere*: it is necessary to be able to speak to the present, to move students into action, to set them on their way also with an almost Christian connotation, that looks at the social purpose of what it does.

There is an inherently political value of doing education. In this regard, Professor Trabucchi held that education 'is a democratic act'. Certainly, it is a political act, which has an impact on the polis, on the collectivity. To quote Justinian, institutions arise from a command, from an imperial choice having influence on the *polis*.

In this regard, Professor Dalla Massara wondered what the main questions are regarding current events and out of date today. The first question concerned whether it was possible today to create an introductory course and, furthermore, to figure out what

the minimum structural unity of such knowledge would be. In this regard, Justinian – quoting Gaius – claimed that the basic structure was *Personae, Res, Actiones,* conforming all legal knowledge to these three main legal figures. Today it is extremely more complex to provide an adequate answer on this point, since it is not clear where the boundary lies, and which is the actual delimitation of civil law nowadays. In a dimension that is boundless, no limits can be identified.

The second question raised concerned the 'book form' as an educational tool and whether this instrument could still be considered as current, since institutions might well be oral. It is not guaranteed that it is always the 'book form' that is best suited to imparting knowledge, nor even the written page. There might be, in fact, a return to orality and video communication in future.

The third question, instead, regarded how to conceive the relationship between private and public law. In this relation, Ulpianus described private and public as *positiones,* so they are points of view, ways of looking at the legal world. However, the question of how to draw boundaries between them remains open.

Referring to the specific choices made in Professor Trabucchi's volume, the speaker then wondered how it would be possible to hold together *nova et vetera* in this specific context, i.e., how to reduce new things to a system, since there is a systematic tension between tradition and innovation.

The current situation seems to impose a requirement for simultaneous cognition of numerous sources and issues, which are complex to be put together into a unity.

In this regard, Professor Trabucchi used an adverb, namely organically, which reveals the Author's specific idea, since legal discourse must also be addressed in an organic manner. This is, in conclusion, the main challenge of current and outdated. The shaping of broad categories with respect to how the world goes.

11. Round Table

At the conclusion of the reports of the several speakers, the round table was opened, during which the first to introduce the discussion was the well-known Philosophy Professor Massimo Cacciari.

He commenced his own reflection by referring to the term handbook, namely something that you keep at hand, but is not at all at hand, because it is complex, difficult, and unreachable. What characteristic should this book possess? This book must demand a dialogue with the reader, it must require the reader to listen to it and discuss with it. The book is required because it provokes a dialogue, a questioning, hence it distinguishes itself because it wants to open new paths of research and, above all, to build a system.

System does not mean the ability to solve issues but, on the contrary, it means being able to put problems or various aspects of them together, even where there is no answer. A system knows how to make them consistent. Therefore, the true handbook is that book which coherently sets out the issues, which relates the problems according to a logic in the original meaning of the term *logos*. *Leghein*: the act of gathering what is similar and of connecting them. The true handbook simply accomplishes this, Professor Trabucchi's handbook fulfils this - it is an open handbook, an open system, which opens inner questions, encouraging research. According to the philosopher's view, the word system must be preserved: one thing is to recognize the difficulty of the current situation, quite another to think that no system could be built in future. It is not appropriate to give up on a system, since it will be maybe more complicated to construct, but not impossible.

The reader of this handbook is the one who talks to the book, it requires an aware reader, since it conveys and demands a reader to communicate with the text. Communication has been overtaken by information. Information and communication are two quite different concepts: the handbook is a communicative book, which implies a communicative community and without this situation, such handbooks are destined to disappear very soon. Considering this, in the philosopher's opinion, science cannot yield to this situation. If this is the threat, then these textbooks must be acclaimed, because they are schools of resistance. Thus, the call to *agere* becomes more and more central in this topic.

After Professor Massimo Cacciari, it was the turn of Professor Antonio Carratta. His discussion, following the philosopher's, is shaped by the concept of category and system.

Categories are reference points that are useful for capturing new elements and

in some way decoding them. The circumstance of being living in an age that witnesses the overcoming of legal positivism and the emergence of a law that instead develops from below, does not necessarily conflict with the use of categories and the construction of a system.

While it is certainly much more challenging to teach law today than in the past, this should not mean that it is impossible to try to convey the emergence of new facts within the categories at disposal. This has always occurred when law has been developing.

It is necessary to capture the innovations presented by society and determine whether it is possible to interpret them or otherwise qualify and lead them back to existing categories with the tools at disposal. This, according to the Professor, should be the main task of institutional education. Law cannot be taught by dealing only with practical cases, since this is not how institutional teaching should be intended; instead, it must provide tools by which to interpret the environment. Practice is an exercise in addition but not a real substitute.

Assuming that, the situation is not the one that currently exists at the time the manual was conceived, the effort that should be made is to renew the handbook. About the possible methodology, since addition does not create a system or an order, the renewing operation to be performed should consist in incorporating the new elements within the existing categories. An incorporation within a structure that may be ancient in terms of its content but not in terms of its structure. Although there is no longer the structure given by the legislator, it is still necessary to create a system, otherwise law runs the risk of becoming merely technical. The mentality of young students, indeed, should be prepared for interpretation and not only for the use of practical tools.

At the conclusion of Professor Carratta's speech, Professor Marco Cian took the chair, who first wished to commemorate his father, Giorgio Cian, Professor Trabucchi's beloved pupil. His speech then focused on the topic of information and method.

Legal studies are characterized by a strongly notional approach, in which efforts are made to inform, i.e., to provide a knowledge of the subject matter that is distinguished by its completeness of information. Nevertheless, this runs the risk that there will be a strong fragmentation of content, and therefore it is essential that a method of knowledge, and not just information, is known and transmitted to the audience.

Professor Cian added that he strongly believed that it is essential that the main goal of textbook's reading, consists in a kind of study that should not just notional, not just informative, but formative instead, thankful the use of a strong and effective method. Hence, efforts ought to be made to provide the student with an understanding of the institutes and notions given. A choice is required, since completeness of information is not possible, it is necessary to select information that allows for an organic understanding of the institutes. This selection must be systematic in nature.

In conclusion, there must be a sense and a rationality: it must show a connection between the goals set and the reality to be analyzed. An institutional, handbook-like treatment of our subjects must go through the exposition of the method, promoting the reader's understanding. There is no point in pursuing comprehensive information – selection must be made since it is the main task of those who provide institutional information to supply the general co-ordinates –. One should not chase an encyclopedic vocation.

The last discussant was Professor Andrea Zoppini, whose speech was focused on the relationship between training and information in education. Then the Professor posed three different issues.

The first one is 'The end of Lawyers' by meaning with this title the phenomenon that all legal activities are progressively decreasing. Activities entrusted to lawyers are progressively shrinking as they are taken over by non-lawyers. First and foremost, this is an interesting fact.

Secondly, there was the issue of what the perspective of legal science is today and should be taught. How to propose a dialogue between theory and practice. There is a problem that concerns the contraction of specialistic knowledge in the face of the increasing prominence of inter-disciplinarity since a legal awareness that is not solely national is crucial.

The third theme is then highlighted – the language of practice and theory have strongly disconnected –. The language of theory fails to interact with the language of practice because the latter have taken two different paths.

Considering such issues, Professor Zoppini then made a concluding remark, according to which, it is more demanding and challenging in education to focus on the theoretical aspects of law than on the practical ones. In the relationship between

information and education, the formation of ideas must be looked at, as this aspect is essential, crucial and requires more time. It is necessary to look at the current chaos, looking for innovative solutions, through the formation of new ideas since this is what really enhances the jurist.

At the conclusion of the round table discussion, Professor Massimo Cacciari again took the word, who emphasized how it is necessary today to break out of a 'weak' thinking complex. Everything appears to be deformed: the old orders have crumbled, this random atmosphere dominates, the world is all about chance, even though – he pointed out – there is a law of chance.

At this end, the Philosopher urged the motion to return to the ordering of chance and new cases. There is no such thing as a period of transition that lasts forever, and therefore one must return to action, since a change of state can occur in a governed manner if there is an effort to order cases, whereas it can occur in a catastrophic manner if there is no order at all. This is the difference between a controlled atomic reaction and an atomic bomb. Science must not abdicate its ordering role.

LUCREZIA MAGLI[*], CAMILLA RAMOTTI[**], GIULIA TARABORRELLI[***]

UNDERSTANDING THE CHALLENGES OF AI IN THE EU LEGAL FRAMEWORK: THREE VOLUMES EDITED BY A. PAJNO, F. DONATI AND A. PERRUCCI

The world in which we live is increasingly characterised by the omnipresence of connections. The affirmation of the said growing interconnectedness has led to the development of new technologies, such as machine learning, deep learning and neural networks, to menage large amounts of data.

The transformation triggered on society by the technological challenge is not halted to mere change, but it is rather shaped like an intriguing transition, which carries within itself infinite potentials.

With respect to the legal environment specifically, the direct effect of technology has been to question the existing legal categories, to examine their ability to manage such new phenomenon since the 1990s, alongside the need to devise normative changes, or even opening to new forms of regulation. Another focal point of the discussion about the impact of artificial intelligence is the investigation of the role that human being plays within the algorithmic decision-making process.

Guido Alpa observes that «we cannot calculate, today, where algorithms will lead us», but law has clearly assumed the role of «malleable science, more flexible and enveloping than it was in the past».

In the first of the three volumes that compose the impressive work edited by

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Alessandro Pajno, Filippo Donati and Antonio Perrucci, each author attempts to portray how the interaction between artificial intelligence and law affects relevant issues, such as the respect of fundamental rights, the protection of personal data, and regulation.

The epochal transition from the «internet of things» to the «internet of everything» is accurately described by Alessandro Pajno in the preface as the revolution that leads from the constant and habitual presence of the internet to the hyper-connectivity between people, processes, and data. This trend has involved a conflict, or at least potentially could be, between machine autonomy and human intervention, between technocentrism and anthropocentrism, with the inevitable emergence of ethical and legal problems. Is this the thread running through the entire work.

In the introduction, edited by Filippo Donati, he describes the three volumes of which the work is composed. The first volume, as will be discussed in more detail, focuses on the definition of artificial intelligence, its impact on fundamental rights and the regulation of large platforms. In the second, the authors discuss the public and private dimensions of the use of new technologies. In the third, the relationship between artificial intelligence, economics and finance is outlined.

The first volume is in turn divided into four parts, devoted respectively to the definition of artificial intelligence, the relationship between the latter and fundamental rights, and personal data and its regulation in relation to digital services and markets.

In the first part, consisting of a single chapter, Giuseppe F. Italiano, Stefano Civitarese Matteucci and Antonio Perrucci take note of the difficulty encountered in trying to answer the question of what exactly artificial intelligence is, a difficulty accentuated by the need to delimit exactly what can be considered «intelligent». The authors exclude the possibility that a system provided with AI can also be considered as having an artificial mind and consciousness. On the contrary, information on the functioning of an artificial intelligence can be found through the study of machine learning algorithms, which can improve automatically through experience and the use of data: in other words, capable of learning. The two problems that arise from this concern the use of algorithms by private and public actors.

In the second part, divided into six chapters, the authors discuss the relationship between fundamental rights and artificial intelligence. The second chapter is edited by

Antonio D'Aloia and concerns the connection between law and AI and, in this context, the role of the human being. In the third chapter, on fundamental rights and algorithms, Filippo Donati addresses the European regulation of artificial intelligence, between strengths and weaknesses. Adelina Adinolfi, Cristina Schepisi and Alberto Oddenino also discuss the supranational level and the relationship with fundamental rights from different points of view in the following chapters. In the seventh and last chapter of part two, Benedetta Cappiello reconstructs the potential integration of AI, blockchain and the right to health (and other rights).

The third part of the work, dedicated to artificial intelligence and personal data, is divided into nine chapters. The eighth chapter, edited by Marco Bassini and Oreste Pollicino, acts as a forerunner for the following chapters and allows the reader to get to grips with the concepts and categories of data protection tensions in the context of AI systems. Giovanni Maria Riccio and Giorgio Giannone, in chapter nine, explore the relevance of the legal bases for processing personal data by using AI systems. In chapter ten, by Giusella Finocchiaro and Laura Greco, the authors focus on the role of the data controller and data supervisor in the processing of personal data managed by artificial intelligence. In chapter eleven, by Giuseppe D'Acquisto, Carmine Andrea Trovato and Ludovica De Benedetti, the authors make some reflections on the concept of machine decision-making autonomy within the regulatory framework. Still about automated decision-making processes, Erik Longo in chapter twelve delves into the issue of the right to explanation. In chapter thirteen, Edoardo Carlo Raffiotta and Massimiliano Baroni discuss artificial intelligence and the protection of identity, while in chapter fourteen, Miriam Allena and Scilla Vernile explore the relationship between AI, the processing of personal data, and public administration. In the last two chapters, the processing of personal data in relation to AI techniques is studied in relation to its impact on universities and workplaces, respectively, by Giulia Schneider first and Mara Parpaglioni later.

The fourth and last part of the first volume is devoted to the relationship between AI and artificial services and markets. Chapter seventeen, edited by Laura Ammannati and Fabiana Di Porto, analyses the contents of the Digital Services Act, the Digital Markets Act and the Artificial Intelligence Act. Ugo Ruffolo and Andrea Amidei, in chapter eighteen, focus on the possible ex ante regulation of AI. In chapter

nineteen, instead, Federico Marini Balestra discusses the regulation of the application phase of AI-related technologies and the same author, in the following chapter, addresses the degree of intensity of regulation itself. Laura Ammannati and Fulvio Costantino, in the twenty-first chapter, treat regulation models and regulators of digital markets. Fabiana di Porto and Annalisa Signorelli close the book with a chapter on new forms of AI regulation.

Overall, the volume has the merit of exploring in detail the relationship between artificial intelligence, fundamental rights, digital services and markets, and regulation. The presence of many authors enriches the content of the book from the point of view of the different expertise of each of them.

The second volume that composes the outstanding work edited by Alessandro Pajno, Filippo Donati and Antonio Perrucci revolves around the public and private dimension of Artificial Intelligence.

After a preface by Alessandro Pajno and an introduction by Filippo Donati, describing respectively the challenge represented by Artificial Intelligence and the plan of the work, the first section of the second volume is dedicated to the relationship between Artificial Intelligence and public administration.

The first chapter, edited by Edoardo Chiti, Barbara Marchetti and Nicoletta Rangone, studies the ways in which several public administrations, such as independent authorities, central administrations, and smart cities, are experimenting AI systems in their activities. The authors get to show the increasing willingness of administrations to exploit the opportunities offered by technology to maximize efficiency. At the same time, administrations should acquire internal technical expertise to identify the systems best suited to their needs, ensure transparency and accountability of algorithmic administrative activity, and, finally, ensure human supervision over AI systems.

In the second chapter, Giulia Avanzini focuses on the challenges of data governance within administrations, depicting the several issues arising from the use of algorithmic systems in administrative procedures. Guarantees for the citizen are considerably weakened by the impossibility to apply traditional institutes to algorithmic decision-making, but also from data sets' low quality, incompleteness and inadequacy. A solution may come from widespread accessibility, accountability and constant human

access to verify or complement algorithmic decisions.

The described anthropocentric approach is also called for by Marco Macchia and Antonella Mascolo in chapter three, in which the authors analyze the new Proposal for a Regulation on Artificial Intelligence for a legal, robust and ethical use of technology. In chapter four, Leonardo Parona summarizes risks and benefits of algorithmic decision-making employed for discretional decisions, proposing a set of essential tools that the administration should bear to face the digital revolution, such as technical expertise and parallel procedures. Given the efficiency increase provided by Artificial Intelligence in public administrations, in chapter five Simone Franca advocates for data protection by design solutions, which should hinge from the GDPR paradigm.

AI also proves to have a strong impact on smart cities and public transport. As demonstrated by Maria Bianca Armiento through the seventh chapter, the latter benefits from a development of relationship with users in terms of consistency, adaptability and equality. On the other hand, Fulvio Costantino in the sixth chapter hopes for a new robust local and supranational legislation to solve the main issues that arise within smart cities.

The volume's second section is dedicated to the liability for Artificial Intelligence systems. Through the eighth chapter, Ugo Ruffolo leads an extensive reasoning on the current legal system's adequacy to ensure protection against any harmful Artificial Intelligence application. The author concludes with the inexpediency for a new *lex robotica*, since liability issues can be solved by interpretating the current provisions, which converge towards a human-centric perspective.

Andrea Amidei's ninth chapter focuses on the European product liability discipline: the current legal frame is appliable to Artificial Intelligence, but manufacturers should fully prevent any form of machine-learning devices malfunction. Against consumers' «digital vulnerability», Enrico Maria Cotugno highlights the need for a specific regulation on AI products, taking as a valid starting point the ex-ante risk assessment and the disclosure norms envisioned in the Proposal for a Regulation on Artificial Intelligence. Paolo Del Vecchio and Valentina Bignoli through chapter eleven sustain the inexpediency for a new *lex robotica* to regulate the responsibility in administrative algorithmic decision-making, as public officials are necessarily to be considered accountable for algorithmic decisions under the current regime. The twelfth chapter by Oreste Pollicino and Giovanni De Gregorio underlines the relevance of the

«new European digital constitutionalism», while describing the AI Act's vertical risk approach in opposition to the GDPR's accountability regime. Valeria Falce's chapter thirteen describes databases' singularity and the proposal for «bridge» solutions to effectively regulate the phenomenon, while waiting for a complete and coherent European legislation. Lastly, Antongiulio Lombardi and Giulio Lombardi describe different hypotheses of AI's liability supervision by independent agencies, trying to avoid responsibility assessment's fragmentation.

The third conclusive section concerns the relationship between Artificial Intelligence and jurisdiction, analyzing predictive justice's benefits and risks. Alessandro Pajno opens chapter fifteen with a thorough analysis of the issues that arise when configuring a machine-driven justice, finding the adversarial principle as a valid solution to guarantee the algorithmic decision's objectivity and neutrality. The following chapter, edited by Filippo Donati, describes the problem of judicial data's anonymization, which represents an open issue for European regulation, considering the various national provisions on the topic. Ugo Ruffolo envisions the machine as an advocate general, in charge of proposing a non-autonomous solution that the human judge can follow or disregard. Mario Libertini, Maria Rosaria Maugeri and Enzo Vincenti, authors of chapters eighteen and nineteen, investigate the use of algorithmic decision-making in civil justice: the proposal of a final decision that must be validated by a human judge is once again the best solution for a maximation of the machine's efficiency while taking into account the necessary guarantees for the citizens.

In Serena Quattrocolo's opinion, the criminal justice system should benefit from the use of Artificial Intelligence, avoiding any form of dystopian closure. Among the main challenges, the demonstrative capacity and reliability of means of proof provided using digital systems and the use of software aimed at predicting specific criminal risks, regardless of the prohibitions of criminological investigations. Ernestina Sacchetto in chapter twenty-one describes the use of facial recognition software as evidence in criminal trials, which bears risks of unaccountability and discrimination without a solid legislative frame. Fabio Pinelli with chapter twenty-two investigates the use of computational models to define criminal liability or the penalty quantum. These applications can only be considered acceptable under a broad and flexible legislation, which imposes human supervision.

The two final contributions, chapters twenty-three by Flavia Risso and the twenty-four by Dario Simeoli, analyze the role of Artificial Intelligence in administrative justice. The only admissible prospect seems to be the administrative trial's «cobotization»: algorithms can only support and could never replace the judge.

The third and last volume of essays, curated by Alessandro Pajno, Filippo Donati and Antonio Perrucci, explores the need for a strong collaboration between law and Artificial Intelligence in order to regulate digital tools. After analysing the impact of artificial intelligence on fundamental rights and on both private and public sectors, the authors reflect on the potential existence of new rights within Intellectual Property, financial and corporate law.

To answer the question titling this very interesting collection, the book describes the radical changes that Artificial Intelligence is demanding within the legal system, looking at the initiatives that have started within these new fields of research. Like the previous volumes, the work is divided into three parts. The first nine chapters, composing the first section, focus on the study of Intellectual Property rights for Artificial Intelligence systems.

Chapter one by Gustavo Ghidini and Isabella Austoni is an overview of the doctrinal debates on whether «authorship» can be applied to inventions made through AI. It also covers the development of new applications of technologies. In the following chapters, Andrea Amidei and Mariateresa Maggiolino hypothesise an extension of certain forms of protection offered by Intellectual Property and support the recognition of *sui generis* rights to machine-generated data collections. The third chapter focuses on Mario Libertini's analysis on the possibility of patenting so-called computer-generated inventions. He emphasises the opinion that an evolutionary interpretation of patent law is absolutely required and reviews the existing thesis on the legal subjectivity of artificial agents. Furthermore, he dwells on the decisions of the numerous judges and on the interactions between data protection and antitrust laws.

Chapter four, written by Isabella Austoni, is based on the second pillar of analysis on the applications of Artificial Intelligence, namely that of the social control of new technologies. It examines the potential violation of human rights and reflects on the problem of the legality of inventions made through AI. The fifth, sixth and

seventh chapters, respectively drafted by Philipp Fabbio, Emanuela Arezzo and Marialaura Rea, explore in detail the subject of AI through the disciplines of designs right, copyright and trade secret. Chapter eight, by Silvia Scalzini and Mariateresa Maggiolino, focuses on the limits for using information stored in databases for training Artificial Intelligence systems. The first part of the book concludes with a note by Gabriella Muscolo on the legal and economic reasons behind the problem of AI patenting and the current state of European regulations.

The second section of the work tries to define the role that AI is assuming with increasing impact within corporate law and governance, focusing on the applications of technology for the operating model and functioning of bodies. Chapter ten by Niccolò Abriani dwells on the use of digital and algorithmic devices within corporations and on the topic of sustainability of corporate governance. The next chapter, by Chiara Picciau, explores the role of Artificial Intelligence for corporate decision-making, suggesting that technology will soon take the place of board members. Giulia Schneider in chapter twelve seeks to critically highlight the interdependent relationship between digitalisation and the sustainability of corporate governance. The author concludes that a «sustainable» corporate governance can only be achieved through a legitimate and public interest-oriented management of data. Finally, the last chapter of this section deals with the potential use of intelligent technology in the initial phase of a new company's constitution, through a comparison between European and Italian regulations conducted by Federico Maria Mucciarelli.

The third and final part of the book is divided into five chapters. This last section portrays the use of AI within the financial sector, to identify the best regulatory approaches. In the fourteenth chapter, Valeria Falce, Antonella Sciarrone Alibrandi, Filippo Annunziata, Maddalena Rabitti and Michele Siri describe the new Proposal for a Regulation on Artificial Intelligence and the European regulatory strategies for FinTech.

The following chapters discuss some areas of the financial sector where the use of AI is already common practice. The purpose is to encourage a better and easier coordination between the Proposal and the Digital Finance Package. Chapter fifteen, by Valeria Falce, deals with the use of intelligent systems for the provision of automated financial advice through digital platforms. Chapter sixteen, by Filippo Annunziata,

delves into different payment services, while chapter eighteen, drafted by Maddalena Rabitti and Antonella Sciarrone Alibrandi, describes the role of independent authorities and the choices that the European Commission is making regarding the use of AI in relation to RegTech and SupTech. Chapter seventeen, edited by Michele Siri, dwells on the appropriate protection, governance and control mechanisms that financial operators must provide when using AI systems.

All these diverging topics and opinions come to a common agreement in the end. The surge of artificial intelligence has since impacted so many different branches of the law, that it is of utmost importance for these two worlds, law and AI, to work together to regulate the new digital State.

FRANCESCO SACCOLITI*

THE DEFENCE OF THE RULE OF LAW IN THE AGE OF CONSTITUTIONAL EROSION: THE ROLE OF CONSTITUTIONAL COURTS

(University of Roma Tre, Faculty of Law, October 11th, 2022)

On October 11th, 2022, the first introductory lecture for 1st year law students of the Faculty of Law of Roma Tre was held by Justice Gilmar Mendes, *Ministro* of the Brazilian Federal Supreme Court, the *Supremo Tribunal Federal*, and Professor of Constitutional Law. The lecture was mainly focused on the analysis of the Brazilian system of constitutional justice and Brazilian constitutionalism augmented with a comparative perspective.

The Justice opened the session with an utterly peculiar comparison between the Italian and the Brazilian constitutional experiences: he reminded that just as the pillars of the newly established Italian Constitutional Court in 1947 were the Republic and the Democracy, likewise in Brazil Democracy and Republic were the two "vectors" that guided the development of constitutional jurisdiction. The Brazilian Republic was proclaimed in 1889 and the first Constitution (1891)[1] established the *Supremo Tribunal*, by taking inspiration from the North American Constitution[2]. The Republican Constitution of 1891 introduced a new concept of the Judiciary: the powers of the State were divided into three independent branches, with the aims of 1) equalizing the Judiciary to the other branches of the government, and 2) making Justices and judges independent and impartial[3].

But, as Justice Gilmar Mendes recalled, in 1892, due to the resignation of

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[1] G.F. Mendes, & P.G. Gonet Branco, *Curso de direito constitucional*, Saraiva (Série IDP), São Paulo 2017, p. 98.

[2] A. Baleeiro, *O Supremo Tribunal Federal, esse outro desconhecido*, Forense 1968, p. 19.

[3] Brazilian Constitution of 1891, Artt. 56-62.

President Deodoro da Fonseca on the 23rd of November, the first President of the Brazilian Republic, a crisis erupted. Indeed, a question arose: could the Vice-President serve out the remaining part of the term, or did the Constitution require a new election? In fact, the new Constitutional Text gave rise to doubts as to the legality of the vice-president taking office less than two years after the incumbent was elected with the promulgation of the Constitution on February 25, 1891. Indeed, a group of civilians and military launched a manifesto demanding a new election, but ultimately Vice-President Floriano Peixoto assumed the presidency and arrested and banished all the signatories of the manifesto – all by means of decrees –.

In this context, the jurist Rui Barbosa, whom Justice Mendes described as "one of Brazil's greatest jurists so far", played a crucial role in the process of the formation of the *Supremo Tribunal Federal* in the 1892 Court's session[4]. More specifically, he advocated for the necessity of investing the Tribunal with the power of judicial review, since the Constitution of 1891, as well as the U.S. Constitution of 1787, was silent on the issue. Nevertheless, according to Barbosa this silence did not prevent the exercise of judicial review, since the judicial review is "a natural and obvious result of every written Constitution"[5]. But his claims were not taken into account until 1898 when it was officially embraced the Barbosa doctrine by the *Supremo Tribunal Federal* itself[6].

Much as the Tribunal at the end of the XIX century was endowed with the power of judicial review, the use of such power was enhanced with the Federal Constitution of 1988. The advent of the Constitution of 1988 marked the beginning of a period of re-democratization of the country.[7] After the experience of the authoritarian regime between 1964 and 1985, the Constitution of 1988 was enacted with the primary aim of reconstructing the democratic order. As highlighted by the Justice, the Constitution of 1988 was born with the "arduous mission of gathering the

[4] O. Dias Corria, *O Supremo Tribunal Federal, Corte Constitucional do Brasil*, Forense, Rio de Janeiro1987, pp. 19-20.

[5] R. Barbosa, *Os atos inconstitucionais do Congresso e do Executivo perante a Justiça Federal*, in «*Trabalhos Jurídicos*», Vol. XI, Rio de Janeiro, 1962, pp. 54-55.

[6] With the Habeas Corpus HC 1.063, of 1898, the Federal Supreme Court embraced the doctrine of Rui Barbosa. The Brazilian doctrine of habeas corpus forged a faster procedural means than extraordinary appeals, so that constitutional issues sensitive to the rule of law could be promptly brought before the Supreme Court. (J.E. Teixeira, *The doctrine of political issues in the Supreme Federal Court*, Sergio Fabris Editor, Porto Alegre 2005, pp. 93-99)

[7] Mendes & Gonet Branco, *Curso de direito constitucional*, cit., p. 1125.

aspirations of a society that was moving away from more than two decades of repression. This explains its focus on a social agenda that far transcends merely formal aspects".

The Constitutional Text of 1988 at Article 102 assigned to the *Supremo Tribunal Federal* the role of "*guardião da Constituição*", the guardian of the Constitution. This expression underlines the central position given to the Court: not only does the *Supremo* have the last words in constitutional interpretation and application, but it also ensures other institutions observe the Constitution. As above mentioned, with the new Constitutional Text, the Tribunal was officially endowed with the power of judicial review over all legislative acts either on appeal (*controle concreto)*, or in first instance (*controle abstracto*)[8]. More specifically, since 1981 the control of constitutionality within the Brazilian constitutional system is both decentralized and centralized. On one hand, the decentralized control of constitutional review is exercised by each inferior court judge[9]. This type of control could be activated during the course of litigation (review *incidenter*) before any lower court by a party, by the members of the *Ministerio Publico* or by the Court itself. The declaration of unconstitutionality via review *indicidenter* has an *inter partes* efficacy, which means that the decision will affect only the case at issue. On the other hand, centralized and abstract control is exercised by the *Supremo* whose decisions have an *erga omnes* efficacy. The Court has an original jurisdiction (Review *Principalitur*) when it is appealed through the *Ações Diretas de Inconstitucionalidade*, *Ações Declaratórias de Constitucionalidade*, *and Ação Direta de Inconstitucionalidade por omissão*[10]. It is interesting to note that before 1988, in Brazil, the Attorney General of the Republic was the only entity with the authority to file a direct appeal (*Ações Diretas de Inconstitucionalidade*) to the Court. But in 1988, in order to ensure the effectiveness of access to constitutional justice, the National Constituent Assembly created a whole new system of adequate judicial means aimed at protecting different legal interests[11] by widening both the number of constitutional actions that could be enacted to access the

[8] Brazilian Federal Constitution of 1988, Art. 103.

[9] The decisions rendered by the inferior courts may be directly appealed to the *Supremo* through a special remedy called *Recurso Extraordinario*.

[10] Mendes & Gonet Branco, *Curso de direito constitucional*, cit., p. 934 ss.

[11] *Ibid.,* p. 987.

Court and the number of subjects entitled to activate such actions[12].

The Federal Constitution of 1988, as highlighted by Justice Mendes, took on the perspective of the "Constitutional State" along the lines outlined by Peter Häberle. In general, a Constitutional State by definition is avulsed from a merely formal perspective of democracy, and it is instead committed to substantial democracy, founded on "non-negotiable values"[13] and specifically: (i) human dignity as an anthropological-cultural premise; (ii) popular sovereignty and division of powers, (iii) fundamental rights and tolerance; (iv) plurality of parties and independence of the courts, that is, as pluralist democracy, as an open society[14]. In other words, as Mendes recalled, the main function of a Constitutional State is to place the power of the State in the condition of defender of these fundamental rights[15]. And it was such attention to fundamental rights, the protection of which inspired the creation of specialized constitutional courts in many civilized countries, such as Italy and Germany, that made them overcome a period of authoritarianism after the Second World War. In this regard, the Justice pointed out that after all the atrocities committed during the war, the West found another way to balance the political need to create a territorial unit with effective command power with the need to restrain states' power.

Justice Gilmar Mendes concluded this comparative-historical analysis with a brief mention of the German Constitutional experience, due to its huge influence on the study of comparative law. In his book *Jurisdição constitucional* he argued that the abstract judicial review exercised by the *Bundesverfassungsgericht*, endowed with such power from its very first establishment, enjoyed a firm stability thanks to the political relevance of the issues brought in front of the Court.[16] In referring to such abstract control Justice Mendes talks about the "dual function of judicial review" of the

[12] Art. 103 Brazilian Federal Constitution of 1988: For instance, currently, if a political party has at least one member that has been elected to the Parliament it could directly appeal to the *Supremo Tribunal Federal* through the direct action of unconstitutionality.

[13] Justice Gilmar Mendes here quoted G. ZAGREBELSKY, *Il Diritto Mite*, Il Mulino, Bologna 1992.

[14] P. HÄBERLE, *El Estado Constitucional*, Trad. Hector Fix-Fierro, Universidad Autônoma de México, México D.F. 2001, p. 7.

[15] M. KRIELE, *Introducción a la teoría del Estado: fundamentos históricos de la legitimidad del Estado constitucional democrático.* Trad. Eugênio Bulygin, Depalma, Buenos Aires 1980, pp. 149-150.

[16] *See* generally, MENDES, *Jurisdição Constitucional*, Saraiva, São Paulo 2004.

Bundesverfassungsgericht: in fact, if on one hand, the Court acts as a defender of the Constitution, by eliminating unconstitutional laws from the legal system (*função de defesa*)[17], on the other hand, it affirms the "existence of unconstitutionality, beating doubts about the [*certezza del diritto*] (*segurança jurídica*)[18]. This point was specifically re-addressed by the Justice during the lecture where he noted, quoting Peter Badura, that the nature of the constitutional body of the *Bundesverfassungsgericht* derives from "its own political responsibility to maintain the rule of law and its regular capacity to function"[19].

The second part of the lecture was opened by Justice Gilmar Mendes with a quote from the former President of the *Bundesverfassungsgericht* : "Skepticism and discredit toward the law are widely echoed whenever political debate becomes radicalized, where the struggle for balance and compromise gives way to mere vilification of the political opponent, and the political and social factors of order in society are fundamentally challenged"[20]. Mendes used this quotation as a trigger for addressing a crucial issue that has been affecting Brazil in the last years: the enormous polarization of the entire country. At the end of 2018 the polarization between the *Partido dos Trabalhadores* and the supporter of former President Jair Bolsonaro, who was defeated on the 30th of November 2022 by Ignacio Lula da Silva, raised a peak. In the elections of 2018, Jair Bolsonaro, by embracing the values of the far right[21], presented himself as the alternative to the establishment after Lula's conviction for money laundering in 2017 to 18 months in prison as a result of the investigation "*Lava Jato*"[22]. Lula, who

[17] *Ibid.*

[18] *Ibid.*

[19] In the original version: "Aus der Verfassungsorganqualität des Gerichts desseneigene politische Verantwortlichkeir fiir die Erhaltung der rechtsstaatlichen Ordnung und ihrer Funktionsfähigkeit", P. BADURA*, Die Bedeutung von Präjudizien im öfffentlichen Recht*, in U. BLAUROCK & W. FIKENTSCHER, *Die Bedeutung von Präjudizien im deutschen und im französischen Recht*, 1985, p. 49.

[20] A. VOSSKUHLE, *Die Zukunft der Verfassungsgerichtsbarkeit in Deutschland und Europa,* Berlin 2021, p. 350.

[21] For further references *see generally* T.G. DALY, *Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro*, (March 11, 2019). This paper was prepared for the 14th International Human Rights Researchers' Workshop: 'Democratic Backsliding and Human Rights', organized by the Law and Ethics of Human Rights (LEHR) journal, 2-3 January 2019, available at SSRN: <https://ssrn.com/abstract=3350098>.

[22] Bloomberg, 'Lula Hunkers Down in Union Office After Arrest Deadline Passes' <https://www.bloomberg.com/news/articles/2018-04-05/brazil-s-former-president-lula-ordered-arrested-by-judge-moro?leadSource

represented and still represents the left wing, despite his conviction, tried to run again for Presidency in 2018, but his candidacy was rejected almost unanimously by the *Supremo Tribunal Eleitoral* [23]. Eventually, in 2021 the *Ministro Relator* of the *Supremo Tribunal Federal* Edson Fachin annulled all Lula's convictions, by declaring the incompetence of the judge who prosecuted and tried Lula da Silva[24].

In such a chaotic context, the paradigm of 2018's political campaign was subject to a radical change: political propaganda shifted from dominating TV and Radio to social media. As well explained by the Justice during the lecture with a tone of harsh criticism for such phenomenon, the development of technological processes related to the (ab)use of social media and big data analysis undermined the reliability of information and put in doubt the ability to govern ourselves as reasonable democracies. And it comes as no surprise that this huge polarization, augmented with the spreading of social media as a primary channel of communication, led to the spread of fake news on the Judiciary, and especially on the *Supremo.* But the inertia of the competent institutions that were supposed to persecute such dissemination of fake news induced the *Supremo Tribunal Federal* to act. In 2019, as reminded by the Justice during the session, Justice Dias Toffoli opened an inquiry[25] to investigate and repress this fraudulent news, threats, and slanderous accusations made by the supporters of Jair Bolsonaro against the honorability and safety of the *Supremo*, its members, and family members. Nevertheless, it was particularly difficult to differentiate criticism an inherent part of democracy, and threats that can fall under the label of "crimes". The situation got more complicated when Justice Alexandre de Moraes became the *Ministro Relator* of the

=uverify%20wall>.

[23] Supremo Tribunal Eleitoral, 'TSE Indefere Pedido de Registro de Candidatura de Lula à Presidência Da República' <https://www.tse.jus.br/comunicacao/noticias/2018/Setembro/tse-indefere-pedido-de-registro-de-candidatura-de-lula-a-presidencia-da-republica>.

[24] Reuters, 'Brazil's Supreme Court Confirms Decision to Annul Lula Convictions' <https://www.reuters.com/world/americas/brazils-supreme-court-confirms-decision-annul-lula-convictions-2021-04-15/>.

[25] Supremo Tribunal Federal, Portaria GP Nº 69, de 14 de março de 2019, available at: <https://www.conjur.com.br/dl/comunicado-supremo-tribunal-federal1.pdf>. *See also*: Consultorio Juridico, 'Toffoli Abre Inquérito Para Apurar Ameaças a Ministros e Ao Supremo' <https://www.conjur.com.br/2019-mar-14/toffoli-abre-inquerito-apurar-ameacas-ministros-tribunal>.

investigation[26]. Although this very last issue was not discussed in the panel, it is worthwhile to say a few words on the matter by reporting one of the most controversial events as a matter of example.

On the 11th of April 2019, the Journal Crusoè published a reportage[27] in which the Brazilian entrepreneur Marcelo Odebrecht, during the trial against him in the Federal Court of Curitiba related to the inquiry *Lava-Jato*, exhibited a document in which he clarified that a person mentioned in an email as the "friend of my father's friend", was Dias Toffoli, a Justice of the *Supremo Tribunal Federal,* who, at the time, was the *Advogado Geral da União*. In brief, by making this claim, the entrepreneur accused Justice Toffoli to be engaged in the huge corruption scheme of *Lava-Jato*. As a consequence, Justice Toffoli who argued that such claims were "... lies and attacks... disseminated by people who want[ed] to attack Brazilian institutions"[28], asked Alexandre de Moraes to verify the truthfulness of the information. Indeed, de Moraes subsequently order the removal of all reports and notes that mentioned Justice Toffoli and summoned those responsible to testify within 72 hours: he explained that such measures could not be classified as censorship and that there was "clear abuse in the content of the matter conveyed"[29]. It goes without saying that de Moraes' decision was highly controversial and strongly criticized by several organizations as the National Newspaper Association (ANJ) and the National Association of Journal Editors (ANER), which express their profound objection to press censorship[30]. Eventually, Justice de Moraes revoked the

[26] Gazeta do Povo, 'Alexandre de Moraes é o Novo Relator Do Inquérito Que Apura Interferência Na PF' <https://www.gazetadopovo.com.br/republica/breves/alexandre-de-moraes-novo-relator-inquerito-interferencia-policia-federal/>.

[27] Crusoè, 'O Amigo Do Amigo de Meu Pais' <https://crusoe.uol.com.br/edicoes/50/o-amigo-do-amigo-de-meu-pai/>. For a detail explanation *see also* O Globo, 'Entenda o Inquérito de Toffoli Sobre Ameaças e Fake News Contra o STF e a Crise No Judiciário' <https://oglobo.globo.com/politica/entenda-inquerito-de-toffoli-sobre-ameacas-fake-news-contra-stf-a-crise-no-judiciario-23604184>.

[28] O Globo, 'STF Censura Sites e Manda Retirar Do Ar Reportagem Que Cita Dias Toffoli' <https://oglobo.globo.com/brasil/stf-censura-sites-manda-retirar-do-ar-reportagem-que-cita-dias-toffoli-23600856>.

[29] *Ibid.*

[30] Folha de S. Paulo, 'Entidades de Imprensa Criticam Censura Do STF a Reportagem Sobre Toffoli' <https://www1.folha.uol.com.br/poder/2019/04/entidades-de-imprensa-criticam-censura-do-stf-a-reportagem-sobre-toffoli.shtml>. Some scholars also criticized the *quomodo* in which the investigation was conducted. For instance a Professor of Constitutional law of the Fundação Getúlio Vargas,Michael Mohallem, pointed out that "[it was] a

decision that censored Crusoè's reportage, excluding its unreliableness[31].

Now, returning to the spread of fake news, Justice Mendes could not fail to mention in the discussion also what happened with the outbreak of the Covid-19 pandemic, where, using his words, the *Supremo Tribunal Federal* once again found itself in the "crosshairs of extremists": social acceptance of the measures restricting individual liberties, and thus public policies, such as the obligation to wear masks in public or the banning of mass events, were attacked and discredited by extremist political groups. Within this political context, the *Supremo* developed the so-called "*jurisprudência da crise*": the constitutional control of laws and administrative measures required the *Supremo* to employ a "constitutional hermeneutic" that was open to social understanding and in accordance with the economic and social reality at hand. In particular, the Court delivered judgments on issues concerning mandatory vaccination and vaccine imports. Interestingly, as Justice Mendes recalled, there was a case in which the *Supremo* decided on the deadline for the National Health Surveillance Agency to issue an opinion on vaccine imports directly by Member States, since the Federal Government was manifestly omissive on the matter[32]. Another case concerned the adoption of measures restricting freedom of movement during the pandemic.

In general, in accordance with Article 196 of the Federal Constitution (1988), health is a right of all and a duty of the State, guaranteed through social and economic policies that aim to reduce the risk of disease […]. Therefore, theoretically, the competence in issuing such measures should be of the Central Government. In the case at hand, the central Government (Union) was trying to prevent Member States and

risk to open an inquiry like this, where the investigator himself is the alleged victim. The judge of the case cannot be the victim himself"(O Globo, 'STF Censura Sites e Manda Retirar Do Ar Reportagem Que Cita Dias Toffoli' <https://oglobo.globo.com/brasil/stf-censura-sites-manda-retirar-do-ar-reportagem-que-cita-dias-toffoli-23600856>). Further, Adriana Rocha Coutinho, Professor of Constitutional Law at the Catholic University of Pernambuco, interestingly underlined that "[…]in this investigation, [there was] an excessive concentration of powers in the Supreme Court and the usurpation of a function that was not granted to it and that [belonged] to the Public Prosecutor's Office (BBC News Brasil, 'Vítima, Investigador e Juiz Em Um Só: Inquérito de Toffoli Deixa Fraturas Na Relação Do STF Com Os Outros Poderes' <https://www.bbc.com/portuguese/brasil-47992337>).

[31] 'Inquérito 4.781 Distrito Federal', Ministro Relator Alexander de Moraes, *Brasília, 18 de abril de 2019* <http://estaticog1.globo.com/2019/04/18/INQ478118abril.pdf?_ga=2.85749917.507926723.1668012123-1199409009.1667315638>.

[32] ACOs 3497, 3500 e 3505, Rel. Min. Ricardo Lewandowski, Plenário Virtual, julg. em 24.5.2021.

Municipalities from adopting measures restricting the liberty of movement of people, since it claimed to have an exclusive competence under the Constitution. The issue was ultimately brought in front of the *Supremo* which ruled that the task of fighting the pandemic, and therefore the competence of enacting such measures was not exclusive of the Union (*União)*, but rather of all federal entities[33]. Justice Gilmar Mendes, in his final remarks, underlined that this case is particularly interesting also because it shows how the dynamics of fake news work in the Brazilian political process: after the decision of the *Supremo*, former President Jair Bolsonaro deceitfully claimed that the reason why he failed to fight the Covid-19 pandemic was that the *Supremo Tribunal Federal* "did not let him act in accordance with his plans"[34]. With no surprise, the *Supremo Tribunal Federal* denied those claims by firmly stating that: "the Plenary decided, at the start of the pandemic in 2020, that the Union, the states, the Federal District, and the Municipalities have concurrent competence in the area of public health to carry out actions to mitigate the impacts of the new coronavirus. This understanding has been reaffirmed by the Justices of the *Supremo Tribunal Federal* on several occasions"[35]. In this regard, Justice Mendes closed the session by pointing out the need to be alert to the harassment that governments launch against the Judiciary, especially Constitutional Courts. In his words, "the survival of civilization against barbarism requires resolutely fighting movements that defend a simplistic understanding of constitutional jurisdiction; the Republic and democracy, today, make us a call: they demand that we are always vigilant".

At this point, it is worth making a few more remarks[36] on this very last case that was mentioned by Justice Gilmar Mendes at the end of the lecture. Indeed, what the

[33] ADIs 6341 e 6343, Rel. Min. Marco Aurélio, Red. para acórdão Min. Edson Fachin, Plenário, julg. em 15.4.2020.

[34] In his words, "If the Supreme Court hadn't prohibited me, I would have a different plan than what was done, and Brazil would be in a completely different situation" (Consultorio giuridico, "Bolsonaro tenta imputar ao STF omissão do governo federal para agir na epidemia", <https://www.conjur.com.br/2021-jan-15/bolsonaro-tenta-imputar-stf-omissao-governo-epidemia>).

[35] Supremo Tribunal Federal, Esclarecimento sobre decisões do STF a respeito do papel da União, dos estados e dos municípios na pandemia, <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=458810&ori=1>.

[36] It has to be noted that the issue that is about to be addressed in the following lines was not expressly analyzed by the Justice during the session.

Court did on that occasion was essentially creating a new legal norm: in fact, if under the Brazilian Federal Constitution the competence over health issues is a matter of the Central Government, the *Supremo*, in order to contrast the pandemic, extended this power to all federal entities. This type of ruling can fall under the label of what scholars have defined as "judicial activism". In general, Elival Silva Ramos has defined judicial activism as a dysfunction of the legislative process, that is the result of the exercise of Judicial Powers beyond the limits that have been imposed by the Constitution, interfering in the legislative function[37]. Hence, judicial activism would be realized mainly when the Constitution is directly applied in non-expressly provided circumstances[38]. In order to avoid such crossing of demarcation lines of the judicial function, to the detriment mainly of the legislative function, the 1937 Brazilian Constitution expressly provided the incompetence of the Judiciary to analyze political issues. But with the advent of the Federal Constitution of 1988, the new transformation of the relations between democracy and constitutionalism lead to the attribution to the Tribunal of new powers. In fact, with the Constitution of 1988, the Brazilian democracy went from being more constitutional than democratic, and the *Supremo* moved to occupy the position of "*órgão de cupula*"[39]. Subsequently, from 2000 society continued to grant the *Supremo* even more powers not originally provided by the Constitution[40], and therefore the Court started to influence the agenda of Congress, by deciding issues of competence of the Legislative Branch[41]. Thus, it is safe to say that in the last years the legitimacy crisis that the Legislative Branch has been facing has led to the expansion of judicial powers, particularly of the *Supremo* in the name of the Constitution[42].

Former Justice of the *Supremo Tribunal Federal* Celso de Mello – during the

[37] In his view, "por ativismo judicial deve-se entender o exercício da função jurisdicional para além dos limites impostos pelo próprio ordenamento que incumbe, institucionalmente, ao Poder Judiciário fazer atuar, resolvendo litígios de feições subjetivas (conflitos de interesse) e controvérsias jurídicas de natureza objetiva (conflitos normativos)", Elival Da Silva, Ramos, *Ativismo judicial: parâmetros dogmáticos*, Saraiva, São Paulo 2010, p. 129.

[38] L.R. Barroso, *Judicialização, ativismo judicial, e legitimidade democrática*", in «*Anuario Iberoamericano de Justicia Constitucional*», 2009, p. 22.

[39] O.V. Viera, *Império da lei ou da Corte*?, in «*Revista USP*», 1994, pp. 71-77.

[40] Brazilian Federal Constitution of 1988, Art. 102.

[41] S.T. Leal, *Ativismo Ou Altivez? - O Outro Lado Do Supremo Tribunal Federa*, Editora Forum, 2010, p. 159.

[42] Barroso, *Judicialização, ativismo judicial, e legitimidade democrática*, cit., p. 24.

speech held within the establishment of Gilmar Mendes to the presidency of the *Supremo Tribunal Federal* – claimed the need the judicial activism in order to make the Constitution prevail. In his belief, judicial activism is a "*necessidade institucional*", when inaction of public powers occurs, offending and disregarding the Constitution and the principles on which it is based[43]. Contrarily, the opponents of judicial activism often claim that it implies: 1) a weakening of the other branch of the government; 2) a lack of political and democratic participation; 3) an overexposure of the Judiciary[44].

Nevertheless, as it is known, the truth is in the middle: as long as judicial activist decisions are rendered by the *Supremo* as a reaction to the need for the protection of fundamental constitutional values, and thus in order to prevent a potential violation of such principles[45], it is the Constitutional Text of 1988 itself that legitimates the use of judicial activism, through the granting to the Court of wider powers[46], which also "allows the Tribunal to adapt and update the Constitution to the new historical circumstances and social demands, acting as a co-participant of the modernization process of the Brazilian State"[47].

[43] Speech given by Minister Celso de Mello on behalf of the Supreme Court, at the inauguration ceremony of Minister Gilmar Mendes, as President of the Supreme Court of Brazil, pp. 11-13, 29/04/2009.

[44] *Estado de Direito e Ativismo Judicial*, edited by Josè Levi Mello do Amaral Jr., Quartier Latin, Brazil 2010, p. 170.

[45] *Ibid.,* p. 168.

[46] "Não é por razoes ideológicas ou pressão popular. E' porque a Constituição exige. Nós estamos traduzindo, até tardiamente, o espírito da carta de 88, que deu a corte poderes mais amplos", Gilmar Mendes, *Jornal Folha de São Paulo*, 10/08/2009, primeiro caderno.

[47] Interview of Justice Celso de Mello to Marcio Chaer, director of the journal *Consultroio Juridico*, available at: <http://www.conjur.com.br/2006-mar-15>.

ARTICLES

NOTES

MEETINGS & READINGS

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