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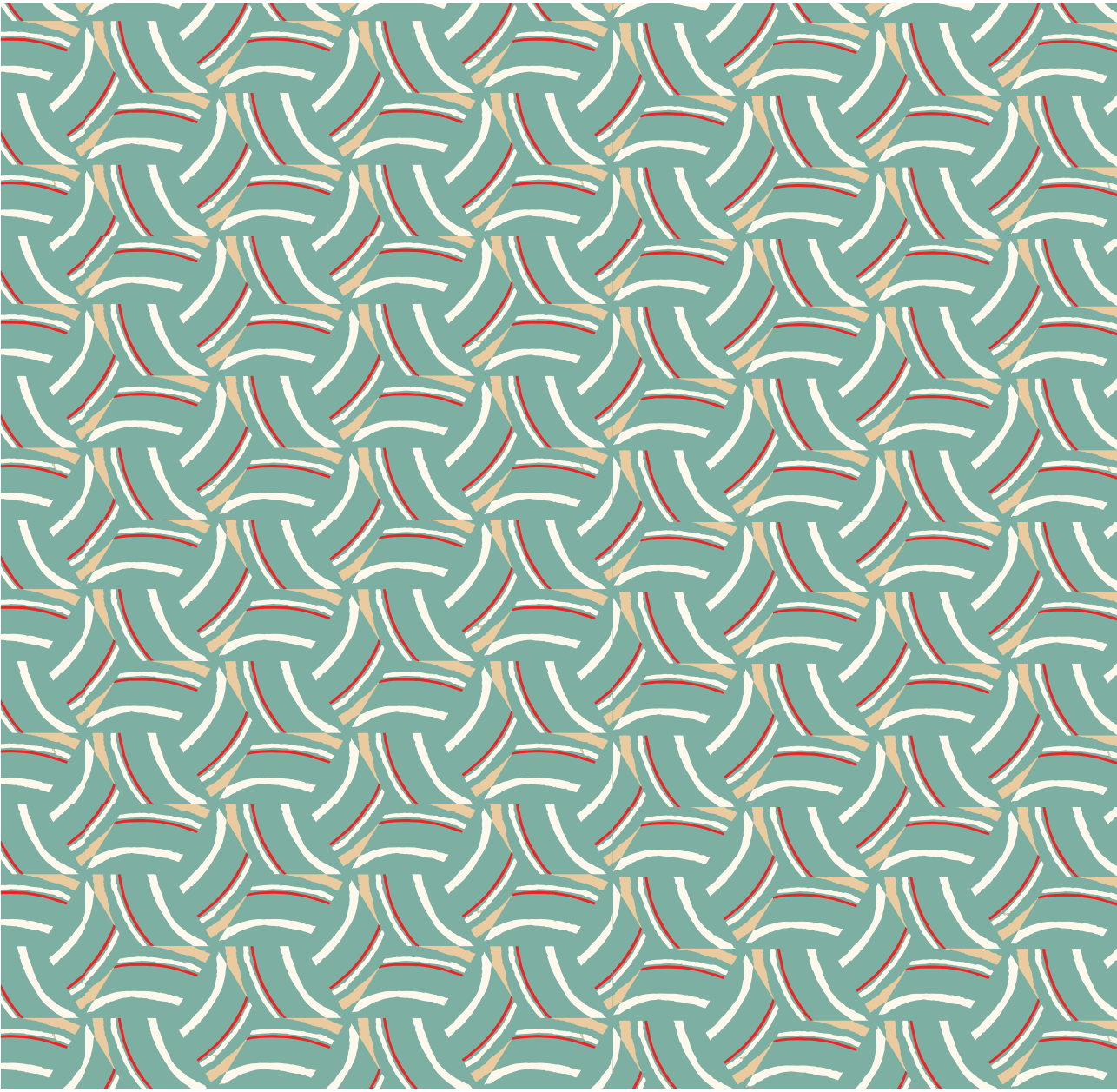
# ROMA TRE LAW REVIEW



RomaTrE-Press
2023

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## EUROPEAN LAWYER AND INNOVATIVE TEACHING

### ARTICLES



### NOTES



### MEETINGS & READINGS

**PETRONIO CALMON***

# PUBLIC CIVIL ACTION IN BRAZILIAN LAW

ABSTRACT. *The paper reviews the forms of collective action in the Brazilian legal system. The Brazilian system provides two types of collective actions: those aimed at protecting collective and widespread rights and those aimed at protecting homogeneous individual rights. The positive discipline is mainly contained in the law on the so-called public civil action (Law 7.347 of 24 July 1985), in the consumer defense code (Law 8.078 of 11 September 1990) and, subsidiarily, in the Brazilian civil procedure code. These three regulatory bills, applying the constitutional precepts, which aim at guaranteeing the efficiency of procedural techniques and the respect of the fair trial, provide a set of differentiated protections, which allow for the defense of any inter-individual or individual collective right.*



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## *1. Brazil and its political and legal foundations*

### *1.1. Comparative law: basic notion*

René David teaches that comparative law has three essential functions: (i) to enlighten jurists as to the function and meaning of law, using the experience of all nations for this purpose; (ii) to facilitate the organization of international society by showing the possibilities of agreement and suggesting formulas for the regulation of international relations; and (iii) to enable jurists of different nations, with regard to their domestic rights, to consider their improvement, freeing them from routine.[1] The foundation of the French professor's thought is found in the sentence, 'There are differences between rights, and the study of a given law implies an awareness of the structural differences that may exist between that law and our own'.[2] The French professor's concern reminds us of a very significant example: the constitutionality review of laws.[3]

Brazilian civil procedural legislation in the last three decades of the 20th century was greatly inspired by Italian doctrine. But some of the Italian lessons accepted by Brazil to date have not become a legislative reality in Italy, or have emerged timidly.

[1] René David, *Os grandes sistemas do direito contemporâneo* (3rd edn, Martins Fontes 1996) 14.

[2] Since this work is initially intended for foreign readers, we begin with a brief summary of Brazil's history and brief explanations of its legal structure, which are essential for understanding any legal issue in another country.

[3] In Italy this control is concentrated and the decisions of the Constitutional Court have *erga omnes* effects, as the law deemed unconstitutional simply ceases to exist. In Brazil, constitutionality review is diffuse, so any judge must cease applying a law if he or she deems it unconstitutional. There is also a system of centralized control, exercised by the *Supremo Tribunal Federal*, but numerically the system of diffuse control prevails. In this system, one or more judges may consider a law unconstitutional and not apply it in the cases they judge, while other judges may have a different interpretation and apply the same law in their cases. Different interpretations of the same law thrive until (but not always) the *Supremo Tribunal Federal* has the final say. This system does not only exist in Brazil. In the United States, for example, the system is similar. The example is needed by foreign jurists, who cannot simply learn about a certain law in force in Brazil. Rather, they need to see whether judges in general are applying it or consider it unconstitutional. This is not an easy research. The foreign author, therefore, can only produce statements about Brazilian law if he or she is thoroughly familiar with the prevailing jurisprudence, which is a very difficult task. The golden rule of comparative law is to know well the country with which you are making the comparison, trying to thoroughly understand its history, culture and how each legal institution is understood and communicated. Translating is not enough.

The most striking example of this phenomenon concerns the very subject of this paper, since the Brazilian law on public civil action dates back to 1985 and was very much inspired by Italian doctrine of the previous decade. In Italy, on the other hand, legislation on the subject is only recently emerging.[4]

Following the golden rule of comparative law, the introduction of this article will consist of a brief presentation of Brazil, its history and legal system. At this point, the organization of Justice, the control of constitutionality of laws, the intervention of the ordinary (single) judiciary in public administration, and the role of the public prosecutor will be highlighted.

### *1.2. Brazil: its history and its law*

The history of Brazil predates 22 April 1500, the day when the Portuguese Pedro Álvares Cabral landed on the coast of the present state of Bahia. The period of colonization lasted 322 years, and throughout this time 'Kingdom Ordinances' were in effect in Brazil. The aforementioned ordinances were a symbiosis of Roman law and canon law, as Portugal was always loyal and submissive to the Church, never departing from it. The domination of the Portuguese empire over vast tracts of land in South America, Africa and Asia strengthened its codification and jurisdiction. Dominion means imposing laws and the judicial system. Since Rome and since time immemorial it has been so.

Independent Brazil did not deviate from this system, for when the Prince of Portugal, Pedro I, proclaimed independence, Brazil was no longer a colony but part of the United Kingdom of Portugal, Brazil and the Algarve. On 15 November 1889, a military coup deposed the emperor and imposed republican rule. With the republic came great transformations. Brazilian republicans were inspired by the United States of America to form a Brazil renewed in its central institutions, but retained the *civil law* system inherited from continental Europe. Thus was born the Brazilian Republic with judges judging according to written laws, but with a Supreme Court composed of judges for life, with single justice and widespread control of constitutionality, as well as the possibility for judges to intervene in administrative acts (judicial review).

[4] Especially Law 31 of 12 April 2019.

Brazil's political history, like that of almost all Latin American countries, is marked by the various interruptions of democracy. Brazil's current Constitution is the seventh in its history. After the peaceful end of the military regime, the President of the Republic convened a constituent assembly, which drafted and approved the text after numerous debates. Thus, on 5 October 1988, the new Brazilian Constitution was promulgated, a modern text, full of references to fundamental and social, individual, collective (widespread) rights. This Constitution is still in force today, despite having already had more than a hundred amendments.

As we mentioned above, Brazil is a country of written law (civil law), embedded in the Romano-Germanic law family (René David). Being a country composed of federated states, one might imagine that the laws of each of these states would prevail over federal laws (as in the United States of America, Germany, Switzerland and Argentina); but in Brazil the federation is very limited in the legislative field. The laws of the federated states deal mainly with taxes and the administration itself, having little influence on the lives of citizens and businesses. The limited legislative competence of the federated states is, as a rule, subject to general rules of a national character, approved by the central parliament. Thus, the civil, criminal, civil trial, criminal trial, commercial and other codes of equal importance are laws passed by the Union Parliament, of uniform application throughout Brazil.

Federated states are strong only in their relations with the civil service and the police, where there is no submission to the central power.

The Brazilian Constitution establishes three independent and autonomous powers in a system of checks and balances: Executive Power, Legislative Power, and Judicial Power. The Public Prosecutor's Office does not fall under any of these powers and enjoys complete autonomy, as we will explain below.

Although Brazil followed the tradition of continental Europe in relation to the system of written laws and strong codification, when the monarchy was abolished, the political winds from the United States blew strongly on the Brazilian republicans, to the point that the new Constitution organized the Brazilian state with the same characteristics as the North American country: republic, federation, unified judiciary, judicial review and widespread control of the constitutionality of laws. Republicans decided to call the country the United States of Brazil. This name prevailed until 1967,

when the country began to be called the Federative Republic of Brazil. As noted above, the organization of the Brazilian republic did not follow the European model of constitutional courts, but a supreme court was created along the lines of the North American one, the Federal Supreme Court, an organ of the judiciary.

Each federated state administers its own Justice, in total autonomy. In Brazil, there are twenty-six states and the capital Brasilia, known as the Federal District. Therefore, there are twenty-seven separate appellate courts and autonomies. Likewise and with full independence, each state has its own prosecutor.

While legislation is mostly centralized in the Union Parliament, the judiciary is completely separate, with the predominance of judges from the federated states. A striking feature of Brazilian justice is its administrative and financial autonomy. Each judge independently administers his or her own auxiliary services. The parliament of each state approves the court's proposed budget, and the executive is obliged to pay the corresponding amount monthly. With this money, the judiciary itself takes care of the construction and maintenance of buildings, support services, and the payment of judges and judicial assistants. In short, judges not only judge but also administer justice. There is no interference from the executive branch.

### *1.3. Single justice, single judge of first instance*

There is no special system of administrative justice in Brazil. The same court that adjudicates conflicts between private parties also adjudicates conflicts between them and the public administration. There is also no distinction between subjective right and legitimate interest in the sense in which Italian law distinguishes them; therefore, there is nothing like the Council of State. There are appellate courts and a superior court, similar in theory to the Italian Court of Cassation.

Despite European influence, particularly Iberian influence, throughout Brazil's history all civil and criminal cases have been and are tried by a single judge. Each judge is a judicial body. The exceptions are the *Tribunal do Júri*, for malicious crimes against life (similar to the jurisdiction of the Italian *Corte d'Assise*); and military tribunals.[5]

[5] These exceptions, likewise, are the only exceptions to the rule of the *toga* judge. In both jury and military courts,

The judges of first instance are all tenured, accessing their careers through a competition open to all law graduates for at least three years and who are lawyers or hold positions for which a law degree is required. The rule, then, is that there are no first instance courts, only monocratic judges. Hence the tradition of allowing appeals against all decisions of first instance judges, not just judgments. All appeals against the (always monocratic) court of first instance are decided by the appellate courts.

First instance judges are promoted to appellate courts by seniority and merit. To advance in his or her career and have higher incomes, the judge must actually be a judge of second instance, acting in the appellate courts. There is an appellate court in each of the federal states and in the Federal District (*Tribunal de Justiça*). For federal justice, there are six appellate courts (*Tribunal Regional Federal*).

### *1.4. Control of constitutionality of laws*

The first competence of the *Supremo Tribunal Federal* (STF) is to exercise abstract and concentrated control over the constitutionality of laws. In this system (like the Austrian system) certain legitimized parties (Attorney General of the Republic, President of the Republic, political parties, Bar Association, among others) can bring a direct action aimed at declaring the constitutionality or unconstitutionality of a given federal or federated state law. The STF will decide in principle whether the specified law is unconstitutional or will give an interpretation of it in accordance with the constitutional text, being able to modulate the effects of its decision over time between the enactment of the law and the decision on the constitutionality of the regulation.

The second important attribute of the Brazilian Supreme Court is to decide appeals against the judgments of appellate and superior courts to rule on the constitutionality of the decision in the particular case, which obviously includes the examination and final decision about the specific case. In this case, the STF does not merely decide on the constitutional issue, but judges the case in its entirety.

This second attribution stems from the widespread review of constitutionality,

judgments are delivered by laymen with very brief investiture. Members of these collegial bodies receive no remuneration, but both are presided over by a judge who is a member of the career judiciary.

since in Brazil any judge may not apply a law because he or she considers it unconstitutional. In such a case, the dissatisfied party can appeal and then file an extraordinary appeal to the Federal Court. Scholars from other countries must be careful not to make a statement based solely on the law in force in Brazil, as it may not be applied by the courts. It often takes years for the case to be heard by the Supreme Court, which creates legal uncertainty for society and uncertainty for the foreign researcher.

More precisely, in Brazil, any judge can and must disapply a law if he or she finds it unconstitutional. But when it does, the process may come before the STF, which will have the final say on the constitutionality of the rule. The trial often does not reach the STF, as a result of the application of a filter: in such cases, the examination of the constitutionality of the law may diverge among the various appellate courts in the country, and so it remains forever.

### *1.5. Judicial review*

Another Brazilian characteristic is the magistrate's wide scope for interference in public administration acts and policies. Until the 1980s, the judiciary did not intervene in the criteria of appropriateness and discretion of the administrative act; and it also intervened very little in the control of legality, leaving the administrator himself to interpret the law in his own way. Until then, the judiciary dealt with obvious and dubious abuses and illegalities. Not surprisingly, this tradition coincided with a politics centralized in the Executive Power through the use of force (dictatorships), as we have already mentioned. With the current Federal Constitution (1988), Brazil has a new direction and the axis of power, which at first seemed destined for the parliament, has definitively shifted to the judiciary.

### *1.6 Interim protection*

The exposition on the particularities of the Brazilian legal system cannot end without alerting the reader to the very widespread application of provisional protection.

The provisional judicial decision issued at the beginning of the trial has ceased to be an exception and has become a norm in Brazilian civil procedural law. The new Code of Civil Procedure (2015), before dealing with the common procedure, provides for interim protection in two modes: emergency and evidentiary.

Emergency protection can be of a precautionary nature or simply an anticipation of final protection, without demonstrating the minimum of *periculum in mora*. Both can be requested: (i) in advance (ie before the main trial begins), (ii) when the main application is filed, or (iii) during the course of the trial. The protection becomes permanent if no appeal is filed against such a decision.

Also in the mode of provisional protection, the Brazilian Code of Civil Procedure provides for evidentiary protection, which may be granted regardless of a showing of danger of harm or risk to the useful outcome of the trial: (i) when characterized by abuse of the right of defense or manifestly dilatory purpose, or (ii) when the facts are supported only by documents.

The topic of interim protection in all its forms is extremely relevant to the study of public civil action, as the effectiveness of interim protection in Brazil in public civil action is equivalent to a nuclear bomb. For example, there have been several unprecedented judicial decisions in Brazil to determine trade closures at the time of the COVID-19 pandemic, when the governor of a federated state either refused to issue a trade closure order or understood that technical conditions already existed for normal resumption of business. Another common example is the immediate withdrawal from circulation of advertising deemed misleading by the court, for violation of consumers' right to honest and clear information.

### *1.7. Public prosecutor: separate and independent career*

The careers of magistrates and prosecutors have always been and are completely separate in Brazil. But only after the 1988 Constitution did they become equivalent in terms of rights, duties and remuneration. Only judges are called magistrates in Brazil, and it is incorrect to use this adjective to refer to members of the public prosecutor's office. The two (completely separate) careers enjoy complete autonomy, both vis-à-vis the government and vis-à-vis their own leadership.

Article 127 of the Federal Constitution establishes the prosecutor's office with the clear function of defending four fundamental values: the legal system, the democratic regime, social interests, and unavailable individual interests. One can clearly see the breadth of the prosecutor's action, with wide margins of interference in the social, economic and political life of the country.

This information needs to be supplemented, to say that the Brazilian Public Prosecutor, as in other countries, intervenes in various types of civil proceedings, in addition to having the legitimacy to bring direct actions of unconstitutionality (in the centralized control system) and for many other functions, all contained in the Federal Constitution.

## *2. Brazil's public civil action law*

### *2.1. Defense of diffuse interests: history*

Brazil's public civil action law is pioneering; it came into force almost four decades ago, on 24 July 1985 (Law 7.347). It is inspired by British and American experiences, but especially by Italian doctrine.[6]

Brazilian doctrine and law have observed these phenomena well and have created mechanisms for the defense of all kinds of nonindividual rights, not limited to consumer defense. The defense of diffuse rights is the center of Brazilian law and experience.

Since 1970 there has been talk in Italy of the need to establish legal instruments for the defense of diffuse interests. There has been no exclusive emphasis on consumer rights (homogeneous individual rights). At the 1974 Pavia conference of Italian proceduralists, Andrea Proto Pisani emphasized the need that the expression *collective rights* should go far beyond the hypotheses of necessary *lis pendens* and expressed his concern for the protection of the new rights provided by the Republican Constitution.[7]

[6] The conferences in Pavia in 1974 ('Actions for the Protection of Collective Interests') and Salerno in 1975 ('The Legal Protection of Diffuse Interests, with Special Emphasis on Environmental and Consumer Protection') were widely disseminated in Brazil, particularly by Professor José Carlos Barbosa Moreira (see José Carlos Barbosa Moreira, 'A ação popular do direito brasileiro como instrumento de tutela jurisdicional dos chamados "interesses difusos"' (1982) 28(7) Revista de Processo 7).

[7] 'It is opportune to be very clear about the function performed by judicial protection in the so-called typical hypotheses of super-individual interests in order to avoid as of now deluding oneself that through recourse to the judge *alone* the need for the protection of multiple interests which, although provided for by the constitution, and although they have the formal characteristics indicated before, have so far remained completely unimplemented, or implemented in a way that is not at all fulfilling'. Andrea Proto Pisani, 'Appunti preliminari per uno studio sulla tutela giurisdizionale degli interessi collettivi (o più esattamente: superindividuali) innanzi al giudice civile ordinario' in Ennio Amodio and others (eds), *Le azioni a tutela di interesse collettivi. Atti del Convegno di studio Pavia, 11-12*

Also at this event, Mauro Cappelletti was very precise in defining diffuse rights and giving a rich exemplification of them.[8]

The great legal breakthrough in favor of diffuse rights occurred in the United States of America in the 1960s, when the first public law litigation, as defined by Abram Chayes, emerged and became universal.[9] Before that, however, as we know, England had already experienced a system of actions of this nature.[10]

What emerges from historical research is that the issues discussed in pioneering collective claims always aimed to protect widespread rights, such as repairing levees for the benefit of the entire community (England, 13th century). The United States is familiar with the group's demands to fight segregation in schools, to respect the rights of prisoners, to fight insurance fraud and unfair competition, to demand adequate housing policy, to defend the rights of women, blacks and other social minorities.

These pioneering trials always dealt with diffuse rights and had as one of their main features the *erga omnes* effects of judicial decisions.

### *2.2. Diffuse rights: concepts*

Diffuse rights are those whose holders are all or a large part of humanity. They go beyond individuality and often beyond a specific collectivity and national boundaries. They are, in essence, non-individual rights, natural rights expressed or not in a legislative diploma. Its recognition is recent, being the result of the maturation of post-industrial society, democracy and the exaltation of the democratic rule of law (although there are historical records of a few much earlier episodes). They are universal, natural, and independent of law. To merit these adjectives, such rights must be of a very high dimension, deeply rooted in human nature and dignity. Human dignity means, above

*giugno 1974* (Cedam 1976).

[8] 'Interests typical of this new world, such as those to health and the natural environment, have a "diffuse", "collective" character since they do not belong to individuals as such but to the collectivity'. Mauro Cappelletti, 'Appunti sulla tutela giurisdizionale di interessi collettivi o diffusi' in Amodio (n 7).

[9] Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harv L Rev 1281.

[10] Among others, we highlight the following Brazilian authors, who present an excellent summary of the history of collective action: Márcio Flávio Mafra Leal, *Ações coletivas: história, teoria e prática* (Sergio Antonio Fabris 1998) 139 ff; Aluisio Gonçalves de Castro Mendes, *Ações coletivas no direito comparado e nacional* (Revista dos Tribunais 2002) 41 ff.

all, equality. The main widespread right is respect for human dignity, which is respect for human equality.

From a historical perspective, diffuse rights were recognized after individual and social rights, whose achievements came from the Renaissance and the English, French, and North American revolutions, among other major sociopolitical movements from the 16th century onward.

The positivization of widespread rights is predominant in the constitutions born with the reconstruction of Europe after the end of World War II and the fall of dictatorships. In the United States, the 1960s and 1970s are known for the civil rights movements, which resulted in important Supreme Court decisions. In Brazil, this consolidation occurred only when the last military dictatorship ended (1964-1985). Not coincidentally, in 1985, the Public Civil Action Law came into effect, but the pinnacle of the positivization of diffuse interests came with the advent of the 1988 Federal Constitution. We talk about the dignity of the human person, the right to nature, social rights, political rights etc.

In conclusion, diffuse rights are those that affect society at large, without the need to individually or collectively name the holder. Of course, people may have the same rights on an individual basis, but often the individual search proves fragile and/or fruitless, clashing with the preconceptions of traditional procedural law. Certainly much more effective is the collective and communal defense of diffuse rights.

As can be seen, after two decades of the 21st century, it is no longer so difficult to define diffuse rights and the task of identifying and grouping them all is not so difficult, although no list is conclusive. There was a time, however, when the concept of diffuse interest was said to be an utterly mysterious character.[11]

To say that diffuse rights are transindividual is a pleonasm, as the terms diffuse and transindividual are used, in this case, in the same sense. The rights with which we are concerned are called diffuse because they are transindividual, although we prefer to say that they are non-individual rights. They are rights of all, although in specific cases they may apply only to a group of people or persons of a certain nature or who share

[11] Massimo Villone, 'La collocazione istituzionale dell'interesse diffuso' in Antonio Gambaro (ed), *La tutela degli interessi diffusi nel diritto comparato* (Giuffrè 1976) 73.

the same lack or need. Since they are rights of a few, of many or of all, they cease to be individual rights and become non-individual rights, that is, diffuse, provided, of course, that the holders cannot be identified. These rights are called in many ways, all similar and with the same purpose.

This feature is extremely important for procedural law, since one of the main rules of the traditional process is that only the holder of the right has standing. Since it is everyone's right, this rule is not broken, as most doctrine says, but some aspects of traditional standing need to be revised.

Brazilian law treats the terms diffuse and trans-individual as synonymous, defining diffuse rights as 'indivisible in nature, owned by indeterminate persons and bound by factual circumstances'.[12] The factual circumstances binding the holders of the diffuse right are those that cause harm to the diffuse rights listed above, such as the rights inherent in the dignity of the human person, the right to nature, social rights, etc. Any injury to one of these rights is in itself a factual circumstance that generates collective standing to sue.

Virtually all Brazilian authors, to define diffuse rights, repeat the definition that focuses their explanations on the pleonasm of transindividuality.[13] Our position, however, follows the teachings of Mauro Cappelletti, who wrote a few decades ago:

> Our time, as we have already seen, brings overbearingly into the picture new 'diffuse' interests, new rights and duties that, without being public in the traditional sense of the term, are nonetheless collective: no one is 'entitled' to them, at the very moment that all members of a given group, class or category are entitled to them.[14]

[12] Consumer Protection Code, Law 8.078 of 11 September 1990, Article 81, single paragraph, Chapter I: 'Diffuse interests or rights, so understood, for the purposes of this code, to be trans-individual, indivisible in nature, owned by indeterminate persons and connected by factual circumstances'.

[13] See Hugo Nigro Mazzilli, *A defesa dos interesses difusos em juízo: meio ambiente, consumidor e outros interesses difusos e coletivos* (11th edn, Revista dos Tribunais 1999) 40; Luiz Manoel Gomes Junior, *Curso de direito processual civil coletivo* (2nd edn, SRS 2008) 9; Antônio Carlos Malheiros, TJSP, Ag Inst 259.609-5/2, 21 May 2002; Ricardo de Barros Leonel, *Manual do processo coletivo* (Revista dos Tribunais 2002) 99; Pedro da Silva Dinamarco, *Ação civil pública* (Saraiva 2001) 52; José Marcelo Menezes Vigliar, *Tutela jurisdicional coletiva* (Atlas 1999) 69-71; Rodolfo de Camargo Mancuso, *Interesses difusos: conceito e legitimação para agir* (4th edn, Revista dos Tribunais 1997) 124-5; Fredie Didier Junior and Hermes Zaneti Junior, *Curso de direito processual civil*, vol 4 (8th edn, JusPodivm 2013) 78.

[14] Mauro Cappelletti. 'Tutela dos interesses difusos' (1985) 33 AJURIS – Revista dos juízes do Rio Grande do Sul 169.

### *2.3. Third generation fundamental rights*

Some say that diffuse rights are third-generation rights, with reference to history and the individualist tradition. I think this is an innocuous discussion in this third decade of the third millennium, but it is always good to remember history; and it is very interesting to approach the topic from the perspective of the generations of rights. However, if diffuse rights are part of the third generation, as has been said for over fifty years, today we are talking about generations of diffuse rights.

José Carlos Barbosa Moreira addressed the issue, in 1982, from the perspective of procedural schemes. The first would be the traditional individual scheme, the second would be the extraordinary legitimacy scheme, which has, for example, the situation of the shareholder, who can claim (in his own name) compensation for damages caused by the directors of the company and, if successful, the amount of the condemnation will be paid to the company and not to the (formal) plaintiff of the claim. The third scheme is that of diffuse rights, 'common to a group of persons, but not necessarily resting on a basic relationship, a well-defined legal bond uniting them'.[15]

From the perspective of substantive law, we point out some prominent Brazilian professors who recognize the gradual emergence of new rights. For Inocêncio Mártires Coelho, rights 'left a fundamental core originating in individual rights, to continue with endless generations of human rights'.[16] Paulo Bonavides supports authors who follow the motto of the French Revolution 'liberty, equality and fraternity' to define the three generations of rights.[17] Celso Lafer even thinks of fourth-generation rights.[18]

In Italy, Norberto Bobbio expressed himself with great propriety:

> Alongside the social rights, which used to be called second-generation rights, so-called third-generation rights have emerged today, which are admittedly still an excessively heterogeneous and vague category that makes it difficult to understand what they are

[15] Moreira (n 6).

[16] Inocêncio Martires Coelho, 'Direitos individuais e coletivos na Constituição de 1988' (1992) 45 Arquivos do Ministério da Justiça 187.

[17] Paulo Bonavides, *Curso de direito constitucional* (4th edn, Malheiros 1993) 480.

[18] Celso Lafer, *A reconstrução dos direitos humanos: um diálogo com o pensamento de Hannah Arendt* (Companhia das Letras 1988) 132.

actually about. The most important of these is the one claimed by environmental movements: the right to live in an unpolluted environment.[19]

### *2.4 Legislative recognition of diffuse rights*

When we examine the origins of the judicial defense of diffuse rights, we see that in *common law* countries legislative recognition of diffuse interests is limited, so much so that when there are written texts these are vague and imprecise, which requires jurisprudence to give it a precise definition through discussion of its contents. As a result of these discussions, written rules have become necessary.

However, in civil law countries, written legislation must be studied, especially constitutions, since in them Justice must objectively follow the order coming from parliament. Cappelletti stated in 1985, 'What is protected in this new type of civil procedure is the diffuse interest, as substantive law has turned it into law'.[20]

We can say, without a shadow of a doubt, that Brazil has played and still plays a leading role in the defense of rights widespread among *civil law* countries. This is because as early as 1934 the Federal Constitution provided for the possibility for a citizen to seek to meddle in acts of the Public Administration that he or she deemed detrimental to the rights of society as a whole. Thus Popular Action was born.

### *2.5. Diffuse rights in the Italian Constitution*

The Italian Constitution guarantees, among others, the rights of childhood and youth, the right to motherhood and the right to the recognition of paternity (Articles 30-31), the right to health and freedom of care (Article 32), the right to freedom of artistic creation and education (Article 33), the right to universal inclusive education (Article 34), the right to work and adequate training (Article 35), the right to fair remuneration and decent working conditions (Article 36), the right to gender equality in relation to work, with special attention to women (Article 37), the right to social assistance (Article 38), the right to trade union organization and strike action (Articles 39 and 40), the duty of social utility of economic initiative (Article 41), the social

[19] Norberto Bobbio, *A era dos direitos* (Campus 1992) 6.

[20] Cappelletti, 'Tutela dos interesses difusos' (n 14).

function of property (Article 42), and the possibility of expropriation, subject to compensation, for reasons of general interest (Article 42).

### *2.6. Diffuse rights in the Brazilian Constitution*

Brazil's 1988 Constitution, the result of the country's redemocratization, is very generous in granting individual, social and widespread rights. Article 5, with its seventy-eight provisions, deals with individual rights and guarantees, based on the principle of equality. Articles 6 through 8 deal with workers' rights. Article 14 deals with political rights. Articles 170 et seq deal with economic activity, establishing important diffuse rights, including those preventing the abuse of economic power. Articles 182 and 183 deal with urban policy, an important field of diffuse rights. Articles 184 to 191 deal with agrarian policy. Article 192 deals with the financial system, stating that it aims to promote the balanced development of the country and serve the interests of the community. Articles 194 et seq deal with social security. Articles 196 et seq deal with the right to health, in all its forms. Articles 203 and 204 deal with social assistance. Articles 205 et seq deal with education, culture and sports. Article 225 deals with the environment, regulating very important diffuse rights. Articles 226 et seq deal with the family, the child, the adolescent, the young, and the elderly, while Articles 231 and 232 deal with indigenous peoples.

### *2.7. Collective rights as subspecies of diffuse rights: definition in Brazilian law*

We have seen that diffuse rights are those that are essentially nonindividual, which the doctrine has decided to call supraindividual, superindividual, interindividual, transindividual or metaindividual, among other adjectives. We prefer to call them simply *non-individual*. Diffuse rights are not individual rights, they are everyone's rights; they have no borders, they even go beyond national barriers. Moreover, the recent history of collective rights advocacy is specifically about the advocacy of diffuse rights.

In Brazilian law, the expression 'collective rights' has two meanings: *lato sensu* and *stricto sensu*. In the broad sense, collective rights are *all* rights that can be asserted

through public civil action.[21] *Stricto sensu,* collective rights are those defined by Brazilian law as those trans-individual rights of an indivisible nature held by a group, category or class of persons linked to each other or to the other party by a basic legal relationship.

It is important to repeat that both (diffuse and collective) are diffuse rights, not individual and indivisible. There is only one right, they are not individual rights of many people, as opposed to homogeneous individual rights.

### *2.8. Homogeneous individual rights*

The definition of homogeneous individual rights is very simple, as they are simply individual rights, nothing more. They are the same rights that Justice has always dealt with in all parts of the world. 'The qualification of homogeneous does not change nor can it distort this nature'.[22] This adjective is used only to give an idea of some similarity between the individual rights of a number of people.

For our study, what matters, instead, is the collective treatment that legislation and jurisprudence give to homogeneous individual rights, forsaking the traditional interest/legitimacy relationship to allow a person to claim individual rights that are not materially his or her own, but belong to an indefinite number of individuals. For Ricardo de Barros Leonel: 'The collective procedural treatment reserved for these interests derives from the convenience of applying collective protection techniques to them. Its implementation configures a legislative policy option'.[23] For this author, homogeneous individual rights are characterized by the fact that 'their holders are determined or determinable; being essentially individual, the protected object is divisible; and they derive from a common fact, individually causing harm to all concerned'.

José Marcelo Menezes Vigliar teaches that: 'Homogeneous individual rights are divisible, divisible, susceptible of being assigned to each of the interested parties,

[21] For this reason, many books and articles published in Brazil talk about class actions, collective jurisdiction, collective process, etc.

[22] Teori Albino Zavascki, *Processo coletivo: tutela de direitos coletivos e tutela coletiva de direitos* (3rd edn, Revista dos Tribunais 2008) 39.

[23] de Barros Leonel (n 13) 108.

in the proportion that pertains to each of them, but which, having a common origin, are treated collectively'.[24]

### *2.9. Heterogeneous legal situations*

We take up here the expression of Teori Albino Zavascki, to mention that there are many factual situations that demonstrate the possibility of rights of various kinds, in which diffuse rights, collective rights, homogeneous individual rights and traditional individual rights coexist.

A real case can be used as an example. In 1967 Kathrine Switzer decided to participate in the Boston Marathon in the United States, a traditional competition whose first edition was held in 1897, a year after the first Olympic Games. For 70 consecutive years, participation was forbidden to women. Kathrine registered using only her last name and the initial of her first name, as well as wearing closed clothing as the cold weather hit the city. No one noticed that there was a woman running. At one point the truck from the test directorate passed by, with many reporters and photographers. When the director of the competition, Jock Semple, noticed that there was an 'intruding' woman in the race, he got out of the car and tried to take her by force, failing only because she was supported by her boyfriend and her coach.

In this concrete case, we can see the possibility of claiming the widespread right to gender equality, especially in sports, the collective right of women in relation to sports, the individual homogeneous rights for the defense of the individual right of each woman who wanted to participate in the Boston Marathon, avoiding the filing of many individual claims. In addition to collective actions, there remains the right of each woman to individually postulate her rights.

[24] José Marcelo Menezes Vigliar, *Ação civil pública* (4th edn, Atlas 1999) 54.

## *3. The protection of diffuse, collective and individual homogeneous rights*

### *3.1. A political solution*

The traditional conception of conflict of interest should be recalled at this point. One would expect individuals, companies, and governments to act in a way that respects and provides for the fulfillment of all diffuse rights (or interests). Since this is not done to an adequate extent, one looks for ways to enforce these rights, as with individual rights. It can no longer be assumed that clauses providing for diffuse rights are not clothed in coercibility or are merely constitutional abstractions with no real value.

In the absence of spontaneous adherence on the part of individuals and businesses, it would be reasonable to expect governments to act to administratively enforce diffuse rights, acting through policy and state organs. However, governments are often silent and, worse, governments themselves often act directly or indirectly to infringe on some diffuse right. An example of this happens when an environmental law is passed, which facilitates the destruction of the environment or creates obstacles to effective control.

Then, the judicial route appears, which was silent for many years but has been active in recent decades to provide or attempt to provide for the correction of destructive pathways.

We observe that although there is a lot of talk about class actions for the defense of consumers and their homogeneous individual rights, history teaches us that the origin of collective legitimacy (England and the United States of America) is related to diffuse (or collective) rights and not to homogeneous individual rights. This fact has been recognized by Italian doctrine since the 1970s (in the Pavia and Salerno conferences).

Today, however, the defense of these three rights is provided for in many countries, with increasing enforcement. Many, but not all. However, this should not be limited to the study and protection of homogeneous individual rights.

As we noted above, when it comes to diffuse, collective and individual homogeneous rights, it is certain that public administration (*government*) comes into play, since the purpose of all public administrations is to provide for the realization of everyone's (diffuse) rights. After all, virtually all diffuse rights must be the subject of appropriate public policies, and such policies are (or should be) carried out or

coordinated by the public administration, not the Judiciary. The latter, at most, should exercise a clearly integrative activity. Recourse to the Judiciary should be *the* last resort.

The realization that the realization of widespread rights is the primary responsibility of public administration (government) is the main foundation of this work. This is because the 'judicialization' of public policies has spread in various parts of the world as if it were a panacea, losing awareness of the supplementary role of the courts. As we will see later, the tools for judicialization are numerous and very effective (especially in Brazil), which sometimes causes irresponsible excitement. Society needs to be well aware of each individual's role in achieving equality and social peace.

The above statement explains why it is the state, through its executive power, which implements public policies, which encourages, coordinates and controls private activities, but of course all private actors (natural and legal persons), who must direct their conduct to respect and promote widespread rights. The role of government, however, is central and preponderant.

Of course, these statements are adaptable depending on the political system adopted in each of the states, which may assume greater or lesser interference in the private economy, but it is always good to remember that the importance of diffuse rights has been recognized even in countries famous for liberalism and capitalism, and that the history of their control and promotion took its first steps precisely through the imposition of equality through the courts.

Therefore, before talking about the interference of the judiciary in public policy and the implementation of widespread rights, we must include the study of so-called regulatory agencies.

### *3.2. The subsidiarity of the judiciary.*

In 1982, the aforementioned Brazilian professor José Carlos Moreira warned us:

> The classical structure of civil procedure, as it exists in most legal systems today, corresponds to a model designed and implemented to respond fundamentally to situations of conflict between individual interests.
> To provide an adequate solution to the spread of rights, the weapons of the legal arsenal inherited from other times often seem ineffective. Indispensable is the work of adaptation, which adapts the tools forged in the old molds to current reality; or rather, in extreme cases, an effort of creative imagination, which invents new techniques for

> the effective protection of interests whose dimensions fall outside the well-defined framework of interindividual relations.[25]

Mauro Capelletti and Bryant Garth stated in their famous research *Access to Justice*:

> Undoubtedly, a real "revolution" is developing within the process.
> The traditional conception of civil procedure left no room for the protection of diffuse rights. The process was seen as a matter between two parties, aimed at resolving a dispute between the same parties over their individual interests. Rights belonging to a group, the general public or a segment of the public did not fit well into this scheme.

Over the 40 years since those words were spoken, Brazil and many other countries have amended their legislation to fill this gap in procedural law.

The objective of this study is to reflect on the reasons for the interference of the judiciary in a matter that is, in principle, the main domain of the executive, either directly or through its independent regulatory agencies. We have already stated that the role of the judiciary is complementary (*ultima ratio*), but what is still observed in many countries, especially in Brazil, is the widening of the interference of the judiciary with respect to the public administration.

Added to this factor is the equal growth of the Public Prosecutor's Office. On the one hand, the Brazilian innovation of constitutionally assigning to the Public Prosecutor's Office very broad tasks in the defense of fundamental values, such as the legal system, the democratic regime, social interests, and unavailable interests, is extremely important. But on the other hand, we must remember that the path taken by the Prosecutor's Office, which led to its enlargement, is a subject that deserves in-depth study, both by jurists and scholars in the social and political sciences.[26]

Maturity and reflection are the key words, in the hope that, with this approach, a compromise solution can be sought, which may have already arrived.

[25] Moreira (n 6) 7.

[26] This analysis, however, would be entirely extemporaneous in the current political moment in Brazil, where Parliament has become very strong in defending the self-interests of its members. Any discussion could lead to retrogression, which would be much worse.

## *4. The Brazilian system of collective actions*

### *4.1. The laws*

We will now analyze the main Brazilian laws dealing with diffuse, collective and individual homogeneous rights, that is, the Brazilian system of collective processes. After all, it was the Brazilian legislature that played a leading role, in a much deeper and richer way than in other civil law countries, in the revolution mentioned by Cappelletti and Garth.[27]

There are many laws dealing with public civil action in Brazil, three of which are the most important, as they are pioneers and form the basis of the system: LAP - Popular Action Law (Law No. 4717, of June 29, 1965); LACP - Public Civil Action Law (Law No. 7,347, of July 24, 1985); and CDC - Consumer Protection Code (Law No. 8078, of September 11, 1990). Although they appear to be specific laws, particularly the Consumer Protection Code, the three laws mentioned form a single system and all their provisions apply to any class action in Brazil. These three laws are sufficient to support Brazil's collective action system, as they regulate its main institutions, but several other laws have been enacted, each dealing with specific diffuse rights. However, the other laws do not create new proceedings or even modify the rules provided in the three basic laws.[28]

The LAP and LACP also refer to the Code of Civil Procedure. Although the reference is to the old Code of 1973, which had not even undergone major changes at

[27] Zavascki (n 22) 26.

[28] Additional laws in specific subjects include: Law on Urban Land Allotment (Law No. 6,766, of Dec. 19, 1979); Law to Support Persons with Disabilities (Law No. 7,853, of Oct. 24, 1989); Law for the Protection of Investors in the Securities Market (Law No. 7913, of Dec. 7, 1989); Statute for Children and Adolescents (Law No. 8069, of July 13, 1990); Administrative Misconduct Law (Law No. 8.429, of June 2, 1992); Law on the Protection of Urban Order (Law No. 10,257, of July 10, 2001); Law on the Protection of Fans (Law No. 10,671, of May 15, 2003); Statute for the Elderly (Law No. 10,741, of October 1, 2003); Law on Genetically Modified Organisms (Law No. 11,105, of March 24, 2005); Law for the Defense of Economic Order and Free Competition (Law No. 12,529, of November 30, 2011). As part of this system, we also have the two laws that structure and regulate the Brazilian Public Prosecutor's Office. The first deals specifically with the Public Prosecutor's Office of the Union and the second has general rules regarding the Public Prosecutor's Office of each state of the federation: Law on the Organization, Attributions and Statutes of the Public Prosecutor's Office of the Union (Law No. 75, May 20, 1993); National Organic Law of the Public Prosecutors of the Federated States (Law No. 8625, February 12, 1993).

the time, it is certain to Brazilian doctrine and jurisprudence that the LACP and CDC now refer to the new Code of Civil Procedure, of 2015, with all the procedural techniques created thereafter to give effect to court orders.

Therefore, to understand the Brazilian class action system, it is essential to know the LAP, LACP, CDC, CPC, and all laws of procedural law, which are mutually applicable.

### *4.2. The scope of application*

As we mentioned above, Brazilian public civil action is the procedural tool for the defense of diffuse, collective and individual homogeneous rights. From the beginning, Article One of the Public Civil Action Law had defined as its scope the liability for moral and material damage caused to the environment, the consumer, and to goods and rights of artistic, aesthetic, historical, tourist, and landscape value. However, five years later, the law was amended to include a provision that clarified that public civil action is an instrument that can be used to defend any diffuse, collective and individual homogeneous right.

The first concern of the law, as can be seen, is the protection of the environment and the consumer, followed by property and rights of artistic, aesthetic, historical, tourist, and scenic value. A later law added the defense of urban order, as a generic value, including those previously defined and any others that may be subject to violation or threat. Economic order, honor and dignity of racial, ethnic and religious groups, and heritage were added. To the end, it remains clarified that the law permits public civil action for the defense of all non-individual rights.

Consumer protection is usually seen as the ultimate example of the defense of homogeneous individual rights, but, of course, the consumer also has diffuse and collective rights. The Brazilian law, however, establishes some exceptions, because it cannot be used in matters of taxes and social security contributions. With these exceptions, the law made it clear that the obligation to pay taxes does not create a consumer relationship between the state and the citizen.

### *4.3. Legitimation to act*

The first to have standing to bring the public civil action in Brazil is the Public Prosecutor. No other country is known where the role of the Public Prosecutor is so broad. Article 5 of the Brazilian Public Civil Action Law defines that, in addition to the Public Prosecutor, the Public Defender and the public administration (the Union, federated states, municipalities, and all decentralized public entities) have standing. Only in the last point of this article are associations mentioned, demonstrating that the system is not based in private, but public legitimacy.

The Public Prosecutor, if not the proponent of the claim, will compulsorily intervene as a third party, and in the event of an unfounded waiver or abandonment of the action by a legitimate association, the Public Prosecutor will assume active title, unless the same is assumed by another legitimate party.

The publicist character of Brazilian legislation is very evident in that it defines the Public Prosecutor as the major player in the system, the main legitimized person. The law is addressed to the Public Prosecutor. Since 1985, the Brazilian Public Prosecutor has ceased to be a body active only in the criminal sphere, to be active in the civil sphere as well. This prominence has been confirmed by the 1988 Federal Democratic Constitution, which provides in Article 127 that it is the duty of the Public Prosecutor to defend four essential values: the legal system, the democratic regime, social interests, and individual interests that are unavailable. The same Constitution stipulates that the Public Prosecutor has the essential function, among other things, of promoting public civil investigation, having the power to issue notifications, request information and documents, and investigative acts.

Other public entities may bring public civil actions, including the Public Defender, the Union, federated states, municipalities, autarchies, and public corporations. The Public Defender is a public body provided for in the Brazilian Constitution, composed of public employees hired through public competition, and is considered a permanent institution, essential to the jurisdictional function of the state, incumbent upon it, as an expression and instrument of the democratic regime. Among its main objectives are legal guidance, the promotion of human rights and the defense, at all levels, that is, both judicial and extrajudicial, of individual and collective rights, integrally and free of charge to those in need. Art. 5, LXXIV of the Brazilian

Constitution enshrines full and free legal aid as one of the fundamental rights for those who demonstrate insufficient resources.

The law allows for lis pendens between legitimated parties. The Public Prosecutor will participate in all cases that are not brought by it, acting, then, as an intervener and will assume standing if the association that brought the case withdraws the case or abandons it without giving valid reasons.

### *4.4. Legitimation of associations*

Also eligible for public civil action is an association that has been established for at least one year in the terms of civil law and that includes, among its institutional purposes, the protection of the widespread, collective or individual homogeneous right that is the subject of the action. The pre-establishment requirement may be waived by the court when there is a clear social interest evidenced by the size or characteristic of the harm, or the relevance of the legal asset to be protected. Importantly, the law does not require the authorization of the members' meeting, a decision of its board being sufficient. Associations are registered only before a notary public, without any control of the public administration.

### *4.5. The public civil inquiry and its filing*

One of the defining elements of Brazilian public civil action and the prominence of the Public Prosecutor is the public civil investigation, which functions in similar terms to the already familiar and traditional criminal investigation. In Brazil, criminal investigation is an almost exclusive attribution of the civil police, but public civil investigation is the primary attribution of the Public Prosecutor.

The law gives the Public Prosecutor the main role in the whole scenario of public civil action, but the exclusive role of investigating the facts he or she learns about. We have already seen that other public entities (as well as associations) can bring the public civil action, but only the Public Prosecutor can initiate the public civil investigation. The other legitimates, of course, will do something similar to this investigation, as they will need to know more about the facts and gather enough evidence to bring the action, but they do not have the power given by the constitution and the law to the prosecutor. Nor is it possible to give the name of public civil investigation to acts aimed at acquiring

elements and evidence that already exist. This, the investigation, is the exclusive responsibility of the prosecutor.

### *4.6. Popular initiative, judges' duty and request for information*

The Law on Public Civil Action provides the possibility for anyone to provoke the public prosecutor's initiative by providing him or her with information on the facts constituting the subject of the civil action and indicating the elements of conviction. This, which is merely an option that the private party may or may not exercise, while it is an obligation for the public employee. The latter, as related to his position or function, is obliged to take such an initiative, and criminal legislation deals with sanctioning its omission.

The law contains a specific provision for judges; it stipulates that in every judicial proceeding, if the judge has knowledge of facts that may give rise to public civil action, he or she must send a copy of part or all of that process to the prosecutor. As we have already mentioned, the prosecutor is the primary author of public civil action, and his constitutional mission is to defend, among other values, social and individual rights that are inalienable.

### *4.7. Self-complaint before or during trial*

Self-composition can lead to three different outcomes: the plaintiff can waive the right on which the claim is based; the defendant can acknowledge the merits of the claim; or, as is more common, both enter into a settlement, that is, a contract in which the parties make mutual concessions. Brazil's Public Civil Action Law allows legitimate public entities to 'assume' from the parties concerned a 'commitment to adapt their conduct to the requirements of the law', showing, on first reading, that the law allows only the recognition of the merits of the claim. However, it is observed, not only in Brazil but also in other countries, that the legislature is not always careful with words, especially in matters of self-composition. For this reason, since the advent of the Brazilian Public Civil Action Law, doctrine and jurisprudence have presented a more elastic interpretation, allowing a certain discretion on the part of the legitimized public entities, to accept that the adjustment of behavior takes place in flexible terms, to facilitate and encourage its spontaneous adherence. In the end, practice has shown that when it comes

to diffuse rights, demanding too much can be utopian. It is usual for the public body to agree to some adjustment of conduct from what was initially claimed. More common, however, is to agree on the form and time in which obligations will be fulfilled.

### *4.8. Jurisdiction*

The law stipulates that public civil actions shall be brought in the court of the place of injury, and adds that the filing of the claim excludes the court's jurisdiction over all subsequently brought actions having the same subject matter.

The problem is not as simple as it seems. We must remember that in Brazil there is a Federal Justice, one justice in each federated state and one in the Federal District (Brasília, the country's capital). This implies the need for an initial analysis with the objective of knowing whether these are federal matters. The Federal Constitution establishes that Federal Justice has jurisdiction over 'cases in which the Union, autarchic entity or federal public corporation is interested as author, defendant or assistant'. Since it is not in the interest of the Union, the justice of the federal state will have jurisdiction.

### *4.9. Precautionary Measures*

Brazil's Public Civil Action Law was passed and came into effect on July 24, 1985, four months after the end of the military regime, when a constitution imposed by that regime was still in effect. As we mentioned at the beginning of this paper, Brazil drew inspiration from the Italian doctrine of the 1970s to create a law that would give concrete possibilities for the judicial protection of widespread individual homogeneous rights. It was not difficult for Brazilian professors to influence the National Congress to debate and approve the Public Civil Action Law partly because the last military government had initiated dialogue with civil society and promoted important acts of redemocratization. At this particular stage in history, the Public Civil Action Law emerged as a result of the political and civil rights movement in Brazil. This explains the fact that the law was passed in the first months of redemocratization.

At present, of course, we have to interpret the Public Civil Action Law in conjunction with the advances in Brazilian civil procedural law that have occurred as a result of reforms to the old code and, of course, the 2015 CPC. Collective judicial protection cannot find limits, and all the revolutionary innovations in Brazilian civil

procedure apply to previously enacted special laws, including the Public Civil Action Law of 1985, the Consumer Defense Code of 1990, and the much older Popular Action Law of 1965.

For this reason, it is not enough for a foreign jurist to know only the Public Civil Action Act. To understand its scope, he or she must know as thoroughly as possible the entire Brazilian civil procedural system, today with its main lines centralized in the 2015 Code of Civil Procedure.

Brazilian civil procedure, individual and collective, is based on effectiveness, extending this concept to the prevalence of preventive protection over compensation. The law cannot wait for harm to occur in order to act later. Where possible, the law must prevent harm from occurring by enforcing justice in a timely, effective, and comprehensive manner. Prominent Brazilian jurists tell us that 'the rights protected by the Public Civil Action Law do not fit within the logic of classic civil proceedings'.[29] In particular, Art. 139, IV, of the new Brazilian Civil Trial Code must be taken into account: 'The judge shall direct the trial in accordance with the provisions of this Code, having the task of determining all the coercive or subrogatory inductive measures necessary to ensure the enforcement of a judicial measure'.

Thus, at present, in any individual or collective process in Brazil, the enforcement of obligations of any kind may be subject to such measures, even if the person concerned does not expressly request them, since the public right of effectiveness of judicial protection prevails. Consequently, the provisions of Articles 3 and 11 of the Public Civil Action Law have been substantially expanded to allow for any kind of judicial protection and any measures that may be necessary to comply with court decisions, particularly injunctions.

The Public Civil Action Law creates the possibility of interlocutory relief, however, it does so with the old system in mind, which required an autonomous interlocutory process based on the classical civil trial system. However, in 1995, the Brazilian Civil Trial Code was amended to create a new system of unitary process, in which the plaintiff can apply from the beginning, even *inaudita altera parte*, for a provisional measure of anticipatory protection. Thus, either a typical interim measure

[29] Egon Bockmann Moreira and others, *Comentários a Lei de ação civil pública* (2nd edn, Revista dos Tribunais 2019).

of protection or a simple anticipatory one can be determined by the court before or immediately after the defendant's first defense. In Brazil, it has become normal to request and grant provisional guardianship. Although it is called provisional guardianship, in some cases it can be stabilized.

### *4.10. Defense Fund for Diffuse Rights*

The Law on Public Civil Action stipulates that money from convictions for damages caused will flow into a fund, which will be managed by a special council. The law refers only to convictions for damages to diffuse rights and those known as *fuid recovery*, i.e., when, in the case of individual homogenous rights, those affected do not seek individual enforcement of the judgment.

### *4.11. Costs, Fees and Civil Liability*

An important point in Brazil's class trial system is that it stipulates that there will be no advance fees and that the plaintiff association will not pay such fees or even attorneys' fees of the winning party in the event that its claim is denied. However, costs and fees will be paid when the losing association's conduct was marked by bad faith.

In cases of bad faith litigation brought by an association, its directors will also be ordered to pay ten times the court costs.

### *4.12. Res judicata erga omnes secundum eventum litis*

The judgment in the Brazilian public civil action produces the effects of res judicata *erga omnes secundum eventum litis*.

If the claim is granted, the judgment applies to all. In public civil action to defend individual homogenous rights, moreover, the Brazilian system adopts the system known as *opt out*. Thus, the judgment applies to everyone except those who have decided to act individually.

Up to this point, it can be said that the Brazilian collective trial system provides for the delivery of a judgment *erga omnes*. However, a new public civil action can be brought when the first one has been declared inadmissible for lack of evidence. This provision should be interpreted as broadly as possible. The new evidence may be evidence previously unknown, evidence already known but not presented, and even

evidence already presented but whose production in court has not been admitted. Of course, these hypotheses must be stated and amply justified in the original application for the new claim to be accepted. The authority of res judicata, then, operates only when the claim is well-founded and when it is unfounded for any other reason, unless the reason is the absence of suitable evidence to support the original judgment. In these terms, it is argued that the Brazilian system is that of the *erga omnes secundum eventum litis* judgment. [30]

### *4.13. Action for the Defense of Homogeneous Individual Rights*

Brazilian law also deals with the specific system dedicated to the defense of homogeneous individual rights. The essence of the defense of homogeneous individual rights is very simple: 1. a single (collective) claim to define the existence of the harmful fact and to identify the person responsible; 2. once liability is established, individual liquidation and enforcement will be carried out, in order to identify each victim and the amount of damage specifically caused to each of them; 3. legitimacy for enforcement may belong to each victim or to the collective legitimates. After the lapse of one year without qualification of the interested parties in numbers consistent with the severity of the damage, one of the collective legitimates must initiate the liquidation and enforcement of the compensation due, similar (though not equal) to the *fuid recovery* in the North American system.

### *4.14. The Brazilian Public Prosecutor as Agent for Public Civil Actions*

The Brazilian prosecutor's office is organized in the same way as the judiciary: there is a federal union prosecutor and one in each of the federated states. They are organized by Laws May 20, 1993, No. 75 and February 12, 1993, No. 8625, respectively.

[30] The law defines this system as follows: In the class actions referred to in this Code, the judgment will be judged: I - erga omnes, unless the claim is dismissed for insufficiency of evidence, in which case any legitimated party may bring another action, with identical grounds, using new evidence, in the hypothesis provided for in point I of the sole paragraph of Art. 81; II - ultra parte, but limited to the group, category or class, unless it is dismissed for insufficiency of evidence, pursuant to the preceding point, this being the hypothesis provided for in Item II of the sole paragraph of Article 81; III - erga omnes, only if the claim is granted, for the benefit of all victims and their successors, in the hypothesis provided for in Item III of the sole paragraph of Article 81.

We have already seen that the prosecutor is the main actor in public civil action in Brazil and that his action is also directed against public entities and public agents. This occurs when a public agent fails to fulfill its duty to act for the promotion of diffuse, collective and individual homogeneous rights or is silent in supervision. For this reason, unlike in other countries, the Brazilian prosecutor is not only the holder of criminal actions but, to a large extent, also of public civil actions. Moreover, as we have already seen, there is a middle ground, which is the control of administrative propriety, as a result of a specific law. The Public Prosecutor's Office, then, in addition to routinely bringing public civil actions, also brings actions for administrative impropriety, seeking a new type of sanction, ranging from compensation for damages to fines, from removal from office to a ban on holding public office and contracting with the state. It is not possible to study public civil action in Brazil without studying in depth the functioning and structure of the Office of the Public Prosecutor.

Brazilian prosecutors are autonomous and their careers are totally separate from those of judges. In Brazil, the words judiciary and magistrate refer exclusively to judges. This has always been the case, but since the 1988 Constitution, members of the Brazilian Public Prosecutor's Office have the same guarantees, salaries, prohibitions and duties as judges.

Since the Constitution, the prosecutor has gained full autonomy in two senses. The first in its relationship with the three traditional powers. The prosecutor is not part of the executive power, nor of the legislature, nor of the judiciary. The second meaning refers to the fact that each prosecutor has his or her attribution defined in advance by rules of law and does not obey orders or directives from the head of the institution or any other public body.

Because Brazil is a federation, there is the Federal Prosecutor's Office and the States Prosecutor's Office. In addition to these, there is the Federal District Prosecutor's Office, which is Brasilia, the federal capital. There are also two specialized prosecutors: the Public Prosecutor's Office, which acts before the Labor Court; and the Military Prosecutor's Office, which acts before the Federal Military Court.

The Federal Prosecutor's Office is headed by the Attorney General of the Republic. Its members are called public prosecutors. In states and the Federal District, prosecutors are headed by the Attorney General for Justice. Its members are designated

as prosecutors and public prosecutors.

In the face of this multiplicity of terminology, it is better to treat everyone as a member of the Public Prosecutor's Office or simply talk about the Public Prosecutor's Office.

According to the Federal Constitution:

> Admission to the career of the Public Ministry shall be by means of an open competition of tests and titles, ensuring the participation of the Brazilian Bar Association in its implementation, requiring from the law graduate, at least three years of legal activity and observing, in applications, the order of ranking.

There is no link between the career of the prosecutor and that of the magistrates. The Prosecutor General of the Republic shall be freely chosen by the President of the Republic from among the members of the Union Prosecutor's Office, subject to the approval of the Federal Senate, for a term of two years, with the possibility of reappointment and reapproval by the Federal Senate.

The Attorney General for Justice of each federated state shall be chosen by the Governor of the state from the members of the career comprising a triple list prepared by all members of the prosecutor's office of the respective state.

Once assigned to a particular office, the prosecutor member becomes immovable, unless he or she requests it. These and other guarantees allow for the total independence of each prosecutor, according to the so-called principle of the natural prosecutor. For each unlawful act there is a previously appointed prosecutor, who will act according to legal and constitutional norms, with complete freedom.

On the other hand, each individual prosecutor (federal and state) has a Board of Governors and an internal supervisory body, with powers to punish the prosecutor in cases of noncompliance with his duties, but never to interfere in his work. The only exception is when the prosecutor member decides to close an investigation due to insufficient evidence, in which case he must submit the filing to the higher body for approval. The latter, if it does not agree, will appoint another member instead of the prosecutor to pursue the case.

At the national level and especially of the High Councils of the various prosecutors' offices (federal and state) there is the CNMP - National Council of the

Prosecution, consisting mainly of members of these various prosecutors' offices, but also composed of lawyers and members chosen by Parliament. The National Council has the power to review the disciplinary acts of the councils of each prosecutor's office, to revoke cases, and to control the administrative and financial activities of the various bodies.

In Brazil, the Public Prosecutor's Office annually submits its budget proposal to the National Congress and itself uses the resources, takes care of property administration and support services, as well as pays each of its members, always following what is approved by parliament. There is no interference by the Executive Power, not even the Minister of Justice.

As in other countries, the Brazilian Public Prosecutor acts as a party in criminal proceedings and as an intervener in civil proceedings. What is new in Brazil, however, is the enormous opportunity for the Public Prosecutor's Office to act as a civil party in civil proceedings, especially in public civil actions.

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# A TURBULENT PATHWAY TO UNIFORM PATENT PROTECTION IN THE EU[***]

ABSTRACT. *This article aims to critically explore the legislative evolution towards the Unitary Patent System in the EU and place it in a contextual setting. In particular, attention is paid to changes of priorities regarding the patent protection and the potential to support the innovativeness and competitiveness. Considering its recent launching, a pioneering observation of its application is added.*



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## *1. Introduction*

The documented recognition of usefulness of ideas about the solution of technical problems goes back to antiquity and perhaps even before that. Many of these inventions turned into innovations which paved the way for the success of the Roman Empire and which are benefitting society even two thousand years later, see the use of concrete, the building and employment of aqueducts or the extension of the transportation framework by four layers  roads with drainage and arches-bridges. Similarly, the trade from the Ancient and Phoenician monetarization are recognized as a valuable contribution to the current understanding of the market economy. As a matter of fact, modern European integration is built upon the famous four freedoms, the current EU policies and statements keep proclaiming the EU determination to be the top innovative and competitive economy and the EU law is shaped accordingly. In 2023, one of the leading, if not the top, EU law mechanisms to boost innovations and competitiveness of the EU is the newly launched unitary patent system (UPS). A great deal of effort and hope has been placed into it and the question is whether this was a foolish waste of time or a smart strategic step or something in between. In order to address this burning issue, it is necessary to overview selected aspects of the history of patent protection in Europe (Section 2), to appreciate the stand-point of the EU (Section 3), to understand the legislative evolution towards  the UPS (Section 4), to overview the  three pillars structure of the UPS (Section 5), to discuss its key features and their (lack of) potential to boost the innovativeness and competitiveness in the EU (Section 6) and to bring pioneering observations about its fresh application (Section 7). Such a plethora of information and arguments culminates with conclusions (Section 8).

## *2. History of selected aspects of the patent protection in Europe*

The patent protection of inventions in the territory of Europe has an almost one millennium long history.[1] In central Europe, the discovery of silver led to a bustling development of the mining industry, which was facilitated by the invention and employment of new mining machineries and technologies, such as water pumping systems. These inventors were granted *privilegia*, such as in the case of Konrád z Kamene (Conratus de Lapide) and Luso z Krásné Hory (Luso de pulchro Monte) who received such a privilege in 1315 for a water draining mechanism used to facilitate silver excavation.[2] The transforming of this invention covered by the privilege into an innovation was done based on an agreement between these two inventors with Heinrich Rothermel to build and operate, at their own expense, a complex water drawing system in mines in Staré Hory (Altenberg), nowadays part of Czech city of Jihlava (Iglau). Interestingly, this agreement was confirmed by King John of Bohemia, the inventors were as well investors and allegedly this invention was, along with other inventions for mining 'exported' abroad, first into Saxony and later on in further German lands and other neighboring territories.[3] The successful spread and use of these innovations is documented, but not the exact features of the applicable law and the (lack of) enforceable legal protection. By then, the Bohemian law focused on another priority – the royal monopoly on the silver excavation and the concessionary method with *urbura*, see the move from customary law to the pioneering code in this field, *Ius regale montanorum* or *Constitutiones iuris metallici* aka the Royal mining law aka the Mining Code of King Wenceslaus II from 1300. It was prepared by an Italian professor of law, Gozzius di Orvieta, and as such it was inspired by the Roman law and covered labor, trade, monetary and even procedural aspects[4] and several of its parts remained valid and

[1] Radka MacGregor Pelikánová, 'International Intellectual Property Rights and Their Enforcement in the Czech Republic' (2010) 1 Journal on Legal and Economic Issues of Central Europe 1, 15.

[2] David Zimola, Karel Malý and Petr Hrubý, 'Rantířovský vodní náhon', Encyklopedie (2012) <https://encyklopedie.ji.cz/home-mmj/?acc=profil_lokality&load=82> accessed 31 July 2023.

[3] MacGregor Pelikánová (n 1) 15.

[4] Roman Zaoral, 'The Management of Papal Collections and Long-Distance Trade in the Thirteenth-Century Czech Lands' (2015) 127 Moyen Age International Review of Applied Economics 2 <https://www.researchgate.net/publi-

applicable up to the 19th century.[5]

The employment of the patent in relation to useful ideas about the solution of technical problems has even clearer parameters in Renaissance Italy. In Florence, Brunelleschi´s invention of the structure of a boat to carry marble up the Arno River was applied for and obtained a privileged monopoly protecting this invention in 1421.[6] In Venice, for decades only a few ad hoc privileges for new inventions related to mineral extractions were granted by the Venetian government until 1474.[7] However, then a milestone occurred, on the 19th of March, 1747, the Venetian senate passed by a large majority a *parte* (act) regulating the patent application and granting process and laid down the foundation of modern patent systems in Europe and even beyond.[8] Patent applications were filed with the *Doge* of Venice and the Senate (*Senato*) and after an evaluation by experts, the Senate made the decision about the approval of such patents. Unlike current patents, Venetian patents provided both negative rights aka monopoly rights to exclude others from the exploitation of the invention, and positive rights to enter into craft guilds. In addition, medieval guilds were so powerful that even this Venetian patent law allowed them to oppose and block patent applications.[9] Consequently, the level of patenting had varied substantially across guilds and naturally guilds were inclined to prevent patenting by other members and external innovators.[10]

Indeed, the patenting process and its results in the early modern period led in

cation/283562396_The_management_of_papal_collections_and_long-distance_trade_in_the_thirteenth-century_Czech_lands.> accessed 31 July 2023.

[5] MacGregor Pelikánová (n 1) 15-18.

[6] Bronwyn H Hall, 'Patents, Innovation, and Development' (2022) International Review of Applied Economics <https://www.tandfonline.com/doi/full/10.1080/02692171.2021.2022295> accessed 31 July 2023.

[7] Stefano Comino, Alberto Galasso and Clara Graziano, 'The Diffusion of New Institutions: Evidence from Renaissance Venice's Patent System' (NBER Working Paper No 24118, 2017) <https://www.nber.org/papers/w24118> accessed 31 July 2023.

[8] John M Golden, ' Patent Privateers: Private Enforcement's Historical Survivors' (2013) 26 Harvard Journal of Law and Technology 545.

[9] Francesca Trivellato, 'Guilds, Technology, and Economic Change in Early Modern Venice' in Stephan R Epstein and Maarten Prak (eds), *Guilds, Innovation and the European Economy, 1400-1800* (CUP 2008) 199-231.

[10] Comino, Galasso and Graziano (n 7).

Europe to situations hardly supporting innovations and competitiveness. On one hand, inventions representing progress did not lead to patents, on another hand there were patents granted for inventions hardly supporting technological or other advancements, see eg patents for playing cards and/or their reversible appearance in England in the 18th century or labelling the introduction of tarot cards in Italy in the 15th century as an invention.[11]

Despite these excesses, there is no doubt that patents have noticeably contributed to the industrial revolution, to the increase of consumer welfare despite the (risk) of monopolistic pricing[12] and to the economic dominance of Western civilization in the 19th and 20th centuries.[13] A positive factor was the increase of transparency and information in the 18th century, when patent rules, regulations and processes started to demand a written description of the solutions, ie a written application describing the invention became a pre-requirement for the granting of a patent (UK since 1718 and USA since 1790).[14] This technically strategic move led to a decrease of capricious, vague and useless ideas missing novelty, the inventive step and industrial utility. At the same time, a proper national recording allowed for the evolution towards, mutual recognition, the harmonization of national, regional and even international systems and even to the global treatment of intellectual property.

In 1883, the foundation of such a system was laid down by the signing of the Convention for the protection of industrial property in Paris (Paris Convention), while other international treaties and conventions followed and, since 1970, are administrated by the World Intellectual Property Organization (WIPO) based on the Convention establishing WIPO which was signed in 1967 in Stockholm. In 1974, WIPO joined the United Nations (UN). Among the 26 international treaties currently administrated

[11] The International Playing-Card Society, 'An Introduction' <https://www.i-p-c-s.org/wp/an-introduction/> accessed 31 July 2023. See also Michael Dummett and John McLeod, *A History of Games Played with the Tarot Pack. The Game of Triumphs*, vol 1 (The Edwin Mellen Press 2004).

[12] Petra Moser, 'Patents and Innovation: Evidence from Economic History' (2019) 27 The Journal of Economic Perspectives 1, 23.

[13] Richard J Sullivan, 'The Revolution of Ideas: Widespread Patenting and Invention During the English Industrial Revolution' (1990) 50 The Journal of Economic History 2, 349.

[14] Hall (n 6).

by WIPO are, as well, patent treaties, such as the Patent Law Treaty signed (PLT) or even more importantly the Patent Cooperation Treaty (PCT). Under the auspices of the World Trade Organization, the enforcement of patent protection was further boosted in 1995 by the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS).

In 1970, the Patent Cooperation Treaty signed was signed in Washington (PCT) allowing for the seeking of patent protection for an invention simultaneously in each of a large number of countries by filing an 'international' patent application with the national patent office or with with the International Bureau of WIPO in Geneva.

In 1973, the European counterpart (and perhaps, competition), the European Patent Convention (EPC) was signed in Munich. The EPC is a special agreement with a basis on Article 19 of the Paris Convention from 1883 under the auspices of the Council of Europe. The EPC basically both parallels and overlaps the international treaty with the Washington PCT from 1970. They both coordinate the filing of (international) application(s), the research with an examination and leads to the granting of individual national patents.[15] Plainly, based on applications, filed pursuant to national laws with national offices or filled directly via the EPC with the EPO or filed in co-operation with the PCT, the EPO can perform the substantive examination and publication and grant a European patent, which is not centrally enforceable per se.

These international treaties, along with other international law instruments have dramatically contributed to the global harmonization of intellectual property regimes and intellectual property rights protection and enforcement, among other features, by establishing international standards for patents[16] and pushing for an objective assessment of inventions regarding their novelty and usefulness as introduced by the Venetian patent law.[17]

[15] ibid.

[16] ibid.

[17] Daniele Aribugi and Andrea Filippeti, 'The Globalisation of Intellectual Property Rights: Four Learned Lessons and Four Theses' (2010) 1 Global Policy 2, 137 <https://doi.org/10.1111/j.1758-5899.2010.00019.x> accessed 31 July 2023.

### *3. The standpoint of the EU – pro-sustainability and pro-IP EU*

Sustainable development and IP are firmly anchored in the EU policies and law.[18] Regarding EU policies, there needs to be emphasized the Europe 2020 Strategy for smart, sustainable and inclusive growth, which was launched by the Barroso Commission in 2010[19] and aimed at creating an economy based on knowledge and innovation in 2020,[20] which should have been the most competitive in the world.[21] Well, this was not completely achieved, but new policies in a similar tenor keep emerging. Regarding the EU law, the EU constitutional triangle entails the Treaty on EU (TEU), Treaty on Functioning of the EU (TFEU) and Charter of Fundamental Rights of the European Union, and clearly proclaims them. Specifically, it declares that, 'The Union's aim is to promote peace, its values and the well-being of its peoples' (Article 3.1 TEU) and that:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.[22]

European Commissions, in particular the current Commission under the presidency of Ursula von der Leyen, attempt not only to reconcile the sustainability

[18] Eurostat, 'Sustainable Development in the European Union – Monitoring Report on Progress Towards the SDGs in an EU Context' (2023) <https://doi.org/10.1111/j.1758-5899.2010.00019.x> accessed 31 July 2023.

[19] European Commission, 'Communication from the Commission Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth' (COM/2010/2020, 3 March 2010) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52010DC2020> accessed 31 July 2023.

[20] Radka MacGregor Pelikánová, 'R&D Expenditure and Innovation in the EU and Selected Member States' (2019) 15 JEMI 1, 13 <https://doi.org10.7341/20191511> accessed 31 July 2023.

[21] Nina Bockova and Tomas Meluzin, 'Europe 2020 Indicator: Research And Development In Czech Manufacturing' in *Proceedings Of 14th International Scientific Conference: Economic Policy In The European Union Member Countries* (Petrovice: Silesian Univ Opava 2016).

[22] Article 3.3 TEU.

and IP demands, but even advance them in a synergy as pivotal instruments to support modern European integration. Consequently, IP concerns became an integral part of the sustainability discourse and they are projected in one of six categories of Corporate Social Responsibility (CSR) with an impact on companies' strategy and even have the capacity to be a springboard for the Creation of Shared Values (CVS).

The EU is committed to the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs), adopted by the UN General Assembly in September 2015. It needs to be emphasized that SDG 8 is to promote inclusive and sustainable economic growth and SDG 9 is to build resilient infrastructure, promote inclusive and sustainable industrialization and to foster innovations. Further, it needs to be emphasized that the current EU and its member states work closely with WIPO, adhere to international treaties managed by WIPO, and consent with the WIPO motto 'Intellectual property is improving the lives of everyone, everywhere'. Similarly, the current EU and EU member states work closely with WTO, adhere to TRIPS and consent with the WTO motto 'Let´s narrow the gaps in the way intellectual property rights are protected and enforced around the world'. In sum, the EU is deeply convinced IP, including inventions protected by patents, is a pre-requirement for sustainable development, competitiveness in the single internal market and for the EU's prosperity.[23] Inventions are the result of creative human intellectual activity, often vested in the form of an idea which can either be kept as a secret or which can be an invention to be shared and protected – and conventionally this 2nd option is considered as a better option for society in the long run, while for inventors their combination appears as the best.[24] 'Neither do men light a lamp and put it under the bushel, but on the stand; and it shine'.[25]

Inventors should be able to effectively and efficiently submit patent applications regarding their inventions which are new, not obvious, usable and not in a breach of public policies with appropriate patent offices in order to get a monopolistic power to

[23] Radka MacGregor Pelikánová, 'R&D Expenditure' (n 20).

[24] Dirk Crass and others, 'Protecting Innovation Through Patents and Trade Secrets: Evidence for Firms with a Single Innovation' (2019) 26 International Journal of the Economics of Business 1, 117 <https://doi.org/10.1080/13571516.2019.1553291> accessed 31 July 2023.

[25] Mt: 5:14.

exploit the economic benefits associated with the invention and to exercise veto power.[26] Europeans know about this and have used various national, regional and international patent (granting) systems. According to some, they have been getting easily too much protection and monopolistic power, according to others they have been getting, at a very high cost a weak and not truly enforceable protection.[27] A proper balancing is the key. Namely, the EU and its key institutions realized that having an effective and efficient system for granting patents for the entire EU would be a great win-win situation and could help the EU and Europeans in the global market place. Having to set and operate such a system in the economically and culturally diversified EU has, however, been a daunting task for a long period of time. The legislative evolution towards the UPS was neither short nor smooth… and as of today it is still not perfectly completed.

## *4. The legislative evolution towards the Unitary Patent System (UPS)*

The Unitary Patent System (UPS), with the European patent with unitary effect ('unitary patent') and the specialized patent court(s), is a decades long project which has encountered a lot of resistance and obstacles and, with a materialization on 1st June 2023, might appear as the unexpected and re-imposed dictate from the European Commission with only a little practical significance. In the reality, the effectiveness and efficiency of the UPS to support the innovations and competitiveness is critical of the EU which desires to be both pro-sustainable and the leading world economy. This, despite, or perhaps inspire, ongoing crises… Well, let´s see how the entire UPS saga started and evolved.

The starting point is clear. Neither the PCT nor the EPC nor the TRIPS leads to the granting of an 'international patent' or a 'European patent' covering automatically, and on an ongoing basis, the territory of more than one state. These are just tools,

[26] Francesco P Appio and others, 'Patent Design Strategies: Empirical Evidence from European Patents' (2022) 181 Technological Forecasting and Social Change <https://www.sciencedirect.com/journal/technological-forecasting-and-social-change/vol/181/suppl/C> accessed 31 July 2023.

[27] MacGregor Pelikánová, 'R&D Expenditure' (n 21).

indeed very useful tools, to get a bundle of national patents requiring individual treatments, such as renewal requests, payment of annual national fees, communicating with various languages, etc. Naturally, this creates obstacles for the establishment and operation of the Single internal market as defined by the TEU and TFEU. In addition, the US as the economic competitor of the EU has a unified patent system and its USPTO grants patents for the entire US territory. Indeed, this was realized already before the establishment of the original three European Communities. In 1949, French Senator Henri Longchambon proposed a unitary patent system for Europe.[28] In 1962, the Commission of European Economic Community published a draft of the EPC in hopes of reaching a '*communautaire*' patent system.[29] As a matter of fact, the EPC was signed as the Munich convention under the auspices of the Council of Europe, because by then not all European Communities member states had ratified (of course now, all EU member states have ratified the EPC).[30] Since the EPC was and remained 'only' a foundation how to get a bundle of patents, not one single unitarian patent, in 2000 the Prodi Commission presented its first proposal on a Council Regulation on the Community patent. For a myriad of reasons this project was not materialized.

In 2007, the Barroso Commission issued the Communication of the Barroso Commission labeled 'Enhancing the Patent System in Europe' which emphasized the commitment to the creation of a single Community patent. In 2007, the Lisbon Treaty was signed, re-shaped the EU constitutional framework and brought TEU and TFEU as we know currently. The focus moved to the recognizing the EU competence to set up a uniform intellectual property protection (Article 118 TFEU) via a special legislative procedure.[31] However, opening the door, does not mean to get there. In 2010, the

[28] Karen Walsh, 'The Unitary Patent Package, the Court of Justice of EU, and Brexit: (Ir)reconciliable?' (2019) Journal of Intellectual Property Quarterly <https://ore.exeter.ac.uk/repository/handle/10871/36176> accessed 31 July 2023.

[29] Lisa Van Dongen, 'The UPC Agreement and Liability Rules. The Entitlement and Enforcement' (2018) <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2700946> accessed 31 July 2023.

[30] Luc Desaunettes-Barbero and others, *The Unitary Patent Package & Unified Patent Court. Problems, Possible Improvements and Alternatives* (LediPublishing 2023).

[31] Katharina Kaesling, 'The European Patent with Unitary Effect – A Unitary Patent Protection for a Unitary Market?' (2013) 2 UCL Journal of Law and Jurisprudence 1, 87 <https://doi.org/10.14324/111.2052-1871.004> accessed

Barroso Commission presented its proposal about the translation regime for the EU patent, see Regulation setting up the language mechanism. A massive wave of objections against it closed this classic pathway to the UPS based on conventional EU Regulation(s). Plan A failed, so plan B to go via enhanced co-operation was put to work.

In 2011, the procedure leading to the enhanced co-operation was launched by 25 EU member states, while Spain and Italy strongly objected to the fact that the UPS languages should only be English, French and German.[32] In addition, the CJ EU issued its opinion, stating that the draft Agreement creating the European and Community Patent Court would be incompatible with EU law. The final straw came from the EU member states themselves, which could not agree about the location of the Central Division of a Unified Patent Court. For almost one year the battle went on about whether this would be London, Munich or Paris, and, pursuant to a resulting compromise, all three cities should be the seat, with Paris being the main seat and London and Munich being attached via modern technologies. However, the CJ EU remained concerned about the (possible removal of its) agenda in favor of such a new court. At the same time the European Commission emphasized that the protection of intellectual property is a key factor for EU competitiveness, that between 44% and 75% of European businesses´ resources are connected to the intellectual property and that the current patent protection in the EU was (and is) fragmented and did not fully support the establishment and operation of the Internal single market without barriers.[33]

In December 2012, a compromise was reached about a limited role for the CJ EU, ie the proposed UPC was to be set to apply the Agreement on UPC which is considered an international patent law. This was a compromise between the CJ EU drive to play a key role and the slightly shaken reputation of the CJ EU regarding its rather controversial decisions about patent law.[34]

During the years 2012-2015, Italy and Spain kept challenging this enhanced co-operation, especially the legal basis in Article 118(1) TFEU and the suggested

31 July 2023.

[32] ibid.

[33] ibid.

[34] Walsh (n 28).

languages´ selection for the UPS by the CJ EU, eg C-274/11 & C-295/11 *Italy v Council*; C-146/13 & C-147/13 *Spain v Council of EU*.[35] In 2015, all these cases were dismissed, Italy decided to become a participant in the EPS (but not Spain) and the three pillars structure of EPS, as we know currently, was established:

(a) a Regulation creating a European patent with a unitary effect, aka a unitary patent,

(b) a Regulation establishing a language regime applicable to the unitary patent and

(c) an Agreement between the EU countries to set up a single and specialized patent jurisdiction, aka the UPC Agreement.

In 2013, Croatia became part of the EU but did not join the EPS, while in 2020 the UK left the EU and the EPS. Since Poland declined to ratify the UPC Agreement, the number of EU member states going to national ratification process is 24. As of January 2013, 17 of them did it, ie they had ratified the UPC Agreement and the Protocol on the Provisional Application of the UPC Agreement. These 17 Member States represent approximately 80% of the EU's GDP.

The remaining seven (Cyprus, Greece, Hungary, Ireland, Romania and Slovakia) may ratify later on and the three non-signatories (Croatia, Poland, Spain) can sign and ratify it later on as well.[36] However countries who are member states of the EPC, but who are not in the EU (for example, the UK, Switzerland and Norway) are not able to join the Unitary Patent or Unified Patent Court. European patents granted by the EPO

[35] [2015] ECR 213/07 – action for annulment under Article 263 TFEU, brought on 22 March 2013 ('[T]he Council's decision, with respect to the establishment of the translation arrangements for the EPUE, to differentiate between the official languages of the European Union, and to choose only English, French and German, is appropriate and proportionate to the legitimate objective pursued by that regulation… Article 118 TFEU does not preclude, when the language arrangements for European intellectual property rights are being determined, reference being made to the language arrangements of the organization of which the body responsible for issuing the intellectual property right to which unitary effect will be attributed forms part. It is moreover of no relevance that the contested regulation does not establish an exhaustive body of rules for the language arrangements applicable to the EPUE. The second paragraph of Article 118 TFEU imposes no requirement on the Council to approximate all aspects of the language arrangements for intellectual property rights established on the basis of the first paragraph of Article 118 TFEU… Action dismissed').

[36] Unified Patent Court, 'UPC Member States' < https://www.unified-patent-court.org/en/organisation/upc-member-states> accessed 31 July 2023.

will still cover these countries, but they will need to be validated, maintained, and enforced separately in each of them, as until now.

On the 1st of June 2023, the new UPS started to operate and covers 17 EU member states, who have ratified the Agreement on the UPC. Namely, the condition of the ratification by 13 EU member states, including three states with the most European patents[37] (Germany, France and, before Brexit, the United Kingdom, and after Brexit, the Netherlands) was met and so the entire package of UPS was activated… but just for those EU member states, which have ratified the Agreement on UPC.

The new Unitary Patent is based on the European patent granted by the EPO under the rules of the EPC to which adhere 39 states. The pre-grant phase remains the same, but once EPO  European patent is granted, the patent proprietor can request unitary effect, thereby getting a European patent with unitary effect (Unitary Patent), that provides uniform patent protection in initially 17 EU Member States.

## *5. The three pillars legal structure of the UPS*

In 2012 the Barroso Commission managed to get the consent of both the Council and Parliament on the (new) patent package consisting of two Regulations and one international agreement representing the three pillars of the UPS and becoming an integral part of an interesting law structure combining national law, regional law and international law.

These three pillars are crucial for the post-grant/validation stage, because the application phase with formal examination (0-18 months) remains governed by national patent laws and/or EPC 2000 and the pre-grant phase with substantive examination (18 months – 3rd or 4th year) remains governed by EPC 2000 and its Protocols. Only during the post-grant/validation state (3rd or 4th year – 20th year), the choice emerges – either to take the classic pathway of bundle of national patents governed by national laws or to take advantage of the UPS governed by two Regulations along with secondary legislative instruments and one international treaty. They form the three pillars legal

[37] Kaesling (n 31).

structure of the UPS.

The first pillar of the UPS is Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection,[38] which was enacted based on proposal COM (2011) 215. This Regulation includes 18 articles and establishes a unitary European patent with a unitary effect, unitary character, uniform protection and equal effect in all of the participating Member States, ie a unitary patent may only be limited, transferred or revoked, or lapse, in respect of all the participating EU member states (Article 3 Regulation 1257/2012). It does not replace the EPC and EPO´s system, but instead the UPS uses the existing structures of EPO (Article 9(1) Regulation 1257/2012) and co-exists, ie Regulation 1257/2012 is a special agreement (Article 142 EPC).[39] This is logical, considering the success of the EPS.[40]

The second pillar of the UPS is and Council Regulation (EU) No 1260/2012 of 17 December 2012, implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements,[41] which was enacted based on proposal COM (2011) 216. This Regulation includes only seven articles and specifies that the language of the proceedings for the European patent with unitary effect (EUP) is the language used in the proceedings before the EPO as defined in Article 14(3) EPC (Article 2 Regulation 1260/2012) and basically no further translations are required (Article 3 Regulation 1260/2012). The official languages of the EPO are English, French and German (Article 14(1) EPC), a European patent application must be filed in one of these three official languages (Article 14(2) EPC) and the official language in which the European patent application is filed is the language of the proceedings.

The first pillar and the second pillar of the UPS are clearly products of internal EU law, namely these Regulations represent EU (primary) legislation. In addition, the

[38] [2012] OJ L 361, 1-8 (Regulation 1257/2012).

[39] Kaesling (n 31).

[40] Desaunettes-Barbero and others (n 30).

[41] [2012] OJ L 361, 89-92 (Regulation 1260/2012).

instruments of the EU secondary legislation were issued to complement these Regulations.[42] Namely, the Select Committee of the Administrative Council of the EPO adopted the Rules relating to Unitary Patent Protection (OJ EPO 2022, A41), which provide for the establishment of a Unitary Patent Division at the EPO and which lay down the procedures to be carried out by the EPO under EU Regulations No 1257/2012 and No 1260/2012. Further, this Committee adopted the Rules relating to the Fees for the Unitary Patent Protection (OJ EPO 2022, A42) and concerning the compensation for the translation costs for SMEs, universities, non-profit organizations and public research organizations, which file a European patent application in an official EU language other than English, French or German. Based on Article 18 Regulation 1257/2012 and on Article 7 Regulation 1260/2012, the applicability of these Regulations depends on the entry into force of the Agreement on UPC. This is interesting, since the Regulations are outcomes of internal sources of the EU law (secondary law), whereas the Agreement on UPC is an international intergovernmental treaty between EU member states which is open to EU Member States only and which places the UPC within the EU legal system.[43] A similar situation happened in 2017 regarding the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the 'Marrakesh Treaty') in the field of copyright law. This is international treaty, whereas the related Directive 2017/1564 and Regulation 2017/1563 are the secondary EU law documents.

The third pillar of the UPS is the Agreement on a Unified Patent Court of 19 February 2013,[44] which is a rather long treaty including 89 articles and two Annexes. It provides for a UPC for the settlement of disputes relating to European patents and (European) unitary patents (Article 1 Agreement on UPC). The UPC comprises a Court of First Instance, a Court of Appeal and a Registry (Article 6 Agreement on UPC) and they are populated by both legally qualified judges and technically qualified judges

[42] European Patent Organization, 'Unitary patent & Unitary court' <https://www.epo.org/applying/european/unitary/ unitary-patent/legal-framework.html> accessed 31 July 2023.

[43] Lisa Van Dongen, 'The UPC Agreement and Liability Rules. The Entitlement and Enforcement' (2018) <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2700946> accessed 31 July 2023.

[44] [2013] C 175/01 (Agreement on UPC).

(Article 15 Agreement on UPC). The UPS shall apply the EU law and respect its primacy (Article 20 Agreement on UPC) and the decisions of the CJ EU, including preliminary rulings, are binding for the UPC (Article 21 Agreement on UPC). The substantive law applied by the UPC includes EU law (especially three pillars of UPS), the EPC, other international agreements applicable to patents and binding on all the Contracting EU member states and national law (Article 24 Agreement on UPC). As mentioned above, so far 17 EU member states have signed and ratified the Agreement on UPC.[45]

## *6. Key features of the UPS and their potential to boost the innovativeness and competitiveness*

The UPS provides an option to avoid the need of validation and the management of bundle of patents governed by various national (more or less harmonized) patent laws. This is done by taking a special route by the EPO and by being a subject of a pre-set linguistic, fees and enforcement regimes. Plainly, instead of à la carte, one procedure with one language (English, French, German) and one payment is needed.

Regarding the administration, the UPS for sure ends complex validation and byzantine bureaucratic national requirements, instead of a number of proceedings and a number of payments, only one proceeding and one bulk payment every year is needed. Therefore, the UPS reduces the administrative demands and increases customer friendliness, ie decreases the administrative burden related to the maintenance of patents with the desired validity for more than one jurisdiction. In sum, the EPS makes the management of a patent as a legal title easier.

Regarding the cost, the situation is more complex and administrative cost, renewal fees and translation expenses needed to be considered. For administrative costs, a myriad of circumstances need to be considered, such as whether the renewal is done

[45] European Patent Organization, 'About the Unified Patent Court' <https://www.unified-patent-court.org/en> accessed 31 July 2023.

in-house or via external specialists. For officially paid renewal fees, it depends for which jurisdictions the patent protection is needed, see the EPO´s 'True Top 4' math, ie the annual fee for the renewal of the unitary patent corresponds to the sum total of the renewal fees paid for national renewal in the four countries in which European patents are most frequently validated (Germany, France, the UK and the Netherlands). For translation expenses, the cost advantage depends again upon for which and how many jurisdictions should the patent be valid. In sum, if patent management is done in house and patent should by only for few jurisdictions with official low renewal fees and/or jurisdictions using the language of the patent application, then the EPS might not be cost advantageous.

Regarding the provided protection, again the assessment is complexed. All EU member states participating in the Unitary Patent System should provide a uniform protection on a one-stop-shop basis, which should make the enforcement more effective and efficient. Well, the Unified Patent Court (UPC) and its case law should contribute over time to an increased predictability, naturally provided the case law is stable. This might be achieved not so easily, see the byzantine EPS court structure. Namely, it includes a Court of First instance with Central (Paris with Munich), Regional (Nordic Baltic) and Local Divisions (Vienna, Brussels, Copenhagen, Helsinki, Paris, Duesseldorf, Hamburg, Mannheim, Munich, Milan, The Hague, Lisbon, Ljubljana), a Court of Appeal (Luxembourg) and a Patent Mediation and Arbitration Center (Lisbon, Ljubljana), a place to foster amicable settlements, while the CJ EU is placed above to address preliminary rulings on questions about EU law.[46]

Further, the all-or-nothing setting with one legal title means that one successful attack in one jurisdiction can be fatale for the entire patent, ie can lead to the instantaneous end of the patent protection in all jurisdictions.

Regarding conceptual foundations, it is questionable whether the move away from the principle of territoriality, so well established in the IP arena, is the right thing to boost innovations and competitiveness. As the example of EU Trademarks shows, a unitary territory doesn't have to be under all circumstances the same. While for

[46] Unified Patent Court, 'UPC Structure' <https://www.unified-patent-court.org/en/court/presentation> accessed 31 July 2023.

trademarks the perception of territoriality can be influenced by the question of distinctiveness for different types of marks, can the same concept of unitary territory be applied to patents?

The EU and many experts voice an extremely positive tenor about the features of the UPS and its potential to boost innovativeness and competitiveness. Arguably, the UPS should decrease the administrative burden along with expensive translation requirements[47] and increase the efficiency of enforcement, decreases its costs[48] and makes the market more attractive for abusers, such as patent trolls, and/or large players pushing out small and medium sized enterprises (SMEs).[49] This should make inventions more valuable and better protected against copying and other abuses,[50] such as patent trolls, and/or large players pushing out SMEs.[51]

However, more sceptic statements and opinions about the UPS, such as the lack of saving and language disadvantage, should not be overlooked. Sadly, the discussion about the UPS does not include critically important CSR and CSV considerations, such as the need for respect, for avoiding waste[52] and for loyalty[53] as well as the call for honesty, transparency and end of greenwashing.[54]

[47] European Commission, 'The Benefits of Unitary Patent Protection for Europe' <https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/patent-protection-eu/unitary-patent-system_en> accessed 31 July 2023.

[48] Keli Larson, 'Enforcement: Legal Implications of the European and Unitary Patent Systems for Non-Practicing Entity Patent Enforcement' in Rosa Maria Ballardini, Marcus Norrgård and Niklas Bruun (eds), *Transitions in European Patent Law: Influences of the Unitary Patent Package* (Wolters Kluwer 2015) 149-150, 157-161.

[49] Hall (n 6).

[50] European Commission (n 47).

[51] Hall (n 6).

[52] Radka MacGregor Pelikánová and Filip Rubáček, 'Taxonomy for Transparency in Non-Financial Statements – Clear Duty With Unclear Sanction' (2022) 13 Danube 3, 173 <https://doi.org/10.2478/danb-2022-0011> accessed 31 July 2023.

[53] Martin Hála, Eva Daniela Cvik and Radka MacGregor Pelikánová, 'Logistic Regression of Czech Luxury Fashion Purchasing Habits During the Covid-19 Pandemic – Old for Loyalty and Young for Sustainability?' (2022) 22 Folia Oeconomica Stetinensia 1, 85 < https://doi.org/10.2478/foli-2022-0005> accessed 31 July 2023.

[54] Adam Balcerzak and others, 'The EU Regulation of Sustainable Investment: The End of Sustainability Trade-Offs?' (2023) 11 Entrepreneurial Business and Economics Review 1, 199 <https://doi.org/10.15678/EBER.2023.110111> accessed 31 July 2023.

Regarding the enforcement via the UPS, it needs to be remembered that this was originally objected even by the CJ EU, see the above mentioned Opinion 1/09 of the CJ EU about the incompatibility of the UPS with the EU.[55] The UPS resulting court structure looks byzantine and the establishment of a fair and consistent case law might be extremely difficult. At the same time, the cost of potential litigation are so far unclear,[56] but for sure the resulting decisions can have a direct impact for several jurisdictions. The UPS facilitates easy attacks with verdicts applicable to 17 or more jurisdictions, since any unitary single 'jurisdiction-territory' of the EU doesn´t exist (in respect to Brussels I Regulation). This all-or-nothing nature can be scary to companies because, with the usual European patent, one would not lose all at once if anything goes wrong.[57]

Conceptually, even if accepting the UPS is a robust patent system leading to an increase in patenting and in the use of patents as a tool of a firm strategy, this does not mean automatically that innovation and competitiveness will be improved.[58] After all, granting and maintaining a patent is a result of a Faustian bargain[59] between the inventor and the society crystalized in a fine and fragile balance between the absolute monopoly and unimpeded innovative activities, potentially leading to a better and more just EU as the most competitive economy in the word.

Regarding the alleged improvement of the balance and the legitimacy of the IP

[55] *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* [2011] 123 Opinion the Court (Full Court) 1/09 ('[P]ursuant to Article 218(11) TFEU and Article 300(6) EC of 8 March 2011 regarding the Creation of a unified patent litigation system – Consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law. Consequently, the Court (Full Court) gives the following Opinion: The envisaged agreement creating a unified patent litigation system (currently called "European and Community Patents Court") is not compatible with the provisions of the EU Treaty and the FEU Treaty').

[56] Appio and others (n 26).

[57] IamIP, 'Unitary Patent and UPC System: Advantages and Challenges' <https://iamip.com/unitary-patent-and-upc-system-advantages-and-challenges/> accessed 31 July 2023.

[58] Hall (n 6).

[59] Aribugi and Filippeti (n 17).

protection in the EU, we are entering into the complex arena of the ephemeral concept of justice and fairness and the consequential, deontological, social contract and other concerns and justifications.[60] The UPS with 17 'full' members, 7 'potential' members and 3 'hopefully sometimes' members (Croatia, Poland, Spain) represents another example of an asymmetric model with elements of symmetry[61] and of search for common shared values and priorities, such as the concept of 'fair-size and fair-cost patent and patent litigation'.[62] There are always winners and losers, so the question is rather who will be the beneficiary of the UPS and the attention should be paid to the fact that the patent protection for European jurisdictions is massively applied for by non-Europeans subjects, such as US and Chinese companies,[63] and that many companies are using patents and attacks to patents as ruthless strategic weapons while destroying the creativity, innovativeness and even well recognized EU values.[64]

## *7. Pioneering observations about the UPS application*

It needs to be recognized that EPO managed well the transition and the EPS was truly launched on 1st July 2023 and runs rather smoothly. Further, it needs to be appreciated that so far no serious complaints emerge and the use of EPS looks rather promising. So prima facie, 'so far so good'. However, a closer look in numbers confirms several problems which have already been mentioned during the pathway towards the UPS.

[60] Petra Žárská and Matúš Mesarčík, 'Dualistic Data Property Right: Solution for Controllership of Data in the European Union?' (2021) 21 International and Comparative Law Review 2, 43 <https://doi.org/10.2478/iclr-2021-0013> accessed 31 July 2023.

[61] Hana Kováčiková, 'Integration Model of the European Economic Area: Symmetric or Asymmetric?' (2021) 21 International and Comparative Law Review 2, 230-246 <https://doi.org/10.2478/iclr-2021-0020> accessed 31 July 2023.

[62] Appio and others (n 26).

[63] Lisa Van Dongen, 'The UPC Agreement and Liability Rules. The Entitlement and Enforcement' (2018) <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2700946> accessed 31 July 2023.

[64] Radka MacGregor Pelikánová, Robert K MacGregor and Martin Černek, 'New Trends in Codes of Ethics: Czech Business Ethics Preferences by the Dawn of COVID-19' (2021) 12 Oeconomia Copernicana 4, 973 <https://doi.org/10.24136/oc.2021.032> accessed 31 July 2023.

On 24th July 2023, the EPO published a Dashboard summarizing the interest in the EPS, ie demands for unitary patents,[65] and offering very interesting numbers.[66] In total 4,215 were registered, 620 are pending and 5 were withdrawn. Regarding fields and industry, the majority of requests for unitary patents are from Infrastructure and Mechanics (999, ie 20.6%), Health (969, ie 20%), Materials & Production (922, ie 19%) and Digital (492, ie 10.2%), while Energy is behind (324, ie 6.7%). Even more interestingly, the selected procedural language is basically either English (3,395, ie 70.1%) or German (1,116, ie 23.1%), while French is way behind (329, ie 6.8%), ie the official trio is de facto turned into duo. The reason why can be extracted from the statistic about the most common translation language, which is obviously English (1,423, ie 29.4%) and German (1,009, ie 20.8%), followed surprisingly by Spanish (1,306, ie 27 %) and then French (231, ie 4.8%) and Italian (228, ie 4.7%). This suggests that francophone advancement in the field of IP, especially EPS, should be perhaps revisited. Indeed, the initial linguistic opposition of Spain and Italy regarding EPS is at least understandable, and perhaps even justified.

Moving away from internal EU linguistic issues, another even more worrisome aspect of the UPS emerges, namely the origin of applicants – the US, Germany and China, followed by France, the United Kingdom, Sweden, Spain and Italy. The EPS is basically a good patent system, but whether its prime beneficiaries are Europeans and whether it boost the innovations and competitiveness of the EU facing the global powers are burning questions…

## *8. Conclusions*

A modern European integration based on the sustainability, shared values and competitiveness is not feasible without innovations. Their source, inventions, must be

[65] European Patent Organization, 'New Dashboard Reveals Demand for Unitary Patents' (24 July 2023) <https://www.epo.org/news-events/news/2023/20230724.html> accessed 31 July 2023.

[66] European Patent Organization, 'Requests for Unitary Effect' (24 July 2023) <https://www.epo.org/news-events/news/2023/20230724/unitary-patent-dashboard.png> accessed 31 July 2023.

covered by an effective and efficient legal system. For three decades, the EU has been trying to establish a unified patent system. Since a plan A via a conventional legislative venue has failed, the EU moved to a plan B based on current EPO mechanism and on the new EU enhanced co-operation. Resulting three pillars legal structure of the UPS was launched and allows to opt-out from the regular EPO multi-jurisdiction validation processes and instead to get a unitary patent for 17 EU member states.

The unified linguistic, fee, administration and enforcement mechanism of the UPS brings both opportunities and challenges. The EU has high expectations and believes that its easier, cheaper, more fair and ultimately very pro-innovative and pro-competitive. However, the management, linguistic and cost efficiency does not apply to all and the effectiveness of the all-or-nothing approach, especially regarding the enforcement by the byzantine EPC system, is questionable.

In sum, the UPS offers the option after the granting of the European patent – instead of a bundle of national patents with different regimes, office locations and payment schedules, it is possible to enjoy a one-stop-shop solution which benefits by the protection in 17 jurisdictions and which is to be decided by a myriad of courts and panels under the auspices of the EPC system regarding all these 17 jurisdictions. Expense calculation and comparative tables regarding languages and times are done, the enforcement mechanism is visualized and many comments about it are presented. However, the most important might be overlooked – why for some many years and after such a conviction campaigns certain jurisdictions and influential groups of stakeholders still do not want the UPS… at any price! The Faustian bargain regarding the legal protection of inventions by patents might be more complexed in the context of a modern European integration then so far admitted. Perhaps the EU, especially its leaders, should focus more on reasons why UPS was or is less popular in certain jurisdictions and be more open minded to consider a depart from certain outdated assumptions, such as language regimes or choice of beneficiaries, and to stick more closely with common shared values, such as respect or fight against waste. The pathway to an effective and efficient patent protection in the EU is definitely turbulent and for sure not completed.

**KAIUS TUORI**[*]

# FUTURES OF THE PAST: ROMAN LAW BETWEEN TOTALITARIANISM AND EUROPEAN INTEGRATION[**]

ABSTRACT. *Goethe famously described the influence of Roman law in European history by using a metaphor about ducks and the fact that they are there even when they are not visible. The purpose of this article is to explore the role of Roman law in the narratives of nationalism and legal reform during twentieth century totalitarianism. It traces how earlier criticism of Roman law was co-opted by the Nazi movement and its repercussions. While the attack on Roman law was unsuccessful, not least because of consistent support by Italian Fascists, the episode had a crucial impact on the position of Roman law after the Second World War. Like the duck in Goethe's metaphor, Roman law bounced back, experienced a resurgence party due to being attacked by totalitarian governments. As law not bound by the vagaries of the nation state, Roman law became an unlikely symbol of justice and shared legal tradition in Europe.*



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## *1. Introduction*

Roman law has been a fixture of European legal history for close to three millennia, but that does not mean that it has been universally loved or even accepted during that time. In fact, criticism of Roman law is as much a staple of European history as Roman law itself. In his famous article, 'Long live the hatred of Roman law!', American legal historian James Q. Whitman discusses the manifold variations of the criticism of Roman law in European history. It was seen to promote greed, materialism, individualism and other vices, ranging from property absolutism to political absolutism.[1]

The purpose of this essay is to discuss the transformation of the role of Roman law in the more recent European legal history, from interwar totalitarianism to the present, through the debates over its significance. One of the high points of the criticism of Roman law was during the Nazi era in Germany where the ruling party declared as its aim the eradication and replacement of Roman law. This will serve as the starting point of the essay, indicative of the turbulence that a seemingly innocuous academic discipline would face during the twentieth century.

In my works, I have often resorted to narratives as explanatory models. When discussing historical events, the use of narratives enables one to discuss alternative explanations from various viewpoints and to engage with issues of historical interpretation. In this sense, a narrative is simply understood as a way to construct an explanatory framework or linkage between events and facts. In a sense, a narrative gives meaning to facts, it answers the question 'why'. My current project focuses on European narratives (in the plural) as a setting of narrative contestation. These European narratives often pit ideas such as European integration against entrenched notions of nationalism and communities that are thought to be natural either through ethnicity, language or common history.[2] What narratives do is convey abstract concepts such as values and ideals through examples, framing them as conflicts that are understandable on a human level.

In the current policy framework, the European Union envisions itself as an 'area

[1] James Q Whitman, 'Long Live the Hatred of Roman Law!' (2003) 2 Rechtsgeschichte - Legal History, 40-57.

[2] This is the Centre of Excellence in Law, Identity and the European Narratives (eurostorie.org).

of freedom, security and justice'.[3] This is not an empty statement, but official policy that is thought to guide the actions of the union. However, such a statement contains within itself a narrative, one of renouncing violence, intolerance, slavery, repression and cruelty, injustices of all kinds that have been amply present in the European history of the twentieth century. Without going into details of why and how such a policy was formed and what it actually entails, it may, without exaggeration, be said that this is the promise of Europe, the possibility of freedom, security and prosperity, that is one of the major attractive forces for the millions of migrants attempting to come here. At the same time, such narratives have been the object of criticism within Europe itself, by politicians who argue that justice and security are attracting too many migrants. While it may be argued that there is a failure built into this promise, it nevertheless contains a powerful message that gives meaning to the whole European enterprise.

It is a commonplace that the interpretation of the past is influenced by the present. This is in the theory of history divided between two main phenomena, presentism and projection. Presentism in its most basic format means that one selects from the past only ideas, values and terms that are important now, to us in the then present. In historical writing in general, this is seen as a grave mistake. In the writing of legal history or that of Roman law, it is more commonly known through labels such as 'Aktualisierung' and 'Reception'. Projection, in turn, means that one inserts into the descriptions of the past modern ideas and preoccupations, for instance in the form of anachronisms. What we will be doing in the following is observing how the various narratives of European legal history and Roman law played a role in contestations over the future of Europe and European law. How were ideals of law projected into the past of Roman law and conversely, how was Roman law seen as a model for the future?

[3] TEU 3.2; TFEU 67. There is a vast literature on the matter; see Maria Fletcher, Ester Herlin-Karnell, Claudio Matera, *The European Union as an area of freedom, security and justice* (Routledge, 2017).

## *2. Criticism of Roman law and legal innovation in Europe*

In the recent historical works on Roman law, the history of Roman law has been tied to the history of Europe. Throughout European legal history, in debates about law and legal development, claims made using Roman law had numerous benefits. Roman law, due to its longevity, provided historical legitimacy, and due to its many incarnations, it could be used to support even opposing claims. Furthermore, Roman law had a Pan-European reach, meaning it could be utilized in almost every part of Europe. Finally, due to the cultural hegemony of the ancient Greco-Roman culture, Roman law could be incorporated into various civilizing narratives about development and Europeanization.[4]

In the historiography of the past decades, several different and competing narratives have been advanced on the roots of European legal integration. The most common of these is that integration was a reaction to the Second World War and its horrors, and that from this basis new rules began to be drafted to first implement the common market and then organically expanding to new fields. This is the economy-driven narrative that is usually described as neo-functionalist. A number of authors have contested this, arguing for an alternative narrative starting point in the Nazi conception of New Europe, a project mostly driven by the SS. In it, Germans sought to gain a wider legitimacy among allies and occupied countries alike by drawing up the idea of a New Europe that would emerge around Germany. Especially in France, they partnered with leaders of Vichy France, which had a considerable impact on the ideological content: a combination of Christian and cultural conservatism, opposition to communism and the labour organizations and the influences from the Anglo-American world. This is, curiously enough, a narrative that is now promoted by populist politicians and authors from Vladimir Putin to Victor Orban, who are critical of the implications that notions such as rights and justice have for the position of minorities. A third notion was that of the common legal heritage, advocated by people like Paul

[4] For a summary, see Reinhard Zimmermann, 'Roman Law in the Modern World' in David Johnston (ed), *The Cambridge Companion to Roman Law*, 2015; Kaius Tuori, 'Introduction' in Kaius Tuori and Heta Björklund (eds), *Roman Law and the Idea of Europe* (Bloomsbury, 2019).

Koschaker and later Reinhard Zimmermann. This narrative maintains that there exists an earlier form of legal community in Europe, one that still is present in the shared traditions of law and thus may be useful for the creation of a new European law.[5]

In their seminal book, *The Invention of Traditions* (1983), Eric Hobsbawm and Terrence Ranger argued that nationalism relies on traditions, some of which are actually invented.[6] The relationship between what has been called invented traditions and European law is fascinating, not least because law beyond the nation state often relies on a similar kind of use of tradition to establish legitimacy. In the case of European law or European tradition, this is linked with the construction of identity and belonging through a shared past. Simplistically put, one forms attachment to what is defined as a nation through various avenues, for example language or culture, but also through history. It is commonly argued that history or the idea of a shared past operates as a mode of legitimation, that a glorious history is an argument for a glorious future. However, what does law have to do with it?

This is a fundamental issue regarding constitutionalism and the construction of belief systems: What constitutes legitimacy? Is it based on a shared belief and agreement, such as money, or are we dealing with something else entirely? In the concept of the nation state, legitimacy of not only the state but in developed countries its legal system is also generally thought to be the result of the exercise of democratic power and, ultimately, popular sovereignty. The people as a self-governing unit legitimate their own forms of governance through their will (even Ulpian, Dig. 1.4.1, maintains that the power of the Roman emperor lies in the people, whose sovereignty was transferred to the emperor via the *lex regia*). When one moves beyond the national constitution and the limits of the nation state, there emerges what is called a sovereign moment. In this moment, the new supranational entity needs to be constituted, either by using the same kinds of legitimating instruments (such as the European Parliament) or by using

[5] Hagen Schulz-Forberg, Bo Stråth, *The Political History of European Integration: The Hypocrisy of Democracy-Through-Market* (Routledge, 2010). On the authoritarian narratives, see Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe* (Hart Publishing, 2003). On the Roman roots narrative, see Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford University Press, 2001).

[6] Eric Hobsbawm and Terence Ranger, *The Invention of Tradition*. (Cambridge University Press, 1983).

the legitimacy of national governments to justify the new forms (*i.a.*, the European Council). These are both forms of external legitimation, derived from constitutional decisions that have legal validity. However, in order to build internal legitimacy, such measures are of little significance. Legitimacy comes from a belief that something is justified, and therein values, aims and belief systems are fundamental. Where do they come from?

Historian Ann Rigney has discussed this issue through the concept of politics of memory. She maintains that historical narratives become enmeshed with politics and thus political exigencies begin to drive the meanings that are given to historical events. This is especially true with regard to the forms of public memory, where certain figures and events are given memorials and these memorials are explained as commemorating a certain interpretation of history. The politics of memory is thus the politics of what is officially remembered and what is forgotten, and what meaning is given to history.[7] While traditional nation states may utilize a rich historical heritage, new entities such as Europe or the EU have to develop their own memory politics and shared history *ex nihilo*.

The meaning of the past for the present is a crucial part of the relationship between legal history and law. This is best explained by the disjunction between two modes of thinking about law, normative and contemplative. Normative legal thinking focuses on what the meaning of the text is and how the law should be applied in a case. Contemplative legal thought is free of such needs to find a solution to a question and may focus on the cultural, societal and other issues that the law may be involved in. Historical thinking about law is contemplative by its very nature. However, there are exceptions, especially in the common law countries, where historical inquiries into major cases may end up changing the law itself. For instance, in the second *Mabo* case (1992) in Australia, the overturning of the *terra nullius* doctrine threw the whole system of land tenure into chaos. In a similar way, such dualities of normative/contemplative nature become problematic when researchers have an active stake in the matter. I have always been wary of authors who dub themselves as researchers and activists, not because of a

[7] Ann Rigney, 'Remembrance as remaking: memories of the nation revisited' (2018) 24 Nations and Nationalism 240. On the difficulties of linking historical memories to entities such as Europe, see Ann Rigney, 'Transforming Memory and the European Project' (2012) 43 New Literary History 607.

dislike of the politics that they advocate themselves, but because these modes of thinking are diametrically opposite.

### *3. Paragraph 19 of the Nazi Party program and Italy*

One of the major upheavals within the modern European legal traditions is the rise of totalitarianism in the interwar period which affected Roman law as well.[8] Previously sacrosanct beliefs about the role of law in society, such as the rule of law were contested and states took unprecedented steps to deprive people of citizenship and the protections of the law. The interwar period was, of course, a period of the rise of the big state; for instance, in the US, the rise of New Deal policies meant a whole new way of thinking about the role of law in enacting societal change. This use of law as a tool for political ends was nowhere as strong as in the authoritarian or totalitarian states of Europe.

Roman law had a curious history in this tumultuous era, which may be best illustrated by a brief comparison between Germany and Italy in the 1930s. In Germany, Paragraph 19 of the NSDAP party program (1920) stated: 'We demand that Roman Law, which serves a materialistic world order, be replaced by a German common law.' As has been discussed in numerous studies, the roots of this statement were in an earlier party program of a small communist party, from which they had been copied into the Nazi party program. What Roman law meant there was related to property relations; it signified law that protected property rights or property absolutism against appropriation. The Nazi officials later clarified their position towards Roman law, stating their approval of Roman militarism and expansionist policies as well as the emphasis that was given to the allegiance of citizens towards the state during the Roman Republic. In contrast, Hans Frank, the Nazi minister of justice, maintained that the Nazis only disliked later Roman law which had been corrupted by 'Semitic' influences and the Pandectist system that had been constructed upon them and continued to influence German law.

[8] Massimo Miglietta and Gianni Santucci (eds), *Diritto romano e regimi totalitari nel '900 Europeo* (Università degli studi di Trento, 2009).

However, Nazi ideas of legal reform were not mainly focused on Roman law, but rather the Nazi *Neue Rechtswissenschaft* or new legal science was based on antiformalism and ideas of replacing the BGB (*Bürgerliches Gesetzbuch*) with a people's law that would reflect Germanic ideas of communalism.[9]

In contrast, in Fascist Italy the history of ancient Rome was idealized, with Roman symbols such as the fasces and other insignia omnipresent in Fascist propaganda. As part of this, Roman law gained strong official support, while many Roman law scholars began to study themes related to Fascist doctrine such as corporativism. As a result of Italy's alliance with Germany, Nazi officials began to tone down their public opposition to Roman law. They found common cause in many other fields. As part of their report on the alliance, the New York Times declared that there had emerged a 'consensus of totalitarian regimes' in areas such as 'social justice and discipline' as well as the 'defence of the civilization of Europe and the world.'[10]

However, in all the authoritarian, totalitarian and quasi-totalitarian countries of Europe, the rise of political aims at the expense of law was linked with the diminishing respect for and understanding of the independence of law.[11] Both in Nazi Germany and in Fascist Italy, the idea of absolute legal protections granted to individuals by law were increasingly replaced by ideas such as dignity of a community, the protections granted to individuals as members of a group, such as an ethnic group or a professional group. This was the legal implication of a curious strand of corporativism which, in Germany for instance, sought to transfer the emphasis from citizens who had rights by law to focusing on members of the Germanic blood community who were accorded privileges as members of the blood community. Of course, similar policies of prioritizing political aims against legal formalities were also enacted in Soviet Russia.

[9]Peter Landau, 'Römisches Recht und deutsches Gemeinrecht. Zur rechtspolitischen Zielsetzung im nationalsozialistischen Parteiprogramm' in Simon Dieter and Michael Stolleis (eds), *Rechtsgeschichte im Nationalsozialismus* (Tübingen 1989); Gianni Santucci, 'L'ostilità nazionalsozialista al diritto romano', in Elvira Migliario and Gianni Santucci, «*Noi figli di Roma» Fascismo e mito della romanità* (2022) Quaderni di storia.

[10] Mario Varvaro, 'Salvatore Riccobono e l'esaltazione giusromanistica di Roma antica', in Elvira Migliario and Gianni Santucci, «*Noi figli di Roma» Fascismo e mito della romanità.*

[11] On the gradual eradication of the *Rechtsstaat*, see Jens Meierhenrich, *The Remnants of the Rechtsstaat. An Ethnography of Nazi Law* (Oxford University Press, 2018).

In all of the interwar countries where authoritarian movements took root, this meant that there was a deep-rooted distrust towards the kind of legal absolutism that Roman law represented. As law beyond the nation state, Roman law was, by its very nature, not pliant to the changing needs of the authoritarian rulers.

### *4. The turn towards integration and the resurgence of Roman law*

The end of the Second World War marked a sea change in the history of Roman law, but also in ideas of European legal tradition. From the interwar crisis and the threats of abolition, Roman law resurfaced with a new lease of life. This is linked with the emergence of European legal tradition as a fundamental narrative of European legal integration. The idea of a European legal tradition is a curious narrative convergence of three different elements: 1) Roman law, 2) Human rights, 3) European integration.

The Europeanization of Roman law has its roots in the 1930s. Scholars such as Paul Koschaker, Franz Wieacker and Helmut Coing began to formulate the idea of law as a European tradition, and Roman law formed one of the key foundational elements. This was of course linked with the resistance towards Paragraph 19 of the Nazi party program, but also with the politization of law and the atrocities that followed. Koschaker's *Krise* (1938) and *Europa* (1947) bookended the war and envisioned what the role of Roman law in Europe was and what it could be: a cultural unity factor.[12] Wieacker's *Privatrechtsgeschichte* (1952) painted a picture of law and legal tradition as an enduring continuity from the Roman law tradition to modernity, where lawyers and their legal consciousness and method safeguard justice.[13] Coing, on the other hand, combined

[12] Paul Koschaker, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* (Beck, 1938); *Schriften der Akademie für Deutsches Recht: Römisches Recht und fremde Rechte*, 1, Beck, München, Berlin, 1938, 1–86; Paul Koschaker , *Europa und das römische Recht,* Biederstein Verlag, München, (Beck, 1966 [1947]); Tomasz Giaro, *Aktualisierung Europas, Gespräche mit Paul Koschaker*, Genoa, Böhlau Verlag, 2000; Tommaso Beggio, *Rediscovering the Roman Foundations of European Legal Tradition*, Heidelberg, Winter Verlag, 2018.

[13] Ralf Kohlhepp, 'Franz Wieacker und die NS-Zeit '(2005) 122Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung 203; Viktor Winkler, *Der Kampf gegen die Rechtswissenschaft: F. Wieackers "Privatrechtsgeschichteder Neuzeit" und die deutsche Rechtswissenschaft des 20. Jahrhunderts*, Hamburg, Verlag Dr. Kovač, 2014; Ville

natural law and Roman law traditions as the key to European legal heritage, where the longevity of the tradition prevents rapid change and political perversion of the law.

The second element is that of rule of law and human rights as the fundamental European tradition. Again, this narrative was formulated by German exile lawyers and political theorists such as Franz Neumann, Ernst Fraenkel and Hannah Arendt, among others and law and rights. At the same time, the creation of the European Convention on Human Rights led to a novel kind of understanding of human rights as a particularly European tradition. As described by scholars like Marco Duranti, this was a development that was strongly favoured by both conservative politicians and religious groups, which wanted to have strong protections against the rampant powers of the state. Of course, the dangers of unchecked state powers were represented not only by Nazi Germany and the Holocaust, but equally by that of the Soviet bloc. Many have argued that the binding of state power was also seen as beneficial to curb socialist reform plans in the Western European countries as well. However, the turn to human rights and rule of law as European traditions was mainly due to the experience of the demise of the rule of law under totalitarianism. Especially in Germany, the collapse of the *Rechtsstaat* led many to ask what, if anything, remains when the legal system has been hijacked and corrupted. For Arendt, this was the conundrum that led to the question about rights to have rights. Although Neumann and Fraenkel were deeply sceptical of natural law thought, the Nazi notions of relative natural law or natural law applicable to the German blood community, were even worse.[14]

The third element, that of shared legal values and the European integration project is the creation of key drivers of the European project. There, persons like Pierre Pescatore, head of the European Court of Justice, and Walter Hallstein, the head of the Commission, wanted to build the legitimacy of European integration through the past, to present a common past that would complement their plans for a common future of Europe. Pescatore had worked as Koschaker's assistant at the university, while Coing

Erkkilä, *The Conceptual Change of Conscience: Franz Wieacker and German Legal Historiography 1933-1968*, Tübingen, Mohr Siebeck, 2019.

[14] Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press, 2017).

was a confident of Hallstein's. Both of them, but especially Hallstein, spoke the language of values, heritage and tradition as the roots of the European project. However, only from the 1990s onwards has the language of tradition been integrated into the European project.[15]

What do these narratives mean then? What is the significance of the idea of a shared European legal heritage? First, it maintains that there is a pre-existing tradition of law in Europe that forms a common basis for legal integration. This is naturally the civil law tradition, based on the foundation of Roman law, but it also contains links to moral imperatives, shared values and human rights that are seen to exist in Europe. They are, in a very concrete sense, norms beyond politics. They are also a sign of an existing unity for Europe. Second, the shared past contains the promise of future orientation, much like the shared past of a nation is the promise of a glorious future. The shared legal past of Europe reaffirms the unity that is already there, as a ready form for the future, legitimating and guiding integration. It is in a sense also a promise of rediscovering a past unity.

The unity of the past and the future are less odd than it may appear at first glance. Chinese president Xi claimed, when celebrating the centenary of Chinese archaeology that 'Historical and cultural heritages tell vivid stories of the past and profoundly influence the present and future.' This makes it important, according to *China Daily*, that archaeology 'provide strong support for promoting a fine traditional culture and strengthening people's confidence in Chinese culture'. Xi urged developing 'archaeology with Chinese features, style and ethos to better showcase the splendor of the Chinese civilization, carry forward the fine traditional Chinese culture and make new and greater contributions to realizing the Chinese Dream of national rejuvenation'.[16] This highlights how the emphasis on the past as the foundation of a national project and narrative is far from an exclusively European preoccupation.

While European countries have been wary of utilizing such nationalistic

[15] The emergence of the language of tradition and heritage in European law is actually an ongoing project of mine.

[16] Wang Kaihao and Cao Desheng, 'Xi highlights vital role of archaeology', *China Daily* | Updated: 2021-10-18 07:06 <www.chinadaily.com.cn/a/202110/18/WS616cac63a310cdd39bc6f6cb_1.html> accessed 22 November 2023.

rhetoric, this has not stopped actors such as identitarian movements from utilizing the past, even the classical past, as their own future of the past (see for example the group Identity Evropa, which uses hoplite weaponry as their insignia).

## *5. Projects and the notion of the new European private law*

The theme of rediscovering a unity that was lost became one of the major points for the new interest in Roman law from the 1990s onwards. This trend was categorized under the label of neo-pandectism, a throwback from the Pandectistic tradition of Roman law in Europe, where its main value was that of law in force.

In addition to neo-pandectism, Roman law has also had cultural and even purely utilitarian uses. For representatives of Catholic conservatism, Roman law was one of the major fields representing law beyond the nation state, the others being natural law and legal philosophy. Roman law also had a vital connection with Christianity and the Christian legal tradition, most famously that of canon law.

Within European integration, especially in Eastern Europe, Roman law was given a role as a sign of Europeanness or belonging to a shared European tradition. For the accession of Eastern European countries to the EU, touting how one's legal tradition was part of the same European heritage was also a political argument for closer integration.

On top of these strands, one would need to remember that the majority of scholarship on Roman law was and is mostly interested in Roman law for its own sake. This strand of scholarship studies Roman law in its own context, at least explicitly, without any regard to its current meanings.

Within the twentieth-century history of Roman law in Europe, there are interesting continuities and break points. The first are modern codifications, the foremost of them being the German BGB, which transferred Roman law to the realm of history and jurisprudence and away from applicable law. The second is the rise of interwar totalitarianism, especially in Nazi Germany, which was hostile to the idea of law independent of politics. The third was the rise of European integration after the Second World War, which gave Roman law a new lease of life as a predecessor of

European legal unity, but at the same time proved to be dangerous as the fortunes of European legal integration changed. In all of these, Roman law and Roman lawyers adopted and overcame challenges, which is hardly surprising. Adaptation is one of the key components of the continuity of the Roman law tradition. Its survival is based on renewal and the continuation of studies.

It is clear that one of the key points in the longevity of the tradition of Roman law is the flexibility of arguments that make it possible to use different aspects of the law in different situations. Goethe famously wrote that Roman law is like a duck, sometimes visible on the surface, sometimes diving and invisible, but always there.[17] But what does the duck do?

Of course, Goethe was a polymath who penned authoritative studies in all kinds of fields from humanities to natural sciences. Ornithology was clearly not his forte because, if it was, Goethe would have known that ducks do not dive.

This is actually quite fitting, because most of the impact and continuing influence of Roman law was not hidden under the surface. Rather, it was evident and blatantly obvious like the tail end of a duck that remains on the surface while feeding. Legal concepts that derive from Roman law, as well as the basic tenets of legal doctrine in most European legal cultures are derived from Roman law.

Roman law is both rooted in the past and, through it, in the law in force today, but also as part of the future. Roman law was equally an inspiration for numerous projects on legal integration in Europe, such as the Common Frame of Reference or various others. It is unequivocally true that Roman law encapsulates ideas, concepts, basic doctrine and methods of legal thinking that are shared by most if not all European countries. Roman law is, what one scholar called, a European identity factor.[18]

Earlier, we discussed the difference between the normative and the contemplative modes of argumentation. This was, as part of the wider discussion on hermeneutics, the crux of a debate between Emilio Betti and Franz Wieacker. In it, Wieacker

[17] Johann Peter Eckermann, *Conversations with Goethe* (Dent, 1971) 313.

[18] Tommaso dalla Massara, 'Roman Legal Tradition as an Identity-Factor towards a New Europe: Five Pillars for the Future?' in Luigi Garofalo and Lihong Zhang (eds), *Diritto Romano fra tradizione e modernità*, *Atti del Convegno internazionale di Shanghai 13-15 novembre 2014* (Pacini editore, 2017).

maintained that, in jurisprudence, there is no true distinction between the historical and the normative, because legal interpretation is by nature always self-reflective and cumulative. However, as Betti points out, within legal history elements such as Roman law have qualities that guide development towards scientific order and rationality. Whether those qualities are built into the tradition and the sources or they are imprinted on them through the process of interpretation is a matter that depends on the historical rootedness of the understanding of legal concepts themselves.[19]

The question remains whether the shared past and the shared legal culture are in themselves indications for future direction.

## 6. *Conclusions*

The role of Roman law in European legal history is by no means confined to antiquity or even to the so-called Reception of Roman law up to the nineteenth century. Rather, Roman law operated even later as a source of historical legitimation and as an example. When authoritarian and totalitarian states in the interwar period sought to minimize the binding nature of law and its power to limit political actors, this tendency was turned on its head. Especially in Germany, the Nazi regime opposed Roman law, but also the general tendency to apply the ideas behind the rule of law, whereas the post-war European integration took the opposite path. European integration was specifically launched as a legal process, while human rights were raised as a great example of European values. Simultaneously, Roman law was raised as the foundation of the shared European legal tradition, which would not only bind European states together, but also guide their future integration.

[19] The main points are summarized in Emilio Betti, *L'ermeneutica storica nella prospettiva di Franz Wieacker*, Napoli, Jovene, Synteleia Vincenzo Arangio-Ruiz, 1964, 66-73.

**DARIO FRANZIN***

# THE AUTONOMY OF CRIMINAL LAW WITH REFERENCE TO THE PROTECTION OF THE ENVIRONMENT: A NEVER-ENDING STORY

ABSTRACT. *This article discusses the complex relationship between criminal law and environmental protection, with a specific focus on Italy. It highlights the interplay between criminal and administrative law in addressing environmental crimes and emphasizes the importance of understanding the* actus reus *in environmental offenses. The text explains that Italian environmental criminal law is closely connected to administrative law, resulting in a 'sanctioning' structure for environmental crimes. This structure implies that environmental behaviors are penalized only when they surpass specific risk thresholds defined by regulatory sources or administrative acts. The* actus reus *is primarily based on non-compliance with preventive-cautionary norms from administrative regulations. These offenses can take different forms, such as purely punitive, partially sanctioning (either 'weak' or 'strong'), or a combination of these. The text emphasizes the need for a balanced approach that allows for the control of environmental governance while effectively prosecuting pollution offenses, all while upholding legal principles and preventing administrative abuse of power. The author suggests that reorganization and rationalization of the system are necessary to navigate these complexities effectively.*



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## *1. The interaction between criminal law and administrative law in the construction of the* **actus reus***: the 'sanctioning' structure of environmental crimes*

Similar to the situation in the entire European context, in Italy, environmental criminal law is closely tied to administrative law. This situation implies that this specific subject is regarded as an appendix of economic-productive activities. It means that possible behaviors that jeopardize the environment are punished only when they exceed specific risk thresholds, identified or updated by regulatory sources or by local or national administrative acts.

Environmental criminal law, with a few significant exceptions,[1] ends up adopting a 'sanctioning structure'. The *actus reus* is always based on the failure to comply with preventive-cautionary norms established within the administrative legal framework, simply referred to by the incriminating provision.[2]

This can be either explicit or implicit, through special illegality clauses (eg the expression 'abusively').[3] Once constructed, the typical offense can take on a purely punitive structure, where the offense is committed by mere disobedience to a command of the administrative authority. Alternatively, it can take on a partially sanctioning structure, where it is necessary for the failure to comply with the administrative-cautionary provisions to originate from a generally polluting source (partially sanctioning model of the 'weak' type), or even exhibit specific offensive features, precisely described by the incriminating norm (partially sanctioning model of the 'strong' type).[4]

[1] Eg the crime of 'failure to remediate polluted sites' or the cases of 'illegal waste trafficking', now stipulated in Articles 257, 259 and 260, respectively, TUA No 152 of 2006.

[2] The expression 'sanction structure' means that the criminal law here 'sanctions', possibly accompanying it with additional, autonomous requirements of offensiveness, disobedience to precepts of administrative source: this is, as evident, a definition inspired by Filippo Grispigni, 'Il carattere sanzionatorio del diritto criminale' (1920) 11 Riv it dir proc pen 240, and which, however, in our case – unlike the well-known approach of Grispigni himself – has a merely descriptive function and not also a content function.

[3] On the particular structure of environmental crime see, in general, Francesco Antolisei, *Manuale di diritto penale. Leggi complementari*, vol 2 (12th edn, Giuffrè 2008) 486. See also, in more detail, Vincenzo Bruno Muscatiello, 'La tutela penale dell'ambiente (il diritto e il rovescio)' in Alessandro Amato and others (eds), *Diritto penale dell'ambiente* (Cacucci 2006) 23 ff; Giuseppe Palmieri*, Contributo ad uno studio sull'oggetto della tutela nel diritto penale dell'ambiente. Dal codice Rocco al 'codice dell'ambiente' (d.lgs. n. 152/2006)* (Edizioni Scientifiche Italiane 2007) 53 ff.

[4] On the distinction between a purely and partially sanctioning structure we are here allowed to refer to Mauro

It is evident that, within this framework, the incrimination scheme that best corresponds to the principles of classical criminal law is one with a partially 'strong' sanction structure. It involves selecting only those 'non-compliances' that demonstrate a further and more pronounced detrimental attitude towards natural ecological balances. This approach avoids the merging of criminal law with administrative law and ensures a closer adherence of this area of the special part to the principles of autonomy, fragmentary and offensive nature of the crime. Moreover, by assigning the task of selecting non-compliance with administrative precepts deserving of criminal sanction to the legislature, it prevents the complete deferral of criminal law determination to the environmental governing authority, thereby ensuring full compliance with the principle of the *riserva di legge*.

In most modern penal systems, all the described models coexist, albeit with a prevailing tendency towards cases built on a partially 'weak' sanctioning model or even those falling under the purely sanctioning scheme.[5] The Italian situation is particularly illustrative in this regard, as the latter two typologies, already characterizing the entire contravention apparatus of the *Testo Unico Ambientale* (TUA), are also included among the crimes against the environment in the penal code.[6]

The hegemony of such models may have various causes, including a strict transposition of the precautionary principle into criminal law, as known in the European Union legal framework.[7] However, what primarily drives legislators towards these

Catenacci, *La tutela penale dell'ambiente. Contributo all'analisi delle norme penali a struttura 'sanzionatoria'* (Cedam 1996) 77 ff.

[5] The finding was already evident in the mid-1980s: see Günter Heine, 'Aspekte des Umweltstrafrechts im internationalen Vergleich' (1986) GA 68.

[6] These are Article 452 *sexies* ('illegal trafficking of radioactive substances'), which basically punishes any unauthorized form of handling and/or putting into circulation of radioactive substances, and Article 452 *septies* ('obstruction of control'), in the part that punishes anyone who 'denies access' in polluting facilities to supervisory authorities.

[7] In this sense Carlo Ruga Riva, *Diritto penale dell'ambiente* (Giappichelli 2011) 41. On the precautionary principle as a cornerstone principle of the European Union see most recently Emanuele Corn, *Il principio di precauzione nel diritto penale. Studio sui limiti all'anticipazione della tutela penale* (Giappichelli 2013) 3 ff. On the penal reflections of the application of the principle to criminal law see Donato Castronuovo, *Principio di precauzione e diritto penale. Paradigmi dell'incertezza nella struttura del reato* (Aracne Editrice 2012) 87 ff; Francesca Consorte, *Tutela penale e principio di precauzione. Profili attuali, problematicità, possibili sviluppi* (Giappichelli 2013) 69 ff. The influence of EU sources in environmental matters has been registered especially in the field of waste, precisely with reference to

models is their considerable 'symbolic' capacity. By framing criminal sanctions as safeguards for the safety standards imposed on polluting sources, they create a perception of greater severity in the system of environmental protection, seemingly better suited to satisfy the collective need for protection from those sources.[8]

However, this perception is rather superficial and should be relativized based on a careful evaluation of the cost-benefit ratio. It does not necessarily correspond to the reality of the facts. Moreover, the use of these techniques not only takes the move from the principles of criminal law but also leads to a significant increase in the practice of so-called criminal law bagatelles, resulting in an unreasonable use of the state's (expensive) repressive machinery. On one hand, a criminal justice system structured to take action against even minimal infringements of preventive-cautionary norms must prosecute cases where the reported infringement is merely formal or, from an environmental harm perspective, still remediable.[9] On the other hand, it is certain that a criminal control 'upstream' of pollutions produces a particular deterrent effect, since, precisely because it is a question here of punishing behaviors that are still far from the actual injury or endangerment of the environment, the punishment towards potential 'polluters' is in any case forced, for obvious needs of proportion and reasonableness, to remain at medium-low levels and therefore accessible to the various benefits (suspension of punishment, oblation, alternative or even clemency measures etc) usually found at

the definition of the concept of criminally relevant 'waste': on the argument at length see Dario Franzin, 'La Corte Costituzionale e la definizione di rifiuto: nuovo capitolo di una complessa vicenda di illegittimità comunitaria' (2011) Cass pen 120.

[8] On the relationship between environmental criminal law and the symbolic function of criminal law, see most recently, Leire Escajedo San Epifanio, *El medio ambiente en la crisis del estado social. Su protección penal simbólica* (Comares 2006) 181 ff. Paradigmatic precisely is the case of the unauthorized trafficking of radioactive substances, the use of which, as is well known, is a source of particular social alarm and which precisely for this reason, not by chance, even outside the Italian context is in some cases placed among the criminal hypotheses of the Criminal Code: see, eg, para 328 of the German Criminal Code.

[9] One thinks here, with reference to purely sanctioning cases such as the one reported in Example 3, of the hypothesis in which the beneficiary of the authorization has merely 'disobeyed' the part of it in which he was required to keep eg a certain documentation up to date; or to cases – in practice far from infrequent – of unauthorized operation of polluting activities in which the latter, although (perhaps for mere bureaucratic reasons) not yet formally authorized, has in fact already spontaneously equipped itself with the anti-pollution measures that the incoming permit is preparing to impose on it.

the 'lower' end of the penalty systems.[10]

In reality, contrary to what has been assumed in the past, it is increasingly evident that the effectiveness of environmental protection policies depends not on downsizing the fundamental principles of criminal law, but on other multiple factors. For example, it relies on the ability to recognize the true criminological identity of pollution, which is nothing more than a branch of economic crime, sometimes taking the form of organized crime. It also depends on the ability to appropriately calibrate related penalties (such as choices regarding criminal liability of legal entities). Furthermore, it requires a clear distinction between prevention and repression of the phenomenon, limiting the use of punitive intervention to cases where alternative government policies or techniques are no longer viable.[11]

Later on, we will see how the Italian legislature attempted to reconcile all these considerations in 2015. However, it must be acknowledged that the resulting framework, although somewhat disappointing in other aspects, managed to establish an interesting application strategy for (contraventional) cases with a purely sanctioning structure. This strategy aims to mitigate their drawbacks and compensate for the negative impact they may have on the fundamental principles of criminal law.

[10] On the real applicative dimension of these 'benefits', by now largely far removed from the special-preventive inspirations that had historically determined them, let us here refer to Mauro Catenacci, 'La "retribuzione mite": riflessioni in tema di sanzioni alternative alla pena detentiva c.d. breve' in *Scritti in onore di Alfonso M. Stile* (Editoriale Scientifica 2013) 3 ff.

[11] Decisive in this regard recently are the contributions of so-called 'green criminology': see among others Lorenzo Natali, Green criminology. *Prospettive emergenti sui crimini ambientali* (Giappichelli 2015), as well as the many authoritative contributions collected in Rob White (ed), *Environmental Crime. A Reader* (Willan Publishing 2009).

## *2. The problem of the criminal court's review of administrative acts referred to by the case*

Regardless of the chosen sanction structure model, it often presents a delicate problem of the relationship between criminal jurisdiction and environmental governance, known as the criminal judge's review of administrative acts.[12] Essentially, it raises the question of how the criminal judge should proceed when, after confirming that the offense described in the indictment has occurred but was carried out in compliance with the administrative regulation referenced, they are nevertheless convinced that the regulation itself is illegitimate. Should the judge conclude that the act is atypical and therefore not punishable? Or can they consider themselves exempt from the judgment of environmental compatibility contained in that regulation and proceed with prosecuting the offense (provided, of course, that the offense appears typical in relation to the other elements of the case)?

In Italy, there are ongoing disagreements between legal doctrine and jurisprudence on this matter. Jurisprudence, suspecting that collusion or even corruption between private individuals and public administrators may be hidden behind the issuance of an authorization, has gradually supported the thesis that if the administrative regulation allowing an act, otherwise conforming to the indicted one, is found to be incidentally illegitimate, then that act must be considered typical and therefore punishable.[13] This is either because the illegitimacy renders the act incidentally nonexistent (following the disapplication provided for by Annex E to Law No 2248 of March 20, 1865, on administrative litigation) or because an offense allowed by an illegitimate act is a *contra ius* offense and cannot be justified in any way. On the other hand, legal doctrine, particularly the majority doctrine, has always criticized this approach, invoking the prohi-

[12] On the limits of the criminal judge's review of administrative acts, among others, Adalberto Albamonte, 'Atti amministrativi illegittimi e fattispecie penale: i poteri del Giudice nella tutela penale del territorio' (1983) Cass pen 1862; Gabriele Fornasari, 'Sulla rilevanza penale delle costruzioni edilizie realizzate in base a atti concessori illegittimi' (1986) (2) Foro it 84; Marco Gambardella, *Il controllo del giudice penale sulla legalità amministrativa* (Giuffrè 2002); Marino Petrone, *Attività amministrativa e controllo penale. Scritti* (Giuffrè 2000) 89; Chiara Silva, *Elementi normativi e sindacato del giudice penale* (Cedam 2014) 25 ff.

[13] Cass, sez un, 27 febbraio 1987, n 3, Giordano.

bition of analogy *in malam partem* (in cases where non-compliance with an administrative regulation is explicitly stipulated as a constituent element of the case)[14] or, more generally, emphasizing the need to respect at least the principle of culpability in such cases. This would involve ascertaining on a case-by-case basis whether the illegality affecting the administrative act was known or knowable by the perpetrator.[15]

In practice, when the criminal judge's scrutiny is exercised, often during the precautionary stage, the issue becomes even more contentious due to an inconsistent application of the concept of excess of power. This, combined with the tendency to employ broad constitutional principles, such as the right to health (Article 32 of the Italian Constitution) or the EU principle of precaution, as parameters for incidental judgments of legitimacy, sometimes leads to a review of the merits of the public administration's authorization choices, thereby arbitrarily limiting its discretionary power.

This question is undoubtedly one of the most complex challenges faced by criminal science today.[16] While the disapplication position is understandable from a political and criminal standpoint (as illegitimate authorizations often involve actual criminal agreements between the administrative authority and private individuals), it is unquestionably unacceptable from a dogmatic and constitutional perspective. On the other hand, the position held by legal doctrine, which is more rigorous in terms of dogmatic and constitutional legitimacy, appears to overlook the need to prevent administrative authorization from becoming an uncontrolled instrument of privilege and corruption.[17]

[14] Cass, sez un, 21 dicembre 1993, n 11635, Borgia. For a general overview see Francesco Prete, 'Il sindacato del giudice penale sugli atti amministrativi nell'abuso d'ufficio e nei reati edilizi' (2013) Dir pen contemp <https://archiviodpc.dirittopenaleuomo.org/d/2408-il-sindacato-del-giudice-penale-sugli-atti-amministrativi-nell-abuso-d-ufficio-e-nei-reati-edilizi> accessed 3 November 2023.

[15] For a more detailed overview we can only refer here to the previous edition of this work: see Mauro Catenacci, 'I reati in materia di ambiente' in Antonio Fiorella (ed), *Questioni fondamentali della parte speciale del diritto penale* (Giappichelli 2012) 364 ff.

[16] Particularly insightful on this point are the analyses of German doctrine, which, since the 1980s, has sought to give a dogmatic construction to the very dependence of environmental criminal law on acts and norms of administrative law: among the most recent summary works on the point see Matthias Kemme, *Das Tatbestandsmerkmal der Verletzung verwaltungsrechtlicher Pflichten in den Umweltstraftatbeständen des StGB* (V&R Unipress 2007) 33 ff; Stephanie Bräutigam-Ernst, *Die Bedeutung von Verwaltungsvorschriften für das Strafrecht* (Nomos 2010) 241 ff.

[17] Rather original on this point is the position taken by the Spanish legislature, which – in an attempt to find an

Therefore, striking the right balance in this matter is challenging. The disapplication approach risks compromising dogmatic and constitutional principles, while the doctrine's position may overlook the prevention of unchecked privilege and corruption through administrative authorization.

Finding a solution to this complex issue requires careful consideration of both political-criminal concerns and dogmatic and constitutional legitimacy. It is essential to ensure that environmental governance remains effective without undermining fundamental legal principles. Striking a balance between the criminal judge's review of administrative acts and the discretionary power of the administrative authority is crucial in maintaining a fair and just system that effectively addresses environmental offenses while safeguarding against abuse of administrative authorization.

Ultimately, resolving the delicate relationship between criminal jurisdiction and environmental governance necessitates ongoing dialogue and collaboration between legal scholars, practitioners, and policymakers. By addressing these disagreements and seeking common ground, it is possible to develop a comprehensive framework that upholds the principles of criminal law while effectively protecting the environment.

## *3. The paradoxical aggravation of the problem with the 2015 reform: the special illegality clauses of the new environmental crimes*

In summary, this issue is both timely and delicate, entangled with conflicting interests and often accompanied by media attention and political implications.[18] It was

acceptable balance between legal certainty and control of legality on the work of the PA – has provided in Article 329 of the *código penal* for a specific figure of '*prevaricación ambiental*', which, among other things, punishes the public official who has maliciously issued or otherwise contributed to the issuance of a manifestly illegitimate (*manifiestamente ilegal*) environmental authorization: for an extensive and documented examination, also critical, of the norm in question, see Cristóbal J Cantero Cerquella, *La responsabilidad penal de los funcionarios por delitos ambientales* (Editorial Reus 2010).

[18] We refer here above all to the court case that still involves the top management of ILVA in Taranto, a case that was triggered precisely on the assumption of an alleged conflict with the right to health under Article 32 of the Constitution of the environmental authorizations issued (moreover, according to the Taranto prosecutor's office, against payment of 'bribes') to that industrial complex, and in the course of which a bitter institutional clash has

widely believed that the inclusion of an autonomous section on crimes against the environment in the Criminal Code could provide an opportunity to address this issue. The aim was to establish a legislative framework that allows the criminal judge to exercise control over the legality of environmental governance while safeguarding the institutional prerogatives of the Public Administration and upholding the principles of legality and culpability.[19]

During the parliamentary process for the approval of Law No 68 of 2015, several interesting proposals were put forward. These proposals suggested that the power of the criminal judge to review the legitimacy of administrative activity should not be inhibited but should be circumscribed within strict limits. For example, one proposal limited the punishment to the violation of specific regulatory provisions rather than generic administrative acts or provisions. Another proposal restricted the use of disapplication to cases of illicit authorization, rather than illegitimate authorization.

However, the final text of Articles 452 *bis* ff did not incorporate any of these suggestions. It has, in fact, disappointed expectations and further muddled the boundaries within which the criminal court can review administrative discretion. The new Title VI *bis* of the Criminal Code does not address or resolve the issue, while the new environmental crime provisions rely on broad illegality clauses that allow the judge significant freedom in assessing the work of the public administration. The expressions 'illegally' and 'illegitimately' used in these provisions, rather than defining clear limits for the criminal judge's scrutiny of environmental governance, create more uncertainty and manipulability.

These broad clauses, due to their conceptual breadth, can be applied to a wide range of infractions or irregularities. This allows the judge (and the prosecutor) to deem any violation, even those unrelated to environmental protection, as abusive or

developed between the Judiciary and the Public Administration, with 'clamorous' implications of an institutional type as well: see for a summary of this complex affair Antonio Picillo, 'Tra le ragioni della vita e le esigenze della produzione: l'intervento penale e il caso Ilva di Taranto' (2013) Arch pen <https://archiviopenale.it/fascicolo-n-2—maggio-agosto-2013-(web)/fascicoli-archivio/134> accessed 3 November 2023.

[19] In this regard, allow me to refer to the considerations expressed in the hearing at the Justice Committee of the Chamber of Deputies on 6 November 2013. The stenographic record and the closed-circuit footage of the hearing are available online.

illegitimate if it is somehow accompanied by an environmental pollution event. On the other hand, these clauses do not select the norms against which the authorization activity of the Public Administration should be evaluated. Instead, they leave room for the consideration of constitutional principles or other principles and guidelines, which lack specific prescriptive content and could be interpreted to imply a review of the merits of environmental governance choices (for example, when a regularly issued authorization measure is deemed insufficient in addressing alleged health risks, contravening Article 32 of the Constitution).

While considering that such broad clauses in environmental protection, prone to vagueness, are constitutionally illegitimate may seem excessive,[20] it is evident that the reform carried out with Law No 68 of 2015 has failed to meet expectations. Instead of providing a clear demarcation line between environmental governance and pollution repression, it has contributed to further confusion and uncertainty. This lays the groundwork for more challenging relations between the judiciary and public administration in environmental matters.

In conclusion, addressing these complexities requires an inescapable task of reorganization and rationalization. It calls for a careful balance between the control of environmental governance and the effective prosecution of pollution offenses, while upholding legal principles and preventing abuse of administrative power.

[20] This is what happened in Germany in the aftermath of the introduction of crimes against the environment in the Criminal Code: the affair described in Catenacci, *La tutela penale dell'ambiente* (n 4) 223 ff. Considerations on the point however in Licia Siracusa, 'La legge 22 maggio 2015, n. 68 sugli "ecodelitti": una svolta "quasi" epocale per il diritto penale dell'ambiente' (2015) Dir pen contemp <https://archiviodpc.dirittopenaleuomo.org/d/4050-la-legge-22-maggio-2015-n-68-sugli-ecodelitti-una-svolta-quasi-epocale-per-il-diritto-penale-dell-a> accessed 3 November 2023.

**FRANCESCO SACCOLITI***

# THE NEW LEGISLATIVE FRAMEWORK OF '*ERGASTOLO OSTATIVO*' INTRODUCED BY LAW 199/2022: ANY CHALLENGES TO THE ECHR?

ABSTRACT. *After three years from the ECtHR's judgements of Viola v. Italy, where the Court found the Italian life imprisonment under section 4-bis of the Prison Administrative Act in violation with Article 3 ECHR, Law 199/2022 finally reformed the legislative framework of 'ergastolo ostativo'. However, the legislator seems to not have correctly implemented the principles enshrined in the Convention. Indeed, the present work is aimed at assessing to which extent the new Italian 'ergastolo ostativo', as reformed by Law 199/2022, is compatible with Article 3 ECHR. Because of the lack of doctrine on the issue, the research is primarily based on a critical analysis of the new provisions, in light of the relevant ECtHR's case law. It will be shown how the current formulation of Article 4-bis can raise no few challenges to the ECHR. The present work, indeed, after a detailed analysis of the main ECtHR's jurisprudence on life imprisonment, highlights the need of rethinking the new framework of 'ergastolo ostativo' in line with such principles.*



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## *1. Introduction*

Until October 2022, Article 4-bis (*ergastolo ostativo*) of the Prison Administrative Act[1] (hereinafter O.P.) provided that the prisoners convicted for particularly serious crimes, such as mafia offences and terrorism, could only be granted special prison benefits upon request if they cooperated with the judicial system. In other words, should a convicted prisoner for one of the offences listed in Article 4-bis O.P. had not cooperated with judicial authorities,[2] he or she would not have been eligible for parole or other beneficial treatments, such as the possibility to obtain temporary release, alternative measures to detention, or to work outside the prison.

In the case *Viola v. Italy (n. 2)*[3] the European Court of Human Rights (hereinafter ECtHR) highly criticized the approach of Article 4-bis O.P., as formulated before the enactment of reform in 2022.[4] More specifically, the ECtHR considered that the absolute presumption set forth by the provision prevented the competent court from reviewing the application for conditional release and whether the applicant had made progress towards rehabilitation that the detention could no longer be justified on legitimate penological grounds. The Court ultimately found the violation of Article 3 European Convention of Human Rights (hereinafter ECHR) claiming that *ergastolo ostativo*, as provided by the law in force at that time, drastically limited both the prospect of release of the prisoner and the possibility of a review.

On October 2022, three years after the ECtHR's judgement *Viola v. Italy*, the Italian Government, with Law Decree D.L. 162/2022, converted into law L. 199/2022, reformed the legislative framework of the *ergastolo ostativo*. Nevertheless, the Law poses no few problems with regard to the compatibility of the new formulation of *ergastolo*

[1] Law July 26, 1975 n. 354 (Norme sull'Ordinamento Penitenziario e sull'esecuzione delle misure privative e limitative della libertà).

[2] According Article 58-ter O.P. to effectively cooperate with law enforcement and judicial authorities means to make efforts to prevent the criminal activity from being carried to further consequences or concretely assist the police or judicial authority in gathering decisive elements for the reconstruction of the facts and for the identification or capture of the perpetrators of the crimes.

[3] *Marcello Viola v Italy (n° 2)* App no 14612/19 (ECtHR, 13 June 2019).

[4] Law December 30, 2022 n. 199.

*ostativo* with the principles enshrined in the ECHR.

Indeed, the present work, after a short analysis of Article 3 ECHR, will retrace the main ECtHR's case law on life imprisonment (section 2). Subsequently, a detailed study of the new legislative system of *ergastolo ostativo* will be given (section 3), focusing the attention on the analysis of the possible challenges of *ergastolo ostativo* to the ECHR, with the aim to find whether the new legislative framework results in degrading treatment in violation of Article 3 ECHR and whether the review of the sentence is *de facto* irreducible. Finally, the last section (section 4) will provide some recommendations to the Italian legislator on how the amended framework could potentially be reformed in light to the ECHR principles.

## *2. Article 3 ECHR: principles on life imprisonment*

Article 3 ECHR is considered to be one of the core rights of the Convention and 'one of the fundamental values of democratic societies',[5] Together with Article 2, the right to life represents one of the most important pillars within the context of human rights. In fact, under no circumstance is a derogation possible (*jus cogens*),[6] not even in case of public danger,[7] regardless of the nature of the offence committed.[8]

Although very clear in its formulation, Article 3 gave rise to a proliferation of case law by the ECtHR,[9] aimed at assessing whether life imprisonment[10] is in violation of the

[5] *Saadi v Italy*, App no 37201/06, para 127 (ECtHR, 28 February 2008).

[6] Article 15(2) ECHR.

[7] *Ireland v the United Kingdom*, App no 5310/71, para 1631(ECtHR, 8 January 1978): '(…) there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation (…)'.

[8] *Indelicato c Italie*, App no 31143/96 (ECtHR,18 October 2001), para 30; '(…) La nature de l'infraction qui était reprochée au requérant est donc dépourvue de pertinence pour l'examen sous l'angle de l'article 3'.

[9] P Duffy, 'Article 3 of the European Convention on Human Rights' (1983) 32 International & Comparative Law Quarterly 316.

[10] Life imprisonment has been defined as a form of punishment pursuant to which a prisoner, as a result of a criminal conviction, is detained for his entire life See Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press, 2019) 35.

Convention. On the one hand, the Convention does not expressly prohibit the imposition of life sentences on Contracting States. However, on the other hand, it is self-evident that such a form of punishment poses not few concerns with regard to human rights. Particularly, the judgments rendered by the ECtHR concern claims alleging both degrading treatment and an incompatibility with the human dignity of whole-life sentences.

In accordance with Article 3, 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. In particular, torture was defined by the European Commission on Human Rights in the *Greek* Case as 'an inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment'.[11] Inhumane are all treatments that cause not only physical but also mental unjustifiable severe suffering. Of course, not all ill treatments can be labeled as inhumane treatments. As the Court stated in *Gäfgen v. Germany*, 'in order for an ill-treatment to fall within the scope of Article 3, it must attain a minimum level of severity'[12] meaning that it requires a sufficient degree of suffering or infliction of pain. Such minimum level of severity is assessed, as the Court recalled, having regard to the circumstances of the case, such as the duration of such treatment, and the mental and/or physical effect produced.[13] To assess whether an ill-treatment can be classified as torture two conditions have to be met: 1) there must be a severe treatment, causing a very serious and cruel suffering; 2) such severe pain must be inflicted with the aim of obtaining information, inflicting punishment, or intimidating.[14]

Whereas, a degrading treatment can be classified as a punishment or other treatment aimed at degrading or 'grossly' humiliating a person in front of another individual, including treatments that compel the victim to act against his will.[15] As it can be inferred, it is very difficult to draw a line between degrading treatment and

[11] The Greek Case (1969) 12 Yearbook of the European Convention on Human Rights 186.

[12] *Gäfgen v Germany* App no 22978/05 (ECtHR,1 June 2010) para 88.

[13] *Jalloh v Germany* App no 54810/00 (ECtHR, 17 July 2006) para 67.

[14] *Gäfgen* (n 12) para 63.

[15] Directorate of Human Rights Council of Europe, *Yearbook of the European Convention on Human Rights* 12 (Springer Dordrecht, 1969) 186.

treatments that fall outside the scope of the Convention. This difficulty is mainly due to the crucial role that the subjective element of torture – namely how the victim perceives the treatment –, plays in the definition of the offence.[16]

As above mentioned, the challenges to Article 3 ECHR arise specifically with regard to the claim of inhumane and degrading treatment of whole-life sentences. Because of the extremely intrusive nature of such punishment, the ECtHR elaborated a set of criteria that have to be fulfilled in order for a life sentence to fall under the scope of Article 3 ECHR. Indeed, in the next sections, the main principles of life imprisonment elaborated by the ECtHR will be examined, through an accurate analysis of the main Court's jurisprudence.

### *2.1. The compatibility of life imprisonment with the ECHR*

As a preliminary notion, the Court has always stressed that only States are competent to design penal policies and to establish the conditions for the sentences' review mechanisms. Nevertheless, the Court constantly reminded that such policies must be implemented in light of the principles of the Convention.

As well described by the Chamber in the *Vinter* case,[17] there are three different types of life sentence: 1) a life sentence that provides the eligibility of release after having served a part of it; 2) a life sentence required by the law that does not contain any provision concerning the possibility for parole which requires a judicial decision in order to be imposed; 3) a life sentence without the possibility of parole imposed by a judge who has no discretion as to whether impose it or not.[18] The Chamber, as reported by the Court in *Vinter,* found that no issue arise with regard to the first type of sentence. The most problematic types of whole-life sentences are undoubtedly the second and the third. Indeed, the focus of the ECtHR's judgments that will be analyzed in the following lines primarily concerns these two types of life sentences.

In the first place, as previously mentioned, and as recalled several times by the

[16] Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd ed Oxford University Press, 2015) 94.

[17] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013).

[18] ibid para 84.

ECtHR, the imposition of a life sentence on adults is not *per se* contrary to the scope of the Convention.[19] Nevertheless, the Court found that, because a life sentence without parole may raise issues with regard to the compatibility with Article 3,[20] minimum guarantees have to be met when imposing such a form of punishment.

### *2.1.1. The prospect of release and the possibility of a review: the de facto and de jure reducibility of whole life sentences*

According to the Court, in order for a life sentence to be compatible with Article 3 ECHR, there must be a prospect of release[21] and a possibility of a review.[22] This means that, when evaluating the compatibility of life imprisonment to Article 3, the attention must be focused on finding whether there is any hope for the prisoner to be released.[23] And such a requirement is met when the sentence is *de jure* and *de facto* reducible. With the wording '*de jure*' the Court intended to say that in domestic systems must exist a norm that expressly provides for an effective mechanism of review of the sentence. Whereas *'de facto*' has been interpreted as meaning that the prisoner must not be deprived of a concrete prospect of release. In other words, 'the prospect of release must exist in concrete terms',[24] namely there must be a 'genuine possibility of release'.[25] Nevertheless, as highlighted by the Court in *Kafkaris*, the Convention does not grant persons serving life sentences the right to early release, nor the right to the termination or remission of the sentence through an administrative or judicial review.[26]

Indeed, as it can be observed, the concept of reducibility of a life sentence appears to be strictly related to the concept of (early) release, which is itself subordinate

[19] *Kafkaris v Cyprus* App n 21906/04 (ECtHR, 12 February 2008) para 97 and references cited therein.

[20] See generally, *Nivette v France* App no 44190/98 (ECtHR, 3 July 2001); *Einhorn v France* App no 71555/01 (ECtHR, 16 October 2001); *Stanford v the United Kingdom* App no 16756/90 (ECtHR, 23 February 1994).

[21] *Kafkaris* (n 19) para 98.

[22] *Vinter* (n 17), para 110.

[23] *Iorgov v Bulgaria (no 2)* App no 36295/02 (ECtHR, 2 September 2010) para 49.

[24] *Kafkaris* (n 19) Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens, para 2.

[25] ibid.

[26] *Kafkaris* (n 19) para 99.

to the existence of a review mechanism. Accordingly, the presence of a provision under national law that allows the judge to at least take into account the possibility of an early release is to be considered a crucial factor when the compatibility of a life sentence to the Convention is assessed.[27] In this regard, it is interesting to note how the Court in *Kafkaris* affirmed that the existence of such a provision should be only considered as a crucial factor that has to be taken into account, rather than decisive criteria for assessing whether there has been a violation of Article 3.[28]

### *2.1.2. The legitimate penological grounds*

All the above mentioned is not to say that a sentence that must be served in full is *per se* contrary to the scope of Article 3.[29] In fact, a prisoner might be obliged to serve the full sentence if, after having been considered for (early) release, or she is refused 'on the ground that he or she continued to pose a danger to society'.[30] In this regard, the Court recalled that States have the obligation to take measures for the protection of society from violent crimes.[31] For this purpose, it might be necessary to impose an indeterminate (life) sentence that entails a continued detention of the dangerous prisoner.[32] Hence, it is enough that the sentence is *de jure* and *de facto* reducible, meaning that national law must provide for a review mechanism aimed at finding whether the changes and the progress in the life of the prisoner are so significant, that detention can no longer be justified on 'legitimate penological grounds'.[33] A detention can be considered to be justified on legitimate penological grounds when its primary aim(s) is/are either

[27] ibid.

[28] Francesco Viganò, 'Ergastolo senza speranza di liberazione condizionale e art. 3 CEDU: (poche) luci e (molte) ombre in due recenti sentenze della Corte di Strasburgo' (2012) Diritto Penale Contemporaneo 3.

[29] *Kafkaris* (n 19) para 98; *Vinter* (n 17), para 108.

[30] *Vinter* (n 17), para 108.

[31] *Osman v the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) para 115.

[32] *Dickson v the United Kingdom* App no 44362/04 (ECtHR, 4 December 2007) para 75; *Vinter* (n 17), para 108; *T v the United Kingdom* App no 24724/94 (ECtHR, 16 December 1999) para 97; *V v the United Kingdom* App no 24888/94 (ECtHR, 16 December 1999) para 98.

[33] *Vinter* (n 17), para 119.

punishment, deterrence, public protection, or rehabilitation.[34] Should at least one of these 'penological grounds' not be present at the time when a life sentence is imposed, a prisoner cannot be lawfully and legitimately detained.[35] Of course, as the Court noted in *Vinter,* such penological grounds, on which the detention must be justified, may change throughout the course of the sentence. Thus, for this reason, it is crucial to carry out 'the review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated'.[36]

### *2.1.3 The role of rehabilitation and the right to hope*

The Court noted that within the European penal policy, much more emphasis has been placed on rehabilitation and reintegration. These two facts have both become two crucial penological grounds that Contracting States have to take into consideration while implementing their penal policies.[37] On the other hand, it has been pointed out that the Convention itself does not guarantee *per se* a right to rehabilitation of the prisoners. Hence, Article 3 cannot be interpreted as imposing an absolute duty for prison authority to engage prisoners in rehabilitative and social reintegrative programs and activities.[38] However, the Court stressed that Article 3 has to be interpreted as requiring those authorities to give life sentence prisoners not only 'a chance, however remote, to someday regain their freedom, but also a real opportunity to rehabilitate themselves', in order to make that chance 'genuine and tangible'.[39] Indeed, depriving a whole-life prisoner of his or her freedom, without giving him or her any possibility of rehabilitation nor the 'chance to regain that freedom at some future date' would be incompatible with human dignity and would entail a degrading treatment contrary to the scope of the Convention. In other words, a prisoner convicted of life term

[34] *Vinter* (n 17), para 111.

[35] ibid.

[36] ibid.

[37] *Dickson* (n 32) para 75; See also *Harakchiev and Tolumov v Bulgaria* App no 15018/11, 61199/12 (ECtHR , 8 July 2014) para 243-246; *Khoroshenko v Russia* App no 41418/04 (ECtHR, 30 June 2015) para 121.

[38] *Harakchiev and Tolumov* (37) para 264.

[39] ibid.

imprisonment must be guaranteed the so-called 'right to hope',[40] namely the right 'to know, at the outset of his sentence, what he must do to be considered for release and under what conditions'[41]. In fact, the knowledge of the conditions for release allows prisoners to properly work on the pathway toward rehabilitation and social reintegration.[42] The Court stressed the importance of the rehabilitative principle also in *Dickson* where it clearly showed support for the principle of progression, according to which the more advanced the sentencing stage, more room should be given to rehabilitation, and less to retribution.[43]

Thus, it is possible to infer that the concepts of 'right to hope', rehabilitation, and social reintegration are interrelated as each of them strives for the protection of the human dignity of whole-life prisoners. Precisely, what links human dignity to the right to hope is the concept of the right to personal development that must be ensured for the convicted prisoner.[44] In light of what has been said so far, it can be concluded that aiming at the rehabilitation of the prisoner without giving him the right to hope or provide of the possibility of a review without a path toward rehabilitation, would be irrational[45] and contrary to the principles enshrined in the Convention.

### *2.1.4. The review of the sentence: general conditions*

It has to be reminded that is not the Court's task to establish the form and timing in which the review should take place, as this is left to the discretion of Contracting States.[46]

[40] *Vinter* (n 17), para 122: '(…) who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading'. (Concurring opinion of Judge Power-Forde).

[41] ibid para 122.

[42] Gustavo Minervini, 'Viola v Italy: A First Step Towards the End of Life Imprisonment in Italy' (2020) 29 The Italian Yearbook of International Law Online 217, 244.

[43] *Dickson* (n 32) para 28.

[44] Smit and Appleton (n 10) 298.

[45] Minervini (n 42) 225.

[46] *Vinter* (n 17), para 120.

Contrarily, the Court's main task is to make sure that domestic law of Contracting States provides for the possibility of such review and sanction the States where whole life sentences do not meet the standards of Article 3 of the Convention, namely where such review mechanisms are absent.[47] Should domestic law not provide any mechanism or possibility of reviewing a whole life sentence, Article 3 is to be considered violated from the moment of the imposition of such a sentence.[48] States are not only required to provide a review mechanism under their national law, but they must make clear under what conditions a whole-life prisoner might be taken into account for release.[49] Indeed, where an 'objective, pre-established criteria of which the prisoner [have] precise cognizance at the time of imposition of the life sentence' is lacking, a violation of Article 3 for the inadequacy of a sentence review mechanism would occur.[50]

In sum, the review mechanism, in order to be compliant with Article 3 ECHR must follow the following principles, as pointed out by Judge Pinto Albuquerque in his partly dissenting opinion in the case of *Murray v. the Netherlands:*[51]

1) The principle of legality ("rules having a sufficient degree of clarity and certainty," "conditions laid down in domestic legislation");

2) The principle of the assessment of penological grounds for continued incarceration, on the basis of "objective, pre-established criteria," which include resocialization (special prevention), deterrence (general prevention), and retribution;

3) The principle of assessment within a pre-established time frame and, in the case of life prisoners, "not later than 25 years after the imposition of the sentence and thereafter a periodic review";

4) The principle of fair procedural guarantees, which include at least the obligation to give reasons for decisions not to release or to recall a prisoner;

5) The principle of judicial review.

[47] ibid, para 121.

[48] ibid, para 122.

[49] ibid.

[50] *Trabelsi v Belgium* App no 140/10 (ECtHR,4 September 2014) para 137.

[51] Partly dissenting opinion, Judge Pinto de Albuquerque, *Murray v the Netherlands*, App no 10511/10 (ECtHR, 26 April 2016) 52.

### *2.1.5. The presidential pardon*

At this point, the following question should be addressed: is the sole possibility under the national law of adjustment of a life sentence through presidential pardon or clemency sufficient for the purpose of Article 3 ECHR? In this regard, the Court found no violation of the Convention when such possibility is given only in the form of pardon/commutation of the President,[52] or it is subject only to the discretion of the Head of State.[53] However, where the mere provision of presidential clemency under domestic law is completely detached from any assessment concerning the eligibility for release on parole, such provision would be in contrast with the Convention. In fact, it would not allow prisoners to know under what conditions they might be considered for release.[54] And this is even more evident where the provisions concerning presidential clemency are extremely vague,[55] or where there is no obligation for the President to motivate the decisions on clemency.[56]

### *2.1.6. The timing of the review: the twenty-five years criteria*

Until 2011, the ECtHR's case law on life imprisonment had primarily concerned the nature of such punishment. Only after 2011, had the Court started to also examine issues regarding the duration of the imprisonment. Be as it may, throughout the course of the years, the Court has always highlighted that it is not the Court's task to establish neither the appropriate length of detention nor the timing in which the review should take place.[57] Nevertheless, the Court, in the last fifteen years, tried to interpret the cases at issue in light of the comparative and international law

[52] *Iorgov* (n 23) para 51-60.

[53] *Kafkaris* (n 19) para 103.

[54] *László Magyar v Hungary* App no 73593/10 (ECtHR, 20 May 2014). para 58.

[55] *Trabelsi* (n 50) para 133-138. For instance, in the case of *Petukhov,* domestic law provided that presidential clemency could have been granted in 'exceptional and extraordinary circumstances', without specifying what those terms meant (*Petukhov v Ukraine (no 2)* App no 41216/13 ECtHR, 12 March 2019 para 173).

[56] *Murray v the Netherlands* (n 51) para 100.

[57] See, ex multis, *T v the United Kingdom* (n 32) para 117; *V v the United Kingdom* (n 32) para 118; *Vinter* (n 18), para 105.

practice of the Contracting States. Very peculiar, and different from the *post-Vinter* scenario, is the case of *Törköly* where the Court found that a prisoner who would become eligible for conditional release after forty years of imprisonment constituted 'a distant but a real possibility'.[58] Contrarily, in 2016 and in 2021, respectively in the case of *T.P. and A.T. v. Hungary*[59] and in *Sandor Varga and others v. Hungary,*[60] the Court found that the possibility of parole after forty years of imprisonment is incompatible with the meaning of Article 3 ECHR.

Indeed, it is clear that from *Vinter* onwards, the Court has been sufficiently consistent in remarking the comparative and international support for a review mechanism capable of being activated no later than twenty-five years after the imposition of a life sentence, 'with periodic review thereafter'.[61] In support of this argument, the Court in *Vinter* cited, *ex multis,* the provision under the International Criminal Court's s Statues, which is considered to set international standards, where Article 110(3) provides that the review of a sentence shall not be conducted before the prisoner convicted to life imprisonment has served at least twenty-five years of the sentence. Interestingly, this European and international trend, namely the (potential) release after having served twenty-five years of the sentence, according to Van Zyl Smit and Appleton, certifies the European and International attention to the right of the prisoner to resocialization.[62]

For instance, the Court found no violation of Article 3 in the case of *Čačko* where the domestic law at issue provided for the possibility for a whole-life prisoner to be conditionally released after having served twenty-five years of his term.[63] Analogously, in *Bodein* the Court considered the applicant's sentence to be in compliance with the criteria established in *Vinter*, as he was eligible to apply for release twenty-six years after

[58] *Törköly v Hungary (dec)* App no 4413/06 (ECtHR) p 5.

[59] See generally, *T.p and A.t v Hungary* App no 37871/14, 73986/14 (ECtHR, 4 June 2016).

[60] *Sandor Varga and others v Hungary* App no 39734/15, 35530/16 and 26804/18 (ECtHR, 17 June 2021).

[61] *Vinter* (n 17) para 120; *Murray* (n 51) para 99; *Hutchinson v. The United Kingdom* App no 57592/08 (ECtHR, January 17 2017) para 69.

[62] Smit and Appleton (n 10) 216.

[63] *Čačko v Slovakia* App no 49905/08 (ECtHR, 22 July 2014) para 77.

the imposition of the life sentence, even though under domestic law the review was possible after 30 years' incarceration, well beyond the abovementioned international supported standards. In this regard, the Court clarified that the timing for the review mechanism should be calculated from the imposition of the sentence and not from the very first incarceration, which it might take place before any judgment is rendered as a security measure. Hence, as a general principle, it can be said that a period of about twenty-five years or less, which run from the moment in which the life sentence is imposed, is sufficient to consider a life sentence as reducible.[64]

### *2.2. The case of Viola v. Italy*

On June 2019 the Grand Chamber of the ECtHR in the case of *Viola v. Italy* rendered a decision concerning the compatibility of Article 4-bis of the Italian Prison Administration Act L. 354/1975 (hereinafter P.A.) with Article 3 ECHR. The case dealt with the reducibility of a life sentence imposed on a person who was found guilty of crimes committed within the context of a mafia criminal organization. This type of life sentence (also commonly referred to as *ergastolo ostativo*), before the reform enacted in November 2022 provided, as described in Chapter 1, that a prisoner convicted for particularly serious offences, such as Mafia offences or terrorism, could not be eligible for release on parole or other beneficial treatments, such as the possibility to work outside the prison and alternative measures to detention, unless he did cooperate with law enforcement, except for the hypothesis that such collaboration was considered to be 'impossible' or 'irrelevant'. The Grand Chamber ultimately found that this type of life imprisonment was in violation of Article 3 ECHR, as the applicant's sentence was *de facto* irreducible.

#### *2.2.1. The case*

The judicial development of this case is particularly complex. In the following lines, we will try to point out the relevant facts that led the applicant to file an appeal to the ECtHR. In the first place, it has to be highlighted that the applicant was convicted

[64] *Murray* (n 51) para 99; *Vella v Malta (déc)* App no 14612/19 (ECtHR, 27 February 2018) para 19.

several times by different courts. The first trial was held between 1990 and 1992 at the end of which the Court of Assize of Appeal of Reggio Calabria in 1999 convicted Mr. Viola to twelve years of imprisonment. In the second trial, also known as the 'Taurus Trial', he was convicted to life imprisonment again by the Court of Assize of Appeal of Reggio Calabria in 2002. In both trials, the applicant was convicted for having committed several crimes, including the crime *ex* Article 416-bis Italian Criminal Code (*associazione di stampo mafioso*).[65] Then, he was subject to the special detention regime 41-bis O.P. between 2000 and 2006, until the *Tribunale di Sorveglianza* revoked such measure in 2006. Subsequently, later in the years, he filed two requests for the obtainment of a temporary release (*permesso premio*), which were both rejected respectively in 2011 and in 2015. Simultaneously, in 2015, Mr. Viola presented also a request for release on parole (*liberazione condizionale*) *ex* Article 176 c.p. to the *Tribunale di Sorveglianza* of L'Aquila. As grounds, he claimed the good behavior taken in prison, and the absence of links with criminal organizations, alleging also the unconstitutionality of Article 4-bis O.P. for contrasting both with Article 27(3) of the Italian Constitution and with Article 3 ECHR. His request was first rejected on May 2015 on the basis that because of Article 4-bis O.P. the applicant could not be considered to be eligible for release on parole, as the collaboration with judicial authorities, which in that circumstance was not neither 'impossible' nor 'irrelevant', was lacking. Against this decision, Mr. Viola filed an appeal to the Italian Court of Cassation in which he claimed the unconstitutionality of the provision at hand, in the extent to which it did provide a legal mechanism that rendered the 'non-collaborative' prisoner unable to obtain the release on parole. However, the Court of Cassation rejected his appeal with the judgment N. 1153/16, in which it pointed out the absolute character of the

[65] This offence does not have a proper translation since only the Italian system of criminal justice does have a specific provision within the criminal code (Art. 416-bis) specifically aimed at contrasting Mafia Associations and crimes linked to it. A 'forced' translation of *associazione di stampo mafioso* could be 'Mafia-type criminal association/organization': 'The association is a Mafia-type criminal association when the participants take advantage of the intimidating power of the association and of the resulting condition of submission and silence to commit offences, to manage or control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for any other persons, or with the aim of stopping or making it difficult to exercise the free right to vote, or to organize votes for themselves or others during public elections'.

presumption of social dangerousness in case of absence of collaboration and the total discretion of the legislator to determine the requirements that have to be met for the obtainment of the release on parole.[66] Hence, the applicant ultimately started the proceedings before the ECtHR, complaining about the violation of Article 3 ECHR, as the life sentence it was imposed on him was *de facto* and *de jure* irreducible.

### *2.2.2. The decision of the Court*

The Court, in deciding over the issue, in the first place, took into account both the national legislation and the relevant case law of the Court of Cassation and of the *Corte Costituzionale*. In analyzing the jurisprudence of these two Courts, not only did the ECtHR find that the principles of rehabilitation and resocialization of the punishment were two core principles in the Italian system of criminal justice,[67] but also that the *ergastolo ostativo* was found to be compatible with the Italian Constitution.[68]

Subsequently, after having recalled principles on life imprisonment elaborated by the ECtHR in *Vinter*, *Kafkaris*, *Murrary*, and *Hutchison*, the Court undertook the analysis of the case at hand. In order to assess whether the sentence of Mr. Viola was *de jure* and *de facto* reducible, the Court focused its attention, particularly on the relationship collaboration-eligibility for obtaining benefits. In other words, the Court's aim was to find to what extent the subordination of the eligibility for the obtainment of parole or temporary releases to the collaboration with judicial authorities was in compliance with Article 3 ECHR.

The Court started by pinpointing that the access to release on parole and to the other benefits was not entirely precluded by the system in force back then. Rather it was subject to the collaboration of the prisoner with judicial authorities.[69] Then, the Court acknowledged the complexity and gravity of the mafia phenomenon, which is characterized by an ongoing adherence to the criminal belief of the members, which led the Italian legislator to prioritize general prevention and public safety. In other words,

[66] *Viola* (n 3) para 28.

[67] See e.g. Corte Cost., 4 February 1966, n.12; Corte Cost., 4 July 1990, n. 313.

[68] *See*, ex multis, Corte Cost., 8 June 1993, n. 306.

[69] *Viola* (n 3) para 101.

the Court was fully aware that Article 4-bis O.P. did constitute a precious resource within the war against mafia. Nevertheless, the Court questioned the legitimacy of *ergastolo ostativo* insofar as it subordinated the release on parole and other beneficial treatments to the collaboration of the prisoner. If on the one hand, the system then in force gave the prisoner the freedom of choice as to whether to collaborate or not, the Court 1) doubted the freedom of that choice and 2) highly questioned the equivalence: absence of collaboration = social dangerousness.[70] With regard to the first issue, the Court noted that the choice to not collaborate may depend on the fear of putting the lives of the prisoner and of his relatives in serious danger. Hence, a lack of cooperation, according to the Court, cannot always be considered a result of a free choice and something from which it is possible to unquestionably infer the ongoing support to the criminal organization.[71] With regard to the second issue, the Court argued that the derivation of an absolute presumption of social dangerousness from a lack of collaboration of the prisoner does not allow to take into account other circumstances relevant for assessing the progress made towards rehabilitation.[72] In fact, as argued among scholars, such equivalence "freezes" the absolute presumption of social dangerousness at the time of the commission of the offence,[73] and did not reflect the progress made by the prisoner.[74] In other words, for the prisoner convicted to *ergastolo ostativo*, it was as if the time stopped at the moment of the reading of the sentence at the end of the trial. Whereas the Court reasonably observed that the personality of a convicted prisoner evolves during the period of detention, being that the ultimate scope of the detention, in accordance with the rehabilitation principle.[75] Hence, the Court declared the violation of Article 3

[70] *Viola* (n 3) para 116. See also, Serena Santini, 'Anche gli ergastolani ostativi hanno diritto a una concreta "via di scampo": dalla Corte di Strasburgo un monito al rispetto della dignità umana' (2019) Diritto Penale Contemporaneo 4.

[71] *Viola* (n 3) para 118. In this regard, see also Marina Silvia Mori, 'Prime osservazioni sulla sentenza Marcello Viola c. Italia (n. 2) in materia di ergastolo ostativo' (2019) 6 Giurisprudenza penale 7.

[72] *Viola* (n 3) para 121.

[73] Minervini (n 42) 226; Maria Rosaria Donnarumma, 'La funzione rieducativa della pena e l'ergastolo "ostativo"' (2020) Giurisprudenza penale 6. See also Francesco Viggiani, 'Viola n. 2: La mancata collaborazione quale automatismo legislativo, lesivo della dignità dell'ergastolano ostativo' (2019) 3 Diritti umani e diritto internazionale 646, 652.

[74] Mori (n 71) 7.

[75] *Viola* (n 4) para 125.

ECHR on the basis that the abovementioned absolute presumption provided by Article 4-bis O.P. *de facto* prevented the judge from correctly assessing: 1) the request for the release on parole; and 2) whether, during the course of the sentence, the applicant had made substantial progress toward rehabilitation so that detention could not have been justified on legitimate penological grounds. Further, as to the claim of the Government pursuant to which the applicant in any event could have received presidential clemency or requested the release on parole for medical reasons, the Court, by recalling its jurisprudence on the matter, clearly said that a prisoner convicted to life imprisonment, such as the applicant, cannot be said to have a *prospect of release*, just for the fact he can potentially rely on clemency or on grounds of health or age.[76]

### *3. The new Article 4-bis O.P.*

According to the new provisions, the lack of collaboration with judicial authorities and law enforcement does not automatically preclude access to prison benefits *ex* Article 4-bis (1) O.P.. The previous system was reformed in light of the judgments rendered by the ECtHR[77] and the Italian Constitutional Court.[78] The two courts highly condemned the absolute character of the presumption of the dangerousness of the non-collaborative prisoner.[79]

Indeed, the new regime, allows also non-collaborative prisoners to obtain the

[76] ibid para 133. See also, *Kafkaris* (n 19) para 127; *Öcalan v Turkey (no 2),* App no 24069/03, 197/04, 6201/06, 10464/07 (ECtHR, 18 March 2014) para 203; *László Magyar* (n 54) para 57-58.

[77] *Viola* (n 3).

[78] Corte Cost., 23 October 2019, judgment n. 253; Corte Cost., 15 April 2021, judgment n. 97.

[79] In the case of *Viola* (n 3), the ECtHR ruled that the life sentence (*ergastolo ostativo*) imposed on the applicant restricted both his prospects of release and the possibility of the review. Indeed, the Court found that applicant's sentence was de facto irreducible, as the abovementioned absolute presumption provided by Article 4-bis O.P. prevented the judge correctly assess: 1) the request for the release on parole; and 2) whether, during the course of the sentence, the applicant had made substantial progress toward rehabilitation so that a detention could not have been justified on legitimate penological grounds. With regard to the judgment 97/2021 of the Italian Constitutional Court, the Court concluded that absolute presumption of social dangerousness inferred from the lack of collaboration – which prevent the prisoner to be considered eligible for parole or other benefits – was constitutionally illegitimate and unreasonable as was based on a generalization that can be, instead, contradicted from ordinary facts (para. 6-7).

aforementioned prison benefits, under certain conditions. The new provision requires, by inverting the onus of proof, the allegation by the prisoner of additional facts and to the evaluation of additional circumstance that does not strictly concern the rehabilitation of the prisoners and the assessment of his social dangerousness. Indeed, according to the new formulation of Article 4-bis(1-bis), the prisoner convicted to *ergastolo ostativo* shall be considered eligible for prison benefits, also in absence of an 'effective collaboration' *ex* Article 58-ter O.P., under certain strict conditions. In brief, the prisoner is required to prove: 1) the absence of any links with the 'criminal context in which the crime was committed', and 2) the danger of the restoration of such link. In order to prove his present and future detachment from the criminal context, the prisoner shall also prove additional circumstances. In the first place, he shall prove either the fulfillment of any civil obligations and pecuniary reparation obligations resulting from the conviction, or the impossibility of such reparation. In the second place, the prisoner shall pinpoint 'specific, different and additional circumstances' other than the prison behavior, the participation in the rehabilitation process, and the mere declaration of detachment from the criminal context. In order to assess whether the detachment of the prisoner from any possible criminal context took place, the judge (*magistrato di sorveglianza*) will take into account also: 1) the personal circumstances; 2) the alleged reasons for the non-collaboration with the justice authorities, and 3) any other available information, including whether any form of reparation or restoration took place.

Indeed, the next sections will be aimed at analyzing in detail the current provision. In particular, section 3 will examine the requirement of damage compensation, whereas section 4 will reason upon the 'additional, specific and different elements'.

### *3.1. The fulfillment of civil obligations and pecuniary damage caused by the crime or the proof of the impossibility to do so.*

In the first place, in order to overcome the abovementioned presumption of social dangerousness, the prisoner is now asked to prove the fulfillment of civil obligations and pecuniary reparation obligations resulting from the conviction (damage compensation). Where this would result impossible, the prisoner must prove the (absolute) impossibility of this reparation. However, to which extent is it legitimate to subordinate the access of these benefits to the fulfillment of pecuniary and civil

obligations by the prisoner? The ECtHR in *Matiošaitis and Others v Lithuania*[80] partially tried to give an answer to this question. The underlying case concerned the granting of the presidential pardon. For this purpose, according to the national legislation, judicial authorities were required to take into account whether the compensation for pecuniary damage caused by the crime had been paid. Interestingly, the Court found that such criteria was legitimate, as it allowed the President to assess whether a life prisoner's continued imprisonment was justified on legitimate penological grounds.[81]

Under the Italian Criminal Code, the release on parole (*liberazione condizionale*) and presidential clemency (*grazia*) are causes of extinction of the sentence (*cause di estinzione della pena*). As such, they are subject to the fulfillment of civil obligations arising out of the judgment. Instead, the temporary releases, the work outside the prison, and the alternative measures to detention cannot be classified as causes of extinction of the sentence: they are prison benefits, more or less temporary, or different ways of serving a sentence. On one hand, it can be said that it might be reasonable to require the fulfillment of the aforementioned obligations as a precondition for granting measures of extinction of the sentence (such as the release on parole). In fact, these measures entail a complete assessment of whether a life prisoner's continued imprisonment is justified on legitimate penological grounds. On the other hand, it can be argued that requiring damage compensation and the fulfillment of civil obligations for the prison benefits other than the release on parole, seems disproportionate. In fact, those measures do not imply a full assessment of the rehabilitation of the prisoner. Only the release on parole or presidential clemency can be said to imply such an assessment. Instead, these measures are supposed to further the process of rehabilitation and social reintegration of the prisoner. Even a single temporary release, such as a day out of prison for work reasons, or a single day of social service probation can have extremely beneficial effects on the prisoner. Thus, it can be concluded that requiring the fulfillment of civil obligations and compensation for damages even to access prison benefits other than

[80] *Matiošaitis and Others v Lithuania,* App no 22662/13, 51059/13, 58823/13, 59692/13, 60115/13, 69425/13 (ECtHR, 23 May 2017).

[81] ibid para 168. Examples of 'legitimate penological grounds' are e.g. punishment, deterrence, protection of the public and rehabilitation (*Vinter* (n 17), para 14).

conditional release, because they make the access to these measures more difficult, the rehabilitation process may be obstructed *a priori*, where the prisoner should not be able to fulfill these obligations.

At this point, another question arises: to what extent can the lack of fulfillment of pecuniary and civil obligation be classified as an element from which to infer the social dangerousness of a prisoner? It can be argued that the fulfillment of the civil obligations and the compensation for pecuniary damages caused by the crime are not directly related to the concrete assessment of social dangerousness, namely the existence of any links between the prisoner and organized crime. In fact, a prisoner may fulfill the aforementioned obligations while nevertheless continuing to adhere to the criminal belief of their original criminal organizations and maintain a stable relationship with them. Hence, it can be concluded that from the fulfillment of civil and pecuniary obligations, it is impossible to ascertain, even only partially, whether a prisoner is still linked to a criminal organization. Accordingly, the fulfillment of civil and pecuniary obligations must not be intended as one of the factor from which to infer the lack of social dangerousness. Similarly, the lack of fulfillment of these obligations cannot be intended as a symptom of social dangerousness.

Ultimately, one could argue that the fulfillment of these obligations, in reality, is not a proper condition for the grant of the aforementioned prison benefits. In fact, according to the new provision, the prisoner may nevertheless be considered eligible for the benefits *ex* Article 4-bis (1) O.P. where the fulfillments of these obligations result to be impossible. However, the law also requires that in this case, the prisoner must prove the 'absolute impossibility' of such fulfillment. Further, not only is the new legislation silent on how the prisoner is supposed to prove such impossibility, but also it does not give any information whatsoever regarding what should be classified as an 'absolute' impossibility.

Conclusively, taking into consideration what has been said so far, the threshold for accessing these benefits seems to be very high under the new legislative framework. And the threshold seems to be even higher in the remaining part of the provision. In fact, the fulfillment of civil obligations and the payment of pecuniary damages, or alternatively the proof of the absolute impossibility of that, is not the only condition that has to be met to access the abovementioned prison benefits.

### *3.2. The 'additional, specific and different elements': the inversion of the onus of proof*

Under the new provision it is also required, through an inversion of the onus of proof, the attachment by the prisoner of 'additional, specific and different elements'. According to the new law, these elements must be additional and different from the mere prison behavior, the mere participation in the rehabilitation process, and the mere declaration of detachment from the criminal organization. From these 'additional and different elements' judicial authorities should be able to infer 1) the absence of any links with the 'context in which the crime was committed', and 2) the danger of the restoration of such links.

The new formulation of Article 4-bis(1-bis) O.P., with regard to this inversion of the onus of proof, has been partially 'suggested' by the Italian Constitutional Court. In fact, the Court in 2019 and 2021 claimed that, in absence of collaboration, the presumption of social dangerousness can be overcome by the acquisition of 'additional, congruous and specific elements'. Indeed, even in the Court's opinion, the mere participation in the rehabilitation program or the mere declaration of detachment from criminal organizations should not be sufficient to ascertain the present and future detachment of the prisoner from the criminal context.[82] With regard to the access of temporary release, the Court observed that these elements could be, for instance, the social context that prisoner would be allowed to access, albeit temporarily and episodically, as well as other information acquired by law enforcement.

Passing to the analysis of the first part of the provision, in the first place it should be pointed out that no clear definition of 'additional elements' is given, nor any criteria whatsoever useful to identify those elements. In the second place, it should be noted that the norm is unclear also as to whether these additional elements must be acquired regardless of the assessment of 1) the rehabilitation of the prisoner, 2) his declaration of the detachment of the criminal context, and 3) the prison behavior. In fact, the norm only mentions that these elements should be 'additional' and 'different' from such assessment. As regards to the *ratio legis*, it can be said that it was not the legislator's

[82] Corte Cost., 23 October 2019, judgment n. 253; Corte Cost., 15 April 2021, judgment n. 97.

intention to completely detach the evaluation of the rehabilitation process from the assessment of the social dangerousness of the prisoner. Rather it can be assumed that the intention of the legislator was to require the evaluation of the progresses toward rehabilitation made by the prisoner together with the assessment of additional circumstances, also in light of personal circumstances, of the alleged reasons of non-collaboration, of the "critical rethinking" (*revisione critica*) of the criminal conduct, and in light of any other available information. Hence, the mere participation in rehabilitation programs, the mere declaration of detachment from the criminal context, and the mere prison behavior are, indeed, not sufficient for the granting of the aforementioned prison benefits. However, Article 3 ECHR

> must be interpreted as requiring […] domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.

But how can the progresses toward rehabilitation of a prisoner be assessed, for the purpose of a future release, if his conduct and his participation in the rehabilitation programs are not even sufficient for the granting of benefits that are supposed to, instead, enhance the rehabilitation process itself?

At this point, a clarification needs to be made. According to the Court of Cassation,[83] along the same lines as the Constitutional Court,[84] Article 4-bis (1-bis) O.P. would not set *per se* an inversion of the onus of proof at the expense of the prisoner. In this regard, the Court of Cassation argued that there would be a difference between the term 'allegation' and 'proof': by requiring just the 'attachment' (*allegazione*) of 'additional, specific and different elements', the new norm would not ask the prisoner to actually 'prove' (*dimostrazione*) these elements. In the Court's opinion, only in the event that any elements from which to infer the existence of ongoing links with criminal organization come to light, the prisoner would be asked to provide contrary evidence (*elementi di prova contraria*), by the *proof*, and not the mere attachment, of these

[83] Cass., 8 March 2023, sez. I Penale, para. 9, Requisitoria per Udienza in Camera di Consiglio.

[84] Corte Cost. 10 November 2022, judgment n. 227.

elements. Be as it may, the Court's reasoning is not convincing for two sets of reasons.

In the first place, nowhere does the new formulation of Article 4-bis(1) expressly provide that the prisoner would be required to 'prove' rather than 'attach' the aforementioned additional elements in the event that evidence of his social dangerousness would arises. The norm only refers to the attachment of these additional elements as a *conditio sine qua non* for the access to the prison benefits *ex* Article 4-bis O.P., not even taking into consideration the hypothesis of emersion of evidence from which to infer the existence of links between the prisoner and the criminal organization. Nevertheless, even if the legislator's intention was to require the prisoner to 'prove', and not simply to 'attach', additional elements only when some indication of ties with organized crime would come up, the prisoner would be in any event required to provide contrary evidence 'within a reasonable period of time'. Indeed, this would result, in any event, in an inversion of the onus of proof.[85] In the second place, it is unreasonable to think that there is a difference, on a practical level, between *attachment* and *proof*. In fact, is by attaching a given circumstance that such circumstance or element is proved. In other words, it is impossible to imagine the attachment of 'additional, specific and different elements', without this attachment resulting in actual proof of those elements.

In light of all abovementioned, it is clear that what is asked to prisoners is the fulfillment and the proof of additional obligations and requirements completely detached: 1) from the assessment of the exclusion of any links with criminal organizations; 2) the assessment of the danger of the restoration of such links; 3) the assessment of the progress of the prisoner toward rehabilitation.[86] Indeed, because the benefits listed in Article 4-bis §1 O.P. it can be argued to constitute the very first step toward rehabilitation, by subordinating the access to these measures to such unreasonable[87] high burden

[85] Riccardo De Vito, 'Finisce Davvero Il "Fine Pena Mai"? Riflessioni e Interrogativi Sul Decreto-Legge Che Riscrive Il 4-Bis' (2022) <www.questionegiustizia.it/articolo/finisce-davvero-il-fine-pena-mai-riflessioni-e-interrogativi-sul-decreto-legge-che-riscrive-il-4-bis> accessed: May 2023.

[86] See also Comunicato Camere Penali, 'Rinvio della riforma Cartabia e stretta sulle ostatività: la presa di posizione dell'Unione', 31st of October 2022: 'La riscrittura del comma 1 bis dell'articolo 4bis (…) inserisce un percorso talmente contorto e ricco di requisiti aggiuntivi, tautologici o assolutamente disancorati rispetto alla congrua valutazione per la esclusione di collegamenti attuali con la criminalità organizzata e del pericolo di concreto ripristino (…)'.

[87] Patrizio Gonnella, 'Ergastolo ostativo, la riforma rischia di diventare un'occasione persa' (2022) <www.antigone.

of proof, the rehabilitation process might be seriously hindered.

It is true that the Convention does not guarantee a right to rehabilitation *per se*. Nevertheless, the ECtHR highlighted that the support and commitment to the rehabilitative aim of punishment among Contracting States, especially Italy, is undeniable.[88] In light of such wide support for rehabilitation, according to the Court, the Convention does, instead, require prison authorities put life prisoners in the conditions to rehabilitate themselves.[89] In this regard, the Court recalled in *Kaytan* v. *Turkey* that life sentence prisoners 'should be given the opportunity to progress towards rehabilitation'.[90] Further, as stressed in *Vinter*'s concurring opinion by judge Power-Forde, even prisoners who commit the most horrendous crimes 'nevertheless retain their fundamental humanity and carry within themselves the capacity to change'. Hence, they must be guaranteed the so-called right to hope, namely the right to 'hope that, someday, they may have atoned for the wrongs which they have committed'.[91]

In the case at issue, it is true that on one hand, under the new legislation, prisoners are *de jure* provided with an opportunity for rehabilitation. On the other hand, the access to the aforementioned measures, which constitutes the essence of the rehabilitation process, can be said to be *de facto* rendered impossible by a *probatio diabolica*, namely the disproportionate evidentiary regime featured by an unreasonable inversion of the onus of proof at the expenses of the prisoner. Further, with regard to the release on parole, such *probatio diabolica* also deprives the prisoners of any concrete

it/news/3416-ergastolo-ostativo-la-riforma-rischia-di-diventare-un-occasione-persa> accessed: June 2023.

[88] *Vinter* (n 17) para 118.

[89] *Harakchiev and Tolumov v Bulgaria* 15018/11, 61199/12 (ECtHR, 2014) para 264: '(…) While the Convention does not guarantee, as such, a right to rehabilitation, and while Article 3 cannot be construed as imposing on the authorities an absolute duty to provide prisoners with rehabilitation or reintegration programs and activities, such as courses or counselling, it does require the authorities to give life prisoners a chance, however remote, to someday regain their freedom. For that chance to be genuine and tangible, the authorities must also give life prisoners a real opportunity to rehabilitate themselves (…)'; *Dickson* (n 32) para 75; *Khoroshenko* (n 37) para 121; *Murray* (n 51) para 104: '(…) Life prisoners are thus to be provided with an opportunity to rehabilitate themselves. As to the extent of any obligations incumbent on States in this regard, the Court considers that even though States are not responsible for achieving the rehabilitation of life prisoners, they nevertheless have a duty to make it possible for such prisoners to rehabilitate themselves (…)'.

[90] *Kaytan v Turkey* App no 27422/05 (ECtHR, 15 September 2015) para 62.

[91] *Vinter* (n 17) concurring opinion of Judge Power-Forde 54.

prospect of release. Hence, it can be concluded that because prisoners are not given a 'real opportunity' to rehabilitate themselves nor a 'right to hope', the new formulation of Article 4-bis(1-bis) O.P., as reformed by Law 199/2022, should be considered as entailing a degrading treatment contrary to principles enshrined in Article 3 ECHR.

### *3.3. The timing of the review*

Under Article 2(1)(b) of Law 199/2022 the prisoner convicted to *ergastolo ostativo* under Article 4-bis (1) O.P. can be considered eligible for parole (*liberazione condizionale*) only after having served at least *thirty* years of their sentence, without prejudice to the conditions required by the same Article 4-bis for the granting of the aforementioned prison benefits.

From a close reading of the norms, one could immediately notice that there is a slight but important departure from the original provision. In fact, pursuant to the old regime, the prisoner convicted to *ergastolo ostativo* was considered eligible for parole after having served twenty-six years of his sentence. Hence, it is self-evident that the period after which the prisoner can request a review of his sentence has been reformed *in peius.* Indeed, at this point, it should be addressed the question of whether the timing of the new review mechanism measures up to the standards of Article 3 of the Convention.

It has been recalled several times by the ECtHR that it is not the Court's task establish neither the appropriate length of detention nor the timing in which the review should take place[92]. However, it is undeniable the comparative and international support for a review mechanism capable of being activated no later than twenty-five years after the imposition of a life sentence, 'with periodic review thereafter'.[93] It is true that the ECtHR in *Bodein v. France*,[94] for instance, found no violation of the Convention, even

[92] See, ex multis, *T v the United Kingdom* (n 32) para 117; *V v the United Kingdom* (n 32) para 118; *Vinter* (n 17), para 105.

[93] *See Vinter* (n 17), para 120; *Čačko* (n 63) para 77; *Bodein v France*, App no 40014/10 (ECtHR, 13 February 2015); *Murray* (n 51), para. 99; *Hutchinson* (n 61) para 69. More recently, the Court reiterated that the possibility of parole after forty years of imprisonment is incompatible with the meaning of Article 3 ECHR , *Sandor Varga and others* (n 60) ; See also *T.p and A.t v Hungary* (n 59).

[94] *Bodein* (n 93).

though under domestic law the review was possible after 30 years of incarceration. Nevertheless, in the underlying case, the applicant was fully eligible to apply for release twenty-six years after the imposition of his life sentence. In general, in order for a mechanism review to be compatible with the principles enshrined in Article 3 ECHR, it should entail a period of about twenty-five years or less, that run from the moment in which the life sentence is imposed.[95]

Turning back to the *ergastolo ostativo*, the new provision does not specify whether the timing of the review should be calculated from the incarceration or from the imposition of the sentence. The law only provides for the possibility to request release on parole after having served thirty years of the sentence, or, in case of temporary punishment, at least two third of it. Although very unlikely, if not impossible, considering the nature of the offenses punished *ex* Article 4-bis, it cannot be excluded that a prisoner convicted to *ergastolo ostativo* may be *de facto* considered eligible for parole (*liberazione condizionale*) well before the 30th year, as it happened in the case of *Bodein*. Nevertheless, it is evident that, in case where a prisoner is required to serve thirty years of his sentence before being considered eligible for parole, the review mechanism would fall outside the scope of the principles established in the Convention.[96] In fact, through the infliction of an aggravating treatment on prisoners who lawfully decide to not collaborate with judicial authorities,[97] such mechanism would render the sentence *de jure* irreducible, depriving the prisoner of any prospect of release.

## *4. Recommendations*

Undoubtedly, Article 4-bis O.P. has always been, and will continue to be, one of the most effective tools in the fight against the mafia; indeed, it is not conceivable to definitely set aside such an instrument. However, the new system of *ergastolo ostativo* needs to be partially reformed along the lines of what has been shown so far, bearing in

[95] *Murray* (n 51), para 99; *Vella* (n 64), para 19.

[96] ibid.; *Vella* (n 64) para 19.

[97] Comunicato Camere Penali (n 86).

mind that any reform must be carried out in light of the extreme social dangerousness of the mafia phenomenon. For this purpose, in the first place, the legislator should consider setting a different evidentiary regime for non-collaborative prisoners on the basis of the prison benefit requested (section 4.1.). In the second place, it should be (re)introduced a more simplified evidentiary regime for prisoners who did not collaborate because of their limited participation in the offence (section 4.2.). In the third place, more value should be given to the rehabilitation path and to prisoner's redemption (section 4.3.). Ultimately, the legislator should consider to lower the timing required for the review of the sentence from thirty to twenty-five years (section 4.4.).

### *4.1. Set a different evidentiary regime for non-collaborative prisoners on the basis of the prison benefit requested*

In order to reform the current system in the sense of Article 3 ECHR, in the first place the legislator should differentiate the hypothesis of non-collaborative prisoners seeking a temporary release, an alternative measure to detention or to work outside the prisoner, from non-collaborative prisoners requesting a release on parole (*liberazione condizionale*). As has been underlined in the previous subsections, the access to these measure should be differentiated, as they imply different assessments and affect sets of interests. On one hand, the release on parole requires a full assessment of 'whether there are legitimate penological grounds for the continuing incarceration of the prisoner',[98] by taking into account 1) any significant changes in the life of the prisoner and 2) the progress towards rehabilitation made in the course of the sentence.[99] On the other hand, the work outside the prison, the temporary releases, and the alternative measures to detention do not require such assessment as they do not imply a potential review of the sentence and a potential full release. Instead, if granted, these measures put the prisoners in the condition to slowly reintegrate themselves into society, but do not give them complete freedom. Hence, it is safe to say that the assessment of the social dangerousness of prisoners seeking a first opportunity to rehabilitate themselves cannot be the same

[98] *Hutchinson* (n 61) para 42.

[99] *Vinter* (n 17), para 199.

for prisoners requesting to be released: the threshold should be much lower for the first set of prisoners and higher for the second one. For this purpose, in order to render the current framework compatible with Article 3 ECHR, it could be provided that the prisoners applying for prisoner benefits other than the release on parole may be granted those benefits under a simplified evidentiary regime, with the aim of facilitating his rehabilitation process, rather than making it *de facto* impossible. For instance, in order to overcome the presumption of social dangerousness in a way that does not entail degrading treatment in violation of Article 3 ECHR, it could be provided for those prisoners to jointly take into account: 1) the participation in rehabilitation programs, as well as the prison behavior; 2) the signs of termination of the links with the criminal organizations, such as the declaration of detachment from the criminal context or the "moral redemption" of the prisoner; and 3) the social context in which the prisoner will be temporarily placed (e.g. in case of granting of a temporary release or social work). Whereas, for prisoners seeking for release on parole (*liberazione condizionale*), it could be provided a tightened evidentiary regime that would require, in addition to the evaluation of progresses toward rehabilitation and the declaration of detachment from the criminal world, also the alleged reasons for not cooperating with judicial authorities, such as the fear of retaliation against one's self or family.

As above mentioned, the fulfillment of civil and pecuniary obligations caused by the crime appears to be an unreasonable requirement for access to temporary releases, work outside the prison, and to alternative measures to detention. On the other hand, it is safe to say is not disproportionate to take into account the fulfillment of these obligations when granting the release on parole, as long as such fulfillment is not to be intended as a circumstance from which to derive the lack of social dangerousness. Indeed, we believe that the fulfillment of the aforementioned obligations should be only seen as an additional circumstance to take into account, rather than a precondition under which access to the release on parole should be subject.

In any event, regardless of whether a prisoner is asking for the release on parole or for other prison benefits, the burden of proof should not be on him. Rather, it should be on judicial authorities who should deeply investigate the reasons for non-collabora-

tion, as also suggested in the *Progetto della Commissione Francesco Palazzo,* 2013.[100]

***4.2. (Re)introduce a more simplified evidentiary regime for prisoners who did not collaborate because of their limited participation in the offence***

Then – along the lines of what the Italian Constitutional Court held in 1994[101] –, it should be re-introduced the possibility to grant the prison benefits *ex* Article 4-bis to the prisoners who were not capable of collaborating because of their limited participation in the criminal offenses and/or their marginal role in the association. For this category of prisoners, it could be introduced a more simplified evidentiary regime – as they can be assumed to be less socially dangerous – that would only require the assessment of exclusion of any link with organized crime through a mere declaration of detachment from criminal organizations.

***4.3. Give more value to the rehabilitation path and to prisoner's redemption***

It is true that from the participation in rehabilitation programs, from the prison behavior, and from the mere declaration of detachment from the criminal context it cannot be univocally inferred a lack of social dangerousness. In fact, a criminal may have progressed toward rehabilitation and have declared to not have any link whatsoever with criminal organizations, while having the intention to rejoin the association when he will have the possibility to do so. However, it would be unreasonable and unfair to ignore these two circumstances as they constitute a crucial factor for the assessment of the social dangerousness of the prisoner. That is why it would be reasonable to provide that, for prisoners seeking prison benefits other than the release on parole, these two elements should be evaluated also in light of the social context in which the prisoner will be placed during the temporary release or when serving an alternative measure to detention: this would be crucial for the successful completion of the gradual reintegration process of the prisoner. Similarly, for prisoners seeking a release on parole,

[100] Ministero della Giustizia - Commissione per elaborare proposte di interventi in tema di sistema sanzionatorio penale (Commissione istituita con decreto del Ministro della Giustizia del 10 giugno 2013, presieduta dal Prof. Francesco Palazzo). See also, Paulo Pinto de Albuquerque , 'Life imprisonment and the European "right to hope"' (2015) 2 Rivista AIC - Associazione Italiana dei Costituzionalisti 1, 10.

[101] Corte Cost., 27 July 1994, judgment n. 357.

in addition to the evaluation of the rehabilitation stage of the prisoner, it might be necessary to inquire also on the alleged reasons for non-collaboration.

### *4.4. Lower the timing required for the review of the sentence from thirty to twenty-five years*

As regards the timing of the review set under the new legislative framework, as it has been shown above, is undoubtedly incompatible with the ECHR, as it renders the entire sentence irreducible. Indeed, the current formulation of Article 4-bis (2), in order to fall within the scope of Article 3 ECHR, must be reformed in the sense of setting the timing of the review of the sentence, namely when the release on parole may be requested, at twenty-five years, instead of thirty, after the imposition of the sentence. This would make the judgment *de jure* and *de facto* reducible and would allow the prisoner to reintegrate himself into society.

## *5. Concluding remarks*

In light of what has been argued so far, the new legislation raises not few challenges to Article 3 ECHR. On one hand, the amended version of Article 4-bis, by inverting the onus of proof, places an unreasonable high evidentiary burden on the prisoner, making more difficult the access to prison benefits. On the other hand, by raising up to thirty years old the period after which the release on parole is now possible, the new provision renders the review mechanism *de facto* impossible.

In this work we tried to find to which extent the Italian *ergastolo ostativo*, as reformed by Law n. 199/2022 is compatible with Article 3 ECHR. We started with a brief scrutiny of the new legislative framework. Subsequently, we critically assessed each controversial point of the new formulation of Article 4-bis O.P.. As first, we pointed out how the broad and vague terminology used in the provision that leave room for mis-interpretations and mis-understandings. Then, we argued how under the new legislation the prisoner is subject to a very harsh regime of onus of proof. Indeed, we pointed out how the prisoner is required to fulfill obligations that are completely detached from the mere assessment of his rehabilitation stage. Hence, we conclude that

such harsh probatory regime, that we have addressed as a being a *probatio diabolica*, makes *de facto* impossible the access to the benefits listed in Article 4-bis O.P.. As a consequence, because the rehabilitation process can be seriously hindered, we concluded that the new formulation of Article 4-bis(1-bis) O.P., as reformed by Law 199/2022, should be considered as entailing a degrading treatment contrary to principles enshrined in Article 3 ECHR. Conclusively, we argued that because the new provision allows for a review mechanism (*liberazione condizionale*) after thirty years since the imposition of the sentence, the international support of the 'twenty-five years criteria', fully acknowledged by the Court, has been violated. As a result, also on this point, the new provision seems to be in violation of the principles enshrined in Article 3 of the Convention.

As a final remark, we have brought to the attention of the academic community a possible way of reforming the current legislative framework of *ergastolo ostativo*. The reform that we have proposed tries to balance several sets of interests, by taking into account the interests of public safety and public security with the interests of the prisoners to the rehabilitation process. In particular, we argued for an introduction of two different probatory regimes: a stricter one for the access to the release on parole (*liberazione condizionale*), and another one more simplified for the access to measures different from the release on parole. We firmly believe, in fact, that the access to all these benefits should be facilitated, as such measures constitute the essence of the rehabilitation process.

**ZIWEI XU**[*]

# THE ASSET LOCK UNDER THE REGULAR OPERATION OF SOCIAL IMPACT COMPANIES IN LUXEMBOURG

ABSTRACT. *The social impact companies in Luxembourg are subject to the principle of social and solidarity economy, and such companies may employ business means to pursue social objectives. To ensure the realization of this goal, 2016 legislation of creating such companies responds to this, the most essential and important instrument of which is the asset lock. To this end, based on the finance tools of the SIS (issuance of bonds and shares) and the movement of the assets of the company, the paper will elaborate and analyze, in relation to the principal stakeholders (directors, shareholders, and third parties), the legal regimes subordinating to this mechanism which these actors comply with. Besides, the regulation of public bodies may also play a positive role in this regard.*



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## *1. Introduction*

While the legal status of social enterprises has not yet been established in Luxembourg, Social Impact Companies (SIS) are considered to be the appropriate legal form of social enterprises and respond to European expectations (EU operational definition of social enterprise in SBI Initiative 2011).[1] The 2016 law[2] establishes SIS as a legal scheme therein,[3] and according to the Ministry of Labor, Employment, Social and Solidarity Economy, these companies are only one type of social and solidarity economy enterprises. The social and solidarity economy sector has employed more than 15,000 people in the country by 2020, representing 4% of national employment.[4] Likewise, social impact companies have evolved in recent years.

Under the 2016 law, a social impact company must comply with the principle of social and solidarity economy (SSE) and in a legal form consistent with one of a public limited company (S.A.), a private limited liability company (SARL) or a cooperative society (SCOP), set up with the approval of the Minister.[5] The aim of creating SIS is, in general, consistent with the objective of the promotion of the social and solidarity economy, that is, both are intended to foster cultural and innovative activities, as well as to increase the visibility and transparency of the socio-economic sector.[6] Yet, there are nuances to both, an SIS being entirely a company, and the social

[1] David Hiez and Francesco Sarracino, 'European Commission Social enterprises and their ecosystems in Europe. Updated country report: Luxembourg' (Publications Office of the European Union 2020), <http://ec.europa.eu/social/publications> accessed on 15th December 2023.

[2] Expressions of both '2016 legislation' and '2016 law' in this paper refer to 'Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal'.

[3] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 2.

[4] Impact Luxembourg, 'L'économie sociale et solidaire et les sociétés d'impact sociétal' <https://luxembourg.public.lu/fr/investir/votre-entreprise-au-luxembourg/economie-sociale-solidaire-societe-impact-societal.html#:~:text=En%20moyenne%2C%20la%20production%20liée,soit%2011%25%20de%20la%20population> accessed 14th December 2023.

[5] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 3 (1).

[6] Liptrap, J.S., 'The Social Enterprise Company in Europe: Policy and Theory' (2020) 20 Journal of Corporate Law Studies 495, 539; Ministry of Labor, Employment, Social and Solidarity Economy & ULESS, 'Les Sociétés d'impact Sociétal (SIS)', <https://mteess.gouvernement.lu/dam-assets/publications/brochure-livre/minist-travail-emploi/br-

mission of the company and performance indicators must be clearly defined in its articles of associations.[7]

The protection of the benefits of vulnerable communities and the pursuit of the public interest are of paramount significance for social enterprises. Consequently, the issue of how to ensure the realization of the social objectives of SIS is central to this, and the 2016 law provides the corresponding response to this, including the regulation of the management and duties of directors (and the restriction of salaries thereof), the limitations on the allocation of profits to shareholders/members, the negative obligations concerning the issuance of debt instruments, the constraints on dealings with the outsiders, as well as the regulation and control of the properties of the SIS; all of which, in effect, are revolving around the asset lock.

The asset lock is a mandatory and irreversible legal or constitutional mechanism that ensures that surplus income, capital, profits, and other property are not distributed to members, shareholders, or individuals of any organization. It prevents an organization's assets from being used for private gain rather than for its social mission throughout its existence and in the event of a sale, dissolution,[8] or even loss of social enterprise qualification. [9] The mechanism applies across the entire life cycle of social enterprises and manifests unique traits while running. It is the regular operation of companies that is normality, and the reflection and the solution of settlement at this stage of the problems that arise may, more or less, be instrumental in resolving the

sis/societes-impact-societal-sis.pdf> accessed 4th November 2023.

[7] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 3 (1).

[8] Susan McLaughlin, *Unlocking Company Law* (4th edn. Routledge 2019); Giulia Galera, and others 'Social Enterprises and Their Ecosystems in Europe. Comparative Synthesis Report' (Office of the European Union 2020), < https://europa.eu/!Qq64ny > accessed on 4th November 2023, Richard C Bishop, *Law and regulation of community interest companies* (Bloomsbury Professional 2022); Giulia Neri-Castracane, 'The Governance Patterns of Social Enterprises' in Henry Peter and others (eds), *The International Handbook of Social Enterprise Law: Benefit Corporations and Other Purpose-Driven Companies* (Springer Nature 2023).

[9] Antonio Fici, 'A European statute for social and solidarity-based enterprise' (2017), European Union <www.europarl.europa.eu/RegData/etudes/STUD/2017/583123/IPOL_STU%282017%29583123_EN.pdf> acces-sed on 15th December 2023; Antonio Fici, 'Social Enterprise Laws in Europe after the 2011 "Social Business Initiative" A Comparative Analysis from the Perspective of Worker and Social Cooperatives' (2020), CECOP <www.un.org/development/ desa/dspd/wp-content/uploads/sites/22/2021/06/Fici_Resource1-1.pdf> accessed on 15th December 2023.

difficulties that may occur in exceptional circumstances and be of considerable weight in the social activities and disposition of the assets of the SIS in this phase of their existence. For this reason, this paper will only address the asset lock in the regular operation of social impact companies.[10]

This paper aims to dissect how the asset lock can be employed to achieve the protection of social objectives in Luxembourg during the period. The principal challenge for the operation of the asset lock is how to secure all the very detailed technical regimes under this rule that are well-positioned to guard the social goals. This paper, as such, is structured like this. Section II will deal with the payment of directors' (employees') remuneration, and analyze the impact of the composition of the assembly of shareholders/members on the resolution of the board of directors (section II). This will be followed by dissecting the constraints of the distribution of dividends to shareholders and the negative obligation of prohibition of bond issuance to them (section III). Also, the implications of transactions between companies and third parties on the asset lock (section IV) ought not to be ignored. The last section contains a review of the findings and some conclusions.

## *2. Directors*

This section will explore the issue of handling assets relating to (board) directors. Precisely speaking, it will try to answer this question, namely, in the course of the normal functioning of the social impact companies (SIS), how directors can pursue the benefits of communities and ensure that they do not deviate from the social ends of the companies in carrying out their duties? The response against it involves two aspects of the legal regime subordinated to the mechanism of asset lock, the restrictions imposed on the remuneration of directors, and the decisive parameter that influences the board's resolution on the disposal of assets. To this end, what follows in the two subsections therein will be elaborated and analyzed respectively surrounding them.

[10] This paper will not deal with the asset lock in the special circumstances of social enterprises, which comprise, for example, the acquisition, conversion, separation or winding up (and bankruptcy), or even dissolution.

### *2.1. Directors' remuneration*

The law on commercial companies in Luxembourg provides that directors' remuneration is determined by the general meeting of shareholders/members and allocated by the board of directors: the general meeting may determine the total amount, and the board of directors then allocates the remuneration. [11] In practice, the situation is somewhat more flexible, and the board of directors may set up a remuneration management committee to establish more precisely the remuneration of each director.[12] The same applies to directors in SIS. There are, however, two special cases to keep in mind hereto.

The first is when the company's directors are also employees. This may seem odd at first blush. After all, directors are agents of the company's shareholders who do not have a subordinate relationship with the company; whereas employees, who are the party to an employment contract, exist in a relationship of subordination with their employer (the company). Also, directors are subject to corporate law, while employees enjoy the protection of labor law. Hence, they may look rather distinct. But such a scenario could exist, at least providing some room for it, namely, the restrictions on the qualifications and conditions for natural person directors do not preclude the possibility that a director is also an employee.

A paradigmatic example would be a managing director who is also performing technical functions distinct from those that the company has authorized him to administer. Case law has held that the same person may carry out both managerial and employee roles if the contract of employment is a real and serious agreement, corresponds to the functions actually exercised, and has an employer-employee relationship of subordination.[13] In this case, the director may receive two remunerations,

[11] Village de la justice, 'La rémunération des administrateurs de sociétés au Luxembourg', <https://www.village-justice.com/articles/remuneration-administrateurs,9359.html#:~:text=Cette%20rémunération%20peut%20être%20prévue,résultats%20de%20l%27exercice%20social> accessed 4th November 2023.

[12] Smart Private Managers, 'Principles Directeurs de la Politique de Remuneration de Smart Private Managers (Luxembourg) S.A' <http://www.smart-pm.eu/principes-directeurs-de-la-politique-de-remuneration-de-smart-private-managers-luxembourg-s-a/> accessed 4th November 2023.

[13] The Government of the Grand Duchy of Luxembourg, 'D1a - Contrat de travail en général, D1a17 - Est-il possible de cumuler une activité de salarié avec une activité exercée à titre de mandataire social auprès d'une même société?',

where payment under the employment contract is to be regulated by the provision of the employee's status, i.e., the maximum annual salary paid to an employee in an SIS may not exceed six times the social minimum wage.[14] To be clear, the scope of employee remuneration restrictions is meant to be broadly understood here to include not only wages in the strict sense but also all forms of economic subsidies received, such as bonuses and benefits in kind, etc.[15]

The second is when an employee is a de facto director who governs the company without being appointed as a de jure director. This direct or indirect interference with management is illegal and the de facto director (the employee) is subject to civil and criminal penalties.[16] A de facto director may be as liable to pay the debt as a de jure director. For example, an employee who enters into a contract with a third party on behalf of the company, without the third party's awareness that he or she is not a director, wears the 'cloak' of a director and has been exercising external powers in his or her capacity as a director without ever having been authorized by the company.

In both cases, whether it is the two remunerations received by the director (who is also an employee) or the employee's civil liability for being a de facto director's apparent proxy, they are both liabilities on the balance sheet of the company's annual financial statements under the company and accounting law, which are subject to validation by a professional accountant at the time of their annual approval, and if there is any impropriety in the performance of their duties, the company's auditor may be held responsible.[17] Beyond that, in the first case, the annual report and the extra-financial impact report of the SIS are also supposed to be sent to the Minister of Labor, Employment, Social and Solidarity Economy within two weeks after the general meeting of shareholders.[18]

<https://itm.public.lu/fr/questions-reponses/droit-travail/contratstravail/a/a17.html#:~:text=Oui.,possible%20 (cumul%20de%20mandats)> accessed 4th November 2023.

[14] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 5 (1).

[15] David Hiez, 'Société D'impact Sociétal : Première Reconnaissance Législative de L'économie Sociale et Solidaire : Loi Du 12 Décembre 2016 Portant Création Des Sociétés D'impact Sociétal' (2017). 52 JTL 110,117.

[16] Alain Steichen, Précis de droit des sociétés (Larcier 2018).

[17] ibid 336-375.

[18] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 6 (3).

In summary, in terms of the remuneration of directors in social impact companies, there are no specific limitations, in line with commercial companies, where the organ that decides on it is the general meeting of shareholders, and the payment of remuneration is carried out by the board. However, when a director is also an employee, he/she needs to observe the restricted provisions of the SIS employee's remuneration, which indirectly safeguards the company's assets and facilitates the realization of the social objectives and its relevant activities. In the second scenario, both corporate employees and directors are accountable. Additionally, the checking duty from the company's internal auditors and the obligation of continuous reporting of SIS offer regulatory support to the social commitment of the company's purpose.

### *2.2. Impact of the composition of the assembly of shareholders on Directors' duties*[19]

Directors of Luxembourg social impact companies (SIS) are appointed by the general meeting of shareholders/members.[20] In the event of a vacancy among the directors, the designated residual directors are entitled to fill it temporarily, unless otherwise provided for in the articles of association; in that case, the assembly conducts the final ballot during its first meeting.[21] Although there are minor distinctions between public limited liability companies (S.A.) and private limited liability companies (SARL) in relation to the tenure of directors and the removal of office, the power of removal of a director remains in the hands of the general meeting.[22] Pursuant to this, the determination of the appointment and the removal of directors rests ultimately with the shareholders. Put in another way, the constitution of the board of directors relies on the composition of the shareholders having voting rights at a general meeting in SIS.

Directors therein follow a double democratic principle of 'one share, one vote' and 'majority vote' for the determination of their appointment. But not all shares carry

[19] This subsection will not talk about all duties of directors but is limited to the duty related to the asset's disposal.

[20] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, ss 441(2) and 710(15).

[21] ibid.

[22] ibid.

voting rights.[23] In general, there are two scenarios for the formation of shares in an SIS (case 1 and case 2, cf. section III, subsection 1). In the case of SIS with all impact shares, the composition of the board of directors is most likely to be pro-social, regardless of whether the shares have voting rights or not. Where two classes of shares co-exist in the companies, impact and performance shares, it is only when the voting rights carried by the impact shares exceed that of performance shares that more members of appointed directors may be dedicated to serving the social ends of the SIS, or else, the law mandates that directors fulfill the purposes of the company which would be exploited by those shareholders seeking to benefit themselves and thereby failing to achieve the public benefit.[24] In the latter instance, indeed, the minimum of half of the social impact shares in the SIS required by law provides a very marginal boost to the achievement of the company's social objectives at this level.

Besides its influence on the structure of the board of directors, the underlying rationale behind attaching this importance to the shares in companies lies in the duties of the directors. They have a fiduciary duty and are expected to comply with the duties of care and loyalty. In SIS, as stated earlier, the higher the volume of impact shares with voting rights are, the more willing the designated directors would pursue the company's social missions, the more positively the content of the directors' duties and their management of the company is centered on it; otherwise, even if the directors are obliged to discharge their responsibilities, they may not voluntarily and proactively want to manage the firm for the realization of community benefits.

In addition, directors are supposed to be liable for mismanagement, either by negligence or intent,[25] such as entering into contracts that are obviously not conducive to the accomplishment of the company's aims or engaging in activities that cause the company's assets to suffer a loss. In practice, given that corporate governance is not an accurate science, judges usually show a degree of restraint in assessing the fault.[26] In this

[23] André Prüm, 'Luxembourg company law – a total overhaul' in Michel Tison and others (eds), Perspectives in company law and financial regulation: essays in honor of Eddy Wymeersch (Cambridge University Press 2009).

[24] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, ss 441(5) and 710 (15).

[25] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 441(9), s 710 (16) and s 833(18).

[26] Isabelle Corbisier, 'La responsabilité des dirigeants de sociétés au regard des régles de la loi sur les sociétés

case, the presence of a comparatively greater number of non-socially oriented directors in SIS but simultaneously with an extra requirement of pursuing the public interest, in view of this, implies that they may potentially breach the fiduciary duty, which is detrimental to practicing social activities and fulfilling the social objectives of the company.

Furthermore, if a director of SIS has a pecuniary interest, whether directly or indirectly, that is opposed to a transaction within the scope of the remit of the board of directors, the board shall be notified and the statement recorded in the minutes of the meeting, and that director may not participate in the deliberation of and vote on the matter.[27] There is no derogation from the realization of the purpose of SIS.

As a result, with regard to the composition and competencies of directors in Luxembourg's SIS, on one hand, the number of directors wearing 'the social mantle' would depend on the volume of voting shares, optimally with only one type of share in the SIS, i.e., the impact shares. On the other hand, when dealing with contracts or other issues related to the company's assets, directors ought to comply with the fiduciary duty and be responsible for any violation of it. However, it is necessary to note that the likelihood of this kind of break occurring would be lower when there is a high number of pro-social directors, with which the likelihood of the realization of the company's social objectives shows a positive correlation.

### *3. Members/shareholders*

Following the 2016 law, in the course of the operation of a social impact company (SIS), there is a threefold primary legal apparatus that has been in place against shareholders/members to defend the social objectives of the company, consisting of restrictions on the distribution of profits (perhaps even non-distribution), the negative obligation to forbid the issuance of debt instruments or loans to shareholders/members, and the binding of company's share buybacks from them. Accordingly, this section will

commerciales et du droit civil', <https://orbilu.uni.lu/bitstream/10993/49279/1/Exposé.docx.pdf> accessed 4th November 2023.

[27] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 441 (7).

discuss these three dimensions of the issue separately. In addition, given the situation in the case of the cooperative form of social enterprise, particularly regarding the repurchase of shares and the withdrawal of members, which differs from the other two forms of social enterprise, the concern ought to be warranted.

### *3.1. Constraints of profit distribution to shareholders/members*

In Luxembourg, SIS was created by the same act that defines the SSE.[28] In accordance with this law, the share capital of an SIS is made up of impact shares and, where applicable, performance shares.[29]. Thus, of these two classes of shares, impact shares are core shares, while performance shares are optional.[30] To this end, theoretically, the share capital within such companies consists either entirely of impact shares or the coexistence of impact and performance shares.

In the first case, i.e., the share capital of social impact companies comprises wholly of impact shares.[31] Besides the tax exemption SIS can enjoy,[32] their superiority in safeguarding social targets is evident. The most straightforward demonstration is that the profits assigned to the impact shares should be used specifically for the realization of the objects of these companies and reinvested in full in the maintenance and development of the business.[33] That is to say, in this situation, the total profits of SIS, after deducting various expenses and withdrawing statutory allowances (e.g., reserves), shall be allocated to the shares and fully utilized for the realization of their societal purposes.

Also, the protection of social mission is bolstered by two other requirements for

[28] David Hiez, 'The Suitability of Luxembourgish Law to B Corp' in Henry Peter and others (eds), The *International Handbook of Social Enterprise Law: Benefit Corporations and Other Purpose-Driven Companies* (Springer Nature 2023).

[29] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 4 (1). Regarding the expression 'performance shares', it is expressed in the law (art. 4, Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal) as 'de parts de rendement'. Since many scholars have used the term 'performance shares' in academia, this paper also adopts this expression.

[30] Hiez (n 15).

[31] Ministry of Labor, Employment and Social and Solidarity Economy, 'Business Report 2021', <https://mteess.gouvernement.lu/en/publications.html> accessed 4th November 2023.

[32] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 14.

[33] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 7 (1).

impact shares. For one thing, holders of impact shares are not entitled to participate in any profits derived by these companies. This means that such shareholders cannot acquire the economic rights of ordinary shares in a traditional for-profit company in the sense that neither do they enjoy any dividend allocation, nor do they earn a share premium.[34] This may lead to the temporary disappearance of the game between the profit-seeking nature of the shareholders themselves and the funds used to achieve social goals. In this sense, this provision serves as a means of preserving its mission, contributing greatly, albeit it is known as a derogation of article 1832 of the Civil Code.[35] For another, the proportion of impact shares shall not at any time be less than 50% of the share capital,[36] up to the maximum of 100%. This not only provides an additional statutory underpinning for the existence of the first instance but allows some room for the survival of the second, where the two shares coexist.

In the second case, both impact shares and performance shares are in SIS concurrently. The limited profitability of performance shares in this scenario, though, leaves a margin for such shareholders' interests to be chased, which may diminish the achievement of the goals of these companies. Nevertheless, such gains are conditional in this instance provided that the social purposes, as assessed by the performing indicators set out in the company's articles of association, have been achieved.[37] Implicit in this provision is indeed a further message, which suggests an SIS can decide not to pay dividends to this group of shareholders or members if its societal purposes remain unfulfilled. Admittedly, restrictions on dividends to holders of performance shares in SIS may discourage 'greenwashing',[38] but this is only an indirect means, and it falls somewhat short of the priority that those impact shares serve for social purposes.

On the other hand, whether it is the 'application form for approval of SIS' [39]

[34] Hiez (n 28).

[35] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 2.

[36] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 4 (3).

[37] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 4 (1).

[38] Dana Brakman Reiser and Steven A. Dean, *Social Enterprise Law: trust, public benefit and capital markets* (Oxford University Press 2017).

[39] Ministry of Labor, Employment and Social Solidarity and Economy, 'Demende d'agrément Ministériel- En tant

filled by companies which explicitly requires them to define precisely the performance indicators (at least two) for the Minister's approval, or the 'annual external financial report'[40] drafted by companies that have been recognized as SIS which details the execution of the performance indicators in the statutes for the review of the shareholders'/members' meeting; both are intended to effectively and reliably verify the achievement of the company's objectives. Even so, it remains a bit challenging to evaluate whether such performance indicators have been accomplished validly, as this issue is also intimately tied to the manner in which they are drafted, and the wording used.

In this context, 'performance shares can be converted into impact shares, but the reverse is prohibited'[41] may provide some hope to ease this pressure. According to the 2016 law, which entitles shareholders/members to request such conversions at any time, there are no further explanations on requests after this. As such conversion concerns substantial clauses in the company's bylaws, it is in principle appropriate to rely on the relevant provisions of the various types of commercial companies that can be certified as SIS.[42] Per this, whether it is a public limited company (S.A.),[43] a private limited company (SARL),[44] or a cooperative society (SCOP),[45] requirements for bylaws amendments are outlined in the commercial company law. This conversion accordingly depends on the result of the resolution of the general assembly of shareholders or members, in S.A. and SARL, each impact share and performance share both may give the right to one vote,[46] while in SCOP whose voting rule is a bit flexible: either follow the democratic principles in traditional cooperatives, i.e., one member, one vote,

que société d'impact societal (SIS)', <https://guichet.public.lu/dam-assets/catalogue-formulaires/creation-societe/demande-agrement-ministeriel-sis/demande-agrement-ministeriel-sis.pdf> accessed 4th November 2023.

[40] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 6 (2).

[41] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 4 (2).

[42] The author argues, however, that the possibility of 'successful conversion at the request of the shareholders/members of the SIS alone, without the necessity of undergoing a general assembly ballot' may not be ruled out completely, when looking purely at the protection of social objectives.

[43] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 450 (2).

[44] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 710 (26).

[45] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 810 (5) 4°.

[46] Draft articles of association SA SIS and Draft articles of association SARL SIS, s 18.

alternatively, one vote per share,[47] which in the latter instance would be the identical voting as in the preceding two types of commercial companies.

As such, in S.A. and SARL, the exit of shareholders and the transfer of their shares, as well as the transferees of the shares, not only influence the passage of the resolution for such conversions but may add to the cost of, or indirectly impede, the attainment of social goals. For example, in the case of a resolution to convert performance shares into impact shares, when voting thereon, the quorum was less than 50% (or the number of votes cast on this resolution was below the legal requirement: under 2/3 or 3/4), and thus failed to be converted. In this situation, the holder of performance shares may choose to transfer his/her shares to an outsider (third party) who to him/her is deemed to be desirous of adhering to the aims of the company.[48] As the third party is more likely to be motivated by a desire for profits than the original shareholder, though, there is a risk that the transferee will erode the accomplishment of the social aims of the company by passing resolutions in the future. It should be further clarified the waiver of shareholders' rights does not equate to an increase in commitments, nor does it require a unanimous decision.[49] Upon the success of such a conversion, the economic rights of the shareholders are reduced. Yet, this diminution of their rights does not parallel an addition to the shareholders' engagements hence a consensus is not required.[50]

Interestingly, this provision for the conversion of SIS shares is designed to favor an increase in the percentage of impact shares, thereby augmenting the number of votes in the hands of the holders thereof, with the hope of affecting the passing of important resolutions at the shareholders'/members' meetings, and ultimately keeping the power to make decisions at the hands of the impact shareholders. While the success of this conversion is closely related to the attitude of the present shareholders, it depends effectively on the weighting of the voting shares held by the impact shareholders, and

[47] ibid 62.

[48] Since cooperative societies (SCOPs) are prohibited from transferring shares to third parties, therefore examples of them will not be dealt with here. For detailed information, please see the next subsection.

[49] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 430 (3).

[50] David Hiez, 'L'économie sociale et solidaire au Luxembourg' (2021) ANN. DR. LUX 197, 243 ; Gratham, Ross, 'The Unanimous Consent Rule in Company Law' (1993) 52 Cambridge L J, 245, 271.

should this class of shares have fewer voting seats than that of performance shares, such a conversion may well be aborted at this step and the legislator's good wishes would be thwarted. It is therefore that perhaps it would be possible to consider loosening the statutory procedures for share conversion, as well as clarify the relation between the shares and voting rights in the bylaws, in particular, that it is desirable that the votes conferred by impact shares carry more weight than performance shares.

Another question in the second case is emerging: how to ensure at all times that the impact shares remain not less than 50 % of the share capital? The enterprise auditor verifies and certifies annually that the composition of the share capital of SIS complies with the statutory requirements.[51] This, however, does not provide an assurance that SIS always observes this provision. Also, the application of it may have an influence depending on the type of company.

Insofar as the response to this question is concerned, the focus is supposed to be on cooperative societies rather than on the other two types of commercial companies (S.A., SRAL); inasmuch as the latter adhere to the principle of fixed share capital,[52] whereas in cooperatives it is set aside and adopted as the rule of capital variability.[53]

This rule herein is in the same vein as traditional cooperatives, though Luxembourg's cooperatives do not necessarily target members' interests,[54] which are both motivated by the openness of membership.[55] In this sense, cooperatives can create new shares or cancel existing ones without amending the articles of association, frequent entry and exit of members resulting in variations in the kind of shares and capital are in practice unlikely to be fully reflected in the articles of association, and it is, indeed, a challenge to maintain always at least ½ of the share capital of an SIS cooperative society in impacted shareholdings, as well as tracking and checking the compliance with this provision.

[51] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 6 (1).

[52] Steichen (n 16) 551-562.

[53] Art. 811-1, loi modifiée du 10 août 1915 concernant les sociétés commerciales.

[54] David Hiez, 'Are Cooperatives Part of Social and Solidarity Economy', in Willy Tadjudje, Ifigeneia Douvitsa (eds), *Perspectives on Cooperative Law* (Springer 2022).

[55] Steichen (n 52).

Besides, while it may be interpreted that this restriction is only directed at the fixed capital component, this exists in cooperatives with the limited liability of members alone,[56] thus, this explanation is somewhat reluctant. Alternatively, a cooperative society could be accredited as an SIS by requiring that all shares (including new shares subscribed by prospective members) should be in the form of impact shareholding. This may seem on the surface to be a once-and-for-all solution, but as innovative as cooperatives are in that they do not have to for the interests of their members, this would suggest that all members 'voluntarily' give up their economic interests in the shares otherwise they cannot become a member of them. This restriction is not conducive to the openness of membership and seems to be a bit of overreach.[57]

The result that this variability of capital brings is so intractable to verify may perhaps be relied on the accountants of the enterprise, who, after all, are the de facto manipulators of the shares at the time of the entry of new members to subscribe for them, and the withdrawal of existing members to buy them back.

All in all, for the protection of social targets, the scenario in which social impact companies are composed entirely of social shares (case one) is significantly more advantageous than the one in which the two forms of shares are present in the company (case two). The latter situation is more complex, as the inflexibility of the statutory procedure to follow the conversion of performance shares into impact shares adds resistance to the practice of SIS social activities; meanwhile, the legal requirement to guarantee always a percentage of impact shares at least 50% of the share capital, poses pragmatic obstacles to the implementation of cooperative societies (given the variability of their capital), even if legislators strive for their social objectives to be conserved.

[56] Hiez (n 15).

[57] However, Luxembourg allows SIS on the one hand to carry out some commercial activities and to participate in public procurement tenders, and on the other hand to permit the company to receive public funding from the State. These financial support instruments provide financial backing for the sustainable development of the company and would seem to increase the likelihood that the SIS, in the form of a cooperative, would be entirely composed of impact shares.

### *3.2. A ban against shareholders/members (negative obligation of SIS)*

SIS has a negative obligation to refrain from granting loans or issuing debt instruments, directly or indirectly, to its members or shareholders.[58] It is a restriction, notably, that does not forbid the issuance of bonds by SIS, and should these companies do so, only their members or shareholders are not allowed to purchase. If this prohibition is violated, any loan contract with or any debt instrument issued to them otherwise will be invalid. [59]

This rule may affect the financing of SIS to some extent, albeit to a more modest degree, as the ban is merely against the present members or shareholders. Yet it reduces the financial pressure on the debt repayment of the SIS properly and indirectly preserves the company's assets thus contributing to the fulfillment of the company's purpose and social mission. This obligation, on the other hand, also prevents the company from circumventing the constraints on the payment of dividends on performance shares through the first two methods of paying economic benefits to its members/shareholders. Viewed from the perspective of upholding societal goals, this prohibition plays a relatively positive role.

There is another scenario worth exploring. Both a public limited company (S.A.) and a private limited company (SARL) in Luxembourg can issue bonds,[60] and so do cooperative societies (SCOP) except where their articles of association specify that no other type of securities except capital shares shall be created.[61] In the case of S.A. which has been accredited as SIS and issued the convertible debenture, taking the flexible low yield (FLY) as an example: a debt instrument with an appropriate rate of return and a conditional conversion feature.[62] Their conversion may be triggered by the right of FLY holders to claim that these bonds are converted to shares when shareholders inappropriately demand dividends or seek ultra-high ones. In this case, a tricky question arises

[58] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 8 (1).

[59] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 8 (3).

[60] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 100 (14).

[61] Draft articles of association SCOP SIS, s 7 (4).

[62] Reiser & Dean (n 38).

as to whether the shares resulting from such conversion are impact shares or performance shares. The law is silent and in practice, this depends on the specifics of the agreement.

In contrast, though, there are restrictions in SARL, and what has a proximate consequence for this prohibition is the rule on the issuance of convertible debentures by such companies.[63] On the one hand, any subscriber to a convertible bond who is not a shareholder is required to obtain the approval of shareholders at the latest at the time of issuance, while on the other hand, any transfer of a convertible debenture to such a group is subject to SARL's share transfer approval system,[64] provided that an understanding exists whereby the approval may be given upon issuing of the debentures or subsequently. This situation is more complex as compared to S.A.

This is, for one thing, because the threshold for transferring bonds to non-shareholders in SIS has been raised (requiring the consent of shareholders with a minimum of 3/4 of share capital, which may be reduced to 1/2 by statute),[65] this requirement is in effect a censoring of the bond subscribers (transferees), and considering that at least 50% of the impact shares are supposed to be in the SIS, holders of these shares would have more or at least an equivalent voice than performance shareholders with respect to the adoption of this approval, accordingly, theoretically, it may be more probable that the profile of the potential purchasers of such bonds is that of a social impact investor. As a result, the likelihood that the converted shares may be the impact shares would be higher should a conversion of such bonds occur.

For another, shareholders, who, under company law, may purchase these bonds within three months upon the refusal, are blocked from subscribing to these bonds to be transferred by virtue of the existence of this prohibition; thus, they can only be transferred to the company (which may cause a reduction of its capital) or to a third party. In the latter scenario, though, the presence of the system of understanding leads to an increase in the cost of the time for the approval, which may indirectly be detrimental to the conduct of the company's social activities. Also, in the case of a third

[63] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 100 (15).

[64] Pit Reckinger, 'La nouvelle société à responsabilité limitée' in André Prüm (ed), *La réforme du droit luxembourgeois des sociétés* (Larcier 2017).

[65] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 710 (12).

party subscribing to the convertible bonds of SARL, including by acquiring them via transfer, the implications may be nuanced to that of the S.A., i.e., despite that it ultimately depends on the type of shares to which the bonds are converted, nevertheless, the conversion of the bonds into the impact shares appears to be more likely to happen due to the availability of a subscriber (and transferee) screening mechanism in a SARL.

Given that these creditors' (bondholders') main intention behind becoming shareholders is to control and affect the resolutions of the general meeting of shareholders, thereby protecting their own interests and the objectives of the company. To this end, it may be recommended to specify in such agreements (notably in the case of S.A. and SCOP) that the convertible bonds would convert into impact shares instead of performance shares. This would not only increase the stickiness of the social goals but also alleviate the cost of review by the company's internal auditors. In this context, high-yield bonds are analogous, save that they confer on the borrower a kind of payment halt period.[66] For an SIS, the potential to defer interest payments helps to maintain the commitment to its social mission.

In short, it can be seen that this obligation of the SIS is accurate and intact, both in terms of its audience and sanction. Further, the rule is balanced between strictness and leniency. The absolute prohibition of issuance of debt instruments to members/shareholders and the unrestricted issuance to external parties, patch up the financing drawbacks of the former via the latter. In addition, both may protect the societal aims of companies to some degree through distinct two ways (circumventing performance shareholders from indirectly getting dividends, and bondholders' acquisition of control, as well as by depriving them of an essential source of generating profit inducements).

### *3.3. The repurchase of shares from shareholders/members*

The 2016 law does not offer specific provisions on share repurchases of social impact companies (SIS), but restrictions on share buybacks may vary among various types of companies according to commercial company law.

In the event of cooperative societies (SCOP), the repurchase of equities, usually

[66] ibid.

in the event of the withdrawal of members, and the reduction of the cooperative's capital as a result of such buybacks, is, in principle, a normal operation of these companies, and there is no need to convene a general meeting of the members to take a decision on this matter.[67] There is also a correlation between the repurchase of cooperative shares and the variability of the capital which may go up or down according to the entry and exit of members. In this case (withdrawal of a member), the proportion of impact shares is affected: should the departing member hold impact shares, all else constant, the performance share ratio would increase; vice versa, the percentage of impact shares increases. Thus, the former appears to be riskier than the latter in terms of achieving social goals.

In the case of private limited liability companies (SARL), which is approved as SIS, has few special restrictions on the purchase of its own shares by the company, subject to the provisions of the law.[68] However, if a company has no distributable reserves, its share buyback from shareholders is bound to reduce its share capital.[69] In this case, potential dangers analogous to cooperative societies may also be faced, and the realization of social objectives is consequently hindered. In addition, in the operation of share buybacks, attention needs to be paid to distinguishing a special situation.

Assuming that a shareholder who is guaranteed by his company is insolvent,[70] the company has repaid the debt he owes to the borrower. In this case, since he/she has become insolvent, the value of the claim held by that company is close to zero, which is in effect a de facto reduction of share capital.[71] Unlike a share buy-back, however, such a guarantee will only achieve this result if this shareholder is unable to pay his debts; this, though, cannot be assumed a priori, as the bank is unlikely to lend to him if it knows or expects that the shareholder would be incapable of repaying his debts when due, and so

[67] Steichen (n 16) 551-562.

[68] Draft articles of association SARL SIS, s 6 (4); Draft articles of association SARL-S SIS, s 6 (4).

[69] Steichen (n 16) 577-624.

[70] An example would be a shareholder whose shares are pledged to a company, and after the company has paid off the shareholder's debt, it is obvious that she/he will not be able to repay its debt, given that the shareholder is insolvent. In this situation, the company would like to offset her/his shares against her/his debt.

[71] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, ss 430 (15) and 1500 (7).

this transaction cannot be regarded as a disguised share repurchase.[72] If he/she holds impact shares, this will adversely affect the statuary shareholding requirements.

In the case of public limited liability companies (S.A.), though, it is in principle not possible for a company to redeem its shares,[73] except in exceptional cases, e.g., where the purchase of its own shares is necessary to prevent serious and imminent damage to the company,[74] or where a person subscribes for shares in the company in his own name but on behalf of the company, and the subscriber is deemed to be subscribing in his own name, etc.[75]

In sum, besides the protection of the creditors' interests in companies, the share repurchases in SIS require more concern on the influence of capital reduction on the sustainable operation of these entities, the shareholding, as well as the realization of social objectives. Among these three types of companies, S.A.'s restrictions on share buybacks are more stringent than those of SARL and SCOP. However, the share capital reduction resulting from share repurchases tends to be related to the genre of shares repurchased and less relevant to the specific type of company. Hence, in terms of the impact on the achievement of social objectives, it is necessary to judge the repurchase based on the class of shares bought back, and in the case of impact shares, the focus would lie on their statutory shareholding and the potential risk to the attainment of the company's purpose. Given the variability of capital and open membership of cooperatives, though, share buybacks have a lesser impact on cooperative societies.

[72] Steichen (n 16) 577-624.

[73] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 430 (14).

[74] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 430 (15).

[75] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 430 (14).

## *4. Third parties*

During the running of the SIS, its trade with third parties (outsiders), in terms of the disposition of the company's assets, and guarding social missions, in reality, impinge on both facets of the issue. For one thing, concern is required regarding the business transactions of SIS with third parties for goods, services, and so forth, in which the trading price is of critical relevance. It is also desirable, from the other side, to focus on the transfer of shares in the company, which may affect the accomplishment of the enterprise's targets in view of the different classes of shares and the legal forms in which they are ratified as the SIS.

### *4.1. The transactions with third parties*

The Luxembourg law on social impact companies (SIS) does not provide any restrictions on transactions with third parties either. Even so, these companies are supposed to be in accordance with the legal provisions and civil customs, as well as the principle of good faith while trading with a third party.

The caveat is that in market transactions, if the SIS defaults, it is the company's own debt, and in the absence of a significant failure or fault of the management, the company is required to assume the debt by itself. In this case, the amount of the company's share capital plays a crucial role in its subsequent development. The minimum share capital of an SIS-accredited company is determined depending on the rules applicable to the legal form of the company. Taking into account that the minimum requirements for the share capital of the companies in those types are, in descending order: S.A. (€30,986.69),[76] SARL (€12,394.68),[77] SARL-S (€1)[78],[79] and cooperative societies (no minimum capital), so in this scenario, the likelihood of survival of these firms is positively correlated with this ranking. In consequence, after paying

[76] Draft articles of association SA SIS, s 5 (1).

[77] Draft articles of association SARL SIS, s 6 (1).

[78] Draft articles of association SARL-S SIS, s 6 (1).

[79] After the reform of the Luxembourgish commercial company law in 2016 (bill no. 5730), the minimum share capital of s.a. and s. à.r.l have amended, with which 30,000 and 12,000 euros.

off their debts, S.A. has a more favorable pool of assets that may be better equipped to facilitate the implementation of social activities and the realization of public purposes.

On the other hand, it is worth looking at the issue of whether an SIS needs to distinguish between a counterparty's enterprise purpose and an SIS's social objectives in the course of a transaction with a third party, as well as the tax benefits available for such a transaction. Make it tangible, when an SIS trades with non-profit associations (ASBL). The latter belongs to the social and solidarity economy (SSE) and follows Luxembourg's requirements for SSE, whereby at least half of the profits ought to be reinvested in the maintenance and development of the associations.[80] Taking into account that the goals of such associations have a strong sense of social attributes, including but not limited to the promotion and development of social cohesion, the elimination of exclusion and inequalities in health, culture, and economic development, the promotion of gender equality, the protection of the environment, etc.[81]

It is believed that dealing with ASBL will not, in the grand direction, deviate from SIS's inherent purpose of serving social objectives. It is therefore not necessarily the case that SIS must strictly observe the identical rules as other market players when transacting with them: either below or above the market price, as agreed by both parties. The UK CIC's approach to dealing with third parties may provide an inspiration to this end, in that SIS may trade at market price (or even less than the market value) when engaging in market transactions with entities with similar societal objectives. For such transactions, the law has not yet clarified the tax benefits, but it is likely to be a trend in the future for the trade to enjoy an appropriate tax incentive for its initial intent.

To sum up, when social impact companies deal with third parties, where the latter are profit-oriented ventures, market rules for dealings apply, i.e., by mutual consent: the SIS will be expected to honor the terms of the contract. If it defaults, damages for breach may have to be paid (or even fines). The minimum share capital of the company in this case provides not only a cushion for the creditors but assists in the sustainability of SIS and the fulfillment of its social goals. In this respect, S.A. is most reassuring. When SIS transacts with entities who have similar aims, the writer looks

[80] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 1(4).

[81] Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal, s 1 (2).

forward to appropriate loose in the transaction conditions in order to facilitate the conclusion of the transaction, thus advancing the social objectives.

### *4.2. The transfer of shares to third parties*

As the 2016 law does not establish a regulatory system for the transfer of shares, it does not prohibit the circulation of these shares.[82] There are two situations in general as far as transfers of shares by shareholders are concerned, internal and external transfers. An inward transfer occurs whereby a shareholder/member transfers his/her shares to another one who also is in this company; the transfer of shares in this case is free. An outward transfer is where someone transfers his/her shares to a non-shareholder/member of this company (i.e., a third party). However, this differs from the former in that, in view of the diversity of legal forms of companies that can be accredited as SIS, the rules for the transfer of shares of such entities to third parties may be distinct which depends on the specific type of company.

In the case of private limited liability companies (SARL), neither shares nor profit shares carrying voting rights may be transferred inter vivos to third parties without the consent of shareholders representing at least three-quarters of the share capital.[83] Yet, if provided for in the articles of association, the percentage of share capital required for the approval may be lower (but cannot be below 50%).[84] In this context, the decision as to the inner pursuance of the societal goals of the transferee of the share rests in the hands of the voting shareholders, and it is predictable that in case of an overwhelming majority of the seats with voting rights held by the impact shares, the third party may well also fall within the category of impact investor. Also, an exception to this is when a shareholder passes away, such approval will not be required for the transfer of share to a descendant, an ascendant, or a surviving spouse.

In the event of public limited liability companies (S.A.), the transfer of shares is not restricted in a particular way under the law on commercial companies. It is worth

[82] Hiez (n 15).

[83] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, ss 710 (12) and 720 (1).

[84] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 710 (12).

noting that the transfer of registered shares[85] shall have an impact on the company if a declaration of transfer, dated and signed by the transferor and the transferee in the share register, or a notification of the transfer to the company (or the company's acceptance of the transfer) is sent to this company and recorded in a deed of authenticity.[86]

The situation of the two previous types of companies calls for a case-by-case analysis from the perspective of promoting the preservation of the SIS's purpose. Where the transferred shares are impact shares, the third party is constrained by the non-conversion of the impact shares into performance shares upon his/her participation and becomes a new shareholder. This scenario is unlikely to have a detrimental effect on the community purpose, given that both classes of shares are not as susceptible to alteration as compared to their prior shareholding. Should the shares be sold as performance shares, the performance shares may have a chance to be converted into impact shares after the new shareholder enters, so there is a possibility to increase the chances that the social commitment will be realized.

When it comes to cooperative societies (SCOP), these entities are not only expected to follow the provisions of the social impact company law but also to comply with the relevant regulations for cooperatives. Luxembourgish cooperatives are commercial companies all by themselves, as they are regulated by the law of August 10, 1915, on commercial companies.[87] Pursuant to this law, members of cooperatives are prohibited from transferring their equities to a third party,[88] and this is also confirmed

[85] In an SIS, whether impact shares or performance shares, they are exclusively registered and issued at par. Thus, in the transfer of shares of S.A. that are certified as SIS, it is only necessary to discuss the registered shares (actions nominatives), neither bearer shares (actions au porteur) nor dematerialised shares (titres dématérialisés) will be dealt with here.

[86] The Government of the Grand Duchy of Luxembourg, 'Public Limited Company (SA)', https://guichet.public.lu/en/entreprises/creation-developpement/forme-juridique/societe-capitaux/societe-anonyme.html#bloub-11 accessed 4th November 2023.

[87] Hiez (n 50).

[88] Loi modifiée du 10 août 1915 concernant les sociétés commerciales, s 811 (1) ; Bruno Reolants, Capital Building in Industrial and Service Co-operatives in ICA: the Capital Conundrum for Co-operatives, <https://www.ica.coop/sites/default/files/publication-files/ica-the-capital-conundrum-for-co-operatives-en-1892359719.pdf> accessed 4th November 2023.

in the model statute of the cooperative.[89] Consequently, those cooperative societies that have become SIS cannot be transferred to third parties either.

Why do cooperatives forbid the transfer of equity to third parties? A hint may be discovered by comparison. It could be argued that two reasons may lie behind the allowance of transfer of shares to third parties in the first two types of companies: new shareholders wishing to join, or the present shareholders intending to exit. However, since the latter can be accomplished by transferring shares to internal shareholders, the previous one, i.e., the entry of new shareholders, may seem to be better explained herein. Whereas in a cooperative, nevertheless, new members can obtain membership by subscription, and members who want to quit do not need to transfer their shares, but can be repurchased by the cooperative, besides transferring them to other members. Consequently, in the case of SCOP, there is no necessity to have a separate clause that permits members to transfer to a third party.

In summary, the sale of shares to third parties in the case of S.A. and SARL is theoretically conducive to the accomplishment of the purposes of social impact companies (SIS). But in the case of cooperative societies, due to the prohibition on the transfer of shares to third parties, though the provision is aligned with that of traditional cooperatives, in which the percentage of shares within the company is also indeterminate, given the variability of the cooperative's capital and, as a result, it is highly probable that at one moment the impact shares will account for less than one half of the capital without anyone being aware of it. For this reason, the SIS of the cooperative society is inferior to the first two types of companies in terms of the benefits of transferring shares to a third party for the protection of social objectives.

[89] ibid 62.

## *5. Conclusion*

This paper considers and analyzes distinct scenarios in which the asset lock during the regular operation of social impact companies (SIS), and the possible implications of this legal mechanism on the fulfillment of the societal purpose of the company, covering four main areas.

Firstly, regarding the link between the defense of the social mission and the duties of directors. On the one hand, as the law requires that the articles of association of SIS specify its objectives and visualize performance indicators, in this sense, in addition to the content of the fiduciary duty inherent to commercial companies, the directors are expected to guard the social purpose of these companies. As a consequence, directors are responsible for the contravention of any of these requirements.

On the other hand, the daily management of the company and the disposal of its assets are ostensibly under the control of directors, whereas, de facto, it remains the ultimate discretion of voting shareholders/members to determine the handling of all properties in these companies (as the appointment of directors rested on the decision of shareholders'/members' assembly). In order to protect the social orientation of such companies, shareholders/members dedicated to this emphasis necessarily keep a controlling stake; in SIS, the optimum situation would be for a company to hold only impact shares, whereby all shareholders stayed committed to it, and where there were few instances of shareholders 'defecting' in the quest for economic gain, and thereby destabilizing the core promise of social enterprises.

The second concerns the nexus between restrictions on the distribution of profits to shareholders or members and the safeguarding of the social purposes of the company, which entails not only the constraints on the dividend allocation to shareholders but requirements on the ratio of impact shares and share conversion, that affect the interests of the community.

For one thing, sorted by the degree of contribution to the pursuit of the social benefits, these are, in SIS, theoretically, in descending order of strength, for which there are three scenarios: i) where there are only impact shares in the company; ii) a coexistence of both types of shares, with performance indicators not reached; and iii) where both types of shares are present, and performance indicators are met. Needless

to say, the first two situations contribute substantially to the realization of social missions from the perspective of the destination and usage of the assets, while in the last one, owing to the distribution of dividends, not all of the company's net profit would be used for the public interests.

Alternatively, as far as the single-way share conversion and the proportion of impact shares requirements are concerned, both provisions may be applied only where the two types of shares co-exist, and both are confined in practice. Whether the desire to convert performance shares into impact shares can be achieved depends on two variables, the voting rights of the shares specified in the company's operating agreement or charter, together with the passage of the resolution. It would appear that a minimum of half of the share capital for impact shares seems to be challenging to implement and validate in cooperative societies. Hence, both requirements, while on the surface designed to facilitate the fulfillment of the social purpose of SIS, may still face some hardships and challenges in practice.

Thirdly, regarding the implications for the pursuit of social aims of companies of the negative obligation to forbid granting loans or issuing debentures to shareholders/members. One of the main effects of the ban is to prevent shareholders from indirectly obtaining economic gain and thereby may not be productive to the attainment of the company's objectives. Beyond this, the negative obligation provides some room for the issuance of convertible bonds. In practice, whether such bonds can indeed be converted into what type of shares depends virtually on the agreement. If, however, the convertible bond has undergone a transfer prior to conversion, the result may vary by company form, whereby a private limited liability company (SARL) has an edge over a public limited liability company (S.A.) and a cooperative society. The provisions governing the SARL proper provide, ipso facto, a pro-social screening system for transferees, and such bonds are more likely to be converted into impact shares in the event that the condition for conversion is triggered.

In addition, with regard to the impact of share buybacks on SIS social targets depends on the type of company. Repurchases of shares by cooperative societies are closely associated with the exit of members from traditional cooperatives, which may unfavorably impact the shareholding requirement if this exiting member holds impact shares. The share buybacks by the other two kinds of companies may indirectly

undermine the realization of community benefits, apart from causing a reduction in share capital that is detrimental to the repayment of the company's liabilities.

The last aspect deals with the consequences of SIS transactions with third parties or the transfer of shares by its shareholders to them on the company's social objectives. The former relates to the type of entities to which the third party belongs and the aims they pursue. It may be within the boundaries of what the law would tolerate in the case of trading with organizations under the social and solidarity economy sector or with another company with similar missions at a price lower than the market price; otherwise, may adversely affect the utilization of assets in favor the social aims of the company. The transfer of shares by shareholders to a third party as such is not allowed in the case of cooperative societies. Insofar as that transfer is a quest for the future social objectives of the company, SARL has an advantage over S.A.

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# FIXING THE CLIMATE WITH EXPERIMENTALIST GOVERNANCE? HOW?

CONTENT. 1. Introduction. – 2. Persuasion of stakeholders or punishment and sanction? – 3. Can experimentalist governance complement market-based instruments? – 4. Could regulatory sandboxes and corporate sustainability reporting obligations play a role in the experimentalist governance approach? – 5. By incentivizing firms to innovate, could the experimentalist governance approach unhinge the power of those who oppose the ecological transition? – 6. The problem of climate crisis raises both technological questions and social justice issues? What is the correct framing to account for growing economic inequalities and their harmful environmental impacts?

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## *1. Introduction*

Official climate data tell us with a very low degree of uncertainty that global temperatures for the months of September and October 2023 represent the highest anomaly ever recorded. The challenge before us, of large and timely phasing out of greenhouse gas emissions is enormous in scale and complexity. There appear to be no ready and fast solutions but there is a need for profound technological changes in several different production sectors. Finally, these solutions must be adopted quickly and promptly to reduce the magnitude of irreversible changes to the planet's climate. The good news, the most reputable studies tell us, is that the technical knowledge available to us allows us to have real solutions.

In the latest International Energy Agency report, World Energy Outlook 2023 released just a few days ago, institute director Fatih Birol writes in the preface that '[t]oday, solar power, wind power, efficiency and electric cars are all well established and readily available. We have at our disposal the lasting solutions to today's energy dilemmas.' We can thus truly aspire to have the opportunity to be the first generation to have transformed their lifestyles into fully sustainable modes.

On October 26, 2023, the Law department of Roma Tre University hosted a special event within the 'Inequality in Rome Seminar Series', hosting Prof. Charles Sabel of Columbia University School of Law to discuss his new volume *Fixing the Climate: Strategies for an Uncertain World*, co-authored with Prof. David Victor of the University of California San Diego. This special event was organized in collaboration with the *Forum Disuguaglianze and Diversità*, an Italian organization that brings together researchers and civil society members to design and advocate for public policies that aim at reducing the levels of inequality in the country.

Sabel and Victor's book proposes an innovative method that can work in the context of radical and pervasive uncertainty about the solutions to be undertaken to make the energy and ecological transition more affordable. *How?* The core of the book lies in the model of global governance of climate change that it promotes. The overall premise is clear – no response to climate change will succeed without international cooperation (p. 153). The problem is what type of cooperation international law should embrace. The answer is, according to the authors, 'experimentalist governance'

(hereinafter EG), a system that goes beyond the Paris Agreement (2015). They argue that such Agreement has failed to achieve its goals. The book instead puts forward the model of governance endorsed by the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer – a history of success, as the Authors rightly maintain (see pp. 4 to 7 and Ch 2).

The book forcefully suggests that we need to reward those who innovate and destabilize the status quo and penalize those who do not want to change through experimental and concrete processes of collaboration between business, between State, business, and citizens, and between States. The states should set ambitious standards and broad goals that are able to incentivize economic agents to act. Moreover, those who set standards interact with those who must solve problems on the ground and implement solutions, following an iterative process of mutual correction of the roadmap and concrete goals to achieve. Such solutions aim at complementing classical market-based approaches. Indeed, the experimentalist governance approach operates in a decentralized manner, coordinating myriads of individuals, institutions, and economic agents just as happens in markets but not by means of prices, but by setting standards that are continually revised by accumulating new information, if necessary, through deliberative and discussion processes. A form of deliberation that uses doubt, disagreement, and a peer review process to advance the technological frontier even in an environment of profound uncertainty.

In this article, we propose the main issues and questions that were raised during the seminar by the panelists Prof. Barbara Annicchiarico, Prof. Roberto Baratta, Prof. Tommaso di Marcello, as well as from the coordinator Prof. Salvatore Morelli.[1] Prof. Charles Sabel provides his responses in turn.

## *2. Persuasion of stakeholders or punishment and sanction?*

The wording 'experimentalist governance' (EG) appears early in the book (p. 3). However, its theoretical description is set out in Ch 3, while other chapters further

[1] We also acknowledge the participation of Dott. Francesco Ferrante as an official panelist of the event.

develop key issues of EG. I prefer to describe EG by referring to its two main characteristics, instead of giving a general definition, which however is provided for in the book – it is in short, an 'organizational structure' for international law-making (see p. 51 ff.). Moreover, the same mechanisms have sometimes been used at a domestic level (e.g. in California).

First, EG is a dynamic and resilient mechanism designed for governing situations of uncertainty. It involves a problem-solving approach that does not coincide with 'hard law' rules (see p. 67). Periodic adjustments and contextualization are key to finding wide consensus on updated solutions (see Ch 5). A supplementary, yet essential component of this 'constantly moving' model of governance is 'guidance' (p. 62), ie rules of soft law meant to set the pace towards virtuous behaviors of public and private actors. EG is also based on 'regular monitoring' of progress towards achieving environmental goals – a system of scrutiny that goes together with a set of incentives for adopting 'good' behaviors and penalties for tackling inconsistencies (see eg p. 56, and 66 ff.).

Second, EG is inherently cooperative, as it involves a wide range of actors, such as states and non-state entities, national regulators, industry, academia (scientists, engineers), civil society, and NGOs, all of them in search of sustainable solutions. This law-making 'process' is grounded on technological innovation (see Ch 4), as stakeholders are demanded to push towards innovative solutions. Incidentally, I would argue that the EU legal system is well-equipped and flexible enough to embrace EG for addressing environmental issues – a topic I cannot dwell on here.

Therefore, EG is neither a top-down nor a bottom-up system of rules. It is both (see, p. 10). It is not a model of enduring and generally applicable regulation. It is rather a mechanism for creating and revising rules until their content, even in prescriptive terms, is defined and climate change will be fixed. Hopefully soon.

**In short, how much is EG a 'recipe' that fits only a social context where a 'group' of actors creates rules and is accountable for them? Is EG based on a concept of international law that presupposes a certain degree of legal indeterminacy, particularly on the consensus or moral persuasion of the global community?**

**Answer:** Very generally speaking, experimentalism is suited to conditions of uncertainty, when action is urgent (or, conversely, inaction is unacceptable), but no

single party is convinced of the viability of its own reflexive response, let alone that of others. Under such conditions, some actors will find it attractive to collaborate in searching for solutions. They can do this by fixing interim goals and using periodic, joint review of progress towards them to clarify their aims, assess the feasibility of the project and test the capabilities and probity of partners. Experimentalism helps by explaining how uncertainty can prompt exploration, and how regulation and contracting under uncertainty can be used to encourage joint learning by regulators and firms. In other words, experimentalism flourishes when uncertainty makes it impossible for principals – actors with a supposedly clear view of their own purposes and a comprehensive understanding of the means to achieve them – to effectively charge and supervise the agents they hire to help execute tasks (as neither principal nor agent alone knows precisely what is to be done), and must collaborate with them instead.

International law is traditionally the law of sovereign states; and sovereign states are conceptually the perfect principals, completely self-determining and answerable to no one. There is no room in traditional international law for experimentalism, or indeed, for any weakening of the control of principals – say the signatories to an international agreement – over the secretariat of the organization that administers the treaty.

But uncertainty is unsettling international relations no less than domestic affairs, and in areas like trade and climate change states are increasingly likely to acknowledge their interdependence, and hence the need for collaboration – at least insofar as geopolitical concerns allow recognition of vulnerability. The last chapter of *Fixing the Climate* describes an experimentalist regime in trade that complements emerging experimentalist collaboration in the exploration of green technologies at the sectoral level, and shows how some of the aspects of self-determination associated with sovereignty could be preserved in a new form in regime of intensified collaboration.

### *3. Can experimentalist governance complement market-based instruments?*

Climate change and related policy issues exhibit two specific types of uncertainty. First, there is deep scientific uncertainty regarding climate sensitivity to greenhouse gas concentration in the atmosphere, encompassing aspects such as global

mean temperature evolution, the occurrence and intensity of extreme events, and the impact of climate change on different regions of the world, along with the extent of environmental damage in various sectors. Second, there is technological uncertainty concerning the future development and diffusion of clean technologies and energy sources. For example, we do not know which clean energy sources will be the most prevalent, how quickly businesses and consumers will adopt green technologies, and whether new green production paradigms will prevail.

In addition to these sources of uncertainty that make it difficult to design and implement effective climate mitigation policies, we must also consider macroeconomic and geopolitical uncertainties. These factors create challenges in balancing short- and long-term objectives during the green transition. For example, a deep recession or high energy price volatility can make it difficult for businesses to invest in long-term climate solutions and meet environmental regulations; on the other hand, in a context of geopolitical turmoil, there is a potential for countries to weaponize their energy interdependence by using energy exports as a tool of coercion. This could make it more difficult to cooperate on ambitious international climate action.

Despite these uncertainties surrounding climate change issues, we must aim to develop policy tools that reduce the risk of catastrophic climate change. It is therefore imperative that we take ambitious actions to reduce greenhouse gas emissions. While existing market-based instruments, such as carbon pricing through carbon taxes and emission trading systems, can contribute to emission reduction, their current limited coverage may not provide sufficient incentives for all sectors of the economy. On the other hand, experimentalist governance approaches offer flexibility and adaptability to uncertainty. However, they can be costly, demanding substantial investments in human capital and the capacity to govern complex processes.

**What role can market-based instruments play within the framework of experimentalist governance? Can they serve as complementary tools, or should they be employed as supplementary measures when experimentalist governance approaches face challenges in effective implementation?**

**Answer:** Market-based or price mechanisms work best in achieving static efficiency or the optimal use of available resources given existing constraints. An increase

in the price of a dirty fuel relative to a clean one is an unbeatably efficient way to encourage a switch to the clean heat source among power plants already or easily equipped to burn both. But prices are not much help in incentivizing dynamic efficiency or adjustment to much larger changes in context, often requiring redirection and therefore reinvention of technology. Prices are ineffective at inducing dynamic efficiency because the costs of changing technological trajectory are likely to be enormous relative to the cost of persisting on the familiar path. Development of successive generations of dirty technology lowers the cost of creating the next dirty generation, while the costs of developing a clean alternative start very high – the early days of innovation are often the riskiest – and get even higher as the performance of the established competitor improves. Indeed, the cost penalty that would have to be applied to the dirty alternative to induce a switch would be so high as to be tantamount to a prohibition – at which point it is the regulatory limit and not the market that is actually doing the work of incentivization. Note that the introduction of carbon taxes and other such price mechanisms has regularly been thought to induce technological innovation, but this expectation has been disappointed again and again.

But, as I hope is clear by now, experimentalist governance is designed precisely to encourage dynamic efficiency, especially innovation along an unfamiliar path, as in the current pursuit of clean technologies. It incentivizes innovation as a way of generating the information that regulators need to incrementally tighten standards; and it uses the tighter standards to spur the next round of competition for further improvement. Once alternatives are consolidated, and a stretch of the way forward is clear, price incentives can aggressively be used to accelerate diffusion and adaptation of the new technology. The Inflation Reduction Act in the US, which uses tax incentives to encourage investment in and purchase of green goods is a recent example.

### *4. Could regulatory sandboxes and corporate sustainability reporting obligations play a role in the experimentalist governance approach?*

One of the main themes of the book *Fixing the Climate: Strategies for an Uncertain World* is the search for an efficient balance in the relationship between the

State and the market, where efficiency must be assessed concerning the goal of keeping climate change under control. In this research, the book's Authors focus on two essential courses of action. The first course of action consists of setting systems of cooperation and incentives by the State in favor of businesses that effectively pursue the aforementioned goal. The second course of action is to set a system of obligations, prohibitions, and other penalties to disincentivize or prevent businesses from undermining the achievement of the goal.

About these courses of action, it might be useful to consider, in addition, or as an alternative to the possible solutions identified by the Authors of the book, the solutions adopted or proposed in the European Union even concerning problems other than climate and environmental ones.

From the perspective of cooperation and incentives, it might make sense to consider the 'regulatory sandbox' tool, which the European Union has promoted or is promoting for (i) testing some AI or other high-tech solutions (such as innovative blockchain and other distributed ledger technologies), (ii) establishing a framework for data access and use and (iii) supporting start-ups or fintech. A regulatory sandbox is a regulatory tool that allows businesses to explore and experiment with new and innovative products, services, or businesses in a controlled real-world environment under an experimental legal regime and the supervision of a regulatory authority for a limited period of time. It also enables regulators to better understand the technology.

From the perspective of obligations, prohibitions, and sanctions, it is perhaps possible to include among the penalties in a broad sense the legal liabilities and reputational damage that may result from breaching rules on information or reporting obligations. From this perspective, it is worth considering the system of both legal obligations and reputational or market incentives and disincentives that the European Union has or will set forth by the rules on corporate sustainability reporting (so far the Non-Financial Reporting Directive and in the future the Corporate Sustainability Reporting Directive) and the Regulation on Sustainability Reporting in the Financial Services sector as well as by the Taxonomy Regulation and the related delegated regulations of the European Commission, which establish the technical screening criteria for determining whether an economic activity qualifies as environmentally sustainable for the purpose of establishing the degree of environmental sustainability of an investment.

**Are regulatory sandboxes a kind of tool to be recommended as part of the experimentalist governance approach or, anyway, can they play a role, and which one, within a framework of experimentalist governance? Can rules on corporate sustainability reporting be sufficient as a penalty system within a framework of experimentalist governance, or can such rules serve only as complementary tools?**

**Answer:** Regulatory sandboxes were invented as a device for testing the need for and definition of innovative regulatory systems to police the safety of innovative products and production processes. To my knowledge they have not played a great role in the green transition, nor do I expect that they will anytime soon. The reason is simply that they are not necessary. Existing regulatory systems are well equipped to incentivize the introduction of innovative technologies, and to monitor their operation. In *Fixing the Climate* we show how the California Air Resouces Board used technology-forcing regulation – fixing demanding targets for pollution reduction in consultation with the automobile industry; tightening those standards again, and again, as breakthroughs advance the frontier of development – to incentivize production of electric vehicles for the mass market. We frequently see that administrative agencies find the means for regulating radical innovation in ingenious use of their current toolbox, whether through waivers or provisional guidance, or in the case of the Water Framework Directive, also discussed in the book, soft law, a close cousin to guidance current in the EU. Indeed, regulation in food, safety pharmaceuticals and other domains in the EU typically has many of the neither top-down nor bottom-up features of experimentalism, so this approach might count as home-grown there. But if regulatory sandboxes prove their worth and are incorporated into the regulators' tool kit, there's no reason to think that they could not be used to test experimentalist solutions as well.

I will say a word – slightly disparaging I'm afraid – about systems for evaluating corporate.

### *5. By incentivizing firms to innovate, could the experimentalist governance approach unhinge the power of those who oppose the ecological transition?*

A crucial aspect of the model and approach proposed in Sabel and Victor's volume is the ability to break vested interests by rewarding the creation of innovation rents. The decentralized experimentalist governance approach should, in other words, push firms to abandon 'positional rents' and pursue 'innovation rents'. Recent empirical studies suggest that Italy has a huge potential for green innovation (one of the highest in the world) and the mapping of firms with great potential does not always overlap with the mapping (including geographic mapping) of the currently most innovative firms.

**How do you think the approach you propose aims to create opposing blocs of innovators and conservatives? Does this have the potential to unhinge the power of those who oppose the ecological transition, creating the strong 'cross-cutting alliances of innovation' that are lacking in our country between innovative firms, institutions, workers, and citizens as the *Forum Disuguaglianze e Diversità* suggests?**

**Answer:** Experimentalism does indeed propose a system of incentives that creates 'innovation rents' – by promising pioneering firms that their products and processes will inform the regulatory standards applied to the whole sector – and reduces the 'positional rents' of incumbents, first by making it risky for them to cling to the status quo when competitors may be raising the standards, and second by eventually imposing draconian sanction or penalty defaults, such as exclusion from the market, on incorrigible laggards who are unable to adopt advances even when their feasibility and utility has been demonstrated. Should we be concerned that the same incentives will encourage formation of a counter bloc – a league of laggards, so to speak – who cooperate or collude to discourage the kind of innovation that would lead to tougher standards, and to persuade regulators to stick to the status quo even when improvements arguably become available?

While it is always important to inquire into the possible unintended effects of reform measures, I don't think we need to be too concerned by this worry here. The reason, of course, is certainly not that firms do not connive to defend the status quo,

and their positional rents, when it is to their interest. Obviously they do. But there is no need for incumbents to manipulate experimentalist incentives in order to organize this defense. They already have tried-and-true means for protecting the status quo, starting with the trade association. The purpose of such organizations is to represent the interest of the median member. In any industry there will be few capable innovators relative to a much larger number of firms that can adjust to innovation, but do not deliberately seek it, or are simply hanging on, resistant to change. The median voter in a typical trade association will therefore be anything but an advocate of bold innovation; on the contrary, trade associations should, and typically do, have a strong preference for maintaining the status quo. That, of course has been the experience of trade associations linked to the carbon economy the world over. The carbon interests, in other words, have long ago solved their collective action problems and organized aggressive protection of their interests. The hope is that experimentalist incentives will, in the case of the green transition and more generally, help those challenging the status quo to cooperate fruitfully with one another, both in accelerating innovation and adjusting regulation accordingly.

### *6. The problem of climate crisis raises both technological questions and social justice issues? What is the correct framing to account for growing economic inequalities and their harmful environmental impacts?*

The great challenge before us is to align traditional economic growth with meeting several social objectives, including those related to climate mitigation, and preservation of biodiversity. Therefore, the key challenge is how to build an economic system that is structurally decoupled and disconnected from the detrimental effects on the environment (largely resulting from emissions of greenhouse gases). The approach on which the volume is based places a large confidence on the role of technological advances and efficiency improvements to help mitigate the overall ecological footprint of our global economic activity. Numerous studies, suggest that these impacts vary widely by wealth and income of individuals; in 2019, for instance, the work by Lucas Chancel published in *Nature Sustainability* in 2022 ('Global Carbon Inequality over 1990-2019')

indicated that nearly half (48%) of global emissions originated from the top 10 percent of emitters, whereas the bottom 50% accounted for merely 12%.

**What response would you offer to those advocating for a shift beyond technological advancement, emphasizing a transition from an economy fostering excessive consumption among the affluent to one prioritizing fulfilling fundamental needs for everyone?**

**Answer:** That half of global emissions are linked to the wealthiest 10% of the individuals in the world is another compelling reason to oppose the concentration of wealth and growing inequality that disfigures our societies. The finding should not be a surprise. Do we really expect an elite of rich oligarchs determined to maximize its control of government, democracy be damned, to exercise self-restraint in its personal affairs, merely for the benefit the planet?

As a practical matter though I don't think the finding should redirect our approach to climate change. As Chancel notes, the carbon footprint of the world's wealthiest is as large as it is chiefly because of their investments in carbon-intensive industries (which are presumably related to the size of their portfolios, rather than an express preference for carbon-related holdings). It is what they own, not the excesses of how they live, that makes them a special burden to the climate. In one sense this is good news because, as Chancel's work makes clear, it is fiendishly difficult to measure individual, consumption-related pollution, as would be necessary for taxing the profligates.

But while it is easier to measure investment-linked pollution than consumption-linked pollution, credibly measuring the former is proving so difficult as to be, at least for now, practically unworkable. Consider the rise and decline, if not fall, of the movement to rate firms on their regard for the environment, sustainability, and good governance (ESG). The idea is that the ratings will alert investors to a firm's carbon exposure, and thus to the risk that its assets could be stranded as a green transition proceeds. Add to this the assumption that universal owners – firms like Fidelity and Blackrock that together control some 20% of the equity in all major corporations – will sacrifice a few (oil company) holdings to protect the value of the whole portfolio against the risk of climate change, and it can seem that an investment-ratings system based on ESG is the key to enlisting the financial markets (and not quite incidentally, the rich

people that control them) into the service of environmental renewal.

That is the theory. In reality, it has proved extremely difficult to arrive at consensus at every stage of the process of standard setting from getting credible, ground-level information about pollution in the firm and its suppliers, to agreeing on thresholds for levels in the rating scheme, to defining the commitments to improvement that firms must make to improve their standing. In many cases, further investigation has uncovered new ambiguities, not clarified existing ones. Opinions will vary as to the prospects of this initiative. But I doubt that anyone thinks that there is currently a robust system for the evaluation the ESG performance of firms by portfolio investors. In the absence of such a system it is hard to see how tax authorities can credibly penalize the wealthy for their pollution-linked holdings.

And why bother? *Fixing the Climate* sketches an experimentalist regulatory scheme for inducing firms to reduce pollution and embrace the green transition. If that, or some alternative approach, succeeds, the carbon footprint of the wealthiest will be reduced because the firms in their portfolios will be polluting less. In that case the rest of us, constrained in our own polluting as much by our means as much as by our morals, won't have the satisfaction of knowing that profligate polluters are paying a price for their selfishness. And when immoral reckoning comes, as I trust it will, I suspect the first charge against the oligarchs will be subversion of democracy, followed by outrage at damage done by their attack on public goods, starting with the climate.

In the meantime, however, I think focusing on the wealthiest polluters is a distraction, though a morally comprehensible one, from the urgent fight to lower pollution generally.

**MARIE-AMÉLIE CONTRÉ***

# FAMILY AND THE MARKET IN THE 3RD GLOBALIZATION: A SURVEY OF LITERATURE

CONTENT. 1. Introduction. – 2. Critical theory as a tool to recognize the existence and significance of the divide between family and the market in the third globalization. – 2.1. The distributive effects of the divide. – 2.2. The factors explaining the creation of the divide. – 2.3. The actual complementarity between family and the market. – 3. The attempts to supersede the divide, and the family law exceptionalism in the third globalization. – 3.1. The current merger of family and the market. – 3.2. The ideas justifying this apparent merger. – 4. The limits of the superseding of the divide: reconceiving the family and the market divide. – 4.1. The endless reproducing of the divide. – 4.2. The negative effects of the merger of family and the market. – 4.3. Transforming the divide: from substantive equality to anti-discrimination. – 5. Conclusion.

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## *1. Introduction*

In 'Three Globalizations of Law and Legal Thought: 1850-2000', Duncan Kennedy, reflecting on the three globalizations doctrine, affirms that the main element that is each time globalized is a mentality.[1] Indeed, the first globalization (1850-1914) was dominated by Classical legal thought (CLT). In the CLT legal consciousness, three elements were seen as defining the law: individualism, formalism, and divides between private and public law, and family and the market. Thus, the divide between family and the market can be perceived as a creation of this legal consciousness. It is characterized by different *paradigms*, but also different *legal techniques*. CLT, for example through *System of Modern Roman Law*, from Friedrich Karl von Savigny, defines the market as the realm of individualism and free will.[2] It is a space where equal individuals contract with each other, in order to serve their best interests. The market therefore embodies the idea of modernity and is ruled by the law of obligations, which is viewed as merely technical. On the other hand, the family is perceived as marginal, which gave birth of the theory of 'family law exceptionalism'. The family is considered as governed by some affects like altruism, and private relations between individuals, according to their status granted by the State, like 'husband', or 'mother'. The dichotomy also contains ideological elements, since the market is pictured as hierarchically superior to the family, that can only remain marginalized. According to Duncan Kennedy,[3] the prevailing will in the family is the one of the State, and not the one of individuals. Therefore, the organization of the family is said to be hierarchical, but also fundamentally local, for it is shaped by traditions, cultures and ideologies. Because the family is seen as the realm of affects, it has to be marginalized from the market, to be protected from the corruption of the economy. This marginalization is also meant to protect the family from the intervention of the State ('non-intervention doctrine'), but it is no just a legal marginalization. Even the scientific approaches of law treat the family as an exceptional field and are reluctant to apply a

[1] Duncan Kennedy, 'Three Globalizations of Law and Legal Though: 1850-2000' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development. A Critical Appraisal* (CUP 2006).

[2] Friedrich K von Savigny, *System of the Modern Roman Law* (J Higginbotham 1867).

[3] Kennedy (n 1).

comparative analysis to it. It is therefore submitted to family law, that departs from the rest of the law. This exceptionalism of family, when compared to the market, can be epitomized by another divide, which is the core/periphery divide.[4] The market thus appears as the center of private law, whereas family remains untouched in the periphery.

Therefore, in the first globalization, the family and the market are two very different domains, relying on contrasting paradigms, which justify their submission to contrasting legal techniques. The divide between family and the market is seen as a reflection of the reality, as a natural and preexisting dichotomy. The second globalization started deconstructing this divide created by CLT, as the family was apprehended for its important social role. It was no longer seen as purely private and exceptional because a social interdependence between the family and the rest of society was identified by the scholars. Besides, some values that were presented as specific to the family in the first globalization, like solidarity, started to be implemented in the market, through social labor laws.

According to Duncan Kennedy,[5] the third globalization can be dated back from 1945, to nowadays. The main feature of this period is the notion of 'identity'. Kennedy argues that identities have different interests, values or even rights, that can conflict. The role of the judge is thus to produce the legal decision as a compromise between these 'conflicting considerations'. The legal tool is seen as a *langue*, that can be used to produce different *paroles*, namely different regimes of positive law. Both family and the market are submitted to the identity discourse. For example, the market is not completely free, since its actors are forbidden to discriminate the weaker parties, like minorities, women etc. Rights are allocated to identities, regardless of the divide between family and the market. Alongside with the concept of identity stands the concept about human rights. The latter are a main feature of the third globalization, because protecting them is an important concern for the legislator, both in the family and in the market. Besides, the international scale is increasingly relevant, which leads to international pressures for the liberalization of family law, that is no longer seen as local. These

[4] Maria Rosaria Marella, 'Critical Family Law' (2011) 19 Am UJ Gender Soc Pol'y & L 721.

[5] Kennedy (n 1).

observations can lead one to believe that there is a blurring of borders between the family and the market in the third globalization.

Therefore, we may wonder if the family and the market divide is a mere product of the first globalization, that is completely off-topic in the third globalization, or if and how it is still relevant. If it is the case, we may wonder if the divide needs to be superseded, as an outdated and Manichean perception of the law, or if it can still be significant nowadays.

Thus, we will see that in the third globalization, Critical theory has acted as a powerful tool to emphasize the existence and significance of the divide between the family and the market (Section 2). This recognition of the divide gave birth to some attempts to supersede and defeat it, in the context of the third globalization (Section 3). Nevertheless, the main outcome of the legal critiques of the third globalization might not be found in this will to deconstruct the divide, but rather in the proposition to reconceive it (Section 4).

## *2. Critical theory as a tool to recognize the existence and significance of the divide between family and the market in the third globalization*

### *2.1. The distributive effects of the divide*

Even though the family and market divide was presented as 'natural' in the first globalization, critical legal scholars like Frances Olsen, Duncan Kennedy, and the 'Up Against Family Law Exceptionalism' movement helped unveiling the fact that it was created. Indeed, the idea that contracts were dominated by the market, and therefore by bargaining behaviors, was a way to dissociate it from the family, as if no bargains could occur in it. As Debora L Threedy argues, naming something a 'market behavior', which refers to bargaining, implies that there are also 'non-market behaviors', namely family matters.[6] Therefore, the existence of the divide itself is sufficient to exclude family from the market, and from contractual law. Critical theory has, nevertheless, claimed

[6] Debora L Threedy, 'Feminists and Contract Doctrine' (1999) 32 Ind L Rev 1247.

that the discourses about this divide mask its distributive effects.

Indeed, Threedy sheds light on the fact that the divide excludes both the family and women from contract law. She takes the examples of the *Miller v Miller*[7] case to show how intrafamilial bargains between men and women have been excluded from the application of contract law. In this specific case, the written agreement between Mrs Miller and her husband, according to which she would not leave him and provide him with a home in exchange for money, was considered unenforceable by the court, whereas in *Hamer v Sidway*[8], an agreement between an uncle and his nephew was found enforceable. In the first case, the judge refused to apply contract law because he affirmed that the performance offered by Mrs Miller was merely her duty as a married woman and could not be bargained. The divide was a justification for the reluctance of the courts to submit family bargains between sexes to contract law, and to recognize them as market activity. The marginalization of the family was therefore the result.

The same goes for women, according to Threedy, because our definition of contracts as market bargains dates from a time where women were mainly involved in family transactions and excluded from the market. Applying different legal techniques to the family and to the market has distributive effects, since women and men are not submitted to the same rules, nor entitled to the same rights. For example, when a woman and a man married, they were considered as one single entity, which justified that the woman was not entitled to make contracts in her own name, but only in her husband's.

Critical legal studies on the divide between family and the market enabled the recognition of its existence, and of its distributive effects, because of its overlapping with the women/men divide. Indeed, the idea that the family shall be completely isolated from the market, and thus from contract law, deprived women of the power to bargain themselves.

But despite the existence of these critiques, some distributive effects of the divide persist in the third globalization, for unveiling the existence of the divide did not make it disappear. We can take the example of the European Union harmonization policies. In their article 'Critical Directions in Comparative Family Law: Genealogies and

[7] [1887] 35 NW 464.

[8] [1891] 27 NE 256.

Contemporary Studies of Family Law Exceptionalism', Janet Halley and Kerry Rittich[9] explain that the European Union has adopted the Savignan model, because there is still the dominant idea, according to which family law is related to the nation. Thus, the debate only takes two directions. The first one is based on the idea that each Member State has its own nation, and that therefore there cannot be a European harmonization. The second claims that there is only one European nation, which makes harmonization possible. In both cases, this debate abides by the idea that family law is exceptional, and different from the market, that has been regulated by the EU for a long time. Besides, the family is still majorly seen as part of the State sovereignty, and as a more political field that the market. Even though international family law scholars praise for de-marginalizing the family, by for example accepting international or European harmonization, the reluctance of the States shows that the divide is still present.

Besides, we can see that some bargains relating to family and reproductive matters, like surrogacy contracts, or sex work, are left out of the market in many countries. Thus, these bargains relating to the body of women are not submitted to contract law, because this law is seen as the attribute of the market only.

This exclusion of sexual and reproductive bargains from the market has been criticized in the third globalization, for instance by Martha Nussbaum.[10] The latter argues that all workers receive money for the use of their bodies. But some occupations, such as prostitution or surrogate motherhood, are particularly stigmatized. Nowadays, in most countries, prostitution itself, or the resort to prostitution are illegal. Among the multiple consequences of this exclusion from the market, we can find immorality. Indeed, the refusal of the law to regulate these activities is not neutral and produces an ideological discourse about them. There are in fact reciprocal relations between the law and morality in this topic, since the refusal of the law to regulate these activities produces them as 'immoral', but their pre-existing 'immorality' is also what justifies their legal exclusion. As Nussbaum explains, this discourse raises the question of how appropriate

[9] Janet Halley and Kerry Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 Am J Comp L 753.

[10] Martha C Nussbaum, '"Whether from Reason or Prejudice": Taking Money for Bodily Services' (1998) 27 J Leg Studies 693.

it is to use moral arguments as the basis for legal restrictions. Indeed, the law pursues other goals than morality, as for instance protecting weaker parties that are submitted to high risks, like prostitutes. But stigmatization also comes from the idea of reification of the sexuality of the prostitute in the market. The transactions on sexual or reproductive capacities are seen as turning these capacities into objects, for men to use and control. But Nussbaum claims that prostitution is no more a commodification of the sexuality of women than teaching is a commodification of the mind of the teacher. In fact, she argues that the ban of prostitution is a way to maintain male control over female desire. Like any other occupation involving health and violence risks, it should be regulated in order to protect the prostitutes, which is the reason why Nussbaum is in favor of the legalization and regulation of prostitution, instead of punishment. She believes that excluding it from the market, and therefore, from the common law, is endangering and disempowering women, also because some of them have no other alternative to have an income. The regulation of prostitution, on the contrary, would enable these women to have an actual control over their working conditions, as well as to have better legal protection like any other employee.

Whether we agree or not, we can see that the divide between family and the market still manifests today through the refusal of most countries to apply contract law to these types of 'family' related bargains.

### *2.2. The factors explaining the creation of the divide*

Although the divide between family and the market was presented as 'natural' and as translating the social reality, many authors unveiled the fact that it is the product of human creation.

The divide between family and the market is firstly a creation of language. Indeed, when analyzing the different functions of the language, Roman Jakobson identified the 'conative' function, that can also be called the performative function.[11] It is the idea that the language does not only reflect reality, but it can also produce it.

This idea can be applied to the family and the market divide, that does not only

[11] Roman Jakobson, *On Language* (Harvard University Press 1995).

reflect reality, but produces it as well. Some legal scholars, like John L Austin,[12] Carol M Rose[13] or Mary Joe Frug,[14] have reflected on this performative power of language, especially when it comes to law. Frug focuses on the performative power of the legal discourse, taking the example of the impossibility doctrine. She says that two authors, Posner and Rosenfield,[15] adopted an analysis based on male virtues, which lead them to a binary outcome: whether full performance should be executed (strict liability), or, if there is ground for impossibility, then full discharge should be granted. There is no in-between in their analysis, which is why Frug says that they privilege predictability and have an abstract idea of contractual relationships. In the opposite, she examines Hillman's[16] theory of impossibility, which she qualifies as based on female virtues. Indeed, Hillman adds other goals to the doctrine than predictability of the allocation of risks. These other goals are fairness norms and adaptability to the situation. Therefore, he privileges flexibility over predictability. Frug's point is that the legal discourse is gendered, even though the gender does not necessarily correspond to the one of the authors. Therefore, a language, including the legal discourse, cannot be neutral. It is the result of a political and social context and gives birth to different legal outcomes. Frug's analysis is thus important to understand that the legal discourse about family and the market divide is a gendered creation of the language. When we look at the values attributed to each of the elements of the divide, we can see that the values associated with the family are more feminine, and the values associated with the market, more masculine. The family and the market divide overlaps the women/men divide, that is also constructed and based on stereotypes of what characterizes the masculine and the feminine.

These stereotypes can be the idea that housework is to be unpaid, as a 'normal' female activity, which is why the family and market divide also overlaps the un-paid/paid work divide. Because of these stereotypes, care-work is identified as part of the 'family',

[12] John L Austin, *How to Do Things with Words* (2nd edn, Harvard University Press 1955).

[13] Carol M Rose, 'Women and Property: Gaining and Losing Ground' (1992) 78 Va L Rev 421.

[14] Mary Joe Frug, 'Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law' (1992) 140 U Pa L Rev 1029.

[15] *See* Richard A Posner and Andrew M Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 J Leg Studies 83.

[16] *See* Robert A Hillman, 'An Analysis of the Cessation of Contractual Relations' (1983) 68 Cornell L Rev 617.

which deems it to remain out of the market and un-paid. Carol Rose summarizes it, saying that 'the economy of domestic relations' is a 'non-market'. Care-work is only one example on how the rhetoric surrounding the family and the market constructs their differences and separation. The family is depicted as the realm of altruism, care, affects, solidarity. All these values are also the ones that the social discourse associates with women. Rose also says that women 'have a taste for cooperation'. This tendency to solidarity and altruism is not necessarily something natural for women, but many people share the cultural belief that they should have this taste. And if women do not have this taste for cooperation, Rose explains that, because of the cultural belief that they should, they can be punished, for example though social exclusion. The consequence will be that whether they naturally have a taste for cooperation or not, women will be coerced to act in accordance with this idea in order to be socially integrated. In addition, there can be legal demands that women cooperate. Rose explains that for example, laws denying women the capacity to own their own property, or to obtain an education, are depriving them of alternatives to cooperating with their husband. On the contrary, the market is depicted as governed by individualism, independence, and self-interest, which are values said to be more masculine. This rhetoric about family and the market creates them as two different and well separated realms. This construction of the language is self-reproducing, and has legal consequences, as care-work illustrates. Indeed, as it is seen as an element of the family, it remains out of the market and unpaid, which, in the end, disempowers women.

This very same rhetorical power of the law can also be observed in the discourse relating to prostitution. As said above, the refusal of many legal systems to regulate prostitution through contract law is justified by the 'immorality' of this activity. In the French Civil Code for instance[17] the conditions of validity of a contract include the 'lawful' character of the agreement, which is the basis used to refuse the enforcement of prostitution agreements. The legal discourse is thus not neutral. When it identifies an activity as 'immoral', it gives legal consequences to this qualification, by, for example, excluding it from the official market.

[17] *See* Article 1128 Code Civil ('The following are necessary for the validity of a contract: 1. The consent of the parties; 2. Their capacity to contract; 3. Content which is lawful and certain').

Consequently, the critical analysis of law, that has been taking place in the second globalization, and mostly in the third, helps to unveil the existence of the dichotomy between family and the market, and how it constructed by the language. This dichotomy thus appears as a structure of power, as it overlaps other dichotomies like female/male, and has consequences on the distribution of the bargaining power.

But the divide's construction through the language took place in a particular context, which is capitalism. Focusing on this context also helps to unveil how the divide was constructed and does not merely express the social reality.

In their article, Halley and Rittich[18] explain that the family and the market divide has not always existed. They also affirm that the 'distinctiveness' between family, its law and the rest of the legal order is not a reflection of reality, but 'a constitutive and productive basis for it'. They explain that before the idea of family as exceptional, there was the 'household'. It was an economic entity, that can be compared with the concept of Firm by Ronald Coase,[19] because it was internally producing some goods like food, but also sometimes resorting to external contracts for the goods that it could not produce. Therefore, the economy of the household was continuous with the economy of the market. This entity was semi-public, as it mixed public and private fields, as well as family and the market. It was indeed composed of the family, but also servants or farm employees for example. The authors believe that the rise of capitalism produced the family law exceptionalism, by segregating the functions of the household in two separated spheres. All the paid work moved to the market, whilst only the husband, the wife and the children remained in the family. They also believe that, whereas the household was dominated by masculinity, the main gender of the family was female. It was a way for patriarchy to establish a distinct feminine domain, deprived of any pecuniary power, and therefore subordinated to the masculine market. This segregation between the two spheres had legal consequences, as family law was applied to the family, whereas the law of obligation applied to the market.

Therefore, by unveiling how capitalism, through the use of a rhetoric, produced the divide between family and the market, which resulted in the exclusion of women

[18] Halley and Rittich (n 9).

[19] Ronald Coase, 'The Nature of the Firm' (1937) 16 Economica 386.

from the law of obligations, critical analysis of the law dating from the third globalization, enables to understand the origins of a dichotomy that still has legal impacts today.

### *2.3. The actual complementarity between family and the market*

As explained above, the divide between family and the market is a rather recent creation, though it claimed to be a mere mirror of the social reality, during the first globalization. This idea of the existence of two distinct spheres still has legal consequences today, but many scholars have recently tried to demonstrate that this dichotomy is not the reality. Indeed, there are interactions and interconnexions between the family and the market, which reinforces the idea that the divide is a mere creation of the legal language.

The Idea of background rules, that was, among others, elaborated by Robert Hale,[20] helps to unveil these interactions. We can argue that Wesley Newcomb Hohfeld[21] is a precursor to this idea of background rules. In his article, he indeed came up with the idea that clear-cut separations between legal concepts are a confusion created by the language. In reality, he believes that all legal interests are relational. Each legal concept has an opposite and a correlative. But jural opposites do not mean that the concepts are separated in an absolute way. For example, privilege is the jural opposite of duty. But privilege and duty are still in relation because the privilege can be defined as the negation of the duty. The privilege against self-incrimination means the negation of the duty to testify. This idea that legal opposites are in relation can be applied to the family and the market divide. In his article called''The Stakes of Law, or Hale and Foucault!', Duncan Kennedy[22] addresses the work of Hohfeld, to elaborate on background rules. The main feature from Hohfeld's work is the idea that, in a legal system, 'inaction is a policy'. Indeed, when the law is silent, it is not however neutral, because it could also regulate instead. For example, if a legal system does not recognize a prostitution agreement as a valid contract, it does not leave this agreement out of the law. On the

[20] Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Pol Sci Q 470

[21] Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 23 Yale LJ 16.

[22] Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15 Leg Stud F 327.

contrary, this legal system is deciding that prostitution *should* not be a contract, which is a political choice. With every 'right' allocated by the law comes a 'no-right', that also distributes the bargaining power. For example, the allocation of the right to contract comes together with the 'no-right' for infants to contract. This idea helps unveiling the distributive effect of the law. In this article, Kennedy sheds light on the fact that, both action and inaction on the part of the law have consequences in how the power is distributed between the parties. It is also the idea of the article 'Bargaining in the Shadow of the Law: The Case of Divorce', by Mnookin and Kornhauser,[23] because law has distributive effects in the foreground, as well as in the background. For example, the settled divorce is regulated by specific rules (foreground), but the rules regulating specifically the litigated divorce will also have consequences on the tendency of the parties to resort to the settled divorce. Therefore, the rules of the litigated divorce act as background rules of the settled divorce. Kennedy[24] also emphasizes the role of alternatives, that act in the background as well. For example, if women have many alternatives to marriage, to have an income, their resort to divorce will be more accessible, and possibly more important. The main element that we can take from this analysis is that there can be no complete isolation of the family from the market, in a legal way. Indeed, the family and the market divide relies on the idea of non-intervention of the law of obligations in the family spheres. It would mean that only family law could apply to the family sphere, which is the main feature of family exceptionalism theory.

Nevertheless, the theory of background rules helps to challenge this idea that there can be a clear-cut divide between the family and the market, because these two spheres are actually in relation, from a legal point of view. In their article,[25] Halley and Rittich argue that there are four layers of rules influencing the family sphere. The first layer (FL1) is composed of the foreground rules that are distinct from the rest of the legal system, namely family law, regulating marriage, divorce etc. But the rhetoric about the existence of a divide between the family and the market claims that only these rules

[23] Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LJ 950.

[24] Kennedy, 'The Stakes of Law' (n 22).

[25] Halley and Rittich (n 9).

apply to the family, for it is exceptional. Halley and Rittich explain, on the contrary, that three other layers influence the family. The second layer (FL2) is composed of substantive laws, not directly addressing the family, like tax law, social insurance law. These rules are not distinct or exceptional like FL1. Then, there are rules of the third layer (FL3), that structure silently the family sphere, as employment rules that enable to dismiss an employee 'at will'. Finally, there is the fourth layer (FL4) that is composed of informal rules. Therefore, the authors explain that there is no actual separation between family and the market, but rather a *continuum*. Because of the interconnections between foreground rules and background rules, every legal reform provokes a flow of resources across a *continuum* between the family and the market. The authors indeed say that, 'Reconnecting FL1 to FL2, FL3, and FL4 renders the modern family visible as part of the law of work, part of poverty law, and reveals its *intimate connection* to wider transformations in the social state and the *global market*' (emphasis added).

Duncan Kennedy has a similar idea when he talks about 'circular causation',[26] because he believes that if a reform modifies one foreground rule, it will have an impact on all interconnected background rules, which will eventually reinforce the initial change, following a circular motive.

The influence of background rules on the family sphere also enables to challenge the idea that it is meant to stay local, whilst the market would be international. Taking the example of nannies that can come from another country, the authors shed light on the fact that migration rules can act as background rules and influence how much a care-worker can expect to be paid in another country. Thus, we can see that the family cannot be reduced to exceptionalism, nor to localism, and that comparative studies can also apply to this sphere.

The critical studies in the third globalization show that the idea of a separation between the family and the market is reductive. It is a construction of the legal language, a rhetoric that produces distributive effects, but it does not take into account the complexity of the law, that is made of multiple interactions. No legal sphere can be fully insolated, which is why, from a normative point of view, the divide between the family

[26] Kennedy, 'The Stakes of Law' (n 22).

and the market can seem irrelevant. Nonetheless, it has concrete consequences from a descriptive point of view, and therefore, some attempts have been made to disrupt this dichotomy in the third globalization.

## *3. The attempts to supersede the divide, and the family law exceptionalism in the third globalization*

### *3.1. The current merger of family and the market*

Even though, as explained above, the divide does not seem to correspond to the normative reality, because of the intertwining of foreground and background rules, it still has concrete effects from a descriptive perspective.

Nevertheless, even from this descriptive point of view, we can see that there is a tendency to the merger of the family and the market spheres in the third globalization. This merger questions the relevance of this divide in the third globalization and may lead us to wonder if it is about to be superseded.

The merger between family and the market takes two directions. First, family tends to be in the market, through a transfer of values. Second, the market is increasingly present in the family, as this sphere tends to shift towards more individualism.

As to the first direction, we may argue that the market started to shift towards the values of the family in the second globalization, that was very socially oriented, as Duncan Kennedy explained.[27] Frances Olsen[28] also focused on this idea, explaining that with the rise of the Welfare state, the market was no longer solely based on individualism, as redistribution of the wealth became a main governmental goal. She also believes that it is wrong to consider the family and the market as separated spheres. To her, they are rather a *continuum*, to which a *chiasmus* structure can be applied. Using this chiasmus structure, she argues that some values of the family easily transfer to the market, such as altruism, and that this transfer can be beneficial especially for women. In the third globalization, this merger is still relevant since concepts that were seen as

[27] Kennedy, 'Three Globalizations' (n 1).

[28] Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 Harv L Rev 1497.

specific to the family are imported in the market. We can take the example of 'good faith' in the French contract law. Since the 2016 reform of the law of obligations, article 1104 of the Civil Code[29] says that good faith is now a general principle that shall apply to the whole contracting process (negotiation, formation and execution of the contract).

About the second direction, we can also argue that the family is shifting towards the market. Indeed, in the third globalization, the tendency for the family is to give a more important place to individualism. During what Duncan Kennedy identifies as the first globalization,[30] the husband and the wife were considered as one single entity. The wife was completely merged with her husband and had therefore no contracting power. Another main feature of this merger is that there was the intrafamilial immunity doctrine, which meant that you could not resort to tort law when it came to the family. Nevertheless, in the third globalization, this intrafamilial immunity doctrine started to be defeated in most countries, as Maria Rosaria Marella explains in the article '"Love Will Tear Us Apart". Some Thoughts on Intrafamilial Torts and Family Law Modernization Between Italy and Canada'.[31] We can in fact observe that many countries transferred tort law, which is part of the law of obligations usually devoted to the market only, into the family sphere. For example, the breaching of marital obligations such as fidelity can now give right to damages, especially for morally hurting the other spouse, of for attempting at the spouse's dignity.[32] It shows that marital obligations of one spouse are now considered as legal entitlements to the other spouse, who is a distinct entity from his husband or wife. As Marella affirms, 'Domestic relations are no longer regulated exclusively by family law, they can even be ruled by the law of obligations'. This idea goes beyond the theory of background rules, because here, the law of obligation is consciously applied to the family (as a foreground rule) and does not only play 'in the shadow'. This incorporation of tort law in the family could lead us to believe that the

[29] *See* Article 1104 Code Civil ('Contracts must be negotiated, formed and performed in good faith').

[30] Kennedy, 'Three Globalizations' (n 1).

[31] Maria Rosaria Marella, '"Love Will Tear Us Apart". Some Thoughts on Intrafamilial Torts and Family Law Modernization between Italy and Canada' (2016) 7 Comp L Rev 1.

[32] *See* Article 1240 Code civil, that can be invoked in the context of a divorce, to obtain damages ('Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it').

divide between family and the market has been superseded. Nevertheless, family law remains exceptional, and still applies to the family sphere, alongside with tort law, which is why we can talk about a 'stratification'.

Thus, we can observe a tendency to the merger of family and the market, through the transfer of family values to the market, and stratification of family law and the law of obligations, which reinforces the idea that there is a *continuum* between the two spheres. This shift towards the superseding of the divide, especially by shifting the family towards the market is often seen as a modernization, as an improvement.

### *3.2. The ideas justifying this apparent merger*

In the third globalization, some critical movements, like feminist studies praised for the defeating of the remains of the family and the market divide, as it was seen as disempowering women. For example, the exclusion of their reproductive or sexual from the market was addressed as a limitation to their right to self-determination. Thus, superseding the divide was a way to reach more formal equality between women and men, as we have seen above that the divide overlaps the female/male divide. This goal would be reachable because including these bodily contracts into the market would give a wider access to income, to women. The consequence could be that women as a social class would gain economic influence and could thus have more political power to incentivize legal reforms. The effort of feminist scholars focused on unveiling the fact that dichotomies like family and the market, or production and reproduction are constructions of the mind. They indeed insisted on the existence of a *continuum*, instead of opposition. For example, as we saw with care-work, the reproduction cannot be disconnected from production because it is the condition to the existence of a labor force. In order to disrupt dichotomies and go beyond the gendered structure of the legal system, two main paths were explored.

One of these paths, as a concrete manifestation of this subversion of the divide, is the incorporation of tort law into the family sphere, studied by Marella.[33] The author explains that the transfer of tort law is for instance addressed in the legal discourse as a 'modernization' of the family sphere. It shows the persistence of the ideological perception of

[33] Marella, '"Love Will Tear Us Apart"' (n 31).

family and the market. Indeed, what comes from the market is seen as superior and more modern, whereas the family is said to be traditional and local. This transfer is also particularly important to take into account in the third globalization, as it was motivated by the goal of protecting human rights within the family, such as the dignity of the spouses. Thus, the idea of modernization is related to the lack of efficiency of family law mechanisms to protect human rights. Indeed, the remedies provided by family law were often only symbolic. For example, in the context of the no-fault divorce, when a spouse caused the breakdown of the marriage, the remedy was the loss of financial support during the time of the separation before the divorce, and the loss of succession rights, but it was ineffective in case the wealthier spouse (most of the time the man) was the misdemeanant spouse. Besides, many familial obligations like solidarity are addressed as moral duties by family law, and the incorporation of tort law helped turning them into enforceable rights. Marella indeed says that family law was acting as a 'soft law', because of the will to preserve the family as an affective unit. In that context, the regulation of domestic relations by other laws than family law can be perceived as an improvement. Using tort law is seen as more efficient because, as a mechanism of resources allocation, it associates an amount of money to each damage. It is therefore seen as a tool to introduce more formal equality into the family, because each member is considered as a specific entity, with its own rights and duties, that can be concretely enforced. Another example can be the increasing introduction of contract law into the family sphere. Pre-nuptial agreements are for instance becoming more popular. Un-married couples' relations are also regulated using contract law, like for example the civil solidarity pact in France.

Therefore, a possible way of defeating the divide, which was the goal of some feminist scholars in the third globalization, is to incorporate elements of the market in the family sphere. The outcomes of this shift towards more individualism are a better enforcement of fundamental rights, as well as more efficiency of the remedies to address family issues. The underlying goal of this attempt to supersede the divide is the search for formal equality between men and women. Nevertheless, we can argue that despite these efforts to reach more equality, there are important limits to the superseding of the divide through formal equality. A more suitable option, that has also been developed in the third globalization, is to reconceive the divide between family and the market, rather than trying to defeat it.

## *4. The limits of the superseding of the divide: reconceiving the family and the market divide*

### *4.1. The endless reproducing of the divide*

Before addressing the efficiency of the superseding of the divide in order to achieve equality, we may wonder if such a superseding is even possible. Indeed, if we consider that superseding the divide means bringing the family closer to the market, we may continue analyzing the incorporation of tort law in the family sphere, on the basis of Marella's article.[34]

According to this article, the incorporation of tort law in the family sphere is not completely replacing family law, but rather creating a 'stratification'. Therefore, family law is still present, and continues to act as a symbolic 'soft law'. Even though the divide between family and the market seems to become less visible, because of this merger, another divide is created inside of the family. Indeed, the initial divide between family and the market is reproduced inside the family sphere between the family issues that are addressed by the law of the market (namely the law of obligations) and the ones still addressed by family law. The issues still submitted to family law can for example be housework.

In their article, Halley and Rittich explained that care work is seen as an exclusively familial activity. Therefore, it remains unpaid, unless it is performed by people that are not members of the family. The idea that housework is executed out of affection and moral values justifies its exclusion of the market, even though there are relations between the two. Indeed, care-work is crucial in the producing of the work force, that will later be used to produce marketable goods. This is the reason why some materialist feminist scholars claimed for a salary for care-workers, who are mostly women. Nevertheless, housework is still governed by family law exceptionalism, in the sense that it is not possible to sue a spouse for not equally taking care of the cleaning or cooking in the household. This remaining submission of care-work to family law illustrates the limits of the feasibility of incorporating the law of obligations in the family. Indeed, particularly in common law, even if we wanted to submit housework or

[34] ibid.

care for the children, for example to tort law, we would face the problem of the standard of care. In the common law, the standard used for negligence law is objective reasonableness, but defining an adequate standard of care is very difficult in the family sphere. This standard does not seem fitted to this sphere, because the characteristics and most importantly the status of the family members matter a lot in the appreciation of care. Even in the case of a subjectivization of the standard of care, we would face the problem of equal treatment among individuals, because the appreciation would depend a lot on the judge, which would lead to inconsistency. But even in civil law, where tort law applies when a right is violated, or when harm was caused, housework is still epitomizing family law exceptionalism, as non-performance of it is never compensated. The duty of contribution in marriage is indeed used to justify the absence of compensation when one of the spouses performs a surplus of care-work, as if it were merely a performance of this duty.

Marella concludes that there is a reproducing of the public/private divide but shifted in the sphere of the family. The intervention of the state through tort law can in fact be seen as an incorporation of public law in the family sphere, while private law remains present through family law, especially when it comes to housework. As the public/private divide overlaps the family and the market divide (cf Section 1), we can assume that the family and the market divide is itself reproduced inside of the family sphere. This conclusion challenges the concrete possibility of completely superseding the divides, because they seem deemed to reproduce themselves.

Besides, one may argue that the possibility of an effective superseding of the divide depends on the legal system. Marella shows, by comparing Canada and Italy, that tort law is not incorporated to the same extent in the family sphere, because of the difference between common law and civil law. On the one hand, in Civil law, tort law seems to be applied as an alternative to family law for any intrafamilial conflict that is violating a subjective right, because family law is no longer seen as satisfactory. On the other hand, in common law, there is an old tradition of intrafamilial immunity doctrine, which means that the use of tort law is restricted to 'hard cases' that family law does not traditionally address alone, like child abuse. The differences between the legal systems therefore lead to different degrees of intersections between the law of obligations and family law, and thus, of merger between family and the market, as if some systems

were more suited for the merger than others. It can lead us to question the possibility of uniformly superseding the divide between family and the market, through the shift of the family towards the market.

### *4.2. The negative effects of the merger of family and the market*

As it was said above, the search for formal equality has sometimes led to believe that making the family more like the market was the solution. In this sense, the superseding of the divide through shifting the family towards the market was seen as an improvement, or a 'modernization', because it reduces family law exceptionalism, and redistributed better the bargaining power between men and women. Nevertheless, as Marella shows in her essay '"Love Will Tear Us Apart"',[35] this merger between the family sphere and the law of obligations is not a full modernization. First, it is difficult to consider that the family sphere in Canada is less modern than in Italy. Yet, a comparative analysis of the two countries led to understand that Canada incorporates tort law in the family to a very narrower extent than Italy does.

But an even more convincing argument is that the incorporation of a law usually associated with the market into the family sphere resulted in an increased regulation of the family sphere. The author even qualifies it as a 'hyper-regulation' of domestic relations because we moved from moral duties to enforceable rights. There is also the fact that tort law quantifies every family issue, by associating an amount of money to it. The consequence is that the family sphere seems more rigidly regulated than it was under family law exceptionalism. This rigidness and hyper-regulation can be qualified as a shift towards traditions, instead of modernization, because State control is increased as in the paternalist order. This return to the traditionalism of State control is not the only critique that can be addressed to the shift of the family towards the market.

Indeed, many scholars pointed out the commodifying effect of the implementation of the law of obligations into the family sphere. This effect applies to both tort law and contract law when it comes to some propositions to legalize agreements regarding prostitution or surrogacy. For example, Marella explains that there is the idea that assessing elements of the family like psychic wellness, care or fidelity, by applying tort

[35] ibid.

law, is turning these elements into alienable goods. Even though incorporating tort law can seem like a way to enforce fundamental rights better, by protecting those familial values, we can argue that it remains an appearance, as an amount of money cannot replace the harm suffered inside of the family, in the case of child abuse for example. Therefore, one may question the ability of the elements of the market, like money compensation, to act as a relevant remedy to family issues, that cannot always be quantified.

As to the propositions of incorporation of contract law into the family sphere, that are often presented as a way to empower women and make them formally equal to men, interesting critiques have been addressed by Carole Pateman, in *The Sexual Contract*.[36] The author argues that contracts are presented as an act of free will and as a neutral tool. But, as Robert Hale already pointed out, this idea is in fact rather a rhetoric, because coercion is present into the market from the moment property exists.[37] Indeed, property as a right, is allocated by the State to some of the citizens, which gives them power to withhold the labor of the non-owners. In order to buy food and to work, non-owners are actually coerced into contracting with the owners, which is why coercion is present even in the market. Carole Pateman's point is close to this idea, when she argues that no contract including domination and subordination can be consented freely. From the moment there is an inferior party in the bargain (ie women when it comes to prostitution or surrogacy), this party has no choice but to accept disadvantageous conditions. She thus argues that 'it is the economic coercion underlying prostitution that provides the basic feminist objection'. Besides, she sheds light on the fiction of 'alienability of property in the person', that is used to justify these sexual and reproductive contracts. In fact, the justification of it is often based on the underlying idea that one's sexuality or reproductive power can be distinguished from the rest of themselves, and that it can be alienated. But Pateman claims that no such separability exists, and that selling command over your body is selling command over yourself. There is no possible commodification of these essential attributes of a person, which means that these contracts result into subordination of the debtor. Contract law applied to the family is actually not defeating the patriarchal order, as it reproduces and legitimizes hierarchy. Therefore,

[36] Carole Pateman, *The Sexual Contract* (Stanford University Press 1988).

[37] Hale (n 20).

incorporating contract law into the family, by allowing exchanges of property in the person, would actually result in more subordination of women, instead of empowering them and reaching equality. A main problem at stake here would also be the protection of the dignity of the human being. The idea of dignity claims the sanctity of the human being, including his body, which opposes its commodification. It is indeed a matter of public policy that is not only addressed in family matters, and also applies to male bodies. The protection of dignity is often seen by legal systems as a superior goal, that can justify restrictions in self-determination, and in what we could call individual freedom. For example, in a famous French case law, a dwarf man was selling his body to perform dwarf-tossing.[38] The Conseil d'État decided to forbid this activity because it was considered to be a violation of human dignity and an endangerment of the public order, even though this prohibition was a restriction to the man's right to self-determination.

Just like for the above conclusion about the incorporation of tort law, we can therefore argue that not all tools of the market (including contract law) are suited to deal with intimate relationships, and that preserving human rights like bodily integrity might in fact require the refusal to treat the body of women as an alienable good.

### *4.3. Transforming the divide: from substantive equality to anti-discrimination*

The latter observations on the possible unsuitability of the law of the market to regulate all family issues can lead us to believe that instead of superseding the divide, as some scholars of the third globalization suggested, we should instead consider its transformation. As Carole Pateman explained in her paper,[39] the search for formal equality assumes that gender neutrality is a reachable goal. It has sometimes led institutions to try to remove sex-based discrimination, by forcing women to conform to legal tools and structures designed for men. But, as evoked above, this quest, when it takes the form of shifting the family towards the market, does not seem to reduce the exclusion and subordination of women. Carole Pateman states that 'humankind has two bodies, and the bodies of women and men have very different social and political

[38] *Morsang sur Orge* [1995] CE, n 136727.

[39] Pateman (n 36).

significance'. This bodily difference can be the starting point of a questioning about how to deal with the problem of equality, that is one of the main issues created by the divide between family and the market. Indeed, an interesting option might be, as some other scholars suggested in the third globalization, to shift the goal from formal equality to *substantive equality*, that would be more adapted to the differences between the family and the market, and females and males taking into account their material conditions. Again, in this suggestion, an important limit is the legal rhetoric itself. Indeed, substantive equality can also lead to reproduce stereotypes about what is suited for the family and for women. Substantive equality is symbolically dangerous since it sometimes presents women as the weaker party, imprisoning them even more in the image of the victim, instead of freeing them. Thus, an even more relevant tendency of the third globalization is to shift the debate from equalizing, for example men and women, to fighting against discriminations regarding any identity. The main acknowledgement of the third globalization is that not only is it impossible to equalize the multiple identities, but it is also irrelevant. The idea is that the legal subject is neither uniform, nor binary, but rather completely fragmented. As Duncan Kennedy explained,[40] the hero of the third globalization becomes the judge, that has to protect identities against discrimination by balancing 'conflicting considerations' (ie interest, rights or values). Nevertheless, this conciliation between conflicts is also a task that the law must perform. We can take the example of how this effort to fight discrimination can take the shape of the re-conception of a legal paradigm. As men and women have different bodies, they are also perceived as behaving differently in the contracts, like Carol Rose addresses when she mentions the wider taste of women for cooperation.[41] But contract law is usually seen as an element of the market because it is dominated by it, which is why it is not always fitted for intimate relationships. Carole Pateman points out that 'contracts and markets cannot be the model for an entire social order'. But an idea could be to reconceive the paradigm of contract law, for it not to be exclusively dominated by the market anymore. Addressing this idea of a re-conception of contract law, Threedy shows that it could be based on giving a central place to the *relationship* between the

[40] Kennedy, 'Three Globalizations' (n 1).

[41] Rose (n 13).

contractors.[42] Indeed, because contract law is currently dominated by the market, the main focus is based on what is exchanged in the contract, which mostly takes discrete contracts into account. Threedy's point is that shifting the focus to the relationship would shed more light on the inter-dependance of the contractors, mutuality and solidarity, like in a marriage rather than considering them as autonomous individuals. Threedy even says that this re-conception could be called the 'law of relationships'. In the end, it would be another form of compromise, as family values and perspectives would be associated to the paradigm of contracts. But in this proposal, human interconnections would be the basis of contracts, rather than hierarchical rights. It is close to what Frances Olsen suggested, when she said, in 1983, that we should make the market more like the family, because dichotomies limit the possibilities of human association and cooperation.[43] Here, the point is not to replace the law of the market by a paradigm based on the family sphere, but rather to create *ad hoc* legal structures that can be adaptive to both spheres. Duncan Kennedy presented this idea of reshaping of the legal paradigm as one of the main features of the third globalization. He explained that 'each new piece of positive law presents itself as a *parole*, dissolvable into the expended legal *langue* that now includes as interchangeable elements all the innovative concepts of the social […]'.[44] This adaptation and expansion of the legal tool could be a way to reduce the discriminative effect of background rules. Indeed, legal tools need to be flexible enough to adjust to different interests and values, rather than to exclude.

[42] Threedy (n 6).

[43] Olsen (n 28).

[44] Kennedy, 'Three Globalizations' (n 1).

## *5. Conclusion*

Thus, in the third globalization, Critical theory appeared as a powerful tool to unveil how the divide between the family and the market is still structuring many aspects of our legal systems. Beyond acknowledgment, it has also proved to be a powerful tool to initiate change. Even though some propositions have been made in the direction of a superseding of the divide, it appears that defining anti-discrimination, regardless of whether it takes place in the family or the market, as the main goal may be a better option. Creating compromises between the different considerations of different identities, without searching to equalize them, is a task that belongs to courts, but also to the legal system itself. As we saw, reshaping the divide through the adaptation of contract law, for it to become more flexible, could therefore be a path to explore. It is only a suggestion, but the effort to incorporate more flexibility can be extended to other legal tools, as for example public law. Nevertheless, this acknowledgement that the legal subject is not binarily divided between the family and the market should not become an absolute fragmentation. The legal discourse has an important role to play here, in order to point out that the legal subject is maybe composed of diversified identities but remains nevertheless unified through common patterns like human rights. As the legal system gives recognition to identities, we may remember that it also produces them through the legal discourse. That is why Critical theory is constantly needed, as it questions how this language shapes the reality. This constant questioning is in fact a way to recognize the legal system as 'natural', but rather as a social production, that can always be re-shaped to reduce inequalities. Indeed, as it was well said by Debora L Threedy, '*Recognition* opens doors to change' (emphasis added).[45]

[45] Threedy (n 6).

**MIGUEL HERRERO MEDINA***

# THE GIOVANNI PUGLIESE LIBRARY AS A GUARANTOR OF THE CIVILIAN TRADITION

One of the great news of the year 2023 for European romanistics has been the appearance of the "Biblioteca Giovanni Pugliese", which is presented as a new series in the framework of the editions promoted by the Department of Jurisprudence of the Roma Tre University; the new series published by the Roma TrE-Press publishing house is co-directed by professors Antonio Carratta, Tommaso dalla Massara, Giuseppe Grisi, Francesco Macario, Maria Rosaria Marella, Giorgio Pino, Giorgio Resta, Vincenzo Zeno Zencovich, Andrea Zoppini.

If the launch of an initiative that promotes the study of Roman law, Civil law, Civil procedure Law and Comparative law should always be a cause for celebration, on this occasion it is even more so, as this project aims to give continuity to the publishing activity carried out for years by the Centro di Eccellenza in Diritto Europeo of the said University.

Since the beginning of the 21st century, this renowned institution has been responsible for promoting research into the romanistics foundations of European law with the aim of laying the bases for a common legal experience through the organisation of doctoral courses, conferences and seminars, the promotion of various research, advanced training and consultancy activities, as well as the development of collaboration between international scientific institutions.

The results of this enormous work have been reflected in the publication of the former collection directed by Professor Letizia Vacca, which also bore the name of the distinguished Romanist Giovanni Pugliese. Since 2008, this collection has published

* Professor of Roman Law at Università Complutense, Madrid.

almost fifty printed works[1] which, from a multidisciplinary perspective, have highlighted the persistence of the foundations of Roman law in current European legal systems.

This new project arises with the vocation of keeping alive the essence of this old editorial collection, in that it aims to promote the study of Roman law from a European perspective, but also taking advantage of the enormous possibilities offered by the new digital resources, to try to promote greater dissemination of the works published among the scientific community. For this reason, from the outset it has been committed to *open access* publication, combining the new digital format with the traditional print publication method.

Given the remit of this new series, the decision to retain the name of Professor Giovanni Pugliese in its title cannot fail to be commended, since, beyond the well-deserved tribute it represents to one of the most important Romanists of the 20th century, this collection is perfectly aligned, both from the point of view of methodology and with regard to the content of the publications it aims to house, with the predominant contents of the distinguished Italian Romanist's work.

In addition to his multidisciplinary nature – not only did he make numerous contributions on various strictly romanistics subjects, among which his major contributions to the field of Roman procedural law [such as *Actio e diritto subiettivo* (Milan, 1939) or the two volumes of *Il processo formulare* (1947-1962)] stand out, but also published writings of notable relevance in the field of modern civil law (where the volume *Usufrutto, uso, abitazione*, published as part of Filippo Vassalli's Treatise on Civil Law in 1954, is worth mentioning) and, especially in his last stage as a researcher, he showed a great interest in comparative law – Giovanni Pugliese's prolific work would have been characterized by promoting the combination between the use of conceptual constructions and the application of the historical-critical method to better understand the essence of legal phenomena.

In contrast to the dogmatic methodology that prevailed at the beginning of his career, in which attention was paid only to the content of the legal sources, assuming that these were unquestionable axioms, the distinguished Romanist always defended

[1] The complete list of the works published by the Centro di Eccellenza in Diritto Europeo 'Giovanni Pugliese' can be consulted at: <https://centroeccellenza.uniroma3.it/centro-di-eccellenza-in-diritto-europeo-giovanni-pugliese/>.

that law was a historical construction and, as such, could not be understood without taking into account the historical dimension in which it had been created or ignoring its evolution over time. Hence the importance he attached to the study of Roman law in order to understand many of the problems of the modern world. In the face of the increasingly widespread practice of approaching legal research in a supposedly aseptic way, importing methods from the world of natural sciences in an attempt to approach the study of law as if it were a discipline that was little less than mathematical, his legacy is more important today than ever.

And for this reason it is only to be welcomed that the Biblioteca Giovanni Pugliese collection stands as the guarantor of a civilian *tradition* – understood in the Latin sense, that is, as the transmission of knowledge from generation to generation – which allows us to understand that only by taking into account the material reality in which the law is created and applied can we come to understand the true meaning of the solutions that have been applied, are applied or are intended to be applied in the future to resolve certain legal controversies.

In this sense, it is a real success that the new collection has begun with the publication of the monograph '*La divisione giudiziale della comunione non ereditaria. Studio sulla funzione dell'adiudicatio*' by Marta Beghini (Rome, March 2023), because, not only does it deal with a procedural subject of the first order, but it does so following the example of Professor Pugliese, that is, displaying an extraordinary mastery of the conceptual constructions in this field, while applying a historical approach to shed some light on legal issues that are still of great importance today.

The work begins with a brief introduction, by way of a premise, in which the author acknowledges that this work takes as its starting point a pronouncement of the Sezioni Unite della Cassazione which not only affirmed that the sentence of division was constitutive in nature, but that this reality was already established in Roman law (pp. 13-14). On the basis of this affirmation, Marta Beghini has proposed a review of the functioning of the judgments of division of non-heritable common property in the context of the Roman process in the classical period.

Her thesis is presented in five chapters, divided in turn into a series of shorter and more concise sections, in which, in a direct and very well organized manner, various

aspects related to the function of the *adiudicatio* are analysed, understood not only as *pars formulae*, but also in the sense of the pronouncement issued by the *iudex communi dividundo*. The work concludes with a final chapter in which a recapitulation of the whole work is made, pointing out the main conclusions reached as a result of this meticulous research work.

The first chapter (pp. 15-53), which is aimed at delimiting the object of the research, analyses the phenomenon of the dissolution of the common thing through the exercise of the *actio communi dividundo*, which fulfilled a double function: on the one hand, it would have served for the attribution of parts of the common thing among the litigants through the *adiudicatio* and, on the other hand, it would have made it possible to adjust the proportion of the share to be distributed among the parties through the *condemnatio*.

Having clarified its divisive purpose, Marta Beghini begins, from the outset, to show signs of the independence and originality that characterise her research, as she points out that although the *actio communi dividundo* has traditionally been analysed together with the *actio familiae erciscundae*, she nevertheless considers that the marked differences between the two procedural resources, both in relation to the role played by the *iudex* in the divisional process and with respect to the characteristics of the object of the division, justify that they should be treated separately. And it is precisely for this reason that she announces that throughout this work she will focus her attention on the function of the *adiudicatio* in the framework of the *iudicium communi dividundo*.

Once the object of the study has been defined, this first chapter provides a detailed overview of the main doctrinal contributions that have been made on this subject since the end of the 19th century (pp. 30-50). Despite the fact that in this list there is perhaps a lack of any reference to the work of D'Ors or Drosdowski, there is no doubt that the author has made a careful study of the most specialised bibliography on the subject in order to present, in a very clear manner, the different positions held in relation to the divisional regime as a whole, the role of the *adiudicatio* or the supposed constitutive effectiveness in the divisional processes.

The elaboration of this state of affairs allows the reader to discover that there are not only many problems, but also of a very varied nature, in relation to the processes of judicial division substantiated on the basis of the *actio communi dividundo*. For this

reason, in view of the need to narrow down her research even further, Marta Beghini warns that she will focus mainly on clarifying the role played by the *adiudicatio* in order to figure out the effects that judicial division has on the object of the process and the parties involved in it.

With the contours of the work perfectly outlined, in the second chapter of the work, the nature of the *adiudicatio* is analysed. And Marta Beghini does so, true to her style, in a straightforward manner: from the outset, she points out that although it is true that it has traditionally been considered that the pronouncement issued by the judge or arbitrator in divisional proceedings was constitutive in nature – which she demonstrates with an overwhelming exposition of the literature consulted in this respect – it does not seem so clear that, in view of the sources that have been preserved, the function of the *adiudicatio formularia* was exclusively constitutive in nature.

In this respect, she analyses the fragment in Gai 4.42, stressing the identification that Gaius makes of *adiudicatio* as the activity of *adiudicare rem* (pp. 60-63). And it is precisely at this point that one of the central proposals of the work is put forward, since in contrast to the position traditionally held on the basis of Arangio-Ruiz's interpretation, which considered this definition to be a tautological construction, Marta Beghini argues that it is a technical expression with a marked significance in the legal sphere.

This original interpretation of *adiudicare rem* is based on a careful reading of the Gayan fragment. From the author's point of view, this definition would have delineated the function played by the *adiudicatio* in the formal process: while the Gayan passage does make express reference to the *litigatores*, it omits any allusion to the *potestas iudicis*, which seems to indicate that the *iudex* would not have absolute discretion in this type of divisional process, but that his action would be mediated both by the will of the litigants involved in the process and by the characteristics of the *res* object of the division.

Then, in this same chapter, some of the most significant sources are examined in relation to the alleged constitutive nature of the *adiudicatio* (Tit. Ulp. 19.16, Vat. Frag. 47a, Paul., 6 *ad Sab*., D. 10.2.44.1 and Marc., 17 *dig*., D. 41.3.17). The conclusions drawn from the analysis of these sources, carried out with the conciseness and exhaustiveness that characterise the author, allow us to glimpse one of the main conclusions of her research, that is, that the function of the *iudex* in the *iudicium communi dividundo* was delimited both by the will of the parties involved and by the

characteristics of the object of the division.

The third chapter begins by analysing the different meanings of the term *res* in the sources and its possible divisibility. In this sense, a distinction is made between those things that, being divisible, can be divided materially into homogeneous portions or, on the contrary, are subject to intellectual or legal division through the notion of quota (pp. 93-106). After this preliminary explanation, the author then goes through the title *Communi dividundo* in Digesto 10.3 in order to analyse the contours of the communal phenomenon and, above all, to determine in which cases the *actio communi dividundo* could be applied.

As a result of the analysis of different fragments contained in this title (Paul., 6 *ad Sab*., D. 10.3.19 pr.; Ulp., 19 *ad ed*., D. 10.3.4 pr.; Ulp, 19 *ad ed*., D. 10.2.20.4; Paul., 6 *ad Sab*., D. 10.2.44 pr.-8; Paul., 23 *ad ed*., D. 10.3.1-9; Gai, 7 *ad ed. Prov*., D. 10.3.2 pr.; Ulp., 30 *ad Sab*., D. 17.2.31), the author concludes that the concept of communion present in the context of the *iudicium communi dividundo* is derived from the notion of *res communis*, which designates the object of division, but not in a concrete way, but as a unitary category characterised by the fact that it belongs to several subjects.

On the basis of this consideration, Marta Beghini explains that in some cases there could be concurrence between the exercise of the *actio communi dividundo* and other procedural remedies such as the *actio familiae erciscundae* or the *actio pro socio*, leading to situations of overlapping between these actions. However, it does not establish in which cases each of them should be applied. In view of the sources analysed, the author concludes that the classical jurists, who were not interested in general categories, never managed to define when the *actio communi dividundo* should be applied in a taxative manner. Instead, they opted to evaluate the characteristics of the common thing to be divided on a case-by-case basis in order to determine which action should be exercised.

However, she specifies that, in any case, the exercise of the *actio communi dividundo* had to be carried out on things that were contemplated in a singularised manner, as if they were a unitary whole belonging to several subjects. And it is precisely on the basis of this observation that the following two chapters of her presentation are based, in which the author deals with the functioning of the procedures for judicial division according to the characteristics of the thing in common.

Both chapters have the same basic approach, as they start from the analysis of

various fragments of Title 10.3 of the Digest – while the fourth chapter focuses on the processes of material division, the fifth chapter deals with the division by ideal quotas – in order to draw a series of partial conclusions on the functioning of judicial division in classical Roman law.

The first of the conclusions reached in this regard concerns the exclusion of the exercise of the *actio communi dividundo* in cases of possession acquired violently or clandestinely, since only *possessors ex iusta causa* would be entitled to exercise this action (Ulp. 20 *ad ed*., D. 10.3.7.3-4). As Marta Beghini rightly points out, division was only contemplated when it was presumed that possession of a common thing could become *dominium ex iure Quiritum* (pp. 125-129).

Secondly, different forms of division are distinguished according to whether it is a materially divisible thing, such as an estate, which can be adjudicated by fractions (Ulp., 32 *ad ed*., D. 19.1.13.17); a thing which is not materially divisible, such as a slave (Ulp., 19 *ad ed*., D. 3.6.9; Paul., 23 *ad ed*., D. 10.3.8.3; Paul., 6 *ad Sab*., D. 10.3.19.3); or it is not expedient to divide (Ulp. 32 *ad ed*., D. 19.1.13.17), in which case the thing is awarded to one of the parties, who is obliged to pay an *aestimatio* of the respective shares to the remainder; the latter solution can also be applied in cases of things which are almost impossible to divide (Ulp. 2 *ad ed*., D. 10.2.55), although in the latter case it is also admitted that the judge can sell the thing and divide the proceeds between the parties.

Finally, in the fifth chapter, reference is made to several cases of division by ideal shares with provision for several real rights. From the analysis of the sources, the author concludes that in cases where the judge in charge of the division provided for the inclusion of some kind of usufruct (Ulp., 19 *ad ed*., D. 10.3.6.10; Lab., 2 *post. a Iav. epit*., D. 33.2.31) or pledge (Ulp., 19 *ad ed*., D. 10.3.6.8) the integrity of the *res* was respected and, above all, a merely constitutive effect was not produced as a consequence of the divisional pronouncement.

The last of the chapters functions as an epilogue (pp. 171-180), in which the author reconstructs the main arguments discussed throughout this work, in order to focus on the two main conclusions that, in her opinion, can be drawn from the analysis of the fragments of Title 10.3 of the Digest: firstly, that despite the enormous discretion enjoyed by the *iudex* in charge of the divisional process, his function would be delimited

by the will of the parties and the characteristics of the thing, since only by taking both variables into account could he carry out the best possible division; secondly, that the traditional debate between the constitutive or declaratory effectiveness of the judicial pronouncement in divisional processes must be overcome, since the *officium iudicis* operates on a strictly procedural level. The judge does not generate or constitute new legal relations, but intervenes to regulate the legal relations already existing in the context of a process of dissolution of the initial community.

In this way, Marta Beghini closes a work that, in a step-by-step manner, offers an overall perspective on the functioning of divisional trials in the Roman legal experience. Based on a detailed study of the most controversial doctrinal questions on this subject, she sets out an investigation which, thanks to her magnificent mastery of the sources, has enabled her to reach conclusions of great significance not only for modern Roman studies, but also for understanding the effects of the application of the law in our current legal systems.

## ARTICLES



## NOTES



## MEETINGS & READINGS




ROMA TRE
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